

FUNDAMENTAL PERSPECTIVES
on INTERNATIONAL LAW



SIXTH EDITION

WILLIAM SLOMANSON

Fundamental Perspectives on International Law

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Fundamental Perspectives on International Law

Sixth Edition

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DEDICACIÓN

*Por la sexta vez para
LAMPC
Las luces de mi vida*

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Abbreviations

CIS: Commonwealth of Independent States
CISG: Convention for the International Sale of Goods
Development
EC: European Community
EHR: European Human Rights, *also known as* Human
FCN: Friendship, Commerce, and Navigation
GA: General Assembly
IAC: Inter-American Convention

ICCPR: International Covenant on Civil and Political
NATO: North Atlantic Treaty Organization
NK: North Korea
OECD: Organization for Economic Cooperation and Rights
re: regarding or
Rights and Fundamental Freedoms
UN: United Nations
UNCLOS: United Nations Convention on the Law of Sea

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Preface to Sixth Edition

Reports about the demise of International Law have been greatly exaggerated. The 5th edition questioned whether 9–11 turned International Law on its head—or merely poured fresh wine into a vintage bottle. The 6th edition continues this critical analysis during the current phase of the War on Terror. It assesses claims that US hegemony has trumped the collective security regime associated with the UN dream of beating swords into plowshares.

This book provides *worldwide* perspectives on International law via its edited cases and commentaries. Of course, it contains many US resources as well. No one country, however, can redefine International Law—although it may have a notable impact. My 5th edition ratio of foreign to US case studies was three to one. It is now four to one. Numerous foreign resources are embedded in this text to provide *global* access to the content of International Law. The materials on US law have also been augmented, largely premised upon its leadership role in the War on Terror.

Some attempts to cover this subject are doggedly focused on the views of the textbook authors. All writers of course pick and choose their sources. The textual quotes feature numerous scholars from many countries. My ubiquitous “collaboration” with other leading commentators facilitates my quest to present worthy evidence of the actual content of International Law.

Numerous examples illustrate current events while plugging historical gaps so as to educate a well-rounded student. Each chapter’s endnotes and online bibliography typically refer readers to *book-length* analyses of the issues presented. Where useful for further research, I have included website and news story citations. These resources facilitate access to succinct accounts of the many newsworthy issues at hand. They do not necessarily equate to my adoption of all views expressed therein.

Rather than present a huge collage of arguably related bits and pieces, this is a smaller, tightly integrated volume. It is designed with two general purposes in mind. First, it presents the fundamental corpus of International Law via a painstaking attempt to engage the student in ways that differ from most other authors. Second, it provides a teaching tool that is suitable for the varied learning styles we encounter in our classrooms. One may tilt the course format to suit institutional needs via the most desirable combination of the lecture, case, and problem/role-playing methods. I have revised certain styles and added parenthetical details to the edited cases, treaties, and commentaries. This will assist the many students taking this course in their second or third language.

After an opening chapter on the general scope of International Law, the next three chapters cast the State, organizational, and individual/corporate actors in their relative roles on the international stage. The next unit, Chapters 5–9, portrays much of the practical substance of International Law. The remaining chapters add more substance in a somewhat distinct unit. They address cross-cutting human rights, environmental, and economic themes. These themes are present to some extent in all the chapters of this book. They present a fundamental core for the more detailed analyses offered in the advanced versions of these subjects taught at many universities.

The general organization and progression of the most recent editions of this book has been retained. It will thus be comfortably familiar to adopters of its prior editions. One of the significant changes to this 6th edition is the folding of the former Chapter 7 (Diplomacy) into Chapter 2 (States). This merger better reflects the negotiating feature of the day-to-day interaction between States.

The second notable alteration is the improved access to online teaching and research materials. This

web-based material bridges the gap between: (1) professors, seeking longer and more detailed original materials; and (2) the student and publisher, both of whom prefer a shorter book that is less expensive. This augmented menu offers a far richer smorgasbord of teaching materials than in past editions. The strategy of playing these integrated print and electronic chessboard pieces will prepare International Law's disciples and detractors for their twenty-first century endgame.

ORGANIZATIONAL RETROFIT

The third important improvement is the addition of a page-one summary of chapter contents at the beginning of each chapter. Also, the substance of each chapter has been comprehensively reorganized into alpha-numeric subsections. These two non-substantive changes will promote quicker access to and review of the content of International Law. This 6th edition retains the book's familiar feel in terms of the general presentation and progression of the 5th edition subject matter. It provides better access to content, however, exemplified by these guideposts.

COURSE WEB PAGE

This edition's electronic component remains available online at: <<http://home.att.net/~slomansonb/txtcsesite.html>>. One need not be confined by the all-too-familiar adage: "A book is obsolete the day it's published." The end-of-chapter bibliographical resources have been moved to the Course Web Page (electronic) portion of this textbook. That change facilitates the addition of fresh resources between editions.

This 6th edition amplifies the 3rd edition's introduction of an electronic component of *Fundamental Perspectives on International Law*. There has been—once again—a cosmic improvement in the amount, reliability, and sustainability of digitalized material. This technical upgrade to the former print-only editions enhances access to treaties, resolutions, and other key international instruments in ways not possible with a single-volume snapshot. Professors may thereby assign the print and online materials most suitable for their particular course needs.

Students may access more of the unedited, full-version cases and materials to satisfy their individualized research needs. From the Course Web Page, one may link to the following resources:

- ◆ key cases, treaties, and academic developments occurring after publication of the print portion of the 6th edition, which can be added to the core of this text during the life of this edition;
- ◆ miscellaneous web resources—including online dictionaries, graduate education opportunities, historical resources, maps, and travel requirements;
- ◆ a Career Opportunities in International Law web page to assist with office-hour questions regarding how one navigates the shift from an academic environment to the international job market;
- ◆ a Glossary of Terms (Internet glossaries); and
- ◆ a Case Reading and Analysis Suggestions web page for non-law student readers.

NEW MATERIALS AND SECTIONS

The 6th edition contains the following fresh materials:

- ◆ updated and expanded examples and analyses of the prominent themes presented in the prior edition;
- ◆ more original documents both in the printed text and on the Course Web Page;
- ◆ new decisions by national and international tribunals including—from the International Court of Justice—its (presumably 2010) validity of *Kosovo Unilateral Independence* case; its (presumably 2010) *Georgia v. Russia Racial Discrimination* case; its 2007 *Bosnia v. Serbia Genocide* case; and—from the International Criminal Court—its 2009 first-ever arrest warrant for a sitting national president;
- ◆ some new, and some revised, role-playing problems for probing student comprehension via applications of course material;
- ◆ a revised "Changes" web page to facilitate the prior adopter's transition from the 5th to the 6th edition;
- ◆ new book sections on extraordinary rendition; national court adjudication of international issues; organizational and corporate accountability; the so-called "redefinition" of torture; how a new US presidential administration apparently seeks to do an "about face" regarding the War on Terror policies of the prior administration; a revised human rights chapter, now offering a potpourri of subsections on rights-specific groups; a revised environmental chapter that now offers readings on alternative environmental fora, war and the environment, criminal law options, environmental human rights, and corporate environmental responsibility; and the economic chapter's coverage of the International Monetary

Fund, World Bank, and globalization backlash; and finally,

- ◆ a revised Teacher's Manual.

INTERNET NOTES

The number of endnotes containing web links has once again increased to provide more access to original materials. These can be coupled with the periodically updated online bibliographies, which include additional web resources that are useful for research papers and presentations. Professors and students may thereby mine the rich vein of academic nuggets extractable from the Internet.

CROSS-REFERENCES

The number of textbook section cross-references has been increased. They appear as “[§_._]” This device promotes access to related materials in other sections of the book. Readers may thereby collate similar materials for class preparation and further research.

The War on Terror (WOT), *for example*, has many facets which cannot be shoehorned into the same, or sequential, book sections. The distinct faces of this war are introduced in §1.1.A.2, presenting Third World perspectives on the content of International Law. The §2.4.C materials address the related interplay of self-determination and contemporary conflicts. The §3.3 and §3.5 materials cover organizational responses to the WOT. The Chapter 5 jurisdictional principles—and Chapter 6 range of sovereignty materials—cover what action can be taken, and where, in the pursuit of terrorists. Chapter 8 addresses the available judicial mechanisms for dealing with various participants in the WOT. Post-9–11 US applications of the Laws of War are provided in §9.7. The Human Rights Chapter [10] is rife with coverage of the host of victims experiencing the WOT on the ground.

In any international treatise, many terms appear in different forms. I have generally opted for the spelling found in the most universal public document (without changing the same term as it appears in quoted documents). For example, “Usama bin Laden” and “Al-Qaida” are the terms used in UN Security Council resolutions. Certain unconventional endnote citation practices are designed to facilitate ease of

reference as opposed to blind adherence to a particular style manual.

INSTRUCTOR'S MANUAL

Go to the above Course Web Page address; then click the html link near the icon for “Profs only.” This related online resource analyzes the new and/or revised end-of-chapter problems. They provide a blend of actual and hypothetical role-playing scenarios. There are almost 100 total—occasionally appearing in the narrative text, but mostly in the chapter Problem sections (89). These will assist those professors who employ the Problem Method for student review and synthesis.

This online Manual also contains a password-protected test bank of International Law examinations. The essay and multiple choice options are accessible via the above Course Web Page. Our materials can be shared on a national and international basis. Adopters are thus encouraged to submit exam questions to me so that we can collaborate on the examination feature of our teaching role.

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CHAPTER ONE

What Is International Law?

CHAPTER OUTLINE

- Chapter Introduction
 - A. Course Relevance
 - B. Point of Entry
- §1.1 Definition and Scope
 - A. State-Driven History
 - B. Non-State Actors Evolve
 - C. International Law or Politics?
 - D. National-International Law Links
 - E. Related Disciplines
- §1.2 Sources of International Law
 - A. Introduction
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- Problems
- Endnotes

INTRODUCTION

A. COURSE RELEVANCE

The American Council on Education published a study in 2003 concluding that: (1) universities are failing to meet the need and student demand for classes with international content; and (2) too many existing classes are historical and academic—failing to adequately reflect upon current affairs. The overall findings revealed the following weaknesses:

- ◆ Most institutions exhibited a low level of commitment to internationalization, as evidenced by the low percentage of institutions that included internationalization

[P]rofound changes in international relations have taken place.... All countries, large or small, strong or weak, rich or poor, are equal members of the international community. No country should seek hegemony, engage in power politics or monopolize international affairs.

...

Mankind is on the threshold of a new era. The peoples of all countries are faced with the increasingly urgent question of the kind of international order they will live under in the next century. The Parties call upon all countries to engage in an active dialogue on the establishment of a peaceful, stable, just and rational new international order, and they are prepared to take part in a joint discussion of any constructive proposals to this end.

—Russian-Chinese Joint Declaration on a Multipolar World and the Establishment of a New International Order (April 23, 1997), at: <<http://www.un.org/documents/ga/docs/52/plenary/a52-153.htm>> (Annex). See textbook §1.1 A.2 on “Universality?”

in their mission statement or as a priority in their strategic plan.

- ◆ The majority of students and faculty expressed support for international activities, but failed to participate in these activities.

...

- ◆ While the number of participants had increased, only a small portion of undergraduates participated in academic programs abroad and many of those that did had short-term experiences.
- ◆ Internationally oriented extracurricular activities attracted a very small minority of students.¹

Your professor and your university are obviously serving the need for internationalization with this course. They are also assisting the United Nations (UN). They are helping to implement the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law. In December 2007, the General Assembly adopted the proposal that “international law should occupy an appropriate place in the teaching of legal disciplines at *all* universities.” This program is designed to facilitate the UN Security Council’s June 2006 “conviction that international law plays a critical role in fostering stability and order in international relations and in providing a framework for cooperation among States in addressing common challenges, thus contributing to the maintenance of international peace and security.”²

Nigerian Professor Chris Okeke provides a succinct glimpse of the rationale for taking a course in International Law:

- (i) To expose the students to a clear understanding of the fact of [the] inter-dependence that ... states and other subjects of International Law, do not live in isolation, but rather must necessarily be interdependent; (ii) To teach the students to appreciate the universal principles and rules designed to ensure normal relations ... irrespective of the differences in their economic, political and social systems; (iii) To educate the students in the spirit of humanism, democracy and respect for the sovereignty of all nations and peoples; (iv) To make the students to [*sic*] be constantly aware of the need to fight for the extermination of the remnants (traces) of colonialism and all forms of racial and national oppression.³

One should not mistakenly perceive International Law as falling within the exclusive domain of academicians. Your study of this subject will unveil numerous career opportunities.⁴ You could peruse the titles of the numerous specialized journals in disciplines like law, diplomacy, and political science in order to appreciate

the diverse array of employment contexts requiring a general understanding of International Law.⁵

B. POINT OF ENTRY

There are a variety of potential entry points for a course in International Law. One would be historical.⁶ The demise of the medieval feudal systems demonstrated the need for a State system that could function as a community of nations, linked by commonly accepted norms of conduct. For the last several hundred years, world leaders have thus referred to this system of rules as “International Law.” More than 150 years ago, when the community of nations was far less integrated than today, the prominent commentator James Kent addressed the importance of studying this branch of the law:

A comprehensive and scientific knowledge of international law is highly necessary, not only to lawyers practicing in our commercial ports, but to every [person] who is animated by liberal views, and a generous ambition to assume stations of high public trust. It would be exceedingly to the discredit of any person who should be called to take a share in the councils of the nation, if [he/she] should be found deficient in the great leading principles of this law; and ... the elementary learning of the law of nations, as not only an essential part of the education of an American Lawyer, but as proper to be academically taught.⁷

One could also begin this course by studying the various schools of thought. They had a profound impact on the evolution of this branch of law. Or one could venture into the dozen idealistic models about the nature of International Law—each with its own cluster of related values, principles, and aspirations. One could also study International Law in terms of justice, sociology, and politics.⁸ These are important features of any academic discipline. But this book is not designed to focus on theoretical approaches.

One might begin, instead, by contemplating a world where “International Law” were marginalized, or ceased to exist. This is not mere hyperbole. After the Russian Revolution of 1917, Marxist advocates like Lenin and Stalin—who would later rescind the Soviet disdain for the then contemporary international legal system—asserted that the distinctive nature of the new communist State required a split with the community of nations, as it had evolved since the 1648 state-centric Treaty of

Westphalia.⁹ The Marxist ideology on International Law had much more emphasis in Western European and American textbooks than in materials published within the former Soviet Union. The Marxist approach was not considered to be an alternative there. It was, instead, the *only* authentic interpretation of general International Law—with no regard to Western views.¹⁰

The University of Amsterdam's Peter Malanczuk succinctly articulates this historical point-counterpoint in the following terms: "The Soviet Union originally denied that there could be one system of international law that applied equally to capitalist and socialist states and rejected the validity of older customary law and treaties concluded by the Tsarist government. The attitude changed. But the Soviet Union remained on the fringe of international affairs until it attained the status of a great power after the Second World War."¹¹

Assume for a moment that world leaders suddenly decided to totally disregard International Law. This hypothetical would be reminiscent of the Dark Ages, between the Pax Romana and the medieval Renaissance, which sparked the desire for creating modern nation States. Such a void actually materialized during the 1966–1976 Cultural Revolution in the People's Republic of China (PRC). All courses on International Law were canceled. Teachers were summarily dismissed and sent elsewhere for reeducation. The Chinese government made no apologies about its distrust of International Law.¹² As one Chinese writer characterized the need for this drastic program, "in the Western capitalist world, suppression of the weak by the strong and the eating of small fish by big fish are not only tacitly condoned by bourgeois international law but also are cloaked with a mantle of legality."¹³

When the PRC's Cultural Revolution ended in 1976, its leaders chose to participate in the quest for world peace, notwithstanding competing ideologies within the community of nations. In a 1982 review of this phenomenon, the President of the Chinese Society of International Law recounted how the PRC had abandoned its parochial disregard of International Law. China's prior decision to sequester itself from the society of nations was counterproductive to its best national interests. Under a renewed commitment to facilitating international relations, he said:

China's international lawyers must begin to work diligently to rebuild her science of international law

which serves to promote world peace and truly represents the interests of the people the world over....

We need to make an intensive study of not only the theory of international law, but the different realms and branches ... as well to facilitate China's international activities and her legislative work. While doing scientific research in this field, we also have the responsibility to train a new generation of specialists and scholars in international law.¹⁴

◆ §1.1 DEFINITION AND SCOPE

This text uses the terms *Law of Nations*, *International Law*, and *Public International Law* interchangeably unless otherwise distinguished. An advanced course in the subject would reveal the differences. But they are not the focus of this introductory text.¹⁵

Your study of this subject begins with a comparison of the internal (often called "domestic") laws of a nation and the international legal norms applied *between* nations. States are *political* entities. That they may choose to observe or ignore (at their peril) the body of international norms, which you will study in this course, should not be astonishing. As classically articulated by Columbia University's Professor Louis Henkin:

First, law is politics.... [T]he distinction between law and politics is only a half-truth.... Law is made by political actors (not by lawyers), through political procedures, for political ends....

Second ... law is the normative expression of a political system. To appreciate the character of international law and its relation to the international political system, it is helpful to invoke (though with caution) domestic law as an analogue. Domestic (national) law ... is an expression of a domestic political system in a domestic (national) society....

Similarly ..., international law is the product of its particular "society," [and] its political system. International law, too, is a construct of norms, standards, principles, institutions and procedures.... But the constituency of the international society is different. The "persons" constituting international society are not individual human beings but political entities, "States," and the society is an inter-State system, a system [for centuries composed only] of States.¹⁶

A. STATE-DRIVEN HISTORY

International Law is the body of rules which nations consider binding in their mutual relations. One may resort to several traditional sources for a more detailed explanation. International jurists often employ useful definitions in their legal opinions. As articulated in a decision of the Permanent Court of International Justice, the predecessor of the current world court:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions [treaties] or by usages [customary state practice] generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.¹⁷

A panel of US jurists, referring to Nazi Germany's wrongful confiscation of a Swiss citizen's property in 1938, classically characterized International Law as "the relationship among nations rather than among individuals. It is termed the Law of Nations, or International Law, because it is relative to States or Political Societies and not necessarily to individuals, although citizens or subjects of the earth are greatly affected by it."¹⁸

What variables impact whether a claimed norm is part of the corpus of International Law?

1. Consent-Based Governance As this course unfolds, you will appreciate that International Law is not entrenched in the governmental structure employed by most nations. The UN Secretary-General is not a chief executive officer and does not command any armed force. The UN General Assembly is not a legislative body. It cannot require nations to act in accordance with its resolutions. The UN's International Court of Justice does not have the power to hear contentious cases absent the express consent of the defendant nation [§8.4.A.].

You will also begin to appreciate that the international legal system presents a comparatively primitive state of affairs. Those who make the rules are also playing the game.¹⁹ States may opt to preserve their respective sovereignties, given the crisis at hand. This symbiotic system depends upon a blend of legal norms and politics to function properly. Thus, a State member of the community of nations is not bound to act in a certain

way unless it has expressly consented to a particular course of conduct. In the international legal system, where States essentially govern themselves, critics understandably assert that the "distinction between law and politics is artificial, even preposterous."²⁰

An introductory definition of International Law would be incomplete without reference to the linkage between national and International Law. Algeria's Mohammed Bedjaoui, a judge of the International Court of Justice, describes this unique interrelationship in the following terms:

The fundamental characteristic of this international law is thus that its function is to regulate the relations between States, in other words, between entities known to be sovereign and which, in principle, assert their full independence of [from] any legal order. This at once raises the problem ... of how these States which affirm their sovereignty can be [simultaneously] subject to international law. If one postulates at the outset that there is no higher authority than the State, how can the norm[s] of international law be produced for and applied by such a sovereign State? As might be expected, there is only [one] possible answer to this question, namely that, historically, it has not been possible for international law to be anything other than a law resting largely on consent, whether express or tacit, of States.... It is more a law of co-ordination (between the sovereign jurisdictions of individual States) than a law of subordination.²¹

But International Law does serve the needs of its constituents. In the lucid description by Princeton's School of Public and International Affairs Dean Anne-Marie Slaughter:

each of its specialized regimes is based in the consent of states to a specific set of roles that allow them to reap gains from cooperation and thereby serve their collective interests.

...

International law provides the indispensable framework for the conduct of stable and orderly international relations. It does not transcend from on high. Rather, it's created by states to serve their collective interests. Consider, for instance, the concept of sovereignty itself, which is routinely described

as the cornerstone of the international legal system.... It is a deliberate construct, invented and perpetuated by states seeking to reduce war and violence in a particular set of circumstances.²²

A State's obligations are thus premised upon its consent to be bound. As acknowledged by the Permanent Court of International Justice: "any convention creating an obligation ... places a restriction upon the exercise of the sovereign rights of the state ... [and] the right of entering into international engagements is an attribute of State sovereignty."²³

State practice, in specific situations involving inter-State relations, is the primary source for determining the content of International Law. Professor Luigi Condorelli of the University of Geneva aptly characterizes this source of determining an applicable norm. A number of States may employ a common practice that ultimately becomes the norm for international relations between all States. This feature of International Law is typically referred to in the academic literature as *opinio juris*. Note that International Law does not necessarily consist of what a number of States might actually do. Rather, it is a blend of their respective expectations and actual practices.²⁴

The International Court of Justice (ICJ), the UN's judicial branch, provided the caveat that "[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.... The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough [to constitute *opinio juris*]."²⁵

The Court also cited the potential derivation of *opinio juris* from UN resolutions. In an analysis involving the alleged mining of Nicaraguan harbors by US agents, the ICJ considered the General Assembly's 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations. The Court reasoned that "the adoption by States of this text affords an indication of their '*opinio juris*' as to [the applicable] customary international law on the question."²⁶

2. Universality? The definitional nature of this introductory chapter requires brief mention of four related

questions: (1) Can the corpus of International Law expand and contract, akin to the ebb and flow of the tides? (2) Is *universal* acceptance required for a rule to become part of the content of International Law? (3) Can a powerful country *unilaterally* change International Law? (4) Should only "civilized" nations—as opposed to the so-called pariah or rogue states—be invited to the table?

First, the content of International Law sometimes evolves gradually and in other instances, briskly. This reality can adversely impact the degree of stability needed for a smoothly functioning legal system. As a leading commentator writing on behalf of the US Department of State thus lamented: "International law is, more or less, in a continual state of change and development. In certain of its aspects the evolution is gradual; in others it is avulsive. [W]hereas certain customs are recognized as obligatory, others are in retrogression and are recognized as nonobligatory, depending upon the subject matter and its status at a particular time."²⁷

Second, universal acceptance is not required for a norm to be incorporated into the body of International Law. If enough nations acknowledge a particular norm, by consistently using it in their international relations, their consensus will cause the norm to become a part of International Law.²⁸ However, a State's sovereign nature authorizes it to expressly reject what others might characterize as "universal" or "customary."

Third, no single nation, regardless of its political or military strength, has the power to create or modify International Law. For example, one nation's practice cannot create global obligations. This branch of law is not created, developed, or abolished by the demand of one country, or a small group of countries. Its sometimes opaque contours are drawn by the common consent of many nations. An academic textbook can do no greater harm than to ignore this complexity. Put another way, one can routinely discern the substance of a country's internal law. Ascertaining the essence of International Law, however, presents a routine challenge.

The US obviously enjoys a unique and powerful post-Cold War posture. It is true that the foundations of International Law have been shaped by hegemonic States. The current prominence of the US *could* lead to some fundamental changes. And as proffered by the Max Planck Institute's Nico Krisch: "Sovereign equality is one of the great utopias of international law, but also one of its great deceptions."²⁹ But the US can neither dominate nor withdraw from the community of nations.

As acknowledged by the US Department of State Legal Advisor in June 2007:

Today's world presents many challenges.... The United States believes that collective action and international law are essential in coordinating the international community's approach to these deep and difficult problems. Shortly after she was confirmed, Secretary Rice explained: "International law is critical to the proper function of international diplomacy." I hope I have also made it clear that the U.S. role in the world makes international law more important to us, not less. We do not seek to impose constraints on others but shrink from them ourselves. Our careful approach to treaty negotiation and treaty acceptance reflects our respect for international law, not a desire to be free of it. When we assume international obligations, we take them seriously and seek to meet them, even when doing so is painful. And where international law applies, all branches of the U.S. government, including the judiciary, will enforce it.

The United States and its critics have gone through a difficult period of reproach and recrimination regarding international law. But in the face of the grave challenges before us, we must look forward, and seek new ways to build international cooperation and the rule of law. We are open to discussion and suggestions, and welcome the opportunity to work with all states.... Together we must strengthen the international community and promote the rule of international law, for the sake of our collective interest and common values ... [because] our common future rests on them.³⁰

As you will study in other chapters, the US helped launch some major human rights treaty regimes, starting in the 1980s. It later withdrew its support for those initiatives, as well as the International Court of Justice. In the 1990s, the US refused to ratify the Kyoto Protocol on greenhouse gas emissions. In 2001, it withdrew from the Anti-Ballistic Missile Treaty. In 2002, the US initiated a number of bilateral treaties designed to undermine the new International Criminal Court. The US launched preemptive wars against Afghanistan and Iraq without the support of many long-term allies and the UN.

The March 2005 supplement to the 2002 US National Defense Strategy [textbook §9.2.D.3.] contended that "[o]ur strength as a nation state will continue to be challenged by those who employ a *strategy of the weak* by using international fora, judicial process, and

terrorism [*italics added*]." This motley grouping appeared to sculpt the following "weaklings" into one mold: *international fora*—presumably the UN; *judicial process*—presumably recent US Supreme Court decisions limiting governmental authority in the war on terrorism; and *terrorists*—exemplified by the September 11th hijackers. This Department of Defense strategy bullet assumes that these actors uniformly employ impotent strategies to achieve their respective objectives. The Bush Administration, by contrast, therein offered its Pre-emptive Strike Doctrine as the most powerful strategy for ensuring national defense in the *War on Terror*.

Why? Powerful nations view the egalitarian notion of "sovereign equality" as a perennial source of irritation. It occupies an awkward point on the continuum between reality and utopia. As articulated by Nico Krisch of Germany's Max Planck Society for the Advancement of Science:

Large nations have always had problems with transforming their factual power into legal superiority, which leaves them discontented with international law as a tool of foreign policy.... As a result, the United States has chosen to retreat from international law: it has made extensive use of reservations and frequently refused to sign or ratify important new treaties. Instead, it has increasingly relied on institutions in which it enjoys superior status ... and it has turned to unilateral means, and notably to its domestic law, as a tool of foreign policy.

...

In international law ... sovereign equality is a far-reaching promise with a largely indeterminate content, while on a concrete level it embodies few, very formal rules that ensure only minimal protection against factual inequalities.³¹

One could surmise that the US was surprised by the dynamics spawned by its own doing and out of its control. There was overwhelming support for the first Persian Gulf War in Kuwait, but little for the second in Iraq. US frustration with the comparative lack of support for this Iraq War Round Two did not necessarily mean a complete rejection of multilateralism. One of the best examples is jointly articulated by the President of New York's International Peace Academy and the Director of Singapore's Institute of Defense and Strategic Studies:

September 11 confirmed the argument ... that "the U.S. foreign policy agenda is being transformed by

transnational challenges that no single country ... can resolve on its own.” The nature of the terrorist threat is such that the United States will need the cooperation of many state and non-state actors.... This requires the United States to embark on a multilateral venture of unprecedented complexity. It calls for a strategy of eliciting the cooperation and sacrifices of numerous states of different political and cultural complexions, as well as those of international institutions and nongovernmental organizations.³²

A number of European allies have officially expressed concerns regarding the diminished role that the US continues to play in world affairs.³³ For example, the Committee on Legal Affairs and Human Rights of the 46-member Parliamentary Assembly of the Council of Europe warned the US in 2007 that it “has paid a high price in terms of loss of international credibility for actions taken at Abu Ghraib, Guantanamo Bay and more generally in Iraq, without much evidence that greater security has been obtained.”³⁴

The 1997 Russian-Chinese Joint Declaration on a Multipolar World, in the opening textbox in this chapter, urgently articulates the theme that “[n]o country should seek hegemony ... or monopolize international affairs.” In August 2008, Russia’s President Medvedev echoed that sentiment when he responded to the US involvement in the then recent Georgia-Russia conflict: “The world must be multipolar; domination is unacceptable. We can’t accept the world order where all decisions are made by one nation, even by such a serious and authoritative nation as the United States. Such a world would be unstable and prone to conflicts.” One month later, the Russian Foreign Minister added: “it is impossible or even disastrous to try to resolve the existing problems in the blindfolds of the unipolar world.”³⁵

Less powerful nations, including the Third World, present a moderate but undeniable form of checks and balances on US dominance. Evidence of this concern is aptly articulated in the following excerpt:

Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law

DAVID P. FIDLER

2 CHINESE JOURNAL OF INTERNATIONAL LAW 29 (2003)

The literature developing under the moniker “Third World Approaches to International Law” (TWAIL) critically analyzes international law in order to promote a more just and equitable approach to the countries and peoples of the developing world. Mutha described TWAIL as a “broad dialectic of opposition to international law” that resists the illegitimate, predatory, oppressive, and unjust [European-based] regime of international law. Gathii similarly argued that “Third World positions exist in opposition to, and as a limit on, the triumphal universalism of the ... [current] consensus in international law.”

...

TWAIL scholars have resurrected Third World opposition to international law because they perceive [that] it creates a hierarchy of cultures that privileges the West, underpins Western political and economic hegemony, and enshrines as global gospel the values, beliefs, and practices of Western liberal civilization. TWAIL seeks to (1) deconstruct the use of international law for creating

and perpetuating Western hegemony; and (2) construct the bases for a post-hegemonic global order.

...

The essential dilemma of the TWAIL quest has been identified many times in international relations theory—finding ground for reform between the extremes of utopianism and *realpolitik*. Structurally, the TWAIL quest would be ill-advised to attempt to destabilize the international system by challenging the military, economic, and political hegemony of the West. The current “War on Terrorism” has been sparked by a desire by radical Islamic groups to revolt against the West through violence and terror. I cannot see anything but suffering for the Third World in that strategy. The events of September 11, 2001 have already reshaped global politics in ways that make the United States and its anti-terrorism allies less tolerant of views that challenge Western political and philosophical hegemony.

A fourth wrinkle in the definitional fabric of International Law involves a distinction between “democratic” and “civilized” nations—in what is nevertheless a de facto global community of nations. Long before the demise of the Soviet Union, Moscow State University Professor Grigori Tunkin embraced this feature of International Law, cast in terms of democratic norms. As described in his prominent 1974 treatise, it is the “aggregate of norms which are created by agreement between states of different social systems, [which] reflect the concordant wills of states and have a generally *democratic* character....”³⁶

Other commentators more explicitly add the qualification that International Law contains only those norms accepted by “civilized” nations. This limitation finds support in the Statute of the ICJ Article 38.1.c. It provides that the Court may rely on “the general principles of law recognized by civilized nations.” Of course, what constitutes *civilized* conduct often dwells in the eye of the beholder.³⁷

B. NON-STATE ACTORS EVOLVE

International Law historically governed only the conduct of States (Chapter 2). It is now applicable to international organizations (Chapter 3). In specified circumstances, it governs the conduct of individuals and corporations (Chapter 4).

1. Non-governmental Organizations Prior to the mold-shattering *Nuremberg Judgment* [§8.5.B.], scholars paid inadequate attention to the role of *private* actors. The international legal system was then typecast as falling exclusively within the realm of State actors. After World War II, the proliferation of non-governmental organizations redirected international attention toward legally protecting the individual. Unlike the previous cast of prima donna-like State actors, all seeking to play a leading role, these understudies projected their character onto the international stage. State members began to delegate certain sovereign powers to these international organizations and corporate entities. This evolution is vividly summarized in the following analysis:

Examples of non-governmental organizations, acting directly or indirectly on behalf of States and sub-national governments, include non-profit entities. The World Jewish Congress (WJC) has offices in more than eighty countries. It pressured the Swiss banking



New Players on the International Stage Symposium on International Legal Personality

PETER SPIRO

2 HOFSTRA LAW & POLICY SYMPOSIUM

25–32 (1997)

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Under Chapter One, click New Players.

industry and Swiss authorities to return Holocaust victims’ assets to their rightful owners. The Nazi regime had sent gold and other assets to Switzerland during World War II. This fact was kept secret by the banks until a Swiss guard refused to shred some documentary proof in 1995. The Swiss banking industry reached a settlement with lawyers representing Holocaust survivors in August 1998. The Swiss banks thereby averted economic sanctions—not by US federal authorities, but by entities other than nations—including the cities of New York and Los Angeles. The latter political subdivisions of the US are not “persons” under International Law [§2.1.A.]. Nor is the WJC an international person. It is not seized with the capacity to officially function in the international legal arena [§3.1.B.]. However, these actors forcefully influenced the Swiss government and the incredibly powerful Swiss banking industry to act on this major international human rights issue with extremely sensitive political overtones.³⁸

In the aftermath of 9–11, many nations now scrutinize NGOs far more closely. Certain charitable organizations serve as fronts for terrorist activity. Spies, who may be employed by them, pose a remarkable challenge to national security.³⁹ Many nations are updating their laws to keep pace with the law-dodging ingenuity of modern spies who work through foreign NGOs.

The Internet Corporation for Assigned Names and Numbers (ICANN) is a non-profit corporation headquartered in California. It was created in 1998 to oversee various Internet-related tasks previously performed directly on behalf of the US Government by other

organizations. These include the original entity run by an I.T. manager at the University of Southern California. ICANN manages the assignment of domain names and IP addresses. It focuses on the introduction of new generic top-level domains. In 2006, ICANN signed a new agreement with the US Department of Commerce, with a view toward assuming full management of the global Internet system that ICANN represents. Such organizations nevertheless operate with the government's blessing [§5.2.G.].

Private security firms (and paramilitary groups) also act on behalf of States. Blackwater Worldwide is a private military and police training company. It trains thousands of people a year, including military personnel, police, and members of various US and foreign government agencies. The training consists of military offensive and defensive operations, as well as providing personal security. Such private organizations have not gone unnoticed in foreign military theaters. In 2004, some Blackwater employees were burned and hung from a bridge in Fallujah, Iraq. This was the first of two incidents which would focus media attention on Blackwater.

The second occurred in Baghdad in September 2007. One of Blackwater's squads killed seventeen Iraqi civilians and wounded twenty-three others with government-issued machine guns. According to the US Democratic National Committee, the US State Department covered up the crime, and the US Department of Defense soon afterward awarded Blackwater another contract worth \$92,000,000. National security was thus placed in the hands of this private security company, whose employees had fired the weapons. But one could argue that those guns were locked and loaded in Washington, DC—when it was decided to employ more private contractors than military troops in Iraq.

A handful of Blackwater guards were ultimately charged (in the US) with manslaughter. As a result of the 2007 Baghdad killings, Iraq's Prime Minister demanded that Blackwater be removed from Iraq. The US refused to do so and awarded Blackwater another annual contract. In 2008, however, a status-of-forces agreement between Iraq and the US included—for the first time—a provision barring US contractors from retaining the immunity they previously enjoyed.

Contrary to a widely-disseminated claim, private security contractors do not operate in a legal vacuum

[text §10.5.B. on corporate human rights violations]. Both international and domestic law govern their conduct. But the *real* controversy is the government's outsourcing of services that were previously the province of military forces. The US presidential administration can thereby avoid the checks and balances associated with presidential reporting requirements to the US Congress when sending military troops abroad or increasing the size of such forces (e.g., the "surge"). While reducing the political cost of many national security decisions, employing private security contractors leads to a less transparent policy process. Prior to the 2007 US troop surge, there were 140,000 US military troops in Iraq and 170,000 private security contractors. In 2008, the number equaled about 160,000 for each group in Iraq (and 30,000 of each in Afghanistan).⁴⁰

2. Other Non-State Actors The extensive role of corporate entities in international legal discourse will be addressed in the chapters on corporate legal status in International Law [§4.3.], human rights actors [§10.5.B.], and corruption in international transactions [§12.5.].

Certain *market-dominant minorities* play an inadvertent role in the modern penchant for transferring State functions to non-State actors. Globalization is the widely heralded promoter of values including democracy and wealth transfer. Its benefits allegedly improve the economic well-being of both majority and minority group citizens in less developed nations.

Analysts such as Yale Law School Professor Amy Chua observe an unintended consequence, however. A handful of State economic powerhouses and world financial institutions are effectively thrusting what was once State-derived economic authority into the hands of a number of national market-dominant *ethnic* minorities. Doing so has had its drawbacks. Examples of the backlash include the 1990s ethnic cleansing of Croats in the former Yugoslavia and mass slaughter of Tutsi in Rwanda. A disproportionately prosperous ethnic minority was attacked by an impoverished majority with support by nationalist governments.

The following excerpt provides a fascinating insight into Professor Chua's views on how these non-State actors have impacted, and likely will impact, global stability:



**World on Fire: How
Exporting Free Market
Democracy Breeds
Ethnic Hatred and Global
Instability**

PROFESSOR AMY CHUA, YALE LAW SCHOOL
New York, N.Y.: Anchor Books, 2004

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Under Chapter One, click World on Fire.

Transnational *social movements* are also non-State actors that wield an increasing sphere of influence in international decision-making. The anti-globalization movement was not limited to events such as the 1999 anti-World Trade Organization “Battle for Seattle.” Individuals thereby protested what corporations were allegedly doing to the worldwide standard of living. They were indirectly supported by both active and passive assistance from powerful States and global or regional economic organizations. This movement spread across continents. It evinced the growing resistance, especially in the Third World, to the Western-derived concept of the nation-State and all of its associated Eurocentric corollaries.⁴¹

Finally, *private individuals* often engage in conduct governed by International Law. They may be agents of a State—or acting solely on their own with no active or passive State involvement. University of Houston Professor Jordan Paust has conveniently collated their contemporary “international” crimes:

Today, the number of specific international crimes that can be committed by private individuals has increased from earlier categories to include, among others, the following: genocide; other crimes against humanity; apartheid; race discrimination; hostage-taking; torture; forced disappearance of persons; terrorism; terrorist bombings; financing of terrorism; aircraft hijacking; aircraft sabotage and certain other acts against civil aviation; certain acts against the safety of maritime navigation, including boatjacking; murder, kidnapping, or other attacks on the person or liberty of internationally protected

persons; trafficking in certain drugs; slavery; and mercenarism.⁴²

These crimes, when perpetrated in the name of the State, yield State responsibility, as covered in the chapters on the Use of Force [§9.1.] and Human Rights [§10.1].

C. INTERNATIONAL LAW OR POLITICS?

1. Why the Question? John Bolton was a Bush Administration US Ambassador to the UN. He loudly questioned the efficacy of this organization. In an earlier academic discourse he posited the “rich tradition of skepticism about the ‘legality’ of international law, although much of the intellectual debate consists of two streams of argument that never really engage in actual combat.” His essential premise is that International Law is not “law.” It is a series of political and moral arrangements that stand or fall on their own merits. Any other characterization is no more than “theology and superstition” masquerading as “law.”⁴³

Skeptics thus assume that States act only in their own best interests with no regard for expectations imposed by International Law. Critics typically recount the excesses of certain members of the League of Nations, and now the United Nations, as prominent examples of an ineffective legal system. This cake is then iced with the claimed lack of the same executive, legislative, and judicial authority displayed by most *national* legal systems. As posited by Wisconsin Law School Professor Richard Bilder:

it remains unclear whether the U.S. public itself really believes in international law ... [which] is only a pretense and ‘window dressing’ for *realpolitik*-based policies and not to be taken seriously.

Curiously, this recent [post-9–11] debunking and devaluing of the importance of international law—at least when it appears to constrain policies a current U.S. administration wished to pursue—comes at a time when the global problems that we and other peoples face could hardly be greater and the need for international cooperation to cope with them more urgent.⁴⁴

Some critics acknowledge that International Law does matter. But they argue that it is less prominent than public officials, legal experts, academics, and the media portray. It

is no more than States pursuing their respective interests on the international level. It does not push States toward compliance with its norms when to do so is contrary to their political or other national interests. They argue that too many global problems just *cannot* be solved via the imposition of any *external* legal order. International Law is perceived as being no more than an instrument for advancing national policy. Thus, according to these skeptics, any attempt to replace international politics with International Law is rooted in a naive optimism that it can actually achieve the goals to which it aspires.⁴⁵

Consider, however, the succinct counterpoint by Columbia University Professor Louis Henkin: “[A]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.” Like other laws, International Law rarely has to be enforced because it is usually obeyed. Hans Morgenthau, the major post-World War II critic of International Law, conceded that “to deny that international law exists as a system of binding legal rules flies in the face of all the evidence.”

The underlying rationale for this tendency to honor international expectations was timelessly expressed by former US Secretary of State Elihu Root: “There is an indefinite and almost mysterious influence exercised by the general opinion of the world regarding the nation’s character and conduct. The greatest and strongest governments recognize this influence and act with reference to it. They dread the moral isolation created by general adverse opinion and the unfriendly feeling that accompanies it, and they desire general approval and the kindly feeling that goes with it.”⁴⁶

But a 1990 column appearing in a major US magazine described International Law as “self-canceling.” In columnist George Will’s words, the term International Law “is virtually an oxymoron. Law without a sword is mere words: lacking an enforcement mechanism ... [it is] merely admonition or aspiration ... [and to be effective it] must be backed by coercion legitimized by a political process. The ‘international community’ has no such process.”⁴⁷

Whether such arguments have more than just superficial appeal must be considered at the outset, before one can seriously proceed to study the field of International Law. There would be little sense in taking this course, or specializing in International Law or any related discipline, if the tangibility of this branch of law cannot be effectively illustrated.

International Law *is* primitive in comparison to national legal systems. It lacks the comparable legislative, executive, and judicial enforcement mechanisms. Under the terms of the UN Charter, for example, the General Assembly makes recommendations. It does not legislate. The customary practice of States and norm-creating treaties are the essential lawmakers in the international legal system [Sources of International Law: §1.2]. The UN Secretary-General does *not* have the power to directly intervene in any conflict beyond that which is expressly provided by the disputing parties or the veto-ridden Security Council. Thus, the UN cannot launch a military strike. It has no standing forces. It can only consider matters affecting international peace in the UN Security Council.

One might consider the criticism of the “realist” school of thought. Its members are known for the penchant to dismiss International Law on the basis that it was created by the powerful States to control weak States. Per the University of Missouri-St. Louis political science professor Martin Rochester’s counterpoint:

Can one identify any legal system that is truly power-neutral, granted [that] some are less arbitrary in the application of law than others? In the international system, as in municipal societies, law is essentially based on politics. That is, the legal rules developed by a society—although they might have some utilitarian value for all members—tend to reflect especially the interests of those members of society who have the most resources with which to influence the rule-making process.⁴⁸

The evolution of entities like the European Union [§3.4.], the World Trade Organization [§12.2.], and the International Corporation for Assigned Names and Numbers (that governs global Internet Protocol) suggests that the traditional label “primitive” is becoming an unwarranted moniker. As characterized by Vienna University Professor Markus Burgstaller:

international law has to some extent “matured” into a legal system covering all aspects of relations not only among states but also aspects of relations between states and their federated units, between states and persons, between persons and several states, between states and international corporations, and between international organizations and their members....

This increasing demand for international regulation contrasts with widespread skepticism of the relevance of international law. Ever since Hugo Grotius wrote [in the eighteenth century] ... in order to refute the views of those who held international law as nonexistent or irrelevant it has been common for writers to comment on the comparison of municipal and international law and to discuss the specific nature (primitiveness and/or weakness) of the latter [by] ... critics who believe that international law is irrelevant because it lacks centralized legislative, judicial, or enforcement procedures.⁴⁹

International dispute resolution mechanisms cannot be thrust upon any State without its consent. Unlike individuals who break the laws of their countries, States are coequal sovereigns in an international legal system. It was never designed to force them to appear in a courtroom to defend a claimed breach of International Law. As §8.4 will illustrate, the International Court of Justice (ICJ) cannot exercise its contentious jurisdiction in a case absent a defendant State's express consent to the proceedings. States have historically refused to cede the requisite degree of sovereignty to enable an international organization to control them in the absence of their express consent. This is the reason why the UN conferred the power on the court to render advisory opinions on critically important issues where a defendant State would predictably refuse to appear—as in the *Palestinian Wall* case [textbook §6.2 principal case] and the *Legality of Nuclear Weapons* case [§9.2 principal case].

One could harvest a truckload of insight about the interplay of law and politics from reading through the arguments made in the above *Palestinian Wall* case—by the unprecedented number of State and non-State participants, as well as the varied opinions expressed by the judges. The case reveals an intriguing array of views on the relationship between law and politics in the ultra-sensitive Palestinian challenge to post-colonial order.⁵⁰

Critics of the international legal system claim that International Law is not a “law.” This routine salvo is fired by the assumption that anything less than full and immediate enforcement power renders a legal system inherently impotent. Political “Realists” chastise the international legal system as being rather crude, in relation to the available enforcement powers in national legal systems. In the judgment of these critics, the

limitations of the international legal system, although intrinsically imposed by State sovereignty, render it comparatively weak.

Yale law professor Jed Rubenfeld classically articulated this public skepticism about the perceived role of International Law in the modern legal order:

Some American international law specialists ... are often perceived by the rest of the U.S. legal world to be speaking a foreign language, or not so much a language as a kind of gibberish lacking the basic grammar—the grammar of enforceability—that alone gives legal language a claim to meaning. Kosovo [which like Iraq, lacked an authorizing UN Security Council resolution for the 1999 bombing] symbolizes not merely an exceptional ... exigent circumstance in which the United States was justified in going outside the U.N. framework, but rather an entire attitude about that framework, according to which the U.N. system, while pretending to be a *legal* system, isn't really a legal system [*italics added*].

...

A deeper reason for the [US] skepticism lies in the indications that international law may be used as a vehicle for anti-American resentments. A case in point is the position taken by the “international community” with respect to the continuing use of capital punishment in some American jurisdictions. Most Americans ... can respect the moral arguments that condemn the death penalty. But what many Americans have trouble respecting or understanding is the concerted effort to condemn the United States as a human-rights violator because of the death penalty and to expel the United States from international organizations on that ground. When the international community throws down the gauntlet over the death penalty in America while merely clearing its throat about the slaughter in Yugoslavia, Americans can hardly be blamed if they see a sign that an anti-American agenda can be expected to find expression in international law.⁵¹

There are two responses to this critique. One is that these systemic limitations were instituted by the State members of the international legal community. They were (and are) simultaneously both the governors and the governed. They function within a system designed to temper the efficacy of enforcement measures with

what critics perceive as International Law's "self-canceling" respect for national sovereignty. As articulated by one of the most prominent US Supreme Court chief justices, in a statement which has been quoted and requoted for almost 200 years: "The jurisdiction of the nation within its own territory is *necessarily exclusive and absolute*. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving vitality from an external source, would imply a diminution in sovereignty ... [italics added]." ⁵²

To appreciate this debate, one should distinguish between law and its often delayed enforcement mechanisms. Six months elapsed after Iraq's invasion of Kuwait. Then, a thirty-four-nation coalition pitted Arab against Arab in the ensuing Persian Gulf War. Prior to the Iranian hostage crisis of 1979–1980, States had observed the institution of diplomatic immunity for two millennia. It made little sense, even for nations at war, to "shoot the messenger." Iran admittedly ignored UN Security Council resolutions and a judgment of the ICJ, each calling for the release of the hostages. Yet it would be a mistake to conclude that, lacking an *immediate* enforcement mechanism in that instance, International Law does not exist. Iran became totally isolated by the terms of the international response to its egregious breach of diplomatic immunity. No nation adversely reacted when the US froze billions of dollars of Iranian assets in the US, as a means of pressuring Iran to comply with International Law. In the previous generation, a number of Hitler's henchmen paid with their lives for their roles in waging Germany's aggressive war as a result of the work of the Allied Nuremberg War Crimes Tribunal.

The other response to the critics who argue that International Law is not a "law" is that this deceptively simple monosyllabic word inherently portrays a chameleon-like nature. Some of the most prominent commentators have drawn upon a variety of resources to illustrate its subtle nature in the following terms:

The task of defining "law" itself, let alone "international law," is not easy. The point is made clearly in Sir Fredrick Pollack, *A First Book of Jurisprudence for Students of the Common Law* [that] ... those ideas which seem to be the most simple are really the most difficult to grasp with certainty and express with accuracy [because] ... the greater has been a lawyer's opportunities of knowledge, and the more

time he has given to the study of legal principles, the greater will be his hesitation in face of the apparently simple question: What is law?

No less difficult is the task of defining "international law"—or, more precisely, of reaching agreement on what we mean by "international law." Indeed, the very reality of international law is sometimes open to challenge, on the grounds that there can be no [hierarchy of] governing sovereign states or that it is not 'real law' because states obey it only when it is in their interest to do so. ... Clearly some definitions of law would exclude international law. ⁵³

The following approach presents a refreshing perspective on International Law as "law," straddled with its intrinsic problems, including national leaders who believe that might makes right.

2. "Soft" versus "Hard" Law Did you ever take a "straw" vote? Jurors, boards of directors, and families often do so to get a non-binding sense of how the group will finally decide the issue at hand. The straw vote provides a sense of direction. Is there is a sufficient consensus to proceed? What process would promote the likelihood of achieving a result that will subsequently bind the particular group? What situation-specific factors inhibit the prospects for progress?

As will be discussed in the chapter on treaty-making, State representatives at an international drafting conference often hammer out a multilateral draft treaty that is generally acceptable in principle to most or all. This is often an incredible accomplishment, given the diversity of State actors who send delegates to such conferences. Their draft is not binding, but it is a good yardstick for measuring the degree of consensus on the general principles that may one day govern the issue addressed by the draft treaty [§7.2.A.]. The term "soft law" is commonly applied to environmental treaty drafts. Numerous draft environmental principles and action plans evolved as a result of the three major UN conferences on the environment [§11.2.]. While many have not been ratified by enough States to enter into force, they represent at least a straw vote about what needs to be done—although not necessarily how to do it.

The term "soft law" is not without its critics. The connotation of the second part of that phrase, "law," is that a document or action plan must, by its inherent nature, be binding. Otherwise, it is not the law. Patricia

Birnie of the International Maritime Law Institute and her co-author Alan Boyle of the University of London offer the crisp articulation that:

So-called “soft law” is a highly controversial subject. Some lawyers harbour such strong dislike of the appellation that they refuse to even mention it, especially in connection with sources [of International Law, as set forth in §1.2 of this textbook]. Generally, what distinguishes law from other social rules is that it is both authoritative and prescriptive and in that sense binding. In this strict sense law is necessarily “hard;” to describe it as “soft” is a contradiction in terms.

None the less, in the case of international law, given the lack of any supreme authoritative body with lawmaking powers, it has always been difficult to secure on a universal basis the consent necessary to establish binding rules. Given as we have seen, the political, cultural, and religious diversity of contemporary international society, it has become increasingly difficult to secure widespread consent to new rules, whether by treaty or custom.⁵⁴

The States and international organizations that produce soft law documents do so with a view toward developing an evolving set of standards that represent some consensus about how to deal with the problem at hand. As addressed in this book’s environmental chapter, their non-binding declarations, action plans, and tentative agreements do contribute evidence of the unwritten customary law or written treaties addressed in the next section on sources of International Law.⁵⁵

3. Of Traffic Lights and International Law A “law” represents the behavior that a particular community deems acceptable [National Court Adjudication: §8.7]. The scofflaw may be indifferent to that law. Imagine you are driving through a busy intersection with the usual array of traffic signals. Most motorists conform to the law. They proceed only when the light is green. They stop when the light is red. This routine observance of community expectations prompts the following question: Why do most motorists observe the commands emitted from the directional signals even when there is no police official present to enforce the applicable rules?⁵⁶

Conforming behavior does not necessarily result from fear of punishment. The motorists at the intersection

observe the law due to their common desire to proceed safely. Otherwise, there would be chaos, were each driver to attempt to reach his or her respective destination via that intersection. If most drivers did not observe the traffic laws at the various intersections of human behavior, there would be numerous collisions. These incidents would defeat their common goal of arriving at their desired locations. While compliance may delay the immediate progress of some hurried drivers, conformity with justifiable expectations enables everyone to arrive—even if untimely. The few scofflaws are likely to ignore the traffic lights. But they will incur at least minor, and in some cases major, consequences.

The international system similarly spawns an astonishing level of order between nations (motorists) because of the common interest they share in observing the fundamental expectations of global harmony (collision avoidance). While some States may occasionally ignore the norms of accepted behavior, the international community has nevertheless imposed a legal framework for establishing mutual expectations. Most State “drivers” within the international legal system engage in consistent and predictable behavior that does not offend the shared sense of global order.

The national decision to voluntarily observe International Law is premised on self-interest and the survival instinct emerging at various international intersections. Self-interested States recognize that it is in their best interest to comply with the mutual expectations of the community of nations. Like most motorists, who observe almost all traffic laws almost all of the time, national interests are served best by observing the prevailing international order.

While the above traffic light analogy is not flawless, it does exemplify the analogous operation of International Law as an important cog in the wheel of international relations. One may avoid the all-too-common misperception that the legitimacy of governance depends, for its very existence, on coercive enforcement rather than commonly shared values. Hence, observance of the law does not depend exclusively on military or economic enforcement measures. States have observed International Law, in most instances, in the absence of a UN standing army and comparable governmental institutions that are the benchmarks of national law.

D. NATIONAL-INTERNATIONAL LAW LINKS

Publishing a one-volume textbook on International Law mandates some difficult choices. One of them is culling the application of International Law from governmental actors in nearly 200 countries,⁵⁷ while paying due attention to the “International” portion of the term “International Law.” The internal law of each nation governs the relations among individuals, corporate entities, institutions, and the government within that nation’s borders. Illustrating how a nation incorporates International Law into its legal system is the specific objective of this section of the book.

1. Governmental Actors The quest for illustrations can be complicated. To find “national” law, one would focus on: (a) the national constitutive document; (b) actions of the executive branch of the government; (c) its legislative enactments (which would not differ under a military junta as in Myanmar); and (d) the pervasiveness of court structures and local judicial opinions (where there is judicial independence). The following examples expose the respective flavors associated with the role of International Law within the selected national legal systems.

(a) Constitutions Article 15(4) of the Russian Constitution offers a glimpse of the relationship between its Federation Law and international treaties: “The commonly recognized principles and norms of the international law and the international treaties of the Russian Federation shall be a component part of its legal system. If an international treaty of the Russian Federation stipulates other rules than those stipulated by the [Federation] law, the rules of the international treaty shall apply.” This authorizes the executive treaty power to trump inconsistent legislation.

It is no surprise that the Bosnia and Herzegovina Constitution expressly embraces internationally recognized human rights as its first priority:

The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law. All competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to: any international human rights monitoring mechanisms established for

Bosnia and Herzegovina; the supervisory bodies established by any of the international agreements listed in Annex I to this Constitution; the International Tribunal for the Former Yugoslavia ...; and any other organization authorized by the United Nations Security Council with a mandate concerning human rights or humanitarian law.

India’s Constitution likewise contains one of the most prolific human rights charters yet framed by any State.⁵⁸

The 1998 Irish Constitution exudes a sense of long-term regional conflict: “Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality ... [and] affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination ... [while accepting] the generally recognised principles of international law as its rule of conduct in its relations with other States.”⁵⁹

The US Constitution provides that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” This approach suggests equality among these documents. In practice, the US Constitution always trumps inconsistent treaties [§7.3.B.1.].

(b) Executive Branch Communications One can also look to communications within or between national executive branches for evidence of the role of International Law. The 1938 exchange of diplomatic correspondence between Mexico and the US provides a classic example. The US claimed that international custom prohibited Mexico’s expropriation of farmland owned by US citizens without compensation. Both nations professed their own convenient applications of the general principle of “reason, equity, and justice.”

The US government wanted Mexico to compensate the US owners for the seized land. US Secretary of State Cordell Hull sent a communiqué to the Mexican Ambassador to the US. Hull thereby generated an exchange of letters that would be a useful source for determining what these two countries considered to be the general principle governing expropriations—there being no applicable treaty. Hull wrote that “we cannot

admit that a foreign government may take the property of American nationals in disregard of the rule of compensation under international law. Nor can we admit that any government unilaterally and through its municipal legislation can, as in this instant case, nullify this universally accepted principle of international law, based as it is on reason, equity and justice.”

The Mexican ambassador disavowed the existence of a general principle of law requiring compensation under the circumstances. In Mexico’s view:

there is in international law no rule universally accepted in theory nor carried out in practice, which makes obligatory the payment of immediate compensation nor even of deferred compensation, for expropriations of a general and impersonal character like those which Mexico has carried out for the purpose of redistribution of the land.... As has been stated above, there does not exist in international law any principle universally accepted by countries, nor by the writers of treatises on this subject, that would render obligatory the giving of adequate compensation for expropriations of a general and impersonal [non-discriminatory] character.⁶⁰

Mexico and the US ultimately negotiated a settlement of this compensation dispute. The quoted diplomatic correspondence demonstrates the reliance of *both* governmental representatives on general principles of International Law as a source for resolving their dispute [State responsibility for injury to aliens: §4.4.].

In a June 2006 UN Security Council debate on strengthening international law, the US Ambassador to the UN stated the Bush Administration’s views on the role and significance of international law in these terms:

Secretary of State Rice has noted that one of the pillars of our diplomacy “is our strong belief that international law is a vital and powerful force in the search for freedom.”

As part of our commitment to international law, the United States has worked actively to expand our dialogue with other countries on international law issues. Commitment to international law does not mean that every treaty or every dispute resolution mechanism will serve to advance our interests. *Nor does it mean that we will always agree with every interpretation of our obligations offered by others.* But international

law often provides a useful foundation for achieving common objectives and understandings with other countries, and where the United States agrees to be bound through such mechanisms, we will honor our legal obligations.⁶¹

The italicized portion of the above sentence suggests the adage that the devil is in the details. Note, however, that notwithstanding political reality, the US executive branch was nevertheless restating its commitment to honoring its international obligations.

(c) National Legislation Perhaps the classic illustration of all time was the 1993 Belgian legislation regarding grave breaches of the Geneva Conventions. Belgian courts were thereby granted jurisdiction over such offenses, without regard to where committed, by whom, or against whom. This meant that a Belgian court could hear cases not involving either a Belgian victim or perpetrator even if the conduct occurred on the other side of the globe. The poster child for this legislation was the 2001 case involving Catholic Rwandan nuns. They were placed on trial—in Belgium—for their complicity in crimes against humanity in the 1994 massacres in Rwanda.⁶²

Although watered down because of Brussels-based NATO and US pressure, this legislation was once a prime example of the interplay between national legislation and International Law.

(d) Judicial Institutions Most court decisions involving issues arising under International Law are those of *national* courts. As explained by George Slyz, New York University Fellow for the Center for International Studies:

International Law has a long history of influencing and forming the basis for decisions of national courts. In the seventeenth century, for example, British and French courts regularly applied international prize law in cases concerning the lawfulness of seizures of a belligerent’s commercial vessels during military conflict. Today, national courts increasingly confront issues of international law as a result of the unprecedented increase in activity on the part of international organizations’ and states’ “newfound willingness to submit their disputes to international tribunals.”⁶³

2. Monist-Dualist Distinction Medieval scholars did not distinguish municipal (i.e., “internal” or “domestic” national) law from International Law. The law of nations was considered to be a universal law that bound all of humanity.⁶⁴ Some contemporary scholars have debated the theoretical relationship between national and International Law for many decades. Some tend to describe this controversy in terms of a “monist” versus “dualist” standard.

(a) Monist Approach The monist perspective is that the Law of Nations and the law of each nation form an integrated, universal legal order. International Law is inherently woven into the legal fabric of every nation. Under this theory, no nation can reject International Law in principle. It may have reservations about certain components. Because so many national leaders have acknowledged the existence of International Law, it may be characterized as a part of human existence that is unrestrained by national borders. From this viewpoint, International Law is an integral part of all national legal systems.

The position of the UN’s International Court of Justice (ICJ) is unquestionably clear: national law can never prevail should it conflict with International Law. The Court confirmed this principle in its 1988 case involving US attempts to close the Palestine Liberation Organization Mission at the UN via national antiterrorist legislation. This law conflicted with the US treaty obligation *not* to close it. The ICJ admonished the US that it should:

recall the fundamental principle of international law that international law prevails over domestic law. This principle was endorsed by judicial decision[s] as long ago as ... 1872 in the *Alabama* case between Great Britain and the United States [textbook §2.3.A.3.], and has frequently been recalled since ... in which the Permanent Court of International Justice laid it down that it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.⁶⁵

Austrian Professor Hans Kelsen was the foremost proponent of the Monist approach. His articulation was that national law and International Law have always been a part of the same legal system of universal norms. In an earlier era, these norms provided the basis for a system that came

to be known as International Law. The same behavioral norms also propelled national legal order. States, through individuals who served as their agents, were expected to behave as would individuals. International Law did not need to establish its primacy in relation to national law, given the interdependent, rather than hierarchical, relationship between these integrated legal systems.⁶⁶

Contemporary examples include:

- ◆ Article 25 of the German Constitution provides that “[t]he general rules of public international law ... take precedence over the [other federal] laws and directly create rights and duties for the inhabitants of the Federal territory.”
- ◆ Article 29(3) of Ireland’s constitution “accepts the generally recognised principles of international law as its rule of conduct in its relations with other States.”
- ◆ Article 19.2 of the Kosovo Constitution states that “[i]nternational customary law and all ratified international agreements have superiority over the laws of the Republic of Kosovo which are not in compliance with them.”⁶⁷

(b) Dualist Approach Dualists reject the Monist perception of International Law as articulating an unrealistic assessment of two autonomous legal regimes. Under this theory, International Law and national law are distinct legal orders. Each nation retains the sovereign power to integrate, or isolate, the norms of International Law. National and International Law are *not* parts of a unified whole.

The Dualist theory flows from the quintessential feature of State sovereignty: consent. The State model, created by the 1648 Peace of Westphalia, evangelized an immutable dogma—a State may *not* be bound without giving its approval. Were it otherwise, how could a State be sovereign? When a nation actively decides to incorporate International Law into its national law, only then is International Law the law of that land. As discussed in the “Sources” section of this chapter, a State’s decision makers typically examine international customs and treaties to ascertain whether the requisite expression of consent exists. Just as general principles of national law may be incorporated into International Law, International Law may be similarly integrated into a State’s national law. Without express incorporation, International Law is more a common goal or standard of achievement for each State member of the global legal community.

A judge must therefore apply his or her national law, such as executive and legislative directives, even if to do so would violate International Law. As illustrated in an opinion of the British Court of Appeals, International Law has no validity except insofar as its principles are accepted and adopted by the United Kingdom's internal law. British decision makers thus "seek to ascertain what the relevant rule is, and having found it they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals."⁶⁸

The quintessential restatement of the contemporary dualist doctrine in the US appeared just twenty-five years after the Supreme Court's 1900 statement that "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." In a significant departure from this Supreme Court articulation of Monist doctrine, an often-cited 1925 federal trial court opinion declared as follows:

a misconception exists here as to the status ... of *so-called* international law when that law encounters a municipal enactment. If we assume for the present that the national legislation has, by its terms, made the acts complained of a crime against the United States even when committed on the high seas by foreign nationals upon a ship of foreign registry, then there is no discretion vested in the federal court, once it obtains jurisdiction, to decline enforcement. *International practice is law only in so far as we adopt it*, and like all common or statute law it bends to the will of the Congress. It is not the function of courts to annul legislation; it is their duty to interpret and by their judicial decrees to enforce it—and even when an act of Congress is declared invalid, it is only because the basic law is being enforced in that declaration.... The act may contravene recognized principles of international comity, but that affords no more basis for judicial disregard of it than it does for executive disregard of it.⁶⁹

The US Supreme Court affirmed this dualist perspective in its 2008 decision where a majority of the Court agreed to the following articulation:

No one disputes that the *Avena* decision [text §2.7.C.2. principal case]—a decision that flows from

the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an *international* law obligation on the part of the United States. But not all international law obligations automatically constitute binding federal law enforceable in United States courts. The question we confront here is whether the *Avena* judgment has automatic *domestic* legal effect such that the judgment of its own force applies in state and federal courts.⁷⁰

The more powerful nations have of course prevailed in the Monist-Dualist context. One example is found in the 1988 *Bangalore Principles*, forged by prominent lawyers from Commonwealth countries (e.g., Australia, India, New Zealand, the United Kingdom) and judicial participants including Ruth Bader Ginsburg (then a judge of the US Federal Court of Appeals, now on the US Supreme Court). These privately-generated norms, although not the product of an international convention of States or a UN General Assembly resolution, are one of the more accurate articulations of the contemporary relationship between national and International Law:

- (1) International law ... is not, as such, part of the domestic law in most common law countries;
- (2) Such law does not become part of domestic law until [a] Parliament so enacts or the judges ... declare the norms thereby established to be a part of domestic law;
- (3) The judges will not do so automatically, simply because the norm is part of international law or is mentioned in a treaty—even one ratified by their own country;
- (4) But if an issue of uncertainty arises (... , [or] obscurity in its meaning or ambiguity in a relevant statute), a judge may seek guidance in the general principles of international law, as accepted by the community of nations; and
- (5) From this source material, the judge may ascertain and declare what the relevant rule of domestic law is. It is the action of the judge, incorporating the rule into domestic law, which makes it part of domestic law.⁷¹

(c) Hybrids Looking to the modern practice of States, where national practice is evident, the majority lie somewhere in between the Monism and Dualism poles.

Certain matters are expressly, or apparently, governed by International Law—but not all. For example:

- ◆ French Constitution: “Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament....” Treaties thus prevail within the French legal system. But this express acceptance is limited to treaties. It does not include Customary International Law.
- ◆ South African Constitution: “When interpreting the Bill of Rights, a court, tribunal or forum ... (b) must consider international law.... When interpreting other matters, a court would not necessarily be bound by this provision.” But when interpreting the structuring and conduct of security services, including the police, members must act “in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.”
- ◆ US Constitution: “This Constitution, and the Laws of the United States ... and all Treaties ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” However, the Constitution prevails over all other possible sources of US law, and for treaties versus federal statutes, the above language has effectively morphed into a “last in time” approach. Congress can trump a treaty requirement with subsequent legislation (and vice versa) [§7.3.B.]⁷²

(d) Internal Law Is No Defense Monists and Dualists do agree on one matter: no nation may assert its internal law in defense of a breach of International Law. As aptly articulated by the Permanent Court of International Justice in 1931: “a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.”

This principle has been solidified by different decision makers in too many eras to be voided by modern expedencies like national security. Under the UN International Law Commission 1949 Draft Declaration on the Rights and Duties of States, every nation must carry out its obligations arising from treaties and other sources of International Law in good faith. A nation “may not invoke provisions in its constitution or its [other internal] laws as an excuse for failure to perform

this duty.” It was more recently reaffirmed in the Commission’s 2001 final draft adopted by the UN General Assembly.

Article 27 of the 1963 Vienna Convention on the Law of Treaties provides that “[a] party may not invoke the provisions of internal law as justification for its failure to perform a treaty.” In 1988, the International Court of Justice chimed in: “recall the fundamental principle that international law prevails over domestic law. This principle was endorsed as long ago as the arbitral award of 14 September 1872 in the *Alabama* case between Great Britain and the United States, and has been frequently recalled since [then]....”⁷³

US courts have cautiously adhered to the theme that internal law is no defense. The Supreme Court, for example, has consistently held that an act of Congress should not be construed to conflict with international obligations—unless Congress expressly intends it do so. Per the Court’s often-cited passage: “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate ... rights, ... further than is warranted by the law of nations as understood in this country.”⁷⁴

E. RELATED DISCIPLINES

This section of the text briefly summarizes some of the other disciplines that have influenced the development of International Law and vice versa. Like history, they are often ignored in law school studies. Each provides a fitting lens, however, for visualizing a number of norms in this course.

1. Private International Law Public International Law refers to the rules which States consider binding in their mutual relations. *Private* International Law encompasses a body of substantive law that each nation applies to private transactions. As succinctly defined by Oxford University’s P. M. North: “The *raison d’être* of private international law is the existence in the world of a number of separate municipal systems of law—a number of separate legal units—that differ greatly from each other in the rules by which they regulate the various legal relations arising in daily life. Courts in one country must frequently take account of some rule of law that exists in another.... Consequently, nations have long found that they cannot, by sheltering behind the principle of territorial sovereignty, afford to disregard foreign rules of

law merely because they happen to be at variance with their own internal system of law.”⁷⁵

Public and Private International Law have always been closely enmeshed. Since the seventeenth century, the term *jus gentium*, or law of nations, has been used to refer to the public sector of International Law. The Romans used this term, however, to describe the body of law that governed disputes between individual Roman citizens and foreigners. French and Italian scholars of the twelfth century developed principles, now referred to as “Conflict of Laws,” for resolving such private transnational disputes.⁷⁶

A number of model international treaties have been drafted for disputes involving individuals from two nations where the result would depend on the different laws of the country where relief would be sought. Some examples are the 1971 Hague Convention on the Law Applicable to Road Traffic Accidents; the 1975 Inter-American Convention on Letters Rogatory—which addresses service of process and the discovery of documents in participating nations [§5.4.]; the 1980 UN Convention on Contracts for the International Sale of Goods [§12.1.B.1.]; the 1988 Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons; and the 2005 Draft Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.

Illustration: The following example demonstrates the problem presented when individuals or corporations are subject to different legal results, depending on *where* a breach of contract suit is filed:

Assume that two individuals, respectively from Nations X and Y, enter into an oral contract in the amount of \$100,000. It is legally enforceable under the laws of Nation X, but not the laws of Nation Y. Under X law, an oral contract involving any sale is enforceable in the courts of State X. No writing is required to prove its terms. Under Y law, however, a contract for any amount over \$500 cannot be enforced unless it was a written contract. Y’s legislature intends to discourage fraud by requiring a written contract as evidence should a party wish to sue to enforce any business deal over \$500. Thus, if a suit to enforce this *oral* contract for \$100,000 is brought in the courts of State X, the plaintiff has a chance of winning. If that same suit is brought in the courts of State Y, however, it will be immediately dismissed—because there was no writing to memorialize the parties’ agreement.

Assume that Nations X and Y decide to ratify the already-mentioned UN Convention on the Sale of Goods (CISG). Article 11 of the CISG states that a “contract of sale need not be concluded in or evidenced by writing.... It may be proved by any means, including witnesses.” This treaty therefore authorizes international contracts, for any amount, to be enforced between individuals living in States X and Y when there is no written evidence of their oral agreement. Article 11 supersedes the internal law result of State Y so that oral contracts entered into by Y residents are enforceable, regardless of which nation is the forum for a breach of contract lawsuit. While the parties are free to expressly disavow the treaty’s application to their particular transaction, it facilitates contract performance and trumps Y’s law, which would otherwise bar an action based on an oral contract.

2. International Relations Disciplines like International Law and International Relations share the common feature of examining how States behave. The study of International Relations assesses the political variables affecting how nations behave.

International Relations emerged as a distinct field of study early in the twentieth century. Post-World War I teachers, scholars, and diplomats recognized the need for the study of International Relations, premised on the platitude that history should not repeat itself. This academic discipline soon underwent a great transformation because of the harsh reality of the events leading to World War II. Political science “realists” characterized International Law as being too abstract and inflexible to adjust to life in the trenches. As summarized by Princeton University’s Anne-Marie Slaughter: “the discipline of international relations was ... quickly dimmed by World War II. The fledgling discipline was thus weaned on Political Realism ... [by] seasoned observers of the interwar period [who] reacted against Wilsonian liberal internationalism, which [had] presumed that the combination of democracy and international organization [the League of Nations] could vanquish war and power politics. They believed instead ... [that] states in the international realm were champions only of their own national interest.... The only relevant laws were the ‘laws of politics,’ and politics was a ‘struggle for power.’”⁷⁷

Commencing in the late 1970s, International Relations theory resurfaced. Its analysts then began to acknowledge the contributions made by International

Law and international organizations. These institutions were perceived as promoting positive State behavior in collaborative ways. International legal norms were recognized as actually assisting governments in their pursuit of desirable political interests. International Law was no longer a mere doctrinal paradigm to be dredged up only when convenient for some governmental objective.⁷⁸

The Cold War, and its demise, had a decisive impact on International Relations theory. International communism was an artificial interlude in the complex geopolitics that froze the normal growth of nationalist aspirations during the Cold War era. For example, Marshal Tito's long reign over Yugoslavia prevented ethnic conflict. It did not prepare the way, however, for the post-Cold War national dissolution, just after the demise of the Soviet Union (1989). The negative features of nationalism, based on ethnicity, surfaced with an unexpected fury. The 1990s could succinctly be described in terms of new republics that would define themselves via "ethnic and religious minorities who see no reason why they should be prevented from pursuing their own national destinies ... at the expense of their neighbors." Their leaders seized upon nationalism as an effective strategy to justify their power grabs after the collapse of communist ideology.⁷⁹

3. Religion

(a) Historical Influence Before the Roman Empire, religion was a source of what is now referred to as the law of nations.⁸⁰ As you will study in Chapter 2, the seventeenth-century Treaty of Westphalia is credited with establishing the entity that evolved into the modern nation or "State." It ended the Thirty Years' War in Europe, fought between Catholics and Protestants. In one graphic depiction, "the Continent burned for three decades, and its people bled in a series of battles among

the Holy Roman Empire, France, Sweden, Denmark, Bohemia, and a host of smaller principalities. The Treaty of Westphalia restored the principle ... that ... the prince of a particular region determines the religion of his people. In today's language, that means that one sovereign cannot intervene in the internal affairs of another."⁸¹

The sometimes symbiotic relationship between law and religion has spawned both positive and negative consequences. Willamette University Professor James Nafziger presents an analysis of the intriguing parallels between religion and International Law in the above Nafziger excerpt. It provides a succinct insight into other materials that you will study in this course:

An incredibly comprehensive collection of resources on vintage religious documents designed to protect people, property, and land from the consequences of war—dating from 1500 B.C. to the present—is available in the US federal case *In re "Agent Orange" Product Liability Litigation*. Scholars have produced an extensive library of succinct overviews and lengthy discourses on the historical relationship between law and religion.⁸²

Contemporary legislation finds some roots in religious history. Under the US Religious Freedom Restoration Act, for example, "governments should not substantially burden religious exercise without compelling justification." Four British citizens thereby sued former Secretary of Defense Donald Rumsfeld and various US military commanders regarding their detention in the US military facility at Guantanamo Bay, Cuba. They alleged that they were harassed while practicing their religion by the following conduct: forced shaving of their beards; banning or interrupting their daily prayers, denying them copies of the Koran and prayer mats; and throwing a copy of the Koran in a toilet bucket in their presence.⁸³

Executive branch decisions are sometimes driven by not-so-subtle religious undertones. Iran is a theocracy. There, the executive branch of government is constitutionally allied with Islam. After 9–11, the Bush Administration daily intelligence briefings were often topped with biblical quotes. For example, the April 10, 2003 Pentagon report to the White House—featuring photographs of the statute of Saddam Hussein being toppled—quoted the Book of Psalms: "Behold, the eye of the Lord is on those who fear him ... To deliver their soul to death."



The Functions of Religion in the International Legal System

BY JAMES A. R. NAFZIGER

IN MARK W. JANIS & CAROLYN EVANS (ED.),
RELIGION AND INTERNATIONAL LAW (1999)

Go to Course Web Page, at:

<<http://home.att.net/~sломansonb/txtcsesite.html>>.

Under Chapter One, click Functions of Religion.

The Vatican and “fundamentalism” are two serviceable case studies about contemporary associations between law and religion.

(b) *Vatican Influence* Vatican City is the site of the Apostolic (or Holy) See. This is the central government of the Roman Catholic Church. The Pope, as Head of State, exercises a unique spiritual reign over the world’s Catholics. The geographical premises of this tiny State are located within Rome, based on a 1929 treaty with Italy.

The Vatican City-State is the only religious entity that has achieved governmental recognition with a status resembling a sovereign State. It has also proposed diplomatic initiatives longer than any sovereign. Since the time of the Emperor Constantine in the fourth century AD, the Pope has officially received numerous foreign emissaries. The Vatican currently maintains diplomatic relations with more than 120 nations.

Some of the prominent developments in Vatican history include: its role in encouraging the medieval crusades; claiming to divide the Atlantic between Spain and Portugal in 1493; the 1867 US congressional withdrawal of funding for a US delegation to the “Papal States”; President Franklin Roosevelt’s sending a personal representative to the Pope on the eve of the outbreak of World War II; criticism for effectively acquiescing in the Nazi takeover of Europe, including complicity in war crimes;⁸⁴ US President Reagan’s rekindling of the Vatican-US relationship in 1984, resulting in the opening of the Vatican embassy in Washington, DC; occasional US Department of State briefings for the Pope during visits to Washington, DC; and its June 2007 rebuke of Amnesty International (AI) by discouraging Catholics from donating money to AI because of its policy of promoting access to abortion services.

The Vatican’s contemporary international role includes the mediation of international crises. In 1965, for example, the Vatican embassy negotiated a cease-fire in the Dominican Republic conflict, whereby US troops departed from the Republic. In 1990, Panama’s leader, Manuel Noriega, sought refuge in Panama’s Vatican embassy. The Vatican’s role prompted Noriega’s surrender to US troops that had surrounded the embassy, shortly after the US invasion of Panama. The Holy See (Vatican) achieved worldwide attention in 1994, during the UN Conference on Population in Cairo, Egypt. The Pope consolidated forces with Iran

and Libya to deflect a potential multilateral approach, which had planned to approve abortion as a means for limiting the world’s population. In 1997, the Pope made a much-heralded visit to Fidel Castro in Cuba.

In a June 2004 meeting with President Bush at the Vatican regarding the Iraq War, the Pope expressed his concern regarding the sensitive subject of torture. He urged as follows: “It is the evident desire of everyone that this situation now be normalized as quickly as possible with the active participation of the international community and, in particular, the United Nations organization, in order to ensure a speedy return of Iraq’s sovereignty, in conditions of security for all its people.” Later, when commenting on torture and terrorist attacks, the Pope added: “Torture is a humiliation of the human person, whoever he is ... [and] there are other means to make people talk.”⁸⁵

(c) *Fundamentalist Movement* The collapse of the Soviet Union unleashed vintage religious rivalries that the Cold War repressed for the four decades after World War II. Postwar political order had been maintained by the North Atlantic Treaty Organization (NATO)-Warsaw Pact paradigm. Then came the subsequent breakdown in statehood when larger States split into smaller sovereign powers.

A number of Western commentators replaced the former Evil Empire (US President Ronald Reagan’s term for the Soviet Union) with a new demon. It is often characterized, or mischaracterized, as “Islamic” fundamentalism. The US post-Gulf War policy of respecting Iraq’s borders, for example, is perceived by fundamentalists like Usama bin Laden as ignoring ethnic Kurdish and religious Shiite claims to autonomy in and around Iraq. Iraq’s borders were frozen after the 1991 Persian Gulf War via no-fly zones aligned with ethnic divisions. As stated in a comprehensive study of what Western writers describe as the fundamentalist post-Cold War insurgency:

[f]undamentalists are boundary-setters: they excel in marking themselves off from others by distinctive dress, customs, and conduct. But they are also, in most cases, eager to expand their borders by attracting outsiders who will honor fundamentalist norms, or by requiring that non-fundamentalists observe fundamentalist codes. The state is the final arbiter of disputes within its borders. In cases in which the state

is “fundamentalist” (e.g., Iran, Sudan) or has been influenced by fundamentalist socio-political agendas (Pakistan, India, Egypt, Israel), the fundamentalism of the enclave is encouraged or even empowered to spill over its natural boundaries and permeate the larger society.⁸⁶

A number of *pre*-9–11 events were not then associated with fundamentalists’ radical views as they would be today. For example, former Attorney General Robert Kennedy was the presumptive Democratic candidate for the 1968 presidential election. He was assassinated by a Palestinian-American born in Jerusalem. The assassin advised the media that he was upset about Kennedy’s “support of Israel ... [by the] attempt to send those 50 bombers to Israel to obviously do harm to the Palestinians.” Four years later, eleven members of the Israeli delegation to the 1972 Munich Olympics were killed by the Palestinian group Black September. The 1985 hijacking of the Achille Lauro cruise ship by the Palestine Liberation Organization resulted in the death of a passenger who was wheelchair-bound because he was Jewish. Other less widely publicized acts could be included in this terrorist prelude to the 2001 massacre of 3,000 individuals from eighty-two countries in the New York World Trade Center.⁸⁷

A novel feature of the contemporary “fundamentalist struggle” involves what some Western observers would describe as terrorist reactions to modern threats to fundamentalist doctrine. In March 1994, for example, Muslim fundamentalists murdered two young schoolgirls in Algiers because they were unveiled. This action marked the bloody enforcement of a February 1994 vow undertaken in the name of religion. Muslim women who do not cover their heads in public joined a growing list of targets, including the Algerian army, police, secularist intellectuals, artists, journalists, and certain unsympathetic foreigners. In 1996, the Taliban government in Afghanistan began to enforce its perception of an ordered society in which women were virtually under house arrest. They could not leave their homes unless accompanied by a related male, or attend school, work, or travel without a full-body garment (burqa).⁸⁸

In December 2007, a British teacher in Sudan could have been put to death for allowing a child to nickname a teddy bear Muhammed. Several thousand Sudanese demonstrated in favor of that punishment because she thereby insulted their religious icon. In 2006, tens of

thousands of Sudanese rallied in the same city because some European newspapers had published a cartoon about Muhammed. These events mystified the West, indicating that there was much to learn about dealing with another culture. In June 2008, Dutch prosecutors decided that legislator Geert Wilders would not be prosecuted for his Arabic-language film named *Ordeal*, which juxtaposes Koranic verses with violent film clips by Islamic radicals. Wilders nevertheless fears traveling outside of The Netherlands because Jordan has enlisted the help of Interpol to secure his arrest and extradition to Jordan where he faces criminal charges for a film that was condemned by UN Secretary-General Ban K-moon.

The cover of the July 21, 2008 issue of the *New Yorker* magazine featured a cartoon caricature of Michelle Obama as an urban terrorist in the Oval Office, wearing an Angela Davis afro with an AK-47 slung over her back and a bandoleer of ammunition. She was doing a fist-bump with Barack Obama, who was wearing a turban and dressed in Muslim garb. This cartoon included a portrait of Usama bin Laden on the wall with an American flag burning in the fireplace. A news media firestorm immediately erupted as to whether this political satire insulted Islam (and a then candidate for US president.) Reasonable persons would not presume that this satire linked Obama to terrorism. While educated Americans might laugh, fundamentalist terrorists likely had a quite different take on the “humor”—which often depends upon whose ox is being gored.⁸⁹

September 11th posed new opportunities for positive US interaction with fundamentalism. The US then enjoyed a fresh opportunity to improve relations with countries in the crucial Middle East region. There were still anti-American rallies, for example, outside the gates of what used to be the US Embassy in Tehran—stormed in 1979 by Iranians as part of the country’s Islamic revolution [*Iran Hostage* case: §2.7.E.]. During the months after 9-11, assembled protesters would again chant “Death to America” to mark twenty-two years since the pro-US regime fell. But the crowds were not of the size or intensity that they once were. As a sign of the attitude then blooming among many Iranians, flow-ers appeared outside the gates of the US embassy.⁹⁰ These were a symbol, quickly removed by Iranian police, of a warming toward America. The US then decided to pursue the Taliban in Afghanistan in 2002 and launch a preemptive war against Iraq in 2003. The latter action

especially damaged US relations with the Muslim world, fueling the contemporary renewal of regional fundamentalism and culminating in many extremists crossing into Iraq to aid the anti-US insurgency.

Religious leaders have participated in cross-border power struggles since the time of the medieval Crusades. A number of Muslim nations supported the Afghan Mujahedeen in its fourteen-year struggle to disengage occupying Soviet troops. Rival factions within Afghanistan subsequently tore it apart, however, with political power struggles waged in the name of Islam. Religious violence approximated that done by the Inquisition and the crusades of the Roman Catholic Church. Mosques were special targets of violence because people used them as safe havens from battles fought by rival factions of the Mujahedeen. The famous Blue Mosque in Kabul was filled with women and children when it was bombed in March 1994. The traditional acquiescence in

the use of mosques as sanctuaries was apparently forsaken by rival religious groups. Even the Soviet regime never dared to break that tradition during its occupation of Afghanistan (1979–1989).

The President of Chechnya, emerging from afternoon prayers at a mosque in March 2009, explained why seven young women had just been executed, then dumped by a roadside. They had exhibited “loose morals” and were “rightfully” shot by male relatives in honor killings. They were the property of their husbands, and they had allegedly violated basic tenets of Islam. The Russian Constitution guarantees equal rights for women and separation of church and State. President Ramzan Kadyrov enjoys the backing of the Russian government, however, because his platform violently contains Chechnya’s Islamic separatists.⁹¹

As succinctly articulated below by McGill University’s Institute of Islamic Studies Professor Hallaq.

Juristic Authority vs. State Power: The Legal Crises of Modern Islam

WAEEL B. HALLAQ

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...

[T]he transposition of the command of the law from the hands of the faqihs (the traditional legal professionals) to those of the state represents the most important phenomenon of modern legal reform, one that signified simultaneously the eternal loss of epistemic authority and the dawning of the much-abhorred authority of the state. The emergence of the state as carrier of legal authority (or, strictly speaking, legal power) is seen as doubly repugnant in Islamic countries not only because the state appropriated law from the community-rooted groups of the religious jurists, but also because it had shown itself, for over a millennium, to be an entity severely lacking in religiosity, piety and rectitude. If Islamic law had represented to Muslims the best of “din” (religion) then the state stood for the worst of “dunya” (worldly existence). With the appropriation of law in the wake of the reforms, the state has sunk into even lower levels of repugnancy. It committed a third felony: it substituted God’s law with a foreign law; and to make things much worse, a fourth felony, it chose none other than the law of the colonizers to do so.

If modern Muslims are demanding a return to the Shari’a, it is because of their perception that all these violations have wreaked havoc with their lives. The modern “Muslim” nation state (however many contradictions may lie in this phraseology) has not commanded, nor is it likely to command, the conformity of the Muslim masses to its will, much less their respect. Put differently, the modern “Muslim” nation state failed to gain authority over its subjects, for authority, unlike power, does not necessarily depend on coercion. When the traditional legal schools acquired authority, they did so by virtue of the erudition of their jurists who proved themselves not only devoted to the best interests of the umma ([masses] whom they served very well) but also the most competent human agency to discover God’s law. Their erudition was their authority, and erudition implied, indeed entailed, a hermeneutical engagement with the divine texts without which no law could be conceived. The state, on the other hand, abandoned God and His jurists’ law, and could find no other tools to replace it than the instruments of worldly coercion and imperial power.

“The constancy and stability...” will start here. The constancy and stability of classical Islamic law during the last 1200 years cannot be adequately explained in a one-volume introductory book on Public International Law; however, several key themes necessarily permeate any more detailed analysis. First, Western legal thought focuses on the nation-State as the body wielding the ultimate authority in virtually all contexts. This is not the case with the Muslim counterparts. The legal system of most contemporary Muslim countries likewise assumes that the State produces legal authority. But there is a disconnect between two perceptions of legal authority. One emanates from the nation-State, while the other is found elsewhere. This second source of authority has been the dominant Muslim conception. The Western-derived perception of authority, lodged in the nation-State (with its origins in the Treaty of Westphalia in 1648), was introduced in these nations only during the last two centuries.

There is no shortage of contemporary religious discourses which interpret, or misinterpret, religious leaders and their perceived impact on international relations. The Pope’s September 12, 2006 lecture at a German university, for example, quoted a fourteenth-century Byzantine emperor who said from “what Mohammed brought ... you will find things only evil and inhuman, such as his command to spread by the sword the faith he preached.”⁹² That reference also sparked controversy throughout the Muslim world. Regardless of intentions, the association of faith with the sword and 9–11 has had a devastating impact on Islamic States as well. London School of Economics International Relations Professor Fred Halliday poignantly asserted this point, not long before 9–11. It remains especially relevant in the aftermath of that tragedy:

Much external discussion has focused on how the Islamist upsurge constitutes a ‘threat’ or challenge to other states, particularly the West.... Terrorism is an issue but ... not one confined to the Middle East. Indeed, for all the rhetoric and [the] occasional act involved ... the Islamic states are if anything weakened by these new ideologies, since they create internal tension and conflict that lessens their ability to play an effective international role. The greatest challenge presented by Islam is, therefore, directed not to the Islamic world, but to the Muslim people themselves: [and that is] the ability to find and implement a viable economic development strategy, the creation

of co-existence and tolerance between different ethnic and confessional groups, [and] the promotion of democracy and political tolerance. These are all goals which the heightened militancy of Islamism makes it more difficult for these states to attain.⁹³

This point has not gone unnoticed in some predominantly Muslim nations. For example, fifteen of the nineteen 9–11 hijackers were Saudi-Arabian. At a June 2008 conference in Mecca, Saudi King Abdullah proclaimed that “Islam must do away with the dangers of extremism and present the religion’s positive message.” Fifty nations with sizeable Muslim populations were then focused on promoting reconciliation between Shiite and Sunni Muslims. Saudi Arabia (primarily Sunni) and Iran (primarily Shiite) are the top rivals for influence in the Middle East. But they are politically divided on many prominent issues including Lebanon, Iraq, and the dominant Israeli-Palestinian problem. The conference objective was to look inward, with the tangible purpose of forging an agreement on a global Islamic charter reflecting an interfaith dialogue with Muslims, Christians and Jews.⁹⁴

This conference occurred a matter of days after the bombing of the Danish embassy in Islamabad, Pakistan—killing six and wounding dozens. A Danish newspaper had reprinted a cartoon depicting the great prophet Mohammad as wearing a bomb-shaped turban. Similar cartoons sparked riots throughout the Muslim world in 2006. Iran retaliated by hosting its International Holocaust Cartoons Contest in November 2006. A Moroccan won the \$12,000 first prize for his depiction of a Star of David sign on a crane. It was hoisting blocks onto a wall, which was separating the Dome of the Rock Muslim shrine from Jerusalem. A gate on the wall resembled the gate at the Auschwitz concentration camp.⁹⁵

Other Muslim nations are taking steps to control the fundamentalists who have also tried to hijack a religion. In June 2006, the Moroccan government connected its largest mosques to a television network. The government’s objectives include fighting radical Islam, curbing the role of radical Muslim preachers who are now less able to incite riots, and broadcasting a more tolerant version of Islam. Three months later, 118 State members of the non-aligned movement of nations met in Havana, Cuba, to discourage “Defamation of Religion.” The Heads of State thus “reaffirmed their strong belief in

the need to stress moderation of all religions and beliefs and to promote understanding through dialogue within and across religions. In this connection, they welcomed the ... promoting [of the] moderate and true values of Islam.”⁹⁶

Even school dress codes are explosive. They provide useful insight into what Westerners like England’s former Prime Minister Tony Blair have characterized as tangible evidence of today’s culture clash. France and Great Britain are two of the most diverse societies in Europe. But each has had to respond to enormous pressures regarding certain Muslim practices. In August 2004, French hostages pleaded for their lives when their captors in Iraq demanded that France rescind its ban on Muslim head scarves in French public schools. This demand echoed amidst beheadings and other pressures exerted by such groups seeking the exodus of foreign military troops from Iraq. While the kidnappers would surely disagree, the French law did not target Muslims. It banned all insignia that “conspicuously manifest a religious affiliation,” such as Jewish yarmulkes, large Christian crosses, and Muslim head scarves.

A British court likewise ended a two-year legal battle in March 2005. The case in question involved a Muslim teenager sent home from school for wearing a *jilbab*, which is a long, flowing gown that covers the entire body (except for the hands and face). Overruling the initial trial court decision, an appellate panel determined that this ban “unlawfully denied her the right to manifest her religion.” She was legally represented by Cherie Booth, who is the Queen’s Counsel and the wife of Prime Minister Tony Blair.⁹⁷

A September 2004 German Federal Constitutional Court case also upheld the right of a female Muslim teacher to wear a headscarf in her classes. Thus, the regional law could no longer ban religious symbols in German classrooms.

4. Comparative Law Just as well-rounded students should consider the impact of religion and culture on International Law, they should also acknowledge the influence of Comparative Law. There are a number of diverse legal traditions throughout the globe. National representatives in any international context—such as diplomats at the UN or multilateral conferences, or judges and arbitrators deciding international disputes—are far more likely to reach a workable result if they acknowledge one another’s respective legal cultures. Indigenous

norms provide a lens through which one may more competently perceive the international legal process.

Differing legal traditions often impact international problem-solving strategy. For example, two of the more prominent legal cultures are civil law (based on French law) and common law (based on British law). The former is derived from Napoleon’s Civil Code of 1804. The latter has its roots in earlier medieval judicial practice.⁹⁸ One of the most challenging phases in the contemporary development of the United Nations’ Yugoslavian war crimes tribunal was determining the extent to which both the Common Law and Civil Law traditions would be utilized for conducting its proceedings.⁹⁹

Comparative Law affects private transactions as well. Assume that a Civil Law lawyer and a Common Law lawyer are negotiating on behalf of their respective clients. Each should come to the conference table prepared to address the question of how disputes will be resolved, and under what terms. If the Civil Law tradition were applied, there would be no jury to resolve disputes. Nor would there be a discovery phase between pleadings and trial. Under the Common Law tradition, the trial judge does not routinely ask questions of trial witnesses. The Civil Law judge would not have the inherent powers exercised by Common Law judges.

◆ §1.2 SOURCES OF INTERNATIONAL LAW

A. INTRODUCTION

International decision makers routinely examine the established “sources” of International Law to see whether the particular rule—which a participant is advocating—is actually a part of the corpus of International Law.

The word *sources* is a chameleon-like term in the jargon of International Law.¹⁰⁰ One should distinguish between a source *where* the law may be found and a source that is the substantive *content* of applicable law. In this section of the book, the term “source” refers to the forensic process involving *where* a decision maker or researcher looks to ascertain the substantive legal rule which governs a legal dispute or academic discourse. In this context, the term “source” does not refer to the actual language of the relevant legal text. Instead, it is a category or type of source where the applicable substantive rule is located.

The international community has routinely applied the following list of sources for researching the content of International Law. Under Article 38.1 of the Statute of the ICJ:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. ... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This portfolio of sources was extracted from Article 38 of the original world court's constitutive statute. It was unanimously adopted by the First Assembly of the League of Nations in 1920. This Permanent Court of International Justice source list evolved from the common practice of local or regional tribunals, which had used these same sources for finding evidence of the substantive content of International Law. The so-called "Permanent" court employed these sources for seeking the details about the actual content of International Law until its judges fled from Holland during World War II. While scholars have debated the completeness of this list of sources,¹⁰¹ it is the definitive list for international arbitral and judicial tribunals.

1. Hierarchy among Sources? There is a hierarchy among the various *norms* of International Law. Few International Law textbook authors would disagree with the following notion: All substantive rules of International Law are important, but some are more important than others. For example, according to the UN's International Law Commission: "A rule of international law may also be superior to other rules by virtue of a treaty provision. This is the case of Article 103 of the United Nations Charter by virtue of which 'In the event of a conflict between the obligations of the Members of the United Nations under the ... Charter and their obligations under any other international agreement, their obligations under the ... Charter shall prevail.'"¹⁰²

This textbook section, however, deals with *where* one seeks guidance for ascertaining the content of International Law. The sequential arrangement of the sources within the above Article 38 of the ICJ Statute suggests an implicit hierarchy. The first layer of this ordering is that treaties, customs, and general principles are the *primary* sources for finding the content of International Law. Judicial decisions and scholarly writings are expressly designated as the *subsidiary* sources for determining the content of International Law.

The possibility of an express hierarchy of sources was incorporated into a draft of the *predecessor* of Article 38 (when the "Committee of Jurists" drafted it for the Permanent Court of International Justice in 1920). The initial draft version provided that any listed sources were to be considered *en ordre successif*—in successive order. This phrase was deleted, however, at the First Assembly of the League of Nations. The League's records do not indicate whether the deletion was meant to avoid a hierarchy, or, alternatively, was so unnecessary as to render the words (*en ordre successif*) surplusage. From a practical perspective, however, a treaty is usually the best evidence of what is International Law; a custom is more readily articulated than a general principle; and so on.¹⁰³

Contemporary commentators are fond of ranking the comparative importance of this statutory list of sources. Many consider custom to be not only at the top, but also the essential basis for the other sources. University of Rome Professor Benedetto Conforti thereby insists that:

Customary rules properly are placed at the top of the hierarchy of international norms. Included as a special category of customary rules, are general principles of law common to all domestic systems. Custom is both the highest source of international norms, and the only source of general rules. Treaties are second in ranking. Their obligatory character [itself] rests on a customary rule, *pacta sunt servanda* [good faith performance], and their entire existence is regulated by a series of customary rules known as the law of treaties. Third in the hierarchy are sources provided by agreements, including, most importantly, acts of international organizations.¹⁰⁴

Practically speaking, State-like entities had interacted for some millennia. Custom was necessarily the major source of their inter-relations—until the invention of the printing press in the fifteenth century.

Other commentators characterize *treaties* as the most fundamental source. Frankfurt University's Professor Rudolf Bernhardt asserts that custom is often superseded by treaties. His informative perspective is that "normal customary law ... can as such be superseded by regional as well as universal treaties. States are in general free to conclude treaties, which depart from customary law. This happens every day. Treaties on economic relations between certain States, double taxation agreements, defence alliances and human rights treaties all change the legal relations between the participating States, impose additional and different obligations, limit the existing freedom and sovereign rights of the States concerned, and [thereby] change the applicable norms. In this context, treaties have a 'higher' rank than customary law."¹⁰⁵

If a rule of Customary International Law and a treaty-based rule were similarly worded, would the treaty provision trump the customary rule? The subject matter governed by these two sources of law does not always precisely overlap. For example, Nicaragua sued the US in the International Court of Justice in 1986, regarding the clandestine use of US force against a Nicaraguan government the US did not support [a §9.2.C.2. principal case]. As explained by the Court:

even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability.

... [T]he Court observes that the United Nations Charter ... by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the "inherent right" ... of individual or collective self-defence.... The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence [which is undefined in the U.N. Charter], and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate

directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.¹⁰⁶

2. Article 38's Critics The 1944 Report of the Informal Inter-Allied Committee on the Future of the PCIJ stated that "although the wording of this provision is open to certain criticisms, it has worked well in practice and its retention is recommended."¹⁰⁷

Some critics question whether this aging articulation of the sources of International Law has continuing vitality. Some Western, Russian, and Chinese scholars have articulated forceful counterarguments:

- ◆ Former University of Chicago Professor Morton Kaplan and former US Attorney General Nicholas Katzenbach argued that this list of sources became "stereotyped." It fails to acknowledge the ever-changing nature of the content of International Law, and thus even the shopping list of sources from which it is derived.
- ◆ Moscow State University Professor Grigori Tunkin poses doubts about the "imperfect formulation" of this Statute of the International Court of Justice Article 38 listing of sources. He comments that a "practice" might not be a *general* practice within the meaning of this Article although it is recognized on a bilateral or regional basis.
- ◆ Chinese scholars perceive Article 38 as being a list of Western-derived sources reflecting the external policy of the ruling classes. These "sources of bourgeois international law are the external policy of the bourgeoisie which is also the will of the ruling class of those big capitalist powers." Third World scholars effectively embrace this latter perception because of the Eurocentric roots of modern International Law. Many of their homelands were colonized by the dominant States that cultivated these rules, long before the global independence movement of the 1960s.
- ◆ *Opinio juris* (what States profess to believe) and State practice (what States actually do) are not sufficiently distinguished by Article 38's reference to "custom." There is much subjectivity associated with the word "custom." The bias or experience of the particular decision maker complicates the daunting task of

assessing the degree to which perceived changes in Customary International Law are merely in the eye of the beholder.¹⁰⁸

The next section of this textbook will explore practical applications for grasping the “sources” of International Law. Decision makers and researchers thus access the following resources in this quest: custom; treaties; general principles; judicial opinions; scholarly writings; and a write-in candidate not on the Article 38.1 list: UN Resolutions.

B. PRACTICAL APPLICATIONS

1. Custom Decision makers often examine the customary practice of various nations as a primary source for determining the content of the rule applicable to the legal issue at hand. An established State practice, accepted by many nations, qualifies as a binding custom. This source has a rich and diverse history dating back to the Roman Empire.¹⁰⁹ It has a persistent vitality because many international obligations were, and are, not expressed in treaties.

When is a custom “binding”? Moscow State University Professor Grigori Tunkin described this question as one of the most important and most complex theoretical problems for diplomats, jurists, and researchers. It is therefore “natural that the question of customary norms of international law has been the object of constant attention of specialists for a century.”¹¹⁰ This complexity has evolved from the dual process of having to determine both where to find evidence of the custom’s existence and what customs are obligatory components of International Law.

There is often a continuum whereby a customary practice among a few nations ultimately ripens into a custom applicable to all nations—on an evolving regional or global basis. Oxford University Professor Ian Brownlie conveniently assembles the four recognized elements for resolving whether a claimed practice in fact falls within this domain: (1) duration or passage of time; (2) substantial uniformity or consistency of usage by the affected nations; (3) generality of the practice, or degree of abstention; and (4) *opinio juris et necessitatis*—international consensus about, and recognition of, the particular custom as binding.¹¹¹

The fourth element is arguably the most important, yet the most difficult to authenticate. The International Court of Justice (ICJ) opinion in the 1969 North Sea

Continental Shelf case authoritatively evaluated the requisite degree of international consensus. The issue in such cases was whether the United Nation’s 1958 Convention on the Continental Shelf, containing an equidistance principle for allocating limited resources within the shelf, codified a customary rule that would be binding on nations that were *not* parties to that Convention. The Court explained that:

Not only must the acts concerned amount to a settled practice, but they must also be such ... as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.... The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.... There are [otherwise] many international acts, e.g., in the field of ceremonial [behavior] and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience, or tradition, and not by any sense of legal duty.¹¹²

(a) Regional Custom A regional custom applied by a few nations is not necessarily tantamount to a custom practiced by all other members of the community of nations. Both categories of custom may be binding. For example, Colombia claimed, in a 1950 ICJ case [*Colombia v. Peru*: §2.7.D.2.], that “American International Law” required Peru to recognize Colombia’s grant of asylum in the Latin American region. Peru responded that the Colombian embassy improperly granted asylum to a Peruvian national seeking to overthrow Peru’s government. Peru was unwilling to permit its Peruvian national to depart the Colombian Embassy, and then leave Peru without being prosecuted for treason. The Court rejected the existence of either a regional or universal custom requiring Peru’s recognition of Colombia’s grant of diplomatic asylum—a decision for which this distant Court in Europe was harshly criticized, especially among African nations.

Yet, the ICJ tacitly approved the potential application of regional customs where they could be proven to exist. The following passage poignantly illustrates what Colombia needed to prove in order to establish that this custom had become a part of Customary International Law: “The Party which relies on custom ... must prove that this [supposed] custom is established in such a manner that it has become binding on

the other Party ... [and] that the [claimed right of asylum] ... is in accordance with a constant and uniform usage, practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum [Colombia] and a duty incumbent on the territorial State [Peru].”¹¹³

Some commentators, however, contend that a practice must be *universal* before a custom can become binding under International Law.¹¹⁴ This “requirement” has been advocated in socialist nations when International Law is not considered part of a legal hierarchy of laws that can bind a sovereign State. The practical problem with this contention is that universality is rarely achieved in an international system composed of many diverse nations and legal systems. International custom gradually evolves through compromise and consistency of application. New York University Professor James Hsiung, writing on Chinese recognition practice, provides a useful insight. It is impossible to measure precisely how strong the dissent must be, before an existing norm is changed—or precisely when a rejected norm ceases to exist. Dissent, or a change of consensus, if supported by a growing number of States, may thus bring about a new norm or at least indicate a revision in customary practice.¹¹⁵

(b) General Custom National courts have various methods for ascertaining the scope of an advocate’s claim that a customary rule of International Law exists and should thus be applied to the local case at hand. For example, the London Court of Appeal articulated how such rules may be proven in its pronouncement that “[r]ules of international law, whether they be part of our law or a source of our law, must be in some sense ‘proved,’ and they are *not* proved in English courts by expert evidence like [hearing testimony about] foreign law: they are ‘proved’ by [the trial judge] taking judicial notice of international treaties and conventions, authoritative textbooks, practice and judicial decisions of other courts in other countries which show that they have attained the position of general acceptance by civilized nations.”¹¹⁶

The following case illustrates how a group of decision makers—in this instance, US federal judges analyzing international human rights and environmental issues—examined the Article 38.1 sources of International Law. They used the Article 38 sources in their quest to determine whether there was a yardstick to measure corporate responsibility for environmental pollution:



Flores v. Southern Peru Copper Corporation

UNITED STATES COURT OF
APPEALS SECOND CIRCUIT
414 F.3d 233 (2003)

Go to Course Web Page, at:
<<http://home.att.net/~slomansonb/txtcsesite.html>>.
Under Chapter One, click Flores.

Flores relied on the same custom alleged in *Filartega*. The latter case involved the Alien Tort Statute (ATS) claim. In Paraguay, a policeman tortured and killed the brother/son of the plaintiff citizens of Paraguay. They successfully claimed that there was clearly a global customary practice among nations, all of whom prohibit such torture. In *Flores*, however, the same federal Court of Appeals in New York ruled against the Peruvian plaintiffs on their fundamental environmental claim arising under the ATS.¹¹⁷

The March 2005 Viet Nam *Agent Orange* case applied Article 38.1 of the International Court of Justice Statute in its quest to derive an applicable environmental norm. Relying on *Flores*, the judge restated the proposition that: “A guide for determining proper sources of international law is the Statute of the International Court of Justice ... to which the United States is a party.” The court observed that: “Customary international law is binding on all states [nations], even in the absence of a particular state’s consent, but may be modified within a state by subsequent legislation or a treaty, provided that the customary international law was not a peremptory norm (*jus cogens*).”¹¹⁸ This latter term embraces unassailable norms, such as the prohibition on genocide from which no state may deviate [§10.1.B.]. It will be further addressed in the treaty chapter [§7.2.B.2(e)].

The US Supreme Court’s *Paquete Habana* articulation has been cited numerous times for this particular passage: “International law is a part of our law, and must be ascertained and administered by the courts ... as often as questions of right depending upon it are duly presented for their determination.”¹¹⁹ There was no treaty provision that addressed the issue presented in that case—whether the US embargo of Cuba, during the Spanish-American War of 1898, authorized the capture

of coastal fishing vessels not associated with Spain's war effort. The court thus examined centuries of foreign governmental decisions. While not binding, they could provide persuasive guidance as to what other nations had done in these circumstances:



The Paquete Habana and the Lola

SUPREME COURT OF
THE UNITED STATES
175 U.S. 677 (1900)

Go to Course Web Page, at:

<<http://home.att.net/~sломansonb/txtcsesite.html>>.

Under Chapter One, click Paquete Habana.

2. Treaties An applicable international convention, commonly referred to as treaty, is the first of the ICJ Statute's list of sources for finding the content of International Law. A multilateral treaty is usually the most convenient way of securing reliable evidence of a consensus on the issue before an international decision maker. When ratified by many nations, a multilateral treaty is direct proof of rights and obligations accepted by multiple parties to that treaty. It is the primary source for ascertaining the nature of what the international participants have agreed to do or not do. As you will observe in Chapter 7 on Treaties, there is often an inverse correlation between the number of treaty parties and specificity. The more parties to the treaty, the less detail there is. That achieves a greater degree of consensus on the underlying principles. Because of the enormous range of issues that are not addressed by express treaty terms, Customary International Law is the quintessential gap filler.

A regional treaty is not intended to have universal applicability. It is nevertheless a useful source for ascertaining the rules which bind its local participants. The Charter of the Organization of American States (OAS), for example, provides that all international disputes between American States shall be submitted to the procedures set forth in the OAS Charter—"before being referred to the Security Council of the United Nations."¹²⁰ State parties thereby agree to first resort to regional OAS agencies, rather than proceeding directly to the UN Security Council. While the UN Charter

encourages such regionalism, this particular treaty *requires* its members to seek an OAS solution first, before pursuing a remedy in a more global forum. Conversely, non-OAS nations are free to lodge their claims directly with the UN or other appropriate fora.

Global multilateral treaties usually provide the best evidence of international consensus, even when they are not universally adopted. One example is the UN Law of the Sea Treaty, which entered into force in November 1994. It is the best evidence of the respective rights and obligations of the parties who have accepted it. When enough nations have ratified such a treaty, its entry into force is the best source for resolving maritime issues between the ratifying States. Such a treaty may also bind non-parties, as a matter of Customary International Law, if it codifies the general practice of many nations. This process was confirmed by the ICJ in its statement that a treaty may have "generated a rule which, while only conventional or contractual in its origin [between ratifying States], has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process ... constitutes indeed one of the recognized methods by which new rules of customary international law may be formed."¹²¹

3. General Principles The prescribed list of sources includes "general principles of law recognized by civilized nations." Why is *this* source necessary? Treaties do not, and usually cannot, provide answers to every future dispute. International decision makers can therefore borrow gap-filling concepts from the internal law of various nations, such as "equity" and "good faith."¹²²

One who is not a lawyer should not assume that common words have a fixed definition, even in a matured national legal system. "Pornography" is mentioned in many legal and social discourses. The US Supreme Court cannot define it, but knows it when it sees it.¹²³ The same is especially true for the international legal system. As pithily articulated by New York University Professor Thomas Franck on the state of International Law: "Even if 'everyone' were to agree, at least in theory, that fairness is a necessary condition ..., this unfortunately would not assure that everyone shared the same sense of fairness or agreed on a fixed meaning. Fairness is not 'out there' waiting to be discovered, it is a product of social context and history. Plato did not

consider slavery to be unfair.... It has been suggested that while we may not be able to define justice, we can probably recognize injustice.... What is considered allocationally fair has varied across time, and still varies across cultures.”¹²⁴

The incorporation of general principles into the ICJ source list for determining the content of International Law thereby “enabled the Court to replenish, without subterfuge, the rules of international law by principles of law tested within the shelter of more mature and closely integrated [national] legal systems.”¹²⁵ Although there is scholarly disagreement about the proper *scope* of this source,¹²⁶ it is limited to the principles of national law, generally applied by many nations.

The international legal system has not enjoyed the same long-term evolution experienced by national legal systems and their predecessors. International tribunals decide far fewer cases than judges in national legal courts. Analytical problems may surface for the international decision maker who is confronted with insufficient resources for independently resolving a dispute. General principles therefore serve as a stopgap because the international judge can deduce an *apropos* rule that has evolved in a national legal system.

Both world courts affirmed the pragmatic value of the general principles source. In an often-quoted statement from a 1937 Permanent Court of International Justice case, Judge Anzilotti drew upon the commonly applied equitable principle that a nonperforming nation cannot take advantage of another nation’s nonperformance. He was convinced that this general principle was “so just, so equitable, so universally recognized, that it must be applied in international relations” as one of those general principles of law recognized by civilized nations under Article 38 of the Court’s Statute. The propriety of using national legal principles in international adjudication was similarly reconfirmed in a 1970 International Court of Justice case dealing with the general principle of judicial independence from other branches of government. Notwithstanding differences in degree among the various national legal systems, judicial independence from the other branches of government “may be considered as a universally recognized principle in most of the municipal [national] and international legal systems of the world.”¹²⁷

On the other hand, the ubiquitous availability of a general legal principle—although staunchly ingrained in many national legal systems—might not be shoehorned

into international jurisprudence. The US Supreme Court has exercised the power of judicial review, for example, over actions by the political branches of the government since 1803.¹²⁸ The ICJ, however, cannot directly review the legality of UN Security Council action (or inaction). As exemplified by the University of Amsterdam’s Professor Erika de Wet:

Since the political organs of the United Nations cannot be a party to contentious proceedings, the question of legality of Security Council resolutions will have to arise [if at all] in proceedings between states.... If a survey of municipal orders were to indicate that judicial review of the decisions of political organs within states was (or was not) emerging as a general principle of law, this could tip the scale of the debate one way or the other. For example if the rationale for accepting such [judicial] control would seem to have become generally accepted, the ICJ could transpose it to the international order through Article 38(1)(c) of its Statute. This presupposes that a comparison with judicial review in municipal law is justified in light of the difference in structure between municipal orders and the international legal order.¹²⁹

Yet, there are many general principles that do “fit,” as classically illustrated in the following case involving the contours of the attorney-client relationship in various European countries:



The AM&S Case Australian Mining & Smelting Europe Ltd. v. E.C. Commission

EUROPEAN COMMUNITY COMMISSION

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Under Chapter One, click AM&S.

This opinion elaborated upon the laws of the various European Community (EC) member States, as opposed to the laws of the EC. Community law was silent on the question of whether there was an attorney-client privilege within this region of the world.¹³⁰ The general role

of the lawyer, and related governmental responsibilities to ensure that it is not infringed upon by State action, were both established eight years later by a conference convened in Cuba by the UN High Commissioner for Human Rights. Paragraph 16 provides that “Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.”¹³¹

The principle that the attorney-client relationship should generally not be infringed upon by Community law does not address all general principles within the attorney-client relationship. For example, an agreement setting minimum fees to be charged to clients in the respective member States can be regulated by the European Community treaty’s antitrust provisions. Thus, an *absolute* prohibition on any deviation from such minimum fees would preclude national members from adopting legislation necessary to regulate the delivery of legal services within their respective borders.¹³²

4. Judicial Decisions

(a) *Subsidiary Source* Article 38.1 of the International Court of Justice (ICJ) Statute includes “judicial decisions” as a source for determining the content of International Law. For a variety of reasons, international decision makers have drawn mostly upon national court decisions, as opposed to the jurisprudence of international tribunals. States do not customarily consent to resolve their most sensitive disputes in international tribunals. There is a comparatively large body of jurisprudence available in the form of *national* case law on issues arising under International Law.

When a particular issue is similarly resolved by the courts of various nations, an international tribunal may thus consider the routine resolution of that issue as evidence of a State consensus. British Professor Hersch Lauterpacht commented that the “decisions within any particular State, when endowed with sufficient uniformity and authority, may be regarded as expressing the *opinio juris*,” meaning an expression of what that nation considers accepted practice.¹³³

This particular Article 38 source is a “subsidiary” source for International Law-finding. A judge’s decision does not *make* law. A judge normally *interprets* the law and applies it to a pending case in both national and international tribunals. This is particularly true in civil law countries where jurisprudence is based on the 1804

Napoleonic Code. There, judges have less discretion than their common law counterparts when interpreting the law created by the legislature. This is especially true in totalitarian societies where the chief executive either directly, or effectively, makes the laws.

ICJ judges come from various legal systems. The court cannot be a binding “decision maker” in the same way that their home-nation supreme courts can effectively overrule legislative and executive action within their national legal systems. The judicial pronouncements of the court of one or many nations do not directly create or modify International Law. Such judicial decisions provide evidence, however, of how the judicial branch of one member of the community of nations has resolved the pending issue.

The “judicial decisions” source for determining International Law has evolved to the point where some commentators have characterized it as the most important factor in the progressive development of International Law—referring particularly to the jurisprudence of *international* tribunals. Some writers characterize such judicial decisions as being entitled to greater significance than the “subsidiary” status accorded them by Article 38.1 of the ICJ Statute. As stated by a past President of the ICJ, decisions of international tribunals “exercise considerable influence as an impartial and well-considered statement of the law by jurists of authority, made in light of actual problems which arise before them.”¹³⁴

(b) *Foreign Decisions under Attack* In 1815, the US Supreme Court made an ambitious statement about the utility of such judicial decisions. The justices were resolving a commercial dispute over a government seizure of sugar belonging to a citizen of a neutral country (Denmark) in time of war (between the US and the UK). The Court therein opined that:

The law of nations is the great source from which we derive those rules [regarding ownership of seized enemy property] which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional [meaning the subject of a treaty]. To ascertain that which is unwritten, we resort to the ... decisions of the Courts of every country, so far as they are founded upon a law common to every country, [which] will be received not as [binding] authority, but with respect. The decisions of the

Courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this [case]....

Judicial reliance on foreign and international resources suddenly came under attack in 2002. As then stated by Supreme Court Justice Antonin Scalia:

Equally irrelevant are the practices of the “world community,” whose notions of justice are (thankfully) not always those of our people. “We must never forget that it is a Constitution for the United States of America that we are expounding.... [W] here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”¹³⁵

In 2004 and 2005, members of the US Congress joined in the assault, expressing stern opposition to federal judicial reliance on foreign national and international court opinions. The former federal judge who became the Bush Administration’s Chief of Homeland Security also joined in that chorus in 2006. Justices O’Connor and Ginsburg received death threats for citing foreign cases and treaties when interpreting the US Constitution. These attacks impact the historically unfettered independence of the judicial branch of the US Government, as asserted in the following assessment:



American Judges Against Judicial Independence

WILLIAM R. SLOMANSON

11 UKRAINIAN JOURNAL OF
INTERNATIONAL LAW 235 (2008)

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Under Chapter One, click Foreign Sources.

(c) Impact of ICJ Opinions The International Court of Justice (ICJ) is fettered with a significant limitation not found in the national law of many UN members—particularly the common law countries such as Canada,

the United Kingdom, and the US. Judicial decisions in such countries normally have precedential effect. They are thus binding in future cases. Under the ICJ Statute, however, its own decisions are “[s]ubject to the provisions of Article 59.” That Article of the Statute provides that the “decision of the Court has no binding force except as between the parties and in respect of that particular case.”

As stated by the Permanent Court of International Justice in 1926, the reason for this statutory limitation “is simply to prevent legal principles accepted by the Court in a particular case from being binding on other States or in other disputes.”¹³⁶ Put another way, national sovereignty was intended to limit the role of the current ICJ’s opinions in a manner not applicable to national courts. The drafters of this provision acknowledged that such a limit would attract more States to submit their disputes to this distant tribunal in Holland. A bad result in one case would not haunt other States in a later dispute. Also, State C would be less reluctant to use the Court if a principle announced in litigation between States A and B were not precedent in subsequent litigation by either one of them against C.

In practice, however, the ICJ has reapplied many principles from its earlier cases. As this case “precedent” has expanded, a number of prior opinions have been the basis for resolving the same issues resurfacing in subsequent cases. Perusing current ICJ opinions reveals that the modern world court is not comfortable with the limitation expressed in Article 59 (whereby deciding today means disregarding the Court’s reasoning tomorrow). Otherwise, there would be little consistency in its decision-making process and less respect for its ability to participate in the progressive development of International Law.

5. Scholarly Writings Article 38.1 further authorizes the use of “the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.” Analyses by influential “publicists,” meaning prominent commentators on International Law, is the remaining statutory method for ascertaining evidence of the content of International Law.

As a practical matter, one who is deciding a question of International Law typically *begins* with academic writings. Where there is a treaty provision or a widely recognized customary practice directly on point, there

would be no need to resort to any other source to answer the issue at hand. Publicists write about established or evolving norms and their interstitial gaps. Their summaries thus influence the rule-making process. But they can never *make* rules, customs, or treaties.

On the other hand, one cannot discount the potential impact that an author's nationality or other subjective experience may have on her written academic perspectives. Per London City University Professor Martin Dixon's 2007 articulation:

In the *Spanish Zone of Morocco Claims Case* (1925), Judge Huber warned that writers 'are frequently politically inspired' and caution must be exercised when the country of the author has a special interest in a particular matter.... In fact, there is very little evidence as to the degree to which the judges of the International Court rely on the writings of jurists, apart from their own, but ... [scholarly writings] may have a tangible effect on state practice as well as being the everyday first reference of the practicing international lawyer.¹³⁷

Scholarly writers serve a related purpose. Their commentaries also memorialize historical and contemporary developments in State practice. Professor Karol Wolfke of Poland characterizes scholarly writing as an essential instrument for analyzing a disputed issue, gathering information about prior resolutions of the same issue, and finding the latest trends in the ebb and flow of international legal norms. In addition to "attracting attention to international practice and appraising it, the writers indirectly influence its further evolution, that is, the development of custom." This respect is premised on the notion that renders their opinions more objective than those of advocates or national officials serving for only a limited period or purpose.¹³⁸

On the other hand, the need for such publicists has dwindled. As articulated in the foregoing *Flores* case:

The ICJ Statute's emphasis on the works of "publicists," more commonly known as scholars or jurists, as a subsidiary or secondary source of customary international law suffers from an anachronism, as the work of international law scholars during the nineteenth and early twentieth century differed considerably from that of contemporary scholars. In "the nineteenth century..." international law scholars

"did the hard work of collecting international practices." The practice of relying on international law scholars for summaries and evidence of customary international law—that is, as secondary or "subsidiary" sources of international law—makes less sense today....

Without taking any view on the merits of different forms of scholarship, and recognizing the potential of theoretical work to advance scholarship, we note that [the earlier raw] compilations and digests are of greater value in providing "trustworthy evidence of what the law *really is*," whereas [today's] expressly theoretical or normative works make their contribution by setting forth the "speculations of ... authors concerning what the law *ought to be*." *The Paquete Habana*, 175 U.S. 677, 700 (1900) (italics added).¹³⁹

6. UN Resolutions Article 38.1 of the ICJ Statute is not necessarily a *closed* list of sources. Resolutions of international organizations also assist international decision makers in search of the substantive content of International Law. There has been a vast proliferation of international organizations in the ninety years since the initial version of Article 38.1 was drafted for use by the current world court's predecessor.

The UN is "the" global organization of States. It does not have a specialized agenda like other large organizations, such as the World Trade Organization. Courts and writers, seeking evidence of State practice and State expectations in a given circumstance, have employed its resolutions as a compass for determining the general content of International Law. But first, one must distinguish between resolutions of the General Assembly and those of the Security Council.

(a) Security Council Resolutions UN Security Council resolutions typically respond to aggressive uses of force in violation of the UN Charter. They are not designed to be normative or rule making. They are, instead, case-by-case reactions to violations of existing International Law principles that may threaten world or regional peace [textbook §3.3.B.2.].

(b) General Assembly Resolutions The UN General Assembly is not an international legislature. Its State Members never furnished it with the sovereign-like

power to enact laws to bind the community of nations. The strongest argument against characterizing General Assembly resolutions as being either normative or rule making may be drawn from the language of the UN Charter. It provides that the General Assembly's role is to make *recommendations*. Under Article 10, the Assembly "may discuss any questions or any matters within the scope of the present Charter, and ... may make recommendations to the Members of the United Nations or to the Security Council..." Under Article 11, the Assembly "may consider the general principles of cooperation in the maintenance of international peace and security ... and may make recommendations with regard to such principles to the [other GA] Members or the Security Council or both..." Otherwise, General Assembly resolutions would be characterized as "laws," greatly reducing the need for an Article 38.1 source listing for ascertaining the substance of International Law.

A former UN Legal Counsel characterized General Assembly resolutions as nonbinding, even when *universally* adopted. Pursuant to this view, the "General Assembly's authority is limited to the adoption of resolutions. These are mere recommendations having no legally binding force for member states. Solemn declarations adopted either unanimously or by consensus have no different status, although their moral and political impact will be an important factor in guiding national policies.... The General Assembly, through its solemn declarations, can therefore give an important impetus to the emergence of new rules, despite the fact that the adoption of declarations per se does not give them the quality of binding norms."¹⁴⁰

To fully appreciate the importance of what follows—in the ensuing chapters of this course in International Law—one should now digest the distinction between *hard* and *soft* International Law. Recognizing the rationale for *why* UN resolutions do not appear on the Article 38 shopping list of International Law's sources aids in making the valuable connection between hard law (e.g., State treaty obligations) and soft law (e.g., UN General Assembly resolutions or aspirational treaties). Paul Szasz, the late Legal Advisor of the International Conference on the Former Yugoslavia, uses this distinction to explain how soft law, such as UN resolutions, often leads to hard law, like UN-sponsored treaties, in the following terms:

Hard international law is, by definition, binding, at least on some international entities [states or IGOs (inter-governmental organizations)], although not necessarily on all. By contrast, soft international law is not binding, though perhaps superficially it may appear to be so; nevertheless, international entities habitually comply with it, and it is this feature that makes possible reference to it as "law." ...

Soft law is usually generated as a compromise between those who wish a certain matter to be regulated definitely and those who, while not denying the merits of the substantive issue, do not wish (at least for a time) to be bound by rigid and obligatory rules—perhaps because they fear they cannot obtain whatever domestic legislative approval is necessary.

There are several reasons why soft law deserves to be included in a study of international law, especially one concerning the international legislative process. In the first place, soft law has much of the predictive value of hard law in regard to how states are expected to act. Indeed, in an international community where even hard and fast obligations are not always observed, there is at best a continuum ... between the predictive value of hard and soft law. Second, soft law does not often remain "soft." Frequently it becomes the precursor of hard law, either because states in complying with it eventually create customary law or because soft law may be part of the raw material taken into account when codifying or developing norms into treaty law; indeed, soft law in the form of solemn declarations is used often by the U.N. General Assembly as a stepping stone to treaty law.¹⁴¹

Some commentators take the next step. They avow that certain UN General Assembly resolutions are sources of International Law that can bind member nations because of their normative distillation of emerging State practice. The 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States was the first instance of an international instrument expressly prohibiting intervention by States in the territory of other States. The Charter bars only UN intervention into the domestic affairs of its member States [textbook §9.2.D.]. Before becoming a judge of the International Court of Justice, England's Rosalyn Higgins wrote that this resolution was a prime example of lawmaking by the General Assembly. But embracing a General Assembly resolution as "law" would soon be

disavowed by the US judge who would later become her colleague on the ICJ.¹⁴²

Such declarations can at least be characterized as evidence of the customary expectations of many States. Professor Krzysztof Skubiszewski, of the Polish Academy Institute of State and Law, notes that “[o]n various occasions, the developing States read into some recommendations the legal duty to conform to them. There is a whole gamut of arguments to justify this attitude. Some writers treat the nonbinding resolutions as a modern source (e.g., [ICJ] Judge [Mohammed] Bedjaoui). Others give an extensive interpretation of the powers of the resolution-making body ([ICJ] Judge T. O. Elias), so extensive that it obviously contravenes its constitutional position [as a body which only makes recommendations].”¹⁴³

General Assembly resolutions exert a strong influence on all of the contemporary law-making processes (e.g., multilateral treaties). As articulated by Russian Academy of Sciences Professor Gennady Danilenko, these resolutions are regarded as the most promising “new source of law.” He views the UN as the major expression of the organized international community. Political conditions in the Assembly, where Third World nations have a stable majority, tend to generate pressures to characterize that body as having “quasi-legislative authority” (as if the Assembly were a global legislative body).¹⁴⁴

Northwestern University Professor Anthony D’Amato, on the other hand, acknowledges that many books have been written on the subject of *sources* of International Law. He makes the practical plea that “there is no clear consensus. International law surely would be a much easier subject to study and master if U.N. resolutions could be treated as definitive statements of rules of international law. But ... the U.N. is not a world legislature, and its resolutions are not the functional equivalent statutes.”¹⁴⁵

Several International Court of Justice (ICJ) opinions lend credence to the argument that some General Assembly resolutions may be binding as a matter of Customary International Law:

- ◆ In the *Certain Expenses Case*, involving the obligation of member nations to contribute to UN expenses, the Court commented that “Article 18 deals with the ‘decisions’ of the General Assembly ‘on important questions.’ These ‘decisions’ ... have dispositive force and effect ... includ[ing] suspension of rights and

privileges of membership, expulsion of Members and ‘budgetary questions.’”

- ◆ In the *Namibia* case, dealing with South Africa’s failure to comply with its trust obligations regarding the former South-West Africa, the ICJ stated that it would not be correct to assume that, because the General Assembly is in principle vested with only the power to recommend, “it is debarred from adopting ... resolutions which make determinations or have operative design.” In the separate opinion of the prominent British ICJ judge, Sir Hersch Lauterpacht, in the *South-West Africa Voting Procedure* case: “[a] Resolution recommending ... a specific course of action creates some legal obligation which ... is nevertheless a legal obligation and constitutes a measure of supervision.”¹⁴⁶
- ◆ In the 1986 *Nicaragua* case, for example, the Court considered the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the UN to be binding. The Court’s view was that this Declaration illustrated the *opinio juris* of all UN members—although it was not the product of any debate. In this limited sense, then, the ICJ employed the General Assembly’s Declaration as a viable source of International Law.¹⁴⁷

The position of a prominent group of US practitioners and academicians illustrates the evolving perception about the somewhat hybrid nature of General Assembly resolutions (and those of other, special purpose, global international organizations). The American Law Institute’s Restatement of the Foreign Relations Law of the United States provides that, unlike States, international organizations historically “have no authority to make law, and their determinations of [what is] law ordinarily have no special weight. But their declaratory pronouncements provide some evidence of what the states voting for it regard the law to be.... Resolutions of universal international organizations, if not controversial and if adopted by consensus or virtual unanimity, are given substantial weight.”¹⁴⁸

The late Columbia University Professor Oscar Schachter questioned this assumption that such resolutions may be entitled to some degree of legal validity. A vote for a resolution may not be intended to signify agreement on the legal validity of the asserted norm. Governments do not always have that intent when they

either vote for a resolution, or fail to object to it. They may fairly assume that, since Assembly resolutions are only recommendations, “their vote should mean no more than that. They may cast their vote solely on political grounds in the belief that a resolution of the General Assembly is entirely a political matter without legal effect.”¹⁴⁹

Regardless of the varied positions on General Assembly resolutions as an extra-statutory source, they are a useful resource for seeking evidence of international norms. Examples include the Assembly’s unanimous affirmation of the principles contained in the Charter of the Nuremberg Tribunal punishing Nazi war criminals and its unanimous resolution producing the ensuing Genocide Convention. These particular General Assembly resolutions expressed the opinions of all UN members that they would henceforth recognize global prohibitions against such State conduct.¹⁵⁰

◆ PROBLEMS

Problem 1.A (after §1.1.A.): A member of the class will serve as the blackboard recorder. Another class member will begin this exercise by defining “International Law.” Others may then suggest modifications that would more (or less) fully and more accurately complete the definition.

Problem 1.B (after §1.1.D.): The following hypothetical conversation has probably occurred on diverse occasions when news of a serious breach of International Law saturates front-page headlines. The following words may have been uttered during either of the twentieth century’s World Wars; after the facts of the Holocaust were exposed to world view; while Iran was holding American and Canadian diplomats hostage for 444 days; when Iraq torched more than 600 oil wells upon Iraq’s flight from Kuwait in 1991; in 1994, when 800,000 Tutsi Rwandans and supposed sympathizers were slaughtered in 100 days; in 1995, when 7,800 Muslim men and boys were slaughtered by Bosnian Serb forces at the world’s first UN safe haven in Srebrenica, Bosnia in a half-dozen days; and after September 11, 2001:

Of course, International Law isn’t really law. Those who purport to be international lawyers and the ivory-tower professors who teach and write on the

subject have a vested interest in trying to convince their clients and students that International Law is something more than a myopic fantasy. The evidence is all around us. First, Professor Henkin was surely smoking a bad batch when he claimed that most nations observe International Law most of the time. Fifteen years later, U.S. Supreme Court Justice Blackmun cleared the air by countering: “At best, ... the ... Court enforces *some* principles of international law and *some* of its obligations *some* of the time.”¹⁵¹ Second, if International Law were really law, Hitler, Karadzic [§8.7.A.], and Hussein would have been stopped dead in their tracks! International Law, if it is “law” at all, is uselessly primitive. Unlike a national government, based on an enforceable Rule of Law, it lacks the essential powers of enforcement. Like God, one may refer to International Law with great reverence—while harboring doubts about its very existence!

Two students (or groups) will continue this debate with a view toward debating the following three propositions: (a) International Law is not really law; (b) swift and effective enforcement measures against scofflaws are the only genuine benchmark for characterizing the international system as legal and effective; and (c) the failure to immediately prosecute the above despots exposes the political reality that there is no applicable law which can effectively govern the relations between States. This modern reality is exemplified by England and other powerful nations appeasing Hitler during the early years of his WWII march across Europe.

Problem 1.C (at end of chapter): It is not long after September 11, 2001. Four US aircraft have been hijacked by nineteen hijackers, mostly Saudi-Arabians. Two of the planes flew into and brought down the New York City World Trade Center’s twin towers. Three thousand individuals from eighty-two countries are now dead. You work for the Department of State in one of the countries whose citizens have been killed. Your superior asks you to either discuss with her, or write a memo about, what sources should be consulted to determine whether this event violates International Law. You need not cite any specific document. The objective is to analyze *where* to find an answer, but not necessarily *what* the answer will be.

◆ FURTHER READING & RESEARCH

See Course Web Page, at: <<http://home.att.net/~sломansonb/txtcsesite.html>>, Chapter One.

◆ ENDNOTES

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2. *General Assembly*: UN Gen. Ass. Sixth Comm. Agenda Item 79, UN Doc. A/62/447 (italics added) & adoption noted at <<http://www.un.org/News/Press/docs/2007/ga10667.doc.htm>>. For Programme website, see <<http://www.un.org/law/programmeofassistance>>. Security Council: Statement by the President, UN Doc. S/PRST/2006/28, at <<http://daccessdds.un.org/doc/UNDOC/GEN/N06/401/59/PDF/N0640159.pdf?OpenElement>>.
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4. For job opportunity resources, see Career Opportunities in International Law, at: <<http://home.att.net/~sломansonb/career.html>>.
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CHAPTER TWO

States

CHAPTER OUTLINE

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[T]he Heads of State ... agreed to undertake the following measures:

...

22.5 Oppose and condemn the categorization of countries as good or evil based on unilateral and unjustified criteria, and ... all unilateral military actions ... against the sovereignty, territorial integrity and independence of Non-Aligned Countries.

...

31.1 The [Non-aligned States] Movement stressed the fundamental and inalienable right of all peoples, including all non-self-governing territories under foreign occupation and colonial or alien domination, to self determination, the exercise of which remains valid and essential, to ensure the eradication of all these situations and to guarantee universal respect for human rights and fundamental freedoms....

—14th Summit Conference of [118] Heads of State or Government of the Non-Aligned Movement, NAM 2006/Doc.1/Rev.3 (Havana, Cuba, 16 Sept. 2006), at: <http://www.cohre.org/store/attachments/RWP_NAM_2006_Havana_Summit_Final_Doc.pdf>. See §2.4.C. on "Self-Determination."

INTRODUCTION

This chapter focuses on the *primary* actor under International Law—the State and its associated entities. As aptly characterized by Jawaharlal Nehru University’s Professor Bhupinder Chimini, in his expose on the economic recolonization of the Third World: “The State is the principal subject of international law. But the relationship between State and international law continually evolves. Each era sees the material and ideological reconstitution of the relationship between state sovereignty and international law. The changes are primarily driven by dominant social forces and States of the time.”¹

After defining the contours of the legal capacity of the State in International Law, this chapter surveys the unprecedented alteration of the infrastructure of International Law—caused by the vast increase in the number of State actors after World War II. This phenomenon was caused by events that included the 1960s decolonization movement and the post-Cold War splintering of larger States into smaller ones. It then addresses issues involving the *de jure* recognition of a State; how and why a location’s status may change—peacefully, or otherwise; responsibility for misconduct and immunity from its consequences; and State interaction via international diplomacy.

◆ §2.1 STATE’S LEGAL STATUS

A State’s legal persona gives it the capacity to conduct relations on an international level. As covered in Chapter 4, individuals and corporate entities do not have the same status under International Law. They have historically lacked the legal capacity to engage in international relations because they cannot undertake State action within the community of nations.

Former UN Secretary-General Boutros-Ghali affirmed the primacy of the State in international affairs in his 1992 *Agenda for Peace Report* to the General Assembly. He therein stated that “[t]his wider mission [of making the United Nations stronger and more efficient] ... will demand the concerted attention and effort of individual States, of regional and non-governmental organizations and or all of the United Nations system ... [but the] foundation stone of this work is and must remain the State. Respect for its fundamental sovereignty and integrity are crucial to any common international progress.” This principle was reaffirmed at the outset of his ensuing 1995 edition: “For almost three centuries, a set of

principles of international cooperation has been in the making. ... In [now] almost every area, ... nations working together, through the United Nations, are setting the global agenda.”²

More than four decades earlier, one of the most prominent International Law scholars described the continuing dominance of the State as the central feature of the international system. Professor Wolfgang Friedmann of Columbia University acknowledged this primacy because it “is by virtue of their law-making power and monopoly that states enter into bilateral and multilateral compacts, that wars can be started or terminated, that individuals can be punished or extradited ... and [the very notion of ‘State’ would be] eventually superseded *only* if national entities were absorbed in[to] a world state”³

The following materials introduce some preliminary questions for your study of the State in International Law: What does the term “State” mean? Under what conditions does an entity become a “State” (elements of statehood)? What is the relationship of a “State” (e.g., Germany’s Bavarian province) within a group of associated “States” (i.e., the rest of the German nation) under International Law?

A. “STATE”

Like many other legal terms, the word *State* means different things to different people. On the other hand, the terms *State*, *nation*, *nation-State*, *community*, *country*, *people*, *government*, and *sovereign* are often used interchangeably. The following words in the Preamble to the UN Charter provide a convenient example of such usages: “We the *peoples* of the United Nations ... [h]ave resolved to combine our efforts ... [through] our respective *Governments* ... [italics added].”

Perusing the following short list of definitions will generate a healthy degree of caution when one is attempting to digest abbreviated discourses on International Law that appear within this book:

- ◆ *State*: “a person of international law [that] should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.”
- ◆ *Nation*: “a practical association of human individuals who consider themselves to be a nation (on the basis of a shared religion, history, language or any other common feature).”

- ◆ *Nation-State*: the joinder of two terms, typically referring to a specific geographic area constituting a sovereign entity and possibly containing more than one group of nationals (individual citizens) based on shared religion, history, or language.
- ◆ *Community*: “a group of persons living in a given country or locality, having race, religion, language and traditions of their own, and united by the identity of such ... in a sentiment of solidarity. ...”
- ◆ *Country*: the territorial element of the term State with attendant borders that define its land mass.
- ◆ *People*: “the permanently residing population of a territory with an internationally legal status (state, mandate territory, etc.).”
- ◆ *Government*: in International Law, the political group or entity responsible for engaging in foreign relations, which is the “true and lawful government of the state ... which ought to exercise sovereignty, but which may be deprived of this right by a government *de facto*.”
- ◆ *Sovereign*: occasional synonym for State or nation although it actually describes “the evolving relationship between state and civil society, between political authority and the community ... [being] both an idea and an institution integral to the structure of Western thought ... and to a geopolitical discourse in which territory is sharply demarcated and exclusively controlled.”⁴

Not all professionals volunteer the subtle (and sometimes not so subtle) differences among such terms. Heads of State, diplomats, speakers, and writers have varying agendas. They do not always identify such details for their respective audiences. Academic commentators have long debated the appropriate nomenclature for describing this entity. In the International Law context, however, a State consists of a group of societies, within a readily defined geographical area, united to ensure their mutual welfare and security.

Regardless of one's word choice, the quintessential entitlement of statehood is sovereign equality. It is rooted in the 1648 Treaty of Westphalia—the ancestor of the modern State—as cast in these terms:

And to prevent for the future any Differences arising in the Politick State, all and every one of the Electors, Princes and States of the Roman Empire, are so establish'd and confirm'd in their antient Rights, Prerogatives, Libertys, Privileges, free exercise of Territorial Right, as well Ecclesiastick, as Politick Lordships,

Regales, by virtue of this present Transaction: that they never can or ought to be molested therein by any whomsoever upon any manner of pretence.⁵

One must first integrate political reality into the legal notion of “State” in order to appreciate the historical evolution and contemporary nature of today's State. It has evolved beyond the utopian vision that underscored the above Treaty of Westphalia. It sought to displace the inequality of medieval nobles and warlords with co-equal sovereign entities. London School of Economics professor Nick Krisch succinctly characterizes this utopia in the following passage:

Sovereign equality is one of the great utopias of international law, but also one of its great deceptions. ... [I]t embodies a far-reaching promise—a promise to abolish all unjustified privileges based on power, religion, wealth, or historical accident, [and] a promise to transcend the blatant injustices of the international system. This utopian aspiration has always been one of the most appealing aspects of international law, has contrasted it to the blatant realities of international politics, and has helped raise the hope that international law can serve as a “gentle civilizer” of nations.⁶

That one State is more equal than others, however, does not expressly or implicitly mean that it would abandon International Law, as done by China during its 1966–1976 Cultural Revolution.⁷ Professor Krisch warns against isolationist behavior that eschews the importance of robust international relations:

The United States has appeared to be a guarantor rather than a subject of international norms: It seeks to ensure other states' respect for such norms by urging strong enforcement mechanisms and using various unilateral means, but it consistently resists monitoring and enforcement against itself. The more extreme measures ..., such as extraterritorial sanctions, have drawn significant criticism from international organizations and third states, which have declared such measures to be “unacceptable” violations of international law, and an example of “bully” behavior.⁸

Given the political reality of a State-centric system, one can more readily detect the *legal* status a geopolitical

entity must achieve in order to be in a position to enter the ring. As the University of California political science professor Arthur Stein succinctly clarifies: “In an anarchic and conflictual world, states develop and nurture cooperative relationships. Tacit bargaining can even occur between enemies in the midst of war.”⁹

B. ELEMENTS OF STATEHOOD

When an entity achieves Statehood, it is entitled to the following—as classically restated in the Charter of the Organization of American States: “the State has the right to defend its integrity and independence, to provide for its preservation and prosperity, and consequently to organize itself as it sees fit, to legislate concerning its interests, to administer its services, and to determine the jurisdiction and competence of its courts. The exercise of these rights is limited only by the exercise of the rights of other States in accordance with international law.”¹⁰

Not all State-like entities can properly lay claim to that status under International Law. One might begin with the question: “When is an entity entitled to Statehood in the international sense of the word? Are so-called “rogue States” nevertheless States under International Law?¹¹ Does a nation-State *wave* its right to sovereignty when it facilitates gross violations of human rights within its borders? Exports terrorism? Proliferates weapons of mass destruction?¹²

A State’s “international legal personality” consists of four elements. Under the 1933 Montevideo Inter-American Convention on the Rights and Duties of States, a “State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.”¹³ The simultaneous presence of these elements identifies a sovereign entity entitled to such international personality.

This treaty-based legal criterion for statehood has been widely adopted. Yet, the level of acceptance has not been matched by simplicity of application. One reason is that the absence of one or more of these distinct elements, even over a period of time, does not necessarily deprive a State of its international personality. Analytical problems most often arise when larger States break up into smaller ones, as did the former Yugoslavia after the demise of the Soviet Union; or when one part of a nation attempts to secede, as in the American Civil War of the 1860s or Quebec’s potential secession from Canada;¹⁴ or

when a foreign power exercises *de facto* control over another State—like Nazi Germany’s expansion in Europe, or South Africa’s long but unentitled dominion of the South-West Africa Trust Territory (now Namibia).

The above four *Montevideo* elements of Statehood have not been replaced. One must acknowledge, however, that a potential replacement is at least on the books. Europe was the epicenter of the 1648 Westphalian launch of modern statehood. Europe is now engaged in an increasingly successful experiment—an international organization of States that could one day be a super-State [§3.4. on the European Union]. Just beyond the current horizon, the day might also come when a global economic organization assumes the kind of sovereignty now wielded by its national members [§12.2. on the World Trade Organization].

1. Population The permanent population element is probably the *least* important of the four elements of statehood. Neither a minimum population nor an express grant of nationality to the inhabitants is required for qualification as a State.¹⁵ Nor does the absence of part of the population over a period of time necessarily vitiate State status. The nomadic tribes on the Kenya-Ethiopia border, for example, have been an ambulatory element of each nation’s population for centuries. The transient nature of this significant component of each State’s population has not diminished the permanence of either bordering State.

Deficiencies with the other elements of statehood—defined territory and a government engaging in foreign relations—have posed more serious problems.

2. Territory The territorial element of Statehood is blurred by mutually exclusive claims to the same territory. A classic example is the former Arab-Israeli territorial conflict, which had its roots in the UN plan to partition Palestine. This plan, devised in 1947 to divide Palestine into an Arab State and a Jewish State, was not implemented due to the Middle East War that erupted in 1948. Israel was able to expand its territory beyond that provided for by the UN plan, displacing millions of Arabs. Columbia University Professor Philip Jessup represented the US in the UN Security Council in 1948 (and later became a judge of the International Court of Justice). He used the following illustration to demonstrate why Israel nevertheless satisfied the doctrinal elements of statehood as early as 1948:

On the Condition of Statehood

3 UN SECURITY COUNCIL OFFICIAL RECORDS
383rd Meeting, at 9-12 (1948)

Over a year ago the United States gave its support to the principles of the majority plan proposed by the United Nations Special Committee on Palestine. That plan envisaged the creation of both a Jewish State and an Arab State in Palestine. We gave our support to the resolution of 29 November 1947 by which the General Assembly recommended a plan for the future government of Palestine involving, as one of its elements, the establishment of a Jewish State in part of Palestine. ...

The Security Council now has before it the application of the Provisional Government of Israel for membership [in the United Nations]. The consideration of the application requires an examination of ... the question of whether Israel is a State duly qualified for membership. Article 4 of the Charter of the United Nations specifies the following:

“Membership in the United Nations is open to peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations. ...”

The first question which may be raised in analyzing Article 4 of the Charter and its applicability to the membership of the State of Israel, is the question of whether Israel is a State, as that term is used in Article 4 of the Charter. It is common knowledge that, while there are traditional definitions of a State in international law, the term has been used in many different ways. We are all aware that, under the traditional definition of a State in international law, all the great writers have pointed to four qualifications: first, there must be a people; second, there must be a territory; third, there must be a government; and, fourth, there must be capacity to enter into relations with other States of the world.

In so far as the question of capacity to enter into relations with other States of the world is concerned, learned academic arguments can be and have been made to the effect that we already have, among the Members of the United Nations, some political entities which do not possess full sovereign freedom to form their own international policy, which traditionally has been considered characteristic of a State. We know,

however, that neither at San Francisco nor subsequently has the United Nations considered that complete freedom to frame and manage one's own foreign policy was an essential requisite of United Nations membership.

I do not dwell upon this point because ... Israel is free and unhampered. On this point, I believe that there would be unanimity that Israel exercises complete independence of judgment and of will in forming and in executing its foreign policy. The reason for which I mention the qualification of this aspect of the traditional definition of a State is to underline the point that the term “State,” as used and applied in Article 4 of the Charter of the United Nations, may not be wholly identical with the term “State” as it is used and defined in classic textbooks of international law.

When we look at the other classic attributes of a State, we find insistence that it must also have a Government. No one doubts that Israel has a Government. I think the world has been particularly impressed with the way in which the people of Israel have organized their government and have established a firm system of administration and of law-making under the most difficult conditions. Although, pending their scheduled elections, they still modestly and appropriately call themselves the Provisional Government of Israel, they have a legislative body which makes laws, they have a judiciary which interprets and applies those laws, and they have an executive which carries out the laws and which has at its disposal a considerable force responsive to its will.

According to the same classic definition, we are told that a State must have a people and a territory. Nobody questions the fact that the State of Israel has a people. It is an extremely homogeneous people, a people full of loyalty and of enthusiastic devotion to the State of Israel.

The argument seems chiefly to arise in connection with territory. One does not find in the general classic treatment of this subject any insistence that the territory of a State must be exactly fixed by definite frontiers. We all know that, historically, many States have begun their existence with their frontiers unsettled. Let me take as one example my own country, the United States of America. Like the State of Israel in its origin, it had certain territory

along the seacoast. It had various indeterminate claims to an extended territory westward. But, in the case of the United States, that land had not even been explored, and no one knew just where the American claims ended and where French and British and Spanish claims began. To the North, the exact delimitation of the frontier with the territories of Great Britain was not settled until many years later. And yet, I maintain that, in the light of history and in the light of the practice and acceptance by other States, the existence of the United States of America was not in question before its final boundaries were determined.

The formulae in the classic treatises somewhat vary, one from the other, but both reason and history demonstrate that the concept of territory does not necessarily include precise delimitation of the boundaries of that territory. The reason for the rule that one of the necessary attributes of a State is that it shall possess territory is that one cannot contemplate a State as a kind of disembodied spirit. Historically, the concept is one of insistence that there must be some portion of the earth's surface which its people inhabit and over which its Government exercises authority.

Although the Montevideo Convention's generic elements of statehood appear to cover all situations, there are a number of contemporary locations that are not readily shoehorned into that paradigm. Selected examples appear immediately below:

(a) *Israel's Erratic Territory* The League of Nations approach to Palestine was premised upon the 1917 Balfour Declaration "in favor of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine." The 1922 League Mandate provided that "[t]he Administration of Palestine shall be responsible for enacting a nationality law ... to facilitate the acquisition of Palestinian citizenship by Jews who take up their residence in Palestine."

Not all influential leaders agreed. As India's Mohandas (Mahatma) Gandhi cautioned in November 1938:

Palestine belongs to the Arabs in the same sense that England belongs to the English or France to the French. It is wrong and in-human to impose the Jews on the Arabs. What is going on in Palestine today cannot be justified by any moral code of conduct. The mandates have no sanction but that of the last war. Surely it would be a crime against humanity to reduce the proud Arabs so that Palestine can be restored to the Jews partly or wholly as their national home.

The nobler course would be to insist on a just treatment of the Jews wherever they are born and bred. The Jews born in France are French in precisely the same sense that Christians born in France are French. ...

The Palestine of the Biblical conception is not a geographical tract. It is in their [the Jews of Palestine] hearts. But if they must look to the Palestine of geography as their national home, it is wrong to enter it under the shadow of the British gun. A religious act cannot be performed with the aid of the bayonet or the bomb. They can settle in Palestine only by the goodwill of the Arabs. They should seek to convert the Arab heart.

The US position enunciated to the UN in 1947 was that "[i]n the final analysis the problem of making any solution work rests with the people of Palestine." On the occasion of the 1947 Partition of Palestine, the UN decreed that "[i]ndependent Arab and Jewish States and the Special International Regime for the City of Jerusalem ... shall come into existence in Palestine two months after the evacuation of the armed forces of the mandatory Power [the U.K.] has been completed but in any case not later than 1 October 1948." The boundaries of the Arab State, the Jewish State, and the City of Jerusalem were all specifically stated in the Partition plan.¹⁶ The 1967 Six-Day War enlarged those boundaries for the Jewish State.

(b) *Republika Srpska* In 1992, the nation of Bosnia and Herzegovina officially declared its independence and was recognized by the European Community and the US. Prior to the 1995 Dayton peace agreement establishing various geopolitical entities within Bosnia, the Serbs in Bosnia sought to maintain control of an area they referred to as "Republika Srpska." Their objective was to drive out Muslims and Croats in order to establish a Serb enclave within Bosnia and

Herzegovina (BiH). To establish peace, the Dayton agreement essentially divided this former Yugoslavian province into two mini-states: the Federation of Bosnia and Republica Srpska. The latter entity has not been internationally recognized.

These entities are largely autonomous. Each has its own president, parliament, police, and army. They are linked by a central government, a national parliament, and a three-member presidency. The Bosnian Constitution further confirms that neither of the “Entities” shall establish controls at the boundary between them; all citizens of either Entity are citizens of Bosnia and Herzegovina; and each Entity may issue BiH passports to its citizens.¹⁷ To further complicate matters, the town of Srebrenica is located in the Republica Srpska portion of BiH. In April 2007, the Srebrenica municipal assembly adopted a resolution demanding partition from the Republica Srpska. This entity has not achieved international recognition. In 2007, the International Court of Justice confirmed that “The Republic of the Serb People of Bosnia and Herzegovina (and subsequently the Republika Srpska) was not and has not been recognized internationally as a State; it has however enjoyed some *de facto* independence.”¹⁸

The practical application of this dilemma is vividly described in a 1995 case filed in the US. A Bosnian victim sought money damages from defendant Radovan Karadzic. He was the self-styled “president” of the Bosnian Serb entity. The most prominent basis for liability was the slaughter of 7,800 Muslim men and boys, near a UN safe haven in Srebrenica, Bosnia [§10.1.C.]. According to Karadzic the presidential status he so coveted thus established his potential responsibility for numerous atrocities by those who acted under his direction. Karadzic was deemed to be “acting under color of state law” when the alleged atrocities occurred.

On the question of Republica Srpska’s statehood and whether Karadzic was the Head of State, the US federal judges’ nuanced rationale was as follows:

The definition of a state is well established in international law: Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities. “[A]ny government, however violent and wrongful in its origin, must be considered a *de facto* government if it was in

the full and actual exercise of sovereignty over a territory and people large enough for a nation.”

...

Appellants’ [victims] allegations entitle them to prove that Karadzic’s regime satisfies the criteria for a state, for purposes of those international law violations requiring state action. Srpska is alleged to control defined territory, control populations within its power, and to have entered into agreements with other governments. It has a president, a legislature, and its own currency. These circumstances readily appear to satisfy the criteria for a state in all aspects of international law. Moreover, it is likely that the state action concept, where applicable for some violations like “official” torture, requires merely the semblance of official authority. The inquiry, after all, is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists.¹⁹

The US court thus characterized Republica Srpska as a State for the *limited* purpose of enabling this case to proceed against its so-called “President.” He was then deemed to be acting on behalf of a “State” entity. Absent any viable status as a recognized independent nation, however, Republica Srpska is unlikely to follow Kosovo’s secession from Serbia.

(c) Taiwan Prior to a nineteenth-century war, China claimed sovereignty over the island of Taiwan. China ceded it to Japan after the Sino-Japanese War of 1895. Japan relinquished sovereignty over the island as part of the 1951 US-Japanese peace treaty. That agreement was silent as to whom sovereignty was thus ceded.

After the communist takeover of mainland China in 1949, the international community recognized the island of Taiwan as the true embodiment of the Chinese people [§2.3.A.2. on Recognition of Governments]. But the vast majority of Chinese were on the mainland. Since the early 1970s: (1) the UN withdrew Taiwan’s entitlement to occupy the organization’s “China” seat; (2) mainland China was substituted for Taiwan at the UN; (3) the nations of the world divided on which entity was the true China, or whether each was entitled to statehood; (4) the World Trade Organization admitted Taiwan, just after the mainland’s People’s Republic of China (PRC) became a member; and (5) each side has

initiated various military maneuvers designed to establish who has the edge.

The PRC's latest contribution to this uncertainty was its 2005 Anti-Secession Law. It was enacted for the purpose of "opposing and checking Taiwan's secession from China, ... promoting peaceful national re-unification [similar to the German experience, and] preserving China's sovereignty and territorial integrity..." Taiwan's statehood is thus ambiguous for a host of reasons, including the US military support of the uneasy status quo; the PRC position of "one country, two systems" akin to Hong Kong's current status; and the Taiwanese counter-proposal of "one country, two governments."²⁰

(d) Quebec In 2006, Canada's Parliament decided to recognize Canada's French-speaking Quebec province as a "nation." This act was introduced by the separatist Bloc Québécois in the aftermath of the 1980 and 1995 attempts to secede from Canada. The inhabitants generally want to better preserve their French language and culture. Car license plates in the province carry the province's official motto "Je me souviens" (I remember)—referring to a variety of incidents emanating from the 1759 French-English Battle for North America. The legislative term "nation" actually enjoys only symbolic weight. It expressly provides: "That this House recognize that the Québécois form a nation within a united Canada."²¹

(e) Stability Operations There may be a growing number of failed States, including Somalia, which was illustrated in the movie *Black Hawk Down*. US ground troops were unprepared to resurrect the toppled government—or the country—from the numerous warlords who still control their respective pieces of this essentially defunct State. Somalia has been unable to independently control criminal activities, either on or off shore [§5.2.F piracy].

In recognition of this (and potential voids in Iraq and Afghanistan), the US military adjusted its traditional role regarding conventional warfare. The 2008 Stability Operations Field Manual announced an unprecedented doctrine especially geared towards failed States: "the greatest threat to our national security comes not in the form of terrorism or ambitious powers, but from fragile states either unable or unwilling to provide for the most basic needs of their people." Such entities are therein identified as the breeders of crime, terrorism, and

religious and ethnic strife. The Manual's revised objective is now nation-building missions in lawless areas, designed to safeguard populations and rebuild countries. These missions will last longer and, ultimately, contribute more to military success than the historic combat mission approach.²²

One hopes that this fresh perspective will not be mistaken for a contemporary form of colonialism. In the context of international trust administration (ITA), University of London Professor Ralph Wilde offers the following potpourri of contemporary assessments of such nation-building programs:

In 2003, Michael Ignatieff defined the "state-building" aspects of internationally-run projects in Bosnia and Herzegovina and Kosovo, alongside the US-run operation in Afghanistan, as manifestation of a new "Empire Lite;" in 2004, James Fearon and David Laitin described a broader set of ITA projects and state-conducted interventions as a "form of international governance that may be described as neo-trusteeship, or, more provocatively, as post-modern imperialism;" in 2006, David Chandler labeled, by way of criticism, contemporary "state-building" projects ... as "Empire Denial."... Rosa Ehrenreich Brooks characterized the promotion of the rule of law across various interventions as a "fundamentally imperialist enterprise" and, together with Jane Stromseth and David Wippman, asked whether this constituted a "New Imperialism."²³

3. Government The "government" element of statehood is problematic when separate entities, operating in different regions of a State, claim that each is the legitimate government of the entire territory. Modern examples include Nationalist and Communist China, North and South Korea, and the two Vietnamese governments of the 1960s and 1970s. In each instance, separate entities—possessing administrative and legislative authority—claimed the exclusive right to govern. External interference by other States contributed to the rigidity that caused each government to adopt and maintain inflexible postures regarding the potential for a shared power arrangement.

Another example of this overlapping governance arises in the awkward situation where an established government *should* be maintaining political order, but civil war or an external threat has impacted its ability to actually "lead the way." The "Finland" of 1917 is a classic example. Shortly after achieving independence

from what was destined to become a strong centralized Soviet Union, the Finnish government was engaged in a territorial dispute with Russia regarding some islands off Finland's coast. The League of Nations appointed jurists to analyze the issue. Under their succinct description of this element:

the conditions required for the formation of a sovereign State did not exist. In the midst of revolution and anarchy, certain elements essential to the existence of a State ... were lacking for a fairly considerable period. Political and social life was disorganized; the [civil] authorities were not strong enough to assert themselves; civil war was rife; further, ... the Government had been chased from the capital and forcibly prevented from carrying out its duties; the armed camps and the police were divided into two opposing forces, and Russian troops, and after a time Germans also, took part in the civil war.... It is therefore difficult to say at what exact date the Finnish Republic, in the legal sense of the term, actually became a definitely constituted sovereign State. This certainly did not take place until a stable political organization had been created, and until the public authorities [of Finland] had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops.

Somalia exemplifies the contemporary problem. It achieved independence in the 1960s, but has experienced recurring governance problems. In 1993, the UN Secretary-General fled for his life, during a visit designed to shore up the (unsuccessful) UN peacekeeping effort in Somalia. The recognized, transitional Parliament and president-in-exile sit in Kenya's capital city of Nairobi. Clan-based militias have been responsible for the deaths of hundreds of thousands of Somalians since the 1991 ouster of its former dictator. The nation's infrastructure has been devastated. There is no civil service, treasury, or buildings within which to meet. Multiple peace efforts since 1991 formed two governments that have failed because they never assumed effective control of Somalia.

After the 2003 US invasion of Iraq, the Coalition Provisional Authority was the recognized occupying power. When it dissolved on June 30, 2004, a fresh Iraqi interim government began to exercise sovereignty. But its control was not complete. It did not have "effective control" of Iraq at the moment of its creation, nor later,

as demonstrated by the raging insurgency. Elections of course provided a degree of legitimacy. But the presence of some 150,000 foreign coalition military troops, and a roughly equal number of police and various Iraqi security forces, failed to secure Iraq's borders. The onslaught of foreign "jihadists" determined to get the US completely out of Iraq and to topple any US-backed regime militated against the characterization of Iraq's government as exhibiting effective control over Iraq. The Iraqi government's effective control will be tested when the US completes its planned withdrawal.²⁴

4. Foreign Relations The attribute requiring the "capacity to enter into relations with other States" is arguably the most decisive criterion for statehood. Under International Law, to be considered a "State," an entity must function independently of any authority other than that which might be imposed by International Law. Not all entities referred to as a "State" possess this capacity.

Some provincial entities engage in foreign relations although another and more powerful governmental entity in the region disputes its legal right to do so. This typically occurs when there is a "breakaway" province, wherein the inhabitants seek to establish their right of self-determination [§2.4.C.]. Taiwan, for example, was a province of China for thousands of years. A number of countries recognize Taiwan as an independent nation. Chechnya yields another example. In January 2000, Afghanistan's Taliban government became the first State to recognize Chechnya. Chechnya opened an embassy in Kabul and commenced the process of appointing its first Ambassador (to Afghanistan).²⁵

An entity may possess the characteristics of sovereignty without actually being in control of its populace and territory. Foreign relations responsibilities may be entrusted to another State. Certain dependent States may be monitored by other more established States. The governmental functions of such "mandated" (League of Nations) or "trust" territories (UN) will be addressed in §3.3.B.4. on the work of the UN Trusteeship Council.

Under International Law, only the *national* government has the legal capacity to engage in foreign relations. Yet an increasing number of local state governments typically engage in international trade relations, crime control, and other governmental matters. The more that these non-federal political entities operate in cross-border fashion, the more likely a conflict between the state and federal

approach to a problem. One might question, for example, the appearance of nine US states—but not the federal government—at the December 2004 Buenos Aires annual conference on climate change. On the eve of the Kyoto Protocol on greenhouse emissions entering into force, the US was not formally represented—and to no one’s surprise, given US objections to this treaty on economic grounds [Kyoto: §11.2.C.4(a)]. But two dozen US states have taken steps to pursue emissions control programs.

A classic illustration of the potential State-state conflict within a nation was presented by the so-called Massachusetts Burma Law. The US Supreme Court struck down a state law imposing sanctions on Massachusetts businesses that traded with Burma. The federal approach to dealing with Burma’s human rights problem was more liberal. The national government desired more flexibility in dealing with the human rights record of Burma’s military government (which renamed the country Myanmar, thus shunning the name imposed by British colonial rule). The Supreme Court characterized the Massachusetts law as “an obstacle to the accomplishment of Congress’s full objectives under the federal Act. We find that the state law undermines the intended purpose ... of at least three provisions of the federal Act, that is, its delegation of effective discretion to the President to control economic sanctions against Burma, its limitation of sanctions [applicable] solely to US persons and new investment, and its directive to the President to proceed diplomatically in developing a comprehensive, multilateral strategy toward Burma.”

The Court ruled similarly in its 2003 Holocaust Victim Insurance Relief Act (HVIRA) case, wherein federal law preempted a California law requiring insurance companies to disclose certain information about policies they or their affiliates wrote in Europe between 1920 and 1945. A strongly-worded dissent by four justices agreed that the California Legislature should not speak on foreign policy issues. However, that was not the effect of this particular state law. Although “the federal approach differs from California’s, no executive agreement or other formal expression of foreign policy disapproves state disclosure laws like the HVIRA. Absent a clear statement aimed at disclosure requirements by the ‘one voice’ to which courts properly defer in matters of foreign affairs, I would leave intact California’s enactment.”²⁶

California’s most recent exercise of its governmental powers in an international context was its January 2007 agreement with the twenty-seven nation European

Union regarding gas emissions [Contemporary (Environmental) Applications: §11.2.4(a)]. But in January 2008, the national Environmental Protection Agency (EPA) refused to allow California to require reductions in greenhouse emissions from its cars and trucks. Sixteen other states of the US were poised to follow California’s lead. However, the federal government withheld the waiver California needed to undertake this global warming program. The federal government’s fuel-efficiency approach is not as tough as that of California. The US Supreme Court remanded the key case, filed by numerous state and local governmental entities, back to the trial court. The purpose was to force the EPA to grant the state entities’ request to proceed with the litigation.²⁷

Further detail regarding the specifics of engaging in foreign relations is provided below in §2.7 on Diplomatic Relations.

◆ §2.2 SHIFTING INFRASTRUCTURE

Earlier sections of this book introduced the fundamentals regarding the development, definition, and general application of International Law. This section focuses on the dramatic change which has occurred in the makeup of the community of nations since World War II. The 1648 Treaty of Westphalia, which produced nation-States as we know them, evolved over the ensuing 300 years to yield approximately fifty nations by the close of World War II. In the last sixty years, however, the fate of a number of those original countries has changed. There are now nearly 200 States [Table 2.1].

Why this drastic change in so short a period? One reason was the European essence of International Law. Its imprint is depicted by Holland’s Professor J. H. Verzijl. In 1955, he articulated the “one truth that is not open to denial or even to doubt, namely, that the actual body of international law, as it stands today, is not only the product of the conscious activity of the European mind, but has also drawn its vital essence from a common source of European beliefs, and in both of these aspects it is mainly of Western European origin.”²⁸

Predictably, this Western-derived basis for International Law has been criticized by scholars from both Western and non-Western nations. Ireland’s Queens University Professor George Alexandrowicz characterized this European essence of International Law as being unacceptably ethnocentric. In his view, “Asian States, who for centuries had been considered members of the

family of nations, found themselves in an *ad hoc* created legal vacuum which reduced them from the status of international personality [statehood] to the status of candidates competing for such personality.”²⁹

One can also criticize past indiscretions. The Berlin Congress of 1885—more transparently referred to as the West Africa Conference—resolved that the African continent was sufficiently uncivilized. That characterization warranted its colonization as being in the best interests of all nations. In an apparently egalitarian gesture, this conference of European powers deemed slavery abolished. That vintage institution was then conveniently characterized as violating the laws of nature. The real reason for this abolition, however, was “prompted by the limited workforce[s] on the Western Coast of Africa, depopulated by the three-centuries-long export trade of slave labor to the Americas.” The Industrial Revolution arguably led to Africa becoming, instead, a potential consumer region.

In 1945, fifty sovereign nations gathered in San Francisco to develop an agreement to set the basic parameters for future international relations (UN Charter). Since then, this community has quadrupled in size to nearly 200 States, most of which are UN members. The original “charter” members no longer exercise the degree of control they enjoyed at the UN’s inception when five of them were able to “call the shots.” These were the permanent, non-rotating members of the Security Council: China, France, Great Britain, the Soviet Union, and the United States. These were the post-war influential participants in the conduct of world affairs. Many of them had colonies, countries, or some form of protectorates under their control at the time.

As you peruse the 192 UN members in Table 2.1, observe the influx of new States in two notable eras. One was the 1960s when colonialism was starting to give way to the self-determination of peoples, especially in Africa [§2.4.C.]. The other relevant era was the 1990s after the collapse of the Soviet Union. The Cold War had effectively suppressed popular aspirations among the populations of Eastern Europe and many other Cold War sphere of influence locations.

Suddenly, the Soviet Union splintered into a number of independent nations no longer tied to policies dictated from Moscow. Yugoslavia splintered into a group of independent States. Within those new countries, there would be even further attempts to adjust sovereign control by making small States out of larger predecessors—

spawned in part by the “ethnic cleansing” designed to divvy up Bosnia, Serbia, and other Balkan theaters.

◆ §2.3 RECOGNITION

The term “recognition” has a variety of meanings. It generally refers to one State’s willingness to establish and maintain official relations with another State, its government, or some belligerent group within another State. The materials in this section focus on recognition of one State by another with a brief comparison of collective recognition of a State by an international organization of States.

Writers and jurists have described recognition as one of the most chaotic and theoretically confusing topics in International Law. It is certainly one of the most sensitive and controversial.³⁰ Recognition of another State or an entity within it typically involves a mixture of political, military, and economic considerations, as described below.

Three prominent examples include the 1903 US recognition of the nation of Cuba, in exchange for maintaining a US military base at Guantanamo Bay [§9.7.B. *Rasul* case]; the now half-century US refusal to recognize the Castro government since its 1959 coup d’état; and the Arab League refusal to recognize Iraq’s US-appointed Governing Council in 2003. The political nature of recognition is suggested by the refusal regarding Iraq’s government, which was rooted in that post-invasion governing entity’s being “dismissed by many in Iraq and across the Arab world as a puppet of Iraq’s US and British occupiers.”³¹ The Arab League ultimately recognized the Iraqi Governing Council as being suitable for filling Iraq’s seat in the Arab League—initially left empty at the outset of the US-initiated war in Iraq. As of two years later, only Australia, the US, and the UK had recognized the Iraqi Governing Council as the *de jure* government of Iraq.

A. RECOGNITION BY STATES

1. Recognition of States The first of the three distinct State recognition scenarios is whether to recognize another “State” (as opposed to a new “government”). Argentina’s former Judge of the International Court of Justice aptly describes recognition of a new State as “a unilateral act whereby one or more States admit, whether expressly or tacitly, that they regard the ... political entity as a State; consequently, they also admit that the ... entity

TABLE 2.1 SOVEREIGN STATES—FROM UN INCEPTION TO THE PRESENT

UN MEMBERS	AMERICAS		EUROPE		ASIA & OCEANIA		AFRICA	
1945 ORIGINAL MEMBERS	Argentina	Guatemala	Belgium	Norway	Australia	Saudi Arabia	Egypt	South Africa
	Bolivia	Haiti	Belorussia	Poland	"China"		Ethiopia	
	Brazil	Honduras	◆ '91 name change to Belarus	Turkey	◆ Taiwan until '71	Syria	Liberia	
	Canada	Mexico		Ukraine	◆ now PRC seated			
	Chile	Nicaragua	Czechoslovakia	USSR	India			
	Colombia	Panama	◆ split '93 into Czech Republic & Slovak Rep.	◆ until '91 ◆ now Russian Federation	Iran			
	Costa Rica	Paraguay			Iraq			
	Cuba	Peru	Denmark	United Kingdom	Lebanon			
	Dominican Republic	United States	France	Yugoslavia	New Zealand			
	Ecuador	Uruguay	Greece	◆ split '92 ◆ now Serbia	Philippines			
	El Salvador	Venezuela	Luxembourg					
			Netherlands					
1945–1965	Jamaica	Trinidad & Tobago	Albania	Ireland	Afghanistan	Laos	Benin	Guinea
			Austria	Italy	Burma	Malaysia	Burundi	Madagascar
			Bulgaria	Malta	◆ now Myanmar	Maldives	Burkina Faso	Malawi
			Cyprus	Portugal	Cambodia	Mongolia	Cameroon	Mali
			Finland	Romania	◆ now Kampuchea	Nepal	Central African Republic	Mauritania
			Hungary	Spain	Indonesia	Pakistan	Chad	Niger
			Iceland	Sweden	Israel	Singapore	Côte d'Ivoire (Ivory Coast)	Nigeria
					Japan	Sri Lanka	Ghana	Rwanda
					Jordan	Thailand	Democratic Republic of the Congo	Senegal
					Kuwait	Yemen	Congo	Sierra Leone
							Democratic Republic of the Congo	Somalia
							Gabon	Sudan
							Ghana	Togo
								Tunisia
								Uganda
								Zambia
1965–1985	Antigua & Barbuda	Belize (was British Honduras)	Federal Republic of Germany	German Democratic Republic	Bahrain	Democratic Yemen	Algeria	Comoros
	The Bahamas	Dominica	◆ until '90	◆ until '90	Bangladesh	◆ Yemen & Democratic Yemen merged '90	Angola	Equatorial Guinea
	Barbados	Grenada	◆ now Germany	◆ now Germany	Bhutan		Botswana	Gambia
		Guyana			Brunei		Brunei	Guinea-Bissau
							Darussalam	
							Cape Verde	Guyana

TABLE 2.1 SOVEREIGN STATES—FROM UN INCEPTION TO THE PRESENT (CONTINUED)

UN MEMBERS	AMERICAS		EUROPE		ASIA & OCEANIA		AFRICA	
1965–1985	Saint Kitts and Nevis Saint Lucia	Saint Vincent and the Grenadines Suriname			Fiji Oman Papua New Guinea Qatar Solomon Islands	United Arab Emirates Vanuatu Vietnam Western Samoa (now Samoa)	Kenya Lesotho Libya Mauritius Morocco Mozambique Papua New Guinea São Tomé and Príncipe Seychelles Swaziland Tanganyika ♦ until '61	Tanzania ♦ Tanganyika & Zanzibar merge '64/ now United Republic of Tanzania United Arab Republic ♦ Egypt & Syria brief merger Zaire ♦ now Dem. Rep. of Congo '97 Zanzibar ♦ until '63
1985–PRESENT			Andorra Armenia Azerbaijan Bosnia and Herzegovina Croatia Czech Republic Estonia Germany ♦ formerly East and West Germany	Georgia Latvia Liechtenstein Lithuania Macedonia Montenegro Moldova Monaco San Marino Slovakia Slovenia	Kazakhstan Kiribati Kyrgyzstan Marshall Islands Micronesia Nauru North Korea ♦ formerly the Democratic Republic of North Korea	Palau South Korea Tajikistan Timor-Leste ♦ formerly East Timor Tonga Turkmenistan Tuvalu Uzbekistan	Djibouti Eritrea	Namibia Zimbabwe

NON-UN MEMBERS

Aruba,^a Cook Islands,^b Holy See (Vatican City), Gaza/West Bank or Palestine (PLO),^c Kosovo,^d Niue,^e Taiwan, Western Sahara (located in Southern Morocco—sovereignty unresolved), and Greenland.^f The Holy See (Vatican) has the status of “Non-Member State Maintaining Permanent Observer Missions at UN Headquarters.” The Turkish Republic of Northern Cyprus was established after the Turkish invasion of 1974; declared its independence in 1983; but has not received extensive international recognition [textbook §2.2.A.1.]. The “Republic of Somaliland” declared its independence in 1991; controls some territory; but is not recognized by any other country. Georgia’s Abkhazia and South Ossetia provinces formally declared their independence in the early 1990s. There were recognized by Russia and Nicaragua (two total) in 2008.

^a Seceded from the Netherlands Antilles in 1986; now separate, autonomous member of the Kingdom of the Netherlands; movement toward full independence halted at Aruba’s request in 1990.

^b Free association with New Zealand.

^c UN Observer status, nonvoting GA seat.

^d Declared independence on February 17, 2008; now under EU administration & N.A.T.O. occupation.

^e Free association with New Zealand.

^f Denmark granted Greenland self-rule status in June 2009, with a view toward independence.

Note: This Table does *not* include territorial possessions of the above-listed States. For further details, see CIA Country Studies, on the World Wide Web and UN Membership Web sites. For further details, see CIA Country Studies at: <<https://www.cia.gov/library/publications/theworld-factbook/index.html>> & UN Membership, at <www.un.org/Overview/unmember.html>.

is an international legal personality, and as such is capable of acquiring international rights and contracting international obligations.”³²

But the term “recognition of States” means different things to different people. As acknowledged by Senior Researcher Olivier Ribbelink at the T.M.C. Asser Institute in The Netherlands:

A distinction must be made between recognition of States and recognition of governments. Recognition of a State only becomes an issue with the appearance of a “new” State. When there is no new State, [unlike a new government,] the issue does not arise. Recognition of a State means that, according to the recognising State, that specific State fulfils the criteria for statehood [§2.1].

...

However, sometimes individual States do add their own criteria or conditions. For example, Switzerland which stated that another ... exclusively political and extremely important criterion is that Switzerland wishes to be able to control ... the effects of an act of recognition, which is taken to mean that it is essential to recognize a State only when its security is by and large assured and guaranteed. ...³³

Receiving recognition is one of the highest-ranking political goals for a new State. Its leaders desire equality of status with the other members of the international community. Statehood, and the distinct but related recognition decision by other States, enables new States to engage in international relations. After Kosovo’s unilateral declaration of independence in 2008, its leaders desperately sought the recognition of the international community. By summer’s end, almost fifty nations had done so. This included twenty of the European Union’s twenty-seven nations. (Spain refused, however, with the consequence that it withdrew its troops from the UN peacekeeping mission in Kosovo.)

Others have not done so, for various reasons. These include concerns about encouraging more breakaway provinces to claim Kosovo’s independence as a model for their respective departures. Such separatists assert that: (1) Kosovo’s *final* status was not established via a UN resolution, which could have multilaterally ended the mandate; and conversely, (2) Kosovo’s *initial* status was established via Security Council Resolution 1244 (1999), expressly acknowledging Serbia’s territorial

sovereignty over Kosovo [§2.4.B.]. China condemned Taiwan for the latter’s immediate congratulations extended to Kosovo on the occasion of its newfound statehood. Taiwan did not recognize Kosovo, however. Taiwan’s status as a *de jure* State has never been solidly confirmed although a number of countries recognize Taiwan (and in many cases, China as well).

Recognition of Taiwan continues to be rooted in political quicksand. Twenty-seven countries currently recognize Taiwan as an independent nation (which includes the recognition of its government). In 1979, the international community shifted from general recognition of Taiwan to the PRC. The US Congress reacted with the Taiwan Relations Act. It pledged to sell defensive arms to Taiwan and to assist if mainland China were to attack. The US has since counseled restraint, via its long-term, but vague “One China, two solutions” policy. The UN then required Taiwan to yield the China seat to the PRC. In the 1990s, US President Clinton sent a naval battle group to the area when China threatened to attack Taiwan. President Bush specified that the US would defend Taiwan if China were to attack. The March 2005 round of this debate flared when the National People’s Congress enacted its Anti-Succession Act, authorizing the use of force—should Taiwan take further steps toward independence. China therein asserted that it “shall employ non-peaceful means and other necessary measures to protect China’s sovereignty and territorial integrity.” China also claims to have 700 missiles aimed at Taiwan, only 100 miles away, but has not specified the threshold for their deployment. In April 2005, the two political parties that fought the original war ended sixty years of hostility. Each thereby pledged to thwart Taiwan’s independence movement.³⁴

By the end of the August 2008 Georgia-Russia conflict, only two countries and one entity recognized Georgia’s breakaway provinces as the independent States of South Ossetia and Abkhazia. One was Russia, due to its potential interest in absorbing them into Russia Proper, or at least extending its sphere of influence in these areas which had declared their independence from Georgia in the early 1990s. The other recognizing nation was Nicaragua, which is likely to counter any US international program for the indefinite future [rooted in the §9.2.B.2 *Nicaragua* principal case]. The other recognizing entity was Hamas, which reigns only in the Palestinian enclave of Gaza. Few countries have recognized the Hamas Government because of its vow to

never recognize Israel and pledge to wipe Israel off the face of the map.

Recognition is a minimum requirement comparable to needing “jacks or better to open” in a poker game. It yields an enhanced stake in the game. The Russian Federation, for example, was keenly interested in the international recognition of its new republic, formed after a forty-year Cold War that stagnated its economy and embroiled it in adverse relations with democratic nations. The US recognized Russia (and a number of other members of the former Soviet Union) in 1991. But the US delayed its recognition of Ukraine until it was clear to the US that Ukraine could function in harmony with the same Russia that had dominated Ukraine for nearly 600 years.

A new State may be recognized almost immediately, or in some cases, years after it is formed. The very existence of the German Democratic Republic (formerly East Germany) was considered a breach of the Soviet Union’s duties under its post-World War II treaties with the Allied powers regarding the administration of German territory. It was obviously a “State” in terms of its *de facto* status. Many Western nations did not recognize East Germany’s *de jure* existence, however, until 1973. A series of unilateral recognitions ultimately cured what many Western nations perceived as an illegal State regime.

There may also be delayed recognition of a State even though it is recognized by some or many other States. The Vatican did not recognize the State of Israel until 1994, forty-five years after Israel was admitted to the UN as a member State. The Vatican delay, until the Israel-Palestine Liberation Organization accords of 1993, was premised on many centuries of distrust between Catholics and Jews. The week before this recognition occurred, Israel’s largest-selling newspaper (*Yedioth Ahronoth*) stated: “The Catholic Church is one of the most conservative, oppressive, corrupt organizations in all human history. ... The reconciliation can be done only if the Catholic Church and the one who heads it fall on their knees and ask forgiveness from the souls of the millions of tortured who went to heaven in black smoke, under the blessing of the Holy See.” This news account was referring to the Catholic Church’s Inquisition during the Middle Ages and its passive stance during the World War II Holocaust. Many Israelis believe that the Catholic Church did nothing to halt, or may have clandestinely supported, Nazi Germany’s appalling treatment of Europe’s Jews.³⁵

De jure recognition may be prematurely granted. The European Community [now European Union (EU)] recognized Slovenia and Croatia approximately six months after their vote for independence from the former Yugoslavia. This was an arguably premature decision, which many claim to be the spark that fueled the fires between ethnic rivals in the former Yugoslavia. Recognition of Bosnia-Herzegovina was arguably premature as well. The Russian newspaper *Pravda* reported in its February 27, 1993, issue that the “international carnage has been largely caused by the hasty recognition [by countries including Russia] of the independence of the unstable state of Bosnia and Herzegovina.” This perspective is premised on Bosnia-Herzegovina not being in control of its territory during the flurry of international recognitions shortly after its secession from the former Yugoslavia and the 1992–1995 Bosnian War.

Belgrade immediately protested that the EU’s premature recognition of these former territories of Yugoslavia violated International Law. Virtually immediate international recognition by other countries allegedly violated Yugoslavia’s territorial sovereignty over its secessionist regions. One can readily argue that there was no *de facto* basis for recognition (of Bosnia-Herzegovina) by other countries, given the lack of the new Bosnian government’s independent control over the territory and populace.

Recognition decisions are thus granted or denied for a variety of reasons. Since the recognizing State is usually satisfied that the legal elements of statehood are present, the essential decision of whether to recognize another State has been traditionally quite political in nature. Examples include:

- (1) whether the new State has been recognized by other members of the international community;
- (2) ethnocentric motives stemming from the perceived inferiority of certain nations, which effectively limited the recognition of new States from outside the European community for many decades;
- (3) a need to appease certain regimes, as when Great Britain recognized the nineteenth-century Barbary Coast, whose pirates were stealing British ships and cargoes;
- (4) humanitarian motives, whereby many states refused to recognize Southern Rhodesia (now Zimbabwe) because of its internal racial policies; and
- (5) commercial and military motives.³⁶

There are two classical theories expressed in recognition discourse: the *constitutive* theory and the *declaratory* theory. Under the constitutive perception, members of the community of nations must recognize a new State in order to constitute or establish its *de jure* international legal personality. The declaratory view, on the other hand, is that recognition is not required for the new State to be considered legitimate. Recognition merely declares or acknowledges the existing fact of statehood.

Although the constitutive theory is still advocated by some States and scholars,³⁷ recognition is not a necessary condition for statehood under International Law. Recognition is a matter of political decision-making at the international level. States have no duty to recognize a new State, merely because it possesses all the legal attributes of statehood. Instead, recognition is a matter of discretion. It is a political act with legal consequences. The former Yugoslavia became the Federal Republic of Yugoslavia (FRY) and is now Serbia. It remains a “State” although it lost a handful of its former political subdivisions. At the UN, the “Yugoslavian” seat remained empty from 1992–2000 [*Application for Revision* case: §3.3.B.1.]. Serbia is now recognized by many countries, which in the 1990s refused to recognize what was then the Yugoslavian “rump” State (FRY).

The prevailing declaratory theory is manifested in regional treaties that specifically negate recognition as an element of the definition of statehood. Less powerful States do not want external recognition decisions to influence their political objectives. They do not want the more powerful nations to use recognition as a ploy to exact political concessions. Under Article 12 of the Charter of the Organization of American States, for example, the “political existence of the State is independent of recognition by other States. Even before being recognized, the State has the right to defend its integrity and independence, to provide for its prosperity, and consequently to organize itself as it sees fit. ... The exercise of these rights is limited only by the exercise of rights of other States in accordance with international law.”

The practical consequences of non-recognition are vividly exposed in the following *Cyprus v. Turkey* case.

The UN plan to reunite the island failed. Turkish Cypriots in the north voted in favor of the reunification plan, while Greek Cypriots in the south rejected it. Each of the respective referenda had to pass for reunification to occur. With the defeat of the planned reunification, Cyprus (and nine other nations) joined the EU in 2004;



Cyprus v. Turkey

EUROPEAN COURT OF

HUMAN RIGHTS GRAND CHAMBER

Application no. 25781/94 May 10, 2001

<<http://www.echr.coe.int/Eng/Judgments.htm>>

Go to Course Web Page, at:

<<http://home.att.net/~sломansonb/txtcsesite.html>>.

Under Chapter Two, click Cyprus v. Turkey.

however, all EU laws and benefits will apply only in the internationally recognized south. Turkey remains a candidate for EU membership. In 2005, the EU advised Turkey that its entry negotiations will be paralyzed if it does not recognize “Cyprus”—as opposed to “Northern Cyprus.” The above court confirmed its position in a judgment finding that the denial of the right of displaced Greek-Cypriots to occupy their homes is a “continuing violation” of the human rights treaty.³⁸ In July 2008, rival Greek and Turkish Cypriot leaders announced the beginning of reunification *talks*.

Should the legality of a regime within State X (e.g., the TRNC) impact State Y’s political recognition decision? As succinctly articulated by Dr. David Raic, of the Hague Institute for the Internationalisation:

States are under a legal obligation not to recognize effective territorial entities which have come into existence as a result of a violation of one or more specific fundamental rules of international law. In this case “non-recognition is said to ‘bar the legality’ of the act or situation in question, unless otherwise legalised.”

...

In addition, ... there is a clear relationship between non-recognition and the criteria for statehood.

... Indeed, serious attention is called for when States withhold recognition of situations or acts where one would normally expect their recognition ... where States are of the opinion that they are under an international *legal obligation* to withhold recognition of an otherwise effective territorial entity claiming statehood.³⁹

2. Recognition of Governments The second category of recognition decisions involves the State decision to continue or break relations with the new *government*

of a previously recognized State. A change of government may trigger a host of political concerns for both the government desiring recognition and States considering whether to recognize the new government.

(a) Recognition Practice As with recognition of a new State, recognition of a new government may be lawfully withheld or withdrawn. States often reconsider prior recognition decisions when the government of an existing State changes, especially when there has been an unconstitutional change in government, such as a coup d'état in a former republic. When comparing the recognition of a State versus its government, one might use the analogy of a "tree" and the "leaves" that it drops from time to time. The tree is the State. The leaves are various governments. While governments (or forms of government) may come and go, the tree remains. Sometimes, State X may choose not to recognize either the tree or a leaf that has just sprouted.

State X might also decide to *withdraw* recognition of State Y's government.⁴⁰ Two of the three countries that recognized Afghanistan's Taliban government, Saudi Arabia and the United Arab Emirates, withdrew their recognition of the Taliban when it refused to surrender Usama bin Laden in the aftermath of September 11, 2001 [chronicled at the outset of §9.7.].

Professor Stefan Talmon from Germany's University of Tübingen succinctly defines recognition, and the associated controversy, as follows:

The confusion which characterizes the subject of recognition of governments is due not so much to the unsettled state of the principles involved as to the nebulous nature of the term "recognition." The lack of any clear definition of the term has sometimes led even [one nation's] government departments to argue whether they have accorded recognition to a certain government

...

By the term "recognition" or "non-recognition" may be meant an indication of willingness or unwillingness on the part of the recognizing government to establish or maintain official, but not necessarily intimate, relations with the government in question. Especially in cases of pro-longed official non-recognition of established governments States frequently speak of their willingness to "normalize" their relations with the Government in question.

...

In the majority of cases, however, no defining formula is added to the term "recognition" and the recognizing government simply states that it recognizes or that it does not recognize a certain government or authority.⁴¹

Why would a nation withhold the recognition of another's government? Recognizing States are often concerned about whether the populace under a new government has actually acquiesced in the change. In addition, a sudden change in the form of government can present significant economic, political, and military concerns to other States. Another reason is to support international isolation of a "rogue" nation—a term which of course means different things to different people.

For example, most States did not recognize the Hanoi-installed Kampuchea government (Cambodia, 1975). It assumed power while Prince Sihanouk's UN-recognized government was in exile. The US did not recognize the government imposed by the 1991 military coup in Haiti. After the democratic election of a Haitian leader who was acceptable to the US, only the Vatican recognized the new Haitian government. This particular decision was arguably premised on the Catholic Church's distaste for the ousted President Aristide, a former Catholic priest.

North Korea has been essentially isolated from the community of nations since the 1950–1953 Korean War. Its government is recognized by only a handful of nations including Austria, Denmark, Finland, Italy, Portugal, and Sweden. Prior to the Iraq War, the US had the largest concentration of troops of any nation stationed on the border between North and South Korea. In March 2009, North Korea indirectly threatened all foreign aircraft "near" its airspace when the annual South Korea-US war game exercises began. Air Canada, Singapore Airlines, and South Korean Airlines all rerouted their commercial passenger flights. If the North's isolationist "rogue" status were to diminish via the adoption of democratic reforms, there would likely be a flood of recognitions of its current government.

(b) Reaction to Recognition Practice A number of new governments have reacted adversely to renewed recognition inquiries. They disavow the need for a round of fresh recognitions, merely because there is a new government. Their perception is that the large and economically dominant States may thus exact new concessions from less powerful States. While the recognizing State may be

merely seeking assurances that prior international obligations will continue to be performed, it might also exact other less desirable concessions. When the new government is openly hostile to the recognizing State, the latter might break diplomatic relations, impose economic sanctions, or build up its military presence in or near the territory of the unrecognized government's territory.

Under the "Tobar Doctrine" (1907), a number of Latin American states entered into treaties providing for the de-recognition of states when there was an interruption of the constitutional order. It was named after Carlos Tobar, the Foreign Relations Minister of Ecuador. Its stated objective was to reduce the threat of revolution and civil war in the Inter-American system by emphasizing the need for all governments to support the establishment of constitutionalism and democracy. Some nations thus entered into treaties embracing this apparently uncontroversial theme. But the Tobar Doctrine was widely viewed not as shoring up democratic principles, but instead, as suppressing internal challenges to the national or regional status quo. The Tobar Doctrine was succeeded by the "Estrada Doctrine" (1930). This initiative reasserted the rights of States not to be subjected to what they perceived as another form of intervention in their internal affairs.

The Estrada Doctrine was named after Genaro Estrada, Mexico's Secretary of Foreign Relations. He complained that a revolutionary change in government should not provide other countries with a fresh opportunity to reconsider whether the new government should be recognized. By adopting the Estrada Doctrine, a number of Latin American nations addressed their concern that larger developed nations were misusing their power to undermine new governments. Latin American countries viewed any external renewal of recognition agenda as no more than a device for treading on a new government's sovereign right to conduct both internal and foreign affairs as it deemed appropriate. How the new government came into existence was not a matter for external recognition decisions by foreign powers.⁴²

On the other hand, governments pondering a recognition decision tend to profess a rather principled question about a new government when it has usurped democratic processes via a violent overthrow of a democratic regime. In Haiti, the democratically elected leader was overthrown by a military coup in 1991. The "Hutu" leaders in Rwanda massacred hundreds of thousands of people in 1994. There was a mass exodus of refugees fleeing for their lives, due to the indiscriminate machete attacks by

rebel forces in Rwanda. States with more democratic and less violent traditions thus tend to avoid international relations with such literally "cutthroat" regimes. The failure to reconsider recognition thereby presents a moral dilemma. To what degree should the community of nations avoid a renewed recognition dialogue? To do so means turning its head the other way, thereby acquiescing in the continued operation of a new government carrying out mass executions of innocent civilians.

(c) Law, Politics, and Recognition If recognition is a matter for *political* decision makers, then what is the *legal* impact of recognition? A new government faces difficult legal barriers when it is not recognized by a particular country or the community of nations. An unrecognized government cannot effectively represent its interests abroad. For example, the unrecognized government and its citizens do not have access to the courts of non-recognizing States. Such governments must endure the fiscal or political consequences of non-recognition.⁴³

A classic illustration materialized in a 1952 US federal judicial opinion. The government-operated Bank of China at Shanghai deposited \$800,000 into a US bank in San Francisco (Wells Fargo). Mao Tse-Tung subsequently overthrew the government of China in 1949. Wells Fargo then received conflicting demands regarding the ownership of the deposited money from what were then the two national "Banks of China." The mainland's new People's Republic of China (PRC) was the alleged successor to the government and property belonging to the Chinese people. The other claimant was the ousted Nationalist Chinese government, then seated in Taiwan (formerly Formosa).

Judge Goodman had to resolve which Bank of China would receive the proceeds. He explored several grounds for resolving this matter, including (a) statehood; (b) which entity more clearly represented the Chinese people; (c) an equitable division of the deposit; and (d) whether Formosa's recognition by the US executive branch would legally foreclose the judicial ability to decide in favor of what was then the non-recognized PRC government. Judge Goodman found that both "Chinas" were States. Both appeared to represent the People of China, the real owner. The Nationalist government was the original depositor. The mainland's communist authority now presided over the vast majority of Chinese people. President Truman announced that the US recognized the Nationalist regime as the legitimate government for all of China.

Judge Goodman thus felt bound to award the money to the Nationalist government.⁴⁴

There are still remarkable recognition-related questions in US courts. Almost fifty years after Judge Goodman's decision, a US federal appellate court had to determine whether Taiwan would be entitled to the same benefits as a treaty ratified by the PRC. Beijing signed the Convention with the declaration that the Convention "shall of course apply to the entire Chinese territory including Taiwan." The underlying question was whether the US de-recognition of Taiwan resulted in Taiwan being bound by China's international agreements.

In another instance after Hong Kong reverted to PRC control (1997), litigants continued to ask US courts to identify the appropriate Chinese entity for seeking extradition from US law officials. The judicial response, like Judge Goodman's 1952 decision, was that the *executive* branch of the US government makes recognition decisions. The judicial branch thus lacks any independent power to decide whether the Hong Kong government is a legitimate "government," now that it is a sub-sovereign of the PRC.

3. Recognition of Belligerency The third form of recognition decision materializes when a State decides to recognize a condition of belligerency within another State. Belligerents typically seek to overthrow the governments. Other nations may wish to officially recognize the belligerent force or to covertly provide support to one side or the other in a civil war. The belligerent group, while not the recognized government, may nevertheless achieve a limited degree of legal personality under International Law. A revolutionary group attempting to seize power in its own country, or a portion of it, might thus be "recognized." The recognition may come initially from the existing government in the State of the belligerency or externally from a foreign State.

The essential elements for achieving this status require a group to:

- (1) be the appropriate representative for a recognizable group;
- (2) exhibit some form of recognizable government;
- (3) field a military arm;
- (4) control some specific territory; and
- (5) achieve external recognition, such as the Confederate States during the US Civil War.

Once recognized externally, such recognition then confers certain rights upon the belligerent entity—as well as on the government that opposes the belligerent entity. The US Supreme Court long ago provided a convenient listing, which includes the "rights of blockade, visitation, search and seizure of contraband articles on the high seas, and abandonment of claims for reparation on account of damages suffered by our citizens from the prevalence of warfare."⁴⁵ When another country is not a party to a dispute between the belligerent forces and the forces of the regular government, it is expected to remain neutral until the belligerency is resolved. This duty of neutrality is at least as old as the historical State-centric system that has driven International Law from the time of the 1648 Treaty of Westphalia between the Holy Roman Emperor, the King of France, and their respective treaty allies. That focal treaty thus provided: "That nevertheless, neither the Emperor, nor any of the States of the Empire, shall meddle with the Wars which are now on foot between them. That if for the future any Dispute arises between these two Kingdoms, the above said reciprocal Obligation of not aiding each others Enemies, shall always continue firm." The 1939 US Neutrality Act presents a more recent example. It provides that "If the President ... shall find that a vessel ... in a port of the United States, has previously departed from a port ... of the United States during such war and delivered men, fuel, supplies, dispatches, information, or any part of its cargo to a warship ... or supply ship of a state [during a war in which the US is a neutral country] ... he may prohibit the departure of such vessel during the duration of the war."

Upon such recognition, the duty to remain neutral means that an uninvolved State shall:

- (1) not take sides to assist either the belligerent or the regular government;
- (2) not allow its territory to be used as a base for hostilities by the belligerent forces (exemplified in earlier British-Confederacy illustration);
- (3) acquiesce in restrictions imposed by the parties to the dispute if it wishes to remain entitled to respect of neutral State rights;
- (4) declare any change in status, as when it decides to side with the belligerency or the regular government;
- (5) accept State responsibility under International Law for any violation of its duty of neutrality.⁴⁷

Switzerland breached this duty during World War II by providing banking assistance to Germany and sending war materials to Japan. Angola, Rwanda, Uganda, and Zambia failed to remain neutral when they provided military aid to rebels who took over some cities in the Congo in 1997. A handful of multilateral treaties on neutrality⁴⁸ generally supplement the Laws of War [§§9.6–9.7].

Recognition of a belligerency effectively helps a group within a State to achieve its political quest for self-determination. In 1837, for example, a group of private American supporters were aiding a Canadian rebellion against British rule. Their support included running a ship carrying men and supplies back and forth across the Niagara River into Canada. When the British learned of this, they sank the ship at its mooring on the US side of the border. While this famous incident is known more for its impact on the right to self-defense [§9.2.D.], the US would have been in violation of its third-party duty of neutrality if Secretary of State Thomas Jefferson had acquiesced in these incursions into Canadian waters.

Great Britain later recognized the Confederate States of the US as “belligerents” when the Civil War with the Northern states of the US began in 1861. Great Britain did not, however, observe its State duty to remain neutral as required under International Law. Ships for the Confederate South were built in British ports and prepared for war with the Union forces in the United States. As a result, the Treaty of Washington of 1871 inaugurated the *Alabama Claims* international arbitration proceedings. Two years later, Great Britain paid over \$15 million to the US as a consequence of the damages done by five vessels built for the belligerent Confederate forces. Ironically, Russian vessels paid port calls to New York and San Francisco in 1863, perceived by many observers as a tacit message that Russia then supported the Union in its quest to defeat the Confederacy. Czarist Russia observed its duty of neutrality because it took no active role in aiding the Union during the Civil War.

In 1981, France and Mexico officially recognized a leftist guerilla movement, which had fought for several years against the Colombian Government. By recognizing this national liberation front as a “representative political force in Colombia,” these nations acknowledged the rebels’ right to participate in negotiations to end the Colombian civil war. Then in 1992, the Colombian rebels were invited to Mexico City where they signed a cease-fire agreement with Colombian

leaders. In May 2005, the Spanish parliament approved a resolution supporting the Prime Minister’s proposal to engage in an open dialogue with the “ETA” Basque-area separatist movement—should it, in turn, renounce violence.

Clan-based warlords overthrew Somalia’s dictator in 1991. That led to the unsuccessful US attempt to restore order in 1993, portrayed in the 2001 movie *Black Hawk Down*. Somalia’s Islamic Courts Union is the paramilitary organization which later wrestled control of the southern half of the nation. Its June 2008 status as a belligerent entity was implicitly recognized when it held talks with the comparatively powerless warlord government. The belligerent entity’s international status was effectively recognized by the US and the European Union during the negotiations between the warlord government and this belligerent entity. That the Islamic Courts Union was supposedly harboring three key Al-Qaida leaders did not deter the US and EU from attempting to help end the then sixteen-year anarchy prevailing in Somalia.

Al-Qaida might arguably kill for the opportunity to be recognized as a “belligerent” entity. Its captured members have, instead, been characterized as “unlawful enemy combatants.” Per this moniker, they have not been afforded any rights arising under the Geneva Conventions [§9.7.A.]. If Al-Qaida *were* recognized as a belligerent entity—as the Palestine Liberation Organization was in Middle East politics—it would also acquire obligations as a price tag for its global war on the US, US allies, and moderate Arab governments. While such a theoretical result might arise under International Law, one must be practical: it would not pass Al-Qaida’s leader Usama bin Laden’s laugh test.

Unlike traditional belligerent entities, however, Al-Qaida has no territorial aspirations. It does not claim to be the legitimate government of a specific populated territory. Yet the US Bush Administration made the novel claim that the US was “at war” with Al-Qaida. The US may have thereby triggered Al-Qaida’s role as being an international belligerency, thus recognized via the US war on terrorism. Some key features of International Law may have changed since 9–11, but the ability of a State to be at war with a group of individuals, located in terrorist cells in various countries, is not one of them. Nor would most nations observe the right of neutrality because of Al-Qaida’s methods in its quest for a new world order.

Pakistan's Taliban is the group that Pakistan blamed for the 2007 assassination of opposition leader Benazir Bhutto. This local Taliban group declared a ceasefire with Pakistan's government forces in February 2008. The agreement described the areas subject to the ceasefire along Afghanistan's borders and a restive region in eastern Pakistan where the traditional Pakistani Army had been battling with Taliban fighters. Thousands of civilians in the subject areas had been displaced because of this fighting. Both Pakistan's Army and the belligerent Pakistan Taliban were thus subject to the Laws of War—specifically in their respective treatment of affected Pakistani residents.

B. RECOGNITION BY ORGANIZATIONS

An international organization consisting of a group of States may decide to extend (or withhold) its collective recognition. Article 1(2) of the League of Nations Covenant provided for a form of collective recognition. It permitted admission to this world body only if applicants expressed a commitment to observing international obligations. A State or other territory could attain League membership “if its admission is agreed to by two-thirds of the Assembly, provided it shall give effective guarantees of its sincere intention to observe international obligations, and shall accept ... regulations ... in regard to its military, naval, and air forces and armaments.”

As noted by a prominent Finnish statesman in 1926, if the League of Nations did not succeed “in repelling an aggression or in preventing an occupation ... of the territory of a Member, the other Members must not recognize that *de facto* change as final and valid *de jure*. If one of the direct consequences of that unlawful aggression has been the establishment of a new State, the Members of the League of Nations should ... refuse to recognize that new State the existence of which is conflicting with the supreme values [of the League]. ...”⁴⁹

The UN does not collectively recognize States. Unlike the League, mere admission into the UN is not regarded as an act of collective recognition. The Charter drafters thought it unwise to imply recognition from admission into this second-generation world body. In 1950, the Secretary-General expressly stated that the UN “does not possess any authority to recognize either a new State or a new government of an existing State. To establish the rule of collective recognition by the UN would require either an amendment to the Charter or a treaty to which all members would adhere.”⁵⁰ This is one reason why the UN is more universal than was the League of Nations.

The individual State members retain the discretion to deny recognition, notwithstanding a new State being admitted to UN membership by the organization.

The European Union (EU) has taken the leading role in developing criteria for international recognition by an international organization. EU recognition requirements are comparatively objective. This is a welcome development, given that State articulations of recognition practice have not been very lucid about pinpointing the subjective criteria for recognizing other States. In 1991, the EU promulgated its Guidelines on the Recognition of New States in Eastern Europe and in the former Soviet Union. This announcement was expressly linked to its commitment to the law of self-determination of States. The EU and its member States adopted the following five criteria that States seeking recognition must satisfy:

- (1) respect for UN Charter provisions and its European counterpart (Conference on Security and Cooperation in Europe);
- (2) guarantees for ethnic and national minorities;
- (3) respect for the inviolability of all frontiers, which can be changed only by peaceful means and common agreement;
- (4) acceptance of international commitments regarding disarmament and nuclear nonproliferation; and
- (5) arbitration or like resolution of all disputes regarding succession and regional disputes.⁵¹

Similar to League of Nations practice, the EU may thereby withhold its collective recognition from States, territories, or colonies that are the product of international aggression. Recognition will not be given to States that violate territorial sovereignty or fail to observe international human rights guarantees. Turkey's 1974 invasion of Cyprus effectively barred Turkey from EU membership, but not Cyprus [per above §2.3.A.1. *Cyprus v. Turkey* case]. A number of nations, including the US, heartily supported this new objective approach in the development of the International Law of recognition. It is now the only official listing of recognition factors.⁵²

EU organizational recognition was not applied to Kosovo when it declared independence in 2008. The EU, instead, opted to allow each member State to decide the issue of recognition of Kosovo. The objection by certain member States was quite predictable. Spain, for example, did not recognize Kosovo, fearing that the Basque region

of Spain might otherwise draw upon Kosovo as precedent for its secession. EU members Bulgaria, Cyprus, Greece, Malta, Portugal, Romania, and Slovakia refused to recognize Kosovo as well.

A lesser form of desired collective recognition by an international organization is provided by the International Olympic Committee (IOC). In February 2008, for example, the IOC determined that Kosovo would have to be effectively recognized by the UN to be considered for participation in its globally supported sporting events. That precluded Kosovo from being in the 2008 Olympics in Beijing.

In October 2008, the UN General Assembly filed a request for an advisory opinion from the International Court of Justice regarding Kosovo's legal status. Per the question certified to the Court: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"⁵³

◆ §2.4 CHANGES IN STATE STATUS

Upon losing or achieving varying degrees of autonomy, an entity's international legal personality can change in a number of ways:

- ◆ *Occupation*: Afghanistan was occupied by the Soviet Union from 1979–1989. During this period, it was unable to govern its people and territory. When attacked by the US in 2002, Afghanistan reverted to the status of an occupied territory. Although it later conducted elections, the remaining North Atlantic Treaty Organization (NATO) operation necessarily raised some question about the degree to which it is a completely independent sovereign.
- ◆ *Political union*: The fifteen former State members of the Soviet Union were governed from Moscow. This union began to disintegrate in 1989 with the collapse of the central government's ability to control so large an area and populace under its form of economic and political management.
- ◆ *Joinder*: Two States may join together—East and West Germany joined to become the reunited "Germany" in 1990 after the demise of the US-USSR Cold War.
- ◆ *Non-existence*: A State may cease to exist—Kuwait would have been absorbed into Iraq, absent the international response to Iraq's 1990 invasion of Kuwait.

- ◆ *Secession*: Groups within a State may secede to create their own State—Bosnia-Herzegovina, Croatia, Macedonia, and Slovenia seceded from the former Yugoslavia during a two-year period beginning in 1992.
- ◆ *Separation*: One State may peacefully separate into two States—in 1993, Czechoslovakia divided into the new States of the Czech Republic and Slovakia.
- ◆ *Colonial divide*: A former colony may become a part of a State and then achieve independence—Eritrea became a State in 1993, having previously been part of Ethiopia.
- ◆ *Colonial autonomy*: Denmark colonized Greenland over 300 years ago. It granted home rule to Greenland in the 1970s. In November 2008, Greenlanders voted to ease ties with Denmark although the latter retains influence over the island's foreign policy and defense. In June 2009, Denmark approved self-rule for Greenland, with a view toward its ultimate independence.
- ◆ *Transitional government*: States such as Afghanistan and Iraq may be invaded, followed by the imposition of a transitional government by an occupying power—which may or may not lead to a full transfer of sovereignty.
- ◆ *International administration*: A portion of a State may be placed under international administration, as with the UN operations in East Timor and Kosovo.⁵⁴
- ◆ *Failed State*: Ethiopia withdrew from its two-year troop presence in Somalia in 2008. US and UN peacekeepers withdrew in 1995. Major pirating activity captured world attention, starting in 2008, because Somalia did not have the capacity to control the waters off its coast. There is no effective government in charge.

This section addresses the changes in status that are especially important in current world affairs: succession, secession, and self-determination.

A. SUCCESSION

1. State Succession This term describes State A's taking over the territory of State B—whereby B ceases to exist. There are treaties that loosely define the term. Under Article 2 of both the 1978 Vienna Convention on Succession of States in Respect of Treaties, and the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts, the term succession of States "means the replacement of one State by another in the responsibility for the international relations of the territory."⁵⁵

Succession occurs in a variety of circumstances including breakups and mergers. Contemporary examples include the 1993 split of Czechoslovakia into two States: the Czech Republic and Slovakia. These republics, in their respective territories, succeeded to the territory formerly occupied by the former State of Czechoslovakia. This split was referred to as the “velvet divorce” because of the bloodless nature of Czechoslovakia’s separation into two distinct States. Atypically, this particular breakup was not bred by civil war or external pressure.

The converse situation is a merger, exemplified by the 1990 merger of the three territories of the Federal Republic of (West) Germany, the (East) German Democratic Republic, and the City of Berlin. The legal status of Berlin was never fully resolved although the significant issues were laid to rest by a treaty, which effectively merged Berlin into the new integrated State of “Germany.” This particular merger was fully agreed to by all the nations with any territorial interest: East Germany, West Germany, France, the (former) Soviet Union, the United Kingdom, and the United States.⁵⁶ The merged entities succeeded to the territory that once consisted of two sovereign States and a special zone, all three losing their formerly distinct international legal personalities in the process.

Succession may also occur in the more controversial scenario where a State, or a portion of it, is occupied and administered by another State. Nazi Germany’s puppet State in France, referred to as the “Vichy State,” ruled within the southern part of the country from 1940–1942. It subsequently maintained a shadowy existence for two more years before dissolving in 1944. The 1974 Turkish invasion of the northern portion of Cyprus spawned a rather complicated succession scenario that has lasted over three decades.⁵⁷

Succession can also result from independence and partition. Contemporary India is an example of both. In 1947, the territory of India achieved full independence. The new State of India replaced the former territory of the same name, which had long been under British control. The Indian territory was split into two distinct States: India and Pakistan. This partition of the former territory of India established two new States, each with its own international legal personality.

There are numerous succession scenarios involving States, recognition, succession between international organizations, a succeeding State’s responsibilities to an international organization, and continuity of membership in the UN and in other organizations.⁵⁸ The most

practical feature of this potpourri of sub-issues is the lingering three-part question about the effect that succession has on the following: (1) preexisting treaties made by the predecessor State; (2) successor State property rights and debt obligations; and (3) the resulting nationality of the inhabitants of the successor State.

Does the successor State take over the treaty obligations of the succeeded State? The historical view is that a new State commences its career with a clean slate. But global (and even intra-regional) perspectives are by no means uniform. When the original thirteen American colonies obtained their independence from Great Britain in 1776, the newly formed “United States” announced the emergent right of freedom from the obligations incurred by any prior treaties undertaken or affecting the territories occupied by these colonies. The former Spanish colonies of South America likewise began their statehood with a clean slate. Yet, when Colombia separated from Spain in 1823, the US position was that Colombia remained bound by Spain’s prior treaty commitments to the United States. In 1840, when the Texas territory gained independence from Mexico, the US declared that all US treaty commitments with Mexico regarding Texas remained in effect.⁵⁹

Today, there is no universal rule regarding State succession and prior *bilateral* treaty obligations, which are purely “political,” as opposed to those which are less political in nature. Political treaties are exemplified by those creating international alliances. Generally, such treaties cease to exist when the State that concluded them no longer exists. These agreements specifically depend upon and assume the existence of the contracting State. They no longer function when that State dissolves. Although there is some disagreement, even non-political treaties concluded by an extinct predecessor State, such as those involving commerce and extradition, generally fail to survive the extinction of the State that once adopted them. Yet, the same treaties are likely to survive the succession where two or more States agree to unify. When Nazi Germany absorbed Austria into Germany, the commerce treaties of the former State of Austria did not bind the successor German State. Yet, the commercial treaties of the former East and West Germanys would bind today’s successor State of unified Germany.

Multilateral treaties present a clearer picture. They survive succession when they contain norms that have been adopted by many nations. The successor State cannot claim a “clean slate” to avoid humanitarian treatment of the citizens of the predecessor State when such

treatment is the subject of a multilateral treaty which the predecessor has ratified. This liability of the new or succeeding State is already rooted in norms of Customary International Law existing independently of the treaty, even where the succeeding State has not become a treaty party to that multilateral treaty.⁶⁰

Does the successor State take over the property and debts of the succeeded State? The property and the debts of an extinct State normally become the property of the successor State. The public international debts of an extinct State are a common illustration of this theme. Why? Because the successor State is expected to absorb both the benefits and the burdens maintained by the former State.

An exception is often claimed when the debts of the succeeded State are contrary to the basic political interests of the successor State. International arbitrators have adopted the view that a successor State cannot be expected to succeed to such debts when they are repugnant to the fundamental interests or public policy of the succeeding State. When Yugoslavia reclaimed the territory of the “Independent Croatian State”—an unrecognized puppet regime established on Yugoslavian territory during World War II—the successor State of Yugoslavia did not assume the debts of the former unrecognized fascist administration.⁶¹

The 1983 Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts addresses this question although it has not yet received sufficient ratifications to enter into force. The successor State is entitled to the property of the former State. Succession does not extinguish obligations owed by the former State to either public or private creditors. The Succession treaty provides that succession “does not as such affect the rights ... of creditors.”⁶²

Must the successor State provide its citizenship to the citizens of the succeeded State? When a State ceases to exist, so does the citizenship that it has previously conferred on its inhabitants. The former citizens of the extinct State must then look to the internal law of the successor State for their citizenship rights. This is generally a matter of internal law, rather than International Law. Yet international practice does suggest that new States confer their citizenship on those who were citizens of the succeeded State, based on habitual residence. On the other hand, the new State may not force its citizenship on individuals within what has become a subjugated State. This would preclude Israel, for example, from imposing its citizenship on people within the “occupied territories” it has acquired as a result of various wars.⁶³

2. Government Succession Unlike the possible avoidance of obligations when a new *State* comes into existence, a new *government* may not claim a “clean slate.” Otherwise, the stability of international relations would be significantly undermined if questions of succession to obligations arose every time a new government assumed power. International Law theory provides further support for the view that new governments cannot avoid international obligations because, unlike a State, a government is not an international person.

B. SECESSION

While *succession* involves the takeover of another State’s territory, *secession* is the breakup of a State, typically for the purpose of achieving independent statehood. Modern examples of secession arose in India and Yugoslavia. When Great Britain’s rule over India ended in 1947 (during the British withdrawal from Asia), Pakistan was created by partitioning part of India’s northeastern territory. In 1971, Bangladesh separated from Pakistan (mostly for religious reasons). In Yugoslavia, conflicts previously suppressed by the Cold War erupted in the 1990s. After the Soviet Union dissolved, ethnic conflict and resurgent nationalism spawned the breakup of the former Yugoslavia into six separate States. As noted in the International Court of Justice case, in Section C below, East Timor effectively seceded from Indonesia, which was itself a Portuguese colony for 500 years.⁶⁴

Some observers characterize the contemporary rash of secessionist movements as a rather dangerous phenomenon. The August 2008 Russian military intervention in Georgia’s South Ossetia province suggests why. Russia was supposedly protecting Russian citizens in this part of Georgia. It attained only *de facto* independence from Georgia after the 1992 conclusion of its conflict with Georgia. But it had yet to clutch the brass ring of international recognition. Most South Ossetians possess either Russian citizenship or ethnicity. Russia was upset with Georgia and US plans for Georgia to join NATO. That would result in yet another Russian neighbor—formerly dominated by Russia and the Soviet Union for two centuries—becoming a huge cog in NATO’s eastward expansion toward Russia’s doorstep.

In August 2008, Russia recognized Georgia’s separatist provinces of South Ossetia and Abkhazia as independent nations. Russia’s president Medvedev explained that Russia’s assessment was quite comparable to the West’s recognition of Kosovo’s breakaway from Serbia. No other major nations followed Russia’s lead. A half-dozen

neighboring republics feared that Russian expansion would ultimately include these provinces. These former members of the Soviet Union came to Georgia's defense. Russia responded, however, that it had no intent to incorporate South Ossetia and Abkhazia into Russia—as desired by much of the ethnic Russian population hoping for a merger between North and South Ossetia.

The UN Security Council's February 2009 Resolution 1866 renewed its Georgian Mission through June 15, 2009. Paragraph 3 affirmed “the need to refrain from the use of force or from any act of ethnic discrimination against persons, groups of persons or institutions, and to ensure, without distinction, the security of persons, the right of persons to freedom of movement and the protection of the property of refugees and displaced persons. ...” This was presumably designed to state the international posture, but also buy time until the International Court of Justice would rule on Georgia's related lawsuit against Russia [§10.3.A.].

Russia's Deputy Chief of Staff of the Armed Forces then warned Poland that it risked attack because it agreed to the US missile-defense base. US officials denied that the timing of this agreement was meant to antagonize Russian leaders. Relations were already strained over the then recent fighting between Russia and Georgia over the separatist Georgian region of South Ossetia. Poland invited Russia to inspect the missile-defense base. That would give Russia “tangible proof” that the planned base in Poland (and its associated Czech Republic radar installation) is directed at nations such as Iran—not Russia.⁶⁵

The University of Arizona's Philosophy Professor Allen Buchanan succinctly characterizes secessionist movements in these terms:

[if] each ethnic group, each “people,” is entitled to its own state, then it [secession movements] is a recipe for virtually limitless upheaval, an exhortation to break apart the vast majority of existing states, given that most [States] if not all began as empires and include a plurality of ethnic groups or peoples within their present boundaries. ... Secession can shatter old alliances ... tip balances of power, create refugee populations, and disrupt international commerce. It can also result in a great loss of human life. And regardless of whether it acts or refrains from acting, each state takes a stand on each secessionist movement—if only by recognizing or not recognizing the independence of the seceding group.⁶⁶

The Canadian province of Quebec was the subject of 1980 and 1995 secession referenda. New York

University Law School's Thomas Franck was one of the five international law experts asked by the Canadian government to analyze issues regarding a hypothesized secession of Quebec. Per his intriguing articulation: “It cannot seriously be argued today that international law prohibits secession. It cannot seriously be denied that international law permits secession. There is a privilege of secession recognized in international law and the law imposes no duty on any people not to secede.” The Supreme Court of Canada clarified that “[a] right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises only in the most extreme cases and, even then, under carefully defined circumstances. ...”⁶⁷

The question of what post-secession obligations remain often arises after a secession. For example, had the Confederacy won the American Civil War of the 1860s, it is not clear whether the South would have retained the international obligations incurred by the US for that portion of the nation. Prior to the end of World War II, international practice clearly supported the rule that a new State (seceding from another) could begin its existence without any restraints imposed by the treaty commitments of the State from which it seceded. After secession, the State from which another has seceded continued to be bound by its own existing treaty commitments, which do not depend on the continued existence of the State that has seceded.

Since World War II, the unequivocal rule that authorized a fresh start for seceding States became somewhat equivocal. New States that have seceded from others still enjoy a “clean slate,” but not as to treaties creating norms intended to bind all States. Humanitarian treaties are the prime example. These normally codify the existing customary practice of States. When Pakistan separated from India in 1947, it acknowledged a continuing obligation to remain a party to the 1921 Convention for the Suppression of Traffic in Women and Children. Pakistan's recognition of this obligation was specifically premised on India's acceptance of the 1921 treaty when the Pakistani territory was still a part of India.⁶⁸

Kosovo and the former Georgian provinces of South Ossetia and Abkhazia present useful case studies of the international community's default presumption against the right to secede and the three elements for recognizing a valid secession. Note the similar approach, but distinct conclusions in the two following analyses:



Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition

CHRISTOPHER J. BORDEN

AMERICAN SOCIETY OF INTERNATIONAL LAW:
ASIL INSIGHT (FEB. 2008)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Two, click Recognition KosovoIndependence.

Serbia lobbied the UN General Assembly in search of a resolution that would yield a legal analysis of the legitimacy of Kosovo's secession. An October 2008 General Assembly resolution gave Serbia the first leg of the relief it seeks. Seventy-seven nations voted in favor of submitting this case to the International Court of Justice for an advisory opinion on the question of whether "the unilateral declaration of independence by ... Kosovo [was done] in accordance with



Legitimacy of the Kosovo, South Ossetia, and Abkhazia Secessions: Violations in Search of a Rule

WILLIAM R. SLOMANSON

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<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Two, click Legitimacy of Kosovo.

international law?"⁶⁹ Although this will be an advisory opinion [§8.4.E.], the Court has invited all interested nations—including Kosovo—to submit their views on the legitimacy of Kosovo's independence.

The UN Mission in Kosovo has undergone an unusual, but not surprising, change in political status. The European Union, aka EUROLEX, is supposed to replace the UN. This awkward arrangement is a holdover from the UN's administration of Kosovo, which began just after the NATO bombing in 1999. The reconfiguration was explained below in December 2008.

The Albanian Kosovar majority does not want the UN or EUROLEX to stay any longer than absolutely

X. UNMIK Reconfiguration

21. As a consequence of the deeply diverging paths taken by Belgrade and the Kosovo authorities following Kosovo's declaration of independence [Feb. 2008], the space in which UNMIK can operate has changed. As is evident from the developments on the ground, my Special Representative is facing increasing difficulties in exercising his mandate owing to the conflict between resolution 1244 (1999) and the Kosovo Constitution, which does not take UNMIK into account. The Kosovo authorities frequently question the authority of UNMIK in a Kosovo now being governed under the new Constitution. While my Special Representative is still formally vested with executive authority under resolution 1244 (1999), he is unable to enforce this authority. ... Therefore, very few executive decisions have been issued by my Special Representative since 15 June [2008].

...


23. The relationship of UNMIK with EULEX has evolved over the reporting period under the terms set forth in my special report to the Security Council on UNMIK of 12 June (S/2008/354). I expect EULEX to move forward with its deployment in the coming period and to assume responsibilities in the areas of policing, justice and customs, under the overall authority of the United Nations, under a United Nations umbrella headed by my Special Representative, and in accordance with resolution 1244 (1999).

...

Note: See Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN DOC. S/2008/692 (24 November 2008).

necessary, given Kosovo's declaration of independence. The Serbian minority is far more comfortable with this residual international presence in Kosovo. The international community has not completely withdrawn, given the likelihood of another bloodbath in the absence of the 16,000-strong NATO troop presence.

The latest major opinion on Kosovo's status was rendered by the International Court of Justice (ICJ). Its advisory opinion was requested by the UN General Assembly:



**Unilateral Declaration of
Independence of Kosovo**

INTERNATIONAL COURT OF
JUSTICE (ADVISORY OPINION: 201_)

[Webpage press release will be replaced by edited
version of published opinion]

Go to Course Web Page, at:
<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Two,
click [ICJ Kosovo Independence](#) case.

C. SELF-DETERMINATION

Of the various modes of altering a territory's status, self-determination may be the least understood and most important. Self-determination is the inhabitants' right to choose how they will organize and be governed. They might not prefer self-governance; or, alternatively, they may opt for some form of autonomy that may or may not be actual statehood.

1. UN Paradigm The UN Charter serves as a key rallying point for the modern law of self-determination. Article 1.2 of the Charter provides that one of the United Nations' essential purposes is "respect for the principle of equal rights and self-determination of peoples. ..." The cornerstone is the Article 73 Declaration Regarding Non-Self-Governing Territories: "Members of the United Nations [that] have or [will] assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost ... the well-being of the inhabitants of these territories. ..."

A key UN development surfaced in 1960, in the midst of the movement to decolonize the many territories controlled by the original members. In Resolution 1514(XV), the General Assembly proclaimed—over objections by Western nations—that the "subjection of peoples to alien subjugation ... constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations ... [because all] peoples have the right to self-determination ... [and any inadequacy] of political, economic, social or educational preparedness should never serve as a pretext for delaying independence." That resolution also provides that:

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

...

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

General Assembly Resolution 1541 further contemplates that non-self-governing territories might enjoy several possible outcomes in the quest for self-determination: (a) emergence as a sovereign independent State; or (b) free association with an independent State; or (c) integration with an independent State. Principle IX of that resolution declared that any "integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes."

The subsequent Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the UN (Resolution 2625 [XXV]) adds that:

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other

political status freely determined by a people constitute modes of implementing the right of self-determination by that people. ... Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle.

One might peruse the historical and current autonomist and secessionist movements of the world.⁷⁰ Doing so reveals the discontent of “peoples” with their geopolitical boundaries in numerous countries and regions. Many such boundaries were initially set by colonial powers, often via straight latitudinal and longitudinal lines with little concern for splitting vintage ethnic enclaves. One of the prominent International Court of Justice self-determination cases describes the contemporary contours of the right to self-determination:



Case Concerning East Timor (Portugal v. Australia)

INTERNATIONAL COURT
OF JUSTICE

GENERAL LIST NO. 84, 1995 ICJ 90 (1995)

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Under Chapter Two, click Case Concerning East Timor.

2. Applications One of the classic examples of self-determination *denied* was the situation in Namibia (formerly South-West Africa). It was controlled by South Africa, originating with a League of Nations mandate. South Africa refused to comply with various UN resolutions demanding that South Africa relinquish its control of South-West Africa. After seventy-four years of domination and a blistering decision from the ICJ,⁷¹ South-West Africa finally achieved its own sovereign identity and was admitted to the UN as the nation of Namibia in 1990. The regional achievement of self-determination through the decolonization movement of the 1960s is

graphically illustrated in Table 2.1. It features the huge number of African colonies, prior to the 1960s, which achieved statehood and thus surpassed the number of original UN members in 1945.

As the African decolonization movement shifted from rhetoric to reality, the rather general right of self-determination was further refined. Article 1.1 of both the 1966 International Covenant on Civil and Political Rights and the 1966 International Covenant on Economic, Social, and Cultural Rights provided the next building block. It provides that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” While the General Assembly approved these covenants with near unanimity, certain Western powers maintained their reservations about the so-called right of self-determination and its nuanced shift from “States” to “peoples.”⁷²

Puerto Rico has been a part of the US for over one hundred years. Its people have not chosen to become an independent sovereign, nor have they chosen to become a state within the federated system of states within the US. If a majority of the people were to prefer *complete* independence from the US, much like the evenly divided Canadians over their Quebec province, then they would *not* be enjoying an effective right of self-determination.

In November 2007, Belgian lawmakers blocked a move by the Dutch-speaking Flemish north and the French-speaking south to split the country. This was not intended to be a complete separation, as when Kosovo seceded from Serbia three months later. If successful, it would have provided more autonomy for each region of Belgium. The respective advocates thus sought what they perceived to be the best means of cultural and linguistic self-determination.

In April 2008, native Hawaiians set up a shadow government which operates from a tent outside the palace of Hawaii’s last monarch. Hawaii was overthrown in 1893 by a group of businessmen with US military assistance. The US annexed Hawaii in 1898. It became a state of the US in 1959. The Hawaiian Kingdom Government (HKG) politely occupies the surrounding space, claims thousands of followers, issues its own car license plates, operates a separate judicial system, and operates as if it were a government in exile. Neither the US nor local government officials have interfered, notwithstanding the HKG’s objective of ousting Hawaii’s state government.

A state agency is pursuing federal legislation that would accord such natives a degree of self-government, akin to that enjoyed by American Indian tribes.⁷³

◆ §2.5 STATE RESPONSIBILITY

A. INTERNATIONAL ACCOUNTABILITY

1. A Consequence of Statehood This section briefly addresses State responsibility under International Law. Once statehood is acquired, a State incurs obligations associated with its international status. It is required to make reparations for any international wrongdoing. A State could thus breach an obligation, which impacts just one State or, alternatively, the entire community of nations.⁷⁴ The materials in this section will support your study of Genocide [§10.1.B.], especially the International Court of Justice *Bosnia v. Serbia* case. That case will focus on Serbia's *alleged* State responsibility for the acts of various State and non-State actors in Srebrenica, Bosnia—where 7,800 Muslim men and boys were slaughtered in several days, near the UN safe haven in 1995.

Before delving into the specific content of International Law, in this section and subsequent chapters, it will be useful to contemplate the general consequences of a State's wrongful conduct. First of all, a State can incur such liability for either intentional or negligent conduct. When a State commits a wrongful act against another State, its breach of International Law triggers the requirement that it make reparations for that harm. Otherwise, States would not be coequal sovereigns under International Law. In August 2008, for example, Italy apologized for Italy's occupation of Libya from 1911–1943. Italy thus paid the equivalent of \$5,000,000,000, to compensate for this long-term breach of Libya's territory. (Italy also provided \$5,000,000 worth of electronic monitoring devices on the Libyan coastline to help prevent clandestine migration to Italy.)

Three elements combine to trigger State responsibility: (1) the existence of a legal obligation recognized by International Law; (2) an act or omission that violates that obligation; and (3) some loss or articulable damage caused by the breach of that obligation.⁷⁵ These elements are drawn from a variety of sources, including various judicial and arbitral awards. The so-called Permanent Court of International Justice tendered the quintessential articulation in 1928: “it is a principle of international law, and even a greater conception of [all] law, that any breach of an engagement [responsibility to

another State] involves an obligation to make reparation.”⁷⁶ Germany had sued Poland, seeking reparations for Poland's breach of its treaty obligation *not* to expropriate a German factory once it was built in Poland.

Support for this principle can also be found in many arbitral decisions. In 1985, the crew of the Greenpeace vessel *Rainbow Warrior* protested French nuclear testing in the South Pacific. French agents then destroyed the vessel in a New Zealand harbor, killing one of the crew members. New Zealand was obviously upset because of this salient breach of its territorial sovereignty. France consequently agreed to transfer the responsible French agents to its base in the Pacific where they would remain for at least three years. They were clandestinely repatriated to France, however, without New Zealand's consent. In the ensuing 1986 arbitration, the UN Secretary-General ruled that France had thus incurred State responsibility for the acts of its agents and the related violation of its treaty commitment to incarcerate them in the geographical region, which was the scene of the crime. The *Rainbow Warrior Arbitration* affirmed that “the legal consequences of a breach of a treaty, including the determination of the circumstances that may exclude wrongfulness ... and the appropriate remedies for breach, are subjects that belong to the customary law of state responsibility.”⁷⁷ (This event is the basis for the Chapter 11 *Rainbow Warrior Problem 11.C.*)

There is a persistent question about whether a finding of fault or intent on the part of a State's agents is required for State responsibility when one State harms another. The International Court of Justice 1949 *Corfu Channel* opinion suggests that some showing of fault is required for liability to arise. Great Britain sued Albania when British naval vessels hit mines that had been recently laid in an international strait off Albania's coast. Albania denied any knowledge of the presence of those mines—notwithstanding rather suspicious circumstances. The Court decided that “it cannot be concluded ... that that state [Albania] necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors [of the act of mine laying in the strait].”⁷⁸

The UK's University of Leicester Professor Malcolm Shaw points out, however, that this lone passage from the Court is not tantamount to its general adoption of a “fault” requirement that would limit State responsibility. While judicial and academic opinions are divided on this

matter, most tend to agree that there is a strict liability standard. Therefore, the State's fault, intent, and apparent knowledge are not necessary conditions for State responsibility. Under this standard, Albania would have been liable for the damages to the British warships—even if it did not *intend* to harm another State, citizens, or property. A State can thus be liable for a *failure* to act, such as when there are floating mines in its territorial waters through which foreign vessels routinely navigate.⁷⁹

2. State Responsibility for Acts of Non-State Actors Perhaps the most challenging feature of State responsibility, particularly in the aftermath of 9–11, is the degree to which the act of a *non-State* actor is attributable to a particular State. Should that attribution be clearly established, then the State that assisted, or looked the other way, incurs international legal responsibility for such conduct. An armed group that launches an attack in another country raises the question of whether the State from which it operates bears international responsibility for that act.

For example, Hezbollah is a Lebanese umbrella organization of radical Islamic Shiite groups and organizations. It opposes the West; hopes to create a Muslim fundamentalist State modeled on Iran; and bitterly opposes Israel's existence. Hezbollah is believed to be responsible for hundreds of attacks since its 1982 inception, which have killed about 1,000 people.⁸⁰ Its obvious lack of transparency prompts the question of whether its acts are attributable to Lebanon, Syria, Iran, or any combination of all three States. Al-Qaida was the entity that literally launched the 9–11 commercial passenger jet attacks on US soil, killing 3,000 civilians in New York, Washington DC, and Pennsylvania. Would its acts on that day be attributable to Afghanistan? Iraq? Some other country? Note that the US did not declare war against Afghanistan when it responded with military force in the following Spring.

The traditional paradigm for addressing such questions was articulated by the International Court of Justice in its *Nicaragua* [§9.2.C.2.] and *Iran Hostage* [§2.7.E.] case opinions. In *Nicaragua*, the Court required effective State control of the non-State actor. Financing, organizing, training, and equipping a group were not enough to trigger State responsibility under this exacting standard. The US was found to be internationally responsible to Nicaragua, but not under the “effective control” standard for attributing responsibility to a State (for the acts of the opposition Contras supported by the US). The Court's *Iran Hostage* opinion

extended State responsibility to the Iranian Government. Iran's liability was premised upon the Khomeini Government's subsequent adoption of the student-driven attacks on the US and Canadian diplomatic offices and hostage-taking—even if totally unaffiliated with the government at the time these acts occurred.⁸¹

The pending UN draft treaty, which is the subject of the subsection immediately below, provides current affirmation of these Court decisions regarding State responsibility for acts of non-State actors. Under Article 8: “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or *under the direction or control of*, that State in carrying out the conduct.” Normally, the conduct of private individuals or entities is not attributable to the State under International Law. But circumstances may arise where such conduct is nevertheless attributable to the State. This occurs when there exists a specific relationship and purpose between the individual or entity engaging in the conduct and the State. As noted in the Commentary to this draft Article:

Most commonly, cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as “auxiliaries” while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as “volunteers” to neighbouring countries, or who are instructed to carry out particular missions abroad.

And under Article 11: “Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State *acknowledges and adopts* the conduct in question as its own.”⁸²

B. DRAFT STATE CONDUCT ARTICLES

The study of International Law would be far simpler if the rules were only contained in a multilateral treaty to which all nations could agree. Three international drafting commissions have attempted to codify the Law of State Responsibility under International Law. From 1924 to 1930, a Committee of Experts working with the League of Nations presented the first phase in this lengthy endeavor. Its draft articles were limited to the responsibility

of States for injuries within their respective territories to foreign citizens or their property. The next phase, from 1949 to 1961, was undertaken by the UN's International Law Commission (ILC)—a group of prominent international legal scholars nominated by the governments of UN member States.⁸³ The length of this renewed endeavor is partially attributable to the remarkable increase in UN membership [Table 1.2.1]. From 1963 to date, the next wave of attempted codification of the law of State responsibility appeared to crest with the UN Charter. The drafters for this phase broadened their efforts to cover State responsibility for all topics within the Charter's reach.

A set of draft articles was first adopted by the ILC's members in 1996. States were asked to provide responses by the beginning of 1998. Some did, which then required more drafting.⁸⁴ The rules contained in the latest draft (2001) focus on *procedural* rules as opposed to substantive rules that could have directly addressed what acts or omissions give rise to State responsibility for a breach of International Law. This model law of State responsibility is thus couched in only the most general of terms, despite more than seventy years of laborious efforts to produce an acceptable draft for an international conference. Article 1 almost bashfully provides that “[e]very internationally wrongful act of a State entails the international responsibility of that State.” Article 2 adds that “[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.”

After a half century of unrelenting efforts to produce a widely acceptable draft, one could readily predict that the ILC may never produce a comprehensive set of *substantive* rules.⁸⁵ The Chinese position hints at this frustration. As its UN Sixth Committee's Chinese representative stated, a half dozen years later:

The Chinese delegation welcomes the fact that the draft articles differentiate between ... serious breaches ... and ... general breaches [of International Law]. ... However, we find that there are still problems. ... For example, the draft articles make no distinction between the consequential gradations in responsibility entailed by these two kinds of breaches. As a result, serious breaches don't entail greater responsibility.... Therefore, we suggest that the draft articles should include provisions on the specific [substantive] meaning of serious breaches as well as provisions on the proportioned responsibility commensurate with the different [substantive] breaches.⁸⁶

Former Article 19, deleted from the 2001 text, was perhaps the most controversial draft article. It contained specifically prohibited State conduct. If it had survived the final cut, it would have restated the law of State responsibility for “international crimes and delicts.” Its deleted Subsection 3 included the following: aggression, failure to safeguard self-determination of peoples, slavery, genocide, apartheid, and massive pollution of the atmosphere or of the seas. These terms were not defined in any detail, which likely explains the decision to delete this article from the 2001 text adopted by the ILC prior to submission to the UN General Assembly. The Assembly will decide if and when to adopt a resolution encouraging States to ratify this draft treaty on State responsibility.⁸⁷

Note: At this point in your course, you might reflect upon the fading role of the State as the classical star on the international stage. Textbook §1.1.B addressed the increasing role of non-State actors in the evolution of international legal norms. This book section illustrates ways in which States are outsourcing their historically sovereign roles to non-State actors. Chapters 3 and 4 of this book will expand upon these themes by analyzing the incredibly pervasive roles that international organizations and transnational corporations play in international affairs. As aptly articulated by Oxford University Professor Vaughan Lowe:

It is undeniable that the influence of the individual nation-State is declining ... as businesses ... obtain supplies, employees, and funds abroad. Transfers of powers to international and supranational organizations such as NAFTA, the WTO, and the EU entail a corresponding reduction in the powers of national governments. ... It seems plain that the power of the State is in decline when it is measured in relation to the increasing power of other actors. The result, however, is not so much an expansion in the scope of international law ..., but rather that the boundaries between international law and neighboring legal subjects are breaking down. ... Lawyers have a contribution to make. They offer one way of going about resolving some of the most crucial problems that face the world. There are many times [however,] when it is much better to call upon a politician, or a priest, or a doctor, or a plumber.⁸⁸

◆ §2.6 SOVEREIGN IMMUNITY

This section of the chapter on States introduces an important adjunct to State status. Although a State

may incur State responsibility for certain conduct, its status as a sovereign entity may shield it from having to respond to suits in the courts of another country. In this context, when sovereign immunity applies, one State's judges cannot assert jurisdiction over other States. Reparations, if any, must be sought in some other forum. The other avenues would include diplomatic intervention or a suit against State A in State A's own courts under State A law.⁸⁹

For example, survivors of Europe's worst massacre since WWII sued the Dutch government (and the UN) in The Netherlands. They claimed that Dutch troops failed to protect their Bosnian relatives, who were slaughtered at a UN safe haven in Srebrenica in 1995.⁹⁰ Some 700 Dutch soldiers acting as UN peacekeepers had not only laid down their arms, but also assisted in separating the women from the remaining 7,800 Muslim men and boys. The several thousand strong Serb force claimed that it was taking them to another location until the cessation of hostilities. A Netherlands governmental investigation absolved the Dutch soldiers of responsibility. The UN's International Court of Justice had recently dismissed a claim filed by Bosnia against Serbia for this massacre [§10.1.B.]. The Dutch government had fallen, which provided a small measure of moral relief. However, 200 survivors, known as the Mothers of Srebrenica, marched to the Dutch Supreme Court to deliver their class action suit against the government. They alleged the State's responsibility for doing nothing to prevent this massacre.

This attribute of sovereignty, immunity from suit in the courts of another country, is premised on one of the fundamental building blocks of International Law: all States are entitled to equality. State B, being a coequal sovereign entity in the community of nations, should not be subjected to a lawsuit in the courts in State A without B's consent. Although the State A plaintiff is entitled to a remedy from the government or an agency of State B, it may be preferable to resolve the dispute through diplomatic negotiations, rather than in the courts of State A.

This equality is often expressed in the constitutive documents of international organizations. Article 2.1 of the UN Charter provides that the "Organization is based on the principle of the sovereign equality of all its Members." Article 9 of the Charter of the Organization of American States provides that "States are juridically [legally] equal, enjoy equal rights and equal capacity to exercise these rights, and have equal duties. The rights of each State depend not upon its power to

ensure the exercise thereof, but upon the mere fact of its existence as a person under international law."

One of the classic illustrations of the rationale for sovereign immunity is contained in the following excerpt from a 2001 US judicial opinion. The US Government successfully requested dismissal of an Auschwitz survivor's claim, thus supporting Germany's argument that it had sovereign immunity for its acts during World War II: "We think that something more nearly express ... is wanted [in the US Foreign Sovereign Immunities Act] before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong."⁹¹

The historical lineage of sovereign immunity is somewhat sketchy. As stated by the Supreme Court of Canada: "The principle of sovereign immunity originated somewhat obscurely centuries ago in a period when the sovereign personified the state, and when sovereign interventions were generally limited to matters of public order, the conduct of international affairs and the defence of the state. ... Sovereign immunity developed from the doctrine of the law of nations, which governs the international community of states based on the notions of sovereignty and equality of states. ... These notions form the basis of an old Latin maxim: 'Par in parem imperium non habet,' which translates as 'An equal has no authority over an equal.'"⁹²

In 1976, the US enacted the first statute generally governing sovereign immunity. That legislation spawned a trend by nations wishing to make such determinations more objective. Congress wished to transfer more of the sovereign immunity decision-making from the executive branch to the judicial branch of the government. As restated by the US Supreme Court's major policy opinion, the legislative history of the 1976 Act expressed the purpose to free the executive branch of the "Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assur[e] litigants that decisions are made on purely legal grounds under procedures that insure due process.'"⁹³

The scope of *sovereign immunity* includes issues spawned by the alleged misconduct of States, Heads of State, governmental agencies conducting State business, diplomats, and military forces operating in foreign theaters. State practice can thus be classified in terms of two general types of immunity: *absolute* and *restricted*.

A. ABSOLUTE IMMUNITY

1. State Nations have historically employed the *absolute* theory of sovereign immunity. The Kenya Court of Appeal provided a useful restatement of this theory. A resident of Kenya sued a British soldier for allegedly causing a motor vehicle accident in Kenya. The Claims Commission within Britain's Ministry of Defence—a government agency of Great Britain—was sued because it would normally be vicariously liable for the soldier's conduct undertaken in the course of his employment. The immunity upheld by Kenya's appellate decision illustrates the rationale for dismissing the governmental defendant:

it is a matter of international law that our courts will not entertain an action against certain privileged persons and institutions unless the privilege is waived. The class ... includes foreign sovereigns or heads of state and governments, foreign diplomats and their staff, consular officers and representatives of international organisations like UNO [UN] and OAU [Organization of African Unity]. Mr. Frazer for the appellant [British governmental agency] cited the English case [citation omitted].

...

The general principle is undoubtedly that, except by consent, the courts of this country will not issue their process so as to entertain a claim against a foreign sovereign for debt or damages. The reason is that, if the courts here once entertained the claim, and in consequence [thereby] gave judgment against the foreign sovereign, they [the courts rendering the judgment] could be called on to enforce it by execution against its property here. Such execution might imperil our relations with that country and lead to [reciprocal] repercussions impossible to foresee. ...

As was held in *Mighell v. Sultan of Johore* [1894] 1 QB 149, the courts in one country have no jurisdiction over an independent foreign sovereign of another country, unless he submits to the jurisdiction. There has been no [such] submission here.⁹⁴

Just after World War II, absolute sovereign immunity applications began to focus on whether the defendant government's particular activity was closely associated with its political objectives within the host State. Thus, the *purpose* of that government's apparent commercial activity was controlling, rather than the fact that a

private business could carry out the same project. The following Polish case is a useful illustration. A woman named Aldona was a typist employed by the weekly magazine *Voice of England*. This magazine was published in Kraków, Poland, by the British Foreign Office of the government of the United Kingdom. Ms. Aldona was dismissed from her job. She was not paid the remainder of the salary due to her under the contract with the magazine. She sued Great Britain in a Polish court for the breach of her contract by the British agency publishing the magazine. The Polish courts dismissed her case because the defendant was a foreign sovereign. Aldona asserted that this dispute involved a mere contract of employment between a private person and a commercial magazine that was a profit-making enterprise. The magazine just happened to be published by an agency of the British government for diplomatic and other political purposes.

Aldona's unsuccessful argument was that publishing a magazine should be characterized as an "economic" rather than a "diplomatic" or some other State-related activity. Her lawyer argued that if Great Britain's magazine could thereby avoid paying her, on the basis of a dismissal on grounds of sovereign immunity, the contractual obligations of the British government in Poland would be meaningless. The Polish court first assessed the reciprocity concerns (suggested in the foregoing case from Kenya). Absent a dismissal in this case, the Polish government or its State-run entities would not fare well in British courts. Subsequent suits against a Polish governmental entity in Great Britain would likely invite a British judge to allow a suit to proceed against Polish government agencies operating in Great Britain. The Polish court noted that while the British magazine was a commercial entity because it was selling magazines for a profit, its underlying *purpose* was an inoffensive political activity on the part of the United Kingdom. The Polish Supreme Court also tied up an important loose end sometimes overlooked in sovereign immunity analyses: the plaintiff has a remedy, but it is not in the courts. Rather, the plaintiff's home State may enter into diplomatic negotiations on her behalf [§4.1.A.]. As reasoned by the Polish Supreme Court:

Polish Courts were unable, given the principle of reciprocity, to accept for deliberation the claim submitted by Aldona S., even if it concerned a commercial enterprise on behalf of the British

authorities. However, such is really not the case, for the [lower Polish] Court of Appeal held that the publishing house of “Voice of England” is not a commercial enterprise. The objection of the plaintiff that this does not concern diplomatic but [rather] economic activity cannot be admitted as valid, for although the activity may not be diplomatic, it is political by its content, and economic only by its form. ...

Finally, the last objection of the plaintiff, that refusal of legal protection would render the obligations of the British Foreign Office as a publisher of a magazine in the territory of our State incomplete and unreal, is also unfounded, for, if the plaintiff does not wish to seek justice before English courts, she may take advantage of general international usage in connection with immunity from jurisdiction, and approach the [Polish] Ministry of Foreign Affairs, which is obliged to take up the matter with the [British] Ministry of Foreign Affairs of a foreign country with a view to obtain satisfaction for a just claim. This approach frequently produces speedier results than court procedure.⁹⁵

2. Head of State The scope of absolute sovereign immunity may also depend on what entities are embraced within the term “State.” There is a distinction between heads of State and the State itself. For 2,000 years, absolute immunity has been universally recognized for heads of State regarding their public and private acts while they are in office. In the famous case *Mighell v. Sultan of Johore*, cited in an 1893 British court decision, Great Britain extended sovereign immunity to a foreign head of State who was sued there for breach of his promise to marry. The case against the sultan was thus dismissed without considering the merits of the plaintiff’s case.⁹⁶

For this application of sovereign immunity, there was an ironclad rule for some two millennia: a foreign Head of State was not subject to *any* civil or criminal prosecution, during and after leaving office. This rule was sired by perceptions of necessity and reciprocity. The uniform customary international practice effectuated a form of golden rule.

In 1989, Manuel Noriega, Panama’s former Head of State, presented the first aberration in contemporary practice. The US invaded Panama; waited for him outside of the Vatican embassy; seized him when he exited; then returned him to the US for trial on drug-trafficking

charges. This was perhaps the first time since Roman leaders brought back captured foreign leaders in chains 2,000 years ago that a foreign ruler was captured abroad and returned to the territory of the captors for trial. The US relied on various bootstrapping legalities, including a state of war (commenced by the US invasion). The US further asserted that this capture was an act of self-defense, premised on the danger that Noriega’s dictatorship posed for US security interests in Panama. Noriega’s capture and subsequent trial in the US was labeled as a “gross violation” of International Law by the former president of the American Society of International Law. A US court nevertheless rejected Noriega’s 1997 claim of head of State immunity.⁹⁷ In other US cases, however, the Heads of State of the PRC and Zimbabwe have been accorded absolute immunity from prosecution in the United States.⁹⁸

The Augusto Pinochet litigation made a significant contribution to toppling the centuries-old immunity accorded to Heads of State, which had continued after they left office. *Pinochet* thus provided a significant spark to an evolving paradigm: one which questioned whether it still made sense to extend absolute immunity to an ex-ruler who engages in such heinous conduct in office that it could hardly be considered State policy.⁹⁹



Judgment of the House of Lords Regina v. Bartle and the Commissioner of Police for the Metropolis and Others ex parte Pinochet

on 24 March 1999

ON APPEAL FROM A DIVISIONAL COURT
OF THE QUEEN’S BENCH DIVISION

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Two, click Ex Parte Pinochet.

In 2006, Chile’s Supreme Court stripped Pinochet of his former immunity from prosecution. He would thus be subject to trial on corruption charges for conduct occurring during his 1973–1990 reign. Most human rights charges, however, have been dropped because of his advanced age.

Slobodan Milosevic was the first Head of State to be prosecuted by an *international* tribunal. His trial for genocide and various other crimes began in 2002, after the Serbian Government turned him over to the International Criminal Tribunal for the Former Yugoslavia. The proceedings by this UN Security Council-initiated court in the Netherlands unsettled the millenniums-old rule of absolute immunity for sitting and former Heads of State. Prosecution of other Heads of State is now within the treaty-based jurisdiction of the International Criminal Court (ICC) in the Netherlands [§8.5.D.]. Under Article 27.1 of the Rome Statute of the ICC, its jurisdiction applies without regard to an individual's official capacity, and "[i]n particular ... a Head of State or Government. ..."

Then in July 2008, the International Criminal Court issued its first indictment of a sitting Head of State, President Omar al-Bashir of Sudan. He stands accused of masterminding the attempts to ethnically cleanse that country's infamous Darfur province by government-backed Janjaweed militia. In March 2009, the ICC issued a warrant for his arrest. Sudan is not a party to the Court's statute. It had not waived the historical Head of State immunity and did not wish for its president to be placed in the dock of this "white man's court."¹⁰⁰ Given these predictable objections to the Court's processes by the Sudanese government, jurisdiction was triggered by a UN Security Council reference to the ICC, a process addressed in textbook §8.5.D.

One of the hybrid international courts—the Special Court for Sierra Leone [SCSL: §8.5.C.] scaled back the former Head of State immunity rule. Former Liberian President Charles Taylor is being detained at The Hague's International Criminal Court facility for holding prisoners who face trial in various international tribunals—in this instance, on behalf of the SCSL court—because his presence within Sierra Leone would draw irrepressible attacks on his life as well as likely mob violence because of his very presence.

This immunity, ironically, persists in civil cases. While there have been some exceptions, most States continue to honor the historic approach. During Chinese President Jiang Zemin's visit to the US in 2002, for example, he was served with a civil suit by the Falun Gong religious sect. The trial court authorized service, based on allegations that the PRC's President outlawed Falun Gong in 1999. He allegedly authorized ensuing the torture of its members as well as forced labor,

re-education, and murder of various members in the PRC. He was served in Chicago. He failed to respond. Plaintiffs applied for a default judgment. The US government then intervened to assert the Head of State immunity on his behalf. The trial court granted the requested dismissal. The federal appellate court's 2004 affirming opinion commented, in no uncertain terms, that:

"[I]t is a guiding principle ... in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs." ... "Separation-of-powers principles impel reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy." The determination to grant or not grant immunity can have significant implications for this country's relationship with other nations. A court is ill-prepared to assess these implications and resolve the competing concerns the Executive Branch is faced with in determining whether to immunize a head of state.

... Pursuant to their respective authorities, Congress or the Executive Branch can create exceptions to blanket immunity. In such cases the courts would be obliged to respect such exceptions. In the present case the Executive Branch has recognized the immunity of President Jiang from the appellants' suit. The district court was correct to accept this recognition as conclusive.¹⁰¹

3. Other Government Officials The leading treaty, on the degree to which government officials are entitled to their historical immunity from criminal prosecution, is the Statute of the International Criminal Court (ICC). In ICC proceedings, governmental capacity is irrelevant when an individual commits an international crime within the court's jurisdiction. The International Court of Justice, a court that hears only cases between States [§8.4.C.], addressed this issue in the Arrest Warrant opinion below.

The UN Charter provides—and the International Court of Justice refers to—the principle that a State may not exercise its authority on the territory of another State because of sovereign equality among all UN member States. No Belgian official went into the Congo to arrest the Congo's Foreign Minister. No other country had arrested him. It was evident that there was a strong *prima facie* case that he committed

the crimes charged. One might argue that the ICJ thus overreacted to Belgium's attempt to enforce the provisions of the clearly applicable substantive rules of international human rights law [§10.2.B.]. So one might question whether International Law *should* be applied to circumvent Justice Guillaume's rationale for concurring in the dismissal of this case. The majority's opinion did not fully address the potential application of the Belgian law beyond its borders as a possible violation of International Law. This feature of the case is presented in the French President's separate opinion, as set forth in §5.2.F of this book.



**Case Concerning the Arrest
Warrant of 11 April 2000**
(Democratic Republic of the
Congo v. Belgium)

INTERNATIONAL COURT OF JUSTICE
General List No. 121 (Feb. 14, 2002)

Go to Course Web Page, at:

<<http://home.att.net/~sломansonb/txtcsesite.html>>.

Under Chapter Two, click Arrest Warrant.

The above *Arrest Warrant* case's majority Paragraph 61 exception, which *would* authorize trial of a government official without violating International Law, was classically applied to a former government official in the new Special Court for Sierra Leone in May 2004. Former Head of State Charles Taylor was thus tried for war crimes. This is the first time that a former African Head of State stood trial for such crimes.¹⁰²

The German courts considered a case filed in 2004 against US Secretary of State Donald Rumsfeld, regarding Iraq's Abu Ghraib prison scandal. The New York-based Center for Constitutional Rights (CCR) and Berlin's Republican Lawyers' Association asserted that there was nowhere else to go. They relied on the German Code of Crimes against International Law, which was enacted in 2002. It grants German courts jurisdiction in cases involving war crimes or crimes against humanity—when military and civilian commanders fail to prevent their subordinates from committing such acts. Before the case was dismissed, Mr. Rumsfeld canceled his planned visit to Germany.

In Round #2, a like case was filed in Germany against Mr. Rumsfeld in 2006, after Rumsfeld's resignation. It stated that the two cases were related, but that new parties had been substituted as well as new evidence. This refiling again relied upon Germany's law, which allegedly enabled the new German prosecutor to prosecute war crimes under the same German law on the grounds that the statute did not limit its application to a particular location or nationality of the defendants. Perhaps the key charging allegation was that *this* time, the US had spoken to the issue of whether it might prosecute Mr. Rumsfeld in relation to the Abu Ghraib prison scandal and other war crimes. In the interim, the US Congress had passed the 2006 Military Commissions Act [textbook §9.7.C.]. It retroactively barred the prosecution of Americans in US courts under the Act.

In October 2007, the International Federation for Human Rights began Round #3—along with several other entities. These were the Center for Constitutional Rights that sponsored Rounds #1 and #2 above; the European Center for Constitutional and Human Rights; and the French League for Human Rights. Their complaint was filed with the Paris Prosecutor before the Paris Court of First Instance. They charged former Secretary of Defense Rumsfeld with ordering and authorizing torture [a crime that is covered in §9.6.B.4(d–e), and §9.7(a).] while he was the US Secretary of Defense. These attempts at national prosecution were spawned by the inability to prosecute such matters against such US officials because of treaty-based problems with International Criminal Court jurisdiction over US citizens [Art. 98 treaties: textbook §8.5.D.4.].¹⁰³

4. Diplomats The immunity of State diplomats and consular officials is established by treaty. The relevant Vienna Conventions are provided in §2.7.E.

5. Military Forces An *occupying* foreign military force is not subject to prosecution in the tribunals of the occupied nation. This does not prevent responsibility under International Law, per the Laws of War [§9.6.]. In most cases, however, State A's military force is present in State B via the invitation and consent of State B. Historically, only State A could prosecute a State A soldier or civilian dependent who committed a crime in State B—on or off State A's military base in State B.

Post-World War II pressures arose which cast doubt on the practical utility of this feature of absolute immunity,

especially for sensational crimes that sparked local attention. A classic illustration arose in Japan and Great Britain when US military dependents (spouses) killed their US husbands who were on active military duty in those countries. In this situation, the degree of jurisdiction of any State A or State B tribunal depends on treaties known as Status of Forces Agreements (SOFA). Years before these homicides, the US-Japan-UK SOFAs provided that military dependents would be tried by a federal statute known as the Uniform Code of Military Justice (UCMJ). This code does not provide for a civilian jury of one's peers as required by the US Constitution for civilian defendants. These women were thus freed because, at the time, there was no law under which to try them. The US Supreme Court held that the SOFAs, which relied on UCMJ proceedings to try the wives, were applied in a manner that violated the wives' right to a civilian jury of their peers.¹⁰⁴

For crimes arising under International Law, the International Criminal Court (ICC) Statute does not deprive the ICC of jurisdiction when the potential defendant is in the military (or a Head of State). However, Article 98 provides for complete immunity from an ICC prosecution when there is a treaty agreement barring either local prosecution of the defendant or extradition from the detaining country to the ICC.

National courts occasionally consider cases filed against military leaders. In May 2003, a Belgian trial court considered a case filed against US General Tommy Franks, who was commander of US forces during the Iraq War. Nineteen Iraqis claimed that they were victims of cluster bombs and US attacks on ambulances and civilians. Belgium's Foreign Minister condemned this lawsuit as an abuse of "universal jurisdiction" [textbook §5.2.F.] because of the overly broad statute *then* available in Belgian courts.¹⁰⁵

A US court considered, but dismissed, a case filed against Israel's former Head of Army Intelligence. The complaint sought money damages for relatives of Lebanese civilians, who died or were injured in a UN compound in southern Lebanon. Israel's semi-autonomous Army Intelligence air force was waging a battle against Hezbollah during its cross-border intelligence-gathering operation. The military commander of this force was available for service of process while visiting the US as a fellow at a Washington, DC think tank. The trial and appellate courts dismissed this case for lack of jurisdiction, citing the US Foreign Sovereign Immunities Act of 1976 (discussed in

subsection 2.6.B., immediately below.)¹⁰⁶ The defendant was considered an agent of Israel and thus not subject to suit in US courts.

6. Civilian Contractors In 2006, the US Uniform Code of Military Justice (UCMJ) became applicable, for the first time, to private US contractors. This loophole was closed in the aftermath of various prison scandals in Iraq and other military and Central Intelligence Agency venues [textbook §1.1.B.2.]. In the first military prosecution of a civilian since the Viet Nam War, an Iraqi-Canadian translator was tried and convicted of stabbing another contractor on a base near Baghdad. The application of the amended UCMJ now makes it easier to prosecute such individuals in theaters where Congress has not formally declared war.

Prior to 2006, civilian contractors were beyond the reach of either military or civilian prosecutors. The Geneva Conventions containing the Laws of War were not applicable [text §9.6.]. This void meant that such contractors were generally immune from prosecution for violating those laws when acting in another country in ways which did not harm the sending nation's soldiers. Some are being prosecuted under laws designed well before this form of liability had been considered by US courts.¹⁰⁷

B. RESTRICTIVE IMMUNITY

The entry into force of the Statute for the International Criminal Court effectively restricted the absolute immunity historically enjoyed by heads of State. The foregoing International Court of Justice Belgian *Arrest Warrant* case lists various contemporary exceptions to the traditional immunity of other government officials. These limitations in criminal jurisdiction were actually predated and influenced by a parallel development in commercial matters after World War II. That is the revision of what *was* the historical rule of *absolute* sovereign immunity when a State was engaged in "for-profit" business ventures.

1. National Policy Shift In 1952, the US government led the way by shifting from an across-the-board *absolute* immunity approach for its civil cases to one of *restrictive* immunity. Foreign governments would thereafter be immune from suit in US courts *only* when the sovereign was acting like a sovereign and not a private merchant. For most of its history, however, US courts granted foreign states complete immunity from civil

suits in US courts. Gradually, as international business evolved after WWII, one could sue foreign states in US courts but only in very limited circumstances.

The specific determinations were generally left to the State Department until Congress enacted the Foreign Sovereign Immunities Act of 1976 (FSIA). It sought to codify the exceptions to sovereign immunity which had evolved since WWII. The FSIA now provides the sole basis for obtaining jurisdiction over a foreign state—or its “instrumentalities,” such as its corporate entities—in US courts. It was amended in 1996 to expose a half dozen “terrorist” States to suit.

The Act generally does not apply to individuals. For example, a former Somali government official tortured Somalis before moving to the US. They sued him under legislation providing a US remedy in these circumstances [textbook §10.6.C.2.–3.]. The FSIA does not insulate such individuals. So he could not cloak himself with its immunity, particularly because he was no longer associated with the Somali government.¹⁰⁸

The lack of sovereign immunity for these nations created additional financial pressure for achieving US policy objectives. In one such case, Iran was ordered to pay \$2,600,000,000 for Iran’s role in the 1983 Marine barracks bombing in Lebanon that killed 241 US Marines. Although Hezbollah carried out this attack, Iran was found to have supported it with financial and logistical assistance. Iran did not respond to this suit. However, Iranian assets in the US may be accessed to collect at least part of the September 2007 judgment. In the words of the court: “this extremely sizeable judgment will serve to ... sound the alarm to the defendants [including the State or Iran] that their unlawful attacks on our citizens will not be tolerated.” In a like ruling, Sudan could not obtain a dismissal of a US case involving its role in the October 2000 Yemen bombing of the U.S.S. Cole.¹⁰⁹

The UN Jurisdictional Immunities Convention was invoked in 2006, by the Japanese Supreme Court. Its members overruled seventy-eight years of its foreign sovereign immunity jurisprudence. Since 1928, it had been impossible to collect payment in Japanese courts from diplomats for purchases that had some relation to their official business. In its July 2006 opinion, the Supreme Court referred to the UN Convention as evidence that Customary International Law no longer provided immunity to foreign sovereigns for civil cases regarding acts unrelated to their sovereignty.¹¹⁰

Under the *contemporary* restrictive theory of sovereign immunity, most States no longer automatically extend absolute immunity to foreign government-owned or operated entities. An entity operated by a State, in its capacity as a trader competing with other private merchants, is not *necessarily* given immunity from suit under the newer restrictive theory of sovereign immunity. As illustrated in the following materials in this section, *this* application of sovereign immunity analysis affects a State engaged in a commercial enterprise as opposed to conduct that can be undertaken *only* by a sovereign nation (such as declaring war). For example, the US-based Boeing and Lockheed corporations are private corporations that build military aircraft. They may benefit if the US government decides to engage in a military conflict with another nation. But only the US government has the legal competence to engage in military combat as opposed to either of these private corporations, which could not require a flight unit to fly sorties into a combat theater.

Assume that a foreign government owns the company that builds its warplanes (e.g., in a communist society where there is no *private* property). That government-owned company orders parts from Lockheed or Boeing. It fails to pay for those parts as promised. Formerly, the US companies would not be able to sue that foreign government or its State-owned entities in a US court for breach of contract. A US court would not be permitted to hear the merits of such a claim because of the old rule, which provided for the absolute immunity of a foreign government from a suit in a US court. Today, the foreign government and/or its State-operated instrumentality will *not* be immune from a suit in a US court. That this government was contracting for the *public* purpose of defending itself is now virtually irrelevant. That foreign government effectively placed itself in the position of a private defense contractor who owes money to the US company for the delivered parts.

Certain States, such as the PRC, still adhere to the absolute immunity theory.¹¹¹ Most States currently apply some form of the restrictive standard for resolving sovereign immunity questions. Western nations typically restrict a foreign sovereign’s immunity from suit based on how the State is *acting*, rather than its disclosed *purpose*. Major differences are fabricated on distinctions like whether the State’s conduct is: (1) sovereign versus private; (2) public versus private; (3) commercial versus noncommercial; or (4) political versus trade-related.

These enumerated distinctions are easily stated but difficult to apply. In a commonly-cited US restatement of the circumstances required to grant immunity from suit, a federal court appeared to articulate an immunity test (for those situations where the executive branch has not spoken) in cases involving: (a) administrative acts within the United States, such as expulsion of an alien; (b) legislative acts such as nationalization; (c) acts concerning the armed forces; (d) acts concerning diplomatic activity; and (e) any public loan.

Now consider an Austrian Supreme Court case to see if the Austrian court should have also found sovereign immunity if it had applied the above standard. In the relevant passage in the court's opinion:

The plaintiff was an Austrian citizen whose automobile was damaged in a collision with a car owned by the U.S. government in Austria. The driver of the U.S. car was delivering mail to the U.S. embassy. The lawyer for the U.S. claimed sovereign immunity from suit in the Austrian courts, premised on the underlying purpose of the trip. The lower court, and the Austrian Supreme Court, allowed the case to proceed, however. It was the act of driving itself, rather than its underlying purpose, that would shape the scope of sovereign immunity in Austrian foreign sovereign immunity analysis. Any qualified driver can drive a car on an Austrian highway. Negligence on the highway, not the underlying purpose of delivering U.S. government mail, therefore vitiated sovereign immunity for the U.S. in the Austrian courts. As stated by the Austrian Supreme Court: "We must always look at the act itself which is performed by State organs, and not at its motive or purpose. We must always investigate the act of the State from which the claim is derived. Whether an act is of a private or sovereign nature must always be deduced from the nature of the legal transaction ... the action taken or the legal relationship arising [as from the collision on an Austrian highway]. ..."

[T]he act from which the plaintiff derives his claim for damages against the defendant is not the collection of mail but the operation of a motor car ... and action as a road user. By operating a motor car and using the public roads the defendant moves in spheres in which private individuals also move.¹¹²

The Austrian courts emphasized the nature of the particular act that resulted in the damage to the Austrian

plaintiff—not the US government's underlying purpose for using the Austrian highways. The act in question was picking up and then delivering embassy mail. The Austrian court distinguished between private and sovereign acts. The delivery of mail to the US embassy in Austria could be considered a sovereign act of the US government; however, the underlying act was merely driving a car on an Austrian highway. That was characterized as a "private" act.

Judges typically apply a two-step process when analyzing the scope of sovereign immunity: (1) Is the entity claiming this defense a "State" for purposes of a sovereign immunity analysis? (2) Is the entity's conduct, which is the reason for the suit, really sovereign, or essentially commercial in nature? If the activity is "sovereign," then the case is normally dismissed. If "commercial," then the State is acting in a way that a private citizen trader may act, thus requiring the State to litigate the underlying claim on the merits. This analysis often presents a very close question as illustrated in the following priest-pedophile case regarding the immunity of the Holy See (Vatican) in US courts:¹¹³



John V. Doe v. Holy See

UNITED STATES COURT OF

APPEALS FOR THE NINTH CIRCUIT

557 Federal Reporter 3d 1066 (2009)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Two, click on Vatican
Sovereign Immunity.

Most sovereign immunity questions involve acts of a recognized State or one of its agencies, undertaking some activity abroad that results in a suit against it in another nation's courts. An aggrieved individual has the power to immediately file a suit to recover the alleged losses. Resorting to one's home country for diplomatic representation may be far more time consuming—assuming that the home State is willing to undertake its citizen's plea for help.

Perhaps the most dramatic example in US history is presented below. When reading it, consider whether sovereign immunity should be discarded as a vintage anachronism because it is a holdover from an era when

States did not do business to the extent that they do today. On the other hand, sovereign immunity may serve a utilitarian purpose in international relations. When a judicial entity proceeds with such a suit, there is always the risk that the proceedings may offend the sensibilities of another nation. Some situations are best handled via executive branch diplomacy.

The contemporary law of sovereign immunity is not uniformly perceived by the various legal systems of the world, nor necessarily even by American judges. In this case alone, the trial, intermediate appellate, and Supreme Courts all differed on whether Saudi Arabia's sovereign immunity was waived by its recruiting and training employees in the United States. At the Supreme Court level, the justices were intensely divided on the question of whether the victim's claim, seeking money damages because of torture at the hands of Saudi government agents, should be dismissed on the technical basis that the relevant legislation protects even this egregious governmental conduct from being aired in an American courtroom.

Only five of the nine justices agreed with the "majority's" opinion written by Justice Souter. One of those nine justices agreed with most, but not all, of the opinion. Two of them concurred with the result, but disagreed with some of the reasoning. Four justices concurred in part and dissented in part. Needless to say, the sovereign immunity shield is not uniformly handled, even by judges on the same court (all of whom were well schooled in the same nation's legal system).



Saudi Arabia v. Nelson

SUPREME COURT OF
THE UNITED STATES
507 U.S. 349 (1993)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.
Under Chapter Two, click on Saudi Arabia v. Nelson.

Claims regarding Saudi Arabia's violations of International Law still abound. In September 2005, a New York federal court considered claims filed by "9-11" survivors and insurance carriers against Saudi princes and a charitable organization—previously labeled a Specially Designated Global Terrorist Entity by the US Treasury

Department. The princes were dismissed on sovereign immunity grounds, but not the referenced organization known as the Rabita Trust. The case was continued as to this entity, in deference to the above executive branch designation.

In a June 2006 case, a United Kingdom House of Lords decision considered credible UN Torture Convention allegations against Saudi Arabia. The court acknowledged the conflict between these competing goals: (1) nations enjoying sovereign immunity in each others' courts, so as to facilitate good relations; versus (2) one nation's courts effectively ignoring violations of the UN Torture Convention by agents of the other State hoping to avoid such air-the-dirty-laundry lawsuits regarding torture outside of the forum. This highest English tribunal was not impressed by US practice which authorizes the assumption of extraterritorial civil jurisdiction under the US Alien Tort Statute and the related Torture Victims Protection Act. Lord Bingham thus quoted from the Joint Separate Opinion of three of the judges in the International Court of Justice *Arrest Warrant* case [textbook §2.6.A.]: "While this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally." Bingham referred to the US practice as a "unilateral extension of jurisdiction ... which is not required and perhaps not permitted by customary international law."¹¹⁴

2. Organizational Attitudes In 1976, signatories to the European Convention on State Immunity therein expressed their concern about this tendency to restrict the cases in which a State may claim immunity before foreign courts. Under Article 2 of this treaty, a State party cannot claim immunity from the jurisdiction of a court of another contracting State if it has undertaken to submit to the jurisdiction of that court either: (a) an international agreement; (b) an express term contained in a contract in writing; or (c) an express consent given after a dispute between the parties has arisen. The essential theme was to ensure that a State would have to give its express consent to being sued in the courts of another European State.¹¹⁵

The UN's 2004 Convention on Jurisdictional Immunities of States and Their Property was adopted by the General Assembly. It is not yet in force because it lacks the required thirty State ratifications. It resembles the 1976 US Foreign Sovereign Immunities Act addressed

in subsection B. below. Per the UN draft's preambular linchpin: "A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention." The exceptions include an express waiver of sovereign immunity, filing or intervening in another State's judicial action, commercial transactions or personal injuries (see *John V. Doe v. Holy See* above), contracts of employment (see *Saudi Arabia v. Nelson* below), and the ownership, possession, and use of property.¹¹⁶

Under Article 21, however, property of the central bank or other monetary authority of the State is not subject to attachment. This would preclude the seizure of a State A's banking assets present in State B, pursuant to any State B judicial processes (unlike the US Foreign Sovereign Immunities Act described in the referenced cases below).

A recurring anomaly of the UN presence in New York City is the city government's perennial attempts to tax the properties of lower-level diplomats. New York law exempts taxes on property directly related to the foreign nation's sovereign activities if used *exclusively* by the leading foreign ambassador. The City has instead sought to tax premises used by other employees. The Permanent Mission of India to the UN, for example, rents a twenty-six story building in Manhattan. Twenty floors contain residential housing for India's lower level diplomatic employees and their families. Article 13 of the 2004 UN Immunities Convention provides that a foreign State cannot invoke immunity from jurisdiction before a court of another State in a proceeding about "any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum." In 2007, a US Supreme Court split opinion held that New York City could thus tax the majority floors in the Indian diplomatic mission. Nothing in the Vienna Convention on Diplomatic Relations, the US Foreign Sovereign Immunities Act, or any other instrument precluded the City from taxing India.¹¹⁷ The Court did not cite the UN's Jurisdictional Immunities Convention, which is not yet in force.

The UN's International Law Commission (ILC) presented its Draft Articles on Jurisdictional Immunities of States and Their Property to the General Assembly in 1991. Article 10.1 contains the following State immunity articulation: "If a State engages in a commercial transaction with a foreign natural or [corporate] juridical

person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction."

The General Assembly adopted the ILC's final draft, which was opened for signature by UN State members between 2005 and 2007. This ILC draft is evidence that State practice has generally shifted from absolute to restrictive immunity in civil cases—undoubtedly for commercial transactions and probably, for most negligence-based harms to individual and corporate plaintiffs.¹¹⁸ The ILC's draft articles on State responsibility for other types of conduct were addressed above in §2.5 of this chapter.

◆ §2.7 DIPLOMATIC RELATIONS

A. INTRODUCTION

This section of the chapter on States describes the working environment and legal status of diplomats, foreign travelers, and others who are protected by International Diplomatic Law. You will explore how diplomatic relations are initiated and broken. The fundamental questions include: What is the nature of diplomatic and consular functions? What is the legal effect of acts within an embassy that do not conform to the laws of the host country? What are the relevant legal principles governing the famous cases involving diplomatic asylum? Do newspaper stories and books—like the foregoing excerpt—fairly depict supposedly deplorable situations where some diplomat has avoided civil or criminal prosecution?

1. Historical Evolution For centuries, special envoys have represented the interests of their rulers in other regions of the world. A treatise apparently written in 300 BC described Greek practice in 800 BC. There were already three categories of what we now call diplomats, consuls, and couriers: those with ministerial rank, those with slightly lesser rank, and the conveyors of messages. The Greek city-states developed lasting rules of diplomatic exchanges, inaugurating the practice that protected messengers who brought bad news from distant lands.¹¹⁹

Around AD 1500, permanent representatives called "ambassadors" were first established in Italy. This institution then flourished elsewhere in Western Europe although other nations resisted it for several more centuries. As

chronicled by London School of Economics Professor M. S. Anderson:

[B]y the middle of the fifteenth century there were clearly taking root in Italy new diplomatic techniques and institutions. These formed the basis of a system of interstate relations recognizable as the direct ancestor of the one which exists today. ... [M]ost of the Italian peninsula was divided between a fairly small number of relatively well-organized states. ... These competed with one another intensely for power, for territory, [and] in the last analysis for survival. It was therefore essential for their rulers to watch closely each other's doings and to be as well informed as possible about each other's policies and ambitions. ... In Italy it was therefore possible to raise day-to-day government to a high pitch of efficiency, to control the territory of these states effectively from a single centre, in a way which was still impracticable in France, Spain, or the growing Habsburg [dynasty in Hungary]. ...

Fifteenth-century Italy, then, was in miniature what in the following hundred years most of western Europe and later the rest of the continent [and modern diplomacy] was to become.¹²⁰

The 1814–1815 Vienna Congress focused on the norms for engaging in international diplomacy. Most European States thereby established the mutually acceptable institutions that governed their international relations. Previously considered a somewhat discredited activity, diplomacy was finally perceived as a very positive institution. Preventative diplomacy was viewed as a vehicle that would not necessarily prevent war, but would serve the long-term interests of the international community.

2. Diplomatic Roles States are expected to employ diplomatic alternatives before resorting to international courts or the use of force. In 1957, the International Court of Justice (ICJ) aptly articulated this practical norm when India objected to Portugal's premature filing of a case against India in the ICJ. The Court's formulation of this principle was that "Portugal, before filing her application in the present case, did not comply with the rule of customary international law requiring her to undertake diplomatic negotiations and continue them to the point where it was no longer profitable to pursue them. ..." ¹²¹ The diplomatic function is not only to

prevent the premature resort to third party resolution. It is primarily to prevent disputes from escalating into violent conflicts.

Some of the world's presidential administrations consider diplomacy a strategy of the weak. Others relish it, to exemplify that with great power comes great responsibility. Congressman Howard Berman, Chairman of the US House of Representatives Foreign Affairs Committee, thus introduced legislation for fiscal years 2010 and 2011 as follows: "Defense, diplomacy, and development are the three pillars of our national security. But in recent years, diplomacy and [economic] development have been short-changed. In order to meet the aims of American foreign policy, we need to rebuild capacity in these critical areas."¹²²

B. DIPLOMATIC ESTABLISHMENT

1. Establishing Relations

(a) Motivation Some States or governments, whether *de jure* or *de facto* entities, may purposefully have no diplomatic relations at all—with minimal prospects for change. The prime example would be the Arab nations involved in the 1954 economic boycott of Israel. That saga was premised upon the non-recognition of Israel's right to exist. Some members have since changed their policies toward Israel by establishing diplomatic relations with it. Another example was spawned by the Cuban nationalization of US properties after Fidel Castro came to power in 1959. Since then, successive US presidential administrations have implicitly attempted to achieve a similar result, so as to drive Fidel Castro's government (and now, that of his brother) from power [US and Cuban legislation: §12.1.B.6.].

Syria and Lebanon decided to establish full diplomatic relations in August 2008. Syria essentially controlled Lebanon for a thirty-year period after sending its "peacekeeping" troops into Lebanon during the latter's 1975–1990 civil war. Syria also stands accused of arranging the assassination of Lebanon's prime minister in 2005. Beirut gave the Damascus-allied organization Hezbollah a strong say in Lebanese affairs. Syria expressly disavowed claims that it considered Lebanon Syrian territory.

China and Taiwan have had an intensely stormy relationship since the Communist takeover of China in 1949. In June 2008, each decided to establish permanent offices in one another's territory with a view toward establishing closer ties—or, at least, being able to talk to

the enemy. This will not likely result in full diplomatic relations, however. China has demanded reunification for decades. Taiwan will likely retain its current posture: not formal independence, but not reunification. De facto diplomatic relations is the likely outcome of this thawing of relations.

When two States agree to establish diplomatic relations, they first exchange representatives, who usually work in the respective capitals of each State. The representative is often referred to as “ambassador,” “minister,” or “head of mission.” A *chargé d’affaires* is normally the second-ranking official in the delegation. He or she takes charge of the mission and the premises in the absence of the primary diplomat.

No State has established diplomatic offices in every other State of the world. Many consulates and embassies have closed for financial reasons. The US maintains approximately 140 embassies abroad. It hosts about 130 foreign embassies in Washington, DC. The US also maintains more than 100 “consular posts” to deal with commercial matters throughout the world. Certain States, however, can afford embassies in only a few places. In 1993, the Philippines announced that it would close its consulates in a number of US cities. It also closed its embassies in Cuba, Jordan, Micronesia, Morocco, Peru, Poland, Romania, Senegal, and Sri Lanka.

Certain financially-disadvantaged States must use the same diplomatic premises as a number of others. Conversely, some States have no diplomatic presence and often rely on their UN mission in New York (or Geneva) to promote their diplomatic interests in other countries.

The host State may close or withhold occupancy of an embassy—without necessarily breaking diplomatic relations. Some prominent examples include the following:

- ◆ The US directed Eritrea to close its consulate in Oakland, California in August 2007. This responded to Eritrea limiting US consular operations in its city of Asmara.
- ◆ The US closed Rwanda’s Washington embassy in July 1994. Rwanda’s diplomats were ordered to leave the US with only five days’ notice. (The US then sought to remove the Rwandan representative from the UN Security Council.) President Clinton explained that the US was not breaking formal ties with Rwanda, but attenuating relations to a lower level of interaction. He explained that the “US

cannot allow representatives of a regime that supports genocidal massacres to remain on our soil.”

- ◆ In 1990, the military government of Lebanon was no longer recognized by the US. Despite claims emanating from “leaders” in Lebanon, the US refused to allow Lebanon’s former representative to occupy the Lebanese embassy in Washington.
- ◆ In 1981 and 1992, China downgraded the Beijing missions of France and the Netherlands, respectively, because of their sales of fighter planes and submarines to Taiwan.

Accreditation often becomes a problem during the postwar occupation by another country. Shortly after the first phase of the 2003 Iraq War, there were a number of foreign diplomats in Baghdad. These diplomats had been accredited to, and by, the regime of Saddam Hussein. Many still resided in former mission residences in Iraq. The US State Department’s position was as follows: “They’re accredited to a regime that is no longer existent, and, therefore, their accreditation would have lapsed.”¹²³

The *location* of the diplomatic premises may signal a political rift. Foreign missions are normally located in the capital city of the host State. Massachusetts Avenue, in Washington, DC, is commonly referred to as “Embassy Row.” There are a large number of foreign missions on that street.

In Israel, most States have located their diplomatic premises in Tel Aviv. They do not recognize Jerusalem as the capital of Israel, as claimed by Israel since 1950. In 1993, the essentially Muslim State of Kyrgyzstan established its embassy in Jerusalem—which is essentially a religious center for Muslims. Only El Salvador and Costa Rica had previously maintained embassies in Jerusalem. In 1998, US Speaker of the House Newt Gingrich acquiesced in a White House request that he not visit the proposed site of the new US embassy in Jerusalem. Both Israel and Palestine claim Jerusalem as their capital city. His visit could have triggered more bloodshed in Middle East peace negotiations.

(b) Exchange Process The process of exchanging diplomats begins with an “accreditation.” The State A host government must consent to the particular diplomat dispatched from State B. State B’s agent typically presents his or her “credentials” to a representative of the head of State A. The credential is a document that identifies the State B agent as State B’s official representative. State A’s

consent is confirmed by an *agrément* which indicates its approval of State B's diplomat.¹²⁴ During the failed 1991 coup by certain Russian military leaders against Mikhail Gorbachev, the ranking US diplomat refused to present his credentials to the coup's leaders. He was forced to leave Russia but was hastily replaced by a new US ambassador who immediately presented his credentials to Gorbachev as a show of US support for maintaining the democratic reforms sought by Gorbachev.

Foreign diplomats must navigate the host State's accreditation process in order to be actually "accredited." In one of the few cases on point, a Gambian citizen in Florida plead guilty to the charge of paying a gratuity in violation of US law [§12.5.A]. Gambia had designated this individual as a Special Advisor to the Special Mission in the United States. Gambia therefore claimed diplomatic immunity under the Vienna Convention on Diplomatic Relations. A federal judge denied that request, however. Gambia had not submitted Mr. Sissoko, or his credentials, for certification by the US Department of State. Thus, there had been no performance of the accreditation process set forth in the Convention and the governing host-State Diplomatic Relations Act. There is a UN Convention on Special Missions. As it had not been signed by Gambia, it could not be proffered by this "Special Advisor" as evidence of his diplomatic status.¹²⁵

2. Breaking Relations

Diplomatic relations, once established, do not always proceed smoothly. An adverse development in the international relations between two States may occur. A diplomat may act in a manner considered unacceptable to the host State and then may be asked to leave—with or without specified reasons. The host State would thus declare the sending State's diplomat *persona non grata* (unwelcome), necessitating his or her departure. For example:

- ◆ On the eve of the 1991 UN-imposed Iraqi departure date from Kuwait (and the ensuing Persian Gulf War), Iraq's ambassador was summoned to the US State Department in Washington and advised that he must reduce the size of his diplomatic staff to four people who could travel no farther than twenty-five miles from their embassy. The rest of the staff was ordered to leave the US, including the Iraqi ambassador himself. While the US did not then "break"

diplomatic relations with Iraq, it closed the US Embassy in Baghdad (which now hosts the largest embassy in the world—the US Embassy).

- ◆ In September 2007, Sudan expelled all top-level diplomats from Canada and the European Union. Certain Sudanese officials have been indicted by the International Criminal Court. There have been a number of UN Security Council resolutions relating to Sudan's human rights atrocities in its Darfur region. Nevertheless, Sudan expelled these diplomats for their "meddling in its affairs" because they were doing what diplomats do—attempting to obtain further details about Darfur.
- ◆ Turkey is a staunch US ally in the War on Terror. It has been a NATO ally for over a half-century. Then in October 2007, a US House on Foreign Relations Committee vote condemned the World War I mass killings of Armenians in Turkey as "genocide." Turkey then withdrew its ambassador from Washington. It also threatened to withdraw its support for the Iraq War. The Turkish Government described the committee decision as "irresponsible ... at a greatly sensitive time." The July 2008 bombing of the US Consulate in Istanbul by Turkish assailants was immediately attributed to Al-Qaida. That group's signature attack, however, is a suicide bombing causing mass civilian casualties—as opposed to one car, containing four gunmen who assaulted this diplomatic enclave. Hypothetically, were the Turkish government inattentive to a heightened security risk, its inaction could spawn State responsibility for failing to protect the US diplomatic premises.
- ◆ In September 2008, Bolivia expelled the US Ambassador. He was accused of supporting Bolivian rebel groups, allegedly exemplified by his granting of asylum to Bolivian officials who have fled Bolivia. The US responded by declaring Bolivia's ambassador to the US *persona non grata*. The US had just done so with Venezuela's ambassador to the US. Venezuela's President entered the fray by declaring that he intended to expel the US Ambassador from Venezuela—so as to express Venezuela's solidarity with Bolivia against the US, and to fight fire with diplomatic firing.

Not all States follow this customary practice of merely withdrawing a particular diplomat's acceptability. Contrary to International Law, diplomats are sometimes held captive and have even been prohibited from exiting

the host State. During its Cultural Revolution, the People's Republic of China (PRC) withdrew the diplomatic status of a representative in the Indian embassy and forbade his departure until he was punished for the "crimes" with which he had been charged.

In a similar episode during the same period, a Dutch *chargé d'affaires* in China was declared *persona non grata*. Rather than facilitating his return to the Netherlands, China did not grant this officer an exit visa until after five months of confinement. In response to this episode, Chinese diplomats in the Netherlands remained secluded in their offices—to avoid having to testify about this affair to Dutch officials. China's actions violated both the customary practice of States and the fundamental diplomatic treaty discussed later. This incident illustrates how host States can readily interrupt and interfere with the normal conduct of diplomatic relations.¹²⁶

Suspension or termination of diplomatic relations is a discretionary State practice. International Law does not require a legal basis for such disruptions. States may abruptly refuse to deal with each other. The sending and host States may opt to recall their respective diplomatic agents. During the student demonstrations in Beijing in 1989, the US did not break diplomatic relations with China. The US did prepare its diplomats to leave Beijing for their safety—an action designed to demonstrate the US protest of the massacre of students seeking democratic reform in China.

The extent of the traditional host-State discretion to accredit foreign diplomats is currently being tested in the International Court of Justice (ICJ). In 2006, Dominica filed an action against Switzerland. The person in question is Dominica's envoy to the UN's Geneva location. The question is whether Switzerland can revoke this diplomat's status in his capacity as a UN, as opposed to State-to-State, diplomat. Dominica claims that Switzerland cannot thus control this envoy's status by claiming he is a businessman undertaking primarily commercial activities in Geneva. The ICJ's decision will clarify the host State's rights and duties in this unique litigation.¹²⁷

In 1979, the US recognized the government of the PRC as the political entity responsible for "China." The US continued to maintain diplomatic relations with Taiwan. The latter is treated as a State. It is permitted access to US courts—unlike the PRC and the former Soviet Union when they were not recognized by the US. Prior to 1993, when mainland China and Taiwan took some preliminary steps to resolve forty

years of political hostility, their proximity required unofficial communications on a regular basis—notwithstanding lack of diplomatic ties and their mutual non-recognition.¹²⁸ As succinctly described by the University of Leicester's G. R. Berridge: "Intermediaries are valued by hostile states seeking some kind of accommodation when at least one of the parties regards the political price of direct talks as unacceptably high, or believes that the participation of a third party in any negotiation with its enemy will bring it material gain and additional security from any settlement."¹²⁹

St. Lucia moved in the opposite direction in May 2007. It severed its ten-year relationship with the PRC. It restored its diplomatic relations with Taiwan. This may be the Mouse That Roared. Both nations have been courting the tiny Caribbean island of St. Lucia, one of the world's smallest nations. As the PRC's perspective is that there is no space, anywhere in the world, for Taiwan, this development has effectively pitted one of the smallest nations against one of the biggest.¹³⁰

3. Broken Relations Severing diplomatic ties does not necessarily cut off the continuing need to deal with each other—even when there are no "official" links. This unconventional diplomacy—when States and other entities without diplomatic relations must nevertheless talk to the enemy—is a worldwide phenomenon. This form of diplomatic exchange is the product of the need for communication between States or other entities publicly at war but privately seeking a reconciliation or some other mutually recognized objective.

One of the more common devices for this shadowy form of diplomacy is to employ the diplomatic corps of third parties who enjoy good relations with both hostile States. Cuba and the US have had indirect dealings with each other ever since Fidel Castro assumed political power in 1959. The US broke diplomatic relations with Cuba, but the Swiss and former Czechoslovakian embassies in Havana exchanged information on behalf of the US and Cuban governments for many years. The Cuban Interest Section of the former Czechoslovakian embassy in Washington, DC, also acted as a go-between in such matters.

Nations sometimes retain their consular ties, notwithstanding the lack of official diplomatic ties. In August 2008, for example, Georgia and Russia broke diplomatic ties. Russia had conducted a military action in Georgia and recognized the latter's breakaway prov-

inces of Abkhazia and South Ossetia. Any Russian-Georgian diplomatic connection would have to be handled by third parties. But they decided to retain their consular offices in each other's territories. Two months before, the US Department of State first considered establishing an Iranian Interest Section in Tehran. It would operate like the US Cuban "Interest Section," which has operated in Havana since 1977. (The Iranians operate their own interest section in Washington, DC) But the US opted not to do so in October 2008, with a view toward not impacting the next president's decision on whether to establish a US outpost in Iran.

In March 1995, an Iraqi court sentenced two Americans to an eight-year prison term because they strayed into Iraqi territory during a visit with friends in the demilitarized zone between Kuwait and Iraq. The US and Iraq had no official diplomatic ties. Poland had such ties with both countries. Its diplomats served as go-betweens to negotiate the release of the US citizens. The Swiss also assisted Iran when unmanned US surveillance drones overflew Iran during the winter of 2005, seeking evidence of a nuclear weapons program. Iran lodged its formal protest with the US via the good offices of the Swiss government.

States also undertake other forms of unconventional diplomacy when they do not recognize one another. Israel and the Palestine Liberation Organization secretly communicated for many years before their 1993 Washington peace accord. The United Kingdom and Sinn Féin (the non-governmental organization seeking independence for Northern Ireland) engaged in private negotiations before the 1994 announcement of their new working relationship. The clandestine methods for international communication include disguised embassies and ceremonial occasions such as the "working funeral" when a prominent dignitary has died.

Some countries have no official relations. Before the US attacked Afghanistan in response to 9-11, there were no diplomatic ties (nor during the prior Soviet occupation). Pakistan was one of only several nations that recognized Afghanistan's fundamentalist Taliban government. After the war's commencement, the Taliban ambassador to Pakistan remained in Pakistan, gave press conferences, and ultimately requested asylum. Pakistan refused. A brief but notable period passed, during which he did not return to Afghanistan. Pakistan then handed him over to the United States. He was transferred to a US warship and taken to the Guantanamo Bay detention

facility in Cuba where he remained until released in September 2005. He is now under house arrest in Afghanistan. Although his prior status as an ambassador requesting asylum was murky, one could argue that Pakistan or the US should have returned him to Afghanistan as a diplomat entitled to protection under the V.C.D.R. On the other hand, his asylum request, Pakistan's denial, and his choosing to remain in Pakistan all suggest that he had effectively relinquished his protected status.

The respective 1961 and 1963 Vienna Conventions are the current encyclopedias of diplomatic practice. They are the core materials for this section of the chapter on States.

4. Restored Relations In July 2008, Kuwait named its first ambassador to Iraq since the 1991 Persian Gulf War. Iraq had opened its embassy in Kuwait in 2003, led by a charge d'affaires (sub-ambassador). Each country did so, notwithstanding Al-Qaida's threatening Arab countries not to open embassies in Iraq because of the perceived collaboration with US military forces in Iraq. Three months later, the Arab League resumed its diplomatic mission in Iraq. The previous envoy quit in January 2007 because Arab nations had failed to do more to ease the suffering of the Iraqi people.

The US broke relations with Libya and designated it as a "terrorist" nation because of the 1988 Lockerbie incident. Libyan intelligence agents blew up a Pan Am airplane over Scotland, killing 270 passengers [§6.3.B]. Libya's bombing retaliated for the 1986 US bombing of Tripoli. That incident was designed to kill Libya's leader (for arranging the killing of US soldiers in the 1986 Berlin discotheque bombing described in Problem 2.K below). In May 2006, the US restored diplomatic ties with Libya. After ten years, the US removed Libya from its list of States engaged in terrorism. Libya's government had previously paid ten million dollars to the families of each passenger. The US has since praised Libya for its role in assisting the US fight against Al-Qaida in the aftermath of 9-11.

C. CORE DIPLOMATIC FUNCTIONS

1. Ambassadors Protecting the interests of State A includes providing diplomatic (or consular) assistance to a State A citizen who is present in, and has allegedly been harmed by, State B or its agents [§4.2.A.]. The State A representative in State B may have to deal with a variety of problems confronting his or her fellow citizens who are visiting or residing in State B. Normally, a

diplomat deals with the host government on intergovernmental issues. While a diplomat's tasks could include making arrangements for a criminal defense or transferring of deceased individuals or their property between the host State and the home State, such details generally fall within the province of consular officials.

Diplomatic functions are globally defined in the 1961 Vienna Convention on Diplomatic Relations.¹³¹ The diplomat, especially the *Ambassador*, therefore:

- (a) represents the sending State in the receiving State;
- (b) protects the interests of the sending State and of its nationals, within the limits permitted by the receiving State's internal laws and International Law;
- (c) negotiates with the Government of the receiving State;
- (d) ascertains, by lawful means, conditions and developments in the receiving State, and reports them to the Government of the sending State; and
- (e) promotes friendly relations between the sending State and the receiving State by prodding the development of their economic, cultural, and scientific relations.¹³²

2. Consular Officials Consular officials are not usually "diplomatic" representatives. They are not generally accredited to the host State although they are official agents of the sending State. Consular officers often conduct "diplomatic" negotiations in international trade matters, however. Such matters are sometimes handled through the institution of the honorary consul. This is an individual who assists in the promotion of trade policies. He or she is typically a national of the *host* State, possessing expertise in host State business matters.

Consular officers have had a longer and more varied history than the above-described duties of the chief diplomat. Consuls once possessed broad powers in both the trade and judicial matters. However, the judicial function is now limited to any express treaty provision which may confer some judicial powers on a consular officer—such as serving notice of judicial proceedings [§5.4.]. As noted by the US Supreme Court in 1875:

the consul was originally an officer of large judicial as well as commercial powers, exercising entire municipal authority over his countrymen in the country to which he was accredited. But the changed circumstances of Europe, and the prevalence of civil order in

the several Christian States, have had the effect of greatly modifying the powers of the consular office; and it may now be considered as generally true, that, for any judicial powers which may be vested in the consuls accredited to any nation, we must look to the express provisions of the treaties entered into with that nation, and to the laws of the States which the consuls represent.¹³³

The forerunner of the modern consul appeared almost as early as people began to trade. The Preamble to the 1963 Vienna Convention (set forth below) acknowledges that "consular relations have been established between peoples since ancient times." As succinctly described by Professor Luke Lee of American University in Washington, DC:

Among the many political contributions of the Greek city-states ... [include] the early development of the consular system; the *prostates* and the *proxenos* are considered forerunners of the modern consuls. The *prostates* were chosen by Greek colonists to live abroad to act as intermediaries in legal and political relations between the foreign (Greek) colony and the local government [of a distant land]. About the sixth century BC the Egyptians allowed Greek settlers ... to select *prostates*, who administered Greek law to the Greeks. In the same period, similar institutions could be found in certain parts of India.

During the first millennium BC, *proxenoi* were appointed in the Greek city-states to look after the interests of the appointing [city-]State. The *proxenos*, though more a political than commercial agent, has been likened to the modern honorary consul, and was [thus] chosen from the nationals of the receiving State.¹³⁴

One of the most sensitive consular functions is providing access to nationals of the home State who are arrested in the host State. Denial of access, or delays, often generate friction in international relations. In 1993, for example, the US protested to Israel about its treatment of three jailed Palestinian-Americans from Chicago. They were visiting relatives in the occupied West Bank where they were arrested and confined without prompt access to either lawyers or US consular officials. The resulting US protest occurred during the period when the US was

attempting to bring Israel and the Palestine Liberation Organization together for the long-awaited peace accords (ultimately achieved in Washington several months later).

The 1963 Vienna Convention on Consular Relations contains the globally defined consular functions. Consular officials thus:

- (a) protect the interests of the sending State and its nationals, within the limits permitted by International Law;
- (b) further the development of commercial, economic, cultural, and scientific relations—and otherwise promote friendly relations;
- (c) ascertain conditions and developments in the commercial, economic, cultural, and scientific life of the receiving State—and report thereon to the government of the sending State and other interested persons;
- (d) issue passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;
- (e) safeguard the interests of nationals, including minors and other persons lacking full capacity of the sending State;
- (f) represent or arrange appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State—where such nationals are unable to assume the defense of their own rights and interests—including the transmission of judicial documents or the taking of evidence for the courts of the sending State;
- (g) exercise rights of supervision and inspection provided for in the laws and regulations of the sending State for vessels having the nationality of the foreign State, as well as aircraft registered in that State; and
- (h) assist vessels and aircraft and their crews, or take statements regarding the voyage of a vessel, examining and stamping the ship's papers, or conduct investigations into any incidents that occurred during the voyage (§6.3 “Port Tranquility” case).¹³⁵

Consular officers thus prepare trade reports, gather information relevant to international trade, and investigate alleged infractions of commercial treaties. Consuls also aid in the supervision of international shipping. Seagoing vessels must be registered to a particular country and fly that country's flag. Consuls authenticate

the registration papers of their home State's ships in the host State. Consuls help their home State's nationals resolve host State customs and immigration problems. Consuls also provide needed services to fellow citizens who become ill or indigent while in the host State. They take charge of the estates of deceased home State nationals and arrange for property distribution under the host State's laws. Unlike diplomats, consuls often directly assist their fellow nationals with *personal* problems—such as obtaining legal representation in host State courts.

All international travelers would be wise to travel with some sense of their international rights, should they be arrested in a legal system that is far different from their home nation. Roughly 2,500 Americans are detained abroad each year. As of July 2001 within the US, only four of 123 foreigners on America's death row—in the previous quarter-century—were promptly told that they could seek help from their home nation's consulate. As to the remainder, Amnesty International reported that (since 1976) at least fifteen foreign citizens had been executed.¹³⁶

The following case from the International Court of Justice illustrates how the US is expected to provide reciprocal assistance to aliens who live in or travel to the United States:



Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America)

INTERNATIONAL COURT OF JUSTICE
General List No. 128 (March 31, 2004)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.
Under Chapter Two, click Avena Diplomatic Relations.

Article 36 of the 1963 Consular treaty thus provides for consular notification when a State party arrests a foreign national. This “requirement” has spawned a number of clashes between the US and the International Court of Justice; President Bush and the governor of Texas; and the Chief Justice of the US Supreme Court and the US President. These are all addressed in

textbook §7.1.B.4., and its March 2008 principal case of *Medellin v. Texas*.¹³⁷ That case addresses which treaties are “self-executing” versus those which require implementing legislation to trigger an individual’s right to directly seek enforcement of a treaty provision.

Fearing that Jose Medellin would be executed without benefit of his Article 36 right to consul, Mexico again sought relief from the International Court of Justice (ICJ) in June 2008. The US Supreme Court denied relief on that ground in the above *Medellin* decision. Mexico asked the ICJ to issue an order that would direct the US not to execute Medellin without further review.¹³⁸ In July, the ICJ ordered the US to take all necessary measures to ensure that Jose Medellin and other named Mexican nationals currently on death row in Texas were not executed—pending settlement of the dispute between Mexico and the US over the interpretation of the judgment in the ICJ’s above *Avena* case.

The issue became moot as to this particular defendant when he was executed in August 2008. Mexico’s request is still pending as to the other fifty Mexican defendants on death row in various States of the US, who did not receive what Mexico and the ICJ deem as a requirement to reassess each defendant’s case to determine the impact, if any, of various US state authorities not providing them with timely access to their local Mexican consular officials (which the ICJ had required in *Avena*).

Texas initially advised the federal government that it did not intend to comply with President Bush’s demand that it conduct further reviews in response to the International Court of Justice *Avena* case. Texas does not, however, seek to keep all detainees in its jails. On the contrary, it has a model plan for implementing the repatriation of foreign nationals where federal treaties so provide. They may thereby serve the remainder of their terms in their home country. This model plan mandates that a correctional official notify the foreign national of this right. Other states have adopted this model plan. In California, for example, the Governor signed into law a 2005 revision, which expands state participation in the international prisoner transfer process. Under California law:

Upon the entry of any person who is currently or was previously a foreign national [naturalized citizen] into a facility operated by the Department of Corrections, the Director ... shall inform the person that he or she may apply to be transferred to serve the remain-

der of his or her prison term in his or her current or former nation of citizenship. The director shall inform the person that he or she may contact his or her consulate and shall ensure that if notification is requested by the inmate, that the inmate’s nearest consulate or embassy is notified without delay of his or her incarceration.¹³⁹

3. Summit Diplomacy There are many examples of Heads of State or their envoys engaging in senior executive exchanges. Leaders may, for example, consult on a periodic basis about matters of mutual interest. The leaders of the Group of Eight, or “G-8” industrialized nations meet annually to address matters of economic concern. [§12.3.B.]

In June 2007, the international diplomatic “Quartet” appointed the former British Prime Minister Tony Blair as its special envoy for its Middle East diplomacy. The US, UN, Russia, and the European Union thus hope to launch a new round of negotiations. His tasks include dealing with Hamas, the unrecognized organization that has both taken over Gaza and further splintered Palestine. The World Bank president left that position in 2006, frustrated with the lack of progress on regional peace.

During the April 2009 Fifth Summit of the Americas, US President Barack Obama met with the thirty-three other democratically elected Heads of State in Trinidad and Tobago. That Summit focused on hemispheric issues of general concern to all constituencies—especially the global economic crisis, climate change, energy cooperation, and crime.

Former presidents may take on a diplomatic role as well although not necessarily acting as a direct representative of their home nation. In April 2008, former President Jimmy Carter once again sought peace in the Middle East. He went to Cairo to meet with officials from Hamas, the Palestinian militant organization now in control of Gaza. He urged Hamas to control the rockets that are frequently fired from Gaza into Israel. He then proceeded to Syria for talks with Hamas and the Syrian president. This “private mission” alternative aids governments that do not wish to be perceived as negotiating with terrorists.

In February 2009, the newly-elected US Vice President extended an olive branch to both Iran and Russia. Vice President Biden told a Munich, Germany national security conference of world leaders that the Obama Administration sought a fresh start with the respective

governments. Biden confirmed that the past deterioration in international relations needed to be reversed because of a host of problems including the 2008 Georgia-Russian conflict; the pending US missile defense shield program in Poland and Czechoslovakia—purportedly limited to concerns about Iran’s nuclear program; and Iran’s intentions regarding the Middle East, as exemplified by the Iranian President’s conformation of the goal to “wipe Israel off the face of the map.”

4. Organizational Diplomacy International organizations with political aspirations often undertake diplomacy to ease tensions that could lead to war or to provide humanitarian assistance. The UN Secretary-General conducts much of the world’s behind-the-scenes diplomacy when international crises are brewing [Secretariat: §3.3.B.5.]. In May 2008, Secretary-General Ban ki Moon attempted to convince Myanmar’s ruling military government to allow the international community to provide relief to its citizens after devastating typhoons killed possibly more than 100,000 people.

D. SENDING OR HOST TERRITORY?

Prior subsections discussed diplomatic and consular functions. There are two important corollaries. *First*: What is the effect of an act undertaken in a foreign embassy or consulate when the legal consequences differ from the law of the host State (where the building is located)? *Second*: May a foreign State give diplomatic asylum within those premises, when to do so would offend the host State?

1. Extraterritoriality Fiction The special international status of embassies and consular premises long ago generated the question of whether they are legally a part

of the *host* State or the *sending* State. Historically, they were considered an extraterritorial extension of the sending State. This legal fiction meant that acts done within an embassy or consulate would be governed by the law of the sending State, even when contrary to host State law.

The historical basis for this view is derived from the practice of medieval “Christian” States. Their consuls exercised full civil and criminal jurisdiction over their fellow nationals located in non-Christian States. This exclusion from the jurisdiction of local tribunals was rooted in the convenient legal fiction of “extraterritoriality.” Foreign nationals could invoke the protection of the more favorable laws of their own home States—a nuanced form of extraterritorial jurisdiction [§5.1.A.]. The Sino-Russian Treaty of Nerchinsk of 1689 provided that criminals would be delivered to the consular officers of their own countries for prosecution. The Franco-US Consular Convention of 1788 similarly provided for consular jurisdiction of the respective nations over civil disputes between Frenchmen when both were in the United States and between Americans when both were in France. The Japanese-American Treaty of 1858 was a model for a number of similar pacts that provided for this extraterritorial regime, conferring jurisdiction to resolve such disputes on foreign consular officers located in the host State.¹⁴⁰

Contemporary courts reject this historical fiction by applying a pragmatic analysis of premise immunity. Under the historical view, Egypt’s consulate in London would have been characterized as being located on “Egyptian” soil. The contemporary approach is that the Egyptian consulate in London is located in England for all relevant purposes. The 1963 Consular Convention protects the premises. The putative conflict is illustrated in the following case:

Radwan v. Radwan

FAMILY DIVISION OF LONDON, ENGLAND

3 All England Reports 967 (1972)

AUTHOR’S NOTE: Mr. Radwan was an Egyptian national who entered into a polygamous marriage with an English woman in the Egyptian consulate in Paris.

Mr. Radwan subsequently moved to London. He entered the Egyptian consulate there, for the purpose

of divorcing his English (second) wife. He thus employed the “*talaq*” procedure. In her absence, he orally decreed, three times, that they were divorced. This *talaq* procedure constituted a valid divorce under the laws of Egypt—but not under English law.

Several years later, his English wife filed her own divorce suit in the English courts, anticipating a more favorable divorce decree under English law than under Egyptian law. Her English lawyer argued that the talaq “divorce,” while performed within the Egyptian consulate in London, was not entitled to recognition under English law. It should not be recognized as a divorce performed “outside of” England. Mr. Radwan, hoping to avoid a comparatively unfavorable English divorce decree, responded to this “wife’s” suit on the basis that he had already obtained a valid divorce. Thus, he argued, his prior talaq divorce was effective, because it was legally performed on “Egyptian territory” (i.e., in Egypt’s consulate in London).

The court’s footnotes are omitted.

COURT’S OPINION:

I have read the relevant subparagraph of the petition whereby the talaq divorce is pleaded. The husband put in evidence the affidavit of Mustapha Kamil Abdul Fata, Deputy Consul General of the Consulate General of the United Arab Republic of Egypt in Kensington Palace Gardens in London. In it he swore [in his capacity as an expert on Egyptian law] as follows:

- (1) The Egyptian Consulate in London is regarded as being Egyptian territory on Egyptian soil.
- (2) The divorce ... registered in Cairo ... is valid and recognised by Egyptian law. ...

I also received the affidavit of Jamil Nasir, a person qualified in Egyptian law. In that affidavit he says that ... under Egyptian law the Consulate General of the United Arab Republic in London is regarded as Egyptian territory. He does not give any reasons for that opinion, but I note that it corresponds with the [above-quoted] statement of the deputy consul of the Consulate General in London. ...

The facts are as follows. The husband was born in Cairo. He is and at all material times was a Mohammedan. He was and remains a subject of the United Arab Republic. ... On 1st [of] April 1970 he entered the Egyptian Consulate in London; the procedure stated in the affidavit of the deputy consul of the Consulate General was followed. The husband three times declared the prescribed [talaq] form of divorce in the presence of two witnesses. All the steps were carried out in accordance with Egyptian law. After the prescribed 90 days the divorce was finalised in accordance

with Egyptian law, and in accordance with that law it was no impediment to the efficacy of the proceedings that the wife knew nothing about it at all. ...

The question for my decision is whether by English law the Consulate General of the United Arab Republic is part of a country outside the British Isles within the meaning of the Recognition of Divorces and Legal Separations Act of 1971. By that Act the relevant sections providing for recognition will have effect in respect of overseas divorces if they have been obtained by means of judicial or other proceedings in any country outside the British Isles, and it is necessary for the efficacy of the talaq divorce that it should have been obtained outside the British Isles by reason of the fact that at the material time the husband had acquired English domicile [emphasis supplied by author].

Curiously, the question has not arisen for decision in England before, that is, the question whether the premises of an embassy or consulate are part of the territory of the sending state as compared to the territory of the receiving state.

I quote and adopt the observations of [legal commentator] Mr J E S Fawcett:

There are two popular myths about diplomats and their immunities which we must clear away: one is that an embassy is foreign territory, and the other is that a diplomat can incur no legal liabilities in the country in which he is serving. The first is a confusion between territory or property and jurisdiction over it, and it is important to clarify it for it has sometimes arisen over ships and aircraft. The building occupied by a foreign embassy and the land on which it stands are part of the territory of what we call the receiving state: it is therefore under the jurisdiction of that state. But the members of the mission and their activities in the embassy are primarily under the control and jurisdiction of the sending state. International law avoids conflict between these jurisdictions by laying down rules to cover the whole field of diplomatic relations. These rules have been embodied in the Vienna Convention [on Diplomatic Relations of] 1961, which may be taken as reflecting existing law and practice. This Convention, and that on Consular Relations drawn up in 1963, are among the first steps ... in the

successful codification of international law. The premises of a mission are inviolable, and the local authorities may enter them only with the consent of the head of the mission. But this does not make the premises foreign territory or take them out of the reach of the local law for many purposes: for example, a commercial transaction in an embassy may be governed by the local law, particularly tax law; marriages may be celebrated there only if conditions laid down by the local law are met; and a child born in it [the diplomatic premises] will, unless his father has diplomatic status, acquire the local nationality.

Judge Cummins then considered similar cases involving this issue arising in other countries. This is a useful illustration of how a decision maker resorts to customary State practice as a basis for ascertaining the content of International Law.

FRANCE: *Nikitschenkof* case: The court was dealing with murderous assaults on the first secretary of the Russian embassy in the Russian embassy in Paris, and an argument was submitted that the place of the crime being the premises of the Russian embassy was a place situated outside the territory of France and not governed by French law. The decision was a decision under art. 3 of the Code of Napoleon. The court said:

[that] all those who live in the territory [France] are subject to [French] police and security laws; Whereas, admitting as exceptions to this rule of public law the immunity which, in certain cases, international law accords to the person of foreign diplomatic agents and the legal fiction in virtue of

which the premises they occupy are deemed to be situated outside the territory of the sovereign to whom they are accredited; Whereas, nevertheless, this legal fiction cannot be extended but constitutes an exception to the rule of territorial jurisdiction ... and is strictly limited to the ambassador or minister whose independence it is designed to protect and to those of his subordinates who are clothed with the same public character; Whereas the accused is not attached in any sense to the Russian Embassy but, as a foreigner residing for the time in France, was subject to French law; and Whereas the place where the crime which he is charged with committing cannot, in so far as he is concerned, be regarded as outside the limits of [French] territory ... the jurisdiction of the French judiciary [is] clearly established.

GERMANY: *Afghan Embassy* case.

ITALY: [citing several cases].

In all these cases the court rejected the argument that diplomatic premises were not part of the territory of the receiving state. ...

Although international conventions [treaties] do not have the force of law unless embodied in municipal legislation [of an individual state], they may in the field of international law be valuable as a guide to the rules of international law which this country as a signatory respects. ...

If it was the view of the high contracting parties [to the Vienna Convention] that the premises of missions were part of the territory of the sending state, that would undoubtedly be formulated [within the language of those treaties].

In this *initial* phase of a stormy divorce, Judge Cummins ruled that Mr. Radwan did not legally divorce his English wife in a place “outside of” England although he performed the *talaq* procedure in the Egyptian consulate. Thus, all the relevant activity was performed in England, and Mr. Radwan’s prior *talaq* “divorce” was not entitled to recognition as a foreign judgment. Mr. Radwan remained married to his English wife. Mrs. Radwan was thus able to prosecute her subsequent divorce action in the English courts.

The same Judge Cummins subsequently decided a related question: whether the *original* Radwan “marriage”

was governed by Egyptian or French law. Their marriage was performed in the Egyptian consulate in Paris. Judge Cummins ruled, in “Radwan 2,” that their marriage occurred in France rather than in Egypt. He noted that the extraterritoriality fiction regarding foreign consulates was not recognized under French law (nor under English law, as he had decided in “Radwan 1”). The marriage ceremony performed in the Egyptian consulate in Paris was *also* void under host State (French) law.¹⁴¹

The popular misconception—even today—is that embassies and consulates are on “foreign” soil. The

Vienna Conventions, mentioned in the *Radwan* opinion, effectively replaced the extraterritoriality fiction—with an *express* protection for diplomatic premises. Judge Cummins based the above London “talaq” opinion on what is *not* said in those treaties. Why does their silence support the proposition that “extraterritoriality” is a fiction no longer necessary under International Law?

In June 2000, a court in Alexandria, Egypt ruled that—while a husband may divorce his wife by saying “I divorce you” three times (talaq procedure)—he cannot do this by e-mail. The court decided that Islam, the basis of family law in Egypt, does not recognize electronic documents as evidence. The wife of the man who attempted this divorce was not free to remarry although he had initiated this so-called e-mail divorce.

2. Diplomatic Asylum A host-State political refugee may request that a foreign-State diplomat provide asylum (protection) from local arrest or extradition to another nation.

There have been a number of prominent instances where this protection has been requested and then granted to the dismay of the host State. During the 1989 Tiananmen Square demonstrations in the PRC, the US granted asylum to China’s top dissident. He and his wife stayed in the US embassy in Beijing. Chinese authorities had ordered his arrest for treason, demanding that the US government surrender him to the local authorities waiting outside the US embassy in Beijing. At the same time, the Chinese sealed their international borders to prevent any clandestine escape attempts.

The Vatican has been a prominent participant in asylum and other diplomatic contexts.¹⁴² The US invaded Panama in 1989. Its dictator, General Manuel Noriega, remained in hiding for five days. He then entered the Vatican embassy in Panama City after evading US military personnel seeking to take him to the US for trial on drug-trafficking charges. The Vatican diplomat initially refused to turn Noriega over to the invading US forces—which had surrounded the embassy with US troops, tanks, and helicopters to prevent any possible escape. After an agreement with US authorities, the Vatican decided to surrender Noriega to the US forces. He was brought to the US for trial. Whether the Vatican actually granted him asylum became a moot issue. Noriega was able to obtain temporary refuge in the embassy until he could arrange a satisfactory bargain with the US authorities. This was not the first time that the Vatican effectively granted asylum to someone wanted by US authorities. In 1866, Pope

Pius XI granted diplomatic asylum to John Surratt, Jr., who had conspired with John Wilkes Booth to assassinate US President Lincoln. Ultimately, the Pope surrendered Surratt to the US for prosecution.

Other sensational asylum cases have generated the popular belief that individuals are routinely granted such refuge in foreign embassies. Political relations may be harmed, however, when asylum is granted. A classic case was that of Hungary’s Cardinal Jozsef Mindszenty, who remained within the premises of the US embassy in Budapest, Hungary, for *fifteen years*. He had been arrested for anti-government activities in 1948, jailed in 1949, and mistakenly freed for several days during a popular revolt in 1956. He then sought refuge in the US embassy. Although the US did not normally grant asylum, it considered this particular request to be a special case. Mindszenty remained in the embassy under a grant of diplomatic asylum from 1956 to 1971 when Hungary finally agreed to his safe passage out of Hungary and to the Vatican.

In the leading international judicial opinion on diplomatic asylum, the ICJ articulated the general principle that State practice does not recognize a *right* of asylum. Diplomatic asylum has been granted with some frequency, however, in Latin America. The following case presents a unique scenario. The Court failed to acknowledge the regional custom of granting asylum, a decision for which it would be criticized for years to come:



Asylum Case: Colombia v. Peru

INTERNATIONAL COURT OF JUSTICE

1950 ICJ Rep. 266 (1950)

< <http://www.icj-cij.org/docket/files/14/1937.pdf> >

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Two, click Columbia v. Peru.

The ICJ decided that Haya de la Torre’s asylum should be terminated because Colombia could not properly grant it. Colombia’s unilateral decision that de la Torre was engaged in “political activity,” rather than a “common crime” against Peru, was not entitled to recognition by other countries. Although the ICJ ruled that Colombia’s granting asylum was not legally valid, Peru’s citizen was effectively sheltered anyway. Peru could not enter the Colombian embassy to force his

surrender. Colombia, on the other hand, could not force Peru to grant de la Torre safe passage through and then out of Peru. After this decision, Colombia and Peru ultimately negotiated an end to the stalemate by permitting de la Torre to leave Peru for Colombia.

Four years after this judgment, Peru ratified the Caracas Convention on Diplomatic Asylum. Article 2 therein provides that “every State has the right to grant asylum...” Article 4 adds that it “shall rest with the State granting asylum to determine the nature of the offense [common crime versus political act] or the motives for the persecution.” These provisions require treaty signatories to recognize unilateral grants of asylum rather than depend on a distant court’s interpretation or application of the general International Law that may differ from a regional State practice.¹⁴³

The ICJ’s judgment in the *Asylum Case* was criticized by many States—especially in Latin America. There, diplomatic asylum was a common regional practice. Commentators characterized the Court as suffering from the continuing influence of irrelevant European judicial perspectives. A representative criticism by a Brazilian author is as follows:

[The various judicial pronouncements in the *Asylum case*] received wide publicity and were the object of various learned papers; those written in Spain and Latin America were, with rare exception, highly critical of the stand taken by the [Court].

...

From a Latin American point of view, [the judgment] contains certain affirmations which simply went to prove that the Court was not qualified to pass judgment since it had examined a typical Latin American juridical institution [diplomatic asylum] exclusively from a European and biased point of view. ... Just as the [reasoning] ... of the International Court of Justice on the question of the international status of South-West Africa made most Afro-Asian States distrust the court, the Haya de la Torre case alienated most Latin American States, contributing to the atmosphere of ill-will which characterizes the relations of most States with the principal judicial organ of the United Nations [the ICJ].¹⁴⁴

In the referenced *South-West Africa* case, decided by the ICJ in the same year as the *Asylum* case, the Court ruled that South Africa had no obligation to place

South-West Africa—a former League “mandate” under the UN Trusteeship system. As a result, this territory remained subject to domination by the white minority government until independence forty years later (as the new State of Namibia). See International Status of South-West Africa.

In May 1999, João Vieira, the president of Guinea-Bissau, was driven from power by a segment of his nation’s army. He successfully sought political asylum in the Portuguese embassy in the capital city of Bissau. Vieira’s nineteen-year rule had been criticized on the basis of entrenched corruption. Portugal’s prime minister provided Vieira asylum. As is typical in such cases, however, there was no guarantee that Vieira would be able to leave the Portuguese embassy to travel out of Guinea-Bissau to go to Portugal.

In April 2005, Brazil granted asylum to Ecuador’s former President Lucio Gutierrez. He had just been removed from office by the Congress for his alleged attempts to overhaul the Supreme Court. He was the third president in eight years. The first in this grouping was declared mentally unfit to govern and fled into exile. The interim president was ousted by a coup, led by Gutierrez (then an army colonel). Demonstrators closed down the airport when an arrest warrant was issued for his arrest. Brazil then entered into negotiations with Ecuador for his safe passage out of Brazil.

E. IMMUNITIES AND ABUSE

This section addresses two integral themes in the International Law of Diplomacy: (1) the extent to which the sending State and its representatives may invoke immunity from prosecution in the host State; and (2) the pressure to seek alternative remedies when a diplomat engages in conduct unbecoming his or her position.

1. Diplomatic Immunity

(a) Evolution Centuries ago, it was customary to protect the representatives of other governments. Otherwise, they could not perform their economic and political functions without fear of injury or death. Protective measures—now referred to as immunities—were created to limit the absolute power or jurisdiction of the host States to which they had traveled to convey their message. The mutual interests of the sending and receiving States required the creation of special privileges and immunities from local prosecution. Diplomats were thus protected from both host State authorities and private

citizens in civil and criminal matters. The foreign envoy could then focus on diplomatic endeavors without fear of arrest or time-consuming involvement in litigation unrelated to the official's diplomatic functions.

Oxford University Professor Ian Brownlie explains the rationale for diplomatic immunity as follows: "The essence of diplomatic relations is the exercise by the sending government of state functions on the territory of the receiving state by license of the latter. Having agreed to the establishment of diplomatic relations, the receiving [host] state must take steps to enable the sending state to benefit from the content of the license. The process of giving 'full faith and credit' to the license results in a body of 'privileges and immunities.'" ¹⁴⁵

This vintage practice, now known as *diplomatic immunity*, has additional roots in the medieval State practice that recognized the need for safe passage through third States. In the fifteenth and sixteenth centuries, a ruler who hoped to defeat an alliance between two other rulers would literally select their respective emissaries as targets. He needed only to kill or imprison any intermediary who was passing through his kingdom. In the fifteenth century, for example, two French envoys were murdered on orders from Spain's Emperor Charles V. As a result, a Spanish Ambassador was subsequently imprisoned in France for four months while he was proceeding through France on a mission to England. Incidents such as these ultimately led to State recognition of diplomatic immunities and privileges. ¹⁴⁶ Unfortunately, many States failed to appreciate the practicality of "not shooting the messenger." Ultimately, certain States began to codify their expectations about diplomatic immunity in their internal laws. England's Diplomatic Privileges Act of 1708, for example, was a direct result of the arrest and detention of the Russian ambassador by English authorities. The Act was designed "to prevent like insolences for the future." ¹⁴⁷

The varied reasons for observing diplomatic immunity changed over the centuries. As Montana and Kansas state history professors Linda and Marsha Frey recount in their seminal work on the history of diplomatic immunity:

The weight of this study falls within the Western tradition, because the establishment of resident envoys is exclusively a Western development and because the expansion of European powers across the globe brought in its wake European international law. Admittedly, in other civilizations some envoys stayed in their host country for long periods. For example, in China in the sixteenth century, envoys from Russia and Central Asia remained in the capital for three or four years; in the eighteenth century, they remained even longer. This practice remained anomalous, however, and was never institutionalized [*i.e.*, in a multilateral treaty]. ¹⁴⁸

Consular immunity is more limited than ambassadorial immunity. The ambassador and his or her immediate staff are normally granted full immunity from the jurisdiction of the host State. Consular officers enjoy less insulation from host State arrest or civil litigation. One reason for this distinction is that they usually represent less sensitive interests than ambassadors. As restated by Stefan Sawicki in the Polish Yearbook of International Law, "members of the consulate enjoy the immunity *only* in relation to official acts considered as [an] expression of a sovereign State. ..." ¹⁴⁹

(b) Modern Treaty Paradigm The contemporary rules of diplomatic immunity are contained in the Vienna Convention on Diplomatic Relations of 1961, ratified by nearly 180 State parties. Its key provisions are as follows:

Vienna Convention on Diplomatic Relations

500 UNITED NATIONS TREATY SERIES 95-239 (1961)

<<http://fletcher.tufts.edu/multi/texts/BH408.txt>>

Article 22.1

The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except

with the consent of the head of the mission. 2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any

intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity. 3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment [seizure resulting in custody and control by a court] or execution [sale of property to satisfy court judgment].

...

Article 24

The archives and documents of the mission shall be inviolable at any time and wherever they may be.

...

Article 27.1

The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State. 2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions. 3. The diplomatic bag shall not be opened or detained. ...

5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

...

Article 29

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Article 30.1

The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission. 2. His papers, correspondence and ... his property shall likewise enjoy inviolability. ...

Article 31.1

A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction [regarding torts, contracts, and other legal matters].

...

A number of these provisions—found also in the 1963 Vienna Convention on Consular Relations¹⁵⁰—were the subject of worldwide attention during the Iranian Hostage Crisis of 1979–1980. Their continuing vitality, notwithstanding a 444-day diplomatic stalemate between Iran and the United States, was illustrated by the fact that

no country supported Iran's actions. The UN Security Council unanimously resolved that Iran should immediately release the diplomatic and consular personnel who were seized at the US embassy and various consular offices in Iran. The crisis, together with its international legal implications, is analyzed in the following case:

CASE CONCERNING UNITED STATES DIPLOMATIC AND CONSULAR STAFF IN TEHRAN (UNITED STATES OF AMERICA V. IRAN)

INTERNATIONAL COURT OF JUSTICE

Judgment on the Merits (1980), Gen. List No. 64

<<http://www.icj-cij.org/docket/files/64/6291.pdf>>

AUTHOR'S NOTE: On November 4, 1979, the US embassy in Tehran, Iran, was overrun by several hundred of the 3,000 Iranians who had been demonstrating

at the embassy gates. They seized diplomats, consuls, and Marines, as they began their occupation of the embassy premises. Two US consulates in other cities in

Iran were also occupied and closed on the following day. The embassy personnel in Tehran were physically threatened and denied any communication with either US officials or relatives. Several hundred thousand demonstrators converged on the US embassy premises on November 22, 1979. The Iranian government made no effort to intervene or to assist the hostages inside the building. While a few hostages were released, most were removed to unknown locations beyond the embassy's premises.

The US instituted this suit against the International Court of Justice, alleging that Iran breached the Vienna Conventions on Diplomatic and Consular Relations, the Vienna Convention on the Prevention of Crimes against Internationally Protected Persons, and the 1955 US-Iran Treaty of Amity.

The position of the Iranian government is contained in correspondence it submitted to the court. Iran refused to send lawyers to represent Iran, to file any official papers, or to directly participate in these proceedings. The ICJ nevertheless considered Iran's correspondence and made preliminary reference to it as follows.

IRANIAN CORRESPONDENCE:

The Government of the Islamic Republic of Iran ... draws the attention of the Court to the deeprootedness and the essential character of the Islamic Revolution of Iran, a revolution of a whole oppressed nation against its oppressors and their masters, the examination of whose numerous repercussions is essentially and directly a matter within the national sovereignty of Iran....

For this question [regarding detention of the diplomatic hostages] only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves ... more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms.

The problem involved in the conflict between Iran and the United States is not [merely] one of the interpretation and the application of the treaties upon which the American Application is based, but results from an overall situation containing much more fundamental and more complex elements. Consequently, the Court cannot examine the American Application divorced from its proper context, namely the whole

political dossier of the relations between Iran and the United States over the last 25 years. This dossier includes ... all the crimes perpetrated in Iran by the American Government, in particular the coup d'état of 1953 stirred up and carried out by the CIA, the overthrow of the lawful national government of Dr. Mossadegh, the restoration [then] of the Shah and of his regime which was under the control of American interests, and all the social, economic, cultural and political consequences of the direct interventions in our internal affairs, as well as grave, flagrant and continuous violations of all international norms, committed by the United States in Iran.

COURT'S OPINION:

...

22. The persons still held hostage in Iran include, according to the information furnished to the Court by the United States, at least 28 persons having the status, duly recognized by the Government of Iran, of "member of the diplomatic staff" within the meaning of the Vienna Convention of Diplomatic Relations of 1961; at least 20 persons having the status, similarly recognized, of "member of the administrative and technical staff" within the meaning of that Convention; and two other persons of United States nationality not possessing either diplomatic or consular status. Of the persons with the status of member of the diplomatic staff, four are members of the Consular Section of the Mission.

23. Allegations have been made by the Government of the United States of inhumane treatment of hostages; the militants and Iranian authorities have asserted that the hostages have been well treated, and have allowed special visits to the hostages by religious personalities and by representatives of the International Committee of the Red Cross. The specific allegations of illtreatment have not however been refuted. Examples of such allegations, which are mentioned in some of the sworn declarations of hostages released in November 1979, are as follows: At the outset of the occupation of the Embassy some were paraded bound and blindfolded before hostile and chanting crowds; at least during the initial period of their captivity, hostages were kept bound, and frequently blindfolded, denied mail or any communication with their government or with each other, subjected to interrogation, threatened with weapons.

24. Those archives and documents of the United States Embassy which were not destroyed by the staff during the attack on 4 November have been ransacked by the militants. Documents purporting to come from this source have been disseminated by the militants and by the Government-controlled media.

...

36. ... [T]he seizure of the United States Embassy and Consulates and the detention of internationally protected persons as hostages cannot [despite Iran's written communication to the ICJ] be considered as something "secondary" or "marginal," having regard to the importance of the legal principles involved. It also referred to a statement of the Secretary-General of the United Nations, and to Security Council resolution 457 (1979), as evidencing the importance attached by the international community as a whole to the observance of those principles in the present case as well as its concern at the dangerous level of tension between Iran and the United States.

...

46. [The court is able to hear this case because the] United States' claims here in question concern alleged violations by Iran of its obligations under several articles of the Vienna Conventions of 1961 and 1963 with respect to the privileges and immunities of the personnel, the inviolability of the premises and archives, and the provision of facilities for the performance of the functions of the United States Embassy and Consulates in Iran. ... By their very nature all these claims concern the interpretation or application of one or other of the two Vienna Conventions.

47. The occupation of the United States Embassy by militants on 4 November 1979 and the detention of its personnel as hostages was an event of a kind to provoke an immediate protest from any government, as it did from the United States Government, which despatched a special emissary to Iran to deliver a formal protest...

It is clear that on that date there existed a dispute arising out of the interpretation or application of the Vienna Conventions and thus one falling within the scope of the Protocols [which are a part of the Vienna Conventions on Diplomatic and Consular Relations requiring States to submit such disputes to the ICJ for resolution].

...

61. The conclusion just reached by the Court, that the initiation of the attack on the United States

Embassy on 4 November 1979, and of the attacks on the Consulates at Tabriz and Shiraz the following day, cannot be considered as in itself imputable to the Iranian State does not mean that Iran is, in consequence, free of any responsibility in regard to those attacks; for its own conduct was in conflict with its international obligations. By a number of provisions of the Vienna Conventions of 1961 and 1963, Iran was placed under the most categorical obligations, as a receiving State, to take appropriate steps to ensure the protection of the United States Embassy and Consulates, their staffs, their archives, their means of communication and the freedom of movement of the members of their staffs.

62. Thus, after solemnly proclaiming the inviolability of the premises of a diplomatic mission, Article 22 of the 1961 Convention continues in paragraph 2:

The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity. [Italics added by the Court.]

So, too, after proclaiming that the person of a diplomatic agent shall be inviolable, and that he shall not be liable to any form of arrest or detention, Article 29 provides:

The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity. [Italics added by the Court.]

The obligation of a receiving State to protect the inviolability of the archives and documents of a diplomatic mission is laid down in Article 24, which specifically provides that they are to be "inviolable at any time and wherever they may be." Under Article 25 it is required to "accord full facilities for the performance of the functions of the mission," under Article 26 to "ensure to all members of the mission freedom of movement and travel in its territory," and under Article 27 to "permit and protect free communication on the part of the mission for all official purposes." Analogous provisions are to be found in the 1963 [Consular] Convention regarding the privileges and immunities of consular missions and their staffs (Art. 31, para. 3, Arts. 40, 33, 28, 34 and 35). In the view of the Court, the

obligations of the Iranian Government here in question are not merely contractual obligations established by the Vienna Conventions of 1961 and 1963, but also obligations under general international law.

63. The facts set out in paragraphs 14 to 27 above establish to the satisfaction of the Court that on 4 November 1979 the Iranian Government failed altogether to take any “appropriate steps” to protect the premises, staff and archives of the United States mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion. They also show that on 5 November 1979 the Iranian Government similarly failed to take appropriate steps for the protection of the United States Consulates at Tabriz and Shiraz. In addition they show, in the opinion of the Court, that the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means.

...

77. ... Paragraphs 1 and 3 of that Article [22] have also been infringed, and continue to be infringed, since they forbid agents of a receiving State to enter the premises of a mission without consent or to undertake any search, requisition, attachment or like measure on the premises. Secondly, they constitute continuing breaches of Article 29 of the same Convention which forbids any arrest or detention of a diplomatic agent and any attack on his person, freedom or dignity. Thirdly, the Iranian authorities are without doubt in continuing breach of the provisions of Articles 25, 26 and 27 of the 1961 Vienna Convention and of pertinent provisions of the 1963 Vienna Convention concerning facilities for the performance of functions, freedom of movement and communications for diplomatic and consular staff, as well as of Article 24 of the former Convention and Article 33 of the latter, which provide for the absolute inviolability of the archives and documents of diplomatic missions and consulates. This particular violation has been made manifest to the world by repeated statements by the militants occupying the Embassy, who claim to be in possession of documents from the archives, and by various government authorities, purporting to specify the contents thereof. Finally, the continued detention as hostages of the two private individuals of United States nationality entails a renewed breach of the obligations of Iran under Article 11, paragraph 4, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights.

...

79. ... [J]udicial authorities of the Islamic Republic of Iran and the Minister for Foreign Affairs have frequently voiced or associated themselves with a threat first announced by the militants of having some of the hostages submitted to trial before a court or some other body. These threats may at present merely be acts in contemplation. But the Court considers it necessary here and now to stress that, if the intention to submit the hostages to any form of criminal trial or investigation were to be put into effect, that would constitute a grave breach by Iran of its obligations under Article 31, paragraph 1, of the 1961 Vienna Convention. This paragraph states in the most express terms: “A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State.” Again, if there were an attempt to compel the hostages to bear witness, a suggestion renewed at the time of the visit to Iran of the Secretary-General’s Commission, Iran would without question be violating paragraph 2 of that same Article of the 1961 Vienna Convention which provides that: “A diplomatic agent is not obliged to give evidence as a witness.”

...

83. In any case, *even if the alleged criminal activities of the United States in Iran could be considered as having been established*, the question would remain whether they could be regarded by the Court as constituting a justification of Iran’s conduct and thus a defence to the United States’ claims in the present case. The Court, however, is unable to accept that they can be so regarded. This is because diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions. [Italics added by author.]

...

85. Thus, it is for the very purpose of providing a remedy for such possible abuses of diplomatic functions that Article 9 of the 1961 Convention on Diplomatic Relations stipulates:

1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not

acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission.

86. Even in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission must be respected by the receiving State. Naturally, the observance of this principle does not mean—and this the Applicant Government expressly acknowledges—that a diplomatic agent caught in the act of committing an assault or other offence may not, on occasion, be briefly arrested by the

police of the receiving State in order to prevent the commission of the particular crime.

87. ... The Iranian Government did not, therefore, employ the remedies placed at its disposal by diplomatic law specifically for dealing with activities of the kind of which it now complains. Instead, it allowed a group of militants to attack and occupy the United States Embassy by force, and to seize the diplomatic and consular staff as hostages; instead, it has endorsed that action of those militants and has deliberately maintained their occupation of the Embassy and detention of its staff as a means of coercing the sending State. It has, at the same time, refused altogether to discuss this situation with representatives of the United States. The Court, therefore, can only conclude that Iran did not have recourse to the normal and efficacious means at its disposal, but [instead] resorted to coercive action against the United States Embassy and its staff.

...

The International Court of Justice (ICJ) ruled that Iran was required to make reparations to the US. The Court left the details to be resolved by subsequent negotiation between the parties. Failing an agreement, the US was free to return for a judicial resolution of the form and amount of Iranian reparations. One year later, however, Iran had not made reparations. But the US did not request that the ICJ reconsider the judgment for the purpose of obtaining a final reparations decision. The US instead requested a dismissal based on the Algiers Accord release of all US hostages.¹⁵¹ This was not to be the last time that Iran would seize embassy staff. During the summer 2009 election protests in Tehran, Iran held various UK embassy staff who were Iranians. Iran premised this action upon the (US and) UK's allegedly inciting the protesters with the help of local Iranian citizens. After a protest by the European Union, Iran released some of the staff.

The US Embassy in Tehran was seized, pursuant to a 2003 judgment enforcement procedure by an Iranian court. The underlying judgment against the US was the equivalent of a half-billion dollars. The plaintiff was a Cyprus-based Iranian businessman. This was the first lawsuit by an Iranian against the US for its alleged support of terrorism. Hossein Alikhani was arrested in a Florida sting operation for allegedly violating US sanctions against Libya. He was then taken to the Bahamas

for further interrogation. The US claimed that the Vienna Convention's immunity provisions precluded the Iranian judgment from being satisfied via seizure of a foreign (US) embassy. Iran countered that: (1) the premises has been abandoned for some years; (2) the US had flouted the Convention because of its 1996 legislation stripping countries like Iran of their immunity from lawsuits in US courts (for terrorist acts perpetrated against US citizens); and (3) the US had effectively waived any right to reliance upon the Convention in this case. Alikhani filed a parallel proceeding in the Inter-American Commission on Human Rights.¹⁵²

Embassy immunity often falls victim to geopolitics in certain parts of the world. In April 2005, 20,000 anti-Japanese demonstrators roamed through the streets of Shanghai. Upon arrival at the Japanese Consulate, they stoned it and smashed cars and shops in the area. China is upset with Japan's bid for a permanent seat on the UN Security Council. Numerous Chinese police were present but did very little to restrain the crowd. Japan lodged a formal protest, given like events in various cities in the PRC for a three-week period. The PRC government responded that Japan had sparked these protests because of its "wrong attitudes and actions on a series of issues such as its history of aggression." (The Chinese government allegedly orchestrated similar public protest against the US when the latter accidentally

bombed the Chinese embassy in Belgrade during the 1999 NATO bombing campaign in the Balkans.) The PRC's failure to do all that was possible to avoid persistent riots at the steps of the Japanese Consulate would be a clear violation of the Vienna Convention's "inviolability of the premises" host-country protection requirement.

In February 2008, Kosovo unilaterally declared independence from Serbia. Tens of thousands of Serbians demonstrated in Belgrade, mostly against the US because of its backing of Kosovo's independence. The crowds attacked the US embassy, setting it afire. The Croatian, Bosnian, and Turkish embassies were also targeted. To the extent that the Serbian government either clandestinely supported the riots or did nothing to prevent them, it incurred State responsibility for failing to control those crowds. On the other hand, events can occur so rapidly as to render a governmental response futile under the circumstances.

In October 2004, the Islamic militant group Al-Qaida in Mesopotamia kidnapped a Moroccan diplomat. He was traveling in Iraq from Jordan. This group posted a Web site death threat, intending it "to be an example for others who are still thinking to challenge the muja-hadeen." If the supposedly independent Iraqi government did little or nothing to assist in his release, Iraq would incur State responsibility under the Vienna Convention.

2. Immunity Alternatives There are many criticisms of diplomatic immunity. Journalists have sensationalized abuses of diplomatic immunity with a view toward revisiting the protection afforded by the Vienna Conventions. The following is perhaps the most graphic depiction of local frustration over diplomatic immunity:

A woman is brutally raped; yet, her attacker goes free. A man is fatally hit by a car, and the driver is not charged with a crime. Drug smugglers are seized, kidnappers identified, thieves caught in the act—and all go free.

...

Most of these given this enormous exemption from civilized behavior are not diplomats. They are the wives, children, drivers, and valets of ambassadors and ministers sent to this country to represent their nations. ... This immunity is particularly bizarre since it is not limited to incidents occurring in the course of "official duties" but rather serves as an absolute security blanket.¹⁵³

The related irony is that US diplomats do not always lead by example. In June 2008, the British Foreign

Ministry complained that the US Embassy in London had failed to pay the equivalent of almost four million dollars in traffic congestion charges. No other embassy topped the list of refusals. Those not entitled to claim immunity must pay daily charges to drive in London. Since 2003, the US had failed to pay this charge 23,188 times.

In May 2009, a Finnish diplomat in Russia illegally helped a Finnish father drive the latter's five year old son across the Russian border into Finland—in the trunk of a car bearing Finnish diplomatic license plates. The Finnish (so-called) diplomatic response was that the Russian mother had illegally brought the child from Finland to Russia.

The 1961 Vienna Convention on Diplomatic Relations (VCDR) codified State expectations, most of which were rooted in reciprocity. The British University of Reading's Craig Barker illustrates that "[e]ven if it were considered desirable to amend the law to deal with the problem of abuse, the question must be asked as to whether such amendment is possible, given the reciprocal nature of diplomatic relations and the manifest desire of each State to ensure the fullest protection for its diplomatic personnel working abroad. On the other hand, does that mean that abuse of diplomatic privileges is simply a necessary evil which must be endured in order to ensure the greater good that is the maintenance of proper international relations?"¹⁵⁴

There are alternatives. Not all States observe the general international rule of diplomatic immunity from criminal prosecution. During the Cultural Revolution (1966–1976), representatives of the PRC "declared that diplomatic immunities were of bourgeois origin and ... had no place in a socialist society."¹⁵⁵

The foregoing examples of moral indignation over diplomatic immunity do not always acknowledge the alternatives available to coping with such abuses, as suggested in paragraph 86 in the Hostage case discussed earlier. The VCDR's ratification by some 180 nations suggests that the overall benefit has not been vitiated by the occasional burdens. Assume that a State A diplomat commits a crime in host State B. The interests of both States are better served if State B declares State A's offending ambassador *persona non grata* with directions to leave State B. If State B were to arrest the State A diplomat, State B would risk reciprocal treatment in some future incident.

Insuring against the diplomat's conduct is an alternative to treaty remedies. State B citizens can be protected

against certain consequences of diplomatic conduct through this risk-shifting device. A portion of the risk of having A's diplomats in State B can thus be borne by State A. This insurance may benefit State B nationals. While the State A diplomat is not subject to suit in State B's courts, a State B insurer can assume a portion of the risks associated with the diplomat's negligence. State B nationals would have a monetary remedy available. This convenient compromise permits the A diplomat to continue his or her duties without the inconvenient disruption of having to defend lawsuits in B's courts. The insurer would do so instead. The US Department of State has promulgated standards regarding compulsory diplomatic insurance.¹⁵⁶

An express *waiver* of diplomatic immunity presents an alternative, which depends on the discretion of the sending State. Assume that an individual is entitled to immunity under either the Vienna Diplomatic or Consular Convention. She has committed a serious criminal offense. The host State might request that the sending State waive the immunity of this foreign agent. States are not precluded from requesting such waivers on an ad hoc basis when circumstances so warrant. The sending State, should it grant the waiver, can thereby ensure the continuance of harmonious relations, especially if one of its diplomats commits a serious crime.

There is a blossoming culture of acquiescence in host-State requests for waivers of diplomatic immunity. In 1996, Zaire's president waived diplomatic immunity for the country's ambassador to France. This ambassador's speeding caused a car accident in Menton, France, that killed two 13-year-old French children and led to protests by 5,000 marchers. In 1997, the Republic of Georgia's second-ranking diplomat was drinking and speeding in Washington, DC. He thereby caused four other cars to crash, resulting in the death of a 16-year-old girl. The US Department of State immediately sought and obtained a waiver of his diplomatic immunity from Georgia. This request was premised on the then-recent statement by Georgia's President Shevardnadze that the moral principle of just punishment outweighed what he considered to be the antiquated, Cold War-era practice of diplomatic immunity. The former Georgian diplomat then began to serve a twenty-one year prison sentence.

States may also substitute themselves into foreign lawsuits on behalf of their diplomats—sometimes, even when they are engaged in private conduct. In Russia, for example, Douglas Kent was the US Consul General to Russia's largest Consular District. Several days after his private car

was shipped to Russia, Mr. Kent caused a 1998 collision. He injured a Russian passenger in another car. Kent refused to submit to a blood alcohol test. He had left work for the day. He was reportedly intoxicated. He claimed to be driving home, supposedly from his gym, in his private vehicle which had been shipped to Russia. After local attempts to resolve this diplomatic conundrum, Kent was named as the defendant in a civil action filed in the US. He then sought a certification from the US government that he was acting within the scope of his employment at the time of the accident. If granted, that would substitute the US for Mr. Kent as the defendant. Although the US Department of Justice (and the trial court) refused to grant Kent's desired certification, the appellate court reversed in Kent's favor. That court took note of the intriguing developments in this widely publicized case:

[P]olitical forces in Russia launched a campaign to use the accident as an opportunity to discredit the United States. False allegations that I was intoxicated and that I laughingly escaped the scene of the accident to a nearby nightclub were promulgated in both the local and official press. The matter, thus fraudulently characterized, allegedly was presented to the Russian Duma which purportedly passed a Resolution condemning the United States for the manner in which it was handling the matter.¹⁵⁷

Four years after the Vienna Conventions entered into force, the UN General Assembly reacted to an alarming increase in crimes against diplomats and other persons in need of special protection under International Law. The Assembly's International Law Commission [§3.3.B.] thus produced draft articles with a view toward their evolving into a multilateral treaty. These were accepted by the Assembly. It thereby requested States to become parties to this special regime: the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents.¹⁵⁸ Heads of State, diplomats, and various governmental agents are the subject of special legislation under the local law of treaty parties. Such laws are designed to ensure special attention to their safety and the safety of members of their immediate households. Aircraft hijackers, assassins, and perpetrators of violent crimes against these protected persons must be prosecuted or extradited without regard to political motive.

The following excerpt from the French *Review of Public International Law* demonstrates the competing considerations that often arise when such abuses occur:

Seizure of Arms in Baggage of Diplomat in Transit

78 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 247 (1974)

Five hand grenades, five revolvers, eight kilos of explosive devices, and 21 letter bombs not yet addressed, rifles and ammunition were discovered on the evening of October 23, 1972, by Dutch customs officers at the airport of Schiphol in the baggage of an Algerian diplomatic agent accredited to a South American nation which the Dutch Minister of Justice refused to identify. Aged 32, born in Jordan, but carrying an Algerian diplomatic passport, the diplomat, who was identified only by the initials II.R., came from Damascus via Frankfurt and was en route to Rio de Janeiro. He declared himself to be entirely ignorant of the contents of his baggage, explaining only he thought he was carrying documents delivered to him in Damascus and destined for an Algerian embassy in a South American republic, which he declined to identify further. He added nevertheless he had bought the rifles, which were found separately, for diplomatic colleagues. The Queen's prosecutor [of the Netherlands] did not institute judicial proceedings against the diplomat because in his judgment it had not at all been established that the diplomat was actually aware of the contents of his baggage. As a result the

diplomat was authorized to continue his trip to South America, but his bags were retained for an investigation.

Following the discovery, the Israeli government—which was convinced the arms seized were to be used in organizing an attack upon its embassy in Brazil—requested an explanation from the Dutch government, because in its opinion the Algerian diplomat should have been held by the authorities at the airport “because diplomatic immunity applies only in the countries where diplomatic agents are accredited and not in the countries through which they are only in transit.” One should have some reservations about this assertion which is contrary to established practice and is contradicted by Article 40 of the Vienna Convention of April 18, 1961, on Diplomatic Relations by whose terms a diplomatic agent in transit through the territory of a third state is given “inviolability and every other immunity necessary for his passage or return.” But, inasmuch as the acts here were outside official functions, the immunity of agents in transit, already subject to strict limitations, obviously ceases in a case of flagrant offense.

One of the most egregious abuses involves the diplomatic bag. Article 27.3 of the Vienna Convention on Diplomatic Relations provides that a “diplomatic bag shall not be opened or detained.”

What constitutes a diplomatic bag is arguably open to question. In March 2000, Zimbabwean authorities impounded a *seven-ton* shipment of supposedly routine equipment for building communications facilities as well as the tools for its installation. England recalled its ambassador from Zimbabwe to protest the opening of this British diplomatic “bag” by customs authorities. They asserted a right to open such unusually large diplomatic packages. British officials countered that the Vienna Convention generally exempts “diplomatic bags” from inspection.

The UN's International Law Commission has been working on draft provisions that would amend the status of the diplomatic courier and the diplomatic bag—through optional protocols to the Vienna Convention. The objective is to provide the State parties to the Vienna

Convention on Diplomatic Relations an opportunity to place further restrictions on such immunity in a way that would better control potential abuse. The UN's Sixth Committee (Legal) is conducting informal consultations on the question as to whether the General Assembly should convene an international conference for the purpose of creating draft articles on this sensitive topic.¹⁵⁹

◆ PROBLEMS

Problem 2.A (after §2.1.B.2. excerpt *On the Condition of Statehood*): The Jessup excerpt presents the argument in favor of Israel's statehood. This Problem addresses the related question of Palestinian statehood. The Palestine Liberation Organization (PLO) was created in 1964 to “liberate” Palestine from Israeli control. Its members include people who are citizens of various Arab States. Their ancestors inhabited that territory since ancient times, long before the Western nation-State model was incorporated into International Law

in 1648. Materials about the PLO are available on the Palestinian National Authority Web site at <<http://www.pna.net>>, and in the §6.2.A.1(b) *Palestinian Wall* case.

In 1919, the Palestinian people were provisionally recognized as a State by the League of Nations, as indicated in the 1922 Mandate for Palestine addressed to Great Britain. The UN's 1947 partition plan (UN Gen. Ass. Res. 181(II)) would have created a Palestinian State, but for the outbreak of war between Arab States and the new State of Israel. The drive for a Palestinian State gained momentum in the 1970s. The creation of the State of Palestine has international support only insofar as it would occupy the additional territories conquered by Israel in various Middle East wars in the 1960s and 1970s, but not that portion of "Palestine" that became the independent State of Israel in 1948. The PLO historically denied Israel's right to exist in what it considered to be "Palestine," dating from biblical times. Palestinians have routinely characterized the UN partition plan of 1947 as a criminal act that denied them rights they believed were guaranteed by the 1919 recognition of Palestine and 1922 League Mandate to Great Britain.

Led by Yasir Arafat, the PLO initially insisted that a Palestinian State should *replace* Israel because the Jewish state had no right to exist in its current location. The PLO later softened its position. In the 1993 agreements brokered by President Clinton, the PLO thereby recognized Israel's right to exist although the comparatively militant members of " Hamas " disagree. The Palestinian National Authority has claimed that it should be given territory taken by Israel during various Middle East conflicts. The 1998 peace negotiations included Israel's demand that the PLO revoke the provision in its 1964 Covenant calling for Israel's destruction. Israel's borders have not been fixed by international agreement with its neighbors. The PLO argues that Palestine's borders are not yet established.

In 1974, the PLO was invited to participate in the UN General Assembly's debate on the Palestine question and in an effort to secure peace in the Middle East. (See G.A. Res. 3210, 29 UN GAOR Supp. [No. 108] at 3, UN Doc. A/RES/3210[XXIX] [1974], and G.A. Res. 3375, 30 UN GAOR Supp. [No. 27] at 3, UN Doc. A/RES/3375[XXX] [1975].) The PLO was then officially recognized by Austria, India, and the Soviet Union. In July 1974, the PLO was also accorded a unique, nonvoting "observer" status in the UN General Assembly. The PLO can now raise issues, cosponsor draft resolutions, and make speeches in the General Assembly. Participa-

tion in the UN was previously limited to traditional States and non-controversial nongovernmental organizations such as the International Red Cross.

In 1987, the US Congress enacted legislation entitled the Anti-Terrorism Act. It was designed to close the PLO's UN observer mission in New York City. The basis for the desired closure was that the PLO's alleged terrorist activities could flow into the US through the PLO's observer mission at the UN. The US government subsequently filed a lawsuit in a US court, under that US antiterrorist law, seeking to close the mission. The PLO responded from Algiers by proclaiming the existence of the new and independent "State of Palestine." This 1988 declaration includes the assertions that "the people of Palestine fashioned its national identity" and "the Palestinian people have not ceased its valiant defence of its homeland ... [of Palestine, which] was subjected to a new kind of foreign occupation" when Israel took over. See Palestine National Council Political Communiqué and Declaration of Independence, reprinted in 27 INT'L LEGAL MAT'LS 1660, 1668 (1988). It contains much of the history surrounding this conflict. This Palestinian declaration of statehood was immediately recognized by the Soviet Union. As of 1988, then, the PLO claimed that the State of Palestine finally achieved *de facto*, if not *de jure*, existence as a State.

In 1989, the ICJ ruled against the US on its unilateral attempt to close the PLO mission at the UN headquarters in New York City. The Reagan administration unsuccessfully argued that the antiterrorist legislation required closure "irrespective of any international legal obligations that the United States may have. ..." The US noted that since the PLO was not a State, the space for its observer mission had been provided only as a mere courtesy, and that the US could do so because it was the host government for the United Nations' New York facilities. One basis for countering the US position materialized in mid-1988. Jordan's King Hussein severed all forms of legal and administrative ties between Jordan and the West Bank. Israel introduced Jewish settlers into that area which the PLO claims as its own territory.

The 1988 UN General Assembly Resolution 43/177 accorded observer-State status to the PLO, thus augmenting the mere *observer* status the PLO had already achieved. Two years later, 114 States had recognized the newly proclaimed State of Palestine—some twenty States more than the ninety-three that recognized Israel.

The 1993 accords established a program resulting in a partial turnover of autonomy over Gaza and the West Bank to the Palestinian National Authority—although this so-called “land for peace” process became subsequently bogged down. In 1998, PLO Chairman Arafat announced that he would proclaim the *de jure* statehood of Palestine within two years, regardless of Israel’s negotiating posture.

In March 1999, the EU began to consider its potential collective recognition of a “Palestinian State.” The EU reaffirmed the Palestinians’ right to self-determination, but did not actually recognize “Palestine” as a State. Since then, attacks and counterattacks in the Middle East have confirmed that when there’s a peace agreement in the air, there are usually bodies on the ground. In 2002, UN Security Council Resolution 1397 became the first to refer to “a vision of a region where two States, Israel and Palestine, live side-by-side within secure and recognized borders. . . .”

In March 2005, a US federal court affirmed a default judgment against the PLO and the Palestinian Authority. Relatives of a husband, wife, and infant son filed this wrongful death claim after they were murdered at a wedding in Israel. The defendants claimed that political recognition was not a prerequisite for a finding of statehood. After applying the usual elements of statehood, the court found that the Palestinian Authority had not yet exercised sufficient government control over Palestine to satisfy the test for statehood. As concluded by the court: “We recognize that the status of the Palestinian territories is in many ways *sui generis*. Here, however, the defendants have not carried their burden of showing that Palestine satisfied the requirements for statehood under the applicable principles of international law at any point in time. In view of the unmistakable legislative command that sovereign immunity shall only be accorded to states . . . the defendants’ sovereign immunity defense must fail.”¹⁶⁰

In April 2008, former US President Jimmy Carter met with top Hamas leaders in Syria. He reported that Hamas is prepared to accept the right of the Jewish state to “live as a neighbor next door in peace.” Carter relayed this message in a speech in Jerusalem, after Hamas leaders said that they would accept a Palestinian state on the 1967 borders and would accept the right of Israel to live as a neighbor next door in peace. The borders Carter referred to were the frontiers that existed before Israel captured large swaths of Arab lands in the

1967 Mideast war—including the West Bank, east Jerusalem and Gaza.

In September 2008, departing Prime Minister Ehud Olmert said that Israel must withdraw from nearly all of the West Bank and East Jerusalem. An undivided Jerusalem would bring 270,000 Palestinians within Israel’s security barrier. In June 2009, Israel’s Prime Minister Benjamin Netanyahu officially endorsed a two-State solution. This concession was premised upon various conditions, including a Palestinian State that would be demilitarized and cede control of its airspace to Israel. In September 2009, the Palestinian Prime Minister announced the intent to pursue and achieve *de facto* statehood by 2011.

Assume that “Palestine” is now applying to the UN for full State membership in the UN General Assembly of States. Had Palestine already satisfied any or all of the four traditional elements of statehood *before* 1993? Did the 1994 Palestinian autonomy agreements do that? Is there now a State of Palestine, after the autonomy agreements? What is its nature; for example, is it a State within the international community of nations? See generally Israel-Palestine Liberation Organization, Agreement on the Gaza Strip and the Jericho Area, 33 INT’L LEGAL MAT’LS 622 (1994); H. Hillel, COUNTDOWN TO STATEHOOD: PALESTINIAN STATE FORMATION IN THE WEST BANK AND GAZA (Albany, NY: State Univ. of NY Press, 1998); and M. Qafisheh, THE INTERNATIONAL LAW FOUNDATIONS OF PALESTINIAN NATIONALITY: A LEGAL EXAMINATION OF NATIONALITY IN PALESTINE UNDER BRITAIN’S RULE (Leiden, Neth: Martinus Nijhoff, 2008).

Problem 2.B (end of §2.3.): Under UN Security Council Resolution 777, the former State of “Yugoslavia” ceased to exist at the UN. (See *Bosnia v. FRY*, on Course Web Page, Chapter Ten.) In 1992, the former Yugoslavia began to split into what are currently seven States: Bosnia-Herzegovina, Croatia, Kosovo, Macedonia, Montenegro, Serbia, and Slovenia.

The Macedonian province ultimately became a nation-State, was recognized by a number of countries, and is now a member of the UN. Selection of the name “Republic of Macedonia” was fraught with irony. Greece was furious about the name chosen for this new country (Macedonia). Greece has its own province named Macedonia. The name “Macedonia” deeply resonates among the Greek population. Alexander the Great resided in this particular Greek province, during his famous conquests of the Roman era. Now, Greece’s northern province of

“Macedonia” and the new “Republic of Macedonia” share a common international border of approximately 300 kilometers. Greece feared that the Republic of Macedonia—by selecting that particular name—effectively demonstrated territorial aspirations for the future assimilation of the Greek province of Macedonia into the bordering country of Macedonia. Greece refers to this area in the new Republic as “Skopje” (also the name of Macedonia’s capital city). The UN Secretary-General suggested that Macedonia at least change its name to “New Macedonia” if the term *Macedonia* were going to remain a part of Macedonia’s official country name.

The EU did not immediately recognize Macedonia when it declared its independence from the former Yugoslavia. Macedonia was then a territory desperately seeking recognition from other States. The EU had recognized Slovenia and Croatia, approximately six months after their votes of independence from the former Yugoslavia. Regarding Macedonia, however, the EU leadership expressed that “there are still important matters to be addressed before a similar step by the Community and its member States will be taken.” This was a smokescreen designed to temporarily delay the recognition of the new State of “Macedonia,” due to Greece’s continuing objections to the recognition of Macedonia by member States of the EU.

The EU then promulgated its Recognition Guidelines [§2.3.B.] as the device for structuring mutually agreed upon succession, secession, and self-determination of the territories of the former Yugoslavia. All applicants for collective recognition by the EU were then required to comply with these requirements, as well as obtain approval of the UN Secretary-General, the Security Council, and the EU Conference on Yugoslavia for resolving such conflicts. This disputed region was admitted to the UN under the name “Former Yugoslav Republic of Macedonia” to sidestep Greek objections. In November 2004, the US decided to bear the wrath of its NATO ally Greece by recognizing Macedonia under its constitutional name “Republic of Macedonia.” Macedonia has since sent troops in support of the US efforts in Afghanistan and Iraq.

The EU chose not to expressly recognize Macedonia. Instead, it determined that its member States could individually decide whether to “recognize that State as a sovereign and independent State ... and under a name that can be accepted by all parties concerned [*i.e.*, Greece] ... [while] member States look forward to

establishing with the authorities in Skopje [Macedonia’s capital city] a fruitful cooperative relationship.”

In November 2008, the “Former Yugoslav Republic of Macedonia” filed suit in the International Court of Justice. FYR Macedonia therein alleged that Greece’s objection to its application for NATO membership breached their 1995 interim accord. That agreement resolved many matters, but not the issue regarding the name of the current nation of “Macedonia.” See M. Karavias & A. Tzanakopoulos, *Legality of Veto to NATO Accession: Former Yugoslav Republic of Macedonia Sues Greece before the ICJ*, ASIL INSIGHT (Dec. 29, 2008), at: <<http://www.asil.org/insights081229.cfm>>.

Questions: (1) Is Macedonia a “recognized” State? (2) What would Macedonia have done to satisfy EU Guidelines for Recognition? (3) Should Macedonia be recognized by other States outside of the EU? See generally Yung Wei, *Recognition of Divided States: Implication and Application of Concepts of “Multi-System Nations,” “Political Entities,” and “Intra-National Commonwealth,”* 34 INT’L LAWYER 997 (2000).

Problem 2.C (after §2.4.B. Kosovo secession excerpts): Recall the following facts: (1) Kosovo’s status as an international protectorate was created and then run by the UN from 1999–2008; (2) UN Security Council Resolution 1244 specifically provided the language “[r]eaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia...;” (3) the EU began its process of taking over the UN’s administrative function in mid-2008; and (4) Kosovo continues to be under military occupation by NATO forces for an indefinite term.

Did Kosovo legally secede from Serbia? Five students will debate the legality of Kosovo’s secession. Student #1 = Kosovo’s Prime Minister; #2 = Serbia’s Prime Minister; #3 = the international organization representative in charge of the UNMIK to EUROLEX transition; #4–#5 = the US and Russian lawyers, who will be submitting their respective amicus curiae (friend of the court) briefs in the pending International Court of Justice case. Recall the UN General Assembly’s request for an advisory opinion on the legality of Kosovo’s unilateral independence.

Problem 2.D (after §2.4.C.): Iraq consists of three main ethnic groups: Sunnis, Shiites, and Kurds. The US

plan has been to keep Iraq strong so that it can one day be an ally in the War on Terror, provide US military bases in the Middle East, and be a stable component of US global Middle East policy.

Having read the materials on succession, secession, and self-determination, consider how the Iraqis might feel. Assume that the occupying forces will withdraw most, but not all, military troops from Iraq. Which final solution, of those that follow, is most suitable for Iraq?

- ◆ *Student #1* will be the UN Under-Secretary General—the UN’s Chief Legal Officer—who will respond on behalf of the international community of nations. S/he will include a statement on UN self-determination principles that apply to this question.
- ◆ *Student #2* will represent the three ethnic groups. Each has some degree of control over their respective ethnic strongholds within Iraq. Each wants to divide Iraq into three nation-States, essentially based on ethnicity—somewhat like the Kosovo solution.
- ◆ *Student #3* is a judge of the International Court of Justice. S/he will comment on the viability of Student #1’s proposals.
- ◆ *Student #4* represents the US, having devoted an incredible amount of resources to bringing peace to Iraq. S/he wants Iraq to remain a vibrant Arab nation that can pool its rich oil resources to better the lives of all Iraqis once the occupation ends.
- ◆ *Student #5* will present an intermediate option, akin to the two entities in Bosnia (which includes the Serb-dominated internal zone known as Republika Srpska). There would be three *regional* and autonomous governments in Iraq, one to represent each ethnic group. There would also be a *central* government in charge of Iraq’s overall fiscal, military, and possibly some other matters.
- ◆ *Student #6* would be a disgruntled historian, who believes that civil war is the only viable solution. That will determine who holds all of the power marbles, even if it means ending up with a despot like Saddam Hussein.

Each student will be allocated an equal amount of time to present his/her position. The class will then discuss the best option.

Problem 2.E (end of §2.4.C.): Europe’s gypsies apparently began their westward exodus from India in the tenth century. They have been a migratory people with

no territory, political influence, or formal organization. Their itinerant wandering is both the hallmark of their culture and their greatest conflict with structured societies. Perhaps one million Spanish gypsies now roam throughout Spain making camp in makeshift villages, living literally on the edge of civilization, outside of towns and on the fringes of Spain’s larger cities.

It is difficult to educate, tax, and count them in any one nation’s population census. The Nazis slaughtered many gypsies in their genocidal campaign to achieve “racial purity” during World War II. In October 2007, Romania apologized for its deportation of thousands of gypsies to Nazi death camps during World War II. They were more recently driven from their homes by Bosnian Serb and Croat military forces while Yugoslavia disintegrated in the 1990s. Thousands then fled to Italy and Germany, only to face attack by neo-Nazis seeking their expulsion under strict immigration laws.

Various European countries and international organizations have specifically addressed Gypsies in distinct ways. In 1991, a Sub-Commission of the UN Commission on Human Rights invited States containing “Roma” (gypsy) communities to take all necessary steps to ensure equality and guarantee the protection and security of gypsies within their various host States.

Gypsies gathered in Seville, Spain, in May 1994 for the first Gypsy Congress. This Congress was conducted under the auspices of the European Commission, the executive agency of the European Union. The Commission is trying to help gypsies help themselves in the current violence, surfacing with a fury in Europe’s waves of ethnic violence that materialized after the Cold War. In 1997, the Czech Republic’s President Havel admonished Czechs to end their intolerance of gypsies after a wave of them departed for Canada in the pursuit of a safe harbor. UN Doc. E/CN.4/1992/. Further details on this general dilemma for host States and international humanitarian law are provided in the Gypsy Law Symposium, XLV AMER. J. COMP. LAW 225-442 (1997). The Gypsy International Recognition and Compensation Action, filed in Switzerland in February 2002, seeks reparations against I.B.M. for its role in helping the Nazis commit mass murder. I.B.M.’s punch-card machines allegedly enhanced the efficiency of the Nazi extermination campaign. In July 2008, the European Parliament characterized Italy’s selective fingerprinting of Gypsies “a clear act of racial discrimination.” The Italian government began this policy as a means of

controlling street crime, especially in the vicinity of Naples.

Are Spain's gypsies entitled to self-determination? If so, *how* would that right be implemented? *See generally*, G. Lewy, *THE NAZI PROSECUTION OF THE GYPSIES* (New York: Oxford Univ. Press, 2000); M. Tsekos, *Minority Rights: The Failure of International Law to Protect the Roma*, 9 HUM. RIGHTS BRIEF, Issue No. 3, at 26 (Wash., DC: Amer. Univ. Coll. Law, 2002), at <<http://www.wcl.american.edu/hrbrief>>; and T. Acton, *A Three-cornered Choice: Structural Consequences of Value-Priorities in Gypsy Law as a Model for More General Understanding of Variations in the Administration of Justice*, 51 AMER. J. COMPARATIVE L. 639 (2003).

Problem 2.F (§2.6.B., after *Saudi Arabia v. Nelson Case* on Course Web Page): Assume that after the US Supreme Court's *Nelson* opinion, the US senator who went to the aid of the Nelsons—while the husband was confined in Saudi Arabia—decides to help future litigants in another way. Senator Hawk proposes the following legislation to Congress as an amendment to the 1976 Foreign Sovereign Immunities Act (FSIA):

Be it hereby enacted that, from this day forward, all courts in the United States will, in doubtful cases involving the “commercial nature” of the act or conduct complained of, grant sovereign immunity to democratic sovereigns, but deny it for authoritarian States and their instrumentalities. In the latter instance, US courts shall proceed to hear the merits of the underlying tort or contract disputes.

Two students will debate the propriety of this proposed legislation. They will specifically address: (1) whether Congress should give democratic regimes greater sovereign immunity than authoritarian regimes; and (2) what impact that 1996 revision to the FSIA *has*, or *could* have, for the purpose of future sovereign immunity cases.

Problem 2.G (§2.6.B., after *Nelson Case* on Course Web Page): Section 1.2 of this book (Sources of International Law) addressed the concept of “*jus cogens*.” It includes State conduct that violates International Law in a manner that provides no defense such as Nazi Germany's official genocidal policy. Section 2.6.A. covers the *Pinochet* litigation, whereby the British House of Lords determined that the conduct of this former Head of State vitiated the

derivative immunity he would otherwise have enjoyed because of his violations of the international Torture Convention [covered in §9.6.B.4(d–e), 7(a)].

In 2001, a US federal appellate court considered, but rejected, an Auschwitz survivor's claim that Germany could not claim sovereign immunity from suit in the United States. While the events described in this case clearly fell within the “*jus cogens*” doctrine, the US court nevertheless dismissed this case in the following terms:

Sampson's complaint alleges horrors which are beyond belief, and the evils he describes cannot be condemned in strong enough terms. In 1939, Sampson was imprisoned in the Lodz ghetto in Poland. He was subsequently transported by cattle car to the Auschwitz concentration camp, where he was forced to perform slave labor. At Auschwitz, the Gestapo killed all sixty members of his family. Sampson somehow survived, and he is now a United States citizen and resident of Chicago.

...

The United States government filed a brief as amicus curiae (the “United States”) in support of Germany's argument that it had sovereign immunity for its acts during World War II.

...

We think that something more nearly express ... is wanted before we impute to the [United States] Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading of [the Foreign Sovereign Immunities Act] §1605(a)(1) would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations. In many if not most cases the outlaw regime would no longer even be in power and our Government could have normal relations with the government of the day—unless disrupted by our courts, that is *Sampson v. Fed. Rep. Germany*, 250 Fed.Rptr.3d 1145, 1146–47 & 1152 (7th Cir., 2001).

Three students, or teams, will respectively represent Mr. Sampson, Germany, and the United States. They will present their respective positions on whether this court should have ruled in favor of *retaining* jurisdiction over this suit (rather than dismissing it). Hearing this case on

its merits would have provided plaintiff Sampson with the opportunity to prove his case against the Federal Republic of Germany.

All parties agree to the following points: (1) Under International Law doctrine, States are bound by the *jus cogens* limitation on their conduct, even if they do not consent to its application. (2) Germany publicly acknowledged that its actions violated *jus cogens* norms (Nazi genocide policy). (3) The contemporary application of *restrictive* sovereign immunity replaced the absolute approach, which prevailed before the end of World War II. (4) Under US law, exceptions to the 1976 Foreign Sovereign Immunities Act (FSIA) have been narrowly construed. (5) US courts have generally determined that, under the FSIA, a foreign sovereign's waiver of its immunity from litigation will normally be inferred only as a last resort—because of the potential impact on foreign relations.

Problem 2.H (end of §2.6.): Marianne Pearl is the widow of the *Wall Street Journal* journalist slain by Al-Qaida commander Khalid Sheikh Mohammed. He is the UK citizen, formerly a resident of Pakistan, who proudly boasted that “I decapitated with my blessed right hand the head of the American Jew, Daniel Pearl.” In his Guantanamo Bay military hearing, Mohammed confirmed that “for those ... who would like to confirm, there are pictures of me on the Internet holding his head.” Mrs. Pearl now lives in France. The popular movie about the Pearls, *A Mighty Heart*, debuted in June 2007.

Mrs. Pearl filed a lawsuit in Brooklyn, NY against Pakistan's largest bank, Habbib Bank, Ltd. Its local branch office is on Manhattan's 42nd Street. She therein claimed that the defendant bank handled accounts funded by Islamic militants to establish worldwide “jihad movements.” Her complaint further claimed that Habbib is part of a series of banks that are fronts for Usama bin Ladin and Al-Qaida. Pakistan is perhaps the most significant US ally in the War on Terror, other than Great Britain.

Two students will represent plaintiff Pearl and defendant Habbib. Assuming that Habbib does have ties with Al-Qaida, is the bank immune from suit in the US court?

Problem 2.I (end of §2.7.D.): In 1992, Peru's ex-President Alan Garcia sought refuge in the Colombian embassy in Peru. This Peruvian president (from 1985

to 1990) was an outspoken opponent of his successor. Garcia went into hiding when the new Peruvian president dissolved the Peruvian Congress and temporarily closed the Peruvian courts. Colombia decided to grant Garcia diplomatic asylum. Colombia began to process Garcia's orderly departure from Peru. Did Colombia violate International Law by granting diplomatic asylum to former President Garcia in 1992? Would Peru be required to let Garcia leave the Colombian Embassy and leave Peru? (In September 2009, ousted Honduran President Manuel Zelaya took refuge in the Brazilian Embassy in Honduras. The new government cut off the food supply to the Embassy, in violation of the Vienna Convention.)

Problem 2.J (end of §2.7.E.): In 1994, a Berlin appellate court reinstated a German arrest warrant issued for Syria's former Ambassador “S.” It determined that neither the Vienna Conventions—nor customary International Law—prohibited his arrest and prosecution for assisting in the 1983 bombing of a French arts center in (the former) West Berlin. Explosives used in this attack had been temporarily stored in the Syrian embassy in (the former) East Berlin. Syria's Ambassador S. was instructed by his government to aid the terrorist organization led by the infamous terrorist “Carlos The Jackal” to carry out this attack. It claimed one life and severely injured twenty-three people. Although the Syrian embassy officer declined to transfer the explosives to West Berlin, storage there did help to conceal their whereabouts.

The German court determined that the diplomatic immunity accorded to a Syrian head of mission by the German Democratic Republic (East Germany) was not binding on third States—including the Federal Republic of Germany (“West Germany” before reunification in 1990). In the court's words: “Diplomatic immunity is only effective in the receiving state. Third states have not consented to the diplomat's activity....” The court also reasoned that the incorporation of former East Germany into the new Germany did not require (reunified) Germany to respect the immunity accorded by a “third state” to this diplomat. *S. v. Berlin Court of Appeal and District Court of Berlin-Tiergarten*, 24 *EUROPAISCHE GRUNDECHTE-ZEITSCHRIFT* 436 (1994). See B. Fassbender, *International Decisions*, 92 *AMER. J. INT'L LAW* 74 (1998).

Three students or groups will debate the soundness of West Germany's decision. One will act as the German prosecutor who argued this case on appeal.

Another will represent Syria. A third will represent the UN International Law Commission (§3.5)—having been summoned as a “friend to the court” to advise all parties about the proper application of the Vienna Convention on Diplomatic Relations to this case.

Problem 2.K (end of §2.7.E.): The following hypothetical is adapted from actual events. Many of the applicable rules of International Law are set forth in the 1961 Vienna Convention on Diplomatic Relations and the ICJ’s 1980 *Iran Hostage* case. Students will engage in diplomatic negotiations to achieve what they believe to be the best resolution. This exercise is designed to illustrate the rules of immunity—and some of their practical limitations:

Basic Facts Rieferbaans is a discotheque in Germany near a US military base. US soldiers often socialize at Rieferbaans. Magenta is a State that has an embassy in Germany but no diplomatic relations with the US. Magenta’s embassy is ten minutes from Rieferbaans by car.

The first secretary of Magenta’s diplomatic mission in Germany is *Chargé d’Affaires* Mann. The leader of Mann’s home State (Magenta) has directed Mann to openly criticize the US and take all steps necessary to publicize Magenta’s belief that the US should withdraw its troops from Western Europe. Magenta’s leader directs *Chargé d’Affaires* Mann to set off a bomb at the discotheque when it is crowded with US soldiers. Mann and the Magenta head of State communicate secretly via coded radio signals.

Unknown to Mann, the Army Intelligence Office at the US military base, in conjunction with a government radio station in Germany, has broken Magenta’s code for diplomatic transmissions. The US and German governments are fully aware of the terrorist plot. They want it to develop, however, to a point where Magenta cannot deny responsibility.

Chargé d’Affaires Mann has assembled a group of armed anti-US “freedom fighters” at Magenta’s embassy premises and at various points between the embassy and Rieferbaans. The Army Intelligence Office learns that there will be a very extraordinary (but apparently innocuous) message transported directly from Magenta’s leader to Mann. It will enter Magenta’s embassy via diplomatic pouch. It contains the signal to carry out the terrorist bombing at the Rieferbaans Disco. Magenta’s diplomatic courier arrives at a German airport, is detained by US

soldiers, and is then arrested by German police. The State of Magenta’s official diplomatic pouch is seized and opened. The US soldiers and the German police intercept the message that would have resulted in the bombing of the discotheque and a massive loss of life.

German police later surround Magenta’s embassy where Magenta’s “freedom fighters” are located. They advise *Chargé d’Affaires* Mann by telephone that the plot has been discovered and that the courier and pouch have been seized due to Magenta’s “abuse of transit” via the diplomatic pouch brought into Germany. Everyone in the embassy is ordered to immediately come outside and cross the street onto “German soil.”

Three students will act as diplomatic representatives. Student 1 will be Hans Smit, a German career diplomat assigned to negotiate a successful conclusion to this crisis. Student 2 will be Joanna Shultz, the US Ambassador to Germany. Student 3 will assume the role of *Chargé d’Affaires* Mann, Magenta’s ambassador to Germany.

Part One Hans Smit (student 1) and Joanna Shultz (student 2) confer at a government building in Germany near the Magenta embassy. They are trying to decide whether *Chargé d’Affaires* Mann should be invited to join them. Germany, the United States, and Magenta are parties to the Vienna Convention on Diplomatic Relations. Smit and Shultz should assess whether Mann can be characterized as having waived the treaty’s immunity provisions. If Mann decides to confer with them outside the Magenta embassy, they should further assess the possibility of revoking his diplomatic immunity to arrest him.

Part Two Assume that Smit and Shultz decide to invite Mann to negotiate, but *not* to arrest him. Can Mann reasonably claim that Germany and the US have violated the Vienna Convention? What specific claims will Mann likely assert?

Part Three The three ambassadors are discussing whether the “freedom fighters” in the Magenta embassy should be permitted to go free—from Germany to France, as they have requested. If Germany decides against this resolution, what can it do to the “freedom fighters”?

Note: The incident on which this problem is based occurred in 1986 in what was then West Berlin. Two US soldiers and a Turkish citizen were killed by a bomb blast in the Berlin discotheque “La Bella” (229 others were

wounded). It finally reached closure after a four year trial of various defendants including: a German who carried the bomb into the disco; a Palestinian working in the Libyan embassy who organized the bombing; and a Libyan diplomat—all of whom were given prison sentences at the conclusion of their trial in November 2001. One of the victims' estates later sued Libya in a US court. See *Beecham v. Socialist People's Libyan Arab Jamahiriya*, 424 Fed.Rptr.3d 1109 (D.C. Cir. 2005). This case was filed in 2004. Libya's appeal on sovereign immunity grounds was dismissed in September 2005. As of 2009, the case has not yet proceeded to trial.

Libya was supposedly retaliating for the US sinking of two Libyan boats near Libya in 1986. Ten days after the disco bombing, President Reagan ordered retaliatory strikes in Libya, one of which supposedly killed Libyan President Gadhafi's daughter. Two years later, Libyan intelligence officers bombed Pan Am 103 over Lockerbie, Scotland (killing 270 people). They were finally tried in The Netherlands in 2000 [§8.4.C.2.]. Relations thawed after Libya compensated victims' families for the tragic 1988 Pan Am 103 bombing incident. Libya participated in the US coalition in Afghanistan reacting to September 11, 2001.

◆ FURTHER READING & RESEARCH

See Course Web Page, at: <<http://home.att.net/~slomansonb/txtcsesite.html>>, Chapter Two.

◆ ENDNOTES

1. B. Chimini, *Third World Approaches to International Law: A Manifesto*, ch. 4, in A. Anghie, et al. (ed.), *THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION* 47, 51–52 (Leiden, Neth: Brill, 2003).
2. 1992: B. Boutros-Ghali, *AN AGENDA FOR PEACE: PREVENTATIVE DIPLOMACY, PEACEMAKING AND PEACE-KEEPING* 9 (New York: UN, 1992). 1995: B. Boutros-Ghali, *AN AGENDA FOR PEACE: SUPPLEMENT TO AN AGENDA FOR PEACE* 1 (New York: UN, 1995).
3. W. Friedmann, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 214 (New York: Columbia Univ. Press, 1964).
4. See generally W. Rice, *Nation v. State—Judgment for Nation*, 44 AMER. J. INT'L L. 162 (1950); M. Brandon, *State v. Nation: Fresh Evidence Admitted*, 44 AMER. J. INT'L L. 577 (1950). *State*: Article 1, 165 LON TREATY SERIES 19, 49 US STAT. 3097. *Nation*: B. Driessen, *A CONCEPT OF NATION IN INTERNATIONAL LAW* 13 (The Hague, Neth.: T.M.C. Asser Inst., 1992). *Community*: Greco-Bulgarian Communities Case, 1930 PCIJ REP., SER. B, No. 17, at 33. *People*: Driessen, at 17.
5. *Government*: J. Fox, *DICTIONARY OF INTERNATIONAL & COMPARATIVE LAW* 75 (2d ed. New York: Oceana, 1997). *Sovereign*: J. Falk & J. Camilleri, *THE END OF SOVEREIGNTY? THE POLITICS OF A SHRINKING AND FRAGMENTING WORLD* 11 (Hants, Eng: Edward Elgar, 1992).
6. Peace Treaty between the Holy Roman Emperor and the King of France and their Respective Allies (Oct. 24, 1648), Art. LXIV, at: <<http://www.yale.edu/lawweb/avalon/westphal.htm>>.
7. More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law, ch. 5, in M. Byers & G. Nolte (ed.), *UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW* 135 (Cambridge, Eng: Cambridge Univ. Press, 2003).
8. See this textbook, Chapter One Introduction, B. Point of Entry.
9. Weak as Constraint, Strong as Tool: The Place of International Law in U.S. Foreign Policy, ch. 3, in D. Malone & Y. Khong, *UNILATERALISM AND U.S. FOREIGN POLICY: INTERNATIONAL PERSPECTIVES*, 41, at 57 (London: Rienner, 2003).
10. Conclusion: Structure, Circumstance, and Choice in International Relations, ch. 7, in *WHY NATIONS COOPERATE: CIRCUMSTANCE AND CHOICE IN INTERNATIONAL RELATIONS* 172 (Ithaca, NY: Cornell Univ. Press, 1990).
11. Charter of the Organization of American States, Art 9, at: <<http://www.yale.edu/lawweb/avalon/decade/decad062.htm#art9>>.
12. Ptera Minnerop, *The Classification of States and the Creation of States within the International Community*, in 7 MAX PLANK YEARBOOK OF UNITED NATIONS LAW 79 (Leiden: Martinus Nijhoff, 2004). For attacks on a “rogue State” absent an attack from one, see *The New National Security Strategy*, id., at 158.
13. See M. Kelly, *Pulling at the Threads of Westphalia: “Involuntary Sovereignty Waiver”—Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 U.C.L.A. J. INT'L LAW & FOREIGN AFFAIRS 361 (2005) & this text §9.5 on Humanitarian Intervention.
14. 165 LEAGUE OF NATIONS TREATY SERIES 19, 49 US STAT. 3097 (entered into force 1934).
15. Although Quebec has received the most attention, Nunavut's flag flew for the first time (April, 1999) in the now self-governing territory in the northernmost portion of Canada. This culminates twenty years of negotiations between Canada and its indigenous, aboriginal Inuit people, who number about 25,000.
16. *Population*: M. Gunter, *What Happened to the United Nations Ministate Problem?* 71 AMER. J. INT'L L. 110 (1977) (no minimum). *Express grant*: Case Concerning Acquisition of Polish Nationality (Germany v. Poland), 1923 PCIJ, SER. B, No. 7, at 18 (Judgment of Sept. 15, 1923) (not required).
17. *Ghandi quote*: available at: <<http://www.whatwouldgandhidho.net/>>. *Balfour declaration*: see Preambular wording at: <<http://www.yale.edu/lawweb/avalon/mideast/palmanda.htm>>. *Mandate*: League of Nations Palestine Mandate, at: <<http://www.yale.edu/lawweb/avalon/mideast/palmanda>

- .htm#art7>. *US position*: Point 10, at <<http://www.yale.edu/lawweb/avalon/decade/decad164.htm>>. *UN Partition*: Part I, A at: <<http://www.yale.edu/lawweb/avalon/un/res181.htm>>.
17. Paragraphs 3, 4, 7(a), and 7(e), at: <http://www.servat.unibe.ch/icl/bk00000_.html>.
 18. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Judgment, Gen. List 91, para. 233 (2007) [§10.1.B.2. principal case].
 19. *Kadic v. Karadzic*, 70 Fed.3d 232 (2nd Cir., 1995), rehearing den'd, 74 Fed.3d 377 (2nd Cir., 1996), cert. den'd, 518 U.S. 1005 (1997).
 20. *Anti-Secession law*: its ten articles are available in English in B. Chimini et al (ed.), *Selected Documents*, in 11 *ASIAN YEARBOOK OF INTERNATIONAL LAW* 347 (Leiden, Neth.: Martinus Nijhoff, 2006). *History*: Purposeful Ambiguity as International Legal Strategy: The Two China Problem, in J. Makarczyk (ed.), *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI* 109 (1996). *Ambiguity*: H. Kuijper, *Is Taiwan a Part of China?*, ch. 2. in J. Henckaerts (ed.), *THE INTERNATIONAL STATUS OF TAIWAN IN THE NEW WORLD ORDER: LEGAL AND POLITICAL CONSIDERATIONS* 9 (London: Kluwer, 1996). *Hong Kong*: S. Zhichao, *International Legal Personality of the Hong Kong Special Administrative Region*, 7 *CHINESE J. INT'L L.* 339 (2008).
 21. For the actual debate, see <<http://www.cbc.ca/news/background/parliament39/motion-quebecnation.html>>.
 22. U.S. Army Field Manual FM 3-07, at <http://downloads.army.mil/docs/fm_3-07.pdf>.
 23. *Quote*: Colonialism and Trusteeship Redux? Imperial Connections, Historical Evolution, and Legitimization in the 'Post-Colonial' Era, ch. 8, in R. Wilde, *INTERNATIONAL TERRITORIAL ADMINISTRATION: How Trusteeship and the Civilizing Mission Never Went Away* 289, at 292–293 (Oxford, Eng: Oxford Univ. Press, 2008). *Cited commentators*: Id., at 289–290 n.4.
 24. *Finland*: League of Nations, Commission of Jurists on Aaland Islands Dispute, *OFFICIAL JOURNAL, SPECIAL SUPP.* 4, at 8–9 (1920). *Iraq*: C. Le Mon, *Legality of a Request by the Interim Iraqi Government for the Continued Presence of United States Military Forces*, *ASIL Insight* (June 2004), at: <<http://www.asil.org/insights/insigh135.htm>>.
 25. The Associated Press reported this development, based on a report by Radio Shariat on January 23, 2000.
 26. *Burma case*: *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373–374 (2000). *Holocaust case*: *American Insurance Association v. Garamendi*, 539 U.S. 396, 430 (2003) (J. Ginsburg dissenting).
 27. *Massachusetts v. EPA*, 549 U.S. 497 (2007).
 28. J. H. Verzijl, *Western European Influence on the Foundations of International Law*, 1 *INT'L RELATIONS* 137 (1955).
 29. *Non-Western writer*: K. Sastri, *International Law and Relations in Ancient India*, 1 *INDIAN YEARBK. INT'L AFFAIRS* 97 (1952). *Western writer*: C. Alexandrowicz, *Mogul Sovereignty and the Law of Nations*, 4 *INDIAN YEARBK. INT'L AFFAIRS* 317, 318 (1955).
 30. P. Chandra, *INTERNATIONAL LAW* 28 (New Delhi: Vikas, 1985) (“chaotic”); D. O’Connell, *INTERNATIONAL LAW* 127 (2d ed. New York: Oceana, 1970) (“confusing”); J. Dugard, *RECOGNITION AND THE UNITED NATIONS* 28 (Cambridge, Eng: Grotius, 1987) (“controversial”) [hereinafter *RECOGNITION AND THE UN*].
 31. Arab Nations Refuse to Recognize Iraq’s Governing Council, *USA Today* (Aug. 5, 2003).
 32. J. Ruda, *Recognition of States and Governments*, ch. 21 in M. Bedjaoui (ed.), *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* 450 (Dordrecht, Neth: Martinus Nijhoff, 1991). On the historical evolution of recognition practice, see G. Abi-Saab, *International Law and the International Community: The Long Road to Universality* 36–39 (The Role of “Recognition”), ch. 1 in R. MacDonald (ed.), *ESSAYS IN HONOUR OF WANG TIEYA* (Dordrecht, Neth: Martinus Nijhoff, 1994).
 33. J. Klabbbers et al. (ed.), *STATE PRACTICE REGARDING STATE SUCCESSION AND ISSUES OF RECOGNITION* 34 & 38 (The Hague: Kluwer, 1999) [hereinafter *Klabbbers*].
 34. *Fifty years later*: *Mingtai Fire & Marine Insurance Co. v. United Parcel Service*, 177 Fed.Rptr.3d 1142 9th Cir., 1999), cert. den'd 528 U.S. 951 (1999). *Hong Kong*: *Cheung v. US*, 213 Fed.Rptr.3d 82, 88–89 (2d Cir., 2000). *PRC legislation*: See J. Kahn, 60 Years Later, China Enemies End Their War, *NEW YORK TIMES* (Apr. 30, 2005).
 35. See, e.g.: “The career of Eugenio Pacelli—Pope Pius XII—from the beginning of this century is the story of a bid for unprecedented papal power that by 1933 had drawn the Catholic Church into complicity with the darkest forces of the era.” Preface, viii, J. Cornwall, *HITLER’S POPE: THE SECRET HISTORY OF PIUS XII* (New York: Viking Press, 1999).
 36. E. McDowell, *Contemporary Practice of the United States Relating to International Law*, 71 *AMER. J. INT’L L.* 337 (1977) (recognition by other States); C. Fenwick, *INTERNATIONAL LAW* 157–159 (4th ed. New York: Appleton-Century-Crofts, 1965) (ethnocentric motives); see *The Helena*, 4 *CH. ROB.* 3 (1801) (British case on pirate treaties), reprinted in W. Bishop, *INTERNATIONAL LAW, CASES AND MATERIALS* 301 (3d ed. Boston: Little, Brown & Co., 1971); G. Von Glahn, *LAW AMONG NATIONS* 69 (7th ed. Boston: Allyn and Bacon, 1996) (commercial and military motives).
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 38. *Xenides-Arestis v. Turkey*, Case No. 46347/99 (2006).
 39. D. Raic, *STATEHOOD AND THE LAW OF SELF-DETERMINATION* 90–91 (Hague: Kluwer, 2002).

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41. S. Talmon, *RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW: WITH PARTICULAR REFERENCE TO GOVERNMENTS IN EXILE* 21–27 (Oxford: Clarendon Press, 1998) (footnotes omitted).
42. *Tobar Doctrine*: see C. Stansifer, *Application of the Tobar Doctrine to Central America*, 23 *The Americas* (Jan. 1967), at 251–72. *Estrada Doctrine*: Genaro Estrada's doctrinal statement is reprinted in 25 *AMER. J. INT'L L. SUPP.* 203 (1931). A provocative response was published in P. Jessup, *The Estrada Doctrine*, 25 *AMER. J. INT'L LAW* 719 (1930).
43. See P. Brown, *The Legal Effects of Recognition*, 44 *AMER. J. INT'L L.* 617 (1950); Comment, *Effects in Private Litigation of Failure to Recognize New Foreign Governments*, 19 *UNIV. CHICAGO L. REV.* 73 (1951).
44. *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 104 Fed. Supp. 59 (1952), affirmed, 209 Fed. Rptr.2d 467 (9th Cir 1953).
45. *Elements for recognition*: J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 *Yale Int'l L. J.* 325 (2003). *Rights conferred*: *The Three Friends*, 166 U.S. 1, 63 (1897).
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47. See generally E. Chadwick, *TRADITIONAL NEUTRALITY REVISITED: LAW, THEORY, AND CASE STUDIES* (Hague: Kluwer, 2002); S. Neff, *THE RIGHTS AND DUTIES OF NEUTRALS: A GENERAL HISTORY* (Manchester, Eng: Manchester Univ. Press, 2000); and *Unilateral and Third Party Claims: Neutrality*, Section 13.4, in C. Chinkin, *THIRD PARTIES IN INTERNATIONAL LAW* 299 (Oxford, Eng: Clarendon Press, 1993).
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49. See English translation in *Collective Recognition and Non-Recognition Under the League of Nations*, ch. 3, at 28 & arguments for and against this practice, ch. 4, in *RECOGNITION AND THE UN* 41, cited in note 30 *supra*.
50. Memorandum on the Legal Aspects of the Problem of Representation in the United Nations, UN Doc. S/1466, Mar. 9, 1950.
51. EU Recognition Guidelines are reprinted in 31 *INT'L LEGAL MAT'LS* 1485 (1992).
52. See, e.g., 2 *FOREIGN POL. BULLETIN* 39, 42 (Nov./Dec. 1991) (testimony of US Deputy Ass't of Dep't of State).
53. ICJ press release: <<http://www.icj-cij.org/docket/files/141/14797.pdf>>.
54. *East Timor*: N. Azimi & Chang Li Lin, *THE UNITED NATIONS TRANSITIONAL ADMINISTRATION IN EAST TIMOR* (Leiden, Neth.: Martinus Nijhoff, 2003). *Kosovo*: United Nations Interim Administration Mission in Kosovo (UN Web page) at <<http://www.unmikonline.org>>.
55. *1978 "treaty" succession*: UN Doc. A/CONF. 80/31. *1983 "property" succession*: UN Doc. A/CONF. 117/14 (the former has entered into force, although only the minimum fifteen nations have ratified it; the latter draft treaty has not entered into force) [hereinafter 1983 treaty].
56. See *Treaty on the Final Settlement with Respect to Germany*, 29 *INT'L LEGAL MAT'LS* 1186, 1188 (1990) ("united Germany shall comprise the territory of the [FRG, GDR,] ... and the whole of Berlin").
57. K. Chrysostomides, *THE REPUBLIC OF CYPRUS: A STUDY IN INTERNATIONAL LAW* (The Hague: Martinus Nijhoff, 2000) (especially Chapter 7: "Unilateral Declaration of Independence" Contrary to International Law, at 237).
58. On State succession generally, see R. Jennings & A. Watts, 1 *OPPENHEIM'S INTERNATIONAL LAW* (Part I) §§60–70 (9th ed. Essex, Eng: Longman, 1993) [hereinafter *OPPENHEIM*]. Recognition issues are addressed in Klabbbers, cited note 33 *supra*. Regarding treaties, property and debt, see P. Menon, *THE SUCCESSION OF STATES IN RESPECT TO TREATIES, STATE PROPERTY, ARCHIVES, AND DEBTS* (Lampeter, Wales: E. Mellon, 1991). A new State's responsibilities to an organization, of which the prior State was a member, is addressed in K. Buhler, *STATE SUCCESSION AND MEMBERSHIP IN INTERNATIONAL ORGANIZATIONS: LEGAL THEORIES VERSUS POLITICAL PRAGMATISM* (Hague: Kluwer, 2001). Succession between international organizations is covered in P. Meyers, *SUCCESSION BETWEEN INTERNATIONAL ORGANIZATIONS* (London: Kegan Paul Int'l, 1993). Regarding UN membership, see K. Buhler, ch. 2, *State Succession, Identity/Continuity and Membership in the United Nations* 187–326, in P. Eisemann & M. Koskeniemi (ed.), *STATE SUCCESSION: CODIFICATION TESTED AGAINST THE FACTS* (Hague: Martinus Nijhoff, 2000).
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61. Regarding Dues for Reply Coupons Issued in Croatia, 23 *INT'L L. REP.* 591 (1956).
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143. See Comment, Diplomatic Asylum in the United States and Latin America: A Comparative Analysis, 13 BROOKLYN J. INT'L L. 111 (1987).
144. G. Do Nascimento e Silva, DIPLOMACY IN INTERNATIONAL LAW 104–106 (Leiden, Neth: Sijthoff, 1972). In the South-West Africa Cases (Ethiopia and Liberia v. South Africa), 1966 ICJ REP. 6, the ICJ held that the plaintiff States did not have a sufficient interest to represent the rights of persecuted natives in South Africa. The suit was dismissed, leaving those natives without an effective remedy.
145. I. Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 343 (6th ed. Oxford, Eng: Oxford Univ. Press, 2003).
146. Claims to Formal Bases of Capability, ch. 7, in LAW OF DIPLOMACY 333, 424–425, cited note 119 supra.
147. See Empson v. Smith, 2 ALL ENGLAND REP. 881, 883 (1965) (discussing the Russian ambassador's detention).
148. L. Frey & M. Frey, THE HISTORY OF DIPLOMATIC IMMUNITY, at 5 (Columbus, OH: Ohio State Univ. Press, 1998) (footnote omitted).
149. XV POLISH YEARBOOK. INT'L L. 119, 120 (1986) (italics added).
150. Consular Convention, cited note 135 supra.
151. See International Court of Justice: Order on Discontinuance and Removal of Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 20 INT'L LEGAL MAT'LS 889 (1981).
152. Iran case: Mike Theodoulou, Tehran Court Judgment Could Turn Over US Embassy to Plaintiff, CHRISTIAN SCIENCE MONITOR (Dec. 4, 2006). After Libya's November 2008 payment into a victims' compensation fund, U.S. President Bush signed an executive order restoring Libya's immunity from lawsuits alleging its terrorist activities, as well as immunizing it from pending suits. Commission proceedings: Hossein Alikhani v. United States, Case 4618/02 (Oct. 2005), summary at: <<http://www1.umn.edu/humanrts/cases/63-05.html>>.

153. C. Ashman & P. Trescott, *DIPLOMATIC CRIME*, at back cover & 14–15 (New York, NY: Knightsbridge Publishing, 1988).
154. J. Barker, *THE ABUSE OF DIPLOMATIC PRIVILEGES AND IMMUNITIES: A NECESSARY EVIL?* 12 (Aldershot, Eng: Dartmouth, 1996).
155. See *CHINA'S PRACTICE*, at 94, cited note 124 *supra*.
156. *Insurance analysis*: Note, Insuring Against Abuse of Diplomatic Immunity, 38 *STANFORD L. REV.* 1517 (1986). *U.S. Government standards*: Regulations on Compulsory Liability Insurance for Diplomatic Missions and Personnel, 22 *CODE OF FED. REGS.* 151 (1980), reprinted in 18 *INT'L LEGAL MAT'LS* 871 (1979). *Federal statute*: 22 U.S. CODE §254e.
157. *Kashin v. Kent*, 457 Fed.Rptr.3d 1033, 1035 (9th Cir. 2006).
158. UN Gen.Ass. Reso. 3166(XXVII) of 14 Dec. 1973, 13 *INT'L LEGAL MAT'LS* 43 (1974), at: <<http://untreaty.un.org/ilc/reports/2006/2006report.htm>>.
159. Report of the Secretary-General on United Nations Decade of International Law, UN Doc. A/47/384, para.153, at 49 (Aug. 26, 1992). See also ILC's Web page on inviolability of the unaccompanied diplomatic bag at <<http://www.un.org/law/ilc/guide/gfra.htm>>, scroll to: 9. Law of International Relations.
160. *Ungar v. PLO*, 402 Fed.Rptr.3d 274 (1st Cir. 2005).

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CHAPTER THREE

Organizations

CHAPTER OUTLINE

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On 12 July 2000 the Ministry of Education of the Russian Federation sent to education departments in Russian regions the instruction “On Activities of Non-traditional Religious Associations in the Territory of the Russian Federation,” which stated, in particular, as follows:

... in the Central part of Russia the international religious organisation The Salvation Army is expanding its activities. Its followers attempt to influence the youth and the military. The Salvation Army formally represents the Evangelical Protestant branch of Christianity, however, in essence, it is a quasi-military religious organisation that has a rigid hierarchy of management. The Salvation Army is managed and funded from abroad.

In at least one neighbourhood, the applicant branch’s mission of delivering hot meals to house-bound elderly persons had had to be stopped entirely because an official of the local administration had refused to work with the applicant branch as it had no official registration.

—Case of the Moscow Branch of the Salvation Army v. Russia, Application No. 72881/01, ¶18 & 32 (5 Oct. 2006), at: <http://strasbourgconference.org/Salvation_Army_v._Russia.doc>. See text §3.A.1(b) on Non-governmental Organizations.

INTRODUCTION

Chapter 2 addressed the legal identity and characteristics of the State, the primary actor in international affairs. This chapter discusses a related building block: the international organization—a supporting actor with increasing influence in global affairs.

There are important contrasts between the legal capacity of States and international organizations. Each State is an independent sovereign entity, enjoying equal status with other States under International Law—regardless of size or power. Each State is endowed with this fundamental attribute: plenary power over persons and things within its borders. A public international organization, on the other hand, owes its existence to the discretion of the States that created it. A non-governmental organization is not beholden to any State or group of States for its existence.

This chapter presents a preliminary description of the legal essence of international organizations, followed by some classification characteristics. It will initially focus on the key *global* organization—the United Nations—followed by perhaps the most robust *regional* organization—the European Union. The salient features of several selected regional organizations are also depicted in this chapter. Economic international organizations are presented in Chapter 12.

◆ §3.1 ORGANIZATION'S LEGAL STATUS

A. INTRODUCTION

What is an “international organization (IO)”?¹ It is a formal institution established by agreement of the affiliated members who created it. The common feature of most IOs is that their members all benefit from an organization working toward common objectives.

IOs operate in more than one country.² An IO may be an organization of States, individuals, or affiliated with various governments. According to popular myth, the International Criminal Police Organization (Interpol) has the capacity to operate independently of national governments. Its agents supposedly track and arrest international fugitives across the globe. In fact, Interpol cannot act without the express consent of the national police of any State wherein it maintains a presence. Interpol does not possess any independent police power to apprehend criminals throughout the world.³

This course focuses on *public* international organizations (PIO) consisting of State members as opposed to non-governmental international organizations like Amnesty International (AI) or Doctors Without Borders [both addressed in §10.5.A.]. Furthermore, a basic course in International Law normally devotes scant attention to PIOs other than those that routinely deal with major ethnic and military conflicts.⁴

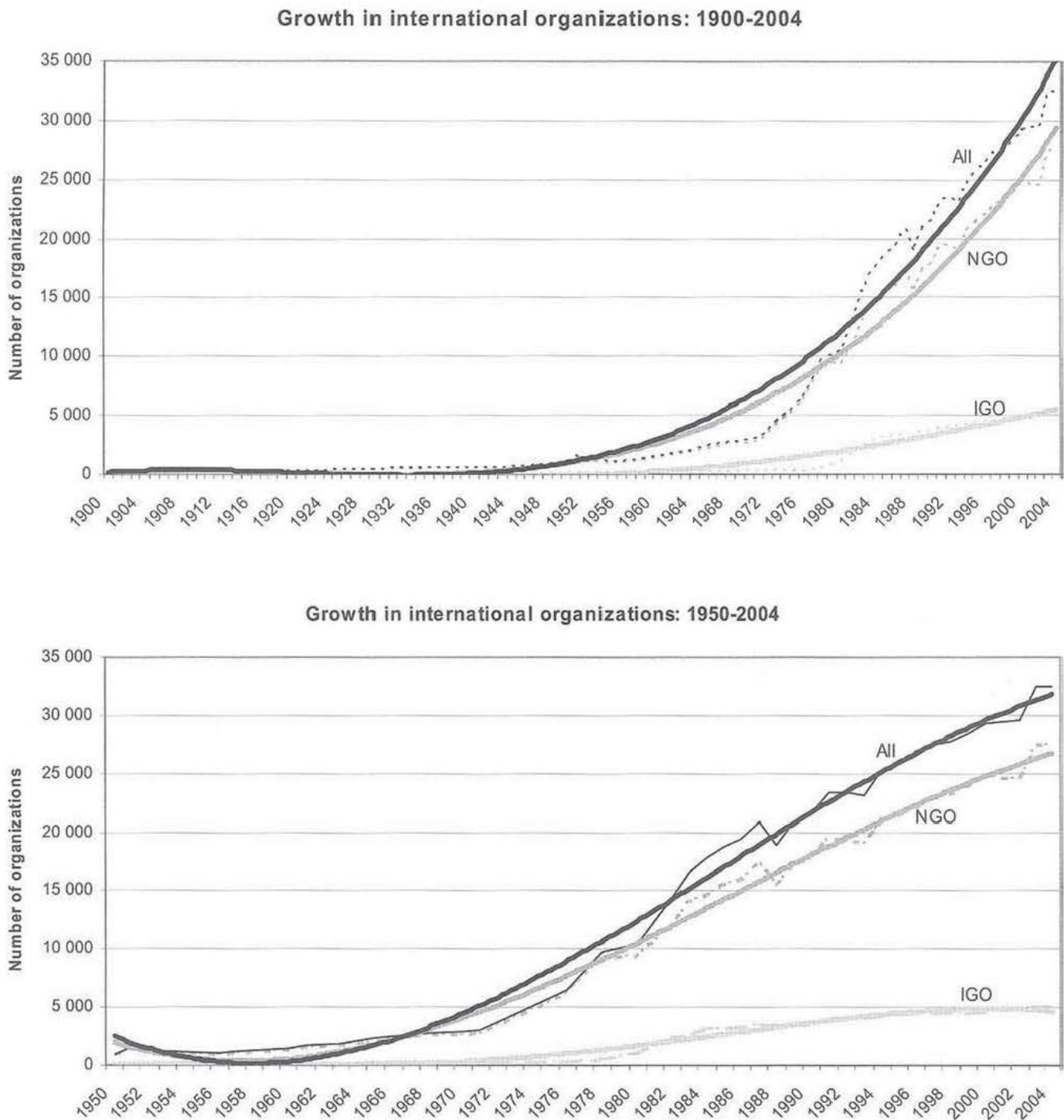
To qualify as a PIO, an entity must be: (1) established by some form of international agreement among States; (2) created as a new international legal entity that functions wholly or partially independent of State sovereign control; and (3) created under International Law.⁵

Inter-governmental organizations—such as the UN or the EU—are established by treaty. Others may be the product of an agreement reached at a ministerial or summit meeting of State representatives or heads of State. The Organization of Oil Producing Countries, for example, was founded at a 1960 meeting of governmental representatives in Baghdad.

To have international legal personality, the organization also must be provided with the capacity to enjoy rights and incur obligations in its relations with member (or nonmember) States. The 1947 General Agreement on Tariffs and Trade (GATT) was essentially an international agreement about each State's published tariffs. There was no sovereign entity, capable of requiring State compliance with GATT goals, until the World Trade Organization materialized in 1995 [§12.2.B.].

Agreements between two nations to provide for public transportation do not create an entity that is directly governed by International Law. The French British Channel Tunnel created an international governing entity, not unlike a corporation. The French Swiss agreement on the Bâle-Mulhouse Airport specifically provides that French law shall apply to airport operations.⁶

There is a striking parallel between the growth of States and IOs since the close of World War II. The number of States increased dramatically, from fifty-one to nearly two hundred. There has been an equally spectacular growth in the number of international organizations, from several hundred to nearly five thousand—raising questions about the value of such multiplication.⁷ Chart 3.1 illustrates the exponential growth in these organizations since 1900:

CHART 3.1 INTERNATIONAL ORGANIZATIONS (1900–2004)

Source: Reprinted from YEARBOOK OF INTERNATIONAL ORGANIZATIONS (2005), with permission of Union of International Associations, Brussels, Belgium.

The notion of an international organization pursuing the common objectives of its member States is not a twentieth-century development. Peace and religion were early motivators. The Egyptian Pharaoh Ikhnaton envisioned an international theological order some 3,400 years ago. The Amphictyon League of the ancient Greek city-states organized themselves with a view toward lessening the brutality of war. The medieval poet Dante proposed a global super-State, operating under control of a central court of justice. Yet these were not organizations in the contemporary sense, which would become permanent organizational institutions, possessing the status-yielding international legal personality.

In the post-Westphalian context [1648 treaty: §1.1.A.], the supremacy of State sovereignty precluded the existence of any other legal “person” on the international plane. This was the prevailing view until the early 20th century. As succinctly illustrated by Professors Schermers & Blokker, of the Leiden Law Faculty in the Netherlands, the early modern IGOs had no legal personality on the international level. One powerful State member would act on behalf of the organization. However:

In the 20th century the notion of absolute [and exclusive] state sovereignty ha[d] become obsolete. There was more need for international organizations to operate independently on the international level, separate from the member states.... There was increasing recognition that international organizations required legal personality within the domestic legal order [of each member State].... It took longer however for states to

accept international organizations in their midst as international legal persons, in the inner circle of happy few bearers of international rights and obligations.⁸

B. CAPACITY UNDER INTERNATIONAL LAW

The UN’s judicial organ, the International Court of Justice (ICJ), provides a novel and insightful analysis of an IO’s legal capacity. It illustrates how inter-governmental organizations can function independently from the constitutive instruments that create them (as more practically illustrated in §3.4 on the European Union). In November 1947, UN General Assembly Resolution 181(II) partitioned the former British Mandate of Palestine to create new Jewish and Arab States. This resolution was accepted by the Jewish Diaspora, but rejected by Middle East Arab nations. Shortly after Israel declared its statehood in May 1948, hostilities began in and around what is now the State of Israel. Two weeks later, UN Security Council Resolution 50 called for a cessation of hostilities.

A Swedish citizen and member of the royal family, Count Folke Bernadotte, was appointed the UN Mediator in Palestine for the purpose of negotiating a settlement. He was killed while pursuing this objective within the Palestinian territory. General Assembly Resolution 194(III) of December 1948 expressed a “deep appreciation of the progress achieved through the good offices of the late UN Mediator in promoting a peaceful adjustment of the future situation of Palestine, for which cause he sacrificed his life.”⁹ The issue for the ICJ was whether the UN Charter gave this IO the legal capacity to demand reparations from the responsible State or States whose agents were responsible for killing employees of the UN organization:

Reparation for Injuries Suffered in the Service of the United Nations

INTERNATIONAL COURT OF JUSTICE

ADVISORY OPINION (1949)

1949 INTERNATIONAL COURT OF JUSTICE REPORTS 174

<<http://www.icj-cij.org/docket/files/4/1835.pdf>>

AUTHOR’S NOTE: This is an International Court of Justice (ICJ) “advisory” opinion. There is no State defendant [textbook §8.4.E.]. The UN requested that the Court render its opinion on the issue of whether the UN had a legal right—distinct from a member State—to sue for damages to the UN, in its capacity as an organization employing international civil servants.

In addition to the death of the UN’s Mediator in Palestine, its agents from various countries were being injured or killed while performing duties on behalf of the organization. Prior to the Court’s decision in this case, only the victim’s State of citizenship had the exclusive right to seek reparations for harm to that State—because of the death of its citizen [§4.1.].

In 1947, the UN claimed that there could be State responsibility, to an international organization, for injury to aliens (UN employees) allegedly caused by Israel, Jordan, and Egypt, where these individuals were working for the UN—in three separate incidents. The UN claimed that the responsible States failed to protect these individuals from private criminal acts. In the case of Israel, for example, two UN employees in Palestine were shot while driving through the Jewish portion of Jerusalem. The UN sought compensation from Israel for the loss of their lives. Its claim was brought for Israel's "failure to exercise due diligence and to take all reasonable measures for the prevention of the assassination; liability of the government for actions committed by irregular forces in territory under the control of the Israel[i] authorities; and failure to take all measures required by international law and by the Security Council... to bring the culprits to justice." Israel refused to pay any compensation, claiming that only the State of the victim's nationality had the legal capacity to assert the State liability of Israel.^{9a}

The Court analyzed whether the alleged harm to the UN, in its legal capacity as an international organization, could be reconciled with—or supplant—the right to seek reparations by the State of the victim's nationality. Put another way, if a Swedish citizen is killed while abroad, only Sweden could seek reparations from the responsible State, prior to creation of the UN. Could the UN Charter be read as furnishing the UN with the legal personality to sue in an international court, for wrongs done to the UN in its capacity as the employer of the deceased?

COURT'S OPINION: The questions asked of the Court relate to the "capacity to bring an international claim;" accordingly, we must begin by defining what is meant by that capacity, and consider the characteristics of the Organization, so as to determine whether, in general, these characteristics do, or do not, include for the Organization a right to present an international claim [for injury to a UN agent].

Competence to bring an international claim is, for those possessing it, the capacity to resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims. Among these methods may be mentioned protest, request for an enquiry, negotiation, and request for submission to an arbitral tribunal or to the Court in so far as this may be authorized by the Statute [of the ICJ].

This capacity certainly belongs to the State; a State can bring an international claim against another State. Such a claim takes the form of a claim between two political entities [*i.e.*, States], equal in law, similar in form, and both the direct subjects of international law. It is dealt with by means of negotiation, and cannot, in the present state of the law as to international jurisdiction, be submitted to a tribunal, except with the consent of the States concerned....

But, in the international sphere, has the Organization such a nature as involves the capacity to bring an international claim? In order to answer this question, the Court must first enquire whether the Charter has given the Organization such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect. In other words, does the Organization possess international personality? ...

The Charter has not been content to make the Organization created by it merely a centre "for harmonizing the actions of nations in the attainment of these common ends" (Article I, para. 4). It has equipped that centre with organs and has given it special tasks. It has defined the position of the Members in relation to the Organization by requiring them to give it every assistance in any action undertaken by it (Article 2, para. 5) and to accept and carry out the decisions of the Security Council; by authorizing the General Assembly to make recommendations to the Members; by giving the Organization legal capacity and privileges and immunities in the territory of each of its Members; and by providing for the conclusion of agreements between the Organization and its Members. Practice—in particular the conclusion of conventions to which the Organization is a party—has confirmed this character of the Organization, which occupies a position in certain respects in detachment from its Members, and which is under a duty to remind them, if need be, of certain obligations.... The "Convention on the Privileges and Immunities of the United Nations" of 1946 creates rights and duties between each of the signatories and the Organization (see, in particular, Section 35). It is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality.

In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large

measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.

Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is a “super-State,” whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.

The next question is whether the sum of the international rights of the Organization comprises the right to bring the kind of international claim described in the Request for this Opinion. That is a[n international organization’s] claim against a State to obtain reparation in respect of the damage caused by the injury of an agent of the Organization in the course of the performance of his duties. Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice. The functions of the Organization are of such a character that they could not be effectively discharged if they involved the concurrent action, on the international plane, of fifty-eight or more Foreign Offices, and the Court concludes that

the Members have endowed the Organization with capacity to bring international claims when necessitated by the discharge of its functions.

Having regard to its purposes and functions already referred to, the Organization may find it necessary, and has in fact found it necessary, to entrust its agents with important missions to be performed in disturbed parts of the world. Many missions, from their very nature, involve the agents in unusual dangers to which ordinary persons are not exposed. For the same reason, the injuries suffered by its agents in these circumstances will sometimes have occurred in such a manner that their national State would not be justified in bringing a claim for reparation on the ground of diplomatic protection, or, at any rate, would not feel disposed to do so. Both to ensure the efficient and independent performance of these missions and to afford effective support to its agents, the Organization must provide them with adequate protection.

The obligations entered into by States to enable the agents of the Organization to perform their duties are undertaken not in the interest of the agents, but in that of the Organization. When it claims redress for a breach of these obligations, the Organization is invoking its own right, the right that the obligations due to it should be respected.... In claiming reparation based on the injury suffered by its agent, the Organization does not represent the agent, but is asserting its own right, the right to secure respect for undertakings entered into towards the Organization....

The question of reconciling action [this right to sue that is claimed] by the Organization with the rights of a national State may arise in another way; that is to say, when the agent bears the nationality of the defendant State....

The action of the Organization is in fact based not upon the nationality of the victim but upon his status as agent of the Organization. Therefore it does not matter whether or not the State to which the claim is addressed regards him as its own national, because the question of nationality is not pertinent to the admissibility of the claim....

Under Article 100 of the Charter, UN employees performing UN duties cannot “seek or receive instructions from any government or from any other authority external to the Organization.” The above UN agent—a citizen of Sweden—was carrying out a mission on behalf of the organization in Sweden. The *Reparation* case suggested reasons

for conferring the right to seek appropriate reparations, based on the injured individual’s organizational employment, even though the UN employee is presumably still entitled to similar protection by his or her home State. Why?

There have been a number of incidents whereby the UN—or other international organizations such as the

European Union—might proceed with diplomatic negotiations or a lawsuit to establish State responsibility under the theory spawned by the ICJ's *Reparation Case*:

- ◆ In December 1991, the body of UN Colonel John Higgins was returned to the UN from Lebanon. While on a UN peacekeeping operation in 1989, he was kidnapped and brutally murdered.
- ◆ In January 1991, five European Community (now EU) truce observers were shot down in their helicopter by Serbian Yugoslavian military forces in Croatia.

Of course, neither Lebanon nor what was then Yugoslavia claimed responsibility for the deaths of these agents. They were on peacekeeping missions for, respectively, the UN and the EU. It is precisely in this situation that these international organizations would hold the right, under the *Reparation* rationale, to seek redress from the responsible States.

- ◆ In December 1992, Cambodia's Khmer Rouge freed eleven UN peacekeepers that had been kidnapped and threatened with execution. As a belligerent entity [§2.3.A.3], the Khmer Rouge would bear responsibility under International Law for any harm that might have come to these UN peacekeepers.
- ◆ In 1995, a Serbian tank fired on UN personnel in Kosovo, severely injuring a British soldier.
- ◆ In November 1997, gunmen stormed aboard a boat moored off Somalia to kidnap five aid workers from the UN and the EU.
- ◆ In February 1998, four UN observers from the Czech Republic, Sweden, and Uruguay (two of them UN employees) were kidnapped by a heavily armed gang in Tbilisi, Georgia. The gang then presented the government of Georgia with the following demand: If seven prisoners accused of plotting to kill the President of Georgia were not released, these UN employees would be killed. Georgian police surrounded the house where the kidnapped UN personnel were being held and eventually captured the surviving gang members.
- ◆ In July 1998, four UN employees from Poland, Uruguay, Japan, and Tajikistan were shot in the former Soviet republic of Tajikistan. UN Secretary-General Kofi Annan said that they had been "ambushed and ruthlessly executed."

- ◆ In May 2000, 500 UN Hostages were detained in Sierra Leone. This was yet another blow to UN peacekeeping efforts in Africa. Four Kenyan peacekeepers were killed. Another dozen from various African nations were wounded. The United States, England, and France declined an invitation to provide reinforcement troops. The West shied away from African peacekeeping after the death of eighteen US marines in the UN-based Somalian mission in 1993. Over 100 Nigerians were detained before being released without their weapons.
- ◆ In 2003, a truck bomb explosion killed eight UN staff members at Baghdad's UN headquarters, including the UN's top representative—resulting in the UN's departure from Iraq.

In 1994, General Assembly Resolution 49/59 adopted the Convention on the Safety of UN and Associated Personnel. Article 7 provides that "United Nations and associated personnel, their equipment and premises shall not be made the object of attack...." Article 9 requires each state party to enact national law making it a crime to either attack UN personnel or to attack the official premises of any UN personnel, which is likely to endanger his or her person. The need for such a treaty is apparent from a subsequent UN report on casualties between 1992 and 1998. 173 UN staffers were killed, and 80 were still missing, as of September 2000. The UN Blue Helmet was once comparable to a security blanket. It is now a target.

In 1997, the United Kingdom enacted legislation whereby crimes against UN personnel are crimes against the UK—just as if those acts had occurred in the UK. This statute is a contemporary example of the *Reparation* theme being implemented under both national and International Law.¹⁰

The *Reparation Case* addressed the UN's capacity to be a plaintiff, seeking damages for harm to one of its international civil servants in an *international* court. The following US legislation, enacted four years earlier, related to the UN's permission to operate on US soil (at its New York City headquarters). Congress thereby generally enabled designated international organizations to exercise the legal capacity to operate—within the US and under its national laws:¹¹

§288.... [T]he term "international organization" means a public international organization in which

the United States participates pursuant to any treaty ... and which shall have been designated by the President ... as being entitled to enjoy the privileges, exemptions, and immunities provided in this subchapter....

§288a. International organizations shall enjoy the status, immunities, exemptions, and privileges set forth in this section, as follows:

- (a) International organizations shall, to the extent consistent with the instrument creating them, possess the capacity—
 - (i) to contract;
 - (ii) to acquire and dispose of real and personal property;
 - (iii) to institute legal proceedings.

The quoted legislation does not specifically say that any particular IO could be a plaintiff (or a defendant) in a US court. Nor does it mention whether an IO can sue national members, or its host-nation. A case decided four years after the above legislation was enacted, and one year after the ICJ's *Reparation Case*, provided some answers. The UN contracted with the US, whereby the latter was to deliver emergency supplies (milk) for children in Europe. The US-hired shipper damaged the milk in some cases and never delivered it in others. A US federal court examined the related issues spawned by this alleged breach of contract: (1) Did the UN have the legal capacity to bring a lawsuit—other than in the ICJ? (2) If so, could the UN sue a member nation in *that* nation's domestic courts? The following critical passages provided an affirmative answer to both questions:

The International Court of Justice has held [*see above Reparation Case*] that the United Nations is a legal entity separate and distinct from the member States. While it is not a state nor a super-State, it is an international person, clothed by its Members with the competence necessary to discharge its functions. Article 104 of the Charter of the United Nations provides that “the Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes” ... [and] the President has removed any possible doubt by designating the United Nations as one of the organizations entitled to enjoy the privileges conferred by the International Organizations Immunities Act.

...

Whether the United Nations may sue the United States is a more difficult question....

The broad purpose of the International Organizations Immunities Act was to vitalize the status of international organizations of which the United States is a member and to facilitate their activities. A liberal interpretation of the Act is in harmony with this purpose.

The considerations which might prompt a restrictive interpretation are not persuasive. It is true that ... international organizations on a grand scale are a modern phenomenon. The wide variety of activities in which they engage is likely to give rise to claims against their members that can most readily be disposed of in national courts. The present claim is such a claim....

International organizations, such as the United Nations and its agencies, of which the United States is a member, are not alien bodies. The interests of the United States are served when the United Nations' interests are protected. A prompt and equitable settlement of any claim it may have against the United States will be the settlement most advantageous to both parties. The courts of the United States afford a most appropriate forum for accomplishing such a settlement.¹²

This key 1950 US domestic court decision could have led the way in an identifiable international trend for resolving disputes between States and IOs. Today, however, there are limited fora within which to pursue such claims. The ICJ is not one of them because “only States” can be parties to cases heard by the world court [§8.4.C.]. And as cautioned by Vienna University's Dr. August Reinisch, regarding State alternatives:

it is ... generally accepted that international organizations may become legally liable according to domestic law. The enforcement aspect, however, is in many cases more controversial. The obvious reason for this legal insecurity as far as the availability of an adjudicative organ to determine and enforce legal accountability is concerned lies in the lack of explicit provisions for such organs or in the explicit exclusion of possible fora [regarding IO liability] ... the predominant position on the domestic level where existing courts are frequently deprived of their adjudicative power as far as international organizations are concerned.¹³

International organizations recognized by *non-member States* may have the capacity to pursue organizational claims in their national courts. In September 2006, for example, the European Court of Justice (ECJ) approved the decision of the European Community and its member States to bring actions for damages against certain American cigarette manufacturers in US courts. The ECJ authorized this legal action, while a Community appeal of two US judicial case dismissals was pending. If the US had not recognized the international legal personality of the Community to appear in US courts, the ECJ decision would have been a meaningless attempt to exert jurisdiction on foreign turf [prohibition on extraterritorial jurisdiction: §5.1.A.]¹⁴

Organizations possessing the requisite capacity to deal on the international level might also deal with other international organizations. The UN has exercised its power to authorize other organizations and their member States to fulfill its critical objectives. The August 2008 Security Council Resolution 1831, for example, decided “to renew the authorization of Member States of the African Union to maintain a mission in Somalia ... for a period of six months.” That mission will assist in the “withdrawal of foreign forces” and create the necessary “conditions for lasting peace and stability.”

C. ORGANIZATIONAL RESPONSIBILITY

1. UN Study In §2.5.B of this book, you studied State Responsibility. Once an entity achieves statehood, it has definite rights and obligations arising under International Law. Recall the draft rules of State Responsibility promulgated by the UN’s International Law Commission (ILC). It is currently engaged in defining the contours of organizational responsibilities arising under International Law.

You will recall that the ILC presented the Draft Articles on *State Responsibility* to the General Assembly (GA) in 2001. The Commission is also defining the obligations of *international organizations*. In 2003, GA Resolution 58/77 therefore “requested a number of international organizations to provide comments and materials ‘especially on questions of attribution [of conduct to international organizations] and of responsibility of member States for conduct that is attributed to an international organization.’”

In April 2004, the ILC presented its report on responsibility of international organizations to the international legal community via the GA. Per the ILC commentary published in August 2006: “The present chapter assumes that there exists conduct attributable to an international organization. In most cases, it also assumes that that conduct is internationally wrongful.”¹⁵ Responsibility would not thereby be rooted in mere negligence; nor would strict liability principles apply (liability without regard to fault). These articles are being considered by the Assembly, with a view toward potential adoption as a treaty-based approach, in 2009 (“First Reading”) and 2011 (“Second Reading”).

The UN proffered a major study that foreshadows the ultimate role of international organizations—collective security, facilitated by more robust State participation in its organizational processes. Per the comprehensive December 2004 Report of the United Nations’ High-Level Panel on Threats, Challenges and Change:

We must not underestimate the difficulty of reaching a new consensus about the meaning and responsibilities of *collective* security.

...

What is needed today is nothing less than a new consensus between [international] alliances that are frayed, between wealthy nations and poor, and among peoples mired in mistrust across an apparently widening cultural abyss. The essence of that consensus is simple: we *all* share responsibility for each other’s security. And the test of that consensus will be action.

...

The attacks of 11 September 2001 revealed that States, as well as collective security institutions, have failed to keep pace with changes in the nature of threats.... We have yet to fully understand the impact of these changes, but they herald a fundamentally different security climate—one whose unique opportunities for cooperation are matched by an unprecedented scope for destruction.¹⁶

2. Private Study The Ford Foundation, a US-based research and policy-making institution, has traditionally advocated for increased reliance on international organizations as a practical vehicle for effecting positive changes in State-to-State relations. Ford’s studies embrace the concept of international cooperation in an era when the State is still the principle international player. In a 1990

study on international organizations and law, for example, this Foundation articulated a shifting paradigm: international organizations and non-governmental organizations could both assume a greater role in the progressive development of the international order. As asserted in the Foundation's serviceable position paper regarding the need for more effective international organizations:

[I]t is abundantly clear that no single nation now dominates our age. The United States, the architect of the postwar order, is no longer able to control events single-handedly, if it ever could. Japan, the European Community, the newly industrializing countries ... and the dominant nations in some regions have become influential international actors.... Partly as a consequence of this diffusion of power, international organizations face far different challenges now than they did forty years ago. The United Nations, Breton Woods institutions [establishing the International Monetary Fund], and the international trade system are all under strain....

Linking the fields of international organizations and international law to multilateral cooperation ... suggests an underlying conviction that institutionalized global cooperation is a necessity ... [that] should be based in law and should include enforceable rights and obligations.¹⁷

3. Judicial Study One of the classic examples of potential *organizational* responsibility for an international delict arose from the 1999 bombing of the territory of the Federal Republic of Yugoslavia. That military action spawned extensive debate about whether the negative implications of the Kosovo conflict should be attributed to the North Atlantic Treaty Organization (NATO) qua international organization—as opposed to some, or all, of its members [§9.5.B. Humanitarian Intervention]. A number of NATO nations were sued in the ICJ and the European Court of Human Rights.¹⁸ In both venues, various respondent States argued that any conduct allegedly violating International Law should be attributed to NATO—rather than to the national participants in that war. Neither action resolved the merits of this response.

By comparison, there is undisputed State responsibility for violations of International Law when a State organ acts on behalf of the State. This customary restatement of *State* responsibility could be applied to an international organization as well. The relevant ILC draft principle thus provides as follows: “the conduct of an organ of an inter-

national organization, of one of its officials or another person entrusted with part of the organization's functions shall be considered as an act of that organization under international law, whatever position the organ, official or person holds in the structure of the organization.”¹⁹

The following case integrates the work of an array of international organizations in an environment addressing their status as international legal personalities. The involvement of the numerous international organizations in this single case study illustrates the vibrant status of international organizations in contemporary international affairs that—as recently as the end of WWII—would have been relegated to the arcane and abstract character of State-driven remedies:



Behrami and Behrami v. France

Application No. 71412/01

and

Saramati v. France, Germany and Norway

Application No. 78166/01

EUROPEAN COURT OF HUMAN RIGHTS

Grand Chamber Decision as to Admissibility
(2 May 2007)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsestite.html>>.

Under Chapter Three, click ECHR UN Attribution Case.

◆ §3.2 ORGANIZATIONAL CLASSIFICATION

International organizations can be sorted in a variety of ways. This section focuses on what an organization is designed to do, based on who created it and why.

A. TRADITIONAL MODEL

The traditional paradigm of organizational classification employs a “functional” approach. International organizations are thereby: (1) public or private; (2) administrative or political; (3) global or regional; and (4) either possess, or do not possess, supranational power.²⁰ One could also initiate a discussion of international organizations (IO) from a host of other perspectives. These include

the “rationalist,” “revolutionary,” “realist,” and “critical” theories for assessing IOs.²¹

The “functional” model is a convenient starting point for characterizing the power and purpose of the myriad of contemporary international organizations. Typically, a group of States will agree to establish a “public” organization—a process with the potential for derogations from State sovereignty. States often enter into written treaties to inaugurate international trade or communications associations. Those bodies then implement the joint decisions of the State representatives.

“Private” international organizations are typically established by non-State entities (individuals or corporations). Non-governmental representatives then execute the mission of the particular organization—hence, the term “Non-Governmental Organization” (NGO). This latter type of international organization is not created by a treaty between sovereign States. Examples include the International Chamber of Commerce (headquartered in Paris) and AI (headquartered in London).

The *administrative v. political* distinction is somewhat blurred by modern practice. Administrative international organizations tend to have goals that are far more limited than those of their political analogues. The United Nations’ International Telecommunications Union, for example, serves an administrative purpose that is not associated with maintaining or directing political order. Among other things, it allocates radio frequencies for communication in outer space. Many political IOs, on the other hand, are intergovernmental entities designed to maintain military or political order. The UN was conceived to implement a system of collective security to discourage the unilateral use of military force. The UN also serves as a forum for improving the economic and social conditions of its member States.

The *global v. regional* distinction is arguably less useful than the other traditional distinctions. The UN is the quintessential example of a global organization. Its impact, however, is not necessarily global. It is not a world government. It often serves as a forum for debating regional problems. Not all regional organizations are, in fact, regional. The press often refers to NATO as a Western European association. Yet the geographical position of certain long-term members such as the United States, Canada, and Iceland makes it difficult to characterize NATO’s function as being limited to Western Europe—especially now that NATO is welcoming certain former Warsaw Pact members from the former Soviet Union [§3.5.A.].

The final traditional distinction involves organizations possessing, or not possessing, *power over member States* requiring them to act or not act in particular ways. One definitional problem is that many international organizations are “supranational.” They are associations of States with independent organs for implementing the goals of the participants. It would be incorrect, however, to characterize the UN as having supranational power. It cannot dispatch a peacekeeping force independently of the approval of the five permanent members of the UN Security Council (SC). Nor does the SC traditionally dispatch troops without the consent of the State or States where they are to be stationed. In the European Union (EU), on the other hand, members have ceded some of their sovereign powers to community organs, which may—and do—require member States to act in ways that would not occur unilaterally.

1. Governmental and Non-Governmental Organizations Another useful classification distinction is the international *governmental* organization (IGO) versus the international non-governmental organization [INGO], as heralded by University of Aberdeen (Scotland) Professor Clive Archer.²² This distinction builds upon UN Economic and Social Council Resolution 288(X) of 1950. It provided that every “international organization that is not created by means of international governmental agreements [treaties] shall be considered as a non-governmental international organization.”

(a) Governmental Organizations As aptly articulated by Columbia University’s Professor Jose Alvarez:

Because of their quasi-governmental status, [governmental] IOs are usually accorded “international legal personality” that approximates that of the prime actors of state-centric international law... They, but not TNCs [transnational corporations] or NGOs, are constituted by one of the recognized sources of international law, an international agreement [§1.2.B.]... IOs are a distinguishable sub-specialty within international law, with a discrete and identifiable literature. While each IO has its own legal order and faces distinct problems, IOs share a certain “unity in diversity,” including common principles..., namely “international institutional law.”

...

An IO must have genuinely international aims intended to cover at least three states; its membership

must include full voting rights and be open to states appropriately qualified in the organization's area of operations; voting must be such that no one national group exerts control; ... there should be the possibility of the continuous operation of a permanent headquarters; the IOs should not engage in profit-making activities...; each IO must show that it can exist independently and elect its own officials; and evidence of current activities must be available....²³

For example, the UN is a global IGO. Its membership consists of 192 States throughout the world [Table 2.1, §2.2]. The European Union is an IGO of 27 States [Chart 3.4]. It operates on a primarily regional international level.

(b) Non-Governmental Organizations IGOs are established by states—as opposed to NGOs, which are established by private initiative. One immediately thinks of Amnesty International (headquartered in London) with its millions of members in most countries of the world [§10.5.A.].

The UN Charter provides an express basis for the work of NGOs being considered in your International Law course. Article 71 provides that one of the six UN entities addressed later in this chapter, the Economic and Social Council (ECOSOC), “may make suitable arrangements with non-governmental organizations which are concerned with matters within its competence.” In 1950, this UN body augmented the status of NGOs, but did not define them, in its Resolution 288(X): “Any international organization which is not created by intergovernmental agreement shall be considered as a non-governmental organization for the purposes of these arrangements.”

Under these articulations, however, not all non-governmental organizations qualify. Under the further ECOSOC refinements, as assessed by Swedish Minister of Justice and human rights advisor Anne-Karin Lindblom in her leading treatise on NGOs, “political parties and liberation movements cannot achieve consultative status [with the U.N.] ... because the ‘aims and purposes of the [NGO] organization shall be in conformity with the spirit, purposes and principles of the UN Charter....’ The same ... seems to be applicable to violent and criminal groups.” The UN has directed its resolutions at “NGOs,” such as Hezbollah in Lebanon. But this Security Council action does not give such organizations any special status as NGOs under International Law.²⁴ At best,

they could qualify as belligerent groups, which would be subject to very specific humanitarian norms in the conduct of a belligerency against their State [§2.3.A.3.].

This is not to say that NGOs do not have political aspirations. Nobel Prize winning NGOs such as the International Campaign to Ban Landmines and Doctors without Borders are at the forefront of movements with the specific objective to influence international politics. There are, of course, many more INGOs with like objectives, including the various national Societies of International Law. Amnesty International (AI: London), for example, was not founded by a conference of governmental leaders, but by a British lawyer. Its members are individuals, from all over the globe, who are concerned about State observance of international human rights norms. They promote AI's agenda through various Web sites.²⁵

The International Olympic Committee (IOC—Lausanne, Switzerland) is another worldwide NGO. It promotes quadrennial sporting competitions to enhance State friendship [§4.2.A. *Perez v. IOC* case]. In 1998, its work, under UN auspices, promoted an agreement by 179 nations that there would be no hostilities during the Winter Olympics in Japan. Prior to the 2004 Olympics, evidence seized by Italian police at the Olympic training headquarters in Italy was shared with the IOC. This is a contemporary example of mutual cooperation between a national member of an NGO and the organization regarding its drug monitoring objectives.

The relationship between States and NGOs designed to pique State human rights consciousness is often strained. It is often a crusading NGO that leads the way for a State or States to appreciate the international dimension of what had previously been considered an exclusively domestic matter.²⁶ Of course, some States will not budge. The UN sponsored the 1995 Fourth World Conference on Women in Beijing. It drew representatives from 189 countries. Some 30,000 individuals and NGOs also attended. The Chinese government limited the latter, however, to conducting a parallel event in a tent city that was thirty-five miles from Beijing. They were thus precluded from direct participation in this official State conference. As noted by the US representative, Secretary of State Madeline Albright: “Freedom to participate in the political process of our countries is the inalienable right of every woman and man. Deny that, and you deny everything.”

In December 2005, Russian legislation restricted NGO activities, especially those funded by western

institutions such as Human Rights Watch and Amnesty International. In her critical response, US Secretary of State Condoleezza Rice responded that Russia should understand “the importance of non-governmental organizations to a stable, democratic environment.” In November 2006, the Peruvian Congress passed like legislation restricting the activities of NGOs. These entities, and their donors, must register with the Peruvian Agency of International Cooperation. This agency is empowered to review and approve (or reject) all NGO projects and activities undertaken by these organizations in Peru. Human rights organizations complain, however, that this law violates Peru’s international obligations to protect the freedoms of expression and assembly.²⁷

(c) Hybrid Organizations Some international organizations (IOs) consist of both International Governmental Organizations (IGOs) and International Non-Governmental Organizations (INGOs). Governments and private corporations have jointly formed an IO to improve telecommunications. The Communication Satellite Corporation (COMSAT) is a mix of both States, which do possess international legal capacity, and nongovernmental corporations, which do not possess such capacity under International Law. They have nevertheless combined to achieve the delivery of better worldwide communications.

The relationship between IGOs and INGOs may be somewhat symbiotic, whereby dissimilar organs unify to serve mutually beneficial interests. For example, certain non-governmental organizations possess a special status at the United Nations. The Palestine Liberation Organization (PLO), the International Committee for the Red Cross, and the American Society of International Law have been accorded special “observer status” by different UN organs. When the General Assembly meets at the UN headquarters in New York City, the PLO sends representatives to monitor the proceedings. As of July 1998, its representative may raise issues, cosponsor draft resolutions, and make speeches in the Assembly. Various INGOs thereby participate in the work of the UN. They are neither States nor governmental organizations, but they do enjoy some degree of legal personality on the international level via their special status within the General Assembly.

The International Red Cross, a private international union, promoted the inter-governmental Geneva Conventions of 1864, 1906, 1929, and 1949 [§9.6.B.]. Israel was finally admitted in June 2006, thus ending decades

of exclusion. The society simultaneously admitted the Palestine Red Crescent. The 184 societies in this organization use a red cross or crescent on their organizational flags. Israel was permitted to substitute the Star of David in lieu of the common crescent.

The Red Cross sometimes acts in ways that do not have the support of the parties in conflict. The North Vietnamese opposed the Red Cross position on the degree of protection afforded to the US and South Vietnamese prisoners in the North during the Vietnam War. The Geneva Convention was characterized by the North Vietnamese as being inapplicable to an undeclared war. The Red Cross pressed all States to reconvene another Geneva Convention in 1977, which established added protections for prisoners in undeclared wars.²⁸ On the other hand, the Bosnian Serbs applauded the Red Cross assistance with the 1994 evacuation of thousands of Muslims and Croats from the town of Prijedor in Bosnia. Although the objective was to save them from the Bosnian Serbs, this atypical Red Cross evacuation indirectly helped the Serbs in promoting their goal of ethnic cleansing.

The Red Cross is best known for its role in visiting detainees in conflicted areas. In October 2003, the Red Cross visited detainees at the infamous Abu Ghraib prison in Iraq. The inspectors said that they were so unsettled by what they found that they broke off their visit and demanded an immediate explanation from the military prison authorities. In summer 2004, inspectors found what was in their words “cruel, inhumane and degrading” treatment of detainees at the US military prison in Guantanamo Bay, Cuba.²⁹ In yet another example, in April 2007, the Red Cross visited five Iranian officials detained in Iraq on suspicion of plotting violence against the US and Iraqi forces.

2. Purpose One might compare the respective purposes of the UN Charter and North American Free Trade Agreement (NAFTA) to see that modern organizations cannot always be neatly pigeon-holed into one category or another. The UN Charter’s mission statement is so broadly worded that it defies a succinct characterization, in terms of any singular purpose. Member States therein provided that:

The Purposes of the United Nations are:

- (1) To maintain international peace and security...;
- (2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...;

- (3) To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character...;
- (4) To be a centre for harmonizing the actions of nations in the attainment of these common ends.


NAFTA's purpose, on the other hand, is more limited, more specific, and more binding (as opposed to the UN Charter, which represents a common standard of achievement). While social improvements and cultural exchanges might also be facilitated by NAFTA, its essential objective is to reduce trade barriers for the economic benefit of its trading partners. NAFTA Article 102.1 illustrates this contrast in purpose vis-a-vis the comparatively broad and egalitarian UN Charter objectives:

The objectives of this Agreement ... are to: (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties; (b) promote conditions of fair competition in the free trade area; (c) increase substantially investment opportunities in the territories of the Parties; (d) provide adequate and effective protection and enforcement of intellectual property rights [copyright, trademark, and patent protection] in each Party's territory; (e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and (f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.³⁰

Al-Qaida, a relatively new INGO, is an amorphous group of individuals claiming allegiance to the Saudi-born multimillionaire Usama bin Laden (UBL). As defined in the US indictment of the September 11th "20th hijacker," Zacarias Moussaoui, this NGO and its leader: "issued a statement entitled 'The Nuclear Bomb of Islam,' under the banner of the 'International Islamic Front for Fighting the Jews and the Crusaders.'" Al-Qaida therein stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God." In its mission statement, signed by five individuals including Usama bin Laden in 1998, Al-Qaida announced that "in compliance with God's order, we issue the following fatwa to all Muslims: The ruling

to kill the Americans and their allies—both civilian and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque [Jerusalem] and the holy mosque [Mecca] from their grip, and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim." Furthermore, "Al-Qaida's goal ... is to overthrow nearly all Muslim governments, which are viewed as corrupt, to drive Western influence from those countries, and eventually to abolish state boundaries."³¹

In prior sections of this book, you learned that States and certain international organizations possess international legal personality. That status facilitates their ability to pursue rights—and to be pursued for breaching obligations—in cases arising under International Law. The prominent NGOs thirst for this status as well. Many NGOs are international in scope and are thus pursuing global objectives. But they must, nevertheless, function under the domestic laws of the State wherein they operate. They often deal with shifts in attitudes, depending on who holds political power at the moment—classically illustrated in the following case:



**Center for Reproductive
Law and Policy v. George
W. Bush**

UNITED STATES SECOND DISTRICT
COURT OF APPEALS
304 F.3d 183 (2002)

Go to Course Web Page, at:
<<http://home.att.net/~slomansonb/txtcse.htm>>.
Under Chapter Three, click NGO v. Bush.

One must appreciate that there are numerous NGOs in the US and most other countries. They can impact States and parallel domestic and international organizations in a variety of ways. Given the incredible diversity of these organizations, you might peruse some of the relevant literature on this subject.³²

B. FUNCTIONAL SHIFT

Many global and regional alliances are shifting from political to economic orientations. The Warsaw Pact, a

prominent figure in international affairs until 1991, is military history. Many of the former Soviet Union member States are being admitted into NATO by way of its Partnership for Peace Program.

Numerous international common markets and free trade areas are working to advance the economic objectives of member States throughout the globe [§12.3.], especially now that the Cold War no longer drives international relations.

Perhaps the most significant related State concern is the degree to which international organizations can disrupt State sovereignty. In the European Union (EU), for example, Ireland was forced to abandon its staunch abortion-related ban on providing abortion information within Ireland (*Dublin Well Woman* principal case in §8.6.B.2]. The

EU's Court of Human Rights in Strasbourg essentially overruled Ireland's prohibition, which was rather discomfiting for many Irish citizens.

US senators are perhaps the most vocal critics of the claimed organizational "takeover" of US sovereignty. This criticism materialized when President Clinton "entangled" the US in certain economic IOs, including the North American Free Trade Association and the World Trade Organization (WTO) [§12.2.–3.]. The minority party senators were distressed because membership in these organizations would arguably transfer sovereignty to the IOs—the quintessential example being the WTO panels that adjudicate member nation disputes in Geneva. This theme is classically articulated in the following excerpt:

International Organizations as a Forum for the Contestation of Sovereignty

DR. DAN SAROOSHI, QUEEN'S COLLEGE, OXFORD UNIVERSITY
in INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS
Chapter 1, pages 3, 7, and 12–13 (Oxford, Eng: Oxford University Press, 2005)

Much of the literature on sovereignty ... has been devoted to discussing the relationship between sovereignty and international law and organizations and the limitations that are said to flow therefrom for the exercise by the sovereign State of its governmental powers within, and external to, its territory. This approach has often led to international organizations being viewed with suspicion ... from the perspective of the State, since certain domestic [usually executive-branch] commentators consider that these organizations involve the 'loss' of a State's sovereignty.

...

The contestation of sovereignty ... has inherent within it causation which runs both ways between States and the organization: States ... contest conceptions of sovereignty put forward ... during the organization's exercise of governmental powers.... A good example of this is provided by the debate within the UK on the constitutional basis of judicial review of Acts of Parliament for their conformity with EC law.

...

This is, moreover, a positive development since simply transposing domestic conceptions of sovereignty onto the international plane is not always appropriate and indeed on the international plane the value [treaty objective] may have developed more extensively than is possible at the national level. In ... conferrals of powers—'transfers by States of powers to international organizations'—this [transfer] has often been taken further by the provision within the organization of a dispute settlement body which is given the authority to render binding interpretations of the organization's constituent treaty and scope of obligations thereunder for member States.

...

Such an approach to sovereignty exemplifies the virtue encapsulated in the concept of unity in diversity: peoples are free to identify themselves as members of a community by virtue of their acceptance of certain values, but what is often more important than the actual content of the value is their common acceptance of a process of contesting these values....

◆ §3.3 UNITED NATIONS

At one point before launching the Iraq War in 2003, US President Bush expressed his frustration that the UN could become “irrelevant.” He asserted it had to provide a supporting Security Council resolution authorizing the use of force against Iraq (which it did not do) to remain a part of the solution to the War on Terror. Just three years earlier, world leaders—including past President Bill Clinton—acknowledged that:

1. We, Heads of State and Government, have gathered at United Nations Headquarters in New York from 6 to 8 September 2000, at the dawn of a new Millennium, to reaffirm our faith in the Organization and its Charter as indispensable foundations of a more peaceful, prosperous and just world.
...
3. We reaffirm our commitment to the purposes and principles of the Charter of the United Nations, which have proved timeless and universal. Indeed, their relevance and capacity to inspire have increased, as nations and peoples have become increasingly interconnected and interdependent.
...
32. We solemnly reaffirm, on this historic occasion, that the United Nations is the indispensable common house of the entire human family, through which we will seek to realize our universal aspirations for peace, cooperation and development. We, therefore, pledge our unstinting support for these common objectives, and our determination to achieve them.³³

After digesting this section of the book, you will be in a better position to make a personal assessment about the UN’s true role; whether too much or too little has been expected of it; and whether the above Millennium Declaration by 152 world leaders provides an accurate vision of what the UN can actually accomplish.

This section of your text covers three central themes: events preceding creation of the UN (Historical Backdrop); the UN’s major institutions (UN Organization); and its successes and failures (UN Assessment).

A. HISTORICAL BACKDROP

1. League of Nations This was the first global international organization and the direct predecessor of the United Nations. The League of Peace, a private

organization in the United States, proposed a League of Nations in a 1914 newspaper editorial at the outset of World War I. Great Britain’s League of Nations Society began to promote this ideal in 1916. The South African statesman who coauthored the Covenant of the League of Nations (and the UN Charter) proposed that the peoples in the territories formerly belonging to Russia, Austria-Hungary, and Turkey create an international organization to resolve their territorial disputes. All States would thereby abide by the fundamental principle that resolutions by “the league of nations should be substituted for any policy of national annexation.”³⁴

US President Woodrow Wilson was a key proponent of the League’s creation. Drawing on the 1917 “Recommendations of Havana,” prepared by the American Institute of International Law meeting in Cuba, Wilson’s famous 1918 “Fourteen Points” speech to the US Congress advocated a “general association of nations [that] must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike.” His essential purpose was to avoid a second world war, based on the popular notion of the day that this first global conflict be the “war to end all wars.” World leaders reacted by expressing their hope that the League would be the ultimate mechanism for avoiding a repetition of the secret military alliances and mutual suspicions that permeated the international atmosphere. The fear of another war thus generated the creation of this organization to encourage open diplomacy and cooling-off periods whenever international tensions threatened peace.

Wilson witnessed the realization of his first point—the creation of an international organization dedicated to open “covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always frankly and in public view.” The 1919 League of Nations Covenant, part of the Treaty of Versailles, was ultimately signed by seventy-three States. Its twenty-six articles dealt with a variety of problems although the central theme was how to control military aggression. It was a progressive development in international relations because it established a two-organ permanent diplomatic conference (a “General Assembly” and a “Security Council”). The League was a central location for conference diplomacy. Unfortunately, it never achieved universality in terms of State participation.³⁵

The dream that the League of Nations would maintain international peace and security failed the test of reality. The US Senate chose not to ratify the League of Nations Covenant. The senators feared a diminution of US sovereignty. They believed that membership would instead draw the US into more wars.³⁶ The US thus opted for isolationism, which was the death knell for the organization's potential effectiveness. League membership consisted essentially of only the war-torn European countries.

While the League enjoyed some successes during its twenty-year existence, its failures eroded global confidence in the ability of an organization to maintain harmonious international relations. The League was unable to control the offensive military objectives of its member States. By the time the Soviet Union (USSR) finally joined the League in 1934, Brazil, Germany, and Japan had already withdrawn. The USSR later invaded Finland, Japan expanded into Manchuria, Germany annexed Austria into the Third Reich, and Italy invaded Ethiopia. A few League members reacted by an almost submissive form of economic sanctions: a brief boycott of Italian-made shoes. The global economic depression of the 1930s—coupled with US isolationism, the expulsion of the USSR (after it invaded Finland), and a somewhat xenophobic atmosphere—all contributed to the demise of the League of Nations.

2. United Nations In 1942, a number of League members met to assess whether the League should be revived. They decided to replace it with another global international organization that would pursue the ideal of collective security. The name “United Nations” was devised by US President Roosevelt.³⁷ It was first used in the “Declaration by United Nations” of January 1, 1942. Representatives of the twenty-six Allied nations therein pledged that their governments would continue their fight against the Axis powers.

The UN Charter was drawn up by the representatives of fifty allied countries during the UN Conference on International Organization, held in San Francisco from April through June 1945.³⁸ (Poland was not represented at the conference although it later signed the Charter to become one of the original fifty-one member States.) Delegates deliberated the various proposals previously tendered by China, the USSR, the United Kingdom, and the United States during meetings held in 1944. The summer 1945 drafting conference in San Francisco barely preceded the atomic bombing of Japan in August, which

effectively ended the war. The new “United Nations” was officially established on October 24, 1945. See Chart 3.2. That day is now celebrated globally as UN Day.

B. UN ENTITIES

The six principle organs of the UN are: the General Assembly (GA), Security Council (SC), Economic and Social Council (ECOSOC), Trusteeship Council (TC), Secretariat, and the International Court of Justice (ICJ). Numerous other UN organs and specialized agencies also exist within this system, as illustrated in Chart 3.3.

1. General Assembly The GA is composed of the UN's 192 member States. Various committees and commissions serve a variety of functions for the GA. They draft, receive, and consider reports on world events, supervise the UN's Trusteeship Council, participate in selection of the judges of the ICJ, approve budgets and applications for membership, and appoint the UN Secretary-General.

Six major committees drive the work of the General Assembly. They are designated the “First” through “Sixth” Committee. The following committee titles suggest the day-to-day work of the Assembly: First Committee—Disarmament and International Security; Second Committee—Economic and Financial; Third Committee—Social, Humanitarian, and Cultural; Fourth Committee—Special Political and Decolonization; Fifth Committee—Administrative and Budgetary; and Sixth Committee—Legal.³⁹

The GA is primarily a global forum for resolving issues within the scope of the UN Charter. Articles 10–17 of the Charter enable the GA to “discuss,” to “consider,” to “initiate studies and make recommendations,” and to “receive and consider annual and special reports.” England's University of Leicester Professor Malcolm Shaw thus characterizes the GA as “essentially a *debating chamber*, a forum for the exchange of ideas and the discussion of a wide-ranging category of problems.”⁴⁰

The GA became more than a mere debate chamber in 1950. Its members recognized that the SC's power to act in sensitive cases would be vitiated by the veto power of any of the five permanent members of the Council. The Assembly then adopted “Uniting for Peace” Resolution 377. Its purpose was to ensure a prompt UN response to threats to international peace—when the SC would not, or could not, take action. The

effect of this resolution, permitting the GA to act in the absence of the express Charter authority to do so, augmented the SC's authority to maintain peace (§9.3).

In an attempt to avert the Iraq War, an NGO—New York City's Center for Constitutional Rights

(CCR)—brought public attention to Resolution 377. In its February 2003 Uniting for Peace campaign, CCR proposed that antiwar activists lobby their national representatives to the United Nations for the purpose of rescuing this matter from the SC's inability

CHART 3.2 SELECTED CHRONOLOGY OF MAJOR UN EVENTS*

1945	UN Charter created and enters into force.	1972	Kurt Waldheim begins service as Secretary-General 1972–1986 (and was later accused of Nazi-era war crimes).
1946	First General Assembly (GA) London; reconvenes in New York.	1974	GA bars South African delegation from participating in GA operations despite Western objections; GA calls for New International Economic Order (Chapter 12).
1947	GA adopts plan to partition “Palestine” to create Arab and Jewish States.	1975	GA passes resolution, equating Zionism with racism (revoked in 1991).
1948	GA adopts Universal Declaration on Human Rights (Chapter 10).	1984	Office for Emergency Operations in Africa created for famine relief.
1949	GA establishes office of High Commissioner for Refugees (Chapter 10).	1989	GA announces the UN Decade of International Law (Chapter 1).
1950	Soviet Union (SU) boycotts Security Council (SC) for failing to oust Nationalist (Formosa) government as representative for “China” seat. SC establishes Korean action under control of US (UN signed truce with North Korea in 1953).	1990	Numerous SC and GA resolutions regarding Persian Gulf War (Chapter 10).
1952	Over South Africa's objections, GA begins study of apartheid (SC arms embargo against South Africa: voluntary 1963; mandatory 1977).	1991	End of Cold War signals improved atmosphere for SC peace efforts.
1956	Hungary obtains SC resolution regarding SU invasion (unenforced). GA establishes first independent UN force to handle Suez Canal crisis.	1992	UN concludes most expensive peace operation in history (Cambodia \$2 billion). SC bans former Yugoslavia from SC seat; status unresolved until successful reapplication for membership in 2000.
1960	GA adopts Declaration on Granting Independence to colonies and peoples. GA: SU's Nikita Khrushchev accuses Secretary-General of abusing position.	1993	US President's GA speech chides UN inability to fulfill agenda; promises US will pay past-due assessments if new funding formula developed. Secretary-General flees from attack by Somali residents. UN not key participant in Bosnia conflict. Russia's Yeltsin requests UN support for Russia to be guarantor of stability in former USSR. UN evacuates 700 refugees from Rwanda.
1962	SC attempts to negotiate solution to Cuban Missile Crisis.	1994	GA establishes post of High Commissioner for Human Rights. US requests UN ban on worldwide arms sales to North Korea. SC authorizes French request for humanitarian intervention in Rwanda. UN establishes Rwanda peacekeeping operation. Bosnian Serbs isolate UN peacekeepers, making them virtual hostages.
1963	World Food Program established by UN Food and Agricultural Organization.	1995	UN (Berlin) Greenhouse Conference negotiates new limits to control global warming. 7,800 Muslim military age men and boys are slaughtered near the UN's Srebrenica, Bosnia safe heaven.
1967	SC adopts Resolution 242 calling for Israeli withdrawal from occupied territories after Six-Day War with Middle East Arab States.		
1968	GA approves Treaty on Non-Proliferation of Nuclear Weapons, calling for ratification (1993: North Korea announces intent not to renew).		
1969	UN Convention on Elimination of All Forms of Discrimination enters into force.		
1971	GA expels Chinese Nationalist representative and seats PRC delegation.		

CHART 3.2 SELECTED CHRONOLOGY OF MAJOR UN EVENTS (CONTINUED)

- 1996** UN Conference on Human Settlements issues Habitat Agenda for urban living in 21st century; because of dues arrearage, US removed from panel regarding UN funding.
- 1997** In its first emergency session in 15 years, the GA demands that Israel stop building Jewish settlements in East Jerusalem. UN's International Criminal Tribunal for Former Yugoslavia conducts first international criminal trial since Nuremberg. New Secretary-General Kofi Annan installed to reform UN.
- 1998** Rome Conference establishes preliminary structure for first permanent International Criminal Court. Secretary-General advises US it must consult with UN before attacking Iraq.
- 1999** UN takes over administration of Kosovo and East Timor. It is thus responsible for rebuilding the governmental functions, which has otherwise always been a matter of State competence. The Secretary-General announces the Observance by UN Forces of International Humanitarian Law, whereby UN forces are subject to Geneva Conventions.
- 2000** UN Millennium Summit draws 152 heads of State from all over the world to reaffirm UN's central position in world affairs.
- 2001** Slobodan Milosevic, Yugoslavia's former head of State extradited to UN's International Criminal Tribunal for trial of war crimes. See UN resolutions addressed in textbook §8.5.C.1.
- 2002** UN Security Council Resolution 1442 referring to the threat that Iraq's "proliferation of weapons of mass destruction ... poses to international peace and security," affords Iraq a final opportunity to comply with its disarmament obligations.
- 2003** *March*: UN Secretary General warns that if the US fails to win approval from the Security Council for an attack on Iraq, Washington's decision to act outside the Council would violate the UN charter. *October*: UNSC Resolution 1511 establishes Multinational UN Force led by US.
- 2004** UN Security Council Resolution 1566 identifies acts of terrorism, specifying that there can be no political or other justification, and calls upon all States to prevent and punish such acts and to become parties to all multilateral treaties on terrorism.
- 2005** UN Security Council Resolution 1593 refers first case (Sudan) to the International Criminal Court.
- 2006** UN Security Council Resolutions address North Korea and Iranian nuclear weapons ambitions. The US and Russian-driven Security Council sanctions against North Korea seek to limit further nuclear tests.
- 2007** Security Council Resolution 1790 reaffirms the continuation of the international presence in Iraq, and unanimously calls for an expanded UN presence in Iraq. Its US and UK sponsors seek to involve more UN resources, because of its perceived neutrality.
- 2008** *March*: UN reaffirms its "long-term commitment to work with the Government and the people of Afghanistan." *April*: UN extends the mandate of the UN mission in Sudan—"with the intention to renew it for further periods" and requests the Secretary-General to report to the Council every three months on the implementation of the UN mandate.
- 2009** UN Security Council ends sixteen-year mission in Georgian province of Abkhazia (now under Russian control).

* UN peacekeeping operations are addressed in §9.3.B.

to act. This major human rights NGO launched its unsuccessful campaign based on its articulation below:

Long ago, the members of the United Nations recognized that such impasses would occur in the Security Council. They set up a procedure for insuring that such stalemates would not prevent the United Nations

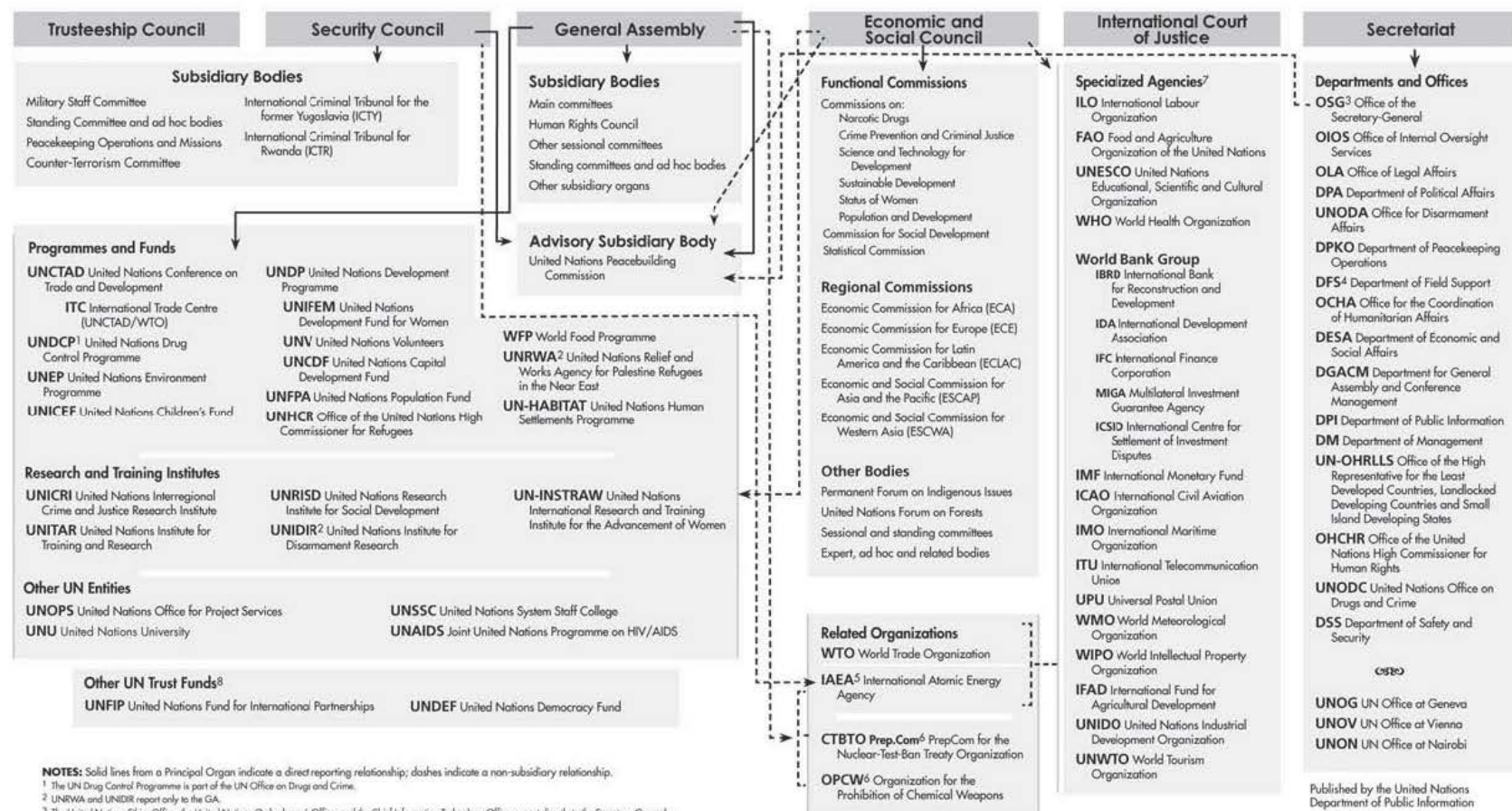
from carrying out its mission to "maintain international peace and security." In 1950, the United Nations by an almost unanimous vote adopted Resolution 377, the wonderfully named "Uniting for Peace." The United States played an important role in that resolution's adoption, concerned about the possibilities of vetoes by the Soviet Union during the Cold War.

CHART 3.3 UNITED NATIONS SYSTEM



The United Nations System

Principal Organs



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Uniting for Peace provides that if, because of the lack of unanimity of the permanent members of the Security Council (France, China, Russia, Britain, United States), the Council cannot maintain international peace where there is a “threat to the peace, breach of the peace or act of aggression,” the General Assembly “shall consider the matter immediately...” The General Assembly can meet within 24 hours to consider such a matter, and can recommend collective measures to U.N. members including the use of armed forces to “maintain or restore international peace and security.”

The Uniting for Peace resolution procedure has been used ten times since 1950. Its first use was by the United States.⁴¹

...

Since the end of World War II, world leaders have often addressed the GA on very sensitive problems in international relations. In 1960, Nikita Khrushchev spoke to the GA, accusing UN Secretary-General Dag Hammarskjöld of abusing his position as head of this global organization. Yasir Arafat, the leader of the Palestine Liberation Organization, spoke to the GA in 1974. His objective was to seek UN assistance in consummating the statehood of the dormant State of Palestine. In 1993, US President Clinton spoke in an effort to convince this body to reduce what he characterized as its overextended commitment to worldwide peacekeeping engagements. President Bush addressed the Assembly in 2003, seeking authorization for a war against Iraq.

It is sometimes easier to define something by first acknowledging what it is not. The GA is *not* a world legislature. It may pass resolutions, some of which ultimately become treaties for State ratification. Other resolutions may indicate the degree of *opinio juris*—regarding a practice which States consider binding in their international relations [§1.1.A.1.]. The Assembly does not, however, have the power to enact legislation like a national legislature such as the US Congress, Mexican Parliament, or Japanese Diet. The majority of State members are unwilling to yield the requisite degree of sovereignty to authorize the GA to pass laws, which would bind all nations. As succinctly stated by the University of Poznan Professor Krzysztof Skubiszewski (Poland), “[w]e know both from the reading of the UN Charter and the history of its drafting (the defeat of the Philippine proposal on this right presented at the [1945] Conference in San Francisco) that no power to make law for states has been conferred on the General Assembly or any other organ of the United

Nations. For such power, whether comprising legislation by virtue of unanimous vote, or by majority decision with the guarantees of the system of contracting out, or by majority decision binding for all, must always be based on an EXPLICIT AND UNEQUIVOCAL TREATY AUTHORIZATION.”⁴²

The GA’s Charter prerogatives are thus limited to the initiation of studies and the recommendation of peaceful courses of action when confronted with pending hostilities. Its fundamental purpose is to promote international cooperation in a political rather than military context. The Assembly’s State members therefore collaborate regarding major economic, social, cultural, educational, human rights, and health issues. They sometimes recommend measures for the peaceful adjustment of any situation deemed likely to impair friendly relations among nations. Thus, there has been a proliferation of global conferences within the UN system. Issue-oriented *ad hoc* world conferences can focus worldwide attention on a particular social or economic problem and spawn institutionalized follow-up activities.

Germany’s University of Tübingen political science professor Volker Rittberger aptly acknowledges that such “[g]lobal conference diplomacy, which takes place in any of these institutional settings, represents a unique vehicle for facilitating and strengthening internationally-coordinated public policy-making ... which is expected to cope with ... resource shortages at the level of the individual decision-making unit, e.g., the central government of a nation state.... Moreover, ... national decision-making units remain necessary, but are no longer exclusive participants in this decision-making system.”⁴³

The GA was effectively controlled by the United States throughout the 1950s. After a paradigm shift, associated with the induction of new independent States (former colonies), the “Third World” began to control the overall direction of the Assembly in the mid-1960s. One of the resulting agenda shifts was the seventy-seven nation announcement of a New International Economic Order [§12.4.A.]. This platform advocated an equitable redistribution of the world’s wealth. The Assembly-driven Law of the Sea Treaty, for example, entered into force in 1994. Its contemporary applicability illustrates some of the ways in which this redistribution is intended to materialize. While economically powerful nations objected, the treaty text requires the powerful seagoing nations to deposit a portion of revenues they draw from mining and fishing into an agency which, in turn, is supposed to repatriate a portion of these revenues to the less powerful States.

This organization's related contemporary goal is conveniently restated in its 118-member document developed in September 2006 in Havana, Cuba. To revitalize the General Assembly, its members propose the unusual (but not novel) suggestion to ensure Assembly action when the veto-ridden Security Council fails to act in appropriate circumstances:

The Heads of State or Government [have] reiterated the role of the General Assembly in the maintenance of international peace and security and expressed grave concern at instances wherein the Security Council fails to address cases involving genocide, crimes against humanity, war crimes, or ceasefire[s] between parties, in fulfillment of its primary responsibility in this regard.⁴⁴

The General Assembly has, at least, provided an unparalleled form of recognition for the less powerful members of the international community. As aptly characterized by Political Science Professor M. J. Peterson of Amherst University, the "egalitarian nature of the Assembly ... makes it the favorite political organ of weak states ... because it gives them an influence over decisions that they lack elsewhere in the international system.... The Third World Coalition ... uses the Assembly more intensely than did the U.S.-led coalition, but its relative lack of power has exposed more clearly the limits on Assembly control over outcomes in world politics."

Venezuelan President Hugo Chavez' September 2006 speech in the General Assembly ranks among the all-time benchmarks for using the UN as a bully-pulpit to address economic and political differences. President Chavez took advantage of his global stage to:

help us understand ... the greatest threat looming over our planet: the hegemonic pretension of US imperialism that puts at risk the very survival of the human species.

...

The Devil came here yesterday. Yesterday the Devil was here, in this very place. This table from where I speak still smells like sulfur.... [T]he President of the United States, who I call "The Devil," came here talking as if he owned the world.

...

As the spokesperson for imperialism he came to give us his recipes for maintaining the current scheme of domination, exploitation and pillage of the world's

people. It would make a good Alfred Hitchcock movie. I could even suggest the title: "The Devil's Recipe."⁴⁵

Losing the seat in the GA would normally be a devastating blow to national prestige. No nation, especially the less powerful ones, would ever wish for the Assembly to exercise its UN Charter Article 6 power of expulsion. In 1979, Taiwan lost the "China" seat to the mainland People's Republic of China (PRC). This was not an Article 6 expulsion, but a matter of collective recognition of the government that more clearly represented the national population [§2.3.B.]. The most fascinating and debatable example involved the status of the United Nations' "Yugoslavia" seat, which remained empty between 1992 and 2000.

The following case illustrates yet another curious intersection of law and politics, which in this instance, yielded a "phantom State." Some apparition had to be conjured for the world court to have: (a) original jurisdiction to proceed to its 1996 judgment; (b) continuing jurisdiction in 2003, in order to deny the successor entity's ability to change that judgment; and (c) power to determine the substantive genocide issue(s) in its 2007 *final* judgment [textbook §10.1.B. principal *Bosnia v. Serbia* case]:



**Application for Revision of
the Judgment of 11 July 1996
in the Case Concerning
Application of the Convention
on the Prevention and
Punishment of the Crime of
Genocide (Bosnia and
Herzegovina v. Yugoslavia)**

INTERNATIONAL COURT OF JUSTICE

General List No. 122 (February 3, 2003)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Three, click Bosnia v. FRY.

2. Security Council

(a) Purpose and Structure The Security Council (SC) is the UN organ with primary responsibility to maintain world peace. Under Article 39 of the Charter, the SC determines what constitutes a threat to peace and what security measures should be taken by the UN.

The Council is much smaller than the General Assembly (consisting of *all* national members). The SC consists of fifteen countries. The Council's limited size was designed to facilitate prompt and effective action by the United Nations—in contrast to the debating atmosphere of the all-member GA. Nations can refer their disputes to the SC for resolution (as well as to the GA when it is in session). Unlike the Assembly, the Council functions continuously. A representative of each of the fifteen member States must be present at all times at UN Headquarters in New York City.

The SC includes five “permanent” members and ten “rotating” members, periodically elected by the GA. The five permanent members are China, France, Russia, the United Kingdom, and the United States. The “Russian” seat on the Council was occupied by the Soviet Union until 1991 and is now occupied by Russia. The “China” seat has been occupied by the PRC since the Republic of China (Nationalist Chinese government) was ousted by UN action in 1971.

The makeup of the SC has always generated debates about its failure to more democratically reflect the United Nations' overall composition. The GA is a comparatively diverse body, consisting of States from every corner of the world, innumerable cultures, all political systems, and every form of economic development. Under the original Charter, however, five of the (then only) eleven SC members occupied permanent seats on the Council. *Any one* of these five could block Council action by exercising its individual right to *veto* any proposed action. No rotating member possesses this extraordinary veto power. Action by the SC therefore requires a unanimous vote of the five permanent members and a majority vote of the fifteen total members.

There have been several significant movements seeking a change to the SC's composition. General Assembly member States believed that the Council should not ignore the less powerful but more populated States within Africa, Asia, and Latin America. In 1965, the UN altered its structure to magnify the presence of such nations—many of which were former colonies of the charter UN members. The number of Council seats was then increased from eleven to fifteen. The four fresh seats were designated as additional rotating seats as opposed to the five permanent seats. A number of commentators viewed this as a relatively minor concession, however, in the struggle to mitigate the powerful-nation dominance of the Council.

After the demise of the Soviet Union, and its attendant Cold War with the United States, Germany and

Japan have consistently sought an upgrade of their status from occasional rotating members. They have sought their addition to the Council, which would result in seven permanent SC members. Unlike the US, the British and French governments are opposed to such a change, as evinced by British Foreign Secretary Douglas Hurd's widely reported 1993 application of the old adage: “If it ain't broke, don't fix it.” US Secretary of State Warren Christopher responded that the SC may not be broke; however, “[i]t's time for some reorganizing.” Ironically, the Japanese and German Constitutions each limit their ability to participate in SC military actions.⁴⁶

The year 2004 spawned a number of significant calls for SC reform. A prominent UN panel suggested two options: (1) adding six new permanent members; or (2) creating a new tier of semi-permanent members—two each from Asia, Africa, Europe, and the Americas. Egypt independently launched its plea for a permanent seat. Its ambassador to the UN proclaimed, in words similar to claims from other countries: “Egypt's regional and international contributions—in African, Arab, Islamic circles, in the Middle East and among developing countries and blooming economies ... [thus] qualifies her...”

Four other nations vowed to support each other's bids for an expanded SC—Brazil, Germany, India, and Japan. Their joint statement noted that the “Security Council must reflect the realities of the international community in the twenty-first century,” drawing support from the four-fold increase of nations since the original fifty-one nations in 1945 [§2.2. listing in Table 2.1.]. This option was not universally supported. For example, in 2005, there were vicious anti-Japanese riots in China. Some 44,000,000 Chinese signed an Internet petition to oppose Japan's achieving its desired permanent seat on the Security Council. Old hatreds persist, in part based on Japan's dominance of various Chinese locations during WWII.⁴⁷

Brazil's president argued in favor of an African option. It must be represented within the Council's permanent membership “to reflect today's realities—not perpetuate the post-World War II era.” The French president also called for an increase from fifteen permanent and rotating nations to twenty or twenty-five. Chirac stated that: “You cannot simply take a snapshot of 1945 and apply it to 2004.” Russian President Putin, speaking in support of India's permanent addition, expressed the view that any reform would be one-sided if new members did not have the veto power.⁴⁸

Because of various limitations built into the UN Charter by the nations that drafted it, there is a prominent distinction between promise and performance. Under Article 47 of the Charter, for example, the Council is responsible for submitting plans to UN members for establishing and maintaining a system to regulate armaments. Under Articles 41 and 42 of the Charter, the SC may decide what related measures are needed to implement its decisions. The Charter states that the Council may order the complete or partial interruption of economic relations with States that violate International Law. If the Council considers such sanctions inadequate, the Charter expressly authorizes its use of air, sea, or land forces as necessary to maintain or restore international peace and security. (Multinational operations under Security Council control are addressed in text §9.3.B.).

For a variety of reasons, including that no Article 43 standing army ever materialized, the Council has had to resort to some rather ingenuous bases for taking action—or affirming action already taken by a UN member or coalition of States (such as NATO). Unlike the circumstances which prevail in each of the many liberal democracies within the UN's membership, there is no review process for assessing the legality of the Council's interventions—as will be addressed in relation to the International Court of Justice, which lacks any judicial review power over the SC's executive acts.

The SC basked in comparatively provocative sunshine in the aftermath of the dark Cold War period of the 1950s through the 1980s. In the 1990s, the Council established two special courts to deal with the atrocities in the Former Yugoslavia and Rwanda [§8.5.C.]. The Yugoslavian tribunal tried the first former Head of State for genocide and war crimes (for which Slobodan Milosevic's claim of presidential immunity would be disregarded when his trial began in 2002).

In another instance of a proactive approach not witnessed during the Cold War, the Council slowly but effectively responded to the 1998 bombings of the US embassies in Kenya and Tanzania—which had killed 224 people—and the 2001 commercial aircraft attacks on New York's World Trade Center and Washington's Pentagon—which killed nearly 3,000 people. Given the widespread belief that Usama Bin Laden planned the embassy bombings, the Council embarked upon a mission to secure his capture. The SC seized upon its Chapter VII powers to “delegate” them to member States. In Resolution 1189, the Council called upon all States to adopt “practical measures for security coopera-

tion, for the prevention of such acts of terrorism....” Resolution 1214 demanded “that the Taliban stop providing sanctuary and training for international terrorists and their organizations....” When Afghanistan did not comply, Resolution 1267 demanded that “the Taliban turn over Usama bin Laden without further delay....” This resolution backed up the Council's demand by authorizing an air embargo and the freezing of financial resources to which the country had access. It was followed by other resolutions that the United States would rely upon as a basis for its air strikes in Afghanistan.

During the Cold War between two of the permanent Security Council members (United States and Soviet Union), the UN exercised only a minimal degree of control over several territories in conflict. The UN's peacekeeping role, not mentioned anywhere in the Charter, was dependent on the consent of parties engaged in the hostilities. Military forces, on loan to the UN by various countries, occupied State territory as a buffer—designed to enforce post-conflict peace agreements [§9.3.B.]. Peacekeeping was not necessarily *peacemaking*.

The Security Council decided to rescue two areas of the world from ethnic tension. It assumed their administration as if it were a sovereign State in the two most striking examples of the Council's post-Cold War renaissance. The first of the two areas was East Timor [§2.4.C.], where the UN rescued the residents from continuing violence resulting from the desire to break from Indonesian colonization. The second has been the administration of Kosovo [§3.5.A.]. There have been many problems with the UN's administration in each of these theaters.⁴⁹ No one can dispute, however, that this unique control of sovereign territory—by the only international organization ever to do so—was a marked departure from the UN's Cold War impotence.

In its major 2004 self-analysis, the UN High-Level Panel on Threats, Challenges and Change determined that:

224. Deploying peace enforcement and peacekeeping forces may be essential in terminating conflicts but are not sufficient for long-term recovery. Serious attention to the longer-term process of peacebuilding in all its multiple dimensions is critical; failure to invest adequately in peacebuilding increases the odds that a country will relapse into conflict.

...

227. ... Given that many peace operations can expect resource shortfalls, the efficient use of resources is

all the more important.... The Security Council should mandate and the General Assembly should authorize funding for disarmament and demobilization programmes from assessed budgets.

228. ... A standing fund for peacebuilding should be established at the level of at least \$250 million that can be used to finance the recurrent expenditures of a nascent Government, as well as critical agency programmes in the areas of rehabilitation and reintegration.⁵⁰

The Council's October 2003 resolution on Afghanistan supported expansion of the NATO-led International Security Assistance Force beyond the capital city of Kabul (Resolution 1510). Its June 2004 resolution endorsed US turnover of Iraq to the Interim Government of Iraq (Resolution 1546). Despite not acting until after the US invasion of these countries, the UN SC nevertheless opted to exercise its influence to monitor their occupation—sending a clear message about ending the respective occupations. One could of course argue that these measures were comparatively passive and arguably face-saving. But were they not preferable to total inaction by the United Nations?

The Security Council also provides diplomatic alternatives when the price of the other options is too high. These are not always successful, but they do buy time while the Council ratchets up the international pressure to act or not act in a specified manner. The US, for example, has attempted various measures to control North Korea and Iran's nuclear weapons ambitions. In October 2006, US and Russian-driven Security Council sanctions against North Korea sought to limit further nuclear tests. The North's obtaining nuclear weapons capacity would disrupt the balance of power in ways that would affect both countries as well as other regions of the world. But the North Korean government responded that sanctions against its nuclear testing were an act of war. Its reaction: "vehemently denounces the resolution, a product of the US hostile policy toward [the North] and totally refutes it ... [because it] cannot be construed other than as an act of war. [North Korea] will closely follow the future US attitude and take corresponding measures ... [now that] it has become a nuclear weapons state."⁵¹

Activities at the UN were likewise intensified after Iran's July 2008 firing of nine test missiles. Iran made it abundantly clear that it would close the narrow Strait of Hormuz, should it be attacked by the saber-rattling US or Israel (which bombed Iraq's nuclear weapons facility

in 1983). Sixty percent of the world's crude oil passes through that vital waterway between Iran and the United Arab Emirates. The US is stretched militarily in Afghanistan and Iraq. This reality and other geopolitical reasons—including not disrupting Iranian oil exports when the price of gasoline is high—mitigate against attacking Iran. These circumstances make the UN a viable diplomatic option for dealing with Iran's nuclear ambitions. One of these ambitions is having a missile strike range that includes Israel, the staunch US ally that Iran has publicly threatened to blast into extinction.

In September 2008, the Security Council *unanimously* reaffirmed its three earlier resolutions imposing progressively tougher sanctions on Iran for the latter's refusal to halt its uranium enrichment program. The Council was joining forces with another agency, the International Atomic Energy Agency, to pressure a State to adhere to their respective demands. The tools included an asset freeze on 65 Iranian companies and individuals; a travel ban on people associated with Iran's nuclear program development; and bans on arms exports and technology with potential military applications.

(b) Veto Dilemma The League of Nations was plagued from the outset by its unanimity requirement for its Security Council to act. The UN strategy was initially perceived as an improvement. Nine of fifteen votes, rather than unanimity, is one of two conditions for SC action. The other condition has bedeviled the SC from the outset: The UN cannot act if one of the five permanent members casts a veto. This feature of Realpolitik might be best described as a dictatorship within a democracy.

Ironically, the word "veto" is not contained in the UN Charter. Article 48 merely states that action "shall be taken by all the Members of the UN or by some of them, as the Security Council may determine." Article 27.3 provides that the Council's substantive decisions "shall be made by an affirmative vote of nine members including the concurring vote of the permanent members." It is the Security Council's *Provisional Rules of Procedure* that contain the somewhat infamous veto provision. It was adopted at the 1945 UN drafting conference in San Francisco. Mindful of the US decision not to join the League of Nations, and the Soviet Union's expulsion from the League for invading Finland, none of the five permanent Council members could be drawn into an armed conflict that it did not wish to enter.

National sovereignty was the *real* culprit in what would soon become apparent with the advent of the

Cold War: powerful States did not want to cede sovereign powers to an external entity. The UNSC would otherwise be enabled to trump a State's unilateral decision about initiating, engaging in, or avoiding future hostilities. Giving this type of power to the SC would also tamper with a powerful State's ability to clandestinely support an "offending" State's action. Handing over such power to an international organization would limit a member's ability to remain indifferent to threats to peace in distant corners of the globe. The State-oriented concern about the retention of sovereign discretion also thwarted materialization of the Article 43 standing army. Had such a force materialized, it would have functioned as an international police force able to react to threats to the peace in different ways than UN members might prefer.

The post-World War II veto dilemma pitted the two most powerful allies against one another, in a way that would severely limit the UN's overall ability to respond to threats to peace. The USSR temporarily boycotted SC meetings in 1950. The USSR had insisted that the PRC (communist mainland China) was the appropriate entity to occupy the "China" seat on the Council, rather than the then-seated Republic of China. The Nationalist government on Formosa—now Taiwan—had been unseated in Mao's successful communist uprising, but not at the United Nations. This historic absence of one of the permanent five SC member States allowed the Council to vote in favor of UN involvement in the Korean Conflict under the direction of a US military command. This would not have happened if the Soviet representative had been present for the vote, or possibly, if the "China" seat had been occupied by mainland China—which would soon be assisting North Korea during the 1950–1953 Korean conflict. This event led to the infamous Cold War "veto" which would ultimately paralyze the SC's pursuit of collective security.

Since its inception, this facet of superpower politics has been most evident when one of the five holders of the veto power has blocked an international response to its *own* threats to international peace. Recent examples by each Council member—armed with the knowledge that it could conveniently deflect SC action—arguably include the 1989 US invasion of Panama; France's involvement in the escape of the French agents responsible for the death of crew members on the Greenpeace vessel *Rainbow Warrior* in New Zealand in 1986; Great Britain's 1982 war with Argentina over the distant Falk-

land Islands just off Argentina's coast; the Soviet Union's occupation of Afghanistan in 1979; and any UN action which might have responded to the reported deaths of some 3,000 civilians in Beijing's Tiananmen Square during the 1989 democracy demonstration.

The Security Council's aging veto process often frustrates UN action, even when there are numerically enough votes to act. One permanent member, of the now total fifteen members, can bar the entire Council from responding to a threat to peace. In July 2008, for example, the Council considered the case of Zimbabwe's leader. He effectively stole the then recent national election via intimidation tactics. That caused his rival to withdraw to protect the lives of the staff members of the opposition leader. There were nine Council votes in favor of UN sanctions against Zimbabwe. However, Russia and China both voted against this US proposal. Each of them is a veto-wielding permanent member of the UNSC. Yet Russia is constitutionally dedicated to the promotion of democracy and human rights. China would host the international Olympics a month later. However, each used their veto power, arguably to minimize US efforts to successfully shepherd such initiatives through the SC—a position adopted by the US on other occasions.

Effective UN Security Council control of international conflict is arguably unlikely without significant change in the SC's voting procedure. All members of the Permanent Five can thereby continue to "have their cake and eat it too." These SC members have all benefited from the veto, which has been unfairly attributed to the obstructionism of just the former Soviet Union.

Although the frequency of the veto declined after the Cold War (1989), the circumstances giving rise to the many ensuing conflicts have not. There will be no effective international organizational control until there is a genuine interest by member States in integrating word and deed. In the words of UN Political Affairs Officer Anjali Patil in her book on the Security Council veto: "It really doesn't matter who enjoys the veto power in the Security Council; international peace and security cannot be maintained until all States accept the need to identify with the whole of humanity. We have struggled over the centuries for absolute peace but have not yet achieved it. While creating the UN has enabled us to avoid a [third] world war, we have yet to create a genuine international society."⁵²

Powerful UN members are apparently obsessed with retaining their options via the historical application of

virtually *complete* State sovereignty. This preoccupation allows too many States to say one thing and mean another. It demonstrates the continuing lack of an international commitment to rely on the Security Council as the tool for attaining the UN Charter ideal “to save succeeding generations from the scourge of war.” One should not be surprised, for example, that Russia and China cast a rare double veto in January 2007 when a U.S.-driven resolution sought sanctions against the military junta government in Myanmar. Their view was that the UN was not the proper forum for undertaking such interventions. This situation did not pose a threat to international security. Otherwise, the UN might launch inquiries into other internal humanitarian questions, which do not spill over some international border. Nonetheless, a UN human rights investigator—barred from visiting Myanmar since the 2003 military take-over—was permitted to enter nine months later.

(c) Peacekeeping Operations UN Peacekeeping operations are addressed in §9.3.B. on the UN Peacekeeping. The materials will address the UN’s provocative role in the governance of post-conflict societies.

3. Economic and Social Council The League of Nations focused on military and political problems. The UN system is more inclusive, evinced by Charter recognition of the economic and social sparks for igniting conflict. UN priorities thus include the observance of human rights and the general welfare of the individual.

The UN Educational, Scientific, and Cultural Organization (UNESCO—headquartered in Paris) conducts studies and issues reports on international economic, social, cultural, educational, and health matters. The results of these studies are forwarded to the GA, to the State members of the United Nations, and to other UN specialized agencies concerned with the promotion of human rights and fundamental freedoms for all people.

The UN’s Economic and Social Council (ECOSOC) also prepares draft conventions for submission to the GA. It arranges international conferences on matters within its competence. It is the lead international agency, for example, for addressing the impact of illegal drug trafficking. An index to its vast array of programs is available on the UN Web site.⁵³

The rotating fifty-four member ECOSOC operates under the authority of the General Assembly. Its job description is to promote: “(a) higher standards of living,

full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”⁵⁴

This institution unfortunately received more limelight than desired when the US Reagan Administration began to shun participation in various UN agencies in the 1980s. It was the first UN agency from which the US withdrew (1984). One disclosed reason was the US assertion that this vast UN bureaucracy had produced much paperwork, but without tangible benefits. In 1990, the United States reaffirmed its opposition to rejoining UNESCO. US Secretary of State James Baker’s remarks provided telling insight into the US position as follows: “Bluntly stated, UNESCO needs the United States as a member far more than the United States needs UNESCO.”

The United States returned to UNESCO in October 2003. (In the interim, this UN organ had lost the former 25 percent US contribution.) The US perspective changed about UNESCO having previously spread anti-American propaganda. The US pays 22 percent of this entity’s budget.⁵⁵

4. Trusteeship Council

(a) Charter Objectives The Trusteeship Council (TC) is a distinct UN organ consisting of selected member States. It has been responsible for the administration of territories that are incapable of self-government. Under Article 77 of the Charter, certain member States have supervised territories detached from enemy States, typically as a result of war. Under Article 73 of the Charter, supervising States accepting a “trust” territory must observe the principle that the interests of the inhabitants of these territories are paramount to any interests of the supervising State. The supervising State must therefore accept the obligation to promote the well-being of the inhabitants.

This “big brother” plan was devised to promote the political, economic, social, and educational advancement of the supervised territories that were not yet capable of self-governance. This posture made sense when the Charter was drafted in 1945, long before the decolonization movement of the 1960s. Another trusteeship objective was to help these territories achieve self-government through the progressive development of

independent political institutions [Self-Determination: §2.4.C.].

The US, for example, administered the Trust Territory of the Pacific Islands beginning in 1947. Portions of the population later developed their own forms of government and constitutions. In 1986, the TC determined that the US had satisfied its obligation to administer most of this territory. The US then declared its obligations to be discharged. The Micronesia and Marshall Islands portion of this US trust territory later joined the UN as independent States. Palau later became an independent nation. The speed of this internationally supervised development has depended on the particular circumstances of each territory, its people, and their stage of political advancement.

The TC's work was completed due to the success of the decolonization movement of the 1960s. It thus suspended operation in 1994, with the independence of Palau—the last remaining UN trust territory. It no longer conducts its annual meetings although it may meet if its president, a majority of its members, the General Assembly or the Security Council so decide.

Although the TC successfully worked itself out of a job, the related performance of some UN members was not without its problems. The leading example of a breach of this trust relationship involved Namibia. This nation was originally a League of Nations “Mandate,” analogous to the League-generated mandates like the British Mandate over Palestine. South Africa, the administrator for Namibia—when it was called South-West Africa—refused to yield to decades of UN pressure to release its hold on this trust territory. South Africa finally agreed to permit Namibia to govern itself in 1990, after which Namibia joined the UN as an independent State member.

There have been other alleged breaches of trust. Nauru, a tiny republic in the central Pacific Ocean, sued Australia in the ICJ in 1989. Nauru therein alleged neglect because of Australia's exploitation and removal of phosphates earlier in the twentieth century. Natives claimed that they were barred from seeking outside legal help to avoid such depletions during the Australian administration. In 1967, the UN General Assembly terminated the Trusteeship. In 1992, the ICJ rejected Australia's contention that the UN's termination of the trusteeship barred the Court from hearing this breach of trust case. Eventually, the parties agreed to discontinue the case, which has been dismissed.⁵⁶

One trust territory even sued its administrative host to terminate the trust relationship. The size of the Trust Territory of the Pacific Islands was reduced by the departure of Micronesia, the Marshall Islands, and the Commonwealth of the Northern Marianas—after the 1986 UN declaration that the US administration had been fulfilled as to these areas. The government of Palau then signed a Compact of Free Association with the United States. This agreement was initially rejected by the people of Palau, however, in a series of UN-observed plebiscites. In 1990, this remaining Trust Territory of the Pacific Islands sued the US in a New York court in its bid for self-rule. The plaintiffs argued that continued UN trusteeship reneged on the lost promise of self-government. But any alteration of this trust relationship requires approval by the UN's SC under Charter Article 83. The US court dismissed this case, partially on the basis that US courts do not have the jurisdiction or power to hear cases to dissolve trust territory relationships—a power expressly reserved by the UN Charter to the Security Council in association with the Trusteeship Council.⁵⁷

Although the TC appears to be a relic of another era, it may nevertheless have some contemporary utility. A number of States are “failing,” in the sense that they are experiencing difficulties in continued self-government. Famine, civil war, and economic deprivation are some of the contemporary causes. Liberia dissolved into chaos in 1990 when rival factions began to assert tribal rivalries—slaughtering tens of thousands in the crossfire. Similar events occurred in Rwanda in 1994.

“Older” States from other regions of the world such as Afghanistan, Mozambique, Somalia, and Zaire are bordering on the same fate. “Newer” States like Macedonia are just one step farther away from such failed status. With contemporary limitations, especially financial problems, the UN is not in a good position to come to their rescue. As noted by the UN Secretary-General in 1995: “Another feature of such [post-Cold War] conflicts is the collapse of State institutions, especially the police and judiciary, with resulting paralysis of governance, a breakdown of law and order, and general banditry and chaos. Not only are the functions of government suspended, its assets are destroyed or looted and experienced officials are killed or flee the country... [Thus, the] United Nations is, for good reasons, reluctant to assume responsibility for maintaining law and order, nor can it impose a new political structure or State institutions. It can only

help the hostile factions to help themselves and begin to live together again.”⁵⁸

(b) Contemporary Colonialism? The UN’s East Timor and Kosovo administrations are routinely characterized as “unique.” These were the prime examples of an unusually proactive UN Security Council committing the UN to *nation-building*—an objective found nowhere in the UN Charter. The UN thereby substituted as the administrative overseer of these post-conflict societies. But these, and other post-conflict reconstruction efforts, raise the question of how an international territorial administration, assuming the obligation to rebuild a nation, might compare to colonialism. The negative features of the lengthy colonial period were supposedly supplanted by the League of Nations Mandates (e.g., Palestine) and the UN’s ensuing Trusteeship Council projects.

The UN has conducted four such operations.⁵⁹ These were not peacekeeping functions, which are military in nature. Their essence was civilian governance. Put another way, is international territorial administration *really* distinct from colonial occupation? Kosovo, for example, had far more autonomy under Tito’s communist regime than it had under the near-decade of the UN Mission in Kosovo. All realistic governance, notwithstanding the development of parallel Kosovar governmental structures, was retained by Kosovo’s governor—the Special Representative to the Secretary-General.

One could similarly argue that Iraq did not become, in fact, independent via the claimed 2004 turnover of sovereignty to the Iraqi people. The extensive international presence belied the notion that Iraq was completely free to usher out the *de facto* occupying powers. The August 2007 Security Council resolution, calling for an expanded UN presence in Iraq—given the 2003 UN pullout after bombings and deaths at UN premises—could conceivably lead to yet another international territorial administration. Four months later, the UN’s new Special Representative to Iraq reasserted the UN’s involvement. Under that 2007 resolution, he would oversee the UN efforts to facilitate the otherwise State-based sovereign objectives of political reconciliation; help address the needs of returning refugees; and settle internal boundary disputes. The initial skeleton staff of 35 would grow to between 250 and 300 employees. The main office is in Baghdad. There are now subsidiaries in

Basra and Irbil. (Ten days later, an attack on the UN Mission in Algiers would kill dozens and wound hundreds. Usama bin Laden would claim: “We are being massacred every day while the United Nations continues to sit idly by.”)⁶⁰

Various commentators have begun to reassess international territorial administration in the following terms: (1) “Empire Lite” (as in Bud Lite beer); (2) “postmodern imperialism”; (3) “Empire in Denial”; (4) interventions that are a “fundamentally imperialist enterprise”; and (5) the “New Imperialism.”⁶¹ The daunting question, however, is under what circumstances such States or territories should be declared temporary wards of the UN? One of many problems would be the predictable reprisals of various local warlords if—under the auspices of the United Nations—a State or group of States attempted to intervene, no matter how humanitarian the motive. Another practical limitation would be the UN’s financial instability, caused by an increasing number of States in arrears on their annual UN dues. In 1992, the UN Secretary-General stated that the UN was “considering” this option. The two Bosnia mediators, Britain’s Lord Owen and his US counterpart, Cyrus Vance, rejected this possibility for Bosnia. The other alternative when a State’s infrastructure has failed to function is to idly observe such tragedies rather than intervene on humanitarian grounds. There is a price for such inaction: some States have become breeding grounds for terrorism.

5. Secretariat The UN Secretariat administers all of the programs of the United Nations. At its zenith, a staff numbering over 30,000 persons (at Geneva, New York, Vienna, and Nairobi) is headed by the UN Secretary-General. Appointed after the General Assembly recommendation to the Security Council, this officer is the UN’s chief administrator.

Employees of the Secretariat, including the Secretary-General, are expected to execute their duties independently of any national allegiances. Article 100 of the UN Charter provides that in the “performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.” State members of the UN must therefore respect the exclusively international character and responsibilities of

their citizens while they are serving on the UN staff [Organizational Immunity: §3.6.A.].

An important, but somewhat obscure, function of the office of the Secretary-General (S-G) is preventative diplomacy. While the public has traditionally perceived the role of this office as merely titular, the S-G has often undertaken quite perilous negotiations to resolve international crises. Under Article 99 of the UN Charter, the S-G “may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.” In Boutros Boutros-Ghali’s *Agenda for Peace*, requested by the heads of State at the first meeting of the SC in 1992, he aptly notes the increasing importance of this role. In his words: “There is a long history of the utilization by the United Nations of distinguished statesmen to facilitate the processes of peace.... Frequently it is the Secretary-General himself who undertakes the task. While the mediator’s effectiveness is enhanced by strong and evident support from the [Security] Council, the General Assembly and the relevant Member States acting in their national capacity, the good offices of the Secretary-General may at times be employed most effectively when conducted independently of the deliberative bodies.”⁶²

In September 2006, S-G Kofi Annan offered to appoint a mediator to aid in the peace talks between Israel and Hezbollah on the release of two abducted Israeli soldiers. Israel had mounted its offensive posture in Lebanon after a cross-border attack by Hezbollah into Israel, resulting in the capture of the two Israeli soldiers. Israel did not want to be perceived as being a nation that negotiates with terrorists. The UN option thus provided a mask that might unmask those captives.

In December 2006, as part of his farewell address at the UN, Kofi Annan warned that the US must not sacrifice its democratic ideals while fighting its War on Terror. The S-G articulated five principles that he considered essential: collective responsibility, global solidarity, rule of law, mutual accountability and multilateralism. Citing a president who was instrumental in the founding of the UN (Truman), Annan said: “‘The responsibility of the great states is to serve and not dominate the peoples of the world.’ He believed strongly that henceforth security must be collective and indivisible. That was why, for instance, that he insisted when faced with aggression by North Korea against the South in 1950, on bringing the issue to the United Nations. Against such threats as these, no nation can make itself secure by seeking supremacy over all others.”⁶³

There is no clear theoretical framework, however, for linkage between the Secretary-General’s Article 99 obligation to bring peace-threatening matters before the SC, and the S-G’s ability to directly gather the information needed to carry out his or her monumental task. This is a critical gap in need of reform. The problem is succinctly stated by Professor of Peace Studies Thomas Boudreau of St. John’s University in Collegeville, Minnesota: “Without a theoretical framework that justifies and clarifies a specific reform, each effort to improve the Secretary-General’s ability to prevent conflict threatens to become a piecemeal ‘band-aid’ solution. In short, there is a need to ... define and develop a clear and consistent link between the Secretary-General’s obligation under Article 99 and his ability to gather, ascertain, and evaluate information concerning conflict prevention. There seems to be a bankruptcy of ideas in the realm of information gathering by the United Nations.”⁶⁴

To combat this concern, the Secretary-General’s August 2005 report—*In Larger Freedom: Towards Security, Development, and Human Rights for All*—was designed to generate a dialogue for the September 2005 Millennium Summit. This event was the fifth year review of the achievements of the UN Millennium Declaration [quoted in above §3.3. Introduction]. The Secretary therein promised that steps will be taken to create a cabinet-style decision-making mechanism. He sought the financial backing to arrange a one-time staff buyout to refresh and realign staff to meet current needs of the organization. A primary objective is to undertake a comprehensive review of the Office of Internal Oversight Services (OIOS) in the aftermath of the UN Oil-for-food scandal in order to strengthen the independence and authority of the OIOS.

6. International Court of Justice The ICJ is the UN’s judicial organ. Its predecessor, the so-called Permanent Court of International Justice (PCIJ), was *not* an organ of the League of Nations. The UN Charter’s drafters envisioned that the present successor, the International Court of Justice (ICJ), would be the UN’s judicial arm. International disputes would thereafter be resolved in the courtroom, rather than on the battlefield, such that there would be no World War III.

The ICJ is headquartered at The Hague in the Netherlands. It is often characterized as not having lived up to the drafters’ ideals. The relevant UN Charter provisions (Articles 92–96) and the operational rules set forth in the companion Statute of the ICJ fell prey to

national sovereignty objections. These, not the court itself, are the culprits that have tarnished the 1945 vision of beating swords into plowshares.

Two prominent examples of the drafters' Charter-based limitations include: (a) the requirement of a State's consent to be sued in the ICJ; and (b) the Court's lack of the power of judicial review over decisions by other UN organs [textbook §8.4.].

C. UN ASSESSMENT

This portion of the international organizations chapter summarizes the perspectives about how the UN has discharged its Charter functions. Some commentators claim that it is merely a place to let off steam, operating as a conduit for the hegemony of its most powerful national members. The most accurate account is one that is drawn after a careful assessment of both sides of the UN balance sheet. Although there have been pluses, the many minuses are attributable to the organization's prototypical limitations. (Recall that the UN's State members created it, but they did not endow it with the same powers typically exercised by their respective executive, legislative, and judicial branches.)

1. Inducing National Compliance There is a widely perceived weakness, which ironically attests to the UN's resiliency under arduous circumstances. The criticism is that the UN has been historically powerless to effectively control the excesses of its member nations. While there has been no World War III, there have been numerous conflicts in its half-century existence. Critics have often wondered aloud why the UN exists if its purpose was to effectively manage conflict, rather than standing on the sidelines.

At the 1945 UN Charter drafting conference, the international community provided the SC with the ostensible power to handle future conflicts. They said one thing, but ultimately meant another. Article 43, for example, stated that the UN would have a military force at its disposal, to be staffed based upon future agreements. While troops *would* later become available, UN operations would always have to be carried out on an *ad hoc* voluntary basis. UN involvement would depend on the political consent of the affected States, as well as that of each of the five permanent SC members (because of their respective abilities to veto UN action). Unlike its member States, the UN would never have a standing army.⁶⁵

The UN Charter was thus drafted to include broad standards of achievement with which no State could

openly disagree. But as is typical of most multinational treaty making, such treaties are not intended to be immediately binding [§7.1.B.]. One reason was that the Charter's blueprint for the post-World War II community of nations was the product of negotiations among State-centric representatives. Since the 1648 Treaty of Westphalia [textbook §1.1.A.], national sovereignty had been the cornerstone of the global way of life. Thus, the UN drafting was not inclined to cede clear-cut, sovereign-like powers to an international organization. State delegates to the 1945 drafting conference feared that the organization might rise up and become their political Frankenstein. It might one day turn into a whole more powerful than the sum of the parts.

The following two analyses explore rationales for: (1) retaining the UN as the centerpiece for twenty-first century security needs—authored by Russian academics in the Chinese Journal of International Law; and (2) the UN's December 2004 broadly-based assessment of its own weaknesses—which must be addressed if the international community hopes to attain “A More Secure World.” These excerpts, from Moscow and the UN, comment on the viability of “going it alone” on national security:



The Concept of the US National Security and International Law: A View from Moscow

IGOR LUKASHUK AND DARYA BOKLAN
2 CHINESE JOURNAL OF INTERNATIONAL LAW 587
(2003) and

A More Secure World: Our Shared Responsibility Report of the Secretary-General's High-level Panel on Threats, Challenges and Change

Part Four *Synopsis*: A More Effective United Nations for the Twenty-first Century, at 64–65 (2004)

ANAND PANYARACHUN, CHAIRMAN

Go to Course Web Page (for both), at:
<<http://home.att.net/~slomansonb/txtcsestite.html>>.
Under Chapter Three, click More Secure World.

The initial Moscow excerpt from the Chinese Journal of International Law states that since 2002, the US

Bush Administration operated solely from national rather than international interests. One might counter that the US is paying more attention to its national interests than in the past, as opposed to ignoring International Law. The Russian authors appear to be rather egalitarian, now that Russia is no longer on the polar axis it occupied during the Cold War. These, and related matters, will be addressed in more detail in future chapters covering international courts, Laws of War, and other perennial concerns within the ambit of “shared responsibility” expressed by these authors.

The other excerpt from the UN—and its entire self-assessment—specifically avoided mentioning any particular conflict. As stated in the overall Report’s transmittal letter from this project’s Chair to the Secretary-General: “Our mandate from you precluded any in-depth examination of individual conflicts and we have respected that guidance.”

Questions remain as to: (1) whether this UN Report signals a remarkable change both at the UN and in its member States; and (2) whether the UN organization will in fact be able to overcome the military excesses of its sovereign members. Unlike the defunct League of Nations—which was unable to control conflicts generated by its State members—the UN hopes to shift its collective security *Synopsis* from dream to reality. Note that not all reform necessarily requires changes in the UN Charter.⁶⁶

In the 1990s, the UN Security Council began to exercise its authority in new ways, which would more directly deal with conflicts and their consequences. This organizational renaissance embraced both internal and international hostilities. The Council’s new-found vigor expressed itself in the exercise of Chapter VII powers, which no longer appeared to be married exclusively to State consent. In 1999, for example, the UN undertook an unusual role by assuming responsibility for the *governance* of Kosovo and East Timor in a way that resembled the exercise of the sovereign power of States. This expanded UN role is addressed further in the Peacekeeping Operations portion of this text [§9.3.B.]. In 2008, the UN Security Council would refer the President of Sudan to the International Criminal Court for prosecution. That power was ceded by the more than 100 State parties to the Court’s Statute—a Security Council act never dreamed of during the Cold War.

In December 2005, the General Assembly and Security Council established a novel UN Peacebuilding Commission.⁶⁷ Its mandate is being coordinated by its

UN Peacebuilding Support Office. The latter entity will explore integrated strategies and pursue predictable financial investment, with the objective of developing the “best practices on issues that require extensive collaboration among political, military, humanitarian and [other] development actors.” This new project will focus on country-specific meetings with the targeted nation, other nations within the same region, and the relevant financial institutions.

This program could evaporate, however, if only designed to pour fresh wine into an aging bottle. Regardless of configuration, neither the Peacebuilding Commission nor its Support Office can act against the wishes of any affected nation. Article 2.7 of the Charter prohibits meddling by any external institution other than the SC. But the joint GA-SC resolutions have resolved to at least “[e]xtend the period of attention by the international community to post-conflict recovery.” One thus hopes that those who have so resolved can match word and deed.⁶⁸

2. Common Criticisms The UN has achieved the degree of success that one might expect from an international organization composed of totally autonomous States. They did not opt to yield the requisite degree of sovereignty to the United Nations, which otherwise would have empowered it to function against their wishes. This international organization was never intended to be a supreme legislative body. Nor did its State creators intend to endow it with executive powers. The UN could do little to force members to comply with the decisions of UN organs. This limitation was evidenced by the lack of Charter language vesting the Secretary-General with effective control over UN military operations.

As capably articulated by contemporary academic realists, “[i]n addition to the perennial problems of dysfunctional institutions, inadequate resources, and ephemeral political will, the UN has always faced rises of expectations.” With the demise of the Cold War, and huge potential for a new era of truly international collective security, the hope that the UN would finally meet its early objectives was dashed by continued resolution in favor of great power interests. So the discussion of reform again “begged the question of whether that reform must take place primarily in the structures, procedures, and personnel that make up the United Nations, or in the willingness of member states to use them.” Thus, the U.S.-led 2003 invasion of Iraq challenged the very notion of international order. That

war split the UN Security Council, NATO, and the European Union.⁶⁹

There have been some successes in advancing human rights, resolving territorial disputes, promoting economic and social welfare programs, and developing draft treaties for State adoption. One is the UN Convention on the Law of the Sea [textbook §6.3.]. The eight-year process, which produced this global constitution of the oceans, evinces a monumental undertaking that would not have materialized without an established global forum to promote it.

Critics tend to focus on the limitations of the Security Council and General Assembly. They often overlook the fact that the UN has commissioned numerous agencies [Chart 3.3] to pursue programs, which have improved living conditions for millions of people. UN economic and social welfare programs have eliminated certain diseases. They have generated hundreds of treaties dealing with a host of issues including narcotics, trade, slavery, atomic energy, road transportation, and famine-relief efforts in Africa.⁷⁰ The UN can similarly be credited with the global proliferation of human rights treaties in recent decades [textbook §10.2.].

Various UN agencies have also resolved a number of territorial disputes. The International Court of Justice has decided many boundary disputes. The UN Committee on the Peaceful Uses of Outer Space undertook the foundational work necessary to conclude the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies. The space treaties produced at the UN yielded a widely accepted paradigm for avoiding future territorial disputes and limiting the militarization of space [§6.4.C.].⁷¹

One resulting perception is that the UN has lost none of its relevance although the status quo is not necessarily satisfactory. Arpad Prandler of the Hungarian Branch of the International Law Association has thus asserted as follows:

The Hungarian People's Republic ... has taken a consistent stand ... against concepts and suggestions which, though well-intentioned, have laid the blame on the Charter for both the failures of the World Organization and the negative tendencies for the international situation and which seek the cure for ills external to the Organization.... The aims and

purposes of the Charter, namely the maintenance of international peace and security, the preservation and removal of threats to peace, the development of friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and international cooperation in the economic, social and cultural fields are of unchanged significance and call for a fuller measure of implementation.

...

On the whole, the Organization ... has stood the test of time. The United Nations Organization and its six principle organs ... live up to their shared function stated by the Charter "to be a centre for harmonizing the actions of nations in the attainment of these common ends." ...

It should also be emphasized that this position is neither in favour of conservatism nor in favour of the status quo, insofar as the Charter could not and cannot be regarded as the repertory of petrified dogmas. In our opinion the organic inner evolution of the world organization should still be supported which, subject to the substantive provisions of the Charter, leaves scope for undertaking and carrying out fresh and specific tasks....

The Hungarian People's Republic has accordingly spared no effort—alongside other Member States—to explore the underutilized possibilities inherent in the Charter and to enhance the effectiveness and the role of the Organization.... Like other socialist countries Hungary is nevertheless prepared to adopt a flexible attitude towards any proposal seeking to find a novel expedient that is politically justifiable, practically feasible and legally adjustable to the system of the Charter.⁷²

Another persistent view is that the UN has *not* accomplished its undoubtedly myopic goal of maintaining world peace. It is no stronger than the sum of its national parts.⁷³ Thus, one should acknowledge that only the resurrection of a deeply committed US interest can save this floundering organization. In the 1980s, for example, the Reagan Administration expressed that the UN needed the United States far more than the United States needed the United Nations. The United States began its withdrawal from various UN agencies. The ICJ determined that the United States had violated International Law by its activities in Nicaragua although

the United States had unsuccessfully attempted to withdraw from the ICJ's proceedings (§9.2). Then, "overnight," the *senior* Bush Administration could not embrace International Law enough—when the United States was soliciting Arab support to rescue Kuwait from Iraq's annexation in 1990.

One could thus pose the question: What would happen if the UN shut down today? Not unlike China's Cultural Revolution where International Law was abandoned for a ten-year period (1966–1976), suppose the UN were discarded! In an iconoclastic passage, challenging UN-driven programs seeking the redistribution of the world's wealth and resources, the influential Heritage Foundation questions the continued vitality of the United Nations as follows:

This obsession with the N.I.E.O. [§12.4 New International Economic Order] has converted the United Nations from an organization that might merely have been costly and annoying for Americans into a body which threatens those nations committed to democracy, liberty and economic development.

This raises the question, understandably, of whether the United Nations serves any positive purpose. If its influence is of no consequence or, indeed, negative, then the world may be better off without the U.N.... [T]he debate is not between competing theories, but is based on fact and history. The United Nations ... no longer is simply a well-intentioned glimmer in an idealist's eye or an embryonic body whose missteps and failures understandably should be overlooked. It is a full-grown organization with a real record and history. A discussion of the U.N. and of whether the world would be better without it, therefore now moves beyond theories and good intentions to a record of comprised facts and data, successes and failures.

...

Only those situations improved by the U.N. argue for the continued existence of the organization. Even here, however, it is possible that other multinational organizations may be able to do as well or better than the UN.⁷⁴

The comprehensive December 2004 Report of the Secretary-General's High-level Panel on Threats, Challenges and Change would predictably beg to differ. As pointed out in a key passage associated with the frustration of global politics during the Cold War:

Nonetheless, without the UN the post-1945 world would very probably have been a bloodier place. There were fewer inter-State wars in the last half of the twentieth century than in the first half. Given that during the same period the number of States grew almost fourfold, one might have expected to see a marked rise in inter-State wars.... The United Nations diminished the threat of inter-State war in several ways. Peace was furthered by the invention of peacekeeping; diplomacy was carried out by the Secretary-General; disputes were remedied under the International Court of Justice; and a strong norm was upheld against aggressive war.⁷⁵

A third perspective is that the UN has enjoyed both successes and failures, but it is now at a major crossroads for several reasons—not the least of which is its financial woes (described below). This organization has more than its fair share of critics. Yet, an examination of the overall balance sheet reveals that it is by no means politically bankrupt. As envisioned by Georgetown University Professor of Government Christopher Joyner: "From a more cynical perspective, the United Nations has been depicted in recent years as an ineffective international bureaucracy hobbled by waste, inefficiency, and mismanagement. While certain degrees of truth obviously reside in each of these impressions, none of them accurately reveals the whole picture, purposes, or activities of the United Nations or of its successes. Nor do they suggest the broad truth that the United Nations has emerged since World War II for nearly all states as the preeminent institutional source of international law." Professor Joyner then observes that "member states over the past five decades have persistently resorted to using UN institutions and processes to create new international law to address problems accrued from changing circumstances and political developments."⁷⁶

Critics have also attacked the UN as being no more than a "Turkish bath." This common perception is that the UN has failed because it serves only as a place to let off steam. Jeanne Kirkpatrick, formerly President Reagan's chief delegate to the UN Security Council, publicly analogized this body with a Turkish bath—unable to achieve the task of resolving international conflict. In 1986, UN General Assembly President Choudhury similarly proclaimed that the Assembly needs to be strengthened because it "has been reduced to a mere debating body."⁷⁷ In September 2009, however, Barack

Obama was the first US President to chair a meeting of the UN Security Council. (The subject of that meeting was Iran's nuclear ambitions). This appearance symbolized his commitment to rebuilding the Council's tattered authority.

While not totally inaccurate, the Turkish bath analogy is misleading. Any UN inability to act or to achieve uniform compliance with the unassailable Charter norms could be—and often has been—characterized as a “complete failure.” One desirable UN function is that it provides adversaries with an opportunity for global access to information about global, regional, and internal problems. UN members meet both regularly and when there is a crisis. Without this forum, there would be no comparable opportunity for discussions, which have brought the force of public opinion to bear on the conduct of certain nations. Distant events otherwise tend to receive little attention outside of the affected country or region, before they might erupt into war crimes, crimes against humanity, or other arenas within the ambit of Charter concerns. Immediate access to the UN's political organs, such as the GA or the SC, serves the national political agenda of establishing and maintaining dialogues on the issues that nations consider important to the preservation of international peace.

The major powers structured this organization in a way that would not compromise their respective national interests. The permanent SC members assured that result via their respective national right to individually veto Council action. This provision, with its heyday during the Cold War, trumped the UN's potential for actually beating swords into plowshares. That all of these nations have immediate access to a public forum, in an electronic age with its instantaneous promulgation of all categories of information [§5.2.G.], may be one reason why threats to peace have not resulted in nuclear winter. On the other hand, it is clear that the organization cannot achieve its Charter potential without significant reform.⁷⁸

One of the most striking criticisms of the UN involves its inability to prevent genocide. The UN Charter's Preamble includes the following as a cornerstone in the organization's foundation: that the UN was determined “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person....” To this end, the UN Preamble contains the further pledge that its members would “practice tolerance and live together in peace with one another as good neighbours....” One should of course assign

responsibility to the States where genocide has occurred, and third-party States for not intervening, in areas such as Rwanda (1994) [§8.5.C.], Srebrenica (1995),⁷⁹ and Darfur (a Sudanese region receiving scant international attention until 2004) [§10.1.C.].

The UN has occasionally been accused of participation in episodic massacres in distant venues. Some 7,800 Muslim men and boys were slaughtered at a UN safe haven in Srebrenica, Bosnia in 1995. That incident was widely publicized, leading to the fall of a Dutch government. There have been some comparatively remote incidents.

In June 2006, for example, UN peacekeepers in the Congo were allegedly “contributing to the systematic destruction of civilian-occupied villages during combined operations with government forces.” A documentary filmed by a local television station memorialized an assault by South African and Pakistani units of the UN's MONUK force (entitled *Unreported World—The UN's Dirty War*). They broke UN rules of engagement by firing upon a small village, Kazana in Ituri in eastern Congo, without notice. Using mortars and heavy machine guns, they fired upon women and children. MONUK is tasked with providing relief to victims of the Congolese conflict. The objective of this fiasco was to dislodge ethnic militia forces from this area before Congo's first democratic elections in the following month. Instead, according to news reports, the UN forces aided government forces in a seven-hour bombardment—with the Congolese forces supposedly high on marijuana and alcohol. The Congolese commander apologized for burning human beings in this village. The government reported that 34 militia had been killed, but *no* civilians. The news reports, however, claimed that thirty civilians were killed as a result of this incident.⁸⁰

There is further head-in-the-sand evidence in what the UN's widely heralded 2004 analysis of twenty-first century threats to the collective security of nations does *not* say. This epic report was designed to identify major threats to collective security. Yet there is no independent section on genocide in this otherwise comprehensive report.⁸¹ The Secretary-General's direction—to avoid naming any county as being responsible—further reflects on the UN's inability to control this all-too-familiar feature of the contemporary international landscape. The Panel's response was to use the terms “mass atrocity” and “humanitarian disaster,” rather than “genocide,” and to mention the Genocide Treaty only once almost in passing.

On a positive note, however, the Report at least lists the countries where acknowledging the existence of “genocide” is unavoidable; admits that the UN Security Council has been inconsistent and ineffective; and recognizes an “emerging” norm requiring the international community to react. Specifically:

199. The Charter of the United Nations is not as clear as it could be when it comes to saving lives within countries in situations of mass atrocity....
200. ... The principle of non-intervention in internal affairs cannot be used to protect genocidal acts or other atrocities, such as large-scale violations of international humanitarian law or large-scale ethnic cleansing, which can properly be considered a threat to international security and as such provoke action by the Security Council.
201. The successive humanitarian disasters in Somalia, Bosnia and Herzegovina, Rwanda, Kosovo and now Darfur, Sudan, have concentrated attention not on the immunities of sovereign Governments but their responsibilities, both to their own people and to the wider international community....
202. The Security Council so far has been neither very consistent nor very effective in dealing with these cases, very often acting too late, too hesitantly or not at all....
203. We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.⁸²

One who authors a textbook could provide chapter and verse on the varied views about the value of the United Nations and what it should do to achieve effective reform. Given that this is not a multi-volume textbook, one might instead focus on a fundamental perspective that is crystal clear. Until the UN or the community of nations noticeably reduces the global level of hunger, poverty, infectious disease, and environmental degradation, there will be no effective security. Events like September 11, 2001, and the ensuing Iraq and Afghanistan Wars, are just the beginning of a very

long—or possibly, in a like sense, comparatively short—twenty-first century.

3. UN Financial Crises

(a) Member Dues Delay Yet another criticism leveled at the UN is the characterization that it is no more than a vast paper mill, existing to serve itself rather than its members. The UN is, of course, a very large business. It employs some 30,000 people throughout the world while generating more than one billion pages of documents per year. Its six-official-language system of administration requires multiple translations and republication of the same information at virtually all levels. Under Article 111 of the Charter, the five original languages included those of the permanent members of the SC: Chinese, French, Russian, and English (United States and Great Britain). Spanish was initially included as an official language due to the large percentage of the world's population that speaks Spanish. Arabic was added for the same reason in 1977.

In the mid-1980s, certain countries began to withdraw from various organs of the UN and/or refused to pay their full annually assessed UN dues. The 1986 US assessment, for example, was approximately \$200 million, or 25 percent of the UN's total \$800 million annual budget. By 1993, the US dues assessment was \$374 million in arrears, which the president promised to pay only if the UN would alter its funding formula to reflect growth in other national economies (such as Germany and Japan, which pay far less in annual dues). In addition, there is the distinct assessment for UN *peacekeeping* costs (31.7 percent of the total figure, often larger in absolute dollars than the *regular* annual budget assessments). Three days after September 11, 2001, both houses of Congress removed their objections to paying the entire amount that the United States owed the United Nations.

The UN finally established an independent Inspector General in 1994. The creation of this new watchdog post helped clear the way for the United States to repay the large amount of money it owed the United Nations. The US Congress was unwilling to pay the arrearage in UN-assessed dues until this position was created, resulting in the naming of a German diplomat to probe bureaucratic mismanagement and waste. The Inspector General is charged with the responsibility of strict financial oversight at the United Nations, as well as strengthening its accountability in ways that should generate greater confidence. There is the daunting question, however, of

whether this measure has been the proverbial “too little, too late.”

About 80 percent of the UN’s budget is paid by only fifteen nations. Various UN agencies support a large number of staff in expensive cities such as Paris (UNESCO). It is understandable that traditional UN supporters, such as the United States which pays 25 percent of the fixed annual budget, would demand more for their involvement—just as any private corporate structure would have to reorganize to meet the demands of stockholders who perceive their stock as dwindling in value because of mismanagement.

Ironically, the US Department of State Legal Advisor concluded in 1978 that the United States and all other member States must pay their assessed obligations. In his words, “the General Assembly’s adoption and apportionment of the Organization’s expenses create a binding legal obligation on the part of State members to pay their assessed shares.” This analysis was based on Article 17 of the UN Charter and the 1962 International Court of Justice case interpreting the Charter as requiring members to pay the organization’s expenses. Certain UN members had then objected to the UN peacekeeping commitments in the former Belgian Congo and the Middle East, unsuccessfully claiming that the related expenditures were not “expenses of the Organization” within the meaning of the Charter.⁸³

By 1995, the US Congress was adamant about the perceived situation at the UN. Republican Party leaders espoused the position that the US was not getting a sufficient political return on its investment. In the UN Withdrawal Act of 1995, the House of Representatives proposed that the US Mission to the UN be closed by 1999 and that the UN Headquarters Agreement Act be repealed so that the UN would cease to function in New York City. Had this Act been adopted into law, the US Congress would not have authorized any annual dues or peacekeeping funds.⁸⁴

The UN reacted by promulgating the 1996 Secretary-General Report on proposed administrative and budgetary reform. Its objective was to appease US complaints about UN waste.⁸⁵ In 1997, the Secretary-General notified the US that it would lose voting rights if the arrearage remained unattended. The United States lost the first of two annual bids for a seat on the powerful Advisory Committee on Administrative and Budgetary Questions—a committee on which the United States had served for fifty years, since the inception of the

United Nations. In 1998, the United States paid only \$197 million of its regular 1998 dues, the minimum necessary to avoid losing its GA vote. A 1998 US Senate Bill would have paid the UN accrued arrearage, which was \$819 million in annual dues, and the \$107 million peacekeeping assessment. However, an otherwise supportive President Clinton was essentially forced to veto this legislation because it contained an abortion rider. UN Secretary-General Kofi Annan and the EU denounced the resulting dues rejection, partially because it came in the same week that the United States sought UN support for a military campaign against Iraq.

In 1999, the US Senate nearly unanimously approved a bill to pay one billion of its arrearage, conditioned on: (a) the annual UN assessment for the US portion of the *regular* budget be dropped from 25 to 20 percent; (b) the *peacekeeping* assessment be scaled back from 31 to 25 percent; and (c) a portion of the US dues payment be used for the US reimbursement of allies in their peacekeeping operations. President Clinton then signed legislation, which authorized payment of \$926 million to the United Nations, subject to certain reforms, which must be certified by the US Secretary of State.⁸⁶ US citizen and media mogul Ted Turner donated \$34 million to cover (just) the 2001 shortfall for the United States, having donated \$1 billion to the UN in 1997. While the UN normally bars such contributions, these donations facilitated a reduction of the US administrative budget assessment from 25 to 22 percent—the first financial reform of the UN’s regular budget in twenty-eight years. The US peacekeeping budget assessment was also reduced from 31 to 27 percent although US law requires a further reduction to 25 percent, as a condition for releasing congressionally allocated arrears now owed by the United States (over \$1 billion). The budget assessment of eighteen other nations will be increased to offset the US reduction.

In May 2000, a UN vote ousted the US from the new UN Human Rights Commission. That ouster was unrelated to the US dues arrearage. However, the US House of Representatives chose to respond by threatening to withhold even more of the UN dues owed by the US.

In April 2006, the US Representative to the UN proposed a new method for calculating dues. Russia, China, and India were not pleased. Their dues would increase, while those of the US, Japan, and major European Union countries would decline. Under this

“purchasing power parity” approach, a nation’s ability to pay would depend on comparative standards of living—as opposed to the current system which bases contributions on gross national product. Using this new method to calculate dues, China would shift from seventh to second; Russia, from sixteenth to tenth; and India, from twelfth to fourth. Japan’s counter, opposed by Russia and China, calls for a minimum of 3 to 5 percent allocation for each of the five permanent members. China’s current rate is 2.1 percent, and Russia’s is 1.1 percent.⁸⁷

There are many contemporary reform initiatives. In May 2005, a US congressional committee proposed the United Nations Reform Act of 2005.⁸⁸ It would condition the payment of the US dues payable to the UN upon the latter’s undertaking various reforms. If the proposed bill was enacted into law, and there were no responsive reform, the United States would reduce its dues payments to fifty percent of its annual assessment by the United Nations. The UN had until October 2007 to implement most of the thirty-nine reforms. If not, then the US merely threatened to hold back fifty percent of its dues payable—currently \$330 million of the \$1.5 billion total UN budget. The Secretary-General responded that the proposed legislation would interfere with the currently pending reforms—the most sweeping in the UN’s sixty-year history.

The US Congress also worked with the Washington, D.C. US Institute of Peace to produce the June 2005 Task Force on the UN Report. Its major recommendations for reform include: (1) the creation of corporate style oversight bodies and personnel standards to improve UN employee performance; and (2) creation of a rapid reaction capability by its member States’ armed forces—to prevent genocide, mass killing, and sustained major human rights violations. If implemented, this particular proposal would be the closest step toward actually implementing the latent UN Charter Article 43 standing army.⁸⁹ The UN Secretary-General backed this theme by proposing a 2,500 member team. It would be a short-term entity that could be quickly deployed to address urgent peacekeeping and political missions. But the General Assembly, dominated by developing countries, controls the ten million dollar annual budget purse strings. Its members have yet to approve significant reform of an organization premised upon the UN’s post-WWII architecture.

The gravest impact of insufficient national financial support for the UN is, of course, borne by the impoverished people of the world. For example, the UN announced an April 2006 food ration cut for 6,000,000 people in Sudan, half of whom are in the most deprived Darfur region. The related problem of child malnutrition is already on the rise. These budget cuts are inversely correlated to world health. The minimum daily requirement of 2,100 calories to survive will thereby lengthen the annual pre-harvest hunger season.⁹⁰

(b) Oil-for-Food Scandal This blemish on the UN reputation involved \$64,000,000 in bribes and half of the 4,500 companies contracting with the UN (in the aftermath of the first Persian Gulf War). The senior Cypriot UN diplomat who managed this program was cited for his role in this scandal. A UN whistleblower claimed that he was fired for reporting this corruption. In August 2005, a senior Russian UN diplomat was the first to be indicted. Cash stashed in red canvas diplomatic bags had been sent by diplomatic courier to the Iraqi Embassy in Moscow. In 2007, a Texas oil tycoon pled guilty to conspiracy to provide kickbacks to Saddam Hussein to obtain and maintain an oil contract in Iraq. In January 2007, the ex-UN oil-for-food chief was also charged, bringing the total of individuals who have been charged to fourteen—including former UN Secretary-General Boutros Boutros-Ghali’s brother-in-law. In March 2008, Volvo avoided prosecution by paying back the profits two of its subsidiaries made, coupled with a fine of (the equivalent of) \$19,200,000.

From 1997 until 2003 (just prior to the Iraq War), the Security Council had sanctioned Iraq for its undisputed threats to international peace. An exception authorized the Iraqi government to sell enough oil to attend to the humanitarian needs of its people, spawned by the impact of the UN sanctions. During this period, Saddam Hussein personally profited by sales arrangements whereby the oil purchasers had to pay bribes. Supplies destined for the Iraqi people were instead diverted, in a way that helped the Iraqi military and the pockets of Hussein and his senior Baath Party associates—an estimated 20 to 25 percent of the overall \$64,000,000 in the sale of Iraqi oil during the seven-year sanctions period.

The episode has fueled the continuing controversy about UN mismanagement, annual dues arrearage by UN member nations, and the need for reform—as

noted earlier in this book's UN Assessment section. Secretary-General Kofi Annan responded by waiving the diplomatic immunity of any responsible UN official. The United States and United Kingdom's relations with France and Russia have also been marred—the latter having sought to continue the oil-for-food humanitarian program after the fall of Baghdad. Approximately \$11,000,000,000 of Iraq's oil sales went to French and Russian companies during the seven years in question.

The September 2005 UN Panel report concluded that this program was "corrupt and inefficient." It called for urgent reform, including creation of a new chief operating officer and an independent oversight board. The Secretary-General then accepted responsibility in his statement to the SC: "The report is critical of me personally, and I accept its criticism.... The inquiry committee has ripped away the curtain and shone a harsh light into the most unsightly corners of the organization."⁹¹

This continuing investigation has revealed that more than 2,000 companies in numerous nations (including the United States) were involved. A chief executive officer in the *private* sector would have been fired. So the UN must adopt the oversight reforms called for by the chief investigator—a former US Federal Reserve Board Chairman. Otherwise, the UN's already battered credibility will be damaged beyond repair.

◆ §3.4 EUROPEAN UNION

The UN Charter acknowledges the utility of other autonomous international organizations. Article 52(1) recognizes the simultaneous "existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations." Under Article 52(3), the UN Security Council encourages the settlement of local disputes through regional organizations. These provisions complement Article 33(1), whereby the State parties to any dispute "shall, first of all, seek a solution by negotiation ... [or] resort to regional agencies or arrangements, or other peaceful means of their own choice." States have developed a number of regional defense, economic, and political organizations.

These entities sometimes operate in harmony with the UN on a global level; with individual States at the regional level; occasionally without any regard for the United Nations; and sometimes without regard to parallel organizations. In July 2008, for example, France led the formation of the 43-nation Union for the Mediterranean (UFM). Nations north and south of that body of water gathered in Paris to address issues relating to the environment, immigration, and policing. One group within this regional cohort—Israel, Syria, the Palestinian delegation, and other countries across Europe, the Middle East, and North Africa—decided to pursue practical steps to establish a Middle East Zone that would be free of weapons of mass destruction. This unabashedly overlaps with certain EU directives although all twenty-seven EU members sent delegates who agreed to the UFM's final aspirational declaration.⁹²

Potential Member States initially ponder the advantages and disadvantages of participation in any IO and ultimately, whether joining serves their best interests. Once this bond is forged, however, they may not engage in conduct contrary to community objectives. In April 2007, for example, the European Court of Justice (ECJ) determined that the Dutch government's Air Transport Agreement with the US undertook an action that was reserved exclusively for the EU. The two countries had entered into a 1957 agreement involving airfares and a computerized reservation system. It preceded the EU's otherwise complete regulation of this field. The Netherlands amended the 1957 agreement with the US in 1992. While those changes were relatively minor, they effectively triggered the application of the 1958 EU air transport regime. The ECJ thus ruled that the Netherlands had violated the *Community's* right to control such matters with this entire post-joinder agreement.⁹³

Many prominent organizations cannot be covered in a course designed to provide the fundamental perspectives. The EU is probably the best example of how a group of States has managed to integrate goals and results at the regional international level. They have the collective experience of more than 2,000 years and the dynamism of a 50-plus-year organization. To join, applicant nations must demonstrate an array of commitments, including: promulgating stringent food safety, human rights, and environmental standards; ensuring an independent judiciary; and fighting organized crime via monitoring and verifying asset transfers by senior government officials.

A. EVOLUTION

1. Pre-EU Existence Long before the much-heralded European Union's Maastricht Treaty of 1992, the concept of an association of European States found political expression in both negative and positive ways. There were attempts to impose unity by Napoleon and Hitler. Napoleon sought to unite the Continent under French hegemony until his military demise at the beginning of the nineteenth century. Hitler sought the subjugation of Europe under the dictatorship of Germany's Third Reich.

Peaceful attempts to unite Europe followed World War I. In 1923, Austria led the Pan-European Movement. It beckoned creation of a United States of Europe, modeled on the success of the Swiss struggle for regional unity after the 1648 Peace of Westphalia [textbook §1.1.A.]. That agreement ultimately led to the modern nation State in the heart of Europe. In 1929, in speeches before the League of Nations Assembly in Geneva, French and German leaders proposed the creation of a European Community within the framework of the League of Nations.

These positive bids for peaceful unification were overcome by a dominant tide of nationalism and imperialism. The twentieth century's two "great wars" demonstrated the futility of the constant rivalry between European nations over many centuries. Europe's collapse, its political and economic exhaustion, and its outdated national structures signaled the need for a fresh start and a more radical approach to the post-World War II reordering of Europe.

2. A Union Emerges The contemporary EU is rooted in the creation of three proximate but distinct communities. The first was the European Coal and Steel Community formed by the 1951 Treaty of Paris. The 1957 Treaty of Rome established the European Economic Community and the European Atomic Energy Community. The initial goal was to create a common market (no internal tariff barriers) in coal and steel for the six member States of Belgium, France, West Germany, Italy, Luxembourg, and the Netherlands. This union would, it was hoped, secure peace by loosely integrating both the victorious and the vanquished European nations of prior world wars. Although France rejected the added aspiration of an international defense organization, the original members built an economic community pre-

mised on the free movement of workers, goods, and services. Mutually agreeable agricultural and commercial policies were adopted by the end of the 1970s. Further history is available on the EU's Web site and in the standard texts.⁹⁴

The contemporary EU apparently possesses international legal personality. That status was essentially borrowed from its constituent State members. They previously possessed (and still retain) the legal capacity to operate on the international level. This curious state of affairs was concisely illustrated by the University of Helsinki's Jan Klabbers:

As many observers have noted, the Treaty establishing the European Union ... does not explicitly confer international legal personality upon the European Union.... Some observers merely note the fact that [there is] no specific reference to the Union's international legal personality, but do not go beyond faintly hinting ... that the European Union might not be able to act under international law. Others contend that, to the extent that the Union wishes to act internationally, it can do so only by means of borrowing powers and institutions from its composite elements that are endowed with international legal personality: the Communities.⁹⁵

An arguable lack of independent legal personality was one of the driving forces behind the 2005 referendums on the proposed EU Constitution. As Article 1.7, entitled *Legal personality*—expressly and independently of any of the other 447 articles—provides: "The Union shall have legal personality." This would not have given the EU any powers not expressly delegated to it under this or prior treaties establishing various Community organs. Had it been ratified by (all) member nations, however, the current entity—with all of its economic, political, social, and military designs—would now possess the required power to act independently of its supporting Community organs. Notwithstanding this limitation, the EU has nevertheless flexed its political muscle independently of its member States—including its November 2004 negotiations with Iran, seeking the latter's withdrawal from a uranium enrichment program.

The EU's current membership and pending applications are set forth immediately below:

3. Community Treaties

(a) Maastricht Treaty The 1992 Treaty on EU was signed in Maastricht, the Netherlands.⁹⁶ It amended earlier treaties on various Community subjects in a way that would bring all of them under one umbrella treaty and eliminate inconsistencies. The objectives stated in the Maastricht Treaty include some key features that define the anticipated future of this organization (Title I, Article B):

- ◆ “Creation of an area without internal frontiers” (much like states of other federated unions such as the US);
- ◆ Social cohesion through an economic and monetary union, which will ultimately create a single currency (historically printed by each individual country);
- ◆ The further assertion of “its identity on the international scene, in particular through the implementation of a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defense” (*implying* a League of Nations or Organization of American States Charter provision providing that an attack upon one member of the international organization is an attack against all. Such a provision was not employed in the UN Charter—as opposed to the express Art. 5 NATO provisions that an attack on one is an attack on all); and
- ◆ strengthening the “protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union” (facilitating even smoother international travel than currently permitted within the EU).

The “Euro” is the currency of the European Monetary Union. The member nations have effectively yielded a degree of their sovereignty to a central bank located in Frankfurt. The French franc, for example, faded into obscurity in February 2002. The first franc was a gold coin created in December 1360. It paid the ransom to the English to free King Jean le Bon, who was held captive for four years during the Hundred Years War.

Members can qualify only if they achieve low inflation, low government budget deficits, and leaner social programs—at a time when unemployment in most member nations is relatively high (approximately 10 percent). Trading in the Euro began on the first day of 1999, with the use of hard currency to follow. The majority of

nations within the EU have thus ceded control over their local interest rates to an international body. This has never been done before in any other treaty arrangement.

(b) Amsterdam Treaty This 1997 treaty contained new approaches regarding community social policies. It was a reaction to the criticism that the EU had focused exclusively on economic interests to the detriment of: social security; employment rights in the event of layoffs possibly associated with controls mandated by Maastricht’s economic guidelines; and social welfare. Thus, the Amsterdam Treaty is designed to reassure the public that basic social needs will not be sacrificed to market forces.

(c) Nice Treaty The potential addition of mostly eastern European nations (most of which became members in 2004) was one of the most contentious issues in EU history. The Nice Treaty required each of the then dozen members to approve of the accession of enough members to essentially double the size of the EU.⁹⁷ Ireland, the most economically challenged member of the EU (until 2004), initially rejected the addition of new EU members. Many Irish voters were concerned about the EU exercising too much control over domestic matters. They were concerned about existing members possibly having to subsidize the economies of the new lower-income nations. Many refugees had already come to Ireland looking for work. These voters feared that adoption of the Nice Treaty could turn this steady stream into a deluge. Nevertheless, ten new members were admitted to the EU in 2004, as listed in Chart 3.4 below.

(d) Mixed Treaties Certain external treaties are mixed agreements. These are agreements that are concluded by the European Community (EC) and all of its member States on the basis of shared competence. The Community, for example, is a party to the UN Law of the Sea Treaty [LOS: textbook §6.3.]. The LOS treaty falls within the joint competence of the Community and its members. It contains a dispute settlement process. Ireland thus filed an action against Great Britain in 2001, seeking arbitration of an environmental claim. A new UK fuel plant would allegedly discharge radioactive contamination into the Irish Sea.

In 2003, the EC filed its own action against Ireland. The EC sought to establish that Ireland’s unilateral

CHART 3.4 EUROPEAN UNION MEMBER STATES AND ASSOCIATED NATIONS^a

Current Members	Candidate Countries ^b	Associated Nations ^{97a}
Austria, Belgium, Bulgaria, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, ^e Germany, Great Britain, ^f Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, and Sweden (27)	Croatia, Macedonia, ^c and Turkey ^d	Loose form of association with southern Mediterranean, African, and Caribbean-Pacific States under the four “Lome Conventions” concluded during the 1970s and 1980s (69) ^g

^a Source: <http://europa.eu.int/abc/governments/index_en.htm#candidate>

^b In May 2006, the EU suspended talks with Serbia for its failure to arrest the region’s Number One war crimes suspect, Ratko Mladic. He is the former head of the Bosnian Serb Army responsible for, among other things, the massacre at Srebrenica [textbook §10.1.B. *Bosnia v. Serbia* principal case]. The Chief Prosecutor for the International Criminal Court has repeatedly urged the EU not to consider Serbia until it surrenders Mladic and the former self-styled “president” of the Bosnian Serb entity, Radovan Karadzic—both of whom were indicted years ago by the International Criminal Court for the Former Yugoslavia.

^c The full name of Macedonia is Former Yugoslav Republic of Macedonia. Admission to the EU was premised, in part, on Macedonia retaining this elongated name. Greece objects to the use of just “Macedonia” (see Ch. 2, *Problem 2.B*).

^d Under Turkey’s Penal Code §301, “Insulting Turkishness” is a crime that is subject to three years in prison. That window on friction with EU ideals is a much-battered barrier to Turkey’s joining the EU. Turkey’s unrecognized occupation of northern Cyprus is another barrier (see *Cyprus v. Turkey* §6.2 principal case).

^e Unlike Turkey’s denial of the Armenian genocide, French law criminalizes denials. A violation can lead to a fine of 45,000 Euro and a one-year prison term.

^f Great Britain has not joined the EU’s monetary union, opting instead to retain the British Pound (a source of great frustration to international travelers). The Euro has increased both price transparency and competition. In May 2007, Great Britain again prevailed. Rather than the EU’s metric system, Britain will retain its feet, inches, ounces, pounds, and gallons measurement regime.

^g In November 2007, the European Community established an Economic Partnership Agreement with the East African Community. The treaty between these international organizations facilitates trade between the Community and Burundi, Kenya, Rwanda, Tanzania, and Uganda.

action in the external UN tribunal violated EC law. Ireland had allegedly failed to respect the exclusive jurisdiction of the European Court of Justice (ECJ) in such matters. The ECJ found that it had the exclusive power to handle such cases among Community members. Ireland should not have filed this grievance in the UN tribunal.⁹⁸

4. EU Constitution? In 2003, Europe’s leaders drafted what was supposed to become the EU’s first constitution.⁹⁹ Europe’s leaders backed this document, which was designed to move beyond a mere monetary and trade union. The proposed constitution generally provides, for example, that member nations can act only when the EU does not. But the people of all twenty-seven EU nations had to agree to the proposed constitution for it to become effective. Instead, several of the original, more powerful members conducted referendums in 2005, which resulted in “no” votes.

There are varied views about the causes. While some will argue they can be overcome,¹⁰⁰ the “no” votes were spawned by an increasing mistrust of local government because of stagnant economies, high unemployment, immigration concerns, and the desire to maintain cultural differences. This was the state of affairs *before* the 2008 world economic downturn.

Another factor was the popularity decline of French President Jacques Chirac, in the face of a mounting Muslim population that was dissatisfied with its apparent position in the economic and social pecking order. He had lobbied extensively for Turkish membership in the EU. A number of French citizens felt, however, that Turkey’s: (a) comparative economic inferiority, (b) large population, and (c) potential for a larger share of representation in the various EU governmental organs, would all combine to spawn a number of costly EU programs—especially the “right to housing assistance” under the proposed EU Constitution.

A *proposed* constitutional reference to the “Christian roots” of Europe was another popular concern about an EU Constitution. Such language was ultimately not included, in keeping with the central theme of being “united in diversity.” The Muslim, Jewish, and other non-Christian minorities would have struggled with any such language. While the Pope felt otherwise, they felt that religious references had no place in this document.

One might also view the popular reluctance to adopt this constitution as a product of the uncertainties associated with the 2004 EU expansion from fifteen to twenty-five countries—accompanied by two more nations since. As aptly described by Professor Joseph Weiler of NYU’s School of Law and the Brugge College of Europe:

There is something, indeed more than one thing, deceptive in the juxtaposition of enlargement and Constitution. First is the notion that these two concepts are different—as if the decision on enlargement was not a constitutional decision. The opposite is true. The enlargement decision was the single most important constitutional decision taken in the last decade, and arguably longer. For good or for bad, the change in number of Member States, in the size of Europe’s [EU] population, its geography and topography, and in its cultural and political mix are all on a scale of magnitude which will make the new Europe a very, very different polity, independently of any constitutional structure adopted.¹⁰¹

In some instances, the national governments have opted to have their parliaments make this decision, rather than the people. People who did not trust their own governments were less likely to welcome even more unification via this governing document that would have been administered for the then twenty-five EU members from Brussels and the other organizational power centers.

In June 2006, EU members announced a period of reflection, intended to delay further discussion of a Constitution until 2008. But in June 2007, EU leaders decided to rekindle negotiations on a replacement. Had it been enacted in its prior draft form, it would have streamlined voting procedure on EU laws; coronated an organizational foreign minister; included an EU bill of fundamental rights; and it would have transferred fresh police and immigration powers to the organization.¹⁰²

Internal concerns are perhaps best represented by the UK’s October 2006 decision to severely restrict immigrants from two new EU members—Bulgaria and Romania.

The resulting Treaty of Lisbon was *signed* in December 2007. The plan was for all member States to *ratify* it by the end of 2008, so it could come into force before the June 2009 European elections. Changes included more decisions being made by majority vote, rather than unanimity; the European Parliament and national assemblies enjoying greater participation in organizational decision-making; trimming the EU’s executive branch from 27 to 17 seats; replacing the system of rotating the EU leaders; and strengthening the role of the EU policy chief.¹⁰³

The Irish rejection in June 2008 suggests that the period of reflection was too short.

5. EU Military Presence The European Union established an official defense policy in 2002. Its objective is: “to add to the range of instruments already at the EU’s disposal for crisis management and conflict prevention in support of the Common Foreign and Security Policy, the capacity to conduct EU-led crisis management operations, including military operations where NATO as a whole is not engaged.”

The EU has been flexing its military muscle in peacekeeping operations in Macedonia, the Democratic Republic of Congo, and now Bosnia. In November 2004, Bosnia’s NATO peacekeeping was transferred to a 7,000-member EU force. Although eighty percent of the troops involved in this operation essentially changed only the insignia on their uniforms, many isolationists are concerned that this is a slippery slope which will lead to unwanted military engagements.

After the August 2008 Russia-Georgia conflict, the European Commission approved \$700,000,000 in aid to help rebuild Georgia, coupled with the EU foreign ministers approving a force of 200 EU ceasefire monitors to observe the Russia-Georgia peace agreement.

6. EU’s Expanding Economic and Political Power The national votes against the EU Constitution in 2005 may have failed to boost the EU’s political clout. But its economic power is growing. The EU can pressure other nations to act or refrain from acting in certain ways. In 1992, the EU imposed economic sanctions and an arms embargo on Libya—in a show of EU solidarity with the UN Security Council. Libya had

refused to extradite its two indicted intelligence agents, who were later convicted of blowing up Pan Am 103 over Lockerbie, Scotland in 1988. The EU expanded its sanctions regime by freezing Libyan bank accounts and denying Libya the right to purchase oil-producing equipment from EU countries. Although the UN's sanctions against Libya ended in 1999, it was not until October 2004 that the EU lifted its distinct twelve years of economic sanctions. This rewarded Libya for its agreement to scuttle plans to develop weapons of mass destruction.

In summer 2005, the EU—which had no political ties with Iraq during Saddam Hussein's twenty-four year reign—opened a permanent mission in Baghdad. The EU spent \$390 million on Iraq in 2003–2004, and \$240 million in 2005. Europe was divided over the War in Iraq in the UN Security Council.

The European Commission, the EU's executive arm, can also require business entities in other countries to adhere to EU laws. This scenario arises when business entities in non-EU countries act in ways that threaten EU competition policy. The following 497,196,304 Euro (then approximately \$600,000,000 dollars) decision against the Microsoft Corporation is a dramatic illustration:



**Commission of the European
Communities v. Microsoft
Corporation
Commission Decision Relating
to a Proceeding
Under Article 82 of the EC
Treaty**

CASE COMP/C-3/37.792 MICROSOFT
(MARCH 03, 2004)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsestite.html>>.

Under Chapter [Three](#), click [European Commission
v. Microsoft Corporation](#).

Under threat of a fine of two million Euros per day, Microsoft appealed the above ruling. In September 2007, in the ensuing Court of First Instance proceedings, Microsoft lost its appeal. The €497 million fine was upheld, as were the requirements regarding server

interoperability information and bundling of its Media Player. Microsoft did not appeal. In February 2008, the EU fined Microsoft an additional (€899 million (US \$1.4 billion) for its interim failure to comply with the March 2004 antitrust decision. That was the largest penalty ever imposed in the 50 years of EU competition policy. In May 2008, Microsoft lodged an appeal in the European Court of First Instance. It hopes to overturn the now (€899 million fine and to obtain “clarity from the court” on the EU's underlying antitrust requirements.

The European Commission instituted a like action against Intel in July 2007. Intel was accused of giving substantial rebates to customers who buy most of their CPUs from Intel, which would violate EU anti-trust policy. In May 2009, the Commission imposed a fine of 1.45 billion dollars on Intel—noting that “the size of the fine should not come as a surprise.” The Commission further ordered Intel to immediately cease its illegal practices.¹⁰⁴

The year 2008 was a banner year for the EU's growing political power, as observable by its role in Kosovo and Georgia. After Kosovo's February 2008 independence, the EU began the process of stepping into the administrative role occupied by the UN since the end of the 1999 conflict with Serbia [§2.4.B.]. In August 2008, the EU flexed its political muscles by repeatedly warning Moscow that Russia's role in the Georgian conflict could result in the postponement of Russia's progress toward EU membership. The EU successfully interceded in the late-2008 and early-2009 gas price dispute between Russia and The Ukraine. (The latter nation had angered Russia by seeking NATO membership.¹⁰⁵) About twenty percent of Europe's natural gas flows through Ukrainian pipelines.

B. EU-UN COMPARISON

What makes the EU different from the UN? Both institutions have their critics.¹⁰⁶ Unlike the UN, however, the EU has a relatively homogeneous social, economic, and legal environment. The EU was initially designed to integrate the European nations economically. Europe was crushed by World War II; its nations had lost many of their colonies; and this region needed to unite to compete with large powers, including the United States to the west and the Soviet Union to the east.

The economic unification of Europe began with the reduction of trade barriers within the Community and the establishment of a common economic policy in relation to nonmember nations. The EU's strategy was

thus designed for the creation of one central bank, followed by one European currency for all member States. By contrast, there is little likelihood of there ever being a central bank or a similar economic program linking UN members.

Another essential objective of the EU's single market is the economic and political stability of Europe. Competitors within this Union will benefit because they will have larger markets, unimpeded by the usual customs inspections, tariffs, and other limitations on international business (Chapter 12). The comprehensive EU rules govern minutiae such as the brands of ketchup to be used in US-owned fast-food restaurants in Paris, the angle of Ford headlights made in London, and the airing of "I Love Lucy" reruns in Amsterdam. Unlike the UN, the EU's institutions are generally endowed with the necessary sovereignty to require member States to treat their citizens in ways that they would not otherwise be required to under national law.

The European Court of Justice fashioned an unprecedented distinction between the two organizations in September 2008. Earlier, a Saudi citizen and Swedish international organization were designated by the UN Sanctions Committee [§9.2.B.1.] as being associated with Usama bin Laden and Al-Qaida or the Taliban. Their bank accounts were frozen. The freeze was rooted in an EU Council regulation ordering the freezing of funds of individuals and organizations listed in an appendix to that regulation.

These two claimants brought an action in the EU's courts. They demanded that the referenced regulation be annulled. The prime issue in this litigation was whether the EU Council possessed the authority to adopt a measure which arguably violated their Community rights to a proper defense and their property without a hearing. Whether the EU courts had the power to review such EU decisions—to implement UN Security Council resolutions—was a far more significant matter than the substantive issue in their successful individual suits.

This issue was particularly acute because of the position assumed by the forty-seven nation Council of Europe in January 2008: that the UN and resulting EU blacklists were "totally arbitrary and have no credibility whatsoever." The UN refused to remove most listees, even after Milan's prosecutor conducted an investigation into three individual list members—finding no grounds upon which to press criminal charges. In his words:

"You can be added to the list for political reasons, without any serious evidence of wrongdoing. There is a risk of making many, many mistakes."

The British UN official in charge of the list made some modifications. However, he acknowledged that they would not satisfy European courts and governments. He noted that it is highly unlikely that the UN would ever allow a court or some independent panel to review its decisions because "[i]t can clearly lead to collapse" of this blacklist system.¹⁰⁷ But, at least, individuals may write directly to the UN Security Council to plead their case in that (political) forum, as demonstrated in the following case:



Yassin Abdullah Kadi & Al Barakaat International Foundation

EUROPEAN COURT OF JUSTICE
GRAND CHAMBER (3 SEPTEMBER 2008)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcse.html>>.
Under Chapter Three, click ECJ UNSC Reso case.

◆ §3.5 OTHER ORGANIZATIONS

The European Union has received much global attention in recent decades. A number of other international organizations are also influential actors in international affairs. Some major economic organizations, including the World Trade Organization, the NAFTA, and the so-called "Group of 77" will be covered in Chapter 12 of this text (International Economic Relations). While a survey course in International Law cannot cover many international organizations, it can touch upon several of the principle military and political international organizations: North Atlantic Treaty Organization; Organization for Security and Cooperation in Europe; Commonwealth of Independent States; Organization of American States; League of Arab States & Organization of the Islamic Conference; and the African Union.

A. NORTH ATLANTIC TREATY ORGANIZATION

1. NATO Nutshell NATO is the major military defense organization in the world. It fought its first war

in Serbia and Kosovo in 1999. It is now the lead entity in the post-9–11 Afghanistan Theater in the contemporary War on Terror (taking command in October 2006). It then had a 37,000-member, twenty-six nation coalition—the International Security Assistance Force in Afghanistan—the biggest operation in NATO history and the most successful military alliance in history. (Its numbers include fewer than 500 troops from Muslim countries.)

NATO's solidarity has occasionally waned, particularly when France withdrew in 1966.¹⁰⁸ France then expressed its concern about the organization being dominated by the US, notwithstanding NATO's historical dependence on US military support. While the NATO Secretary-General has always been a European, its Supreme Commander has always been an American. France returned, in a minimal capacity, but did not fully reintegrate into NATO's military structure until more than four decades later (March 2009).

NATO air raids spawned widely publicized civilian deaths, starting in August 2008. In September 2008, it tightened its rules of engagement regarding use of lethal force. Troop shortages have caused its military forces to rely on air power. The result has enraged Afghanistan's population while triggering international condemnation. Afghanistan's government then demanded a military status of forces agreement be established between Afghanistan and NATO after 2008 became the deadliest collateral damage year since NATO ousted the Taliban in 2001.

NATO's current members and affiliates are listed in Chart 3.5.

2. NATO Expansion During the Cold War, NATO expanded three times: adding Greece and Turkey in 1952, West Germany in 1955, and Spain in 1982. At the height of the Soviet-US Cold War, NATO had more than two million military personnel deployed in Western Europe. The Soviet Union's parallel Warsaw Pact nations deployed about four million troops in Eastern Europe. After the Soviet Union collapsed, NATO took a cautious approach to any potential eastward expansion so that Moscow would not unnecessarily fear encirclement.

US President Ronald Reagan's celebrated 1987 Berlin Wall request was: "Mr. Gorbachev, tear down this wall." Just after it fell, the US Secretary of State vowed that NATO would not expand one inch eastward. In 1994, NATO instead developed its "Partnership for Peace Program." That initiative involves joint military exercises, peacekeeping, and the exchange of military doctrine and weaponry. One objective was to expand NATO's membership eastward to incorporate the former members of the Soviet Union. The Heads of State Framework Agreement for this program provides that:

This Partnership is established as an expression of a joint conviction that stability and security in the Euro-Atlantic area can be achieved only through cooperation and common action. Protection and promotion of fundamental freedoms and human rights, and safeguarding of freedom, justice, and peace through democracy are shared values fundamental to the Partnership.

In joining the Partnership, the member States ... subscribing to this Document recall that they are committed to the preservation of democratic societies,

CHART 3.5 NATO MEMBERSHIP AND ASSOCIATED NATIONS

Member Nations	Partnership for Peace Program
Albania, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, United Kingdom, United States (28)	Armenia, Austria, Azerbaijan, Belarus, Bosnia and Herzegovina, ^a Finland, Georgia, Ireland, Kazakhstan, Kyrgyz Republic, Malta, Moldova, Montenegro, Russia, Serbia, ^b Sweden, Switzerland, Macedonia, Tadjikistan, Turkmenistan, Ukraine, Uzbekistan (22)

^{a, b} Bosnia and Serbia were each initially excluded from consideration for membership for their failure to turn over the two most-wanted men in Europe: the self-styled Republika Srpska (northern and eastern Bosnia) president, and a former Bosnian general. They were both indicted by the International Criminal Tribunal for the Former Yugoslavia [§8.5.C.] for war crimes, including the massacre at Srebrenica, Bosnia—the worst massacre since the Holocaust, as depicted in the §10.1.B. *Bosnia v. Serbia* principal case.

their freedom from coercion and intimidation, and the maintenance of the principles of international law.

They reaffirm their commitment to fulfill in good faith the obligations of the Charter of the United Nations and the principles of the Universal Declaration on Human Rights; specifically, to refrain from the threat or use of force against the territorial integrity or political independence of any State, to respect existing borders and to settle disputes by peaceful means. They also reaffirm their commitment to ... the fulfillment of the commitments and obligations they have undertaken in the field of disarmament and arms control.¹⁰⁹

Russia began to express its concerns about NATO expansion embracing the former Soviet Union's Warsaw Pact nations as early as 1990. One can appreciate this irony by reference to the NATO Secretary General's 1990 speech to the Supreme Soviet in Moscow, just before the Warsaw Pact was dissolved. Germany's Manfred Worner proposed an association as follows:

This visit in itself symbolizes the dramatic changes of the past year. The Cold War now belongs to the past. A new Europe is emerging ... [yet] age-old fears and suspicions cannot be banished overnight; but they can be overcome. Never before has Europe had such a tangible opportunity to overcome the cycle of war and peace that has so bedeviled its history...

I have come to Moscow today with a very simple message: we extend our hand of friendship to you. And I have come with a very direct offer: to cooperate with you. The time of confrontation is over. The hostility and mistrust of the past must be buried. We see your country, and all the other countries of the Warsaw Treaty Organization, no longer as adversaries but as partners in a common endeavor to build what you [might] call a Common European Home, erected on the values of democracy, human freedoms, and partnership...

[The NATO Secretary General then proposed that] the Soviet Union gains partners that will help in its great domestic task of reform and renewal. Partners who will cooperate to ensure that the Soviet Union is an active and constructive part of the dynamic Europe of advanced industrial economies and technological interdependence of the 21st century... Beyond confrontation we can address the immense global challenges of today and tomorrow: environmental degradation, drugs, terrorism, hunger, population, the proliferation of immensely

destructive military technologies in the Third World... The Alliance I have the honour to represent wants partners in the building of a new Europe... Let us look to a common future, and work for it with trust and imagination.¹¹⁰

In 2001—years after the Warsaw Pact folded, and the Partnership for Peace Program resulted in NATO's expansion to include Poland, Hungary, and the Czech Republic—Russian President Vladimir Putin posed the rhetorical question of whether it was NATO's turn to either disperse or change. He proclaimed that:

NATO ... has outlived its usefulness and should disband or be extended to include Russia.

If NATO does not reach out to embrace Russia, it should be scrapped and replaced by a new body that includes all of Europe and Russia.

...

The Warsaw Treaty does not exist, the Soviet Union does not exist, but NATO exists and ... when we are told that it is a political organization, then, naturally, we may ask, why did you bomb Yugoslavia?¹¹¹

Russia was invited to participate in NATO. It then signed the NATO Partnership agreement—one day after US troops finally withdrew from Berlin. But NATO has since taken incredibly confrontational steps—geographically toward, but politically away from Russia. In August 2008, the US solidified its plans to place a “defensive” missile shield system in the former Soviet nations of Poland (missiles) and the Czech Republic (radar).¹¹² Russian President Putin responded by threatening to aim missiles at Europe. Russia has not overtly targeted Europe since the fall of the Soviet Union. On the other hand, the US then stated that NATO would not move eastward.

Germany and the US are split on the issue of whether Russia should ultimately become a full-fledged member of NATO. Germany's defense minister had warned that allowing Russia to become a member would “blow NATO apart.” Vintage rivalries still spawn historical concerns about European security in a way that could arguably preclude the full integration of all “European” States into this regional military organization. Russia had recently proclaimed (in its 1997 joint declaration with China) the need for a *multipolar* world. This declaration envisioned a post-Cold War “new international order”

wherein “[n]o country should seek hegemony, engage in power politics or monopolize international affairs.”¹¹³ In May 2005, Russia’s Foreign Minister Sergei Lavrov declared—to the Russian Parliament’s lower house—that Russia was not going to join NATO and the EU.

Since June 2007, Russia has feared a “colossal geopolitical shift,” should certain former Warsaw Pact nations become full members of NATO—especially the adjacent nations of Ukraine and Georgia. Russian rhetoric began to heat up during a July 2007 Black Sea military exercise involving forty NATO nations. In July 2008, Russia responded by openly suggesting Cuba as a location for refueling its strategic nuclear-capable bombers. The US Air Force general and nominee for the Chairman of the US Joint Chiefs of Staff, in turn, responded that the very mention of this option “crosses a threshold ... a red line for the United States of America.” Shortly thereafter, (then Prime Minister) Putin called upon Russia to “restore our position in Cuba.” In 1962, Russia attempted to place nuclear missiles in Cuba [Cuban Missile Crisis: §9.2.D.]. Russia eventually backed down and withdrew after a tense thirteen-day standoff. The US then secretly removed its missiles from Turkey.

3. Mission Creep One may question whether NATO’s current offensive military focus is consistent with its original objectives. Its mandate, like that of the UN, refers to the obligation not to use force in organizational relations. An October 2005 debate in the Italian Legislature vividly brought this question to life. A Parliamentary question arose when a senator asked how NATO’s then recent military actions (e.g., in Kosovo and Afghanistan) could allow the alliance to so act, in the absence of any armed attack on a European nation. Thus:

Such developments could constitute a substantial change of the Founding Statute of the Organization ... with reference ... to the Member State’s obligation to abstain in their international relations from the threat or use of force in contrast with the aims of the United Nations. Therefore ... [would it be] advisable to support an amendment to the [NATO] Treaty of Washington to clarify the respective roles of both NATO and the European Union.

...

[The Italian Under-Secretary of State for Foreign Affairs responded as follows:] Today NATO is undoubtedly a different institution from the one that

was created in 1949. Nevertheless the Italian Government does not believe that the strategic changes that have occurred constitute a substantial amendment.... [T]he solidarity clause of Article 5 [where an attack on one is an attack on all NATO members] ... was invoked for the first time in history as a result of the terrorist attacks of 11 September against the [NATO member] United States. Such political solidarity and the commitment to mutual defense arising therefrom show that the Atlantic Treaty is still valid, even after the disappearance of the geopolitical [Cold War] context from which it originated....¹¹⁴

Some 20,000 NATO troops from thirty-four countries have been keeping the peace in Bosnia since 1995—with the powers to arrest war crimes suspects for trial in The Hague. Over 16,000 NATO troops have conducted the ten-year NATO occupation of Kosovo.

In December 2007, the US Secretary of Defense admonished national members of the NATO alliance for not contributing sufficient numbers of trainers, helicopters, and infantry in Afghanistan. But had the US not deviated to undertake what was initially described as a weapons of mass destruction campaign in Iraq, NATO might not have taken over in Afghanistan. But the Taliban is rekindling its forces in Afghanistan. Opium production—currently ninety-three percent of the global production—is again a major source of illicit revenue for the insurgency. In October 2008, NATO shifted its defense posture to allow troops operating in Afghanistan to attack drug lords and their networks.

The Arctic presents the potential for yet another NATO mission expansion. Because of global warming [§11.2.C.], Arctic summers may be ice-free by 2013, far earlier than previously expected. NATO is likely to have a military presence, in part, because of the competing claims to Arctic resources [§6.1.D.].

NATO military pacts were exploited by the US to run secret prisons holding ghost detainees. They disappeared from wherever they were detained, and were placed on flights to various locations within NATO member countries in Eastern Europe. Poland and Romania denied reports that high-profile US War on Terror detainees were being held there. Other European nations were furious.

4. NATO Blocking? Given the agreements regarding the introduction of US missile defense sites and radar

systems into the Czech Republic and Poland—on Russia's doorstep—one wonders how the 1962 Cuban Missile Crisis and the 2008 “Missile Shield” agreement in Eastern Europe would *not* overlap.¹¹⁵ The US news media has failed to capture the intensity with which Russia views this particular threat. That containing Iran is supposedly the real target of this US program is not a very satisfying explanation for moving nuclear missiles within minutes of Moscow. In 1962, the US was willing to go to war over the Soviet Union's plan to place nuclear missiles ninety miles from US shores. Poland shares a common border with Russia. The Czech Republic is virtually next door. In March 2009, the new US presidential administration fortunately announced that the US would reconsider this incredibly sensitive plan.

Several years previously, the US began to loudly tout Georgia and Ukraine as being the next NATO members—who could join at any moment. Per the September 2008 Congressional Record:

[I]t is the sense of Congress that—

- (A) the expansion of NATO contributes to NATO's continued effectiveness and relevance;
- (B) the Republic of Georgia and Ukraine are strong allies that have made important progress in the areas of defense, democratic, and human rights reform;
- (C) a stronger, deeper relationship among the Government of Georgia, the Government of Ukraine, and NATO will be mutually beneficial to those countries and to NATO member states; and
- (D) the United States should take the lead in supporting the awarding of a Membership Action Plan to Georgia and Ukraine at the meeting of the NATO Foreign Ministers in December 2008.¹¹⁶

No quantum leap of faith would be required to connect this language (which echoes earlier overtures) with the August 2008 Russian invasion of two Georgian provinces. They contain large ethnic Russian populations, many of whom were given Russian citizenship after their non-recognized declarations of independence in the early 1990s. Russia would not have done so, had Georgia already achieved NATO membership. Article 5 of the NATO Charter provides that an attack on one member is an attack on all.

Russia's new six-nation security alliance, the Shanghai Cooperation Organization,¹¹⁷ ironically declined to fully back Russia's positions on these Georgian breakaway

provinces. The US responded via the US-Ukraine (Dec. 2008) and the US-Georgia (Jan. 2009) Charters on Strategic Partnership and Security.

The West's position is that Russia overreacted with its military action in Georgia. A number of commentators have countered, however, that Russia is *not* being alarmist about US hegemony in Europe. NATO's Supreme Commander has always been a US military officer. One such officer conducted NATO's Kosovo bombing campaign in 1999 [§9.5.B.]. There was no UN Security Council resolution authorizing this first-ever NATO military campaign. Just after the bombing stopped, the NATO commander (US General Wesley Clark) ordered the British theater commander (British General Sir Michael Jackson) to use force to secure the suddenly Russian-occupied airport in Kosovo [Problem 3.G. below]. General Jackson responded that “I'm not going to start the Third World War for you.”¹¹⁸

Russia could reasonably list its NATO-related concerns as follows: (a) NATO launched its first military campaign in 1999 in Kosovo (where it almost started a war with Russia); (b) NATO claims to have taken over military control of an entire nation (Afghanistan) in 2002; (c) the Bush Administration announced the US's rather subjective preemptive Strike Doctrine later in 2002 [§9.2.D.]; (d) most of the NATO nations have troops on the ground in nearby Iraq (a war which started in 2003), and NATO more recently set up a military training center (for Iraqis); (e) Russia is not a full-fledged member of NATO, and there now appears to be open opposition to its becoming so; and (f) NATO combat jets are now within three minutes of St. Petersburg.

One might therefore conclude with the following three questions: (1) What is the likely consequence of Russia *not* becoming a full member of NATO—the world's strongest international military organization? (2) Will it matter, if the US continues to be the only long-term superpower? (3) If the US economy does not fully recover, might that necessitate its rethinking the role of NATO in the future global balance of power?

B. ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE

In terms of State membership, the Organization for Security and Cooperation in Europe (OSCE) is the largest *non*-military, regional security organization in the world. It has fifty-six participating States from Europe, Central Asia, and North America. Like NATO, the

OSCE has a “Partnership” program, which facilitates a dialogue between its members and other States in the region.¹¹⁹ OSCE activities include early warning, conflict prevention, crisis management, and post-conflict rehabilitation. Its members include Canada and the United States, while Japan enjoys official “observer” status. The former Yugoslavia’s attempt to retain the “Yugoslavian” seat in the OSCE was rejected until former President Slobodan Milosevic was no longer in power.

The OSCE’s roots date from the mid-1950s when the Soviet Union initiated “European Security Conferences” attended by representatives of Eastern European States. These meetings resulted in creation of the Warsaw Treaty Organization, which would become NATO’s regional competitor. In the 1960s, the Warsaw Pact initiated additional conferences seeking greater peace and security in Europe. Thanks to the artful diplomacy by the Federal Republic of Germany in the field of East-West relations, the CSCE (Conference on Security and Cooperation in Europe—the original name until 1995) was inaugurated in 1972, just after the conclusion of the first Strategic Arms Limitations Treaty between the United States and the Soviet Union. The OSCE’s predecessor was thus established to deal with Cold War tension and to provide for security from Vancouver to Vladivostok. The 1991 CSCE Madrid Conference produced the framework of the CSCE Parliament. The 1992 meeting of the Council of Ministers produced the Prague Document on the nonproliferation of nuclear weapons and limitations on arms transfers within Europe.¹²⁰

There have been several defining moments in the CSCE/OSCE process. The first major achievement was the Helsinki Final Act of 1975. That instrument emphasizes concerns of regional security, economic matters, and humanitarian treatment. To ensure the equality of States—despite vast differences in economic, military, and political power—the organization’s members resolved that its proceedings “shall take place outside military alliances.” This has avoided a narrow NATO-versus-Warsaw Pact approach to regional problem solving. The OSCE functions somewhat like a remodeled United Nations, whereby diverse players on the European stage continually meet for purposes including the provision of “confidence-building” measures involving security and disarmament.

Other major achievements included the 1989 Concluding Document of Vienna. It contains a mandate for the Negotiation on Conventional Armed Forces in Europe talks. This was followed by the 1990 Conven-

tional Forces in Europe (CFE) Treaty of Paris.¹²¹ A number of participating States, including France, which has not rejoined the military wing of NATO, perceive the OSCE process to be the genuine European alternative to resolving regional problems. The OSCE has thus played a role in monitoring events in Bosnia, Chechnya, and Kosovo, with a view toward maintaining the commitments tendered by the respective parties in those conflicts. It was the OSCE that undertook responsibility for the conduct of national and municipal elections, arms control negotiations, and human rights monitoring in Bosnia under the 1995 Dayton Peace Accords. When Serbian authorities would not recognize the 1996 election results, the OSCE called upon them to abide by the results.

Yet another example of the lasting importance of this organization is its emphasis on human rights issues. The Conference on the Human Dimension meets annually to exchange information about questionable State practices and unresolved human rights problems. Prior to the destruction of the Berlin Wall, the United States tapped this organization as a vehicle for expressing concern that Eastern European members had failed to live up to professed objectives including the right to travel, freedom of religion, and freedom from psychiatric abuse while in detention. In March 1995, Russia’s president, Boris Yeltsin, agreed to receive a permanent human rights mission from the CSCE to monitor events in Chechnya, the rebellious region consisting of mostly Muslims who seek independence.

The OSCE’s 1994 code of conduct on the political and military features of the region’s security may be the most intriguing document within its voluminous work product. This code—the offspring of a prior French proposal—as noted in the introduction to the paragraph-by-paragraph code commentary: “is the most important normative document adopted by the OSCE participating states since the 1975 Helsinki Final Act. It . . . intrudes into an area of state power which has hitherto been normally considered taboo: armed forces . . . fill[ing] a normative gap . . . regulating the role and use of armed forces (at domestic as well as [the] external level) in the context of states wherein the rule of law prevails.”¹²² It is nevertheless a proposed code of conduct, not enforceable as a binding treaty, although arguably within the corpus of regional customary International Law [textbook §1.2.B.1.].

Were this code to materialize, the fifty-six national members of the OSCE would have produced a document well ahead of its time, given the current UN and global preoccupation with collective security in the aftermath

of 9-11 and the Iraq War.¹²³ For example, paragraph 3 of its first section provides that OSCE member nations: “remain convinced that security is indivisible and that the security of each of them is inseparably linked to the security of all others. They will not strengthen their security at the expense of the security of other states. They will pursue their own security interests with the common efforts to strengthen security and stability within the OSCE area and beyond.”¹²⁴

One by-product of OSCE cooperation was the March 1995 Pact of Stability. It requires former East bloc States, wishing to join either the EU or NATO, to first settle any border disputes and ethnic conflicts. The Pact requires that these former Soviet bloc countries agree to permit the OSCE to be the watchdog agency for ensuring compliance. If this bargain eventually performs as designed, new Yugoslavia-like conflicts will be resolved before they can erupt—advancing the objectives of democracy and peaceful international relations on the European continent.

The OSCE is gradually assembling solid organizational infrastructure. In 1996, the OSCE heads of State announced the “Lisbon Summit Declaration.” Its objective was to create a comprehensive security framework for Europe in the twenty-first century premised upon improved conflict-prevention measures, arms control, and meaningful assessment of security-related economic, social, and environmental problems. In 1997, the OSCE followed up by announcing its Guidelines for a Charter on European Security.

The OSCE’s 1999 Istanbul Conference determined the future direction for this organization by acknowledging that the OSCE would have to work in concert with other international organizations in Europe. The heads of State of the member nations restructured the OSCE’s foundation in the following (abbreviated) Charter blueprint for the future:¹²⁵

At the dawn of the twenty-first century we, the Heads of State or Government of the OSCE participating States, declare our firm commitment to a free, democratic and more integrated OSCE area where participating States are at peace with each other, and individuals and communities live in freedom, prosperity and security. To implement this commitment, we have decided to take a number of new steps. We have agreed to:

- ◆ Adopt the Platform for Co-operative Security, in order to strengthen co-operation between the

OSCE and other international organizations and Institutions, thereby making better use of the resources of the international community;

- ◆ Develop the OSCE’s role in peacekeeping, thereby better reflecting the Organization’s comprehensive approach to security;
- ◆ Create Rapid Expert Assistance and Co-operation Teams (REACT), thereby enabling the OSCE to respond quickly to demands for assistance and for large civilian field operations;
- ◆ Expand our ability to carry out police-related activities in order to assist in maintaining the primacy of law;
- ◆ Establish an Operation Centre, in order to plan and deploy OSCE field operations;
- ◆ Strengthen the consultation process within the OSCE by establishing the Preparatory Committee under the OSCE Permanent Council.

We are committed to preventing the outbreak of violent conflicts wherever possible. The steps we have agreed to take in this Charter will strengthen the OSCE’s ability in this respect as well as its capacity to settle conflicts and to rehabilitate societies ravaged by war and destruction. The Charter will contribute to the formation of a common and indivisible security space. It will advance the creation of an OSCE area free of dividing lines and zones with different levels of security.

This document is, of course, aspirational in nature. Like the UN Charter, it contains unassailable principles, with which no State member of this organization would openly disagree. One example of its hortatory nature is the phrase in paragraph 2, stating that “*We have put Europe’s old divisions behind us* (italics added).” Since its promulgation, there have been continuous conflicts within the States covered by its call for cooperation.

The OSCE balance sheet has not been perfect. Some limitations still hamper the OSCE process. Like the UN Charter, the 1975 Helsinki Final Act is a political, rather than a legally binding, document. It is not a treaty in the sense of creating immediate obligations although some participants have argued that the 1975 Act resulted in some binding commitments by member States to at least continued participation in a Pan-European process.¹²⁶ This state of affairs should not be surprising, given the historical diversity of its member States. The OSCE historically exhibited a rather light institutional structure until the creation of some permanent administrative and political organs in the early 1990s.

In December 2008, Russia unilaterally blocked OSCE's continued mission in Georgia's breakaway South Ossetia and Abkhazia provinces. OSCE had attempted to resolve this conflict, for the sixteen years before Russia militarily intervened, in the provincial requests for *de jure* independence from Georgia. The Georgian government angrily reacted to this cancelling of the OSCE mission, by accusing Russia of refusing to support an extended mandate to cover up its "war crimes." The next round of this ongoing dispute was the April 2009 decision of the International Court of Justice [§10.3.A.1.].

C. COMMONWEALTH OF INDEPENDENT STATES

The Commonwealth of Independent States (CIS) is the partial successor to the former Soviet Union. In 1991, Belarus, Ukraine, and Russia established the

Minsk Declaration, or Agreement Establishing the Commonwealth of Independent States. Two weeks after the establishment of the CIS, eight more former Soviet republics joined: Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan. Georgia and Moldova joined, respectively, in 1993 and 1994. The companion protocol, or Alma-Ata Declaration, facilitated former States of the Soviet Union becoming members of the CIS.¹²⁷ The Baltic members—Estonia, Latvia, and Lithuania—chose not to join. Each had finally gained long sought-after independence and thus decided not to participate in what they considered to be a fresh version of the Soviet Union.

The CIS States inaugurated their international organization in the following document:

Agreement on the Establishment of the Commonwealth of Independent States

Signed on December 8, 1991 at the city of Minsk,
by the Republic of Belarus, the Russian Federation (RSFSR) and Ukraine
<<http://www.therussiasite.org/legal/laws/CISagreement.html>>

We ... as the High Contracting Parties, do state that the Union of Soviet Socialist Republics, as a subject of international law and a geopolitical reality, hereby terminate its existence. Based on the historical community of our peoples and the relations that have formed between them, taking into account the bilateral agreements concluded between the High Contracting Parties, striving to build democratic law-based states, intending to develop our relations on the basis of mutual recognition and respect of state sovereignty, the inherent right to self-determination, the principles of equality and non-interference in internal affairs, a rejection of the use of force, economic or other methods of pressure, regulation of disputed issues through negotiations, and other generally recognized principles and norms of international law, believing that further development and strengthening of relations of friendship, good neighborhood and mutually beneficial cooperation between our states corresponds to the fundamental interests of their peoples and serves peace and security, confirming our adherence to the purposes and principles of the Charter of the United Nations, the Helsinki Final Act, and other documents of the Conference on Security and Co-operation in Europe, undertaking to observe generally recognized

international norms on human and peoples' rights, have agreed upon the following:

...

Article 2

The High Contracting Parties hereby guarantee their citizens, irrespective of their nationality or other differences, equal rights and liberties. Each of the High Contracting Parties guarantees the citizen of the other Parties, as well as stateless person residing in its territory, irrespective of their nationality or other differences, civil, political, economic and cultural rights and liberties in accordance with generally recognized international norms on human rights.

...

Article 5

The High Contracting Parties shall recognize and respect the territorial integrity of one another and the inviolability of existing borders under the framework of the Commonwealth. They shall guarantee the openness of borders, freedom of movement for citizens and for the transfer of information.

...

Article 6

Member States of the Commonwealth will cooperate in ensuring international peace and security, implementing effective measures to reduce arms and military expenditures. They will strive to eliminate all nuclear weapons, general and full disarmament under strict international control. The Parties will respect one another's aspiration to achieve the status of a non-nuclear zone and neutral state.

Member States of the Commonwealth will preserve and support under a united command the common military and strategic space, including unified control over nuclear weapons, the procedure for the implementation of which shall be regulated by a special agreement. They shall also guarantee necessary conditions for the placement, functioning,

material and social support for strategic military forces.

...

Article 12

The High Contracting Parties shall guarantee the performance of international obligations arising for them from the treaties and agreements of the former Union of Soviet Socialist Republics.

...

Article 14

The official location of the coordinating bodies of the Commonwealth shall be the city of Moscow. The activity of the bodies of the former Union of Soviet Socialist Republics in the territories of the member states of the Commonwealth shall be terminated.

...

The CIS treaty accomplished a number of objectives. First, in a manner akin to State succession [§2.4.A.], the original founding States of the Soviet Union (1922) terminated the existence of this former international organization. They announced the CIS succession, which guaranteed the observance of the treaty obligations of the State members of the former Soviet Union (per above Article 12). The successor organization further recognizes current borders and each member republic's independence, sovereignty, and equality (Article 5). It also established a free-market ruble zone, embracing the republics' interdependent economies and a joint defense force for participating republics.

Regarding the materials, which will be studied in future chapters of this book, such as Chapter 4 on the status of the individual in International Law, this CIS instrument expressly provides for rights that are guaranteed to individuals regarding citizenship, statelessness, and human rights (Articles 2 and 5). The CIS States further expressed their aspiration for "implementing effective measures to reduce arms and military expenditures" as well as, one day, achieving a nuclear free zone (Article 6). While these expressions of intent are not necessarily a binding treaty commitment, they are nevertheless clear statements of intent to make this an organizational priority.

In 2001, the US Bush Administration announced its intent to rekindle the US missile defense shield program (dubbed "Star Wars") in violation of the 1972 Anti-Ballistic

Missile Treaty [§9.4.C.]. The CIS States view this attempt to place "defensive" nuclear weapons in space as a threat. Ironically, the 1991 CIS Agreement's nuclear free zone goal was a rather significant departure from the Soviet Union's Cold War position on nuclear arms. The decade-later US policy announcement, regarding its so-called Star Wars Defense Shield, suggests one reason why the CIS States are concerned about a renewed arms race and the continuing eastward expansion of NATO.

D. ORGANIZATION OF AMERICAN STATES

The Organization of American States (OAS), headquartered in Washington, D.C., is composed of all States of the Western Hemisphere, except Cuba (thirty-five member States). As a result of the 1962 Cuban Missile Crisis [§9.2.D.], OAS members voted to suspend Cuba's participation because Cuba had "voluntarily placed itself outside of the inter-American system."¹²⁸ In June and July of 2009, the OAS respectively rescinded its decision to suspend Cuba (the latter opting not to reapply), while suspending Honduras from membership because of an unconstitutional interruption of its democratic order.

Of the existing international organizations, the OAS is the world's oldest. In 1890, several nations created a bureau, later known as the Pan American Union. In 1948, it was incorporated into another entity called the Organization of American States. Its essential purposes are as follows:



Charter of the OAS

Signed in Bogotá in 1948,

as amended by the

Protocol of Buenos Aires in 1967,

Protocol of Cartagena de Indias in 1985

and Protocol of Managua in 1993

<<http://www.oas.org/EN/PINFO/CHARTER96/chart96e.htm>>

Go to Course Web Page, at:

<<http://home.att.net/~sломansonb/txtcsesite.html>>.

Under Chapter Three, click OAS Charter.

The OAS Charter broadly addresses nearly all facets of economic and political life in the Western Hemisphere, drawing on parallel provisions and organizations found in the UN Charter. For example, it has both an organ of consultation, similar to the UN Security Council, and an international court, similar to the UN's International Court of Justice [Regional Courts: §8.6.B.].

Under Article 1 of its Charter, the OAS is a "regional agency" of the UN. These two international organizations are distinct and do not share a hierarchical relationship. The OAS is neither controlled by, nor directly responsible to, the UN. The loose association between these organizations is an example of regionalism within a universal system. This was the preferred post-World War II apparatus for ensuring the coexistence of the new global organization and any regional groupings, which might wish to pursue local concerns. One example of this approach is suggested by the earlier League of Nations Covenant. It similarly provided that the League's creation would not affect the vitality of "regional undertakings like the Monroe Doctrine [US policy of excluding external powers from exerting any control in the Western Hemisphere] for securing the maintenance of peace."¹²⁹

Article 4 of the OAS Charter establishes the organization's essential purposes: "(a) To strengthen the peace and security of the continent; (b) To prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the Member States; (c) To provide for common action on the part of those States in the event of aggression; (d) To seek the solution of political, juridical and economic problems that may arise among

them; and (e) To promote, by cooperative action, their economic, social and cultural development."

The OAS has changed its functional orientation several times. It was a commercial international organization when its predecessor was formed in 1890. After World War I, its members adopted a non-intervention theme to discourage unilateral action by any OAS member in hemispheric affairs.

To promote joint military responses to external threats, the twenty-one American States ratified the 1947 Rio Treaty. It proclaimed that "an armed attack by any State against an American State shall be considered as an attack against all the American States."¹³⁰ Each member thereby promised to assist the others in repelling such attacks. OAS members are still concerned with defense matters, as evinced by the 1948 OAS Charter's Article 3(g) provision that "An act of aggression against one American State is an act of aggression against all the other American States." The latter wording is not as clear an expression of collective self-defense (§10.2).

The organization's current emphasis is the development of economic and political solidarity in the hemisphere. In 1987, for example, some member nations (other than the US) began to pursue the possible economic reintegration of Cuba into the OAS.

The UN was not the only international organization seeking the restoration of Haiti's democratically elected president to power after the 1991 military coup. The OAS imposed an embargo on Haiti. In 1992, the US thereby seized an oil tanker bound for Haiti that was in violation of the OAS embargo. This was the first time that such an embargo resulted in a property seizure. In 1997, an amendment to the Charter entered into force, authorizing suspension of any State whose democratic government is forcibly overthrown.

The OAS reached a milestone in 2000. It was able to mediate a border dispute with which the UN had struggled since 1980. Guatemala characterizes the resolution of this dispute as essential to the continuing validity of its acceptance of Belize's borders, after Belize declared independence from Great Britain in 1981. Then, the UN General Assembly urged Guatemala and Belize to find a peaceful solution to their territorial differences. In the interim, a territorial dispute between these two OAS members resulted in bloody confrontations between their military forces.

The OAS has also wrestled with its growing role as intermediary between certain Latin American

governments and their opponents. It has thus probed violence and democratic lapses in Bolivia, Columbia, Ecuador, and Venezuela. Guatemala's perception was that the OAS General Assembly had failed to facilitate a satisfactory solution to the unresolved territorial claims involving several UN member States. Belize contended that its borders had been accepted by previous Guatemalan governments, the international community, the UN, and the OAS.

The OAS has increasingly engaged in preventative diplomacy. In November 2000, pursuant to the OAS mediation efforts, delegations from Belize and Guatemala signed an agreement to adopt a comprehensive set of "confidence-building measures to avoid incidents between the two countries." Neither country thereby renounced sovereignty over the claimed territories. Yet this negotiation at least temporarily established a sufficient degree of trust to prevent further hostile incidents, as a prelude to resolving long-simmering territorial claims.¹³¹ In March 2008, the organization stopped short of condemning Colombia for its military strikes inside of Ecuador. The OAS hopes to quell the violence by ratcheting up diplomatic pressure to prevent such cross-border excursions.

E. ARAB LEAGUE AND ORGANIZATION OF THE ISLAMIC CONFERENCE

1. Arab League The League of Arab States is an international organization comprised of twenty-two Middle Eastern states and the Palestine Liberation Organization (PLO). The League was established in 1945 to promote comprehensive cooperation among countries of Arabic language and culture.¹³²

When Egypt first proposed the Arab League in 1943, Arab states wanted closer cooperation—but without the loss of complete self-rule which can result from a total union (comparable to the EU). The original charter of the league thus created a regional organization of sovereign States, which was neither a union nor a federation. Among the goals the league set for itself were winning independence for all Arabs still under foreign rule in the Middle East and preventing the Jewish minority in Palestine (then governed by the British) from creating a Jewish State.

League members then established the Council of Arab Economic Unity in 1964 to promote an Arab Common Market and various other economic programs. The resulting institutions include the Arab Fund for Economic and Social Development for projects in Arab countries (1968),

the Arab Bank for Economic Development in Africa (1973), and the Arab Monetary Fund (1976).

League objectives include political collaboration for preserving the independence and the State sovereignty of its members. The Council of the League deployed inter-League peacekeeping forces in Kuwait in 1961 and Lebanon in 1976. The latter effort eventually failed in 1989, however, when Syria refused League demands to withdraw its troops from Lebanon and Iraq (Syria's archenemy).

One of the League's long-term goals is to operate as a collective self-defense organization like NATO. Some States within the League question why the US unilaterally engaged in a missile strike against Iraq in 1993 (in response to a threat on the life of the first President Bush), while it would not readily engage in such tactics against the Bosnian Serbs. In 1998, the Arab League protested the US bombing in the Sudan when the US responded to the bombing of its embassy there.

The political solidarity of the League was adversely affected by a number of events occurring in the latter part of the twentieth century. Under the Camp David Agreements of 1978, US President Jimmy Carter facilitated a series of meetings between Egypt and Israel at Camp David near Washington, D.C. This led to Egypt's establishing independent ties with Israel. Since this was contrary to League policy, Egypt was suspended from the League in 1979 (and has since been reinstated). The 1991 Persian Gulf War further deteriorated Arab unity. Certain Arab members even went so far as to assist the United States in protecting Israel from League member Iraq's missile attacks.

In 1993, the Israeli deportation of Muslim fundamentalists to Lebanon also helped rekindle the League's anti-Israeli focus. The League sought worldwide support at the UN for the responsive Security Council resolution. Yet the evident lack of fervor in the private commentaries of Arab League representatives reflected a deep antipathy toward militant Arab fundamentalists. Many of them do not support the PLO's control of relations with Israel. Now that the PLO has negotiated an autonomy agreement with Israel, in the Gaza Strip and the City of Jericho, the League has less of an anti-Israeli flavor. Yet the League's political cohesion remains in a state of flux because of worldwide claims that certain States within its membership have engaged in a systematic program of State terrorism to accomplish nationalistic goals.

The Arab League has been rather splintered during its existence. Egypt was expelled due to President Sadat's decision to enter into friendly treaty relations with Israel. Egypt was readmitted in 1989, and the League headquarters is once again in Cairo. The League virtually fell apart during the Persian Gulf War. Members who formerly advocated Israel's demise fought their Arab League ally Iraq, which, among other things, protected Israel from Iraqi attack. The contemporary Palestine Liberation Organization autonomy further confirms the lack of unity about conquering Israel—the traditional military and political foe of League members (see, e.g., Arab Boycott §9.1.C.2.).

This organization is nevertheless one of the key players for nations waging the current War on Terror and concerned about their international reputation. It provides an external link to the international community—in a forum other than the UN Security Council, which cannot act without the imprimatur of permanent members such as the US and the UK. In 1998, for example, the Secretariat of the League “learned with resentment of the bombing by the United States [in Sudan on August 20, 1998] ... [and] consider[ed] this unjustified act a blatant violation of the sovereignty of a State member of the League of Arab States, and of its territorial integrity, as well as against all international laws and tradition, above all the Charter of the United Nations.”¹³³

The League has undertaken a variety of programs related to political strife in the Middle East. In 2004, it rejected threatened UN sanctions against Sudan for the humanitarian crisis in Darfur. The League—during the interim period when Sudan's government was supposed to cooperate with the UN investigation—feared what it characterized as “forced foreign military intervention in the area.” In May 2006, it began to pay civil servants in Gaza when the new Hamas government was denied funds due from Israel and other nations because of its affiliation with terrorism.

In July 2007, the Arab League sent envoys to Israel, which was an organizational first. The League has been historically hostile to Israel, and many national members disavowed Israel's right to exist. The League has been more conciliatory, however, in the wake of the expanding influence of Islamic extremists—particularly the Hamas takeover of Gaza the month prior to this announcement. In Israel, the League delegates met with the president, prime minister, and parliament. They pre-

sented the familiar proposal that Arab nations would fully recognize Israel in exchange for the latter's returning land to its Arab neighbors taken in the 1967 Middle East War.

2. Organization of the Islamic Conference The OIC is the largest Muslim international organization in the world, established in Morocco in 1969. It is an inter-governmental organization of fifty-six States. They have therein pooled their resources, as stated on the organization's Web page, to “speak with one voice to safeguard the interest and ensure the progress and well-being of their peoples and those of other Muslims in the world over ... in the wake of the criminal arson perpetrated on 21 August 1969 by Zionist elements against Al-Aqsa Mosque, in occupied Jerusalem....”

The purposes expressed in its comparatively brief 1972 Charter are to: strengthen Islamic solidarity among Member States; coordinate action that will safeguard its holy places; support the struggle of the Palestinian people and assist them in recovering their rights and liberating their occupied territories; facilitate the right to self-determination and noninterference in the internal affairs of Member States.

The OIC's State members also “pledge[d] to refrain, in relations among Member States, from resorting to force or threatening to resort to the use of force against the unity and territorial integrity or the political independence of any one of them.”¹³⁴

In June 2004, this group expressed its support for the then new Iraqi Interim Government on the eve of its takeover from the US administrator. This support was characterized as a notable change for Arab nations in regard to the Iraq War. Yet, one would *expect* the OIC to do so, as a means of actively assisting the new government in the aftermath of the prior US invasion and direct administration of Iraq. A year earlier, the OIC had authorized the then new US-installed Iraqi Governing Council to take Iraq's seat in the organization.

In June 2005, OIC Ambassador Atta El-Manan Bakhit urged the United States to “live up to its responsibility and not show leniency to perpetrators of *qur'an* desecration” reportedly occurring at the Guantanamo military base in Cuba.

F. AFRICAN UNION

The African Union (AU)—previously the Organization of African Unity—is rooted in the Western-derived institutions of colonial rule and the related treatment of

nations on the African continent. This organization's traditional goal has been African political unity to promote self-determination. As succinctly described by the University of East Anglia (England) Professor Gino Naldi:

Pan-Africanism has its origins in nineteenth-century America where the American Colonization Society for the Establishment of Free Men of Color of the United States was formed in 1816 in response to the alienation and exploitation of the Negroes with the purpose of repatriating freed slaves. This led to the founding of Liberia in West Africa [by freed slaves from the US] as a free and sovereign State in 1847. Nevertheless, the Pan-African movement, which gathered momentum at the turn of the century, continued to struggle for the end of the colonial system in Africa and called for the dismantling of the colonial boundaries agreed upon at the Congress of Berlin in 1885 [premised upon Africa's supposed inability to govern itself without European influence].... But it was the post-Second World War era that provided the impetus for self-determination in Africa. The demand for political, economic and cultural self-determination became a flood that the colonial powers could not dam. The independence of Ghana on 6 March 1957 marked the beginning of a new dawn in Africa.¹³⁵

The predecessor OAU was established in 1963, and headquartered in Ethiopia. It consists of all of the independent nations in Africa. Morocco withdrew, and Zaire (now Democratic Republic of Congo) suspended its membership when the Western Sahara became an independent member in 1984—based on unresolved territorial claims [§2.4 Changes in State Status]. The fifty-three nation organizational purposes were retained in the 2002 establishment of the African Union.¹³⁶ The AU purposes include the following:



African Union Constitutive Act (July 9, 2002)

click [Constitutive Act](#)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.
Under Chapter [Three](#), click [African Union Charter](#).

The AU's most distinctive (and successful) objectives were to resolve the political problems in South-West Africa and South Africa. The Union thus supported the black nationalist movements in southern Africa. The six "Frontline Countries" constituted a bloc within the (formerly named) OAU, designed to assist the remaining colonial territories in achieving independence. The primary goal of the Frontline Countries was to free South-West Africa from South African rule—held in violation of numerous UN resolutions. This objective was accomplished with the independence, renaming, and entry into the UN of the new renamed State of Namibia in 1990. The other success was responding to the plight of black South Africans, who were subject to white minority rule under that nation's former system of apartheid. These OAU internal institutions were dismantled just prior to Nelson Mandela's assumption of the presidency of South Africa in 1994. South Africa then joined the OAU.

The OAU, now AU, is expanding upon its traditional political purpose. South Africa's rejection of apartheid and the presidency of Nelson Mandela inadvertently deprived the OAU of the one issue that united its otherwise fractious membership. The organization is currently pursuing economic objectives to a much greater degree than in the past, now that the racial vestiges of colonialism are no longer official state policy in South Africa.

The Charter tasks the organization to provide for the territorial integrity of its member States. In 1981–1982, the organization seized upon its implied powers in the predecessor OAU Charter to establish a peacekeeping force in Chad. However, that force's mandate was unclear, and it lacked financing and organization. These circumstances led to failure—mostly because the peacekeeping force was perceived by Chad's President as being an enforcement arm of the Chad government, rather than a neutral force.¹³⁷ When Liberia's 1990 civil war erupted, neither the OAU nor the UN attempted to mediate or keep the peace—although another African (economic) organization did send in forces.¹³⁸ The OAU played a minor role in the UN peacekeeping operations in the 1990s (e.g., Somalia, Liberia, and Mozambique).

It has established a commission to mediate all disputes between African nations.¹³⁹ In 1998, an OAU delegation went to Ethiopia to mediate the territorial dispute involving invading Eritrean forces. The OAU's current orientation is essentially economic, however, premised

on its 1991 treaty establishing the OAU's economic community.¹⁴⁰

In both 2004 and 2005, the AU proposed a peace mission in the troubled Darfur region of Sudan. International donors then pledged over \$200,000,000 to fund the AU's peacekeeping operation (§10.3 Peacekeeping Operations). This force now operates in the Darfur region. However, its small size has prevented it from having an effective impact against the genocide that a number of nations have identified as occurring in Darfur. Sudan's president was indicted by the International Criminal Court in July 2008 (and the subject of its March 2009 arrest warrant) for his role in promoting that conflict and resisting AU efforts to control it. He was previously bypassed in a bid to serve as president of the AU because of the ongoing Darfur conflict (often referred to as "Slow-motion Rwanda," as described in textbook §8.5.D.).

The UN is not the only international organization suffering from membership delinquency in paying assessed shares of the annual budget. A number of African nations have fallen behind in their payments to the OAU. Given the concerns about the impact of this development on operational integrity, the OAU resolved that its member States must no longer threaten its continued operation in this manner. In 1990, the organization resolved to limit its annual budget ceiling to 10 percent above the amount expended in the previous year. Another remedial measure was to remind delinquent member States that they could not participate in organizational decision-making or present candidates for OAU (now AU) posts.¹⁴¹

◆ §3.6 ORGANIZATIONAL IMMUNITY

State *Responsibility* under International Law was addressed in §2.5 of this book. State *immunity* from prosecution for that responsibility was addressed in §2.6. After forty years of drafting, the UN's International Law Commission recently presented draft articles on State Responsibility to the UN General Assembly [textbook §2.5.B.]. The ILC then continued with its companion project on the responsibility of international organizations [textbook §3.1.C. *Behrami & Saramati* UN Attribution Case]. The ILC has not addressed the related question of either State or organizational responsibility for the acts of another international organization.¹⁴²

Compared to State immunity analysis, the immunity of an international organization (IO) is more complex

and less evolved. This comparative vacuum is especially frustrating for individuals harmed by employees or agents of an IO. As aptly articulated by the Catholic University of Nijmegen's Professor Karel Wellens: "the category of non-state claimants is still encountering the common procedural obstacle of jurisdictional immunity before the domestic courts, which is normally claimed by and frequently granted to international organizations The immature state of development of a remedial regime is, of course, embedded in the evolving process of elaboration and consolidation of the overall accountability regime for international organizations."¹⁴³

This organizational immunity regime may encourage more nations to shoulder the burdens of peacekeeping, nation-building, and achieving other organizational goals. But it does not set well in the Third World countries left without an effective remedy when an organization should incur responsibility for its employees' intentional actions [Organizational Responsibility: §3.1.C.].

The September 2006 summit conference of 118 Heads of State announced its opposition in the summit's comprehensive Final Document. It provides that this organization of States now seeks to "[o]ppose all actions in particular through the [UN] Security Council aimed at establishing a process to grant immunity to the staff members of UN peacekeeping operations, which violate the relevant provisions of the Rome Statute of the ICC and damage the credibility and independence of the ICC...."¹⁴⁴

One of the most underreported examples of crimes committed by peacekeepers is sexual abuse resulting in "UN Peacekeeping Babies." A March 2005 report, written by Jordan's Ambassador to the UN—a former peacekeeper—proposed remedies for the ongoing sexual exploitation of local women by UN peacekeepers. Given the problems with peacekeepers being drawn away from their UN mission, the proposal suggests that a trust fund be developed to assist the mothers of these babies—especially in the Democratic Republic of the Congo, where there have been numerous allegations of sexual misconduct. A permanent UN investigative team would include a local prosecutor. There would be special courts-martial at the scene of a crime for local prosecutions. At present, the UN has no tracking system for this flow of "peacekeeping babies." As reported by Refugees International: "A 'boys will be boys' attitude in peacekeeping missions breeds tolerance for exploiting and abusing local [Haitian and Liberian] women ...

[and such] behavior would not be accepted in the home country of these soldiers.”¹⁴⁵

Immunity from arrest is one of the attributes of organizational immunity. An organization’s employees are generally free to work within a State that is a member of the employing international organization. In December 2007, for example, British and Irish employees of the UN and EU went to one of Afghanistan’s most volatile provinces. They were detained on the basis that their presence in this largest poppy-growing region of the country was contrary to national security. US-supported President Karzai, through a spokesperson, said that these two employees “were involved in some activities that were not their jobs.” There were reportedly non-organizational issues with provincial residents, rather than with Taliban militants as agreed. Because of their organizational status, however, they could not be arrested in Afghanistan. These employees were instead required to leave Afghanistan immediately.

This section focuses on the question of whether an international organization is entitled to immunity from suit in the national courts of its member States. You will recall that State immunity analysis depends on whether the forum nation follows the “absolute” or the “restrictive” approach to sovereign immunity. The answer to the question of organizational immunity involves a similar

quest to shield organizations from suits in their member States.

One reason for the dearth of available cases is that international organizations appear in national courts far less frequently than do State defendants. When organizations do so, decisions on the scope of immunity accorded to an international organization rest solely with the forum State’s law. Traditionally, the executive branch of the government has been the decision maker on this issue. The courts then defer to such decisions so that the respective branches of the government do not conflict. There is a modern trend, however, whereby many courts—rather than blindly adhering to such executive control—are engaging in “free evaluation of immunity issues by the courts themselves.”¹⁴⁶

A. UNITED NATIONS

1. Treaty and Case Provisions The Convention on the Privileges and Immunities of the United Nations was adopted by the GA in 1946.¹⁴⁷ The key provisions appear below.

UN employees and their personal baggage are immune from arrest or the other interferences mentioned in the Convention. UN property and assets are immune from expropriation or detention. Under Article

Article IV—Section 11

Representatives of Members to the principle and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during the journey to and from the place of meeting, enjoy the following privileges and immunities:

- (a) Immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind;
- (b) Inviolability for all papers and documents;
- (c) The right to use codes and to receive papers or correspondence by courier or in sealed bags;
- (d) Exemption in respect of themselves and their spouses from immigration restrictions, aliens

registration or national service obligations in the State they are visiting or through which they are passing in the exercise of their functions;

- (e) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;
- (f) The immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys, and also;
- (g) Such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties or sales taxes.

VI §22, the same general protection applies to *ad hoc* experts dispatched to gather information or perform other work for the UN, when they are not routine UN employees. This protection facilitates temporary assignments, while minimizing interruptions such as local arrests for espionage.

The degree of protection actually enjoyed by UN employees or special experts is not uniform. In 1989, the ICJ determined that Romania violated Section 22 of the Convention by detaining a special rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. In 2002, the United States expelled two Cuban diplomats posted to the United Nations, who were supposedly spying. This was a violation of the UN Convention although the UN did not protest. In March 2004, British Intelligence officials monitored UN Secretary-General Kofi Annan's telephone calls during the period leading to the Iraq War. The 1946 immunities convention does not specifically refer to such monitoring—as does the Vienna Conventions on Diplomatic and Consular Relations [textbook §2.7.C.]. However, under UN Charter Article 100.2: “Each Member of the United Nations undertakes to respect the exclusive international character of the responsibilities of the Secretary-General and the staff.” Article 2, Section 3 of the 1946 Convention provides that: “The premises of the United Nations shall be inviolable ... [and] shall be immune from search ... or any other form of interference...”¹⁴⁸

In 1998, the International Court of Justice (ICJ) addressed immunity from national court judgments against the UN's Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers. He was named as a defendant in four civil defamation suits in Malaysia, resulting from statements he made in 1995 in an article in *International Commercial Litigation*, a magazine published in the United Kingdom and circulated in Malaysia. The UN Secretary-General issued notes confirming that based on a determination by the UN Legal Counsel, this UN employee's remarks were made in his official capacity as a Special Rapporteur—and that he should thus be immune from such litigation under the Convention. The Malaysian Ministry of Foreign Affairs asked the Malaysian courts to determine the immunity question. The High Court for Kuala Lumpur declined to find that he was protected by the claimed immunity. The Malaysian government considered the Secretary-General's notes merely to be

“opinions” with no binding legal effect. After further attempts to stay the court proceedings or reach some settlement, the UN and Malaysia agreed to refer the matter to the ICJ. The President of the ICJ issued an order, based on the submission of written statements and responses from the parties. It called on the Government of Malaysia to stay all court proceedings in this matter and to accept the advisory opinion as decisive.¹⁴⁹

The UN mandated immunity for its employees—and supporting troops—in the administration of Kosovo. In 1999, the Security Council authorized Member States and relevant international organizations to establish the international security presence in Kosovo, known as KFOR (composed primarily of NATO military forces). One year later, the UN Interim Administration Mission in Kosovo (UNMIK) announced a joint declaration on the status of KFOR and UNMIK. It outlines the privileges and immunities to which the organizational forces in Kosovo are entitled. While they must respect local law, to the extent that it does not conflict with the basic UN resolution (1244), the various components of KFOR enjoy wide latitude in the performance of their work in Kosovo. Should any KFOR employees breach the law, they cannot be (legally) detained. They can be prosecuted, but only by their home nation upon their return [*Behrami* principal case on attribution of certain Kosovar claims to the UN: §3.1.C. above].

The UN also invoked its immunity in June 2008, when the relatives of the victims of the Srebrenica, Bosnia massacre filed claims against Dutch troops and the UN in a Dutch court. The UN then asked the Dutch court to dismiss it from this case.¹⁵⁰

2. Immunity Waiver Can the UN *waive* the immunity of its employees? This occurred in two widely reported incidents in Kosovo. In 2002, an Egyptian working as a UN police officer killed his female translator in his apartment. The UN chose to waive its organizational immunity, thus resulting in his trial in the local judicial system and a thirteen-year sentence. In 2004—the day after the King of Jordan publicly commented that the war in Iraq had created unprecedented animosity toward Americans across the Middle East—Jordanian (UN) police fired on vehicles carrying US (UN) police. Two Americans and one Jordanian were killed, leaving eleven others wounded. The Jordanians could not be interviewed until the UN waived their right to diplomatic immunity.¹⁵¹

The Article Two immunities thus include the provision that “[l]ocally recruited KFOR personnel shall be immune from legal process in respect of words spoken or written and acts performed by them in carrying out tasks exclusively related to their services to KFOR.” Other personnel are:

- a. immune from jurisdiction before courts in Kosovo in respect of any administrative, civil or criminal act committed by them in the territory of Kosovo. Such personnel shall be subject to the exclusive jurisdiction of their respective sending States; and
- b. immune from any form of arrest or detention other than by persons acting on behalf of their respective sending States. If erroneously detained, they shall be immediately turned over to KFOR authorities.¹⁵²

In the US, the UN enjoys the same immunity that is enjoyed by foreign governments.¹⁵³ Because of local complaints about abuse of this immunity, however, the UN is bowing to pressure to waive its traditional immunity. In March 1999, the UN announced that it would authorize the wage garnishment of its staff members who fail to pay court-ordered spouse and child support, rather than permitting them to rely on institutional immunity to evade legal obligations under local state law. In December 2000, a UN official, who, ironically, wrote and lectured on poverty in Africa, faced a lawsuit from a Zambian man who claimed the official held him in indentured servitude for seventeen months. A lawsuit filed in New York accused the official of paying the plaintiff illegally low wages of \$160 a month for working in his home nearly 70 hours per week.¹⁵⁴

In the UN “Oil for Food” scandal [§3.3.C.3(b)], the UN was monitoring Iraq’s sale of oil for humanitarian purposes from 1997 to 2003. Secretary-General Kofi Annan resisted requests from the US Congress for interviews with UN staff and for access to UN internal audits of this now defunct program. Annan ultimately waived diplomatic immunity in certain cases, resulting in the first indictment in August 2005.

B. OTHER ORGANIZATIONS

The scope of immunity for other international organizations is not as clear. In some nations, international organizational immunity is likened to diplomatic immu-

nity [§2.7.E.]. Other nations draw upon the analogy to State immunity [§2.6.].

1. Private Company Illustration In a 1990 arbitration, the Federal Republic of Germany (the “FRG” prior to German unification) sought to tax certain activities of the European Molecular Biology Laboratory (EMBL). This is an international organization, which had negotiated a Headquarters Agreement with the FRG, similar to the agreement between the UN and US regarding the immunities of the organization’s New York City facilities. The FRG imposed taxes and customs duties on income and goods related to this organization’s canteen and guest house used by visiting staff and scientists, as well as maintenance of the residence of the Director-General of the EMBL. The organization believed that these taxes violated the Headquarters Agreement between Germany and the EMBL. When ruling in favor of the EMBL, the arbitrators noted the organization’s special status, and immunity from taxes and duties, in the following terms:

Therefore it was inadmissible [for the FRG] to tend to limit the privileges and immunities of the EMBL, and to interpret them restrictively. For the privileges and immunities were not intended to provide international organizations with individual legal entitlements, but to contribute to an effective discharge of the responsibilities by the organization and make the latter independent from internal jurisdiction [of the FRG courts over EMBL]....

Besides the general principle of the respect of the effective discharge of the responsibilities and of the independence of the organizations, the largely undisputed principle had to be respected that a host State must not draw financial advantages from the official activities of an international organization. Otherwise it would adversely affect the financial resources of the organization at the expense of the financial contribution of the other member States.¹⁵⁵

In 2004, the new International Criminal Court began to execute privilege and immunities agreements with the countries wherein its employees would be working to gather prosecution evidence. This type of arrangement is necessary to ensure the safety, independence, and confidentiality required for such sensitive investigations.

2. International Organization Illustration Can IOs be sued in the courts of their member States? In Chapter 2 of this book, you studied the ability of an IO to pursue its own independent claim against a State that harms a UN employee (ICJ *Reparations Case*). You also read about the UN being able to sue one of its member States (*Balfour* note case). The following case classically illustrates an employee's suit against an IO, lodged in the courts of a country that was (and remains) a member of that IO:



Broadbent v. Organization of American States

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT
628 Fed.Rptr.2d 27 (1980)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Three, click Broadbent v. OAS.

Section 2.6 of this book analyzes the distinction between the “absolute” and the “restrictive” immunity of States. Recalling those materials will help with answering the following questions: (1) How did the *Broadbent* trial and appellate courts apply that distinction, in very different ways, to an international organization? (2) There was no difference in the end result. Why? (3) Would it have made a difference if there had been no administrative tribunal at the OAS to handle such terminations?

In 1998, the same Court of Appeals determined that the scope of immunity accorded international organizations under the International Organizational Immunities Act of 1945 is probably broader than that of States under the Foreign Sovereign Immunities Act of 1976. This court did not clearly resolve whether Congress generally intended that greater immunity be accorded to international organizations than States.¹⁵⁶

◆ PROBLEMS

Problem 3.A (after §3.1.B. *Reparation Case*): In September 1991, in the aftermath of the Persian Gulf War, a UN nuclear inspection team entered Iraq for the purpose of ensuring that it was not producing weapons of

mass destruction. This inspection was to be conducted under a UN Security Council (SC) resolution requiring Iraq to divest itself of such weapons. Iraq responded by seizing forty-four UN team members, including citizens of several nations. Iraq claimed that some were spies. The SC then approved Iraqi demands. One was that the inspectors must make lists of Iraq's secret nuclear weapons program papers that they intended to take with them for further analysis by the United Nations. This minor SC concession (allowing Iraq to make some demand of the UN) may have saved the lives of the UN's inspectors.

If they had been killed by Iraqi agents, to whom would Iraq have State responsibility for reparations under International Law? Should there be an *exclusive* remedy for this type of wrong, assertable by only one entity?

Problem 3.B (end of §3.2.): In 1991, military leaders overthrew the democratically elected government of Haiti. The US considered this coup to be quite adverse to the hemispheric interests of other democratic nations in and near the Caribbean.

Assume that sometime thereafter, the US president announces that the US will undertake a “humanitarian intervention” in Haiti. The president announces that the purpose will be “to help the people of Haiti restore democracy.” Assume further that Haiti's military government responds to the US announcement with its own statement, as follows: “North American imperialism will never prevent the people of Haiti from achieving their rightful role in hemispheric affairs, which have been dominated by the US since establishment of international organizations including the Organization of American States (1890) and the UN (1945).”

The UN previously imposed an embargo on oil bound for Haiti. Assume that the UN either cannot or will not respond to this particular flare-up. The US has just vetoed a proposed UN Security Council resolution that would prohibit the US from acting unilaterally to invade Haiti. As covered in textbook §3.3.B.2(b), the veto of one of the “permanent five” precludes Council action on such matters (e.g., from dispatching peace-keeping forces to Haiti). Furthermore, Haiti's military leaders are unlikely to agree to a UN intervention which would threaten their continued control of Haiti's government.

Later, assume that there is a local response to the events in Haiti. The Organization of Central American

States (OCAS) has asked its members—consisting of States in Central America—to participate in a peace process. The organs of this international organization cannot act without the unanimous consent of all members of the OCAS. The dual goal of this conference will be to establish regional containment of this hypothetical Haitian scenario and to avoid further confrontation between the US and Haiti. The OCAS is an independent international organization whose membership includes the US and Haiti. UN administrators have referred to this international organization as one of the UN's regional agencies. Under Article 33 of the UN Charter, regional agencies are encouraged to resolve threats to international peace.

The Inter-American Economic and Social Council is part of the infrastructure of the Organization of Central American States. Its fundamental purpose is to promote the economic and social welfare of the member States of the OCAS through better utilization of all natural resources within the region. It has made many recommendations to OCAS member States dealing with economic and social matters. To accomplish its purpose, assume that Council members vote to conduct a research study of the effect of both the US and the new Haitian regime on the economic and social well-being of this Caribbean nation. Council members believe that the economic scenario in Haiti will undoubtedly worsen as a result of social and military problems resulting from the US-Haitian confrontation. The Council study, not yet completed, will address these interrelated matters for the US and other OCAS members. It will consider what collective action might be taken to avert the further escalation of hostilities in this region.

What is the nature of the OCAS—the international organization addressing this explosive situation? Discuss the various ways in which one might classify this organization.

Problem 3.C (after §3.3.B.2(a) Security Council *Purpose and Structure* materials): Membership on the Security Council has not been particularly democratic. It was not until May 2000 that Israel became aligned with any group of nations. While it is geographically part of the Asian Group, Israel was accepted into the Western European and Others Group. (Previously, Israel was the only UN member to be barred from *any* group because of Arab-nation resistance.) Israel's admission was limited to four years, after which it was subject to reconfirmation. In

two years, Israel was able to vie for participation in certain UN bodies for the first time. Another non-democratic example is that only five States occupy *permanent* seats on the Council. As to the *rotating* seats, there are five groupings used for filling the rotating SC seats from among the UN's other 186 nonpermanent members.

The US has backed the addition of Germany and Japan as future permanent members of the UN Security Council. This option has not been universally supported. For example, in 2005, there were vicious anti-Japanese riots in China. Some 44,000,000 Chinese signed an Internet petition to oppose Japan's achieving its desired permanent seat on the Security Council. Old hatreds persist, in part based on Japan's dominance of various Chinese locations during WWII.

Many other possible changes would arguably do a better job of making the Council “mirror” the Assembly, by more accurately reflecting the demographic composition of the community of nations. Consider the following options:

- (1) Should Great Britain and France each continue to occupy a permanent seat?
- (2) Alternatively, should either nation cede its seat to Germany, or should all three somehow rotate on this particular “permanent” slot on the Council—to be known as the “European Seat”?
- (3) Would Japan be entitled to a permanent seat, given its economic superiority in global affairs?
- (4) Should China share (rotate on) the permanent “Asian seat” with India, given the latter's immense population, which surpasses that of all Council members except China?
- (5) Should Germany, Japan, or any other nation be added as a permanent SC member—but without the right of veto, thus providing for *some* status on the Council? This would be permanent status, but without the attendant right of automatic veto which is currently exercisable by the original five permanent members.
- (6) Would any of these changes truly influence, in a positive way, the SC's ability to perform without diminishing its power to act?
- (7) Should there be some *other* change?
- (8) Should there be *no* change at all?
- (9) Which of these would be the best option?

Class members will examine these options. They will resolve which alternative would best suit the following

goals: (a) better representation of the community of nations on the SC; and (b) more reliable conduct of Council business under its Article 39 (or other) mandate(s).

Problem 3.D (after §3.3.B.2.): A major legal question arose, as of the US 1998 military buildup in the Persian Gulf: Could the US unilaterally attack Iraq premised on aging 1991 UN resolutions—as opposed to soliciting a fresh UN Security Council resolution to authorize an attack on Iraq?

UN Charter Article 2.4 prohibits the use of force. The Charter-based exceptions are self-defense (Article 51) and SC authorization (Article 42). As will be seen in Chapter 9 on the use of force, State practice has arguably augmented the Article 51 requirement of an “armed attack” by relying on “anticipatory” self-defense—given advances in weapons technology since the Charter was drafted in 1945.

Resolution 678, passed just before the first Persian Gulf War began, said that member States “can use all necessary force” to oust Iraq from Kuwait. However, seven years had passed by the time of the US saber rattling; Iraq had departed Kuwait; there had been a ceasefire; the US did not have the benefit of the same worldwide resolve to go to war in 1998 (not that of permanent SC members China, France, and Russia, or any of the Arab nations that so staunchly supported the PGW in 1991); there was no provision in any SC resolution authorizing a UN member State to use force on its own initiative; and Article 2.4 of the UN Charter generally prohibits the use of force, which could be interpreted to require the express authorization of force by the SC rather than leaving a doubtful situation to the discretion of one member State.

The US support for its military buildup relied on several arguments: Resolution 678 could be still invoked because peace and security had not been restored to the area; in 1994, Iraqi forces moved toward Kuwait, then pulled back when the US dispatched a naval carrier group to the Gulf; in 1996, Iraq sent its forces into Northern Iraq to help a Kurdish group recapture a key city inside a safe haven protected by US-led forces; and Article 51 of the UN Charter accorded the right of collective self-defense because of the potential use of the biological and chemical weapons thought to be hidden in Saddam Hussein’s large presidential palaces. Thus, the continuing threat of biological warfare would mean that the war had never really ended. Iraqi compliance with the ceasefire

agreements would thereby be construed as a condition precedent to an effective ceasefire (Resolution 686).

Two students (or groups) will debate whether the US possessed the authority to attack Iraq—as planned prior to the Secretary-General’s successful intervention—*without* a fresh UN Security Council resolution. While some basic arguments have been provided, there are others. This exercise illustrates some of the problems with potential UN solutions to threats to peace.

Problem 3.E (after Trusteeship Council Materials in §3.3.B.4.): The aftermath of the Cold War included the breakdown, if not splintering, of State sovereignty. For example, the Soviet Union collapsed into a number of smaller States. One State under its influence, Yugoslavia, further split into five additional States.

One consequence of the realization of statehood, especially by former colonies in Africa, has been the increasing frequency of what many have referred to as “failed States.” These are States that have achieved independence but not sufficient economic and political stature to thrive. Warring tribes and ethnic groups are responsible for mass terror, executions, fleeing refugees, and economic hardship for the citizens of such countries.

Africa is not alone in terms of States that are vulnerable. The US magazine *Foreign Policy* publishes an annual survey entitled Failed States Index. Per the 2008 results, seven of the top ten, among the world’s sixty weakest States, are in Africa. However, notwithstanding large-scale US support, Iraq and Afghanistan were numbers five and seven respectively. This respected survey’s definition of a failed State includes the following factors: (1) the inability to effectively control its territory; (2) the government is not perceived as being legitimate, by a significant percentage of its population; (3) it does not provide domestic security or basic public services; and (4) lack a monopoly on the use of force.¹⁵⁷

Somalia, the “leader” in this survey, is just one example of the negative facets of postcolonial statehood: a State that has failed, or will fail, thus producing anarchy (as depicted in the movie *Black Hawk Down*). UN efforts to provide humanitarian relief have resulted in mass looting, anti-UN actions, and anti-UN sentiment expressed by various segments of the populace. The UN Secretary-General fled for his life during a 1993 visit to Somalia, during which he had hoped to bolster the spirit of the peacekeeping forces in Somalia. In 2004, UN Security Council Resolution 1558 deplored the

massive flow of weapons and ammunition into and through Somalia in violation of the UN arms embargo. The government sits in exile, in Nairobi, Kenya. When that government called for an African Union peace-keeping force to help control Somalia's lawlessness, thousands of Somalians protested the potential infusion of foreign, non-Muslim troops.

Peruse Articles 75–85 of the UN Charter on the Course Web Page, at: <<http://home.att.net/~slomansonb/txtcsesite.html>>, under Chapter Three (Treaties), click UN Charter, especially Articles 77 and 78. Then reconsider the definition of statehood in §2.1 of this textbook. Three students will now assume the roles of: (1) the UN's Trusteeship Council; and (2) Somalia's government in exile (Kenya); and (3) a supervising nation, willing to take Somalia under trusteeship. They will analyze/debate the following issues:

- (1) Should the UN bring such a quasi-State “under its wings”? Should the UN attempt to reestablish the Trusteeship system because of Somalia's inability to control its own international affairs? Would the UN's current financial problems [UN Assessment: §3.3.C.] affect this debate?
- (2) Would that be best accomplished by reviving the trust system; or alternatively, by taking over Somalia's governmental functions, as the UN did in East Timor and Kosovo?
- (3) If the Trust device is doable, *which* UN member State should administer Somalia Trust Territories? (The UN's comparatively brief administration of East Timor preceded its 2002 statehood and admission to the UN; the UN has administered Kosovo, since 1999, and remains there notwithstanding Kosovo's February 2008 declaration of independence.)
- (4) Should the UN Charter be amended to *delete* the entire concept of trusteeship?¹⁵⁸

Problem 3.F (after §3.3.C. UN ASSESSMENT materials): The UN Secretary-General originally threatened that the US would lose its General Assembly (GA) vote at the end of 1998 if it did not pay its arrearage of what was then more than \$1.5 billion. (The US position in the SC would not be affected.) The US accounting system has generally created problems for the United Nations because the UN expects dues to be paid at the beginning of the calendar year, but the US has normally paid its dues around October 1.

As of the close of 1998, the year when the financial crisis began to receive an extraordinary degree of public attention, eighteen other nations had also fallen behind by failing to pay their dues for more than two years: Bosnia, Burundi, Cambodia, Comoros, Congo, Dominica, Equatorial Guinea, Georgia, Guinea-Bissau, Iraq, Liberia, Moldova, São Tomé, Somalia, Tajikistan, Togo, Vanuatu, and “Yugoslavia.” The February 2002 list of countries actually barred the following countries from voting in the GA: Cape Verde, Central African Republic, Chad, Mauritania, Niger, and Seychelles. The materials in the text summarize some of the subsequent developments in this financial crisis.

Article 19 of the UN Charter provides as follows: “A member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.” In May 2005, the US Congress first considered its United Nations Reform Act of 2005. The US would thereby withhold one-half of its assessed dues if certain reforms were not implemented by the annual payment date of October 1, 2007. See Course Web Page, at <<http://home.att.net/~slomansonb/txtcsesite.html>>, under Chapter Three (Further Reading and Internet Research), click US United Nations Reform Act.

Three students, or groups, will analyze/debate whether the US should thus lose its vote in the GA. They will represent: (1) the United States, (2) the United Nations, and (3) US allies which *have* timely paid their assessed dues. Japan and Germany, for example, shoulder (respectively) the greatest financial burdens, other than the United States.

Problem 3.G (after §3.6.B.): Former US General Wesley Clark (and 2004 presidential contender) was the US Supreme Allied Commander in Europe during the 1999 Kosovo bombing campaign by NATO forces. A number of NATO countries actively participated in this military campaign—the first in NATO's history. There was no UN Security Council resolution to authorize this intervention in the former Yugoslavia. US and UK military forces, acting under the authority of NATO, bombed various parts of Serbia, including Belgrade and Kosovo.

Just as the NATO bombing campaign ended, and before the UN Mission in Kosovo was operational, Russia—a traditional ally of Serbia—dispatched its military forces. They went on a two-day march from where they were serving under the UN in Sarajevo, Bosnia. At that time, Russia was not associated with NATO's operations in Kosovo. The Russian troops were cheered as saviors by Pristina's Serbian population.

To avoid losing control of Kosovo's main airport to the Russians, General Clark—with the approval of NATO leader Javier Solana—ordered British troops to seize the airport from the small advance contingent of Russian forces that were occupying one end of the airport. Russian planes were in the air, outside of Kosovo, but were refused overflight permission from Hungary and Romania. The UK General, Sir Michael Jackson, refused Clark's order, responding that—as General Jackson reportedly said to Clark—"I'm not going to start World War III for you."¹⁵⁹ The Russians later agreed to integrate their forces with NATO's forces in Kosovo.

Assume that, instead, General Jackson followed Clark's order. Many of the 200 Russian troops at the Pristina airfield are killed or wounded. After an intense diplomatic exchange, President Clinton appears to apologize. Russia wishes to use this incident, however, as a tool to focus global attention on this (hypothetical augmentation of the actual) event. Russia and the US agree to an international arbitration. Russia pursues not only the US and the United Kingdom as defendants, but also NATO.

Five students are the arbitrators, chosen as follows: one by Russia; one by the US/UK; one by NATO; one from a nation that refused the Russian overflights to get to the Kosovo airport; and the UN Under-Secretary General (and Chief Legal Officer). Drawing upon the materials, especially in §3.1 (organizational status) and §3.6 (organizational immunity), the arbitrators will address—some or all of—the following questions in their debate:

- (1) Is NATO *independently* responsible for the death/wounding of the Russian soldiers?
- (2) Should liability, if any, instead be limited to the US and UK? Should NATO, the UK, and the US *all* be liable?
- (3) What percentage of fault should be attributed to NATO, the US, the UK, and/or Russia?

- (4) Can NATO claim that it is immune from any liability for this incident?
- (5) Would it be wise for NATO to *waive* any potential claim of immunity? One purpose might be to establish a leading role, whereby a major international organization would thereby accept the consequences of its members' actions—given the potential arbitral finding of organizational responsibility.

◆ FURTHER READING & RESEARCH

See Course Web Page, at: <<http://home.att.net/~slomansonb/txtcsesite.html>>, Chapter Three.

◆ ENDNOTES

1. A classic analysis of the terms "international" and "organization," as well as the distinctions between those terms, is provided in Definitions and History, ch. 1 in C. Archer, *INTERNATIONAL ORGANIZATIONS* (2d ed. London: Routledge, 1992) [hereinafter *Archer*].
2. See, e.g., M. Karns & K. Mingst, *Nonstate Actors: NGOs, Networks, and Social Movements*, ch. 6 in *INTERNATIONAL ORGANIZATIONS: THE POLITICS OF GLOBAL GOVERNANCE*, at 211 (Boulder, CO: Rienner, 2004).
3. W. Slomanson, *Civil Actions Against Interpol: A Field Compass*, 57 *TEMPLE LAW QUARTERLY* 553 (1984).
4. *Ethnic conflict*: M. Esman & S. Telhami (ed.), *INTERNATIONAL ORGANIZATIONS AND ETHNIC CONFLICT* (Ithaca, NY: Cornell Univ. Press, 1995). *Military conflict*: H. McCoubrey & N. White, *INTERNATIONAL ORGANIZATIONS AND CIVIL WARS* (Aldershot, Eng: Dartmouth Pub., 1995).
5. H. Schermers & N. Blokker, *INTERNATIONAL INSTITUTIONAL LAW* §33, at 26 (4th rev. ed. Leiden, Neth: Brill, 2003) (elements covered in detail in §§32–47) [hereinafter Schermers & Blokker].
6. *Id.*, §§33–45, at 27–37.
7. M. Prost & P. Clark, *Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?*, 5 *CHINESE J. INT'L L.* 341 (2006).
8. Schermers & Blokker, §1563, at 987 (cited note 5).
9. Further details on the resolutions and related events are provided in R. Lapidoth & M. Hirsch (eds.), *THE ARAB-ISRAELI CONFLICT AND ITS RESOLUTION: SELECTED DOCUMENTS* 71 (Dordrecht, Neth: Martinus Nijhoff, 1992).
- 9a. Further details on these matters are available in 8 M. Whiteman, *DIGEST OF INTERNATIONAL LAW* 742 (Wash., DC: US Gov't Print. Off., 1967).
10. *Regina v. Ministry of Defence Ex Parte Walker*, at: <<http://www.publications.parliament.uk/pa/ld199900/ldjudgmt/jd000406/walker-1.htm>> (Judgment, House of Lords, 6 April 2000).

11. The US recognition legislation was the International Organizations Immunities Act, 59 STAT. 669, 22 USCA §§288(a)–(f).
12. *Balfour, Guthrie & Co. v. United States*, 90 Fed. Supp. 831, 832–833 (D.C. Cal. 1950).
13. A. Reinisch, Do National Courts Provide an Appropriate Forum for Disputes Involving International Organizations? ch. 6 in *INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS*, at 318–319 (Cambridge, Eng: Cambridge Univ. Press, 2004).
14. *E.C.J. case: Reynolds Tobacco And Others v. Comm'n*, Case C-131/03, at: <<http://curia.europa.eu>>. *Analysis*: E. Sanchez, The European Court of Justice Approves Lawsuits By The European Community Against Cigarette Companies In U.S. Courts, ASIL Insight (Nov. 21, 2006), at: <http://www.asil.org/insights/2006/11/insights061121.html#_ednref1>.
15. U.N., Report of the International Law Commission, General Assembly Official Records, Supplement No. 10 (A/61/10), para. (3), p. 277 (August 2006). The exceptions involve matters of defense, such as State consent to, or participation in, certain forms of wrongful conduct.
16. *UN Report*: A. Panyarachun (Chair), Part I, Different Worlds 1945 and 2005, in *A More Secure World: Our Shared Responsibility—Report of the United Nations' High-Level Panel on Threats, Challenges and Change*, UN Doc. A/59/65 (italics added), at: <www.un.org/secureworld>, click Document [hereinafter High-Level Panel Report]. *Analysis*: G. Shafir, Legal and Institutional Responses to Contemporary Global Threats: An Introduction to the U.N. Secretary-General's High-level Panel Report on Threats, Challenges and Change, 38 CALIF. WEST. INT'L L.J. 1 (2007).
17. Ford Foundation, *INTERNATIONAL ORGANIZATIONS AND LAW* 5 & 8 (New York: Ford Found., 1990).
18. ICJ: Legality of the Use of Force (*Yugoslavia v. Belgium*), General List No. 105 (1999), proceedings, at: <<http://www.icj-cij.org/icjwww/idecisions.htm>>. ECHR: *Bankovic and Others v. Belgium and 16 other Contracting States*, application no. 52207/99, §§14–27, ECHR 2001–XII, proceedings, at: <<http://www.echr.coe.int>>.
19. G. Gaja, Special Rapporteur, General Rule on Attribution of Conduct to an International Organization, Art. 4, ILC Second Report on Responsibility of International Organizations, ¶28.1, at 14, UN Doc. No. A/CN.4/541 (2004).
20. P. Sands & P. Klein, *BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS*, 16–19 (5th ed. London: Sweet & Maxwell, 2001).
21. N. White, Theories of International Organisation, ch. 1 in *THE LAW OF INTERNATIONAL ORGANISATIONS* 1–22 (Manchester, Eng: Manchester Univ. Press, 1997).
22. Classification of International Organizations, ch. 2 in *Archer*, 38 (cited note 1).
23. Introduction, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS*, ch. 1, at 3–4 (Oxford, Eng: Oxford Univ. Press, 2005). See also, J. Alvarez, International Organizations: Then and Now, 100 AMER. J. INT'L L. 324 (2006).
24. *Quote*: The Diversity of NGOs: Definition and Delimitations, §1.3, in *NON-GOVERNMENTAL ORGANISATIONS IN INTERNATIONAL LAW*, at 39 (Cambridge, Eng: Cambridge Univ. Press, 2005) [hereinafter Diversity of NGOs]. *UN resolution*: U.N.S.C. Reso. 1701, S/RES/1701 (11 Aug., 2006), ¶1 (“Calls for ... the immediate cessation by Hizbollah [Hezbollah] of all attacks...”).
25. *Politics*: See S. Ahmen & D. Potter, *NGOs IN INTERNATIONAL POLITICS* (Bloomfield, CT: Kymarian Press, 2006). *Amnesty*: The host site for many of AI's constituencies is: <<http://www.amnesty.org>>. This site links to numerous online reports, programs, and video presentations about AI's world-wide programs.
26. A leading analysis is provided in S. Charnovitz, Nongovernmental Organizations and International Law, 100 AMER. J. INT'L L. 348 (2006).
27. American University College of Law, Peruvian NGO Restriction Bill, HUMAN RIGHTS BRIEF 49 (Winter 2007).
28. PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Geneva: Int'l Comm. Red Cross, 1977).
29. *Abu Ghraib*: see N. Lewis & F. Fleck, The Struggle for Iraq: Red Cross Found Abuses at Abu Ghraib Last Year, NEW YORK TIMES (May 11, 2004). *Guantanamo*: see J. White & J. Mintz, Red Cross Cites ‘Inhumane’ Treatment at Guantanamo, WASHINGTON POST (Dec. 1, 2004).
30. NAFTA text: <<http://www.nafta-sec-alena.org/english/index.htm>> (click NAFTA).
31. *Indictment*: U.S. v. Moussaoui, 2003 Westlaw 1877700 (E.D. Va., 2003) (from original indictment). *Web page*: <<http://www.fas.org/irp/world/para/docs/980223-fatwa.htm>>. Originally published in the Arabic Newspaper al-Quds al-Arabi (London), Feb. 23, 1998, at 3. Available at Cornell's Mid-East Web site, at: <<http://www.library.cornell.edu/colldev/mideast/fatw2.htm>>. *Further details*: Y. Alexander & M. Swetnam, USAMA BIN LADEN'S AL-QAIDA: PROFILE OF A TERRORIST NETWORK (Ardsley, NY: Transnat'l, 2001).
32. See Diversity of NGOs (cited note 24) & B. Arts, M. Noortmann & B. Reinalda, *NON-STATE ACTORS IN INTERNATIONAL RELATIONS* (Aldershot, Eng: Ashgate, 2001). A symposium, the product of a conference on NGOs, is available in the following summary: On the Possibilities and Limitations of NGO Participation in International Law and its Processes, in *PROCEEDINGS OF THE NINETY-FIFTH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW*: (Wash., DC: Amer. Soc. Int'l Law, 2001).
33. United Nations Millennium Declaration, UN Doc A/55/L.2 (Sept. 6, 2000) (Heads of State Summit at UN HQ in New York), at: <<http://www.unitednations.org.uk/info/millenniumdec.html>>.
34. Succinct but authoritative histories are available in League of Nations, E. Osmanczyk, *ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL AGREEMENTS* 511–516 (2d ed. London: Taylor & Francis, 1990) [hereinafter *UN Encyclopedia*] and Y. Choue (ed.), *WORLD ENCYCLOPEDIA OF PEACE* 177 (2d ed. Seoul, Korea: Jin Wang Kim Pub., 1999) (Vol. 3). For the most scholarly studies, see F. Walters, *A HISTORY OF THE LEAGUE*

- OF NATIONS (London: Oxford Univ. Press, 1952); A. Zimmermann, *The League of Nations and the Rule of Law 1918–1935* (London: MacMillan, 1936). For illustrated histories, see G. Ostrower, *THE LEAGUE OF NATIONS FROM 1919–1929* & G. Gill, *THE LEAGUE OF NATIONS FROM 1929–1946* (Garden City Park, NY: Avery Pub. Group, 1996) (two volumes in same series).
35. *First Point*: see 2 *SELECTED LITERARY AND POLITICAL PAPERS AND ADDRESSES OF WOODROW WILSON* (New York: Grosset & Dunlap, 1952) for Wilson's "Fourteen Points" speech. *Text*: <<http://www.unog.ch/library/archives/lon/lbryfset.html>>, click Library Documents, then click The League of Nations Covenant.
 36. For a contemporary expression of this concern, see H. Jacobson, W. Reisinger, & T. Mathers, National Entanglements in International Governmental Organizations, 80 *AMER. POL. SCI. REV.* 141 (1986).
 37. See generally, T. Hoopes & D. Brinkley, *FDR AND THE CREATION OF THE U.N.* (New Haven, CT: Yale Univ. Press, 1997) and A. Yoder, The Birth of the United Nations, Ch. 3, in *THE EVOLUTION OF THE UNITED NATIONS SYSTEM* 27 (2d ed. Wash., D.C.: Taylor & Francis, 1993).
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CHAPTER FOUR

Individuals and Corporations

CHAPTER OUTLINE

- Chapter Introduction
- §4.1 Individual's Status
 - A. Historical Limitation
 - B. Evolving International Personality
- §4.2 Nationality, Statelessness, and Refugees
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 - B. Statelessness
 - C. Refugees
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 - A. Theoretical Underpinning
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- §4.4 Injury to Aliens
 - A. Codification Attempts
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[O]ne of the revolutionary features of the Community legal system is the fact that private parties, as well as the Member States, are subject to EC law. Thus, EC law has gone beyond the boundaries of International Law to produce a direct impact on the rights and obligations of Community Nationals. Accordingly, it was only fair that natural and legal [corporate] persons should be able to obtain a review not only of acts of the Member States, in contravention of EC law but also of acts of Community institutions that could be illegal or disproportionately harmful to their interests.

—A. Albers-Llorens, *PRIVATE PARTIES IN EUROPEAN COMMUNITY LAW: CHALLENGING COMMUNITY MEASURES* 7–8 (1996). See §4.1(b), regarding the individual's contemporary status in International Law.

INTRODUCTION

Prior chapters defined International Law and analyzed the role of the various entities possessing legal capacity to act on the international level. This chapter analyzes the role of the other “player”—individual and corporate persons. Historically, individuals were not accorded any status in International Law—a system designed by States to govern their own conduct in their international relations. Although there are significant domestic legal distinctions between individuals and corporations, explor-

ing that level of detail is beyond the scope of this survey course.¹ This chapter's use of the term “individual” generally refers to both people and corporations, unless otherwise indicated.

The first section of Chapter 4 explores the evolution of the individual's international legal personality. One legacy of the Nazi Third Reich was its role in spawning the comparatively robust post-World War II pressure to create more direct enforcement vehicles for prosecuting and protecting individuals under International Law.

◆ §4.1 INDIVIDUAL'S STATUS

◆
Soldier Jones Hypothetical

Assume that States X and Y share a common border. State Y forces have been crossing into X from a small remote village in Y near the border. State Y villagers have been assisting State Y military forces by providing them with food and information about troop movements—just on the other side of the border in State X.

Jones is a soldier in the army of State X. His superior officer sends him into State Y on a secret mission designated *Operation Phoenix*. Its objective is to “neutralize” anyone who might help State Y forces cross into State X near the State Y village on this international border. Jones interprets “neutralize” to mean “kill.” He kills most of the civilian men, women, and children in the State Y village and escapes back into State X.

The remaining relatives of the slaughtered villagers from State Y want Soldier Jones and State X to pay for this brutal massacre. *Operation Phoenix* undoubtedly violated International Law. This neutralization mission violated the territorial sovereignty of State Y. State X thereby conducted an extraterritorial military operation

in State Y without Y's consent. Consider the following questions:

- ◆ Can the State Y relatives directly negotiate with State X? (If you were a Y relative, whose family had been slaughtered by State Y, does this option make sense—even if you could actually determine with whom to meet?)
- ◆ Can the State Y relatives pursue Soldier Jones in a State or international tribunal? Which one? (Would you have the financial resources to pursue this claim? What about the limitation imposed by §2.6.B. sovereign immunity?)
- ◆ State X has obviously violated International Law. Has Jones? (Who created the current system of International Law—and whose conduct is governed by those norms?)

Other limitations (described in this chapter) will further preclude the villagers from seeking a remedy against either Soldier Jones or State X.

A. HISTORICAL LIMITATION

1. Theoretical Underpinning The British philosopher Jeremy Bentham coined the term “International Law” in his famous treatise of 1789. It articulated the historical perspective that only the State could be governed by International Law because “[t]ransactions which may take place between individuals who are subjects of different states ... are regulated by the internal laws, and decided upon by the internal tribunals, of the one or the other of these states.... There remain then the mutual transactions between sovereigns as such, for the subject of that branch of jurisprudence which may be properly and exclusively termed international.”²

For the next two centuries, States would continue to be the “subjects” of International Law. They were the legal entities that created this body of rules to govern their relations with each other. Individuals and business entities have historically been the subjects of *national* law. The laws of Morocco, for example, govern the conduct

of a person living in Morocco or a foreign corporation doing business in Morocco. If a private Moroccan corporation wants to purchase metal from Germany, it will have to consult the internal law of Morocco for any local import restrictions on German metal. Furthermore, Moroccan law may prohibit that corporation from importing such metal for the purpose of making automatic machine guns. A violation of these laws, applicable to persons and corporations in Morocco, would subject this corporation and its owners to punishment under national law.

Under this historical approach, Soldier Jones would be incapable of violating International Law. He is an individual, not a State. Only State X could incur responsibility for directing him to slaughter the Y villagers. Under Bentham's classical view, individuals lack the required “legal personality” or “capacity” to incur responsibility under International Law. Soldier Jones undoubtedly violated the national law of State Y, where he carried out

his mission. It was his home State (X) that violated International Law by ordering its agent to carry out *Operation Phoenix*. Jones was acting as an agent of State X. Only X would possess the capacity to incur State responsibility as a legal “person” subject to the rules of International Law.

This perspective prevailed in most countries until World War II. The existence of a direct relationship between the individual and International Law was denied, especially by scholars in socialist countries. Chinese International Law texts published in the 1980s deny that individuals are necessarily the subjects of International Law.³ One result is that the individual, who is not the subject of International Law, cannot accuse a State of breaching an obligation arising under International Law. A 1983 study by the East Asian Legal Studies Department of the University of Maryland corroborates this perspective. Otherwise, the sovereign nature of the State would be effectively diminished by subjecting State power to scrutiny by an individual. The “[r]ecognition of individual responsibility for personal acts under international law would ... clash with Marxist principles regarding the class struggle in international relations. Moreover, the Chinese rejection of the concept of individuals as subject[s] of international law is an indisputable repudiation of the ... conception of law which, by casting individuals in the role of international entities, attempted to circumvent the internal sovereign rule of the state. To the PRC, the only legitimate instrument to ensure the rights of individuals is the nation state.”⁴

Soviet theoreticians presented an alternative. The status of the individual could be acknowledged by International Law, only to the extent that it was expressly recognized by the national law. Otherwise, the UN Charter Article 2.7 principle of State sovereignty and freedom from external intervention in local matters would be meaningless. The Soviet perspective was that even international organizations, heralding the human rights of the individual, could not circumvent the primacy of the State. Doing so would be tantamount to international interference in the internal affairs of the Soviet Union.

Professor Lung-chu Chen of New York University argues that authoritarian regimes deny individual status in International Law to conveniently serve the totalitarian purposes of those States that govern without legitimate authority. They “will not tolerate their nationals complaining to other state elites or the larger community of

mankind [e.g., at the UN] about the deprivations within their particular communities.”⁵

The Vietnamese government chose not to espouse the claim of its citizens against the US companies that manufactured “Agent Orange.” This product was a group of chemicals used by the US during the Viet Nam War to clear jungle foliage to limit enemy concealment and destroy crops, which they could use for food. Some 10,000 US war veterans have received US medical disability benefits because of their exposure to this herbicide. The US had no interest in hearing, or obligation to hear, the claims of Vietnamese citizens. Their only recourse was to sue these chemical corporations in a US court. This suit was dismissed in March 2005, on the basis that “[t]here is no basis for any of the claims of plaintiffs under the domestic law of any nation or state or under any form of International Law.”⁶

In April 2005, the UN Security Council took action on behalf of the victims of the Prosecutor’s claimed genocide in the Darfur region of the Sudan. Some half million people had been killed, driven away, or otherwise injured by the government supported militia. These individuals had no recourse against their own government. The Council thus referred this matter to the International Criminal Court [§8.5.D.], naming specific individuals who were to be prosecuted for their human rights violations. The Council also urged the African Union to provide forces to protect the Sudanese victims from further atrocities.

2. Practical Application What is the practical consequence of the individual’s not being able to directly pursue such claims as a plaintiff under International Law? The State enjoys virtually exclusive discretion regarding whether or not to pursue a remedy on the international level. It can lodge a diplomatic claim or institute proceedings in an international tribunal on behalf of its citizens who are harmed by another country. In 1928, the Permanent Court of International Justice (PCIJ) explained that “[r]ights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never, therefore, identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due the State [whose citizen has been harmed].”⁷

National law, of course, embraces the discretionary nature of the State to espouse the claims of its citizens. A US court in Florida dismissed such a case on the basis that the judicial branch of government does not have the power to hear such a claim when it has already been denied by the executive branch. The plaintiff had alleged that her husband was the captain of a cargo ship, traveling from Miami to Montevideo, Uruguay. She claimed that a governor in Brazil arranged for the deceased husband's ship to be hijacked—whereupon agents of the governor tortured her husband. She contended that her husband died from the resulting injuries. She filed this action because she wanted the court to require the US Secretary of State to submit her claim to the Brazilian government. The federal court in Miami dismissed her petition on the basis that it could not require the US Department of State to act. In this situation, the US government had complete discretion *not* to pursue this claim against Brazil. In the words of the federal court:

Mandamus [judicial relief] is available only when a government agency has a duty to act on the part of an individual. It is not available to review the discretionary acts of government officials....

The action is, in effect, a demand that the State Department “espouse” Petitioner’s claim. Espousal is the assertion of the private claim of United States nationals by the government against another sovereign. The Secretary of State has the discretion to determine whether to espouse a claim.

The Court finds that espousal being a discretionary function, it does not have jurisdiction to provide the mandamus relief sought by Petitioner.⁸

Many international tragedies illustrate the application of this legal regime. Iran sued the US in the International Court of Justice (ICJ) for the 1988 destruction of an Iranian commercial airliner, which was flying near a US naval vessel in the Persian Gulf. Its radar mistook that distant plane for an attacking fighter jet. Under International Law, Iran’s State status provided it with the legal capacity to present a claim in an international tribunal against the US for the acts of its military agents. The relatives of the Iranian citizens killed in the incident could not take such direct action against the United States. The Iranian relatives, of course, expected Iran to act on their behalf. Iran was harmed, under International Law, when its citizens were killed.

This tragedy triggered Iran’s discretionary decision to pursue a remedy against the offending nation. Iran claimed that the death of the Iranians on the ill-fated flight and the destruction of the Iranian aircraft constituted unprovoked violations of the right to fly over international waters. Furthermore, any monetary compensation obtained by Iran for the destruction of the aircraft and the loss of life would belong to Iran. The victims’ families would benefit, but only if Iran chose to give them any of the US compensation for its tragic mistake.

Many States *do* turn over such recoveries to the individuals or relatives harmed in these circumstances. Because of poor international relations, however, the US offered to provide compensation to the Iranian survivors conditioned on the special requirement that all payments would go directly to the victims’ families, rather than pass through the hands of the Iranian government.⁹

Traditional doctrine espouses the following remedy for individual plaintiffs harmed by the action of a State: Their home State may choose to pursue a claim in an international venue—via diplomacy, judicial, or some related process—for harm done to them by a foreign nation. The Permanent Court of International Justice (PCIJ) characterized such claims in the following terms: “By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.”¹⁰

In the above Soldier Jones Hypothetical, Jones, though an individual, could incur direct responsibility under International Law *if* his conduct amounted to an international crime such as genocide (as defined in Chapter 10), but not murder. Jones would thereby directly violate International Law. If Jones had been assigned to kill all members of the hypothetical village, for the purpose of eliminating a particular ethnic group—as opposed to merely securing a military position—he would then be directly punishable in an international tribunal. This was Slobodan Milosevic’s fate. This former Yugoslavian president was tried by a UN tribunal in the Netherlands, in part because his orders went beyond the “mere” ethnic cleansing of certain groups in the former Yugoslavia [Head of State Immunity: §2.6.A.2. & Regional Courts: §8.5.C.]. Whether the crime was murder or genocide, a relative of a deceased villager would not have the capacity to be a plaintiff in an international tribunal. Only States or international organizations have the general

capacity to pursue claims in international tribunals or via State-to-State diplomacy.

In Chapter 2, you studied the contemporary diminution of immunity of Heads of State in the context of sovereign immunity. That immunity dates back many centuries before the appearance of the State-centric system of International Law that evolved from the 1648 Treaty of Westphalia (§1.1.A.).

At about the same time, nations began to apply a customary practice whereby there was one type of individual who *was* able to be reckoned with on the “international” level: *the pirate*. Individual perpetrators of this “international” crime were clearly subjects of International Law. They could be prosecuted in the courts of any nation for violating the law of nations prohibiting piracy. Many jurists held that pirates were liable for their conduct directly under International Law, even when their conduct did not violate the law of the State where they could be found. Piracy was sufficiently heinous to be considered a crime against all nations. Pirates were thus committing the original “international” crime against humanity (universal jurisdiction: §5.2.F. & modern human rights instruments: §10.3.).¹¹

B. EVOLVING INTERNATIONAL PERSONALITY

1. Impact of War The notion that individuals could violate International Law—not just national law—surfaced with a fury as a result of the horrors perpetrated by Germany’s World War II Nazi regime. Western scholars and jurists revived the (piracy) theory that an individual could breach International Law. It was memorialized in the 1946 Judgment of the Nuremberg Tribunal and the companion war crimes trials in Tokyo [§8.5.B.]. These major postwar tribunals tried individuals for conduct deemed to violate International Law, given that their actions did not violate either German or Japanese law at the time. The resulting State denial of the dignity of the individual ultimately led France, England, the Soviet Union, and the US to try the key Nazi and Japanese war criminals under the international agreements establishing the Nuremberg and Tokyo Military Tribunals.

The liability of the Nazi and Japanese defendants was based on the direct relationship between the individuals’ conduct and International Law. The individual defendants claimed that they had no obligations under International Law. Their only duty was to their own nations, which in turn, would bear any resulting State responsibility for breaches of International Law. The International Military Tribunal

at Nuremberg disagreed in the following terms: “Individuals have international duties which transcend the national obligations of obedience imposed by the individual State (to which they owe allegiance). He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.”

This trial, and its results, generated an intense global interest in acknowledging the liability of the individual defendant—under International Law—premised largely on the unfathomable, genocidal conduct of these defendants. University of Denver Professor Ved Nanda thus comments that “[h]istory will perhaps recall that the single most significant international law development in the second half of the twentieth century was the dramatic shift in the individual’s status from a mere object to a subject of international law. Indeed, the human being as an individual is becoming a full-fledged claimant with standing to seek redress in the international arena. The protection of internationally recognized human rights is by all accounts a revolutionary change.”¹²

The potential for a *corporation* to violate International Law has also evolved. As noted in the above §4.1.A Vietnamese *Agent Orange* case, US corporations were sued for their alleged *international* legal responsibility regarding the widespread use of this herbicide during the Vietnam War:

[US] [d]efendants argue that corporations cannot be liable under international law. There is substantial support for this position.

...

Limiting civil liability to individuals while exonerating the corporation directing the individual’s action [however,] ... makes little sense in today’s world....

A corporation is not immune from civil legal action based on international law. The opinion on this point of [University of Houston] Professor Paust is compelling. “Companies and corporations have duties arising under international law, especially with respect to laws of war and human rights. Moreover, they have never been granted immunity under any known treaty or customary law with respect to violations of treaty-based or customary international law.”¹³

Antonio Cassese, on the Faculty of Political Sciences at University of Florence, describes this feature of international legal capacity as being directed by events associated with World War II:

Individuals

BY ANTONIO CASSESE

in M. Bedjaoui (ed.), *INTERNATIONAL LAW: PROCESS AND PROSPECTS* 114–120 (1991)

1. It is well known that States and insurgents [§2.3] are “traditional” subjects of the international community, in the sense that they have been the *dramatis personae* on the international scene from the beginning. Recently, especially after the Second World War, other poles of interest and activity have gained international status: international organizations, “peoples” finding themselves in certain conditions and being endowed with a representative structure (i.e., liberation movements; and individuals). The emergence of these “new” subjects is a distinct feature of modern international law.

...

4. Over a long period of time, during virtually the whole of the first stage of development of the international community (1648–1918), human beings have been under the exclusive sway of States. Individuals were only taken into consideration by international law *qua* individuals of a given State and in case of conflict, their interests were concretely safeguarded only if their national State decided to exercise diplomatic protection Thus, if individuals acquired some relevance in international affairs, it was as mere “objects” or, at best, “beneficiaries of international agreements.”

...

8. After the Second World War international protection of human beings as such increased to a staggering extent. Individuals were no longer taken care of on the international level *qua* members of a group (minority or particular category); they began to be protected *qua* individual human beings.

9. Why did things change so drastically? The main reason was the conviction shared by all the victorious powers, that the Nazi aggression and the atrocities perpetrated had been the fruit of a victorious philosophy based on utter disregard for the dignity of man. One means of preventing a return to these horrors was the proclamation at all levels of some basic standards for respect for human rights.

...

18. ... [O]ne should not underestimate the importance of individuals acting on the international scene.

First, one should bear in mind that it is not easy for States to deprive themselves of some of their sovereign prerogatives, in particular their traditional right to exercise full control over physical persons subject to their jurisdiction. Given the present structure of the world community and the fact that States are still the overlords, the limited status of individuals can be regarded as a remarkable progress....

Second, whenever individuals are granted the right to petition international organs, they may act irrespectively of their nationality, whether they be citizens of the State complained of, or nationals of other States ... or even stateless persons. The right of petition is therefore granted to physical persons *qua* human beings. No bond of nationality nor any other form of allegiance is taken into account. This represents a momentous innovation in its own right.

...

19. It is apparent from the foregoing remarks that individuals ... [nevertheless] remain dependent on the will of their “creators.” Like international organizations, individuals perform activities delegated to them by States.... On this score both organizations and individuals can be styled “*ancillary*” subjects of international law....

20. It follows that, like international organizations, individuals are *derivative* subjects, in that they draw their existence from the formal decisions (normally a treaty) of other subjects [States].... Consequently one may distinguish between *primary* and *secondary* subjects, the former embracing States, the latter encompassing individuals.

...

One category Professor Cassese mentions, “*peoples*,” historically had no direct representation in international affairs. The UN Charter refers to this grouping in its Article 1.2 purpose “to develop friendly relations among nations based on respect for the principles of equal rights and self-determination of *peoples* [italics added].” In 1982, the UN created a Working Group on Indigenous Populations. In 1993, The General Assembly adopted a program of activities for the International Decade of the World’s Indigenous People (1995–2004). It then identified the establishment of the Forum as one of the main objectives of the Decade. In July 2000, the UN’s Economic and Social Council established a Permanent Forum on Indigenous Issues as a subsidiary organ of the Council. ECOSOC Res. 2000/22. This new forum formally integrates indigenous peoples and their representatives into the structure of the UN. It marks the first time that representatives of States and non-State actors have been accorded *parity* in a permanent representative body within the UN Organization. As noted by the UN High Commissioner for Human Rights, who is the coordinator of the Indigenous People Decade, this is an historic step forward: “The Permanent Forum promises to give indigenous peoples a unique voice within the UN system, commensurate with the unique problems which many indigenous people still face, but also with the unique contribution they make to the human rights dialogue, at the local, national and international levels.”¹⁴

The early post-World War II movement toward European integration showed signs of relaxing one of the most rigid norms of the State-centric regime: that the individual had no standing on the international level to lodge his or her claim—thus requiring the aid of a willing State. This limitation effectively meant that many wrongs went without a remedy. It was typically one’s *own* State that caused one harm.

The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms first spoke of lodging a claim against a State in the European Court of Human Rights.¹⁵ Under Article 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 of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.” Of course one could not make a claim unless the offending State was a party to this treaty. However,

this was the first major institution to at least offer the possibility of an individual or non-governmental organization functioning at the international level (i.e., individual v. State in an international forum).

Some *global* organizations thus accord the right of direct petition by an individual to an international body. Individuals may thereby bring State breaches of the individual’s treaty-based rights to the attention of the appropriate international enforcement body. This regime is dependent upon the State ratification of treaties and/or protocols which authorize such individual access to an international forum.¹⁶

2. Contemporary International Access Consider textbook §3.4 on the European Union, §8.3 on Arbitral Classifications and Tribunals, §8.5 on International Criminal Courts, §10.2 on the UN role in promoting human rights, and §12.3 on Regional Economic Associations. These are some of this book’s best illustrations of the current, almost taken-for-granted, international access that both individuals and corporations have earned—for better or for worse—in the last half-century. They may pursue their claims on the international level without having to first trigger the discretionary decision of their home nations to present their claims. They may also be pursued on the international level without the approval of their home nations being invoked. Classic illustrations include the former Yugoslavia’s President Milosevic (1999) and Sudan’s President Omar al-Bashir, who were indicted by international tribunals.

Individuals may also *present* legal claims against their *home* States—directly in the EU—just as the EU can bring a legal action against a corporation. See, for example, the §3.4.A. principal case, pitting the European Commission against Microsoft for the latter’s imbedding of computer codes in a way that precluded Real Player from operating in Europe’s Windows-competitive environments. The §8.3 arbitration fora provide individual and corporate access to international tribunals which are specifically designed to handle their business-specific claims. This theme is illustrated by the 1987 France–United Kingdom Channel Tunnel Treaty. It expressly authorizes dispute resolution between all public and private entities (concessionaires) and either national party to that treaty. Concessionaires thus have: access to a convenient dispute-resolution mechanism, regardless of the legal status of any particular tunnel-service provider, and without facing any of the sovereign immunity problems [presented in §2.6 and §3.6 of this text].

Under the North American Free Trade Agreement [§12.3.A.], a NAFTA-area investor may sue for breach of certain NAFTA provisions by one of the three NAFTA nations. The claim is heard by an international tribunal, normally composed of three members appointed by the investor and the NAFTA country being sued. Tribunals are formed under the investor's choice of commercial arbitration rules. (World Trade Organization disputes, on the other hand, are initiated only by governments against other governments, as described in text §12.2.C.)¹⁷

◆ §4.2 NATIONALITY, STATELESSNESS, AND REFUGEES

An individual's nationality, often referred to as citizenship, is a bond between an individual and a State that establishes their reciprocal rights and duties. This bond was once an automatic attribute of mere residence within the Roman Empire (except for certain "barbarians" who were not considered legal residents). In AD 212, the Edict of Caracalla conferred Roman citizenship on all individuals who lived within the area controlled by the Empire. There was no distinction based upon place of birth, parental citizenship, or whether one wished to become a Roman citizen or abandon that citizenship.¹⁸

This section analyzes contemporary citizenship rules, State competence in such matters, and the related consequences of citizenship. The four major components of this subject are nationality, dual nationality, statelessness, and refugees.

A. NATIONALITY

1. Scope Nationality is a legal, political, and social link between the individual and the State. In 1955, the International Court of Justice (ICJ) defined nationality as "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said ... that the individual upon whom it is conferred ... is in fact more closely connected with the population of the State conferring nationality than with that of any other State...."¹⁹

Nationality establishes mutual expectations for both the State that confers it and the individual who acquires it. The State has the right to require its citizens to serve in its military forces. The State may also tax an individual

for earnings accrued anywhere in the world. The individual is correlatively entitled to certain expectations based on his or her nationality. One of the most important of these rights is the State protection of the individual. The home State normally assists its nationals when they are mistreated by another State or its agents in another country. A Canadian citizen who is mistreated in Saudi Arabia may seek Canada's assistance. The protection is likely to materialize in some form of a Canadian diplomatic or consular official's inquiry or protest on behalf of the Canadian citizen harmed by Saudi conduct that violated international normative expectations.

Nations have not always protected their citizens abroad. The concept of nationality was not introduced in mainland China, for example, until the mid-nineteenth century. The Chinese government historically showed little interest in protecting its citizens when they were abroad. Choosing to live abroad was *prima facie* evidence of disloyalty. Residing among "barbarians" rendered Chinese citizens unworthy of the State's protection.²⁰

Is nationality a matter of national law or International Law? If giving or withholding nationality were not subject to international legal norms, then a State would be free to deprive its citizens of citizenship against their wishes. In a 1915 case, the then new Turkish government, fearing that Turkish Armenians were a dangerous "foreign element with cousins in the Russian army," deported them to Syria and other Middle Eastern areas.

In 1923, the Permanent Court of International Justice proclaimed that States generally had unlimited discretion when making nationality decisions. Exceptions included those situations where there was a treaty obligation to confer, or the inability to confer, nationality under the particular circumstances. In one of the two prominent cases, France conferred French nationality on residents of Tunis and Morocco, notwithstanding a British protest on behalf of British citizens living in those territories. The Court was asked to decide whether this was a matter of national discretion, which fell exclusively within France's unbridled power to decide. The Court responded that this matter involved an issue arising under International Law although the conferring of nationality was normally a matter committed to the discretion of each State's national law. Thus, "nationality is not, in principle, regulated by international law, [however] the right of a State to use its discretion is nevertheless restricted only by obligations which it may

have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State [*i.e.*, conferring nationality on residents of its territories] is limited by rules of international law.”

In the same year, the Court added an important limitation in the following Polish case: “One of the common problems which presented itself in connection with the protection of minorities, was that of preventing these States from refusing their nationality, on racial, religious or linguistic grounds, to certain categories of persons, in spite of the link which effectively attached them to the territory allocated to one or [the] other of these States.”²¹

In 1939, Stalin and Hitler signed a non-aggression treaty containing a secret protocol placing various nations, including Estonia, under Soviet influence. Stalin ordered the deportation of 60,000 Estonian nationals to Siberia after taking away their Estonian citizenship. This was one of the war-related events that would later stimulate international pressure to limit the wide latitude of discretion exercisable by States in nationality matters. The results of such pressures included postwar refugee and genocide treaties that now pose further impediments.

2. Acquisition How is nationality acquired? Individual nationality, or citizenship, is acquired in three ways: (1) passively, by parentage; (2) passively, by being born in a State that considers a child born there its citizen; and (3) actively, by naturalization of an individual who voluntarily changes allegiance from one State to another.

(a) Parentage Citizenship derived from parentage is a rule drawn from the ancient Roman law. The child’s citizenship was that of the parents. This rule is referred to as *jus sanguinis*, or “blood rule,” for establishing citizenship. A child born of Roman parents in any region of the world not under Roman control was nevertheless a Roman citizen. The *jus sanguinis* basis for acquiring nationality is applied in Europe, Latin America, and many English speaking countries.

(b) Birth Many countries apply a nationality-by-birth rule. This is the rule known as *jus soli*, or “soil rule,” for determining citizenship. In the Middle Ages, birth within certain European territories automatically vested the newborn with that nation’s citizenship. Under its contemporary application, a child born in England, whose parents are visiting Italian citizens, is an English citizen under the immigration and nationality laws of England.

(This child would also be an Italian citizen because Italy follows the blood rule.)

Nationality determinations are often complicated by the simultaneous applicability of the laws of the country of the parents and the child’s country of birth. Assume that a Japanese couple has a baby during a visit to the United States. Application of the parentage or *jus sanguinis* blood rule would make the baby a citizen of Japan. Application of the *jus soli* or soil rule would make the baby a citizen of the US. This child is a citizen of both countries and may have to choose one of two citizenships upon attaining adult status. To alleviate such problems in Europe, the Council of Europe’s 1997 European Convention on Nationality—and the failed 2005 EU Constitution—provide that everyone has a right to nationality. A treaty party must automatically grant its nationality to persons having at least one parent who is a national of that State, which does not apply to persons born abroad. In that instance, the European Convention provides that there is an obligation to facilitate the acquisition of that State’s nationality (although not automatically).²² However, Ireland is now the only nation in the EU that automatically grants citizenship to anyone born within the nation.

This 1997 Convention contains only general principles, but no specific rules on nationality. Europe has had too long a history of statelessness associated with State succession (§2.4.A. on Succession). The May 2006 Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession is the prescribed remedy. Under various global draft treaties, everyone has the right to nationality so as not to be stateless. Under Article 2 of this contemporary regional treaty: “Everyone who, at the time of the state succession, had the nationality of the predecessor state and who has or would become stateless as a result of the state succession has the right to the nationality of a state concerned...” Article 5 builds upon the International Court of Justice *Nottebohm* case, just below, in terms of the factors for the grant of nationality by the successor State:

1. A successor state shall grant its nationality to persons who, at the time of the state succession, had the nationality of the predecessor state, and who have or would become stateless as a result of the state succession if at that time:
 - a. they were habitually resident in the territory which has become territory of the successor state; or

- b. they were not habitually resident in any state concerned but had an appropriate connection with the successor state.
- 2. For the purpose of paragraph 1, sub-paragraph b, an appropriate connection includes, *inter alia*:
 - a. a legal bond to a territorial unit of a predecessor state which has become territory of the successor state;
 - b. birth on the territory which has become territory of the successor state;
 - c. last habitual residence on the territory of the predecessor state which has become territory of the successor state.

There are a number of new European nations, e.g., the post-Cold War united Germany, Czech Republic, Slovakia, and Kosovo. The above treaty provisions would specifically preclude them from withholding nationality on some discriminatory basis. This would also be the case if the same regime were to govern a two-State solution where Palestine achieved *de jure* statehood.

There have been efforts to curtail the US application of the *jus soli* rule, which automatically confers US nationality upon those born on US soil. The US Constitution provides that “All persons born or naturalized in the US ... are citizens of the United States...”²³ In 1993, California Governor Pete Wilson made a proposal that, if adopted by Congress and then ratified, would have amended the US Constitution. That change would have repealed this constitutional guarantee. Children of undocumented foreign nationals born on US soil would no longer automatically be US citizens.

The right to a nationality can also be treaty-based. In September 2005, the Inter-American Court of Human Rights considered the first case wherein it addressed the right to a nationality under the American Convention on Human Rights. Two girls were born in the Dominican Republic. Their mothers are Dominican nationals and their fathers are Haitian nationals. The Dominican Republic’s constitution provides that all persons born in its territory are Dominican nationals. But when the girls’ mothers sought to obtain their official birth certificates, they were denied their registrations. They each had an *unofficial* birth document from their birthplaces.

An officer of the local civil administration denied the girls their official birth certificates. He did so, on the grounds that they did not have the necessary documents to establish their Dominican citizenship. These girls

were denied birth certificates and hence, school registration based on apparent discrimination against their ethnic background. Their families lived in fear that their children would be forced to leave the country at any time in the absence of a certificate of nationality. The Dominican Republic responded as follows: first, the decision not to grant the girls’ birth certificates was based on the fact that they failed to produce the necessary documents—which allegedly had nothing to do with discriminatory intent; second, there was no policy of deporting Haitians in the Dominican Republic, so the families’ allegations of fear and distress were unfounded.

The Court held that under the Inter-American Convention on Human Rights [textbook §10.4.B.], Article 20 provides that nationality is a fundamental human right from which a State party cannot derogate. The Convention provides for the right of nationality in two respects: (1) nationality must be granted to a person who has established a link between the State and the individual; and (2) State parties must ensure that the individual is not deprived of his or her nationality in an arbitrary manner. Post-judgment news reports were that the Dominican Republic’s Foreign Ministry refused to recognize the Court’s ruling.²⁴

(c) Naturalization Individuals may actively change their nationality through the process of naturalization. The national law of the country from which nationality is sought establishes its naturalization requirements. In a notable passage from a US Supreme Court opinion: “It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”²⁵

Neighboring nations may have very different approaches. French and German leaders sought, respectively, to open and close the door to immigrants in the same month. In June 1993, France’s National Assembly overwhelmingly approved a tougher immigration law that made it more difficult for foreign citizens to acquire French citizenship via marriage or residence with a family member in France. Immigration is one of France’s most explosive social issues because of increasing crime, which the French press has attributed to “foreigners.”

Germany’s Chancellor Helmut Kohl contemporaneously urged the German Parliament to make it easier to

become a German citizen. Responding to pressure after fatal attacks on Turks in Solingen, Germany, Kohl attempted to initiate a process that would change Germany's eighty-year-old nationality law. It had barred many lifelong residents (including some born in Germany) from applying for German citizenship if they could not establish the legality of their presence in Germany. Later that year, however, Germany instead introduced a tough immigration policy, designed to halt the influx of immigrants spawned by the end of the Cold War. One year later (1994), illegal immigration had dropped by two-thirds, and the number of individuals seeking political asylum dropped by 72 percent.²⁶ On the other hand, German law did accommodate over two million ethnic Turks who lived in Germany for decades without full citizenship rights. A 1913 citizenship law provided that citizenship was to be derived only from parentage. New legislation now provides that children born after January

1, 2000, whose parents have lived in Germany for at least eight years, are automatically German citizens.

Marriage by a citizen of one nation to the citizen of another is a common basis for seeking naturalization so as to unite the spouses and any children they may have. But it is not a talismanic answer to the related immigration problems posed in both conflicted and peaceful environments.

Naturalization, undertaken for reasons not related to habitual residence in the naturalizing country, is a major problem under many local immigration laws. Granting citizenship under these circumstances does not necessarily entitle an individual to claim that he or she is a national of the naturalizing State for all purposes. The relatively lax nationality laws of one State may be in conflict with the more demanding laws of another. In 1955, the ICJ addressed this recurring problem in the following major case:

◆

Nottebohm Case (Liechtenstein v. Guatemala)

INTERNATIONAL COURT OF JUSTICE (1955)

1955 International Court of Justice Reports 4

<<http://www.icj-cij.org/docket/files/18/2674.pdf?PHPSESSID=13694a8478a1f023929da09328c3acb3>>

AUTHOR'S NOTE: Nottebohm was a German citizen residing in Guatemala. He operated a successful business in both Guatemala and Germany before World War II. Guatemala's laws discriminated against foreign citizens and business entities that were nationals of countries with which it was at war. German citizens could not do business in Guatemala.

Just before Guatemala declared war against Germany, Nottebohm went to Liechtenstein and applied for citizenship. His purpose was to avoid the discriminatory laws against foreign citizens so that he could continue his lucrative business in Guatemala. There was no state of war between Guatemala and Liechtenstein. Liechtenstein waived its usual three-year waiting period when it granted citizenship to Nottebohm. He immediately took an oath of allegiance, became a naturalized citizen of Liechtenstein, and was issued a passport prior to leaving for Guatemala.

When Nottebohm attempted to return to Guatemala as a citizen of Liechtenstein, however, he was unable to reenter. His property in Guatemala was seized by the government. Guatemala still considered Nottebohm a German national and would not recognize Liechtenstein's grant of nationality. In 1946, Liechtenstein first asserted its right to protect Nottebohm, whom it considered to be its naturalized citizen. In 1951, after unsuccessful negotiations with Guatemala, Liechtenstein instituted this suit in the International Court of Justice. Liechtenstein wanted to recover for damages to Nottebohm caused by Guatemala's treatment of a person that Liechtenstein considered its citizen.

The Court's opinion in this famous case addresses the requirements for the international recognition of citizenship conferred under national law. The legal question included whether Liechtenstein could present this claim on behalf of Nottebohm, and in turn,

whether Guatemala had to recognize Nottebohm as a citizen of Liechtenstein.

COURT'S OPINION: [T]he Court must ascertain whether the nationality conferred on Nottebohm by Liechtenstein ... bestows upon Liechtenstein a sufficient title to the exercise of protection in respect of Nottebohm as against Guatemala. In this connection, Counsel for Liechtenstein said: "the essential question is whether Mr. Nottebohm, having acquired the nationality of Liechtenstein, that acquisition of nationality is one which must be recognized by other States."

Guatemala expressly stated that it could not recognise that Mr. Nottebohm, a German subject habitually resident in Guatemala, has acquired the nationality of Liechtenstein without changing his "habitual residence." There is here an express denial by Guatemala of Nottebohm's Liechtenstein nationality.

The naturalization of Nottebohm was an act performed by Liechtenstein in the exercise of its domestic jurisdiction. The question to be decided is whether that act has the international effect here under consideration.

International arbitrators have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc. [I]nternational law leaves it to each State to lay down the rules governing the grant of its own nationality. On the other hand, a State cannot claim that the rules it has laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States.

According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal

rights and duties. It may be said to constitute the juridical connection of the fact that the individual upon whom it is conferred either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State, which has made him a national.

At the date when he applied for naturalization Nottebohm had been a German national from the time of his birth. His country had been at war for more than a month, and there is nothing to indicate that the application for naturalization then made by Nottebohm was motivated by any desire to dissociate himself from the Government of his country [Germany].

He had been settled in Guatemala for 34 years. He had carried on his activities there. It was the main seat of his interests. He returned there shortly after his naturalization, and it remained the centre of his interest and of his business activities. He stayed there until his removal as a result of war measures [passed by Guatemala] in 1943. He subsequently attempted to return there, and he now complains of Guatemala's refusal to admit him [now that he claims Liechtenstein rather than German nationality].

In contrast, his actual connections with Liechtenstein were extremely tenuous. No settled abode, no prolonged residence in the country at the time of his application for naturalization: the application indicates that he was paying a visit there and confirms the transient character of this visit by its request that the naturalization proceedings should be initiated and concluded without delay. If Nottebohm went to Liechtenstein in 1946, this was because of the refusal of Guatemala to admit him. No indication is given of the grounds warranting the waiver of the condition of residence. There is no allegation of any economic interests or of any activities exercised or to be exercised in Liechtenstein, and no manifestation of any intention whatsoever to transfer all or some of his interests and his business activities to Liechtenstein.

These facts clearly establish, on the one hand, the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection

between him and Guatemala, a link which his naturalization in no way weakened. That naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation. In both respects, it was lacking in the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a State in the position of Guatemala. It was granted without regard to the concept of nationality adopted in international relations.

Naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent State [Germany] that of a national of a neutral State [Liechtenstein], with the sole aim of thus coming within the protection of Liechtenstein.

Guatemala is under no obligation to recognise a nationality granted in such circumstances. Liechtenstein consequently is not entitled to extend its protection to Nottebohm vis-à-vis Guatemala.

The ICJ dismissed Liechtenstein's claim filed on behalf of Nottebohm. He was a citizen of Liechtenstein under its national law. Under International Law, however, Liechtenstein could not confer its citizenship on Nottebohm for the purpose of requiring other countries to treat him as if he were a citizen of Liechtenstein. As a result, Guatemala could appropriately characterize Nottebohm as a German citizen—remaining free to apply its discriminatory laws against the citizen of a country with which Guatemala was at war.

The court never decided the merits of this claim regarding Guatemala's alleged mistreatment of Nottebohm. He was not represented by a country with which he had the effective link of nationality. Liechtenstein therefore did not have the legal capacity to bring this claim. Only Germany possessed the right to question Guatemala's discriminatory treatment of Nottebohm, which it did not invoke during or after the war. But the *Nottebohm* case is often cited for its restatement of the factors for assessing international recognition of naturalization by another State: residence, center of interests, family ties, participation in public life, and attachment shown for a particular State.

Financial status may be a relevant factor as well. The Caribbean island nation of Dominica provides its economic citizenship via its "passport to paradise" program. For the equivalent of US \$50,000, the country can become a safe haven for fugitives, tax evaders, and corrupt foreign politicians—according to Emilia Puma, spokeswoman for the US Embassy in Barbados. A March 1999 US Department of State report cited Caribbean-based "economic citizenship" as an obstacle to fighting international crime. Belize, Grenada, and St. Kitts and Nevis also have economic citizenship for sale. A US

program authorizes people who invest US \$1 million (\$500,000 in depressed areas) and employ ten people to obtain a visa for two years. They may then apply for permanent residence.

3. New Forms of Citizenship The next generation of citizenship options may involve citizenship that is provided by an international organization, citizenship in a borderless world, or gratis no-limitation naturalization to serve the interests of the issuing nation.

(a) Organizational Citizenship As early as 1974, the Paris Summit of the Heads of State launched a study of "the conditions under which the citizens ... of the Member States could be given social rights as members of the [European] community." Since then, the European Union (EU) has moved beyond a mere economic entity, including military structure (§3.4.A.). The EU is addressing the full panoply of social and other needs that fall within the traditional competence of the State.

Article G of the 1992 Maastricht Treaty incorporates an earlier treaty creating the European Community. The "Citizenship of The Union" provision states as follows:

Article 8

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.
2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

The remaining provisions of Article 8 afford treaty-based protection for the following rights of citizens

within the EU: the right to move and reside freely within the territory of the Member States; the right to vote and be a candidate in municipal elections in the Member State in which he, although not a citizen of the Member State, resides under the same conditions as nationals of that State; protection by the diplomatic or consular authorities of any Member State under the same conditions as the nationals of that State; and the right to petition the European Parliament about any matter which comes within the Community's fields of activity and which affects that citizen.²⁷

Article I-10.1 of the failed 2005 EU Constitution contained a comparable article that carefully distinguishes between community citizenship and State nationality: "Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it." This essentially confers rights including: moving and residing freely within the territory of all member States; voting and standing as a candidate in elections to the European Parliament; and diplomatic representation in any member country in which another member State does not have consular representation available.

By analogy to the ICJ's earlier *Nottebohm* case, assume that Germany, Guatemala, and Liechtenstein are all members of the same international organization. It provides citizenship rights, as specified in Article 8 of the regional Maastricht Treaty. In that instance, the court would *not* have dismissed Liechtenstein's case. In 1955, there was of course no common citizenship provision, which accorded "community" rights to all citizens. If that were the case today, then the appropriate court would have an obligation to hear the merits of *Nottebohm*'s claim—regardless of which of the three member nations were to present this claim. Further, *Nottebohm*, as an individual, would have the right of petition to the appropriate community (international) organ to present his own claim without the necessary sponsorship of Liechtenstein (or Guatemala, or Germany).²⁸

(b) Citizenship in a Borderless World As *Nottebohm* confirmed in 1955, citizenship or nationality is the bond between the individual and the State. The section on State Jurisdiction and the Internet [§5.4.G.] presents the current impact of the Internet on twenty-first century society. With the advent of the Information Age and the electronic world of "cyberspace," citizenship may, one day, not be dependent on the relationship between the

individual and the State, as has been the case since the modern system of states dating from the 1648 Treaty of Westphalia.

"Globalization" [§1.1.B.2. & §12.2.E.]—a term meaning different things to different people—has profoundly affected contemporary notions of citizenship. The major corporations have annual budgets which dwarf that of many nations. Globalization will continue to change the degree to which nation-States are sovereign as borders become less relevant to our daily lives.²⁹ A representative comment on the impact of globalization illustrates the evolution:

This move to globalization has ... conjured up thoughts of a new status of "world citizen;" a person with rights of travel anywhere. In a world without territorial borders that would be possible, and it would certainly herald a radical shift in the laws of migration.... International trade and development of a global economy represent a significant starting point ... [whereby] the effect of these changes is a disjuncture between the formal authority of the state and the actual system of production, distribution and exchange. The global economy involves the internationalization of production and financial transactions. Moreover, the international corporation has been engaged in investment, production and exchange which has transcended nation-state borders.

So too have regional economies and markets encouraged a borderless world by promoting free movement of goods and labour across nation-state borders.

...

In the twenty-first century, people will recognise themselves as members of a nation-state and members of a global community. Moreover, there is likely to be a continued growth of citizens of multiple nation-states as well as global citizens. The consequence can be articulated as people having more than [*sic*] one "legal status" and one "community" with which they identify.

...

How do these factors stand up in a borderless world? Habitual residence may not be a reality for those who are traveling often for the purpose of work, given the effect of the international economy on borders. Moreover if we concentrate on the "centre of a person's interests," this may no longer

have a necessary connection to a nation-state. Family ties could very well be situated around the world, and participation in public life may be a public on a much greater scale through non-government international organizations.³⁰

Given the contemporary pressure by international organizations to protect individual rights, and as State sovereignty thus contracts, one might also anticipate linkage between the individual and the forces of globalization. The UN, for example, undertook the governance function of State territory (East Timor and Kosovo). Its membership is changing. Larger States are continuing to break up into smaller ones as the fruits of self-determination ripen.

The UN Secretary-General's October 1999 perspective supports this theme in the sense that the individual and the State are effectively engaged in a role-reversal: "State sovereignty, in its most basic sense, is being redefined—not least by the forces of globalisation and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty—by which I mean the fundamental freedom of each individual, enshrined in the charter of the UN and subsequent international treaties—has been enhanced by a renewed and spreading consciousness of individual rights. When we read the charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them."³¹

(c) Political Passport Some nations have issued their passports to individuals in other nations as a means of achieving geopolitical objectives. Shortly after the demise of the Soviet Union in the early 1990s, two of Georgia's provinces declared their independence: South Ossetia and Abkhazia. Each borders on Russia and has a predominantly ethnic Russian population. The Georgian government did little about reining in these breakaway provinces. Russia began to issue Russian passports to the ethnic Russians in these Georgian provinces—ultimately issuing tens of thousands of such passports in Georgia. They thus enjoyed a degree of autonomy although their so-called independence was not internationally recognized [legitimate secession and recognition: §2.4.B.].

In August 2008, friction between Tbilisi and Moscow turned to military conflict. Russia's leadership wanted to limit the pro-west Georgian leadership from entering

NATO (after which an attack on Georgia would be an attack on all NATO members under Article 5 of the NATO treaty). Russia also controls much of the natural resource distribution in the region—but not the pipeline running through Georgia's capital from the Caspian Sea to the Black Sea. Russia's short-lived military offensive was supposedly necessary, so as to protect its passport-carrying Russian citizens in Georgia. Without this "hook," Russia would have had no arguable basis, other than expanding its borders, for its military incursion into Georgia.

4. Dual Nationality As noted by the former General Counsel of the US Immigration and Naturalization Service: "Dual or multiple citizenship has grown increasingly common, despite a global legal order nominally opposed to such a status. Because that opposition is more and more at variance with the needs and realities of an interconnected globe, where travel is cheaper, swifter, and more frequent, it has been widely but unevenly eroded."³²

A dual national possesses the citizenship of more than one nation. An individual may: (1) be born in a nation that applies the *jus soli* rule of automatic nationality by birth; and (2) simultaneously acquire the parents' citizenship when their home nation applies the *jus sanguinis* rule that the nationality of the parents trumps the birth location.

Dual nationality is also spawned by those nations allowing their nationals to emigrate and acquire a new nationality without forfeiting their original citizenship status. In 1998, Mexico joined the growing number of countries promoting dual nationality—in the sense that it no longer vitiates the original Mexican nationality, based solely on a Mexican becoming the citizen of another country. For example, although the individual becomes a citizen of the US, he or she is also a dual national under Mexican law. This change in Mexican law ameliorated the concern of many Mexicans who migrate to the US, who did not want to "betray" Mexico by opting for US citizenship. Mexico's objectives include a desire to build a larger political base in the US, whereby these dual citizens will be able to vote and hold office in the US, own property in Mexico, and influence issues of interest to both nations.

Members of an international community of nations do not always have the same approach to dual nationality. In the North American Free Trade Agreement region,

for example, Canada approved dual citizenship in 1977. The US, on the other hand, does not favor dual citizenship, partially because of diplomatic problems regarding which country should represent a dual national who has been harmed in a third nation.

An individual may encounter some unusual burdens as a result of dual nationality. One of them is being subject to the jurisdiction of two countries, each of which considers that person its national. Each nation might then command that individual to return, such as when his or her testimony is needed [§5.2.C.]. Both nations may wish to tax the income of such individuals or impress them into military service.

Such individuals may not be able to predict which nation will protect them if they are harmed in a third nation. For example, a famous international arbitration decision denied Italy the right to espouse a claim on behalf of an Italian citizen born of Italian parents. He was an Italian national under the law of Italy. He was Peruvian, however, by birth. The tribunal refused to recognize Italy's attempt to bring a claim on his behalf against Peru. As described earlier, various attributes flow from the bond of nationality between a nation and its citizens who happen to be abroad. An individual's home nation may be expected to provide diplomatic protection in a dispute involving mistreatment of the individual by another nation that considers that person an alien. Here, Peru was in the awkward position of purporting to protect a Peruvian national against action taken by Italy for this dual national who was also an Italian citizen.³³

A dual national, who would be entitled to relief if she were a citizen of just Country A (e.g., Mexico), may lose her international protection if she were to also become a citizen of Country B (e.g., the US). In the context of the Vienna Convention on Consular Relations, where A sues B, B might raise the defense that the Vienna Convention does not apply to protect a citizen of Country A, who is also a citizen of Country B, and thus, not a foreigner in B in need of special international protection.

The ICJ has not answered this question, and its following case quote leaves that decision for another day. But the Court did say the following, when Mexico sued the US in the ICJ in 2004 [*Avena* principal case: §2.7.C.2.]. The US therein claimed that this treaty could not apply to one of its *own* citizens, who would therefore be subject to *US* law—and hence, not in need

of the *international* protection afforded by the Vienna Convention:

41. The Court now turns to the question of the alleged dual nationality of certain of the Mexican nationals the subject of Mexico's claims [that the US failed to provide them with their Article 36 access to Mexican consular officials, when arrested in the U.S.] This question is raised by the United States ... [which] contends that ... Mexico had failed to establish that it may exercise diplomatic protection based on breaches of Mexico's rights under the Vienna Convention with respect to those of its nationals who are also nationals of the United States. The United States regards it as an accepted principle that, when a person arrested or detained in the receiving State is a national of that State, then even if he is also a national of another State party to the Vienna Convention, Article 36 has no application, and the authorities of the receiving State are not required to proceed as laid down in that Article; and Mexico has indicated that, for the purposes of the present case it does not contest that dual nationals have no right to be advised of their rights under Article 36.

42. It has however to be recalled that Mexico, in addition to seeking to exercise diplomatic protection of its nationals, is making a claim in its own right on the basis of the alleged breaches by the United States of Article 36 of the Vienna Convention. Seen from this standpoint, the question of dual nationality is ... one of ... [the] merits. A claim may be made by Mexico of breach of Article 36 of the Vienna Convention in relation to any of its nationals, and the United States is thereupon free to show that, because the person concerned was also a United States national, Article 36 had no application to that person, so that no breach of treaty obligations could have occurred. ... It is thus in the course of its examination of the merits that the [US] Court will have to consider whether the individuals concerned, or some of them, were dual nationals in law....

Another disadvantage of dual nationality is the potential for expulsion during time of war. Ethiopia expelled a large number of Ethiopian nationals who obtained Eritrean citizenship, for example, after the Eritrean portion of Ethiopia became independent—followed by a war between these two countries. Ethiopia thus deprived

them of their Ethiopian nationality. International Law does not permit a nation to arbitrarily deprive its citizens of their nationality. Eritrea therefore sought relief from Ethiopia in the Permanent Court of Arbitration in The Hague. The Eritrea Ethiopia Claims Commission therein rejected Eritrea's claim. International Humanitarian Law gives belligerents the power to expel nationals of the enemy State during times of conflict [§9.6.B.]. Thus, "Ethiopia lawfully deprived a substantial number of dual nationals of their Ethiopian nationality following identification through Ethiopia's security committee process. Ethiopia could lawfully expel these persons as nationals of an enemy belligerent, although it was bound to ensure them the protections required by Geneva Convention IV and other applicable international humanitarian law. Eritrea's claim that this group was unlawfully expelled is rejected."³⁴

Some multilateral treaties have attempted to ameliorate the adverse impact of dual citizenship although they have accomplished little:

- ◆ The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws was the first multilateral treaty to address dual nationality. While it restates the basic nationality rules already discussed, none of its provisions resolves the dilemma posed for the individual dual national when two nations claim that person as their citizen. Under Article 3, for example, "a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses." Under this early treaty on dual nationality, each nation may apply its own law to the same individual.
- ◆ Some relief was available via the wording of the 1930 Hague Protocol Relating to Military Obligations in Certain Cases of Double Nationality. This treaty provides a model for avoiding competing military service claims in the case of dual nationals. If it had been adopted by a sufficient number of countries, it would have eliminated double military service for individuals who were dual nationals.
- ◆ The 1964 Paris Convention Concerning the Exchange of Information with Respect to Acquisition of Nationality is another multilateral treaty designed to assist dual nationals. While useful for the purpose of acquiring information, none of its provisions addresses inconsistent obligations for dual nationals.³⁵

The most effective device for avoiding inconsistent burdens is the bilateral treaty that specifically addresses dual nationality issues. The classic problem emerges when two States draft an individual into their respective armies. The Netherlands-Belgian Agreement of 1954, for example, concerning the Military Service of Young Men Possessing Both Belgian and Netherlands Nationality, is a good illustration of international cooperation. It avoids the potential unfairness of having to serve in two armies just because an individual is a dual national. Military service for one nation automatically precludes military service obligations in another nation.³⁶

The 1997 European Convention on Nationality is a recent attempt to alleviate burdens associated with dual nationality. In contrast to the 1930 Hague Convention, this instrument does not decide the issue of diplomatic protection. Article 17 merely refers to the existing rules of Customary International Law for resolving such issues—a reference that leaves much to the imagination. It does provide, at least in principle, that dual nationals are expected to fulfill any military obligation only once although this standard does not apply in cases of an emergency mobilization of military forces.³⁷

B. STATELESSNESS

Individuals are stateless when they lack the nationality of any State. Loss of one's original citizenship—typically conferred by birth or parentage—without obtaining a new citizenship—renders the individual stateless. Such individuals cannot claim the bond of citizenship with any State to protect them. There is no State to come to the aid of an individual in need of diplomatic representation.

1. Causes During and after both world wars, numerous people became stateless. Many were refugees who lost their citizenship after fleeing from their native lands. They were not citizens of the State where they had found temporary refuge. Many fled certain Eastern European countries to avoid political persecution only to find that they had been deprived of their original citizenship for doing so. Under the 1948 Hungarian Nationality Act, for example, the government of Hungary could "deprive of his Hungarian nationality a person who ... on going abroad contravenes or evades the statutory provisions relating to the departure from the country."

The 1951 Polish Nationality Act provided that a Polish citizen who resided abroad would be deprived of Polish nationality if the government determined that

such an individual “left the territory of the Polish State unlawfully” or “refused to return to Poland at the summons of the competent authority.”

The phenomenon of statelessness is not limited to the two world wars. Many refugees fled Cuba in the 1960s, and Vietnam in the 1970s, because of political persecution. They lost their citizenship as a result of their decision to flee. They were stateless before they underwent any naturalization proceedings in the countries where they found temporary or permanent refuge.

In 1971, the UK forcibly exiled the entire Chagossian population from the UK’s archipelago Diego Garcia in the Indian Ocean. They were sent to Mauritius. This was done because the US needed Diego Garcia as a military base. (A post-9–11 secret US CIA detention facility was supposedly located on this British territory.) In 2000, the British Foreign Secretary expressed his government’s desire to repatriate the Chagossians to all British-held islands in the archipelago (other than Diego Garcia). But a 2002 study confirmed that resettlement would be too “precarious and costly” for the British taxpayers and would breach the military base treaty with the US as well. In 2004, the House of Commons thus opted to prevent this relocation. The ensuing court decision admonished the government as follows: “the Crown has not begun to establish an overriding imperative entitling it to frustrate the Chagossians’ expectation that they would at least continue to have the status of belongers.”³⁸

The significance of statelessness is that affected individuals encounter great difficulty in traveling and obtaining work. The absence of identity documents, like a birth certificate or passport, typically precludes an alien from entering or working in most countries. It can materialize in very charged contexts, such as the sensitive Olympic dispute involving Cuba and the United States:

In 1957, the Supreme Court of British Columbia reviewed a deportation order made by Canadian immigration authorities regarding an individual named Hanna. He had sought residence in Canada and a waiver of compliance with its Immigration Act due to a classic illustration of statelessness. He was born at sea and had no known record of his birth. As a minor child, he crossed and re-crossed the international boundaries of Ethiopia, French Somaliland, British Somaliland, and Eritrea—without encountering difficulty with the immigration officials of those countries. As he grew older, Hanna began to encounter difficulty because he could not possess any nationality. In Eritrea, Hanna stowed away on an Italian steamer, hoping to land at some country that would grant him asylum. But upon arriving at any port, he was immediately locked up and denied permission to land. After a year of aimless wandering and imprisonment, Hanna escaped from the Italian vessel and concealed himself in the hold of the Norwegian motor-ship Gudvig. As a stowaway, he fared no better than before. He was effectively held prisoner aboard the Gudvig for more than sixteen months, making several trips to Canada. Canadian immigration authorities, having initially refused his entry, ultimately granted him asylum—on the basis that otherwise, he would be effectively condemned to life imprisonment at sea.³⁹

In a similar incident during August 2007, an Egyptian man swam in the Mediterranean Sea from the Gaza Strip to Egypt. He previously resided in Gaza for two years, and could not otherwise leave, because he had no identity documents. He had entered Gaza in 2005 when border controls between Gaza and Egypt had temporarily broken down.

In the same month, Suha Arafat, the widow of former Palestinian Authority chairman Yasser Arafat, was stripped of her Tunisian citizenship. She supposedly inherited hundreds of millions of dollars from her husband. She was supposedly expelled because of a business dispute with her Tunisian partners. She had to leave Tunisia, together with her 12-year-old daughter Zahwa (who was not mentioned in the Tunisian decree). Mrs. Arafat is now staying in Malta with her brother, who is the Palestinian Authority ambassador to Malta.



Perez v. International Olympic Committee

COURT OF ARBITRATION FOR SPORT
Ad Hoc Division: Sydney Olympic Games

Cas Arbitration No. Syd 5
(19 SEPT. 2000)

Go to Course Web Page, at:
<<http://home.att.net/~slomansonb/txtcsesite.html>>.
Under Chapter Four, click Perez v. IOC.

2. Treaty-Based Remedies International organizations have attempted to alleviate the problems caused by statelessness. In 1921, the League of Nations established the Office of the High Commissioner of Refugees in

response primarily to people made stateless by the Russian Revolution of 1917. (Members of the UN would later establish the UN Relief and Rehabilitation Administration to deal with the statelessness resulting from World War II.) Several treaties therefore address, but have yet to resolve, this recurring problem. The goal of the 1930 Hague Protocol Concerning Statelessness was to provide nationality to those deprived of it because of political dissension or military conflict. This draft treaty never became effective because too few nations ratified it.

The 1948 Universal Declaration of Human Rights, although not a binding treaty, nevertheless established a moral obligation that discourages UN member States from intentionally creating statelessness. The 1948 Declaration of Human Rights thus articulated the UN's aspiration for comprehensive post-World War II nationality laws. Article 15.1 provides: "Everyone has the right to a nationality." Article 15.2 follows with its ambitious call for a world wherein "[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

The UN Convention on the Reduction of Statelessness entered into force in 1975. It obliges its signatories to grant their citizenship to stateless people who are willing recipients and found within their borders. It also removes the State discretion to deprive inhabitants of citizenship except on grounds that are not associated with race, religion, and political beliefs. But there are only fifteen State members. That is hardly enough to signal a global commitment to the problem of statelessness. The UN High Commissioner for Refugees currently deals with such matters.

The 1989 Convention on the Rights of the Child [textbook §10.3.C.] provides that a birth certificate is a child's primary right because it is evidence of an official identity and nationality. Only Somalia and the US have not ratified this Convention. In 1998, the UN International Children's Emergency Fund (UNICEF) presented its annual Progress of Nations Report. UNICEF therein reported that one-third of the world's children do not have a birth certificate, a problem which is increasing by approximately forty million children per year. This circumstance deprives the children of many developing countries from obtaining health care, vaccinations, and education, while subjecting many of them to premature military service.

Government policies can adversely impact the rising number of stateless children. Many babies in China are

not registered so that families can avoid the People's Republic of China's policy of one child per family.

The 1997 European Convention on Nationality provides in its preambular wording that signatories should use their sovereign powers to avoid statelessness. Article 4 specifically provides that everyone has a right to nationality. Under this treaty, statelessness would be significantly reduced (presuming sufficient ratifications) in an area of the world that has produced millions of stateless persons because of two world wars. It would thus be the first legally binding multilateral treaty containing a comprehensive set of rules to govern nationality problems.⁴⁰

The 1999 UN International Law Commission's Draft Articles on Nationality of Natural Persons in Relation to the Succession of States provide: "Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned, in accordance with the present draft articles."⁴¹

In the aftermath of 9-11 and the wars in Afghanistan and Iraq, the US was deporting aliens to countries that did not necessarily want them, or to places where the alien did not wish to go or return. In January 2005, the US Supreme Court determined that this could no longer be ordered without the consent of the transferee country.⁴²

C. REFUGEES

State treatment of refugees is a problem that overlaps with statelessness. The plight of refugees is a predicament, which has received much attention because of the twentieth century's two world wars. Shortly after World War II, it was immediately evident that refugee problems were not finally over.

1. The Problem In April 2006, the UN Refugee Agency reported a twenty-five-year low in the number of refugees. It was attributed to the drop in armed conflicts and large-scale repatriations to countries such as Afghanistan (at least before the 2008 escalation in the Taliban Insurgency). The overall decline was especially noticeable during the period 1992–2004. The estimate was roughly halved from 18,000,000 to 9,200,000.⁴³

On the other hand, certain conflicts have yielded disproportionately high numbers of refugees—such as the Darfur region of Sudan. In the June 2008 annual report, the UN determined that the number of refugees

had risen at an unusual rate. An estimated 11,400,000 people were forced to leave their countries in 2007. Roughly half were from Afghanistan (3,100,000) and Iraq (2,300,000).

The UN further estimated that there are 25,000,000 *internally* displaced refugees. Their plight is not covered by the UN Refugee Convention that is the centerpiece of this textbook section (below). In *post*-genocide Rwanda, two thousand internally displaced persons (IDP), mostly women and children, were massacred in 1995. They were “living” in northwest Rwanda’s IDP Camp Kibeho. The Rwandan Army committed the massacre as part of its mission to close that camp, notwithstanding the presence of a dozen UN agencies, 120 non-governmental organizations, and 5,500 UN peacekeepers in this small country.⁴⁴

Nor is the plight of the family members of those seeking asylum adequately addressed in international treaties or State asylum practice. This is a huge problem. It exponentially expands the number of individuals who are impacted by the grant—or denial—of asylum. As poignantly articulated by the University of Essex Professor Steve Peers:

The treatment of family members of persons seeking or receiving international protection is an important practical issue for all individuals who have fled their country of origin due to persecution, civil war, or risks of serious breaches of their basic human rights. Their family members, if left behind in the country of origin, or a country of transit, might not be safe. Even if they are, the family has been split up, causing emotional and practical difficulties for all its members. How soon can they be reunited, and what conditions will they face? Will there be adequate income, accommodation and health care for the family, and how will the children adjust to a different school system, probably in a different language?⁴⁵

Several intriguing examples are provided by Israeli and Swedish State practice and also by a significant decision of an international court regarding Irish law. Under a 2003 amendment to Israel’s Nationality Law, Palestinians who marry an Israeli spouse are prohibited from living in Israel. One in five of Israel’s population is Palestinian. This ban was upheld by the Israeli Supreme Court in 2006, on national security grounds. But it discourages unification in families where the spouses so

intermarry. Such restraints are not limited to conflicted areas. The Scandinavian “Love Bridge” presents a less harrowing example. Each day, about 1,000 Danes leave their foreign-born spouses in Sweden to cross the “Love Bridge” to work in Denmark. Denmark’s immigration law prevents these husbands and wives from settling in Denmark because of their different nationalities.⁴⁶

A European Court of Human Rights (ECHR) July 2008 decision voided an Irish law that required a national of a third country, who is a family member of a European Union (EU) citizen, to prove lawful resident status in an EU Member State in order to lawfully reside in Ireland. A group of asylum seekers were denied asylum on this basis. They had married EU citizens who were lawfully residing in Ireland. But the Irish law violated the relevant EU directive, which is silent regarding any residency requirement for such family reunification. The definition of “family member” in the EU Directive does not distinguish between those family members who are lawful residents of a Member State and others who are not. The imposition of this particular residency requirement seriously obstructed the right to free movement of EU citizens living in Ireland, whose family members could not reside with them. Several Member States expressed their concern that such a broad ECHR interpretation would lead to serious consequences—by increasing the number of individuals who will benefit from a right of residence in the Community. The court responded as follows: (1) the only people to benefit will be family members of EU citizens; and (2) member States would not be deprived of the power to control entry into their territories. Chapter VI of the Directive authorizes EU member States to “refuse entry and residence on grounds of public policy, public security or public health,” where justified.⁴⁷

2. The UN Refugee Convention Rather than a series of spontaneous *ad hoc* agreements, UN members initiated a process leading to the 1951 Geneva Convention on the Status of Refugees—and its 1967 Protocol. The basic Convention applies to those who became refugees prior to 1951. The Protocol applies to refugees since then. A 2001 declaration of the 143 State members reaffirmed the central role of the Refugee Convention for the protection of the world’s refugees.⁴⁸

This objective of refugee law is to establish and maintain the fundamental rights of the individual. The primary job of the UN High Commissioner for

Refugees—established in 1950 by a General Assembly resolution—is to promote, organize, and supervise international protection for refugees who lack national protection. The former Commissioner, Guy Goodwin-Hill, captured the spirit of this objective:

As was the case with some of the inter-war arrangements, the objective of the 1951 Convention and the 1967 Protocol is to both establish certain fundamental rights ... and to prescribe certain standards of treatment. The refugee may be stateless and therefore, as a matter of law, unable to secure the benefits accorded to nationals of his or her country of origin. Alternatively, even if nationality is retained, the refugee's unprotected status can make obtaining such benefits a practical impossibility. The Convention consequently proposes, as a minimum standard, that refugees should receive at least that treatment which is accorded to aliens generally.⁴⁹

An example of the benefit this convention could have provided originated in the Netherlands. Had its guarantees been in place during World War II, a Jewish resident and his daughter—who would one day become world famous—would not have been denied a US visa in 1941. His family was granted a visa to Cuba. It was revoked, however, ten days later when Germany declared war on the US. He was Otto Frank, the father of Anne Frank.⁵⁰

So who are refugees under International Law? The 1951 Convention and its related Protocols do three things to answer this question. They define refugees; determine their legal status; and provide the administrative and diplomatic machinery for implementing protective treaty provisions.

Article 1.A.(2) of the 1951 Refugee Convention defines a refugee as any person who “owing to [a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or ... unwilling to return to it.” The April 2004 Common European Asylum System implements the general terms of this Convention in the EU.⁵¹

What are a refugee's legal entitlements under International Law? One of the most important treaty protections is described in Article 33.1 of the Convention. A State may not return an individual to his or her homeland if “his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

One of the largest refugee populations is that of the Palestinians, estimated to be 4,000,000 people. The UN General Assembly's 1948 Resolution 194 provided that “refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so...” It would be reaffirmed many times since, including Resolution 3236, which confirms the “inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted.” The 1967 war spawned numerous refugee camps scattered throughout the Middle East in the West Bank, Gaza, Lebanon, Jordan, and Syria. The 2005 Israeli departure from Gaza satisfies a portion of Resolution 3236.

Israel has linked the repeated Palestinian calls for their “right of return” to events, which subsequently threatened its very existence. In 1948, the UN partitioned what was then known as “Palestine” into two parts: one that would be the State of Palestine and the other the State of Israel. Israel's new Arab neighbors rejected that partition by attacking Israel. The Arab League would soon decree its economic boycott of Israel, actually designed to extinguish the State of Israel [§9.1.C.2.].

Refugee issues resurfaced with a renewed fury after the Cold War, in Bosnia, Rwanda, and Kosovo, to name just a few locations touched by this lamentable feature of the individual's traditionally passive role in International Law.

3. National Applications Nations have applied (or ignored) international refugee law in a variety of significant contexts. The Fifth Strafsenat of the Bundesgerichtshof of the Federal Republic of Germany affirmed the State Court of Berlin's manslaughter convictions of Egon Krenz, the former General Secretary of East Germany (GDR), and two others. The defendants had been found criminally liable for participating in resolutions passed by the GDR Politburo and National Security Counsel, leading to fatal shootings at the Berlin Wall between 1984 and 1989. The German court thus held that the actions of the accused were illegal and

unjustified under both GDR border law and State Practice. While the shooting of refugees was legal and even sanctioned under GDR law, such legal doctrines could serve as neither justification nor excuse for manslaughter. The Bundesgerichtshof found no mistake of law and affirmed the application of the German Reunification Agreement [addressed further in §10.3.E. *Berlin Wall Border Guard* case].

The British House of Lords applied the Refugee Convention's "members of a particular social group" language to two married Pakistani women. They sought refugee status in the United Kingdom because they were at risk of being falsely accused of adultery in Pakistan. If returned, they would be subject to criminal proceedings for sexual immorality. If found guilty, their possible punishments included public flogging or stoning to death. The majority of the House panel held that evidence of state-sanctioned or state-tolerated discrimination— notwithstanding constitutional guarantees of equality— rendered women in Pakistan "members of a particular social group" and thus entitled to protected status under Art 1A(2) of the 1951 Convention.

In 2004, the England and Wales Court of Appeal (EWCA) considered a refugee claim by a Russian army deserter. He refused to fight in the Chechen War and then unsuccessfully sought asylum from the United Kingdom's Secretary of State and Immigration Appeal Tribunal. They determined that his application did not fit within the 1951 Refugee Convention. The EWCA returned this case to the Tribunal. The question was whether this war warranted "international condemnation." The EWCA thus determined that he might be entitled to refugee status if his participation was premised upon a war that was contrary to the basic rules of human conduct as defined by International Law.⁵²

Australia extended similar protection to a Chinese national born in 1996 to Chinese parents in an immigration detention center in Australia. An administrative tribunal found that the child was not a refugee, merely because the parents "feared" retaliation if they were returned home to China, notwithstanding its one child per family State policy. On appeal, the High Court of Australia determined that the parents' fear for their child was sufficient to meet the "fear" component of the Convention definition of refugee.⁵³

The EU grew from fifteen to twenty-five countries in 2004. The newest members are largely former members of the Soviet Union. Unlike the older EU member

nations, they had to make notable concessions regarding the treatment of minorities and refugees. Now that they are EU members, they will—as one knowledgeable academic grouping notes—be "unwilling to remodel their domestic legislation again.... To be sure, the present Member States will lose much of their bargaining power vis-a-vis the candidate states once these have been admitted to the club. It is acknowledged by most working in the field ... that the scope of sub-regional policies have yet to bring about a viable refugee protection framework that guarantees adequate protection to refugees in the applicant states."⁵⁴

North Korea threatened to withdraw from regional nuclear weapons discussions unless the US repealed the October 2004 North Korean Human Rights Act. This US legislation removed barriers for North Koreans wishing to obtain asylum in the US. It allocated \$20,000,000 per year to help settle those North Koreans who apply for asylum.

In December 2005, Egyptian police killed a dozen Sudanese war refugees in Cairo. Hundreds had occupied a squatter's camp, established to protest: (a) the UN refusal to support their quest for refugee status; and (b) Egypt's refusal to resettle them in a third country. The UN Commissioner for Refugees merely responded: "There is no justification for such violence and loss of life."

A November 2007 Canadian federal court ruled that Canadian authorities could no longer turn back asylum seekers at the US-Canadian border, notwithstanding an earlier refugee treaty designed to prevent asylum-shopping. The lower court determined that the US was not a safe country for refugees. Its War on Terror policies appeared to violate both the UN Refugee Convention and the UN Convention on Torture [§9.6.B.4(d-e); 7(a)]. This landmark decision was reversed in July 2008. The lower court appeared to overstep its authority by attempting to pronounce on "wide swaths of US policy and practice."

Canada's Federal Court of Appeal ruled that the proper test was whether the Canadian cabinet had acted in good faith when it negotiated the 2004 Safe Third Country Agreement and was then satisfied that the US granted sufficient protections to refugee claimants. The court majority's reasons included "that the US does not 'actually' comply is irrelevant." It determined that so long as the Cabinet had "considered" the human rights situation in the US and was not acting in bad faith in entering into the agreement, the reality facing refugees affected by the agreement does not matter.⁵⁵

4. US Interpretation The most famous case decided by any national court of a State party to the 1951 Refugee Convention has also been the most widely criticized. The following US Supreme Court case applied the “return” provision to Haitian refugees who sought asylum in the United States. In 1991, a group of military leaders displaced the government of Jean-Bertrand Aristide, the first democratically elected president in Haitian history. All parties to the litigation agreed that since this military coup, “hundreds of Haitians have been killed, tortured, detained without a warrant, or subjected to violence and the destruction of their property because of their political beliefs. Thousands have been forced into hiding.”

Following the coup, the US Coast Guard suspended repatriations for a period of several weeks, and the US imposed economic sanctions on Haiti. In the meantime the Haitian exodus expanded dramatically. During the next six months, the Coast Guard interdicted more than 34,000 Haitians. Because so many of them could not be safely processed on Coast Guard cutters, the Department of Defense established temporary facilities at the US Naval Base in Guantanamo, Cuba, to accommodate them during the screening process. In May 1992, the US Navy determined that no additional migrants could safely be accommodated at Guantanamo. This background set the stage for the US action that allegedly violated its commitments under the treaty.

President Clinton directed the Coast Guard to intercept vessels illegally transporting passengers from Haiti to the US and to return those passengers to Haiti without first determining whether they may qualify as “refugees” under the 1951 UN Convention Relating to the Status of Refugees. This reaction posed the question of whether such forced repatriation to Haiti violated the US Immigration and Nationality Act (INA) and Article 33 of the UN Protocol Relating to the Status of Refugees. The US Immigration Act was supposedly amended to codify the US treaty commitment under the 1951 Refugee Convention.

The treaty gap that triggered this litigation involved how to apply the term “return.”⁵⁶ Did the French-language treaty term *refouler* broadly require a determination of refugee status for *all* returns—even on the high seas—or just those returns occurring after the asylum seeker has arrived within the territory (or territorial waters) of a State that is a party to the 1951 Refugee Convention?

The text and the history of the US legislation, like that of Article 33 of the UN Convention, are completely silent on the applicability of returns undertaken *outside* territorial borders or waters. The “Respondents” (Haitians) argued that the 1967 Protocol’s broad remedial goals prohibit a nation from repatriating refugees to their potential oppressors—whether or not the refugees are the objects of the US return within or beyond US territory.

The drafters of the 1951 Convention and the parties to the companion Protocol—like the drafters of the conforming 1980 US immigration law amendment—apparently did not contemplate that any nation would ever gather fleeing refugees and then return them to the very country from which they so desperately sought to escape:



Sale v. Haitian Centers Council

SUPREME COURT OF THE UNITED STATES

509 U.S. 155 (1993)

Associate Justice Blackman, dissenting.

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Under Chapter Four, click Sale v. Haitian.

The Supreme Court majority found that no treaty can impose unanticipated extraterritorial obligations on those who ratify it, regardless of the general humanitarian intent of the treaty. Because the text of Article 33 did not *authorize* a signatory’s “returns” outside of its territory, it could not be interpreted to *prohibit* such actions.

Questions: Could one argue that the majority of the court effectively violated the “spirit” of the Article 33 “refouler” provision? Did the US Supreme Court majority’s restrictive interpretation of the treaty’s refoulement provision violate US obligations under the Refugee Convention? Alternatively, should such situations be left to the discretion of each State to apply either a broad or a narrow construction? Should the treaty be amended to clarify this point? If so, would there be a danger in reopening the treaty to national interpretations which could water down what rights are already expressed in the Convention and Protocol?

Justice Blackmun was not the only “dissenter.” The majority’s decision was chastised by the President of the American Society of International Law in the Society’s Newsletter of Sept.–Oct. 1993. Society President Louis Henkin therein remarked that “the Supreme Court has adopted an eccentric, highly implausible interpretation of a treaty. It has interpreted those treaties ... not as other state parties would interpret them, not as an international tribunal would interpret them, [and] not as the US Supreme Court would have interpreted them earlier in our history when the justices took the law of nations seriously, when they appeared to recognize that in such cases US courts were sitting in effect as international tribunals.”⁵⁷

As the above 1993 Haitian case illustrates, no UN program or treaty has fully accomplished the goal of eradicating the problems identified in *Sale*. The primary barrier is national distrust. Many countries share the concern about potential UN or treaty interference with nationality decisions that they would like to make on a case-by-case basis. Their view, effectively, is that the State’s treatment of individuals remains a matter that should be exclusively within national jurisdiction. *Sale* arguably provided another illustration of the disdain shown by certain national courts for broad interpretations of their treaty commitments.

Consider this passage from perhaps the most authoritative statement about refugee law, penned by a former UN High Commissioner for Refugees. He was referring to the principle of *non-refoulement* and contemporary applications of the 1951 Convention and its 1967 Protocol: “If each State remains absolutely free to determine the status of asylum seekers and either to abide by or ignore the principle of nonrefoulement, then the refugee’s status in international law is denied and the standing, authority, and effectiveness of the principles and institutions of protection are seriously undermined.”⁵⁸

In a new challenge to Refugee Convention expectations, the US Border Patrol may—as of August 2004—return foreigners to their home country *without* a hearing before an immigration judge. A Department of Homeland Security notice authorizes an expedited removal process for aliens who cannot demonstrate to the border patrol agent, within 100 miles of any US border, that they have been in the US for fourteen days before the encounter. Amnesty International’s response was that “Someone else, someone a few steps removed from the ‘heat of battle,’ needs to

make the life-and-death judgment call whether those apprehended should be removed to their country of origin.”⁵⁹

In a comparable Coast Guard incident, this government service applies a “wet feet, dry feet” test for determining whether an asylum applicant has arrived on US soil. The policy was instituted in 1980, after the Muriel Boat Lift, whereby a presidential dinner remark effectively invited all willing Cubans to flee to US shores. One group arrived on the unused Seven Mile Bridge in the Florida Keys. It is not connected to land at either end. It is affixed to the ocean floor. The Coast Guard characterized this landing as a “wet feet” landing on a manmade object because the bridge is essentially a “buoy.” The Cuban asylum applicants characterized the bridge as providing a “dry feet” landing. It is historically a part of the US, having been built in 1909 for the purpose of extending the eastern coast of Florida. If you were the judge, how would you rule?⁶⁰

◆ §4.3 CORPORATE NATIONALITY

A. Theoretical Underpinning A corporation is considered a legal “person” under the national law of most nations. There are a variety of entities to which this section could apply. The most common form is that of the “corporation,” a business entity created for the purpose of limiting liability beyond that which is available to a natural person. This section will use the term “corporation” to refer collectively to all such institutions.

Traditional analyses distinguish between the subjects and objects of International Law. As discussed earlier in this chapter and in the human rights chapter, individuals were not the subjects of International Law prior to World War II. States essentially had the corner on that market. As the Holocaust horrors were revealed, that theory gave way to the realization that an individual could act in ways that triggered criminal responsibility under International Law.

Given the post-WWII explosion of cross-border business activities, a number of multinational corporations generate more revenue than the countries where they operate. The classical subject-object distinction—regarding corporate status under International Law—raised doubts about its continuing vitality. As assessed by Stephan Tully, legal officer of the Migration and Refugee Review Tribunals in Sydney, Australia:

International lawyers are overly wedded to the subject-object distinction and questions of international legal personality. Whereas governments are the most authoritative actors within the vertically aligned state, they are just one entity among a plurality of autonomous actors within the horizontally structured international legal order.

...

The international legal personality of corporations is derivative [from their home nations] and limited, whereas that of states is original and subjective [because States are the self-made subjects of International Law].

...

International legal theory also acknowledges that corporations can conclude contracts with governments and have standing before arbitral or judicial fora.

As Geneva's Dr. Cynthia Wallace adds: "The juridical picture has accordingly evolved ... to take into account some of the changing realities. The involvement of these [corporate] entities with the governments ... of foreign countries may call for the application of international law or general principles of law and for direct recourse, by the private corporations involved, to international arbitration."⁶¹

This chapter previously addressed the legal bond of nationality linking the individual and his or her native State. There are instances where a corporation needs like protection on the international level. A corporation may be taxed by more than one country, each claiming that the corporation is its citizen. It may be nationalized by the host country without adequate (or any) compensation to the shareholders [§4.4.B.3(b)].

The genuineness of an individual's nationality link with a particular State is comparatively easy to establish (*Nottebohm*). The genuineness of a corporation's link with a particular country is a more complex question. Today's multinational enterprises are often owned by parent corporations and, in turn, by numerous shareholders residing in various countries. When the enterprise is harmed, it is the individual shareholder owners who are actually harmed. These investors sometimes seek the assistance of the States of their individual nationalities to help them obtain a remedy for the wrong done to the multinational enterprise.

Other times they seek such help in the name of the corporation.

B. Practical Application Studying corporations is also important for reasons beyond determining with which State they are properly aligned—for purposes of diplomatic representation, arbitrations, or cases filed in regional or global tribunals. A number of these "multinationals" generate annual earnings eclipsing the gross national product of the nations wherein they operate. Some have thus wielded a heavy hand in terms of influencing State behavior. A 1909 US Supreme Court antitrust case provides a classic illustration. Costa Rica nationalized the plaintiff US corporation's assets. The apparent motive for this property taking was provided by another US corporation, which conspired with the government to monopolize the lucrative Central American banana trade.⁶² UN codes of conduct have since evolved in the contemporary effort to control the corporate potential for harming both nations and their inhabitants [§12.5.D].

Like a natural person, a business entity possesses nationality under International Law. It, too, can be harmed in and by foreign countries. Like individuals, corporations such as the US corporation harmed by Costa Rica in the preceding paragraph lack the international legal capacity to seek remedies for wrongs. Historically, corporations have had to convince their home governments to present claims on their behalf, usually via diplomatic efforts on their behalf or the national pursuit of litigation in an international tribunal against the offending State. But States are not *obligated* to present such claims on an international level.

In an age when many corporations engage in business transactions around the globe, the issue of the corporation's legal situs—where it can claim citizenship—presents a judicial quagmire. A number of European nations treat a multinational corporation as a national of the country where its headquarters or home office is located. In the United States, a corporation is a US national if it is incorporated in one of its fifty states. In the UN International Law Commission's view, corporate nationality is either: (a) the nation wherein the corporation was created and thus incorporated; or (b) that of another country, when the corporation consists of foreign nationals; and: (i) has no ties with the place of incorporation, and (ii) the corporation is controlled in the other country. Per the 2006 Report of the International Law

Commission: “the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.”⁶³

Which country may legally espouse a claim on behalf of a corporation? Consider this hypothetical: Assume that Investco is a large multinational corporation located in Hong Kong. It is owned by shareholders from Brazil, France, Germany, South Africa, and the United States. Assume that the Chinese government nationalizes Investco’s assets after the 1997 takeover of

Hong Kong. The PRC does so without any compensation. Under International Law, not all of the “shareholder” nations have the capacity to present a claim for compensation against China. By analogy, the ICJ determined that Mr. Nottebohm’s receipt of a new nationality did not authorize Liechtenstein to present his property claim against Guatemala. A similar analysis is appropriate in the case of corporations when they have ties with more than one nation. A tribunal would have to decide which nation best represents Investco’s corporate personality. Under International Law, the appropriate State is normally the State where Investco is incorporated.

There are exceptions, however, as discussed in the following case:

Barcelona Traction, Light, and Power Co.

INTERNATIONAL COURT OF JUSTICE

1970 INTERNATIONAL COURT OF JUSTICE REPORTS (Second Phase) 3 (5 Feb. 1970)

<<http://www.icj-cij.org/docket/files/50/5387.pdf>>

AUTHOR’S NOTE: Barcelona Traction was incorporated in Canada. It operated a power company in Spain. It was declared bankrupt by a Spanish court, which ordered the seizure of its assets. Belgium, England, Canada, and the US all tried to assist Barcelona Traction in resisting the seizure.

Individual citizens in these countries owned the stock of the corporation. The shareholders believed that the Spanish authorities prematurely sought bankruptcy for some ulterior purpose. The corporation was a legal person, separate from its stockholders, and claiming that it was a corporate citizen of Canada. However, Canada exercised its State discretion, by choosing not to process this claim on behalf of the Canadian shareholders or the corporation.

Belgian nationals owned eighty-eight percent of the Barcelona Traction stock at the time the bankruptcy was declared. Belgium thus decided to prosecute this action in the ICJ against Spain, because the majority of the individual shareholders were Belgians.

The ICJ dismissed this suit. It ruled that Belgium could not represent Barcelona Traction. If the country

of incorporation (Canada) was unwilling to pursue the claim, the State of the majority of the individual shareholders (Belgium) could not do so. Selected portions of the ICJ’s opinion present the Court’s rationale for vesting the country of incorporation with the exclusive right of representation on the international plane (in diplomatic or international judicial proceedings). The paragraph numbers are those of the Court.

COURT’S OPINION:

...

70. In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office... . However, in the particular field of the diplomatic protection of corporate entities, no absolute test of the “genuine connection” has found general acceptance... .

71. In the present case, it is not disputed that the company was incorporated in Canada and has its registered office in that country. The incorporation of the company under the law of Canada was an act of free choice. Not only did the founders of the company seek its incorporation under Canadian law but it has remained under that law for a period of over 50 years. It has maintained in Canada its registered office, its accounts and its share registers. Board meetings were held there for many years; it has been listed in the records of the Canadian tax authorities. A close and permanent connection has been established, fortified by the passage of over half a century. This connection is in no way weakened by the fact that the company engaged from the very outset in commercial activities outside Canada, for that was its declared object. Barcelona Traction's links with Canada are thus manifold.

72. Furthermore, the Canadian nationality of the company has received general recognition. Prior to the institution of proceedings before the Court, three other governments apart from that of Canada (those of the United Kingdom, the United States and Belgium) made representations concerning the treatment accorded to Barcelona Traction by the Spanish authorities. The United Kingdom Government intervened on behalf of bondholders and of shareholders. Several representations were also made by the United States Government, but not on behalf of the Barcelona Traction company as such.

...

75. The Canadian Government itself, which never appears to have doubted its right to intervene on the company's behalf, exercised the protection of Barcelona Traction by diplomatic representation for a number of years, in particular by its note of 27 March 1948, in which it alleged that a denial of justice had been committed in respect of the Barcelona Traction, Ebro and National Trust companies, and requested that the bankruptcy judgment be canceled...

76. In sum, the record shows that from 1948 onwards the Canadian Government made to the Spanish Government numerous representations which cannot be viewed otherwise than as the exercise of diplomatic protection in respect of the Barcelona Traction company. Therefore this was not a case where diplomatic protection was [totally] refused or remained in the sphere of fiction. It is also clear that over the whole

period of its diplomatic activity the Canadian Government proceeded in full knowledge of the Belgian attitude and activity.

...

78. The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural [individuals] or legal [corporate] persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is to resort to municipal [internal] law, if means are available, with a view to furthering their cause or obtaining redress.... However, all these questions remain within the province of municipal law and do not affect the position internationally.

79. The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action. Whatever the reasons for any change of attitude, the fact cannot in itself constitute a justification for the exercise of diplomatic protection by another government, unless there is some independent and otherwise valid ground for that.

...

88. It follows from what has already been stated above that, where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim.

...

96. The Court considers that the [unsuccessfully argued] adoption of the theory of diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in international economic relations. The danger would be all the greater inasmuch as the shares of companies whose activity is international are widely scattered and frequently change hands.

It might perhaps be claimed that, if the right of protection belonging to the national States of the shareholders were considered as only secondary to that of the national State of the company, there would be less danger of difficulties of the kind contemplated. However, the Court must state that the essence of a secondary right is that it only comes into existence at the time when the original right ceases to exist [for example, the State of incorporation ceases to exist—as discussed in §2.4]... .

100. In the present case, it is clear from what has been said above that Barcelona Traction was never reduced to a position of impotence such that it could not have approached its national State, Canada, to ask for its diplomatic protection, and that, as far as appeared to the Court, there was nothing to prevent Canada from continuing to grant its diplomatic protection to Barcelona Traction if it had considered that it should do so.

...

The Court's language in this 1970 opinion solidly vests the appropriate State with the sole discretion to determine whether it will process a claim for a corporation. Should the shareholders be able to have their claims espoused by *another* country? In their own right, as individuals in a claim

against a State? Consider the following more recent case, decided under the International Convention on Settlement of Investment Disputes between States and Nationals of Other States. It presents the contemporary view of the relevant shareholder rights under International Law:

CMS Gas Transmission Company (Claimant) v. The Republic of Argentina (Respondent)

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Case No. ARB/01/8

42 International Legal Materials 788 (2003)

AUTHOR'S NOTE: CMS is a US corporation. It lodged this arbitration against Argentina in the International Centre for Settlement of Investment Disputes (ICSID), which is located in Washington, DC. Argentina had suspended a tariff adjustment formula, for gas transportation by an enterprise in which CMS had invested (by granting it licenses). Argentina enacted new privatization measures related to the gas sector of its national economy. Those measures applied to a company ("TGN") in which CMS had invested. Argentina's new regulations were allegedly applied in a way that therefore harmed CMS investments—supposedly in violation of a bilateral investment treaty ("BIT") between the US and Argentina.

The following segment of this case addresses just the question of whether the CMS corporation had the legal

standing ("*jus standi*") to seek relief from Argentina. The Republic essentially claimed that—regardless of the *merits* of the CMS claim—CMS was not the proper plaintiff to present this claim. Therefore, the CMS claim could not be heard by this tribunal ("admissibility").

TRIBUNAL'S OPINION:

Decision of the Tribunal on Objections to Jurisdiction

...

Objection to admissibility on the issue of the Claimant's *jus standi* [legal standing]:

36. The Republic of Argentina has objected to the admissibility of the claim by CMS on the ground that the Claimant does not hold the rights upon which it bases its claim—to wit, TGN being the licensee, and

CMS only a minority shareholder in this company, only TGN could claim for any damage suffered. ... It follows, in the Respondent's view, that CMS is claiming not for direct damages but for indirect damages which could result from its minority participation in TGN.

...

43. The parties have turned next to the discussion of the situation under international law, with particular reference to the meaning and extent of the *Barcelona Traction* decision. Counsel for the Republic of Argentina are right when arguing that that decision ruled out the protection of investors by the State of their nationality when that State is different from the State of incorporation of the corporate entity concerned. ... However, Counsel for the Claimant [CMS] are also right ... it did not rule out the possibility of extending protection to shareholders in a corporation in different contexts. Specifically, the International Court of Justice was well aware of the new trends in respect of the protection of foreign investors under the 1965 Convention and the bilateral investment treaties related thereto.

...

46. The Republic of Argentina has advanced the argument that, when shareholders have been protected separately from the affected corporation, this occurred in cases where the shareholders were majority or controlling, not *minority* shareholders as in the instant case. This fact may be true, but it is equally true, as argued by the Claimant ...; rather they were concerned with the possibility of protecting shareholders

independently from the affected corporation, that is, solely with the issue of the corporate legal personality and its limits [italics added].

47. State practice further supports the meaning of this changing scenario. Besides accepting the protection of shareholders ... , the concept of limiting it to majority or controlling participations has given way to a lower threshold in this respect. Minority and non-controlling participations have thus been included in the protection granted or have been admitted to [make a] claim in their own right. Contemporary practice relating to ... the decisions of the Iran-United States Tribunal and the rules and decisions of the United Nations Compensation Commission ... evidence increasing flexibility in the handling of international claims.

48. The Tribunal therefore finds no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders. Although it is true, as argued by the Republic of Argentina, that this is mostly the result of ... specific treaty arrangements that have so allowed, ... [and] is so prevalent that it can now be considered the general rule, certainly in respect of foreign investments and increasingly in respect of other matters. To the extent that customary international law or generally the traditional law of international claims might have followed a different approach—a proposition that is open to debate—then that [traditional] approach can [now] be considered the exception.

Assume that you represent the respondent Argentina. You have now considered both the ICJ's *Barcelona Traction* and ICSID's *CMS* case. *CMS* is evidence that the bright-line *Barcelona Traction* rule (only the State of incorporation can espouse claims on behalf of a corporation) is too rigid for contemporary cross-border investment decisions. Your country wants to encourage more foreign investment. Should you therefore recommend that your nation continue to object to *CMS*-like claims being heard in an international investment tribunal like the ICSID? Should the rule for a corporation (*Barcelona Traction*) or its shareholders (*CMS*)—as to who can tender claims in an international forum—be, instead, the *Nottebohm* “genuine link” test applied to individuals?

◆ §4.4. INJURY TO ALIENS

INTRODUCTION

State responsibility is a vast component of International Law. It appears (not always on the front burner) throughout the chapters of any textbook on this subject. As discussed in §2.5.B., for example, there have been numerous attempts to achieve consensus on articulating this facet of International Law—mostly without complete success. States, the *prima donnas* of the international stage, are not directly involved in such attempts. Do-gooder codifiers will thus be incredibly talented if they manage to overcome the State inertia likely to drag out any draft UN treaty on this subject.

This section of the book covers a smaller piece of State responsibility, which is somewhat more enmeshed in International Law via the customary practice of States: Injury to Aliens. It dovetails with the prior introductory analyses of the individual and corporation under International Law. Essentially, a State may be held accountable for the acts of its agents, harming aliens in a way that treats them differently from its own citizens.

Early commentators had practical reasons for focusing on this category of State responsibility.⁶⁴ Many nationals of one State—who have lived, traveled, or worked in another State—have endured abuse and discrimination throughout recorded history. As noted by a leading study: “Since ancient times foreigners have been regarded with suspicion, if not fear, either due to their non-conforming religious and social customs, their assumed inferiority, or because they were considered potential spies and agents of other nations. The Romans refused aliens the benefits of the *jus civile* [civil law], thirteenth-century England limited their recourse to the ordinary courts of justice [rather than all courts], and imperial Spain denied them trading rights in the New World.” Too often, word and deed have yet to merge.

The development of the law of State responsibility for injury to aliens had its roots in the writings of one of the foremost commentators of the 18th century. Over 250 years ago, Emmerich de Vattel expressed this theme in his influential book on the *Law of Nations*:

¶71. ... Private persons who are members of one nation, may offend and ill-treat the citizens of another, and may [thus] injure a foreign sovereign.... Whoever uses a [foreign] citizen ill, indirectly offends the state, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, ... since otherwise the citizen would not obtain the great end of the civil association, which is, safety.

¶72. But ... the nation or the sovereign ought not to suffer the citizens to do an injury to the subjects of another state, much less to offend that state itself: and this, not only because no sovereign ought to permit those who are under his command to violate the precepts of the law of nature, which forbids all injuries—but also because nations ought mutually to respect each other, to abstain from all offence, from all injury, from all wrong.... If a sovereign, who might keep his subjects within the rules of justice and peace, suffers them to injure a foreign nation either in its

body or its members, he does no less injury to that nation than if he injured it himself. In short, the safety of the state, and that of human society, requires this attention from every sovereign. If you let loose the reins to your subjects against foreign nations, these will behave in the same manner to you; and, instead of that friendly intercourse which nature has established between all men, we shall see nothing but one vast and dreadful scene of plunder between nation and nation.⁶⁵

His articulation was adopted by many international tribunals and commentators as the rationale for recognizing State responsibility for injury to aliens. The US Supreme Court, for example, continues to cite de Vattel as the authoritative source of the Law of Nations.⁶⁶ As the 19th century philosopher Hermann Cohen wrote: “The alien was to be protected not because he was a member of one’s family, clan, or religious community, but because he was a human being.”

One might, at this particular point in an International Law discourse, consider the immutable November 2005 remark of US Senator John McCain (a US prisoner of war in North Viet Nam for five-and-a-half years during the Viet Nam War). Speaking about the US detentions of alien detainees at the US military base in Cuba, he said: “It’s not about who *they* are. It’s about who *we* are” (*italics added*). One might view his classic statement as a restatement of an underlying rationale for the law of State responsibility to aliens.

But word and deed have not fused. Russia’s unusual treatment of Georgians in the fall of 2006 provides a powerful example. Georgia arrested four Russian military officers and a dozen civilians for spying in Georgia. Georgian forces surrounded Russia’s military headquarters in Tbilisi to demand the handover of yet another Russian officer. Russia’s retaliation was swift and focused. Georgia’s ambassador to Moscow was summoned to the Russian foreign ministry and given a protest note demanding the immediate release of the officers. There was no problem with that particular response. At least in the city of Moscow, however, Georgian restaurants were targeted for additional health inspections and closings. Georgians were also the focus of intense Russian immigration efforts to deport as many Georgians as possible, and for a short period, almost without regard to immigration violations by any other group of foreign citizens. To the extent that Russian authorities thus discriminated

against Georgians, Russia theoretically incurred State responsibility for injury to aliens.

This branch of State responsibility relied on the internal tort law applied by many States. Tort law governs civil wrongs by an individual for unreasonable conduct that harms another individual. If someone takes the property of another without justification, that person is liable under the internal tort law of many nations. Writers and jurists believed that a State should be similarly liable when its unreasonable acts or omissions harmed aliens. Such protection was necessary because national law typically insulated the State from the claims of its own citizens. When State X nationalized the property of a foreign citizen without compensation, that citizen's home State Y could assert a case against State X because of X's responsibility for discriminating against an alien.

A. CODIFICATION ATTEMPTS

The law of State responsibility for injury to aliens is not codified in a comprehensive multilateral treaty. As the International Law textbook, used for many years, at Russia's Moscow State University urges: "codification is now an urgent task. Members of the League of Nations sought to codify those norms of international law dealing with the responsibility of States for damage to the person or property of foreigners (which efforts served the interests of imperialist States)."⁶⁷

Several attempts have been made to codify the law of State responsibility for injuries to foreign individuals and corporations. The first was the 1929 draft Convention on Responsibility of States for Damage Done on Their Territory to the Person or Property of Foreigners. It was compiled and produced under the auspices of the Harvard Law School Research in International Law Project during the period between the two world wars. Another campaign to codify this branch of State responsibility surfaced in 1953 when members of the UN General Assembly decided that "it is desirable for the maintenance of peaceful relations between States that the principles of international law governing State responsibility be codified." This UN resolution resulted in the drafting of several reports on various facets of State responsibility. Those reports did not, however, generate a written multilateral agreement.⁶⁸

One of the most extensive presentations of the law of State responsibility toward aliens was published in 1961: the Draft Convention on the International

Responsibility of States for Injury to Aliens. The authors were Harvard University Professors Louis Sohn and Marvin Baxter. Their work exemplifies the Western view that underdeveloped nations have a significant interest in importing foreign investment and technological assistance and can profit by the just treatment of foreign corporations and employees. The Sohn-Baxter perspective is that both developed and lesser-developed nations should encourage the fair and nondiscriminatory treatment of their citizens while abroad. This draft treaty does not incorporate the views of all commentators. It is an alternative, however, to the so-called Third World New International Economic Order (described below), whereby a State may treat aliens differently than its own citizens.⁶⁹

Current UN efforts to codify State responsibility have not yet produced *final* draft articles on this particular feature of State responsibility. The recent 1998 draft is admittedly silent because "one *should not* find in the state responsibility draft articles a discussion of the law governing, for example, expropriation of the property of foreign nationals."⁷⁰ This project, as it continues to develop, will hopefully contain draft treaty articles, which may serve as a generally acceptable basis for greater international cooperation on this pre-medieval problem.

B. CATEGORIES OF INJURY

What specific State conduct triggers responsibility for injury to aliens? Classification is not exactly an easy task. But customary violations may be stated with comparative ease:

- (1) Nonwealth injuries;
- (2) Denial of justice, including what some writers characterize as separate subcategories of wrongful arrest and detention, and lack of due diligence;
- (3) Confiscation of property; and
- (4) Deprivation of livelihood.

1. Nonwealth Injuries This form of State responsibility evolved from the unreasonable acts or omissions of State agents, which caused death or physical injury to foreign citizens. A 1983 report by the Panel on the Law of State Responsibility of the American Society of International Law defined nonwealth injury as "an injury inflicted by a State upon an alien either (1) directly through some act or omission causing physical or other personal injury to or the death of an alien, or (2) indirectly through some failure to act, including the failure

under certain circumstances to prevent injury inflicted by another party, the failure to provide the injured alien with an effective remedy, or the failure to pursue, prosecute, and punish the responsible party.”⁷¹

This category of harm is distinguished from the other types of State responsibility by its physical attributes. While a nonwealth injury can have economic consequences, the harm is not directed at the victim’s pocket-book. In October 1965, for example, Indonesian army forces conducted a campaign directed at Chinese nationals in Indonesia. Chinese citizens were beaten, arrested without cause, and murdered. In addition, Indonesia’s army issued permits allowing civilians to demonstrate for the purpose of persecuting Chinese nationals. The Chinese government sought and received assurances from Indonesia’s central government that this violence would end. Had the Indonesian government refused the Chinese demands, it would have incurred further responsibility for physical nonwealth injuries to China’s nationals.

2. Denial of Justice

(a) *Discrimination against Aliens* A State’s discriminatory application of its domestic laws to an alien is described as a “denial of justice.” This is now a somewhat “procedural” form of injury, rather than a physical harm. The standard procedures, which apply to the benefit of a local citizen, are withheld from an alien.

Two to three centuries ago, denial of justice not only typically involved physical harm—it also was a cause célèbre for declaring war. As vividly recounted by Northwestern Law School Professor Anthony D’Amato:

The masses of people then ... reacted far more to stories of maltreatment of their fellow citizens ... than they did to the plotting of kings and princes for national expansion. ... The best way to raise an army was to whip up public sentiment against a foreign country, and public sentiment was most easily aroused when stories could be spread of insults to ambassadors abroad or denials of justice to fellow citizens traveling abroad. An insult to the nation’s honor that could be felt in sympathy by every citizen was much more effective in mobilizing the troops than were appeals for conquest.

Perhaps the most influential international law writer of the time, Emmerich de Vattel, referred specifically to “denial of justice” to aliens abroad as a

justification for wars of reprisal launched by the alien’s home nation.

...

[Alexander Hamilton] was obviously afraid of what [U.S.] state courts might do in cases involving foreigners. ... [because] state courts in 1787 were notoriously biased against foreigners. The result in state courts could be the occasion of the very thing Hamilton feared most—the denial of justice to an alien. Hence, federal courts, with judges more insulated against state passions and more aware of the importance of maintaining neutrality for the new nation, were given direct jurisdictional authorization over cases brought by aliens alleging torts in violation of the law of nations.

Thus, the Alien Tort Statute [textbook §10.3 on national human rights legislation] was an important part of a national security interest in 1789. Acutely recognizing that denials of justice could provide a major excuse for a European power to launch a full-scale attack on our nation, the Founding Fathers made sure that any such provocation could be nipped in the bud by the impartial processes of the federal courts.⁷²

The US federal courts would also establish “Diversity of Alienage” subject matter jurisdiction in the 1789 Judiciary Act. That provided a federal forum within which aliens could sue, or be sued. Often located in more sophisticated urban environments (when a federal judge was not dispensing horseback justice), the federal courts thus played a role in ameliorating the impact of discrimination against aliens (but not all US residents, such as Dred Scott—when the Supreme Court barred him from suing in a federal court a half century later—because as a former slave, he was not a “person” within the meaning of the applicable federal statute).⁷³

Currently, there is no uniform definition of the term “denial of justice.” National and international tribunals have nevertheless found a denial of justice in countless cases. There are some limitations, however. In Latin American States, a denial of justice can occur only when the State has *completely* refused access to its courts—or its courts will not take the necessary steps to render a decision. The regional perspective is that there can never be a denial of justice based on the quality or unsatisfactory nature of the procedures used by the tribunal when it is deciding an alien’s claim. If there is some access to some tribunal, which will ultimately decide the particular matter, then a foreign citizen cannot complain about

the quality of justice although different procedures apply in his or her own home state.⁷⁴

Most nations adopt a broader interpretation of the term “denial of justice.” A State can be responsible for injuring an alien when its tribunals do not provide adequate time or legal representation to prepare a defense. This must occur in a way that provides less protection than that afforded to the offending State’s own citizens. If local citizens are allowed to seek legal assistance, it would be a denial of justice to withhold that right just because the prisoner is a foreign citizen.

(b) International Minimum Standard Another subcategory of denial of justice is the unreasonable arrest and detention of an alien. Incarceration is thereby unlawful (under International Law) when it discriminates against aliens. States must not unreasonably depart from generally accepted confinement procedures. An arresting State would be liable if it failed to give a reason for the arrest or detention of an alien defendant or if trial were delayed for an unreasonable time after arrest. Some might argue that the US violated this principle by ignoring the decision of the International Court of Justice when various Mexican nationals were executed in the absence of receiving their “right to *consul*” under the Vienna Convention on Consular Relations [Diplomatic Functions: §2.7.C.2 *Avena* case & Self-Executing v. Declaration of Intent treaty: §7.1.B.4. *Medellin* case].

Can a State incur liability for a denial of justice when it treats foreign citizens in the *same* way that it treats its own citizens? A variation on the denial of justice theme arises when a State treats a foreign citizen in a standard way and then defends on the basis of equal treatment of all individuals in the same circumstances. This problem triggers the daunting question of whether there is an international minimum standard (IMS) below which no State may fall in its treatment of all individuals including its own citizens. The comparatively poor treatment of individuals is not discriminatory as long as there is no discrimination against aliens. Both foreign and local citizens are subjected to the same type of treatment. If an IMS does exist, however, that State would not be able to use equality of treatment to justify its falling below the IMS regarding the treatment of both foreign and local citizens.

The historical maturation of such a standard has been retarded by economic and political differences between Western States and States in lesser-developed regions of

the world. What is probably the most definitive (and equally broad) statement defining the IMS was made by US Secretary of State Elihu Root in 1910:

Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization.

There is [however] a standard of justice very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The ... system of law and administration shall conform to this general standard. If any country’s system of law and administration does not conform to that standard, although the people of the country may be content to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment of its citizens.⁷⁵

There have been some UN-driven codification attempts. They generally protect human rights in the prisoner’s context. However, as is typical of broadly worded statements of principle with which no State could disagree, they prohibit torture and inhumane conditions without defining those terms. In 1955, the first UN Congress on the Prevention of Crime and the Treatment of Offenders sought to promote a general consensus about generally accepted treatment of prisoners and management of penal institutions. This Congress promulgated the Standard Minimum Rules for the Treatment of Prisoners, which was approved by the Economic and Social Council in its 1957 Resolution 663. While it expressly denied any intent to draft a model system of penal institutions, its work is still regarded as one of the seminal statements regarding international standards for the treatment of prisoners. Its *Basic Principle* is that “[t]here shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The 1988 UN General Assembly Resolution 43/173 then promulgated the Body of Principles for the Protection of All Persons Under any Form of

Detention or Imprisonment. *Principle 1* provides that all persons “shall be treated in a humane manner and with respect for the inherent dignity of the human person.” *Principle 6* adds that no one “shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.”⁷⁶

An IMS has been uniformly asserted in the following circumstances: the complaining State asserts that the responsible State departed from generally accepted standards of justice for the latter’s treatment of *all* individuals, both foreign and domestic. The responding State typically counters its actions by relying on the “national treatment” standard set forth in the 1933 Montevideo Convention on Rights and Duties of States (ratified mostly by Latin American nations). A foreign citizen is thereby entitled to no better treatment than the local citizens of the responding State. Equal treatment of local and foreign nationals precludes any international liability for injury to an alien.

There is no clear consensus about the existence or scope of the IMS, partially because of the comparative economic positions of the nations usually involved in these controversies. One of the few but enlightening cases applying the so-called IMS is the following 2003 North American Free Trade Agreement panel case:



**In The Proceeding Between
The Loewen Group, Inc. and
Raymond L. Loewen
(Claimants) and United States
of America (Respondent)**

INTERNATIONAL CENTRE FOR SETTLEMENT OF
INVESTMENT DISPUTES (JUNE 26, 2003)
Case No. ARB(AF)/98/3

Go to Course Web Page, at:
<<http://home.att.net/~sломansonb/txtcsesite.html>>.
Under Chapter Four, click Loewen v. US.

(c) Lack of Due Diligence A State may incur responsibility under International Law although the principal actor is *not* an agent of the State. A State’s failure to exercise due diligence to protect a foreign citizen is wrongful if the unpunished act of a private individual is a crime under the

laws of that State (or generally recognized as criminal conduct elsewhere in the principal legal systems of the world). Responsibility then arises under International Law if that State fails to apprehend or control the individual who has committed the crime against the foreign citizen.

Examples include the 1979 storming of the US embassy in Iran by Iranian citizens. Iran’s leader denied that his government had arranged for them to storm the embassy and take US citizens hostage because they were foreign citizens from a disfavored nation. Iran nevertheless incurred State responsibility for failing to take any action to stop the crowds from stampeding the persons and property of these foreign citizens (§2.7.E.). A more common example of such State responsibility is the indifference of lower-echelon officials in circumstances where a local citizen would be given prompt assistance. States are expected to control such officials when they act, or fail to act, in a way that would protect a local citizen and thus unreasonably discriminate against an alien who does not receive like treatment.

3. Confiscation of Property There is a significant conflict between traditional Western expectations and contemporary non-Western models, regarding whether either International Law *or* host State law should apply.

(a) Right to Nationalize The State generally possesses inherent power over persons and things within its borders. It may thus nationalize property belonging to foreigners (and local citizens). As succinctly stated by a contemporary Chinese scholar:

Public international law regards nationalization as [a] lawful exercise of state power. This is because each state, being possessed of sovereignty, naturally has the right within its own territory to prescribe whatever economic and social system it chooses to establish. Speaking more concretely, each state has the exclusive right to regulate ... conditions of acquisition, loss, and contents of ownership. Consequently, when one approaches this question from the standpoint of the principle of state sovereignty, one must recognize that states enjoy the right to adopt nationalization measures. Nationalization belongs to matters of national jurisdiction and therefore ... neither the United Nations nor other states have a right to intervene [when another country nationalizes the property of its citizens].⁷⁷

(b) “Confiscation” Limitations

(i) *Whose Law Governs?* Under the traditional Western view, a nationalization must be undertaken for a “public” purpose. It must also be accompanied by “prompt, adequate, and effective” repayment for the property taken by the government.⁷⁸

There is no public purpose when the government takes property that merely adds to the personal holdings of a dictator. Providing *some* compensation does not mean that the compensation is adequate. A nationalization violates the Western-derived formula if the terms of the compensation are less favorable than those provided to citizens of the host State, or the amount of compensation is below the fair market value of the property.

The standard for determining fair market value is subject to a great deal of controversy. Some States do not feel compelled to use any of them. Concepts like “fair market value,” “replacement cost,” and “book value” are rather indefinite terms when applied by experienced accountants, let alone officials or mediators from different legal or social systems.

In a case with major immense political undertones, Fidel Castro orchestrated the revolutionary takeover of Cuba in 1959. The US subsequently imposed a quota on the amount of Cuban sugar importable into the United States. Castro characterized this singular US sugar quota as an act of “aggression, [done] for political purposes.” The Cuban government then nationalized the sugar interests of US individuals and corporations, but not Cuban-owned sugar interests. Cuba was willing to pay for the nationalized sugar interests in its own government bonds—payable twenty years later, at a rate of interest well below that of similar bonds. This type of compensation was legal under the laws of Cuba. The US Department of State viewed it as inadequate, however, referring to it as “manifestly in violation of those principles of international law which have long been accepted by the free countries of the West. It is in its essence discriminatory, arbitrary and confiscatory.” Payment in long-term bonds, at a comparatively low rate of interest, was neither prompt nor adequate. The State Department claimed that Cuba’s purpose was discriminatory because Cuba took the US property as a political response to the US import quota imposed on Cuban sugar.⁷⁹

(ii) *Human Rights Violation* A government’s taking may also be limited by International Humanitarian Law [Laws of War: §9.6]. In the 2005 Eritrea Ethiopia Claims

Commission Case between Ethiopia and Eritrea, Ethiopia claimed that Eritrea illegally confiscated large amounts of property belonging to the Ethiopian Government, Ethiopian nationals, and international aid organizations in Eritrean ports in May 1998. Ethiopia described the claim as “a classic claim for property lost as a result of actions attributable to a foreign government. ... [T]his is a claim for property lost primarily at the port of Assab.” The 1993 independence of Eritrea left Ethiopia without a direct outlet to the sea. Most of Ethiopia’s export and import cargo continued to be shipped via the Eritrean port of Assab. The alleged takings of property allegedly violated the customary international law rules barring takings of property, absent specified conditions (e.g., compensation for even legitimate takings).

Ethiopia contended that the takings violated *other* applicable principles of international law, including provisions of international humanitarian law bearing on shipments of humanitarian goods—in particular, Article 23 of Geneva Convention IV [textbook §9.6.], by blocking the shipment of humanitarian food cargoes present at Assab in May 1998. That article requires the free passage of consignments of medical and hospital stores and religious objects, as well as of certain supplies “for children under fifteen, expectant mothers and maternity cases.” The Claims Commission found that the record failed to establish any such violation. Thus, “[w]hile some medical supplies may have been included in the mass of property remaining at Assab in May 1998, the record did not show that any meaningful proportion was potentially subject to Article 23, that Ethiopia requested the passage of any such goods, or that Ethiopia had any control measures in place to prevent their diversion.”⁸⁰

Although Ethiopia did not prevail on this claim, the proceedings illustrate this meaningful conflict-related limitation on government takings.

(c) *Non-Western Models* A number of lesser-developed countries (LDCs) have adopted an alternative yardstick for measuring the appropriate degree of compensation in such cases. Their position is that the more-developed countries (MDCs), whose corporations operate within their borders, unfairly profit from long-term economic relationships. Foreign multinational corporations have thus been characterized as extracting enormous profits for distant shareholders with little return for

the local citizens. The LDCs do not perceive uncompensated nationalizations of foreign property as necessarily being confiscatory takings in violation of International Law.

One supporting argument is that the MDCs have effectively deprived the LDCs of their national sovereignty over natural resources through unacceptable business arrangements that have historically taken unfair advantage of the LDCs. Huge profits, they argue, have been expatriated to the private shareholders of the MDC multinational corporations. Instead, more of these profits should be injected into the sagging economies of the world's LDCs. An uncompensated nationalization returns only a fraction of what has been improperly taken from the LDC via one-sided business arrangements. This scenario has thus diluted national sovereignty over disappearing natural resources with no tangible benefits for the LDCs.

Many LDCs decided to respond to the above Western-derived compensation requirements via their premise, stated in the UN General Assembly Resolution of 1962 on Permanent Sovereignty over Natural Resources. Its objective was to machinate a paradigm in customary international practice as it evolved while the LDCs were still colonial territories of the MDCs. A fresh standard for determining compensation for expropriations had to be determined under the national law of the host State where the taking occurs. This would be more representative than measuring compensation via the historical practice evolving from an era predating the existence of the vast majority of current members of the international community. The resulting Resolution therefore provides as follows: "[T]he owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures ... [and] the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States ... settlement of the dispute shall be made through arbitration or international adjudication...."⁸¹

There is tension between two competing policies in this East-West, or North-South, dialogue. One is the primacy of a State's territorial jurisdiction over persons and things within its borders. The opposing policy is the historical protection afforded to aliens by the external influence of International Law. The claimed applicability of both policies then spawns a dilemma which pits them against one another. The University of Minnesota's Professor Gerhard von Glahn describes what is clearly

the Western perception of the proper balance between these twin goals:

Each state is the sole judge of the extent to which aliens enjoy civil privileges within its jurisdiction. But beyond those permissive grants, each alien, as a human being, may be said to be endowed with certain rights, both as to person and to property, that are his by virtue of his being. It is primarily in connection with those basic rights that a responsibility by the host state arises. It is in this sphere that claims originate and ... may be advanced against the host state by the government to which the alien owes allegiance.⁸²

The essential feature of this counter to the Western formulation is that national law rather than International Law should govern these MDC-LDC disputes. Foreign shareholders of the affected MDC corporation would be limited to the local remedies of the nationalizing State (if any). The LDC would neither be accused of violating International Law, nor would it have to engage in international adjudication—absent its express consent. This is one of the basic tenets of the New International Economic Order (NIEO) promulgated in 1974 by many nonaligned nations. It will be addressed later in this textbook [§12.4.A.] in the broader context of international economic relations. At present, with respect to this section's analysis of State responsibility for injury to aliens, Pace University (New York) Professor S. Prakash Sinha provides this summary:

They challenge some of the rules of international law as not consistent with their view of the new order and they point to the need for international law to reflect a consensus of the entire world community, including theirs, and promote the widest sharing of values. They criticize the system of international law as being a product of relations among imperialist States and of relations of an imperial character between imperialist States and colonial peoples. ... Moved by the desire to cut inherited burdens, to free themselves from foreign control of their economies, and to obtain capital needed for their programmes of economic reconstruction, the newly independent States have resorted to expropriation of foreign interests. In their opinion, the validity of such expropriation is not a matter of international law.⁸³

On the other hand, the widespread application of this approach could foster economic suicide. Adoption would frustrate the free flow of capital to a State whose leader suddenly nationalized foreign property without paying compensation. Other corporate structures would fear similar treatment by State X. The resulting lack of investment would retard its economic growth.

Neither the Western position (prompt, adequate, effective compensation) nor the Third World position (host State law determines compensation on case-by-case basis) has been adopted in any multilateral treaty. This tension has retarded universal applicability of some major treaties with components seeking to redistribute global wealth. The UN Law of the Sea Treaty, for example, became effective in 1994. However, it contains a number of equitable redistribution principles to which MDCs have objected [especially Exclusive Economic Zone: §6.3.E.].

The Latin American variation to the LDC perception of Western economic hegemony is the “Calvo Doctrine.” It evolved from the tenet that no government should have to accept financial responsibility for civil insurrection resulting in mistreatment of foreign citizens at the hands of insurgents rather than the defending government. The relevant adaptation of this concept is that a State may impose conditions on foreign individuals and corporations who wish to do business within that State’s borders. It may thus require, as a condition of doing business there, that foreigners be treated on equal footing with local citizens. A foreign company doing business in a Calvo jurisdiction must thereby relinquish its right, arising under International Law, to seek the diplomatic assistance of its home State when there has been a nationalization. As exemplified by Article 27.1 of the Mexican Constitution, foreigners must agree to “consider themselves as [Mexican] nationals in respect to such property, and bind themselves not to invoke the protection of their governments....” This constitutional clause thereby waives the right to claim the assistance of a foreign government when the Mexican government has decided to nationalize foreign property.⁸⁴

(d) Iran-US Claims Tribunal One entity that could develop a wider degree of consensus on international expropriation norms is the Iran-US Claims Tribunal. The Iranian revolution that led to the International Court of Justice *Iranian Hostages Case* [§2.7.E.1(b)] and the treaty which freed them in 1980 presented a rich opportunity for unifying the respective compensation rules.

In this instance, host-State takings were outspokenly anti-American. They were done with utter disregard for any international norms. The Iranian government nationalized or otherwise controlled virtually all foreign property in all conceivable industries. The governmental objective was to exorcize the “US Demon” in Iran. The US responded by freezing Iranian assets in the United States. As part of the treaty agreement leading to release of the American hostages after 444 days in captivity, the US made these Iranian assets available to this tribunal for the purpose of satisfying claims against Iran.

This tribunal is unlikely to break new ground, however. Its mandate, agreed to by negotiators for the US and Iran, is to decide all cases “on the basis of respect for law, applying such ... rules and principles of commercial and international law as the Tribunal determines to be applicable....”⁸⁵ The Tribunal has had the unenviable task of interpreting this “governing law” term, but only in several of the nearly 500 cases it decided during its first ten years of existence. Most claimants avoided raising the issue of determining the precise international norms, perceiving the potential legal task as unproductively expensive due to the attendant ambiguity and complexity. As stated by a practicing lawyer who is one of the leading commentators on this issue: “In only a few cases has the issue been addressed, and in some of these, the awards suggest it was used more as a justification for achieving a result predetermined to be fair or equitable by the arbitrators than as a set of rules to be followed in reaching a reasoned decision based in law.”⁸⁶

Until a widely accepted treaty accomplishes a greater degree of international consensus, the debate about the appropriate compensation paradigm will continue to polarize the developed and developing States in this category of State responsibility for injury to aliens.

4. Deprivation of Livelihood Another category of State responsibility for injury to aliens is the unreasonable deprivation of a foreign citizen’s ability to enjoy a livelihood. The withdrawal of his or her ability to continue practicing a certain occupation is an unacceptable deprivation if done for a discriminatory purpose.

The US Supreme Court case of *Asakura v. City of Seattle* is a useful illustration. Under a treaty between Japan and the United States, the citizens of both countries were entitled to enjoy equal employment rights with the citizens of each country. The city of Seattle subsequently passed a pawnbroker ordinance providing

that “no such license shall be granted unless the applicant be a citizen of the United States.” The Court determined that this ordinance “makes it impossible for aliens to carry on the business. It need not be considered whether the State, if it sees fit, may forbid and destroy business generally. Such a law would apply equally to aliens and citizens....” The ordinance improperly discriminated against aliens in violation of the treaty specifically providing for equal treatment of Japanese citizens working in the United States. If the court had ruled against the plaintiff Japanese pawnbroker who challenged the ordinance, the US would have incurred State responsibility for depriving foreign citizens of a livelihood during peacetime.⁸⁷

State-approved discrimination against undocumented migrants creates tension between the notion of livelihood for all and national immigration laws [text §10.3.E.].

◆ PROBLEMS

Problem 4.A (end of §4.1.B.): Two Libyan military intelligence officers were responsible for blowing up Pan Am Flight 103 over Lockerbie, Scotland, in 1989. All 270 passengers, from various countries of the world including England and the United States, died violent deaths. UN Security Council Resolution 731 of 1992 demanded the trial of these two suspects in the West. The Arab League negotiated with Libya’s leader to turn over the suspects for trial outside of Libya. England and the US sought the extradition of these individuals from Libya for trial. Libya’s leader (Colonel Gadhafi) refused all of these demands and requests.

A 1998 arrangement to try them in the Netherlands as if the court there were sitting in Scotland—where the plane exploded—finally resolved this segment of a seemingly never-ending controversy. In May 2002, Libya offered to pay the US \$2.7 billion to compensate the victims’ families (\$10 million each) in return for the US and the UN terminating their respective sanctions against Libya.

Assume that these two Libyan intelligence agents have not (yet) been brought to trial. Who could seek remedies for the death of the passengers on Pan Am Flight 103? Against whom? Where?

Note that in August 2008, the United States: Libyan Claims Resolution Act restored “normal U.S.-Libya relations.” It provided “fair compensation” to “all US nationals who have terrorism-related claims against

Libya.” In addition, the Act grants Libya immunity from terror-related lawsuits [terrorist State exception to sovereign immunity: §2.6.B.].

Problem 4.B (after *Nottebohm Case* §4.2.A.): In June 1989, the best-known dissident in the PRC entered the US Embassy in Beijing to seek diplomatic asylum. Fang Lizhi, a prominent astrophysicist and human rights advocate, remained there until June 1990, refusing treatment for a heart ailment for fear of arrest. China’s agreement to allow him to leave the US Embassy (without being arrested) for a new home in Great Britain signaled a thawing of Sino-US relations. The Chinese government acceded to US pressure to allow this dissident to leave China, possibly due to its desire to retain favorable trading status with the United States.

Assume, instead, that Fang Lizhi is *still* residing in the US Embassy in Beijing. His request for asylum has not yet been resolved. No diplomatic arrangements have been made regarding his safe passage out of the PRC. He therein declares his intent to “defect” to either the US or Great Britain now that his immediate family is assembled with him in the US Embassy. They are ready to leave on short notice to any country that will take the family. The US ambassador initially says that “the granting of asylum at this critical time might jeopardize the US negotiations with China over human rights issues.” After conferring with the US Secretary of State and the British Foreign Minister, the parties decide that Fang Lizhi should apply for British citizenship. He has never been in Great Britain. The British government is apparently willing to waive all citizenship requirements, including a waiting period of three years (as in *Nottebohm*). After one week, Great Britain issues Fang Lizhi a British passport, which is delivered to him in the US Embassy in Beijing.

Assume further that (contrary to the actual facts in this case) the Chinese government protests, accusing the US and Great Britain of meddling in Chinese affairs. The PRC is not willing to allow safe passage so that Fang Lizhi can leave China. The Chinese government’s Minister of Foreign Affairs advises all concerned that this dissident, engaging in anti-State conduct, will be arrested the moment he leaves the embassy. In the eyes of the PRC, he remains a Chinese citizen and a traitor.

Students will represent China, Great Britain, and the United States. They will debate the following matters: What is Fang Lizhi’s nationality? Must China recognize the British citizenship conferred on this dissident?

Problem 4.C (end of §4.2.C., after *Sale v. Haitian Centers Council*): As Justice Blackmun stated regarding Jewish refugees during the World War II era: “The tragic consequences of the world’s indifference at that time are well known.” One example might be the following incident. Even prior to US entry into World War II, the fate of the Jewish citizens and some other minorities of Nazi Germany was well known—see M. Gilbert, *AUSCHWITZ AND THE ALLIES* (New York: Holt, Rinehart & Winston, 1981). US families were willing and qualified to sponsor a number of Nazi Germany’s Jewish children. In 1939, the US Congress defeated proposed legislation that would have rescued about 20,000 such children from Nazi Germany. The rationale was that this rescue would have exceeded the US immigration quota from Germany. See A Brief History of Immigration to the United States, in T. Aleinkoff & D. Martin, *IMMIGRATION PROCESS AND POLICY* 52 (St. Paul: West, 1985)—describing this event as “what may be the cruelest single action in US immigration history.”

In 1994, there were savage machete killings of the minority Tutsis by Rwanda’s majority Hutus. Some one million Rwandans fled into Zaire (renamed Democratic Republic of the Congo) and neighboring African nations. Assume that an organization like the *Sale* case’s Haitian Council is trying to save several hundred Tutsi orphans. The Hutu tribal leaders vow that such children will have no place in Rwanda’s future if they remain. No other country is willing to take them.

Assume that the US Embassy’s Ambassador to Rwanda is approached by the Save the Rwanda Children Organization (SARCO). Its representative presents a plan whereby willing and qualified US citizens will accept Rwandan refugees in the US. A part of this plan is an application to the US for asylum for these children, who are being discriminated against locally on the basis of “membership in a particular social group” (the Tutsi minority) within the meaning of Refugee Convention Article 33.1.

The SARCO representative brings a small group of teenage Tutsi boys to this embassy meeting. They have been earmarked for slaughter because of their family ties to the Tutsis fighting to stop the Hutu-led massacre. After consultation with the US Department of State, the US Embassy officer declines to accept them, or any Tutsi children. Her reason is that “the US does not have the capacity to become a haven for the world’s refugees.” This US refusal means that these children will probably

be exterminated, possibly within a matter of hours after leaving the US Embassy in Rwanda.

Questions:

- (1) Would the 1951 Refugee Convention legally affect the ability of the US to say “no” to this proposal, which means certain death for the children? What about the 1967 Protocol?
- (2) Blackmun’s dissent in *Haitian Centers Council* scolds the Supreme Court majority for its refusal to apply the Refugee Convention on an “extraterritorial” basis; that is, in the international waters between Haiti and the US, which are heavily patrolled by the US Coast Guard. Is Blackmun’s argument applicable to the above Rwandan children hypothetical?

Problem 4.D (§4.4.B.2., after “Denial of Justice” subsection): Harry Roberts was a US citizen charged by Mexico with “assaulting a house.” When he and several armed American companions gathered outside a house in Mexico, the owner summoned the Mexican police. After an exchange of small-weapons fire, the police arrested Roberts. The Mexican Constitution provided that prisoners had to be brought to trial within twelve months of their arrest. Roberts was in a Mexican jail for nineteen months without any hearing.⁸⁸

The arbitration report further notes that “[w]ith respect to this point of unreasonably long detention without trial, the Mexican Agency contended that Roberts was undoubtedly guilty of the crime for which he was arrested; that therefore had he been tried he would have been sentenced to serve a term of imprisonment of more than nineteen months; and that, since, under Mexican law, the period of nineteen months would have been taken into account in fixing his sentence of imprisonment, it cannot properly be considered that he was illegally detained for an unreasonable period of time.”

His conditions of incarceration were typical for Mexican prisons of that era, but less tolerable than US prison conditions in the 1920s. The international arbitration reported that he was kept in a “room thirty-five feet long and twenty feet wide with stone walls, earthen floor, straw roof, a single window, a single door and no sanitary accommodations, all the prisoners depositing their excrement in a barrel kept in a corner of the room; that thirty or forty men were at times thrown together in this single room; that the prisoners were given no facilities to clean themselves; that the room contained

no furniture ... and that the food given them was scarce, unclean and of the coarsest kind.”

After his release, Roberts obtained US assistance for presenting this case against Mexico. The US representative claimed that Mexico was responsible for a denial of justice to a US citizen. It had violated the IMS applicable to all prisoners. Mexico’s representative countered that Roberts was treated the same as *all* prisoners, including Mexicans.

Jail conditions can be terrible, even in a comparatively strong economy like the US today. A federal court, for example, placed California’s state prison system in receivership in 2007—whereby a health specialist was responsible for administering that feature of the state’s prisons. Various US courts have occasionally enunciated a minimum constitutional standard for the treatment of prisoners. The following 1976 case from Alabama (*fifty years after* the *Roberts* international arbitration) is a classic example:

There can be no question that the present conditions of confinement in the Alabama penal system violate any current judicial definition of cruel and unusual punishment, a situation evidenced by the defendants’ [State of Alabama and its Board of Corrections] admission that serious Eighth Amendment [cruel and unusual punishment] violations exist....

Confinement itself within a given institution may amount to a cruel and unusual punishment prohibited by the [federal] Constitution where the confinement is characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people even though a particular inmate may never personally be subject to any disciplinary action.

The conditions in which Alabama prisoners must live, as established by the evidence in these cases, bear no reasonable relationship to legitimate institutional goals. As a whole they create an atmosphere in which inmates are compelled to live in constant fear of violence, in imminent danger to their physical well-being, and without opportunity to seek a more promising future.

Pugh v. Locke, 406 F.Supp. 318, 329 (Dist. Ct. Ala, 1976), cert. granted in part, judgment reversed in part on other grounds, *Alabama v. Pugh*, 438 U.S. 781 (1978).

Two students will represent Mexico and the United States. A third will represent a neutral country (not located in the western hemisphere). Assume that Mexico did not treat Roberts any differently than other prison-

ers. The advocates will address the following questions arising under the US claim: that Mexico breached the IMS for the treatment of (this imprisoned) alien:

- (1) Is Roberts’ guilt or innocence a factor in this analysis?
- (2) Absent any relevant treaty in the 1920s, was there then/today an applicable IMS?
- (3) Should your international tribunal promulgate an IMS? If so, what should it be?
- (4) Mexico violated its constitutionally required twelve-month period between arrest and trial. Roberts was jailed for *nineteen* months before being tried. Would that delay automatically constitute a breach of the IMS? Be a relevant but not independently dispositive factor?
- (5) Did the Mexican prison conditions in *Roberts* breach the IMS?
- (6) What *should* be the result announced in your international arbitration between the US and Mexico?

Problem 4.E (§4.4.B.3., after “Confiscation of Property” subsection): Reynolds-Guyana (RG) was a foreign-owned mining corporation that mined bauxite in Guyana for a number of decades. The parent company was a US corporation. Guyana is a former British colony. It achieved its independence and statehood in 1966. RG’s profits were substantial although there were enormous start-up costs, including research and development.

In 1974, Guyana’s government assessed an equally enormous “bauxite tax deficiency” against RG. The company immediately characterized this tax as being fabricated for confiscatory purposes. Guyana’s Prime Minister responded that RG would be fully nationalized by the end of 1974. A US agency, the Overseas Private Investment Corporation, advised RG *not* to pay the bauxite tax deficiency. This agency then negotiated the sale of RG’s mining operations to a third party on terms acceptable to the government of Guyana.

Assume the following hypothetical: there has been no sale to a third party, as occurred in the actual 1974 case. Further:

- (1) A 1973 Guyana law, passed on the eve of this 1974 controversy, provides that the Calvo Doctrine is incorporated into every contract involving any foreign business operation in Guyana.

- (2) This 1973 law contains a provision, similar to that contained in the Iran-US Claims Tribunal, stating that “any compensation dispute requires respect for the law, and the law to be applied to any nationalization is International Law.”

The majority of RG shareholders are US citizens. They became quite wealthy as a result of their stock investment in R.G. Negotiators are now deliberating about whether Guyana has incurred State responsibility to compensate RG’s parent corporation (in the US) for injuries caused by the confiscatory bauxite deficiency tax. Two students (or groups) represent Guyana and the US investors. They will now debate the impact of applying assumptions (1) and (2).

◆ FURTHER READING & RESEARCH

See Course Web Page, at: <<http://home.att.net/~sломansonb/txtcsesite.html>>, Chapter Four.

◆ ENDNOTES

1. I. Seidl-Hohenveldern, *CORPORATIONS IN AND UNDER INTERNATIONAL LAW* (Cambridge, Eng: Grotius, 1987).
2. J. Bentham, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 296 (Dover, NH: Longwood Press, 1970) (Burns & Hart edition).
3. See H. Chiu, Book Reviews and Notes, 82 *AMER. J. INTL L.* 892, 894–895 (1988).
4. D. Salem, *THE PEOPLE’S REPUBLIC OF CHINA: INTERNATIONAL LAW AND ARMS CONTROL* 13 (Baltimore: Univ. of Maryland, 1983).
5. L. Chen, The Individual, ch. 5 in *AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY ORIENTED PERSPECTIVE* 76, 77 (New Haven, CT: Yale Univ. Press, 1989).
6. In re “Agent Orange” Product Liability Litigation, 373 F.Supp.2d 7, 129 (E.D.N.Y. 2005) [hereinafter *Agent Orange*].
7. Case Concerning the Factory at Chorzow (Germany v. Poland), 1928 PCIJ, SER. A, No. 17 (Judgment of Sept. 13, 1928).
8. *Brown v. Warren Christopher*, Secretary of State, No. 93–1375–CIV (S.D. Fla. Nov. 18, 1993) (unpublished opinion).
9. Iran and the United States ultimately settled this suit for \$61.8 million, upon dismissal of the case from the ICJ’s docket of cases. The order and surrounding facts are available in 35 *INT’L LEGAL MAT’LS* 550 (1996).
10. *Mavrommatis Palestine Concessions case*: PCIJ, SER. A, No. 2 (1924), reported in 2 *INT’L L. REP.* 27. See also that “rules creating individual rights and obligations ... [are] enforceable by the national courts.” *Danzig Railway Officials Case*, PCIJ, SER. B, No. 15 (1928), reported in 4 *INT’L L. REP.* 287.
11. See generally A. Rubin, *THE LAW OF PIRACY* (2d ed. Irvington-on-Hudson, NY: Transnat’l, 1998).
12. V. Nanda, *International Law in the Twenty-First Century*, ch. 5 in N. Jasentuliyana (ed.), *PERSPECTIVES ON INTERNATIONAL LAW*, at 83 (London: Kluwer, 1995).
13. *Agent Orange*, at 54 & 58, cited in note 6 supra.
14. For background analysis, see John Carey and Siegfried Wiessner, *A New United Nations Subsidiary Organ: The Permanent Forum on Indigenous Issues*, ASIL FLASH INSIGHT (April 2001), at: <<http://www.asil.org/insights/insigh67.htm>>.
15. Available at: <http://conventions.coe.int/Treaty/EN/cadre_principal.htm>.
16. See generally, P. Ghandi, *THE HUMAN RIGHTS COMMITTEE AND THE RIGHT OF INDIVIDUAL PETITION: LAW AND PRACTICE* (Aldershot, Eng: Ashgate, 1998).
17. A comprehensive summary of laws, procedures, and NAFTA links is available at: <<http://www.naftaclaims.com>>.
18. E. Paras, *A Brief History of Conflict of Laws*, ch. 15, in *PHILIPPINE CONFLICT OF LAWS* 438 (7th ed. Manila: Rex Book Store, 1990).
19. *Nottebohm Case (Liechtenstein v. Guatemala)*, 1955 ICJ REP. 4.
20. Determination of Chinese Nationality, in 1 J. Cohen & H. Chiu, *PEOPLE’S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY* 746 (Princeton, NJ: Princeton Univ. Press, 1974).
21. *France: Nationality Decrees in Tunis and Morocco* (Advisory Opinion), PCIJ, SER. B, No. 4 (1923), reported in 1 *World Court Rep.* 145. *Poland: Acquisition of Polish Nationality* (Advisory Opinion), Permanent Court of International Justice, SER. B, No. 7, at 79 (1923 case interpreting nationality provision of WWI peace treaty between the Allied Powers and Poland).
22. European Convention on Nationality, Done at Strasbourg, Nov. 6, 1997, reprinted in 37 *INT’L LEGAL MAT’LS* 47 (1998) [hereinafter 1997 *Nationality Convention*].
23. US Const., Amend. XIV (1868). An analysis of this provision is available in J. Guendelsberger, *Access to Citizenship for Children Born Within the State to Foreign Parents*, 40 *AMER. J. COMP. L.* 379 (1992).
24. *Case (Spanish only) synopsis: Case of the Girls Yean and Bosico v. The Dominican Republic*, September 8, 2005, at: <<http://www.asil.org/ilib/2005/11/ilib051115.html#j2>>. *News story*: See The Dominican Republic has rejected accusations of racial discrimination against Haitians born in its territory, BBC NEWS, at: <<http://news.bbc.co.uk/1/hi/world/americas/4335840.stm>>.
25. *Nishimura Ekiu v. United States*, 142 US 651, 659 (1892).
26. Details on the various national and international court decisions are available from the Finnish author Ruth Donner, *The Principle of the “Link” in Nationality Law*, ch. 2, in *THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW* (2d ed. Irvington-on-Hudson, NY: Transnational, 1994).
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CHAPTER FIVE

Extraterritorial Jurisdiction

CHAPTER OUTLINE

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 - B. Covert Applications
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 - D. Passive Personality Principle
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INTRODUCTION

Prior chapters covered the preliminary essentials for defining International Law and the actors who shape its contours. This chapter commences your coverage of operational norms. It focuses on limitations on State power in an “extraterritorial” context. This is the basic question: Under what circumstances can a State legally exercise its sovereign powers beyond its borders? This

Yahoo! is an Internet service provider which has its principle place of business in Santa Clara, California. Its American website, www.yahoo.com, targets U.S. users and provides many services, including auction sites, message boards, and [former] chat rooms, for which Yahoo! users supply much of the content. Nazi discussions have occurred in Yahoo!’s [former] chat rooms and Nazi-related paraphernalia have appeared for sale on its auction website.

[T]he French Criminal Code bans exhibition of Nazi propaganda for sale and prohibits French citizens from purchasing or possessing such material.

On May 22, 2000, the French court ... issued an order requiring Yahoo!—subject to a fine of 100,000 Francs (approximately \$13,300) per day—to destroy all Nazi-related messages, images, and text stored on its server....

—Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme, 379 F3d 1120, 1121–1122 (9th Cir. 2004), rehearing granted, 399 F3d 1010 (9th Cir. 2005).
The 2006 rehearing is the principal case in §5.2.G. below.

common feature of State practice appears to conflict with the norm that sovereignty is not permeable.

You will learn in Chapter 6, however, that State sovereignty is somewhat porous when it comes to acceptable exercises of national jurisdiction in other national spheres of influence, as well as in many common areas that

no State can own. In this chapter, you will focus primarily on State exercises of jurisdiction involving individuals.

With this chapter's general concepts of State jurisdiction and sovereignty in mind, one can then delve into the specifics of the closely linked Chapter 6 on the geographical *range* of State sovereignty.

◆ §5.1 DEFINITIONAL SETTING

Nations often regulate the activity of their inhabitants and certain non-residents, whose conduct occurs or has an effect within their boundaries. That supervision is often described in terms of both “jurisdiction” and “sovereignty.” Although often used synonymously, especially by the media, these terms are related—but at best, only first cousins.

A. SOVEREIGNTY AND JURISDICTION

1. Sovereignty Jurisdiction, as it is analyzed in this chapter, involves acceptable extensions of a State's power to act or react to events occurring beyond its own borders. Sovereignty, as analyzed in this course, typically involves unacceptable intrusions by one State into another. The September 2008 US-Afghan commando raid into Pakistan set the stage for the first US ground attack against a Taliban target inside Pakistan. They were executing what had previously been a secret US program that “authorized” these special forces to pursue the Taliban and Al-Qaida via cross-border raids deep into Pakistan. The press reported that there were “new hot pursuit ground rules [to] provide some room for US troops to maneuver during battle.”

Pakistan's Foreign Ministry was obviously unaware of the supposed new hot pursuit rules because they condemned that raid as a “gross violation of Pakistan's territory” and “a grave provocation.”¹ Pakistan then warned the US that Pakistan would not tolerate further intrusions by Afghan and US commandos. Pakistan is a sovereign nation. Only it has the *exclusive* right to authorize such raids. Otherwise, it would just be a US vassal. The US did not have the jurisdictional power, absent Pakistani consent, to engage in these special operations.

States possess the sovereign right to exclusively govern the affairs of their inhabitants. This right is generally free from external control—including (and perhaps *especially*) the UN. The latter pursues its causes célèbres—including human rights programs, environmental conservation, and maintaining world peace—subject to a significant

Charter limitation. Under Article 2.7: “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.”

This theme has spawned friction between the UN and its members on many occasions. The UN Security Council, for example, has aggressively used its Charter-based powers to manage sensitive problems such as the former Apartheid regime in South Africa; former President Slobodan Milosevic's excessively nationalistic approach to governance in the former Yugoslavia; and the Sudanese government's ethnic cleansing of its Darfur region. In each case, local governors claimed that the UN membership was trampling on sovereign rights reserved only for the States and their leaders.

One reason for this friction is that the term “sovereignty” has a chameleon-like quality. It shifts with the context. As aptly articulated by Oxford University's Professor Dan Sarooshi, it should not be surprising that:

the concept of sovereignty is largely contingent on the text in which it figures. There is no [such] objective concept that is universally applicable and yet it is of fundamental importance to the concept of the State and indeed of modern political knowledge.

...

The precise meaning and scope of the application of sovereignty in different contexts remains unclear.... In addition to domestic sovereignty, independence sovereignty, international legal sovereignty, and Westphalian sovereignty [textbook §1.1.A.], the concept of sovereignty, as the ultimate and supreme power of decision, can both be analyzed and qualified from the perspective of what can be called its “contested elements:” such elements as legal v political sovereignty, external v popular sovereignty, indivisible v divisible sovereignty, and governmental v popular sovereignty.²

A sovereign State has the international capacity to exchange diplomats with other States, to engage in treaty making, and to be immune from the jurisdiction of the courts of other States. A State thus possesses sovereignty when it is able to act independently of the consent or control of any other State. International theorists describe State sovereignty in terms of a solid sphere, much like a billiard ball, whereby one nation cannot intrude into the internal affairs of another. When there is a clash between two or more such spheres of

influence, the theoretical equality of each contestant rigidly repels the other “billiard ball” on the international playing surface.

University of Belgrade Professor Branimir Jankovic traces these roots of sovereignty as follows:

the idea of sovereignty originated when there appeared a growing opposition to feudal anarchy and to interference in the affairs of other states. The [emerging national] rulers of those times fought for their unlimited, sovereign authority, within their states as well as outside their borders. In this struggle to supersede the feudal retrogressive system and create a new social order, the idea of state sovereignty had a progressive significance. Although at first historically progressive, [sovereign] absolutism ... was based upon an unlimited autocracy and brute force. It is in the ideology of absolutism that we find the roots of the theory of absolute sovereignty.... The sovereignty of a state means today its independence from external intervention. This is the supreme authority inherent in every independent state, limited only by the universally adopted and currently valid rules of international law. This supreme power extends within the borders of the national territory and is usually described as territorial sovereignty, or territorial jurisdiction of states.³

A classic example of the historic notion of European State-centric sovereignty is quite familiar to every first-year law student in the US. The ubiquitous bedrock of modern jurisdictional analysis flows from the Supreme Court's 1877 definition of sovereignty,⁴ borrowed directly from the then contemporary European State practice. The Court reversed the sale of land, pursuant to a judgment obtained without the knowledge of the owner. The seeds of European jurisdictional practice were replanted by the US Supreme Court as follows:

every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.... The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of

one State have no operation outside of its territory, except so far as is allowed by comity.

...

The ... familiar rule that countries foreign to our own disregarded a judgment ... where the defendant had not been served with process nor had a day in court; ... “The international law ... as it existed among the States in 1790, was that a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, when the defendant had not been served with process....”⁵

The underlying seventeenth-century concept of sovereignty to which the US Supreme Court refers reigned unchallenged from its Westphalian roots until well into the twentieth century. It has since endured contemporary attacks. As aptly described by Professor John Jackson in his lecture series at Cambridge University in 2002:

Although much criticized, the concept of “sovereignty” is still central to most thinking about international relations and particularly international law. The old “Westphalian” concept in the context of a nation-state’s “right” to monopolize certain exercises of power with respect to its territory and citizens has been discredited in many ways..., but it is still prized and harbored by those who maintain certain “realist” views or who otherwise wish to prevent (sometimes with justification) foreign or international powers and authorities from interfering in a national government’s decisions and activities. Furthermore, when one begins to analyze and dis-aggregate the concept of sovereignty, it quickly becomes apparent that it has many dimensions. Often, however, the term “sovereignty” is invoked in a context or manner designed to avoid and prevent analysis, sometimes with an advocate’s intent to fend off criticism or justifications for international “infringements” on the activities of a nation-state or its internal stakeholders and power operators.⁶

Examples of the modern diminution of the traditional State-centric notion of “absolute” sovereignty include:

- ◆ Contemporary norms of Customary International Law, to the extent that they bind rogue States—formerly exemplified by Libya when it sparred with the international community in the aftermath of its bombing a

passenger jet over Lockerbie, Scotland in 1988 (Chapter 4, Problem 4.A);

- ◆ The post-World War II watering down of sovereign immunity from the absolute to the “restrictive” approach [§2.6.B.];
- ◆ European integration—spawned by the consent of the twenty-seven European Union States—yielding the requisite degree of State sovereignty for certain community institutions to require State members to act or refrain from acting on preadmission State preferences [§3.4.A.];
- ◆ Evolving limitations on the rule of *absolute* immunity for Heads of State, per Article 27.1 of the 1998 Statute of the International Criminal Court [§8.5.D.];
- ◆ National willingness of many countries to embrace the Kyoto environmental treaty in order to plan against the dangers of global warming [§11.2.C.4(a)]; and
- ◆ The majority of the community of nations participating in the World Trade Organization process, resulting in Geneva panel decisions restricting the conduct of even the most powerful nations [§12.2.C.].

Contemporary international practice may (or may not) appear to make sovereignty look like Swiss Cheese. But geographic, border-compliant, territorial sovereignty remains alive and well. One can readily observe this feature of State sovereignty at most international border crossings where one must produce evidence of citizenship or a visa that authorizes one’s entry.

This feature of State sovereignty is especially evident in the context of military conflicts. Turkey, for example, has insisted that it has the right to pursue Iraq’s Kurdish rebels back into Iraq. Kurdish groups in southeast Turkey, knowing that Iraq’s territory is otherwise occupied, have been crossing the border into northwest Iraq in pursuit of their quest for cross-border Kurdish autonomy. Iraq has nevertheless refused to give its official imprimatur to Turkey’s pursuit of the Kurds into Iraq. One reason is that Iraq has enough problems—without inviting more—by authorizing Turkey’s military to enter into Iraq in “hot pursuit” of these separatist rebels.

Iran captured fifteen British sailors and marines whom it says violated Iranian sovereignty by venturing into its territorial waters in March 2007. In a similar incident in June 2004, Iran captured eight British sailors and marines. Great Britain is patrolling Iranian waters, under the direction of the UN Security Council, supposedly hunting for smugglers in the same disputed waterway between Iran and Iraq.

2. Jurisdiction

The term “jurisdiction” also has multiple meanings. In Chapter 8 of this book, you will study the jurisdiction of various local, regional, and international courts. In the history of varied legal orders, jurisdiction has been the first subject of the articulated legal order.⁷ The most relevant context for analyzing *jurisdiction* in a Public International Law course is the State’s legal capacity to: (a) make, (b) enforce, and (c) adjudicate breaches of its laws.

State legislatures now enjoy a degree of globally recognized consent to enact laws governing conduct occurring, at least in part, beyond their immediate borders. In instances where that power is acceptable to other nations, then it naturally follows that the executive branch of a State’s government may take steps to act outside of that State in ways that do not generally violate other States’ expectations. That State’s judicial branch may, as a result, adjudicate matters involving conduct that may start (either locally or) abroad that impact the adjudicating State. Under the November 2000 Military Extraterritorial Jurisdiction Act, for example, 18 US Code § 3261 provides:

- (a) Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year ...
 - (1) while employed by or accompanying the Armed Forces outside the United States; or
 - (2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice),
 shall be punished as provided for that offense.
- (b) No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated.

The first former US Army soldier was thus prosecuted under this Act in April 2009. Steven Green—and four fellow soldiers who remained in the Army where they were tried by military court-martial—was prosecuted and convicted of raping a fourteen-year-old Iraqi girl, then killing her and her family in Mahmudiya, Iraq.

He was tried in Paducah, Kentucky—6,700 miles away from the territory where his conduct occurred. The above legislation authorized the court to proceed via this jurisdictional gap-filler (which also covers civilians, their spouses, and military contractors). He was no longer subject to a US military court-martial. Iraq would not prosecute him, but did not object to the US prosecution for a crime committed before its sovereignty was restored.

An unacceptable exercise of sovereign power in the territory of another State is appropriately protested as an exercise of “extraterritorial” jurisdiction. That, in turn, violates Customary International Law. The offending State has the obligation not to interfere with another State’s enjoyment of the right to control people and activities within its borders. The targeted State possesses the right, based on its status as a sovereign entity, to at least an apology. It possesses equal rights and dignity, as does each member of the community of nations, regardless of its geographical or military prowess. The jurisdictional principles in this chapter thus authorize—and limit—a State’s ability to proscribe and punish individuals who commit crimes beyond the borders of the prosecuting State.

In 1935, a major study at the Harvard Law School confirmed the continuing need for expanding criminal jurisdiction in this context. The Introductory Comment of the study explained it as follows: “From its beginning, the international community of States has had to deal in a pragmatic way with more or less troublesome problems of penal jurisdiction. In exercising such jurisdiction ... States became increasingly aware of the overlappings and the gaps which produced conflicts [between two States wanting to prosecute the same criminal] and required cooperation.... In the [nineteenth] century, with the increasing facility of travel, transport and communication ... the problems of conflict between the different national systems became progressively more acute.”⁸

A relatively homogeneous perspective about the acceptable exercises of extraterritorial jurisdiction evolved. Today, State practice no longer views every application of national jurisdiction as possibly smashing into an impenetrable brick wall at every international border. As ably explained by Vanderbilt School of Law Professor Harold Maier:

Today, improvements in means of communications and transportation both facilitate international economic and social intercourse and support the proposition that the effects of governmental encroachments upon human liberty often transcend national bound-

aries ... and the resulting need to regulate ... can no longer be localised within national boundaries. These increasingly complex inter-relationships between national, social, [environmental] and economic interests foster a recognition by the world community that there are occasions when both national and [international] community interests are served by permitting a nation to address, under its laws, activities carried on outside its national borders.⁹

The UN’s International Law Commission [ILC: §3.3.B.] has studied the topic of extraterritorial jurisdiction for many years. In 2006, the ILC promulgated its latest Report, wherein the relevant portion articulated the fundamentals necessary to proceed with your study of this chapter:



United Nations Report of the International Law Commission

FIFTY-EIGHTH SESSION (1 MAY–9 JUNE AND 3 JULY–11 AUGUST 2006)

GENERAL ASSEMBLY OFFICIAL RECORDS,
SUPPLEMENT NO. 10 (A/61/10)

Annex E. Extraterritorial Jurisdiction

<<http://untreaty.un.org/ilc/reports/2006/2006report.htm>>

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B. COVERT APPLICATIONS

Many States have, at one time or another, engaged in both overt and covert activities within the territory of another State. What constitutes acceptable State practice is sometimes a matter of degree. Spying, for example, is a form of extraterritorial jurisdiction in the sense that Nation X clandestinely sends an X citizen into Nation Y to spy, or employs a Nation Y citizen to spy on his or her own country. Such activities are often executed in the name of counter-terrorism.¹⁰ The US, for example, constructed a secret tunnel under the former Soviet Union’s new embassy in Washington, D.C., jointly managed by the FBI and the National Security Agency. While diplomats and government agencies are not supposed to engage in this

sort of activity, many diplomats have been expelled for spying. All nations hosting an embassy profess to loathe spying on sending nations' diplomats. Their proclaimed legal basis is that the spying nation violates the territorial sovereignty of the nation spied upon. Ironically, there is no international convention wherein States have expressly agreed to prohibit spying.

One venue for such clandestine activity is the international organization. It may be used for the ulterior purpose of obtaining sensitive information about a targeted member nation. The US has claimed that various UN representatives have been operatives for foreign nation information-gathering purposes. In January 1999, Iraq credibly established that US weapons inspectors, working for the UN's international weapons inspection team in Iraq, were undertaking simultaneous intelligence operations—apparently unbeknownst to the chief weapons inspector, Britain's Richard Butler, who denied that the UN mission was being used for this purpose.

Some exercises of “extraterritorial” jurisdiction are far more acceptable than others. Many countries routinely apply their laws to conduct occurring beyond their national borders in ways which do not adversely impact international relations. The US Military Extraterritorial Jurisdiction Act of 2000 was first applied to a woman who stabbed her husband to death on an Air Force base in Turkey (May 2003). Under Title 18 of the US Code §3261, the US Justice Department may thereby prosecute civilians who accompany military personnel on international assignments if the host government chooses not to prosecute. But the 2002 US executive branch announcement—regarding the right to launch preemptive strikes in the name of self-defense [§9.2.D.3.]—has been openly embraced by only *one* other national government (United Kingdom).

There are examples of extraterritorial jurisdiction that no State would condone. In July 2005, for example, Italy demanded that the US show “full respect” for Italian sovereignty. The prime minister summoned the American ambassador to explain the US Central Intelligence Agency's abduction of a Muslim cleric from a street in Milan in 2003. An Italian judge had ordered the arrest of thirteen people linked to the Central Intelligence Agency, on charges of kidnapping Mr. Nasr and flying him to an Egyptian prison. The chief prosecutor also assessed the legal status of another six Americans who were allegedly involved in this abduction.¹¹

The handful of recognized bases for an extraterritorial application of sovereign power are presented in the following section.

◆ §5.2 JURISDICTIONAL PRINCIPLES

A. INTRODUCTION

1. Historical Evolution States exercise both civil and criminal jurisdiction over events abroad. Both derive from principles firmly established by customary State practice in criminal matters.

Commentators use the term “International Criminal Law” in two related but distinct contexts. They are generally referring to: (1) the penal features of International Law; and (2) the international application of a nation's internal criminal law. Courts and journalists are not always clear about where they diverge.

The first usage involves crimes that are in essence “internationalized” by the community of nations. The classic illustration is genocide. In August 2001, Bosnian Serb general Radislav Krstic was the first soldier to be convicted of genocide by the UN's International Criminal Tribunal for the former Yugoslavia. International Criminal Law, used in *this* sense, refers to that general's conduct—related to the 1995 killing of 7,800 Muslim men and boys at an overrun UN safe haven. This was a very special kind of internationally based crime, which would be distinct from 7,800 individual murder convictions under Bosnian law¹² [textbook §10.1.B. *Bosnia v. Serbia Genocide* case].

Otherwise, the term “International Criminal Law” is used (or misused) when referring to applications of national law to crimes that involve two or more countries. As Sweden's Uppsala University Professor Ian Cameron succinctly explains:

a state can criminalize conduct which occurs outside its territory, and provide for prosecution of the actors should they come within its territory. A state's assertion of [its jurisdictional] competence in this way can be referred to as “extraterritorial criminal jurisdiction,” although the actual prosecution and punishment of the offender is intraterritorial. All states apply their criminal law to events and conduct occurring outwith [without] their territories to a greater and lesser extent, and so all states apply rules which lay down the spatial scope of their criminal law and grant competence to their courts to try and punish people who have committed abroad [the] acts defined in their criminal codes as offences.¹³

The Piracies and Felonies Clause of the US Constitution specifically grants power for the punishment of offenses beyond the territorial limits of the US (the

only clause to do so). Early Supreme Court opinions addressed extraterritorial applications of US law under the 1790 Act for the Punishment of Certain Crimes Against the US. In a representative opinion, Chief Justice Marshall stated for the Court: “The question, whether this act extends farther than to American citizens, or to persons [not] on board American vessels, or to offences [not] committed against citizens [*sic*] of the United States, is not without its difficulties. The constitution having conferred on congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States.”¹⁴

But most instances of an extraterritorial exercise of sovereign power do not involve piracy, which was the original and recurring international crime.¹⁵ In a frequently quoted premise expressed over a century later by the Permanent Court of International Justice (*S.S. Lotus*

below): “the principle and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in the territory of another State.” In 1804, the US Supreme Court likewise admonished—in circumstances *not* involving the historic and widely accepted exercise of extraterritorial jurisdiction to punish pirates: “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate ... the law of nations as understood in this country.”¹⁶

2. Jurisdictional Principles Illustrated International practice acknowledges five customary bases for legitimate State regulation of individual or corporate conduct occurring either partially or wholly beyond its borders. Chart 5.1 summarizes this significant intersection between extraterritorial jurisdiction and International Law:

CHART 5.1 STATE “X” INTERNATIONAL JURISDICTIONAL GUIDE

Jurisdictional Premise		Conduct for Which State “X” May Prosecute
Territorial	(<i>Subjective</i>)	Defendant’s conduct violates State X law <ul style="list-style-type: none"> • Conduct starts <i>in</i> State X • Conduct <i>completed</i> in State X
Territorial	(<i>Objective</i>)	Defendant’s conduct violates State X law <ul style="list-style-type: none"> • Conduct starts <i>outside</i> State X • Conduct <i>completed</i> in State X (“effect” in X)
Nationality		Defendant’s conduct violates State X law <ul style="list-style-type: none"> • Defendant is a citizen (national) of X • Conduct <i>may</i> start and end anywhere
Passive Personality		Defendant’s conduct violates State X law <ul style="list-style-type: none"> • Victim is a citizen (national) of X • Conduct <i>may</i> start and end anywhere
Protective		Defendant’s conduct violates State X law <ul style="list-style-type: none"> • Conduct <i>may</i> start and end outside State X • (Territorial <i>must</i> either start or end in X) • (Protective need not have “effect” in X)
Universality		Defendant’s conduct violates State X law <ul style="list-style-type: none"> • Defendant’s conduct sufficiently heinous to violate the laws of <i>all</i> States • Conduct started and completed anywhere • All States may prosecute (not just X)

B. TERRITORIAL PRINCIPLE

1. Fundamental Application Under this principle, the State's jurisdictional authority is derived from the location of the defendant's act. That conduct usually starts and ends within the State that is prosecuting the defendant. The State may thereby punish individuals who commit crimes within its borders. Of all jurisdictional principles, this application is the most widely accepted and the least disputed.

The mold for this approach has been strained, if not broken, by contemporary criminal conduct. As attested to by the University of Leicester's Troy Lavers:

Prior to the 20th century the majority of criminal acts were usually tied to one particular country or territory. It was only with the substantial growth in overseas travel, mass mobility, multinational corporations, and technological advancements in communication that transnational criminal activity became a common phenomenon. The law has been slow to keep pace with criminals who have extended their activities to the international plane.¹⁷

Now there are two applications of the territorial principle: "subjective" (internal) and "objective" (external). Assume that the defendant is a foreign citizen. A State may have the jurisdictional power to prosecute violators of its laws without regard to that person's nationality. For example, Italy may wish to prosecute a Swiss citizen who plots the overthrow of the Italian government. That individual is captured by the Italian police in Rome where he planned this *coup d'état*. Italy possesses the subjective territorial jurisdiction to prosecute and punish this defendant, even though he is a

foreign citizen, because this conduct took place within Italy's borders. In response to a Swiss defendant's unsuccessful claim that Italy would lack jurisdiction in such a case, Italy's Court of Cassation stated that there "is no rule of Italian public law or international law which exempts from punishment an alien who commits an act in Italy which constitutes a crime.... The crime of which the appellant [defendant] has been found guilty, is not less a crime because he is a Swiss national...."¹⁸

Under International Law, Italy may also exercise its sovereign powers over those whose extraterritorial conduct violates its laws. The prior historical limitation—that a State could regulate only that conduct occurring within its geographical boundaries—no longer makes sense. Nineteenth-century national legislation began to reflect this internationalization of criminal activity, which was made possible by the evolution of technology and communication. Since then, geometric improvements in travel and communication have greatly enhanced the criminal's ability to commit a crime (or parts of a crime) in more than one country. The unlawful conduct of the aforementioned Swiss citizen may occur partially inside and partially outside of Italy—thus authorizing its objective application of the territorial principle although a segment of the punished conduct occurs in Switzerland (or elsewhere).

This facet of territorial jurisdiction is more easily abused. The prosecuted conduct may occur outside of the prosecuting nation. It may have the requisite effect within a nation to allow it to prosecute based on accepted State practice. The leading international case on this "effects doctrine" was decided in 1927 by the Permanent Court of International Justice:

The S.S. Lotus (France v. Turkey)

PERMANENT COURT OF INTERNATIONAL JUSTICE

PERMANENT COURT OF INTERNATIONAL JUSTICE REPORTS, SERIES A, NO. 10 (1927)

<http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus>

AUTHOR'S NOTE: In 1923, the French mail steamer Lotus was in international waters, headed for Constantinople. The Lotus collided with an outbound Turkish coal ship, the Boz-Kourt. Eight Turkish seamen were

killed in the collision. When the Lotus arrived in Turkey, Turkish authorities arrested and prosecuted the French ship's watch officer, Lieutenant Demons (as well as the Turkish vessel's captain) for involuntary man-

slaughter. Defendant Demons' negligence allegedly cost the lives of Turkish citizens as well as substantial property damage to the Turkish vessel.

France objected to Turkey's exercise of jurisdiction over its French citizen. The alleged criminal negligence did not occur on Turkish territory or in its territorial waters. After diplomatic protests, France and Turkey decided to submit France's objection to Turkey's exercise of its national jurisdiction to the PCIJ for a neutral resolution.

Some italics have been added. All footnotes were omitted.

COURT'S OPINION:

I.

...

The violation, if any, of the principles of international law would have consisted in the taking of criminal proceedings against Lieutenant Demons. It is not therefore a question relating to any particular step in these proceedings [by Turkey] but of the very fact of the Turkish Courts exercising criminal jurisdiction. That is [because] the proceedings relate exclusively to the question whether Turkey has or has not, according to the principles of international law, jurisdiction to prosecute [France's citizen] in this case.

The Parties agree that the Court has not to consider whether the prosecution was in conformity with Turkish law....

The prosecution was instituted [however] in pursuance of [the following] Turkish legislation.

...

[Art. 6 of the Turkish Penal Code provided that] Any foreigner who ... commits an offence abroad to the prejudice of Turkey or of a Turkish subject ... shall be punished in accordance with the Turkish Penal Code provided that he is arrested in Turkey.

...

[T]he question submitted to the Court is not whether that article is compatible with the principles of international law; it is more general. The Court is asked to state whether or not the principles of international law prevent Turkey from instituting criminal proceedings against Lieutenant Demons under Turkish law.

II.

...

Now the first and foremost restriction imposed by international law upon a State is that ... it may not

exercise its power in any form in the territory of another State. In this sense, jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

It does not, however, follow that international law prohibits a State from exercising jurisdiction ... [over] acts which have taken place abroad.... Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States....

It follows from the foregoing that the contention of the French Government to the effect that Turkey must in each case be able to cite a rule of international law authorizing her to exercise jurisdiction, is opposed to the generally accepted international law.

...

III.

...

Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory.... But this is certainly not the case under international law as it stands at present.

...

IV.

...

[I]t is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory [of the prosecuting State] if one of the constituent elements of the offence, *and more especially its effects*, have taken place there.... Again, the Court does not know of any cases in which

governments have protested against the fact that the criminal law of some country contained a rule to this effect or that the courts of a country construed their criminal law in this sense. Consequently, once it is admitted that the effects of the offence were produced on the Turkish vessel, it becomes impossible to hold that there is a rule of international law which prohibits Turkey from prosecuting Lieutenant Demons because of the fact that the author of the offence was on board the French ship.

...

It follows that what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies. If, therefore, a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory.

...

This conclusion could only be overcome if it were shown that there was a rule of customary international law which, going further than the principle stated above, established the exclusive jurisdiction of the State whose flag was flown. The French Government has endeavoured to prove the existence of such a rule, having recourse for this purpose to the teachings of publicists, to decisions of municipal and international tribunals, and especially to conventions ... creating exceptions to the principle of the freedom of the seas by permitting the war and police vessels of a State to exercise a more or less extensive control over the merchant vessels of another State....

In the Court's opinion, the existence of such a rule has not been conclusively proved.

...

So far as the Court is aware there are no decisions of international tribunals in this matter; but some decisions of municipal courts have been cited. Without pausing to consider the value to be attributed to the judgments of municipal courts in connection with the establishment of the existence of a rule of international law, it will suffice to observe that the decisions

quoted sometimes support one view and sometimes the other.

...

The offence for which Lieutenant Demons was prosecuted was an act—of negligence or imprudence—having its origin on board the [French ship] *Lotus*, whilst its effects made themselves felt on board the [Turkish ship] *Boz-Kourt*.... It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction.

...

V.

...

The Court, having heard both Parties, gives, by the President's casting vote—the votes being equally divided—judgment to the effect ... that Turkey, by instituting criminal proceedings in pursuance of Turkish law against Lieutenant Demons, officer of the watch on board the *Lotus* at the time of the collision, has not acted in conflict with the principles of international law.

...

M. LODER, DISSENTING

Turkey, having arrested, tried and convicted a foreigner for an offence which he is alleged to have committed outside her territory, claims to have been authorized to do so by reason of the absence of a prohibitive rule of international law.

...

In other words, on the contention that, under international law, every door is open unless it is closed by treaty or by established Custom.

...

The fundamental consequence of their independence and sovereignty is that no municipal law, in the particular case under consideration no criminal law, can apply or have binding effect outside the national territory.

...

The criminal law of a State applies in the first place to all persons within its territory, whether nationals or foreigners, because the right of jurisdiction over its own territory is an attribute of its sovereignty.

...

The general rule that the criminal law of a State loses its compelling force and its applicability in relation to

offences committed by a foreigner in foreign territory, a rule derived from the basic principle of the sovereignty and independence of States, has indeed undergone modifications and has been made subject to exceptions restricting its scope by the *mutual consent* of the different Powers in so far as territory properly so called is concerned.

But according to a generally accepted view, this is not the case as regards the high seas. There the law of the flag and national jurisdiction have retained their indisputable authority to the exclusion of all foreign law or jurisdiction.

The Permanent Court of International Justice (PCIJ) held that Turkey could exercise its national criminal jurisdiction over a “foreigner” who violated Turkish law when the French officer committed an offense abroad. On these facts, “abroad” included international waters. Unlike State sovereign territory, such areas do not “belong” to anyone. The Court approved “wide discretion” for this application of Turkish law. As will be seen in the next chapter, this development is also referred to as the ability of a State to exercise its jurisdiction based on the “law of the flag.” A Turkish vessel might thus be legally characterized as an extension of the Turkish territory. Which alternative form of the “territorial principle” did the Court approve in *Lotus*?

The Court also acknowledged the applicability of the “passive personality” principle in this case. The victims of the French officer’s negligence were Turkish citizens, as was the vessel. This feature of extraterritorial jurisdiction is analyzed below in this section.

Both prior and subsequent State practice conformed to the *Lotus* court’s application of the accepted principles of extraterritorial jurisdiction. Its 1927 application of territorial jurisdiction coincided with that applied by the *Pennoyer v. Neff* US Supreme Court decision in 1887 [§5.1. above]. *Pennoyer* inducted European jurisdictional principles into the basic US law of territorial jurisdiction. Ten years after *Lotus*, Ireland expressly provided for this practice in Article 29.8 of its 1937 Constitution: “The State may exercise extra-territorial jurisdiction in accordance with the generally recognised principles of international law.”

2. Hot Pursuit Claims to the so-called right of hot pursuit were plentiful in earlier epochs when there were fewer treaties and no Internet. Modern governments have responded to the pesky realities of contemporary sovereignty sensitivities and territorial jurisdiction in a variety of ways. Some nations have devised means of enforcing their laws on an extraterritorial basis, more so

on the high seas where no nation is sovereign. But some have been known to cross into a neighboring State in the hot pursuit of criminals in the act of fleeing across a border. But the more dramatic measures—such as the unilateral abduction [§5.3.B. *Alvarez-Machain* principal case], transmission [§5.3.C.3 Rendition], or murder of fugitives abroad—are comparatively rare, other than the attempted US internationalization of its criminal laws after 9–11. As discussed in §5.3 below on Extradition, such conduct has not occurred without a price.

A number of obstacles deter States from unilateral cross-border law enforcement. Perhaps most significant is the lack of the requisite sovereign military power and the illegality of such conduct under both International Law and the law of the affected country. Because of modern communications speed and access, Princeton professor Ethan Nadelman observes the quintessential consideration that “generating tensions in foreign relations ... [by] unilateral actions will invite comparable initiatives by foreign agencies within one’s own borders ...”¹⁹

In some instances, however, a nation will not be easily deterred. Kurds in the cross-border region linking eastern Turkey and northwestern Iraq have sought autonomy and/or an independent Kurdish State for a number of decades. They became far more bold in 2008, when they launched a series of cross-border incursions into both Turkey and Iraq. Turkey claimed the right of hot pursuit, knowing that the Iraqi and US governments had more pressing problems in Iraq. Turkey even went on to establish “security zones” in Iraq, near the Turkish border’s Kurdish area.

The US government supposedly approved rules of engagement which allow elite military commando units (Army Rangers) to pursue suspected terrorists into Pakistan from Afghanistan. While Pakistan considers such raids a threat to its sovereignty, the US has not always consulted with the Pakistanis in advance for fear of compromising military missions.²⁰

Regardless of the practice of a powerful nation, hot pursuit on land—in the absence of a prior treaty or present ad hoc concession—is nevertheless a *major* breach of a fundamental tenet of International Law. As expressed in the 1945 UN Charter, and portraying every morsel of authoritative intendment in today's eve-of-Cold-War-II brinksmanship:

Article 2

1. The Organization is based on the principle of the *sovereign equality* of all its Members.
...
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 [*Italics added*].

Today's claims of entitlement to "hot pursuit" are typically associated with Law of the Sea exceptions to jurisdiction [§6.3.B.]. The land/sea distinction is succinctly stated by Athens' University of Piraeus professor Nicholas Poulantzas' enduring treatise on hot pursuit:

even in cases of extreme necessity and in self-defence, States by no means recognize such a right to neighboring countries without a treaty including an express provision to the contrary. Therefore, pursuit on land has not succeeded in acquiring the character of a right in customary international law, as is the case with hot pursuit in the international law of the sea. This is the reason why a network of treaties between various States was necessary[,] permitting and expressly providing for hot pursuit on land on a basis of reciprocity and only under special conditions. These conditions are mainly the commencement of the pursuit immediately after the commission of the offence and the continuation of the pursuit ... [but] only up to a certain territorial limit.²¹

C. NATIONALITY PRINCIPLE

A State may regulate the conduct of its own citizens even when their acts occur entirely outside of that State. In 1992, US chess master Bobby Fischer defied a UN resolution imposing sanctions against the former Yugoslavia. No US citizen was permitted to travel to Yugoslavia because of US legislation, which required compliance with the UN resolution. When Fischer defied the travel ban, the US Treasury Department sent him a letter, warning him about the penalties for his refusal to comply. Although his

conduct took place on foreign soil, the US could rely upon the nationality principle of jurisdiction to legitimize any ensuing prosecution for his prohibited travel.

In the *Lotus* case discussed earlier, France could have prosecuted the French ship's officer for his negligence. Lieutenant Demons was a French citizen who damaged a French public vessel. This exercise of State jurisdiction would have been premised on the legal bond between a State and its citizens. That link generates reciprocal rights and obligations. As previously analyzed in the §4.2.A. *Nottebohm* case, a State is expected to protect its citizens when they are abroad—for as long as they owe it their allegiance. Conversely, a citizen's conduct may touch and concern the interests of his or her home State in a way that allows that State to request that the citizen return home. That State may also punish its citizen for certain conduct abroad, such as operating a public French vessel in a way that damaged it in a collision at sea, based on the nationality link between France and its citizen.

The nationality principle is invoked less frequently than the territorial principle. One practical reason is that the territorial and nationality principles often overlap. France would not *have* to invoke the nationality principle if it wanted to prosecute Lieutenant Demons. The territorial principle would be conspicuously available because his negligence also harmed the French vessel in the *Lotus* collision—an extension of France's territory on the high seas. In *Lotus*, Turkey did not claim that its criminal jurisdiction was based in whole or in part on this principle because the *Lotus* watch officer was not a Turkish citizen. Turkey might have done so if the *Lotus* issues had included any wrongdoing by the captain of the Turkish vessel.

Under the nationality principle, States enjoy relatively unfettered legal control over their citizens. A State's treatment of its own citizens was historically not within the legal province of other states.²² The following case explains why:



Blackmer v. United States

SUPREME COURT OF THE
UNITED STATES

284 U.S. 421 (1932)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Five, click Blackmer.

D. PASSIVE PERSONALITY PRINCIPLE

This form of jurisdiction is based on the nationality of the victim when the crime occurs outside of the prosecuting State's territory. It is probably the least used jurisdictional basis, given its potential for abuse.

An unlimited application of the passive personality principle would result in the potential prosecution of *anyone* in the world, *anywhere* in the world, who allegedly harmed citizens of the prosecuting country. It is generally not used unless another principle is also applicable. In the above PCIJ *Lotus* case, Turkey relied on the passive personality principle to support its prosecution of the French ship's officer (in addition to its primary territoriality principle argument). His conduct harmed Turkish citizens and Turkish property interests. Because the conduct took place outside of Turkey, the Court cautiously acknowledged the theoretical applicability of this principle. Some of the judges expressed their belief that International Law does not permit assertions of jurisdiction exclusively on this basis. Judge Moore warned that jurisdiction based solely on the victim's citizenship would mean "that the citizen [victim] of one country, when he visits another country, takes with him for his 'protection' the law of his own country and subjects those with whom he comes into contact to the operation of that law. In this way an inhabitant of a great commercial city, in which foreigners congregate, may in the course of an hour unconsciously fall under the operation of a number of foreign criminal codes...."²³

The courts have narrowly applied the passive personality principle of extraterritorial criminal jurisdiction. In 2002, for example, a Mexican national was convicted of sexual contact with a minor US citizen on a cruise ship in Mexican territorial waters. The federal Court of Appeals analysis was as follows:

International law supports extraterritorial jurisdiction in this case. Two principles of international law permitting extraterritorial jurisdiction are potentially relevant: the territorial principle and the passive personality principle. Under the territorial principle, the United States may assert jurisdiction when acts performed outside of its borders have detrimental effects within the United States. The sexual contact occurred during a cruise that originated and terminated in California. Neil's conduct prompted an investigation by the FBI, and an agent arrested Neil in the United States. The victim was an American citi-

zen who lives and goes to school in the United States, and who sought counseling in this country after the attack. These facts are enough to support jurisdiction under the territorial principle.

...

Extraterritorial jurisdiction is also appropriate under the passive personality principle. Under this principle, a state may, under certain circumstances, assert jurisdiction over crimes committed against its nationals.... Citing the Restatement [(Third) of Foreign Relations Law of the United States § 402, in a similar case] we noted that, in general, the passive personality principle has not been accepted as a sufficient basis for extraterritorial jurisdiction over *ordinary* torts and crimes.... By contrast, [US Criminal Code] § 2244(a)(3) ... invokes the passive personality principle by *explicitly* stating its intent to authorize extraterritorial jurisdiction, to the extent permitted by international law, when a foreign vessel departs from or arrives in an American port and an American national is a victim (*italics added*).²⁴

In March 2005, two members of the Italian Ministry of Justice and an Italian journalist were passengers in a car being driven to the Baghdad Airport. The ministers were accompanying the journalist, just after her release from captivity. US forces mistakenly fired on that car, killing the journalist and wounding the ministers. A joint investigation by Italy and the US could not agree upon the appropriate outcome. In February 2007, a member of the US National Guard was indicted by Italian prosecutors for his role in this incident. He was tried in absentia. The judge ruled that the "law of the flag," in this case referring to the US soldier's sending state, prevailed over the passive personality principle of jurisdiction. In the absence of a status of forces agreement, an exercise of criminal jurisdiction over a combatant—based upon the passive personality—was not appropriate when this soldier's US sovereign was in command at the time of this event. The Italian judge thus ruled that any claim against the combatant was essentially one against his sovereign State. Any international claim would have to be resolved via political means.²⁵

E. PROTECTIVE PRINCIPLE

Under this theory, the criminal act must threaten the security (territorial integrity or political independence) of the State. The protective principle allows a State to

prosecute its own citizens, as well as citizens of other States, for their relevant conduct outside of its territory. The perpetrator may choose not to enter the State whose laws have been violated. That State will then have to seek his or her extradition from a State where the offending individual is found. In any event, and as acknowledged by the US Supreme Court, “under the ‘protective principle’ of international law, a nation is permitted ‘to assert jurisdiction over a person whose conduct outside the nation’s territory threatens the nation’s security.’”²⁶

The protective principle differs from the analogous territorial principle because the effect of the criminal’s conduct does *not* have to be felt within the territory of the offended State. In a US case distinguishing these two principles, a Canadian citizen made false statements while trying to obtain a visa from the US Consulate in Montreal. The court noted that “the objective principle [requiring that the effects of the crime be directly felt within the territory] is quite distinct from the protective theory. Under the latter, all the elements of the crime occur in the foreign country and jurisdiction exists because these actions have a ‘*potentially* adverse effect’ upon security or governmental functions ... and there *need not be any actual effect* within the country as would be required under the objective territorial principle.”²⁷

Because of the potential for abuse, national legislation which relied on this vintage principle to assert jurisdiction normally required that high officials undertake discretionary reviews of its proposed use against conduct abroad which might not be criminal under foreign law, for example, when a Swedish national acted legally abroad in a way which harmed Swedish interests. The basic concern is the subjugation of aliens to Swedish law for acts undertaken far from Sweden, which *might* have some effect (unlike the territorial principle which requires that effect to be felt within the prosecuting nation).

Contemporary applications of the protective principle also require double criminality. The Swedish prosecution of a person (Swedish or otherwise) for a crime against Swedish interests requires that the crime also be a violation of the nation where the act was perpetrated. Furthermore, Sweden will not impose a sanction that is greater than the place of occurrence would levy.

The primary reason for imposing modern limitations is the 1970 European Convention on the International Validity of Criminal Judgments. The Convention strengthened individual rights, while bringing State exer-

cises of criminal jurisdiction more into line with the realities of the modern world. As noted in the lone book which focuses exclusively on this principle: “With greatly increased international mobility, it was no longer felt to be reasonable to use the criminal law to impose unconditionally Swedish norms of behaviour on nationals and domiciled aliens when they were abroad.”²⁸

In the aftermath of corporate accounting scandals in the US, especially those involving Enron and Worldcom, the US Congress responded with legislation with an extraterritorial effect. It effectively asserts jurisdiction over foreign accounting firms. European Union (EU) countries were upset because their laws already dealt with such matters—thus obviating the need for this “intrusion.” In the words of one French journalist: “After the Enron and Worldcom affairs one would have thought that the United States was in a poor position to give the world lessons about corporate governance.”²⁹ One provision in this legislation singles out foreign accounting firms. It asserts jurisdiction over them if they play “a substantial role in the preparation and furnishing” of accounting statements filed with the Securities and Exchange Commission.³⁰ This legislation is similar to the 1996 Helms-Burton Act [textbook §12.1.B.6.]. Its provisions penalize non-American firms for “trafficking” in property expropriated by Cuba in 1959. Both statutory regimes are examples of laws designed to secure US economic interests.

Most states do not use this theory for exercising jurisdiction. In the leading treatise on International Law as applied by Canada, the authors explain that the focus on “security” underscores the potential for abuse:

A state may exercise jurisdiction over acts committed abroad that are prejudicial to its security, territorial integrity and political independence. For example, the types of crime covered could include treason, espionage, and counterfeiting of currency, postage stamps, seals, passports, and other public documents.

Canada and other countries such as the United Kingdom have not favored this principle when unaccompanied by other [jurisdictional] factors such as nationality or other forms of allegiance tying the accused to the forum.³¹

F. UNIVERSAL PRINCIPLE

Certain crimes spawn a “universal interest” because they are sufficiently heinous to be considered crimes against

the entire community of nations. The perpetrators of these crimes are deemed to be enemies of all mankind. Any nation where the perpetrator is found is expected to arrest and try the perpetrator or to extradite the criminal to a State that will prosecute. Genocide [§10.1.B.] is the classic example. The universality principle is not applied to “common crimes” such as murder because it is not sufficiently outrageous. This section will help you in the quest to determine whether an event like “9–11” is a *universal* crime or the *national* crime of (mass) murder.

One distinguishing feature of universal jurisdiction is that it is “criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.”³² Unlike all of the other bases for a State to exercise its jurisdiction over matters arising beyond its boundaries, the universal jurisdictional linchpin is the nature of the crime—rather than any connection to a particular country.

The 2001 *Princeton Project* provides a convenient shopping list of universal crimes: “(1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity”³³—the latter three being the fundamental Nuremberg allegations you will study in §8.5.B. While some commentators may disagree with the length or completeness of this list, its moral accuracy cannot be contested.

1. Piracy Piracy was the first crime over which there was “universal” jurisdiction. It was effectively invoked when no other principle was applicable. It was (and is) usually committed on the high seas, rather than within the territorial waters of any nation. In 1803, US President Thomas Jefferson rebuffed demands that he pay a \$225,000 ransom to end pirate attacks against the US. These were the famed Barbary Pirates, who were Ottoman privateers operating off the coast of North Africa. Jefferson dispatched US war ships to the Mediterranean instead. They ultimately rid the area of pirates at that time.

Piracy in this region of the world was not eradicated, however. In November 2005, pirates attacked a luxury cruise liner with a rocket-propelled grenade and machine guns off the coast of east Africa. Several ships per month had been attacked, valuables stolen, and crews held hostage for ransom. Small speed boats had been boarding yachts and oil tankers. Under the universal principle, all

nations have the jurisdiction and the duty to apprehend pirates when they are present and thus subject to capture or extradition. In March 2006, two US Navy military vessels returned fire, killing and wounding pirates near Somalia’s coast. The US was engaged in maritime security operations within twenty-five miles of the Somali coast. While Somalia’s unrecognized warlord government might have objected, the other nations of the world did not. In April 2009, the US was itself subjected to the first seizure of a US vessel on the high seas in two centuries. US Navy Seals brought that incident to an end by killing or capturing five Somali pirates while rescuing the private vessel’s US captain.

The zenith occurred in the fall of 2008. Nine ships were simultaneously being held for ransom off the Gulf of Aden (between Somalia and Yemen), which is the main sea route between Europe and Asia. In February 2009, Somali pirates collected a \$3,200,000 ransom for an Ukrainian vessel laden with Russian tanks and ammunition. This amount was paid as US warships observed the pirates’ departure. They feared that any retaliation would endanger the lives of the 147 hostages aboard other captured ships in the area. The UN had essentially authorized a global response to this scourge in December 2008. The Security Council unanimously authorized “all necessary measures,” whereby willing nations could conduct land and air attacks on known pirate bases on Somalia’s protracted coastline. Permission must first be obtained from Somalia’s “government,” however, which will in turn notify the UN Secretary-General. The maritime industry appears to be the victim. It may be argued, however, that this industry “is itself a standard-bearer for the advantages that exist in a world beyond law and regulation.... The very same people who for years have made a mockery of the nation-state idea ... know that whatever pirate tolls they pay will always pale in comparison with the taxes that would be imposed if global law and order ever actually prevailed.”³⁴

Aerial piracy is a modern analogy, serving as a basis for applying this vintage jurisdictional concept. In the 1970s, it became quite evident that: aircraft could be seized by individuals of unknown nationality; they answered to no State authority; and their interference with navigation was taking place over the high seas, Antarctica, and places elsewhere on the planet that were outside the territorial jurisdiction of any nation.³⁵

2. International Terrorism? The UN's 2001 Security Council Resolution 1373 appears to include international terrorism as well. Under its terms:

all States shall ...

[2](e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

...

[3](d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;

(e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001)....

However, this language is not specific enough to require that UN members draft and implement a treaty on "international terrorism." You will recall from textbook §1.2 on Sources of International Law that conventions (treaties) are one source for ascertaining the content of International Law. There is no treaty, however, which is so cavalier as to be entitled the Treaty Against International Terrorism. Why? Not all States agree on what that term means. One person's terrorist may be another person's hero. States *have* become parties to treaties specifying particular conduct as being sufficiently terrorist in nature to be a punishable or extraditable offense. The 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, for example, extends the universality principle of jurisdiction to aircraft hijacks [textbook §6.3]. You will also recall that consent is the linchpin of State-driven modus operandi of International Law [textbook §1.1.A.1.]. Not all States are parties to the Hague Convention. Of those that are parties, some have done so on the basis of a limiting reservation. These are tolerated as a price tag for encouraging more robust treaty participation (a focal theme of textbook §7.2.A. on Treaty Formation). Put another way, half a loaf is better than none.

3. Genocide [§10.1.B.] One of the clearest and most prominent examples of a prosecution for a universal crime involved acts perpetrated during the Nazi Holocaust in World War II. In *Israel v. Eichmann*, Israel prosecuted Adolf Eichmann, Hitler's chief exterminator, under its Nazi Collaborators Punishment Law. That legislation and the ensuing prosecution were based on the application of universal jurisdiction. (In September 2008, an Israeli cabinet minister asserted that Iran's president should likewise be brought to Israel—on the premise of President Ahmadinejad's repeated calls for Israel to be "wiped off the face of the map." Iran's UN ambassador responded with a protest to the UN Secretary-General.)

None of the other jurisdictional principles were available to Israel to avenge the Nazi-directed Holocaust. The territorial principle could not apply because Israel did not become a State until 1948. The nationality principle was inapplicable because *Germany* would have to be the prosecuting State for that principle to apply. The passive personality principle did not apply because no victim could possibly be a citizen of the State of Israel before it came into existence. In the absence of an Israeli State during the period in which Eichmann engaged in his atrocities, the protective principle could not be invoked to protect the interests of a nation that did not yet exist. Israel could not garner the help of the US. Its intelligence community did not want to expose Eichmann's known location. The fear was that—if captured—he could expose the intricate system of West German undercover efforts aimed at the Soviets during the Cold War.³⁶

Eichmann committed the crime of genocide against the citizens of various European States before Israel existed. Eichmann was abducted from Argentina by Israeli commandos to stand trial in Israel. The resulting prosecution was undertaken in Israel's capacity as a member of the community of nations. It asserted its universal jurisdiction to prosecute Eichmann. In the opinion of Israel's Supreme Court:

The crimes defined in this [Israeli] law must be deemed to have always been international crimes, entailing individual criminal responsibility: customary international law is analogous to the Common Law and develops by analogy and by reference to general principles of law recognized by civilized nations; these crimes share the characteristics of crimes ... which damage vital international interests, impair the foundations and security of the international community, violate universal moral values and humanitarian prin-

ciples ... and the principle of universal jurisdiction over “crimes against humanity” ... similarly derives from a common vital interest in their suppression. The State prosecuting them acts as agent of the international community, administering international law.³⁷

The most prominent contemporary application could be the trial of Usama bin Laden [Problem 5.C.]. Any one of the eighty-one countries that lost citizens in 9–11 might prosecute him. But so could any other nation of the world, assuming it characterizes his role in 9–11 as a universal crime. That country might (theoretically) decide not to turn bin Laden over for trial to any other national or international tribunal. It would thus be exercising universal jurisdiction.

One of the most intriguing judicial applications of universal jurisdiction involved a Belgian prosecution—where there was *no* other jurisdictional link between the perpetrator and the prosecuting State, as illustrated in the following case:



Case Concerning the Arrest Warrant of 11 April 2000

(DEMOCRATIC REPUBLIC OF
THE CONGO V. BELGIUM)

INTERNATIONAL COURT OF JUSTICE

GENERAL LIST NO. 121 (FEB. 14, 2002)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Five, click [Belgian Arrest Warrant](#).

Palestinians brought suit against former Israeli Prime Minister Ariel Sharon in a Belgian court. They claimed reparations for the acts occurring under his military command in Lebanon in 1982. The relevant massacres had been investigated under Israel’s Commissions of Inquiry Law that year—resulting in this suit being dismissed as politically motivated. So the Palestinians took advantage of Belgium’s universal jurisdiction statute. Then, it required no nexus between Belgium and the defendant. At least thirty such cases were brought under this now modified Belgian law. The defendants included world leaders and their agents, including President Fidel Castro of Cuba, former President Hashemi Rafsanjani of Iran, and President Paul Kagame of Rwanda.

A number of nations were not pleased with the potential reach of Belgium’s statute. Claims could be filed there against any government official in the world who could be accused of a universal crime such as genocide. For example, in May 2003, the US House of Representatives passed H.R. 2050, the bill known as the “Universal Jurisdiction Rejection Act of 2003.” This bill was presented on the House floor, “[t]o prohibit cooperation with or assistance to any investigation or prosecution under a universal jurisdiction statute.” Belgium soon thereafter limited its unique universal jurisdiction law (if for no other reason than NATO’s being headquartered in Brussels).

Spain reacted otherwise. Its (highest) Constitutional Court overruled the Spanish Supreme Court 2003 decision that Spain’s universal jurisdiction statute applied *only* to crimes involving *Spanish* citizens. That interpretation was deemed too restrictive. The Constitutional Court’s October 2005 decision thus reversed the Spanish Supreme Court’s earlier result—that Spain’s universal jurisdiction statute was available only when Spanish citizens were the target of universal crimes, but not for this Guatemalan plaintiff. Per the Constitutional Court, the Supreme Court’s unnecessarily restrictive limitation “contradicts the very nature of the crime [of genocide] and the aspiration of its universal prosecution,” as envisioned by the UN Convention on the Prevention and Punishment of the Crime of Genocide [textbook §10.1.B.]. Thus: “The principle of universal jurisdiction takes precedence over the existence or not of national interests.” The Guatemalan Nobel Prize-winning plaintiff (who resides in Spain) was ultimately permitted to sue Guatemalan officials in Spanish courts for their alleged atrocities against Guatemalans from 1978–1986 (including genocide, torture, and illegal detentions).³⁸ Thus, only the presence of the wrongdoer on Spanish territory is required—as is the case in the US application of universal jurisdiction under its Alien Tort Statute [text §10.6.C.].

In October 2007, the International Federation of Human Rights and the European and US Centers for Constitutional and Human Rights filed a case against former Secretary of Defense Donald Rumsfeld in a French court. They claimed that under French law, Rumsfeld’s presence in France yielded an appropriate application of the universal jurisdiction principle. They relied on alleged violations of the UN Convention on Torture [covered in §9.6.B.4(d–e), 7(a).] at Abu Ghraib in Baghdad, the US Guantanamo Bay facility in Cuba, and various other locations where the US has a military or civilian presence. The

(former) US general in charge of Abu Ghraib and other prisons in Iraq filed documents with the court regarding abuse of detainees under her command. Similar cases against Rumsfeld have been filed in Germany, Argentina, and Sweden. None have yet gone to trial.³⁹

A global table, listing the various incantations of universal jurisdiction, would illustrate that Europe has the most encompassing laws of this nature.⁴⁰

G. INTERNET APPLICATIONS

1. Net Threat Now that you have studied the five jurisdictional principles, we can focus on their application in a fresh context: the Internet. As of November 2005, fifteen percent of the planet's six billion inhabitants already have access to the Internet. Almost fifty-two percent of these cybernauts are located in Canada, Europe, and the US. These percentages will increase dramatically by the next edition of this book. Sovereign nations fully understand the implications and have reacted in predictable ways.

One attribute of the contemporary *Information Revolution* is that States are finding it increasingly unmanageable. Individuals and corporations are using the Internet to challenge the State's traditional ability to control activities occurring within—and in many cases beyond—its borders. They have numerous reasons for attempting to control the Internet, especially in the current global War on Terror. One example is the use of the Internet by Al-Qaida. In a prominent scenario, an Egyptian member registered a domain name and rented a server in China in February 2000. It served as a hub for this group's activities in various countries. The US President Bush Administration, for example, unreservedly asserted his authorization of electronic surveillance of various communications media in and outside the US. This has been done without judicial approval in the name of national security so as to wage the War on Terror.⁴¹

One of the prominent figures in such matters was Abu Musab al-Zarqawi. He formed the group which later became Al-Qaida in Iraq (which he led until his death in 2006). Al-Zarqawi used the Internet to take responsibility, via his discreetly disseminated audio and videotapes, for numerous acts of violence in Iraq. These included suicide bombings and gruesome hostage executions. He used the Internet as a powerful tool for his "global jihad." A deluge of web tributes thus reached an audience that greatly expanded. He reached groups such as Russia's Chechan separatists and Hamas in Gaza.

He became known as the Alexander Graham Bell of terrorist propaganda. His hour-long video, *Winds of Victory*, displayed numerous pictures of suicide bombings that were then serialized on extremist websites. As of December 2007, a Saudi researcher estimated that 5,600 Al-Qaida-linked websites are spreading its ideology worldwide. Some 900 new sites appear every year, most of which are difficult to track.⁴²

It is thus no surprise that governments today have an intense interest in controlling the Internet. It can threaten national security. During Russia's 2008 military advances in Georgia's South Ossetia region, the Georgian government suffered a cyber warfare attack on its government websites. They crashed frequently. Imagine the impact in your home country, were all or a portion of its government, military, or civilian components to crash during the onslaught of some external military campaign—or the equivalent of Batman's League of Shadows, or the Joker, trying to bring down Gotham. A US security research team established that a data stream, known as a distributed denial of services, was directed at Georgian government websites. This contrivance overloaded and shut down Georgia's government servers. The command and control server, though based in the US, was directed by the Russian-language website <<http://stopgeorgia.ru>>. The Russian government denied any association with the St. Petersburg criminals who launched their cyber attack from this website. It was launched just before Russia launched its first air attack in Georgia.⁴³

Previously addressed jurisdictional theory, such as the territorial "effects doctrine" and other internationally recognized bases for governmental control are ineffective solutions to the jurisdictional issues posed by the Internet. The intersection of law and the Internet presents problems, which have not been adequately addressed in the emerging shift from a traditional, territorial domain to a virtual, electronic environment. States are therefore attempting to apply traditional legal principles to retain what power they can summon to control either Internet commerce or Internet content that may be offensive to public policy. In one instance, Austria investigated 2,360 suspects from seventy-seven countries, who were viewing the worst kind of child pornography—including very young girls screaming while being raped. This was facilitated via a Russian website stored on a Vienna computer.⁴⁴

In spring of 2004, the People's Republic of China closed down 8,600 Internet cafes, mostly for illegally admitting juveniles. China bans them from operating

within 220 yards of schools to prevent students from being exposed to pornography or becoming addicted to online video games. The General Administration for Industry and Commerce provided a statement regarding the above closures that “cafes admitting children have brought great harm to the mental health of teenagers and interfered with school teaching, which has aroused strong reaction from the public.” In March 2007, China banned the opening of any new Internet cafes.⁴⁵ In January 2009, it rescinded an earlier web filtering rule that if implemented would have required manufacturers to install Internet filtering software in all computers made in or bound for China.

Many other nations, espousing admirable objectives, exhibit like concerns. The 2001 Council of Europe Cybercrime Convention, for example, facilitates cooperation in the investigation and prosecution of Internet-based offenses.⁴⁶ This Convention applies to any Internet service provider (ISP) having a fixed location within the EU. It created the new criminal offense “illegally accessing an information system.” The European Network and Information Security Agency, operational as of 2004, is designed to help governments (including the US, which is a party), businesses, and consumers protect their computers and privacy interests. At the invitation of the Swiss Federal Data Protection Commissioner, the 27th International Conference of Data Protection and Privacy Commissioners met and produced the September 2005 Montreux Convention. It “encourages international and supra-national organizations to commit ... to complying with principles ... compatible with ... data protection and privacy ... [and] software manufacturers to develop products and systems integrating privacy enhancing technologies.” The goal is to control the risks associated with biometrics in government-issued passports, identity cards, and travel documents.

Many nations are combating online gambling services which operate beyond their borders. The London-based BetOnSports business generated about \$6,000,000,000 annually from US players. The Unlawful Internet Gambling Enforcement Act became law in October 2006. Its provisions include the following purpose: “New mechanisms for enforcing gambling laws on the Internet are necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.” The month after this law was passed, the US government

settled its case against BetOnSports. That entity has agreed never to knowingly accept another bet from a US player (raising the enforcement question addressed in the *French Yahoo!* case below).⁴⁷

International organizations are likewise involved in controlling Net usage. During Saddam Hussein’s rule, UN sanctions prevented Iraq from importing most computer equipment. These sanctions did not hurt the people of Iraq. Hussein’s regime severely limited citizen access to cyberspace. After the regime changed, the November 2005 UN-sponsored World Summit on the Information Society convened in Tunis. One objective was to promote UN participation in controlling the Internet. This program has been labeled, however, as a digital Trojan Horse. Under the guise of making the Internet more accessible to the world’s population, its working group (including China, Cuba, Iran, and Saudi Arabia) hopes to concentrate control within the UN. Some of the most repressive regimes therefore seek to wrestle Internet control from the private organization now controlling domain names and the other trappings of Internet governance.⁴⁸

Other organizations have been more successful. The Council of Europe is responsible for the 2001 Convention on Cybercrime. Its 2003 Protocol to this treaty criminalizes acts of a racist or xenophobic nature when facilitated via computer. An individual user may not threaten any cognizable group via computer. She may not insult such groups, especially those associated with genocide.⁴⁹

In February 2009, the European Union issued the Safer Social Networking Principles (Principles). They are aimed at providing “good practice recommendations for the providers of social networking and other user interactive sites.” They also seek to enhance “the safety of children and young people using their services.” These Principles are “aspirational and not prescriptive or legally binding.” They are the product of a joint effort between the Social Networking Services (SNS) providers and the European Commission. SNS providers are now expected to utilize the “range of good practice approaches” outlined therein as the methodology for decreasing possible harm to children and young adults. A number of US states have joined in the US version, known as the Joint Statement on Key Principles of Social Networking Sites Safety.⁵⁰

Governmental control—whether by States or international organizations—is difficult to maximize. At least twenty-five countries now censor websites for political, religious, social, or criminal control reasons. These reasons run the range from “good” to “bad,” much of which is in

the eye of the beholder. The August 2008 Olympics in China was a disappointment to the International Olympic Committee. It had assurances that China would not limit Internet access during the Olympic Games—which unfortunately was not the case. Examples of “good” controls would include any which would prevent the reoccurrence of the America Online employee who stole 93,000,000 e-mail addresses in 2003 for sale to spammers.

The Net is just one of the e-platforms arguably in need of some control. In June 2007, the French government banned the BlackBerry from the presidential palace and government ministries. In the age of terrorism and corporate espionage, the French government fears that the US National Security Agency might be eaves-

dropping on ministerial messaging. While the BlackBerry’s manufacturer denies this, the French nevertheless consider it a threat to state secrets. The German Constitutional Court similarly banned using the Internet for spying. In its February 2008 opinion, the court barred the government from spying on criminals or suspected terrorists. In summer 2009, Iran blocked access to Facebook three weeks prior to the presidential election that sparked extended protests against the incumbent winner. Iran later blocked cell phone access and Twitter communications.

But wrestling control of the Internet from its users is easier said than done. For example, you probably have access to a computer terminal and the Internet, both at

Law and Borders—The Rise of Law in Cyberspace

BY DAVID JOHNSON AND DAVID POST

48 STANFORD LAW REVIEW 1367 (1996)

Cyberspace radically undermines the relationship between legally significant (online) phenomena and physical location. The rise of the global computer network is destroying the link between geographical location and: (1) the power of local governments to assert control over online behavior; (2) the effects of online behavior on individuals or things; (3) the legitimacy of a local sovereign’s efforts to regulate global phenomena; and (4) the ability of physical location to give notice of which sets of rules apply...

Cyberspace has no territorially based boundaries, because the cost and speed of message transmission on the Net is almost entirely independent of physical location. Messages can be transmitted from one physical location to any other location without degradation, decay, or substantial delay, and without any physical cues or barriers that might otherwise keep certain geographically remote places and people separate from one another. The Net enables transactions between people who do not know, and in many cases cannot know, each other’s physical location.... The system is indifferent to the physical location of those machines, and there is no necessary connection between an Internet address and a physical jurisdiction. Although the domain name initially assigned to a given machine may be associated

with an Internet Protocol address that corresponds to that machine’s physical location (for example, a “.uk” domain name extension), the machine may be physically moved without affecting its domain name.

Alternatively, the owner of the domain name might request that the name become associated with an entirely different machine, in a different physical location. Thus, a server with a “.uk” domain name need not be located in the United Kingdom, a server with a “.com” domain name may be anywhere, and users, generally speaking, are not even aware of the location of the server that stores the content that they read.

...

They [governmental authorities] assert jurisdiction only over the physical goods that cross the geographic borders they guard and claim no right to force declarations of the value of materials transmitted by modem. Banking and securities regulators seem likely to lose their battle to impose local regulations on a global financial marketplace. And state attorneys general face serious challenges in seeking to intercept the electrons that transmit the kinds of consumer fraud that, if conducted physically within the local jurisdiction, would be easier to shut down.

...

home and at school. Yet your digital machinations have only the most tenuous connection to your physical location. Nations wishing to participate in modern commerce will have to strike a balance between what their governments wish to regulate and grasping the immense value that the information age now offers. Two leading analysts posed the above dose of cyberspace reality.

The foregoing excerpt illustrates the inherent difficulty with placing new wine (Internet transactions) into old bottles (territorial jurisdiction). As national authorities struggle to control this communications medium, they are relying on jurisdictional principles dating from the 1648 Treaty of Westphalia. Such efforts are bound to result in national apprehension after Nation No. 1 attempts to regulate the Internet, followed by Nation No. 2 responding in kind.

2. Net Conflict The foremost case to capture the essence of this dilemma is the *French Yahoo* case. This book's 5th edition contained segments of the five previous French and US judgments in this cyber saga. The 6th edition retains the original French decision, rendered by the Tribunal De Grande Instance of Paris in 2000—click “French Yahoo Judgment” on the Course Web Page, Chapter Five. The ostensibly final 2006 US decision also appears at that point on the Course Web Page; click en banc US judgment.

Attempted national control can spawn inter-State conflict in far less charged contexts as well. After 9–11, the US obtained the transfer of airline passenger data from European countries for flights originating in Europe and bound for, or flying over, the US. Akin to the above *French Yahoo* judgment, the European experience with the Holocaust makes the transfer of personal data a comparatively huge undertaking, regardless of the reasonable intentions of the Bush Administration in this quintessential matter of national security. The European Council concluded an agreement between the European Community and the US in 2004. It resulted in 34 items of personal information for each passenger being transferred to the US, within 15 minutes of the departure of each flight. But in May 2006, the EC's Court of Justice annulled that treaty, notwithstanding the Commission's assurances of necessary dissemination of information related to public security. Even Canada has resisted the US plan requiring such data about airline passengers flying from Canada, including when departing aircraft will be flying over the US without stopping.⁵¹



Yahoo! Inc.

v.

**La Ligue contre le Racisme et
l'Antisémitisme and L'Union
Des Etudiants Juifs De France**

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Five, click as follows:

en banc US judgment for final US case &
French Yahoo! Judgment for initial French case.

The waning but nevertheless ever-present State monopoly on power can also be used to bring local dissidents into line. China, for example, used economic pressure to lure foreign service providers into its program—as described in a US congressional hearing—for “decapitating the voice of online critics.” Pursuant to congressional testimony in the spring of 2006, the US companies Cisco, Google, Microsoft, and Yahoo have expanded their markets by the sale of software that enables China to conduct surveillance of its citizens. Per Yahoo's retort: “Just like any other global company, Yahoo must ensure that its local company sites operate within the laws, regulations and customs of the country in which they are based.” Per Reporters Without Borders, a Chinese division of Yahoo provided information to authorities resulting in the arrest and conviction of a major dissident. His crime was criticizing local officials online. The Google representative testified that Google has lent its expertise and name to blocking information on religion, politics and history that the Communist Party believes might undermine its monopoly on power. This House Subcommittee on Africa, Global Human Rights, and International Operations hearing was conducted with a view toward developing legislation that would bar an Internet company's ability to censor or filter out basic political or religious terms from users' electronic communications.⁵² Needless to say, Tibet's Dalai Lama would love to return to China even if only in cyberspace via his website's thousands of images.

3. FutureNet As you studied in Chapter 2, States are increasingly outsourcing sovereign responsibilities; and in Chapter 3, you learned how more international organizations are thus taking on roles once limited only to States. One example is the evolution of the Internet Corporation for Assigned Names and Numbers (ICANN). This is a California non-profit corporation created in 1998.⁵³ It manages Internet-related tasks on behalf of the US Government—for example, the resolution of domain name ownership for the generic top-level domains, including “.org” and “.edu.”

The US has attempted to retain the existing system of Internet governance, now being reconsidered via the negotiations within the World Information Summit Outcome on Internet Governance. Countries such as Brazil, China, Iran, and Saudi Arabia have criticized the US dominance of the Internet and its controls. The US nevertheless agreed to creation of the ensuing Internet Governance Forum. Its statement of principles includes signals that the competition for Internet control, coming from both national and individual competitors, will not be ignored:



Tunis Agenda for the Information Society

WORLD SUMMIT ON THE INFORMATION SOCIETY

DOCUMENT: WSIS-05/TUNIS/DOC/6(Rev.1)-E
(18 Nov. 2005)

<<http://www.itu.int/wsis/docs2/tunis/off/6rev1.pdf>>

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Five, click Tunis Agenda for the Information Age.

◆ §5.3 EXTRADITION

Section 5.2.A.2 presented the five jurisdictional bases for prosecuting individuals engaged in international criminal activity. The theoretical availability of jurisdiction is pointless, however, if the alleged criminal is not present. Some States try criminals *in absentia* under their internal laws. This is not very satisfying, however, if the State cannot enforce its judgment because the convicted

criminal is absent. There is no global extradition treaty. Instead, there are hundreds of bilateral treaties listing mutually agreeable conditions for the surrender of accused or convicted criminals to stand trial in the requesting State. An extradition request by State X asks State Y to turn over an individual located in State Y who has committed a crime which violated the laws of State X. State X normally seeks extradition of the individual via diplomatic channels. If State Y agrees to X's request, then Y surrenders the accused to X authorities.

This process has ancient origins. The first recorded extradition treaty dates back to 1280 BC, when an Egyptian Pharaoh foiled an attempted invasion by the bordering Hittite nation. The ensuing peace treaty provided for the exchange of the activists who had returned to their respective nations where they sought shelter after the unsuccessful invasion attempt.⁵⁴

A. UTILITY

Extradition treaties are usually necessary because extradition is not automatic. A nation may, of course, decide to extradite an individual to a requesting country although there is no applicable treaty. As of June 2008, Cuban President Raul Castro (unlike his brother Fidel) has extradited four people to the US.

There is no *duty* to surrender an individual to another nation. As articulated by the US Supreme Court: “in the absence of a conventional or legislative provision, there is no authority vested in any department of the government to seize a fugitive criminal and surrender him to a foreign power.... There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that statute or treaty does not deny the power to surrender. It must be found that [some] statute or treaty confers the power.”⁵⁵

When granted, extradition overcomes a major jurisdictional limitation closely linked to State sovereignty. Extradition allows States to accomplish indirectly what they cannot do directly. Austria's police agents cannot enter Germany to apprehend a criminal. Austria's desire to prosecute that criminal is met, however, should Germany grant Austria's extradition request. Extradition circumvents the limitation that Austria's territorial jurisdiction cannot extend beyond its borders into Germany. Extradition also accomplishes the broader objective of facilitating international assistance in the apprehension of criminals.

The British jurist Lord Russell stated in a classic case that “the law of extradition is ... founded upon the broad principle that it is in the interest of civilised communities that crimes ... should not go unpunished, and it is a part of the comity of nations that one State should afford to another every assistance towards bringing persons guilty of such crimes to justice.”⁵⁶ The nation that honors a request for extradition today may want the requesting nation to return that favor tomorrow.

Extradition treaties typically list a mutually acceptable schedule of offenses which are subject to extradition. The crimes are usually major offenses against the law of both parties to the treaty. For example, Article II of the 1978 Treaty on Extradition Between the United States of America and Japan provides as follows: “Extradition shall be granted in accordance with the provisions of this Treaty for any offense listed in the Schedule annexed to this Treaty ... when such an offense is punishable by the laws of both Contracting Parties by death, by life imprisonment, or by deprivation of liberty for a period of more than one year; or for any other offense when such offense is punishable by the federal laws of the United States and by the laws of Japan by death, by life imprisonment, or by deprivation of liberty for a period of more than one year.”⁵⁷ The extraditable offenses in this treaty include murder, kidnapping, rape, bigamy, robbery, inciting riots, piracy, drug law violations, bribery, evasion of taxes, unfair business transactions, and violations of export/import laws.

Some countries prohibit or greatly limit extradition. The Honduran Constitution, for example, has historically prohibited the extradition of Honduran citizens to the United States. The constitutions of Colombia (from 1991 to 1997), Russia, and Slovenia have barred extradition of their citizens to *any* foreign country. In 1993, a Pennsylvania judge claiming to be a Slovenian national fled from the United States to Slovenia after being convicted of corruption—where he remains a fugitive and is beyond the reach of US authorities. A related limitation is that, even when States X and Y have entered into an extradition treaty, the criminal may find a safe haven in State Z if it is not a party to the X-Y treaty.

On the other hand, there may be an *internationally* derived duty to surrender a fugitive for trial, which does not depend on a treaty as a legal basis for seeking extradition. The classic instance involves two Libyan intelligence

officers who were indicted by the United Kingdom and the United States for their alleged role in the 1988 terrorist bombing of Pan Am Flight 103. The plane blew up over Lockerbie, Scotland, claiming the lives of 270 people.⁵⁸ Libya refused to surrender them for trial. Several UN Security Council resolutions demanded their release for trial. Ultimately, negotiations with Libya resulted in their being extradited to The Netherlands to stand trial before three Scottish judges. In the interim, Libya countered with a lawsuit in the International Court of Justice, claiming that the United Kingdom and United States violated an air treaty to which all three (and most nations of the world) are parties. Libya claimed that it complied with this treaty. The United Kingdom and United States allegedly violated that treaty because a State in whose territory an offender is found has the obligation to try or extradite such individuals. Having submitted them to prosecution in Libya, there was supposedly no further Libyan obligation to extradite. Because of massive international pressure, Libya nevertheless surrendered them for trial abroad.⁵⁹

Case Study: In the US, extradition not based on a bilateral treaty is exceedingly rare. In the following case, however, the President committed the US to supporting the UN’s International Criminal Tribunals for both the former Yugoslavia and Rwanda without Senate involvement (a scenario further addressed in § 7.3.A. of this book.)

In 1996, the United States was about to surrender a Rwandan national—residing in Texas after leaving Rwanda two years earlier—to the International Criminal Tribunal for Rwanda (ICTR). This is the only case where transfer to one of the UN’s ad hoc international criminal tribunals was litigated in a US court. A federal magistrate denied the ICTR’s extradition request. He ruled that the federal statute authorizing such transfers was unconstitutional. Historical practice requires a bilateral treaty, even for the extradition of a foreign national from the United States. Another trial judge later decided that Mr. Ntakirutimana *could* be surrendered to the ICTR.

The appellate court delayed his extradition, but ultimately approved his surrender to the ICTR. A two-judge majority opinion recalled prior US Supreme Court case law whereby “no statutory basis conferred the power on the Executive to surrender a citizen to the foreign government.” However, even if Congress has rarely exercised the power to extradite by statute, rather than by executive

treaty, “a historical understanding exists nonetheless that it may do so.... [I]n some instances in which a fugitive would not have been extraditable under a treaty, a fugitive has been extradited pursuant to a statute that ‘filled the gap’ in the treaty.”

One of the two judges approving this extradition to the ICTR filed a concurring opinion in *Ntakirutimana*. He presented the following plea to the participating US Department of State:

I ... invite the Secretary to closely scrutinize the underlying evidence as she makes her decision regarding whether Ntakirutimana should be surrendered to the International Criminal Tribunal for Rwanda. The evidence supporting the request is highly suspect. Affidavits of unnamed Tutsi witnesses acquired during interviews utilizing questionable interpreters in a political environment that has all the earmarks of a campaign of tribal retribution raises serious questions regarding the truth of their content.

It defies logic, and thereby places in question the credibility of the underlying evidence, that a man who has served his church faithfully for many years, who has never been accused of any law infraction, who has for his long life been a man of peace, and who is married to a Tutsi would somehow suddenly become a man of violence and commit the atrocities for which he stands accused.

The third judge on this panel dissented, as follows:

Our Constitution is the result of a deliberate plan for the separation of powers, designed to prevent both the arrogation of authority and the potential for tyranny. Notwithstanding our nation’s moral duty to assist the cause of international justice, our nation’s actions taken in that regard must comport with the Constitution’s procedures and with respect for its allocation of powers. That is why we claim to be a nation ruled by law rather than men....

The Attorney General’s litigation position in this case has apparently been chosen for the purpose of validating a constitutional shortcut which would bypass the Treaty Clause. She stakes her case on the validity and enforceability of a warrant issued by the United Nations International Criminal Tribunal for Rwanda, which is a non-sovereign entity created by the United Nations Security Council, purporting to

“DIRECT” the officials of our sovereign nation to surrender the accused....

A structural reading of the Constitution compels the conclusion that most international agreements must be ratified according to the Treaty Clause of Article II. The history of national and international practice indicate that extradition agreements fall into this category. Our Founding Fathers intended that the President have authority to negotiate such agreements, but also that they be ratified pursuant to a special process intended to set a higher standard of legislative agreement than that required for ordinary legislation.⁶⁰

There were three distinct opinions issued by the judges on this appellate panel. Given the expectation that the President will exercise the constitutional treaty power to extradite individuals from the US in conjunction with the Senate, should the court have approved Ntakirutimana’s extradition to the ICTR?

The second judge stated that the ICTR indictment in this case “defies logic.” The defendant was a minister, had no prior criminal record, and was married to a member of the Rwanda Tutsis, who were slaughtered by the majority Hutus. Would it be better for the US court to resolve this issue, as part of the extradition process, or leave it to the foreign tribunal to resolve the logic of the charges? The ICTR ultimately found this defendant guilty of the charges of aiding and abetting genocide, but *not* conspiracy to commit genocide, crimes against humanity, murder, or cruel treatment of persons not taking an active part in hostilities. At his sentencing, he was found to be “a person of good moral character until ... 1994 during which he was swept along with many Rwandans into criminal conduct.”⁶¹

Criminals have always fled across borders to escape prosecution. But cross-border collaboration is growing in novel ways. One alternative to extradition is the Country B prosecution of a Country A national in the courts of country B for crimes committed in A. Under the Mexican Penal Code, Americans who violate state laws in the US—and then flee to Mexico where they are apprehended—are tried and serve time in Mexico for crimes committed in the US. The state of California has consistently led the US (since 1980) in relying on the Mexican law that authorizes the prosecution of anyone who violates the laws of California—rather than extradite the detainees to California. As of April

2007, just California's state and local authorities sought convictions in 277 cases in Mexico with the help of Mexican prosecutors. This alternative avoids sensitive issues in Mexico, as exemplified by the principle *Alvarez-Machain* case below. It also reduces the cost of prosecution for US prosecutors because the proceedings are being conducted in Mexico.⁶²

This option might be of interest in the reverse sense. Some countries do not extradite their citizens to other countries for criminal prosecution. Russia, for example, refused to extradite a KGB officer to England—where he allegedly killed a Russian critic of Russian President Putin via radiation poisoning in a London hotel. The U.K.'s May 2007 request was barred by the provision in the Russian Constitution barring extradition of a Russian citizen for trial abroad. The U.K. had relied on Russia's signing the 1957 European Convention on Extradition. However, Russia's participation was nevertheless subject to the Russian constitutional limitation.

B. IRREGULAR ALTERNATIVES

States do not always depend on extradition treaties when seeking to prosecute certain individuals. They may expel or deport wanted individuals without going through a formal extradition process, regardless of whether there is an applicable extradition treaty. States have also resorted to kidnapping.⁶³ In February 2003, the US CIA kidnapped an Egyptian Muslim preacher from the streets of Milan, Italy. He was flown to Egypt, where he alleges that he was tortured. Upon release, he sued Egypt's Interior Ministry, accusing it of complicity in this brazen daylight abduction. He plans on suing the Italian Prime Minister for assisting the US with his abduction. In June 2007, a court in Milan began the now suspended trial of the twenty-six absent US defendants. Trial had begun on the day that the US President arrived in Italy for unrelated meetings with the Pope and the Italian premier and president.

The most notorious defendants typically claim that they cannot be prosecuted because of an irregular extradition, regardless of the merits of the accusations against them. The State whose sovereignty has been violated may, of course, lodge a diplomatic protest. Few nations, however, are likely to go to the mat to protest an irregular extradition (abduction) with such despots. In the case of Adolf Eichmann (§5.2.E.—chief architect of the

Holocaust's "Final Solution"), Israel violated the territorial sovereignty of Argentina when its commandos secretly entered Buenos Aires to capture him for trial in Tel Aviv. He was not able to successfully invoke this violation as a defense to his prosecution in the Israeli court.

In the South African case, which follows (the US Supreme Court's *Alvarez-Machain* case below), the individual defendant was able to secure a dismissal of the case against him on this procedural ground. In 1994, a Venezuelan-born member of the Popular Front for Liberation of Palestine, Carlos "The Jackal," was finally brought to justice in France. He was the world-famous terrorist who allegedly trained many European and Middle East terrorist organizations during the 1970s and 1980s. As he was undergoing a medical operation in the Sudan, he was drugged and smuggled from the Sudan to Paris. While the Sudanese themselves may have arranged this kidnapping, his technical complaint about the method of capture and informal extradition was rejected by the French court wherein he was prosecuted. In any event, the Sudan did not protest this irregular alternative to extradition to France.

Slobodan Milosevic, the Federal Republic of Yugoslavia's former president, claims that he was improperly "deported" from Yugoslavia to the UN's criminal tribunal in The Netherlands—rather than being properly "extradited" under Yugoslavian law. President Vojislav Rostunica, Milosevic's successor, publicly commented that the Yugoslavian constitution "does not allow extradition of Yugoslav citizens to a foreign court, so any talk about possible extradition is not legally founded."⁶⁴ Yugoslavia's Constitutional Court subsequently voted unanimously to suspend his extradition to the UN war crimes tribunal. Prior to his departure, Milosevic's defense lawyer characterized any attempt to extradite him as an "outright kidnapping, an act of legal terrorism."⁶⁵ Ultimately, an official other than the new Yugoslavian president authorized Milosevic's departure, allegedly because of the threatened withdrawal of a \$1.3 billion US aid package related to the North Atlantic Treaty Organization (NATO) bombing campaign in Yugoslavia.

In one of the most internationally criticized cases ever decided by a national tribunal, the US Supreme Court reasoned that the *absence* of an express provision in a US-Mexico extradition treaty, which would have expressly barred international kidnapping, did not

deprive the US courts of the jurisdiction to try a kidnapped defendant. In 1985, a US Drug Enforcement Administration (DEA) agent, Enrique Camerena, was brutally tortured for many hours in Mexico. A Mexican doctor reportedly kept him alive so that Mexican drug lords could torture him. This was one of the most sadistic murders in recorded history, and the first death of a US drug agent on Mexican soil.

Although there were earlier denials, the US president conceded that a “system of rewards,” specifically, a \$50,000 bounty, was established to ensure the capture of the doctor who allegedly kept Camerena alive to be tortured.

A Mexican policeman was supposed to deliver this doctor to US authorities, but this arrangement fell through. Doctor Alvarez-Machain was then released from a Mexican jail. A private team of current and former US police officers assisted some Mexican nationals with the kidnapping of this doctor from his office in Guadalajara, Mexico. He then “appeared” in a Los Angeles federal court to face criminal charges related to the Camerena murder. The Mexican government protested, demanding that Doctor Alvarez-Machain be released because of what it characterized as a violation of the general principle of International Law prohibiting violations of territorial sovereignty:

United States v. Humberto Alvarez-Machain

SUPREME COURT OF THE UNITED STATES
504 U.S. 655, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992)

AUTHOR’S NOTE: The defendant’s lawyers defended him on several grounds, including the procedural argument that the way by which he appeared before the court was so outrageous that the US courts did not have jurisdiction to hold him for trial. Since the nineteenth century, the US courts had ruled that an individual criminal defendant may not obtain a dismissal, based on how he or she was brought before the court—with the modern exception of conduct “shocking the conscience” of the court. In this instance, it was argued that the case against the doctor should be dismissed, because the manner of obtaining his presence for trial in the US violated the basic tenets of “due process of law.”

The US Government did not dispute the facts of this kidnapping. The trial judge in Los Angeles dismissed this case against the doctor, because of the “shocking” conduct of the US agents in violation of the laws of Mexico and the 1980 extradition treaty between the US and Mexico. In the words of the trial judge: “This court lacks jurisdiction to try this defendant.” The intermediate Court of Appeals affirmed this dismissal—holding that the proper remedy was to release this Mexican national from US custody so that he could return to Mexico. The majority of the US Supreme Court judges reversed, as follows:

COURT’S OPINION:

The Chief Justice delivered the opinion of the Court.

The issue in this case is whether a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country’s courts. We hold that he does not, and that he may be tried in federal district court for violations of the criminal law of the United States. ...

Respondent moved to dismiss the indictment, claiming that his abduction constituted outrageous governmental conduct, and that the District Court lacked jurisdiction to try him because he was abducted in violation of the extradition treaty between the United States and Mexico....

In the instant case, the Court of Appeals affirmed the district [trial] court’s finding that the United States had authorized the abduction of respondent, and that letters from the Mexican government to the United States government served as an official protest of the Treaty violation. Therefore, the Court of Appeals ordered that the indictment against respondent be dismissed and that respondent be repatriated to Mexico. We granted certiorari, and now reverse [for purposes of authorizing further proceedings in the US]....

In *Ker v. Illinois*, ... [this court held] in line with “the highest authorities” that “such forcible abduction is no

sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court....”

The only differences between *Ker* and the present case are that *Ker* was decided on the premise that there was no governmental involvement in the abduction; and Peru, from which *Ker* was abducted, did not object to his prosecution.... Therefore, our first inquiry must be whether the abduction of respondent from Mexico violated the extradition treaty between the United States and Mexico. If we conclude that the Treaty does not prohibit respondent’s abduction, the rule in *Ker* applies, and the court need not inquire as to how respondent came before it.

In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning. The Treaty says nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nation, or the consequences under the Treaty if such an abduction occurs.

More critical to respondent’s argument is Article 9 of the Treaty which provides: “1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.” “2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense....”

[But] Article 9 does not purport to specify the only way in which one country may gain custody of a national of the other country for the purposes of prosecution....

The history of negotiation and practice under the Treaty also fails to show that abductions outside of the Treaty constitute a violation of the Treaty. As the [US] Solicitor General notes, the Mexican government was made aware, as early as 1906, of the *Ker* doctrine, and the United States’ position that it applied to forcible abductions made outside of the terms of the United States–Mexico extradition treaty. Nonetheless, the current version of the Treaty, signed in 1978, does not attempt to establish a rule that would in any way curtail

the effect of *Ker*. Moreover, although language which would grant individuals exactly the right sought by respondent [Doctor Alvarez] had been considered and drafted as early as 1935 by a prominent group of legal scholars sponsored by the faculty of Harvard Law School [see note 7 to this chapter], no such clause appears in the current Treaty.

The language of the Treaty, in the context of its history, does not support the proposition that the Treaty prohibits abductions outside of its terms. The remaining question, therefore, is whether the Treaty should be interpreted so as to include an implied term prohibiting prosecution where the defendant’s presence is obtained by means other than those established by the Treaty.

Respondent contends that the Treaty must be interpreted against the backdrop of customary international law, and that international abductions are “so clearly prohibited in international law” that there was no reason to include such a clause in the Treaty itself. The international censure of international abductions is further evidenced, according to respondent [doctor], by the United Nations Charter and the Charter of the Organization of American States. Respondent does not argue that these sources of international law provide an independent basis for the right respondent asserts not to be tried in the United States, but rather that they should inform the interpretation of the Treaty terms....

In sum, to infer from this Treaty and its terms that it prohibits all means of gaining the presence of an individual outside of its terms goes beyond established precedent and practice ... [and] to imply from the terms of this Treaty that it prohibits obtaining the presence of an individual by means outside of the procedures the Treaty establishes requires a much larger inferential leap, with only the most general of international law principles to support it. The general principles cited by respondent simply fail to persuade us that we should imply in the United States–Mexico Extradition Treaty a term prohibiting international abductions.

Respondent [Alvarez] ... may be correct that respondent’s abduction was “shocking,” and that it may be in violation of general international law principles. Mexico has protested the abduction of respondent through diplomatic notes, and the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive

Branch. We conclude, however, that respondent's abduction was not in violation of the Extradition Treaty between the United States and Mexico, and therefore the rule of *Ker v. Illinois* is fully applicable to this case. The fact of respondent's forcible abduction does not

therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States.

The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

In the following year: (a) Costa Rica's Supreme Court discarded the US-Costa Rican extradition treaty on grounds that the *Alvarez-Machain* decision made a mockery of extradition treaties to which the United States is a party; (b) Mexico and the US began to renegotiate the 1978 extradition treaty interpreted in this case, a process that still remains unresolved; and (c) Doctor Alvarez-Machain, who was released for lack of evidence, filed a \$20 million lawsuit against the United States. It included allegations of torture by US agents related to the abduction.

This doctor's civil case successfully asserted that State-sponsored abduction in another country violated the international laws regarding the preservation of sovereignty, as well as the international human rights norms protecting the plaintiff. His claim was permitted to proceed against the named individual Mexican defendant involved in the abduction (aided by five unnamed Mexican nationals currently in the US federal witness protection program). But the other codefendant, the United States, was *initially* dismissed from this case (by the trial court) on the grounds that the Federal Torts Claims Act did not apply to the Drug Enforcement Administration's (DEA) conduct in Mexico. The federal appellate court reversed, thus reinserting the United States back into this case. The DEA was then required to defend its conduct, which allegedly infringed upon various fundamental rights.

The reviewing court, citing the US obligations under the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (analyzed in the §5.2 Judge Guillaume opinion in the *Belgian Warrant Case*) noted that "[a] Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law."

In June 2004, the US Supreme Court—after the United States had been dismissed—determined the

remaining portion of this case involving the Mexican policeman who allegedly arranged the Doctor's kidnapping. That case, *Alvarez-Machain v. Sosa* [§10.5.B.], held that the Mexican defendant's actions did not violate International Law.

In a major 1974 federal case from New York, the defendant *Toscanino*—an Italian citizen living in Uruguay—moved to dismiss the indictment against him on facts similar to *Alvarez-Machain*. He was abducted from his home by Uruguay's police, turned over to Brazilian police, tortured, sedated, and flown to the US—where he was immediately placed in the custody of the US Drug Enforcement Administration. He claimed that US officials participated in the abduction and torture. While the alleged conduct was not ultimately proven, the appellate court did rule on this potential defense as follows: "[W]e view due process as now requiring a court to divest itself of jurisdiction ... where it has been acquired as the result of the government's *deliberate, unnecessary and unreasonable* invasion of the accused's constitutional rights. This conclusion represents but an extension of the well recognized power of federal courts in the civil [case] context ... to decline to exercise jurisdiction over a defendant whose presence has been secured by force or fraud." This approach has not been adopted in other federal circuits. It has been raised by many defense attorneys, however, as a desirable exception to the general rule that defendants cannot rely on the circumstances of their arrest in another country to avoid a US prosecution.⁶⁶

Toscanino is cited in the following case from South Africa, dealing with precisely the same issue. The South African court, unlike *Alvarez-Machain* where Mexico protested the kidnapping of a defendant, received no protest from Swaziland. Nevertheless, its reasoning and result are quite different from the foregoing US Supreme Court decision:

State v. Ebrahim

APPELLATE DIVISION FOR EAST/SOUTH-EAST CIRCUIT, 1991
31 INT'L LEGAL MAT'LS 888 (1992)

AUTHOR'S NOTE: Ebrahim, a citizen of South Africa, previously completed a fifteen-year jail term in South Africa. In 1980, he left South Africa for Swaziland, because he was a leading member of the African National Congress (Nelson Mandela's political party). He was forcibly abducted from Swaziland in 1986 by unidentified persons. He was taken to the Republic of South Africa where he was formally arrested, tried, convicted of treason, and sentenced to twenty more years of imprisonment. Unlike the situation in *Alvarez-Machain*, in which Mexico protested the US assertion of jurisdiction, Swaziland did not object to the kidnapping in this case. This appeal (decided fifteen months before *Alvarez-Machain*) raises the same question: Whether a person abducted by State agents is amenable to the criminal jurisdiction of the courts of the State to which he is abducted. Ebrahim lost his jurisdictional plea in the lower court.

This appellate court decision first examines the historical antecedents, including the Roman and Dutch laws that are still applied in South Africa. Previous judicial decisions, in which criminal jurisdiction had been "properly" exercised over abducted persons, were rejected as a result of this case.

COURT'S OPINION:

Appellant argues that the abduction was a violation of the applicable rules of international law, that these rules are part of our law, and that the violation of these rules deprived the trial court of competence to hear the matter...

In *Nduli and Others v. Minister of Justice* [1978] this court decided that where the accused were abducted from Swaziland by members of the South African Police in breach of orders from their commanding officer, the South African state was not responsible and accordingly there was no violation of international law. Consequently the trial court was not deprived of its competence to try the accused. In that case, as in the present case, the accused were formally arrested in South Africa. In the present case, ... the appellant was abducted from Swaziland to South Africa by persons

who were not police but who acted under the authority of some state agency...

According to [Roman Law] Digest 2.1.20:

"Paul Edict book 1: One who administers justice beyond the limits of his territory may be disobeyed with impunity..."

This limitation on the legal powers of Roman provincial governors and lawgivers is understandable and was unavoidable in the light of the great number of provinces comprising the Roman Empire in classical times, with their ethnic and cultural diversity, and their different legal systems which the politically pragmatic Romans allowed to remain largely in force in their conquered territories. Until late in the history of the Roman Empire certain provinces were controlled by the Senate and others by the Emperor. Intervention by one province in the domestic affairs of another was a source of potential conflict...

It is inconceivable that the Roman authorities would recognize a conviction and sentence, and allow them to stand, when they were the result of an abduction of a criminal from one province on the order or with the cooperation of the authority of another province. This would not only have been an approval of illegal conduct, and therefore a subversion of authority, but would also have threatened the internal interprovincial peace of the Empire...

One of the foremost Roman-Dutch jurists was Johannes Voet (1647–1713), a Professor of Law in the University of Leiden. According to Voet in his *Commentarius* and *Pandectas* 48.3.2:

So far however must the limits of jurisdiction be observed in seizing a person accused of crime that, if the judge or his representative pursues him when he has been caught in the judge's own area and has taken flight, he nevertheless cannot seize or pursue further than the point at which the accused has first crossed the boundaries of the pursuer. A judge is regarded as a private person in the area of another, and thus he would in making an arrest in that area

be exercising an act of jurisdiction on another's ground, a thing which the laws do not allow....

From the repeated exposition and acceptance of the above rule in its different forms it is clear that the unlawful removal of a person from one jurisdiction to another was regarded as an abduction and as a serious breach of the law in Roman-Dutch law....

It is therefore clear that in Roman-Dutch law a court of one state had no jurisdiction to try a person abducted from another state by agents of the former state. The question must now be considered whether this principle is also part of our present law.

Our [English-based] common law is still substantially Roman-Dutch law as adjusted to local circumstances [in South Africa]. No South African statute grants or denies jurisdiction to our courts to try a person abducted from another state and brought into the Republic of South Africa....

Several fundamental legal principles are contained in these rules, namely the protection and promotion of human rights, good inter-state relations and a healthy administration of justice. The individual must be protected against illegal detention and abduction, the bounds of jurisdiction must not be exceeded, sovereignty must be respected, the legal process must be fair to those affected and abuse of law must be avoided in order to protect and promote the integrity of the administration of justice. This applies equally to the state. When the state is a party to a dispute, as for example in criminal cases, it must come to court with "clean hands." When the state itself is involved in an abduction across international borders, as in the present case, its hands are not clean.

Principles of this kind testify to a healthy legal system of high standard. Signs of this development appear increasingly in the municipal law of other countries. A telling example is that of *United States v. Toscanino*, 500 F.2d 267, to which [defendant's counsel] Mr.

Mahomed referred us. The key question for decision in that [1974 US] case was formulated as follows:

In an era marked by a sharp increase in kidnapping activities, both here and abroad ... we face the question as we must in the state of the pleadings, of whether a Federal Court must assume jurisdiction over the person of a defendant who is illegally apprehended abroad and forcibly abducted by Government agents to the United States for the purpose of facing criminal charges here.

The [South African] Court refused to follow the decisions of *Ker v. Illinois*, 119 US 342 (1886), and *Frisbie v. Collins*, 342 US 519 (1952), for the following reasons:

Faced with a conflict between the two concepts of due process, the one being the restricted version found in *Ker-Frisbie* and the other the expanded and enlightened interpretation expressed in more recent decisions of the Supreme Court, we are persuaded that to the extent that the two are in conflict, the *Ker-Frisbie* version [whereby the abducted individual has no right to complain] must yield. Accordingly we view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the Government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights. This conclusion represents but an extension of the well-recognized power of federal courts in the civil context to decline to exercise jurisdiction over a defendant whose presence has been secured by force or fraud (at 275)....

It follows that, according to our common law, the trial court had no jurisdiction to hear the case against the appellant. Consequently his conviction and sentence cannot stand.

C. AVOIDING EXTRADITION

1. Extradition Limits States do not always honor valid extradition requests. The laws of the requesting State may be perceived as violating fundamental human rights. For example:

- ◆ Canada does not apply the death penalty in criminal cases. The United States does. Canada initially refused

extradition of a US citizen accused of the sex-torture slaying of thirteen people in 1985 in California. In 1991, a Canadian jet flew this individual to the United States after the Canadian Supreme Court restricted Canada's death-penalty extradition exception by interpreting the Canadian rule as being inapplicable to non-Canadian citizens. In 1989, however, the European Court of Human Rights barred Great Britain from

extraditing a West German citizen to the United States—where he would face the death penalty.

- ◆ In April 2005, the European Court of Human Rights similarly noted the violation of the European Convention on Human Rights for extraditing a prisoner under circumstances likely to result in persecution or death. Certain Georgians and Russians, who were ethnic Chechens, thus avoided extradition from Georgia to Russia. The Court noted the increasing volume of applications to the Court from other applicants—also concerned about the persecution and killings of persons of Chechen origin in Russia.⁶⁷
- ◆ In March 2004, Norway did not extradite to Iran two men who hijacked a Russian plane in 1993, served prison sentences in Russia, and then returned to Oslo. They risked torture if they were returned home. The Iranian government labeled this decision as a “reward for terrorism.”

Extradition treaties typically require that extraditable offenses be those that violate the laws of both parties to the treaty. The conduct charged may violate the laws of one country but not the other. State practice varies on whether a treaty party can refuse extradition—opting, instead, to try the accused. Roorkee University (India) Professor Prakash Chandra comments on this contrast as follows: “Some jurists—Grotius, [de] Vattel and Kent among them—hold that a state is bound to give up such fugitives but the majority ... appear to deny such obligation. But mutual interests of states for the maintenance of law and order and the common desire to ensure that serious crimes do not go unpunished require that nations should cooperate with one another in surrendering fugitive criminals to the state in which the crime was committed.”⁶⁸

There is a tendency to strictly interpret extradition treaties and their implementing statutes. For example, extradition may be granted only when a crime has been committed within the territorial jurisdiction of the offended State seeking extradition from the State where the fugitive is located. In 1997, the Nova Scotia Supreme Court denied extradition in a case in which Taiwanese crewmembers threw several Romanian stowaways overboard to their deaths. This was done in circumstances in which the stowaways could not reasonably survive. While both Romania and Taiwan desired the crewmembers be extradited for murder, the Canadian court determined that extradition was not warranted because the crime was not committed within Romanian or Taiwanese territory.⁶⁹

2. Political Offense Exception Another basis for refusing extradition is the “political offense” exception. Extradition treaties typically include this form of escape clause. The requested State thus has an opportunity to deny extradition on political grounds when extradition would otherwise be required.

(a) What is a Political Offense? This question is subject to much debate. The 1935 Draft Extradition Treaty produced by the Harvard Research in International Law project used this perennial definition: “[T]he term ‘political offense’ includes treason, sedition and espionage, whether committed by one or more persons; it includes any offense connected with the activities of an organized group directed against the security or governmental system of the requesting State; and it does not exclude other offenses having a political objective.” The commentary to this proposed article adds that no “satisfactory and generally acceptable definition of a political offense has been found yet, and such as have been given are of little practical value.”⁷⁰ Seven decades later, there is still little consensus on what constitutes a political crime for the purpose of avoiding extradition.⁷¹

While State practice varies, most countries prefer not to define “political offense” in their extradition treaties. As explained by Brazilian jurist, Dr. Isidoro Zanotti, “few governments if any, would be willing to sign a convention on extradition containing a definition of a political offense in view of the universally accepted principle that the requested State determines whether or not an offense is of a political character.”⁷²

Attempting to comprehensively pigeonhole the various categories of this exception would be less successful than herding cats. Some observations may be offered, however. Western European practice distinguishes between crimes committed with or without a purely ideological motive. Imagine someone like Goldfinger from the James Bond novel, who raids the German version of Fort Knox (source of US gold supply). If successful, he has stolen a fortune. He is no more than a common criminal, who is of course subject to extradition from the State where he is subsequently located, e.g., Switzerland. But he is already rich. Assume that his sole purpose is to seriously disrupt the sitting German government’s ability to govern. Herr Goldfinger immediately broadcasts his motive to the world via his obscure website: he will not contaminate Germany’s gold if its current government dissolves. He will then return the gold. Assume that Germany and Switzerland are parties to an extradition

treaty containing a “political offense” exception. Although unlikely, Switzerland has the option of refusing Goldfinger’s extradition to Germany. Whether it does so, depends on whether Switzerland views this theft as a crime with an accompanying political motive, or only a common crime because it is not a “purely” political crime.

An example of the latter would be a crime arising under Turkish law, such as its Penal Code’s “insulting Turkishness.” Given the long-term friction between Greece and Turkey, Greece would be unlikely to extradite the insolent Turk for criminal prosecution in Turkey. In October 2006, two Turks hijacked a Turkish airliner. It was bound from Tirana, Albania, to Istanbul, but landed in Italy. They obviously did not want to steal the plane. Their act, instead, was their means of protesting the Pope’s planned visit to Turkey—because of a papal speech about Mohammed [textbook §1.E.3(c)]. Assuming the usual, broadly-worded political offense clause in a Turkish-Italian extradition treaty, Italy would have the option of either trying the two Turks in Italy, releasing them, or sending them back to Turkey.

The 1977 European Convention on the Suppression of Terrorism contains a regional approach for its member States. Its first article contains a list of offenses for which extradition may not be denied under the political offense doctrine. These include crimes under the multilateral treaties governing aircraft, crimes against diplomats, the taking of hostages, and bombing of civilians. In the aftermath of 9–11, a pending protocol has expanded this list of crimes that may not be characterized as political offenses. The 1998 UN Convention for the Suppression of Terrorist Bombings was the first *global* treaty to specifically prohibit a party from allowing this defense to extradition.⁷³

The Anglo-American approach to applications of the political offense exception to extradition relies on a comparatively narrow “incidence” theory.⁷⁴ It is used in those treaties that narrowly construe this exception to extradition. The offense must be incident to an uprising, or other violent political disturbance, at the time of the extraditable offense; and the offense must be undertaken in the course of, or in furtherance of, that uprising. In a practical example, a naturalized US citizen, who resided in California, was born in Viet Nam. His political group’s sole purpose was to dismantle the Communist dictatorship of Viet Nam. In his case, the means chosen was to bomb the Vietnamese embassy in Bangkok, Thailand. The Thai government sought his extradition, per the

extradition treaty between Thailand and the US. Van Duc Vo was thus eligible for extradition to Thailand.

His federal court petition for a stay of extradition was denied. As explained by the court: “The uprising prong constitutes the critical part of the incidence test ... [which] involves a geographic limitation. An uprising ‘can occur only within the country or territory in which those rising up reside ... [which thus] serves to exclude from coverage under the exception criminal conduct that occurs outside the country or territory in which the uprising is taking place.’ This limitation ensures that the political offense exception will not serve to protect international terrorism.” Recall that, per textbook §2.7.D, events occurring at an embassy in the host State (Thailand) are no longer characterized as occurring in the sending State (Viet Nam).

An all-too-familiar reason for such refusals is that the requested State clandestinely supports the acts of the individual charged with a crime in the requesting State. Extradition can be denied when the requested State characterizes the crime as a “*political offense*.” In an amendment to the 1986 US-UK extradition treaty, for example, “extradition shall not occur if ... the request for extradition has in fact been made with a view to try to punish him on account of ... political opinions.”

The application of the political defense exception to extradition produced a useful breakthrough in the stormy political relationship between Taiwan and China. In 1994, China conceded that Taiwan could exclude certain hijackers from repatriation to China if a Taiwanese court found that the hijackers acted out of political motives. Between April 1993 and August 1994, there had been twelve such aircraft hijackings from China by dissidents seeking asylum in Taiwan. China ultimately decided to recognize this defense, avoiding the closing of this avenue of escape. As a result, China now recognizes the right of Taiwanese vessels to patrol the waters of the Taiwan Straits as well as the jurisdiction of Taiwanese courts over such matters.

State practice generally vests the decision about the “political” nature of the defendant’s crime with the requested State which has the offender in custody. Interpretations often depend on the circumstances of the particular case. Under Article IV of the above US-Japan extradition treaty, for example, extradition “shall not be granted ... [w]hen the offense for which extradition is requested is a political offense or when it appears that the request for extradition is made with a view to prosecuting, trying or punishing the person sought for a political

offense. If any question arises as to the application of this provision, the decision of the requested Party shall prevail.” The common “political offense” treaty exception is left purposefully vague. The requested party thus enjoys a wide latitude of discretion when handling future cases.

(b) Seriousness of Crime Serious crimes have been treated as a discrete category of political crime. Is a murderer, for example, eligible for asylum, and thus able to avoid extradition by the arresting nation, because his conduct may be characterized as falling within the political offense exception to extradition? This question is of immense practical concern in the aftermath of 9–11. In the following 2002 case, the applicant for asylum in Australia murdered a policeman in India. The applicant was the chief communications officer for a leading anti-governmental organization. Judge Calligan of the High Court of Australia provided as precise a response as one might expect—given the characteristic penchant for flexibility in characterizing a crime as falling within the political offense exception to extradition:

The underlying, inescapable, moral question which the Convention does not answer is, however, do the ends of a political cause justify any means, including murder and assassination?

In a sense, violence, especially in its final and worst manifestation, killing, is the antithesis of political activity. Politics is the art or science of government. Murder can hardly be fairly characterisable as an activity in furtherance of, or part of the practice of, an art or science.

...

A crime, in my opinion, murder, especially premeditated murder, or its planning or furtherance, will practically never be a political crime. I say “practically never” because, as I have already intimated, it is impossible to predict precisely what circumstances and cases of desperation, and justification, may come before the courts.

A crime, in my opinion, will be a political crime if, first, it is done genuinely and honestly for political purposes, that is in order to change or influence an oppressive government or its policies, and, secondly, the means employed, although of a criminal nature according to the law of the country in which they are employed, are reasonably, in all of the circumstances, adapted to that purpose.⁷⁵

States will also exempt certain dangerous crimes from a political offense rescue. The US-UK extradition treaty of 2006 excludes “terrorism” (a term which itself means different things to different people) and other violent crimes.

3. Rendition A rendition is the act of surrendering an individual to a foreign government in the absence of any treaty. The contrast between extradition and rendition is vivid. Extradition is an open procedure under which a fugitive is lawfully sent to a requesting State where he has committed a serious crime. Rendition is a covert operation under which even an innocent person may be forcibly transferred to a State where he has committed no crime. The rendered individual is deprived of the benefits of access to counsel and a hearing.

Since 9–11, US intelligence agencies have “rendered” terrorists to friendly governments, mostly in the Islamic world, for detention and interrogation. Rendered individuals often cannot be lawfully extradited because they have committed no crime in the State to which they are rendered. Sometimes, the friendly government does not know the identity or activities of the person prior to rendition—especially when the individual is not a national of the receiving State to which he is rendered.

Human rights groups claimed that these renditions facilitate a US policy whereby “ghost detainees” were dispatched from Afghanistan, Iraq, and Cuba to the third countries. This practice created a remarkable rift between the US and its European allies. Dozens of suspected terrorists were secretly dispatched to discreet non-US locations for questioning. According to a European Parliament report, some 1,000 such undeclared secret flights have occurred over European territory since 9–11. Upon arrival, these individuals are subject to being tortured.

In May 2005, for example, the Canadian Defense Minister testified in Ottawa that his office was upset because of the US transfer of a dual national Syrian-Canadian from New York to Syria (while en route to Canada, upon his return from Tunisia). Alex Neve, the head Amnesty International officer in Canada, also commented that “[t]he concern is, do we have a Canadian version of the notorious American practice of extraordinary rendition?” A 2005 US Department of State report noted that Egypt and Syria (some of the countries to which individuals have been rendered) practice

torture in their prisons. This could give rise to US liability for what occurs there.⁷⁶

US rendition in East Africa is a lesser known practice. The governments of Ethiopia, Kenya, and Somalia have allegedly engaged in torturing individuals rendered to them by the US. The US, for example, supposedly created and funded the Kenyan Anti-terror Police, after the 1998 bombing of the US embassies in Kenya and Tanzania [§2.7.E.1.]. Since then, some 150 ghost detainees have been placed on flights departing from Kenya, including eleven children and thirteen women. They were taken to Addis Ababa, Ethiopia, where it is claimed that they were harshly interrogated by US agents. As of August 2008, the whereabouts of forty of them were still unknown. In 2007, the Muslim Human Rights Forum sought an injunction in a Kenyan court that challenged the legality of this practice.⁷⁷

(a) Organizational Perspectives In June 2006, the European Parliament commissioned a detailed study of rendition, in the aftermath of press reports about the US CIA rendering ghost detainees to secret prisons in locations including Eastern Europe. The adjacent column's excerpt provides some relevant findings of the Parliament's study:



Alleged Secret Detentions and Unlawful Inter-state Transfers involving Council of Europe Member States

COMMITTEE ON LEGAL AFFAIRS
AND HUMAN RIGHTS

<http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf>

Go to Course Web Page, at:
<<http://home.att.net/~slomansonb/txtcsesite.html>>. Under Chapter Five, click Secret Detentions Europe.

In February 2007, 57 nations met in Paris to approve a ban on secret detentions. The US did not approve. The UN High Commissioner for Human Rights diplomatically characterized this treaty as “a message to all modern-day authorities committed to the fight against terrorism” that some practices are “not acceptable.” The June 2007 Council of Europe draft resolution expressly condemned this US-driven program:

Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report.

PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE

DOC. 11302 REV. (11 JUNE 2007)

<<http://assembly.coe.int/ASP/APFeaturesManager/defaultArtSiteView.asp?ID=684>>

1.... the existence of a spider's web of illegal transfers of detainees woven by the CIA in which Council of Europe member states were involved, and expressing suspicions that secret places of detention might exist in Poland and Romania.

2.... not ruling out the possibility that secret CIA detentions may also have occurred in other Council of Europe member states.

...

4. These secret places of detention ... [were] publicly referred to by the President of the United States on 6 September 2006.

...

6. The 'HVD' [High Value Detainee] programme was set up by the CIA with the co-operation of official European partners belonging to Government services and kept secret for many years thanks to strict observance of the rules of confidentiality laid down in the NATO framework. The implementation of this programme has given rise to repeated serious breaches of human rights.

...

8. The Assembly earnestly deplores the fact that the concepts of state secrecy or national security are invoked by many Governments (United States, Poland,

Romania, the former Yugoslav Republic of Macedonia, Italy and Germany, as well as the Russian Federation in the Northern Caucasus) to obstruct judicial and/or parliamentary proceedings aimed at ascertaining the responsibilities of the executive in relation to grave allegations of human rights violations and at rehabilitating and compensating the alleged victims of such violations.

...

15. In Germany, the work of the Bundestag commission of inquiry is proceeding energetically. But the prosecutorial authorities, engaged in the hunt for the kidnappers of Khaled El-Masri, still meets with lack of

co-operation on the part of the American and Macedonian authorities. Khaled El-Masri still awaits the rehabilitation and redress of damage owing to him, in the same way as Maher Arar, the victim in a comparable case in Canada [Arar and el-Masri cases below].

16. The Assembly solemnly restates its position that terrorism can and must be combated by methods consistent with human rights and rule of law. This position of principle, founded on the values upheld by the Council of Europe, is also the one that best guarantees the effectiveness of the fight against terrorism in the long term.

...

(b) Governmental Perspectives In June 2008, the Legal Advisor for the US Department of State testified before the House Foreign Affairs Subcommittee on International Organizations, Human Rights, and Oversight about current US rendition policy below.

One month later, a group within the British Parliament's House of Commons weighed in on the question of whether turning over a detainee—from British custody in Iraq to US custody in Iraq—would violate the European Convention on Human Rights, as well as Great Britain's national Human Rights Act. The

underlying assumption for this hypothetical circumstance, not based on any particular case, was that there would be a serious risk that the former British detainee would be subjected to torture or inhuman and degrading treatment.

As the disquieting statement in footnote 20 of the following opinion provides by way of introduction:

In the case of the United States, an undertaking to the effect that transferred individuals will not be subjected to inhuman or degrading treatment or torture,

Diplomatic Assurances and Rendition to Torture: The Perspective of the State Department's Legal Adviser

HOUSE FOREIGN AFFAIRS SUBCOMMITTEE ON INTERNATIONAL
ORGANIZATIONS, HUMAN RIGHTS, AND OVERSIGHT

Witness: The Honorable John B. Bellinger, III,
Legal Adviser, US Department of State
Serial No. 110-192

<<http://foreignaffairs.house.gov/110/42904.pdf>>

...

Oral Testimony: At the outset, it is important to understand the United States' legal obligations and related policies with respect to sending individuals to countries where they might be tortured. The touchstone of our legal obligations with respect to transfers of individuals is Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading

Treatment or Punishment, which we also call CAT [covered in §9.6.B.4(d-e), 7(a).].

As a state party to CAT, the United States has an international legal obligation under Article 3 not to expel, return, or extradite a person from the United States to a country, quote from Article 3, "where there are substantial grounds for believing that the person would be in danger

of being subjected to torture.” So that is the legal standard that we observe as a matter of international law.

I want to note three things about this obligation. First, the United States interprets Article 3’s operative language to prohibit extradition or removal the words “substantial grounds” to mean if it is more likely than not that the person would be tortured. There has been some criticism about that standard, the “more likely than not” standard, but I want to make clear that that is the interpretation that was given to us by the Senate in 1990 and included in the U.S. Instrument of Ratification in 1994. So the standard we use is, “If it is more likely than not that a person would be tortured if returned to another country.” Second, the obligation in Article 3 does not apply with respect to individuals who are outside the territory of the United States.

...

Now the last point I want to make on the law is that the obligation in Article 3 and our related policy are absolute. They are not subject to any exceptions or any kind of balancing of interests or harms, even in cases involving the possible removal or extradition of dangerous individuals who may pose a threat to the safety and security of the American people. Now with that legal background, I would like now to explain how diplomatic assurances, when properly employed, come into play. Let me present it this way: When confronted with the presence in the United States of a dangerous foreign national, for example a suspected terrorist or a person who has been charged with a violent crime abroad, such as murder, what are our options?

...

The legal standard is always that we may not send them back to a country if we believe it is more likely than not that they will be tortured.

...

In many of the countries ... that we want to return people to may have a questionable human rights record. The legal standard, though, is not whether the country that we would like to turn someone back to has a questionable human rights record as a general matter but whether this particular individual is more likely than not to be tortured if we send them back. And that is where the diplomatic assurances come into play. If the country has a bad human rights record, there is immediately going to be a yellow light about whether we would send someone back.

...

I think the overall point that I am trying to make here is, we are certainly aware of the concerns that you raise. We have an international law obligation. We have a statutory obligation. We have policy concerns going back several administrations that we do not want to send an individual to any country where it is more likely than not that they will be tortured.

On the other hand, if someone poses a threat to our country, nor do we want to let them go into our general population. And so if they are in Guantanamo, it means that they just stay in Guantanamo. Or if they are in the continental United States and you can’t keep them in prison, it means they go loose in the general population. Hence the tool of diplomatic assurances is an important one that allows us to seek assurances from a foreign country that an individual will not be mistreated, and there are not really other good alternatives.

Prepared Written Testimony: To reduce the risk of torture, it is of course essential that diplomatic assurances be credible. This requires direct engagement with the potential receiving country. In such cases, where appropriate, the U.S. Government can change the facts on the ground by directly engaging with the receiving country regarding the treatment that a particular individual will receive and securing explicit, credible assurances that the individual will not be tortured.

The seeking of diplomatic assurances is, of course, not appropriate in all cases. We would not rely upon assurances unless we were able to conclude that with those assurances, an individual could be expelled, returned, extradited, or otherwise transferred consistent with our treaty obligations and stated policy. The efficacy of assurances must be assessed on a case-by-case basis and can depend on a number of factors related to the particular country involved, including the extent to which torture may be a pervasive aspect of its criminal justice, prison, military or other security system; the ability and willingness of that country’s government to protect a potential returnee from torture; and the priority that government would place on complying with an assurance it would provide to the United States government (based on, among other things, its desire to maintain a positive bilateral relationship with the United States government). But in cases where credible assurances could be effective in permitting removal or extradition, consistent with our non-refoulement obligations [text §4.2.C.], such assurances are a critical and valuable tool.

without more, would probably not satisfy the requirements of [European Convention on Human Rights] Article 3 because the US Government has made clear that its understanding of those terms does not exclude certain “enhanced interrogation techniques” that would be regarded as a violation of Article 3 as a matter of UK and Convention case law.



Legal Opinion on Detainee Handovers by UK Forces: In the Matter of the All Party Parliamentary Group on Extraordinary Rendition and in the Matter of the Human Rights Responsibility Arising From Military Detainee Handovers in Iraq [and Afghanistan]

Go to Course Web Page, at:

<<http://home.att.net/~sломansonb/txtcsesite.html>>. Under Chapter Five, click British Rendition.

(c) Judicial Perspectives The following case is one of the few rendition cases to be reported by a public tribunal. It was apparently recast as the 2007 movie *Rendition*, which was not well-received by American audiences (as measured by its short-lived projection in movie theaters). The case below raises the question, among others, about how much one has to establish to proceed with such a claim against the government (the gist of the judicial split), and if the plaintiff is successful, whether judges should nevertheless delve into this perhaps not so extraordinary rendition process.⁷⁸



Arar v. Ashcroft

UNITED STATES COURT OF
APPEALS, SECOND CIRCUIT
532 Federal Reporter 3d 157 (2008)

Go to Course Web Page, at:

<<http://home.att.net/~sломansonb/txtcsesite.html>>. Under Chapter Five, click Arar v. Ashcroft Rendition Case.

The US pled the “State Secrets” defense in *Arar*. The majority opinion side-stepped the applicability of this government privilege. These judges held that plaintiff Arar had not stated a viable claim under US law.

In perhaps the most widely publicized contemporary decision to address State Secrets doctrine, the US Supreme Court denied a rendered foreign plaintiff’s request for judicial review of the dismissal of his case. This plaintiff’s case arose in circumstances substantially similar to the above *Arar* rendition case. Mr. El-Masri was a German citizen of Lebanese descent. He alleged that he was illegally detained as part of the CIA’s extraordinary rendition program. While traveling in Macedonia in December 2003, El-Masri was detained by Macedonian law enforcement officials. Three weeks later, he was handed over to CIA operatives. They flew him to a CIA detention facility near Kabul, Afghanistan. There, he was held until May 2004. He was then transported to Albania and released in a remote area. Albanian officials then picked him up and took him to an airport in Tirana, Albania—from which he traveled to his home in Germany. Munich prosecutors obtained warrants for the arrest of the thirteen CIA agents involved in the Milan incident. Spain is helping Germany with this case because the not-so-covert operation originated on the Spanish island of Mallorca.⁷⁹

El-Masri filed a constitutionally-based claim (as in *Arar*) against the former Director of the US CIA (and others). The complaint asserted that El-Masri had not only been held against his will, but that he had also been mistreated in a number of other ways during his detention. These included being beaten, drugged, bound, and blindfolded during transport; confined in a small, unsanitary cell; interrogated several times; and consistently prevented from communicating with anyone outside the detention facility, including his family or the German government (textbook §7.1 will address the potential German claim against Macedonia and the US, for failure to provide access to a German consular official during his detention). A US federal judge in Virginia granted the US government’s motion to intervene and then granted its motion to dismiss—on state secret grounds.

Under the state secrets privilege, the US government may prevent the disclosure of information in a judicial proceeding if there is a “reasonable danger” that such disclosure “will expose military matters which, in the

interest of national security, should not be divulged.” Per the US Supreme Court’s leading decision on this privilege, an Air Force bomber had crashed during testing of secret electronic equipment. The widows of the three civilian observers on that flight sued the US under the Federal Tort Claims Act. They sought discovery of certain Air Force documents relating to the crash. The Air Force refused to disclose the documents. It filed a formal Claim of Privilege, contending that the plane had been on a highly secret mission of the Air Force. Disclosure of the requested materials would “seriously hamper national security, flying safety and the development of highly technical and secret military equipment.”⁸⁰

The European Court of Human Rights issued a February 2008 decision involving a Tunisian national in Italy, who was arrested on grounds of suspected terrorism. During the two-year period that his case worked its way through the Italian court system, he was convicted in absentia by a Tunisian court for membership in a terrorist organization operating abroad in times of peace.

The relevant issue was whether Tunisia’s diplomatic assurances that this individual would not be tortured—upon his expulsion from Italy and return to Tunisia—were sufficient to meet Italy’s obligation not to render him to a nation where he was allegedly likely to be tortured. The U.K. intervened in this case, providing like assurances that Tunisia would not torture him. Nevertheless, the Court rebuffed these assurances, holding that mere assurances of non-torture were not enough to relieve Italy of its obligation to pursue the facts beyond diplomatic assurances from the respective defendant and intervening governments.⁸¹

◆ §5.4 JUDICIAL ASSISTANCE

Service of a State X subpoena in State Y, requiring an individual to do something—such as return to State X to testify in a criminal matter—is an act of executive/judicial administration which many countries consider a violation of their territorial sovereignty. State Y’s consent should be obtained, either on an *ad hoc* basis (e.g., via a State X consular official in State Y), or on a treaty basis where State Y gives its advance consent to specified forms of process as set forth in the treaty. Service of

process in a civil matter may likewise offend a foreign nation’s sensibilities, especially if it requires a State Y citizen to take action—like hiring a defense lawyer in one or both countries—to respond to the State X civil proceedings.

In the *Blackmer* decision [§5.2.C. Nationality Principle], the US Supreme Court validated the US consular official’s service of the subpoena in France, referring only to the US statute authorizing service abroad. There was no mention of *France’s* position on a US subpoena being served within French territory. The court did say, merely in passing that “The mere giving of such a notice to the citizen in the foreign country of the requirement of his government that he shall return is in no sense [*sic*] an invasion of any right of the foreign government and the citizen has no standing to invoke any such supposed right.”⁸² Thus, the court was not at all concerned about the related feature of this case which was not addressed: whether Nation X or its citizens can effect service of criminal subpoenas or civil summons in Nation Y without Y’s consent.

Modern cases distinguish between the mere giving of notice of a proceeding as opposed to service of a document requiring action, which avoids some sanction in the nation issuing such process. One of the classic articulations surfaced when the US Federal Trade Commission sought to enforce an investigatory subpoena, served upon a French corporation by registered mail:

When the individual being served is not an American on U.S. soil but a foreign subject on foreign soil, the distinction between the service of *notice* and the service of *compulsory* process takes on added significance. When process in the form of summons and complaint is served overseas, the informational nature of that process renders the act of service relatively benign. When compulsory process is served, however, the act of service itself constitutes an exercise of one nation’s sovereignty within the territory of another sovereign. Such an exercise constitutes a violation of international law.... Given the compulsory nature of a subpoena, ... service by direct mail upon a foreign citizen on foreign soil, without warning to the officials of the local state and without initial request for or prior resort to established channels of international judicial assistance, is perhaps maximally intrusive.

⁶⁷“(T)he first and foremost restriction imposed by international law upon a State is that failing the existence of a permissive rule to the contrary it may not exercise its powers in any form in the territory of another State.” Case of the S.S. “*Lotus*,” (1927) [§5.2.B. above]. See also 1 L. Oppenheim, *International Law* §144b (8th ed. Lauterpacht 1955) (“States must not perform acts of sovereignty within the territory of other States”)

The court added that “not only does it represent a deliberate bypassing of the official authorities of the local state, it allows the full range of judicial sanctions for non-compliance with an agency subpoena to be triggered merely by a foreign citizen’s unwillingness to comply with directives contained in an ordinary registered letter.”⁸³ There are now several *multilateral* treaties, whereby State parties agree to permit such acts of foreign administration within their territories under specified conditions. Examples include the Hague Service Convention for serving civil process, the Hague Evidence Convention for obtaining evidence in pending civil and criminal matters, and the Inter-American Convention on Letters Rogatory governing most details in this class of litigation.⁸⁴

The basic service provision requires an attorney in State X to forward process to a Central Authority in State Y, rather than directly to the target defendant. Then, the local Authority delivers the document to the witness or defendant—rather than a plaintiff or prosecutor in State X attempting to do so directly. This added layer of service delays litigation. However, it ameliorates concerns with abuses of process, which violate State Y’s territorial sovereignty. The EU has a draft regional treaty, for example, which would designate transmitting agencies. Community Regulation 1348/2000, effective in May 2001, exempts all submitted documents from various formalities which accompany the discussed global treaties.⁸⁵

These model treaties are often ratified by nations that tender reservations, which vary the terms of the general treaty provision as applied to that nation. (Chapter 8 deals with the treaty process, including the importance of reservations.) Thus, citizens in Nation X must be aware of an applicable treaty, whether it has been ratified, and whether the nation—wherein someone is targeted for service—has any local limitations expressed in a treaty reservation.⁸⁶

Some nations and international organizations issue guidelines for service of process abroad, regardless of applicable treaty commitments. The European Union’s

Regulation 1393/2007 provides community-wide rules for serving documents (except for Denmark). Each member State has a receiving agency. All documents must be accompanied by a standard request form. This regulation does not prohibit service via other means—for example, via consular or related diplomatic means. It went into effect on November 13, 2008.

There is a provision for service in the receiving nation’s official language. One hopes that this regime will assist plaintiffs suing State entities like the Vatican. It requires Latin translations of all such documents. In a 2005 US case alleging sexual molestation by Catholic priests, the Holy See demanded incredibly detailed translations of the summons, complaint, and related documents. Although the Latin translations were not perfect, the court found that “in the interest of judicial efficiency, ... [there was] no significant problem with the content of the notice of suit, as it provides the basic information required.... Defendant’s demand for detailed, treatise-like explanations of various court documents and legal terms is unreasonable.”⁸⁷

Rule 4(f) of the US Federal Rules of Civil Procedure, for example, provides that “if there is no internationally agreed means of service or the applicable international agreement allows other means of service [which are not treaty-based],” then such other means are appropriate “provided that service is reasonably calculated to give notice ... in the manner prescribed by the law of the foreign country ... [or] as directed by the foreign authority in response to a letter rogatory [request for the appropriate authority to effect service, or] ... by other means not prohibited by international agreement as may be directed by the court.”

A US federal statute classically illustrates the flexibility needed for good international relations without regard to any specific treaty agreement. In 2004, the US Supreme Court demonstrated its commitment to work with the judiciary in different parts of the world to accommodate the needs of private litigants in their respective proceedings:



**Intel Corporation v.
Advanced Micro Devices, Inc.**

UNITED STATES SUPREME COURT

542 U.S. 241 (2004)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Five, click Intel v. Micro Devices.

◆ PROBLEMS

Problem 5.A (end of §5.1.A.): Is Iraq a sovereign nation? If so, when did it achieve its sovereignty? Review the definition of statehood in §2.1.A. The US attacked Iraq in March 2003. In June 2003, the US announced that it wished to abandon its plan to have Iraqis form a provisional government because of internal rivalries. The US instead appointed an interim government in July 2003. UN Security Council Resolution 1511 recognized the legitimacy of the appointed interim government, while calling for a timetable for Iraqi self-governance. The coalition announced that such governance would be achieved by June 2004, though the coalition forces would remain in Iraq.

The US could not establish a stable government. It therefore asked for the help of the UN. In January 2004, Lakhdar Brahimi was appointed as a special UN envoy. By March 2004, the various factions agreed on an interim constitution. During the spring of 2004, terrorist attacks escalated as the date for handing over sovereignty—from the US-appointed governor to the interim government—approached. In June 2004, the Security Council unanimously passed resolution 1546. It legitimized the authority of the interim government about to assume power in Iraq—the Iraqi Governing Council (IGC). The resolution also authorized the multinational force to provide security in partnership with the new government; established a leading role for the UN in helping the political process over the next year; and called upon the international community to aid Iraq in its transition. The IGC chose Iyad Allawi as Iraqi Prime Minister. Allawi is a Shi'ite and was a member of Saddam Hussein's Ba'ath party.

The terrorist attacks continued with reports that the insurgents wanted the US and the UK out of Iraq. The illusive Iraqi Constitution was finally presented to the people in Fall 2005. During this period, between 150,000 and 180,000 coalition troops remained in Iraq, and are likely to remain for several more years, while Iraqi police and military forces are being trained.

In September 2005, an eighteen-member National Sovereignty Committee of elected Iraqi legislators in the governing Iraqi National Assembly released a report. It claimed that the presence of the US military prevented Iraq from becoming a full sovereign nation. The Committee's report called for the multinational forces to leave. It said that to end the "occupation," the United States would have to set a timetable for departure. As of that point, the US steadfastly refused to do so. Iraq's

government officials, who depend on the US for security and financial backing, later opposed either withdrawal or a timetable. This Committee also asked the UN to pass a resolution ending the immunity of foreign nationals from prosecution in Iraqi courts.⁸⁸

During this period, was Iraq: (1) a State, operating under the classic definition of statehood in the Montevideo Convention? (2) a sovereign nation? (3) a territory in transition, working its way toward achieving its own sovereignty? (4) an occupied territory? (§6.2.A.) (5) operating under the shadow of another more powerful government—like Afghanistan under Soviet occupation (1979–1989)?

Four students or groups will address this matter. One will be Iraqi Prime Minister Iyad Allawi. The second will be the (hypothetical) National Sovereignty Committee. The third will be the US and/or the Coalition forces in Iraq. The fourth will be a representative of one of the §3.5.E international organizations in which Iraq participated before the 2003 Iraq War.

Problem 5.B (end of §5.2.F.): In 1988, two Libyan citizens planned and executed the bombing of Pan Am Flight 103 over Lockerbie, Scotland. All 259 passengers aboard the flight plunged to their violent deaths. More people were killed on the ground when the plane fell to earth. Pan Am was a US corporation. There were both UK and US citizens aboard this ill-fated flight.

The UK and the US indicted the individuals responsible, demanding that Libya surrender them for trial. This demand was backed by a UN Security Council resolution. Libya initially said that it would cooperate, but only if former US President Ronald Reagan and former UK Prime Minister Margaret Thatcher were to be tried simultaneously for bombing Tripoli in 1986. That bombing was a US reprisal for Libya's earlier bombing of a Berlin discotheque where a number of US soldiers died. The perpetrators were ultimately extradited to The Hague for trial before a special international tribunal agreed to by the US, UK, and Libya.

Assume, instead, that Libya has not yet agreed to release its two intelligence officers accused of that crime. On what bases could the UK and US apply their criminal jurisdiction consistently with the basic principles of "international criminal jurisdiction"?

Problem 5.C (end of §5.2.F.): Today is September 11, 2001. There has just been a terrorist attack on the US.

(1) Which jurisdictional principles would apply, were the US to capture Usama bin Laden for prosecution in the US? Would it matter *where* he was captured? (2) Which principles would apply to those individuals (mostly Saudi Arabian), previously residing in the US, who hijacked the commercial aircraft on that day?

Problem 5.D (end of §5.3.C.1. on Rendition): Recall the following documents: (1) the European report on Alleged Secret Detentions and Unlawful Inter-state Transfers involving Council of Europe Member States; (2) the *Arar* and *el-Masri* rendition cases; and (3) the following US Department of State's congressional testimony about Diplomatic Assurances and Rendition to Torture: The Perspective of the State Department's Legal Adviser.

Questions: Their lawyers are seeking discovery of information to flesh out their clients' allegations regarding illegal renditions to third party governments who may torture Arar and el-Masri. The government moves to dismiss these cases. It asserts the State Secrets privilege. If permitted by the trial judge, these cases will be dismissed on national security grounds. If so, then the government could effectively mask its conduct by withholding the very information these plaintiffs need to prove their claims.

If you were a justice on the US Supreme Court, would you vote in favor of granting certiorari to resolve the issue of the government's alleged misconduct in these two rendition cases? To do so would, of course, ultimately result in some cases being effectively forfeited by the government to avoid the revelation of the critical and confidential information needed to conduct its War on Terror.

Two students or groups will debate the resolution of the government's dismissal motion.

Problem 5.E (after §5.2.G. *French Yahoo! Judgment*): Four students (or groups) will participate in this exercise. The first two are French lawyers who previously represented the respective parties in the French court *Yahoo!* case. The other two are American lawyers who have represented the parties in this second round of the case in the US court. They will debate the following questions:

(1) Paragraph [8] of the *French Yahoo!* case states that "looking at such objects [Nazi memorabilia on the web] obviously causes a wrong in France." Was the wrong caused "in" France?

- (2) Paragraph [10] resolves that "A tying link of the present case with France ... gives this Court full jurisdiction to hear the claims...." Does this so-called link really exist?
- (3) Paragraph [14] refers to the Court's previous May 22nd announcement which "Order[ed] Company Yahoo! France to give to any internaut, before he opens the link ... a notice informing him that, if the result of his search ... leads him to point to sites, pages or forums, the title and/or contents of which constitute a violation of the French law, ... then he must stop the consultation of the site concerned...." Would compliance with this order present Yahoo! with an insurmountable technical problem? Does paragraph [30] provide any insight?
- (4) Paragraph [53.6] states that "it would be appropriate to ask the internauts, when their IP address is ambiguous, that they subscribe a declaration of nationality." Would French subscribers—knowing that accessing the Nazi memorabilia web page is illegal in France—be likely to declare their French nationality? Is this a viable alternative?
- (5) Paragraph [71] concludes that "most certainly it would cost Yahoo! Inc. very little to extend the above prohibitions to symbols of Nazism...." Yahoo could have settled the French case, thus avoiding the costs including those of the expert consultants—not to mention the costs associated with the related US litigation. Was Yahoo thus taking a principled approach to its dilemma because it was an advocate of First Amendment freedom of speech? Was Yahoo actually fighting for some other purpose? Was the French judge wrong in his assessment that developing more software programs to fix the nationality of the user would cost Yahoo "very little?"
- (6) Paragraph [i] of the US federal court's subsequent opinion notes that while the procedural question regarding jurisdiction might present a "higher threshold" for foreign defendants, constitutional concerns sometimes trump such limitations. What was the gist of Yahoo's constitutional argument?
- (7) If the Holocaust had occurred in the US, would the US court be as likely to liberally interpret First Amendment freedom of expression?

Problem 5.F (after §5.2.G. *French Yahoo! Judgment*): In January 1998, a German prosecutor charged the former German Chief of Staff for CompuServe, a

US-based ISP, with transmitting child pornography over the Internet. In May 1998, a German trial court in Munich imposed a two-year term of probation and a Deutschmark 100,000 fine (US \$57,000).

An expert for the defense testified that the defendant could not have known about the child pornography being transmitted over the Internet by some CompuServe customers. The prosecutor dropped the charge although the judge still found Felix Somm guilty. He was thus legally accountable for pornographic content transferred from private individuals to German citizens over the Internet via CompuServe, even when the Internet traffic may be as high as 100 gigabytes per day. Further details are available at <www.freudenstadt.net/somm/english.html>.

Assume that “Joe,” who is a child pornography provider, posted offensive materials on the Internet. Joe is a private CompuServe customer, living in New Jersey. He uses CompuServe as his ISP to send such information to other interested individuals. His materials are viewed in Germany. The German prosecutor issues an arrest warrant and thereafter seeks Joe’s extradition to Germany for prosecution. This will be an important test case for the German government in its efforts to keep Internet pornography from coming into Germany. Joe is about to be extradited to Germany for sending an e-mail attachment to German citizens (and the rest of the cyberworld). It contained samples of the pornographic materials that are on his personal Web site. This site is provided by CompuServe, a US corporation. Joe’s personal Web site (and its e-mail capacity) is one of the thousands of “pages” that CompuServe customers have established, thereafter inserting their desired content.

Extradition in this case could spawn future foreign prosecutions and similar extradition requests by other countries of the world. These governments would be interested in controlling the information made available to their citizens—because of e-mails sent and personal Web sites maintained by millions of US citizens. The German government’s interests include blocking the transmission of illegal materials via the Internet. The US interests include not wanting other governments to impose their views of what is illegal on US citizens.

Two students will represent the respective German and US Departments of State. They will debate whether extradition is a good idea in this case.

Problem 5.G (after §5.3.B. *State v. Ebrahim* case): The US Supreme Court and the South African Supreme Court arrived at very different conclusions about whether a court had jurisdiction to proceed with the prosecution when the custodial State’s agents arranged the abduction of the defendant from foreign soil.

Assume that a South African citizen is abducted through arrangements made by US agents to secure his presence for trial in the US. South Africa protests, based on an extradition treaty between the two countries. That treaty does not prohibit such abductions, nor does it condone them. South Africa and the United States decide to resolve this matter in the International Court of Justice (ICJ). The issue for the ICJ is whether the United States has the jurisdiction, under International Law, to proceed with the criminal case against the South African defendant.

Two students (or groups) will argue this matter before three class members, who will serve as the ICJ judges. They will announce their decision in this case, based upon the presentations and the relevant legal principles. The resulting decision will not necessarily be unanimous. But it should be quite useful for generating the ensuing class discussion.

◆ FURTHER READING & RESEARCH

See Course Web Page, at: <<http://home.att.net/~slomansonb/txtcsesite.html>>, click Chapter Five.

◆ ENDNOTES

1. U.S. Sends Troops into Pakistan in Attack on Taliban: Officials Report 20 People Killed, WASH. POST & NEW YORK TIMES SERVICE (Sept. 4, 2008).
2. International Organizations as a Forum for the Contestation of Sovereignty, ch. 1, in D. Sarooshi, INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS 3–4 (Oxford, Eng: Oxford Univ. Press, 2005).
3. B. Jankovic, PUBLIC INTERNATIONAL LAW 115–117 (Dobbs Ferry, NY: Transnational, 1983) (Pravo translation).
4. The individual states within the US must yield to the federal powers created by the US Constitution. This is the exception, not the rule in state–federal relations. The constitutional delegates established a federated system consisting of thirteen States and a federal district. But they also feared the reestablishment of *another* excessively powerful central federal government. Under the Tenth Amendment: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

5. *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714, 722 (1877) (mostly overruled on other grounds).
6. J. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AMER. J. INT'L L. 782 (2003).
7. See J. McVeigh, *JURISPRUDENCE OF JURISDICTION* (New York, N.Y.: Routledge-Cavendish, 2006).
8. The Research in International Law of the Harvard Law School, *Jurisdiction with Respect to Crime*, 29 AMER. J. INT'L L. SUPP. 443 (1935) [hereinafter *Harvard Research*].
9. H. Maier, *Jurisdictional Rules in Customary International Law*, ch. IV, in K. Meessen (ed.), *EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE* 64, at 65 (London: Kluwer, 1996). See also C. Ryngaert, *JURISDICTION IN INTERNATIONAL LAW* (Oxford, Eng: Oxford Univ. Press, 2008).
10. See generally *Spying: Territory and Espionage*, ch. 3, in J. Kish, *INTERNATIONAL LAW AND ESPIONAGE* (The Hague, Neth: Martinus Nijhoff, 1995). *Counter-terrorism: G. Rivers, THE SPECIALIST: REVELATIONS OF A COUNTERTERRORIST* (New York: Stein & Day, 1985).
11. *Hostages*: 18 U.S. Code §1203. *Drug law*: 46 USC §1901. *Environment*: *Environmental Defense Fund v. Massey*, 986 Fed.Rptr.2d 528 (D.C. Cir. 1993). *Abduction*: *U.S. v. Alvarez-Machain* case in §5.3.B. *Antitrust case*: *Hartford Fire Insur. Co. v. Merrett Underwriting*, 509 US 764 (1993). *Refugees*: *Sale v. Haitian Council* case in textbook §4.2. *Kidnapping*: Italy's November 2009 conviction of twenty-two CIA officials was the first judgment about US rendition practice. See F. Kirgis, *Alleged CIA Kidnapping of Muslim Cleric in Italy*, ASIL INSIGHT (July 2005), at: <<http://www.asil.org/insights/2005/07/insights050707.html>> & T. Hancock, *The Government Must Tighten the Laws on Rendition*, TELEGRAPH.CO.UK (05 Nov 2009), at: <<http://www.telegraph.co.uk/comment/personal-view/6508899/The-government-must-tighten-the-laws-on-rendition.html>>.
12. Further readings are available in J. Paust et al., *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* (2d ed. Durham, NC: Carolina Academic Press, 2000); and L. Sunga, *THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW* (The Hague, Neth: Kluwer, 1997).
13. I. Cameron, *THE PROTECTIVE PRINCIPLE OF INTERNATIONAL CRIMINAL JURISDICTION* 11–12 (Aldershot, Eng: Dartmouth, 1994) [hereinafter *Protective Principle*].
14. *U.S. v. Palmer*, 16 U.S. (3 Wheat.) 610, 630 (1818) (involving US jurisdiction over foreign pirates on a Spanish vessel on the high seas).
15. The piracy connection with 9–11 may be discerned from the piracy-terrorism discussion in the leading treatise on piracy: A. Rubin, "Piracy Today," ch. 6, in *THE LAW OF PIRACY* 373, at 378 (2d ed. Irvington-on-Hudson, NY: Transnational, 1998) [hereinafter *Law of Piracy*].
16. *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).
17. *Jurisdictional Issues in Extraterritorial Criminal Law*, ch. 5, in C. Waters (ed.), *BRITISH AND CANADIAN PERSPECTIVES ON INTERNATIONAL LAW* 87 (Leiden, Neth: Martinus Nijhoff, 2006).
18. Regarding *Penati*, Case No. 30, reported in 46 ANNUAL DIGEST AND REPORTS OF PUBLIC INT'L L. CASES 74.
19. *The Nature of International Law Enforcement*, ch. 1 Introduction, in *COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT* 1, at 8 (Univ. Park, PA: Penn State Univ. Press, 1993).
20. Scott Lindlaw, *U.S. OK'd Troop Terror Hunts in Pakistan*, FOXNEWS.COM (AUG. 23, 2007), at: <http://origin.foxnews.com/printer_friendly_wires/2007Aug23/0,4675,CrossingIntoPakistan,00.html>.
21. I. General International Treaties, Part One, *The Right of Hot Pursuit on Land*, in *THE RIGHT OF HOT PURSUIT IN INTERNATIONAL LAW* 9, at 11–12 (2d ed. Hague: Martinus Nijhoff, 2002).
22. Human rights violations concern all States. Chapter 11 will explore the contemporary applicability of International Law to a State's treatment of its own citizens within its own borders.
23. *The S.S. Lotus (France v. Turkey)*, PCIJ, SER. A, No. 10 (1927) (Judge Moore, dissenting).
24. *U.S. v. Neil*, 312 F.3d 419, 422–423 (9th Cir. 2002).
25. E. Jensen, *Exercising Passive Personality Jurisdiction over Combatants: A Theory in Need of a Political Solution*, 42 INT'L LAWYER 1107 (2008).
26. *U.S. v. Cardales*, 168 F.3d 548, 553 (1st Cir. Puerto Rico, 1999).
27. *U.S. v. Pizzarusso*, 388 Fed.2d 8 (2d Cir. 1968), cert. den'd, 392 US 936 (1968) (italics added).
28. For a historical overview of the protective principle jurisdiction in the Swedish Criminal Code, see *Protective Principle* 97, at 101, cited in note 13 supra.
29. Laurent Cohen-Tanugi, *La Chronique de Gouvernement d'entreprise Sous Pavillon Americain*, Les Echos (Aug. 20, 2002), at 35. The translation was provided by D. Vagts, *Extraterritoriality And The Corporate Governance Law*, 97 AMER. J. INT'L L. 289 n.2 (2003).
30. *Sarbanes-Oxley Act*, Pub. L. No. 107–204, 116 Stat. 745 (2002) (codified principally in titles 15 and 18 of the US Code) §106.
31. H. Kindred et al., *INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED IN CANADA* 518 (6th ed. Toronto: Edmond Montgomery, 2000).
32. Principle 2.1—Serious Crimes Under International Law, in *THE PRINCETON PRINCIPLES OF UNIVERSAL JURISDICTION* 28 (Princeton, NJ: Princeton Univ., 2001).
33. *Id.*, at 29. Further detail on this project is available in S. Macedo, *UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW* (Philadelphia: Univ. Penn. Press, 2003).
34. *Zenith*: E. Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, ASIL INSIGHT (Feb. 6, 2009), at: <<http://www.asil.org/insights090206.cfm>>. Perhaps the most vivid description of the contemporary attacks is provided in *The Pirate Latitudes*, VANITY FAIR 148 (April 2009). *Mockery*: M. Winship, *THE SHIPPING NEWS* (Apr. 18, 2009), available online at <www.commondreams.org/print/40998>.
35. See *Law of Piracy, Aircraft Hijacking*, in *Piracy in the Twentieth Century*, ch. 5, at 321, cited in note 15 supra.
36. J. Borger, *Why Israel's Capture of Eichmann Caused Panic at the CIA*, THE GUARDIAN (June 8, 2006).

37. Attorney-General of Israel v. Adolf Eichmann, Dist. Ct. of Jerusalem; reported in 36 INT'L LAW REP. 5, 15 (1968) (decided in 1961).
38. Spain May Judge Guatemala Abuses, BBCNEWS (Oct. 5, 2005).
39. Jen Nessel, Donald Rumsfeld Charged with Torture During Trip to France, NEW YORK CENTER FOR CONSTITUTIONAL RIGHTS (Oct. 26, 2007), at: <<http://ccrjustice.org/newsroom/press-releases/donald-rumsfeld-charged-torture-during-trip-france>>.
40. See Universal Jurisdiction: Prosecuting Any Crimes Committed Anywhere?, New York Law School, 10 INTERNATIONAL REVIEW 14 (Fall 2007). *Table*: p. 16–17. *Downsides*: p. 18–19.
41. *Al-Qaida*: See A. Higgins, K. Leggett, and A. Cullison, How al Qaeda Put Internet to Use: From Britain, Webmaster Kept 'The Brothers' Abreast on Terror, WALL STREET J. (Nov. 12, 2002). *US reaction*: See Eric Lightblau, Judges and Justice Dept. Meet Over Eavesdropping Program, NEW YORK TIMES (Jan. 10, 2006).
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43. J. Markoff, Warfare First Began as Internet Barrage, NEW YORK TIMES (Aug. 13, 2008).
44. *Shift away from territorial approach*: see K. Boele & C. Kessedjian (ed.), INTERNET: WHICH COURT DECIDES? WHICH LAW APPLIES? (The Hague: Kluwer, 1998) & its Selected Bibliography, at 177. Additional commercial applications are analyzed in Symposium on Borderless Electronic Commerce, 35 INT'L LAWYER 1–106 (2001). *Child porn*: Vienna Busts Huge Child Porn Ring, BBCNEWS (Feb. 7, 2007).
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48. *Montreux Declaration*: <<http://www.privacyconference2005.org/index.php?id=6>>. *UN World Summit*: <<http://www.un.org>>, click the following—Main Bodies, General Assembly, Search, UN Search. See J. Gurwitz, U.N. Oversight of Internet Threatens Freedom of Information, LOS ANGELES DAILY JOURNAL (Nov. 23, 2005).
49. *Convention on Cybercrime* (2001), at: <<http://conventions.coe.int/Treaty/EN/Treaties/Html/185.htm>>. *Additional Protocol* (2003), at: <<http://conventions.coe.int/Treaty/EN/Treaties/Html/189.htm>>.
50. *EU*: <http://ec.europa.eu/information_society/activities/social_networking/docs/sn_principles.pdf>. *US*: <<http://www.doj.mt.gov/news/releases2008/20080508statement.pdf>>.
51. *Europe*: Judgment of the Court (Grand Chamber), Case No. C-317/04 and C-317/05, searchable by case number on the Court's website, at: <<http://curia.europa.eu/en/transitpage.htm>>. *Canada*: Ian Austen, U.S. Plan for Airline Security Meets Resistance in Canada, NEW YORK TIMES (Oct. 14, 2007).
52. T. Zeller, House Member Criticizes Internet Companies for Practices in China, NEW YORK TIMES (Feb. 15, 2006).
53. See organizational website at: <<http://www.icann.org>>.
54. B. Yarnold, INTERNATIONAL FUGITIVES: A NEW ROLE FOR THE INTERNATIONAL COURT OF JUSTICE 11 (New York: Praeger, 1991).
55. *Valentine v. United States ex rel. Neidecker*, 299 US Rep. 5, 9 (1936).
56. *Re Arton*, 1 QUEEN'S BENCH 108, 111 (1896).
57. 31 US Treaties 892 (1979); US TREATIES AND OTHER INTERNATIONAL AGREEMENTS SERIES, No. 9625 (1980).
58. See generally R. Wallis, LOCKERBIE: THE STORY AND THE LESSONS (Westport, CT: Praeger, 2001).
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61. *Case*: Prosecutor v. Elizaphan & Gerad Ntakirutimana, Case Nos. ICTR-96-10, ICTR-96-17-T. *Further analysis*: U.S. extradition proceedings are evaluated in L. Klarevas, The Surrender of Alleged War Criminals to International Tribunals: Examining The Constitutionality of Extradition Via Congressional-Executive Agreement, 8 UCLA J. INT'L L. & FOREIGN AFF. 77 (2003) & Casenote, Validating a Constitutional Shortcut—The "Congressional-Executive Agreement," Ntakirutimana v. Reno, 184 F.3d 419 (5th Cir. 1999), 69 UNIV. CINCINNATI L. REV. 1055 (2001).
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66. *Protocol*: Mexico-U.S. Protocol to the Extradition Treaty, done at Washington, DC, Nov. 13, 1997, reprinted in 37 INT'L LEGAL MAT'LS 154 (1998). *Jurisdiction divested*: U.S. v. Toscanino, 500 F.2d 267, 275 (2d Cir. 1974) (italics added).
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- www.worldlii.org/eu/cases/ECHR/1989/14.html>. *Georgian example*: Shamayev and 12 Others v. Georgia and Russia (April 12, 2005), available on the Court's Web site (in French). See <<http://www.echr.coe.int>>.
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 69. *Romania v. Cheng*, 114 C.C.C.3rd 289 (Nova Scotia S.Ct., 1997).
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 71. G. Gilbert, *The Political Offence Exemption*, ch. 6, in *TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW: EXTRADITION AND OTHER MECHANISMS* 203 (The Hague, Neth: Martinus Nijhoff, 1998).
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 81. For a brief but authoritative analysis, see F. de Londras, *Saadi v Italy*: European Court of Human Rights Reasserts the Absolute Prohibition on Refoulement in Terrorism Extradition Cases, *ASIL INSIGHT* (May 13, 2008), at: <<http://www.asil.org/insights080513.cfm>>.
 82. *Blackmer v. U.S.*, 284 U.S. 421, 439 (1932).
 83. *F.T.C. v. Compagnie De Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1313 n. 67, 1314 (D.C. Cir., 1980) (italics added and footnotes omitted).
 84. *Service*: 4 *INT'L LEGAL MAT'LS* 341 (1965). *Evidence*: 8 *INT'L LEGAL MAT'LS* 37 (1969). *Rogatory*: *Inter-American Convention on Letters Rogatory*, 14 *INT'L LEGAL MAT'LS* 339 (1975) & *Protocol*: 18 *INT'L LEGAL MAT'LS* 1238 (1979).
 85. *OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES* (L 160) 37 (June 30, 2000).
 86. See, e.g. *Dr. Ing. H.C.F. Porsche A.G. v. Superior Ct.*, 123 Cal. App.3d 755, 762, 177 Cal.Rptr. 155, 159 (3d Dist. 1981) (HSC preempts state mail service alternative) & *Securities and Exchange Comm'n v. International Swiss Investments Corp.*, 895 F.2d 1272 (9th Cir. 1990) (IAC inapplicable at time of service because treaty signed but not yet ratified).
 87. *O'Bryan v. Holy See*, 490 F.Supp.2d 826, 833 (W.D. Ky., 2005).
 88. See N. Youssef, *U.S. Presence Blocking Sovereignty, Iraqi Panel Says*, *KNIGHT RIDDER NEWS SERVICE* (Sept. 14, 2005).

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CHAPTER SIX

Range of Sovereignty

CHAPTER OUTLINE

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 - A. Sovereign Territory
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 - C. Terra Nullius
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Problems

Endnotes

Discussion among the officers of the U.S.S. Enterprise, upon learning that persistent travel at certain warp speeds (faster than light) is damaging the fabric of outer space:

Captain Picard: Ah, we've received new directives from the Federation Council on this matter. Until we can find a way to counteract the warp field effect, the Council feels the best course is ... [that travel in] areas of space found susceptible to warp fields will be restricted to essential travel only and effective immediately, all Federation vehicles will be restricted to a speed of warp 5, except in cases of extreme emergency.

Worf: The Klingons will observe these restrictions, but the Romulans will not.

Troi: And what about the Ferengi, and the Cardassians for that matter?

Picard: The Federation is sharing all our data with warp capable species. We can only hope that they realize it's in their best interest to take similar action.

—Star Trek: The Next Generation, Force of Nature, Episode No. 158 (1994), reprinted in M. Sharf & L. Roberts, The Interstellar Relations of the Federation: International Law and “Star Trek: The Next Generation,” 25 UNIV. TOLEDO LAW REV. 577, 594 (1994). See §6.4.C. on Outer Space.

INTRODUCTION

You have now studied the fundamentals of statehood and the related limitation that one State cannot unilaterally act within the territorial boundaries of another State. This chapter augments these themes by illustrating the extent to which sovereign power is properly (and improperly) exercisable in, over, and outside of other States. The essential question is this: To what extent may a State exercise its sovereign powers abroad without violating the sovereign rights of other States? This chapter thus addresses the twilight zone between absolute sovereign power to exclude another nation's entry and the practical need to encourage commercial and other forms of international interaction.

◆ §6.1 CATEGORIES OF TERRITORY

Four species of territory emerged with the modern system of States:

- ◆ Territory owned by a sovereign State (sovereign territory);
- ◆ Territory not owned by any State due to its special status (trust territory);
- ◆ Territory capable of ownership although not yet under sovereign control (*terra nullius*); and
- ◆ Territory that cannot be owned by any nation (*res communis*).

A. SOVEREIGN TERRITORY

States possess the right to control the land located within their territorial boundaries. The extent of that sovereignty is ordinarily defined by oceans, mountains, and other natural frontiers. One attribute of the State-centric system inherited from the seventeenth century is that all land is subject to sovereign control. As recounted by the London research consultant Peter Hocknell: "Some 127 new states have emerged since 1945, and the number of recognised international land boundaries has increased from approximately 280 in the late 1980s to about 315 today [2001]. New land is not being created; instead, states have fragmented into smaller states and other political structures. Ever since 1648, international law, the basis of the Westphalian state system, has abhorred undefined territory and portrayed international boundaries as inviolable."¹

B. TRUST TERRITORY

Certain territories were not subject to the sovereignty of *any* State because of their special status. These were the League of Nations "mandates" or post-World War II UN "Trust Territories" [§3.3.B.4(a)]. The League and the UN placed such areas under the protection of established States. The grand (but arguably neo-colonial) design was to promote the self-determination of the inhabitants. No State, including the protecting State in whose care such a territory had been placed by the organization, could claim title to such land. It was under a temporary disability to engage in self-governance, usually because it lacked political infrastructure. Some current "States," such as Somalia, are creeping toward failure—in the classical sense of statehood [§2.1.B.2(e)].

At present, there are no such trust territories. Kosovo, while under UN administration after the 1999 North Atlantic Treaty Organization (NATO) bombing campaign [§3.5.A.], would be a contemporary, but nevertheless rough, equivalent. It was (and is) being administered by overlapping international organizations, rather than another State—with a view toward allowing time for Kosovo to achieve its final status [§2.4.B.]. There are many issues beyond the scope of a single introductory volume regarding territory that is being administered by organizations. One might, instead, explore the rich vein of academic literature that focuses on the evolution of the international legal regime governing land territories and whether today's international territorial administration is the contemporary substitute for colonization.²

C. TERRA NULLIUS

Most territories were once capable of being legally acquired. At one time, no State controlled them. These locations were referred to, in earlier colonial eras, as *terra nullius*. They were conveniently characterized as belonging to no nation, but capable of being legally acquired by the colonial European powers. International Law, after all, was shaped by the more powerful European States. They effectively determined when an existing State was competent to designate certain territories as *terra nullius*.

In 1885, for example, the States attending the Conference of Berlin declared that most of the African continent was *terra nullius*. The inhabitants of that continent were supposedly incapable of governing themselves. International frontiers and boundaries, there and elsewhere,

separated various lands, rivers, and lakes. They were subject to varying sovereign claims. These frontiers had varying sizes. By 1900, they had almost disappeared. They were replaced by linear boundaries. Such line drawing was often achieved via deceptively convenient means, such as latitude and longitude, or subjectively determined administrative districts. This opportune device too often ignored the divisive splintering of like ethnic groups on opposite sides of what was effectively an artificial border—spawning cross-border ethnic violence that would wreak havoc for years to come.³

In a 1971 International Court of Justice (ICJ) case, South Africa argued that it continued to be seized with the sovereign right to control South West-Africa (now Namibia). The people of that protectorate were supposedly incapable of governing themselves. The Court seized this opportunity to unreservedly declare a “blunder” by those States that, almost 100 years before, had characterized African territory as *terra nullius*. As stated by the Court:

African law illustrated ... the monstrous blunder committed by the authors of the Act of Berlin, the results of which have not yet disappeared from the African political scene. It was a monstrous blunder and a flagrant injustice to consider Africa south of the Sahara as *terrae nullius*, to be shared out among the Powers for occupation and colonization, even when in the sixteenth century Victoria had written that Europeans could not obtain sovereignty over the Indies by occupation, for they were not *terrae nullius*.

By one of fate’s ironies, the declaration of the 1885 Berlin Congress which held the dark continent to be *terrae nullius* related to regions which had seen the rise and development of flourishing States and empires. One should be mindful of what Africa was before there fell upon it the two greatest plagues in the recorded history of mankind: the slave-trade, which ravaged Africa for centuries on an unprecedented scale, and colonialism, which exploited humanity and natural wealth to a relentless extreme. Before these terrible plagues overran their continent, the African peoples had founded states and even empires of a high level of civilization....⁴

More than one State may attempt to control the activities of the people who inhabit areas that are *terra nullius*. This conflict has generated the occasional question

regarding which State may legitimately claim territorial sovereignty—when the area is not controlled exclusively by either? In the famous 1928 Island of Palmas arbitration, the US and the Netherlands both claimed the exclusive right to an island located in the Philippine archipelago. The resulting arbitral opinion could be characterized as a restatement of the imperialistic nature of the regime of *terra nullius*, carried forward into twentieth-century legal thought:

Territorial sovereignty belongs always to one [State] ... to the exclusion of all others. The fact [is] that the functions of a State can be performed by any State within a given zone ... in those parts of the globe which, like the high seas or lands without a master, cannot or do not yet form the territory of a State....

In the exercise of territorial sovereignty there are necessarily gaps, intermittence in time and discontinuity in space. This phenomenon will be particularly noticeable in the case of colonial territories, partly uninhabited or as yet partly unsubdued.⁵

As a condition for establishing its right to claim sovereignty, a State must normally establish that the particular zone was, in fact, *terra nullius* and thereby available for occupation and the ensuing claim to title. The ICJ’s 1974 Western Sahara case analyzed this prerequisite in a dispute between Spain and Morocco over control of a portion of the Western Sahara desert. This area is an extraordinarily sparsely populated desert flatland. It is bordered by Morocco and Algeria to the north, Mauritania to its east and south, and the Atlantic Ocean on its western coast. Since the UN-sponsored ceasefire agreement of 1991, most of the Western Sahara territory has been controlled by Morocco, with the remainder under the control of the Polisario (which has been formally recognized by a number of countries regarding sovereignty over the area it controls).

The Court confirmed the international expectation that mere occupation is not enough to justify a claim of sovereignty over an occupied area. It also must have been a *terra nullius* if the claimant State seeks exclusive sovereign control. The Court therein traced the history of the term:

[The] expression “terra nullius” was a legal term of art employed in connection with “occupation” as one of the accepted legal methods of acquiring

sovereignty over a territory ... [and it] was a cardinal contention of a valid “occupation” that the territory should be *terra nullius* “a territory belonging to no-one” at the time of the act alleged to constitute the “occupation.” ... A determination that the Western Sahara was a *terra nullius* at the time of colonization by Spain would be possible only if it were established that at that time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of “occupation.”⁶

In 2004, the UN Secretary General, for the first time, referred to Morocco as the “administrative power” in Western Sahara. The Under Secretary General, however, found that Morocco was *not* so considered. The people of this area were thus deemed entitled to its natural resources as a feature of their right to self-determination. In 2006, UN Security Council Resolution 1720 recalled a number of its prior resolutions on Western Sahara. Its purpose was to reaffirm the organization’s continuing commitment to achieving: (1) a lasting and politically viable solution providing for the self-determination of its people; and (2) the need to respect the then fifteen-year-old military agreement between Morocco & the Polisario—the people’s non-governmental organization backed by Algeria—regarding their ceasefire.

D. RES COMMUNIS

A fourth category of territory is incapable of ever being legally owned or controlled. It is typically referred to as being *res communis*. It belongs to no one. It must remain available for all to use. Under International Law, the entire community of nations must have unfettered access to such areas. These territories cannot be lawfully controlled by any State or group of States without the approval of the community of nations. The clearest examples of *res communis* are the high seas and outer space, as discussed later in this chapter.

One might argue that Antarctica is effectively a “land” area that is *res communis* because the underlying ocean is always frozen. It has long been inhabited and explored by a number of nations. Even traditionalist scholars would acknowledge that the moon and other celestial bodies are better examples of locations that are, at present, *res communis*. Some scholars have thus argued in favor of a territorial approach which would analogize Antarctica to the high seas, the deep seabed, outer space, and the Arctic (which has no land mass). Chilean

Professor Emilio Sahurie, for example, notes that even the high seas have been appropriated in a manner analogous to occupation, as illustrated by the textbook §6.3 sea zones. One might even argue that an occupation or territorial approach to the proper characterization of Antarctica is becoming obsolete with advances in modern technology.⁷

Regardless of the theoretical perspectives, Article 4 of the 1959 Antarctic Treaty provides that States shall not recognize, dispute, or establish territorial claims there, and no new claims may be asserted by parties to this treaty. Some commentators have characterized Antarctica as *res communis* for a more practical reason: the harsh weather conditions which make it incredibly difficult to occupy. (It is the coldest, driest, and most windy region on earth.) As Italy’s University of Siena’s professor Patrizia Vigny explains: “the legal status of Antarctica, established by Article 4 of the Antarctic Treaty, impedes the exercise of the traditional State jurisdiction, based on the principle of territoriality, in this area.”

Given the *res communis* nature of Antarctica, one might have theoretical difficulty with establishing a liability regime for this no man’s land. The 1959 Antarctic Treaty does not address liability. However, an environmental protocol now addresses liability arising from environmental emergencies. The majority of activities there are conducted by State agents carrying out scientific research in Antarctica. Should liability, if any, be determined by reference to the laws of the State (or States) of which the responsible individual(s) is a citizen? The flag of his/her vessel? The closest nation?⁸

The Arctic Circle is the northernmost region of the world. It does not fall within the ambit of the 1959 Antarctic Treaty. It is part ice cap. But unlike the Antarctic, it encompasses a sizeable segment of land subject to various territorial claims by its eight surrounding countries: Canada, Finland, Greenland, Iceland, Norway, Russia, Sweden, and the US. Global warming may one day render the Northwest Passage large enough for it to become a standard trade route. This so-called passage consists of a series of historically frozen straits and channels that are bordered by Canadian land. Should global warming proceed as anticipated, this route would cut 9,000 kilometers from the journey that ships must otherwise traverse when transiting the Panama Canal. Substantial oil reserves will become accessible as the ice melts and more of its terrain becomes visible.⁹ A US study indicates that as much as twenty-five percent of

the world's undiscovered oil and gas reserves may lie beneath the Arctic floor.

Not surprisingly, there are conflicting claims to respective regions of the Arctic Circle. In July 2008, Canada announced plans for an army training center and deep-sea port over its portion of the Arctic floor. Other adjacent nations have various claims as well. Russia placed a flag on its portion of the Arctic's seabed floor in August 2007 [§6.3.F Continental Shelf]. But no one country has an exclusive territorial claim. Parts of the underlying land mass are located within some of the above States' 200-mile Exclusive Economic Zones [§6.3.E.]. Upon ratification of the UN Convention on the Law of the Sea, a country has a ten year period within which to make claims to extend its 200 nautical mile zone further.

As of 2009, the US is not a party to the United Nations Convention on the Law of the Sea (UNCLOS). Several US presidents have sought Senate ratification so that the US can have a place at the table when global warming renders the Northwest Passage more viable for commercial (and military) purposes. All Arctic claims will likely be resolved one day by a UN commission established under the global Law of the Sea Treaty (which entered into force in 1994).

◆ §6.2 DOMINION OVER LAND

A State ordinarily possesses the exclusive right to the use of its territory and to exclude other nations from being present without its consent. However, disputes over ownership and control have existed for centuries—and have been directly responsible for untold loss of life, countless human rights violations, devastation of economic resources, diplomatic conundrums, and numerous broken commitments.¹⁰ Israel's occupation of the Palestinian territory stems from land taken by conquest during the 1967 Middle East War. Argentina's 1982 invasion of the Falkland Islands was the contemporary phase of a dispute with England, dating from 1833. England's possession of Ireland's northern six counties, and continuing territorial conflict in the Caucasus region of Eastern Europe–Russia, are just a few examples.

In the last hundred years, most legal scholarship about land feuds has focused on adjudications where, as noted by the University of Texas professor Steven Ratner, judges and arbitrators have managed to “draw lines—across mountains, deserts, rivers, and human

settlements—where mere politicians had never succeeded.” Of course those lines could not be drawn without State consent to the proceedings that drew them [Consent-Based Governance: §1.1.A.1. & State Sovereignty: §5.1.A.1.]. Professor Ratner aptly characterizes the adjudication of such matters with his version of political reality:

Adjudications could be viewed as a sideshow for addressing small-scale conflicts, the results dictated more by a desire to appease both parties than by reasoning toward some principled solution.

The equation of international law with international adjudication is nowhere as pronounced as in the area of territorial sovereignty.... Territorial negotiations seem dominated by power, politics bargaining, and compromise; determining the role for law in this process has seemed almost impossible. Thus, when border disputes were resolved through adjudication, the literature gravitated toward it to enlighten us on the state of the law.¹¹

The overwhelming percentage of territorial disputes have *not* been resolved by the courts. A 2006 study appearing in the *American Political Science Review* analyzed 1,490 negotiations involving 348 disputes from the end of WWI through 1995. Of those, only 30 resulted in an agreement to resort to either a judicial or arbitral solution.¹²

The peaceful resolution of such disputes is often complicated because judges, arbitrators, or diplomats have to rely on documents that are centuries old. In a 1953 International Court of Justice (ICJ) case, England and France both claimed the exclusive right to two islets within the English Channel. The ICJ analyzed a number of medieval treaties in its effort to establish which State was entitled to this territory: the Treaty of Lambeth of 1217, the Treaty of Paris of 1259, the Treaty of Calais of 1360, and the Treaty of Troy of 1420. The ICJ even considered a papal declaration in 1500, which transferred the Channel Islands from the French Diocese of Coutances to the English Diocese of Winchester. None of these documents specifically mentioned the disputed islets. The Court ultimately granted title to Great Britain based on its acts of possession.

Uti possidetis juris is a more blunt instrument, originating in Roman law. It later facilitated border resolutions in Latin America, Africa, Asia, the former Soviet Union,

and Yugoslavia. It conveniently defines the borders of newly sovereign States on the basis of prior externally imposed administrative frontiers. Europe, for example, divided Africa according to “spheres of influence.” The collapse of colonial rule resulted in the drawing of abstract lines, based on latitudes and longitudes. These were roughly equivalent to the previous administrative zones. The resulting cross-border ethnic division effectively encouraged groups to attempt secession from their own States. Such reunification efforts met with severe resistance from the international community, which was intent on establishing concrete borders¹³ [§2.4.B. on Secession].

The materials in this section analyze the general modes for establishing sovereign title. The historical approach is presented first, followed by contemporary criticisms of these modes.

A. HISTORICAL APPROACH

The traditional methods for acquiring sovereignty over territory are as follows: occupation, conquest, cession, prescription, and accretion.

1. Occupation

(a) Historical Perspective Exclusive occupation for an extended period of time is the most common basis for claiming sovereignty over a particular geographical area. This mode of acquisition is referred to as an “original” claim to territory, as opposed to a “derived” basis for claiming sovereign title. In the latter instance, title may be expressly derived from a document, such as a treaty in which two or more States formally agree on exclusive or shared sovereignty over a particular territory.

During the previous colonization era, effective occupation required that the State occupy an area that was originally *terra nullius*—owned by no other country, but capable of ownership. The World Court has repeatedly stated that occupation is “legally an original means of peaceably acquiring sovereignty over territory ... [however] it was a cardinal condition of a valid ‘occupation’ that the territory should be *terra nullius*—territory belonging to no-one—the time of the act alleged to constitute the ‘occupation.’”¹⁴

This method for authenticating sovereign title was typically proven by “discovery.” The medieval perspective was that mere discovery, without actual possession, was sufficient to establish valid title. State practice in the later centuries of Europe’s colonial expansion retreated

from that view. After territory was discovered, there had to be at least some symbolic act signifying possession. State representatives planted flags or created more substantial ties, such as establishing a settlement within the discovered territory. Discovery, coupled with such acts, established a colorable title, which was thus initiated but not necessarily perfected.

The nineteenth-century European powers relied on discovery as a basis for initiating claims of exclusive land title. They carefully protected their respective colonial claims to the territories of the African Continent. The 1885 Berlin Conference, whereby well-established African tribes were deemed incapable of self-governance, echoed the then prevailing State practice that *any* form of occupation should be immediately communicated to the other colonial powers. Formal notification to all signatories was designed to prevent or ameliorate problems of successive discoveries of the same territory.

There is no general agreement about the effect of “discovery” on modern claims to State territory. Though some countries assert that discovery alone generates legal rights, others disagree. The US government, for example, claims that mere discovery yields no rights. When the US entered into an 1824 treaty with Russia, establishing the boundaries of Alaska, the US declared that “dominion cannot be acquired but by a real occupation and possession, and an intention to establish it [by mere discovery] is by no means sufficient.”¹⁵ Under this viewpoint, some form of occupation was necessary to claim legitimate sovereignty over territory. The US astronaut who planted the American flag on the moon in 1969 did not establish any US sovereign rights or title to that territory.

Discovery was supposed to be followed by *effective* occupation. States generally agreed that they did not have to physically occupy the territory in question. They did have to conduct some activity, however, to confirm the existence of some form of actual governmental administration. The Permanent Court of International Justice [PCIJ (located in The Netherlands)] validated this requirement in the 1933 Danish-Norwegian dispute over eastern Greenland. The Court declared that sovereign claims to territory often depend “upon continued display of authority, involv[ing] two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.”¹⁶ Denmark did not physically occupy the contested portion of eastern Greenland.

It did not establish settlements or send governmental officials to administer the area. Yet Denmark's title was successfully predicated upon "the peaceful and continuous display of authority over the island." This was an *effective* occupation during the several centuries that Denmark engaged in diplomatic exchanges with other governments concerning eastern Greenland. These acts demonstrated the requisite degree of dominion to support Denmark's claim to sovereignty.

In November 2002, Italian divers planted a flag, twenty-six feet beneath the sea, on a normally submerged volcanic island between Italy and Sicily. Italy thus claimed title to this island via discovery. It has emerged four times in recorded history. The last occasion was in 1831, when it reached a height of 213 feet and a three-mile circumference. It is also claimed by the United Kingdom ("Graham Island"), Sicily ("Ferdinanda"), and Spain. Under International Law, however, the inability of any sovereign to establish control moots its susceptibility to ownership.¹⁷ In September 2008, Russia planted a titanium flag two and one-half miles under the Polar Ice Cap for similar reasons.

(b) Belligerent Occupation Contemporary occupations, resulting from a hostile takeover of territory, are often described by the occupying government as being temporary in nature. Some last far longer than initially predicted. As noted by Oxford University's Professor of International Relations, Adam Roberts: an implicit assumption is that "military occupation is a provisional state of affairs, which ... will be transformed into some other status through negotiations conducted at or soon after the end of the war. However, many episodes during this [twentieth] century have called into question the assumption that occupations are of short duration."

What measures may an occupying power employ to counter resistance from inhabitants of the occupied territory?¹⁸ The key international instruments are the 1907 Hague Regulations and the 1949 Fourth Geneva Convention. Article 43 of the Hague Regulations provided that the occupying power "shall take all the measures ... to restore and ensure, as far as possible, public order and [civil life], while respecting ... the laws in force in the [occupied] country." This article was incorporated into the analysis of the post-World War II Nuremberg Trials. Articles 47 and 64 of the Geneva Convention—the contemporary governing rule according to the Red Cross—provide a similar but more detailed articulation

of the law of occupation. Their key provisions state that ([Article] 47) "persons who are in the occupied territory shall not be deprived ... of the benefits of the present Convention by any change introduced ... into the institutions or government of the said territory ... nor by any annexation...." Furthermore ([Article] 64), the occupying power may "subject the population ... to [penal] provisions which are essential to enable the Occupying Power ... to maintain the orderly government of the territory...."

Occupiers are thereby supposed to remain, after the cessation of hostilities, only until a final peace treaty establishes the fate of the occupied territory. As aptly articulated by Wayne State University's Professor Gregory Fox, rather than *regime change*, a focal point for the US War in Iraq, "an occupier enjoys no general legislative authority to make permanent changes to legal and political structures in the territory. These are instead choices reserved to an indigenous government upon its return to power at the end of the occupation."¹⁹

In 2003, after the US invasion of Afghanistan and Iraq, the 70th biennial reunion of Belgium's Institut de Droit International produced its Bruges Declaration on the Contemporary International Law on the Use of Force. Since 1873, this widely respected non-governmental organization has considered it a duty to comment upon and reaffirm which State applications of force lie within and beyond International Law. Its Bruges Declaration contains a contemporary restatement of the law of belligerent occupation, based upon the rules codified in the Hague Regulations of 1907 on humane treatment of civilians and Prisoners of War; the Fourth Geneva Convention of 1949 regarding civilian protection in time of war; and the First Additional Protocol, including colonial domination and alien occupation, as follows:

- ◆ Belligerent occupation does not transfer sovereignty over territory to the occupying power.
- ◆ The occupying power can only dispose of the resources of the occupied territory to the extent necessary for the current administration of the territory and to meet the essential needs of the population.
- ◆ The occupying power assumes the responsibility and the obligation to maintain order and to guarantee the security of the inhabitants of the territory and to protect its historical heritage, cultural property, and basic infrastructure essential to the needs of the population.

- ◆ The occupying power has the obligation to meet the basic needs of the population.
- ◆ The occupying power has the obligation to respect the rights of the inhabitants of the occupied territory which are guaranteed by international humanitarian law and international human rights law....²⁰

Contemporary examples of what are, or are destined to become, prolonged occupations include:

- ◆ *Cyprus*. The northern part of Cyprus has been occupied by Turkish military forces since 1974 (see §2.4.A. *Cyprus v. Turkey*). Turkey supports the supposedly distinct State-like entity known as the Turkish Republic of Northern Cyprus (TRNC). In March 2007, the Greek Cypriot government bulldozed (without notice) the twelve-foot concrete wall in Nicosia, which was the symbol of the island's division. The Turkish Cypriot government replaced it with screens and armed soldiers in a matter of hours. No other country in the world recognizes the TRNC as the *de jure* government of this occupied area on Cyprus.
- ◆ *Lebanon*. Israel established a special "zone of peace" in the southernmost portion of Lebanon in 1978. Because of many attacks from this area, Israel claimed a critical need for this zone—about 10 percent of Lebanon's landmass—under the guise of self-defense.²¹ It was designed to provide a buffer between rival forces because Syria also began its own occupation of Lebanon in 1978. Syria also claimed the critical need for a military foothold in a land that bordered Israel. Given Israel's earlier withdrawal and the pendency of the Iraq conflict, the September 2004 UN Security Council Resolution 1559 called upon Syria to respect the "sovereignty, territorial integrity, unity, and political independence from Lebanon...." Given Syria's weak economy, not well suited to withstand UN economic sanctions, Syria withdrew in May 2005. The Syrian presence was not necessarily over. In November 2005, Syria's exiled former vice-president accused President Assad of personally ordering the assassination of Lebanon's prime minister. Assad rejected any related discussion with UN investigators.
- ◆ *Afghanistan and Iraq*. US preemptive strikes after 9–11 resulted in what was clearly an initial period of belligerent occupation. Interim "official" transfers of sovereignty and ensuing elections in both nations brought these formal occupations to an end from the US viewpoint. The US proclaimed the end of its

occupation of Iraq, for example, in June 2004. As of September 2005, Afghanistan had successfully conducted nationwide elections, choosing from 6,000 candidates for 249 parliamentary seats—plus legislative councils in each of its thirty-four provinces.

Many Middle Eastern nations, however, characterize the continued presence of: (a) US military forces, (b) civilians working for entities such as the US Central Intelligence Agency, and (c) US-installed governments—in both nations—as clear evidence of a contemporary form of continuing occupation. That the US has announced the possibility of having permanent military bases in each country adds to this perception. In May 2006, the Deputy Air Commander of the US Central Command stated as follows: "We'll be in the region for the foreseeable future. Our intention would be to stay as long as the host nations will have us." The US intends to have air bases in the region because there will not be a capable Iraqi or Afghan air force for many years.

Whether those bases will be in or outside of Iraq and Afghanistan after the foreign ground troops depart, remains an open question. As of August 2008, there was no Status of Forces Agreement between Afghanistan and the US. Normally, when foreign forces are present in a sovereign nation, their status is the subject of a bilateral treaty which governs all aspects of the foreign military presence.

- ◆ *India*. In October 2008, the troubled province of Assam endured a new round of supposed separatist bombings and related deaths. The United Liberation Front of Assam insurgents are demanding independence from India. Assam has twenty-six million inhabitants who are predominantly Muslim. If attributable to this movement, the October bombings were the first separatist attack of this size (seventy-six dead and three-hundred wounded in various markets and government buildings) and magnitude (thirteen blasts in four towns).

(i) *Palestinian Exemplar* The legal distinction between occupation and conquest has blurred in this long-term conflict between Israel and displaced Palestinians. Having successfully concluded several military campaigns, Israel occupied the West Bank of Jordan and the Gaza Strip which formerly belonged to Egypt; Syria's Golan Heights (which Israel annexed in 1981); and Egypt's Sinai Desert (for a comparatively brief period). In 1967, the UN responded with Resolution 242, whereby Israel was advised to (a) withdraw its

armed forces from those territories; (b) terminate all claims or any belligerent occupation; and (c) respect “the sovereignty, territorial integrity and political independence of every state in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.” The Security Council has since issued further resolutions referring to this Resolution, but to no avail.

This “occupation” (or “conquest” depending on one’s perspective) once again received worldwide attention in 1997. Israel had built approximately 200 settlements in the West Bank, Gaza Strip, and the Golan Heights. On three occasions in four months, the UN General Assembly adopted resolutions condemning Israel for housing its citizens in these territories. During the first “emergency session” of the General Assembly in fifteen years, the vote was virtually unanimous: 131–3, with Israel, Micronesia, and the US voting against the last resolution. Article 49 of the 1949 Geneva Convention provides that an occupying nation may not “transfer parts of its own civilian population into territory it occupies.” A series of agreements have failed to resolve various territorial disputes.²² Israel left Gaza in August 2005. Its national security interests nevertheless render Gaza subject to renewed, but presumably temporary, occupation by Israeli military forces until a functioning Palestinian State is established. In December 2005, for example, Israel established a security zone in northern Gaza to prevent Palestinian rocket attacks upon Israel.

Israel has taken certain steps to preserve Palestinian rights. Israel evicted Jewish squatters from Palestinian areas in May 2006. In December 2006, the Israeli Supreme Court voided a law which had prevented Palestinians from seeking compensation from Israel for damaged caused by Israeli Army activities in the occupied territories. However, the main evidence of an occupation is the Israeli Wall. On the other hand, in June 2008, Israel announced plans for 1,300 *new* homes in East Jerusalem. That would bring the total number of homes approved for construction in the occupied territories to 3,000.

With the launch of the second Intifada and its related suicide bombings, Israel constructed a security wall, fencing in eight to sixteen percent of the West Bank (depending on whose estimate one relies) which is undoubtedly part of the Palestinian Territory. The General Assembly then exercised its Charter-based authority to refer this matter to the International Court of Justice (ICJ) for an advisory opinion on the legality of Israel’s construction

of this wall. In July 2004, the ICJ rendered its opinion about the legality of this means of dealing with the suicide bombings.²³



Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

INTERNATIONAL COURT OF JUSTICE

9 JULY GENERAL LIST No. 131 (2004)

Go to Course Web page at

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Six, click Palestinian Wall Case.



Picture used with Permission of S'ra DeSantis of Vermonters for a Just Peace in Palestine/Israel.



United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory

RULES AND REGULATIONS GOVERNING THE
REGISTRATION OF CLAIMS (JUNE 19, 2009)

Go to Course Web page at

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Six, click UN Register of Damage.

The wall—or “fence,” as identified in Israeli news sources—may protect Israel in a manner that the Israeli court will ultimately characterize as properly assuring the security of all persons in the manner expected of an occupying nation. When completed, it will extend 403 miles (more than four times the length of the Berlin Wall). At the opening of the 2005 UN annual session, Israeli Prime Minister Ariel Sharon asserted that this barrier has blocked many terrorist bombers, specifically stating: “This fence is vitally important [to Israel’s national security]. This fence saves lives.”²⁴ The US House and Senate similarly responded to the ICJ’s negative decision about the legality of the barrier in their respective July 2004 resolutions deploring this “perversion of justice.”

Fourteen months later, the Israeli Supreme Court concluded that one area of the Wall was illegal because its presence violated the international law of belligerent occupation. The Israeli Supreme Court unanimously required Israel to reconsider alternatives for the fence route near a West Bank Israeli village. That portion of the fence surrounded five Palestinian villages. The village residents received permanent resident cards, allowing them to enter this enclave. All others had to obtain a permit to enter. The Israeli court’s September 2005 decision echoed its earlier decision. Both cases held that to erect such a wall requires taking possession of Palestinian—owned land. Under both the 1907 Hague Regulations and the 1949 Geneva Conventions [text-book §9.6.B.], such takings must serve the articulable needs of the army’s occupation and are allowed only if “absolutely necessary by military operation.”

Perhaps the most significant part of the Israeli Supreme Court’s decision addressed the interplay between its wall-related cases and the above advisory opinion of the ICJ. Both prior and subsequent cases before the Israeli court would of course spawn arguments by various Palestinian petitioners that the fence violates International Law. The Israeli court arguably muted that argument in the following terms:

the Supreme Court of Israel shall give the full appropriate weight to the norms of international law, as developed and interpreted by the ICJ in its Advisory Opinion. However, the ICJ’s conclusion, based upon a factual basis different than the one before us, is not *res judicata* [previously decided], and does not obligate the Supreme Court of Israel to rule that each and every segment of the fence violates international law. The Israeli Court

shall continue to examine each of the segments of the fence, as they are brought for its decision and according to its customary model of proceedings; it shall ask itself, regarding each and every segment, whether it represents a proportional balance between the security-military need and the rights of the local population. If its answer regarding a particular segment of the fence is positive, it shall hold that that segment is legal. If its answer is negative, it shall hold that that segment is not legal. In doing so, the Court shall not ignore the entire picture; its decision will always regard each segment as a part of a whole.²⁵

(ii) *Congolese Exemplar*



Case Concerning Armed Activities on the Territory of the Congo

(DEMOCRATIC REPUBLIC OF THE CONGO V. UGANDA)

INTERNATIONAL COURT OF JUSTICE
GENERAL LIST NO. 116 (DEC. 19, 2005)

<<http://www.icj-cij.org/docket/files/116/10455.pdf?PHPSESSID=d22a6140f6327a3a292e9de9bde770c51>>

Go to Course Web page at
<<http://home.att.net/~slomansonb/txtcsesite.html>>.
Under Chapter Six, click Congo Occupa.

(c) **Humanitarian Occupation** An international organization may assume the powers of a national government over territory, primarily to reform its political institutions. The UN, for example, administered both East Timor and Kosovo prior to their current independent status—if for no other reason than to control the hemorrhaging of lives spawned by those ethnic-laden conflicts. Given the strong preference against secession, this contemporary development is related to the international community’s objective to: (a) maintain existing States and their populations; and (b) restrain further the post-Cold War splintering of nations.

While the UN Security Council authorized the above territorial administrations, their legal pedigree remains in doubt. As vividly illustrated by Wayne State University Law Professor Gregory Fox:

The principles and purposes of the Charter are sufficiently vague that they can be read to encompass both arguments for a robust Security Council authority to remake states through humanitarian occupation and opposing arguments for preserving national political autonomy. A theory of implied consent either implausibly argues that UN member states have granted the Security Council a blank check under Chapter VII [textbook §9.2.B.], including the authority to unleash a parade of destructive horrors against their territories, or deems such acts outside the boundaries of the states' consent, in which case one is returned to claims about why some Security Council actions are legitimate but not others.

These [legitimacy-seeking] weaknesses emerge more from logical cul-de-sacs in the arguments than from their actual rejection by states. None has grounding, either positive or negative, in substantial state practice, let alone in formal adjudication by an international court or tribunal. This gives the arguments a decidedly tentative cast. But they are not encouraging for those seeking a home for humanitarian occupation in conventional legal justifications. Some may find reassurance in a Security Council

with unlimited authority to impose agreements and dictate the architecture of national politics. But this can only be a short-term solution.²⁶

For example, Kosovo unilaterally declared its independence from Serbia in February 2008. After a nine-year UN and NATO humanitarian occupation and a multiple-year negotiation process, Serbia did not obtain one inch of territory in return. Belgrade expressed its bewilderment over the final outcome of the UN Security Council resolution creating this anything but Westphalian arrangement—whereby an international organization of States governed Kosovo for nearly a decade. (The ultimate court of international opinion may be found in the court's 20__ advisory opinion in textbook §2.4.B.).

As you read the following excerpt from the document that established the international occupation of Belgrade's southernmost province of Kosovo, assume that you represent the Serbian government in Belgrade. That may help you to appreciate the agreement to which Belgrade believed it had agreed. It may also suggest why humanitarian occupation has not enjoyed the unanimous imprimatur of international legal scholars and benches. (The italics appearing below have been inserted by the author.)

United Nations Security Council Resolution 1244 (1999) On the Situation Relating to Kosovo

ADOPTED BY THE SECURITY COUNCIL AT ITS 4011TH MEETING, ON 10 JUNE 1999
UN DOC. S/RES/1244

<<http://www.un.org/Docs/scres/1999/sc99.htm>>, click Security Council resolution 1244

THE SECURITY COUNCIL

...

Welcoming the general principles on a political solution to the Kosovo crisis adopted on 6 May 1999 (S/1999/516, annex 1 to this resolution) and *welcoming also the acceptance by the Federal Republic of Yugoslavia of the principles* set forth in points 1 to 9 of the paper presented in Belgrade on 2 June 1999 (S/1999/649, annex 2 to this resolution), and the Federal Republic of Yugoslavia's agreement to that paper,

Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal

Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and [Resolution 1244's] annex 2,

...

Determined to ensure the safety and security of international personnel and the implementation by all concerned of their responsibilities under the present resolution, and acting for these purposes under Chapter VII of the Charter of the United Nations,

...

4. *Confirms* that after the withdrawal *an agreed number of Yugoslav and Serb military and police personnel will be*

permitted to return to Kosovo to perform the functions in accordance with annex 2;

...

5. *Decides* on the deployment in Kosovo, under United Nations auspices, of international civil and security presences, with appropriate equipment and personnel as required, and *welcomes the agreement of the Federal Republic of Yugoslavia to such presences*;

...

10. *Authorizes* the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of *Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia*, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo;

11. *Decides* that the main responsibilities of the international civil presence will include:

...

(a) Promoting the establishment, pending a final settlement, of *substantial autonomy and self-government in Kosovo*, taking full account of annex 2 and of the Rambouillet accords (S/1999/648);

...

(f) In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a *political settlement*;

...

ANNEX 1

Statement by the Chairman on the conclusion of the meeting of the G-8 Foreign Ministers held at the Petersberg Centre on 6 May 1999

The G-8 Foreign Ministers adopted the following general principles on the *political solution* to the Kosovo crisis:

...

- ◆ A political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, *taking full account ... the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia* and the other countries of the region...;

ANNEX 2

Agreement should be reached on the following principles to move towards a resolution of the Kosovo crisis:

...

5. Establishment of an interim administration for Kosovo as a part of the international civil presence under which the people of Kosovo can enjoy *substantial autonomy within the Federal Republic of Yugoslavia*, to be decided by the Security Council of the United Nations.

...

8. A political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, *taking full account of the ... principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia* and the other countries of the region....

2. Conquest A related historical method for establishing title to territory is conquest. Nations historically acquired territory by forcefully taking it. Twentieth century examples include the following: Israel conquered the West Bank of Jordan during its 1967 war with neighboring Arab nations. In the closing days of WWII, Russia seized the four-island Kurils area between Russia and northern Japan, which has since prevented the two countries from signing a formal peace treaty. Germany annexed Austria in 1939. Japan annexed Korea in 1910. Belgium annexed the Congo in 1908.

In much of the Middle East, Great Britain's colonial boundaries devolved upon its former protégés in a way

that spawned much dissension because of lines drawn literally in the sand. This early twentieth-century geopolitical boundary making is ably depicted by Oxford Professor John Wilkinson as a regime that defies adherence to any evolved notion of International Law:

Not one of the states of the Arabian Peninsula recognized by the international community, Kuwait, Saudi Arabia, Bahrain, Qatar, the United Arab Emirates, Oman, and Yemen could put up a watertight case to the International Court at The Hague to retain the territory it actually occupies. Each one of their boundaries could be challenged, in whole or in part, by its neighbour or a third party....

There are two reasons for this state of affairs. Firstly, the boundaries have not fully met the precepts of international law. Secondly, local concepts of territorial organization have been largely ignored in imposing or otherwise deciding boundaries....

Because the legal rulings that an international body would apply in arbitrating the disputes would generally have been unfavourable to Britain's attempts to maintain a permanent sphere of territorial control, Britain decided in 1955 to resolve the situation by unilaterally declaring a frontier [in] which it stated defined territory that incontestably belonged to its protégés....²⁷

The twentieth-century development of rules prohibiting the use of force outlawed conquest as a legitimate basis for ceding or claiming title to State territory. In 1945, the UN Charter expressly prohibited the use of force in international relations. After two world wars initiated by the expansionist territorial policies of numerous States, the Charter's drafters effectively vitiated conquest as a basis for claiming title to property. Although there have been scofflaws, most States have observed this norm most of the time.

While the "right" of conquest is no longer legally viable, there remains the practical problem of certain ethnic subdivisions—claiming the right of self-determination—never amassing the requisite political basis for national recognition, absent some degree of territorial conquest. One could argue that a permanent state of civil war is too great a price to pay for blind adherence to the norm prohibiting conquest as a legal basis for achieving self-determination. As asserted by Sharon Korman, formerly of St. Anthony's College (Oxford):

Given that a right of conquest is no longer recognized, what is to be done about a state—the recent history of Bosnia-Herzegovina provides a possible illustration of the problem—which has no real existence or central authority capable of maintaining orderly government in its territory, and whose violent intercommunal hatreds are likely to lead to a permanent state of war, with all the dangers to international order which that entails? ... While old-fashioned partition ... must, in the late twentieth century, be regarded as an unacceptable and barbaric solution, has contemporary international society devised any alternative procedures for preserving the interest of order in a case of

this kind? Does an insistence on the legitimacy of impractical boundaries, in the name of preserving the territorial integrity of a state whose ethnic composition makes it inherently ungovernable, not tend to exacerbate rather than alleviate the problem?²⁸

3. Cession An international agreement that deeds territory from one nation to another is called a *cession*. The grantee nation's right to claim title to the granted land is derived from that agreement. In the 1928 Island of Palmas Arbitration, the Permanent Court of Arbitration (Netherlands) addressed the viability of transferring title by cession. The US unsuccessfully claimed sovereignty over an island in the Philippine archipelago, based on the 1898 Treaty of Paris between Spain and the US. Spain did not have proper title to the Island of Palmas at the time it ceded its treaty rights to the US. Spain could not, therefore, cede more rights to the US than Spain itself possessed. The opinion generally addressed the way in which title by cession is established:

[Titles] of acquisition of territorial sovereignty in present-day international law are either based on ... occupation or conquest, or, like cession, presuppose that the ceding [grantor] and the cessionary [grantee] Power, or at least one of them, have the faculty of effectively disposing of the ceded territory.... The title alleged by the United States of America ... is that of cession, brought about by the Treaty of Paris, which cession transferred all rights of sovereignty which Spain may have possessed in the region indicated in Article III of the said Treaty and therefore also those concerning the Island of Palmas or Miangas.²⁹

Cession spawns smoldering hostility when it is forced on the granting State because it has lost a war. Germany was required to cede land to Poland after World War I. The ceded territory contained more than 1,000,000 ethnic Germans. For them, this change meant a drastic role reversal. The Polish government was suddenly confronted with a significant German minority in a region where power relationships had been quite different for more than a century. There may have been a legally sufficient transfer of title to this territory, but the German minority refused to consider itself subject to Polish rule. Germany, in turn, refused to formally renounce the region although it had been forced to do so by the Treaty of Versailles. Poland was determined to create a homogeneous society

in this region, and there were lingering socio-economic differences between the new “Polish” Germans and the other citizens of this newly ceded territory, formerly in Germany and now in Poland.³⁰

The former Yugoslavia splintered into multiple countries during the 1990s. There were, and are, continuing border and personal property ownership disputes. The 2001 Agreement on Succession Issues Between the Five Successor States of the Former State of Yugoslavia addressed some of these disputes. Property of the former Yugoslavia was thereby legally transferred to the successor State in whose territory it is now located.³¹

4. Prescription State A may derive title to territory within State B by occupying some part of it without objection. After some period of time (not uniformly defined), A may thus validate its title to the land, which was in B, if B does not effectively protest a prolonged presence.

Prescription is not universally accepted as a method for acquiring sovereign title. Some nineteenth-century jurists rejected the view that prescription is recognized under International Law. They asserted that one State could *not* legally claim title by merely taking over another’s territory. Abandonment was an unacceptable legal fiction. The purported acquiescence in the prescriptive rights of the new occupant was characterized as merely a face-saving device. Most States, however, now recognize prescription as a valid basis for claiming sovereignty over territory.

One practical reason is that ineffective or excessively delayed opposition to hostile occupation conveniently removes defects in sovereign claims to disputed territory. Prescription is thus a common means for resolving long-term border disputes. The International Court of Justice (ICJ) addressed the underlying practicalities when it resolved a then six-decade boundary dispute between France (on behalf of Cambodia) and Thailand (formerly Siam). Each claimed sovereign rights to the area surrounding a sacred temple on the Thailand Siamese-Cambodian border. In the 1962 *Case Concerning the Temple of Preah Vihear*, Thailand’s title claim was based upon a 1904 treaty. That agreement did not, however, rebuff Cambodia’s occupation of the disputed area, as evidenced by Cambodian military troops seizing this border temple in 1954. The ICJ affirmed the utility of prescription, as a device for acquiring title to property, on the basis that this scenario

appears to have amounted to a tacit recognition by Siam of the sovereignty of Cambodia ... over [the Temple]

Preah Vihear, through a failure to react in any way, on an occasion that called for a reaction in order to affirm or preserve title in the face of an obvious rival claim.... In general, when two countries establish a frontier between them, one of the primary objects is to establish stability and finality. This is impossible if the line so established can, at any moment ... be called in question ... indefinitely [because] finality would never be reached....³²

One disadvantage to this particular title cleanser is that it does not necessarily resolve the underlying dispute. Even a judicial resolution is no guarantee. A June 2008 standoff rekindled this dispute after Cambodia obtained the June 2008 UN Educational, Cultural and Social agency designation of the Temple Preah Vihear as a World Heritage Site. Notwithstanding the 1904 treaty and the 1962 court decision in favor of Cambodia, both Thailand and Cambodia have a small contingency of military troops stationed in the immediate area, subject to ultimate resolution via diplomatic means. In October 2008, Thai and Cambodian military forces exchanged rocket and rifle fire in a confrontation over control of this temple.

5. Accretion The other historical method for establishing sovereign title is accretion. A State’s territory may be augmented by new formations of land gradually deposited from bodies of water. Examples include additions to territory by the formation of islands within a State’s territorial waters or a natural change in the flow of an international river.

In November 1998, China, Russia, and North Korea extended a World War II-era border agreement regarding the Tumen River. It flows from one of China’s northern provinces into the Sea of Japan, separating the northern tip of North Korea from Russia. Its course has changed in the decades since the war. The three nations finally resolved resulting border issues, which had been on hold since a 1991 agreement between Russia and China. North Korea effectively delayed implementation for political reasons. However, such border disputes are sometimes even more complex because of the passage of time coupled with *both* gradual and sudden changes in a river on an international border.

Sudden changes do not affect the boundary between two nations. The change must be gradual and imperceptible. The *Chamizal Arbitration* between the US and Mexico dealt with both types of change. One of the major boundaries between these two nations is the Rio

Grande River. Treaties in 1848 and 1852 fixed this international boundary at a point farther north than that existing at arbitration in 1911. In the interim period, the gradual southward movement of the Rio Grande exposed a tract of land that was formerly *within* the river. This movement was exacerbated by a sudden flood in 1864. Both the gradual accretion and the instantaneous flooding altered the course of the Rio Grande, producing a 600-acre tract that became the subject of a territorial land dispute. The Mexican and US arbitrators described the legal impact of accretion in this instance as follows:

[Because of] the progressive movement of the river to the south, the American city of El Paso has been extending on the accretions formed by the action of the river on its north bank, while the Mexican city of Juarez to the south has suffered a corresponding loss of territory....The contention on behalf of the United States of Mexico is that this dividing line was fixed, under those treaties, in a permanent and invariable manner, and consequently that the changes which have taken place in the river have not affected the boundary line which was established and marked in 1852.

On behalf of the United States of America it is contended that ... if the channel of the river changes by gradual accretion, the boundary follows the channel, and that it is only in a case of a sudden change of bed that the river ceases to be the boundary, which then remains in the abandoned bed of the river.³³

The arbitrators resolved this US-Mexican dispute by dividing the tract in accordance with the usual international rules applicable to accretion. They decided that the US was entitled to sovereignty over that portion of the Chamizal Tract resulting from the gradual southward accretion of land prior to the 1864 flood. Mexico was entitled to the remaining acres exposed by the flood. In 1967, the US put an end to the matter by formally transferring this portion of the Chamizal Tract to Mexico.

B. HISTORICAL APPROACH CRITICS

Contemporary scholars have criticized the historical modes for acquiring sovereignty over State territory. According to Oxford University Professor Ian Brownlie, “[m]any of the standard textbooks, and particularly those in English, classify the modes of acquisition in a stereotyped way which reflects the preoccupation of

writers in the period before the First World War.”³⁴ Some significant claims also arose (or resurfaced) after World War II. Professor Brownlie depicts some of the reasons why such claims will continue to adversely affect international relations in the following way:

The pressures of national sentiment, new forms of exploitation of barren and inaccessible areas, the strategic significance of barren and inaccessible areas previously neglected, and the pressure of population on resources, give good cause for a belief that territorial disputes will increase in significance. This is especially so in Africa and Asia, where the removal of foreign political domination has left the successor states with a long agenda of unsettled [sovereignty] problems, legal and political.³⁵

The following excerpt provides a representative Chinese perspective on Western development of the modes for acquiring State territory. It addresses why those historical modes are unacceptable:



A Criticism of Bourgeois International Law on the Question of State Territory

HSIN WU

KCWTYC (newspaper) No. 7:44-51 (1960)

Reprinted and translated in J. Cohen & H. Chiu

Vol. 1 PEOPLE'S CHINA AND
INTERNATIONAL LAW 323

Princeton University Press (1974)

Go to Course Web page at

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Six, click Bourgeois Int'l Law.

C. NEW TERRITORIAL ACQUISITION MODES

Title may now be acquired in ways other than those developed over the centuries since the 1648 Treaty of Westphalia, which yielded the modern system of States [§2.1.A.]. These newer methods include renunciation, joint decision, and adjudication.

1. Renunciation A nation may relinquish title to its territory by renunciation. There is no transfer of title, unlike the “treaty cession” that *formally* cedes sovereignty

to the grantee nation. In 1947, Italy renounced title (previously obtained by conquest) to its territories in northern Africa. These were involuntary renunciations orchestrated by the victorious Allied powers after Italy lost the war. A State may voluntarily relinquish its territorial sovereignty as well. This method of transferring sovereignty is sometimes referred to as acquiescence, estoppel, and even prescription.

The distinction between these results is sometimes rather blurred. They do share a common denominator. A State may not assert a territorial claim in a manner that is inconsistent with its conduct. In the 1968 Rann of Kutch arbitration, for example, Pakistan implicitly relinquished its title to an area on its common border with India. For more than 100 years, Pakistan's predecessor did not react to obvious assertions of sovereignty (by England and then India) in this disputed border area. The arbitrators determined that Pakistan had acquiesced in India's exercise of sovereignty over the suddenly disputed area. Pakistan could not reclaim this land after another State had peacefully occupied it for so long a period of time.³⁶

2. Joint Decision A joint decision by the victors of war is a twentieth-century device for transferring sovereignty over State territory. After each world war, victorious States claimed and exercised a right to dispose of certain property that the defeated States had obtained by forceful conquest. After World War I, certain victors decided to jointly dispose of the territory of the losers. The PCIJ acknowledged this method for transferring sovereign territory in 1923. After World War II, the victorious nations felt compelled to impose security measures on the losing nations. One such measure was the joint decision of the Allies to reduce certain German frontiers. As a result, Germany was forced to yield its sovereignty over that territory.³⁷

3. Adjudication This is another method for legitimizing the transfer of sovereignty. Title disputes to State territory are often examined by judges or arbitrators. Although many have classified adjudication as an independent mode for "acquiring" title to State territory, this is a misnomer. International tribunals have no more power than that granted to them by the sovereign States that create them. Adjudication is the result of an international agreement that authorizes a mutually acceptable tribunal to resolve a dispute between the participating States. The tribunal is merely interpreting the agreement.

Title by adjudication is similar to a treaty cession from a grantor to a grantee State. In both instances, the participating States enter into an agreement about how they will fix a boundary line. By adjudication, the parties agree to establish sovereign rights after the tribunal examines the facts and renders its decision. The ICJ has resolved more territorial disputes than any other issue before the court.

◆ §6.3 LAW OF THE SEA

INTRODUCTION

1. Treaty Evolution The widely heralded "freedom of the seas" norm is also a limitation. It was crafted to restrict national attempts to unreasonably extend coastal sovereignty into international waters. In its heyday, free seas conflicted with the rights of all States to fish in and navigate through commercial trade routes on the high seas. The approximately three-mile "cannon-shot rule" is often attributed to an influential Dutch jurist who refused to recognize greater sovereignty than that recognized under late medieval practice.³⁸ As characterized in a study by Yale Law School scholars:

The concept of "freedom of the seas" entered the law of nations as a reaction against broad claims to territorial sovereignty over vast sea areas put forward by Spain, Portugal, England, and other states in the sixteenth and seventeenth centuries. The object of these claims was to monopolize fisheries, and trade with areas thought particularly rich in resources.... No interference whatever with navigation was justified because effective occupation was impossible by the nature of the sea itself. The same principle was applicable to fisheries ... for the additional reason that the resources of the sea were [then considered] inexhaustible.... The claim of the Dutch to free navigation ... [evinces the] common interest in navigation and fishing [which] triumphed over monopoly, and that the great principle of "freedom of the seas" became in this sense universally accepted.³⁹

Freedom of the seas then served the interests of the more powerful European nations. It authorized their vessels to navigate, fish, and mine without limitation. A coastal State was precluded from interfering with a foreign vessel's activities, just beyond the accepted marine-league territorial sea. As customary State

practice evolved, the sovereignty of the nation whose flag a ship sailed under often claimed rights, which trumped those of port authorities. By the dawn of the contemporary system of State sovereignty, introduced by the 1648 Peace of Westphalia, European powers assumed that the ocean's resources were unlimited. Thus the area beyond three nautical miles was an area that was conveniently characterized as *res communis*—meaning open to all comers. As succinctly described by University of Ottawa Professor Donat Pharand:

Beginning in the seventeenth century, the Law of the Sea was developed and maintained to accommodate the interests of the major maritime powers. They developed a legal regime which protected their colonial, commercial and military interests. That legal regime was characterized by two basic principles: the freedom of the seas and the sovereignty of the flag State. The expression “freedom of the seas” designated mainly two types of freedom, fishing and navigation. It was thought that biological resources of the sea were inexhaustible and that any State, having the necessary fishing capability, could simply go out and help itself without any restriction whatever. As for the sovereignty of the flag State, it meant that the country under whose flag the ship was sailing had exclusive jurisdiction over all activities aboard the ship. Certainly this was the case when the ship was on the high seas ... beyond the traditional three-mile territorial sea. Aside from two exceptions covering slave trade and piracy, this principle of sovereignty of the flag State remained untouched. In a nutshell this represented the state of the law of the sea until after World War II.⁴⁰

The end of World War II signaled many beginnings. One was the coastal State tendency to extend sovereignty into marine areas well beyond the traditional three-mile limit of the “territorial” sea. Twentieth-century technology caused the free seas pendulum to swing in the opposite direction. Free accessibility to the *high seas* resulted in a depletion of global marine resources, as well as a reevaluation of the international penchant for a *laissez faire* ocean policy. As suggested by All Souls College (Oxford) Professor David Attard, however, replacement of a free access regime by a treaty-based extension of sovereignty comes with a price. Thus, “the division of the oceans today on the basis of sovereignty ... is a solution as dangerous and

as obsolete as the maintenance of an unrestricted concept of the freedom of the seas. Clearly, therefore, neither [the] sovereignty nor freedom [alternatives] today provide an acceptable basis for a viable regime to regulate uses of the sea beyond the territorial sea.”⁴¹

Various coastal zones surfaced. Some States claimed full sovereignty over large areas, while other claims were comparatively limited. Indeed, all States have an important interest in guarding against illegal drug trafficking, immigration, and pollution. The less-developed States watched in dismay, while the more-developed States entered their general maritime regions to fish and exploit the nearby oceans with technology unavailable to the coastal State. As more seagoing nations began to extract resources from the sea, pressure mounted to compress the notion of freedom of the seas. The colonial period was in decline [Shifting State Infrastructure: §2.2.]. The new resource-rich, but technology-poor, coastal States began to espouse the view that freedom of the seas continued to serve the ever-present colonial purposes of many large and economically powerful nations. The historical regime of freedom of the seas did not incorporate the interests of the newer members of the international community, especially those coastal nations seeking to facilitate a more equitable distribution of the ocean's resources. Former colonies that did not become sovereign States until the 1960s were excluded from any role in the evolution of the Law of the Sea segment of International Law.

The UN thus sponsored various treaties with two objectives in mind: first, acknowledging the need to limit freedom of the seas; second, incorporating new coastal State perspectives about evolving sea zones which were unheard of before World War II. The most important and comprehensive of these treaties effectively codified a new constitution of the oceans, finally entering into force in 1994.

In November 1994, the most ambitious and comprehensive treaty of all time entered into force: the 1982 UN Convention on the Law of the Sea (UNCLOS).⁴² It was the work product of the third multilateral treaty negotiation on the law of the sea, consisting of numerous meetings of the national delegates from 1974 to 1982. One hundred and seventeen nations originally signed this treaty in 1982. As of 2009, 159 States are now parties to the treaty.⁴³

The UNCLOS is the global maritime constitution. Much of the UNCLOS codifies prior State practice. A

number of provisions resulted from a progressive evolution during the eight years of negotiations. Some of its provisions were then quite novel. This portion of the textbook thus addresses this revised maritime legal regime—proceeding outward from the coastline, through the various sea zones, as arranged below: (A) Internal Waters; (B) Territorial Sea; (C) High Seas; (D) Contiguous Zone; (E) Exclusive Economic Zone; (F) Continental Shelf; and (G) Deep Seabed.

Chart 6.1 depicts these zones, at the outset, to illustrate the first major theme of this section: The coastal State may control certain activities in ocean waters, including portions of the high seas, in a way which limits the activities of other States. Its control of these various zones is itself limited, however. The farther away from the coast it wants to act, the less the coastal State may impede the conduct of other States.

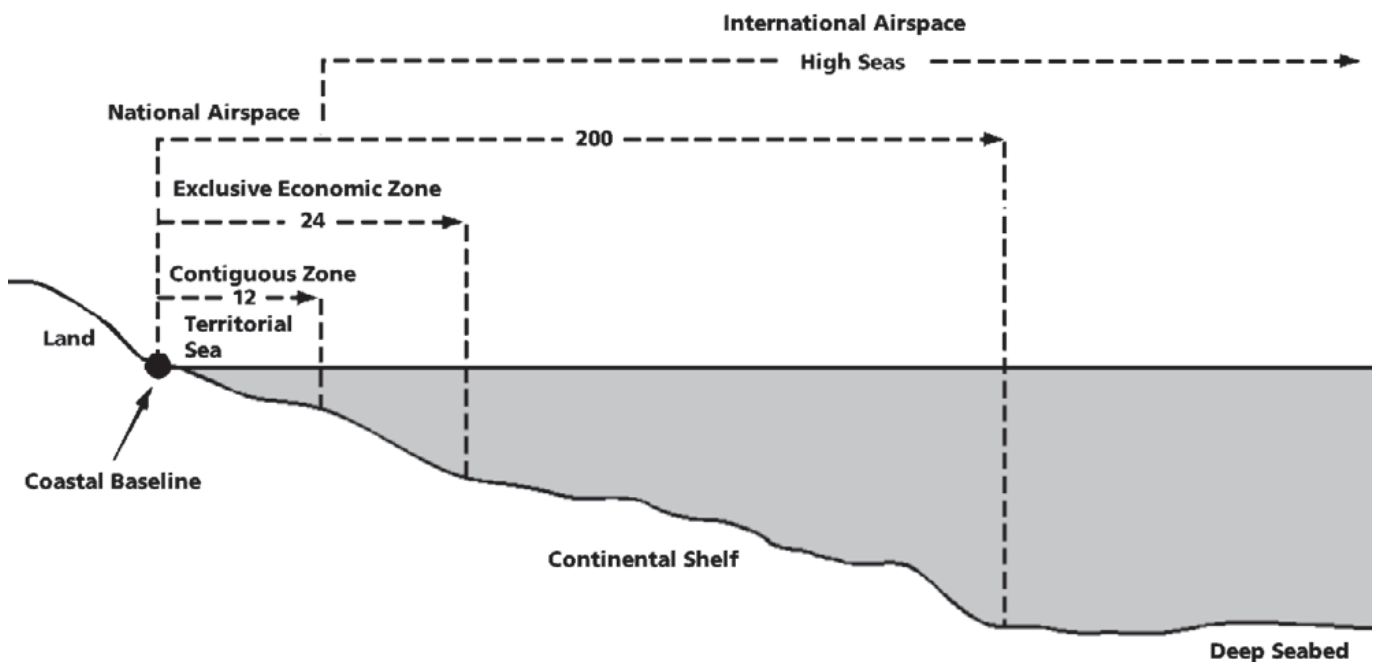
2. US Role—Then and Now In the quarter century since this UN treaty has been open for signature, the US has resisted the comprehensive approach offered by this constitution of the oceans. The treaty addresses huge environmental, military, sovereign, economic, and War on Terror concerns the US faces in this twenty-first century. After its 1982 debut, US President Reagan

refused to sign it because of concerns with Part XI of the treaty on mining of deep seabeds. He felt that it did not adequately protect US free-market interests (The UK and Germany had similar concerns). Reagan's US Ambassador to the UN added her fuel to this fire. As late as 2004, Jeane Kirkpatrick asserted that the convention was disadvantageous to industry and a "bad bargain" for large industrialized economies.

President Clinton renegotiated the deep seabed mining control provisions to which Reagan objected. In 1994, he signed the agreement on behalf of the US, and submitted it to the Senate for its advice and consent.⁴⁴ The UN General Assembly then adopted its resulting 1994 implementing agreement to accommodate the concerns of the objecting maritime powers, granting them access on "reasonable terms and conditions." It was then adopted by all other NATO countries, the Organization for Economic Co-operation and Development countries, the European Community (including the formerly objecting UK and Germany), Russia, and China.

The Senate Foreign Relations Committee unanimously recommended that the full Senate approve the treaty in 2004. The Committee then noted that the Convention "advances national security interests by

CHART 6.1 SEA ZONES



preserving the rights of navigation and overflight across the world's oceans on which our military relies to protect US interests around the world, and it enhances the protection of these rights by providing binding mechanisms to enforce them." The full Senate has yet to consider it, however.

The UNCLOS attracted a huge post-9–11 fan: US President Bush. In his May 2007 letter to the Senate urging ratification, he identified four reasons for US adoption. It will:

- ◆ serve the national security interests of the US, such as confirming maritime mobility worldwide, and the legal boarding of foreign vessels on the High Seas;⁴⁵
- ◆ secure US sovereign rights over extensive maritime areas, including the natural resources within them, e.g., the 200-mile exclusive economic zone and the treaty's continental shelf extensions provisions;
- ◆ promote US interests in the environmental health of the oceans [threats: §11.1.C.]; and
- ◆ provide a seat at the table when vital rights are being considered—such as Russia's claim to the Lomonosov Shelf below one-half of the Arctic Circle [Continental Shelf: §6.3.F2.].

US critics have tendered the usual complaint that the treaty adversely impacts US sovereignty. The same objection was made to the now US-ratified North American Free Trade Agreement [textbook §12.3.A.] and World Trade Organization treaty [§12.2.B.]. Their arbitral panels, it was initially argued, would infringe on American sovereignty. Critics also perceived UNCLOS dispute resolution as subjecting the US to the oversight of unaccountable UN institutions, such as the International Tribunal for the Law of the Sea (ITLOS), seated in Hamburg, Germany.

Article 110 of the UNCLOS provides justifications which authorize boarding a ship on the High Seas—but not expressly including suspicion of terrorism or possession of weapons of mass destruction. Yet, the treaty does exempt "military activities" from the jurisdiction of the ITLOS tribunal's power to hear cases arising under the treaty. Unlike the students in your course, various Senators and journalists have never taken a course in International Law. The US could, of course, tender a reservation containing a ratification that would clarify limitations on its participation [treaty reservations:

§7.2.A.4.].⁴⁶ On this matter, President Bush had sound advice, resulting in this 2007 (unsuccessful) attempt to make the US ratification of UNCLOS a part of his legacy.

A. INTERNAL WATERS

UNCLOS Article 8.1 defines internal waters as the "waters on the landward side of the baseline of the territorial sea." As with its land, a State has the sovereign right to control its bays, rivers, and other internal waters. Like repelling foreign invaders from its soil, a State has a strong interest in monitoring the military and commercial activities of foreign vessels within its internal waters. As depicted in Chart 6.1, the coastal baseline is the point where the sea intersects with the edge of the land at the seacoast. The baseline is a geographical yardstick for distinguishing internal waters from the sea and the starting point for measuring the various ocean water zones.

Two settings complicate the application of the exclusive jurisdiction of the coastal State over its internal waters. One is the problem of jurisdiction over events occurring on a foreign vessel while it is in port. The other scenario involves conflicting rights in certain large coastal bays because they contain more open seas than the typical bay.

1. Ports For the purpose of separating a State's internal waters from the territorial waters off its coast, a port extends to the outermost permanent harbor facility forming an integral part of that harbor's system. A long entryway consisting of natural twists and turns is a part of the port. An artificial buoy area constructed outside of the mouth of that entryway, however, is usually not part of the port.

Each State has the absolute right to control the internal waters contained within its ports. Customary practice has incorporated some limitations, however. When a foreign warship enters internal waters with permission, the port authorities do not board it for mutual security reasons. Neither State wants to subject its military secrets to unnecessary scrutiny when its naval vessels enter a foreign port. A different limitation applies to merchant and other private vessels. They have the implied right to enter the internal waters of another State without express permission. They are routinely boarded, however, for customs or immigration purposes.

The UNCLOS does not cover the important jurisdictional problem associated with a member of a foreign crew who commits a crime while in port (as opposed to one committed on a ship passing through the TS). When the vessel's sailors go ashore, they subject themselves to the laws or jurisdiction of the coastal State. When a crime is committed on board a foreign vessel in a port, however, either the laws of the coastal State or the laws of the State to which the vessel is registered (the flag State) might be applied.

The ancient rule was that any ship entering another nation's port became subject to the latter's complete control. Modern customary and treaty practice have altered that rule. In the case of crimes that do not affect the port's tranquility, the flag State—rather than the port State—usually has the primary jurisdiction to prosecute the criminal. That concession facilitates the smooth progress of international commerce. It also avoids undue interference with a ship's movements by the port State. But when the onboard crime causes a significant intrusion upon the port's tranquility, the perpetrator becomes subject to prosecution by the port State.

Not all States automatically cede jurisdiction over on-board crimes to the flag State. In some regions, all crimes occurring within the internal or territorial waters trigger the coastal nation's competence to prosecute foreign sailors (absent the usual treaty exception for military personnel). Under customary practice, the flag State is competent to act if the port State chooses not to prosecute. For example, a court in Argentina had to determine the question of Argentina's jurisdiction over a theft that occurred aboard an Argentine merchant vessel at anchor in the port of Rio de Janeiro, Brazil. The ship left the Brazilian port and returned to Argentina with the thief still aboard. The thief was prosecuted in the Argentine court system. Although his lawyer argued that Argentina had no jurisdiction because the crime occurred in Brazil, the court disagreed in the following terms:

According to the rules of public international law ... offences committed on board a private ship fall within the jurisdiction of the courts of the flag State if the ship is on the high seas, and fall within the jurisdiction of a foreign State only in the event that such offences have been committed while the ship is in the [internal or] territorial waters of that other State.... [The court then decided that Argentina

nevertheless had jurisdiction because this] principle is not an absolute rule ... for if the foreign State does not choose to exercise its right to institute proceedings because it considers that the act has not affected the community at large or the peace of the port (as maintained in French and Italian doctrine), the flag [State] may then assert full authority over the ship for the purpose of restoring order and discipline on board or protecting the rights of the passengers....⁴⁷

The rights of the port and flag States are not always left to judicial interpretation under *customary* International Law. The respective jurisdictional rights are often agreed to by treaty. Such treaties typically cede primary jurisdiction to the flag State. They frequently contain a "port tranquility" exception, permitting the port State to prosecute foreign sailors in specified situations.

What type of criminal conduct activates the "port tranquility" exception to the primary jurisdiction of the flag State? The US Supreme Court addressed this question in the following classic illustration, since relied on by over 100 courts and administrative bodies:



Mali v. Keeper of the Common Jail of Hudson County (Wildenhuis Case)

SUPREME COURT OF THE UNITED STATES
120 U.S. 1 (1887)

Go to Course Web page at

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Six, click Port Tranquility Case.

2. Bays Most bays consist of only internal waters. Large bays with wide mouths present the issue of whether they contain only internal waters, or whether they *also* contain territorial and international waters (high seas). This type of bay illustrates the natural tension between freedom of the seas in international waters and the coastal State's need to control activities in a strategic bay that penetrates deep into its coastline.

A classic illustration of this tension drew worldwide attention in 1986 when US warplanes were attacked over the Gulf of Sidra in the large southern indentation of the Mediterranean Sea on Libya's coastline. Libya's leader, Mu'ammar Gadhafi, had proclaimed a "Line of

Death” across the mouth of this gulf, approximately 300 miles across. At its deepest indentation on Libya’s coastline, this gulf extends well over 100 miles into Libya’s coastline on the Mediterranean Sea. Libya considers the entire gulf to be internal waters subject to its exclusive control. The US warplanes were operating over the gulf on the premise that it contains international waters because of its immense width.

Article 10 of the UNCLOS defines a bay as “a well-marked indentation whose penetration ... constitute[s] more than a mere curvature of the coast. An indentation ... [must be] as large as, or larger than, that of a semicircle whose diameter is a line drawn across the mouth of that indentation.” The mouth of a bay consists of its natural entrance points.

A coastal State may normally exercise complete sovereignty up to twelve nautical miles from its coast (see “Territorial Sea” later). In the case of a bay, if the Article 10 semicircle diameter of the bay is *less* than twenty-four miles—between each side of the mouth of the bay—its waters consist solely of internal waters. If the diameter is *greater* than twenty-four miles, the bay also contains high seas (international waters) in the center of the mouth; and territorial waters up to twelve miles from the entire coastline that forms the land boundary of the bay.

Bays are quite important to the national interests of coastal States.⁴⁸ The 1910 North Atlantic Coast Fisheries arbitration between England and the US addressed this significance in the following terms: “[A]dmittedly the geographical character of a bay contains conditions [that] concern the interests of the territorial sovereign to a more intimate and important extent than do those [interests] connected with an open coast. Thus conditions of national security and integrity, of defense, of commerce and of industry are all vitally concerned with the control of the bays penetrating the national coastline. This interest varies, speaking generally, in proportion to the penetration inland of the bay...”⁴⁹

An *historic* bay may contain only internal waters (as opposed to the “territorial” waters discussed below) although its mouth may be wider than the above twenty-four miles limitation of the UNCLOS. Over a long period of time, a State may claim exclusive sovereignty over a large bay that would normally contain one or more of the other categories of ocean waters [Chart 6.1]—because the distance between its natural entrance points is more than twenty-four miles across. If

other States do not dispute such a claim, they effectively acquiesce in the coastal State’s treatment of the large historic bay as consisting of only internal waters.

One of the classic disputes is the aging US objection to Canada’s claim that Hudson Bay is an “historic” bay, allegedly consisting solely of internal waters. It is fifty miles wide at its mouth. As stated by the Canadian Minister of Northern Affairs and Natural Resources in 1957, “the waters of Hudson Bay are Canadian by historic title.... Canada regards as inland waters all the waters west of a line drawn across the entrance to Hudson Strait...”⁵⁰ The US characterizes most of the Hudson Bay as international waters, however, on the basis that the US has consistently disputed Canada’s claim that it is exclusively internal waters. The international status of this bay has not been resolved, since neither nation has a strong enough interest to actually resolve this dispute.

B. TERRITORIAL SEA

States have historically disagreed about the dividing line between the high seas and the territorial sea. Bold, unilateral expansions of exclusive sovereignty crested during the fifteenth and sixteenth centuries. The range of these national claims extended deep into what is now considered the high seas. Denmark and Sweden claimed large portions of the globe’s northern seas. Each claimed complete sovereignty over the entire Baltic Sea. England claimed the entire English Channel and much of the North Sea. A land demarcation by the Pope, as Head of the Holy See (Vatican State), effectively ceded most of the Atlantic and Pacific Oceans to Spain and Portugal in 1492.

Under the comprehensive UN 1982 treaty, the territorial sea extends outward twelve nautical miles from the national coastline. A coastal State exercises sovereignty over this portion of its territory, essentially to the same extent that it does so over its landmass. Its range of sovereignty includes the air over the territorial sea belt adjacent to the coast, the seabed below, and the subsoil within this zone.

Unlike the other zones, addressed later, a State *must* exercise its sovereign power in this adjacent strip of water. The minimum expectation is that the coastal State will chart the waters, this close to its coast, to provide warning of navigational hazards. As stated in a 1951 International Court of Justice decision: “To every State whose land territory is at any place washed by the sea, international law attaches a corresponding portion of maritime territory consisting of what the law calls territorial waters....

No maritime States can refuse them. International law imposes upon a maritime State certain obligations and confers upon it certain rights arising out of the sovereignty which it exercises over its maritime territory. The possession of this territory is not optional, not dependent upon the will of the State, but compulsory.”⁵¹

However, there are contemporary limitations which render it difficult, if not impossible, to do so. In April 2008, for example, a French military operation rescued a crew of thirty being held for ransom after a hijacking off the Somalian coast. France is one of the maritime powers pursuing UN approval for a plan whereby coastal states with limited (or no) navies would agree to maritime powers entering their territorial waters. The purpose would be to engage in the hot pursuit necessary to capture pirates in at least the three most vulnerable regions of the world: the Horn of Africa, the Gulf of Guinea, and the Straits of Malacca between Indonesia and Malaysia. In a ten-year period ending in that month, some 3,000 people across the world had been taken hostage by pirates, near the coasts of Third World countries unable to so defend their territorial waters.

There are military and terrorism concerns at play. In September 2008, an Ukrainian ship carrying Russian tanks and ammunition bound for Kenya or Sudan caused the deployment of a Russian naval vessel to assist the US in monitoring this particular vessel lying in Somalian territorial waters. Somalia has been without an effective government (since 1991). This hijacking has likely attracted the attention of terrorists to the Horn of Africa. But as the pirates, who feel they have been misunderstood, countered in this instance: “We don’t consider ourselves sea bandits. We consider sea bandits those who illegally fish in our waters and dump waste in our seas. We are simply controlling our seas. Think of us like a coast guard.”⁵²

The UN did not accept this flippant characterization. Per UN Security Council Resolution 1838, 3,500,000 Somalis would become dependent on humanitarian food aid by the end of the year 2008. Maritime contractors for the UN’s World Food Programme would not deliver food aid to Somalia without naval warship escorts. Thus, the Council called upon all “States whose naval vessels and military aircraft operate on the high seas and airspace off the coast of Somalia to use on the high seas and airspace off the coast of Somalia [to employ] the necessary means, in conformity with

international law, as reflected in the [UN Law of the Sea] Convention, for the repression of acts of piracy....”

Ironically, the Security Council took all steps to minimize the possibility that this UN action—undoubtedly long overdue—would launch some distress signal that all such humanitarian crises could draw upon Resolution 1838 as a subterfuge for colonial aspirations. The Council’s caveat thus confirmed “that the provisions in this resolution apply only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of member States under international law, including any rights or obligations under the Convention, with respect to any situation, and *underscores* in particular that this resolution shall not be considered as establishing customary international law.”

Treacherous definitional undercurrents muddled the territorial sea before the UNCLOS was negotiated. These included the location of the “baseline,” the “breadth” of the territorial sea, what constitutes “innocent” passage, and the extent to which there exists a right to pass through straits, which formerly contained international waters.

1. Baseline The territorial sea begins at the baseline depicted in Chart 6.1. Each begins where the ocean’s edge meets the coastline. Under Article 5 of the UN Convention on the Law of the Sea (UNCLOS), the “normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.” The baseline is the yardstick for marking the inner boundary of the various coastal sea zones described in this chapter (see Chart 6.1).

The demarcations on the coastal State’s official baseline charts do not mandate international recognition of its placement of the baseline. Coastal baselines must follow the general direction of the coast. However, unnatural land contours make it difficult to establish indisputable baselines. Article 7.3 of the UNCLOS espouses the general principle that “the sea areas lying within the [base]lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.” This language, of course, begs the question of proper baseline placement for the inner edge of the TS on erratic coastlines.

The International Court of Justice (ICJ) furnished guidelines, not bright lines, in its 1951 *Anglo-Norwegian Fisheries* case. When Norway announced the location of

its baselines after World War II, it included a substantial portion of what were previously international fishing areas within its internal and territorial waters. Norway has many ramparts of rocks and small islets that interrupt the natural course of its coastline. Norway drew straight baselines, conveniently encompassing the rocks and islets off its coast, rather than using the traditional method of tracking the contour of its irregular coastline. By placing its baselines at the outer edge of these rock and islet configurations, Norway thus claimed a greater share of the common fishing area than Great Britain was willing to recognize. British fishermen had operated off Norway's coast (within the straight baseline area set by Norway) since the early 1900s. The parties to this dispute had exchanged diplomatic correspondence about their respective rights to these fishing grounds for many years.

The ICJ therein delineated the general rules applicable to baseline placement for cases involving such unusual coastlines in the following passage:

The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal [internal] law....

It is the land which confers upon the coastal State a right to the waters off its coasts. It follows that while such a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of baselines must not depart to any appreciable extent from the general direction of the coast.

Another fundamental consideration ... is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them. The real question raised in the choice of baselines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters. This idea, which is at the basis for the determination of the rules relating to bays, should be liberally applied in the case of a coast, the geographical configuration of which is as irregular as that of Norway.

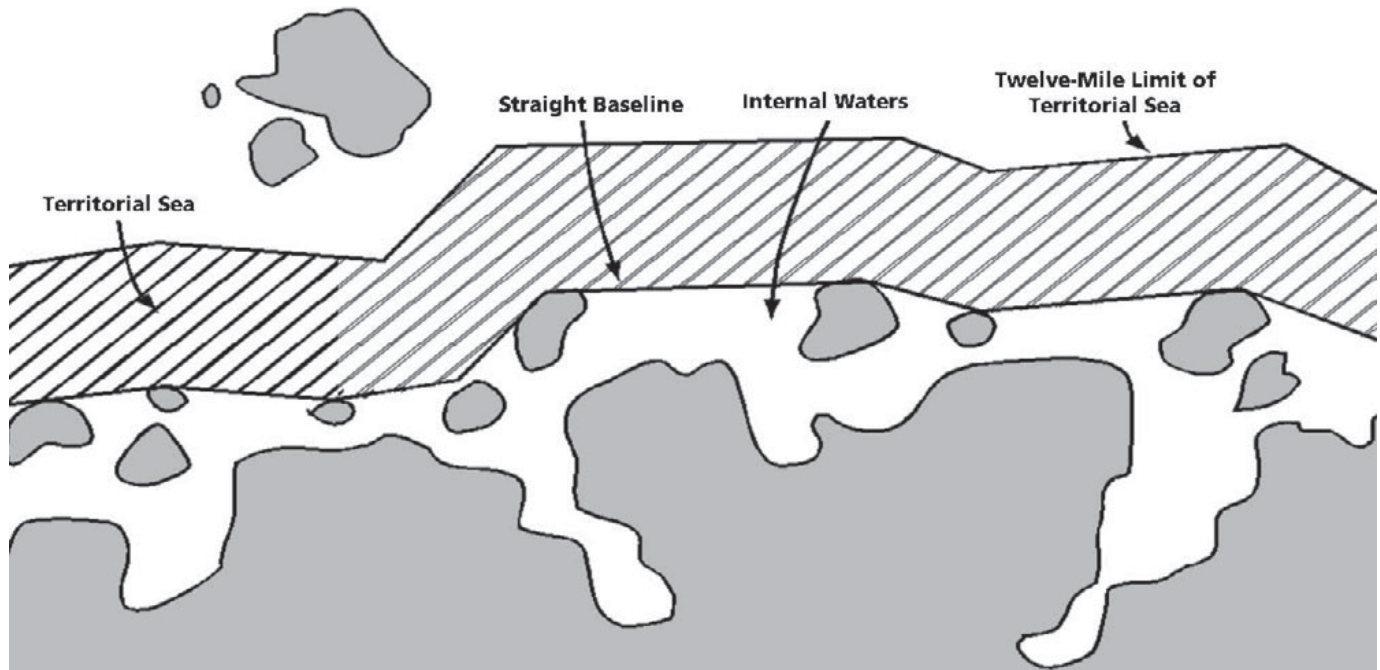
Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.⁵³

The majority of the ICJ's judges thereby approved Norway's straight baseline method in these unusual circumstances because the resulting straight lines were sufficiently aligned with the general direction of the Norwegian coast. Although this method did not produce the usual replica of the coastal nation's coastline, it was acceptable in international practice. Chart 6.2 illustrates the Court's description of the method that Norway used to establish its baselines.

2. Territorial Sea Breadth The width of the territorial sea has long been controversial. In 1492, for example, Spain claimed exclusive territorial sovereignty over the entire Pacific Ocean. Portugal similarly claimed the Indian Ocean and most of the Atlantic Ocean.⁵⁴ Claims to entire oceans, however, were never recognized under International Law. States recognized the existence of a much narrower belt of water subject to the coastal State's exclusive control. In 1702, the writings of an often-quoted Dutch judge articulated the vintage State perception of the breadth of this particular coastal zone: "Wherefore on the whole it seems a better rule that the control of the land [of its adjacent Territorial Sea] extends as far as a cannon will carry; for that is as far as we seem to have both command and possession. I am speaking, however, of our own times, in which we have those engines of war; otherwise, I should have to say in general terms that the control of the land ends where the power of men's weapons ends; for it is this, as we have said, that guarantees possession."⁵⁵

This often-cited passage reveals that the three-mile shooting range of the eighteenth-century cannon established the width of the territorial sea. The coastal State could claim no more than it could control. Under this view, the maximum range of existing weapons was the yardstick for measuring the breadth of the territorial sea. Had this view persisted until the 1960s, the range of intercontinental missiles would make entire oceans the territorial waters of the launching nation.

After the American War for Independence, the US claimed a territorial sea extending from the outer tips of various capes on its eastern coast. It used a straight baseline method, which did *not* conform to its coastline. The resulting baselines were not a natural extension of the coastline—unlike Norway's straight baselines that connected the nearby rocks and islets immediately adjacent to its coasts. The US territorial sea thus purported to extend its exclusive jurisdiction far beyond three miles

CHART 6.2 STRAIGHT BASELINE METHOD

from its shores. Various nations objected to this departure from international practice. In 1793, Secretary of State Thomas Jefferson responded by suspending this cape-to-cape baseline method. He formally advised England and France, noting the customary “cannonball” measure of the breadth of the territorial sea:

[The] President of the United States, thinking that, before it shall be finally decided to what distance from our seashores the territorial protection of the United States shall be exercised ... finds it necessary in the meantime to fix provisionally on some distance for the present government of these questions. You are sensible that very different opinions and claims have been heretofore advanced on this subject. The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of human sight, estimated at upwards of twenty miles, and the smallest distance ... is the utmost range of a cannonball, usually stated at one sea league [three nautical miles]. Some intermediate distances have also been insisted on, and that of three sea leagues has some authority in its favor. The ...

President gives instructions to the officers acting under his authority to consider those heretofore given are restrained for the present to the distance of one sea league or three geographical miles from the seashores.⁵⁶

Certain coastal States claimed territorial sea boundaries much wider than the customary limit. Most of these claims were made by lesser-developed nations with significant fishing or seabed resources adjacent to their coasts—while lacking the superior technology possessed by developed nations to take advantage of these resources. In 1952, Chile, Ecuador, and Peru claimed a territorial sea of 200 nautical miles from their coasts. In 1956, a number of other nations in the same region of the world attended the Meeting of the Inter-American Council of Jurists in Mexico City. They adopted the following principle, which differed from the prevailing yardstick for a uniform approach to measuring the territorial sea: “The distance of three miles as the limit of territorial waters is insufficient, and does not constitute a general rule of international law. Therefore, the enlargement of the zone of the sea traditionally called

'territorial waters' is justified. *Each State is competent to establish its territorial waters* within reasonable limits, taking into account geographical, geological, and biological factors, as well as the economic needs of its population, and its security and defense."⁵⁷ Such statements generated worldwide pressure to expand the historical three-mile limit.

In 1958, under sponsorship of the UN, representatives of eighty-six nations gathered in Geneva, Switzerland, to pursue a global agreement about the breadth of the various sea zones. The Geneva Convention on the Territorial Sea and Contiguous Zone (1958 LOS Convention) expressly adopted the customary three-mile limit. However, many nations subsequently extended their territorial sea zones to twelve nautical miles. The 1982 Conference on the Law of the Sea (attended by 148 States) adopted this development in State practice. Under Article 3 of the UNCLOS, every "State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles...."

Although some 140 nations adopted a three nautical mile limit at the UN's 1982 Conference, the US rejected the entire convention (as discussed later under deep seabed mining analysis). Shortly after achieving independence from Great Britain, the US announced its adherence to the customary three-mile limit and retained that limit for two centuries. In 1988, however, President Reagan unilaterally extended the US territorial sea from three to twelve miles in "accordance with international law, as reflected in the applicable provisions of the 1982 United Nations Convention on the Law of the Sea."⁵⁸ As of this textbook edition, the US has yet to become a party although all presidential administrations since Ronald Reagan's have attempted to convince the US Senate to give its consent [treaty practice: §7.3.A.].

This quadrupling of the territorial waters zone had two major effects upon the Law of the Sea. First, it limited freedom of the seas because coastal States could regulate more activities because of the nine-mile expansion from three to twelve nautical miles. That development simultaneously extended the existing rules of "innocent passage." Second, many straits, through which ships pass from one part of the high seas to another, no longer contained international waters (high seas). Ships passing through such waters suddenly became subject to regulation by the coastal States on either side of the strait. Both of these developments were addressed in the UNCLOS as follows in Chart 6.3.

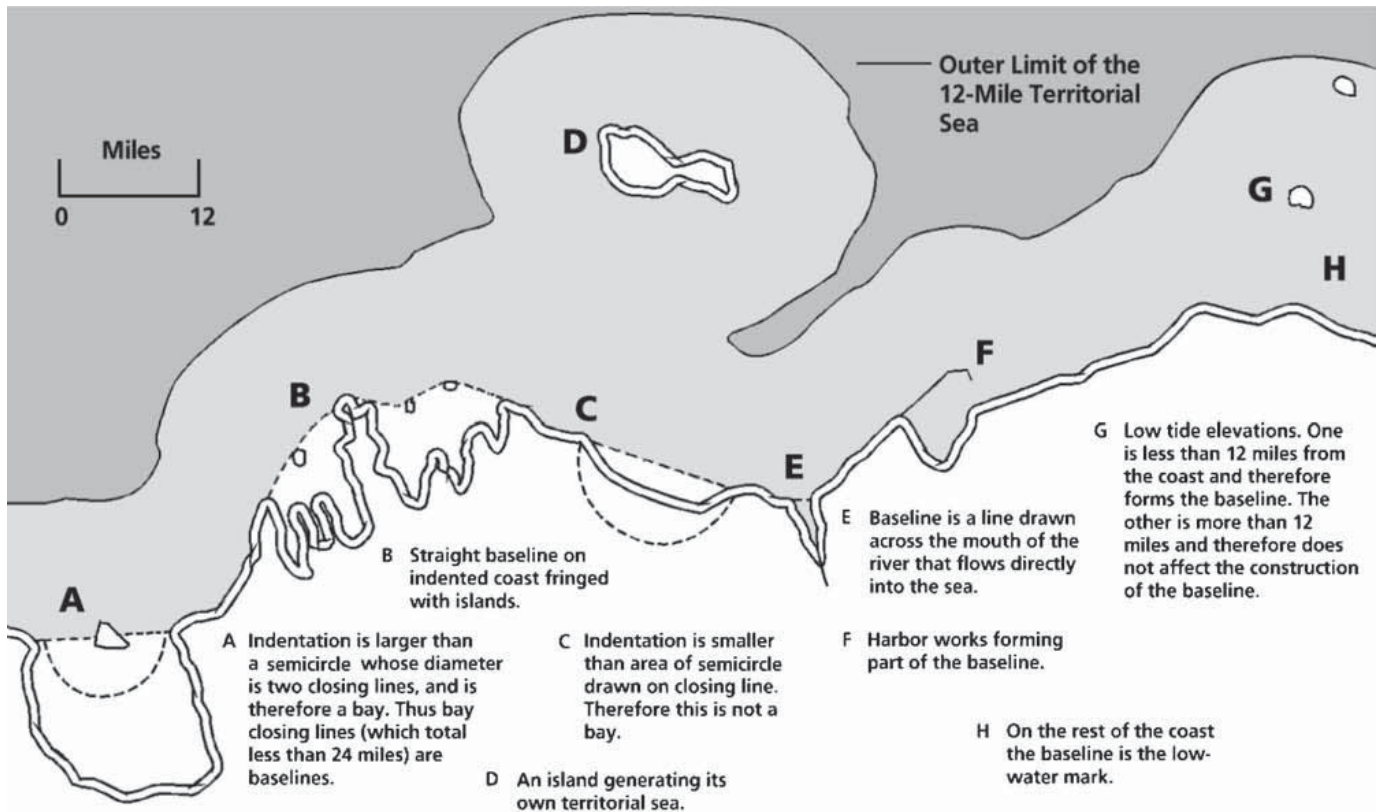
3. Innocent Passage One of the most tangible impacts of the change to a twelve nautical mile territorial sea was the extension of coastal State rules of "innocent passage." Article 18.1 of the UNCLOS Convention defines passage as "navigation through the territorial sea for the purpose of: (a) traversing that sea without entering internal waters ... or (b) proceeding to or from internal waters...."

It would border on sarcasm to assert that piracy is not innocent passage. Somalia has some 1,880 miles of coastline. Its government disintegrated in 1991, when warlords ousted the dictator, then turned on each other. Rampant piracy has plagued Somalia since then because it has had no navy or coast guard. In February 2007, for example, pirates hijacked a cargo ship delivering 1,800 tons of UN food aid to Somalia. The US assists Somalia's transitional government in exile (in Kenya) with the preservation of good order in this huge expanse of coastal waters.

But when is the passage "innocent"? In 1986, two US naval vessels entered the Black Sea via the Turkish Straits. They were equipped with electronic sensors and sophisticated listening devices. Their disclosed purpose was to exercise what the US naval authorities characterized as their "right of innocent passage" through the territorial waters of the Soviet Union. The Soviet Union placed all of its Black Fleet military vessels on combat alert. The Soviet Union protested this entry as unnecessarily provocative because it was a clear violation of its territorial sovereignty. But innocent passage violations are usually not so confrontational. As illustrated in a 2005 US Supreme Court case, Russian forces apprehended and boarded an American commercial vessel—traversing territorial waters, before Alaska was ceded to the US in 1867. The Court described its voyage as not being innocent, due to its "purpose of procuring ... Indians to hunt for sea otter on the said coast."⁵⁹

Under Article 19 of the UNCLOS, "innocent" passage means a passage that is "not prejudicial to the peace, good order, or security of the coastal State." The passing vessel may not stop or anchor unless incidental to ordinary navigation or undertaken for the purpose of the authorized entry into a foreign port. A vessel may thus proceed to or from port and render assistance to persons, ships, or aircraft needing emergency assistance.

Article 19 further requires foreign vessels to ascertain and comply with the innocent passage regulations promulgated by coastal States. Regulations relating to

CHART 6.3 BAY, BASELINE, HARBOR, ISLAND, AND TERRITORIAL AREA

Source: Modified from R. Churchill & A. Lowe, *THE LAW OF THE SEA* 39 (Manchester, Eng: Manchester University Press, 1988).

customs, immigration, and sanitation protect the coastal nation's interests in its territorial waters. An ocean liner carrying passengers into another country's territorial waters must comply with local tax laws affecting its cargo, passport regulations affecting its passengers, and waste-offloading requirements.

Military vessels, when expressly authorized to enter a foreign port, normally give notice of their intended arrival at least several days in advance. The unannounced presence of a foreign military vessel in the coastal State's territorial waters otherwise offends the sovereignty of the coastal State. In a 1968 dispute between North Korea and the US, North Korea seized the US naval vessel *Pueblo*. The *Pueblo* was on an intelligence-gathering mission, whereby it arguably sought to "steal" communications and their related electronic signatures from North Korea. There was a debate about whether the *Pueblo* was in North Korea's territorial waters when captured.⁶⁰ According to the US, the *Pueblo* was 15.8 nautical miles from the nearest North Korean land. If so,

then one would not have to address the legal question of whether the coastal State was entitled to a three-mile or a twelve-mile territorial sea—the distance then claimed by North Korea. The year was 1968. The US did not shift from a three-mile to a twelve-mile territorial sea until twenty years later (1988). The now ubiquitous UN Convention on the Law of the Sea had not yet been drafted (commencing in 1974).

On the other hand, one could question whether Customary International Law then prohibited the boarding of a foreign military vessel that had either strayed into, or was intentionally located in, territorial waters. In March 2007, Iran captured fifteen British sailors and marines who were allegedly in disputed territorial waters between Iran and Iraq. Their patrols were conducted under the auspices of a UN Security Council resolution. The European Union thus (successfully) demanded their release. A similar incident occurred there in 2004 when eight British sailors and marines were held for three days.⁶¹

The application of the “innocent passage” regime is nevertheless elastic and ill-defined. Nations sometimes disagree about whether certain conduct poses a threat. A “threat” can take many forms, often being in the eyes of the coastal State beholder. There are, of course, clear breaches. A foreign military ship authorized to enter the territorial waters of another State could undertake military exercises upon arrival. Submarines might navigate below the surface in territorial waters, undetected by the coastal authorities. In September 1996, for example, a North Korean submarine went aground when passing through South Korean territorial waters, clearly violating the principles that prohibit military entry without permission and entering such waters submerged. In November 2004, Japan filed a protest when a Chinese nuclear submarine entered its territorial waters without notice or identification.

Less threatening activities can be labeled as threats by a coastal State. Foreign vessels can also collect hydrographic information, conduct research, fish, or disseminate propaganda via electronic means. During the Cold War, Soviet “fishing” trawlers with elaborate electronic devices aboard hovered just outside the US three-mile territorial water limits to gather information. Suppose that a private vessel called the *Greenpeace* distributes leaflets or displays signs against nuclear weapons to ships passing through the territorial waters of a major nuclear power. That State’s coast guard vessel may stop the dissemination of such information because the activities of the *Greenpeace* would not be considered innocent. The UNCLOS provisions are ambiguous, but a better option than no definition at all.

The coastal State’s discretion to arbitrarily apply locally defined rules of innocent passage is limited by the UNCLOS. Article 24 imposes a duty not to “impair” the innocent passage of foreign ships. The coastal State cannot impose navigational requirements that effectively deny the right of innocent passage. Failure to publicize dangers to navigation in the State’s official navigational charts, for example, would make territorial sea passage impractical and dangerous. The same article also prohibits coastal States from promulgating regulations that discriminate against the ships or cargo of a particular nation, or ships carrying cargo to or from certain nations. The Arab embargo of Israeli shipping and goods breached this provision of the treaty [textbook §9.1.C.2.].

This norm was foreshadowed in the first contentious case judgment by the International Court of Justice (1949). The UK alleged that Albania had mined the

Corfu Channel Strait to interfere with British naval exercises—which were not merely innocent passage. Albania denied any knowledge about the source of the moored contact mines within this strait (of the German GY class, apparently laid by two Yugoslavian war vessels several days before the explosions that damaged the British war vessels). The ICJ nevertheless responded with its own riposte, given the UK’s alleging conspiracy by these two communist nations to mine the strait. Assuming that Albania did not lay these mines:

The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.⁶²

This common thread is woven into the fabric of modern International Environmental Law as well. One nation cannot allow the use of its territory, even by private inhabitants, in a manner that yields a cross-boundary environmental interference [§11.1.B.].

4. Strait Passage The second major effect of expanding the territorial sea surfaced in a number of strategic straits. These are the natural sea passages connecting two large maritime areas. The Strait of Gibraltar, for example, connects the Mediterranean Sea and the Atlantic Ocean. There are extraordinary implications regarding anything that would limit or close such straits. The Strait of Hormuz on the Persian Gulf is the transshipment point for forty percent of the world’s crude oil—about 17,000,000 barrels per day.⁶³ If Iran were to carry out its threat to respond to an attack by closing that Strait, there would be worldwide pandemonium.

The relatively narrow width of most straits does not present such problems. In most instances, the navigable channel of a strait is more than twelve miles from each of the adjacent national coasts. Such straits still contain a

swath of international waters which are *high seas*. Ships are entitled to unrestricted passage through the high seas portion of such straits, assuming that their activities are not repugnant to the coastal State's interests in other zones, such as the CZ or EEZ described below. But when such a strait is less than twenty-four nautical miles wide at its narrowest point, it contains only *territorial* waters.

As a result of the UNCLOS augmentation of coastal jurisdiction by nine additional miles, approximately 116 of these comparatively narrow international straits—formerly containing High Seas—suddenly embodied Territorial Seas only. Under customary State practice, coastal States would appropriately apply their “innocent passage” rules to such waters. Under the UNCLOS “strait passage” articles, however, the coastal State's innocent passage rules do *not* apply to these special straits. Military and commercial vessels are entitled to free transit in them, just as if those special straits still contained slices of high seas within them.

The Bering Strait between Russia (Siberia) and the US (Alaska) provides a useful illustration. That strait is nineteen miles wide at its narrowest point. Ships pass through it when going between the Arctic and the northern Pacific Oceans. The former Soviet Union claimed a twelve-mile territorial sea. Prior to 1988, the US three-mile territorial sea claim left a four-mile slice of high seas at the narrowest point of this strait. Military and commercial vessels could freely navigate in that strip of international waters in the middle of the Bering Strait.⁶⁴ When the US adopted a twelve-mile territorial sea in 1988, there were no high seas left in that strait. All States would otherwise be subject to the arguably subjective “innocent passage” rules promulgated by Russia (the eastern border of the strait) and the US (the western border). At its narrowest point, the Bering Strait now contains only the territorial sea of both the US and Russia. Such a strait is normally delimited by an equidistance principle directing ships to pass in the middle of the navigable channel.

Under the regime of “transit passage” proposed by the US, which would govern straits traditionally used for such international navigation, all States could navigate the Bering Strait as if it still contained a slice of high seas in the middle of the navigable channel. A number of States rejected this UNCLOS provision by tendering reservations to its application when they ratified the treaty.

The UNCLOS “transit passage” provisions are designed to balance two competing national interests: the *pre*-1982 right to transit through straits containing some international

waters—through the high seas, when the norm was a three-mile territorial sea limit—and the *post*-1982 UNCLOS extension of the coastal State jurisdiction from three to twelve miles. Under Article 38.2, ships and aircraft may undertake “transit passage” through such straits now containing only territorial waters that formerly contained international waters “solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas ... and another part of the high seas....” The coastal State or States may not impede such transit on the arguable basis that the otherwise amorphous rules of innocent passage apply to these waters that otherwise contain only territorial waters because of the narrowness of such a key navigational strait.

Assume that the US and Russia were to agree upon applying this Article 38 transit passage provision. A Chinese ship, passing through the Bering Strait between the Arctic and northern Pacific oceans, would not be subject to either US or Russian innocent passage rules—although that strait would otherwise be territorial waters at its narrowest point (nineteen miles). Neither coastal State could prohibit the foreign commercial vessel from traversing their overlapping territorial waters although the Chinese vessel would pass less than twelve miles from the coasts of both the United States and Russia. As long as the Chinese vessel was merely passing through this strait, the potential US-Russian adoption of the transit passage provisions under Article 38 of the UNCLOS would entitle that ship to pass freely through the strait, just as if it still contained high seas.

A similar problem has evolved, given the impact of global warming on the Northwest Passage between Canada and the US. The opening of this route, projected to occur around 2030, would trim 9,000 kilometers for the east-west shipping now passing through the Panama Canal. Canada claims most of these waters, while the US disputes that claim under an UNCLOS-based strait passage regime.⁶⁵

C. HIGH SEAS

1. Description The high seas, also referred to as “international waters,” cover seventy-one percent of the earth's surface, host eighty percent of the planet's life forms, and absorb more carbon dioxide than the forests. They consist of that part of the ocean not subject to the complete territorial sovereignty of any State. States have “exclusive” jurisdiction *only* over their twelve-mile territorial seas. They have *some* powers in the zones seaward of their territorial waters. The degree of jurisdictional

power is inversely correlated to the distance of the particular zone from the coastal baseline.

The most fundamental division among the various zones discussed in this section of the textbook is the distinction between the territorial sea and the high seas. (Two additional ocean water zones, the Contiguous Zone (CZ) and the Exclusive Economic Zone (EEZ), also begin at the coastal State's baseline.) As depicted in Chart 6.1, the outer edge of the territorial sea zone marks the inner edge of the high seas.

Freedom of the high seas has long been the articulated centerpiece of Westphalian International Law for several centuries. In 1927, the Permanent Court of International Justice reaffirmed the principle that this freedom was virtually absolute. The Court's comment, noting that this liberty was subject to only those special limitations expressly recognized by State practice, was as follows: it "is certainly true that ... vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them. If a war vessel, happening to be at the spot where a collision occurs between a vessel [from its own country] ... and a foreign vessel, were to send on board the latter an officer to make investigations or to take evidence, such an act would undoubtedly be contrary to international law."⁶⁶

The 1958 UN Law of the Sea Conference delegates restated the rule of complete freedom of the high seas in Article 1 of the 1958 Convention on the High Seas. It defined the high seas as "all parts of the sea that are not included in the Territorial Sea or in the internal waters of a State." Article 2 added that the "high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty."⁶⁷

Freedom of the seas is no longer absolute. The 1958 treaty was drafted just before the decolonization period of the 1960s. The maritime pendulum then began to swing in the other direction. During the 1974–1982 UNCLOS process: the territorial sea was quadrupled, the size of the CZ was doubled, and a 200-mile EEZ was created. The impact has been a "territorialization" of the oceans, once thought to belong to all. One result of these expansions and the creation of the new economic zone was the extension of coastal sovereignty into the high seas. The remainder is scheduled for control by an International Seabed Authority, which regulates all resource-extraction activities in the far

reaches of the oceans under the UNCLOS regime described below. The high seas could hardly continue to be characterized as *res communis* (belonging to all). As aptly stated by Professor Francis Ngantcha, in his book published by the Geneva Institute of International Studies:

The Law of the Sea has traditionally been aimed at protecting the international community's interests over the inexhaustible uses of ocean space. To this end, the main pillar of the law has been freedom of the sea—with the implication that seagoing vehicles may freely roam the oceans. When much of the ocean space was considered *res communis*, this tenet was considered unquestionable.

The "territorialization" of the ocean space, *i.e.*, its division into zones of coastal State sovereignty and/or jurisdiction, has put a stop to the "old" system of "free" global maritime communication and transportation. Consequently, the international networks of trade and commerce, naval mobility, overflight, etc., have come to depend upon the national maritime spaces of third States for purposes of passage.⁶⁸

2. Criminal Conduct One of the major issues regarding coastal State jurisdiction in the high seas is the degree to which it can protect itself against criminal activities which threaten its national interests. Drug trafficking threatens coastal State interests, long before the drugs reach any of the UNCLOS treaty zones. Consider the following *Larsen* case wherein US customs inspectors seized drugs and arrested the leader of an international drug-smuggling ring near Singapore's coastline.

Larsen deals with something different than extracting resources from the high seas. The US was prosecuting a US citizen for criminal conduct occurring on the high seas. Should the US have such jurisdiction to apply its laws anywhere on the high seas under International Law? A 2002 Canadian Supreme Court decision articulated a representative perspective regarding the extraterritorial application of domestic law:

A judgment of this Court, *Daniels v. White*, (1968) S.C.R. 517, sets out when international law is appropriately used to interpret domestic legislation. In that case, Pigeon J. held at p. 541 that:

... this is a case for the application of the rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner

United States of America v. Larsen
 UNITED STATES COURT OF APPEALS, NINTH CIRCUIT
 952 Federal Reporter 2d 1099 (1991)

AUTHOR'S NOTE: The defendant was convicted of "aiding and abetting the knowing and intentional possession with intent to distribute marijuana" under national controlled substances laws. The appellate court held that Congress intended that the applicable statute should be applied outside the US "where necessary." US customs agents were thus authorized to seize a private vessel and arrest its crew in the High Seas near Singapore—thousands of miles from the California forum where the defendant was brought to trial for his violation of this statute.

COURT'S OPINION:

Before Browning, Alarcon, and T.G. Nelson, Circuit Judges.

Charles Edward Larsen was convicted for his involvement in an international marijuana smuggling operation.... Larsen challenges the legality of his conviction on numerous grounds, including the court's extraterritorial application of 21 USC §841(a)(1) [the controlled substances law serving as the basis for his arrest near Singapore]. We affirm.

Larsen's conviction was based on evidence which established that he, along with codefendants and numerous other individuals, conspired to import shipments of Southeast Asian marijuana into the United States from 1985 to 1987, and to distribute the marijuana in the United States. The profits from these ventures were concealed by a fictitious partnership created by the defendant and others. This partnership was used to purchase the shipping vessel intended to transport the marijuana. During some of the smuggling operations, Larsen served as captain of the vessel.

Under Count Eight, Larsen was convicted of aiding and abetting codefendant Walter Ulrich in the crime of knowing and intentional possession with intent to distribute marijuana in violation of 21 USC §841(a)(1). The marijuana was seized by [US] customs inspectors from a ship on the high seas outside of Singapore. Larsen claims that the district court erred when it denied his motion to dismiss Count Eight because 21 USC §841(a)(1) does not have extraterritorial jurisdiction....

Congress is empowered to attach extraterritorial effect to its penal statutes so long as the statute does not violate the due process clause of the Fifth Amendment. There is a presumption against extraterritorial application when a statute is silent on the matter. However, this court has given extraterritorial effect to penal statutes when congressional intent to do so is clear. Since 21 USC §841(a)(1) is silent about its extraterritorial application, we are "faced with finding the construction that Congress intended."

The [US] Supreme Court has explained that to limit the locus of some offenses "to the strictly territorial jurisdiction would greatly curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home." Congressional intent to attach extraterritorial application "may be inferred from the nature of the offenses and Congress' other legislative efforts to eliminate the type of crime involved."

Until now, the Ninth Circuit [where appeals from California federal trial courts are heard] has not applied this "intent of congress/nature of the offense test" to 21 USC §841(a)(1); however, four other circuits have. They all held that Congress did intend the statute to have extraterritorial effect.

The Fifth Circuit held that Congress intended that 841(a)(1) have extraterritorial effect because it was a part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, and the power to control illegal drug trafficking on the high seas was an essential incident to Congress' intent to halt drug abuse in the United States.

The Third Circuit held that Congressional intent to apply 841(a)(1) extraterritorially could be implied because "Congress undoubtedly intended to prohibit conspiracies to [distribute] controlled substances into the United States ... as part of its continuing effort to contain the evils caused on American soil by foreign as well as domestic suppliers of illegal narcotics.... To deny such use of the criminal provisions 'would be greatly to curtail the scope and usefulness of the statute.'"

The First Circuit concluded that the district court had jurisdiction over a crime committed on the high seas in violation of 841(a)(1) because “[a] sovereign may exercise jurisdiction over acts done outside its geographical jurisdiction which are intended to produce detrimental effects within it.” The Second Circuit similarly held that “because section 841(a)(1) properly applies to schemes to distribute controlled substances within the United States,” its extraterritorial application was proper.

Extraterritorial application of a drug possession/distribution statute comports with the reasoning behind the Supreme Court’s *Bowman* decision, since such a statute is “not logically dependent on locality for the Government’s jurisdiction, but [is] enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated” and “[i]t would be going too far to say that because Congress does not fix any locus it intended to exclude the high seas in respect of this crime” [citation omitted]....

Larsen cites to a passing reference in *Hayes* which stated that Congress accepted the views of representatives from the Department of Justice and the DEA who testified that the Comprehensive Drug Abuse Prevention and Control Act of 1970 did not apply to American ships on the high seas. While the *Hayes* court acknowledged that some might conclude that §841(a)(1) does not apply extraterritorially because of this Congressional testimony, the court nevertheless held that §841(a)(1) did have extraterritorial application.

In affirming Larsen’s conviction, we now join the First, Second, Third, and Fifth Circuit Courts in finding that 21 USC “841(a)(1) has extraterritorial jurisdiction. We hold that Congress’ intent [to apply this drug law to the High Seas] can be implied because illegal drug trafficking, which the statute is designed to prevent, regularly involves importation of drugs from international sources.

[Conviction] AFFIRMED.

inconsistent with the comity of nations and the established rules of international law. *It is a rule that is not often applied, because if a statute is unambiguous, its provisions must be followed even if they are contrary to international law....* (Emphasis added [by the court].)

The questions at stake fall within the purview of the domestic legislation. Indeed, it can be argued that the domestic legislation is more specific than the rules set out by the international legal principles and as such, there would be little utility in examining international legal principles in detail. In other cases, international law principles might have a more direct impact and the disposition of the matter might turn on their interpretation and application.⁶⁹

Assume that the drug seizure and Larsen’s arrest occurred in one of the following sea zones: (a) Singapore’s Exclusive Economic Zone; or (b) Singapore’s Contiguous Zone; or (c) Singapore’s Territorial Sea zone. Would Singapore be more concerned about the location of the arrest and seizure in any particular zone as opposed to another? Might the US be violating any rights of the coastal State if the events in *Larsen* occurred in *any* of these zones (see Chart 6.1, page 302)?

In December 2002, Spain stopped and boarded the *So San*, about 600 miles off the coast of Yemen. The *So San* was a Yemen vessel carrying fifteen Scud missiles and eighty-five tons of chemicals buried under 40,000 bags of cement. Yemen disavowed knowledge of its destination. This vessel was not flying any flag. The then new US Bush Administration policy was to interdict shipments of arms capable of carrying weapons of mass destruction. Thus, any government could board the vessel to determine its cargo and destination. It was placed under control of a US admiral, then escorted by the Spanish Navy to a US military base in the Indian Ocean. Did this exercise of Spanish and US jurisdiction violate the rules applicable to the high seas (including freedom of the seas)?

Modern terrorism has played a large role in limiting freedom of the seas. Perhaps the single-most prominent event was the 1985 Mediterranean incident aboard the Italian cruise liner *Achille Lauro*. Members of the Palestine Liberation Organization boarded this luxury ship, then murdered an elderly, wheelchair-bound US passenger because he was Jewish.

This event triggered a series of treaties for responding to terrorism. The main one was the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. A post 9-11 diplomatic conference yielded a

number of SUA (Suppression Unlawful Acts) protocols in 2005. Various SUA treaties envision international reaction to the seizure of ships by force; acts of violence against persons on board those ships; and the placing of explosive devices that are designed to damage or destroy targeted ships. The dozen “amendments” to the original 1988 Suppression treaty, when they have entered into force, should fill important gaps in the global fight against terrorism.⁷⁰

The term “high seas” may have a distinct meaning under the national law of certain countries. In 1996, TWA Flight 800 crashed eight miles off the Long Island shore. The Death on the High Seas Act (DOHSA) provides for limited liability when a death occurs on the “high seas.” The version of this act effective at the time of the 1996 disaster provided that high seas meant “beyond a [three-mile] marine league from the shore of any State....” A two-judge majority held that this event did *not* occur on the high seas. The dissenting judge, displeased with the majority’s application of the federal act, countered:

[President Reagan’s] Proclamation changed the meaning of the U.S. territorial sea—and thus its complement the “high seas”—for international, but not domestic, law purposes.... The majority ignores that [in] the DOHSA Congress, by using the phrase “high seas beyond one marine league from the shore of any State,” intended both to define and to indicate the geographical boundary line at which the high seas began—three nautical miles from the U.S. coast—because that boundary line coincided with the outer border of the states’ territorial seas. Congress wished to preserve state [legal] remedies in state waters, and to provide a separate remedy, *i.e.* DOHSA, to waters subject only to federal jurisdiction, *i.e.*, “the high seas” beyond a [three-mile] marine league. Simply stated, it is irrelevant whether Congress shared the international legal understanding of “high seas” as “non-sovereign waters,” because its only concern at the time of DOHSA’s passage was state, and not federal, boundaries. Nothing in DOHSA’s language or legislative history supports the majority’s conclusion that Congress intended “high seas” to be a variable term “subject to change” because of evolving international concepts.⁷¹

Four years later, Congress amended the DOHSA to change the statutory boundary between US territorial seas and the high seas from “one marine league” to “twelve nautical miles.”⁷²

3. Deep-Sea Fisheries The other major High Seas problem is the environmental and economic concern about responsible management of deep-sea fisheries. These aquacultures reside in the High Seas areas beyond the EEZ. The importance of maintaining sustainable fisheries was envisioned by the agreement offered by the following 1995 UN General Assembly for ratification:



**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**

UN GEN. ASS. DOC. A/CONF.164/37
(8 SEPTEMBER 1995)

Go to Course Web page at
<<http://home.att.net/~slomansonb/txtcsesite.html>>.
Under Chapter Six, click StradMigratoryFish.

This 1995 “agreement,” a General Assembly draft treaty adopted without a vote (and thus no debate), did not draw as robust a response as preferred. In the interim, the UN Food and Agriculture Organization (FAO) developed its 2003 Strategy for Improving Information on Status and Trends of Capture Fisheries. That document also responded to the 2002 Plan of Implementation of the World Summit on Sustainable Development, in search of achieving sustainable fisheries. The latter document stated the objective of maintaining or restoring fishing stocks “to levels that can produce the maximum sustainable yield with the aim of achieving these goals for depleted stocks on an urgent basis and where possible not later than 2015.”

A breakthrough surfaced in 2008, after two years of negotiations. The UN Food and Agriculture Organization promulgated new international guidelines to limit the impact of fishing on fragile deep-sea species. They were developed to implement the UN General Assembly’s 2006 Resolution 61/31. The Assembly therein expressed its frustration with a lack of effective management of marine capture fisheries. It was rendered “difficult in some areas by

unreliable information and data caused by unreported and misreported fish catch and fishing effort and the contribution this lack of data makes to continued overfishing in some areas.” According to the FAO Guidelines, all deep sea fishing activity is to be “rigorously managed.” Vulnerable ecosystems are to be more aggressively identified and protected. But because the guidelines recommend that overfishing activities be voluntarily ceased, few countries have in fact complied, or have been financially able to invest the necessary resources to avoid damage to such ecosystems. This “soft law” marine feature of the environment will be addressed in more detail in textbook Chapter 11 on the Environment.⁷³

D. CONTIGUOUS ZONE

Coastal State sovereignty is *exclusive* in the territorial sea belt immediately adjacent to its landmass. A coastal State may also exercise *limited* jurisdiction in the Coastal Zone (CZ). It extends from the baseline to twenty-four nautical miles from the coast. As depicted in Chart 6.1, the outer edge of the territorial sea is the midpoint of the CZ.

Why is there a CZ? Sovereign rights in the CZ allow a coastal State to effectively preserve various national policies. Under Article 33.1 of the UNCLOS, the activities of foreign States or their vessels in the CZ are subject to the coastal State’s jurisdiction for the express purposes of enforcing “customs, fiscal, immigration, or sanitary laws.” The State of California relied on this regime as its basis for enacting the strictest nautical pollution emissions law in the US. As of July 2009, all tankers, cargo, and cruise ships sailing into California ports must switch from heavy crude oil to a more expensive, but cleaner-burning, low-sulfur fuel. They must do so when they pass into the twenty-four-mile national CZ. Such ships made 11,000 port calls in 2006. The absence of these regulations would have resulted in harmful vessel emissions doubling by 2020. (Military, government, and research vessels are exempt.)⁷⁴

This zone’s proximity to the coastline requires a balance of international and coastal State rights to respectively use and control these waters. Enforcement of special maritime laws in this zone is not an unreasonable infringement of the international right to freely navigate through them. During the eighteenth and nineteenth centuries, State practice acknowledged the right to seize foreign and domestic vessels and arrest their occupants in international waters at some distance beyond the three-mile territorial sea. Coastal States were unwilling to ignore harmful or

illegal activities occurring in this fringe area just beyond their territorial seas. The classic illustration was rumrunners during the US alcohol Prohibition era of the 1920s. They would hover there without dropping anchor. They sought opportunities to enter the territorial sea or to turn over their contraband to smaller boats, which could then offload it at undisclosed locations ashore. This gave rise to the “hovering laws” extending coastal jurisdiction for the limited purpose of fending off anticipated violations of US liquor laws. The same concern exists today, given the “invasion” by international drug traffickers.

A number of early twentieth-century developments impacted the creation and subsequent extensions of the CZ. The 1928 meeting of Stockholm’s Institut de Droit International (Institute of International Law) was the first international attempt to react by assessing the proper scope of such hovering laws. The 1929 Harvard Law School study of the Law of Territorial Waters stated that “navigation of the high seas is free to all States. On the high seas adjacent to the marginal [territorial] sea, however, a State may take such measures as may be necessary for the enforcement within its territory or territorial waters of its customs, navigation, sanitary or police laws or regulations, or for its immediate protection.”⁷⁵ The League of Nations 1930 Conference on the Law of the Sea did not reach any express agreement about the precise scope or breadth of the CZ. The participants did agree on one important matter. Unlike territorial waters where a coastal nation must exercise its sovereign control, a State had to expressly declare its claim to jurisdiction over a CZ. Under International Law, the CZ is not a necessary adjunct of the inherent scope of the territorial sovereignty of coastal States.

This consensus placed the burden on coastal States to justify any extension of sovereignty beyond their territorial seas. Other States did not have to recognize unusual jurisdictional claims in this area beyond the historic three-mile territorial sea. A major difference between the two zones was that a coastal State could not claim exclusive sovereignty over its CZ for all purposes. It could monitor and exclude hovering activities there. It could not limit passage that was otherwise not harmful to coastal State interests.

One problem with the 1958 UN Convention on the Law of the Sea was the specific twelve-mile breadth of the CZ. Its establishment may have been a step backward. The drafters’ intent was to place a single limit on the diverse national interests claimed by coastal States in this zone. States that wanted jurisdiction over a larger sea zone, however, did not ratify this provision of the 1958 Convention.

They did not acquiesce in the prospect of their coast guard cutters idly standing by while contraband was being unloaded just outside the proposed twelve-mile CZ. In a related extension, the 1958 UN Law of the Sea Convention provided for coastal jurisdiction over the Continental Shelf “to where the depth of the superjacent waters admits of the exploitation of the natural resources....” This provision effectively permitted coastal States to monopolize the marine resources in and over their Continental Shelves—normally including and extending beyond the CZ.⁷⁶

The third UN Law of the Sea Conference produced some answers to these problems through seaward extensions of sovereign control. The UNCLOS delegates expanded the territorial sea from the coastal baseline to twelve miles and the CZ to twenty-four miles. This treaty-based expansion, which codified existing State practice, formally resolved the simmering disputes over the acceptable breadth of the CZ.

E. EXCLUSIVE ECONOMIC ZONE

During the 1974–1982 UNCLOS negotiations, State representatives proposed a novel plan to accommodate the competing interests of freedom of the high seas versus natural resource depletion. Customary State practice had condoned the offshore regulation of fishing, mining, security, and certain other activities of interest to coastal States. These national interests were effectively codified by the 1982 treaty provisions, expressly adopting a 200-mile Exclusive Economic Zone (EEZ). This “economic” zone starts at the coastal baseline and overlaps the twenty-four mile Coastal Zone as well as the twelve-mile Territorial Sea zone.

Although the EEZ is now firmly established in International Law, the vagueness of the 1982 Convention—typical of any multilateral treaty where a wide degree of consensus is sought—masks continued disagreement about the respective rights of different States in *overlapping* EEZs. The difficulty in reaching any agreement over the eight-year negotiating period was partially overcome by employing vague language, thereby enabling all participants to claim that their varied objectives had been achieved.

Under Article 56 of the UNCLOS, the coastal State enjoys sovereign rights in the EEZ for the purposes of “exploring and exploiting, conserving and managing the natural resources ... of the waters superjacent to the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water....” Other

nations in that zone are thus subject to licensing fees for fishing in the EEZ. Failure to register has consequences.

In March 2007, for example, a US Coast Guard cutter detained a Mexican fishing boat that was eleven miles inside this 200-mile zone beyond the California coast. The Mexican boat was towing several miles of longline fishing gear to catch shark. Longline fishing is legal, but nineteen species of fish were protected under the laws of the coastal country. The US had the backing of International Law when it seized and caused the boat to be towed to San Diego, pending resolution of the environmental issue. Although the US is not a party to UNCLOS, it did adopt the same 200-mile economic zone, just after the conclusion of the negotiations resulting in the creation of the global treaty that is the centerpiece of this section of the book.

In concert with Canada, there will be a pollution control zone within 200 miles of the respective coastlines. Large vessels will therein use low-sulfur fuel or new technology to emit less sulfur dioxide, nitrogen oxide, and soot within this zone. While pollution control historically falls within the area encompassed by the UN Convention’s Coastal Zone, the UN’s International Maritime Commission nevertheless approved this technology-driven extension in October 2008. One reason is that it implements the 1973 International Convention for the Prevention of Pollution from Ships. Furthermore, such zones already exist in the Baltic and North Seas.

The above UNCLOS Article 56 articulation provides no objective yardstick for measuring the discretion of the coastal State to exclude the activities of other States in its EEZ. For example, the coastal State may determine the “allowable catch” of fish to be taken by other States from its EEZ. This treaty language contains no concrete standard to define just what constitutes an allowable catch.

Under Article 62, when a State fails to determine its allowable catch or does not have the “capacity to harvest the entire allowable catch, it shall, through agreements ... give other states access to the surplus of the allowable catch....” This article requires the coastal State to provide for access to the surplus by other nations. Unfortunately, this provision means no more than an agreement to agree at a later time—without the benefit of guidelines to define specifically another State’s right of access to the surplus resources of the EEZ.

Article 292 presents another example of the confusion spawned by treaty language, which is forever in need of judicial interpretation. Such matters are determined by the twenty-one member International Tribunal for the

Law of the Sea, seated in Hamburg, Germany. (It is the treaty-based entity for resolving maritime disputes.⁷⁷) What type of activity would result in a violation of coastal State fishing regulations in its EEZ? The following case illustrates this predicament. In its first judgment in 1997, the Tribunal was acutely divided over this issue:



**Application for Prompt
Release
The Camouco Case**

(PANAMA V. FRANCE)

JUDGMENT OF 7 FEBRUARY 2000

(TRIBUNAL CASE NO. 5)

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

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Law of the Sea, Office of Legal Affairs, United
Nations, New York.

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Under Chapter Six, click Camouco Case.

The Tribunal's August 2007 decision involved a similar scenario. Russia had granted the Japanese salmon and trout fishing vessel *Hoshinmaru* a license to fish in Russia's EEZ. However, the *Hoshinmaru* caught sockeye salmon, instead of chum salmon, in violation of Russian law. After the vessel's capture, the Japanese Embassy requested that the Russian Ministry of Foreign Affairs release the *Hoshinmaru* and its crew, all pursuant to standard UNCLOS Article 73 procedure. But Japan considered Russia's demanded 22,000,000 ruble bond amount excessive, arguing instead that 8,000,000 rubles was appropriate. Here, the dispute was not jurisdictional. The court considered this case unique because it did not involve fishing without a license. It turned solely upon the reasonableness of Russia's bond demand. The Tribunal stated that this was no minor violation. It thus ordered Russia to release Japan's vessel and its crew in exchange for a bond of 10,000,000 Russian rubles (about \$393,000), to be tendered by the ship's owner to Russia.⁷⁸

This newest sea zone is a product of the tension between historical expectations associated with freedom of the seas and modern pressures to decentralize

the exploitation of ocean resources. After World War II, the more developed nations used their superior technology to extract the rich fishing and mineral resources contained in the sea and under the ocean's floor. Many of these natural resources were located just beyond the territorial seas of the lesser-developed nations. They witnessed the resulting depletion of these natural resources, virtually within sight but beyond their grasp. Even some developed nations were concerned about protecting the resources off their own coasts from unlimited exploitation by other economic powerhouses. The sovereignty equation struck in the EEZ does not preclude all activity in this portion of the high seas which could be characterized as being "economic."⁷⁹

Although the coastal State effectively enjoys the economic fruits of this area, UNCLOS Article 58 provides that other States retain the right therein to navigate, overfly, and lay submarine cables and pipelines "compatible with ... this Convention." As a result of the treaty-based creation of this zone, the less powerful coastal States can now share in the wealth of natural resources adjacent to their shorelines. They established a licensing regime for recapturing a percentage of the revenues derived by the extraction of natural resources from the sea, or the subsoil under the sea, up to 200 nautical miles from their coasts.

The international adoption of the EEZ regime has had the following impact upon the International Law of the Sea. Over one-third of all ocean space, containing ninety percent of global fishing resources, is now subject to the sovereignty of the coastal nations of the world. Now that the 1982 UNCLOS has been ratified by enough countries for it to enter into force, the lesser-developed nations have achieved one objective in their proposed redistribution of world wealth: an increase in the national sovereignty of such nations over global economic resources in the ocean waters near their shores but beyond both the older territorial sea and the CZs.

On the other hand, there is no evidence that international approval of the 1982 Convention's EEZ articles have helped or will actually help the poorer or underdeveloped States as envisioned by its proponents.

As stated by Professor Arvid Pardo, Malta's former ambassador to the UN and an UNCLOS participant:

Unfortunately, States do not uniformly apply the terminology properly associated with this zone. As

The “Juno Trader” Case

(SAINT VINCENT AND THE GRENADINES V. GUINEA-BISSAU)

APPLICATION FOR PROMPT RELEASE (DEC. 18, 2004)

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

44 INT’L LEGAL MAT’LS 498 (2005)

DECLARATION OF JUDGE KOLODKIN

1. Every year, the United Nations General Assembly in its annual resolutions on the oceans and the law of the sea appeals to all States to harmonize their legislation to bring it into compliance with the United Nations Convention on the Law of the Sea.

2. Unfortunately, not all States Members of the United Nations that are parties to the United Nations Convention on the Law of the Sea have heeded those appeals. In the “Juno Trader” Case it has been found that a coastal State, the Respondent, has used the expression “the maritime waters of Guinea-Bissau” to mean not only territorial sea of Guinea-Bissau, but also its exclusive economic zone.

3. On 19 October 2004, the Interministerial Maritime Inspection Commission adopted the Minute [Order] in which was stated that the Juno Trader

“... was arrested ... in the maritime waters of Guinea-Bissau...” However, it is known that the Juno Trader was arrested in the exclusive economic zone of Guinea-Bissau and, under the United Nations Convention on the Law of the Sea, exclusive economic zones do not form part of the territorial sea or “maritime waters” of any State.

4. There is another trend in the application of the United Nations Convention on the Law of the Sea: some coastal States are demanding, in their domestic legislation, prior notification by vessels intending to enter their exclusive economic zones even if only for the purpose of transiting them in application of the freedom of navigation which is guaranteed by article 58, paragraph 1, of the United Nations Convention on the Law of the Sea.

Anatoly Kolodkin

recently lamented by a judge on the Law of the Sea Tribunal:

[T]he Convention is grossly inequitable not only as between coastal States and landlocked and geographically disadvantaged States, but also as between coastal States themselves: only ten of these in fact obtain more than half of the area which the Convention places under national control [since so many nations separated by international waters are less than four hundred miles apart].... It should be noted that adequate scientific capability, appropriate technology and substantial financial resources are required to effectively develop offshore resources, particularly mineral resources; thus, only wealthy countries and a few large developing countries such as China, Brazil, India and a few others have the means themselves to engage in significant offshore development. This could mean that marine areas under the jurisdiction of many small developing countries ... could be exploited in

practice predominantly for the benefit of technologically advanced countries with far-reaching political consequences.⁸⁰

This perspective illustrates that comparatively wealthy and developed States can still extract the usual benefits from their international ventures in the EEZs of other nations.

Some of the most powerful States have also *extended* this zone by augmenting it to accommodate what they characterize as special circumstances. In 1994, Canada enacted “emergency” legislation authorizing the arrest of violators of its new ban on catching the endangered “turbot” fish in the Grand Banks area, 220 miles off Newfoundland. In March 1995, Spanish and Portuguese fishing trawlers were either seized or threatened with capture. The European Union then engaged in unsuccessful diplomatic attempts to convince Canada to cease this interference with the recognized right to fish in international waters *beyond* the 200-mile EEZ. Spain’s resulting case against Canada was dismissed by the International

Court of Justice on the basis of Canada's not having consented to the Court's jurisdiction.⁸¹ This jurisdictional defect was tendered to avoid a resolution of this issue on its merits. The sovereignty scenario is analogous to the previously discussed "historic bay." Such bodies, normally containing *both* internal waters and high seas because of their size, may be characterized as exclusively "internal" waters. Canada, similarly, was hereby attempting to expand its sovereignty because of its historic claim to an area, which spilled over the outer limits of the 200-mile EEZ.

After the UNCLOS has entered into force (1994), coastal States began to enjoy greater profits from their EEZs. They may, as illustrated in the above *Camouco Case*, charge licensing fees for taking fish or minerals from those zones. They may erect artificial islands or structures to harvest fish in the waters and minerals in the seabed of the EEZs. They may also conduct marine research and legitimately exclude other States from engaging in such activity.

One reoccurring problem with creation of the EEZ and its attendant expansion of the range of coastal sovereignty is that many States cannot possibly claim an exclusive 200-mile EEZ. Their shorelines may be less than 400 nautical miles from another nation. Or, adjacent nations may share an irregular geographical land configuration, which necessarily limits their respective abilities to claim a full 200-nautical-mile swath of ocean waters without crossing over into one another's EEZs. Under Article 74 of the UNCLOS, States with opposing or adjacent coastlines are thus expected to resolve any inconsistent claims to their respective EEZs "by agreement on the basis of international law ... in order to achieve an equitable solution."

A similar problem arises with delimitation in facing or adjacent CSs (later). Between 1969 and 1993, for example, the ICJ heard six cases wherein it was called upon to establish respective rights in such EEZs or Continental Shelves in various regions of the world. The Court has not been able to produce a uniform principle other than its routine articulation of the rather vague notion of "equidistance" so that geographical limitations require States to claim only their share of a limited resource. However, "equidistance" is a term meaning different things to different nations.

In practice, some nations have established their respective rights to overlapping coastal zones by using an equidistance principle. Italy and what was the former Yugoslavia, for example, faced one another across the Adriatic Sea. It is only 100 miles across at many points. UNCLOS Article 74 mandates an agreement to "achieve

an equitable solution" to the geographic inability of both nations to claim an entire 200-miles width across the Adriatic as their EEZ. Under customary State practice, the Italian and (former) Yugoslavian EEZs would extend to a median line that is equidistant from both coasts. Italy and Yugoslavia would be entitled to comparable EEZs of some fifty nautical miles at certain points from their respective shores.

Article 59 of the 1982 LOS Convention provides that conflicts over the control and the breadth of the EEZ are supposed to be resolved "on the basis of equity and in light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole." This article is obviously vague. It does not define *equity*, *relevant*, or *interests*. There is, however, a degree of accuracy that is self-defeating. This treaty, in other words, illustrates that consensus was once again achieved through the use of broad terminology, thus yielding the flexibility that sovereigns love to retain.

F. CONTINENTAL SHELF

1. Historical Development The US devised a novel approach for protecting its natural resources: It claimed a right to control the resources over its Continental Shelf (CS). In 1946, President Truman unilaterally announced a "fishing conservation zone" beyond what was then a three-mile territorial sea. The US claimed limited jurisdiction over the CS adjacent to its coasts, a distance extending approximately 200 nautical miles from both coasts.

President Truman did not thereby claim exclusive sovereignty in this area of the high seas. He expanded coastal sovereignty for the limited purpose of controlling economic activity in the waters over the CS. Other nations retained the right to pass freely through the high seas over these shelves. They could not fish there, however, without observing new US coastal fishing regulations. This Continental Shelf Doctrine was later adopted by some other nations and was the central theme of the 1958 UN Convention on the Continental Shelf.⁸²

Many States have a CS that differs drastically from that of the US. Chile, Ecuador, and Peru, for example, have shelves extending out to only a few miles from their coastlines. Their shelves then drop off to great depths. They took a more direct approach to preserving adjacent economic resources in the high seas. In 1952, these States claimed a 200-miles-wide territorial sea. Unlike the US, they claimed *exclusive* territorial sovereignty in this extended area adjacent to their coasts—which unlike the

US, had no large CS. They perceived little difference between their claim of exclusivity and the US claim of more limited sovereignty over its respective shelves.

2. UNCLOS Treatment Article 76 of the 1982 Law of the Sea Treaty (UNCLOS) defines the coastal State's CS as "seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural extension of its land territory..." The range of the CS may vary from [a minimum of] 200 nautical miles from the coastal baseline to 350 nautical miles, depending on the natural extension of the coastal State's underwater landmass—which often drops off to great depths relatively close to many coastlines. The CS depicted in Chart 6.1 naturally slopes off, as is the case with countries like the US where there is no sudden drop. There is no CS to speak of off coastal States such as Chile, Ecuador, and Peru.

What happens when two or more coastal States share the same CS? What are their respective rights regarding the use of their shared CS? The International Court of Justice addressed this matter in its 1969 North Sea Continental Shelf case decision. Germany, Denmark, and the Netherlands disputed the respective CS delimitations in the North Sea on each of their coasts. The Court stated that there was no obligatory method of delimitation. However, the delimitation was to be arranged "by agreement in accordance with equitable principles ... in such a way as to leave as much as possible to each party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other[s]..."⁸³

The 1982 UNCLOS essentially codified the North Sea Continental Shelf Cases decision in Article 83.1. States with opposite or adjacent coasts must thereunder enter into an "agreement on the basis of international law." Unfortunately, this is merely an agreement to agree although typical of multilateral conventions and interpretive judicial decisions where consensus is achieved by the use of question-begging language with which no State could disagree.

Under Article 76.8 of the UNCLOS, the UN Commission on the Limits of the Continental Shelf is supposed to address and resolve disputes in this ocean area. In 2002, Russia presented its claim that its Lomonosov and Mendeleev Ridges are natural extensions of the Eurasian continent—and thus Russia's continental shelf.

The Lomonosov Ridge, for example, is a 1,240-mile underwater mountain range. The Commission neither accepted nor rejected Russia's claim. The Commission instead suggested that Russia needed to do more research during the interim period before the Commission's next meeting in 2009.

When the referee is looking the other way, the participants often believe they are free to explore their options. Russia thus decided to take a more active stance. In August 2007, a Russian expedition descended to the North Pole's Arctic floor, over two miles below the surface. A pair of small submarines planted a Russian flag made of rustproof titanium. This presumptively supports Russia's disputed claim to half of the area below the Arctic Ocean. Canada, however, claims sovereignty over much of this area. Useful illustrations are available in the responsive analytical document prepared by University of Quebec Professor Marc Benitah. He supports the Commission's delay on the basis that the "natural prolongation" definition in Article 76.1 is insufficiently broad to either embrace or reject this continental shelf. The two options are 200 nautical miles from the coastline; or if the Article 76.3 combined "seabed and subsoil of the shelf, the slope, and the rise" naturally extend farther, as far as 350 nautical miles.⁸⁴

G. DEEP SEABED

1. Historical Regime Exploitation of marine life was only the first of two major reasons for international interest in extending national sovereignty into the high seas. The second reason was control of mineral exploitation in the seabed, just beyond the Territorial Sea and Contiguous Zone. After World War II, the technology for deep seabed mining advanced quickly. Valuable ore deposits beyond the territorial sea became increasingly accessible and were extracted on a first-come, first-served basis. The coastal State could exercise exclusive sovereignty in the territorial sea, limited sovereignty in the CZ, but no further control in the high seas. Under International Law, the high seas beyond these zones were *res communis*—belonging to no one, and thus accessible by all. Many coastal States could not obtain, nor could they prevent, other States from extracting the mineral resources under these waters just beyond their sovereign control.

In 1970, the UN General Assembly proposed another ocean regime designated the "Common Heritage of Mankind." In Resolution 2749, the Assembly attempted to institutionalize the Common Heritage of

Mankind in areas beyond national jurisdiction. Management, exploitation, and distribution of the resources of the ocean area beyond the national control of the coastal States should be governed by the international community rather than by the predilections of the more technologically advanced States and their multinational corporations. To this end, the UN General Assembly called for the convening of a new law of the sea conference that would reflect this change in attitude and draft articles for consideration by the international community.⁸⁵

2. UNCLOS Provisions The work of the ensuing conference produced the most drastic revision of the historical conception of “freedom of the seas.” The 1982 Law of the Sea Treaty provisions on resources in the deep seabed, Part XI (Articles 136–153), address what is called the “Area.” These provisions delayed the treaty’s entry into force for more than a decade. Developed nations had been profitably mining the oceans under the high seas for decades before promulgation of the 1982 UNCLOS.

Article 1 of the UNCLOS defines the “Area” as the ocean floor and its subsoil “beyond the limits of national jurisdiction.” Article 136 provides that the “Area and its resources are the common heritage of all mankind.” This is the area under the oceans that does not otherwise fall within any of the zones described earlier in this section of the book. There are valuable minerals located in the high seas, or the area beyond the territorial seas and the CZ and EEZ.

While no State may exercise its exclusive or limited jurisdiction within “the Area,” a treaty-based organization called the International Seabed Authority (ISA, or “the Authority”) materialized. It was designed to control virtually all aspects of deep seabed mining in the Area. Article 137.2 of the UNCLOS contained a feature which drew harsh objections from the major maritime powers: “All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the [International Seabed] Authority shall act. These rights are not subject to alienation [sale or licensing by a national authority]. The minerals recovered from the Area, however, may only be alienated in accordance with this Part [XI] and the rules, regulations and procedures of the Authority.”

Under the 1982 Convention, the ISA consists of all national participants in the UNCLOS. It is based in Jamaica and funded by assessed contributions from UN members. The ISA is expected to organize and control all

economic activities in the Area. Mineral resources within it are *beyond* national jurisdiction (outside of the EEZ of 200 miles) and thus *within* the Authority’s control.

The ISA commenced operations in 1996. It is one of the three new international institutions, including the previously discussed LOS Tribunal in Germany, created upon the entry into force of the UN Convention on the Law of the Sea. As an autonomous but UN-related organization, the ISA is responsible for organizing, monitoring, and controlling specific issues covered in Part XI of the Convention. Part XI of the treaty focuses on activities such as mining on the international seabed beyond the limits of national jurisdiction of coastal States.

ISA activities include the following:

- ◆ reviewing work plans for seabed exploration and exploitation—particularly in the area of solid, liquid or gaseous mineral resources;
- ◆ monitoring compliance with the rules, regulations and procedures for seabed exploration and exploitation;
- ◆ promoting and monitoring scientific research, data collection and the development of sustainable marine technology; and
- ◆ developing recommendations on mining standards for the protection and preservation of the marine environment.⁸⁶

These tasks are assigned to the “Authority.” It thus operates the “Enterprise,” the mineral exploration and the exploitation organ of the ISA. Under the UN’s Law of the Sea Treaty, the Enterprise monitors the commercial production of all mineral resources in the Area. The revenues derived from the Enterprise will be the royalty payments or profit shares of national or individual miners who extract minerals from seabeds in the area. The collection of these revenues and potential transfer of mining technology to the Authority’s Enterprise are designed to circumvent what some 1982 Law of the Sea Conference delegates characterized as the monopolistic behavior of the larger developed nations. A small group within the community of nations possesses the requisite technology for mining these deep seabed resources.

Under UNCLOS Article 150g, however, the Enterprise is tasked with the responsibility to ensure the “enhancement of opportunities for all ... irrespective of their social and economic systems or geographical location, to participate in the development of the resources

of the Area and the prevention of monopolization of activities in the Area.”

3. Agreement on Implementation of Part XI In 1994, the then US Secretary of State Warren Christopher announced the US intent to sign the 1982 UNCLOS. The US realized that the UNCLOS would soon enter into force in November 1994, because the minimum number of ratifications (sixty) had already been deposited with the UN. This realization was a motivating factor for the July 1994 US “signing” (but not ratifying) of this treaty [distinction: §7.2.A.2.]. The US Senate has not voted on whether to ratify the UNCLOS because the former Chair of the Senate Foreign Relations Committee would not conduct hearings on this issue.

While treaty ratification stalled in the US Senate, executive branch support is rooted in the successful negotiation of a separate agreement entitled the “Agreement Relating to Implementation of Part XI of the United Nations Convention on the Law of the Sea.” Former Secretary of State Christopher lamented that the original UNCLOS Part XI provisions are “seriously flawed.” Yet “it is imperative from the standpoint of our security and economic interests that the United States become a [ratifying] party to this Convention.... Its strategic importance cannot be overstated.... The result is a regime that is consistent with our free market principles and provides the United States with influence over decisions on deep seabed mining commensurate with our interests.” He thus expressed the US intent to become a party to the UNCLOS if it can simultaneously ratify the two agreements (i.e., the 1982 Treaty and the special 1994 Agreement adopted by the UN General Assembly in 1994) as if they were a single instrument.⁸⁷

The July 1994 Special Agreement, approved by the General Assembly, restructured Part XI of the 1982 Treaty as a compromise designed to achieve more universal participation in a global law of the sea. The major maritime powers were reluctant to ratify Part XI as approved in the original treaty text of 1982. The 1994 Report of the Section of International Law and Practice of the American Bar Association recommended that the US sign (and ratify) the 1982 UNCLOS because “new threats to United States security posed by the end of the Cold War and by the rise of new nations and regional powers [make] ... it important to seek long-term stability of rules related to the oceans.”

The original treaty text suggests the creation of a new form of cartel—the Enterprise. This entity would be

responsible for the mandated sharing of technology, the degree of production control and pricing, and an infrastructure not unlike that of the Organization of Petroleum Exporting Countries, which is responsible for worldwide price increases and production quotas—hardly a free market enterprise. As stated in the Congressional Record, the objections of industrialized States to Part XI of the 1982 treaty included that “it established a structure for administering the seabed mining regime that did not accord industrialized States influence in the regime commensurate with their interests; [and] it incorporated economic principles inconsistent with free market philosophy...”⁸⁸

The special 1994 Agreement removes a number of such objections to the deep seabed mining provisions, articulated by the major industrialized powers. It removes objections to deep seabed mining resource allocation, which had excluded the input of the major powers within the ISA. It negates mandatory technology transfer; production limitations; more onerous financial obligations for the private enterprises of the economically powerful mining nations; and a subsidized international entity (the Enterprise), which could otherwise compete unfairly with existing commercial enterprises. The essential objective of the fresh agreement was to retain a free market-oriented regime, whereby the major powers have flourished since World War II.

The 1994 Agreement specifically permits an industrialized nation to veto the financial or budgetary decisions of the ISA. This agency could otherwise decide to use revenues derived from the Enterprise to fund some national liberation movement, which is not in harmony with that nation’s political interests. Under the 1994 Special Agreement, the mandatory technology transfer provisions are supplanted by more cooperative arrangements, such as joint ventures involving procurement on the open market. The Enterprise will not have to be financed by the developed States only. There is also a “grandfathering” provision which allows mining contracts that were already licensed under national law to continue on the same favorable terms as those previously granted by the Authority to French, Japanese, Indian, and Chinese companies whose mine site claims were already registered. To meet yet another objection to the wording of the Part XI provisions of the UNCLOS, certain financial obligations imposed on mining nations at the exploration stage were eliminated under the special 1994 Agreement.

For those nations that are already parties to the 1982 Convention, there is no specific time frame for either the Enterprise’s commencement of mineral production

or the Authority's equitable distribution of Enterprise-generated revenues. Upon ratification by a sufficient number of nations, however, the Authority began its every-five-year review of progress made toward these production and distribution goals. There will be another international review conference fifteen years after the Authority begins its commercial production of minerals in the Area. That conference will monitor the Authority's progress toward exploration, exploitation, conservation, and distribution of the resources from the ocean areas beyond national control.

H. PROGNOSIS

Individual conference participants in the drafting of the 1982 Treaty have provided mixed reviews about its achievements. Tommy Koh, Singapore's ambassador to the UN and President of the Conference, described the Area and Authority provisions as a success. In his view, the delegates reconciled the competing interests of many diverse groups of nations. Per his positive assessment:

[T]he international community as a whole wished to promote the development of the seabed's resources as did those members of the international community which consume the metals extracted from the ... nodules [in the ocean's floor]. The developing countries, as co-owners of the resource, wanted to share in the benefits of the exploitation of the resources and to participate in the exploitation.... A seabed miner will have to pay to the International Seabed Authority either a royalty payment or a combination of a royalty payment and a share of his profits.... Under the Convention, a seabed miner may be required ... to sell his technology to the Authority. This obligation has caused great concern to the industrialised countries. It should be borne in mind, however, that the obligation [to transfer technology] cannot be invoked by the Authority unless the same or equivalent technology is unavailable in the open market. A contract study by the US Department of the Interior indicates that there is a relatively large number of suppliers of ocean mining system components and design construction services. If this is true, then the precondition [requiring technology transfer to the Authority] cannot be met and the obligation can never be invoked.⁸⁹

The perspective of Arvid Pardo, Malta's Ambassador to the UN Conference on the Law of the Sea, was not

as rosy as that of Ambassador Koh. Per Ambassador Pardo's contrasting perspective:

[T]he Convention reflects primarily the highly acquisitive aspirations of many coastal States, particularly of those developed and developing States with long coastlines fronting on the open ocean and of mid-ocean archipelagic States. Perhaps as much as forty percent of ocean space, by far the most valuable in terms of economic uses and accessible resources, is placed under some form of national control [by adoption of the exclusive economic zone].... Additionally, elaborate provision is made for [the Authority's] international management of the mineral resources of the seabed beyond national jurisdiction. Nevertheless, the approach of the Convention to problems of marine resource management appears seriously deficient in several respects.... [T]he common heritage regime established for the international seabed is a little short of disaster. The ... competence of the Authority is limited strictly to the exploration and exploitation of mineral resources; the decision-making procedures ... ranging, according to the nature of the question, from a two-thirds majority to a consensus, are such as to render unlikely appropriate and timely decisions on important questions.... Thus, there arises the unpleasant prospect of the establishment of new and expensive international organizations incapable of effectively performing the functions for which they were created.... It is a pity that this side of the Convention has not been developed in a practical way. Instead a truly historic opportunity to mold the legal framework governing human activities in the marine environment in such a way as to contribute effectively to the realization of a just and equitable international order in the seas ... has been lost.⁹⁰

The ambitious provisions of the UNCLOS have not all been implemented. But the following events are all very positive developments, ranking it among the most successful multilateral treaties in history. It has been ratified (or acceded to, via later acceptances) by 156 nations. It has been signed by some dozen other nations. This treaty was a "package deal" that could not necessarily be the talismanic answer for all nations. There is tension between certain regional regimes, such as the companion Fish Stock agreement, and the struggle to reconcile them with one constitution of the oceans.

The UN General Assembly accepted a renegotiated Part XI on deep seabed mining. That resulted in the US deciding to sign both side agreements (Part XI and Fish Stock agreements although it has yet to ratify the UNCLOS as a whole). There is now a functioning Law of the Sea Tribunal, which facilitates the convention's regime for compulsory dispute resolution.⁹¹

◆ §6.4 AIRSPACE ZONES

This section of the chapter identifies the various air zones and the degree to which State authority may be exercised in those zones. It analyzes State's rights and obligations: (A) in domestic (national) airspace; (B) in that of other States; (C) over international waters belonging to no one; and (D) in outer space.

A. DOMESTIC AIRSPACE

Few branches of International Law have developed as rapidly as International Air Law. Prior to World War I, there were no norms to govern international flight. The military use of aircraft quickly filled this vacuum. Hostile aircraft could approach more swiftly than approaching armies or warships. Rapid advancements in the technology of air travel profoundly accelerated the need to establish norms to control national airspace. Almost immediately, States claimed the right to include airspace within the definition of their "territory."

State practice quickly reflected the impact of air travel on international trade. A 1942 commentary in the *American Journal of International Law* addressed the significance of commercial air travel for internal security and foreign competition:

The unprecedented, accelerated speed of change in the last thirty years has been such that, politically, air navigation has already passed through many of the phases which it took sea navigation centuries to span.

As to air navigation, it may be observed that in 1910, the states were preoccupied only with guaranteeing the safety of their territory; the necessity of permitting other states to navigate freely to and over their territory was recognized to the fullest extent where this freedom did not affect the security of the state. The period 1910–1919 can thus be compared with that period in the history of shipping in which the adjacent seas were appropriated primarily to secure the land from invasion.

In 1919, the first consideration was still the security of the states, but ... some small clouds were already appearing on the horizon of the free sky. In the minds of some ... the idea took shape to use the power of the state over the air to protect its own air navigation against foreign competition. As in shipping, the pretensions to the appropriation of the sea and the power to restrict foreign sea commerce grew in proportion to the increase in the direct profits to be expected from them, so in aviation the pretensions to unrestricted sovereignty—not in doctrine but in practice—grew in proportion to the development of aviation during the period from 1919 to 1929.⁹²

National legislation imposed various limitations on international air travel. It prohibited the unauthorized entry of aircraft. These laws restricted freedom of navigation, types of importable cargo, and conditions of passenger travel. States soon recognized the need to enter into international treaties for the purposes of establishing mutual expectations and facilitating international trade.

1. Paris Convention The vertical extension of State sovereignty first appeared in the 1919 Paris Convention Relating to the Regulation of Aerial Navigation. Article 1 provided "that every Power has complete and exclusive sovereignty over the airspace above its territory." Under Article 15, each State party to this treaty could "make conditional on its prior authorisation the establishment of international airways and the creation and operation of regular international air navigation lines, with or without landing, on its territory."⁹³ As international commerce grew, the international community needed to solidify its expectations so that there could be a comprehensive air-treaty regime.

2. 1944 Chicago Convention The next multilateral air treaty became the cornerstone of International Air Law: the 1944 Chicago Convention on International Civil Aviation. Most nations of the world are parties to this treaty. Its fundamental provisions are:

Article 1 The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

Article 2 For the purposes of this Convention the territory of a State shall be deemed to be the land areas

and territorial waters adjacent thereto under the sovereignty ... of such State.

...

Article 5 Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services, shall have the right ... to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing.

Article 6 No scheduled [commercial] international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State....

These provisions codify the sovereign right to completely exclude air travel through the airspace above the State's landmass and above the territorial waters adjacent to its coastlines. France, for example, legally denied US President Ronald Reagan's request that US military aircraft fly over France during a 1986 retaliatory bombing mission in Libya. US warplanes were required to fly a circuitous route *around* France's territorial airspace. They proceeded on a much longer route, through the Straits of Gibraltar, in order to gain access to Libya via the western entrance to the Mediterranean Sea.

In most instances, States encourage *commercial* flights through their airspace in order to maintain economic ties with other States. The Chicago Convention governs both the nonscheduled flights of private aircraft and the scheduled flights of commercial passenger and cargo air services. The key articles, their intended applications, and the essential provisions on military and other state aircraft are abstracted later.

3. Private Aircraft Noncommercial private aircraft enjoy the general right to fly into or over state territory (Article 5 above). They may land for refueling and other purposes without prior permission. An English citizen may land to refuel his plane at a French airport while en route to Germany. That pilot must, however, file a flight plan at the flight's point of origin. France may require an alteration of that flight plan if the intended flight path interferes with any French regulation or security concerns. State practice is more restrictive in the case of commercial aircraft (Article 6 above). They may not fly

over or land in the territory of another country without advance routing or landing arrangements. Otherwise, the impacted State may undertake necessary measures to divert an intruding aircraft or require it to land.

4. Commercial Aircraft The International Civil Aviation Organization (ICAO) regulates international commercial aviation. Established by the State parties to the Chicago Convention, this international organization schedules air routes, cargo delivery, and passenger service. Under Article 44 of the Chicago Treaty, the ICAO promotes "the safe and orderly growth of international civil aviation throughout the world ... [by] development of airways, airports, and air navigation facilities ... [and avoidance of] economic waste caused by unreasonable competition."

The organization's member States are encouraged to use a neutral tribunal to resolve disputes involving the ICAO's administrative decisions. Article 84 provides that States may appeal such decisions "to an *ad hoc* arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice."⁹⁴ In 1989, the International Court of Justice reviewed an ICAO decision whereby the US was not legally responsible when one of its naval vessels shot down an Iranian commercial aircraft over the Persian Gulf. Iran filed a suit, asking the court to declare the ICAO's decision erroneous. The parties ultimately dismissed this suit in 1994 after a number of delays in its pleading phase.

The 1944 Chicago Convention did not resolve many of the problems associated with the scheduling of air services. The commercial airlines of the world formed a private organization called the International Air Transport Association (IATA), which has focused its work on achieving the Chicago Convention goal of avoiding "unreasonable competition." The IATA is essentially a cartel of private airlines attempting to avoid destructive or excessive competition among international airlines—an unusually competitive business. The IATA, for example, ensures that flights by competing airlines do not leave the same airport at the same time. Such competition would ultimately destroy one or more of the competitors.

In a related development, "Open Skies Agreements" create a free market for aviation services and provide substantial benefits for travelers, shippers, and communities as well as for the economy of each country. These agreements give the airlines of two or more countries the right to operate air services from any point in one country to any point in the other, as well as to and from

third countries. These rights enable airlines to network by using strategic points across the globe. In November 2000, for example, Brunei, Chile, New Zealand, Singapore, and the US concluded the Multilateral Agreement on the Liberalization of International Air Transportation to replace the bilateral agreements between them.

The US–Kenya open skies agreement of May 2008 is the twentieth such agreement between the US and an African nation. It permits airlines in both nations to determine routes and destinations based on demand. It also, characteristically, does not limit either the number of carriers or the number of flights that may serve both nations. This degree of governmental regulation not only allows “free” skies, but also ensures that market demand drives this process, rather than government.

That is not the case with the US–European Union agreement of November 2005. It was to be the successor to numerous bilateral civil aviation agreements between the US and EU member States. However, the European Court of Justice determined that it violated EU law [text-book §5.G.2.].

Some airlines have claimed that there is, in fact, a great deal of anticompetitive activity in international aviation. In 1983, Laker Airways of England filed lawsuits in Great Britain and the US, claiming that various Belgian, British, and Dutch airlines (IATA members) conspired to bankrupt Laker Airways because it offered very competitive airfares to the public. Members of the IATA allegedly perceived Laker’s operations as a threat to the price structure established by their association. Plaintiff Laker claimed that the IATA airlines “agreed to set rates at a predatory level to drive Laker out of business.” Laker also alleged that these international air carriers conspired to stop Laker from expanding its international air routes.⁹⁵

Restrictive business practices in the international airlines industry are not limited to just private airline carriers. Many governments subsidize their government-owned or certain private international airlines, a practice facilitating continuing operation and increasing their share of the international market. These subsidies permit the favored airlines to charge lower fares or operate at a better profit margin even when they charge the same or lower fares than their competitors. Subsidizing countries thereby create artificial economic barriers to normal market competition. They impose limitations on certain categories of importable cargo and on frequency of passenger aircraft entry into their airspaces. (Similar barriers to international competition are addressed in §12.2.C.)

In 1998, a European Union court annulled France’s 1994 plan to provide 20,000,000,000 francs—about US \$3.3 billion—to Air France.

The nations of the world recognized the need for an orderly disposition of claims against international air carriers, not long after the advent of commercial aviation. The 1929 Warsaw Convention thus applies “to all international transportation of persons, baggage or goods performed by aircraft for hire.”⁹⁶ The purpose of this constitution of the airways is to unify International Air Law, whereby any conflicting national laws of the State parties are supplanted by a treaty agreement. As noted in an annotated handbook on this convention, it “seeks to limit international air carriers’ potential liability in case of accidents, facilitate speedy recoveries by passengers, [and] unify laws in treaty countries....”⁹⁷

International air travelers can generally benefit from this treaty when there has been a “delay in the transportation by air of passengers, baggage or goods.” Under Articles 20 and 21, the treaty provides that the air carrier can avoid responsibility if it took all necessary steps to avoid the delay or the delay was caused by the passenger’s own negligence.

But Article 19 of the Warsaw Convention does not define the key term “delay.” The carrier is not liable for all delays. The delay may have been caused by some event or third party. Furthermore, a passenger cannot obtain legal relief against an airline registered in a Warsaw Convention country for exceeding a scheduled time limit. An “unreasonable” delay would be required, pursuant to the IATA regulations regarding delay.⁹⁸

5. State Aircraft

(a) Military Aircraft Public (as opposed to private) aircraft are operated by the military, customs, and police authorities. These flights are not generally governed by the 1944 Chicago Convention although it does make certain limited provisions for such aircraft. Under Article 3:

- (a) This convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.
- (b) Aircraft used in military, customs and police services shall be deemed to be State aircraft. [However,]
- (c) No state aircraft ... shall fly over the territory of another State or land thereon without authorization by special agreement.

Unlike nonscheduled private aircraft, government aircraft cannot enter another State’s national airspace

without its express prior consent. Israel apologized to Turkey for its allegedly unintended overflight of Turkish airspace in September 2007. Israeli jets were conducting a raid into Syria to bomb a suspected nuclear reactor. But overflight agreements are often made on a case-by-case basis between friendly countries. Before making an emergency landing in another State, a military pilot must seek permission to enter that State's airspace (and to land). This requirement prevents one State from sending its planes on a hostile mission under the pretext of a feigned emergency. Military flight agreements, such as those governing a State aircraft's entry into foreign airspace during joint military exercises, are normally made by formal agreements between affected States.

There are many gaps in treaty coverage, however. China claims a right to prohibit aerial surveillance over the South China Sea in an area well beyond its twelve-mile territorial sea. The US has occasionally claimed special "defensive sea areas" extending beyond its territorial sea—in time of war or declared national emergency. Article 3(c) of the Chicago Convention came into play when a US reconnaissance aircraft flew over international waters about 50 miles southeast of China's Hainan Island in April 2000. It collided with a Chinese jet fighter, which had been tracking its movements. Chinese authorities proclaimed that the US aircraft swerved and hit the Chinese jet. American authorities claimed that the Chinese jets that track the movements of US surveillance planes fly too close to them for safe

aerial operations. The Chinese pilot was allegedly at fault. (In spring 2009, the world watched when Chinese vessels in that vicinity shadowed a US spy vessel in international waters just off Hainan Island.)

The pilot of the US aircraft did not obtain verbal permission for the emergency landing in China. The Chicago Convention is not designed for noncommercial State aircraft. However, Article 3(c) provides that state aircraft may not overfly the territory of another State, and may not land without authorization by special agreement. Although the US plane landed on Chinese territory without verbal clearance, it did so under distress. There is no express exception to Article 3(c) for State aircraft in distress. Customary International Law recognizes that ships at sea have a right to enter another nation's ports when in distress. A similar right arguably applies to aircraft in distress, including state aircraft. Article 25, which does not apply to noncommercial state aircraft like the ones in this instance, provides that "Each contracting State undertakes to provide such measures of assistance to aircraft in distress as it may find practicable...."⁹⁹

The following case is a classic illustration of the tension associated with the presence of foreign State aircraft flying directly over another State's territory, even for a plane with no weapons systems. It further illustrates that more than one State can violate International Law when a single plane makes an unauthorized entry into another nation's airspace:

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Did the US violate Soviet airspace? If so, did any other nation incur State responsibility for breaching International Air Law? Was the Soviet Union being overly technical about the threat posed by this unarmed plane with no military capability?

There are a number of unresolved problems in International Air Law. Two of them are particularly sensitive. States have not agreed on the permissible degree of response to violations of national airspace or the altitude that constitutes the upper limits of their territorial airspace. The upper limit is important because it separates national airspace from outer space—the latter being *res communis*, and thus available to all nations.

(b) Missiles Munitions or other objects discharged from one State's aircraft or surface and subsurface platforms into—or over—another State's airspace are of course an intense violation of territorial sovereignty. The planned US placement of “defensive” missiles in Poland dictates that they never be fired over Russia, or any other non-consenting nation, absent a clear case of legitimate self-defense [Self-defense: §9.2.D.]. Russia's apparently responsive August 2008 placement of missiles in the Georgian province of South Ossetia would violate Georgian sovereignty—to the extent that Georgia retains sovereignty over that troubled border province now claimed by Russia (and recognized by only Russia and Nicaragua). If ever launched, Russia's missiles would be violating Georgian airspace.

That missiles may be test-fired presents an intriguing question when they are fired into an area that is *res*

communis. As the noted Washington and Lee University School of Law Professor Emeritus Frederic L. Kirgis suggests: “It would be a stretch to argue that customary international law prohibits the testing of *unarmed* missiles over the oceans, unless ships at sea or other lawful users of ocean space or air space are harmed. Customary international law reflects the practice of nation-states, and that practice for many years has encompassed missile testing over the high seas by the United States and others (most recently, by India) [*italics added*].” North Korea's July 2006 test-firing of unarmed missiles over the Sea of Japan did not violate Japan's airspace. Nor did they pass over any Japanese vessels (or airspace) before striking the ocean beyond any ocean zone controlled by Japan.¹⁰⁰

Were such missiles *armed*, the international community would have a far greater interest in even the most innocent of trajectories. Test-firing an unarmed missile is one thing; arming it is quite another, given the question of why a launching State would be using live weaponry in a supposed test.

6. Excessive Force How much force may a State use to repel intruders? A number of military planes have purposefully or accidentally entered foreign airspace. A number of commercial aircraft have also encroached on territorial airspace. In some parts of the world, these unexpected intrusions are routinely ignored. In some cases, however, the intruder has been ordered to change course, escorted out of the offended State's territorial airspace, fired on as a warning, forced to land, or actually shot down.

In the decade after World War II, deadly force was employed in many incidents involving nonmilitary aerial intrusions into national airspace. In the major international incident of 1955, an Israeli commercial plane flew into Bulgarian airspace while en route from Austria to Israel. A Bulgarian military aircraft shot it down over Bulgaria, killing all fifty-eight passengers. Israel instituted proceedings in the International Court of Justice. The court decided, however, that it could not hear the case because Bulgaria had not consented to the court's jurisdiction to hear such cases.¹⁰¹ Israel and Bulgaria ultimately negotiated a compensation agreement in 1963.

In 1983, a Korean Air Lines passenger jet, KAL Flight 007, was shot down over the Sea of Japan after it strayed into Soviet airspace. All 269 passengers and crew were killed. The Soviet pilot knew that it was a passenger aircraft. This incident generated a number of diplomatic protests, International Civil Aviation Organization deliberations, and several meetings of the UN Security Council. It also demonstrated the importance that the former Soviet Union attributed to the presence of any nonscheduled aircraft in its national airspace.

The US did not institute litigation against the Soviet Union (the International Court of Justice being a likely forum). KAL settled with families of the deceased victims in some 100 civil suits against the airline in the US. KAL was found liable for the willful misconduct of the crew, which had flown off-course for a number of hours. Suits involving such incidents have reached the US Supreme Court on more than one occasion.¹⁰²

Unfortunately, some States still use deadly force to react to nonmilitary intrusions of their airspace. Cuban military aircraft shot down a private US aircraft in a February 1996 dispute over whether the small Cessna was flying over Cuban territorial or international waters. It belonged to Brothers to the Rescue, a human rights organization whose members hoped to distribute anti-government leaflets to Cubans by air. In September 1999, Ethiopia shot down a private jet flying over Ethiopia, which was en route from Egypt to South Africa. This killed the British and Swedish copilots of a plane registered to a US company. The flight and plan had been approved by both countries. Ethiopia had declared a "no-fly zone" in the vicinity of the disputed border between Ethiopia and Eritrea.

7. Upper Limit The upper limit of territorial airspace has not been precisely established. While the 1944

Chicago Convention is the centerpiece of International Air Law, it does not define the extent or height of national airspace. The Legal Adviser of the US Department of State once claimed complete and exclusive sovereignty over air space that extended to 10,000 miles from the surface of the Earth. That 1950s announcement was not accepted elsewhere. The US now claims (unilaterally) that the dividing line between air and outer space is 80 kilometers above the Earth's surface.

A number of States have supported (but not officially claimed) the former Soviet Union's proposed 110 kilometers above sea level Karman Line. A global non-governmental organization agrees. That is the Fédération Aéronautique Internationale, which governs air sports and aeronautical world records. The Karman Line is associated with the Hungarian-American physicist von Kármán. He calculated that at 100 kilometers into the atmosphere, the air becomes so thin that a craft must travel at greater than orbital speed to stay aloft. The air there is too thin for aeronautic purposes. Orbits below the Kármán line quickly degrade, approaching or slamming into the surface of the Earth. Activity above that point is thus considered *astronautic* rather than *aeronautic*.

The UN Committee on the Peaceful Uses of Outer Space has done various studies and surveys. They have varied in terms of what factors would apply to establishing an agreeable definition. But there is no international agreement.¹⁰³

Different States, with varying political agendas, therefore claim different limits for distinguishing national airspace from outer space. As noted by Robert Goedhart, in his work at the University of Utrecht in the Netherlands: "In spite of extensive discussions, anything but agreement on the said boundary has been arrived at ... neither at a political level nor at a legal level, for which the tensions and enmity between the main spacefaring nations, the former Soviet Union and the United States, as a consequence of the Cold War are partly to blame."¹⁰⁴

As a practical matter, territorial airspace is limited to the navigable airspace over State territory and its adjacent territorial seas (twelve nautical miles from the coastline under the Law of the Sea Treaty). Not unlike the three-league cannon-shot rule of the early Law of the Sea (§6.3.B.), this is the practical limit claimed by most States that realistically characterize the extent of their controllable territorial airspace. Navigable airspace would then be the highest altitude attainable by military aircraft not in orbit.

B. AIRSPACE ABROAD

Although the 1944 Chicago Convention on International Civil Aviation is the fundamental air treaty, other treaties were needed to address issues that evolved during air travel after World War II. For example, could a State exercise jurisdiction over criminal offenses aboard its own aircraft when it was flying over international waters or in the airspace of another State? The need to expand jurisdiction over crimes aboard civil (nonmilitary) aircraft became apparent as States began to experience prosecutorial limitations because of treaty voids.

A classic instance of this vacuum emerged in 1950 when a US passenger assaulted several US citizens aboard a plane registered under a US airline company while it was flying over international waters. The Chicago Convention vests jurisdiction in the State where an incident occurs. But this event took place beyond national airspace. The American prosecutor resorted to US internal law. Under US law, there had to be a statute that specifically made the passenger's conduct a criminal act. The only relevant statute made it a crime to assault passengers on "vessels" that were "on the high seas." The plane was neither a vessel within the meaning of the only applicable statute nor was it "on" the high seas.¹⁰⁵ The US was unable to prosecute this individual, however, because of the absence of an applicable national law. The case was dismissed. The defendant was thus released from custody. The US Congress reacted by expanding this statute to include aerial offenses. This incident suggested the need for an international approach. State representatives ultimately negotiated and ratified a series of international treaties to fill such legal gaps.

1. Tokyo Convention After World War II, the wartime concern about hostile flights appeared to be eclipsed by another problem. Airlines with large fleets of commercial aircraft were understandably concerned about their aircraft being subjected to the exclusive control of foreign nations while operating within foreign airspace. Within two decades after the war ended, members of the airline industry convinced their respective governments to negotiate the first multilateral air treaty containing several jurisdictional alternatives—the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft. It became effective in 1969 and has been ratified by most nations of the world.¹⁰⁶

The Tokyo Convention established a framework for punishing individuals who commit violent crimes

during international flights. This treaty emphasizes the jurisdiction of the aircraft's State of registration (often called the *flag State*) rather than that of the airspace of the State where the offense is committed. This treaty facilitated prosecution under jurisdictional principles not contemplated by the 1944 Chicago Convention while effectively expanding the range of sovereignty now exercisable in the airspace above distant lands. Because States had the exclusive sovereign power over the airspace above them (Chicago Convention), they had the correlative right to yield this total control of their airspace for mutually acceptable purposes. Under Article 3 of the Tokyo Convention, the "State of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board [and each participating State] shall take such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State."

Under Article 4 of the Tokyo Convention, a State that is not the State of registration cannot interfere on the basis that its territorial criminal jurisdiction also applies in its own airspace—except in the following specific cases [extraterritorial jurisdiction: §5.2.]:

- (a) The offense has an effect on the territory of such State (territorial principle).
- (b) The offense has been committed by or against a national or permanent resident of such State (nationality and passive personality principles).
- (c) The offense is against the security of such State (protective principle).

Assume that a Japanese airliner is flying in an easterly direction 25,000 feet over Hawaii en route to Canada. A German passenger assaults and kills a French citizen during the flight. All of these countries are parties to both the Chicago and the Tokyo conventions. Under the territorial principle of international criminal jurisdiction, the incident occurred "in" the US because the Japanese aircraft was flying within the navigable airspace of a state of the US. Under the 1944 Chicago Convention, the US has "complete and exclusive sovereignty over the airspace above its territory." Japan is the State of registration (*i.e.*, the *flag State*). Under Article 3 of the 1963 Tokyo Convention, Japan would be "competent to exercise jurisdiction over offences and acts committed on board [its airliner and should] take such measures as may be

necessary to establish its jurisdiction.” Since the US is a party to the Tokyo Convention, it will yield its territorial right to Japan to prosecute the German passenger. Japan will be obliged to prosecute this German citizen for the offense aboard the Japanese aircraft (unless it accedes to a US request to have the perpetrator tried in the US).

Under Article 4 of the Tokyo Convention, States other than the State of registration should not interfere by exercising their criminal jurisdiction over the offender. While the US has territorial jurisdiction over the German passenger, it should assist Japan in the latter’s efforts to prosecute him. If the plane lands in Hawaii, the US should grant Japan’s extradition request.

There are significant exceptions to the treaty norm of ceding jurisdiction to the State of registration. Other States may prosecute the German citizen in four situations. First, another State may prosecute him if his crime has an effect on its territory. This exception draws from the “effects doctrine” established by the Permanent Court of International Justice in the *S.S. Lotus Case* in 1927 [§5.2.B.1.]. The Tokyo Convention thus provides for applications of the territorial principle of international criminal jurisdiction. If the captain of the Japanese airliner has to alter course or altitude to respond to the incident, that action might violate navigational rules established for the safety of aircraft. The US could then request that the plane land and prosecute the German for various crimes against the US—over Japan’s objection. This is an example of the territorial principle of jurisdiction, which remains available under the terms of the Tokyo Convention.

The second and third bases for States other than Japan (the State of the aircraft’s registration) to exercise jurisdiction over the German citizen employ the nationality and passive personality principles of criminal jurisdiction. Germany and France may prosecute the German passenger under Article 4b of the above Convention: The “offense has been committed by or against a national or permanent resident of such State [that is a treaty party].” Germany may prosecute its national under the nationality principle; and France may prosecute the German passenger for killing a French citizen, under the passive personality principle.

The fourth exception to Japan’s primary jurisdiction as the flag State involves the protective principle of jurisdiction. The German passenger may be prosecuted outside of Japan if this “offense is against the security” of some other State. It is unlikely that the US would

actually claim that its security was threatened by the killing of the French citizen or, alternatively, by the unusual maneuvers of the Japanese aircraft over Hawaii. Suppose, however, that the French citizen was working for the US Central Intelligence Agency and was carrying sensitive documents, which the German stole and which were the reason for the murder aboard the aircraft. US security interests might support the exercise of US jurisdiction under the “security exception” to Japan’s primary jurisdiction over its aircraft.

These additional jurisdictional bases for extending the range of State sovereignty have invoked all the typical rationales for international criminal jurisdiction except for one—the universality principle. The Hague Convention (discussed below) was required because the Tokyo Convention was not intended to cover such interferences with civil aviation. The Tokyo Convention paid lip service to primary jurisdiction of the State of registration, while at the same time retaining all of the criminal jurisdictional principles. These were employed as express exceptions to the rule that the flag State would have the initial option to prosecute criminal conduct occurring aboard its aircraft operating over another State and international waters.¹⁰⁷

2. Hague Convention The 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft added another jurisdictional alternative for prosecuting crimes on international flights. The universality principle provides that certain crimes are sufficiently heinous to be considered crimes against all States. Every State would thus have the jurisdiction to capture and punish or to extradite the perpetrator of such crimes [§5.2.F.]. The Hague Convention extends the universality principle of jurisdiction to aircraft hijacks.

The treaty’s fundamental theme is that all States must take the necessary steps to prosecute or extradite those who unlawfully seize commercial aircraft. This treaty is a direct response to the rash of international hijacks that began in the late 1960s. Too many nations clandestinely supported the political goals underlying those hijacks, seeking to publicize the political problems of the Middle East. These nations characterized brutal crimes aboard hijacked aircraft as “political conduct” rather than extraditable common crimes [§5.3.C.2(a)]. They granted asylum to, or did not otherwise prosecute, the responsible hijackers. Consequently, there was a growing international desire to

deny such asylum to those involved in what was otherwise a “universal” crime. The 1970 Hague Convention neither addresses nor precludes this practice. Under the 1976 European Convention on the Suppression of Terrorism, however, offenses governed by the 1970 Hague Convention cannot be characterized as “political” offenses. This European treaty applies to only a handful of nations, however, that are parties to the Hague Convention.¹⁰⁸

The Hague Convention was nevertheless the first *multilateral* step toward establishing aircraft hijacking as a universal crime. More than 140 nations are parties to this treaty. It permits the exercise of jurisdiction over international flights by States other than the State of registration. Under Article 4 of the Hague Convention, each “[c]ontracting State shall take such measures as may be necessary to establish its jurisdiction over the offense ... [and] shall likewise take such measures as may be necessary to establish ... jurisdiction over the offense in the case where the alleged offender is present in its territory and it does not extradite him....” Article 8 provides that the “offense shall be treated, for the purposes of extradition between Contracting States, as if it had been committed *not only* in the place in which it occurred *but also* in the territories of the States required to establish their jurisdiction in accordance with Article 4” (*italics added*).

Assume that the hypothetical German terrorist mentioned in this section forcefully takes control of the Japanese airliner over Hawaii. The hijacker causes it to land in Canada to refuel. The plane is then diverted to Libya. That nation does not comply with its treaty obligation to capture and prosecute the hijacker, who has committed a universal crime under the Hague Convention. The terrorist then escapes to Lebanon. All of these nations are parties to the Hague Convention. What States may thereby exercise jurisdiction over the German terrorist under the 1970 Hague Convention? Under Article 4, each State party must take measures to ensure that jurisdiction is somehow established. In this case, Japan could exercise its jurisdiction over the terrorist, but only if Lebanon were convinced to surrender the terrorist to Japan. The latter is the State of registration of the aircraft with “territorial” jurisdiction over events occurring aboard it anywhere in the world.

Under Article 6, any State “in the territory of which the offender or the alleged offender is present shall take him into custody or take other measures to ensure his presence.” Canada or Lebanon would have the

obligation to exercise jurisdiction in the case of such a “universal” crime. The Hague treaty requires them to take the necessary steps to prosecute or extradite the terrorist—either when the plane landed for refueling in Canada, or when it arrived at the final destination of Libya.

Because neither Canada nor Libya actually captured the hijacker, Lebanon would incur the ultimate obligation of prosecution or extradition under the Hague Convention. Lebanon would be justified in treating the terrorist’s act “as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction” over this hijacking incident. Lebanon is thereby obligated to capture this terrorist upon arrival in its territory. Mere custody of the terrorist would give Lebanon the right (or obligation) to either try him or extradite him to Japan, Canada, or the US. Parts of the crime occurred in their respective territories.

Unfortunately, certain States have clandestinely supported hijacking incidents while appearing to satisfy their Hague Convention prosecution obligations. Under Article 7, a State that does not extradite a hijacker is “obliged, without exception whatsoever ... to submit the case to its competent authorities for the purpose of prosecution.” States that are sympathetic to the political cause of a particular hijacker, however, have sometimes allowed the terrorist to “escape.” Alternatively, they have conducted mock trials for the purpose of concluding that the terrorists were not guilty of hijacking charges in violation of the Hague Convention. In 1973, for example, an Italian court released the hijackers of an Israeli passenger plane and tried them in absentia. Cyprus released Arab terrorists who attacked an Israeli plane in Cyprus after they were sentenced to imprisonment. These States technically met their treaty obligation to “prosecute” terrorists who seize commercial aircraft.¹⁰⁹

3. Montreal Sabotage Convention The related 1971 Montreal Sabotage Convention similarly establishes universal jurisdiction over those who bomb or sabotage (rather than merely seize) commercial aircraft.¹¹⁰

The terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland in 1988 triggered the criminal liability of the Libyan individuals allegedly responsible for the deaths of 230 passengers. Libya had the responsibility to prosecute these perpetrators, or to turn them over for trial in the United Kingdom or the US,

where they were indicted. UN Security Council Resolution 731 of 1992 determined that Libya must release them for trial. Libya responded with a suit in the International Court of Justice (ICJ), claiming that the US and the UK had themselves breached the Montreal Convention. Libya presented the theory that they had rejected Libyan efforts to resolve this matter in good faith and that they both threatened the use of force in response to this incident. Libya thus requested that the ICJ issue an interim order prohibiting these countries from acting in any way that would further threaten peaceful relations. Libya was presumably concerned that, like the 1986 US bombing of Tripoli in response to another terrorist incident linked to Libya, these nations might undertake a military mission to extract the Libyan agents allegedly responsible for the bombing of Pan Am Flight 103.¹¹¹

The Court decided *not* to grant Libya's request for these special measures, pending the resolution of this matter between Libya, the US, and the UK. The essential stumbling block was that another UN organ, the Security Council (Resolution 731), had already demanded that Libya turn over the terrorists for trial elsewhere. The ICJ did not want to be in the awkward position of rendering an injunction against US-UK action under the existing norm of International Law that prohibits the use of force to resolve disputes. The Court avoided this dilemma by noting that Libya chose instead to base its request for relief on the Montreal Convention, which does not address reprisals. As described by Guyana's ICJ Judge Shahabuddeen:

the decision [that] the Court is asked to give [in favor of Libya] is one [that] would directly conflict with a decision of the Security Council.... Yet, it is not the jurisdictional ground for today's Order [denying Libya's request that the US and UK not take any action involving the use of force until this case is resolved on its merits]. This [denial] results not from any collision between the competence of the Security Council and that of the Court, but from a collision between the obligations of Libya under the decision of the Security Council and any obligation it may have under the Montreal Convention. The [UN] Charter says that the former [must] prevail.

In 1998, almost six years after Libya instituted this suit, the ICJ finally ruled that it had jurisdiction to hear this

case.¹¹² In so doing, the ICJ acknowledged the potential for conflict between the UN Charter and other international agreements. Libya's claim under the Montreal Convention was that it was competent to investigate its own agents who were on Libyan soil. But the Security Council had ordered Libya to release them for trial *elsewhere*, given Libya's apparent responsibility for this act of State terrorism. Under Article 25 of the UN Charter, UN members agree to comply with decisions of the Security Council. Under Article 103 of the Charter, the Charter prevails "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement...." Thus, Libya's treaty-based right to investigate and try these individuals was superseded by the Security Council action and the conflict resolution mechanism expressed in Charter Article 103.

Libya finally turned these two men over for trial at The Hague, which was partially attributable to negotiations involving the potential lifting of sanctions against Libya. Camp Zeist, a Dutch Air Force base in Utrecht, Netherlands, was temporarily declared sovereign territory of the United Kingdom under a treaty between the British and Dutch governments. The three civilian judges were Scottish. Scottish law applied, per Lockerbie's location within Scotland. At the 2001 trial, one of these Libyan intelligence officers was acquitted for insufficient evidence, notwithstanding his close ties with the convicted defendant. The latter is serving his sentence in The Netherlands. The trial site was then decommissioned and returned to the Dutch government. One appeal was rejected and another has been pending since June 2007. The trial court's decision is the most comprehensive recitation of the events during and after the bombing of Pan Am 103.¹¹³

C. OUTER SPACE

The exploration of outer space began in 1957, when the Soviets launched their Sputnik satellite. This was the first man-made object to orbit the Earth. In 1961, the UN General Assembly resolved that international "law, including the Charter of the United Nations, applies to outer space and celestial bodies."¹¹⁴

The following Charter-based principles for peaceably governing activities in the rest of the universe exist, but have yet to be fully defined:

CHART 6.4 OUTER SPACE "CHARTER"

1958 UNGA resolution	UN General Assembly Res. 1348(XIII): Peaceful use of outer space and avoidance of national rivalries in outer space
1959 UNGA resolution	Res. 1472(XIV): Freedom of space exploration <i>and</i> UN establishes the Committee on the Peaceful Uses of Outer Space
1961 UNGA resolution	Res. 1721(XIV): Space to be used for benefit of all humankind
1962 UNGA declaration	General Assembly Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space: Resolved to conclude a nuclear test ban treaty; did not specifically recognize military use of outer space (3 ILM 157)
1963 treaty	Treaty Banning Nuclear Weapon Tests in Atmosphere, Outer Space and Under Water: No nuclear explosions are permitted in outer space (2 ILM 883)
1963 UNGA resolution	Res. 1884(XVIII) Regarding Weapons of Mass Destruction: US and USSR are not to station nuclear or other weapons of mass destruction in outer space (2 ILM 1192)
1967 UNGA treaty regime	Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies Outer Space Treaty: The Magna Charta of outer space regime; no weapons of mass destruction allowed; no military bases or maneuvers in space, although use of military for science; implicit acceptance of conventional weapons (6 ILM 386)
1971 convention	International Liability for Damage Caused by Space Objects: Launching State liable for damage caused by falling space debris (Liability Convention) (10 ILM 965)
1979 UNGA resolution	Moon Treaty: Clarifies ambiguities in 1967 Outer Space Treaty; moon subject to same demilitarization regime as other bodies. "Peaceful purposes" remains undefined (18 ILM 1434)
Various bilateral treaties	Most prominent are the SALT I and II Agreements between the US and former USSR providing for strategic arms limitations (20 ILM 477; 26 ILM 232)

Note: ILM refers to *International Legal Materials*, published by the American Society of International Law in Washington, D.C.

1. Moon Treaty The current status of outer space is analogous to the historical maritime concept of *res communis*. The High Seas are *res communis*. They cannot be owned or subject to control by any nation. They, therefore, remain open to the peaceful use of all States. Under International Law, space and the planets within it are governed by the same regime. The 1967 UN Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies Outer Space Treaty is the *Magna Charta* of outer space. It established mutual State expectations about international relations in outer space. Its essential provisions are as follows:

- ◆ *Article I*: [the] "exploration and use of outer space ... shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of

economic or scientific development, and shall be the province of all mankind."

- ◆ *Article II*: "Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."
- ◆ *Article III*: [the] "activities in the exploration and use of outer space ... [are governed by] international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding."
- ◆ *Article VIII*: "A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body..."¹¹⁵

International Law thus mandates free access to outer space, the moon, and other celestial bodies. For example, the US landed on the moon in 1969. Under the 1967 Moon Treaty, it did not thereby acquire any sovereign rights. The Soviet Union was the first to land unmanned spacecraft on the moon, Venus, and Mars. But neither nation can claim any of these celestial bodies, nor preclude other nations from gaining access to them. The universe may be explored for scientific purposes, but not to expand national sovereignty.

The Moon Treaty text purports to demilitarize outer space. Its national signatories “undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner ... [because the] moon and other celestial bodies shall be used by all State Parties to the Treaty exclusively for peaceful purposes.” The treaty does permit a limited military presence in space. Article IV concurrently provides that the “use of *military* personnel for scientific research or for any other peaceful purposes shall not be prohibited” (emphasis added).

The US and China present two of the major challenges. The US has announced its plans for a missile shield program in the former Soviet Union member nations of Poland and the Czech Republic. Having even “defensive” missiles so close to Russia was bound to spawn the inklings of a fresh Cold War. In August 2007, Russia resumed its long-range strategic bomber patrols. The increase in oil prices has allowed Russia to increase its military spending. In 2008, Russia announced the possibility of its strategic air force flights landing in Cuba to refuel. During the August 2008 Georgia-Russian crisis, Russia moved missiles into two disputed territories historically a part of Georgia (the US having strongly urged Georgian membership in NATO starting the year before). That a cross-Georgian pipeline is the only one in the region not controlled by Russia arguably played a role in its more aggressive military presence.

In October 2006, the US announced a new national space policy (which may not be necessarily new, since the US did not ratify the above, and most vital, Moon Treaty). National security will be at the helm of possible development of space-based weapons. The US had already withdrawn from the Anti-Ballistic Missile Treaty in 2002 [Multilateral Agreements: §9.4]. This fresh

approach directs the US Secretary of Defense and the Director of National Intelligence to “develop and deploy space capabilities that sustain U.S. advantage and support defense and intelligence transformation,” and to “develop capabilities, plans, and options to ensure freedom of action in space, and, if directed, to deny such freedom of action to adversaries.”¹¹⁶ Space may be comparatively militarized, but it may not be long before it’s weaponized. (The US also announced its intent to return to the Moon by 2024, to establish an international base camp.)

China added fuel to this new race in space by its weapons test that, for the first time in 2007, used an anti-satellite weapon to destroy one of its weather satellites at 500 miles above the earth. Russia and the US had done so, but retreated from such activity in the 1980s. The successful Chinese test brought down a potentially failing satellite that would have fallen to earth. It simultaneously launched China into the first such event in twenty years. In February 2008, a US missile cruiser shot down a crippled spy satellite. This was viewed as the Pentagon’s unscheduled test of its anti-ballistic missile program. Unlike the Chinese test, the US provided notice of this event as required by treaty. In September 2008, China facilitated its first spacewalk. China also hopes to build its own space-station, launching other countries’ fear that it could gain technical secrets that could be applied to its global arms industry.

Thus, China and the US have taken provocative steps that may lead to a fresh arms race in space. Many nations have therefore called for a new treaty, referred to as the Treaty on the Prevention of an Arms Race in Outer Space. It would ban all weapons in space, even those characterized as “defensive.”¹¹⁷ The UN General Assembly’s 2007 draft resolution on page 339 expresses the immense concern of many State members about the dangers of the above-described events.

2. Nuclear Test Ban Treaty The ostensible demilitarization language in the 1967 Outer Space Treaty was drawn in part from the 1963 Nuclear Test Ban Treaty, whose original members were the United Kingdom, the former Soviet Union, and the US. Most nations of the world are parties to the Nuclear Test Ban Treaty [§9.4.C.]. Article I of the Moon Treaty contains a promise that each member “undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test

Prevention of an Arms Race in Outer Space

UNITED NATIONS GENERAL ASSEMBLY FIRST COMMITTEE

DRAFT RESOLUTION, SIXTY-SECOND SESSION, AGENDA ITEM 96

U.N. Doc. A/C.1/62/L.34 (17 October 2007)

THE GENERAL ASSEMBLY,

...

1. *Reaffirms* the importance and urgency of preventing an arms race in outer space and the readiness of all States to contribute to that common objective, in conformity with the provisions of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies;

2. *Reaffirms its recognition*, as stated in the report of the Ad Hoc Committee on the Prevention of an Arms Race in Outer Space, that the legal regime applicable to outer space does not in and of itself guarantee the prevention of an arms race in outer space, that the regime plays a significant role in the prevention of an arms race in that environment, that there is a need to consolidate and reinforce that regime and enhance its effectiveness and that it is important to comply strictly with existing agreements, both bilateral and multilateral;

3. *Emphasizes* the necessity of further measures with appropriate and effective provisions for verification to prevent an arms race in outer space;

4. *Calls upon* all States, in particular those with major space capabilities, to contribute actively to the objective of the peaceful use of outer space and of the prevention of an arms race in outer space and to refrain from actions contrary to that objective and to the relevant

existing treaties in the interest of maintaining international peace and security and promoting international cooperation;

5. *Reiterates* that the Conference on Disarmament, as the sole multilateral disarmament negotiating forum, has the primary role in the negotiation of a multilateral agreement or agreements, as appropriate, on the prevention of an arms race in outer space in all its aspects;

6. *Invites* the Conference on Disarmament to complete the examination and updating of the mandate contained in its decision of 13 February 1992 and to establish an ad hoc committee as early as possible during its 2008 session;

7. *Recognizes*, in this respect, the growing convergence of views on the elaboration of measures designed to strengthen transparency, confidence and security in the peaceful uses of outer space;

8. *Urges* States conducting activities in outer space, as well as States interested in conducting such activities, to keep the Conference on Disarmament informed of the progress of bilateral and multilateral negotiations on the matter, if any, so as to facilitate its work;

9. *Decides* to include in the provisional agenda of its sixty-third session the item entitled "Prevention of an arms race in outer space."

explosion, or any other nuclear explosion, at any place under its jurisdiction or control..."

This language, contained in both the Test Ban Treaty and the Outer Space Treaty, is ambiguous. It was the product of a compromise to ensure the participation of the then-existing space powers in the Outer Space Treaty. They would not approve a *total* ban on a military presence in space. But in 1998, India and Pakistan's respective nuclear testing programs generated a fresh resolve to broaden participation in this particular treaty.

Suddenly, the world seemed poised to deal with another crisis, this time between regional rivals. That year, the US Departments of State and Defense thereby objected to President Clinton's approval of the sale of satellite technology to the People's Republic of China. This was a "dual technology" transfer. It focused on commercial communications equipment but was readily convertible to weapons guidance systems. It arguably violated various treaties, including the 1972 Anti-Ballistic Missile Treaty, which outlaws missiles in outer space.

The treaty concern about the potential militarization of space was also the basis for the Soviet claim that the US would have violated the Moon Treaty if it had implemented the so-called Star Wars Strategic Defense Initiative announced by the Reagan administration in 1983. Under that proposal, the US considered placing “defensive” nuclear military installations in outer space to neutralize Soviet weapons—and those of other countries—before they could reach the US. Then, in 1997, the US military announced its plans to aim a laser at a US satellite in space. The purpose was to test methods for protecting satellites from jamming and being otherwise disabled. This spawned concern in the US Congress that Russia might respond by resurrecting its own testing involving ballistic missile shots at its satellites. The US executive branch would later ratchet up the tension by several notches.

In May 2001, US President Bush took steps to negate the US treaty commitment not to place missiles in space (and resurrect the Reagan proposal of 1983) to the disappointment of many US allies.¹¹⁸ US Defense Secretary Rumsfeld ordered the Pentagon to review missile defense options and to consider outer space as the battlefield of the future, but not to answer questions regarding whether the US plans to develop space weapons. This capability would, under the aegis of avoiding a space-based Pearl Harbor, possibly deploy space weapons to defend US satellites and to destroy those of its foes.¹¹⁹

3. Liability Convention The Moon Treaty incorporates some nonmilitary concerns of the international community. It requires participants to assume full civil liability for their activities in outer space that cause harm to any of Earth’s inhabitants. Under Article VI, launching nations “bear international responsibility for national activities in outer space....” This requirement inspired the creation of the 1971 Liability Convention under which ratifying States have accepted automatic responsibility for damage caused by their spacecraft upon reentering Earth’s atmosphere.

Under Article II of the 1971 Liability Convention, a “launching State shall be absolutely liable [even if its conduct is not negligent] to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight.” Over 17,000 manmade objects have fallen back to earth. There are now about 18,000 such objects orbiting in outer space. The launching State must provide advance notification of an anticipated

breach of airspace caused by a falling object. This convention was applied in 1979 when Canada lodged a claim against the former Soviet Union, alleging that the latter nation did not comply with its treaty obligation to notify Canada of a nuclear-powered satellite’s potential reentry into Canadian airspace. Canada claimed that when “Cosmos 954” fell, it deposited harmful radioactive debris in various parts of Canada’s Northwest Territories. Canada’s claim was later resolved diplomatically.¹²⁰

Like car accidents, collisions in outer space have been rather contentious. In February 2009, for example, Russia and the US sparred over responsibility for a huge satellite collision. It occurred 500 miles over Siberia. The nearly one-ton Russian spacecraft was designed for military communication. The more than half-ton US “Iridium” satellite was on a joint commercial-defense mission. This collision scattered its wreckage over an area estimated to range between 300 and 800 miles above the earth. That debris is thus a potential threat to all other orbiting satellites, including the International Space Station. This incident alone generated some 1,000 objects at least four inches in diameter. Just these collision remnants will threaten other satellites for an estimated 10,000 years. Scientists are skeptical about the likelihood of a cleanup, which would be costly and risk more collisions.

The research and exploration of outer space has been essentially “on hold” in the sense that there was no space race between the two superpowers for the two decades after the Cold War. Furthermore, economic considerations made it difficult for the US and Russia to continue the massive planning that occurred immediately after the Soviet Sputnik went into orbit in 1957. Yet all States are interested in pursuing the age-old dream of space travel. With world financial markets on a virtual roller coaster, international cooperation may be the only way to tap the many resources available in outer space. In the interim, private investment is taking the lead with evolving telecommunications projects in outer space.¹²¹

4. The Future “Where do we go from here?” This familiar question has special meaning in the context of outer space. The population continues to outgrow food supply. The environment is unable to meet demands currently being placed on it. Consider the future, when at present: 10 countries are able to launch their own satellites; over 50 nations and international organizations (e.g., the European Space Agency and NATO) have satellites in orbit; 3,200 satellites are operating in space; there are over

13,000,000 satellite radio listeners—just in the US; and over 16,000,000 satellite dishes—just in the US.¹²² Hundreds more are expected to be in orbit in the coming decade, especially as the information age evolves via space technology. As described in the following *Outlook on Space Law* excerpt, there is no guarantee that existing charters and organizations will be able to meet the evolving demands of life in the twenty-first century. Comparable to the 1960s US-Soviet Union space race, the key players are now China and Japan. The key issue is, as in so many other subsets of contemporary International Law, the jointly-pursued security of all nations.¹²³

The Achilles heel in the UN Moon Treaty system is the lack of specificity regarding the most sensitive issues. As already described, space is not supposed to be militarized. Yet treaty articles permit a military presence in space as long as it is “for scientific research or for any other peaceful purposes.” As lamented by the Director of the UN Office for Outer Space Affairs and President of the International Institute of Space Law:

The five [multilateral] outer space treaties lay out general legal rules without providing specific standards or procedures by which the treaties are to be implemented and by which space activities are to be controlled. In doing so, they create technical and legal weaknesses in the treaties. To give just two examples: in the Outer Space Treaty, Article XI requires States to “adopt appropriate measures” so as to avoid the harmful contamination of the Earth and outer space environments while conducting space activities. However, the treaty does not recommend the measures that are to be taken.... In the Liability Convention, procedures for rendering assistance as provided for in Article XXI (which deals with large scale danger to human life by damage caused by a space object [falling] on Earth) are not established.¹²⁴

The UN Committee on the Peaceful Uses of Outer Space has been the standing committee for dealing with space issues for the last half of the twentieth century to the present. The time may be ripe for a World Space Organization—known in contemporary pop culture as the “Federation Council” (see *Star Trek* episode appearing at the beginning of this chapter). Such a new international organization would receive and provide the specialized expertise for achieving objectives like those enshrined in the UN Charter at the dawn of

what was then a new era in international relations. The international political environment appears to be more amenable to augmenting the UN’s outer space programs in the new millennium of interplanetary relations—now that Cold War confrontation is no longer an irrefutable fact of life. Yet the cost and complexity of space exploration is astronomical. This organization could be the catalyst, however, for managing resources, technology, and manpower for the benefit of all nations—not unlike the work of the UN’s ISA for the oceans of the globe.¹²⁵

Unlike the Law of the Sea with its now functioning Tribunal, there is no comparable sitting dispute resolution entity. Given all the regulations suggested by the Moon Treaty, Liability Convention, and various other space-related regimes, an International Law of Space is currently unable to function with the vitality associated with today’s land, air, and sea disputes. One might argue, instead, for an *interdisciplinary* approach to the settlement of disputes in space. Regardless of approach, the UN or another relevant entity must develop a comparable system of dispute resolution for this next frontier.¹²⁶

In the twenty-first century, people will likely inhabit space stations and other planets for extended periods of time, if not permanently. Commencing in 1984, the US forged a cooperative effort with fourteen other countries and the European Space Agency to develop an International Space Station by 2010. In November 1998, Russia launched the initial module of the International Space Station. Fifteen nations now participate in this project, consisting of 100 elements, which was completed in 2006. The living space will be about the size of the cabins of two 747 jets. It will be an orbital home for at least fifteen years and a stepping-stone for the potential habitation of other planets.¹²⁷ US spacecraft are now on Mars and orbiting Mercury—our solar system’s innermost planet.

Will those societies govern themselves in accordance with the peaceable norms of International Law developed on the Planet Earth? The critical questions that will have to be answered include the following:

- (1) Will interplanetary colonization result in “States” as we now know them?
- (2) Will the UN Charter’s prohibition against the use of force actually be extended into space? Or be abandoned? Supplanted by some other regime?

- (3) Will the national entities on Earth, referred to as States, apply Earth-bound legal principles to the vast reaches of outer space?
- (4) Will various social groupings in space apply different paradigms, which each planet or solar system considers appropriate for their independent galaxies separated by light years of travel?
- (5) Will the existence and discovery of another species of life make these questions irrelevant?

The following essay projects the likely integration of law and technology, which will be required by the demands of space travel, and the potential for either introducing or joining colonies on other planets:



Outlook on Space Law Over the Next 30 Years

GABRIEL LAFFERRANDERIE (EDITOR),
INTRODUCTION, AT 6

Kluwer Law International (1997)

Go to Course Web page at
<<http://home.att.net/~sломansonb/txtcsesite.html>>.
Under Chapter Six, click Space Law Outlook.

◆ PROBLEMS

Problem 6.A (after §6.2.A. Bruges Declaration): Note the following timeline—January 2003: President Bush announces the US readiness to attack Iraq, regardless of whether the US can secure an authorizing UN Security Council resolution. March 2003: The US attacks Iraq. April 2003: Baghdad falls to US forces. May 2003: President Bush declares an end to major combat operations, and a US diplomat replaces a US general as Iraq's governor. July 2003: Iraq's Interim Governing Council—composed of 25 Iraqis appointed by American and British officials—is inaugurated although US diplomat Paul Bremer retains ultimate authority. October 2003: Coordinated suicide attacks in Baghdad launch a campaign where hundreds die and thousands are wounded over the next two years. Insurgents increasingly victimize civilians, Iraqi security forces, and foreign aid agencies—not just US troops. December 2003: A directive issued by the US Deputy Secretary of Defense bars

France, Germany, and Russia from bidding on lucrative contracts for rebuilding Iraq.

March 2004: The Iraqi Governing Council signs an “interim” constitution. April 2004: The US agrees to a UN proposal to replace this Council with a caretaker government. June 2004: The US announces the end of its occupation of Iraq. September 2004: Estimated Iraqi civilian deaths, since the start of the Iraq War, range from 12,000 to 14,000. September 15, 2004: UN Secretary-General Kofi Annan says the war against Iraq was illegal and a violation of the UN Charter. The Bush Administration requests that the Senate divert \$3.4 billion of the \$18.4 billion Iraq reconstruction budget to improve its security. The worsening security situation—with pockets of Iraq essentially under the control of insurgents—threatens to disrupt national elections (then scheduled for January 2005). November 2004: US forces initiate a major assault on Falluja, which has been under the control of insurgents since May. Falluja had been severely damaged by artillery, air and tank bombardments, while most of the city's 300,000 residents had not returned.

January 2005: Iraq's elections select a National Assembly. A total of 8.5 million people voted, representing about 58 percent of those Iraqis eligible to vote. Violence accompanies the voting, with 260 attacks taking place on election day, the largest number since the war began. June 2005: The US commander of US forces in the Middle East states that the Iraq insurgency remains as strong as it had been at the start of 2005 and the number of Iraqi civilian deaths was then estimated to be 25,000. A private estimate claims that these deaths exceed 100,000.

August 2008: On the eve of a national election for a new US president, the sitting President announces *plans* to observe a timetable for the pullout of US troops within a time certain—although the US will maintain a large military presence in Iraq, for years to come, because of an agreement for the US to indefinitely retain military bases in Iraq. The newly-elected President confirms the US intent to pull most troops out of Iraq in sixteen months after taking office in January 2009.

Assume that the Bruges Declaration is an accurate restatement of the contemporary law of belligerent occupation. Did the US comply with it? Four students or groups will debate this matter. They will represent: (1) the Iraqi government, as of January 2009; (2) the US; (3) Iraqi insurgents, seeking the departure of *all* US military personnel and base closures; and (4) the UN.

Problem 6.B (end of §6.2.): Assume the following facts: Iran (or its predecessor Persia) has exercised sovereignty over the Persian Gulf island of Kais (Arabic—or Kish in Persian) as a result of a military conquest 500 years ago. It is located near Iran's coastline. Assume further that Iran and Iraq are now at war (sometime during their 1980–1988 war). Iraq's military forces seize Kais and refuse to return it to Iranian control. Iraq does not physically occupy Kais, but its military vessels prohibit Iran from gaining any access to Kais. Iran takes no counteraction until fifteen years later. It then lodges a formal diplomatic protest with Iraq, disputing Iraq's current control of Kais and its surrounding waters. Iran insists that Kais remains under Iran's historical territorial sovereignty.

Two students will act as representatives for Iran and Iraq. They will debate whether Kais is now legally owned by Iran or Iraq.

Problem 6.C (§6.3.B., after Territorial Sea): The US and the hypothetical nation of Estado are on the verge of a military confrontation. A sizable US fleet is steaming toward Estado. It plans to engage in what some cantankerous US senators have branded *gunboat diplomacy*—a show of force, designed to illustrate the US decision to back up its political position in the region surrounding Estado, with this show of military strength.

The US fleet crosses into what Estado has claimed to be its 200-nautical-mile “territorial sea” (announced in 1952). Estado has never announced a sovereign claim to any other sea zone. Estado claims exclusive sovereignty over all of Bahia Grande, the large bay adjacent to its northern coastal border. This would be the first time that foreign vessels have ever entered Bahia Grande without Estado's permission.

The fleet continues to head directly for Estado's Port El Centro on the southern edge of Bahia Grande. The bay's east-west mouth is forty nautical miles wide. The Port's outer harbor facilities are on the coastal baseline. That point is twenty miles south of the mouth (or entrance points of the bay). These facilities are on a point of the bay's coastline that is equidistant from the entrance points forming the mouth of the Bahia Grande. No branch of the Estado government has defined the term “bay.” A 2005 US Supreme Court decision, drawing upon a common treaty definition, defines it as “a well-marked indentation whose penetration ... constitute[s] more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as,

or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.”¹²⁸

The US military forces pass through the center of the bay's navigable channel in the middle of the mouth of the bay. The armada pauses at a point fifteen miles from the outer edge of Port El Centro (from the baseline) and equidistant from the sides of the semicircular coastline forming the edges of Bahia Grande. This resting point is also five miles south of a line that could be drawn across the bay between its entrance points.

When the US forces come to rest, are they located in the internal waters of Estado or in some other zone defined by the UN Law of the Sea Treaty?

Problem 6.D (after §6.3.B.): A US Navy vessel and a US passenger ship are about to pass through an international strait between two coastal nations. The strait's natural width varies from fifteen to twenty-five nautical miles between the bordering coastal States. Each State has ratified the 1982 UNCLOS. The navigational officer (N.O.) does not know whether the two coastal States have ratified Articles 37–44 of the UN Convention on the Law of the Sea. They authorize “strait passage.” The N.O.'s petty officer is researching this matter, and will subsequently report to the captain.

N.O. 1 is the navigational officer aboard the Navy vessel. N.O. 2 is the navigational officer aboard the passenger ship. The N.O.s will advise their respective captains (the class) of the rights of each ship and the coastal States. The N.O.s will review the various rules of passage outlined in the materials in the “territorial sea” section of the book.

Problem 6.E (after §6.3.E.): Refer to Problem 6.C, whereby the US fleet has now steamed into Estado's Bahia Grande. Assume that Bahia Grande is *not* a historic bay that contains only internal waters. Refer to the Chart 6.1 Sea Zones chart at the beginning of §6.3. Assume that Port El Centro's outer harbor facilities are located on that chart at the point marked “Coastal Baseline.” Apply the 1982 UN Law of the Sea Conference (UNCLOS) principles, and any related Customary International Law principles, to answer the following questions:

- (1) Did the US violate Estado's territorial waters when it crossed into Estado's 200-mile “territorial sea”?

- (2) What sea zone did the US fleet first enter when it was en route to Estado?
- (3) Did the US fleet ever enter Estado's contiguous zone? If so, where?
- (4) Did the US fleet ever enter Estado's territorial waters?
- (5) Where do Estado's internal waters meet its territorial sea?

Problem 6.F (after §6.3.F.): In September 2007, the 2,052-passenger cruise ship *Elation* had just sailed from San Diego, California. It was in the High Seas, off the coast of northern Mexico, while en route to Cabo San Lucas, Mexico. The *Elation* is owned by the Miami-based Carnival Cruise Lines. It sails under the Panamanian flag. It is registered as a Panamanian vessel. It carries mostly US passengers although the passengers aboard *Elation* come from many parts of the world.

Scott and Kade were two US passengers aboard the *Elation* for this cruise. Scott lives in San Diego. Kade lives in Utah. They were drinking, and got into a scuffle. Kade pushed Scott down a set of stairs. The ship was diverted to Ensenada, Mexico. Scott was then airlifted from Ensenada to a hospital in San Diego. He has been in a coma since, and unable to tell his side of the story.

Assume that: (1) Scott dies as a result of his injuries; and (2) Kade's conduct would violate the criminal law of all relevant jurisdictions. Who would have the right to try Kade, based on Chapter §5.2's various jurisdictional principles, as applied to this Chapter 6.3 Law of the Sea Convention context? What jurisdictional principles would apply? For what reasons might more than one country have the right to prosecute Kade?¹²⁹

Problem 6.G (end of §6.3.G.): Assume that the US and the hypothetical nation of Estado enter into a treaty giving US corporations the right to establish business operations in Estado. Assume that a large multinational enterprise called Mineco is the US-based corporate parent for many worldwide subsidiary corporations. Mineco has established a foreign corporate subsidiary in Estado. None of Mineco's key management personnel are citizens of Estado although all of Mineco's blue collar workers are Estado nationals.

Under the Estado-US licensing agreement, Mineco is solely responsible for all mining of Wondore, a valuable ore found mainly in and near Estado. Wondore is used to create cheap energy. US scientists are now exploring whether it can also serve as an alternative to

oil. Under the licensing agreement with Estado, Mineco has the exclusive right to do all of the drilling in and near this resource-rich nation. There are vast reserves of Wondore in the seabed adjacent to Estado's shores—up to 300 nautical miles from its coastline. Mineco is now examining the viability of drilling under the ocean floor, in a corridor stretching from Estado to 300-nautical-miles seaward from its coast.

Assume that Estado is a party to and has ratified the 1982 Law of the Sea Treaty, which entered into force in 1994. The US position is not relevant because any rights involving mining in or near Estado waters will depend on Estado's position regarding the UNCLOS. You should assume the following alternatives: (a) Estado *is*, or (b) Estado *is not* a party to the special 1994 Agreement (prompted by the US to avoid the impact of the UNCLOS's Part XI provisions regarding the mining of deep seabed resources). How do the new UNCLOS provisions affect Estado's and Mineco's right to extract these minerals from the 300-mile corridor containing Wondore?

Problem 6.H (after §6.4.A. *Powers Case*): The US and a Caribbean neighbor are engaged in what may turn out to be a hostile conflict. A US fleet containing US Marine and Naval forces is now steaming toward the hypothetical State of Estado. A US multinational corporation owns a global positioning satellite in orbit over Estado, at an altitude of 22,500 miles. That corporation allows the US forces to use the civilian-owned satellite to monitor events occurring in Estado. This sophisticated outpost permits a monitor aboard the fleet command ship to count individual troops in Estado. US fighter-bomber aircraft are launched in international waters and fly over Estado, after the satellite confirms that all Estado military aircraft are on the ground.

Does the *presence* of the privately owned satellite "over" Estado violate its airspace under any of the treaties in §6.4.?

Problem 6.I (after §6.4.B.): A group of Estado extremists seizes a US commercial airliner as it flies over Jamaica. There are eighty US citizens on board the aircraft. The hijackers divert the plane to Estado. En route, they broadcast that their reason for seizing the aircraft is to bring world attention to the plight of Estado. They proclaim that their only way of dealing with US imperialism is to capture one of its aircraft and bring the US hostages

to Estado. The plane arrives, and the hostages are hidden from public view. It is not clear whether Estado's government played a role in planning this hijacking.

The Estado hijackers are tried in an Estado "People's Tribunal" and found *not* guilty. The tribunal decides that the defendants have committed a "political" crime rather than an ordinary crime under Estado law. Estado is a party to all of the multilateral treaties dealing with commercial air flights (described in the air zones section of this chapter). Estado is not a party to any regional air treaty, such as the referenced European Convention on the Suppression of Terrorism. Has Estado breached the air treaties to which it is a party? How?

Problem 6.J (after §6.4.B.): Section 9.7 of this text addresses various issues spawned by the September 11, 2001 terrorist attack on the US. In this 9–11 context, which, if any, treaties in §6.4 of the textbook on International Air Law were thereby violated? By whom?

Problem 6.K (after §6.4.C.): In July, 2000, a French prosecutor commenced an investigation of whether the US global surveillance system ("Echelon") is a threat to France. France's counter intelligence agency appraised whether this system that listens in on millions of telephone calls and sends faxes/e-mails each day "is harmful to the vital interests of the nation." The French concern is that this Cold War development is now being used to further US economic interests. The European Parliament commissioned an earlier report (written by a British journalist). It determined that Echelon had twice helped US companies gain an advantage over Europeans although the specific details were never made public. Europeans are generally concerned because the United Kingdom is a US partner in the use/development of Echelon—although France supposedly operates a similar system on a smaller scale.¹³⁰

In February of 2005, unmanned US surveillance drones overflew Iran during the winter of 2005, seeking evidence of a nuclear weapons program. In March 2009, US jets shot down an Iranian drone in Iraqi airspace after tracking it to a point within sixty miles of Baghdad. Both sides to the above Echelon affair might have used this kind of detail in any debate about the Echelon system. In December 2005, the European Union launched its first satellite in a bid to break the US monopoly on space-based networks. Given its greater accuracy, it is likely that coexisting military uses will materialize.

In December 2007, the US announced its plan to launch a new multi-billion dollar satellite system in 2011 called "BASIC." Photo reconnaissance satellites gather information about terrorist groups, adverse governments, and damages from natural disasters. A prototype US commercial satellite was launched the month before this announcement by the company DigitalGlobe. It can discern the outline of a 20-inch object from outer space. As of April 2008, a similar satellite is now able to see objects that are sixteen inches wide. By 2011, this measurement will narrow to ten inches.¹³¹

Assume that France and the US are parties to all the treaties contained in §6.4 on outer space. Could the US/UK use of Echelon violate any of those treaties? How?

◆ FURTHER READING & RESEARCH

See Course Web Page <<http://home.att.net/~sломansonb/txtcsesite.html>>, click Chapter Six.

◆ ENDNOTES

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CHAPTER SEVEN

Treaties

CHAPTER OUTLINE

- Chapter Introduction
- §7.1 Definition and Classification
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 - B. Contemporary Classification
- §7.2 Formation, Performance, Cessation
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INTRODUCTION

States have used treaties to establish their mutual expectations for many centuries—both orally and in writing.¹ Today's primary method of determining mutual expectations is the written treaty, governed by the 1969 Vienna Convention on the Law of Treaties.² From the end of World War II through 2003, the UN, which receives copies of most treaties, has registered over 50,000 bilateral and multilateral treaties. The contributors include: China—more than 6,000; France—almost 7,000; and the US and Japan—approximately 10,000 each.³

This chapter focuses on the universal treaty on treaties. The 1969 Vienna Convention on the Law of Treaties deals only with *State* treaties. The drafters wanted to mold a State treaty regime first—saving an international organization treaty regime for another day. Of course

MOSCOW—Russia and China signed a treaty of friendship and cooperation yesterday, binding the two nations closer together over the next 20 years.

The treaty also commits them to jointly oppose much of the framework for international security that the United States is seeking to erect in the post-Cold War era.

... [T]he treaty formally joins Russia and China in opposing the U.S. plans for missile defense and places Russia more firmly behind China's claim of sovereignty over Taiwan.

It also strengthens military cooperation between Beijing and Moscow and rejects the kind of humanitarian intervention that NATO undertook in the Balkans in 1999.

...

One Russian commentator here described the treaty as “an act of friendship against America.”

—Patrick Tyler, Russia, China sign strategic accord to meet all threats, NYT News Service, July 17, 2001.
See §7.1.B.4., on whether this is a “self-executing” treaty.

treaties may be, and have been, concluded between States and international organizations.⁴ In 1991, for example, the International Monetary Fund (IMF) signed an accord with the Soviet Union (on the eve of its demise). Their agreement established a special association, whereby

the IMF could advise the Soviets on economic and fiscal policy during their transition to a market economy.

The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations is the *international organization* counterpart of international treaty law.⁵ Its rules are similar to the 1969 convention regarding State treaty-making. In 1998, UN General Assembly Resolution 53/100 encouraged States and international organizations that had not yet done so to become Parties to the 1986 treaty. But it has not yet entered into force.⁶ As is typical of the State-driven machinery of post-Westphalian International Law, a minimum number of States (thirty) must ratify this treaty for it to enter into force. One of the most telling contemporary examples of this need for codification is the 2007 European Court of Human Rights *United Nations Attribution Case* you studied in §3.1.C. of this textbook.

As predicted in one of the leading treatises on international organizations by Professors Henry Schermers and Niels Blokker of the University of Leiden: “[most] international organizations have not participated in general law-making treaties. This may have to change in the future. Organizations using military forces may have to become parties to treaties on the law of war; organizations operating a radio station or operating ships or aircraft may have to be parties to treaties on telecommunications or navigation. International organizations may wish to adhere to universal or regional conventions on human rights.”⁷

◆ §7.1 DEFINITION AND CLASSIFICATION

A. DEFINITIONAL CONTOURS

1. “Treaty” The word “treaty” means different things to different people. Some three dozen terms are used interchangeably with that word. Thus, there have been several prominent studies. A major Harvard Law School analysis described treaty law as “confusing, often inconsistent, unscientific and in a perpetual state of flux.” The UN International Law Commission (ILC) undertook an exhaustive study of this term. The ILC characterized the word treaty as a “generic term covering all forms of international agreement in writing concluded between states.”⁸ This analysis nevertheless concluded that “judicial differences, in so far as they exist at all ... lie

almost exclusively in the method of conclusion and entry into force.” The legal distinctions among these various terms are minimal, however, in the sense that each synonym depicts obligations, which are binding under International Law.⁹

Article 2.1 of the 1969 Vienna Convention on the Law of Treaties (VCLT) defines a treaty as “an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” This “constitution” on treaty law does not address *oral* agreements because of the comparative prominence of written instruments as a basis for creating contemporary international obligations.

Treaty disputes have adversely affected international relations on many occasions and in a variety of contexts. There have been many issues of interpretation with the formation, observation, and termination of treaties. The UN thus developed the VCLT as a code to govern international agreements—a treaty on treaties. It governs written treaties made after 1980, when the convention was ratified by the required minimum number of nations to become effective. It provides the best insight into the treaty practice of States and is the core of this chapter on the treaty system.

2. Analogy to Contract Law? There is a daunting question about whether public treaties between nations are analogous to private contracts between individuals (including corporate “persons”). By producing a global yardstick, the VCLT drafters arguably oversimplified treaty law. As described by Professor Andreas Gasis of the Hellenic Institute of International and Foreign Law (Greece):

As is well known, man, when faced with a problem not previously encountered, frequently resorts to a familiar solution, derived from an analogous situation This practice is widespread in the realm of European Continental Law, where the more elaborated Civil Law of Roman origin has systematically been used as the root onto which new branches of law have been grafted....

The ... phenomenon has also appeared in the realm of international law, where there has been an attempt to codify a Law of Treaties in recent years.

Thus, the relevant Vienna Convention on the Law of Treaties, 1969, takes a notoriously narrow “contract” view of Treaties.... Hence, when reading the text ..., one cannot escape the impression of being at the forefront of ... a Continental Civil Code governing [the] private law [of] contract....¹⁰

When drafting or applying a treaty between sovereigns, however, there is often a need for more flexibility than expected of a business relationship between individuals. As aptly articulated by the University of New South Wales Senior Lecturer Shirley Scott: “A *legal* interpretation of a multilateral treaty takes the treaty at face value. The preamble is read as indicative of the goals of the treaty. From the perspective of the *political* interpretation of a treaty, the treaty per se is not considered to have goals. The preamble points to, but does not define, a principle whose acceptance as a basis of negotiation was essential to the conclusion of the treaty. Whereas from a legal perspective all preambular paragraphs are of equal importance, from a political perspective those making reference to the foundation[al] ideology ... are of greater political importance than the others.”¹¹

The VCLT is thereby characterized as failing to incorporate the fact that an international treaty is something different than a contract governing private relationships between individuals, who often speak the same native language. The above scholars argue that a treaty should not be thought of as a “concluded” agreement expressing the complete intent of the parties to the treaty. Instead, it is merely evidence of an underlying legislative purpose to be ascertained by international consensus. Even an agreed-upon meaning associated with a particular treaty word can undergo subsequent alteration when there has been a lapse of time or a change in State practice regarding the application of that term. The nineteenth-century legal writer Robert Phillimore cautioned that “due construction of the instrument may require a [k]nowledge of the antiquated as well as the present use of the words....”¹²

States generally prefer less specific agreements than do private international traders in order to retain maximum flexibility in their respective dealings. University of Helsinki Professor Jan Klabbers comments that many “formal and visible agreements make it politically difficult for states to change their policies. The necessity of sending proposed agreements through cumbersome

procedures of approval in their national legislatures reduces states’ freedom of action. Further, agreements allowing for quick renegotiation or modification are by definition not as inflexible as agreements which do not make [such an] allowance. Finally, agreement can be reached more swiftly ... the more informal the proposed instrument is considered to be.”¹³ One should acknowledge that the twentieth-century “public treaty as private contract” analogy is not without its critics. A lawyer in a treaty-drafting process may prefer to “cross all the t’s.” A political scientist might focus on the relationship between the four corners of the document. A diplomat must view the process through both lenses.

3. “Unequal” Treaties International agreements are supposedly the product of a mutually beneficial decision to create rights and honor obligations. Unfortunately, a number of treaties have been imposed by one State on another because of their inherently unequal bargaining positions.

During the seventeenth and eighteenth centuries, however, writers first raised the question of whether treaties were valid in the absence of any real bargaining or negotiations. In 1646, the famous Dutch author Hugo Grotius distinguished between equal and unequal treaties. He described an unequal treaty as one that is forced on one nation by another, rather than being the product of a negotiated process. In 1758, Swiss author E. de Vattel examined the problem of unequal treaties—concluding that States, like individuals, should deal fairly with one another. De Vattel hypothesized that because States “are no less bound than individuals to respect justice, they should make their treaties equal, as far as possible.” Neither of these influential writers, however, questioned the legal *validity* of such treaties. A bargained-for exchange was not considered a necessary prerequisite for a valid treaty between sovereign States. But as later stated by American author H. Halleck in 1861: “[T]he inequality in the ... engagements of a treaty does not, in general, render such engagements any the less binding upon the contracting parties.”¹⁴

Examples of unequal treaties include:

- ◆ Napoleon’s 1807 threat to place the King of Spain on trial for treason unless the king surrendered his throne. Having no choice, King Ferdinand entered into an agreement with France that was devoid of any bargained-for advantages for Spain.

- ◆ In the 1856 Treaty of Paris, Russia was prohibited from maintaining a naval fleet on the Black Sea on its geographically sensitive southwestern border.
- ◆ In 1903, a US condition for recognizing Cuba's independence from Spain was the Guantanamo Naval Base Treaty. The US thereby "acquired" a permanent lease for a military base that proved critical to US interests.
- ◆ The 1903 Panama Canal Treaty with Columbia validated US control over the Canal (until relinquished in 1977).
- ◆ The Treaty of Versailles, which ended World War I, was signed by German delegates who had unsuccessfully objected to draconian terms requiring that Germany pay the victors for damages incurred during World War I.
- ◆ Just prior to World War II, Hitler threatened to bomb Czechoslovakia to force the adoption of a treaty placing the Czechs under German "protection."¹⁵

In the twentieth century, legal commentators began to question the historical presumption that unequal treaties are valid. National Chengchi University (Taipei) Professor Hungdah Chiu summarized them as follows:

After the 1917 Bolshevik revolution in Russia, the Bolshevik government offered to abolish and later did abolish some former Tzarist treaties imposed upon China, Persia, and Turkey; and Soviet writers then began to discuss the question of the validity of those "coercive, predatory, and enslaving" treaties, although the term "unequal treaties" was not widely used after World War II. This early development in the Soviet Union, however, was generally ignored by Western scholars.

In the 1920s, however, the problem of unequal treaties received world-wide attention when China demanded the abolition of some treaties that it termed unequal. Only then did some Western writers renew interest in the problem. In 1927, at the annual meeting of the American Society of International Law, a session was devoted to the discussion of China's unequal treaties. With the abolition of what were presumed to be the last of China's unequal treaties in the early 1940s, Western scholars again lost interest in the subject.

With the emergence of many new states in Asia and Africa in the 1960s, the question of unequal treaties again began to attract worldwide attention. When

the Draft Articles on the Law of Treaties prepared by the United Nations International Law Commission was sent to UN member states for comment, many states expressed concern about the question of unequal treaties.¹⁶

B. CONTEMPORARY CLASSIFICATION

The convenience of any treaty classification system is rivaled by the danger of oversimplification. Four common distinctions illustrate the general nature of most treaties: oral versus written; bilateral versus multilateral; lawmaking versus contractual; and self-executing versus declaration of intent.

1. Oral versus Written The VCLT was drafted in terms of "written" treaties. While most treaties are written, States routinely incur international obligations based on oral agreements. State representatives may orally incur a binding international obligation.

In a prominent example, Denmark and Norway established Denmark's sovereignty over Eastern Greenland in a manner that was far less formal than a written treaty. The right to this vast area had been disputed since the 1819 termination of the union between what is now Denmark and Norway. In a recorded conversation in 1919, the Norwegian Minister of Foreign Affairs and a Danish diplomat agreed that Norway would not object to Danish control over all of Greenland, including the disputed portion of its eastern coast. The so-called Permanent Court of International Justice held that this oral understanding resulted "in the settlement of this [sovereignty] question."¹⁷ The Court accorded great weight to the context in which this particular conversation occurred. Although certainly not as formal as a written treaty, this agreement was nevertheless binding on Norway because of the subject matter of this diplomatic discussion. Two diplomats had orally resolved a question falling within the negotiating authority conferred upon them by their respective nations.

A document does not have to be a formal treaty to create international obligations. In 1994, the International Court of Justice reviewed some documents related to a maritime boundary dispute. These were the 1987 exchanges of letters between the King of Saudi Arabia and the Emir of Qatar; the 1987 letters between the King of Saudi Arabia and the Emir of Bahrain; and a 1990 document entitled "Minutes," signed at Doha by

the Ministers for Foreign Affairs of Bahrain, Qatar, and Saudi Arabia. These exchanges constituted international agreements, which obligated the State Parties to abide by the terms of those agreements, including the undertaking to submit their long-term maritime boundary dispute to the Court.¹⁸

2. Bilateral versus Multilateral A bilateral treaty establishes mutual rights and obligations between two States. It normally affects only them, but not others. Other States typically derive no benefits or duties from such a treaty. The States entering into this type of treaty do not intend to establish rules that contribute to the progressive development of International Law. For example, there are hundreds of bilateral extradition treaties. Each one lists the circumstances under which the two treaty parties agree to return criminals to the State requesting extradition. The respective States do not intend to make a change to international practice, merely by agreeing on which crimes are thereby subject to mutual extradition.

Bilateral treaties do not confer benefits on or create obligations for nonparties unless that is the *express* intent of the contracting parties. Nor does a multilateral treaty necessarily do that. However, its contents may be evidence of accepted State practice which lies within the parallel universe of Customary International Law [§1.2.B.1.].¹⁹ A multilateral treaty, on the other hand, is an international agreement among three or more States. Most of the military, political, and economic organizations discussed in this book were created by multilateral treaties. They expressed the rights and duties of the member States and the competence of the particular organization created by their treaty.

There was a significant proliferation of multilateral treaties in the twentieth century. Writing on the impact of the 1982 UN Convention on the Law of the Sea, for example, George Washington University Professor Louis Sohn traces the comparative deluge after World War II:

International lawyers have by now accepted the fact that rules for drafting and putting into force such [multilateral] agreements are flexible....

This flexibility is due primarily to the tremendous increase in the last fifty years in the role being played by international institutions and multipartite diplomacy. Originally, evidence of the existence of a rule of international law could be found only in books written by eminent professors or in briefs prepared

by practitioners in disputes involving international law.... The Hague Peace Conferences of 1899 and 1907 inaugurated a new approach: the contracting parties, acting on behalf of “the society of civilized nations,” agreed on a number of lawmaking conventions ... [regarding] “the principles of equity and right on which are based the security of States and the welfare of peoples ... and the dictates of public conscience.”

During the period of the League of Nations, while the 1930 Codification Conference [on treaty practice] did not prove successful, the number of multipartite treaties increased considerably. Professor Manley O. Hudson collected in the first eight volumes of *International Legislation*, covering the period 1918 to 1941, 610 international multipartite treaties of that period. Since the Second World War, the United Nations, acting not only through the International Law Commission, but also through its specialized agencies and special conferences ... together with the increasing number of regional organizations and various groups of states dealing with specific topics of international law, has given birth to several thousands of multipartite agreements covering practically every conceivable subject [more than 33,000 when this article was written].²⁰

3. Lawmaking versus Contractual Treaties may also be classified as either “lawmaking” or “contractual.” A lawmaking treaty creates a new rule of International Law designed to modify existing State practice. The 1982 UN Law of the Sea Treaty contains a number of new rules governing jurisdiction over the oceans. Although it codifies (restates) some previously existing rules that States applied in their mutual relations, this multilateral treaty also contains some novel lawmaking provisions. For example, the new International Seabed Authority was created to control the ways in which the ocean’s resources are globally (re)distributed. Free “transit passage” would replace the otherwise applicable regime of restricted “innocent passage” through the territorial waters of coastal States [§6.3.B.3.]. Ratification of some of the associated provisions would *change* State practice, which had not previously required either an equitable redistribution of global resources or transit passage.

On the other hand, some treaties are merely “contractual.” An import-export treaty sets forth the terms of a contract, which the State parties agree to for

a specified period of time. For example, under the GATT/WTO regime [§12.2.B.], State X agrees to charge an 8 percent tariff on incoming State Y wine. State Y may export up to 100,000 bottles of wine per year to State X. This arrangement is a simple contract. It does not purport to create, alter, or abrogate any of the norms that govern international trade.

French Professor Paul Reuter, in his distinguished treatise on treaty law, succinctly recounted that “[t]he development of treaties during the second half of the nineteenth century prompted several new doctrinal distinctions.... [T]he expressions ‘law-making treaties’ and ‘contractual treaties’ came into use, the former referring to the treaties [that] first laid down general conventional rules governing [all of] international society.... It is important to make clear, when speaking of treaties as either [normative] ‘legislation’ or [mere] ‘contracts,’ whether they are being viewed from [either] a legal or sociological standpoint.”²¹

An entire treaty, or parts of it, may break new legal ground. The North American Free Trade Agreement (NAFTA) associated Canada, Mexico, and the US into a large free-trade area. That development was “lawmaking” because it created a new international organization. Yet there was nothing novel or lawmaking about their reduction of trade barriers to form a common economic market. Many other countries, as in the European Union, had already done so. In this sense, NAFTA merely created an international contract governing the respective goods and services exchange among the State parties, just like a private contract would do between three merchants engaged in a similar cross-border transaction. One could distinguish the 1995 World Trade Organization (WTO), however. It replaced the established 1947 General Agreement on Tariffs and Trade (GATT) process. The physical bulk of the WTO process merely continued the GATT process of publishing national tariff schedules. But establishing an authoritative WTO process involved fresh lawmaking because of the way in which nations therein decided to resolve their international trade disputes.

4. Self-Executing versus Declaration of Intent

(a) Definitional Contours A treaty may be further classified as “self-executing” when it expressly imposes immediate obligations. A self-executing treaty requires no further action to impose binding obligations on its signatories. It is instantly incorporated into both

International Law and the internal law of each treaty member by the express terms of the treaty. There is no need for additional executive or legislative action by the State parties to immediately create binding legal obligations. Alternatively, a treaty may be a declaration of intent. It would thereby contain general statements of principle, which set forth a hortatory standard of achievement for all parties. Such treaties require follow-up, individual State action before any of the parties incur actual legal—as opposed to moral—obligations under the treaty.

Bilateral treaties concluded by two States are normally self-executing. The contracting States would have no treaty if they were unable to agree to all of its terms. Not so with a multilateral treaty. Most multilateral treaties are not self-executing. The State drafters who sign them intend them to be statements of principle, which do not impose immediate *legal* obligations to act in a particular way. Such treaties are intended to articulate mutually agreeable goals or standards of achievement. Each participant must undertake some subsequent act under its internal law for the stated standard to then ripen into a binding legal obligation.

If all treaties were self-executing, few States would participate. There is a vast difference in economic, cultural, political, or military capabilities to immediately institute all features of certain multilateral treaties. An initial agreement on the aspirational goal accommodates these differences via the expression of commonly understood objectives. As acknowledged by former UN Secretary General Kofi Annan, in his Millennium Summit invitation for nations of the world to ratify the twenty-five core multilateral treaties:

Since the founding of the United Nations in 1945, over 500 multilateral treaties have been deposited with the Secretary General.... Without exception, all of these treaties have been the result of meticulous negotiations and reflect a careful balance of national, regional, economic and other interests.... The aspirations of nations and of individuals for a better world governed by clear and predictable rules agreed upon at the international level are reflected in these instruments. They constitute a comprehensive international legal framework covering the whole spectrum of human activity, including human rights, humanitarian affairs, the environment, disarmament, international criminal matters, narcotics, outer space, trade, commodities and transportation....

Some of these multilateral treaties, though negotiated many years ago, are still to receive the minimum number of ratifications and accessions required for their entry into force. Others are still far from achieving universal participation. It is my hope that Heads of State and Government will ... rededicate themselves to the multilateral treaty framework and thereby contribute to advancing the international rule of law and the cause of peace....²²


Some commentators, and the *US Restatement of Foreign Relations Law*, proclaim the existence of a robust presumption in favor of such global treaties being characterized as self-executing.²³ In this book's §7.3.B. below, you will even find an apparently supportive provision in the US Constitution: treaties entered into by the US "shall be the Supreme Law of the Land." So keep this presumption and constitutional provision in mind, as you now delve into the following US Supreme Court reaction to an International Court of Justice (ICJ) directive that the US review the convictions of fifty-one Mexicans to determine the impact of their not having access to the nearest Mexican consular official when arrested.

In some other countries, such treaties *do* create rights that individuals can directly claim on their behalf. Under Article 25 of the current German Constitution, for example: "The general rules of public international law constitute an integral part of federal law. They take precedence over statutes and directly create rights and duties for the inhabitants of the federal territory."²⁴ This is one reason why Germany was disappointed with the Court's handling of two German nationals who were not given Vienna Convention access to their German consular official.²⁵

(b) US Supreme Court Application The following case arose in the context of the Vienna Convention on Consular Relations. The 2004 International Court of Justice (ICJ) *Avena* order [textbook §2.7.C.2.] directed the US—and its various states that were holding fifty-one Mexican defendants on death row—not to execute them until each of their cases could be reviewed. Per the ICJ's preliminary order, each US state court where the individual defendants were incarcerated was to determine the impact of the failure of law enforcement authorities to provide these detainees with access to their local consular officials.

The ICJ's external directive was barred under US law, however. The defendants had all failed to raise this issue before their convictions. Specifically, they or their legal *counsel* failed to seek the closest *counsel*—a mistake you would not make as a lawyer, having read *Avena* [Core Diplomatic Functions: §2.7.C.2.] and the following *Medellin* case. (These men are, and some including *Medellin were*, on death row in various US states. Several were subsequently executed, pursuant to the terms of their state court convictions.)

The specific question for the US Supreme Court in this reconsideration of the prior state-court convictions was whether the Consular Convention was self-executing. If so, the criminal defendants were undoubtedly entitled to a treaty-based right to so challenge their convictions on this new ground. If the treaty was thus self-executing, these treaty beneficiaries would have the personal right to invoke its protection when the state authorities failed to provide them with their Article 36 right to *counsel*:



Medellin v. Texas

SUPREME COURT OF THE
UNITED STATES
128 S.Ct. 1346 (2008)

Go to Course Web Page, at:
<<http://home.att.net/~slomansonb/txtcsesite.html>>.
Under Chapter Seven, click Medellin v. Texas.

The *Medellin* majority determined that the Vienna Convention on Consular Relations was *not* self-executing. It did not create a "private cause of action" that the *Medellin* cohort could personally claim as a defense to their individual convictions because this defense was not presented prior to judgment.

In January 2009, the ICJ issued its final judgment in Mexico's case against the USA. After *Medellin's* execution, Mexico sought to finalize this case at the ICJ. Mexico sought an interpretation of the earlier provisional decision, barring the US from executing *Medellin* (and others) without a post-conviction review. The ICJ denied that petition. In that round, the ICJ determined that there was nothing more for it to decide, which thus "leaves it to the United States to choose the means of implementation" of its 2004 decision requiring US

review of the convictions of the remaining Mexican nationals for “Vienna Convention error.”

Some US states had already provided more Vienna Convention protection than the Supreme Court’s above *Medellin* decision suggests. As of 1999, California required that “every peace officer, upon arrest and booking or detention for more than two hours of a known or suspected foreign national, shall advise the foreign national that he or she has a right to communicate with an official from the consulate of his or her country, except ... [that] [c]ountries requiring mandatory notification under Article 36 of the Vienna Convention shall be notified ... without regard to ... [the] foreign national’s request to the contrary.”²⁶ Fifty-six countries are listed under this code section. Each requires notification to their local consular official when one of their citizens is arrested.

◆ §7.2 FORMATION, PERFORMANCE, CESSATION

This section of the book deals with the treaty process: how a treaty is formed, expectations regarding its performance, and when performance may be interrupted. Although this section focuses on the main international treaty on treaties, local procedures for adopting a treaty vary from country to country. As noted by the Council of Europe:

Treaty-making constitutes the very basis of the international legal order and influences international relations. It channels the expression by States of consent to be bound and defines the commitments they enter into. However, the national procedures by which States express their consent to be bound vary considerably, depending on constitutional, legal and political conditions which reflect the history of each country.²⁷

A. TREATY FORMATION

The chronological phases in the formation and implementation of a multilateral treaty are negotiation, signature, ratification, reservations (if any), entry into force, and registration.

1. Negotiations The emergence of a multilateral treaty often begins when an international organ such as the UN General Assembly decides to study some

problem of global concern. The Assembly might resolve that the problem should be the subject of an international conference. State representatives commence the treaty process with preliminary negotiations during an international conference. Most nations of the world first met in 1974, for example, to draft an International Law of the Sea treaty. These initial discussions expanded, over the course of the next eight years, during which many nations negotiated their respective positions on proper use of the oceans and their natural resources. These representatives drafted and redrafted a “constitution” of the oceans. They produced a final treaty text, which was satisfactory, at least in principle, to the participants [textbook §6.3.].

(a) Delegate’s Authority Conference representatives must possess the authority to negotiate on behalf of their respective States. Not unlike diplomats who present their credentials to host State authorities, conference participants are normally vested with “full powers” by the State they represent. A document from each State’s government is presented to a chair or conference committee at the inception of the conference. That document normally vests the representative with various powers: to negotiate, provisionally accept, or perform any act necessary for completing this initial phase of the treaty process. The “full power” instrument facilitates assurances that conference developments will be acceptable to the governments that will one day have to decide whether to ratify the final draft of the treaty text negotiated by their respective conference representatives.

The lack of such authority adversely affected international relations when a former US minister to Romania signed two bilateral treaties. But he did not have his president’s authority to do so. To complicate matters, as to one of those treaties, the US minister improperly advised the US president that he was signing a different treaty than the one he actually signed with Romania. As to the other agreement, he had no authority whatsoever to actually bind the US. The US attempted to avoid its obligations under those treaties. That was resisted by Romania. The US had already officially entered into these two agreements.²⁸

To help clarify treaty expectations in such instances, Article 8 of the Vienna Convention on the Law of Treaties (VCLT) provides that any “act relating to the conclusion of a treaty performed by a person who cannot be considered ... as authorized to represent a State

for that purpose is without legal effect unless afterwards confirmed by the competent authority of the State.” This language theoretically creates the potential for abuse, whereby a State representative can enter into a treaty, and the home State can subsequently disavow the authority of its representative. In practice, however, the representative’s presentation of documentary powers at the inception of a conference contains clear notification to all participants about the extent of a particular delegate’s powers (which may be limited by the dispatching government).

(b) Coercion of Delegate In the 1960s, many of the new nations and former colonies in Africa and Asia advocated the proposition that (the previously discussed) “unequal treaties” were no longer acceptable under International Law. One prominent forum for advocating this perspective was the drafting negotiations for the 1969 VCLT. Article 2.4 of the UN Charter requires all members to “refrain in their international relations from the threat or use of force ... [which is] inconsistent with the purposes of the United Nations.” If force was illegal in international relations, then coercion in the treaty process should invalidate the legality of any treaty forced upon these former colonies whose bargaining power was no match for their former occupiers.

The result of the VCLT negotiations was the incorporation of two articles applicable to treaties concluded after the effective date of the VCLT (January 27, 1980). Article 51 provides that the “expression of a State’s consent to be bound by a treaty which has been *procured by the coercion of its representative* through acts or threats directed against him shall be without any legal effect” (italics added). Article 52 provides that a “treaty is void if its conclusion has been *procured by the threat or use of force* in violation of the principles of international law embodied in the Charter of the United Nations” (italics added). Although coerced treaties that had been concluded prior to the VCLT were presumed valid by some writers, Articles 51 and 52 expressly negated that presumption for subsequent treaties. As stated by the International Court of Justice, there “can be little doubt, as is implied in the Charter of the United Nations and recognized in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void.”²⁹

During the VCLT negotiations, a number of Eastern communist bloc and African states advocated the view

that the Article 52 prohibition against force should expressly include “economic, military, and political” coercion. Their attempts to ban treaties procured through these categories of force were rebuffed by Western representatives. The Western position was that, given the difficulty of defining “force” in the treaty process, it would be too difficult to determine whether a treaty was invalid because it was allegedly signed as a result of such duress.

Article 52 of the VCLT therefore does not contain a specific definition of force. Instead, it generally prohibits the threat or use of force in violation of the principles of International Law embodied in the UN Charter. That language thus meant that “the precise scope of the acts covered by this definition should be left to be determined in practice by interpretation of the relevant provisions of the [UN] Charter.” Yet Article 2.4 of the Charter also begs the question of what is the intended meaning of the term “force.” It vaguely prohibits the use of force “against the territorial integrity or political independence of any state....” The Vienna Convention Article 52 definition of force in the treaty process was likewise left purposefully vague because it incorporated the Charter’s inherently vague definition of force.³⁰

Some ambiguity about the scope of the term “force” was offset at the conclusion of the VCLT. The delegates adopted the separate Declaration on the Prohibition of Military, Political, or Economic Coercion in the Conclusion of Treaties. They therein stated that the UN Conference on the Law of Treaties “solemnly condemns the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent....”³¹

This Declaration was actually made independently of the VCLT rather than directly expressed within the text of the Article 52 prohibition of force in the conclusion of treaties. This exclusion—which more precisely defined force, but in the supplemental text not officially a part of the VCLT itself—was a compromise. It ameliorated Western opposition to nonmilitary duress as a basis for invalidating a treaty. Because the VCLT itself defines coercion only by the reference to the “principles of international law embodied in the Charter of the United Nations,” it is difficult to determine when a treaty would be void on the basis of duress in its creation.

2. Signature The next significant step in the treaty process is “opening for signature.” States and any participating international organizations are invited to sign (which is distinct from subsequent ratification). A State that *signs* a treaty has agreed, in principle, to the general wording of the articles appearing in the text of its final draft.

Under Article 81 of the VCLT model for multilateral treaties, “[t]he present Convention shall be open for signature by all States Members of the United Nations ... and by any other State invited by the General Assembly to become a party to the Convention ...” States that did not participate in the drafting conference may subsequently “accede” to a treaty. That State thereby consents to be bound, albeit in principle, like any States that signed the treaty at or near the conclusion of the drafting conference. Alternatively, accession *may* express a State’s willingness to accept the treaty’s obligations as being immediately binding without the necessity of ratification (discussed below).

Unanimous and immediate consent of all States is possible, but quite atypical—for reasons addressed in the “reservations” portion of this section. Fully embracing the treaty’s commitments normally evolves through two related stages. The first stage is *provisional* acceptance of the treaty by the conference delegates. This stage expresses consent to the general wording of the final conference draft. Unless otherwise specified, the signature of a representative on a multilateral treaty merely indicates that his or her State agrees in principle with the essence of the treaty. *Final* acceptance would follow when a State expresses its willingness to be legally bound by the treaty’s terms, expressed in that State’s ratification of the treaty.

3. Ratification Post-conference ratification is the typical mode for each State’s full acceptance of a treaty. The conference delegate has already submitted the provisionally accepted treaty text to the proper authority in his or her State for final approval. This ratification is then determined in accordance with each State’s internal laws on treaty acceptance. Oxford University’s Sir Humphrey Waldock provides a useful explanation for the necessity of *post-conference* ratification by each potential State party: “[T]he interests with which a treaty deals are often so complicated and important that it is reasonable that an opportunity for considering the treaty as a whole should be reserved. A democratic state must consult public

opinion, and this can hardly take shape while the negotiations, which must be largely confidential, are going on.”

As classically articulated in a 2005 US federal Court of Appeals decision, drawing upon some leading International Law treatises:

The ratification process, in whatever form it may take serves several functions. First and foremost, “it affords a state the chance to scrutinize closely the provisions of a complicated agreement” after signing it. “The need for an institution such as ratification is principally that, for various reasons, states need time after agreement has been reached upon a definitive text of a treaty before they feel able to commit themselves to it.” In addition, in the time between signing and ratification, States are able ... (1) to effect changes in domestic law that may be necessary for the implementation of a treaty, (2) to seek and obtain the consent of legislative bodies as may be required, and (3) to re-examine the relevant provisions before committing to them.³²

4. Reservations Acceptance of a multilateral treaty is usually not an “all-or-nothing” proposition. A reservation is a State’s unilateral variation from the language of some general term contained in the negotiated text. Notwithstanding ratification of the overall treaty, a State may exclude, or modify, the legal effect of *its* obligations, which would otherwise arise under the general language of the “model” article in the final draft of the treaty. The reserving State is expressing its agreement with the text generally; but it does not wish to become obligated on all terms. A State’s provisional acceptance at the drafting conference does not preclude it from tendering a reservation although it may have signed the treaty.

A reservation to a specific provision in a treaty is a conditional consent. If the reservation is acceptable to the other parties, it limits the scope of the reserving State’s general consent to the rest of the treaty. The reserving State is not bound by what it thus identifies as an “objectionable” treaty provision. It is bound by all other terms of the ratified treaty to which it has not submitted a reservation.

In the case of a bilateral treaty between just two nations, reservations are generally nonexistent. One of the two parties may still have a “reservation” to a tentative agreement. But any reservation is effectively a fresh proposal, which is a counteroffer to change their treaty.

Both States must agree on all terms of a bilateral agreement. Otherwise, it cannot become uniformly applicable for each treaty party.

Hypothetical reservation illustration: Assume that the representatives of States A, B, C, and D provisionally accept the final text of a treaty at the conclusion of their four-nation drafting conference. They express their agreement to be bound by the broadly worded principles stated in the treaty. They open this treaty for signature (and subsequent ratification). The terms of the treaty are not self-executing because the conference delegates did not have the power to ratify the treaty immediately upon conclusion of the drafting stage. No State is yet entitled to the rights, nor bound to perform the obligations, specified in the treaty. Each State must subsequently accept the treaty through the respective national ratification processes. State A's leaders review this treaty for possible ratification. They decide to object to the application of one treaty clause. State A will thus tender a reservation to that particular provision of the treaty. Assuming that A's reservation is acceptable to B, C, and D, State A is excused from performing that particular provision of the treaty. Assume that B, C, and D do not tender the same reservation when they ratify this treaty. Unlike State A, they are bound to perform whatever is required by this treaty clause among them. However, the three countries do not have to perform that obligation in their respective dealings with State A.

Why are reservations permitted? They encourage wider participation in multilateral treaties via the practical compromise: permitting reservations. Broad participation is better than limited participation by only those few States that might be willing to accept *every* term in a draft treaty. For example, few States would agree to be sued in the International Court of Justice (ICJ) if they were unable to make reservations to the final draft treaty provision regarding the ICJ's competence to hear and decide its own cases. Article 36.6 of the Statute of the ICJ provides that any disputes over the Court's jurisdiction, or power to hear the particular case, are to be determined by the Court itself. Every UN member is automatically a party to this Statute, which is itself a treaty.

States often object to the Court's jurisdiction to hear a case that has just been filed against them. These States may do so if they have previously decided not to give their full consent to Article 36.6 of the ICJ Statute. Many States tendered reservations to this treaty-based

competence of the ICJ to decide its own jurisdiction. They reserved the question of the Court's power to hear a case unto themselves whenever they would be summoned as a defendant in a future case before the Court. This common reservation precludes the ICJ from deciding its own jurisdiction under the ICJ's Statute. This complex feature of the Court's jurisprudence is analyzed in textbook §8.4.C.

Suffice it to say that at this juncture, there was a practical need for compromise. Without the possibility of such a treaty reservation, a number of major powers would not have recognized a distant Court—sitting in Europe—as having the absolute power to hear all international controversies. Reservations like this one accommodate the special interests of States that would not otherwise participate in the overall process of international adjudication by the ICJ. Half a loaf is better than none.

Such conditional assent cannot be used in *all* treaties. The drafting conference negotiators may decide to insert a prohibition against reservations within the express language of the final treaty text. The 1995 Agreement for Implementation of the Provisions of the UN 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 prohibits reservations. Predictably, such a provision can limit effective participation. While the US Senate gave its approval to this treaty in 1996, members of that body warned other nations that this should not be construed as US acquiescence in future treaties containing a comparable provision.³³

Many treaties say nothing about the possibility of the parties being able to tender reservations to the final text. Silence normally cannot be construed as supporting or defeating the right to become a party while attempting to do so via a reservation to a key text provision. This can yield a very sensitive debate. The classic example is the UN Genocide Convention.³⁴ The principles enshrined in this 1948 instrument were unanimously adopted by all UN members in the aftermath of Nazi Germany's Holocaust. Many States, however, did not ratify the Genocide Convention. The term "genocide" has meant different things to different people. States were thus reluctant to accept it without knowing what specific obligations might one day materialize. They feared that the absence of a reservation provision in the Genocide Treaty might one day subject them to scrutiny

on grounds that they had never contemplated. The US, for example, did not become a party until nearly forty years later (1986) because of prior senatorial concern about the meaning and application of its various terms.

The International Court of Justice (ICJ) *Reservations Case* addresses this issue. In 1948, the UN General Assembly unanimously adopted the Convention on Genocide. It materialized, first, as a General Assembly resolution. It would not become binding on UN members—directly via treaty ratification and later under Customary International Law—until the minimum number of State ratifications were submitted to the UN.

In 1950, the year before the Convention entered into force, the UN General Assembly requested an advisory opinion from the ICJ. There was no provision on the extremely sensitive question of whether reservations would be permitted. If reservations *were* to be allowed, then States could theoretically exclude certain forms of genocide from their consent to be bound by this treaty. The General Assembly asked the Court to interpret the Genocide Convention to determine whether a State might ratify the Convention and yet simultaneously tender a limiting reservation to the egalitarian terms of this classic humanitarian treaty:

Reservations to the Convention on Genocide

INTERNATIONAL COURT OF JUSTICE

1951 I.C.J. REPORTS 15 (1951)

<<http://www.icj-cij.org/docket/files/12/4283.pdf>>

AUTHOR'S NOTE: The Court chose to articulate a somewhat abstract analysis of this sensitive question. Noting the apparent divergence of State views on the possibility of reservations to this particular treaty, the ICJ decided that it implicitly contained the right to become a party and to simultaneously present a reservation—as long as it was “compatible” with the language and purpose of the treaty. The relevant portion of the opinion follows—unsigned by any member of the Court.

COURT'S OPINION: [T]he precise determination of the conditions for participation in the [Genocide] Convention constitutes a permanent interest of direct concern to the United Nations which has not disappeared with the entry into force of the Convention....

It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation [by one state] can be effective against any [other] State without its agreement thereto. It is also a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention. To this principle was linked the notion of the integrity of the convention as adopted, a notion which in its traditional

concept involved the proposition that no reservation was valid unless it was accepted by all the contracting parties without exception, as would have been the case if it had been stated during the negotiations.

This concept, which is directly inspired by the notion of contract, is of undisputed value as a principle. However, as regards the Genocide Convention, it is proper to refer to a variety of circumstances which would lead to a more flexible application of this principle. Among these circumstances may be noted the clearly universal character of the United Nations under whose auspices the Convention was concluded, and the very wide degree of participation envisaged by Article XI of the [Genocide] Convention. Extensive participation in conventions of this type has already given rise to greater flexibility in the international practice concerning multilateral conventions. More general resort to reservations, very great allowance made for tacit assent to reservations, the existence of practices which go so far as to admit that the author of reservations which have been rejected by certain contracting parties is nevertheless to be regarded as a party to the convention in relation to those contracting parties that have accepted the reservations—all these factors are manifestations of a new need for flexibility in the operation of multilateral conventions.

It must also be pointed out that although the Genocide Convention was finally approved unanimously, it is nevertheless the result of a series of majority votes. The

majority principle, while facilitating the conclusion of multilateral conventions, may also make it necessary for certain States to make reservations. This observation is confirmed by the great number of reservations which have been made in recent years to multilateral conventions.

In this state of international practice, it could certainly not be inferred from the absence of an article providing for reservations in a multilateral convention that the contracting States are prohibited from making ... reservations. Account should also be taken of the fact that the absence of such an article or even the decision not to insert such an article can be explained by the desire not to invite a multiplicity of reservations. The character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect....

The Court recognizes that an understanding was reached within the General Assembly on the faculty [ability] to make reservations to the Genocide Convention and that it is permitted to conclude [therefrom] that States becoming parties to the Convention gave their assent thereto. It must now determine what kind of reservations may be made and what kind of objections may be taken to them.

The solution of these problems must be found in the special characteristics of the Genocide Convention. The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties ... furnish elements of interpretation of the will of the General Assembly and the parties. The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96(I) of the General Assembly, December 11th, 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without conventional obligation. A second consequence

is the universal character both of the condemnation of genocide and of the cooperation required "in order to liberate mankind from such an odious scourge" (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States.

The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.

The foregoing considerations, when applied to the question of reservations, and more particularly to the effects of objections to reservations, lead to the following conclusions.

The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result. But even less could the contracting parties have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible. The object and purpose of the Convention thus limit both the freedom

of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.

Any other view would lead either to the acceptance of reservations which frustrate the purposes which the General Assembly and the contracting parties had in

mind, or to recognition that the parties to the Convention have the power of excluding from it the author of a reservation, even a minor one, which may be quite compatible with those purposes.

It has nevertheless been argued [independently of these proceedings] that any State entitled to become a party to the Genocide Convention may do so while making any reservation it chooses by virtue of its sovereignty. The Court cannot share this view. It is obvious that so extreme an application of the idea of State sovereignty could lead to a complete disregard of the object and purpose of the Convention.

There would be a devastating impact on human rights programs if there were a flood of reservations to the various instruments—in the absence of provisions regarding whether reservations are permissible.³⁵ There are now 137 State parties to the Genocide Convention [textbook analysis: §10.1.B.]. Thirty of them have tendered reservations with their ratifications. A common example involves objections to Genocide Convention Article IX. It “requires” State parties to submit relevant disputes to the International Court of Justice (ICJ). Many countries, on the other hand, have registered objections to these reservations. Some nations have objected to a reservation from a specific nation. Some nations refuse to accept *any* of the reservations, deeming them all to be incompatible with the object and purpose of the Genocide Convention.

Turning to Article 31 of the VCLT (which became effective in 1969), one finds its “General rule[s] of interpretation.” The first subsection mystically provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Subsection 2(a) adds that “any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty...”

Given the speculation that this approach may involve, especially for aging multilateral treaties, subsection 31.3 of this VCLT article instinctively directs the *object and purpose* inquiry to any subsequent agreement or practice between the parties, regarding the interpretation of the treaty or their ensuing application. As embraced by Croatia’s University of Rijeka Professor V. Crnic-Grotic: “the

best result may be obtained by relying on the subsequent practice of the contracting States, as provided by Article 31(3) of the Vienna Convention.”³⁶

Over a half-century after the ICJ’s *Reparations* case, the ICJ addressed the Congo’s case against Rwanda, regarding the alleged genocidal killing of 3,500,000 Congolese. The Court again considered the matter of Genocide Convention reservations. Both the Congo and Rwanda were parties to the Genocide Convention. Rwanda, however, was one of the above nations that had filed a reservation objecting to the ICJ resolution of such disputes.

The Congo argued that such a reservation was fundamentally inconsistent with a State’s acceptance of the Genocide Convention. Rwanda could not merely agree in principle to the Convention and then object to resolution of genocidal disputes by the ICJ. The Congo thus argued that “the object and purpose of the Convention are precisely the elimination of impunity for this serious violation of international law.” Rwanda could not inconsistently “call on the United Nations Security Council to set up an international criminal tribunal to try the authors of the genocide committed against the Rwandan people [*Radio Machete* §8.5.C.2. case], while at the same time refusing to allow those guilty of genocide to be tried when they are Rwandan nationals or the victims of the genocide are not Rwandans.”

Rwanda also responded to the Congo’s claim that Article 120 of the Statute of the International Criminal Court (ICC) prohibits *any* reservations. Rwanda argued that the ICC treaty had no bearing whatsoever on this issue. First, Rwanda is not a party to the ICC Statute. Second, that the States forging the Criminal Court Statute

“chose to prohibit all reservations to that treaty in no way affects the right of States to make reservations to other treaties which, like the Genocide Convention, do not contain such a prohibition.”

The International Court of Justice seized upon Rwanda’s reservation in its February 2006 holding that the ICJ did not have the power to proceed with this case. Not unmindful of the above State reservation practices in the interim, the Court essentially echoed its earlier *Reservations* jurisprudence. Thus: “Rwanda’s reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute ... is to be regarded as being incompatible with the object and purpose of the Convention.”³⁷

Reservations, when *not* objected to, are not necessarily compatible with the underlying scope of a treaty. As noted in a 2007 report of the work of the UN’s International Law Commission [ILC: textbook §3.1.C.], “in the main, the formulation of objections to reservations is practised by a relatively small number of States.”³⁸ The above *Congo v. Rwanda* court mentioned that the Congo had not objected to a Rwandan reservation to the Genocide Convention. But this ILC observation (in the following year 2007) renders that portion of the Court’s argument only a make-weight assessment not borne out by State practice.

The US ratified the International Covenant on Civil and Political Rights [textbook §10.2.B.2.]. This treaty is often referred to as the primary international guarantor of Due Process of Law—especially in its first two dozen articles. Upon ratification, the US included two pages of “Reservations,” “Understandings,” and “Declarations.” One of the latter states as follows: “(1) ... the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing.” One might argue that the US did not convincingly ratify this treaty; and that its declaration might be *incompatible* with the object and purpose of that treaty.³⁹

The text and commentaries in the International Law Commission’s Draft Guidelines on Reservations to Treaties were provisionally adopted in 2001. This project is designed to clarify mostly procedural issues related to reservations, especially when a nation ratifies a treaty

and then wishes to later augment its earlier position with a limiting interpretation of its existing reservation. In reference to the European Convention on Human Rights: “Any State may, when signing this Convention or when depositing an instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.”⁴⁰

In 1999, Trinidad and Tobago re-acceded to the Optional Protocol to the International Covenant on Civil and Political Rights. This Protocol included the provision that ratifying nations were to allow prison inmates to file claims with the UN Human Rights Committee regarding alleged human rights violations. Trinidad and Tobago therein tendered a reservation, which purported to vitiate the ability of its death row inmates to submit such communications for external review. The UN Committee decided that this reservation was incompatible with the purpose of the protocol. It thus decided that this UN body *could* hear such a petition from an inmate, notwithstanding the acceding country’s reservation to its obligations under the treaty protocol.⁴¹

In addition to the above Statute of the International Criminal Court, the proposed World Health Organization Framework Convention for Tobacco Control does not permit *any* reservations. The latter addresses governmental controls of the global tobacco industry. Article 30 provides as follows: “No reservations may be made to this Convention.” In May 2003, the US forcefully objected to this non-reservation clause. It was willing to become a party, but only if it could attach reservations to the treaty provisions setting minimum sizes for tobacco package warnings, restricting free distribution, and limiting advertising promotions.⁴² This convention entered into force in February 2005, without US ratification.

5. Entry into Force The next phase of the treaty process is “entry into force.” The participants may have provisionally accepted the treaty’s final draft language at the drafting conference, followed by final acceptance of the treaty via their individual ratifications. Unlike bilateral treaties where only two States have to agree on all terms for a treaty to come into force, multilateral treaties usually require greater indicia of international consensus before they are binding. An “entry into force” provision ensures that an agreed-upon minimum number of States

ratify the treaty before it becomes binding on those which have signed.

The manner and date of entry into force is determined from the particular treaty's express provisions. Multilateral treaties normally enter into force when a minimum number of ratifications are deposited at some central location, such as the UN. The 1948 Genocide Convention, for example, did not enter into force until twenty States had deposited their ratifications with the UN Secretary-General. The 1982 UN Law of the Sea Convention did not enter into force until 1994, one year after the sixtieth State (Bosnia) ratified it, pursuant to an express provision so stating in that treaty.

States that have not ratified a treaty are not bound by its terms just because it has entered into force. They may be bound by its underlying norms if the treaty codifies the existing practice of most States. They may consent to be bound by submitting a subsequent ratification/accession.

6. Registration Treaties must be registered, meaning that they are normally sent to the UN Secretariat or another appropriate international institution most directly involved with the object of the particular treaty. Both of the Vienna Conventions, which govern the treaties of *States* and of international *organizations*, mention this obligation.⁴³ UN Charter Article 102 provides that "Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it." The UN thus maintains both print and electronic versions of its *United Nations Treaty Series*.⁴⁴

Registration approximates the filing of an important document with a court such as a pleading, which can be accessed by all interested parties at a known location where it is archived. Registration also ensures that international agreements are public, as opposed to the secret treaties that led to World Wars I and II. Treaties are usually registered at the UN or at the headquarters of the applicable international organization.

The publication of treaties is typical, but not always accomplished. Certain countries, especially those with the economic capacity to do so, publish all of their treaties. While some government representatives might prefer to engage in "quiet" diplomacy and treaty negotiations, the product of their efforts must be subject to public scrutiny. The US Congress therefore requires publication in the comprehensive source US Statutes at Large. Once

published therein, US laws and treaties "shall be legal evidence of laws ... treaties, and international agreements other than treaties [that is, executive agreements]." ⁴⁵

There is a peculiar difference between the League of Nations Covenant and the UN Charter regarding the registration requirement embraced by both documents. Article 18 of the Covenant contained an outright bar, which vitiated the legality of unregistered treaties. Secret treaties were thus characterized as being void from the outset. UN Charter Article 102, on the other hand, provides that a party to an unregistered treaty may not "invoke that treaty or agreement before any organ of the United Nations." This does not "void" the treaty. It declares that the particular instrument cannot be used in any proceedings involving the UN, such as judicial proceedings in the International Court of Justice. In 1992, a London newspaper reported that presidential candidate Bill Clinton had struck a secret deal with the head of the European Community. A new world trade agreement [WTO 1995 entry into force: §12.2.B.] would be delayed until after his election, which he denied. Such an agreement would be completely void under League practice, but effective under UN practice as long as it was not relied upon in any UN proceeding.

As a practical matter, many treaties are not registered (published). Because of the time and money inherent in the registration/publication process, certain international organizations have narrowly construed the meaning of the word "treaty" to limit which treaties are subject to the UN Charter registration requirement. The UN, subject to budgetary constraints, has resolved to improve the availability of its documents on the Internet. General Assembly Resolution 211(C) of 1997 "[r]equests the Secretary-General to ensure that the texts of all new public documents ... are made available through the United Nations Web site ... and are accessible to Member States without delay..."

B. TREATY OBSERVANCE

There are several yardsticks for determining whether a State has performed or properly rebuked "its end of the deal:" good faith performance of national treaty obligations; changed circumstances justifying nonperformance; express and implied consent to suspension or termination of a treaty; material breach by one party justifying another's nonperformance; impossibility of performance; and conflict with a peremptory norm of International Law.

1. Good Faith Treaty Performance Under Article 2.2 of the UN Charter, “Members ... shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.” The universal character of this norm was aptly articulated by the former Dutch ambassador to the United Nations in 1967:

The principle of good faith itself ... extends beyond the scope of this article and is generally recognized as expressing a fundamental concept underlying the entire structure of the international public order. It applies to the observance and interpretation of treaties and even to the obligation not to frustrate the object of a treaty prior to its entry into force, as well as to the fulfillment of obligations arising from other sources of international law. Particularly in the context of the law of treaties the principle of good faith ... clearly emerges as having a fundamental and universal nature.⁴⁶

A State must not act in a way which would frustrate the purpose of a treaty that it has signed or ratified. It may not pass subsequent internal legislation that is inconsistent with those obligations. In a US-UK treaty delineating the fishing rights of US citizens in Canadian waters, the UK’s post-treaty regulations limited those rights in a way that was not contemplated by the wording of the treaty. The arbitrators in this famous proceeding noted that such regulations had to be “drawn according to the principle of international law that treaty obligations are to be executed in perfect good faith, therefore excluding the right to legislate at will concerning the subject-matter of the treaty, and limiting the exercise of sovereignty of the States ... to such acts as are consistent with the treaty...”⁴⁷

Various cases decided by the International Court of Justice illustrate the problems with *applying* the unassailable good faith performance standard. In two significant cases, the International Court of Justice (ICJ) dealt with what it perceived to be tardy claims not made in good faith. In the 1960 *Case Concerning the Arbitral Award Made by the King of Spain*, a bilateral treaty required Honduras and Nicaragua to arbitrate their boundary dispute. Spain’s king was the agreed-upon arbitrator after the treaty-designated arbitrator failed to act. When the king decided this boundary dispute in 1960, neither country objected to his decision. Years later, Nicaragua challenged the validity of his award because the king “was

not designated arbitrator in conformity with the provisions of the ... Treaty [which] had elapsed before he agreed to act as arbitrator.” Honduras responded that Nicaragua was acting in bad faith, having waited too long to assert this potential bar to enforcement of the king’s award. The ICJ held that Nicaragua could not in good faith raise such procedural problems so many years after the arbitration was complete and the treaty purpose fulfilled. In the words of the ICJ: “It would be contrary to the principle of good faith governing the relations between States were it [Nicaragua] permitted now to rely upon any irregularity in the appointment to invalidate the Award. Its conduct up to the moment of the Award operated in my opinion so as to preclude it thereafter from doing so...”⁴⁸

In another illustration, Cambodia and Siam (now Thailand) agreed to a boundary delimitation made by a “Mixed Commission” of individuals from Thailand and Cambodia. The commission’s work was completed in 1907. A subsequent dispute arose over an important religious site situated at the border, but not mentioned in surveys conducted by the commission’s officers. The surveys apparently placed the temple area within the territory comprising French Indochina (included in what is now Cambodia). The commission members from Siam received copies of the surveys and did not object at the time to that body’s findings. Years later, Thailand refused to cede authority over the area to Cambodia. In the 1960 proceedings before the ICJ, Thailand had two objections to the treaty-based boundary of 1907: First, the surveys were not actually the work of the treaty-designated commission; second, they contained material errors in the placement of the Thai-Cambodian boundary. The ICJ rejected Thailand’s claim for two reasons: It was not made in good faith because of the tardiness in asserting it; also, Thailand had apparently acquiesced in the boundary line fixed by the commission decades before it presented an objection. Both forms of conduct led to the Court’s useful articulation regarding the importance of good faith performance:

The primary foundation of this principle is the good faith that must prevail in international relations, inasmuch as inconsistency of conduct or opinion on the part of a State to the prejudice of another is incompatible with good faith. Again, I submit that such inconsistency is especially inadmissible when the dispute arises from bilateral treaty relations. A secondary

basis of the principle is the necessity for security in contractual relationships. A State bound by a certain treaty to another State must rest in the security that a harmonious and undisturbed exercise of the rights of each party and a faithful discharge of reciprocal obligations denote a mutually satisfactory state of things which is permanent in character and is bound to last as long as the treaty is in force. A State cannot enjoy such a situation and at the same time live in fear that some day the other State may change its mind or its conduct and jeopardize or deny rights that for a long time it has never challenged. A continuous and uncontroverted fulfillment of a treaty is tantamount to a pledge, a security renewed day by day that the treaty rights, passiveness or any form of express or tacit acquiescence, and other disputes have been decided against litigant States on the general basis of inconsistency between the claims of States and their previous acts.⁴⁹

The lack of a precise definition of “good faith treaty performance” has spawned the occasional question of whether it is in fact a general principle of International Law. Professor Charles Fenwick, former director of the Department of Legal Affairs of the Pan American Union, asserted the doubtful existence of this norm. He used treaties of peace, imposed by the victor on the vanquished, as his prime example that good faith was not seriously expected in treaty matters. When a vanquished State wanted to repudiate a treaty imposed on it by a victorious nation, the simple solution was another war. Given this fact of international life, he argued that “[a]ppearances could be saved, if [even] necessary, by finding other grounds of war, and then, if the outcome were successful, taking back what had been previously granted under duress.... Thus the faithful execution of treaties of peace was adjusted to shifts in the balance of power, and the principle of good faith was maintained while being indirectly undermined.”⁵⁰

Various organizations have attempted to articulate a standard for resolving questions about the precise content of the rather elastic “good faith performance” yardstick—often referred to as *pacta sunt servanda*. The UN International Law Commission (ILC) commenced its study of this “norm” shortly after the UN was created. The ILC’s first work product on this subject was the Draft Declaration on the Rights and Duties of States. Article 13 provided that every “State has the duty to

carry out in good faith its obligations arising from treaties ... and it may not invoke provisions in its constitution or its [internal] laws as an excuse for failure to perform this duty.”⁵¹ This limitation was almost too acceptable because it was not a functional description of the norm’s supposed content.

Two decades later, some of the Vienna Convention on the Law of Treaties delegates argued in favor of *eliminating* the term from international treaty law because of its perennial ability to mean different things to different people.⁵² The wording chosen for Article 26 of the VCLT was general enough to achieve a consensus. It provides that every treaty “is binding upon the parties to it and must be performed by them in good faith.” That language is no more specific than any earlier attempt to define good faith. Thus, good faith performance of treaty obligations does not mean literal compliance and should be assessed by reference to the circumstances of each particular case.

2. Treaty Suspension and Termination

(a) Changed Circumstances A treaty is no longer binding if there has been a “fundamental change in circumstances,” also referred to as the doctrine of *rebus sic stantibus*. While a treaty is a solemn contract between States, a party may invoke changed circumstances as an excuse for suspending or terminating that contract.

The Vienna Convention’s essential provision is Article 62.1. It provides as follows:

A fundamental change in circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

This theme often surfaces as a defense to the good faith performance requirement. Defining “changed circumstances” is as amorphous a venture as defining “good faith.” Commentators, diplomats, and jurists are unable to agree on the precise circumstances for properly invoking this basis for avoiding treaty obligations. This obstacle has not impeded the evolution of a spectrum of

divergent views. For example, *rebus sic stantibus* has been characterized as (1) a “clearly a reasonable doctrine [that] ... international law should recognize;” (2) an “alleged principle of international law;” and (3) an “unsuitable method for altering treaty obligations to accommodate changed conditions.”

The prolific Chinese scholar Wang Yao-t'ien dubbed changed circumstances as a contrivance fashioned by capitalist States to abrogate treaties at will. In his 1958 treatise on trade treaties, he wrote that two States should renegotiate their treaty, rather than one of them unilaterally suspending or terminating its treaty obligations. In his words: “There is a doctrine of ‘*rebus sic stantibus*’ in the works of bourgeois international law.... In international relations, sometimes it is necessary to revise or abrogate a treaty in the light of fundamental change of circumstances. However, capitalist states frequently use this principle as a pretext to justify their unilateral [abrogation] of treaties. Generally, the process should be: When a fundamental change of circumstances occurs, the contracting states should seek revision or reconclusion of the original treaty through diplomatic negotiation.”⁵³

Columbia University's Professor Oliver Lissitzyn aptly referred to the changed circumstances doctrine as a right with unsettled contours. In his words: “After centuries of doctrinal discussion, the existence, scope and modalities of such a right remain controversial and perplexing. Its practical importance may at times be exaggerated; but nations dissatisfied with the *status quo* continue to regard it as a welcome device for escaping from burdensome treaties, while others fear it as a threat to stability and to their interests. Terminology has complicated the problem.... Governments, in asserting the right, have variously employed or refrained from employing such terms as *rebus sic stantibus*.”⁵⁴

Changed circumstances does not permit an outright unilateral abrogation of treaty commitments. When circumstances beyond the control of the parties necessitate the alteration of a treaty commitment, the remedy is usually suspension or termination of the treaty—depending on the nature and extent of the conditions which have changed. The reality may be that the State claiming changed circumstances may no longer want to fulfill commitments that have become inconvenient or not as beneficial as anticipated.

During the 1960s, the drafters of the Vienna Convention on the Law of Treaties attempted to clarify the

legal contours of the changed circumstances doctrine. The drafting committee articulated its concern as follows:

Almost all modern jurists, however reluctantly, admit the existence in international law of the principle ... commonly spoken of as the doctrine of *rebus sic stantibus*.... Most jurists, however, at the same time enter a strong caveat as to the need to confine the scope of the doctrine within narrow limits and to regulate strictly the conditions under which it may be invoked; for the risks to the security of treaties which this doctrine presents ... [are] obvious. The circumstances of international life are always changing and it is easy to allege that the changes render the treaty inapplicable.⁵⁵

The existence of the changed circumstances doctrine has been reluctantly conceded in international litigation. The Permanent Court of International Justice grudgingly recognized its vitality. The Court refused to assess its contours, however, ultimately choosing not to apply it.⁵⁶ In the early 1970s, the International Court of Justice effectively characterized Iceland's changed circumstances defense as an unacceptable attempt to unilaterally terminate its treaty obligations. The segment of this case dealing with changed circumstances is presented below. It echoes the sentiment of the Vienna Convention on the Law of Treaties (which came into force seven years after this case was decided) that renegotiation or judicial settlement is the preferred alternative to unilateral termination supposedly based on “changed circumstances.” The dissenting opinion, on the other hand, vividly portrays the perennial problem associated with larger nations historically taking advantage of smaller ones:



Fisheries Jurisdiction Cases

(GERMANY V. ICELAND)

INTERNATIONAL COURT OF JUSTICE

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Seven, click Fisheries Jurisdiction Cases.

(b) Consensual Termination

(i) *Express Consent* States typically enter into treaties of indefinite duration. Some treaties, however, terminate by their own terms—in conformity with the expressed desire of the treaty parties. For example, the expiration of a specified time of duration is a routine basis for termination. The People's Republic of China commonly makes treaties that remain in force only for a designated period. For example, the 1950 Sino-Soviet Treaty of Friendship, Alliance, and Mutual Assistance provided that the “present treaty will be valid for thirty years. If neither of the contracting parties ... desire[s] to renounce the treaty, it shall remain in force for another five years and will be extended in compliance with this rule.”⁵⁷

Treaties that do not expire under their own terms typically contain provisions for advance notification of termination. The 1955 Sino-Indonesian Treaty on Dual Nationality provided that if “after the expiration of twenty years, one party requests its termination, it must so notify the other party one year in advance and in written form; and the present treaty shall be terminated one year after the tendering of such notification.” The 1954 Mutual Defense Treaty between the US and the Republic of China (Taiwan) provided that it would remain in force “indefinitely [although] either Party may terminate it one year after notice has been given to the other Party.” In 1978, President Carter gave notice that he intended to terminate the treaty with Taiwan. That treaty was terminated by the US one year later when he officially recognized the People's Republic of China (mainland China) as the *de jure* government of China.

A treaty may be terminated or suspended even when it does not contain revocation or notice provisions. The participants may simply repeal it in another treaty. Under Article 58 of the Vienna Convention on the Law of Treaties, two (or more) nations may suspend a treaty as it relates to their mutual obligations to one another.

States sometimes withdraw from treaties on political grounds unrelated to any breach. In September 2002, Mexico announced its intent to withdraw from the key Organization of American States 1947 hemispheric defense treaty. Mexico was frustrated over the more restrictive US immigration policy imposed in the aftermath of 9–11.

(ii) *Implied Consent* Treaty parties can effectively disapprove a treaty by implication. If a subsequent treaty is silent about the continued validity of a prior treaty on

the same subject, termination or suspension can be implied from the circumstances. The State parties may enter into a later agreement on the same subject matter as an earlier treaty. If provisions in the second treaty conflict with the first, then the first is canceled via the implied consent of the parties. The supposedly conflicting provisions must be incompatible in order to terminate the earlier treaty by implication.

Examples include the 1939 Permanent Court of International Justice case wherein a majority of the Court had decided that two related agreements were compatible. Justice Anzilotti's dissent succinctly stated the general requirements for implicit treaty abrogation: There “was no express abrogation [of the 1931 treaty]. But it is generally agreed that, beside express abrogation, there is also tacit abrogation resulting from the fact that the new provisions are incompatible with the previous provisions, or that the whole matter which formed the subject of these latter [understandings] is henceforth governed by the new provisions.”⁵⁸

Under Article 59(b) of the 1969 Vienna Convention on the Law of Treaties, the parties may consent by implication to treaty termination when a subsequent treaty is “so far incompatible with the earlier one that the two treaties are not capable of being applied at the same time.”

Failure of compliance is another basis for implied consent to a treaty's termination. A treaty can be negated by implication when all of the parties unabashedly ignore it. The absence of objections constitutes an implied understanding that the treaty is no longer in force.

(c) *Material Breach* One party's treaty breach may allow the other(s) to consider the treaty as either suspended or terminated.⁵⁹ The breach must be material, not minor. Under Article 60 of the VCLT, the material breach of a *bilateral* treaty by one party permits the other party “to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.” Material breach of a *multilateral* treaty similarly entitles “the other parties ... to suspend the operation of the treaty ... in the relations between themselves and the defaulting State [but not between one another]....” The clearest example of a material breach under Article 60 would be an outright repudiation of a treaty. The other party would then be authorized to suspend or terminate its own obligations under that treaty.

In practice, it is often difficult to establish what constitutes a material breach and which party is actually responsible for the breach. In 1966, North Vietnam claimed that South Vietnam had materially breached the Geneva Accords. That international agreement, agreed to by representatives of both governments, called for a cessation of hostilities in Vietnam, the reduction of military forces, and reunification through free elections. The North Vietnamese claimed that South Vietnam had materially breached the Accords, premised on the introduction of US military forces into the Southern portion of the country. The US justified South Vietnam's departure from the Geneva agreement on the basis of a material breach by North Vietnam. The US claimed that the "substantial breach of an international agreement by one side [North Vietnamese aggression in South Vietnam] permits the other side to suspend performance of corresponding obligations under the agreement. South Vietnam was allegedly justified in refusing to implement the provisions of the Geneva Accords," which otherwise would have required it to limit expanded military involvements and to arrange unification elections. South Viet Nam thus claimed that the introduction of military personnel into the southern portion of the country "was justified by the international law principle that a material breach of an agreement by one party [North Vietnam] entitles the other [South Vietnam] at least to withhold compliance ... until the defaulting party is prepared to honor its obligation."⁶⁰ North Vietnam and South Vietnam thus accused each other of materially breaching their respective commitments under the Geneva Accords.

In a 1972 International Court of Justice case, Pakistan complained that India materially breached several aviation treaties. An Indian aircraft had been hijacked and diverted to Pakistan. India then revoked Pakistan's right to fly over Indian territory. For reasons unrelated to the merits of this case, the ICJ did not resolve whether India breached the aviation treaties when it refused to allow Pakistani aircraft in Indian airspace. It did find, however, that the Indian suspension of Pakistan's treaty rights to pass over Indian territory, and to land in India, constituted material breaches of this aviation treaty.⁶¹

(d) Impossibility of Performance A treaty party may invoke impossibility of performance as a basis for suspending or terminating its obligations. Article 61 of the Vienna Convention on the Law of Treaties (VCLT) provides that impossibility "results from the permanent

disappearance or destruction of an object indispensable for the execution of the treaty." The drafters of the VCLT used the following examples: submergence of an island that is the object of a treaty relationship, the drying up of a river, and the destruction of a dam or hydroelectric installation indispensable for the execution of a treaty. The permanent or temporary impact of such circumstances would terminate (or suspend) rights and obligations arising under a treaty governing their use.⁶² One hopes that global warming does not become a major contributor-inhibitor of related treaty performance [§11.2.C.4.].

A fundamental change that radically alters the nature of treaty obligations has been characterized by some jurists as impossibility of performance—presenting a fine-line distinction from the above "changed circumstances" analysis. Although there are similarities, the criteria employed for applying "impossibility" differ. Every impossibility of performance involves a changed circumstance, but not every changed circumstance constitutes impossibility of performance. The changed circumstances doctrine may excuse difficulty of performance, while impossibility excuses only that performance that would be totally impossible. This excuse exonerates one or both parties from treaty performance when the relevant circumstance renders the treaty meaningless.⁶³

Assume that Spain and Portugal establish their respective rights to fish in an area on either side of a boundary in the international waters off their adjacent coasts. They agree to regulate their respective fishing fleets on either side of the line separating Spain's area from Portugal's area. The purpose of this treaty is to maintain the equal distribution of the resources near their respective coasts. If the fish unexpectedly migrate into Portugal's area, then the treaty would be suspended. The changed circumstance is that fish are temporarily unavailable in equal numbers to both Spain and Portugal. Spain's fishermen might be permitted to fish in Portugal's area of the high seas because of the treaty's mutually agreed purpose of equitable distribution. The same fishing treaty would be terminated under the impossibility doctrine if all of the fish were permanently driven away by contamination of the treaty area. The treaty would be meaningless because the object of that agreement would no longer exist.⁶⁴

(e) Conflict with Peremptory Norm A post-treaty custom may evolve, which possesses the attributes of *ius*

cogens—a peremptory norm from which no State may deviate [§1.2.B.1(b)]. The VCLT provides that such a rule trumps the treaty. It is otherwise silent, however, about the interplay of a new customary State practice conflicting with a prior treaty when that fresh norm is not *jus cogens*. In this instance, the Brussels writer Nancy Kontou invoked the jurisprudence of international tribunals assessing the impact of supervening custom on prior incompatible treaties. Her research yielded the “proposition that one party has the right to call for the termination or revision of a treaty on account of the development of new custom.”⁶⁵

A new treaty is void *ab initio* if it instantly conflicts with a peremptory norm of International Law. Article 53 of the Vienna Convention on the Law of Treaties defines *jus cogens* as a norm which is “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” However, the VCLT does not provide examples of what constitutes such a norm.

The International Law Commission’s draft Articles on State Responsibility provide no substantive clues regarding *which* norms fall within this category. Article 26 states only that “Nothing in this Chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.” Article 40 follows with “the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law ... [which] is serious if it involves a gross or systematic failure by the responsible State to fulfill the obligation.”

Some jurists and commentators deny the functional existence of *jus cogens* because even the most generally accepted rules have not achieved universality. Moscow State University’s Professor Grigori Tunkin explains that the “arguments of opponents of *jus cogens* can be reduced to the fact that such principles are possible only in a well-organized and effective legal system, and since international law is not such a system, the existence of principles of general international law having the character of *jus cogens* is impossible.”⁶⁶

One can make a reasonable theoretical argument that applying *jus cogens* (assuming that it actually exists) would render certain treaties void. When two States have entered into a treaty in which they agree to invade another country, that agreement violates the most

fundamental UN Charter article: Article 2.4’s prohibition on the use of force in international relations. Such a treaty would violate an undisputable Charter norm. Today, Stalin and Hitler’s then secret 1939 agreement to divide Europe could not legitimately circumvent the Article 2.4 prohibition of force.

(f) Conflict between Parties Nations often sever their diplomatic or consular relations. That circumstance does not *necessarily* affect their respective treaty rights and obligations. Article 2.3 of the Vienna Convention on Consular Relations, for example, provides that the “severance of diplomatic relations shall not ipso facto [automatically] involve the severance of consular relations.” As Article 73 of the Vienna Convention on the Law of Treaties similarly provides: “the present Convention shall not prejudice any question that may arise in regard to a treaty ... from the outbreak of hostilities between States.”

A December 2005 decision of the Eritrea Ethiopia Claims Commission, relying upon the leading British treatise on International Law, restates the norm that “[t]he outbreak of war at once causes the rupture of diplomatic intercourse between the belligerents, if this has not already taken place. The respective diplomatic envoys are recalled.”⁶⁷ This Commission effectively complimented the parties for the unusual steps they took to maintain such ties during the Eritrea-Ethiopia war.

War and other hostile relationships do not necessarily terminate treaty *obligations* of parties to the conflict. The US war with Germany, for example, did not terminate the 1923 US treaty obligation to transmit property of deceased individuals to German citizens.⁶⁸ States are expected to continue to perform certain treaty obligations, such as the Geneva Conventions of 1949 dealing with Red Cross monitoring and the treatment of prisoners of war [textbook §9.6.B.].

Whether a treaty continues to be effective is another question. The principal British treatise does not take a categorical position: “The effect of the outbreak of hostilities between the parties to a treaty upon the [continuing] validity of that treaty is far from settled.... It is a matter not prejudged by the provisions of the Vienna Convention.”⁶⁹

3. VCLT Applied In 1997, the International Court of Justice adjudicated the following dispute between Hungary and Slovakia. Hungary relied on various Vienna Convention on the Law of Treaties provisions—resulting

in termination of the 1977 Budapest Treaty between Hungary and (what was then) Czechoslovakia:



**Case Concerning the
Gabcíkovo-Nagymaros Project**
(Hungary v. Slovakia)

INTERNATIONAL COURT OF JUSTICE (1997)

Go to Course Web Page, at:

<<http://home.att.net/~sломansonb/txtcsestite.html>>.

Under Chapter Seven, click Hungary/Slovakia
Treaty Breach Case.

◆ §7.3 US TREATY PRACTICE

Under International Law, there are two general principles for resolving conflicting laws. One is that the UN Charter prevails when it conflicts with another international instrument.⁷⁰ The other is that a nation's internal law cannot be used as a defense to its breach of an international obligation.

How *other* nations make and rank treaties is beyond the introductory scope of this book. The range of practice includes legislative and executive treaties, or some combination of the two.⁷¹

A. TREATY VERSUS EXECUTIVE AGREEMENT

1. Constitution's Express Treaty Power The US Constitution articulates the president's treaty power. Under Article II, Section 2, clause 2: "He shall have Power, by and *with the Advice and Consent of the Senate*, to make Treaties, provided that two thirds of the Senators present concur ... [italics added]."

2. President's Executive Agreement Power

(a) Evolution There is an oceanic distinction between the constitutionally articulated "treaty" power and the nearly simultaneous appearance of the president's "executive agreement" power. All presidential agreements with other nations or international organizations are treaties. But under US practice, executive agreements are often undertaken by the president alone—without the "advice and consent" or prior involvement of Congress.

The "treaty" versus "executive agreement" distinction was spawned by early US practice. During the Constitutional Convention of 1787, the House of Representatives

was ultimately excluded from an express treaty-making role, which would have been exercised in conjunction with the Senate, as originally proposed. After debating the matter, the delegates acknowledged the widespread feeling that diplomatic negotiations required a degree of secrecy possible only in the smaller senatorial body (then twenty-six senators from the thirteen former colonies). The fervor of this debate effectively overshadowed the importance of what remained in the final draft of the Constitution—excluding the House completely and including the president as the Constitution's treaty maker.⁷²

Almost immediately, US presidents, without seeking the consent of the Senate, began to enter into "executive agreements." This contrast evolved, in part, because the US Constitution does not actually *define* the term "treaties." When it was adopted in 1787, its drafters apparently saw no need to define a concept that was then well known in international practice.⁷³ The Treaty Clause has never been judicially interpreted by the judicial branch of the US government to mean that the president must have the Senate's advice and consent for all international agreements.

Two types of "executive agreements" evolved. One is the *congressional-executive* agreement. The president also requests approval of certain executive agreements by joint resolution of both houses of Congress. Columbia University Professor Louis Henkin presents the following vindication for this implied presidential power:

Neither Congresses, nor Presidents, nor courts, have been seriously troubled by these conceptual difficulties and differences. Whatever their theoretical merits, it is now widely accepted that the Congressional-Executive agreement is available for wide use ... and is a complete alternative to a treaty: The President can seek approval of any agreement by joint resolution of both houses of Congress rather than by two-thirds of the Senate. Like a treaty, such an agreement is the law of the land, superseding inconsistent state laws, as well as inconsistent provisions in earlier treaties, in other international agreements, or in acts of Congress.⁷⁴

The other category of executive agreement is the *sole executive* agreement. While congressional approval for executive agreements is often sought, it has been completely avoided in some instances. The president has exercised the inherent power to incur an international obligation independently of the Senate (Article II treaty) or

both houses of Congress (congressional-executive agreement). Columbia University Professor Oliver Lissitzyn succinctly describes the historical but troubled development of the president's executive agreement power:

The making of executive agreements is a constitutional usage of long standing [that] apparently rests upon the President's vast but ill-defined powers in the fields of foreign relations and national defense. Neither the usage nor the decisions of courts, however, provide clear-cut guidance as to the scope of the treaty-making power and the scope of the executive agreement-making power [which] are not mutually exclusive. What may be properly accomplished by executive agreement may also be accomplished by treaty...

It is not believed that any attempt to delimit rigidly the scope of the executive agreement-making power is likely to be successful or to result in a correct portrayal or prediction of actual practice. Some writers, while refusing to regard the executive agreement-making power as co-extensive with the treaty-making power, wisely refrain from attempting to define the scope of the former...

It may be proper, therefore, to regard the executive agreement-making power as extending to all the occasions on which an international agreement is

believed by the Chief Executive to be necessary in the national interest, but on which resort to the treaty-making procedure is impracticable or likely to render ineffective an established national policy. The test here suggested is the only one that adequately accounts for the variety of situations in which the President, with or without the approval of Congress, has resorted to the executive-agreement procedure. It also accounts for the increasing frequency of resort to the executive-agreement method in recent years, with the growth of complexity in international affairs and of pressure of work in the Senate.⁷⁵

Not all Commonwealth countries allow executive agreements to have automatic effect as domestic law. Such a treaty is binding under International Law standards. Under Australia's Constitution, however, an executive agreement cannot have any internal effect until it is enabled into law via legislation.

Chart 7.1 illustrates the historical comparison between "treaties," in the constitutional sense of requiring the Senate's advice and consent, and "executive agreements," undertaken as either the congressional or sole variations of that term. It is readily evident that the executive agreement has far surpassed the treaty in terms of how the president exercises the treaty-making power:

CHART 7.1 ARTICLE II—TREATY V. EXECUTIVE AGREEMENT COMPARISON

US Treaties and Executive Agreements from 1789–2004			
Period	Treaties	Executive Agreements	Treaty/Exec Agreement Percentage
1789–1839	60	27	69/31
1839–1889	215	238	47/53
1889–1939	524	917	36/64
1939–1989	702	11,698	6/94
1990–1999	249	2,847	8/92
2000–2004	84	977	8/92
Total	1,834	16,704	10/90

The author's percentage calculations are expressed in rounded numbers. Data on the period since 1945 has been furnished by the US Department of State, Office of the Assistant Legal Adviser for Treaty Affairs. Data prior to 1945 is from the Congressional Record, May 2, 1945, at 4118 & E. Borchard, *Treaties and Executive Agreements*, 40 AMER. POL. SCIENCE REV. 735 (Aug. 1947). This table was adapted from, and further detail is available, at Congressional Research Service, *TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE: A STUDY PREPARED FOR THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE* (2001), at: <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_senate_print&docid=f:66922.wais>. The more recent numerical comparisons were forwarded to the author by Jennifer Elsea, Legislative Attorney for the Congressional Research Service.

The Senate has occasionally expressed concern about this spiraling use of executive agreements, which has arguably emasculated its constitutional role in the treaty-making process. The most heated debate occurred between 1952 and 1957. Senator John Bricker generated an intense challenge by his proposed amendment to the Constitution's Treaty Clause. He advocated that all international agreements by the US should become effective only when legislation passes in both the House of Representatives and the Senate. If he had been successful, the proposed constitutional amendment would have eliminated the president's ability to enter into any international agreement without express congressional approval. He or she would thus have been more of a negotiator than a *maker* of treaties.

Although the Bricker Amendment failed, Congress did pass the Case Act in 1972. It requires the president to advise Congress (in writing) of all international agreements made without the consent of the Senate or without a joint resolution of Congress. The president may believe that public disclosure would prejudice national security, however. In this instance, he or she may secretly enter into and later transmit a completed executive agreement to the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs.⁷⁶

(b) Application The US Supreme Court has occasionally described, but not clearly defined, the scope of the president's executive agreement power. In a case growing out of President Carter's 1979 executive agreement with Iran—which ended the hostage crisis [§2.7.E.1(b) *Iran Hostage Case*] and provided a basis for resolving business claims against Iran—the Court characterized that general power as follows: “In addition to congressional acquiescence in the President's power to settle [such] claims, prior cases of this Court have also recognized that the President does have *some* measure of power to enter into executive agreements without obtaining the advice and consent of the Senate.”⁷⁷

The *Weinberger* case below illustrates the difficulty in drawing a precise legal demarcation between the president's executive agreement power and the Senate consent required under the US Constitution.

The Supreme Court effectively “lent its hand” to the president's intentional discrimination against US citizens who had hoped to work on US military bases abroad. Military dependents, who were typically spouses of enlisted personnel with a generally lower wage structure than that of military officers, would be unable to work.



Weinberger v. Rossi

SUPREME COURT OF THE
UNITED STATES
456 U.S. 25 (1982)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Seven, click Weinberg Treaty.

In many cases, they would be unable to accompany their military spouses during overseas assignments. The rationale for promoting US interests, via intentional discrimination in favor of foreign nationals, was the superior governmental interest in ensuring the availability of foreign military bases necessary to the national defense.

The materials in this book section suggest a two-part process for deciding whether the president's exercise of the executive agreement power transgresses any limits contained in the constitutional Treaty Clause or limiting congressional legislation. First, the president (through the appropriate federal agency) must determine whether his or her proposed executive agreement instead falls within the parameters of the Treaty Clause, which would require Senate consent. Second, the president must examine existing congressional legislation and attitudes to determine whether congressional approval should be obtained. As stated in the principal treatise on US constitutional law:

The precise scope of the President's power to conclude international agreements without the consent of the Senate is unresolved. At one extreme, the proposition that the treaty is the exclusive medium for affecting foreign policy goals and, consequently, that executive agreements are *ultra vires* [unconstitutional] seems adequately refuted....

At the other extreme the notion that executive agreements know no constitutional bounds proves equally bankrupt. Executive agreements, no less than treaties, must probably be limited to appropriate subject matter. The more difficult question is whether there exist species of international accord that may take the form of a treaty, but not that of an executive agreement.⁷⁸

In September 2004, a federal appellate court resolved a conflict akin to *Rossi*—in this instance between a

president's military Status of Forces Agreement (SOFA) with the UK and the US Foreign Sovereign Immunities Act (FSIA) [textbook §2.6.B.]. During a bar fight in Tacoma, Washington, several members of the British military started a fight with and severely injured a US civilian. The 1976 FSIA is ordinarily the "exclusive" source of jurisdiction over suits involving foreign States and their instrumentalities. While foreign States are generally presumed to be immune from suit, this conduct fell within the FSIA "noncommercial tort" exception. The civilian plaintiff could thus sue the UK.

The 1951 SOFA executive agreement between the US and the UK was created to avoid just such disruptions in military service obligations. Local plaintiffs in either country may proceed with their suits, but against the host country—just as if its own soldiers had committed the wrongful act. The UK was thus immune from suit under the SOFA, but liable under the FSIA. The US court applied the familiar rule that US legislation should not be applied in a way that violates international obligations unless Congress clearly intends to do so. Thus, the UK was dismissed, and the local citizen's claim was instead deemed to be against the US, under the Federal Tort Claims Act.⁷⁹

Some US labor unions brought an action challenging constitutionality of the North American Free Trade Agreement (NAFTA). President Clinton entered into that treaty, on behalf of the US, with Canada and Mexico—but *without* Senate consent. The issue was whether entering into NAFTA would require an "Article II Treaty" and thus Senate consent in order for the US to ratify that treaty. The federal appeals court "decided" that this dispute was a non-justiciable, political question [national adjudication of international issues: textbook §8.7.A.]. Thus:

[t]he appellants [unions] concede, as they must, that the Constitution affords the political branches substantial authority over foreign affairs and commerce. The appellants also concede that the Supreme Court has recognized the constitutional validity of the long-standing practice of enacting international agreements which do not amount to full-fledged treaties....

Indeed, just as the [Art. II] Treaty Clause fails to outline the Senate's role in the abrogation of treaties, we find that the Treaty Clause also fails to outline the circumstances, if any, under which its procedures must be adhered to when approving international commercial agreements....

Significantly, the appellants themselves fail to offer, either in their briefs or at argument, a workable definition of what constitutes a "treaty." Indeed, the appellants decline to supply any analytical framework whatsoever by which courts can distinguish international agreements which require Senate ratification from those that do not.⁸⁰

B. CONFLICT RESOLUTION

What is the relative ranking among treaties, the US Constitution, and federal statutes when there is a conflict? The debate sometimes splits legal hairs regarding whether the president—who makes all treaties with or without the Senate's consent—can use the executive's treaty-making power to trump some constitutionally required legislative involvement in certain foreign affairs. In 1977, for example, sixty members of the US House of Representatives unsuccessfully sued President Carter when he relinquished US control of the Panama Canal. Article IV, Section 3, clause 2 of the Constitution provides that the "Congress [both houses] shall have Power to dispose of ... Property belonging to the United States...." In the view of these members of the House, President Carter had improperly relied on the Constitution's Treaty Power when he successfully sought the "Advice and Consent of the Senate"—rather than seeking the Canal's transfer to Panama via *both* houses of Congress.

In parts of Europe, Mexico, and certain other regions, treaties must take precedence over internal law in the event of a conflict.⁸¹ The constitutions of Burkina Faso, Congo, Mauritania, and Senegal expressly provide that a treaty is superior to internal law—although there is apparently no reported judicial decision that affirms this elevated status.

The US Constitution, however, does not provide a direct answer to the resolution of such conflicts. Article VI provides only that the "Constitution and the Laws [federal statutes] of the United States which shall be made in Pursuance thereof and all Treaties made ... shall be the supreme Law of the Land...." This wording does not establish any relative hierarchy in the event of a conflict. An internal law of the US may occasionally clash with and supersede a prior international agreement. This portion of the treaty chapter addresses the resolution of such conflicts under US law, as opposed to International Law where a State may not rely on its internal law to avoid international obligations.

1. Treaty versus Constitution The US Supreme Court has consistently held that the Constitution prevails when it conflicts with statutes or treaties. Both a federal statute and a treaty (executive agreement) were in conflict with the Constitution in the 1957 case of *Reid v. Covert*.⁸² The Court held that civilian wives who had killed their military husbands on US bases in England and Japan could not be tried by a military court-martial. The Supreme Court examined several distinct sources of US law to arrive at this conclusion. The Uniform Code of Military Justice (UCMJ) is federal legislation, which then provided for a court-martial in this situation. Presidential executive agreements governing crimes occurring on US bases abroad incorporated these provisions of the UCMJ, which was thus expressly applicable to these civilian wives. The court found that neither the Military Justice Code nor the executive agreements could deny the spouses' constitutional rights to indictment by a civilian grand jury and to a jury trial by their peers. These rights enshrined in the US Constitution could not be vacated by either the federal statute (UCMJ) or by an executive agreement, which purported to apply the UCMJ to military dependents abroad.

2. Treaty versus Statute Treaties and federal statutes are generally on equal footing under Article VI of the Constitution. Each is therein referred to as the "supreme law of the land." Neither is superior to the other under the express terms of the Constitution.

The US Supreme Court applies the following rule: "The last in time prevails." As stated in the above *Reid* decision, the Court has "repeatedly taken the position that an Act of Congress ... is on full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null."⁸³ The Court affirmed this position in 1998, when construing the 1996 Anti-terrorism and Effective Death Penalty Act. A Paraguayan defendant was thus foreclosed from appealing the failure of the Virginia state court system to notify Paraguay of his arrest and detention. Such notification is required by the 1963 Vienna Convention on Consular Relations [§2.7.C.2.].⁸⁴ Congress may thus denounce it prior treaties under US law. In its comprehensive Anti-Apartheid Act of 1986, Congress expressly repudiated a presidential executive agreement providing for air service with South Africa (prior to the improvement in

international relations when the white minority relinquished power in 1993).⁸⁵

The US Supreme Court illustrated this progression in a case involving civilian wives who murdered their military husbands abroad. The case involved all three: the US Constitution's Bill of Rights, a federal statute (Uniform Code of Military Justice—UCMJ), and a prior treaty regarding which country would have jurisdiction to try civilian spouses. When conflicts arise, the "Court has ... repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null."⁸⁶ So in the event of a conflict:

- (1) The US Constitution prevailed over International Law.
- (2) A statute (UCMJ) and a bilateral Status of Forces treaty—regarding which country would try these civilians—were on the same legal footing.
- (3) The later in time—either treaty or federal statute—trumped the prior of the two.

◆ PROBLEMS

Problem 7.A (§7.1.A.3., after Unequal Treaty materials): In 1980, the Vienna Convention on the Law of Treaties became effective when the minimum number of national ratifications were deposited with the UN. During the negotiating process, US hostages initially remained captive in the American embassy and, for most of the time, at other locations in Iran. The US and Iran had no direct diplomatic relations. Algeria assisted US President Jimmy Carter in negotiating a treaty with Iran to secure the liberation of these hostages. They were released in exchange for the simultaneous expungement of Iranian assets in the US, which had been frozen by Carter near the outset of the crisis. The US also agreed to return assets subject to its control that belonged to the family of the former Shah of Iran. Various documents about that treaty and related matters are reprinted in 20 INT'L LEGAL MAT'LS 223–240 (1981). A criticism of the US Department of State's decision not to raise the question of force in this particular treaty process is presented in *Iranian Hostage Agreements*, in Malawer book, at 27 (cited, note 16 *infra*).

A very sensitive provision of this treaty required arbitration of any subsequent disputes related to the “Hostage Crisis.” This provision precluded the hostages, their families, or any governmental entity from suing Iran in the US, the International Court of Justice, or anywhere else. President Carter’s economic sanctions were not working, and he did not want to undertake further military action to retrieve the hostages from Iran after a failed rescue attempt in 1979. Instead, he entered into an *executive agreement* to resolve this crisis and obtain the guaranteed safety of the hostages. Subsequent suits by several hostages were dismissed by US courts on the basis of the president’s agreement not to permit suits against Iran that were spawned by the Hostage Crisis.

The US Senate attempted to abrogate this agreement (the Algiers Accords) on several occasions, as recently as 2003. This is a recurring legislative response to cases like the July 2003 District of Columbia federal case where Iran was potentially subject to a judgment in a hostage families’ class action lawsuit. Iran had been designated a terrorist State under an amendment to the Foreign Sovereign Immunities Act [textbook §2.6.B.1(a)]. The executive branch nevertheless intervened to obtain a dismissal of this action. Its lawyers successfully argued that the Algiers Accords were not affected by Iran’s subsequent “terrorist” status under US law.⁸⁷

Assume that the US Senate is debating the propriety of President Carter’s negotiations leading to the above executive agreement between the US and Iran. The topic of this hypothetical Senate debate is not whether the Senate’s advice and consent were necessary for the hostage-release agreement with Iran. The Senate has instead chosen to debate whether it can avoid the US obligations under the treaty, on the basis that the president had to enter into the hostage-release treaty under duress.

Senator Dove represents a number of colleagues who do not wish to alter or negate the effect of the president’s arrangement with Iran. They do not want to risk renewed hostilities or create the impression that America goes back on its obligations. Dove contends that “there was no physical, military, or economic coercion that forced this powerful nation into President Carter’s treaty. It was the US that employed forceful tactics, rather than Iran, when Carter’s military rescue mission failed.”

Senator Hawk represents an opposing group of senators. She and her colleagues hope to refreeze Iranian money accounts and gold bullion still within the US or controlled by private US businesses in foreign countries.

She wants to renew the 1980 *Hostage Case* litigation in a separate phase in the International Court of Justice [order that Iran free hostages: textbook §2.7.E.1.]. Relying on Article 52 of the VCLT, Hawk believes that the ICJ should render an authoritative decision characterizing the hostage treaty as being invalid on the basis of VCLT duress.

Senator Hawk thus contends that “the Iranian treaty would never have seen the light of day if we were not forced into it by the hostage situation.” Senator Dove’s litmus test for validating the treaty is an imaginary bright line that separates military and nonmilitary coercion in all circumstances. “The proper approach, in my not so humble opinion, is to invalidate the sham, and shameful, Iranian deal by distinguishing between lawful and unlawful coercion—rather than Senator Dove’s approach, which isolates military duress [to invalidate the treaty] from nonmilitary duress [whereby the treaty would be unaffected].”

Make the following assumptions:

- (a) Iran is a party to the VCLT.
- (b) It did not make any reservations.
- (c) The hostages have been released, but the Iranian assets are still frozen/available for seizure.
- (d) The Carter hostage release agreement was made *after* the January 27, 1980 “start” date for the prospective applicability of the VCLT.

Two students will present the arguments that Senators Dove and Hawk might use in their Senate debate on the applicability of the VCLT. Can the US void its treaty obligations to Iran under President Carter’s executive agreement?

Problem 7.B (after §7.1.B.4. *Medellin case*): Reconsider the ICJ 1980 *Hostage Case* and the 1961 Diplomatic Relations Convention provisions, both set forth in §2.7.C.1. of this book. Answer the following questions based on the materials in §7.1:

- (1) Did the Vienna Convention on Diplomatic Relations have to be “self-executing” for the US to claim that Iran breached it?
- (2) Are those provisions self-executing? Can this be answered by reading the given articles?
- (3) Based on the *Medellin* case analysis, how would you resolve the question of whether the Diplomatic Relations treaty is self-executing?

Problem 7.C (after §7.2.A.4. *Reservations case*): The treaties you will later read [§10.2] illustrate the UN's promotional role in human rights. One of them is the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) [§10.3.B.], available at: <<http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>>. Read and compare the following information regarding the reservations submitted to this convention by Bangladesh, Nigeria, Saudi Arabia, and the US:

- ◆ *Bangladesh*: “On reading the Bangladeshi reservation to the Women’s Convention, indicating that it will implement this convention in accordance with Islamic Sharia Law, the advocates of women’s rights cannot but be extremely skeptical about the possible contribution of the Convention (as amended by the [Sharia Law] reservation) to the improvement of the situation of women in Bangladesh.” L. Lijnzaad, *RESERVATIONS TO UN-HUMAN RIGHTS TREATIES: RATIFY AND RUIN?* 3 (Dordrecht, Neth: Martinus Nijhoff, 1995).
- ◆ *Nigeria*: Nigeria ratified CEDAW in 1985, without any reservations. In 2004, it signed CEDAW’s Optional Protocol. State parties must thereby implement the anti-discrimination against women treaty by “all appropriate means.” But §12 of the Nigerian Constitution requires legislative implementation of all treaties before they can be legally enforced. Nigeria has yet to internally enable its obligations under CEDAW. Some 780 local government councils support early marriage, forced marriage, early and excessive childbearing expectations, varied forms of gender violence, and constraints on sexual and reproductive choices. See A. Ijeoma, *The Convention on the Elimination of All Forms of Discrimination Against Women and the Status of Implementation on the Right to Health Care in Nigeria*, 13 *HUMAN RIGHTS BRIEF* 34 (Wash., D.C.: Amer. Univ. College of Law, 2006).
- ◆ *Saudi Arabia*: “In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.”
- ◆ *United States*: The US has signed (1980) but not ratified CEDAW. The US is therefore committed in principle, but has yet to merge word and deed via Senate confirmation. Per materials in §8.2 of the textbook, a signatory cannot take any action that is

inconsistent with the object and purpose of a signed treaty.

Determine the following:

- (1) Do the Bangladesh and Saudi Sharia Law reservations comply with the ICJ *Reservations Case* “compatibility” test?
- (2) Does the US have a higher duty to avoid discrimination against women—than *either* of the above two ratifying nations—because the US has signed CEDAW? Does the post-*Reparations Case* note, on the Draft Guidelines on Reservations to Treaties, help to resolve these questions?

Problem 7.D (after §7.2.A.4. *Reservations Case*) Article 17(2) of the 1969 Vienna Convention on the Law of Treaties states that when “it appears from the ... object and purpose of the treaty that the application of the treaty *in its entirety* between all the parties is an *essential condition* of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties” (italics added). VCLT Article 19(1)(a) provides that the legal effect of a reservation is that it “[m]odifies for the reserving state the provisions of the treaty to which the reservation relates to the extent of the reservation.”

Assume the following facts: La Luce del Pueblo—meaning “Light of the People,” or LLP—is an ultra-radical group of citizens within a hypothetical Caribbean State called Haven. Last September, Haven’s military leader placed the LLP in charge of guarding some kidnapped US citizens. They were being held incommunicado during political hostilities with the US. Without authority from the country’s leader, some members of LLP decided to mistreat the US citizens. Several were beaten. One was brutally murdered. His body was then dumped on the steps of the US embassy in Haven, where journalists had gathered to learn about the latest developments in the escalating hostilities.

A number of foreign newspapers printed a picture of the body of the dead US citizen on the US embassy steps. Their news story about the beatings and execution assigned responsibility to “LLP, the zealous group of Haven idealists who say that they resent the decades of the US dominance in hemispheric affairs.” This newspaper account included LLP’s statement to these journalists: “We plan, for the benefit of the People’s

Revolutionary Party (led by Haven's military leader), to eliminate all US citizens in Haven who hinder our progress." Subsequently, US citizens were randomly attacked and beaten in Haven's restaurants and bars. Nationals from other countries were not harmed in these incidents. Haven's leader denied any involvement with what he characterized as "an idealistic, but irresponsible splinter group of radicals to be dealt with if found." Worldwide media attention now focused on Haven and its growing confrontation with the US.

Some US senators thus stated for the Congressional Record that "Haven had added genocide to the long list of international obligations breached by Haven in the last decade. Haven has failed to adhere to the bilateral treaties between the two nations, to the wishes of the Organization of American States, and to the unmistakable minimum standards of international behavior." Under the Genocide Convention, *genocide* is the killing of members of a particular ethnic group with the intent to destroy it [§8.5.C.2 *Radio Machete* case].

Under the applicable US-Haven treaty, murder is an extraditable offense. Last October, the US Department of State demanded that Haven extradite those responsible for killing the US citizen so that they could be tried either in the US or in some international tribunal for the crime of genocide. Haven refused this extradition request because "those who have killed the US citizen may have committed murder, but they could not possibly be thereby responsible for the bizarre claim of genocide."

Assume that Haven, attempting to show its solidarity with the world community, chooses this point in time to become a party to the Genocide Convention. Haven tenders its consent to the appropriate international authority. It also submits the following reservation: "Haven hereby adopts the Genocide Convention as binding. Haven reserves the sovereign right, however, to use any means at its disposal to eliminate external threats to Haven's territorial integrity."

Can Haven legitimately tender this reservation to the Genocide Convention, under the ICJ *Reservations Case*? The Vienna Convention on the Law of Treaties?

Problem 7.E (after §7.2.B.2. *Fisheries Jurisdiction Cases*): The US and the hypothetical Latin American State of Estado entered into a 1953 Treaty of Friendship, Commerce, and Navigation (FCN). This treaty

initiated their international relationship and covered a number of details. In the relevant treaty clause, the US agreed that Estado could nationalize American business interests. In return, Estado was required to provide reasonable compensation, which was defined in the treaty as "the fair market value of all nationalized assets."

The US-Estado relationship has turned sour. The Estado government nationalizes a major US corporation's property in Estado, but does not tender *any* compensation. Estado resisted the US claim of entitlement to compensation under the 1953 friendship treaty. Estado's Minister of State issued the following statement:

A fundamental change in circumstances has precluded the continued viability of the 1953 FCN Treaty. The 1974 United Nations Declaration on the Establishment of a New International Economic Order obviously necessitates termination of the decades earlier compensation requirements of the outmoded US-Estado FCN Treaty [New International Economic Order: textbook §4.4.B.3.]. The changed circumstance is that our nation, which the Creator has endowed with natural resources, need no longer fall prey to another nation's multinational enterprises. The United States corporation has plundered untold billions of dollars in excessive profits from the very core of Estado. All of the profits have been repatriated back into the United States, rather than remaining here to benefit Estado's economy. The content of International Law was developed by powerful nations over the many centuries before Estado even existed. It is a self-perpetuating vehicle used by countries like the United States to justify its asserted right to compensation in the amount of the "fair market value" of nationalized property. Due to these changed circumstances, Estado may reasonably justify its refusal to pay any compensation to a corporation that has already acquired much more than it could ever repay to Estado. As a showing of good faith on the part of my Government, Estado will not seek reimbursement in an international forum, settling instead for the fair market value of the nationalized assets, which is only a small fraction of what the United States enterprise has itself expropriated in natural resources from the people of Estado.

Can Estado properly invoke the doctrine of *rebus sic stantibus* to terminate its treaty obligation to repay fair market value for nationalizing the US corporation?

Problem 7.F (end of §7.2.C.): Refer to Problem 7.E immediately above. Assume that Estado later repealed all treaty commitments with the US after the US senators widely condemned its nationalization of the US corporate property. Questions:

- (1) Is the US now required to perform its obligations under any treaty with Estado?

- (2) Does the US have any remedies under the Vienna Convention on the Law of Treaties?

Problem 7.G (after §7.3.): Briefly peruse the following UN Convention against Torture (CAT) articles on the Course Web Page. At Chapter 2, *click* Torture Convention: Article 1.1; Article 16.1; Article 10.1; Articles 11–14.1. You will revisit the CAT in several chapters of this book—especially in §9.6.B.4(d–e), and 7(a). The next occasions will be §9.6 and §9.7 on the Laws of War; then §10.2 on the UN promotional role regarding the prevention of torture.

The US reservation to its acceptance of the CAT is as follows:⁸⁸

I. The Senate's advice and consent is subject to the following reservations:

(1) That the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment,' *only insofar* as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment *prohibited by* the Fifth, Eighth, and/or Fourteenth Amendments to *the Constitution of the United States* [italics added].

...

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:

(1)(a) That with reference to [CAT] article 1, the United States understands that, in order to constitute torture, an act *must be specifically intended* to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality [italics added].

(b) That the United States understands that the definition of torture in article 1 is intended to apply only to acts directed against persons *in the offender's custody or physical control* [italics added].

(c) That with reference to article 1 of the Convention, the United States understands that 'sanctions' includes judicially-imposed sanctions and other enforcement actions *authorized by United States law or by judicial interpretation of such law* [italics added]....

(d) That with reference to article 1 of the Convention, the United States understands that the term 'acquiescence' requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.

(e) That with reference to article 1 of the Convention, the United States understands that noncompliance with applicable legal procedural standards does not *per se* constitute torture.

...

(3) That it is the understanding of the United States that article 14 requires a State Party to provide a private right of action for damages only for acts of *torture committed in territory* under the jurisdiction of that State Party [italics added].

...

III. The Senate's advice and consent is subject to the following declarations:

(1) That the United States declares that the provisions of articles 1 through 16 of the Convention are not self-executing.

Questions:

- (1) Is the CAT a “self-executing” treaty [§7.1.B.]?
- (2) Does the reservation comply with the international jurisprudence on the validity of reservations to a treaty? [textbook §7.2.A.4.]?
- (3)(a) Assume that your government wants an opinion from you, regarding whether it should accede to the UN’s Thou-Shalt-Not-Torture treaty. It wants your advice on whether to use the above US CAT reservation as its model. How will you advise your national leaders, who are now considering whether to accede to the CAT?
- (b) Is there any reason why your country should not submit a like reservation, given your nation’s concerns about national security?

◆ FURTHER READING & RESEARCH

See Course Web Page, at: <<http://home.att.net/~slomansonb/txtcsesite.html>>, click Chapter Seven.

◆ ENDNOTES

1. See generally D. Bederman, *INTERNATIONAL LAW IN ANTIQUITY* (Cambridge, Eng: Cambridge University Press, 2001).
2. The text of this convention is reprinted in 63 *AMER. J. INT’L L.* 875 (1969), 8 *INT’L LEGAL MAT’LS* 679 (1969), and <<http://fletcher.tufts.edu/multi/texts/BH538.txt>> [hereinafter *VCIL*]. Its terms have been masterfully chronicled in M. Villager, *COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* (Leiden, Neth: Martinus Nijhoff, 2009). A succinct History of the Convention is therein provided at 28–38, which is expanded in the “History” portion of each article’s distinct chapter.
3. D. Hollis, *A Comparative Approach to Treaty Law and Practice*, ch. 1, in D. Hollis, M. Blakeslee & L. Ederington (ed.), *NATIONAL TREATY LAW AND PRACTICE* (Leiden, Neth: Martinus Nijhoff, 2005), containing chaptered analyses on the treaty practice of nineteen nations.
4. See M. Kaniel, *THE EXCLUSIVE TREATY-MAKING POWER OF THE EUROPEAN COMMUNITY UP TO THE PERIOD OF THE SINGLE EUROPEAN ACT* (Hague: Kluwer, 1996).
5. UN Gen. Ass. Doc. A/CONF.129/15 of March 20, 1986, reprinted in P. Menon, *THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS* 159 (Lewiston, NY: Edwin Mellon Press, 1992), and online at: <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf>.
6. As of August 2008, the UN Treaty Database listed forty *parties* to this Convention, but only 28 states—the others being international organizations.
7. Law-making Agreements, §1773, in *INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY* AT 1133 (4th rev. ed. Boston: Martinus Nijhoff, 2003).
8. Comment (2) to Art. 2, *Int’l L. Comm’n, Commentary on the Vienna Convention on the Law of Treaties*, in *Official Documents—United Nations Reports of the International Law Commission*, 61 *AMER. J. INT’L L.* 248, 287 (1967) [hereinafter *Commentaries*]. The ILC study did not address “oral” agreements, because of the comparative prominence of written instruments as a basis for international obligations.
9. *Harvard study*: Draft Convention on the Law of Treaties, 29 *AMER. J. INT’L L.* 652, 712 (Supp., 1935). *Multiple terms*: A comprehensive table depicting these terms, with accompanying details, is available in D. Myers, *The Names and Scope of Treaties*, 51 *AMER. J. INT’L L.* 574, 576 (1957). *ILC study*: *Commentaries*, Comment (3) to Art. 2, at 288, cited in note 8 *supra*.
10. A. Gasis, Preface to E. Raftopoulos, *THE INADEQUACY OF THE CONTRACTUAL ANALOGY IN THE LAW OF TREATIES XIII* (Athens: Hellenic Inst. Int’l & Foreign Law, 1990) [hereinafter *CONTRACTUAL ANALOGY*].
11. S. Scott, *Proposing a Political Theory of Treaty Interpretation*, ch. 5, in *THE POLITICAL INTERPRETATION OF MULTILATERAL TREATIES* 97, at 111 (Leiden, Neth: Martinus Nijhoff, 2004) (*italics added*).
12. R. Phillimore, 2 *COMMENTARIES UPON INTERNATIONAL LAW* 99 (3d ed. London: Butterworths, 1892).
13. *Scientific approach*: The Public Law View of Treaties in the 19th and the Early 20th Century, ch. 5, in *CONTRACTUAL ANALOGY* text, at 151, cited in note 10 *supra*. *Informal approach*: Treaty-Like Instruments: An Overview, ch. 1, in J. Klabbers, *THE CONCEPT OF TREATY IN INTERNATIONAL LAW* 27 (Hague: Kluwer, 1996).
14. *Grotius*: 2 *DE JURE BELLI AC PACIS* [The Law of War and Peace] 394 (Kelsey translation, Wash., DC: Carnegie Endowment for Int’l Peace, 1925). *E. de Vattel*: 3 *LE DROIT DE GENS OU PRINCIPES DE LA LOI NATURELLE* [The Law of Nations or Principles of Natural Law] 165 (Wash., DC: Carnegie Endowment for Int’l Peace, 1916 reprint of 1758 treatise). *American author*: H. Halleck, *INTERNATIONAL LAW* 196 (San Francisco: Bancroft, 1861).
15. *Treaty of Paris*: An account of this event and its related treaty validity problems is provided in J. L. Brierly, *THE LAW OF NATIONS* 332–333 (Waldock 6th ed. London: Oxford Univ. Press, 1963) [hereinafter *Brierly*]. *Treaty of Versailles*: This treaty and its consequences are described in C. Fenwick, *INTERNATIONAL LAW* 531–532 (4th ed. New York: Appleton, 1965) (Fenwick translation from the French) [hereinafter *Fenwick*]. *Hitler treaty*: A detailed account of the events is provided in G. Von Glahn, *LAW AMONG NATIONS* 479–480 (7th ed. Boston: Allyn and Bacon, 1996).
16. H. Chiu, *Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties*, in J. Cohen (ed.), *CHINA’S PRACTICE OF INTERNATIONAL LAW: SOME CASE STUDIES* 241–242 (Cambridge, MA: Harv. Univ. Press, 1972) (footnotes omitted). A brief assessment and criticism of the Soviet writers on this subject is available in S. Malawer, *Soviets and Unequal Treaties*, in *ESSAYS ON INTERNATIONAL LAW*, at 101 (Buffalo, NY: Hein, 1986).

17. Status of Eastern Greenland (Denmark v. Norway), 1933 P.C.I.J. SER. A/B, No. 53.
18. Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment of 16 March 2001, at: <<http://www.icj-cij.org/icjwww/idocket/iqb/iqbframe.htm>>.
19. The general rule against creation of third-party obligations is exhaustively examined in C. Chinkin, States as Third Parties to Treaties: Formal Prescriptions, ch. 2, in *THIRD PARTIES IN INTERNATIONAL LAW* 25 (Oxford, Eng: Clarendon Press, 1993). Potential exceptions are also addressed in A. Verdross, *VOLKERRECHT* 143–144 (5th ed. Vienna: Springer Verlag, 1964). An English-language restatement of the Verdross Position is provided in G. I. Tunkin, *THEORY OF INTERNATIONAL LAW* 93 (Cambridge, MA: Harv. Univ. Press, 1974) (Butler translation from Russian language) [hereinafter *Tunkin*].
20. L. Sohn, International Law Implications of the 1994 Agreement, 88 AMER. J. INT'L L. 696, 701–702 (1994).
21. P. Reuter, *INTRODUCTION TO THE LAW OF TREATIES* 20 (2d ed. London: Pinter Pub., 1989) (Mico & Haggenmacher translation).
22. K. Annan, *Foreword*, MILLENNIUM SUMMIT MULTILATERAL TREATY FRAMEWORK: AN INVITATION TO UNIVERSAL PARTICIPATION ix (New York: UN, 2000).
23. *Restatement*: §111(4) provides that an international agreement is not self-executing if: (a) it manifests an intention that it shall not become effective without implementing legislation; or (b) the Senate, when giving its consent, requires such legislation; or (c) implementing legislation is constitutionally required. None of these instances apply. *Commentator*: J. Paust, *Medellin, Avena*, the Supremacy of Treaties, and Relevant Executive Authority, 31 SUFFOLK TRANSNAT'L L. REV. 302, 328 (2008).
24. The Basic Law (Grundgesetz), Article 25, The Constitution of the Federal Republic of Germany (May 23rd, 1949), as Amended by the Unification Treaty (31 August 1990 and Federal Statute of 23 September 1990), at: <<http://www.constitution.org/cons/germany.txt>>.
25. Earlier Germany and Paraguay cases involving the US, ICJ, and the Vienna Consular Convention are cited in *Medellin's* footnote 14.
26. Calif. Penal Code §834c(a) and (d).
27. Council of Europe (ed.), *Foreword*, TREATY MAKING—EXPRESSION OF CONSENT TO BE BOUND BY A TREATY (Hague: Kluwer, 2001).
28. An account of this event is provided in 4 G. Hackworth, *DIGEST OF INTERNATIONAL LAW* 467 (Wash., DC: US Gov't Print. Off., 1942).
29. Fisheries Jurisdiction (U.K. v. Iceland), 1973 ICJ REP. 1, 14 (decided after 1969 VCLT conference, but before the VCLT's 1980 effective date).
30. *Communist-African position*: An account of the varied perspectives of the participants is available in R. Kearney & R. Dalton, The Treaty on Treaties, 64 AMER. J. INT'L L. 495, 532–535 (1970) [hereinafter Treaty on Treaties article]. *Force left unde-*
fined: Commentaries, Art. 49 [now Art. 52], cited in note 8 supra & Comment (3), at 407 (VCLT, cited in note 2 supra).
31. UN Doc. A/CONF. 39/26, contained in Documents of the Conference, at 285, May 22, 1969. The text is reprinted in 8 INT'L LEGAL MAT'LS 733 (1969).
32. *Waldock quote*: Brierly, 319–320, cited in note 15 supra. *Court quote*: *Avero Belgium Ins. v. American Airlines, Inc.*, 423 F.3d 73, 80 (2d Cir. 2005) (citing Oppenheim & Brownlie treatises).
33. *Treaty*: UN Doc. A/Conf. 164/37 (1995), reprinted in 34 INT'L LEGAL MAT'LS 1542 (1995). *Senate caveat*: [T]he Senate's approval of this treaty should not be construed as a precedent for acquiescence to future treaties containing such a provision. Dep't State Files L/T, discussed in 90 AMER. J. INT'L L. 270 (1996).
34. Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948, 78 UN TREATY SERIES 277 (1951), at: <<http://fletcher.tufts.edu/multi/texts/BH225.txt>>.
35. For fascinating analyses, see L. Lijnzaad, RESERVATIONS TO UN-HUMAN RIGHTS TREATIES: RATIFY AND RUIN? (Dordrecht, Neth.: Martinus Nijhoff, 1995) & J. Gardner (ed.), HUMAN RIGHTS AS GENERAL NORMS AND A STATE'S RIGHT TO OPT OUT: RESERVATIONS AND OBJECTIONS TO HUMAN RIGHTS CONVENTIONS (London: Brit. Inst. Comp. Law, 1997).
36. Object and Purpose of Treaties in the Vienna Convention on the Law of Treaties, in K. Sik, M. Pinto & S. Subedi (ed.), 7 ASIAN YEARBOOK INT'L L. 141, at 165–166 (1997).
37. Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), General List No. 126 (3 February 2006), ¶67, at <<http://www.icj-cij.org/docket/files/126/10435.pdf>>. ¶68 goes on to refer to earlier ICJ cases wherein it had previously confirmed the ability of States to tender reservations to the Genocide Convention—typically, regarding dispute resolution, as opposed to substantive limitations as to particular groups or situations.
38. Report of the International Law Commission, Fifty-ninth Session, General Assembly Official Records, Sixty-second Session, Supplement No. 10 (A/62/10) (2007), at: <<http://un.org/law/ilc>>, search treaty reservations.
39. W. Schabas, Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party? 21 BROOKLYN INT'L L.J. 277 (1995) & K. Ash, U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence, 3 NORTHWESTERN UNIV. J. INT'L HUMAN RIGHTS 7 (2005).
40. ILC, Conventions and Other Texts, at: <<http://www.un.org/law/ilc/convents.htm>>, scroll to “Topics currently under consideration,” last entry under “Reservations to treaties,” at 497 (pdf at 61), n. 1200.
41. See Decision of the Human Rights Committee Under the Optional Protocol to the International Covenant on Civil and Political Rights, UN GAOR, Hum. Rts. Comm., 67th Sess., Annex, ¶7, U.N. Doc. No. CCPR/C/67/D/845/1999 (1999).

42. See D. Fidler, World Health Organization's Framework Convention for Tobacco Control, ASIL INSIGHT (Mar. 2003), at: <<http://www.asil.org/insights/insigh100.htm>>.
43. *States*: VCLT, Art. 80.1, cited in note 2 *supra*. *Organizations*: treaty on organizations, Art. 81.1, cited in note 2 *supra*.
44. This UN publication, approaching nearly 1,500 print volumes, is available in electronic form at: <<http://untreaty.un.org/>> (subscription required). The United Nations charges a fee for using this site. Researchers can obtain no-cost electronic versions of many major multilateral treaties from online university collections and the Web pages of individual professors.
45. 1 US CODE §112.
46. P.-H. Houben, Principles of International Law Concerning Friendly Relations and Cooperation among States, 61 AMER. J. INT'L L. 703, 725 (1967).
47. North Atlantic Coast Fisheries Arbitration, Permanent Court of Arbitration No. VII (1910), 11 ROYAL INST. FOREIGN AFFAIRS 167 (1932).
48. Honduras v. Nicaragua, 1960 ICJ REP. 192 (Judgment of Nov. 18, 1960).
49. Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), 1962 ICJ REP. 6 (Judgment of June 15, 1962).
50. *Fenwick*, at 531 (footnote omitted), cited in note 15 *supra*.
51. See Proposed Article 13, Report of the International Law Commission Covering Its First Session, contained in UN GAOR, 4TH SESSION, SUPP. NO. 10, DOC. A/925, at 8 (1949).
52. See *Treaty on Treaties* article, at 516–517, cited in note 30 *supra*. The proposed exclusion is therein reported by members of US Department of State participants in the VCLT.
53. *Spectrum of views*: The quoted characterizations are contained in the *Brierly* treatise, at 338, cited in note 15 *supra* (clearly reasonable); Briggs, The Attorney General Invokes Rebus Sic Stantibus, 36 AMER. J. INT'L L. 89, 93 (1942) (alleged principle); M. Akehurst, A Modern Introduction to International Law 145 (7th ed. London: Routledge, 1997) (unsuitable). *Chinese view*: This excerpt is from International Trade Treaties and Agreements (Peking: 1958) and is reprinted in 2 J. Cohen & H. Chiu (eds.), PEOPLE'S CHINA AND INTERNATIONAL LAW, at 1257 (Princeton: Princeton Univ. Press, 1974) [hereinafter PEOPLE'S CHINA].
54. O. Lissitzyn, Treaties and Changed Circumstances (Rebus Sic Stantibus), 61 AMER. J. INT'L L. 895 (1967) [hereinafter Changed Circumstances].
55. Commentaries, Art. 59 (now Art. 62), at 428–429, cited in note 8 *supra*.
56. See The Free Zones of Upper Savoy and the District of Gex (Switzerland v. France), 1929 PCIJ, SER. A, NO. 22, and SER. A/B NO. 46, 2 WORLD COURT REP. 448 (1971).
57. Translation provided in 2 J. Cohen & H. Chiu, PEOPLE'S CHINA 1166, 1167, cited in note 53 *supra*.
58. Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria), 1939 PCIJ, SER. A/B, NO. 77, at 64 (dissenting opinion of Judge Anzilotti).
59. See generally M. Gommaa, SUSPENSION OR TERMINATION OF TREATIES ON GROUNDS OF BREACH (Hague: Martinus Nijhoff, 1996).
60. The US government's brief is reprinted in US Department of State, The Legality of United States Participation in the Defense of Viet-Nam, 60 AMER. J. INT'L L. 565, 585 (first quote) and 577 (second quote) (1966). For additional detail, see American Society of International Law, THE VIET-NAM WAR AND INTERNATIONAL LAW (Princeton: Princeton Univ. Press, 1968) (three volumes).
61. Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), 1972 ICJ REP. 46 (Judgment of Aug. 18, 1972).
62. Commentaries, Art. 58 (now Art. 61), Comment (2), at 427, cited in note 8 *supra*.
63. Changed Circumstances, cited in note 54 *supra*.
64. See American Law Institute, RESTATEMENT SECOND OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §153, Illustration 1 (St. Paul: West, 1965). (Unlike the prior *Restatement*, the new *Restatement Third* does not use illustrations in the replacement §336.)
65. N. Kontou, THE TERMINATION AND REVISION OF TREATIES IN THE LIGHT OF NEW CUSTOMARY INTERNATIONAL LAW 2 (Oxford, Eng: Clarendon Press, 1994).
66. *Judicial denial*: see Commentaries, Comment (1) to Art. 50 (now Art. 53), at 409, cited in note 8 *supra*. *Academic denial*: Tunkin, at 149, cited in note 19 *supra*.
67. Eritrea Ethiopia Claims Commission, Partial Award in Diplomatic Claim: Eritrea's Claim 20 (Eritrea v. Ethiopia), citing Oppenheim 1952 treatise p. 2, n.2, at: <<http://www.pca-cpa.org/upload/files/FINAL%20ER%20DIP%20AWARD.pdf>>.
68. Clark v. Allen, 331 U.S. 503 (1947).
69. R. Jennings & A. Watts (ed.), I OPPENHEIM'S INTERNATIONAL LAW §655, at 1310 (9th ed. Essex, Eng: Longmans, 1992) (subsequent edition of Oppenheim, cited in note 67 *supra*).
70. See ICJ's analysis regarding the Pan Am Flight 103 Libyan terrorist bombing case in §6.4 of this book under Montreal Sabotage Convention. UN Charter Article 103 was thus characterized as controlling, notwithstanding the conflicting treaty that would otherwise accord Libya the exclusive right to resolve this matter within its judicial system.
71. See S. Reisenfeld & F. Abbott (eds.), PARLIAMENTARY PARTICIPATION IN THE MAKING AND OPERATION OF TREATIES: A COMPARATIVE STUDY (Dordrecht, Neth: Martinus Nijhoff, 1994).
72. The process is recounted in A. Bestor, Advice from the Very Beginning, Consent When the End is Achieved, in L. Henkin, M. Glennon & W. Rogers, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 6 (Ardsley-on-Hudson, NY: Transnat'l Pub., 1990).
73. An analysis of the drafters' intent is available in L. Henkin, International Concern and the Treaty Power of the United States, 63 AMER. J. INT'L L. 272 (1969).
74. L. Henkin, FOREIGN AFFAIRS AND THE US CONSTITUTION 217 (2d ed. Oxford, Eng: Clarendon Press, 1996) (footnotes omitted).
75. O. Lissitzyn, The Legal Status of Executive Agreement on Air Transportation, 17 J. AIR L. & COMM. 436, 439–442 (1950) (footnotes omitted).

76. The relevant section of the *Case Act* is contained in 1 U.S. Code §112b(a).
77. *Dames & Moore v. Regan*, 453 U.S. 654, 682 (1981) (noting that the President's power to settle claims regarding international relations had been exercised for 200 years with congressional acquiescence) (*italics added*).
78. L. Tribe, *Treaties and Executive Agreements*, §4-4, in 1 *AMERICAN CONSTITUTIONAL LAW* 648-649 (3d ed. New York: Foundation Press, 2000).
79. *Moore v. United Kingdom*, 384 F.3d 1079 (9th Cir. 2004).
80. *Made in the USA Foundation v. U.S.*, 242 F.3d 1300, 1314-1315 (11th Cir., 2001).
81. *Switzerland: Librairie Hachette, S.A. v. Societe Cooperative*, XXV *Annuaire Suisse de Droit International* 239 (1968). *Belgium: Minister for Economic Affairs v. S.A. Fromagerie Franco-Suisse*, 1972 *Common Market Law Rep.* 330. *Mexico: Constitution*, Art. 133.
82. *Reid v. Covert*, 354 U.S. 1 (1957).
83. *Reid*, at 18.
84. *Breard v. Greene*, 523 U.S. 371 (1998).
85. See *South African Airways v. Dole*, 817 Fed. Rptr.2d 119 (D.C. Cir. 1987).
86. *Reid*, at 18 (1957). Subsequent legislation includes the 2000 *Military Extraterritorial Jurisdiction Act*, first applied to a woman who stabbed her husband to death on an Air Force base in Turkey in May 2003. The U.S. Justice Department may thereby prosecute civilians who accompany military personnel on international assignments. See 18 U.S.C.A. § 3261.
87. See *Roeder v. Islamic Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003).
88. See Office of the High Commissioner for Human Rights, *Declarations and Reservations*, scroll to United States, at: <<http://www.unhchr.ch/html/menu2/6/cat/treaties/convention-reserv.htm>>.

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CHAPTER EIGHT

Arbitration and Adjudication

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IRRELEVANCE OF OFFICIAL CAPACITY

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official *shall in no case exempt a person from criminal responsibility* under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

—Statute of the International Criminal Court, Article 27.1 (italics added), adopted July 1998, at: <www.un.org/icc/romestat.htm>. See §8.5.D.3 of this chapter on its application.

INTRODUCTION

This chapter first examines alternative dispute resolution mechanisms. They are often employed by the parties hoping to avoid the cost and delay associated with judicial resolutions. The following arbitration and adjudication subsections unveil the circumstances whereby States are willing to rely on some third party, not directly involved in their disputes, as an alternative to judicial remedies. The materials in this chapter then proceed through the key global, regional, and national court alternatives for resolving issues arising under International Law.

◆ §8.1 ALTERNATIVE DISPUTE RESOLUTION

A. INTRODUCTION

Modern International Law emerged from the seventeenth century Peace of Westphalia [§1.1.A.] The notion of State entities was not accompanied by a world government to control their predictable use of force. As the international community grew in size, there was less to share—and more pressures on peaceful cohabitation of the planet, given limited landmasses, oceans, natural resources, and ultimately, air space. Disputes became a not so surprising feature of international relations.

The UN has a variety of devices for alternative dispute resolution (ADR) between nations. Relevant examples appear in both the UN Charter and ensuing resolutions. For example: (1) “The parties to any dispute ... shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement ... or other peaceful means of their own choice;” and (2) States “shall accordingly seek early and just settlement of their international disputes by negotiation, enquiry, mediation, conciliation....”¹

Post-World War II State practice matured to the point where leaders and merchants alike acknowledged the advantages of bloodless alternatives. As succinctly portrayed by London School of Economics Professor Christine Chinkin:

Among their most frequently cited advantages are cheapness, flexibility and privacy compared to litigation. The parties’ freedom of choice with respect to third party facilitators allows them to draw upon appropriate technical, legal, cultural or other expertise, and even to bring together a balanced team of experts. The consensual nature of the [various ADR] processes is said to be empowering for the disputants who can craft for themselves a mutually acceptable outcome, unfettered by the restrictions of legal procedures and remedies. The parties’ retention of control over the outcome is thought likely to produce a potentially more durable, forward-looking settlement to the dispute than one imposed by a court, which will almost inevitably be framed in a “win/lose” formulation. Further, since the dispute need not be presented in the bilateral model required by litigation, third party and collective interests can be more readily accommodated, at least in theory.²

Contemporary devices can be more effective and less formal than arbitration or judicial proceedings. They include the following primary means of ADR: (1) truth commission; (2) negotiation; (3) inquiry; (4) mediation; (5) conciliation; and (6) mini-trial.

B. DEVICES

1. Truth Commission

(a) *Rationale* Timothy Ash, Oxford University’s professor of European Studies, identifies the three main paths by which countries come to terms with human rights abuses by their governments—purges, trials, and history lessons. He observes that the “choice of path, and the extent to which each can be followed, depends on the character of the preceding dictatorship, the manner of transition, and the particular situation of the succeeding democracy.”³ This alternative process is not adjudicatory in the sense of an award to litigants in arbitration or judicial proceedings. Finding the truth is an objective that outweighs obtaining one’s pound of flesh. In most countries where such horrors occur, there are very limited public funds available to gather the facts and apply a judicial solution. The truth commission device also provides more comprehensive evidence of the actual facts—and culpability—than is available in today’s international courtrooms.

Judicial resolutions are often limited by the rules of evidence or an inability to force parties to produce all available documentation. Many commentators are disappointed, for example, with the 2007 International Court of Justice (ICJ) *Bosnia v. Serbia* Genocide case [§10.1.B.2]. In what many believed to be a clear-cut case against Serbia, the court was unable to subpoena or otherwise force Serbia to produce some relevant evidence, which supposedly would establish Serbia’s responsibility for genocide. Instead, the court held that Serbia “failed to prevent” genocide.

The International Center for Transitional Justice assists countries in the pursuit of establishing accountability for past mass atrocities and human rights abuses. This non-governmental organization works in societies emerging from repressive rule or armed conflict. It also covers established democracies where historical injustice or systemic abuse remains unresolved. It was conceived by the US-based Ford Foundation in 2000. The Center commenced operations in New York City in 2001. Its *raison d’être* is “helping societies to heal by accounting for and addressing past crimes after a period of repressive rule or armed conflict.” Its website can be accessed to see reports regarding the work of other national truth

commissions, such as Indonesia (including allegations that Indonesia never intended to fulfill its promise to hold perpetrators responsible for the violence which led to East Timor's independence in 1999).⁴

(b) South African Model The South African TRC experiment addressed the period 1960–1994. It is the most illustrative and comprehensive in terms of identifying all facets of a ubiquitous governmental policy that perpetrated one of the most dreaded and ingrained abuses since Germany's Nazi government took power: a generation of *official* Apartheid. As noted by the late George Washington School of Law Professor Louis Sohn, the enactment of various apartheid laws "caused great consternation around the world." As early as 1952, thirteen Asian and African nations unsuccessfully requested that the UN General Assembly address this "dangerous and explosive situation, which constitutes both a threat to international peace and a flagrant violation of the basic principles of human rights and fundamental freedoms."⁵

South Africa's post-Apartheid government (consisting of a majority of black African National Congress members) engaged in three hundred hours of parliamentary debate to enact its National Unity and Reconciliation Act. That legislation was the premise for the national Truth and Reconciliation Commission. It had the unusual power to grant amnesty to individuals on a case-by-case basis; to issue subpoenas requiring individuals to testify about their role in the Apartheid regime as perpetrators or victims; and to authorize police search and seizure of persons and documents needed to achieve the objectives of the Truth Commission.⁶

The constitutionality of the National Unity and Reconciliation Act was challenged on a variety of grounds. Prominent among them was the potential amnesty available to agents of the State who committed gross human rights violations. The Act allegedly breached a duty arising under International Law to punish the perpetrators and to provide a judicial forum to air such grievances. The South African Constitutional Court's 1996 decision provides a riveting account of decades of terror, juxtaposed with responsible individuals being potentially expunged through the legislative offer of amnesty in exchange for truth. As characterized by the University of Cambridge Lecturer in Law Antje du Bois-Pedain:

Commentators at the time praised the eloquence of [Justice] Mohamed DP's judgment and accepted his

argument that the ... Constitution provided sufficient grounds in constitutional law for the limitation of the victims' procedural and substantive rights. But the court's response to points of international law was seen as deeply unsatisfactory. The court failed to engage with the argument that there might be a duty in customary [international] law to prosecute the perpetrators of crimes against humanity, applicable in the case of South Africa. The court also did not address ... the international community's efforts to suppress state torture and to protect human rights.... [I]t remained an unanswered question whether the South African Amnesty scheme was compatible with international law.⁷

As you read the South African court's analysis, bear in mind the balance required between the stated need for truth and reconciliation and effective justice. If you have experienced a civil war in your nation, you might consider whether the following South African truth and reconciliation approach was, or may have been, a suitable model for addressing today's post-war claims:



**Azanian Peoples Organisation
(AZAPO) and Others v.
President of the Republic of
South Africa**

CONSTITUTIONAL COURT OF SOUTH AFRICA
(27 July 1996)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsite.html>>.

Under Chapter Eight,
click South African Amnesty case.

The South African TRC conducted thousands of thematic and institutional hearings. The hearings were generally organized by subject: children, women, the judiciary, the media, health, business, and labor sectors. The relevant victims, perpetrators, and experts appeared. One result was that 21,300 victims gave their accounts of what happened and how—recognizing that there were tens of thousands who would not be able to make such compelling contributions.

As classically articulated by career US Foreign Service Officer Dorothy Shea: "These thematic and institutional

hearings collectively did help the TRC to avoid the pitfall of looking at specific cases of human rights abuse in isolation ... [and] to highlight the institutional and societal legacies of apartheid, such as the vast and egregious disparity that still exists between rich and poor ... [and] to get away from a strict victim-perpetrator approach to address the role of beneficiaries of apartheid as well.”⁸

(c) Other Prominent Processes Section 8.5.C.3. below addresses the work of the Sierra Leone Tribunal. There have been criticisms of its companion, but distinct, Truth and Reconciliation Commission (TRC) process. The Sierra Leone Statute does not mention the TRC. Nor do Special Court prosecutors use information obtained from TRC hearings in that court’s prosecutions. Objectors have expressed concerns about perpetrators escaping justice in similar proceedings in South Africa, Afghanistan, and Latin America. Such flexibility in a TRC process gives rise to claims of unfairness.⁹ The tradeoff is obtaining public disclosure by perpetrators and thus more detail about who did what to whom.

Another advantage of the Sierra Leone process is its treatment of juvenile offenders. They too committed atrocities. But as explained by Hungary’s Miskolc University lecturer Eszter Kirs: “their case is different than the one of adults. Mostly they were manipulated, [and thus] forced to commit crimes. This is why the Statute of the Special Court declared that it has no jurisdiction over any person who was under the age of fifteen at the time of the commission of the crime.... The Statute recommends truth and reconciliation mechanisms, where appropriate, in the case of juvenile offenders. It seemed to be an optimal alternative, especially because the system of juvenile justice has not worked sufficiently in Sierra Leone.”¹⁰

The East Timor process ended in 2005. In his final report on behalf of the Commission of Reception of Truth, [and] Reconciliation (CAVR), Commission President Aniceto Guterres stated the essential rationale for the decision to pursue the truth commission alternative—a process officially mandated by the government:

This begs the deeper question, however, as to why TimorLeste chose to address its difficult past. As a resource poor nation burdened with exceptional challenges, TimorLeste could have done nothing or opted to forgive and forget. Instead our nation chose to

pursue accountability for past human rights violations, to do this comprehensively for both serious and less serious crimes, unlike some countries emerging from conflict which focused on only one or two issues, and to demonstrate the immense damage done to individuals and communities when power is used with impunity. CAVR was established as part of this process. Like other transitional justice mechanisms in Latin America, Africa and Europe, our mission was to establish accountability in order to deepen and strengthen the prospects for peace, democracy, the rule of law and human rights in our new nation. Central to this was the recognition that victims not only had a right to justice and the truth but that justice, truth and mutual understanding are essential for the healing and reconciliation of individuals and the nation. Our mission was not motivated by revenge or a morbid or political preoccupation with the past. CAVR was required to focus on the past for the sake of the future—both the future of Timor-Leste and the future of the international system....¹¹

In June 2006, aides of Iraq’s Prime Minister—and US officials—proposed a national reconciliation plan. It invited insurgents to disarm and offered amnesty for those who have not engaged in “acts of terrorism.” The objective was to diminish the sectarian violence that plagued Iraq. It reportedly received the support of the parliament and its varied ethnic factions. But given the above South African experience, it is unlikely that this objective will be attained by this now dormant proposal. There were few concrete details. And in the Prime Minister’s words, “reconciliation will be neither with the terrorists nor the Saddamists,” referring to supporters of the late President Saddam Hussein. The lack of specificity, coupled with the quoted limitations, is unfortunately reminiscent of the vintage adage “One man’s terrorist is another man’s hero.” For example, at Prime Minister Malaki’s ensuing press interview, he said that no pardon would be offered to those who killed Iraqi soldiers, Iraqi policemen, or US soldiers.

The April 2009 Independent Fact Finding Committee on Gaza was commissioned by the League of Arab States. It consisted of renowned international academics, legal practitioners, and independent judges. This Committee interviewed victims and witnesses regarding the December 2008 Israeli military offensive in Gaza. It made recommendations to the League which

included that: (1) the UN Security Council refer the situation in Gaza to the International Criminal Court; and (2) the UN General Assembly seek an advisory opinion from the International Court of Justice.¹²

2. Negotiation Negotiation differs from the other informal modes of ADR because its conduct is completely controlled by the immediate parties to the dispute. Negotiations between States are normally conducted through diplomatic channels. They may be performed by heads of State, ambassadors, draft treaty conference participants, or other designated representatives.

The parties may thus consult with one another in their attempt to resolve a dispute. Consultation facilitates problem solving before any adverse action has been taken by either party. After the 1982 Falkland Islands War, Argentina and Great Britain hoped to avoid unnecessary confrontations because of the presence of their respective military forces in the same area. In 1990, they entered into an Interim Reciprocal Information and Consultation System. It applies to “movements of units of their Armed Forces in Areas of the South West Atlantic. The aims of this system are to increase confidence between Argentina and the United Kingdom and to contribute to achieving a more normal situation in the region [including a direct communication link].”¹³

3. Inquiry Unlike direct negotiations, the other ADR modes invoke the assistance of a third party. An inquiry is conducted by someone, not a party to the dispute, who attempts to provide adversaries with an objective assessment of their respective positions. A stalemate may otherwise lead to a more confrontational mode of dispute settlement. The presence of a third party facilitates the injection of a more balanced and informed approach to resolving the dispute—before it erupts into hostilities.

The term “inquiry” is commonly used in two senses. The broader connotation refers to the process itself. A court, arbitral body, international organization, or individual tries to resolve a dispute between other States or entities. The narrower connotation of this term, as used in this section of the book, refers to an arrangement, which requires that the third party conduct an independent investigation of the underlying facts.¹⁴

In the famous *Dogger Bank Inquiry*, a group of Russian war vessels were en route from the Baltic Sea to the Far East in 1904 to engage hostile forces in the war with

Japan. The Russian ships steamed directly into a fleet of private British fishing vessels at the Dogger Bank in the North Sea. The Russian fleet assumed that it was under attack by British war vessels, which were reportedly in the area. The Russians fired on the fishing vessels, sinking one, damaging others, and killing and wounding a number of civilian fishermen. Great Britain then made plans to intercept the Russian fleet.

France fortunately intervened, convincing Russia and Great Britain to establish a commission of inquiry under the 1899 Hague Convention on the Pacific Settlement of International Disputes. Five admirals from Austria-Hungary, Great Britain, France, Russia, and the US spent two months hearing evidence from witnesses. This commission found that the Russian admiral had no justification for opening fire—although the report was worded so as not to expressly discredit the Russian admiral. Russia received the commission’s findings and decided to pay damages as a result of the conduct of this Russian squadron.¹⁵

4. Mediation This alternative dispute resolution option also invokes the assistance of an “outsider” who is not a party to the dispute. Unlike the commission of inquiry, which is basically a fact-finding tool, the mediator is typically authorized to advance his or her own proposal for resolving the dispute. Nothing is binding about the mediator’s role. Otherwise, he or she would really be an arbitrator or judicial officer, seized with the power to require a particular result. There is no prior commitment by the parties to accept the mediator’s proposal.

The mediator can make his or her proposals informally, based on information supplied by the parties. The mediator does not undertake an independent investigation, as would a commission of inquiry. Where negotiations are deadlocked, the mediator can attempt to move the parties in the direction of at least considering his or her proposal (or that of the other party). Such proceedings are normally informal and private, unlike an arbitration or judicial proceeding with its formal procedures for taking evidence from witnesses in an open-hearing context. The Red Cross often acts as a mediator in those conflicts where the parties are unlikely to negotiate face-to-face. Algeria served in this capacity, mediating the Iran-US Hostage Crisis in 1979–1980.

On the other hand, a proliferation of well-intentioned mediators can add a degree of complexity, which includes some less well-intentioned competition marked by turf battles, such as the many mediations leading to the Dayton

Peace Accords (which was to bring peace to Bosnia.)¹⁶ As acknowledged by the editors of a major analysis of international mediation: “The multiplication of mediators is less a matter of choice than a fact of life in today’s world. This complexity has been brought on by the end of the Cold War and by the increasing involvement of a wide array of both state and non-state actors in the more fluid and less structured relationships of the current era.”¹⁷

“Good offices” is a variant of the mediation technique. A third party communicates the statements of the disputing parties to one another. This is a useful technique when the dispute involves States that do not maintain diplomatic communications. Good offices may involve the “outsider” inviting the disputing parties to a settlement conference or undertaking other steps to facilitate their communications. This theme was the focal point of the 1936 Inter-American Good Services and Mediation Treaty as well as the 1948 American Treaty on Peaceful Settlement of Disputes (the Bogotá Treaty). The UN Secretary-General has often used his position to facilitate inter-State settlement of disputes through the “good offices” of the UN.

In October 1998, four nations used various features of the mediation technique to resolve a border dispute between two other nations. From 1941 to 1995, Ecuador and Peru had fought three wars over a forty-eight-mile strip of jungle on their 1,050-mile common border. Argentina, Brazil, Chile, and the US mediated during three years of deadlocked negotiations. The disputing parties felt that they had not obtained all that they were entitled to receive under this mediation. However, their joint agreement ended this dispute on terms that were an acceptable alternative to another war.

The December 2004 Report of the UN High-level Panel on Threats, Challenges and Change strongly recommended additional mediation training and applications:

100. United Nations efforts ... are often inhibited by the reluctance of Member States to see their domestic affairs internationalized. But more effort ... should be made in this area, particularly through the appointment of ... regionally experienced envoys, mediators and special representatives, who can make as important a contribution to conflict prevention as they do to conflict resolution.
101. ... This would be made easier by the establishment of a facility for training and briefing ... United Nations mediators, and we so recommend.

102. ... The [UN] Department of Political Affairs should be given additional resources and should be restructured to provide more consistent and professional mediation support.

103. ... [T]he details of such a restructuring ... should take into account the need for the United Nations to have ... (c) Greater interaction with national mediators, regional organizations and non-governmental organizations involved in conflict resolution.¹⁸

5. Conciliation Conciliation is third-party dispute-resolution in a more formalized setting than negotiation or mediation. Like the commission of inquiry, a conciliation commission may engage in a fact-finding role. Yet, a conciliation commission normally attempts to promote a resolution. This is a step beyond mere fact-finding inquiries; yet, it is less formal than an arbitration or judicial proceeding.

The textbook definition of conciliation was provided by the late Professor Clive Parry of Cambridge, England. It is the “process of settling a dispute by referring it to a commission of persons whose task it is to elucidate the facts and (usually after hearing the parties and endeavoring to bring them to an agreement) to make a report containing proposals for a settlement, but not having the binding character of an [arbitral] award or [court] judgment.”¹⁹ The conciliator attempts to reconcile differences by portraying the negative aspects of the respective positions.

In 1922, the League of Nations General Assembly resolved that States should conclude treaties requiring the submission of disputes to conciliation commissions—unless the parties preferred to resolve the dispute via arbitration or litigation in the Permanent Court of International Justice. Some twenty treaties contained a conciliation requirement. These included the famous post-World War I Locarno agreements between Germany, on the one hand, and Belgium, France, Czechoslovakia, and Poland on the other. The Locarno Treaty was then incorporated into the League’s 1928 General Act for the Pacific Settlement of Disputes. League members established both *ad hoc* and permanent conciliation commissions to act. Nearly 200 such treaties were concluded before the outbreak of World War II.

6. Mini-trial While quite similar to conciliation, the mini-trial is a fresh approach to international dispute resolution. It is not a real trial. The parties confront one another in a similar context, however, and must verify

their positions before a neutral third party. The “judge” is typically an expert in the particular field and not necessarily a sworn judicial officer (or lawyer). These “trials” often take place before negotiators who are senior employees of the respective parties. Each negotiator, in turn, then proceeds to illustrate the weaknesses in his or

her employer’s position long before a costly arbitration or judicial proceeding at some point in the future.

Italy’s Mauro Rubino-Sammartano, who practices in French and Italian courts, illustrates the successes with this comparatively new device in his book on international arbitration:

Illustration[s]

Xerox Corporation entered into a distribution agreement with a Latin American company... [T]he distributor construed the contract as applying (i) not to one line of computers only, but to all the computers sold by Rank Xerox (ii) throughout Latin America rather than in a more limited territory.

One year after proceedings had been started before the California Courts, an extremely quick mini-trial took place (Rank Xerox presenting its case in 1 hour and 40 minutes), which produced a positive result ending in a promptly reached settlement.

Another positive mini-trial is the *Telecredit-TRW* dispute concerning trademarks, conducted before the

parties’ negotiators and a neutral advisor; the dispute was settled by the parties’ CEOs in 30 minutes after 14 hours of mini-trial.

A third positive mini-trial is reported as having taken place between a German manufacturer and an American distributor. Settlement was reached after a presentation of [just] one hour by each party.

Note: See M. Rubino-Sammartano, Arbitration and Alternative Disputes Resolution, ch. 1, in INTERNATIONAL ARBITRATION LAW AND PRACTICE 15–16 (Deventer, Neth: Kluwer, 2001) (footnotes omitted).

There are inherent limitations to this alternative dispute resolution device. Goodwill is an essential element in such a process. Large corporate enterprises, however, have little to lose by such devices—as opposed to the time and expense associated with the more formal resolution mechanisms addressed in the remaining sections of this chapter.

7. Non-governmental Courts Governments have occasionally recognized special courts as alternative methods for resolving disputes. These are often associated with a particular religious practice. In September 2008, the UK government officially recognized the power of *Sharia* judges to rule on cases involving divorce, financial disputes, and domestic violence—assuming agreement of the parties. In a recent example, a Sharia Court divided an estate among three daughters and two sons. The sons received twice as much as the daughters. In a traditional British court, all would have received equal shares. The UK now has a network of five regional Sharia courts whose decisions are entitled to full recognition.

Jewish Beth Din courts with similar powers have been recognized for more than a century. As stated in a 2004 California proceeding regarding a Beth Din proceeding: “The trial court also erroneously concluded that a pending private arbitration in Israel deprived California courts of subject matter jurisdiction and vested the Israeli courts with exclusive authority to determine the matters at issue.... [D]efendants submitted their dispute to a beth din in Israel. A ‘beth din’ ... is a Rabbinic Court, an authoritative forum of Jewish law.... Agreements to resolve disputes before a beth din have been enforced in this country’s courts.”²⁰

◆ §8.2 ARBITRATION AND ADJUDICATION: EVOLUTION

The relevant inquiries begin with the following:

- ◆ Who can pursue a remedy for a violation of International Law?
- ◆ Where can a violation of International Law be adjudicated?

- ◆ Should it be resolved by an arbitrator or a judge?
- ◆ How feasible is third-party dispute resolution in cases involving international relations between States? Between a State and an international organization? Between individuals or corporate entities? In cases involving the most sensitive matters, as opposed to those of lesser concern to national interests?

A. ARBITRATION HISTORY

The city-States of ancient Greece used arbitration as a peaceful alternative for resolving their disputes. A treaty in 445 BC grew out of the Peloponnesian War between Athens and Sparta. They agreed not to resort to war as long as the other was willing to resolve a dispute via arbitration. A violation of this treaty subsequently resulted in a ten-year war after which the parties once again agreed not to engage in war—with a renewed commitment to resolving any future disputes via arbitration.²¹

Modern commercial law is based on European medieval practices developed by international merchants. Their standard expectations were called the “Law Merchant.” This body of law was created and developed by specialized tribunals in various Mediterranean ports—where private merchants resolved both internal and international business disputes in an arbitral setting. The Law Merchant thus flourished in the twelfth-century Italian city-States, later spreading to other commercial centers. The customary practices developed by these tribunals were ultimately incorporated into the commercial laws of many nations.

International arbitration had its own “Dark Ages,” lasting until just before the nineteenth century. The famous 1794 Jay Treaty between Great Britain and the United States established a regime whereby an equal number of British and American nationals were selected to serve on an arbitral commission. It settled disputes arising out of the Revolutionary War, which could not be resolved by British-American diplomacy.²² The former enemies further encouraged the use of international arbitration in their 1871 Treaty of Washington Arbitration. The US claimed that Great Britain had violated the neutrality rules arising under customary State practice. Great Britain had aided the South during the American Civil War by building ships for the Confederate Navy. This arbitral tribunal ordered Great Britain to compensate the United States for its resulting losses. When Great Britain complied, there was a renewed interest in international arbitration. The national practice

of inserting arbitration clauses into treaties increased dramatically.

Russia’s Czar Nicholas invited the international community to meet at the Netherlands city of The Hague. Numerous national delegates attended the Hague Peace Conferences of 1899 and 1907. The resulting 1899 Hague Convention for the Pacific Settlement of International Disputes recognized arbitration as “the most effective and at the same time the most equitable means of settling disputes which diplomacy has failed to settle.” The 1907 Convention for the Pacific Settlement of Disputes was the first multilateral treaty to provide that “International Arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law.” Before these Conventions materialized, arbitrations were usually *ad hoc*. Arbitrators were typically limited to available heads of State, academics, national agencies, and politicians.²³ The Hague Conference process produced the Permanent Court of Arbitration (PCOA) in 1907, which still functions a century later.

Articles 12 and 13 of the Covenant of the League of Nations “mandated” that League members could not go to war if the subject of their dispute had been submitted previously to arbitration. Three months were to elapse after an award before a State party could resort to war.

This Covenant also created the first “World Court.” It was named the Permanent Court of International Justice (PCIJ) and was also located at The Hague. But resort to international arbitration declined—from the PCIJ’s inception in 1920 until after World War II.

With establishment of the second World Court—the International Court of Justice (ICJ) at The Hague in 1945—the State members of the international community once again envisioned the submission of international legal disputes to a permanently constituted judicial body, as opposed to *ad hoc* arbitrations. The foremost collection of data regarding international arbitrations has been compiled by Nijmegen University (Netherlands) Professor A. M. Stuyt. His Survey of International Arbitrations lists nearly 180 inter-State arbitrations between 1900 and 1945. The last half of the twentieth century, roughly the same period of years (1945–present), yielded only forty-three inter-State arbitrations.²⁴

Those corners of the globe not served by such judicial organs sometimes establish *ad hoc* tribunals, especially for resolving postwar claims. The December 2005 Eritrea-Ethiopia Claims Commission, for example,

addressed claims arising from Eritrea's 1998 invasion of Ethiopia. This Commission determined that Eritrea's actions did not constitute lawful self-defense, merely because of a border dispute.

A number of prominent disputes have been submitted to various permanent arbitral tribunals. One advantage is avoidance of the delay factor associated with the litigation alternative. The States involved must first consent to being sued in international tribunals (as with arbitration). States must be willing to await their turn on the particular court's docket, should they decide to submit their dispute to a third-party institution, such as the ICJ. Since the 1980s, the average length of a judicial proceeding, from filing to disposition, has grown from two-and-one-half to four years.²⁵

While *States* generally moved away from inter-State arbitration, other forms of international arbitration involving *private* parties began to flourish, as later described in §8.3.A. Less sensitive matters, such as commercial disputes, are often quite amenable to resolution by arbitration. More sensitive problems, such as an offensive use of force, spawn more publicity in a litigation context. Global venues, such as the International Court of Justice or the International Criminal Court, inherently generate more public attention than resolving such differences via some bilateral, ad hoc claims commission process.²⁶

An increasing number of courts are encouraging: (1) both domestic and foreign arbitration of matters previously resolved only by local tribunals; (2) application of foreign law to local arbitral proceedings; and (3) local enforcement of foreign arbitral awards. As articulated by the United Arab Emirates (UAE) Supreme Court of Cassation: "in the absence of an agreement, an arbitration award must be issued by the U.A.E. However there is nothing to prohibit the parties from agreeing on the issuance of the arbitration award outside the UAE. In such a case the procedure applicable in the foreign country will be applicable to the arbitration award.... Thus it is not contrary to U.A.E. law for the parties to agree on foreign arbitration or foreign arbitrators. Such an agreement is not contrary to U.A.E. public policy."²⁷

B. ADJUDICATION HISTORY

1. Dearth of Apologies The pursuit of litigious remedies in an open forum is typically more complicated than quiet diplomacy. An allegedly offending nation will not readily admit its liability, even in the clearest of circumstances. But an apology, or a promise that the

offending act will not reoccur, is often unattainable for a host of reasons. In most cases, the concerned States will undertake a diplomatic exchange with a view toward amicably resolving their differences. As succinctly articulated by the United Kingdom's former Legal Advisor to the Foreign Office: "In international relations apology lies at the crossroads of the diplomatically commendable and the legally dangerous. In international life as in private life, saying 'sorry' does much to neutralize the diplomatic fallout from an unfortunate incident; but saying 'sorry' may also imply an admission of legal liability. The art lies (from one point of view) in achieving the diplomatic benefits while avoiding the legal risks: but (from the other point of view) ... in maximizing the legal gain while not wholly negating the diplomatic achievement."²⁸

Countries are understandably reluctant to admit a breach of International Law. For example, the US never admitted its State responsibility under International Law when an American U-2 reconnaissance aircraft violated Russian airspace in 1960. The plane was shot down 2,000 kilometers inside the Soviet border. The pilot claimed that he had merely strayed off course [§6.4.A.5(a) *Powers* case].

The shoe was on the other foot in 1983. The Soviet Union refused to admit liability when a Russian pilot shot down a Korean commercial aircraft that strayed off course over Russian territory. Nearly three hundred civilian passengers and crew were killed. The aircraft posed no security threat to Russian sovereignty. The Soviets claimed that warnings were given and that this response to an intrusion of its airspace did not involve the use of "excessive force."

In November 2003, Ukraine agreed to pay approximately \$1,000,000 for each of the seventy-eight Israeli and Russian passengers on a jet that Ukrainian forces accidentally shot down over the Black Sea while it was en route to Tel Aviv from Russia (October 2001). Ukraine never admitted legal responsibility, which was abundantly clear. Under the terms of the accompanying agreement, Ukraine instead stated as follows:

Ukraine recognizes the Aerial Catastrophe as a terrible human tragedy and expressed deep regret over the loss of lives.... Ukraine has not acknowledged any legal liability or responsibility.

...

[T]he Ukrainian Side shall pay, on an *ex gratia* basis, to the Israeli Side [dollar amount] ... without any responsibility arising there from for Ukraine.

The Israeli Side acknowledges that Ukraine ... shall be immune from any and all Claims before the courts of the State of Israel....²⁹

States may have something to learn from the private sector. In March 2004, a major US law firm with offices in Tokyo placed notices in two leading Japanese newspapers. This was a condition for settling a suit against the firm by a former client that allegedly became bankrupt, partially due to the law firm's role in the client's development of luxury hotels around the world.³⁰

2. Early Conferences Some national leaders wanted a durable dispute-resolution alternative for inter-State disputes. The Latin American participants in the Hague Conferences proposed, and then implemented, a judicial response to such international disputes. They established the Central American Court of Justice in 1908. It was the first international court designed to address regional disputes. It closed in 1918.

One (small) reason was the forecast that the French-conceived League of Nations and the Permanent Court of International Justice (PCIJ) would supplant any need for a regional court. A global court would, it was hoped, shift the resolution of inter-State disputes from the battlefield to the courtroom. The States creating the PCIJ wanted it to play a role in the achievement of world peace through law. Some believed that this court would function as a judicial buffer between adversaries, who would otherwise resolve their disputes in a military arena. Others anticipated that a world court would, at the very least, be a neutral forum for settling certain disputes. A number of national leaders, including US President Woodrow Wilson, believed that an international court could positively influence national adherence to International Law.

The concept of a world (as opposed to regional) international court evolved through two phases, each commonly associated with a particular international organization: the now defunct PCIJ and the current ICJ. The PCIJ was not a part of the League, however. A State desiring to use it would enter into a treaty with another State. Several hundred bilateral treaties among the various nations of the world conferred jurisdiction on the PCIJ. On the other hand, States joining the United Nations are automatically parties to the Charter's companion treaty—the Statute of the ICJ. While they are not required to use the ICJ, this symbiotic

nexus with the Court's Statute attested to the judicial role that the Charter drafters envisioned for the fledgling UN organization.

The PCIJ was the first permanently constituted dispute-resolution mechanism available to all nations of the world. In the case of States unwilling to actually litigate their differences, organs within the League of Nations could (and did) request "advisory" opinions from the PCIJ. Its judges thus had the power to apply International Law to situations where a potentially liable State was unwilling to appear in judicial proceedings as a defendant. From 1922 to 1940, the PCIJ heard twenty-nine contentious cases between adversaries who litigated their cases in the court. It also rendered twenty-seven "advisory opinions." This was a special category of decision available in international (but usually not national) courts [ICJ application: §8.4.E.].³¹

Two paradoxes contributed to the demise of the Permanent Court of International Justice. First, while this court was sponsored by the League of Nations, it was not an official organ of the League. Second, while US President Wilson played a fundamental role in developing international support for the League, the US did not join the League and never appeared as a litigant before the PCIJ. The Senate blocked US participation in the League. Because of rampant post-World War I isolationist sentiment, US senators feared any international alliances because any one of them might one day draw the US into a second world war.

The 1939 outbreak of World War II destroyed the potential effectiveness of the PCIJ. The court conducted its last public sitting in that year—when most of the judges fled to Geneva to take advantage of Switzerland's wartime neutrality.

The dream of a global judicial body was not totally shattered by the abrupt reality of war. In 1943, the "Four Powers" (China, the Soviet Union, Great Britain, and the United States) determined that another global international organization should replace the League of Nations. The possibility of another world court was also rekindled by Great Britain's invitation to a group of International Law experts who met in London. These experts agreed that another global court was needed. It would have to be a fresh and innovational court in order to diffuse the criticism of the earlier PCIJ—perceived by many States as a European institution designed by European jurists to dominate the legal affairs of other regions of the world.

◆ §8.3 ARBITRATION: MODERN CLASSIFICATION

Arbitration is a comparatively formal mode of dispute resolution. Adversaries rely on a third party to hear

the evidence and resolve the dispute by issuing a binding arbitral award. This section of the book covers the types of arbitration and some prominent arbitral tribunals.

A. ARBITRAL TRIBUNAL CHART

CHART 8.1 SELECTED ARBITRAL TRIBUNALS

Arbitral Tribunal	Location	Type of Dispute
Permanent Court of Arbitration	The Hague, Netherlands	Inter-State commercial disputes
Claims Commissions*	Post-conflict area	Unresolved individual and entity claims incident to a recently concluded conflict
Commission of Mediation, Conciliation, and Arbitration	Addis Ababa, Ethiopia	Inter-State commercial disputes
International Centre for the Settlement of Investment Disputes between States and Nationals of Other States	Washington, D.C.	Investment disputes between a State and a foreign national (individuals or corporations) of another State
International Court of Arbitration	International Chamber of Commerce (Paris)	Business disputes of an international character (mostly corporate)
World Intellectual Property Organization Arbitration and Mediation Center	Geneva	Copyright, patent, and trademark-infringement claims between States, individuals, and/or entities

*Many of these are facilitated or hosted by the Permanent Court of Arbitration. See <http://www.pca-cpa.org/showpage.asp?pag_id=1151>.

B. CLASSIFICATION

Arbitration may be classified as follows: *ad hoc* versus permanent; by the nature of the parties; composition of the tribunal; and category of dispute.

1. Ad Hoc versus Permanent Arbitrations have historically been *ad hoc*. After a dispute arises, the parties determine what will be decided and who will do the deciding. They agree on the general terms and limitations that they will impose on the arbitrators. *Ad hoc* arbitration presents the recurring problem of not having predetermined procedures already in place, resulting in a loss of time for resolving the merits of the dispute. On a more positive note, an overwhelming percentage of parties to these arbitrations have fulfilled their international obligations established by binding arbitration awards.³²

Assembling an *ad hoc* international arbitration may leave much to the discretion of the arbitrator and the participants. In 1988, for example, an international arbitration panel ruled in Egypt's favor in a border dispute with Israel, leaving the parties to work out the details of

actually determining the precise boundary line. The parties tend to encounter less flexibility, however, when they submit their case to a standing arbitral tribunal—with its own pre-established set of rules and procedures. Permanently established arbitration tribunals have the advantage of predictability and stability in resolving business disputes. As aptly depicted by Canada's McGill University Professor Stephen Troope:

Since the 1960s, the international business community has manifested an increasing interest in arbitration as a dispute resolution mechanism. Concurrent with this increased attraction to arbitration has been the emergence and growth of more and more arbitral institutions ... providing facilities and organisational mechanisms for the arbitral resolution of commercial disputes ... [and] with the increasing scale of international trade, arbitration has very much come into its own....

Because of the potential application of contemporary commercial arbitration in many economic

contexts ... one can understand the superficial attraction of institutional arbitration which provides a stable organisational base for an arbitration, a staff trained to administer arbitration and more importantly, a set of pre-established procedural rules which should prevent renegotiation during a heated dispute, thereby helping to ensure that the arbitration goes forward even in the face of a recalcitrant party. It is asserted, therefore, that institutional arbitration enhances the values of certainty and predictability.³³

2. Nature of Parties Arbitration historically involved inter-State disputes, achieving its heyday in the first half of the twentieth century. The prime example is the Permanent Court of Arbitration (PCOA), a product of the 1899 Hague Peace Conference. Various nations met in Holland to explore ways to achieve peace and disarmament. They adopted the Convention on the Pacific Settlement of International Disputes. Treaty participants viewed the PCOA as an egalitarian device, which would implement their goal of peacefully resolving international disputes. It commenced operations in 1913 and still functions today at its seat in The Hague.

The PCOA is not a court. Its “judges” are mostly lawyers who have expertise in international business matters and are willing to travel. They serve on small arbitration panels. Each of the seventy-five participating countries appoints four individuals to provide arbitration services for a fixed number of years. The national parties to a dispute choose several of these experts to serve on a panel, which will deliberate their particular problem. In April 2009, for example, the PCOA began its mediation of a 2005 peace agreement dispute between the Sudan People’s Liberation Movement and the government of Sudan.

The number of inter-State arbitrations has declined significantly since World War II. The post-World War I creation of the Permanent Court of International Justice in The Hague diverted national attention from the PCOA. Prior to 1931, the PCOA heard twenty-four cases. Since then, it has heard only several, including the Iran-US Claims Tribunal. The sixty-five-year-old PCOA was the convenient forum for carrying out the details of the US-Iran 1980 Hostage Treaty. The PCOA could immediately begin to consider the difficult compensation issues arising out of that dispute.

Another “States-only” arbitral tribunal was established by the Charter of the Organization of African Unity

(OAU). The OAU’s Commission of Mediation, Conciliation, and Arbitration is seated in Addis Ababa, Ethiopia. Its twenty-one members have “jurisdiction” (noncompulsory) to resolve any inter-State dispute referred to it by the parties or by certain governmental entities of the OAU or its State members. The essential role of the OAU Commission is to facilitate alternative dispute-resolution mechanisms among the various African States.

The lion’s share of contemporary “international” arbitrations involve either private individuals/corporations and a State; or disputes between private persons/corporations and international organizations. Contracts between private corporations normally contain a forum selection clause. The parties thus agree in advance to dispute resolution in a designated institution with the appropriate expertise.³⁴

Inter-State treaties are not always locked into a particular arbitral body. The 1987 France-United Kingdom Channel Tunnel Treaty expressly authorizes the reference of disputes to arbitral tribunals for disputes between: (a) the State parties, (b) States and concessionaires, or (c) just concessionaires. All public and private entities (concessionaires) have access to a convenient dispute-resolution mechanism—without regard to the status of any particular tunnel-service provider. There are no sovereign immunity problems for concessionaires. A claimant does not have to surmount potential sovereignty objections between the States involved in the tunnel’s operation. There is no need for a business entity to first enlist the assistance of its home State in order to present a claim against an international person (*i.e.*, France or the United Kingdom). A private non-governmental corporation may then arbitrate a dispute with its own home State. It does not have to first resort to the traditional International Law requirement that it seek sovereign representation at the international level. The major multilateral treaties that provide for this form of mixed State-private party arbitration are the New York Convention, the Inter-American Convention on International Commercial Arbitration, and the Washington Convention.³⁵

3. Composition and Category A functional classification of the varied types of arbitration would be mixed international arbitration; private disputes involving a public interest; and administrative arbitration.

(a) Mixed Arbitration In a “mixed” arbitration, one party is a State and the other is either a private party or

a business entity. A classic instance is the Algiers Accords—the agreement creating the Iran-US Claims Tribunal in 1981.³⁶ The US hostages being held in Iran were released. Iran was able to regain control over some of its assets, which had been frozen at the inception of this major international dispute. US individuals and corporations were provided with a means of redress against Iran. The Tribunal then began its task of resolving claims against the Iranian funds, which would be disbursed as a result of its decisions. Due to the animosity between the parties and the high claims at stake, the Tribunal's lasting value was rather evident. It was unlikely that a negotiated settlement between the US and Iran could have been reached without this independent mechanism for “post-hostility” claims adjudication typical of postwar tribunals formed to resolve private claims against State parties.³⁷

In 1991, the UN Security Council established the UN Compensation Commission (UNCC), headquartered in Geneva. Its mandate is to process, determine, and pay any claims against Iraq arising from the 1991 Persian Gulf War. This tribunal was created under the Council's Chapter VII powers whereby it takes various measures to control threats to peace. The UNCC's function is to decide the amount and validity of claims arising on or after August 2, 1990—the date of Iraq's invasion of Kuwait. Its decisions have announced settlements in claims involving serious personal injury or death that resulted from Iraq's annexation of Kuwait. In 1996, the UNCC began to issue checks based on money obtained from Iraqi oil sales—30 percent of which is retained for the payment of UNCC claims.³⁸

The International Centre for Settlement of Investment Disputes (ICSID) is another prominent commercial arbitral body. Its constitutive 1966 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States established the ICSID.³⁹ The host organization is the UN's International Bank for Reconstruction and Development located in Washington, DC. The ICSID was designed to develop confidence in private foreign investment through arbitration. It differs from other international arbitral bodies, such as the Hague Permanent Court of Arbitration, because use of ICSID facilities is not limited to governmental parties. An individual or corporation may arbitrate directly with a foreign State. An individual does not need to seek and obtain governmental or diplomatic assistance from one's own country to arbitrate an international claim.

Like the ICOC's International Court of Arbitration, the ICSID does not directly arbitrate disputes at its headquarters. It maintains panels of legal and business experts who are willing to arbitrate claims submitted to it. They arbitrate many contract disputes between private corporations and the foreign States with which they deal.⁴⁰ In 1993, the ICSID rendered the first award ever given under a bilateral investment treaty to which the US was a party.⁴¹ The 2003 *Loewen* case, featured in §4.4.B.2(b) of this textbook, is an ICSID case.

(b) Private Disputes Another form of international arbitration is “commercial” arbitration between business enterprises.⁴² While there are a number of such tribunals, several bear special mention. The International Court of Arbitration of the International Chamber of Commerce (ICOC) is a prominent arbitral organization based in Paris. It has resolved commercial disputes since 1923. It currently receives approximately 350 cases per year. Under Article 1.1 of the ICOC Rules of Conciliation and Arbitration, the “function of the Court is to provide for the arbitration of business disputes of an international character...”⁴³ The parties submit their requests for dispute resolution assistance to the Secretariat of the ICOC Court of Arbitration. The “court” then delegates the power to arbitrate matters referred to it. The Secretariat appoints an odd number of individuals (either one or three) to consider the dispute, depending on its complexity. These individuals sit on the ICOC National Committee located in each participating country.⁴⁴

There are also “special purpose” commercial arbitral bodies that specialize in specific areas of law or trade. The World Intellectual Property Organization (WIPO) is a specialized agency of the United Nations with headquarters in Geneva. It maintains panels for resolving international problems involving alleged copyright, patent, and trademark-infringement claims. This body published its revised alternative dispute resolution rules, which became effective in 1994. It has become a particularly expeditious and suitable means for accommodating the special problems associated with intellectual-property disputes. A patent or trademark holder may have instant access to a body of intellectual-property experts. A claim that a foreign company is illegally making or marketing the owner's product—without entering into a licensing arrangement with that patent or trademark owner—may be lodged with the WIPO. The owner does not have to

pursue either diplomatic or judicial remedies, which would depend upon the willingness of the owner's home State to one day pursue such claims (should such a case become a priority for the State).

In a classic illustration of this entity's utility, the WIPO process yielded a swift result at minimal cost with an instantly available worldwide result. In 1999, US citizen Michael Bosman registered the Internet domain name <worldwrestlingfederation.com> with an Australian company. Bosman then contacted the World Wrestling Federation (WWF), a US company, offering to sell that domain name to the WWF for US \$1,000. The WWF then electronically submitted a complaint to WIPO's Arbitration and Mediation Center in Geneva. The Panel concluded that Bosman's offer to sell that domain name had been registered in bad faith. His failure to establish a Web site under the referenced domain name indicated that Bosman had not in fact "used" the domain name. The *use* requirement is intended to discourage such registrations by cybersquatters who do so only for the purpose of resale.⁴⁵

Certain commercial treaties expressly provide for judicial confirmation of international arbitral awards. The North American Free Trade Agreement (NAFTA) protects private investors in Canada, Mexico, and the US. They may obtain awards from a NAFTA tribunal and then enforce them in the courts of each NAFTA country. In one case, a US citizen obtained a \$50,000,000 NAFTA panel award against Mexico, which was confirmed by a Canadian court.⁴⁶

(c) Administrative Arbitration This arbitration category typically involves the inner workings of international organizations. In a representative case, a UN staff member from the Russian delegation at the UN in New York applied for asylum in the US. He also requested a career appointment at the UN, based on his excellent service record. When his request was denied, he filed an administrative action in the UN Administrative Tribunal. The UN Tribunal decided that the Secretary-General's decision was "flawed" although it would not reverse the UN's non-employment decision.

In a 2004 decision, a former UN employee living in France was charged with Rwandan war crimes for killing his colleagues in 1994. He was initially awarded six months back pay. His appeal resulted in his winning thirteen months pay, instead, on the basis that he was unfairly dismissed.⁴⁷

◆ §8.4 INTERNATIONAL COURT OF JUSTICE

The dream of world peace, entwined with a judicial body for resolving international disputes, is not new. The medieval Florentine poet Dante's *De Monarchia* proposed a world State which would be incomplete without a central court of justice. The twentieth century was the first to yield world organizations dedicated to peace. The World War I-ending Versailles Treaty, for example, set the stage for the League of Nations and its Permanent Court of International Justice.

In 1943, the Four Powers (China, Soviet Union, United Kingdom, and United States) agreed that another global international organization should replace the defunct League of Nations. This was debated during the 1945 UN development conference in San Francisco. Fifty nations met there to forge the principles now contained in the UN Charter and its annexed Statute of the International Court of Justice (ICJ). The UN Charter drafters decided that the powers of the new Court must be directly incorporated into the UN Charter. The status of this second World Court would, in principle, be on par with the other major organs of the United Nations. The ICJ was designated as the judicial arm of the United Nations. It would share responsibility with the other major UN organs for monitoring national observance of the principles set forth in the UN Charter.

This section of the textbook describes the contemporary operations of the Court—what it is, and is *not*, designed to do. One might never imagine a major Western power submitting a border dispute to the ICJ. Yet African and Latin American nations not only have done this, but also have ended conflicts as a result of ICJ judgments. In June 2006, for example, Nigeria agreed to withdraw from an oil-rich peninsula to settle a long-standing border dispute with Cameroon. The related agreement was forged in the wake of the ICJ judgment determining that this area belonged to Cameroon. In October 2007, Honduras and Nicaragua effectively celebrated an ICJ decision which resolved their dispute over four Caribbean Islands.⁴⁸

A. CHARTER PROVISIONS

The UN's founding members decided to place the constitutive ICJ provisions directly in the UN Charter. This integrated the international organization and its new

World Court, unlike the loose “association” existing between the League of Nations and its (distinct) PCIJ.⁴⁹

The UN Charter sets forth the general functions of the Court in Articles 92 through 96. The Statute of the ICJ contains the procedures for submitting and resolving national disputes. The following materials survey the UN Charter provisions on the Court, summarize the Court’s functions under its statute, and analyze how State practice has affected its roles *after* the Charter materialized in 1945.

The UN Charter provides that: (1) all member States are automatically parties to the Statute of the ICJ; (2) members promise to comply with the decisions of the Court; and (3) the Security Council may undertake enforcement measures if this promise is breached. To encourage national use of the ICJ, Article 93.1 of the Charter requires all State members to become “parties to the Statute of the International Court of Justice.” This statute is often referred to as being “annexed” to the Charter. The drafters wanted the Charter and the Court’s Statute to be jointly adopted by every State that joined the United Nations. This Statute, discussed below, became operative in 1951. Several States—not UN members until several decades after it came into existence—initially became parties to the ICJ Statute, but not to the UN Charter (Liechtenstein, San Marino, and Switzerland).

Under Article 94.1 of the Charter, each UN member “undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.” This is a fundamental requirement of any organized judicial system. While the judgments of the ICJ have been honored by most State parties, some States have ignored its judgments. And, as usual, certain commentators have focused on this feature of the judicial process, construing the conduct of several scofflaws as a fatal blow to the continuing willingness of most States to abide by ICJ judgments. As will be seen, getting a State to consent to the jurisdiction of the Court is not always a given proposition. Once consent has been obtained, however, States have routinely complied with the Court’s judgments.

The conspicuous examples of State defiance of ICJ decisions include the following:

- ◆ For over a decade, Libya disobeyed the Court’s order to turn over the two Libyan terrorists allegedly responsible for blowing up Pan Am Flight 103 over Lockerbie, Scotland, in 1988.

- ◆ South Africa refused to honor the Court’s “advisory” order in the 1971 *Namibia Presence* case to terminate control of the area of South-West Africa (now the independent State of Namibia).
- ◆ In the 1973 *Fisheries Jurisdiction* cases, the ICJ ordered Iceland and the United Kingdom to negotiate an equitable solution to foreign fishing rights in the international waters near Iceland’s coast [§7.2.B.2(a)]. This matter was not seriously negotiated and has not been resolved.
- ◆ In the 1980 *Hostage Case*, Iran refused to release the US diplomats held hostage in Tehran.
- ◆ From 1984 to 1988, the US refused to participate in, or honor, the ICJ’s judgments in the *Nicaragua* case (discussed below).⁵⁰

Defiance of the Court’s orders and judgments is not a wrong without a remedy. As UN Charter Article 94.2 provides: if “any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have *recourse to the Security Council*, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment [italics added].” A State may notify the Security Council when another State has failed to comply with any Charter obligations, including this one.

By the early 1950s, a handful of States had failed to perform their obligations as determined by the Court. Although the Charter does not specify what measures may be taken in this instance, the Security Council could have devised and announced post-judgment compliance measures, pursuant to its Chapter VII powers to maintain world peace.

The Security Council formulated what was probably its most significant (although unsuccessful) ICJ enforcement measure after the Court rendered its opinion in the 1971 *Namibia Presence* case [§2.4.C.2.]. The Court ordered South Africa to terminate its control of South-West Africa (Namibia). The Council then ordered South Africa to comply with the ICJ’s judgment. It also ordered other States to abstain from dealing with South Africa in any way that was inconsistent with the ICJ’s investment divestment opinion. South Africa ultimately agreed to cooperate with the United Nations. Two decades later, South-West Africa finally achieved its independence from South Africa.

The UN Security Council has had very limited experience with enforcing judgments and little incentive

to develop enforcement measures. Under UN Charter Article 36.3, “legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.” States do not, as a general rule, refer their more sensitive legal disputes to the ICJ. This is one reason why even the more powerful States that litigate disputes in the ICJ have generally complied with its judgments. A potentially adverse result is usually not particularly detrimental to the critical political or economic interests of the litigants.

This politically-based remedy—Security Council consideration of State failure to adhere to ICJ judgments—is too often overlooked by journalists and other naysayers. The reality of such a limited judgment enforcement capability in the UN Charter suggests the drafting States’ underlying practical compromise. They had already agreed to agree that there would be an Article 43 standing UN military force (which never materialized) [§9.2.A.]. State members of the UN thereby limited the potential for this world organization to become their Frankenstein. It was not sired to trump the State’s primacy in matters such as how and when to go to war. These had been committed to their discretion since their nascent existence was birthed by the 1648 Treaty of Westphalia [§2.1.A.].

Detractors who complain of the ICJ’s supposed judgment enforcement impotency fail to acknowledge that the State rule-makers, who made the UN Charter, wanted it that way. More States would likely sign on to the UN Charter’s swords-into-plowshares vision if they were not locked in to remedies which could impact their ever-cherished sovereignty. Simply put: Half a loaf would be better than none.

B. UN TRUST FUND

One reason for limited use of the ICJ is the financial condition of the UN’s smaller States. As noted in textbook §2.7.B., many of them do not have the resources to maintain a diplomatic presence in other countries. Many cannot operate any embassy anywhere because of quite limited financial resources.

The same problem has historically limited small States’ access to the ICJ as a dispute-resolution center. It is costly to maintain a local presence at The Hague (Netherlands) where the ICJ is located, even for the limited purpose of filing pleadings, conducting the research necessary to adequately participate in judicial

proceedings on a distant continent, and paying the cost of scientific studies and expert testimony in the Court’s proceedings.

A partial remedy was proposed at the UN. In Secretary-General Boutros Boutros-Ghali’s 1992 report on preventive diplomacy, he recognized that while the Court’s docket has grown, it is an underutilized resource. He urged UN members to “support the Trust Fund established to assist countries unable to afford the cost involved in bringing a dispute to the Court...”⁵¹ This is an inducement to States to submit their disputes to the ICJ.

This fund constitutes a form of international legal aid as envisioned by Secretary-General Javier Perez de Cuellar in 1989. It is financed by voluntary contributions from the comparatively prosperous States, international organizations, and non-governmental organizations. Thirty-four States had contributed \$500,000 to the fund as of the Secretary-General’s 1992 annual report.

Chad is one State that reported its ability to participate in ICJ proceedings, only because of the availability of this fund (during a public hearing at the ICJ on July 14, 1993, in the ICJ Territorial Dispute case between Libya and Chad). While some commentators view this fund as a make-work device for the Court, the ICJ itself is not an intended beneficiary. A permanent fund is preferable to the common scenario whereby needy States must seek financial assistance from other States. The latter may, of course, exact undesirable political concessions for such grants or loans.

As reported by a staff member of the ICJ, the fund’s resources were essentially depleted (after only two successful applications). Thus, “new incentives are needed to raise the level of contribution by wealthier states and enable a larger number of less fortunate states to settle their disputes peacefully in the World Court.”⁵² It is unfortunately evident that smaller States’ access to the ICJ is not a priority of the larger States. The UN still has a long way to go in currying favor for funding the UN Secretary-General’s Trust Fund.

C. ICJ STATUTE

Earlier materials in this section identified the basic UN Charter provisions of the ICJ. The various provisions of the companion “Statute of the International Court of Justice” provide additional details regarding the judges, court functions, the pivotal “optional” clause, and the Court’s “advisory” jurisdiction (as opposed to its “contentious” jurisdiction).⁵³

1. Judges The ICJ is composed of fifteen judges, each from a different UN member State. Recurring suggestions that there be more judges are not very practical. The United Nations does not have the resources to pay the salaries of a large number of jurists. There has been a rather limited caseload to date.

The UN Secretary-General invites State members who are parties to the Permanent Court of Arbitration to submit names of judicial candidates. They are then elected by the UN General Assembly and Security Council. There are triennial elections of five judges to the Court, each serving a nine-year term.

Article 2 of the Statute of the International Court of Justice establishes the eligibility requirements for its judges. They must be independent, “elected ... from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults [learned in International Law] of recognized competence....” About one-third of the judges actually have been judicial officers in their countries. Most have been law professors and practicing lawyers. Some judges have been senior government administrators, and two were heads of State.⁵⁴

Unlike other branches of the UN or certain regional tribunals, ICJ judges do not represent their governments. They must act independently. Under Articles 16 and 17 of the Statute, judges cannot “exercise any political or administrative function, or engage in any other occupation of a professional nature.” Nor can they “act as agent, counsel, or advocate in any case.” Since the judges are not national delegates, their respective governments cannot dismiss them from the ICJ for their judicial opinions. Only the Court itself can vote to dismiss a judge. It has never done so.

2. Functions and Limits The Court’s basic function is to hear and determine cases involving interpretations and applications of the principles set forth in the UN Charter. Under ICJ Statute Article 36.1, the Court’s jurisdiction consists of “all cases [that] the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties....” Under Article 38, the Court applies the following sources of International Law to disputes submitted for its consideration: treaties; customary State practice; general principles of law applied by civilized nations; national or other international court decisions; and scholarly writings of the experts in International Law [§1.2.B.5.].

The Court’s first contentious case was the 1948 *Corfu Channel* litigation. The United Kingdom sued Albania when UK warships hit mines laid in Albania’s territorial waters. The Court decided that the UK had a right to navigate through these waters, holding Albania responsible for the damage to the UK war vessels. In the 1950 *Protection of French Nationals and Protected Persons in Egypt Case*, France sued Egypt for harming French citizens residing in Egypt. After the suit was filed, Egypt rescinded its objectionable measures. The ICJ discontinued the proceedings because Egypt’s remedy satisfied France. The Court was apparently headed for a bright future.

Some built-in jurisprudential problems impacted the Court’s ultimate performance, however. Nigeria’s former Judge and President of the ICJ, T. O. Elias, observed that “[t]he ICJ or World Court is unique in a number of ways and, as such, generates no international legal system of its own.” Unlike national tribunals, the ICJ has no bailiffs or prison system to ensure compliance with its interim orders and judgments.⁵⁵ There were no special forces dispatched, for example, when the Court ordered Libya to turn over its two citizens allegedly responsible for the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland. When Libya finally turned over these individuals for trial, there was no UN jail at the disposal of the ICJ. This void necessitated reliance, instead, on the aid of a national UN member to facilitate the execution of such orders. Thus, when these individuals were tried in The Hague in 2000, it was not in the ICJ (where only States may appear). The defendants were turned over for trial to a special tribunal agreed upon by England, Libya, the US, and the Netherlands. They were thus tried before a panel of Scottish judges, applying Scottish law, at a former US military base known as Camp Zeist. After one of them was found guilty and sentenced to a lengthy jail term, he was committed to a special jail facility in The Netherlands not associated with the ICJ.⁵⁶

There is another significant jurisprudential problem with the Court: It is a *trial* court, not an *appellate* court. Reviewing tribunals in national legal systems routinely rely on an extensive judicial record generated by a lower court, whose lawyers refine and advocate the respective views of the precise nature of the issue to be resolved. New York University Professor Thomas Franck notes the inherent limitation of not having a record from which to draw:

[T]he Court, as both trial court and court of ultimate jurisprudential recourse, is in a far more difficult

position than domestic [national] courts, where it is customary to make fact-determination the principal concern of the lower court while leaving it to a higher tribunal to devote itself almost exclusively to the jurisprudential issues applicable to predetermined facts. Moreover, to this burden of duality should be added the disadvantage of distance. That The Hague is very far ... [from] the forests of El Salvador or the jungles of Thailand and the desert of Western Sahara, is self-evident. Less immediately apparent is the ... Court's cultural diversity, [because] few members can draw upon personal experience to imagine the substantive realities as to which the pleadings establish contradictory assertions.... In the [ICJ's] Peace Palace, the judges ... cannot ... reach into their life experiences to weigh the comparative probabilities. Even where contradictory witnesses are concerned, how can they rely on socio-culturally conditioned instinct to feel who is likely to be lying ... when the witnesses are from a culture that is wholly unfamiliar to most members of the Court?⁵⁷

While the ICJ has always functioned as a trial court, it could arguably undertake a form of judicial review of UN agency actions. In several instances, certain UN members have claimed that the ICJ *must* review and overrule Security Council sanction decisions allegedly beyond the Council's Charter powers. In its *Namibia Case*, however, the Court stated: "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned [which included the Security Council]."⁵⁸ The express power to judicially review the Council's action is not suggested in the UN Charter, or in the companion Statute of the ICJ, or its Rules of Court. However, as reasoned by Cambridge University Professor Dapo Akande, "lack of an express power of review is not ... determinative. What is more important is lack of an express prohibition from engaging in judicial review."⁵⁹

By analogy, the US Supreme Court decided, early in the new Republic's existence, that it necessarily possessed the power of judicial review. As of 1803, that Court could trump the acts of the other two (political) branches of government. In the Supreme Court's words: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."⁶⁰

In a democratically constituted national court system, the inter-branch balance-of-power principle unquestionably authorizes judicial review of the constitutionality of executive and legislative action.⁶¹ The ICJ has never reviewed a Security Council sanction decision to determine whether it complied with the UN Charter. However, further study of this question reveals that there is a full spectrum of opinions as to whether the ICJ *could* find—as have many national courts in democratic countries—that the judicial branch must have that power for a democratic regime to survive.⁶²

3. Optional Clause

(a) "Compulsory" Jurisdiction All State members of the United Nations are automatically parties to the ICJ Statute per Article 93.1 of the UN Charter. Its terms "dictate" as follows: "All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice." That rather commanding language does not actually mandate ICJ dispute resolution, however. This "requirement" is arguably one of form, rather than substance. Those who created the ICJ anticipated that sovereign States would not be willing to vest the ICJ with the full judicial power necessary to require them to appear in a lawsuit filed by another State. The prospect of a distant tribunal, rendering judgments against the more powerful nations of the world, was too myopic to compel compulsory jurisdiction in all cases. If such a mandate had been placed in the Charter or ICJ Statute, the United Nations would be a far smaller organization than it is today.

Instead, the drafters of the ICJ Statute provided that a nation could join the United Nations and decide later whether or not to accept the Court's compulsory (mandatory) jurisdiction. Article 36 of the Statute thus provides that the ICJ will have jurisdiction to hear and decide cases against a consenting State:

- ◆ in "cases the parties refer to it" [for example, by inserting a treaty clause specifically referring disputes to the ICJ]; or
- ◆ "States parties to the present Statute may ... [unilaterally by an appropriate filing with the UN Secretary-General that the filing State] recognizes as compulsory ... the jurisdiction of the Court in all legal disputes concerning:
 - (a) the interpretation of a treaty;
 - (b) any question of international law;

- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation [such as damages] to be made for the breach of an international obligation.”

The Court’s “compulsory jurisdiction” depends completely on the will of States to accept the Court’s power over them—in the specific circumstances expressed in each Declaration of Acceptance. The specific methods for exercising these alternatives are succinctly summarized by Polish Academy of Sciences Professor Renata Szafarz in his book on the ICJ’s “compulsory” jurisdiction:

The consent may be expressed *ad hoc* once a dispute has arisen. It may also be expressed *post hoc* by a party to the dispute when the case has been brought before the court by another party. Finally, consent may be expressed *ante hoc*, in advance, with reference to all legal disputes to be submitted in the future or to certain categories of dispute. The latter form of jurisdiction is usually, though not very precisely, termed compulsory or obligatory jurisdiction. Since the compulsory jurisdiction of the ICJ results either from the acceptance by states of the so-called optional clause ... or from the acceptance of judicial clauses contained in treaties a considerable majority of states have accepted the compulsory jurisdiction of the ICJ, at least to some extent ... even though ... there should be more than the present 54 declarations accepting the optional clause and that there should be fewer reservations to [such] judicial clauses.⁶³

(b) Optional Clause Applied The UN blueprint for judicial dispute resolution was a practical compromise. The organization’s judicial process could not reasonably mandate compulsory jurisdiction for all members, all of the time. State sovereignty necessitated avoidance of a Pollyannaish framework, which would otherwise have locked each State into submitting each dispute to this fledgling, untested tribunal. The Optional Clause compromise represented a unique variation from the “compulsory” jurisdiction commonly exercised by national courts. States joining the United Nations would automatically “accept” the ICJ Statute, which

contained a “compulsory jurisdiction” clause. That clause would be triggered, however, *only* by the member State’s subsequent decision to expressly subject itself to the jurisdiction and judgments of the UN’s judicial arm. Requiring *truly* compulsory jurisdiction as a condition of joining the United Nations would have been a disaster. Few nations would have joined the UN if its court had possessed compulsory jurisdiction over all international disputes, no matter how sensitive to the State parties.

This unique limitation is found in Article 36.2 of the ICJ Statute: States party “to the present Statute *may at any time* declare that they recognize as compulsory ... the jurisdiction of the Court in all legal disputes...” [italics added]. Lacking this option, the world’s more powerful nations would otherwise be unlikely to swell the membership ranks of the new world organization. This is one reason why the UN Charter also incorporated other dispute-resolution mechanisms, including its following Charter Article 33.1 mandate: “The parties to any dispute ... shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice” [as presented above in §8.1.].

The “compulsory” jurisdiction to hear cases is the most controversial and misunderstood feature of the ICJ’s jurisdiction. States have unilaterally tendered a variety of acceptances: (a) very narrow acceptances of the ICJ’s compulsory jurisdiction; (b) very broad ones; and (c) others lying somewhere in between. Under Article 36.3, national declarations opting to accept the compulsory jurisdiction of the ICJ may thus be made as follows: (1) unconditionally, (2) for a limited time, or (3) on the condition of reciprocity (explained in the ICJ’s *Norwegian Loans* case below).

Egypt’s 1957 declaration of acceptance was perhaps the narrowest. The ICJ would have the power to resolve cases *only* in the event of an international dispute directly involving its operation of the Suez Canal. The broadest acceptance comes from countries like Nicaragua, which has submitted unconditional unilateral acceptance of the ICJ’s jurisdiction—authorizing the ICJ to hear *any* case involving Nicaragua. That country has little to lose in a forum where it can theoretically “square off” with the major powers of the world. The declaration accepting ICJ jurisdiction on specified terms lies somewhere in between. This acceptance category

includes the acceptance that functions for a limited period of years (subject to renewal).

(c) Jurisdiction to Determine Jurisdiction State practice spawned a non-statutory limitation on ICJ jurisdiction. It clashes with the express terms of the ICJ Statute. Article 36.6 provides that in “the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.” This provision was interpreted by the ICJ in the Court’s 1955 *Nottebohm* case [§4.2.A.]. The relevant passage addresses the virtually global practice that courts have the jurisdiction to determine their own jurisdiction when one of the parties questions whether a court has the power to hear the case:

Paragraph 6 of Article 36 merely adopted ... a rule consistently accepted by general international law ... [whereby] an international tribunal has the right to decide to [resolve questions about] its own jurisdiction and has the power to interpret for this purpose the instruments which govern jurisdiction. This principle, which is accepted by general international law in the matter of arbitration, assumes particular force when the international tribunal ... is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation, and is in the present case the principal judicial organ of the United Nations.... The judicial character of the Court and the rule of general international law referred to above are sufficient to establish that the Court is competent to adjudicate on its own jurisdiction in the present case.⁶⁴

The ICJ does not—withstanding the express wording of ICJ Statute Article 36.6—possess the exclusive power to decide its own jurisdiction. The more powerful UN members began to limit their declarations when they filed *so-called* acceptances of the Court’s “compulsory jurisdiction.” Their reservations to this statutory language, when tendered in advance of any dispute, specified that the defendant State—not the ICJ—would decide whether the Court could actually require them to appear as a defendant.

Try to imagine a national judge’s reaction, if a defendant were to tell the judge that the court did not have the power to act; that the *defendant* had decided this question; and that the judge could do nothing about it.

In a national court, that argument might support an insanity plea. This is exactly the argument that many States have successfully tendered by cautiously limiting the scope of their “acceptance” of the Court’s compulsory power to hear cases against them. The ICJ Statute was not worded so as to *require* UN members to accept the Court’s jurisdiction. The Court has therefore been powerless to act in some widely publicized instances. Recall that this is not an unforeseen Charter defect. The State rule-makers wanted it that way to preserve their political options on a case-by-case basis.

France’s acceptance (withdrawn in 1974) is a good example. Its acceptance was quite narrow because it “does not apply to differences relating to matters that are essentially within the national jurisdiction *as understood by the Government of France* [italics added].” In this instance, France warmly embraced Article 2.7 of the UN Charter. It provides that “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters [that] are essentially within the domestic jurisdiction of any state....” France (and a number of other nations) thereby invoked the UN Charter’s own limitation on its general power to act as the basis for the following State practice: (a) *appearing* to submit to the jurisdiction of the Court, while (b) actually retaining the ability to avoid certain ICJ disputes—by classifying them as falling within their “domestic” jurisdiction and as supposedly not “international” in scope.

Canada’s acceptance of the ICJ’s compulsory jurisdiction is limited as follows: In a 1994 reservation to the UN Law of the Sea Treaty, its Declaration of Acceptance consented only to jurisdiction “over all disputes ... other than ... disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the ... Regulatory Area ... and the enforcement of such measures.” This area is the subject of conflicting fishing rights and an ICJ case wherein Spain sued Canada because of its assertion of fisheries jurisdiction beyond the economic zone established in the UN treaty.

(d) Reciprocity When invoked, this statutory alternative limits the scope of national acceptances of the ICJ’s compulsory jurisdiction. It acknowledged that not all States would recognize the Court’s jurisdiction on identical grounds. A potential defendant State might consider it unfair for a plaintiff State, which had previously tendered a narrower acceptance of the Court’s jurisdiction before any dispute arose, to sue in circumstances

whereby the plaintiff State would not be similarly amenable to the Court's jurisdiction.

The following ICJ case illustrates the problems spawned by such national declarations, some of which were not included in the ICJ Statute. This case simulta-

neously demonstrates how the domestic jurisdiction limitation and the reciprocity limitation combined to deprive the ICJ of its otherwise available power to decide a case arising under International Law:

Case of Certain Norwegian Loans

(France v. Norway)

INTERNATIONAL COURT OF JUSTICE

1957 ICJ Reports 9 (1957)

<<http://www.icj-cij.org/docket/files/29/4773.pdf>>

AUTHOR'S NOTE: From 1885 to 1909, the Norwegian Government borrowed money from French sources. Norway's loans were secured by banknotes, whereby the Norwegian government promised to repay the loans in gold. In 1914 (when World War I began in Europe), Norway wanted to retain its gold reserves. It therefore suspended the convertibility of its banknotes into gold for an indefinite period. Norwegian law provided that when creditors refused to accept payment in Bank of Norway notes (rather than the promised gold), Norwegian debtors could postpone payment of their loans in gold. French citizens were unable to obtain their repayment in gold, as they had been promised under the express terms of their loans to Norwegian borrowers.

The French government suggested that this dispute be submitted to either an international commission of financial experts, or any mutually acceptable arbitral body—or, to the International Court of Justice. Norway consistently refused all of these alternatives on the basis that this matter should be heard only in Norway's judicial system. Norway considered this problem to be a local matter, involving no more than an alleged breach of contract governed by the domestic laws of Norway. France finally filed this case in the ICJ. In its application for relief, the French government sought a judgment that Norway could discharge these loans only by payment in gold—as originally promised.

The ICJ did not reach the merits of France's case. The Court could not hear and decide it, because its inherent judicial power was vitiated by the combined effect of France's "domestic jurisdiction" reservation, and Norway's "reciprocity" reservation.

The opinion of the majority of the judges illuminates the rationale for the ICJ not having the power to

act under these circumstances. Judge Lauterpacht's separate opinion concurred with the result (that the court lacked the power to proceed). He based his conclusion, however, on different footing: France's purported submission to the compulsory jurisdiction of the court was illusory—a rather daunting theme that continues to plague the Court to this day.

COURT'S OPINION:

The Application [by France for a judgment against Norway] expressly refers to Article 36, paragraph 2, of the Statute of the Court and to the acceptance of the compulsory jurisdiction of the Court by Norway on November 16th, 1946, and by France on March 1st, 1949. The Norwegian Declaration reads:

I declare on behalf of the Norwegian Government that Norway recognizes as compulsory ipso facto and without special agreement ... on condition of reciprocity, the jurisdiction of the International Court of Justice in conformity with Article 36, paragraph 2, of the Statute of the Court, for a period of ten years as from 3rd October 1946.

The French Declaration reads:

On behalf of the Government of the French Republic, and subject to ratification [which was later given], I declare that I recognize as compulsory ipso facto and without special agreement ... on condition of reciprocity, the jurisdiction of the International Court of Justice ... for all disputes which may arise [unless] the parties may have agreed or may agree to have recourse to another

method of peaceful settlement. This declaration does not apply to differences relating to matters which are essentially within the national jurisdiction [of France] as understood by the Government of the French Republic....

The Norwegian Government maintained that the subject of the dispute was within the exclusive domain of the municipal [internal] law of Norway, and that the Norwegian Government relied upon the reservation in the French Declaration [excluding] matters which are essentially within the national jurisdiction [of France] as understood by the French Government....

[Norway explained that] There can be no possible doubt on this point. If, however, there should still be some doubt, the Norwegian Government would rely upon the reservations made by the French Government in its Declaration of March 1st, 1949. By virtue of the principle of reciprocity, which is embodied in Article 36, paragraph 2, of the Statute of the Court and which has been clearly expressed in the Norwegian Declaration of November 16th, 1946, the Norwegian Government cannot be bound, vis-à-vis the French Government, by undertakings which are either broader or stricter than those given by the latter Government [of France].... [In a subsequent portion of the opinion, the Court responded as follows.] In the Preliminary Objections filed by the Norwegian Government it is stated:

The Norwegian Government did not insert any such reservation in its own Declaration. But it has the right to rely upon the [narrower] restrictions placed by France upon her own undertakings.

Convinced that the dispute, which has been brought before the Court by the Application of July 6th, 1955, is within the domestic jurisdiction, the Norwegian Government considers itself fully entitled to rely on this right [as France would do if a defendant in this Court]. Accordingly, it requests the Court to decline, on grounds that it lacks jurisdiction, the function which the French Government would have it assume.

In considering this ground of the Objection, the Court notes in the first place that the present case has been brought before it on the basis of Article 36, paragraph 2, of the Statute and of the corresponding

Declarations of acceptance of compulsory jurisdiction; that in the present case the jurisdiction of the Court depends upon the Declarations made by the Parties in accordance with Article 36, paragraph 2, of the Statute on condition of reciprocity; and that, since two unilateral declarations are involved, such jurisdiction is conferred upon the Court only to the extent to which the Declarations coincide in conferring it. A comparison between the two Declarations shows that the French Declaration accepts the Court's jurisdiction within narrower limits than the Norwegian Declaration; consequently, the common will of the Parties, which is the basis of the Court's jurisdiction, exists within these narrower limits indicated by the French reservation....

France has limited her acceptance of the compulsory jurisdiction of the Court by excluding beforehand disputes relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic. In accordance with the condition of reciprocity to which acceptance of the compulsory jurisdiction is made subject in both Declarations and which is provided for in Article 36, paragraph 3, of the Statute, Norway, equally with France, is entitled to except from the compulsory jurisdiction of the Court disputes understood by Norway to be essentially within its national jurisdiction....

The Court does not consider that it should examine whether the French reservation is consistent with the undertaking of a legal obligation and is compatible with Article 36, paragraph 6, of the Statute [the core of Justice Lauterpacht's concurring opinion] which provides:

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

The validity of the [French] reservation has not been questioned by the Parties.... The Court considers that the Norwegian Government is entitled, by virtue of the condition of reciprocity, to invoke the reservation contained in the French Declaration of March 1st, 1949; that this reservation excludes from the jurisdiction of the Court the dispute which has been referred to it by the Application of the French Government; that consequently the Court is without jurisdiction to entertain the [French] Application....

The ICJ then voted twelve to three that it lacked the necessary jurisdiction to hear and determine France's claim.

SEPARATE OPINION OF JUDGE SIR HERSCH LAUTERPACHT

While I concur in the operative part of the Judgment inasmuch as the Court has declared itself incompetent to decide on the merits of the case submitted to it, I much regret that I do not find myself in agreement with the grounds of the Judgment....

I consider it legally impossible for the Court to act in disregard of its Statute which imposes upon it the duty and confers upon it the right to determine its jurisdiction. That right cannot be exercised by a party to the dispute. The Court cannot, in any circumstances, treat as admissible the claim that the parties have accepted its jurisdiction subject to the condition that they, and not the Court, will decide on its jurisdiction. To do so is in my view contrary to Article 36(6) of the Statute which, without any qualification, confers upon the Court the right and imposes upon it the duty to determine its jurisdiction. Moreover, it is also contrary to Article 1 of the Statute of the Court and Article 92 of the Charter of the United Nations which lay down that the Court shall function in accordance with the provisions of its Statute. It is that question which I now

propose to consider in connection with the examination of the validity of the French Acceptance [where under it decides jurisdiction rather than the ICJ]....

Moreover, the particular [French] reservation now at issue is not one that is contrary to some merely procedural aspect of the Statute. It is contrary to one of its basic features. It is at variance with the principal safeguard of the system of the compulsory jurisdiction of the Court. Without it, the compulsory jurisdiction of the Court being dependent upon the will of the defendant party, expressed subsequent to the dispute having been brought before the Court, has no meaning. Article 36(6) is thus an essential condition of the system of obligatory judicial settlement as established in the Statute. That provision was inserted in the Statute with the deliberate intention of providing an indispensable safeguard of the operation of the system. Article 36(2) speaks of the recognition by the parties to the Statute of the "compulsory" jurisdiction of the Court. But there is no question of compulsory jurisdiction if, after the dispute has arisen and after it has been brought before the Court, the defendant State is entitled to decide whether the Court has jurisdiction....

Accordingly, in my view the entire French Declaration of Acceptance must be treated as devoid of legal effect and as incapable of providing a basis for the jurisdiction of the Court. It is for that reason that, in my view, the Court has no jurisdiction over the dispute.

Both State litigants had expressly agreed, long before this dispute arose, to use the World Court to decide international disputes. Yet the terms of their conditional consents, i.e., reservations to the treaty [§7.2.A.4.], reserved their respective rights to avoid the Court's "compulsory" jurisdiction over them as specified in their reservations to its jurisdiction. France's comparatively narrow acceptance reserved its ability to characterize any claim as one arising under France's internal law—regardless of whether the claim arose under International Law. Norway merely piggybacked onto France's narrower Declaration of Acceptance. Norway had accepted the ICJ's compulsory jurisdiction, subject to its own Declaration of Acceptance based on "reciprocity," thus allowing it to *borrow* the same term when contained in a plaintiff nation's own reservation to the jurisdiction of the Court.

Consider the following questions, with a view toward reviewing the major (and complex) rationale for the

ICJ's decision that it did not have the jurisdictional power to hear the *Norwegian Loans* case on its merits:

- (1) Under the *Statute* of the ICJ, who decides whether the Court has jurisdiction?
- (2) What is the "optional clause," and which State or States invoked it?
- (3) When a State accepts the optional clause, what specific obligation does it thereby incur?
- (4) The text of the optional clause includes the word "compulsory." What does the latter term actually mean? So what limitations does the ICJ Statute contain?
- (5) States do *not* have to unconditionally accept the jurisdiction of the ICJ in all matters. How did Norway limit its Declaration of Acceptance when years before, it supposedly submitted itself to the compulsory jurisdiction of the Court?
- (6) Why was Norway able to *avoid* litigating this case?

(7) Why did Judge Lauterpacht characterize France's submission to the compulsory jurisdiction of the ICJ as being "invalid"?

(e) Other Limited Acceptances Reciprocity is not the only basis for a willing nation to accept the ICJ's "compulsory" jurisdiction. One should never underestimate national resourcefulness in finding new ways to simultaneously submit to, and limit, the Court's ability to hear cases against them. Spain (representing the general interests of the European Union—because only "States" may be parties to ICJ cases) sued Canada in the ICJ. Spain thereby claimed that Canada's special fisheries jurisdiction some 220 nautical miles off Canada's coast, and well beyond the 200-miles Exclusive Economic Zone, both violated International Law. In December 1998, the ICJ dismissed this suit on the basis that it lacked jurisdiction to hear Spain's case. One year before enacting this special legislative fishing-conservation zone, Canada tendered a fresh acceptance to the compulsory jurisdiction of the ICJ. Canada thus limited its consent to suit in the ICJ by excepting any case against Canada regarding Canada's amended Coastal Fisheries Protection Act. The Court rejected Spain's assertion that the Canadian reservation could not be invoked.

In June 2000, the ICJ determined that it did not have jurisdiction to hear Pakistan's case against India, which had allegedly shot down a Pakistani military aircraft in Pakistan. They argued the issues of whether: (a) British India's 1931 accession to the Permanent Court of International Justice 1928 Jurisdictional Act, had survived the demise of the League of Nations; and (b) if so, whether India and Pakistan had become parties upon their accession to independence. In a 1974 communication to the United Nations, India "never regarded [itself] as bound ... since Independence in 1947 [regardless of whether accomplished] by succession or otherwise...." The ICJ concluded that India could not be regarded as having been a proper party to the predecessor court's 1928 Act.

Also, India's declaration accepting the compulsory jurisdiction of the ICJ contains a reservation whereby "disputes with the government of any State which is or has been a Member of the [British] Commonwealth of Nations" are excluded from the Court's jurisdiction. Regardless of why India limited the scope of its acceptance, the Court refused Pakistan's argument that India's reservation was "extra-statutory" (*à la* Lauterpacht) or obsolete.⁶⁵

(f) Stare Decisis In many (mostly Common Law) countries,⁶⁶ a judicial decision is characterized as having *stare decisis* effect—that the legal point it decides is applicable to future cases involving the same issue. Article 59 of the ICJ Statute is an arguable manifestation of a general sovereign mistrust of any "outside" judicial resolution of local disputes. The Court's decisions "have no binding force except as between the parties and in respect [only] of that particular case." Although the Court is expected to aid in the progressive development of International Law, its Statute expressly limits the binding effect of ICJ judgments for use in subsequent cases.

Decisions legally bind only the immediate parties in the immediate suit. The parties are not necessarily bound in the event of a similar issue arising between them in the future. *Stare decisis* is generally rejected in countries employing Civil Law jurisprudential principles (e.g., France)—as opposed to Common Law countries (e.g., England) where case precedent is a central feature of the nation's jurisprudence. The Court has nevertheless relied on its prior decisions as evidence of the content of International Law. It would be a waste of judicial resources, however, to completely disregard earlier decisions when the same point of law is later presented in another case.⁶⁷

The World Trade Organization is another world body where *stare decisis*, or binding precedent, does not prevail. Its various panels have decided hundreds of cases since becoming operational in 1995. There is no obligation for one nation's courts to follow the decisions of another. A number of nations have relied on another nation's resolution of a similar issue for its persuasive effect (§1.2.B.4 on Judicial Decisions as a source of International Law). While the lack of *stare decisis* is expressed in the ICJ Statute, the WTO Statute is silent. One may thus presume that, absent an express provision in favor of *stare decisis* for WTO panel decisions, none could be implied. The WTO creation of an ad hoc dispute settlement panel for each dispute arising between nations arguably militates against such a result. On the other hand, once a decision is appealed, it would take a unanimous vote by the WTO's member nations to overturn such a decision. For the sake of consistency, however, a WTO Dispute Settlement Understanding amendment would clarify the actual WTO position on panel decisions that are not appealed.

D. CHAMBERS OPTION

Under Article 26 of the ICJ Statute, the "Court may form from time to time one or more chambers, composed of

three or more judges ... for dealing with particular categories of cases.” Upon the request of a party to a dispute, the president of the ICJ determines whether the other party is agreeable to the formation of a chamber to hear the dispute. The original intent to provide chambers to hear labor, transit, and communications cases expanded in 1982. Various ICJ chambers began to consider border disputes between the US and Canada, Mali and Upper Volta, El Salvador and Honduras, and Benin and Niger.⁶⁸

The chamber mode of dispute resolution offers two advantages. One is that the judges may decide matters on a summary basis. Article 29 of the ICJ Statute provides that with “a view to the speedy dispatch of business, the Court shall form annually a chamber composed of five judges who, at the request of the parties, may hear and determine cases by summary procedure.” The judges can dispense with certain court rules and procedures when deemed appropriate. The other advantage is that States do not have to submit their cases for consideration by the full Court. The entire tribunal of fifteen jurists may include judges from States having poor relations with a party to a particular dispute.

In 1993, the US and Russia tendered a joint proposal at the United Nations which encouraged greater use of the ICJ via a “chambers” process. The objective is to encourage resort to a convenient dispute-resolution mechanism, at least in cases involving the terrorism and narcotics treaties signed by both States in the aftermath of the Cold War. The other UN Security Council members—France, Great Britain, and China—were asked to support and ultimately join the US-Russia chambers proposal. Disputes would be resolved by “panels” of fewer than all fifteen judges. But Great Britain and a number of commentators characterized this proposal as a step backward. It supposedly discouraged use of full-court powers. France and China remain so suspicious of the ICJ that their endorsement of this plan never surfaced.⁶⁹

E. ADVISORY JURISDICTION

1. Special Judicial Power The ICJ also renders “advisory” opinions. No State is a party to the proceedings. The Court’s Statute invites States and international organizations to provide information to assist in its advisory deliberations. Unlike the ICJ’s *contentious* litigation (e.g., the above *Norwegian Loans* case), there is no named plaintiff or defendant. A particular State, however, may be the conspicuously absent target of the Court’s opinion.

This type of hearing differs dramatically from the national practice of many UN Member States. There, jurisprudential limitations on a national or local court restrict the ability to hear *all* cases that might be filed with a court. One of them is that the case must present a live controversy as opposed to a theoretical question that is not currently the subject of any contentious dispute between two or more named parties. Under Article III, Section 2 of the US Constitution, for example, the federal “judicial Power shall extend to all ... *Controversies*” between States, individuals, and the federal government [*italics added*].

The ICJ succinctly summarized the fundamental difference between its contentious and advisory jurisdiction as follows:

The participation of interested States had conferred on the present proceedings a wholly unusual character tending to obscure the difference in principle between contentious and advisory proceedings. Whereas in contentious proceedings the Court has before it parties who plead their cause and must, where necessary, produce evidence in support of their contentions, in advisory proceedings it is assumed that the Court will itself obtain the information it needs, should the States not have supplied it. In contentious proceedings, if a party does not succeed in producing good grounds for a claim, the Court has only to dismiss it, whereas in advisory proceedings the Court’s task is not confined to assessing the probative force of the information supplied by States, but consists in trying to arrive at an opinion with the help of all the elements of information available to it.⁷⁰

The ICJ’s advisory jurisdiction resolves sweeping questions of International Law in a comparatively non-adversarial context. An advisory resolution fills the gap created by the general lack of State commitment to resolving sensitive international disputes in contentious (adversarial) litigation. Many States are normally unwilling to submit their major disputes to the Court.

Some States have even registered objections, however, when a UN agency sought an advisory opinion. An early ICJ decision (1950) determined that State consent is *not* required for an advisory opinion: “It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in

order to obtain enlightenment as to the course of action it should take. The Court's [advisory] Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an 'organ of the United Nations,' represents its participation in the activities of the Organization, and, in principle, should not be refused."⁷¹

2. Who Initiates and Why Under Article 65 of the Statute of the ICJ, the "Court may give an advisory opinion on any [international] legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." An individual State may bring a problem to the attention of one of these bodies. Under UN Charter Article 96, however, only the General Assembly, the Security Council, and specialized agencies authorized by the General Assembly may "request advisory opinions of the Court on legal questions arising within the scope of their activities." The Court then interprets and applies International Law in the absence of State litigants. In 1993, for example, the General Assembly's World Health Organization sought an advisory opinion from the ICJ requesting guidance on the question of whether the threat or use of nuclear weapons is permitted in any circumstances.

This UN judicial organ may also resolve conflicting interpretations of the Charter by different UN organs. In the 1945 Statement on Charter Interpretation contained in UN Conference Document No. 933, the drafting committee provided as follows: "Difficulties may conceivably arise in the event that there should be a difference of opinion among organs of the Organization concerning the correct interpretation of the Charter. Thus, two organs may conceivably hold and may express or even act upon different views.... [I]t would always be open to the General Assembly or to the Security Council ... to ask the International Court of Justice for an advisory opinion concerning the meaning of a provision of the Charter."

Another reason for the ICJ's advisory jurisdiction is that only *States* may be parties in the Court's contentious cases. Unlike certain regional international courts [§8.6.B.], other international organizations, their agencies, and individuals cannot be parties in ICJ litigation.

3. Advisory Opinion Applications Among the Court's more prominent advisory opinions are the 1950

Competence of the Assembly case, the 1951 *Genocide Reservations* case, and the 1988 *PLO UN Mission* case. In the first of these opinions, the ICJ resolved a dispute involving the respective powers of the UN's General Assembly and Security Council. The Court decided that the UN Charter could not be interpreted to permit the General Assembly to unilaterally admit members to the United Nations. It was unwilling to condone the suggestion—contrary to the Charter's language—that a recommendation of the Security Council was not required. In the second of the above advisory opinions, the General Assembly sought guidance about the permissibility of potential reservations to the Genocide Treaty. While the court did not clearly answer this genocide reservation question [textbook §7.2.A.4.], it did decide that State treaty reservations must be generally compatible with the underlying purpose of a treaty. In the 1988 Palestine Liberation Organization (PLO) UN Mission case, the Court decided that the US could not close the mission of the PLO in New York. The US obligations to the United Nations precluded closure of the PLO's UN Mission although it had been accused of engaging in terrorism.⁷²

Given the political interest that States sometimes exhibit in proceedings related to an advisory opinion, the difference between advisory and contentious litigation can be obscured. Normally, the Court obtains what information it desires when exercising its advisory jurisdiction—particularly when one or more interested States are not forthcoming in providing factual details for the Court's legal analysis. But in some advisory cases, State interest generates a degree of participation virtually on par with that manifested by the ICJ's contentious cases.

In the 1975 *Western Sahara* advisory opinion [§6.1.C.], for example, the UN General Assembly requested an ICJ advisory opinion regarding the status of the referenced territory. The Court called upon Spain, Morocco, and Mauritania to submit information regarding their respective claims to this region. The proceedings resembled contentious litigation because of the presentation of conflicting adversarial views to the Court—although the case technically involved only the advisory jurisdiction of the Court. As aptly articulated by professor Peter Kovacs of Hungary's Miskolc University, regarding the 2004 *Palestinian Wall* case: "Does this very special advisory opinion—which was, in fact, a *quasi* judgment (even if, of course, without a direct, binding nature)—falling upon a State in a lawsuit launched on a very

peculiar basis remain an isolated phenomenon or does it mean the opening of a new jurisprudence....?"⁷³

The Court's 2004 *Palestinian Wall* opinion ranks among the most notable and sensitive exercises of advisory jurisdiction in ICJ history. The substantive issues addressed by the ICJ were presented in the edited version of this case [textbook §6.2.A.1(b)(i)]. The following portion of the same opinion provides an excellent assessment of the rationale for this form of dispute resolution found in few national court systems:



Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

INTERNATIONAL COURT OF JUSTICE

(July 9, 2004)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Eight, click Palestinian Wall Advisory Jurisdiction case.

F. ICJ ASSESSMENT

1. Hope and Reality Jeremy Bentham, the British philosopher and oft-described “Father” of modern International Law, wrote a global peace plan in 1789, reflecting upon both the long and arduous war which led to creation of the seventeenth-century nation-State and the many conflicts since its appearance:

the maintenance of ... pacification might be considerably facilitated, by the establishment of a common court of judicature, for the decision of differences between the several nations, although such court were not to be armed with any coercive powers.

...

While there is no common tribunal, something might be said for this. Concession to notorious injustice invites fresh injustice. Establish a common tribunal, the necessity for war no longer follows from difference of opinion. Just or unjust, the decision of the arbiters will save the credit, the honour of the contending party.

...

There might, perhaps, be no harm in regulating, as a last resource, the contingent to be furnished by the several states for enforcing the decrees of the court. But the necessity for the employment of this resource would, in all human probability, be superseded for ever by having recourse to the much more simple and less burdensome expedient, of introducing into the instrument by which such court was instituted, a clause guaranteeing ... that the diet [parliament] might find no obstacle to its giving, in every state, to its decrees, and to every paper whatever which it might think proper to sanction with its signature, the most extensive and unlimited circulation.⁷⁴

Bentham would likely observe little change were he alive to assess the “realization” of his dream. Of the “Permanent Five” members of the UN Security Council—who wield the most power—only the United Kingdom remains committed to ICJ membership. China, France, and the US have withdrawn. The Soviet Union/Russia was never a party. Given that none of these powers have committed to the now functioning International Criminal Court, one might reason that the concept of global adjudication as an alternative to war is too idealistic to be workable.

It is unlikely that States will rekindle the resilient interest in international (non-regional) adjudication like that which blossomed between 1944 and 1946. In 1944, even before World War II ended, some of the world's most powerful nations planned a global organization of States, which would avert further wars. In 1945, they drafted unassailable principles calling for the peaceful settlement of disputes. These norms were then incorporated into both the UN Charter and the ICJ Statute. The language in these constituting documents expressed the hope that the Court would play a prominent role in managing subsequent hostilities. UN Charter Article 36.3 states “that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.”

The Court was designed to serve as a buffer for adversaries who would otherwise resort to the familiar forms of hostility to settle disputes. If an offending State failed to comply with the Court's interim orders or final judgments the Security Council would surely devise measures to ensure compliance. After all: “Most professors of international law say that compliance with international

law is no worse than that of any other law. Indeed, national court decisions are not always complied with.”⁷⁵

In the UN Secretary-General’s 1992 special report to the UN Security Council, Boutros Boutros-Ghali recommended the following steps to reinforce the role of the ICJ: “(a) All member States should accept the general jurisdiction [rather than the usual reliance on special treaty clauses] of the International Court ... without any reservation, before the end of the United Nations Decade of International Law in the year 2000. (b) When submission of a dispute to the full Court is not practical, the Chambers jurisdiction should be used. (c) States should support the Trust Fund established to assist countries unable to afford the cost involved in bringing a dispute to the Court.”⁷⁶

The 1999 comment of the Court’s past President, on the eve of the new Millennium, was that “today, 53 years after its creation, the International Court of Justice has more than justified [the] perception ... [that] a world court can fundamentally foster peace through the adjudicated settlement of international disputes and the development of the body of international law.”⁷⁷

This statement is in marked contrast to that of Jawaharlal Nehru University’s R. Anand—one of the premier spokespersons for Third World views on International Law. Referring to the positive sentiments expressed when a world court was reestablished after World War II:

These hopes were however woefully belied after 1945 in the tension-ridden bipolar world ... that ensued between the Communist and the non-Communist States. Although 23 countries which had accepted the jurisdiction of the Permanent Court were deemed to have accepted the jurisdiction of the ICJ ... in 1945, not many more countries came forward to accept the jurisdiction of the new court. In fact 17 countries ... let their declarations lapse or terminated them. In 1990, out of the 164 members ... only 51 States (about 30%) had accepted the jurisdiction of the International Court.... These included 16 States from Africa, 9 from Latin America, 3 from Asia and 23 from Western European and other States. ... Not only have very few countries accepted the jurisdiction of the Court but even these declarations under the Optional Clause have been made with far-reaching reservations which are found in almost 40 out of 51 declarations.⁷⁸

There are, of course, a variety of methods for participation in ICJ proceedings. A State may decide to do so on an ad hoc basis without the necessity of a prior submission to the court’s jurisdiction. It has thus been argued that “neither the number nor the quality of acceptances ... provide a reliable pointer to States’ readiness to use judicial settlement.”⁷⁹

The existing geopolitical terrain has not closed the gap between hope and reality. Many of the original UN members refused to yield sovereign control over their own disputes to an international organization headquartered in a distant land (New York City) or its judicial organ (in The Hague). Many UN delegates at the 1945 UN drafting conference distrusted the first World Court (Permanent Court of International Justice), which had been conceived by the French and staffed with mostly European judges. The UN delegates were likely to give only lip service to a model that appeared to entrust sensitive disputes to a judicial body hundreds or thousands of miles away in Europe. Socialist States would routinely avoid the submission of their disputes to this tribunal, which was seen as a bourgeois threat to their sovereign decision-making prerogatives. Many lesser developed States lacked familiarity with formal adjudication and were thus rather cautious about formal mechanisms like “compulsory jurisdiction.”⁸⁰

Finally, one of the plausible answers for the failure to embrace a Bentham-like “common court of judicature” is the perceived lack of impartiality. Can it be said that the judges vote impartially when they vote for their own nations ninety percent of the time? When their home State is not a party, the judges still vote in favor of the litigant whose position most closely resembles their home State. As statistically demonstrated by the University of Chicago’s Professor Eric Posner, wealthy judges vote for wealthy nations, and poor judges for poor nations.⁸¹

2. ICJ Utility Although numerous criticisms persist, the ICJ has been useful. It has decided a number of significant disputes. Most of its decisions have been implemented by the participating States. In 1992, for example, El Salvador and Honduras accepted an ICJ border-dispute judgment that ended *two centuries* of friction in their international relations. As stated by the Honduras President Rafael Callejas, two Central American States thus illustrated “that any dispute, however complex, can be resolved in a civilized and conciliatory way.” The Court has also been able to proceed to an important

judgment even in the absence of the defendant State. Such cases have aided in the progressive development of International Law; examples include the *Nicaragua* judgment against the US after its unsuccessful withdrawal from the proceedings [§9.2.C.2.] and a long overdue international judicial pronouncement regarding at least some notable issues in the Palestinian territories.

The utility of the ICJ includes the plaintiff State's ability to file a case with a view toward encouraging settlement when diplomatic negotiations are deadlocked. Nicaragua filed a transborder armed-conflict claim against Honduras in 1988. Honduras responded by attacking the jurisdiction of the Court. The Court determined that it did have jurisdiction over this dispute. The parties then reached an out-of-court agreement, likely facilitated by the Honduran recognition that it could obtain more via settlement than by a possibly all-or-nothing court judgment. Nicaragua then requested that this case be discontinued after the two nations fully resolved their dispute diplomatically.

One must acknowledge that in many cases, the applicant State is seeking something more than the mere resolution of a dispute. Litigation in the ICJ provides the opportunity to alert the international community to the illegal conduct of another State.⁸²

Success must be tempered by the realization that States tend not to submit their most sensitive disputes to the Court. The Court has played a tangible role in facilitating the continuous development of International Law as it ebbs and flows with the complex developments of State practice. Through no fault of its own, however, it has not contributed significantly to the preservation of world peace. It cannot realistically control disputes when the participants who would be benefited by its jurisprudence fail to employ its resources.

Can the ICJ be fairly accused of failing? It was never vested with the independent power to require the participation of potential defendant States or render enforceable legal solutions. In the final analysis, the "compulsory" jurisdiction of the Court is solely dependent on State consent for its very existence. Some States have even deprived the Court of the otherwise universally exercised judicial power to determine its own jurisdiction to proceed. England's Sir Hersch Lauterpacht, one of the most prominent members of the Court, explained that "it would be an exaggeration to assert that the Court has proved to be a significant instrument for maintaining peace. The degree of achievement of this end by an international court, as

indeed by any other court, is dependent upon the state of political integration of the society whose law it administers. But international society has in this respect, in the years following the two World Wars, fallen short of the expectation of those who in the Covenant of the League of Nations and in the Charter of the United Nations intended to create, through them, the basis of the future orderly development of the international community."⁸³

Some commentators claim that the ICJ is the classic ivory tower, occupied by a group of theoreticians. Its jurists supposedly generate pointless discourses that are unrelated to how States actually behave in the real world. These criticisms are misdirected. The United Nations was not intended to be the judge of any world governance system. It was not empowered to replace the primacy of national sovereignty. The ICJ was not intended to be a true world court in the sense that it would be a primary tool for dispute resolution. The optional nature of the ICJ's so-called "compulsory" power to hear and determine cases arising under International Law is the Court's legal Achilles heel.

The UN has not replaced States as the core element in the superstructure of the international legal system. Its members never transferred the requisite jurisdictional powers to the ICJ, its judicial organ, and certainly not the full complement of enforcement powers available to its State members. They did not want to vest such organizational entities with the power to resolve international disputes, absent the full consent of the participating States on an almost case-by-case basis. The original fifty-one UN members had various reasons for limiting the power of this judicial body. The older and more developed powers perceived the potential change in the post-war composition of the community of nations as an unwelcome shift in the balance of power.

Nearly three-fourths of current UN members did not exist in 1945, when the other quarter created the organization. The newer States do not share the same political and economic perspectives of certain older, powerful, and more economically established members. Beginning in the 1960s, these "third world" States expressed the common view that they should become members of the international community on equal terms with the original UN members. From the perspective of new States, many aspects of modern International Law developed by Europeans incident to the 1648 Peace of Westphalia discouraged the third world's States from achieving a comparable military and economic stature. One might

argue that the ICJ, and the ability of the more powerful UN members to manipulate it, is just another facade for perpetuating the dominance of the older members of the international community. This perspective suggests that until international tribunals command a wider constituency, national courts provide a more realistic medium for judicial development of International Law. The ICJ cannot be a talismanic cure for international disputes, given the contemporary degree of political integration (or lack thereof) within the community of nations.

Many observers of the International Court of Justice exude a religious reverence for the Court and a demonic disdain for States that have not used it. This perspective is also misleading. The ICJ is not like a national supreme court, typically exercising the powers to command the presence of adversaries and to enforce its court judgments. The States that sired the ICJ brought it into a community where there is no world government. They did not want the ICJ to function like their own national courts. If “weakness” is an appropriate characterization, why blame the child for the infirmity of its parents?

3. US Position The US has been rather reserved about the ICJ from the outset. In 1946, the US Senate debated whether the US should accept the jurisdiction of the UN’s new court. Senator Connally, Chairman of the Senate Foreign Relations Committee, expressed his concern that the US would be effectively surrendering the fate of important national interests to the United Nations by generally accepting the Court’s compulsory jurisdiction. In his words: “I am in favor of the United Nations, but I am also for the United States of America. I do not want to surrender the sovereignty or the prestige of the United States with respect to any question which may be merely domestic in character ... [when the] best hope of the world lies in the survival of the United States with its concepts of democracy, liberty, freedom, and advancement under its [own] institutions.”⁸⁴

The US nevertheless “accepted” the ICJ’s jurisdiction in 1946, but not without reservations. The key US limitations, precluding the Court from hearing international cases, were those instances where cases were: (a) entrusted to *other* tribunals by a distinct treaty provision; (b) essentially within the domestic jurisdiction of the US, *as determined by the United States*; and (c) cases arising under a multilateral treaty—unless all parties to the dispute were also parties to the particular treaty *and* all agreed to the submission of the dispute to the ICJ.

After accepting the Court’s jurisdiction, subject to the above limitations, the US publicly supported an increased use of the ICJ. In 1974, the US Senate asked the US president to consider the feasibility of increasing the nation’s participation in the ICJ. In 1977, the resulting US Department of State study concluded that the “underlying presumption of this Senate Resolution is that it is desirable to widen access to the International Court of Justice in order to increase its activity, use and contributions to the development of international law. As a general proposition, the Department of State strongly endorses that presumption.”⁸⁵

In the 1980s, the pendulum reversed course. The US began to withdraw from various organs of the United Nations, as well as refusing to pay its assessed share of UN dues [§3.3.C.3(a)]. In 1984, the US refused to participate in Nicaragua’s suit against the US, which claimed that the US Central Intelligence Agency had arranged the mining of key Nicaraguan harbors. The US withdrew its acceptance of the Court’s jurisdiction—virtually on the eve of the filing of the case by Nicaragua. In its 1946 declaration accepting the jurisdiction of the ICJ, the US had promised a minimum of six months’ notice for any withdrawal.

US Secretary of State George Schultz nevertheless stated that the immediate withdrawal from any case involving any Central American State was necessary “to foster the continuing regional dispute settlement process which seeks a negotiated solution to the interrelated political, economic, and security problems of Central America.” Because the US could not *legally* withdraw without giving six months’ notice, the Court proceeded with the case and entered a judgment against the US.⁸⁶

A sharp debate arose regarding both the legality and political propriety of the US withdrawal. George Mason University (Virginia) Professor Stuart Malawer made the following observation in opposition to the US withdrawal from this case:

The World Court [judges] in absolutely astonishing majorities rejected the American arguments concerning the lack of jurisdiction and inadmissibility of Nicaragua’s claim against it. Reading the recent court decision, one must wonder how anyone ever believed the [Court’s] decision could have been otherwise.

Why is it that the United States, the country which has championed international law in foreign affairs and the development of the World Court, has

gotten itself into such an embarrassing position, and is now on the verge of being branded an outlaw state, when the transgressions of so many others are so great? My answer is simple. The legal advice given by the lawyers in the State Department must have been terrible.⁸⁷

Although scholars may debate the legality of the US withdrawal, one conclusion is inescapable. The US did not comply with its reservation promising to give six months' notice of its intent to withdraw its acceptance of the Court's compulsory jurisdiction. Then in 1985, the US terminated its *general* acceptance (1946) of ICJ compulsory jurisdiction. The US position was that, of the five permanent members of the UN Security Council, only the US and the United Kingdom had previously accepted the Court's compulsory jurisdiction (albeit in rather limited circumstances). The US had never been able to bring a case against another State, while being sued there three times. Therefore, the US presidential administration publicly "blamed" Nicaragua, Cuba, and the former Soviet Union for using the Court's processes as a political weapon in the Cold War.

The subsequent indication of the US posture on the Court can be gleaned from the 1993 Final Report of the US Commission on Improving the Effectiveness of the United Nations. This special government commission was established by the US Congress under the Foreign Relations Authorization Act of 1988. It studied the role of the United Nations and its place in US foreign policy. In the Findings and Recommendations, this Commission (consisting of House members and other special appointees) determined that the US should take the lead in advocating wider acceptance of the compulsory jurisdiction of the Court. The Commission recommended as follows: "that, to set a standard of leadership, the US consider reaccepting the compulsory jurisdiction of the Court."⁸⁸

As to the Court's *advisory* jurisdiction, the Commission also recommended support for the gradual expansion of this facet of the ICJ's competence. Specifically, *other* States were thus encouraged to refer questions of International Law from their national courts to the ICJ.

In June 2008, the US Supreme Court ignored the ICJ's directive not to execute convicts located on state-court death rows [§7.1.B.4.]. The representative legal literature prior to that decision expressed that the "need for a clarification of the relationship between

national and international courts is no longer purely theoretical ... to clearly elucidate procedural mechanisms to ensure the protection of foreign citizens' rights under the Vienna Convention [on Consular Relations]."⁸⁹

◆ §8.5 INTERNATIONAL CRIMINAL COURTS

A. EARLY PROSPECTS

The concept of a war crimes trial is not unique to the revered Nuremberg Trial. There are accounts of a war crimes trial in 405 BC near what is now Turkey; the trial of a European governor for his actions in 1427, when his troops raped and killed innocent individuals; and the post-World War I trial of a submarine commander who torpedoed a British hospital ship and then sank its lifeboats. The League of Nations produced an international penal code and a Convention on the Establishment of the ICC (within the PCIJ). It was signed by Belgium, Bulgaria, Cuba, Czechoslovakia, France, Greece, Spain, Monaco, the Netherlands, Romania, Turkey, the USSR, and Yugoslavia. This treaty never entered into force, however, because of the lack of sufficient ratifications.⁹⁰

In theory, the trial of "international" criminals is best accomplished by an international court—as opposed to a national court. The 1921 Leipzig trials of German nationals in Germany for war crimes against the Allies and the 1961 Israeli trial of Hitler's chief exterminator, Adolf Eichmann, are classic examples of the judicial dilemma associated with such national tribunals. In 1994, Ethiopia commenced war crimes trials against the leaders of its former Marxist dictatorship. After these leaders seized power in 1974, some 250,000 people were killed or died in forced relocation programs. In one six-hour period during 1988, 2,500 civilians were killed by helicopter gunships and fighter planes. It was arguably difficult for these respective national judicial bodies to exercise impartiality, which is the hallmark of an international tribunal. As stated in a prominent study of the future of international courts:

The existence of international crimes and the recognition of individual responsibility for such crimes logically suggests that there should be an international tribunal with power to try individuals for the commission of international crimes. It is just as

important to have an international criminal court to administer international criminal law as it is to have national criminal courts to administer national criminal law. For however objective and impartial national courts in fact may be, because they are courts of particular states there will inevitably be a suspicion of bias when a national court tries an international criminal....

[T]rying international criminals before municipal courts is haphazard, unjust and militates against the development of a universal criminal law. The administration of international criminal law will only become systematic, just and universal when the organ of its administration is a permanent international criminal court.⁹¹

Between 1946 and 1993 (the dates of establishment of the Nuremberg tribunal and Balkans-oriented tribunal for crimes in the former Yugoslavia), there were many calls for the creation of the second exclusively *criminal* international tribunal to try various types of “international” crimes. This tribunal would have universal jurisdiction over war crimes [§5.2.F], terrorism, and hijacking. Building on the 1934 League of Nations draft Convention for the Creation of an ICC, an unofficial non-governmental organization attempted to assert pressure on the community of nations to bring such a tribunal into existence. The organization, the Foundation for the Establishment of an ICC, conducted two drafting conferences in 1972. These gatherings were attended by experts from all over the world.⁹² In 1986, the US Congress asked President Reagan to explore the possibility of international pressure being exerted to establish an ICC to deal with international terrorists.

In the aftermath of September 11, 2001, however, when the World Trade Centers and the Pentagon were struck by hijacked aircraft, the US opted for a military response—rather than a judicial one.⁹³ Usama bin Laden had not been captured since 9–11. The US Congress did not declare war against Afghanistan when it supposedly harbored bin Laden from capture. So a judicial response would be one that only Don Quixote might have proffered. Before 9–11, the US threatened the capture and prosecution of those responsible for: the first World Trade Center attack (1993); the subsequent bombing of the USS Cole in Yemen; and the bombing of various US installations in other countries.

Securing the extradition of criminals who commit *universal* crimes has been a major obstacle to bringing them to justice. One would think that an asylum-granting State would be in an awkward position if it refused to yield such an offender to an international criminal tribunal. But that is no more awkward than traditional reliance on the “political offense” exception contained in numerous extradition treaties [§5.3.C.2.].

This form of political end-run became the object of ridicule after the rash 1970s aircraft hijackings in the Middle East. Branding terrorist acts as “political” crimes, rather than as common (or universal) crimes has often been an extradition stumbling block because it is a convenient basis for refusing to extradite individuals who engage in conduct that the holding State clandestinely supports.⁹⁴ Libya ignored international pressure for more than a decade after the 1988 Pan Am 103 bombing. In 1992, the UN Secretary-General appointed a Commission of Experts to document violations of humanitarian law [§9.6.B.] in the former Yugoslavia, preceding the UN’s establishment of the Yugoslavian tribunal in 1993.

Given the debate about whether national or international tribunals should be trying international criminals, there has always been the underlying question about whether there is actually an “international criminal law”⁹⁵ or just international crimes that fall within the jurisdiction of either national courts or the *ad hoc*, limited-purpose tribunals established by the UN Security Council in the mid-1990s (Yugoslavia and Rwanda). They will be closed in the not-too-distant future after they have tried the few aging individuals turned over for some very expensive prosecutions. The trial of Slobodan Milosevic began in 2002. It was predicted that his trial would take six years to complete. The permanent International Criminal Court (ICC) commenced its prosecutorial functions in 2005. If it remains permanently open and effective, it might then become the international “point person” in the progressive development of International Criminal Law.⁹⁶

Victors often punish the vanquished. In earlier eras, the motivation was revenge. If the twenty-first century experience with an ICC is an accurate barometer, the contemporary motivation is to punish those guilty of outrageous human rights violations. The most famous criminal tribunal to date has been the post-World War II “Nuremberg Trial” of Nazi Germany’s notorious war criminals. The 1990s dabbling with a new version yielded

two temporary alternatives: the currently functioning *ad hoc* tribunals for crimes occurring in the former Yugoslavia and Rwanda. This section of the textbook presents a critical question: whether the “permanent” ICC will effectively transform dream to reality.

Why not expand the existing ICJ? On the other hand, some commentators urged that altering the existing Statute of the existing International Court of Justice (ICJ) would have been preferable to creating an entirely new and costly world criminal court. States could have changed the ICJ limitation which authorizes only States to be parties to its proceedings. As succinctly articulated by Florida International University’s Professor Barbara Yarnold: “[T]he International Court of Justice is the best forum for the adjudication of state and international crimes, for several reasons.... Certainly, this recommendation that the International Court of Justice be given jurisdiction over international crimes [rather than leaving it to State jurisdiction] ... will be opposed by those superpowers in the world community that historically have favored the use of force over the rule of law.”⁹⁷ After studying this chapter, you can judge for yourself.

B. NUREMBERG AND TOKYO TRIBUNALS

The eleven-nation International Military Tribunal of the Far East tried twenty-five Japanese defendants for war crimes. All were found guilty. Seven were sentenced to death.⁹⁸ The most famous tribunal, however, was the four-nation body established by the Nuremberg Charter. The US, Great Britain, France, and the former Soviet Union created the Nuremberg Tribunal by international agreement. The fundamental objective was to try Nazi “war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of [military] organizations” of the German government.⁹⁹ It was hoped that these limited-purpose tribunals would deter future war crimes by heads of State and military leaders.

The constituting treaty, known as the Nuremberg Charter, contained what the Allied powers perceived as a novel method for deterring the national misuse of force. Germany’s key planners were tried and imprisoned or executed for the various crimes defined in the case below. The following excerpt from the resulting Nuremberg Judgment analyzes the role that International Law played in assessing the tactics planned and executed by German leaders during World War II:



Nuremberg Trial Proceedings (1946)

CHARTER OF THE INTERNATIONAL
MILITARY TRIBUNAL
INDICTMENT OF THE DEFENDANTS
WITNESS EXAMINATION (Otto Ohlendorf)
JUDGMENT OF THE INTERNATIONAL
MILITARY TRIBUNAL
22 INTERNATIONAL MILITARY TRIBUNAL:
TRIAL OF THE MAJOR WAR CRIMINALS 411 (1948)
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Under Chapter Eight, click Nuremberg Trial.

The principles enshrined in the Nuremberg Judgment were later approved by the UN General Assembly. In 1946, shortly after the Judgment was published, the Assembly adopted Resolution 95(1) to express its sentiment that the “Nuremberg principle” had been incorporated into International Law. The UN General Assembly’s International Law Commission completed its restatement of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal in 1950.¹⁰⁰

Under this principle, a State and its agents who wage an aggressive war commit the supreme international crime. It is punishable by any nation able to bring the perpetrators to justice. The responsible leaders thereby incur criminal responsibility arising directly under International Law for their conduct, which makes them liable for this crime. The validity under the internal laws of Germany did *not* provide them with a defense although it was considered as a mitigating factor in their sentencing. They were tried and punished for their participation as agents of the State in its unlawful use of force against other States. As articulated by the judges at Nuremberg, “[C]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”

Neither the Nuremberg principles nor the related UN Nuremberg Resolution had a significant impact on subsequent decisions to use or refrain from using force. In 1974, the University of Michigan’s renowned

Professor William Bishop expressed his frustration with this predicament. He thus posed the following question:

What then, has ... international law done for the welfare of humanity since its promulgation? The answer is clear and simple: nothing. Since Nuremberg, there have been at least eighty or ninety wars (some calculators exclude armed invasions of neighbors too weak to attempt resistance), some of them on a very large scale. The list includes the Korean War, the Suez invasion [by France and Great Britain] of 1956, ... the four Arab-Israeli wars, the Vietnam wars (including the accompanying fighting in Laos and Cambodia), and the invasion of Czechoslovakia by the Soviet Union and its myrmidons. In none of these cases, nor in any other, was an aggressor arrested and brought to the bar of international justice, and none is likely to be. For all the good it has done, the doctrine that aggressive war is a crime might as well be relegated to the divinity schools.¹⁰¹

C. AD HOC INTERNATIONAL CRIMINAL TRIBUNALS¹⁰²

The post-World War II Nuremberg and Tokyo trials were the last time that a small group of victorious nations would establish a tribunal to try the agents of defeated nations for waging war. In the mid-1990s, the Council conjured an unconventional alternative found nowhere in the Charter. It employed its Chapter VII powers to propel the UN's peacekeeping oversight role into a fresh and robust adjudicatory remedy for preserving victims' rights. The Security Council's Yugoslavian and Rwandan tribunals, discussed below, were the product of UN Security Council resolutions. Unlike Nuremberg and Tokyo, these new tribunals would not be as readily characterized as a victor imposing its justice on the vanquished.

However jubilant international lawyers might be about these ad hoc courts, one should not lose sight of the questionable financial commitment of the international community to those tribunals. Specifically, "from this perspective, financing is the most delicate and revealing issue.... It has been reported that the Fifth Committee of the [UN] General Assembly has been extremely reluctant in appropriating the necessary funds for investigative purposes."¹⁰³

1. Yugoslavian Criminal Tribunal Unlike the Allied Powers treaty arrangement establishing the

Nuremberg and Tokyo tribunals, the current Yugoslavian and Rwandan international courts were established by UN Security Council Resolutions. In 1993, the first of the two specialized tribunals was the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia since 1991 (ICTY). As explained in the resolution creating this court, the Security Council "[e]xpressing once again, its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia ... including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of ethnic cleansing ... Decides hereby to establish an international tribunal for the sole purpose of prosecuting [the] persons [who are] responsible...."¹⁰⁴

This court has brought individuals to justice who committed major atrocities in Bosnia from 1991 to 1995 (from the breakup of the former Yugoslavia through the restoration of peace). Its seat is in The Hague. Its most prominent case was the trial of the former president of the former Yugoslavia, Slobodan Milosevic.¹⁰⁵ He died of a heart attack, three years into that trial. It was nevertheless notable because it was the first trial of a Head of State by an international tribunal. Years later (February 2009), the same court would acquit Milan Milutinovic, another former Serbian president, of ordering a campaign of terror to drive ethnic Albanians out of Kosovo. But five other Serbs would be convicted—yielding the ICTY's first judgment to establish widespread Serbian crimes in Kosovo.

The ICTY consists of trial chambers and an appellate chamber. The executive organs include a registry for the court and a prosecutor's office. In September 1993, the UN General Assembly elected eleven judges to serve four-year terms from a slate of candidates nominated by the UN Security Council. The judges are professors and lawyers from various nations. The first president of the International Tribunal (and its appellate chamber) was from Italy. The vice-president was from Costa Rica. A female judge from the US was the first president of one of the two trial chambers. This choice was particularly significant because of the alleged mass rapes of Muslim women by Serbian soldiers as part of an ethnic-cleansing plan.¹⁰⁶ A Nigerian was the first president of the other trial chamber.

The ICTY applies the rules of international humanitarian law applicable to armed conflict. These are the 1949 Geneva Convention for the Protection of War Victims, the 1948 Genocide Convention, the crimes against humanity formulation contained in the above 1946 Nuremberg Judgment, and the 1907 Hague Convention on the Laws and Customs of War on Land [§9.6.B.]. The ICTY (and ICTR) have prosecuted for “genocide,” “war crimes,” and “crimes against humanity.” Four countries—Finland, Italy, Norway, and Sweden—agreed with the ICTY to provide cells for those serving prison terms.¹⁰⁷

Since its inauguration, the ICTY has rendered a number of spectacular decisions in the sense of a contemporary implementation of the Nuremberg principles.¹⁰⁸ Prominent examples of its work product include spectacular innovations in prosecuting rape—both sexual violence and enslavement—as war crimes and as crimes against humanity. Its modern contributions also include prosecution under International Humanitarian Law for killings, beatings, and sexual mutilation (*Tadic*).

This tribunal’s first such verdict in 1997 was arguably its most significant because of the legal precedents it established for subsequent prosecutions:



**Prosecutor v.
Dusko Tadic aka “Dule”**

INTERNATIONAL TRIBUNAL FOR THE
PROSECUTION OF PERSONS RESPONSIBLE
FOR SERIOUS VIOLATIONS OF
INTERNATIONAL HUMANITARIAN LAW
COMMITTED IN THE TERRITORY OF FORMER
YUGOSLAVIA SINCE 1991 (ICTY)
(May 1997)

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Under Chapter Eight, click Tadic Case.

In 2004, its Appeals Chamber delivered its judgment in the Srebrenica case. In 1995, 7,800 Muslim men and boys were slaughtered by Bosnian Serb forces commanded by Radislav Krstic. This event took only three days and was the worst mass murder in Europe since World War II. The appellate panel found that the evidence was not conclusive that defendant Krstic

personally harbored genocidal intent although he was aware of that specific intent on the part of his Drina Corps personnel such as Tadic. His sentence for genocide was reduced to aiding and abetting genocide. In mitigation, he had just assumed command, was not present, and had promulgated written orders to treat Muslims humanely.¹⁰⁹

In 2006, this tribunal began to transfer cases to national courts for further prosecution. Bosnia’s judicial police thus took custody of the first two suspects at the Sarajevo airport. Their capture was an ingredient of the ICTY’s strategy to concentrate on the highest-ranking political and military leaders. Lesser criminal suspects were sent to various Balkan nations where their alleged crimes occurred. Such transfers help, but have not solved the problem of finally concluding the ICTY proceedings. The UN Security Council’s September 2008 Resolution 1837 extended the terms of forty-one of its trial and appellate judges until December 31, 2009, or until the completion of their cases.

2. Rwandan Criminal Tribunal In the same year the ICTY was established (1993), the Council established the International Criminal Tribunal for the Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (ICTR).¹¹⁰ It is located in Arusha, Tanzania, to facilitate more expeditious prosecutions.

This tribunal has tried and convicted various individuals, including a mayor and the former premier of Rwanda (life terms) for their roles in Rwanda’s genocidal massacre. The ruling Hutu majority government was responsible for mass murder, rape, and other crimes against some 800,000 Tutsis (and Tutsi sympathizers)—in a 100-day period in 1994, when certain rivers ran blood red.¹¹¹

After ten years of practice, this tribunal’s balance sheet includes both assets and liabilities—the latter due largely to limitations in the Court’s statutory mandate.¹¹² Also, the ICTR was established over Rwanda’s objection. Perhaps key to the Rwandan opposition was its concern about the cultural relativism likely to be introduced into the African-based proceedings. This concern is articulated by the following Santa Clara University Teaching Scholar:

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The Security Council opted against a Rwandan location on a variety of grounds including security risks, lack of appropriate infrastructure, and perceptions of judicial partiality normally associated with conducting trials in the very nation where the atrocities occurred. Rwanda did not support establishment of this tribunal, partially because it was outside Rwanda.

The ICTR has had its share of administrative problems. In 1998, one of six judges at the Tribunal stepped down, claiming mismanagement and a lack of leadership. The UN Secretary-General had previously fired the administrative head of the tribunal. Rwanda suspended cooperation with the ICTR because: (1) a former Foreign Ministry official was released because he was held too long, in violation of the Court's speedy trial guarantee, in Arusha, Tanzania—the seat of the Tribunal; and (2) Rwanda has criticized the Court's slow pace and lack of a death penalty. This development restricted the tribunal's genocide and human rights investigations.¹¹³

In the Rwandan premier's case, the ICTR drew upon the Appellate Tribunal's analysis contained in the ICTY's above *Tadic* case. The ICTR judges were ruling on a decisive defense motion, which unsuccessfully challenged the court's jurisdiction to hear and determine such cases. This phase of this particular proceeding effectively illustrated that the Security Council had properly invested the *ad hoc* Rwandan court with the express power to prosecute.¹¹⁴ Its analysis also paved the way for implementing a permanent International Criminal Court treaty, pursuant to the 1998 Rome Conference (below).

There were five principle objections, all rejected by the ICTR, which provide insight about future issues which may arise, should the permanent ICC treaty enter into force. First, Rwanda's State sovereignty had allegedly been violated because the ICTR was not created by a treaty ratified by Rwanda. One defect in this allegation

was that *Rwanda* had requested establishment of an *ad hoc* criminal tribunal for adjudicating cases involving its 1994 genocide.

Furthermore, the individual defendants were hard-pressed to establish a UN Charter Article 2.7 UN blunder. That article precludes the UN from interfering in matters which that State considers as falling exclusively within its domestic adjudicatory power [textbook §3.3.C.1.]. However, Rwanda's rationale for not approving the final ICTR draft statute did *not* involve sovereignty-based objections.

Second, the defense asserted that the UN Security Council exceeded its authority when it relied on its "Chapter VII" powers to create this tribunal. The Rwandan genocide was allegedly *not* a threat to international peace. This argument presented the view that the UN Charter never contemplated formation of such a judicial tribunal to preserve peace. Assuming the truth of that observation, however, the Rwandan genocide (and other violations of international human rights) inherently supported the Council's authority to prevent such threats to peace—then, via the ICTR and later, via the permanent International Criminal Court. Note that the Security Council had devoted years and many resolutions to the international threat to peace under South African Apartheid [§3.5.F].

Third, the former Rwandan premier's defense team challenged the primacy of the international tribunal vis-à-vis the national courts of Rwanda. "Primacy" in ICTY proceedings is expressed in Article 9(2) of the ICTY Statute, whereby it "shall have primacy over national courts.... [The ICTY] may formally request national courts to defer to the competence of the International Tribunal." The Trial Chamber of the ICTR acknowledged the applicability of the general principle that persons accused of crimes should retain their right to be tried by the customary domestic court, as opposed

to a politically founded *ad hoc* tribunal which might fail to provide impartial justice. The Appellate Chamber decision in the ICTY's *Tadic* case led to the ICTR's assessment, however, that its establishment under the Security Council's Chapter VII powers enabled the ICTR to prosecute a Rwandan citizen—even in the absence of Rwandan consent.¹¹⁵

Fourth, the defense argued that the UN Charter did not encompass the possibility that a UN-based tribunal could confer jurisdiction over individuals as opposed to States ([textbook §8.4.A.] regarding only States being parties to contentious International Court of Justice cases). Also, the Council had never done so in the past when clear violations of human rights laws had occurred. The Court responded that by establishing the ICTR (and ICTY), the Security Council had effectively extended international criminal responsibility directly to individuals for their violations of international humanitarian law. This was another instance where the Nuremberg Principles provided a precedent for such actions although that case was tried by the four Allied Powers (independently of the UN).

Finally, the defense raised the other potentially recurring issue: that the ICTR is not an impartial entity because of its establishment by a political entity (Security Council). However, the Tribunal's judges are not accountable to the Council. Also, the ICTR's Statute explicitly requires a fair trial. Ironically, the defense did not mention the *advantage* of being tried by the ICTR, rather than in the national courts of Rwanda—where the death penalty applied at that time and had been applied to a number of defendants convicted of similar crimes. In April 1998, despite pleas for clemency by Pope John Paul II, twenty-two men were tied to stakes and shot. Large crowds witnessed this mass execution. In some instances, the convicts had no lawyers, and no witnesses were called in their defense in the national proceedings. In July 2007, Rwanda revoked its death penalty with a view toward more suspects being extradited for trial in Rwandan courts.¹¹⁶

The ICTR's following *Radio Machete* case provides excellent insight into the concrete operations of the ICTR. The activities giving rise to this case are vividly depicted in the 2005 movie *Hotel Rwanda*. The internal media played no small role in inciting genocide; the external media either ignored or misconstrued what was occurring in Rwanda during that shocking 100 days in spring 1994.¹¹⁷



**The Prosecutor
v. Ferdinand Nahimana,
Jean-Bosco Barayagwiza &
Hassan Ngeze**

INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA
TRIAL CHAMBER I

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Under Chapter Eight, click Radio Machete.

The ICTR experience has received mixed reviews. As stated by two of the leading commentators on the proceedings of the ICTR (and ICTY):

The establishment of the Rwanda Tribunal constitutes one of the most important milestones in the history of international criminal law. The significance of this event becomes clear only when it is viewed in its historical context, taking into account the difficulties encountered in previous efforts to create *ad hoc* international criminal tribunals and in the continuing efforts to create a permanent international criminal court.

...

While some of the causes of the delay were perhaps unavoidable, the major cause of the delay resulted from the need to build an entire international institution from the ground up.... Yet the delay could have been avoided if there had existed a permanent international criminal court.... Since the establishment of the Rwanda Tribunal, the members of the Security Council have experienced ... tribunal fatigue.... Notwithstanding a host of other atrocities ... at least one permanent member of the Security Council [possessing the right of veto] "China" has openly expressed concern about using the Yugoslavia and Rwanda Tribunals as precedent for the creation of other *ad hoc* [by country or by incident] criminal tribunals. Moreover, the expense of establishing *ad hoc* tribunals, each with its own staff and facilities, is simply seen as too much for an organization [UN] whose budget is already stretched too thin. Thus, the requests by Burundi and Cambodia to establish

similar tribunals to address the atrocities committed in those countries have not received a favorable response by the Security Council to date.¹¹⁸

Similar delays were unavoidable in the Netherlands-based Lockerbie *Pan Am 103* case, Tokyo's *Women's International War Crimes Tribunal* judgments, and Sierra Leone tribunal prosecutions. These count among the reasons that the UN Security Council has mandated that, like the ICTY, the ICTR develop a strategy for downsizing its caseload—with a view towards shutting down as soon as practical. Compared to the ICTY, the ICTR has not been as willing to transfer its cases to national courts.¹¹⁹

3. Hybrid National-International Tribunals

Unlike the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) devices, a number of nations have opted for a mixed tribunal consisting of both local and international judges, prosecutors, and staff. These countries shared the unfortunate similarity that each had experienced widely publicized atrocities. But there were practical, logistical, and economic reasons why there would be no tribunal created—and then operated by—the UN Security Council via its Chapter VII powers. The following are selected examples.

(a) Sierra Leone Perhaps the most prominent is the Sierra Leone court. In August 2000, UN Security Council Resolution 1315 requested that the Secretary-General negotiate with the government of Sierra Leone to create a “Special Court” for atrocities in Sierra Leone. Since 2002, eleven judges have been sworn in. Two are from Sierra Leone. Most were chosen by the UN Secretary-General. The others were chosen by Sierra Leone's government. This is the first time that a court was established based on a treaty between the UN and a national government—unlike the previously mentioned *ad hoc* tribunals established by the UN Security Council. Like the ICTY and ICTR, the Special Court for Sierra Leone (SCSL) may request that a national court in Sierra Leone transfer a particular case to the Special Court. In contrast, the permanent International Criminal Court (ICC) is generally expected to yield to national court prosecutions.

Unlike some other internationally-created criminal courts, the Sierra Leone court is located in the country

where the alleged crimes occurred. This process facilitates more timely access to evidence and less costly proceedings. It also promotes local media coverage, whereby the victims can more clearly see the results—unlike the other criminal courts located well beyond the borders of where atrocities occurred.

However, in the case of former Liberian President Charles Taylor (tried for crimes in Sierra Leone), his Liberian successor successfully lobbied the UN to facilitate his transfer out of Sierra Leone to The Hague for trial. She feared that his very presence in the region would spark unrest.¹²⁰ The Netherlands agreed to host this trial on the condition that a third country imprison him if he were convicted. Great Britain so agreed. Taylor has boycotted the proceedings because of difficulties with obtaining defense evidence. While Taylor is allegedly responsible for like conduct in his native Liberia, the latter country has opted, instead, for a truth and reconciliation process [§8.1.B.1.].

This Special Court is designed to prosecute for crimes committed in Sierra Leone *after* November 30, 1996 (as opposed to the conflict's 1991 commencement). The SCSL has the power to prosecute persons bearing “greatest responsibility” for serious violations of international law and Sierra Leonean law. Its special emphasis is gender-related crimes. As related by its Chief Investigator: “let me mention ... [something] that makes this special tribunal unique. Gender crimes will be emphasized as a war crime and will be pursued from the outset.... We are making gender crimes a top priority ... because rape, and sexual assault used as a tool of war needs to be prosecuted.”¹²¹

This court's key task is the ongoing prosecution of former Liberian President Charles Taylor. In May 2004, the Appeals Chamber determined that his serious “international crimes” in Sierra Leone included responsibility for terrorizing the civilian population of Sierra Leone, sexual and physical violence, use of child soldiers, forced labor, and attacks on peacekeepers and humanitarian assistance workers.¹²² This prosecution was especially important because of its unwavering pursuit of this former head of State. It has thus lent support to the practice of the UN *ad hoc* tribunals and the ICC regarding prosecutions of sitting or former national presidents.

In February 2008, the Appeals Chamber issued a final judgment, unanimously upholding the Trial Chamber's conviction of the three former leaders of the Armed Forces Revolutionary Council for crimes against

humanity, war crimes, and other serious violations of international humanitarian law. One of the defendants argued that child recruitment was not a war crime on the November 30, 1996 start date of the SCSL's temporal jurisdiction. The Prosecutor successfully countered that the Appeals Chamber had already ruled, in a decision on a preliminary motion to dismiss a case for lack of jurisdiction, that the crime attracted individual criminal responsibility under Customary International Law even before that date. For the first time in International Law, a judgment finally addressed the crime of conscripting and using children under 15 years of age in hostilities. Child soldiers were a particularly unfortunate feature of the Sierra Leonean conflict. Through a combination of drugs and duress, they first became victims, and then became perpetrators, of horrendous atrocities.¹²³

Lack of funding is another problem. As noted in the UN Secretary-General's Report on the Special Court, it will be realistically financed only via assessed contributions from UN member nations. One may expect donor fatigue in a system based on voluntary donations, especially in view of the UN's problem with threats to cut payments of its already limited resources. One who loudly proclaims the need for justice, and that justice delayed is justice denied, must be aware of the huge cost that justice demands. As noted by Robert Skilbeck, Principle Defender at the Extraordinary Chambers of the Courts of Cambodia: "Crimes against humanity are by definition widespread or systematic, so the investigative authorities must find evidence for thousand of individual incidents, often with far less resources than would be dedicated to a simple murder trial in a rich country, often trying to undertake investigations in remote areas, and probably in a foreign language."¹²⁴

(b) Cambodia In 1997, Cambodia's Prime Minister asked the UN for assistance in bringing the Khmer Rouge national leaders to justice. From 1975 to 1979, they perpetrated mass atrocities when the US left the region after the Viet Nam War. The new government's goal was to facilitate national reconciliation for the former regime's murder of some 1,700,000 Cambodians and the exodus of some 2,000,000 others, as memorialized by the movie *The Killing Fields*.

The UN Secretary-General appointed a group of experts in 1998. Their task was to explore the legal options for bringing these leaders to justice. They determined that neither a national Cambodian court nor a

tribunal like the ICTY or ICTR would be practical. Problems developed, however, because the new government did not want to limit the judicial mandate to just 1975–1979. Cambodia wanted to expand this period to the pre-1975 period when the US bombed Cambodia, causing 1,000,000 deaths and intense hatred of the US among the populace. It also rejected establishing a truth commission [§8.1.B.1.].

In 2001, the UN General Assembly approved creation of the Cambodian tribunal, called the Extraordinary Chambers in the Courts of Cambodia (ECCC). But in 2002, the Secretary-General determined that it would no longer be feasible for the UN to participate in this process. Given an Assembly directive, however, the Secretary-General pursued this process, resulting in the 2003 agreements by Cambodia and the General Assembly to establish this court.

The Trial Chamber consists of three Cambodian judges and two international judges. The Supreme Court Chamber has four Cambodian judges and three international judges. The latter are chosen by Cambodia from a list provided by the UN Secretary-General. The ECCC opened in April 2006. Its initial three-year budget was about \$56.3 million, of which \$43 million is to be paid by the UN and \$13.3 million by Cambodia. The *first* shipment of evidence (July 2006) contained 383,149 pages. The tribunal's first public hearing was a November 2007 defense bail request.

Trials finally began in 2008, which are expected to last for three years. The first of five indicted defendants went on trial in February 2009. However, the impact of corruption alleged by a UN auditing agency is likely to delay the ECCC's proceedings.¹²⁵

(c) Assessment These mixed national-international judicial tribunals were created as a comparatively inexpensive alternative to the above ICTY and ICTR processes. After the event-limited jurisdiction of all of the tribunals expires, one hopes that future criminal prosecutions will all be lodged in what turns out to be a successful experiment in the comparatively permanent International Criminal Tribunal.

As astutely articulated by Yves Beigbeder after his lengthy career in various UN organizations:

Mixed national-international criminal tribunals have been created as an alternative, as the 'second best' to genuine international criminal tribunals, or, more

positively, as an expected improvement over unwilling or incapable national tribunals. The reluctance of the Western permanent members of the Security Council to still create more costly, fully international criminal tribunals played a role in the creation of these new [mixed] tribunals.

...

An ... important criterion will be the extent to which the internationalized domestic tribunal has not only ensured accountability, but has contributed significantly to the building or strengthening of the national justice system.

...

One open question is whether future situations where the most serious crimes of international concern have been committed will be submitted to the International Criminal Court, or whether more temporary ad hoc international criminal courts and national-international [hybrid] courts will be created.¹²⁶

D. PERMANENT ICC¹²⁷

For decades, DePaul University (Chicago) Professor M. C. Bassiouni and former Nuremberg Prosecutor Benjamin Ferencz of New York kept the vision of a permanent International Criminal Court (ICC) from fading into obscurity. Their exhaustive studies served as models for the UN's creation of the ad hoc tribunals for atrocities committed in the former Yugoslavia and Rwanda.¹²⁸

1. Contemporary Evolution In a 1997 Red Cross plea for establishing a permanent ICC:

The topic under discussion today is particularly important for the ICRC [International Committee of the Red Cross]. Through its activities, the ICRC witnesses the commission of atrocities on a wide scale, including war crimes, which are all too often left unpunished. This situation simply cannot continue, and we firmly believe that the international community must ensure that those responsible are made accountable for their acts. Although States already have a duty to prosecute, and also to undertake all the necessary steps to adapt their national legislation and to provide effective penal sanctions, today's reality shows that this duty is not fulfilled. It is in this context that the establishment of an international criminal court is so important to change this pattern of impunity.¹²⁹

In July 1998, representatives of approximately 150 UN members gathered in Rome to draft the first global ICC Statute.¹³⁰ One hundred twenty voted in favor of establishing this permanent International Criminal Court (ICC); twenty countries abstained; and seven opposed. At the UN's 2000 Millennium Summit, national leaders supported the evolution of this tribunal in their following resolution: "We resolve, therefore ... [t]o ensure the implementation, by States Parties, of treaties in areas such as arms control and disarmament, and of international humanitarian law and human rights law, and call upon all States to consider signing and ratifying the Rome Statute of the International Criminal Court."¹³¹

The treaty creating the ICC entered into force in July 2002. There are now 110 State Parties who have ratified it. Nearly twenty more nations have signed it. In March 2005, the Iraqi Interim Government nullified a previous decree, whereby Iraq would have acceded to the ICC treaty. On February 15, 2005 the Council of Ministers of Iraq's Interim government issued Order Number 20, announcing Iraq's decision to accede to the Rome Statute. The Council ultimately decided to join the Court because the provisions of the Rome Statute embody the highest values shared by all of humanity and also because most of its provisions can be found in existing international treaties. But unlike Afghanistan, which ratified the ICC treaty, Iraq has yet to sign it. One could allocate some of the resistance to joining to appeasing the occupying powers, which may bear some responsibility for delicts including civilian collateral damage.¹³²

This global criminal court, located in The Hague, Netherlands, is a contemporary Nuremberg Tribunal. Its task is to prosecute individuals charged with Genocide, Crimes against Humanity, and War Crimes. The ICC differs from the International Court of Justice (ICJ) in several significant respects:

- ◆ The ICC is the global *criminal* court for prosecuting criminal matters while the ICJ "World Court" hears disputes between nations.
- ◆ Unlike the ICJ, the ICC cannot render *advisory* opinions (as opposed to contentious cases between adversaries).
- ◆ The ICC tries individuals while only States may be parties in contentious ICJ proceedings.
- ◆ The ICC may issue enforceable subpoenas, requiring individuals to testify and produce documents.

The ICJ may request, but not force, States to do the same—perhaps the most salient feature of its 2007 *Bosnia v. Serbia* genocide decision [textbook §10.1.B.].

Powerful nation objections to an International Criminal Court (ICC) included Articles 17 and 20. They authorize the Court to ignore national rules providing for amnesty and other limitations on its jurisdiction. In January 1999, the French Constitutional Council ruled—in a case brought by France’s president and prime minister—that the French Constitution would have to be amended before France could ratify the ICC Statute. Article 27 waives immunity from any criminal responsibility of a Head of State or government or members of a ratifying government and parliament. The French Council held that this treaty provision would contradict the constitutional provisions regarding the relevant immunity of State officials. France nevertheless ratified the ICC Statute in June 2000. In terms of the UN Security Council’s “Permanent 5,” France’s ratification was followed by the United Kingdom.¹³³ While Russia signed this treaty, China and the US publicly dissented (via President Bush’s unsigned the ICC treaty signed by former President Clinton).

As stated by the 118 national members of the non-aligned movement of States, whose Conference of Heads of State or Governments gathered in Havana in September 2006: “The Non-aligned States Parties to the Rome Statute of the ICC call upon those States, which have not yet done so, to consider to ratify or accede to the Rome Statute of the ICC.” As confirmed by a former Legal Advisor to the US Department of State and the past president of the American Society of International Law, regarding the price tag for States that chose otherwise:

After World War II, the United States was the chief architect of the United Nations ... and associated international institutions. All of them bear many of the marks of the American political and legal experience. More recently, U.S. trade negotiators pushed steadily for the increasing legalization of the GATT and ultimately the creation of the World Trade Organization. Over the past fifty years, the United States has been a major participant in these institutions, exercising a predominant influence in their implementation and evolution.

...

Consistent with its own conception of its global position, the United States should be taking the lead in shaping these new institutions. It is not too late. By signing the treaty, ... the United States would strengthen its ability to participate as an observer in the early phases of implementation. If the United States stands aside from the process, it will miss an opportunity of serious dimensions. And the loss will have an impact on national interests far beyond the work of prosecuting war crimes.¹³⁴

2. “Aggression” Stalemate The nations who produced the ICC’s Rome Statute in 1998, did not successfully negotiate to produce a treaty definition of “Crime of Aggression.” Should that occur, the ICC prosecutor will then be empowered to further charge individuals with such crimes. Defining aggression in this particular context is no easy task. “Aggression” is normally a matter of State responsibility, rather than that of its agents [textbook §9.1.A.2.].

While the Rome Treaty has entered into force, its “crime of aggression” provision did not. In the early negotiations, various nations raised the issue that the time had come to define this crime. But there were other priorities.¹³⁵ Until the Rome Treaty’s “crime of aggression” is addressed and then defined by treaty, this potential basis for prosecutorial charging is completely out of the question. While aggression was ever so briefly defined by a 1974 UN General Assembly Resolution regarding State conduct,¹³⁶ the Rome Statute is a State-based treaty geared toward individual prosecutions. A sufficiently specific and prosecutable definition of aggression was left open to a future protocol.

The ICC’s governing body is the Assembly of States Parties to the Rome Statute. It has met on a number of occasions with a view toward one day producing an acceptable definition of the Crime of Aggression, which would spark this now moribund section of the Rome Statute. The key provision in the ICC Assembly’s draft working definition is as follows: “the planning, preparation, initiation or execution, by a person in a position to effectively exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character constitutes a manifest violation of the Charter of the United Nations.”¹³⁷

In the interim, perhaps the leading national case is *Regina v. Jones*. The issue in this 2006 House of Lords decision was whether otherwise criminal acts can be

justified if undertaken to prevent the crime of aggression, as defined under the national criminal law. Five peace activists trespassed upon and caused damage at the Royal Air Force base at Fairford in Gloucestershire, England. These defendants defended their actions as being legally justified to prevent the crime of aggression. They believed a military act of aggression was being committed with respect to the then impending US-led military action in Iraq. The activist defendants cited the Criminal Law Act, providing that “a person may use such force as is reasonable in the circumstances in the prevention of crime.”

The House of Lords decision in this case provided a rich restatement of the evolution of the international prohibition against aggressive wars in the following passages:



United Kingdom House of Lords: *Regina v. Jones*

[2006] UKHL 16, ON APPEAL
FROM [2004] EWCA CRIM. 1981 AND
[2005] EWHC 684 (ADMIN)
MARCH 19, 2006

<<http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060329/jones-1.htm>>

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Eight, click UK v. Jones.

However, the *Regina v. Jones* trial court found that the “crime of aggression” may not be raised within the context of the national criminal law. In the Court of Appeal, the government affirmed that “aggression” does not exist within the criminal law of England. The current lack of consensus about its definition apparently implied that its elements are too uncertain to support criminal charges under either domestic or International Law. The House of Lords determined that the crime of aggression may exist within Customary International Law. But it was not a part of the domestic criminal law of England. Thus, efforts to prevent its commission could not serve as a legal justification in a criminal trial.

3. Procedural Safeguards The Rome Treaty contains a number of procedural safeguards designed to allow such prosecutions only in the most egregious of

circumstances. A case is inadmissible, for example, if it is “not of sufficient gravity to justify further action by the Court.”

Unlike the Nuremberg and Tokyo tribunals, there is no death penalty. Rather than dealing with such crimes on an *ad hoc* basis—as have the Yugoslavian and Rwandan Tribunals established by UN Security Council vote—this State-driven, treaty-based ICC is now a permanent fixture on the international landscape. Ironically, the use of poison gas and exploding bullets are punishable, but not the use of nuclear weapons, land mines, or chemical weapons. As discussed in textbook §7.2.A.5., however, many compromises are usually necessary to achieve the broad consensus needed to fabricate a generally acceptable multilateral treaty.

Under the Article 124 “transitional clause,” a State—upon becoming a party to the Statute—may declare that, for a period of seven years, it does not accept the jurisdiction of the Court over war crimes committed by its nationals or in its territory.

As you will recall from Chapter 7 on multilateral treaty formation, one must acknowledge that there is a price to be paid for obtaining the support of many diverse nations. The Rome Treaty is fraught with further compromises which allow States or the Security Council to delay investigations or delay prosecutions. An ICC investigation, for example, may be commenced only by one of several triggering mechanisms: a Security Council resolution, the request of a State party to the Rome Statute, or by the ICC Prosecutor.¹³⁸

For investigations launched against an individual of State A, the ICC Prosecutor will seek the consent of either the State on whose territory the crime occurred or the State of the nationality of the accused [based on the territorial and nationality jurisdictional principles you studied in §5.2.B.–C.]. This is referred to as “complementarity.” A case cannot be heard when a State with jurisdiction is already investigating a crime unless: (a) that state “is unable or unwilling genuinely to carry out the investigation;” (b) a State has made a good faith decision not to investigate; or (c) the accused has already been tried for the conduct alleged. As succinctly explained by Professor Mauro Politi of the University of Trento, Italy:

I now come to the principle of “complementarity” ... that, instead of replacing national jurisdictions, the Court will intervene only in those situations where national justice systems are unavailable or ineffective.

Unlike the Yugoslav or Rwanda Tribunals, the ICC does not have “primacy” over national jurisdictions....

The main question is what criteria should determine the application of complementarity. In other words, when should the Court be authorized to act instead of a national jurisdiction? In which cases should a national justice system be deemed “unable or unwilling genuinely to carry out” an investigation or prosecution, to use the formula of Article 17?

Here, I do not share the pessimism of some commentators. Under Article 17, the Court will be able to affirm its competence in many significant situations: for example, after the total or partial collapse of a national judicial system, or in the presence of “sham” proceedings undertaken to shield the accused from criminal responsibility....

Furthermore, it is always up to the Court to decide on issues of complementarity. This helps to reinforce the independence and the effectiveness of the Court....¹³⁹

In October 2007, the ICC opened its fifth field office. It now has them in the Central African Republic, Chad, Congo, Kampala, and Uganda. These offices outside of the Court’s Hague location allow the prosecutors, investigators, witness protection experts, and the defense to work more efficiently while in the field.

4. ICC at Work The Court’s first case was based upon an agreement signed by the UN and Uganda. It began with the ICC Prosecutor’s June 2004 announcement launching an investigation into the Ugandan Lord’s Resistance Army (LRA) for war crimes and crimes against humanity—for atrocities it allegedly perpetrated in

Uganda and the Congo. In 2005, the Court issued its first arrest warrants for five LRA leaders. In September 2008, the LRA rebel leader, Joseph Kony, agreed to sign a peace agreement between his rebel movement and the Ugandan government. He explained that the LRA forces “will not be disarmed until the Ugandan government goes to the UN Security Council to remove the arrest warrants.”

The Congo’s militia leader Thomas Lubanga Dyilo was in detention in The Hague. He was the first detainee to be in ICC custody, based on the ICC agreement with its hosting Dutch government. Dyilo was charged with conscripting children under fifteen years old to carry out atrocities in the Congo. He was also charged with a deadly attack on UN peacekeepers in the Congo after its 1998–2003 civil war. His was the first ICC trial, which began in March 2006. In July 2008, however, Dyilo was released for lack of evidence.

The ICC will not act unless the nation where the alleged crimes occurred either waives local prosecution or refuses to extradite in cases where the duty to prosecute is crystal clear. The latter option is triggered by a UN Security Council resolution, which requires the blessing of the five permanent members of the Security Council, but not that of the targeted country. In March 2005, the Security Council made its first referral to the ICC. It referred a list of fifty-one government officials and other Sudanese citizens for potential prosecution in the ICC—for their alleged complicity in various atrocities in Sudan’s remote Darfur region.¹⁴⁰ This Security Council referral of the Darfur case to the ICC was an historic occasion. It provided the much-needed spark for illuminating the dark sixty-year gap between the Nuremberg/Tokyo tribunals and this contemporary reincarnation:

United Nations Security Council Resolution 1593

REPORTS OF THE SECRETARY-GENERAL ON THE SUDAN

Adopted by the Security Council at its 5158th Meeting

(31 March 2005)

<<http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>>

THE SECURITY COUNCIL,

Taking note of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur (S/2005/60),

Recalling article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,

Also recalling articles 75 and 79 of the Rome Statute and encouraging States to contribute to the ICC Trust Fund for Victims,

Taking note of the existence of agreements referred to in Article 98.2 of the Rome Statute [a superfluous reference to the Article 98 treaties the U.S. has pursued with many signatories, but also a likely “requirement” for the U.S. abstention from the Security Council vote],

Determining that the situation in Sudan continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* to refer the situation in Darfur since 1 July 2002 [because the Statute operates only prospectively from the date of its entry into force] to the Prosecutor of the International Criminal Court;

2. *Decides* that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;

3. *Invites* the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity;

4. *Also encourages* the Court, as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote

the rule of law, protect human rights and combat impunity in Darfur;

5. *Also emphasizes* the need to promote healing and reconciliation and encourages in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore longstanding peace, with African Union and international support as necessary;

6. *Decides* that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;

7. *Recognizes* that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;

8. *Invites* the Prosecutor to address the Council within three months of the date of adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution [also referring the names of fifty-one Sudanese officials and other citizens to the ICC Prosecutor based on reports provided by the UN Secretary-General];

9. *Decides* to remain seized of the matter.

In May 2007, US President Bush took the unusual step of officially labeling the situation in Darfur as “Genocide.” Some other nations were reluctant to do so because of the international community’s obligations to prevent genocide if in fact it is occurring—which is not an inexpensive undertaking [§10.1 on Human Rights in Context]. President Bush announced a comparatively vigorous sanctions regime (given earlier UN diplomatic efforts to diplomatically vitiate this threat to peace). In his supporting words:

I promise this to the people of Darfur: The United States will not avert our eyes from a crisis that challenges the conscience of the world. For too long the people of Darfur have suffered at the hands of a government that is complicit in the bombing, murder and rape of innocent civilians. My administration has called these actions by their rightful name, genocide. The world has a responsibility to help put an end to it. President Bashir’s actions over the past few weeks follow a long pattern of

promising cooperation while finding new methods for obstruction.¹⁴¹

The January 2005 investigation was commissioned by the UN, pursuant to the Security Council's Resolution 1564 of 18 September 2004 on Darfur. The resulting *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* concluded as follows:

the Government of the Sudan has not pursued a policy of genocide.... the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.¹⁴²

In July 2008, however, the ICC Prosecutor's application for an arrest warrant for the President of Sudan concluded otherwise:



**Introductory Note on
International Criminal Court:
Summary of the Prosecutor's
Application for Warrant of
Arrest against Omar Hassan
Ahmad al Bashir**

WILLIAM R. SLOMANSON
47 INT'L LEGAL MAT'LS 829 (2008)
(most footnotes omitted)

Go to Course Web Page, at:

<<http://home.att.net/~sломansonb/txtcsesite.html>>.
Under Chapter Eight, click ICC Arrest Warrant.

The African Union predictably reacted to a January 2009 report that the ICC was likely to issue the al-Bashir arrest warrant. Its January 2009 Summit strongly stated that it: "REITERATES its appeal to all United Nations (UN) Member States, in particular the EU States, to suspend the execution of warrants issued by individual

European States until all the legal and political issues have been exhaustively discussed between the AU, the EU and the UN...."¹⁴³

Al-Bashir's March 2009 response was that this warrant was a Western conspiracy, aimed at destabilizing Sudan's vast oil-rich people's government. Specifically: "There will be no recognition of or dealing with the white man's court, which has no mandate in Sudan or against any of its people [referring to the earlier indictment of fifty-one Sudanese officials for comparable crimes]."

The UN Security Council will not always act, however, as it did in the case of Darfur. In that particular instance, the US abstained, rather than veto Security Council action regarding Sudan. The genocide in Darfur did not involve any US defendant. This particular prosecution was in keeping with the US president's (and Prime Minister Blair's) 2005 Donor Nations for Africa Initiative. Whether the new ICC will effectively control despotic governments will depend on the will of the international community, which has the historically under-utilized power to turn promise into reality. Any related failure should not be attributed to the less powerful nations.

5. US Position on ICC The US delegation participated extensively in the preparatory negotiations which began in 1995. President Clinton frequently spoke in favor of the International Criminal Court (ICC) and appointed a first-ever Ambassador at Large for War Crimes Issues to focus the administration's efforts. Clinton commented upon the US signing (but not ratifying) the ICC treaty: "The United States has a long history of commitment to the principle of accountability, from our involvement in the Nuremberg Tribunals that brought Nazi war criminals to justice to our leadership in the effort to establish the international criminal tribunal for the former Yugoslavia and Rwanda. Our action today sustains that tradition of moral leadership."

The US position drastically changed during the ensuing Bush Administration. The US became a fierce dissenter—although the US nurtured the creation of the previously mentioned Nuremberg, Tokyo, Rwanda, and Yugoslavian international tribunals. Although President Clinton signed the ICC treaty on behalf of the US, President Bush "unsigned" it, early in his first term. The President's stated fear was that the ICC would be used for political prosecutions against US soldiers, US government officials, and any other American who might be charged with the above international crimes.

The Secretary of State has thus negotiated bilateral Article 98 treaties with as many nations as possible. That provision of the ICC treaty authorizes exemption from extradition to the ICC between any nations that so agree. The US successfully lobbied the UN Security Council on two ICC anniversary occasions to exempt its citizens/soldiers from ICC prosecutions. This Band-Aid approach provided wiggle room to continue negotiating numerous bilateral Article 98 treaties. These are designed to achieve essentially the same result as the two earlier Security Council moratoria, but on a country-by-country basis. A number of commentators question whether either tactic remains justified in the aftermath of the Iraq Abu Ghraib prison scandal, the US Supreme Court's Guantanamo Bay, Cuba Detainee Cases [§9.7.B.], and the US-Eastern European ghost detainee rendition program [§5.3.C.3.].¹⁴⁴

Many commentators have criticized the US for this enormous antagonism. But the balance sheet must take account of similar circumstances where US financial backing has prompted prosecutions in other international tribunals, as evinced by the last statutory provision above regarding specific individuals and groups. Belgrade received sizeable economic incentives, for example, to entice Serbia to turn over former President Slobodan Milosevic for trial in the International Criminal Tribunal for the Former Yugoslavia. The US also offered a \$5,000,000 reward each, for information leading to the extradition of the two individuals (Karadzic and Mladic) who were indicted by the ICTY regarding the Srebrenica, Bosnia massacre of 1995. The US has made major financial and political contributions to this tribunal and to the UN's Rwanda tribunal.

The US Congress supports this approach. One month after the ICC treaty entered into force, Congress passed the so-called Hague Invasion Act to protect the US military. The president is thereby authorized to use all means necessary to facilitate the release of any person who is being detained by, or on behalf of, the ICC. The key provisions of this federal law, entitled the American Servicemembers' Protection Act of 2002, are as follows:

[N]o United States Court, and no agency or entity of any State or local government, including any court, may cooperate with the International Criminal Court in response to a request for cooperation submitted by the International Criminal Court pursuant to the Rome Statute.

... [N]o agency ... may extradite any person from the United States to the International Criminal Court...

Members of the Armed Forces of the United States may not participate in any [UN] peacekeeping operation ... unless the President has submitted to the appropriate congressional committees a certification ... with respect to such operation.

... [N]o United States military assistance may be provided to the government of a country that is a party to the International Criminal Court.

The President may ... waive the [above] prohibition ... with respect to a particular country if he determines ... that it is important to the national interest of the United States to waive such prohibition.

The President may [also] ... waive the [above] prohibition ... if he determines and reports to the appropriate congressional committees that such country has entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Criminal court from proceeding against United States personnel present in such country.

The President is authorized to use all means necessary and appropriate to bring about the release of any person [US citizen] ... who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court.

Nothing in this subchapter shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Usama bin Laden, other members of Al Queda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.

Exempting US citizens from prosecution in the ICC does not mean absolution from conduct governed by international treaties such as the Geneva Conventions. This only means no prosecution by the ICC, as opposed to other forums. The price tag, as articulated by the prominent *New York Times* commentator Nicholas Kristof, renders this policy as one which "undermines our friends and confirms every prejudice that people abroad have about Americans."¹⁴⁵

Over 100 countries have agreed to such exemption treaties; however, forty-five countries, including most of Latin America, have publicly refused to sign an exemption

agreement with the US. Both geographical neighbors Mexico and Canada became parties to the ICC Statute, notwithstanding their close political and economic association with the US. The US pursuit of an Article 98 agreement with Mexico has many drawbacks. They include the unlikely success for achieving the outcome it desires; success would be rather unflattering to the image of US foreign policy; and even the process of ardently pursuing such an immunity agreement would be counterproductive to US foreign policy objectives.¹⁴⁶

China refused, on the convenient basis of US abuses related to the Abu Ghraib prison scandal in Iraq. The US has also withdrawn its soldiers from some UN peacekeeping operations as well. If a head of State can be prosecuted, UN peacekeepers likewise lack immunity from prosecution—although the stated goal and implemented ICC policy continues to be the prosecution of only the most senior commanders responsible for the major crimes within the Court's jurisdiction.

US opposition to the ICC may be thawing. In a November 2005 statement in the General Assembly, the US representative sought to reduce the friction associated with the US position:

While our concerns about the ICC have not changed, we would like to move beyond divisiveness on this issue. We share the commitment of parties to the Rome Statute to bring to justice those who perpetrate genocide, war crimes, and crimes against humanity. While we have honest differences of view on how accountability is best achieved, we must work together to ensure that perpetrators of these atrocities are held accountable for their actions. The actions of the United States demonstrate clearly that we have been and continue to be among the most forceful advocates for the principle of accountability for war crimes, genocide and crimes against humanity.

We demonstrated our willingness to [work] constructively on these matters in connection with Darfur, where it was the United States that concluded that genocide had occurred, and the United States that called for and supported the creation of the International Commission of Inquiry. And while we would have preferred an alternative mechanism, we believed it was sufficiently important for the international community to speak with one voice and to act decisively that we accepted referral of the Darfur situation by the Security Council to the ICC....

... We respect the right of other states to become parties to the Rome Statute; we ask in return, however, that other states respect our decision not to do so.... As we move forward, we urge ICC supporters to reciprocate our efforts to seek common ground and avoid divisiveness. In our view, this begins with an acknowledgment that there are honest differences of views on these issues, and an acknowledgment of the right of the United States and other states to decide not to become parties to the ICC and not to subject their citizens and officials to its jurisdiction. This should not be too much to ask.¹⁴⁷

The "Darfur" allusion of course refers to the UN Security Council's March 2005 referral of the genocidal situation in Darfur to the ICC Prosecutor [§8.5.D.3.]—which would not have occurred but for the US Security Council voting abstention making that resolution possible. A US veto would have precluded the Security Council action that in March 2009 resulted in the ICC arrest warrant for Sudan's president. Furthermore, in September 2006, the US repealed its prior military training funding exclusion for the twenty-five nations that had not signed an Article 98 ICC exemption treaty with the US.

One could argue that the US has the ICC Prosecutor in a political pickle. The US assisted the ICC by choosing not to block the Security Council's Darfur resolution. Eleven months after the Darfur resolution, in February 2006, the Prosecutor decided not to investigate the coalition forces for the alleged deaths of thousands of Iraqi civilians during the March 2003 invasion of Iraq (which did not have UN Security Council approval). In his explanatory letter, he stated that "we do not have jurisdiction with respect to actions of non-States party nationals [which includes American military forces, and that there was no evidence of] ... widespread or systematic attacks directed against any civilian populations.... [and that] detailed computer modeling was used in assessing targets [based on] political, legal, and military oversight ... for target approval."¹⁴⁸

◆ §8.6 REGIONAL COURT ADJUDICATION

A. INTERNATIONAL LAW IN REGIONAL COURTS

Article 33 of the UN Charter provides that the "parties to any dispute ... shall, first of all, seek a solution by negotiation, ... arbitration, ... resort to regional agencies or arrangements, or other peaceful means of their own

choice.” This section of the book thus surveys *regional* litigation, the apparent advantages over dispute resolution by a global entity, and some practical problems with this form of international dispute settlement.

For many centuries, international disputes were not resolved by international courts. Diplomatic negotiations and occasional *ad hoc* arbitrations served this purpose. Successful postwar diplomacy, beginning in the nineteenth century, began to establish international “Claims Commissions.” These temporary bodies heard evidence from representatives of the States involved in a particular dispute. The resolution of claims dissolved the commission.

The modern trend has been away from the use of *temporary* regional tribunals toward more permanent institutions. During the twentieth century, a number of regional courts (and two global courts) have been created by international agreement. Full-time judges and permanent staffs are available to the parties who may submit disputes to these tribunals. Unlike the Yugoslavian and Rwandan criminal tribunals, one does not have to await a several-year organizing process before filing an action and proceeding with a comparatively prompt resolution. There is no need for creating a new *ad hoc* tribunal, negotiating its rules of engagement, and selecting the judges.

In theory, regional courts should be more viable dispute-resolution mechanisms than global courts. Like the ICJ, they are generally underutilized. Mistrust of international institutions with distant seats, as opposed to a national court, should be less of a problem in a regional court. Local judges from the affected region are arguably in a better position to resolve international problems originating within their own region. They are likely to be familiar with regional norms of conduct, which may not be universal. The two “World Courts,” both seated in the heart of Europe, have been criticized for not fully comprehending the impact of regional practices [e.g., §2.7.D.2. *Asylum Case*].

The comparative ability to enforce judgments is a related benefit of regional dispute resolution. Unlike judgments from the UN’s ICJ, which have sometimes been ignored, judgments from the regional tribunals, especially in Western Europe, are unquestionably incorporated into the fabric of the member States. With the exception of this particular region, however, it is not clear that regional courts have been more effective than global courts. A number of regional courts have not survived. Those that have endured do not hear and resolve many cases. A Central American Court, the first regional

international court, was established by treaty in 1907. The State participants soon decided that any need for regional courts would be supplanted by the Permanent Court of International Justice. The Central American Court was therefore disbanded in 1918.

The success of regional adjudication depends on the solidarity of the member States. In many instances, the political and economic unity of the region has been minimal. This discourages national resort to such courts for resolving disputes. In the EU, on the other hand, members have demonstrated the necessary cohesiveness to support a regional court system now spanning more than four decades. The participating States possess similar economic and political interests—a political and economic reality which has contributed significantly to the success of the EU and its judicial dispute-resolution. In most regions, the lack of political solidarity among nations has limited the potential for a more effective regional court process.

Not all citizens relish the concept of an international tribunal on foreign soil having authority over their affairs. One example is the comparatively successful European Court of Human Rights (ECHR), as illustrated in the following complaint:

Many Britons—not only lawyers like myself—find it an insult to national pride that ... the two 15-year-old Liverpool boys convicted five years ago by an English court of murdering 2-year-old James Bulger in a crime that shocked the world, will be allowed by the European Court of Human Rights in Strasbourg, France, to argue that the English legal system breached their human rights....

For many, myself included, the court is unpopular, despite the good work it has done. It is generally perceived as arrogant, unwieldy and the source of much chaos and delay. It is absolutely typical that when I telephoned recently to check the name of the chief judge, they were all at lunch. A recorded voice told me in French and English that someone would get back to me but, of course, no one did.¹⁴⁹

In a perfect world, the resolution of international disputes would not be affected by political considerations. The decision about whether to go to court, however, is itself a major political consideration. Many States avoid regional (and global) courts for reasons unrelated to the legal issues or merits of their disputes. National leaders may decide that the filing of a lawsuit in a public

forum will only exacerbate national differences, which might otherwise be managed more effectively through quiet diplomacy. A State may oppose judicial resolutions of international disputes because a public airing of the problem may escalate (or create) a rift in international relations. In a different political environment, the same State may seek a judicial resolution. Amicable relations may be preserved by submission of the case to an impartial international tribunal.

Another problem, strikingly reminiscent of the global court paradigm, is that States have not given most of the regional courts the compulsory jurisdiction to litigate. When States have created regional courts, they theoretically agree that the availability of a standing tribunal is a good idea. In practice, however, they do not require themselves to submit to the judicial processes of the regional courts they create. They fear the loss of sovereignty they typically associate with submitting sensitive cases to a public forum, which they do not control.

The lack of a defined relationship between the global and regional court systems further limits the potential for the judicial resolution of international disputes. Issues arising under International Law have been adjudicated both in the various regional courts and in the ICJ. UN Charter Article 95 grants the ICJ the power to hear cases arising under International Law. No Charter provision, however, creates or even suggests a relationship between the ICJ and the various regional courts. Charter Article 33 merely provides for prior resort to “regional agencies or arrangements” for the resolution of international disputes. The same case could be lodged in a regional court, the ICJ, and a national court. Certain State violations of an individual’s human rights, for example, could be heard in the ECHR (against an individual defendant), the ICJ (only State defendants), or the UN’s ICC for the trial of war crimes in the former Yugoslavia (although it possesses “primacy” over parallel national litigation).

The lack of a hierarchy among national, regional, and global courts is a related limitation on the viability of regional adjudication. While the litigants are expected to exhaust local remedies in national courts before coming to the ICJ (textbook §2.5 State Responsibility), the ICJ has never required its litigants to resort first to available regional courts. Neither the UN Charter nor the Statute of the ICJ give the ICJ power to suspend regional court proceedings so that the ICJ might provide a global response to the problem at hand.

There is yet another significant problem. Regional courts operate independently of national courts, the ICJ, and each other. Regional international courts function as trial courts from which there is no right of appeal. States normally do not cede appellate powers to regional (or global) courts so that they can judicially review decisions by the national judiciary. States generally avoid the common model existing within their own court systems. In many national court systems, cases normally proceed through a hierarchy of judicial levels. This progression creates a trial-court record resolving factual issues so that an appellate tribunal may then concentrate on the legal issues involved in the dispute. This review process thus promotes uniformity of decision-making within national legal systems. A higher appellate court may then provide guidance to the various national trial/lower appellate courts to promote uniformity of the applicable law within that national system.¹⁵⁰

The general lack of a legal relationship among regional courts, and between regional courts and the ICJ, has generated other problems. The predicament of having entirely independent regional court systems was forecast by prominent British commentator Professor Jenks. In 1943, prior to creation of the regional courts that exist today, he cautioned against such a system because “[t]he coexistence of the Permanent Court of International Justice and of entirely independent regional international courts would involve at least two dangers. There would be a danger of conflicts regarding jurisdiction, and a danger that regional courts might be inspired by regional legal conceptions to such an extent that their decisions might prejudice the future unity of the law of nations in respect of matters regarding which uniform rules of worldwide validity are desirable.”¹⁵¹

Jenks’ concern about parochial definitions of International Law was well founded. The interpretation of what constitutes a local custom has jeopardized prospects for a smooth relationship among national, regional, and global courts. What one international court perceives as falling within the general parameters of International Law may present a rather parochial perspective. The ICJ’s 1950 *Asylum Case* [§2.7.D.2.] illustrates this problem. Colombia relied on a regional practice to establish its claim that Peru had failed to honor the right of asylum existing in the Latin American region of the world. There was, in fact, support for Colombia’s position. The ICJ did not affirm the right of asylum, however, because it was not practiced on either a regional level in Europe

or on a global level. The ICJ ruled that Colombia “failed to meet its burden” of proving the existence of such a right under International Law. The ICJ was harshly criticized for its failure to recognize and apply this regional practice.

The following subsection surveys the operations and aspirations of the prominent regional courts. See Chart 8.2:

B. SELECTED REGIONAL COURTS

CHART 8.2 SELECTED REGIONAL INTERNATIONAL COURTS

COURT	LOCATION (DATE) ^a	BENCH	PRIMARY AFFILIATION	CASES HEARD
Court of Justice of the European Communities ^b	Luxembourg (1973)	15 judges: 1 from each European Union member State; and president	European Union	<ul style="list-style-type: none"> • Commission v. State • Private v. EU institution • Cases referred from national courts
European Court of First Instance ^b	Luxembourg (1989)	15 judges: 1 from each European Union member State	European Union	<ul style="list-style-type: none"> • Actions brought by individuals • Appeals to Court of Justice
European Court of Human Rights ^b	Strasbourg, France (1958)	3-judge Committees, 7-judge Chambers, 17-judge Grand Chamber (40 total from Council of Europe members)	Council of Europe	Determines State violations of European Convention on Human Rights
Inter-American Court of Human Rights	San Jose, Costa Rica (1979)	6 part-time judges, 1 full-time president (all from OAS member States)	Organization of American States	Determines State violations of American Convention on Human Rights
Central American Court of Justice	(1907 & 1965) ^c	Presidents of member State judiciaries	Organization of American Central States	Disputes between States and between individual and State ^d
Arab Court of Justice	Cairo, Egypt (1965)	^d	League of Arab States	^d
OPEC Judicial Tribunal	Kuwait (1980)	7 part-time Arab judges	Oil Producing Exporting Countries	<ul style="list-style-type: none"> • Interpretation of OPEC Agreement • Disputes between member country and petroleum company operating in its territory
African Economic Community Court of Justice ^e	(1991)	^d	Organization of African Unity	^d

CHART 8.2 SELECTED REGIONAL INTERNATIONAL COURTS (CONTINUED)

COURT	LOCATION (DATE) ^a	BENCH	PRIMARY AFFILIATION	CASES HEARD
African Court on Human and Peoples' Rights ^h	Gambia (est. 1998 & judges installed 2006) ^d	11 judges from OAU States	Organization of African Unity	Interprets African Charter on Human and Peoples' Rights
Economic Community Court of Justice	Lagos, Nigeria (1975/ operational in 2002)	7 judges: appointed by Heads of State	Economic Community of West African States	Individuals and institutional plaintiffs · business and human rights cases
Tribunal of the Southern African Development Community	Windhoek, Namibia (1992/2005)	10 judges	Southern African Development Community	Develops Community jurisprudence
Caribbean Court of Justice	Seat not yet selected (1999)	President and not more than nine other Judges	Caribbean Community and Common Market	^f
Islamic Court of International Justice	^{d, g}		Organization of Islamic Conference	

^a Date established, or re-established.

^b Compulsory jurisdiction over member States.

^c Hiatus from 1918 until reconstituted in 1965; see D. Bowett, *THE LAW OF INTERNATIONAL INSTITUTIONS* 287 (4th ed. London: Stevens & Sons, 1982); not mentioned in 5th ed.

^d Proposed but not yet operational.

^e See A. Yusuf (ed.), 1 *AFRICAN YEARBOOK OF INTERNATIONAL LAW* 237 (Art. 7) & 241 (Art. 18) (Dordrecht, Neth: Martinus Nijhoff, 1994) and <<http://www.oau-oua.org/document/Treaties/Treaties.htm>>, 1991 treaty sections 18–20.

^f Disputes between Contracting State Parties; State Parties & Community; referrals from national courts or tribunals; applications by nationals re any treaty right. See <<http://www.sice.oas.org/trade/ccme/ccj1.asp>>.

^g See b above, Sands & Klein, 5th ed. of Bowett, at 391.

^h See Scott Lyons, *The African Court on Human and Peoples' Rights*, ASIL INSIGHT (Sept. 19, 2006), at <http://www.asil.org/insights/2006/09/insights060919.html#_ednref2>. Proposed merger pending between African Human Rights Court and African Court of Justice to facilitate a single African judicial entity. See July 2008 Protocol on the Statute of the African Court of Justice and Human Rights.

There have been other dormant or defunct regional courts. The former Central American Court of Justice ceased to function in 1918. While it was supposedly reestablished in 1965, it has not yet issued a case. The Court of Justice of the European Coal and Steel Community was replaced by the current European Court of Justice (ECJ) in 1973. The League of Arab States has contemplated establishing an Arab Court of Justice since 1950. The proposed court is described in a draft statute. However, insufficient political solidarity in the region has prevented its activation.¹⁵²

Several regional courts currently hear issues arising under International Law. They include the following courts, which are discussed below: (1) European Court of Justice; (2) European Court of Human Rights; (3) Inter-American Court of Human Rights, and (4) Andean Court of Justice. These courts essentially interpret the treaties that created the political or economic organizations they serve.

1. European Court of Justice The 1957 Treaty of Rome established the first European regional court:

the Court of Justice of the European Coal and Steel Community. Article 3 of the 1973 Convention on Certain Institutions Common to the European Communities transferred the powers of this court to the current ECJ, which is located in Luxembourg. The ECJ's judges from EU member countries decide about 200 cases per year.

The ECJ, sometimes called the "Supreme Court of Europe," resolves disputes between the national laws of member States and European Community law. For example, EU nations are not supposed to create import duties or non-tariff barriers on most products imported from other EU members. This Court decided that Italy violated community transportation rules by prohibiting an Irish airline from picking up passengers in London and flying them to Milan.

The judicial power of this remarkably successful tribunal is succinctly described by the UK's University of Exeter Professor John Bridge, as follows:

The ECJ is an "international court" in more than one sense of that term. It is international in the fundamental sense that it is a creation of international law through the joint exercise of the treaty-making powers of the Member States. In organizational terms it is international in that it is composed of judges of the different nationalities of the [EU] Member States. In jurisdictional terms it is international in the classic sense that it is competent to hear and determine cases alleging the failure of Member States to fulfill treaty obligations. Another aspect of its international character lies in its authority to review, with reference to the Treaties, the legality of acts and omissions by the institutions set up by the Treaties to serve the purposes of the Communities. The ECJ also has jurisdiction to rule on the compatibility with the EEC Treaty of proposed agreements between a Community and either third states or an international organization. It also serves as an international administrative tribunal through its jurisdiction in disputes between the Communities and its servants.¹⁵³

The ECJ differs from the traditional international tribunals. Unlike the practice of the global International Court of Justice where only States may be parties, individuals and corporations may participate in certain

proceedings before the ECJ (especially through its Court of First Instance).

The first two cases heard by the European Court were filed by private (non-governmental) corporations. Individuals who have been fined by an administrative body of the EU may appeal to the ECJ. Individuals and corporations may also ask the ECJ to annul administrative decisions and regulations of EU agencies, which allegedly violate EU norms. In one case, a British citizen filed suit in the ECJ to recover damages incurred during an assault in Paris. The administrator of a French fund for French citizens had denied the British citizen's claim on the basis of his foreign nationality. In another early case of great constitutional significance, a French political group was able to successfully attack the European Parliament's allocation of funds from its budget to certain political parties. This clarified the Court's position that the decisions of all EU institutions, including the European Parliament, were open to judicial review via suits brought by private individuals or non-governmental entities.¹⁵⁴

National tribunals may also invoke the expertise of the ECJ. Under Article 177 of the European Economic Community's Treaty and Article 150 of the Euratom Treaty, courts and other tribunals from within the EU's member States have requested that the ECJ rule on a treaty matter arising within their particular national systems. UN members do not have that option. In fact, certain members have expressly ignored the directives of the UN's International Court of Justice [e.g., US consular access case: §7.1.B.4(b)].

This Court's practice also differs from international litigation in the UN International Court of Justice. Unlike the twenty-seven-nation EU, the UN is composed of almost 200 member States. The objectives of the UN's members are quite diverse in comparison with those of the much smaller EU. The profile of EU member States is much more homogeneous. The respective constitutional charters are quite different. The UN Charter is not a legally enforceable document. It did not create immediately enforceable obligations applicable to all member States. These were, instead, standards of achievement or a statement of global political aspirations [§3.3.A.]. On the other hand, the various treaties applicable to the more integrated EU were intended to create legal obligations

from the outset. EU member States are thus subject to the economic directives contained in its various self-executing treaties. The EU may enforce those provisions in the same manner that a national court may require compliance with its internal law.

This difference accounts for the comparative volume of cases heard by the ECJ. The range of the ECJ's jurisdiction has had an impact on States outside of the EU—including the US. There is an understandable global obsession with the “extraterritorial application” of the laws of the United States [§5.2.A.]. The ECJ exercises similar power, however, under its own case law, which allows it to enforce Community legislation against even nonmembers. The ECJ has thus relied on US antitrust case law in support of its judicial authority over corporate anticompetitive conduct beyond the EU.

2. European Court of Human Rights This court (ECHR) is the other major regional court in Europe. It was established by the Council of Europe—now fifty-six nations since adoption of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. The ECHR was operational in 1958. In 1959, it began to hear cases arising under the European Convention on Human Rights in Strasbourg, France.

Article 45 of the Convention provides that the ECHR may hear “all cases concerning the interpretation and application of the present Convention.” The Court's basic role is to provide judicial protection for the fundamental rights of the individual. Thus, it may hear cases that might not be heard under the laws of the aggrieved individual's home State. In Great Britain, for example, there is no written constitution that enumerates a list of individual rights. Great Britain's commitment to the preservation of human rights under the European treaty, however, does provide certain guarantees. Its citizens may file claims against their government in the ECHR at its seat in Strasbourg France (*see also* §10.3 on Regional Human Rights).¹⁵⁵

ECHR judgments are supposedly enforced in the national courts of the parties to the European Convention on Human Rights. The Rapporteur of the Committee on Legal Affairs and Human Rights Committee of the Council of Europe issued a disturbing progress report in August 2009, however. It details “the non-implementation and/or delay in implementation” of too

many judgments handed down by the ECHR. The non-execution of the Court's judgments by the national parties to the European Convention “is far graver and more widespread than previous reports have disclosed.” The following case offers a dramatic illustration of a member State nevertheless yielding the requisite degree of sovereignty to an international court, so as to effectuate its judgments—and thus, achieve the common objectives of those member States.

The year 1992 was a stormy one in Ireland in terms of the very sensitive issue of abortion. Ireland's Constitution prohibits abortion due to the passage of a referendum by its voters in 1983. It is also a crime punishable by life imprisonment. A 1979 law had previously been enacted, making it unlawful to advocate or assist in the obtaining of an abortion in any manner. Here, a lower Irish court prohibited a fourteen-year-old girl who had been raped from going abroad for the purpose of obtaining an abortion. After it became clear that she would commit suicide, the Irish Supreme Court overruled that opinion in a rather succinct one-sentence opinion, which did not squarely resolve the issue, at least for future cases where a potential defendant wished to obtain abortion information.

The EU's European Court of Justice, seated in Luxembourg, determined that it had no jurisdiction with regard to Ireland's national abortion law. Any issues related to that national law were characterized as “lying outside the scope of [European] Community Law.” This case was then lodged with the European Court of Human Rights.

The following decision addressed whether family planning counselors in Ireland could advise women about the option of traveling to England where abortion is legal. The defendants' lawyers claimed that Ireland's prior judicial actions, prohibiting abortion counseling, violated the European Human Rights Convention. In a closely-related companion case, some student newspapers were charged with publishing information about pregnancy alternatives in violation of Irish law. The ensuing opinion of the ECHR, seated in Strasbourg, France, effectively reversed the Irish Supreme Court injunction against the defendants' counseling activities in Ireland. It is thus a *classic* illustration of how an international organization can require a State to act in a way that is contrary to its national law:

Case of Open Door and Dublin Well Woman v. Ireland

EUROPEAN COURT OF HUMAN RIGHTS

No. 64/1991/316/387–388 (1992)

<<http://www.echr.coe.int/echr>>

AUTHOR'S NOTE: The Irish Supreme Court affirmed a lower Irish court order requiring the defendants—Open Door Counselling, Ltd., Dublin Well Woman, Ltd., and certain individuals—to cease counseling on the availability of abortions outside of Ireland. The court order had already resulted in the closure of defendant Open Door. The defendants applied to the ECHR for relief under the European Convention on Human Rights (European Convention) provisions—which protect freedom of expression, and prevent disclosure of information received in confidence.

The ECHR did not rule directly on Ireland's constitutional ban on abortions. The majority of the Court's judges did rule, however, that preventing women from getting information on how to get abortions outside of Ireland violated the European Convention. Ireland could no longer use its own anti-abortion laws to deprive its citizens of human rights guaranteed by the European Convention. This was nevertheless an exceptionally divided court, the majority opinion resolving this matter by a vote of fifteen to eight of the judges. Seven of twenty-three judges wrote their own separate opinions. The Court's paragraphs numbering is omitted.

COURT'S OPINION:

The case was referred to the Court by the European Commission on Human Rights [and] ... by the Government of Ireland.... It originated in two applications against Ireland lodged with the Commission ... by Open Door Counselling Ltd, a company incorporated in Ireland; the second by another Irish company, Dublin Well Woman Centre Ltd., and one citizen of the United States of America, ... and three Irish citizens, Ms Ann Downes, Mrs X and Ms Maeve Geraghty [two employed as trained counsellors for one of these companies and two in their capacity as women of child-bearing age residing in Ireland]....

The applicants complained of an injunction imposed by the Irish courts on Open Door and Dublin Well Woman to restrain them from providing certain information to pregnant women concerning abortion facilities outside the jurisdiction of Ireland....

On 19 December 1986 Mr Justice Hamilton, President of the High Court [lower Irish court], found that the activities of Open Door and Dublin Well Woman in counselling pregnant women ... to travel abroad to obtain an abortion or to obtain further advice on abortion within a foreign jurisdiction were unlawful [under] ... the Constitution of Ireland.

He confirmed that the Irish criminal law [thus] made it an offence to procure or attempt to procure an abortion.... Furthermore, Irish constitutional law also protected the right to life of the unborn from the moment of conception onwards.

An injunction was accordingly granted " ... that the Defendants [Open Door and Dublin Well Woman] and each of them, their servants or agents, be perpetually restrained from counselling or assisting pregnant women within the jurisdiction of this court [Ireland] to obtain further advice on abortion or to obtain an abortion."

Open Door and Dublin Well Woman appealed against this decision to the [Irish] Supreme Court which in a unanimous judgment ... rejected the appeal [affirming the lower court's injunction requiring the defendants to cease giving information about the availability of abortions in Great Britain].

On the question of whether the above activity should be restrained as being contrary to the [Irish] Constitution, Mr Justice Finlay C. J. stated:

[T]he issue and the question of fact to be determined is: were they thus assisting in the destruction of life of the unborn?

I am satisfied beyond doubt that ... the Defendants were assisting in the ultimate destruction of the life of the unborn by abortion.

[In a companion case, an Irish anti-abortion society applied to the lower Irish court to restrain the publication of information in student newspapers regarding abortion information. That court referred this, and the Open Door and Well Woman matter, to the European Court of Justice in Luxembourg for a determination of whether this issue fell within the ambit of Community

Law. But on appeal of that case referral, the Irish Supreme Court instead restrained the student publication from further publishing abortion counseling information. The dispositive statement from the Irish Supreme Court in the related newspaper case is provided by the ECHR in its Open Door and Dublin Well Woman decision at this point in the opinion.]

... I reject as unsound the contention that the activity involved in this case of publishing in the students' manuals the [Great Britain abortion clinic information] ... can be distinguished from the activity condemned by this Court in [the Open Door Counselling case].... It is clearly the fact that such information is conveyed to pregnant women, and not the method of communication, which creates the unconstitutional illegality....

[The ECHR next returned to its analysis of the Open Door and Dublin Well Woman defendants.]

Section 16 of the Censorship of Publications Act 1929 ... provides that:

It shall not be lawful for any person, otherwise than under and in accordance with a permit in writing granted to him under this section ... to print or publish ... any book or periodical publication (whether appearing on the register of prohibited publications or not) which advocates ... the procurement of an abortion....

... In their applications lodged with the Commission ... the applicants complained that the injunction[s] in question constituted an unjustified interference with their right to impart or receive information contrary to Article 10 of the [European Human Rights] Convention....

[The Commission had then ruled that the Irish Supreme Court injunctions did violate the European Convention, triggering the ECHR's jurisdiction to hear this case. Its analysis continues with the Open Door and Dublin Well Woman defendants.]

The applicants ... invoked [Convention] Article 10 which provides:

1. 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 [within the Community].

2. The exercise of these freedoms ... may be subject to such formalities, conditions, [and] restrictions

... necessary in a democratic society ... for preventing the disclosure of information received in confidence....

In their submissions to the Court the [Irish] Government contested these claims and also contended that Article 10 should be interpreted against the background of Articles 2 ... and 60 of the Convention the relevant parts of which state:

1. Everyone's right to life shall be protected by law....

60. Nothing in [the] Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party....

The Court cannot accept that the restrictions at issue pursued the aim of the prevention of crime since ... neither the provision of the information in question nor the obtaining of an abortion outside the jurisdiction [*i.e.*, in Great Britain] involved any criminal offence. However, it is evident that the protection afforded under Irish law to the right to life of the unborn is based on profound moral values concerning the nature of life ... [which was] reflected in the stance of the majority of the Irish people against abortion as expressed in the 1983 referendum....

The Court [however] is not called upon to examine whether a right to abortion is guaranteed under the Convention or whether the foetus is encompassed by the right to life as contained in Article 2....

The only issue to be addressed is whether the [Irish] restrictions on the freedom to impart and receive information contained in the relevant part of the [Irish court's] injunction are necessary in a democratic society for the legislative aim of protection of morals....

[T]he national authorities enjoy a wide margin of appreciation in matters of morals, particularly [when they] ... touch on matters of belief concerning the nature of human life.... However this power of appreciation is not unlimited. It is for the Court ... to supervise whether a restriction [like this one] is compatible with the Convention....

In this context, it is appropriate to recall that freedom of expression is also applicable to "information" or "ideas" that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society." ...

The [Irish] Government ... [has] submitted that Article 10 should not be interpreted in such a manner as to limit, destroy or derogate from the right to life of the unborn which enjoys special protection under Irish law... [T]he Court recalls [however] that the injunction ... [and] the information that it sought to restrain was available from other sources. Accordingly, it is not the interpretation of Article 10 but the position of Ireland as

regards the implementation of the [anti-abortion] law that makes possible the continuance of the current level of abortions obtained by Irish women abroad.

In light of the above, the Court concludes that the restraint imposed on the applicants from receiving or imparting information was disproportionate to the [governmental] aims pursued. Accordingly there has been a breach of Article 10.

The Court held that Ireland violated Article 10 of the Convention and that it must pay damages to the defendant entities Open Door and Dublin Well Woman. These private corporations and the individuals who were parties to this suit were capable of personally enforcing their treaty rights provoked by Ireland's violations of the European Human Rights Convention. In the UN's International Court of Justice, however, only States may be parties to such enforcement proceedings. *Open Door* illustrates how an international organization may vary the rule of International Law that otherwise requires a State to bring an action on behalf of its injured citizens at the international level.¹⁵⁶

In March 2002, Irish voters rejected a referendum, which would have overruled a 1992 Irish court decision holding that the potential suicide of the mother was grounds for an abortion. This vote handed a stunning defeat to the government and the powerful Roman Catholic Church.

In July 2004, the ECHR held that France did not violate the right to life of a six-month old fetus when a doctor mistakenly pierced the mother's amniotic sac—thinking that she was another woman. A criminal court in Lyon, France, acquitted the doctor of any criminal wrongdoing. An appellate court reversed, imposing a fine and six-month jail term. The superior French Court of Cassation reversed the intermediate appellate court's ruling. That high court commented that this was a matter of national law, as there was no majority consensus on this point in member States. The ECHR ultimately determined that France did not violate the rights of the fetus by failing to punish the doctor by making his conduct a criminal offense.

Two years after the US Supreme Court's *Roe v. Wade* decision, the comparable German Constitutional Court decided contrary to the more liberal result in the US and the ECHR:

1. ... The State's duty to protect forbids not only direct state attacks against life developing itself, but also requires the state to protect and foster this life.
2. The obligation of the state to protect the life developing itself exists, even against the mother.

In 2002, the Mexican government allegedly violated the right of a thirteen-year-old girl to have an abortion—after being raped in her home by an intruding heroin addict. Baja California state officials, priests, and the Attorney General discouraged her from aborting although Mexican law permits abortions in this situation. She then filed a petition in the Inter-American Court of Human Rights, seeking an unspecified amount of monetary restitution on behalf of her family.¹⁵⁷

3. Inter-American Court of Human Rights Organization of American States (OAS) member State representatives drafted the American Convention on Human Rights, which became effective in 1978.¹⁵⁸ Approximately two-thirds of the more than thirty member States have adopted this treaty (not including the US).

In 1979, the OAS established the Inter-American Court of Human Rights (IACHR) in San Jose, Costa Rica. It has since heard several contentious cases. The court's primary function is to interpret the American Convention. The IACHR hears claims alleging that an individual's civil and political rights have been infringed

by State action. Unlike the practice developed in Europe's regional courts, individuals can never appear either directly or indirectly in the IACHR. Under Article 61(1) of the Convention, "only States Parties and the [Human Rights] Commission shall have the right to submit a case to the Court."

The IACHR hears disputes between States when one accuses another of violating individual freedoms guaranteed under the American Convention. The participating States must consent, however, to the jurisdiction of this Court to resolve such disputes. Unlike the practice of the two European international courts (discussed earlier), only a few OAS member States have accepted the compulsory jurisdiction of the IACHR.

Like the International Court of Justice, the IACHR may also issue "advisory" opinions. These do not depend on the presence or consent of an offending nation. The purpose of this power, similar to that of the ICJ's advisory jurisdiction, is to provide judicial guidance to member States about certain practices that violate the Human Rights Convention.¹⁵⁹ The Court is thereby able to develop the regional Latin American norms regarding State compliance with the American Convention.

One of the Convention's key provisions prohibits States from harming their citizens for political purposes. In a landmark trial in 1988, the IACHR heard the first contentious trial against a Latin American State for the politically motivated murders of its own citizens. Honduras was tried for the disappearance and murders of 90,000 people since the 1950s.¹⁶⁰ The IACHR is only the second regional court (after the ECHR) to judge States for violations of internationally recognized human rights.

In one of the Court's most significant cases, it rejected Peru's July 2000 decision, purporting to withdraw from the Court's contentious jurisdiction in a case involving Peru. The IACHR had recently determined that Peru would have to retry four people convicted of treason. They had been tried and convicted by a military, rather than a civilian, tribunal. Peru's antiterrorism legislation had authorized civilians to be tried in military courts for the terrorism-related offence of "treason." The IACHR determined that Peru should amend this law because the independence and impartiality of its national court system was seriously in doubt. The Court said that Peru's failure to carry out the Court's

decisions—before and after Peru's attempt to withdraw from the Court's jurisdiction—went "to the very essence of international law, *i.e.* good-faith performance of treaty obligations." Peru ultimately acknowledged the Court's jurisdiction, rather than face possible expulsion from the OAS.¹⁶¹

The IACHR is something more than a temporary arbitral body, but something less than a permanent judicial institution. Its seven jurists from different OAS nations do not conduct proceedings on a full-time basis. Funding has been delayed, pending development of the Court's jurisprudence to a point where full-time judges are necessary. This part-time status is unique among the regional courts of the world. The Court's former Chief Justice, now a member of the International Court of Justice, lamented that "... a part-time tribunal might give that body an *ad hoc* image, likely to diminish the prestige and legitimacy it might need to obtain compliance with and respect for its decisions in the Americas. But the [OAS] General Assembly opted instead for a tribunal composed of part-time judges ... [who are] free to practice law, to teach, and to engage in whatever other occupations they may have in their native countries."¹⁶²

This tribunal oversees the rather ambitious set of goals set forth in the various regional human rights documents. Its once *theoretical* utility is now being proven by State practice. This regional court may not enjoy the comparatively lengthy period of development and degree of solidarity that exists in Europe's regional tribunals. The tangible progress of this Court was recently limited. University of Canterbury (New Zealand) Professor Scott Davidson's 1992 account was as follows:

nonuse of the contentious procedure ... lies more likely in the political and economic structures of the states of the region and in the perceptions which these structures engender. If certain states continue to see the inter-American human rights system as a threat to entrenched positions rather than an aid to furthering support for the forms of liberal democracy which the Court and the instruments upon which it relies clearly support, then such states are unlikely to encourage its [expanded] use.

Ensuing decades, however, brought a prominent change of heart. National maturation in terms of

embracing more democratic values led to increased reliance upon the Inter-American Commission and Court. These became standard bearers for the direction in which the region's comparatively new democracies hoped to proceed. University of Texas Professor Morse Tan's fresh description in 2005 likened the Inter-American system to that of Europe:

Over twenty years ago, international human rights law was not taken very seriously. It was considered to be "soft law." However, over the years, there have been dozens of cases before the Inter-American Court of Human Rights and thousands of cases in which the European Court of Human Rights have found states in violation of their international legal obligations with respect to human rights. Of those many rulings, only a few states have refused or been slow to comply with these Courts' orders. There is little doubt that now international human rights law is "hard law," i.e., effective law in many respects. Therefore, international human rights fora generally are both available, and provide remedies to violations of human rights with which states often comply.¹⁶³

4. Andean Court of Justice The 1969 Treaty of Bogotá, often referred to as the "Andean Pact," was adopted by five South American nations. They hope to develop an economic union similar to that of the EU. The national members are Bolivia, Colombia, Ecuador, Peru, and Venezuela. (Chile previously withdrew.)

In 1983, the Andean Pact countries created the Andean Court of Justice (ACJ), which sits in Quito, Ecuador. It has five judges—one from each member State. Contrary to the more flexible practice in the Inter-American Court of Justice, the judges of the ACJ must live near Quito. They may not undertake any other professional activities.¹⁶⁴

Under Article 32 of the ACJ agreement, judgments are directly enforceable in the national courts of member States. There is no need for any national incorporation of the regional court's judgments into internal law. Similar to the practice in the European Court of Justice, Article 33 provides that States cannot submit any controversy arising under the Andean Pact "to any [other] court, arbitration system or any other procedure not contemplated by this Treaty." This limitation is designed to promote uniformity of decision and application of the same judicial standards to economic disputes arising throughout the region. Judges

of national courts within Andean Pact states may also request that the regional court interpret the Andean Pact's economic provisions when such issues are litigated in their national courts. This power encourages regional solidarity in matters of Latin American economic integration.

The court is able to overrule decisions by the Andean Pact's other major organs. A member State's alleged non-compliance with the Pact's economic integration plan is first considered by either the Commission, the Pact's major administrative organ, or the Junta, its chief executive organ. These bodies may submit a dispute with a member nation to the Court. The Court can nullify decisions of the Commission or the Junta and require the offending State to comply. In the ACJ's first case, decided in 1987, Colombia questioned a resolution of the Junta. The Court ruled that the Junta improperly limited Colombia's introduction of protective measures against imports from Venezuela.¹⁶⁵

Under Article 25 of the treaty creating the ACJ, the offending nation's noncompliance permits the court to "restrict or suspend, totally or partially, the advantages deriving from the Cartagena [Andean Pact] Agreement which benefit the noncomplying member country." Suppose that a member State does not reduce its tariffs on exports of another member State as required by the terms of the Andean Pact regulations. The ACJ Court has the power to render a judgment requiring the offending State to comply with the treaty or its related regulatory rules. The Court has never issued such an opinion, however. Like other international courts, the ACJ may also render advisory opinions.

The ACJ has not been utilized extensively for a variety of economic and political reasons. The underlying Cartagena Agreement (Andean Pact) was modified in 1989 by the Quito Protocol with a view toward bringing the Andean regional process in line with that of the EU. In that year, the member States also issued a manifesto whereby they committed themselves to fully implementing the Andean Common Market. Should that degree of integration materialize, then the Andean Pact has the theoretical ability to mature into a viable international judicial process—but not before.¹⁶⁶

◆ §8.7 NATIONAL COURT ADJUDICATION

This section provides an incredibly truncated view of the management of international legal issues in

selected national courts. A one-volume classroom text leaves scant room for a comprehensive analysis of all significant subjects within the discipline at hand. A text on International Law, if it is to address the fundamentals, while providing a truly international perspective, cannot focus all deserved attention on the rich vein of national case law concerning international legal issues. As ably recounted by the University of Notre Dame's Professor Mary Ellen O'Connell:

National courts are, in many respects, the most important institutions for enforcement of international law.... International law places few restrictions on states that wish to subject violations of international law to their domestic enforcement institutions. Despite this freedom, the method is not as widely used as one might expect. States themselves [often] restrict access to their [own] courts....

Nevertheless, national courts remain powerful for enforcing international law.... Unlike the international legal system, all functioning nation-states have institutions for enforcing the law....

The enforcement of international law through national courts is the most commonly used method of international law enforcement and in many respects the most attractive. Perhaps the oldest and best known example ... is the use of national courts to enforce the international law against piracy by arresting pirates, then subjecting them to judicial process by the state's courts and imprisoning them in the state's prisons.¹⁶⁷

A. JURISPRUDENTIAL RESTRICTIONS

National courts have nevertheless developed a convenient array of jurisprudential doctrines to avoid the resolution of issues arising under International Law. Chief among them are the following: (a) Sovereign Immunity; (b) Political Question Doctrine; and (c) Act of State Doctrine. Their case-by-case application gives rise to the mischievous potential for avoiding the resolution of significant issues arising under International Law.

All three are implicated in the following case. Rodovan Karadzic was allegedly responsible for Bosnia's 1995 Srebrenica massacre and numerous other atrocities. Some 7,800 Muslim men and boys were executed near the Srebrenica UN safe haven within one week—and allegedly on Karadzic's orders. The facts of the Srebrenica

massacre are set forth in graphic detail in the International Court of Justice *Bosnia v. Serbia Genocide Case* [textbook §10.1.B.2]. One of the earlier US civil cases against Karadžić arose when he was invited to the UN in relation to the peace negotiations regarding the 1992–1995 Bosnian War:



Kadic v. Karadžić

UNITED STATES COURT
OF APPEALS, SECOND CIRCUIT (1995)
70 Fed. Reporter 3d 232, *rehearing den'd*,
74 Fed.Rptr.3d 377
On remand, Jane Doe I v. Karadzic, 1996
WestLaw 194298, *cert. den'd*, 518 U.S. 1005
(1996)

Go to Course Web Page, at:
<<http://home.att.net/~slomansonb/txtcsesite.html>>.
Under Chapter Eight, click Karadzic.

He was ultimately discovered hiding in Serbia, living under an assumed identity. He was sent to The Hague for trial by the ICTY. In December 2008, the court ruled on his claim that he had been granted immunity by an alleged 1996 immunity from prosecution by US Ambassador Richard Holbrooke—who was supposedly speaking on behalf of the international community. The Trial Chamber held that the documents Karadžić requested, including the alleged immunity agreement, “could shed light on the behavior of the Accused after the fact, and, if so, would be items which may be taken into consideration in the determination of any eventual sentence.” The ICTY Trial Chamber thus ordered the Prosecution to disclose to Karadžić any written agreement and related notes in its possession that were made during the meeting between Karadžić and Holbrooke.

The Chamber gave, but it also took away. The existence of an immunity agreement would be *irrelevant*, however, in the determination of guilt because: “it [is] well established that any immunity agreement in respect of an accused indicted for genocide, war crimes and/or crimes against humanity before an international tribunal would be invalid under international law.”¹⁶⁸

B. COUNTRY STUDIES

The following two country studies (Canada and the US) provide penetrating insight into whether the incorporation of International Law into the national judicial dialogue is effectively either a robust or a diminutive enterprise. A number of executive, legislative, and judicial decisions already have been—and will be—presented in this book. At this point, you can observe the polar views of two major Western nations. While they are the closest of allies, that is not necessarily the case in terms of their respective approaches to embracing International Law within the national jurisprudence.

You might at present reconsider earlier textbook materials as the backdrop for what follows: §1.1.D. on International Law Links; §1.2.B.4(b) on Foreign Decisions Under Attack; §3.3.C.1. on Inducing National Compliance; §5.3.C.3. on Rendition; and §7.3.B.1. regarding the Treaty versus Constitution conflict resolution.

1. Canadian Application The first of two country studies is drawn from Canadian practice under that nation's pervasive human rights regime. Mr. Mugesera was a well-educated Rwandan residing in Canada, as of this 2005 Supreme Court decision. His offense was giving a fiery incitement to genocide speech in Rwanda in 1992. He had been sought by Rwandan authorities. He fled the country and become a permanent resident of Canada in 1993. (The 1994 Rwandan massacre is presented in the §8.5.C.2. principle *Radio Machete* case). In 1995, the Canadian Minister of

Citizenship and Immigration commenced proceedings against Mugesera. This immigration deportation matter proceeded through various administrative and judicial reviews prior to the Canadian Supreme Court's decision of 2005.

Evidence of the comparatively inclusive Canadian approach to incorporating International Law into its national fabric appears in the following verbatim paragraphs from the Canadian Supreme Court's opinion. Note the repeated references to international treaties and cases as support for the analysis of Mr. Mugesera's deportation:



Mugesera v. Canada (Minister of Citizenship and Immigration)

SUPREME COURT OF CANADA

44 I.L.M. 1468 (2005)

<<http://www.lexum.umontreal.ca/csc-scc/en/rec/html/2005scc040.wpd.html>>

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsestite.html>>. Under Chapter Eight, click Mugesera (Canada).

2. United States Application Evidence of the American approach, which does not readily incorporate International Law into its national fabric, appears in the verbatim paragraphs from the following frequently-cited US judicial opinions:

- ◆ [1925—textbook §1.1.D.2(b)] “International practice is law only in so far as we adopt it, and like all common or statute law it bends to the will of the Congress.... The act [enforcing laws on an extraterritorial basis] may contravene recognized principles of international comity, but that affords no more basis for judicial disregard of it than it does for executive disregard of it.”^a
- ◆ [1957—textbook §7.3.B.1.] “Even though a court-martial does not give an accused trial by jury and other Bill of Rights protections, the Government

contends that article 2(11) of UCMJ, insofar as it provides for the military trial of dependents accompanying the armed forces in Great Britain and Japan, can be sustained as legislation which is necessary and proper to carry out the United States' obligations under the international agreements made with those countries. The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.

Article VI, the Supremacy Clause of the Constitution, declares:

‘This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land...’

There is nothing in this language which intimates that treaties ... do not have to comply with the provisions of the Constitution.^b

- ◆ [2005—textbook §1.2.B.4.] Though the views of our own citizens are essentially irrelevant to the Court’s decision today, the views of other countries and the so-called international community take center stage.

...

More fundamentally, however, the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.

...

[T]he Court undertakes the majestic task of determining (and thereby prescribing) *our* Nation’s *current* standards of decency. It is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War—and with increasing speed since the United Kingdom’s recent submission to the jurisprudence of European courts dominated by continental jurists—a legal, political, and social culture quite different from our own.

...

Foreign sources are cited today, *not* to underscore our “fidelity” to the Constitution, our “pride in its origins,” and “our own [American] heritage.” To the contrary, they are cited *to set aside* the centuries-old American practice—a practice still engaged in by a large majority of the relevant States—of letting a jury of 12 citizens decide whether, in the particular case, youth should be the basis for withholding the death penalty. What these foreign sources “affirm,” rather than repudiate, is the Justices’ own notion of how the world ought to be, and their diktat that it

shall be so henceforth in America. The Court’s parting attempt to downplay the significance of its extensive discussion of foreign law is unconvincing. “Acknowledgment” of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court’s judgment*—which is surely what it parades as today.

...

However sound philosophically, this is no way to run a legal system.... The result will be to crown arbitrariness with chaos.^c

- ◆ [2008—textbook §5.3.C.3.] “Counts two and three of Arar’s complaint allege that defendants violated Arar’s rights under the substantive due process component of the Fifth Amendment by removing him to Syria with the knowledge or intention that he would be detained and tortured there. Count four of Arar’s complaint alleges that defendants violated Arar’s rights to substantive and procedural due process under the Fifth Amendment by mistreating him while he was detained in the United States.”

...

The Supreme Court has observed on numerous occasions that determinations relating to national security fall within “an area of executive action in which courts have long been hesitant to intrude.” ... At its core, this suit arises from the Executive Branch’s alleged determination that (a) Arar was affiliated with Al Qaeda, and therefore a threat to national security, and (b) his removal to Syria was appropriate in light of U.S. diplomatic and national security interests. There can be no doubt that for Arar’s claims to proceed, he must probe deeply into the inner workings of the national security apparatus of at least three foreign countries, as well as that of the United States.... For its part, the United States, as noted above, has invoked the state-secrets privilege in response to Arar’s allegations.

... [T]he effective functioning of U.S. foreign policy would be affected, if not undermined. For, to the extent that the fair and impartial adjudication of Arar’s suit requires the federal courts to consider and evaluate the implementation of the foreign and national security policies of the United States and at least three foreign powers, the ability of the federal

government to speak with one voice to its overseas counterparts is diminished, and the coherence and vitality of U.S. foreign policy is called into question.

...

There can be no doubt that litigation of this sort would interfere with the management of our country's relations with foreign powers and affect our government's ability to ensure national security.

...

Arar alleges that, while in the United States, he was subjected to "coercive and involuntary custodial interrogations conducted for excessively long periods of time and at odd hours of the day and night" on three occasions over twelve days; deprived of sleep and food on his first day of detention; and, thereafter, was "held in solitary confinement, chained and shackled, [and] subjected to [an] invasive strip-search." These allegations, while describing what might perhaps constitute relatively harsh conditions of detention, do not amount to a claim of gross physical abuse.... For this reason, we conclude that Arar has not adequately alleged that the conditions of his confinement violated his Fifth Amendment substantive due process rights under the "*gross physical abuse*" approach of the Fifth Circuit and Eleventh Circuit (*italics added*).^d

- ◆ [2008—textbook §2.7.C.2. (*Avena*) & §7.2.B.4. (*Medellin*)] "... [S]ubsequent to the ICJ's judgment in *Avena*, the United States gave notice of withdrawal

from the Optional Protocol to the Vienna Convention. Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations.

...

No one disputes that the *Avena* decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an *international* law obligation on the part of the United States. But not all international law obligations automatically constitute binding federal law enforceable in United States courts. The question we confront here is whether the *Avena* judgment has automatic *domestic* legal effect such that the judgment of its own force applies in state and federal courts.

This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law.... In sum, while treaties 'may comprise international commitments ... they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms.'"^e

^a *The Over the Top*, 5 F.2d 838, 842 (D.C. Conn. 1925).

^b *Reid v. Covert*, 354 U.S. 1, 16.

^c *Roper v. Simmons*, 543 U.S. 551, 622–630 (2005) (Scalia dissenting, joined by the Chief Justice and Justice Thomas.).

^d *Arar v. Ashcroft*, 532 Fed.Rptr.3d 157, 163–189 (2nd Cir 2008).

^e *Medellin v. Texas*, 128 S.Ct. 1346, 1354–1356 (2008).

◆ PROBLEMS

Problem 8.A (after *South African Amnesty* §8.1.B.1. materials): Review paragraph [8] which quotes §22 of the South African Constitution & paragraph [25] regarding the Geneva Conventions. Lawyers for the plaintiffs attacked both the constitutional and legislative amnesty provisions. They argued that this approach deprived apartheid victims of any effective recourse for the gross human rights violations perpetrated by the

government during the apartheid era. In Justice Mohamed's words in paragraph [2], however, South Africa needed to "close the book on that past."

In September 2009, South Africa acquiesced in the litigation door remaining ajar. It withdrew its opposition to human rights lawsuits filed in New York under the US Alien Tort Statute [textbook §10.6.C.]. South Africa's Minister of Justice now considers the US to be an "appropriate forum" to hear claims not resolved by the Truth Commission process.

Two students or groups will debate whether the court thus rendered South Africa's majority population its last blow, by ruling that amnesty was the best path for placing the nation on the correct path to healing its wounds. Would governmental reparations have made more sense? Be practical? Would the Parliament's ethnic composition (not stated in the case) be relevant to the moral validity of South Africa's truth-commission-limited amnesty legal regime?

Problem 8.B (§8.1.B.1 after *South African Amnesty case*): In August 2008, a South Korean commission finished its three-year investigation of claims that both Korean and US troops perpetrated wartime atrocities during the 1950–1953 Korean War. The US military's own wartime investigation determined that the US actions were “amply justified.”¹⁶⁹

Recall the Chapter 5.3.C.3 extraordinary rendition materials. Assume that your State X Congress is about to consider proposed legislation. It is tentatively entitled the “State X Rendition Truth and Reconciliation Act.” Its provisions, should you adopt them, would grant full or partial amnesty to State X's current and former government officials and agents involved in these renditions. All of these government employees rendered individuals to other countries to be interrogated. Then, there was no legislative or judicial oversight of these renditions. Both State X and foreign nationals were rendered from either State X territory or X-controlled military bases abroad to other States—known for their harsh methods of interrogating detainees.

Assume, for purposes of this exercise, that the legislation you are about to vote on will very likely be constitutional under State X law—as determined by South Africa's Constitutional Court when it assessed that country's post-apartheid Truth and Reconciliation Act. This means that you will have the last word on what remedy would be appropriate for rendered individuals who were thus tortured in violation of the UN Convention against Torture [§9.7.B.3(e)]. Some of the constituents in your voting district are observing your legislative debate on this issue.

Several students or groups will debate the following:

- (1) Should this hypothetical legislation grant amnesty:
 - (a) based on the South African model; or (b) some different approach?
- (2) Should amnesty be granted in some, but not all of the above categories? In any of these categories?

- (3) Would this legislation be beneficial, or dreadful, for those who were victimized by extraordinary renditions from State X to torturing nations?

Problem 8.C (after §8.4.C.3(d) *Norwegian Loans case*): The International Court of Justice (ICJ) *Reservations to the Convention on Genocide* opinion is set forth in §7.2.A.4. The Court therein held that a reservation must be “compatible” with the underlying purposes of the treaty. In *Norwegian Loans*, France's reservation provided that France would decide if the ICJ has jurisdiction—over cases which France could characterize as falling within its domestic jurisdiction. Under the ICJ Statute, the ICJ decides whether it has the power to hear such cases. Is France's reservation compatible with the underlying purpose of the ICJ Statute (which is a treaty)?

Problem 8.D (after ICJ Statute §8.4.C.): Two groups of students will meet separately to draft their versions of a new or revised “World Court Statute.” Each group must draft clauses defining the court's power to act. These clauses will address whether the UN membership should do any of the following:

1. automatically be parties to this new or revised World Court Statute;
2. have the option to accept the court's “compulsory” jurisdiction:
 - a. without any possible reservation or
 - b. with reservations;
3. If 2(b) is permitted, should the new draft Statute authorize conditional acceptances to ensure wider participation in the new “World Court Statute”?

Problem 8.E (after §8.4.E.3. *Palestinian Wall* advisory opinion): The ICJ possesses advisory jurisdiction to hear a case referred to it by a UN organ such as the General Assembly. The US dissenter Judge Buergenthal claimed that the ICJ should never have exercised its advisory jurisdiction to even consider the *Palestinian Wall* case [see §6.2.A.1(b)(i) segment of the case, on the Chapter 6 Course Web Page].

Consider the following questions:

- (1) what was the gist of his §9.6 dissenting opinion;
- (2) do you agree; and

- (3) did he appear to dissent based on his belief that Israel should be permitted to protect itself against suicide bombings originating from the West Bank?

Four students will assume the roles of:

- (a) Judge Buerghenthal;
- (b) pro and con debaters regarding the soundness of his dissent; and
- (c) a potential critic, who will assess whether this judge's US citizenship may have affected his lone dissenting vote.

Problem 8.F (§8.5.C.1., after ICTY *Tadic* Case): Defendant Tadic was sentenced to twenty years in prison after his killings, sexual assaults, torture, and related conduct. The possible sentences for his various crimes added up to a total of ninety-seven years. The court opted to minimize his sentence by having the respective sentences served concurrently. He was not given the ultimate sentence possible: life in prison.

Neither the ICTY nor the Rwandan tribunal has the power to sentence a convicted war criminal to death. One reason is the growing sentiment that the death penalty violates International Law. A Protocol to the International Covenant on Civil and Political Rights prohibits the death penalty in member nations [§10.2.3(b)]. The tribunal remarked that Tadic was a lower level functionary, operating out of a deep hatred spawned by a party and governmental campaign of terror which many individuals carried out—while only a few were captured and prosecuted.

In February 2006, the ICTY rendered a comparatively light sentence for Nasr Oric. He is the former Muslim police officer who commanded troops tasked with defending the Muslim villages in the vicinity of Srebrenica, Bosnia. That is where 7,800 Muslim men and boys were exterminated over a three-day period [International Court of Justice *Srebrenica* case in §10.1.B.2.]. He received a two-year sentence. He was released, having already served that time during his three-year trial. (He had been imprisoned for failing to prevent the murder and torture of supposedly thousands of Serb captives.)

Should the ICTY have sentenced Tadic to life in prison? Would a “life” sentence be more than the minimum necessary to send a message that war criminals can no longer undertake such acts with the impunity that so many of them have savored since Nuremberg?

Would “life” have suggested that the judges were unnecessarily flexing their judicial muscles in an effort to make an example of this lower level criminal? Alternatively, was the tribunal too lenient because it sentenced Tadic to only twenty years of the possible ninety-seven-year sentence? In November 2008, Tadic was released. Was his sentence fairly comparable with that of the Muslim commander Oric? Could the tribunal justify apparently treating these Srebrenica-area defendants differently?

At trial, the prosecutor did not object to Tadic serving *concurrent* twenty-year sentences. In November 2008, Tadic was released. He had already served two-thirds of his sentence. Release was thus a common ICTY approach for such sentences. Further, he was a lower level functionary.

Assume that Tadic has just been convicted, but not yet sentenced. Two students will represent, respectively, the ICTY prosecutor's office and Tadic's defense counsel. They are conducting a “rehearing” in the mock penalty phase of this trial. They will debate these (and any related) factors which should impact the length of Tadic's sentence.

◆ FURTHER READING & RESEARCH

See Course Web Page, at: <<http://home.att.net/~sломansonb/txtcsesite.html>>, click Chapter Eight.

◆ ENDNOTES

1. *Quote (1)*: UN Charter Art. 33.1 (1945). *Quote (2)*: UN Gen. Ass. Res. 2625(XXV) (1970).
2. C. Chinkin, Alternative Dispute Resolution under International Law, ch. 7, in M. Evans (ed.), *REMEDIES IN INTERNATIONAL LAW: THE INSTITUTIONAL DILEMMA* 123–124 (Oxford, Eng: Hart, 1998).
3. The Truth about Dictatorship, New York Review of Books, NEW YORK TIMES, at 36 (Feb. 19, Oxford, Eng: Hart, 1998).
4. International Center for Transitional Justice, Mission and History, at: <<http://www.ictj.org/en/about/mission>>.
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CHAPTER NINE

Use of Force

CHAPTER OUTLINE

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Problems

Endnotes

“It seems to me ... it would be absurd to say you couldn’t ... stick something under the fingernail, smack him in the face. It would be absurd to say you couldn’t do that.

...

I suppose it’s the same thing about so-called torture. Is it really so easy to determine that smacking someone in the face to find out where he has hidden the bomb that is about to blow up Los Angeles is prohibited by the Constitution?

...

How close does the threat have to be? And how severe can the infliction of pain be? I don’t think these are easy questions at all, in either direction.

...

Europeans get really quite self-righteous, you know, (saying) ‘no civilized society uses it.’ They used it themselves—30 years ago. We don’t pretend

to be Western mullahs who decide what is right and wrong for the whole world.”

—U.S. Supreme Court Justice Antonin Scalia, “So-Called Torture” OK: High Court Judge Tells BBC That Interrogators Can Inflict Pain To Thwart Imminent Terror Threat, BBC NEWS (Feb. 13, 2008), at: <<http://www.cbsnews.com/stories/2008/02/13/world/main3824162.shtml>>. See §9.7.D. below, on Torture Redefined.

INTRODUCTION

This chapter focuses on the many faces of “force”; when it may be legitimately invoked; and its capacity to disrupt international relations. It thus addresses some of the most sensitive issues arising under International Law. You will consider and reconsider both polar and insular views about the correct application of the most basic tenets of human interaction. Our existence depends on several essential ingredients: food, water, shelter, and social organization. All of these are brutally disrupted when subjected to the scourge of war—in all of its varied forms.

◆ §9.1 DEFINING “FORCE”

A. WHAT IS FORCE?

States, international organizations, and commentators have embraced and vilified the use of force in a variety of circumstances.¹ Of course, leaving it undefined yields the flexibility most sovereign entities actually desire. States can then decide the appropriate circumstances that “necessitate” their use of force, on a case-by-case basis, and how to use it. Recall your Chapter 1 reading on “just” and “unjust” wars, regarding which there was no uniform definition or consensus [§1.1.E.3(a)].

The UN Charter, for example, was sired as a means of avoiding World War III. As its fundamental provision—the noble and unassailable Article 2.4—provides: “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....” While the word “force” is mentioned, it is nowhere defined in the Charter. Under Chapter VII of the Charter, the Security Council is supposed to determine how to use force in

controlling a State’s “act of aggression” (aka *force*) which threatens international stability. Per Article 11.1, the General Assembly “may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments....”

This world association of States resolved to subsequently fill the Charter’s definitional gaps with several major resolutions regarding the use of force.

1. Friendly Relations Declarations In the first of two related resolutions, the UN General Assembly broadly defined the term “force” in its Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (1970).² This comparatively lengthy Declaration contains provisions drawn from a variety of interim UN documents regarding the use of force. The purpose of the 1970 Declaration was to collate them and to affirm what States should be willing to accept as a post-Charter norm.

The 1970 Declaration “recalls” the duty of States to refrain from military, political, economic, or any other form of coercion directed at the political independence or territorial integrity of another State. It specifies that such “a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.” This Declaration provides that a State may not use “propaganda,” “terror,” or “finance” to coerce another State into acting in a particular way.

The 1970 Declaration was not the product of a negotiated process. The UN membership did not exchange concessions to produce a binding agreement. It was a statement in principle, containing common sense provisions that arguably belabored the obvious. The final paragraph, for example, provides that the “principles of the Charter [that] are embodied in this Declaration constitute basic principles of international law, and consequently [it] appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles.”

In 1987, the General Assembly approved a similar declaration. It augmented the earlier declaration. This was the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations. This ensuing attempt to

more clearly define aggression was the product of ten years of committee work. Like the UN's 1970 Declaration on Friendly Relations, the General Assembly ultimately adopted the 1987 UN Declaration without a vote.³

The 1987 Declaration contains some general clarifications. States must:

- ◆ refrain from “organizing, instigating, or assisting or participating in paramilitary, terrorist or subversive acts, including acts of mercenaries, in other States”;
- ◆ abstain from threats against the economic elements of another State; and
- ◆ avoid “economic, political or any other type of measures to coerce another State” for the purpose of securing advantages of any kind.

There are two significant similarities in these UN Declarations. First, they broadened the Charter rule prohibiting force by expressly prohibiting particular uses of

force, which were not mentioned in the 1945 Charter. Second, they share the same infirmity. The national members of the General Assembly did not include concrete measures to enforce the principles they purported to add to the UN's trilogy of basic articles on force [textbook §9.2.A.]. These declarations are arguably just that: declarations—as opposed to multilateral treaties with specific obligations. On the other hand, they do serve as indicators of what conduct States deem to be, in principle, included within the Charter's prohibition on the use of force.

2. “Aggression” The General Assembly's interim 1974 definition of the term “aggression” came as no surprise. It stated the obvious and thus meant different things to different people. UN General Assembly Resolution 3314, like the Assembly's 1970 and 1987 declarations, was also adopted without a vote. There was no debate as to specific applications:

Definition of Aggression

UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 3314 (XXIX) (1974)
<<http://www.un.org/documents/ga/res/29/ares29.htm>>

Article 1

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

Article 2

The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

Article 3

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Article 4

The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

...

Article 6

Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.

Article 7

Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

Article 8

In their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions.

There are of course many questions about how to apply this definition to specific cases:

- ◆ Article 1 prohibits “the use of armed force by a State,” for example, against the sovereignty of another State. Should that include a nation clandestinely funding the Al-Qaida terrorist organization?
- ◆ Does Article 3(a) mean that the US pursuit of Taliban and Al-Qaida members in Afghanistan in response to 9–11 was an act of aggression? And the 2008 US pursuit of Taliban militants into Pakistan? The discussion below regarding UN Charter Article 51 may help you resolve these questions. Should it matter that, unlike the Iraq War, few States objected to the US invasion of Afghanistan in its pursuit of those responsible for 9–11?
- ◆ Would Article 3(b) mean that the 1999 North Atlantic Treaty Organization (NATO) nation bombing of Serbia and its former Kosovo province—to prevent ethnic cleansing—constituted an “act of aggression”?
- ◆ Does Article 3(g) mean that paramilitary groups sent into South Africa—by surrounding African nations during the Apartheid era—rendered the sending nations guilty of “acts of aggression” within the meaning of this General Assembly resolution?

- ◆ Does the Article 7 preservation of the rights to “self-determination, freedom and independence” mean that Palestinian suicide bombers are subjecting the Palestinian Authority to prosecution for the “crime of aggression”?

As poignantly articulated by the Geneva Center for Applied Studies in International Negotiations scholar Oscar Solera:

The analysis of past attempts to define aggression underscores that failures are partly rooted in the strong focus on establishing the outer limits of a definition of aggression, instead of concentrating on its essence. Previous definitional processes have tried to describe the species in order to ascertain the genus.... Catalogue definitions, such as the one contained in General Assembly Resolution 3314, contain the risk that new warfare techniques or new forms of aggression would be excluded of [from] the definition, because no list of acts can be sufficiently comprehensive to foresee future developments.⁴

To overcome the inertia associated with States not wishing to actually define “aggression,” the UN’s

International Law Commission successfully recommended to the General Assembly that it rename this work product. In 1987, it acquired the new moniker of “Draft Code of Crimes against the Peace and Security

of Mankind.” The 1996 final text provides as follows. Note the shift in emphasis from direct State responsibility to individual responsibility of the offending State’s commanders:

Draft Code of Crimes against the Peace and Security of Mankind

<http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf>

PART ONE

GENERAL PROVISIONS

Article 1—*Scope and application of the present Code*

1. The present Code applies to the crimes against the peace and security of mankind set out in part two.

2. Crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law.

PART TWO

CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

Article 16—*Crime of aggression*

An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.

[*The remaining crimes are those generally set forth in the International Criminal Court Statute, textbook §8.5.D.*]

Perhaps the most intriguing contemporary question is the meaning of “Crime of Aggression” under the Rome Statute that constituted the International Criminal Court (ICC) in The Hague. The ICC Prosecutor may charge and has now charged individual defendants with the three defined crimes: War Crimes, Crimes Against Humanity, and Genocide. He or she will remain unable to charge anyone with the fourth category of crime mentioned in the 1998 ICC treaty: Crimes of Aggression. This term was mentioned in the ICC’s Statute; but it is moribund at best. States have failed to enter into or conclude the once anticipated treaty-based definition of “aggression” for eighty years [textbook §8.5.D.2.]. If the primary actors in International Law cannot agree on a definition of “aggression” for *individual* criminals, it is no surprise that they cannot agree on a shopping list of State-specific responsibility for aggression.

But the above UN resolutions on Friendly Relations and Aggression—adopted without a vote and thus with no debate—may be likened to the US Supreme Court’s attempted definitions of “obscenity.” One has difficulty defining the term; yet, all claim to know it when they see it.⁵ You will recall from your study of Chapter 2 on States that express State consent is necessary to create binding obligations. A multilateral treaty would be the

best evidence of such obligations. An international organization’s resolution is *not* the equivalent.

Pursuant to your study of Chapter 3 on organizations, a resolution is at least a nonbinding statement of general principles that States *should* observe in their mutual relations. The Friendly Principles and Aggression declarations provide guidance about the direction in which International Law points. Beware of those who characterize such resolutions as actually defining the specific content of International Law—as well as those who deny their suitability for any purpose.

The treaty on the International Criminal Court (ICC) [textbook §8.5.D.] did nothing to aid the progressive development of the law on this point. It does provide definitions for three of the four chargeable crimes: genocide, crimes against humanity, and war crimes. The fourth category of chargeable crimes in the ICC Statute, set forth in its Article 5.1(d), is “The crime of aggression.” However, the ICC treaty did not define “aggression.” As you learned in Chapter 8, one can expect many compromises in a multilateral treaty whose participants hope to include as many participants as possible. Instead, the 1998 conference delegates added Article 5.2: “The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted ... defining the crime and setting out the conditions under

which the Court shall exercise jurisdiction with respect to this crime.”⁶

This compromise had the advantage of retaining the prospect of future definitional negotiations, presumably at the Article 123 seven-year review of this treaty (2009). The disadvantage was the continuing lack of a negotiated agreement within the international community on the elements of this arguably theoretical crime. As articulately concluded by the Legal Advisor to the Egyptian Delegation to the UN, this compromise “was not without a price; it resulted in a main defect in the Statute ... [which] does not contain a readily applicable provision on aggression which, according to the whole international community, represented by the General Assembly, is ‘the gravest of all crimes against peace and security throughout the world’, without the punishment of which the ICC would not really become the ultimate long awaited [vessel for applying] international criminal jurisdiction.”⁷

B. VARIABLES AFFECTING LEGITIMACY

1. Economic and Political Force States compete with one another, employing various forms of economic and political force. There is often a fine line between economic competition and aggression. The Arab boycott of Israel classically illustrates economic intimidation designed to drive a State out of existence. Just after the establishment of the State of Israel, members of the Arab League unanimously planned the economic collapse of Israel as follows: a primary boycott of Israeli goods sold in the international marketplace; a secondary boycott, whereby Arab States discouraged other States from trading with Israel; and a tertiary boycott, whereby other States which traded with Israel were blacklisted from obtaining international contracts of any kind with the boycott’s overseers [§9.1.C.2.].

In 1979, US President Carter ordered a freeze on the transferability of billions of dollars worth of Iranian assets, found in the US or controlled by US entities, in response to Iran’s seizure of US diplomats. Freezing Iran’s vast financial assets in the US ultimately played a significant role in the resolution of this diplomatic conflict [§2.7.E.]. The December 2007 Sudan Accountability and Divestment Act involved a similar effort by the US Congress. It employed this sanction to permit state and local governments to divest from—and prohibit investment in—all Sudanese business operations. Contractors working for the US Government must certify that they are in

compliance. The Securities and Exchange Commission mandates related investment disclosures.⁸

Collectively imposed sanctions often bring more “force” to bear than State-sponsored sanctions. The breakdown of South African apartheid, for example, was to a significant degree facilitated by UN-imposed sanctions. These were leveled against South Africa because of its official policy of separating the races at all levels of society. The UN directed its member States to boycott South African goods and investments. The long-term effects of this economic deprivation were partially responsible for that government’s decision to abandon apartheid in order to avoid the adverse long-term effects of this external economic pressure. Unlike the Arab boycott of Israel, these economic sanctions were not designed to drive South Africa out of existence, but rather to end its official policy of racial discrimination.

One must acknowledge, however, that multi-nationally imposed economic sanctions are another form of force. Such sanctions are presumably far less forceful than military alternatives. That is not always the case. In his revealing study, former Iraqi Ambassador to the US and the United Kingdom Amir Al-Anbari points out that:

Economic sanctions are generally conceived as peaceful measures preferable to the use of force. In reality, however, economic sanctions are by no means peaceful and quite often are deadlier and more destructive than military action.

...

Consequently, economic sanctions imposed [by the UN] on states or governments degenerate into a collective punishment of the people. It is almost a cliché to hear that the suffering of the civilians particularly children and women is a collateral or unintended side effect. Be that as it may, when the main victim of the sanction is the civilian population then the sanctions have to be terminated or modified ... to ensure the safety and human rights of the civilian population. Under the present Charter there is no such requirement.⁹

2. Aggressive versus Defensive Force The actor’s posture—aggressor or a victim with no choice—is a significant factor in determining whether the use of force is acceptable or not. As acknowledged in this section’s materials on self-defense, this distinction is often rather ambiguous. The underlying question is whether the

particular use of force resembles a sword more than a shield.

3. State or Organizational Actor One distinction focuses on whether the State actor is undertaking *unilateral* action or acting at the directive of an international organization attempting to restore peace.

A classic illustration of a unilateral use/threat of force arose in 1998, when the US engaged in two, proximate military buildups in the Persian Gulf. Iraq had consistently thwarted UN efforts to conduct inspections in search of weapons of mass destruction. In 1991, UN Security Council Resolution 678 authorized the use of “all necessary force” to eject Iraq from Kuwait. Seven years later, however, it was not clear that the US could continue to rely on an aging Council resolution to use additional force against Iraq. In the absence of a fresh resolution, the UN Secretary-General advised the US that a new one would be necessary for the US employment of forceful measures in the latter scenario.

Three Security Council members (France, the PRC, and Russia) objected to the US assertion of virtually *carte blanche* authority to invade Iraq. The US was not defending Kuwait’s sovereignty in 1998. There was no longer a widely accepted Arab coalition, which favored multilateral action against Iraq. The US nevertheless responded that it retained the authority to use force. That was because Iraq had failed to comply with UN weapons-inspection mandates after the PGW. The US thus asserted that it did not need *fresh* Council authority to attack Iraq. However, other nations countered that a US attack would have constituted an *aggressive* use of force in violation of UN Charter principles.¹⁰

For PGW II (commencing March 2003), the US was unable to secure a UN resolution backing its intended use of force. In September 2004, after eighteen months of expressing reservations, the Secretary-General announced that the Iraq War was illegal. It was the other post-attack events, however, that trimmed back international support for the US and Coalition presence in Iraq. These events included the:

- ◆ Withdrawal of certain Coalition nations such as Spain when the 2004 Madrid metro bombings effectively unelected the previously pro-war government;
- ◆ Leaking of the previously secret March 2003 Downing Street memo wherein: (a) Great Britain’s Attorney General advised the Prime Minister before the

war started regarding the illegality of launching an Iraq War; (b) that the White House viewed military action against Saddam Hussein as inevitable since 9–11; and (c) that “the intelligence and facts were being fixed around the policy;”¹¹

- ◆ Failure to find any weapons of mass destruction;¹² and
- ◆ Swelling of foreign insurgents able to aid the insurrection—an estimated total strength of 200,000, as opposed to the US military’s 150,000 troops.

The following argument is offered as a basis for assessing whether the *organizational* use of force would have been legally and morally preferable to the US war in Iraq:



What Future for the UN Charter System of War Prevention?

RICHARD A. FALK

97 AMERICAN JOURNAL OF INTERNATIONAL LAW 590,
597 (2003)

Go to Course Web Page, at:

<<http://home.att.net/~sломansonb/txtcsesite.html>>.

Under Chapter Nine, click UN War Prevention.

4. Force against Non-State Actors The post-9–11 War on Terror posed the dilemma of how a State could go to war with an individual (bin Laden) or organization (Al-Qaida). Since the 1648 treaty establishing what we now think of as nation-States, the ensuing development of International Law contemplated the military use of force between sovereign nations. The Nazi atrocities of WWII sparked a new paradigm regarding individual accountability on the international level. As organizations flourished in the post-WWII era, individuals were also given access to the international playing field via their new-found abilities to petition for relief to entities such as the UN, European Union, and Inter-American Commission on Human Rights [§4.1.B.].

As the State adaptation of this new paradigm evolved, so did organizational sanctions. Individual terrorists and financial entities became the common subject of various UN and EU “smart” sanctions. These sanctions targeted individuals, rather than the nations wherein they operated [§9.2.B.1(a)]. States began to engage in cross-border hot pursuit of individuals

and groups. In August 2008, for example, Colombia pursued its insurgent nemesis F.A.R.C. (Revolutionary Armed Forces of Colombia) into Ecuador. Turkey recently pursued Kurdish rebels into Iraq. Israel targeted Hamas operatives in Gaza. The US pursued insurgents into Afghanistan and Pakistan.¹³

Such operations have often been cloaked with the imprimaturs of UN Charter Article 51 “self-defense” [textbook §9.2.D] and necessities in the War on Terror. But to be justified under International Law, the sixty-year⁺ default positions applicable to state and organizational actors [textbook §9.2.B.–E.] have *not* been altered by the global War on Terror:

- ◆ A State’s use of such force must not violate the Charter Article 2.4 prohibition against any use of force that violates another State’s territorial integrity.
- ◆ A State’s use of such force must not violate the Charter Article 51 self-defense provision.
- ◆ The UN (and other organizations) must not intervene in matters essentially within the domestic jurisdiction of any State.

C. SELECTED APPLICATIONS

Force has been applied when States are at war, on the brink of war, exchanging political or economic potshots, and when one adversary is unaware of the clandestine acts of the other. States have also invoked measures, short of war, which have had devastating effects on the target nation. The selected categories below—and their imprecise dividing lines—provide insight into the range of activities that qualify as “force.” They appear generally on an increasing scale of intensity:

1. Politics as Force The use of force has become a natural feature of many political struggles for achieving national objectives. The use of force can be necessary to achieve political power both internally and in international relations. China’s revolutionary leader from a recent generation in Chinese political thought, Mao Tse-Tung, viewed “politics as war without bloodshed and war as politics with bloodshed.”¹⁴ During and after his rise to power in 1949, Mao asserted that war would no longer be necessary after international communism eliminated the world’s social and economic classes. In the interim, aggressive military means were justified by the end.

The former Soviet Union championed a distinct communist articulation, purportedly designed to *avoid* the use of force. Prior to the Soviet demise, the use of force was

characterized as becoming obsolete as other nations embraced the principle of “peaceful coexistence,” which was enshrined in the Soviet Constitution. The basic premise was that two nations with opposing political and economic ideologies could nevertheless coexist in peace—if each was able to pursue distinct social, political, and economic goals during the global transition from capitalism to communism. Commentators often referred to this Soviet foreign policy with the West as “détente.” It necessitated tolerance of the Western capitalist system until it could be overcome by the fall of capitalism. Moscow State University Professor Grigori Tunkin explains it as follows:

The principle of peaceful coexistence of states with different social systems presupposes the existence of other major principles of international law, such as non-use of force or threat of force, respect for sovereignty and non-intervention in internal affairs. It reflects their substance in a general form even though it goes beyond these principles. The principle of peaceful coexistence prohibits policies that are directed at confrontation between states belonging to different social systems and requires that policies be directed at developing cooperation between them, in short, be policies of détente.

...

It follows that the principle of peaceful coexistence is directed against anti-communism in interstate relations. That is why it is so strongly disliked by reactionary circles of capitalist countries who assert that this principle does not exist in international law.¹⁵

Contemporary political science “realists” discount the accuracy of claims that history has ever produced binding limitations on the use of force. Their perspective is that international rules about force are meaningless in a crisis. There is no practical utility in the legal formulations that purport to justify, or limit, the national employment of force. Analyzing the legitimacy of aggressive conduct is, in reality, theoretical and unproductive. The role of law in international relations, in their view, is overstated. One supporting example is that States retained the inherent right to use force, notwithstanding the contemporary prohibition on the threat or use of force in Article 2.4 of the UN Charter. It is thus unrealistic to expect States to justify their conduct to anyone. Australian National University Professor D. W. Greig describes this view as follows:

The extent to which a state is entitled to use force in the conduct of its international relations raises a profusion and a confusion of politico-legal problems [that] are scarcely capable of analysis, let alone solution....

In no area is international law more vulnerable to the taunt that “*it really doesn’t work*” than in the context of the rules which are claimed to exist [about] prohibiting or restricting the use of force. The reason why this type of assertion is made is partly due to the fact that widespread publicity is given to instances of the use of force by states, while peaceful inaction or cooperation, that is, the normal situation in the relations of states, merits scarcely a mention in the news media. However, the making of such an assertion discloses a fundamental misunderstanding of the role of international law. It has already been demonstrated that legal principles are only allowed to be the sole determinants within a limited area (i.e. mainly within the jurisdictional competence of the International Court). The more important the issue, the less traceable it is to anything other than political compromise in which the part played by the legal rules is correspondingly limited. And if one assumes that states will only have recourse to force as a last resort when they consider their vital interests most gravely threatened or affected, the role of legal principle may well vanish altogether, even though the states concerned will often advance reasons which purport to establish the legality of their actions within the existing or supposed legal order.¹⁶

In practice, a number of States do not characterize force, or certain of its applications, as being inherently mischievous. For some, it is a natural instrument of foreign policy.¹⁷ Many nations have thus employed combinations of military action, threats, and economic coercion to achieve political objectives such as the multifaceted US reaction to the terrorist attacks in the US on September 11, 2001 [summary: §9.7.]. Most nations ostensibly characterize force as being “bad” in the abstract. It often becomes a “necessary evil” if not inherently “just” when such a critical national interest is at stake. One of the most difficult decisions a leader can make is whether to use force and the degree to which it is in the national interest. The US Congress, for example, has declared war only five times in the nation’s history. A major Brookings Institution (think tank) study revealed

that the US President was “called upon” to employ US forces 215 times between 1946 and 1975—and hundreds more, before then and after the Viet Nam War.¹⁸

The preceding summary yields only a small slice of the spectrum. Many shades of gray emerge when viewing this subject in depth—more so than with any other surface on the International Law canvas. The underlying concern is this: Will the international community effectively control national uses of aggressive force, now that sophisticated weaponry can consummate Armageddon?

2. Economic Coercion This application of force has many faces. A State that clandestinely finances a terrorist or terrorist group is effectively launching a countermeasure against the State where the terrorist strikes. Individuals like India’s Prime Minister Gandhi, Egypt’s President Sadat, and the prime ministers of Argentina and Italy were killed by terrorist acts allegedly financed by external sources. These leaders were punished for legitimate political conduct while in office through the clandestine support of other States. In a more contemporary context, fifteen of the nineteen 9-11 aircraft hijackers were Saudi Arabian nationals. If their activities were financed by their homeland or some other nation, this would be an extreme form of State-sponsored countermeasure against the US—and quite a stretch if done in the name of self-defense.

One of the most prominent examples is the nearing five-decade US economic embargo of Cuba.¹⁹ Many nations, including staunch US allies, nevertheless trade with Cuba. In fact, a number of them joined in the October 2005 demand that the US abide by the thirteen successive UN General Assembly resolutions calling on the US to end its Cuban embargo. (This embargo is presented in further detail in textbook §12.1.B.4.).

The most turbulent illustration of economic coercion is the Arab nation boycott of Israeli products, which began in 1954. For the next half-century, it would be a vivid reminder of how nonmilitary force can be used for the most sensitive of political purposes: to drive a nation out of existence. Members of the Council of the Arab League of Nations drafted and unanimously approved the 1954 Unified Law on the Boycott of Israel. The Council was composed of State representatives from each State in the League. The Council was established to promote cooperation through periodic meetings of the foreign ministers of each Arab State. The Arab States agreed to prohibit the purchase of Israeli exports when they approved the Unified Law as follows:

1. All persons within the enacting country [in the Arab League] are forbidden to conclude any agreement or transaction, directly or indirectly with any person or organization (i) situated in Israel; (ii) affiliated with Israel through nationality; or (iii) working for or on behalf of Israel, regardless of the place of business or residence; and
2. Importation into the enacting country [adopting this boycott] is forbidden of all Israeli goods, including goods manufactured elsewhere [outside of Israel] containing ingredients or components of Israeli origin or manufacture.

The 1968 Palestinian Charter affirmed the principal reason for the Arab boycott as follows:

The partition of Palestine in 1947 and the establishment of the state of Israel are entirely illegal, regardless of the passage of time, because they were contrary to the will of the Palestinian people and to their natural right in their homeland, and inconsistent with the principles embodied in the Charter of the United Nations, particularly the right to self-determination.

... Judaism, being a religion, is not an independent nationality. Nor do Jews constitute a single nation with an identity of its own; they are citizens of the states to which they belong.²⁰

In 1972, the Arab League announced a revision of the boycott law called the General Principles for the Boycott of Israel. This version retained the broad language of the original agreement and supplemented it by imposing three specific categories of prohibitions. A *primary* boycott barred Arab nations from exporting goods to and importing goods from Israel. A *secondary* boycott generally banned trade between League members and countries that trade with Israel. Israel's trading partners are thus placed on a blacklist that limits their ability to trade with nations in the Arab League.

A *tertiary* boycott further discouraged trade with Israel. League members could not deal with companies that did any business with blacklisted countries, such as a company which had contracted to supply buses to Saudi Arabia. When the Saudis learned that the seats were made by a firm located in a blacklisted country, they threatened to cancel the bus order. The bus

manufacturer then substituted seats made by a different firm that was *not* located in a blacklisted country. Only then did the Saudis consider the contract to be acceptable. The buses could thus be delivered to Saudi Arabia.²¹

The Arab League's Unified Law further prohibited trade with persons "affiliated with Israel through nationality." Some commentators asserted that this language was a euphemism for persons of the Jewish faith. If so, the Arab boycott applies to *all* Jewish-owned businesses, wherever they are located throughout the world. Some States, including the US, passed legislation to punish compliance with this boycott. League members rejected this characterization of the boycott as being overly inclusive.²²

The Arab boycott of Israel exhibited a comparatively hostile form of nonmilitary pressure. Travelers in the Middle East were not surprised to see lists at airport customs booths, listing Israeli-made goods or those from "offending" countries that dealt with Israel, thereby precluding travelers from bringing such goods to an Arab nation port of entry.

Several events impacted the solidarity once enjoyed by the twenty-one member States of the Arab League [§3.5.E.]. Egypt broke ranks with the League by its decision to even negotiate with Israel—incident to the 1979 "Camp David" agreements facilitated by US President Carter. A dozen years later, Kuwait no longer supported the Arab boycott of Israeli goods when the US rescued Kuwait from an Iraqi conquest. That particular war pitted various Arab League members against its own League member Iraq. The 1993 Washington Peace Accords between Palestine Liberation Organization Chairman Yasir Arafat and Israeli Prime Minister Yitzhak Rabin presented an important breakthrough for ending the Arab boycott of Israel, which had threatened international relations in the Middle East for more than four decades.

There was still work to be done to end this boycott. In 1997, US Defense Secretary William Cohen learned that the air force was excluding Jews from working for a private contractor on a US military base in Saudi Arabia. That predicament was spawned by lingering vestiges of the decades-old boycott. Given the US law that prohibits compliance with that discriminatory boycott, the Secretary ordered all US military installations to ensure strict compliance with the US antidiscrimination

law designed to counter the effects of the Boycott. In the 1998 Washington-brokered peace effort between Israel and the PLO, the PLO finally agreed to the removal of the language from the Palestinian National Charter that called for the dismantling of Israel.

In February 2006, a Dubai-based firm, owned by the United Arab Emirates (UAE), sought to take over the operation of six US ports. As a staff member of the Dubai Customs Department's Office for the Boycott of Israel confirmed: "Yes, of course the boycott is still in place and is still enforced. If a product contained even some components that were made in Israel, and you wanted to import it to Dubai, it would be a problem."²³ A Certificate of Origin is used by customs officers in countries enforcing the boycott. That practice confirms the country of origin and needs to be seen by the office which ensures any trade boycotts are enforced. The UAE's above-quoted customs official did not, however, expand his comments to include what the company would do if a US port—operated by this UAE company—were to import Israeli products.

Boycotts are, of course, not unique to the Middle East. Economic boycotts and embargos have been used by other countries as an alternative to military coercion. The US, for example, has participated in boycotts against Cuba, Iran, Nicaragua, North Korea, and Vietnam.²⁴ The UN has established its own boycotts. The international boycott of South Africa was based in part on UN resolutions that condemned apartheid.

In 1998, the UN passed General Assembly Resolution 53/10 on the Elimination of Coercive Economic Measures as a Means of Political and Economic Compulsion. It thus urged States not to unilaterally impose coercive economic measures. The underlying concern was the severe impact that such measures have on the economy and free trade of the State against whom they are directed. The Assembly therein called for the repeal of unilateral extraterritorial laws which impose such "sanctions on corporations and nationals of other States." It also called on States to cease applying or recognizing such unilateral measures.

Many nations have used economic sanctions to achieve political ends. There are reports about a grassroots effort in a number of Arab countries to boycott American goods as well. The primary impetus is the US support of Israel during its Spring 2002 offensive in the occupied Palestinian territories. The Al Montazah supermarket

chain in Bahrain, for example, is enforcing this boycott. It has replaced some 1,000 US-made products otherwise available to its estimated 10,000 daily customers. Syria had already barred US products for some time.²⁵

The withdrawal of economic aid resides on the obverse side of this political coin. In April 2006, for example, the US and the European Union jointly halted economic aid to Hamas—the political entity in charge of Gaza. Hamas failed to meet the donor demand to recognize Israel, renounce violence, and respect prior Israeli-Palestinian agreements.

3. Countermeasures The term countermeasure is a euphemism for *sanction*. Either term refers to a counter-action that responds to allegations of internationally wrongful conduct.

A *reprisal* is a prominent example from another era. It was a coercive measure typically involving a government-authorized seizure of property or persons in another country. It retaliated for a prior wrong to the initiating State or its citizens. While not uncommon during war, it was not authorized during times of peace. Unlike the 1789 US Constitution, the 1970 UN Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the UN explicitly prohibits acts of reprisal.²⁶

Reprisals could be public and private. Public reprisals were once confined to injuries sustained by the State itself. In the eighteenth century, however, governments began to authorize reprisals for injuries to their citizens caused by foreign governments. When the ship of an English Quaker was seized in French waters, for example, England's Lord Cromwell demanded redress from the French government. When he was ignored, he sent orders to English warships to seize the French vessels and goods. Private reprisals were executed by individuals, as opposed to State military forces. Individuals would petition their home States for the issuance of "letters of marque and reprisal." In times of peace, the carrier of such a letter would be authorized—within his or her home State—to seize property or citizens of the offending State under authority of the issuing State's letter.²⁷

Contemporary public reprisals are not as common as in the past, but nevertheless a negative feature of international relations. When US soldiers were killed in a Berlin discothèque in 1986, President Reagan dispatched

military aircraft to Tripoli with a view toward killing Libya's responsible leader [§2.7.B.4.]. Libya responded by bombing a Pan Am jet carrying 270 passengers—mostly British and US citizens [§8.5.C.2].

Sanctions also include the confiscation of goods or the freezing of assets—as when US President Carter froze Iranian bank accounts during the hostage crisis of 1979–1980. A countermeasure might be imposed for purely political reasons. A State might decide to withdraw or expel a diplomat because of some political rift in international relations with another country. Such countermeasures are typically launched by States on the basis of self-defense. While *legitimate* self-defense is a justification for the use of force, countermeasures undertaken for other purposes are not justifiable.²⁸

Countermeasures are of course constrained by the necessity or proportionality principles. In January 2007, the US launched at least two air strikes in southern Somalia—the first US operation since the botched 1994 mission where eighteen US soldiers were killed in Mogadishu (depicted in the movie *Black Hawk Down*). The US aircraft targeted several Islamist extremists. They were believed to be members of an Al-Qaida cell responsible for the 1998 bombings of the US embassies in Kenya and Tanzania [§2.7.E.1(b)]. Some twenty-seven non-combatant civilians were killed in this operation. Somalia's interim President backed this US action by his statement that: “[t]he US has a right to bombard terrorist suspects who attacked its embassies in Kenya and Tanzania.”²⁹

But it would be difficult to justify the necessity and possibly the proportionality (especially if 250 were killed, as claimed in other news reports). Put another way, would a reprisal for conduct occurring nine years ago be necessary? Would the death of maybe ten times the number of civilians to extremists be proportional? (Both limitations are analyzed in §9.2.C.1. below.)

4. Gunboat Diplomacy This moniker refers to a State's arguably threatening conduct, designed to intimidate another State. In the International Court of Justice 1949 *Corfu Channel* judgment, for example, Albania had contested the presence of foreign military vessels in the channel between Albania and the Greek Island of Corfu. A British warship hit a mine while navigating within those waters. The presence of British warships was a hostile act, which apparently provoked Albania to take mining countermeasures. Before the Viet Nam War, US

warships were continuously present off the coast of North Vietnam, as more US military advisors were being introduced into South Vietnam. The message to North Vietnam, sent by the mere presence of these vessels, was that the US was literally always on the horizon.

More recent examples of this form of force involve the Pre-Persian Gulf War tension between Iraq and the US. Iraq engaged in cat-and-mouse diplomacy with its 1994 military buildup in southern Iraq, near Kuwait's northern border. The US responded to this show of force by conducting military exercises in the immediate area. US warplanes then dropped bombs on Iraqi tanks abandoned in the Kuwait desert during the PGW. In March 1995, Iraq deployed some 6,000 troops and chemical weapons near the edge of the Persian Gulf. This buildup was apparently well beyond Iraq's reasonable defense requirements. It was apparently intended as a regional show of force. In 1998, two US military buildups, in and around the Persian Gulf, sent the message that the US was willing to launch a major military attack against Iraq. The message, occasioned by the presence of the US forces, was that Iraq must rescind its decision to thwart UN weapons inspectors from doing their job of monitoring Iraq's potential for producing weapons of mass destruction. Then in the months before the Iraq War began, President Bush threatened Saddam Hussein with a hostile reaction if Hussein did not permit access to inspect for weapons of mass destruction.

Iran's April 2006 version of brinksmanship/gunboat diplomacy was its war exercises in the Persian Gulf and Arabian Sea. It conducted several tests of its new high-speed Hoot torpedo. At 223 miles per hour, it can overrun any submarine or warship, regardless of the latter's evasive tactics. Iranian and US naval forces had engaged in minor skirmishes in the Gulf during the 1980–1988 war between Iran and Iraq (wherein the US supported Saddam Hussein's Iraq). US warships then operated in the Persian Gulf to protect transient oil tankers.

Not to be outdone, Israel conducted similar exercises in the Mediterranean Sea in June 2008. That event was undoubtedly undertaken to send a counter message to Iran: curb your nuclear weapons ambitions! The week before, the European Union named Iran's largest commercial bank, the head of Iran's elite military Red Guard unit, and the chief of Iran's nuclear weapons program as the targets of new economic sanctions imposed because of Iran's nuclear defiance. Iran predictably reacted by vowing to bomb Israel, if attacked, and to close off the

Straits of Hormuz—the narrow outlet for oil tankers leaving the Persian Gulf.

The US Navy had previously conducted such exercises in the Persian Gulf for several years. US President Bush denied that there was any “smoking gun,” the euphemism for launching a pre-emptive attack on Iran, which would suggest the need for a military response. He publicly proclaimed in 2006, and since then, that the US intended to pursue diplomatic options. However, press reports that a military option has been considered are enough to demonstrate the not so subtle impact of gunboat diplomacy in the Gulf.

In September 2008, the US and NATO also sent ships to the Black Sea. This alarmed Russia because of the number of ships deployed. The leader of Georgia’s breakaway province Abkhazia responded with an invitation to Russia to establish a base at its lone deep-sea port. Tensions escalated further when Ukraine’s president announced that Russia’s access to its Crimean deep-sea port at Sevastopol would be revoked when the Ukraine–Russia lease agreement expires in 2017. Under the relevant regional treaty, military ships from nations that do not border on the Black Sea cannot remain for more than three weeks. It also prohibits some warships, such as aircraft carriers, from passing through the two Straits which effectively connect the Black and Aegean (and Mediterranean) Seas.³⁰

In December 2007, the US deployed a noticeable increase in warships transiting the Taiwan Strait between the rival “Chinas.” This maneuver came on the heels of the mainland Chinese government’s refusing to let US warships dock in Hong Kong, some to escape bad weather. As to the Taiwan strait (100 miles wide at its narrowest point), it was unusual for an entire US aircraft carrier battle group to transit the Strait en masse.

5. “Brinksmanship” Non-violent force has been used in a variety of contexts which might be characterized as brinksmanship: lighting the fuse without actually firing—often referred to as “saber rattling.” Since the Korean War ended in 1953, both the US and North Korea have stationed tens of thousands of military troops and munitions at this potential flashpoint.³¹ When Iraqi Kurds stepped up their cross-border raids into Turkey in July 2007, Turkey amassed 140,000 troops on its border with Iraq. This concentration of military power illustrated Turkey’s resolve to invade Iraq, if necessary, to control the Kurdish militants.

In August 2008, the US solidified its plans to place a “defensive” missile shield system in the former Soviet nations of Poland (missiles) and the Czech Republic (radar) [NATO: §3.5.A.].³² Russian President Putin responded by threatening to aim missiles at Europe. Russia has not overtly targeted Europe since the fall of the Soviet Union. On the other hand, the close of the Cold War spawned the US promise that NATO would not move eastward.

In an act that would have led to a regional war (at least before the Cold War between the Soviet Union and the US), Israeli jets entered Syria in September 2007 (as done the year before). They provoked and fired upon Syrian air defenses. This incident escalated existing tension over their disputed frontier. The chosen path was inevitably linked to the potential for continuing on to Iran. Israel claims that Syria is clandestinely assisting Iran in a variety of ways that could spark another Middle East War.

6. Clandestine Support A State that is a third-party to a conflict should remain neutral [§2.3.A.] When it supports one of the warring parties, that State might (illegally) opt to provide military or financial support.

(a) Small Arms A June 2006 UN conference attempted to curtail this flow of weapons throughout the world—with knowledge that the UN Security Council’s “Permanent 5” are the most prominent suppliers.³³ An estimated 1,000 per day are killed because of this clandestine support of rebel groups. China, for example, is the main supplier of small arms to The Sudan (eighty-eight percent). As of 2006, the number of Sudanese small arms imports from China jumped 137 times from the 2001 level. One might argue that China has thus aided in the genocide that Sudan’s government has apparently perpetrated in its Darfur region [§10.1.B.].

The UN’s major Security Council members are not the only culprits. In November 2008, Iraqi Kurds acquired three plane loads of small arms and ammunition from Bulgaria. The Kurds seek autonomy from the Iraqi government and possibly independence at some point. Introducing weapons into that volatile military theater is only likely to add to Iraq’s contemporary problem with controlling violence within its borders.

The US expressed what was implicit in the policy objectives of the other four veto blocking States; its Undersecretary of State for Arms Control and International

Security Affairs reported to the UN General Assembly that the US would object to any steps to establish the international regulation of ammunition or ban governments from giving or selling arms to rebel groups of their choice. In his words: "While we will of course continue to oppose the acquisition of arms by terrorist groups, we recognize the rights of the oppressed to defend themselves against tyrannical and genocidal regimes and oppose a blanket ban on [such recipient] non-state actors."

The key provisions of the UN-sponsored small arms control program are as follows:



**United Nations Conference to
Review Progress Made in the
Implementation of the
Programme of Action to
Prevent, Combat and Eradicate
the Illicit Trade in Small Arms
and Light Weapons in All Its
Aspects**

U.N. Doc. A/CONF.192/2006/RC/WP.4

New York, 26 June–7 July 2006

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Nine, click Small Arms Programme.

(b) Suicide Missions The explosives used in suicide (and roadside Improvised Explosive Device "I.E.D.") bombings are not grown on local farms. They are typically imported from clandestine sources, including sympathetic nations and rulers. Iraq's Saddam Hussein offered the equivalent of \$25,000 to the families of "successful" Palestinian suicide bombers. The above small arms discussion suggests other sources in terms of both large and small powers seeking to disrupt some perceived inequity.

One might, instead, focus on the *cause* of such action rather than just the *result* (unlike the traditionally narrow law school course on National Security, or text on Public International Law). The latter dominates news headlines all over the world. The former is often relegated to only a footnote. As classically articulated by Columbia University Political Science Professor Jon Elster:

The most relevant feature of the populations from which suicide bombers are drawn, a least in the Middle East and Sri Lanka, seems to be permanent feelings of *inferiority* and *resentment*, the former emotion being based on a comparison and the latter on interaction. On the participants in the 9/11 mission, conjecture was that they were motivated by the "bruising loss of status and prestige" they experience when transplanted to the West European context. Their destructive urge ... was "intensified by envy of America's prosperity and power." Most writers on the Palestinian suicide bombers emphasize the intense resentment caused by the daily humiliations that occur in interactions with Israeli forces. Beyond the degrading checks and controls to which the Palestinians are subject, there is also their awareness that many Israelis think all Arabs are "lazy, cowardly, and cruel," as a Jerusalem taxi driver said to me almost twenty years ago. This deep-seated and widespread stereotype has ancient roots. For the Palestinians, the perception that Israelis view them at the bottom of the social hierarchy must be doubly unsettling since under Ottoman rule the Jews were at the bottom of the social hierarchy.³⁴

7. Low-intensity Conflict This point on the use of force spectrum lies between the categories of all-out war and small-scale hostilities. Low-intensity conflicts continued to surface with increasing frequency in the aftermath of the Cold War. The post-1945 Soviet objective of worldwide communism and the alleged US exaggeration of the Soviet threat (so as to manipulate US allies) are no longer factors in the suppression of low-intensity conflict.³⁵

The word "war" conjures visions of the two world wars of the twentieth century and the more contemporary PGW (1991) in which two-dozen States joined in the fight to liberate the oil-rich sheikhdom of Kuwait from Iraq. But there have been hundreds, if not thousands, of conflicts of a lesser magnitude wherein death and destruction have been just as exacting for the affected individuals. Residents of Somalia, for example, would hardly consider that 1993 conflict as being anything less intense than a large geopolitical conflict like World War II. An event like 9-11 can ignite, then fuel, external military and political sparks to fan the flames of war beyond the flashpoint. The Russian-Georgian conflict evolved into open warfare

in August 2008. But it was preceded by a lengthy period of simmering skirmishes. They dated from South Ossetia's unrecognized declaration of independence in 1992, after which Russia began to distribute its passports to this predominantly ethnic Russian enclave within Georgia.

The US military definition of low-intensity conflict provides useful insight into the conduct of contemporary foreign affairs: "Low-intensity conflict is a politico-military confrontation between competing states or groups below conventional war and above the routine, peaceful competition among states. It frequently involves protracted struggles of competing principles and ideologies. Low-intensity conflict ranges from subversion, such as training and paying paramilitary rebels, to the use of armed force. It is waged by a combination of means, employing political, economic, informational, and military instruments. Low-intensity conflicts are often localized, generally in the Third World, but contain regional and global security implications."³⁶ Examples include: interventions like the 1994 US military operation in Haiti to restore democracy; border wars between Third World countries; and wars involving national liberation fronts, such as the mid-1980s US support of the Contras—who sought to topple Nicaragua's Sandinista government [§9.2.C.2. *Nicaragua Case*].

An analysis in a US Government Printing Office publication reported the findings of the Commission on Integrated Long-Term Strategy. While it was prepared (just) before the collapse of the Soviet Union, this analysis still suggests the continuing stake in low-intensity conflict and its implications for US national security:

To help protect US interests and allies in the Third World we still need more of a national consensus on both means and ends. Our means should include:

- ◆ Security assistance at a higher level and with fewer legislative restrictions....
- ◆ Versatile mobile forces, minimally dependent on overseas bases that can deliver precisely controlled strikes against military targets.
- ◆ In special cases, US assistance to ... insurgents who are resisting a hostile regime that threatens its neighbors. The free world will not remain free if its options are only to stand still and retreat.³⁷

8. War

(a) *Traditional Perception* This ultimate use of force was not condemned in ancient Greece or Rome. On the other hand, Aristotle wrote that it was regarded as the antithesis of happiness and leisure: "We make war in order that we may live at peace.... Nobody chooses to make war or provokes it for the sake of making war; a man would be regarded as a bloodthirsty monster if he made ... [friendly nations] into enemies in order to bring about battles and slaughter."³⁸

War appeared to be a necessary evil in the nation-State system spawned by the 1648 Peace of Westphalia. The cornerstone, State sovereignty, demanded territorial protection. Breaches meant war, which had to be waged to protect even barren hinterlands from foreign occupation or trespass. Yale University Professor Michael Reisman penned a valuable insight in his provocative essay on a global system that continues to promote war:

The rhetoric of peace is more than neutralized by the symmetrical prominence of the military in competing governments. The manifest drive is for security, in a system which is structured for insecurity.... The allocation of power is, of course, an inescapable concern, but one of the functions of a system of nation-states ... is to perpetuate insecurity through artifacts such as the "balance" or imbalance of power.... While a war system requires a culture of parochialism, self-sacrifice, and the paraphernalia of wars, it does not require wars. Rather it requires a pervasive expectation of impending violence in order to sustain and magnify personal insecurity. Small wars can be nourished as a neat means of keeping this expectation alive....

The viciousness of a war system is circular as well, for even those who concede its horror and absurdity [can readily] perceive ... a situation in which the sense of insecurity can be quite accurate and rational.... In international politics there is, indeed, a very real enemy with very real operations-plans [prepared in anticipation of war].³⁹

During the evolution of modern International Law in the eighteenth and nineteenth centuries, the use of force was often (mis)characterized as a "necessity." The more powerful European States developed convenient justifications for their aggressive uses of force, including the

so-called “just war.” They commonly claimed that force was the only effective method for enforcing International Law. An aggrieved State could not allow the violation of International Law to go unpunished, for fear of anarchy. Force was characterized as an inherent right—beyond question—when a State in its unbridled discretion deemed it necessary to use force in the name of God and country.

Great Britain’s Sir Hersch Lauterpacht was one of the most prolific legal historians, teachers, writers, and judges [International Court of Justice (ICJ)] of all time. His ubiquitous writings on war aptly described it as the ultimate instrument for enforcing national policy. It was also the self-acclaimed enforcement mechanism of International Law, given the absence of an international organization to control uses of force (prior to the twentieth century). Lauterpacht traced the development of the legal justification for unilateral uses of force as follows:

[T]he institution of war fulfilled in International Law two contradictory functions. In the absence of an international organ for enforcing the law, war was a means of self-help for giving effect to claims based or alleged to be based on International Law. Such was the legal and moral authority of this notion of war as an arm of the law that in most cases in which war was in fact resorted to in order to increase the power and the possessions of a State at the expense of others, it was described ... as undertaken for the defence of a legal right. This conception of war was intimately connected with the distinction, which was established in the formative period of International Law and which never became entirely extinct, between just and unjust wars....

In the absence of an international legislature it was a crude substitute for a deficiency in international organization. As [the English legal analyst] Hyde, writing in 1922, said “It always lies within the power of a State to gain political or other advantages over another ... by direct recourse to war.” International Law did not consider as illegal a war admittedly waged for such purposes....

War was in law a natural function of the State and a prerogative of its uncontrolled sovereignty.⁴⁰

In the nineteenth century, the limitless use of force became the centerpiece of national policy for certain leaders. They employed it to preserve the “national

security.”⁴¹ However, the self-righteous implications of that term provided only a thin veneer for the aggressive nature of their Realpolitik. Napoleon used force to dominate Europe in the late eighteenth and early nineteenth centuries. Hitler’s twentieth-century use of force expanded Germany’s national frontiers and influence throughout Europe. His aggressive policies sparked World War II.

Many military conflicts have erupted since the end of World War II—mostly in the third world. These have been declared or undeclared wars; large-scale military combat or low-intensity conflict; and civil or international wars. In all such instances, the conduct of the belligerents and the treatment of the victims are governed by International Humanitarian Law including the 1949 Geneva Conventions (GC). These will be addressed in §9.6 and §9.7 in this chapter.

(b) Post-9–11 Conception “War” took on a new meaning after 9–11. War was historically the existence of international hostilities characterized by clashing military forces. Notice was typically provided via a declaration of formal hostilities. But with the advent of the UN Charter, such declarations were no longer the benchmark for shaping the debate regarding two nations who were “at war.” The focus became whether or not one of these nations was the victim of an armed aggression by the other nation—the legal condition precedent to the attacked State’s use of defensive force, as analyzed in the next section of this book.

In the mid-1990s, an individual (rather than a nation-State) named Usama bin Laden issued his arguable declaration of war, proclaiming the murder of “any American, anywhere on earth” as the “individual duty for every Muslim.” When nearly 3000 people from some eighty nations died in the attacks of September 11, 2001, prior legal distinctions about whether a state of war could exist with an individual or a group such as Afghanistan’s supportive Taliban began to fade into obscurity. As explained by Jane Dalton, the Charles H. Stockton Professor of International Law at the US Naval War College:

... [I]f the United States was unsure prior to September 11th, 2001 whether it had been the victim of an armed attack, there was absolutely no doubt after that date. NATO invoked Article 5 of the North Atlantic Treaty, and the Organization of American States invoked the equivalent provision, Article 3(1), of the Rio Treaty,

[both treaties] providing that an armed attack against one or more of the parties shall be considered an attack against them all. United Nations Security Council Resolution 1368 invoked the inherent right of self-defense. And President Bush decided that it was time to break with the practice of treating terrorism as exclusively a criminal offense, and that the United States would respond with its armed forces and with every instrument of United States national power. Recall that President Clinton also took military action against al Qaeda training camps in Afghanistan and a chemical facility in Sudan in 1998, though he did not launch an all-out war against terrorism as did President Bush.

...

One of the concerns raised by some about the use of the “war” construct is that it purportedly permits killing suspected terrorists without warning and detaining suspected terrorists without end. That characterization is only half correct. Certainly the law of armed conflict [textbook §9.6] does not require that notice be given to an enemy combatant before he is attacked. Concerning detention, however, detention is lawful only until the end of hostilities, not until the end of all time [textbook §9.7]. The war on terrorism is no

different than any other war in that its end cannot be predicted with any certainty. It is unlikely that the prisoners of war in detention on both sides in 1942, 1943 and 1944—when things were looking dark for the Allies—had any hopes of being repatriated by 1945, as ultimately occurred.⁴²

◆ §9.2 UN PRINCIPLES ON FORCE

A. FUNDAMENTAL REGIME

The UN Charter contains deceptively simple directives on the use of force:

1. States may not use or threaten the use of force.
2. States may use force defensively, when responding to an “armed attack.”
3. The UN Security Council possesses the legal monopoly on the use of force.

The UN Charter’s drafters hoped to control the aggressive outbursts of behavior that led to the demise of the post-World War I League of Nations and the outbreak of World War II. The key Charter provisions on the use of force were cast in the following terms:

United Nations Conference on International Organization

SIGNED 26 JUNE 1945, SAN FRANCISCO, CALIFORNIA
<http://www.un.org/en/documents/charter/index.shtml>

CHAPTER I. PURPOSES AND PRINCIPLES

Article 2.4

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 [behave] in any other manner inconsistent with the Purposes of the United Nations.

Article 2.7

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 ...; but this principle shall not prejudice the application of [UN Security Council] enforcement measures under Chapter VII.

CHAPTER VII. ACTIONS WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall ... decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and may call upon Members of the United Nations to employ such measures. These may include complete or partial interruption of

economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate ..., it may take such action by air, sea, or land forces as may be necessary to 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.

Article 51

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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council to maintain or restore international peace and security.

B. UNSC CHAPTER VII POWERS

1. UN Sanctions

(a) *Global Initiatives* No sanctions regime is effective unless its objective is shared by neighbors of the targeted nation or group. The application of sanctions by an international organization, as opposed to sanctions being unilaterally imposed, increases the likelihood of both consensus and success. Unilaterally imposed sanctions, on the other hand, tend to encourage the escalation of threats to peace. But when they are imposed by a multilateral body, the sanctioning State(s) is not as readily perceived to be an aggressor.

A lone State or small group of States may be perceived as taking advantage of a situation with a view toward

achieving some less-than-altruistic objective. Even the Kosovo and Iraq conflicts, for example, have been likened to colonialism. Neither enjoyed the imprimatur of a prior UN Security Council resolution, which could have authorized these “organizational” State-driven uses of force [§3.3.B.4(b) *Continued Colonialism?*]. Each of these conflicts was promptly addressed, however, via following (rather than authorizing) Security Council actions. The State protagonists in these non-UN-authorized coalitions of course welcomed subsequent UN involvement. That arguably cast a positive glow upon their *fait accompli*. Such actions have appeared to enjoy a post-hoc UN seal of approval, as illustrated below:

Security Council Resolution 1830

SC/9416 (7 AUGUST 2008)

<<http://www.uniraq.org/FileLib/misc/Resolution1830.pdf>>

THE SECURITY COUNCIL,

Recalling all its previous relevant resolutions on Iraq, in particular 1500 (2003) of 14 August 2003, 1546 (2004) of 8 June 2004, 1557 (2004) of 12 August 2004, 1619 (2005) of 11 August 2005, 1700 (2006) of 10 August 2006 and 1770 (2007) of 10 August 2007,

Reaffirming the independence, sovereignty, unity and territorial integrity of Iraq,

Emphasizing the importance of the stability and security of Iraq for the people of Iraq, the region and the international community,

...

Reaffirming the importance of the United Nations, in particular the United Nations Assistance Mission for Iraq (UNAMI), in supporting the efforts of the Iraqi people and Government to strengthen institutions for representative government, promote political dialogue and national reconciliation, engage neighbouring countries, assist vulnerable groups, including refugees and internally displaced persons, and promote the protection of human rights and judicial and legal reform,

...

Welcoming the Secretary-General's appointment on 11 September 2007 of a new Special Representative for

Iraq and recognizing the expanded role given to him and UNAMI as established in resolution 1770 (2007) of 10 August 2007,

...

Acknowledging the important roles played by the United Nations and the Government of Iraq in the First Anniversary Ministerial Review of the International Compact with Iraq, held in Stockholm on 29 May 2008, as well as in the Expanded Neighbours Conference held in Kuwait on 22 April 2008, its working groups and its ad hoc support mechanism, and underscoring the importance of continued regional and international support for Iraq's development,

Welcoming the Government of Iraq's decision to allocate a parcel of land in Baghdad to the UN for its new integrated headquarters, and *urging* the Government of Iraq to fulfil its commitment to contribute financially to this project.

Welcoming also the letter of 4 August 2008 from the Minister for Foreign Affairs of Iraq to the

Secretary-General (S/2008/523, annex), setting forth the request of the Government of Iraq that the United Nations Assistance Mission for Iraq (UNAMI) continue to assist Iraqi efforts to build a productive and prosperous nation at peace with itself and its neighbours,

1. *Decides* to extend the mandate of the United Nations Assistance Mission for Iraq (UNAMI) for a period of 12 months from the date of this resolution;

2. *Decides further* that the Special Representative of the Secretary-General and UNAMI, at the request of the Government of Iraq and taking into account the letter of 4 August 2008 from the Minister of Foreign Affairs of Iraq to the Secretary-General (S/2008/523, annex), shall continue to pursue their expanded mandate as stipulated in resolution 1770 (2007);

...

7. *Decides* to remain seized of the matter.

The protagonist who is backed by an international organization is more likely to be characterized as furthering multinational objectives. US President Carter, for example, applied a series of sanctions against Iran during the 1979–1980 Hostage Crisis [§2.7.E.]. Virtually every nation of the world condemned Iran's actions when it seized diplomatic hostages. With the backing of the UN Security Council and the International Court of Justice, the US sanctions directed at Iran were far more acceptable than any action which the US might have taken without that level of international support.

The UN has been criticized for its previous “blunt sanctions” policy, some of which hurt the very people it was intended to help. This downside to UN sanctions was particularly evident in the interim period between the Iraq “Persian Gulf Wars.” A number of States and humanitarian organizations expressed concern at the possible adverse impact of sanctions on the most vulnerable segments of the population. Concerns were also expressed about the negative impact sanctions had on the economy of third world countries not directly subject to sanctions. The time had come to introduce “smart sanctions” (an analogy drawn from smart bombs that reduce collateral damage in modern conflicts).

The UN has been criticized for its post-Apartheid African sanctions policy. The US, for example, offered a garden-variety UN Security Council proposal in July 2008. Zimbabwe's President Mugabe had just hijacked the national elections. He lost, but forced the opposition to pull out of a second-round runoff vote (just to stay alive). The US sought: an arms embargo on Zimbabwe; the appointment of a UN mediator; and travel and financial restrictions on Mugabe and his top military and government officials for stealing the Zimbabwe elections.

Russia's UN ambassador argued that such sanctions exceeded the Security Council's mandate. “We believe such practices to be illegitimate and dangerous,” he said, describing the US resolution as one more obvious “attempt to take the Council beyond its charter prerogatives.” Even South Africa's president sought to prevent any meaningful UN pressure on the Mugabe dictatorship. The US ambassador to the UN complained because international economic sanctions brought down South Africa's apartheid government, which had long oppressed that country's black majority population. Per New York Times columnist Thomas Friedman's provocative taxonomy: “When whites persecute blacks, no amount of U.N. sanctions is too much. And when blacks persecute blacks, any amount of U.N. sanctions is too much.”⁴³

The UN Security Council established a Sanctions Committee within its ranks. The Security Council's objective was to facilitate a more refined approach to the design, application, and implementation of mandatory sanctions under its Article 41 *non*-military powers. These refinements include measures targeted at specific individuals or entities as well as humanitarian exceptions embodied in various Security Council resolutions. Targeted sanctions, for example, may involve the freezing of assets and blocking the financial transactions of political elites or entities whose behavior triggered the need for UN sanctions. (The European Court of Justice *Kadi & Al Barakaat* decision provided details regarding the impact of the work of this entity in text §3.4.B.)

"Conflict diamonds," illustrated by the 2006 movie *Blood Diamonds*, is one example of smart sanctions

directed at responsible groups—rather than at countries as a whole. The tragic conflicts in Angola and Sierra Leone were fueled by illicit diamond smuggling. That led to the Security Council's exercising its Chapter VII powers against Angola's National Union for the Total Independence of Angola and the Sierra Leone Revolutionary United Front. These entities were acting in contravention of the international community's objective to restore peace in these two countries.

The General Assembly participates in this process via its work that targets particular problem people or groups. As to the blood diamonds scenario, like so many others, progress must be measured by the cooperation of States, international organizations, and cross-border business interests—all of whom have a role to play in resolving the tragic connection between African diamonds and war:

The Role of Diamonds in Fueling Conflict Conclusions of the Ministerial Meeting, Pretoria, 21 September 2000

UNITED NATIONS GENERAL ASSEMBLY FIFTY-FIFTH SESSION, AGENDA ITEM 175
Annex to the letter dated 21 November 2000 from the Permanent Representative
of South Africa to the United Nations addressed to the President of the General Assembly
<<http://www.un.org/documents/ga/docs/55/a55638.pdf>>

We, the ministers and representatives of the world's leading diamond exporting, processing and importing States, met in Pretoria on 21 September 2000 at the invitation of the African diamond-producing countries to agree on what we could do to break the link between the illicit trade in rough diamonds and armed conflict.

We reviewed the challenges and reached the following conclusions:

- ◆ We are concerned that the trade in conflict diamonds is prolonging wars in parts of Africa, is frustrating development efforts and is causing immense suffering. We understand conflict diamonds to be rough diamonds which are illicitly traded by rebel movements to finance their attempts to overthrow legitimate Governments;
- ...
- ◆ We are resolved to do more and to work together to deny these conflict diamonds

access to world markets, while recognizing the difficulty of devising and enforcing measures to prevent the smuggling of items that are portable, concealable, valuable and difficult to identify by source, such as diamonds.

We welcome important progress to date, in particular:

...

- ◆ The role of the Security Council in addressing this problem. We commit ourselves to the full and rigorous implementation of the various United Nations sanctions regimes targeting the link between the illicit trade in rough diamonds and the supply of weapons and fuel to rebel movements;
- ◆ The initiative of the Group of 8 [textbook §12.3.B.1.], in the context of its commitment to conflict prevention expressed at the summit held in Okinawa, Japan, in July 2000, to

support practical approaches to the issue of conflict diamonds, including consideration of an international agreement on certification of rough diamonds;

- ◆ National initiatives, including the steps taken by the Governments of Angola and Sierra Leone, to put in place effective national certification schemes, as well as the efforts by trading and marketing centres in Belgium, Israel and India to strengthen regulation of and transparency in the trade;
- ◆ Proposed steps by industry, including the resolution agreed at the World Diamond Congress held in Antwerp, Belgium, in July 2000 to address the problem of conflict diamonds;
- ◆ The constructive role played by civil society organizations in raising public awareness on the issue of conflict diamonds, proposing practical solutions and helping generate the necessary political will required for concrete action.

We especially welcome the African initiative that led to the Kimberley process. As the first of its kind, this initiative brought together producing, processing and trading countries, and drew on the different perspectives and expertise of Governments, industry and civil society in generating ideas for workable solutions. It highlighted that the

problem of conflict diamonds is of international concern and requires a comprehensive and practical approach.

We agree that:

- ...
 - ◆ A mechanism of establishing an intergovernmental body to monitor compliance with the certification system should be investigated. This should include investigating the relationship between the intergovernmental body and the World Diamond Council;
- ...
 - ◆ We are resolved to maintain the momentum of the Kimberley process by moving ahead into an intergovernmental process to design a workable international certification scheme for rough diamonds. We favour a simple and effective scheme that does not place an undue burden on Governments and industry, particularly smaller producers;
- ...

We are conscious of the need for Governments and industry to work together and to implement effective measures soon. This is necessary to curb conflicts in parts of Africa and to maintain consumer confidence vital to the well-being of the industry. We are equally conscious of the need to ensure that the diamond trade optimally contributes to sustainable development and of the importance of working towards that objective.

(b) Regional Initiatives The above UN Charter Article 39 “measures ... to maintain or restore international peace and security” does not discourage measures undertaken by *regional* organizations to promote dispute resolution on a more local level. Like UN Security Council oversight, such action is not supposed to be unilaterally inflicted in the absence of organizational endorsement. For example, the European Community’s anti-investment measures against South Africa were imposed as a means of participating in the broader UN policy of encouraging member States to dismantle apartheid. The Organization of American States (OAS) imposed economic sanctions on Haiti in 1991, after military leaders deposed that country’s first democratically elected leader. The 1992 OAS sanctions barred oil deliveries to Haiti as a measure for securing Haiti’s observation of the democratic principles contained in the OAS Charter. The OAS also considered sanctions

against Peru in 1992, when its leader closed Congress and suspended the Peruvian Constitution.

2. Persian Gulf War I Application Iraq invaded Kuwait in 1991. The UN’s expressed objective was to defeat Iraq and then contain it with sufficient force to eliminate its potential for further threats to international peace. The Council thus resolved as follows: “Acting under Articles 39 and 40 ... *Demands* that Iraq withdraw immediately and unconditionally all its forces” and “Acting under Chapter VII of the Charter [commencing with Art. 39] ... *Decides* as a consequence, to take the following measures to secure compliance of Iraq ... and to restore the authority of the legitimate Government of Kuwait ... *Decides* that all States shall prevent: (a) The import into their territories of all commodities and products originating in Iraq or Kuwait exported therefrom after the date of the present resolution; ... [and other measures designed to boycott Iraq].”⁴⁴

The ensuing UN Security Council Resolution 687 was a milestone in UN history. This cease-fire resolution, among the many issued by the Council during and after the cessation of hostilities,⁴⁵ was a major break from the Council's past assertions of power. One reason was 687's breadth; another was its purported control

over future State behavior. The Council ordered unprecedented and unparalleled controls in terms of observing international border delimitations, nonuse of chemical and nuclear weapons, sanctions, and required war reparations. The relevant paragraphs of this particular resolution are reprinted here:

United Nations Security Council Resolution 687

2981ST MEETING (3 APRIL 1991)

<<http://www.fas.org/news/un/iraq/sres/sres0687.htm>>

The Security Council ...

Welcoming the restoration to Kuwait of its national sovereignty, independence, and territorial integrity and the return of its legitimate government,

...

2. *Demands* that Iraq and Kuwait respect the inviolability of the international boundary.

...

4. *Decides* to guarantee the inviolability of the above-mentioned international boundary and to take as appropriate all necessary measures to that end in accordance with the Charter;

...

8. *Decides* that Iraq shall unconditionally accept the destruction, removal, or rendering harmless, under international supervision, of:

- (a) all chemical and biological weapons and all stocks of agents...;
- (b) all ballistic missiles with a range of greater than 150 kilometers and related major parts, and repair and production facilities;

...

14. *Takes note* that the actions to be taken by Iraq ... represent steps towards the goal of establishing in the Middle East a zone free from weapons of mass destruction and all missiles for their delivery and the objective of a global ban on chemical weapons;

...

24. *Decides* that, in accordance with Resolution 661 (1990) and subsequent related resolutions and until a further decision is taken by the Council, all States shall continue to prevent the sale or supply ... to Iraq by their nationals ... of:

- (a) arms and related materiel of all types...

25. *Calls upon* all States and international organizations to act strictly in accordance with paragraph 24 above, notwithstanding the existence of any [prior] contracts, agreements, licenses, or any other arrangements;

...

30. *Decides* that, in furtherance of its commitment to facilitate the repatriation of all Kuwaiti and third party nationals, Iraq shall extend all necessary cooperation to the International Committee of the Red Cross.

...

32. *Requires* Iraq to inform the Council that it will not commit or support any act of international terrorism.

...

34. *Decides* to remain seized of the matter and to take such further steps as may be required for the implementation of this resolution and to secure peace and security in the area.

The quoted portions of Resolution 687 provide the foremost statement of conditions ever made by the SC because of their comprehensive nature and their purported control of future action by Iraq and all members of the international community. The Cold War veto

power, held by the five permanent members of the UNSC [§3.3.B.2.], precluded a similar resolution in prior conflicts. This resolution signaled a zenith in the willingness of the Council to implement its Charter task of maintaining global peace and security.

Adherence to this resolution was not as forthcoming as expected. Iraq chose to restrict UN agents from conducting inspections of its war-making potential. Iraq even seized certain agents during their UN-sanctioned visits. In spite of such problems with implementation, this resolution heralded what would appear to be the effective return of the SC from its Cold War hiatus.

Prior exercises of the Council's Chapter VII powers politically necessitated a more restrained approach when flexing its muscles by applying force to maintain peace. But Resolution 678 authorized "all necessary means" to force Iraq's withdrawal from Kuwait in addition to imposing a post-cessation of hostilities regime. Such organizational force had previously authorized less forceful measures before resorting to such forceful measures. The Council had previously authorized forcible sanctions only after less severe ones failed to work. However, its activism in this instance indicated that the Charter should also be a flexible document in terms of the Council's scope of authority to carry out its mandate to control threats to international peace.

David Scheffer of the Carnegie Endowment for International Peace therefore commented that "[t]he Iraq-Kuwait crisis served to remind us that the Charter is a flexible document that can be interpreted as such. Narrow, rigid interpretation of the Charter by U.N. enthusiasts may have the unintended result of creating unnecessary obstacles to the effective implementation of critical Charter provisions. For example, there was some discussion during the early months of the Iraq-Kuwait crisis that trade sanctions must be proven to have failed before the Security Council could authorize use of force under Article 42 of the Charter. However, the text of Article 42 offers more latitude.... The Security Council could make a determination at any time that trade sanctions 'would be inadequate' [under Article 41] and move on to Article 42 and the use of force."⁴⁶ Professor Scheffer's argument thus favored a liberal Charter interpretation. It was ultimately corroborated by the fact that Iraq was militarily defeated in the PGW; yet, it restationed a large military force near the Kuwait border in late 1994 and avoided full inspections of its capacity for producing weapons of mass destruction.

3. Security Council Activism

(a) *Post-Cold War Initiative* Resolution 687 was actually a segment of a larger development. The Council's Gulf War activism triggered divergent perceptions:

that the UN was casting off the fetters of the Cold War; and suspicion by nations that could be the next object of powerful member hegemony. Many "third world" countries (a label reminiscent of the Cold War) perceived the PGW and the Council's related activism as providing the cannon fodder for a new form of control by the post-Cold War dominant States. This concern is aptly articulated by Kyoto University's Professor Yoshiro Matsui:

The Gulf War symbolizes the United Nations activism after the end of the Cold War. The Security Council adopted many resolutions under Chapter VII of the Charter during and after the Gulf War, without being disturbed by the veto of its permanent Members, and this fact is highly appreciated ... as illustrating a "rebirth" of the United Nations' collective security....

But ... there spreads a wide suspicion, especially among the nonaligned and developing countries, that this United Nations activism may be a Great Power hegemony in disguise, since they are the only possible targets of this activism. This suspicion seems to be reinforced by the fact that almost all the resolutions ... have not specified the concrete article of the Charter as their basis [for Council actions against Iraq]. This ambiguous constitutionality ... is not a happy one for the United Nations activism, and Member States have legitimate interests to see that the Security Council acts within the framework of the Charter which they have accepted.⁴⁷

Professor Matsui attributes this suspicion to the inherently limited scope of available UN controls. Neither the Charter, nor the Security Council, nor any precedents give the Secretary-General authority to act in a military operation. The superpowers ensured their control of their own destiny in 1945, when the Charter emerged just short of providing such authority to the head of the United Nations. No State later chose to provide the standing military forces called for in Article 43 of the Charter—as opposed to the resulting *ad hoc*, case-by-case approach, whereby each nation must consent to provide supporting military forces on an incident-by-incident basis.

Article 2.7 of the UN Charter presents another facet regarding the constitutionality of the Council's post-Cold War/PGW activism. It provides that "[n]othing

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.”

Prior to the Gulf War, the Cold War period bred a restrictive application of Chapter VII. It was historically difficult for the SC to take an activist role in maintaining international peace. With world opposition to Iraq’s invasion of Kuwait, however, the Council was willing to employ more ambitious applications of its Charter VII powers—with less concern about encroaching upon the Article 2.7 qualifier. This atmosphere set the stage for potential SC intervention in Yugoslavia (humanitarian aid), Somalia (where force was used first by UN troops), Rwanda (humanitarian relief) and the UN administration of troubled areas such as East Timor and Kosovo (peace-keeping).

(b) Subsequent “Unilateral” Action? For a number of years after the PGW, Iraq played the cat and mouse game of frequently testing the UN resolve to ensure that any weapons of mass destruction would be found and dismantled. The US finally mounted a massive military presence in the Persian Gulf in 1998. The US relied on the language of the UN’s PGW resolutions from 1991, including one that called on States to take all necessary measures to ensure the preservation of peace and Iraq’s restoration of sovereignty to Kuwait. The counter to the US perspective that it could still act under authority of the then seven-year-old Security Council resolutions was that Charter Article 2.4 prohibits the use of force—the exceptions being Article 51 self-defense and/or SC authorization under Article 42.

This stalemate was broken, but not legally resolved, by a Memorandum of Understanding between the UN and the Republic of Iraq, brokered by UN Secretary-General Kofi Annan.⁴⁸ This agreement put off the question of whether the US could legally attack Iraq without the benefit of a *fresh* UN Security Council resolution authorizing this particular use of force—*seven years* after the PGW resolutions had accomplished the objective of Iraq departing from Kuwait.

4. Bosnia-Herzegovina Application The SC’s activism was temporarily shelved as events were unfolding

in the former Yugoslavia. Several regional entities voted for independence and were recognized by the international community. Throughout the 1991–2000 period when the UN reacted to various events in the former Yugoslavia, the basis for SC action was by no means conspicuous. One reason was that the UN’s role in the deployment of its peacekeeping force (UNPROFOR) gradually assumed enforcement characteristics. As characterized by David Schweigman of the T.M.C. Asser Institute in The Hague: “The Council generally refrained from specifying the exact legal basis for its actions. In most cases the Council merely stated that it ‘was acting under Chapter VII of the Charter,’ after a prior determination that a threat to peace and security existed. ... The deployment of UNPROFOR against the will of the states concerned, however, raises the interpretive issues as to the legal basis for UNPROFOR’s continued presence in Yugoslavia.”⁴⁹

At the beginning of the PGW period, the first SC Resolution demanding Iraqi retraction from its invasion of strategically located and oil-rich Kuwait came 10 hours after the invasion. The Council never “took charge,” however, in the less strategically located and resource-poor arena of Bosnia-Herzegovina. The Bosnian Serbs perpetrated a full-scale war, marked by the brutal infliction of extreme violations of humanitarian norms on Bosnia’s Muslim and Croatian civilian population. Bosnian Serbs mistreated those in detention, ignored the basic international safeguards intended to protect civilians and medical facilities, and perpetrated a policy of “ethnic cleansing,” resulting in the disappearance or uprooting of hundreds of thousands of refugees on the basis of their ethnicity and religion.

Unlike the Council’s activism during the PGW, there was a waning optimism about the SC’s continued role in actively maintaining peace in the Bosnian theater. It engaged in a form of political “hot potato,” regarding who should take charge of the international response to the Bosnia crisis. The Council authorized the use of force in three resolutions:

- ◆ Resolution 770—“all necessary measures” could be “taken nationally or through regional agencies or arrangements” to deliver humanitarian assistance when needed in Bosnia-Herzegovina.
- ◆ Resolution 816—States and regional groups may use necessary means that they may determine for enforcing no-fly zones established by the Council to contain this conflict.

- ◆ Resolution 836—UN member States “acting nationally or through regional organizations or arrangements” could employ air power to protect UN peacekeepers on the ground in Bosnia. It appeared that the United Nations was thus in search of a significant role to play in bringing the Bosnian conflict under control.

The NATO-based ultimatum that Serb weapons be withdrawn from UN-designated safe havens was the most effective tool for shifting political and military responsibility. NATO was simultaneously courting Russian membership while the UN was hoping for a face-saving device in the aftermath of Serb defiance of various UN directives. The UN would thereby exercise some degree of control, via its plan to give NATO authority to order air strikes as needed to control Serbian nationalism.

5. Kosovo Administration In 1999, the UN Security Council employed an unheralded degree of activism and the most striking to date. When NATO’s Kosovo air-strikes stopped in June 1999, the Security Council immediately adopted Resolution 1244. It created a transitional civil administration in Kosovo, known as the UN Interim Administration Mission in Kosovo [§2.4.B.]. This would be the UN’s second such administration, whereby it would be the only international organization to ever administer sovereign territory.⁵⁰

Relying on several prior resolutions, promulgated pursuant to its Chapter VII powers, the Council thus established a framework for nation building.⁵¹ Under this cooperative venture: the UN headed the civil administration of Kosovo from 1999 until shortly after independence in 2008; NATO provides military security; the European Union (EU) is responsible for Kosovo’s physical reconstruction as well as providing administrative oversight after Kosovo’s independence; the Organization for Security and Cooperation in Europe is in charge of institution-building and democratization (and the UN High Commission for Refugees humanitarian mission which has since dissolved).⁵²

While this blueprint is extraordinary in terms of nation building in the aftermath of long-term ethnic hostilities, the UN’s effort to rebuild the judicial system has experienced local challenges to its credibility and legitimacy. It did not incorporate resources from the local population. As recommended by those with direct personal experience: “A number of the problems experienced by the international community could be

avoided in future situations by using a more developed, phased approach, which ultimately allows for full participation by the local population, but in the short-term relies on international standards and expertise.”⁵³

C. CHARTER PROHIBITS STATE FORCE

1. Article 2.4 This key Charter article enshrines *the* most fundamental principle in International Law. States may not use or threaten to use force in their international relations. This undefined but fundamental ban almost immediately spawned debates about whether it is, in fact, a meaningful norm. Unlike earlier multilateral treaties on the use of force—such as the 1928 Paris Peace Pact that expressly condemned war—the UN Charter mentions but does not define the terms “war” or “aggression.”

Some commentators have therefore argued that Article 2.4 is deficient as a legal norm. It is too broad to have any specific meaning. Others have argued that the drafters’ use of such broad terms was intended to avoid any narrow interpretation of this centerpiece of the UN Charter. Columbia University Professor Oscar Schachter, former Director of the UN Legal Division, asserts that Article 2.4 was intended to broadly outlaw *all* forms of aggressive force:

Admittedly, the article does not provide clear and precise answers to all the questions raised. Concepts such as “force,” “threat of force” or “political independence” embrace a wide range of possible meanings. Their application to diverse circumstances involves choices as to these meanings and assessments of the behavior and intentions of various actors. Differences of opinion are often likely even among “disinterested” observers; they are even more likely among those involved or interested. But such divergences are not significantly different from those that arise with respect to almost all general legal principles. ... [A]rticle 2.4 has a reasonably clear core meaning. That core meaning has been spelled out in [subsequent] interpretive documents ... adopted unanimously by the General Assembly. ... The International Court and the writings of scholars reflect the wide area of agreement on its [intended] meaning. It is therefore unwarranted to suggest that article 2.4 lacks the determinate consent necessary to enable it to function as a legal rule of restraint.⁵⁴

Some States and commentators interpret Article 2.4 far more narrowly. They do not view economic

coercion, for example, as falling within the meaning of the Charter's prohibition against force. Under this delimiting view, a State-imposed trade embargo against a particular State's products is not "force" within the meaning of the Charter.⁵⁵

This legal debate began to take shape in 1952. The General Assembly established the Special Committee on the Definition of Aggression. Many States, particularly those in the Western hemisphere, urged that since International Law had already banned the use of force, further definitions of "aggression" were unnecessary. The Committee and the General Assembly ought to concentrate, it was argued, on defining the Charter terms "armed attack" and "self-defence." A more detailed definition of aggression would only serve to hamper the UN's organs in ways that might preclude the Security Council from exercising its "Chapter VII" powers to control breaches of the peace. This blocking move was countered with the argument that the major powers, in reality, sought to retain their own discretion to act in ways not expressly prohibited by the UN Charter.

In its 1956 Report to the UN Special Committee on the Definition of Aggression, the US representative asserted the futility of attempting to achieve globally acceptable refinements. The US had signed a number of more specific regional definitions, including the Organization of American States (OAS) 1947 Inter-American Treaty of Reciprocal Assistance. Such "instruments belonged to the same geographical area and were united by many bonds, including a feeling of solidarity, which were not present to the same degree among the Members of the United Nations."⁵⁶ Further articulations would be best deduced by a *regional* refinement process (which the US could better control).

The International Law Commission [§3.3.B.] is an organ of the General Assembly. In July 2001, it promulgated the text of its years-in-the-making *Draft Articles on State Responsibility*. Its treatment of countermeasures addresses State activity undertaken for purposes ranging from the imposition of economic sanctions to military self-defense:

International Law Commission Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts

(adopted by the Drafting Committee on second reading)

UNGA Doc. A/CN.4/L.602/REV.I (26 JULY 2001)

http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

CHAPTER II COUNTERMEASURES

Article 49

Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two [Content of the International Responsibility of a State].
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Article 50

Obligations not affected by countermeasures

1. Countermeasures shall not affect:
 - (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
 - (b) Obligations for the protection of fundamental human rights;
 - (c) Obligations of a humanitarian character prohibiting reprisals;
 - (d) Other obligations under peremptory norms of general international law.
2. A State taking countermeasures is not relieved from fulfilling its obligations:
 - (a) Under any dispute settlement procedure applicable between it and the responsible State;

- (b) To respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Article 51

Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 52

Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:
 - (a) Call on the responsible State, in accordance with article 43, to fulfil its obligations under Part Two;
 - (b) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.

2. Notwithstanding paragraph 1(b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.
3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:
 - (a) The internationally wrongful act has ceased, and
 - (b) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.
4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Article 53

Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.

The General Assembly's International Law Commission Articles do not provide the specific circumstances under which a State may react when an adversary's conduct is not unmistakable military aggression. Nor do they define the outer limits of behavior that appropriately trigger a resort to force in the name of self-defense.⁵⁷

2. ICJ Position on Force The International Court of Justice 1986 *Nicaragua* case took the position that the Article 2.4 "armed attack" provision of the UN Charter is not the exclusive blueprint for employing force in International Law. While Nicaragua and the US agreed that Article 2.4 is the fundamental norm, the Charter's language is but one module of the legal foundation for the use of force:

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)

INTERNATIONAL COURT OF JUSTICE (1986)

1986 I.C.J. REPORTS 14

<<http://www.icj-cij.org/docket/files/70/6503.pdf>>

AUTHOR'S NOTE: Nicaragua alleged that the US had mined its harbors, trained counterinsurgents, and promoted civil dissent against the Sandinista government, which was unpopular with the US. The excerpted paragraphs address the interplay of Article 2.4 and customary State practice.

COURT'S OPINION:

...
183... [T]he Court has next to consider what are the rules of customary international law applicable to the present dispute. For ... the Court recently observed,

It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* [commonly accepted practice] of States, even though multilateral conventions [such as the UN Charter] may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.

...

188. The Court thus finds that the Parties thus both take the view that the fundamental principle in this area is expressed in the terms employed in Article 2, paragraph 4, of the United Nations Charter... The Court has however to be satisfied that there exists in customary international law ... [State acceptance of] the binding character of such abstention. This may ... be deduced from ... the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly ... [the 1970 Declaration concerning Friendly Relations]. The effect of [unanimous] consent to the text ... may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution themselves. The principle of non-use of force, for example, may thus be regarded as a principle of customary international law.

...

191. As regards ... the principle in question, it will be necessary to distinguish the most grave forms of the use of force (those constituting armed attack) from other less grave forms. In determining the legal rule which applies to these latter forms, the Court can again draw on the formulations contained in the Declaration [concerning Friendly Relations].... Alongside certain descriptions which may refer to aggression, this text includes other ... less grave forms of the use of force. In particular, according to this resolution:

... Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands ... for incursion into the territory of another State.

Every State [also] has the duty to refrain from ... assisting or participating in acts of civil strife or

terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts ... involve a threat or use of force.

192. Moreover, in the part of this same resolution devoted to the principle of non-intervention in matters within the national jurisdiction of States, a very similar rule is found:

Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.

In the context of the inter-American system, this approach can be traced back at least to 1928 (Convention on the Rights and Duties of States in the Event of Civil Strife, Art. 1(1)); it was confirmed by resolution 78 adopted by the General Assembly of the Organization of American States on 21 April 1972. The operative part of this resolution reads as follows:

The [OAS] General Assembly Resolves:

1. To reiterate solemnly the need for the member states of the Organization to observe strictly the principles of nonintervention and self-determination of peoples as a means of ensuring peaceful coexistence among them and to refrain from committing any direct or indirect act that might constitute a violation of those principles.
2. To reaffirm the obligation of those states to refrain from applying economic, political, or any other type of measures to coerce another state and obtain from it advantages of any kind.
3. Similarly, to reaffirm the obligation of these states to refrain from organizing, supporting, promoting, financing, instigating, or tolerating subversive, terrorist, or armed activities against another state and from intervening in a civil war in another state or in its internal struggles....

The ICJ ruled against the US in this 1986 case. Nicaragua's claim for reparations was pending before the ICJ during the ensuing five years. In 1991, the Nicaraguan government notified the Court that it had decided to "renounce all further right of action based on the case and did not wish to go on with the proceedings...." As is typical in such cases where a party has requested a discontinuance of the case, the US was given an opportunity to object to the "discontinuance." Two weeks later, the Legal Adviser to the US Department of State responded with a letter to the Court "welcoming the discontinuance." The case was removed from the ICJ's list of active cases.

In February of 2001, the US Presidential Administration approved \$4 million in aid to dissidents who opposed Iraq's President Saddam Hussein. Sharif Ali, spokesperson for the London-based Iraqi National Congress, responded that "We will use that [money] to enhance our own network there [in Iraq], to penetrate the Iraqi regime and to expose the crimes of the regime." The expressed objective of this grant was to develop a legal case, which would establish Hussein's crimes against humanity. The "Congress" is an umbrella organization opposed to the Hussein government. *Question:* Did the unilateral decision by the US to aid those who are contra (as in Nicaragua's "Contras") to the Iraqi regime violate the spirit of the ICJ's 1986 Nicaragua judgment against the US?

The ICJ amplified the anti-use of force principles announced in its *Nicaragua* decision in 2005. Unlike the US posture in *Nicaragua*, Uganda's military operations in the Democratic Republic of Congo (DRC):

- ◆ were far more *overt*—due to the brazen presence of Uganda's regular military "defense" forces;
- ◆ were *not* designed to overthrow the D.R.C. government, but instead to upgrade Uganda's security;
- ◆ did *not* involve the alleged use of force by a member of the Security Council, wielding its veto power to preclude the Council from issuing multiple resolutions against the Ugandan aggressor; and
- ◆ did involve two nations from a continent whose member States are more *prone to accept the jurisdiction of the ICJ* in sensitive military matters.

The above blend of comparatively distinctive circumstances provided cannon fodder for the Court to issue an even more concrete restatement of UN principles against the use of force in an open military conflict:



Case Concerning Armed Activities on the Territory of the Congo

(Democratic Republic of the Congo v. Uganda)

INTERNATIONAL COURT OF JUSTICE
GENERAL LIST NO. 116 (DEC. 19, 2005)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Nine, click Armed Act Congo.

3. Litigating National War Decisions May an individual require her country to publicly explain its allegedly illegal decision to go to war? You learned in Chapter 4, on the status of the individual in International Law, that this option is generally not an option. It may be doable, however, if you reside in a regional system that would conceivably allow this issue to come before a regional international court. But to get there, it would first likely have to survive scrutiny in the national courts of a member country.

Just before reading the following case, assume that you are the petitioning mother of one of the deceased British soldiers. Your lawyer has just handed you the "Downing Street Memo," portions of which are set forth in Problem 9.A below:



Regina (Gentle and Another) v. Prime Minister and Others Appeal to the United Kingdom House of Lords

BRITISH LEGALITY OF IRAQ WAR CASE
(APRIL 9, 2008)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Nine, click British Iraq War Legality case.

D. CHARTER SELF-DEFENSE PROVISION

Article 51 authorizes force for the limited purpose of self-defense. The never-ending international debate about what circumstances properly trigger its

application has evolved through three phases—each arguably associated with a particular event and approximate date:

- ◆ Armed attack (1945—UN Charter)
- ◆ Anticipatory self-defense (1962—Cuban Missile Crisis)
- ◆ Preemptive first-strike (2002—US post-9–11 national defense policy)

1. Armed Attack In 1945, the UN Charter expressed that self-defense could be justified only in the case of “armed attack.” That year was also the dawn of the nuclear age when the US dropped atomic bombs on Hiroshima and Nagasaki, effectively ending World War II. The development of weapons technology mushroomed in the ensuing decades. The claimed scope of self-defense would be expanded by national concerns with limiting self-defense to only the moment when an attack was underway.

Is Article 51 the *exclusive* source for defining the parameters of the permissible “self-defense”? Prior to World War II, an armed attack was not synonymous with annihilation of an entire country or region of the world. In 1945, however, only one nation had the monopoly on nuclear weapons. As new alliances formed and technical information was thus shared, the sophistication of intercontinental weapon systems began to heavily influence international relations during the Cold War. The Charter-based definition of self-defense quickly became obsolete.

Rather than States being limited to “armed attack,” nations and commentators—arguably using revisionist history—asserted that the Charter’s drafters could *not* have intended to prohibit self-defense until missiles were actually launched. The *inherent* right of self-defense of course antedated the expression of that right in the UN Charter. But some analysts clung to the view that this UN Charter provision had only one clear meaning. Self-defense was thereby perceived as being properly invoked only in cases where an “armed attack” was underway.

Australian National University Professor D. W. Greig criticizes the circuitry of this narrow “plain meaning” argument as an unrealistic interpretation of the UN Charter. By using this term, the Charter did not become the *sole* source for defining the contours of self-defense. Customary State practice was thus a viable alternative for defining the contours of the

justifications for self-defense. In Greig’s aptly conceived account:

Because Article 51 refers solely to situations where *armed* attack has actually occurred, it has been argued that the Charter only reserves the right of self-defense to this limited extent. Supporters of this view have inevitably been led into tortuous distinctions between different situations to decide whether each situation qualifies as an “armed attack.” Once a missile is launched, it may be said that the attack has commenced; but does it also apply to the sailing of an offensive naval force? Does the training of guerrillas and other irregular forces for use against another state constitute an armed attack? ...

However, there would appear to be no need to adopt such an unrealistic approach to Article 51, because it is possible to reconcile its wording with the reasonable interests of states. It has already been pointed out that [under] Article 51 [a State] retains the “inherent right of self-defence” independently of other provisions of the Charter in cases of an armed attack. In cases where there is no armed attack but where, under traditional [customary] rules of international law, there existed a wider right of action in self-defence ... [it] still continues to exist, though made subject to the restrictions contained in the Charter [prohibiting the aggressive use of force].⁵⁸

2. Anticipatory Self-Defense

(a) Historical Context Note that the above UN International Law Commission’s Article 52.2 authorizes only such countermeasures as are “*necessary*.” Article 51 limits countermeasures to those commensurate with the injury suffered, pursuant to its title “*Proportionality*.” These integrated requirements are the key ingredients for the many applications you will encounter in this chapter.

Most courses in International Law mention a widely accepted and debated test of “necessity” which dates back to 1842. US Secretary of State Daniel Webster rejected a British claim of self-defense as follows: Great Britain claimed a necessity when it raided the steamship *Caroline*, which some Canadian forces were using in support of a Canadian insurrection (prior to independence in 1867). A British raiding party boarded the ship when it was moored on the New York side of the Niagara River. They attacked those

on board and set the ship afloat so that it plunged over Niagara Falls. Webster said that although Great Britain possessed a right of self-defense, the exercise of that right should be confined to cases in which the “necessity of that self-defence is instant, overwhelming, and leaving no choice of means and no moment for deliberation.”⁵⁹

In 1848, the then US House of Representatives Republican from Illinois, Abraham Lincoln, referred to a letter from a colleague regarding the Mexican-American War in the following terms:

... Let me first state what I understand to be your position. It is that if it shall become necessary to repel invasion, the President may, without violation of the Constitution, cross the line and invade the territory of another country, and that whether such necessity exists in any given case the President is the sole judge....

If it is, it is a position that neither the President himself, nor any friend of his, so far as I know, has ever taken.... Allow the President to invade a neighboring nation, whenever *he* shall deem it necessary to repel an invasion, and you allow him to do so, *whenever he may choose to say* he deems it necessary for such purpose—and you allow him to make war at pleasure.... Study to see if you can fix *any limit* to his power in this respect, after you have given him so much as you propose. If, today, he should choose to say he thinks it necessary to invade Canada, to prevent the British from invading us, how could you stop him? You may say to him, “I see no probability of the British invading us” but he will say to you “be silent; I see it, if you don’t.”

The provision of the Constitution giving the war making power to Congress was dictated, as I understand it, by the following reasons: kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us. But your view [on pre-emptive strikes] destroys the whole matter, and places our President where kings have always stood....⁶⁰

Which of these key variables—necessity and proportionality—is more easily decided and applied: necessity or proportionality? Are they applied universally? A useful response is offered by University of Adelaide Professor Judith Gardam:

Although it is true to say that there will be a theoretical divide between States involved in an armed conflict in terms of their respective legal position under the [UN] Charter ban on the use of force, its practical impact is *negligible*. With some notable exceptions [however], States *invariably* conduct themselves on the basis that, whatever the legal status ... proportionality and necessity govern their actions. Even States that claim expansive rights to resort to force do not regard themselves as having the right to use unlimited force.

...

On reflection, proportionality ... can be seen as somewhat of a success story. Despite the limitations in that regime and the controversy it always seems to generate, it has been possible to incorporate the restraints of proportionality into concrete norms that have proved capable of broad application to particular situations.... The application of the requirement of necessity is more straightforward than proportionality. There are not so many variables that can contribute to the decision-making process in determining the necessity to resort to forceful measures in any given situation.... [N]ecessity plays a significant role as a restraint in the use of force under current international law ... [and] the mere fact of the intense debates ... where forceful action is [being] considered indicates the constraining role of necessity.

The need for further refinement of these norms has been highlighted by the revival of the global terrorist threat and the 2001 National Security Strategy of the United States in relation to the use of pre-emptive force. With the constraints of the Charter norms on the use of force subjected to considerable strain, necessity and proportionality arguably are all that is left uncontested in the legal regime.⁶¹

To what extent are these vintage principles of real significance to States on the brink of war? This may be the most sensitive subject of all. The late Oscar

Schachter, former Legal Advisor to the United Nations, responded that:

In virtually all wars, questions of necessity and proportionality have given rise to controversy that is troubling and divisive.

...

However, centuries of discussion by philosophers and jurists about the meanings of necessity and proportionality in human affairs do not seem to have produced general definitions capable of answering concrete issues. As with many abstract concepts, the answers to specific questions depend on the circumstances, appraised in the light of the humanitarian ends that justify the[se two] restraints. Determining the proper relation between means and ends in situations of great complexity and uncertainty is never easy. Decision makers ... cannot forget the risks and costs of restraint, yet they must also be mindful of the legal imperative to avoid unnecessary and disproportionate force.

In 1948, the Tokyo Military Tribunal tried crimes comparable to those adjudicated by the Nuremberg Tribunal. The Tokyo court's judicial analysis was an exceptionally rare instance of anticipatory self-defense arising in a post-*Caroline* self-defense context. Japan had not directly attacked The Netherlands. But Japan did threaten to seize certain Dutch territories. The Netherlands relied on that threat to declare war on Japan in December 1941. The Tribunal determined that the Japanese attack was sufficiently imminent to authorize the Dutch decision to go to war against Japan.⁶²

In 1986 and 1996, the International Court of Justice confirmed the universal understanding of the role played by necessity and proportionality: "self-defence would warrant only measures which are *proportional* to the armed attack and *necessary* to respond to it, a rule well established in customary international law" [italics added].⁶³ In February 2009, Israel's former prime minister Ehud Olmert appeared to disregard this bedrock principle. He expressed his frustration, regarding the continuing Hamas rocket attacks on Israel after Israel's brief military strike in Gaza, followed by its withdrawal during a supposed truce as follows: "If there is shooting at residents of the [Israeli] south, there will be an Israeli response that will be harsh and disproportionate in its

nature." Israel had just launched a three-week offensive after years of Hamas rocket attacks, leaving 1,300 Gaza residents dead. More than half were civilians. One could then only hope that the prime minister's assertion was merely false bravado, proclaimed during an Israeli election campaign.

You have now had an opportunity to grapple with some applications of the easily stated, but difficult to apply, dual requirements of necessity and proportionality. Having initially considered this preliminary building block, it should be easier to digest the following materials. They delve into the three specific Charter provisions often applied in use of force analyses.

(b) Cuban Missile Crisis Under Article 51, the right of self-defense may be invoked only until the Security Council (SC) has undertaken measures against the aggressor. This is a reason why the victim is supposed to immediately report any defensive activity to the Council. Article 51 intended that the attacked nation would immediately discontinue its defensive actions once the SC implemented countermeasures on its behalf under the Council's various Chapter VII powers.

A variety of post-Charter developments, including Cold War veto practice (§3.3), precluded the Council from performing this ostensible function. As noted by one of the foremost authorities on Charter interpretation, Professor Brunno Simma of the University of Munich, one must conclude that "[t]here is no consensus in international legal doctrine over the point in time from which measures of self-defense against an armed attack may be taken."⁶⁴ One can nevertheless resort to State practice for the purpose of drawing conclusions about its acceptable contours.

The Cuban Missile Crisis of 1962 presented the next round in the debate on the outer limits of self-defense applications:



Cuban Missile Crisis

ANTICIPATORY SELF-DEFENSE
DEBATE

Article 51: Use of Force in Self-Defense

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Nine, click Cuban Missile Crisis.

The US premised its Article 51 self-defense posture on the progressive development of International Law, which then arguably acknowledged “anticipatory” self-defense. A State could not stand by without taking decisive action when an arch-rival’s missiles appeared on platforms only 90 miles away. But the UN Security Council was not given an opportunity to take control of this crisis, as envisioned by Article 51. It provides that a State may take unilateral action “until Security Council has taken measures necessary to maintain international peace and security.” Under the US view, the Charter may have rendered the SC the primary entity for monitoring the defensive use of force. It was not the *exclusive* one, however.

President Kennedy was fully aware that the Soviet Union would undoubtedly block any Council action by exercising its veto power. Kennedy’s legal advisor, Leonard Meeker, later wrote, “The quarantine was based on a collective judgment and recommendation of the American Republics made under the [OAS] Rio Treaty. It was considered not to contravene Article 2, paragraph 4, because it was a measure adopted by a regional organization in conformity with the provisions of the [UN] Charter. Finally, in relation to the Charter limitation on threat or use of force, it should be noted that the quarantine itself was a carefully limited measure proportionate to the threat and designed solely to prevent any further build-up of strategic missile bases in Cuba.”⁶⁵

The former Soviet Union and the PRC opposed the legality of the US-imposed “quarantine” of Cuba. They did not perceive it as a measure that reasonably reacted to any imminent danger. The Soviet Union introduced a resolution in the SC condemning the US “blockade” of Cuba. It characterized this US action as a hostile act of aggression, *not* defensive in nature, because the US did not first seek the SC’s approval. While the Council did not act on the Soviet resolution to condemn the US action in Cuba, there was a general consensus that the UN Secretary-General should have been given the opportunity to negotiate a settlement. And in November 1962, an article in the Chinese Government’s Chinese People’s Daily newspaper summarized the Sino-Soviet perspective on why this was an illegal blockade under International Law:

Disregarding the severe condemnation and strong protest of the world’s people, United States President

Kennedy ruthlessly declared that a military blockade of Cuba was being put into effect....

It is extremely clear that American imperialism frivolously hopes to use the military blockade to exterminate the revolutionary regime of Cuba, to wipe out the Cuban people’s right of self-determination. It is a serious act of criminal intervention in the internal affairs of Cuba and infringement of the sovereignty and independence of Cuba. This naked aggression is also a thorough undermining of the Charter of the United Nations [Article 2.4] ... and even [Article 15] of the “Charter of the Organization of American States”....

This further proves that any rules or any rights confirmed by the Charter ... can be torn to pieces by the United States in accordance with its own needs of aggression and war.⁶⁶

3. Preemptive First Strike In 1992, UN Secretary-General Boutros Boutros-Ghali issued a warning that the traditional Laws of War would not suffice for future conflicts. His warning was virtually ignored, when promulgated in 1992:

The new breed of intra-State conflicts have certain characteristics that present [the] United Nations ... with challenges....

They are usually fought not only by regular armies but also by militias and armed civilians with little discipline and with ill-defined chains of command. They are often guerilla wars without clear front lines. Civilians are the main victims and often the main targets. Humanitarian emergencies are commonplace and the combatant authorities ... lack the capacity to cope with them....

Another feature of such conflicts is the collapse of State institutions, especially the police and judiciary, with resulting paralysis of governance, a breakdown of law and order, and general banditry and chaos.⁶⁷

This theme unfortunately deserved center stage in the midst of calls for change as of the horrific events of September 11, 2001 [chronicled in §9.7. below] As to the matter of national self-defense, the US Permanent Representative to the UN informed the Security Council (less than one month later) of the following change in US defense policy:

**Letter dated 7 October 2001 from the Permanent Representative
of the United States of America to the United Nations
addressed to the President of the Security Council**

UN Doc. S/2001/946 (7 OCTOBER 2001)

<<http://www2.kobe-u.ac.jp/~shotaro/kogi/2005kiko/s-2001-946e.pdf>>

In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001.

... Since 11 September, my Government has obtained clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks. There is still much we do not know. Our inquiry is in its early stages. We may find that our self-defence requires further actions with respect to other organizations and other States.

The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of

Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad.

In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan....

I ask that you circulate the text of the present letter as a document of the Security Council.

John D. Negroponte

Unlike the Cuban Missile Crisis, the US was *actually* attacked in New York, Washington, D.C., and Pennsylvania. The perpetrators employed flying “bombs” (the hijacked commercial aircraft). When the United States first responded with military and ground forces in Afghanistan, there was no claim that “Afghanistan” had incurred State responsibility for these attacks. While the US was displeased with the Taliban’s refusal to turn over the prime suspect, Usama Bin Laden, the US did not purport to be protecting itself from either the country it was bombing or its Taliban government. Although the US Congress did not actually declare war, the President repeatedly stated that America was “at war.”

Also unlike the 1962 Cuban Missile Crisis and the 2003 Iraq War, the US military response in Afghanistan *did* have some advance blessing by the UN in two resolutions passed the day after the September 11th attacks. The first was the General Assembly’s September 12th

global call for “international cooperation to prevent and eradicate acts of terrorism, ... [so] that those responsible for aiding, supporting, or harbouring the perpetrators, organizers and sponsors of such acts will be held accountable.”

Second, the Security Council’s other resolution recognized “the inherent right of individual or collective self-defence *in accordance with the Charter*” (italics added). However, the Council carefully expressed “its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations—as proclaimed by the Council’s resolution wording ‘to remain seized of the matter.’”

Article 51 of the UN Charter envisions UN oversight so that the Security Council can orchestrate the resulting scenario spawned by State claims of self-defense, once the initial threat is contained. But Council

control was never achieved because of the supreme national interests at stake for the US. Turning the war over to the UN did not conform to the US desire to retain maximum flexibility. This would be a “war” against individuals and non-governmental organizations, which could, and has, lasted for years. The US would soon implement the above UN Ambassador’s letter to the President of the Security Council by making its unilateral claim to the right of preemptive self-defense. Unlike the Cuban Missile Crisis claim of anticipatory self-defense where the water was boiling, the US claimed the right to attack when it was merely simmering—as determined by the US.

On September 17, 2002, President Bush confirmed the new US approach to self-defense. He stated the rationale in support of preemptive first strikes as part of the war on terror. When formulating your reaction to the questions in this exercise, consider the following:

- ◆ The unparalleled threats with which the US must now contend.
- ◆ That the four other permanent members of the UN Security Council have not openly embraced this National Defense Strategy.⁶⁸



The National Security Strategy of the United States of America

PRESIDENT GEORGE W. BUSH

THE WHITE HOUSE (SEPT. 17, 2002)

Go to Course Web Page, at:

<<http://home.att.net/~sломansonb/txtcsesite.html>>.

Under Chapter Nine, click National Security
Defense Exercise.

- ◆ The position of other world leaders, who must also assess the new US National Security Strategy (NSS) in a remarkably charged context.

A regional alliance, led by Russia and China, ultimately reacted by calling upon the US to withdraw from Afghanistan. The Shanghai Cooperation Organization urged the US to set a deadline for withdrawal because of the decline of active fighting in Afghanistan. The US rejected that request in July 2005. The reaction by several prominent academics to the 2002 US National Security Strategy includes the following three excerpts:

International Law and the War in Iraq

JOHN YOO

97 AMERICAN JOURNAL OF INTERNATIONAL LAW 563 (2003)

Despite the long-standing recognition of a nation’s right to self-defense, some argue that Article 51 has limited the right to permit only a response to an actual “armed attack.” Some even argue that an armed attack must occur across national borders to trigger Article 51. Under this interpretation, the UN Charter superseded the existing right under customary international law to take reasonable anticipatory action in self-defense. There is no indication that the drafters of the UN Charter intended to limit the customary law in this way, nor that the United States so understood the Charter when it ratified. Instead, Article 51 merely partially expressed a right that exists independent of the UN Charter.

...

The use of force in anticipatory self-defense must be necessary and proportional to the threat. At least in the

realm of WMD, rogue nations, and international terrorism, however, the test for determining whether a threat is sufficiently “imminent” to render the use of force necessary at a particular point has become more nuanced than Secretary Webster’s nineteenth-century formulation [in the above 1837 Caroline incident]. Factors to be considered should now include the probability of an attack; the likelihood that this probability will increase, and therefore the need to take advantage of a limited window of opportunity; whether diplomatic alternatives are practical; and the magnitude of the harm that could result from the threat. If a state instead were obligated to wait until the threat were truly imminent in the temporal sense envisioned by Secretary Webster, there is a substantial danger of missing a limited window of opportunity to prevent widespread

harm to civilians. Finally, in an age of technologically advanced delivery systems and WMD, international law cannot require that we ignore the potential harm represented by the threat.

Applying the reformulated test for using force in anticipatory self-defense to the potential use of force against Iraq reveals that the threat of a WMD attack by Iraq, either directly or through Iraq's support for terrorism, was sufficiently "imminent" to render the use of force necessary to protect the United States, its citizens, and its allies. The force used was proportionate to the threat posed by Iraq; in other words, it was limited to that which is needed to eliminate the threat, including the destruction of Iraq's WMD capability and removing the source of Iraq's hostile intentions and actions, Saddam Hussein.

...

International law permitted the use of force against Iraq on two independent grounds. First, the Security Council authorized military action against Iraq to implement the terms of the cease-fire that suspended the hostilities of the 1991 Gulf war. Due to Iraq's material breaches of the cease-fire, established principles of international law—both treaty and armistice law—permitted the United States to suspend its terms and to use force to compel Iraqi compliance. Such a use of

force was consistent with U.S. practice both with regard to Iraq and with regard to treaties and cease-fires. Second, international law permitted the use of force against Iraq in anticipatory self-defense because of the threat posed by an Iraq armed with WMD and in potential cooperation with international terrorist organizations.

...

The use of force in anticipatory self-defense against terrorist groups armed with WMD, or against the rogue nations that support them, will depend on three factors that go beyond mere temporal imminence. First, does a nation have WMD and the inclination to use them? ...

Second, nations will have to use force while taking into account the available window of opportunity. If a state waits until a terrorist attack is on the verge of being launched, it likely will be unable to protect the civilians who are being targeted, especially against suicide bombers who seem immune to traditional methods of deterrence. ...

Third, nations will have to take into account that the degree of harm from a WMD attack would be catastrophic. The combination of the vast potential destructive capacity of WMD and the modest means required for their delivery make them more of a threat than the military forces of many countries. ...

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The US *National Security Strategy* and the New “Bush Doctrine” on Preemptive Self-defense

CHRISTINE GRAY

1 CHINESE JOURNAL OF INTERNATIONAL LAW 587 (2002)

The *US National Security Strategy* ... is a dramatic document, a mixture of triumphalism at the victory of the West in the Cold War and alarmism about the threat of terrorism.

...

The series of terrorist attacks after September 11, on a nightclub in Bali, a Moscow theater, and a French supertanker in Yemen, confirmed the continuing danger, but also made clear the difficulties with any strategy based on fighting terrorism by the use of force.

...

The threatened extension of the war against terrorism beyond Afghanistan to the states of the Axis of Evil [e.g., Iraq in 2003] and the claims to a wide right of preemptive action against states in possession of, or in the process of developing, weapons of mass destruction have proved divisive.

...

The US, with the UK and Israel, have supported a wider right of self-defense than most states. This has long been controversial and is certainly not as generally accepted as the *Security Strategy* suggests.

...

In the famous case of the 1981 attack by Israel on the Iraqi nuclear reactor,^a the UN Security Council

unanimously condemned the Israeli action in Resolution 487.... The US—very unusually—voted in favour of the resolution on the ground that Israel had not exhausted peaceful means for the resolution of the dispute.

...

The new doctrine goes far beyond the previous rare claims to preemptive action. There is a central uncertainty in that it is not at all clear what will trigger an attack; there is also uncertainty as to what form the preemptive action will take, and as to the role, if any, envisaged for the UN. In 2002, President Bush is reported to have authorized the CIA to return to the controversial policy of assassination^b of foreign heads of states, such as Saddam Hussein, and of terrorists, a policy abandoned in 1976.... There is an inherent problem with proportionality in any preemptive use of force; in the absence of clear evidence as to the nature and scope of a particular threat the requirement that any response be proportionate is necessarily difficult to apply.

...

The new *Security Strategy* seemed to be designed with Iraq [rather than Afghanistan] in mind, on the basis that preemptive military action will be needed to prevent its development of nuclear weapons and supply of those weapons to terrorists.

...

The question also arises how far, if at all, the US would be willing to accept the application of these new doctrines on the use of force by other states. Does the *Security Strategy* offer a green light for states wishing to suppress independence movements, to invite outside help for that purpose and to take cross-border action?

...

A new Bush doctrine is emerging.... The uncertainties at its heart increase the doubts as to the legality of the radical new doctrine; its impact will depend on the reaction of the rest of the world and to date the other states have proved distinctly cautious.^c The *Security Strategy* may yet prove more a rhetorical device [that was] designed to put pressure on Iraq than a serious attempt to rewrite [the] international law on self-defense.

^a See T. McCormack, *SELF-DEFENSE IN INTERNATIONAL LAW: THE ISRAELI RAID ON THE IRAQI REACTOR* (Jerusalem: Magnes Press, Hebrew University, 1996).

^b Regarding assassination as a government policy, see M. Scharf, *In the Cross Hairs of a Scary Idea*, *WASHINGTON POST* (Apr. 25, 2004), at B-1.

^c The referenced caution intimates that the Bush doctrine, regarding pre-emptive first strikes, could one day be more widely accepted by the international community (although possibly limited to just the terrorist context).

Professor Gray revisited the above assessment of the US national security policy of preemptive first strike four years later after it had been reaffirmed by the Bush Administration:

The questions left open in the 2002 US *National Security Strategy* as to what will trigger pre-emptive action, when action against non-State actors will be permissible and what degree of force will be proportionate in pre-emptive action are still unresolved. The promise that “[t]he reasons for our actions will be clear, the force measured and the cause just” does not offer much in the way of specific guidance. It is very striking that in this context, the US strategy makes no reference to international law or to the role of the UN Security Council.... The EU 2003 *Security Strategy* provides a marked contrast

in that it does not adopt the doctrine of pre-emptive self-defence, does not expressly identify “rogue States” and does profess respect for international law and the role of the UN. Other States have not generally shown themselves willing to accept a Bush doctrine of pre-emptive self-defence. They agree that there are new threats facing the world from international terrorists and the proliferation of weapons of mass destruction, but the [ir UN] 2005 World Summit showed clearly that there is generally no acceptance of pre-emptive action.⁶⁹

The referenced UN response to the new US *National Security Strategy* may be observed in its December 2004 report, which restates the familiar and comparatively non-contentious Customary International Law requirements of “necessity” and “proportionality”:

Report of the UN High-level Panel on Threats, Challenges and Change A More Secure World: Our Shared Responsibility

U.N. GENERAL ASSEMBLY DOCUMENT

A/59/565 (DEC. 2, 2004)

<<http://www.un.org/secureworld>> click [Document]

...

In all cases, we believe that the Charter of the United Nations, properly understood and applied, is equal to the task: Article 51 needs neither extension nor

restriction of its long understood scope, and Chapter VII [e.g., Art. 39 threat assessment and Art. 42 collective use of military force] fully empowers the Security Council to deal with every kind of threat that States

may confront. The task is not to find alternatives to the Security Council as a source of authority but to make it work better than it has.

That force *can* legally be used does not always mean that ... it *should* be used. We identify a set of five guidelines—five criteria of legitimacy—which we believe that the Security Council (and anyone else involved in these decisions) should always address in considering whether to authorize or apply military force. The adoption of these guidelines (seriousness of threat, proper purpose, last resort, proportional means and balance of consequences) will not produce agreed conclusions with push-button predictability, but should significantly improve the chances of reaching international consensus on what have been in recent years deeply divisive issues [p.53].

...

[Para.] 188.... The problem arises where the threat in question is not imminent but still claimed to be real: for example the acquisition, with allegedly hostile intent, of nuclear weapons-making capability.

189. Can a State, without going to the Security Council, claim in these circumstances the right to act, in anticipatory self-defence, not just pre-emptively

(against an imminent or proximate threat) but preventively (against a non-imminent or non-proximate one)? Those who say “yes” argue that the potential harm from some threats (e.g., terrorists armed with a nuclear weapon) is so great that one simply cannot risk waiting until they become imminent, and that less harm may be done (e.g., avoiding a nuclear exchange or radioactive fallout from a reactor destruction) by acting earlier.

190. The short answer is that if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment—and to visit again the military option.

191. For those impatient with such a response, the answer must be that, in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all [to do so].

E. COLLECTIVE SELF-DEFENSE

1. Nicaragua Application The US relied on “collective” self-defense to vindicate its actions in a major ICJ case filed by Nicaragua. The US had supported anti-government forces for the purpose of undermining the mid-1980s Sandinista government. This case presented an opportunity for the ICJ to address the applicability of collective self-defense arguments, which had not been determined during the Cuban Missile Crisis but were now ripe for decision. The issue was whether the US could assert collective self-defense as a legal justification for its political actions, which included the work of US CIA operatives who arranged the mining of strategic harbors in Nicaragua. The US asserted that its interference was justified as a form of self-defense against some future armed attack by Nicaragua on other OAS members. Nicaragua was allegedly helping antigovernment forces in countries such as El Salvador overthrow democratically elected governments in the region.

The ICJ was not receptive to the US claim of justifiable intervention in the name of collective self-defense. For

such a general right to legally materialize, the US would have to prove a fundamental modification of the Customary International Law principle of nonintervention. The ICJ disapproved the US basis for intervention in Nicaraguan affairs, reasoning that it could not be justified with a collective self-defense rationale. In the Court’s words:

the United States has not claimed that its intervention, which it justified in this way on the *political* level, was also justified on the *legal* level, alleging the exercise of a new right of intervention regarded by the United States as existing in such circumstances. As mentioned above, the United States has, on the legal plane, justified its intervention expressly and solely by reference to the “classic” rules involved, namely, collective self-defence against an armed attack. Nicaragua, for its part, has often expressed its solidarity and sympathy with the opposition [anti-government forces] in various States, especially in El Salvador. ...

The Court therefore finds that no such general right of intervention, in support of an opposition

within another State, exists in contemporary international law. The Court concludes that acts constituting a breach of the customary principle of non-intervention will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations.⁷⁰

2. Kuwait Application The next major opportunity to analyze Article 51 occurred during the PGW. Four days after Iraq invaded Kuwait, the UN Security Council issued Resolution 661. That statement identified the application of self-defense by "... [a]ffirming the inherent right of individual and collective self-defence, in accordance with Article 51 of the Charter..."⁷¹ The dozen SC resolutions during that war reflected a *clear* consensus about the existence of the inherent right of collective self-defense.

The question was whether either individual or collective self-defense could be undertaken at any time without the direct participation of the Council. Article 51 authorizes self-defense "until the SC has taken measures necessary to maintain international peace and security." Although time was allegedly of the essence, the text of Article 51 does not condone a wholly unilateral exercise by a group of States without some UN involvement. The Council was motivated to quickly and incessantly issue resolutions so as to remain openly involved with the US-directed process of forcing Iraq to withdraw from Kuwait.

3. Embassy Bombing Application The pre-Charter elements of *necessity* and *proportionality* were arguably stretched to the limits when the US launched cruise missile attacks into Afghanistan and Sudan in 1998, in retaliation for the August bombings of US embassies in Kenya and Tanzania. Some 250 people had been killed during these embassy bombings, including twelve American citizens. More than 5,000 people were wounded. Neither Afghanistan nor Sudan took any action to find the perpetrators, who demonstrated their continued interest in directing more terrorist attacks toward US embassies.

The US considered these embassy bombings as armed attacks on the US. Both attacks occurred half a world away from US shores. Only a small fraction of those harmed were US citizens. Those found to be responsible for the bombings were not State agents of either Afghanistan or Sudan. At that point in time, there was no overwhelming

concern about such an attack ever reoccurring. And there was no resort to the UN Security Council. Doing so would likely compromise the secrecy and timeliness of any forceful US reaction to these embassy bombings in Africa. To label the US response "acceptable" under International Law would require characterization of the missile attack as constituting a limited right of reprisal launched in the name of self-defense.

4. September 11, 2001 Application For the first time in NATO's history, the North Atlantic Council implemented the collective self-defense provision, which is Article 5 of the Washington Treaty [NATO's constitutive document: textbook §3.5.A.]—

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

The European and North American treaty members thus agreed that in the event of an attack within the meaning of Article 5, each would assist the attacked party and take such action as necessary. The commitment to collective self-defense embodied in this 1949 treaty was entered into in a different era. There are now a host of security risks quite unlike those which effectively called NATO into existence. International terrorism rendered that long-term collective self-defense commitment no less valid, especially now that Russia and the US are working hand-in-hand to respond.

One day after the attack, NATO allies unequivocally activated their treaty-based commitment to work with

the US to respond to international terrorism. British commandoes entered the ground war, and other NATO members made various economic, legislative, and diplomatic contributions to the organization's joint response to the attack of September 11th. This uniform resolve thus solidified one of the most clearly supported instances of collective self-defense in history.

The second paragraph of Article 5 includes a NATO commitment to the UN. NATO members therein agreed that they would defer self-defense measures when the UN Security Council has taken its own measures to maintain the peace. This scenario presents a fresh example of the persistent tug-of-war between NATO and the UN regarding the ultimate scope of collective self-defense. NATO conducted the Kosovo bombing without the imprimatur of the UN Security Council [§2.4.B.]. On the other hand, the Council is unlikely to pull rank by stepping in when a common objective is being successfully pursued by NATO. The UN may once again effectively look the other way; delegate its Chapter VII peacekeeping powers to this regional organization—rather than risk a turf war which would impede a successful antiterrorism campaign; or effectively give its stamp of approval by undertaking a peacekeeping operation in a post-Taliban Afghanistan.

F. NUCLEAR WEAPONS DILEMMA

There are now two handfuls of confirmed nuclear weapons States (in order of number of stockpiled weapons): the US, Russia, France, China, the UK, India, Pakistan, Israel, and possibly North Korea—based on its October 2006 claim that it tested a nuclear weapon. Per the responsive Security Council resolution, this test violated the “Joint Statement issued on 19 September 2005 by China, the Democratic Peoples Republic of (North) Korea, Japan, the Republic of (South) Korea, the Russian Federation and the United States, to achieve the verifiable denuclearization of the Korean Peninsula and to maintain peace and stability on the Korean Peninsula and in north-east Asia...”⁷²

There have been various diplomatic and military actions to frustrate other nations from joining this club. As discussed below in this part of the book, various UN Security Council resolutions have sought to frustrate Iran's objective to become a nuclear nation. Israel has been far more aggressive. In 1983, it bombed Iraq's nuclear program out of existence. In 2007, it bombed a

Syrian project, which hampered North Korea's clandestine assistance to Syria in pursuit of their respective nuclear objectives. Syria has since refused to allow the International Atomic Energy Agency to probe beyond the site where Israel attacked the Syrian facility.⁷³

In 1962, US President Kennedy was prepared to go to war with the Soviet Union because of the latter's attempt to station nuclear missiles in Cuba [§12.1.B.1(b)]. He also strongly considered attacking China to keep it from getting “the” bomb. When China finally achieved nuclear capability in 1964, it did not bully the rest of Asia, as anticipated by Kennedy. There was an eerie resemblance to President Bush's January 2006 statement that an Iran with nuclear weapons would be “a grave threat to the security of the world.” Kennedy's 1963 statement about China was that a nuclear-armed China would be a “great menace in the future to humanity, the free world and freedom on earth.”⁷⁴

1. Judicial Perspective In 1996, the International Court of Justice addressed the unthinkable situation whereby a nation State might one day use this particular weapon in the name of Article 51 self-defense:



Legality of the Threat or Use of Nuclear Weapons

INTERNATIONAL COURT OF JUSTICE

Advisory Opinion of 8 July 1996

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Nine, click Nuclear Weapons Case.

The ICJ's decision was not very satisfying. It is susceptible to varied interpretations. As aptly characterized by St. John's University (New York) Professor Charles Moxley, author of a book-length analysis of this book-length case:

From a litigator's point of view, one—from either side of the issue—can find much language and expressed sentiment to quote and manipulate in arguing the issue in the next case [assuming there is one], or in justification of policy decisions and contingency planning and military training ... in the meantime.

For *proponents* of nuclear weapons, there is the wide-open barndoor of self-defense, and the basis to argue that ... nuclear weapons, like any other weapon, may be used, and, indeed, that arguably they may be used in extreme circumstances of self-defense regardless of the dictates of other provisions of international law.

For the *opponents* of nuclear weapons, there is the recognition of the “general” unlawfulness of nuclear weapons and the suggestion that all uses of nuclear weapons would be unlawful if the contention of the nuclear powers is disproved that they can deliver modern precision low-yield nuclear weapons at a target, discriminating between military and nonmilitary targets and controlling collateral effects, particularly radiation.

Professor Moxley’s comprehensive analysis does note, however, that the case is not without contemporary utility: “Most fundamentally, the decision contains a grand and historic invitation: Show us the facts.... When viewed in light of the extraordinary fact ... that the United States defended the lawfulness only of the modern precision low-yield nuclear weapons, the Court’s invitation becomes focused and real: Give us the facts as to the type of weapons whose legality is being defended and the putative circumstances of such lawful use, and the issue can be decided.”⁷⁵

2. North Korea One of the more vexing problems with implementing multilateral agreements on the control of force surfaced in 1991. The Cold War had ended. North Korea had been admitted to the UN in 1991 as a “peace-loving state” under Article 4.1 of the UN Charter. It signed a Treaty of Reconciliation with South Korea. The US had announced a major withdrawal of its troops, stationed in South Korea since the Korean War. North Korea had announced its agreement, in principle, with a US plan to purge the Korean peninsula of nuclear weapons. The US had already removed its nuclear weapons from South Korea.

Suddenly, it appeared that one remnant of the Cold War was about to resurface, another major threat to regional and global stability centered on the possession of nuclear weapons of mass destruction. North Korea announced that it would no longer permit inspections by the UN International Atomic Energy Agency as conducted under the 1968 Nuclear Non-Proliferation

Treaty. All foreigners, except accredited diplomats, were asked to leave North Korea in 1993 as this disruptive scenario continued to unfold. North Korea then announced its withdrawal from the 1968 nuclear control treaty, which was later scaled back to a “suspension” after extensive UN-sponsored negotiations. Japan and South Korea pleaded with the US not to impose sanctions on North Korea. The world was once again perceived by many commentators as being near the brink of nuclear confrontation. In 1994, the US sent in scores of Patriot surface-to-air antimissile batteries to block North Korean Scud missiles in the event of the North’s attack on the South. Later in 1994, North Korea finally agreed to permit inspectors to re-enter the country to determine its nuclear weapons capability.

While the tension was ultimately diminished, the related compromise has arguably set a risky precedent. The US agreed to North Korea’s demand that inspections of its suspected nuclear sites be postponed for several years. The US provision of \$4 billion in aid would help North Korea pursue alternative energy resources. North Korea would freeze all nuclear programs for several years. This incident may have sent an unintended message to rogue States: Violating the 1968 treaty has its rewards. North Korea was effectively free to proceed as it wished. The international community was “put off” for several years, and North Korea remained again free to disregard the nuclear control treaty when that time frame elapsed.

During summer 2005, six nations revived discussions on North Korea’s evolving nuclear weapons capability—China, Japan, North Korea, Russia, South Korea, and the US. The PRC supplies North Korea with seventy percent of its oil and one-third of its food. But China does not want to risk reducing or eliminating such exports, fearing that to do so would render North Korea more belligerent. The US Secretary of State has repeatedly advised this member of the President’s “Axis of Evil” that the US does not intend to invade. North Korea nevertheless fears that the new US National Security Strategy, which guided the Iraq War, would logically place North Korea in America’s weapons of mass destruction crosshairs. In a September 2005 accord, North Korea agreed to: scrap all of its existing nuclear weapons and production facilities; rejoin the Nuclear Non-Proliferation Treaty; and readmit international nuclear inspectors. The other nations assured North Korea’s security and agreed to provide economic and

energy benefits—reminiscent of the earlier US agreement with North Korea.

In May 2009, Korea conducted an underground nuclear test. It also triggered a stronger wave of international condemnation than ever before. Even China and Russia protested. The explosion violated a 2006 UN Security Council resolution barring North Korea from detonating any nuclear device. The Council's June 2009 Resolution 1874 unanimously imposed sanctions. It authorized other nations to inspect North Korean vessels, while prohibiting international sales that could assist in its nuclear development.

3. Iran The Security Council issued five sanctions resolutions between March 2006 and September 2008—none of which would be possible if any of the Permanent Five members had exercised its veto power [§3.3.B.2.(b)]. Their common purpose was to frustrate Iran's pursuit of nuclear weapons. Iran's boilerplate response has been that it will press forward with its nuclear program, including uranium enrichment, because Iran “cannot and will not accept a requirement which is legally defective and politically coercive.” This reaction effectively guarantees that Iran's nuclear program will remain atop the international security agenda.

These resolutions include financial measures against specific Iranian individuals and institutions; provisions for inspecting certain Iranian vessels and aircraft when not in international waters; and restrictions on the sale of some dual-use scientific-military materials to Iran. Each has provided an “incremental” increase in pressure on Tehran with a view toward halting its enrichment program. Perusing portions of the March 2008 version (which retains certain references for further research) yields a snapshot of how the Security Council issues its (UN Charter) Chapter VII warnings, cast in respectively diplomatic (for Iran) and obligatory (for all other UN members) terms:



United Nations Security Council Resolution 1803

5848TH MEETING (3 MARCH 2008)

Go to Course Web Page, at:

<<http://home.att.net/~sломansonb/txtcsesite.html>>.

Under Chapter Nine, click UNSC 1803 (Iran).

The UN's above organizational pressure has been seconded by the European Union. In February 2008, EU ministers approved their own Iranian sanctions plan—essentially cutting trade ties with Iran. This approach was meant to facilitate a resolution of the above nuclear weapons standoff between the West and Iran, while supporting the UN sanctions regime. Ten years earlier, the EU undertook its de facto ban on the sale of weapons to Iran.

4. Outer Space The potential for nuclear weapons in space is another source of friction. In 2001, US President Bush expressed the desire to amend the 1972 US-Russian Anti-Ballistic Missile Treaty. Doing so would remove this restriction on building a space-based missile defense system—aka the “Star Wars” defense shield during the Reagan presidency. The US based this intention on its concern with what it called “rogue nations,” such as North Korea. They might use whatever nuclear weapons capability they have to politically blackmail the US. Russia's President Putin stated that if “the United States abandons the 1972 agreement, we will have the right to pull out not only of Start II but also from the entire arms reductions and control system.” Putin previously announced Russia's stance on the potential use of nuclear arms in January 2000 when he appeared to lower the nuclear threshold: “The Russian Federation considers it possible to use military force to guarantee its national security according to the following principle: the use of all forces and equipment at its disposal, *including nuclear weapons*, if it has to repel armed aggression if all their means of resolving the crisis have been exhausted or proved ineffective.” In December 2002, the US provided notice of its withdrawal.⁷⁶

There has been another prominent US disengagement from the Cold War-era nuclear arms control regime [Chart 9.2.]. The 185 signatories of the 1968 Nuclear Non-Proliferation Treaty pledged never to acquire, nor help another nation acquire, nuclear weapons. By the turn of the century, however, seven nations including rivals India and Pakistan were declared nuclear powers. A total of forty-four nations are believed to have varying capacities to produce nuclear weapons.

In October 1999, the US Senate voted to reject the 1996 Comprehensive Test Ban Treaty (CTBT), which had been signed by Russia, China, and the US. These nations strongly urged the US to ratify this treaty, which

had languished in Senate controversy for the three years since President Clinton signed it. Archrivals India and Pakistan did not sign the CTBT, which was a priority for the Clinton Administration because of their vernal nuclear capability. It requires nuclear-capable nations to halt their weapons testing. Nations ratifying the CTBT agreed to accept increased international monitoring for detecting unauthorized testing. The US Senate opponents, however, complained that other nations could cheat. Their taking advantage of an arguably unenforceable treaty would ultimately erode the US nuclear advantage.

One downside of the US decision not to ratify the CTBT is the example that it set for others. When the US rejected this major arms control treaty, 151 nations had signed, and fifty-one of those had ratified it. These numbers then included twenty-six of the forty-four nuclear-capable nations. This treaty was supposed to enter into force when all nations believed to have nuclear capacity had ratified it.

One might thus conclude with the following question: How well can existing arms control agreements effectively suppress mutually assured destruction, while the nuclear community continues to grow, mature, and test nuclear weapons in the name of preserving national security?

G. FUTURE ORGANIZATIONAL FORCE

1. Rapid Deployment Force? Former UN Secretary-General Boutros Boutros-Ghali advocated a more forceful method for applying Charter principles to future hostilities. In 1992, he proposed that UN forces be made available for the rapid deployment of force under the Charter's Chapter VII powers. There had never been a standing army as envisioned by UN Charter Article 43. Yet the time was ripe in the aftermath of the Cold War to establish some force capable of quickly responding to threats to peace.

In his *Agenda for Peace*, which was prepared in response to a request from the heads of State of the Council members (see *Security Council Summits* below), Boutros-Ghali proposed that the PGW had taught the community of nations an important lesson. A permanent body should be on call to serve as a deterrent to future threats to peace. He thus proposed "peace-enforcement units." Under this proposal, the "ready availability of armed forces could serve, in itself, as a means of deterring breaches of the peace since a potential

aggressor would know that the Council had at its disposal a[n immediate] means of response."

This never-implemented proposal sought the introduction of a UN rapid deployment force into any conflict deemed appropriate by the SC. Boutros-Ghali's perspective was that the Council should consider "the utilization of peace-enforcement units in clearly defined circumstances."⁷⁷ In his view, adoption by the Council would have bolstered the UN's diplomatic role, while simultaneously providing the manpower to be an effective *peacemaker*—rather than continuing to serve in its perennial role as mere *peacekeeper*.

2. Security Council Summits In the same year (1992), world leaders conducted a summit-level meeting of the UN Security Council members in New York. This was the 3,046th meeting of the Council, but the first meeting of its heads of State. As proclaimed by Britain's SC President, on behalf of the UNSC to the participating heads of State at their final gathering:

This meeting takes place at a time of momentous change. The ending of the Cold War has raised hopes for a safer, more equitable and more humane world....

Last year, under authority of the United Nations, the international community succeeded in enabling Kuwait to regain its sovereignty and territorial integrity, which it had lost as a result of Iraqi aggression.

The members of the Council also recognize that change, however welcome, has brought new risks for stability and security. Some of the most acute problems result from changes to State structures [§2.4]....

The international community therefore faces new challenges in the search for peace. All Member States expect the United Nations to play a central role at this crucial stage. The members of the Council stress the importance of strengthening and improving the United Nations to increase its effectiveness.

Rather than taking the initiative, by resolving *how* this "strengthening and improvement" would occur, the Security Council's heads of State instead requested that the UN Secretary-General assume this task. In his responsive work product (*Agenda for Peace*, earlier) Boutros Boutros-Ghali therein made specific recommendations in three areas:

1. *Preventative diplomacy*—formal fact-finding mandated by the SC; meeting “away” from the Council’s New York headquarters, notwithstanding this Charter requirement, so as to directly diffuse any underlying disputes based on the Council’s presence in a major city of the major superpower.
2. *Peacemaking*—mediation or negotiation by an individual to be designated by the SC; that the Council devise means for using financial institutions and other components of the UN system to insulate certain States from the economic consequences of economic sanctions under Article 41; that States undertake to make armed forces available to the Council, on a permanent basis, when it decides to initiate military action under Article 42; that the Council utilize peace-enforcement measures only in “clearly defined circumstances and with their terms of reference specified in advance.”
3. *Peacekeeping*—that regional arrangements be undertaken in a manner that would effectively contribute to a deeper sense of participation, consensus, and democratization in international affairs.

3. US “Monkey Wrench” In 1994, President Clinton responded to the 1992 Summit meeting with new guidelines for US participation. His directive would do two things. First, it would greatly limit future US involvement in UN operations involving the use of force. The essential feature is that “the President will never relinquish command over US forces. However, the President will, on a case-by-case basis, consider placing appropriate US forces under the operational control of a competent UN commander for specific UN operations authorized by the Security Council.”

There may be room within this US executive policy for supporting the rapid deployment force proposed two years earlier by the Secretary-General. It is unlikely, however, that it would survive either executive or congressional scrutiny. The Clinton Directive modified the prior Bush Administration’s expansive UN policy, during a post-Cold War period that experienced an unparalleled increase in UN peacekeeping operations associated with the Security Council’s renaissance during the PGW.

The following analysis could not be directly based on the President’s classified Directive although the US Department of State provided a separate analysis summarizing the key elements. The first paragraph addresses the general US voting posture in future SC

matters. The second provides specifics about the conditions for committing US troops to such actions:

We have determined that the US should support international action when a threat exists to international or regional peace and security, such as international aggression, an urgent humanitarian disaster or interruption of established democracy or gross violation of human rights that is coupled with violence. In determining whether to support international action, the US will consider whether operations have clear objectives, a defined scope, and an integrated politico-military strategy to achieve our objectives. An international “community of interests” should exist to support multilateral operations. For Chapter VI [presumably meaning Chapter VII] operations, a ceasefire should be in place. The availability of financial and human resources to carry out the strategy will be a critical factor in US deliberations, as will the linkage of expected duration to clear objectives and realistic exit criteria for the operation.

The standards will be even more stringent when the US considers deploying American forces to participate in UN peacekeeping operations. The US will only participate in a peace operation when:

- ◆ It advances US interests and the level of risk is acceptable;
- ◆ US participation is necessary for the success of the operation;
- ◆ An integrated politico-military strategy exists to achieve our objectives;
- ◆ The personnel, funds, and resources are available to support the strategy;
- ◆ Command and control arrangements are satisfactory;
- ◆ Likely duration and exit conditions have been identified; and
- ◆ Domestic and Congressional support exists or can be marshaled.

We believe these factors are critical to the successful conduct of peace operations and to building public and Congressional support for US involvement in those operations. As for command and control arrangements, the President will never relinquish command over US forces. However, the President will, on a case-by-case basis, consider placing appropriate US forces under the operational control of a competent U.N. commander for specific U.N. operations authorized by the Security Council.⁷⁸

Assume you represent another member of the UN Security Council. How will you advise your country about the potential for US involvement in a UNSC action that your country is about to advocate to the rest of the Council?

◆ §9.3 PEACEKEEPING OPERATIONS

Regional powers have established a number of significant *non*-UN peacekeeping operations. You will recall from your study of international organizations [§3.4. introduction] that the UN Charter envisions a role for regional agencies as well. This section focuses mainly on UN peacekeeping and how it evolved in the absence of any express Charter provision.

A. NON-UN PEACEKEEPING

The UN is not the only international organization for dispatching international peacekeeping forces. The North Atlantic Treaty Organization, Organization of American

States, and the European Union—as well as some individual nations—have attempted to control State uses of force.

NATO has authorized the use of air strikes since 1993, for example, under extensive international pressure to react to the Bosnian Serb attacks on civilian targets. NATO awaited UN authorization before it carried out its “threat” by bombing some Serbian positions when the Serbs failed to retreat and then attacked UN-designated safe havens in Bosnia. NATO’s 1994 air strikes were the first attacks on ground troops in NATO’s existence. In 2001, NATO assembled a European Defense Force to deal with future problems—first, in Macedonia to disarm Albanian rebels.

Other less-publicized operations and proposals have been conducted by several international organizations, including the following (listed chronologically in Chart 9.1) below.

The Organization on Security and Cooperation in Europe is assuming a prominent organizational role in

CHART 9.1 NON-UN PEACEKEEPING FORCES (NATIONAL AND INTERNATIONAL)

African Union–Darfur ^a (2004–present)	Eighty military observers and 300 soldiers from the African Union in the Darfur region of The Sudan; a September 2004 UN Security Council resolution endorsed an expansion; a September 2006 governmental ultimatum initially required the AU force to accept Sudan’s blockage of a UN force; a 26,000 member UN-authorized joint AU-UN force was supposed to deploy as of January 1, 2008; Sudan rejected that presence in relation to the International Criminal Court prosecution of senior Sudanese officials. The underfunded and ill-equipped 7,000-member AU force covered Darfur—and an area about the size of Texas.
EUFOR (2004–present)	The European Union Force took over from NATO in 2004. It gradually cut back on its initial 6,500 troop force as Bosnia became more stable. In October 2008, the UN Security Council unanimously extended the mandate for this 2,100-member military peacekeeping presence, while NATO maintained its administrative presence there as well—all in the pursuit of Bosnian integration.
Coalition (2003–present)	UN Security Council resolution authorizes US-led force in Iraq, mandating establishment of democracy.
African Union–Burundi (2003)	AU’s first P.K.O. of 2,700 troops in Burundi (until takeover by UN peacekeepers in May 2004).
West African PKO (2003)	3,250 specialized troops headed by Nigeria.
Australia (2002–2008)	Monitors various states of emergency in the now independent Timor-Leste (the first, and former, UN territorial administrative region until 2002).
Russia ^b (2001–2008)	Russian peacekeeping force which initially assisted Georgia with its separatist Abkhazia and South Ossetia provinces after their unilateral claims to independence/2001: the Georgian Parliament asked Russia to withdraw its troops from this force/after the Georgia-Russia conflict in Fall 2008,

CHART 9.1 NON-UN PEACEKEEPING FORCES (NATIONAL AND INTERNATIONAL) (Continued)

	Russia established its “peacekeeping force” in these separatist regions, while the European Union sent in 200 civilian observers to the areas of Georgia hosting Russian soldiers near, but outside of, Abkhazia and South Ossetia.
Int’l Stabilization Force (2001)	Initial 15-nation peacekeeping 5,000 member force in post-Taliban Afghanistan; replaced by NATO and US-led Coalition (2003).
NATO (2001)	European Defense Force of 3,500 British, French, and Italian troops in Macedonia and Kosovo.
OAU (1998)	African foreign ministers met in Ethiopia, rejecting Western nations’ proposal to help train potential OAU peacekeeping force on the African continent.
ECOMOG (1997)	Economic Community of Western African States “Military Observer Group” was authorized by the UN Security Council to intervene to maintain order in Sierra Leone’s civil war (between 7,000 and 20,000 peacekeepers by January 1999).
High Readiness Brigade (1996)	Seven nations signed an agreement in December 1996 to deploy a 4,000-person force to crisis spots under the direction of the Security Council: Austria, Canada, Denmark, Poland, Netherlands, Norway, and Sweden.
OAS (1993)	A sixteen-nation OAS civilian observer force was present in Haiti to assess the effect of the coup of its first democratically elected leader in 1991.
WEU (1992)	The Western European Union assisted NATO with enforcing a UN-imposed blockade. The warships of certain European States kept all vessels from passing in or out of the Adriatic Sea near the former Yugoslavia.
WAC (1990)	The sixteen-member West African Community sent a five-nation peacekeeping force into Liberia during its civil war to locate the leader of the rebel forces in Liberia.
British Commonwealth (1979)	One thousand troops from five nations of the British Commonwealth were sent into Southern Rhodesia. Their goal was to keep the peace achieved as a result of a ceasefire agreement between antigovernment guerrillas and the government of Southern Rhodesia. The presence of this force enabled Southern Rhodesia to transfer political power to the new Zimbabwe government in 1980.
Arab League (1976)	The six-nation Inter-Arab Deterrent Force was sent into Lebanon by the Arab League. On Lebanon’s request, the League sent more than 30,000 troops there to monitor the peace “established” by an agreement between Muslim and Christian factions during Lebanon’s civil war.
OAS (1965)	The Dominican Republic was on the verge of a civil war. The US sent more than 20,000 troops in a unilateral action that violated standing OAS regional security agreements. The OAS later replaced those troops with its own much smaller Inter-American Peace Force.

^a F. Olonisakin, *REINVENTING PEACEKEEPING IN AFRICA: CONCEPTUAL AND LEGAL ISSUES IN ECOMOG OPERATIONS* (Hague: Kluwer, 2000).

^b J. Mackinlay & P. Cross, *REGIONAL PEACEKEEPERS: THE PARADOX OF RUSSIAN PEACEKEEPING* (Tokyo: UN Univ. Press, 2003).

maintaining peace in Europe. It has monitored election results, for example, and is a potential NATO “competitor” for broadening regional peacekeeping activity. However, it may be difficult to cultivate a smooth functioning relationship with the UN Security Council, a problem experienced throughout much of the “UN”

peacekeeping process. As University of Pisa Professor Natalino Ronzitti writes:

The usual pattern has been established by relations between the UN and regional organizations: regional organizations are entitled to take enforcement measures

if so authorized by the UN Security Council [which] ... can “utilize” regional organizations for enforcement action “under its authority.” This concept is based on the supremacy of the Security Council, under the authority of which regional organizations can act.

The way in which this concept has been implemented in practice is a moot point. During the Cold War, regional organizations often acted without any authorization from the Security Council (the best example is the Organization of American States). Even in the post-Cold War period, relations between regional organizations and the Security Council are still not easy (UNPROFOR and NATO in Bosnia and Herzegovina is a case in point) and regional organizations sometimes act without real directions from the Security Council, as proven in the case of NATO in former Yugoslavia (Bosnia and Herzegovina), where the UN adopted an “enabling resolution” putting NATO under the nominal authority only of the UN.⁷⁹

B. UN PEACEKEEPING

1. Evolution UN peacekeeping has been a focus of worldwide attention since its inception. The UN’s first such mission was the 1948 UN Truce Supervision Organization. It is still carrying out its mission with observers who remain in the Middle East to monitor ceasefires, supervise armistice agreements, and attempt to prevent escalation of the conflict.

The UN has actually conducted a number of “peacekeeping” operations although the term was not employed officially until the 1956 Suez Canal Crisis. Since then, approximately one-half million UN troops have been deployed in many regions of the globe. A listing of the numerous UN peacekeeping missions is available on the UN Web site.⁸⁰

In 1965, the President of the UN General Assembly established a Special Committee on Peacekeeping Operations, consisting initially of 33 States (now 114, plus 12 observer States, as of 2005). The scope of these operations has dramatically increased over time, particularly during the period after the Cold War and just prior to the UN’s end-of-millennium financial crisis. As noted by Mike Hanrahan, Military Adviser to Canada’s Permanent Mission to the UN: “Since the early 1990s the Special Committee has encouraged all regional and sub-regional organizations ... to promote the maintenance of international peace and [to] work in cooperation with the United Nations.... The Special Committee has consis-

tently stressed the primacy of the United Nations ... but has [also] consistently encouraged the different regional organizations ... to actively support UN peace and security requirements.”⁸¹

In 1992, the number of UN forces quadrupled from 11,000 to 44,000. By the end of 1993, there were 80,000 UN peacekeepers. As of December 2004, this number was down to 60,000. And for the first time in UN history, US combat troops were assigned as UN peacekeepers, sent to Macedonia to aid in containing the Bosnian conflict so that it would not spill over into bordering States.

At the turn of the century, world leaders made a commitment to act upon a contemporary report which called for more peacekeeping resources to facilitate conflict management—in the following terms: “We resolve, therefore ... [t]o make the United Nations, more effective in maintaining peace and security, by giving it the resources and tools it needs for conflict prevention, peaceful resolution of disputes, peacekeeping, post-conflict peace building and reconstruction. In this context, we take note of the Report of the Panel on United Nations Peace Operations and request the General Assembly to consider its recommendations expeditiously.”⁸²

The UN’s December 2004 High-level Panel Report reconfirmed this commitment. It further noted that the “developed States have particular responsibilities here, and should do more to transform their existing force capacities into suitable contingents for peace operations.”⁸³

As of 2006, the UN’s overall annual budget was \$10,000,000,000 (ten billion). Seventy percent of that figure is allocated to its peacekeeping operations. That is roughly double the size of ten years before, as the UN Security Council was about to break out of its veto-laden history that had precluded it from such progressive activities. By the next year, Secretary-General Ban Ki-moon reported the busiest period in UN peacekeeping history. There were eighteen UN peacekeeping missions, 100,000 personnel in the field, and UN involvement in thirty joint peacekeeping operations worldwide. By 2008, the number of UN peacekeepers rose to 110,000, with a \$5,000,000,000 *annual* budget.

In an effort to reform the UN’s WWII management structure, Secretary-General Kofi Annan offered this March 2006 proposal: the UN should have at its disposal a 2,500-member Rapid Reaction Team (originally a Russian proposal). That force would be the modern but greatly downsized equivalent of the UN Charter Article 43 standing army, which never materialized [textbook §3.3.B.2(a)].

2. Limitations From the outset, there were problems with the laudatory objective of the UN as keeper of the peace. No standing army ever materialized, as arguably contemplated by some participants in the drafting of Article 43 of the Charter. The Cold War blocked effective *peacemaking*. Contemporary UN peacekeeping problems include inadequate funding, insufficient national resolve to continue participation, and the severely limiting US guidelines promulgated by President Clinton in 1994 [§9.2.G.3.].

Member State unwillingness to cede the requisite degree of State sovereignty to the UN is the basic limiting factor. The Charter was drafted with a view toward ensuring that the UN would not become a form of world government possessing the preeminence to override national sovereignty. Therefore, Article 2.7 of the Charter retained the primacy of State sovereign power, in the following terms: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters [that] are essentially within the domestic jurisdiction of any state...” This constitutional limitation historically precluded the organization from operating in any theater absent consent of the State, giving rise to the perennial UN role as “peacekeeper” rather than “peacemaker.”⁸⁴

The UN learned this lesson the hard way in the unique expansion of its “Operation Restore Hope” in Somalia. In practice, a peacekeeping invitation had always been understood to mean that the UN troops would take on a somewhat passive role. UN “Blue Helmets” would not actively participate in local military conflicts. These neutral “troops” would serve only as a buffer between hostile forces, only *after* a hostility-ending agreement with all sides. UN troops in Somalia seized arms and conducted raids, however, in search of a particular Somalian warlord. This organizational activity violated the practice that this organization would not use its presence to act in ways not authorized under its non-Chartered peacekeeping role.

Another preliminary handicap limited the UN’s peacekeeping potential. France had unsuccessfully attempted to gather support for an international police force during the League of Nations drafting conference. At the Dumbarton Oaks UN preparatory conference, however, Article 43 was worded as follows:

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to

the Security Council, on its call and in accordance with a special agreement or agreements, armed forces ... necessary for the purpose of maintaining international peace and security.

...

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall ... be subject to ratification by the signatory states in accordance with their respective constitutional processes.

Article 43 was inserted into the UN Charter as an open-ended provision that was, in effect, only an agreement to agree. The Charter did not specify the intended *composition* of the UN force. The members opted not to stock the putative “armed forces.” There would never be a standing military force. The Council was not destined to have an immediately available, and thus rapidly deployable, military subdivision at its disposal when hostilities arose.

So that the Security Council would not be totally out of the loop, national staffing agreements were to be approved by the SC. Article 47 even provided for a Military Staff Committee, which would supposedly facilitate the Council’s role in developing “military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.”

Thus, the general lack of specificity allowed the national representatives to quickly conclude the drafting of the UN Charter. Unfortunately, it also vitiated the SC’s power to effectively maintain peace since it had no standing army available for potential police actions to deal with threats to international peace.⁸⁵

The Soviet-US Cold War was an insurmountable problem. For four decades, UN peacekeeping operations would not be established within any US or Soviet sphere of direct influence. William Durch, a prominent policy analyst at the Henry Stimson Center in Virginia, notes that “the UN offered a nominally impartial alternative that could meet this objective. ... Peacekeeping missions more often served the West’s interests in regional stability. Since Moscow’s interest ... was to foster regional *instability* ... lead[ing] to radical political change and greater Soviet regional influence, Soviet support for UN peacekeeping was intermittent at best throughout this period.”⁸⁶

The recent example of UN peacekeeping limitations is in Lebanon. UN Security Council Resolution 1701 ended the thirty-four day Israeli-Hezbollah conflict. But

the resolution restrained any ensuing force from policing any peacekeeping mandate. In August 2006, the European Union thus decided not to send a peacekeeping force to Lebanon. Israel did not want countries in that force with which Israel does not have diplomatic relations. It did seek the inclusion of Muslim countries to lend credibility to this operation. While Israel had no direct say, its wishes coincided with the concern of European powers regarding the lack of mission-accomplishing strategies.

The UN thus stepped in. However, its mission became more defined by what it could not do, than by what it could. For example, the operation's subordination to Lebanese sovereignty precluded checkpoints. There would be no car/home/business searches and no detaining of suspects. The 5,000-troop force would have to obtain Lebanese approval for any conduct they wished to undertake. In the absence of any policing power, the UN's Lebanese force was thus comparatively impotent. On the plus side of the balance sheet, the already-strained UN would not have to shoulder the cost of this significant increase in its peacekeeping

budget for what would have meant 110,000 soldiers on the ground throughout the globe.

3. Uniting for Peace Resolution Frustration with the SC's potential for inaction led the GA to adopt the 1950 Uniting for Peace (UFP) Resolution. With the SC effectively precluded from controlling hostilities—because of the veto power of any one of the five permanent members—the UN General Assembly decided to fashion its *own* method for taking action independently of the Council, mentioned nowhere in the Charter.

The Assembly's UFP Resolution was designed to remedy the potential failure of the SC to discharge its responsibilities on behalf of the General Assembly's numerous member States. The resolution's supporters devised a strategy, not contemplated by the terms of the Charter, purporting to authorize the *General Assembly* to initiate measures to restore peace—including the use of armed force. This novel resolution is set forth below:

Uniting for Peace, Resolution 377 (V)

UN GENERAL ASSEMBLY OFFICIAL RECORD

5th Session (1950), Supp. No. 20 (A/1775), p.10

<<http://www.un.org/Depts/dhl/landmark/pdf/ares377e.pdf>>

... *Conscious* that failure of the Security Council to discharge its responsibilities on behalf of all the Member States ... does not relieve Member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security,

Recognizing in particular that such failure does not deprive the General Assembly of its rights or relieve it of its responsibilities under the Charter in regard to the maintenance of international peace and security,

Recognizing that discharge by the General Assembly of its responsibilities in these respects calls for possibilities of observation which would ascertain the facts and expose aggressors; for the existence of armed forces which could be used collectively; and for the possibility of timely recommendation by the General Assembly to Members of the United Nations for collective action which, to be effective, should be prompt...

Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven Members, or by a majority of the Members of the United Nations [General Assembly]....

This resolution was not used excessively but was nevertheless important to the future of UN peacekeeping operations. The League of Nations had failed to prevent the outbreak of World War II. The promoters of this resolution did not want history to repeat itself. If the SC were unsuccessful in exercising its “primary” responsibility to maintain peace because of permanent member vetoes, then the General Assembly must assist in the achievement of the fundamental objectives of the organization. This resolution effectively amended the UN Charter’s SC provisions by augmenting the organizational source for dispatching peacekeeping forces. The Uniting for Peace Resolution was the basis for the first UN peacekeeping operation: the 1956 Suez Canal Crisis. The president of Egypt nationalized the Suez Canal, one of the major transshipping points of the world. Its closure would require time and great cost to circumnavigate continents to deliver goods and troops. Control of the canal could also affect the price of transporting Middle Eastern oil to the rest of the world.

The significant economic and military threats posed by Egypt’s control of the Suez Canal concerned the entire international community. Great Britain, France, and Israel secretly decided that Israel would attack Egypt. Great Britain and France would rely on that attack as the basis for their own police action. After the Israeli attack, Great Britain and France then vetoed a SC resolution calling on Israel and Egypt to cease their hostilities. These vetoes by permanent members of the Council temporarily precluded the establishment of a UN peacekeeping force. Great Britain, France, and Israel thus presumed that they could protect their own interests in the canal without any UN interference.⁸⁷

The UN Emergency Force (UNEF) was established in 1956. The General Assembly invoked the Uniting for Peace Resolution to enable it to act after the SC was stalemated by the British and French vetoes. A 5000-troop force was drawn from States that were not members of the SC. They were deployed to Egypt to serve as a buffer between Egypt and its British, French, and Israeli adversaries. In 1967, at the request of Egypt, the UN Secretary-General took the controversial step of withdrawing this force at the time of the Six Day War between Israel and its Arab neighbors. This suspended the UNEF operation until 1973, when it was revived to keep peace and order in the Sinai Desert and Gaza Strip. This time, the SC exercised its Charter powers to establish the next of many Council operations in that theater.

4. Contemporary Blemishes Three widely-publicized matters have especially tarnished the reputation of the UN’s otherwise popular “Blue Helmets.” In July 1995, 7,800 Muslim men and boys of military age were gathered at a UN safe haven in Srebrenica, Bosnia. They were drawn there on the basis of promised UN protection to them from the region’s violent ethnic conflict. The UN’s 750 peacekeepers were suddenly vastly outnumbered by Serb forces. The Serbs slaughtered the Muslim refugees in three days. This became Europe’s worst such genocidal act since the Holocaust. The Dutch government fell when this event was made public because the Dutch troops took no action to stop the killing. The families of those killed filed a lawsuit against the UN and the Dutch government in November 2003. Against a backdrop of protests, and now lawsuits, these very troops were given citations in December 2006—honoring them for their service at Srebrenica.⁸⁸

In December 2004, there were some 150 *reported* rapes of young girls in The Congo. UN peacekeepers were accused and are being investigated. UN Secretary-General Kofi Annan responded that there was “clear evidence that acts of gross misconduct have taken place. This is a shameful thing for the United Nations to have to say, and I am absolutely outraged by it.” There have been some dismissals, but no successful prosecutions—mostly due to organizational immunity (§3.6.A. principle *UN Attribution Case*). The cure for this dilemma would be for the UN to permit local authorities to prosecute abusers.⁸⁹

Reports of fraud have besieged UN peacekeeping operations. In December 2007, a UN task force uncovered a pervasive pattern of corruption and mismanagement. Contracts involving hundreds of millions of dollars have been rigged regarding food, construction, and other materials needed for this UN operation. Three officials at the UN headquarters in New York were convicted of bribery schemes. But the UN’s Office of Internal Oversight Services has had a poor record of holding corrupt officials accountable since its inception in 1994.

◆ §9.4 MULTILATERAL AGREEMENTS

This section summarizes the many treaty-based attempts to control the use of force by States. The quest to limit the use of military force is not just a twentieth-century phenomenon. In 1789, English writer Jeremy Bentham published arms-control proposals emphasizing disarmament as the prerequisite to achieving

peace. He hoped to pacify Europe via treaties to limit the number of troops that States could maintain. As an alternative, he envisioned an international court which would resolve any disputes regarding implementation of his proposed regime. He did caution, however, with a relevance that has not faded with the passage of time that “such a court was not to be armed with any coercive powers.”⁹⁰

In the nineteenth century, a number of European States considered the efficacy of drafting rules on the laws of war. They produced the Paris Declaration of 1856, a collection of principles on the methods for employing and conserving the use of force in armed conflicts. The ensuing treaty regime would not materialize, however, until the turn of the century.

A. HAGUE CONFERENCES

1. 1899 Hague Conference Russia’s Czar Nicholas then invited a number of national representatives to The Hague in the Netherlands for the first of two turn-of-the-century international peace conferences. The objective was to limit the national use of armaments. Once the conference participants realized that there would be no international agreement eliminating war, the central theme became how to conduct war. For example, the representatives agreed to provide advance warning when any nation intended to use force to settle a dispute. The conference delegates also prepared numerous declarations in the form of draft treaties. A representative list is provided below:

- ◆ Convention for the Adaption to Maritime Warfare of the Principles of the Geneva Convention of 1864 on the Laws of War
- ◆ Declaration on Prohibiting Launching of Projectiles and Explosives from Balloons
- ◆ Declaration on Prohibiting the Use of Projectiles Diffusing Suffocating Gas
- ◆ Declaration on Prohibiting the Use of Expanding Bullets
- ◆ Hague Convention with Respect to the Laws and Customs of War on Land

2. 1907 Hague Conference The follow-up conference added the following contributions:

- ◆ Convention for the Pacific Settlement of International Disputes

- ◆ Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts
- ◆ Convention Relative to the Opening of Hostilities
- ◆ Convention Respecting the Rights and Duties of Neutral Powers and Persons in War on Land
- ◆ Convention Respecting Bombardment by Naval Forces in Time of War

The Hague Conference representatives did not establish a system to *remedy* violations of the principles contained in the above agreements. There would be no international military force to act as a peacekeeper/peacemaker at the scene of hostilities. Instead, they announced an arbitration system to settle international disputes [Permanent Court of Arbitration: §8.3.B.2.]. But no nation was *required* to resort to arbitration before using force. This round of draft treaties contained rights without effective remedies. Obligations were thus unenforceable.

Many of the Hague Conference principles nevertheless served as bases for later treaties, conferences, and the Nuremberg Trials. The Hague draft agreement on suffocating gas was reconsidered during the 1925 Geneva Protocols on the manufacturing of chemical weapons for future use. These post-World War I agreements prohibited the use of poisonous gases in warfare although nations could continue to stockpile such weapons.

In 1971, UN delegates considered both of these earlier documents when they resolved to prohibit the development, production, and stockpiling of biological and toxic weapons. The Hague Conference chemical weapons principles resurfaced in 1989. Discovery of a chemical weapons plant in Libya focused new attention on the need for international control of chemical weapons to avoid their use by terrorists. There was a renewed fear about the effects described in the preparatory work for the early twentieth-century chemical weapons conferences. The former Soviet Union and the US then pledged that they would reduce their arsenals of chemical weapons. Iraq was “required” to end its production of any such weapons as a consequence of the 1991 PGW. The UN weapons inspectors would be frustrated (and even taken hostage), however, in their efforts to assure that Iraq was not producing weapons of mass destruction—a theme which would rekindle international interest after September 11, 2001.

B. LEAGUE OF NATIONS

The 1919 Treaty of Versailles established peace expectations after World War I, then referred to as “the war to end all wars.” That treaty prohibited war until three months after an arbitral or judicial decision considering the particular dispute (League of Nations Covenant, Article 12).⁹¹

Article 16 of the League’s Covenant contained a significant innovation. It established the first collective security measure adopted by an international organization: War against one member of the League was tantamount to war against all. The League’s representatives believed that they could deter hostile actions by agreeing to an interrelated mutual defense system. They opted for economic rather than military enforcement measures. Article 16 provided that “[s]hould any of the ... Parties break or disregard its covenants under Article XII, it shall thereby ipso facto [by that act automatically] be deemed to have committed an act of war against all the other members of the League, which hereby undertake immediately to subject it [the offending nation] to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant breaking State, and the prevention of all financial, commercial, or personal intercourse between nationals of the covenant breaking State and the nationals of any other State, whether a member of the League or not.”

This Article was first tested in the mid-1930s during Italy’s war against Abyssinia (now Ethiopia). The League did not intervene, even when Abyssinia sought its assistance to control Italy’s aggression. The League instead responded by directing several nations to draft a report on Italy’s hostile acts. With League approval, Great Britain and France established an embargo against certain Italian exports. The products that were the object of this embargo, however, were insignificant. Great Britain and France did not want to risk war with their Italian trading partners. Japan then attacked Manchuria in 1939. The League’s inability to respond decisively destroyed its credibility and exposed its inability to control the State use of force.⁹²

C. OTHER INITIATIVES

1. Kellogg-Briand Pact The 1928 Treaty for the Renunciation of War, or Kellogg-Briand Pact, was advocated by France and the US. It was not designed to be merely a regional peace process. The participants focused on Europe, however. It was the region most affected by World War I, not to mention the region most engaged

in wars since creation of the modern State in 1648 [§2.1.A. Treaty of Westphalia]. Napoleon unwittingly spawned the first international attempt to declare war illegal. In 1814, after his defeat, Austria, Prussia, Russia, and Napoleon himself, all agreed that any attempt to declare war or to wage it was illegal.⁹³

The Kellogg-Briand Pact was an outright *condemnation* of war. It contained the agreement that States “shall” use only peaceful means to settle their differences. Under Articles 1 and 2, the “Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another. The ... Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be ... shall never be sought except by pacific means.” It contained unassailable principles, but it also lacked any effective enforcement provisions to stop the outbreak of another world war.

2. Latin American Initiatives Other significant peace initiatives also condemn war on a regional level. The 1933 Montevideo Treaty provided that “settlement of disputes or controversies shall be effected only by the pacific means [that] shall have the sanction of international law.” The 1948 Charter of the OAS also prohibits the aggressive use of force. Its Article 21 provides that the “American States bind themselves in their international relations not to have recourse to the use of force.” This treaty does not contain a specific arms control regime, however.

3. Multilateral Agreements There are numerous treaty-based regimes for controlling the use of force—on both regional and multilateral levels. Chart 9.2 provides a snapshot of selected instruments designed to control modern applications of military force.



Chart 9.2: SELECTED MULTILATERAL ARMS CONTROL REGIMES

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsite.html>>.

Under Chapter Nine, click Arms Control Treaties.

◆ §9.5 HUMANITARIAN INTERVENTION

A. INTRODUCTION

1. Charter Article 56? Humanitarian intervention is not mentioned in the UN Charter, the NATO Charter, or any similar organizational document. Arguments have been made that Article 56 of the UN Charter serves as a legal basis for justifying humanitarian intervention. It states: “All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.” Subsection (c) of the latter article encourages “universal respect for human rights ... without distinction as to race, sex [gender], language, or religion.”

As recounted by Professor Brian Leard of the University of Nebraska School of Law:

Opponents of humanitarian intervention ... either continue to challenge the universal validity of these [“universally accepted” international human rights] norms, argue only that particular and narrowly circumscribed human rights violations warrant military intervention [e.g., genocide], or emphasize instead more peaceful methods of bringing about [their] observance.

...

Scholars have debated whether the pledge in Article 56 should be considered a legal obligation or merely a moral one. The most prominent reason offered in favor of regarding the pledge as a legal obligation is that the term “pledge” itself connotes a legal undertaking.

Any rules that have emerged are instead the byproduct of Customary International Law. Per a UN history of the meaning of, and practice under, Article 56:

I. GENERAL SURVEY

3. ... [T]here was no elaboration of the meaning of the word “pledge” in the decisions of the United Nations and instances occurred where a word other than “pledge” was used in the decisions referring to Article 56. For example, in the preamble of the resolution concerning the question of the establishment of a special United Nations fund for economic development reference was made to “the obligations of the United Nations and its Members under

Articles 55 and 56 of the Charter,” and in a decision concerning the question of race conflict in the Union of South Africa the General Assembly referred to “the obligations contained in Article 56 of the Charter.”

II. ANALYTICAL SUMMARY OF PRACTICE

...

6. In the decision taken at its ninth [annual] session the General Assembly made no express reference to Article 56, but it did refer to “the pledge of all Member States to respect human rights and fundamental freedoms without distinction as to race.” At the tenth session the General Assembly adopted resolution 917 (x) which reiterated resolution 616 B (VII) in which the General Assembly had declared [and couched in moral, rather than legally obligatory terms,] that “it is in the higher interests of humanity to put an immediate end to religious and so-called racial persecution and discrimination and that governmental policies which are designed to perpetuate or increase discrimination are inconsistent with the pledges of the Members under Article 56 of the Charter....”⁹⁴

2. Subsequent Practice A commonly cited UN General Assembly contribution is the 1965 Inadmissibility of Intervention in Domestic Affairs Resolution 2131—often associated with the decolonization movement of the 1960s, which focused on self-determination on the African Continent. It then reaffirmed the principle of nonintervention proclaimed in numerous global and regional charters. It recognized “that full observance of the principle of non-intervention of States in the internal affairs of other States is essential to the fulfillment of the purposes and principles of the United Nations.”

What this resolution did not do was to foresee the many failed States and governments that would wreak havoc on their own people in Africa and other regions after the end of the Cold War. In October 2003, for example, Russia announced the reservation of its right to intervene militarily in former Soviet States where the human rights of ethnic Russians were being violated.⁹⁵

Such interventions may be military or nonmilitary, unilateral or collective. The UN has authorized collective interventions with military forces that were designed to endorse the Charter’s humanitarian objectives. Charter Article 2.7 eschews UN intervention, however, “in matters essentially within the domestic jurisdiction of any State.” But this sovereignty-driven principle does “not

prejudice the application of enforcement measures under Chapter VII.”

The UN Security Council has thus relied on its Chapter VII powers to establish the *ad hoc* International Criminal Tribunals for Rwanda and Yugoslavia [textbook §8.5.C.]. Because Article 39 authorizes the Council to “decide what measures shall be taken ... to maintain or restore international peace and security,” it authorized this form of nonmilitary intervention to address the atrocities perpetrated within those arenas by forces within those countries.

Unilateral humanitarian intervention may conflict with the norms associated with territorial sovereignty and the use of force. The extent to which a *State* may unilaterally intervene for various purposes, including the rescue of political figures and hostages, is fraught with complex issues of legitimacy. This section focuses on situations which some States have conveniently characterized as “humanitarian” interventions, especially when they have a dual purpose in mind.

One may usefully define a concept by stating what it is not. One cannot study the subject of International Law—especially international criminal courts, humanitarian intervention, human rights, and the parade of horrors you read in each day’s new headlines—with a sense that the associated negative behavior will one day be eradicated. One *can* make a difference, which is presumably a reason why you are taking this course. As realistically articulated by Sweden’s Vaxjo University Professor John Janzekovic:

The international community should stop trying to convince potential belligerents that genocide and other crimes against humanity are morally wrong because this is mostly a waste of time. A positive moral outcome is achieved if [instead] belligerents are either physically stopped or their activities are halted through fear of immediate and substantial retribution by the international community. It is not necessary that they be morally converted but is it necessary that they be stopped.⁹⁶

B. DEFINITIONAL CONTOURS

As classically articulated by the nineteenth century British philosopher, John Stuart Mill: “To go to war for an idea, if the war is aggressive, not defensive, is as criminal as to go to war for territory or revenue; for it is as little justifiable to force our ideas on other people, as to

compel them to submit to our will in any other respect. But there assuredly are cases in which it is allowable to go to war, without having been ourselves attacked, or threatened with attack; and it is very important that nations should make up their minds in time, as to what these cases are.”⁹⁷

One should begin a *contemporary* analysis with this question: whether or not there is an emerging right to humanitarian intervention—at least by international organizations regarding matters within their geographic or political competence. The issue has been succinctly framed by Université Libre de Bruxelles Professor Olivier Corten in the following terms:

... [T]wo trends have developed in legal scholarship. The first considers that the link between maintaining the peace and protecting human rights does not call into question the cardinal principle of the sovereignty of states. By exercising their sovereignty to commit themselves to respect and guarantee certain fundamental rights, states have accepted that these rights go beyond their national competence and have accordingly waived the invocation of the principle of non-intervention.... [E]very UN Member State has also accepted that the Security Council should ... take measures to maintain international peace and security. Should ... [it] find that severe violations of human rights constitute a threat justifying the adoption of coercive measures, as expressly indicated by Article 2(7) ... there is no breach of the principle of non-intervention.

A second line of scholarship, on the contrary, interprets the strengthening of rules protecting human rights as a challenge to the principle of the sovereignty of states.... [T]he emergence of a “right of humanitarian intervention” has been ... understood as consecrating the progress made in recent years in the human rights area. The [problem] ... has become topical again with the war waged by NATO member states in Kosovo, essentially in the name of “humanitarianism.” ... [¶] “Right” means here a legal title by definition incompatible with the traditional rules of international law, and in particular, with the concept of sovereignty. “Intervention” is used to mean an offensive military action that goes well beyond not only coercive measures that may be taken in the economic sphere.... “Humanitarian” is used to indicate an official justification directed at satisfying the most basic needs of a civilian population.⁹⁸

With this tension in hand, we can now launch a voyage in search of the evidence, one way or another, on the modern viability of the notion of “humanitarian intervention” in International Law.

The latter portion of Mill’s above nineteenth-century quest finds contemporary expression in the widely heralded 2001 report by the International Commission on Intervention and State Sovereignty—endorsed by the UN Secretary-General and recommended to all States for consideration. While noting the primacy of State sovereignty, the Commission cautioned that primary responsibility for the protection of its people lies with the State itself. The second of its two main principles thus acknowledges that: “Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.”

The contemporary articulation of this not-so-clear-cut issue is classically embraced by the following three observations:

- ◆ “The legal status of humanitarian intervention poses a profound challenge to the future of global legal order. The central question is easy to formulate but notoriously difficult to answer: Should international law permit states to intervene militarily to stop a genocide or comparable atrocity without a Security Council resolution? That question has acquired even greater significance in the wake of military interventions in Kosovo and Iraq, and the non-intervention in the Sudan.”
- ◆ The legitimacy of humanitarian intervention is the “core challenge to the Security Council and the United Nations as a whole in the next century: to forge unity behind the principle that massive and systematic violations of human rights—wherever they may take place—should not be allowed to stand.”

...

“To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask ... in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization,

should such a coalition have stood aside and allowed the horror to unfold?”

- ◆ “This is not an abstract or hypothetical concern. Humanitarian intervention is becoming an increasingly used option in international affairs. Whether it was Vietnam’s invasion of Cambodia in the 1970s, or Tanzania’s 1979 effort to oust Idi Amin in Uganda, or (most recently) NATO’s military action to expel marauding Serb forces from Kosovo, humanitarian interventions have captured the headlines and have also become a central issue of the foreign policies of many nations, great powers and small nations alike.”⁹⁹

In its Principles for Military Intervention, the above Commission on Intervention and State Sovereignty defines its “Just Cause Threshold” as follows (bolding in the original): Military intervention for human protection purposes is an exceptional and extraordinary measure. To be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur, of the following kind:

- A. **large scale loss of life**, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
- B. **large scale ‘ethnic cleansing’**, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

This formulation arguably builds upon the rhetoric of the International Court of Justice in its 1986 *Nicaragua* case [textbook §9.2.C.2.], wherein the Court commented as follows:

There can be no doubt that the provision of *strictly humanitarian aid* to persons or forces in another country, whatever their political affiliations or objectives, *cannot be regarded as unlawful intervention, or as in any other way contrary to international law*. The characteristics of such aid were indicated in the first and second of the fundamental principles declared by the Twentieth International Conference of the Red Cross, that:

“The Red Cross, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours—in its international and national capacity—to prevent and alleviate human suffering wherever it may be found. Its purpose is to

protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, cooperation and lasting peace amongst all peoples.”¹⁰⁰

There may thus be a *duty* to intervene in appropriate circumstances. Gross violations of fundamental human rights that would violate the Genocide Convention enable the UN to act under Article VIII of the Convention “to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide.” But as University of Zagreb Professor Budislav Vukas notes: “Unfortunately, the United Nations often are not acting in accordance with this provision.... Notwithstanding the ongoing genocide of the population of the Darfur region in Sudan, the United Nations are not even considering an efficient action which would stop that the Security Council called [2005] ‘the world’s worst current humanitarian disaster.’”¹⁰¹

One can only hope that the March 2005 Security Council reference of fifty-one perpetrators to the International Criminal Court prosecutor will have a deterring effect there and elsewhere. And as stated in the UN’s December 2004 High-level Report on Threats, Challenges, and Change:

201. The successive humanitarian disasters in Somalia, Bosnia and Herzegovina, Rwanda, Kosovo and now Darfur, Sudan, have concentrated attention not on the immunities of sovereign Governments but their responsibilities, both to their own people and to the wider international community. There is a growing recognition that the issue is not the “right to intervene” of any State, but the “responsibility to protect” of *every* State when it comes to people suffering from avoidable catastrophe—mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease.

...

203. We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other largescale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.¹⁰²

The case of Rwanda would of course be the last decade’s worst case scenario [*Radio Machete* case §8.5.C.]. The international community was hesitant to label Darfur—aka slow motion Rwanda—as “genocide.” The Genocide Convention Article VIII international responsibility to intervene would be triggered by the application of that term. However, the costs, UN limitations, donor fatigue, the priority for saving strangers, and a host of other priorities explain why the international community is so slow to act in such cases.¹⁰³ The facts are often crystal clear, but not the motives.

Multilateral intervention is often undertaken by a regional or global organization for the purpose of aiding people who are enduring intolerable conditions. The underlying cause may be a civil war or degradation at the hands of a despotic political regime. The intervention may take the form of military or economic action designed to bring about a policy change by the targeted State. Too often, intervention has been a euphemism for political domination. States have long recognized the practical utility of characterizing their actions as a moral and legal benevolence, which has been undertaken for “humanitarian” purposes.¹⁰⁴

This strain of force is often justified by a State or an international organization on the basis that the inhabitants of some nation are not receiving the protection they deserve under the International Law of Human Rights. In other words, the government is accused of arbitrarily and persistently abusing its inhabitants or a particular ethnic group. The US unilaterally intervened in Cuba in 1898, for example, to “put an end to barbarities, bloodshed, starvation, and horrible miseries.”¹⁰⁵

Organizations such as the UN must be cautious, of course, not to allow member States to drive wedges between unadulterated altruism and contaminated intervention. UN authorization for a humanitarian intervention must not trump any inconvenient, but durable, national legal regime at the geographical point of intrusion. As restated in the Humanitarian and Social Issues segment of the 2004 Dar-es-Salaam Declaration on Peace, Security, Democracy and Development in the [African] Great Lakes Region:

We [national presidents of the eleven Great Lakes nations, witnessed by the presidents of seven others, the U.N. Secretary-General, and the Chairperson of the African Union Commission] commit ourselves [to] ... **Guarantee** the safety of humanitarian personnel in

accordance with the 1994 Convention on the Safety of United Nations and Associated Personnel, and Resolution 1502 of the United Nations Security Council, with the understanding that international humanitarian organisations respect the national laws of the countries where they intervene [bolding in original text].¹⁰⁶

But the permissible contours of “humanitarian intervention” have not been defined in a way that represents a meaningful State consensus. One reason is that this term became part of the customary post-Cold War lexicon; however, neither word in this phrase has been precisely defined. The US Department of State’s Sean Murphy comments on this vacuum:

The adjective “humanitarian” is very broad and in common parlance is used to describe a wide range of activities of governmental and nongovernmental actors that seek to improve the status and well-being of individuals.... The international community is not fully in agreement on the normative content of many human rights....

Assuming certain core human rights upon which there is more or less universal agreement, there is nevertheless an inherent subjectivity in assessing whether, for any given situation, those rights are threatened and must be protected. This subjectivity in turn raises important questions about who is competent to make the assessment. Is it important that the international community regard an intervention as “humanitarian,” or is it sufficient that the state or group conducting the intervention consider it humanitarian? ...

The noun “intervention” is, likewise, quite broad and has been the subject of extensive debate in the United Nations and of scholarly treatises on international law. When a state, group of states, or international organization takes action against a state ... [it] “intervenes” in the affairs of that state in the lay sense of the term, even if no military coercion is brought to bear. Indeed, all of international law and international relations consists of varying levels of states interacting and thereby “intervening” in each other’s affairs.¹⁰⁷

The following analytical essay surveys some muddy footing in the humanitarian intervention terrain. It vividly presents the choices, which sometimes spawn an intervention, in ways not imaginable during the Cold War:



Realpolitik and the CNN Factor of Humanitarian Intervention

EDWARD NEWMAN, RESEARCHER IN LAW,
UNIVERSITY OF KENT

in the United Nations in the New World Order:
The World Organization at Fifty 191–194
(Hampshire, UK: Macmillan, 1995)

Go to Course Web Page, at:
<<http://home.att.net/~slomansonb/txtcsesite.html>>.
Under Chapter Nine, click CNN & Human.Interv.

Collective intervention is readily more justifiable than a unilateral intervention by one State. Chapter VII of the Charter gives the SC broad powers to intervene when there are threats to peace although the Charter contains potentially conflicting norms. Members are expected to avoid the use of force because it threatens peace, while at the same time not acquiesce in ongoing human rights atrocities. The Charter’s expressed expectation is that UN members pledge “to take joint and separate action” in cooperation with the UN for the achievement of its humanitarian purposes. They must therefore promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”¹⁰⁸ As acknowledged in the *Restatement of Foreign Relations Law of the United States*: “Whether a state may intervene with military force in the territory of another state without its consent ... is not agreed or authoritatively determined. Such intervention might be acceptable [however] if taken pursuant to [a] resolution of a United Nations body or of a regional organization such as the Organization of the American States.”¹⁰⁹

The UN Charter further authorizes regional arrangements in Chapter VIII. It does not specify the interplay between that chapter of the Charter and the Council’s Chapter VII enforcement powers. A collective regional action, undertaken in the name of humanitarian intervention, would not be necessarily authorized by SC inaction or silence. Under Article 53, regional *enforcement* actions require authorization from the SC.¹¹⁰ On the other hand, there is room for the argument that customary State practice may augment or clarify the

meaning of the term “humanitarian intervention,” given the inherently imprecise nature of that term. As articulated by the ICJ in its 1986 *Nicaragua* case: “There can be no doubt that the provision of *strictly* humanitarian aid to persons or forces in another country, whatever their political affiliation or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law.”¹¹¹ This “right” might support one State’s providing humanitarian supplies in specified emergencies. It would not include the right of armed penetration or intervening in a way which violates the intervener’s duty of neutrality in a civil war.

Post-Cold War international humanitarian interventions “rescued” Bosnia and Kosovo.¹¹² Claims of ethnic cleansing by Serbian military forces, mass rapes of Muslim women as a military tactic to achieve “ethnic cleansing,” and other atrocities gave rise to the first International Criminal Court since Nuremberg. NATO air strikes on Serb positions provided some small relief

for the suffering of the civilian populace. In a January 1993 speech, the Pope claimed that the international community had a “duty to disarm the aggressor” if other means failed. This sentiment was premised, in part, on the appeal of non-Serbian leaders for any form of intervention which would balance the playing field in the Bosnian war. The Serbs stood accused of genocidal acts and defying UN mandates in violation of human rights.

The resulting 1999 NATO bombing in Yugoslavia was a classic illustration of a collective use of force, applied in the name of humanitarian intervention, being subjected to intense scrutiny. After the bombing began, the Federal Republic of Yugoslavia (FRY) filed a lawsuit in the International Criminal Court. The FRY sought “interim measures” from the Court, requesting an interim order that the US and its NATO allies cease their bombing campaign until the merits could be litigated at a later date:

The Application of The Federal Republic of Yugoslavia Against The United States of America For Violation of the Obligation Not to Use Force

YUGOSLAVIA V. UNITED STATES OF AMERICA

29 April 1999 General List No. 114

<<http://www.icj-cij.org/docket/files/114/7173.pdf>>

APPLICATION INSTITUTING PROCEEDINGS

The subject-matter of the dispute are acts of the United States of America [and nine other N.A.T.O. countries] by which it has violated its international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty of another State, the obligation to protect the civilian population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group.

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

...

There are many casualties, including a large number of civilian deaths. Even residential areas have been attacked. Countless dwellings have been destroyed. Enormous damage has been caused to schools, hospitals, radio and television stations, institutions and cultural monuments as well as to places of worship. Many bridges, roads and railway lines have also been destroyed. Industrial facilities have not been spared either. Attacks on oil refineries and chemical plants have had serious environmental effects on some cities, towns and villages in the Federal Republic of Yugoslavia. The bombing of oil refineries and oil storage tanks as well as chemical plants is bound to produce massive pollution of the

environment, posing a threat to human life, plants and animals. The use of weapons containing depleted uranium warheads is having far-reaching consequences for human health.

From the onset of the bombing of the Federal Republic of Yugoslavia, over 10000 attacks were made against the territory of the Federal Republic of Yugoslavia. In air strikes were used: 806 warplanes (of which over 530 were combat planes) and 206 helicopters stationed in 30 air-bases (situated in 5 states) and aboard 6 warships in the Adriatic Sea. More than 2,500 cruise missiles were launched and over 7,000 tons of explosives were dropped.

About 1000 civilians, including 19 children, were killed and more than 4,500 sustained serious injuries....

After these military attacks hundreds of thousands of citizens have been exposed to poisonous gases which can have lasting consequences for the health of the entire population and the environment.

...

The aviation of the United States of America also targeted many hospitals and health-care institutions, which have been partially damaged or totally destroyed....

Over 2000 schools, faculties and facilities for students and children were damaged or destroyed (over 25 faculties, 10 colleges, 45 secondary and 90 elementary schools, 8 student dormitories, as well as a number of kindergartens)....

PUBLIC AND HOUSING FACILITIES (TENS OF THOUSANDS) [plus infrastructure, telecommunications, and cultural-historical monuments and museums]: ...

Photo-evidence is supplemented as annex to the Request.

...

POSSIBLE CONSEQUENCES IN CASE REQUESTED MEASURES ARE NOT ADOPTED

If the proposed measure were not to be adopted, there will be new losses of human life, further physical and mental harm inflicted on the population of the FR of Yugoslavia, further destruction of civilian targets, heavy environmental pollution and further physical destruction of the people of Yugoslavia.

REQUESTED MEASURES

The Government of the Federal Republic of Yugoslavia request the Court to order the next measure:

The United States of America shall cease immediately its acts of use of force and shall refrain from any act of threat or use of force against the Federal Republic of Yugoslavia.

Belgrade, 28 April 1999
Rodoljub Etinski, Agent for
the Federal Republic of Yugoslavia

In the §3.3.B.1. *Bosnia v. Serbia* Genocide Convention case, the ICJ determined that it had jurisdiction over the defendant Former Republic of Yugoslavia (FRY)—notwithstanding that entity's unique (non)status at the UN from 1992–2000. It was during this unusual period of the former Yugoslavia's "existence" that the FRY brought this suit (1999). The FRY sought an emergency order from the Court, hoping to bar NATO members from continuing with their 1999 bombing campaign in Serbia (and its Kosovo province). The Court denied the requested relief and dismissed this case. The Court found that it lacked the jurisdiction to hear it. Both the US and Yugoslavia were parties to the Genocide Convention. However, the US reservation to that treaty required US consent to be sued in the ICJ (which the US refused). Thus, the Court found that the "FRY" existed in the earlier case when it was a

defendant nation—but not in this case when it was a plaintiff nation.

The majority of the court had little to say about humanitarian intervention. Vice President Weeramantry filed his customary dissenting opinion in a number of such cases. He therein expressed what to expect were such cases ever to be heard on the merits:

Human rights violations on [the scale reported in Kosovo] are such as to throw upon the world community a grave responsibility to intervene for their prevention and it is well-established legal doctrine that such gross denials of legal rights anywhere are everyone's concern everywhere. The concept of sovereignty is no protection against action by the world community to prevent such violations if they be of the scale and nature alleged.

...

On the other hand, however well intentioned the air strikes that have been launched by NATO powers ... there are assertions by the Applicant [Yugoslavia] that *this* use of force lacks United Nations sanction and authority and overlooks express Charter provisions [*italics added*].

The global concern about the morality and legality of NATO's first war is encapsulated in the following analysis:



NATO, the UN, and the Use of Force: Legal Aspects—Kosovo, The Thin Red Line

PROFESSOR BRUNO SIMMA,
UNIVERSITY OF MUNICH

Go to Course Web Page, at:
<<http://home.att.net/~sломansonb/txtcsesite.html>>.
Under Chapter Nine, click Thin Red Line.

Various groups have assessed the legal validity of NATO's Kosovo bombing campaign. In December 1999, the UN International Criminal Tribunal's chief war crimes prosecutor commenced an investigation into the conduct of NATO pilots. In June 2000, the prosecutor resolved that there was no basis for a formal investigation about whether NATO committed war crimes during its Yugoslavia bombing campaign. Carla del Ponte (Switzerland) thus advised the SC that there was no evidence that NATO deliberately bombed civilians, nor did it conduct any unlawful bombing.

In May 2000, England's House of Commons Foreign Affairs Select Committee prepared a report which found the bombing campaign to be of "dubious legality." It rejected humanitarian intervention grounds for the bombing campaign as being without legal foundation. London-based Amnesty International went a step further, characterizing NATO as having conducted various attacks in which numbers of civilians were certain to be killed. One example was the bombing of Radio Television Serbia where civilian technicians were killed in a predawn attack. NATO characterized the response to this particular incident as part of the "propaganda machine" of the Yugoslav President Slobodan Milosevic.¹¹³

One can readily observe the problems associated with a *regional* organization's use of force under the banner of "humanitarian intervention." Without the imprimatur of a UN Security Council prior/subsequent resolution, bombing another nation's territory—to save its populace from its government—is the category of humanitarian intervention which has drawn the most criticism from the international community of nations.

C. PRIVATE INTERVENTION

Given the difficulties of establishing criteria for legitimate humanitarian intervention, certain *non-governmental* actors have sought the right to privately intervene in appropriate conflicts. At France's insistence, the General Assembly supported this development in its three resolutions between 1988 and 1991 on "Humanitarian assistance to victims of natural disasters and similar emergency situations."¹¹⁴ France sought to establish the right of private French groups to cross international borders, unhindered by sovereign limitations which otherwise prevented them from treating the victims of armed hostilities and other disasters.

These General Assembly resolutions paved the way for the 1991 SC Resolution 688. It demanded that Iraq provide immediate access to those in need of humanitarian assistance—especially its Kurdish population, which had been the subject of government poison gas attacks several years before. Resolution 688 did not, however, authorize *armed* intervention. Council members were then reluctant to set any precedent, regardless of Iraq's extremely provocative conduct, reminiscent of the Nazi Holocaust. International humanitarian organizations, such as the International Red Cross, were thus endowed with a new justification for their ongoing humanitarian relief missions—often blocked by the competing notion of national sovereignty.

It is arguable that States have a duty under International Law either to provide humanitarian assistance to their *own* populations or to accept external humanitarian assistance. In appropriate circumstances, other States could provide such help, presumably without the consent of the State whose populace is in need of such "intervention." Because the oft-stated basis for humanitarian intervention is to limit or eliminate human suffering, then accessibility to any afflicted group by non-governmental organizations would be a reasonable compromise. It would balance sovereign concerns with the evolving human rights regime discussed in the next chapter of this

book. As stated by University of Zurich Professor Dietrich Schindler:

Access by private humanitarian organisations to victims without the consent of the government of the State concerned must be considered lawful in the following two cases. First, in a non-international armed conflict [civil war], an impartial humanitarian body, such as the International Committee of the Red Cross, may bring humane assistance to victims of the insurgent party without the consent of the legal government.... Second, if a State refuses a humanitarian organization [to have such] access to its territory in contradiction to its duties, such organizations can assert the same rights as a State. They may bring assistance to the victims in spite of the refusal of the government.¹¹⁵

D. RESCUE

Certain States employ clandestine forms of coercion in their international relations. One of these is the taking of hostages as a means of placing political pressure on another nation. The aggressor nation takes hostages or financially supports a group of individuals to force another nation to act pursuant to the captors' demands.

Hostage taking occurred with alarming frequency in the 1970s when it became a useful tool for accomplishing national political objectives. The UN responded to this phenomenon with the 1979 International Convention against the Taking of Hostages. The primary impetus for this convention was Iran's 1979 seizure of American diplomats and military personnel at the US embassy in Tehran. Article 1 of the Hostage Convention provides that any person who detains and threatens to kill another person in order to compel a State "to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offense of taking hostages." Under International Law, a person acting on behalf of a State may not take a hostage to coerce another State to act in a certain way. When this occurs, the responsible State breaches this prohibition.

Some States have disregarded this principle, giving rise to a related issue in International Law. Danger invites rescue. When one nation's citizens are held hostage in another country, there is intense national pressure to free them. It is difficult to yield to that pressure because giving in to the captors' demands encourages further hostage taking. This dilemma has triggered the occasional

but widely publicized use of an innovative form of countermeasure. Rescue missions have been carried out in other States to save hostages facing certain death.

Military rescue missions present both practical and legal problems. The nation launching the rescue mission clearly breaches the territorial sovereignty of the nation where the hostages are held. The rescuing nation claims, however, that necessity dictates this response. One reason for the necessity is that International Law cannot enforce the Hostage Convention's principles when a nation either takes or effectively condones hostage taking. Where no action appears to be on the horizon other than the usual diplomatic efforts to free the hostages, they have often been harmed or killed. It is therefore argued that the rescuing nation's right of self-defense supports the existence of a limited right to breach the sovereignty of the captor nation for this humanitarian purpose. States and international organizations have undertaken occasional rescue missions to extract their citizens or agents who are likely to die at the hands of some terrorist or government. While not a completely altruistic form of humanitarian intervention, there are similar concerns regarding the violations of sovereignty that may accompany such forms of self-help.

There is a viable legal basis for an *organization's* activities that extract its agents involved in SC enforcement actions. In 1992, a UN anti-mine team rescued a convoy that had braved two days of crossfire to deliver food to the besieged Bosnian town of Gorazde. While returning to the Bosnian capital of Sarajevo, this convoy was trapped by land mines. Neither warring faction would come to the aid of these UN workers to ensure their safe return. In this instance, no nation would obstreperously object to organizational action to retrieve such international civil servants from their dilemma.

The dominant problem with hostage rescue is the unilateral use of force by a single nation. The US has been involved in a number of such rescue attempts. In 1980, a failed US military operation in Iran attempted the retrieval of US diplomats held captive for more than one year [§2.7.E. principal *Iranian Hostages Case*].

In 1992, a US Navy SEAL team conducted a secret rescue mission in Haiti. It extracted a handful of former Haitian officials aligned with the then-ousted but democratically elected President Aristide. The lives of these officials were in danger, according to Pentagon officials.

US Congressman Charles Rangel condemned this rescue, promising that Congress would conduct an inquiry into this matter. US President Bush did not comment on the raid although a White House spokesman denied presidential knowledge of the rescue (a highly suspect representation).

The classic hostage rescue mission occurred in 1976. A French passenger plane, containing mostly Israeli citizens, was hijacked in Athens by a Middle East terrorist organization and flown to Entebbe, Uganda. Some newspaper accounts of this event reported that a Middle Eastern nation clandestinely promoted this hijacking. The hijackers threatened to systematically kill the hostages unless other Middle Eastern citizens were freed from Israeli prisons. Uganda's President, Idi Amin, refused to help the hostages. He apparently wished to avoid diluting his political capital with any Arab nation that may have sponsored the hijacking. A group of Israeli commandos then flew into Uganda in a clandestine hostage rescue mission. They killed a number of Ugandan soldiers at the airport where the hostages were being held. The SC's ensuing debate follows:



**Excerpts from United Nations
Security Council Debate on
the Entebbe Incident**

(August-September 1976)

Go to Course Web Page, at:

<<http://home.att.net/~sломansonb/txtcsesite.html>>.

Under Chapter Nine, click Raid on Entebbe.

◆ §9.6 LAWS OF WAR: TRADITIONAL APPLICATION

A. HISTORICAL SETTING

The Laws of War are the customary State practices and multilateral treaties addressing the manner in which belligerents conduct war. National laws prohibit war-related crimes, such as espionage or treason. It is International Law, however, which protects the innocent and defenseless against the excesses of State actors who believe that the end justifies the means. Democratic States tend to include certain of these expectations in their military field manuals.

Expediency during hostilities must sometimes yield to legal and moral concerns about humane treatment. The areas of concern include the following: summary executions of civilians and military personnel; ethnic cleansing and forcible displacement; mistreatment of detained prisoners of war (POW); indiscriminate use of force against nonmilitary targets; attacks on medical and related relief personnel; looting and other destruction of civilian property with no military purpose; terrorizing and starving a civilian population; use of military or civilian human shields against a pending attack; and the use of particular types of warfare condemned under the international agreements mentioned in this section of the book.

History is fraught with accounts of “man’s inhumanity to man” and woman in time of war. There is a rich vein of humanitarian control of war, dating back to the Bible’s Old Testament. It contains admonitions prohibiting the following: the slaughter of captured men; the transplanting of innocent women and children; the plunder of animals and other property; and the pillaging and wanton destruction of cities. In the Battle of Teutoburg Forest of AD 9, a Germanic tribal chieftain defeated several Roman legions. He declared at the point of victory that “those prisoners who were not hewn to pieces on the spot were only preserved to perish by a more cruel death in cold blood.” During the medieval Crusades, combatant forces routinely slaughtered enemy prisoners. Women were raped, and the inhabitant’s goods were forfeited. These prizes of war were available as an incentive for soldiers facing periods of protracted siege.¹¹⁶

This is not to say that all societies of the era believed in such cruelty. The religious overtones of the evolving Muslim world were by no means oblivious to the importance of limitations on how war was to be conducted. The Qur’an, for example, provided as follows: “War is permissible in self-defence, and under well defined limits.... In any case, ... women, children, old and infirm men should not be molested, nor trees and crops cut down, nor peace withheld when the enemy comes to terms.”¹¹⁷

Sporadic efforts have limited the cruelty of warfare. A few military leaders and heads of State required their soldiers to observe certain minimum standards of humane conduct in warfare. In 559 BC and 333 BC, respectively, the King of Persia and Alexander the Great ordered their troops to spare the civilian population of conquered areas. They were also admonished not to

intentionally desecrate religious sites. In 70 BC, the Roman commander Titus arranged for the safe departure of women and children from Jerusalem when it was under his siege. In AD 410, the Visigoth leader Alaric, known for his cruelty to foreign soldiers, forbade his soldiers to violate the women of Rome when he captured the city. In the Middle Ages, certain Christian and Muslim leaders humanized the conduct of war, partially because of a more long-range strategy to avoid an overly desperate enemy otherwise facing some cruel form of extinction.

The notion of the “Just War,” of which Aristotle wrote, was sewn into the fabric of the new international legal system established by the seventeenth-century Peace of Westphalia. The European perspective was that if the war was “just,” then the enemy was by definition “unjust.” Adversaries therefore were not entitled to humane treatment other than that within the discretion of the on-scene military commander. As articulated by Hugo Grotius, the so-called Father of International Law, in his 1625 treatise on war:

By way of conclusion to this subject it may be observed, that all actions no way conducive to obtain a contested right, or to bring the war to a termination, but calculated merely to display the strength of either side are totally repugnant to the duties of a Christian and to the principles of humanity. So that it behooves Christian princes to prohibit all unnecessary effusion of blood, as they must render an account of their sovereign commission to him, by whose authority, and in whose stead, they bear the sword.¹¹⁸

By the mid-nineteenth century, the various modes for conducting, declaring, and waging war were no more than pretenses for justifying aggressive tendencies. States and private organizations, such as the Red Cross, understood that increasingly sophisticated weapon systems were capable of inflicting alarming consequences. Military theorists, theologians, and moralists believed that certain State practices were too inhumane to be condoned by a civilized society. The desire for controlling such excesses began to materialize in national and treaty-based Laws of War. Although there were several predecessors, the 1864 GC for the Amelioration of the Condition of the Wounded in Armies in the Field was the first such treaty to be

drafted and widely ratified. The Laws of War would soon find their way into the national laws of many countries as well as appear in major international treaties. As stated in a post-Civil War US Supreme Court decision regarding the treatment of enemy aliens during an internal civil war:

When a rebellion becomes organized, and attains such proportions as to be able to put a formidable military force in the field, it is usual for the established government to concede to it some belligerent rights. This concession is made in the interests of humanity, to prevent the cruelties which would inevitably follow mutual reprisals and retaliations.

...The concession made to the Confederate government in its military character was shown in the treatment of captives as prisoners of war, the exchange of prisoners, the recognition of flags of truce, the release of officers on parole, and other arrangements having a tendency to mitigate the evils of the contest. The concession placed its soldiers and military officers in its service on the footing of those engaged in lawful war, and exempted them from liability for acts of legitimate warfare.¹¹⁹

The year 1847 was an important turning point. Swiss General Dufour ordered his officers to protect wounded enemy soldiers who were prisoners of war. He was one of the original members of the “Committee of Five,” which became the International Committee of the Red Cross in 1876. The International Red Cross worked with the Swiss government on a project that would one day yield four treaties that are often referred to as the 1949 “Geneva Convention.” Thus, it was actually a non-governmental actor that ignited the international movement for regulating the treatment of civilians and prisoners in times of war.

No multilateral agreement has fully embraced the varied perspectives about the content of the Laws of War. In 1899, Russian Minister and Professor of International Law at Petersburg University Fredrick de Martens drafted the well-known “de Martens” clause. He therein provided that “Until a more comprehensive code of rules of war is prepared, ... the people and belligerent parties are under the protection of principles of the law of nations stemming from the customs adopted by the civilized peoples, from the rights of humanity and public conscience.” Although designed for

a turn-of-the-century Hague Convention covering military combatants, it was later incorporated into the 1949 GCs (Common Article 3). This was designed to be a description of Customary International Law, which would serve as the default provision in the absence of applicable treaty protection.

The Laws of War are not applicable to only adult military combatants. In a 1998 UN report issued by the UN Secretary-General's special representative for children and armed conflict, Olara Otunnu reported that the twentieth-century impact of war on civilians had grown exponentially. In the First World War, civilians constituted *five* percent of all casualties. In the Second World War, this figure rose to *forty-eight* percent. By the last decade of the century, *ninety* percent of such casualties were civilians. He also provided the estimate that 300,000 military combatants are under the age of eighteen, many children being used for mine clearance, spying, and suicide bombings. Thus, the need for international control continues to be needed by all sectors of society.

Due to the work of the UN's International Tribunal for the former Yugoslavia [ICTY, textbook §8.5.C.1.], the Laws of War now expressly incorporate rape as a category of war crimes, crimes against humanity, and genocide features of contemporary conflicts. This is only a comparatively recent development, however. Consider the following apologetic explanation for the delay and plea in favor of incorporating rape into the lexicon of International Human Rights Law—tendered during the height of the 1992–1995 Bosnian War:

It is a pity that calamitous circumstances are needed to shock the public conscience into focusing on important, but neglected, areas of law, process and institutions. The more offensive the occurrence, the greater the pressure for rapid adjustment. Nazi atrocities, for example, led to the establishment of the Nuremberg Tribunal.

...

Today, in contrast to the past, the rapid dissemination of knowledge about the continuing abuses combined with the public's broader sensitivity to human rights to strengthen political will and make some kind of action a moral imperative. Because the international community has failed in the central task of ending the bloodshed and atrocities, the establishment

of the tribunal has become the preferred means to promote justice and effectiveness of international law. This editorial considers only one example of the egregious violations of human dignity in former Yugoslavia—rape.

That the practice of rape has been deliberate, massive and egregious, particularly in Bosnia-Herzegovina, is amply demonstrated in reports of the United Nations, the European Community, the Conference on Security and Co-operation in Europe and various nongovernmental organizations. The special rapporteur appointed by the UN Commission on Human Rights ... highlighted the role of rape both as an attack on the individual victim and as a method of "ethnic cleansing" "intended to humiliate, shame, degrade and terrify the entire ethnic group." Indescribable abuse of thousands of [predominantly Muslim] women in the territory of former Yugoslavia was needed to shock the international community into rethinking the prohibition of rape as a crime under the laws of war.

The ICTY's work product has also addressed command responsibility for gender crimes and genocide-related prosecutions.¹²⁰

B. ESSENCE OF LAWS OF WAR

1. Terminology The term "Laws of War" is synonymous with "International Humanitarian Law" (IHL)—and sometimes "International Criminal Law" (ICL)—reminiscent of the French, German, Italian, and Spanish legal traditions.¹²¹ ICL, when called that, *modernly* suggests a broader subject matter involving certain crimes which are international in scope because of the attention they have received via multilateral treaties. This notion is not to be confused with a historically common crime that spills over an international border and may thus subject the offender to extradition. Even ICL now invokes the more sinister conduct that requires all nations to prosecute and punish what is referred to as an "international crime," such as war crimes, crimes against humanity, and genocide—which are also the grist of IHL.

This textbook articulates, instead, the overlapping subjects of International Humanitarian Law in this chapter and Human Rights Law in the next. IHL deals with offenses by adverse military troops against each other, or their treatment of civilians within the zone of

conflict. The rules of international humanitarian law are generally not intended to apply to the relationship between the state and its own citizens. For example, Article 4 of the Fourth Geneva Convention provides that a “protected civilian” is someone who is *not* a citizen of the state that is detaining him in an international armed conflict. Human Rights Law, on the other hand, generally addresses a government’s offenses against its own civilian population in times of peace.

Some decision-makers immediately spot a bright line division between these two subsets of International Law. For example, the Inter-American Court of Human Rights articulated the difference in a February 2000 opinion:

the Court interprets the [human rights] norm in question and analyzes it in light of the provisions of the [Human Rights] Convention. The result ... will always be an opinion in which the Court will say whether or not that norm is compatible with the American Convention. The latter has only given the Court competence to determine whether the acts or the norms [allegedly violated] ... are compatible with the [Human Rights] Convention itself, and *not* with the 1949 Geneva Conventions [one of the charging allegations alleged by relatives of the deceased children executed by units of Colombia’s National Police Force and the Colombian Army—italics added].

Such a division is no longer generally adopted, however, particularly by the International Court of Justice. In its *Nuclear Weapons* and *Wall Advisory* opinions, the latter Court determined that there is not only overlap, but also that both bodies of human rights norms routinely operate co-extensively:

The Court observes that the protection of the International Covenant on Civil and Political Rights [textbook §10.2.B.2.] does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.

More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on

Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and ... international humanitarian law.¹²²

Commentators routinely articulate yet another categorization of the laws of war. Typically, theoretical discussions of war may be cast into two analytical pillars. One column consists of *jus ad bellum*, the morality of the decision to go to war. For example, wars are considered either “legal or illegal,” “just or unjust,” or “good or bad.” The other column, *jus in bello*, is analytically distinct: this counterpart assesses the morality of the *way* in which the war is waged. In other words, assuming that a conflict is already underway—regardless of whether it is just or unjust (terms often in the eyes of the beholder)—there are internationally imposed limitations on whether *particular* methods or monitions are moral or immoral. This author avoids these terms to the extent possible, opting instead for plain English rather than such foreign-language labels.

2. Summary The Laws of War (International Humanitarian Law) govern how nations may legally wage war. The corpus of the Laws of War are collated in the 2005 two-volume text by the Red Cross, its four-volume Commentary on the respective 1949 Geneva Conventions, and its companion book on the 1977 Protocols.¹²³

As covered earlier [textbook §1.1.A.], the ebb and flow of what constitutes the actual content of International Law is often a moving target. The Red Cross [textbook §3.2.A.1(c)] is, of course, the world’s leading international organization on the subject of the Laws of War. But its texts and commentaries, while generally recognized on a worldwide basis, are not necessarily accepted in all respects by all countries. The Legal Advisor to the US Department of State and the General Counsel to the US Department of Defense submitted the following response to the above 2005 restatement of International Humanitarian Law [IHL]:

A US Government Response to the International Committee of the Red Cross Study [of] Customary International Humanitarian Law

JOHN B. BELLINGER III AND WILLIAM J. HAYNES II

NOVEMBER 11, 2006

<[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-866-p443/\\$File/irrc_866_Bellinger.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-866-p443/$File/irrc_866_Bellinger.pdf)>

The United States welcomes the ICRC Customary International Humanitarian Law study's discussion of the complex and important subject of the customary "international humanitarian law" and it appreciates the major effort that the ICRC and the Study's authors have made to assemble and analyze a substantial amount of material. The United States shares the ICRC's view that knowledge of the rules of customary international law is of use to all parties associated with armed conflict, including governments, those bearing arms, international organizations, and the ICRC.

... The United States recognizes that a significant number of the rules set forth in the Study are applicable in international armed conflict because they have achieved universal status, either as a matter of treaty law or—as with many provisions derived from the Hague Regulations of 1907—customary law. Nonetheless, it is important to make clear—both to the ICRC and to the greater international community—that, based upon the U.S. review thus far, the United States is concerned about the methodology used to ascertain rules and about whether the authors have proffered sufficient facts and evidence to support those rules.

...

STATE PRACTICE

Although the Study's introduction describes what is generally an appropriate approach to assessing State practice, the Study frequently fails to apply this approach in a rigorous way.

- ◆ First, for many rules proffered as rising to the level of customary international law, the State practice cited is *insufficiently dense* to meet the "extensive and Reports and virtually uniform documents" standard generally required to demonstrate the existence of a customary rule [italics added].
- ◆ Second, the United States is troubled by the type of practice on which the Study has, in too many places, relied. The initial U.S. review of the State practice volumes suggests that the Study places too much emphasis on written materials, such as military manuals and other guidelines published by States, as opposed to actual operational practice by States during armed conflict. Although manuals may provide important indications of State behavior and *opinio juris*, [textbook §1.1.A.1.] they cannot be a replacement for a meaningful assessment of operational State practice in connection with actual military operations. The United States also is troubled by the extent to which the Study relies on nonbinding resolutions of the General Assembly, given that States may lend their support to a particular resolution, or determine not to break consensus in regard to such a resolution, for reasons having nothing to do with a belief that the propositions in it reflect customary international law.
- ◆ Third, the Study gives *undue weight to statements by non-governmental organizations* and the ICRC itself, when those statements do not reflect whether a particular rule constitutes customary international law accepted by States [italics added].
- ◆ Fourth, although the Study acknowledges in principle the significance of negative practice [options that States have not generally undertaken], especially among those States that remain non-parties to relevant treaties, that practice is in important instances given inadequate weight.
- ◆ Finally, the Study often fails to pay due regard [insufficient weight] to the practice of specially affected States. A distinct but related point is that the Study tends to regard as equivalent the practice of States that have

relatively little history of participation in armed conflict and the practice of States that have had a greater extent and depth of experience or that have otherwise had significant opportunities to develop a carefully considered military doctrine. The latter category of States, however, has typically contributed a significantly greater quantity and quality of practice.

OPINIO JURIS

The United States also has concerns about the Study's approach to the *opinio juris* requirement. In examining particular rules, the Study tends to merge the practice and *opinio juris* requirements into a single test. In the Study's own words,

it proved very difficult and largely theoretical to strictly separate elements of practice and legal conviction. More often than not, one and the same act reflects both practice and legal conviction.... When there is sufficiently dense practice, an *opinio juris* is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of an *opinio juris*.

The United States does not believe that this [lack of a sufficient distinction] is an appropriate methodological approach. Although the same action may serve as evidence both of State practice and *opinio juris*, the United States does not agree that *opinio juris* simply can be inferred from practice. Both elements instead must be assessed separately in order to determine the presence of a norm of customary international law. For example, Additional Protocols I and II to the Geneva Conventions contain far-reaching provisions, but States did not at the time of their adoption believe that all of those instruments' provisions reflected rules that already had crystallized into customary international law; indeed, many provisions were considered groundbreaking and gap-filling at the time. One therefore must be cautious in drawing conclusions as to *opinio juris* from the practice of States that are parties to conventions, since their actions often are taken pursuant to their treaty obligations, particularly inter se, and not in contemplation of independently binding customary international law norms. Even if one were to accept the merger of these distinct requirements, the Study fails to

articulate or apply any test for determining when state practice is "sufficiently dense" so as to excuse the failure to substantiate *opinio juris*, and offers few examples of evidence that might even conceivably satisfy that burden.

...

FORMULATION OF RULES

The Study contains several other flaws in the formulation of the rules and the commentary. Perhaps most important, the Study tends to over-simplify rules that are complex and nuanced. Thus, many rules are stated in a way that renders them overbroad or unconditional, even though State practice and treaty language on the issue reflect different, and sometimes substantially narrower, propositions. Although the Study's commentary purports to explain and expand upon the specifics of binding customary international law, it sometimes does so by drawing upon non-binding recommendations in human rights instruments, without commenting on their non-binding nature, to fill perceived gaps in the customary law and to help interpret terms in the law of war. For this reason, the commentary often compounds rather than resolves the difficulties presented by the rules, and it would have been useful for the Study's authors to articulate the weight they intended readers to give the commentary.

IMPLICATIONS

By focusing in greater detail on several specific rules, the illustrative comments below show how the Study's methodological flaws undermine the ability of States to rely, without further independent analysis, on the rules the Study proposes.

These flaws also contribute to two more general errors in the Study that are of particular concern to the United States:

- ◆ First, the assertion that a significant number of rules contained in the Additional Protocols to the Geneva Conventions have achieved the status of customary international law applicable to all States, including with respect to a significant number of States (including the United States and a number of other States that have been involved in armed conflict since the Protocols entered into force) that have declined to become a party to those Protocols; and

- ◆ Second, the assertion that certain rules contained in the Geneva Conventions and the Additional Protocols have become binding as a matter of customary international law in *internal* armed conflict, notwithstanding the fact that there is little evidence in support of those propositions [italics added].

...

CONCLUSION

The United States ... reiterates its appreciation for the ICRC's continued efforts in this important area, and hopes that the discussion in this article, as well as the responses to the Study by other governments and by scholars, will foster a constructive, in-depth dialogue with the ICRC and others on the subject.

In response, a drafter of the 2005 Study—the Red Cross Legal Advisor—replied that the ICRC's ten-year project involved consultations with 150 governments and academic experts (although State practice sources would presumably be the linchpin of the US position which questions the Study's methodology). His riposte included a response to the US position on the thinness of the requisite “density” required to establish Customary International Law. He responded that while such practices must be “extensive and virtually uniform,” there is no precise mathematical formula for calculating how widespread a practice must be to fall within the corpus of International Humanitarian Law.¹²⁴

Chart 9.3 provides a summary of the major instruments within the four corners of the Geneva Convention IHL world:



Chart 9.3: SELECTED LAWS OF WAR TREATIES

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.
Under Chapter Nine, click Laws of War Treaties.

3. Geneva Convention Text Of the four interrelated Geneva Conventions (GC), the Treatment of Prisoners of War is the most relevant to the contemporary War on Terror. The following 1960 *Commentary* is the edited official summary of the critical GC provisions. The quotation marks within this *Commentary* identify the actual language of the listed articles:

The Geneva Conventions of 12 August 1949 Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War

J. PICTET (ED.), INTERNATIONAL COMMITTEE OF THE RED CROSS, (GENEVA: I.C.R.C., 1960)
<<http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>>>

Article 3: There shall be no “outrages upon personal dignity, in particular, humiliating and degrading treatment. It also prohibits the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

Article 4: Detainees who are POWs are protected from being punished for refusing to cooperate with interrogators beyond providing name, rank, and serial number. They must also be repatriated upon the conclusion of the hostilities. Protected persons are “those

who at a given moment and in any manner whatsoever find themselves, in case of a conflict of occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”

Article 5: Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal. [The GC does not define the term *competent tribunal*.]

...

Article 17: No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

...

Article 100: Prisoners of war and the Protecting Powers shall be informed as soon as possible of the offences which are punishable by the death sentence under the laws of the Detaining Power.

...

Article 102: A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

...

Article 104: In any case in which the Detaining Power has decided to institute judicial proceedings against a prisoner of war, it shall notify the Protecting Power as soon as possible and at least three weeks before the opening of the trial.

Article 105: The prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the call-

ing of witnesses and, if he deems necessary, to the services of a competent interpreter. He shall be advised of these rights by the Detaining Power in due time before the trial.

Failing a choice by the prisoner of war, the Protecting Power shall find him an advocate or counsel, and shall have at least one week at its disposal for the purpose. The Detaining Power shall deliver to the said Power, on request, a list of persons qualified to present the defence. Failing a choice of an advocate or counsel by the prisoner of war or the Protecting Power, the Detaining Power shall appoint a competent advocate or counsel to conduct the defence.

...

The representatives of the Protecting Power shall be entitled to attend the trial of the case, unless, exceptionally, this is held in camera in the interest of State security. In such a case the Detaining Power shall advise the Protecting Power accordingly.

Article 106: Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.

...

Article 108: Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.

There are two 1977 protocols to the 1949 GCs.¹²⁵ The first protocol addresses the status of those captured during international military hostilities. The second

protocol requires the same humane treatment for individuals who are detained during a conflict that is *not* international in character.¹²⁶

Protocol I

<<http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>>

Article 45

1. A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on

his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.

2. If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the

offence. The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held in camera in the interest of State security. In such a case the detaining Power shall advise the Protecting Power accordingly.

...

Protocol II

<<http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument>>

Preamble

The High Contracting Parties, Recalling that the humanitarian principles enshrined in Article 3 common to the Geneva Conventions of 12 August 1949, constitute the foundation of respect for the human person in cases of armed conflict not of an international character.

...

Art. 1. Material field of application

1. This Protocol ... shall apply to all armed conflicts which are *not covered* by ... the Geneva

Conventions ... relating to the Protection of Victims of *International Armed Conflicts* (Protocol I) [*italics added*] and which take place in the territory of a High Contracting Party....

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

4. Ground Warfare

(a) Vietnamese Application One of the most widely publicized breaches took place in 1968 at the Vietnamese village of My Lai. The following US military court-martial provides a realistic “in the field” perspective about the soldier who must choose between punishment for disobeying the order of a superior—and alternatively, punishment for violating the Laws of War. The dissent raises the troubling question of whether the same yardstick should measure the wartime conduct of all soldiers:

(b) Modern German Application The superior orders defense, shunned in both the *Calley* and *Nuremberg* judgments, may be gaining ground in the context of the Iraq War. In June 2005, the Federal Administrative Court of Germany acquitted an army major who had been charged, tried, and demoted because he disobeyed an order in violation of his military duty of obedience and loyal service. His offence was the refusal to participate in a military software project that supported Operation Iraqi Freedom. He believed that the Iraq War was illegal. He was permitted to refuse the order under his German constitutional right of freedom of conscience.

The court held that the serious reservations about the legality of Operation Iraqi Freedom and thus Germany’s involvement in the Iraq War required instead that he be offered alternative tasks unrelated to a war that he reasonably believed to be illegal. Consequently, an order is not binding when it violates human dignity; does not legitimately serve the defense of Germany; and



United States v. Calley

US COURT OF MILITARY APPEALS

Go to Course Web Page, at:


<<http://home.att.net/~sломansonb/txtcsesite.html>>.

Under Chapter Nine, click Calley Court-Martial.

obeying the order would constitute an offense under national or international criminal law. The court further held that an order would not be binding if in support of a war of aggression that would disturb the peaceful coexistence of nations or contravene fundamental rules of international law such as the UN Charter ban on the use of force.

A similar defense was presented in a US case, which may or may not be successful. The petitioner sought federal habeas corpus review regarding his court-martial for missing his troop movement to Iraq. He claimed that this was an illegal war in a case that is still pending.¹²⁷

(c) *Persian Gulf War I Application* The 1992 Report by the US Department of Defense classically presents the dilemmas faced by nations and their field commanders in war zones:



Conduct of The Persian Gulf War: Final Report to Congress

PURSUANT TO TITLE V OF THE PERSIAN GULF CONFLICT SUPPLEMENTAL AUTHORIZATION AND PERSONNEL BENEFITS ACT OF 1991 (April 1992)

Go to Course Web Page, at:
<http://home.att.net/~slomansonb/txtcsesite.html>.
 Under Chapter Nine, click PGW I & Laws War.

The above Department of Defense Report concludes with the following comment: “The death of civilians always is regrettable, but inevitable when a defender fails to honor his own law of war obligations or callously disregards them, as was the case with Saddam Hussein.” As of October 2006, a team of US and Iraqi public health researchers estimated that more than 600,000 civilians had died in the violence across Iraq since the March 2003 invasion. A number of these deaths are attributable to insurgent activities, such as suicide bombings and the use of improvised explosive devices. In any event, those attributable to military actions led the Iraqi government to preclude media access to the Health Ministry and the central Baghdad morgue—the two main sources for information regarding civilian deaths.¹²⁸

Collateral damage assessments usually conjure up the image of civilians caught in the middle of an intense conflict between military forces. Such damage can also occur long after the cessation of hostilities. In Iraq, for example, the January 2008 assessment was that there are an estimated 25,000,000 land mines left over from both the current conflict and those of the recent past. That would be one for every Iraqi citizen. This is one of the reasons why the nation’s oil reserves are beyond the reach of those who would tap Iraq’s rich oil reserves. The 1997 Ottawa Convention banned anti-personnel landmines [Chart 9.2 above].

The US is the only major country that has pledged to clear all mines for which it is responsible. It has not, however, ratified the Ottawa Convention. The Department of State’s 2007 explanation is as follows:

the United States operates at the center of the humanitarian mine action community, yet it stands outside of the Ottawa process. Given this unique position, the United States has the advantage of well-earned credibility to provide commentary on the past and future of mine action, and to do so unconstrained by any demands to adhere to the political orthodoxy of the Ottawa Convention.

The Ottawa Convention’s clear and simple message, to ban anti-personnel landmines, caused the convention to be quickly adopted, and has undeniably led to reductions in the humanitarian hazards generated by indiscriminately used anti-personnel landmines. Yet it is this very simplicity that is also the greatest weakness of the Ottawa Convention; it ignores other hazardous mines—such as anti-vehicle mines—and at-risk munitions, calls for the wasteful and unnecessary expenditure of scarce resources where they are sometimes not needed most, and perpetuates an artificial and sometimes acrimonious divide between states that share the goal of reducing the humanitarian effects of such munitions on civilians.¹²⁹

(d) *Civilian or Combatant?* One of the clearest mandates of the Laws of War is that a State may kill enemy combatants, but it may not kill civilians. In today’s environment of guerrilla warfare—as opposed to the traditional State v. State and uniformed army v. army—it is often difficult to distinguish between civilian and combatant.

The following Israeli case addresses this dilemma and the balance which must be struck when a State's supreme sovereignty interests collide with the WWII-era Geneva Convention protection of civilians:



**Public Committee Against
Torture in Israel and
Palestinian Society for the
Protection of Human Rights
and the Environment
v. Government of Israel, Prime
Minister of Israel, Minister of
Defense, Israel Defense Forces,
Chief of the General Staff
of the Israel Defense Forces,
and Shurat Hadin**

SUPREME COURT OF ISRAEL
Sitting as the High Court of Justice
23 Kislev 5767 (13 December 2006)

Go to Course Web Page, at:
<<http://home.att.net/~sломansonb/txtcsesite.html>>.
Under Chapter Nine, click Israeli Civilian v.
Combatant case.

(e) Persian Gulf War II Application There are a host of International Humanitarian Law issues associated with the conduct of the Coalition Forces in Iraq. Those which spawned the most attention were chronicled early in the Iraq War in the following synopsis:



**International Legal Issues
Surrounding
The Mistreatment of Iraqi
Detainees by American Forces**

AMERICAN SOCIETY OF INTERNATIONAL LAW
INSIGHT

LEILA NADYA SADAT, WASHINGTON
UNIVERSITY SCHOOL OF LAW (May 2004)

Go to Course Web Page, at:
<<http://home.att.net/~sломansonb/txtcsesite.html>>.
Under Chapter Nine, click Abu Ghraib Prison Scandal.

Iraq's Abu Ghraib prison was ultimately closed. A dozen US military personnel were subject to courts-martial; found guilty of abusing detainees; and are now serving significant sentences in US military prisons. The US and Great Britain have since prosecuted a number of other soldiers for their alleged war crimes in Iraq.

There have been calls for the closure of the US Guantanamo Bay, Cuba military detention center. In May 2006, the UN Committee Against Torture did so. President Bush responded (during a German television interview) that he would like to do so and get the detainees to a court. The stated problem was finding other countries to which the US could take the inmates. Of course that would not close down the need for US facilities. The US would likely expand its prison facilities in Afghanistan.

In December 2002, the UN General Assembly adopted Resolution A/RES/57/199—thereby promulgating a protocol to the UN torture treaty, now open for signature by willing States. It is the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Under Protocol Article 1, its objective is “to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.” Under Article 3: “Each State party shall set up ... visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism).” Under Article 30: “No reservations shall be made to the present Protocol.”

The US has neither signed nor ratified this Protocol. The US subsequently admitted that torture had occurred at the US military base in Guantanamo Bay, Cuba. It relied, however, on the “few bad apples” defense and claimed that its investigation tactics did not violate generally accepted international practice.

The UK ratified this Protocol in 2003. The British courts have already dealt with deaths in Iraqi prisons under UK control. The Iraqi government has good reason to consider ratification of the Convention Against Torture and its new optional Protocol in the aftermath of both the US Abu Ghraib Prison scandal and the one which surfaced in late 2005 regarding Iraq's treatment of its own detainees.

Four provocative incidents echo the long-term consequences of not observing the Laws of War. *First*, Afghanistan President Hamid Karzai condemned the October 2005 body burning of two Taliban fighters, punctuated by a propaganda campaign against insurgents near Kandahar. The Geneva Convention provides that disposal of war dead “should be honorable if possible, according to the rites of the religion to which the deceased belonged.” This event was particularly offensive to Muslims, who do not permit bodies to face west and bury them within 24 hours. The US military sentenced the responsible US soldiers for displaying these bodies in a way that taunted Islamic traditions. Afghanistan reacted by preparing for major riots over the next several weeks.

Second, in November 2004, the US military used white phosphorus (WP) munitions in Fallujah, Iraq. While it was used “very sparingly for illumination purposes,” allegations emerged that the US had used illegal chemical weapons during this military campaign. Italian public television aired a documentary entitled “Fallujah: The Hidden Massacre.” It accused US military forces of using WP as ammunition against insurgents and collaborating civilians. The US military ultimately acknowledged this use of WP as a “potent psychological weapon.”

Third, Gaza doctors documented the use of WP incendiary shells during the January 2009 Israeli offensive. An Israeli newspaper reported the use of 200 such shells, twenty of which were used in populated areas.

Fourth, Israel’s Supreme Court banned the use of Palestinian human shields in October 2005. They were being used in arrest raids to minimize military casualties. The Chief Justice decried this military tactic, however, with his admonition: “You cannot exploit the civilian population for the army’s military needs, and you cannot force them to collaborate with the army.”¹³⁰

5. Naval Warfare There have been few reported incidents of violations of the naval Laws of War. This does not mean that they have not occurred or are less heinous in potential effect. During the Nazi war crimes trials at Nuremberg, two U-boat captains were accused of ordering totally unrestricted submarine warfare. One was found guilty of sinking all vessels within a neutral shipping zone. The other was charged (although there was insufficient evidence for conviction) with the crime of killing survivors of sunken ships. Naval captors may

not deny quarters to or kill a defenseless enemy. He was not found guilty of this particular charge, partially because the tribunal found that this was also the US practice in the Pacific.¹³¹

The 1980–1988 Iran–Iraq war provided a fresh opportunity to reexamine the relevant principles that States consider under the modern naval Laws of War. First, belligerents have a right to visit and search neutral-flagged merchant vessels. While this was done routinely during the Vietnamese conflict, it was basically just one State (the United States) that exercised this “right.” Visit and search occurred with much greater frequency during the 1991 PGW, thus giving rise to the rather clear expectation that States at war may undertake this form of intrusion. It is a necessary incident to maintain security against various forms of infiltration by belligerents and violations of neutrality by third parties [§2.3.A.3.].

Minelaying is permitted, but not without limitations. The 1907 Hague Convention Relative to the Laying of Automatic Submarine Contact Mines precludes indiscriminate minelaying without proper monitoring by the responsible State. States may not lay mines in the high seas if doing so endangers the shipping of nonbelligerent States. UN Security Council Resolution 540 of 1983 provides that States may not thereby threaten “the right of free navigation and commerce in international waters.” Notification is an essential requirement. The ICJ commented on this expectation in both its 1949 *Corfu Channel* case and its 1986 *Nicaragua* decision. In the earlier case, Albania was at fault for not removing surface mines hit by British ships passing through an international strait adjacent to its coast. In the later case, the US was responsible for assisting indigenous forces to lay mines in key harbors to interrupt Nicaraguan shipping.¹³²

This norm was tested during the PGW when Iran threatened to close the Straits of Hormuz—the only entry to the oil-exporting Persian Gulf. University of Pisa (Italy) Professors Andrea de Guttry and Natalino Ronzitti comment on the scope of this right of passage as follows:

[N]eutral warships are granted the right of passage through international straits even if the littoral [coastal] State is at war. If such right is accorded to warships, so much the more will it be binding for merchant vessels flying a neutral flag. Not all scholars

agree on this, but it seems to us that practice in the Gulf is perfectly in tune with what appears to be the dominant trend, a trend which probably now corresponds to precise customary rules.

Faced with Iran's repeated threat to close the Strait, the USA, the United Kingdom, France and Italy ... firmly emphasized that the right of passage through international straits can never be suspended, even when the littoral State is one of the belligerents.¹³³

6. Air Warfare

(a) Airplanes The comparatively recent appearance of the airplane in military warfare may account for the fact that there were no such charges made at either the Nuremberg or Tokyo trials. The only reference therein was a statement addressing the bombing of a city that kills innocent civilians (without mention of the 1945 US atomic bombings of Hiroshima and Nagasaki). In the words of the Nuremberg Tribunal: "This is ... an unavoidable corollary of battle action. The civilians are not individualized. The bomb falls, it is aimed at railroad yards, houses along the tracks are hit and many of their occupants killed. But that is entirely different, both in facts and in law, from an armed force marching up to these same railroad tracks, entering those houses abutting thereon, dragging out the men, women, and children and shooting them."¹³⁴

Air warfare tactics are regulated by the 1977 Geneva Protocol and the 1980 Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons. Article 42 of this Geneva Protocol prohibits ground or air attacks on persons parachuting from aircraft in distress. Such individuals must also be given an opportunity to surrender before engaging them as enemy soldiers. Airborne troops are excepted from this protection. One reason for the protocol was the North Vietnamese position that the 1949 GCs did not apply to undeclared conflicts such as the Vietnam War.

(b) Environment Given modern technology and geometric advances in weapon system capabilities, one must acknowledge environmental warfare as a fourth dimension of this survey—hovering over warfare on land, at sea, and in the air. The common applications involve bacteriological and gaseous substances. Adolf Hitler considered the use of such weapons in World War II. His field marshals convinced him, however, that Germans

would likely suffer more than the enemy. Germany did use Soviet prisoners and its own citizens to conduct experiments in anticipation of the war potential for possessing and using biological warfare.¹³⁵

The 1976 Environmental Modification Convention prohibits hostile uses of the environment to destroy the enemy. Ensuing protocols exhibited the international concerns regarding acts that affected lives far beyond the immediate military theater. The 1977 protocol precludes any use that would cause "widespread, severe damage to the environment." Reprisals that use the environment are also prohibited.

These conventions proved ineffective when the most disastrous environmental act of war occurred in 1991. During its retreat from Kuwait at the end of the PGW, Iraq's military forces set fire to over 600 oil wells. This wartime tactic sent flames and smoke into the upper atmosphere for a period of nine months until all wells could be capped. This event also generated the call for a new "Fifth" GC dedicated solely to the protection of the environment in time of armed conflict.¹³⁶

(c) Air and Missile Warfare As with so many other aspects of International law, it is often a challenge to provide a snapshot of its constant ebb and flow. Since 2003, a sizeable group of respected international law scholars has been hammering out a Draft Manual on International Humanitarian Law in Air and Missile Warfare. The persuasiveness of their work product has resulted in comments by governments.

One of the prominent challenges is the controversial nature of certain weapons capable of delivery by air or outer space. As illustrated by China's Xi'an Institute of Politics Professor Wang Haiping:

The relevant commentary to Section B lists some "lawful weapons" that can be used in air and missile warfare, such as (i) blast weapons; (ii) fragmenting and penetrating munitions, including depleted uranium; (iii) incendiary weapons; (iv) non-incendiary weapons; (v) combined-effects munitions; (vi) smoke; (vii) kinetic-energy weapons; (viii) delayed-action munitions. But this kind of listing can certainly cause much ... confusion.... For example, the USA developed a new bomb, which is called "super-bomb" or "mother of all bombs." It belongs to "blast weapons," and the effects of such super-bomb can not only cause "excessively injurious

or to have indiscriminate effects,” but also modify the natural environment of the targeting area.

What is the legitimacy of such weapons? As to depleted uranium munitions, their use can also lead to disastrous effects upon the natural environment and unnecessary suffering to victims of war, and they are deadly harmful to the local people for survival after military actions. As to kinetic-energy weapons, they are weapons mainly for space warfare, not limited to warfare at sea or on land or in the air. If they are “lawful,” then there must be the legality for warfare in outer space, but up to now, neither international treaties nor customary rules have provided for such legality. Does this “lawfulness” mean that outer space can be a legal area for air and missile warfare? ... [W]e would better make it clear that certain weapons are prohibited and restricted in air and missile warfare, and that we should not expressly permit such weapons, nor should we break the threshold of restraints on means and methods of warfare, or undermine the legal basis of IHL.¹³⁷

7. Implementing National Legislation A number of countries have enacted related legislation. The US Congress passed the War Crimes Act of 1996, for example. It expressly incorporated the 1949 Geneva Conventions (GC) into US law. It also provided criminal penalties for certain war crimes.

(a) First US War Crimes Prosecution US courts may generally fine and imprison those who, inside or outside the US, violate the Geneva Convention prohibitions under specified circumstances. This broadens US jurisdiction over war crimes abroad although the legislation is limited to prosecuting members of the US armed forces and certain US civilians:

Chuckie Taylor was the first person to be tried under this act for crimes committed abroad. His father, the former President Charles Taylor of Liberia, was being simultaneously tried at The Hague (so as to distance him from his cross-border victims in Sierra Leone). The junior Taylor was placed under arrest upon returning to the US where he is a citizen because he was born in Boston. When in Liberia, Chuckie Taylor was the head of its Demon Forces security unit. He was charged with war crimes, including burning victims’ flesh with molten candle wax, shocking their genitals with an electrical prod, and ordering the beheading of one victim with a knife.¹³⁸

Commenting on Taylor’s October 2008 conviction and sentence of ninety-seven years in prison, US Attorney General Michael Mukasey proclaimed in a US Department of Justice Press release: “Today’s conviction provides a measure of justice to those who were victimized by the reprehensible acts of Charles Taylor Jr. and his associates. It sends a powerful message to human rights violators around the world that, when we can, we will hold them fully accountable for their crimes.” Miami’s US Attorney added: “This is the first case in the United States to charge an individual with criminal torture [under the War Crimes Act]. I hope this case will serve as a model to future prosecutions of this type. I also hope today’s verdict helps those who were victims of torture in Liberia rest a bit easier, although nothing can erase the physical and mental scars that resulted from the punishments they endured.”

(b) Prosecution Avoidance This case is significant for another reason. Since the statute was enacted in 1996, no US administration had ever enforced it. Perhaps the main reason was that its original version embraced a political hot potato: the nagging controversy over the harsh US interrogation practices approved by the Bush administration in the War on Terror [§9.7.D].

But for the above amendment to this US War Crimes Act, certain CIA and related contractors would have incurred individual responsibility under the original Act. It was amended after 9-11, with a view toward shielding certain government agents from liability in relation to their interrogation activities, exemplified by the not surprisingly short-lived run of the 2007 movie *Rendition*.

The presidential executive order, cited in relation to the 2006 amendment to the War Crimes Act, provides as follows:



War Crimes

CRIMES AND CRIMINAL
PROCEDURE

18 U.S. Code § 2441 (as of 2006 amendment)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Nine, click US War Crimes Act.

Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency

PRESIDENTIAL EXECUTIVE ORDER NO. 13,440 (JULY 20, 2007)
72 Federal Regulations 40707, 2007 WestLaw 2086675

By the authority vested in me as President and Commander in Chief of the Armed Forces by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force, the Military Commissions Act of 2006 [textbook §9.7.C.] it is hereby ordered as follows:

Section 1. General Determinations.

- (a) The United States is engaged in an armed conflict with al Qaeda, the Taliban, and associated forces. Members of al Qaeda were responsible for the attacks on the United States of September 11, 2001, and for many other terrorist attacks, including against the United States, its personnel, and its allies throughout the world. These forces continue to fight the United States and its allies in Afghanistan, Iraq, and elsewhere, and they continue to plan additional acts of terror throughout the world. On February 7, 2002, I determined for the United States that members of al Qaeda, the Taliban, and associated forces are *unlawful enemy combatants* who are not entitled to the protections that the Third Geneva Convention provides to prisoners of war [italics added]. I hereby reaffirm that determination.
- (b) The Military Commissions Act defines certain prohibitions of Common Article 3 for United States law, and it reaffirms and reinforces the authority of the President to interpret the meaning and application of the Geneva Conventions.

...

Section 3. Compliance of a Central Intelligence Agency Detention and Interrogation Program with [Geneva Convention] Common Article 3.

- (a) Pursuant to the authority of the President under the Constitution and the laws of the United States,

including the Military Commissions Act of 2006, this order interprets the meaning and application of the text of Common Article 3 with respect to certain detentions and interrogations, and shall be treated as authoritative for all purposes as a matter of United States law, including satisfaction of the international obligations of the United States. I hereby determine that Common Article 3 shall apply to a program of detention and interrogation operated by the Central Intelligence Agency as set forth in this section. The requirements set forth in this section shall be applied with respect to detainees in such program without adverse distinction as to their race, color, religion or faith, sex, birth, or wealth.

- (b) I hereby determine that a program of detention and interrogation approved by the Director of the Central Intelligence Agency fully complies with the obligations of the United States under Common Article 3.

...

Section 5. General Provisions.

- (a) Subject to subsection (b) of this section, *this order* is not intended to, and *does not, create any right* or benefit, substantive or procedural, enforceable at law or in equity, *against the United States*, its departments, agencies, or other entities, *its officers or employees, or any other person.*
- (b) *Nothing* in this order *shall* be construed to *prevent* or limit *reliance upon this order* in a civil, criminal, or administrative proceeding, or otherwise, by the Central Intelligence Agency or *by any individual acting on behalf of the Central Intelligence Agency* in connection with the program addressed in this order [italics added].

This order effectively removed the potential for any civil or criminal action against the government or any of its agents for their rendition of aliens to third-party

nations, or for the harsh interrogations approved by either Secretary of Defense Rumsfeld or any of his superiors. No US Attorneys had charged any CIA employee or

agent under this (or any other) statute. As a result, any question of US breaches of the Geneva Conventions via CIA harsh interrogation [textbook §9.7.D.] or rendition to torturing countries [textbook §5.3.C.3.]—between September 11, 2001 and July 20, 2007—will not be prosecuted under US law. This was one basis for the various (unsuccessful) attempts to seek indictments in foreign national courts (Germany and France).¹³⁹

C. ORGANIZATIONAL ACCOUNTABILITY

No treaties specifically address the responsibility of an international organization to observe the Laws of War. The UN, of course, is not a State party to the Geneva Conventions governing the Laws of War. By analogy, however, national contingents operating in the service of the UN, NATO, or other organizations would be at least theoretically bound by the same requirements, as if they were operating on behalf of their own States [see textbook §3.1.C. European Court of Human Rights *UN Attribution Case*].

The perennial International Committee of the Red Cross request to the UN is that it promote the practice of having its member States provide renewed instructions to their national contingents, prior to departure for UN service abroad. In 1961, there were reports that UN emergency forces were violating the Laws of War during the UN operation in the Congo. Now that the UN peacekeeping operations have exercised the option of firing first, in situations carefully prescribed after the 1993 Somali conflict, this concern has taken on a new significance. Several Geneva Convention Articles incorporate the State responsibility of instructing its military forces about the Laws of War. The Red Cross document pleads “that such contingents receive, before leaving their own countries, appropriate instruction so that they may acquire a sufficient knowledge of these Conventions.”¹⁴⁰

Members of the Canadian components of the UN peacekeeping mission in Somalia and the NATO action in Bosnia would be the modern test cases. In 1997, the Canadian Army’s commanding officer said that forty-seven soldiers in Bosnia were accused of misconduct, including physically abusing mental hospital patients in 1993–1994. Ten other Canadians allegedly killed a Somali during the UN operation there in an incident that was exposed after a cover-up. Because of a shift from the traditional national defense posture to international peacekeeping, Canada took steps to improve its soldiers’ training so as to fulfill its national obligations to both the UN and the international community of nations.

In 1999, Kofi Annan promulgated a Secretary-General’s Bulletin requiring UN forces to observe International Humanitarian Laws:

Section 3 Status-of-forces agreement

In the status-of-forces agreement concluded between the United Nations and a State in whose territory a United Nations force is deployed, the United Nations undertakes to ensure that the force shall conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel.

...

Section 5 Protection of the civilian population

5.1 The United Nations force shall make a clear distinction at all times between civilians and combatants and between civilian objects and military objectives. Military operations shall be directed only against combatants and military objectives. Attacks on civilians or civilian objects are prohibited.¹⁴¹

In January 2007, NATO said that it had killed too many Afghan civilians during its 2006 fighting against insurgents. It vowed to change that in 2007.¹⁴² President Hamid Karzai would nevertheless continue to complain in 2008 about the excessive number of civilians killed during NATO air strikes on insurgent positions.

On the subject of organizational responsibility, non-governmental entities such as Al-Qaida would incur (theoretical but likely unenforceable) responsibility for indiscriminate attacks on civilians. If the UN Security Council can resolve that *States* must exercise due care to prevent civilian deaths, Al-Qaida would incur that same responsibility—to the extent that: (1) State practice recognizes its post-9–11 international status in the War on Terror; and (2) belligerent entities already have that responsibility under the Laws of War.

◆ §9.7 LAWS OF WAR: POST-9–11 US APPLICATION

September 11, 2001 is the starting point for examining new US applications of the Laws of War.¹⁴³ As a result of the fateful events of that day, the US undertook some responsive measures that are the subject of this section. What follows is a narrative history that chronicles the events of that day and shortly thereafter:



September 11, 2001

WILLIAM R. SLOMANSON

Go to Course Web Page, at:

<<http://home.att.net/~sломansonb/txtcsesite.html>>.

Under Chapter Nine, click September 11, 2001.

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International Law.*

One might commence this segment of the Laws of War sections of this chapter with an insight by perhaps the most prominent American commentator on the Laws of War. As the University of Houston's Professor Jordan Paust, a former Judge Advocate General military officer, muses:

... [T]his country must not engage in inhumane treatment.... [W]ar crimes policies and authorizations are not merely a threat to constitutional government and our democracy. They degrade our military, place our soldiers in harm's way, thwart our mission, and deflate our authority abroad. They can embolden an enemy, serve as a terrorist recruitment tool, and fulfill other terrorist ambitions.¹⁴⁴

A. COMBATANT STATUS

1. US Approach The US Congress gave President Bush its support for the US riposte in Afghanistan (and Iraq). September 11, 2001 was thus labeled as the beginning of the "War on Terror." If it has no end, combatants could be held indefinitely, i.e., until the end of hostilities, which could be years or decades from now. This was not a scenario the venerable Geneva Conventions anticipated when promulgated just after WWII.

Congress chose not to declare war. One reason might be that the US military offensive was not mounted against "Afghanistan" as a nation. Instead, the US was in Afghanistan to defend itself via the pursuit of individuals, such as Usama bin Laden—and non-governmental international organizations—typified by Al-Qaida.¹⁴⁵ September 11th signaled the claimed need to revamp the Laws of War to reflect these contemporary realities.¹⁴⁶ The Geneva Conventions flourished in an era dominated by wars between *countries* and between soldiers *in uniform*.

The Third Geneva Convention (GC) contains two cardinal principles of utmost importance to prisoners. First, a prisoner of war (POW) cannot be prosecuted and punished, merely for taking part in the hostilities. Second, POWs must be given humane treatment from the time they fall into the power of the enemy until their final release and repatriation. If a person is not given combatant status, he may be tried for having committed an unlawful belligerent act. As such, he would not have the "licence to kill" as would a military combatant. He may thus be subject to the death penalty (in countries which allow it).

The terms "combatant" and "unlawful combatant" do not appear in the GCs. A civilian spy or mercenary might present such a question. Neither may properly claim "POW" status. But when in doubt, a detainee's status must be determined by an Article 5 "competent tribunal" [see §9.6.B.3. Geneva Text]. This Convention, however, does not: (1) describe the composition of the tribunal; (2) specify the due process rights of the person undergoing this status determination; nor (3) explain the judicial guarantees to which the detainee is entitled under International Humanitarian Law.¹⁴⁷

As high profile detainees were captured during the "War on Terror"—initially in Afghanistan (and later in Iraq)—the initial US position was that *no* detainee would be entitled to the various GC protections. One reason given was that these individuals did not wear recognizable uniforms, did not openly display their arms, and never wore traditional military insignia. In February 2002, the Bush Administration partially modified its hard-line stance: *Taliban* detainees would be protected pursuant to GC principles although they would not be reclassified as "POWs." *Al-Qaida* captives would remain classified as "unlawful combatants" who would not, under any circumstances, be entitled to GC protection.

The International Committee of the Red Cross (ICRC), not satisfied with this distinction, responded as follows: "International Humanitarian Law foresees that the members of armed forces as well as militias associated to them which are captured by the adversary in an international armed conflict are protected by the Third Geneva Convention. There are divergent views between the US and the ICRC on the procedures which apply on how to determine that the persons detained are not entitled to prisoner of war status. The US and the ICRC will pursue their dialogue on this issue."¹⁴⁸ The US position softened somewhat when in March 2002, Secretary Rumsfeld announced that he anticipated trying very few

of the detainees. The rest were expected to be returned for a suitable disposition in their home countries.

Article 4.1 of the Fourth Geneva Convention specifies as follows: “Persons [also] protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” This apparently all-embracing definition suggests that *any* person would be protected once within the grasp of a Party to a conflict or occupying power. However, its scope has been reduced by specific exceptions. Also, the Fourth Convention (protecting civilians) has not been applied to individuals protected by the first three (land, sea, and POWs).¹⁴⁹ (Article 49 of this Convention also prohibits “individual or mass forcible transfers ... from occupied territory to the territory of the Occupying Power or to that of any other country.”)

The US ratified all four 1949 Geneva Conventions (GC). It signed the 1977 Protocol I, but has not ratified it. The Article 5 “competent tribunal” determination never bound the US as an express treaty obligation. During the Viet Nam conflict, however, each captured Viet Cong (not regular military combatants, and thus no uniforms) received an “Article 5” hearing to determine POW status. The US did the same in the ensuing conflicts in Grenada and the first Persian Gulf War—all pursuant to Army Regulation 190-8. It was adopted to implement the GC III regarding detainee classification and treatment provisions. Per its terms: “A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.”

The US altered its practice with the Guantanamo detainees, however. It claimed that the Guantanamo Combat Status Review Tribunals (CSRTs) operated as if they were Geneva Convention Article 5 tribunals. The latter are supposed to determine POW status. The former merely classify a detainee as an “enemy combatant,” which differs from whether the same person is an “unlawful combatant.”

The CSRTs completed their work in March 2005. They determined whether the foreign detainees at the Guantanamo Bay, Cuba US military facility were “unlawful combatants.” If detainees were characterized as

“lawful,” then the Geneva Convention’s POW convention provides that such detainees would be entitled to trial procedures akin to those used for the detaining country’s own military forces. If deemed “unlawful,” however, then the US position was that they were (and still are) not entitled to *any* treaty-based rights, at least not under GC POW provisions.

Although the issue has not been resolved, some commentators asserted that the Combat Status Review Tribunals were never competent to *deny* POW status. They were tasked only with identifying “enemy combatants”—supposedly a broad enough category to embrace the previously unambiguous term “POW” under 1949 GC III. Given the substantial overlap between the concepts of “enemy combatant” and “POW,” these commentators argued that Guantanamo detainees should have been treated as presumptive POWs.¹⁵⁰

2. Israeli Approach The never-ending Israeli conflict has yielded a similar civilian/combatant characterization problem. A number of non-citizen Palestinians have been branded as “unlawful combatants.” Israel does not detain them as either lawful military combatants or civilians who are not involved in the conflict. (It has no convenient offshore island where it can house them beyond the reach of the Israeli Constitution).

The following Israeli Supreme Court case addresses the dilemma posed by the Geneva Convention Prisoners of War versus civilian status, juxtaposed with the (US-created) moniker “unlawful combatant:”



**Appellants A & B v.
Respondent State of Israel**

THE SUPREME COURT OF ISRAEL
SITTING AS THE COURT OF CRIMINAL
APPEALS

15 Adar 5767 (5 March 2007)

Go to Course Web Page, at:
<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Nine, click Israeli Unlawful
Combatant case.

B. DETAINEE CASES

The post-9–11 War on Terror did not present the first occasion where the US held detainees for indefinite

periods without a trial. Two months after the December 1941 Japanese attack on Pearl Harbor, for example, 110,000 US citizens of Japanese descent were relocated to military-style internment camps in the US. President Roosevelt's Executive Order 9066 authorized this action for anyone deemed a threat to US national security. A San Francisco area welder, who twice tried to enlist, defied this order. After his arrest and conviction, he was relocated to a camp in Utah. He challenged that order in the US courts. In a 6-3 decision, issued one day after plans were announced to end these internments, the US Supreme Court upheld his conviction. National security concerns "justified" this race-based incarceration, in a case that has never been overruled.¹⁵¹

As individuals were captured by US military forces during the War on Terror, they were removed from various conflict zones in Afghanistan and elsewhere. The president used his constitutional power as Commander-in-Chief to detain them at the US military base in Cuba. They were neither fish nor fowl. They were not confined in the US and thus not subject to prosecution in civilian courts. They were not deemed to be POWs for reasons including their lack of a distinctive military uniform, so they were not to be tried under Uniform Code of Military Justice procedures. They were instead designated "unlawful enemy combatants." That characterization subjected them to the later devised military commission process, in part because there was no specialized national security court system to try them.¹⁵²

1. Administrative Findings As word of the detainees' presence there began to be reported, the conditions of their confinement spawned a national debate on whether they should be detained—some for years—without being charged with crimes, without legal assistance, and all without their status being determined by anyone other than the president. He exercised his power to denominate these approximately 640 suspected terrorists as being "unlawful combatants" who were beyond US borders and therefore, also not entitled to any US constitutional rights. They would not be processed via military courts-martial as POWs are expected to be under the Geneva Convention. Nor were they entitled to any of the US constitutional guarantees normally accorded to civilians in US criminal prosecutions.

One of the many problems with such secret incarcerations is the "ghost detainee." US Army jailers in

Iraq, acting at the request of the US Central Intelligence Agency (CIA), kept dozens of such prisoners at the Abu Ghraib prison. Under the Geneva Convention, a temporary failure to disclose the identity of prisoners is permitted. However, this exemption is triggered only by military necessity.¹⁵³ In December 2004, the House of Lords thus overruled a British detainee policy that had impacted foreign Muslims. This was a violation of civilian detention requirements under the European Convention on Human Rights [textbook §10.3.G.].

The US was in the midst of a popular debate, which pitted application of the 2002 National Security Strategy against the core values which routinely apply to anyone in US custody. Foreign citizens (and two US civilians) were thus denied the right of habeas corpus: to petition a judge, requiring the warden to produce the body, for the purpose of judicially assessing the validity of the incarceration. One result was the following remarks by the Inter-American Commission on Human Rights—an entity closely associated with the Organization of American States, which is headquartered in Washington, DC:



Findings of the Inter-American Commission on Human Rights

PERTINENT PARTS OF OCTOBER 28, 2005
REITERATION AND FURTHER AMPLIFICATION OF
PRECAUTIONARY MEASURES (DETAINEES IN
GUANTANAMO BAY, CUBA)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Nine, click Inter-AmerComm
GITMO.

In February 2009, the prior presidential administration official in charge of deciding whether to bring Guantanamo detainees to trial acknowledged that US military personnel tortured at least one Guantanamo detainee. Susan Crawford spoke about a Saudi who had planned to participate in the 9-11 attacks. He was interrogated with techniques that included isolation, sleep deprivation, nudity, and prolonged exposure to cold, all of which left

him in a “life-threatening condition.” But, as this retired judge and General Counsel to the Army noted:

The techniques they used were all authorized, but the manner in which they applied them was overly aggressive and too persistent.... It was abusive and uncalled for. And coercive.... It was that medical impact [two hospitalizations] that pushed me over the edge [to call it torture. He also] was forced to wear a woman’s bra and had a thong placed on his head during the course of his interrogation ... [and] was told that his mother and sister were whores ... and forced to do a series of dog tricks.


A December 2008 US Senate report [textbook §9.7.D.1], based on a year-long study, contradicted Bush administration claims that harsh prisoner interrogation techniques were sought by front-line military officers for use in the War on Terrorism. It bluntly rejected the claim that abusive interrogations at Abu Ghraib, Afghanistan, and Guantanamo were the work of a few bad apples: “Secretary of Defense Donald Rumsfeld’s authorization of aggressive interrogation techniques for use at Guantanamo Bay was a direct cause of detainee abuse there.” Per the final paragraph of this report:

Conclusion 19: The abuse of detainees at Abu Ghraib in late 2003 was not simply the result of a few soldiers acting on their own. Interrogation techniques such as stripping detainees of their clothes, placing them in stress positions, and using military working dogs to intimidate them appeared in Iraq only after they had been approved for use in Afghanistan and at GTMO [Guantanamo]. Secretary of Defense Donald Rumsfeld’s December 2, 2002 authorization of aggressive interrogation techniques and subsequent interrogation policies and plans approved by senior military and civilian officials conveyed the message that physical pressures and degradation were appropriate treatment for detainees in U.S. military custody. What followed was an erosion in standards dictating that detainees be treated humanely.¹⁵⁴

US presidents and legislators have occasionally found it necessary to limit such judicial review. Examples include President Adams’ approval of the 1798 Alien Sedition Act and President Lincoln’s suspension of the writ of habeas corpus during the US Civil War. During the War on Terror, various cases worked their way

through the courts, presenting the core question: What rights, if any, should suspected terrorists have after being placed beyond the modern battlefields in the War on Terror?

2. Judicial Analysis The US Supreme Court answered some key questions in the following case:




Rasul v. Bush

SUPREME COURT OF THE
UNITED STATES
542 U.S. 466 (2004)

Go to Course Web Page, at:
<<http://home.att.net/~slomansonb/txtcsesite.html>>.
Under Chapter Nine, click Rasul Habeas Cuba
Detainee case.

Rasul held that Guantanamo detainees were entitled to access US federal courts via habeas corpus petitions. (Four years later, the US Supreme Court extended the same right to US citizens detained in Iraq—to two US citizens who had voluntarily traveled to Iraq after 9–11). It did not resolve a host of related issues. In the interim of the three US Supreme Court “Guantanamo Detainee Cases,” *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) [p.544], the Court next addressed whether Guantanamo detainees could be tried by the military commissions established by the President—the alternative to trial by military courts-martial or in the civilian criminal justice system. A related issue arose in *Boumediene*:



Boumediene v. Bush

SUPREME COURT OF THE
UNITED STATES
128 S.Ct. 2229 (2008)

Go to Course Web Page, at:
<<http://home.att.net/~slomansonb/txtcsesite.html>>.
Under Chapter Nine, click Boumediene Suspension
Clause case.

Boumediene held that the October 2006 Military Commissions Act violated the US constitutional right of the detainees to meaningful habeas corpus review by

federal civilian judges. The Court did not decide what specific habeas corpus procedures would be required. It thus remanded the case(s) back to the federal trial judge for further proceedings on this and related issues.

On remand, the trial judge reconsidered what definition to employ for the term “enemy combatant.” He held that—because there is no clear definition of that term by either the Supreme Court or the Court of Appeals—he would “adopt the same definition that was employed in the [Combatant Status Review Tribunal] CSRT hearings.” That definition reads as follows: “An ‘enemy combatant’ is an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the US or its coalition partners. This includes *any* person who has committed a beligerent act or has directly supported hostilities in aid of enemy armed forces [*italics added*].” But does this render the Geneva Convention obsolete in US courts?¹⁵⁵ “Any” person who “supported” a hard-to-identify group is an incredibly broad definition that added no clarity to this debate. (After seven years of captivity, Boumediene was released and flew to France. In May 2009, the French Foreign Minister proclaimed that “he was deemed innocent of all charges.”)

At a key hearing, the military tribunal judge expressed his frustration about articulating an appropriate moniker for determining the status of such detainees:

that question remains unresolved more than six years after suspects were first brought to Guantanamo Bay. We are here today, much to my dismay, I might add, to deal with a legal question that in my judgment should have been resolved a long time ago. I don’t understand, I really don’t, how the Supreme Court made the decision it made and left that question open.... I don’t understand how the Congress could let it go this long without resolving [it].¹⁵⁶

Unfortunately, this selection from the 2004 Combat Status Review Tribunal definition suggests but does not directly address the distinction between the Geneva Convention term “enemy combatant” and the post-9–11 moniker “*unlawful* enemy combatant.” The Israeli Supreme Court explored the meaning of the term “unlawful enemy combatant” in June 2008 [*Appellants A & B v. Respondent State of Israel*, a principal case in textbook §9.7.A.2.], but without apparent success.

C. MILITARY COMMISSIONS

This method of trial is not unique to the US “9–11” response. Nor was the above *Padilla* detention of a US citizen for over three years without charges or trial, which would have resulted in a trial by military commission. President Lincoln, and others since, have authorized military commissions to try civilians outside of the civilian criminal justice system. After the US Civil War, for example, a military commission tried a Mississippi newspaper editor. Congress passed a law withdrawing his right to have the Supreme Court decide the validity of his detention via habeas corpus. In the PGW of 1991, the US conducted 1,196 such trials. American military officers therein tried and released three-quarters of the detainees.

In March 2003 (and again in 2005), the Inter-American Commission on Human Rights of the OAS formally requested—upon receipt of an earlier US response—that the US “take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.” In April 2005, the Council of Europe passed Resolution 1433, therein stating that “the Assembly concludes that the circumstances surrounding detentions by the United States at Guantánamo Bay show unlawfulness and inconsistency with the rule of law....”¹⁵⁷

After the Supreme Court’s preceding June 2004 trio of “unlawful combatant” cases, Deputy Secretary of Defense Paul Wolfowitz assumed the task of revamping the traditional US approach to the status determinations for captured prisoners. (US Army Regulation 190–8 codified the “Article 5” Geneva Convention process.) The new tribunals were called Combat Status Review Tribunals (CSRT). Under the CSRT process, an enemy combatant was “an individual who was part of or supporting Taliban or Al-Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.” The United States then claimed that the pre-9–11 military regulations no longer applied to the Guantanamo military base—on the basis of the presumption of correctness of the president’s determination that they were “enemy combatants.” In March 2005, the CSRT process was completed for all detainees. Of the 558 cases, all but thirty-eight were not “enemy combatants.”

In a second process, the government devised its Annual Review Boards (ARB). The task of these boards is to determine whether those still detained at Guantanamo present a continuing threat or any factor which is the basis

for continued detention. The three-member ARB panels are military officers. There is no access to counsel and only closed hearings. In October 2004, a US federal court determined that the right to counsel applied to these detainees. In November 2004, another federal trial judge issued a broad protective order, requiring that the detainees' lawyers meet a series of national security restrictions, among other restrictions, such as no disclosure of classified information to the detainees' counsel.¹⁵⁸

The broadened definition of "enemy combatant" resulted in more litigation in the aftermath of *Rasul* and the new regulations. The US government claimed that *Rasul* only resolved the narrow issue of whether the federal courts had habeas corpus jurisdiction in the case of the Guantanamo detainees. *Rasul*, it was argued, did not govern the scope of legal rights, if any, possessed by these detainees. In January 2005, two federal judges reached opposite results on this point. In one case, the US Constitution and Geneva Conventions were applied to the Taliban detainees, but not to members of Al-Qaida. In the other, no detainees had any such rights.¹⁵⁹

Congress previously passed the Antiterrorism and Effective Death Penalty Act. It placed all federal court habeas corpus proceedings on a fast track. Prisoners were thus limited to a single habeas petition. The 2006 Defense Reauthorization Act further limited review by habeas corpus. It removed the judicial power to hear such proceedings in the case of the remaining alien detainees at the US military installation at Guantanamo Bay, Cuba. One appeal is permitted, however, from a detainee's Combat Status Review Tribunal.

The key federal court decision that analyzes detainee objections to trial by military commission appears below. This particular detainee admitted that he was Usama bin Laden's driver, bodyguard, and general assistant:



Hamdan v. Rumsfeld

UNITED STATES SUPREME COURT

548 U.S. 557 (2006), superseded by statute
(Military Commission Act)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Nine, click Hamdan Military
Commissions case.

D. TORTURE REDEFINED?

1. UN Convention The UN's 1984 Convention Against Torture and Other Cruel Inhuman, or Degrading Treatment (CAT—to which the US is a party, with the reservation described later in this book section) provides the internationally-accepted definition of torture. Under CAT Article 1.1:

For the purposes of this Convention, "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Member nations and other international organizations are of course free to adopt provisions which augment this minimum standard.

Article 2 provides as follows:

No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal or political instability or any other public emergency, may be invoked as a justification against torture.

Article 3.1 further prohibits a Member State from sending individuals to States that may torture them. Thus:

No State Party shall expel, return ('refouler') [see textbook §4.2.C. for the UN Refugee Convention, and the related cases defining this term] or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. National Court Applications

(a) England The leading post-9–11 British torture case eloquently and authoritatively restates the British position on the CAT:

◆

**A (FC) and Others (FC) (Appellants) v.
Secretary of State for the Home Department (Respondent)**

BRITISH HOUSE OF LORDS

45 INTERNATIONAL LEGAL MATERIALS 503 (2006), 2006 WestLaw 1071398

...

33. It is common ground in these proceedings that the international prohibition of the use of torture enjoys the enhanced status of a *jus cogens* or peremptory norm of general international law [textbook §10.6.C.2.]. For purposes of the Vienna Convention [on the Law of Treaties], a peremptory norm of general international law is defined in article 53 to mean “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” In *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)* [2000] the *jus cogens* nature of the international crime of torture, the subject of universal jurisdiction [textbook §5.2.F.], was recognised. The implications of this finding were fully and authoritatively explained by the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Furundzija* [1998] ICTY 3, 10 December 1998 in a passage which ... calls for citation (footnotes omitted):

**MAIN FEATURES OF THE PROHIBITION
AGAINST TORTURE IN INTERNATIONAL LAW**

[Citing ICTY’s *Furundzija* case ¶147. There exists today universal revulsion against torture: as a [leading]

USA Court put it in *Filartiga v. Peña-Irala* [textbook §10.6.C.2.], ‘the torturer has become, like the pirate and the slave trader before him, hostis humani generis, an enemy of all mankind.’ This revulsion, as well as the importance States attach to the eradication of torture, has led to the cluster of treaty and customary rules on torture acquiring a particularly high status in the international normative system, a status similar to that of principles such as those prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination. The prohibition against torture exhibits three important features, which are probably held in common with the other general principles protecting fundamental human rights.

148. ... [G]iven the importance that the international community attaches to the protection of individuals from torture, the prohibition against torture is particularly stringent and sweeping. States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irretrievably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture.

Per Lord Bingham’s opinion in the above case, Article 3 of the European Convention on Human Rights prohibits “torture or inhuman or degrading treatment”—a right which is “absolute.” The appellants contended that the admission of evidence of their confessions, obtained by inflicting treatment of the severity necessary to fall within article 1 of the Torture Convention, will “shock the community.”

He went on to say that under Article 15 of the Torture Convention: “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture

as evidence that the statement was made.” As Lord Bingham added: “In Resolution 1433, adopted on 26 April 2005, on the Lawfulness of Detentions by the United States in Guantanamo Bay, the Parliamentary Assembly of the Council of Europe called on the United States to cease the practice of rendition and called on member states to respect their obligation under article 15 of the Torture Convention.”

(b) Canada A landmark 2007 Canadian opinion analyzed the problem regarding an individual’s being sent to a third country that does or may torture people. Article 33 of the Refugee Convention [textbook §4.2.C.]

provides that no Contracting State shall expel or return (“refouler”) a refugee, “in any manner whatsoever, to the frontiers of territories where his life or freedom would be threatened” on account of his race, religion, nationality, membership of a particular social group or political opinion.

Article 1 of the Convention Against Torture defines it as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him ... information or a confession, ... or intimidating or coercing him ... when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Article 3 dictates that no State Party shall expel, return (“refouler”) or extradite a person to another State “where there are substantial grounds for believing that he would be in danger of being subjected to torture.” For the purpose of determining whether there are grounds for concern, that article also directs the national authorities to consider “the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

As to the Refugee Convention practices of the US, the Canadian Federal Court reversed the finding of the administrative decision-maker—Governor-in-Council (“GIC”)—that the US was a safe third country to which applicants could be diverted. The court’s disposition of this issue was based upon “instances of non-compliance with Article 33 [that] are sufficiently serious and fundamental to refugee protection that it was unreasonable for the GIC to conclude that the U.S. is a ‘safe country.’ ” Per the court’s similar conclusion as to the Convention Against Torture (CAT) claim: “U.S. law authorizes the acceptance of assurances from another country that it will not torture a deportee but neither U.S. law, nor certainly its practice, considers that deportation to a country where torture is a likely occurrence to be an absolute bar to deportation. The CAT prohibits deportation to torture where it is reasonably likely. In other words, a deporting country that knows or ought to know that torture would likely occur cannot deport a person into those circumstances.”

Recall the *Arar* rendition case in textbook §5.3.C.3(c). In the instant 2007 Canadian Federal Court case, the bench took notice of those proceedings as proof positive that the US was not complying with its CAT obligations, in the following paragraphs:

[260] While this is not the Maher Arar case and this Court is not trying that case, the Court can take judicial notice of the findings of the [Canadian] Report of Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (the Arar Report). Although the U.S. did not participate in those [Commission] proceedings, it advised the Commission that it complied with Article 3 of CAT.

[261] The facts in the Arar case give one serious cause to doubt that assurance. It may be that the assurance is based on a narrow interpretation of Article 3 but it would be an interpretation which is at odds with Canadian understanding of the obligations under CAT.

[262] Specifically, in this regard, the Applicant’s submissions and evidence that the U.S. does not comply with Article 3 are credible. Those submissions and evidence are supported by a real life example [*Arar*] and therefore more credible than the Respondent’s [contrary] evidence. It was unreasonable, given the evidence, for the GIC to conclude that the U.S. meets the standards of Article 3 of CAT.¹⁶⁰

(c) United States The US codified its commitment to the CAT by defining “torture” in 18 US Code §2340(1): “‘torture’ means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control....” Under §2340(2)A: “‘severe mental pain or suffering’ means the prolonged mental harm caused by or resulting from ... the intentional infliction or threatened infliction of severe physical pain or suffering....”

The executive branch of the government, however, operated under the assumption that the president’s primary responsibility to protect the nation trumped a broad application of this statute to the War on Terror. The secret 2003 “Torture Memo” (when discovered) was the flashpoint. A revised US interpretation of torture had emerged. Torture suddenly embraced only that degree of pain that was so intense that it would result in “organ failure, impairment of bodily function, or even death.”¹⁶¹ Interrogations which fell just short of these results were suddenly justified in the name of national self-defense.

New guidelines were approved, but not publicized. The list of six Enhanced Interrogation Techniques included “waterboarding.” This is a mock execution by

drowning, which would be prohibited by the Geneva Convention. The US first used it in 1902 in the Philippines. Only a handful of CIA officers applied this technique after 9–11, reportedly to only three high-value detainees. Nevertheless, contemporary critics could then draw upon the articulation by the prominent seventeenth-century scholar Hugo Grotius: “Avenging himself to excess, [a]nd slaughtering the guilty, guilty himself [he] became.”¹⁶²

For the two years before its partial repudiation by the White House in June 2004, the administration relied on various memos written by the Justice Department’s Office of Legal Counsel, narrowing the definition of torture. Attorney General Alberto Gonzales released these documents in June 2004—explaining that such memos were designed only to explore the limits of the legal landscape. In a December 2004 legal opinion, the Justice Department characterized any torture as being ‘abhorrent.’

President Bush then proclaimed that the US does not torture. Commentators still express confusion over that statement. One reason is that the US reservation to the UN Torture Convention is arguably incompatible with the object and purpose of the treaty [see textbook §7.2.A.4. on the acceptability of treaty reservations]. The Senate adopted the CAT; however, per its 1994 reservation: “the United States considers itself bound by the obligation under Article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment,’ only insofar as the term ... means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”

Another basis for questioning the statement that the US does not torture involves the President’s signing statement relating to the 2005 Detainee Treatment Act:

The executive branch shall construe ... the Act, relating to detainees, in a manner consistent with the constitutional authority of the President ... as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President ... of protecting the American people from further terrorist attacks.¹⁶³

After the February 2005 arrival of Attorney General Gonzalez, however, the Justice Department issued another

secret memo. It endorsed the harshest interrogation techniques ever used by the US Central Intelligence Agency (CIA). These expressly included head-slapping, simulated drowning, and exposure to frigid temperatures. Later in 2005, Congress moved toward further limitations on such interrogations. After more adverse information exposed what was actually occurring, the Bush Administration stated that it would drop the harshest techniques. It also dropped Secretary of Defense Rumsfeld, the ultimate authority for approving the use of these harsh techniques on a case-by-case basis. In February 2007, however, President Bush claimed that waterboarding is legal, and might be used again. This tactic would be retained on the grounds that additional catastrophic attacks were inevitable. As of one year later, the CIA chief was unsure of its legality. The Attorney General had decided not to conduct a probe of this issue.¹⁶⁴

There are other US players that will figure heavily in history’s assessment. The November 2008 *Senate Armed Services Committee Inquiry into the Treatment of Detainees in U.S. Custody* is a major example:



Senate Armed Services Committee Inquiry into the Treatment of Detainees in U.S. Custody

<[http://levin.senate.gov/newsroom/
supporting/2008/Detainees.121108.pdf](http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf)>

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Nine, click Senate Armed Services
Committee Report.

One might draw upon the materials in textbook §9.2.A., regarding ‘necessity’ as a basis for certain military actions or reactions. However, invoking necessity as justification for torture is an unlikely option. The State wishing to do so must have no role in bringing about the situation for which it seeks such justification.¹⁶⁵

(d) Lawyers Violating Laws of War? Some high profile lawyers provided legal memos, upon which President Bush and Secretary of Defense Rumsfeld relied, to justify the harsh interrogation techniques first implemented

at the US military base in Guantanamo, Cuba. Well before President Bush left office, some of them moved on to academic and judicial careers. None of them perceived the inconvenient truth that there might be constitutional limits on the President's obligation to ensure US national security. In June 2009, a federal judge ruled that a convicted terrorist could sue (but not necessarily win a case against) the lawyer most closely associated with the Torture Memos relied on by the Bush Administration to conduct high-value detainee interrogation techniques.¹⁶⁶

The three following excerpts quote relevant portions of the above 2009 US Senate report, the 1947 Nuremberg Military Tribunal trials, and the one US case filed against an alleged lawyer-perpetrator. As you read them, consider what role the referenced lawyers may have played in potential violations of the Law of War:



**[1] Senate Armed Services
Committee Inquiry into
the Treatment of Detainees in
U.S. Custody (2009)
(legal responsibility excerpt)**

**[2] Opening Statement for the
Prosecution [Nazi Lawyers]**

NUERNBERG MILITARY TRIBUNAL (1947)

[3] Padilla v. Yoo (2009)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Nine, click Lawyers Violating
Laws of War?.

In the above Senate Armed Services Committee Inquiry, two sets of lawyers (civilian and military) were hard at work with their assessments of the legality of the detainee treatment techniques authorized for use at the US military prison in Guantanamo Bay, Cuba. Consider these four questions:

1. Did either of these US lawyer groups (military or civilian) appear to violate the principles articulated by the

Nuremberg Military Tribunal's Chief Prosecutor, Brigadier General Telford Taylor?

2. If so, is their conduct comparable to that of the indicted Nazi lawyers?
3. If not, should they be prosecuted under the US War Crimes Statute [§9.6.B.7(a)] that implemented the UN Torture Convention [§9.6.B.4(d-e), 7(a).]?
4. Would the comparatively trifling number of detainees in the Guantanamo, as opposed to Nuremberg, context affect your analysis of (1)–(3)?

(e) “Guantanamo” Case Law In the above British decision [(a)], various members of the House of Lords cited US case law as their basis for marshalling evidence as to why confessions involving torture should be excluded. The US itself would later provide a fresh answer, which was bound to favorably impact foreign perspectives about the US military justice system.

A key confession, extracted from a prominent War on Terror figure, was suppressed by a Guantanamo US military judge. This was the first US-conducted war crimes trial since Nuremberg. In July 2008, evidence of the confession of Usama bin Laden's driver, Salim Hamdan, was barred from consideration—because Hamdan was subjected to “highly coercive” conditions after his capture (in Afghanistan). Hamdan was kept in isolation for twenty-four hours a day. His hands and feet were restrained. Soldiers at the US Afghan detention facility prompted him to talk by kneeling him in the back. They put a bag over his head and knocked him to the ground. He was repeatedly moved from cell to cell and prevented from sleeping for a period of fifty days.

The Hamdan confession rejection is very significant. It occurred in the first full trial test of the Pentagon's system for prosecuting terrorists—especially poignant because this particular defendant was so closely tied to the world's most wanted criminal. It was the first time that any Guantanamo prisoner's case had finally reached trial. The military judge added that he would throw out any adverse statement in this and future cases when there was no government witness available to vouch for the questioner's interrogation tactics.

There had been a barrage of news stories about abuses. Public opinion had been swayed by media references to Guantanamo's “Kangaroo Court” proceedings. Yet, a US military tribunal in Guantanamo employed civilized standards to the determination of whether Hamdan's confession would stand.

There would be many other complaints about the process, including the Pentagon's statement that Hamdan would remain in indefinite detention as an "enemy combatant," regardless of the verdict (before he was finally convicted on certain charges).¹⁶⁷ But this particular decision resolved a number of doubts about whether a US military trial judge could objectively dispense justice. Similar to the circumstances in subsection (d) above, regarding the military and civilian lawyers involved in the "torture memos," military judges once again demonstrated the ability to dispense justice in a way that seemed to escape certain former civilian lawyers at the US Department of Justice.

3. A Nation Reacts The Detainee Treatment Act, passed by Congress in December 2005, required the Defense Department to restrict interrogation methods to those set out in the US Army Field Manual. It bans coercive interrogations. Pending legislation would amend the 2005 Detainee Treatment Act to add the following language to the above §2340(1) definition of torture: "... and includes the technique known as 'waterboarding,' which includes any form of physical treatment that simulates drowning or gives the individual who is subjected to it the sensation of drowning." Any shopping list of what constitutes torture may become obsolete as new techniques are developed. But the very existence of that listing at least provides a target-rich environment for identifying practices deemed unacceptable as of that point in time.

Abiding by the above broadened definition of torture would have assisted the US officials who appeared before the UN Torture Committee in May 2006. This was the first time since 9–11 that a US delegation answered questions from an international body regarding abuses by US soldiers and intelligence officers. Their appearance was prompted by the pre-9–11 US ratification of the UN Convention on Torture. Member States must thereby periodically report about their observation of treaty requirements [see Problem 7.G].

Unlike the Geneva Conventions, those who violate the Torture Convention can be criminally prosecuted. Injured individuals may also allege a claim seeking money damages or other relief against the perpetrator. This level of commitment has not deterred the vast majority of nations from ratifying the Torture Convention.

The McCain Amendment to the 2006 US Defense Appropriations Law attempted to strike a balance between

national security and the prohibition on torture. US Senator John McCain, who was himself tortured for over five years in North Vietnam, describes it as follows: "It's not about who *they* are. It's about who *we* are." His amendment essentially provides: "No person ... under detention in a Department of Defense facility shall be subject to any technique of interrogation not authorized by the United States Army Field Manual on Intelligence Interrogation.... [Further no], individual ... shall be subject to cruel, inhumane, or degrading treatment or punishment." This law was certainly welcome news for military leaders in the field. It clarified prior ambiguity regarding the treatment of prisoners.

However, upon signing this act into law, the US president simultaneously executed a signing statement which limits this new torture provision.¹⁶⁸ This caveat reserves the president's stated power to bypass the McCain Amendment, based upon an executive determination that torture is required in some present or future context. This particular practice (demonized by liberals) was designed to preserve the president's primary obligation: to preserve the national security.

In September 2006, the Department of Defense published a new directive on principles governing its detainee policy. The US Army published a new Army Field Manual. It prohibits all of the above interrogation techniques. The treatment of detainees must thereby conform to the Geneva Conventions (as interpreted by the US). Military officers and civilian officials can more readily identify the legal contours for conducting interrogations as opposed to the sinister period when secret memos prevailed.¹⁶⁹

E. RENDITION

See textbook §5.3.C.3.

F. POST-2008 ABOUT FACE?

US President Barack Obama's inauguration speech set the tone for a marked departure from the immediate past administration that was in office since 9–11. Obama's words echoed those of Ben Franklin, uttered over 200 years before—essentially that those who sacrifice liberty for security deserve neither. This was President Obama's version:

As for our common defense, we reject as false the choice between our safety and our ideals. Our Founding Fathers, faced with perils we can scarcely imagine,

drafted a charter to assure the rule of law and the rights of man, a charter expanded by the blood of generations. Those ideals still light the world, and we will not give them up for expedience's sake.

...

Recall that earlier generations ... understood that our power alone cannot protect us, nor does it entitle us to do as we please. Instead, they knew that our power grows through its prudent use; our security emanates from the justness of our cause, the force of our example, the tempering qualities of humility and restraint.

While a presidential candidate, Barack Obama made many promises during his campaign (510 to be exact). He sped out of the starting gate upon taking office. Two days later, he issued the following executive orders regarding the next chapter in the US War on Terror:



- [1] Executive Order—Ensuring Lawful Interrogations
- [2] Executive Order—Review of Detention Policy Options
- [3] Executive Order—Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities
- [4] Memorandum—Review of the Detention of Ali Saleh Kahlal al-Marri^a

BARACK OBAMA, PRESIDENT, UNITED STATES
(22 JAN. 2009)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>. Under Chapter Nine, click Obama Executive Orders.

^a In December 2008, the US Supreme Court chose to review al-Marri's case. He is an alien who entered the US on September 10, 2001 to pursue graduate studies. He was lawfully residing in the US. He was designated as an enemy combatant, based on the charge that he was an Al-Qaida "sleeper agent." In March 2009, his appeal was mooted, by his (discretionary) transfer from military to civilian custody for further Justice Department proceedings.

One must acknowledge, however, that announcing the closure of the US prison in Guantanamo Bay, Cuba would not necessarily mean that the inmates would be orderly "processed" elsewhere. Having been branded as some of the world's most notorious criminals, few trusted countries were eager to repatriate them. As for detainees who might stand trial in the US civilian criminal justice system, no US citizen would be anxious to have them released in their neighborhood.

The remaining options include dispatching them to facilities at the US Air Force's Bagram military base in Afghanistan (where conditions would be more spartan than in Cuba). The Iraqi criminal justice system was then at a virtual standstill. Given the closure of the secret Eastern European interrogation centers, the remaining option would be to house them on US military vessels afloat or at other US military bases around the world. These options present the potential for rekindling a simmering disconnect. The US objective was to regain its pre-War on Terror stature in the sense announced by President Obama very early in his administration. But there are obvious political risks associated with another wave of detentions at these alternative facilities.

In March 2009, the US Department of Justice filed a modified definition of who could be detained—limited to only the habeas corpus petitions of detainees at the US detention center at Guantanamo Bay, Cuba. The executive branch thus suggested that these petitions, emanating from the facility that must be closed within about a year of President Obama's taking office, should be adjudicated under the following "definitional framework:"

The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or *substantially supported*, Taliban or al-Qaida forces or [any] *associated forces* that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces [*italics added*].

The key defining phrases are "substantial support," and "associated forces." This offers a nuanced position.

Its eschews the prior administration's (literal) catch phrase "unlawful combatant." But it withholds any finality of definition, as couched in the following terms:

It is neither possible nor advisable, however, to attempt to identify, in the abstract, the precise nature and degree of "substantial support," or the precise characteristics of "associated forces," that are or would be sufficient to bring persons and organizations within the foregoing framework ... [and] the particular facts and circumstances justifying detention will vary from case to case.... Accordingly, the contours of the "substantial support" and "associated forces" bases of detention will need to be further developed in their application to concrete facts in individual cases.

This position is limited to the authority upon which the government is relying to detain the persons now being held at Guantanamo Bay. It is not, at this point [respondent's judicial filing deadline for Guantanamo habeas cases], meant to define the contours of authority for military operations generally, or detention in other contexts.

...

Pursuant to Executive Order 13,493, the Government is undertaking "a comprehensive review of the lawful options available to the United States with respect to the apprehension, detention, trial, transfer, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interest of the United States and the interests of justice."

The 2010 closure of Guantanamo, during the next phase of the "War on Terror," may spawn more "case-by-case" specificity. In the interim, the US is now relying on a subjective three-part standard, not found in the Geneva Conventions: (1) US national security policy; (2) US foreign policy interests; and (3) the US government's notion of what constitutes the "interests of justice." In the interim, President Obama revived the military commission tribunals. The Pentagon also reported that one out of seven ex-detainees have returned to terrorism or military activity that threatens the US.

More questions have been asked than answered about the scope of International Humanitarian Law in the aftermath of 9–11. The prominent Geneva Academy of

International Humanitarian Law and Human Rights has therefore launched the Rule of Law in Armed Conflicts Project. Through its global database and related analysis, the Project hopes to examine every State and disputed territory in the world, confirm the legal norms that apply, and confirm the extent to which those norms are respected by the relevant actors. This project may be aided by the availability of habeas corpus to US detention facilities throughout the world.¹⁷⁰

◆ PROBLEMS

Problem 9.A (after §9.1.A.1., UN General Assembly Friendly Relations Declarations): Refer to the *Alvarez-Machain* case, featured in §5.3.B. of this book. A similar incident occurred in Panama, two years earlier. Its President, General Manuel Noriega, was extracted by US military forces during the US "invasion" of Panama in 1990 [textbook §2.6.A.2.], complete with live CNN coverage of the beachhead where US forces landed. Noriega stood trial and was convicted in the United States on international drug-trafficking charges. Panama did not protest. Panama was supposedly glad to be rid of this despot, in part because of his being on the US CIA payroll.

Assume, instead, that Panama's acting President, Mr. MiniNorg, decides that he must take decisive action because of the US abduction—especially because it involves an official of Panama. In a speech to the people of Panama, MiniNorg declares as follows: The unforgivable atrocity perpetrated this week by US authorities demonstrates the unquenchable imperialistic attitude of the US toward Panama's political independence, territorial sovereignty, and indisputable right to self-determination. I am thus forced to take measures to counter this unlawful operation of US forces in our beloved nation. Because humanitarian concerns do not guide the actions of the US, I must focus US attention upon our sovereign rights by using economic counter-measures. This morning, I ordered Panama's Minister of Banking and Commerce to seize all bank accounts and assets belonging to US citizens.

The US president responds to this expropriation by imposing an embargo on all goods from Panama. The US Customs Service refuses to allow any products from Panama to enter the US.

Given this hypothetical scenario, would Panama's bank account seizures, and the responsive US embargo,

violate the principle of International Law prohibiting the State use of force? What principles would apply to the resolution of this question? How should it be resolved?

Problem 9.B (after §9.1.A.2., defining “Force”): Consider the formerly secret July 23, 2002 “Downing Street Memo” [seven months before the 2003 invasion of Iraq]. The memo shared otherwise undisclosed British perspectives on the potential war with Iraq. A British foreign policy aide therein reported regarding a meeting with President Bush:

Military action was now seen as inevitable. Bush wanted to remove Saddam, through military action, justified by the conjunction of terrorism and WMD. But the intelligence and facts were being fixed around the policy [five days before Secretary of State Powell’s WMD presentation to the U.N.]. The NSC [US National Security Council] had no patience with the UN route [which would have required a second U.N. resolution authorizing the use of force against Iraq].

...

It seemed clear that Bush had made up his mind to take military action, even if the timing was not yet decided. But the case was thin. Saddam was not threatening his neighbours, and his WMD capability was less than that of Libya, North Korea or Iran. We should work up a plan for an ultimatum to Saddam to allow back in the UN weapons inspectors. This would also help with the legal justification for the use of force.

The [British] Attorney-General said that the desire for regime change was not a legal base for military action. There were three possible legal bases: self-defence, humanitarian intervention, or UNSC authorisation. The first and second could not be the base in this case. Relying on ... [an aging UN Security Council resolution] ... would [also] be difficult.

...

Conclusions:

We must not ignore the legal issues: the [British] Attorney-General would consider legal advice with ... [government agency] legal advisers.¹⁷¹

Was the crime of aggression (or attempted aggression) perpetrated, as of the date of this memo?

Five students will act on behalf of the following individuals: (1) Iraq’s President Saddam Hussein; (2) US

President Bush; (3) British Prime Minister Tony Blair; (4) UN Secretary-General Kofi Annan; and (5) UN Under-Secretary General Hans Corell—the UN Legal Officer. Each will speak for one minute, followed by a group (and class) discussion of this issue.

Problem 9.C (within §9.2.B.3(b), after Subsequent Unilateral Action): A major legal question arose, as of the US 1998 military buildup in the Persian Gulf: Could the US unilaterally attack Iraq, premised on aging 1991 UN resolutions, as opposed to soliciting a *fresh* UN Security Council resolution to authorize an attack on Iraq?

Resolution 678, passed before the PGW began, provided that member States could use “all necessary force” to oust Iraq from Kuwait. However, seven years had passed by the time of this US saber rattling; Iraq had left Kuwait; there had been a cease-fire; the US did not have the benefit of the same worldwide resolve to go to war in 1998 (i.e., the US lacked the same support which it previously enjoyed from the permanent SC members China, France, and Russia and the Arab nations which had so staunchly supported the PGW in 1991); there was no provision in any SC resolution authorizing a UN member State to use force on its own initiative; and Article 2.4 of the UN Charter generally prohibits the use of force. This provision could be interpreted to require the *express* authorization of force by a fresh SC resolution, rather than leaving a doubtful situation to the discretion of one member State.

The US position relied on several arguments, including the following: Resolution 678 could still be invoked because peace and security had not been restored to the area; in 1994, Iraqi forces moved toward Kuwait, then pulled back, when the US dispatched a naval carrier group to the Gulf; in 1996, Iraq sent forces into Northern Iraq to help a Kurdish group capture a key city inside a safe haven protected by US-led forces; and Article 51 of the UN Charter accorded the right of collective self-defense because of the potential use of the biological and chemical weapons thought to be hidden in Saddam Hussein’s large presidential palaces. Thus, the continuing threat of biological warfare could mean that the war had never really ended. Iraqi compliance with the cease-fire agreements could be construed as a condition precedent to an actual cease-fire.

Two students (or groups) will debate whether the US possessed the authority to attack Iraq—as planned, prior to the Secretary-General’s successful intervention—without a *fresh* UN Security Council resolution. The

basic arguments have been provided. Others are available in J. Lobel & M. Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Ceasefires, and the Iraqi Inspection Regime*, 93 AMER. J. INT'L LAW 124 (1999). This exercise portrays some problems with potential UN solutions to threats to peace.

Problem 9.D (after §9.2.D.2(b) Cuban Missile Crisis Materials): Did the US properly invoke UN Charter Article 51's provision, which authorizes self-defense?

Problem 9.E (after §9.2.D.2(b) Article 51 Materials): In April 1993, after the senior US President Bush left office, he traveled to Kuwait. After he returned, the US discovered that Saddam Hussein had planned to assassinate ex-President Bush during this visit. The US responded in June 1993 by launching several missiles into Baghdad. The US claimed that an unsuccessful armed attack on a former head of State justified this responsive use of force as Article 51 self-defense.¹⁷²

Two students—one representing Iraq and one representing the US—will debate whether a State's use of force in these circumstances is justifiable self-defense, as opposed to a mere reprisal.

Problem 9.F (after §9.2.F. nuclear weapons materials): The US "bunker buster" nuclear bomb is a low-yield bomb. It is designed for penetrating underground complexes such as those potentially used by armed forces, paramilitary, and Al-Qaida in Afghanistan's mountainous terrain. It is quite difficult to search and penetrate all such complexes. This type of landscape may account for the inability to find Usama bin Laden. Using such a tactical weapon would: (a) greatly diminish the potential impact on the above-ground environment; (b) virtually eliminate the possibility of civilian collateral damage; (c) not be prohibited under the 2002 US National Security Strategy (§9.2); and (d) arguably fall within the necessity and proportionality limitations imposed by Customary International Law.

The Bush administration's proposed budget for FY 2006 contains appropriation lines for resuming research on the nuclear bunker-buster. This plan presents the issue of whether such research is illegal under the disarmament obligations established by the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). Article VI of the NPT states: "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on

effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control." The treaty is available at: <<http://www.fas.org/nuke/control/npt/text/npt2.htm>>.

The US is expected to press for tougher global rules on the spread of nuclear weapons and the fuel-cycle technology needed to produce weapons-usable fissile materials. Its main concerns include North Korea's threatened withdrawal from the NPT, its assertion that it has nuclear weapons, nuclear activities being undertaken by Iran, and the threat of terrorist acquisition of nuclear weapons. But the 2002 NSS does not mention its potential use of bunker busters. For a very useful analysis, see A. Grotto, ASIL Insight: Nuclear Bunker-Busters and Article VI of the Non-Proliferation Treaty, available at: <<http://www.asil.org/insights/2005/02/insight050217.html>>.

Two students or groups will debate whether or not the US use of bunker busters would violate International Law.

Problem 9.G (after §9.5.B. Definitional Contours): In the aftermath of the Asian tsunami of December 2004, the affected nations all welcomed all forms of international relief. Not so with Myanmar's more colossal May 2008 cyclones—a natural disaster that killed an estimated 134,000 people. It also drove perhaps 2,400,000 members (half) of Myanmar's population into camps where they languished for many of the following months.

The ruling military junta refused any international assistance for about one month. Even then, relief supplies were permitted to be taken only to the capital city of Rangoon and only by civilian vessels. The UN engaged in tense negotiations with the government's leaders, as did the International Red Cross. Forty-five nations attended a conference on how to provide humanitarian assistance to the destitute citizens of Myanmar. US military ships left the area on the assumption that their presence might be complicating matters. Myanmar's junta ultimately relented in the following month, allowing its Asian neighbors to supervise the provision and distribution of humanitarian aid to the people.

Assume that you are the commander of a foreign military force that remained, just after the above US

Navy's departure. Assume further that Myanmar's leadership has yet to give in to international demands to force the distribution of on-scene aid, via the numerous military and civilian vessels under your command. The US warships are within one day's travel of your position off the coast of Myanmar.

The various documents you have at hand include your legal officer's copy of the UN General Assembly's 2005 World Summit Outcome Declaration. Under the Part IV Human Rights and the Rule of Law section, it contains the following subsection entitled **Responsibility to Protect**:

118. We agree that the protection of populations from genocide, war crimes, ethnic cleansing and crimes against humanity lies first and foremost with each individual State.... The international community, through the United Nations, also has the obligation to use diplomatic, humanitarian and other peaceful means ... to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we recognize our shared responsibility to take collective action, in a timely and decisive manner, through the Security Council under Chapter VII of the UN Charter [textbook §9.2.B.] and in co-operation with relevant regional organizations, should peaceful means be inadequate and national authorities be unwilling or unable to protect their populations.¹⁷³

Another document has just been dug up by the same legal officer. It is the October 2007 revision of the US Military Maritime Strategy. It signals the US post 9–11 shift from the narrow "Eurocentric sea combat" strategy to one of "soft power" with a view toward providing humanitarian assistance. In a key passage, it states the proposed US strategy,¹⁷⁴ based on a conference attended by the leaders of 100 supportive nations (including yours) in 2007:

By being there, forward deployed and engaged in mutually beneficial relationships with regional and global partners, maritime forces will promote frameworks that enhance security. When natural or man-made disasters strike, our maritime forces can provide humanitarian assistance and relief, joining with inter-agency and non-governmental partners. By participating routinely and predictably in cooperative

activities, maritime forces will be postured to support other joint or combined forces to mitigate and localize disruptions.

...

Building on relationships forged in times of calm, we will continue to mitigate human suffering as the vanguard of interagency and multinational efforts, both in a deliberate, proactive fashion and in response to crises. Human suffering moves us to act, and the expeditionary character of maritime forces uniquely positions them to provide assistance. Our ability to conduct rapid and sustained non-combatant evacuation operations is critical to relieving the plight of our citizens and others when their safety is in jeopardy.

...

Integration and interoperability are key to success in these activities, particularly where diverse forces of varying capability and mission must work together seamlessly in support of defense, security, and humanitarian operations.

Finally, your executive officer reminds you that the US claimed the right to provide humanitarian aid to Georgia in relation to Russia's August 2008 intervention in Georgia.

Each day that you delay, more than 1,000 Myanmar citizens, many of them children, will die—because the country's military junta has not yet decided to grant your fleet access to anywhere within the country, including the key distribution points for humanitarian aid. You must now decide whether to intervene. What will you do?

Problem 9.H (after §9.5.D.): The border separating the hypothetical nations of North Alpha and South Bravo is lined with military installations on both sides. Both nations are members of the UN. Alpha and Bravo recently signed a bilateral treaty in which they agreed that neither State may use coercive measures of an economic or political character. They further agreed that neither could force its sovereign will on the other State, nor attempt to use force to obtain advantages of any kind.

Their international relations are now very poor. A small band of Alpha's military troops covertly crossed the border into Bravo and disappeared into Bravo's heartland. Bravo's leader learns about this clandestine military operation and decides that he must respond to this threat. He takes some prominent visiting Alpha citizens

as hostages. He then announces that they will remain under house arrest in an unknown location in Bravo. The Alpha troops in Bravo are given an ultimatum by Bravo's leader in a widely broadcasted radio and television message: The Alpha soldiers must surrender to Bravo authorities, or the Alpha civilian hostages will be executed, one each day, until Alpha's troops surrender.

Alpha's military forces in Bravo decide *not* to surrender. Instead, they plan a hostage-rescue mission. An Alpha military plane, loaded with specially trained Alpha soldiers, flies into Bravo to assist them. All of the Alpha soldiers in Bravo then join forces at a predetermined rendezvous point, near the city where the Alpha citizens are being held. Bravo is not surprised. Bravo's military troops ambush and kill all of the Alpha soldiers. Bravo's leader then orders the mass execution of all Alpha hostages.

Did Alpha's rescue mission violate any international norms? Was there any justification?

Problem 9.I (after §9.7.A.2. Israeli Unlawful Combatant case): (a) Assume that you are the on site Israeli military commander in the Occupied Territories. You are in charge of numerous military personnel. How would you explain the substance of this case to your military troops?

(b) Reread paragraph 24 and 25 of this case. Same question as in (a); however, you are, instead, commanding a Palestinian-based militia. Would you agree with the Court's analysis and thus advise your "Freedom Fighter Militia" to observe the principles this case enunciates? (Recall the Court's paragraph 63 comment that none of the parties will necessarily read or consider this case's analysis of the targeted killing policy, but the Court is nevertheless going to do its job).

(c) The two *Intifadas* must have a basis, regardless of whether one agrees/disagrees about their origin or rational nature. For example, if you are the militia leader in (b), might some of your combatants claim as follows: "Europe should not have soothed its collective guilt—for failure to react to the Nazi Holocaust—by creating the State of Israel in the heart of Palestine"?

If you were the Israeli leader in (b), would you respond: "That was then—this is now. Terrorists do not deserve to be called 'Freedom Fighters,' because of their tactics. They cannot achieve their political objectives at the expense of innocent civilian lives, in violation of International Human Rights Law (Chap. 10),

International Humanitarian Law (this section), and the national security law of a sovereign nation."?

Is there a different explanation for the conflict, than those suggested in the hypothetical quotes in parts (b) and (c) above? For an exhaustive UN-initiated report, concluding that both sides violated the Laws of War, see UN Human Rights Council, Human Rights In Palestine and Other Occupied Arab Territories—Report of the United Nations Fact Finding Mission on the Gaza Conflict, at: <http://www2.ohchr.org/english/bodies/hr_council/specialsession/9/docs/UNFFMGC_Report.pdf>.

Problem 9.J (after §9.7.D.): Assume that there is going to be another terrorist strike in Baghdad—one of many on US and Iraqi soldiers and police in Iraq—but this time on the magnitude of 9-11. The US military captures Abu Musab al-Zarqawi, the leader of Al-Qaida in Iraq and the world's second most-wanted person. He is sent to the US military base in Cuba. President Bush immediately determines that al-Zarqawi is an "unlawful combatant." Mr. al-Zarqawi is the most valuable asset ever captured by the US.

You are the most skilled military interrogator in the US military forces. You learn from other sources about al-Zarqawi's planned nuclear attack on Baghdad. What are your options or limitations for interrogating al-Zarqawi? Assigned students will serve as military liaisons, who will provide you with a brief synopsis of this chapter's materials on each of the following matters: military necessity and proportionality; the Geneva Conventions; the UN Torture Convention; the 2002 US National Security Strategy; the US president's first obligation as Commander-in-Chief to ensure national security; and Professor Bacchus' perspectives in *The Garden*. You are now ready to interrogate al-Zarqawi, who is known for his ability to withstand extraordinary physical torture. Failure to obtain the information you need will likely result in major coalition casualties for great distances from the epicenter in Baghdad. What will you do?

Problem 9.K (at end of §9.7.F.) The "ticking bomb" hypothetical is often used to focus attention on this debate. Your region of the nation is about to experience a second 9-11. Your detainee admits that he has the information to avoid this tragedy.

(1) If necessary, will you torture him to death to get the bomb location information?

- (2) Would your answer be the same if you “suspected”—but did not know for sure—that your detainee had the critical information you need to find the explosive device (or some environmental pollutant that could take hundreds of thousands of lives)? Would a legal or moral dividing line between “knowing” and “suspecting” make a difference? Could such a distinction lead to a slippery slope where mere suspicion is all that is needed for the government to torture anyone to death? Should there be a distinction between “torture” and “cruel, inhumane, and degrading treatment”?
- (3) For those who would not answer “yes” to (1) or (2) above, would it be better to open this question to public debate, and have your country abide by the democratic result?
- (4) Could that vote be skewed by geographical proximity to the first 9–11? For example, would a New York City, Madrid, or London resident be entitled to a weighted vote? No vote? The same vote as everyone else?
- (5) Should such decisions remain within the government, rather than being subjected to a democratic vote?
- (6) You are in your government’s legislature. Would you vote to pass legislation that exempts governmental officers from the reach of the above statutes (18 USC §2304 and §2304A)? Alternatively, would you remind your executive branch that no one is above the law? That is, there is *already* a clear public statement in these statutes—which were passed to implement the US Torture Convention commitment? Do those statutes necessarily preclude permanent implementation of the above August 1, 2002 memo?

◆ FURTHER READING & RESEARCH

See Course Web Page, at: <<http://home.att.net/~slomansonb/txtcsesite.html>>, click Chapter [Nine](#).

◆ ENDNOTES

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CHAPTER TEN

Human Rights

CHAPTER OUTLINE

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Problems

Endnotes

“Perhaps the quality of the prosecutor’s evidence is best captured by the statement of the ICC-indicted Sudanese Minister of State for the Interior. He publicly acknowledged that [Sudan’s] President al-Bashir had given him the power to kill whomever he wanted, and that, ‘for the sake of Darfur, they were ready to kill three-quarters of the people in Darfur, so that one-quarter could live.’

Many eye witnesses have corroborated what they were brazenly told when military and paramilitary commanders explained al-Bashir’s plan to destroy the specific ethnic tribes: ‘You are blacks, no blacks can stay here, and no blacks can stay in Sudan. The power of al-Bashir belong[s] to the Arabs and we will kill you until the end.’ Ironically, the word “Sudan” evolved from the Arabic phrase

Bilad-al-sudan, which literally translates to Country of the Blacks.”

—Awaiting al-Bashir’s arrest warrant, *SAN DIEGO UNION TRIBUNE* (Nov. 23, 2008), at: <http://www.signonsandiego.com/uniontrib/20081123/news_mz1e23sloman.html>. See §10.1.B., regarding the Genocide “Debate” & §10.5.B., regarding a proposed corporate criminal court.

INTRODUCTION

The first nine chapters of this book address the diverse mechanics of International Law. The remaining chapters contain cross-cutting themes, some of which previously played a supporting role: human rights, the environment, and economic relations. Each is typically offered as a separate course in both undergraduate and law schools. This survey course in Public International Law would be incomplete without chapters that touch upon the essentials.

After a contextual overview, this chapter traverses the terrain which scholars have designated the “International Bill of Human Rights.” To stimulate an appreciation of both successes and obstacles, the remaining sections highlight prominent global and regional approaches to human rights. This chapter thus explores the culpability of various entities for human rights violations. Individuals and corporations are now receiving more attention for their inhuman wrongs. This dilating spotlight cannot be used by the State, however, to avoid its obligation as the primary guardian of International Human Rights Law.¹

The content of this chapter may, at times, appear to overlap a few concepts covered in Chapter 9 on the Use of Force—specifically, sections 9.6 and 9.7 on International Humanitarian Law. That related branch of International Law governs the obligations of a State and certain other actors, which must be observed in both internal and international conflicts. International Human Rights Law, on the other hand, typically addresses the relationship between a State and its inhabitants. The latter is the subject of this chapter.

◆ §10.1 HUMAN RIGHTS IN CONTEXT

A. HISTORICAL FOREWORD

What does the term “human rights” mean? Internationally defined human rights cannot legally be withheld by any State. Judges and scholars typically describe this cornerstone of International Law as “the protection of individuals and groups against violations by governments of their internationally guaranteed rights ... referred to as ... international human rights law.”²

The English Magna Charta (1215 A.D.), the French Declaration of the Rights of Man (1789), and the US Constitution’s Bill of Rights (1791) included inherent, inalienable rights. The government could not deprive an individual of these rights, absent appropriate exceptions. The French Declaration and the US Constitution incorporated one of the most fundamental of all contemporary human rights: No person shall be deprived of life, liberty, or property without due process of law. The US Constitution’s Bill of Rights was a group of Constitutional amendments which guaranteed a host of individual rights.

One must acknowledge, however, that the scope of human rights depends on the nature of the society that lays claim to them. A State’s level of economic development cannot be ignored. In democratic societies, individual rights routinely focus on political rights. In lesser-developed societies, social and economic rights are the individual’s primary concern. Food, shelter, health care, and a minimal education are the “human rights” of primary importance. Many individuals must therein struggle for their daily existence, just to obtain essential food and shelter. Unlike a comparatively developed nation, the government of such a society is not in as good a position to achieve the standards set forth in the fundamental human rights documents addressed in this chapter.

One could view World War II as “the” war that was fought to promote human rights. Certain States had deprived their inhabitants of life, liberty, and property by instituting sweeping social reforms to eliminate particular scapegoats. Germany’s Nazi government deported a large portion of the German population to concentration camps in Poland and other occupied areas of Europe. Nazis totally disregarded the inherent dignity of the individual.

If anything positive can be drawn from that experience, it is that the Nazi form of fascism spawned the

international consensus that the dignity of the individual is not solely a matter of State consent. After the war, States opposed to that form of government formed an international organization of States—the UN. A centerpiece of its *raison d'être* would be the development of the various human rights initiatives, which are the focus of this chapter. Postwar treaties, declarations, and commentaries stand as evidence of an international moral order that now limits State discretion in the treatment of its citizens. Regimes like the white minority South African government (apartheid), Bosnian Serbs (ethnic cleansing), and Afghanistan's Taliban (religious extremism exemplified by its mistreatment of women) learned that the community of nations would initially watch from afar—but ultimately take direct action to topple governments.

A brief history of human rights is provided below by a Canadian scholar. It provides a useful perspective for understanding how the contemporary international human rights regime developed; why certain States began to appreciate the importance of protecting individuals, while clinging to the 1648 Treaty of Westphalia notion of State sovereignty; and in what way this renewed fervor would form the basis of the contemporary UN human rights model:



The International Law of Human Rights in the Middle Twentieth Century

JOHN HUMPHREY

UN DIRECTOR OF DIVISION OF HUMAN RIGHTS
FROM 1946 TO 1966

THE PRESENT STATE OF INTERNATIONAL LAW
AND OTHER ESSAYS WRITTEN IN HONOUR OF
THE CENTENARY CELEBRATION OF THE
INTERNATIONAL LAW ASSOCIATION 75

(London: Int'l Law Ass'n, 1973)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.
Under Chapter Ten, click Human Rights 20th Cen.

This perspective of the UN's first Human Rights Director depicts the political reasons for disparate applications of the Charter and the ensuing

Charter-based human rights declarations. The contemporary International Law of Human Rights had not been adopted by all social and political systems. Thus, some States continued to assert that the scope of human rights remained a matter of internal law.³ They put forward the conflict between two UN Charter objectives: first, State sovereignty, which precludes UN meddling in “matters [that] are essentially within the domestic jurisdiction of any state” (Art. 2.7); and second, “universal respect for ... human rights and fundamental freedoms for all” (Art. 55c). Under this view, what constituted such rights was reserved exclusively for national implementation on a discretionary basis, reflecting local rather than internationally defined conditions.

Even today, Western scholars acknowledge that a globally defined human rights regime does not flourish in certain national systems. The human rights of the individual do not readily prevail in a society where the rights of the State necessarily take priority over the rights of the individual. Internationally defined human rights are not common to all cultures and cannot be readily incorporated into all of the world's social and political systems. Canadian and US professors Rhoda Howard and Jack Donnelly illustrate this point as follows:

We argue, however, that international human rights standards are based upon a distinctive substantive conception of human dignity. They therefore require a particular type of “liberal” regime, which may be institutionalized in various forms, but only within a narrow range of variation. ...

Human rights are viewed as (morally) prior to and above society and the state, and under the control of individuals, who hold them and may exercise them against the state in extreme cases.

In the areas and endeavors protected by human rights, the individual is the “king. ...”

Communitarian societies are antithetical to the implementation and maintenance of human rights, because they deny the autonomy of the individual, the irreducible moral equality of individuals, and the possibility of conflict between the community's interests and the legitimate interests of any individual. ...

Communist societies obviously must violate a wide range of civil and political rights during the revolutionary transition, and necessarily, not merely

as a matter of unfortunate excesses in practice. Even after communism is achieved, the denial of civil and political rights remains necessary to preserve the achievements of the revolution. The permanent denial of civil and political rights is required by the commitment to build society according to a particular substantive vision, for the exercise of personal autonomy and civil and political rights is almost certain to undermine that vision.⁴

One must also acknowledge certain limitations to the UN's ability to consummate its human rights objectives. The UN's annual human rights budget is approximately \$11 million, or less than 1 percent of its regular (non-peacekeeping) budget. Yet the work of the UN Commission on Human Rights tripled during the ten years between the early 1980s and the early 1990s. Facing the budget limitations discussed in textbook §3.3, the UN has been more active in the oversight of areas torn by gross human rights violations—as when the UN embraced the administration of East Timor and Kosovo [§3.3.B.4(b)].

B. GENOCIDE “DEBATE”

You were previously alerted to some specifics about the crime of genocide. They surfaced in several places in this book: for example, universal jurisdiction as a potential exception to the prohibition of extraterritorial law

enforcement [§5.2.F.] and the work of the International Criminal Tribunal for Rwanda [§8.5.C.2. *Radio Machete* case]. By the time of that decision in 2003, the term “genocide” had appeared in a number of major post-WWII international human rights instruments. These included the UN's 1948 Genocide Convention, the Statutes of the International Criminal Courts for the former Yugoslavia and Rwanda, and the Statute of the International Criminal Court. The omnipresence of international institutions dealing with genocide should by no means trigger a presumption that genocide has been exterminated.

There is a curious dilemma awaiting your study of genocide in the following materials. Many national leaders have long eschewed using the term “genocide.” Acknowledging its presence could lead to the presumption that something must be done about it. Genocide Convention Article 8 calls for State parties not only not to commit, but also to *prevent*, genocide from occurring. It is one thing to sign or ratify such a noble treaty. It is quite another to launch troops or commit economic resources in an attempt to stop it. When genocide occurs in a distant location, it does not necessarily capture the imagination of another State's populace not directly ravaged by its consequences. The role of semantics is vividly captured in the following excerpt by the founding Chief Prosecutor of the Special Court of Sierra Leone [textbook §8.5.C.3(a)]:

“Boxed In:” Semantic Indifference to Atrocity

Symposium, To Prevent and Punish: Commemorating the Sixtieth Anniversary
of the Negotiations of the Genocide Convention

DAVID M. CRANE

40 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 137, at 144–145 (2008)

...

War crimes, crimes against humanity, and genocide, among other violations of international humanitarian law, will [continue to] dog the United Nations. Diplomats seem to place genocide in a separate category—the crime of crimes—to be declared cautiously, lest the clear mandates within the Genocide Convention kick-in. Political leaders and diplomats are reluctant to

call a mass killing genocide, in hopes that it may “only” be a crime against humanity. Then, other, more politically desirable and expeditious mechanisms may become substitutes for justice.

Yet, if we do not charge genocide, there is the possibility that atrocities may go unpunished. Genocide is not [as] easy to disregard or negotiate away, where

the other “lesser” international crimes might be. Thus, in a strange way, the decision to act resides in the hands of politicians and not the courts, potentially subjecting atrocity victims to the machinations of politicians....

Thus, how the international community reacts to mass killing largely stems from a semantic debate—is it or is it not genocide?—with a desire to avoid the “G” word, in order to keep the world’s options for dealing with a particular atrocity open.

...

[W]e must be mindful that there may be a subconscious political reflex that could change the international reaction to present and future atrocit[ies].

Rhetorically, ... having a separate crime of genocide complicates matters. Why not just have war crimes and

crimes against humanity, rolling up the elements of genocide into other crimes? Is genocide [in fact] a greater crime? One can certainly argue yes, but does an injustice then occur when the world chooses to denote it as something else? The reaction may be: “It’s not genocide therefore we can do something that is easier ... [to fit] into extant politics.”

What one does not want to see is boxing atrocity into a category that weakens a response or gives a rationale or excuse for the United Nations and the international community to do nothing at all. ... Semantics may lead to action, inaction, and indifference. Let us not focus on words but [the perpetrator’s] action. Mass killings are mass killings, [and] the reason why is important, but justice should be the driving force.

1. Framing the Issue What we now call *genocide* is arguably illustrated in religious scripture. While scholars have debated this point for centuries, one might draw one’s own conclusion from the following biblical passages: “Now go and strike Amalek and utterly destroy all that he has, and do not spare him; but put to death both man and woman, child and infant, ox and sheep, camel and donkey.” The Amalek was a nomadic tribe, which some biblical historians refer to as “the first of the nations.” Its members once dwelled in the region south of Judah where the Israelites allegedly initiated a conflict to “cleanse” this region of the Amalekites. As explained in Deuteronomy, ch. 25, verse 19: “Therefore it shall be, when the LORD thy God hath given thee rest from all thine enemies round about, in the land which the LORD thy God giveth thee for an inheritance to possess it, that thou shalt blot out the remembrance of Amalek from under heaven; thou shalt not forget it.”⁵

Perhaps the modern “debate” regarding what constitutes genocide commences with the Armenian genocide of 1915–1918, which Turkey disavows. In the waning days of the Ottoman Empire, some 1.5 million Armenians were driven out of Turkey. The Ottomans feared that the Armenians would collude with Russia to overthrow the Empire’s strategic location in Turkey. In July of 1915, the US Ambassador to Turkey reported to Washington about the Young Turk’s “systematic attempt to uproot peaceful Armenian populations.” He therein described “terrible tortures, wholesale expulsions and

deportations from one end of the empire to the other accompanied by frequent instances of rape, pillage and murder, turning into [a] massacre....” One month later, he warned of an “attempt to exterminate a race.” Turkey responded that the Armenians were a dangerous fifth column which was colluding with Russia—the Ottoman’s fiercest rival—to overthrow the Empire. Turkey acknowledges that there were many deaths, but no government-driven slaughter.⁶

This is a taboo subject in Turkey where mention of it subjects people to an Article 301 Turkish Criminal Code prosecution for “insulting Turkishness.” Turkey’s external relations on this subject are not going well, especially because of its desire to enter the European Union. France recognized this “genocide” in 2001. When Canada’s Prime Minister acknowledged this “genocide” in 2006, Turkey pulled out of a NATO military exercise in protest. In October 2007, Turkey warned the US that their mutual diplomatic and military ties (via NATO) would be tarnished if the Congress passed a resolution on this matter. President Reagan had convinced Congress not to do this in 1984. The Bush Administration successfully lobbied against this resolution. President Obama stated, while campaigning for office, that he would seek US recognition of the “Armenian Genocide.” If that happens, Turkey may (at least) threaten to lessen its support for the US in Iraq.

In October 2008, a Swiss court fined three Turkish individuals for racial discrimination in Winterthur,

Switzerland. They had organized a demonstration there to disclaim the Armenian Genocide.

Perhaps the next most debated event is the 1932–1933 famine in The Ukraine. The Ukraine claims that it was a man-made Soviet era program that killed one-third of the nation's population (allegedly 33,000 per day). Ukraine wants Russia to acknowledge this as a State-sponsored genocide. Stalin's plan was to force peasants to give up their private farms and to join collectives in what was then known as the breadbasket of the entire Soviet Union—as well as a seat of anti-Soviet nationalism. Moscow has warned Kiev's parliament not to thus characterize these events.

Certain government-sponsored genocides are not debatable. Rwanda is perhaps the clearest example [text §8.5.C.]. Darfur is arguably a closer case because Sudan's government claims that it is guilty, if at all, only of ethnic cleansing (per the chapter-opening vignette).

2. A Definition Emerges The term “genocide” was coined by Rafael Lemkin, a Polish Jewish lawyer whose family was eradicated by the Nazis. This moniker combined the terms “genos”—Greek for race or tribe—and “cide”—Latin for killing. As recounted by a prosecutor at the Nuremberg Trials:

[Lemkin's interest was sparked by] concern over the unpunished Turkish massacre [1915–1918] of hundreds of thousands of Armenians. The Turkish official who ordered the massacre was not brought to trial but the young man who allegedly assassinated him was. Lemkin saw a great anomaly between the situation of an individual who had allegedly committed a single murder being put on trial for his life while the instigator of the massacre of thousands of people went scot free. ... [I]n the 1930s Lemkin prepared a draft of a law that would punish those who committed the destruction of people for racial, religious or national origins reasons. He wanted the concept of Universal Jurisdiction to apply to the law's enforcement so that those who committed these crimes could be tried wherever they were caught, regardless of where the crime was committed and regardless of the defendant's nationality or official status.⁷

Lemkin's theme ultimately morphed into the 1948 Genocide Convention on the Prevention and Punishment of the Crime of Genocide. Article 8 provides as

follows: “Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide. ...”⁸

Two somewhat contradictory trends have contributed to misunderstandings about the proper application of the term genocide. One is overuse, and the other is underutilization. Misuse (or overuse) of the term “genocide” lies at one end of this spectrum. Maltreatment of individuals and groups in its many diverse forms has been conveniently mischaracterized by politicians, the media, lawyers, and students of International Law. As lamented by the President of the International Court of Justice, Justice Rosalyn Higgins: “There is undoubtedly a degradation of the concept of genocide in its all too easy invocation by politicians who have not troubled to learn the distinction between mass murders, war crimes, crimes against humanity and genocide. Lawyers have not been immune from contributing to this degradation.”⁹

One must distinguish between mass murder and genocide. The perpetrators killed 3,000 people on 9–11. Without evidence of their intent, however, this could “only” be mass murder. That is because Article 2 of the Genocide Convention states that “genocide means any of the following acts committed with [the specific] intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. ...”

International courts interpreting the Genocide Convention and International Humanitarian Law [§§9.6 and 9.7] have therefore required a finding that the actor *specifically intended* to destroy, or at least partially destroy, a specified group.¹⁰ As elucidated by two prominent British authors: “[t]he mental element of genocide differs from other international crimes ... in that here the *mens rea* required for genocide is one of specific intent ... it must be shown that the act was directed against a national, ethnical, racial, or religious group and was carried out with the clear objective of destroying in whole or in part that particular group. Anything different may constitute another offense, *e.g.* crimes against humanity [or war crimes], but it will not be a crime of genocide.”¹¹

There is also the question of whether genocide can be attributed to an association of terrorists as opposed to a particular State. The *raison d'être* of the 1948 Genocide Convention was to place future States on notice that the individual would no longer be subjected to the whims of a rogue government like the Third Reich.

There is also some debate about whether genocide can be committed only by the State or some entity closely associated with it—such as the Janjaweed paramilitary in The Sudan. As noted by William Schabas, Director of the Irish Centre for Human Rights: “Because of the scope of genocide, it can hardly be committed by an individual, acting alone. Indeed, while exceptions cannot be ruled out, it is virtually impossible to imagine genocide that is not planned and organized either by the State itself or by some clique associated with it.” On the other hand, neither the Preparatory Commission for the Statute of the International Criminal Court nor the original UN General Assembly Genocide Convention resolution included such a requirement. Also, certain prominent national court decisions have not required governmental planning as an element of genocide.¹²

3. State Practice States have been long on rhetoric, but short on embracing the Article 8 call for international action when genocide has no doubt occurred. In 1994, the US Clinton Administration resisted using the word “genocide” when referring to Rwanda.

The post-2000 election Bush Administration initially avoided that word when describing the horrors occurring in The Sudan. The US House of Representatives simultaneously considered the conduct of the Sudanese government in Darfur to be “close” to genocide. In September 2004, US Secretary of State Colin Powell proclaimed the US view that the systematic and government-sponsored elimination or departure of millions of members of the non-Arab population was in fact “genocide.” In his testimony to the US Senate’s Foreign Relations Committee, Powell sternly admonished Sudan’s government-backed militia. He “concluded that genocide has been committed in Darfur and that the government of Sudan and the Janjaweed [militia] bear responsibility. ...” Subsequently:

- ◆ President George W. Bush added: “We urge the international community to work with us to prevent and suppress acts of genocide.”
- ◆ The UN Secretary General’s office responded that this was the *first* time—since the Genocide Convention’s 1948 inception—that a nation had made such a declaration.
- ◆ The US Congress passed the December 2004 Comprehensive Peace in Sudan Act of 2004, stating that

“through a military coup in 1989, the Government of Sudan repeatedly has attacked and dislocated civilian populations in southern Sudan in a coordinated policy of ethnic cleansing and genocide that has cost the lives of more than 2,000,000 people and displaced more than 4,000,000 people.”

- ◆ Between the end of WWII and 2007, genocide and political mass murder claimed from twelve to twenty-two million noncombatant lives in thirty countries.¹³

State diplomacy is another weapon in the arsenal for combating genocide. In December 2006, for example, Rwanda broke its diplomatic relations with France, accusing France of complicity in the 1994 Rwandan genocide. Rwanda hopes to secure an international arrest warrant against France’s former President and several other high officials. If successful, it would be the first occasion for an African nation to seek the extradition of European nationals for war crimes.

4. UN “Results” A UN inquiry related to the above Rwanda tragedy admitted that the failure of the UN and its membership was one of the root causes:

The Independent Inquiry finds that the response of the United Nations before and during the 1994 genocide in Rwanda failed in a number of fundamental respects. The responsibility for the failings of the United Nations to prevent and stop the genocide in Rwanda lies with a number of different actors, in particular the Secretary General, the Secretariat, the Security Council, UNAMIR [UN mission in Rwanda] and the broader membership of the United Nations. This international responsibility is one which warrants a clear apology by the Organization and by Member States concerned to the Rwandese people. As to the responsibility of those Rwandans who planned, incited and carried out the genocide against their countrymen, continued efforts must be made to bring them to justice—at the International Criminal Tribunal for Rwanda and nationally in Rwanda.¹⁴

In March 2005, the UN Security Council issued its first referral of allegedly responsible individuals to the International Criminal Court [textbook §8.5.D.]. Although the US is staunchly opposed to this court, it

abstained during the Security Council vote. The silent acquiescence of the US supported the first UN referral of a case to the ICC Prosecutor. In March 2006, the UN Secretary General appointed the first Advisory Committee on Genocide Prevention and Special Advisor on the Prevention of Genocide.

Delay has been rampant for a variety of reasons. One is that the use of the very sensitive term “genocide” would antagonize the allegedly responsible government. Even threats of sanctions could backfire. Sudan’s Arab-dominated government, for example, backed the Darfur conflict against non-Arabs. Arab nations might characterize sanction threats as further evidence of US hegemony in Africa or evidence of some broader anti-Arab sentiment.

The UN has traditionally been reluctant to use the term “genocide” to describe the activities of a member government. (Recall from textbook §8.5.D. that the International Criminal Court is *not* a UN entity.) The UN Commission of Inquiry Report on the Sudan concluded that there was mass murder and other atrocities. These would constitute crimes against humanity, according to the UN Commission, but not “genocide.”¹⁵ The October 2004 Security Council terrorism resolution tracks the wording of the Genocide Convention without actually using the word “genocide.” As its Resolution 1566 affirms:

criminal acts, including [those] against civilians, committed with the intent to cause death or serious bodily injury ... with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, ... are under no circumstances justifiable ... and [it] *calls upon* all States to prevent such acts and ... to ensure that such acts are punished by penalties consistent with their grave nature. ...

5. Judicial Development National courts have the primary duty to punish and prevent genocide. As passionately articulated by the President of the International Criminal Court: “Both the 1948 [Genocide] Convention and the [1998 ICC’s] Rome Statute recognize that it is the primary responsibility of national courts to investigate and prosecute genocide.”¹⁶

One could argue that they have not been able to live up to that responsibility. Reasons include the inability of State A to pursue State B on sovereign immunity grounds. Such cases against individuals in national courts are often costly and difficult to prove, especially given the *specific intent* element required for a genocide prosecution. Of course, a State prosecutor’s ability to actually charge a defendant with a crime that meets Genocide Convention requirements assumes that the court: (a) sits in a nation that *has* incorporated the Genocide Convention into its domestic law via implementing legislation; and (b) *has not* acceded to this treaty with some limiting (or limitless) reservation. (Regarding incorporation into domestic law, recall §7.1.B.4.; and §7.2.A.4., as to type of reservation.)

When there is no State forum, then international courts may be called upon to bring some certainty to this somewhat neglected area of the law. Perhaps the leading case decision to collate the definitions and facts that constitute genocide and its lesser included offenses—such as the failure to prevent it—was issued by the International Court of Justice in 2007:



**Case Concerning the
Application of the Convention
on the Prevention and
Punishment of the
Crime of Genocide
(Bosnia and Herzegovina v.
Serbia and Montenegro)**

INTERNATIONAL COURT OF JUSTICE
GENERAL LIST NO. 91 (26 FEBRUARY 2007)

Go to Course Web Page, at:
<<http://home.att.net/~slomansonb/txtcsesite.html>>.
Under Chapter Ten, click Bosnia v. Serbia
Genocide Case.

In November 2008, the International Court of Justice finally determined that it would hear Croatia’s case against Serbia. In its suit, Croatia claimed that 20,000 of its citizens died during the early 1990s Serbian offensive when Serbia—at a minimum—allegedly failed to prevent genocide.

C. ETHNIC CLEANSING VARIATION

Tracing the lineage of “ethnic cleansing” is arguably less daunting when one acknowledges the reluctance of the UN and its members to apply the term “genocide” to sensitive international relations. The term “ethnic cleansing” is mentioned in a 1993 UN report. This comparatively new concept is therein defined as “rendering an area ethnically homogeneous by using force or intimidation to remove from a given area the persons from another ethnic or religious group.”¹⁷

It was first associated with the 1990s breakup of the former Yugoslavia. As noted in one of the very few reported national court decisions to define it:

The term “ethnic cleansing” emerged from the tragedy in the former Yugoslavia and is a translation of the Serbo-Croatian term, *etničko čišćenje*. It is commonly understood to be a euphemism for genocide. Unlike genocide, however, “ethnic cleansing” is not a legal term of art; therefore, the Court uses quotation marks when citing the term.¹⁸

Its application actually has a much older genealogy. In 1972, for example, a British plan would have evacuated 200,000 Catholics from Northern Ireland to “homogenous enclaves within Northern Ireland.” This plan was rejected, however, because unless “the [British] government were prepared to be completely ruthless in the use of force, the chances of imposing a settlement consisting of a new partition together with some compulsory transfer of population would be negligible.”¹⁹ Israel would be an ethnic cleanser to the extent that its Jewish settlements in the West Bank and Gaza drive away previous Palestinian residents. During World War II, the US forced hundreds of thousands of Japanese-Americans into relocation camps. In the nineteenth century, tens of thousands of US Native-Americans were moved from their lands by the federal government.

As to the substantive difference, Genocide Convention Article 8 calls for States to *prevent* genocide. It does not mention “ethnic cleansing.” The latter may easily become the former. Many commentators have not made this important distinction. The National University of Ireland’s Professor William Schabas, perhaps the foremost expert on the study of genocide, offers that the “Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary and Arbitrary Executions has characterized ethnic cleansing as a euphemism

for genocide. The view that the two terms are equivalent or that they overlap is widely held within the diplomatic and academic communities. After many years of sharing such a view [however], I have come to the conclusion that the two concepts are quite distinct and that they do not coexist.”²⁰

The Genocide Convention requires the specific intent to destroy part or all of a particular group. Ethnic cleansing is not yet a “legal term” in the sense of being the subject of a treaty or having been authoritatively defined in the case law from international tribunals. One could argue that any “intent” element for a domestic court’s ethnic cleansing prosecution should not be as demanding as that which is necessary for genocide. Merely banishing people from their homes or from a particular region may be economically driven. But without more, that does not constitute “genocide.” As discussed in the §10.5.B.1. *Unocal* case, villagers were driven from their homes to ensure the security of the oil pipeline. Some were killed. But there was no apparent racial or ethnic hatred associated with the government’s egregious conduct in that case.²¹

There are competing interpretations within the UN itself. As chronicled by the International Court of Justice, in paragraph 190 of the above *Bosnia v. Serbia* genocide case:

The term “ethnic cleansing” has frequently been employed to refer to the events in Bosnia and Herzegovina which are the subject of this case; see, for example, Security Council resolution 787 (1992), para. 2; resolution 827 (1993), Preamble; and the Report with that title attached as Annex IV to the Final Report of the United Nations Commission of Experts (S/1994/674/Add.2) (hereinafter “Report of the Commission of Experts”). General Assembly resolution 47/121 referred in its Preamble to “the abhorrent policy of ‘ethnic cleansing,’ which is a form of genocide,” as being carried on in Bosnia and Herzegovina [*italics added*]. ... It is in practice used, [however] by reference to a specific region or area, to mean “rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area” (S/35374 (1993), para. 55, Interim Report by the Commission of Experts). ... It can only be a *form of genocide* within the meaning of the Convention, if it corresponds to or *falls within one of the categories of acts prohibited by Article II* of the

Convention. Neither the intent, as a matter of policy, to render an area “ethnically homogeneous,” nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is “to destroy, in whole or in part” a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement.

If courts in fact interpret the law as it is, it would be up to the community of nations—conceivably via an express treaty undertaking—to demonstrate that this Court was wrong about so significant a distinction. While Palestinians have, for example, accused Israel of genocide, the Nakba (Arabic for “catastrophe” or 1948 UN partition of Palestine) could arguably amount to ethnic cleansing at the worst, but not genocide. As to individual culpability, a Dutch businessman supplied raw materials to Iraq for the mustard gas that killed 5,000 Kurds in 1993 (Saddam Hussein was hanged for this). The Dutch judicial system acquitted the businessman on charges of genocide. There was insufficient evidence that he specifically intended to annihilate the Kurds as an ethnic group. He wanted only to make money, regardless of the horrific cost in human lives.²²

D. HUMANITARIAN INTERVENTION

Textbook §9.5.A. and B. previously addressed humanitarian intervention—in the context of the Use of Force. This book’s human rights dialogue would be incomplete, however, without scrutinizing the UN’s performance. As noted in §9.3.B. of this book, UN peacekeepers in Africa violated the terms of the UN presence there. Many engaged in conduct unbecoming an international representative who is expected to come to the aid of victims as opposed to creating even more victims. The UN has another major human rights problem, which has received virtually no attention: its detention policies in the locations it has administered (East Timor and Kosovo). None of the relevant East Timor regulations—for the comparatively brief period of direct UN administration there—ever held the UN accountable in situations where there would be State responsibility for violations of international norms.²³ During the UN administration of Kosovo, which began in 1999:

The SRSG’s [Special Representative for the Secretary-General] use and abuse of executive orders in Kosovo demonstrates the problems that arise from a virtually unchecked centralized authority. The case of Afrim Zeqiri emphasizes the need to rethink the means by which the Security Council applied and enforced human rights standards on interim administrations. U.N. police arrested Zeqiri, an ethnic Albanian, for the murder of three Serbs and the attempted murder of two in the Kosovo village Cernica. He was arrested in May 2000 and held ... based on judicial detention orders until late July 2000. Following the lapse of the judicial detention order, ... [the UN] extended Zeqiri’s detention ... because local prosecutors chose to abandon the case. ... When the series of executive orders and judicial decisions to extend detention expired in November 2000, Zeqiri remained in a detention center at the U.S. Army Base. In response to the [Organization for Security and Co-operation in Europe] Ombudsperson’s request for clarification of the legal basis for the prolonged detention, the [UN] Director of the Department of Judicial Affairs wrote that Executive Order detentions were lawful based on the broad mandate of Resolution 1244 which permitted the SRSG to take “any measure necessary to ensure public safety and order and the proper administration of justice.” After nearly two years in prison, KFOR released Zeqiri from detention because of the lack of evidence against him.²⁴

The UN has to “do it better.” Otherwise, it cannot be a role model for any State administration that follows in its wake.

◆ §10.2 UN PROMOTIONAL ROLE

A. UN CHARTER PROVISIONS

Because of the atrocities that occurred before and during World War II, the “United Nations” proclaimed a preliminary 1942 Declaration. It was the initial landmark in the evolution of the UN system. Forty-seven Allied Powers therein declared their conviction that “complete victory over their enemies is essential to defend life, liberty, independence and religious freedom ... to preserve human rights and justice in their own lands as well as in other lands. ...”²⁵

1. Charter Language In 1945, the UN's charter members wove a number of human rights provisions

into the fabric of this institution dedicated to worldwide peace:

Charter of the United Nations

SAN FRANCISCO CONFERENCE: APRIL 25-JUNE 26, 1945.

ENTERED INTO FORCE: OCTOBER 24, 1945

<<http://www.un.org/en/documents/charter>>

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

...

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small,

AND FOR THESE ENDS

to practice tolerance and live together in peace with one another as good neighbours, and

...

to employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS

CHAPTER I PURPOSES AND PRINCIPLES

Article 1

...

3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

...

CHAPTER IX INTERNATIONAL ECONOMIC AND SOCIAL CO-OPERATION

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56

All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

A preliminary question in any human rights dialogue involves the legal nature of the UN Charter: Do its human rights provisions impose legally binding obligations—or are they merely a statement of goals? (You studied this treaty distinction in §7.1.B.4a of this text.) The Charter contains a statement of aspirational stan-

dards for all member States. Article 56 contains the oath that members “pledge themselves to take joint and separate action in cooperation with the Organization” to achieve the human rights goals specified in the Charter. If this language were designed to require *immediate* steps to implement the Article 56 pledge, however,

joining the UN would have required instant compliance with the Charter's human rights provisions. States intended the Charter to be a broad statement of principle, requiring a moral commitment to provide the specified rights to all inhabitants.

When the Charter was being drafted, many States were in shambles. It was readily foreseeable that an immediate universal obligation to protect and promote all the specific human rights which were the subject of many *later* treaties would be prohibitively expensive—not to mention the cultural relativity which a universal norm might entail. Ultimate compliance was expected to vary with: (1) the respective UN members' economic, social, and political ability to fully implement Charter expectations and (2) just how the post-World War II interest in human rights would be defined by subsequent human rights instruments. Columbia University Professor Louis Henkin offers this explanation:

[B]ecause, in general, the condition of human rights seemed to have little relation to the foreign policy interests of states, traditional policy-makers and diplomats tended to have little concern for the human rights movement, but neither did they see any need to court the public embarrassment of opposing it. In the United Nations General Assembly ... governments could take part in the ... [human rights] process without any commitment to adhere to the final product, trying nevertheless to shape emerging international norms so that their country's behaviour would not be found wanting ... and [that] it might even be possible to adhere to them without undue burden if that later appeared desirable.²⁶

2. From Word to Deed The transformation from moral imperative to legal duty would have to be accomplished by subsequent events, including: (a) ratifying global treaties such as those in Chart 10.1 on p. 592; (b) ratifying regional treaties containing human rights provisions acceptable to certain UN members in a localized context; and (c) enacting legislation at the national level to finally implement the various UN Charter moral commitments.

One might be tempted to characterize the UN Charter's human rights provisions as saying one thing, but meaning another. No State would dare to openly object to the Charter's human rights provisions.

However, no State was obliged to immediately act on the Charter's "Article 56 pledge." Each State was implicitly authorized to defer the decisions regarding "how," "what," and "when" until that point in time and development when implementation would be economically and politically feasible.

The statement of South Africa's representative at the Charter drafting conference portrays the underlying concern. In the context of Charter Article 2.7, which prevents UN interference in matters essentially within the jurisdiction of the sovereign State:

if the United Nations were to be permitted to intervene under Article 55c, which, incidentally, concerns the promotion of human rights ... then the Assembly would be equally permitted to intervene in regard to matters set out in Article 55a and b, that is economic and social matters, higher standards of living, full employment, health legislation, etc. And I submit that no State on earth would tolerate this.

... In conclusion, on this point, I should draw attention to the fact that neither the Charter nor any other internationally binding instrument contains any definition of fundamental human rights. If they had, there would have been no need to set up the [Human Rights] Commission to frame the proposed covenant on human rights.²⁷

But as noted by the University of Munich Professor Bruno Simma—regarding the half century of practice since the above articulation: "Today, sweeping statements can often be found, according to which human rights no longer belong to the domestic jurisdiction of States. ... Such statements are unquestionably true in the sense that States have vastly reduced their sphere of unfettered decision-making by agreeing to a large number of human rights declarations and treaties and by participating in the formulation of a considerable body of customary international human rights law. ... United Nations organs have identified specific and individual human rights violations and have demanded that governments remedy those violations."²⁸

One prominent example is the March 2005 UN Security Council reference of Sudanese State officials to the Prosecutor of the International Criminal Court (§9.5.D.). The UN had attempted to halt the continuing human rights violations in Sudan. Its president then vowed to block this international effort on behalf of the

residents of Darfur, who were being terrorized by the government-backed militia.

The 1945 UN Charter nevertheless avoided self-executing language, which would have made the UN Charter a legally binding document. In an often-cited judicial pronouncement on this point, the 1952 California Supreme Court candidly analyzed the nonobligatory nature of the UN Charter's human rights provisions in the following terms:

It is clear that the provisions ... are not self-executing. They state general purposes and objectives of the United Nations Organization and do not purport to impose legal obligations on the individual member nations or to create rights in private persons. ... Although the member nations have obligated themselves to cooperate with the international organization in promoting respect for, and observance of, human rights, it is plain that it was contemplated that future legislative action by the several nations would be required to accomplish the declared objectives, and there is nothing to indicate that these provisions were intended to become rules of law for the courts of this country upon the [U.S.] ratification of the charter.²⁹

On the other hand, the Charter's broadly worded provisions did present a malleable standard by which national conduct would be measured. The founding UN members had very practical reasons for creating such a hybrid document. They did not want to accept obligations for themselves and purport to require such obligations for future applicants for admission, which had not been precisely defined in this new era of attention to "human rights." Given the pre-World War II inattention to this theme, this indefinite term would mean different things to different people. Charter members might otherwise risk the embarrassment of a UN inquiry into unforeseen matters, which they as State sovereigns might wish to characterize as *national* rather than *international* in scope.

The initial UN members had too many "skeletons in the closet" to intend that the Charter be a legally binding instrument, without further treaty-based clarifications of what "human rights" meant. South Africa would officially proclaim its apartheid policy in 1948. Various governmental entities in the US had officially sanctioned racial segregation and prohibited interracial

marriages. The former Soviet Union had its gulags—the forced-labor camps where individuals who resisted State policy in peaceful ways were incarcerated. Nor were the other powerful nations without their own human rights problems.³⁰

The UN Charter provided only a skeletal backbone for fleshing out the global and regional human rights regime, which would evolve during the latter half of the twentieth century. Midway through that period, the General Assembly announced the 1970 Declaration on the Occasion of the Twenty-Fifth Anniversary of the UN. State representatives therein lauded the UN's work, while recognizing that there remained much to be done. In the words of the Assembly, "serious violations of human rights are still being [routinely] committed against individuals and groups in several regions of the world."³¹

The UN's rather comprehensive human rights program has received remarkable publicity. Commentators argue, however, that many State participants merely "pay lip service" to these programs while their inhabitants suffer. New York University Professor Theodore Meron espouses the representative view that—rather than editing or beefing up existing treaties—a completely new instrument is needed. His perspective is that:

In recent years there has been a proliferation of human rights instruments, not all of them necessary and carefully thought out. It would nevertheless appear that the international community needs a short, simple, and modest instrument to state an irreducible and nonderogable core of human rights. ...

Some might argue that a solution could be found in better implementation of the existing law, rather than in the adoption of new instruments. But attainment of an effective system to implement the existing law is not probable in the near future. Neither would it help to remedy the weakness inherent in the quantity and quality of the applicable norms.³²

On the other hand, some commentators believe that the existing regime should be *supplemented*. Professor Lyal Sunga of the Graduate Institute of International Studies at Geneva proposed an increased emphasis on individual responsibility for human rights violations. His starting point would be the establishment of legal liability of individuals for serious violations in the

context of the Laws of War. The Nuremberg Judgment, followed by the 1949 Geneva Conventions, did this on an *ad hoc* basis. Dr. Sunga argues that there should be a general rule of individual responsibility under International Law for serious human rights violations to supplement existing rules of State responsibility for such violations.³³

Since the presentation of these diverse commentaries, there have been a number of UN developments that have positively expanded the degree of protection afforded to the human rights of the individual. These include the creation of two functioning tribunals for prosecuting human rights violations in the former Yugoslavia and Rwanda, promoting the International Criminal Court (§8.5.D.), and the creation of the UN post for the High Commissioner on Human Rights (addressed below).

In the interest of full disclosure, however, the UN Human Rights Committee, under attack for lack of effectiveness, opened its July 2005 annual session with a call for strengthening the UN human rights system. The opening address contained the following plea: “the whole United Nations human rights system, including our Office as well as human rights bodies and mechanisms must be strengthened in order to ensure better implementation of fundamental freedoms and rights worldwide.”³⁴

B. INTERNATIONAL BILL OF HUMAN RIGHTS

Numerous human rights instruments materialized [Chart 10.1 below] during the six decades since the June 1945 dissemination of the UN Charter. Its main human rights provision, Article 55(c), advocated the persuasive (but legally non-binding) principle that “the United Nations shall promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” In its only other specific human rights provision, UN members “pledge themselves to take joint and separate action in cooperation with the Organization” to achieve the goals specified in Article 55(c).

The international community agreed that the Charter would be no more than a starting point in the quest for further defining the content of its terms “human rights” and “fundamental freedoms.” The basic building blocks of the contemporary International Bill of Human Rights were constructed over the next twenty years.

The following documents facilitated the evolution of more concrete definitions and obligations:

1. 1948 Universal Declaration of Human Rights;
2. 1966 International Covenant on Civil and Political Rights;
3. the two optional protocols to the Civil and Political Rights Covenant; and
4. 1966 International Covenant on Economic, Social, and Cultural Rights and its 2009 individual complaints optional protocol.

1. Universal Declaration The UN’s 1948 UN declaration would add a number of detailed principles to flesh out Article 55(c); however, it also was not intended to be binding. The definitional blueprint for the UN program, fostering a global human rights culture, is the Universal Declaration of Human Rights (UDHR). This UN General Assembly resolution was adopted without dissent—although five members of the Soviet bloc, Saudi Arabia, and South Africa abstained from voting. It was the first comprehensive human rights document to be formally declared on a global scale. Its specificity, while not elaborate, readily eclipsed the UN Charter’s minimal reference to human rights.

The UDHR promotes two general categories of rights. The first of two, *civil and political rights*, includes the following: the right to life, liberty, and security of the person; the right to leave and enter one’s own country; the prohibition of slavery and torture; freedom from discrimination, arbitrary arrest, and interferences with privacy; the right to vote; freedom of thought, peaceable assembly, religion, and marriage. The second category of UDHR rights consists of *economic, social, and cultural rights* including: the right to own property, to work, to maintain an adequate standard of living and health, and the right to education.

Like the UN Charter, this Declaration is also a statement of principles. It did not *require* UN members to immediately provide the listed rights to their citizens. The diversity of domestic economies, per capita income, regional cultures, and the like was one reason for this limitation. A lesser-developed country would not be able to give its citizens what a more developed country would consider to be a minimum standard of living or education. But each UN member State *was* expected to pursue the laudatory purposes of the Universal Declaration at its own pace, according to its respective financial

ability to comply with the spirit of that trend-setting document.³⁵

Eleanor Roosevelt, Chair of the US Commission on Human Rights and US Representative to the UN General Assembly, gingerly expressed the national sentiment regarding this post-war statement of “universal” principles. She carefully noted that “[i]n giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations.”³⁶

The UDHR was thus initially intended to be a statement of aspirations. Since its adoption in 1948, however, a number of commentators have characterized it as evolving into something more. In 1971, the Vice President of the International Court of Justice (ICJ) perceived the Declaration’s human rights provisions as having ripened into general practices that had become “accepted as law.” In his separate opinion in the *Namibia* case, Judge Ammoun (Lebanon) expressed the view that:

[The] Universal Declaration of Human Rights ... stresses in its preamble that “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law. ...” The Court could not remain an unmoved witness in face of the evolution of modern international law which is taking place in the United Nations through the implementation and the extension to the whole world of the principles of equality, liberty and peace in justice which are embodied in the Charter and the Universal Declaration of Human Rights. By referring ... to the Charter of the United Nations and the Universal Declaration of Human Rights, the Court has asserted the imperative character of the right of peoples to self-determination and also of the human rights whose violation by the South African authorities [the Court] has denounced. ...

The violation of human rights has not yet come to an end in any part of the world. ... Violations of personal freedom and human dignity, the racial, social or

religious discrimination which constitutes the most serious of violations of human rights ... all still resist the currents of liberation on the five continents. That is certainly no reason why we should close our eyes to the conduct of the South African authorities. ... Although the affirmations of the Declaration are not binding *qua* international convention [that is, not possessing legal capacity as an immediately binding treaty obligation] ... they can bind states on the basis of custom ... because they have acquired the force of custom through a general practice accepted as law. ...

The equality demanded by the Namibians and by other peoples of every colour ... is something of vital interest here ... because it naturally rules out racial discrimination and apartheid, which are the gravest of the facts with which South Africa, as also other States, stands charged. ...

It is not by mere chance that in Article 1 of the [French 1789] Universal Declaration of the Rights of Man there stands, so worded, this primordial principle or axiom: All human beings are born free and equal in dignity and rights. ... The condemnation of apartheid has passed the stage of declarations and entered the phase of binding conventions.³⁷

Some US commentators share Judge Ammoun’s belief that certain human rights provisions of the UN Declaration are now binding under customary State practice. In 1987, a nationwide group of US judges, academicians, and government lawyers confirmed that:

Almost all States are parties to the United Nations Charter, which contains human rights obligations. There has been no authoritative determination of the full content of those obligations, but it is increasingly accepted that states parties to the Charter are legally obligated to respect some of the rights recognized in the Universal Declaration. ... It has been argued that the general pledge of the members in the Charter [to promote human rights] ... has been made definite by the Universal Declaration, and that failure by any member to respect the rights recognized in the declaration is a violation of the Charter. Alternatively, it has been urged, the Charter, the Universal Declaration ... and other practice of states have combined to create a customary international law of human rights requiring every state to respect the rights set forth in the Declaration.³⁸

Critics have consistently objected to the root source of the 1948 Universal Declaration on Human Rights (UDHR) as being “Western” (sometimes referred to as “Northern”). It lacked input from lesser-developed nations and those with more diverse political and social viewpoints. Norwegian author Ashborn Eide and Iceland’s Gudmundur Alfredsson (of the UN Secretariat) characterize this common criticism as being somewhat overstated. In their leading study of the UDHR, they depict its evolution as follows: “[P]articipants came from all over the world. Admittedly, there was only one participant from the African continent (Egypt). Indigenous peoples and minorities had no representation during the drafting and adoption stages. While this may be true, today the broad wording of the Declaration and its general principles together with subsequent standard-setting and implementation activities [see Chart 10.1 below] reduce the value of this statement to history.”³⁹

Ironically, the June 1993 Vienna World Conference on Human Rights appeared to take a step backward in terms of globally defining human rights entitlements. (China and Indonesia were the front runners in the final conference statement.) It contends that Western-derived human rights standards should be tempered by “regional peculiarities and various historical, cultural and religious backgrounds.” This perspective, promulgated in the Vienna Declaration and Programme of Action,⁴⁰ arguably diminishes the efforts to eliminate barriers to the internationalization of human rights enforcement.

Furthermore, some nations considered the UDHR as somewhat “treacherous.” The annual reports of Amnesty International (AI) furnish insight into this reasoning. In its 1988 report, AI observed that many UN member nations consider the 1948 Declaration of Human Rights “subversive.” It was the first UN document to assert that individuals have a right to direct protection by the *international community*, as opposed to their own States.

The underlying concern is that such a protection clashes with the national right to freedom from international meddling with matters essentially within the local jurisdiction of a sovereign State. As reported by AI: “In at least half the countries of the world, people are locked away for speaking their minds, often after trials that are no more than a sham. In at least a third of the world’s nations, men, women and even children are tortured. In scores of countries, governments pursue their goals by kidnapping and murdering their own citizens. More than 120 States have written into their laws the right to

execute people convicted of certain crimes, and more than a third carry out such premeditated killings every year.”⁴¹

2. International Covenant on Civil and Political Rights

In 1966, the UN General Assembly added two core documents to the International Bill of Human Rights. The more widely adopted one is the International Covenant on Civil and Political Rights (ICCPR).⁴² This will be the second leg of four laps in your pursuit of mastering the International Bill of Human Rights. The other 1966 treaty was the International Covenant on Economic, Social, and Cultural Rights (ICESCR)—the gist of subsection 4 below.

Unlike the 1948 UDHR, these human rights instruments are not mere declarations of principle. Both covenants were expressly cast as multilateral treaties. Adopting States could thus ratify their legally binding provisions. By 1976, the minimum number of States had ratified both treaties. This development signaled an accord within the post-World War II international community. It solidified the international augmentation of protection for the individual—who before World War II was required to rely exclusively on his or her home State. Such pre-Covenant reliance had a predictable chilling effect on human rights: the victim was beholden to the violator.

These two covenants share a number of common substantive provisions. Both restate the human rights provisions contained in the Universal Declaration. The distinguishing feature of the Covenants vis-à-vis the 1948 UDHR is that they *obligate* ratifying States to establish conspicuous and effective machinery for filing charges and then dealing with alleged violations of human rights.

The essential provisions of the ICCPR, ratified by over 150 nations, include those set forth below.

The International Covenant on Civil and Political Rights, by its own terms, is a self-executing treaty: “The States Parties to the present Covenant ... Agree upon the following articles...” Were it otherwise, then the 1966 UN objective to augment the 1948 UN Declaration on Human Rights—with a ratifiable treaty regime—would make little sense. [Regarding self-executing treaties, see textbook §7.1.B.4.].

On the other hand, ratification and full acceptance of all a treaty’s terms are not synonymous. The US ratified the ICCPR in 1992. It tendered the following

International Covenant on Civil and Political Rights

<<http://www.hrweb.org/legal/cpr.html>>

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

...

3. Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

...

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation.

...

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime . . . This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

...

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure[s] as are established by law.

...

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

...

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. . . .

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Article 20

...

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

...

Article 23

3. No marriage shall be entered into without the free and full consent of the intending spouses.

...

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members. ...

limitation, however, as one of its reservations to this human rights treaty: "That the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing." This reservation can hardly be acceptable, if one applies the International Court of Justice *Reservations to the Convention on Genocide Case* definition: a reservation to a multilateral treaty must be "compatible" with its object and purpose [textbook §7.2.A.4.].

Article 4 of the ICCPR does not permit a State party to derogate from certain treaty provisions, including Article 6. The latter provision states that the death penalty "can only be carried out pursuant to a final judgement rendered by a competent court." A post-September 11, 2001 presidential executive order provided for military tribunals to try detainees not captured and housed on US soil. Such tribunals do not extend the same constitutional guarantees to civilians who are arrested in the US. Such detainees might thus be tried by military tribunals in Pakistan, Afghanistan, or on a US warship in international waters. If the US Supreme Court were to determine that these military tribunals were "competent courts," then the above ratification reservation to the ICCPR would insulate the US from claims that it had breached Article 6 [see *Hamdan v. Rumsfeld* military commissions decision in textbook §9.7.C.].

The following materials illustrate how the Covenant has been applied in other countries. In a February 2004 opinion by the Uganda Supreme Court, two journalists were charged with the criminal offense of "Publication of False News" in violation of Section 50 of Uganda's

Penal Code. They republished a story extracted from a foreign newspaper (Indian Ocean Newsletter), claiming among other things that the president of the Democratic Republic of the Congo "has given a large consignment of gold to the Government of Uganda as payment for 'services rendered' by the latter during the struggle against the former military dictator, the late Mobutu Sese Seko." Their defense was that being prosecuted infringed upon their rights to the freedoms of thought, conscience, belief, and association and to the freedom to practice their profession. Uganda's Supreme Court noted as follows:

In the International Covenant on Civil and Political Rights, Article 10 provides [that] ... "Every one shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

From the foregoing different definitions, it is evident that the right to freedom of expression extends to holding, receiving and imparting all forms of opinions, ideas and information. It is not confined to categories, such as correct opinions, sound ideas or truthful information.

...

A democratic society respects and promote[s] the citizens' individual right to freedom of expression, because it derives benefit from the exercise of that freedom by its citizens. In order to maintain that

benefit, a democratic society chooses to tolerate the exercise of the freedom even in respect of “demonstrably untrue and alarming statements,” rather than to suppress it.

...

Democratic societies uphold and protect fundamental human rights and freedoms, essentially on principles that are in line with J.J. Rousseau’s version of the *Social Contractor* theory. In brief, the theory is to the effect that the pre-social humans agreed to surrender their respective individual freedom of action, in order to secure mutual protection, and that consequently, the *raison d’être* of the State is to provide protection to the individual citizens. In that regard, the state has the duty to facilitate and enhance the individual’s self-fulfillment and advancement, recognising the individual’s rights and freedoms as inherent in humanity.

In August 2003, the United Nations Human Rights Committee found that the government of Australia discriminated against a homosexual man by denying him pension benefits following the death of his male partner (a war veteran). Under Australian law, only heterosexual married couples or heterosexual couples who were *de facto* married were entitled to receive pension benefits. The Committee found that Australia had not demonstrated how a distinction between same-sex partners, excluded from pension benefits, and unmarried heterosexual partners, who were granted such benefits, was objectively reasonable. Article 26 of the Covenant prohibits sexual-orientation discrimination. The UN Committee determined that Australia had

provided no arguments as to how the distinction between same-sex partners and unmarried heterosexual partners was reasonable. Nor had Australia advanced any evidence as to the factors that would be used to justify such a distinction.⁴³

3. ICCPR Optional Protocols

(a) “1503” Right of Petition The first of two protocols to the International Covenant on Civil and Political Rights (ICCPR) is designed to monitor compliance with the ICCPR via the Article 28 Human Rights Council.⁴⁴ That committee’s national members consist of prominent individual representatives—based on an equitable geographical distribution of membership among the different forms of government and the world’s principal legal systems.

The Council examines the periodic compliance reports that the treaty parties must submit to the UN. This first optional protocol thus enables the Committee to receive and consider communications from individuals claiming to be victims of violations of the rights set forth earlier in the Covenant. The interim UN Resolution 1503 procedure of 1970 materialized about halfway between the 1966 promulgation of the ICCPR and its entry into force in 1976. It recognized an individual’s right to petition the UN as a basic human right. (This Committee was replaced by a much broader group of nations, based on the UN reform efforts addressed in §3.3.B.).

The following example is an individual petition submitted to this Committee (now Council) under the first optional protocol to the ICCPR. As you read this passage, note the subjectivity of the government’s basis for the arrests in this case:

Report of the Human Rights Committee

24 UN MONTHLY CHRONICLE 66 (JUNE 1979)

... The Committee also concluded, for the first time, consideration of a communication submitted to it by a Uruguayan national in accordance with the Optional Protocol to the International Covenant on Civil and Political Rights. Under the terms of the Protocol, individuals who claimed that any of their rights enumerated in the Covenant had been violated and who had exhausted all available reme-

dies, might submit written communications to the Committee for consideration. The Committee, after examining the communication in question, took the view that it revealed a number of violations by Uruguay, the State Party concerned, of the Covenant provisions.

It held that the State Party was under an obligation to take immediate steps to ensure strict observance of

the Covenant provisions and to provide effective remedies to the victims.

The communication was written by a Uruguayan national residing in Mexico, who submitted it on her own behalf, as well as on behalf of her husband, Luis Maria Bazzano Ambrosini, her stepfather, Jose Luis Massera, and her mother, Martha Valentini de Massera.

The author alleged, with regard to herself, that she was detained in Uruguay from 25 April to 3 May 1975 and subjected to psychological torture. She stated that she was released on 3 May 1975 without having been brought before a judge.

The author claimed that her husband, Luis Maria Bazzano Ambrosini, was detained on 3 April 1975 and immediately thereafter subjected to torture.

She also claimed that her stepfather, Jose Luis Massera, professor of mathematics and former Deputy to the National Assembly, had been arrested on 22 October 1975 and held incommunicado until his detention was made known in January 1976, and that her mother, Martha Valentini de Massera, had been arrested on 28 January 1976 without any formal charges and that in September 1976 she was accused of "assistance to subversive association," an offence which carried a penalty of two to eight years imprisonment. ...

The Committee decided to base its views on the following facts which had not been contradicted by the State Party. Luis Maria Bazzano Ambrosini was arrested on 3 April 1975 on the charge of complicity in "assistance to subversive association." Although his arrest had taken place before the coming into force of the International Covenant on Civil and Political Rights and of the Optional Protocol thereto, on 23

March 1976, his detention without trial continued after that date. After being detained for one year, he was granted conditional release, but that judicial decision was not respected and the prisoner was taken to an unidentified place, where he was confined and held incommunicado until 7 February 1977. On that date he was tried on the charge of "subversive association" and remained imprisoned in conditions seriously detrimental to his health.

Jose Luis Massera, a professor of mathematics and former Deputy to the National Assembly, was arrested in October 1975 and has remained imprisoned since that date. He was denied the remedy of habeas corpus [whereby a neutral judge would assess the basis for his incarceration] and another application for remedy made to the Commission on Respect for Human Rights of the Council of State went unanswered. On 15 August 1976 he was tried on charges of "subversive association" and remained in prison.

Martha Valentini de Massera was arrested on 28 January 1976. In September 1976 she was charged with "assistance to subversive association." She was kept in detention and was initially held incommunicado. In November 1976 for the first time a visit was permitted, but thereafter she was again taken to an unknown place of detention. She was tried by a military court and sentenced to three-and-a-half years imprisonment.

The Committee, acting under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights, took the view that those facts, in so far as they had occurred after 23 March 1976, disclosed violations of the International Covenant on Civil and Political Rights [by Uruguay].

Subsequent developments suggest that Uruguay's shift to civilian control had a positive impact on its observance of international human rights norms. Ten years after the Commission's consideration of this claim of human rights abuses (June 1989), a court in Montevideo, Uruguay, ordered Uruguay's Defense Ministry to pay the equivalent of \$47,000,000 to an electrician tortured with his own equipment for eighteen months during 1976 and 1977. This was the first time that such a judgment was rendered in Uruguay—where such incidents were commonplace during the military dictatorship of the 1970s to the mid-1980s.

The "1503" (UN Resolution) right of petition has not been particularly successful. Reasons include the difficulty of individual access, which is effectively controlled by those States that did not become parties to the ICCPR. No communication may be received regarding States which are not parties to the optional protocol. Individuals must exhaust administrative remedies of the home State. They must submit evidence of the claimed violation in writing. Submissions may not be anonymous.⁴⁵

The lackluster performance of this individual petition process, also used in various regional systems, is such that even when a country ratifies the relevant

protocol, a petition does not trigger any judicial process that will compel compliance. Participating nations have competing priorities and do not necessarily spend the time and money to respond (or fully respond). This frustration is succinctly articulated by Durham University's Reader in Law Holly Cullen:

It is undeniable that international petition systems do not involve courts in the way that they are understood in national legal systems.... Not least of the differences ... is the fact that the [UN] Human Rights Committee and all of its UN treaty body counterparts operate a purely written procedure in reviewing individual petitions [thus saving time and money, unlike the truth commission procedures covered in textbook §8.1.B.1.], although the European Court of Human Rights does have an oral hearing stage. Furthermore, they do not engage in findings of fact or the evaluation of the credibility of evidence.⁴⁶

(b) Death Penalty Protocol The second optional protocol to the ICCPR is a separate treaty designed to put teeth into ICCPR provisions. Article 6 of the ICCPR attempts to limit death penalty practice. Article 37(a) of the UN Convention on Rights of the Child prohibits the death penalty for minors under the age of eighteen. As of the beginning of the 21st century, six nations put juvenile offenders to death: Iran, Nigeria, Pakistan, Saudi Arabia, Yemen, and the US. States ratifying the second protocol thereby agree not to impose the death penalty under any circumstances.⁴⁷

There is a flourishing movement in the international community to treat this common feature of State practice as a violation of International Law.⁴⁸ The International Criminal Tribunals (Yugoslavia and Rwanda) and the Rome Statute for a permanent tribunal all bar the death penalty. The ultimate sanction in these tribunals is life imprisonment. Under the second ICCPR protocol, reservations are permitted only for "the most serious crimes of a military nature" committed during the time of war. During a 1994 debate in the UN General Assembly's Social, Humanitarian and Cultural (Third) Committee, the Chair summarized the respective arguments by various national representatives for and against the death penalty as follows:

[T]he Committee had clearly been divided into two camps: those favoring the abolition of capital pun-

ishment and those wishing to retain it. Arguments in favor of abolishing the death penalty had been the following: States could not impose the death penalty as a means of reducing crime because there was no evidence that it had a deterrent effect; the right to life was the most basic human right and, consequently, States did not have the right to take the life of any individual; the death penalty sometimes veiled a desire for vengeance or provided an easy way of eliminating political opponents; the death penalty, once applied, could not be reversed in the event of a judicial error; and capital punishment was excluded from the penalties used by international tribunals ... and should consequently be less prevalent in national legislation.

Arguments in support of maintaining the death penalty had been the following: certain legislative systems were based on religious laws; it was not possible to impose the ethical standards of a single culture on all countries; there was a need to discourage extremely serious crimes; and, in some countries, capital punishment was a constitutional or even a religious obligation.

At the same time, all members agreed on certain fundamental points: the death penalty should be applied only in exceptional circumstances and subject to strict preconditions; and its scope of application should be extremely limited.⁴⁹

The mixed reaction to the death penalty at the UN was memorialized during the UN General Assembly's December 2007 Moratorium on The Death Penalty. It passed by a vote of 104 in favour, 54 against, 29 abstentions, and 5 absences—which is actually 88 votes not favoring the moratorium. It called on all States employing capital punishment to "progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed." They were also called on to provide the Secretary-General with information on their use of capital punishment and to respect international standards that safeguard the rights of condemned inmates.⁵⁰

Abolition of the death penalty is further supported by the forty-seven-member Council of Europe, which includes the twenty-seven-member European Union. These international organizations established the following program that builds upon the work of numerous non-governmental organizations and is intended to influence other nations to do the same:

Joint European Union/Council of Europe Declaration Establishing a “*European Day against the Death Penalty*”

(10 OCTOBER 2008)

<<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/850>>

Recalling that the death penalty is contrary to the fundamental rights on which the European Union and the Council of Europe are founded; that the abolition of the death penalty is enshrined in Protocols Nos 6 and 13 to the *European Convention on Human Rights and Fundamental Freedoms* and reflected in Article 2 of the *European Union Charter of Fundamental Rights*;

Recalling that since 1997 there has been no instance of capital execution in any part of the geographical area made up by the 47 Member States of the Council of Europe, including the 27 European Union Member States;

Emphasizing that abolition of the death penalty is a condition which States are required to meet in order to become members of the Council of Europe or the European Union;

Inviting Member States of the Council of Europe and the European Union to continue to explain the importance of abolishing the death penalty in Europe for the respect of human dignity;

Recalling the central place held in the European system of human rights by Protocols Nos 6 and 13 to the *European Convention on Human Rights and Fundamental Freedoms*, which respectively abolish the death penalty in peacetime and in all circumstances, and stressing the importance of their ratification by all the Member States of the Council of Europe;

Recalling the importance of the ratification and promotion by the Member States of the Council of Europe and the European Union of the Second Optional Protocol to the International Covenant on Civil and Political Rights, which is the principal universal instrument aimed at abolishing the death penalty;

Stressing the importance of persevering in the pursuit of actions aimed at abolishing the death penalty in the world, by making representations to third countries, acting within multilateral arenas and supporting the action of civil society towards this end;

Inviting European citizens to support the abolition of the death penalty in the world and thereby contribute to the development of fundamental rights and human dignity;

Recognising the importance of the “*World Day against the Death Penalty*,” which has taken place on 10 October every year since 2003, and to strengthen this initiative of nongovernmental organisations by the involvement of the European Institutions;

The European Union and the Council of Europe, approve the establishment of the “*European Day against the Death Penalty*” on 10 October each year.

...

According to Amnesty International:

- ◆ 2007: at least 1,252 people were executed in 24 countries. At least 3,347 people were sentenced to death in 51 countries.
- ◆ 2006: at least 1,591 people were executed in 25 countries. At least 3,861 people were sentenced to death in 55 countries. As in prior years, the vast majority of executions worldwide were carried out by a small handful of countries. About 91 percent of all known executions took place in six countries (in the following order): China, Iran, Pakistan, Iraq,

Sudan and the USA.⁵¹ US perspectives on the death penalty were provided earlier in this book in the context of the Supreme Court debate regarding its members’ reliance on foreign judicial opinions [§1.2.B.4(b)].

- ◆ 133 countries have abolished the death penalty as of 2008.

To what extent should a regional process, akin to the UN 1503 right of individual petition to an international body, impact a national court’s death penalty process? This question dovetails principles contained in the above two

optional protocols to the International Covenant on Civil and Political Rights. The following case addresses this issue and the related point regarding the effect of international human rights death sentence treaties in a nation where such treaties have not been integrated into local law:



**Attorney General and
Superintendent of Prisons v.
Jeffrey Joseph and Lennox
Ricardo Boyce**

**CARIBBEAN COURT OF JUSTICE: APPEAL FROM
THE COURT OF APPEAL OF BARBADOS**

JUDGMENT OF 8 NOVEMBER 2006

Go to Course Web page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Ten, click Death Penalty
Protocol Case.

4. International Covenant on Economic, Social, and Cultural Rights (ICESCR) The other major 1966 UN human rights work product was the ICESCR.⁵² It requires State parties to provide adequate or improved

living conditions for their inhabitants and to facilitate international cooperation to achieve this objective.

This second basket of rights was the subject of a separate 1966 UN draft treaty for good reason. It would be neither practical nor politically feasible to lump its non-political rights into a comprehensive treaty governing the “universe” of rights set forth in the 1948 Universal Declaration of Human Rights (from which both the civil Covenant and the economic Covenant drew their inspiration.) There was too much diversity in the political, economic, social, and cultural fabric of the UN membership. Two respective half-loaves were better than none.

This reality was especially evident to the treaty drafters because of the influx of new UN member States as a result of the decolonization movement of the 1960s. Some developing nations would consider the achievement of *economic* rights a more pressing goal than the *political* rights contained in the other 1966 treaty. They would naturally focus on basic food and shelter requirements,⁵³ as opposed to societies where the fulfillment of such rights has already been far more achieved. Many lesser-developed nations would have economic limitations precluding them from making any commitment regarding the furnishing of *either* basket of rights to their populace.

The essential treaty provisions are as follows:

International Covenant on Economic, Social and Cultural Rights

<<http://www2.ohchr.org/english/law/cescr.htm>>

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

...

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work, which ensure, in particular:

- (a) remuneration which provides all workers, as a minimum, with:
 - (i) fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
 - (ii) a decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) safe and healthy working conditions;
- (c) equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- (d) rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

...

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 10

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. ...

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of

living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right. ...

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed.

...

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education.

...

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:

- (a) to take part in cultural life. ...

Article 16

1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.

2. (a) All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant.

Article 17

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant.

...

The December 2008 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights is designed to address the reality that member States have a wide margin of latitude in determining their respective approaches to implementing

the rights and obligations set forth in the ICESCR. For example, the treaty's "maximum available resources" clause qualifies the State's obligation to take steps towards the *full* realization of treaty-based rights. Member States, for example, have a duty to facilitate the

right to food by taking measures to strengthen the access of their inhabitants to the related resources and means to ensure their livelihoods. In those instances where they are unmistakably unable to achieve access to adequate food, the State would then come under some obligation to devise a means of implementing the right to food—perhaps by way of direct State intervention in the form of arranging temporary food assistance to countless needy families.

The 2008 Protocol thus encourages State parties to assess, elaborate, and implement such strategies. Article 46 of the ICESCR Protocol calls for, “[i]n particular, three distinct forms of monitoring...: periodic assessments with the use of human rights indicators and benchmarks; monitoring and analysis of national budget processes; and judicial and quasi-judicial review of violations related to the progressive realization of economic, social and cultural rights.”

Economic, social, and cultural rights have been illuminated as a distinct category of rights based on their historical origins. As noted in a leading commentary about the evolution of the rights governed by the International Covenant on Economic, Social, and Cultural Rights:

Economic, social, and cultural rights are frequently termed “second generation” rights, deriving from the growth of socialist ideals in the late nineteenth and early twentieth centuries and the rise of the labor movement in Europe. They contrast with the “first generation” civil and political rights associated with the eighteenth-century [French] Declaration on the Rights of Man, and the “third generation” rights of “peoples” or “groups,” such as the right to self-determination and the right to development. In fact the reason for making a distinction between first and second generation rights ... [was] the ideological conflict between East and West pursued in the arena of human rights during the drafting of the covenants. The Soviet States, on the one hand, championed the cause of economic, social, and cultural rights, which they associated with the aims of socialist society. Western States, on the other hand, asserted the priority of civil and political rights as being the foundation of liberty and democracy in the “free world.” The conflict was such that during the drafting of the International Bill of Rights the intended treaty was divided into two separate

instruments which were later to become the ICCPR and the ICESCR.⁵⁴

Like the Committee that monitors political rights under the ICCPR, the ICESCR is also evolving within a UN committee structure: the UN Committee on Economic, Social and Cultural Rights. It is the focal institution for the normative development of such rights. It did not begin that way, however.

Both the West and the Soviets had distinct reasons for *opposing* an economic committee overseer which could act as a substitute for world court dispute resolution. Western nations wanted a committee process for overseeing political rights, but not for monitoring the economic treaty rights quoted above. They did not believe that there could be an effective enforcement mechanism for this category of human rights. The Soviets, as the self-appointed champions of the economic rights treaty regime, had problems with *either* a political or economic UN enforcement regime under the auspices of an international organization. The more that such bodies developed competence and expertise, the more they would be perceived as infringing on matters within the State’s domestic competence. This disconnect spawned what has turned out to be a comparatively ineffective mechanism for implementing economic human rights vis-à-vis political human rights.⁵⁵

Like the typical international treaty designed to facilitate broad participation, the ICESCR provides for broad-based human rights. Its provisions are actually more fundamental than those contained in the ICCPR’s more widely-publicized provisions on political rights. For example, consider the right to food and housing—which many nations take for granted. Access to potable water is and will become a more prominent basis for future conflicts. Is water, then, a staple of the ICESCR rights? The p. 590 *Mazibuko* case from South Africa interprets and applies the Covenant to answer this fundamental question.

The US-led War on Terror has crossed paths with the ICESCR’s objectives. The US has not ratified this treaty although it is a signatory. Accordingly, it is required not to take any action that is inconsistent with the object and purpose of this treaty as dictated by the International Court of Justice and the Vienna Convention on the Law of Treaties [§7.2.A.4.]. Per the May 2006 UN Economic and Social Council report of the Commission on



**Ilindiwe Mazibuko et al.
In the Matter Between
[Applicants]
and
The City of Johannesburg
[First Respondent]
Johannesburg Water (Pty) Ltd
[Second Respondent]
The Minister of Water Affairs
and Forestry [Third
Respondent]
The Centre on Housing Rights
and Evictions**

IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

JUDGMENT CASE NO: 06/13865
(30 APRIL 2008)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsestite.html>>.

Under Chapter Ten, click Johannesburg Right to
Water Case.

Human Rights, regarding the Situation of Detainees at Guantánamo Bay:

I. THE LEGAL FRAMEWORK

B. The Obligations of the United States under International Law

...

8. The United States is party to several human rights treaties relevant to the situation of persons held at Guantánamo Bay, ... [including] the International Covenant on Economic, Social and Cultural Rights (ICESCR), which it has not yet ratified. Some of the provisions of these treaties reflect norms of customary international law. The prohibition of torture moreover enjoys *jus cogens* status.

...

V. THE RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH

66. The right to health derives from the dignity of the human person and is reflected in the following international instruments relevant in the current situation: article 25(1) of the Universal Declaration of

Human Rights, article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), article 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination and article 24 of the Convention on the Rights of the Child. ... The United States is also a Contracting Party to the World Health Organization, and thus has accepted the principle that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being.⁵⁶

C. SPECIAL HUMAN RIGHTS INITIATIVES

1. Human Rights Czar In 1993, the UN General Assembly added another cog to its wheel of human rights machinery. The Assembly established the post of UN High Commissioner for the Promotion and Protection of All Human Rights—a proposal first made by Uruguay in 1951. The Commissioner is now appointed by the Secretary-General, subject to approval by the General Assembly. The first Commissioner was Jose Ayala Lasso, Ecuador's Education Ambassador to the UN (appointed in 1994).⁵⁷

The Commissioner is the focal point for coordinating the UN's fragmented efforts to implement the rights enshrined in its numerous problem-specific treaties (Chart 10.1 below). This UN official manages the UN's Center for Human Rights, which is expected to move more swiftly than the overburdened International Covenant on Civil and Political Rights treaty's Human Rights Commission—whose workload tripled between the early 1980s and the early 1990s.

The task of the first UN Commissioner began with a compromise. Western States agreed to modify language that would have given the Commissioner responsibility for "elimination and prevention" of human rights violations. The Commissioner's task is now worded so as to require only "an active role in removing the current obstacles" to the global enjoyment of human rights. This attenuated version of the Commissioner's role may ultimately relegate this office to bureaucratic obscurity.

2. Human Rights Council The UN Human Rights Commission was the object of a great deal of criticism for six decades. The Secretary-General's August 2005 report—*In Larger Freedom: Towards Security, Development, and Human Rights for All*—proposed a new

body, called the UN Human Rights Council. It is a principal organ of the UN General Assembly.⁵⁸ The previous UN Human Rights Commission had been a persistent embarrassment because of its participation and control by countries themselves accused of gross human rights abuses. Libya, for example, chaired this body in 2003.

The new Human Rights Council, instead, operates year-round. That allows it to act more frequently. The US declined the opportunity to seek a seat on this forty-seven-nation body on grounds that this new process was flawed. The General Assembly ignored the US concerns and approved the new Council and its process 170–4. Now, rather than a two-thirds vote of the General Assembly, it takes only a simple majority of national votes to be on this Council. The US thus complained when China, Cuba, Libya, Sudan, Saudi Arabia, and Zimbabwe won seats on the new Human Rights Council established in June 2006.

The fate of this new body is predicted by Gian Burci, Legal Counsel to the World Health Organization in the following terms:

[T]he establishment of the Council has generated radically different reactions. Some commentators, including unsurprisingly the Secretary-General and the President of the General Assembly, acknowledge the many compromises that had to be struck to secure wide support. At the same time, they undermine the innovative features of the Council—the periodic review, longer and [more] flexible sessions, the majority [needed] for election, [and] the system of electoral pledges—that show a clear break with the past while ... [it] offers a blueprint that will have to be developed and strengthened by the [freshly constituted] Council. The critics and detractors accuse the GA of having adopted a fake reform, where cosmetic changes conceal a “business as usual” approach that will not allow the Council to play a strong and credible role.

... As noted above, much will depend on the balance of power within the Council and the political orientation of the initial membership that will inevitably set the tone for future work. At the same time, the undeniable innovations that have been introduced can start an incremental process of change and increased accountability that may in turn generate ... a positive ripple effect throughout the other United

Nations bodies and processes devoted to the protection and promotion of human rights. ...⁵⁹

Perhaps the new Council’s most sensitive endeavor was its January 2009 decision to dispatch a fact-finding mission to investigate “violations against Palestinians in occupied territory.” The Council called for the immediate cessation of Israeli military attacks throughout the Palestinian Occupied Territory; for Israel to end its occupation of all Palestinian lands occupied since 1967; to respect its commitment within the peace process towards the establishment of the independent sovereign Palestinian state with east Jerusalem as its capital; and that Israel “stop the targeting of civilians and medical facilities and staff as well as the systematic destruction of cultural heritage.” The Council thus demanded that Israel “lift the siege and open all borders,” while requesting the Secretary-General to investigate the “latest targeting of ... facilities in Gaza, including schools, that resulted in the killing of tens of Palestinian civilians, including women and children.”

Israel’s predictable response was that this UN Human Rights Council resolution: (1) was not balanced; (2) did not reflect the realities in the Gaza Strip; and (3) “did no service to the cause of peace or to the human suffering of Palestinians in Gaza. Such a resolution would only embolden Hamas and weaken the trust of the Israeli public in the United Nations and the Council.”

This development confirms Gian Burci’s above-quoted assessment that “much will depend on the balance of power within the Council and the political orientation of the initial membership.” One can only hope that the positive innovations he catalogues will one day trump this newfound potential for the UN Human Rights Council to become as stale as the UN Security Council during the Cold War.

◆ §10.3 HUMAN RIGHTS POTPOURRI

The foundational International Bill of Human Rights supports the many robust add-ons that have been erected by the international community. Chart 10.1 yields a blueprint for surveying the human rights treaties expressing concern for the selected groups addressed in this part of your course in International Law:

CHART 10.1 PRINCIPAL UN HUMAN RIGHTS INSTRUMENTS*

YEAR	TREATY	YEAR	TREATY
1948	Universal Declaration of Human Rights (the lone <i>declaration</i> in this list of post-WWII treaties)	1966/1976	International Covenant on Economic, Social and Cultural Rights ◆ Optional Protocol (2009) (individual may submit violations by home State to UN HR Committee)
1948/1951	Convention on the Prevention and Punishment of the Crime of Genocide, affirming Nuremberg Principles	1968/1970	Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity
1949/1951	Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	1973/1976	International Convention on the Suppression and the Punishment of the Crime of Apartheid
1951/1954	Convention Relating to the Status of Refugees (as a result of WWII)	1979/1981	Convention on the Elimination of All Forms of Discrimination Against Women
1966/1967	— ◆ Protocol (regarding <i>post</i> -WWII refugee scenarios)	—	—
1952/1954	Convention on the Political Rights of Women	2000/2000	◆ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (UN Committee to receive and consider communications from individuals)
1954/1960	Convention Relating to the Status of Stateless Persons	1981	Convention Concerning Occupational Safety and Health and the Working Environment
1957/1958	Convention on the Nationality of Married Women	1983	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment
1960/1962	Convention Against Discrimination in Education (covers all distinctions not expressed in Charter Articles 1.3 and 55c prohibition on discrimination based on race, gender, language, or religion)	1984	—
1962/1964	Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages	1987	—
1965/1969	International Convention on the Elimination of All Forms of Racial Discrimination	2002	◆ Optional Protocol (system for monitoring places of detention by independent bodies)
1966/1976	International Covenant on Civil and Political Rights	2006/2006	◆ Optional Protocol (creating Subcommittee on Prevention of Torture)
—	—	1989/1990	Convention on the Rights of the Child
1966	◆ First Optional Protocol to the International Covenant on Civil and Political Rights (individual victims may submit violations by home State to UN HR Committee)	—	—
1976	—	2000/2002	◆ Optional Protocol One to the Convention on the Rights of the Child (children in armed conflict)
—	—	—	—
1989/1991	◆ Second Optional Protocol to the International Covenant on Civil and Political Rights (abolition of the death penalty)	2000/2002	◆ Optional Protocol Two to the Convention on the Rights of the Child (sale of children, child prostitution and child pornography)
		1989/1991	Convention Concerning Indigenous and Tribal Peoples in Independent Countries (maintain distinctions)

CHART 10.1 PRINCIPAL UN HUMAN RIGHTS INSTRUMENTS* (CONTINUED)

YEAR	TREATY	YEAR	TREATY
1990/ 2003	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	2002	UN High Commissioner For Human Rights Principles and Guidelines on Human Rights and Trafficking
1980/ 1981	Convention for the Elimination of All Forms of Discrimination Against Women	2005	Office of the High Commissioner for Human Rights: Human Rights Resolution 2005/35 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
—	—	2005	UN Security Council Resolution 1612 on Child Soldiers
1999/ 2000	◆ Optional Protocol (Committee investigation of individual complaints)	2006/2006	Convention on the Rights of Persons with Disabilities
1994	Draft Declaration on the Rights of Indigenous Peoples	2006	Pact on Security, Stability, and Development in the Great Lakes (African) Region Protocols for the:
1998/ 2002	Rome Statute of the International Criminal Court (to prosecute war crimes and crimes against humanity)		◆ Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination
1999	Convention Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour		◆ Prevention and Suppression of Sexual Violence Against Women and Children
2000/2003	UN Convention against Transnational Organized Crime		◆ Protection and Assistance to Internally Displaced Persons
—	—		◆ Property Rights of Returning Persons
2000/2003	◆ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children	2007	UN General Assembly Declaration on the Rights of Indigenous Peoples
—	—	2007	International Convention for the Protection of All Persons from Enforced Disappearance
2000/2004	◆ Protocol against the Smuggling of Migrants by Land, Sea and Air	2008	UN Security Council Resolution 1820 on Women, Peace and Security
2001	Universal Declaration on Cultural Diversity (cultural diversity as necessary for humankind as Biodiversity for nature & cannot be invoked to deny internationally recognized human rights)		

**Second date*: year of treaty's entry into force. The bolded entries are the root treaties in contemporary human rights law. Further details: see comprehensive University of Minnesota *Human Rights Library*—by topic and searchable by key word at: <<http://www1.umn.edu/humanrts/instree/ainstls2.htm>>.

This section now undertakes an incredibly ambitious task. It offers a selective glimpse of the deluge of human rights developments and materials since World War II. That event, perhaps more than any other, sparked the enduring quest to define the contours of the term *human rights*. A solely textual approach to this extraordinary subject would yield more physical coverage. But the rich vein of human rights case law studies better

illustrates the fascinating evolution of the expanded rights of individuals vis-à-vis their governments in the last six decades.

A. RACIAL/ETHNIC RIGHTS

1. Racial Discrimination Treaty This feature of the family of human rights instruments is best introduced by the following treaty. It was sired by a number of prior

UN General Assembly Resolutions. It has been ratified by 173 nations and signed by five others:



**International Convention on
the Elimination of
All Forms of Racial
Discrimination**

**UNITED NATIONS GENERAL ASSEMBLY
RESOLUTION 2106 (XX)
(7 MARCH 1966)**

U.N. Doc. A/6014, Annex, 20 U.N. GAOR
Supp. (No. 14) entered into force (4 January 1969)

Go to Course Web Page, at:

<<http://home.att.net/~sломansonb/txtcsesite.html>>.

Under Chapter Ten, click Racial
Discrimination Treaty.

Reread the above Article 1.2. in the Convention on the Elimination of All Forms of Racial Discrimination (CERD). Recall textbook §4.4. on Injury to Aliens. CERD expressly authorizes discrimination based on citizenship. *Should* it do so? Reread CERD Article 1.4. Does it encourage discrimination based on race? If so, *should* it do so?

Article 22 of the CERD is the linchpin for dispute resolution among the parties to this treaty. It provides that “[a]ny dispute between two or more States Parties with respect to the interpretation or application of this Convention, *which is not settled by negotiation* ... shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision ... [italics added].”

Georgia’s provinces of South Ossetia and Abkhazia proclaimed their independence in the 1990s, with little international response (almost no recognitions). The August 2008 introduction of Russian military forces into these provinces immediately brought this particular territorial dispute to the world’s attention. Many separatist movements had moved to another level after the end of the Cold War, which had served to suppress ethnic tension.

Later in the month of Russia’s “invasion,” Georgia filed a CERD application with the International Court of Justice (ICJ) after what Georgia characterized as a

Russian “invasion” of Georgia. Russia, on the other hand, recognized the independence of the two “formerly Georgian provinces” of South Ossetia and Abkhazia. Georgia thus sought provisional emergency relief from the ICJ in the form of a request that the Court issue an interim order—pending subsequent litigation on the merits. Georgia claimed that Russian military forces were discriminating against ethnic groups in its “Georgian provinces” whose members were not ethnic Russians.

Russia responded that there could be no such “dispute” within the meaning of CERD’s Article 22 jurisdictional clause. The parties had not yet negotiated. The ICJ’s eight to seven split opinion issued some orders, but not at the echelon that Georgia had hoped for. The Court stated the obvious in its order that “[b]oth parties ... shall (1) refrain from any act of racial discrimination against persons....; (2) abstain from sponsoring, defending or supporting racial discrimination by any persons or organizations....”⁶⁰ The Court subsequently ruled on the merits of Georgia’s claim against Russia:



**Case Concerning Application
of the International
Convention on the Elimination
of All Forms of Racial
Discrimination**

(Georgia v. Russia)

Judgment of ____ _ , 20__

INTERNATIONAL COURT OF JUSTICE

Go to Course Web Page, at:

<<http://home.att.net/~sломansonb/txtcsesite.html>>.

Under Chapter Ten, click Georgia v. Russia
CERD Case.

The US is not a party to the CERD. The US has a strong tradition of constitutionally guaranteed First Amendment freedom of expression (classically illustrated in the textbook §5.2.G. *French Yahoo Judgment*). In the following case, for example, the National Socialist Party of America (NSPA) successfully obtained a permit to march in Nazi uniforms—through a predominantly Jewish neighborhood in Illinois.⁶¹

◆ Collin v. Smith

U.S. SEVENTH CIRCUIT COURT OF APPEALS
578 Fed.Rptr.2d 1197 (1978)

AUTHOR'S NOTE: When the National Socialist Party of America (NSPA) announced its plans to march in front of the Village Hall in Skokie, Illinois (May 1, 1977), the Skokie officials obtained a state court preliminary injunction against this neo-Nazi demonstration. The next day, the Village enacted several ordinances to prohibit demonstrations such as the one that the NSPA intended to conduct. The ordinances effectively imposed the requirement that no assembly of persons would portray criminality, depravity or lack of virtue in, or incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation.

The US Supreme Court denied review of this federal appeals court decision. That cleared the way for the Nazi party to march through Skokie. As set forth in Note 1 of the court's opinion, the members wore brown shirts with a dark brown tie; a swastika pin on the tie; a leather shoulder strap; a black belt with buckle; dark brown trousers; black engineer boots; and either a steel helmet or a cloth cap; a swastika arm band on the left arm; and an American flag patch on the right arm.

COURT'S OPINION:

...

Among NSPA's more controversial and generally unacceptable beliefs are that black persons are biologically inferior to white persons, and should be expatriated to Africa as soon as possible; that American Jews have 'inordinate ... political and financial power' in the world and are 'in the forefront of the international Communist revolution.' NSPA members affect a uniform reminiscent of those worn by members of the German Nazi Party during the Third Reich, and display a swastika thereon and on a red, white, and black flag they frequently carry.

The Village of Skokie, Illinois, a defendant-appellant, is a suburb north of Chicago. It has a large Jewish population, including as many as several thousand survivors of the Nazi holocaust in Europe before and during World War II.

...

But our task here is to decide whether the First Amendment protects the activity in which appellees wish to engage, not to render moral judgment on their views or tactics. No authorities need be cited to establish the proposition, which the Village does not dispute, that First Amendment rights are truly precious and fundamental to our national life. Nor is this truth without relevance to the saddening historical images this case inevitably arouses. It is, after all, in part the fact that our constitutional system protects minorities unpopular at a particular time or place from governmental harassment and intimidation, that distinguishes life in this country from life under the Third Reich.

...

Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content [as opposed to time, place, and manner of restrictions on the right of assembly] would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'

...

The Village's ... argument is that the Nazi march, involving as it does the display of uniforms and swastikas, will create a substantive evil that it has a right to prohibit: the infliction of psychic trauma on resident holocaust survivors and other Jewish residents.

...

It would be grossly insensitive to deny, as we do not, that the proposed demonstration would seriously disturb, emotionally and mentally, at least some, and probably many of the Village's residents. The problem with engrafting an exception on the First Amendment for such situations is that they are indistinguishable in principle from

speech that 'invite(s) dispute ... [and] induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.' Yet these are among the 'high purposes' of the First Amendment. It is perfectly clear that a state may not 'make criminal the peaceful expression of unpopular views.' Likewise, 'mere public intolerance or animosity cannot be the

basis for abridgement of these constitutional freedoms.' [A]ny shock effect ... must be attributed to the content of the ideas expressed. It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.

...

CERD Article 4(a) requires, among other things, State parties to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination." If the US were to ratify the CERD, the US would likely be required to overrule such cases, thus inhibiting the right to speak freely about one's beliefs—subject to appropriate governmentally-imposed time, place, and manner restrictions.

2. Other Minority Rights Whether a particular group is a "minority" is of course not limited to racial categories.⁶² There are many other minorities. The scope of this introductory textbook does not permit the extraordinary depth necessary to address all such groupings and issues. One can at least acknowledge that there are numerous organizational and academic restatements of the perceived human rights obligations which States may owe to their various minorities.

As you likely gleaned from earlier chapters in this book, States prefer to address such sensitive issues with a minimum of interference from both outsiders (e.g., international organizations) and insiders (e.g., protesters with access to the media). The corpus of human rights norms has evolved more so in international organizations than in national organizations;⁶³ and often in terms of moral obligations as opposed to legal ones [Soft Law versus Hard Law: text §1.1.C.2. and §11.2.B.4.].

B. WOMEN'S RIGHTS

1. Treaty Regime A State actor undoubtedly incurs international liability for gender discrimination in the rare instance where the national objectives include crimes against women as such. Examples of State responsibility for discrimination against women would be the Bosnian Serb *de facto* tactic of encouraging the rape of Muslim (and other) women as a method for

driving them out of a particular area of Bosnia. Afghanistan's former Taliban government officially treated women far different than men. It relied on a fundamentalist religious interpretation of the *Qur'an*. That government would, of course, accuse the West of cultural relativism. Its treatment of any person within its borders would thus be considered a matter of local law, rather than falling within the province of International Law.

The historical "public/private" International Law dichotomy does not support women who are harmed by non-State actors, such as their husbands or fathers. Perpetrators have traditionally acted just beyond the grasp of International Law—which governs the conduct of *nations* in their mutual relations. However, contemporary feminist legal theorists began to characterize this traditional distinction as perpetuating a disengagement of the State from historical, economic, and political reality. While the State is the primary actor in International Law, human rights law is designed to guarantee freedom and equality of the individual on the international level—premised upon the all-encompassing rights of liberty and equality of the individual.

The University of Sydney's Shelley Wright, in a 1993 study by the American Society of International Law, notes that "international law depends on an ambiguous definition of the state which includes [the elements of] territory, population, and government. The indeterminate nature of this definition means that women's unequal participation in the habitation, ownership, and use of territory and other material sources; women's primary role in the reproduction of population; and their absence from government is left unrecognized in international law. This [indifference] in turn ensures that male control of these processes at a national and global level remains undisturbed by international regulation."⁶⁴

One of the foremost analysts, the University of Minnesota Professor Cheryl Thomas, aptly describes the

pressure on the international community of States to bring women's rights under the umbrella of international human rights law:

Evidence from every region of the world indicates that when women turn to their legal systems for recourse from violence in their homes, the treatment they receive is frequently hostile, with authorities failing to acknowledge the crime of wife assault and doing nothing to prevent further violence.

...

In the United States, police have been described as 'largely indifferent' to domestic violence.

...

[A]ccording to Bulgarian law, in the case of medium-level injuries, the law distinguishes between an assault by a stranger and one by a relative. Those injured by a relative are not entitled to involvement by the state prosecutor's office. They may prosecute their own cases but must do so alone; they must locate and call their own witnesses and present their own evidence in court. A prosecutor from Sofia, Bulgaria, explained in 1995: "A woman must decide for herself whether she wants to harm the family relationship through prosecution; the state will not damage the family by assisting her."⁶⁵

The 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)—a product of the UN Decade of the Woman—entered into force in 1981. It specifically observes that, despite the existence of the UN Charter and the Universal Declaration of Human Rights, "extensive discrimination against women continues to exist. Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, [it] is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries [which] hampers the growth and prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and humanity."

In 1988, the UN General Assembly called upon all States to ratify this treaty. There have been mixed reactions, even in western democracies. For example, Canada and Mexico have ratified this treaty, but not the US. Its key provisions are as follows:



Convention on the Elimination of All Forms of Discrimination against Women

UNITED NATIONS GENERAL ASSEMBLY (ENTERED INTO FORCE 3 SEPTEMBER 1981)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Ten, click
Discrimination Women Treaty.

An illustration of CEDAW's application appeared in a 1999 Canadian Supreme Court case, involving a woman who said "no" three times before her potential employer engaged her in intimate relations without her *express* consent. The court held that Canadian law no longer recognizes the defense of *implied* consent to sexual assault. Supreme Court Justice McLachlin explained that "[t]he specious defence of implied consent (consent implied by law), as applied in this case [by the trial judge], rests on the assumption that unless a woman protests or resists, she should be 'deemed' to consent. ... On appeal, the idea also surfaced that if a woman is not modestly dressed, she is deemed to consent. Such stereotypical assumptions find their roots in many cultures, including our own. They no longer, however, find a place in Canadian law."

In a concurring opinion, Justice L'heureux-Dube emphasized that Canada's obligations under the UN General Assembly's 1988 Declaration on the Elimination of Violence Against Women. It sets a common international standard whereby nations should adopt measures to eliminate prejudices based on stereotyped roles for men and women. Therefore, "[t]his case is not about consent, since none was given ... [but is about] [m]yths of rape ... [and] ... [s]tereotypes of sexuality. ..." Regarding the trial judge's error of using an objective test to presume the victim's consent, Justice L'heureux-Dube emphasized that:

Canada is a party to the *Convention on the Elimination of All Forms of Discrimination against Women*, which requires respect for and observance of the human rights of women. Violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights. These human

rights are protected by ... the *Canadian Charter of Rights and Freedoms* and their violation constitutes an offence under the assault provisions of ... the *Criminal Code*.

This case is not about consent, since none was given. It is about myths and stereotypes. The trial judge believed the complainant and accepted her testimony that she was afraid and he acknowledged her unwillingness to engage in any sexual activity. However, he gave no legal effect to his conclusion that the complainant submitted to sexual activity out of fear that the accused would apply force to her. The application of [Criminal Code] s. 265(3) requires an entirely subjective test. As irrational as a complainant's motive might be, if she subjectively felt fear, it must lead to a legal finding of absence of consent.

The question of implied consent should not have arisen. The trial judge's conclusion that the complainant implicitly consented and that the Crown failed to prove lack of consent was a fundamental error given that he found the complainant credible, and accepted her evidence that she said "no" on three occasions and was afraid. This error does not derive from the findings of fact but from mythical assumptions. It denies women's sexual autonomy and implies that women are in a state of constant consent to sexual activity.

The majority of the [intermediate] Court of Appeal also relied on inappropriate myths and stereotypes. Complainants should be able to rely on a system free from such myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions.

The findings necessary to support a verdict of guilty on the charge of sexual assault were made. In particular, there was no evidence that would give an air of reality to a defence of honest but mistaken belief in consent for any of the sexual activity which took place in this case. ... [Canadian law thus] precludes an accused from raising that defence if he did not take reasonable steps in the circumstances known to him at the time to ascertain that the complainant was consenting.⁶⁶

In 1993, the UN General Assembly adopted a Declaration on the Elimination of Violence against Women.⁶⁷ Its objective was for nations to one day have a treaty-based instrument designed to protect

women—specifically against violence. In the interim, the UN Office of the High Commissioner for Human Rights published its (March 2008) 167-page report regarding a Project on a Mechanism to Address Laws that Discriminate Against Women.⁶⁸ The project involves the appointment of a Special Rappateur [reporter]. This official will be the point person for studying the discriminatory laws of all nations. While this not atypical UN project is no talisman, one could argue that "half a loaf is better than none."

In 2000, the US Supreme Court determined that the 1994 *federal* Violence Against Women Act (VAWA) was *unconstitutional*. The majority opinion concluded its analysis as follows: "Petitioner Brzonkala's complaint alleges that she was the victim of a brutal assault. But Congress' effort in § 13981 [of the VAWA] to provide a federal civil remedy can be sustained neither under the [federal Constitution's] Commerce Clause nor under ... the Fourteenth Amendment. If the allegations here are true, *no civilized system of justice could fail to provide her a remedy* for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States [i.e., not the *federal* government]" (the federal statute was trumped by state-federal constitutional limitations).⁶⁹ The court did not consider the CEDAW treaty to which the US is not a party. Nor did the US court engage the prospect for considering it as an expression of Customary International Law (especially sensitive, given the federal debate about the applicability of "foreign law" to constitutional issues, per textbook §1.2.B.4b). Thus, one could consider this case as an example of the historical national approach, whereby neither International Law nor nationwide law applies to the protection of women as a distinct group.

In October 2007, then Senator Joe Biden introduced the International Violence Against Women Act in the US Senate. If enacted into law, it would require the US President to "develop and commence implementation of a comprehensive, five-year international strategy to prevent and respond to violence against women and girls internationally." This bill, drafted in collaboration with over 100 non-governmental organizations, would identify between ten and twenty ethnically different nations facing particularly high levels of violence. The US would work with those governments with \$10 million a year in funding, a target established before the US

economic implosion in 2008. This bill did not pass in either the Senate or the House of Representatives.⁷⁰

A June 2009 European Court of Human Rights decision provided the most forceful judicial voice for establishing State responsibility for victims of domestic violence:



Case of Opuz v. Turkey

EUROPEAN COURT OF
HUMAN RIGHTS

Go to Course Web Page, at:

<<http://home.att.net/~sломansonb/txtcsesite.html>>.

Under Chapter Ten, click Domestic Violence Case.

2. Security Council Concern The UN, in addition to most of its State members, has not enjoyed a reputation for equal treatment of women. The Security Council therefore demonstrated great insight by finally taking

action to incorporate a pervasive gender perspective into an organization whose own constitution requires member States to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion” in Charter Article 55(c).

On October 31, 2000, the Security Council—the organ tasked primarily with monitoring threats to peace—articulated a striking principle by: affirming the role of women in preventing and resolving conflicts as well as in peace building; stressing the importance of women’s equal participation and full involvement in all efforts to maintain and promote peace and security; focusing on the need to increase the role of women in decision making for conflict prevention and resolution; and by urging member States to ensure their increased representation at all decision making levels. Fully embracing this theme will result in a more balanced implementation of every feature of the UN Charter—while directly addressing some anachronistic features of the nation-State system:⁷¹

United Nations Security Council Resolution 1325

ADOPTED BY THE SECURITY COUNCIL AT ITS 4213TH MEETING

UN Doc. S/Res/1325 (2000)

<http://www.un.org/events/res_1325e.pdf>

...

Reaffirming the important role of women in the prevention and resolution of conflicts and in peace-building, and *stressing* the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution,

...

1. *Urges* Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict;

...

5. *Expresses* its willingness to incorporate a gender perspective into peacekeeping operations, and *urges* the Secretary-General to ensure that, where appropriate, field operations include a gender component;

...

13. *Encourages* all those involved in the planning for disarmament, demobilization and reintegration to consider the different needs of female and male ex-combatants and to take into account the needs of their dependants;

...

15. *Expresses* its willingness to ensure that Security Council missions take into account gender considerations and the rights of women, including through consultation with local and international women’s groups;

...

17. *Requests* the Secretary-General, where appropriate, to include in his reporting to the Security Council progress on gender mainstreaming throughout peacekeeping missions and all other aspects relating to women and girls;

18. *Decides* to remain actively seized of the matter.

The Security Council met on June 19, 2008 to hold a ministerial-level meeting on “Women, Peace and Security.” US Secretary of State Condoleezza Rice—who then held the Council presidency—commented that in the sixty years of UN history, only seven women had held the post of Special Representative of the Secretary-General (in various conflicts directly involving the UN). Ms. Rice further commented that rape and sexual violence were instruments of warfare which could never be condoned. Yet, women and girls around the world have been continually subjected to such violence in many conflicts. While there had long been a debate about whether the Security Council should debate about the role which the Council should take on this issue, the broad and high-level participation in that event sent the international community the message that the answer was a resounding yes.

The Security Council forged the following response, designed to build upon its defining Resolution 1325 in a more concrete way—particularly by calling for more

control over *UN* peacekeeping missions (see “**italics added**” within the resolution text below):



United Nations Security Council Resolution 1820

Adopted by the Security Council
at its 5916th meeting

UN Doc. S/RES/1820 (JUNE 2008)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Ten, click UNSC 1820 Women and Armed Conflict.

The September 2008 Report of the UN Secretary-General further responded to the critical theme so forcefully expressed in the Security Council’s above-quoted Resolutions 1325 and 1820.⁷²

Report of the UN Secretary-General: Women and Peace and Security

UN Doc. S/2008/622 (SEPTEMBER 2008)

<<http://daccessdds.un.org/doc/UNDOC/GEN/N08/523/14/PDF/N0852314.pdf>>

...

4. Despite the Security Council’s repeated appeals to respect the equal rights of women and their role in peace processes and in peacebuilding, millions of women and children continue to account for the majority of casualties in hostilities, often in flagrant violation of human rights and humanitarian law. In armed conflicts and post-conflict situations, women bear the brunt of shattered economies and social structures.

5. The overriding concern for women in crisis and conflict situations, however, is their physical security and that of their children. For women, the lawlessness of many post-conflict situations, with its widespread violence, is as dangerous as a situation of armed conflict. Only when the basic need for personal security is met can one begin to consider participation in public

life and the labour market. Owing to the increased civilian-combatant interface of current conflicts, the targeted use of sexual violence is increasingly becoming a potent weapon of war and a destabilizing factor in conflict and post-conflict societies. Thus, sexual violence is a security problem requiring a systematic security response commensurate with its scale and magnitude.

...

93. Member States, the United Nations system and civil society have made some important progress towards developing and pursuing more comprehensive approaches towards the full implementation of resolution 1325 (2000), including through a better defined role of the Security Council. The cumulative effect of those efforts has made the overall peace and security architecture of the United Nations more sensitive to

women's needs in situations of armed conflict and post-conflict societies.

94. ... However, the noticeable gap that remains between policies and their effective implementation must be closed. More needs to be done at the country level to mainstream gender perspectives at every stage of conflict prevention, resolution and management as well as peacebuilding, including security sector reform;

prevent and end sexual and gender-based violence; increase women's representation in decisionmaking bodies and security institutions; increase resources and technical support for women's organizations; and ensure stronger United Nations capacity to support Member States in implementing resolution 1325 (2000).

...

International organizations are bringing attention to the plight of women in a variety of traditional International Law contexts. The UN International Children's Emergency Fund 1997 *Progress of Nations Report* announced that violence against women is the world's most pervasive form of human rights abuse. As stated by its Executive Director, "[i]n today's world, to be born female is to be born high risk." In 1999, the World Bank reported that female suicide in the People's Republic of China is the highest in the world. Fifty-six percent of the world's female suicides (500 per day) occur in China. The problem is attributed to the male control of family assets, women not dining with husbands and sons, and the comparatively low status of women in China.

In §2.3.A. of this text, you studied State recognition of other States and governments. Afghanistan's Taliban government conducted what the West would characterize as gender apartheid. Assuming that Afghanistan had then incurred State responsibility for violating the human rights of its female population, one might question what the international community could have done to effectuate change—other than going to war. The prewar options included:

- ◆ *Withholding or withdrawing recognition* (neither of which would affect Afghanistan's de facto status as a State). US President George Bush withheld recognition of six former Soviet republics until it was clear that they would adopt democratic principles of governing their peoples. Russia's President Boris Yeltsin called upon the three States that first recognized the Taliban government to withdraw their recognition.
- ◆ *Altering the offending government's status in an international organization*. The former Yugoslavia was relegated to a shadowy status at the UN. The remaining rump State was not authorized to occupy the seat for

"Yugoslavia" although it was not actually expelled from the UN [§3.3.B.1.]. This unusual tactic was an organizational sanction for its aggression in Bosnia and other human rights abuses described in earlier chapters.

- ◆ *Imposing an embargo*. In April 1998, the UN Security Council imposed an arms embargo on "Yugoslavia" because of its violence against ethnic Albanians in the Kosovo region, near Yugoslavia's border with Albania.
- ◆ *Pressing for change via treaty commitments*. The UN Declaration on the Elimination of Violence Against Women limits the conduct of ratifying States by providing treaty-based protections for women. However, it is *non-State* actors who typically batter or harass women. As noted in the earlier account, the responsible individuals normally incur no liability under International Law. Their liability is limited to *national* laws to the degree that they protect women from abuse. A State would be responsible only if it had an express policy or implicit practice condoning violence against women—such as Afghanistan's Taliban government.

Which, if any, of these options would have been a viable strategy for exerting international pressure on Afghanistan to reverse its gender apartheid policies? Would it be fair to say that the US invasion of Afghanistan was the only plausible way of effecting such change—especially in view of the Muslim human rights excerpt presented earlier in this section?

A number of commentators have expressed concern about the role of "Islam," regarding the rights of women who have been subjected to centuries of disparate treatment based on gender [discussed further in §10.4.E. below]. In December 1997, the eighth annual Islamic

Summit Conference, conducted in Iran, proclaimed the following objective intended to respond to these negative perspectives:

20. [To e]mphasize their full respect for the dignity and rights of Muslim women and enhancement of their role in all aspect[s] of social life in accordance with Islamic principles, and call on the [Islamic] General Secretariat to encourage and coordinate participation of women in the relevant activities of the OIC [Organization of the Islamic Conference: §3.5.E.].

The phrases “all aspects of *social* life” and “in accordance with Islamic principles” might provide only rhetorical lip service to women’s rights—arguably inserted to counter the western perception that Islam and the disparate treatment of Muslim women are redundant terms.

One must be cautious about unintentionally injecting cultural relativism into any debate regarding the universal application of human rights norms spawned primarily by western culture. As noted by New York’s International Centre for Transitional Justice scholar Vasuki Nesiah:

While both sides of the universalism–cultural relativism dichotomy have haunted third world feminism, [it] ... has also pushed against both sides of the dichotomy. ... If we return to the debate about veiling and school girls in France, the principal who enforced the suspension of the girls in scarves in the name of secular-universalism, was enforcing a conception ... that can itself be grounded in a particular tradition ... including liberal statecraft (and the attendant project of French nation building), [and] protestant Christianity. ...⁷³

3. Contemporary Gender Dialogue

(a) Mainstream Perspectives The following two excerpts offer enduring paradigms for incorporating feminist perspectives in International Law discourse. The first deals with the historical “hands off” attitude of the State, which accepted no responsibility for violence to woman by non-State actors. The second excerpt dovetails with the above UN Security Council resolutions, whereby that entity has taken on the role of incorporating gender into the traditional modes of conflict resolution.

Accountability in International Law for Violations of Women’s Rights by Non-State Actors

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RECEIVING REALITY: WOMEN AND INTERNATIONAL LAW
p. 93–106 (Washington, D.C.: American Society of International Law, 1993)

INTRODUCTION

It can be shown that many states fail to discharge obligations under customary international law to protect women’s human rights, and that they fail to protect such rights to which they have expressly committed themselves through voluntary membership of international human rights conventions, including the Convention of the Elimination of All Forms of Discrimination Against Women. Failures can be directly attributed to the executive, judicial and legislative organs of states. It may therefore be

asked what is added to states’ obligations by attempting to demonstrate and enforce their accountability in international law for violations of women’s rights by non-state actors, including private persons. . . .

Women’s human rights warrant defense when their violation originates in state action and also in private action. It is not a reason to disregard privately originating violations because violations also occur in the public sector of national life, or because they remain unremedied when they are directly attributable to organs of the state, or because they are more difficult to

tackle when they arise through non-state actors. It will advance women's rights to address violations that occur both through direct state action and through state responsibility for the conduct of non-state actors. The pursuit of remedies for violations of rights originating through organs of state and through the conduct of non-state actors can be undertaken in tandem, and if such pursuit is frustrated in one area it nevertheless may be advanced in the other. The identification of violations of women's rights both by organs of state and by conduct of non-state actors for which the state can be shown accountable are complementary goals, and not alternatives to or in competition with each other. . . .

Customary international law and treaty law provide a number of approaches to engaging the responsibility of states. These approaches are addressed to consider how they might be applied to some of the more pervasive causes of violations of women's human rights by non-state actors.

BACKGROUND LAW

The law of state responsibility has evolved over the centuries as a principal area of concern within public international law, and has become subject to official codification under the League of Nations and the United Nations. The modern phase of codification, endorsed by the U.N. General Assembly in 1963, has produced the International Law Commission's Draft Articles on State Responsibility, Part I of which was adopted by the Commission between 1973 and 1980.

Article 11 (1) of the ILC Draft contains the classical proposition that the conduct of a person or a group of persons not acting on behalf of the state shall not be considered as an act of the state under international law. Detailed provisions govern when states may delegate powers to private persons, and when private persons may become empowered to act on behalf of a state, but the Article reflects the general propositions that private persons are not subjects of international law and that "[t]he acts of private persons or of persons acting ... in a private capacity are in no circumstances attributable to the State."

It does not follow, however, that a state cannot incur international responsibility of its own because of the acts of private persons. When a state owes an obligation, for instance to protect a foreign diplomat or visitor, an act of a private citizen that harms such a protected person engages the responsibility of the state. It must provide adequate protection against repetition, police

inquiries to identify and prosecute a criminal suspect, and access to due process in its justice system to compensate the victim.

State responsibility for failure to take proper measures to protect nationals of other countries, and to offer means of redress for their grievances, has been extended by international human rights law to require states to protect and provide justice for their own nationals. Where nationals are injured by acts of private persons, the state will have no greater accountability than under international customary law regarding the protection of nationals of other countries, unless the state has accepted a treaty obligation to assure that injury to its own national will not occur, or to afford a national victim justice through its own institutions and reasonable safeguards against the predictable repetition of private persons' injurious misconduct. . . .

STATE RESPONSIBILITY FOR NON-STATE ACTORS UNDER TREATY LAW

The evolution of post-1945 international human rights law has been to amplify and reinforce the legal protection that individuals enjoy against state power exercised by governments of their own nations. Accordingly, human rights treaties bind states in their treatment particularly of their own nationals. States are not obliged in principle to ensure compliance with treaty provisions in private law relations conducted between individuals or among non-state actors. In specific regards, states parties to treaties may commit themselves to a higher level of obligation, but the thrust of international human rights treaties is to hold states accountable only for violations of individual rights committed by state actors.

I. THE SCOPE OF STATE RESPONSIBILITY

While it is obvious that states parties are responsible for their interference with human rights protected by treaties, a critical question concerns responsibility for failure of state action against private conduct that so denies individual rights protected by treaties as to impoverish a victim's enjoyment of life and citizenship. A state may be responsible for its failure to make its legal protection available to individuals against private action. Criminal law provides for the punishment and deterrence of private persons whose actions against victims endanger the well-being of the community. Civil courts enable individuals to employ the authority of the state to achieve justice for themselves in private relations. If the state refuses or fails to employ the state's protective

power of individuals through its police and criminal justice system, or denies individuals reasonable access to self-protection through resort to the civil courts, the state may be considered in breach of its treaty obligation to protect human rights.

State responsibility for failure of its criminal law system was recognized by the European Court of Human Rights in *X and Y v. The Netherlands*, where the state had not enacted adequate criminal legislation to vindicate the rights of a mentally handicapped rape victim, and to deter such future assaults as required by the European Convention on Human Rights. Responsibility for failure to make civil justice accessible to individuals pursuing similarly protected rights was recognized by the Court in *Airey v. Ireland*, where the state offered no legal assistance to an applicant to a civil court whose processes were too complex for a lay person to undertake without legal aid. State responsibility is not for the conduct of private individuals that created the need for resort to the courts, but of the state's denial of justice to victims of crime and potential civil litigants when treaty rights have been violated.

...

VI. THE GUARANTEE OF THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

... By becoming states parties to the Women's Convention, states agree to "condemn discrimination in all its forms." The Preamble to the Women's Convention notes that the UN Charter, the Universal Declaration of Human Rights, the Women's Declaration, the two international human rights Covenants and UN and specialized agencies' resolutions, declarations and recommendations promote equality of rights of men and women.

However, the drafters expressed concern in the Preamble "that despite these various instruments extensive discrimination against women continues to exist." The Preamble concludes with an expression of determination "to adopt the measures required for the elimination of such discrimination in all its forms and manifestation." ...

The importance of eliminating all forms of discrimination against women is underscored by Recommendation 19 on Violence against Women of the Committee on the Elimination of Discrimination Against Women (CEDAW), established to monitor states parties' compliance with the Women's Convention, the draft UN Declaration on the Elimination of Violence against Women and the draft Inter-American Convention on Violence against Women. ...

VI. SPECIFIC GUARANTEES

The Women's Convention commences with the agreement of states parties "to pursue by all appropriate means and without delay" a policy of eliminating discrimination against women, and to observe specific undertakings. Included are the significant commitments: "To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise" and "To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women." The Convention follows with a number of specific duties by which states accept obligations, a number of which are "to ensure" outcomes such as the full development and advancement of women in such fields as politics, economics and culture, retention of nationality despite marriage, equal rights to education, and employment equity.

Women as Architects of Peace: Gender and the Resolution of Armed Conflict

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15 MICHIGAN STATE JOURNAL OF INTERNATIONAL LAW 63 (2007)

...

Historically, women were largely ignored by or shut out from the formal legal and political mechanisms of

armed conflict resolution. As a result of the failure to include women, issues of particular concern to them were also ignored.

...

Armed conflict is not a gender neutral event. The dispute resolutions designed to resolve armed conflict should therefore not be neutral toward gender.

...

The study of war and peace within political science and international law has contributed to perpetuating the false assumption of gender neutrality in war. First, although the effect of war on gender within society has been broadly explored, the role of gender has been an infrequently examined factor in the causes of war. ... [B]ecause men, with notable exceptions, generally carry out the military dimension of war, as political and military leaders and as warriors, they are largely viewed as the natural representatives of the parties of interest to a conflict.

... Ethnicity, religion and ideology are important factors to understanding both causation of war and lasting solutions to underlying conflicts. However, political scientists now recognize that limiting research along these dimensions may mask profound gender issues. ... [F]eminist theories ... may have brushed over important interactions between gender, ethnicity, religion and ideology that contribute to armed conflict. ...

Consider feminist theories about the outbreak of war. ... [They] propose that states, cultures and international organizations among states and cultures are patriarchal, and thus their very structure is a contributing factor to the frequent occurrence of war. However, ... because peace is more common than war, a theory of patriarchy is unhelpful for understanding why wars occur. Rather than treating patriarchy as a constant, feminist theories might be more helpful if they looked at patterns of war and peace that took into account how culture and gender relations in various political systems interacted in historical situations to provoke or prevent the outbreak of war.

... The democratic peace theory, generally accepted by international relations scholars, posits that states at a higher level of democratic development tend not to go to war with one another. The civil war corollary of the

democratic peace posits that democracies are also less likely to experience civil war. The gender corollary to the democratic peace argues that, since the level of women's legal, social and political equality is often dependent on a higher level of democracy, societies with higher levels of women's equality are less likely to go to war with one another or experience civil war. ... [S]tates with higher levels of gender equality resort less frequently to the use of military action to settle international disputes. ... [An] empirical examination of internal conflicts between 1960 and 2001 similarly showed a positive correlation between gender inequality within a state and the likelihood that the state will experience intrastate warfare. Together, these studies demonstrate that societies with higher levels of women's equality are less likely to experience either interstate or civil war.

...

Given that the majority of wars that have taken place since the end of the Cold War are internal conflicts, the "gender corollary" of democratic peace theory suggests that international legal and political efforts toward achieving women's equality are not only important to improving the lives of women, but that they are central to the project of international peace and security.

...

The call for taking gender into account in the resolution of armed conflict has grown louder in the five years since the passage of Resolution 1325 [reprinted above]. This has been fueled by a linking of women on the ground in conflict zones who have been profoundly affected by processes that in large measure exclude them, with international lawyers and, in some prominent cases, women diplomats and political leaders. This shift in focus has, importantly, been influenced by the actual experiences of women in the dozens of wars and peace processes that have occurred since the end of the Cold War.

...

(b) Extremist Perspectives One might expect a western author to explore only mainstream perspectives on women's rights. However, the student of International Law should also consider what western commentators would certainly describe as radical or extremist views.

The two following contemporary examples yield access to a broader spectrum of views about the role of women in their respective societies.

Saudi Arabia, an ally to the West in many spheres of influence, implements a legal code based on a strict

Wahhabi interpretation of Islamic law. As explained by the Public Broadcast System (PBS): “For more than two centuries, Wahhabism has been Saudi Arabia’s dominant faith. It is an austere form of Islam that insists on a literal interpretation of the Koran. Strict Wahhabis believe that all those who don’t practice their form of Islam are heathens and enemies. Critics say that Wahhabism’s rigidity has led it to misinterpret and distort Islam, pointing to extremists such as Usama bin Laden and the Taliban.”

In 2006, a Saudi court more than doubled the number of lashes that a seventeen-year-old female rape victim was sentenced to receive (from 90 to 200) in addition to six months in prison. Her crime was that she was in the same car with an unrelated man in a remote area of the city of Qatif when both were attacked by a half-dozen men who raped them both. She was deemed to have invited the attack because she was partially dressed in a dark area inside her companion’s car. The victim’s lawyer, a well-known Saudi activist, criticized the sentence and was suspended from the practice of law. (The attackers were sentenced to periods of from two to five years in prison and 80 to 1,000 lashes each.) The Saudi Minister of Justice, who approved of the woman’s sentence, expressed his regret about the media’s depiction of the role of women in Saudi Arabia. In his words, the press did not understand, because “[t]he charged girl is a married woman who confessed to having an affair with the man she was caught with.” Her sentence was announced in November 2007, after her appeal failed. The court stated that the sentence was legal because it applied “the book of God and the teachings of the Prophet Muhammed.” The Saudi king ultimately pardoned the rape victim. The king reportedly supported the verdicts, but issued the pardon in the public interest in the wake of worldwide press coverage.

In March 2007, Iran freed most of the thirty-one women activists who had staged an illegal demonstration. They sought the nullification of the law that allows Iranian men to have four wives. When they were released, one condition was that they not attend a protest at the Iranian Parliament celebrating International Women’s Day. Their bails were set at the equivalent of between \$11,000 and \$55,000. The UN Human Rights Commissioner expressed her concern over this incident. The Commissioner’s reasons included that a man’s testimony has more value than a woman’s; women cannot become judges; and the need for a male guardian’s permission to work or travel. (However, unlike in Saudi Arabia, Iranian women can drive, vote, and run for public office.)

There have been successful suicide bombings by women in Iraq and Afghanistan. But in May 2008, Al-Qaida’s second in command, Ayman Al-Zawahri, denied women the “right” to be suicide bombers. He did not recognize the equality demanded by some Muslim women who wish to participate in military conflicts. He responded that the role of such women is limited instead to caring for the homes and children of Al-Qaida fighters. This launched an ironic cry of gender inequality from fundamentalist women who obviously do not agree with the above UN-based attempts to include women in government and other institutions—as a means of achieving both gender equality and world peace. In a lengthy online protest, one woman responded to Al-Zawahri’s denial of the equal right to participate in Al-Qaida as follows: “How many times I have wished I were a man. ... When Sheikh Ayman al-Zawahri said there are no women in al-Qaida, he saddened and hurt me. I felt that my heart was about to explode in my chest. ... I am powerless.”⁷⁴

C. CHILDREN’S RIGHTS

1. Children in Armed Conflicts As aptly articulated by Hungary’s Miskolc University Faculty of Law Professor Eszter Kirs:

Children belong to the most vulnerable [of] human groups during an armed conflict. More than two million children died in the last decade as a direct result of war. ... There is a specific group of children affected by war, who are especially in danger of being harmed, children who ... have to take part in hostilities. They are mostly forced to join armed forces and then they have to face the brutal reality of war. The physical and psychological harms that they suffer can destroy all their hopes for a better future. War can be over, but this trauma can hardly be healed, and in this way, integration of the children into their [former] communities is hard to realize. If there is no way back to the society, in many cases the only way [of surviving] remains to return to the armed groups. In this way, child recruitment can destroy the basis and future of a whole society.⁷⁵

In 1997, the UN International Children’s Emergency Fund and the non-governmental organization working group on the Convention on the Rights of the Child, conducted a symposium in Cape Town. The purpose was to assemble experts and partners who might develop

strategies for preventing recruitment of children. The primary objectives included establishing the age of eighteen as the minimum age of recruitment and demobilizing child soldiers to help them reintegrate into society. The resulting *Cape Town Principles and Best Practices* recommends actions to be taken both by governments and affected communities to end this egregious violation of children's rights. Under these widely-accepted definitions:

"Child soldier" in this document is any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms. ¶¶ "Recruitment" includes compulsory, forced and voluntary recruitment into any kind of regular or irregular armed force or armed group.⁷⁶

The UN Security Council has established a mechanism for monitoring the repulsive use of child soldiers in armed conflicts. In 2005, the new working group began its review of progress in developing and implementing action plans that were called for in a prior Resolution. This entreaty calls on the parties concerned (especially in Africa⁷⁷) to prepare concrete action plans to halt the recruitment and use of children in armed conflicts. The Council therein expressed its serious concern regarding the lack of progress in development and implementation of these action plans in the following resolution:



**United Nations Security
Council Resolution 1612
Adopted by the Security
Council at its 5235th meeting
(26 July 2005)**

<<http://daccessdds.un.org/doc/UNDOC/GEN/N05/439/59/PDF/N0543959.pdf?OpenElement>>

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Ten, click UNSC 1612 Child Soldiers.

The first convictions regarding the use of child soldiers emanated from the Special Court for Sierra Leone [textbook §8.5.C.3.]:



**Prosecutor v. Brima,
Kamara, and Kanu**

SPECIAL COURT FOR SIERRA LEONE
APPEALS CHAMBER

Case No. SCSL-2004-16-A Conviction

Conformation (22 February 2008)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Ten, click Child Soldier Case.

There was at least one child soldier at the US military prison in Guantanamo, Cuba. He was fifteen when captured; was still a prisoner there as of 2009; and had reached the age of twenty-two when his habeas corpus petition came before the US courts. Omar Khadr, a Canadian citizen, was captured in Afghanistan. He was taken into US custody after a fight that claimed the life of at least one US soldier, while injuring several other coalition members. But being caught in the act does not absolve a detaining nation from considering one's childhood status, especially when placed in an adult prisoner population.

His petition alleged that: (1) his trial before a military commission would be unlawful, because the Military Commissions Act "does not confer personal jurisdiction to try juveniles"; (2) his "detention as an 'enemy combatant' was unlawful, because under both US law and the Laws of War, a juvenile cannot be a 'member,' 'affiliate,' or 'associate' of an armed group such as al-Qaeda"; and (3) even if he was lawfully detained, his detention as a juvenile "requires that he be placed in a rehabilitation and reintegration program appropriate for former child soldiers." The federal civil court held that "federal courts normally will not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted." Khadr had not yet exhausted all available remedies since he had yet to be tried by military commission—a process suspended by President Obama when he took office.

As stated by the European Court of Human Rights in a January 2009 case against Turkey: "the applicant's

age, the length of his detention in prison together with adults, the failure of the authorities to provide adequate medical care for his psychological problems, and, finally, the failure to take steps with a view to preventing his repeated attempts to commit suicide ... [left] no doubts that the applicant was subjected to inhuman and degrading treatment.” Furthermore, the fact that the applicant was detained from the age of fifteen and was kept in pre-trial detention for a period in excess of four and a half years satisfied the Court that there was a violation of the European Convention on Human Rights’ prohibition of inhuman or degrading treatment and its protection of the rights to liberty and security.⁷⁸

2. Protecting Other Children The UN Convention on the Rights of the Child has been ratified by all nations except Somalia and the US.⁷⁹ The latter nation questions the inherent breadth of this treaty’s language, as well as the language of other such treaties [textbook §10.6.A. below], which in their terms means different things to different people. You will recall from the Treaty chapter of this book that such instruments tend to adopt rather general and principled language as a means of encouraging more nations to at least sign onto a multilateral framework for addressing the problem at hand [text §7.2.A.].

The more contentious (but seemingly non-contentious) provisions include the following:

- ◆ Article 6.1 recognizes that every child has the inherent right to life. The term “every” of course embraces the abortion debate [textbook §8.B.2. *Open Door* case].
- ◆ Article 7.1 requires that all children be registered immediately after birth. Many nations of the world do not have the capacity to do that or the power to require their citizens to come to a central location for that purpose.
- ◆ Article 11.1 requires States to take measures to combat the illicit transfer and non-return of children abroad. This provision conflicts with the clandestine State support of sex trafficking—or a State’s unwillingness to commit funds to prosecute or prevent it. It has been cited by activists who object to the US detention of eight juveniles, aged 13–17, at the Guantanamo Bay prison facility for a number of years (now released). A February 2009 UN report disclosed that women are the majority of sex traffickers in almost a third of the 155 reporting nations. Twenty percent of the victims are children.⁸⁰
- ◆ Article 37(a) prohibits the death penalty for minors (who become adults upon reaching the age of eighteen). Six nations currently put *juvenile* offenders to death: Iran, Nigeria, Pakistan, Saudi Arabia, Yemen, and the US. States ratifying the second protocol to the International Covenant on Civil and Political Rights thereby agree not to impose the death penalty under *any* circumstances.⁸¹
- ◆ Article 23.1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life in conditions that ensure dignity, promote self-reliance and facilitate the child’s active participation in the community. Many States do not take account of these children’s needs, for financial reasons at best and discriminatory reasons at worst.
- ◆ Article 24 of the Rights of the Child Convention contains an obligation whereby participating States must fully implement the right of children to attain the highest possible standard of health and to combat disease via provision of adequate food and drinking water. Article 14 of the African Convention on the Rights of the Child expresses the identical obligation.⁸²

One of the more contentious (in other words, costly) features of the UN’s Rights of the Child Convention is the Article 28.1 provision on the “right of the child to [an] education, and with a view to achieving this right progressively and on the basis of equal opportunity....” This provision parallels the right to education contained in the International Covenant on Economic, Social and Cultural Rights.⁸³ The following case classically illustrates the tension between a child’s culture and social integration into the relevant society he or she inhabits:



Case of D.H. and Others v. The Czech Republic

EUROPEAN COURT OF HUMAN RIGHTS
(GRAND CHAMBER)

Application no. 57325/00 (13 November 2007)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Ten, click Czech Republic
Roma Case.

D. RELIGIOUS AND LINGUISTIC RIGHTS

The quintessential restatement of the rights of these major religious and linguistic subgroups is the UN document below.

One of the more widely publicized cases was the 2006 prosecution of a man who faced execution in

Afghanistan for converting from Islam to Christianity (in the early 1990s). Muslim extremists demanded death for Abdul Rahman as an apostate for his rejection of Islam. Authorities barred journalists from seeing Rahman in prison. The international reaction placed President Karzai in an awkward position. While trying to

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 47/135 (18 DECEMBER 1992)

<http://www.unhchr.ch/html/menu3/b/d_minori.htm>

...

THE GENERAL ASSEMBLY,

Desiring to promote the realization of the principles contained in the Charter, the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and the Convention on the Rights of the Child, as well as other relevant international instruments that have been adopted at the universal or regional level and those concluded between individual States Members of the United Nations,

Considering that the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live,

...

Bearing in mind the work done so far within the United Nations system, in particular by the Commission on Human Rights, the Subcommission on Prevention of Discrimination and Protection of Minorities and the bodies established pursuant to the International Covenants on Human Rights and other relevant international human rights instruments in promoting and protecting the rights of persons belonging to national or ethnic, religious and linguistic minorities,

Proclaims this Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities:

...

Article 2

1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.

...

4. Persons belonging to minorities have the right to establish and maintain their own associations.

5. Persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties.

Article 4

3. States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.

4. States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.

...

Article 8

...

4. Nothing in the present Declaration may be construed as permitting any activity contrary to the

purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States.

...

address concerns of foreign supporters, he also sought not to alienate religious conservatives who wield considerable influence in Afghanistan.⁸⁴

E. MIGRANT RIGHTS

The pressures concerning migrant rights were covered in part in textbook §4.2. on Nationality, Statelessness, and Refugees. The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families entered into force in 2003.⁸⁵ Examples of its key, but more contentious provisions, include:

- ◆ Article 8: “Migrant workers and members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order ..., public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present part of the Convention.” Had this provision ended at the word “law,” referring to local national law, there would be fewer objections to this treaty. The add-ons suggest further minimum measures, however, to which many countries are unwilling to adhere.
- ◆ Article 16.2: “Migrant workers and members of their families shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions.” While most nations would now tend to agree in principle, not all have the financial resources to provide for their own citizens—and are unwilling to take on what they perceive as an added responsibility.
- ◆ Article 20.1: “No migrant worker or member of his or her family shall be imprisoned merely on the ground of failure to fulfil a contractual obligation.”

Under constitutions like that of the US, one cannot be jailed for being poor or for not having the means to pay all monetary obligations. But this is not the case in a number of other countries, which of course are not parties to the Migrant Workers’ Convention.⁸⁶

An approach that discourages equal treatment of nationals and migrants could arguably violate the principles contained in the textbook §4.4.B.4 subsection on Injury to Aliens, specifically, Deprivation of Livelihood. As stated in a leading international text on workplace laws:

Although there are several international conventions designed to protect migrant workers, there is no multilateral framework that structures the movement of people across national borders. Rather, [it is national] immigration law[s], and in particular workplace law that can be invoked and enforced by immigrant workers.... This regulatory scheme [however,] does little to discourage migration, which continues to accelerate. In 2000, an estimated 175 million people were living outside the country in which they were born. The World Commission on the Social Dimensions of Globalization estimates that worldwide there are fifteen to thirty million irregular immigrants—people who lack legal permission to be present and/or to work in the country where they are located. Given ... that an estimated eleven million undocumented persons reside in the United States alone, the worldwide estimates appear low.⁸⁷

The US Supreme Court fractured over the balance to be struck between fairness to undocumented aliens and national immigration law. In 2002, a 5–4 majority made its judgment call as follows:

The National Labor Relations Board (Board) awarded backpay to an undocumented alien who has never been legally authorized to work in the United States. We hold that such relief is foreclosed by federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986 (IRCA).

...

As we have previously noted, IRCA “forcefully” made combating the employment of illegal aliens central to “[t]he [prevailing] policy of immigration law.” It did so by establishing an extensive “employment verification system,” designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States. This verification system is critical to the IRCA regime. To enforce it, IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work. If an alien applicant is unable to present the required documentation, the unauthorized alien cannot be hired.

...

We therefore conclude that allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations. However broad the Board’s discretion to fashion remedies when dealing only with the NLRA, it is not so unbounded as to authorize this sort of an award.

The *other* four justices of the Supreme Court *disagreed*, on the following basis:

the general purpose of the immigration statute’s employment prohibition is to diminish the attractive force of employment, which like a “magnet” pulls illegal immigrants toward the United States. To *permit* the Board to award backpay could not significantly increase the strength of this magnetic force, for so speculative a future possibility could not realistically influence an individual’s decision to migrate illegally [*italics added*].

To *deny* the Board the power to award backpay, however, might very well increase the strength of this magnetic force. That denial lowers the cost to the employer of an initial labor law violation.... It thereby increases the employer’s incentive to find and to hire illegal-alien employees. ... [F]or, as the Board has told us, the Court’s rule offers employers immunity in borderline cases, thereby encouraging them to take risks, *i.e.*, to hire with a wink and a nod those potentially unlawful aliens whose unlawful employment (given the [majority of the] Court’s views) ultimately will lower the costs of labor law violations.

The American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) and the Confederation of Mexican Workers responded by lodging a complaint against the US with the UN’s International Labour Organization (ILO). The AFL–CIO alleged that the US was thus violating obligations arising under the ILO’s 1998 Declaration on Fundamental Principles and Rights at Work. The ILO determined that eliminating the back pay remedy left the US government with little or no machinery for effectively ensuring that undocumented workers are protected against discrimination.⁸⁸

F. INDIGENOUS RIGHTS

The 1648 Treaty of Westphalia helped mark the end of the so-called Dark Ages when feudalism reigned. It ushered in the then fresh concept of the nation-State [textbook §1.1.A.]. But it included a great deal of ambiguity about how these new entities were to treat their indigenous populations. As vividly recounted by University of Arizona Professor S. James Anaya, in his analytic references to Swiss diplomat and prominent academic theorist Emmerich de Vattel (1714–1769):

Vattel’s ambiguity on the status of indigenous peoples was compounded by his statements on the condition of political communities falling under the authority of others. On the one hand Vattel held that a [S]tate does not loose its sovereignty or independent status by placing itself under the protection of another as long as it retains its powers of self-government. On the other hand ... , once ‘a people ... has passed under the rule of another,

[it] is no longer a State, and does not come directly under the Law of Nations.' Of this character were the Nations and the Kingdoms which the Romans subjected their Empire.⁸⁹

The early position of the post-Revolution US government may be gleaned from the US Supreme Court in one of its related decisions in 1823:

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.

Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill, prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parceled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or immediately, through its grantees or deputies.⁹⁰

The Unrepresented Nations and Peoples Organization (UNPO) is an international membership organization comprised of indigenous peoples. Its members also include individuals in occupied nations, minorities, and

independent states or territories who have joined together to protect their human and cultural rights, preserve their environments, and to find non-violent solutions to conflicts affecting them. Members share the unfortunate condition of not being sufficiently represented in major international fora, such as the UN. That gap results in limited representation of their human rights issues.⁹¹

The UNPO website provides information about its activities, including the relevant work of the UN Commission on Human Rights, the UN Working Group on Indigenous Populations, and the UN Permanent Forum on Indigenous Issues. As a result of the work of such organizations, the UN produced the following document—with 144 states in favor and 4 votes against (Australia, Canada, New Zealand and the US). Notwithstanding Australia's objections, it did make an historic apology to its indigenous Aborigines and Torres Strait Islanders in February 2008.⁹²

Note how this human rights treaty: (a) dovetails with the others presented in this chapter section on the potpourri of UN-supported human rights programs; and (b) is unlikely to readily make the transition from "soft-law" declaration/resolution to "hard law" in the developed nations that have much to lose by its implementation:



United Nations Declaration on the Rights of Indigenous Peoples

RESOLUTION ADOPTED BY THE
GENERAL ASSEMBLY

U.N. DOC. A/RES/61/295 (2 OCTOBER 2007)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Ten, click UN: Indigenous Peoples.

Later in the same month as the above UN Resolution, a case study classically illustrated the manner in which indigenous groups evolve and how the local government can help (or hinder) realization of their rights under national and international legal regimes:



**Aurelio Cal and Maya Village
of Santa Cruz v.
Basilio Teul et al, the Attorney
General of Belize, and
Minister of Natural Resources
and Environment Defendants**
and the consolidated case of
**Manuel Coy, Maya Village of
Conejo, Manuel Caal, Perfecto
Makin, Melina Makin
Claimants v. Attorney General
of Belize, Minister of Natural
Resources, and Environment
Defendants**

SUPREME COURT OF BELIZE
(18 OCTOBER 2007)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Ten, click Indigenous
Rights Case.

Bolivia expressly embraced indigenous rights in its January 2009 Constitution. Its dozens of indigenous groups won the right to vote in 1952. But their autonomy over indigenous lands in Latin America's poorest country was not protected by the constitution until 2009—when the first indigenous president, an Aymara Indian, was in office. He aligned himself with Venezuelan President Hugo Chavez' "21st-century socialism." A constitutional provision now grants autonomy to the thirty-six indigenous "nations" within Bolivia as well as the opposition-controlled Bolivian states where large agri-business and natural gas reserves drive much of Bolivia's economy.⁹³

G. PRISONERS' RIGHTS

Other parts of this book touch upon the rights of prisoners: refugees [§4.2.C.]; injury to aliens [§4.4.B.]; universal principle of jurisdiction [§5.2.F.]; self-executing treaties [§7.1.A.]; international criminal courts [§8.5.B]; Geneva Conventions [§9.6–§9.7]; and the UN Convention on Torture [§9.6.B.4(d–e), and §9.7(a).]. This section focuses on the prisoner, qua prisoner. It exposes the reality of how prisoners of any stripe are treated within most nations—and thus a matter of international concern.

As succinctly summarized by former UN Special Rappateur and Professor of Law at England's University of Essex Nigel Rodley: "Most findings by international bodies involve a combination of factors such as overcrowding, prolonged solitary confinement, confinement within cells without any or much activity outside the cell, and poor sanitation facilities. The first two, by themselves, amount to prohibited ill-treatment under certain circumstances. Of course, brutal treatment by prison personnel will offend the prohibition."⁹⁴

This problem spawned the UN Declaration on Standard Minimum Rules for the Treatment of Prisoners. They were adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955. They were subsequently approved by the UN Economic and Social Council in 1957 and 1977.⁹⁵ As they explicitly acknowledged: "In view of the great variety of legal, social, economic and geographical conditions of the world, it is evident that not all of the rules are capable of application in all places and at all times." They were not intended to describe in detail a model system of penal institutions. They were (and remain) a UN-vetted general consensus on the essential elements of an adequate system. These Rules thus serve as a generally accepted restatement of good principles and practice for the treatment of prisoners and institutional management.

In 1988, the UN General Assembly authored two related documents. As you read them, you might consider how they have been applied (or misapplied) in the above-referenced sections of this book:



**Body of Principles for the
Protection of All Persons
under Any Form of Detention
or Imprisonment**

GENERAL ASSEMBLY RESOLUTION 43/173
(9 DECEMBER 1988)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Ten, click Detention/Imprisonment
Principles.

Can interrogations be undertaken that are not intended to do bodily harm, nor leave evidence of their

occurrence? The companion UN document immediately below asks: What if harsh interrogations are deemed necessary to protect a large civilian population that is constantly under attack from its neighbors?



Israeli Interrogation Cases

UNITED NATIONS HIGH
COMMISSIONER ON HUMAN RIGHTS
CONSIDERATION OF REPORTS SUBMITTED

BY STATES PARTIES

UNDER ARTICLE 19 OF THE CONVENTION (ISRAEL)

BY COMMITTEE AGAINST TORTURE

CAT/C/33/Add.2/Rev.1 (18 February 1997)

Go to Course Web Page, at:

<http://home.att.net/~sломansonb/txtcsesite.html>.

Under Chapter Ten, click Israeli Interrogation Cases.

H. DISABLED RIGHTS

The Convention on the Rights of Persons with Disabilities and its Optional Protocol were adopted in December of 2006. The Protocol provides the competence of the Committee on the Rights of Persons with Disabilities to receive and consider communications regarding individuals or groups who claim to be victims of a violation by a State Party.

There were eighty-two immediate signatories to the Convention, forty-four to the Optional Protocol, and one onsite ratification of the Convention. This is the highest number of signatories to ever participate in a UN Convention on its opening day. This Convention clearly marks a shift in national attitudes regarding people with disabilities.

The Disabilities Convention embraces a broad range of persons with protected disabilities. It facilitates people with disabilities being able to enjoy the same human rights and fundamental freedoms guaranteed to other groups. It clarifies how various rights apply to persons with disabilities with provisions on how persons with disabilities may effectively exercise their rights; in what circumstances their rights have been violated; and where protection of their rights must be reinforced.⁹⁶

The key provisions are as follows. Note the connections with other materials you previously studied regarding International Humanitarian Law, torture, and the International Covenant on Economic, Social, and Cultural Rights:



United Nations Convention on the Rights of Persons with Disabilities

<http://www.un.org/disabilities/convention/conventionfull.shtml>

Go to Course Web Page, at:

<http://home.att.net/~sломansonb/txtcsesite.html>.

Under Chapter Ten, click Disabilities Treaty.

I. GLBT RIGHTS

Members of the Gay, Lesbian, Bisexual, and Transgender Communities also assert their entitlement to freedom from discrimination. They feel that discrimination often comes in the form of criminal sanctions imposed by governments thrusting themselves into the most private corners of their lives. Consider the following two documents (pro and con) in the first-ever UN General Assembly debate on this issue:



Statement on Human Rights, Sexual Orientation and Gender Identity

General Assembly French-Dutch Declaration
Read in the General Assembly by Argentina
(December 19, 2008)

&

Joint Statement, Issued by the Syrian Delegation

Organization of Islamic Conference-sponsored
Declaration

Read in the General Assembly by Syria
(December 19, 2008)

UN Round of the Gay Rights Debate (op-ed)

William R. Slomanson (Feb. 24, 2009)

Go to Course Web Page, at:

<http://home.att.net/~sломansonb/txtcsesite.html>.

Under Chapter Ten, click GLBT UN Debate.

France decided to use the above declaration format because there was not enough support for an official UN General Assembly resolution. The above text was read aloud in the General Assembly by Ambassador Jorge Argüello of Argentina. It is the first declaration on gay rights ever read in the 192-member General Assembly. This unprecedented French and Dutch-sponsored declaration was broadly supported in Europe and Latin America. It initially won the support of sixty-six countries.

Several speakers addressing a separate conference on the same subject noted that the discriminatory laws stemmed as much from the British colonial past as from religion or tradition. Navanethem Pillay, the UN High Commissioner for Human Rights, said that—like apartheid laws that criminalized sexual relations between different races—laws against homosexuality “are increasingly becoming recognized as anachronistic and as inconsistent both with international law and with traditional values of dignity, inclusion and respect for all.”⁹⁷

The above French and Dutch-sponsored statement follows on the heels of the March 2007 Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity. This group of human rights experts, including the former UN High Commissioner on Human Rights, met in Yogyakarta, Indonesia to express views akin to the above French–Dutch declaration.⁹⁸


Homosexuality is criminally prohibited in over seventy countries. It is subject to the death penalty in a half-dozen of them—particularly in Africa, Asia, and the Middle East. The following ranked among those nations that refused to support this nonbinding measure: China, the Organization of the Islamic Conference (textbook §3.5.E.), Russia, the US, and the Vatican. Middle Eastern opponents criticized it as an attempt to legitimize “deplorable acts.”

The opposing statement read in the General Assembly was supported by nearly sixty nations. It rejected the idea that sexual orientation is a matter of genetic coding. The statement, led by the Organization of the Islamic Conference, provides that the effort to decriminalize homosexuality threatens to undermine the international framework of human rights by trying to normalize pedophilia, among other acts.

US opposition was based on technical legal grounds. The text was claimed to be too broad. It uses terminology regarding anti-discrimination such as “without dis-

tinction of any kind.” If adopted by the US, it might be interpreted as an attempt by the federal government to override states’ rights on issues including gay marriage. As Alejandro Wolff, the US Deputy Permanent Representative to the UN explained: “We are opposed to any discrimination, legally or politically, but the nature of our federal system prevents us from undertaking commitments and engagements where federal authorities don’t have jurisdiction.” President Obama changed course from Candidate Obama in March 2009. The US then opted to support the French view.

Given the above claimed attribution of anti-GLBT sentiment to colonial British-based homophobia, it is fitting to choose a contemporary British case regarding its current attitude:



**Naz Foundation v.
Government of NCT of Delhi**

HIGH COURT OF DELHI
AT NEW DELHI
(July 2, 2009)

Go to Course Web Page, at:
<<http://home.att.net/~slomansonb/txtcse.html>>.
Under Chapter Ten, click [India Gay Rights](#) case.

◆ §10.4 REGIONAL HUMAN RIGHTS APPROACHES

Several regional human rights programs coexist with the UN program. The degree to which they have been successful, in comparison to the UN’s *global* program, depends on the political solidarity of the particular region. This section highlights some human rights initiatives in Europe, Latin America, Africa, and Asia.⁹⁹

The UN Charter encouraged the development of regional processes. It did not provide for any juridical link between the UN’s International Court of Justice (ICJ) and the various human rights courts that evolved [Chart 9.1]. The ICJ is called upon to adjudicate any type of dispute between States, arising anywhere in the world. Regional human rights courts, on the other hand, entertain a comparatively limited scope of jurisdiction, based on local human rights treaties.

As with States, organizational enforcement entities must acknowledge the general prohibition upon engaging in extraterritorial applications of regionally defined human rights norms. The Inter-American Human Rights Commission, for example, would not purport to officially question any action taken by the United States in Afghanistan or Iraq. But ordering the US to take the “urgent measures necessary” to accord the Guantanamo Bay detainees’ human rights guaranteed under a local treaty regime is another matter [Inter-American Guantanamo directive: §9.7.B.1.].¹⁰⁰

A. EUROPE

1. Historical Evolution The Council of Europe (1949) is an international organization composed of forty-three European nations. The Council’s essential goal is the maintenance of political and economic stability in Europe. Member States have characterized the preservation of individual rights as being an important method for achieving this goal. The constitution of the Council of Europe provides that each member must ensure “the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.” This provision was implemented by the creation of two human rights treaties: the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHR) and the European Social Charter. Upon ratification, the national participants bind themselves to grant the rights contained in various regional treaties to their inhabitants.¹⁰¹ One of these is the 1992 Treaty of Maastricht, which deals with economic development. The pervasiveness of human rights as an element of development is evident in Article 130(u). It provides that “Community policy ... shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.”

The CPHR treaty contains civil rights that are virtually identical to those set forth in the foregoing United Nations Covenant on Civil and Political Rights. The CPHR treaty protects the rights to life, public and fair hearings, peaceful enjoyment of possessions, an education, freedom from torture or other degrading treatment, and the freedoms of thought, conscience, religion, expression, and peaceful assembly.

The European Social Charter provides for economic and social rights that are similar to those set forth in the above UN Covenant on Economic, Social, and Cultural

Rights. The European Social Charter guarantees the rights to work, safe working conditions, employment protection for women and children, vocational training, and the right to engage in gainful occupations in the territories of other member States.

2. Enforcement The European Court of Human Rights may be *the* most effective tool in this region’s human rights arsenal. This is the judicial arm of the Council of Europe. The Court hears cases arising under the European Human Rights treaty [textbook §8.6.B.]. The Court is seated with the Council of Europe in Strasbourg, France. It was this court’s predecessor that directed Ireland to permit a pregnant minor to leave the country for the purpose of obtaining an abortion in Great Britain although the Irish Constitution forbade abortions under the circumstances.¹⁰²

In 1998, a reconstituted court replaced the two prior entities responsible for ensuring that the Contracting Parties comply with their obligations under the Convention: a court with the same name and the European Commission on Human Rights. The reform was spawned by the growing difficulty experienced by the prior judicial body and the former administrative Commission’s efforts to cope with an ever-increasing volume of cases. The reconstitution of the European Court of Human Rights into various chambers and the elimination of the European Commission on Human Rights avoided the time-consuming examination of the same cases by two separate bodies. Under Protocol No. 11 to the European Convention on Human Rights (ECHR), the Court’s jurisdiction is now compulsory. Under the prior system, acceptance of both the right of individual petition to the Commission and the Court’s jurisdiction were optional. Another feature of the revised structure is that the adjudicative role of the Committee of Ministers of the Council of Europe was eliminated. The Committee of Ministers will, however, retain its present responsibility for supervising the execution of the Court’s judgments.¹⁰³

The European Court of Human Rights has been a very useful force for preserving human rights in Europe. One reason is that unlike other international venues, individuals may themselves be parties—rather than States only.¹⁰⁴ In a 1998 decision, for example, the Court rendered a unanimous judgment against Bulgaria that had been brought by several individuals. They successfully claimed that while a father had hit his plaintiff

son on the day that injuries were also allegedly caused by the police, Bulgaria violated the ECHR. It failed to investigate “torture or degrading treatment or punishment” by public authorities and thus failed to provide an effective remedy for police misconduct. The police also failed to adequately review the lawfulness of the son’s two-year detention, during which the case should have come to trial.¹⁰⁵

The European Court of Human Rights is a forum that also advocates limits on State excesses which can threaten regional stability. The following case involves a classic illustration:



K.-H. W. v. Germany

EUROPEAN COURT OF
HUMAN RIGHTS

Judgment on the Merits (22 March 2001)

Application No. 37201/97

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Ten, click Berlin Wall Border
Guard Case.

In August 2007, timed to coincide with an anniversary of German reunification, archivists located the first written proof that German border guards had been ordered to shoot to kill. The unsigned order dated October 1, 1973, provided for such shootings, “even when the border is breached in the company of women and children, which is a tactic the traitors have often used.” Between 270 and 780 people were killed in their attempts to cross to West Germany. Some 2,800 East German border guards became such “traitors” by crossing themselves. The last East German communist leader denied such orders, even after their revelation, because “such an order would have contradicted East German law.”

A 1950 letter from the US Ambassador to South Korea—dated the day of the US Army’s mass killing of South Korean refugees at No Gun Ri in 1950—was the first evidence that the official US policy was to shoot in the following circumstances: “If refugees do appear from the north of US lines they will receive warning shots, and if they persist in advancing they will be shot.”¹⁰⁶

The morality of these episodes (East German or US in Korea) would be intensely considered by placing yourself in the shoes of the on-scene military commanders, caught up in the prevailing political scenarios at hand. Alternatively, is there no possible excuse for either event? Would your response likely be affected by your having a military background or a family member in the military? Your political affiliation?

The existence of Europe’s comprehensive human rights machinery does not mean that the interests of the national participants always yield to the rights of the individual. For example, Great Britain’s 1988 Prevention of Terrorism Act extended pre-arraignment detention for those suspected of terrorism from two to seven days. In the major national case to be prosecuted under that act, four men from Northern Ireland were held for periods of from five to seventeen days. They were never charged with a crime. They were unable to seek redress in the English courts, so they filed a claim in the European Court of Human Rights. The Court in Strasbourg held that England’s law permitting police to detain suspected terrorists for even seven days without a hearing violated the ECHR. The ECHR requires “prompt” access to a judicial officer after an arrest. The ECHR also provides for “an enforceable right to compensation.” However, rather than complying with the court’s ruling, the British government announced that it would withdraw from the applicable sections of the ECHR treaty. (The 1,100 suspected terrorists detained in the US under its Patriot Act—between September 11, 2001 and November 2001—fared no better.¹⁰⁷)

Notwithstanding occasional setbacks, this regional human rights process is the model for all regions of the world. The work of the ECHR and the national willingness to abide by its judgments has greatly contributed to overcoming the historical national sovereignty barriers to effective enforcement of International Human Rights Law. As summed up by University of Connecticut Professors Mark Janis and Richard Kay:

Nowadays, the European Court of Human Rights regularly finds nations in breach of their obligations under the international human rights law. ... Remarkably, sovereign states have respected the adverse judgments of the Court ... [and] have reformed or

abandoned police procedures, penal institutions, child welfare practices, administrative agencies, court rules, labor relations, moral legislation, and many other important public matters. The willingness with which the decisions of the European Court have been accepted demonstrates the emergence of a crucial new fact in the Western legal tradition: an effective system of international law regulating some of the most sensitive areas of what previously had been thought to be fields within the exclusive domain of national sovereignty.¹⁰⁸

In February 2005, the court ruled against Russia in six cases involving incidents occurring in Chechnya between October 1999 and February 2000. In each case, Russia violated Article 2 (right to life) and Article 3 (right to an effective remedy) of the European Convention on Human Rights. The applicants complained of various wrongs, including:

- a. extra-judicial executions of their family members by Russian military forces;
- b. Russian criminal investigations failing to identify those responsible although a civilian court ordered the Russian Ministry of Defense to pay money damages to the families of the deceased;
- c. the bombing of civilians attempting to escape the fighting in Chechnya's Grosny region; and
- d. the intentional and unnecessary destruction of civilian property.¹⁰⁹

3. OSCE Process Another European process has emerged as the regional guardian of human rights. Under the "Helsinki Final Act" of 1975, thirty-five nations (now fifty-six) convened the Conference on Security and Co-operation in Europe (CSCE—now OSCE). The initial driving force for this development was the former Soviet Union and other Warsaw Pact nations. They pursued the concept of a regional political and security arrangement for several decades. Canada and the US were invited to participate because of their prominent positions in NATO.¹¹⁰ The organization now has several institutions dedicated to the preservation of human rights,¹¹¹ including a High Commissioner on National Minorities and an OSCE Elections Commission tasked with observing elections as an international observer.¹¹²

These entities are playing possibly their most prominent human rights role ever, working with the UN in its administration of Kosovo. The OSCE is the key agency responsible for human rights monitoring, protection, promotion, and capacity building. Its human rights monitors are deployed throughout Kosovo. They report human rights violations and assist in building a local capacity to self-monitor, report, and advocate for human rights. Together with the UN High Commissioner for Refugees, the OSCE Mission's human rights teams have conducted surveys on the situation of ethnic minorities in the province.

The Final Act is not a treaty in the traditional sense. Its human rights work product more closely resembles the aspirational nature of the UN Charter and Universal Declaration of Human Rights—which is not surprising given the comparatively large number of members from all over Europe. They are not integrated in the many ways enjoyed by members of the Council of Europe. The Act is a declaration of "Principles Guiding Relations Between Participating States." It is a political statement of principles not intended to be immediately binding. It provides a regional standard of achievement. The State participants decided not to commit themselves to anything other than general principles, due to a lack of consensus on the question of how to achieve regional security.

The fundamental human rights provision of the Helsinki Final Act is Principle VII of its Declaration of Principles. It provides that in "the field of human rights and fundamental freedoms, the participating States will act in conformity with the purposes and principles of the Charter of the UN and the Universal Declaration of Human Rights. They will also fulfill their obligations as set forth in the international declarations and agreements in this field, including inter alia the [1966] International Covenants on Human Rights. ..."

International disagreements about the individual's right to travel were one reason for the early inability of conference participants to achieve a concrete agreement on security and human rights. Certain nations, particularly the US, actively pursued implementation of the right to international travel. The US State Department issued annual reports for ten years after the initial 1975 CSCE conference, focusing on travel restrictions between East and West. The US therein denounced Eastern European travel restrictions, typified by the

former “Berlin Wall,” as being contrary to the human rights principles stated in the Helsinki Declaration (*see, e.g., above Berlin Wall Border Guard Case*).

The OSCE played a notable, but ultimately unsuccessful, role in monitoring the Russian assault on Chechnya that began in 1994. In 1995, Russian President Boris Yeltsin agreed to allow an OSCE human rights mission to maintain a permanent presence in the region. Yeltsin assured the foreign ministers of Germany, France, and Spain, who were on a mission from the European Union, that Russia was committed to a political settlement of the Chechnya crisis to be undertaken in conformity with OSCE human rights objectives. The OSCE contribution in other fields is addressed in §3.5.B. (international organizations).

In April 2004, delegates from the fifty-five (now fifty-six) OSCE nations met in Berlin for the OSCE Conference on Anti-Semitism, spurred in part by the notable increase in anti-Semitism in France. Leaders there unveiled their landmark “Berlin Declaration” against anti-Semitism, pledging to “intensify efforts to combat anti-Semitism in all its manifestations and to promote and strengthen tolerance and non-discrimination.” Its key provisions are as follows:

Recalling that Article 18 of the Universal Declaration on Human Rights and Article 18 of the International Covenant on Civil and Political Rights state that everyone has the right to freedom of thought, conscience and religion,

...

Recognizing that anti-Semitism, following its most devastating manifestation during the Holocaust, has assumed new forms and expressions, which, along with other forms of intolerance, pose a threat to democracy, the values of civilization and, therefore, to overall security in the OSCE region and beyond,

...

3. Declare unambiguously that international developments or political issues, including those in Israel or elsewhere in the Middle East, never justify anti-Semitism. ...¹¹³

B. LATIN AMERICA

1. Treaties Human rights norms are expressed in the Charter of the Organization of American States (OAS),¹¹⁴ the American Declaration of the Rights and

Duties of Man, and the American Convention on Human Rights. These norms are monitored by the Inter-American Commission on Human Rights.

The OAS Charter and the American Declaration of the Rights and Duties of Man were both proclaimed in 1948. The latter declaration of principles echoes the political and civil rights contained in the UN’s 1948 Universal Declaration of Human Rights (UDHR) [§10.2.B.1.]. Its duties include the individual’s duty to obey the law and the general duty to conduct oneself in a way that serves the immediate community and the nation.

Like the UN Charter and the UDHR, the rights contained in the American Declaration were not intended to immediately bind the participating Latin American States. It would be better to obtain State participation in a process that at least paid lip service to modern human rights perspectives rather than risk an OAS with very few members. Yet the signatories did agree to a general statement of principles which set the normative stage for embracing the democratic ideals of the modern human rights agenda.

The most recent Latin American human rights document is the American Convention on Human Rights. In the mid-1970s, OAS members decide to expand the minimal human rights provisions contained in the 1948 OAS Charter (as amended in 1970) and the 1948 American Declaration of the Rights and Duties of Man. They were concerned because the latter document emphasized the duties of the individual rather than those of the State. The product of their work was the American Convention on Human Rights. It contains many of the human rights mentioned in the UN Charter and Universal Declaration of Human Rights. The American Declaration was one response to the excesses of the military governments of the 1960s and 1970s.

Prior to the Convention’s entry into force in 1978, the existing Inter-American Commission on Human Rights did not have a reliable legal foundation that could be traced to any document drawn by OAS member nations. The American Convention provided an express source for the Commission’s power to hear and determine human rights violations. As you read its provisions below, note the similarity to the UN articulations [§10.2.B.].

There have been mixed reactions to the region’s apparent human rights achievements. The OAS

American Convention on Human Rights

1969 PACT OF SAN JOSE, COSTA RICA

<<http://www.oas.org/juridico/english/treaties/b-32.html>>

The American states signatory to the present Convention ...

Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states;

...

Have agreed upon the following:

...

STATE OBLIGATIONS AND RIGHTS PROTECTED

Article 1. Obligation to Respect Rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

...

CHAPTER II CIVIL AND POLITICAL RIGHTS

Article 4. Right to Life

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commis-

sion of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

Article 5. Right to Humane Treatment

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

...

CHAPTER III ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

Article 26. Progressive Development

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States

...

CHAPTER VII INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Article 41. [Functions]

The main function of the Commission shall be to promote respect for and defense of human rights.

...

Article 44. [Competence]

Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

Inter-American Commission on Human Rights, for example, conducted an early human rights investigation when Cuba's Castro regime imprisoned anyone suspected of disloyalty to the 1959 revolution. Cuba did not allow the Commission to conduct inspections. Consequently, the Commission's members conducted hearings in Florida to interview Cuban refugees. The Commission found that there was a widespread suspension of the human rights guaranteed by various regional instruments. Cuba was ultimately expelled from the OAS. Yet, many commentators, who noted that similar violations occurred in the same period elsewhere in Latin America, espoused the conviction that superpower Cold War politics played a larger role in this expulsion than human rights abuse. Numerous military dictatorships in Latin America had employed similar tactics to control their people, but they were not the object of such detailed human rights scrutiny.

One must acknowledge the seeming paradox that Latin America enunciated more than its share of normative human rights values, while at the same time enduring a tradition of repressive regimes. Contrasting the political underpinnings in Western Europe and Latin America during the evolution of their respective human rights regimes in the 1970s provides a rather provocative insight. As portrayed by a past president of the Inter-American Commission on Human Rights:

Western Europe's human rights institutions, the Commission and the Court [of Human Rights], also charged governments with violations of human rights. ... Moreover, both competitive elections and ... constitutional restraints enforced by independent courts broadly limited their ends and means to those generally consistent in fact with internationally recognized human rights. ...

Latin American constitutions also contained long lists of protected rights and corresponding checks on government action. But few, if any, countries had effectively independent judiciaries available and committed to enforcing them. Furthermore, on close inspection constitutional restraints were often riddled with specific exceptions and were for the most part subject to derogation in times of emergency. And the region's constitutional courts had shown little zeal for auditing executive branch claims that the required

emergency existed and that the particular suspension of guarantees was reasonably necessary to protect public order. Their determined passivity may not have been entirely unconnected to the fact that judges ... came from the same middle and upper classes suffused with anxiety about Leftist threats to the established order of things. Serving in the midst of what luminaries of that order ... declared to be a global Cold War and in ideologically polarized societies, judges would naturally be inclined to concede to governments a very large margin of appreciation about the requirements of domestic security. In actual fact, however, governments ... committed the most flagrant human rights delinquencies secretly or at least behind the often thin veil of official denial.¹¹⁵

There was another disconnect with the apparent regional human rights renaissance in Latin America. There had been a shift from military to democratic governments everywhere except in Cuba. Chile's Pinochet was not unique [principal case: §2.6.A.2.]. In the 1960s and the 1970s, the military dictators in this region were well known for their *desaparecidos*. These were the "disappeared" individuals who were political or personal enemies of government officials.

These dictatorships, which had exhibited little concern for human rights, suddenly shifted to democracies in the 1980s. The evidence of improvement, however, was far from conclusive. Commentators were at best reluctantly positive. Many charged that little had actually changed when military rule was replaced with civilian rule. The collapse of military dictatorships did not minimize the degree of human rights violations for years to come. The following 1987 excerpt from the US-based Pacific News Service explains the apparent paradox:

The most telling clue to what sustains terror in democracies lies in Argentina where last April [1987], President Raul Alfonsín reached an accord with military officers. The accord followed protests in which some military [personnel] occupied bases to block the prosecution of fellow officers for human rights abuses committed during the 1970s.

The Argentine military functions almost like an American political party—with its own leaders, hierarchy, and civilian constituents who support it either out of blood ties or ... the conviction that any drastic action to preserve law and order is justified. But it is

a party with a difference—it has a monopoly on modern weapons and a fiercely loyal membership. Government officials have little weight with military officers, who have risen in rank because of their allegiance to generals, not to democracy.

Threatened with a coup, President Alfonsín agreed not to prosecute lower ranking officers—and to preserve democratic rule. He made a “convivencia,” or “living together” [arrangement of convenience]. ...

Nor is the *convivencia* unique to Argentina. Similar agreements exist in Guatemala, Peru, Colombia, Ecuador, Bolivia, El Salvador, and Uruguay, where civilian governments no longer [bother to] determine the level of human rights abuse.

In democratically ruled Guatemala, infamous secret police still “disappear” government critics—425 political assassinations were recorded by the local press in the first two months of 1987 alone, according to US Embassy sources. ...

And death squads continue to haunt such democratically run countries as Brazil, El Salvador, and Ecuador.¹¹⁶

In 1994, the OAS promulgated two new human rights instruments: (1) the Inter-American Convention on Forced Disappearance of Persons; and (2) the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women.¹¹⁷ The impact of the dictatorships of twenty plus years ago is fading. The OAS is increasingly engaging in regional and international business ventures [§12.3.C.]. It is taking significant steps to eliminate the historical characterization of Latin America as a region where States are committed only in principle to the rule of law in human rights matters. The Form for Presenting Petitions on Human Rights Violations is prominently posted on the OAS Web site.¹¹⁸ All such international instruments are geared toward eliminating “‘Disappearances’ [which] have come to be regarded as a quintessential evil practiced by abusive governments.”¹¹⁹

2. Cases While the foregoing account does not paint a soothing picture, there is clear evidence that the Inter-American judicial process has had very positive moments. To its credit, the Inter-American Commission on Human Rights, working in conjunction with the Inter-American Court of Human Rights, has prosecuted violations and has even allowed *amicus curiae* (friends of

the court briefs) by some very prominent human rights NGOs from a distant member State.

Certain countries (including the US) have not ratified the American Convention on Human Rights. Their rationale is that they cannot determine the extent of their commitments under the “full and free exercise of human rights” provision of the Convention. Without specific obligations being set forth in that agreement, they are unwilling to commit themselves to a process that does not fully identify the outer parameters of State responsibility to the individual.

Some OAS nations have been reluctant to ratify the 1978 American Convention for yet another reason. A unique human rights provision was inserted into the 1978 American Convention, stating that judicial remedies for certain rights cannot be suspended. The treaty-based right of *habeas corpus* means that prison officials can be forced to produce a prisoner for a prompt judicial examination of the legality of an incarceration. Under the Convention, that right cannot be suspended, even in time of emergency [see post-9–11 US habeas corpus cases in textbook §9.7.B.].¹²⁰

(a) State-Directed Disappearances A classic illustration of judicial independence, in a very sensitive context, appears in the following case where legal briefs were submitted by Amnesty International, the Association of the Bar of the City of New York, the Lawyers Committee for Human Rights, and the Minnesota Lawyers International Human Rights Committee:



Velasquez Rodríguez Case

INTER-AMERICAN COURT OF
HUMAN RIGHTS

INTER-AM. CT. H.R. (SER. C) No. 4
(JULY 29, 1988)

Go to Course Web Page

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Ten, click Rodríguez v. Honduras.

(b) Right of Information? The Court’s September 19, 2006 judgment resolved the intriguing question of whether governments have to honor a “right to information.” The existence of such a right would arguably

trump a State's ability to engage in extraordinary renditions [textbook §5.3.C.3.].

In what is perhaps the leading case on point, the Inter-American Commission lodged certain individuals' applications against the State of Chile in the Inter-American Court of Human Rights. Their claims arose generally under the Convention articles regarding Freedom of Thought and Expression, Right to Judicial Protection by the American Convention, and Obligation to Respect Rights of individuals. Specifically, Article 13.3 of the American Convention on Human Rights establishes that "[t]he right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, *or by any other means* tending to impede the communication and circulation of ideas and opinions [*italics added*]."

Chile allegedly refused to provide the petitioners with all the information they requested from Chile's Foreign Investment Committee on two forestry companies. The details involved a deforestation project that "c[ould] be prejudicial to the environment and to the sustainable development of Chile." A related organization sought "to participate actively in public debates and in the production of sound, scientific information to support the social and civic efforts of the people of Chile in favor of sustainable development." The Commission stated that the government's refusal to allow this sharing of information occurred without the State "providing any valid justification under Chilean law." Furthermore, these individual claimants supposedly "were not granted an effective judicial remedy to contest a violation of the right of access to information, [nor were] they ensured the rights of access to information and to judicial protection, and there were no mechanisms guaranteeing the right of access to public information."

In October 2004, the Comptroller General's Office issued an opinion, in response to a request filed by several individuals and organizations that contested the legality of forty-nine decisions (including the relevant investment decisions) concerning declarations of secrecy or confidentiality. That administrative opinion stated that "numerous decisions exceed the laws and regulations by declaring the secrecy and confidentiality of other types of issues... [and that] several decisions establish matters subject to secrecy or confidentiality in such broad terms that it cannot be understood that they are protected by the legal and regulatory provisions on

which they should be based." The Comptroller General's Office further stated that "it should be observed that some decisions do not include the precise justification for declaring certain documents secret or confidential."

In August 2005, the Chilean Constitution was reformed. The changes included a new Article 8:

The exercise of public functions obliges officials to comply strictly with the principle of probity in all their actions. The acts and decisions of the body of the State are public, and also their justification and the procedures used. Only a law with a special quorum can establish their secrecy or confidentiality when disclosure would affect due compliance with the functions of these entities, the rights of the individual, or national security or interest.

In October 2005, the Senate of the Republic of Chile adopted the draft law on access to public information, modifying the text of the Organic Law on General Principles of State Administration. The proposed modification would "achieve a high level of transparency in the exercise of public functions [and encourage] increased and more effective civic participation in public matters" (which remained in draft form during these judicial proceedings). Chile's Presidential Advisory Committee for the Protection of Human Rights informed the Court that "it had taken the initiative to unofficially urge some entities of the State Administration to respond to requests for information made by individuals and, particularly, non-profit organizations."

The State responded that when the above individuals submitted their petition in December 1998—and up until 2002—there was no law requiring or regulating either the disclosure or confidentiality of the administrative acts of the Foreign Investment Committee, or the documents on which its actions were based.

The Inter-American Court of Human Rights nevertheless determined that "[i]n light of the proven facts in this case, the Court must determine whether the failure to hand over part of the information requested from the Foreign Investment Committee in 1998 constituted a violation of the right to freedom of thought and expression of [the] petitioners." The Court thus characterized "the information the State failed to provide was of public interest, because it related to the foreign investment contract signed originally between the State and two foreign companies and a

Chilean company (which would receive the investment), in order to develop a forestry exploitation project that caused considerable public debate owing to its potential environmental impact....”

The Court then commented on the regional and organizational approach to such matters in the following case analysis:



In the Case of *Claude Reyes et al. v. Chile*

Judgment of September 19, 2006

INTER-AMERICAN COURT OF HUMAN RIGHTS

Go to Course Web Page, at:

<http://home.att.net/~slomansonb/txtcsesite.html>.

Under Chapter Ten, click Right to Info.

(c) Advisory Jurisdiction Section 8.4.E. of this book addressed the extent to which the UN’s International Court of Justice (ICJ) could advance International Law via its advisory opinions. This facet of the ICJ judicial power may be initiated only by a UN organ when it is unlikely that the disputing States will agree to an adversarial resolution by the ICJ. In Latin America, by contrast, the ability of the Inter-American Court of Human Rights to enhance the development of human rights is broader. In addition to OAS organs, any member State—not just the State parties to the Inter-American Convention—may request an advisory opinion. Furthermore, the Court’s Article 64.1 advisory jurisdiction is not limited to interpreting just the Convention. It extends to all “other treaties concerning the protection of human rights in the American States.”

The (right column) case on this page illustrates the Court’s advisory jurisdiction at work.

C. AFRICA

The Organization of African Unity (OAU) became Africa’s political organization of States [§3.5.F.] The 1963 OAU Charter reaffirmed the human rights principles of the UN Charter and the UN’s Universal Declaration of Human Rights. It added certain rights not contained in these documents, such as the rights to the “eradication of colonialism” and the well-being of the African people.



Interpretation of the American Declaration of Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights

INTER-AMERICAN COURT OF HUMAN RIGHTS

ADVISORY OPINION OC-10/89 (1989)

Go to Course Web Page, at:

<http://home.att.net/~slomansonb/txtcsesite.html>.

Under Chapter Ten, click American Declaration Case.

Like other regional human rights documents, the OAU Charter provisions are moral rights that exist on paper awaiting implementation. University of Calabar (Nigeria) Professor U. O. Umzurike characterizes this situation as follows:

During the 1970s human rights appeared to enjoy low esteem in Africa. ... The O.A.U. maintained an indifferent attitude to the suppression of human rights in a number of independent African states by unduly emphasizing the principle of noninterference in the internal affairs of member states at the expense of certain other principles, particularly the customary law principle of respect for human rights. ... For instance, the massacres of thousands of Hutu [tribal people] in Burundi in 1972 and 1973 were neither discussed nor condemned by the O.A.U., which regarded them as matters of [Burundi’s] internal affairs. The notorious regimes of Idi Amin of Uganda (1971-1979) [and other African leaders] escaped the criticism of the O.A.U. and most of its members.¹²¹

One could of course add a score of other subsequent disasters, including the 1994 Rwanda genocide where 800,000 citizens were hacked to death while the OAU, neighboring African nations, and the UN knowingly failed to react.¹²²

In his 1993 treatise on International Law, Professor Umzurike characterized the positive potential of the Banjul (African) Charter on Human and Peoples’ Rights, which entered into force in 1986. It contains rights like those in the UN’s 1966 Covenants [§10.2.B.].

A number of those rights can be derogated by law, however, without any significant limitations on the State parties. While the African Charter internationalizes human rights on the African Continent, "there are practically no effective measures for enforcement."¹²³

Why do human rights in Africa not enjoy the degree of recognition found in Europe or the Americas? One reason is that the question just posed contains a degree of cultural relativism. The latter societies tend to perceive human rights as having a broader basis than just the individual. A Danish scholar who has written extensively on comparative human rights issues commented as follows on the divergent paradigms:

[W]hile the American approach reflects a strong ideological stance favorable to universality of human rights, the Europeans base their conclusions more on the degree to which the universality is reflected empirically in the various instruments.

The African approach can mainly be divided into two schools, the first of which constitutes the most radical opposition to [a] universalist approach. The main argument here is rooted in the different philosophical basis of Western Europe and Africa, with a particular emphasis on the lack of an individualistically perceived personality in traditional African culture, which would render most human rights inapplicable.¹²⁴

The African perspective is generally one involving a distrust of internationally derived human rights measures. Some African scholars perceive these "global" rights as being yet another attempt to impose Western cultural values on the African continent. University of Cape Town Professor T. W. Bennett summarized this position in his study of human rights in southern Africa (in 1991, just prior to South Africa's cessation of minority white political governance):

The talk about human rights that currently permeates discussions about South African law has its origins in the [external] international and constitutional human rights movement. The universality claimed for this movement should not obscure its actual cultural provenance. Although the accession of many developing countries to United Nations declarations and international [human rights] conventions gives a superficial impression of universalism, human rights

are the product of bourgeois western values. In many parts of Africa this has given cause for suspicion about a renewed attempt to impose western cultural hegemony.

[The author then refutes the argument that human rights are irrelevant to the situation in Africa, with counter-arguments including the following:]

... Feminist studies, for instance, have revealed that women used to be assured of material protection and support within the framework of the extended family; after the introduction of capitalism, however, the system of labour migration caused the breakdown of this family structure to the detriment of women (amongst others). They have now been rendered vulnerable, and at the same time forced to undertake roles (for which they have no formal legal powers) that were previously prescribed for all men.¹²⁵

Like Latin America's 1948 American Declaration on the Rights and Duties of Man, the 1986 Banjul (African) Charter on Human Rights focuses on duties. The individual has the duty to preserve family, society, the State, and even the OAU. For example, individuals must care for their parents and always conduct themselves in a way that "preserves social and national solidarity."

The fulfillment of such duties may be perverted by a national leader. Idi Amin suppressed individual rights in Uganda, leading to thousands of citizens being killed or jailed without just cause in the 1970s. While no human rights document would mean anything to a leader like Amin, the 1986 African Charter conveniently emphasized duties rather than the minimal rights denied to Ugandans under Amin. As stated by Professor Umozurike, the "concept of duties stressed in the Charter is quite likely to be abused by a few regimes on the continent, if the recent past can be any guide to future developments. Such governments will emphasize the duties of individuals to their states but will play down their rights and legitimate expectations."¹²⁶

Like other global and regional instruments, the 1986 African Charter established an administrative commission for overseeing the observance of human rights. The African Commission on Human Rights is an eleven-member body composed of representatives from the fifty-two national members of the OAU. Seated in Banjul, Gambia, the Commission is tasked with managing alleged human rights violations on the African Continent. It may only study, report, and recommend. It has

no enforcement powers. It conducts country studies and makes recommendations to member governments. The Commission has the power to publish its reports when it concludes that an OAU State has violated the human rights provisions of the African Charter.¹²⁷ This Commission's very existence, however, represents a significant aspirational improvement after centuries of slave trade, colonialism, and despotic regimes. But this regional mechanism was nevertheless unable to regulate the egregious human rights violations exemplified by the Rwandan slaughter of 1994.

If one were to characterize the Commission's power of publication of negative reports as a voice for enforcing human rights in Africa, then that voice may be easily silenced. Individuals and States may report violations of the African Charter to the Commission. The Commission then explores the basis for such claims, drafts confirming reports, and may publish them in all OAU countries. The allegedly offending nation's leader may, however, avoid such negative publicity by requesting a vote from the OAU Assembly (Africa's heads of State) to block publication. Since its creation, the Commission has not published one adverse report of mistreatment of individuals by an OAU member State.

There is a fresh perspective, however. The October 2002 Cairo-Arusha principles on Universal Jurisdiction in Respect of Gross Human Rights Offenses are an attempt to use universal jurisdiction [§5.2.F] in a unique way. Universal jurisdiction would apply to gross violations in war and "even in peacetime." It would not be limited to just individual defendants, but would be extended to legal entities such as States or corporations. Crimes that the Cairo-Arusha Principles add to the usual list of universal crimes (specifically referring to the Statute of the International Criminal Court) would include acts of plunder, gross misappropriation of public resources, trafficking in human beings, and serious environmental crimes.¹²⁸

The use of truth and reconciliation commissions [§8.1.B.1.] and other alternative forms of justice would not relieve States of their "responsibility and their duty" to prosecute, extradite or transfer persons suspected or accused of gross human rights violations under International Law. The principles also provide that the victims of these offenses should receive reparation, "to the extent possible." The cost of this civil remedy, if implemented, would be extraordinary—a main objective of the Cairo-Arusha Principles.

In December 2003, a protocol to the African Charter presented State members with the opportunity to establish an African Court on Human and Peoples' Rights. The body is supposed to complement and reinforce the functions of the above Commission on Human and Peoples' Rights. Pursuant to this Protocol, the Court "will address the need to build a just, united and peaceful Continent free from fear, want, and ignorance ... [and it will] enhance the African Union's Commitment to the realisation of human rights ... on the Continent." This treaty entered into force in 2004. Under the July 2008 Protocol on the Statute of the African Court of Justice and Human Rights, they "are hereby merged into a single Court and established as 'The African Court of Justice and Human Rights.'"

D. ASIA

A number of Chinese scholars view the existing International Law of Human Rights as a pretext for intervention in the internal affairs of socialist nations. They believe that the field of human rights is primarily a matter governed by the internal law of a State rather than one falling within the competence of International Law. Any pressure on China to apply Western standards to the government's treatment of its own citizens would interfere with Chinese sovereignty. The Chinese were quite offended, for example, when the 1989 government restraints on the student uprisings in Beijing were characterized by the Western press as a return to Maoist-era restrictions on internationally recognized human rights. See Tiananmen Square picture below.

A representative Chinese scholar from the earlier Maoist era rationalized such treatment with the perspective that human rights have been intact in China for some time. Thus, there is no need to embrace the approach expressed in the UN's International Bill of Human Rights. The elimination of private ownership of property, for example, is perceived as a guarantee of the genuine realization of human rights of the Chinese people. Chinese Professor Ch'ien Szu stated in 1960 that the "rights of landlords and bourgeoisie arbitrarily to oppress and enslave laboring people are eliminated; the privilege of imperialism and its agents to do mischief ... is also eliminated. To the vast masses of people, this is a wonderfully good thing; this is genuine protection of the human rights of the people. The bourgeois ... international law scholars, however, consider this to be a



A Chinese man stands alone before a row of Chinese tanks at the time of the 1989 Tiananmen Square massacre in Beijing, China. AP photo by Jeff Widener reprinted with permission of AP/World Wide Photos.

bad thing, since it encroaches upon the ‘human rights’ of the oppressors and exploiters.”¹²⁹

Contemporary human rights perspectives are not as State-centric as in previous eras. In the aftermath of the Cultural Revolution of 1966–1976, Professor Szu’s perspective would no longer be representative of recent Chinese scholarship on human rights. Contemporary thought is that the way in which one country or group establishes a human rights model is not necessarily the sole criterion for judging the performance of other countries. Chinese citizens enjoy far greater human rights protection now than in the Maoist era.¹³⁰ Yet the People’s Republic of China (PRC) was rather irritated when Hong Kong incorporated the UN Covenant on Civil and Political Rights into its domestic law just prior to the PRC takeover by China. The 1991 Bill of Rights Ordinance made the UN Covenant the essential source of human rights law in Hong Kong.¹³¹

Scholars in Asia’s democratic States have a distinct criticism for what they characterize as arrogant Western

human rights standards. Indian scholars believe that the Western-derived concepts of human rights, stated in the UN Charter and the various regional programs modeled after the Charter, benefit only developed States [textbook §10.4.E. on Muslim Perspectives]. Thus, the UN’s international human rights program has little meaning for a State whose people do not all have the basic necessities of life. As articulated by Patna University (India) Dean Hingorini, traditional “human rights have no meaning for these States and their peoples. Their first priority is [obtaining] basic necessities of life. These are bread, clothing and shelter. These necessities of life could be termed as basic human rights for them.”¹³²

Dean Hingorini’s perspective does not mean that Indian scholars *oppose* the human rights principles set forth in the various UN and regional charters. Their view is that these politically oriented rights are irrelevant for the time being and of little practical value to the people of India today. Attaining such rights, as expressed in what might be considered an advanced UN model,

cannot take precedence over India's need to first provide the more basic essentials to its populace. The more developed nations can afford to be the champions of political and economic human rights such as the rights to work and education.

Indian scholars also perceive developed nations as proclaiming the importance of such advanced rights for the convenient purpose of ensuring that their multinational corporations can exploit the Indian masses. As East Indian Professor S.B.O. Gutto recalls:

Historical developments in the Third World countries in the last few decades have firmly fashioned the Third World as theaters for the violation of human rights. ... Classical international law, under the umbrella of "law of nations" developed as a major super-structural tool for facilitating and justifying the actions of some states and their agents, in ensuring the dominant economic classes and institutions, and in dividing the world into spheres where ... enslavement, dehumanization, super-exploitation of peoples labour and resources takes place. The unsatisfactory condition of human rights in the Third World today is therefore not solely a reflection of inherent social factors in the Third World but rather products of the historical relations in the world system corresponding to the international division of labor.¹³³

The contemporary scope of national economic development may thus be correlated to the degree of affordable human rights enjoyed by a nation's populace. A high percentage of unemployment may be characterized under prevailing human rights norms as a State's failure to afford the right to work. An underdeveloped country like India is not economically equipped to create and implement such human rights or to establish commissions to monitor human rights observance. Such countries must first achieve a comparatively minimal degree of economic development.

India's Professor T. O. Elias, formerly a judge of the International Court of Justice, articulated the following assessment of this correlation when he described the 1964 Seminars on Human Rights in Developing Countries conducted in Kabul, Afghanistan: "[T]he existence of adequate material means and a high standard of economic development were essential prerequisites of the full and effective enjoyment of economic, social and cultural rights, and contributed to the promotion of

civil and political rights. ... [T]he right to work was meaningless in countries where employment opportunities were grossly inadequate owing to overpopulation combined with economic underdevelopment."

In the last two decades, some 10,000,000 female fetuses have been aborted in India because of the availability of ultrasound equipment to identify gender. The law officially prevents doctors from revealing this information to the parents. But as explained by Bombay's Doctor Shirish Sheth: "Daughters are regarded as a liability. ... In some communities where the custom of dowry still prevails, the cost of her dowry could be phenomenal."¹³⁴

Given these realities, a comparatively poor and undeveloped economy simply cannot afford the contemporary package of human rights espoused by the more developed nations. Any attempt to implement Western political and economic rights would detract less developed nations from other national priorities—one of which is the right to development.¹³⁵ They must necessarily delay realization of these "advanced" rights contained in the prevailing human rights instruments until the far more "basic" human rights to food and adequate living conditions are first realized.

There have been some "breakthroughs" in terms of an evolving common approach to considering human rights issues. The July 2007 meeting of the Association of Southeast Asian Nations [ASEAN: text §12.3.C.] announced its Regional Working Group for [an] ASEAN Human Rights Mechanism. This statement materialized in relation to the High Level Task Force on the Drafting of an ASEAN Charter. It mandated the inclusion of a Charter provision on creation of a human rights body for this ten-nation (historically economic) group. Article 14 of the resulting 2008 Charter mentions that "ASEAN shall establish an ASEAN human rights body."¹³⁶

E. MUSLIM PERSPECTIVES

International human rights norms are supposed to exert external limitations on how a State governs its inhabitants. But as benchmarks for modern constitutional democracies, they are not necessarily as fungible as you and I might have expected. The key measurements should include: Does a given State tolerate open discussion by diverse segments of its population? Does it allow the weak a voice in their political and personal affairs? It is at this point that one can compare contemporary

Muslim States in terms of their internal human rights philosophy and practice.

University of Illinois Professor Maimul Ahsan Khan is one of the foremost analysts of human rights

in the Muslim world. His work illustrates the clash of ideals between the majority of contemporary Muslim States and today's growing number of constitutional democracies:

Islamic Legal Philosophy and Human Rights

Maimul Ahsan Khan

HUMAN RIGHTS AND THE MUSLIM WORLD:

FUNDAMENTALISM, CONSTITUTIONALISM, AND INTERNATIONAL POLITICS 237–242

(Durham, NC: Carolina Academic Press, 2003)

...

[V]ery rarely can we find a Muslim nation-state that can boast of having a functional constitutional system with long-lasting effects on the rule of law and human rights. The Muslim governments have been failing for a long time in developing their own constitutional system based on the legal doctrines presented in the Islamic sources.

... The tragedy of the Muslim people is that the ruled Muslim lacks consciousness and awareness regarding the necessity of a strong constitutional system, and the Muslim rulers are indifferent to the basic human rights of their own people.

...

The unfortunate reality is that today Muslims predominantly remain illiterate, and in this respect the situation in the oil-rich Arab countries is no better than that of their fellow non-Arab poor Muslim nations.

...

The main indicator of the success and failure of the Western and secular concepts of human rights is material achievement, while spiritual salvation is the prime concern of Islamic concepts of human rights. In mate-

rial terms, a state or society may be rich, but its humane character may be horribly poor because of its weak moral, ethical, and spiritual foundation. . . .

...

The real state of affairs concerning basic human rights in the modern Muslim nation-states does not fulfill the demands of the day. The poor performance of Muslim governments in realizing various human rights in their societies remains as a colonial legacy, and no Westernization process has helped Muslim societies achieve good governance on their own. . . . [They] have in fact adversely affected the general welfare and standard of the rule of law sustained by autocratic Muslim leaders and politicians.

...

With the help of their Western allies, many Muslim governments have been brutal in exercising state powers over their own people. That very unfortunate phenomenon has been met with popular uprisings in the Muslim world. This is the backdrop of the wide-ranging violations of human rights by the Muslim governments and the resurgence of Muslim militant groups throughout the world.

It would appear that school dress codes would be one of the more likely subjects for the application of State law, as opposed to International Human Rights Law.¹³⁷ France and Great Britain, for example, are two of the most diverse societies in Europe. Each has had to respond to enormous pressure regarding Muslim practices. In August 2004, French hostages pleaded for their lives when their captors in Iraq demanded that France rescind its ban on Muslim headscarves in French public

schools. This demand echoed amidst beheadings and other pressures exerted by such groups, seeking the exodus of foreign military troops from Iraq. While the kidnapers would surely disagree, the French law did not target Muslims. It banned all insignia that "conspicuously manifest a religious affiliation," such as Jewish yarmulkes, large Christian crosses, and Muslim headscarves.

A British court ended a two-year legal battle in March 2005. The case in question involved a Muslim

teenager sent home from school for wearing a *jilbab*. It is a long, flowing gown that covers the entire body (except for hands and face). Overruling the initial trial court decision, an appellate panel determined that this ban “unlawfully denied her the right to manifest her religion.” She was legally represented by Cherie Booth, the Queen’s Counsel and wife of Prime Minister Tony Blair.¹³⁸

A September 2004 German Federal Constitutional Court case likewise upheld the right of a female Muslim teacher to wear a headscarf in her classes. Thus, the regional law could no longer ban religious symbols in German classrooms. All of these examples can be analogized to the current leading case from the European Court of Human Rights. Its facts predate all of the preceding examples:



Leyla Sahin v. Turkey

EUROPEAN COURT OF
HUMAN RIGHTS

STRASBOURG, FRANCE

Application No. 44774/98

Judgment on the Merits (June 29, 2004)

Go to Course Web Page, at:

<<http://home.att.net/~sломansonb/txtcsesite.html>>.

Under Chapter Ten, click Muslim Headscarf Case.

The next round in this tempest surfaced in the Turkish courts in June 2008. In the 1990s, headscarves were banned from public college campuses in Turkey. They

were considered an affront to the secular notion of detaching religious affairs from all governmental institutions after the fall of the Ottoman Empire and rise of the modern Turkish State. This constitutional principle was reaffirmed as a result of a military coup in 1980.

Turkey’s Constitutional Court ruled on a February 2008 constitutional amendment, which had reinstituted the right to wear headscarves to university classes (but not other schools or in state offices). It was enacted in the context of supporting personal and religious freedom. But in June 2008, this Turkish Court determined that this constitutional amendment was unconstitutional. It violated the principle of secularism that is the hallmark of Turkey’s 1923 Constitution.¹³⁹

In October 2008, an Afghanistan appeals court imposed a twenty-year prison sentence on a male Afghan journalism student. The court ruled that he had blasphemed Islam by asking questions in class regarding women’s rights under Islam. (The trial court had sentenced him to death.) The prosecution alleged that twenty-four-year-old Sayed Kambashkh downloaded an article by an Iranian writer questioning some of the tenets of Islam relating to women’s rights from the internet, which he later distributed to others. He has always denied this charge. He claims that he was tortured into making a confession that was used against him in his trial.

The meticulous student of International Law must also consider the impact of cultural relativism in the Western quest to achieve universal human rights norms. (Problem 10.J. on female genital mutilation pursues this issue.) The following book excerpt by a University of West England professor vividly brings this point to life:

The Paradox of Universalism and Cultural Relativism

CHAPTER 2 HUMAN RIGHTS AND ISLAMIC LAW
in INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW 26–28
Oxford University Press (2003)

MASHOOD BADERIN

The theory of universalism is that human rights are the same (or must be the same) everywhere, both in substance and application. Advocates of strict universalism assert that international human rights are exclu-

sively universal. This theory is mostly advocated by Western States and scholars ... through a strict Western liberal perspective. They reject any claims of cultural relativism ... as an unacceptable theory advocated to

rationalize human rights violations. Scholars ... also often argue that Western norms should always be the universal normative model for international human rights law. Advocates ... usually seek support for their argument in the language of international human rights instruments, which normally state ‘every human being,’ ‘everyone,’ or ‘all persons’ are entitled to human rights. While ... the language ... generally supports the theory of universalism, present State practice hardly supports any suggestion that in adopting or ratifying international human rights instruments, non-Western State Parties were indicating an acceptance of a strict and exclusive Western perspective.... One may observe ... that Article 31(2) of the ICCPR, for instance, provided that in electing members of the [UN] Human Rights Committee ‘*consideration shall be given to equitable geographic distribution of membership and the representation of the different forms of civilization and of the principal legal systems*’ of the State Parties (emphasis added [by Prof. Baderin]). It is arguable that this recognizes the need for an inclusive and multi-civilizational approach in the interpretation of the Covenant.

The [counter]theory of cultural relativism is thus advocated mostly by non-Western States and scholars

who contend that human rights are not exclusively rooted in Western culture, but are inherent in human nature and based on morality. Thus human rights ... cannot be interpreted without regard to the cultural differences of peoples. ... [They] assert that ‘rights and rules about morality are encoded in and thus depend on cultural contexts.’ The theory emanates from the philosophy of the need to recognize the values set up by every society to guide its own life, the dignity inherent in every culture, and the need for tolerance of conventions though they may differ from one’s own. Cultural relativism is thus conditioned by a combination of historical, political, economic, social, cultural, and religious factors and not restricted only to indigenous cultural or traditional differences of [a] people.

...

The question has thus often been raised as to whether the theory of strict universalism in human rights is not another ‘form of neocolonialism serving to strengthen the dominance of the West.’ The ideals of universalism in international human rights law need therefore to be advanced in a manner that escapes charges of cultural imperialism ... [by] non-Western societies.

◆ §10.5 OTHER HUMAN RIGHTS ACTORS

A. NON-GOVERNMENTAL ORGANIZATIONS

Previous sections of this chapter addressed the regional and global efforts of international organizations to secure the human rights of the individual. Other human rights organizations and entities are also effective advocates. The most prominent are the privately constituted non-governmental organizations (NGOs) [§3.2.B.]. They have undertaken the rather daunting task of prodding the national observance of international human rights norms, especially where State actors have paid only lip service to this objective. The State-centric system of International Law brands them as “non-governmental” institutions.¹⁴⁰

There are limitations on the resources that States are actually willing to commit to human rights objectives. This is where NGOs routinely assist, but not without occasional blemishes on the State-NGO relationship. In

mid-1993, for example, 167 State representatives convened the Second UN World Human Rights Conference in Vienna. Their work product was the “Vienna Declaration and Programme of Action.”¹⁴¹ Their key objectives were to advocate creation of an International Criminal Court and the Office of the UN High Commissioner for Human Rights. Both were achieved. The primary credit for these developments in the International Law of Human Rights was attributed to other public institutions. The UN Security Council established the first *ad hoc* International Criminal Court (for the former Yugoslavia) in 1993. The UN General Assembly finally established the Office of the High Commissioner in 1994.

Some 1,500 NGOs sent representatives to the UN’s Vienna Conference. The UN ousted them from the drafting of the Conference’s Vienna Declaration and Programme for Action. The more powerful NGOs, such as Amnesty International, bitterly protested. But China’s threatened boycott convinced the UN to bar NGOs

from direct participation. China's perspective was that the UN did not need NGOs to accomplish its inter-governmental agenda.

The PRC's position reflects that of many Asian States. They perceive western State NGOs as attempting to impose their religious and cultural values under color of UN authority. This usually arises in the context of denouncing human rights abuses in politically targeted nations or regions. The NGOs responded to their ouster by accusing the UN of bowing to national pressure and thus retarding the achievable degree of national accountability for human rights violations.

These private organizations have nevertheless played a very critical role in human rights monitoring. The International Red Cross is one of the most prominent. Its efforts included relentless pressure for internationalizing the Laws of War [textbook §9.6.A]. The most significant work product was the 1949 Geneva Conventions and their Protocols, which deal with the treatment of civilians and prisoners during the time of war and related hostilities [Chart 9.3]. The Red Cross is the NGO that routinely inspects various national detention centers that hold political prisoners so that inmates might receive medical and other basic necessities.

The Red Cross also pressured the US military to cease its torture of prisoners at the US government's Guantanamo Bay prison in Cuba. Upon release, victims can seek the aid of Redress, the London-based human rights organization for assisting released tortured individuals to reintegrate into society. On the other hand, the Red Cross has been criticized for "remaining mostly silent in public when it has observed repeated violations of widely accepted humanitarian standards." While this assertion is true in some cases, one must acknowledge that silence is a price to be paid for at least being able to *access* prisoners under authoritarian (and some not so dictatorial) regimes.¹⁴²

Doctors Without Borders is another prominent NGO that aids those afflicted by military conflict. In June 2004, this organization lost five more members in Afghanistan, bringing its death toll to thirty-two. As claimed by a Taliban representative: "We killed them because they worked for the Americans against us, using the cover of aid work. We will kill more foreign aid workers."

Amnesty International (AI) is perhaps the most prominent watchdog group. This NGO has offices and individual members throughout the world. AI produces

annual reports on national compliance with the various human rights treaties and declarations on human rights. It is one of the many private monitors that publicize the human rights problems discussed in this chapter. As noted by Iceland's AI Director, in describing the power of the individual to change the behavior of governments all over the world: "The two pillars of Amnesty International's effectiveness are reliable research and the ability to mobilise people around the world for action. ... The research work is backed up by visits to the countries for fact-finding investigations, trial observations and meetings with both governmental and non-governmental bodies. ... The government in question will start receiving appeals from the rest of the world."¹⁴³

The major human rights NGOs enjoy consultative status in various international organizations including the Council of Europe, the OAS, and UN Economic and Social Council. Their representatives present reports to these organizations as a way of maintaining public scrutiny of offending State practices.


A prominent, but admittedly incomplete, listing of the major human rights NGOs (and headquarters) includes: Amnesty International (London); Canadian Human Rights Foundation (Montreal); Civil Liberties Organization (Nigeria); Committee for the Defense of Democratic Freedoms and Human Rights in Syria (Damascus); Doctors Without Borders (Paris); Human Rights Watch (New York); International Association of Democratic Lawyers (Brussels); International Commission of Jurists (Geneva); International Committee of the Red Cross (Geneva); International Federation for the Rights of Man (Paris); International Helsinki Federation for Human Rights (Vienna); International League for Human Rights (New York); Lawyers Committee for Human Rights (New York); Lawyers Without Borders (Connecticut); Punjab Human Rights Organization (Chandigarh); and Reporters Without Borders (Montpellier, France).¹⁴⁴

B. PRIVATE CORPORATIONS

1. Corporate Violations of Human Rights Law?

Recent US litigation has begun to address the reality of multinational corporate entities that either promote or engage in human rights violations against individuals abroad. The foreign government will of course claim sovereign immunity. But corporate actors have been increasingly scrutinized for their conduct undertaken in concert with a State actor that tramples on the rights of the individual.

The following is a classic illustration, in what is probably the most prominent case to go to trial. The subsequent stipulated dismissal and vacation of the trial court judgment means that this case cannot be cited as precedent—a far better result for Unocal and like companies than the trial court opinion remaining “on the books:”



John Doe 1 v. Unocal Corporation

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

395 F.3d 932 (2002); order for rehearing en banc,
395 F.3d 978 (2003); and
stipulated dismissal and vacation of district court
opinion, 403 F.3d 708 (2005).

Go to Course Web Page, at:
<<http://home.att.net/~sломansonb/txtcsesite.html>>.

Under Chapter Ten, click Corporate Human Rights Case.

In May 2006, Unocal settled another such case. Fifteen Myanmar villagers filed it in the US under the Alien Tort Statute [textbook §10.6.C.]. They accused Myanmar’s government of using its military forces to rape, torture, and murder as a means of preventing the plaintiffs from interfering with the building of Unocal’s oil pipeline. The case settled before trial, however, for an undisclosed amount. This was apparently the first time in US history that a corporation (actually, its insurance company) had to pay money damages for its role in human rights violations abroad.¹⁴⁵

2. Emerging Norms In August 2003, the UN Sub-Commission for the Promotion and Protection of Human Rights unanimously adopted a resolution entitled Draft Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. Pursuant to the following key norms:

- ◆ (c)(3): Transnational corporations and other business enterprises shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture,

forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law.

...

- ◆ (h)(18): Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken. In connection with determining damages in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law.

Under a quotable, but arguably Pollyannaish resolution, this subcommittee decided “to invite the transnational corporations or other business enterprises concerned to provide any comments they may wish within a reasonable time. ...” Another remote option would be a proposed International Corporate Criminal Court, modeled after the International Criminal Court (ICC) [text §8.5.D.] It would try individuals and corporations regarding corporate crimes. It is “potentially more viable than home state jurisdiction, and superior to expanding the jurisdiction of an existing tribunal.” But it would also require State consent because the UN Security Council would likely not wish to act as a triggering mechanism—as it has for the ICC.¹⁴⁶

That the various norms are now in the public sphere does not mean that transnational corporations will readily agree to incorporate them into their contractual and corporate culture. The US, for example, has not agreed to the Kyoto Protocol on greenhouse gas emissions because of the expense to its corporations [§11.2.C.4(a)]. Nevertheless, the UN’s promulgation of *some* human rights norms for corporate behavior is a step forward. Some companies have actually agreed to “road test” these principles.¹⁴⁷

In April 2008, the UN moved the potential regime for corporate human rights responsibility to the next level:



**Promotion and Protection of
all Human Rights,
Civil, Political, Economic,
Social and Cultural Rights,
including the Right to
Development**

**Report of the Special Representative
of the Secretary-General on the Issue
of Human Rights and Transnational
Corporations and Other Business
Enterprises—Protect, Respect and
Remedy: A Framework for Business
and Human Rights**

UNITED NATIONS HUMAN RIGHTS COUNCIL
U.N. Doc. A/HRC/8/5 (7 APRIL 2008)

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Go to course Web page at

<<http://home.att.net/~sломansonb/txtcsesite.html>>.

Under Chapter Ten, click Corporate Human
Rights Report.

The Organization for Economic Co-operation and Development (OECD) promulgated its Guidelines for Multinational Enterprises: Text, Guidelines, Commentary in June 2000. As articulated by the Chair of the OECD's Ministerial body, they are recommendations about responsible business conduct, which the thirty-three participating governments have directed to multinational enterprises operating in or from these countries. The OECD *Guidelines* are the only comprehensive multilaterally endorsed code that governments are committed to promoting. The *Guidelines* express the shared values of the governments of countries that are the source of most of the world's direct investment flows and home to most multinational enterprises.

In January 2009, the non-governmental organization (NGO) named Global Witness alleged that a British corporation violated the *Guidelines*. The latter allegedly did so by paying bribes to a rebel group in the Democratic Republic of the Congo (DRC) and purchasing minerals from mines in the DRC that employ forced child labor. A UK public entity agreed with the NGO

plaintiff. Afrimex thus contributed to a conflict that “prevented the economic, social and environmental progress [that is] key to achieving sustainable development and [thus] contributed to human rights abuses.”¹⁴⁸

Until this point, attempts to control human rights abuses have been geared toward State and individual actors. That focus resulted from the State-centric system which essentially shielded business enterprises—throughout the Industrial Revolution—from claims that they too can be liable for human rights abuses. This UN program seeks to more clearly inject corporations into its global human rights process. States that outsource military functions, for example, by employing private security contractors in a combat zone are perhaps most in need of this program [textbook §1.1.B.1.].

◆ **§10.6 US HUMAN RIGHTS
PERSPECTIVES**

Space limitations preclude anything but the very selective coverage of national approaches to human rights problems. This section will thus spotlight the international focus on US human rights practice.

The two preliminary rounds were presented earlier in this textbook: at §5.3.C.3. on US post-9–11 rendition practice and the Council of Europe's response; and at §9.7, on US post-9–11 Laws of War practice regarding detainees and their alleged torture while under US jurisdiction.

A. TREATY PARTICIPATION DILEMMA

The US is not a party to a number of international human rights instruments [Chart 10.1]. When ratification *has* occurred, it has typically taken decades. For example, the US Senate did not ratify the 1948 Genocide Convention until 1986.¹⁴⁹ It did not ratify the 1966 International Covenant on Civil and Political Rights (ICCPR) until 1992. When it did so, its reservation was comparable to Swiss cheese. Its various “Declaration” (reservation) clauses include that “the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing.” (The referenced ICCPR articles are listed under the previously mentioned “International Covenants.”)

As you learned in §7.1.B.4. of this book, a treaty or clause that is not self-executing creates no specific obligation. While a number of bilateral treaties with other

countries contain human rights provisions, the US has not been willing to ratify a number of multilateral human rights agreements. *Why?* One reason is that—at the time of the 1945 UN Charter, the 1948 Universal Declaration of Human Rights, and the 1948 American Convention on Human Rights, racial discrimination was permitted or in some instances, mandated in the US. Black soldiers were buried at Arlington National Cemetery in a segregated plot. Many southern Senators were not willing to embrace the post-World War II wave of UN human rights instruments. They feared that the US could be subjected to embarrassing international inquiries, based on noncompliance with certain human rights instruments.

This form of discrimination was not limited to the South. In 1948, US Supreme Court Justice Black lamented that the majority of the judges (in the particular case before the Court) ignored the UN Charter's human rights provisions. The US Supreme Court's judges thus allowed US states to legally discriminate against Japanese citizens residing in the US. Aliens were thereby prohibited from owning land under California law—in a state which had hosted wartime Japanese internment camps. In Justice Black's words:

California should not be permitted to erect obstacles designed to prevent the immigration of people whom Congress has authorized to come into and remain in the country. ... [I]ts law stands as an obstacle to the free accomplishment of our policy in the international field. One of these reasons is that we have recently pledged ourselves to cooperate with the United Nations to "promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?¹⁵⁰

It was not until 1954 that the US Supreme Court would decide in *Brown v. Board of Education* that "separate but equal facilities" were unconstitutional under US law. *De facto* racial discrimination did not end with *Brown*, however. US government agencies continued to struggle with the full implementation of *Brown* and its progeny.¹⁵¹

At the same time, Ohio's Senator John Bricker sought an amendment of the US Constitution's treaty power clause, which would have eliminated the president's executive agreement power [textbook §7.3.A.]. If successful, that measure would have required the president to obtain the advice and consent of the Senate for *all* treaties—and thereby exclude executive agreements from being included in the term "treaty."

Senator Bricker's underlying fear was spawned in part by the California Supreme Court's *Sei Fujii* case. The trial court had just ruled against discriminatory land laws which barred alien ownership. This decision could be embraced by a presidential executive agreement without any input from Congress (a possibility that never occurred). He was further troubled by US Supreme Court Justice Holmes' dictum, suggesting that treaties are not bound by constitutional limitations. Coupled with the specter of a self-executing treaty [§7.1.B.4.], more specifically an executive agreement under US practice, Bricker relentlessly expressed his concern that numerous state and federal laws might fall in the wake of presidential agreements that the Senate would not be able to bar or control.¹⁵²

In the 1960s and 1970s, Presidents Kennedy and Carter submitted various human rights treaties to the US Senate for its advice and consent. Few were ratified. The Genocide Convention was ratified during the Reagan years, but not without significant concern about how it might later "haunt" the US. Like most multilateral instruments, that widely ratified treaty is broadly worded with unassailable statements of general principle. But when there is an attempt to apply them: (a) they contain no specific definitions; and (b) both sides to a dispute can reasonably interpret them to support the polar results each one of them advocates.

A new constitutional concern supplanted the inter-governmental balance of power concerns earlier expressed by Senator Bricker. Threats to the constitutionally protected right to freedom of speech emerged as the contemporary argument for opposing US ratification of human rights treaties. Under US law, treaties cannot override the Constitution. A variety of international provisions might require the US to abandon its staunchly ingrained judicial posture that the US Constitution cannot be overcome by a treaty. When the US Senate finally ratified the 1948 Genocide Convention, forty years after the UN General Assembly's unanimous adoption, it appended a reservation providing that

“nothing in the [Genocide] Convention requires or authorizes legislation or other action by the United States of America as interpreted by the United States.” It is thus open to question whether the US is actually a party, given the famous Lauterpacht ICJ opinion that such broadly worded reservations do not agree to accepting any treaty obligation.¹⁵³

Like a number of other human rights instruments, this Convention contains wording that prohibits racial or religious hatred that constitutes an incitement to discrimination of any kind. In 1978, the American Civil Liberties Union successfully litigated the First Amendment right of Neo-Nazis to parade in Skokie, Illinois—complete with swastikas.¹⁵⁴ Assuming that the US had ratified the Genocide Convention before the time of that march, absent the preceding treaty reservation, the judicial approval and city-issued permit for this march would likely subject the US to international responsibility for a government-approved activity that incited religious hatred. Under US law, this march was a constitutionally protected activity under the First Amendment.

The question of whether ratification of human rights treaties would yield unintended consequences (State responsibility for breach of a treaty) is not limited to the free speech concerns discussed. For example, many countries have abolished the death penalty.¹⁵⁵ Many states of the US, however, impose the death penalty. Also, various US invasions might have violated some segment of the 1977 Geneva Convention Protocol relating to the protection of civilian victims in armed conflict. The US Senate declined ratification on grounds that it was “fundamentally unfair and irreconcilably flawed” because it “would undermine humanitarian law and endanger civilians in war.” The NATO bombing of Kosovo in 1999 and the invasions of Afghanistan and Iraq could conceivably trigger similar concerns—at least before 9–11 and the resulting 2002 National Security Strategy’s nascent methodology for fighting the War on Terror [textbook §9.7.D.3.].

B. EXECUTIVE BRANCH POLICY

In December 1998, President Clinton issued the Executive Order on Implementation of Human Rights Treaties. Section 1 provides that it will be US “policy and practice ... to fully respect and implement its obligations under the human rights treaties to which it is a party,”

specifically referring to the International Covenant on Civil and Political Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention on the Elimination of All Forms of Racial Discrimination.^{155a} Each executive department and agency of the US government was thereby directed to appoint a contact person who would be responsible for coordinating the implementation of human rights obligations within that department or agency.

An Interagency Working Group on Human Rights was established to coordinate human rights implementation activities. These include the preparation of responses to allegations of US human rights violations submitted to international organizations; the development of mechanisms to review legislation for conformity with human rights obligations; the monitoring of actions by state, municipal, and territorial governments for conformity with international human rights obligations; and the direction of an annual review of US reservations, declarations, and understandings to human rights treaties.¹⁵⁶

After 9–11, the US assumed a national defense posture raising questions about the US commitment to human rights. A number of journalists, academicians, and human rights advocates included the following as evidence of this concern:

- ◆ The US Patriot Act where certain rights were compromised in the name of national defense.
- ◆ The Abu Ghraib prison scandal where it did not take long to discount the military’s initial claim that only a few “bad apples” were at fault [§9.7.B.].
- ◆ The lengthy detention of “unlawful combatants” at the US military base in Cuba without access to the rights normally accorded to those imprisoned by the US [§9.7.A.]. On the other hand, the novel 2002 National Security Strategy [textbook §9.2.D.] conveyed the intended message that many of the traditional rules are *passe*—arguably ill-suited for the post-9–11 world.

There are of course a number of positives within this balance sheet. In October 2006, for example, President Bush signed an executive order blocking all financial transactions with Sudan. This implemented US policy regarding his earlier declaration that President al-Bashir’s government had committed genocide in its Darfur

sector. And although the US has not signaled its intent to sign a number of sensitive UN human rights treaties, its domestic policy supports the principles that they enshrine. The debate still centers on the vintage concern about treaties that are vague enough to garner signatures [text §7.2.A.], but not too specific about what conduct constitutes a violation.

While it may be too soon to resolve this particular debate, there are enough US policy perspectives in place to suggest that even with occasional bumps in the road, the path is still relatively clear. The following materials illustrate why.

C. LEGISLATIVE PERSPECTIVES

The US Congress has enacted some remarkable legislation to implement the rich human rights tradition the US has traditionally portrayed as a hallmark of western democracy. The following are three key examples:

1. Foreign Assistance Act Certain statutes target conduct abroad that adversely impacts human rights. One of them is Title 22 of the US Code, containing the Foreign Assistance Act. Sections 2304(a)(1) and (a)(2) provide:

The United States shall, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with the constitutional heritage and traditions of the United States, promote and encourage increased respect for human rights and fundamental freedoms throughout the world without distinction as to race, sex, language, or religion. Accordingly, a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.

Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.

This legislation prohibits providing police training to any offending foreign government unless the president certifies to Congress that extraordinary circumstances exist to warrant such assistance. The Act defines gross violations as “torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without

charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and [any] other flagrant denial of the right to life, liberty, or the security of person. ...”

Section 2151(n) of the Foreign Assistance Act is also designed to protect abused children. No assistance may be provided to any government that fails to take appropriate measures, within its means, to protect children from exploitation, abuse, or forced conscription into military or paramilitary service. The “within its means” provision recognizes that certain governments may not have the economic competence to provide the degree of protection expected under US standards.

Under the Foreign Assistance Act, the US Secretary of State must transmit an annual report to the Speaker of the House of Representatives and the Senate Committee on Foreign Relations on practices of assisted nations involving “coercion in population control, including coerced abortion and involuntary sterilization...” This provision places the relationship between the US and the PRC at odds because of the PRC’s official policy of depriving State benefits to parents who have more than one child (generally enforced in urban areas).¹⁵⁷

The Foreign Assistance Act *formerly* provided for an Assistant Secretary of State for Human Rights and Humanitarian Affairs. This position was statutorily repealed in 1994 under Vice President Gore’s “restructuring” program to reduce the size of US government. The new title for the officer in charge of this monitoring function is the Assistant Secretary of State for the Bureau of Democracy, Human Rights, and Labor. This seemingly inconsequential title change illustrates that the “restructuring” effectively contracted this officer’s human rights monitoring duties because of the significantly expanded job description.¹⁵⁸

2. Alien Tort Statute “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹⁵⁹ Congress thus gave the federal courts the power to hear appropriate cases not involving breach of contract. The predecessor of this statute was enacted in the original Judiciary Act of 1789. There is some debate about the reasons for this early legislation in the country’s first legislative statement of

the federal judicial power, as addressed later in the *Sosa* case.

The modern debate focuses on the statute's underlying purpose. The various theories include the following:

To provide a remedy for an international scandal involving a French noble who attacked a French diplomat.

To provide federal control over cases where the rights of foreign citizens had been deprived, thereby spawning international repercussions.

To give the courts of a weak, young nation— anxious to avoid foreign intervention—the ability to react quickly to such transgressions in US courts.¹⁶⁰

There is at least one basis for agreement: its scope includes suits between non-US citizens for conduct occurring abroad. In October 2005, for example, two Kurds filed a class action in the US against Saddam Hussein and his former defense minister (“Chemical Ali”). These plaintiffs sought relief for the defendants’ gassing and torching their village. This was one of forty genocidal incidents resulting in the 1988 deaths of over 5,000 Iraqi Kurds.

One critical limitation is that notice of suit must be served on the defendant while present in the US. This provides a territorial element to the exercise of US jurisdiction in such circumstances [§5.2.F]. This distinguishes US law from the prior Belgian law (which did not require *any* jurisdictional nexus with the defendant). The US Supreme Court authoritatively interpreted the Alien Tort Statute (ATS), 215 years after its enactment in the first US Judiciary Act:

The *Filartiga* case mentioned in *Sosa* unleashed the long dormant ATS. The US Supreme Court’s *Sosa* decision did not overrule *Filartiga*, but it clearly chose not to embrace it. Several scathing academic rebuttals by prominent writers resisted *Filartiga*’s sweeping application of the ATS. Chief among them is Tufts University Professor Alfred Rubin. In his view: (1) It is by no means clear that the “law of nations” was meant to apply to individuals, as opposed to States—especially in 1789, when the ATS was enacted; (2) rather than “torture,” the *Filartiga* plaintiffs alleged a “wrongful death” claim in their complaint—raising doubts as to whether the “law of nations” could provide a remedy in an action for “wrongful death”; (3) attempts to recover money damages from convicted Nazi war criminals or their heirs had been rejected by both East and West German courts; (4) the first Congress did not intend that civil lawsuits would supplant criminal offenses against the law of nations; and (5) *Filartiga* signaled a vast expansion of the rules of national jurisdiction which had been rejected in the early days of the nation.¹⁶¹

Between the 1980 *Filartiga* case and the 2004 *Sosa* case, there were many §1350 cases, which were better candidates for application of the ATS. A federal appellate court in California, for example, was the first to decide that a political leader could be held liable for *peacetime* human rights violations committed by subordinates. After a fourteen-year rule in the Philippines, Ferdinand Marcos moved to Hawaii in 1986 where he was served with process. The plaintiff Filipino victims and families received a huge money damage award based on the disappearances, summary executions, and torture that occurred under Marcos’ command authority while he was dictator.¹⁶²

The previously referenced *Kadic v. Karadzic* US case is another example.¹⁶³ A Bosnian Serb leader was responsible for the slaughter of 7,800 Muslim men and boys in several days. Victims’ relatives hired a New York human rights foundation, whose lawyers served Karadzic with process in a §1350 case (while he was attending peace negotiations at the UN’s New York headquarters).

On the other hand, the US Department of State is known for its “more often than not” filing of requests seeking dismissal of such cases. For example, in a case which relied heavily on the above US Supreme Court *Sosa* decision:



Sosa v. Alvarez-Machain

UNITED STATES
SUPREME COURT
542 U.S. 692 (2004)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Ten, click Alien Tort Statute Case.

Introductory Note on *Sarei v. Rio Tinto*

WILLIAM SLOMANSON

487 F.3d 1193 (9th Cir. 2007)

Rehearing en banc granted, 499 F.3d 923 (2007)

Remanded, 550 F.3d 822 (2008) and

___ F.Supp.2d ___, 2009 WL 2762635 (C.D.Cal.)

46 INT'L LEGAL MAT'LS 587 (2007)

...

Plaintiffs are current or former residents of Bougainville, Papua New Guinea (PNG). They alleged that they were victims of numerous violations of international law, at the hands of the London-based Rio Tinto corporation, at its Bougainville mining operations. The 1988 uprising at the Rio Tinto mine spawned a 10-year civil conflict in PNG. The plaintiffs specifically alleged that Rio Tinto, with the assistance of the PNG Government, committed egregious violations of *jus cogens* norms and customary international law including a blockade, aerial bombardment of civilian targets, burning of villages, rape and pillage. Plaintiffs asserted that thousands of Bougainville's residents died, and those who survived suffered related health problems. Many were internally displaced, and were forced to live in refugee camps, while others have fled PNG.

Plaintiffs filed suit in federal district court seeking compensatory and punitive damages, and equitable and injunctive relief for their environmental contamination and medical monitoring claims. In addition to attorney's fees and costs, they sought disgorgement of all profits earned from the Bougainville mine.

In August 2001, the district court sought guidance from the U.S. Department of State "as to the effect, if any, that adjudication of this suit may have on the foreign policy of the United States." The State Department filed a statement of interest ("SOI") in which it responded that "in our judgment, continued adjudication of the claims would risk a potentially serious adverse impact on the peace process, and hence on the conduct of our foreign relations." Further, PNG, a "friendly foreign state," had "perceive[d] the potential

impact of this litigation on U.S.-PNG relations, and wider regional interests, to be 'very grave.'" The PNG government's attached communiqué added that this case "has potentially very serious social, economic, legal, political and security implications for" PNG, including adverse effects on its international relations, and "especially its relations with the United States." The plaintiffs asked the State Department to clarify this initial response to the district court. But the Department responded that it "did not intend to file another statement of interest."

...

The appeal addressed ... whether a U.S. court is the appropriate forum for resolving such claims—where the parties and conduct are all beyond U.S. borders. The Ninth Circuit had delayed its consideration of this case while awaiting the U.S. Supreme Court's (2004) decision in *Sosa v. Alvarez-Machain* (542 U.S. 692). In *Sosa*, the Supreme Court held that "courts should require any [ATS] claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigm" causes of action for "offenses against ambassadors, violations of safe conduct ... [and] piracy."

...

The U.S. Supreme Court's *Sosa* majority opined that a "series of reasons argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early [ATS] statute."

...

As indicated in the above *Doe v. Unocal* litigation [§10.5.B.], wherein the corporation reportedly paid \$30,000,000 to settle—especially to get the unfavorable district court decision dismissed from the precedent-setting books—corporations have much to worry about.

The negative publicity referred to in the UN Human Rights Report set forth in textbook §10.5.B. could be even more costly. This statutory remedy has not been a moneymaker. But it has led to corporate counsel paying far more attention to situations where multinational

corporations depend on foreign governments to assist them in producing wealth at the cost of indigenous human rights and the environment.

3. Torture Victim Prevention Act In 1991, Congress added a refinement to the ATS. It effectively adopted the *Filartiga* decision in a limited application of its principles to “torture” and “extrajudicial killings.” The congressional purpose was to fulfill the US commitment after ratification of the UN Torture Convention. Its essential provisions follow below.

The Torture Victim Prevention Act (TVPA) limits claims to “individuals.” That prevents claims from being asserted against foreign *nations*, who are otherwise subject to suit *only* under the terms of the Foreign Sovereign Immunities Act (FSIA). The classic illustration of this limitation is set forth in the US Supreme Court *Nelson* decision [§2.6.B.]. It precluded a claim that relied on the FSIA when Saudi Arabian officials tortured Mr. Nelson for diligently carrying out his hospital management responsibilities. Because his torture was perpetrated by the Saudi government, Mr. Nelson had no legally viable claim against Saudi Arabia.

Torture Victim Protection Act

UNITED STATES CONGRESS

Pub. L. 102-256, Mar. 12, 1992, 106 Stat. 73, 28 U.S.C.A. § 1350

[Preamble]

An Act to carry out *obligations of the United States under the United Nations Charter* and other international agreements pertaining to the protection of human rights by *establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing [italics added]*.

...

Sec. 2—Establishment of Civil Action

(a) *Liability.* An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.

...

Sec. 3—Definitions

(a) *Extrajudicial killing.* For the purposes of this Act, the term “extrajudicial killing” means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by

civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) *Torture.* For the purposes of this Act—

(1) the term “torture” means any act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering ... whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person ... ; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

After the §11.4 *Sosa* decision, the courts will have to address whether the TVPA applies to private, as opposed to governmental, corporations as well. The latter are generally insulated from suit under the FSIA's "instrumentalities of a State" limitation.

Unlike the above Alien Tort Claims Act regarding suits between aliens, the 1991 Torture Victim Protection Act authorizes claims made by or against US citizens. This means that US perpetrators and victims are subject to, and have remedies under, this legislation. Various post-9-11 executive branch torture memos, however, purported to trump the applicability of this remedy with national security concerns [§9.7.D.]. The TVPA nevertheless codifies the universally accepted norm prohibiting torture by a governmental official. The TVPA extends the Alien Tort Statute to summary executions, even when not perpetrated in the course of committing genocide or war crimes.

This conduct may now be prosecuted under the TVPA when committed by foreign state officials. In the above-mentioned *Karadzic* case, the Bosnian Serb political leader was characterized as a "state official" because of his self-claimed authority over Serb forces in Bosnia. His alleged conduct was deemed to be a violation of the TVPA. Thus, the plaintiffs could pursue their claim for civil damages on the facts of this case under both federal statutes.¹⁶⁴

The September 2000 statement by the same respected federal appeals court that decided *Karadzic* and *Filartiga* provides the ideal closure (or new beginning) for the human rights chapter in an International Law course. It depicts the appropriate level of commitment needed at all levels of government to solidify the rule of law in International Human Rights Law:

The TVPA [Torture Victim Protection] thus recognizes explicitly what was perhaps implicit in the [Alien Tort Claims] Act of 1789—that the law of nations is incorporated into the law of the United States and that a violation of the international law of human rights is (at least with regard to torture) *ipso facto* a violation of US domestic law.

...

[P]laintiffs make a strong argument in contending that the present law ... expresses a policy favoring receptivity by our courts to such suits. ... This evolution of statutory language seems to represent a more direct recognition that the interests of the United

States are involved in the eradication of torture committed under color of law in foreign nations.

...

The new formulations of the Torture Victim Protection Act convey the message that torture committed under color of law of a foreign nation in violation of international law is "our business," as such conduct not only violates the standards of international law but also as a consequence violates our domestic law.¹⁶⁵

4. Genocide Accountability Act This 2007 legislation closed a loophole in the earlier statute that had domestically implemented the Convention on the Prevention and Punishment of the Crime of Genocide (for the US). That prior law provided that a prosecutor could charge a defendant with the crime of genocide, but only if it was committed either: (1) *within* the US; or (2) *by* a US national *outside* of the country. Thus, non-US nationals, accused of committing genocide elsewhere, who later became lawful residents of the US, could not be prosecuted in US courts for genocide. Such persons could be prosecuted for immigration fraud or customs law irregularities—and then deported to their home countries to face possible prosecution there. In this situation, however, many of those countries did not have the resources to effectively prosecute perpetrators. Worse yet, such countries might be governed by genocidal regimes, or regimes that are sympathetic to human rights abusers.

The revised genocide statute provides universal jurisdiction [textbook §5.2.F] for the crime of genocide [textbook §10.1.B.].¹⁶⁶

Now, 18 U.S. Code §1091 of the federal criminal code provides as follows:

(d) REQUIRED CIRCUMSTANCE FOR OFFENSES.—The circumstance referred to in subsections (a) and (c) [chargeable crime] is that—

1. the offense is committed in whole or in part within the United States;
2. the alleged offender is a national of the US (as that term is defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101));
3. the alleged offender is an *alien lawfully admitted* for permanent residence in the US (as that term is defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101));

4. the alleged offender is a *stateless* person whose habitual residence is in the US; or

5. after the conduct required for the offense occurs, the alleged offender is *brought into*, or *found* in [text §5.3.B. *Alvarez-Machain* kidnapping case & §5.3.C. *Arar v. Ashcroft* rendition case], the US—even if that conduct occurred outside the US.

◆ PROBLEMS

Problem 10.A (after 10.1.B. International Court of Justice *Genocide Case*): Did the 2007 International Court of Justice *Bosnia v. Serbia* decision correctly determine that: (1) genocide occurred at Srebrenica, Bosnia; (2) Serbia was not responsible for committing genocide; and (3) Serbia failed to: (a) prevent and (b) punish those responsible for committing genocide at Srebrenica?

Two teams of students will represent Bosnia and Serbia; debate each of the questions above—making all reasonable concessions as good advocates must often do; and most importantly, provide reasons for their conclusions.

Problem 10.B (after §10.1.B. Genocide “Debate”): The events of 9–11 suggest an act designed to send a message to moderate Arab governments that they should eschew western ideology. The citizens of eighty-one countries were killed in New York City’s World Trade Center that day. The majority of the victims were Americans. Some commentators referred to this event as “genocide.”

The 9–11 Al-Qaida hijackers—fifteen of nineteen being Saudi nationals—could have broadcasted their supposed intent that 9–11 was part of a grand design to kill all US citizens—or as many as possible. They could have publicly announced: “We are now acting on the 1998 fatwa issued by Usama bin Laden for Muslims to kill all Americans.” They of course did not want to bring any attention to their evolving plot. Several Saudis claimed to be the “20th Hijacker” (and thus, the 16th Saudi, along with the other fifteen who planned and personally executed 9–11). Assume that “Mr. Twenty” is available for prosecution in the International Criminal Court. You are the Prosecutor. Can you charge “Twenty” with the crime of genocide?

Five students will present their respective arguments on whether this was an act of genocide as opposed to multiple counts of murder. The argument will include,

but not be limited to, textbook materials that bear upon their respective assignments.

Student No.1 is Saudi Arabia’s Ambassador to the US. Student No.2 is the US Ambassador to the UN (who knows that members of the bin Laden family were permitted to depart the US during the brief no-fly period just after 9–11). Student No.3 is the Taliban’s former Ambassador to Pakistan (one of three nations which then recognized the Taliban as the *de jure* government of Afghanistan—and the only nation to do so for several months after 9–11). Student No.4 is a senior law student at your university, who will be working for the US diplomatic corps next fall. Student No.5 is a journalist, who has not taken this course, but was invited by your professor to participate. S/he knows “genocide when s/he sees it;” and cannot believe that this subject is even debatable.

Problem 10.C (after §10.1.C.): In May 2006, a group of Israeli diplomats planned on getting Israel to file legal proceedings against Iran in the International Court of Justice. They were concerned about Iranian President Mahmoud Ahmadinejad’s scathing remarks against Israel’s right to exist. The Iranians are exerting increasing efforts to obtain nuclear weapons. (This particular concern is the rationale, given to Russia by the US for the Poland-Czech Republic missile defense shield system described in §9.2.F.4.). This Israeli cohort quoted a speech by Ahmadinejad from October 28, 2005. He therein called for Arab nations to “wipe Israel off the map.”

The Genocide Convention includes lesser crimes than genocide. Would Iran be guilty of any of them? Would something more have to occur for liability to arise under the Genocide Convention?

Problem 10.D (after §10.3.A.): A March 2008 report by the UN Committee for the Elimination of Racial Discrimination expressed its deep “concern about the increase in racial profiling against Arabs, Muslims and South Asians in the wake of the 9/11 attacks.” As further stated: “Measures taken in the fight against terrorism must not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin.”¹⁶⁷

The US signed, but has not ratified, the Convention on the Elimination of All Forms of Racial Discrimination (CERD). Your class is now in legislative session in

the US Congress. Members are addressing whether the US should now ratify the CERD, having reviewed the above report. Republican Senator Hawk will argue against ratification. Democratic Senator Dove will argue in favor. A US citizen named Joe Plumber is the Washington, D.C. Police Chief. He will offer his views. A US citizen named Tina Fey heads Amnesty International. She will offer her views.

Each individual will make a one or two-minute opening statement to Congress. They will then begin a debate, in which they may ask questions of one another—followed by questions from the class. The professor will facilitate this portion of the exercise.

Problem 10.E (after §10.3.B.): In August 2007, five Pakistani female activists (three teenagers) were simultaneously abducted at gunpoint, beaten, shot, thrown into a ditch, and buried alive in so-called “honor killings.” They had defied tribal leaders by asking a civil court to allow them to choose their husbands.

In May 2007, a seventeen-year-old Kurdish girl of the Yezide Sect was stoned to death in Mosul, Iraq. Bystanders applauded and recorded her death on their cell phones. She was also kicked and beaten for two hours, then burned and buried with the remains of a dog after her death. She had fallen in love with a Muslim neighbor. However, Yezidis are forbidden to have any relations with either Muslims or Christians. One of her uncles came to fetch her from the refuge she sought with a Yezide cleric. In fact, he lured her to a location where thirteen of her cousins and many more sect members awaited her arrival for stoning.¹⁶⁸

In 2002, a Pakistani woman named Mukhtar Mai was gang raped on orders from a village council. This was a punishment decreed after her thirteen-year-old brother supposedly had an illicit affair with a woman from a family in a higher caste. Mukhtar Mai and her family not only denied her brother’s affair but also claimed that her brother was sexually molested by members of the other family. While this was a stunning news account in other countries, it was not a unique “punishment” for someone in Mukhtar Mai’s position—whose family member supposedly had sexual relations out of wedlock, especially with a woman not in his “caste.”

In 2002, the eight men on the village council were acquitted of all charges brought against them as a result of this rape. In March 2005, a lower court acquitted five others of the total of thirteen men involved in the rape

(and commuted the death sentence of a sixth man to life in prison). They were temporarily held in custody (to protect Mukhtar Mai) until a final resolution of this matter. In June 2005, an intermediate court ordered the release of all thirteen men. In June 2005, the Pakistani Supreme Court ordered that these men be rearrested.

The Asian-American Network Against Abuse of Women invited Mukhtar Mai to the US to speak about her ordeal. She stated that she “wanted to go (abroad) as [an] ambassador for Pakistan.” She could not accept, however, because President Musharraf banned her from travel to prevent her from casting Pakistan in a bad light. The Pakistani government withheld her passport. In June 2005, he lifted her travel ban in the aftermath of a strong condemnation of that restriction from Washington.

As a result of this incident, Pakistan’s lower house of parliament amended Pakistan’s rape laws in November 2006. The earlier Hudood Ordinance was enacted by a military dictator in 1979 to appease Islamic fundamentalist political groups. Its death penalty and flogging penalties no longer threaten intimate consensual relations outside of marriage. Judges also have the discretion to try such cases in Pakistan’s criminal rather than Islamic courts.¹⁶⁹

Students or groups will debate whether Pakistan has: (a) violated International Law; and (b) if so, *which* major human rights instruments in this chapter were violated. One student will be a Pakistani government lawyer, who will represent Pakistan in its defense that the State has not violated International Law. A second lawyer represents Mukhtar Mai and her family. The third will be the UN High Commissioner for Human Rights.

Problem 10.F (after §10.3.B.): Fifteen women from China, Taiwan, South Korea, and the Philippines sued Japan in a US court. They were forced into sexual slavery before and during World War II. They and many others were called “comfort women” by the Japanese military forces. In June 2005, with the case having already been to the Supreme Court, but remanded back to the Washington, DC federal Court of Appeals, the latter court decided that their case presented a “nonjusticiable political question [text §8.7.A.], namely, whether the governments of the appellants’ countries foreclosed the appellants’ claims in the peace treaties they signed with Japan.” Thus, due to a “series of treaties signed after the war” that “clearly aimed at resolving all war claims

against Japan,” the “comfort women” cases were then dismissed.

The Court reasoned that Japan had signed peace treaties, long ago, with all of the governments of the appellants’ countries. This potential “judicial intrusion into the relations between Japan and these other foreign governments would impinge upon the ability of the President to conduct the foreign relations of the United States.” The US argued in its “Statement of Interest of the United States” that it would be “anomalous” to allow foreign nationals to sue Japan in the courts of the US, while US nationals would be precluded from doing so under those treaties. *Hwang Geum Joo v. Japan*, 413 F.3d 45 (D.C. Cir., 2005).

The US Supreme Court declined to review this decision. In January 2007, legislation was introduced in the US House of Representatives that would urge Japan to apologize to the remaining estimated 20,000 women who were so enslaved from 1932–1945. Although the Japanese government established a victims’ compensation fund, only 286 women had received their share as of 2006. In March 2007, Japan’s Prime Minister “apologized” in the Japanese Parliament after his prior comments which questioned whether they were in fact coerced. They were supposedly professional prostitutes who were paid for their services. The sincerity of this apology was questioned by China and South Korea—countries that were another source for the so-called “Comfort Women.” Japan was upset that other nations were telling it how to apologize.

Several individuals have been convicted of the crime of mass rape—in the International Criminal Court for the former Yugoslavia (ICTY)—for this (and more heinous) wartime tactics, designed to shame Muslim women into leaving Bosnia during the Serb ethnic cleansing campaign [§8.5.C. ICTY]. Unlike the Japan case, there were no treaties with Yugoslavia that merged these victims’ claims into a post-conflict settlement between the parties.

The “comfort women” case was filed after the mass rape convictions in the ICTY. If Japan does not have to answer for its conduct regarding the “comfort women,” should China, Taiwan, South Korea, the Philippines, and the US bear at least the moral responsibility for effectively burying their claims in the post-World War II treaty settlements?

Problem 10.G (after §10.3.C.): **Background** In May 2007, the UN International Children’s Emergency

Fund (UNICEF) estimated that 3,000,000 young girls undergo female genital infibulation *each year*. In the following month, Great Britain reported that the practice was growing, notwithstanding its illegality. British police estimate that there are 400–500 girls in that country who undergo this procedure *each year*. It is banned in Egypt, yet assumed to be a common practice. See generally, R. Mustafa (ed.), *FEMALE CIRCUMCISION: MULTICULTURAL PERSPECTIVES* (Philadelphia, PA: Univ. Penn. Press, 2006).

In a December 1993 report, the World Health Organization (WHO) estimated that “over 80 million [living] female infants, adolescents, and women in over 30 countries ... have been subject to female genital mutilation.” In its 1997 Progress of Nations Report, the UN International Children’s Emergency Fund (UNICEF) Executive Director identified this figure as being 130 million living women. Further details are available from the UN Commission on the Status of Women, based on a report from the NGO called Equality Now, U.N. Doc. E/CN.4/Sub.2/1997/NGO/31, 7 August 1997; E. Hicks, *INFIBULATION: FEMALE MUTILATION IN ISLAMIC NORTHEASTERN AFRICA* (New Brunswick, NJ: Transaction, 1993); and J. Berkey, *Circumcision Circumscribed: Female Excision and Cultural Accommodation in the Medieval Near East*, 28 *INT’L J. MID. EAST STUDIES* 19 (1996).

This procedure is commonly referred to as “female circumcision.” At an average age of ten, a young girl is held down by several women. A “practitioner,” who does not necessarily have medical training, uses a razor or paring knife to do this procedure in the home. It is extremely painful and performed without anesthesia. The WHO is concerned about the resulting hemorrhaging, tetanus, infection, infertility, and death that has occurred in an increasingly reported number of cases. Further details are provided on the AI Female Genital Mutilation (FGM) Web site at: <<http://www.amnesty.org/ailib/intcam/femgen/fgm1.htm>>.

It is a tradition that dates from ancient Egypt. It is estimated that in Somalia, for example, *all* women undergo Female Genital Mutilation. The estimate for Egypt is seventy to ninety percent. Young women, mostly in Africa and the Middle East, are social outcasts if they do not endure this procedure, which has been associated with the retention of virginity and lack of physical sensation. In countries where this technique is practiced, most men will not marry women who have not undergone this procedure.

In a December 2000 CNN report of a case in Kenya, a father lost his battle to force his daughters to undergo this procedure. His concern was that without it, any potential husband might return the daughter and demand return of the dowries. The court's reported reason for breaking precedent, by deciding against the father, was based on the particular magistrate's discretion rather than the law. This was the first time that a Kenyan court ruled *against* the forced circumcision of girls. There is no legislative provision on this point in Kenya. Some groups, among them the Kenya Family Planning Association, want to preserve the ritual connected with female circumcision. However, they favor a symbolic ceremony that does *not* involve any cutting of the female genitalia, but preserves the importance of this local "rite of passage" to womanhood.¹⁷⁰

While it appears that no religion specifically endorses it, some Muslim scholars have endorsed female circumcision as "a noble practice [that] does honor to women" (Washington Post, Apr. 11, 1995, p. A14). While it is not officially endorsed as a State policy in any country, female circumcision is effectively condoned in a number of countries that have never taken any steps to curtail it, regardless of the known health risks. Many Muslims advocate that Islam—contrary to popular belief—does *not* support this practice. The Egyptian Organization for Human Rights specifically disputes this Koran-related claim. Some Egyptian Christians still follow this practice, which *predates* Islam by 1,500 years.

In 1994, a US immigration judge in Boston considered whether two US-born Nigerian girls, aged five and six, would be returned to their father in Nigeria or remain in the US with their mother after their parents divorced. The judge decided to overturn the mother's deportation order on humanitarian grounds. There are an estimated 2,000,000 living women in Nigeria who have undergone this "treatment." The judge permitted the daughters to remain in the US with their mother. Had the girls returned home with their father, they would have been required to undergo this traditional procedure, just like their mother had when she was a child in Nigeria. In the US judge's words: "This court attempts to respect traditional cultures, but this is cruel and serves no medical purpose." *INS v. Oluloro*, an unreported case reviewed in the *Maui News*, March 29, 1994.

In a more recently reported case, the US Board of Immigration Appeals (BIA) accepted the argument that a Togolese woman who fled her home country was

being persecuted because she was threatened with forced genital mutilation. The BIA concluded that despite her persecutor's benevolent intent, petitioner Kasinga was a "refugee" because female genital mutilation constitutes "persecution" within the meaning of the US Immigration Act. In *re Fauziya Kasinga*, Int. Dec. 3278, at 12 (BIA June 13, 1996) (*en banc*) (designated as precedent by the BIA), reprinted in 35 INT'L LEGAL MAT'LS 1145 (1996).

In June 1997, an Egyptian court overruled a one-year-old government decree that had banned this practice. The judge noted that he was not ruling on the health aspects of the case, but rather on the legality of the ban that unduly restricted doctors from practicing medicine as they wish. The court ruling did not disturb that portion of the ministerial decree, however, which unreservedly bars unlicensed and untrained midwives from performing this procedure.

In the West, women's rights groups (the National Organization for Women, Global Campaign for Women's Human Rights, Population International, and Women's International Network) seek the global abolition of female circumcision. This procedure is outlawed in France, Great Britain, and the US as of 1996. In 1993, US House of Representatives Resolution 3247 was the first congressional bill to deal with what Western newspapers have described as "the most widespread existing violation of human rights in the world." In 1994, the State Department first focused on this treatment of women in its annual human rights report, referring to this practice as "ritual mutilation." An analysis of this phenomenon is available in Eugene Gifford, *The Courage to Blaspheme*, 4 U.C.L.A. WOMEN'S L.J. 329 (1994).

As a result of the *Kasinga* case, the US Criminal Code now prohibits this procedure from being performed on any person who is *under eighteen* years of age. This law provides that "no account shall be taken ... that the operation is required as a matter of custom or ritual." (18 U.S. Code §116c). Furthermore, the US Immigration and Nationality Act provides that "[i]n consultation with the Secretary of State, the Commissioner of Immigration and Naturalization shall identify those countries in which female genital mutilation is commonly practiced. ..." The INS and Department of State thus make available to "all aliens who are issued immigrant or non-immigrant visas, prior to or at the time of entry into the United States ... [i]nformation on the severe harm to

physical and psychological health caused by female genital mutilation ... compiled and presented in a manner [that] is limited to the practice itself and respectful to the cultural values of the societies in which such practice takes place" (8 U.S. Code §1374). Both statutes were enacted in 1996.

In July 1999, the US Circuit Court of Appeals in New York held that US immigration officials erred in denying a woman from Ghana's application for asylum on the grounds of forced genital mutilation. That decision thereby blocked the imminent deportation of Adelaide Abankwah, who had been held at a detention facility in Queens, New York, for two and a half years.

In April of 2004, the federal Ninth Circuit Court of Appeals was the first court to rule that women who have already undergone this procedure can claim asylum under the 1984 UN Torture Convention [§9.6.B.4(d-e) and 7(a).] in addition to the mother's claim that if she were deported to Nigeria, her eight-year-old daughter—a US citizen—would have to undergo this procedure. *Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004).

In 2006, the British House of Lords ruled that the threat of FGM was a basis for an intact fifteen-year-old female applicant from Sierra Leone to be granted asylum. Were she to return, she would have been infibulated by relatives. She was thus deemed to possess "membership of a particular social group" for purposes of the UN Refugee Convention. *Fornah v. Secretary of State for the Homeland Dep't*, 3 World L. Rep. 733 (2006), [2006] U.K.H.L. 46, 2006 Westlaw 2929319.

In June 2008, Norwegian police arrested the parents of five daughters, ages five to fourteen, who had been so treated. The parents were from Gambia and had become Norwegian citizens.

Problem Scenario Assume that a wealthy African family vacations in the US each year when the heat is most intense in their home nation, herein referred to as Country X. Mrs. X is a citizen of Country X. Her husband is a ranking government official in Country X. While he considers it inappropriate for him to ever attend one of his wife's "procedures," he nevertheless agrees with the purpose of her work—as do most of the officials in the State X government, who are fully aware of this common practice in State X and neighboring countries.

Mrs. X is a devout religious woman who has undergone the "procedure" herself and performed it on her

own daughters, as well as hundreds of ten- to twelve-year-old girls in Country X. This practice has been passed on from generation to generation in her family for hundreds of years. She believes that it is her "God-given" duty to perpetuate her faith by performing this ritual. She believes that this work is especially important in contemporary times when adolescent behavior in other regions of the world subjects young women in Country X to many adverse influences which will certainly debase her family's cultural and religious beliefs.

During her annual vacation in New York City, Mrs. X is served with process in a US lawsuit accusing her of torture in violation of International Law, specifically under the Alien Tort Statute and its companion Torture Victim Protection Act [§10.6.C.]. The plaintiff is the mother of a Middle Eastern girl who underwent this procedure in Country X—only after Mrs. X convinced the mother that this tradition cannot be changed. She advised the mother that "The Divine Order" requires that only through this practice can faithful women be made suitable for marrying Country X males. "Otherwise," Mrs. X explained to the plaintiff mother, "the social, cultural, and religious traditions of Country X will be vitiated by Western influences." Although death from FGM is unusual, this particular child died of complications several very painful weeks after Mrs. X performed the "procedure." This is the *only* death attributable to Mrs. X's procedure, which she has performed hundreds of times in her career as a State X midwife.

Proceedings

First: The plaintiffs' law firm, the New York Center for Constitutional Rights, files this case in a New York court against Mrs. X. The deceased child's mother therein alleges torture resulting in her daughter's death. The plaintiff's lawyer decides not to sue on the basis of the gender-discrimination provisions in International Human Rights Law. Those instruments address *State* responsibility for discrimination rather than individual responsibility under International Law. The plaintiff's lawyer further decides not to name the father as a defendant in this matter because he would be entitled to diplomatic immunity. Assume, for the purpose of this problem, that Mrs. X is *not* entitled diplomatic immunity.

Second: The lawyer for the deceased child's mother also decides to bring this matter to the attention of the

UN by filing a §1503 petition with the UN Human Rights Commission. In the petition, the plaintiff mother claims that her daughter's rights were violated by Country X because it has failed to provide sufficient information about the dangers of this procedure. That nation did not mandate any medical licensing or training for Country X midwives who perform this procedure. Thus, State X is responsible for the human rights violations against her deceased daughter and all female children who have undergone this procedure in State X.

Four students or groups will play the following roles in this hypothetical case:

Session No.1: Two New York trial lawyers are debating this matter in a New York trial court. The plaintiff's lawyer represents a relative of the deceased child. That individual filed this test case to establish some precedents about the applicability of §1350 in such cases. The plaintiff relative's complaint relied on §1350 jurisdiction—arising under the Alien Tort Statute and the Torture Victim Protection Act. The relative's goal is to hold the defendant, Mrs. X, civilly liable for damages in the death of the child for surgery performed in Country X. The defense lawyer for Mrs. X claims that the New York court should not proceed with this case because no law has been violated. There is a federal law against FGM, but Mrs. X has never performed this procedure in the US.

The trial judge must decide whether to dismiss this case because the defendant supposedly did nothing wrong. Questions: (1) Is Mrs. X liable for violations of: (a) the Alien Tort Statute; and/or (b) the Torture Victim Protection Act? (2) Would the US Supreme Court's *Sosa* decision play any role in analyzing the legal liability of Mrs. X under US law? (3) Does the location of the surgical procedure matter?

Session No.2: Two career UN diplomats are engaged in proceedings before the UN Human Rights Commission. The diplomat who represents the international community claims that State X is liable under International Law for acquiescing in and therefore passively approving the torture of all female children who undergo this procedure in State X. The diplomat who represents State X claims, however, that no UN entity could possibly decide this petition against State X because it has not violated International Human Right Law. This procedure has been done for centuries in a number of countries, including State X. Also, it is always

performed with the consent of the child's parents. Would State X be liable for torture, or any other human rights violation, under International Law?

How should the US judge (Session No.1) and the UN High Commissioner for Human Rights (Session No.2) rule in their respective state and international venues?

Problem 10.H (after §10.3.H.): In November 2008, the Canadian Supreme Court affirmed that Canadian airlines had to determine which passengers are obese and thus eligible for another seat at no extra charge. A January 2008 ruling by the Canadian Transportation Agency required Canadian airlines to make free, additional seating available to such passengers. This ruling applies only to *domestic* Canadian carriers on *domestic* flights. The airlines must therefore make an additional seat and/or space for a wheelchair or stretcher, including such passengers who must be accompanied by a personal attendant. Canadian bus, train, and ferry companies have provided such additional accommodations for some time. The airlines industry lost its appeal in the nation's highest court, having unsuccessfully argued that this would have significant cost consequences for all concerned—a total of .09 to .16 percent of the industry's revenues.¹⁷¹

The US Department of Transportation's official policy states that "if an obese passenger—whether the passenger is qualified with a disability or not—occupies more than one seat, airlines may charge that passenger for the [total] number of seats the passenger occupies."

You will now assess whether: (1) the UN disability treaty has been breached by the US; (2) financial constraints on Canadian airlines should relieve them of any obligation to so accommodate obese passengers; (3) Canada is breaching the UN disability treaty, by not applying its rules to *foreign* air carriers who operate in Canada; and, finally, (4) the definition of "obese passenger."

Four students will participate in this exercise. The first will represent the UN as to whether obesity should be governed by the UN disability treaty, as opposed to State Parties remaining free to decide this matter under local law. The second student will be the CEO of Air Canada. The third will be the CEO of American Airlines. The fourth will represent Canada's obese air travelers.

Problem 10.I (after §10.4.A.): The UK Human Rights Act of 1998 gives further effect to rights and freedoms

guaranteed under Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹⁷² Sections 2 and 3 of that legislation implement certain human rights provisions of the Convention. All British courts recognize these Convention rights when resolving pending cases. Legislation in the UK must also be interpreted in a way that is compatible with Convention rights. Any legislation, which is apparently *incompatible* with Convention rights, requires the court to issue a declaration of incompatibility between the statute and the human rights protected by the ECHR. Such a declaration does not affect the validity of the legislative provision that is arguably inconsistent with that treaty. But a judicial declaration of incompatibility may serve as the basis for the Minister of the Crown to amend English law to remove or reword the provision that is incompatible with the treaty.

Section 19 of the Act introduced a "Statement of Compatibility" into Great Britain's parliamentary procedure. After rereading a Bill in the Parliament, the Minister of the Crown has to either: (1) make a Statement of Compatibility with the ECHR, saying that in his or her view, the provisions of the Bill are compatible with rights which are available under the treaty; or (2) announce for the record that he or she is unable to make such a Statement. Parliament may nevertheless wish to proceed with the legislative process—having been duly advised of this executive branch concern.

Assume that legislation is introduced that would codify a woman's right to an abortion as it exists under British case law—similar to the right as it exists in the US under the 1974 *Roe v. Wade* decision by the US Supreme Court (410 U.S. 113). The ECHR, however, contains a provision that specifically recognizes the "right to life" as follows:

Article 2—Right to Life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his [or her] life intentionally save in the execution of a sentence of a court following his 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.

Two students will participate in a House of Commons debate about the compatibility of the pending legislation—which would legislatively authorize abortions in the UK—versus the right-to-life provision of the European Convention. Student 1 is the Minister of the Crown, who will present a Statement of Compatibility, regarding the pending legislative passage under debate, with the treaty's right-to-life provision. Student 2 is a member of the House of Commons who demands that the Minister must conclude that a Statement of Compatibility between the proposed British "prochoice" law and the ECHR is not possible.

Both students may rely on the resources in this chapter on human rights, including the various instruments of the International Bill of Human Rights. All of them contain a right-to-life provision. The question is whether the legislation expressly authorizing abortion in England is compatible with the ECHR's Article 2.1 right-to-life provision.

Problem 10.J (after §10.4.B.2b): First, recall textbook §5.3.C.3. on extraordinary rendition; Problem 7.G (US reservation to acceptance of UN Convention Against Torture); §9.7 post-9–11 US application of Laws of War; and excerpt from this chapter's Inter-American Court on Human Rights §10.4.B.2(b) *Reyes v. Chile* decision on the "Right to Information."

A case has just been filed by a national of the country of Justus. Her name is Jane Q. Citizen (JQC). JQC seeks information under your government's Freedom of Information Act. She is a reporter who, based upon a reputable source, believes that Justus has arranged secret renditions of terror suspects who are foreign nationals. They have supposedly been captured abroad by Justus military forces. Your political Head of State has designated some of them as "unlawful combatants." JQC has been denied access to any of the Justus government files regarding their alleged rendition.

Under Justus law, the status of the detainees, when applicable, is generally governed by the Geneva Conventions you studied in textbook §9.6 (and § 9.7). (But disregard any related rules, such as the prohibition on

moving military detainees out of the nation or occupied area where they were captured.)

Upon taking office as the President of Justus, its new leader declared that no Justus civilian or military personnel would subject any detainee to torture or use any related tactic that would violate the Geneva Conventions, the UN Convention on Torture, or any national laws of Justus. She has also prohibited their being rendered to *any* third nation. Instead, they are supposedly being detained in an allied nation's US Air Force military prison and on Justus military aircraft carriers at various locations in international waters.

Your leader has determined that this rendition program is a critical and necessary feature of the global War on Terror. She has determined, under her constitutional power as the Justus military Commander-in-Chief, that these extraordinary renditions are absolutely vital to both the national security of Justus and the safety of all Justus inhabitants. These designated "unlawful enemy combatants" cannot be brought to Justus. That would jeopardize the safety of the Justus civilian population—given the possibility that terrorists might attempt to rescue them, were they confined in military or civilian jails within Justus.

There has been no allegation that they have been mistreated because of the Justus rendition program. The Justus President has made it crystal clear to the military leadership that no detainee may be mistreated in a way that would violate the Justus Army Field Manual (which prohibits torture), a treaty, or international norm. However, Justus does not permit any reporter to have access to either detainees or their case files. Justus is a party to all relevant international treaties, including the Inter-American Convention on Human Rights. Has its leader violated the *Reyes v. Chile* right to information?

Problem 10.K (at end of §10.4.B.): Nicaragua's Sandinista government during the mid-1980s learned about a US Central Intelligence Agency plot. Key Nicaraguan harbors were mined, and US financial aid was provided clandestinely to a rebel group known as the "Contras." In a widely reported announcement, US President Reagan said, "I, too, am a Contra."

Assume that you are the national leader in Nicaragua. You have just learned about this foreign "presence" in your country. To defend your borders against this form of aggression, you declare martial law. Your military forces now control all of Nicaragua. Civil rights,

including access to the courts, are suspended. Martial law has further limited opposition from the Roman Catholic Church and Nicaragua's various human rights groups. Any individual may incur criminal liability for the crime of "civil disobedience," which you imposed under martial law. Nicaragua previously ratified and has publicly embraced the UN's International Bill of Human Rights.

You now decide to dispatch a series of warnings to local groups that you suspect are supporters of the anti-government Contras. The basic Contra objective is to unseat your government. First, you warn the Catholic Bishop of Nicaragua that "the Church must stay out of political affairs and cannot be used as a vehicle for influencing governmental decisionmaking on behalf of the people of Nicaragua." Amnesty International (AI) is part of a worldwide organization designed to monitor progress toward the accomplishment of UN human rights goals. AI has more offices in the US than in any other country. AI's local office in Nicaragua opposes martial law. You thus close the AI office in Nicaragua, which has been distributing unapproved literature that must first be approved by your Minister of Defense.

Martial law has resulted in the arrest of numerous Nicaraguan citizens charged with "civil disobedience." You believe that their detention is necessary because they are probably aiding the rebel Contra forces. On the basis of this national emergency, you have established "People's Tribunals" to accelerate the prosecution of subversion cases. You are concerned that military tribunals will not appear to be as impartial as tribunals staffed by the people themselves. You are, of course, careful to staff them with conservative people who are sworn to defend Nicaragua against all enemies of the State.

These tribunals have the power to summarily imprison anyone in Nicaragua. They have exercised this power to jail Nicaraguan citizens who are Catholic, members of AI, and/or suspected of "civil disobedience." This term is not legislatively or judicially defined. Arresting authorities and the prosecuting tribunals have the necessary discretion to deal with the rebellion and foreign intrusion/attack on a case-by-case basis.

You rely on this national emergency to temporarily suspend "due process of law," which is a fundamental guarantee in all human rights treaties which your country has ratified. The inhabitants of Nicaragua are charged with violating the broadly worded crime of "civil disobedience" at the time of their arrests. There is

no independent judicial officer available to verify the propriety of incarcerations by the agents of the People's Tribunals. Each local tribunal has the complete discretion to orchestrate what Amnesty characterizes as the "disappearance" of many Nicaraguan citizens. No one jailed under your proclamation can question the legal basis for his or her incarceration. You will, of course, revive this right after this crisis passes and you can abolish martial law.

While in jail, prisoners are routinely tortured. Although this is not an official State policy, it is difficult to control. Your police force is your first line of defense in finding information about the US-supported Contras. Given this emergency, torture is an unpleasant necessity for extracting the vital information necessary to identify all citizens who seek the imminent overthrow of your government. You thus impose curfews on travel at night and travel between the rural and urban areas of Nicaragua—both of which require a government-issued permit. The Contra forces are located mostly in rural areas of your country although they might now be anywhere because of massive assistance provided by the US.

You have undertaken all of these steps to maintain public order in Nicaragua. It is clear to you that a major foreign power has effectively launched a military assault on your nation. Your harbors have been bombed. The antigovernment Contras have been well financed. The Catholic Church and other private organizations in your country are disseminating information to incite the populace to rise up against your government.

Have you violated the UN's International Bill of Human Rights? If so, how? Were you justified in doing so?

Problem 10.L (end of chapter): In *Abdullahi v. Pfizer*, 562 Fed.3d 163 (2d Cir. 2009), a federal appellate court reversed and remanded a case to the trial court, thus allowing the plaintiffs to proceed with their claims against the US pharmaceutical company Pfizer. Plaintiffs, on behalf of their Nigerian children, sued the world's largest pharmaceutical corporation, alleging that "Pfizer violated a customary international law norm prohibiting involuntary medical experimentation on humans when it tested an experimental antibiotic on children in Nigeria, including [the plaintiffs' children] ...without their consent or knowledge."

Pfizer, with the cooperation of the Nigerian government, allegedly experimented with *Trovan*, a new antibiotic, on child patients at a Nigerian hospital. Pfizer did not have the consent of either the children or their guardians about the experimental drug trial. Pfizer allegedly knew that the new drug had never before been tested on children in the form being used at the Nigerian hospital.

Plaintiffs claimed that "animal tests showed that *Trovan* had life-threatening side effects, including joint disease, abnormal cartilage growth, liver damage, and a degenerative bone condition." As a result of this alleged deliberate conduct by Pfizer, eleven children died, and "many others [were left] blind, deaf, paralyzed, or brain-damaged."

Assuming the truth of these allegations, what national or international rules (in this chapter) did Pfizer violate?

◆ FURTHER READING & RESEARCH

See Course Web Page, at: <<http://home.att.net/~sломansonb/txtcsesite.html>>, click Chapter Ten.

◆ ENDNOTES

1. M. Evans, International Wrongs and National Jurisdiction, ch. 11, in M. Evans (ed.), *REMEDIES IN INTERNATIONAL LAW: THE INSTITUTIONAL DILEMMA* 173 (Oxford, Eng: Hart, 1998).
2. T. Buergenthal, Historical Antecedents of International Human Rights Law, ch. 1, in *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* 1 (3d ed. St. Paul: West, 2002) [hereinafter *NUTSHELL*].
3. See J. Gardner (ed.), *HUMAN RIGHTS AS GENERAL NORMS AND A STATE'S RIGHT TO OPT OUT: RESERVATIONS AND OBJECTIONS TO HUMAN RIGHTS CONVENTIONS* (London: Brit. Inst. Comp. Law, 1997).
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17. Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780, *UN SCOR*, Annex IV, at 16, *UN Doc. S/25274* (1993).
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22. *Netherlands v. Frans Van Anraat*, Hague District Court (Dec. 23, 2005). Review in English of Dutch language case at: <http://www.judicialmonitor.org/archive_0306/casesofnote.html>.
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27. See B. Simma (ed.), *The Position of the Principle of Non-Intervention in the Legal System of the United Nations*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 148 (1st ed. Oxford, Eng: Oxford Univ. Press, 1994) [hereinafter *Simma*].
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29. *Sei Fujii v. State of California*, 38 Cal. 2d 718, at 722 (1952). This case employed §8.1 to illustrate the distinction between “self-executing” treaties and those instead containing “standards of achievement.”
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CHAPTER ELEVEN

Environment

CHAPTER OUTLINE

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- D. Environmental Human Rights
- E. Corporate Environmental Responsibility

Problems

Endnotes

INTRODUCTION

World wars, the Cold War, and the possibility of nuclear holocaust appear to have subsided as perceived threats to Earth's inhabitants. Events like September 11, 2001 and the War on Terror now occupy center stage. But environmental degradation may prove to be *the* apocalyptic threat to humanity. Unlike the recent rash of governmental economic stimulus plans, Mother Nature does not do bailouts.

“On the night of December 2–3, 1984, the most tragic industrial disaster in history occurred in the city of Bhopal ... India ... [where] there was a chemical plant owned and operated by Union Carbide.... Methyl isocyanate (MIC), a highly toxic gas, ... leaked from the plant in substantial quantities for reasons not yet determined.

The prevailing winds ... blew the deadly gas into the overpopulated hutments adjacent to the plant and into the most densely occupied parts of the city. The results were horrendous. Estimates of deaths directly attributable to the leak range as high as 2,100. No one is sure exactly how many perished. Over 200,000 people suffered injuries—some serious and permanent—some mild and temporary. Livestock were killed and crops damaged. Businesses were interrupted.” [The official death count rose to 10,000, plus injuries to *another* 380,000 people.]

—In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India, 634 F.Supp. 842, 844 (SDNY, 1986), *aff'd*, 809 Fed. Rptr. 2d 195 (2nd Cir., 1987), *cert. den'd*, 484 US 871 (1987). See §11.1.C. on *sudden* environmental disasters.

...

“An Indian court issued a warrant Friday for the arrest of the former head of the American chemical company responsible for a gas leak that killed at least 10,000 people in Bhopal 25 years ago. Warren Anderson was the head of Union Carbide Corp.

when its factory in the central Indian city leaked 40 tons of poisonous gas on Dec. 3, 1984—the world’s worst industrial disaster. More than 555,000 people who survived the initial disaster are thought to have suffered aftereffects, though the exact number of victims has never been determined. Many have died over the years from gas-related illnesses, like lung cancer, kidney failure and liver disease.”

—India Court Orders Arrest of American Who Led Union Carbide When Bhopal Gas Leak Killed 10,000, CBS News: World (July 31, 2009) (paragraphs deleted).

The UN Charter does not directly address environmental issues. A relevant passage in Article 74 merely suggests that its State members’ “policy in their metropolitan areas must be based on the principle of good neighborliness.” That, in turn, requires them to consider “the interests and well-being of the rest of the world, in social, economic and commercial matters.”

This chapter presents the essential features of State responsibility for the contemporary charging allegation “transboundary environmental interference.” The environment knows no boundaries. The UN’s dramatic environmental program therefore seeks to shift the current legal regime from the many “soft law” norms to more “hard law” treaty ratifications. These materials analyze the somewhat counterintuitive objective of “sustainable development.” This touchstone seeks to strike a balance between the interests of the international community’s “haves” and “have nots.”

Students will be intrigued by the studies linking lead released into the air with IQ loss, poor academic achievement, and permanent learning disabilities. In the US alone, 16,000 facilities such as smelters [§11.1.B.], cement factories, and steel plants [§11.3.A.2.]—not to mention transportation vehicles—annually emit an estimated 1,300 tons of lead into the air.¹

◆ §11.1 HISTORICAL DEVOLUTION

A. EARLY APPREHENSION

Ancient Greek and Roman smelters emitted enough lead to contaminate the entire northern hemisphere, rivaling

gasoline as a cause of pollution in the modern era. The silver refining of 2,500 years ago was the oldest large-scale hemispheric pollution ever reported prior to the Industrial Revolution of the nineteenth century.

A few treaty-based limitations surfaced in the jurisprudence of the Permanent Court of International Justice in the 1920s and 1930s. Those cases dealt with State activity in rivers and canals used for international navigation or irrigation.²

The radioactive fallout from the US bombing of Nagasaki and Hiroshima initially killed 100,000 people and ultimately killed or harmed an additional 100,000 people within several years. The following Cold War round of nuclear weapons development would spawn extensive atmospheric and underground testing, which wreaked havoc on more than just the political environment.³

Similar problems surfaced early in the jurisprudence of the current International Court of Justice (ICJ). The ICJ’s first environmental decision (1949) pronounced the obligation of States not to allow the use of their territories to interfere with the rights of other States. Albania was liable for its failure to notify Great Britain about the presence of mines in Albanian waters within the international strait adjacent to its coastline. The exploding mines served a military purpose, while doing a great disservice to the environment.

In 1974, the Court similarly ordered France to cease its nuclear atmospheric testing in the South Pacific. Otherwise, radioactive fallout would further prejudice health and agricultural interests of the citizens of Australia, New Zealand, and all downwind islands. France carried out over 200 tests between 1960 and 1996, first in Algeria and then the South Pacific. By March 2009, France agreed to pay nuclear test victims for related *downwind* illnesses. Approximately 1,000 British citizens seek compensation from their government for similar test-related illnesses, mostly cancer.⁴

Downriver problems are augmenting downwind disasters with increasing frequency. After a November 2005 chemical plant explosion in northern China, near the Russian border, a 50-mile long benzene slick began its ill-fated downstream journey. The pollutants affected seventy Russian cities and villages—and potentially over a million residents along the Songhua and Amur Rivers. China’s extraordinary economic development thus left its mark on a bordering nation. This scenario classically illustrates the tension between economic growth and environmental pollution. About seventy percent of

China's rivers, lakes, and airspace are sufficiently polluted to make them unsafe for humans and animals alike. Some 400,000 people die prematurely each year from diseases linked to air pollution.⁵

B. TRAIL SMELTERS ARBITRATION

This 1941 case study classically articulated a fundamental norm which still resonates in contemporary International Environmental Law (IEL) more than seventy years later: "The Tribunal, therefore, finds ... that, under the principles of international law, as well as of the law of the US, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."⁶

This was the first tribunal to deal authoritatively with cross-border air pollution. A Canadian smelter, about ten miles from the US state of Washington, was initially established in 1896 by a US corporation, then taken over by a Canadian corporation. Its 400-foot high stacks emitted extraordinary amounts of sulfur dioxide fumes, harming the atmosphere and the agricultural industry in Washington for more than a decade. The two governments twice resorted to legal arbitration—once from 1928 to 1931—and again from 1935 to 1941—in an attempt to resolve the dispute. In 1931, a joint commission decided as follows: (1) the Trail smelter should limit its sulfur dioxide emissions; and (2) Canada should pay the US \$350,000 as compensation for damages. In the latter arbitration, the US and Canada established a three-member arbitral tribunal that consisted of Canadian, US, and Belgian arbitrators (the third being a neutral arbitrator selected by the other two). The tribunal determined that Canada had incurred State responsibility for environmental damage although the smelter was privately owned and operated.

In one passage, the arbitrators effectively predicted the direction of the "sustainable development" analysis [§11.2.B.2.]. They then referred to the competing interests of industrial development and prevention of agricultural degradation in the region surrounding British Columbia and the state of Washington. Drawing from commonly accepted sources, the arbitral decision also determined that "[i]t would not be to the advantage of the two countries concerned that industrial effort should be prevented by exaggerating the [environmental]

interests of the agricultural community. Equally, it would not be to the advantage of the two countries that the agricultural community should be oppressed to advance the interest of industry."

Legal commentators have varied perceptions about whether the *Trail Smelters* holding—"no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another"—has, in fact, stood the test of time. Philippe Sands, London's University College Professor of Law, comments that "[m]ost writers accepted this formulation as a rule of customary international law, and it was cited, with apparent approval, by Judge de Castro ... in the [International Court of Justice] *Nuclear Tests* case.[7] ... The Rappateur to the ILA [London-based International Law Association] Committee on Legal Aspects of the Environment concluded ... that state practice was founded upon the rule in the *Trail Smelter* case. [¶] But] in fact, state practice is not really discernible."

But as the City of New York Law School Professor Rebecca Bratspies cautions:

Although almost every discussion of state responsibility begins with its talismanic invocation, time has not been kind to the Trail Smelter arbitration.... While these Trail Smelter principles have become customary international environmental law, the arbitration itself is often viewed as a quaint remnant of a bygone world. Many scholars view Trail Smelter's marginalization as inevitable in light of international law's [pre-WWII] evolution from a state-to-state realm to one of multi-lateral, consensus-based actions.... [leading one] to conclude that Trail Smelter has little relevance for resolving the thorny transboundary environmental challenges that beset our ever-globalizing world.

... Hampered by a lack of scientific evidence, the Trail Smelter Tribunal crafted an adaptive decisional structure in order to fulfill its charge to be just to all parties while resolving a conflict over pollution flowing across the Canadian border and causing harm in Washington State....

This structure—using preliminary measures to prevent harm while information sufficient to create a permanent regime fair to all parties is developed—is the Trail Smelter arbitration's (semi)precautionary legacy. Regardless of the critiques of the arbitration's holdings or its normative relevance, this (semi)

precautionary legacy resonates profoundly in modern international environmental law.⁸

While the State parties purported to seek a final resolution of this major environmental decision for the next forty years, *Trail Smelter* authoritatively set the stage for an emerging principle routinely cited in national and international litigation: a State must not knowingly permit the use of its territory to harm other States. It has the obligation to protect other States from the injurious acts of individuals and corporations within its borders. Sovereign rights also entail the concomitant responsibility to respect the territory of other sovereigns.

In December 2006, the UN promulgated a contemporary byproduct of the Golden Rule standard effectively embraced by *Trail Smelter*:



**Principles on the Allocation of
Loss in the Case of
Transboundary Harm Arising
Out of Hazardous Activities**

UN GENERAL ASSEMBLY RESOLUTION 61/36
ANNEX, UN Doc. A/RES/61/36 (18 Dec. 2006)

Go to Course Web Page, at:

<<http://home.att.net/~sломansonb/txtcsesite.html>>.
Under Chapter Eleven, click Allocation Loss Prin.

C. SELECTED DISASTERS

A number of comparatively recent disasters dramatically illustrate the importance of solidifying a global environmental protection regime. Two years after the 1984 Bhopal, India disaster, an explosion at the Chernobyl nuclear reactor in the Ukraine caused the first *officially* reported radiation deaths from a nuclear power plant accident. The reactor released radioactive material into the atmosphere that was carried as far away as the US. An unusually high percentage of the 700,000 post-Chernobyl immigrants from that area, now living in the US, have been diagnosed with thyroid disease associated with that disaster.⁹

A 1986 Swiss fire resulted in thirty tons of hazardous chemicals being washed into the Rhine River in one of Europe's most serious environmental catastrophes. In 1991, near the close of the Persian Gulf War, retreating Iraqi forces set fire to over 600 Kuwaiti oil wells. That single military campaign sent millions of tons of contaminants

into the biosphere during the nine months it took to extinguish all of these fires. In 1993, a Norwegian tanker spilled 4,000 tons of sulfuric acid into the sea off the Mexican coast.

In November 2007, a Russian oil tanker, cut in half by a storm, spilled 560,000 gallons of oil into the Black Sea's narrow Strait of Kerch. During the same storm at the same location, waves sank two Russian freighters carrying 7,150 gallons of sulfur. A total of ten ships sank in the same storm in that general location. Russia's Emergency Situation Ministry predicted a minimum two-year period to clean the area of the resulting oil and sulfur contaminants. A regional prosecutor determined, however, that there would be no prosecutions because this situation did *not* constitute an environmental danger.

These are examples of *sudden* disasters. There have been equally severe *incremental* threats: ozone depletion, climate change, deforestation of entire regions, and many other potentially incalculable dangers to human survival. Many of these hazards have reportedly caused skin cancer, cataracts, suppression of the human immune system, and agricultural degradation. The circulation of industrial contaminants throughout the atmosphere may also lead to catastrophic rises in sea levels. A sea-level increase of only a few feet sounds minimal, but it could have profound consequences for flood-prone countries such as Bangladesh or Myanmar.

In 1993, Russia's head environmental adviser revealed that the former Soviet Union had clandestinely dumped vast amounts of highly radioactive waste at sea during the previous thirty years. This was twice the *combined* amount of the other major nuclear nations. This total included 2,500,000 curies (a mathematical unit) of radioactive waste and eighteen nuclear reactors dumped into the Arctic Sea and the Sea of Japan. In the northern Arctic, there are vast depots of aging post-Soviet nuclear weapons, submarines, and leaking nuclear fuel assemblies.

In June 2006, the glaciers of Greenland were melting twice as quickly as they were five years earlier. The ice sheets of Antarctica are also shrinking at unprecedented speed. The March 2006 issue of the journal *Science* reported that the sea level rose six inches in the previous century. But global warming could cause it to rise eighteen inches in the ensuing hundred years with at least an additional three percent in that exponential growth in the following century. Most of South Florida and Louisiana would then be underwater.

Ironically, the experts are still battling over such estimates. The Director of the Washington-based Center of

Science and Public Policy deems such estimates “ridiculous” and “overblown.” This group claims that evidence of prior warm epochs demonstrates that such change is due, instead, to the earth’s orbit and tilt of its axis. Professors and students who are not environmental experts—and thus caught between the extremes—might acknowledge such disparities and then turn to the UN’s Intergovernmental Panel on Climate Change 130-nation-strong summary presented below in section 11.2.C.4(b) for guidance on what the overwhelming majority of national experts can agree upon.

US naysayers point to the positive side of the environmental balance sheet. For example, toxic chemical pollution from US industrial plants, mines, and factories dropped five percent in 2007. The claimed reduction was based on company reports to the government. They reported releasing *only* 4,100,000,000 pounds of toxic chemicals into the air, water, and land in 2007—an increase from 4,026,000,000 pounds in 2006.

The US Environmental Protection Agency 1997 soot and pollutant abatement standards are another example. Small particles (two-and-a-half microns, where each micron measures one-millionth of a meter across) are especially damaging to respiratory health. They become imbedded deep in lung tissue. By 2009, only a handful of US counties failed to meet the EPA’s 1997 standards. But Tony Hamet, Director of Scripps Institute of Oceanography, cautions that massive quantities of carbon soot—e.g., aerosols from heat trappers made by human beings, not covered by Kyoto greenhouse gases controls [§11.2.C.4(a) below]—play a significant role, perhaps as much as 10 to 15 percent of the total excess heating.¹⁰

The pivotal crisis in the “incremental” category of environmental degradation may ultimately be *overpopulation*. In 1994, the Worldwide Watch Institute, a Washington, DC, research academy, issued its grimmest annual report ever. According to Worldwide Watch, this planet is nearing its capacity to produce food. If the earth’s growing population remains uncontrolled and soil and water resources continue to be degraded, then there will be no positive correlation between food production and human consumption. The Institute projected that the world’s population (then 5.4 billion) would increase by 3.6 billion in the next forty years. The world’s per capita seafood catch fell 9 percent from 1984–1994. Grain production, which expanded by 3 percent between 1950 and 1984, dropped to a 1 percent annual growth rate between 1984 and 1994. Just as ideological conflict

dominated the last four decades of the Cold War, the Earth’s physical capacity to satisfy the growing demand for food may dominate the ensuing four decades.¹¹

The related problem of *shelter* is no less in crisis. The 1996 UN Conference on Human Settlements issued its Istanbul Declaration and the Habitat Agenda. It reported that by the year 2001, more than fifty percent of the world’s population would be residing in cities. Housing has thus become an even greater problem for local and national governments. An estimated one billion people in developing nations do not have adequate shelter.

It was statistics such as these that motivated 180 nations to develop a twenty-year plan for slowing population growth at the 1994 UN Population Conference in Cairo. This conference focused on birth control, economic development, and providing women from certain societies and religious backgrounds with more power over their lives. The Vatican had rejected the final documents of the earlier world population conference debates held in 1974. At the 1994 conference, however, the Pope partially supported the results in principle—although he remained averse to the abortion alternative. The Cairo Program of Action calls on States to provide better education for women in traditionally male-dominated societies, wider access to modern birth control methods, and the right to choose if and when one becomes pregnant. This program purports not to conflict with national laws, religious beliefs, and cultural norms—which does not necessarily match word and deed.¹²

◆ §11.2 UN ENVIRONMENTAL PROGRAM

A. EMERGING MULTILATERALISM

The 1972 Conference on the Environment spawned an unprecedented political and diplomatic awakening. The UN, together with regional environmental organizations and world leaders, repositioned international environmental issues from the periphery to the center of national political and diplomatic agendas. Conferences of States, UN initiatives, and intergovernmental treaties permeated the public consciousness in the last portion of the twentieth century.

This subsection provides a snapshot of the major international environmental instruments. The following overview in Chart 11.1 will aid in your visualization of the various campaigns designed to save the environment from unrestrained assaults:

CHART 11.1 MAJOR ENVIRONMENTAL INSTRUMENTS

YEAR	EVENT
1972	Stockholm Declaration of UN Conference on Human Environment: first global statement of environmental principles (11 INT'L LEGAL MAT'LS [ILM] 1416)
1972	UN Gen. Ass. Reso. 2997 on Institutional and Financial Arrangement for International Environment Cooperation: established UN's environmental fund and Governing Council for policy guidance (13 ILM 234)
1973	UN Gen. Ass. Reso. 3129 on Cooperation in the Field of the Environment Concerning Natural Resources Shared by Two or More States: governing Council reports on measures taken (17 ILM 1097)
1974	Convention for the Prevention of Marine Pollution from Land-Based Sources: ecological protection (13 ILM 352)
1977	Environmental Modification Convention: prohibits military and other hostile uses of the environment (16 ILM 88).
1978	Protocol Relating to International Convention for the Prevention of Pollution from Ships: ecological protection (17 ILM 546)
1980	Gen. Ass. Reso. 35/48 on Historical Responsibility of States for Preservation of Nature for Present and Future Generations (UN Doc. A/35/48, GAOR, 35th Session, Supp. No. 48)
1983	World Charter for Nature: nature's essential processes not to be impaired; genetic viability not compromised; all areas of earth subject to conservation; ecosystems managed for optimum sustainable productivity; no degradation by warfare or other hostile activities (22 ILM 455)
1985	Vienna Convention for the Protection of the Ozone Layer: protects layer of atmospheric zone above planetary layer (26 ILM 1529)
1985	◆ Montreal Protocol on Substances that Deplete the Ozone Layer: specific obligations to limit and reduce use of chlorofluorocarbons and possibly other chemicals depleting the ozone (26 ILM 516)
1989	◆ Helsinki Declaration on the Protection of the Ozone Layer: agrees to phase out CFCs not later than the year 2000; to phase out other ozone-depleting substances; to develop acceptable substitute technologies; to transfer technology and replacement equipment to developing countries at minimum cost (28 ILM 1335)
1986	International Atomic Energy Agency Convention on Early Notification of a Nuclear Accident: designed to minimize consequences and protect life, property, and environment (25 ILM 1369)
1987	Experts Group on Environmental Law of World Commission on Environment and Development: legal principles for maintaining "sustainable development" of developing countries (UN Doc. WCED/86/23/Add. 1)
1988	Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Nitrogen Oxides or Their Transboundary Fluxes: States to control or reduce emissions to 1987 levels (28 ILM 212; 1979 treaty in 18 ILM 1442)
1989	Hague Declaration on the Environment: cooperation in controlling ozone-layer deterioration caused by emissions from industrialized States adversely affecting the right to live (28 ILM 1308)
1989	Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (28 ILM 649)
1991	Protocol on Environmental Protection to the Antarctic Treaty: updates 1959 treaty prohibiting nuclear testing and hazardous-waste disposal (19 ILM 860) to enhance protection of all ecosystems, prevent jeopardy of endangered species, and prohibit mineral resource activities except scientific (30 ILM 1461)
1992	Rio Declaration on Environment and Development: Second major conference of States; establishes current program for global partnership discouraging environmental degradation while encouraging sustainable development (31 ILM 874)
1992	Agenda 21: most extensive statement of priorities including review and assessment of International Law, development of implementation and compliance measures, effective participation by all States in lawmaking process, study of range and effectiveness of dispute resolution procedures (800-page Action Plan)
1992	Framework Convention on Climate Change: measures to combat greenhouse effect of emissions of carbon dioxide and similar gases and to finance controls (31 ILM 849)

CHART 11.1 MAJOR ENVIRONMENTAL INSTRUMENTS (CONTINUED)

YEAR	EVENT
1997	◆ Kyoto Protocol to strengthen Climate Change Convention by promise to reduce greenhouse emissions to 1990 levels between 2008 and 2012 (37 ILM 22)

2005	◆ Asia Pacific Partnership for Clean Development and Climate (Australia, China, India, Japan, South Korea, and US): supposed complement to Kyoto Protocol, that will develop cleaner energy technologies to combat global warming—but members may opt to set their goals for reducing emissions individually, with no mandatory enforcement mechanism.
1992	Convention on Biological Diversity: national monitoring and strategies for conserving biological diversity of all ecosystems (31 ILM 818)
1992	Statement of Principles for Global Consensus on the Management, Conservation and Sustainable Development for All Types of Forests: principles encourage sustainable development, reforestation, and reduction of pollutants, especially acid rain (31 ILM 881)
1992	Convention on the Protection and Use of Transboundary Watercourses and International Lakes (31 ILM 1312)
-----	◆ Protocol on Water and Health: requires parties to provide access to drinking water and sanitation; establish targets for standards and levels of performance (achieved/maintained) for increased protection against water-related diseases (38 ILM 1708)
1999	
1993	UN Gen. Ass. Reso. on Institutional Arrangement to Follow Up the [1992] UN Conference on Environment and Development: UN General Assembly follow-up resolution welcoming adoption of Agenda 21, stressing integration of environmental protection and sustainable development (32 ILM 238)
1994	UN Convention to Combat Decertification (33 ILM. 1328)
1997	UN Convention on International Watercourses: framework for development, conservation, management, and protection (36 ILM 700)
1997	IAEA Joint Convention on Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management: obligation to establish a legislative and regulatory framework to govern spent fuel from both civilian reactors and military or defense programs (36 ILM 1431)
1998	Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade: requires consent for importation of hazardous materials (38 ILM 1)
1999	Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (38 ILM 517)
2001	Stockholm Convention On Persistent Organic Pollutants: encourages parties not having regulatory and assessment schemes for pesticides and industrial chemicals to develop such programs (40 ILM 532)
2005	Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty, Liability Arising from Environmental Emergencies (http://www.ats.org.ar/Atcm/atcm28/att/atcm28_att102_rev1_e.doc)
2005	Kyoto Protocol with mandatory emissions cutbacks enters into force for participating nations
2007	◆ Curitiba Declaration on Cities and Biodiversity is promulgated by mayors of numerous large cities of the world at conference in Curitiba, Brazil on conservation of biological diversity, sustainable use of its components, and the fair and equitable sharing of the benefits arising from the use of genetic resources, available at: < http://www.cbd.int/doc/meetings/biodiv/mayors-01/mayors-01-declaration-en.pdf > ◆ International Civil Aviation Organization proposes noise and emission standards for the airline industry, at < http://www.icao.int/env/sbsta-27.pdf >.
2009	◆ Ad Hoc Working Group on Long-term Cooperative Action under the Climate Change Convention announces comprehensive process to enable sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012 expiration of Kyoto Protocol ◆ UN Convention for the Safe and Environmentally Sound Recycling of Ships approved by sixty-three nations requires higher standards for recycling and at designated recycling yards

B. 1972 STOCKHOLM CONFERENCE

1. Emerging Principles This was the first of three major UN Conferences on the environment.¹³ The resulting proclamations recognized that preservation of the environment is essential to the continued enjoyment of life itself. The importance of preserving the environment was succinctly stated in the aspirational proclamation providing (in part) as follows:

1. ... In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale.... [M]an's environment ... [is] essential to his well-being and to the enjoyment of basic human rights—even the right to life itself.

2. The protection and improvement of the human environment is a major issue [that] affects the well-being of peoples and economic development throughout the world; it is the urgent desire of peoples of the whole world and the duty of all Governments.

The bulk of the Stockholm Conference work product consists of twenty-six principles that call on States and international organizations to “play a co-ordinated, efficient and dynamic role for the protection and improvement of the environment” (Principle 25). This conference established the Governing Council of the United Nations Environment Program. The Council's functions include implementation of environmental programs and “[t]o keep under review the world environmental situation in order to ensure that emerging environmental problems of wide international significance receive appropriate and adequate consideration by Governments...”¹⁴ The key provisions are Principles 21 and 22, which set the stage for an evolving regime for establishing both standards and remedies:

Principle 21

States have, in accordance with the Charter of the United Nations and the principles of international law, ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Principle 22

States shall cooperate to develop further international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States beyond their jurisdiction.

2. Sustainable Development Proclamation 4 of the 1972 Stockholm Resolution provides that “[i]n the developing countries most of the environmental problems are caused by under-development.... Therefore, the developing countries must direct their efforts to development, bearing in mind their priorities and the need to safeguard the environment.” One might characterize this aspiration as an attempt to impose the rough equivalent of an environmental impact statement when a government undertakes any project with the potential for causing transboundary pollution on land, in the sea, or in the air. The focus of International Environmental Law (IEL) soon became *sustainable development*.


This phrase represents a somewhat symbiotic relationship between economic development (the benefit) and environmental degradation (the burden). In an ideal world, the improvement of underdeveloped economies would not be accompanied by unacceptable costs to the environment. The more developed countries are generally calling for environmental control. The less-developed countries counter that today's powerful nations had their Industrial Revolution. It is now someone else's turn to reap the same benefits.

This is perhaps the major impasse in IEL today. It effectively pits the industrialized north against the lesser-developed south. Nations of the former group seek comparatively more regulation to control environmental degradation. Lesser-developed nations seek economic prosperity. They are more willing to accept its attendant costs to the environment.

To address this disconnect, a UN group of experts drafted principles which have served as a yardstick for measuring the acceptable scope of “sustainable development” for developing countries. In 1983, the Experts Group on Environmental Law of the World Commission on Environment and Development promulgated its Principles for Environmental Protection and Sustainable Development. The Brundtland Commission Report defined sustainable development as “development which meets the needs of the present generation

without compromising the ability of future generations to meet their needs.”

The Brundtland Report became the most influential perspective on sustainable development, which was the topical focus of the UN's ensuing 1992 Rio Conference as well as the contemporary sustainable development dialogue:



**Brundtland Commission
Report: Our Common Future**

WORLD COMMISSION ON ENVIRONMENT
AND DEVELOPMENT (1987)

Go to Course Web Page, at:
<<http://home.att.net/~slomansonb.index.html>>.
Under Chapter Eleven, click Brundtland
Commission Report.

In one of the few environmental cases decided by the International Court of Justice, Vice-President Gregory Weeramantry succinctly articulated the interplay of the rights to “development,” “environmental protection,” and “sustainable development” in the following terms:

A. The Concept of Sustainable Development

...

The people of both Hungary and Slovakia are entitled to development for the furtherance of their happiness and welfare. They are likewise entitled to the preservation of their human right to the protection of their environment.... The present [1997] case thus focuses attention, as no other case has done in the jurisprudence of this Court, on the question of the harmonization of developmental and environmental concepts....

Article 1 of the [UN] Declaration on the Right to Development, 1986, asserted that “The right to development is an inalienable human right.” This Declaration had the overwhelming support of the international community....

The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* [indispensable prerequisite] for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken

of in the Universal Declaration and other human rights instruments....

While, therefore, all peoples have the right to initiate development projects and enjoy their benefits, there is likewise a duty to ensure that those projects do not significantly damage the environment....

After the early formulations of the concept of development, it has been recognized that development cannot be pursued to such a point as to result in substantial damage to the environment within which it is to occur. Therefore development can only be prosecuted in harmony with the reasonable demands of environmental protection. Whether development is sustainable by reason of its impact on the environment will, of course, be a question to be answered in the context of the particular situation involved.

It is thus the correct formulation of the right to development that that right does not exist in the absolute sense, but is relative always to its tolerance by the environment. The right to development as thus refined is clearly part of modern international law. It is compendiously referred to as sustainable development.¹⁵

The 1982 UN Conference on the Law of the Sea produced a Convention that entered into force in 1994 [§6.3.]. Article 235 contains an important statement of the applicable environmental norms that echo the Brundtland principles mentioned earlier:

1. States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.

2. States shall ensure that recourse is available in accordance with their [national] legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical [that is, corporate] persons within their jurisdiction.

3. “Transborder Environmental Interference”

This term of art is commonly used to describe State liability for both permissible or impermissible activities that cause environmental damage to another State and its inhabitants.

The Brundtland Report also determined that State responsibility should attach even when a transboundary

environmental harm results from permissible activities. The rationale for liability for unintentional cases is appropriate when “the overall technical and socio-economic cost ... far exceeds the long run advantage” of the particular activity. A State should thus be responsible for both intentional and inattentive uses or misuses of its resources which cause an adverse environmental impact in another State.

The prevailing Brundtland Report remedies provide that the offending State must then: (1) cease the wrongful act; or (2) reestablish the environmental circumstances as they were prior to the wrongful act; or (3) provide compensation to the State harmed by the transborder environmental interference; or (4) some combination of all three as the circumstances merit. These remedies are not supposed to be applied cumulatively, so as not to punish a State excessively for its transboundary environmental interference. They are the alternatives to be used in an appropriate combination, depending on the facts of the given case.

There were (and still are) some questions that have not been satisfactorily resolved. Even assuming that liability is clear, *which* of these remedies should a decision-maker employ? Should the responsible State pay damages for the “environmental interference”? If so, *how much* would appropriately compensate the harmed State? Would it be more fair to require the offending State to restore the *status quo* as it existed prior to the environmental degradation? The “sustainable development” paradigm is supposed to balance the competing interests of protecting the environment while encouraging underdeveloped nations to improve industrial growth. But striking this balance makes both liability and remedy assessments rather complex, given the ambiguities associated with the ill-defined term “sustainable development.”

The current state of liability for such harm is briefly restated by Rene Lefebvre, an environmental scholar-practitioner in The Hague:

[C]ontemporary international law and municipal law generally provide for the injurious consequences of harm to lie where they fall, unless the occurrence of harm is imputable, in the sense of the wrongful conduct, to the source of the harm.... Thus, if a victim cannot prove that the source of the harm has violated the law ... the law does not afford protection to the victim with the result that the innocent victim will

have to bear the injurious consequences of harm alone.... Having considerations of fairness, justice, and equity in mind, there is increasing support for the principle that the innocent victim should not be left to bear the loss, at least not alone ... [and] should be borne by the source of the harm or should, at least, be shared by means of some kind of burden-sharing arrangement irrespective of whether the source of the harm has violated the law or not. The idea that the injurious consequences of harm should be shifted to the source of the harm also finds support in the polluter-pays principle. The object ... is to channel the costs of prevention and reparation of environmental interference to the source of that interference.¹⁶


There are, of course, defenses to an alleged “transboundary environmental interference.” The very nature of the environment can obscure the diagnosis of how a degradation occurred—including its contributing factors. One must sometimes search for a causal link between the result and the responsible actor. An adverse result may occur long after the incident (if *one* is identifiable) that allegedly caused the degradation.

Existing pollution may also be a factor. The *Trail Smelter Arbitration* found that carbon dioxide (in the form of acid rain) was discharged into the atmosphere across the border from Canada to the US state of Washington. Assuming that the Washington fog became increasingly dense, it would be difficult for the state of Washington to conveniently trace the fog problem directly or exclusively to the Canadian smelter. Other contaminants in the US may have contributed to that fog, including industrialization in the region near the border. The pollution on the US side may have originated from a variety of sources, including US automobiles, forest depletion machinery operations, and other industrial activities—in addition to smelter operations on either side of the international border.

A joint research project of the Italian universities of Sienna and Parma succinctly described the practical problem with international responsibility for environmental harm. The then president of the European Council for Environmental Law therein cautioned that environmental damage cases are not comparable to a linear progression from Point A directly to Point B. His analogy is that “[t]he procedure of compensation for environmental damage can be compared to a steeple-chase where different obstacles must be overcome before arriving to the

final result. Some obstacles—and maybe the hardest ones to overcome—result from [trying to determine what are] the *facts* while others have a *legal* character [lacking a lineage traceable to uncluttered precedent].”¹⁷

The following case is one of the prominent environmental decisions by the International Court of Justice (ICJ)—in a contentious case with actual litigants, as opposed to the ICJ *Nuclear Weapons Case* below (an advisory opinion requested by the World Health Organization). The *Gabcíkovo* case involved a joint construction project on the Danube agreed to by both Hungary and Czechoslovakia in 1977. After the breakdown of the former Soviet Union, there was a dispute regarding how to carry out the respective treaty obligations. Public opposition to this project had surfaced in Hungary. The following ICJ opinion reviewed the basket of International Environmental Law evolving during the two decades spanning the litigants’ 1977 treaty and the Court’s decision:



**Case Concerning the
Gabcíkovo–Nagymaros Project
(Hungary v. Slovakia)**

INTERNATIONAL COURT OF JUSTICE
JUDGMENT OF 25 SEPTEMBER 1997

Go to Course Web Page, at:
<<http://home.att.net/~slomansonb/txtcsesite.html>>.
Under Chapter Eleven, click Gabcíkovo–Nagymaros Project.

The ICJ considered its first *contentious* environmental case in 1993. The small, formerly resource-rich State of Nauru alleged that Australia had incurred State responsibility for the environmental degradation of Nauru. It claimed that Australia (and others) mined the phosphate-rich soil of Nauru to satisfy the fertilizer needs of Australia’s agricultural industry, but at great expense to Nauru’s future. Nauru received a woefully inadequate share of the profits from its natural resources in addition to experiencing a depletion that also degraded its economic, social, and cultural environment as previously announced by an independent Commission of Inquiry.¹⁸

The parties settled this case shortly after the ICJ announced its Environmental Chambers Constitution

in 1993 [§11.3.A.1.]. One might presume that the Court’s pending consideration of Nauru’s contentious case, coupled with the establishment of a specialized environmental chamber, may have combined to pressure Australia into pursuing a settlement—rather than face the consequences of an adverse ICJ judgment. One possible consequence could have been a court-mandated requirement that Australia restore Nauru to the position it would have enjoyed but for the environmental degradation. Australia would not necessarily honor such a decision because of the immense economic impact of such a mandate. Australia would then have been in the unenviable position of ignoring a world court order.

A book-length account of the work of the Commission of Inquiry (undertaken before Nauru’s post-independence ICJ litigation) depicts the resulting environmental degradation of Nauru by the partnership of Australia, New Zealand, and Great Britain. A scientific report used by the Commission of Inquiry illustrates the relevant findings:

Land shortage resulting from mining has given Nauru one of the most important social problems which the country now faces.

In relation to fauna and flora, [scientists who prepared this report] ... have described how centuries will be needed for the forest to reestablish itself naturally even in modified form, and how numerous plant species are scattered and stunted as compared with their growth in the unmined forest.... These scientists have stressed “the disastrous effects and almost total disruption of island ecosystems that resulted from inappropriate development projects and land use.” Natural forest microclimates have been transformed into new microclimates with increased sunlight and lower humidity, resulting in greatly altered patterns of vegetation. A number of indigenous plant species are endangered.

With the changes in vegetation, Nauruan diet too has suffered a drastic change.¹⁹

The Court’s subsequent major environmental case involves Argentina’s claim against Uruguay that the latter violated a 1975 bilateral treaty regulating the use of a river on their border. Uruguay unilaterally authorized construction of two pulp mills in ways which fouled Argentina’s environment and operation of nearby tourist resorts. The Court denied provisional measures

against Uruguay on the ground that all issues may be resolved when the full case is decided on its merits.²⁰

4. “Soft” Law v. “Hard” Law Section 1.1.C.1. of this textbook presents the question: Is International Law Really Law? Section 7.1.B.4. presents the related treaty sub-classifications of “self-executing versus declaration of intent” treaties. In both instances, you were asked to reflect upon whether a nonbinding custom or instrument can ultimately ripen into one that is widely recognized as binding law. In the field of International Environmental

Law (IEL), more so than in any other subset of International Law, critics are fond of using the term “soft law” to describe the numerous instruments produced since the seminal 1972 Stockholm Declaration.

One who does not appreciate the underlying evolution of the law as process can easily fail to see the forest for the trees. The process, from establishing initial norms to treaty ratification, resembles the adage about one having to learn to crawl before one walks and eventually runs. As explained by a group of prominent commentators in their book on IEL:

International Environmental Law and Policy

E. WEISS, S. McCAFFREY, D. MAGRAW, P. SZASZ, AND R. LUTZ
Aspen Law & Business 189, 190–191 (New York: 1998)

Hard international law ... is, by definition, legally binding, at least on some international entities (states and IGOs), although not necessarily on all. By contrast, what some commentators refer to as “soft international law” is not binding, though perhaps superficially it may appear to be so. Nevertheless, the international entities concerned habitually comply with it, and it is this feature that arguably makes it appropriate to refer to it as “law.”

Soft law manifests itself in various ways. One is hortatory rather than obligatory language [which would be] set out in otherwise binding instruments, such as when in a treaty in force certain actions to be taken are preceded by “should” rather than by “shall.” ...

According to one view, such nonbinding precepts (rather than obligations) can be considered as soft law only if international entities, particularly states, habitually comply with them—or at least pretend to do so, thus to effect acknowledging their authority. Such behavior, even in the absence of a strict legal obligation, may be due to various factors, such as the existence of a control mechanism that notes and may report on non-compliance; it may also be due to a mere expectation of

compliance expressed by other states and by the general public ...

Soft law is generated as a compromise between those who desire a certain matter to be regulated definitely and those who, while not denying the merits of the substantive issue, do not wish (at least for a time) to be bound by a rigid and obligatory rule—perhaps because they cannot obtain the necessary domestic legislative approval.

In any event, there is an ever-growing amount of soft law, most particularly in respect to the environment, expressed in the form of standards, guidelines, and rules formulated by expert organs and often promulgated by the executive head of a technical IGO or organ, such as UNEP [the UN Environmental Program].... Similarly, when such norms are to be amended or supplemented, this often can be done much more rapidly and simply than even a simplified treaty-amending procedure.

Inherently even less binding than soft law instruments that at least in form suggest an expectation of compliance, are those that are merely presented as model legislation, regulations, or treaties

Diplomatic and academic commentators have spent the last two decades attempting to invoke Customary International Law by elaborating rules of State responsibility for transboundary pollution. States have begun to develop principles for the prevention of harmful environmental activity. They also have been experimenting with different modes of regulation for special

environmental problems. Numerous intergovernmental organizations now monitor pollution and regulate environmentally harmful behavior.²¹ In the last decade of the prior millennium, a number of academic publications suddenly emerged as the core for teaching and research efforts to “catch up” with developments in IEL.²²

One unifying theme is quite evident: States may no longer rely on territorial sovereignty to invoke the familiar UN Charter Article 2.7 defense that certain matters fall exclusively within national jurisdiction and are not subject to international legal controls.

C. 1992 RIO CONFERENCE

On the twentieth anniversary of the Stockholm Conference, nations assembled once again to reassess the interplay between the potentially conflicting objectives of maintaining the Earth's environment and sustaining development of the southern tier of nations. Nearly 180 States and 100 heads of government all gathered in Rio de Janeiro, Brazil, for the second UN Conference on Environment and Development (UNCED). The fundamental principle resolved by this conference was that a State is liable for its conduct or omission that is a "trans-boundary environmental interference."

How to manage the connected but sometimes competing objectives of economic development and environmental protection was a central issue. As provided in the resulting UN declaration, the Rio objectives are "to promote the further development of international environmental law, taking into account the [1992] Declaration of the UN Conference on the Human Environment, as well as the special needs and concerns of developing countries, and to examine ... the feasibility of elaborating general rights and obligations of states, *as appropriate*, in the field of the environment..."²³

This widely heralded gathering of diverse States produced the five major documents of the international environmental agenda for the twenty-first century. The primary components of "Rio 1992" are the following: (1) Agenda 21; (2) Rio Declaration; (3) Biological Diversity Convention; (4) Framework Convention on Climate Change; and (5) The Forest Principles.

1. Agenda 21 This is the 800-page blueprint for managing all sectors of the environment in the twenty-first century.²⁴ Many of the action items are quite specific. Yet they aspire to degrees of protection which are well beyond the existing capacity of many States.

The most controversial of these was protection of the atmosphere. Financing is the critical issue. There was an agreement that fresh funding sources are needed if the objective of sustainable development is to be something more than just lip service to an unattainable ideal. However, the developed States did not succumb to pressure

to commit even a small fraction of their GNP to assisting developing States.

Agenda 21 has other drawbacks. It does not contain any mandatory rules and depends largely on follow-up processes to attain the laudable goals of its 800-page *Program of Action*. Stanley Johnson, author of several environmental books, laments in his description of *Agenda 21* that it:

may suffer from its own sheer bulkiness ... as well as from the fact that it does not lay down any mandatory rules, nor on the whole does it require truly bankable commitments to be made by any of the [State] parties involved. *Agenda 21* is in reality the softest of "soft law," exhortory in nature, a cafeteria where self-service is the order of the day.

Much hope is placed in the "follow-up" process, i.e., how the implementation of *Agenda 21* at [the] national and international level will be monitored, but this is an area where much confusion still has to be dissipated.

UNCED [merely] agreed on new institutional arrangements, particularly an inter-governmental Commission on Sustainable Development reporting to the General Assembly through ECOSOC [Economic and Social Council in §3.3.B.3. of this text], whose primary responsibility would be to investigate the extent to which states were fulfilling their duties under *Agenda 21*. ... With so many uncertainties, it is hard to enthuse ... over the creation of another new institution in the UN framework [referring to the UN Commission for Sustainable Development].²⁵

2. Rio Declaration The Rio Declaration on Environment and Development consists of twenty-one principles.²⁶ The several key themes include Principle 2. It repeated verbatim the quoted Stockholm Principle 21 on the general duty not to permit any use that harms another State's interests. The Rio Declaration also expanded the quoted Stockholm Principle 22 statement of environmental expectations. Rio's articulation distinguished between the responsibilities of developed nations and other countries, specifically referring to the new goal of "sustainable development."

Under Principle 7: "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions of global environmental degradation, States have common but differentiated

responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”

Principle 15 of the Rio Declaration is referred to as the “Precautionary Principle.” Certain types of environmental damage are so severe that any related State action that risks them requires the following: “Where there are threats of serious or irreversible damage, [the] lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” Global fisheries conservation provided the genesis for this theme. Threats to the world’s turbot, bluefin tuna, and swordfish stocks, for example, spawned various capacity limits on these increasingly fragile species. But they have been difficult to achieve. As vividly depicted by Senior Lecturer Rosemary Rayfuse of the University of New South Wales, capacity limits have proved difficult to enforce because of “proposals from the EU and Japan repeatedly failing due to the concerns of Iran, India and other developing states[,] that proposed limits would prevent growth in their fishing industries while at the same time guaranteeing existing levels of excessive capacity for the developed distant water fishing states.”²⁷

The March 2007 UN General Assembly Resolution 61/105 deplored “the fact that fish stocks, including straddling fish stocks and highly migratory fish stocks, in many parts of the world are overfished or subject to sparsely regulated and heavy fishing efforts, as a result of, inter alia, illegal, unreported and unregulated fishing, inadequate flag State control and enforcement, including monitoring, control and surveillance measures, inadequate regulatory measures, harmful fisheries subsidies and overcapacity....”

Scientific journals are reporting that all of the world’s commercial fisheries could collapse in less than fifty years, absent fishery conservation measures which are not now in place. As fewer marine organisms survive the restricting of biodiversity, the world could conceivably run out of seafood in the next century. Illegal and unsustainable fishing occurs on the high seas beyond the 200-mile economic zone observed by most nations of the world [§6.3.E.].²⁸

The 1998 Wingspread Statement on the Precautionary Principle added *some* clarity to the defined expectations: “When an activity raises threats of harm to human health or the environment, precautionary measures should be

taken even if some cause-and-effect relationships are not fully established scientifically. In this context the proponent of an activity, rather than the public, should bear the burden of proof. The process of applying the precautionary principle must be open, informed and democratic and must include potentially affected parties. It must also involve an examination of the full range of alternatives, including no action.”²⁹ One could add that this addition is so broadly worded that it is likely impossible to effectuate.

The World Conservation Union published a similar statement in May 2007. This Union consists of 82 countries, 111 government agencies, more than 800 non-governmental organizations, and 10,000 scientists and experts from 181 countries in a unique worldwide partnership. The underlying concern is that a false prediction that an act *will not* result in environmental harm is potentially more harmful to society than a false prediction that such action *will* result in harm.³⁰

It is by no means clear, however, that this notion now falls within the corpus of Customary International Law. You will recall from the first chapter of this book on sources of International Law that State practice is the linchpin for assessing the degree to which such a norm is entitled to that status. You will learn, perhaps more from this chapter than any other, that International Environmental *Law* is, in many ways, “more art than science.”³¹

A generally cautious application of the precautionary principle does not negate the fact that specific examples can be found. In 2003, for example, Azerbaijan, Iran, Kazakhstan, the Russian Federation, and Turkmenistan signed a Framework Convention for Protection of the Marine Environment of the Caspian Sea. Under Article 2, its objective is to protect “the Caspian environment from all sources of pollution including the protection, preservation, restoration and sustainable and rational use of the Caspian Sea.” Article 5 adopted the Rio Principle 15 precautionary principle, adding an agreement that “the polluter pays.” Polluters thereby assume the obligations to prevent, control, reduce, and report any pollution of the Caspian Sea.³²

Principle 24 addresses the relationship between novel environmental concerns and traditional international legal theory. It provides as follows: “Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.” The drafters likely had in mind the virtually incomprehensible

devastation wrought by Iraq's armed forces during their retreat from Kuwait. They set fire to over 600 Kuwaiti oil wells. It took *nine months* to bring these infernos fully under control. In the interim period, millions of tons of hazardous gases belched into the air over Kuwait. UN Security Council Resolution 687 affirmed that Iraq was "liable under International Law for any direct loss, [or] damage, including environmental damage and the depletion of natural resources ... as a result of Iraq's unlawful invasion and occupation of Kuwait."³³

The ICJ 1996 *Nuclear Weapons Case* explores the environmental fallout associated with the potential use of this unique weapon. Black marketeers, ethnic or religious zealots, and terrorists may all be playing a clandestine role. One group used poisonous gas in Tokyo's subways in 1995, which attests to the potential danger of nuclear environmental pollution. When the US military

was first present in Afghanistan after September 11, 2001, the president noted that Usama bin Laden claimed to have nuclear capability. The US had recently lifted economic sanctions against India and Pakistan, which had been imposed as a consequence of their nuclear testing programs.

Even before these events, the UN's World Health Organization requested an advisory opinion from the International Court of Justice. This UN agency sought guidance from the Court about the legality of a State's potential *use* or *threat* to use nuclear weapons. All States and international organizations with an interest in the resolution of this case submitted their written input to the Court. One of the issues was how to balance environmental degradation with the national prerogative to use *any* means available to preserve the State. The relevant portions of the Court's 1996 decision follow:

Legality of the Threat or Use of Nuclear Weapons

INTERNATIONAL COURT OF JUSTICE

General List No. 95 (Advisory Opinion of 8 July 1996)

<<http://www.icj-cij.org/docket/files/95/7495.pdf?PHPSESSID=4ee5b94068878e7a690804690550ae7e>>

AUTHOR'S NOTE: You first studied this case in §9.2.F. The World Health Organization requested an advisory opinion from the ICJ regarding the following issue: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" The Court did not authoritatively resolve the question presented. Nor did it provide a definitive statement on the legality of using nuclear weapons in self-defense. The Court did, however, enunciate some useful environmental guidelines. That portion of the case, addressing nuclear weapons in an environmental context, is set forth immediately below.

COURT'S OPINION: The Court ... gives the following Advisory Opinion:

...

27. In both their written and oral statements, some States furthermore argued that any use of nuclear weapons would be unlawful by reference to existing norms relating to the safeguarding and protection of the environment, in view of their essential importance.

Specific references were made to various existing international treaties and instruments. These included

Additional Protocol I of 1977 to the Geneva Conventions of 1949, Article 35, paragraph 3, of which prohibits the employment of "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment"; and the Convention of 18 May 1977 on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, which prohibits the use of weapons which have "widespread, long-lasting or severe effects" on the environment (Art. 1). Also cited were Principle 21 of the Stockholm Declaration of 1972 and Principle 2 of the Rio Declaration of 1992 which express the common conviction of the States concerned that they have a duty "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." These instruments and other provisions relating to the protection and safeguarding of the environment were said to apply at all times, in war as well as in peace, and it was contended that they would be violated by the use of nuclear weapons whose

consequences would be widespread and would have transboundary effects.

28. Other States [countered, and thus] questioned the binding legal quality of these precepts of environmental law; or, in the context of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, denied that it was concerned at all with the use of nuclear weapons in hostilities....

It was also argued by some States that the principal purpose of environmental treaties and norms was the protection of the environment in time of peace. It was said that those treaties made no mention of nuclear weapons. It was also pointed out that warfare in general, and nuclear warfare in particular, were not mentioned in their texts and that it would be destabilizing to the rule of law and to confidence in international negotiations if those treaties were now interpreted in such a way as to prohibit the use of nuclear weapons.

29. The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a *catastrophe* for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.

30. ...The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.

This approach is supported, indeed, by the terms of Principle 24 of the Rio Declaration, which provides that:

Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment

in times of armed conflict and cooperate in its further development, as necessary.

31. The Court notes furthermore that Articles 35, paragraph 3, and 55 of [Geneva Convention] Additional Protocol I provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals.

These are powerful constraints for all the States having subscribed to these provisions.

32. General Assembly resolution 47/37 of 25 November 1992 on the Protection of the Environment in Times of Armed Conflict, is also of interest in this context. It affirms the general view according to which environmental considerations constitute one of the elements to be taken into account in the implementation of the principles of the law applicable in armed conflict: it states that "destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law." Addressing the reality that certain instruments are not yet binding on all States, the General Assembly in this resolution "[a]ppeals to all States that have not yet done so to consider becoming parties to the relevant international conventions." ...

33. The Court thus finds that while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.

...

35. ...The Court has noted the definitions of nuclear weapons contained in various treaties and accords. It also notes that nuclear weapons are explosive devices whose energy results from the fusion or fission of the atom. By its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation. According to the material before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon

of radiation is said to be peculiar to nuclear weapons. These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.

The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.

...

57. The pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments. The most recent such instruments are the Convention of 10 April 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their destruction which prohibits the possession of bacteriological and toxic weapons and reinforces the prohibition of their use and the Convention of 13 January 1993 on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction which prohibits all use of chemical weapons and requires the destruction of existing stocks. Each of these instruments has been negotiated and adopted in its own context and for its own reasons. The Court does not find any specific prohibition of recourse to nuclear weapons in treaties expressly prohibiting the use of certain weapons of mass destruction.

58. In the last two decades, a great many negotiations have been conducted regarding nuclear weapons; they have not resulted in a treaty of general prohibition of the same kind as for bacteriological and chemical weapons.

...

60. Those States that believe that recourse to nuclear weapons is illegal stress that the conventions that include various rules providing for the limitation or elimination of nuclear weapons in certain areas (such as the Antarctic Treaty of 1959 which prohibits the deployment of nuclear weapons in the Antarctic, or the Treaty of Tlatelolco of 1967 which creates a nuclear-weapon-free zone in Latin America), or the conventions that apply certain measures of control and limitation to the existence of nuclear weapons (such as the 1963 Partial Test-Ban

Treaty or the Treaty on the Non-Proliferation of Nuclear Weapons) all set limits to the use of nuclear weapons. In their view, these treaties bear witness, in their own way, to the emergence of a rule of complete legal prohibition of all uses of nuclear weapons

...

76. Since the turn of the century, the appearance of new means of combat has[,] without calling into question the longstanding principles and rules of international law[,] rendered necessary some specific prohibitions of the use of certain weapons, such as explosive projectiles ... [c]hemical and bacteriological weapons ... weapons producing "non-detectable fragments," of other types of "mines, booby traps and other devices," and of "incendiary weapons," was either prohibited or limited.

...

78. ... In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.

...

93. A similar view has been expressed with respect to the effects of the principle of neutrality. Like the principles and rules of humanitarian law, that principle has therefore been considered by some to rule out the use of a weapon the effects of which simply cannot be contained within the territories of the contending States.

94. The Court would observe that none of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the "clean" use of smaller, low yield, tactical nuclear weapons, has indicated what, supposing such limited use were feasible, would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons. This being so, the Court does not consider that it has a sufficient basis for a determination on the validity of this view.

...

Questions: As determined in the above *Nuclear Weapons* opinion, what is a State's environmental responsibility when it is contemplating the use of nuclear weapons? Must a State choose between preservation of the environment and self-defense? Would it be fair to characterize this "decision" as one wherein the judges were unwilling to be specific in the absence of a set of specific hypothetical facts? Are they arguably willing to give a more satisfactory answer, but only if some future litigant were to present a case where nuclear weapons were actually used (e.g., the Problem 9.F on the US use of bunker busters)?

Nuclear weapons are not mentioned in the hundreds of instruments of International Environmental Law generated since the 1972 Stockholm Conference. Does this absence suggest that nuclear weapons fall *within*, or are *beyond* the scope of these instruments?

3. Biological Diversity Convention Unlike earth's other inhabitants, humans act in ways that disadvantage plant and animal eco-systems. Contemporary extinction rates (compared to the last 13,000 years of human inhabitation of the earth) are much higher than normal. Humans appropriate forty percent of global production to their own use. The consequences include burned forests, overexploited soils, polluted wetlands and oceans, and little harmony between humans and earth's other species.

The connection between biodiversity and climate change is undeniable. The UN Intergovernmental Panel on Climate Change [IPCC, addressed in §11.2.C.4(b) below] issued an April 2007 draft report, estimating that "roughly 20-30 percent of species are likely to be at high risk of irreversible distinction." This group of scientists reached this conclusion based on the assumption that the average global temperature would rise by 2.7 to 4.5 degrees Fahrenheit.

Biological diversity is an imprecise term that may refer to diversity in a gene, species, community of species, or ecosystem; it is often contracted to *biodiversity*, and used broadly with reference to total biological diversity in an area on the Earth as a whole. Pest resistance in different rice varieties, or the number and kinds of species present in an area of forest, or the changing quality of natural grassland, are all aspects of biodiversity, but whatever the

context, [maintaining] the diversity of organisms is central.³⁴

The 1992 Rio Conference spawned yet another major dispute. The "Biodiversity Treaty" was opened for signature at the Conference. It mandates national development, monitoring, and preservation of all forms of life.³⁵ It requires the maintenance of "variability" among living organisms from all sources and ecosystems—a form of endangered-species protection. The desired diversity is not limited to the earth's soil. Vessels and planes traversing the world's oceans and airways introduce pollutants that disturb the world's biodiversity.

Due to global warming, polar bears could be driven to extinction within 100 years. By some accounts, Arctic sea ice is melting at a rate of up to nine percent per decade. Arctic summers could be ice-free by 2050. Polar bears rely on sea ice to catch seals. But the distances they have to swim are impacted by the ice cap melting at unusual speed. These mammals are therefore drowning in record numbers. (Nor are whales immune from man's activities, including the military use of sonar and the corporate search for oil. The associated technologies create sounds that harm their hearing and impact their food searches.³⁶)

This concern led to the US-Canadian agreement on polar bears. Canada hosts sixty percent of the world's estimated 22,000 polar bears. It builds upon the 1973 Agreement for the Conservation of Polar Bears. These documents provide an international conservation framework between Canada, Norway, Denmark (for Greenland), Russia, and the US. The US-Canadian agreement has established a governmental Oversight Group. Its *raison d'être* is to develop and integrate cooperative programs into the Oversight Group's conservation priorities. They plan on doing so by drawing upon the Canadian Aboriginal experience with the polar bear segment of their culture.³⁷

Article 3 of the Biodiversity Treaty contains an important principle designed to dovetail environmental protection and sustainable development: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the [concomitant] responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other

States or areas beyond the limits of national jurisdiction.” This feature of the sustainable development doctrine now permeates the various international environmental debates.

A related dispute arose when President George Herbert Walker Bush declared that the US would not endorse the 1992 Biodiversity Treaty, even in principle. He objected to the required transfer of technology and intellectual property rights held by US corporations, the sharing of access to profitable biotechnologies with developing countries, and a required financial commitment to advance the relative economic position of developing countries. The gist of the US objection was that the US did not want to donate its biotechnology nor provide financing for other countries to develop competitive capabilities.

The US then stood alone among the world’s leading nations in taking a stance against implementation of the Biodiversity Treaty. Some 120 States had signed this treaty at, or shortly after, the Rio Convention. In 1993, however, President Bill Clinton reversed the US position. He announced that the US would “sign” this treaty—meaning that the US would agree in principle, but was not ready to ratify it as a binding instrument. President Clinton announced that the US would subsequently work with the European Union to develop an interpretive agreement which would not debase the intellectual property rights of US and European companies that use genetic resources in their research and development programs.

4. Framework Convention on Climate Change³⁸ This treaty voices environmental concerns about the atmosphere. It addresses greenhouse emissions, especially carbon dioxide. One should first observe that the “greenhouse effect” is not per se a bad thing. As depicted by the German environmental lawyer Roda Verheyen:

... The climate is mainly driven by the energy provided by the sun in the form of solar radiation. About one-third of this energy is absorbed by the atmosphere, oceans, land and biosphere, [and] the rest is reflected back into space. The natural greenhouse effect is caused by atmospheric greenhouse gases such as water vapor, carbon dioxide, ... and chlorofluorocarbons ... which effectively act as a blanket that traps radiation (heat) and prevents most of the thermal radiation from entering outer space—like in

a greenhouse. Without these gases and their heat trapping abilities, the Earth would be about 34°C colder than it currently is—it would be a frozen wasteland. The natural greenhouse effect increases the mean temperature on Earth to a life sustaining 14°C.

Increases in the concentration of greenhouse gases in the atmosphere lead to less radiation entering outer space, which gradually increases the temperature of the lower atmosphere and the Earth’s surface (“global warming”).³⁹

As of June 2007, China is literally choking on its economic success as the top producer of carbon dioxide emissions—the biggest man-made contribution to global warming. The US is ranked second for this dubious honor (yielding between twenty-two and twenty-five percent of the world’s total). The 2008 economic implosion also means that a country like the US will do an even worse job in overseeing the cause and effect. The September 2007 National Research Council and the US Government’s own Government Accounting Office both claimed that federal government oversight has become increasingly foggy. Among other reasons, the several satellite-based measuring programs are virtually ignoring global warming. Long-term data gathering and monitoring networks are deteriorating.⁴⁰

The primary problem is the burning of fossil fuels which thrust heat-trapping “greenhouse gases” into the atmosphere. Some six percent of the world’s industrialized population now produces thirty percent of the gases responsible for this greenhouse effect.⁴¹ About eighty percent of the world’s carbon dioxide emissions originate outside of the transportation sector—mostly from power generation facilities. Extracting and transporting molasses—like crude oil—requires a great deal of electricity and steam. Each of these requires burning a fossil fuel, thus producing massive amounts of carbon dioxide—probably the major global warming gas. The “greenhouse effect” is the unnatural warming of the biosphere, which results in heat waves, melting of the polar ice caps, and depletion of the ozone layer that protects against the sun’s infrared rays.⁴²

The Climate Change Convention requires the parties to submit periodic reports about their gaseous emissions, which harm the atmosphere by depleting the ozone layer above the earth. An environmental agency reviews national compliance with the treaty goal of limiting these environmentally adverse emissions to

earlier levels—as opposed to unregulated increases. Article 9 calls for continual assessment of scientific evidence, as it becomes available, for controlling climate change and incorporating the relevant technologies for achieving better national control. In 2002, the US submitted its third climate report to the UN, detailing the effect that global warming will have on the environment. The US Climate Action Report calls for *voluntary* measures.⁴³ This was its Third National Communication under the UN Framework Convention on Climate Change, submitted in compliance with US obligations under the Climate Change Convention. [The fourth, and latest, is described in subsection 4(b) below.]

(a) Kyoto Protocol The 1992 Climate Change Convention generally strives for a return to the emission levels of 1990 by the year 2000. The US, for example, has the second highest rate of greenhouse gas emissions in the world: approaching twenty-five percent of the total, which was twenty tons per person as of 1995. At the 1997 (Rio) follow-up conference, 175 nations—including thirty-eight industrialized nations—agreed to reduce greenhouse emissions to 1990 levels at some point between 2008 and 2012 in the Kyoto Protocol. Unlike the Climate Change Convention, its Kyoto Protocol sets comparatively clear targets for the abatement of greenhouse emissions.⁴⁴ Poorer countries, who feel entitled to their own industrial development, are reluctant to be parties to this treaty.

As part of the 2000 UN Millennium Declaration, 150 heads of State weighed in with the following statement:

We resolve therefore to adopt in all our environmental actions a new ethic of conservation and stewardship and, as first steps, we resolve:

- ◆ To make every effort to ensure the entry into force of the Kyoto Protocol, preferably by the tenth anniversary of the United Nations Conference on Environment and Development in 2002 [entered into force on Feb. 16, 2005], and to embark on the required reduction in emissions of greenhouse gases.⁴⁵

...

The Kyoto Protocol debate initially (and for some years) focused on whether the projected greenhouse effect was real and whether the environmentalists were crying wolf. In June 2001, the Intergovernmental Panel

on Climate Change solicited and received input from 2,000 climate scientists who had examined the evidence in 180 countries. Their consensus put this debate to rest. Unless changes are forthcoming, the earth's average temperature will rise from somewhere between 2.5 and 10.4 degrees Fahrenheit in the twenty-first century. That increase would be two to ten times the 1.1 degree increase in the last century. The panel said that translates into millions of deaths, huge population migrations, frequent droughts, famines, heat waves, and tropical diseases—all of which will *begin* in coastal cities and the tropics.⁴⁶

But preventative measures are costly. The estimated cost would be \$120,000,000,000 *per year* to control (not eliminate) global warming. Not many States have the economic capacity to provide the requisite funding. The 1992 Climate Convention was thus supposed to provide financial assistance to the lesser-developed countries. Funding would become available through the Global Environmental Facility of the World Bank. This bank was the intergovernmental institution responsible for rebuilding postwar Europe through the establishment of national economic development programs. The Global Environmental Facility would be the world's environmental banker. Given existing concerns about the objectivity of the World Bank, however, it is not clear that the more developed nations will ratify this device for financing sustainable development.⁴⁷

The 1997 Kyoto Protocol was sired by compromise. For the first time, developed nations adopted an agreement accepting (in principle) that they must meet specific targets/timetables so that the greenhouse gas cause of adverse climate change will be dealt with in a binding “hard law” treaty. Kyoto's primary innovation is its creation of new mechanisms designed to harness market forces for determining how and where to reduce greenhouse gas emissions. The first of these mechanisms, emissions trading, will allow developed countries to achieve their emissions targets by trading emission credits among themselves. Emission reductions would be achieved in the most cost-effective manner because nations could buy and sell credits earned by reducing their CO₂ emissions. Uniform adoption of the Kyoto Protocol program would hopefully result in the 5.2 percent reduction of such gases by 2012.

In July 2001, President George W. Bush announced that the US would not participate further because of the administration's projection of the Kyoto Protocol's

financial impact on US corporations and the public. The US *signed* the Kyoto Protocol during the Clinton presidency, but has not ratified the 1997 Protocol. Ironically, at the same time he rejected Kyoto, President Bush was willing to sign the Stockholm Convention on Persistent Organic Pollutants. The Stockholm treaty bans the dirty dozen toxic chemicals and pesticides linked to cancer, birth defects, and other health problems [Chart 11.1]. Bush felt that there were too many unanswered questions in the Kyoto Protocol including: how the emissions trading would actually function; and how to address a ratifying party's failure to comply with the stated targets and timelines.⁴⁸

The September 2004 UN annual conference on global warming—carbon dioxide emissions—drew a number of industrial nations but not the US. However, nine states of the US sent delegates. More than two dozen US states have taken action to reduce carbon dioxide emissions by ordering cuts in power plant emissions and limiting state government purchases of sport utility (fuel-inefficient) vehicles.⁴⁹

The December 2005 Montreal Conference was the first annual international meeting associated with the entry into force of the Kyoto Protocol.⁵⁰ There, 157 nations of the 190 attendees agreed to begin talks on specific compliance with Kyoto's mandatory post-2012 reduction of greenhouse gases. Australia and the US rejected this primary conference pillar because it was not binding upon developing nations as well. But these dissenting nations at least agreed to the secondary conference platform—beginning a fresh global dialogue about future steps to combat adverse climate changes. While the US had previously responded (in 2002) that such measures should be voluntary,⁵¹ one retort may be that “half a loaf is better than none.”

While the US rejection of the global warming Kyoto Protocol could have doomed its existence, it nevertheless entered into force in February 2005. The 170 ratifying countries included all members of the European Union, Russia, and both of the US North American Free Trade Agreement partners (Canada and Mexico). China, one of the major industrializing countries of the world, has approved Kyoto in principle. The US is the only member of the economic group “G-8” [§12.3.B.1.] that has not ratified Kyoto. The US appears to have agreed to a G-8 plan that would reduce emissions by fifty percent by 2050. This plan is unpopular because it does not in fact provide specifics on how to accomplish

that goal although other environmental treaties and plans have often suffered from the same defect.⁵²

The environmentalists claim that the earth will get warmer, which is already occurring. If unchecked, the “greenhouse effect” will cause floods and destroy many natural resources. The depletion of the ozone layer will also contribute to global health hazards as the sun's ultraviolet rays more readily penetrate the atmosphere.⁵³

Ironically, the US Environmental Protection Agency's Web site offers a rather sinister warning:

Rising global temperatures are expected to raise sea level, and change precipitation and other local climate conditions. Changing regional climate could alter forests, crop yields, and water supplies. It could also affect human health, animals, and many types of ecosystems. Deserts may expand into existing rangelands, and features of some of our National Parks may be permanently altered.

Most of the United States is expected to warm, although sulfates may limit warming in some areas. Scientists currently are unable to determine which parts of the United States will become wetter or drier, but there is likely to be an overall trend toward increased precipitation and evaporation, more intense rainstorms, and drier soils.⁵⁴

The polar opposite is claimed by those who believe that the Kyoto Protocol should have been ignored. The University of Virginia's Professor Emeritus of Environmental Sciences, Fred Singer, describes the Kyoto Protocol as “outrageously costly,” “completely ineffective,” and “essentially defunct.” Industrialized nations cannot return to 1990 levels although they can slow emissions. Countries not covered by the treaty would, arguably unfairly, become the biggest greenhouse emitters. Kyoto and the international community should be focusing on other pollutants, rather than being obsessed by this one contributor.⁵⁵

Case Study: In 1978, Congress passed the *National Climate Program Act*. It required the President to establish a program to “assist the nation and the world to understand and respond to natural and man-induced climate processes and their implications.” In 1987, Congress enacted the *Global Climate Protection Act*. Its congressional findings were that manmade pollution may be producing a substantial increase in average temperature.

In 1990, the UN's Intergovernmental Panel on Climate Change [text subsection (b) immediately below] published its first comprehensive report on global warming. It confirmed that human activities are significantly increasing the average global temperature. The UN then convened the 1992 "Earth Summit" in Rio de Janeiro. President Bush (senior) attended and signed the resulting non-binding 1992 UN Framework Convention on Climate Change. The objective was to reduce the atmospheric concentrations of greenhouse gases. The 1997 Kyoto Protocol assigned mandatory reduction targets. Because they did not apply to developing and heavily polluting nations like China and India, the US did not ratify the Kyoto Protocol.

In 1999, fifteen environmental organizations filed a petition with the US Environmental Protection Agency, seeking to establish its responsibility to regulate greenhouse gas emissions from new cars. Eleven US states and local governments later joined the organizational petitioners in their quest to have the EPA take action.

In 2003, the EPA denied this petition—thus entering the fray on the negative side of the Kyoto debate. The agency claimed that the congressional intent of the 1987 Global Climate Protection Act was to regulate local pollutants—but not global pollutants which were commonplace throughout the world. The agency reasoned that the phenomenon of "climate change" had a political history by which it was not bound. The EPA also argued (unsuccessfully) that it did not have to regulate automobile greenhouse gas emissions under the national Clean Air Act.

The Supreme Court five-four majority split along predictable political lines. It found that the transportation sector emits an enormous amount of carbon dioxide. That was more than 1,700,000,000 tons in 1999 alone, which was about one-third of the amount in all US sectors. The Court ordered the EPA to at least take steps to reduce these emissions. In the Court's words: "The risk of catastrophic harm, though remote, is nevertheless real." Thus, the EPA was bound to explore the further regulation of greenhouse gas emissions from new automobiles.⁵⁶

The year 2008 brought "California Kyoto." The State of California announced its final plans (first announced in 2006) for dealing with greenhouse emissions while expressing frustration at the slow pace of the federal government. The specifics include requiring companies and the state government to roll back greenhouse gas emissions to 1990 levels by 2020. Comparable to the

UN environmental program, companies would have to buy emission credits from companies that are emitting at a level below their thresholds.

The federal EPA once again effectively took an anti-Kyoto stance. It initially supported the right of states to act in lieu of the federal government but later withdrew its approval. Regardless, seven western states and four Canadian provinces have joined in a Western Climate Initiative. It would establish a regional market for trading emission credits. Britain's former Prime Minister had previously signaled Great Britain's agreement to join this potential trans-Atlantic market.⁵⁷

Car speed is a related greenhouse gas emissions contributor. In March 2007, the European Union's Greek environmental minister proposed that Germany impose a speed limit on its famed Autobahn. Cars there travel at the speed of a jet takeoff, often reaching speeds between 100 and 175 miles per hour. Germany responded that this proposal trivialized the real problem. But a speed limit of seventy-five miles per hour would reduce Germany's overall carbon dioxide emissions by several million tons per year.

Airline emissions represent a significant gap in Kyoto coverage: a routine flight spawns carbon emissions which are three times the amount of fuel burned. In 2006, the European Commission thus proposed that the European Union (EU) emissions trading program include aircraft. A resolution called for the introduction of a gas tax on kerosene and jet fuel for domestic flights within the EU. Exceptions would be made for non-EU carriers.

The private International Civil Aviation Organization [textbook §6.4.A.4.] proposed related noise and emissions standards in 2008. The US and EU may be in conflict over which of the two are appropriate. The US and many other non-EU nations contend that unilateral imposition of the proposed EU Greenhouse Gas Emission Trading Scheme (as of 2012) violates the 1947 Chicago Convention [textbook §6.4.A.2.] as well as a host of bilateral treaties, all of which require State consent for such matters to be introduced.⁵⁸

Hurricanes figure into the Kyoto debate as well. The US National Center for Atmospheric Research September 2005 post-Katrina report provides an insightful example. One cannot categorically conclude that rising sea-surface temperatures caused a specific storm like Katrina. However, this environmental study does demonstrate the potential for more Katrina-like storms. In the 1970s, there was a yearly average of eleven storms

in the powerful Categories 4 and 5. Since 1990—the year to which the Kyoto Protocol is tied—the world-wide average has been eighteen per year. This increase in powerful hurricanes is directly attributable to global warming—coinciding with a rise of nearly 1 degree Fahrenheit in the tropical sea surface. The warm water ocean vapor drives tropical storms. As the water gets warmer, the amount of evaporation increases. That in turn fuels such tempests. The estimated cost of the September 2005 Hurricane Katrina was \$300,000,000,000. One might question whether it is more costly to evade the Kyoto Protocol if that means enduring this kind of expense—not to mention the “cost” of the hundreds of lives lost because of Hurricane Katrina alone.

(b) Intergovernmental Panel on Climate Change In 1988, the UN Environment Programme (UNEP) and the World Meteorological Organization (WMO) established the Intergovernmental Panel on Climate Change (IPCC). Membership is open to State Members of both organizations. This Panel does not conduct research. It does not review climate data. Its role is to evaluate

scientific, technical, and socioeconomic information relevant to understanding the “scientific basis of risk of human-induced climate change, its potential impacts and options for adaptation and mitigation.” Its assessments are thus premised on data appearing in peer-reviewed literature from experts around the world. The IPCC’s essential task is to present balanced reporting of all viewpoints.

This international panel has three working groups (and a special task force on greenhouse gas inventories). The focus of each of them is as follows. Group I: the scientific aspects of the climate system and climate change; Group II: the vulnerability of socioeconomic and natural systems to a changing climate; and III: the possible ways in which greenhouse gas emissions and other aspects of climate change can be mitigated. In addition to working group reports, the IPCC conducts assessments.⁵⁹ The IPCC’s complete November 2007 *Fourth Assessment Report Summary for Policymakers* summarizes the salient features of the previous three working group reports (which is available on the Course Web Page under Chapter Eleven).

They agree on at least the following key points:

Climate Change 2007: Synthesis Report Summary for Policymakers An Assessment of the Intergovernmental Panel on Climate Change

(FOURTH ASSESSMENT REPORT)

VALENCIA, SPAIN, 12–17 NOVEMBER 2007

<http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf>

AUTHOR’S NOTE: The Intergovernmental Panel on Climate Change’s delegates from 130 nations produced this global climate change assessment. It does not provide all the answers. But it does represent the most objective assessment of the changing climate, its consequences, and predictions regarding inaction. The Report’s key conclusions are set forth below as bullet points. Each one is supported by extensive supporting detail.

Minor style modifications have been introduced, to improve readability.

PANEL OPINION:

1. OBSERVED CHANGES IN CLIMATE AND THEIR EFFECTS

- ◆ Warming of the climate system is unequivocal, as is now evident from observations of increases in

global average air and ocean temperatures, widespread melting of snow and ice and rising global average sea level.

- ◆ Observational evidence from all continents and most oceans shows that many natural systems are being affected by regional climate changes, particularly temperature increases.
- ◆ There is medium confidence that other effects of regional climate change on natural and human environments are emerging, although many are difficult to discern due to adaptation and non-climatic drivers.

2. CAUSES OF CHANGE

- ◆ Global GHG [carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and

sulphurhexafluoride] emissions due to human activities have grown since pre-industrial times, with an increase of 70% between 1970 and 2004.

- ◆ Global atmospheric concentrations of CO₂, methane (CH₄) and nitrous oxide (N₂O) have increased markedly as a result of human activities since 1750 and now far exceed pre-industrial values determined from ice cores spanning many thousands of years.
- ◆ Most of the observed increase in global average temperatures since the mid-20th century is very likely due to the observed increase in anthropogenic GHG concentrations. It is likely that there has been significant anthropogenic warming over the past 50 years averaged over each continent (except Antarctica).
- ◆ Advances since the TAR [Third Assessment Report of 2001] show that discernible human influences extend beyond average temperature to other aspects of climate.
- ◆ Anthropogenic warming over the last three decades has likely had a discernible influence at the global scale on observed changes in many physical and biological systems.

3. PROJECTED CLIMATE CHANGE AND ITS IMPACTS

- ◆ There is high agreement and much evidence that with current climate change mitigation policies and related sustainable development practices, global GHG emissions will continue to grow over the next few decades.
- ◆ Continued GHG emissions at or above current rates would cause further warming and induce many changes in the global climate system during the 21st century that would very likely be larger than those observed during the 20th century.
- ◆ There is now higher confidence than in the TAR in projected patterns of warming and other regional-scale features, including changes in wind patterns, precipitation and some aspects of extremes and sea ice.
- ◆ Studies since the TAR have enabled more systematic understanding of the timing and magnitude of impacts related to differing amounts and rates of climate change.

- ◆ Altered frequencies and intensities of extreme weather, together with sea level rise, are expected to have mostly adverse effects on natural and human systems.
- ◆ Anthropogenic warming and sea level rise would continue for centuries due to the time scales associated with climate processes and feedbacks, even if GHG concentrations were to be stabilised.
- ◆ Anthropogenic warming could lead to some impacts that are abrupt or irreversible, depending upon the rate and magnitude of the climate change.

4. ADAPTATION AND MITIGATION OPTIONS

- ◆ A wide array of adaptation options is available, but more extensive adaptation than is currently occurring is required to reduce vulnerability to climate change. There are barriers, limits and costs, which are not fully understood.
- ◆ Adaptive capacity is intimately connected to social and economic development but is unevenly distributed across and within societies.
- ◆ Both bottom-up and top-down studies indicate that there is high agreement and much evidence of substantial economic potential for the mitigation of global GHG emissions over the coming decades that could offset the projected growth of global emissions or reduce emissions below current levels. While top-down and bottom-up studies are in line at the global level there are considerable differences at the [technological] sectoral level.
- ◆ A wide variety of policies and instruments are available to governments to create the incentives for mitigation action. Their applicability depends on national circumstances and sectoral context.
- ◆ Many options for reducing global GHG emissions through international cooperation exist. There is high agreement and much evidence that notable achievements of the UNFCCC [UN Framework Convention on Climate Change] and its Kyoto Protocol are the establishment of a global response to climate change, stimulation of an array of national policies, and the creation of an international carbon market and new institutional mechanisms that may provide the foundation for future

mitigation efforts. Progress has also been made in addressing adaptation within the UNFCCC and additional international initiatives have been suggested.

- ◆ In several sectors, climate response options can be implemented to realise synergies and avoid conflicts with other dimensions of sustainable development. Decisions about macroeconomic and other non-climate policies can significantly affect emissions, adaptive capacity and vulnerability.

5. THE LONG-TERM PERSPECTIVE

- ◆ Determining what constitutes “dangerous anthropogenic interference with the climate system” in relation to Article 2 of the UNFCCC involves value judgements. Science can support informed decisions on this issue, including by providing criteria for judging which vulnerabilities might be labeled ‘key.’
- ◆ The five ‘reasons for concern’ identified in the TAR remain a viable framework to consider key vulnerabilities. [*Risks to unique and threatened systems. Risks of extreme weather events. Distribution of impacts and vulnerabilities. Aggregate impacts. Risks of large-scale singularities.*] These ‘reasons’ are assessed here to be stronger than in the TAR. Many risks are identified with higher confidence. Some risks are projected to be larger or to occur at lower increases in temperature. Understanding about the relationship between impacts (the basis for ‘reasons for concern’ in the TAR) and vulnerability (that includes the ability to adapt to impacts) has improved.
- ◆ There is high confidence that neither adaptation nor mitigation alone can avoid all climate change impacts; however, they can complement each other and together can significantly reduce the risks of [adverse] climate change.
- ◆ There is high agreement and much evidence that all stabilisation levels assessed can be achieved by deployment of a portfolio of technologies that are either currently available

or expected to be commercialized in coming decades, assuming appropriate and effective incentives are in place for their development, acquisition, deployment and diffusion and addressing related barriers.

- ◆ The macro-economic costs of mitigation generally rise with the stringency of the stabilisation target. For specific countries and sectors, costs vary considerably from the global average.
- ◆ Responding to climate change involves an iterative risk management process that includes both adaptation and mitigation and takes into account climate change damages, co-benefits, sustainability, equity and attitudes to risk.

Impacts of climate change are *very likely* to impose net annual costs, which will increase over time as global temperatures increase. Peer-reviewed estimates of the social cost of carbon in 2005 average US\$12 per tonne of CO₂, but the range from 100 estimates is large (−\$3 to \$95/tCO₂). This is due in large part to differences in assumptions regarding climate sensitivity, response lags, the treatment of risk and equity, economic and non-economic impacts, the inclusion of potentially catastrophic losses and discount rates. Aggregate estimates of costs mask significant differences in impacts across sectors, regions and populations and *very likely* underestimate damage costs because they cannot include many non-quantifiable impacts.

Limited and early analytical results from integrated analyses of the costs and benefits of mitigation indicate that they are broadly comparable in magnitude, but do not as yet permit an unambiguous determination of an emissions pathway or stabilisation level where benefits exceed costs.

Climate sensitivity is a key uncertainty for mitigation scenarios for specific temperature levels.

Choices about the scale and timing of GHG mitigation involve balancing the economic costs of more rapid emission reductions now against the corresponding medium-term and long-term climate risks of delay.

The January 2009 edition of the *Proceedings of the National Academy of Sciences* confirmed the findings of the IPCC. It predicted an “irreversible” change that will remain for 1,000 years, even if humans immediately stopped adding carbon to the atmosphere. As one portion noted: “It’s not like air pollution where if we turn off a smokestack, in a few days the air is clear.” Prior to the Industrial Revolution, the air contained about 280 parts per million (ppm) of carbon dioxide. That has now risen to 385 ppm. If it peaks at 450–600 ppm, there would be persistent decreases in dry-season rainfall comparable to the 1930s North American Dust Bowl. That condition would occur in southern Europe, northern Africa, southwestern North America, South America, and western Australia. Both the temperature and sea-level changes in the report are underestimated and conservative.

Climate change (albeit not exclusively) is also threatening cultural landmarks from Canada to Antarctica. The World Monuments Fund issues a list of endangered sites every two years. The group blames rising seas, spreading deserts, and intensifying weather. The June 2007 losses included the Church of the Holy Nativity, which is under Palestinian control; the Machu Picchu Historic Sanctuary in Peru; and the famed Highway 66 spanning much of the US. Since 1996, this organization has donated nearly fifty million dollars to help preserve nearly two hundred sites.

Governments could learn from the outlook of this particular non-governmental organization. As avowed by its president: “On this list, man is indeed the real enemy. But, just as we caused the damage in the first place, we have the power to repair it.” More than three-fourths of the locations identified by the Monuments Fund have thus been removed from this endangered list—reminiscent of the adage “Where there is a will there is a way.”⁶⁰

(c) Post-2012 Climate Change Regime The December 2007 “Bali Roadmap” launched a program designed to complete negotiations regarding the above Kyoto Protocol’s “mandatory” post-2012 reduction of greenhouse gases. This Indonesian conference was both the thirteenth annual meeting of the ongoing Conference of the Parties to the above 1992 UN Framework Convention on Climate Change and the third Meeting of the Parties to the 1997 Kyoto Protocol.

The Bali Roadmap negotiations focused on mitigating climate change emissions; facilitating clean technology

transfer among the national parties; adapting to climate change consequences, including flooding and drought; and how to finance the above measures. The resulting Ad Hoc Working Group on Long-Term Cooperative Action is facilitating this agenda between conferences—with a view toward completing its agenda and recommendations in time for the post-2008–2012 working period.

The Roadmap agenda includes the urgent implementation of measures to protect poor nations from the adverse consequences of climate change and addresses how to ameliorate the damage flowing from climate change. One attendee, former US Vice President Al Gore—a Nobel Peace Prize Laureate for his environmental work—noted that the US was primarily responsible for blocking progress at the Bali conference. He urged negotiators to draft open-ended agreements, the details of which could be pursued after a new president was inaugurated in 2009.

Conference delegates noted that the energy sector contributes about eighty percent of the world’s greenhouse (heat-trapping) gas emissions. The World Bank estimate is that there will be a sixty percent increase in energy production carbon emissions by 2030. A consensus was reached, whereby participating nations would adopt significant reduction plans, to dovetail with the Intergovernmental Panel on Climate Change target of twenty-five to forty percent reductions to 1990 levels by 2020—as provided in the IPCC’s [above subsection (b)] Fourth Assessment Report. However, Canada, Japan, and Russia objected to mentioning the percentage reduction in the report (while an absent US delegation conducted its own parallel negotiations).

As noted by University of South Dakota Law School Professor Elizabeth Burleson—and member of the Bali conference UNICEF delegation—the British government secured the unanimous agreement of the UN Security Council Member States to consider those portions of the climate change agenda that affect the Council’s work. Climate change, for example, could displace 200,000,000 people by 2050. UN Secretary-General Ban Ki-Moon expressed his view that climate change is at a threat-level that is comparable to war.⁶¹

(d) Climate Change and Gender How one measures environmental “costs” is a relative matter. The cost of environmental degradation includes the negative impact of climate change on women. The Council of Women

World Leaders, the Women's Environment and Development Organization, and the Heinrich Böll Foundation of North America organized a 2007 conference at the Permanent Mission of Germany to the UN entitled: "How a Changing Climate Impacts Women." This was one of the first high-level sessions to focus on the linkages between gender equality and climate change.

Roundtable participants lamented the absence of any reference to gender in the UN Framework Convention on Climate Change. But climate change is not gender neutral. Progress on achieving the UN Millennium Development Goals [textbook §3.3], including their related gender equality goals, has been slowed or reversed due to climate change. As emphasized by conference participants: "It is not an oversight that gender isn't being addressed, but instead part of a systemic problem of societies and governments marginalizing women."

Examples include that provided by the former UN High Commissioner for Human Rights: "The impact of climate change on women is important from a justice perspective. Women are responsible for 75% of household food production in sub-Saharan Africa, 65% in Asia and 45% in Latin America. Erratic weather causes women to spend more time gathering food, which means less time for education, personal, and family life." In a poignant illustration by the Costa Rican representative:

We also know that 70–80% of overall deaths were women in the 2004 Asian Tsunami. In Bangladesh, women suffered the most following the cyclone and flood of 1991. Among women aged 20–44, the death rate was 71 per 1000, compared to 15 per 1000 men. Warning information was transmitted by men to men in public spaces, but rarely communicated to the rest of the family. Without secure access to and control over natural resources (land, water, livestock, trees) women are less likely to be able to cope with permanent climatic change or willing to make investments in disaster mitigation measures. We women from the South wonder ... [w]hen will the politicians and scientists recognize that climate change is not gender neutral? When is enough? ⁶²

This group seeks a more prominent role for women in the post-Kyoto Protocol era beginning in 2012. Its members seek the inclusion of their perspective in the negotiations regarding the global attention to climate change after Kyoto expires.

(e) *Climate Change and Indigenous Populations* Selected areas in developed nations are perennial favorites for dumping hazardous waste or conducting hazardous operations. They are often comparatively uninhabited or at locations with less political clout than the more prosperous areas. The choice of the Nevada test site for US nuclear weapons testing is a prominent example. As graphically illustrated by Barbara Rose Johnston, Senior Research Scholar at the Santa Cruz, California Center for Political Ecology:

A review of U.S. government documents pertaining to the selection of the Nevada test site indicates that the prime continental U.S. site, in minimizing public exposure to fallout, was located on the East Coast, south of Cape Hatteras, North Carolina. The site was rejected. The rationale for this decision, as articulated in the federal records, was that the federal government did not own the land, and did not want to go through the process of acquiring it. Choices were then redefined to lands the federal government already owned or controlled, with less consideration given to possible health effects than to geographic proximity to Los Alamos Laboratory in New Mexico. The Nevada test site was ultimately chosen—with the knowledge that prevailing westerly winds would blow fallout over most of the country.⁶³

Such policies adversely impact indigenous populations as well. The adverse effects have often materialized in the form of less environmental concern for indigenous areas and reduced scrutiny of corporate activities in those areas that are resource rich. The UN Declaration on the Rights of Indigenous Peoples [text §10.3.F] recognized this disparity. Its preambular wording acknowledges "respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment, ... [and in Article 29, that]

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take

place in the lands or territories of indigenous peoples without their free, prior and informed consent.”

You have studied potential violations of this principle elsewhere in this course, in addition to the above-quoted UN Declaration [Indigenous Rights: §10.3.F]. Other examples include the textbook §1.2.B.1(b) *Flores v. Southern Peru Copper Corporation* case, and the §10.5.B. *John Doe 1 v. Unocal Corporation* case—both of which occurred in an isolated area inhabited by an indigenous population. In 2004, Royal Dutch Shell was fined \$1,500,000,000 by a Nigerian court. Its liability arose from polluting the Niger delta by degrading the creeks and spoiling crops and fishing in an indigenous area inhabited by Nigeria’s Ijaw people.

The example of Brazil’s Amazon demonstrates the need to halt mining on indigenous peoples’ lands. Barbara Rose Johnston’s examination vividly illustrates the problem:

[T]he government is unable or unwilling to keep gold miners from invading indigenous peoples’ lands. The peoples affected are caught in the struggle simply to survive the cumulative effects of introduced diseases, degraded and toxic settings, social fragmentation caused by loss of life, and the rise of violent conflict.... [R]ights-protective mechanisms are lacking, in part owing to the physical distance between the power centers and rural “frontier,” in part owing to the struggles between state and federal government institutions over respective responsibilities and power domains, and in part owing simply to the lure of gold. Owners, workers, and indigenous peoples are hugely distant from each other, in cultural, socioeconomic, and geographically spatial terms. Controlling powers may wonder, [w]hy bother to deal with occupational health and safety issues, worry over indigenous rights, and show concern about environmental degradation in a distant wilderness, when the people affected are so inconsequential and so much money is at stake?⁶⁴

(f) Nuclear Alternative One option for addressing such climate change would be nuclear power. France announced its plan to shift to nuclear energy in 1973. Most reactors were built between 1980 and 1995. It has the lowest per capita emissions in the entire EU. The US has nuclear energy available in certain areas, but the largest use for nuclear power is for military vessels. The above California plan—cutting back to 1990 levels by

2020—would be quite doable with nuclear energy. At present, the nation’s electricity demand is met as follows: fifty-two percent coal; twenty percent nuclear power; seventeen percent natural gas; and eleven percent all others (e.g., wind and solar).

Those opposed to more nuclear power would likely cite Pennsylvania’s 1979 Three Mile Island leak & the 1986 Chernobyl (Ukraine) disasters. On the other hand, given France’s success with harnessing nuclear energy, one must at least acknowledge that the US relies on far too much of its energy supply from abroad. Should we wait until we hit an iceberg before steering in another direction?

One could also argue that we inhabitants of the planet Earth tend not to appreciate the long-term effects of nuclear power (and weapons) development—and the dramatic impact that nuclear winter, or related environmental terrorism, could have on the environment. Barbara Rose Johnston’s work attests to this phenomenon in the following terms:

Crisis genesis, experience, [and] response ... are mapped out over a time scale that represents ... a few generations in time. Some environmental crises, however, defy our conception of time. The nuclear hotspots of the world—places where nuclear power containment mechanisms failed—will continue to contaminate life processes for thousands of years. Our ability to contain, reduce, or even remove their threat is seriously inhibited by the changing, and relatively short-lived, nature of our sociopolitical systems.

...

Radiation exposure of the Marshall Islands was carried out in the name of United States national security. For years, [the] institutional response ... was to deny culpability and withhold scientific information that would allow Marshall Islanders to understand the full extent of human and environmental exposure.⁶⁵

5. Forest Convention The Non-Legally Binding Authoritative Statement of Principles for Global Consensus on the Management, Conservation and Sustainable Development for All Types of Forests is a related feature of the 1992 Rio Convention work product. Rio’s *Forest Principles* encourage sustainable development as well as reforestation and the reduction of pollutants (especially acid rain).⁶⁶

In conjunction with the International Monetary Fund, the World Bank is currently working to fund the cleanup and restoration of the Amazon forests in Brazil. These are often referred to as the earth's "lungs" in the sense that fifty to eighty percent of the Western hemisphere's oxygen comes from these rain forests. Each year, however, approximately 25,000,000 acres of trees are cleared from the world's rain forests. In 1994, the US Agency for International Development estimated that Guatemala and Colombia would ultimately lose thirty-three percent of their remaining forests, and Ecuador and Nicaragua would lose fifty percent. This form of environmental depletion affects all other nations throughout the hemisphere.

The UN Economic and Social Council created the UN Forum on Forests in 2000, with a view toward strengthening political commitment to the Forest Convention's principal objectives. Its 2007 seventh annual session outcome document was a non-binding draft resolution. It confirms the Trail Smelters Arbitration theme [text §11.1.B.]. States have the sovereign right to exploit their resources. They must not do so, however, in a way that harms the environment in other States. The Multi-year Programme of Work of the United Nations Forum on Forests for 2007-2015 further provides that this group will focus on specific problem areas in each of those years. Thus:

(d) In each session, the *cross-cutting issues* [will be]: Means of implementation (Finance, Transfer of Environmentally Sound Technologies, capacity building, awareness raising, education and information sharing) and forest law enforcement and governance at all levels will be addressed in the context of the discussions of the themes of that session;

(e) Each session will also address the *common agenda items*: achieving the four global objectives on forests and implementing the non-legally binding instruments on all types of forests; regional and sub-regional inputs; multi-stakeholder dialogues and participation; enhanced cooperation and cross-sectoral policy and programme coordination, including activities and inputs of Collaborative Partnership on Forests ... [italics added].⁶⁷

So what did the Rio Conference accomplish? On the one hand, only two Heads of State attended the first UN environmental conference in Stockholm (India and Sweden). Within twenty years, enough attention was brought to environmental issues to attract over 100

Heads of State. And as previously noted in this section, there must often be "soft law" on the table from which nations can move forward toward "hard law" treaty agreements. However, as ironically noted by New Delhi's Jawaharlal Nehru University Professor R.P. Anand:

If the purpose of the Rio Conference on Environment and Development ... was to forge a new global partnership between the rich and the poor countries, and to develop a new law of environment and development for the protection of our small planet which is under serious threat of almost certain doom, it achieved neither. The instruments adopted at the Rio Conference were couched in such general and uncertain language that they entailed no legal, political, or even moral obligation [which] ... merely shows extreme conservativeness, if not insincerity, of the delegates who were concerned about their "sovereignty" and entrenched "sovereign rights." ... The differing priorities of the rich developed world for environmentalism, and the poor developing world for development were clearly reflected in the long and bitter debates at Rio.... The proposed Earth Charter led to emotional outbursts, became a "graphic symbol of the North-South divide," and "was converted into a mere, pedestrian, rather wordy declaration...."⁶⁸

In October 2009, four of the world's largest meat producers supported Greenpeace (the entity described in Problem 11.C. below) in its efforts to combat excessive deforestation. Those companies agreed to ban the purchase of cattle from the newly deforested areas of Brazil's Amazon rain forest. Washington, DC's Conservation International estimates that this region's deforestation generates twenty percent of the world's greenhouse gas emissions, which in turn fuels climate change. These rain forests are commonly referred to as the "lungs of the earth." They naturally convert CO₂ and other greenhouse emissions into oxygen. But skeptics, such as Chicago's Heartland Institute, claim that high CO₂ levels actually benefit wildlife and human health.

D. 2002 JOHANNESBURG SUMMIT

This was the third UN environmental conference. It was attended by more than 100 nations. The Johannesburg Declaration on Sustainable Development was a key work product. It identified the contemporary problems as follows:

13. The global environment continues to suffer. Loss of biodiversity continues, fish stocks continue to be depleted, desertification claims more and more fertile land, the adverse effects of climate change are already evident, natural disasters are more frequent and more devastating and developing countries more vulnerable, and air, water and marine pollution continue to rob millions of a decent life.

14. Globalization has added a new dimension to these challenges. The rapid integration of markets, mobility of capital and significant increases in investment flows around the world have opened new challenges and opportunities for the pursuit of sustainable development. But the benefits and costs of globalization are unevenly distributed, with developing countries facing special difficulties in meeting this challenge.

...

18. We welcome the Johannesburg Summit focus on the indivisibility of human dignity and are resolved through decisions on targets, timetables and partnerships to speedily increase access to basic requirements such as clean water, sanitation, adequate shelter, energy, health care, food security and the protection of biodiversity. At the same time, we will work together to assist one another to have access to financial resources, benefit from the opening of markets, ensure capacity building, use modern technology to bring about development, and make sure that there is technology transfer, human resource development, education and training to banish forever underdevelopment.

...

37. From the African continent, the Cradle of Humankind, we solemnly pledge to the peoples of the world, and the generations that will surely inherit this earth, that we are determined to ensure that our collective hope for sustainable development is realized.⁶⁹

The culmination of this conference was its plan of implementation. It set broad timetables for controlling sanitation, chemical pollution, and endangered species between the 2002 conference and 2022. There would be: (a) the reduction of threats to endangered species by 2010; (b) a reduction of the poor who lack sanitation by 2015; (c) the minimization of health and environmental problems by 2020; and (d) many other pledges.⁷⁰

The more powerful nations blocked efforts to set specific and verifiable timetables for reducing oil and gas consumption. Given the abundance of pledges and

comparative dearth of specific and enforceable timetables one could conclude that this third UN conference merely added to global warming. Of course if one were to advocate for change, one might resort to local government as opposed to acquiescing in a national government's disdain for global environmental treaties and declarations. As noted by University of New Hampshire Professor of Political Science Stacy D. VanDeveer:

If Americans want more effective environmental law, they should demand that their own government actually abide by the promises it so often makes and so rarely keeps. Because U.S. citizens use a disproportionate share of the Earth's resources, they have a disproportionately large opportunity to improve its environment by enacting strong and sensible policy at home and supporting—rather than undermining—international environmental laws and organizations. If U.S. policy makers don't like the Kyoto Protocol, they could do more than complain that it's unfair to the world's wealthiest and most powerful country. They could adopt reasonable policies of their own to efficiently reduce emissions of carbon dioxide and other greenhouse gases in the United States.

...

[S]uccess in protecting the environment will require a more explicit acknowledgment that treaties and high-profile conferences are no substitute for leadership at home.... That job is left to us.⁷¹

◆ §11.3 CONTEMPORARY ALTERNATIVES

A. ALTERNATIVE ENVIRONMENTAL FORA

1. ICJ Chambers Section 8.4.D. of this book briefly addressed the International Court of Justice (ICJ) "Chambers" process, whereby States may access the expertise of certain International Court of Justice (ICJ) judges to resolve their conflicts—rather than having to resort to the more lengthy process associated with the full bench of fifteen judges. Article 26.1 of the Statute of the ICJ thus provides for "chambers, composed of three or more judges...."

In 1993, the ICJ formed a "Chamber of the Court for Environmental Matters" to determine environmental cases on an expedited basis. That Chamber's constitution proclaims that the ICJ is willing to deal with environmental matters on an *ad hoc* basis. The special "Constitution of a Chamber of the Court for Environmental

Matters” provides as follows: “In view of the developments in the field of environmental law and protection which have taken place in the last few years [Chart 11.1 above], and considering that it should be prepared to the fullest possible extent to deal with any environmental case falling within its jurisdiction, the Court has now deemed it appropriate to establish a seven-member Chamber for Environmental Matters...”⁷²

The Environmental Chamber has yet to decide any case. Given the intense interest in major environmental disasters of the current generation, however, States will hopefully refer such matters to this specialized forum by treaty or other special agreement. The anticipated advantages include the development of a special body of expertise by a group of judges who are readily available for a quicker resolution than possible under the traditional full Court procedure. Judges can also be selected so as to seat those of particular nationalities rather than the full court, which may be a preferred posture for some litigants.

The crosstown option is The Hague’s Permanent Court of Arbitration (PCOA) where ninety-four member States promulgated their June 2001 first-of-its-kind rules relating to the resolution of controversies concerning environmental protection and conservation of natural resources.⁷³

2. European Court of Human Rights Commentators often focus on the extensive UN process regarding the evolution of environmental norms. Much of the dirty work is accomplished, however, at the regional and national levels. One might consider internal fouls that simultaneously violate both national laws and regional treaties to which a nation is bound. They too offer a rich vein of environmental resources that can be mined for academic profit:



In the Case of Ledyayeva and Others v. Russia

EUROPEAN COURT OF HUMAN RIGHTS
STRASBOURG, FRANCE

Judgment of 26 October 2006

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb.index.html>>.

Under Chapter Eleven, click Russian Steel Plant Case.

This Russian illustration is by no means unique. Recall, for example, the *Flores* and *Agent Orange* cases regarding Peru and Viet Nam [§1.2.B.1(b)]. The

environmental degradation in those countries also reflects leftovers from an industrial age where external corporate entities helped—but at the same time harmed—inhabitants of underdeveloped nations. Certain features of China’s non-market economy may be aligned with the State-driven pollution in the Russian steel plant case. In April 2005, 50,000–60,000 elderly Chinese residents protested over pollution from nearby factories in a rural village in China. Some 3,000 police officers halted this protest. In 2003, tens of thousands of Chinese villagers protested pollution in another province—a symptom of social unrest related to industrializing economies.⁷⁴

3. National Tribunals Critical Environmental issues may also be litigated in influential national courts. In 2005, eight states, municipalities (including the City of New York), and certain private groups were found not have the standing to pursue global warming nuisance claims. Their goal was to force the five largest green house gas emitting companies in the US to reduce emissions. Notwithstanding cited reports from the Intergovernmental Panel on Climate Change [textbook §11.2.C.4(b)] and the U.S. National Academy of Sciences, the trial court deemed this global warming matter to be a non-justiciable “political question” [§8.7.A.]. The defendant companies successfully asserted that the plaintiffs had chosen the wrong venue to pursue their claims in the following terms: “because global warming is a world-wide problem, federal courts are not the proper venue for this action, nor could the courts redress the injuries ... because global warming will continue despite any reduction in Defendants’ emissions.” But in September 2009, however, the intermediate federal appellate court overruled that decision. Per the latter’s precedent-setting reversal: “we hold that New York City and the [states and] Trusts have stated a claim under the federal common law of nuisance.”^{74a}

B. WAR AND THE ENVIRONMENT

In 1991, near the close of the Persian Gulf War, retreating Iraqi forces set fire to over 600 Kuwaiti oil wells. That single military campaign sent millions of tons of contaminants into the biosphere during the nine months it took to extinguish all of the resulting fires. The following assessment is particularly notable, however, because of its compensation for *other* damages to the environment. It analyzes issues that have rarely come before an international body. These include whether

compensation is owed for damage to natural resources that have no commercial value and if so, how that loss should be valued.⁷⁵

This \$252,000,000 award (a fraction of the fifty billion dollars sought) decision, rendered by the UN Security Council's tribunal for war claims against Iraq, is a model for the International Court of Justice or any other international decision maker that might seek guidance about how to identify and apply International Environmental Law to a military conflict:



**United Nations Compensation
Commission
Governing Council Report and
Recommendations
Made by The Panel of Commissioners
Concerning the Fifth Installment of
“F4” Claims**

UN Doc. S/AC.26/2005/10 (JUNE 30, 2005)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb.index.html>>.

Under Chapter Eleven, click UNCC Iraq Case.

C. CRIMINAL LAW OPTION

1. Global Example The failure to address the exporting of hazardous waste to developing countries constitutes yet another Kyoto gap. The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal responded to the environmental and human health impacts associated with the dumping of industrialized nation waste into developing countries and Eastern Europe. This Convention (ratified by 167 nations) is designed to minimize the generation of hazardous waste; to dispose of it as close to the source of generation as possible; to do so in an environmentally sound manner; and to reduce the trans-boundary movement of hazardous wastes. Just the *European* export of paper, plastic, and metal trash rose tenfold from 1995 to 2007—now 20,000,000 containers per year.

The Basel Convention thus prohibits exporting waste to countries that have not consented (in writing) to such imports and to countries lacking the ability to manage such waste in an environmentally sound manner. The Convention further requires the State parties to cooperate in addressing this form of environmental

crime, especially by preventing and punishing the illegal trafficking in hazardous waste. Such waste has migrated to Bangladesh, China, India, and Pakistan. There, labor is cheap, and environmental and occupational safety regulations are either non-existent or not enforced.

A French aircraft carrier is the cause célèbre for the unauthorized shipping of hazardous waste. A French naval shipyard's bid for scrapping this vessel was rejected as being too costly. The (formerly) nuclear-propelled *Clemenceau* thus began its long-term hunt for a final port. In November 2003, France had to retake possession of its former warship, after a Spanish company breached its contract by attempting to take the vessel to Turkey before removing toxic material. While later en route to India, the *Clemenceau* reached the Suez Canal. Egyptian authorities sought information on hazardous waste aboard the carrier from the French authorities. After a one-week wait, it crossed the Canal en route to India. But in February 2006, India's Supreme Court blocked the *Clemenceau* from entering Indian waters. The French Council of State ordered a suspension of the ship's transfer. Just before an official visit to India, French President Chirac ordered the *Clemenceau* to return to France, this time via the Cape of Good Hope near South Africa. The ship was then destroyed in France.

France previously contested the application of the Basel Convention to its former military carrier, the *Clemenceau*. France claimed that its ex-carrier constituted “war material” and was thus exempt from the Basel regime. But the Basel Convention only exempts radioactive waste and waste derived from the normal operations of a ship that are subject to *other* international regimes. Military vessels generally receive specified immunities under the Law of the Sea. It is debatable, however, whether the *Clemenceau* qualified as a military vessel. All operational elements had been removed. It had been towed to various locations around the world for scrapping. Assuming the *Clemenceau* were characterized as a military vessel, the Basel Convention does not distinguish between military or civil waste. So the “ship” itself appears to be “waste” that is subject to the Convention's limitations.⁷⁶

2. Regional Example The frustration with finding an effective environmental control mechanism led the Council of Europe to draft the following treaty, which was opened for signature in 1998. While it has not yet been ratified by enough nations to enter into force, its

Convention on the Protection of the Environment Through Criminal Law

EUROPEAN TREATY SERIES NO. 172

STRASBOURG, FRANCE (NOV. 4, 1998)

<<http://conventions.coe.int/Treaty/EN/cadreprincipal.htm>> (search Environment)

PREAMBLE

...

Convinced of the need to pursue a common criminal policy aimed at the protection of the environment;

...

Recognising that, whilst the prevention of the impairment of the environment must be achieved primarily through other measures, criminal law has an important part to play in protecting the environment;

Recalling that environmental violations having serious consequences must be established as criminal offences subject to appropriate sanctions;

Wishing to take effective measures to ensure that the perpetrators of such acts do not escape prosecution and punishment and desirous of fostering international co-operation to this end;

...

Have agreed as follows:

...

ARTICLE 2—INTENTIONAL OFFENCES

1. Each Party shall adopt such appropriate measures as may be necessary to establish as criminal offences under its domestic law:

- a. the discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which:
 - (i) causes death or serious injury to any person, or
 - (ii) creates a significant risk of causing death or serious injury to any person;
- b. the unlawful discharge, emission or introduction of a quantity of substances or ionising radiation

into air, soil or water which causes or is likely to cause their lasting deterioration or death or serious injury to any person or substantial damage to protected monuments, other protected objects, property, animals or plants;

- c. the unlawful disposal, treatment, storage, transport, export or import of hazardous waste which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;
- d. the unlawful operation of a plant in which a dangerous activity is carried out and which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;
- e. the unlawful manufacture, treatment, storage, use, transport, export or import of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants, when committed intentionally.

...

ARTICLE 3—NEGLIGENT OFFENCES

1. Each Party shall adopt such appropriate measures as may be necessary to establish as criminal offences under its domestic law, when committed with negligence, the offences enumerated in Article 2, paragraph 1 a to e.

...

provisions nevertheless encourage States to enact national legislation to address this key priority:

This Convention reflects the concern of the more than fifty member States, expressed in the Preamble, that “the uncontrolled use of technology and the excessive exploitation of natural resources entail serious environ-

mental hazards” and that ratifying parties should take “effective measures to ensure that the perpetrators of environmental hazards having serious consequences do not escape prosecution and punishment.” The essential objective is to criminalize certain intentional or negligent forms of environmental offenses, which may be

limited to acts of gross negligence. The intentional discharge of ionizing radiation into the air, soil, or water that causes death or serious injury, or creates a “significant risk” of death or serious injury, is thereby prohibited. States may not “unlawfully dispose, treat, store, transport, export, or import hazardous waste” that is likely to cause death or serious injury or “substantial damage to the quality of air, soil, water, animals, or plants.” Aiding and abetting the intentional commission of an environmental offense is to be criminalized under domestic law. Both individual and corporate offenders may be imprisoned, fined, and required to reinstate the previous condition of the environment. Each ratifying State would also adopt measures for the confiscation of property and proceeds derived from environmental degradations.⁷⁷

This remains a “soft law” instrument until ratified by enough nations to enter into force. Also, no nation would likely ratify it unless it had already enacted the relevant legislation or committed to doing so on a date certain. Yet it does present a fresh option in the arsenal of treaty-based initiatives for combating transboundary environmental interferences.

In the interim, judicial resolutions may operate to enforce national environmental criminal law as a means of limiting at least the impact of violations of domestic criminal law and internationally guaranteed human rights laws—as illustrated in the §11.3.E. Nigerian *Shell Petroleum Development* case.

D. ENVIRONMENTAL HUMAN RIGHTS

State environmental decisions are spawning a growing number of related human rights claims. In December 2004, for example, the Arctic Inuit tribes announced their plan to seek a startling ruling from the Inter-American Commission on Human Rights. They claim that the US has substantially contributed to global warming—a direct menace to their existence. These 155,000 natives are seal-hunting peoples scattered around the Arctic Ocean. They claim to be threatened by rising temperatures, caused more by the US than any other nation. They are seeking legal relief from the Inter-American Commission, which tends to treat environmental degradation as a human rights matter.⁷⁸

Governmental decision making about environmental matters without due consideration of the human rights of various minorities is vividly illustrated in the following case from Japan:



Kayano and Others v. Hokkaido Expropriation Committee (Nibutani Dam Decision)

SAPPORO DISTRICT COURT, JAPAN
(27 MARCH 1997)

Go to course Web page at
<<http://home.att.net/~sломansonb/index.html>>.
Under Chapter Eleven, click Nibutani Dam
Decision.

In October 2007, China announced plans to move 4,000,000 people from areas surrounding its Three Gorges Dam to enable its largest hydropower project while controlling the perennial flooding of the Yangtze River. Environmental groups complain that this project has wreaked ecological havoc, is forcing people to move to locations where they cannot find work, and causing serious pollution due to the submerging of hundreds of factories, mines, waste dumps, and runoff from heavy industry upstream.

E. CORPORATE ENVIRONMENTAL RESPONSIBILITY

The §10.5.B. *Unocal* case addressed corporate reliance on local paramilitary forces to protect an oil pipeline in Myanmar. The following excerpt about another oil company’s activities in Nigeria illustrates the pressures, as consistently proclaimed by numerous human rights and environmental organizations, on nation States and private corporations to acknowledge what is often joint responsibility for environmental fiascos:

According to the complaint, Shell Nigeria coercively appropriated land for oil development without adequate compensation, and caused substantial pollution of the air and water in the homeland of the Ogoni people.... Allegedly, Shell Nigeria recruited the Nigerian police and military to attack local villages and suppress the organized opposition to its development activity.

... [W]hile these abuses were carried out by the Nigerian government and military, they were instigated, orchestrated, planned, and facilitated by Shell Nigeria under the direction of the defendants. The Royal Dutch/Shell Group allegedly provided money, weapons, and logistical support to the Nigerian military, including the vehicles and ammunition used in

the raids on the villages, procured at least some of these attacks, participated in the fabrication of murder charges against Saro-Wiwa ... and bribed witnesses to give false testimony against them.⁷⁹

In August 2005, Indonesia brought criminal charges against Newmont, a US mining company that is the world's largest gold producer. The indictment charged that the corporation and its president allowed its toxic waste to enter the sea in excess of government regulations. This was an unusual case because of an American company having to defend itself in a criminal trial in a developing country. Under a method known as submarine tailing disposal, the company piped waste into the waters about a half-mile offshore. This method is banned in many industrialized countries, including the US. Newmont claimed that it was unaware of a required permit that it failed to obtain from the Ministry of the Environment.⁸⁰

In August 2006, the Indian Center for Science and the Environment study claimed that there were grossly excessive levels of pesticides in India's most popular soft drink brands, Coca-Cola and Pepsi. These companies replied that the official tolerance limit of pesticides in these and other food items such as tea, eggs, rice, and milk products was much higher than the limits set by the Ministry of Health. The Indian Center's report claimed that the Coke and Pepsi violations were twenty-five times the prescribed governmental limit.⁸¹

Various non-governmental entities have embraced the need to fill gaps left by notions of sovereignty and corporate missions. The Paris-based International Chamber of Commerce's Business Charter for Sustainable Development produced a set of voluntary corporate standards in 1991. Over 1,000 companies have pledged their support of these principles. The first Corporate Priority is "[t]o recognize environmental management as among the highest corporate priorities and as a key determinant to sustainable development; to establish policies, programmes and practices for conducting operations in an environmentally sound manner." Its version of the Precautionary Principle is "[t]o modify the manufacture, marketing or use of products or services or the conduct of activities, consistent with scientific and technical understanding, to prevent serious or irreversible environmental degradation."⁸²

At about the same time, after the 1989 Exxon-Valdez oil spill in Alaska, a group of investors and environmental

non-governmental organizations created the Coalition for Environmentally Responsible Economies (CERES). They produced the voluntary Valdez Principles, later renamed the CERES Principles, for participating corporations who are committed to environmental responsibility.⁸³ As of 2005, there are sixty-five CERES companies, including: American Airlines, Bank of America, Coca-Cola, Ford, General Motors, and Nike. These companies thereby pledge to monitor and improve the environmental impact of their corporate activities although there is no third-party verification of compliance. Maybe "soft law" is preferable to total environmental anarchy.

Corporate human rights responsibility is not limited to the comparatively plaintiff-friendly environment in US courts. The European Union launched its Eco-Management and Audit Scheme in 1993.⁸⁴ This Regulation became effective in 1995. While participation remains voluntary, this program requires third-party compliance assessment. National courts are beginning to address this issue as illustrated in the *Gbemre* case below:



**Between Mr. Jonah Gbemre and
Shell Petroleum Development
Company Nigeria Ltd,
Nigerian National Petroleum
Corporation,**

Attorney General of the Federation

FEDERAL HIGH COURT OF NIGERIA BENIN
JUDICIAL DIVISION

(Judgment of 14 November, 2005)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter [Eleven](#), click [Gbemre v. Shell
Petroleum](#).

One might conclude this environmental chapter as follows. Since the UN's seminal Stockholm Conference in 1972, there have been hundreds of global and regional environmental instruments purporting to regulate environmental degradation. But not all States are willing to merge word and deed. There is a frightening disconnect between the lip service being paid to environmental concerns and the unwillingness to sacrifice for the benefit of future generations. Between now and

a date to be determined, the consequences of this failure will far outdistance the terror spawned by September 11, 2001.

◆ PROBLEMS

Problem 11.A (after §11.2.C. Kyoto Protocol): As you are nearing the end of this course, it will be useful to review some of its key concepts in an environmental context. Now that you have studied the various environmental norms, especially the Kyoto Protocol, a few questions: Is your country bound by it? If so, how? If not, why not? Should your country ratify this Protocol? Three students or groups will debate these questions, which rest in part on your initial exposure to the materials in §1.2 of this book on Sources of International Law.

The assigned students will thereby facilitate this brief review in the following representative capacities: (1) The US Secretary of State, who represents the US and other industrialized nations opposed to the Kyoto Protocol. (2) Russian and European Foreign Ministers, who represent nations which ratified the Kyoto Protocol. (3) Two executives from the UN Environmental Development Program, who will represent a global perspective on whether “sustainable development” either demands or forbids national adoption of the Kyoto Protocol. (4) An independent environmental science professor, who will predict what will happen if the international community does—or does not—fully embrace the Kyoto Protocol.

Problem 11.B (after §11.2.C.2. *Nuclear Weapons Case*): In September 2002, the North Atlantic Treaty Organization (NATO—textbook §3.5.A.) disclosed that it had fired thousands of rounds of munitions with uranium tips in Bosnia (1995) as well as Kosovo and Serbia (1999). While most radioactivity had been depleted before this use, these rounds nevertheless emitted some low-level radiation. Shell casings had broken, and uranium deposits, potentially toxic, disintegrated into dust.

The University of Montenegro’s nuclear physics Professor, Perko Vukotic, headed a twelve-person cleanup team. He lamented: “We don’t understand why anyone would want to attack and contaminate the place on the last day of the war [June 1999].” Both NATO and the US Pentagon acknowledged the radiation but stated that because the level was so low, it could not have been harmful to humans or other parts of the Balkan ecosystem.⁸⁵

In May 1999, while the NATO bombing campaign was still underway, the Prosecutor of the International Criminal Tribunal for Yugoslavia (ICTY) undertook an investigation to determine whether NATO or its participating members had committed any war crimes. This project was initiated by complaints from Yugoslavia and various non-governmental organizations, based in part on the use of depleted uranium projectiles. Several NATO attacks, most notably the one on a Serbian petrochemical complex (Pancevo), released stored toxic chemicals into the air and water.

A report by the UN Environmental Development Programme concluded “that the Kosovo conflict has not caused an environmental catastrophe affecting the Balkans as a whole [but the] pollution detected at some [of the twenty-one] sites is serious and poses a threat to human health.”⁸⁶ (Some of this air pollution of course predated the 1999 NATO bombing.) The June 2000 ICTY report was submitted just after the cessation of bombing. It determined that none of the NATO actions rose to the level of criminal conduct that could be prosecuted by the ICTY.⁸⁷

The ICTY prosecutor’s investigation focused on Protocol I to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts—as being the essential governing law (which the US has not ratified). Article 35(3) prohibits: “methods and means of warfare which are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment.” Article 55 adds: “This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.”⁸⁸

The ICTY prosecutor Louise Arbour (a Canadian national) was inundated with numerous other claims that attracted more global attention. For example, these included Serbian President Milosevic’s genocidal tendencies and the Srebrenica massacre where some 7,800 Muslim men and boys were slaughtered in several days at a UN safe haven in Bosnia [§8.5.C.1. ICTY and §9.6.B. Laws of War]. The prosecutor’s decision not to pursue the radiation munitions claim against the US and any participating NATO allies could be characterized as: (a) politically expedient; (b) not prosecutable for evidentiary reasons; or (c) premised upon a variety of other theoretical motives.

Class members will now assess whether NATO and/or its responsible national members incurred any liability

under International Environmental Law. Five persons or groups will debate this matter. They represent: (1) the UN Environmental Development Programme Administrator; (2) Bosnia and Kosovo, which were liberated at different times from what was considered a despotic regime, via the respective NATO and US military actions; (3) Serbia (the prime object of the 1999 NATO bombing campaign); (4) participating European NATO nations; and (5) the US—the country most distant from the environmental “fallout.”

Problem 11.C (end of Chapter): *Basic Facts* Greenpeace International is a non-governmental organization (NGO) headquartered in Amsterdam. Its objective is to protect the environment, often by monitoring threats to an increasingly fragile environment. It operated a small ocean-going fleet, including the former British-registered flagship *Rainbow Warrior*, which began to make international port calls in 1971. French nuclear testing was then a popular target for Greenpeace activity.

In 1973, New Zealand and Australia sued France in the International Court of Justice, seeking a judgment that would require France to cease its nuclear testing in the South Pacific. The plaintiff States feared that radioactive fallout would adversely affect the atmosphere throughout the South Pacific. Rather than participating in this litigation, France withdrew. The ICJ dismissed the case in 1974 on the basis of France’s unilateral declaration that it would cease such testing—which it subsequently resumed.

The private multinational crews of Greenpeace vessels had recently begun to follow various oceangoing vessels suspected of excessive whaling and other fishing enterprises in violation of international norms, transporting and dumping of nuclear fuels and waste materials, and dumping other toxic substances into the ocean. Greenpeace had become the world’s foremost environmental NGO. Given the mid-1970s case filed by two State opponents of France’s nuclear testing, Greenpeace believed that it was in a good position to bring worldwide attention to France’s resumption of nuclear testing.

The most famous “collision” between Greenpeace and the French government occurred in 1980 at a harbor’s entrance to a port in France. A Japanese merchant vessel was carrying nuclear reactors to France. Greenpeace characterized this shipment as a major hazard because of potential radiation leaks associated with

transferring this material by sea. Put another way, this was a nuclear *Exxon Valdez* waiting to happen. As Greenpeace’s *Rainbow Warrior* began to shadow the Japanese vessel, the Greenpeace vessel was rammed by a French police ship. After its seizure by French port authorities, the Greenpeace vessel was released and ordered never to return to French waters.

The primary newsworthiness of the *Rainbow Warrior* was its subsequent “shadowing” of French, Russian, and Spanish naval vessels in its attempts to disrupt French nuclear testing in French Polynesia (not far from New Zealand). Greenpeace was the target of a plot by the *Directeurat-Generale de Sécurité Extérieure* (DGSE), a French governmental intelligence agency. A DGSE agent purporting to be a Greenpeace supporter worked undercover in the Auckland, New Zealand office of Greenpeace International. She photographed Auckland’s harbors as part of a plan to sink the Greenpeace ship after a decade of shadowing French military vessels. New Zealand, as part of its Nuclear Free Zone policy, had banned French nuclear vessels from its harbors. This agent’s photographs were sent to Paris for intelligence-gathering purposes, which would soon bring worldwide attention to the ongoing Greenpeace–French connection.

While in Auckland Harbor in 1985, the *Rainbow Warrior* was bombed and sunk by a group of at least eight DGSE agents. Two bombs, exploding near midnight, resulted in the death of a Dutch citizen who was the ship’s onboard photographer. The explosion injured several crewmembers of various nationalities (other than New Zealand) and sank this British-flagged ship. Most of the French agents escaped. It appears that a nearby French submarine sank the boat in which they escaped from Auckland Harbor, after bringing them aboard for their probable return to France via French Polynesia.

New Zealand captured two of the French DGSE agents, tried them, and sentenced them to ten-year terms for manslaughter and arson (to name a few of the charges). New Zealand’s citizens were outraged. The *Rainbow Warrior* incident was the first operation by a foreign government involving a bombing, death, and sinking of a vessel in a New Zealand harbor. New Zealand lodged a diplomatic protest with France and demanded reparations based on France’s alleged State responsibility for various violations of national and International Law.

The UN Secretary-General then arbitrated an agreement between France and New Zealand whereby: (1) France

was to pay damages to New Zealand, but not damages on account of the death or damage to the vessel caused by the bomb blast; (2) New Zealand would transfer the two convicted agents to a prison in French Polynesia to serve out the remainder of their prison sentences; and (3) France would not impose trade barriers against New Zealand's butter and meat exports, as France had threatened to do during the *Rainbow Warrior* negotiations. New Zealand thus agreed to release the two captured French army officers to French custody so that they would serve the remainder of their jail terms in a French Polynesian prison.⁸⁹

Within four years, the two transferred prisoners "escaped" from the French island prison. They were repatriated to France but never taken into custody in France (for what would otherwise be their return to the prison in French Polynesia). France claimed that there was no basis for New Zealand to demand their continued incarceration because they were acting on "superior orders." The other French agents were never arrested or tried. The French government conceded its role in the bombing of the *Rainbow Warrior* but inconsistently claimed that its agents had exceeded their authority. France nevertheless threatened to use further force if any other Greenpeace vessel attempted to disrupt future French nuclear testing.

In 1991, another French agent involved in the *Rainbow Warrior* bombing was arrested in Switzerland. Greenpeace immediately pressured the New Zealand government to seek his extradition from Switzerland. New Zealand opted not to pursue the harbor-bombing incident any further. Switzerland allegedly bowed to French pressure to release the agent from custody, even providing a diplomatic escort to the French border.

Additional "Facts" In addition to the above facts, assume the following hypothetical facts. The explosion and sinking of the *Rainbow Warrior* in Auckland Harbor contaminates the harbor due to the nature and large volume of chemicals to be used for testing purposes. New Zealand and French authorities were unaware of the presence of these chemicals aboard the Greenpeace vessel when it entered the harbor. Greenpeace testing aboard its vessel did nothing to pollute the air. But the combination of existing pollutants in Auckland Harbor and the chemicals aboard the sunken *Rainbow Warrior* further contaminates the fish within the harbor. One month after the explosion and sinking, the fish in Auckland Harbor are no longer fit for human consumption.

France continues to conduct nuclear testing in French Polynesia. France actually conducted fifty such reported tests before and after the 1985 *Rainbow Warrior* incident. The people of New Zealand begin to experience a severe form of "cold" that makes the average healthy person sick for several months at a time. The common symptoms are flu, fever, and skin rash. This form of cold did not exist in New Zealand prior to the start of French and US nuclear testing in the South Pacific in the 1950s. Since the 1970s, a small percentage of the population has exhibited these symptoms. In the last five years, however, it has become a fact of life for most New Zealanders.

New Zealand lodges a diplomatic claim with France in 1995, accusing France of "transboundary environmental interference" within the meaning of the various UN instruments—especially the various 1992 Rio declarations, which New Zealand characterizes as the essence of IEL. New Zealand and France agree to arbitrate this matter. Both are parties to the UN Law of the Sea Treaty, the only agreement in force between them which contains relevant environmental provisions. New Zealand seeks remedies for: (1) the flu that its citizens now suffer; and (2) the contamination of Auckland Harbor.

The Forum Two students (or groups) will represent France and New Zealand as the arbitrators chosen by the respective parties to today's "Flufish Arbitration." A third student will sit as the third and neutral arbitrator selected by the other arbitrators (or professor). This student is the UN's environmental representative who has been asked to be the neutral on this three-person arbitral tribunal for resolving the Flufish dispute between New Zealand and France.

This arbitral body will first debate/discuss how it would best resolve whether France has incurred State responsibility under International Law for harm to New Zealand. In the event of a split decision, the dissenting arbitrator will report his/her decision for further class discussion. All participants will focus on the following:

Issues for Resolution

1. What rule or rules should the arbitrators use to assess whether France is liable under International Environmental Law?
2. What rules of International Law from *prior* chapters were breached by France in the revised *Rainbow Warrior/Flufish* matter?

3. Is France:
 - (a) responsible for a transboundary environmental interference in New Zealand? Elsewhere?
 - (b) subject to suit in a New Zealand court (or any other national court—see §2.6.B. & §1.1.D.)?
4. If France were liable for the degradation of New Zealand's environment, what remedy should this international arbitral tribunal require?

Additional Resources

- ◆ The Application of International Law in the Case of the Rainbow Warrior, Chap. 3.A, in L. Guruswamy et al., *INTERNATIONAL ENVIRONMENTAL LAW: A PROBLEM-ORIENTED COURSEBOOK* (2d ed. St. Paul, MN: West, 1999)
- ◆ Rainbow Warrior (New Zealand v. France), 82 INT'L LAW REP. 499 (1990)

◆ FURTHER READING & RESEARCH

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◆ ENDNOTES

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 87. Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, Final Report to the Prosecutor, at: <<http://www.un.org/icty/pressreal/nato061300.htm>>.
 88. The best analysis of this ICTY proceeding, from which many of the facts were drawn, is available in A. Schwabach, *NATO's War in Kosovo And The Final Report to The Prosecutor of The International Criminal Tribunal For The Former Yugoslavia*, 9 TULANE J. INT'L & COMP. L. 167 (2000).
 89. For UN Secretary-General's arbitral decision, see 26 INT'L LEGAL MAT'LS 1346 (1987).

CHAPTER TWELVE

Economic Relations

CHAPTER OUTLINE

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INTRODUCTION

This final chapter provides an overview of international economic relations. It begins by reviewing the pervasive

4.3 The applicant [Dutch exporter] contended that its interest in free international trade should in this case carry much weight, because if the delivery of submarines to Taiwan were canceled, the survival of 1000 or possibly all of the 2000 jobs in its enterprise would be greatly endangered.

...

4.5 ... [T]he respondent [Dutch Minister for Economic Affairs] further contended that granting the permission ... [to export the submarines to Taiwan] would impair the interest of the international legal order in yet another respect: continued delivery of submarines implied support for Taiwan's rejection of proposals for peaceful reunification [with the PRC] ... and was therefore likely to thwart a settlement of the existing conflict between the PRC and Taiwan.

—Wilton Feyenoord BV v. Minister for Economic Affairs, Netherlands Trade and Industry Appeals Tribunal (1984), 101 INT'L LAW REP. 419, 424–426 (1987). See §12.1.B.6., on links between international economics and use of force.

interplay between international commerce and law—often looming just below the surface of earlier materials you encountered in this course.

Subsequent sections will survey contemporary international economic integration: the essential organizations such as the World Trade Organization (WTO), their

basic objectives, and the “globalization” controversy—a convenient segue for the so-called New International Economic Order. These features of the “have” versus “have not” nation dialogue were supposedly designed to close this gap although there is a raging debate about both of them. No analysis of international business relations would be complete without some coverage of the role played by corruption.

◆ §12.1 ECONOMICS AND INTERNATIONAL LAW

A. HISTORICAL EVOLUTION

1. Pre-World War II Trade was pivotal in the evolution of ancient and medieval areas. Civilization developed in part from the concentration of people on or near major trade routes and ports. Trade ultimately led to diplomatic and other exchanges among these congregations of people. The great powers like Persia and Rome could afford to be somewhat apathetic about foreign trade. They maintained well-developed agricultural bases. For many other population centers, however, trade was a key method for raising revenue and exercising some degree of political power. From ancient Athens through the medieval city-States, the role of trade was to create wealth that, in turn, facilitated other advances. Trade ultimately led to diplomatic and other exchanges among these congregations of people. Trade also provided access to broader social and cultural perspectives as merchants traveled in search of marketing opportunities.

A number of early medieval agreements focused on economic matters. The treaty of 860 AD between Byzantium, the major trading empire of that era, and Russia formalized their diplomatic and commercial relations. Under Article 4 of that agreement, Russia removed its previous ban on Byzantine exports. Trade was the ideal vehicle for developing international relations and for ushering in an era of relative peace. That concession also launched Russia’s development of international trade relations with other nations.¹

Links between commerce and law were forged by exploration. Many territories of the world were “discovered” by explorers seeking new trading opportunities. The ancient Phoenicians traveled the Mediterranean Sea and the North Atlantic Ocean in search of new trading partners. Portuguese and Spanish explorers discovered the new world during their trade development programs of the fifteenth and sixteenth centuries.

Modern international commercial law is rooted in the trade practices that developed during the resulting interaction of national legal systems. Many standard contractual expectations were expressed in the medieval “Lex Mercatoria” (Law Merchant). This body of law was created and applied by specialized commercial tribunals, typically located in major port cities. Private merchants could conveniently resolve their local and international business disputes by submitting their disagreements for resolution to a neutral third party. The Lex Mercatoria flourished in the twelfth-century Italian city-States and later spread to other commercial centers. The customary practices of these tribunals were ultimately incorporated into the commercial laws of many nations.²

An early twentieth-century English case suggests how judges continued to apply the Lex Mercatoria when resolving maritime disputes. A shipment of goods was en route from San Francisco to London. The contract did not include a clause about *when* payment was due. It thus failed to express the intent of the buyer and seller. While the goods were en route, the seller’s agent presented the bill of lading (document of title) to the buyer. The buyer refused payment. He wanted to inspect the goods on arrival in London. The seller sued the buyer for breach of contract before the goods arrived. Under the medieval maritime practice, a buyer was required to pay for goods when the seller’s agent provided a bill of lading for cargoes still en route by sea—unless the parties expressly contracted for payment at another time. The London court effectively incorporated this vintage commercial practice into the contract and thus supplied the missing term based on this customary practice.³ Arbitrators and judges incorporated certain commercial practices into the decisional law of maritime nations. Those practices then became customary rules of international commercial law. Some practices were then codified into national legislation and treaties.

2. Post-World War II

(a) International Financial Agreements In June 1944, delegates from all of World War II’s Allied Nations met in Bretton Woods, New Hampshire. This meeting was convened under auspices of the United Nations Monetary and Financial Conference. The representatives of those forty-four nations forged the Bretton Woods Agreement. Its objective was to create fresh international organizations that would manage post-War redevelopment; establish a global financial order; and

become the new pillars of post-World War II global economic stability.

The three primary institutions they created were the General Agreement on Tariffs and Trade (GATT), the "World Bank," and the International Monetary Fund.⁴ The GATT was the predecessor to the 1995 World Trade Organization. Both are described in textbook §12.2.B. below.

The current 185-nation "World Bank" actually refers to the Bretton Woods-derived institutions known as the International Bank for Reconstruction and Development and the International Development Association. These entities focus on a host of developing country needs including agriculture, environment, infrastructure, and health. They provide grants to the poorest countries and preferential rate loans to participating nations. Their programs typically support specific projects, which are linked to desired policy changes in the affected sector. For example, a loan to improve coastal environmental management may be linked to development of new environmental institutions at national and local levels and the implementation of new regulations to limit pollution.

In March 2009, the World Bank established a Vulnerability Fund to help developing countries navigate the current economic recession. It called on developed countries to devote seven-tenths of one percent of the money they spend to assist developing nations struggling with their economies. The Bank then predicted the first shrinking of the global economy since the 1940s. As of 2008, 94 of the 116 developing nations endured an average seventeen percent drop from their

2007 net private capital flows. That will not bode well for combating the spread of terrorism, which feeds on abject poverty.

The (also) 185-nation International Monetary Fund is more directly member-oriented. It focuses on exchange rates and the balance of payments. While it offers financial and technical assistance to its members, it is not designed to be a primary lender like the World Bank. On the other hand, the IMF is more suited to handle larger and more immediate country bailouts.

The relative impact of the above-referenced decline in funding from developed nations will limit the IMF options to generate immediate stimulus plans similar to what the federal government did for the US in 2009. If so, it is possible that more money will be needed to keep regions like Eastern Europe afloat. Such aid would be critical for maintaining the stability of the former Soviet satellites. That financial redirection would leave less to allocate to developing nations that were already on the verge of collapse before the world's 2008–2009 economic implosion.⁵

These international lending institutions have not been without their detractors. Late in the Cold War period, for example, IMF policymakers supported military dictatorships which were friendly to American and European corporate interests. Critics began to assert that the IMF had become apathetic to the supposed member-nation views on democracy and human rights. The controversy has helped spark the anti-globalization movement [§12.2.E.]. The following Canadian author's assessment explains a significant feature of this problem:

A Need to Refocus the Mandate of the International Monetary Fund and the World Bank

GUY BRUCCULERI

17 WINDSOR REV. LEGAL & SOC. ISSUES 53 (2004)

The control that many economically powerful countries exert over the IMF has left it susceptible to political pressure. The clout that some member countries enjoy became apparent in the wild financial climate of the 1990s and the legitimacy of the IMF as an independent institution was tarnished. The purpose of the IMF ... is to promote cooperation, expansion and stability of

the international markets. The organization is monetary in nature and ... it is clear that the IMF has a non-political mandate.

The first major financial crisis of the 1990s that the IMF faced was in Mexico. The Mexican crisis was very large and the Clinton administration in the United States was determined that its new NAFTA partner must

not collapse economically. The Clinton administration pressured the IMF into finding a quick solution to the Mexican crisis.... The size and the speed at which the amount was approved caused European officials to complain that the IMF was altering its lending policies. A US government report found that in order to grant Mexico's conditional loan the IMF "circumvented the established procedures for approving loans and limiting their size in relation to the borrower's IMF [borrowing] quota."

...

Similar events occurred during Russia's [post-Cold War] financial difficulties ... Foreign lenders made loans and bought securities expecting that the IMF would involve itself to protect ... in the event of crisis because of the importance of a politically stable Russia.... In the Asian crisis, the IMF avoided publicly supporting the concept of protecting foreign investors in part because of the stinging criticism it received regarding the Mexico bailout. But the IMF implicitly provided the [Russian] private sector with guarantees that it [the IMF] would cover private debt. Through the political interference by powerful countries the IMF has strayed from its purpose of short-term stabilization. The IMF is not supposed to ... provide assistance to countries to satisfy political agendas.

...

The purposes of the World Bank are clearly stated in Article I. The World Bank is to assist in the "reconstruction and development of territories of members by facilitating the investment capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of

the development of productive facilities and resources in less developed countries." In contrast with the IMF, the World Bank was created with the purpose of financing long-term loans for redevelopment.

...

The World Bank's Articles of Agreement, just as the IMF's, provides limits regarding its ability to interfere in the domestic policies of member states.

...

While the World Bank has moved into the area of placing intrusive conditions on loans it has consistently avoided taking account of human rights issues regarding its loan process. The World Bank maintains that to include human rights issues when providing loans would essentially void its mandate. The refusal on the part of the World Bank to take account of human rights issues revolves around a narrow interpretation of Article IV of the Articles of Agreement. The Article ... holds that the World Bank "will not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighted impartially."

...

The World Bank has lost focus of its policy objectives through this contradiction. Commitment to non-interference in the political workings of a country, regardless of circumstance, must be consistent. However, the World Bank has proceeded in an ad hoc manner showing that it has no problem in interfering in the political affairs of countries, regardless of human rights abuses, as long as it serves larger financial goals.

(b) Post-WWII Business Boom The global business climate changed dramatically after World War II. The postwar Marshall Plan announced by the US in 1947 was the largest and most successful foreign assistance program ever devised. The US was unable to agree with the Soviet Union about the scope of German reparations for the latter's role in causing Europe's economic devastation. The Marshall Plan was the US substitute for the dismal failure of the post-World War I Versailles Treaty process. It unfortunately isolated Germany, rendered its economy stagnant, and unwittingly contributed to the resurgence of Germany's military power in the 1930s.

After World War II, the US wanted Germany and Japan to rise from the ashes of defeat to become prosperous allies. Helping them to rebuild their economies was an important factor in maintaining an enduring peace, which would later develop markets for US goods and its lifestyle. A prosperous West Germany would ultimately "showcase" the advantages of market capitalism during the Cold War. Improved economic conditions in Germany and Japan created new long-term markets for US exports. The demise of the Soviet Union drove the West's promotion of democracy via economic initiatives in its former republics. Aid was thus linked to reform,

arms control, nonproliferation of nuclear weapons, and the development of new consumer markets.

What occurred due to the US approach is a good example of the successful development of economic ties that can lead to lasting peace. US economic interaction with Germany and Japan strengthened the political and economic ties between these nations. The stage was set for a comparative frenzy of international business transactions unlike the isolationist tendencies of earlier eras.

The US government's postwar objectives impacted corporate life in the US, as well as other countries. Corporate managers had previously concerned themselves only with local or nationwide business ventures. The country's vast internal markets did not encourage medium and small entrepreneurs to engage in *foreign* commerce. By the 1970s, however, foreign competitors began to enter into US markets in unprecedented numbers. The rebuilding programs of an earlier generation created economic Frankensteins. As the US demand for foreign products increased, a trade imbalance developed. US export growth lagged behind that of imports. Jobs in the affected US industries were at risk for enterprises unwilling to accommodate the surge of foreign competition.

A price would have to be paid for the unexpected degree of success of the US plans to develop foreign consumer markets. In order to compete, many US companies had to develop an expertise in problems that they had not previously encountered in local or nationwide business contexts. Even companies that did not engage in international business had to respond in their own markets to foreign competitors. There was a growing consumer demand for foreign-made goods, a major contributor to the commonly articulated problem of "the foreign trade deficit."

On the other hand, multinational enterprises in regions like Europe had never been isolated from international commercial transactions, unlike the US continent bordered by two oceans and only two countries. Europe's natural proximity to foreign borders—coupled with some limitations in the local availability of natural resources—presented a business environment more intuitively driven toward foreign markets. The same aggregate space between the eastern and western borders of the US could be geographically occupied by virtually all of Europe with its ubiquitous international frontiers. One reason for the success of the European Union's (EU) economic integration is that many national economies were naturally inclined to operate in

an international business climate. European States could not afford to be as isolationist as a nation with little international competition just across a number of nearby borders.

Although the US had its large conglomerates operating worldwide, there were not as many as in other trading nations. In the post-World War II period, US managers contemplating international business opportunities had to become familiar with the intricacies of importing, exporting, and producing in or for foreign markets. They had to incorporate *governmental* perspectives to appreciate the range of international economic issues that affect our daily lives. As aptly characterized by perhaps the foremost US authority on international economic issues:

Indeed, almost every conceivable area of economic activity which for one reason or another attracted governmental concern and often regulation, is now impacted by actual or potential international regulation of one kind or another. Thus we need to step back and ask ... [about the impact of] often *ad hoc* government responses. The fundamental subject appears to be the question of the "regulation of economic behavior which crosses national borders." How should policy makers (and scholars) approach this broad question? Are there some general principles of government regulatory activity which could be applied in most or all situations involving cross-border economic behavior? Can we develop some sort of general framework for policy analysis of this type? ... These and many more questions can appropriately engage scholarly and policy-maker's attention for years to come.⁶

A useful restatement of the consequences of ill-fated governmental responses to these questions is provided by University of South Carolina Business School Professor Christopher Korth. "The economy will likely suffer if the government of a country accedes to [excessive] protective pressures, regardless of the specific nature of the argument and regardless of whether the interested group represents the private or governmental sector. Protectionism means that a higher price must be paid by the majority in order to benefit the few. The list of arguments on behalf of controls is long. The list of 'reasonable' arguments from the viewpoint of the public good (as opposed to that of special interest groups) is very

short. Even in these cases, however, both national and world efficiency, income, and living standards will decline.”⁷

Public International Law textbooks historically avoided any detailed discussion of commercial transactions. The rationale was that a course on Public International Law should deal with *State* behavior and the work of international organizations of States with political and military objectives. Private International Law, in contrast, was sharply distinguished because it deals with the impact of differing national legal systems on *individuals*, such as merchants engaged in cross-border commercial transactions.⁸

In the late 1970s and 1980s, however, the academic environment began to change. Books and courses began to catch up with global economic developments. Business and undergraduate institutions in the US had been slow to respond to the internationalization of commercial life. A number of international law professors were understandably reluctant to “cram” Private International Law themes into a course in Public International Law. At present, international business and economics courses have become distinct offerings and curricula in many universities.

B. INTERNATIONAL LAW LINKS

The following materials focus on the connection between international economic relations and the general body of International Law norms covered in earlier chapters.

1. Chapter 1—What Is International Law?

(a) *Private International Law* Whether a contract is enforceable often depends upon which nation’s tribunals are chosen by one of the parties. Also, traders in different countries may operate in quite diverse negotiating postures. Socialist countries, for example, have historically conducted their trade via national trade agencies rather than through private enterprise. Non-socialist nations depend on a market economy for the conduct of trade, which is done by private enterprises for profit rather than for the direct benefit of all people of the State. The government agencies in socialist States are characteristically bureaucratic and desperately in search of predictability. Such intersystem crossovers are often more cumbersome than transactions between traders in private market economies.⁹

Illustration To demonstrate how differences might affect a common commercial setting, assume that XCorp

agrees to sell a load of widgets to YCorp. XCorp does business in its home country State X. YCorp does business in its home country of State Y. XCorp then sends its first shipment of widgets to YCorp. That shipment contains defects. Their written contract does not include a seller’s promise that the goods will arrive without defects. Under the national law of State Y, an importer cannot ask a Y court to *imply* a contractual term not expressed by the parties to a contract. The courts of State Y do not want to rewrite business contracts for the parties which would supply terms. Such terms *might* have been reasonably included in the sales contract but were not necessarily *intended* by the parties to the shipping agreement. Under the national law of the exporting State X, the lack of contractual warranties does not preclude YCorp from seeking a judicial remedy in State X. YCorp could sue for breach of the contract in State X based on an implied warranty (not mentioned in the contract) that the goods will arrive without substantial defects. In the absence of an international treaty which effectively supplies agreed-upon missing terms to such “private” international law conflicts, the result will depend on the country in which the case is filed and/or enforcement is sought.

Given the recurring problems generated by differences in national legal systems, the UN opened the Convention for the International Sale of Goods (CISG) for ratification by interested nations in 1980.¹⁰ Under Public International Law, two States that ratify the CISG thereby choose a uniform rule that governs the contractual relationships of their respective private traders. The CISG does not preclude the parties from a private contractual agreement which differs from the otherwise applicable CISG result under the circumstances of the particular case. Both the buyer and the seller may prefer that the law of one of the involved countries will govern their transaction. The CISG authorizes them to agree that the national law of either State X or State Y will apply to their contract. Freedom of contract is thus preserved.

One of the best articulations for a nation to adopt the CISG was provided by US President Ronald Reagan. It appears in the following excerpt from his letter to the US Senate, recommending that the US adopt this treaty:

International trade law is subject to serious legal uncertainties. Questions often arise as to whether our law or foreign law governs the transaction, and our traders and their counsel find it difficult to evaluate

and answer claims based on one or another of the many unfamiliar foreign legal systems [whose law might apply]. The Convention's uniform rules offer effective answers to these problems. Enhancing legal certainty for international sales contracts will serve the interests of all parties engaged in commerce by facilitating international trade.¹¹

Until 1998, there was no authoritative judicial interpretation of the 1980 CISG for US merchants.¹² The following decision illustrates how this treaty facilitates international trade, when US law would have otherwise resulted in a dismissal of this case:



**MCC-Marble Ceramic Center,
Inc. v. Ceramica Nuova
D'Agostino, S.P.A.**

UNITED STATES ELEVENTH CIRCUIT COURT
OF APPEALS

144 F.3d 1384 (1998),
cert. denied, 526 U.S. 1087 (1999)

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Twelve, click Italian Marble Case.

Of course, even when the Convention on the International Sale of Goods (CISG) undoubtedly applies, not all disputes between merchants in ratifying nations are expressly resolved by the treaty. Gaps are likely to be resolved by reference to the law of the forum where the case is filed—which can frustrate the CISG's inherent purposes.¹³

For example, the Uniform Commercial Code—adopted in many states of the US—and the CISG each provide that goods do not conform to the contract if they are unfit for the purpose intended. The CISG, however, does not expressly state whether the buyer or seller bears the burden of proof on whether goods conform to the contract. In 2005, a federal court resolved a case against the buyer although the Canadian seller's prime ribs were deemed rotten at the US port of entry. As its members noted: "because there is little case law under the CISG, we interpret its provisions by looking to its language and to the 'general principles' on which it is based. See CISG Art 7(2). The CISG is the international

analog to Article 2 of the Uniform Commercial Code ('UCC')." The court then resorted to American academic literature to interpret the UCC (and CISG) in its quest to assign that burden.

Thus, the UN's contribution to the progressive development of International Law is not limited to managing State to State relations. In addition to the success of the above International Goods treaty, the UN has pursued the quest for legal certainty and predictability in other private law contexts as well. The UN Commission on International Trade Law produced the 2005 draft Convention on the Use of Electronic Communications in International Contracting. Its purpose is to facilitate uniformity in identifying the time and place of dispatch and receipt of electronic communications.¹⁴

(b) Letters of Credit The Letter of Credit (LOC) is probably the most useful mechanism for enabling an international commercial transaction between merchants in distant countries. The term "LOC" is commonly used because it was derived from the following historic practice: the buyer's bank would transmit a letter of credit from the buyer's bank on the buyer's soil to the seller's bank on the seller's soil. The LOC's functional equivalent was used by bankers in ancient Egypt and Greece, Imperial Rome, and Renaissance Europe.¹⁵

The LOC is especially useful for merchants with little or no prior business dealings. A documentary credit is the written promise of a bank, undertaken on behalf of a buyer, to pay a seller the amount specified in the LOC. The seller must comply with the terms set forth in the underlying contract, as manifested by the LOC agreement. The terms and conditions usually require the presentation of documents that bear title to the goods, which will be shipped by the seller, and the terms of payment. Banks thus act somewhat like escrow agents. They are the intermediaries who collect payment from the buyer in exchange for transfer of the seller's title documents.

This short chain of events enables the buyer to take possession of the goods upon arrival in the buyer's country. LOCs provide an immutable level of protection and security to buyers and sellers. The seller is assured that payment will be made by a bank that is independent of the buyer. The buyer is assured that payment will be released by the bank to the seller only after the bank has received the documents of title to the shipped goods which are described in the LOC.¹⁶

The International Chamber of Commerce (ICC), located in Paris, composes standardized commercial documents, contract terms, and rules of interpretation. One of the ICC's most prominent contributions is the Uniform Customs and Practices for Documentary Credits (UCP). The UCP contains a series of articles that standardize the use of the LOC in international banking. A letter of credit is not required merely because the contract is international in scope. On the other hand, some governments require it for *all* transactions involving foreign trade.

The LOC has an important but little known connection with Public International Law. It has been used to settle conflicts between States at war and to mitigate problems spawned by poor international relations. The classic illustration arose in the aftermath of the ill-fated 1961 Bay of Pigs invasion of Cuba. US President Kennedy supported Cuban rebels, who had previously migrated to the US, in this clandestine mission to overthrow Fidel Castro. But they were captured shortly after landing. A US naval destroyer was shelled as it monitored these events. One reason this mission failed was that President Kennedy was reluctant to provide air support once the plot was discovered by Cuban authorities.

A New York law firm attempted to negotiate the release of the invading Cuban immigrants who had been assisted by the US Central Intelligence Agency. The ensuing 1962 Cuban Missile Crisis did not derail the negotiations for their release. A secret bargain was struck. Cuba was to receive \$53,000,000 in food and medical supplies in return for their release. But Cuba had no way of knowing whether the US would renege on its part of the bargain once Cuba released these prisoners. Even if the US did comply, there was no guarantee about the quality of supplies that the US might ultimately ship to Cuba. It would be quite difficult to provide assurances via diplomatic representations—which the Cuban government was understandably unlikely to trust. The absence of formal diplomatic ties between Cuba and the US was but one of the problems with making this exchange.

The US negotiator successfully requested that the Red Cross apply for a Letter of Credit from a Canadian bank executed in favor of Cuba. Once the bank issued an irrevocable LOC, Cuba would collect \$53,000,000 from the Canadian bank if the US failed to provide the supplies or if they were inferior. Cuba could be assured that the bank would make the payment. To subsequently dishonor its LOC, even if prodded to do so by the US

government, would ruin that bank's credibility in all future banking matters. LOCs are governed by the marketplace, and diplomacy is governed by politics. Nevertheless, the US and Cuban governments were able to employ an LOC to resolve this most sensitive of matters—at a time when these nations least trusted one another because of the ensuing Cuban Missile Crisis [§9.2.D.2(b)].¹⁷

2. Chapters 2 and 3—States and Organizations

(a) International Legal Personality After World War II, States engaged in international commercial transactions with individuals and corporations in other States, with each other, and with international organizations such as the UN on an unprecedented scale. The increasingly routine appearance of States in the international marketplace where their profit motive resembled that of any other trader accordingly created the pressure to alter State sovereign immunity practice (§2.6). National and international tribunals began to reconsider the historical practice of *absolute* immunity, resulting in today's *restrictive* approach to sovereign immunity for States and increasingly, international organizations [§3.6.B. *Broadbent* case].

The expansion of organizational legal capacity is classically illustrated by the famous “German Beer” case of 1987. The Commission of the European Communities sued the Federal Republic of Germany, claiming that it had breached obligations arising under regional International Law. The relevant treaty ceded the capacity to the Council of Europe to enact directives which limited a member State's ability to use restrictive business practices against other members of the region's international community. The relevant German law, dating from the year 1516, prohibited using additives in making beer. Germany's national beer law barred the importation of beer from any country in which beer contained substitutes for malted barley—the basic and unadulterated substance for making German beer. Other States in the region wanted to export a different kind of beer to the German market that contained such a substitute for malted barley. Germany defended its restrictive beer law on the basis that consumers would be misled—thinking that imported non-German beer was the same as that produced in Germany for four centuries. The Court of Justice of the European Community ruled that Germany's vintage restrictions did not survive the 1985 European Council Directives barring non-tariff barriers (NTBs) to imports from other countries within the

European Community. Germany's legislative protection unlawfully impeded the free importation of member-State products throughout the Community.¹⁸

(b) Recognition The non-recognition of one State by another often yields a rippled economic effect. For example, Serbia and Bosnia and Herzegovina do not recognize Kosovo's independence. They refuse to import Kosovar goods or to allow goods to cross through their respective territories after they have passed through Kosovo (thus bearing Kosovar customs markings). Kosovo has not retaliated against (at least) Bosnia, on the basis of the Central European Free Trade Agreement. Kosovar shipments were acceptable, however, when they bore "UNMIK" (UN Mission in Kosovo) markings, prior to Kosovo's February 2008 declaration of independence.

(c) Sovereignty International organizations can also affect commerce in far more sensitive ways. After Yugoslavia splintered into smaller nations, one of the new republics took the same name as the neighboring Greek province of Macedonia. Greece imposed a trade ban on the new State of Macedonia. As discussed in the materials on statehood and recognition, Greece's objection was not limited to the resulting confusion of two Macedonias sharing a common border. Greece questioned whether this fragment of the former Yugoslavia would ultimately seek to expand its territorial boundaries to include the adjacent Macedonian portion of Greece [Problem 2.B].

In April 1994, the European Union threatened legal action against Greece, whose trade blockade against the Republic of Macedonia affected the ability of fellow EU members to access the nearby Greek port of Salonika. This is the customary Greek port for the journey of goods to and from the new Republic of Macedonia. Salonika is the exchange point for eighty percent of Macedonian trade and all of its oil imports. EU member States, Great Britain, and Germany pressured the EU to take this action for political reasons. Greece's continued trade blockade of Macedonia might trigger a new round of Balkan destabilization. The EU advised Greece of its intent to sue in the European Court of Justice. This was an awkward decision for several reasons, including that the president of the EU was a Greek citizen. Greece ultimately backed down based on assurances that the country of Macedonia would never expand to include the Greek province of Macedonia.

In September 2008, the Asian Development Bank approved a \$40,000,000 loan to Georgia with an interest rate between one and one-and-a-half percent over the thirty-two year life of the loan. This rather generous loan was made just after the Georgia-Russian skirmish in what Georgia historically claimed as its own South Ossetia and Abkhazia provinces. In this way, member nations, including nearby Turkmenistan and Uzbekistan, China, and Japan expressed their dissatisfaction with Russia's military action in Georgia. A number of Asian nations were alarmed because of their own separatist problems.

(d) Diplomacy Economics and diplomacy are not strangers. In 1991, the European Community withheld a \$1,000,000,000 food and aid package destined for what was then the crumbling Soviet Union. The Community also delayed execution of a half-billion dollar technical assistance agreement with Moscow, announcing its intent to file a human rights complaint with the Organization for Security and Co-operation in Europe [§3.5.B.]. Soviet President Mikhail Gorbachev had just imposed a military "crackdown" on pro-independence groups in the Baltic republics of the former Soviet Union. The European Community action effectively protested the Soviet response to the political violence in Latvia. France and Germany simultaneously announced that they would seek to temper the Soviet hard-line attitude toward the independence movement in the Baltic States of Lithuania, Latvia, and Estonia.

The US also pursued trade-related diplomacy at the time. President George Bush (senior) negotiated with Gorbachev on the basis that the US Congress could grant the (former) Soviets special trading status. The objective was to normalize international economic relations between the two superpowers. Bush's announced "global partnership" was designed to prevent the US and the crumbling Soviet Union from rekindling the tensions that the Cold War symbolized. The US was employing economic incentives to reduce the risk of political and military hostilities while exploring the possibility of new Eastern European markets for US exports.

The UN suffered a major blow to its prestige in the Iraq oil-for-food scandal [§3.3.C.3(b)]. One may question the UN's continuing ability to "take the moral high ground"—given the related corruption which swept the UN from its diplomatic pedestal.

A non-federal entity, which includes cities, states of a federal union, and other political subdivisions of a country, does not enter into formal diplomatic relations with foreign countries. But many do so anyway as an avenue for pursuing business opportunities. That can create a firestorm of controversy. In June 2006, the California City of Irvine entered into a relationship with a similar district in Shanghai. Under the terms of the agreement, Irvine could not send official city delegations to Taiwan; fly the Taiwanese flag on city property; or officially act in ways which would recognize the existence of Taiwan—including using the term “Two Chinas.” The 10,000 citizens of Taiwanese descent living in Irvine’s Orange County did not appreciate this sister-city agreement and sought to have it rescinded. The Irvine mayor blamed a new employee who signed the agreement, who allegedly did not have the authority to sign it.

3. Chapters 5 and 6—Jurisdiction and Sovereignty

(a) Internet The range of State sovereignty was tested in the French Yahoo litigation’s dueling judgments [§5.2.G. *French Yahoo Judgment*]. A Parisian court required a California-based Internet service provider to preclude even *non*-French customers from accessing illegal Nazi memorabilia information on the Yahoo Web site. A San Francisco court relied on the US Constitution’s First Amendment right to freedom of speech to reach the opposite result. The ultimate resolution will have enormous consequences for international business as States attempt to keep the wine which so many are savoring in the geographical bottle.¹⁹

In December 2007, a California-based free speech group filed what could be the test case for forging the link between the Internet, WTO requirements, the national sovereignty to control e-commerce, and human rights. The non-profit plaintiff wants China to end its Internet censorship; and to remove barriers to American e-commerce business—within the context of the market access rules governing China since its 2001 entry into the WTO. It presented its claim to the Office of the US Trade Representative in Washington, D.C. regarding the so-called Great Firewall of China.²⁰

(b) Other Jurisdictional Links Multinational corporations must also beware of jurisdictional quicksand. A classic example appeared when an international cartel, including US wood pulp producers, allegedly conspired to fix paper prices in member States of the European

Community. The EC’s executive and judicial bodies fined the companies in the cartel pursuant to European Community Law because their price-fixing conspiracy violated the EC’s antitrust laws. These legal actions, although taken against business entities as far away as the US, did not constitute an improper “extraterritorial” regulation of commercial transactions. The conduct of the foreign enterprises was characterized as having the requisite effect within the territory of the European Community.²¹

There is a price, however, for applying local law to foreign enterprises. A major example is the US application of its law to foreign corporate activity. US state and federal law often subject foreign companies to conflicting demands. The US Supreme Court, for example, trumped Swiss bank secrecy laws by approving the application of US law to the US branch of a foreign commercial enterprise. It was required to disclose information that subjected it to criminal sanctions under Swiss law.²² In another case, the Supreme Court decided that procedures in the Hague Convention for the Taking of Evidence Abroad in Civil or Commercial Matters were *optional* rather than mandatory. A French company thus had to submit documents to an adversary under US procedural rules—although the French Penal Code *prohibited* the sharing of this technology in the absence of an express treaty exception.²³

As a result of such cases, US allies in Europe have enacted “blocking statutes.” These statutes are countermeasures whereby State X “blocks” the potential application of US law to the corporate activities of State X individuals or corporations who may be subjected to US legal processes. Blocking statutes typically make it a crime for non-US corporations to reveal such information.²⁴ The Chinese State Secrecy Law, for example, generally forbids the disclosure of financial data by Chinese corporations. This statute is designed to protect Chinese State agencies from disclosing information requested by authorities in other countries. But it creates a problem for the Chinese entity that is subject to conflicting demands. When Chinese companies do business in the US, for example, they have consistently been required to disclose financial information when demanded by a US judge. These companies are held to the more liberal informational disclosure standard in US litigation. In 1992, a federal judge in San Francisco imposed a fine of \$10,000 per day for each day that a Chinese corporation refused to comply with an American company’s right to obtain business information.²⁵

Banking and other commercial investment entities will no doubt be dramatically affected by the Bush Administration's 2001 antiterrorist legislation. It unreservedly subjects foreign entities to US jurisdiction on two fronts. First, foreign banks will have to alter their business practices in their nations and other nations outside of the US if they wish to continue doing business with the US. Second, because the majority of Internet messaging is routed through information hubs in Virginia and California, criminal conduct abroad is now subject to US jurisdiction—as messages facilitating the criminal enterprise flow through the US. The US is acting on the messages pertaining to the discovery and prosecution of individuals related to September 11, 2001.

Space tourism is now a viable enterprise. Russia's space travel program allows wealthy individuals to travel to and stay at the International Space Station (220 miles above the earth). Russia, of course, does not claim ownership of the space containing the Space Station. Per the materials in Chapter 6, space is *res communis*, meaning that it is not subject to claims of sovereignty by any nation on Earth—although the anticipated hotels there will literally be out of this world. That venture will hopefully spawn an international framework that protects physical and intellectual property rights in space.²⁶

Individuals are likewise subject to jurisdictional rules that bind them wherever they travel. California's Governor Arnold Schwarzenegger allegedly purchased a single Cuban cigar in Canada in June 2007. US law prohibits its citizens from buying Cuban cigars anywhere in the world. His office would neither confirm nor deny the story, as reported in the *Ottawa Citizen* newspaper. (This prohibition apparently does not apply to US citizens who purchase Cuban cigars while legally present in Cuba. This author did so in 2001, and was permitted to bring a declared *box* of cigars into Miami from Havana.)

4. Chapter 7—Treaty Applications The more than half-century-old Arab economic boycott of Israel was a centerpiece in the Arab League plan to bankrupt Israel. The League sought to drive Israel out of existence—through a multilateral treaty response to the UN's 1947 partition of Palestine to create the State of Israel [§9.1.C.2.].

The materials in the remaining sections of this final book chapter explore global and regional economic treaty relationships, which evolved out of the desire to advance the commercial interests of the participants.

5. Chapter 8—Arbitration and Adjudication The adjudication chapter dealt with the resolution of disputes by some specialized tribunals created for the finite purpose of winding down hostile relations. Dispute resolution typically plays out in a commercial context. The Iran-US Claims Tribunal is a serviceable example. It still functions in a building near the International Court of Justice (ICJ) in the Netherlands.

A third-party resolution model once again served as the means of clipping the loose economic strings spawned by the Iranian Hostage episode. At the conclusion of the 1979–1980 Iranian Hostage Crisis, Iran released the US hostages to Algeria. The US released a portion of Iran's assets, which were frozen by US President Jimmy Carter at the outset of the crisis. Since then, the Iran-US Claims Tribunal has steadily worked to resolve the private claims of US businesses. This third-party dispute-resolution mechanism peacefully resolved one of the most sensitive disputes ever to arise under Public International Law.²⁷ The §11.3.B. UN Compensation Commission case is engaged in a similar process: addressing damage and reparation disputes spawned by Iraq's torching over 600 oil wells as its military forces withdrew from Kuwait in the first Persian Gulf War.

6. Chapter 9—Use of "Force" The materials on the use of force could be revisited to cultivate the commercial roots in the genealogy of Public International Law. The UN Security Council, for example, invoked its UN Charter powers to impose international economic sanctions with varying degrees of success on South Africa to eliminate its State policy of apartheid; on parts of the former Yugoslavia, to reduce the flow of arms entering the Bosnian conflict; on Iraq, to keep it from perpetrating additional affronts to Kuwait's sovereignty during and after the 1991 Persian Gulf War; and on the Taliban government in Afghanistan because of its posture in relation to Usama bin Laden.

Modern States are increasingly using economics as their weapon of choice as opposed to using or threatening military force. After the end of the Cold War, for example, the US became the lone superpower. It continued to rely on a unilateral sanctions policy in certain cases, rather than deferring to either the UN Security Council or World Trade Organization (WTO). Despite being the leading voice in favor of the WTO, the US has threatened or used various legislative and executive policies without the approval of these international organizations. Under

the authority of Title 50 of US Code §1701, for example, the president implemented the Iran and Libya Sanctions Act of 1996. This statute authorizes the targeting of certain countries to “deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the US, to the national security, foreign policy, or economy of the US, if the President declares a national emergency with respect to such threat.”

The US Foreign Investment and National Security Act of 2007 is a useful illustration of the relationship between economics and use of force. The April 2008 regulations under this Act authorize the President to suspend or prohibit any foreign merger he or she deems to threaten or impair national security. The government thus reviews the proposed transaction to address any security concerns. The 2000 Iran Nonproliferation Act authorizes sanctions on *foreign* companies providing Iran with materials that could be used to make unconventional weapons. As of 2006, seven companies—two Russian—were so sanctioned. This form of “force” essentially precluded US government agencies from buying goods or services from, or providing assistance to, these seven companies. The goal is to prevent the sale of sensitive military equipment or services to these companies or their subsidiaries.²⁸

Political relations between the US and some of the above political adversaries have vacillated. Libya surrendered its agents for trial who were responsible for the Pan Am 103 bombing incident in 1988. Libya also paid each of the victims’ families millions of dollars in reparations. Libya wished to be a WTO member and cast itself free of the interim economic sanctions which crippled its economy. But the US-Libya relationship would never approach the category of allies. The US negotiated in favor of Iran’s 1996 application to the WTO in return for Iran’s freezing of its nuclear weapons program. Less than a decade later, the Bush Administration identified Iran as a member of the three-nation “Axis of Evil” (along with Iraq and North Korea).

In addition to the Arab economic boycott of Israel, and sanctions imposed or threatened after the September 11, 2001 attacks on the World Trade Center and the Pentagon, the next most prominent example of the use of economic force may be the Helms-Burton legislation. Rather than use economic tools to embrace Cuba, the US Congress arguably perpetuated Cold War tactics with this 1996 law. It was the next step in the now five-decade-plus US economic embargo of Cuba. That sanction does not have the blessing of the UN Security

Council, the European Union (as of June 2008), or US allies such as its North American Free Trade Agreement partners Canada and Mexico. That the US maintains a robust business relationship with other communist countries such as China and Viet Nam has accentuated the discriminatory nature of this policy.

This economic legislation is a forceful example of the interplay between politics, economics, and International Law. It has prompted diplomatic protests from the above-mentioned organizations and many nations. You may now read the edited versions of the US law, the responsive legislation enacted by Cuba, and references to the official objections to Helms-Burton on the course Web page:



**United States 1996 Cuban
Liberty and Democratic
Solidarity Act and the responsive
Republic of Cuba 1996
Reaffirmation of Cuban Dignity
and Sovereignty Act**

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Twelve, click Cuban Liberty and
Democratic Solidarity Act & Reaffirmation of
Cuban Dignity and Sovereignty Act.

The Helms-Burton legislation was initially vetoed by President Bill Clinton. He later signed it after Cuban military jets shot down two private US aircraft in 1996 [§6.4.A.6.]. This was then the latest incident in the unrelenting friction between the US and Cuba, initially spawned by Fidel Castro’s 1959 coup d’état. Its purpose was to tighten the economic embargo of Cuba by making it a crime to “traffic” in property originally belonging to US nationals but confiscated by Cuba in 1959 after the US first imposed a quota on Cuban sugar products.

This legislation purports to prohibit third-country companies from “trafficking” in such property, a term previously reserved for US drug laws. It creates civil liability and excludes visits to the US by officers, controlling shareholders, families of trafficking companies, and anyone else who violates its terms. As noted in the foregoing Web page excerpt, Mexico, Canada, and the EU were prominent US trade partners who characterized this Act as an illegal extraterritorial application of US law.

In 1997, the EU brought a claim in the WTO, regarding this US legislation. The EU dropped its claim against the US in 1998. One can presume that it sensed that pursuing this claim in the WTO presented a “lose-lose” scenario for the then new WTO dispute resolution process. If the EU were to continue to prosecute this matter there and succeed, the case would have effectively politicized the fledgling global trade organization. It was, after all, designed to *avoid* politics in international trade. There was no guarantee that the US would remain in the WTO. (The US abandoned the ICJ in the mid-1980s when its supreme national interests were at stake in Nicaragua [a §9.2.C.2. principal case].)

Alternatively, if the US were to win this case, its “national security” defense to anti-competitive trade measures would have effectively made a mockery of the WTO. The organization was basically conceived to ensure free, nondiscriminatory trade—which was of course expressly contrary to the *raison d’être* of the Helms-Burton Act. The US had its reasons for negotiating with the EU to drop its Helms-Burton case. During the eight-year Uruguay Round, which produced the WTO, the US was generally the first and loudest proponent to claim that a prospective defendant should not frustrate the dispute settlement provisions of the WTO.

President Clinton waived key portions of Helms-Burton a half-dozen times since its passage (each waiver has a six-month life span). He expressed the concern that there would be retaliation against US companies, especially because foreign businesspeople operating in Cuba could be sued under this US law, regarding any transaction involving “trafficked” property. A 1998 bipartisan campaign was launched in the US Congress to ameliorate the potential impact of this Act and the forty-year embargo on the Cuban people (as opposed to the targeted government). President Bush used his first opportunity to continue the presidential waiver of the Act’s trafficking provisions that if implemented, would offend many nations of the world (not to mention the EU and UN). President Bush, notwithstanding his strong anti-Castro rhetoric, also waived his executive prerogative to fire this economic salvo.

In October 2008, the UN again weighed in with its seventeenth consecutive General Assembly resolution, calling on the US to cease its economic embargo of Cuba. The recorded vote was 185 in favor to three against (Israel, Palau, US) with two abstentions (Federated States of Micronesia and Marshall Islands). That figure loudly proclaims the overwhelming international opposition to the US policy on Cuba:

Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America against Cuba

UNITED NATIONS GENERAL ASSEMBLY
UN Doc. A/Res/63/7 (29 October 2008)

<<http://havanajournal.com/politics/entry/united-nations-votes-185-to-3-against-us-embargo-on-cuba>>

THE GENERAL ASSEMBLY,

...

Reaffirming, among other principles, the sovereign equality of States, non-intervention and non-interference in their internal affairs and freedom of international trade and navigation, which are also enshrined in many international legal instruments,

Recalling the statements of the Heads of State or Government at the Ibero-American Summits concerning the need to eliminate unilateral application of economic and trade measures by one State against another that affect the free flow of international trade,

Concerned at the continued promulgation and application by Member States of laws and regulations, such

as that promulgated on 12 March 1996 known as the “Helms-Burton Act,” the extraterritorial effects of which affect the sovereignty of other States, the legitimate interests of entities or persons under their jurisdiction and the freedom of trade and navigation,

Taking note of declarations and resolutions of different intergovernmental forums, bodies and Governments that express the rejection by the international community and public opinion of the promulgation and application of measures of the kind referred to above,

...

Concerned that, since the adoption of its [prior sixteen annual] resolutions [since 1992] ..., further measures of that nature aimed at strengthening and extending the

economic, commercial and financial embargo against Cuba continue to be promulgated and applied, and concerned also at the adverse effects of such measures on the Cuban people and on Cuban nationals living in other countries,

...

2. Reiterates its call upon all States to refrain from promulgating and applying laws and measures of the kind referred to in the preamble to the present resolution, in conformity with their obligations under the Charter of the United Nations and international law, which, *inter alia*, reaffirm the freedom of trade and navigation;

3. Once again urges States that have and continue to apply such laws and measures to take the necessary

steps to repeal or invalidate them as soon as possible in accordance with their legal regime;

4. Requests the Secretary-General, in consultation with the appropriate organs and agencies of the United Nations system, to prepare a report on the implementation of the present resolution in ... light of the purposes and principles of the Charter and international law and to submit it to the General Assembly at its sixty-fourth session [commencing in October 2009];

5. Decides to include in the provisional agenda of its sixty-fourth session the item entitled "Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba."

Iran began its 2005 campaign by calling for the demise of the State of Israel. This tactic hints at one downside of the long-term US policy seeking Cuba's economic demise: the US does not have a clean slate in terms of the national employment of economic and political pressure to destroy another nation's economy. In an analysis of the arguments for and against the legality of Helms-Burton in the American Bar Association's periodical, *International Lawyer*, the Founding Executive Director of the Legal Center for Inter-American Free Trade and Commerce concludes:

The moment for multilateral diplomacy with respect for Cuba and the Western Hemisphere could not be any more auspicious. [T]he European Union has adopted a new foreign policy strategy vis-à-vis Cuba. The purpose of the European plan is to address human rights abuses and, consistent with Title II of *Helms Burton*, to foster the transition to a democratically elected government in the Caribbean island. Harmonious with this plan, Pope John Paul II made an unprecedented visit to Cuba during the early part of 1998 as a favorable prelude to the Second Summit of the Americas. As the international legal system approaches the crossroads in its continued development, the door to multilateral diplomacy is open. The only question is whether the US President and the Congress will make the correct policy choice.²⁹

The US and many other countries have often joined forces in this use of economic force for political purposes.

The US and the European Union, for example, imposed embargos on the Palestinian (West Bank) government of Mahmoud Abbas until summer 2005. These bans were lifted after Hamas' unexpected election victory in Gaza. The end of such sanctions demonstrated external support for the Abbas government in the face of Gaza's then being politically operated by Hamas—designated a terrorist organization by other nations including the US.

7. Chapter 10—Human Rights There are numerous contemporary examples, but space for only several. In mid-1994, the US opposed Singapore as the initial host of the WTO's premier 1995 ministerial meeting. The US Trade Representative objected to a Singapore site because of its 1994 "caning" (severe corporal punishment with a whip-like cane) of an eighteen-year-old US citizen. President Clinton was unable to dissuade Singapore from carrying out this punishment after the youth had spray-painted several cars. There were widely reported global concerns with this form of State action on the basis that it constituted torture or cruel and degrading punishment under International Human Rights Law. While US pressure did not prevent the caning, the US was able to sidetrack Singapore's bid for hosting this major event at the dawn of the new WTO's operations.³⁰

Before the normalization of trade relations with China in 2001, there had been a relatively long and tortuous political history associated with the recurrent decisions of US presidents regarding China's trading status with the US since World War II [§12.2.C.1.] In 1951, during the early stages of the Cold War,

US President Harry Truman denied Most Favored Nation (MFN) status to *all* communist countries. President Richard Nixon unsuccessfully attempted to extend MFN status to China in 1972 when he initiated US relations with the People's Republic of China (PRC). In 1980, President Jimmy Carter finally extended MFN status to that nation. In 1990, President George Bush decided that China would receive MFN status—but not the former Soviet Union because of obstacles it had erected to Jewish emigration from that country to Israel. This appeared to set a double standard for US MFN policy. Candidate Clinton campaigned in 1991 that, if elected, he would revoke China's MFN status because of continuing concerns with China's human rights performance. In 1993, President Clinton scaled this pledge back to denying MFN status only to State entities. Full MFN status was revived that year and continued thereafter.³¹

The threatened revocation of China's MFN status then became a continuing commercial wrinkle in Sino-US diplomatic relations. It resurfaced with a fury after the PRC's massacre of pro-democratic Chinese students in Tiananmen Square in 1989. In 1994, the US Trade Representative announced a new tactic in the pursuit of Chinese human rights improvement—a cutback of twenty-five to thirty-five percent on the US importation of Chinese textiles and clothing. The US experiences a major trade deficit with the PRC. But the expressed rationale for this particular round of human rights diplomacy was that China had continued to display a poor human rights record after a decade of prodding by various human rights organizations. This particular link between human rights and Sino-US economic relations evaporated with the 2001 entry of China into the WTO.

The Association of South East Asian Nations (ASEAN) promulgated its first charter in November 2007. That document features a European Union-styled economic association of ten States. The charter calls for establishing an ASEAN institution devoted to upholding the human rights of its citizens. But the charter fails to mention any international human rights instruments that could serve as a model for generating an action plan.

8. Chapter 11—Environment The citizens of Bhopal, India, certainly gained from the presence of a major US corporate operation in their territory making chemicals for agricultural use. Thousands of jobs were created. India's economy was favorably impacted by the

presence of this multinational corporate enterprise. More money was spent locally in the form of the added spending power of corporate employees, steady jobs, and a decline in unemployment. There would be a significant environmental cost in 1984, however, for hosting a foreign corporation's operations in Bhopal—the site of one of the worst (sudden) environmental disasters in history [§11.1.C.].

The 1992 Rio Conference and ensuing UN environmental programs have strived to accomplish sustainable economic development for the underdeveloped countries of the world. But there is continuing concern about the environmental cost of such development. The flourishing industrial-chemical plants of the 1970s and 1980s in Ireland, for example, helped raise the economic standard of living in Ireland, one of the European Union's poorest members. But they also produced one of the most polluted atmospheres in the northern hemisphere.³²

The contemporary climate change problem demonstrates that in addition to any moral imperative, there are practical economic stresses as well. The global economic implosion is comparatively foremost in terms of immediacy. But it is possible that we can insulate the global economic and energy crises by addressing them jointly, rather than distinctly. As stated by the UN Secretary-General and several prominent national leaders from diverse corners of the globe:

The answer is to find common solutions to the grave challenges facing us. And when it comes to two of the most serious—the financial crisis and climate change—the answer is the green economy. If our way of life is threatened, our response must be to adapt. Scientists agree: to address climate change, we need an energy revolution, a wholesale change in how we power our societies.

Economists agree as well. The hottest growth industry in the world ... is renewable energy. That's where jobs of the future are already being created and where much of the technological innovation is taking place that will usher in our next era of economic transformation.

...

Worldwide, nearly 2 million people are employed in the new wind and solar power industries, half of them in China alone. Brazil's biofuels program has been creating nearly a million jobs annually. In

Germany, investment in environmental technology is expected to quadruple over the coming years.

...

Studies show that the United States could cut carbon emissions significantly at low or near-zero cost, using existing know-how. For evidence, consider how Denmark has invested heavily in green growth. Since 1980, GDP [gross domestic product] increased 78 percent with only minimal increases in energy consumption.

...

Today's global financial crisis is a wake-up call. It demands fresh thinking. It requires innovative solutions that take into account the larger challenges we face as a global people....³³

◆ §12.2 WORLD TRADE ORGANIZATION

The World Trade Organization (WTO) became effective in 1995, emerging in the form of a 26,228-page document. This global agreement embodies a six-part program designed to reduce barriers to international commerce. Its pillars include the following restraints:

- ◆ *Tariffs.* Import taxes and other tariff barriers would be reduced on 85 percent of the world's trade. The associated taxes are called customs duties, charges, tolls, assessments, or levies. The most common term is "tariff."
- ◆ *Dumping.* Resisting the practice of temporarily selling imports at a price below cost in the target market. This is a predatory tool for eliminating local competition. After market access is secured, the pricing structure increases significantly so that ultimately profits recoup previous losses after eradication of most or all competitors.
- ◆ *Agriculture.* Farm subsidies, which artificially reduce the cost of production, are to be reduced by an average of 36 percent.
- ◆ *Textiles.* Import quotas on textiles from developing countries—which currently help the local market's competitors maintain a greater market share—would be phased out over a ten-year period.
- ◆ *Service sectors.* Markets in "service" sectors such as banking, shipping, and insurance are subject to international trade controls for the first time. Only "goods" were regulated under the 1947–1994 version of the WTO (GATT).
- ◆ *Intellectual property.* The WTO regime extends protection against unauthorized copying of "intellectual" property such as books, films, music, computer

programs, and pharmaceutical products—thus providing additional copyright and patent protection on a global basis.

A. TARIFFS AND TRADE AGREEMENT

In the consummate economic world, managerial skill and economic efficiency would be the exclusive market forces that drive international economics. Instead, governments have introduced a variety of impediments to the free flow of cross-border commerce. The tariff is the primary international trade barrier. (Non-tariff barriers to free trade will be discussed later in this section.) When the government of State X so taxes a foreign-made commodity, the resulting tariff increases the cost of that product for the State Y exporter wishing to sell it and the State X consumer wishing to buy it. The higher the tariff, the higher the cost—and the less likely the importation of foreign goods and international competition for that particular product. While the taxing nation's products are protected by tariffs on imported products, that protection has a price. That nation should expect its trading partners to counter with their own tariffs.

The inverse relationship between the level of tariffs and the level of international trade is classically illustrated by the effect of the US tariff law of 1930. It imposed the highest tariffs ever levied on foreign-made products. The US Congress then believed that this trade restriction would stimulate local industry and agriculture and that the US would not be harmed by this tariff legislation. Quite the opposite occurred, however. The other major industrial countries retaliated by placing higher tariffs on US exports. The foreign demand for American products fell immediately, resulting in a dramatic loss of jobs in the US. These events contributed to the Great Depression of the 1930s and the global recession of that era.

In 1934, US President Franklin Roosevelt and the Congress worked together to reverse this disastrous high-tariff protectionist program to stimulate the domestic economy. Congress enacted the Reciprocal Trade Agreements Program to encourage international competition. It generally reduced tariff rates, encouraging similar reductions by other countries in turn. The legislative goal was to vitiate the adverse effect of the high tariffs that had strangled the flow of international commerce—both in and out of the US. Congress then authorized the president to negotiate mutual tariff reductions with individual nations. The US Trade Representative began to negotiate an exhaustive series of

bilateral agreements to reduce tariffs. This program increased the volume of US exports, while stimulating worldwide trade benefits as other countries responded by reducing their tariffs. The US tariffs gradually declined to the lowest levels in the nation's history.

During World War II, certain nations explored the possibility of a multilateral trade institution. They advocated a single, global trade agreement that would replace the hundreds of independent bilateral agreements. The US pursued this objective by lobbying for creation of the International Trade Organization (ITO) to develop and maintain a global trade agreement. Representatives from several nations met to draft an ITO Charter. They simultaneously created a comparatively informal document called the General Agreement on Tariffs and Trade (GATT) at Geneva in 1947. The GATT was originally supposed to be a statement of principles related to, but distinct from, the anticipated ITO Charter.³⁴

The ITO never materialized. The US Congress resurrected its isolationist trade posture after World War II. It thus decided against US participation in the proposed ITO. The US had the most prosperous postwar economy. Many of today's major economic powers were in ruins or economically depressed after the war. Without US support, the ITO became impractical. After that, GATT continued to be a *de facto* arrangement, which was useful, even if not legally enforceable when its obligations (discussed later) were breached by a participating State.

GATT became the device for coordinating global policies on international commerce, accomplishing trade objectives, and overcoming the inertia of the US Congress. In 1948, twenty-two nations executed an interim Protocol of Provisional Application—the original GATT agreement referred to as “GATT 1947.” A GATT General Secretariat and administrative staff were established by 1955 in Geneva. Their task was to implement the trade objectives of the participating countries—which could not be called “members” because the GATT did not achieve official status as an international organization of States. GATT did not possess its own power to act when a State decided to ignore its GATT “obligations” during the next forty years.

In 1994, the status of the GATT arrangement changed. Most nations of the world either joined or sought accession to the various agreements produced by its eight-year “Uruguay Round” of GATT negotiations. The resulting “GATT 1994” was the last of five periodic rounds conducted since GATT's inception. During that session, the

national representatives produced the “Final Act,” referring to the WTO.³⁵ In January 1995, sixty nations became charter members of the WTO. Some have signed but not yet ratified the WTO agreement. Twenty-one others immediately began to negotiate for admission. Some States, however, remained in just the GATT, rather than accept the mandatory dispute-settlement provisions of the 1995 WTO process. China was finally admitted in November 2001, notwithstanding internal protests because of its closure of State-owned factories and reduction of farm subsidies as conditions of WTO membership.

B. GATT EVOLVES INTO WTO

The shift from General Agreement on Tariffs and Trade (GATT) to the World Trade Organization (WTO) has been very dramatic. The GATT was a temporary arrangement with no institutional framework, no secretariat, and no ties to an existing international organization.³⁶ WTO is a truly international organization, which has become the treaty-based centerpiece of International Trade Law.³⁷ The primary reason for this upgraded status is that the WTO radically changed dispute settlement procedures in international commerce. Chart 12.1 below.

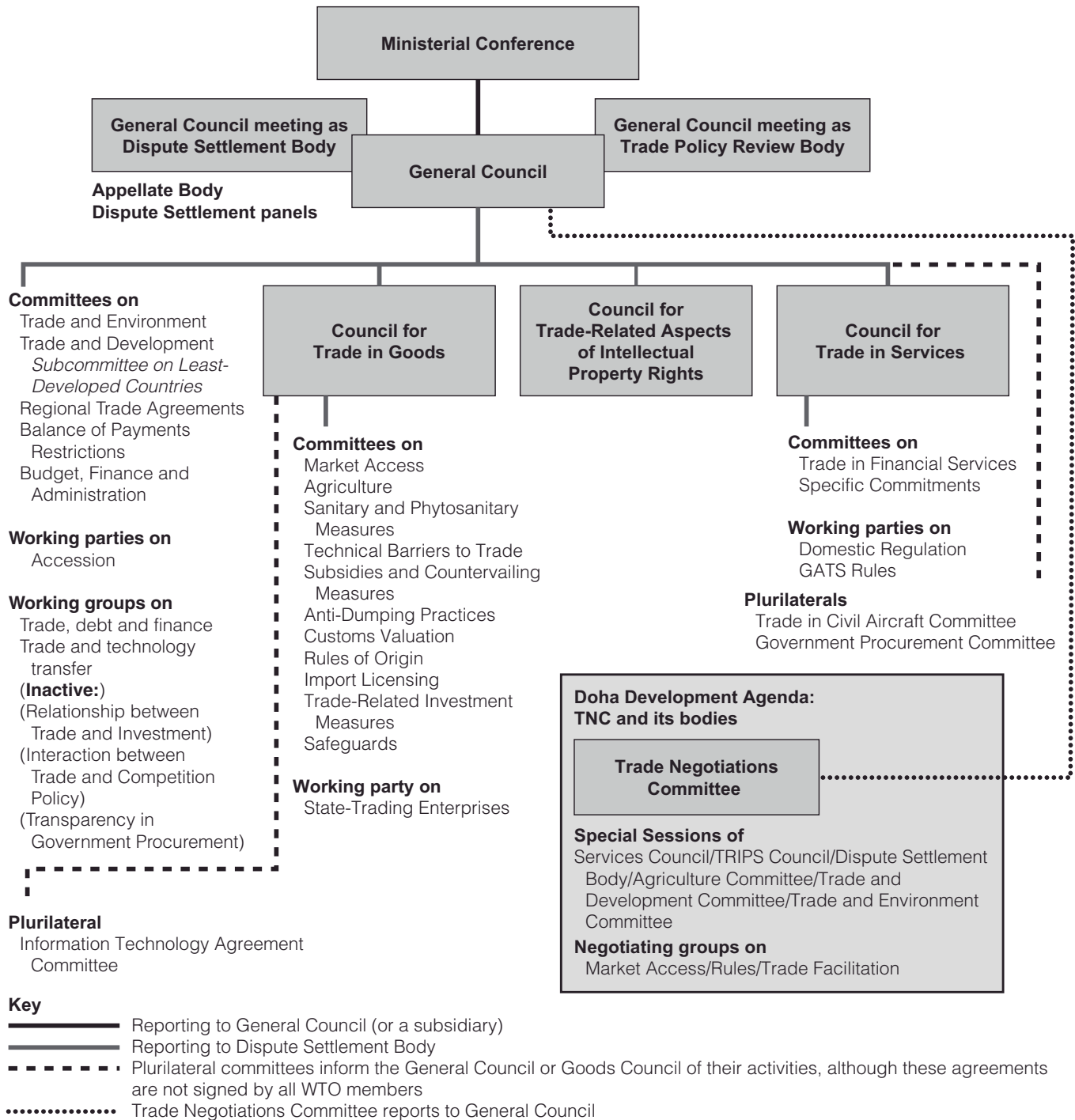
Overcoming the national distrust associated with submitting sensitive trade disputes to a third-party dispute-resolution body was a primary objective of the switch from GATT to WTO. The following commentary by Ernst-Ulrich Petersmann, the former WTO Legal Adviser, succinctly describes this undercurrent:

Both the classical international law of coexistence and the post-War international law of economic cooperation, including the General Agreement on Tariffs and Trade (GATT), had focused on the rights of states and governments rather than on the rights of their citizens.... While *Alexis de Tocqueville* could describe the US Supreme Court as a model for the judicial control of protectionist abuses of government powers [within a nation], the termination, in October 1985, of the US acceptance of the compulsory jurisdiction of the International Court of Justice ... revealed a widespread distrust vis-à-vis judicial settlement of disputes with their countries.

How can such distrust of judicial control of foreign policy powers be overcome? How can ... abuses of foreign policy powers be prevented? How can a liberal international trade order be protected more effectively? ... The 1994 WTO Agreement, adopted

CHART 12.1 WTO STRUCTURE**WTO structure**

All WTO members may participate in all councils, committees, etc, except Appellate Body, Dispute Settlement panels, and plurilateral committees.



The General Council also meets as the Trade Policy Review Body and Dispute Settlement Body

The chart is available from the WTO Web site at <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm>.

by 124 countries and the EC ... [is] arguably the most important worldwide agreement since the UN Charter of 1945....

As a global integration agreement, which regulates international movements of goods, services, persons, capital and related payments in an integrated manner, the WTO agreement reduces the current fragmentation of separate international agreements and organizations.... Fifty years after the Bretton Woods Conference, its entry into force on 1 January 1995 completed the legal structure of the Bretton Woods system based on the IMF, the World Bank Group and [now] the WTO. The WTO was designed to serve constitutional functions and rule-making functions ..., in addition to its executive functions, surveillance functions and dispute settlement functions for the foreign economic policies of member states, more so than the IMF and the World Bank, whose statutes include few substantive rules for the conduct of government policies and for the [much needed] rule-oriented settlement of international disputes.³⁸

The new comprehensive title, “WTO” (as opposed to “GATT”), was more than just a name change. First, this *de jure* international economic organization is now endowed with jurisdictional powers ceded by its member States. Second, the WTO has a power that was withheld from the GATT process by its participating States. The WTO can force compliance when one of its nearly 150 member nations breaches organizational obligations (as analyzed below). Third, there is now room for economies that were not historically free-market economies. Both the former Soviet Union and the PRC expressed interest in participating in the earlier GATT agreement. They were initially placed in the Observer Government group.

Russia’s comparatively recent shift to a market economy, assuming that democracy and capitalism continue to flourish, renders it a likely candidate for ultimate inclusion. US President Bush lobbied (unsuccessfully) in favor of Russian membership by the end of 2006. Ukraine became the 152nd member in May 2008, after its fifteen-year quest—but not a member of NATO, as strongly advocated by the Bush Administration for Ukraine and Georgia.

The US initially opposed China’s participation because of the latter’s extensive piracy of patented and copyrighted US materials. These products include computer

hardware, software, books, movies, and a host of other items protected by the WTO treaty. US estimates were that China’s breach of international copyright and patent treaties has cost US companies more than \$1 billion a year in lost revenues. Ninety-four percent of US-made products in China were pirated copies. China and the US thus entered into a bilateral treaty in November 2001, which enabled China to enter the WTO.³⁹

One major difference between the WTO and GATT is that a GATT member could pick and choose among the various GATT “obligations” based on expediency. This selective incorporation produced a very complex web of varying obligations, doing little to promote GATT’s universal appeal. This is one of the reasons why *regional* trade organization virtually eclipsed the (former) GATT in importance [§12.3.]. The WTO treaty, on the other hand, requires that participating States agree to *all* of the basic provisions (with some temporary exceptions).

The WTO also differs from GATT because GATT was limited only to commodities. WTO membership requires accession to the four fundamental parts of the 1994 Final Act: (1) trade in goods; (2) services; (3) intellectual property rights; and (4) investment rules. The “goods” portion of international commerce continues to be the primary area of concern. It will be summarized below as the focal point in this section. The WTO case selection for this section covers the increasingly important arena of intellectual property.

The primary *legal* difference between GATT and the WTO is the latter’s mandatory dispute-resolution mechanism. The former GATT panels of experts often issued their determinations without the ability to force compliance with the basic obligations described below. A far more formal adjudicatory system currently provides enforceable remedies. The significance is conveniently summarized by New York University Professor Andreas Lowenfeld, a prominent international commercial arbitrator:

Until now dispute settlement in the GATT has generally reflected a certain ambivalence. Some states and many “old GATT hands” within the secretariat and among the delegations in Geneva believed that GATT dispute settlement should aim at lowering tensions, defusing conflicts, and promoting compromise; others, notably American officials and writers, have looked to the dispute mechanism of GATT as an opportunity to build a system of rules and remedies.

Over the forty years of GATT dispute settlement, there has been an ebb and flow between the diplomatic and the adjudicatory models. It seems clear that the adjudicatory model prevailed in the Uruguay Round.⁴⁰

Under GATT, the losing party could essentially ignore (“block”) a GATT “panel report.” States could disregard the findings of the GATT panel when told to cease an offending practice. A powerful trading partner could even block the GATT Secretariat from organizing a panel that was supposed to decide a complaint.⁴¹

The WTO discourages unilateral fact-finding by an individual member of the organization. The Agreement Establishing the WTO provides that, should a member seek redress for a violation of GATT obligations, it “shall have recourse to, and abide by, the rules and procedures of this Understanding...” Members may not make their own determinations and must instead seek “recourse to dispute settlement in accordance with the ... [WTO] Understanding.”⁴²

Under this Understanding on Rules and Procedures Governing the Settlement of Disputes, there is still an adjudicatory “panel” process. But State members of the WTO can no longer ignore a panel decision for three reasons. First, there is an initial consultation process. The aggrieved party may institute a relatively informal consultation with the allegedly offending party. This informal process has a short fuse so that the aggrieved party may then secure the establishment of a formal panel if the matter remains unresolved for sixty days. Second, one State may not unilaterally block the establishment of a panel when another has lodged a complaint in the WTO’s headquarters in Geneva. Third, the unlikely acceptance of an adverse panel decision without any form of review would place the WTO and the entire GATT process at risk.

States have been traditionally reluctant to yield sovereign powers to an external decision maker without any recourse. Panel members can make mistakes. Thus, the losing party may *temporarily* block a panel decision—unlike the former panel “process” which could drag on for months with no resolution. The losing party must now seek immediate appellate review by the WTO’s Appellate Body in Geneva. This standing organ consists of seven persons, three of whom review the lower panel decisions. The existence of an appellate process is an innovation that has been criticized, however, on the

basis that the availability of appellate review reduces the prestige of the “trial” panel. It also offers a clear advantage: the losing party has the opportunity to rectify a perceived mistake—a common attribute of democratic systems of governance which adds to the integrity of the WTO process.⁴³

An international organization may have similar parochial concerns. In the European Union, Community legislation may be inconsistent with WTO requirements. A “legal person” or business entity may not plead that activities compliant with WTO rules are a defense to contract Community rules. In March 2005, the Court of Justice for the European Communities (ECJ) ruled that a Belgian company was unable to import the quantity of bananas it had imported over the prior twenty years. A WTO panel had ruled that the restrictive community regulations were incompatible with the WTO’s more liberal rules. As stated by the Court in a March 2005 decision:

To accept that the Community Courts have the direct responsibility for ensuring that Community law complies with the WTO rules would deprive the Community’s legislative or executive bodies of the discretion which the equivalent bodies of the Community’s commercial partners enjoy.

It follows from all of the foregoing that an operator [Belgian corporation], in circumstances such as those in the main proceedings, cannot plead before a court of a Member State that Community legislation is incompatible with certain WTO rules, even if the DSB [Dispute Settlement Body] has stated that that legislation is incompatible with those rules.⁴⁴

One reason for such a result is that the WTO’s above described mandatory dispute-resolution mechanism was a major procedural hurdle to national acceptance. This recent decision echoes the pre-WTO concern of the more powerful nations about a devolution of sovereignty to a distant process in Geneva.⁴⁵ This inertia has been partially overcome, now that nearly 150 nations of the world have accepted the WTO and its mandatory settlement provisions.

In September 2008, the ECJ dismissed appeals by two Italian companies who sought damages caused by a decade-old WTO panel decision. That panel suspended tariff concessions against the European Community as a WTO sanction against the European Union’s banana

import regime. The WTO had rejected the Community's authorization of economic discrimination which violated WTO anti-discrimination policy. This ECJ decision appears to bar the possibility of European traders to obtain any compensation for those discriminatory measures from the Community.⁴⁶

The WTO's primary substantive obligations are covered next.

C. WTO AT WORK

What exactly does participation in the WTO mean? What obligations does a State undertake when it opts to join this international organization of States? The fundamental objective is to combat trade barriers. National representatives thereby attempt to reduce or eliminate the varied forms of trade barriers: tariffs, non-tariff barriers, and discriminatory trade practices.

The essential obligations are set forth in Articles I, II, III, and VI.⁴⁷ The relevant portion of each one is provided immediately below, followed by a brief explanation.

Article I—Most-Favored-Nation Treatment

(1) With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges ... any advantage, favor, privilege or immunity granted by any contracting country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Under International Law, States are generally free to discriminate in their economic dealings. This is an attribute of the sovereign power to engage in international relations with other States. University of London Professor Georg Schwarzenberger explains that in "the absence of bilateral and multilateral treaty obligations to the contrary, international law does not ordain economic equality between States nor between their subjects. Economic sovereignty reigns supreme. It is for each subject of international law to decide for itself whether and, if so, in which form, it desires to grant equal treatment to other States and their subjects or give privileged treatment to some and discriminate against others."⁴⁸ A nation's tariffs may thus discriminate against the goods from one country and favor those of another.

Groups of States may combine to charge discriminatory tariffs. The States within the EU want to eliminate tariffs on the exported commodities of only its own members. They do not have to extend this favorable tariff treatment to other countries.

The Article I MFN clause has been a centerpiece of GATT, and now the WTO. Even prior to the GATT's appearance in 1947, many bilateral treaties contained such a clause. Each nation thereby promised that the tariff rate on the imports of its trading partner would be the lowest rate imposed on like imports from any other nation. Then under the GATT, member nations agreed to grant MFN status to the imported products from other GATT members.

The WTO process is the same. Assume that South Africa imposes a 10 percent tariff on imported Italian shoes. Both of these countries are members of the WTO. The MFN article requires South Africa to charge Italy the lowest shoe tariff that it levies on like shoes from any other country. South Africa may charge a higher twelve percent tariff on shoes from State X if X is not a WTO member. If X is a WTO member, and South Africa were to reduce its tariff on like shoes from some other nation, South Africa would then have to reduce its tariff to the same rate for State X and other WTO members.

Article II—Schedules of Concessions

(1.b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation ... be exempt from ordinary customs duties in excess of those set forth therein....

(1.c) The products described in Part II of the Schedule relating to any contracting party which are the products of territories entitled under Article I to receive preferential treatment upon importation into the territory to which the Schedule relates shall, on their importation ... be exempt from ordinary customs duties in excess of those set forth and provided for in Part II of that Schedule.

Each State's tariffs on imported products are listed in "concessions," referred to as "schedules." These schedules have been renegotiated during the various periodic GATT rounds since the original 1947 agreement. Members have thereby updated and published their latest tariff schedules, giving their tariff for each item on the list of items governed by the GATT.

There is a dual system of tariffs under the GATT. Article II(1.c) authorizes a GATT member to place the imports of designated nations on its “Part II Schedule” of tariffs. That action results in lower tariffs being imposed on imports from a developing nation. Each GATT member may publish different tariffs for the same category of import on its Part I and II lists. The lower tariffs on a member’s Part II Schedule of tariffs favor the products of certain developing countries. The more they can benefit by developing their markets through lower tariff schedules, the larger their markets will be for exports from developed nations.

Since WTO came into existence in 1995, there has been renewed emphasis on assisting developing nations integrating into the global economy. The post-World War II Marshall Plan for Europe was channeled to specific economic sectors including redevelopment, reconstruction, industry, infrastructure, and the education of skilled labor forces. But the resources allocated to Africa have not been designed to create managerial capabilities and technical or vocational skills. Under the US African Growth and Opportunity Act of 2005, for example:

Congress finds that—

(1) it is in the mutual interest of the United States and the countries of sub-Saharan Africa to promote stable and sustainable economic growth and development in sub-Saharan Africa;

...

(3) sub-Saharan Africa represents a region of enormous economic potential and of enduring political significance to the United States;

...

(5) certain countries in sub-Saharan Africa have increased their economic growth rates, taken significant steps towards liberalizing their economies, and made progress toward regional economic integration that can have positive benefits for the region;

(6) despite those gains, the per capita income in sub-Saharan Africa averages approximately \$500 annually;

(7) trade and investment, as the American experience has shown, can represent powerful tools both for economic development and for encouraging broader participation in a political process in which political freedom can flourish;

...

(9) offering the countries of sub-Saharan Africa enhanced trade preferences will encourage both higher levels of trade and direct investment in support of the positive economic and political developments under way throughout the region.⁴⁹

—

This statute encourages enhanced trade and investment incentives. But it does not provide concrete steps for reaching its lofty goal of rebuilding Africa. Such steps may not be economically feasible because of US taxpayer expense associated with the Iraq War and the financial impact of Hurricane Katrina and the US recession.

Direct aid to Africa has always been on a comparatively small scale. So the 2005 US-UK African debt relief initiative and the G-8 [now G-20] debt cancellation program should help.⁵⁰ But these programs do not *create* the institutions that can result in the economic power now wielded by the EU members who benefited from the Post-World War II Marshall Plan. As concisely articulated by Debra Stegar, former Principal Legal Counsel to the Government of Canada for the Uruguay Round of the WTO: “When the world emerged from the ravages of WWII, ... [it] needed to rebuild the war-ravaged economies of Europe and Asia, in order to ensure economic growth and prosperity. They also realized that with economic growth and prosperity, peace and security would also be maintained.”⁵¹

In November 2000, the *Final Communiqué* from the Meeting of African Trade Ministers in Libreville, Gabon called upon the WTO to assist them as follows. First, they decided to request the following:

7. Call for duty-free and quota-free access to all developed-country markets for products of African origin.... We also welcome the efforts by the United States under the African Growth and Opportunity Act and urge that all opportunities be explored to ensure that all African countries and products benefit from the Act;

8. Call for the immediate implementation of G-7 measures to cancel part of the debt of all African countries and invite other creditors, including the financial institutions, to take similar measures so as to generate surplus resources for technological investments geared towards international trade;

9. Call on the international community to take action for the effective establishment of a World

Solidarity Fund aimed at reducing poverty in Africa and world-wide.

...

12. Call for the streamlining and facilitation of the accession process of African countries, non-Members of the WTO, on terms compatible with their level of development. In this regard, we call for sufficient and adequate technical and financial assistance to these countries....⁵²

This is a particularly ambitious Declaration. One reason is suggested by UN Secretary-General Kofi Annan's issuing a similar call for aid for developing countries in the form of a Global Health Fund. His primary concern was the epidemic spread of HIV/AIDS. At the time of his request, the UN's World Health Organization learned that WTO members were not very favorably disposed to diluting intellectual property rights in favor of creating cheaper generic drugs in the least developed countries.

Article III—National Treatment on Internal Taxation and Regulation

...

(2) The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.

A tariff increases the cost of selling a particular product in a foreign market. A domestic business in that market obviously does not have to pay any import tariff. It can compete without having to factor in a tariff on its products. If a US company wants to sell steel to Germany, for example, the latter's tariff on that steel is an added cost of doing business in Germany for the American company. German steel producers do not have to pay this same cost in their internal German market. If the international steel market is very competitive, then price differences will normally be minimal. Thus, Germany's tariff may present an insurmountable cost barrier, making it unprofitable for a US company to sell steel in the German steel market.

The amount of a *disclosed* tariff can be considered when an international seller is deciding whether the country imposing that tariff would be an efficient market for its products. In addition to direct import tariffs, the

importing country might impose an indirect barrier to trade. This would be a non-tariff barrier (NTB) to competition for that product. NTBs protect local industries from foreign competition. They create another cost above that already assessed on the imported product by the published import tax.

Article III(2) prohibits such indirect barriers on imports. If the importing company has already paid an express tax (tariff) on its product, then its cost of doing such business should be transparent—rather than being hidden in the form of some costly restriction imposed after the product has already been taxed via the importing nation's scheduled tariff rate.

Assume that a US steel company determines that after accounting for the German tariff, it is still profitable to export its American-made steel to the German market. Representatives of the German steel industry then convince the German legislature to enact a law that requires new inspections for structural defects in steel. This new law applies only to *foreign* steel imported into Germany. The US steel company must now pay the added cost of this new inspection procedure. This law is a prohibited NTB. It discriminates against foreign steel producers without imposing the same cost of doing business on domestic German steel producers.

There are various forms of NTB. The simplest is a quota on the quantity of foreign imports from a particular country. Another example is the "buy national" law. It provides economic incentives to local consumers to buy domestically made products which are in competition with foreign-made products. There is also the dual-purpose protectionist NTB. The US Congress, for example, passed environmental protection legislation in 1986 that discriminated against foreign oil. Congress created a new tax on oil to establish the "Superfund" for cleaning up US waste-disposal sites. The tax was set at 11.7 cents per barrel of *imported* oil, but only 8.2 cents per barrel for *domestic* oil. Many oil-exporting States complained that this was an indirect tariff on their oil sold in the US. A GATT dispute panel found that this tax violated the GATT because it was an NTB to compete with foreign oil. The US accepted the findings of the GATT panel and changed the law.⁵³

NTBs can discriminate against foreign imports in even more subtle ways. A good example, although arising in a non-GATT context, was a French tax struck down in 1985 by the European Court of Justice.

France had imposed a tax on automobiles based on their horsepower. This special French tax applied only to automobiles with a very high horsepower. It was five times the tax imposed on cars with the usual horsepower for cars in France. French automobile makers effectively could not be subject to this tax because none made vehicles with this high rate of horsepower. Although the French tax law purportedly applied to all automobile makers, its actual impact was limited to foreign automobile makers. France was required to repeal this tax. It was an unlawful NTB to international trade within the European Community, which effectively imposed higher costs on foreign enterprises doing business in the French market.⁵⁴

Article VI—Dumping

The contracting parties recognize that ... dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry....

A nation may not “dump” its products onto another nation’s market at a price below the *fair market value* at which it is sold in the exporting or third countries. Such conduct normally “causes or threatens material injury to an established industry.” Dumping is the type of business conduct that most likely “retards the establishment of a domestic industry” where none is already present in the target market. Cheaper imports are one of the common benefits of participation in the WTO regime.

This antidumping provision controls predatory business plans, such as those designed to initially flood a foreign market with cheap imports. These are first sold at a price below their value (after considering shipping and insurance costs). Upon capturing the foreign market, then the importer is in a position to charge a monopolistic price. Alternatively, there may already be domestic producers of the same product. “Dumping” into the foreign market is designed to manipulate the elasticity of demand so that consumers will stop buying the domestically made product in favor of the import. When the local manufacturer goes out of business or shifts production to a different product, then the foreign company is in a position to raise prices. The increase is more readily accomplished when a dumped product is

the only one available—given the absence of competition from former domestic producers.

Should an entity within the exporting nation be suspected of dumping, the importing nation “shall be free ... suspend the obligation in whole or part or to withdraw or modify the concession.” It may thus initiate a Safeguard Measure when it objectively determines “that such product is being imported into its territory in such increased quantities, absolute or relative to [its] domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produced like ... competitive products.”⁵⁵

The US, for example, instituted a Safeguard Measure on a wide range of steel imports in 2000 because of the struggling US steel industry. The US measure thereby imposed extra tariffs on foreign steel imports into the US. The EU responded by threatening to impose counter tariffs on US steel exports. It also filed an action in the WTO. In November 2003, the WTO Appellate Body definitively ruled that the US safeguard measures were, instead, a violation of GATT Article XIX and its related Safeguards Agreement. Both prohibit tariffs designed to subsidize local industry in a way that adversely impacts like products from abroad. President Bush’s Trade Representative later claimed that the President had independently reversed course. The President no doubt realized that to ignore the WTO ruling against the US would invite other nations to ignore other rulings in favor of the US.⁵⁶

Article VI—Countervailing Duties

In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect to such product.

A State may *augment* its scheduled (published) tariff concession on a product when it determines that imports are being dumped onto its domestic markets. This is an antidumping or countervailing “duty” which is a special tax imposed on imports in addition to the usual tariff for that commodity. The purpose is to offset the anti-competitive effect of the dumped product.⁵⁷ The importing State thus elevates the cost of exporting the offending product into the “dumped” market to a level that approximates the normal cost.

A major change from the former GATT to the “New GATT” (*i.e.*, WTO process) is the introduction of the

more specific “Agreements on Implementation of the General Agreement on Tariffs and Trade.” This new feature embodies the results of the seven-year Uruguay Round of GATT negotiations. Article 3.5 of the Agreement on Implementation of Article VI provides as follows:

It must be demonstrated that the dumped imports are, through the effects of dumping ... causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall [include] ... any known factors other than the dumped imports which ... are injuring the domestic industry, and the injuries caused by these other factors [such as contraction of demand, developments in technology, or domestic productivity].

Such implementing agreements clarify what factors should (and should not) affect the WTO’s determination of whether dumping is actually occurring. They also facilitate the determination of whether dumping is in fact *causing* harm to the importing market’s domestic industry.

Dumping accusations are regularly voiced when the importing nation learns that the exporting nation has somehow subsidized a product. With this government assistance, the product becomes marketable at a price that gives the exporting nation’s company an improper

financial advantage over makers of that product in the importing nation. The advantage makes a product competitive in a foreign market because it may be sold comparatively cheaply. But subsidies are not known for being transparent. Thus, related litigation often turns on the issue of whether the government involvement constitutes a subsidy. When it is, the importing nation is authorized to levy a countervailing duty on the product. This type of sanction adjusts for the foreign government’s interference with unadulterated market forces.⁵⁸

In 1995, for example, an Australian federal court examined Pakistan’s price-fixing policy. Pakistan indirectly assisted Pakistani cotton manufacturers, who were thus able to buy raw materials at a price lower than fair-market value in the global market. Although the Australian trial and appellate courts did not find that Pakistani policy sired an unfair “subsidy,” the appellate court noted that this particular subsidy did not violate the above antidumping regime. On the facts of this case, the Pakistani government’s assistance did not constitute an illegal subsidy because “there was no material injury to an Australian industry producing like goods.”⁵⁹ Put another way, an exporter can dump at will as long as in so doing there is no anticompetitive impact in the target market.

A 2009 US case illustrates the linkage between dumping, countervailing duties, and enforcement in the following illustration:

U.S. v. Eurodif S.A.

UNITED STATES SUPREME COURT
129 S.Ct. 878 (2009)

...

Petitioners ... [including] United States Enrichment Corporation, (USEC collectively) run the only uranium enrichment factory in the United States,³ which was built by the United States Government in the 1950s and run by various federal agencies until it was leased to USEC in 1998. In December 2000, USEC petitioned the Commerce Department for relief under

§ 731 of the Tariff Act, alleging that [defendant] LEU imported from France and other European countries ... was being sold in the United States at less than fair value and was materially harming domestic industry. Notice of Initiation of Antidumping Duty Investigations: Low Enriched Uranium From France, Germany, the Netherlands, and the United Kingdom, 66 Fed. Reg. 1080 (2001).

Section 731 of the Tariff Act of 1930 ... 19 U.S.C. § 1673, provides a two-step process to address harm to domestic manufacturing from foreign goods sold at an unfair price:

...

³There are only five major uranium enrichers in the world, a scarcity that illustrates the “huge financial investment in facilities and a technically skilled work force” necessary to support the enrichment process.

- (1) [If] the administering authority [the Secretary of Commerce] determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
- (2) the [United States International Trade] Commission determines that—
 - (A) an industry in the United States—
 - (i) is materially injured, or
 - (ii) is threatened with material injury, or
 - (B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

Then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value

exceeds the export price (or the constructed export price) for the merchandise.

...

The Tariff Act's antidumping provision derives from similar terms in the Anti-Dumping Act, 1921, which were adopted to "protec[t] our industries and labor against a now common species of commercial warfare of dumping goods on our markets at less than cost or home value if necessary until our industries are destroyed...." Following the USEC charges, the Commerce Department opened an investigation into the practices of respondents, a French enricher, Eurodif, S.A., its owner, Compagnie Général des Matières Nucleaires ..., its U.S. subsidiary ..., and United States utilities that consume LEU (Eurodif collectively)....

In its final determination, the Commerce Department concluded that [the enriched product] LEU from France ... was being sold, or likely to be sold, in the United States at less than fair value.

...

The following case demonstrates an actual application of antidumping duties by an international court. It arose in the intriguing context of continuing duties, originally imposed on a "Yugoslavian" business entity after "Yugoslavia" no longer existed:



Belgian State and Banque Indosuez and Others

COURT OF JUSTICE OF THE
EUROPEAN COMMUNITIES
JUDGMENT OF THE COURT (1997)

Go to Course Web Page, at:
<<http://home.att.net/~slomansonb/txtcsesite.html>>.
Under Chapter Twelve, click Banque Indosuez.

The WTO process is flexible enough to provide unusual remedies that would not likely be available in national fora. Its General Agreement on Trade in Services (GATS) and its Trade Related Aspects of Intellectual Property Agreement (TRIPS) respectively address the comparatively new WTO regimes for regulating international trade in services and intellectual property. Perhaps the most intriguing illustration is the 2005 decision of a WTO panel on gambling and public morals, involving both of these Agreements.

In December 2007, a WTO arbitrator decided the US Measures Affecting the Supply of Gambling and Betting Services dispute. Antigua and Barbuda (Antigua) won the right to suspend WTO concessions and related obligations to the US under the Agreements on TRIPS and GATS. Antigua sought \$3,000,044,000 in damages, based on the amount of damage that the US gambling restrictions allegedly caused to the Antiguan economy. The Arbitrator concluded that Antigua was entitled to \$21 million per year as a result of the US prohibition on Antigua's online gambling activities. In addition, it was not practicable or effective for Antigua to suspend its concessions or other obligations to the US under the GATS only. Antigua was allowed to suspend concessions and other obligations under the TRIPS agreement, concerning the protection of intellectual property rights as well. This special relief constituted a "rare form of compensation."⁶⁰

D. INTELLECTUAL PROPERTY

A number of other WTO cases have dealt with intellectual property issues. This field of the law involves copyright, trademark, and patent issues. There is a growing concern by property owners that their property rights are being diluted as foreign business enterprises do the following: pirate books, films, and videos in the copyright arena; dilute trademarks by opening stores and marketing goods or services which are identified with a particular

trademark; and mass produce generic drugs with different names but the identical patented ingredients.

The WTO's August 2001 trademark ruling involving Bacardi Rum's confiscated property is an example. It effectively acquiesced in the anti-Cuban US embargo of Cuba [Helms-Burton §12.1.B.6.], over objections by the European Union. The WTO panel found no inconsistency between US law and the WTO's Trade Related Aspects of Intellectual Property Agreement (TRIPS later) because "TRIPS doesn't regulate the question of the determination of the ownership of intellectual property rights."⁶¹

In a primer prepared by prominent international intellectual property practitioners, the past chair of the Intellectual Property Committee of both the Section of International Law and Practice and the Antitrust Section of the American Bar Association describes this phenomenon as follows:

Innovation and product differentiation are essential to competitiveness in a global economy. The costs of constant innovation and product differentiation are exceedingly high and the rewards are uncertain. Participation in such a high-cost risk environment can only be justified by the potential for rewards commensurate with the risks. The protection of intellectual property rights in innovation and product differentiation is essential to reward the entrepreneurs taking these risks.

Innovative industries producing goods and services driven by intellectual property protection compromise a critical sector of, not only the U.S. economy, but also the economies of other developed countries. Indeed, intellectual property protection is arguably a necessary element for the transition of developing nations to advanced industrial economies. In any event, American innovators, particularly those in export-oriented industries such as the computer, entertainment, medical and pharmaceutical industries, are frequently confronted by massive piracy and other infringements of their intellectual

property rights which undermine their expenditures on research, development and product differentiation.

The challenge of the Uruguay Round was to sell the vision of intellectual property protection as the engine for innovation and development to countries which see themselves as the victims rather than the beneficiaries of intellectual property protection.⁶²

The following intellectual property provisions yield a snapshot of some of the key rights, which are legally protected by WTO members:



Agreement on Trade-Related Aspects of Intellectual Property Rights

WORLD TRADE ORGANIZATION TEXT (1995)
ANNEX 1C

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.
Under Chapter Twelve, click Intel Property Agreement.

In May 2001, the United Nations World Health Organization debated whether to adopt an extraordinary proposal to extend access to inexpensive generic HIV/AIDS drugs to affected people. Brazil proposed that locally produced, cheaper generics should be available to save the lives of infected individuals. The European Community, the US, and other developed nations' representatives presented the objections on behalf of multinational producers of brand-name products. The World Health Organization's March 2000 study in Geneva provides an informative assessment of the underpinnings of the relationship between health and intellectual property rights.⁶³

Six months later, a WTO Ministerial Conference tendered the following response:

Declaration on the TRIPS Agreement and Public Health

WT/MIN(01)/DEC/2, adopted on 14 November 2001

<http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm>

1. We recognize the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.
2. We stress the need for the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to be part of the wider national and international action to address these problems.

3. We recognize that intellectual property protection is important for the development of new medicines. We also recognize the concerns about its effects on prices.
4. We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.
...
5. Accordingly and in the light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include:
...
 - c. Each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.
 - d. The effect of the provisions in the TRIPS Agreement ... leave[s] each Member free to establish its own regime ... , subject to the MFN and national treatment provisions of Articles 3 and 4 [set forth above, under general WTO obligations].
6. We recognize that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement....
7. We reaffirm the commitment of developed-country Members to provide incentives to their enterprises and institutions to promote and encourage technology transfer to least-developed country Members pursuant to Article 66.2. We also agree that the *least-developed country Members will not be obliged*, with respect to *pharmaceutical products*, to *implement* or apply ... the *TRIPS Agreement* or to enforce rights provided for under these Sections *until 1 January 2016*, without prejudice to the right of least-developed country Members to seek other extensions of the transition periods as provided for in Article 66.1 of the TRIPS Agreement [italics added].
...

In September 2003, the WTO clarified its position regarding the exceptional circumstances necessary for justifying waivers from obligations set forth in the TRIPS Agreement for pharmaceutical products, mentioned earlier. Eligible importing States must notify the Council for TRIPS of the names and expected quantities of the product needed and to confirm eligibility for the special developing country emergency waivers. These may be sought to mitigate conflicts between patent law and the International Covenant on Economic, Social, and Cultural Rights right to medication [Covenant: §10.2.B.4].⁶⁴

In 2005, India approved a more restrictive patent bill that its local health groups opposed. They claimed that it could increase drug prices for millions of people suffering from diseases including AIDS. Prior law allowed Indian pharmaceutical firms to copy patented drugs as long as they used a different process than the foreign patent holder. Once this measure became law, foreign patent holders enjoyed more rights at the expense of local generic drug

manufacturers. Life-saving generic drugs would no longer be available at affordable prices although India has been one of the world's largest producers of generic drugs.⁶⁵

Having studied the background and institutional framework for the WTO, you will find that the Indian patent case below provides a valuable snapshot of an actual pharmaceutical trade dispute. It pits the US against India in the very sensitive context of the WTO supposedly protecting the intellectual property rights of its developed State members—while attempting to provide sufficient flexibility to permit the expanded availability of generic pharmaceuticals that poor countries need for their inhabitants to survive.

The “current” (and suspended) DOHA round, however, did not meet its initial expectations. The frustration is not limited to the inability to develop a widely acceptable patent-pharmaceutical regime for poor countries, desperately in need of cheap generic drugs for AIDS and other diseases. Participants had also hoped



India—Patent Protection for Pharmaceutical and Agricultural Chemical Products

India, *Appellant* v. United States, *Appellee*
European Communities,
Third Participant

WORLD TRADE ORGANIZATION APPELLATE BODY
REPORT
(19 DECEMBER 1997)

Go to Course Web Page, at:
<<http://home.att.net/~sломansonb/txtcsesite.html>>.
Under Chapter Twelve, click WTO TRIPS India
Patent Case.

to implement various controls for e-commerce and international antitrust, which had been negotiated to a common level of satisfaction.⁶⁶ In fact, a prominent 2003 report on the WTO predicted many unfortunate developments, including: (a) that the Most-Favored Nation clause had been degraded into an exception amidst the “Spaghetti bowl of Preferential Trade Agreement deals”; (b) that sovereignty was the “mantra, red-herring” for protectionism; and (c) problematic retaliation mechanisms due to economic asymmetries between the WTO’s rich and poor nations.⁶⁷

The Trade Related Aspects of Intellectual Property and Services (TRIPS) agreement provides a robust environment for the *patent* protection of products less sensitive than life-saving medicines, especially in the *trademark* arena. The WTO is not the only forum that has contributed to this rich dispute resolution vein which can be mined for academic profit. The following TRIPS trademark case was decided by an international *human rights* court:



Case of Anheuser-Busch Inc. v. Portugal

EUROPEAN COURT OF HUMAN RIGHTS
GRAND CHAMBER
(11 JANUARY 2007)

Go to Course Web Page, at:
<<http://home.att.net/~sломansonb/txtcsesite.html>>.
Under Chapter Twelve, click WTO TRIPS Portugal
Trademark Case.

One could succinctly sum up the essential problem with the current Doha Round of WTO negotiations, and arguably all others, as offered by the Australian Bond University Professor Ross Buckley: “The challenge does not lie principally in knowing how to improve the multilateral trading system but in summoning the political will to do it. Global prosperity depends on politicians of all nations putting the common good of all their constituents above the interests of selected groups of constituents. The peculiar political challenge is that in all countries[,] vested interest groups will fight far, far harder to not be prejudiced by trade liberalization than the average person will fight to benefit from it.”⁶⁸

E. GLOBALIZATION FISSURE

The Chapter 1 materials on market-dominant minorities were your first exposure to globalization in this book [§1.1.B.2.]. Those materials addressed the role that various non-State actors play on the modern international stage. Here, globalization is examined again but within an economic context. The US National Security Council, via its reports to the CIA, predicts that the main driver of world trends will continue to be globalization. The Pope introduced a religious dimension with his June 2009 encyclical. It focused on ways to make globalization more mindful of the needs of the poor amidst the worldwide financial crisis.

The majority of WTO member States are developing nations. Between the 1950s and 1980s, many of them had employed trade policies, which included high tariffs and NTBs to protect their emerging industries. As the WTO’s roots began to bear fruit in the 1990s, however, it was evident that they would have to liberalize their trade regimes. Failure to join the WTO would marginalize a nation’s economy and discourage foreign investment. The developing nations thus made dramatic changes in their economic and development strategies, with a view toward becoming competitive in international trade by developing export-oriented industries. One result was that they would also attract *globally* competitive industries.⁶⁹

But developing nations ultimately seemed to adversely react to WTO measures designed to constrain their options to pursue a truly free-market economy. The London School of Economics and Political Science Professor, Robert Wade, succinctly captured the essence of this development in 2003, not long after the 1986–1994 Uruguay Round of the WTO negotiations [§12.2.B.] was completed:

The world is currently experiencing a surge of international regulations aimed at limiting the development policy options of developing country governments. Of the big three agreements coming out of the Uruguay Round—on investment measures (TRIMS), trade in services (GATS), and intellectual property (TRIPS)—the first two limit the authority of developing nations to constrain the choices of [foreign] companies operating in their territory, while the third requires the governments to enforce rigorous property rights of foreign (generally Western) firms. Together, the agreements make comprehensively illegal many of the industrial policy instruments used ... [by] the successful East Asian developers to nurture their own industrial and technological capacities and are likely to lock in the position of Western countries at the top of the world hierarchy of wealth.... [T]he three agreements constitute a modern version of ... ‘kicking away the ladder.’ ... [T]he practical prospects for change along these lines are slender, but not negligible.⁷⁰

The prior “global” economy had few power centers. They included the US, the European Union, and Japan. That economy was driven by trade and the dollar as central organizing themes. The contemporary global economy has multiple power centers. These now include China, Saudi Arabia, and to a significant extent, Russia. The growing decentralization of economic power suggests that today’s economic powerhouses lack the same political alliances as in the past. One result was that the seven-year on-again, off-again Doha Round of negotiations—a characteristic

feature of the WTO’s process—collapsed in 2006⁷¹ and again in 2008. The US can no longer unilaterally drive the WTO agenda. China and India, for example, refused to budge regarding US attempts to compromise over farm protection and related subsidies for developing nations.

The NGO-driven November 1999 “Battle of Seattle” was at the site for the 1999 annual meeting of the WTO’s trade ministers. This popular protest focused worldwide attention on the “globalization problem”—the liberalized trading processes associated with creation of the WTO (1995). Most protestors did not object to free trade as such. They focused on the severe cutbacks in government spending in health service, education, wages, and farm subsidies, which have negatively impacted living standards in nearly eighty countries.

The related objection was the perceived corporate dominance of the methodology for creating worldwide trade rules by the unelected WTO administration. The “undemocratic” corporate influence was viewed as the catalyst for continuing economic colonization of the developing members of the international community. When this influence was coupled with the impact of IMF and World Bank policies, developing countries were perceived as being fully dependent upon their industrialized big brothers. The protest focused on the claim that the real beneficiary of globalization, which had encouraged the developing nation trade liberalization of the 1990s, was multinational corporate enterprise.

The following excerpt provides fascinating insight into a respected editor’s view about how globalization has and will impact the WTO’s members (and all nations):

Will the Nation-State Survive Globalization?

Martin Wolf

Financial Times Associate Editor

80 FOREIGN AFFAIRS 178 (2001)

DEFINING GLOBALIZATION

A specter is haunting the world’s governments—the specter of globalization. Some argue that predatory market forces make it impossible for benevolent governments to shield their populations from the beasts of prey that lurk beyond their borders. Others counter that benign market forces actually prevent predatory governments from fleecing their [own] citizens.... But is it true that governments have become weaker and

less relevant than ever before? And does globalization, by definition, have to be the nemesis of national government?

...

CHOOSING GLOBALIZATION

Globalization is not destined, it is chosen. It is a choice made to enhance a nation’s economic well-being—indeed, experience suggests that the opening of trade

and of most capital flows enriches most citizens in the short run and virtually all citizens in the long run.

...

The policy change that has most helped global integration to flourish is the growth of international institutions since World War II. Just as multinational companies now organize private exchange, so global institutions organize and discipline the international face of national policy. Institutions such as the World Trade Organization (WTO), the International Monetary Fund (IMF), the World Bank, the EU, and the North American Free Trade Agreement underpin cooperation among states and consolidate their commitments to liberalize economic policy. The nineteenth century was a world of unilateral and discretionary policy. The late twentieth century, by comparison, was a world of multilateral and institutionalized policy.

...

THE CONTINUING IMPORTANCE OF STATES

A country that chooses international economic integration implicitly accepts constraints on its actions....

For example, the assumption that most governments are benevolent welfare-maximizers is naive. International economic integration creates competition among governments—even countries that fiercely resist integration cannot survive with uncompetitive economies, as shown by the fate of the Soviet Union. This competition constrains the ability of governments to act in a predatory manner and increases the incentive to provide services that are valued by those who pay the bulk of the taxes.

...

What, then, does globalization mean for states? ... [I]nternational economic integration magnifies the impact of the difference between good and bad states—between states that provide public goods and those that serve predatory private interests, including those of the rulers.

Finally, as the world economy continues to integrate and cross-border flows become more important, global governance must be improved. Global governance will come not at the expense of the state but rather as an expression of the interests that the state embodies. As the source of order and basis of governance, the state will remain in the future as effective, and will be as essential, as it has ever been.

In September 2006, 118 non-aligned nations offered their view regarding globalization and its related issues. As they proclaimed:

6. Globalisation presents opportunities, challenges and risks to the future and viability of developing countries. The process of globalisation and trade liberalisation has produced uneven benefits among and within States and ... the global economy has been characterised by slow and lopsided growth and instability. In its present form, globalisation perpetuates or even increases the marginalisation of developing countries. Therefore, globalization must be transformed into a positive force for change for all peoples, benefiting the largest number of countries, and prospering and empowering of developing countries, not their continued impoverishment and dependence on the developed world....

7. The revolution in information and communication technologies continues to change the world at a rapid speed and in a fundamental way, and has created a vast and widening digital divide between the

developed and developing countries, which must be bridged if the latter are to benefit from the globalisation process....⁷²

In January 2007, 80,000 people gathered in Nairobi, Kenya to protest, among other things, *capitalism*. The World Social Forum movement began in 2001 in Brazil. It is a group or organization proclaiming that it “is not a group nor an organization.” Its website states that it is an open meeting place where social movements, networks, non-governmental organizations and other civil society organizations can oppose “a world dominated by capital or by any form of imperialism.” Individuals may come together to pursue their thinking, debate ideas democratically, formulate proposals, share their experiences freely, and network for effective action.

Its Charter of Principles provides as follows:

4. The alternatives proposed at the World Social Forum stand in opposition to a process of globalization commanded by the large multinational corporations and by the governments and international institutions

at the service of those corporations' interests, with the complicity of national governments. They are designed to ensure that globalization in solidarity will prevail as a new stage in world history.

...

11. As a forum for debate, the World Social Forum is a movement of ideas that prompts reflection, and the transparent circulation of the results of that reflection, on the mechanisms and instruments of domination by capital, on means and actions to resist and overcome that domination, and on the alternatives proposed to solve the problems of exclusion and social inequality that the process of capitalist globalization with its racist, sexist and environmentally destructive dimensions is creating internationally and within countries [italics added].

...

Approved and adopted in São Paulo, on April 9, 2001, by the organizations that make up the World Social Forum Organizing Committee, approved with modifications by the World Social Forum International Council on June 10, 2001.⁷³

The World Social Forum may not be well-known, but it is not without its followers, as evinced by the tens of thousands of otherwise non-aligned individuals who gathered in Kenya in 2008. But do note its somber underpinnings, which include attacking capitalism as an economic system. Once unknown people named Lenin and Mao Zedong did that as well. What is known is that globalization is by no means welcomed in vast swaths of the have-not world.

◆ §12.3 REGIONAL ECONOMIC ASSOCIATIONS

Chapter 3 analyzed various categories of international organizations of States. That material introduced the essential characteristics of such associations, focusing on military and political associations of States. This section of the text concentrates on *economic* associations of States.

A. REGIONAL ANATOMY

There is a diverse array of economic organizational structures. Regional economic organizations virtually eclipsed the importance of global devices like the General Agreement on Tariffs and Trade before the 1995

appearance of the World Trade Organization. The analysis might begin with the basic objectives of the particular economic network. The following are the fundamental categories, in ascending order of degree of integration:

- ◆ *Preferential trade.* Trade preferences are granted in the form of freer access to the respective members' markets. This is the most basic form of trade association. The US negotiated this form of agreement with its Caribbean neighbors in the 1983 Caribbean Basin Initiative.
- ◆ *Free trade area.* Tariffs between the member States are initially reduced and ultimately eliminated. Each member may keep its original tariffs as against countries outside of the free trade area. There is no organized policy among the members as to other countries. The North American Free Trade Agreement among Canada, Mexico, and the US is an example.
- ◆ *Customs union.* The members liberalize trade among themselves while erecting a common tariff barrier against all nonmember States. The 1969 South African Customs Union is an example.
- ◆ *Common market.* Usually after a customs union has been established, the members remove restrictions on the internal movement of the means of production and distribution of all commodities. The EU is the most successful of all common markets.
- ◆ *Economic union.* This is a common market which includes a unified fiscal and monetary policy within the union. The result is similar to the linkage among the fifty states of the US. The difference is that an economic union consists of international States, rather than states within a federated nation. The EU made a significant step toward becoming a fully integrated economic union through the implementation of the Single European Act commonly referred to as "1992." In 1999, the eleven members of the EU implemented a common currency for all citizens and agencies within those States. The "Euro" replaced their currency in 2002.⁷⁴

There are numerous regional trading blocs. They function in a variety of ways. Blocs range from those that act like super-States to those that are more like political arrangements merely cast in the form of economic blocs. Many commentators characterize trade blocs as sharing a common bond—each of them is allegedly the product of protectionist fears. A Washington, D.C., legal practitioner offers the following assessment of the underpinnings of economic integration:

The New World Order of Regional Trade Blocs

Joseph Brand of the District of Columbia Bar

8 AMER. UNIV. J. INT'L LAW & POLICY 155-157 (1992)

... Our world today is dividing into trading blocs. Some have the superstructure of nation states. The European Communities (... the European Community), with a parliament and courts and the supremacy of Community laws over those of its members, begins to look more and more like a state; others are multinational agreements that may be more political negotiating arrangements than cohesive trading blocs. ASEAN (Association of Southeast Asian Nations) is a relevant candidate. These blocs, however strong or weak, are growing all around the world. Like the empires (from Rome to the Soviet Union) that preceded them, the regional trading blocs of the new economic world order may divide into a handful of protectionist super-states. If by the new political world order we mean increased American hegemony disguised as international cooperation, we may come to know the new economic world order as regional hegemony disguised as free trade...

[A variety of reasons explain the formation of economic associations of States.] First, they are born of political fear. The European Community was proposed ... just five years after the end of the Second World War. European unity was perceived as the antidote to European war. Fear of war gave birth to the union. Another kind of fear seems relevant to the extension of the US-Canada Free Trade Agreement into a wider hemispheric economic bloc. Critics of the North American Free Trade Agreement (Canada, Mexico, and the United States) believe fear of a successful EC 1992 and the economic eminence of Japan underlies the political imperative that moves these negotiations.

Second, blocs espouse trade liberalization internally, but achieve trade protection externally. For example, the Uruguay Round of trade liberalization is now held hostage to the Europeans' protective treatment of their farmers.

...

This rather bleak perspective about the motivation for regional trade groupings is not necessarily the only one. Dalhousie University (Canada) Professor Gilbert Winham espouses a different perspective. It is not as negative, and certainly more buoyant, as noted in his book on the evolution of trade agreements: "What is the role of international trade agreement[s] in the modern nation-state system? The answer is to reduce protectionist national regulation, but even more important [it is] to reduce the uncertainty and unpredictability of the international trade regime, and to promote stability. The greatest cause of uncertainty in the contemporary trading system comes from the self-serving actions of self-interested nation states. It can be said that one nation's sovereignty is another nation's uncertainty."⁷⁵

This perspective may explain why members of the Association of Southeast Asian Nations (ASEAN)—Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar (Burma), Philippines, Singapore, Thailand, and Vietnam—seek regional economic stability in the form of the ASEAN trade agreement. They have thereby engaged in a joint enterprise with similarly situated

powers who ultimately seek freedom from external influences over their sovereign affairs.

The ASEAN members have traditionally feared Chinese and Japanese territorial aspirations in that region of the world. The ASEAN States have expressed fears that history may repeat itself. Domination by war or by trade has been perceived by some as a matter of degree. But the 2003 Protocol to the ASEAN agreement moved a step closer toward integrating China. The adoption of this Protocol signals the progressive elimination of tariff and non-tariff barriers, liberalization of trade in services, and establishment of an open and competitive investment regime with China by 2012.⁷⁶

The creation of a regional trade bloc does not necessarily equate to relief from internal trading conflicts. For example, the North American Free Trade Agreement (Canada-US-Mexico) expressly provided that Mexican trucks would ultimately be free to travel throughout the US. As of 2009, however, they were authorized to deliver their goods only to specified border areas. Most of these zones lie within twenty miles of the US-Mexican border (seventy-five miles for Arizona).

Canadian trucks are not subject to this limitation. The US claims that there are recurring truck safety problems with the Mexican trucks. Mexico claims that American unions, who were generally anti-NAFTA, are sowing seeds of discontent in Washington.

Early in 2009, the US announced its decision to end the pilot program that had allowed Mexican trucks to enter the US to deliver goods in the twenty-mile zone. In March 2009, Mexico announced that it would raise tariffs on ninety US products. This increase retaliated for the US failure to implement one of the NAFTA agreements. The trucks of all three nations were to travel freely throughout the NAFTA region, subject only to common safety requirements. On the other hand, both the global War on Terror and the regional war on drug cartels had to influence the US reluctance to observe this NAFTA requirement.

Furthermore, recall the textbook §7.1.1.A. admonition that treaties between nations are not necessarily

analogous to private contracts between individuals. There is a need for more flexibility than expected of a business relationship between individuals. A legal interpretation of a multilateral treaty like NAFTA takes its terms at face value. Relying on norms like good faith performance of treaty obligations [§7.2.B.1.] misses the point. A number of scholars assert that a treaty should *not* be characterized as a concluded agreement, expressing the *complete* intent of its State parties. Instead, the treaty evinces its underlying legislative purpose. That, in turn, depends upon continuing international consensus as to how the treaty should be applied to post-ratification circumstances.

Regardless of the motivation for pursuing or limiting international trade relations, economic integration is likely to be a prominent feature in international relations for the foreseeable future. To appreciate its current contours, Chart 12.2 lists the major economic associations of States and summits:

CHART 12.2 SELECTED REGIONAL ECONOMIC ASSOCIATIONS OF STATES

Name ^a	Members and Objectives ^b
AEC	African Economic Community (1991): Economic organ of Organization of African Unity designed to promote solidarity and collective self-reliance of OAU nations ^c
ANCOM	Andean Common Market: Bolivia, Colombia, Ecuador, Peru, Venezuela: Chile withdrew (1969) as it moved toward integration. Conflicting national interests have inhibited achieving common market
APEC	Asia-Pacific Economic Cooperation: Australia, Brunei, Canada, (Chile has applied), China, Hong Kong, Indonesia, Japan, Malaysia, Mexico, New Zealand, Papua New Guinea, Philippines, Singapore, South Korea, Taiwan, Thailand, United States (1990): Pacific Rim trade cooperation ^d
ASEAN	Association of Southeast Asian Nations: Brunei, Indonesia, Malaysia, Philippines, Singapore, Thailand (1976): Vietnam potential member. Promotes regional economic stability and protection from external influences (China, Japan); 1992—program to create common market responding to economic alliances in Europe, North America; 1998—Hanoi Plan of Action to address economic crisis. ^e The “ASEAN + 3” pact is the arrangement between ASEAN and China, Japan, and South Korea, all of whom seek full membership
CAFTA	Central American Free Trade Agreement: Central American nations of Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and United States (2005). Designed to pursue enlarged free-trade area
CEFTA	Central European Free Trade Agreement: Bulgaria, Croatia, Kosovo, Macedonia, Romania (Bulgaria and Romania left CEFTA in 2006 to join the European Union. The EU’s current members, the Czech Republic, Hungary, Poland, Slovakia, and Slovenia were prior CEFTA members.)

^a City = headquarters for those organizations that have a permanent seat

^b (Date) = when the association was originally formed

^c Treaty available in A. Yusef (ed.), 1 AFRICAN YEARBOOK OF INT’L LAW 227 (Dordrecht, Neth: Martinus Nijhoff, 1993)

^d K. Okuizumi (ed.), THE US-JAPAN ECONOMIC RELATIONSHIP, IN EAST AND SOUTHEAST ASIA: A POLICY FRAMEWORK FOR ASIA PACIFIC ECONOMIC COOPERATION (Wash., DC: CSI Studies, 1992)

^e See Framework Agreement on Enhancing ASEAN Economic Cooperation, 31 INT’L LEGAL MAT’LS 506 (1992)

^f See A. Payne, THE POLITICS OF THE CARIBBEAN COMMUNITY, 1961–1979: REGIONAL INTEGRATION AMONG NEW STATES (New York: St. Martin’s Press, 1980)

CHART 12.2 SELECTED REGIONAL ECONOMIC ASSOCIATIONS OF STATES (CONTINUED)

Name ^a	Members and Objectives ^b
CARICOM	Caribbean Community and Common Market: Anguilla, Barbados, Belize, Dominica, Grenada, St. Kitts-Nevis, St. Lucia, St. Vincent, Trinidad, Tobago (1974): Elimination of internal trade barriers and common external tariff ^f
ECOWAS	Economic Community of West African States (Lagos, Nigeria): 16 West African nations (1975): Promotes (Lagos, Nigeria) cooperation and development; seeks creation of a customs union ^g
EFTA	European Free Trade Association: Austria, Denmark, Iceland, Norway, Portugal, Sweden, Switzerland (1959): Great Britain, initially refused membership in EU, led this rival scheme before withdrawing after becoming an EU member ^h
European Union	Only free trade zone with no tariff barriers ⁱ (see twenty-seven State listing in textbook §3.4.A.)
Group of Twenty (G-20)	Canada, France, Germany, Great Britain, Italy, Japan, Russia, United States (1974): Annual summits on economic policies of major industrial democracies (was “G-7” before Russia joined) ^j As of September 2009, also includes Argentina, Australia, Brazil, China, European Union, India, Indonesia, Mexico, Saudi Arabia, South Africa, South Korea, and Turkey. Objective is to shift toward multilateral decisions
Gulf Cooperation Council	Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates (1981): Standardized subsidies; eliminating trade barriers; negotiating with European Union and other regional organizations to obtain favorable treatment ^k
IECO (Islamabad)	Islamic Economic Cooperation Organization—Iran, Pakistan, Turkey (1964): Seven former Soviet republics joined in 1992 to promote trade among Islamic States
MERCOSUR	Southern Common Market: Argentina, Brazil, Paraguay, and Uruguay.
NAFTA	North American Free Trade Agreement: Canada, Mexico, United States (1994): Free trade zone treaty promoting reduction and elimination of tariffs and other trade barriers ^l
OECD (Paris)	Organization for Economic Cooperation and Development (1961): 24 mostly Western European industrialized States. Promotes world trade on nondiscriminatory basis for economic advancement of lesser-developed countries
OPEC (Vienna)	Organization of Petroleum Exporting Countries: Algeria, Ecuador, Gabon, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, United Arab Emirates, Venezuela (1960): Controls production and international pricing of oil ^m
SELA	Acronym for twenty-five nation Latin American Economic System (1975): Goal to establish system for pooling resources, creating agencies to sell resources on world market similar to OPEC
Summit of the Americas	Summit of Western Hemisphere’s 34 heads of State (1994): Free Trade Area goal by 2005; 1998 Santiago Declaration and Plan of Action of second summit reaffirming 1994 Miami summit objectives

^g See ECONOMIC COMMUNITY OF WEST AFRICAN STATES: AN OVERVIEW OF THE ECONOMIES OF WEST AFRICAN STATES (Lagos, Nigeria: ECOWAS Secretariat, not dated)

^h See M. Sheridan, J. Cameron & J. Toulin, EFTA LEGAL SYSTEMS: AN INTRODUCTORY GUIDE (London: Butterworths, 1993)

ⁱ See R. Folsom, EUROPEAN COMMUNITY LAW IN A NUTSHELL (St. Paul, MN: West, 1992)

^j See A. Mep & H. Ulrich, PARTNERS FOR PROSPERITY: THE GROUP OF SEVEN AND THE EUROPEAN COMMUNITY (Upland, PA: Diane Pub., 1994)

^k See G. Dietl, THROUGH TWO WARS AND BEYOND: A STUDY OF THE GULF COOPERATION COUNCIL (New York: Advent, 1991)

^l R. Folsom, M. Gordon & D. Lopez, NAFTA: A PROBLEM-ORIENTED COURSEBOOK (St. Paul, MN: WestGroup, 2000) and R. Folsom, NAFTA IN A NUTSHELL (4th ed. St. Paul, MN: WestGroup, 2004)

^m See OPEC OFFICIAL RESOLUTIONS AND PRESS RELEASES 1960–1990 (Vienna: OPEC Secretariat, 1990)

ⁿ *Miami Summit*: See R. Rosenberg & S. Stein (ed.), ADVANCING THE MIAMI PROCESS: CIVIL SOCIETY AND THE SUMMIT OF THE AMERICAS (Boulder, CO: Miami Univ. North-South Center Press, 1994). *Santiago Summit*: 37 INT’L LEGAL MAT’LS 947 (1998)

B. SUMMITS: ECONOMIC DIPLOMACY

The heads of State summit is another organizational structure for facilitating international economic integration. Several examples follow:

1. "G-8" National leaders have used economic summits as a basis for developing special-purpose economic associations. Solidarity of approaches to a variety of problems is promoted by emphasizing trade and financial issues. For nearly twenty-five years, the leaders of the world's major industrialized democracies met at various locations for their annual "G-7" summit.

The Group of Seven consisted of the world's richest countries: Canada, France, Japan, Germany, Great Britain, Italy, and the US. In mid-1994, the "G-7" became the "G-8" with the admission of Russia. At the Naples meeting of the association, President Boris Yeltsin described this occasion as a "large step to[ward] full security of peace on Earth." During the Cold War, there could be no such association. The former Soviet Union was politically opposed to democracy and to the capitalist market system. Now the US and Russia, two former rivals, have joined with the other G-8 nations in a loose economic association designed to extinguish the mistrust associated with their forty years as political adversaries.

The 1994 summit communiqué of this ostensibly economic grouping of States went much further than just economics. It contained joint positions on Bosnia, Haiti, the Middle East, and North Korea as well as on nuclear proliferation. At the same time, the two most powerful members, Japan and the US, were involved in a major economic confrontation over the US trade deficit and US access to Japanese markets. Nevertheless, this annual summit procedure continued to provide the opportunity for the leaders to review their drive toward a coordinated economic policy.

G-8 has endured criticisms. During the decade after the fall of the Soviet Union, G-8 was oriented toward assisting Russia in its transition to a market economy and into the global economy. It has not been very effective in reaching the goal of resisting the advance of economic and political regionalism within the community of nations. Scholars nevertheless perceive G-8 as providing leadership by institutionalizing the summit as one of the positive factors in trade globalization.⁷⁷

G-8's 2007 Joint Statement of the G8 Business Organizations envisions breaking the deadlock on the DOHA Round of the World Trade Organization [textbook

§12.2.D.]. It seeks the reduction of agricultural subsidies, liberalization of trade in services [§12.2.C.], and enhanced protection of intellectual property rights [§12.2.D.]—as well as addressing counterfeiting, piracy, market stability, and greenhouse gas emissions.⁷⁸ One might argue that this is a most ambitious agenda, which would take an incredible amount of time, money, and attention to accomplish within a reasonable period of time.

2. Summit of the Americas In December 1994, the heads of the western hemisphere's thirty-four democracies met in Miami for the first *Summit of the Americas*. Their goal was to convert the hemisphere into a free-trade zone called the Free Trade Area of the Americas (by 2005). The first (and last) summit on this topic was in 1967. The GATT has prodded freer trade since 1947. But regional agreements, like the 1993 North American Free Trade Agreement (NAFTA), have created new opportunities—and new problems.

The 1994 Summit's final decree called for joint action to combat crime and poverty. The summit leaders further agreed, in principle, to promote environmental cooperation, democracy, and literacy. The 1998 Santiago Summit of the Americas reconfirmed the Miami Summit programs. The documents signed at both summits are legally binding and signal strong political commitments by the democratic governments of the hemisphere. The Santiago Declaration builds on the first summit's aspirations: more education to improve the living conditions of its inhabitants; the commencement of negotiations for achieving the Free Trade Area of the Americas (by 2005); and renewing the struggle against corruption, money laundering, terrorism, and other impediments to trade and good relations.⁷⁹

The Third Summit of the Americas, held in Quebec City in 2001, focused on the integration of trade and democracy. National leaders assembled to work on a hemispheric free trade agreement. Like the 1999 WTO conference in Seattle, however, thousands of protesters expressed their fear that such an agreement would be another step toward the negative characteristics of "globalization." Continuing to be concerned about the lack of a more democratic process, the protesters focused on the free trade pact being negotiated behind closed doors. They set up their own summit called "The People's Summit."

Other impediments may limit the potential for implementation. Due to the summit's rather progressive environmental and workers' rights objectives, it will be

more difficult for certain States in the hemisphere to adopt or implement every item contained in both final decrees' statements of intent. Furthermore, Latin American States do not support the US policy on Cuba [§12.1.B.4.], which is the only State not invited to this summit of the hemisphere's democracies. The April 2009 Summit in Trinidad and Tobago did not address or resolve this lingering hemispheric issue.

3. APEC Summit In 1993, fifteen Pacific rim nations met in Seattle, Washington for the annual Asia-Pacific Economic Cooperation (APEC) meeting. Members of this "rim" of nations all have borders with the Pacific Ocean. This was the largest gathering of world leaders in the US since the 1945 UN Conference in San Francisco. It also brought a great deal of attention to APEC in the aftermath of President Clinton's success in negotiating NAFTA. This economic association of States contains just over half of the world's economic production capabilities and approximately 40 percent of the world's population. For the US, trade across the Pacific surpassed trade across the Atlantic by 1983. By 1992, Pacific trade amounted to \$315 billion—one-third more than the US trade across the Atlantic.

APEC has associated the world's three largest economies—China, Japan, and the US. The 1993 summit was the first opportunity for a US president to meet a Chinese leader since the 1989 Tiananmen Square massacre. That particular event widely impacted subsequent Sino-US trade and human rights discourses. Meeting under the auspices of APEC provided an opportunity to develop a personal dialogue that could ease tensions associated with the Beijing massacre [§10.4.D.] at a time when China was being considered for membership in the WTO.

The APEC nations established an inter-summit Group of Eminent Persons at the 1993 summit. Its task is to follow up on the declarations made at the 1993 summit. In September 1994, this group's report pronounced the objective to "commit the region to achieve trade in all goods, services, capital and investment by the year 2020 with implementation to begin by 2000." The 1994 follow-up summit in Indonesia generated the declaration that the developed members of APEC would remove such barriers by the year 2010.

This group rejected both the EU and the NAFTA trade bloc approach to economic integration. Instead, it encourages "open regionalism." APEC is willing to accept new member States—if they internationalize

their economies. Unlike the EU and NAFTA, APEC does not intend to sustain trade discrimination against outsiders. It encourages APEC members to extend trade liberalization to non-APEC members.

APEC solidarity is limited by its being *the* most diverse regional economic organization of States. China has the least codified trade policies. Japan and South Korea have the most intricate NTBs to international trade. China and Taiwan are the two largest economies that were not original members of the GATT (China immediately sought access to the WTO, while Taiwan did not). The 1993 APEC summit was boycotted by the prime minister of Malaysia due to a concern that APEC will become a device for forcing western-style democracy and market reforms on its smaller members.

4. EU-US Summit A 2007 framework agreement sought to express a sense of greater Transatlantic economic integration. This agreement reaffirmed two prior EU-US Summit Declarations to reduce transatlantic trade barriers. One of the key understandings involves the creation of the Transatlantic Economic Council. It will oversee a host of objectives sought by the respective constituencies.

C. TRADE NGOS

Chapter 3 on "International Organizations" and Chapter 11 on "Human Rights" addressed the role of non-governmental organizations (NGOs) in these respective arenas. In the current era of economic integration, NGOs are now beginning to play prominent roles in trade-related initiatives. They may start as regional organizations that emulate global goals of State-based economic organizations.

Jubilee 2000 is a serviceable example. It is a London-based coalition of NGOs, churches, and aid agencies. Its purpose is to seek debt relief for low-income, heavily indebted States. This think tank is drafting a comprehensive plan for addressing the debt burden of the poor and least developed nations who are seen as victims of globalization. Jubilee is thus committed to:

- ◆ Developing a new, more accountable, and transparent process for sovereign lending, borrowing, and debt negotiations—with human rights at the center of its focus.
- ◆ Highlighting and developing policies for financing development in a more self-reliant way, without recourse to dependency on foreign donors and creditors.

- ◆ Opening up international financial institutions and markets to democratic scrutiny and accountability by civil society.⁸⁰

◆ §12.4 NEW INTERNATIONAL ECONOMIC ORDER

A. HISTORICAL EVOLUTION

During the nineteenth and twentieth centuries, multinational corporations experienced a commanding expansion that roughly coincided with the decolonization movement of the 1960s [§2.4.C.]. Parent companies established foreign subsidiaries with the ability to rapidly shift capital in and out of the foreign theater of operations. The foreign subsidiary was incorporated under the national laws of the host State. But the corporate operation was not subject to the effective control of the host State. The corporate parent in a developed State fostered this development while the host State assisted because it sought the infusion of foreign investment.⁸¹ The people of the host State became more and more dependent on the multinational corporation for economic survival—especially in nations where the cost of labor was cheap due to high unemployment. The multinational corporation's arrival created and supported a job base. This presence conferred economic benefits on the underdeveloped State. It improved the quality of life for its citizens where there was high unemployment.

During the decolonization of the 1960s, many lesser-developed nations of the world sought a forum for the purpose of establishing what they perceived as being a more equitable distribution of global wealth. A deluge of underdeveloped States suddenly appeared on the international level, now armed with access to a world forum where they could express their desire for equality. Lesser-developed States began to articulate their right to economic independence by challenging the international status quo, specifically, the international legal principles on foreign investment, nationalization, and required host State compensation for nationalization. They characterized International Law as a Eurocentric web of control, spun by the more powerful members of the UN to entrap their former colonial “partners.”

A series of UN developments surfaced in the 1960s that forged the early statement of this “third world” position. In 1962, the UN General Assembly proclaimed the Resolution on the Permanent Sovereignty over Natural Wealth and Resources. Developing States therein

complained about their required abdication of sovereignty—the price tag for encouraging foreign investment. The follow-up Resolution (1973) expressed the essence of the New International Economic Order (NIEO) movement wherein the General Assembly expressed that it:

2. *Supports resolutely* the efforts of the developing countries and of the peoples of the territories under colonial and racial domination and foreign occupation in their struggle to regain effective control over their natural resources;

3. *Affirms* that the application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might rise should be settled in accordance with the national legislation of each State....⁸²

G-77 (Group of 77 developing nations) also prompted creation of the UN Conference of Trade and Development (UNCTAD) in 1966. This was a form of collective bargaining with the States that G-77 characterized as economic big brothers who were effectively dominating their existence. An UNCTAD resolution purported to demolish the basic tenet that International Law rather than national law provided the yardstick for measuring the scope of compensation for nationalized property.

UNCTAD then began to promulgate a series of codes that purported to govern the conduct of multinational corporations. These included a Restrictive Business Practices Code and a Transfer of Technology Code. These were essentially guidelines for an international antitrust law, designed to equitably distribute the proceeds of multinational corporate activity in developing nations. G-77 was also able to enlist the assistance of the industrialized nation Organization for Economic Co-operation and Development (OECD) with similar Guidelines.⁸³ This influence would later surface in the 1974–1982 negotiations during the UN Conference on the Law of the Sea, producing provisions designed to redistribute the natural wealth found in and under the high seas [§6.3.E.–G.].

The corporate code of conduct theme has lost none of its relevance since it emerged in the 1960s. Today's panorama now includes the possession of comparatively

sophisticated technology that divides the “have” and “have not” societies. Economic progress and international competitiveness necessitate not only access to knowledge about machines for generating goods and services. The comparatively fresh area of concern is access to

expertise about acquiring knowledge itself, including patent, trademark, and related developments. The current and past UNCTAD Secretary-Generals describe this critical feature of the evolving code of conduct in the following terms:

International Technology Transfer: The Origins and Aftermath of the United Nations Negotiations on a Draft Code of Conduct

RUBENS RICUPERO & GAMANI COREA
PREFACE XX (THE HAGUE: KLUWER, 2001)

...

In a world of rapid and continuing change, eroding boundaries, multiplying interest groups and an increasingly integrating global economic system, we need to invest more time and energy in the process of constructing shared frameworks ... that enforce a “level playing field.” The objective of the draft International Code of Conduct was exactly that—to establish a shared understanding of where we want to go in matters relating to international technology transfers. The central question provoked by the initiators of the draft Code of Conduct, which is—how can we facilitate a just and mutually beneficial system of technology flows in a world of rapid change and increasing gaps in the technological capability of the developed and the developing countries—is still relevant today. . Around the world, the emergence of a global information society is accelerating the pace of change and [also] overwhelming established methods of organizing production and governing societies that were developed for a world of more limited information flow...

In this respect, the lessons arising from the earlier [UN] efforts to establish a Code of Conduct on the Transfer of Technology through a negotiated agreement will be valuable as we continue to seek an acceptable mechanism for the international transfer of technology. While globalization has opened opportunities, it has also generated new dangers of exclusion and marginalization across and within societies. Exclusion from accessing knowledge is one of the critical factors limiting the capacity of marginalized countries to learn, adjust and integrate effectively into the world economic system. This is not to imply “free-for-all” knowledge transfer, nor to suggest that inventors and innovators should not be adequately rewarded. To the contrary, appropriate reward for innovation is vital for knowledge generation and should be part and parcel of policies to promote the generation and transfer of knowledge. These are in brief some of the issues that will dominate any future discussion on the international transfer of technology.

In 1966, the G-77 established the UN Industrial Development Organization (UNIDO). UNIDO’s primary objective, contained in Article 1 of its Constitution, was the “promotion and acceleration of industrial development in the developing countries with a view to assist in the establishment of a New International Economic Order.”⁸⁴

The NIEO arguably failed in terms of not achieving its objective of altering the Eurocentric nature of International Law [textbook §1.1.A.]. But it did launch the Third World’s entry onto the international economic stage in terms of a movement that challenged long-held values associated with colonialism. As chronicled by Balakrishnan Rajagopal, Director of the Massachusetts Institute of Technology:

the group of Third World States at the UN, led by OPEC, caused a system-wide international economic and political crisis, which is generally known as an attempt to establish an NIEO. That period marked the first time that the Third World emerged as a major actor in a system-wide international crisis. There were essentially three sources of impetus for the demand for the NIEO: the lessening of western aid; the disappointment with political independence in the Third World; and the success of OPEC as a primary commodity cartel. The political, diplomatic, and economic offensive of the NIEO were launched on three fronts: the rise of oil prices by OPEC, acting for the first time as a coalition of producer states

against western oil corporations; second, an oil embargo by OPEC against countries that supported Israel, including the US, its European allies, and Japan; and third, the calling of the Sixth Special Session of the UNGA [UN General Assembly] by Algeria which convened in April 1974.... Combined with the waves of nationalization sweeping across the Third World from Algeria to Nigeria, it represented a fundamental challenge to the 'old' international economic order that rested on colonial relationships.⁸⁵

The third world's New International Economic Order was officially announced at the UN in 1974. Its roots may be traced to the early years of the twentieth century. The major political and economic powers engaged in extensive overseas investment and took protective measures to ensure continued profitability. They did not conduct their business operations with a view toward improving conditions in the host countries. The decolonization movement of the 1960s did not extinguish smoldering claims that Western hegemony survived independence. The 1974 NIEO "Charter" was the platform for articulating the perspective about a more rational application of various UN Charter principles, including the following:

- ◆ "equal rights of ... nations large and small" (UN Charter Preamble)
- ◆ "international machinery for the promotion of the economic and social advancement of all peoples" (Preamble)
- ◆ "international cooperation in solving international problems of an economic ... character" (Article 1.3)
- ◆ "the principle of the sovereign equality of all its Members" (Article 2.1)
- ◆ "promoting international cooperation in the economic ... field" (Article 13b)
- ◆ "the United Nations shall promote: higher standards of living ... and conditions of economic and social progress and development" (Article 55a)

G-77 thus initiated a fresh debate on the question of whether the western foundations of modern International Law could remain intact, given the inequitable distribution of global wealth [§6.3.E.–G.].

The UN's establishment of UNIDO and UNCTAD was to be the precursor whereby developing nations

would have a more prominent role on the economic-political horizon. The creation of these institutions reflected the growing thirst of the newly independent States for a greater role in global economic and political affairs. The G-77 nations firmly believed that the GATT operated primarily to preserve the economic hegemony of the relatively powerful and developed States. They were also dissatisfied with the operation of the postwar Breton Woods Agreement establishing the International Monetary Fund. The IMF was not designed to effectively further the economic interests of the developing nations.

The member States of G-77 decided to seek a change in the state of International Law, particularly because of its Eurocentric special protection for aliens. Multinational corporations facing uncompensated nationalizations of their enterprises could resort to the entrenched regime of State responsibility for injury to aliens [§2.5.A.]. The "old" international order, established before many decolonized entities became States, precluded reliance on host State law. Developing States perceive this limitation as perpetuating their economic dependence. In the following excerpt, University of Kansas Professor Raj Bhala vividly describes the associated hypocritical trade policies advocated by an unholy alliance among the third world's economic elite:

There is ... another dimension to the relationship between the Marxist paradigm and the "anti-Third World claim" leveled at the WTO and international trade law. The critics claim that during the present period of neo-colonialism, as in the colonial era of the past, capitalists advocate free trade policies vis-à-vis developing countries. They push for open markets overseas as an outlet, or vent, for their excess production [not needed for the domestic market]. Simultaneously, they lobby their governments for protection from foreign imports, so as to avoid exacerbating competitive pressures in domestic markets. Here is a double standard that amounts not to pure free trade, but rather mercantilism in new garments.

Worse yet, there seems to be nothing in the logic of capitalism to put an end to the hypocrisy. Marx, and his adherents, ... observed that the declining rates of return to capital in developed country markets, caused by overproduction and ferocious competition, coupled with the prospect of cheap labor overseas, mandate a push to pry open Third World markets.

Yet, independent of this mandate is another: natural resources. Some Third World countries have minerals and other raw materials necessary to fuel the engines of capitalist production.⁸⁶

The G-77 promulgated the 1974 UN Charter of Economic Rights and Duties of States.⁸⁷ Its essential purpose was to further regulate the multinational corporations and change the legal *status quo*. The NIEO's Economic Charter, supported by a majority of the UN's member States, demanded that International Law be modified to accommodate developing nations' economic development in relation to the UN's economically dominant members. G-77's goal was to effectuate a redistribution of global wealth. One of the primary methods would be to recapture some of the wealth derived by multinational corporations, which were otherwise free to operate without constraints in the host State's sovereign territory.

The posture of the International Court of Justice is that there is no clear ruling on this perennial debate. The Court explains why in the following passage from a 1970 case, involving a Spanish nationalization of a Canadian corporation, owned by Belgian stockholders: "Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that *no generally accepted rules* in the matter have crystallized on the international plane."⁸⁸

Some western commentators have relied on the (so-called) Permanent Court of International Justice 1928 *Chorzow Factory* case for its comparatively straightforward compensation requirements. The Court therein stated that established international practice required compensation which would "wipe out all the consequences of the *illegal act*....To this obligation, in virtue of the general principles of international law, must be added that of compensating loss sustained as the result of the seizure."⁸⁹ This reliance is misplaced because that case involved an illegal taking of alien property. In that instance, a treaty-based obligation precluded the sovereign State from exercising its inherent power of nationalization.

The promoters of the NIEO hoped to create a legal precedent, which would deem all such compensation decisions as falling *solely* within the discretion of the

host State. If, for example, a nationalizing State's court or other tribunal were to find that the multinational enterprise had taken unfair advantage of its position over a period of time, then the host State would not necessarily have to pay any compensation for its taking of property. Compensation would not *have to be* "prompt, adequate, and effective"—the common articulation of the Western-derived principle. Latin American States had already objected to *international* authority being forced upon them via the Calvo Clause. Now was the time to build on that model via the NIEO perception that "host State law should govern such matters."⁹⁰

The 1974 UN Economic Charter was the centerpiece of the NIEO. In its capacity as a sovereign entity, the host State should be able to set the standard of compensation when it nationalizes a foreign enterprise or certain assets. *Whether and how much* to compensate a multinational enterprise was now to be characterized as a matter governed by the host State law. The NIEO was designed to trump International Law as formulated by the economically developed States, long before many underdeveloped nations even existed. Article 2.2 of the NIEO's Economic Charter provides that each State has the following "right":

To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought [to resolve compensation issues] on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.⁹¹

Article 2 presented a variation on the Latin American "Calvo Doctrine" [§4.4.B.3(c)]. As a condition of doing business, the foreign enterprise must waive the protection of International Law that prohibits the discriminatory treatment of aliens. A Calvo clause, stated either in the contract or mandated by host State law, precludes a nationalized entity from seeking the diplomatic assistance of its home State. The enterprise is thereby treated as if it were a citizen of the nationalizing State—in which case, it must look to *national* law for a remedy.

The nationalizing State's decision regarding whether and *how* to compensate is based on its national law rather than International Law.

The NIEO's obstacle would be the commonly applied standard of requiring prompt, adequate, and effective compensation for a governmental taking of foreign corporate assets. The source for this principle is ascertainable from customary State practice and international arbitrations. No multilateral treaty exists to express the consensus of States. The decisions of various international tribunals typically reasoned that a nationalizing State must compensate the owner of foreign assets under the "prompt, adequate, and effective" rule [§4.4.B.3(d) Iran-US Claims Tribunal]. This meant the fair-market value of the seized property in freely transferable currency, the preferred yardstick of the western capital exporters.

B. NEW, NEW INTERNATIONAL ECONOMIC ORDER

During the 1980s, the multinational corporations in developed nations—particularly in the US—reacted to the G-77's UN-based articulation of the NIEO in a way that was not anticipated by its proponents. Corporate management diverted the flow of foreign investment from "third world" nations participating in this attempted paradigm shift to other developed nations. What was thought to be a clear legal standard, permitting nationalization but requiring compensation of foreign investment, had blurred. Corporate management decided to avoid the potential impact of the NIEO, stimulating a capital flight into other nations. The instability wrought by the NIEO backfired on the G-77 although it had grown to 120 nations during the 1970s and 1980s and currently numbers 130.⁹²

As a result, the lesser-developed countries began to negotiate bilateral investment treaties (BITs) with the capital-rich States in order to re-attract foreign investment. These treaties are typified by clauses entitling the multinational corporation to fair-market-value compensation in readily transferable currency in the event of a nationalization.⁹³ BITs became the wave of the 1990s. As of 2004, there were more than 1,500 BIT treaties in existence. The Uruguay Round of the GATT process presented a similar device. Trade Related Investment Measures (TRIMs) have been incorporated into the GATT and WTO processes to protect foreign investors and to reverse the capital flight of the 1980s (away from lesser-developed countries because of the so-called NIEO).

This bilateral treaty approach has not been accepted by all of the original members of the G-77. The BITs are virtually treasonous competitors with the UN

process that pioneered the NIEO. The new NIEO appears to be coming full circle—returning to the *old* order. Foreign investment could not be attracted without sufficient protection from uncompensated nationalizations. Nevertheless, the September 1999 Twenty-third Annual Ministers' Meeting for Foreign Affairs Ministerial Declaration "expressed the urgent need for certain developed countries to immediately eliminate laws with adverse extra-territorial impacts against developing countries ... [advocating a stronger UN system which] would enhance coordination between the UN and multilateral trade institutions ... [because trade institutions] must take into account the policy framework adopted by the UN and should ensure that their policies are in conformity with the developmental objectives of developing countries ... [and their] right to development."⁹⁴

An international legal system that *overemphasizes* differences may eclipse values common to all. Central European University (Budapest) Professor Helen Hartnell aptly characterized this problem with the NIEO: "The failed Charter of Economic Rights and Duties of States, like the failed Soviet Union, was built by 'levelers.' Their failure is rooted in [not conceding] the inevitability of diversity. Today's scrambling toward political, economic and legal integration in the eastern and western hemispheres might be seen to stem from fear of the consequences of too much difference, or [alternatively] from a recognition that cooperation can erase destructive differences. In any case, integration always has its limits ... the point at which differences begin to overshadow common values and interests."⁹⁵

◆ §12.5 CORRUPT INTERNATIONAL TRANSACTIONS

A. US KICKOFF

Corrupt business transactions are not limited to a few countries. This is a global phenomenon encompassing every region of the world.⁹⁶ The Principle Deputy Assistant US Secretary of Commerce succinctly described its scope as follows:

By all accounts, however, the corruption problem is most prevalent in the world's transitional economies.

... While the problem is difficult to quantify (i.e., there are no ways of collecting meaningful statistics on corrupt payments), anecdotal evidence indicates that the demand for illicit payments has significantly increased in recent years as these markets have

opened their doors to foreign investment and procurement. From Russia to Eastern Europe to China, western businessmen are seeking to participate in these growth markets, thus creating significant opportunities for payments. The size, variety, and prevalence of these foreign payments ... undoubtedly retards the formation of democratic institutions, economic development, and the rule of law in many societies.

The problem is perhaps most acute in post-communist societies. After decades of communist dictatorship, with law serving as an instrument of, rather than a check on, arbitrary state power, the rule of law is fragile and largely undeveloped in these countries.... While reformist governments are rewriting new anti-corruption laws, business regulations, and ethical guidelines, these regulations contain significant gaps, and the development of institutions to implement and enforce these new laws is a long-term process.⁹⁷

In 1976, the US Securities and Exchange Commission published a report that more than 400 US companies, including 117 of the Fortune 500 companies, made “questionable” payments to foreign officials.⁹⁸ In 1977, US President Gerald Ford and the US Congress responded with the Foreign Corrupt Practices Act (FCPA) that: (1) was designed to restore public confidence in US business; (2) would have a significant impact on the ability of US business enterprises to do business abroad; and (3) led to claims of cultural relativism because the US was perceived as trying to legislate morality on an international scale.

While portions of the FCPA appear in various titles of the US Code, the following provisions illustrate its basic content:



**1977 Foreign Corrupt
Practices Act and
International Anti-Bribery and
Fair Competition Act of 1998**

(implementing US ratification of the 1997 Bribery
Convention)

UNITED STATES CONGRESS

Go to Course Web Page, at:

<<http://home.att.net/~slomansonb/txtcsesite.html>>.

Under Chapter Twelve, click Foreign Corrupt
Practices Act.

As applied by a federal appeals court in 2004 (and affirmed in 2007):

None contend that the FCPA criminalizes every payment to a foreign official: It criminalizes only those payments that are intended to (1) influence a foreign official to act or make a decision in his official capacity, or (2) induce such an official to perform or refrain from performing some act in violation of his duty, or (3) secure some wrongful advantage to the payor. And even then, the FCPA criminalizes these kinds of payments only if the result they are intended to produce—their *quid pro quo*—will *assist* (or is intended to assist) the payor in efforts to get or keep some *business* for or with “any person.”⁹⁹

Paying a foreign government official is thus illegal if the payment is intended to induce the recipient to misuse his or her position to direct business to the person who pays the bribe. Foreign officials include any officer or employee of a foreign government, department, or agency, member of a royal family, or member of a legislative body who is acting in an official capacity. Payment to an official to induce even a private company to award a contract is also prohibited. The Act excludes payments for routine governmental actions. Although referred to as “grease” payments, fees for obtaining a license or official document, processing governmental papers, or scheduling inspections do not violate the FCPA—as long as such payments are authorized under the written laws of the country where the payment is made.

The FCPA has been prosecuted more heavily than recognized by the general public. Since 2006, the US Department of Justice and the Securities and Exchange Commission have more than doubled their prosecutions for foreign bribery. Compliance was enhanced by passage of the 2002 Sarbanes-Oxley Act. With the beginnings of many corporate meltdowns on the horizon, that Act required “internal-controls review,” making it harder to evade the FCPA. Companies are thereby encouraged to self-report to avoid prosecution under Sarbanes-Oxley.

Selected examples of major FCPA violations include the following:

- ◆ 1995: Lockheed Martin Corporation of Bethesda, Maryland, pled guilty to bribing an Egyptian official to ensure the purchase of three C-130 cargo planes. This resulted in a criminal fine of \$21,800,000, a civil settlement of \$3,000,000, and a prison sentence and

criminal fine for one of two responsible corporate executives.¹⁰⁰

- ◆ 1999: The CIA received allegations that between May 1994 and April 1998, bribes were used to influence the outcomes of 239 international contract competitions that totaled \$108,000,000,000. Seventy percent were allegedly offered or paid to ministry or executive branch officials.
- ◆ 2004: Halliburton, the major US defense contractor, was investigated for alleged complicity in paying \$180,000,000 in bribes regarding Nigerian gas contracts.¹⁰¹
- ◆ 2005: Titan Corporation, a US defense contractor that provided much of the nonmilitary security in Iraq, paid a \$28,500,000 fine. Titan had paid out over \$2,000,000 in bribes during the 2001 election campaign in the West African nation of Benin. Titan had 120 agents in 60 foreign countries with no meaningful oversight of their payouts to various government entities. This was the largest fine ever imposed under the FCPA.
- ◆ 2007: Vetco International, a subsidiary of a foreign oil field equipment manufacturer, paid a \$26,000,000 criminal fine for violating the FCPA.
- ◆ 2007: William Jefferson, a Louisiana member of the US House of Representatives, was the first US *official* charged with violating the FCPA. The charges included his allegedly bribing a Nigerian official. Congressman Jefferson unsuccessfully contended that the US Constitution's "Speech or Debate Clause" protected him from prosecution. It generally provides legislators with absolute immunity for their legislative activities, relieving them from defending those actions in court.
- ◆ 2008: Six enforcement actions are pending, based upon the UN Independent Inquiry Committee report on the corruption in the humanitarian oil for food program [§3.3.C.3(b)] run by the UN that allowed oil sales from Iraq and evolved into a major investigation involving Congress, multiple US agencies, and many foreign governments. The commission reported that thousands of companies worldwide had paid almost \$2 billion in kickbacks to the Iraqi government. The results of this investigation included the US Department of Justice and the Securities and Exchange Commission-regulated participants in the program.¹⁰²

One might argue that US defendants fare better than their counterparts in some other nations. In July 2007, for example, China executed a former department head

at its State Food and Drug Administration. Zheng Xiaoyu was sentenced to death for taking bribes to approve substandard medicines, including an antibiotic that killed ten Chinese citizens.

B. BRIBERY AND INTERNATIONAL LAW

The US instigated the movement to control international corruption by both government officials and private entities. But it was not the first country to have such laws on the books. Kenya's 1956 Prevention of Corruption Act, for example, was construed in the following 2006 arbitration analysis, decided by the International Centre for Settlement of Investment Disputes [§8.3.B.3.]. Its important contribution is to sketch the evolution of bribery as an object of International Law:



World Duty Free Company Limited (Claimant) and The Republic Of Kenya (Respondent)

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES
ICSID CASE No. ARB/00/7

Go to Course Web Page, at:
<<http://home.att.net/~slomansonb/txtcsesite.html>>.
Under Chapter Twelve, click ICSID Bribery.

C. REGIONAL CONTROLS

In the twenty years between the US 1977 FCPA and the 1997 OECD Bribery Convention, some regional organizations drafted interim treaties addressing this market force manipulation. These include the following:

- ◆ Organization of American States Inter-American Convention Against Corruption (1996) and Quito Declaration on the Impact of Corruption (2004)
- ◆ European Union Convention on the Fight Against Corruption Involving Officials of Member States of the European Union (1997)
- ◆ Interim Committee of the Board of Governors of the International Monetary Fund Code of Good Practices on Fiscal Transparency (1998 Declaration on Principles)
- ◆ Council of Europe's Group of States Against Corruption (2000)

- ◆ African Union Convention on Preventing and Combating Corruption (2003)
- ◆ Council of Europe Convention on Cybercrime (2003), Protocol concerning criminalization of racist and xenophobic online activities, enters into force (2006).¹⁰³

None of these instruments eradicated this commercial nemesis. They did develop an environment conducive to the production of a draft convention for global consideration. A UN General Assembly resolution and the Secretary-General's report on which it was based¹⁰⁴ did little to control a problem that all nations acknowledged, but few were willing to act upon.

D. GLOBAL CONTROLS

1. UN Conventions/Programs

(a) UN International Code of Conduct for Public Officials The 1996 UN General Assembly Resolution 51/59, entitled "On Action Against Corruption," provides as follows:

Concerned at the seriousness of problems posed by corruption, which may endanger the stability and security of societies, undermine the values of democracy and morality and jeopardize social, economic and political development, ...

Convinced that, since corruption is a phenomenon that currently crosses national borders and affects all societies and economies, international cooperation to prevent and control it is essential, ...

Adopts the International Code of Conduct for Public Officials annexed to the present resolution, and recommends it to member States as a tool to guide their efforts against corruption.¹⁰⁵

(b) Convention Against Corruption The 2003 Convention Against Corruption was announced as the UN proclaimed December 9th as International Anti-Corruption Day. This convention entered into force two years later after the thirtieth ratification. The intervening UN Oil-for-Food scandal [§3.3.C.3(b)] severely tarnished the UN's image as a competent global corruption fighter. This may explain why only a few European Union member States have ratified it. The United States ratified it in November 2006.

(c) Convention Against Transnational Organized Crime The UN has also promulgated two associated protocols. They are the: (1) Protocol to Prevent, Suppress and Punish



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Trafficking in Persons; and (2) Protocol on Migrant Smuggling. This treaty regime enjoys US support because of the latter's 2005 ratification of the basic convention.

(d) Stolen Asset Recovery Initiative The theft of public assets from developing countries is an important cog in the wheel of international corruption. The World Bank estimates cross-border flow of the global proceeds from criminal activities, corruption, and tax evasion at between \$1 trillion and \$1.6 trillion per year. The amount of bribes received by public officials from developing and transitional nations is estimated at \$20 billion to \$40 billion per year. As described by the World Bank:

Assets stolen by corrupt leaders at the country-level are frequently of staggering magnitude. The true cost of corruption far exceeds the value of assets stolen by the leaders of countries. This would include the degradation of public institutions, especially those involved in public financial management and financial sector governance, the weakening if not destruction of the private investment climate, and the corruption of social service delivery mechanisms for basic health and education programs, with a particularly adverse impact on

the poor. This “collateral damage” in terms of foregone growth and poverty alleviation will be proportional to the duration of the tenure of the corrupt leader.

While the traditional focus of the international development community has been on addressing corruption and weak governance within the developing countries themselves, this approach ignores the “other side of the equation”: stolen assets are often hidden in the financial centers of developed countries; bribes to public officials from developing countries often originate from multinational corporations; and the intermediary services provided by lawyers, accountants, and company formation agents, which could be used to launder or hide the proceeds of asset theft by developing country rulers, are often located in developed country financial centers.

This UN-World Bank Initiative is an integral part of the World Bank Group’s Governance and Anti-Corruption Strategy. That program recognizes the need to help developing countries recover stolen assets. The international legal framework would be provided by the UN Convention Against Corruption, which entered into force in December 2005. The UN Office on Drugs

and Crime is the custodian and the lead agency that facilitates implementation of that UN Convention in addition to the World Bank Secretariat to the Conference of State Parties. Legal reform is also needed in *developed* countries, not just developing countries. Both national groups must ratify and implement the UN Convention Against Corruption, if this more concrete Initiative is to flourish.¹⁰⁶

2. OECD Bribery Convention The thirty members of the Organization for Economic Co-operation and Development (OECD) drafted the most global of corruption treaty alternatives to date. These industrialized nations were joined in the drafting process by five nonmembers: Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic.¹⁰⁷

The preambular wording states the underlying premise regarding bribery in international business transactions: It undermines good governance and economic development, while distorting competitive conditions in the international marketplace. The twin purpose of this convention is to pressure member nations to criminalize bribery and to facilitate enforcement measures among the ratifying States.

This comparatively effective treaty defines bribery and conspiracy to commit it as follows:

Article 1

The Offence of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.
2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorization of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.
3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as “bribery of a foreign public official”.
4. For the purpose of this Convention:
 - a. “foreign public official” means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization;
 - b. “foreign country” includes all levels and subdivisions of government, from national to local;
 - c. “act or refrain from acting in relation to the performance of official duties” includes any use of the public official’s position, whether or not within the official’s authorized competence.

...

Article 3 of the Bribery Convention requires each ratifying nation to take necessary measures to ensure that bribes, the proceeds from bribery of a foreign public official, or their corresponding property value are subject to seizure and confiscation—or, alternatively, that monetary sanctions of comparable effect are applicable.

Article 4 provides for both domestic and international jurisdiction, premised on the familiar jurisdictional principles of International Law [text §5.2.B.–F.]. Thus, each ratifying State “shall take such measures as may be necessary” to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part within its territory.

Article 9 requires member States to provide mutual assistance. This means extradition to the most appropriate State under Article 10. To complete this comprehensive guide for ensuring prosecution, each ratifying nation “shall review whether its current basis for jurisdiction is effective” in the fight against the bribery of foreign public officials. If not, then that State must take remedial steps to create or modify its jurisdictional rules to comply with its treaty obligations to prosecute such cases.

The OECD May 2006 Action Statement on Bribery and Officially Supported Export Credits requires members:

2. To take, appropriate measures to deter bribery in international business transactions benefiting from official export credit support, in accordance with the legal system of each member country and the character of the export credit and not prejudicial to the rights of any parties not responsible for the illegal payments, including:

...

d) Requiring exporters and, where appropriate, applicants, to disclose whether they or anyone acting on their behalf in connection with the transaction are currently under charge in a national court or, within a five-year period preceding the application, have been convicted in a national court or been subject to equivalent national administrative measures for violation of laws against bribery of foreign public officials of any country.

...

(i) If there is credible evidence at any time that bribery was involved in the award or execution of the export contract, informing their law enforcement authorities promptly.

...

3. Private Initiatives Members of the “Global Reporting Initiative” (GRI) have issued the Amsterdam Declaration on Transparency and Reporting, calling on governments to “extend and strengthen the global regime of sustainability reporting.” Membership includes a large number of corporations and academic institutions, including Pizza Hut, Harrah’s Entertainment, and Harvard Business School’s Executive Education Department.

According to the GRI, “the root causes of the current economic crisis would have been moderated by a global transparency and accountability system based on the exercise of due diligence and the public reporting of ESG [environmental, social and governance] performance.” As a result, governments need to rebuild the existing economic framework by: “[1] Introducing policy requiring companies to report on ESG factors or publicly explain why they have not done so; [2] Requiring ESG reporting by their public bodies—in particular: state owned companies, government pension funds and public investment agencies; [3] Integrating sustainability reporting within the emerging global financial regulatory framework being developed by leaders of the G20 [presumably referring to an expanded number of G-8 countries].”¹⁰⁸

4. What Does It All mean? First, under Article 12 of the Bribery Convention, ratifying States will cooperate in carrying out a program of systematic follow-up to monitor and promote full implementation. This will most likely be done within the framework of the OECD working group on Bribery in International Business Transactions.

Second, the US was one of the first nations to have created legislation to ratify and implement the 1997 Bribery Convention (see FCPA Act on course Web page). It thereby took a leadership position, not unlike the lonely vigil it commenced with its 1977 Foreign Corrupt Practices Act. Assuming the requisite degree of acceptance by other ratifications, US enterprises will be freed from the double standard that resulted from the generation of lost bids when competing with unrestrained bribery in foreign markets. The 1997 Bribery Convention went beyond the US 1977 FCPA by also making it illegal to *receive* a bribe.

Third, there is now a uniform standard for defining and combating bribery in international business. Thus, as is the consummate objective of International

Law, the same rules will one day apply across the board to State officials—and to officials in international organizations including the UN [Oil-for-food scandal: §3.3.C.3(b)].

◆ PROBLEMS

Problem 12.A (after §12.1.B.1a Italian Marble case): The UN Convention on the International Sale of Goods (CISG) authorizes the legal enforcement of oral contracts—without regard to the amount of money involved. It may also authorize written contract terms that vary from the oral exchange between the parties. In February 2000, a Canadian winery entered into a telephonic agreement with a French subsidiary—located in California—to purchase 1.2 million corks. The parties to the phone conversation agreed upon the amount to be paid and the shipping terms, but nothing else. There were no prior dealings between the parties.

The French parent company shipped the corks to Canada in eleven shipments. Each shipment included a seller's invoice containing a forum selection clause stating: "Any dispute arising under the present contract is under the sole jurisdiction of the Court of Commerce of the City of Perpignan [France]."

A US court held that this forum selection clause (FSC) was valid and thus enforceable. The trial judge therefore dismissed this case, which had been filed in California. The appellate court reversed that dismissal, thereby reinstating this case for trial in the California forum. The appellate court's rationale was that the eleven identical FSCs were unenforceable. They were not to be considered a part of the agreement between the parties. For additional details, see *Chateau des Charmes Wines Ltd. v. Sabate USA Inc.*, 328 F.3d 528 (9th Cir., 2003), *cert. denied*, 540 U.S. 1049 (2003).

Three students will argue the merits of this case, specifically whether the (post-oral contract) mailing of the individual FSC clause(s) with each of the eleven shipments should be a valid part of this agreement. Students one and two will advocate on behalf of the respective parties. Student three is a judge who sits on dispute resolution panels of the WTO in Geneva. The judge will render a decision, comment on whether the enforcement of the FSC will help or hinder international trade, and invite comments from the class as to whether the judge properly decided.

Problem 12.B (after §12.2.C.):

Hypothetical Brazil and the US are parties to GATT/WTO. In 2008, Brazil announced a major discovery. After years of research in its rain forests, Brazilian chemists developed a generic drug substitute for a popular but expensive drug made by a US company in the US. The brand name of the US drug is "A-1." The Brazilian generic substitute is called "B-2." Both drugs are the best nonprescription treatments for the common cold.

Brazen Inc. is a Brazilian State-owned corporation. Brazil uses the profits to raise revenue for the social and economic advancement of its people. Brazen's corporate management realizes the extraordinary potential for B-2 to become a substitute for A-1. The A-1 US drug has been used by most US consumers to treat their cold symptoms.

Brazen launches its marketing plan by selling B-2 to associated US companies wishing to compete with the US maker of A-1. A US importer is licensed to market B-2 to US consumers. The price charged is slightly less than what US consumers pay for A-1. The US tariff rate is low enough to make the exportation and sale of B-2 sufficiently profitable to encourage Brazen's entry into the US market.

Brazen exports B-2 to the US, which costs Brazen \$2 total per unit shipped. It costs Brazen the equivalent of \$1 per unit shipped to produce B-2 in Brazil, and then another \$1 to market B-2 in the US. In 2009, some parts of the US market slowly begin to accept B-2 as the cheaper generic substitute for A-1. Brazen and its US associates then decide to lower the price charged to US consumers to 95 cents per unit. This price reduction yielded immediate benefits for US customers. They paid substantially less for B-2 than for A-1 (95 cents as opposed to just over \$2 per bottle of A-1). More consumers can now afford this relatively inexpensive and very effective cold remedy.

B-2's unusually low prices quickly generated a large US demand. A-1's sales plummeted. US consumers could obtain B-2 at a substantially lower cost than A-1. The maker of A-1 reduced its production capacity and began to look for profits in some other line of pharmaceuticals.

In 2010, Brazil's Minister of Commerce authorized an increase in B-2 prices via gradual steps. By the end of the year, the cost to US consumers increased beyond the initial \$2 cost of B-2. Brazen began to profit again from the large volume of B-2 sales in the US. It had lost

money during the 2009 marketing campaign. Brazen's below-cost pricing strategy had resulted in US consumers relying almost exclusively on B-2. Brazen's per unit production and shipping costs remained constant, at \$2 per bottle of B-2. The retail price of B-2 has now temporarily settled at \$2.50 per bottle shipped. That price could increase any day. But charging too much more for B-2 might encourage other US or foreign companies to enter or reenter this particular market for cold remedies.

The maker of A-1 reconsiders its decision to completely withdraw from manufacturing A-1. It begins by having its lobbyist in Washington, DC, convince the US Customs Service to issue a new series of special regulations governing the importation of foreign cold remedies. These tests are not conducted on A-1. The expressed purpose of these new requirements is to ensure the quality control and consumability of imported drugs. The new customs procedures reduce the risk of unauthorized or unsafe generic pharmaceuticals entering the US.

First, the new regulations require special customs inspections for imported cold remedies. Second, the new regulations impose strenuous quality testing of foreign cold remedies arriving at US ports of entry. All of these new procedures, the special inspections and quality testing, are uniformly applied to all foreign pharmaceuticals, regardless of their national origin. The new regulations result in the rejection of most of the Brazilian B-2 now arriving in the US.

Brazil lodges a complaint with the US Department of State and the WTO, claiming discriminatory treatment that has targeted foreign-made cold remedies from Brazil. Brazen Inc. is now unable to reap the benefits of the Brazilian discovery of B-2 for Brazil's economy. Brazen may be driven out of this market because so much of its B-2 cold remedy is not permitted to enter the US by US Customs inspectors.

Questions

1. Did Brazil's state-owned company violate GATT/WTO because of its marketing activities?
2. Did the US violate GATT/WTO by instituting its new customs regulations?

Problem 12.C (after §12.2.D.): Read the *WTO TRIPS Intellectual Property Case* on the Course Web page, at: <<http://home.att.net/~slomansonb/txtcsesite.html>>, scroll to Chap. 12. Four students (or groups) will represent, respectively, India, the US, the EU, and the WTO.

They will present their respective views on the following matters.

Assume these facts: (1) Americorp is a US multinational corporation. It holds the exclusive patent on the drug it has created called "Hivicural." It retards any further development of HIV in HIV positive persons. (2) Americorp markets its new, patented wonder drug throughout the world. Twenty-one treatments are required. They must be taken consistently, one treatment per week for twenty-one weeks, to arrest the evolution of the HIV virus. The cost to importers in all countries is \$100 per treatment. The total wholesale cost is thus US \$2,100 per patient. (3) Americorp spent \$5 billion in research and development costs which coupled with the costs of marketing, shipping, and paying tariffs to export Hivicural, nevertheless yields a total anticipated profit of about \$10 billion during the life of the Hivicural patent. That profit will be distributed to shareholders.

Americorp stock is sold on the New York stock exchange. Numerous investors will be financially rewarded by about \$10,000 each. (4) The appearance of any generic substitute would ruin the value of Americorp's drug Hivicural. Any generic derived from Hivicural would almost immediately eliminate demand for this more expensive patented drug. (5) Americorp's claim would be "espoused" by the US Trade Representative in the WTO dispute resolution process.

India is developing a generic pharmaceutical, based on Americorp's patent ingredients in Hivicural. That would make it possible for the Indian government to cheaply dispense a generic copy of Hivicural to save the rapidly increasing percentage of the population infected with HIV. The average annual salary in India, one of the world's most populated—and poorest—countries, is \$275.

1. Would the WTO TRIPS agreement, the *U.S. v. India* case, and/or the November 2001 Doha Declaration prohibit the Indian government from making its own generic drug derived from Hivicural?
2. India is a member of G-77. It supports the New International Economic Order. If the answer to (1) would allow India to develop a generic for Hivicural, should India pay compensation for violating Americorp's patent?
3. If India *could* legally use Americorp's patent to produce a generic substitute, are there any WTO-related limits to prevent India from totally ignoring Americorp's rights as the owner of the Hivicural patent?

4. Assume that India ultimately makes and dispenses its own generic substitute for Hivicural only to its own citizens, who are the most affected by HIV. Twenty years later, a completely new disease called “Ebola II” appears. It threatens to kill a large percentage of India’s population. Would Americorp be likely to conduct the research and development to find a cure for Ebola II?

Problem 12.D (after §12.5.A.): You are the legal officer for Deftco, a US corporation doing business in Russia. You are transacting business in St. Petersburg where you meet Misha. He is the personal secretary for the Russian CEO of a state-owned company. This company is accepting bids for refurbishing the Hermitage. That landmark is the Russian government’s world-renowned art museum near the center of the city. Misha is also the CEO’s brother. Misha maintains copies of all documents involved in the bidding process.

Misha notices that your company has not yet paid the standard “maintenance fee.” It is a payment which does not ever appear in any of the documents regarding this bidding process. Russian law does not prohibit this payment. Nor is there any legal provision authorizing such a fee in either Russia or the US. You return to your hotel room, open your laptop computer, and research the Foreign Corrupt Practices Act and the OECD Bribery Convention. The US is a party to the OECD treaty. Russia is not.

You return to Misha’s office to explain why you cannot pay this fee: It will subject you to a US prosecution. Your company is the strongest contender for successfully bidding on the Hermitage refurbishing job. Misha, a Russian lawyer, has studied law in the US—where he obtained a graduate law degree after completing law school in Moscow. He has always been fascinated by what he describes as the “condescending and arrogant attitude of American lawyers, who think that they can impose their parochial values on the world.”

Two students will assume your role and that of Misha. They will deliberate about whether the maintenance fee is illegal under either US law or International Law.

Problem 12.E (after §12.5.D.): A Romanian-based global crime ring launched an e-mail phishing scam. In May 2008, various participants were charged with identity theft, stealing US Social Security numbers, credit card data, and other personal information from networked computer systems. Phishing typically involves sending fraudulent e-mails with links directing recipients

to fake Web sites. They are then asked to input sensitive data. Phishers commonly include attachments that, when clicked, secretly install “spyware,” which can capture personal information and send it to third parties over the Internet. See L. JORDAN, ABCNEWS.COM (May 19, 2008), at: <<http://a.abcnews.com/Technology/wireStory?id=4884953>>.

Assume that Romanian officials knew of this scam, but acquiesced in its being globally perpetrated. What Chapter 12 corrupt international transaction treaties, if any, have been violated—(a) by Romania; and (b) the individual phishers?

◆ FURTHER READING & RESEARCH

See Course Web Page, at: <<http://home.att.net/~sломansonb/txtcsesite.html>>, click Chapter Twelve.

◆ ENDNOTES

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