BERKELEY JOURNAL OF INTERNATIONAL LAW

VOLUME 22 2004 NUMBER 3

CONTENTS

Articles

Berkeley Journal of International Law

Volume 22 | Issue 3 Article 1

2004

Jefferson Memorial Lecture - Transnational Legal Process after September 11th

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Jefferson Memorial Lecture Transnational Legal Process After September 11th

By
Harold Hongju Koh*

I come to you from Yale University, where, even as we speak, our campus is hosting the national collegiate final of that most popular American answer-and-question game show, *Jeopardy*. So I hope you will forgive me if, in the *Jeopardy* spirit, I start this lecture not with a question and an answer, but with an answer and a question. The answer is: "Same-sex sodomy, Affirmative Action, North Korea, Iraq, Guantanamo, Enemy Combatants, Juvenile Death Penalty, and the International Criminal Court."

If that is the answer, what is the question? The question is: "What are all features of transnational legal process after September 11th?" Now if the relationship between my answer and my question is not immediately obvious, please sit back, make yourself comfortable, and let me elaborate.

Let me break this topic—transnational legal process after September 11th—into three parts: First, why do nations obey international law? Second, how does what I call "transnational legal process" contribute to national obedience with international law? And, third, what role can transnational legal process play in affecting the behavior of several nations whose disobedience with international law has attracted global attention after September 11th—most prominently, North Korea, Iraq, and our own country, the United States of America? For shorthand purposes, I will call these three countries "the axis of disobedience."

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I.
WHY NATIONS OBEY INTERNATIONAL LAW

For most of my career as a lawyer, as a scholar, and in the government, I have focused on the questions of why nations obey international law and why they sometimes disobey it. And in my academic work, I have offered five cumulative explanations to that question: (1) reasons of power and coercion, (2) reasons of self-interest, (3) reasons of liberal theory—both rule legitimacy and political identity, (4) communitarian reasons, and (5) reasons of legal process.[1]

To illustrate what I mean, let me ask a simple question. How do we make anybody obey the law? Even here in Berkeley, the height of global civilization, how do we persuade scofflaws to obey the law in a domestic setting? How do we get persistent litterers or traffic violators to follow the law? If you ponder that question for a little while, I think you will come to the conclusion that the most complete answer is some combination of these five factors I have identified.

If you are faced here in Berkeley with persistent litterers or traffic violators, you first threaten them with coercion: reasons of power. You threaten them with sanctions, like a ticket, or jail time, or you deny them benefits—"no Peet's coffee for you!" Second, you tell them that it is in their long-term self-interest to obey the law: reasons of self-interest. Third, you invoke liberal, Kantian ideals. You tell them that they should obey the littering and traffic rules because the rules are fair ("rule legitimacy"), and because they should see themselves as law-abiding individuals ("political identity"). Fourth, you make appeals to community. You tell them, "We are part of the same community," and you ask them to act in the communal interest, not just in their narrow self-interest. Finally, violators can be encouraged to obey for reasons we lawyers understand best, which I call "reasons of process." We try to enmesh law violators in processes, institutions, and regimes that force them to internalize the rules we want them to obey into their internal value set.

For example, as those of us who live in universities all know, the tactic that works best with a student who has a disciplinary problem is to put him or her on the school disciplinary committee. Why? Because participating in the process of law and enforcement makes students see why it is in their enlightened self-interest to obey the law, and it encourages them to try to incorporate the norm of obedience into their internal value set.

If you want to see this played out intuitively in another setting, consider why most people do not steal from one another. It is not because of coercion or fear of sanctions. After all, how often is a policeman standing by you when an opportunity to steal presents itself? In fact, over time, through a lifetime of participation in various processes, people come to internalize a normative set of

1. *See generally* Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 626-32 (1998) [hereinafter Koh, *The 1998 Frankel Lecture*]; Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (describing these reasons) [hereinafter Koh, *Why Do Nations Obey*].

values, a moral code or a religious faith, that makes them choose not just to comply with a norm against stealing but actually to *obey* it voluntarily. Internal value commitments promote a pattern of obedience to rules, a pattern that becomes constitutive of who they are. The real reason why I do not burglarize my neighbor is not because of coercion or because of self-interest, but because I have an internalized moral code. In my case, it is a Christian code, but others could just as easily substitute Jewish, Buddhist, Ba'hai, Muslim, or whatever creed they choose.

My claim, then, is that norm-internalization, and not coercion, is the ultimate reason why most people obey the law. If this is true locally, why shouldn't this also be true globally? So the key to obedience of international law, in my view, is participation in process, or what I call "transnational legal process." By so saying, let me distinguish two types of international process: The first is a so-called "international legal process" in the Benthamite sense, namely, a government-to-government, horizontal process where nation-states interact in intergovernmental fora, with the main goal of promoting compliance with international norms. The other strand I call "vertical process," or "transnational legal process," where state and nonstate actors interact in a variety of domestic and international fora with the goal of encouraging norm violators to accept norms into their internal value sets so that they obey those norms, not just comply with them, as a matter of domestic law.[2]

So, the core of my approach is as follows: Why do most nations comply with the rules of international law? In a nutshell, because most compliance comes from obedience; most obedience comes from norm-internalization; and most norm-internalization comes from participation in legal process, particularly transnational legal process.

II.
How Transnational Legal Process Promotes Obedience of International Law

Transnational legal process is a process whereby public and private actors, including nation states, corporations, international organizations, non-governmental organizations, and individuals, interact in a variety of fora to interpret, enforce, and ultimately internalize, rules of international law.[3] The key elements of this approach are interaction, interpretation, and internalization. Those seeking to embed certain norms into national conduct seek to trigger *interactions* that yield legal *interpretations* that are then *internalized* into the domestic law of even resistant nation states.[4] Let me illustrate by giving you some concrete examples. First, suppose you were a human rights lawyer in Great Britain, and you were protesting the treatment of immigrants who were being detained by the

2. For elaboration, see generally Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 Ind. L. J. 1397 (1999) [hereinafter *Human Rights Law Enforced*].

3. *See* Harold Hongju Koh, *Transnational Legal Process*, 75 Neb. L. Rev. 181, 183 (1996).

4. For elaboration, see Koh, *The 1998 Frankel Lecture*, *supra* note 1; Koh, *Why Do Nations Obey*, *supra* note 1; and Koh, *How is Human Rights Law Enforced*, *supra* note 2.

British government. What would you do? You would start by challenging the legality of the detention before the British courts. Suppose you lost. Is that the end of the story? Not any more. Today, any British lawyer worth his or her salt would appeal the British court's ruling to the European Court of Human Rights in Strasbourg, an international body, and try to win a judgment invalidating the British government's conduct under European human rights law. To use my terms, you would trigger an interaction in a European court that would promote an interpretation of European law that would lead, you hope, to the internalization of that international rule into British domestic law. So your ultimate approach would not be a horizontal one but a vertical one—internalization of an international standard into a domestic legal system through transnational legal process.

What does this have to do with our country, you ask? Let me take a second example. In the early 1980s, it came to light that the Reagan administration was supporting the Contras in their struggle against the Nicaraguan Sandinista Government, and that one of the chosen means was to mine the harbor of Corinto.[5] In 1984 the Nicaraguan Government filed a suit against the U.S. Government in the International Court of Justice in The Hague.[6] Many people assumed that this was just a publicity stunt, one that could have no conceivable impact on the United States. They did not appreciate that Nicaragua was not so much seeking an international judgment as it was seeking to enforce transnational legal process against a more powerful adversary.[7] By suing in this intergovernmental forum, and triggering an interaction, Nicaragua pursued the goal of obtaining a judicial interpretation that the United States was violating international law, an interpretation that it then hoped to internalize into U.S. domestic law. Nicaragua won a so-called "provisional measures" order from the ICJ, but instead of seeking enforcement, the Nicaraguans went to the U.S. Congress, where then-Senator Daniel Patrick Moynihan introduced a resolution that terminated future aid to the Contras for any actions that violated the ICJ ruling.[8] In response, the Reagan administration stopped mining the harbors almost immediately.[9] So, in my view, what happened here was a different kind of appeal, not an appeal to judicial process but to a transnational legal process, in which the Nicaraguans triggered an interaction, which led to an international legal interpretation, which was ultimately internalized into U.S. funding statutes, or domestic law. By in-

5. Senator Barry Goldwater revealed President Reagan's authorization of the mining. *See* 130 Cong. Rec. 8537 (1984).

6. *See* Case Concerning Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, No. 70 (June 27).

7. The late Harvard law professor Abram Chayes, a former Legal Adviser to the State Department, appeared as Nicaragua's agent against the United States. For his personal reminiscence of the case, see Abram Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445 (1985).

8. *See* Paul Gumina, *Title VI of the Intelligence Authorization Act, Fiscal Year 1991: Effective Covert Action Reform or "Business as Usual"?*, 20 HASTINGS CONST. L.Q. 149, 170 (1992) (citing legislation).

9. *See* David Rogers, *House Adopts Resolution to End U.S. Role in Mining of Nicaraguan Ports, Waters*, WALL ST. J., April 13, 1984, at 62. I am told that upon being told of the aid cutoff, Professor Chayes said, "We just got our provisional measures from Congress."

voking this process, a relatively powerless nation forced the most powerful nation of the world, the United States, into obedience with international law.[10]

This brings me to a third example, the most prominent Supreme Court cases of the last term: the Texas sodomy case, *Lawrence v. Texas*,[11] and the two Michigan affirmative action cases under the title case *Grutter v. Bollinger*.[12]

As most of you know, in 1986, in *Bowers v. Hardwick*, the Supreme Court of the United States upheld the Georgia law that outlawed same-sex sodomy between consenting adults.[13] The United States is not part of the European human rights system, so the losing attorneys could not formally appeal the U.S. Supreme Court ruling to a higher court. But the United States *is* part of a transnational legal process, which is, in good measure, a process of its own creation. And so, the lawyers sought to use that fact to revisit this decision at some later point. It turned out that even at the time of *Bowers v. Hardwick*, the Supreme Court had ignored a European case called *Dudgeon v. United Kingdom*, which struck down the prohibitions on same-sex sodomy.[14] And since *Bowers*, the European Court of Human Rights had reaffirmed its *Dudgeon* decision, not once, but twice.[15] So, the U.S. lawyers, particularly the LAMBDA Legal Defense Fund, waited, and then provoked another interaction, this time at the U.S. Supreme Court, by asking the Court to reconsider *Bowers v. Hardwick*. LAMBDA asked me and some colleagues to write an *amicus* brief on behalf of the former UN High Commissioner on Human Rights Mary Robinson, arguing that the U.S. Constitution's guarantees of privacy and equality encompassed the international understanding found in the European human rights cases.

In his decision in *Lawrence*, which overruled the *Bowers* decision, Justice Kennedy accepted our view, writing,

> To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* has been rejected [by the European Court of Human Rights]. . . . Other nations, too, have taken action consistent

10. At this writing, a similar process is playing out with regard to the effort by the Government of Mexico to force reconsideration of U.S. state death sentences imposed upon 51 Mexican nationals who were arrested, convicted, and sentenced to death in U.S. courts without receiving the consular notification required under the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T., 77, U.N.T.S. 261. *See* Marlise Simons & Tim Weiner, *World Court Rules U.S. Should Review 51 Death Sentences*, N.Y. TIMES, April 1, 2004, at A1. In the case of one of those nationals, Osbaldo Torres, an Oklahoma appeals court stayed the execution, and the governor later commuted Torres's death sentence to life without parole. Both the court and the governor cited the decision of the International Court of Justice in The Hague and noted the violation of Torres's right to contact Mexican consular officials under the Vienna Convention on Consular Relations. In a special concurrence, one judge reasoned that the Oklahoma court was obligated to comply with the international court's decision, in light of the United States' treaty obligations under the Vienna Convention. *See* Adam Liptak, *Execution of Mexican is Halted*, N.Y. TIMES, May 14, 2004, at A2.

11. 123 S. Ct. 2472 (2003).

12. 539 U.S. 306 (2003).

13. 478 U.S. 186 (1986).

14. 45 Eur. Ct. H.R. (ser. A) at 149, 161, ¶ 41 (1981).

15. Norris v. Ireland, 142 Eur. Ct. H.R. (ser.A) at 186 (1988); Modinos v. Cyprus, 259 Eur. Ct. H.R. (ser.A) at 485 (1993).

> with an affirmation of the protected right of homosexual adults to engage in intimate, consensual sexual conduct.[16]

Justice Kennedy went on to say, "The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate."[17] In transnational legal process terms, LAMBDA triggered an interaction, which provoked a constitutional interpretation by our Supreme Court, which effectively internalized European human rights norms into U.S. Constitutional law.

To show that this was not just a fluke, only a few months earlier in the Michigan affirmative action cases, Justice Ruth Bader Ginsburg asked the Solicitor General,

> [W]e're part of a world, and this problem [of affirmative action] is a global problem. Other countries operating under the same equality norm have confronted it. Our neighbor to the north, Canada, has, the European Union, South Africa, and they have all approved this kind of, they call it positive discrimination. . . . [T]hey have rejected what you recited as the ills that follow from this. Should we shut that from our view at all or should we consider what judges in other places have said on this subject?[18]

The Solicitor General basically answered, "Shut your eyes, and don't consider it."[19] But in rejecting that view, Justice Ginsburg's concurring opinion with Justice Breyer pointed out that: "the Court's observation that race-conscious programs 'must have a logical end point,' . . . accords with the international understanding of the office of affirmative action."[20] By so saying, she, too, was essentially arguing for internalization of the global standard on affirmative action into U.S. equal protection law.

To give another well-known example, consider the death penalty. As you know, the Eighth Amendment to the U.S. Constitution bans cruel and unusual punishments.[21] That provision has been construed in light of "evolving standards of decency that marked the progress of a maturing society."[22] The Supreme Court had recognized in the 1950s that that evolving standard ought to be determined by reference to international as well as domestic measures.[23] And in a number of Supreme Court cases, the Court had looked into international opinions to decide whether conduct was or was not unusual.[24] Two terms ago, in

16. *Lawrence*, 127 S. Ct. at 2483 (citing Brief Amici Curiae of Mary Robinson, et al., Lawrence v. Texas, 127 S. Ct. 2472 (2003)). Professors Kenji Yoshino, Ryan Goodman, and Robert Wintemute and an extraordinary group of Yale law students worked with me on this amicus brief.

17. *Id.*

18. Transcript of Oral Argument at 24, Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (No. 02-516), *at* https://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-516.pdf.

19. *See id.*

20. 123 S. Ct. at 2347 (Ginsburg, J., concurring) (citing the International Convention for the Elimination of Racial Discrimination).

21. U.S. CONST. amend VIII.

22. Trop v. Dulles, 356 U.S. 86, 101-02 (1958).

23. *See id.*

24. The Court made clear that the Eighth Amendment's bar against cruel and unusual punishment embodies broad evolving "concepts of dignity, civilized standards, humanity and decency," while effectively acknowledging that contemporary standards of "humanity" must consider practices

Atkins v. Virginia, the Supreme Court finally struck down the practice of executing persons who are mentally retarded.[25] In doing so, they took note of the fact that, within the world community, the imposition of the death penalty for crimes committed by the mentally retarded is overwhelmingly disapproved.[26] My colleagues and I also submitted a brief in that case.[27] We learned, much to our amazement, that the United States and Kyrgyzstan were the only countries *in the world* that permitted the execution of persons with mental retardation. And, when we filed the amicus brief so saying, the government of Kyrgyzstan immediately sent a letter to the *New York Times* saying, in effect, "In fact, we stopped executing people with mental retardation many years ago."[28] Only the United States, the Kyrgyz implied, would engage in such a barbaric practice. The Kyrgyz letter supported our claim, for if, of all the nations of the world, only the United States applied a certain kind of punishment, then surely that practice must be "unusual" for purposes of the cruel and unusual punishments clause.

So once again, transnational legal process means triggering interactions, to seek a legal interpretation that has the result of internalizing a global standard into domestic law. That is the critical moment—the moment of norm-internalization, when domestic compliance becomes international obedience. Some have asked me, "Is your notion of transnational legal process an academic theory? Is it an activist strategy? Or is it a blueprint for policy makers?" Over time, my answer has become, "It is all three." My time in the government confirmed the supreme irony that I had suspected when I was a professor: that in the world of policy making, those with ideas tend to have no influence, and those with influence tend to have no ideas. Too often we witness what I call the "tragic triangle": decision makers react to crises, but without any theory of what they are trying to accomplish; activists agitate, but without any broader strategy about what pressure points they want to push; scholars have ideas, but they lack a

of nations other than our own. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 102 (1976). In *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977), the Court determined that international practices regarding the death penalty for rape were relevant to "evolving standards" analysis. Five years later, in *Enmund v. Florida*, 458 U.S. 782, 797 n.22 (1982), the Court noted that "the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe." In *Ford v. Wainright*, 477 U.S. 399, 409 (1986), the Justices noted "the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today." Finally, in *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (plurality opinion), the Court held that the Eighth Amendment bars the execution of fifteen-year-old offenders. Following the reasoning of *Trop v. Dulles*, Justice Stevens, writing for the plurality, evaluated the "civilized standards of decency" embodied in the Eighth Amendment in part by looking to the prohibition of the execution of minors by the Soviet Union and nations of Western Europe and taking note of the views of "other nations that share our Anglo-American heritage, and . . . the leading members of the Western European community." In addition, both the plurality and Justice O'Connor's concurrence found significant that three major international human rights treaties—including Article 68 of the Geneva Convention, which the United States had ratified—explicitly prohibited juvenile death penalties.

25. 536 U.S 304 (2002).

26. *Id.* at 316 n.21.

27. *See* Brief of Amici Curiae Diplomats Morton Abramowitz et al. at 1-21, McCarver v. North Carolina, 2000 U.S. Briefs 8727 (N.C. June 8, 2001) (later refiled in *Atkins v. Virginia*).

28. *See* Baktybek Abdrisaev, Editorial, *Penalties in Kyrgyzstan*, N.Y. TIMES, June 30, 2001, at A14.

practical understanding of how to make those ideas useful to anybody else. And so, too often we witness decision makers making policy without theory, activists implementing tactics without strategy, and scholars generating ideas without influence.

My belief is that we can bridge the tragic triangle through the concept of transnational legal process. It functions both as a theory of explanation and a blueprint for action. I do not believe that the principles of international law are self-executing any more than I believe that principles of medicine are self-executing. Anyone knows that if you want to use medical theories to make a patient's body better, you should call a good doctor. Similarly, if you want to use legal theories to persuade a body politic to obey international law, you should call a lawyer who is skilled in the manipulation of transnational legal process.

III.
TRANSNATIONAL LEGAL PROCESS AND THE "AXIS OF DISOBEDIENCE" AFTER SEPTEMBER 11TH

Let me now turn to the final part of this lecture: how the concept of transnational legal process helps to explain where we are after September 11th, particularly with regard to the three countries I mentioned earlier: North Korea, Iraq, and the United States.

As everybody knows, North Korea is one of the most isolated countries in the world. It is also one of the biggest scofflaws. In 1993, North Korea faced a crisis because it could not provide power and food to its own people. Instead of addressing those core concerns, the North Koreans started building nuclear weapons. Significantly, North Korea, headed by that strange dictator, Kim Jong Il, stands almost entirely outside the international legal system. So, if you look at my earlier list of factors that promote compliance, one encounters great difficulty in trying to appeal to such notions as political identity, rule legitimacy, or appeals to the international community. Faced with this tough choice, the Clinton administration chose to appeal to the North Koreans through a combination of self-interest and legal process. The administration decided that coercion was not a realistic option in a situation in which so many American soldiers and so many South Korean citizens would be put at risk by any military approach. Instead, the Clinton administration sought to enmesh the North Koreans in a multilateral diplomatic framework. Within this so-called "Agreed Framework," the United States, South Korea, and Japan would engage North Korea diplomatically, with a single message: If you give up your nuclear program, or reduce it, we'll give you, in return, involvement in the international community, increase in aid, and the expansion of cultural and economic links.[29]

The American hope was that by enmeshing the North Koreans in this framework of processes, institutions and regimes, the North Koreans would come to see their self-interest as working within the system. The hope was that

29. *See* James T. Laney & Jason T. Shaplen, *How to Deal with North Korea*, FOREIGN AFF., Mar.-Apr. 2003, at 16.

the North Koreans would come to develop a more law-abiding political identity, and over time would come to internalize a rule of nuclear restraint into their internal value set, shifting eventually from a law-violating to a law-abiding approach.

So constructed, the Agreed Framework functioned moderately well for about a decade. While there is no doubt that the North Koreans violated it, neither should there be any doubt that it had a restraining effect on North Korea's nuclear behavior. Indeed, Deputy Secretary of State Richard Armitage recently testified that "there are dozens of nuclear weapons that North Korea doesn't have because of the framework agreement."[30] The North Koreans placed moratoria on tests of long-range missiles; they admitted that they had kidnapped Japanese citizens; they allowed greater inspections; and they started a bilateral dialogue with then South Korean President Kim Dae Jung.[31] In November 2000, in what appeared to mark a new thaw in the bilateral relationship, the North Koreans met in Pyongyang with a high-level delegation from the United States led by Secretary of State Madeleine Albright.[32] My point is that even if this transnational legal process approach did not work perfectly, it was working. It was based on the right idea: using process to get the North Koreans to accept international norms as part of their internal value set. Most fundamentally, it put into motion a transnational process that could have led, eventually, to the internalization of norms into the North Korean system.

In January of 2001, the Bush administration came in and abruptly abandoned this approach. They stopped negotiating, and instead began making coercive noises, naming North Korea as one of the three countries—along with Iraq and Iran—that formed the so-called "Axis of Evil." [33] Now, having met and spent a number of days with Kim Jong Il, I can tell you that he may be strange and cruel, but he is by no means stupid. He can certainly count to three. And when you are on a list of three "evil" countries, and the first labeled country has been attacked, you might well decide that your best option is to gain leverage by resuming the process of rebuilding nuclear weapons, which is exactly what he did.[34] That quickly led to the intolerable situation in which the North Koreans were once again "going nuclear," and we Americans were doing essentially nothing about it.

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30. *See* Testimony of Deputy Secretary of State Richard Armitage Before the Senate Foreign Relations Committee on North Korea, FED. NEWS SERVICE, Feb. 4, 2003 ("I think it's quite clear that from 1994 to now, Yongbyon itself did not produce more plutonium, which could be turned into nuclear weapons. And so, there are dozens of nuclear weapons that North Korea doesn't have because of the framework agreement, and we have to acknowledge that, I believe.").

31. *See generally* Laney & Shaplen, *supra* note 29, at 10-11.

32. I was lucky enough to serve on that delegation, which was the highest-level American delegation ever to visit North Korea.

33. *See generally* Laney & Shaplen, *supra* note 29.

34. *See* Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1492-93 (2003) (noting Kim Jong Il's decision to "build" more bargaining chips by lifting the freeze at Yongbyon, beginning to enrich plutonium to make nuclear weapons, ousting weapons inspectors, openly cheating on other international agreements, and . . . announcing North Korean withdrawal from the Nuclear Nonproliferation Treaty").

What happened next? After months of non-engagement, in April 2003, the Bush administration finally returned, you guessed it, to a transnational legal process strategy. After a series of false starts, the United States re-engaged the North Koreans within a new multilateral, diplomatic framework, which will likely include elements of the old Agreed Framework, while seeking to be more verifiable and less susceptible to North Korean blackmail.[35] In short, after diverting our policy toward counterproductive strategies of naked coercion, we eventually returned months later to where we began: to dealing with a noncompliant North Korea through a transnational legal process approach based on promoting self-interest and norm-internalization.

It will not surprise you that much the same analysis applies to the case of Iraq. Saddam Hussein ranked right up there with Kim Jong Il as one of the gross violators of international law in the world: of human rights treaties, disarmament treaties, and cease-fires. In 1991, as we all know, during the Gulf War, the United States and its allies used a coercive approach, but within a framework of international law, to force Saddam to leave Kuwait through Security Council resolutions that created an inspections regime that was initially working.[36] Over the years, that regime atrophied, until we arrived at a situation of massive Iraqi noncompliance.

In what was initially a worthwhile approach, the Bush administration went to the U.N. General Assembly and said we are ready to use coercion, if necessary, within the U.N. framework to enforce international law. Through the cooperation of British Prime Minister Tony Blair and U.S. Secretary of State Colin Powell, the United States brought both issues—use of force and disarmament—back within the Security Council framework. With United Nations Security Council Resolution 1441, the United States achieved a significant and unanimous diplomatic success.[37] I consider Resolution 1441, which was unanimous, to be a classic piece of transnational legal process. An interaction generated an interpretation that Iraq was in material breach of international law and set up a process—essentially a public trial of disarmament-type facts—that went on for about four months. The broader goal was internalizing a norm against weapons of mass destruction into the resistant Iraqi system.

In hindsight, the transnational legal process approach was working. For whatever reason, norm internalization seems to have been working. Whatever weapons of mass destruction were being held in Iraq, they were being removed.

35. *See* Karen DeYoung & Doug Struck, *Beijing's Help Led to Talks: U.S. Cuts Demands on North Korea*, WASH. POST, Apr. 17, 2003, at A1.

36. *See, e.g.*, S.C. Res. 678, U.N. SCOR, 45th Sess., at 28, U.N. Doc. S/RES/678 (1990), *reprinted in* 29 I.L.M. 1565 (1990).

37. *See* S.C. Res. 1441, U.N. SCOR, 57th Sess., U.N. Doc. S/Res/1441 (2002) ((1) deciding that "Iraq has been and remains in material breach of its obligations" through its failure to cooperate with inspectors and its failure to disarm; (2) affording Iraq "a final opportunity to comply with its disarmament obligations under relevant resolutions" by setting up an enhanced inspection regime and ordering Iraq to submit an accurate and complete declaration of its chemical, biological, and nuclear weapons programs; and (3) recalling that it had repeatedly "warned Iraq that it will face serious consequences as a result of its continued violations of its obligations.") Seven days after, Iraq reluctantly confirmed its intent to comply with the resolution.

Moreover, the transnational legal process approach took the Bush administration much further than it might have preferred down a legal, U.N. path. At first, the Bush administration said that it did not need a new resolution; then it got Resolution 1441. Then they said they did not need inspections; but they eventually pursued inspections for four months. Then they said they did not need a second Security Council resolution; but they pursued a second resolution, which they ultimately did not get. In the spring of 2003, we arrived at the now-famous tragic impasse where the Bush administration, feeling the pressure of its own military timetable, initially pursued a second piece of transnational legal process—a second, follow-on U.N. Security Council resolution that would permit an attack on Iraq. We then witnessed the ensuing destructive game of "chicken" between Presidents Bush and Chirac, wherein the French proclaimed that they would veto any resolution that called for force, while President Bush announced that he would go to war whether he got a second U.N. resolution or not. These incompatible proclamations created a zero-sum situation, where the only resolution that the U.S. thought was relevant—one authorizing the U.S. to attack Iraq—was one that the French were pre-committed to veto. This impasse also made it pointless to seek the support of the nine countries who were necessary to get a Security Council majority, because even close U.S. allies, such as Mexico or Chile, were unwilling to subject their citizens to controversial votes that they knew would become meaningless once either the U.S. chose to make war anyway or the French vetoed that resolution.[38]

Sadly, we all know what happened next. The U.S. abandoned the quest for a second Security Council resolution, attacked Iraq with the support of only a thin "coalition of the willing," and won a smashing military victory. The President quickly declared major combat operations over. But at this writing, months later, billions of dollars have been spent, many Americans and Iraqis have died, the United States seems mired in Iraq, and the American people and the world are recoiling from revelations of repugnant abuses of prisoners of war at the Iraqi prison at Abu Ghraib.[39]

Looking back, what went wrong? My point is that a transnational legal process solution was available but was tragically bungled. The Bush administration chose to frame the issue in bipolar terms: "either attack, or accept the status quo in which Saddam is building weapons of mass destruction." The underexplored legal process solution was to *disarm Iraq without attack* through a strategy of multilateral disarmament, enhanced containment, and more aggressive human rights intervention that would have driven Saddam out and into a system of accountability.[40] Iraq could have been disarmed through multilateral inspections under a U.N. scheme, and Saddam could have been brought to an International War Crimes Tribunal of the United States' making. So why didn't this

38. For a review of this history, see Koh, *On American Exceptionalism*, *supra* note 34, at 1516-19.

39. *See generally America and the Middle East: Fumbling the moment*, ECONOMIST, May 27, 2004.

40. *See id.* (elaborating upon this history and strategy).

third option materialize? For the simple reason that the Bush administration's goal, as it finally admitted, was not just disarmament, but regime change.

But again we ask a transnational legal process question: Why did the United States not do more to develop a "Miloševic-type solution," where Saddam and his sons would be prosecuted for their offenses before some judicial tribunal? And why not invest that energy to create such a tribunal to avoid invasion and occupation, which is exactly what happened in Belgrade, when the United States drove out Slobodon Miloševic without invasion? When the war began, both President Bush and Secretary Rumsfeld announced to the Iraqi high leadership, "you *will* be prosecuted," but that only raised the obvious question—where? The United States has unsigned the International Criminal Court (ICC) treaty, and Iraq is not a party to that treaty either.[41] To get a Chapter VII resolution from the Security Council that the United States has just snubbed will be very difficult. So what the Bush administration failed to see was that by rejecting a legal process approach, it limited itself to coercive solutions, which have now ironically diminished its capacity for global leadership under a banner of rule of law. A legal process approach would have allowed the United States to achieve all of its objectives: to oust Saddam without attack, to rid Iraq of weapons of mass destruction, to promote human rights, to remain within a legal framework, to leave open the possibility for U.N. support for reconstruction efforts, *and* still to hold Saddam accountable. Instead, the United States myopically rejected all of these options and left itself with a coercive, unilateralist approach that has now greatly diminished its capacity for global leadership.

Turning to the United States, the final member of the "axis of disobedience," our greatest surprise should be how quickly after September 11th we turned the story from the non-compliance of others with international law, to our own non-compliance. Examples abound: first and most obviously, the U.S. unsigning of the International Criminal Court Treaty; second, the U.S. attitude towards the Geneva Conventions—including its actions in Abu Ghraib, its decision to create zones in Guantanamo in which people are being held without Geneva Convention rights[42] as well as to designate certain U.S. citizens within the United States as enemy combatants;[43] and third, the death penalty, which

41. In one of his last acts, President Clinton signed the Rome Statute of the International Criminal Court on December 31, 2000. *See Clinton's Words: "The Right Action,"* N.Y. TIMES, Jan. 1, 2001, at A6. In May 2002, however, the Bush administration purported to unsign the treaty and notified the United Nations that it did not intend to become a party to the Rome Statute. *See* Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to Kofi Annan, U.N. Secretary General (May 6, 2002), *available at* http://www.state.gov/r/pa/prs/ps/ 2002/ 9968.htm.

42. *See* Koh, *On American Exceptionalism*, *supra* note 34, at 1509.

43. At this writing, the legality of that status is being litigated before the U.S. Supreme Court in the case of two U.S. citizens now being held on U.S. soil in a military brig: Jose Padilla (the so-called "dirty bomber") and Yasser Hamdi, a Louisiana-born soldier captured in Afghanistan, brought to Guantanamo, and eventually to the United States. Both cases raise the question whether the U.S. courts should permit U.S. citizens to be held indefinitely and without counsel on U.S. soil based on ambiguous statutory authority, and whether such citizens can be placed in the essentially rights-free status of "enemy combatant," as distinct from the rights-bearing statuses of "prisoner of war" or "criminal defendant."

has become a growing irritant in the relationship between the United States and the European Union, even in the war against terrorism. What we are witnessing is nothing less than an assault by our government on the transnational legal process that we created after World War II in our own perceived national interest.

Remember the history. After WWII, the United States constructed a world public order devoted to liberal internationalism. Its effectiveness was muted by the intense bipolarity of the Cold War. But after the Berlin Wall fell—from 1989 to 2001—an era of global optimism ensued in which the United States tried to revive the notion of using global cooperation to solve global problems, such as war crimes, global warming, trade imbalances, absence of democracy, development, AIDS, transnational crime, and drugs. The approach adopted by the United States was simple: more diplomacy, more human rights, more democracy, more legal process. To maintain this structure of global cooperation, the United States supported the creation of an elaborate legal framework, a legal exoskeleton if you will, to constrain and facilitate its own actions. Then came September 11th, the classic global problem to be solved by global cooperation. But the Bush administration chose to respond to that crisis not within the existing post-war framework—not by using the existing legal exoskeleton—but instead by creating a new architectural counter-response, what I call "The Bush Doctrine."

Three years later, five elements of the Bush Doctrine have clearly emerged:[44]

1. *Achilles and his heel.* After September 11th, the United States became intensely aware that, like Achilles, we are a superpower, but with super-vulnerability. To respond, the Bush Doctrine has resolved to use our superpower status to protect our super-vulnerability.

2. The chosen means, the promotion of *Homeland Security*, in both the defensive and preemptive sense. To protect our vulnerability, we employ domestic security, immigration control, security detention, information awareness, even while asserting under international law a novel right forcibly to disarm any country that presents a gathering threat to our security.

3. This concept is supported by a dramatic *Shift in our Focus on Human Rights*. In 1941, Franklin Delano Roosevelt had set the global standard for human rights by setting our sights on the four freedoms: freedom of speech, freedom of religion, freedom from want, and freedom from fear.[45] Yet Bush administration officials have reset our human rights priorities to say that only one freedom really counts, and that is freedom from fear. They have created a two-pronged strategy of *extralegal zones*, predominantly in Guantanamo, where they have effectively asserted that no law applies, and *extralegal persons*, so-called "enemy combatants," who may, like Jose Padilla, be U.S. citizens held on American soil.

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44. For elaboration, see Koh, *On American Exceptionalism*, *supra* note 34, at 1497-1500.

45. Franklin Delano Roosevelt, Eighth Annual Message to Congress (Jan. 6, 1941), *in* 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790-1966, at 2855 (Fred L. Israel ed., 1966).

4. *Top-down democracy promotion.* Our strategy for democracy-promotion has shifted from "bottom-up democracy" to "top-down democracy." Since the U.S. invasion of Afghanistan, democracy-promotion efforts have shifted toward *militarily imposed democracy*, characterized by United States-led military attack, prolonged occupation, restored opposition leaders and the creation of resource-needy post-conflict protectorates.[46] Globally, a four-pronged strategy seems to be emerging: "Hard," militarily imposed democracy promotion in Iraq and Afghanistan; "soft," diplomatic democracy promotion in Palestine; optimistic predictions of "domino democratization" elsewhere in the Middle East; and reduced democracy-promotion efforts elsewhere.

5. *Strategic Unilateralism/Tactical Multilateralism.* Fifth and finally, if the Clinton administration had pursued its foreign policy goals through what my friend Strobe Talbott has called "Strategic Multilateralism and Tactical Unilateralism," the Bush administration has shifted instead to an approach characterized by "Strategic Unilateralism and Tactical Multilateralism." Avoiding genuine multilateral consultation, the United States has acted alone, enlisting for multilateral "cover" those other nations it can persuade or coerce to go along.

If this is the emerging approach, what is wrong with it? First, instead of promoting universal values, the United States has promoted double standards by which other nations are held accountable to human rights standards from which the United States exempts itself. The recent horrors at Abu Ghraib show that the United States is now reaping the whirlwind of its strategy of condoning wide-scale departures from traditional prisoner-of-war protections. By treating these legal regimes as a nuisance to be disregarded in the war against terrorism, the Bush administration forgot the critical role that these legal protections play both in protecting our troops from violations and in protecting our country from needless humiliation by conduct that most Americans find abhorrent.[47] Second, by engaging in this unilateralism, the United States has diminished its standing in the international regimes in which it takes part, limiting its "soft power" or its power to persuade in the global arena.[48] We see this diminished standing in our mounting incapacity to mobilize other countries to help us in the daunting task of rebuilding Iraq. Third and most sadly, this strategy has converted us from the major supporter of the post-war global legal exoskeleton into the most visible

46. *See* Chibli Mallat, *Focus on Human Rights Offers Hope of Reconciliation*, TIMES (London), Mar. 29, 2003, at A13.

> Welcome to the post-modern war. Even before it started, this war appeared surreal, not least for the idea that the United States and Britain were "liberating Iraq" while refusing to involve any Iraqi in the process of change. . . . Even [hawkish Iraqis] are uneasy about American plans to rule Iraq "directly," echoing a universal rejection in the Arab world of American or British occupation.

Id.

47. *See, e.g.*, Charlie Savage, *As Threats to US Changed, So Did Prison Tactics*, BOSTON GLOBE, May 16, 2004, at A1.

48. *See* JOSEPH S. NYE, JR., THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE 9 (2002) ("Soft power rests on the ability to set the political agenda in a way that shapes the preferences of others. . . . If I can get you to *want* to do what I want, then I do not have to force you to do what you do *not* want to do. If the United States represents values that others want to follow, it will cost us less to lead").

outlier trying to break free of the very legal framework we created and supported for half a century.

So this, in a nutshell, is my diagnosis: the United States has unwisely avoided the channels of transnational legal process with respect to North Korea, Iraq, and its own conduct. But if that is the problem, what is the solution? Quite simply, the United States and those within it who are committed to the rule of law should now invoke transnational legal process as a way to address the continuing problems in each case.[49] In North Korea, as I have already said, the obvious solution is to negotiate another Agreed Framework—a transnational legal process solution that continues the process of norm-internalization with respect to a ban on nuclear weapons that was so unwisely abrogated when the Bush administration took office. Now that we have occupied Iraq, our goal must similarly be norm-internalization: the promotion of a domestic constitutional reform that internalizes international human rights norms into the emerging Iraqi legal system, with the goal of promoting a fundamental transformation in the character of the country.

And what about the United States? On the one hand, America is the toughest case because it is the most powerful nation in the world. On the other hand, there are so many legal, political, and social channels through which norms can seep into U.S. law—what I have elsewhere called channels of legal, political and social internalization—that the United States should be the most permeable society of the three to international influence.

Our efforts to renounce transnational legal process have only triggered a counter-response. Take, for example, the International Criminal Court (ICC). The Bush administration unsigned that court's treaty, hoping that that would be the end of America's relationship with it. But we should realize that every future act by which the United States cooperates with the ICC constitutes a *de facto* repudiation of the political act of unsigning. Over time, the new prosecutor's office in the ICC can internalize guidelines for responsible prosecution. Advocates of the ICC within the United States can try to develop support for it. Most of all, the United States can engage in case-by-case cooperation with the ICC over particular cases, such as the prosecutions recently brought with respect to Uganda and the Congo or by honoring requests for the provision of classified information within U.S. control. My point is that as much as the Bush administration may wish to be free of the legal exoskeleton that the United States has helped create, already that legal framework is visibly pushing back. A successor administration could gradually reengage with the Court on a piecemeal basis, restoring our national respect for and within that evolving institution.

Similarly, with regard to the Geneva Conventions and Guantanamo, U.S. conduct has not gone unchallenged, but rather, has been aggressively litigated in a variety of fora, not just in U.S. courts, but in the Inter-American Commission on Human Rights,[50] before the British courts,[51] and increasingly, before the U.

49. For a fuller account, see Koh, *On American Exceptionalism*, *supra* note 34, at 1501-26.

50. Jess Bravin, *Panel Says U.S. Policy on Detainees in Cuba Breaks International Law*, WALL ST. J., Mar. 14, 2002, at B2; Inter-Am. Comm'n on Human Rights, Request for Precautionary

S. Supreme Court. At this writing, three cases have been argued before the U.S. Supreme Court this term—the Guantanamo cases arising from the D.C. Circuit,[52] the José Padilla case in the Second Circuit[53] and the Yasser Hamdi case in the Fourth Circuit.[54] Each of these cases asks whether U.S. conduct is consistent with the Geneva Conventions as well as the U.S. national interest and tests the extent to which our Supreme Court will internalize these international standards into U.S. law.

And what about the death penalty? As I speak, advocates of transnational legal process are bringing suits throughout the United States in an effort by the government of Mexico to force reconsideration of U.S. state death sentences imposed upon 51 Mexican nationals who were arrested and convicted and sentenced to death in U.S. courts without receiving the consular notification required under the Vienna Convention on Consular Relations.[55]

Similarly, landmark litigation is currently pending before the U.S. Supreme Court challenging the constitutionality of the juvenile death penalty under both domestic and international law.[56] At this writing, the United States and Somalia are the only two countries in the world that permit the execution of juveniles, inasmuch as they are the only two countries that have not ratified the U.N. Convention on the Rights of the Child.[57] Since 1989, the United States has carried out more publicly reported executions of juvenile offenders than any other country in the world. In 1999, the only country other than the United States to admit to executing a juvenile offender was Iran.[58] As abolition of the death penalty has become a cornerstone of European human rights policy, Central and Eastern European countries who aspire to enter the European system have increasingly calculated that the benefits of joining the European political and economic sys-

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Measures, Detainees in Guantanamo Bay, Cuba (Mar. 12, 2002), *available at* http://www.photius.com/rogue_nations/guantanamo.html (last visited June 8, 2004).

51. *See* Abbasi & Anor v. Sec'y of State for Foreign & Commonwealth Affairs, [2002] E.W.C.A. Civ. 1598, 2002 WL 31452052.

52. Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 72 USLW 3171 (U.S. Nov. 10, 2003) (No. 03-334), *argued* April 20, 2004.

53. Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *cert. granted*, 72 USLW 3488 (U.S. Feb. 20, 2004) (No. 03-1027), *argued* April 28, 2004.

54. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *cert. granted*, 72 USLW 3434 (U.S. Jan. 9, 2004) (No. 03-6696), *argued* April 28, 2004.

55. Simons, *supra* note 10.

56. *See* Roper v. Simmons, 112 S.W.3d 397 (S.C. Mo. 2003), *cert. granted*, 72 USLW 3310 (U.S. Jan. 26, 2004) (No. 03-633) *to be argued* in October 2004 term.

57. Article 37(a) of the Childrens' Rights Convention states that "capital punishment . . . shall [not] be imposed for offences committed by persons below eighteen years of age." Convention on the Rights of the Child, G.A. Res. 44/25, annex, 44 U.N. GAOR, Supp. (No. 49), art. 37(a), U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990. *But see* Stanford v. Kentucky, 492 U.S. 361 (1989) (holding, by a five-to-four vote, that the Eighth Amendment does not prohibit execution of juvenile offenders who committed their offenses at age sixteen).

58. *See* AMNESTY INTERNATIONAL, THE EXCLUSION OF CHILD OFFENDERS FROM THE DEATH PENALTY UNDER GENERAL INTERNATIONAL LAW (July 2003), *available at* http://web.amnesty.org/abolish/reports/exclusion_child_offenders.html (last visited June 8, 2004). AMNESTY INTERNATIONAL, REPORTED EXECUTIONS OF CHILD OFFENDERS SINCE 1990 (July 18, 2003) [hereinafter AMNESTY REPORT], *at* http://web.amnesty.org/library /index/engact500042003 (last visited June 8, 2004).

tem far exceed any benefits that might result from the occasional use of the death penalty against juveniles.[59] Thus, from 1994-2003, Amnesty International recorded twenty executions of child offenders in only five countries: Democratic Republic of the Congo, Iran, Pakistan, Nigeria, and—the leader, with 13—the United States.[60] Of these, "[t]he only country that openly continues to execute child offenders within the framework of its regular criminal justice system is the USA."[61] Even within the United States, executions of child offenders since 1973 have been carried out in just seven states, with over two-thirds being committed by Texas and Virginia.[62] Given these facts, any commonsense understanding of a ban against "cruel and unusual punishments" should now include a practice that is deemed not just unusual, but illegal by all but five countries in the world and all but a few states even in this country. Thus, *Roper v. Simmons*, a case that will be heard by the U.S. Supreme Court early in the 2004 Term, presents the next major challenge for transnational legal process. In that case, as in the September 11th cases, the Court will decide whether to internalize foreign and international law into its constitutional analysis. In particular, the Court will have to decide whether, under evolving standards of decency, state executions of child offenders now violate the Eighth and Fourteenth Amendments of the U.S. Constitution.

How these cases are resolved remains to be seen. But there should be no doubt that in each of these areas, the battleground will be the realm of transnational legal process. In each area—North Korea, Iraq, the ICC, the Geneva Conventions, Guantanamo, the death penalty—the question will be the same: whether interactions can be brought in appropriate fora that will lead to interpretations of international law that will eventually internalize these global norms into the domestic law of the resisting nation.

CONCLUSION

In closing, I hope I have convinced you that same-sex sodomy, affirmative action, North Korea, Iraq, Guantanamo, enemy combatants, the juvenile death penalty, and the ICC are all features of transnational legal process after September 11th.

But increasingly, in a post September 11th world, I believe we are facing a new kind of Jeopardy—to coin a phrase. On the one hand, the United States has long recognized and urged a norm-based approach to international cooperation, what I call a strategy of "norm-based internalization." But in recent months, the United States has been trying to break free from the very legal structure—the

59. As the Death Penalty Information Center has chronicled, steps have recently been taken to abolish or impose a moratorium on the death penalty in such countries as Poland, Latvia, Azerbaijan, Georgia, Bulgaria, Estonia, and Lithuania. *See generally* RICHARD C. DIETER, ESQ., INTERNATIONAL PERSPECTIVES ON THE DEATH PENALTY: A COSTLY ISOLATION FOR THE U.S. (Oct. 1999), *available at* http://www.deathpenaltyinfo.org/article.php?did=127&scid=30 (last visited June 8, 2004).

60. AMNESTY REPORT, *supra* note 58.

61. *Id.* at sec. 5.

62. *See* DEATH PENALTY INFORMATION CENTER, JUVENILES AND THE DEATH PENALTY, *available at* http://www.deathpenaltyinfo.org/article.php?did=205&scid=27 (last visited June 8, 2004).

very legal exoskeleton it created after World War II—by pursuing a Bush Doctrine that rests instead on a narrow theory of coercive, power-based internationalism.[63]

We will see how this tension is resolved in the months ahead. But I, for one, believe that as a nation conceived in liberty, and dedicated to certain inalienable rights, the United States has very strong impulses to address the world not just in the language of power, but more fundamentally, in the language of power coupled with principle. We, as scholars, lawyers, thinkers and activists who care about the rule of law, should not just be bystanders at this pivotal time. Each of us should do what we can to use transnational legal process after September 11th to prod this country that we love to follow the better angels of our national nature.

63. To see the tension between America's approach to norm-based internationalism and coercive, power-based internationalism, see President Bush's speech to the U.N. General Assembly on Sept. 23, 2003, *available at* http://www.whitehouse.gov/news/releases/2003/09/20030923-4.html (last visited June 8, 2004).

Berkeley Journal of International Law

Volume 22 | Issue 3 Article 2

2004

The Case for International Antitrust

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The Case for International Antitrust

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We already live in a world of international competition policy. Although no international institution or agreement governs the subject, firms doing business internationally face a de facto regime generated by the overlap of domestic regimes. The question, then, is not whether there should be an international competition policy, but rather whether the existing system is better than what might otherwise exist. Examination of how globalization and trade interact with domestic competition policies and how they influence the incentives of domestic policymakers suggests there is significant value in increased cooperation among states. Furthermore, this cooperation must extend beyond the current set of information-sharing agreements and bilateral negotiations to include substantive antitrust issues.

I.
THE CASE FOR COOPERATION

A. The Costs of Noncooperation

The regulation of international activity by national regulators generates costs and benefits that are not fully internalized by domestic decision makers. This failure to take all effects into account is inevitable in a world with neither a single governmental body charged with establishing objectives and policies nor a forum in which domestic authorities can negotiate effectively over their domestic policies and the international implications thereof. Among the costs generated by the current noncooperative system are the effects of multiple regulators reviewing a single transaction (including redundant filing and reporting obligations), the risk of biased prosecutions based on the nationalities of the parties, and the impact of international activity on the substantive rules chosen by states.

1. Transaction Costs

The most obvious problem is the duplication of costs. Firms must satisfy regulatory agencies in many countries, meaning they must hire legal representation in each state and meet the reporting and disclosure requirements of each jurisdiction. At a minimum, this generates duplicative costs and wastes time. It

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may also impose conflicting requirements on firms. Additional costs are borne by the regulatory agencies that must review a firm's documents. Because each country's regulators act independently, each country must review and evaluate the firm's filing de novo, generating redundancy and waste in the review process.

2. *Bias*

When transactions cross borders, regulatory authorities review the activities of both foreign and domestic firms. Agencies will be tempted to be lenient toward locals and tough on foreigners in this review process, even if no such double standard is called for in the relevant legislation. Furthermore, even if the process is unbiased, foreign firms subject to review—as well as their governments—may believe that an unfavorable ruling represents an attempt to penalize foreign firms. This perception is itself costly because it may chill firm behavior or generate hostility among states.

Ample evidence suggests that states are, indeed, biased in their application of competition policy. Export cartel exemptions are the most obvious example.[1] Perhaps less obvious are the industry exemptions that American law provides to several privileged industries, including international aviation, international energy, international ocean shipping, and international communications. To the extent local firms benefit from these exemptions, they enjoy an advantage over their foreign rivals. Although it is more difficult to demonstrate bias at the administrative level than at the statutory level, favoritism toward locals is likely in the selection of cases to pursue. One would expect more aggressive prosecution of foreign firms than domestic firms, either because the regulators themselves view local firms more favorably or because political leaders bring pressure to bear on regulators and encourage them to pursue foreign firms rather than national champions.

The increased transaction costs of noncooperation and the impact of bias are familiar in the international antitrust literature, so this article does not dis-

1. American antitrust laws have long provided an explicit exception for export cartels. The Webb-Pomerene Act, 15 U.S.C. §§ 61-66 (2000), adopted in 1918, creates an exemption from the Sherman Act and from Section 7 of the Clayton Act for export associations formed for the sole purpose of engaging in export trade and actually engaged solely in such export trade. Export associations must register with the FTC. § 65. The Act does not protect activity that has an anticompetitive effect within the United States, and there are other restrictions on its applicability. *See* A. Paul Victor, *Export Cartels: An Idea Whose Time Has Passed*, 60 ANTITRUST L.J. 571, 572 (1991). By the early 1980s, the Webb-Pomerene Act was, for various reasons, not being used by exporters and was, in that sense, no longer effective. *See id.* at 573–74. Congress responded by enacting the Export Trading Company Act of 1982, 15 U.S.C. §§ 4001-16 (2000), and the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (2000). The Export Trading Act allows a firm to apply for and receive a Certificate of Review from the Secretary of Commerce by demonstrating that its activities will not have harmful effects on the United States. *See* 15 U.S.C. § 4013. The certificate does not grant complete immunity to the firm, but it does provide immunity from treble damages and criminal liability. It also establishes a presumption of legality for any activity that is covered by the certificate. § 4016(b)(3). The Foreign Trade Act offers a more direct exemption for export activity. It exempts from Sherman Act prosecution activity that does not have a "direct, substantial, and reasonably foreseeable" effect on American commerce. 15 U.S.C. § 6a(1) (2000). Other countries have similar exemptions.

cuss them further. It focuses instead on the question of how and why international trade distorts substantive antitrust policies and makes sound policymaking virtually impossible without cooperation. The analysis that follows requires only the modest assumption that each state pursues its own interests without regard for the interests of other states. If this is so, international trade will distort decisions on antitrust relative to the regime each state would choose if it were a closed economy. These systematic and predictable deviations represent attempts to externalize the costs and internalize the benefits of the exercise of market power across borders. The analysis holds for any reasonable assumption about government behavior, whether based on public choice assumptions or the alternative hypothesis that governments seek to maximize the well-being of citizens.[2] To keep the presentation simple, I assume that states do not consider foreign costs and benefits at all, but even this assumption of complete disregard for foreigners could be relaxed. The only absolutely necessary assumption is that local interests are favored over foreign interests.

B. International Trade and Domestic Policy

To see how international trade can distort policy decisions in antitrust, suppose that a country exports virtually all of its production in imperfectly competitive industries.[3] (Only imperfectly competitive industries are of concern here because firms in competitive industries are not problematic from an antitrust perspective.) When domestic firms engage in activities that might be considered anticompetitive, the great majority of the harm is felt by foreigners, whereas the benefits are felt by local firms. Policymakers, looking only to local costs and benefits, will take into account all of the resulting benefits enjoyed by firms, but will consider only that fraction of the harm that is felt by local consumers. A government designing an antitrust policy in this context would, therefore, favor the interests of producers over those of consumers. Note that this effect operates in addition to any preference for one group or the other generated by domestic political concerns. One way to think about this is to imagine that the policymaker adjusts the payoffs to local consumers and producers to reflect the relative weights or priorities that he or she assigns to each. In contrast to local interests, foreign interests are not considered at all—they receive a weight of zero. Thus, trade causes the country to favor producers over consumers more than would be the case in the absence of international trade.

To illustrate, imagine that a state favors firm interests over consumer interests. If the country is a closed economy, it will adopt policies that favor firms but, in evaluating policy options, will give consumer interests at least some

2. For example, if government officials behave as public choice models predict—pursuing campaign contributions, political support, and a good public image—the discussion that follows applies as long as it is primarily domestic interests that influence the goals of those officials. In other words, as long as domestic contributors dominate campaign contributions, important political supporters are locals, and the public image that matters is domestic, the discussion that follows is consistent with public choice assumptions.

3. See Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501 (1998), for a more detailed discussion of the impact of trade on competition policies.

weight. Now consider a country that has the same political economy but that exports most of the production of its imperfectly competitive industries. Because the political economy favors firms, the interests of domestic producers are still weighted more heavily than those of domestic consumers. In addition to this effect, the impact of the antitrust regime on consumers is underestimated because foreign consumers receive zero weight in the government's calculus. This generates policies that are still more favorable to firms, at the expense of consumers, than was the case in the absence of trade.

Several strategies are available to governments that wish to favor firms over consumers. The easiest of these, the already-discussed export cartel exemption, is a relatively crude instrument because it applies only if all of a firm's production is exported. A more nuanced strategy is to change the state's substantive laws. This benefits all firms, including those that sell some of their goods domestically. Returning to the example of a country that exports most but not all of its production in imperfectly competitive industries, the government could react to the pattern of trade by weakening its competition laws. This strategy opens the door to more anticompetitive activity by local firms than would be the case in the absence of trade, yet it retains some limits on conduct to protect local consumers.

Imports generate an analogous distortion. If a country is able to regulate extraterritorially, it has an incentive to tighten its policy (relative to what a closed economy would do) in response to the importation of goods in imperfectly competitive markets. In the case of imports, the full amount of harm suffered by local residents is included in the policy calculus, whereas only the benefits to local firms are considered. As with exports, this generates a predictable distortion regardless of how policymakers weigh the interests of firms and consumers.

The combination of trade and consumption patterns in imperfectly competitive markets suggests how a rational state's competition policy will differ from a closed-economy baseline. Assume that there are two kinds of goods: those that trade in competitive markets and those that trade in imperfectly competitive markets. Firms whose goods trade in competitive markets have no market power and therefore cannot engage in conduct that raises competition policy concerns. Firms whose goods trade in imperfectly competitive markets, however, enjoy market power, and states attempt to regulate these firms through the use of antitrust laws. For simplicity it is assumed that if a country's firms are responsible for x percent of global production of imperfectly competitive goods, those same firms enjoy x percent of the monopoly rents generated by the sale of those goods.[4] The government of that country, then, will take into account x percent of the producer surplus generated by a change in its policies. Thus, for example, a country's relaxation of its competition policies might lead to an increase in producer surplus. But the government ignores the portion of that sur-

4. This assumption could be relaxed without changing the analysis, but at a cost of considerably more complexity.

plus that falls outside the country. If the same country's consumers account for y percent of global consumption of goods sold in imperfectly competitive markers, then the government will take into account y percent of the global effect of its policies on consumers.

The net effect of trade, then, depends on the ratio of a country's global share of production to its global share of consumption of imperfectly competitive goods. Notice that a closed economy would be one in which these are equal ($x = 100 = y$). If a country is a net exporter (meaning that its share of global production exceeds its share of consumption, $x > y$), the country will take into account a larger portion of its policy's impact on producers than on consumers. Relative to what it would do if it were a closed economy, the country will favor the interests of producers, yielding a more permissive competition policy regime. If a country is a net importer of these goods ($x < y$), the opposite is true—the preferred policy is stricter than would be the case in a closed economy. International activity, then, causes a state's domestic antitrust laws to deviate in systematic and predictable ways from what that state would choose if it were a closed economy. These deviations represent attempts to externalize the costs and internalize the benefits of the exercise of market power across borders.

C. Choice of Law

In part because of the divergent interests just discussed, the current level of cooperation in international competition policy is quite modest. This lack of cooperation, however, has generated an "accidental" competition policy regime created by the interaction of national regimes and their choice-of-law rules. Because of these rules, a single activity may be overregulated or underregulated, depending on how it intersects with jurisdictional policies. Independent from, and in addition to, the distorting effects of international trade, the choice-of-law rules chosen by domestic systems interact to create a complex regulatory system that affects international activity but that is not controlled by any single authority.

1. Overregulation

The activities of firms doing business in the United States, the European Union (EU), and other states that apply their laws extraterritorially are often within the jurisdiction of two or more domestic regimes. The net effect is a more restrictive and burdensome set of substantive rules than exists under the legal regime of any single state. Consider a proposed merger of two or more large firms doing business in both the United States and the EU and subject to merger review in both jurisdictions: those firms face more regulation than they would under either of the domestic regimes. First, even if the substantive criteria for review were identical in the United States and Europe, the proposed merger could go forward only if both regulatory authorities permitted it. This duplicative review would not matter if regulatory review were a precise science, but of course it is not. Any review by regulators is affected by the idiosyncratic views of the individual reviewers, the culture of the reviewing agency, the politi-

cal climate in the country, and other factors. Requiring the approval of two independent regulatory bodies, therefore, increases the likelihood that an activity will be deemed a violation and increases the regulatory burden.

Second, firms doing business in states that apply their laws extraterritorially face a heightened burden because the substantive provisions of those laws are not identical across jurisdictions. Where legal rules vary across jurisdictions and all such rules must be followed, the relevant international legal regime consists of a medley of the strictest elements of each national regime. Suppose, for example, the activities of a firm are subject to the competition laws of Countries A and B. Assume that Country A has, relative to Country B, a restrictive policy with respect to horizontal restraints of trade and a permissive policy with respect to vertical restraints. For its own reasons, Country A believes this combination represents the optimal competition policy. Country B, however, believes that its regime, which is relatively permissive with respect to horizontal restraints but restrictive with respect to vertical restraints, is optimal. Firms subject to the jurisdiction of both states face a de facto regime that includes the strict horizontal restraint regulations of Country A and the strict vertical restraint regulations of Country B. This is a stricter policy than either Country A or Country B believes should exist.

In short, firms doing business in both the United States and the EU face an international competition policy regime that is more burdensome than the regime of either the EU or United States and very likely more restrictive than what either jurisdiction would choose if it were a closed economy. The only way to prevent such overregulation is to end the extraterritorial assertion of jurisdiction—which would impose its own costs, as discussed below—or enter into some form of cooperative policymaking.

2. *Underregulation*

Although some jurisdictions, including the United States, apply their laws extraterritorially, many countries (including most developing states) either do not have effective competition laws or do not apply their competition laws to conduct beyond their borders.[5] Business activity that takes place within these states also faces an accidental international competition policy, but its contours are more complex than is the case for businesses operating in the United States and the EU.

Consider, first, the impact of international trade on the domestic competition policy of a country that does not apply its laws extraterritorially. With respect to imported goods, the country is unable to prevent anticompetitive ac-

5. A country might choose to limit the jurisdiction of its laws to territorial conduct, or it may simply lack the ability as a practical matter to apply its laws abroad. Historically, every nation limited its laws to conduct within its territory. *See, e.g.*, Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). Even as extraterritoriality has become accepted, states have retained limits on the reach of their laws. In the United States, for example, the reach of the securities laws is limited by a variety of rules. Many developing countries have little choice but to opt for a territorial jurisdiction because they lack both the capacity and the political power to enforce their laws more broadly.

tivity by the foreign producers of those goods. Recognizing this, when policymakers shape the state's substantive competition policy, they only consider the impact of the law on domestic production. Put another way, because the domestic law cannot affect the behavior of foreign firms, the optimal policy for the state is the same as it would be if there were no imports. As long as domestic firms sell at least some of their products abroad, then, the state has an incentive to adopt competition laws that are more permissive than would be the case in a closed economy. (If local producers in imperfectly competitive markets only sell domestically, the local competition policy will be the same as it would be in a closed economy.) This is so because a tightening of the antitrust laws affects both producers and consumers. More restrictive laws hurt producers, while more competitive pricing benefits consumers.[6] Policymakers will tighten the laws until the marginal benefit to consumers equals the marginal cost to producers.[7] In a closed economy, all gains enjoyed by consumers are taken into account because all consumers are local. In a trading economy, however, this is not so. At least some consumers are located abroad, and the policymaker ignores all benefits conferred on these consumers by domestic laws. Because some of the benefits of tougher laws are ignored, the optimal policy for the state is less restrictive in the presence of trade.

One of the predictions of this analysis is that small, open economies—whose firms export a high percentage of their goods and whose consumers import a high percentage of their consumption—will have weak or nonexistent antitrust laws. This prediction is consistent with the empirical observation that small states rarely have significant antitrust laws. It is also consistent with the experience of the EU. When competition policy was made at the national level, the EU's competition policies were relatively permissive. When policy moved to the regional level (and as extraterritoriality came to be the practice), the EU adopted a much stricter antitrust regime.[8]

If no states applied their laws extraterritorially, the above analysis would lead to the conclusion that substantive competition laws are systematically more lenient than would be the case if all costs and benefits were taken into account. In fact, however, the conduct of these states that apply their laws extraterritorially affects the legal regime facing many firms, including some that do business in states that do not apply their laws to foreign conduct.

Because the United States and the EU apply their laws to foreign conduct that has a local effect, firms active in those markets are at least potentially sub-

6. Consumers need not always benefit from stricter antitrust laws, of course. In particular, they can be harmed if the tougher laws prevent firms from achieving efficiency gains. Even in that event, however, domestic policies will be weaker for a trading country without extraterritoriality than for a closed economy.

7. To account for the realities of the political economy, it may be more accurate to say that policymakers will tighten the laws until the net marginal gain to those policymakers is zero. As long as the policymakers' gains from tougher laws stem from the benefits to consumers and the costs stem from the burden on producers, the analysis presented above applies. That policymakers may weigh producer interests more heavily than consumer interests (or vice versa) does not affect the results.

8. *See* Guzman, *supra* note 3, at 1537–38.

ject to the laws of both jurisdictions. This overlap is relevant to all states, including those that do not apply their laws extraterritorially, because the EU and the U.S. regimes affect the global operations of producers. Imagine, for example, that two or more producers of passenger aircraft wish to merge. If they do so, they will enjoy greater market power, earn more profits for the newly merged firm, and increase the price of aircraft. A state that does not apply its laws extraterritorially can only reach the proposed merger if one of the firms happens to be located within its borders, and even then it can—at most—prevent its local firm from participating. The same proposed merger, however, will trigger jurisdiction in both the EU and the United States and can be blocked by either of those states. If the merger is blocked, this affects all states, including those that do not apply their laws extraterritorially. Economic activity within these states, then, is influenced by the competition policies of foreign states. This can yield benefits for a state that does not apply its laws extraterritorially, because it is able to free ride on the regulatory supervision of those countries that do apply their laws in this way.

A strategy of free riding is especially effective in the presence of an open trading regime because a firm can retain local market power only if it also has global market power. A firm that operates monopolistically locally but not internationally will earn excess profits from its local operations, attract competitors from abroad, and see its market power erode. If, however, a firm has market power internationally, it is likely to sell its products into the United States, the EU, or both.

Although free riding can operate as a substitute for domestic competition policy, it falls short of a satisfactory legal regime for states that do not apply their laws extraterritorially. In addition to the distortions already discussed, there are at least two further reasons why free riding is likely to yield suboptimal policy. First, if the impact of a particular activity is small in developed states but large in developing states, neither the EU nor the United States may bother to pursue a case. There is no reason to think that the costs and benefits of an activity are the same in all countries, especially when comparing developing countries to developed ones. As a result, a decision on whether to bring a case in the United States or the EU may be quite different from what is in the interests of a developing country.[9] Similarly, there are at least some goods that are sold only regionally (for example, regional periodicals) and that will not trigger jurisdiction in the United States or the EU.

Second, even when goods trade globally, the existence of a strong and effective competition policy in the United States and the EU, complete with extraterritorial application, may not prevent firms from engaging in anticompetitive conduct in other countries. Consider how a profit-maximizing firm with market power and global sales will react if it faces effective competition laws in some but not all of the states in which it does business. In states with an effective

9. In the market for pharmaceuticals designed to treat tropical diseases, for example, firms with market power may act in a way that would violate the substantive laws of the United States and the EU without attracting the attention of regulators in either jurisdiction.

policy, the firm would restrain its anticompetitive activities so as to remain within the law. But the firm need not sell at the same price everywhere. As long as arbitrage between markets is costly, the firm can charge higher prices in markets without effective competition laws or without laws that apply extraterritorially. Although the United States and the EU have jurisdiction over the firm, they have no reason to pursue a case if the firm's conduct in the United States and the EU mimics that of a firm in a competitive industry. Countries whose laws cannot reach the firm, then, may not be able to free ride on the competition laws of the EU and the United States. The empirical evidence suggests exactly this sort of market segmentation and price discrimination has taken place.[10]

Overall, the de facto competition policy regime that exists in countries that do not apply their laws extraterritorially is almost certainly a mix of overregulation in some markets (where EU and U.S. laws apply) and underregulation in other markets (where those laws do not apply or are not effective). Cooperation has the potential to reduce the level of regulation in the former markets and increase it in the latter.

D. The Promise of Cooperation

If we assume that governments pursue some measure of national welfare, government decisions in a closed economy represent optimal decisions in the sense that they take into account all relevant costs and benefits. Deviations from this closed economy policy represent attempts by states to externalize cost while internalizing benefits. The resulting policies are, by assumption, domestically optimal but are suboptimal from a global perspective because some costs and benefits are ignored. If we instead assume a public choice model of government, the analysis is more complex. Under this model, trade causes policies to move away from the closed economy policy, which may represent a move toward or away from the optimal policy, depending on the way in which public choice issues affect decision making.

To isolate the impact of trade on policy, assume for the moment that there is an international consensus on the objectives of antitrust policy and the appropriate way to achieve those objectives. Even under these assumptions, noncooperative states will not all adopt the same policies: Net importers will adopt relatively strict antitrust laws (assuming they can apply their laws extraterritorially), and net exporters will adopt relatively permissive laws. Nevertheless, because states have a shared view of the optimal antitrust law for a closed economy, they will be able, absent transaction costs, to reach an agreement that

10. *See, e.g.*, MARGARET LEVENSTEIN & VALERIE SUSLOW, WORLD BANK, PRIVATE INTERNATIONAL CARTELS AND THEIR EFFECT ON DEVELOPING COUNTRIES, (Background Paper for the *World Development Report*, 2001), *available at* http://www-unix.oit.umass.edu/~maggiel/ WDR2001.pdf; JOHN M. CONNOR, GLOBAL PRICE FIXING: OUR CUSTOMERS ARE THE ENEMY (2001); Lawrence J. White, *Lysine and Price Fixing: How Long? How Severe?*, 18 REV. INDUS. ORG. 23 (2001); JULIAN L. CLARKE & SIMON J. EVENETT, AEI-BROOKINGS JOINT CTR. FOR REGULATORY STUDIES, THE DETERRENT EFFECTS OF NATIONAL ANTI-CARTEL LAWS: EVIDENCE FROM THE INTERNATIONAL VITAMINS CARTEL, (Working Paper 02-13, Dec. 2002), *available at* http://www.aei.brookings.org/admin/authorpdfs/page.php?id=218.

implements that policy on a global scale. That is, states will agree on the most efficient global antitrust regime. This result is an application of basic theories of federalism, which suggest that decision-making responsibility should be assigned to the lowest level of government that is capable of internalizing economic externalities.[11] In the case of antitrust policy, the externalities provide a strong argument for international regulation or cooperation.

Assuming a consensus of opinion and zero transaction costs is, of course, wholly unrealistic. The proper role of competition policy is a subject of considerable disagreement, and international negotiations are plagued by transaction costs. In recognition of these realities, we now relax these assumptions.

For the moment, continue to assume that transaction costs are zero, but allow that the objectives of competition policy differ from state to state. There are any number of reasons why states might have divergent goals. For example, some countries may understand what competition policy can and cannot do, and others may simply be mistaken. In this situation, agreement may be possible through dialogue and debate. Over time, one view may come to be accepted while the other is discredited, and international agreement on a common policy will be possible.

Another possibility is that disagreements are not the result of differences in information but, rather, differences in preferences. Diversity of preferences may exist for many reasons, ranging from differing priorities to differing conditions in domestic markets to different interest group constellations. If the preferences differ, the sharing of information cannot by itself generate consensus. This will not preclude an optimal agreement, however, so long as states can compensate one another for accepting a policy that differs from their preferred policy. Just as parties to a contract will bargain to maximize the joint value of the agreement, states will bargain to maximize the joint value of competition policy. Imagine, for example, that one state prefers a relatively restrictive policy toward mergers—perhaps because it values the existence of small and medium-sized businesses—while another prefers a more permissive merger policy based solely on efficiency grounds. This difference in preferences can be overcome through the use of transfer payments. An agreement will be struck in which the party with the stronger preferences gets its preferred policy and in exchange makes a compensatory payment to the other state.

The same result holds if the divergent preferences stem from the trade-induced distortions discussed earlier. Specifically, the parties would enter into an agreement that puts in place the globally optimal competition policy and provides for a transfer from states that benefit from this policy to states that suffer losses relative to their noncooperative payoffs. Because cooperative policy is globally optimal, it must be the case that there are sufficient gains for a Pareto improving agreement to be reached.

11. *See, e.g.*, Robert P. Inman & Daniel L. Rubinfeld, *Rethinking Federalism*, J. ECON. PERSPS., Fall 1997, at 43, 45. This desire to internalize externalities explains why competition policy is carried out by the federal government in the United States and by the regional government in the EU.

Thus, putting aside political economy issues (discussed below), the real impediment to achieving an optimal policy is transaction costs. Because the interests of net importers and exporters diverge, cooperation can only be achieved through transfers from prospective winners to prospective losers. It follows that ad hoc attempts at cooperation, limited to competition policy alone, stand little chance of success: States that stand to gain from a particular agreement have no way to compensate those that stand to lose. Negotiation over competition policy must occur in a sufficiently broad institutional context to allow for compensation in other areas such as trade or the environment.[12] The negotiation of transfer payments through concessions in other areas of negotiation is, of course, difficult. This difficulty, however, is unavoidable because without it, cooperation at a substantive level is likely impossible. Before considering the possible forms of cooperation, I now turn to discuss the main arguments advanced in opposition to cooperation.

II.
THE PROBLEMATIC CASE AGAINST COOPERATION

The problems of noncooperative policymaking, combined with the realities of international business activity, make it impossible to defend the status quo as an optimal competition policy regime. If there were a well-functioning international governmental system, the case for making antitrust policy decisions at that level would be irrefutable. Because the case against international regulation fails as a matter of theory, sophisticated opponents of international cooperation argue, as they must, that cooperation is too difficult or too costly as a matter of practice. The most common and powerful argument is that policymaking at the international level is too inefficient, undemocratic, and corrupt to be trusted with competition policy.[13] Even skeptics of international cooperation must admit, though, that it has proven effective in some instances. Few, if any, observers would argue that the General Agreement on Tariffs and Trade, the Trade-Related Aspects of Intellectual Property Rights Agreement, the Basle Accord, the North American Free Trade Agreement, and the EU have all generated net social costs. That said, there is no doubt that international agreements come with costs. The question in any given case is whether the costs outweigh the benefits.

The greatest risk posed by international cooperation in antitrust is that the international process itself will generate undesirable outcomes—foremost, because negotiators might favor the interests of certain groups over those of others.

12. *See* Andrew T. Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property*, 43 VA. J. INT'L L. 933 (2003) (arguing that the TRIPS agreement was possible because negotiations took place in the WTO, where transfer payments are possible).

13. For a generalized argument opposing international cooperation on these grounds, see Paul B. Stephan, *Regulatory Competition and Competition: The Search for Virtue*, *in* TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS 167-202 (George A. Bermann et al., eds., 2000); Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents, and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681 (1996–97); Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743 (1999); Paul B. Stephan, *The Political Economy of Choice of Law*, 90 GEO. L.J. 957 (2002).

For example, business interests may enjoy greater influence than consumer interests, generating a bias toward lenient rules. But while public choice problems will certainly occur at the international level, there is no way to know how large these effects will be or if they will be larger or smaller than the corresponding domestic problems.

As a first cut, international public choice problems are likely to reflect domestic public choice problems. That is, interest groups will be able to influence negotiators because they can influence the politicians who control the negotiators. This influence is not created by internationalization but, rather, by the political structure of domestic government. If policy is made domestically, the same interest group biases will be present. Furthermore, international negotiations may help to reduce the power of interest groups. Interest groups in one country may have significant control over policy, but when governments must negotiate with one another, powerful interest groups in one state may be offset by opposing groups in another. For example, trade agreements counter protectionist pressure by giving policymakers the ability to open foreign markets and thereby please exporters. The net result is less influence on policy for import competing industries and freer trade. Given the clear evidence that a noncooperative regime frustrates domestic policies, it seems appropriate to demand that skeptics advance a more precise model of the political economy of domestic and international policymaking to support their account of international public choice problems.

John McGinnis offers the most comprehensive extant attempt to show that public choice problems on the international level are likely to generate higher costs than domestic regulation.[14] Although his arguments have some theoretical merit, their validity in any particular context turns on empirical questions that cannot be resolved here. More importantly, the modest level of proposed cooperation in international antitrust fails to trigger most of the costs McGinnis identifies. McGinnis's principal concern is that international negotiators and functionaries have an interest in generating complex rules or other devices to maximize their own influence. But this legitimate concern is not a reason to resist cooperation altogether. The same problem exists and, in the competition policy context, is much more acute domestically. International bureaucrats have considerably less rule-making authority than their domestic law counterparts, so they have a more limited ability to pursue their own interest in this way. Outside the EU and a very small number of "quasi-judicial" bodies, there are very few, if any, instances in which international bureaucrats have any policymaking authority independent of national governments. In the area of international antitrust, no serious proposal exists for an international antitrust agency

14. *See* John O. McGinnis, *The Political Economy of International Antitrust Harmonization*, *in* COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY (Michael S. Greve & Richard A. Epstein eds., 2004) [hereinafter COMPETITION LAWS IN CONFLICT].

authorized to develop its own rules and policies.[15] In other words, international cooperation in antitrust can and should proceed without significant bureaucracy.

Ultimately, the issue here concerns the form of cooperation rather than its merits. If cooperation is desirable, concerns about bureaucracy should not frustrate it. To the extent bureaucratic capture is a concern, there should be less delegation to those bureaucrats.[16]

Along similar lines, McGinnis expresses concern about the enforcement of a cooperative regime. He argues that centralized enforcement entails significant costs while decentralized enforcement leads to the problem of divergent standards. Though a regime of harmonization might well present that dilemma, a more modest level of cooperation (described below) avoids it. An adjudicatory body—such as the World Trade Organization's Appellate Body—could adjudicate disputes that arise with respect to a small number of general rules while leaving other issues to the states themselves. That arrangement would also leave room for innovation and experimentation and, in that fashion, allay McGinnis's fears over the rigidity and inflexibility of international institutions.

Two additional arguments against international antitrust cooperation warrant a brief discussion. First, in antitrust, as in many other areas, the internationalization of business activity can and has been viewed as a welcome challenge and discipline for regulators. Until the *Alcoa* case (1945) in the United States and the *Wood Pulp* decision (1988) in Europe, for example, activities that took place offshore but had an effect in the jurisdiction were (at least arguably) beyond the reach of local authorities.[17] Even today, many countries make no attempt to exercise jurisdiction over foreign conduct. Where national law is applied on a strictly territorial basis, it may fail to reach conduct that is alleged to impose harm on local interests. If one believes that existing domestic antitrust laws are excessively tough (or, indeed, entirely unnecessary), internationalization that removes conduct from the local jurisdiction may be seen as desirable. On this view, the internationalization of business corrects a failure of the domestic political system and reduces the authority of local regulators in a desirable way. As McGinnis puts it, "[F]oreign bias may counteract the public

15. A proposed "International Antitrust Code" includes the establishment of an "International Antitrust Authority" that arguably would possess some of the bureaucratic characteristics that concern McGinnis. *See* International Antitrust Code Working Group, *Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement* (July 10, 1993), 65 Antitrust & Trade Reg. Rep. (BNA) S-1, Issue No. 1628 (Aug. 19, 1993) (Special Supp.). For a discussion of the Draft Code, see Daniel J. Gifford, *The Draft International Antitrust Code Proposed At Munich: Good Intentions Gone Awry*, 6 MINN. J. GLOBAL TRADE 1 (1997). This proposal, however, was advanced in 1993 and does not seem to have generated any significant support. Were it made as a serious proposal today, I would share many of McGinnis's objections.

16. Ultimately, the dispute here turns on empirical questions. I have previously outlined my views on how to proceed with international cooperation in the face of the inevitable uncertainty regarding public choice issues. *See* Andrew T. Guzman, *Public Choice and International Regulatory Competition*, 90 GEO. L.J. 971, 977-80 (2002).

17. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); Case 89/85, *In re* Wood Pulp Cartel, 1988 E.C.R. 5193.

choice driven biases against wealth maximizing laws and thus move competition law toward a more optimal state."[18]

The readiest—and sufficient—reply is that this argument ignores the current state of international antitrust. Both the United States and the EU, among others, now apply their laws to conduct that takes place abroad but has local effects. Rather than undermining the authority of local regulators, a failure to cooperate will generate overlapping jurisdictional claims and, at least among developed states, more rather than less regulatory review.

Second, and finally, one could argue that a global market reduces the potential for monopolization or other anticompetitive conduct to the point of rendering antitrust law unnecessary. Trade can certainly substitute for competition policy in some instances. The clearest example is a small, closed economy in which local monopolies harm consumers. Opening the country to foreign trade would undermine the market power of local firms and force them to compete. Trade here works as a substitute for competition policy, with the added advantage of promoting competition without government intervention.

Still, trade is not a full substitute for competition policy. Trade can only undermine monopolies that rely on trade barriers for their existence. When firms have *international* market power, one would expect them to behave as monopolists just like domestic firms with market power. Although it may be more difficult to establish and maintain market power internationally, there is no reason to believe that it is impossible or, for that matter, rare. Industries such as pharmaceuticals, passenger aircraft, and software illustrate the phenomenon.

III.
The Form of Cooperation

Although international cooperation on competition policy is necessary, its critics are right that cooperation carries costs. As decisions are moved further from individual citizens, democratic control is weakened. For this and other reasons, special efforts may be necessary to rein in international bureaucracies. Cooperation can be frustrated by weak and unreliable international enforcement mechanisms. And of course, international agreements involve transaction costs. They are slow to negotiate, distract officials from other tasks, and can cause animosity among states. Even when negotiations are successful, the ensuing cooperation can be costly, especially if new institutions are needed. Once completed, these same costs, typically coupled with a unanimity requirement, make international agreements difficult to change. Attempts to reduce the cost of change by delegating authority to international bureaucrats generate their own costs in the form of entrenchment and lack of democratic control.

18. McGinnis, *supra* note 14 (manuscript at 17, on file with author).

To reduce these inevitable costs, the preferred form of cooperation is the lowest level that avoids the distortions of noncooperative policymaking.[19] Cooperative strategies on international competition policy come in essentially three forms, from lowest to highest levels of cooperation: voluntary information sharing and consultation (the system that currently exists); procedural cooperation on choice-of-law rules, with an eye toward restricting the number of legal systems claiming jurisdiction; and substantive cooperation, which imposes on states more or less demanding requirements in terms of their domestic substantive rules. A review of these options shows that effective regulation of antitrust requires at least some cooperation with respect to substantive laws. Although such a strategy has drawbacks, including the fact that it may be difficult to reach any agreement, it represents the only way for states to address the externalities associated with international competition policy.

A. Information Sharing

Faced with continuing growth in international business activity, domestic antitrust authorities have been forced to adopt new strategies. Without at least some sharing of information among national regulators, it would often be difficult to build a case against international firms. If prosecutors were helpless beyond their own borders, a firm could violate the law with little risk by keeping key documents offshore, holding offshore meetings among participants in the violative activity, and residing in a foreign jurisdiction. To prevent erosion of their authority and enforcement powers, antitrust authorities have cooperated with one another.

With few exceptions, cooperation has been limited to voluntary information-sharing agreements.[20] A typical agreement calls for the sharing of information between enforcement authorities when the actions of regulators in one country affect the interests of the other state.[21] In addition, the agreements provide for consultation to resolve concerns between the states, indicate that the parties should cooperate in enforcement when possible, and call for each state to take into account the effects of anticompetitive conduct on the other state when considering an enforcement action. This last element (taking the effect of domestic conduct on other states into account) would go a long way toward ad-

19. I have previously written on the question of how to manage cooperation in a wider set of regulatory areas. *See* Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883 (2002).

20. *See* Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1785–88 (2000).

21. *See, e.g.*, Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, Aug. 3, 1995, U.S.-Can., *reprinted in* Trade Reg. Rep. (CCH) 4, ¶ 13,503; Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, U.S.-F.R.G., 27 U.S.T. 1956. The United States has entered into similar agreements with Australia, the European Communities, Israel, Japan, Brazil, and Mexico. For a detailed discussion, see John J. Parisi, *Enforcement Cooperation among Antitrust Authorities*, 12 INT'L Q. 691 (2000); see also Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343 (1997).

dressing the problems with the existing international competition policy regime. Unfortunately, existing agreements do not lay out any details about how this consideration is to be given, do not include any sort of sanction for a failure to take the interests of the other party into account, and say nothing about how the interests of other states should affect domestic policy decisions.

Although these information-sharing agreements play an important role in international antitrust enforcement, they are not and cannot be a solution to the problem of international cooperation. There is, for example, no coordination of substantive laws, no compromise of domestic control,[22] and no minimum standards. Furthermore, compliance is voluntary. Each state is free to refuse cooperation when it wishes and remains guided by its own interests in deciding when to do so.

Information sharing, or "soft" cooperation, has also been pursued at the Organisation for Economic Co-operation and Development, which has generated several aspirational texts.[23] None of these impose obligations on states, and they are not intended to do so. Their goals are modestly limited to improving communication on competition issues. This dialogue—and, more recently, multilateral cooperation through the International Competition Network—is important and may have contributed to greater harmonization of substantive laws than would otherwise exist.[24] Still, it barely exceeds the level one would expect from self-interested states and administrative agencies seeking to preserve their own influence.[25] By sharing information, enforcement agencies cooperate in such a way as to allow both themselves and their sister agencies to continue their work, but they do not surrender any of their authority over domestic matters. This form of soft cooperation furthers the enforcement goals of regulators but does virtually nothing to address the over- and underregulation of antitrust at the international level.

22. There are two significant exceptions. Canada and the United States have entered into the Treaty on Mutual Legal Assistance in Criminal Matters, Mar. 18, 1985, Can.-U.S., 24 I.L.M. 1092, which provides for the use of compulsory powers to gather evidence in criminal antitrust cases and allows the exchange of compulsory information. The United States has also entered into an agreement with Australia under the International Antitrust Enforcement Assistance Act of 1994, Pub. L. No. 103-438 (codified at 15 U.S.C. §§ 6201–12 (2000)).

23. *See, e.g.*, *The OECD Guidelines for Multinational Enterprises* (rev. 2000), *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf; *Council Recommendation Concerning Action Against Restrictive Business Practices Affecting International Trade Including Those Involving Multinational Enterprises*, OECD Doc. C (78)133 (Final) (Aug. 9, 1978), 17 I.L.M. 1527; *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, OECD Doc. C(98)35 (Final) (May 13, 1998), *available at* http://www.oecd.org/dataoecd/39/4/2350130.pdf.

24. *See* Diane P. Wood, *Soft Harmonization Among Competition Laws: Track Record and Prospects*, 48 ANTITRUST BULL. 305, 315 (2003).

25. *See* Parisi, *supra* note 21, at 691 ("As business concerns have increasingly pursued foreign trade and investment opportunities, antitrust compliance issues have arisen which transcend national borders and, thus, have led antitrust authorities in the affected jurisdictions to communicate, cooperate, and coordinate their efforts to achieve compatible enforcement results.").

B. Choice of Law

Stepping one rung higher on the cooperative ladder, states could set the terms of their interaction through choice-of-law rules that assign jurisdiction (based on some criteria) to one or more states. The criteria for such a selection are familiar and include factors such as the location of the disputed activity and the principal place of business of the firm. But choice-of-law rules cannot, without more, address the problems of over- and underregulation. A choice-of-law system that allows for overlapping jurisdiction leaves the problem of overregulation unresolved. A system that assigns jurisdiction to a single state can reduce the problem of overregulation but may exacerbate the problem of underregulation. Nor can a choice-of-law strategy prevent local favoritism and trade-induced distortions of national substantive policies.

Theoretically, the problem of underregulation in states that cannot extend their laws extraterritorially could be addressed through a choice-of-law rule that grants standing to plaintiffs if the relevant firm activity took place within the jurisdiction, even if the injuries occurred abroad. (An even more aggressive rule would grant standing to any plaintiff regardless of where the conduct took place.) This rule would give injured plaintiffs a remedy against the actions of foreign firms that target states whose laws do not apply extraterritorially, as long as the conduct was within a state with effective antitrust rules. Such a rule would at a minimum ensure that Western firms faced some regulation when selling into countries without extraterritorial reach. The justification for this rule is essentially the same as the justification for eliminating export cartels exemptions: It requires states to pursue some anticompetitive behavior. The Supreme Court's recent ruling in *F. Hoffmann-La Roche v. Empagran*[26] establishes that American law does not apply to foreign plaintiffs in this circumstance. In that case, the Court found that the jurisdictional reach of the federal antitrust laws does not extend to conduct with a direct, substantial, and reasonably foreseeable effect on U.S. commerce if the transaction at issue took place wholly outside the United States. If one concludes, as this case suggests, that the adoption and operation of a rule like the one described above is unlikely, the lesson is that deeper cooperation is needed.

C. Deep Cooperation

Once it is accepted that cooperation with respect to substantive laws is required, the question becomes how to achieve it. Experience and theory show that a substantive agreement will be difficult to reach because the transaction costs of negotiation in this context are significant. The challenge, then, is to reduce transaction costs as much as possible.

I have argued elsewhere that the WTO represents the best forum for negotiations on the subject.[27] Regardless of the chosen forum, however, the distortion

26. No 03-724, 2004 U.S. LEXIS 4174 (June 14, 2004).

27. *See* Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. REV. 1142, 1156–58 (2001); Andrew T. Guzman, *Global Governance and the WTO*, HARV. INT'L

of domestic incentives cannot be corrected short of cooperation on substantive competition policy. This need not take the form of harmonization because states may conclude that policy differences across regimes are desirable, but it does require negotiation over substantive policy in a forum where transfers are available. For the reasons noted, it seems prudent to start with a relatively modest agenda—without foreclosing greater cooperation in the future.

The most plausible agenda item is a nondiscrimination principle.[28] This would ideally include both national treatment and most favored nation components, although national treatment is the more important element. Work by McGinnis[29] and by Trebilcock and Iacobucci,[30] as well as my own past writing, support the notion of a national treatment requirement.[31] A national treatment obligation appeals to our sense of fairness, is consistent with the spirit of existing WTO obligations, and would address export cartel exemptions.

Although a national treatment obligation could eliminate explicit discrimination, it would be less successful at addressing the problem of discrimination in application and enforcement. In attempting to deal with discriminatory enforcement, Trebilcock and Iacobucci observe that international trade law addresses the problem of de facto discrimination in other contexts. The antitrust context, however, differs from other areas where discrimination is prohibited. In the trade context, for example, discrimination against an imported product is relatively easy to identify by comparing the treatment of one product with the treatment of another "like product." One can carry out a meaningful inquiry, for example, into the question of whether a country treats imported watches differently from locally produced watches. This sort of comparison is much more difficult in the antitrust context because each prosecution turns on a unique set of facts. It will not typically be the case, for instance, that the prosecution of an alleged international price-fixing scheme can be reviewed by looking at a domestic scheme carried out in the same fashion and in the same industry. A lack

L.J. (forthcoming 2004). At least two of the chapters in COMPETITION LAWS IN CONFLICT, *supra* note 14, argue against the inclusion of competition policy in WTO negotiations. *See* Michael Trebilcock & Edward Iacobbucci, *National Treatment and Extraterritoriality: Defining the Domains of Trade and Antitrust Policy*, *in* COMPETITION LAWS IN CONFLICT, *supra* note 14 (manuscript at 31–33, on file with author); Paul B. Stephan, *Competitive Competition Law?: An Essay Against International Cooperation*, *in* COMPETITION LAWS IN CONFLICT, *supra* note 14 (manuscript at 21–22, on file with author).

28. One could argue that the WTO's national treatment obligation in art. III:4 of the GATT applies to antitrust rules. I take no position on the applicability of this provision and simply note that the Doha Declaration's charge to the WTO Working Group in Trade and Competition Policy to consider nondiscrimination suggests that there is at least serious doubt about the applicability of the most-favored-nation (MFN) and national treatment clauses. *See Ministerial Declaration, Doha Ministerial Conference Fourth Session*, WTO Doc. WT/MIN(01)/DEC/1 (Nov. 20, 2001), at ¶ 25, *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf [hereinafter *Ministerial Declaration*].

29. *See* McGinnis, *supra* note 14.

30. *See* Trebilcock & Iacobucci, *supra* note 27.

31. *See* Guzman, *Antitrust and International Regulatory Federalism*, *supra* note 27, at 1162. Trebilcock, Iacobbucci, and McGinnis resist labeling a nondiscrimination provision as substantive harmonization, although it is hard to know what else to call an obligation that forbids states from adopting substantive rules or practices that favor locals over foreigners.

of a closely analogous set of facts will often obviate comparisons. True, some benchmarks (such as the Hirfindahl-Herschman Index, or HHI) may permit comparisons, but even in those cases, the prosecution of antitrust violations involves much more discretion and case-specific facts than a conventional trade case.

Moreover, other areas subject to nondiscrimination requirements are not always policed effectively, and the national treatment obligation is often more of a de jure than a de facto standard. This is especially true in areas where fact-specific inquiries are involved, as would be the case in antitrust. Under the WTO's Agreement on the Application of Sanitary and Phytosanitary Measures, for example, WTO members may adopt measures necessary "for the protection of human, animal or plant life or health."[32] As applied, this requirement is extraordinarily modest, requiring only that there be a rational relationship between the disputed measure and the required risk assessment.[33] Similar nondiscrimination requirements exist in other parts of the WTO agreements, and where the obligations go to nontrade issues, the result is virtually always the same: De facto discrimination is largely ignored because the WTO is hesitant to second-guess domestic decisions with respect to such policies.

A national treatment obligation for antitrust, then, is useful primarily to prevent the use of export cartel exemptions and perhaps to constrain egregious forms of de facto discrimination. It cannot prevent regulators from favoring locals in the day-to-day administration of the law or, for that matter, resolve the problems associated with the domestic adoption and enforcement of rules to govern international activity, for example, the strategic choice of domestic law by states engaged in trade.

The slightly more ambitious WTO agenda for reform is a good first step toward more meaningful cooperation. This approach would focus on "core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; [and] modalities for voluntary cooperation. . . ."[34] Seeking cooperation on the most agreed upon violations such as hard-core cartels is sensible, as are efforts to increase transparency and voluntary cooperation. Eventually, it would be helpful to see other forms of cooperation emerge, including mandatory information-sharing arrangements (subject to appropriate confidentiality provisions),[35] streamlining and cooperation in inter-

32. Agreement on Sanitary and Phytosanitary Measures, Apr. 15, 1994, Agreement Establishing the World Trade Organization, Annex 14, *in* FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, MARRAKESH, 14 Apr. 1994, at 69 (1994).

33. *Id.* art. 5; *see, e.g.*, MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 147, (2d ed. 1999) ("[I]f countries generally feel committed to adopting more stringent health, safety, consumer protection, environmental or conservation standards . . . they remain largely free to do so, subject to demonstrating that there is some rational scientific basis for their actions . . . and that such measures do not gratuitously encumber international trade.").

34. *Ministerial Declaration*, *supra* note 28, ¶ 25.

35. *See* McGinnis, *supra* note 14 (manuscript at 28, on file with author) (supporting the notion that nations should be required to "permit the extraterritorial application of another nation's laws, at

national merger review,[36] and jurisdictional agreements. Cooperation of the sort described here is difficult to achieve, but it is the only way to attain a sensible competition regime in our globalizing world.

least on the same antitrust theories deployed by the nation whose producers are the target of antitrust enforcement").

36. For example, a firm proposing to merge might be required to seek approval for the merger from only one or two states (perhaps its home states or the state with the most affected consumers), and the same forms could then be submitted (with translations if necessary) to authorities in other states who would have the option of requesting further submissions.

Berkeley Journal of International Law

Volume 22 | Issue 3 Article 3

2004

The New Bush National Security Doctrine and the Rule of Law

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The New Bush National Security Doctrine and the Rule of Law

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> [W]e must face the fact that the United States is neither omnipotent nor omniscient—that we are only 6 percent of the world's population—that we cannot impose our will upon the other 94 percent of mankind—that we cannot right every wrong or reverse each adversity—and that therefore there cannot be an American solution to every world problem.
>
> — John F. Kennedy[1]

PROLOGUE

The war on terrorism has dramatically impacted the direction of U.S. foreign policy, as well as the strategic and tactical operations for securing its objec-

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1. President John F. Kennedy, Address at the University of Washington's 100th Anniversary Program in Seattle, Washington (Nov. 16, 1961), reprinted in PUB. PAPERS 726 (1961).

tives. Three questions central to U.S. foreign relations are whether these interests are consistent with international law; whether the United States seeks to modify international law to secure its interests; or whether foreign policy makers see the need to significantly change international legal standards. The aftermath of the of the attacks of September 11, 2001 in the United States triggered an intuitive reaction that the normal rules of restraint embodied in international law might no longer be relevant to the safety and vital security interests of the United States. In short, the attacks of September 11 changed the international law landscape in such a way as to make credible the claim that many of the rules and institutions of international security are now obsolete. Some in the Bush administration saw a way to co-opt international collective security institutions to render them so weak that their prescriptive and operational force would simply become irrelevant.

The British government, however, sought to respond through international institutions. According to British Foreign Secretary Jack Straw, countries could respond to the threat of terrorism within the framework of international law, particularly within the overarching structure of international security codified in Article 51, the self-defense provision of the U.N. Charter.[2] The Bush administration followed the British lead and soon indicated that, indeed, international law was not obsolete and that the United States could appropriately respond to international terrorism within the general framework of U.N. Charter principles, especially Article 51.[3]

Immediately following the September 11 attacks, the United States needed to identify the terrorists responsible for the attacks on New York and Washing-

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2. British Foreign Secretary Jack Straw spoke before the United Nations General Assembly on November 11, 2001 to make the case for war against Afghanistan within the framework of Article 51. He stated:

> [W]e face a real and immediate danger. The murderous groups who plotted the terrible events of September 11 could strike again at any time. And our first duty, to our citizens and to each other, is to defend ourselves against that threat. When the nations of the world agreed the UN Charter, they recognized the right of self-defence in Article 51. It is in exercise of this right that the military coalition is now engaged in action against Al-Qa'ida and the Taliban regime which harbours them. Taking military action is always a tough decision. But here it truly was unavoidable. . .

Jack Straw, United Kingdom Member of Parliament and Secretary of State for Foreign and Commonwealth Affairs, Address at the United Nations General Assembly (Nov. 11, 2001), *available at* http://www.ukun.org/articles_show.asp?SarticleType=17&Article_ID=346. Prior to this speech, the United Kingdom reported its self-defense plans against Afghanistan to the United Nations Security Council as required by Charter Article 51. *See* Letter dated 7 October from the Chargé d'affaires of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council (Oct. 7, 2001), U.N. Doc. S/2001/947 (2001).

3. Immediately after the attacks of September 11, Congress passed a joint resolution that granted the President broad powers to use "all necessary and appropriate force" to combat the terrorists responsible for the recent attacks. *See* P.L. 107-40, 2001 S. J. RES. 23 (Sept. 18, 2001) (Authorization for the Use of Military Force). Soon thereafter, the United States also reported to the U.N. Security Council its self-defense plans against Afghanistan as required by Charter Article 51. *See* 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 (Oct. 7, 2001), U.N. Doc. S/2001/946 (2001).

ton. Next came the difficult task of determining what strategies were permissible to bring these terrorists to account. The U.S. government had long known that the terrorists maintained a territorial presence in the Taliban-ruled Afghanistan.[4] Intense public diplomacy followed on the issue of whether or not the Taliban would cooperate in bringing the terrorist perpetrators to justice. Noncooperation by the Taliban regime implied an undesirable option: An invasion of Afghanistan predicated on the principle that the regime collaborated with or protected al Qaeda and sought to use Afghan sovereignty to do so. This compromised Afghanistan's sovereignty; it effectively became a terrorist state, or a state within which terrorists had a disproportionate influence. The Taliban regime transformed Afghanistan into what the United States defines as a "rogue state," one that abuses its sovereignty.[5] The Taliban regime's inevitable noncooperation created for the United States the option of intervention, which brought issues of the material and human costs of an actual invasion to the fore.[6] Historically, the USSR, which had previously maintained a strong military presence in Afghanistan, became so mired in the then-existing civil war that the cost of its presence significantly affected the stability of the Soviet regime. Would the United States become mired in an endless conflict in the region? So far, the answer is no.

The victory of U.S. and allied forces in Afghanistan suggested a significantly changed picture of the region. The war cost little in terms of human and material losses. Moreover, the strategic value of Afghanistan, with regard to the projected oil pipeline from Russia to the Arabian Sea, indicated that the United

4. In 1999 and 2000 in two separate resolutions, the Security Council demanded that Afghanistan's *de facto* controlling power, the Taliban regime, turn over Osama bin Laden to a country in which he was under indictment. *See* S.C. Res. 1267, U.N. SCOR, 54th Sess., 4051st mtg., U.N. Doc. S/RES/1267 (1999); *see also* S.C. Res. 1333, U.N. SCOR, 55th Sess., 4251st mtg., U.N. Doc. S/RES/1333 (2000).

5. Afghanistan was among a series of countries designated by the State Department as being of "particular concern" as state sponsors of terrorism or, in recent years, as "rogue states." Former Secretary of State Madeleine Albright also designated Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria as state sponsors of terrorism. *See* 31 C.F.R. §596.201 (2000). The concept that a state can somehow be a branded as an "outlaw" nation can be traced to the 1970s, and memorably to the 1980s when President Ronald Reagan called Libyan "Leader of the Revolution" Colonel Muammar Qaddafi an "outlaw." *See* Robert S. Litwak, *What's in a Name? The Changing Foreign Policy Lexicon*, 54 J. INT'L AFF. 375, 377 (2001). However, the phrase "rogue state" enjoyed more recent popularity during the Clinton administration before the State Department officially replaced it with the preferred phrase of "states of concern," the same words that now appear in the International Religious Freedom Act of 1998. *See* 22 U.S.C. 6401 et. seq. (2000) (enacted Oct. 27, 1998). For an analysis of the International Religious Freedom Act, see Steven Wales, *Remembering the Persecuted: An Analysis of the International Religious Freedom Act*, 24 HOUS. J. INT'L. L. 579 (2002). However, President George W. Bush resurrected the phrase, "rogue state" in Part V of the 2002 National Security Strategy of the United States of America entitled, "Prevent Our Enemies From Threatening Us, Our Allies, and Our Friends, with Weapons of Mass Destruction." *See* WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 13 (Sept. 17, 2002), *available at* http://www.whitehouse.gov/nsc/nss.pdf [hereinafter NATIONAL SECURITY STRATEGY].

6. For a discussion of post–September 11 defense funding increases, see Steven M. Kosiak, *Funding for Defense, Homeland Security, and Combating Terrorism Since 9/11: Where Has All the Money Gone?*, *in* SECURITY AFTER 9/11: STRATEGY CHOICES AND BUDGET TRADEOFFS 7-11 (2003), *available at* http://www.cdi.org/mrp/security-after-911.pdf.

States could maintain a strategic interest in the region with minimal political, economic and humanitarian cost.[7] The Taliban regime had been a military paper tiger after all.

Is the Bush administration's success breeding ambition and dimming its clarity of vision, and if so, what are the implications for long-term domestic security interests? This article seeks to advance the discussion of national security in general, with specific regard to American foreign policy as outlined by President George W. Bush. In particular, we undertake a detailed examination of historically significant national security doctrines as well as the legal basis underlying the 2003 American attack on Iraq in order to explore the Bush administration's international policy determinations. Part I of this article discusses the character of national security in the United States following its war on terror in Afghanistan. Part II introduces threshold considerations as to how national security doctrines are created. Part III then discusses the national security doctrines of a series of developing nations, or "lesser powers." Part IV proceeds to discuss the national security doctrines of a series of developed nations, or the "hegemons." Part V explores President George W. Bush's new national security doctrine for the United States. Part VI scrutinizes the new Bush national security doctrine by assessing the legal basis of the 2003 Iraq war, followed by Part VII, which offers possible strategic justifications. In conclusion, Part VIII suggests some implications of the Iraq war for the United States from a strategic standpoint.

I.
NATIONAL SECURITY AFTER AFGHANISTAN

The war against the Taliban is not quite over.[8] While there is still much to do in Afghanistan, the war provided a needed justification for officials who have long interpreted the U.N. Charter as a limited concept of self-defense to secure legitimate U.S. security interests. The Afghan intervention also served as a precedent for a different principle: intervention into the sovereign internal affairs of a state can be justified under the principle of defensive regime change.[9] Modern

7. The United States' presence in Iraq between 1990 and 1991 during the Persian Gulf War caused the United States Strategic Petroleum Reserve (SPR) to grow to approximately 600 million barrels of oil. *See* ETHAN BARNABY KAPSTEIN, THE POLITICAL ECONOMY OF NATIONAL SECURITY: A GLOBAL PERSPECTIVE 187 (1992). *See generally* Seth Stevenson, *Pipe Dreams: The Origin of the "Bombing-Afghanistan-for-Oil-Pipelines" Theory*, SLATE MAGAZINE, Dec. 6, 2001, *available at* http://slate.msn.com/?id=2059487 (stating that some journalists and analysts suggest that a key impetus for the United States' military campaign in Afghanistan was its covert plan to construct an oil pipeline through the now relatively stable and "West-friendly" Afghanistan).

8. Tony Karon, *The U.S. Says the Afghanistan War Is Over. The Taliban Aren't So Sure*, TIME ONLINE EDITION, May 6, 2003, available at http://www.time.com/time/world/article/ 0,8599, 449942,00.html?cnn=yes.

9. Michael McFaul, *Since Sept. 11, Nation-Building is Ascendant Again in the White House: Dueling Ideologies Make Justifications for War Unclear*, SAN JOSE MERCURY NEWS, Jan. 19, 2003, *available at* http://www.bayarea.com/mld/mercurynews/news/editorial/4983375.htm (stating that "Sept. 11, 2001. . .compelled. . . the president to rethink basic assumptions about the world we live in. Bush began, almost overnight, to believe that the United States had to go on the offensive and remake the world into a safer place, a mission that sounded more like Wilson's and less like his

international scholars must now grapple with two fundamental problems of international constitutional law. The first touches on matters of security, self-defense, and the strategic scope of defensive interventions to secure these claims if they are authentic.[10] The second deals with the circumstances under which it is permissible to enlarge or constrain the constitutional system of state sovereigns.[11]

The first problem of international constitutional law is that the stability of the international system depends on the stability and security of the state. The state, therefore, must be given a preferred position in the international constitutional system.[12] The circumstances under which external interference in a state's internal affairs might occur must be limited and specifically defined. In this sense, the U.N. Charter—with its endorsement of formal equality among states—protects the domestic jurisdiction of states and prohibits aggression against states large and small. [13] The most explicit indicators of this constitutional principle are already in the U.N. Charter. The Charter also reflects that the international order is not static,[14] so claims for self-determination and independence are tantamount to claims to change the composition of the sovereign entities in the international system.[15] Accordingly, the international constitu-

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father's."). *See generally* Pierre-Richard Prosper, *Reluctant Nation Building: Securing the Rule of Law in Post-Taliban Afghanistan: On Respect for the Rule of Law*, 17 CONN. J. INT'L L. 433 (2002).

10. *See generally* Oscar Schachter, *State Succession—The Once and Future Law*, *in* INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS 322 (Charlotte Ku & Paul F. Diehl eds., 2nd ed. 2003) (stating that self-defense can be clarified through lex specialis, but that the relationship between national security and the Charter prohibition on the use of force is "inevitably complicated and fluid").

11. The United States regularly promotes its domestic democracy by pursuing U.S. national interests and defending American sovereignty. Jeremy Rabkin writes that "America's first duty must be to protect is own democracy and the rights and resources of its own people–by safeguarding its own sovereignty." JEREMY RABKIN, WHY SOVEREIGNTY MATTERS 101 (1998). However, the United States has consistently opposed any general rule permitting unilateral armed force to remove threatening or unfriendly regimes. *See* Michael J. Glennon, *The New Interventionism: The Search for a Just International Law*, FOREIGN AFF., May/June 1999, at 2 (stating that during the Kosovo crisis, it was proposed that the law should have been changed to allow NATO to act in place of the United Nations Security Council; the United States showed no interest in this move and later did not request authorization from NATO for the Iraqi invasion plan).

12. "A world where international obligations are kept within proper bounds may also be a world that offers more encouragement for accountable government and individual rights." RABKIN, *supra* note 11, at 101.

13. *See, e.g.*, U.N. CHARTER art. 1(2) (stating that "[the purpose of the U.N. is to] develop friendly relations among nations based on respect for the principle of equal rights. . .); *id.* art. 2(1) (stating that "[the U.N. is] based on the principle of the sovereign equality of all of its Members."); *see also id.*, Chapter II-Membership, Chapter VII-Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.

14. In re Piracy Jure Gentium, 1934 App. Cas. 586, 594 (P.C.) (U.K.), *reprinted in* 3 BRIT. INT'L L. CASES 836, 839 (1965) (where the Privy Council states that i nternational law is constantly evolving because "[it] has not become a crystallized code. . .but is a living and expanding branch of the law.").

15. The "purposes" of the U.N. Charter have been (and still are) determined by the continuing evolution of international law since 1945. With regard to the self-determination of peoples, it is possible to apply the International Court of Justice's ("ICJ") test in the Namibia opinion, in which it referred to the developing concept of the "sacred trust" contained in Article 22 of the League Covenant. The Court concluded that this "sacred trust" created the contemporary right of self-determination of peoples. *See* Legal Consequences for States of the Continued Presence of South Africa in

tional system, like all law, must clarify the circumstances under which it will defend the status quo or instead allow lawful change.

The second problem of international constitutional law pertains to the permissibility of altering the constitutional system of state sovereigns. Prior to October 7, 2001—when the United States began bombing Afghanistan—the invasion of Afghanistan staked a claim to more than mere self-defense. In general terms, it was a claim to intervene and change a state's composition in the international constitutional system. This claim required an expansive interpretation of the right to self-defense in situations where the enemy is not a state, but a significant group of terrorists within a state. American officials and decision-makers who sought to solve the Afghanistan problem inflated the principle of self-defense so that international law would not be constrained by matters of temporal limitation, such as the imminence of future attacks or the need for immediacy required to repel an actual attack.[16] The inevitable corollary envisioned a regime change in Afghanistan to replace the Taliban, which was a surrogate for terrorist interests.[17] This relies on a notion that conflates the Taliban regime and the terrorists' interests, manifesting the concept of a "terrorist state" with only a patina of legitimate sovereignty. Thus, the Afghanistan intervention could be justified by the interesting principle that a regime sufficiently implicated in terrorism, in the protection of terrorist operatives, and unrepentant about the culture of terrorism within its borders may justify an invasion of the primary

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Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ REP. 16, 28-31 (June 21) [hereinafter Namibia case] (upholding Namibian people's right to self-determination under international law). Accordingly, international instruments may be interpreted and applied within the framework of the legal system that exists at the time of such interpretation and application, so long as the concepts in the instrument in question are inherently evolutionary and that it was the intention of the parties to have them considered as such. *Id.* at 31. Much has been postulated over the last few hundred years with regard to the importance of self-determination; the birth of the sovereign state gave rise to ideas about liberty and freedom. Christian von Wolff, a philosopher and the author of a treatise on the law of nations, accepted the general principles of self-determination and nonintervention. He saw a world of sovereign, autonomous states that exist separately yet as equal parts of the whole global entity. *See generally* C. Wolff, *Jus Gentium Methodo Scientifica Pertractatum, reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW 9 (J. Drake trans., 1934). Wolff wrote in 1749 that "[n]ations are regarded as individual free persons living in a state of nature." *Id.* at 9.

16. Some scholars argue that Article 2(4) of the U.N. Charter does not generally prohibit force, but rather it prohibits force designed to compromise the territorial integrity and political independence of another state. It also prohibits uses of force that are inconsistent with the purposes of the U.N. Mary Ellen O'Connell recounts Professor Anthony D'Amato's position. *See* MARY ELLEN O'CONNELL, THE AMERICAN SOCIETY OF INTERNATIONAL LAW TASK FORCE ON TERRORISM: THE MYTH OF PREEMPTIVE SELF-DEFENSE, THE AMERICAN SOCIETY OF INTERNATIONAL LAW 17 (2002), *available at* http://www.asil.org/taskforce/oconnell.pdf (citing Anthony D'Amato, *Israel's Air Strike Upon the Iraqi Nuclear Reactor*, 77 AM J. INT'L L. 584 (1983)). According to O'Connell, D'Amato interprets Article 2(4) to justify Israel's 1981 strike against the Osirik nuclear reactor in Iraq. *Id.* Israel apparently sought to maintain its long-term security by preventing Iraq from developing nuclear weapons. *Id.* According to D'Amato, Israel's strike did not compromise Iraq's territorial integrity or political independence and it was consistent with the purposes of the U.N.; thus, it did not violate the prohibition of force in Article 2(4). *Id.*

17. *See generally* AHMED RASHID, TALIBAN: MILITANT ISLAM, OIL, AND FUNDAMENTALISM IN CENTRAL ASIA (2000). For a brief summary of Afghan history from 1709 to the present, see the chart From Empire to Revolt and Back: A Sampling of Afghanistan's Warriors, Kings and Dynasties, N.Y. TIMES, Dec. 9, 2001, at B5.

"terrorist state" by a primary "victim state" of terrorism.[18] The specific purpose of the Afghanistan intervention was to remove all of its "terrorist state" characteristics and replace them with a new conception of statehood and sovereignty more consistent with these themes as defined by the U.N. Charter.[19]

Unfortunately, in Afghanistan, violence, political and military consolidation, and the threat of terrorism continue to pose grave problems.[20] The critical question, or at least, the interesting focus of inquiry apart from regime change is whether the strategic method of action and intervention is itself reconcilable with international law. This formulation of the question might concede too much, since it appears to defend the regime change principle under international law. On the other hand, regime change is more than a claim; it is a fact.[21] Justifying the principle of regime change under international law is tricky because its relevance may be far-reaching. It is also technically and intellectually interesting and represents an important challenge to the international rule of law.

If regime change in Afghanistan is consistent with international law might there be other regime change targets of opportunity? Afghanistan made the regime change concept an important element in the emerging national security doctrine of President George W. Bush. The Bush administration apparently saw the regime change principle as relevant to its future policy in Iraq. The envisioned invasion would have to meet certain legal standards: it would have to be both consistent with U.S. domestic law, particularly constitutional law, and justifiable under international law. To effectively accomplish this, it must be justified by the new Bush Doctrine, the precepts of which must in turn be appraised by both domestic and international legal standards. In the next part of this article, we explore the relationship between national security doctrines and legal culture. Ultimately, this article explores the ambitious invocation of the regime replacement principle in the attack on Saddam Hussein's Iraq.

18. *See* Oscar Schachter, *The Lawful Use of Force by a State Against Terrorists in Another Country*, *in* Terrorism & Political Violence: Limits & Possibilities of Legal Control 243, 250 (Henry H. Han ed., 1993).

19. State sovereignty is expressly protected by the U.N. Charter. *See* U.N. CHARTER art. 1, para. 2 (regarding the "equal rights and self-determination" of peoples); *id.* art. 55 (regarding the "equal rights and self-determination" of peoples); *id.* art. 2, para. 7 (forbids the U.N. to "intervene in matters which are essentially within the domestic jurisdiction of any state.").

20. *See generally* Karon, *supra* note 8.

21. Regime change is sometimes seen as a strategic objective of humanitarian interventions; it comprises a claim to employ unilateral force that has apparently gained legitimacy since NATO bombed Serbia and Kosovo in 1999 and the variety of commissions established to review the lawfulness of the action eventually concluded that it was illegal but given the circumstances, it was the right thing to do. *See generally* HOUSE OF COMMONS, FOREIGN AFFAIRS COMMITTEE—FOURTH REPORT, KOSOVO (May 23, 2000), available at http://www.parliament.the-stationery-office.co.uk/pa/cm 199900/cmselect/cmfaff/28/2813.htm. Thus, the United States keeps some historical company with regard to its regime change effort, which may be lawful under international law in the contextually appropriate mechanisms to accomplish an inherently lawful act. *Id.*

II.
LAW AND NATIONAL SECURITY: THRESHOLD CONSIDERATIONS

To better investigate the national security issue it would be useful to review an important, often underappreciated aspect of international law: national security doctrines. International relations experts carefully focus their concerns on the problems of national security and often serve as advisors and operative players in the formulation of corresponding doctrines. However, the technical basis of or justification for any national security doctrine should rest in part on international law and in part on municipal constitutional law.

The international law element of a national security doctrine is that it is essentially a claim by a state that certain interests are vital to its survival and security. In almost idiosyncratic manner, a state articulates these interests through its national security doctrine to advise potential adversaries of what it regards to be the limits of tolerable conduct, and signals that it is willing to defend its interests by force if necessary.[22] This means that all national security doctrines contain at a minimum implicit claims that the doctrine is necessary for the survival of the state and clarify the circumstances under which the state might use its assets (such as the military, economic or diplomatic pressure, or propaganda) to defend itself from external threats. The broad legal basis for the defense of the state from external threats or aggression is the principle of self-defense,[23] codified in Article 51 of the U.N. Charter and recognized as customary international law.[24]

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22. An historic international doctrine traced to Hugo Grotius articulates that a state may respond to anticipated, as well as actual, harms under international law. "International law is not a suicide pact"; it should allow for such unilateral measures when they become absolutely necessary to protect the survival of a target state's population. *See* Louis Rene Beres, *On International Law and Nuclear Terrorism*, 24 GA. J. INT'L & COMP. L. 1, 31 (1994).

23. Article 51 of the U.N. Charter accords states an "inherent" right of self-defense in response to the threat or use of force as manifested by an "armed attack." See U.N. CHARTER art. 51. International law scholars continue to debate whether this right includes anticipatory or preventative strikes. See IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 272-78 (1963). The international obligation to refrain from use or threatened use of force has been recognized as a rule of customary international law. See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 4, 100. The ICJ has also narrowly construed "armed attack" to exclude instances of a state's supply of weapons or training to non-state actors. *Id.* Accordingly, detractors of anticipatory self-defense might argue that since the terrorists responsible for hijacking and crashing the four US airplanes into the World Trade Center, the Pentagon, and a field in Shanksville, Pennsylvania were not Afghan nationals, their support from the *de facto* rulers of Afghanistan did violate Afghanistan's international legal obligations under principles of state responsibility, but it did not create a right of self-defense for the United States. According to such scholars, absent a visibly high level of state support of terrorism, an anticipatory or preventative strike would find dubious justification under international law. *See* ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM 72-74 (1993).

24. Some authors contend that self-defense exists as a peremptory norm because it meets the "substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat[s]. . . to the survival of States and their peoples and the most basic human values." *See* Draft Articles on Responsibility of States for Internationally Wrongful Acts, pt. 2, Art. 40, para. 3, *in* Report of the International Law Commission on the Work of Its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001), *reprinted in* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002). Implicit in the concept of self-defense is an urgent call to action to combat

In municipal constitutional law, the question emerges more explicitly in terms of internal actions a state might take to defend national security interests. Broadly, the executive authority often seeks to circumvent domestic civil liberties to more effectively defend the state. In some circumstances, this concept is expressed through a "National Security State," which is ostensibly in a permanent state of concern over threats to its own safety and security.[25]

Any national security doctrine creates a classic problem for the rule of law as claims based on national security typically tend to be impatient with legal restraints. The principle of government under law often comes under pressure as the need to protect vital security interests presents the expediency of naked power. The danger posed by national security doctrines and the "National Security State" is, as Professor A.S. Matthews explains, that a temporary derogation from the rule of law has a tendency to become relatively permanent.[26]

Threats based on terrorism, particularly when supported by weapons of mass destruction (WMD), provide a powerful justification for the triumph of national security power over the rule of law in constitutional and international law terms.[27] In other words, the classic problem presented by the claim to a national security doctrine presents a critical question of whether power can indeed be constrained by law or whether such power is so critical to the survival of the state that it cannot and must not be constrained by law.[28]

We might assume that matters of critical national security simply represent the limits of law, so when we cross over onto the terrain of national security, legal culture is abandoned.[29] This approach suggests that the role for lawyers,

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breaches of peremptory norms by dissenting states under the consensual framework of the international system by imposing obligations on these states deemed fundamental by the international community. *See* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Request for Provisional Measures, 1984 ICJ REP. 196 (Order of May 10) (Schwebel, J., dissenting) ("These fundamental rights of a State to live in peace, free of the threat or use of force . . . are rights of every State, erga omnes."). Accordingly, the right to self-defense is a "strong candidate for acceptance as [a] peremptory [norm] of international law." Christine M. Chinkin, *Third-Party Intervention Before the International Court of Justice*, 80 AM. J. INT'L. L. 495, 513 (1986).

25. *See* AREND & BECK, *supra* note 23, at 73.

26. *See generally* A.S. Mathews & R. C. Albino, *The Permanence of the Temporary —An Examination of the 90- and 180-Day Detention Laws*, 83 S. AFR. L.J. 16, 37-38 (1966).

27. For an interesting explanation of the relationship between the rule of law and national security, see Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002). Judge Barak concludes that "[j]udicial review of the legality of the war on terrorism may make this war harder in the short term, but it also fortifies and strengthens the people in the long term. The rule of law is a central element in national security." *Id.* at 158.

28. This contest between security and power is an historic one. In 1974, Chair of the Senate Subcommittee on Constitutional Rights Senator Sam Ervin stated that "with power comes the ability to do harm. The fundamentals of our constitutional system [and others] require us always to ensure that governmental power is sufficiently constrained by law so that as much as is humanly possible the power of government is used for good alone." STAFF OF SENATE SUBCOMM. ON CONSTITUTIONAL RIGHTS, COMM. OF THE JUDICIARY, 93d CONG., PREFACE TO FEDERAL DATA BASES AND CONSTITUTIONAL RIGHTS: A STUDY OF DATA SYSTEMS ON INDIVIDUALS MAINTAINED BY AGENCIES OF THE UNITED STATES GOVERNMENT, at III (Comm. Print 1974). However, some scholars believe that international law leaves open whatever international recourse is necessary to protect the survival of a state's population. *See, e.g.*, Beres *supra* note 22, at 31.

29. Some scholars argue that when matters of national security arise, international law regarding the use of force, particularly in the U.N. Charter, ceases to be viable. Professors Franck, Comba-

and the concept of legal accounting, must necessarily be limited.[30] On the other hand, we might view law as so critical to the values that make social organization worth defending that we cannot assume an abdication of the role of law and legal culture, even in the context of a strong claim to the use of power for national security. We would submit that lawyers in general are committed to a principle of realism.[31] This principle requires an abdication of the lawyer role only in absolutely extreme circumstances. We submit that the operative presumption should be that the lawyer's role is even more critical in the context of claims to national security because the stakes posed by the clash of law and power are so high.[32]

Lawyers and concerned policymakers might improve the quality of decision making if careful self-appraisal were directed at national security doctrines. This approach would ensure that the invocation of the national security doctrines, as far as reason permits, would be consistent with the constitutional foundations of the state, as well as those of the international system. One of the central elements of the political theory and jurisprudence of the state is the assumption that it does not exist to secure its own destruction.[33] To service this objective, every state has an implicit—or, indeed, explicit—national security doctrine of some sort. It is possible, as the Romans saw it, that the safety of the state is indeed the most important objective of politics and law.[34]

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cau, and Glennon have reviewed states' continuing breach of Charter rules and deduce that the U.N. Charter is no longer practicable and as a result, is generally ignored. *See generally* Thomas M. Franck, *Who Killed Article 2(4)?*, 64 AM. J. INT'L L. 809 (1970); Jean Combacau, *The Exception of Self-Defence in U.N. Practice*, *in* THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 9, 32 (1986) ("[t]he international community no longer believes in the system of the Charter, because the collective guarantee, in exchange for which its members had renounced their individual right to resort to force, does not work. . ."); Michael Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J. L. & PUB. POL'Y 539, 540-56 (2002) (suggesting that the U.N. has failed as a legal regime for regulating the use of force in the international system); Michael J. Glennon, *Preempting Terrorism; The Case for Anticipatory Self-Defense*, WKLY STANDARD, Jan. 28, 2002, at 24 (calling into question the viability of the Charter rules on the use of force).

30. The normative aspect of the lawyer's role reflects upon the systems of cultural and professional identifications of lawyers. Professor Winston Nagan asks, "do they identify themselves as bureaucrats, as champions, as acolytes, as 'friends' or are they influenced by the basic law models of operational systems or the prescribed values of the UN Charter?" Winston Nagan, *Lawyer Roles, Identity, and Professional Responsibility in an Age of Globalism*, 13 FLA. J. INT'L L. 131, 133 (2001). The U.N. Charter emphasizes values including world peace, security, human rights, and development, which constitute the procedural and substantive foundations of the international rule of law. *Id.* at 133. It might follow that the role of the international lawyer changes in times of national security concern.

31. See *generally* MARTTI KOSKENNIEMI, THE INTERNATIONAL LIBRARY OF ESSAYS IN LAW & LEGAL THEORY, AREA 5: INTERNATIONAL LAW xviii (Martti Koskenniemi ed., 1992) (suggesting that lawyer realism is important and that the ongoing argument between realists and idealists is an unproductive intellectual "cul-de-sac").

32. The role of the international lawyer encompasses principles "built around several critical 'keynote' concepts which seek to secure peace, security, basic human rights and responsible eco-social progress." Nagan *supra* note 30, at 153.

33. In other words, a state will not rationally be complicit in its own demise.

34. *See generally* LESTER L. FIELD, LIBERTY, DOMINION, AND THE TWO SWORDS: ON THE ORIGINS OF WESTERN POLITICAL THEOLOGY (1998).

Neither the state nor the scope and content of national security concerns are static matters. For example, technological advances at once enhance security and insecurity. One state's security claim may be another state's concern for its own vulnerability. More than that, one state's claim to security may pose a threat to the security of the entire world community. Hence, the odd juxtaposition promoted by law is that both national security claims and collective security claims are—on their face—valid. The tragic events of September 11, 2001 resurrected the problem of a superpower gravitating not only to a particular kind of claim to national security, such as the informal declaration of an indefinite war against global terrorism made by President Bush, but also of the construction of a particular politico-juridical state for the future of the nation. In other words, the claim implies a "national security" or "garrison" state of indefinite duration. The claim implicit in the evolution of our current national security posture seems to be in the direction of Lasswell's famous "garrison state" hypothesis. [35]

The central question that vexed lawyers at the height of the Cold War was how to secure civil liberties in a time of crisis over WMD. The internal legal culture and the position they articulated under domestic law were subject to pressures about the scope of executive power, with an emphasis on the needs of and fidelity to the values of the American republic. Since a central value of American law and politics is the idea of limited power, a claim promoting expansion or unlimited powers based on a national security crisis poses a serious threat to the principle that official power must be subject to law.

The U.S. attack on Iraq notably required the articulation of a very carefully structured national security doctrine. It required significant reevaluation of the boundaries of self-defense in an age in which terrorists may have access to and might be able to deploy WMD. Moreover, the question of regime replacement in light of the abuse of sovereignty typical of the "rogue state" requires us to carefully examine the notions of national sovereignty and the state in international law as they are currently understood. Such an approach might deepen our appreciation of the relationship between national security doctrines and actual practice in international law. This perspective may help us appreciate the challenge the new Bush Doctrine poses for the rule of law and its legal currency in the Iraq crisis. It should be noted that states large and small, particularly the planet's hegemons, have some sort of national security doctrine, and, in different ways, confront the problems of law and power.[36]

35. *See* Harold D. Lasswell, *The Garrison State*, 46 AM. J. SOC. 455 (1941), reprinted in HAROLD D. LASSWELL ON POLITICAL SOCIOLOGY 165 (Dwayne Marvick ed., 1977).

36. With regard to national security doctrines, most states have two priorities: "[o]n one hand, protecting national security; on the other hand, protecting the dignity and freedom of every person." Further Hearing 7048/97, Anon. v. Minister of Defense, 54(1) P.D. 721, 740 (Isr.). This is because "there is no choice. . .in a democratic society seeking freedom and security but to create a balance between freedom and dignity on one hand and security on the other. . .[to create a] balance. . .between the freedom and dignity of the individual and State and public security." *Id.* at 743; *see also* Barak, *supra* note 27, at 155 ("[p]rotection of national security is a social interest that every State strives to satisfy.").

The challenges or responsibilities of the safety and security of the American people do come at a price. Law must pay for a part of the bill, but how much? Perhaps the eighteenth century ghosts of Marbury and Madison will continue to haunt us in thought as well as in deed. States may think in very different ways about how they might secure the survival of their vital interests. Some states effectively see any threat to their survival as a threat to the moral values implicit in their organization; in these cases, defending the state might prove difficult because these states' values may be threatened by an internal enemy. What about the extra-territorial international law aspects of our problem? Before we take a harder look at this issue, a comparative as well as a national overview of previously employed national security doctrines might better ground our discussion of how national security doctrines impact the rule of law.

III.
NATIONAL SECURITY DOCTRINES AND THE LESSER POWERS

Rather than begin this analysis with a review of national security doctrines of great powers such as the United States or the Russian Republic, we first embark on a perhaps counter-intuitive, but insightful analytical approach by briefly assaying national security doctrines of smaller states and non-governmental entities. This focus allows a greater appreciation of the ubiquitous problems and issues tied to the legal regulation of national security interests. The first example is Costa Rica. Costa Rica has a markedly different conception of how it protects itself as a state as compared to other states. Rather than craft a traditional national security doctrine, its security values are constructed around the fact that it does not want a professional army, air force, or navy.[37] The implicit policy that sustains this judgment is the idea that the militarization of a society constitutes a greater threat to state security than not investing vast resources in military institutions. As a result, Costa Rica apparently relies on collective (regional or national) security principles and concludes that joining the arms race simply increases security threats. Thus, Costa Rica instead opts for disarmament, peace, human rights, and the rule of law to enhance its own prospects of peace and security.[38]

The second example is a state with unique and exceptional qualities: the Vatican. Quixotically, one is reminded of Stalin's comment about the Vatican State's lack of a national security apparatus. The question he asked rhetorically was, "How many divisions has the Pope?"[39] The Pope maintains a small Swiss Guard to maintain public order, but such a security concession appears to be largely symbolic and ceremonial.[40] Of course, the Vatican managed to survive

37. For a summary of Costa Rica's national security doctrine and its history of conflict prevention, conflict resolution, and international relations, see Paul Wehr & Klaus Pfoser, *Toward Common Security in Central America*, *in* CONFLICT RESEARCH CONSORTIUM (1990) (Working Paper 90-8), *available at* http://www.colorado.edu/ conflict/full_text_search/AllCRCDocs/90-8.htm.

38. *Id.*

39. George Weigel, *The Pope's Divisions*, WASH. POST, Sept. 22, 1996, Book World, at 1.

40. Milton Lipson, *Private Security: A Retrospective*, 498 ANNALS AM. ACAD. POL. & SOC. SCI. 11, 13-14 (1988).

without an army when Italy was a fascist state occupied by the Nazis, who were generally unsympathetic to Catholic values. The Vatican's doctrines and practices during the war are still considered somewhat controversial, since ostensible neutrality in the face of the Nazi scourge led the Vatican to remain silent regarding the Christian values it championed.[41] However, such a position might have been important to the Vatican's survival in other ways.[42]

Our third example comes from South Africa. Its approach to national security under the Nationalist Party was the crude "Total Onslaught" doctrine, which was based on three principles: 1) communist aggression and subversion was a major international threat to the South African state, 2) *De swart gevaar* (the threat of black internal resistance), and 3) *Kragdadigherd* (the use of brute force, both internally and externally to defend the state).[43] Later, South Africa refined these doctrines to position itself as an integral cog in the global defense of "freedom" against communism. In effect, it sanctioned an unlimited "war" against the opponents of apartheid, which involved interventions abroad, state terrorism, and death squads at home. The international community subsequently determined apartheid was a crime against humanity.[44]

Our fourth example, the former Socialist Federal Republic of Yugoslavia (SFRY), had a formulated military doctrine. The SFRY contemplated the threat posed by new Soviet policies (*Perestroika* and *Glasnost*) and feared the prospect of the Federation's fragmentation. In response, it created the infamous "Operation Ramparts" doctrine, based ideologically on the equally infamous doctrine of the Serbian Academy, the "Serbian Memorandum."[45] The memorandum posited the idea of a greater Serbia, and the security doctrine to secure it was "Operation Ramparts." The fundamental assumption made by the Serbian elite was that if the SFRY could not avoid disintegration, the army (the JNA) would mili-

41. The Vatican expressed remorse for its inaction during World War II in a document entitled We Remember: A Reflection on the Shoah. Pope John Paul II asserted that the document "will indeed help to heal the wounds of past misunderstandings and injustices." *See* Commission for Religious Relations with the Jews, The Vatican, We Remember: A Reflection on the Shoah, Mar. 12, 1998, at 7; Anton La Guardia, *Jews Scorn Pope's Apology*, DAILY TELEGRAPH, Mar. 17, 1998, at 1 (exploring the Vatican's We Remember: A Reflection on the Shoah document).

42. In a private conversation with British Ambassador to the Vatican, Ivone Kirkpatrick, the Vatican's Secretary of State under Pope Pius XI, Eugenio Pacelli (the future Pope Pius XII) expressed "disgust and abhorrence" of Hitler's reign of terror, but stated on August 11, 1933 that "[he] had to choose between an agreement on their lines and the virtual elimination of the Catholic Church. . ." Ivone Kirkpatrick (The Vatican) to Sir Robert Vansittart (Aug. 19, 1933) *in* DOCUMENTS ON BRITISH FOREIGN POLICY 524 (1956); *see also* RALPH STEWART, POPE PIUS XII AND THE JEWS 17 (1999).

43. *See* House of Assembly Hansard, Mar. 21, 1980, Col. 3321 (remarks of P.W. Botha) ("South Africa finds itself the target of a three-pronged onslaught . . . calculated to bring about the downfall of this state . . . The main object of the onslaught on the Republic of South Africa, under the guidance of the planners in the Kremlin, is to overthrow this state and create chaos instead, so that the Kremlin can establish its hegemony here.").

44. *See* Human Rights Watch, "Prohibited Persons": Abuse of Undocumented Migrants, Asylum-Seekers, and Refugees in South Africa, *at* ch. III, 4. (1998), *available at* http://www.hrw.org/reports98/sareport.

45. For a brief historical summary of events leading up to the drafting of the Serbian Memorandum, see Murat Somer, *Cascades of Ethnic Polarization: Lessons from Yugoslavia*, 573 ANNALS AM. ACAD. POL. & SOC. SCI. 127, 143 (2001). *See generally* VUK DRASKOVIC, KNIFE (2000).

tarily conquer as much of the SFRY as could be absorbed into a greater Serbia. The Serbs' ethnic cleansing policy led to the creation of the International Criminal Tribunal of Yugoslavia (ICTY) and the principle of international military intervention.[46]

Our fifth example centers on the conflict in the Middle East between the State of Israel and the Palestinian people, and the various institutions that compete for leadership among them. This conflict creates important insights into the nature of national security doctrines as well as the problem it poses for the international rule of law. In situations of extreme conflict, state and non-state participants are often fueled by informally constructed security doctrines generated by elites or counter-elites. For instance, elements in the Likud Party maintain that Israel cannot be made secure unless it has expanded secure boundaries that include territories historically identified as Sumeria and Judea.[47] Thus, the idea exists that at the end of the day, Israel might only be secure if it can establish a "Greater Israel." The doctrine—as advocated by these interests—is sometimes supported by the idea that it is historically just to claim territories that were originally part of the Hebrew heritage.[48] The claim to security in these terms would be incompatible with not only the original resolution for the partition of Palestine, but other U.N. Resolutions which indicate that a final disposition of territorial claims must be implemented according to law rather than the unilateral claims to a zone of exclusive security. In short, such a claim would seriously challenge important aspects of international law.

From the Palestinian perspective, Palestinian State rights can never be achieved on the basis of a U.N. Resolution, which might be seen as dispossessing Palestinians of their land, or the realism of Israel's national security claims, which might involve the extinction of Palestinians' rights. These elements also seem to see the future as requiring a "Greater Palestine" and an extinction of the State of Israel.[49] These points of view do not represent the official positions of either the government of Israel or what is left of the Palestine authority. But there are powerful social forces at the controlling ends of both institutions that vigorously assert these kinds of national security doctrines and therefore significantly influence the prospects of peace under law. Moreover, the claims to the

46. *See generally* Winston P. Nagan, *Strengthening Humanitarian Law: Sovereignty, International Criminal Law and the Ad Hoc Tribunal for the Former* Yugoslavia, 6 DUKE J. COMP. & INT'L L. 127, 154 (1995).

47. Israel's right wing national party, Likud, has consistently encouraged settlement in Palestinian occupied territories and plans on annexing the territories. Within the Israeli right there is the secular nationalist wing, embodied in the Likud, and the radical right, spearheaded by the settlers of the occupied territories. *See* Ehud Sprinzak, *The Politics of Paralysis I: Netanyahu's Safety Belt*, FOREIGN AFF., Jul. 1, 1998, at 18; *see also Divide and Multiply*, THE ECONOMIST, Apr. 25, 1998, at 8.

48. *See* Sprinzak, *supra* note 47, at 18.

49. Some Palestinian authors argue that if Israel retains any measure of control or jurisdiction over the Palestinian settlements in the event of a lasting Israel-Palestine accord, such control would be tantamount to annexation and would in fact preempt the outcome of the final status negotiations. They argue that the continued existence of Palestinian-controlled territory is contingent on the total absence of Israeli control or involvement. *See generally* GEOFFREY R. WATSON, THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS (2000).

integrity and security of the state and the claims for self-determination and independence have generated strategic initiatives that, on their face, are violations of international law. For example, the use of homicide bombers to attack Israeli civilians seems to be a clear violation of various provisions of the Geneva Conventions. It remains unclear which forms of Israeli retaliation also meet the standards of the Geneva Conventions and whether, in fact, the rules of belligerent occupancy (which incorporate the Geneva Conventions) impose specific obligations on Israel.[50]

In truth, the claims to national security and patterns of retaliation and counter-retaliation seem to gravitate to a position in which the rule of law is seriously weakened. In the words of the poet Yeats, "the ceremony of innocence is drowned."[51] What, however, is striking about the national security claims within the framework of the Arab-Israeli conflict is the fact that each side often sought to justify its position by bringing it closer to the national security doctrines of the planet's hegemons, thus giving distinctively global dimensions to a regional conflict.[52] It may be that converting a regional conflict into a global test of ideologies makes the conflict worse for the parties directly involved in it. The Middle East is awash in conventional weaponry and, notwithstanding the difficulty of finding WMD in Iraq, common sense requires us to acknowledge the existence of some forms of such weapons or the capacity to produce them.[53] This acknowledgement presents a threat from state and non-state actors alike.

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50. Israel's position is that the fourth Geneva Convention is not applicable to the disputed territories; specifically, Israel argues that:

> The fourth Geneva Convention, where it applied—and to our knowledge it has never formally been applied anywhere in the world—is intended for short-term military occupation and is not relevant to the *sui generis* situation in this area. Moreover, even were the laws of belligerent occupancy applicable, these rules, including the 1907 Hague Convention, contain no restriction on the freedom of persons to take up residence in the areas involved.

Chaim Herzog, Israel's Ambassador to the United Nations, Statement to the United Nations, U.N. Doc. A/32/PV 47, para. 102 (Oct. 26, 1977).

51. WILLIAM B. YEATS, *The Second Coming*, *in* THE POEMS OF W. B. YEATS 187 (1983).

52. *See* ROBERT MANDEL, THE CHANGING FACE OF NATIONAL SECURITY: A CONCEPTUAL ANALYSIS (1994); DANIEL J. KAUFMAN ET AL., *A Conceptual Framework*, *in* U.S. NATIONAL SECURITY: A FRAMEWORK FOR ANALYSIS 3-26 (1985); MOSHE LISSAK, *Civilian Components in the National Security Doctrine*, *in* NATIONAL SECURITY AND DEMOCRACY IN ISRAEL 55 (1993). *See generally* DAN HOROWITZ, *The Israeli Concept of National Security*, *in* NATIONAL SECURITY AND DEMOCRACY IN ISRAEL 11 (1993).

53. Such common sense is supported by the recent location of small amounts of chemical weapons in Iraq. *See* Liza Porteus, *Tests Confirm Sarin in Iraqi Artillery Shell*, FOXNEWS ONLINE, May 19, 2004, *available at* http://www.foxnews.com/story/0,2933,120268,00.html (reporting that a 155-millimeter binary chemical artillery shell that exploded in May 2004 contained three or four liters of sarin, a deadly nerve agent, and that another artillery shell discovered in Iraq on May 2, 2004, contained mustard gas.); *see also* Associated Press, *Iraq Sarin Find Worries U.S.*, CBS ONLINE, May 17, 2004, *available at* http://www.cbsnews.com/stories/2003/06/25/iraq/main560449.shtml.

IV.
NATIONAL SECURITY DOCTRINES AND THE HEGEMONS

Great powers or hegemons are the key formulators of national security doctrines. The global salience of their "claims" to spheres of security interests has an influence on the conditions of world order, especially the system of power and legal relations upon which it is based. At first blush, it may seem somewhat oxymoronic to think about any national security doctrine as having to do with rule of law. In general, the historic invocation of the necessity of national security powers was meant to limit the role of law in the exercise of those powers. Invocation of most national security competences insulates political decision-makers from the restraints of conventional, constitutional, and even international law. Thus, national security powers are ostensibly political and not legal.[54] They are justified by the claims that the state's survival or critical interests can only be secured by authorized political decision-makers who must be given the degree of political discretion to make effective strategic and tactical choices about the safety and security of the body politic. A viable national security doctrine is not merely a strategic option for the United States, it is a strategic, governmental imperative. American international lawyers might best deal with the accompanying clash between international law and international power by examining past American national security doctrines.

A. National Security and United States Executive Authority

Under the Oath of Office clause, the President, who exercises the constitutionally prescribed executive competence of the state, is obliged to "defend" the Constitution of the United States.[55] Other officials may be required to support the Constitution, but the President alone has the textual obligation to defend it. This article is the prime source of the President's power over matters of national security. The President does not have the power to declare war; that authority is vested in the Congress.[56] The President does, however, have the authority over the conduct of war and armed conflict. Although limitations are imposed on this power, its effect is vast and in the event a superpower President occupies the White House, the fate of humanity rests in his control.

The effect of a greater state's hegemonic ambitions can be tempered by the power-balancing effect of a lesser state's strong national security doctrine. Indeed, a strong national security doctrine is also a core component of a lesser state's realistic foreign policy decision-making. The proliferation of strong national security doctrines in states large and small may eventually establish a

54. For the leading study of the interplay between law and power in the context of world politics, see generally Myres McDougall & Harold Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 A.J.I.L. 1 (1959). For an additional general analytical framework of the relationship between international law and power, see MYRES S. MCDOUGAL & HAROLD D. LASSWELL, A JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY, 375-449 (1992).

55. U.S. CONST. art. II, § 1, cl. 7.

56. U.S. CONST. art. I, § 8, cl. 11.

common security, an emergent concept of international relations, which seeks to interlink domestic national security doctrines with international human security.

In the United States, the President, his National Security Advisors, his intelligence advisors from the Pentagon and the CIA, and his political advisors from the Department of State as well as his informal but influential ties and connections to the private sector facilitate the formulation of the semi-official national security doctrine of the nation. The doctrine was an especially important part of the strategic positioning of the United States during the Cold War, although prior to the Cold War, the United States did formulate doctrines that incorporated national security values for the region. In searching for a rationale for the public exercise of articulating and disseminating a national security doctrine for a particular administration, several target audiences are implicated within the reach of the communication. These could be well known competitors for power in the global arena. During the Cold War, the major competitor scrutinized in the name of U.S. national interests was the power with the capacity to destroy the United States. That power was the Union of Soviet Socialist Republics (USSR). It became important for the President to articulate as clearly as possible how the United States perceived its vital interests and what it might do to defend them.

Nevertheless, the power positions of both the United States and the USSR maintained symmetry, as the USSR sought to articulate its own doctrines and the scope of its vital interests. An assumption implicit in the invocation of most national security competences is that the articulation of these doctrines lent a degree of predictability as well as stability to relations between the two power hegemons. But the question remains as to whether such doctrines have a juridical basis, and if not, should they? Further, if they should, what exactly is the relationship between the law, the definition, and the expectations incorporated in the assertion of national security interests via national security doctrines? To the extent that law can have something to do with national security interests—the most visible institutional and professional expression of which is found in the ABA section on National Security—as well as the development of executive instruments of self-limitation, congressional legislation, a potpourri of internal administrative regulations and controls for intelligence agencies, and the development of teaching materials and courses, we must assume that national security is indeed subject to national security law.[57] The specific issue we want to examine is the extent to which the formulation of a national security doctrine (or expectation) is an indication of a state's willingness to project power to defend its certain interests. The critical question is whether the rule of law constrains

57. For examples of A.B.A. guidance regarding U.S. security issues, see *Ambassador Miller Provides Rules for Low Intensity Conflict*, A.B.A. NAT'L SECURITY L. REP. 16 at 3, 7-8 (A.B.A. Standing Comm. Law & Nat. Sec. 1994). *See also National Security Law in a Changing World: The Sixth Annual Review of the Field*, A.B.A. NAT'L SECURITY L. REP. 20, no. 2 at 1-12 (A.B.A. Standing Comm. Law & Nat. Sec. 1998); *Special Conference Issue: Nonproliferation of WMD Conference*, A.B.A. NAT'L SECURITY L. REP. 16, no. 7-8 at 1-18 (A.B.A. Standing Comm. Law & Nat. Sec. 1994); *The First (and Last?) Published Opinion of the Intelligence Court*, A.B.A. INT. REP. 3, no. 12 at 3-4, 6-10 (A.B.A. Standing Comm. Law & Nat. Sec. 1981).

the formulation, projection, or application of such power. This essentially means that we confront the problem of national security powers in terms of legal restraints, if any, on those powers; in short, we confront the clash of law and power.

The practical Romans, although deeply committed to the culture of Roman law, seemed to accept the principle that during war the law is silent. The Roman maxim *inter arma silent leges* affirms this.[58] This spirit is reflected in a President whose power to conduct war is rooted in his constitutional authority. In 1998, Chief Justice of the United States Supreme Court William Rehnquist provided the Roman idea with a modern constitutional gloss. His view is that during war, the government's authority to limit civil liberties is greater than such power exercised in times of peace.[59] The Chief Justice believes that it is:

> neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime, but it is . . . likely that more attention will be paid by the courts to the basis of the governments' claims of necessity as a basis for curtailing civil liberty. The laws will thus not be silent during time of war, but they will speak with a somewhat different voice.[60]

A fair appraisal of the philosophy behind this conclusion may lead one to believe that the fundamental assumption about the role of law and the role of courts as protectors of civil liberties and human rights does not presumptively kick in during a national security crisis, such as war.[61] On the other hand, this statement may also be charitably viewed as not incorporating a complete abdication of the role of law in the management of national security powers in conditions of crisis.

The object of this article is limited to national security law in the larger global environment and an exploration of its precise impacts on international legal order and international law. However, lines between what constitutes the domestic, the municipal, and the national, as well as the global or the international, are historically difficult to draw.[62] In the aftermath of the September 11

58. See WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 218 (1998).

59. Chief Justice Rehnquist's wartime/peacetime dichotomy might not represent an evocative empirical distinction. There may never again be another war officially declared by Congress, as required by the Constitution. Of the more than two hundred active deployments of U.S. troops abroad in the history of the United States, Congress has only declared five wars, none of which have occurred since World War II. *See* THOMAS FRANCK & MICHAEL GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS, AND SIMULATIONS 649 (2nd ed. 1993).

60. *See* REHNQUIST, *supra* note 58, at 224-25.

61. Chief Justice of the Israel Supreme Court, Aharon Barak, wrote that "one must recognize that the court will not solve the problem of terrorism. It is a problem to be addressed by the other branches of government. The role of the court is to ensure the constitutionality and legality of the fight against terrorism." *See* Chief Justice Aharon Barak, The Role of a Supreme Court in a Democracy and the Fight Against Terrorism, Cambridge Lectures (Jul. 18, 2003) (transcript available at http://www.embassyofIsrael.dk/messageboard/TheRoleofaSupremeCourtinaDemocracyandtheFight-AgainstTerrorism.pdf). He went on to write that the Court "must ensure that the war against terrorism is conducted within the framework of the law and not outside it. This is the court's contribution to the struggle of democracy to survive." *Id.*

62. "Globalization . . . is a multifaceted concept encompassing a wide range of seemingly disparate processes, activities, and conditions . . . connected together by one common theme: what is geographically meaningful now transcends national boundaries and is expanding to cover the entire

attacks, Congress enacted the Uniting and Strengthening America Providing Appropriate Tools Required to Intercept or Obstruct Terrorism Act of 2001 (the "PATRIOT Act").[63] Among the high visibility issues under this and other legislation are the concerns regarding national security detentions of citizens and non-citizens, national security trials, and the procedure of military tribunals.[64] These issues implicate both civil and political rights as well as international obligations under human rights law and, in particular, they implicate the standards of the Geneva Conventions for the conduct of war and activities analogous to war.[65] The domestic lawyer must confront the effect of domestic legislation that seeks to control and regulate international terrorism under the auspices of U.S. domestic law, which is designed to have extra-territorial applications and circumvent the scope of both civil and political rights, and the protections of international humanitarian law. Congressional legislation and executive practice and initiatives have thus vastly expanded the scope of national security law and the challenge to the rule of law from both a domestic and an international point of view.

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planet. Globalization has led to an awareness that international issues, not just domestic ones, matter." Alex Y. Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT'L L.J. 429, 429 (1997); *see also* Alfred C. Aman, Jr., 1 IND. J. GLOBAL LEGAL STUD. 1, 1- 2 (1993) ("'globalization' refers to complex, dynamic legal and social processes. . . Today, the line between domestic and international is largely illusory.").

63. Pub. L. No. 107-56, 115 Stat. 272 (2001).

64. After September 11, 2001, the FBI rounded up and arrested more than one thousand Middle-Eastern men in the United States. *See* Peter Grier, *Which Civil Liberties—and Whose—Can be Abridged to Create a Safer America?*, CHRISTIAN SCI. MON., Dec. 13, 2001, *available at* http://www.csmonitor.com/2001/1213/p1s2-usju.htm. In October 2001, rules were created to suspend attorney-client confidentiality privileges for certain categories of this group of detainees. *Id.* These rules are a part of a "multipiece package of legal changes which, taken together, represent a profound increase in federal policing powers." *Id.* To justify these new policies, the Bush administration reasoned, "[w]e're battling an enemy committed to an absolute unconditional destruction of our society." *Id.* The Bush administration apparently believes that terrorists prefer to attack "ordinary Americans, in their homes and places of work. That's a new threat, and guarding against it may require a new kind of domestic police work." *Id*; *see also* Dante Chinni, *Wide FBI Dragnet Turns Up Leads, But Also Criticism*, CHRISTIAN SCI. MON., Oct. 15, 2001, at 2 (stating that "[i]nvestigators' willingness to 'go out there and take in every single person that may have done something wrong' is troubling, says a former senior FBI official. Civil rights violations are not his only concern: several FBI agents working on the case have told him in the past week that the investigation may lack focus . . . [because] it is much more of a blanket approach than a laser approach.").

65. Scholars debate about the extent to which the Patriot Act affects American citizens' civil and political rights. Many authors are quite opposed to it. *See* Nancy Chang, *How Does USA Patriot Act Affect Bill of Rights?*, 226 N.Y.L.J. 109, at 1 (2001) (arguing that the PATRIOT Act has the "potential to diminish our privacy and political freedoms to an unprecedented degree by enhancing the executive's ability to conduct surveillance, placing new tools at the disposal of the prosecution, and granting the authority to detain immigrants suspected of terrorism for lengthy, and in some cases indefinite, periods of time."). Others argue that infringing on civil and political rights is justifiable in light of the importance of preventing future terrorist attacks. *See* William C. Banks & M. E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 4 (2000) (observing that "invasions of privacy [may be construed] as necessary evils in enforcing the criminal laws . . . [and in] seeking intelligence information.").

B. *National Security Challenges Faced by American International Lawyers*

American lawyers who practice internationally confront a problem the moment they are conscious of the fact that they call themselves international lawyers. If the scope and character of a national security doctrine purports to trump law, these lawyers are not only irrelevant, but they become apologists for the triumph of power over law. Even Chief Justice Rehnquist to some degree stops short from that precise conclusion in the context of domestic law. This leaves American international lawyers with a more difficult task. In order to stress the idea that our constitution subjects a political authority to the restraints of law, our lawyers must consistently appraise specific applications of national security doctrines to ensure that they can be reconciled with international law. American lawyers are acting from a powerful domestic need to ensure that the projection of American power via a national security imperative can be rationalized as falling within the outlines of the U.N. Charter. This can lead to fairly self-serving constructions of what international law requires, but the central purpose here is less to influence the international community than to defend the principle that the U.S. government is not acting outside the law nationally or internationally.[66]

The impression garnered by international lawyers outside of the United States is that American international lawyers are driven by U.S. interests and their constructions of international law are designed to serve narrow national interest of the United States.[67] We suspect there is some truth in this position, but we are inclined to think that American lawyers are basically conservative and that they do not, under any circumstances, want to concede the principle that the government itself is not subject to law. In this sense, American international lawyers seek to preserve the rule of law even in national security conditions, where considerations of crisis management loom large. It is also the case that not many states articulate as explicitly their national security doctrines or interests upon a change of government, if they ever experience a change of govern-

66. The United States is party to various international conventions which articulate the signatories' pledge to abide by international law. This pledge is perhaps best articulated by the Preamble of the Charter of the United Nations, which states in part that signatories pledge "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and . . . to unite our strength to maintain international peace and security, and . . . to employ international machinery for the promotion of . . . all peoples." U.N. CHARTER, pmbl. The United States has been a signatory to the U.N. Charter since it entered into force on October 24, 1945.

67. It is a widely held belief among non-U.S. lawyers and government officials that the United States international or government lawyer serves the interests of "his supervisor in the department or agency, the agency itself, the statutory mission of the agency, [and] the entire government of which that agency is a part . . ." Note, *Developments in the Law –Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1413, 1414 (1981); *see also* Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI L. REV. 1293, 1298-99 (1987) (suggesting that the duties of the executive branch attorney generally serve the interests of the executive branch); Robert Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 FED. BAR J. 61, 62 (1978) (observing that rather than ask "who is the client?", the U.S. government lawyer typically asks whose directions must be taken, whose confidences must be respected, and exactly how does his or her role determine what course of action must be taken with respect to everything else).

ment. As a result, American lawyers and the legal culture they represent have significantly enriched discussions concerning the classical problem of the confrontation between law and power in the international law context.[68]

C. National Security Doctrines: Cold War to the Present

During the Cold War, the dominant doctrine of the United States was fed by the principle that Soviet imperialism had to be contained. This was a cardinal principle behind the so-called Truman Doctrine.[69] In the defense of this doctrine, the United States was able to secure the support of the United Nations and, although the United States led the military operations in Korea, it was in effect a U.N. sanctioned operation. The intellectual roots of the Truman Doctrine were attributed to a famous article published anonymously by the diplomat, scholar, and historian, George Kennan.[70] The doctrine was devised under the assumption that the USSR was an imperialist, revolutionary state and that it sought to subvert the international state system by supporting revolutionary activities designed to secure regime change of a socialist character. The fundamental principle was therefore the doctrine of containment.[71] International activity by the hegemons to either contain revolutionary nationalism or to expand it posed a powerful threat to the constitutional foundations of international legal order based on the U.N. Charter. Scholars could conceptualize the problem of defining spheres of influence as an element of a national security doctrine, which essentially requires a weakening of the idea of sovereignty. Another possibility might be the concept of permeable sovereignty; sovereignty subject to superpower intervention as a disguised claim to change the constitutional foundations of world order to account for the distribution of real power in bi-polar terms.[72] This clash of superpower spheres of interest and influence

68. "[International] law is neither a frozen cake of doctrine designed only to protect interests in status quo, nor an artificial judicial proceeding, isolated from power processes . . . [W]hen understood with all its commitments and procedures, law offers . . . a continuous formulation and reformulation of policies and constitutes an integral part of the world power process." Myres McDougal, *Law and Power*, 46 AM. J. INT'L L. 102, 111 (1952).

69. Of the doctrine that bears his name, President Truman officially asserted, "I believe that it must be the policy of the United States to support free peoples who resist attempted subjugation by armed minorities or by outside pressures." Jeane J. Kirkpatrick & Allan Gerson, *The Reagan Doctrine, Human Rights, and International Law*, *in* LOUIS HENKIN ET AL., RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 26 (2d ed. 1991). However, Truman articulated his personal beliefs regarding war in his memoirs: "[t]here is nothing more foolish than to think that war can be stopped by war. You don't 'prevent' anything by war except peace." HARRY S. TRUMAN, MEMOIRS, VOL. II: YEARS OF TRIAL AND HOPE 383 (1956).

70. *See The Sources of Soviet Conduct*, 25 FOREIGN AFF. 566 (1947) (authored by George Kennan during his tenure as Director of the Policy Planning Staff in the State Department; scholars widely believe the article represents an official policy statement of containment of Soviet power and international communism).

71. *Id.*

72. In other words, by permeable, we mean that the major powers claimed a right to intervene to secure and protect their virtual ideological, economic, military, and other interests. After the fall of the USSR, post-Communist brushfires swept the globe and fresh governmental, social, and economic powers rose in East Asia and the Middle East to challenge the United States. Author Samuel Huntington asserts that no final victory for Western-style democracy and capitalism are possible because of the emerging, unavoidable conflict between the great civilizations of the world, each with

would deepen considerably as the development of nuclear weapons and sophisticated methods of strategic deployment increased the stakes concerning the survival of civilization. This, of course, posed a vital threat to the constitutional order of the U.N. Charter and how it would ultimately evolve as an instrument of world order and progressive change.

When the USSR became a nuclear power, the assumption that it was an imperialist state with nuclear weapons provoked a modified version of the Truman Doctrine, the Dulles-Eisenhower Doctrine of massive retaliation, or Mutually Assured Destruction (MAD).[73] From a legal point of view, a doctrine which seemed to shortchange the principle of necessity, undermine the principle of proportionality, and completely ignore the principle of humanity raised the question of whether technology had not itself superceded the international law rules regulating the conduct of war.[74] In effect, the international community had to wait until 1996 for the International Court of Justice to provide a legal clarification of the circumstances under which nuclear weapons could be used and the scope of such use.[75]

Recognizing that massive retaliation might overstate any security crisis and elevate it to a direct, superpower conflict (specifically, the Cuban missile crisis),[76] President Kennedy developed a nuanced version of the MAD doctrine. This was the doctrine of "Flexible Response."[77] The Kennedy Doctrine of "Flexible Response" led the United States into the Vietnam conflict and raised important questions about the lawfulness of intervention in that country as well as the conduct of the war itself. The CIA's policy of assassinating Viet Cong

fundamentally different views of man, society, and the state. *See generally* SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND REMAKING OF WORLD ORDER 28 (1996).

73. The defense strategy of MAD evolved from the principle that neither the United States nor its enemies would initiate a nuclear war because the opposing side would retaliate massively. *See generally* H.W. BRANDS, JR., COLD WARRIORS: EISENHOWER'S GENERATION AND AMERICAN FOREIGN POLICY 8-9 (1988).

74. Dulles is renowned for his risk-taking in Korea, Indochina, and the Formosa Straits conflicts, yet he was practical enough to refrain from painting the United States into a nuclear corner; in the Southeast Asian crises of 1953, 1954, and 1955, he repeatedly declared that he had deterred the Chinese from aggression by threatening them with punishing nuclear retaliation. *Id.* at 9-20. Interestingly, such risk-taking came to an abrupt halt in the Eisenhower Administration when it came to preventative warfare. On the issue of preemption, President Eisenhower asserted, "[a] preventative war, to my mind, is an impossibility . . . . I don't believe there is such a thing and frankly I wouldn't even listen to anyone seriously that came in and talked about such a thing." JOHN F. STACKS, SCOTTY: JOHN B. RESTON AND THE RISE AND FALL OF AMERICAN JOURNALISM 133 (2003).

75. *See* Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J 226, *reprinted in* 35 I.L.M. 809 & 1343 (1996).

76. Interestingly, President Kennedy also dismissed the notion of preventatively attacking Cuban missile sites; Robert Kennedy called preemptive attacks "Pearl Harbor in reverse." *See* ARTHUR SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES 508 (1978).

77. Under the Kennedy Administration's "Flexible Response" Doctrine, the United States military discontinued its procurement of heavy missiles and instead concentrated on developing significantly larger amounts of smaller missiles to better facilitate the complete elimination of enemy forces. *See* SENATE FOREIGN RELATIONS COMMITTEE, REPORT ON THE SALT II TREATY, S. EXEC. DOC. NO. 96-14, at 68-69, 167-73 (1979). For example, the government's shift in munitions preference permitted the development of the Minuteman missile, a small, accurate, relatively inexpensive and solid-fueled missile that the United States could produce in high numbers and which eliminated the need for heavy payload missiles with counter-force capabilities. *Id.*

leaders was an issue that focused on the role of intelligence and conduct during armed conflict. It was claimed that some 20,000 Viet Cong leaders were assassinated by CIA and allied operatives in the Phoenix Program.[78] These issues led to U.S. executive orders seeking to constrain the ability to assassinate foreign leaders under the umbrella of national security imperatives.[79]

The Nixon administration sought to avoid the pitfalls of the Kennedy "Flexible Response" and formulated a doctrine that assumed a certain symmetrical disposition of power between the USSR and the United States. This led to *détente* between the United States and the USSR and, indirectly, the stability thus strengthened the rule of law in some ways and weakened it in others.[80] To this was added a kind of quasi-juridical recognition of the respective spheres of hegemonic containment. This would result in rhetorical condemnation of superpower interventions in their own spheres of influence but no prospect of direct military confrontation. This doctrine did much to support superpower interventions.

The Carter Doctrine endeavored to dramatically expand the role of law as a stabilizing factor in the world community by seeking to provide solutions to regional problems and vigorously expanding concern for human rights. A central element of the Carter Doctrine was the idea that needless confrontations with other hegemonic powers ought to be avoided; the consequences of a failure to maintain stable expectations among super powers could, indeed, be catastrophic. The idea of minimizing conflict with the USSR—unless it was absolutely required—was also a way of reinventing some of the basic constitutional values of the U.N. Charter.[81]

The Reagan Doctrine was a significant change from all previous doctrines.[82] The Reagan policymakers believed that the USSR was, in fact, vulnerable and could be militarily challenged in various parts of the world. The

78. *See* VICTOR MARCHETTI & JOHN D. MARKS, THE CIA AND THE CULT OF INTELLIGENCE 263-64 (1974); Jason Vest, *Kill this Idea*, THE AMERICAN PROSPECT, May 7, 2001, at 2.

79. The executive order provides: "No person employed by or on behalf of the United States Government shall engage in, or conspire to engage in, assassination." Exec. Order No. 12,333, § 2.11, 46 Fed. Reg. 59,941, 59,952 (1981) (issued by President Reagan); *see also* Exec. Order No. 12,036, 43 Fed. Reg. 3,675 (1978) (issued by President Carter); Exec. Order No. 11,905, 42 Fed. Reg. 7,707 (1976) (issued by President Ford).

80. For a general summary of the Nixon-Kissinger Doctrine, including its intention to modernize middle powers to enhance security against the Soviet Union and its subsequent toleration of internal repression within these regimes, especially within the Shah's Iran, see ROBERT S. LITWAK, DÉTENTE AND THE NIXON DOCTRINE: AMERICAN FOREIGN POLICY AND THE PURSUIT OF STABILITY, 1969-76 (1984).

81. The Carter Doctrine emerged in January 1980 as an apparently lawful exercise of the critical zone practice. In response to aggression in Afghanistan on the part of the Soviet Union, President Carter declared: "An attempt by any outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States of America, and such an assault will be repelled by any means necessary, including military force." 16 WEEKLY COMP. OF PRES. DOC. 197 (Jan. 23, 1980). The Carter Doctrine is not a disguised technique of intervention in the internal affairs of states; it justifies itself in that it derives its lawfulness from its articulated promised defense of governments from external aggression.

82. *See generally* W. Michael Reisman, *Old Wine in New Bottles : The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice*, 13 YALE INT'L L. J. 171 (1988).

Reagan Doctrine was designed to move from containment, which was implicit in previous doctrines, to encroachment, which effectively attempted to roll back Soviet ideological and territorial influence.[83] The Reagan Doctrine was fueled by his famous—or infamous—description of the "evil empire" associated with Soviet hegemony.[84] Put simply, the theory was that the United States could spend the USSR into bankruptcy in the arms race and, indeed, it succeeded in doing so.[85]

The Reagan Doctrine also had immense effects on other countries and regions, including a rapprochement-plus-constructive engagement approach to the problems in South Africa, engaging the Ayatollah Khomeini with a bible and a chocolate cake, [86] and involving members of the Reagan administration in the Iran-Contra scandal. The encroachment inherent in the Reagan Doctrine was of great interest to international lawyers because Nicaragua sued the United States in the International Court of Justice and won.[87] The United States argued that the ICJ did not have jurisdiction over the case, and that, in any event, the issue was a matter of national security and as a result, was not amenable to judicial settlement.[88] It is possible to conclude that the Reagan Doctrine as applied to Nicaragua failed the test of basic lawfulness under international law.

The other controversial aspect of the Reagan Doctrine was the formulation of a policy of constructive engagement with the South African apartheid regime. It is hardly likely that the Congress would have promulgated the Comprehensive Anti-Apartheid Act of 1986[89] but for the vigorous and controversial promotion of its endeavors to constructively engage racist South Africa as a part of the roll-back of communism worldwide. The Reagan Doctrine therefore inadvertently

83. Scholars and officials Kirkpatrick and Gerson wrote that the Reagan Doctrine functioned to restore self-government by subscribing to counter-intervention as opposed to intervention. *See* Kirkpatrick and Gerson, *supra* note 69, at 31. These scholars and officials further wrote that Reagan's was not a "roll-back" doctrine. *Id.* Based on the significant correlations between the Reagan Doctrine and its roll-back practices, however, we must disagree.

84. *See* Ronald Reagan, Remarks at the Annual Convention of the National Association of Evangelicals (Mar. 8, 1983), *in* PUB. PAPERS 359, 363 ("[w]hile they [in the Soviet Union] preach the supremacy of the state, declare its omnipotence over individual man, and predict its eventual domination of all peoples on the Earth, they are the focus of evil in the modern world.").

85. Eventually, after Nikita Khrushchev's bold threat, "Whether you like it or not, history is on our side. We will bury you," the arms race eventually ended with the "missile gap" favoring the United States. *See* Remarks following the signing of a Moscow-Warsaw joint declaration in Moscow, November 18, 1956, WASH. POST, Nov. 19, 1956, at 1; *see also* JAMES H. MCBRIDE, THE TEST BAN TREATY: MILITARY, TECHNOLOGICAL, AND POLITICAL IMPLICATIONS, 13-21 (1967).

86. In 1985, just after President Reagan's re-election, his administration embarked on an imprudent scheme to sell thousands of missiles and spare parts to secure the freedom of a small number of hostages from Iran, which was then ruled by the Ayatollah Khomeini. As part of the exchange, then National Security Adviser, Robert McFarlane and General Oliver North flew to Tehran bearing a Bible and a chocolate cake as apparent signs of good faith. *See* Mark Tran, *Iran After Khomeini: White House Hopes for Better Times*, GUARDIAN UNLIMITED, June 5, 1989, *available at* http://www.guardian.co.uk/print/0,3858,4613115-110875,00.html.

87. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 4, 100.

88. *See generally* U.S. Department of State, Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, *reprinted in* 24 I.L.M 246 (1985) [hereafter ICJ Withdrawal Statement].

89. Pub. L. No. 99-440, 100 Stat. 1086 (1986).

brought the United States not only into full compliance with international law, but made the United States an active promoter of change under international law.[90]

The lesson of the congressional regime change initiative (South Africa) versus the Reagan Doctrine's effort at regime change (Nicaragua) indicates that Congress' approach, notwithstanding an attempted veto by the Reagan administration, was vastly more effective in promoting transition to democracy. The Reagan administration's effort to promote violence in Nicaragua proved very costly and provoked a constitutional crisis inside the United States. It should be noted that in the context of intervention, the Comprehensive Anti-Apartheid Act was a remarkable acceptance of the principle that either South Africa was a rogue state, or that its policies and practices of apartheid constituted an abuse of sovereignty under international law, which made U.S. intervention by the sanctions regime and its promotion of constructive initiatives of peaceful change a remarkable stratagem of action in modern international law.[91] Today, South Africa is a liberal democracy.

During the Cold War, the USSR also formulated its own national security doctrine. The Brezhnev Doctrine asserted the power to intervene in states within the Soviet sphere of influence to protect international socialist gains.[92] Both *détente* and the Brezhnev Doctrine accepted forms of intervention into the governance of nation states within the spheres of claimed hegemony. The fall of the USSR made national security claims based on the hegemons of a bipolar world seem obsolete. The new forms of conflict and threats to world order, particularly the new ethnic conflict threats to world order, did not fit into the existing definitions and perspectives of security specialists. When President George H. W. Bush came to power in the late 1980s his administration was confronted with a post-Cold War world, in which the United States was the only superpower.

The first Bush Doctrine confronted certain ethnic conflicts and acts of aggression, and in seeking the roll-back of Iraq after its invasion of Kuwait, positioned U.S. national security policy within the framework of the U.N. Charter.

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90. In 1985, President Reagan attempted to implement the Reagan Doctrine by invoking the International Emergency Economic Powers Act (IEEPA), [now available as 50 U.S.C.S. §§ 1701-1706 (1988)] as the authority for a range of sanctions against the government of South Africa. *See* Exec. Order No. 12,532, 50 Fed. Reg. 36,861 (1985); Exec. Order No. 12,535, 50 Fed. Reg. 40,325 (1985). For the implementing Treasury regulations, see 50 Fed. Reg. 41,682 (1985). Interestingly, President Reagan's efforts were intended to forestall congressional action. *See* MICHAEL P. MALLOY, ECONOMIC SANCTIONS AND U.S. TRADE 447-48 (discussing sanctions under IEEPA and subsequent congressional legislation). President Reagan's effort was ultimately unsuccessful because in 1986, Congress enacted the Comprehensive Anti-Apartheid Act of 1986 over the President's veto, which brought the Reagan administration's policies under the umbrella of international law.

91. *See* Comprehensive Anti-Apartheid Act, Pub. L. No. 99-440, 100 Stat. 1086 (1986).

92. The Brezhnev Doctrine comprised the Soviet Union's official disposal of some fundamental provisions of the U.N. Charter; it proclaimed such U.N. Charter violations a "duty" in cases where the "achievements of socialism" were threatened in any of the "fraternal countries." *See generally* Richard Goodman, *The Invasion of Czechoslovakia: 1968*, 4 INT'L LAW 42 (1969); Nicholas Rostow, *Law and the Use of Force by States: The Brezhnev Doctrine*, 7 YALE J. WORLD PUB. ORD. 209 (1980-1981).

Iraq's invasion of Kuwait was severely rebuked in international circles where the U.N. Charter values, having survived the Cold War, were now under the direct threat of unilateral repudiation. The invasion was a direct violation of Article 2(4) and there was no pretense that Article 51 could cover the obviousness of the aggression.[93] The great powers found the United Nations and rediscovered the U.N. Charter. The defense of the Charter was, admittedly, supported by the threat Iraq posed to vital energy interests in the region; but multilateralism became fashionable and the first President Bush saw an opportunity to construct a different doctrine based on what he thought would be a kinder and gentler world. However, the new world order rhetoric was short lived.

The non-ideological conflicts in the former Yugoslavia, Rwanda, Somalia, and elsewhere weakened the enthusiasm for multilateralism, which rekindled the latent U.S. interest in isolationism and stoked the general antipathy toward international responsibility. These forces have a long, dreary history of collectively and successfully blocking U.S. ratification of the principal human rights covenants. For example, they spearheaded the drive to prevent the United States from paying financial dues owed to the United Nations, they insisted on reforming the United Nations, and the rhetoric of the right-wing in the Senate was unrestrained to an extraordinary degree.[94] The major casualty from such attacks was the Comprehensive Nuclear Test Ban Treaty.[95] The Treaty was a vital complement to the Non-Proliferation Treaty and sent an international signal that the United States was not in favor of banning the proliferation of nuclear weapons.

As indicated earlier, most states have some sort of national security doctrine. The doctrine's ostensible rationale is to defend the state's national interests—or state's *perceived* national interests.[96] National security in general

93. "President George Bush led the United States in the Gulf War coalition proclaiming, at the war's end, a 'new world order under the rule of law.' The exemplary conduct of that coalition war reinvigorated the Charter rules and the role of the Security Council." O'CONNELL, *supra* note 16, at 17.

94. For example, the Torture Convention was described by Senator Helms as "a skunk in a bag." *See Convention Against Torture: Hearing Before the Senate Comm. on Foreign Relations*, 101st Cong. 2 (1990) (statement of Senator Jesse Helms). Senator Rod Grams of Minnesota described the International Criminal Court as a "monster" that had to be killed. *See* Jesse Helms, *We Must Slay This Monster: Voting Against the International Criminal Court Is Not Enough. The US Should Try to Bring It Down*, FIN. TIMES, July 31, 1998, at 18. Senator Gram wanted the U.S. government to "make sure the treaty is never ratified by the sixty nations necessary for it to go into force" and if the court should come into existence, against this out-and-out pressure by the United States on other countries, Gram urged a "firm policy of total non-cooperation: no funding, no acceptance of its jurisdiction, no acknowledgment of its rulings, and absolutely no referral of cases by the Security Council." *Hearing on the Creation of an International Criminal Court Before the Subcommittee on International Operations of the Committee on Foreign Relations*, 105th Congress, at 3 (1998). Right-wing Senators have additionally talked openly about their inspiration, which they garnered from the "defeat" of the League of Nations.

95. *See* Comprehensive Nuclear-Test-Ban Treaty, U.N. Doc A/Res/46/29 (1991).

96. A national security doctrine is a series of concepts with no precise, analytic meaning. *See generally* Note, *Developments in the Law: The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130 (1972). "At its core [a national security doctrine] refers to the government's capacity to defend itself from violent overthrow by domestic subversion or external aggression. . .it also encompasses simply the ability of the government to function effectively so as to serve our

targets the defense of basic values central to the integrity of the state. These values include the integrity of territorial security, the security of the population, security over basic resources, and defense of fundamental ideals. The strategies of national security tend to target military sufficiency, diplomatic efficacy, economic viability, as well as the management of the signs and symbols of communications propaganda. In international relations, the study of national security has stressed the role of these values in the global balance of power, in collective security, in the structural importance of federalist approaches to world order, and the development of integrated functionalist approaches to the field.[97] The various doctrines would, in all probability, provide conceptual markers or guidelines to policymaking and might also be seen to trigger warning signs about the outline of perceived security interests and the extent to which the state might go to defend those interests.

V.
THE NEW BUSH DOCTRINE[98]

When President George W. Bush came to power in 2000, his campaign stressed that U.S. interests would be viewed with more isolationism than before, with an inherent suspicion of multilateral ties, and with an even deeper suspicion of both the U.N. Charter and international human rights.[99] This was not formulated as a doctrine, unless one assumes that the reinvention of isolationism is something novel in the American political landscape. The attacks of September 11 changed all of this. In the aftermath of the attacks, the outlines of a new national security doctrine began to emerge from the post-Cold War world in which the nature of perceived threats came from international terrorism directed both at U.S. global interests and at the heartland of the United States itself.[100]

It would be useful to give a brief overview of national security doctrine indicators in the current Bush administration prior to the events of September 11. First, there has always been a tendency to see the United States as having an exceptional position within the international legal system. This exceptionalism has often meant that the United States must carry a disproportionate burden

interests at home and abroad." *Id.* at 1133. Accordingly, "[v]irtually any government program, from military procurement to highway construction and education, can be justified in part as protecting the national security." *Id.*

97. Inis Claude, Jr., *Theoretical Approaches to National Security and World Order*, *in* NATIONAL SECURITY LAW 31, 36 (Moore et al. eds., 1990).

98. This section discusses the national security doctrine created by President George W. Bush and members of his administration.

99. The Bush administration's battle cry apparently hearkened back to Senator Daniel Patrick Moynihan's in the Reagan administration, "real men [do] not cite Grotius." DANIEL PATRICK MOYNIHAN, ON THE LAW OF NATIONS 7 (1990).

100. *See* R.C. Longworth, *'Bush Doctrine' Arises From the Ashes of Sept. 11*, CHI. TRIB., Mar. 7, 2002, at 4 (reporting that President Bush's post 9/11/01 foreign policy has become increasingly unilateral and isolationist); Emily Eakin, *All Roads Lead to D.C.*, N.Y. TIMES, Mar. 31, 2002 at 4, (reporting the recent American scholastic development of branding the United States an "empire" with imperialist tendencies); Fred Hiatt, *Our Rose-Colored Cold War*, WASH. POST, Mar. 25, 2002, at A19 (criticizing the similarity between the United States' recent foreign policy anti-terror ambitions and twentieth-century Cold War-era policies).

when crises of great magnitude affect the planet.[101] In more crude formulation, it is sometimes said that the United States is an important element in the process of policing the global environment. The fact that the United States is the strongest military power on earth seems to heighten the expectation of its role in interventions. Paradoxically, it also heightens the expectation that it can act unilaterally in these matters because it often pays the price for multilateral ineptitude, which may increase the prospect of retaliation.[102] U.S. exceptionalism might be justified in different ways, including, but not exclusively, by U.S commitment to democratic values and the rule of law, the U.S. track record of not being an imperialist occupying power, and U.S economic power and military dominance.

Prior to the election of President George W. Bush there were indications that the grounds for American exceptionalism would serve as a justification for U.S. unilateralism. American unilateralism carries a political constituency long identified by the notion that U.S. exceptionalism justifies U.S. unilateralism. U.S. unilateralism, in turn, has a constituency that supports U.S. isolationism. Both isolationism and exceptionalism seem to be significant influences on the emerging foreign relations doctrine of the Bush administration. Prior to Bush's electoral "victory," he stated that the United States would retreat from its commitment to promote development, which would, correspondingly, suspend poverty alleviation around the world. In 1999, the Senatorial right-wing scored a major defeat against the Clinton administration when it became jurisdictionally seized of the Comprehensive Test-Ban Treaty and achieved its defeat.[103] Although there was little public outcry about this shortsighted act, the opportunities for controlling and regulating nuclear WMD were seriously compromised.[104]

Moreover, as earlier indicated, the right-wing contingent in the Senate was up in arms about the Rome Statute of the International Criminal Court (ICC), claiming that this treaty would compromise American sovereignty. So vehement was this antagonism to the ICC that many Senators suggested the United Nations was a candidate for extinction, much like the ill-fated League of Na-

101. Author Richard Haass argues that "the United States [must] act, whenever possible with others but alone if necessary and feasible, to shape the behavior and, in some cases, capabilities of governments and other actors so that they are less likely or able to act aggressively either beyond their borders or toward their own citizens and more likely to conduct trade and other economic relations according to agreed norms and procedures." RICHARD HAASS, THE RELUCTANT SHERIFF: THE UNITED STATES AFTER THE COLD WAR, 4 (1997).

102. *See* JAMES C. HSIUNG, IS SOVEREIGNTY STILL RELEVANT? ANARCHY AND ORDER: THE INTERPLAY OF POLITICS AND LAW IN INTERNATIONAL RELATIONS *in* GLOBAL LAW WITHOUT A STATE 18 (1997) ("[i]n the anarchic system, a specific violation of international law by one country—if it should stem from a unilateral action of self-help—is apt to invite reciprocal or competitive counter-violations by opponent states"). *See generally* Beth A. Simmons, *Compliance with International Agreements*, 1 ANN. REV. POL. SCI. 75 (1998).

103. *See* Eric Schmitt, *Senate* Kills *Test Ban Treaty in Crushing Loss for Clinton; Evokes Versailles Pact Defeat*, N.Y. TIMES, Oct. 14, 1999, at A1 (reporting the Senate's rejection of the Comprehensive Test Ban Treaty).

104. *Id.*

tions.[105] When President Bush came to power, he refused to sign the Kyoto Protocol on Global Warming even though the Protocol was revised to accommodate all articulated U.S. concerns.[106] The Bush administration also developed a profoundly negative approach to the Anti-Ballistic Missile Treaty,[107] the Nuclear Non-Proliferation Treaty,[108] as well as the treaties governing biological

105. *See* Remarks by Senators Helms and Grams, *supra* note 94.

106. The Kyoto Protocol is an international treaty to reduce greenhouse gas emissions. Dec. 10, 1997, U.N. Doc. FCCC/CP/1997/7/Add.2, Dec. 10, 1997. For a summary of the Kyoto Protocol and its implications, see Clare Breidenich, et al., *The Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 92 AM. J. INT'L L. 315 (1998). In March 2001, the Bush administration announced that the United States would not seek to join the Kyoto Protocol to the U.N. Framework Convention on Climate Change (UNFCCC), May 9, 1992, S. TREATY DOC. NO. 102-38 (1992), 1771 U.N.T.S. 108, reprinted in 31 I.L.M. 849 (1992). At the resumed Sixth Session of the Conference of the Parties to the UNFCCC in July 2001 in Bonn, Germany, key compromises were reached by developed states other than the United States on implementing the Kyoto Protocol. *See* Note, *Contemporary Practice of the United States*, 95 AM. J. INT'L L. 132 (2001). Participating states reached final agreement on the details for implementing the Kyoto Protocol at a meeting for the Seventh Session of the Conference of the Parties in Morocco in November 2001. *See* the Marrakesh Accords and the Marrakesh Declaration (Nov. 10, 2001), *available at* http://unfccc.int/cop7/documents/accords_draft.pdf; *see also* Andrew C. Revkin, *U.S. Is Taking a Back Seat in Latest Talks on Climate*, N.Y. TIMES, Oct. 29, 2001, at A5 (stating that the United States representative attended this meeting but maintained that the U.S. rejection of the treaty was final).

107. The Anti-Ballistic Missile Treaty between the United States and the Soviet Union was concluded in 1972. Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435, 944 U.N.T.S. 13; *see also* Note, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 879, 910 (1999) (stating that Anti-Ballistic Missile Treaty functioned to stem nuclear warfare between the United States and the Soviet Union, so that "neither the United States nor the Soviet Union would initiate a nuclear attack if it were unable to defend itself against the retaliation that almost certainly would ensue."). Each party undertook not to deploy anti-ballistic missile (ABM) systems for the defense of the territory of its country, not to provide a base for such defense, and not to deploy ABM systems for individual regions. *Id.* In May 2001, President Bush withdrew the United States from the Treaty, stating that:

> [W]e must move beyond the constraints of the 30-year-old ABM Treaty. This Treaty. . . . enshrines the past. No treaty that prevents us from addressing today's threats, that prohibits us from pursuing promising technology to defend ourselves, our friends and our allies is in our interests or in the interests of world peace. . . . When ready, and working with Congress, we will deploy missile defenses to strengthen global security and stability. . . . We are not presenting our friends and allies with unilateral decisions already made. We look forward to hearing their views. . . . We'll also need to reach out to other interested states, including China and Russia. . . . We should leave behind the constraints of an ABM Treaty that perpetuates a [U.S.-Russia] relationship based on distrust and mutual vulnerability.

See President George W. Bush, Remarks at the National Defense University, 37 WEEKLY COMP. PRES. DOC. 685, 687-88 (May 1, 2001).

108. Defense Secretary Rumsfeld has observed that the Non-Proliferation Treaty and others like it do not require the destruction of the United States' nuclear warheads. *See* Defense Secretary Donald H. Rumsfeld, Prepared Testimony for the Senate Foreign Relations Committee regarding the Moscow Treaty (July 17, 2002), *available at* http://usinfo.state.gov/topical/pol/arms/02071802.htm. Specifically, he has argued that "[t]his charge is based on a flawed premise – that irreversible reductions in nuclear weapons are possible. In point of fact, there is no such thing as an irreversible reduction in nuclear weapons. The knowledge of how to build nuclear weapons exists . . . Every reduction is reversible, given enough time and money." *Id.* President Bush was no more reassuring than Secretary Rumsfeld in his response to a question as to why the United States still needed 1,700 nuclear warheads when he stated, "[y]ou know, friends really don't need weapons pointed at each other. . . . But it's a realistic assessment of where we've been. And who knows what will happen 10 years from now? Who knows what future Presidents will say and how they react?" The President's News Conference with President Vladimir V. Putin of Russia in Moscow, 38 WEEKLY COMP. PRES.

and chemical warfare.[109] The administration's policy on small arms and land mines was particularly unpopular in international circles.[110] Individuals wielding small arms are responsible for almost 500,000 deaths each year.[111] John Bolton, President Bush's Representative for Arms Control and Security, told the United Nations that the Second Amendment to the U.S. Constitution protected an individuals' right to keep and bear arms; the United States, therefore, would not support limiting trade in small arms or limiting civilian access to small arms.[112]

The attacks of September 11 provided fuel for those who feel that unilateralism is the only effective way to protect vital national security interests. This has provoked a major discussion and significant conflict within the Bush administration. This conflict reflects the claim that there are few limits to the deployment and invocation of the use of force in the war against terrorism, as well as

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Doc. 887, 889 (May 24, 2002). It would require incredible intellectual and linguistic dexterity to reconcile this view with the disarmament obligation of the United States under Article VI of the Nuclear Non-Proliferation Treaty.

109. The Bush administration persists in chemical weapons research. The Department of Defense (DoD) argues that such research is necessary to protect soldiers against such chemical or biological weapons use and the DoD research has produced two drugs that could potentially provide soldiers with an internal defense against chemical and biological weapons, however, they are as yet unapproved by the Food and Drug Administration (FDA). *See* A STAFF REPORT PREPARED FOR THE COMM. ON VETERANS' AFFAIRS, 103RD CONG, IS MILITARY RESEARCH HAZARDOUS TO VETERANS' HEALTH?: LESSONS SPANNING HALF A CENTURY 21. (1994); *see also* Jill C. Keeler et al., *Pyridostigmine Used as a Nerve Agent Pretreatment Under Wartime Conditions*, 266 J.A.M.A. 693, 693 (1991) (reporting on the pretreatment effects of pyridostigmine bromide for nerve agent exposure during wartime). The DoD petitioned the FDA to waive the "informed consent" requirement, which would allow the DoD to administer these two new drugs to U.S. troops without first obtaining their informed consent. *See* Informed Consent for Human Drugs and Biologics; Determination that Informed Consent is Not Feasible, 55 Fed. Reg. 52,814 (1991) (codified at 21 C.F.R. pt. 50). The waiver was approved on a temporary basis, and permitted the DoD to issue pyridostigmine bromide vaccine and anti-botulism vaccine to troops without obtaining their informed consent. *See* George J. Annas & Michael A. Grodin, *Guinea Pigs in the Gulf*, N.Y. TIMES, Jan. 8, 1991, at A21. Recently, however, the Bush administration has acted on an initiative to eliminate some of the dangerous chemicals in the United States' chemical weapons stockpile. Specifically, the Bush Administration has ordered the Department of the Army to neutralize 1,269 tons of the United States' stockpile of VX, an extremely deadly nerve agent. *See* Associated Press, *Army To Destroy Deadly Nerve Gas*, CNN ONLINE (Jun. 9, 2004), *available at* http://www.cnn.com/2004/US/Midwest/06/09/nerve.gas.ap/index.html; *see also* Associated Press, *Top Stories—VX*, FOXNEWS ONLINE (Jan. 28, 2003), *available at* http://www.foxnews.com/story/0,2933,76872,00.html (reporting that VX agent "is the deadliest nerve agent ever created" and that even trace amounts, as little as a "fraction of a drop of VX when absorbed through the skin, can kill by severely disrupting the nervous system." It is also reported that "Some experts and Iraqi defectors say that Saddam Hussein used VX against Iranian forces in both the 1980-1988 Iran-Iraq War and the 1988 chemical attack on Iraqi Kurds in Halabja.").

110. *See* Richard Falk, *A Just Response*, THE NATION, Oct. 8, 2001, at 2.

111. The Small Arms Survey, an independent research project at the Graduate Institute of International Studies in Geneva, Switzerland is an important source of information regarding small arms. In 2001, it conducted a survey that completed a study that implicated small arms in 1,300 deaths each day. *See Small Arms Survey 2001: Profiling the Problem*, *available at* http://www.smallarmssurvey.org/Yearbook2001/Chapter_2.pdf (last visited Apr. 5, 2004).

112. *See* John R. Bolton, Statement by United States Under Secretary of State for Arms Control and International Security Affairs at U.N. Conference on Illicit Trade in Small Arms and Light Weapons in All its Aspects (July 9, 2001), *available at* http://usinfo.state.gov/topical/pol/arms/stories/01070902.htm.

the argument that to be effective in that war, much more than force is required—and in any event, any effective war requires multilateralism and international cooperation including an important role for the United Nations. When President Bush spoke to the United Nations last year, he specifically stressed his administration's impatience with the U.N. process and argued that the United States reserved the right to unilaterally attack Iraq.[113] Those who follow the current state of the debate face a radical polarization of both the American body politic and the larger global community. To some, the war and its aftermath are disasters; the strategic plan in the region lacks focus, consumes vast amounts of money, and produces little in the way of an effective post-conflict scenario.[114] President Bush, in a series of speeches, articulated the New Bush Doctrine for the post-September 11 world. Although the volume of the document is modest, it raises the question of how much unilateralism, cooperation, and central guidance might be developed through the organs of national security, collective security, and the United Nations. In this section of the article, we examine these issues more carefully.

A. National Security Strategy: the Documents

The Bush Doctrine is the current national security strategy of the United States. The primary document, essentially a collection of several speeches that have been reorganized on thematic rather than chronological links, was released by the executive. It provides an overview of U.S. international strategies: the nation as a champion of human dignity, strengthening the alliance against terror, and cooperation renewed by defusing regional conflict. Part V, entitled, "Prevent Our Enemies From Threatening Us, Our Allies, and Our Friends, with WMD,"[115] is of particular concern because of its possible justification for a war against Iraq. The other chapters stress the need to enhance global economic growth by enhancing free market and free trade principles, expanding the reach of development policies and tying these to democratic values, developing agendas for future corporate action, and a transformation of U.S. national security institutions to meet challenges of the twenty-first century.[116]

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113. This is a pervasive sentiment among members of the Bush administration. For example, shortly before President George W. Bush took office, Undersecretary of State John Bolton argued that the United States had the right to act unilaterally to protect its sovereignty and reject multilateralism in its many forms. He wrote that "[i]f the American citadel can be breached, advocates of binding international law will be well on the way toward the ultimate elimination of the 'nation State.'" John R. Bolton, *The Risks and Weaknesses of the International Criminal Court from America's Perspective*, 41 VA. J. INT'L L. 186, 193 (2000).

114. Florida Senator and former Presidential Candidate Bob Graham asserted that he "voted against the resolution to go to war in Iraq . . . because [he] thought it was the wrong war against the wrong enemy, which represented the lesser threat to the people of the U.S. . . . [and he goes on to remark that] [t]oday, the question is . . . how do we extricate ourselves from Iraq . . .?" Senator Bob Graham, Democratic Primary Debate, (Sept. 4, 2003), *available at* http://www.issues2000.org/2004/Bob_Graham_War_+_Peace.htm.

115. *See generally* NATIONAL SECURITY STRATEGY, *supra* note 5, at 13.

116. *Id.*

Part V also focuses on what the Bush administration refers to as "Axis of Evil" regimes because they possess or desire WMD.[117] The administration's approach was refined and expanded in December 2002 in a separate document entitled "National Strategy to Combat Weapons of Mass Destruction," the details of which were delivered by President Bush at his 2002 West Point commencement speech.[118] The West Point speech discussed the containment doctrine ("MAD") and noted that since the collapse of the USSR, the global security environment had changed.[119] New threats to security interests were those of rogue states and terrorists (apparently in that order). According to President Bush, "rogue states" are those that brutalize their own people, squander national resources for personal gain, give no regard to international law, threaten neighboring states, violate treaty obligations, acquire (or are determined to acquire) WMD (or similar advanced technology), are aggressive, sponsor terrorism, reject human rights, hate the United States, and hate the values of the United States.[120]

President Bush proposed a doctrine designed to meet these challenges, calling for pro-active counter-proliferation efforts, such as detection, diffusion, and the use of counterforce.[121] He also proposed strengthening the efforts of non-proliferation regimes. The intended consequences are effective management and response to the effects of any use of WMD, whether by terrorists or rogue states, and determination to "be prepared to respond" and "[not] let our enemies strike first."[122]

During the Cold War, the threat to the United States was characterized by a risk-averse enemy and the existing doctrine was one of containment and deterrence. Use of WMD was considered to be the last possible resort.[123] Now, WMD are the weapons of choice as tools of intimidation, blackmail, and aggres-

117. *Id.* In his 2002 State of the Union Address, President George W. Bush identified Iraq, Iran, and North Korea as terrorist states which, with "their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world." *See* Press Release, THE WHITE HOUSE, President Delivers State of the Union Address (Jan. 29, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/02/20020129-11.html. The United States has also identified Cuba, Libya, and Syria as additional Axis members. *See U.S. Expands "Axis of Evil,"* BBC NEWS, May 6, 2002, *available at* http://news.bbc.co.uk/1/hi/world/ americas/1971852.stm. The U.S. list of additional Axis members noticeably excludes Egypt, Pakistan, and Saudi Arabia, all of which have been closely linked with terrorist groups but all of which are additionally strategic U.S. allies. *See generally* Sean D. Murphy, *U.S. Judgments Against Terrorist States*, 95 AM. J. INT'L. L. 134 (2001).

118. WHITE HOUSE, NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION, (Dec. 2, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf; President Bush, Remarks at West Point Commencement (June 1, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html.

119. *Id.*

120. *See* NATIONAL SECURITY STRATEGY, *supra* note 5, at 18.

121. *Id.*

122. *Id.*

123. *See* Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J 226, *reprinted in* 35 I.L.M. 809 & 1343 (1996) (separate Opinion by Judge Fleischhauer, at para. 5) (stating that recourse to nuclear weapons "could remain a justified legal option in an extreme situation of individual or collective self-defense in which the threat or use of nuclear weapons is the last resort against an attack with nuclear, chemical or bacteriological weapons or otherwise threatening the very existence of the victimized State.").

sion. Practicing containment and deterrence will not work on rogue states or on non-risk-averse opponents.[124] Indeed, as in the case of al Qaeda, statelessness is itself a weapon.

During his first term, President Bush has introduced a new category of self-defense—preemptive self-defense—that he claims is legally justified in the new post-September 11 world. President Bush first planted the seeds of the argument for pre-emptive self-defense in his address to the United Nations General Assembly on Sept. 12, 2002, when he said, "The first time we may be completely certain [Saddam Hussein] has a – nuclear weapons is when, God forbids [sic], he uses one. We owe it to all our citizens to do everything in our power to prevent that day from coming."[125] Five days later, he spelled out the case for preemptive self-defense more fully and forcefully in his National Security Strategy, now known as the "Bush Doctrine." Some excerpts from his National Security Strategy follow:

> For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue States and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of WMD—weapons that can be easily concealed, delivered covertly, and used without warning. The targets of these attacks are our military forces and our civilian population, in direct violation of one of the principal norms of the law of warfare. As was demonstrated by the losses on September 11, 2001, mass civilian casualties is the specific objective of terrorists and these losses would be exponentially more severe if terrorists acquired and used WMD. *The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security.* The greater the threat, the greater is the risk of inaction— and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively. The United States will not use force in all cases to preempt emerging threats . . .[126]

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124. The future of terrorist attacks will assume a massive scope as terrorists adopt the use of biological and nuclear WMD to their strategy of "activated hatred." *See generally* PHILIP B. HEYMANN, TERRORISM AND AMERICA: A COMMON SENSE STRATEGY FOR A DEMOCRATIC SOCIETY (1998).

125. *See* President George W. Bush, Address to the United Nations General Assembly in New York City, 38 WEEKLY COMP. PRES. DOC. 1529, 1531-32 (Sept. 12, 2002); *see also Legal Authority for the Use of Force Against Iraq*, 92 AM. SOC'Y INT'L L. PROC. 137 (1998) (remarks of then-Deputy Legal Adviser Michael J. Matheson).

126. NATIONAL SECURITY STRATEGY, *supra* note 5, at 15 (emphasis added). The Bush administration's apparent departure from Nixonesque realism—the supporters of which argue the United States should not neglect its own interests in the service of others—and journey into the realm of idealism—the supporters of which urge continued dedication to benevolence—with regard to the interventionary and self-defense practices of the United States is somewhat reminiscent of the Wilsonian doctrine of global meliorism. After Woodrow Wilson's election in 1912, he strove to depict the foreign policy of the United States as one guided both by its moral imperative that peoples oppressed by foreign despots must be liberated and its lasting dedication to the continuing better-

President Bush categorically asserted in his 2002 State of the Union Address that "The United States of America will not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons."[127] These concepts were expanded upon in the September 2002 document, which indicates that the new concept of deterrence is a fundamental change from the past. According to President Bush, there are three principles of counter-proliferation: deterrence according to these new rules, defense, and mitigation.[128] Defense and mitigation are activated when deterrence fails. The special threat posed by WMD makes this exception reasonable, which activates three additional doctrinal steps: preemption, detection, and destruction of WMD before they can be used.[129]

The new Bush Doctrine is linked to a broadened concept of self-defense based on threats posed by non-state terrorist groups and their rogue state sponsors. A central sanction built into the doctrine is the concept of regime replacement. As we have seen, these ideas test the limits of permissible behaviors based upon conventional international law doctrines. However, if state behavior is significantly influenced by these principles, they may become more firmly grounded as the new rules of the international legal system, even if vigorously contested. The central point, however, is that if a regime is a candidate for rogue state status and that regime is implicated in detectable weapons of mass destruction development, that regime may be at risk. This means that the princi-

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ment of humanity. *See* THE RECORD OF AMERICAN DIPLOMACY 454-57 (Ruhl Bartlett ed., 4th ed. 1964). Wilson asserted, "[t]he world must be safe for democracy. Its peace must be planted upon the tested foundations of political liberty. We have no selfish ends to serve. We desire no conquest, no dominion. We seek no indemnities for ourselves, no material compensation for the sacrifices we shall freely make." ALBERT K. WEINBERG, MANIFEST DESTINY: A STUDY OF NATIONALIST EXPANSIONISM IN AMERICAN HISTORY 469 (1958) (quoting Woodrow Wilson). President George W. Bush similarly asserted, "we do not use our strength to press for unilateral advantage. We seek instead to create a balance of power that favors human freedom . . . We will defend the peace by fighting terrorists and tyrants . . . We will extend the peace by encouraging free and open societies on every continent." NATIONAL SECURITY STRATEGY, *supra* note 5, at iv. To similar extents, both presidents articulated altruistic motives for their actions, and both had these motives called into question. *See* GADDIS SMITH, THE LAST YEARS OF THE MONROE DOCTRINE 1945-1993, 27 (1994) (stating that President Wilson "failed to convince many contemporaries and historians . . . that his ideals were not a hypocritical cloak for traditional selfish purpose."); *see also* Karen DeYoung, *Unwanted Debate on Iraq-Al Qaeda Links Revived*, WASH. POST, Sept. 27, 2002, at A19 (stating that Saddam Hussein's ties to Al Qaeda are not substantiated by the evidence presented); Barbara Slavin & John Diamond, *Experts Skeptical Of Al-Qaeda-Iraq Tie*, USA TODAY, Sept. 27, 2002, at 4 (stating that American experts are critical of the evidence used by the Bush administration to possibly justify a war with Iraq based on its ties to the Al Qaeda terrorist network).

127. *See* State of the Union Address, *supra* note 117.

128. The Bush administration plans to be ready to respond to conventional and nuclear threats with defense capabilities by bringing to bear effective intelligence, surveillance, interdiction, and domestic law enforcement to detect and deter any threat from the use of WMD. President Bush's strategy blends a reliance on enhanced counterproliferation measures, increased nonproliferation efforts to combat WMD proliferation, and consequence management to respond in the event that WMD are deployed against the United States. *See generally* NATIONAL SECURITY STRATEGY, *supra* note 5.

129. *Id.* However, Henry Kissinger noted, "[i]t is not in the American national interest to establish preemption as a universal principle available to every nation." *See* Henry Kissinger, *Our Intervention in Iraq*, WASH. POST, Aug. 12, 2002, at A15.

ple of non-interference in the sovereignty of the state may indeed be more optional than has been the case in the past as a practical reality.

B. The Libyan Example

This brings us to the recent development regarding Libya, the United States, and the United Kingdom. According to reports in the media, Colonel Qaddafi, the Libyan Head of State, has agreed to completely eliminate his program for the development for WMDs and allow the United Nations as well as the United States and the United Kingdom, complete access to its facilities.[130] The timing of this public announcement might certainly be seen as a justification for the far-reaching implications of the Bush Doctrine. It will be recalled that among the shifting justifications for the war and replacement of the Baathist regime in Iraq was the apparent reluctance of the Hussein regime to completely divest itself of WMDs. The fact that evidence so far does not sustain this does not make irrelevant the point that the United States and its allies will not hesitate to use force if a rogue state develops WMDs because that rogue state may constitute a threat to its vital security interests. The easy answer to the question of whether the Bush Doctrine is the cause of the Libyan change in policy on WMD is that it clearly has influenced Qaddafi's switch. The more interesting and complex question is what other factors might have coalesced around the timing of the Bush Doctrine to influence the decision. These other factors may indeed compete with the currency of the Bush Doctrine in facilitating the Libyan decision. In short, there could be an ideological question about whether the Bush Doctrine was a success in this matter or whether patient diplomacy over a long period of time was the key to the Libyan decision.

Libya was severely punished by the sanctions imposed on it as a result of the destruction of Pan Am 103.[131] The investigation of this incident generated evidence pointing ineluctably to the government of Libya.[132] Libya's resistance to international accountability weakened when South Africa became a leading player in Africa and a new version of African unity implied an opportunity for Libyan leadership in Africa. This, in effect, led to the informal South African intervention by President Mandela and Dr. Jakes Gerwel.[133] Mandela was able to persuade Libya that it was within its own interest to gravitate to a condition of normalcy in the international system and to permit a Scottish court, sitting in Holland, to try the Libyan defendants.[134] Meanwhile, Libya's own economic

130. David Sanger, *U.S. Lifts Bans on Libyan Trade, But Limits on Diplomacy Remain*, N.Y. TIMES, APR. 23, 2004, at A4.

131. *See* ALLEN GERSON AND JERRY ADLER, THE PRICE OF TERROR 274 (2001) (stating that U.N. sanctions have cost Libya between $20 and $30 billion).

132. *See generally* Lorna Hughes, *Libya: We're Guilty: Gaddafi to Admit Lockerbie Bombing; He'll Claim He Didn't Issue Order*, SCOTTISH DAILY REC. & SUNDAY MAIL LTD., Sept. 22, 2002, at 8.

133. *See* Anthony Sampson, *Mandela* Says *UK Must Drop Libya Sanctions*, THE INDEPENDENT, Feb. 9, 2001 (reporting that former South African President Nelson Mandela sent his representative, Professor Jakes Gerwel, to communicate with General Qaddhafi in 1999).

134. *See* Allen Nacheman, *Tripoli Distances Itself From Lockerbie Verdict as Libyan Convicted*, AGENCE FRANCE PRESSE, Jan. 31, 2001 (remarking on former South African President Nelson

resources remained vastly underdeveloped because of the sanctions and the lack of advantage from its African initiatives. It should be noted that the Treaty of Pelindaba makes Africa a nuclear free zone.[135] It should also be noted that South Africa itself was the only nuclear power to voluntarily give up nuclear weapons and allow full access to international inspectors. Mandela, therefore, spoke with particular authority. The Libyans also perhaps felt is was in their own self-interest to gravitate to a situation of international normalcy that might also serve to remove the sanctions and permit freer trade with the more prosperous parts of the world.

British diplomacy remained open to contact with Libya and after the September 11 attacks there was some urgency for Libya to distance itself from international terrorism. The Bush Doctrine added an important dimension to Libyan decision-making.[136] The idea that strong action would be taken against a state with so called "rogue state" status and with an ongoing program developing WMDs was itself a threat to Libyan sovereignty and independence. In short, the action in Iraq and Afghanistan suggested as a practical matter, that sovereignty is more permeable than in the past and that regime replacement may have an operational reality. We may add to this the fact that Pakistan itself was already beginning to disclose the recipients of its nuclear largesse.[137] Thus, there are several factors that conspired to make Libya accelerate the disclosure and international accountability for its WMD program. The example of the Libyan policy to relieve itself of WMD seems now to be influencing another rogue state: North Korea.

The technical question that an international lawyer would have to confront about national security doctrines is the claim that the sovereignty of certain smaller states or powers is in fact permeable.[138] In effect, if the United States has a right to intervene in Santa Domingo,[139] Panama,[140] Granada,[141] Guate-

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Mandela's role in assisting Libya to release the Lockerbie suspects for trial); *see also Tortuous 10 Years to Bring Lockerbie Bombers to Trial*, AGENCE FRANCE PRESSE, Mar. 19, 1999 (noting that former President Mandela's contact with Libya helped to persuade the Libyan government to release the Lockerbie suspects to the U.N. Secretary General for prosecution in the Netherlands).

135. *See* African Nuclear-Weapon-Free Zone Treaty, June 21-23, 1995, 35 I.L.M. 698 (1996) (this treaty is also widely referred to as the Treaty of Pelindaba).

136. *See* James Risen & Tim Weiner, *C.I.A. Is Said to Have Sought Help from Syria*, N.Y. TIMES, Oct. 30, 2001 (reporting that the Central Intelligence Agency opened lines of communication with government and intelligence officials from a number of countries with historic ties to terrorism, including Libya); *see also* Arshad Mohammed, *Libya Extends Deadline on Ending U.S. Sanctions*, REUTERS, Apr. 20, 2004, *available at* http://news.findlaw.com/international/s/20040420 /libyausadc. html (detailing the progress made in United States/Libyan relations after September 11th, 2001).

137. *See* Alison Caldwell, *Atomic Energy Agency Concerned over Pakistan Nuclear Leaks*, ABC ONLINE, Feb. 6, 2004, *available at* http://www.abc.net.au/worldtoday/content/2004/s103 9770.htm (reporting that Pakistan President, General Pervez Musharraf, discussed the fact that Pakistani nuclear scientist, Doctor Abdul Qadeer Khan, passed on Pakistan's nuclear secrets to Libya, North Korea and Iran throughout a period of ten years).

138. *See* HUNTINGTON, *supra* note 72, at 28.

139. The United States occupied Santa Domingo from 1916 to 1924. *See generally* BRUCE CALDER, THE IMPACT OF INTERVENTION: THE DOMINICAN REPUBLIC DURING THE U.S. OCCUPATION OF 1916-1924 (1984).

140. The United States intervened in Panama In 1989 to safeguard the lives of American nationals in the country and to protect U.S. interests in the Panama Canal. *See* Marian Nash Leich,

mala,[142] Brazil,[143] Venezuela,[144] South Africa,[145] the Congo,[146] Vietnam,[147] Laos,[148] Cambodia,[149] The Dominican Republic[150] and the Middle East, the territorial integrity and political independence of a state is conditioned by factors other than those envisioned in the U.N. Charter. Similarly, Soviet intervention in Hungary,[151] Czechoslovakia,[152] Poland,[153] or indirect intervention in Ethio-

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Contemporary Practice of the United States Relating to International Law, 84 AM J. INT'L L. 536, 545-49 (1990). The United States dislodged Manuel Noriega from power in the same year. *See generally* Ved P. Nanda, *The Validity of United States Intervention in Panama under International Law*, 84 AM J. INT'L L. 494 (1990). The United States previously assisted in the overthrow of the elected President of Panama in 1941.

141. The United States intervened in Grenada in 1983. *See* J. Moore, *Grenada and the International Double Standard*, 78 AM. J. INT'L L. 145 (1984). *See generally* O. Audcoud, *L'Intervention Americano-Caraibe a la Grenade*, 29 ANN. FRANCAIS DE D. INT'L 217 (1983). The United States allegedly intervened to safeguard the lives of American nationals; the intervention was additionally legitimized by a government invitation and the authorization of a regional organization. The practical effect of the intervention, and perhaps its underlying purpose, was to prevent Grenada from falling to Communism. *See* The Situation in Granada, G.A. Res. 38/7, U.N. GAOR, 38th Sess., Supp. 47, at 19, U.N. Doc. A/38/L.8 & add.1, A/38/L.9 (Nov. 2, 1983) (condemning the unilateral action undertaken by the United States).

142. The United States intervened in Guatemala throughout the middle of the 20th Century. Indeed, the United States assisted in the overthrow of the elected President of Guatemala in 1954. *See generally* PIERO GLEIJESES, SHATTERED HOPE: THE GUATEMALAN REVOLUTION AND THE UNITED STATES, 1944-1954 (1991).

143. The United States intervened in Brazil from 1962-1964, resulting in a military coup in 1964. *See* CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL 33 (1996).

144. The United States has been accused of intervening in Venezuela to oust Venezuelan President Hugo Chavez on April 12, 2002. *See* Michael Shifter, *Democracy in Venezuela, Unsettling as Ever*, THE WASH. POST, Apr. 21, 2002, at B2.

145. The United States lightly intervened in the South African power exchange after the fall of apartheid in 1991. The South African example is "exceptional in that the parties completely renegotiated their political system with only a minimum of outside intervention." *See* WORDS OVER WAR: MEDIATION AND ARBITRATION TO PREVENT DEADLY CONFLICT 237 (Melanie Greenberg et al. eds., 2000).

146. In 1964, the United States and Belgium cooperatively intervened in the Congo to safeguard the lives of foreign nationals during a heightened period of civil unrest. *See* S.C. Res. 199, U.N. SCOR, 19th Sess., 1189th mtg. at 328-29, U.N.Doc. S/6129 (1964) ("Reaffirming the sovereignty. . .of the Democratic Republic of the Congo " and calling for "states to refrain. . . from intervening in the domestic affairs of the Congo, " but not demonstrating support for the cooperative intervention). The 1962 Congo crisis instigated the *Certain Expenses of the United Nations* case, which then expanded the security role of the United Nations. *See generally* Advisory Opinon, Certain Expenses of the United Nations, 1962 I.C.J. 151 (July 20).

147. The United States intervened in Vietnam from 1965 until the cease-fire of January 1973. *See* Daniel McIntosh, *The U.S. Style of Intervention*, *in* SUPERPOWERS AND REVOLUTION 51, 61-62 (Jonathan R. Adelman ed., 1986) (briefly discussing the United States' intervention in Vietnam).

148. The United States had continuing, clandestine operations in Laos for several decades during the twentieth century. *See generally* JANE HAMILTON-MERRITT, TRAGIC MOUNTAINS: THE HMONG, THE AMERICANS, AND THE SECRET WARS FOR LAOS, 1942-1992 (1993).

149. The United States backed a coup in Cambodia in 1970 to install pro-American General Lon Nol. *See* THOMAS M. FRANCK & EDWARD WEISBAND, FOREIGN POLICY BY CONGRESS 13-23 (1979) (briefly discussing the U.S. incursion into Cambodia).

150. The United States intervened in the Dominican Republic in 1965, supported by the OAS, to safeguard the lives of U.S. and foreign nationals, as well as to halt a fomenting communist revolution. *See* 52 DEP'T ST. BULL. 744, 745-46 (1965) (statement by President Lyndon B. Johnson of May 2, 1965, explaining and offering justifications for the United States' unilateral intervention).

151. The Soviet Union occupied Hungary in the 1950's and imposed on it a treaty requiring Hungary to allow Soviet troops to remain there. *See* Agreement on the Legal Status of the Soviet

pia,[154] Angola,[155] and Latin America[156] (including Cuba) suggest that the power to intervene limits an individual state's territorial integrity or political independence. We might say that claims for hegemonic power to intervene are, in effect, a call to reinterpret the sovereignty provisions in the U.N. Charter to conform to new world conditions, new weapons systems, and the overriding concerns that the superpowers need to intervene in their spheres of influence, which must be tolerated because the greater good it secures prevents the world from drifting toward Armageddon and merits its high price. On the other hand, these claims could be characterized as violations of international law that represent a weakness in the international system and leave victims without an international remedy. The International Court of Justice in *Nicaragua v. United States* determined that the Reagan administration's attack in Nicaragua violated international law and could not be justified by self-defense. It further required the United States to pay damages to Nicaragua.[157] In a repudiation of the rule of law in this context, the Reagan administration refused to pay the bill and even withdrew U.S. consent to jurisdiction from the International Court of Justice.[158]

Cold War military strategy did not rest exclusively on the vision of MAD,[159] but rather was based on an expanded version of the right of a state to defend itself. Given the conditions of self-defense with WMD and advanced systems for deploying them, such as nuclear submarines, these doctrines—even

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Forces Temporarily Present on the Territory of the Hungarian People's Republic, May 27, 1957, USSR-Hung, *reprinted in* Official Documents, 52 AM. J. INT'L L. 215, 215-21 (1958).

152. The Soviet Union invaded Czechoslovakia in 1968. *See* R. Mullerson, *Intervention by Invitation*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 128-29 (L. Damrosch & D. Scheffer eds., 1991) (discussing the Soviet invasions of Hungary, Czechoslovakia and Afghanistan).

153. Nazi Germany collaborated with the Soviet Union by way of a nonaggression pact in 1939, after which the Reich attacked Poland and Danzig. *See generally* A. READ & D. FISHER, THE DEADLY EMBRACE: HITLER, STALIN AND THE NAZI-SOVIET PACT (1988).

154. Italy invaded Ethiopia in 1937. For an examination of the events leading up to the Italian invasion of Ethiopia, see George Padmore, *Abyssinia - The Last of Free Africa*, CRISIS, May 1937, at 134.

155. During the 1960's and 1970's, the Soviet Union collaborated with Cuba to support insurgency movements in African countries, especially in Angola, to fight "imperialism and colonialism anywhere in the world." *See* ROBERT E. QUIRK, FIDEL CASTRO: THE FULL STORY OF HIS RISE TO POWER, HIS REGIME, HIS ALLIES, AND HIS ADVERSARIES 750 (1993). In response, the United States indirectly offered military support for insurgency movements in Angola. *See* Stuart S. Malawer, *Reagan's Law and Foreign Policy, 1981-87: The "Reagan Corollary" of International Law*, 29 HARV. INT'L L. J. 85, 93 (1988).

156. Amid the many interventions and assisted insurgencies in Latin America, perhaps President Theodore Roosevelt's adherence to the Drago Principle, which prohibited armed intervention in or occupation of American territories by European powers, left the most indelible impression on the future of American foreign policy. Roosevelt's support of the Drago Principle led to the Roosevelt Corollary to the Monroe Doctrine, which justified continuing U.S. intervention in Latin America. *See* CLIFFORD DAMMERS, A BRIEF HISTORY OF SOVEREIGN DEFAULTS AND RESCHEDULING, IN DEFAULT AND RESCHEDULING: CORPORATE AND SOVEREIGN BORROWERS 80 (David Suratgar ed., 1984).

157. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 4.

158. *See* ICJ Withdrawal Statement, *supra* note 88.

159. Fear of nuclear destruction prevented military conflict between the United States and the Soviet Union during the Cold War. The deterrence value of these weapons may have been a reason why the International Court of Justice did not declare them illegal. *See* THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 214, 217 (Michael Howard et. al. eds., 1994).

when they provided restrictions on the sovereignty of some states—were critically important to define the appropriate sphere of self-defense utilizable by the major powers. By defining that sphere, humanity potentially avoids the terrible consequences of war between hegemons. Of course, if the superpowers did not act to stabilize their expectations by intervention the only available option would be direct confrontation, limited only by an official declaration of war.

Even interventionists have sought to constrain themselves and legitimize their actions in ways that could make these acts more reconcilable with different versions of international law and the appropriate rules and proscriptions. For example, in *Nicaragua*, Reagan argued that the Contras represented a movement of liberation asserting the right to self-determination.[160] The Brezhnev Doctrine sought to rationalize the protection of socialist political order on the basis that it was more representative of the right to self-determination.[161] Thus, even if these excuses are transparent in that they seek to limit the power of law, they nonetheless also attempt to use the law to provide a degree of legitimacy. Even at the height of the Cold War, the constraints of law were in the forefront of asserted justifications to exercise certain powers of intervention. On the other hand, the U.N. Charter stipulates that sovereign equality and independence do not trump international obligations, which include issues relating to peace, human rights, and the development of the rule of law.[162] Both national security and international law seek to limit sovereignty, but in different ways with different objectives. The principle that sovereignty is not unlimited implies, at a minimum, the existence of a legal expectation that sovereignty not be abused.

VI.
JUSTIFICATIONS FOR THE IRAQ WAR

The technical justification under international law for the 2003 Iraq war is that the 1991 Persian Gulf War had not yet ended, although some might see this justification as weak and transparent. A condition for the formal ending of the 1991 war seems to be the complete disarmament of Iraq, with special regard to

160. *See* ICJ Withdrawal Statement, *supra* note 88.

161. *See generally* Reisman, *supra* note 82.

162. "In 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, their obligations under the present Charter shall prevail." *See* U.N. CHARTER art. 103. The U.N. Charter is a treaty within the definition of the Vienna Convention on the Law of Treaties, so the principle pacta sunt servanda applies. Vienna Convention on the Law of Treaties, May 23, 1969, Art. 26, 1155 U.N.T.S. 331 ("[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."). This means that sovereign signatories—all 191 of them—though they are sovereign and independent, must not limit the exercise of the rights and freedoms guaranteed in the Charter, nor override constitutional provisions, or undermine fundamental rights guaranteed by their national constitutions or international human rights standards. *See e.g.*, Civil Liberties Org. (in re Nigerian Bar Ass'n) v. Nigeria, Comm. No. 101/93, para. 15, 1994-1995 Afr. Ann. Act. Rep., Annex VI; Civil Liberties Org. v. Nigeria, Comm. No. 129/94, para. 12, 1995-1996 id., Annex VIII (remarking in its condemnation of ouster clauses in decrees transmitted by the Nigerian military government, that "Nigeria cannot negate the effects of its ratification of the [African] Charter through domestic action. Nigeria remains under the obligation to guarantee the rights of Article 7 to all of its citizens.").

accounting for all WMD. However, reliance on Security Council resolutions is controvertible and while mere semantic constructions and interpretations may provide a patina of legitimacy, the legality of actions of this magnitude cannot often stand on a weak imprimatur of legal validity. Critics want stronger legal reasons to justify the expanded scope of Article 51.[163] Valid security doctrines may strengthen or weaken these claims.

The technical justifications for the attack on Iraq were based on Iraq's failure to honor its international obligations to disarm, including its pledge to divest itself of WMD. The basis of the claim is as follows: the Security Council authorized the use of force under Chapter VII to repel Iraq's aggression against Kuwait.[164] So long as Iraq did not comply with the U.N.-mandated condition for a final peace settlement, the authorization for the further use of force continued, and Iraq—under the Hussein regime—still constituted a threat to international peace and security. The asserted legal basis for the Bush administration's invasion and regime replacement policy, without further Security Council authorization, is based on preexisting Security Council resolutions. For the sake of brevity, the relevant provisions and interpretive issues of the Security Council resolutions are summarized as follows.

Resolution 678 authorized the use of "all necessary means to uphold" Security Council Resolution 660, as well as resolutions passed after 660.[165] These resolutions served to restore international peace and security in the Gulf. Resolution 678 therefore served as the technical legal basis for the 1991 Persian Gulf War. Resolution 687 stipulated a cease-fire, but imposed conditions relating to the disarmament of Iraq, in particular conditions relating to the identification and destruction of WMD.[166] Since the cease-fire was subject to certain disarmament conditions, including inspections conducted by the U.N., a material breach of these cease-fire conditions terminated the grounds on which the cease-fire was created under Resolution 687.[167] The material breach provides a con-

163. The present approach to self-defense is that "Art. 51 clearly licenses *at least one kind* of resort to force by an individual member State: namely, the use of armed force to repel an armed attack." Bert V.A. Röling, *The Ban on the Use of Force and the U.N. Charter*, *in* THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 3 (A. Cassese ed., 1986).

164. Chapter VII of the U.N. Charter gives the Security Council the power to act. Article 39 of this chapter grants the Security Council power to determine if a state's actions constitute a "threat to peace, breach of the peace, or act of aggression." U.N. CHARTER art. 39. If a state's actions threaten to or breach the peace, or constitute an act of aggression, the Security Council decides what steps are necessary to "restore international peace and security." Id. Among the actions it may authorize is the use of force under Article 42. Id. art. 42. The Security Council can authorize various kinds of force, such as employing U.N. troops (Blue Helmets) or empowering member states to act individually or collectively. *Id.*

165. *See* SC Res. 678, U.N. SCOR, 45th Sess., Res. & Dec., at 27, U.N. Doc. S/INF/46 (1990), reprinted in 29 I.L.M. 1565 (1990) [hereinafter Resolution 678].

166. *See* SC Res. 687, U.N. SCOR, 46th Sess., Res. & Dec., at 11, U.N. Doc. S/INF/47 (1991), reprinted in 30 I.L.M. 847 (1991) [hereinafter Resolution 687].

167. The United States' position is best articulated in the letter sent by the Permanent Representative of the United States of America to the United Nations to the President of the Security Council, dated March 20, 2003:

> The actions being taken are authorized under existing Council resolutions, including its resolutions 678 (1990) and 687 (1991). Resolution 687 (1991) imposed a series of

tinuing justification for invocation of armed force against Iraq. The specific interpretive issues involve the question of whether the words "all necessary means"[168] found in Resolution 678 (1990) cover Resolution 687 (1991). It is argued that since Resolution 678 was decided prior to 687, it cannot, without more support, be read to cover the later Resolution 687.[169] The critical paragraph of Resolution 678 reads as follows:

> [Resolution 678] Authorizes Member States cooperating with the government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1. . .the foregoing resolutions, to use *all necessary means* to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.[170]

The critical paragraph of Resolution 687 reads as follows:

> [The final operative paragraph of resolution 687 reads that the Security Council] Decides to remain seized of the matter and to take such further steps as may be

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> obligations on Iraq, including, most importantly, extensive disarmament obligations, that were conditions of the ceasefire established under it. It has been long recognized and understood that a material breach of these obligations removes the basis of the ceasefire and revives the authority to use force under resolution 678 (1990). This has been the basis for coalition use of force in the past and has been accepted by the Council, as evidenced, for example, by the Secretary-General's public announcement in January 1993 following Iraq's material breach of resolution 687 (1991) that coalition forces had received a mandate from the Council to use force according to resolution 678 (1990). [For the Secretary-Generals' public announcement, see Statement Made by the Secretary-General of the United Nations in Paris (Jan. 14, 1993), reprinted in IRAQ AND KUWAIT: THE HOSTILITIES AND THEIR AFTERMATH 741 (M. Weller ed., 1993).]
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> Iraq continues to be in material breach of its disarmament obligations under resolution 687 (1991), as the Council affirmed in its resolution 1441 (2002). Acting under the authority of Chapter VII of the Charter of the United Nations, the Council unanimously decided that Iraq has been and remained in material breach of its obligations and recalled its repeated warnings to Iraq that it will face serious consequences as a result of its continued violations of its obligations. The resolution then provided Iraq a "final opportunity" to comply, but stated specifically that violations by Iraq of its obligations under resolution 1441 (2002) to present a currently accurate, full and complete declaration of all aspects of its WMD programmes and to comply with and cooperate fully in the implementation of the resolution would constitute a further material breach. The Government of Iraq decided not to avail itself of its final opportunity under resolution 1441 (2002) and has clearly committed additional violations. In view of Iraq's material breaches, the basis of the ceasefire has been removed and use of force is authorized under resolution 678 (1990).

Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/351 (Mar. 21, 2003).

168. Specifically, in Resolution 678, the United Nations Security Council authorized states even outside the provisions of Chapter VIII of the Charter (that is, member states cooperating with the government of Kuwait) "to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area." *See* Resolution 678, *supra* note 165, at para. 2.

169. For an additional synopsis of the legal basis for the Iraq War, see U.K. Attorney General Lord Goldsmith's answer to a Parliamentary question regarding the legal basis for the use of force against Iraq, *UK: Legal Basis for* War, CNN NEWS, Mar. 17, 2003, *available at* http://www.cnn.com/2003/WORLD/meast/03/17/sprj.irq.uk.legal/. For Spain's position on the legal basis for the use of force against Iraq, see U.N. Doc. S/PV.4721, at 15-16 (Mar. 19, 2003).

170. *See* Resolution 678, *supra* note 165, at 1565.

required for the implementation of the present resolution and to secure peace and security in the area.[171]

It is possible to read these two resolutions together, but one is stretching syntactic interpretation to secure authorization for the 2003 Gulf War from this base of authority. Resolution 687 specifies in categorical terms that the Security Council decided to remain seized of the events that led to the creation of Resolution 687. One can therefore read Resolution 687—by necessary implication—as terminating the authorization of Resolution 678 because the matter was effectively before the Security Council. If the Council is seized of the matter, so the argument would go, it would be obliged to conclude whether a material breach of the conditions of the cease-fire exists. If it found such a breach, the Council would have to authorize the use of force. The critical resolution, in addition to those already discussed, for justifying the 2003 Gulf War, is United Nations Security Council Resolution 1441. According to Resolution 1441 (2002):

[The United Nations Security Council] Decides that Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991), in particular through Iraq's failure to cooperate with United Nations inspectors and the IAEA, and to complete the actions required under paragraphs 8 to 13 of resolution 687 (1991);

[The United Nations Security Council] Decides, while acknowledging paragraph 1 above, to afford Iraq, by this resolution, a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council; and accordingly decides to set up an enhanced inspection regime with the aim of bringing to full and verified completion the disarmament process established by resolution 687 (1991) and subsequent resolutions of the Council;

Recalls. . .that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations;

[The United Nations Security Council] Decides to remain seized of the matter.[172]

The phrase, "serious consequences" in Security Council Resolution 1441 did not textually authorize the use of force.[173] Indeed, the plausible construction of its language is that if the Council seriously contemplated the use of force, it could have done so specifically, since the authorization of the use of force comprises one of the major decisions that the Council can undertake.[174] Accordingly, the Council would not leave the question of the use of force to an implication in textual language supplemented by tenuous strands drawn from preceding resolutions. To some, therefore, an analytical interpretation of whether the use of force in Iraq was authorized by the Security Council is an argument that cannot be sustained on the basis of the language used in the relevant texts and the interrelationships thereof.[175]

171. *See* Resolution 687, *supra* note 166, at 854.

172. *See* U.N. SCOR Res. 1441, U.N. SCOR, 4644th mtg., U.N. Doc. S/RES/1441 (2002), at para. 2, 13, 14 [hereinafter Resolution 1441].

173. *Id.* at para. 13.

174. *See* U.N. CHARTER arts. 39, 42.

175. For example, at a White House Press Briefing on March 13, 2003, former White House Press Secretary Ari Fleischer asserted, "[t]he United Nations Security Council Resolution 678 authorized use of all necessary means to uphold United Nations Security Council Resolution 660, and subsequent resolutions and to restore international peace and security in the area." Press Secretary Ari Fleischer, The White House, Press Briefing (Mar. 13, 2003), *available at* http://

Broader interpretive standards might justify the use of force under relevant resolutions, but these justifications may sound highly technical and may not carry a justification that clearly sustains the object and purpose of the interpretation.[176] Here, in effect, the concept of preemptive action seems not to be justifiable under United Nations Security Council resolutions and processes. The text alone seems to provide no justification for the attack, and a purposive and teleological interpretation of the text would provide only weak legal support.[177] A central element in the American and British claims, in contrast with those states that favor the primacy of Security Council decision-making, is that the American and British perspectives undermine the institutional competence of the United Nations, particularly the Security Council, by overriding the principle that the Security Council has primary jurisdiction over matters of collective security. To assert security values outside the principle of institutionally regulated collective action reverts to the almost completely decentralized authority manifested by the League of Nations, which opened the door to unilateralism and weakened the force of international peace keeping institutions. Unilateralism may be a quick-fix solution that earns immediate popular approval, but it is no substitute for sustained collaborative action in making lasting peace.

The United Nations is best suited for turning swords into ploughshares. In the age of globalism and interdependence, its institutions of collective security are absolutely indispensable to world order. Despite this institutional competence, it does not necessarily follow that a state may not take unilateral preemptive action. New types of threats might require a more careful appraisal of the primacy of the Security Council's institutional reach and the scope of certain unilateral actions under color of Article 51 or self-defense under customary international law. The central question is what institutional innovations within the Council as a whole, particularly with regard to the P-5, might be developed to respond effectively and collectively to new global security threats.

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www.whitehouse.gov/news/releases/ 2003/03/20030313-13.html. *See generally* Resolution 678, *supra* note 165; Resolution 687, *supra* note 166. Some scholars have argued that the United States' creation of a formal legal basis for the attack on Iraq by relying on Resolution 678 (1990), rather than the later Resolution 687 (1991) is misleading, since Resolution 687 does not address WMD, it only addresses Iraq's invasion of Kuwait.

176. *See* Felicity Barringer, *Critics Say U.S. Lacks Legal Basis for Attack*, N.Y. TIMES, Mar. 20, 2003, at A19; Keith B. Richburg, *French See Iraq Crisis Imperiling Rule of Law*, WASH. POST, Mar. 6, 2003, at A19; *see also* U.N. Doc. S/PV.4721, at 8 (Mar. 19, 2003) (statement of Russian representative); U.N. Doc. S/PV.4726, at 28, 32 (Mar. 26, 2003) (statements of China and Syria).

177. Florida Senator Bob Graham remarked that the true purpose of the Iraq invasion cannot be justified by the Bush administration's asserted legal basis. Rather, he concludes that the only viable purpose of the invasion was to liberate the Iraqi people. Senator Graham stated that "we have a chance to show the world that we were in fact in Iraq for the right reasons . . . and we were there for the purpose of liberating the Iraqi people . . . not about the expansion of American power . . . not about oil . . . We ought to lay this marker down." *See* Graham, *supra* note 114. Massachusetts Senator Ted Kennedy also questioned the Bush administration's motives and legal basis for the United States' invasion of Iraq. In an interview with the Associated Press in September 2003, Kennedy declared, "There was no imminent threat [to justify the United States' invasion of Iraq]. This [threat] was made up in Texas, announced in January to the Republican leadership that war was going to take place and was going to be good politically. This whole thing was a fraud." *Kennedy Labels Iraq War a 'Fraud'*, WASH. TIMES, Sept. 19, 2003 [hereinafter *Kennedy Remarks*].

The strongest credible reason for unilateral armed intervention by the United States and the United Kingdom is to counter terrorism. Access to WMD by terrorists constitutes such an important security threat that reasons exist beyond the letter of international law that must be canvassed in order to ultimately determine the lawfulness of the U.S./U.K. position.[178] As earlier indicated, whether one uses a textual or contextual method of construing these provisions, the weight of interpretive logic does not support the construction given by either the Bush administration or the Attorney General of the United Kingdom. Such a construction must assure the perspective of a neutral third party. Because of the nature of the international constitutional system, the power to interpret and decide is vested in the Security Council. However, the Security Council cannot repudiate the construction given to these provisions by the United States and the United Kingdom; both nations have the power to prevent this from happening.[179] This effectively leaves the question of the lawfulness of the attack based on a construction of these resolutions partly in the perspectives of the critical state actors themselves, a model of the principle of international law-making realism, which Georges Scelle called the dedoublement fonctionnel —the double law-making character of a sovereign state as both a claimant and a decider of the meaning, reach, and justification of an international law claim.[180]

A reasonable claim of this character might strengthen the juridical basis of a claim to lawfulness if the position is objectively compelling and gains widespread acceptance.[181] In the context of high stakes issues, it might be that states

178. The evidence relating to WMD amassed by the British Government to justify the United Kingdom's involvement in the 2003 Iraq War has been questioned. Prime Minister Tony Blair has since been a focus of the Hutton inquiry, which was developed to investigate the circumstances surrounding the death of the British weapons expert Dr. David Kelly, who was responsible for the dossier to justify the British involvement in the war. *See generally* Lord Brian Hutton, Investigation Into the Circumstances Surrounding the Death of Dr. David Kelly, Aug. 11, 2003, *available at* http://www.the-hutton-inquiry.org. The Hutton Inquiry suggests that the evidence was inflated or "sexed up." *See* Julia Day, *Kelly Said Government Sexed Up Iraq Dossier*, GUARDIAN UNLIMITED, Aug. 12, 2003, *available at* http://www.guardian.co.uk/Iraq/ Story/0,2763,1017078, 00.html. Similarly, President Bush stated that the war against Iraq was mandated by the fact that it had WMD and was ready to use them, yet after several months of searching, the American inspection team led by David Kaye has been unable to find them. *See generally Report: No WMD Found In Iraq*, Sept. 25, 2003, *available at* http://www.cbsnews.com/stories/2003/09/25/iraq/main575078.shtml; Paul Reynolds, *Banned Weapons: Where Are They?*, BBC NEWS, *available at* http://news.bbc.co.uk/2/hi/ middle_east/ 2949441.stm (last visited Mar. 25, 2004); *see also* Associated Press, *Top U.S. Commander Surprised at Not Finding WMD*, USA TODAY ONLINE, May 30, 2004, *available at* http://www.usatoday.com/news/world/iraq/2003-05-30-iraq-wmd_x.htm (reporting that Lt. Gen. James Conway, the top commander of U.S. Marine forces in Iraq stated that he is surprised that searches for WMD in Iraq have failed so far, despite the existence of American intelligence that indicated such weapons were supplied to frontline Iraqi forces at the outbreak of the 2003 Iraq war. Specifically, Lt. Gen. Conway stated that "It was a surprise to [him] . . . that we have not uncovered weapons . . . in some of the forward dispersal sites." The Lt. General went on to say that "We've been to virtually every ammunition supply point between the Kuwaiti border and Baghdad, but [the WMD are] simply not there.").

179. U.N. CHARTER art. 24(2).

180. Georges Scelle, *Le Phenomene Juridique du Dedoublement Fonctionnel*, *in* RECHTFRAGEN DER INTERNATIONALE ORGANISATION 324 (1956).

181. For example, in a departure from what has become the Bush administration's typically unilateral international posture, Department of Defense officials feared the weakening POW regime and urged President Bush to recognize the applicability of the Geneva Conventions to the special

are ill-advised to act in the international arena if the fundamental basis of their actions rests on a highly technical legal justification that lends itself to other permissible constructions which undermine it and, in any event, would require more compelling justifications because the legal predicate, although plausible, is a weak one. When a state goes to war with an utterly "formal" legal basis to justify it, international public opinion[182] and common morality will likely require its position to be supplemented with stronger, justifiable principles *prior* to taking action.[183]

It is perhaps precisely with this consideration in mind that the United States and the United Kingdom shifted their technical justifications for the invasion of Iraq away from sole reliance on the prior relevant Security Council resolutions.[184] If Saddam Hussein were, in fact, secretly developing nuclear, biological, or chemical WMD, the possibility of a terrorist delivery system would pose a future threat to the United States and the United Kingdom.[185] In the aftermath of the attacks of September 11, this is a strong and legitimate national security and self-defense concern.[186] It not only comprises a powerful justification, but

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conditions in Afghanistan. *See* Thom Shanker & Katharine Q. Seelye, *Behind-the-Scenes Clash Led Bush to Reverse Himself on Applying Geneva Conventions*, N.Y. TIMES, Feb. 22, 2002, at A12. Shanker and Seelye additionally refer to the Department of State's support for applying international conventions, a position that stems as much from concern over adverse precedent as from a bureaucratic design in favor of conformity to treaties. *Id.*

182. Professors W. Michael Reisman and Chris T. Antoniou explain that in modern democracies "even a limited armed conflict requires a substantial base of popular support. That support can erode or even reverse itself rapidly, no matter how worthy the political objective, if people believe that the war is being conducted in an unfair, inhumane, or iniquitous way." *See* THE LAWS OF WAR xxiv (W. Michael Reisman & Chris T. Antoniou eds., 1994).

183. The Bush administration was met with a marked degree of public outrage at the advent of the United States' invasion of Iraq. *See* Patrick E. Tyler & Janet Elder, *Poll Finds Most in U.S. Support Delaying a War*, N.Y. TIMES, Feb. 14, 2003, at A1; Michael Powell, Around Globe, Protest Marches, WASH. POST, Mar. 23, 2003, at A19. However, public sentiment was sufficiently split so that the Bush administration's highly technical legal basis was, for some, enough to justify the invasion. *See* Adam Nagourney & Janet Elder, *More Americans Now Faulting U.N. on Iraq, Poll Finds*, N.Y. TIMES, Mar. 11, 2003; Dan Balz, *War Support Widespread*, WASH. POST, Apr. 8, 2003, at A28; Diana Jean Schemo, *Iraq Violates Rules of War, U.S. Complains*, N.Y. TIMES, Mar. 24, 2003, at B6.

184. *See generally* Goldsmith, *supra* note 169.

185. Some government officials and scholars feel that the threat to the United States posed by Saddam Hussein was best encapsulated by his attempt to assassinate Former President George Herbert Walker Bush. *See* Richard Bernstein, *U.S. Presents Evidence to U.N. Justifying Its Missile Attack on Iraq*, N.Y. TIMES, Jun. 28, 1993, at A7; *see also Excerpts for U.N. Speech: The Case for Clinton's Strike*, N.Y. TIMES, June 28, 1993, at A7 (statement of Madeleine K. Albright, U.S. delegate to United Nations).

186. Some point to Saddam Hussein's April 2003 pledge to award $25,000 to families of Palestinian homicide bombers. *See* Mohammed Daraghmeh, *Iraq Raises Suicide Bombers' Payments*, ASSOC. PRESS, Apr. 4, 2002, at A20 (Saddam Hussein has pledged to pay $ 25,000 to the families of suicide bombers). The Hussein pledge articulated for rewarding homicide bombers were strict; he insisted that only individuals who blew themselves up with a belt laden with explosives would receive the full amount; "payments [were to be] made on a strict scale, with different amounts for wounds, disablement, death as a 'martyr' and $25,000 for a suicide bomber." President George W. Bush, Saddam Hussein's Support for International Terrorism, The White House, Nov. 4, 2002, *available at* http://usinfo.state.gov/regional/nea/iraq/text/0912wthsbkgd.htm. Additionally, some rely on information gleaned from former Iraqi military officers, who have described highly secret training facilities in Iraq where Iraqis and non-Iraqi Arabs were trained in plane and train hijacking, sabotage, assassinations, and explosives. *See id.*

also strengthens the weight given to the technical construction of the relevant Security Council resolutions. It may be that the United States and the United Kingdom understood this and made the issue of WMD a major part of the justification for the attack on Iraq. This, in turn, generated national and international concerns about the reliability and interpretations of intelligence regarding WMD.[187]

Certainly, WMD coupled with the threat of an apocalyptic form of terrorism provided compelling justifications to take the kind of action the states saw as permissible and lawful, but we must enter this analysis cautiously. Threats alone may not justify the specific strategic form of intervention undertaken. In short, even if Saddam Hussein's alleged WMD posed a threat to the security of the United States and the United Kingdom, it is not certain that an armed attack was the most reasonable defense of the American and British national security interests, or that such attack could not have been effectively pursued in the Security Council.[188] The American and British claims become particularly vulnerable in light of a more critical examination of the principle of self-defense under international law. It is precisely in this area where the Bush Doctrine is most challenging. The Bush Doctrine recognizes that the proliferation of WMD during the Cold War could be limited by policies that might rationally influence an adversary. The American adversary during the Cold War was one committed to a balance of global power and committed to a rational policy of being risk-averse.[189] In this context, deterrence stabilized international security and permitted international cooperation in areas of arms control and non-proliferation. However, the days of the Cold War—when WMD were generally regarded as weapons of last resort—are over.[190] Contemporary security theorists surmise that the enemies of the West now view WMD as an effective instrument of destruction.[191] Within this context, the concept of deterrence as conventionally understood is weak if not obsolete. According to President Bush:

187. Arthur Schlesinger Jr., the "lion of liberalism," often points to former British Foreign Secretary Robin Cook's infamous March 2003 indictment of the entire Iraq war when he asserted, "instead of using intelligence as evidence on which to base a decision about policy, we used intelligence as the basis on which to justify a policy on which we had already settled." *See* Arthur Schlesinger Jr., The Imperial Presidency Redux, Wash. Post., June 28, 2003, at A25 (quoting Cook and stating that he "formulated the charge [against the war] with precision."); *see also* Arthur Schlesinger, Jr., *Eyeless in Iraq*, N.Y. TIMES REV. OF BOOKS, Oct. 23, 2003, at 26 (again quoting Secretary Cook and stating that "we note now . . . the greedy zeal with which Bush and his allies seized upon crumbs of intelligence.").

188. Recall that former President George H. W. Bush's use of military force in the Persian Gulf War was guided by limitations in the 1991 Iraq Resolution. *See* Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991) (outlining the restrictions on use of military force). According to the Iraq Resolution, the President was required to prove to Congress that all diplomatic avenues for resolving the conflict were exhausted before war before fighting began and that the scope of military activity was limited to achieving the goals set out by United Nations Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, 677, and 678. *Id.*

189. *See* Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J 226, *reprinted in* 35 I.L.M. 809 & 1343 (1996) (separate Opinion by Judge Fleischhauer, at para. 5).

190. *Id.*

191. *See* HEYMANN, *supra* note 124.

> [t]raditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocents; whose so-called soldiers seek martyrdom in death and whose most potent protection is statelessness. The overlap between states that sponsor terror and those that pursue WMD compels us to action.[192]

We contend that the new Bush Doctrine makes a narrow but reasonable claim that Article 51 of the U.N. Charter—relating to self-defense—simply cannot be read literally. Article 51 provides a state with a right of self-defense in international law, "if an armed attack occurs." The Bush Doctrine explicitly claims that a state may lawfully take action to defend itself if there is an imminent danger of attack; the Bush administration holds that anticipatory self-defense is conditioned by the factual imminence of an attack.[193] As a technical matter of interpretation, if this broader construction of Article 51 is accepted, it must also have a technical justification to validate the form of such an interpretation.[194]

Two principle justifications may, in theory, be presented to support the new Bush Doctrine of preemption. First, one must assume that self-defense in international law holds its place of prominence in the U.N. Charter and in customary international law, because of the importance of the term "self."[195] This effectually means that even though institutions of collective security for collective action are currently highly developed, when viewed from a historical perspective, a significant element of security management must ultimately be left to the principle of the "self" included in the concept of international self-defense. Notwithstanding the constitutional development of efforts to institutionalize collective security through the Security Council and through regional security associations, it is still the case that an important competence over national security lies with the individual nation state. If this assumption is correct, then the critical question is whether there are standards that might guide a rational invocation of the right to self-defense if the conditions in a given situation make preemptive action reasonable. This leads us to the second element of justification. If we accept the fact that the word "self" in "self-defense" simply recognizes important imperfections in the system of collective security, then the structure of a state's claim to self-defense comes close to the principle of the dedoublement fonctionnel.[196] The state is a claimant, claiming the right to preemptive self-defense. Since the state may have acted on that claim, the state has an international obligation to justify it as an exercise of a national security competence that is reasonable within the framework of the major purposes and poli-

192. *See* NATIONAL SECURITY STRATEGY, *supra* note 5, at 15.

193. *Id.*

194. *See* WALTER GARY SHARP, SR., CYBERSPACE AND THE USE OF FORCE 7, 95, 226 (1999) (discussing the U.S. military's definitions of hostile intent and hostile act and arguing that at some point a threat to use force that is short of actual use can demonstrate hostile intent and trigger a nation's right to anticipatory self-defense).

195. *See generally* Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI L. REV. 113 (1986); Report of the Committee on Use of Force in Relations among States, 1985-86 AM. BRANCH INT'L. L. ASS'N, PROC. & COMM. REPS. 188, 201-10.

196. *See generally* Scelle, *supra* note 180.

cies of the international constitutional system. This principle was well expressed by Professor H.A. Smith, writing in another context:

> The law of nations, which is neither enacted nor interpreted by any visible authority universally recognized, professes to be the application of reason to international conduct. From this it follows that any claim which is admittedly reasonable may fairly be presumed to be in accord with law, and the burden of proving that it is contrary to the law should lie on the State which opposes the claim.[197]

What the doctrine seeks to do, however, in light of the September 11 attacks, is to suggest that states "must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."[198] Since terrorists and rogue states seek to use unconventional means to attack the security of their perceived adversaries, [199] they will seek to inflict the highest amount of damage upon their victim states by operating covertly and potentially unleashing WMD on innocent civilian populations without warning.[200]

In the war against terrorism, the Bush Doctrine unambiguously states that the United States reserves the option to use force in preemptive action to protect its national security. According to President Bush, "[t]he greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack."[201] The Bush Doctrine notes that "rogue states" might have the resources to develop WMD and may disseminate or deploy them because they "display no regard for international law. . .and callously violate international treaties to which they are a party."[202] This is a far-reaching stretch for contemporary international law. Let us further examine this.

A. Formulating the Doctrine: WMD and Non-WMD Threats

There are two separate issues that must be distinguished in the formulation of the doctrine and its relationship to international law. The first is simply the threat of terrorism absent the threat of WMD.[203] The restraints international law

197. H.A. SMITH, THE LAW AND CUSTOM OF THE SEA 20 (1950).

198. *See* NATIONAL SECURITY STRATEGY, *supra* note 5, at 15.

199. September 11, 2001 brought aircraft hijacking—a particularly horrific form of terrorism—to the forefront of concern for American travelers and metropolitan workers. Lately, the government has been dealing with the problem of allowing general aviation to fly under visual rules and "permitting light aircraft and helicopters over cities, requiring a reconsideration of the damage these aircraft could do as prepared suicide vehicles against 'soft targets' such as concentrations of people at sports stadiums, concerts, or political events." *See* Phillip A. Karber, *Re-Constructing Global Aviation in an Era of the Civil Aircraft as a Weapon of Destruction*, 25 HARV. J.L. & PUB. POL'Y 781, 805 (2002). Another disastrous form of terrorism is that perpetrated over the Internet, which threatens soft targets associated with day-to-day business, economic, and social communications and transactions. *See* William Gravell, Briefing to the Worldwide Antiterrorism Conference, Information Warfare and Terrorism: Changing the Rules, San Antonio, TX (Aug. 19, 1997).

200. The United States has known for over a decade that increased security at hard targets has shifted terrorists' attention to soft targets. In 1990, 75% of all terrorist attacks worldwide were perpetrated against tourist spots, businesses, and other nonofficial targets. UNITED STATES DEPARTMENT OF STATE, PATTERNS OF GLOBAL TERRORISM: 1990, 37 (1991).

201. *See* NATIONAL SECURITY STRATEGY, *supra* note 5, at 15.

202. *Id.* at 14.

203. On September 17, 2002, President Bush expanded his administration's approach to the dangers posed by all terrorists, including those with and those without access to WMD. Specifically,

imposes on the Bush Doctrine regarding such a threat would be, at a minimum, whether preemptive action—which cannot meet an objective criterion of imminence because of the nature of the terrorist threat—can still meet an objective standard of reasonableness reconcilable with the fundamental right to self-defense under Article 51 of the Charter, or evolving customary international law.[204] Such action runs the risk of attempting to justify standardless interventions, unguided by principles of international law and the trade-off between the war against terror and unilateral action might be seen as an especially dangerous strategy of action.[205] It is therefore imperative that international lawyers carefully articulate the standards that might justify a preemptive intervention; it is additionally essential that the procedures for reporting interventions to the Security Council be fully employed so that such standards of justification may be clearly established within the framework of the Security Council's mandate of primary responsibility over matters of international peace and security.[206] Even if a terrorist organization such as al Qaeda poses a threat to the security of another state, that threat must be based on credible intelligence that can subsequently be made available to the Security Council subject to the reporting requirements of Article 51.[207]

Situations involving possible access to or deployment of WMD by terrorist groups seem to change considerably the legal calculus. It is therefore vitally important that when the Bush administration acted on the rogue state principle in attacking Iraq, it based its strategic analysis and self-defense justifications on Iraq's control of WMD, as well as on the possibility that Iraq might distribute those WMD to terrorist groups with the capacity to attack the United States, the United Kingdom, and other possible targets of opportunity.[208] It is also possible

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President Bush declared that "[his] immediate focus will be those terrorist organizations of global reach and any terrorist or state sponsor of terrorism which attempts to gain or use WMD or their precursors." NATIONAL SECURITY STRATEGY, *supra* note 5, at 6.

204. *See* ALBRECHT RANDELZHOFER, ARTICLE 51 IN THE CHARTER OF THE UNITED NATIONS, A COMMENTARY 675 (1995) (stating 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.").

205. Following his 2002 commencement speech at West Point, President Bush was met with international criticism for the tone of his address, in which he implied that the United States has the unique ability to make and enforce decisions, which—he implied—is a power unavailable to other states. However, it is well established under international law that the United States is equal with all other sovereign states before the law. Article 2(1) of the U.N. Charter states that "[t]he Organization is based on the principle of the sovereign equality of all its Members." *See* U.N. CHARTER art. 2, para. 1. Consider also Helmut Steinberger, *Sovereignty, in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 500, 515 (Rudolf Bernhardt ed., 1984), who states that

> States enjoy an equal juridical status under general international law . . . [T]he basic structure of international law [is] as a legal order of co-ordinated juxtaposed political entities, as distinguished from a civitas maxima or a world State order . . . General international law does not accord hegemonic powers a privileged legal authority over their spheres of political influence, whether in the form of a 'police power' or an adjudicative authority.

206. States are obligated to inform the Security Council of whatever measures of self-defense that state intends to exercise under Article 51. *See* U.N. CHARTER art. 51.

207. *Id.*

208. This approach manifests a departure from the traditional approach to armed conflict, which turns on exactly when an armed attack begins, as articulated by the *Caroline* case. The *Caroline* case permits the use of defensive force when the "[n]ecessity of that self-defense is instant, over-

that a threat posed by the combined existence of terrorism and WMD may require decision-making innovations on the part of the Security Council, if the principle of collective responsibility is to be preserved.[209] Perhaps the Security Council could create an institutional mechanism of intelligence cooperation, at least among the five permanent members, with full participation by a representative of the Secretary General.[210] Other States Parties might also have roles in this process, as appropriate to their specific security concerns.[211] Additionally, the Security Council might want to examine the development of enhanced intelligence capabilities, so that the U.N. may more effectively protect its own personnel.

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whelming, and leaving no choice of means, and no moment for deliberation." 29 British & Foreign State Papers 1129, 1138 (1840-41) (quoting Daniel Webster, concerning the Caroline incident).

209. According to the Charter, the Security Council is explicitly responsible for rectifying international threats to the peace in the interest of maintaining collective security. *See* U.N. CHARTER art. 39.

210. Although the Security Council has primary responsibility for collective security in the international system, its powers and efficacy are not unproblematic. The practical strength of the institution of the Security Council is that the five permanent members wield important factual powers in the international system, and thus, wield important influence over security matters on a worldwide basis. When the P-5 has a consensus, collective security initiatives will maximize the efficacy of intervention. The practical problem of the Security Council is that each permanent member has a veto. This means that a single permanent member can block effective Security Council collective action by the threat of a veto or the actual exercise of it. This problem was partly resolved when the General Assembly adopted the Uniting for Peace Resolution. This resolution was most unusual and could, with hindsight, be understood as an organic modification or change in the U.N. Charter mandated by the principle of necessity. Action taken under these powers was heavily controverted, although the ICJ in an Advisory Opinion, *The Expenses Case*, upheld the constitutional validity of the Uniting for Peace Resolution. Since the composition of the General Assembly does not provide majoritarian support for any particular member of the Security Council's permanent block, there is obviously a reluctance to use the General Assembly process as a super-Security Council in emergency situations when the Council's action is terminated by a veto. The veto by permanent members is a power that was more universally institutionalized in the League of Nations, and in particular, in the principle that League decisions required unanimity; by voting no, any sovereign party could exercise veto power. This was, of course, a central reason that the League was a failure in matters of international peace and security. The issue arose indirectly in the context of the conflict in the former Yugoslavia. In effect, the new states victimized by Serbian aggression were also limited in their capacity to defend themselves by U.N. arms embargo. Thus, states could not effectively defend themselves against ethnic cleansing and genocide, partly because a lifting of the arms embargo would have to be done only if assurance could be had that no permanent member of the Security Council would exercise the veto. This put the U.N. in an extremely difficult situation. In some degree, the issues of the murkiness of the landscape regarding the scope of possible war crimes, including crimes against the peace, remains problematic. *See generally* Winston P. Nagan, *Rethinking Bosnia and Herzegovina's Right of Self-Defence: A Comment*, 52 INT'L COMM. JUR. 34 (1994); *see also* HENKIN, *supra* note 69, at 69 (stating, "it is important that Charter norms—which go to the heart of international order and implicate war and peace in the nuclear age—be clear, sharp, and comprehensive.").

211. The events of September 11 therefore require us to be sensitive to the problem of the veto, the downside of which may provide a spur and justification for the unilateral use of force and for a possible abuse of the doctrine of preemption, unconstrained by any objective standards of reasonableness. It is possible that the nature of the new threats to international peace and security will require important constitutional changes in the structure and the processes of the Security Council. For a review of some arguments regarding the possible reformulation of the Security Council and P-5 veto power, see generally Craig Hammer, *Reforming the U.N. Security Council: Open Letter to U.N. Secretary General Kofi Annan*, 15 FLA. J. INT'L L. 261 (2002).

Facts implicating WMD would significantly change the criteria of what might count as a reasonable invocation of preemptive self-defense, which could theoretically stretch the meaning of "imminence" to suggest possible extinction.[212] One might look at the rules governing the regime of nuclear weapons and conclude, as Judge Weeramantry did, that they should be declared unlawful per se.[213] Paradoxically, this argument might provide the strongest justification for the Bush Doctrine's rising policy of preemptive strikes against rogue states that have or might have the capacity to make, disseminate, and possibly use WMD. If, for example, nuclear weapons are per se unlawful, then the possible development and use of them by a state may well strengthen the characterization that such a state is both a rogue state and a candidate for preemptive action.[214] Of course, this line of argument glosses over the fact that many states that have WMD are not rogue states, and seemingly fall under the protection of rules that prohibit intervention into their internal affairs. The rogue state argument might then suggest that such a state must meet some criterion of "rogueness" that carries an international law justification, which must have existed without regard to its status as a state posing a WMD threat.[215] It is possible that Iraq was a prime candidate for this kind of analysis in the sense that its "rogueness" was tied to its aggression against Kuwait and the Iraqi regime's reluctant tolerance or, perhaps its uncooperative attitude toward the U.N. inspection regime. We should note, however, that in the shifting justifications for the attack against Iraq, it was the concern for the threat of WMD that seemed to be the strongest.[216] To date, the invading forces have not found these weapons.[217] It is possible that they are simply looking for the wrong things. With the almost decade-long inspections regime, it is hardly likely that the Iraqi regime would have kept the recipe for producing WMD inside Iraq in some logical place accessible to inspectors or to invading forces. There can be no doubt that the Hussein regime clearly had an incentive and a policy to produce WMD.[218] Israel had them; this posed a re-

212. Sir Humphrey Waldock asserted that "[w]here there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted, then an armed attack may be said to have begun to occur, though it has not passed the frontier." *See* Humphrey M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 451, 498 (1952).

213. *See* Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J 226. As Judge Weeramantry found, "humanitarian law reveals . . . an abundance of rules which both individually and collectively render the use or threat of use of nuclear weapons illegal." *Id.* at 496.

214. *See* Waldock, *supra* note 212, at 498.

215. *See* Winston P. Nagan & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations* (forthcoming 2004, COLUMBIA J. TRAN. L.). Professor Nagan delineates a typology of approximately thirteen forms of state. The categories are somewhat overlapping, but they are meant to be descriptive rather than juristic. These typologies are: failed states, anarchic states, genocidal states, homicidal states, thug controlled states, drug controlled states, crime controlled states, terrorist states, authoritarian states, garrison or national security states, totalitarian states, democratic rule of law states, and rogue states [this latter category is recognized in the new Bush Doctrine].

216. Philip Shenon & David Stout, *Rumsfeld Says Terrorists Will Use Weapons of Mass Destruction*, N.Y. TIMES, May 21, 2002.

217. *See generally* Reynolds, *supra* note 178.

218. *See, e.g., Is Preemption Necessary?*, WASH. Q., Spring 2003, at 115.

gional threat to most Arab states, which is why Egypt's position after 1973 was to move ahead with a peace treaty with Israel.[219]

Although this is not officially acknowledged in the Camp David Accords, Egypt's position on the prospect of peace in the Middle East was influenced by the fact that Israel had WMD. Indeed, Egypt has had a long-standing policy of promoting the idea that the Middle East should be a nuclear-free zone.[220] It was one of the prime movers in the promulgation of the Treaty of Pelindaba, which made Africa a nuclear-free zone.[221] The Hussein regime took an alternative course, namely, to seek to match Israeli WMD developments with its own. The Iraq regime then became Israel's critical state security threat in the region.[222]

Indeed, a symmetrical balance of WMD in the Middle East runs into the political problem that the checks and balances in a totalitarian state are not the same as those in a democratic state and thus, the symmetry and deterrence value of the threat of mutual destruction is largely illusory. Israel's bombing of Iraqi nuclear reactors was an example of a stretched version of anticipatory self-defense, based on an expanded reading of the concept of an imminent threat. Israel's idea of imminence was redefined by the nature of the threat, namely, Iraq's scientific progress in the direction of the possible production of WMD.[223] Consequently, so long as the Hussein regime had the desire, resources, and technical capability to produce and possibly deploy WMD, that regime would pose a serious threat to the security of the Israeli state. Strategic planners would also have to consider the possibility that WMD could be deployed outside the boundaries of conventional state defensive or offensive posture; they could be passed on to terrorist groups, thus allowing rogue states to avoid detection and responsibility for the possible use of such weapons. In short, a rogue-type regime could disseminate WMD to terrorist groups on an anonymous basis, and thus insulate itself both from responsibility and the prospect of retaliation. Introducing the

219. The world reached the brink of nuclear war approximately thirty years ago. The Yom Kippur war quietly commenced when Egypt and Syria perpetrated a surprise attack against Israel; the Egyptian Army crossed the Suez Canal and scores of Syrian tanks deeply infiltrated the Golan Heights. Israel was caught entirely unprepared, and launched confused, unsuccessful counterattacks until the early hours of October 9, 1973, when senior Israeli military leaders suggested that Israel deploy nuclear weapons. Then Prime Minister Golda Meir rejected this course of action and instead lobbied the United States for support. Soon thereafter, Henry Kissinger arranged air supply to Israel, which turned the tide of the conflict. The Israelis crossed the Suez Canal, were within 20 miles of Damascus, and encircled the Egyptian Army by October 21. Days later, the countries established a permanent cease-fire. *See* Avner Cohen, *The Last Nuclear Moment*, N.Y. TIMES, Oct. 6, 2003, at A17. For a comprehensive review of the political history of Israel's nuclear program, see generally AVNER COHEN, ISRAEL AND THE BOMB (1998).

220. For a discussion regarding the development of a nuclear-weapon-free zone in the region of the Middle East, see G.A. Res. 3263, U.N. GAOR First Comm., 29th Sess., Supp. No. 31, at 27, U.N. Doc. A/9631 (1974) [hereinafter Resolution 3263].

221. *See* Treaty on the Nuclear-Weapon-Free Zone in Africa (Pelindaba Treaty), *supra* note 135.

222. In 1981 Israel claimed it acted in self-defense when it bombed an inactive Iraqi nuclear reactor, arguing that Iraq was going to use the reactor to make nuclear weapons to threaten Israel. *See* STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 159 (1996).

223. *Id.*

terrorism element into such strategic and operational concerns tests the foundations of the self-defense principle as it is traditionally understood.[224]

If a regime is not reluctant to use WMD, it will be perceived as a greater and more realistic threat than a state that has them, but has never used them. The use of chemical weapons in Hallabja, a Kurdish populated city in Kurdistan, signaled to the world community the possibility that the Hussein regime might be unrestrained about its willingness to use chemical weapons in circumstances that cannot be justified by international law.[225] Most human rights groups would have characterized the use of chemical weapons to exterminate the Kurdish population of Hallabja as a human rights atrocity[226] and, at least, as an international crime under the Genocide Convention, since the manifest targeting of a specific group carried the Hussein regime's intent to destroy it in whole or in part.[227]

International lawyers must work more carefully through the specific problem posed by the Bush administration concerning the conditions now linked to the major forms of armed conflict, which threaten individual and collective security. We would submit that a central principle implicit in the Bush Doctrine is that when the reasons for a rule change, the rule must accordingly change.[228]

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224. "[I]t is the attack that provides the decisive test" as to when self-defense can be exercised. *Id.* at 165.

225. Under Saddam Hussein's Iraqi regime, northern-dwelling Kurds constituted 23 to 27% of population of Iraq. *See* Howard Adelman, *Humanitarian Intervention: The Case of the Kurds*, 4 INT'L J. REFUGEE L. 4, 5-7 (1992). Conflict between Iraqi Arabs and Iraqi Kurds has been ongoing for decades. For example, a Kurdish revolt against Saddam Hussein's Baa'th regime transpired in 1974 after a 1970 autonomy agreement between Iraqi Kurds and the Baa'th regime fell apart. Saddam Hussein crushed this rebellion in 1975 when his forces killed 50,000 Kurds. *Id.* Later, after the Iran-Iraq war ended in 1988, the Iraqi army killed thousands of Kurdish nationalists and used chemical weapons against the civilian population of the Kurdish village of Hallabja. *Id.*

226. A report by Max Van der Stoel, special United Nations investigator, tells of arbitrary executions of individuals, families, entire Kurdish villages, and of arbitrary arrests and horrific torture, such as beatings, rapes, electric shocks, burning, and teeth and nail extractions. *See Report on the Situation of Human Rights in Iraq*, U.N. Commission on Human Rights, 48th Sess., Agenda Item 12, at 12-30, U.N. Doc. E/CN.4/1992/31 (1992); *see also* Jonathan C. Randal, *Iraqi Files Point to Mass Deaths*, WASH. POST, Feb. 22, 1992, at A1.

227. According to Article II of the Genocide Convention of 1948, acts of genocide are certain acts "committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." *See* Convention on the Prevention and Punishment of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277.

228. For example, President Bush intimated in his March 2002 speech in O'Fallon, Missouri that international terrorism has changed the reasons underlying the rules level of armed conflict. Specifically, with regard to fighting the war on terrorist acts perpetrated by al Qaeda operatives under the protection of the Taliban regime during the war in Afghanistan, President Bush declared:

> [Y]ou've got to know that we're fighting against Taliban determined group of killers. These are people who would rather die than surrender. These are people who hate America. They hate our freedom. They hate our freedom to worship. They hate our freedom to vote. They hate our freedom of the press. They hate our freedom to say what you want to say. They can't stand what we stand for. And, therefore, we have no choice but to hunt 'em down one by one to defend the very freedom we hold dear in America.

President George W. Bush, Speech in O'Fallon, Missouri, March 18, 2002, *in* Bush Vows to Continue Fight Against Terrorism, *available at* http://usinfo.state.gov/regional/nea/sasia/afghan/text/0319bush.htm. President Bush apparently argues that the nature of the attacks of September 11,

This principle works on the assumption that rules are responses to problems in society generated by certain conditions. When the conditions change, it might be possible to salvage the general basis of the rule, which might continue to serve a purpose; it would thus be necessary for interpreters to decipher new meanings that might be ascribed to the rules, but they must be developed with far greater exactitude than the formulations as they currently appear in the new Bush Doctrine. The idea that terrorists are non-risk-averse, have access to significant resources, and could have access to WMD provides a small margin for error on the part of both states and the Security Council in seeking to maintain international peace and security. If a mistake is made, the consequences of the use of WMD would be catastrophic, and one suspects that the freedoms we now enjoy would be even more significantly diminished as a political matter.[229] This means that we must ever more carefully scrutinize background facts and intelligence communiqués, as they become available, and cautiously monitor conflict situations in ways that have not yet been done to ensure that the balance between security and liberty is not destroyed. This balance is crucial to the foundations of the rule of law as we currently understand it.

B. Rogue States

Against this background we come to precise issues implicit in the claims asserted by the new Bush Doctrine. Two important principles merit analysis. First, the doctrine observes the concept and expectation of what constitutes a rogue state; second, the doctrine acknowledges that regime change may be justified by international law when states meet the "rogueness" criterion. According to the Bush Doctrine, there are five characteristics which determine rogue state status. They are states that:

> brutalize their own people and squander their national resources for the personal gain of the rulers;
> display no regard for international law, threaten their neighbors, and callously violate international treaties to which they are party;
> are determined to acquire weapons of mass destruction, along with other advanced military technology, to be used as threats or offensively to achieve the aggressive designs of these regimes;
> sponsor terrorism around the globe; and
> reject basic human values and hate the United States and everything for which its stands.[230]

The drafters of the rogue state definition might, of course, have had a specific regime in mind when drafting these criteria. However, it seems that these drafters stumbled upon one of the most important, but nonetheless difficult,

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2001 was extreme enough to change the face of the *Caroline* doctrine's established meaning of self-defense under Article 51 of the U.N. Charter.

229. In the aftermath of September 11, there was some concern that attempts to preempt future attacks may trump democratic freedoms and liberties. *See* 148 Cong. Rec. S8646 (2002) (expressing understanding for the desire to curb terrorism but fearing that the Bush administration, or any other administration, "might become so zealous and so focused on that mission that important freedoms could be trampled.").

230. *See* NATIONAL SECURITY STRATEGY, *supra* note 5, at 13-14.

questions of when a state is subject to international jurisdiction based on international concern. What, in short, is the scope of an international obligation under the U.N. Charter to limit the concept of sovereignty?[231] The distinction made by the Charter is that certain matters are reserved to the domestic jurisdiction of a state. The implication is that sovereignty is divisible; some facets of sovereignty cannot trump the concept of international obligation and some preserve sovereign autonomy over matters essentially within the domestic jurisdiction of a state. The five criteria listed by the Bush Doctrine involve factors that are clearly within the purview of international jurisdiction because they are specifically, individually, and collectively matters of international concern. Generally, this outlook might be surprising since the Bush administration's approach to matters of international obligation has been littered with claims to U.S. exceptionalism,[232] or what others have called U.S. unilateralism.[233] If the Bush Doctrine seeks to hold sovereign regimes in the international community to its emerging standard of adherence to international obligations, soon, the United States may not be able to pick and choose which rogue states to coddle and which to destroy.

If one eliminates the "rogue state" language of the Bush Doctrine and simply examines criteria indicative of unacceptable international behavior under the U.N. Charter, the concept of a "rogue state" is not normatively exceptional. Indeed, it gravitates to a position long held by liberals and progressives in the international community that U.N. Charter values must infuse the authority foundations of the state. In short, the rogue state criteria are essentially the same criteria normatively unacceptable for admission to U.N. membership.[234] Liberal

231. The Security Council has lately taken a far more interactive approach to the existence of threats to international peace, which suggests that once they are generally notified, member states have an obligation to rectify these threats under the auspices of the Charter. Between 1990 and 1996, the Security Council declared the existence of a formal threat to international peace and security sixty-one times, as opposed to the six times it did so in the preceding forty-five years. Jessica T. Mathews, *Power Shift*, FOREIGN AFF., Jan./Feb. 1997, at 50, 59.

232. Historically, "exceptionalism" has been a staple of American foreign policy since Alexis de Tocqueville published his observations of American society over one hundred-fifty years ago, which has since evolved into American unilateralism. "Tocqueville is the first to refer to the United States as exceptional–that is, qualitatively different from all other countries." SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD 18 (1996). Among the various aspects of American culture with which Tocqueville was fascinated, he was particularly struck by the individualistic nature associated with America's international relationships. See *id.* at 33 for Seymour Martin Lipset's views, which are representative of a contemporary proponent of the "America as unique" thesis.

233. *See* Michael J. Glennon, *There's a Point to Going it Alone: Unilateralism Has Often Served Us Well*, WASH. POST., Aug. 12, 2001, at B2 (explaining the phenomenon of U.S. unilateralism).

234. From a historical standpoint, liberals have long had a deep-seated mistrust of antidemocratic processes, which stemmed largely from scores of eighteenth-century liberals skeptical of the prevailing covert diplomacy and clandestine alliance politics, which they felt compelled states to go to war. *See* FELIX GILBERT, THE BEGINNINGS OF AMERICAN FOREIGN POLICY 45-47, 60-62 (1961). World War I confirmed the fears of the successive generation of liberals, which paved the way for President Woodrow Wilson to call for "[o]pen covenants of peace openly arrived at" and the development of the League of Nations. *See* President Woodrow Wilson, Address to Congress, Point 1 of the Fourteen Points (Jan. 8, 1918), *reprinted in* RUTH CRANSTON, THE STORY OF WOODROW WILSON 461 (1945). The liberal solution to international enmity has hence been collective security

international lawyers have long supported humanitarian intervention when threats to international peace and security—based on the same criteria indicated by President Bush—are threatened. The rogue state principle has other interesting ramifications. It perhaps highlights the lacuna in the international system which, traditionally, bases the recognition of a state on such practical criteria as control over territory, population, internal governance, and the capacity to manage foreign relations.[235] Modern international law has sought to base the recognition of a state as a member of the U.N. on its ability and willingness to uphold the values of the U.N. Charter, in particular the values related to peace and security. The rogue state principle seems to dramatically move the conception of what comprises an acceptable sovereign state in the direction of the explicit standards, policies, and purposes behind the U.N. Charter. If the United States sought to define the concept of a rogue state in unilateral terms, the unilateral invocation of critical U.N. Charter standards is an endorsement rather than a depreciation of the Charter as an organizing principle of sovereignty and world order.[236] We do not believe that this is what the Bush Doctrine intended, but this may be an unintended consequence.

There is a further insight that we might draw from the new Bush Doctrine. We have mentioned that international law contains traditional criteria for the identification of a state as well as those additional normative criteria discernable from the U.N. Charter. Additionally, the recognition of the new states in the Balkans has imposed even more strenuous criteria on the recognition of sovereignty by demanding that these new states' constitutions must be democratic, safeguard human rights, and secure the protection of minorities.[237] Where, then, does the Bush Doctrine lead us? We would suggest that the rogue state concept implies that decision-makers must now take a far more discriminating look at

by targeting the act of aggression itself, as opposed to a particular aggressor, thus subordinating national interests to the interests of the global community. *See* MICHAEL SMITH, REALIST THOUGHT FROM WEBER TO KISSINGER 54-59 (1986) (discussing liberal theories and ideas underlying the concept of the League of Nations). The iteration of liberal ideology which followed emerged during and after World War II; the belief in a new order based not on "exclusive alliances" but on "an all-embracing vision of One World at peace" was heralded by the growing liberal societal base in America. *See* M. DONELAN, THE IDEAS OF AMERICAN FOREIGN POLICY 23-24 (1963). Contemporarily, these liberal views are entirely comprised by the chief instrument of international peace, the United Nations, the Charter of which specifies that only defensive wars are legitimate. *See* U.N. CHARTER, art. 1, para. 1 (stating that the primary purpose of the United Nations is to suppress "acts of aggression or other breaches of the peace"); *id.* art. 2, para. 4 ("All members shall refrain . . . from the threat or use of force against the territorial integrity or political independence of any state."); *id.* art. 42 (permitting the Security Council to employ force "to maintain or restore international peace and security"); *id.* arts. 43, 45 (obligating member states to provide forces to the Security Council); *id.* art. 51 (preserving the right of individual or collective self-defense).

235. According to the Third Restatement of Foreign Relations section 201, "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." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 201 (1987).

236. *See* U.N. CHARTER arts. 55, 56.

237. *See* WARREN ZIMMERMAN, ORIGINS OF A CATASTROPHE: YUGOSLAVIA AND ITS DESTROYERS—AMERICA'S LAST AMBASSADOR TELLS WHAT HAPPENED AND WHY xii (1996).

the nature of a state and the trimmings of sovereignty within which it is clothed. There are more discriminating criteria to distinguish states than simply size.[238]

There is a third and final element in this aspect of the analysis. In 1998, Congress enacted legislation that encouraged the United States to work toward the replacement of the Hussein regime in Iraq.[239] A group of neo-conservative politicians led by such figures as Richard Perle and Paul Wolfowitz produced a study that suggested that the then-existing circumstances in Iraq compelled the United States to embark on a policy of regime change.[240] This policy was submitted to the Clinton administration, although to our knowledge the Clinton administration did not act on it. Several of the same neo-conservative intellectuals were also in the business of advising Benjamin Netanyahu concerning Israel's security interests and the future.[241] The document they produced implied a quite valid criticism of U.S. government policy in the Middle East.[242] If it was

238. *See* Nagan, *supra* note 210. For example, there are entities which meet the requirements of traditional international law but which may still be regarded as essentially failed states (including drug-controlled states, cleptocratic states, thug-controlled states,and terrorist states) as well as authoritarian states, totalitarian states, garrison states, and the related national security states in addition to democratic states. It thus would seem that the Bush administration is claiming that the international community must be more discriminating about what the content of state and sovereignty really are. This, of course, means that the formal theory of sovereignty may now be more carefully scrutinized to determine whether, from the Bush Doctrine point of view, sovereignty serves a as mask for a rogue state or, from an international point of view, whether sovereignty obscures certain realities which are clearly matters of international jurisdiction.

239. Congress passed and President Clinton signed the Iraq Liberation Act into law on October 31, 1998. Iraq Liberation Act, Pub. L. No. 105-338, 112 Stat. 3178 (codified at 22 U.S.C. § 2151), which requires the United States to support military force to replace Saddam Hussein's regime.

240. In 1992, then-Under Secretary of Defense for Policy Paul Wolfowitz supervised the drafting of the Defense Policy Guidance document, in which Wolfowitz made clear his objections to what he considered to be the premature end of the 1991 Persian Gulf War. In the Defense Planning Guidance document, he outlined plans for military intervention in Iraq as a required action to ensure "access to vital raw material, primarily Persian Gulf oil" and to prevent proliferation of weapons of mass destruction and threats from terrorism. The document further called for preemptive attacks and ad hoc coalitions, but explicitly states that the United States should be ready to act alone in the event that "collective action cannot be orchestrated." *See* Joseph Cirincione, *Origins of Regime Change in Iraq*, 6 PROLIFERATION BRIEF, Carnegie Endowment for International Peace, Mar. 19, 2003, *available at* http://www.ceip.org/files/nonprolif/templates/Publications.asp?p=8&PublicationID=1214. For greater detail on the Defense Planning Guidance document, see Douglas C. Lovelace, Jr. & Thomas-Durell Young, *U.S. Department of Defense Strategic Planning: The Missing Nexus*, Carlisle Barracks, PA: Strategic Studies Institute 7-8, 37-38 (Sept. 1, 1995), *available at* http://www.carlisle.army.mil/ssi/pubs/1995/nexus/nexus.pdf. When the Defense Planning Guidance document was leaked to the New York Times, its terms proved to be so extreme that much of the document had to be rewritten. *See* Patrick Tyler, *U.S. Strategy Plan Calls for Insuring No Rivals Develop*, N.Y. TIMES, Mar. 8, 1992, at A6. *See generally* Bill Keller, *The Sunshine Warrior*, N.Y. TIMES MAG., Sept. 22, 2002, at 48.

241. In 1996, Richard Perle, Douglas Feith and David Wurmser, collaborated on a report to the newly elected Likud government in Israel. In this report, they called for "a clean break" with the Israeli policy of negotiating with Palestinians and trading land for peace. They wrote that "Israel can shape its strategic environment . . . by weakening, containing and even rolling back Syria. This effort can focus on removing Saddam Hussein from power in Iraq . . . Iraq's future could affect the strategic balance in the Middle East profoundly." Institute for Advanced Strategic and Political Studies, *A Clean Break: A New Strategy for Securing the Realm*, *at* http://www.why-war.com / resources/files /cleanbreak.pdf (last visited Oct. 11, 2003). The report additionally called for "reestablishing the principle of preemption." *Id.*

242. Several of the drafters of this document served as advisors to the Foreign Minister of the Israeli government, Benjamin Netanyahu of the Likud Party. Their charge was to freshly reexamine

the U.S. policy to preserve the status quo, then U.S. policy would fail because the status quo was committed to armed conflict and, from the Arab side, dedicated to the possible extinction of Israel. Since most of these Arab states are undemocratic and unaccountable, creating peace with them would essentially be a tactical or strategic expedient to postpone conflicts indefinitely, not end them. Theorists then realized the potential of a regime change in Iraq, which could be the lever to completely shift the paradigm of Middle East conflicts. The strategic implications were essentially these: if Iraq's Hussein regime could be overthrown and a democratic regime could be instituted with a strong American military and intelligence presence, this presence could influence regime change in Iran, where the Ayatollahs are known to be unpopular, in Syria, which runs on undemocratic Baa'thist lines, and it could exert tremendous pressure on Saudi Arabia to adapt.

The assumption made by the neo-conservatives was that the promotion of democracy and the empowerment of civil society would dramatically shift the paradigm of conflict in the Middle East. We suspect that these assumptions were based on the notion that certain kinds of states are most reluctant to wage war; these kinds of states often have vested interests in making peace and developing their societies by progressive means. This builds on the oft-cited dictum that democracies tend not to make war on each other. This suggests a further principle, which implies a claim that the preferred form of sovereign independence is tied to democratic values, and that democratic values are themselves critical for the establishment of enduring peace. It is not altogether clear in the aftermath of the invasion and occupation of Iraq that this indeed is the scenario that is being played out. In our judgment, if this is an accurate estimation of the strategic objectives of the current administration, then one must admit that it was a vastly ambitious and incredibly risky exercise. The critical question is: Can war be justified simply to promote democracy?

The new Bush Doctrine must not be read simplistically; its creators might have thought they were erecting a narrow construct to justify unilateral intervention. The Bush Doctrine has also established an ostensible, yet elementary, framework with regard to international relations and practice, which over time may generate expectations about the permissible limits of what is and is not

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the situation in the Middle East and to devise new strategies to possibly implement a new paradigm. The document they produced was a highly sophisticated interpretation of the crisis in the Middle East. Effectively, they collectively indicate that U.S. policy in general seeks stability in the Middle East by developing short-term understandings with regimes which are largely undemocratic, unaccountable, ruthless with regard to their own people, and unyielding in their covert support for international terrorism. Implicit in this formulation is the empirical assumption that in general, democracies are not aggressive and do not coddle terrorism. Therefore, bold thinking required the unthinkable; Arab states would have to contemplate regime change in a democratic direction and, if that proved possible, the foundations for long-term peace in the Middle East would be assured. Implicit in this approach is the idea that real sovereignty must be based on democratic principles and that sovereignty based on absolutism can often mean a threat to international peace and security. This approach seems to contain the incipient seeds of the Bush Doctrine with regard to rogue states, abuse of sovereignty, and the stratagem of regime change.

lawful.[243] The Bush Doctrine, in fact, seems to promote the ideas of aggressive international obligation, rethinking of state responsibility, and virtually and implicitly asserts that democracy is a critical normative standard for maintaining peace and security in the world community.[244] These values have not always been characteristic of U.S. foreign relations. Statements of principle do not exhaust the analysis of the lawfulness of certain conduct under international law. The methods, techniques, strategies, and tactics to secure a state's objectives must still be subject to the most rigorous scrutiny to determine if they meet at least a standard of reasonableness; if these doctrines do manifest reasonable restraint in their assertion of claims in the international system, they must additionally justify them.

VII.
STRATEGIC JUSTIFICATIONS FOR THE IRAQ WAR

Let us backtrack a bit. Israel basically has a monopoly on WMD in the Middle East. It developed nuclear capability because it apparently felt that ultimately, nuclear deterrence was and is the only way to guarantee its continued existence. There is evidence that during the 1973 war, the Israeli Cabinet considered using nuclear weapons to defend itself if it became necessary.[245] Clearly, Egypt would have been one of the target states for a nuclear attack. It is therefore not surprising that the Egyptians seriously examined the nuclear threat; Egypt soon opted to become a nuclear-free state, committed to abolish nuclear weapons in both the Middle East and Africa.[246] We suspect that this Egyptian policy was induced by the facts that Israel had nuclear weapons and a territorial rearrangement could not be achieved through the use of force. The Egyptians had an incentive at Camp David to make peace. The Israelis also had an incentive to make peace, particularly with an Arab state working so aggressively to rid the Middle East and Africa of nuclear weapons. Iraq, however, had a different point of view. Clearly, Israeli nuclear weapons constituted a threat to Iraq and from Iraq's point of view, there needed to be a symmetrical rather than an asymmetrical balance of power in the Middle East. Thus, Iraq's effort to develop WMD enhanced the security threat in the region, and partly explains why Israel attacked the Iraqi nuclear reactor near Baghdad on the morning of June 7, 1981.[247]

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243. With all interventions comes the possibility of setting dangerous precedents. *See* Nigel S. Rodley, *Collective Intervention to Protect Human Rights and Civilian Populations: The Legal Framework*, *in* TO LOOSE THE BANDS OF WICKEDNESS 31 (Nigel S. Rodley ed., 1992).

244. Peacebuilding is a problematic element in the new Bush Doctrine because of the confusion surrounding the concept itself. The Bush administration argues that the only way to secure a lasting peace in Iraq (with implications for the rest of the Middle East) is to establish democratic institutions. For a review of this long-standing idea, see Pauline H. Baker, *Conflict Resolution Versus Democratic Governance: Divergent Paths to Peace*, *in* MANAGING GLOBAL CHAOS: SOURCES OF AND RESPONSES TO INTERNATIONAL CONFLICT 563-72 (1996).

245. *See* COHEN, *supra* note 219.

246. *See generally* Resolution 3263, *supra* note 220.

247. *See* W. Thomas Mallison & Sally V. Mallison, *The Israeli Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?*, 15 VAND. J. TRANSNAT'L L. 417

Legal justifications do not exhaust a rational inquiry into whether the use of force is permissible. Broader contextual factors might serve to enhance or lighten the weight of proffered justifications. Indeed, strategic justifications may have an influence on what is and is not permissible or reasonable in the context of states' international relations. Strategic justifications may undermine the claim that certain forms of conduct are lawful, while they might support other claims to lawfulness. The critical question, then, is what strategic calculations animated the Bush administration to press for an attack on Iraq in the face of Security Council opposition, which itself created a global crisis of confidence in either the prudence of U.S. foreign policy or in the relevance of the U.N. as an institution for moderating conflicts and developing peaceful structures of global importance? We recall that the central argument articulated by the Bush administration was that Iraq was in breach of its obligation to disarm.[248] If this were all, the justification for going to war—upholding the U.N.'s inspection regime—seems weak if the inspection regime itself had not completed its work and if the U.N. reposed faith in the fact that the regime could complete its work. This left the administration to offer a second justification, that Iraq was a rogue state with WMD and was therefore a threat to international peace and security. A preemptive attack with regime replacement to follow would be justified. As we have seen, the latter is a more serious claim that must be examined from a strategic point of view.[249]

A single nuclear power in the Middle East—or a state with other WMD capabilities—constitutes a major security threat for all states and peoples in the region and two WMD powers immeasurably enhance the instability of the region. From the Israeli point of view, WMD in the hands of a contiguous dictator is a long-term and vital security threat. Under such circumstances, the Israeli authorities would have a vital interest in seeing preemptive action in Iraq and possibly even regime change. Likewise, the U.S. Congress also saw the threat posed by Iraq and enacted legislation calling for the replacement of the Saddam Hussein regime.[250]

VIII.
WHETHER THE STRATEGIC IMPLICATIONS FOR IRAQ UNDERMINE THE NEW BUSH DOCTRINE

These strategic implications must still meet the test of whether the methods used to secure regime change can be justified under international law. This recalls the standards that govern the imperative to intervene under whatever con-

(1982); *see also The Israeli Air Strike: Hearings Before the Senate Comm. on Foreign Relations*, 97th Cong., 1st Sess. 85-88 (1981).

248. *See* Julia Preston & Todd S. Purdum, *U.S. Moves to Persuade Security Council to Confront Iraq on Arms Inspections*, N.Y. TIMES, Sept. 14, 2002, at A6.

249. For example, if there were a reason to believe that the Hussein regime had WMD, then the enemies of this regime might be justified in feeling vulnerable if the regime could deploy these weapons to terrorist groups bent on mass murder.

250. *See generally* Iraq Liberation Act, Pub. L. No. 105-338, 112 Stat. 3178 (codified at 22 U.S.C. § 2151).

struction we give to the principle of self-defense in international law. Here, the asserted strategic justifications for regime change, which suggest a course of action to replace a dictator with a regime of democratic aspiration on the grounds of humanitarian intervention[251] or based on this dictator's potential to produce WMD in the future, must confront additional facts which suggest other motives for intervention. These other motives might include the possibility that a war in Iraq would be popular in the United States through the lens of U.S. domestic politics.[252] The actual invasion of Iraq also coincided with the Enron scandal.[253] Enron, with its major Texas connections, was a corporation close to the President's political pocketbook.[254] An invasion of Iraq would also be relatively low cost, but its enormous oil resources would constitute a win-win scenario for American corporate interests, as well as the Iraqi exiles who would replace Saddam's elite ruling autocracy. The oil interest scenario implicated Afghanistan as well, since Unocal, an operation with ties to the Republican Party, pressed the U.S. government to negotiate with the Taliban on the oil pipeline through Afghanistan. What is clear is that economic interests tied to big oil represent self-interested pressure, and such pressure would seem to undermine the case that self-defense, preemptive self-defense, and regime change were matters mandated by reasonable standards in international law.

One further point might be made with regard to these contextual factors; the invasion of Iraq would also subject the United Nations to the dictates of the United States, or perhaps demonstrate that the United Nations is, in fact, irrelevant. These factors might detract from the idea that the Hussein regime represented the kind of threat which mandated an armed intervention. In the context of Iraq's reconstruction, the Bush administration seems to have a continuing policy of unilateralism. The administration has expressed evident reluctance to expand the U.N. role in nation-building, and reluctance to bring other nation-

251. Note that Saddam Hussein ran what we describe as a homicidal state. *See* Nagan & Hammer, *supra* note 215.

252. Among the U.S. domestic interests that might be protected by the war in Iraq include continuing the war on terror, especially against Al Qaeda, and continuing the search for weapons of mass destruction in Iraq. *See* Dana Milbank, *Bush's Oratory Helps Maintain Support for War: Skillful Rhetoric Keeps Public on Board Despite Mounting Casualties*, MSNBC NEWS, *at* http://msnbc.msn.com/id/4825552/ (last visited Apr. 26, 2004).

253. During the 107th congressional session, Congress was preoccupied with the Enron Scandal and with the terrorist attacks of September 11, 2001; accordingly, a series of congressional resolutions were sponsored, which dealt with homeland security, corporate accountability, and, perhaps most importantly, the authorization of force against Iraq (just prior to bankruptcy reform). *See Session Headed For Another Week; Endgame In Doubt*, CONGRESS DAILY, Oct. 10, 2002.

254. *See* Kurt Eichenwald, *Audacious Climb to Success Ended in a Dizzying Plunge*, N.Y. TIMES, Jan. 13, 2002, at 1 (stating that "[b]y the time Mr. Bush was inaugurated in January 2001, Enron and a number of its executives, including Mr. Lay, had contributed more money to Mr. Bush over his political career than anyone else, an amount exceeding $550,000. Enron then wrote a check for $100,000 for Mr. Bush's inaugural committee, and Mr. Lay added another $100,000."); Joseph Kahn & Jeff Gerth, *Collapse May Reshape the Battlefield of Deregulation*, N.Y. TIMES, Dec. 4, 2001, at C1 (reporting that Kenneth Lay met with Vice-President Cheney for thirty minutes to discuss the Bush administration's new national energy policy, which included Enron's long-standing goal of breaking up monopoly control of electricity transmission networks, and that "Enron also had an unusual opportunity to influence Mr. Bush's choices" for appointments to the Federal Energy Regulatory Commission (FERC)).

states under the umbrella of the U.N., even though this could ease the burden on Americans in human lives and the economic cost of the occupation. The presence of private industry, such as Halliburton, which has received billions in payment for reconstructing Iraq, also seems to suggest a level of self-interestedness that undermines the ostensible goals and objectives indicated in the Bush Doctrine.[255]

Overthrowing the Hussein regime in Iraq was only the second pillar to fall in the plan to redesign the entire region. However, strategically, it is a crucial pillar. The Hussein regime was an international delinquent that institutionalized brutalization and torture and even used WMD on its own inhabitants. It was also a regime rich in human and material resources. Disposing of Hussein would give the U.S. interests control over Iraq's oil, which would essentially permit Iraq to pay for the replacement of its own regime.[256] As indicated earlier, a critical U.S. presence in Iraq could then be effectively used to destabilize Iran, Saudi Arabia, and Syria since all of these regimes are widely acknowledged to be unpopular, corrupt, and thoroughly undemocratic.[257] The Iraq War was a bold strategic design; had the original plan worked, it is likely that some Middle-eastern nations would have praised President Bush's efforts. However, the Bush administration stalled on Saudi Arabia, apparently because of the extensive ties between the Bushes and the royal family.[258] With Saudi Arabia off

255. Iraq, apparently, is officially for sale; in September 2003, the U.S.-appointed administration in Iraq announced it was opening up nearly all segments of the Iraqi economy to foreign investors. By this time, the U.S./Iraqi Administration and the Iraqi Governing Council, which was handpicked by U.S. occupying forces, already awarded reconstruction contracts to U.S. firms, including Bechtel and Halliburton, but offered their competitors no opportunity to bid on these projects and recently announced actions to allow foreign ownership of "any of Iraq's assets, apart from its oil." *See* Charles Hodson, *Iraq Opens up to Global Investors*, CNN NEWS, Sept. 22, 2003, *available at* http://edition.cnn.com/2003/ WORLD/meast/09/21/iraq.dubai/. This includes everything from pharmaceuticals and engineering to electricity and telecommunications, which could mean that hundreds of previously state-owned companies would be sold off at fire-sale prices. *Id.*

256. The United States might employ the same compensation scheme as the United Nations Compensation Commission (UNCC) applied after the 1991 Persian Gulf War. Specifically, the United Nations Security Council determined that the UNCC would retain 30% of Iraq's oil revenues to pay for the operating costs of the UNCC, according to U.N. Resolution 687. *See* Resolution 687, *supra* note 165. In May 1991, the U.N. Secretary-General anticipated that Iraq's oil revenues for 1993 would amount to $21 billion, of which the UNCC would be entitled to $ 6 billion. *See* William E. Huth, *The Iraq Claims Tribunal: An Overview of the U.N. Compensation Commission*, 54 DISP. RESOL. J., May 1999, at 25, 83.

257. Richard Murphy, a former Assistant Secretary of State to the Reagan administration, contends that Iran's longstanding problems stem from its inherently corrupt and mismanaged government. *See* Richard W. Murphy, *It's Time to Reconsider the Shunning of Iran*, WASH. POST, July 20, 1997, at C1. With regard to Saudi Arabian corruption and anti-democratic governance, see generally Kathy Evans, *Fundamental Difficulties*, GUARDIAN, May 15, 1993, at 27.

258. *See* Lally Weymouth, *How Bush Went to War*, WASH. POST, Mar. 31, 1991, at B1. At the advent of the Persian Gulf War, under President H.W. Bush, Secretary Dick Cheney was sent to discuss the U.S.-Saudi relationship with Prince Fahd of the Saudi royal family; A Bush administration official said, "there was a conclusion that we needed to put a defensive posture into Saudi Arabia to let Saddam know that an attack against Saudi Arabia was an attack against the U.S." Professor Michael Glennon has written that President H.W. Bush's pledge to Saudi Arabia was "made as a sole executive agreement . . . more sweeping in its terms than any of the seven mutual security treaties to which the United States is party, for none of those contains an ironclad commitment to go to war." *See* Michael J. Glennon, *The Gulf War and the Constitution*, 70 FOREIGN AFF.

the radar screen and the problems of consolidating the victory in Iraq looming large, the metaphor that the United States hooked the big Iraqi fish, forcing others to quickly fall into the net, was reversed. Now, the United States appears to be on the hook and terrorist operatives in the region have not ceased.

Meanwhile, the cost of U.S. unilateralism under the Bush Doctrine has increased exponentially in terms of the human cost as well as the material price.[259] Most recently, President Bush addressed the United Nations, issuing a call for U.N. support in the peacekeeping and reconstruction efforts in Iraq.[260] Bush's call was mandated by the problematic situation of security on the ground and the difficulty of reconstructing the basic infrastructure of Iraq. The human costs have become a serious political problem for the President; the economic costs are such that it is imperative that outside states be willing to make important contributions to Iraqi reconstruction.

Unfortunately, in light of his September 23, 2003 speech to the United Nations, it is now evident that the President does not concede the relevance of the United Nations in these matters.[261] Neither has the President actually seen how

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84, 85 (1991); *see also Bush: No Appeasement: U.S. Role in Saudi Arabia is 'Wholly Defensive, America Will Stand by Her Friends,' President Declares*, L.A. TIMES, Aug. 8, 1990 at P1.

259. Speaking on the war in Iraq, Senator Ted Kennedy said the Bush administration has failed to account for nearly half of the $4 billion the war is costing each month. He said he believes much of the unaccounted-for money "is being used to bribe foreign leaders to send in troops." *Kennedy Remarks*, *supra* note 177.

260. Specifically, President Bush stated that

> [T]he United Nations can contribute greatly to the cause of Iraq self-government. America is working with friends and allies. . .[to] expand the U.N.'s role in Iraq. . .[and] the United Nations should assist in developing a constitution, in training civil servants, and conducting free and fair elections [in Iraq]. . . .The United States is [also] using sanctions against governments to discourage human trafficking. The victims of [the human trafficking] industry also need help from members of the United Nations. . . .[These challenges] require urgent attention and moral clarity. Helping Afghanistan and Iraq to succeed as free nations in a transformed region, cutting off the avenues of proliferation, abolishing modern forms of slavery—these are the kinds of great tasks for which the United Nations was founded.

See President George W. Bush, Remarks by the President in Address to the United Nations General Assembly, (Sept. 23, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/09/20030923-4.html.

261. In his September 23, 2003 speech to the United Nations General Assembly, President Bush admonished the Assembly that "careful discussion . . . and also decisive action [is needed regarding Iraq]." *See id.* His subsequent remarks insinuated that the United States has assumed the responsibility of following through on the principles of the U.N. Charter; accordingly, he seems to suggest that if the United Nations does not take action in situations that—in the estimation of U.S. government officials—demand action, then the United States shall act instead. Specifically, President Bush stated that

> [The United States was] an original signer of the U.N. Charter . . . [a]nd we show that commitment by working to fulfill the U.N.'s stated purposes, and give meaning to its ideals. The founding documents of the United Nations and the founding documents of America stand in the same tradition. Both assert that human beings should never be reduced to objects of power or commerce, because their dignity is inherent. Both require—both recognize—a moral law that stands above men and nations, which must be defended and enforced by men and nations.

These remarks seem to harmonize with the President's earlier remarks to the United Nations General Assembly of September 12, 2002, in which he questioned the relevance of the United Nations. Specifically, President Bush stated that "the United Nations [faces] a difficult and defining moment.

important it is to secure United Nations approval as a means to collaborate with other states. It is also possible that the credibility of the United States, in seeking to deal unilaterally with global terrorism, has compromised the delicate structures of the diplomatic process for forging complex alliances under international law. U.S. exceptionalism, and the trend toward unilateralism, will require a sea change in the administration's perspectives on multilateralism and its support for the integrity of U.N. institutions and processes. The ultimate challenge is not simply a challenge to the viability of the United Nations or to conventional international law principles, the challenge is fundamentally to the vital importance of the international rule of law itself.

Are Security Council resolutions to be honored and enforced or cast aside without consequence? Will the United Nations serve the purpose of its founding or will it be irrelevant?" *See* President George W. Bush, Address to the United Nations General Assembly (Sept. 12, 2002), *available at* http://www.whitehouse. gov/news/releases/ 2002/09/20020912-1.html. This position has been reiterated by various members of President Bush's administration. *See* Statement by U.S. Ambassador John Negroponte, U.N. Press Release SC/7564 (Nov. 8, 2002) (stating that if the United Nations Security Council "failed to act decisively in the event of further Iraqi violation, [Resolution 1441] did not constrain any Member State from acting to defend itself against the threat posed by that country, or to . . . protect world peace and security.").

Berkeley Journal of International Law

Volume 22 | Issue 3 Article 4

2004

The Problems of Security and Freedom: Procedural Due Process and the Designation of Foreign Terrorist Organizations under the Anti-Terrorism and Effective Death Penalty Act

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The Problems of Security and Freedom: Procedural Due Process and The Designation of Foreign Terrorist Organizations Under the Anti-Terrorism and Effective Death Penalty Act

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INTRODUCTION

"The problems of security are real. So are the problems of freedom. The paramount issue of the age is to reconcile the two."[1] Although Justice Douglas wrote those words at the onset of the Cold War, his words still have resonance more than half a century later as the United States confronts the threat of international terrorism. The dilemma of how to ensure the national security of the United States while preserving the constitutional liberties of Americans is not new, but it is pressing. The great powers of Congress and the President in the arena of foreign relations and national security are subject to the limits set by the Constitution.[2] Yet "while the Constitution protects against invasions of individual rights, it is not a suicide pact."[3] Unless the United States "has the capability and will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning."[4]

Long before the terrorist attacks of September 11, 2001, Congress determined that international terrorism was a grave threat to the national security of the United States, passing the Anti-Terrorism and Effective Death Penalty Act ("AEDPA").[5] Pursuant to AEDPA, the Secretary of State has the authority to designate certain foreign entities as terrorist organizations.[6] The designation al-

1. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 174 (1951) (Douglas, J., concurring).

2. As Justice Goldberg stated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-65 (1963):

> It is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process. The imperative necessary for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with the fundamental constitutional guarantees which, it is feared, will inhibit government action.

See also United States v. Robel, 389 U.S. 258, 264 (1967) ("Yet, this concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart.").

3. *Mendoza-Martinez*, 372 U.S. at 160.

4. Wayte v. United States, 470 U.S. 598, 612 (1985).

5. *See* AEDPA, Pub. L. No. 104-132, § 301(a)(1), 110 Stat. 1214 (1996) (codified as amended in scattered sections of the U.S.C.) ("[I]nternational terrorism is a serious and deadly problem that threatens the vital interests of the United States."); § 301(a)(4) ("[I]nternational terrorism affects the interstate and foreign commerce of the United States by harming international trade and market stability, and limiting international travel by United States citizens as well as foreign visitors to the United States."); H.R. REP. NO. 104-383, pt. 2, at 45 (1995) ("The foreign organizations designated as terrorist are criminal enterprises.").

6. *See* 8 U.S.C. § 1189(a)(1) (2000 & Supp. I. 2001).

lows the government to freeze an organization's assets and prohibits any person's knowing provision of material support to it.[7] After the terrorist attacks, Congress amended AEDPA through the USA PATRIOT Act.[8] The PATRIOT Act amendments broadened the statutory criteria governing designations, extended the Secretary of State's ability to redesignate terrorist organizations, and increased the penalty for providing material support to such organiztions.[9]

These designations implicate the Due Process Clause of the Fifth Amendment, which requires that the government provide persons whom it has deprived of life, liberty, or property with notice of the deprivation and an opportunity to be heard.[10] This article asks whether the means chosen by Congress to fight terrorism comport with procedural due process. Specifically, this article examines whether designated organizations are entitled to notice and hearings before or after their designations, as well as what type of notice and hearings they must receive under the Fifth Amendment.

In part I, this article reviews title 8, section 1189 of the United States Code, which outlines the procedures for designating foreign terrorist organizations. Part II gives a brief summary of procedural due process law. Part III describes the different approaches taken by courts in determining when and what due process must be afforded to designated organizations. Part IV discusses how the Supreme Court handled procedural due process issues in *Joint Anti-Fascist Refugee Committee v. McGrath*, which dealt with the designation of communist organizations. Part V examines whether designated organizations should receive their procedural due process rights before or after their designation as terrorist organizations. Part VI inquires into the type of notice and hearing to which designated organizations are entitled under section 1189.

I.
OVERVIEW OF SECTION 1189

AEDPA, as amended by the USA PATRIOT Act, gives the Secretary of State, in consultation with the Attorney General and Secretary of the Treasury, the power to designate foreign terrorist organizations.[11] To designate an organization as terrorist, the Secretary of State must find that (1) the organization is foreign; (2) the organization engages in terrorist activity[12] or terrorism,[13] or

7. *See* § 1189(a)(2)(C); 18 U.S.C. § 2339B (2000 & Supp. I 2001).

8. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

9. §§ 411(a), 411(c), 809(d).

10. *See* Boddie v. Connecticut, 401 U.S. 371, 377 (1971) ("'[D]ue process of law signifies a right to be heard in one's defence.'") (quoting Hovey v. Elliott, 167 U.S. 409, 417 (1897)); Morgan v. United States, 304 U.S. 1, 18 (1938) ("The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one.").

11. AEPDA § 302 (codified at 8 U.S.C. § 1189); USA PATRIOT Act § 411(c).

12. The term "terrorist activity" means

> any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the

retains the capability and intent to engage in terrorist activity or terrorism; and (3) the organization's terrorist activity or terrorism threatens the national security[14] of the United States or the security of its nationals.[15] In making this finding, the Secretary must create an administrative record, which can contain

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laws of the United States or any State) and which involves any of the following: (I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle); (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a government organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained; (III) A violent attack upon an internationally protected person . . . or upon the liberty of such a person; (IV) An assassination; (V) The use of (a) any biological agent, chemical agent, or nuclear weapon or device, or (b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property; and (VI) A threat, attempt, or conspiracy to do any of the foregoing.

8 U.S.C. § 1182(a)(3)(B)(iii) (2000 & Supp. I 2001).

To "engage in terrorist activity" means

> in an individual capacity or as a member of an organization: (I) to commit or incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity; (II) to prepare or plan a terrorist activity; (III) to gather information on potential targets for terrorist activity; (IV) to solicit funds or other things of value for (aa) a terrorist activity, (bb) a terrorist organization described in clause (vi)(I) or (vi)(II), or (cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate that he did not know, and should not reasonably have known, that the solicitation would further the organization's terrorist activity; (V) to solicit any individual (aa) to engage in conduct described in this clause, (bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II), or (cc) for membership in a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate that he did not know, and should not reasonably have known, that the solicitation would further the organization's terrorist activity; (VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training (aa) for the commission of terrorist activity, (bb) to any individual who the actors knows, or reasonably should know, has committed or plans to commit a terrorist activity, (cc) to a terrorist organization described in clause (vi)(I) or (vi)(II), or (dd) to a terrorist organization described in clause (vi)(III), unless the actor can demonstrate that he did not know, and should not reasonably have known, that the act would further the organization's terrorist activity.

§ 1182(a)(3)(B)(iv).

As used in § 1182(a)(3)(B)(iv), the term "terrorist organization" means

> an organization (I) designated under section 1189 of this title; (II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General, as a terrorist organization, after finding that the organization engages in the activities described in subclause (I), (II), or (III) of clause (iv), or that the organization provides material support to further terrorist activity; or (III) that is a group of two or more individuals, whether organized or not, which engages in the activities described in subclause (I), (II), or (III) of clause (iv).

§ 1182(a)(3)(B)(vi). The USA PATRIOT Act amended the definition of "engage in terrorist activity" and added the definition of the term "terrorist organization." USA PATRIOT Act § 411(a).

13. The term "terrorism" means "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents." 22 U.S.C. § 2656f(d)(2) (2000).

14. The term "national security" is defined as "the national defense, foreign relations, or economic interests of the United States." § 1189(c)(2).

classified information subject only to *ex parte* and *in camera* disclosure to a court during judicial review.[16] The Secretary of State must publish all designations in the Federal Register,[17] notifying specified members of Congress a week beforehand.[18] Publication in the Federal Register constitutes constructive notice of the designation to the designated organization. Section 1189 does not provide the designated organization with any direct notice[19] either before or after publication in the Federal Register, and the organization does not receive notice of the materials used by the Secretary of State in making the designation.[20] Section 1189 does not provide for any hearing before or after the designation at which the organization could submit evidence to rebut the Secretary's findings.[21]

Designations are effective for two years, but the Secretary of State may renew them every two years if he or she finds that the organization still meets the statutory criteria.[22] The Secretary of State may also revoke the designation if "the circumstances that were the basis for the designation" change or "the national security of the United States warrants a revocation of the designation."[23] In addition, an act of Congress can block or revoke a designation.[24] Within thirty days of publication in the Federal Register, a designated organization can seek judicial review of the designation in the D.C. Circuit.[25] This re-

15. § 1189(a)(1)(A)-(C). Under AEDPA, the Secretary of State could designate foreign organizations that engaged in terrorist activity threatening national security or American nationals, but the USA PATRIOT Act amendments expanded § 1189(a)(1)(B) to include organizations engaged in terrorism and organizations retaining the capability and intent to engage in terrorist activity or terrorism. USA PATRIOT Act § 411(c).

16. § 1189(a)(3)(A), (B).

17. § 1189(a)(2)(A)(ii).

18. § 1189(a)(2)(A)(i) (requiring the Secretary of State to notify the Speaker and Minority Leader of the House of Representatives, the Majority Leader, Minority Leader, and President pro tempore of the Senate, and any relevant congressional committees through a classified written communication seven days prior to a designation).

19. In this article, "direct notice" means notice sent directly to the involved party, as opposed to the constructive notice of publication in the Federal Register. Unless otherwise specified, "notice" refers to "direct notice."

20. *See* § 1189(a)(2); Nat'l Council of Resistance of Iran v. Dept. of State ("NCRI"), 251 F.3d 192, 196 (D.C. Cir. 2001); *see also* Joshua A. Ellis, Note, *Designation of Foreign Terrorist Organizations Under the AEDPA: The* National Council *Court Erred In Requiring Pre-Designation Process*, 2002 B.Y.U. L. REV. 675, 714 (2002) ("When the Secretary publishes notice of designations in the Federal Register, she merely lists the name of each foreign terrorist organization and the names of its aliases. Nowhere does the document state the factual basis for designating each organization.").

21. *See generally* § 1189; *NCRI*, 251 F.3d at 196.

22. § 1189(a)(4). An organization cannot be redesignated sooner than 60 days prior to the termination of its last designation. *Id.* Redesignations are effective immediately following the end of the prior two-year designation period. *Id.* Although AEDPA originally provided for only one redesignation after the initial designation, the USA PATRIOT Act amendments allow for perpetual redesignations. USA PATRIOT Act § 411(c).

23. § 1189(a)(6). Revocations take effect on the date provided or, if no date is provided, upon publication of the revocation in the Federal Register. § 1189(a)(6)(B). The revocation of a designation does not affect any action based on conduct committed prior to the effective date of the revocation. § 1189(a)(7).

24. § 1189(a)(5).

25. § 1189(b)(1).

view is based solely on the administrative record and any classified information submitted by the Secretary of State for *ex parte* and *in camera* review.[26] If the court finds that the designation is arbitrary and capricious, it must vacate the designation.[27]

Designation as a terrorist organization entails serious consequences.[28] First, the Secretary of the Treasury can freeze all of the organization's assets held by American financial institutions.[29] Second, members of the organization cannot enter the United States.[30] Third, any person who "knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so," faces up to fifteen years in prison (or life imprisonment if death results from such activity).[31] The term "material support or resources" includes "currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials."[32] Those accused of providing such support or resources are forbidden from challenging the validity of the underlying designation of the terrorist organization during their trial.[33]

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26. § 1189(b)(2).

27. AEDPA provides:

> The Court shall hold unlawful and set aside a designation the court finds to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right; (D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court under paragraph (2), [sic] or (E) not in accord with the procedures required by law.

§ 1189(b)(3).

28. Or, as the Ninth Circuit put it in *Humanitarian Law Project v. Reno* ("Humanitarian Law Project I"), 205 F.3d 1130, 1132 (9th Cir. 2000), "[t]his provision has teeth."

29. § 1189(a)(2)(C); 18 U.S.C. § 2339B(a)(2).

30. 8 U.S.C. § 1182(a)(3)(B)(i). Additionally, aliens who engage in terrorist activity could be deported. *See* 8 U.S.C. § 1227(a)(4)(B) (2000 & Supp. I 2001) ("Any alien who has engaged, is engaged, or at any time after admission engages in terrorist activity (as defined in section [1182(a)(3)(B)(iv) of this title]) is deportable.").

31. 18 U.S.C. § 2339B(a)(1). Congress created this crime because it found that "some foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds within the United States, or use the United States as a conduit for the receipt of funds raised in other nations." AEDPA § 301(a)(6). The USA PATRIOT Act amendments increased the usual maximum penalty from 10 years to 15 years imprisonment and inserted the penalty of any term of years or life imprisonment if death resulted. USA PATRIOT Act § 810(d). The Ninth Circuit recently construed § 2339B to require that before a defendant may be convicted, he must be proven to have had "knowledge, either of an organization's designation or of the unlawful activities that caused it to be so designated." Humanitarian Law Project v. DOJ ("Humanitarian Law Project II"), 352 F.3d 382, 402-03 (9th Cir. 2003).

32. 18 U.S.C. § 2339A(b) (2000 & Supp. I 2001). The Ninth Circuit has held that the terms "training" and "personnel" as used in this definition are void for vagueness. *Humanitarian Law Project I*, 205 F.3d at 1137-38, *aff'd Humanitarian Law Project II*, 352 F.3d at 404.

33. § 1189(a)(8).

The Secretary of State made the first designations under section 1189 in October of 1997, releasing a list of thirty foreign terrorist organizations.[34] In October of 1999, the Secretary redesignated twenty-seven of those organizations, dropped three from the list, and added al Qaeda because of its involvement in the bombings of American embassies in Kenya and Tanzania.[35] As of October 2003, the list included thirty-six foreign terrorist organizations.[36]

II.
SUMMARY OF PROCEDURAL DUE PROCESS LAW

The Due Process Clause of the Fifth Amendment imposes certain procedural restraints on government actions that deprive a person of life, liberty, or property.[37] In accordance with this procedural due process, the government must provide a person subject to a deprivation with notice of the deprivation and a right to be heard "at a meaningful time and in a meaningful manner."[38] The two main issues in procedural due process law are when process is due (that is, whether a person receives notice and a hearing before or after the deprivation) and what process is due (that is, the type of notice and hearing required).

Procedural due process normally requires notice and a hearing prior to a governmental deprivation.[39] Courts have recognized, however, that due process is not a fixed technical concept; instead, the level of procedural protection depends on the particular situation.[40] Some "emergency" situations may warrant the postponement of notice and hearings until after the deprivation.[41] To deter-

34. AUDREY KURTH CRONIN, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS: THE "FTO LIST" AND CONGRESS: SANCTIONING DESIGNATED FOREIGN TERRORISTS 6 (October 21, 2003), *available at* http://www.fas.org/irp/crs/RL32120.pdf.

35. The Secretary of State dropped the Democratic Front for the Liberation of Palestine (DFLP) and the Manuel Rodriquez Patriotic Front Dissidents (FPMR/D) because they had not committed terrorist activity within the two-year designation period. *Id.* at 6 n.18. The Secretary of State also dropped the Khmer Rouge because it no longer existed. *Id.*

36. *Id.* For the complete list as of October 21, 2003, see the appendix to Cronin's report. The Secretary of State's list is not the federal government's only list of terrorist organizations. *Id.* For a discussion of these other lists, see *id.* at 3-5. *See also infra* note 339.

37. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law"). The Fifth Amendment, which applies to the federal government, Pub. Util. Comm'n of the Dist. of Columbia v. Pollak, 343 U.S. 451, 461 (1952), is the source of the procedural rights here. The Due Process Clause has both procedural and substantive components. United States v. Salerno, 481 U.S. 739, 746 (1987). Procedural due process ensures that government deprivations of an individual's life, liberty, or property are "implemented in a fair manner." *Id.* By contrast, substantive due process protects individuals from government conduct that "shocks the conscience," *id.* (quoting Rochin v. California, 342 U.S. 165, 172 (1952)), or "interferes with rights 'implicit in the concept of ordered liberty.'" *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

38. Goldberg v. Kelly, 397 U.S. 254, 267 (1970) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

39. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985).

40. Gilbert v. Homar, 520 U.S. 924, 930 (1997).

41. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 299-300 (1981).

mine when process is due, the Supreme Court uses the balancing test articulated in *Mathews v. Eldridge*.[42] The *Mathews* test weighs the following factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[43]

Like the timing of due process, the type of notice and hearing required by due process depends on the circumstances of the deprivation. Essentially, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them opportunity to present their objections."[44] The purpose of the hearing requirement is "to minimize substantively unfair or mistaken deprivations."[45] Due process requires a meaningful hearing in which the person subject to a deprivation can present evidence on his or her behalf, but the form of the hearing may vary.[46] While due process sometimes requires a full trial-type hearing, other times the presentation of evidence through oral argument, or even written submissions, is sufficient.[47]

III.
CASE LAW ON PROCEDURAL DUE PROCESS IN THE CONTEXT OF TERRORISM

Although only a few courts have addressed the issue of procedural due process as it relates to the designation of foreign terrorist organizations, different approaches to the issue have emerged. The cases described below provide a good starting point from which to discuss the "when" and "what" of procedural due process in the terrorism context.

A. The D.C. Circuit Approach

The D.C. Circuit crafted its approach to designations under section 1189 in three cases. In *People's Mojahedin Organization of Iran v. Department of State* (*"PMOI I"*), the court reviewed the Secretary of State's 1997 designation of the People's Mojahedin Organization of Iran ("PMOI") and the Liberation Tigers of

42. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The Supreme Court originally created the *Mathews* test to determine what due process the Fifth Amendment requires under given circumstances. *See id.* Since then, the Court has repeatedly used the *Mathews* test to determine when process is due as well. *See, e.g., Gilbert*, 520 U.S. at 931-36; United States v. James Daniel Good Real Prop., 510 U.S. 43, 53-56 (1993); Connecticut v. Doehr, 501 U.S. 1, 10-17 (1991). *But see infra* part V.C. (discussing the Court's recent use of the *Mullane* test instead of the *Mathews* test to examine the sufficiency of notice).

43. *Mathews*, 424 U.S. at 335. The Court has also referred to the second *Mathews* factor as "a cost-benefit analysis of the risks of an erroneous deprivation versus the probable value of additional safeguards." Dusenbery v. United States, 534 U.S. 161, 167 (2002).

44. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

45. Fuentes v. Shevin, 407 U.S. 67, 81 (1972).

46. *Boddie*, 401 U.S. at 378-79.

47. *Compare Goldberg*, 397 U.S. at 266-70, *with Matthews*, 424 U.S. at 345, 348-49.

Tamil Eelam ("LTTE") as terrorist organizations.[48] The Secretary of State found that the LTTE, which seeks an independent Tamil homeland in Sri Lanka, and the PMOI, which seeks the overthrow of the Iranian government, had committed various terrorist activities, including some against Westerners and Americans.[49] The LTTE and PMOI argued that their designations violated their procedural due process rights because they had not received pre-designation notice and hearings.[50]

The court upheld the designations and made two important holdings. First, the court held that the Due Process Clause did not apply to the LTTE and the PMOI because they had no property or presence in the United States.[51] Only designated organizations that had voluntary, substantial connections with the United States could mount a procedural due process challenge to their designations, although organizations with no substantial connections could still contest their designations as arbitrary and capricious.[52] Second, the court held that it could not review the Secretary of State's finding that the terrorist activity of a designated organization threatened the national security of the United States or the security of its nationals.[53] The court reasoned that "it is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch."[54] Thus, the court decided that it could only review whether a designated organization was a foreign organization engaged in terrorist activity.[55] The court then found that there was substantial support in the record for the finding that the PMOI and LTTE were foreign organizations engaged in terrorist activity.[56]

Despite its holdings, however, the court was clearly frustrated with the lack of procedural safeguards to ensure the truth of the Secretary of State's findings. Before describing the facts of the case, the court offered a disclaimer:

> At this point in a judicial opinion, appellate courts often lay out the "facts." We will not, cannot, do so in these cases. What follows in the next two subsections may or may not be facts. The information recited is certainly not evidence of the sort that would normally be received in court. It is instead material the Secretary of State compiled as a record, from sources named and unnamed, the accuracy of which we have no way of evaluating.[57]

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48. 182 F.3d 17 (D.C. Cir. 1999). In denying certiorari, the Supreme Court also granted the "motion of the Solicitor General for leave to lodge under seal a copy of the sealed version of the brief for appellees filed in the United States Court of Appeals." 529 U.S. 1104 (2000).

49. 182 F.3d at 19-21.

50. *Id.* at 22.

51. *Id.*

52. *Id.* In other words, even designated organizations without voluntary, substantial connections to the United States are entitled to the statutory procedures created by Congress in section 1189.

53. *Id.* at 23.

54. *See also id.* ("These are political judgments, 'decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibilities and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.'") (quoting Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

55. *Id.* at 24.

56. *Id.* at 24-25.

57. *Id.* at 19.

The court also noted that "[b]ecause nothing in the legislation restricts the Secretary from acting on the basis of third hand accounts, press stories, material on the Internet or other hearsay regarding the organization's activities, the 'administrative record' may consist of little else."[58] At the end of its opinion, the court revealed just how uncomfortable it was with section 1189:

> We reach no judgment whatsoever regarding whether the material before the Secretary is or is not true. As we wrote earlier, the record consists entirely of hearsay, none of it was ever subjected to adversary testing, and there was no opportunity for counter-evidence by the organizations affected. . . . Her conclusion might be mistaken, but that depends on the quality of the information in the reports she received—something we have no way of judging.[59]

These concerns colored the court's decision in *National Council of Resistance of Iran v. Department of State* ("*NCRI*").[60] In that case, the court reviewed the designation of the National Council of Resistance of Iran ("NCRI"), which the Secretary of State found to be an alias of the PMOI during its 1999 redesignation as a terrorist organization.[61] The court held that the Secretary of State had substantial support for her finding that the NCRI was an alias of the PMOI and, therefore, the NCRI was a terrorist organization because the PMOI had been so designated.[62] Unlike in *PMOI I*, however, the court addressed the NCRI's procedural due process claim. Since the NCRI had a small bank account in the United States, the court held that the NCRI had developed a substantial enough connection in the country to receive procedural due process rights.[63] Moreover, since the NCRI and the PMOI were the same organization, the court held that the PMOI had also established a substantial connection in the United States.[64] Next, the court held that the NCRI's small bank account was a cognizable property interest under the Due Process Clause.[65]

The court then applied the *Mathews* test to determine when process was due to the NCRI. First, the court examined the private interest that would be affected by the designation. Relying on *United States v. James Daniel Good Real Property*,[66] in which the Supreme Court required notice and a hearing before the civil forfeiture of a home allegedly involved in a drug crime, the Secretary of State argued that, comparatively, the NCRI's bank account was not a weighty property interest.[67] The court rejected this argument, finding that

58. *Id.*

59. *Id.* at 25.

60. 251 F.3d 192, 196 (D.C. Cir. 2001).

61. 251 F.3d at 198-99.

62. *Id.* at 199-200.

63. *Id.* at 202-05 ("[A] foreign organization that acquires or holds property in this country may invoke the protections of the Constitution when that property is placed in jeopardy by government intervention."). Finding a sufficient property interest, the court did not address the NCRI's arguments that the designation abridged its members' right to travel and First Amendment rights of association and expression. *Id.* at 204-05.

64. *Id.*

65. *Id.*

66. 510 U.S. 43 (1993).

67. 251 F.3d at 206.

> [t]he fact that the Supreme Court has held that the Fifth Amendment provides protection for a highly important property interest is at most neutral on the question of whether that Amendment provides protection to an arguably less important property interest, or even a concededly less important one. If anything, the [*James Daniel Good*] decision would seem to weigh in favor of affording due process protection to the interest asserted by petitioners—it being a property interest as was the interest before the Supreme Court in [that case].[68]

Second, the court inquired into the risk of an erroneous deprivation stemming from the procedures set out in section 1189. The Secretary of State argued that the risk of an erroneous deprivation was low because she had to consult with the Attorney General and the Secretary of the Treasury before making the designation.[69] The court disagreed, finding that

> [t]he involvement of more than one of the servants of that unitary executive in commencing a deprivation does not create an apparent substitute for the notice requirement inherent in the constitutional norm. Neither is it apparent how notice by the Article II branch of government to representatives of the Article I branch can substitute for notice to the person deprived.[70]

Third, the court considered the government's interest. The Secretary of State argued that the government's compelling interest in national security warranted post-deprivation notice and hearing.[71] The court found that the government's interest in national security clearly pertained to the what of due process, such as the use of classified information in a hearing, but that the government had not shown "how affording the organizations whatever process they are due before their designation as foreign terrorist organizations and the resulting deprivation of right would interfere with the Secretary's duty to carry out foreign policy."[72] For the court, it was not clear "how the foreign policy goals of the government" would be "inherently impaired" by, for example, giving the following pre-designation notice to terrorist organizations: "We are considering designating you as a foreign terrorist organization, and in addition to classified information, we will be using the following summarized administrative record. You have the right to come forward with any other evidence you may have that you are not a foreign terrorist organization."[73] The court held that the NCRI must receive pre-designation due process, although the court mentioned that a showing of necessity could warrant post-designation notice and hearings in some situations.[74]

Finally, the court turned to the what of due process. At this point, the court read a notice and hearing requirement into section 1189. The court decided that the Secretary of State must give a designated organization direct notice of its designation as soon as she reached the tentative decision to make the designation.[75] The notice "must include the action sought, but need not disclose the

68. *Id.*
69. *Id.* at 206-07.
70. *Id.* at 207.
71. *Id.*
72. *Id.* at 207-08.
73. *Id.* at 208.
74. *Id.*
75. *Id.* at 208-09.

classified information to be presented *in camera* and *ex parte* to the court."[76] To fulfill the hearing requirement, the court held that the Secretary of State must "afford to entities considered for imminent designation the opportunity to present, at least in written form, such evidence as those entities may be able to produce to rebut the administrative record or otherwise negate the proposition that they are foreign terrorist organizations."[77] Absent a record compiled pursuant to these requirements, the court found that it could not adequately review the designations. Accordingly, the court remanded the designations of the NCRI and PMOI back to the Secretary of State for compliance with its holdings.[78]

After its redesignation as a terrorist organization in 2001, the PMOI again sought review in the D.C. Circuit. In *People's Mojahedin Organization of Iran v. Department of State* ("*PMOI II*"), the PMOI argued that the Secretary of State's use of classified information in making the redesignation violated due process.[79] The court explained that it had already determined in *NCRI* that the only process due to designated organizations was direct notice and a written hearing.[80] Reasoning that the executive branch had a compelling interest in the secrecy of its classified information and that courts were "ill-suited to determine the sensitivity of classified information," the court reaffirmed that the Secretary of State need only disclose unclassified information used in the designation to the designated organization.[81] Even if the use of classified information were error, the court held that the error was harmless because "the unclassified record taken alone is quite adequate to support the Secretary of State's determination."[82] Listing several undisputed examples of terrorist activity against Iranian targets, the court stated that "we could hardly find that the Secretary of State's determination that the Petitioner engaged in terrorist activities is 'lacking substantial support in the administrative record taken as a whole.'"[83] In response, the PMOI argued that "the attempt to overthrow the despotic government of Iran, which itself remains on the State Department's list of state sponsors of terrorism, is not 'terrorist activity,' or if it is, it does not threaten the security of the United States or its nationals."[84] As in *PMOI I*, the court held that the Secretary's finding that the PMOI threatened national security was nonjusticiable.[85] For the third time, the court upheld the designation of the PMOI as a terrorist organization.[86]

One commentator has criticized the D.C. Circuit's approach. Joshua Ellis argues that designated terrorist organizations should only receive post-designa-

76. *Id.* at 208.
77. *Id.* at 209.
78. *Id.*
79. 327 F.3d 1238, 1241-42 (D.C. Cir. 2003).
80. *Id.* at 1242.
81. *Id.* at 1242-43.
82. *Id.* at 1243.
83. *Id.* at 1243-44 (quoting § 1189(b)(3)(D)).
84. *Id.* at 1244.
85. *Id.*
86. *Id.* at 1245.

tion notice and hearings.[87] Ellis asserts that the *NCRI* court gave inadequate weight to the government's interest in national security, which he believes outweighs the risk of an erroneous deprivation and the NCRI's interest in its small bank account.[88] On the issue of what process is due to designated organizations, however, Ellis agrees with the *NCRI* court's reading of direct notice and hearing requirements into section 1189.[89]

B. A Different Approach

In *United States v. Rahmani*, a district court in California rejected the D.C. Circuit's approach and found section 1189 unconstitutional under the Due Process Clause.[90] *Rahmani* dealt with seven defendants charged under section 2339B with knowingly providing material aid to the PMOI.[91] Although section 1189 explicitly states that defendants charged under title 18, section 2339B cannot attack the validity of the underlying designation,[92] the defendants made two arguments attacking the PMOI's designation on procedural due process grounds in a motion to dismiss their indictment.

The defendants first tried to collaterally attack the underlying designation under *United States v. Mendoza-Lopez*,[93] in which the Supreme Court held that deported aliens charged with illegal reentry could collaterally attack the underlying deportation order when the deportation proceedings violated due process.[94] Referring to *NCRI*, the defendants argued that the designation of the PMOI violated procedural due process and, therefore, *Mendoza-Lopez* allowed them to attack that designation.[95] The district court rejected this argument, reasoning that on remand the Secretary of State had designated the PMOI as a terrorist organization "after the due process defects were purportedly cured" and, as a result, those defects were not prejudicial to the PMOI.[96]

The court agreed with the defendants' second argument, however, holding that they could raise the constitutionality of section 1189 as a defense to a violation of section 2339B.[97] The court noted that section 1189 allows designated

87. Ellis, *supra* note 20, at 715-16.

88. *Id.* at 698-710. Interestingly, Ellis' article treats all the *Calero-Toledo* factors as a sub-analysis within the government interest prong of the *Mathews* test. *Id.* For a discussion of *Calero-Toledo* factors, see footnote 124 and accompanying text.

89. *Id.* at 710-15.

90. 209 F. Supp. 2d 1045 (C.D. Cal. 2002).

91. *Id.* at 1047; 18 U.S.C. § 2339B(a)(1).

92. 8 U.S.C. § 1189(a)(8).

93. 481 U.S. 828 (1987).

94. *Rahmani*, 209 F. Supp. 2d at 1055.

95. *Id.*

96. *Id.* The district court in *United States v. Sattar* also rejected the notion that defendants charged with § 2339B could use *Mendoza-Lopez* to attack the Secretary of State's designation of the terrorist organization to which they had allegedly provided material support. 272 F. Supp. 2d 348, 365-68 (S.D.N.Y. 2003) (holding that § 1189(a)(8) did not violate the due process rights of defendants charged with § 2339B by precluding them from challenging the factual correctness of the Secretary of State's designation of the Islamic Group ("IG") as a terrorist organization because § 1189(b) enabled the IG itself to obtain judicial review of its designation).

97. *Rahmani*, 209 F. Supp. 2d at 1054-55. In so holding, the court rejected the argument that the D.C. Circuit is "the sole arbiter of Section 1189's constitutionality." *Id.* at 1053-54. Although

organizations to seek judicial review of their designations, but forbids defendants charged under section 2339B from challenging the designation that forms the basis for their crime.[98] As a result, defendants on trial for providing material support to designated organizations would be deprived of their liberty based in part on a designation that they could not challenge.[99] For the court, this inability to challenge the underlying designation violated the defendants' due process rights.[100] The court also found that while the issue of whether the PMOI was a terrorist organization raised a nonjusticiable political question, the court nonetheless had "the duty to scrutinize the designation *procedure* for conformance with the Constitution."[101]

The court then proceeded to analyze the constitutionality of section 1189, finding that "[s]ection 1189, by its express terms, provides the designated organization with no notice and no opportunity to object to the administrative record or supplement it with information to contradict the designation."[102] The government argued that section 1189 was not unconstitutional on its face because circumstances exist in which the statute would be valid, such as those discussed in *PMOI I* and *NCRI*.[103] But the court refused to find a constitutional application of section 1189 in *PMOI I*, because that court "explicitly found that the entity had neither presence nor property in the U.S. and, therefore, did not enjoy any constitutional rights."[104] The court also rejected *NCRI*, finding that the D.C. Circuit had engaged in impermissible "judicial legislation" in construing "non-existent provisions into a statute to save it from unconstitutionality."[105] Thus, the court found that, due to the lack of any notice and hearing for designated organizations, section 1189 was unconstitutional under the Due Process Clause.[106] As a consequence, the government could not rely on section 1189

section 1189 specifically provides for judicial review of designations in the D.C. Circuit, the district court found that this provision did not provide "clear and convincing evidence" that Congress intended to prevent other courts from considering the constitutionality of section 1189. *Id.*

98. *Id.* at 1054-55.

99. *Id.*

100. *Id. But see Sattar*, 272 F. Supp. 2d at 367 ("The inability to raise as a defense in this case the correctness of the Secretary's determination that [the IG] is [a foreign terrorist organization] is not itself a violation of the defendants' rights to due process. The element of the offense is the designation of the IG as an FTO, not the correctness of the determination."). *Cf.* Yakus v. United States, 321 U.S. 414, 469-89 (1944) (Rutledge, J., dissenting) (arguing that splitting up a criminal prosecution into two parts, an administrative proceeding without the protections afforded criminal defendants and a later criminal proceeding where the result of the administrative proceeding could not be challenged, is unconstitutional).

101. *Rahmani*, 209 F. Supp. 2d at 1051-52 (emphasis in original).

102. *Id.* at 1055.

103. *Id.* at 1055-56.

104. *Id.* at 1056.

105. *Id.* at 1056-57.

106. *Id.* at 1058.

designations in section 2339B prosecutions.[107] The court therefore dismissed the indictment against the defendants.[108]

C. *Conflicting Approaches in Cases Involving the Designation of Specially Designated Global Terrorists Under Executive Order 13,224*

Courts have also dealt with procedural due process issues in cases involving the designation of Specially Designated Global Terrorists ("SDGTs") under Executive Order 13,224,[109] which President George W. Bush promulgated pursuant to the International Emergency Economic Powers Act ("IEEPA").[110] Courts considering designations under Executive Order 13,224 and section 1189 face similar procedural due process issues, so examining the former sheds light on the present analysis.

Under IEEPA, the President can declare a national emergency to deal with foreign threats "to the national security, foreign policy, or economy of the United States."[111] After declaring a national emergency, the President has broad authority to regulate international economic transactions relating to the emergency.[112] Following the terrorist attacks of September 11, 2001, President Bush declared a national emergency and signed Executive Order 13,224[113] as a response to the terrorist threat.[114] Executive Order 13,224 authorizes the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to designate any individual or entity determined "to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the

107. *Id.* at 1058-59. Confronted with the government's argument that "invalidating Section 1189 would have serious negative consequences on this country's counter-terrorism efforts," the court decided that "[w]hen weighted against a fundamental constitutional right which defines our very existence, the argument for national security should not serve as an excuse for obliterating the Constitution." *Id.* at 1057.

108. *Id.* at 1059. The United States has appealed the district court's decision to the Ninth Circuit. *See* Brief for the Appellant, United States v. Rahmani, 2002 WL 32298238 (9th Cir. 2002) (No. 02-50355). No opinion has been issued yet.

109. 66 Fed. Reg. 49,079 (Sept. 23, 2001).

110. Pub. L. No. 95-223, 91 Stat. 1625 (1977) (codified at 50 U.S.C. § 1701 et seq.).

111. 50 U.S.C. § 1701(a) (2000).

112. 50 U.S.C. § 1702(a)(1)(B) (2000 & Supp I. 2001). IEEPA is modeled after the Trading with the Enemy Act ("TWEA"), Pub L. No. 65-91, 40 Stat. 411 (1917) (codified at 50 U.S.C. App. § 1 *et seq.*), which grants the President similar authority to regulate international economic transactions in wartime. 50 U.S.C. App. § 5 (2000).

113. Exec. Order No. 13,224, 66 Fed. Reg. 49,079, appears to be modeled after Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995), in which President Bill Clinton authorized the Secretary of the Treasury to block transactions with Specially Designated Terrorists ("SDTs") who were disrupting the Middle East peace process.

114. The Executive Order defines the term "terrorism" as

> an activity that (i) involves a violent act or an act dangerous to human life, property, or infrastructure; and (ii) appears intended (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking.

§ 3(d), 66 Fed. Reg. at 49,080; *cf.* 8 U.S.C. § 1182(a)(3)(B)(iii) (definition of terrorist activity as used in § 1189).

United States" as an SDGT.[115] The Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, can further designate as SDGTs any organizations owned or controlled by, or acting on behalf of SDGTs designated by the Secretary of State.[116] The Secretary of the Treasury has the power to block all property interests of SDGTs in the United States and prohibit any transactions involving the blocked property interests.[117]

The D.C. Circuit and the Seventh Circuit have split on the issue of when due process should be afforded to SDGTs. In *Holy Land Foundation for Relief and Development v. Ashcroft* ("*Holy Land Foundation*"), the D.C. Circuit held that the pre-designation notice and hearing requirements of *NCRI* also apply to the designation of SDGTs.[118] By contrast, in *Global Relief Foundation v. O'Neill*, the Seventh Circuit held that post-designation notice and hearings were sufficient for SDGTs. [119] The courts did agree, however, that any classified information utilized in these designations need not be disclosed to the designated organizations.[120]

In *Holy Land Foundation*, the Secretary of the Treasury designated the Holy Land Foundation for Relief and Development ("HLF"), a large Islamic charity, as an SDGT because it acted for or on behalf of Hamas, a militant Palestinian group previously designated as an SDGT.[121] Seeking a preliminary injunction against the designation, the HLF argued that the designation violated its procedural due process rights because the government had not provided it with notice or a hearing prior to its designation.[122]

The district court found that *NCRI* did not control its decision in this case because, unlike in *NCRI*, "a Presidentially declared national emergency (as required by the IEEPA) existed to justify the absence of notice and an opportunity to be heard" prior to the designation.[123] The court examined the HLF's due process claim in light of the test outlined in *Calero-Toledo v. Pearson Yacht Leasing Company.*[124] To justify post-deprivation notice and hearings under the *Calero-Toledo* test, the government must show that

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115. § 1(b), 66 Fed. Reg. at 49,079.

116. § 1(c), 66 Fed. Reg. at 49,079. The Secretary of the Treasury has delegated such decisions to the Department's Office of Foreign Assets Control ("OFAC"). *See* Rudolph Lehrer, Comment, *Unbalancing the Terrorists' Checkbook: Analysis of U.S. Policy in its Economic War on International Terrorism*, 10 TUL. J. INT'L & COMP. L. 333, 336-39 (2002).

117. §§ 2, 4, 66 Fed. Reg. at 49,080. These sections of the Executive Order also prohibit contributions to SDGTs. *Id.*; *cf.* 18 U.S.C. § 2339B (prohibiting knowingly providing material support or resources to a designated terrorist organization).

118. 333 F.3d 156 (D.C. Cir. 2003), *cert. denied*, 2004 WL 368125 (Mar. 1, 2004).

119. 315 F.3d 748 (7th Cir. 2002), *cert. denied*, 124 S. Ct. 531 (2003).

120. *Holy Land Found.*, 333 F.3d at 164; *Global Relief Found.*, 315 F.3d at 754.

121. *Holy Land Found.*, 333 F.3d at 159. Hamas had also been designated as an SDT under Exec. Order No. 12,497, 60 Fed. Reg. 5079. *Id.* at 159-60.

122. Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57, 64, 77 (D.D.C. 2002), *aff'd*, *Holy Land Found.*, 333 F.3d 156.

123. *Id.* at 76.

124. 416 U.S. 663, 679-80 (1974). In *Calero-Toledo*, the Supreme Court held that post-deprivation notice and hearing was sufficient for the seizure of a yacht containing drugs. *Id.* The *Calero-Toledo* test relied on factors originally outlined in *Fuentes*, 407 U.S. at 90-91 (1972).

> (1) the deprivation was necessary to secure an important government interest; (2) there has been a special need for very prompt action; and (3) the party initiating the deprivation was a government official responsible for determining, under the standards, [sic] of a narrowly drawn statute, that it was necessary and justified in a particular instance.[125]

First, the court recognized that the designation served the important governmental interest of combating terrorism.[126] Second, the court found that "prompt action by the Government was necessary to protect against the transfer of assets subject to the blocking order."[127] Third, the court found that government officials, rather than private parties, blocked the HLF's property interest pursuant to "the IEEPA and two Executive Orders that specifically authorize[d] such action in limited circumstances."[128] Therefore, according to the district court, the HLF was only entitled to post-designation notice and hearing, and its procedural due process rights had not been violated.[129]

On appeal, the D.C. Circuit affirmed the district court's holding but relied on its own reasoning in *NCRI* rather than that of the district court. The appellate court held that "[e]ven if Treasury's initial designation [in December 2001] arguably violated HLF's due process rights" because it lacked pre-designation notice and hearing, the Secretary of the Treasury had given the HLF the "notice and opportunity for response" required by *NCRI* prior to its redesignation as an SDGT in May 2002.[130] Thus, the "HLF's funds are blocked currently by a redesignation which Treasury applied in accordance" with procedural due process.[131] Also consistent with *NCRI*, the court reiterated that "we do not require an agency to provide procedures which approximate a judicial trial; therefore, HLF has no right to confront and cross-examine witnesses."[132] The court also explained that the Secretary of the Treasury did not have to disclose the classified information utilized in making the designation, reasoning that the executive branch had the privilege to maintain the secrecy of its classified information and that "IEEPA expressly authorizes *ex parte* and *in camera* review of classified information."[133]

In *Global Relief Foundation*, the Secretary of the Treasury designated the Global Relief Foundation ("GRF"), an Illinois-based Islamic charity, as an SDGT for funding various terrorism activities.[134] Pursuing a preliminary injunction against its designation, the GRF argued that its procedural due process rights were violated because it had no notice or hearing before its designation.[135] Like the district court in *Holy Land Foundation*, the district court in this

125. *Holy Land Found.*, 219 F. Supp. at 76 (citing *Calero-Toledo*, 416 U.S. at 679-80).
126. *Id.* at 76-77.
127. *Id.* at 77.
128. *Id.*
129. *Id.* at 76-77.
130. *Holy Land Found.*, 333 F.3d at 163-64.
131. *Id.* at 163.
132. *Id.* at 164 (internal citations omitted).
133. *Id.* In this case, the court essentially standardized its procedural due process requirements for the designation of terrorist organizations under section 1189 and Executive Order 13,224.
134. 315 F.3d at 750-51.
135. *Id.*

case also applied the *Calero-Toledo* test.[136] The court held that the GRF could receive only post-designation due process because of "the need to prevent the flight of assets and destruction of records" and "the compelling government interest in promoting its declared national security and foreign policy goals."[137] Furthermore, the court found that the post-designation administrative procedures available to the GRF, such as the right to present evidence that the designation was in error and the opportunity to "request licenses for payment of certain expenses," were adequate.[138] The court also found that the government did not violate due process by denying the GRF access to classified documents because "Congress and the President have determined a need for the secrecy of government information" in this situation.[139]

The Seventh Circuit affirmed, holding that the Constitution did not entitle the GRF to pre-designation notice and hearing.[140] According to the court, pre-designation notice and hearings "would allow any enemy to spirit assets out of the United States."[141] Acknowledging that "pre-seizure hearing is the constitutional norm," the court nonetheless stated that "postponement is acceptable in emergencies."[142] Although "[r]isks of error rise when hearings are deferred," the court reasoned that "these risks must be balanced against the potential for loss of life if assets should be put to violent use."[143] The court noted that if its designation "turns out to be invalid," the GRF could "obtain recompense under the Tucker Act."[144] Yet, if the GRF's designation was not in error, the "GRF does not have any grievance, any more than a cocaine ring has a right to recover the value of the illegal drugs or a thief a right to be paid the value of confiscated burglar's tools."[145] The court also held that "[a]dministration of the IEEPA is not rendered unconstitutional because that statute authorizes the use of classified evidence that may be considered *ex parte* by the district court."[146] Noting that *ex parte* consideration of classified information was common, the court reasoned that "[t]he Constitution would indeed be a suicide pact if the only way to curtail enemies' access to assets were to reveal information that might cost lives."[147]

136. Global Relief Found. v. O'Neill, 207 F. Supp. 2d 779, 803-04 (N.D. Ill.), *aff'd*, 315 F.3d 748 (7th Cir. 2002).

137. *Id.*

138. *Id.* at 804-05. This licensing mechanism does not seem to be available under AEDPA.

139. *Id.* at 805.

140. *Global Relief Found.*, 315 F.3d at 754.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* More specifically, if its designation was in error, the GRF could bring a Takings Clause claim in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491(a) (2000). *Id.*

145. *Id.*

146. *Id.*

147. *Id.* (internal citations omitted). The court noted that *ex parte* consideration of classified information is common in criminal cases, as well as those involving the Freedom of Information Act and the Foreign Intelligence Surveillance Act. *Id.*

IV.
COMPARISON TO PROCEDURAL DUE PROCESS IN THE CONTEXT OF COMMUNISM

The current threat that terrorism poses to the national security of the United States is similar to the national security threat posed by communism during the Cold War.[148] Therefore, an examination of *McGrath*,[149] where the Supreme Court confronted the issue of procedural due process in the context of the threat of communism, can inform a discussion of the process due to designated terrorist organizations.

In *McGrath*, three entities designated as Communist organizations by the Attorney General mounted procedural due process challenges to their designations.[150] Under Executive Order 9835,[151] the Attorney General had the authority to designate any entity as a Communist organization.[152] The Attorney General then provided the names of designated organizations to the Loyalty Review Board, which considered membership in them as evidence in determining whether to fire federal employees or refuse to hire applicants for federal employment on the grounds of disloyalty to the U.S. government.[153] Executive Order 9835 provided for no pre-designation notice or hearing, requiring only that the

148. *Compare* AEDPA § 301(a)(1) ("[I]nternational terrorism is a serious and deadly problem that threatens the vital interests of the United States."); H. REP. No. 104-383, pt. 2, at 43 ("Terrorist organizations have developed sophisticated international networks that allow them great freedom of movement, and opportunity to strike, including inside the United States."), *and* Exec. Order. No. 13,224, 66 Fed. Reg. at 49,079 ("[G]rave acts of terrorism and threats of terrorism committed by foreign terrorists, including the terrorist attacks in New York, Pennsylvania, and the Pentagon committed on September 11, 2001 . . . and the continuing and immediate threat of further attacks on United States nationals or the United States constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States."), *with* Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 93 (1961) ("Congress has found that there exists a world Communist movement, foreign-controlled, whose purpose it is by whatever means necessary to establish Communist totalitarian dictatorship in countries throughout the world, and which has already succeeded in supplanting governments in other countries."), *and id.* at 93-94 ("Congress has found that . . . the foreign government controlling the world Communist movement establishes in various countries action organizations which, dominated from abroad, endeavor to bring about the overthrow of existing governments, by force if need be, and to establish totalitarian dictatorships subservient to that foreign government.").

149. 341 U.S. 123.

150. *Id.* at 130-37. The three organizations were the Joint Anti-Fascist Refugee Committee, which raised funds for exiles and refugees of the Spanish Civil War, the National Council of American-Soviet Friendship, Inc., which desired to strengthen relations between the Soviet Union and the United States, and the International Workers Order, a fraternal society that supplied insurance to its members. *Id.*

151. Exec. Order. No. 9835, 12 Fed. Reg. 1935 (Mar. 21, 1947), rested on the authority of section 9A of the Hatch Political Activity Act, 53 Stat. 1148 (1939) (codified at 5 U.S.C. § 118(j) (Supp. III 1946)), which prohibited federal employees from being a member of "any political party or organization which advocates the overthrow of our constitutional form of government in the United States."

152. 12 Fed. Reg. 1935 § (III)(2)(3). The Attorney General could also designate organizations as totalitarian, fascist, subversive, or committed to the violent overthrow the United States government. *Id.*

153. *Id.* § (III)(2)(3), (V)(8). At their loyalty hearing, employees could not challenge the underlying designation of an organization as Communist. *McGrath*, 341 U.S. at 184; *cf.* § 1189(a)(8) (defendant charged with § 2339B cannot challenge underlying designation under § 1189).

Attorney General make the designation "after appropriate investigation and determination."[154] In their complaints, the three organizations averred that the designations had caused a decline in their membership, a decrease in their financial support, and the stigma of public disgrace for their remaining members.[155]

Eight justices produced six opinions in the case.[156] Announcing the judgment of the Court, Justice Burton vacated the designations of the three organizations without addressing the due process issue because the Attorney General defended the designations based "upon the very facts alleged by" the organizations in their complaints, which did not "state facts from which alone a reasonable determination can be derived that the organizations are Communist."[157] Four concurring opinions each found that the designations violated the due process rights of the organizations.[158] A three-justice dissent rejected the due process claim.[159] Despite the fragmented nature of the decision, the similarity between designations under Executive Order 9835 and section 1189 warrant a look at how the concurring justices handled the procedural due process issue.

Since the concurring justices believed that the three organizations had suffered an actionable deprivation,[160] they went on to discuss the due process issue. Examining the when of due process in this case, Justice Frankfurter stated that "the right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society."[161] While the "precise nature of the [organizations'] interest that has been adversely affected" must "be weighed against a claim of the greatest of all public interests, that of national security," Justice Frankfurter nonetheless found that "[n]othing has been presented to the Court to indicate that it will be impractical or prejudicial to a concrete public interest to disclose to the organizations the nature of the case against them and to permit them to meet it if they can."[162] Justice Black agreed with Justice Frank-

154. 12 Fed. Reg. 1935 § (III)(2)(3); *see also McGrath*, 341 U.S. at 138 n.11, 161.

155. *McGrath*, 341 U.S. at 130-35.

156. *Id.* at 123. Justice Clark did not participate. *Id.*

157. *Id.* at 126. Justice Douglas joined Justice Burton's opinion.

158. Justices Frankfurter, Douglas, and Jackson thoroughly addressed the due process issue. *Id.* at 160-74 (Frankfurter, J., concurring), 175-83 (Douglas, J., concurring), 186-87 (Jackson, J., concurring). In his concurrence, Justice Black stated that he agreed with Justice Frankfurter's conclusions on the due process issue. *Id.* at 143.

159. The dissenting justices (Justice Reed joined by Chief Justice Vinson and Justice Minton) did not believe that the designations deprived the organizations of any liberty or property interest. *Id.* at 202.

160. *See id.* at 160-61 (Frankfurter, J., concurring) ("This designation imposes no legal sanction on these organizations other than it serves as evidence in ridding the Government of persons reasonably suspected of disloyalty. It would be blindness, however, not to recognize that in the conditions of our time such designation drastically restricts the organizations, if it does not proscribe them."); *id.* at 175 (Douglas, J., concurring) ("An organization branded as 'subversive' by the Attorney General is maimed and crippled. The injury is real, immediate, and incalculable."); *id.* at 185 (Jackson, J., concurring) (finding that the deprivation of present and future government employment caused by an organization's designation was enough for an organization to state a due process claim); *id.* at 143 (Black, J., concurring) (standing was derived from right of organizations to be free from "unjustified governmental defamation").

161. *Id.* at 168 (Frankfurter, J., concurring).

162. *Id.* at 163-64, 172-73 (Frankfurter, J., concurring). This somewhat hints at the Court's future *Mathews* test.

furter that "the Due Process Clause of the Fifth Amendment would bar such condemnation without notice and a fair hearing."[163] Similarly, Justice Douglas found that "[t]he gravity of the present charges is proof enough of the need for notice and hearing before the United States officially brands these organizations as 'subversive.'"[164] Justice Jackson also found that "[t]o promulgate with force of law a conclusive finding of disloyalty, without [a] hearing at some stage before such finding becomes final, is a denial of due process of law."[165] Thus, a scattered plurality agreed that organizations designated as Communist should receive pre-designation notice and hearing.

As to the what of due process, Justice Frankfurter touched on the type of notice and hearing required for a designated organization. To ensure the correctness of the designation, Justice Frankfurter suggested that the Attorney General should provide the designated organization with notice of the basis for the designation and give the designated organization a chance to submit evidence to rebut the designation.[166] According to Justice Frankfurter, the hearing "must be a real one, not a sham or a pretense."[167] The rationale behind Justice Frankfurter's concept of a hearing was that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights," because "[s]ecrecy is not congenial to truth-seeking" and "[a]ppearences in the dark are apt to look different in the light of day."[168] His concurrence noted that "[t]he plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected."[169] Justice Douglas also believed that the hearing must consist of "an opportunity to appear and rebut the charge."[170]

Having pieced together the views of the concurring justices, the question becomes what this case means for the issues of when and what process is due to designated terrorist organizations.[171] Certainly, strong similarities exist between *McGrath* and cases involving designations under section 1189. In both

163. *McGrath*, 341 U.S. at 143 (Black, J., concurring) (basing his agreement on the assumption that "the Constitution permits the executive officially to determine, list and publicize individuals and groups as traitors and public enemies"). However, Justice Black denied that assumption. *Id.* Citing the First Amendment, he did not believe the executive had such authority "with or without a hearing." *Id.* For him, the designation also amounted to an unlawful bill of attainder. *Id.*

164. *Id.* at 178 (Douglas, J., concurring).

165. *Id.* at 186 (Jackson, J., concurring). Justice Jackson noted that he agreed with Justice Frankfuter on this point. *Id.*

166. *See id.* at 171-72 (Frankfurter, J., concurring) ("No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.").

167. *Id.* at 164 (Frankfurter, J., concurring) (quoting *Palko*, 302 U.S. at 327).

168. *Id.* at 170-71 (Frankfurter, J., concurring).

169. *Id.* at 171 (Frankfurter, J., concurring) (quoting United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting)).

170. *Id.* at 178 (Douglas, J., concurring).

171. The *PMOI I* court cited *McGrath*, but found it inapplicable because the PMOI had no due process rights. 182 F.3d at 22. The *NCRI* court, which reached the due process issue, did not cite to the case. 251 F.3d 192.

instances, pursuant to legal authority,[172] a high-level executive official[173] designates organizations deemed to be national security threats, which results in harsh consequences for the organizations[174] and their members,[175] without affording prior notice and hearings to the organizations. Had a full majority in *McGrath* reached the same conclusions as the concurrences, courts facing section 1189 would likely be bound to follow the same reasoning. Given the fragmented plurality, however, this cannot be true.[176] At best, the concurrences, especially Justice Frankfurter's,[177] serve as merely persuasive authority.

V.
When Process is Due to Terrorist Organizations Designated Under Section 1189

A. Alien Presence in the United States

The first inquiry in the due process analysis is whether foreign terrorist organizations can even invoke the Due Process Clause. The case law regarding the point at which aliens receive constitutional protections is well established. While aliens seeking entry into the United States have only those due process rights granted by Congress, lawful resident aliens possess certain due process rights under the Fifth Amendment.[178] The Supreme Court has also held that alien organizations possess Fifth Amendment rights when they hold property in

172. *Compare* § 1189 (congressional authority for designations), *with* Exec. Order No. 9835, 12 Fed. Reg. 1935 (presidential authority for designations).

173. *Compare* § 1189(a)(1) (designation made by Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury), *with* Exec. Order No. 9835, § (III)(2)(3), 12 Fed. Reg. 1935 (designation made by the Attorney General).

174. *Compare* § 1189(a)(2)(C) (designation results in the freezing of terrorist organization's funds), *with McGrath*, 341 U.S at 130-35 (designations led to the loss of membership and financial support).

175. *Compare* § 2239B (designation is element in crime of knowingly providing material aid to terrorist organization), *with* Exec. Order No. 9835, § (IV)(8), 12 Fed. Reg. 1935 (designation presented as evidence in Loyalty Review Board hearing).

176. *But see* Paul v. Davis, 424 U.S. 693, 702-05 (1976) (piecing together the opinions in *McGrath* to show that "at least six of the eight Justices" viewed a stigma imposed by official action "as an insufficient basis for invoking" the Due Process Clause). It is probably a stretch to say that a majority of the Court agreed that pre-designation due process was necessary in this case. With one justice absent, three justices came to that conclusion. A fourth, Justice Black, only mentioned his agreement in passing and clearly stated that he believed the entire Act to be unconstitutional under the First Amendment and the Bill of Attainder Clause. Even if all the justices had agreed, they would still only have comprised a plurality. In *City of Erie v. Pap's A.M.*, the Court stated that "[i]t is permissible to find precedential effect in a fragmented decision," but "to do so a majority of the Court must have been in agreement on the concept that is deemed to be the holding." 529 U.S. 277, 285 (2000).

177. Justice Frankfurter's concurrence is frequently cited for its legal propositions. *See, e.g., Mathews*, 424 U.S. at 333; *Fuentes*, 407 U.S. at 81.

178. *Compare Knauff*, 338 U.S. at 544 (holding that an alien entering the United States is entitled only to "[w]hatever the procedure authorized by Congress is"), *with* Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) ("It is well-established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment."); Rafeedie v. INS, 880 F.2d 506, 522 (D.C. Cir. 1989) ("[I]t is clear that, in defining an alien's right to due process, the Supreme Court is concerned with whether he is a permanent resident.").

the United States.[179] This is because, as the Supreme Court articulated in *United States v. Verugo-Urquidez*, "aliens receive constitutional protections when they have [voluntarily] come within the territory of the United States and developed substantial connections with the country."[180] In that case, the issue was whether a Mexican drug dealer, who had been arrested in Mexico and transported to the United States for trial, could challenge a post-arrest search of his Mexican home by United States law enforcement agents under the Fourth Amendment.[181] The Court, after reviewing its cases on alien constitutional rights, many of which concerned the Due Process Clause, held that the defendant had no Fourth Amendment protections because he had "no previous significant voluntary connection with the United States."[182] Therefore, the D.C. Circuit seems to be correct that designated organizations with voluntary, substantial connections to the United States must receive due process rights, while designated organizations without such connections are only entitled to what process Congress gave them in section 1189.[183]

B. Liberty or Property Interest Implicating the Due Process Clause

The second inquiry in the due process analysis is whether designations under section 1189 implicate a liberty or property interest[184] within the meaning of the Due Process Clause. According to the Supreme Court, "[p]roperty interests are not created by the Constitution, [but rather] 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'"[185] Some examples of property interests previously found to implicate the Due Process Clause are real property, personal property, employment, and governmental entitlements.[186] The cognizable property interests of designated organizations include their bank accounts, financial assets, and possibly even their interests in their tax exempt status or organization

179. *See* Russian Volunteer Fleet v. United States, 282 U.S. 481, 489-492 (1931) (holding that the Fifth Amendment Takings Clause applies to an alien friend corporation with property in the United States).

180. 494 U.S. 259, 271 (1990).

181. *Id.* at 261-62.

182. *Id.* at 271, 274-75.

183. *Compare PMOI I*, 182 F.3d at 22 (holding that the PMOI had no due process rights because it did not have voluntary, substantial connections with the United States), *with NCRI*, 251 F.3d at 202-05 (holding that, based on a small bank account, the *NCRI* had a sufficient connection with the United States to possess due process rights). *See also* 32 County Sovereignty Comm. v. Dept. of State, 292 F.3d 797, 799 (D.C. Cir. 2002) (holding that the possession of post office boxes and a bank account by members of designated organizations did not establish that the organizations had developed substantial connections with the United States for the purposes of the Due Process Clause).

184. The Supreme Court does not make "a categorical distinction between a deprivation of liberty and one of property"; both interests receive equal protection under the Due Process Clause. Zinermon v. Burch, 494 U.S. 113, 132 (1990).

185. *Loudermill*, 470 U.S. at 538 (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)). However, a property interest "cannot be defined by the procedures provided for its deprivation any more than can life or liberty." *Id.* at 541.

186. *James Daniel Good*, 510 U.S. at 53-54 (home); *Calero-Toledo*, 416 U.S. at 679 (yacht); *Loudermill*, 470 U.S. at 538-41 (continued public employment); *Goldberg*, 397 U.S. at 262-64 (welfare benefits).

headquarters.[187] However, a designated organization's interest in its reputation alone is not an actionable property interest.[188]

While those liberty interests that only an individual can enjoy probably do not apply to organizations,[189] they might still enjoy other liberty interests implicated by section 1189. For example, a designated organization has a liberty interest in its First Amendment right to solicit contributions.[190] A designated organization might also have associational standing to assert its members' liberty interests, such as their rights to travel[191] and to make political and charitable contributions, [192] on their behalf.[193]

187. *NCRI*, 251 F.3d at 205 (small bank account); *Holy Land Foundation*, 219 F. Supp. 2d at 70-71 (contributions made by the HLF to Hamas suggest that the HLF had millions of dollars in assets); *Global Relief Foundation*, 207 F. Supp. 2d at 785 (contributions received by the GRF suggest millions of dollars in assets); *Paul*, 424 U.S. at 704-05 (suggesting that tax exempt status would be an actionable property interest); *James Daniel Good*, 510 U.S. at 53-54 (real property).

188. *Paul*, 424 U.S. at 712 (reputation alone is not a property or liberty interest under the Due Process Clause).

189. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (stating that liberty interests include the rights to be free from bodily restraint, to acquire useful knowledge, to marry, to establish a home and raise children, to worship God, and "to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men"). The interest in life also probably does not apply to organizations. *See* Ellis, *supra* note 20, at 686.

190. *See* Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 123 S. Ct. 1829, 1836 (2003); Riley v. Nat'l Fed. of the Blind of North Carolina, 487 U.S. 781, 789 (1988); Sec'y of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 959-62 (1984); Village of Schaumburg v. Citizens for a Better Environ., 444 U.S. 620, 632 (1980).

191. *See, e.g.*, Kent v. Dulles, 357 U.S. 116, 126 (1958); *Kwong Hai Chew*, 344 U.S. at 593-94, 601 (holding that a resident alien who was taken into custody upon return from a foreign voyage could not be denied procedural due process). Since the members of designated organizations cannot enter the United States, a member who is a resident alien or citizen might not be able to travel abroad and reenter the United States. *See NCRI*, 251 F.3d at 204.

192. Section 2339B, which prohibits the knowing provision of material support and resources to terrorist organizations, could implicate the First Amendment rights of a designated organization's members and contributors, who contribute money and possibly other material resources to the designated organization. *See* Buckley v. Valeo, 424 U.S. 1, 26-30 (1976) (announcing a First Amendment right to make political contributions); *see also* Kamerling v. Massanari, 295 F.3d 206, 214 (2d Cir. 2002) ("The Supreme Court has acknowledged that contributions, in both charitable and political contexts, function as a general expression of support for the recipient and its views and, as such, are speech entitled to protection under the First Amendment."); Brock v. Local 375, Plumbers Int'l Union of Amer., 860 F.2d 346, 349 (9th Cir. 1988) (stating that charitable contributions benefit from First Amendment protection).

193. The Court has stated that

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977).

Although the NCRI raised its members' right to travel and First Amendment rights when challenging its designation, the *NCRI* court did not reach those issues. *NCRI*, 251 F.3d at 204-05. If it had, it likely would have held that a designated organization can assert the First Amendment rights of its members. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 459 (1958) (allowing the NAACP to assert the First Amendment rights of its members in challenging the compelled disclosure of its membership lists); *see also* Fla. League of Prof. Lobbyists, Inc. v. Meggs, 87 F.3d 457, 459 (11th Cir. 1996) (stating that an organization has standing to litigate its members' First Amendment rights when its members must either "refrain from engaging in protected First Amendment activity or risk civil sanction for alleged unethical conduct"). It is less likely that a designated

C. When Terrorist Organizations are Entitled to Due Process

The *Mathews* test is the proper test for determining when process is due to terrorist organizations designated under section 1189. Although some district courts have applied the *Calero-Toledo* test to designations under Executive Order 13,224,[194] they have done so mistakenly. First, while the Court in *Calero-Toledo* relied on a formulation of its procedural due process precedent articulated earlier in *Fuentes v. Shevin*,[195] the *Mathews* Court reformulated that precedent into a new test two years after *Calero-Toledo*.[196] The *Mathews* Court found that "prior decisions indicate that identification of the specific dictates of due process generally requires consideration" of the private interest, the risk of an erroneous deprivation, and the governmental interest.[197] Second, the Supreme Court fashioned the *Mathews* test in a case dealing with administrative procedures, making it even more appropriate for use in cases involving designations made by the executive branch.[198] Third, since the *Mathews* decision, the Supreme Court has consistently applied the *Mathews* test to determine when process is due in particular contexts.[199]

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organization could assert its members' right to travel. In *Communist Party of the United States*, the Supreme Court held that the Communist Party could not contest the potential deprivation of its members' right to receive and use passports. 367 U.S. at 81. To be comprehensive, this article assumes associational standing and addresses these potential liberty interests.

This article does not, however, assume associational standing for a designated organization to assert its members' liberty interest in being free from deportation, see note 30 *supra*, because it is highly unlikely that a court would find associational standing. Resident aliens do have a strong liberty interest in being free from deportation. *See* Kiareldeen v. Reno, 71 F. Supp. 2d 402, 413 (D.N.J. 1999) ("*Kiareldeen I*") (noting that a resident alien's "interest in his physical liberty," including not being "removed from his community, his home, and his family," "must be accorded the utmost weight"); *see also* American-Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045, 1068-69 (9th Cir. 1995) ("AADC") (same). But the first prong of the *Hunt* test requires that at least one member of the organization suffer "immediate or threatened injury as a result of the challenged action." 432 U.S. at 342 (quoting Warth v. Seldin, 422 U.S. 490, 511 (1975)). Since no deportation proceedings would have been brought against any of the organization's alien members at the time of its designation, and it is possible that deportation proceedings would never be brought, those alien members could claim no injury and would not themselves have standing to sue at that point. *Cf. Communist Party of the United States*, 367 U.S. at 16-17, 79-81 (holding that the Communist Party lacked standing to address the denaturalization provisions of the Subversive Activities Control Act, which included a provision making the Party's alien members deportable). Moreover, deportation proceedings are highly factual in nature and require the presence of the individual subject to deportation. *Cf.* Rent Stabilization Ass'n of New York v. Dinkins, 5 F.3d 591, 596-97 (2d Cir. 1993) (holding that highly factual Takings Clause claims cannot be asserted by organizations on behalf of their members).

194. *See* discussion *supra* part III.C.

195. 407 U.S. at 90-91.

196. *Mathews*, 424 U.S. at 335.

197. *Id.*

198. *Id.* at 319-26; California *ex rel.* Lockyer v. FERC, 329 F.3d 700, 710 n.8 (9th Cir. 2003) (stating that "the *Mathews v. Eldridge* analysis is well-suited to evaluating the appropriateness of the [Federal Energy Regulatory] Commission's procedures, since '[t]he *Mathews* balancing test was first conceived to address due process claims arising in the context of administrative law") (quoting Medina v. California, 505 U.S. 437, 444 (1992)).

199. *See, e.g.*, *Gilbert*, 520 U.S. at 931-36; *James Daniel Good*, 510 U.S. at 53-56; *Doehr*, 501 U.S. at 10-17; *Loudermill*, 470 U.S. at 543-45; Dixon v. Love, 431 U.S. 105, 112-115 (1977).

Finally, the *Mathews* test remains appropriate despite the Court's recent decision in *Dusenbery v. United States*.[200] There, the Court held that the *Mullane* test of reasonableness under the circumstances, [201] rather than the *Mathews* test, applies to the sufficiency of notice.[202] In so holding, the Court stated that although it had applied the *Mathews* test to evaluate due process claims in different contexts, the Court had "never viewed *Mathews* as announcing an all-embracing test for deciding due process claims."[203] This statement has created some confusion about when the *Mathews* test still does apply.[204] Even *Mathews* only held that "the identification of the specific dictates of due process *generally* requires consideration" of the three *Mathews* factors.[205] Since *Dusenbery*, lower courts have consistently applied the *Mullane* test to determine the sufficiency of notice,[206] but have declined to apply it either to examine the type of hearing required by due process,[207] or when that notice and hearing are due.[208] While it could be argued that *Mullane*'s reasonableness standard is broad enough to address all these concerns,[209] it is not preferable to the *Mathews* test, which specifically addresses factors a court would examine in conducting a more general reasonableness analysis under *Mullane*. The *Mathews* test is thus better suited to determine the when of due process than the comparatively vague and indeterminate *Mullane* standard. This article therefore utilizes the *Mathews* test to determine the when of due process.

The *Mathews* test weighs (1) the private interest affected by the government's action, (2) the risk of an erroneous deprivation of that interest by the procedures employed by the government, as well as the probable value of any

200. *Dusenbery*, 534 U.S. at 167-68.

201. *Mullane*, 339 U.S. at 314 (requiring notice to be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

202. 534 U.S. at 167-68.

203. *Id.*

204. *See, e.g.*, People v. Gonzalez, 31 Cal. 4th 745, 754, 74 P.3d 771, 777 (2003) (expressing uncertainty as to which test governs the sufficiency of notice in the criminal context following *Dusenbery*).

205. *Mathews*, 424 U.S. at 334-35 (emphasis added).

206. *See, e.g.*, Mard v. Town of Amherst, 350 F.3d 184, 190-91 (2003) (applying *Mullane* to test the sufficiency of notice of the impending termination of a firefighter's injury leave benefits); James v. City of Dallas, 2003 WL 22342799, at *15-17 (N.D. Tex. Aug. 28, 2003) (applying *Mullane* to test the sufficiency of the Dallas Urban Rehabilitation Standards Board's notice of hearings, default orders, and demolition orders); *cf. Gonzalez*, 31 Cal. 4th at 754, 74 P.3d at 777-78 (holding that, whether the *Mullane* or *Mathews* test applied to the sufficiency of notice to a defendant of a trial court's intended sentence, the result was the same).

207. *See infra* note 314.

208. *See, e.g.*, Grayden v. Rhodes, 345 F.3d 1225, 1232-43 (11th Cir. 2003) (applying the *Mathews* test to determine when notice and hearings were due to tenants whose building was condemned by the government, but applying *Mullane* to test the sufficiency of the notice of that condemnation). *Rhodes* confusingly referred to the question of whether the tenants must receive notice and hearings before or after the government deprivation as a question of "what process is due," but it is clearly a question of when process is due. *Id.* at 1232.

209. A hearing, for instance, would then need to be "reasonably calculated, under all the circumstances,. . . to afford [interested parties] an opportunity to present their objections." *Mullane*, 339 U.S. at 314.

additional procedural safeguards, and (3) the government's interest, including the administrative burden of any additional procedural requirements.[210]

1. The Private Interest

The first *Mathews* factor concerns the weight of "the private interest that will be affected by the official action."[211] Liberty interests are often entitled to substantial weight.[212] But not all private interests receive the same weight. For instance, the Court has recognized gradations in property interests. In *James Daniel Good*, the Supreme Court found that the seizure of a home, which entails governmental interference in "a private interest of historic and continuing importance," produced a "far greater deprivation" than the "loss of kitchen appliances and household furniture" in *Fuentes*.[213] Similarly, the *Mathews* Court found that the loss of welfare benefits in *Goldberg v. Kelly*, which deprived a recipient of "the very means by which to live," was greater than the loss of Social Security disability benefits, which were not based on financial need.[214] Following this logic, "a driver's license may not be so vital and essential as are social insurance payments on which the recipient may depend for his very subsistence."[215]

The "degree of potential deprivation that may be created by a particular decision," that is, the length and finality of the deprivation, must also be considered.[216] The *James Daniel Good* Court found that the seizure of a home worked a greater deprivation than the attachment of one.[217] Along similar lines, the termination of an employee causes a greater deprivation than the suspension of one, even though the employee's right to continued employment is substantial in both cases because of "the severity of depriving a person of the means of livelihood."[218] Extrapolating from this analysis then, the revocation of a driver's license would work a greater deprivation than the temporary suspension of a horseracing license.[219]

While the first *Mathews* factor must be analyzed on a case-by-case basis, some general conclusions can be drawn. The *NCRI* court likely erred in finding that a $200 bank account "would seem to weigh in favor of affording due pro-

210. *Mathews*, 424 U.S. at 335.

211. *Id.*

212. *See, e.g., Zinermon*, 494 U.S. at 131 (finding that the petitioner had "a substantial liberty interest in avoiding confinement in a mental hospital"); *Boddie*, 401 U.S. at 380-81 (holding that appellants possessed a procedural due process right to have access to the courts to get a divorce); *Mendoza-Martinez*, 372 U.S. at 160-61 (finding that the right to citizenship is "one of the most valuable rights in the world today" and its loss could be a "calamity.").

213. 510 U.S. at 53-54. *See generally Fuentes*, 407 U.S. 67.

214. *Mathews*, 424 U.S. at 340-41 (quoting *Goldberg*, 397 U.S. at 264).

215. *Dixon*, 431 U.S. at 113. The court noted that, on the other hand, while entitlement payments could be made retroactively, a wrongly deprived licensee cannot be entirely made whole. *Id.*

216. *Mathews*, 424 U.S. at 341-42; *see also Gilbert*, 520 U.S. at 932.

217. 510 U.S. at 54.

218. *Compare Loudermill*, 470 U.S. at 542-43 (employment termination), *with Gilbert*, 520 U.S. at 932, 934-35 (employment suspension).

219. *Compare Dixon*, 431 U.S. 113 (revocation of driver's license), *with* Barry v. Barchi, 443 U.S. 55 (1979) (temporary suspension of horseracing license).

cess protection."[220] The court seemed to confuse the question of whether a property interest implicates the Due Process Clause with the issue of what weight to allocate it.[221] Both a home and a small bank account implicate the Due Process Clause, but the former is a more substantial private interest. While the NCRI's interest in its $200 bank account carries little weight, the interests implicated in *Global Relief Foundation* and *Holy Land Foundation* would be entitled to great weight. The contributions to the GRF totaled $431,155 in 1995 and $3.7 million in 2000.[222] The HLF contributed $1.4 million to eight Hamas-controlled charity committees between 1992 and 1999, and $5 million to seven other Hamas-controlled charitable organizations between 1992 and 2001,[223] which suggests that the HLF has millions of dollars in assets. A designated organization's First Amendment right to solicit contributions would also be a private interest of considerable weight. And, assuming that a designated organization could assert its members' right to travel and First Amendment right to make contributions,[224] those liberty interests would be entitled to substantial weight.

Further, designations under section 1189 are effective for two years, during which time all the assets of a designated organization remain frozen.[225] Although this two-year deprivation might seem more like a suspension of employment or a license than a termination or revocation, the effects of the designation can, in some respects, be even harsher than such termination or revocation. While a fired employee can find another job and a person whose driver's license is revoked can take other forms of transportation, a designated organization cannot reach any of its assets or acquire new assets; it has no funds with which to fulfill its organizational purpose.[226] Moreover, designations can be renewed every two years,[227] giving the deprivation a more permanent character.

2. *The Risk of Erroneous Deprivation*

The second *Mathews* factor weighs the risk that the administrative procedure will work an erroneous deprivation of the private interest, as well as the probable value of any additional procedural safeguards to reduce that risk.[228] This factor focuses on "the fairness and reliability" of the procedures governing the deprivation, because "procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases."[229]

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220. *NCRI*, 251 F.3d at 206.
221. *See id.*
222. *Global Relief Found.*, 207 F. Supp. 2d at 785.
223. *Holy Land Found.*, 219 F. Supp. 2d at 70-71.
224. *See supra* note 193.
225. § 1189(a)(2)(C), (4)(A).
226. *See* 18 U.S.C. § 2339B (prohibiting the knowing provision of material support to terrorist organizations).
227. § 1189(a)(4)(B). Already, many entities have been redesignated multiple times. Cronin, *supra* note 34, at 6.
228. *Mathews*, 424 U.S. at 335.
229. *Id.* at 343-44.

The Supreme Court has found that a narrowly drawn statute that provides criteria "specific enough to control government action" will decrease the risk of an erroneous deprivation.[230] A reliable independent assessment supporting the government's action, such as an independent finding of probable cause, can also reduce that risk.[231] Flaws in such an independent assessment, however, will increase the risk of an erroneous deprivation.[232] Where a deprivation decision is "sharply focused and easily documented," and turns on a limited amount of specific evidence like "routine, standard, and unbiased medical reports by physician specialists," rather than a wide variety of relevant information, the risk is lower.[233] In general, procedures that work deprivations in a random or arbitrary manner present a high risk of an erroneous deprivation.[234] If the government has a direct pecuniary interest in the outcome of a deprivation proceeding, or a post-deprivation hearing would not occur until months after the deprivation, the risk is higher.[235]

The Secretary of State may only designate organizations as terrorist if they are foreign and engage in terrorist activity or terrorism that threatens the national security of the United States or of its nationals (or have the capability and intent to do so).[236] These statutory criteria, while broad, are no less specific than other statutory criteria previously found sufficient to control executive actions.[237]

230. *Hodel*, 452 U.S. at 301. *Compare id.* at 301-02 (finding that the statutory and regulatory standards governing the Secretary of the Interior's authority to stop surface mining operations that posed an imminent threat to public health and safety were specific enough to reduce the risk of an erroneous deprivation), *with Fuentes*, 407 U.S. at 93 (finding that state statutes authorizing replevin based upon the complaints of private parties were not narrowly drawn and amounted to an abdication of state control over state power).

231. *See* Fed. Deposit Ins. Corp. v. Mallen, 486 U.S. 230, 241 (1988) (finding that the risk of a baseless suspension was low where a grand jury had determined that there was probable cause to indict a bank manager); *Gilbert*, 520 U.S. at 934 (finding that an employment suspension was not likely baseless or unwarranted where an independent third party determined that probable cause existed for an arrest and formal charges had been filed); *Dixon*, 431 U.S. at 113 (finding that the revocation of a license was not likely erroneous where the "appellee had the opportunity for a full judicial hearing in connection with each of the traffic convictions on which the Secretary's decision was based"); *Barry*, 443 U.S. at 65 (finding that a determination of probable cause based on "an expert's affirmance, although untested and not beyond error," decreased the risk of an erroneous license suspension).

232. *See James Daniel Good*, 510 U.S. at 55 (finding that a magistrate's determination of probable cause that real property was being used for the commission of a narcotics felony offense was not an adequate safeguard, where the statute provided for an innocent owner defense but "[t]he Government is not required to offer any evidence on the question of innocent ownership or other potential defenses a claimant might have"); *Doehr*, 501 U.S. at 13-14 (finding that a court's determination of probable cause based upon "a skeletal affidavit" and "one-sided, self-serving, and conclusory submissions" was an inadequate safeguard against the unwarranted attachment of a house).

233. *Mathews*, 424 U.S. at 344-45 (quoting Richardson v. Perales, 402 U.S., 389, 404 (1971)).

234. Logan v. Zimmerman Brush Co., 455 U.S. 422, 434-35 (1982).

235. *James Daniel Good*, 510 U.S. at 55-56.

236. § 1189(a)(1)(A)-(C).

237. *See, e.g.*, *Hodel*, 452 U.S. at 301-02 (finding that the statutory and regulatory standards governing the Secretary of the Interior's authority to stop surface mining operations that posed an imminent threat to public health and safety were specific enough to reduce the risk of an erroneous deprivation); *Rhodes*, 345 F.3d at 1235 (finding that the definition of nuisance in the Orlando City Code, "while somewhat vague," could adequately guide the city building inspector and therefore reduced the risk of an erroneous deprivation).

Additionally, due to "the changeable and explosive nature of contemporary international relations" and the executive branch's ability to quickly gather and process foreign intelligence, "Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas."[238] On its face, section 1189 does not seem to create a high probability of a random or arbitrary deprivation. For example, the Secretary of State cannot designate as terrorist either a domestic organization, even if it is engaged in terrorism threatening the national security, or a foreign organization engaging in terrorist activity, if that activity does not threaten the security of the United States or its nationals. It is also true that the Secretary of State does not have a direct pecuniary interest in the designation, as the designated organization's assets are frozen, not seized by the government.

The risk of an erroneous deprivation comes not from the statutory criteria, but instead from the lack of a notice and hearing requirement in section 1189. Organizations affected by the designations have no opportunity to present their own evidence rebutting the Secretary of State's findings on the statutory criteria and the statute does not direct the Secretary to consider exculpatory evidence.[239] This results in the type of one-sided determination denounced by Justice Frankfurter.[240] Further, the determination is based on a wide variety of foreign relations and intelligence information, rather than a limited amount of specific evidence. Since the Secretary of State's finding that an organization represents a national security threat is nonjusticiable,[241] the inability of a designated organization to present evidence on its behalf forecloses *any* possibility of challenging the evidence in support of that finding. The lack of *any* direct notice[242] or hearing for a designated organization, either before or after its designation, greatly increases the risk of an erroneous deprivation, because the Secretary of State is not compelled to consider the sufficiency of his or her evidence in an adversarial manner.[243] Were the Secretary of State to err in a designation, there is a high probability that the error would remain uncorrected.

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238. Zemel v. Rusk, 381 U.S. 1, 17 (1965).

239. *See generally* § 1189; *NCRI*, 251 F.3d at 196.

240. See *McGrath*, 341 U.S. at 170 (Frankfurter, J., concurring) ("[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights.").

241. The *PMOI I* court was likely correct in holding this. *See Waterman*, 333 U.S. at 111 ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative."). *Accord* Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952); Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918).

242. After making a designation, the Secretary of State publishes the names of designated organizations in the Federal Register. § 1189(a)(2)(A)(ii). However, notice is not directly sent to the designated organizations and the notice in the Federal Register does not "state the factual basis for designating each organization." Ellis, *supra* note 20, at 714.

243. *See James Daniel Good*, 510 U.S. at 55 ("The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all government decision-making."); *see also POMI I*, 182 F.3d at 25 (expressing frustration that "the record consists entirely of hearsay, none of it was ever subjected to adversary testing, and there was no opportunity for counter-evidence by the organizations affected").

The Secretary of State's consultation with the Attorney General and the Secretary of the Treasury[244] is not the type of independent assessment that the Supreme Court has found to decrease the risk of an erroneous deprivation. Unlike a grand jury or a judicial officer (or even a law enforcement officer unconnected to the ultimate deprivation decision), the Attorney General and the Secretary of the Treasury, both of whom belong to the same executive administration as the Secretary of State, are not independent third parties and are not required by section 1189 to undertake an independent investigation of the facts supporting the designation. While it is possible that the legislators notified by the Secretary of State prior to the designation might prevent it,[245] such a possibility does not amount to a procedural safeguard in the majority of designations.[246] The participation of these government officials in the designation can neither significantly protect the designated organization's private interest nor provide a substitute for an adversarial test of the evidence.[247] Furthermore, the lack of any hearing means that the D.C. Circuit must review a designation solely on the basis of the unchallenged findings of the Secretary of State.[248] In sum, the risk of an erroneous deprivation under the procedures set out in section 1189 is high.

The second *Mathews* factor also includes an analysis of the probable value of any additional procedural safeguards. Since the high risk of an erroneous deprivation stems from the lack of any direct notice and hearing afforded to designated organizations, reading a notice and hearing requirement into section 1189 is appropriate.[249] The Supreme Court has explained that the central meaning of procedural due process is that "[p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified."[250] According to the Court, "when a person has the opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented."[251] As stated by Justice Frankfurter, "[n]o better instrument

244. § 1189(c)(4).

245. § 1189(a)(2)(B)(i)-(ii).

246. *See Mathews*, 424 U.S. at 344 (stating that "the generality of cases, not the rare exceptions" shape procedural due process rules). For the same reason, the possibility of revocation by Congress or the Secretary of State, which would not occur in the majority of cases, cannot substitute for the lack of any hearing before or after the designation.

247. *Cf. James Daniel Good*, 510 U.S. at 55-56 (stating that an *ex parte* pre-forfeiture proceeding, where "[t]he Government is not required to offer any evidence on the question of innocent ownership," cannot adequately protect the interests of the innocent owner).

248. *See NCRI*, 251 F.3d at 196-97.

249. The *NCRI* court also read a notice and hearing requirement into section 1189, although during its discussion of the what of due process. 251 F.3d at 208. Because the second *Mathews* factors specifically provides for an analysis of additional procedural safeguards, this does not smack of the "judicial legislation" complained of in *Rahmani*. 209 F. Supp. 2d at 1056-57.

250. *Fuentes*, 407 U.S. at 80 (quoting Baldwin v. Hale, 68 U.S. 223, 233 (1863)); *see also Goldberg*, 397 U.S. at 267 ("The fundamental requisite of due process of law is the opportunity to be heard.") (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).

251. *Fuentes*, 407 U.S. at 81; *see also id.* at 87 ("The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. 'To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due

has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."[252] Giving designated organizations notice and a hearing would decrease the risk that a designation is erroneous, because the rebuttal and exculpatory evidence submitted by designated organizations would test the sufficiency of the Secretary of State's evidence and, as a result, make the Secretary of State's findings more reliable. Subjecting the administrative record of a designation to the adversary process would also facilitate better judicial review, because a reviewing court would not have to rely solely on the Secretary of State's findings in making its own determinations.

3. *The Government Interest*

The third *Mathews* factor weighs the strength of the government's interest.[253] For instance, the government has a strong interest in the maintenance of public safety,[254] the preservation of public health,[255] the successful exercise of its war powers and foreign relations responsibilities,[256] the promotion of market stability,[257] and the assurance of its fiscal soundness.[258] In certain circumstances, the government must act quickly to prevent its interest

process of law would have led to the same result because he had no adequate defense upon the merits.'") (quoting Coe v. Armour Fertilizer Works, 237 U.S. 413, 424 (1915)).

252. *McGrath*, 341 U.S. at 171 (Frankfurter, J., concurring).

253. *Mathews*, 424 U.S. at 335.

254. *See Gilbert*, 520 U.S. at 932 (finding that a state university has a strong interest in preserving public confidence in its police officers, "who occupy positions of great public trust and high public visibility"); *Hodel*, 452 U.S. at 300 ("Protection of the health and safety of the public is a paramount governmental interest."); *Dixon*, 431 U.S. at 114 (finding a strong public interest in safety on the roads and highways); Jones v. City of Gary, 57 F.3d 1435, 1443 (7th Cir. 1995) (finding that a city has a strong interest "in having a full complement of firefighters" that are able to "respond in a timely and effective manner").

255. *See Hodel*, 452 U.S. at 300 (finding that the government has a strong interest "in protecting the public health and safety and the environment from imminent danger"); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 601 (1950) (finding a strong public interest in preventing the distribution of food and drug articles that are dangerous or fraudulently or misleadingly labeled); N. Amer. Cold Storage Co. v. City of Chicago, 211 U.S. 306, 315, 320 (1908) (finding that a city has a strong interest in destroying food "unfit for human consumption" in order to protect the public health).

256. *See* Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 896 (1961) (finding that the government has a strong interest in managing "the internal operation of an important federal military establishment"); *Mendoza-Martinez*, 372 U.S. at 159 ("The powers of Congress to require military service for the common defense are broad and far-reaching."); Bowles v. Willingham, 321 U.S. 503, 520-21 (1944) (finding that Congress has a strong interest in stabilizing housing rents to control for inflation during the exigencies of wartime, because "[n]ational security might not be able to afford the luxuries of litigation and the long delays which preliminary hearings traditionally have entailed"); Stoehr v. Wallace, 255 U.S. 239, 245-46 (1921) (finding that the government has a strong interest in the seizure of enemy-owned property in wartime).

257. *Mallen*, 486 U.S. at 240-41 (finding that the government has a strong interest in protecting the interests of depositors and maintaining public confidence in financial institutions); Fahey v. Mallonee, 332 U.S. 245, 250-54 (1947) (finding that the government has a strong interest in preserving the stability of a financial institution).

258. Phillips v. Comm'r, 283 U.S. 589, 595 (1931) (finding that the government has a strong interest in tax collection).

from being thwarted.[259] This "special need for very prompt action" is an exigency that weighs heavily in favor of post-deprivation notice and hearings.[260]

With regard to section 1189, the issue is the government's national security interest in fighting terrorism.[261] The Supreme Court has declared that "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the nation."[262] In passing AEDPA, Congress, which "under the Constitution has power to safeguard our national security,"[263] found that "international terrorism is a serious and deadly problem that threatens the vital interests of the United States."[264] As a means of combating the terrorist threat,

259. *See Mallen*, 486 U.S. at 241 (finding that the prompt suspension of an indicted bank manager was necessary to preserve "the integrity of our banking institutions"); *Hodel*, 452 U.S. at 301 (finding that the halting of surface mining to prevent an environmental disaster was a situation "in which swift action is necessary to protect the public health and safety"); *Calero-Toledo*, 416 U.S. at 679 (finding that the government interest in seizing property used to transport drugs would be thwarted if advance warning were given of the seizure of a yacht, which was the sort of property "that could be removed to another jurisdiction, destroyed, or concealed"); *Dixon*, 431 U.S. at 114 (noting that the government had a strong interest "in the prompt removal of a safety hazard"); *Ewing*, 339 U.S. at 601 (finding that a pre-seizure hearing would thwart the "speedy, preventative device of multiple seizures" that Congress chose as the means to protect the public from food and drug articles that are dangerous or fraudulently or misleadingly mislabeled); *N. Amer. Cold Storage Co.*, 211 U.S. at 320 (finding that "the destruction of food which is not fit for human use" is an emergency situation requiring speedy action in the interest of public health); *Rhodes*, 345 F.3d at 1237 (holding that "the emergency evacuation of tenants from a dangerous and potentially life-threatening structure" was an exigent circumstance that justified their eviction "without a pre-deprivation hearing").

260. *See Fuentes*, 407 U.S. at 91; *see also Calero-Toledo*, 416 U.S. at 679; *Mallen*, 486 U.S. at 240.

261. *See* AEDPA, Pub. L. No. 104-132 (stating that deterring terrorism was a major purpose of AEDPA); H.R. REP 104-383, pt. 2, at 38 ("The fundamental purpose of this legislation, then, is to provide our law enforcement agencies—within carefully prescribed constitutional boundaries—with the tools necessary to prevent and punish criminal terrorist enterprises."); *id.* at 37 ("The legislation is intended to strengthen the ability of the United States to deter terrorist acts and to punish those who engage in terrorism."); 8 U.S.C. § 1189(a)(1) (granting the Secretary of State only the power to designate foreign organizations whose terrorist activity or terrorism threatens "the national security of the United States or the security of its nationals"); USA PATRIOT Act, Pub. L. No. 107-56 ("An Act [t]o deter and punish terrorist Acts in the United States and around the world.").

262. Haig v. Agee, 453 U.S. 280, 307 (1981) (quoting Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964)); *see also id.* ("Protection of the foreign policy of the United States is a governmental interest of great importance, since foreign policy and national security considerations cannot neatly be compartmentalized."); *Wayte*, 470 U.S. at 611-12 (stating that "[f]ew interests can be more compelling than a nation's need to ensure its own security" because "[u]nless a society has the capability and the will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning"); *McGrath*, 341 U.S. at 164 (Frankfurter, J., concurring) (stating that national security is "the greatest of all public interests"); *Communist Party of the United States*, 367 U.S. at 95 ("To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated.") (quoting Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889)); *id.* (noting that James Madison wrote in the Federalist No. 41 that "[s]ecurity against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union").

263. *Aptheker*, 378 U.S. at 509.

264. AEDPA § 301(a)(1). In passing AEDPA, the House Judiciary Committee noted that "[t]here is no more important responsibility of government than to protect the lives and safety of its citizens." H.R. REP. 104-383, pt. 2, at 38.

Congress delegated to the Secretary of State, a member of the executive branch, which is itself "endowed with enormous power in the two related areas of national defense and international relations,"[265] the power to designate foreign terrorist organizations so that their activities might be stopped.[266] Thus, contrary to the *NCRI* court's conception of the government interest at stake in section 1189 cases, the government has a strong interest in maintaining the national security of the United States independent of its national security interest in classified information.[267] In determining when process is due to designated organizations, the government's national security interest in fighting terrorism must be considered compelling and afforded the greatest weight.

Further, designations under section 1189 involve a pressing need for prompt action to prevent the frustration of the government's compelling national security interest in fighting terrorism.[268] Congress has determined that an effective way to fight terrorism is to freeze the assets of terrorist organizations.[269] This can be difficult, however, as assets in American financial institutions are fungible and can be quickly removed to and concealed in other jurisdictions.[270] In Executive Order 13,224, President Bush found that "because of the ability to transfer funds or assets instantaneously, prior notice to [Specially Designated Global Terrorists] of measures to be taken pursuant to this order would render these measures ineffectual."[271]

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265. New York Times Co. v. United States, 403 U.S. 713, 727 (1971) (Stewart, J., concurring).

266. § 1189(a)(1).

267. The *NCRI* court found that the government interest in national security applied to the what of due process, because "the United States enjoys a privilege in classified information affecting national security," but that "[i]t is not immediately apparent how that affects the 'when' of the process." 251 F.3d at 207. Yet, as discussed here, the government also has a strong national security interest in fighting terrorism. That interest, unlike the government's national security interest in its classified information, is certainly pertinent to when process is due to designated organizations.

268. *See James Daniel Good*, 510 U.S. at 56 ("The governmental interest we consider here is not some general interest in forfeiting property but the specific interest in seizing real property before the forfeiture hearing. The question in the civil forfeiture context is whether *ex parte* seizure is justified by a pressing need for prompt action.").

269. § 1189(a)(2)(C). In *Sardino v. Fed. Reserve Bank of New York*, a Cuban sued to regain $7,000 frozen in a New York bank pursuant to the Cuban Assets Control Regulations, 31 C.F.R. § 515.201, and the TWEA, 50 U.S.C. App. § 5(b)(1). 361 F.2d 106, 107 (2d Cir. 1966). Holding against Sardino, the court reasoned that "[t]he founders could not have meant to tie one of the nation's hands behind its back by requiring it to treat as a friend a country which has launched a campaign of subversion throughout the Western Hemisphere." *Id.* at 112. The court continued: "Hard currency is a weapon in the struggle between the free and communist worlds; it would be a strange reading of the Constitution to regard it as demanding depletion of dollar resources for the benefit of a government seeking to create a base of activities inimical to our national welfare." *Id.* (footnotes omitted); *cf.* Silesian-American Corp. v. Clark, 332 U.S. 469, 476 (1947) (upholding the government's seizure of alien property in "preparation for the storm of war" under the war power because "[t]his taking may be done as a means of avoiding the use of the property to draw earnings or wealth out of this country to territory where it may more likely be used to assist the enemy than if it remains in the hands of the government").

270. *See Global Relief Found.*, 207 F. Supp. 2d at 803-04; *Holy Land Found.*, 219 F. Supp. 2d at 77; Ellis, *supra* note 20, at 707-08; *cf. Calero-Toledo*, 416 U.S. at 679-80 (finding that exigent circumstances existed where a yacht involved in a drug crime could be moved to another jurisdiction upon advance notice of its forfeiture, thus frustrating the government's interest).

271. §10, 66 Fed. Reg. at 49,081.

The same consideration applies to designations under section 1189. If a foreign organization were to receive advance notice of its impending designation[272] and realized that its assets were about to be frozen, its response would almost certainly be to immediately remove its assets—whether they total $200 or $2 million—from American financial institutions. Those assets could then fund future terrorist activity against the United States and its nationals. Any real or personal property held by the designated organization could also be liquidated to the same end.[273] Moreover, the same reasoning applies to an organization's right to solicit contributions and other liberty interests it and its members otherwise enjoy. If a designated organization could speed up its fundraising during the period between the advance notice and the designation, it could raise a substantial amount of money for terrorist activity pending the designation.[274] Similarly, between the notice and the designation, the organization's members could donate a substantial amount of money and other support.[275] They could also hastily travel abroad to transmit funds to (or solidify plans with) terrorists planning attacks on the United States or its nationals.[276] In light of these exigent circumstances, it is clear that pre-designation notice and hearings would soundly frustrate the government's compelling national security interest in fighting terrorism. The government's pressing need for prompt action here also distinguishes this case from *McGrath*, where pre-designation notice and hearings would not have frustrated the government's ability to use the designations in subsequent loyalty hearings.[277] This pressing need for prompt action, which the

272. *See supra* part III. A., for the example notice suggested by the *NCRI* court. 251 F.3d at 208. The court also held that advance notice must be provided "as soon as the Secretary has reached a tentative determination that the designation is impending." 251 F.3d at 209. While the Secretary of State would presumably wait as long as possible to reach this tentative decision in order to decrease the amount of time between the advanced notice and the designation, this standard, which clearly evidences the court's intent for notice to be given to a designated organization as far in advance as possible, certainly seems to allow enough time for the government's national security interest to be thwarted in the ways described here.

273. *See Global Relief Found.*, 315 F.3d at 754.

274. *Cf.* Christopher Marquis, *Fund-Raising Records Fall As Soft Money Ban Looms*, N.Y. TIMES, July 12, 2002, at A15 (describing how national political parties embarked on a "cash-seeking frenzy" trying to obtain soft money donations before the McCain-Feingold soft money ban took effect); Alison Mitchell, *Fearing Limits on Soft Money, Parties Fill Coffers*, N.Y. TIMES, Feb. 11, 2002, at A1 (describing how national political parties engaged in a "helter-skelter drive to raise soft money in case such fund-raising is suddenly ended").

275. *See* AEDPA § 301(a)(6) ("[S]ome foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds within the United States, or use the United States as a conduit for the receipt of funds raised in other nations."); H.R. REP. 104-383, pt. 2, at 43 ("This legislation severely restricts the ability of terrorist organizations to raise much needed funds for their terrorist acts within the United States.").

276. *Cf. Zemel*, 381 U.S. at 15-18 (upholding ban on travel to Cuba, which was supported by "the weightiest considerations of national security," against a challenge based on the right to travel); Regan v. Wald, 468 U.S. 222, 242-43 (1984) (again upholding the ban on travel to Cuba, the purpose of which was to "curtail the flow of hard currency to Cuba," against a right to travel challenge because it was "justified by weighty concerns of foreign policy").

277. In that case, the purpose of the Attorney General's designations was to furnish the Loyalty Review Board with a list of Communist organizations. Exec. Order. No. 9835, § (III)(2)(3), (V)(8), 12 Fed. Reg. 1935. A federal employee's (or job applicant's) membership in a designated Communist organization was evidence of disloyalty in hearings before the board. *Id.* § (V)(8). However, while the government's national security interest in fighting communism is similar to its national

D.C. Circuit did not consider in *NCRI*,[278] weighs heavily in favor of post-designation due process.[279]

Finally, the third *Mathews* factor also examines the administrative costs of the additional procedural safeguards.[280] The government has an interest "in conserving scarce fiscal and administrative resources" and the cost of the additional notice and hearing requirements in section 1189 could be considerable.[281] Nevertheless, the value of the notice and hearing requirements in decreasing the risk of an erroneous deprivation, and in assuring the constitutionality of section 1189,[282] outweighs any increased costs and delays resulting from those requirements.

4. *Balancing the* Mathews *Factors*

The question, then, is how to balance the *Mathews* factors. This is not a situation where a substantial private interest and a high risk of error can outweigh a moderate but not pressing government interest,[283] nor is it an instance where an important government interest and a low risk of error can outweigh the private interest.[284] In the context of section 1189, the private interest could range from insubstantial to substantial, the risk of error is high, and the governmental interest is both compelling and pressing.

Nevertheless, it is possible to balance the government's interest with the need to minimize the risk of an erroneous deprivation of the private interest, no matter how substantial. Were a designated organization to receive pre-designation notice and hearings, it would almost certainly take actions that would thwart the government's interest. This is exactly the type of exigent circumstance that

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security interest in fighting terrorism, the type of exigent circumstances that exist for designations under § 1189 (for example, the government's pressing need to block a designated terrorist organization's assets before they are removed from American financial institutions) have no parallel in *McGrath*.

278. *See NCRI*, 251 F.3d at 207-08.

279. *See* Palestine Info. Office v. Schultz, 853 F.2d 932, 942-43 (D.C. Cir. 1988) ("The Supreme Court has long recognized and deferred to the need of the executive branch to act speedily and authoritatively in the realm of foreign affairs.").

280. *Mathews*, 424 U.S. at 335.

281. *Id.* at 347-348.

282. *See Rahmani*, 209 F. Supp. 2d at 1058 (declaring section 1189 unconstitutional under the Due Process Clause because it did not provide designated organizations with notice and a hearing).

283. *See, e.g., James Daniel Good*, 510 U.S. 43 (holding that a hearing was required before the seizure of real property where the private interest in home ownership was "of historic and continuing importance," the risk of error was high, and the government's legitimate interest in ensuring that "the property not be sold, destroyed, or used for further illegal activity" was not in danger of being thwarted).

284. *See, e.g., Mallen*, 486 U.S. at 240-41 (holding that a post-suspension hearing was sufficient because the strong government interest in protecting the interests of depositors and maintaining public confidence in financial institutions outweighed an indicted bank manager's private interest in continued employment, where the risk of error was low due to a grand jury indictment); *Dixon*, 431 U.S. at 113-14 (holding that a pre-license revocation hearing based on too many traffic violations was not necessary because the "important public interest in safety on the roads and highways, and in the prompt removal of a safety hazard" outweighed the private interest in a driver's license, where the risk of error was low due to prior judicial hearings on the underlying traffic violations).

the Supreme Court has found to justify post-deprivation due process.[285] In cases arising under section 1189, the government's interest is so compelling and pressing that it outweighs even the high risk of an erroneous deprivation of even a substantial private interest. Therefore, a designated organization is not entitled to direct notice or a hearing prior to its designation.

Once the designation takes effect and the consequences of section 1189 apply, however, the government's pressing need for prompt action disappears; at that point, even the government's compelling national security interest cannot outweigh the high risk of an erroneous deprivation of even an insubstantial private interest. A designated organization must therefore receive notice and a hearing promptly after its designation.[286] It could then rebut the evidence against it and create an administrative record subject to the adversary process for the purpose of judicial review.

This arrangement would decrease the risk of an erroneous deprivation without thwarting the government's compelling national security interest in fighting terrorism and would therefore satisfy due process for designations under section 1189. It better balances the competing interests involved in designations than the *NRCI* court's approach, which over-weighed the NCRI's $200 bank account and did not consider the government's compelling national security interest in fighting terrorism and its pressing need for prompt action.[287]

VI.
WHAT PROCESS IS DUE TO DESIGNATED TERRORIST ORGANIZATIONS

A. Type of Notice

Notice is "[a]n elementary and fundamental requirement of due process," because the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."[288] As the Supreme Court recently reiterated in *Dusenbery*,[289] notice is sufficient if it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[290] The notice "must be

285. *See supra* notes 259-260.

286. *Cf. Gilbert*, 520 U.S. at 931-35 (holding that a post-suspension hearing for an employee suspended after an arrest and the filing of formal charges satisfied due process, but that "[o]nce the charges were dropped, the risk of an erroneous deprivation increased substantially, and . . . there was likely value in holding a prompt hearing").

287. The *NCRI* court did leave open the possibility that the Secretary of State could "in an appropriate case" demonstrate the need for withholding pre-designation notice and hearing. 251 F.3d at 208. In most designations, however, this particularized approach would not give adequate credence to the government's interest and its pressing need for action, resulting in a high probability that the government's interest would be frustrated.

288. *Mullane*, 339 U.S. at 314.

289. 534 U.S. at 167-68.

290. *Mullane*, 339 U.S. at 314.

of such a nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance."[291]

Under the circumstances of section 1189 designations, the Secretary of State's post-designation publication of the organization's name in the Federal Register[292] will not satisfy due process. Constructive notice does not provide the type of information needed by the designated organization to begin gathering rebuttal or exculpatory evidence and to start formulating its defense against the designation. After making a designation, therefore, the Secretary of State must give the designated organization direct, written notice of its designation in such a way that the organization is reasonably likely to receive it.[293] This notice should inform the designated organization of the designation, note the consequences flowing from it, and reference the statutory scheme authorizing it.[294] The notice must inform the designated organization that it is entitled to a hearing to contest its designation, describing in sufficient detail when that hearing will take place and how it will be conducted; any specific time frame or procedural rules should also be included.[295] Having informed a designated organization of the charges against it, the notice must state enough of the factual basis for the designation so that the organization can gather the necessary rebuttal or exculpatory evidence and formulate an effective response.[296] If the Secretary of State does not afford designated organizations a reasonable opportunity to know the claims against them and their factual basis,[297] then the hearing will not be adequate.[298]

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291. *Id.* (citations omitted).

292. *See* Ellis, *supra* note 20, at 713-15.

293. *See Mullane*, 339 U.S. at 315 ("The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected.").

294. *See* Morrissey v. Brewer, 408 U.S. 471, 486-87 (1972) (stating that notice to a parolee of a parole revocation hearing should "state what parole violations have been alleged").

295. *See id.* (stating that a parolee "should be given notice that the [parole revocation] hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation").

296. The Court held in *Morgan* that

> The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

304 U.S. at 18-19 (holding that the Secretary of Agriculture inadequately informed market agencies at the Kansas City Stock Yards of the charges against them).

297. Since due process normally does not require the Secretary of State to disclose classified information utilized in making the designation to the designated organization, see discussion *infra* part VI.C., the notice does not have to include the factual basis for that classified information. However, because due process requires the Secretary of State to provide a designated organization with an unclassified summary of all classified information utilized in the designation, see discussion *infra* part VI.C., that summary should be included with the notice.

298. *See Morgan*, 304 U.S. at 18-19.

B. *Type of hearing*

The essence of the hearing requirement is that a party must be given a meaningful opportunity to present its case.[299] Due process does not require any particular type of hearing in every circumstance.[300] Instead, the type of hearing mandated by due process is "tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard.'"[301]

In *Goldberg v. Kelly*, the Supreme Court held that a trial-type evidentiary hearing had to be given to welfare recipients before the termination of their benefits.[302] In that case, the Court found that welfare recipients must be able to present their evidence and arguments at an oral hearing.[303] Written submissions were "an unrealistic option" for many recipients who "lack the educational attainment necessary to write effectively and who cannot obtain professional assistance."[304] In addition, written submissions were an inadequate basis for a decision where the credibility of the recipient was at issue.[305] Welfare recipients also needed the opportunity to confront and cross-examine adverse witnesses.[306] The Court stopped short of requiring a full judicial hearing, deciding that "[i]nformal procedures will suffice" and that "due process does not require a particular order of proof or mode of offering evidence."[307] Later cases made clear, however, that the Court based its decision heavily on the circumstances facing welfare recipients.[308] In *Mathews*, the Supreme Court noted that "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision-making in all circumstances."[309]

An important question is when due process requires an oral hearing and when a hearing on written submissions is sufficient. The presentation of testimony at an oral hearing may be required under some circumstances, such as

299. *See Boddie*, 401 U.S. at 377 (noting that "due process of law signifies a right to be heard in one's defence") (quoting *Hovey*, 167 U.S. at 417); *Morgan*, 304 U.S. at 18 (holding that the right to a hearing embraces "the right to present evidence").

300. *Mathews*, 424 U.S. at 348-49; *Loudermill*, 470 U.S. at 545; FCC v. WJR, 337 U.S. 265, 277 (1949).

301. *Mathews*, 424 U.S. at 349 (quoting *Goldberg*, 397 U.S. at 268-69).

302. *Goldberg*, 397 U.S. at 266-71.

303. *Id.* at 267-68.

304. *Id.* at 269.

305. *Id.*

306. *Id.* at 268-70.

307. *Id.* at 269.

308. *See, e.g.*, *Loudermill*, 470 U.S. at 545 ("In only one case, *Goldberg v. Kelly*, has the Court required a full adversarial evidentiary hearing prior to adverse governmental action.") (citations omitted).

309. *Mathews*, 424 U.S. at 348; *see also Loudermill*, 470 U.S. at 545 ("In general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action.") (quoting *Mathews*, 424 U.S. at 343); United States v. Nugent, 346 U.S. 1, 7-9 (1953) (holding that hearings to evaluate the sincerity of conscientious objectors to military service did not require "a full-scale trial").

where a final decision involves credibility determinations.[310] In *FCC v. WJR*, however, the Court stated that

> due process of law has never been a term of fixed and invariable content. This is as true with reference to oral argument as with respect to other elements of procedural due process. For this Court has held in some situations that such argument is essential to a fair hearing, in others that argument submitted in writing is sufficient.[311]

Therefore, whether a party may orally argue its position at a hearing, or whether that party may only submit written documents, clearly depends upon the circumstances.[312]

The *Mathews* test is the proper test for determining what type of hearing is due to designated organizations, even after *Dusenbery*. As with the when of due process,[313] there is no indication that *Dusenbery*, which dealt solely with the sufficiency of notice,[314] displaced the use of the *Mathews* test to determine the adequacy of hearing procedures. Since *Dusenbery*, lower courts have consistently applied the *Mathews* test to evaluate the adequacy of hearing procedures.[315] This article does so as well.[316] The D.C. Circuit held that hearings on written submissions would be sufficient to satisfy due process.[317] The remainder of this section discusses whether, pursuant to the *Mathews* test, that holding is correct, or whether designated organizations are entitled to oral or trial-type hearings.

The *Mathews* test first weighs the private interest.[318] In designations under section 1189, the weight of the private interest depends on the factual circumstances of a particular case.[319] A designated organization could have a small

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310. Califano v. Yamasaki, 442 U.S. 682, 697 (1979) ("Evaluating fault, like judging detrimental reliance, usually requires an assessment of the recipient's credibility, and written submissions are a particularly inappropriate way to distinguish a genuine hard luck story from a fabricated tall tale.").

311. 337 U.S. at 275 (footnotes and citations omitted); *see also Mallen*, 486 U.S. at 247-48 ("There is no inexorable requirement that oral testimony must be heard in every administrative proceeding in which it is tendered.").

312. *WJR*, 337 U.S. at 276, 284 ("[T]he right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances.")

313. *See* discussion *supra* part V.C.

314. 534 U.S. at 167-68 (using the *Mullane* test of reasonableness under the circumstances instead of the *Mathews* three-prong test to determine the sufficiency of notice given to prisoners); *see also Lockyer*, 329 F.3d at 710 n.8 (noting that, while the *Mathews* test was not "all-embracing," the Supreme Court had applied it "in all but a few contexts" and declined to apply it "in only a few specific contexts," such as determining the sufficiency of notice).

315. *See, e.g.*, *Lockyer*, 329 F.3d at 707-713 (applying the *Mathews* test to the adequacy of the hearing provided by the Federal Energy Regulatory Commission to California and the Northern California Power Agency); *Sonnleitner v. York*, 304 F.3d 704, 711-16 (7th Cir. 2002) (applying the *Mathews* test to determine whether a pre-suspension hearing was inadequate because it had not given a state employee the chance to respond to some of the more serious charges against him).

316. Since section 1189 did not provide for a hearing at all, this article cannot use the *Mathews* test to determine whether statutory procedures are adequate. *Cf. Mathews*, 424 U.S. at 339-49 (determining the adequacy of hearing procedures outlined by Social Security regulations). But the *Mathews* test can be used to determine what type of hearing due process affords a designated organization.

317. *NCRI*, 251 F.3d at 209.

318. 424 U.S. at 335.

319. *See* discussion *supra* part V.C.1.

property interest, like a $200 bank account, a substantial property interest like millions of dollars in assets, or a substantial liberty interest like the right to solicit contributions or its members' right to travel and First Amendment right to make contributions.

The second *Mathews* factor weighs the risk of an erroneous deprivation.[320] Under the circumstances of a section 1189 designation, the purpose of a hearing is to allow the designated organization to present evidence rebutting the Secretary of State's findings which form the basis for the designation.[321] An ancillary purpose is to create an administrative record of evidence and counter-evidence for judicial review.[322] The plain language of paragraph (a)(1) limits the evidence and arguments that designated organizations need to present in their defense. First, the organization could rebut the Secretary of State's finding that it is foreign[323] by simply introducing evidence that it is in fact a domestic organization. Second, the organization could rebut the Secretary of State's finding that it engages in terrorist activity or terrorism, or has the capability and intent to do so,[324] by producing evidence that it did not commit the terrorist acts alleged by the Secretary of State or that the acts committed by it did not meet the statutory definitions of terrorist activity or terrorism,[325] and that it lacked either the capability or intent to engage in terrorist activity or terrorism. Third, the organization could provide evidence that, even if it committed the specified terrorist acts, those acts did not threaten the national security of the United States or the security of its nationals.[326] For example, the designated organization could show that it purposefully and successfully avoided targeting Americans or attacking American economic and security interests.[327]

In light of the limited arguments and evidence that a designated organization needs to present to rebut the Secretary of State's evidence supporting the designation, the risk of an erroneous deprivation in a hearing on written submissions is relatively low. The Secretary of State does not generally need supplementary oral clarifications to examine the type of hard evidence that a designated organization would need to submit on its behalf, such as financial records, tax filings, internal documents relating to its mission and activities, and

320. 424 U.S. at 335.

321. *See* § 1189(b).

322. Presumably, if the designated organization produces enough evidence to successfully rebut any one of the findings, then the Secretary of State (or the reviewing court) would realize that the designation was in error and rescind it.

323. § 1189(a)(1)(A).

324. § 1189(a)(1)(B).

325. *See* definitions *supra* notes 12-14. In 1999, the Secretary of State dropped the DFLP and FPMR/D from the list of terrorist organizations because they did not commit terrorist activity within the two-year redesignation period. *See supra* note 35.

326. § 1189(a)(1)(C).

327. Perhaps the designated organization could submit evidence that it targeted only an enemy of the United States or that the United States covertly funded its operations. *See PMOI II*, 327 F.3d at 1243; *see also Rahmani*, 209 F. Supp. 2d at 1051 (noting that some members of Congress disagreed with the Secretary of State's finding that the PMOI was a threat to the United States and believed instead that the PMOI was "a legitimate resistance movement fighting the tyrannical regime presently in power in Iran").

so on. In its written submissions, the designated organization could thoroughly explain why its evidence negates the Secretary of State's findings and compels a revocation of the designation.[328] Unlike cases in which credibility plays a significant role,[329] a face-to-face confrontation is probably not necessary in most instances. Also, it will rarely be necessary for designated organizations to confront and cross-examine adverse witnesses to rebut the Secretary of State's findings so long as they are fully informed of the factual basis underlying those findings. [330] A hearing by written submissions would also create a reliable record for judicial review.

Yet, a bright line rule prohibiting any oral hearing for a designated organization is probably not desirable. For instance, after having evaluated the written submissions, the Secretary of State might need to hear supplemental oral testimony from a designated organization official or an anti-terrorism expert who submitted an affidavit stating that, based on his or her research, the designated organization was not engaged in terrorist activity threatening the national security of the United States.[331] Additionally, if the designation turns on whether the organization has the intent to engage in terrorist activity or terrorism, the credibility of the organization's leaders or members might become an issue. In that instance, oral testimony or even trial-type procedures, such as cross-examination, might be necessary.[332] It is unlikely, however, that these concerns will arise in most cases.[333]

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328. At this point, a designated organization's assets would be frozen and its avenues of material support would be cut off, hampering its ability to mount a defense. *Cf.* Caplin & Drysdale v. United States, 491 U.S. 617, 625-626 (1989) (holding that a defendant on trial for drug crimes could not use his forfeited assets to pay for his legal defense). Holding the hearing promptly after the organization's designation, however, would temper this hardship.

329. *Nugent*, 346 U.S. at 5-6 (noting that an oral hearing was necessary to determine whether a person actually held the beliefs of a conscientious objector); *Goldberg*, 397 U.S. at 267-69 (requiring an oral hearing to examine the credibility of a welfare recipient); *Califano*, 442 U.S. at 697 (requiring an oral hearing to examine the credibility of a recipient of Social Security disability benefits).

330. Even if due process requires the Secretary of State to reveal classified information pertaining to a designation to the designated organization, but see discussion *infra* part VI.C., it is not clear that a designated organization should be able to confront and cross-examine the government's intelligence sources. If the designated organization can rebut the factual basis of the Secretary of State's decision, then a cross-examination of the Secretary of State's intelligence sources would be superfluous. If the designated organization cannot rebut the factual basis of the Secretary of State's decision, then it is unlikely that the value of such a cross-examination would outweigh the danger in exposing the Secretary's foreign intelligence sources.

331. See *Kiareldeen I*, in which a former FBI director testified that Kiareldeen was probably not involved in the 1993 World Trade Center bombing. 71 F. Supp. 2d at 417.

332. It is not unusual for due process to require different types of hearings for similar or related administrative proceedings if the circumstances warrant it. *See, e.g.*, *Califano*, 442 U.S. at 695-97 (holding that an oral hearing is not necessary for Social Security disabilty benefit recipients requesting reconsideration of the government's decision to recoup overpaid benefits because "reconsideration involve[s] relatively straightforward matters of computation for which written review is ordinarily an adequate means to correct prior mistakes," but that an oral hearing is necessary for recipients requesting waiver of the recoupment because the broad standard for waiver decisions required a credibility determination).

333. *See Mathews*, 424 U.S. at 344 (stating that "the generality of cases, not the rare exceptions" shape procedural due process rules).

Finally, the *Mathews* test also weighs the government's interest.[334] At issue here is "the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources."[335] This factor does not merely weigh the administrative cost and burden of a particular designated organization's hearing, but rather "the ultimate additional cost in terms of money and administrative burden" in holding hearings for all designated organizations.[336] As discussed above, designated organizations must receive hearings after their initial designation and after each subsequent redesignation.[337] A trial-type hearing would be more costly than an oral hearing, which in turn would be more costly than a hearing on written submissions. Nonetheless, the administrative cost and burden of a hearing on written submissions is not insubstantial. According to a Congressional Research Service report, "[i]t is a significant bureaucratic burden to ensure that the designations are appropriately reviewed, investigated, the administrative record updated, the appropriate agencies consulted, and the public statement of renewal made every two years after the initial designation."[338] Compounding this burden are the great number of entities listed as terrorist under different governmental lists[339] and the generally simultaneous nature of biennial redesignation reviews. The weight of the government interest in conserving scarce fiscal and administrative resources is therefore at least moderate and perhaps high.

The three *Mathews* factors must be weighed together. A hearing on written submissions poses a low risk of an erroneous deprivation of a designated organization's private interest, no matter how substantial. This would not outweigh the moderate to great government interest in conserving scarce fiscal and administrative resources. A hearing on written submissions is thus sufficient to satisfy due process in most circumstances.

C. The Secretary of State's Use of Classified Information in Making a Designation

Closely related to the issues of notice and hearings under section 1189 is the question of whether due process requires the Secretary of State to release classified information used to support designations to the designated organizations so that they may rebut it. In making a designation under section 1189, the

334. *Id.* at 335.

335. *Id.* at 348.

336. *Id.* at 347.

337. *See supra* notes 249-252 and accompanying text (reading a hearing requirement into section 1189).

338. CRONIN, *supra* note 34, at 10.

339. In addition to foreign terrorist organizations, the U.S. government tracks, pursuant to various statutes, state sponsors of terrorism, SDTs, SDGTs, and various other non-terrorist entities. *Id.* at 3-5. There are currently over 200 SDTs and SDGTs. *Id.* at 4. For OFAC's comprehensive list of all "Specially Designated Nationals and Blocked Persons," which includes all of these and numerous other designations, and is constantly updated, see http://www.treas.gov/offices/eotffc/ofac /sdn/index.html (last visited March 28, 2004). Not included in this master list are those individuals who are on the Secretary of State's "Terrorist Exclusion List," who cannot enter the United States and who may be deported from it. *Id.* at 5. Additionally, the United Nations, the European Union, and other intergovernmental agencies maintain similar lists. *Id.* at 3 n.6.

Secretary of State may consider classified information,[340] which "shall not be subject to disclosure for such time as it remains classified, except that such information may be disclosed to a court *ex parte* and *in camera* for the purposes of judicial review."[341] By the statute's plain language, designated organizations have no opportunity to review any classified information used by the Secretary of State and thus have no opportunity to refute evidence that forms the basis of a designation they challenge.

The facts of *Kiareldeen v. Reno*, which concerned the habeas corpus petition of a Palestinian man subject to deportation, illustrate the dilemma posed by the use of classified information in adversary proceedings.[342] In *Kiareldeen*, the INS made an *ex parte* and *in camera* submission of classified information to an immigration judge alleging that

> (1) Kiareldeen was a member of a foreign terrorist organization, (2) he was involved in a meeting planning the 1993 attack on the World Trade Center one week prior to the actual attack, at which a suicide bombing was discussed, and (3) he later threatened to kill Attorney General Janet Reno for her role in convicting those responsible for the 1993 bombing of the World Trade Center.[343]

According to the FBI, this information came from multiple sources that it considered reliable.[344] Based on unclassified summaries of the classified information given to him by the INS, however, Kiareldeen believed that "one likely source of the government's allegations is his ex-wife Amal Kamal, whom he claims seeks revenge after a bitter divorce."[345] Kiareldeen introduced evidence, including police reports, showing that he had been falsely arrested six times due to "false accusations by Ms. Kamal of domestic violence charges."[346] Kiareldeen produced evidence that his ex-wife made allegations that he and his brother were terrorists, and that "he had threatened to put a bomb in her car unless she permitted him to visit their daughter," an accusation which a state court later found to be baseless.[347] The problems highlighted by this case are stark: classified information strongly suggested that Kiareldeen was a national security threat, but it was probably based all or in part merely on the unreliable accusations of his estranged ex-wife. Moreover, the government's interest in the secrecy of its classified information was upset when Kiareldeen was able to

340. § 1189(c)(1) ("[T]he term 'classified information' has the meaning given to that term in section 1(a) of the Classified Information Procedures Act."). The term "classified information" means "any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security." 18 U.S.C. App. § 1(a) (2000).

341. § 1189(a)(3)(B); *see also* § 1189(b)(2) (the administrative record may include classified information.).

342. *Kiareldeen I*, 71 F. Supp. 2d at 404-05.

343. Kiareldeen v. Ashcroft, 273 F.3d 542, 546 (3d Cir. 2001) (regarding the government's appeal of Kiareldeen's subsequent suit for attorney's fees under the Equal Access to Justice Act) ("*Kiareldeen II*").

344. *Id.*

345. *Kiareldeen I*, 71 F.Supp. 2d at 416.

346. *Id.* at 416-17.

347. *Id.* at 417. The INS refused to put Kamal on the stand, although she had to submit to written interrogatories. *Id.*

determine that his ex-wife was likely one of the FBI's sources based on unclassified summaries of classified information.

The nature of the case in which the government seeks to preserve the secrecy of its classified information can influence a court's decision whether or not to require its disclosure. In tort cases against the government, courts have held that the government need not divulge classified information, because plaintiffs "suing the sovereign on the limited terms to which it has consented" are not necessarily entitled to discover information when disclosure would threaten the national security of the United States.[348] In deportation or criminal cases, where the government has itself brought a proceeding against an individual, courts are more wary of allowing the government to use its interest in confidential information as a sword rather than a shield.[349] Designations under section 1189 are more like deportation and criminal cases than civil cases such as torts. That similarity, however, cannot by itself force the government to disclose classified information to designated terrorist organizations. Even in criminal cases, courts have sometimes permitted the government to keep classified information secret from the defendant.[350]

The *Mathews* test governs whether the Secretary of State can use classified information to make a designation without disclosure to the designated organization.[351] As mentioned above, this is true even after *Dusenbery*, which did not

348. McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1023 (Fed. Cir. 2003) (holding that the state secrets privilege—the government's privilege against disclosure of information that would adversely affect national security—prevented discovery of the government's classified information in a contractual dispute); *see also* Molerio v. FBI, 749 F.2d 815, 820-22 (D.C. Cir. 1984) (holding that the state secrets privilege blocked discovery of classified information on why the FBI had rejected the plaintiff's employment application).

349. *AADC*, 70 F.3d at 1070 (holding that, even if the government could use the state secrets privilege as a shield in tort cases, the government could not use classified information as a sword in deportation cases); *Kiareldeen I*, 71 F. Supp. 2d at 410-14 (holding that the use of classified information in a unlike in civil cases, courts have reasoned in criminal cases that "it is unconscionable to allow [the Government] to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense") (quoting United States v. Reynolds, 345 U.S. 1, 12 (1953)).

350. *See, e.g.*, United States v. Yunis, 867 F.2d 617, 622-25 (D.C. Cir. 1989) (holding that a defendant accused of hijacking was not entitled to discovery of the government's classified information because "a legitimate government privilege protects national security concerns"). The Supreme Court has also held that people petitioning to be relieved from military service as conscientious objectors are not entitled to see FBI reports on their background and reputation so they can respond during a hearing on their petition. Gonzales v. United States, 364 U.S. 59, 64-65 (1960); *Nugent*, 346 U.S. at 5-6.

351. *See, e.g.*, *AADC*, 70 F.3d at 1068-70 (applying the *Mathews* test to determine whether the government's refusal to disclose classified information violated due process); *Kiareldeen I*, 71 F. Supp. 2d at 412-414 (using the *Mathews* test to determine whether the use of classified information in an immigration proceeding violated due process); Al Najjar v. Reno, 97 F. Supp. 2d 1329, 1352-57 (S.D. Fla. 2000), *vacated as moot sub nom.* Al Najjar v. Ashcroft, 273 F.3d 1330 (11th Cir. 2001) (utilizing the *Mathews* test to determine whether the use of classified information in an alien's bond redetermination hearing violated due process). In *Yunis*, the D.C. Circuit applied the state secrets privilege to analyze whether the government's classified information was subject to disclosure in a criminal trial. 867 F.2d at 622-25. But since subsection 1189(a)(3)(B) already allows the Secretary of State to consider classified information in a designation without disclosing that information to a designated organization, the Secretary of State would not need to invoke the state secrets privilege anyway. Moreover, even if the Secretary of State's use of classified information under subsection

change the application of the *Mathews* test to the adequacy of hearing procedures.[352] The first *Mathews* factor weighs the private interest.[353] As discussed above,[354] the weight of the private interest involved in a designation under section 1189 depends on the factual circumstances of a particular designation. The property interest of a designated organization could vary from a $200 bank account to millions of dollars in assets. Its liberty interests, such as its right to solicit contributions or its members' right to travel and First Amendment right to make contributions, could be substantial.

Turning to the second *Mathews* factor, the risk of an erroneous deprivation[355] in this situation appears high.[356] The "hallmark of the adversary system" is that parties have access to the evidence used against them, because "[t]he openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts."[357] "Use of secret evidence," however, "creates a one-sided process by which the protections of our adversarial system are rendered impotent," compelling parties to "prove the negative in the face of anonymous 'slurs of unseen and unsworn informers.'"[358] Preventing the disclosure of classified information means that "there is no adversarial check on the quality of information" used against a party.[359] In *Rafeedie v. INS*, the Immigration and Naturalization Services ("INS") sought to exclude a resident alien who left the country from re-entry because he allegedly belonged to various Palestinian terrorist groups.[360] The court noted that

> Rafeedie—like Joseph K. in *The Trial*—can prevail before the [INS] Regional Commissioner only if he can rebut the undisclosed evidence against him, *i.e.*, prove that he is not a terrorist regardless of what might be implied by the Government's confidential information. It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden.[361]

1189(a)(3)(B) does violate due process, then the state secrets privilege likely cannot save that violation.

352. *See supra* parts V.C., VI.B.

353. 424 U.S. at 335.

354. *See* discussion *supra* part V.C.1.

355. 424 U.S. at 335.

356. In *AADC*, the court found that the government's confidential information concerning the terrorist activities of the Popular Front for the Liberation of Palestine ("PFLP") was not sufficient by itself to show that its members could be deported as terrorists. 70 F.3d at 1069-70. But since the Secretary of State's classified information must show that the foreign organization itself engaged in terrorist activity, this guilt-by-association problem would probably not arise in designations under section 1189.

357. Abourezk v. Reagan, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987).

358. *Kiareldeen I*, 71 F. Supp. 2d at 413 (quoting Jay v. Boyd, 351 U.S. 345, 365 (1956) (Black, J., dissenting)); *see also McGrath*, 341 U.S. at 171 (Frankfuter, J., concurring) ("Secrecy is not congenial to truth-seeking."); *id.* ("The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.") (quoting *Knauff*, 338 U.S. at 551 (Jackson, J., dissenting)); H.R. REP. 104-383, pt. 3, at 180 (dissenting view) ("The cardinal rule of due process is that evidence used against a party must be fully disclosed to that party.").

359. *AADC*, 70 F.3d at 1069.

360. 880 F.2d at 508-09.

361. *Id.* at 516.

Similarly, the Ninth Circuit has found that "the very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error."[362] That section 1189 provides for the *ex parte* and *in camera* disclosure of the Secretary of State's classified information during independent judicial review[363] decreases the risk of an erroneous deprivation.[364] However, such disclosure cannot fully eliminate the risk. Courts, lacking the institutional competency to review foreign policy and national security information as they would other information, must give strong deference to the political branches in these matters.[365] Furthermore, even with *ex parte* and *in camera* disclosure, designated organizations still cannot review and rebut the classified information used in the designation.

The third *Mathews* factor weighs the government's interest.[366] The Supreme Court has found that "[t]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."[367] This is so because "[i]t is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence."[368] In order to secure these sources, the government must "tender as absolute an assurance of confidentiality as it possibly can."[369] If intelligence sources believe that the government will be "unable to maintain the confidentiality of its relationship to them," they will refuse to supply information the government needs.[370] The Court has therefore recognized that "[e]ven a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.'"[371] In addition, the disclosure of classified information could result in valuable United States intelligence information falling into the hands of its adversaries, who could glean from it important knowl-

362. *AADC*, 70 F.3d at 1069.

363. § 1189(a)(3)(B).

364. *See Abourzek*, 785 F.2d at 1061 (noting that even where statutes provide for the *ex parte* and *in camera* inspection of classified information, the court had been "vigilant to confine to a narrow path submissions not in accord with our general mode of open proceedings").

365. *See* CIA v. Sims, 471 U.S. 159, 176 (1985); *Wald*, 468 U.S. at 242; *Agee*, 453 U.S. at 292; *Zemel*, 381 U.S. at 17; *Waterman*, 333 U.S. at 111; *Harisiades*, 342 U.S. at 588-89; United States v. Curtis-Wright Export Corp., 299 U.S. 304, 315-22 (1936); *Oetjen*, 246 U.S. at 302.

366. 424 U.S. at 335.

367. Snepp v. United States, 444 U.S. 507, 510 n.3 (1980) (holding that an ex-CIA agent breached his contract with the CIA by publishing a book without allowing the CIA to examine it to ensure that he had divulged no classified information, as stipulated in his employment contract); *see also Sims*, 471 U.S. at 175; *Yunis*, 867 F.2d at 623.

368. *Snepp*, 444 U.S. at 512 n.7.

369. *Sims*, 471 U.S. at 175 (holding that the Freedom of Information Act did not require the CIA to release the names of researchers who had worked on the MKULTRA project, which researched ways to counter "Soviet and Chinese advances in brainwashing and interrogation techniques").

370. *Id.* "The continued availability of these foreign sources depends upon the CIA's ability to guarantee the security of information that might compromise them and even endanger the personal safety of foreign agents." *Snepp*, 444 U.S. at 507.

371. *Sims*, 471 U.S. at 175.

edge not apparent to a court.[372] Since the disclosure of classified information could result in the loss of intelligence sources and reveal important intelligence information to terrorists, the Secretary of State has a compelling interest in preserving the secrecy of classified information concerning designated organizations.

The question is how to balance the *Mathews* factors here. It could be argued that the high risk of the erroneous deprivation of a substantial private interest would outweigh even this compelling government interest. The second *Mathews* factor, however, allows for the consideration of additional procedural safeguards that would decrease the risk of an erroneous deprivation.[373] As in *Kiareldeen*, the Secretary of State could provide a designated organization with an unclassified summary of its classified information,[374] which would allow the designated organization to mount at least some sort of defense against the classified information, materially decreasing the risk of an erroneous deprivation. Such an unclassified summary should give the designated organization "access to the decisive evidence to the fullest extent possible, without jeopardizing legitimately raised national security interests."[375] An unclassified summary is not without risk to the government interest,[376] but the risk a summary poses to national security is certainly less than that posed by full disclosure of the classified information. Notably, the unclassified summary would be created by the Secretary of State, who is in the best position to know how to both preserve intelligence sources and protect the classified information from terrorists. Further, the administrative cost and burden associated with writing unclassified summaries would not tip the scales against their creation. Given the reduction in the risk of error that unclassified summaries would entail, the government interest in keep-

372. *Yunis*, 867 F.2d at 623; *Sims*, 471 U.S. at 176-77. In *Kiareldeen I*, the district court stated that it did not "necessarily accept at face value the government's contentions that national security is implicated by the petitioner's alleged misdeeds" and found that "the government's unclassified 'summary' evidence" was "lacking in either detail or attribution to reliable sources which would shore up its credibility." 71 F. Supp. 2d at 414. Referring to this finding in *Kiareldeen II*, the Third Circuit responded: "That the FBI would be unwilling to compromise national security by revealing its undercover sources, [sic] is both understandable and comforting. That a court would then choose to criticize the FBI for being unwilling to risk undermining its covert operations against terrorism is somewhat unnerving." 273 F.3d at 552; *see also id.* at 553 (criticizing the district court for disregarding the government's "often complex determinations involved in releasing confidential counterterrorism intelligence into the public arena through its introduction into both administrative hearings and court proceedings"). It is clear that, when examining classified information, courts have to walk a fine line between rubberstamping classified information that may be unreliable and ordering the disclosure of classified information that may be harmful to national security.

373. *Mathews*, 424 U.S. at 335.

374. 273 F.3d at 546 ("The INS provided Kiareldeen with several unclassified summaries of the [FBI's] classified evidence."); *see also* 18 U.S.C. App. § 6(c)(1)(B) (2000) (stating that an alternative to disclosing classified information is the creation of "a summary of the specific classified information").

375. *Abourzek*, 785 F.2d at 1060; *see also Kiareldeen II*, 273 F.3d at 551-52 (noting that the unclassified summaries of classified information provided to Kiareldeen by the government illustrated "a concentrated effort to divulge as much information as possible to assist him in his defense, without disclosing information in a way that could potentially compromise national security").

376. As mentioned above, Kiareldeen was able to speculate that his ex-wife was a confidential source based on the unclassified summaries of classified information. *Kiareldeen I*, 71 F. Supp. 2d at 416-17.

ing classified information secret would likely outweigh even a substantial private interest held by a designated organization and actual classified information would not itself need to be disclosed. Having read the possibility of unclassified summaries being made available to designated organizations that seek them into section 1189, the Secretary of State's use of classified information in making designations does not offend due process.

CONCLUSION

In enacting AEDPA in 1996, Congress found that "international terrorism is a serious and deadly problem that threatens the vital interests of the United States."[377] Terrorist organizations had "developed sophisticated international networks that allow them great freedom of movement, and opportunity to strike, including inside the United States."[378] Many terrorist organizations were "attracting a more qualified cadre of 'believers' with greater technical skills" and had "established footholds within ethnic or resident alien communities in the United States."[379] Those organizations were raising "significant funds within the United States" and using "the United States as a conduit for receipt of funds raised in other nations."[380] Faced with these facts, Congress chose to combat the terrorist threat by delegating to the Secretary of State the power to designate foreign terrorist organizations and attaching harsh consequences to these designations, such as the freezing of the designated organizations' funds and the prohibition of the knowing provision of material support to them. The question posed by this article is whether Congress's chosen means for fighting terrorism, codified in section 1189 of title 8 of the United States Code, are constitutional under the Fifth Amendment Due Process Clause.

The answer is that section 1189 comports with procedural due process so long as designated organizations are entitled to post-designation notice and hearings. This is because the government's pressing need for prompt action to avoid the frustration of its compelling national security interest in fighting terrorism outweighs the high risk of an erroneous deprivation of even a substantial private interest of a designated organization. After the designation, however, when the government's pressing need for prompt action disappears, a designated organization must receive prompt notice and a hearing. The due process that designated organizations must receive is direct notice of the designation and a written (or, in some cases, oral) hearing to rebut the Secretary of State's evidence. The Secretary may also use classified information in making a designation, so long as the designated organization is provided with an unclassified summary of the classified information. In that case, the government's compelling national security interest in maintaining the secrecy of its intelligence information outweighs the risk of an erroneous deprivation of even a substantial private interest.

377. AEDPA § 301(a)(1).
378. H.R. REP. 104-383, pt. 2, at 43.
379. *Id.*
380. AEDPA § 301(a)(6).

Congress has chosen to fight the terrorist threat with the means outlined in section 1189. As Justice Frankfurter stated in *Communist Party of the United States v. Subversive Activities Control Board*, "the legislative judgment as to how that threat may best be met consistently with the safeguarding of personal freedom is not to be set aside merely because the judgment of judges would, in the first instance, have chosen other methods."[381] Similarly, in *Harisiades v. Shaughnessy*, Justice Jackson stated that "[w]e, in our private opinions, need not concur in Congress' policies to hold its enactments constitutional."[382] Where, as here, the "[m]eans for effective resistance against foreign incursion" pass constitutional muster under the Fifth Amendment, those means "may not be denied to the national legislature."[383]

381. 367 U.S. at 96-97; *see also* Rostker v. Goldberg, 453 U.S. 57, 64 (1981) ("[W]e must have 'due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government.'") (quoting *McGrath*, 341 U.S. at 164) (Frankfurter, J., concurring).

382. 342 U.S. at 590; *see also Humanitarian Law Project I*, 205 F.3d at 1136 ("We will not indulge in speculation about whether Congress was right to come to the conclusion that it did. We simply note that Congress had the fact-finding resources to properly come to such a conclusion.").

383. *Communist Party of the United States*, 367 U.S. at 95.

Berkeley Journal of International Law

Volume 22 | Issue 3 Article 5

2004

Crimes against Humanity as a Nexus of Individual and State Responsibility: Why the ICJ Got Belgium v. Congo Wrong

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Crimes Against Humanity as a Nexus of Individual and State Responsibility: Why the ICJ Got *Belgium v. Congo* Wrong

by
Adam Day*

INTRODUCTION

The principle of sovereignty requires that states refrain from issuing binding orders towards other states.[1] Accordingly, customary international law dictates that each state possess immunity from the jurisdiction of other states.[2] The purpose of this immunity is to protect state actors while they perform their duties without foreign interference, as well as protect their state's dignity.[3] Because heads of state or foreign ministers carry out much of international relations, protection of state functions requires that sovereign immunity be extended to these officials.[4] This derivative immunity allows state officials to negotiate abroad without the fear that they will be subject to the criminal codes of foreign countries, while maintaining each state's integrity in the international arena.

However, the immunity granted to state officials is not absolute. As the House of Lords in the famous *Pinochet* case noted, human rights violations rising to the level of core crimes—genocide, crimes against humanity, and war crimes—may be exceptions to state officials' immunity.[5] Genocide, in particu-

* J.D. Expected, 2006, University of California, Berkeley (Boalt Hall). The author would like to thank Professor Richard Buxman for guiding the seminar that resulted in this work and Anita Matta for her excellent contributions as my editor.

1. *See* Schooner Exchange v. M'Faddon, 11 U.S. 116, 137 (1812) ("This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects."); *see also* U.N. CHARTER art. 2, para. 1.

2. Steffen Wirth, *Immunities, Related Problems, and Article 98 of the Rome Statute*, 12 CRIM. L.F. 429, 430 (2001) [hereinafter Wirth, *Immunities, Related Problems*]; *see also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 329 (5th ed. 1998).

3. Steffen Wirth, *Immunity for Core Crimes? The ICJ's Judgment in the* Congo v. Belgium *Case*, 13 EUR. J. INT'L L. 877, 882 (2002) [hereinafter Wirth, *Core Crimes*].

4. *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 3230, 500 U.N.T.S. 95, 96 ("*Realizing* that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.").

5. Regina v. Bow Street Magistrate, *Ex parte* Pinochet, [1999] 38 I.L.M. 581 (H.L.).

lar, constitutes a clear exception to the principle of state immunity under Article IV of the Genocide Convention.[6] Likewise, the Torture Convention eliminates most immunities for torture allegations.[7] Consequently, these exceptions to state immunity can lead to the *personal* liability of state officials for their crimes, provided that such crimes are included among the group of core crimes.[8]

Nevertheless, core crime exceptions must still comply with the two general purposes of state immunity: (1) the performance of official functions, and (2) the protection of each state's dignity. Accordingly, customary international law recognizes two categories of state immunity in order to ensure the protection of these values. First, all state officials enjoy "functional immunity," or immunity *ratione materiae*, for acts carried out as part of their official duties for their state.[9] The rationale behind functional immunity is that by acting on behalf of a state, the official's acts are attributed directly to the state and, consequently, individual liability does not arise.[10] Second, some state officials (only those occupying the highest positions, such as heads of state and foreign ministers) enjoy "personal immunity," or immunity *ratione personae*, for all acts committed while holding an official state position.[11] Once that position is relinquished, as the House of Lords noted in *Pinochet,* personal liability arises, even for those acts committed while in office.[12] Both categories protect the functions of state officials in international relations; however the former is directed at the inviolability of the sovereign, whereas the latter merely protects an official from criminal prosecution during their tenure in office.

The International Court of Justice (ICJ) in the *Case Concerning the Arrest Warrant of 11 April 2000* (*Congo v. Belgium*) (*"Congo"*) raised the difficulty of maintaining the distinction between these two types of immunity.[13] The ICJ not only held that an incumbent minister of foreign affairs of a foreign state enjoyed immunity from prosecution for crimes against humanity before Belgian courts, but, in a controversial *obiter dictum*, it also held that *former* foreign ministers would also be immune from prosecution for their official acts.[14] Many scholars, including at least one of the dissenting judges in *Congo*, have noted that this holding contradicts the reasoning presented by the House of Lords in *Pinochet*,

6. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 4, 102 Stat. 3045, 78 U.N.T.S. 278, 280 [hereinafter Genocide Convention].

7. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 39 U.N. GAOR, Supp. No. 187, at 197, U.N. Doc. A/39/51 (1984). *See also* Wirth, *Immunities, Related Problems*, *supra* note 2, at 433.

8. Salvatore Zappalá, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The* Ghaddafi *Case Before the French Cour de Cassation*, 12 EUR. J. INT'L L. 595, 601 (2001).

9. Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the* Congo v. Belgium *Case*, 13 EUR. J. INT'L LAW 853, 862 (2002).

10. *Id.* at 863.

11. Zappalá, *supra* note 8, at 598.

12. *Pinochet*, 38 I.L.M. at 585 ("the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention").

13. Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14), *available at* http://www.icj-cij.org/icjwww/idecisions.htm.

14. *Id.* at para. 61.

in which the House of Lords excluded core crimes from the protection of functional immunity.[15] In contrast, under the ICJ's ruling, a crime against humanity committed as part of an official state duty would almost inevitably fall under the rubric of functional immunity and would therefore not give rise to individual criminal liability.[16]

Part I of this article will argue that the ICJ's holding in the *Congo* case is erroneous in light of the two categories of immunity mentioned above. In particular, it will examine the ICJ's reasoning for granting immunity to an incumbent foreign minister, and discuss the points at which the holding contradicts the scope of that immunity as established in customary international law. Furthermore, it will argue—as does Judge Van den Wyngaert's dissent in *Congo*—that no rule granting immunity to foreign ministers from core crimes exists in customary international law.

Part II will discuss the rule abrogating immunity for crimes against humanity in three different fora: (1) the domestic courts of several nations, (2) the *ad hoc* tribunals created in Rwanda and the former Yugoslavia, and (3) the International Criminal Court (ICC). Ultimately, it will argue that a clear rule has crystallized in customary international law: foreign ministers have no defense of immunity for crimes against humanity.

Part III will expand this rule to include state responsibility as well as individual liability for crimes against humanity. It will argue that the very definition of these crimes necessarily invokes state responsibility, whether through a state's active participation in or failure to prevent each crime. Individual responsibility is not dissolved by this definition; rather, a crime against humanity generates both individual and state responsibility. This section will conclude by addressing the possible problem of inappropriate forum as one cause of the unsound ruling in *Congo*. In particular, part III asks whether or not the ICJ, a court whose jurisdiction is limited to inter-state disputes, is the appropriate forum for resolving disputes that implicate both individual and state liability.

I.

IMMUNITIES OF FOREIGN MINISTERS ACCUSED OF CORE CRIMES

This part will maintain that the ICJ's holding, which grants immunity to former foreign ministers in *Congo*, is manifestly flawed. First, it will focus on the distinction between functional and personal immunity and the *Congo* court's conflation of the two. The ICJ's confusion resulted in a category of immunity for former foreign ministers, which contradicts the rationale of sovereign immunity established under customary international law, by all but granting former foreign ministers absolute impunity.

15. *See* Marina Spinedi, *State Responsibility v. Individual Responsibility for International Crimes*: Tertium Non Datur?, 13 EUR. J. INT'L LAW, 895, 896-97 (2002); *see also Congo v. Belgium*, at para. 36 (dissenting opinion of Judge Van den Wyngaert).

16. *See* Wirth, *Core Crimes*, *supra* note 3, at 881 ("The Court [ICJ] thereby seems to recognize an unrestricted immunity for all acts committed in the official capacity of a former Minister of Foreign Affairs.").

Second, this part will analyze Judge Van den Wyngaert's dissenting opinion in *Congo*, maintaining that the majority misstated the status of *both* functional and personal immunity in customary international law. Highlighting the absence of *opinio juris* concerning incumbent foreign ministers' immunity from core crimes, this part will postulate that foreign ministers should never receive immunity from the prosecution of core crimes under customary international law, even while those ministers are in office.

A. *The ICJ's Misjudgment of Functional Versus Personal Immunity in* Congo v. Belgium

On April 11, 2000, Judge Damien Vandermeersch of the Brussels court issued an international arrest warrant for Mr. Abdulaye Yerodia Ndombasi (Yerodia), who was at that time the Minister of Foreign Affairs for the Democratic Republic of Congo (DRC).[17] The warrant accused Yerodia of crimes against humanity in violation of the 1949 Geneva Conventions, for allegedly inciting the massacre of Tutsi residents in Kinshasa in 1998.[18] In its application to the ICJ, the DRC claimed that Yerodia, as the incumbent Minister of Foreign Affairs, enjoyed immunity before all foreign courts.[19] Furthermore, it alleged that Belgium's imposition of universal jurisdiction over acts committed in the sovereign territory of another state constituted a violation of sovereignty under customary international law.[20] However, by the time of the final submissions to the court, the DRC only invoked the defense of the absolute inviolability of foreign ministers.[21]

Interestingly, the Court noted that neither party cited to any specific authority concerning the immunity granted to foreign ministers. Both parties referred to the New York Convention on Special Missions of 8 December 1969, in which Article 21 provides:

> The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law.[22]

However, as neither Belgium nor the DRC was a party to the above Convention, the ICJ relied on customary international law and a functional understanding of the duties of a foreign minister to support its holding.[23] Among the duties of a foreign minister, the Court emphasized the full powers granted to a foreign minister to act on behalf of the state, the necessity of travel abroad, and the binding

17. Pieter H.F. Bekker, *World Court Orders Belgium to Cancel an Arrest Warrant Issued Against the Congolese Foreign Minister*, AM. SOC'Y OF INT'L L., Feb. 2002, at 1, *available at* http://www.asil.org/insights/insigh82.htm.

18. *Congo v. Belgium*, at para. 15.

19. *Id.* at para. 12.

20. *Id.*

21. *Id.* at para. 45.

22. *Id.* at para. 52.

23. *Id.* at paras. 52-53.

nature of his or her decisions.[24] Ultimately, it found that a foreign minister "occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State."[25] Correspondingly, the Court held that "*throughout the duration of his or her office,* he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability."[26]

This definition of the immunity afforded to an incumbent foreign minister adheres to the definition of personal immunity, or *ratione personae*, present in customary international law. As Cassese notes, personal immunity is founded on the notion that a head of state or foreign minister must be immune from foreign jurisdiction over *any* activity, in order to protect against "foreign states either infringing sovereign prerogatives of states or interfering with the official functions of foreign state agent[s] under the pretext of dealing with an exclusively private act."[27] As the ICJ reasoned, the role of high state officials in international relations requires this total inviolability while officials maintain their governmental position.[28]

However, a crucial aspect of personal immunity is that it does not render the official permanently immune from criminal proceedings; rather, it guarantees immunity only as long as the official retains his or her position in government.[29] Personal immunity, therefore, is a *procedural* law that (i) protects any act carried out by a state agent while in office or before taking office; (ii) is afforded only to those high officials who represent the state in international relations; and (iii) comes to an end at the termination of the official position.[30]

In contrast to personal immunity, functional immunity, or *ratione materiae,* is a matter of *substantive* law rendering state officials permanently unaccountable to other states for acts that fall within his or her official capacity.[31] Instead, under functional immunity, official acts are directly attributable to the state itself and thus cannot give rise to individual criminal responsibility.[32] As Cassese points out, the substantive nature of functional immunity means that a state official's violation of national or international law does not negate the violation. It means only that individual liability does not attach.[33] And because no individual liability ever arises for these official acts, at the termination of a state agent's position, that agent bears no personal criminal or civil liability.[34]

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24. *Id.*
25. *Id.* at para. 53.
26. *Id.* at para. 54 (emphasis added).
27. Cassese, *supra* note 9, at 862.
28. *Congo v. Belgium*, at para. 54.
29. Cassese, *supra* note 9, at 862.
30. *Id.* at 863-64.
31. *Id.* at 862.
32. *See* Zappalá, *supra* note 8, at 598 ("[A] public official cannot be held accountable for acts performed in the exercise of an official capacity, as these are to be referred to the state itself.").
33. Cassese, *supra* note 9, at 863.
34. *Id.* For an example of the distinct definitions of functional and personal immunity applied to diplomatic agents, the Vienna Convention of 1961 states the following:

> [W]hen the functions of a person enjoying the privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when

The critical difference between functional and personal immunity in *Congo* rests upon the distinction between official versus private acts. Whereas personal immunity temporarily protects the agent for all acts, official or private, functional immunity is limited to those acts carried out on behalf of the state.[35] When understood as a matter of substantive law, by which individual acts are attributed to the state, functional immunity should be limited to those acts that are actually committed on behalf of the state. There is no basis in international customary law to impute the private actions of individuals to the state. Likewise, when personal immunity is understood as a provisional, procedural immunity intended to protect an official's position within the sovereign structure, it should dissolve at the moment the official leaves that position. As an agent's private actions are not attributed to the state, personal immunity attaches to the official position itself, not the individual.

Throughout most of its discussion, the *Congo* Court referred to the immunity enjoyed by incumbent foreign ministers solely in terms of personal immunity. For instance, it asserted that *all* of Yerodia's acts were immune,

> regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an "official" visit or a "private" visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an "official" capacity or a "private" capacity.[36]

By failing to distinguish between private and official acts, the court reinforced that its application of immunity was personal rather than functional. This finding should, under customary international law, lead to the conclusion that the immunity evaporated at the moment the minister left office.[37] In apparent support of this conclusion, the court held that jurisdictional immunity was "procedural in nature," and hence could not exonerate an official from all criminal responsibility.[38] This clear categorization of a foreign minister's immunity as procedural (and thus personal), can be paired with the holding that customary international law provides no exception to the rule that *incumbent* foreign ministers enjoy immunity for all acts done before or during their tenure. These two statements together would support a finding that *former* foreign ministers do not enjoy that same immunity.[39] Personal immunity, therefore, must dissolve at the moment the foreign minister leaves office.

> he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 39, 23 U.S.T. 3227, 3245, 500 U.N.T.S. 95, 118.

35. *See* Cassese, *supra* note 9, at 863.

36. *Congo v. Belgium*, at para. 55.

37. Cassese, *supra* note 9, at 864.

38. *Congo v. Belgium*, at para. 60.

39. *Id.* at para. 58. Note that the question posed to the court became whether a former minister of foreign affairs enjoyed immunity from alleged crimes against humanity in a foreign court. *See* Bekker, *supra* note 17, at 2.

The Court subsequently inferred, however, that the immunities granted to incumbent foreign ministers do not represent a bar to criminal prosecution in four different circumstances, the third of which significantly undermines the court's initial rationale:

> [T]he immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances. [The court mentions two other exceptions that will be covered later in this paper.]
>
> Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, *as well as in respect of acts committed during that period of office in a private capacity.*[40]

By limiting the liability of former foreign ministers for their crimes against humanity to only those acts committed outside of their tenure in office, or to acts committed "in a private capacity," the Court recognized an unlimited immunity for all acts committed by foreign ministers in their official capacity. This is a surprising statement considering that the Court's sole rationale for granting this type of immunity is the protection of high state officials' ability to perform their functions.[41] A former foreign minister clearly does not require this protection, however, because his or her official functions have already ceased.

The *Congo* Court thus conflated the two distinct categories of immunity regarding international crimes. The Court merged personal immunity, which covers all acts (official and private) while the minister is in office, with functional immunity, which negates individual liability and instead attributes all official acts to the state itself. The result: former foreign ministers retain no liability for international core crimes, provided they can show the acts were committed as part of their official duties while in office.

This conclusion has a potentially devastating effect on the advances made over the last fifty years in international humanitarian law. As Cassese points out, international core crimes—genocide, crimes against humanity, and war crimes—are almost never committed "in a private capacity."[42] Rather, the very nature of these crimes generally requires individual perpetrators to utilize military or governmental authority to achieve their objectives.[43] It is, in fact, the abuse of their official status that enables such officials to order, instigate, or tolerate crimes against humanity or grave breaches of the Geneva Convention.[44] The ICJ's limited exception to the otherwise absolute immunity is therefore a *de*

40. *Congo v. Belgium*, at para. 61 (emphasis added).
41. *Id.* at para. 55.
42. Cassese, *supra* note 9, at 868.
43. *Id.*
44. *Id.*

facto empty set: international crimes committed by incumbent foreign ministers in their private capacity simply do not occur with any frequency.[45]

The empty exception laid out by the ICJ to the immunity granted to foreign ministers thus expands both functional and personal immunity far beyond what is allowed under customary international law. As Marina Spinedi argues, the ICJ ruling offers an "either/or" response to the problem of attribution: either (1) a former foreign minister's acts are considered official acts and are attributed directly to the state, or (2) they are considered private acts, and the state is not accountable for the ministers' crimes.[46] This result contradicts the Court's reasoning that foreign ministers' jurisdictional immunity is procedural in nature and does not mean impunity for the perpetrator of serious international crimes.[47] It also defies customary international law concerning the immunity granted to foreign ministers in general.

B. The Absence of Customary International Law Concerning Immunity to Incumbent Foreign Ministers

In his dissenting opinion, Judge Van den Wyngaert rejects the majority's opinion on the broadest grounds. He argues that neither personal *nor* functional immunity protects foreign ministers from core crimes under customary international law. This line of reasoning can be broken into two related premises: (1) there is no customary rule of international law granting immunity to foreign ministers, and (2) the laws granting immunity to heads of state cannot be attributed to foreign ministers.

(1) Customary International Law

In one of its leading precedents, *North Sea Continental Shelf*, the ICJ clearly laid out the criteria for establishing customary international law:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be 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 need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. 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. There are many international acts, e.g., in the field of ceremonial 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.[48]

As both Judges Van den Wyngaert and Al-Khasawneh argue in their dissenting opinions in *Congo*, no such clearly established customary law exists for granting

45. Interestingly, Yerodia made his public remarks inciting racial violence in 1998 before he actually took the position of foreign minister in the DRC—under the ICJ's rationale, therefore, his acts would have been considered "private." *See* Congo v. Belgium, at para 67.

46. Spinedi, *supra* note 15, at 899.

47. *Congo v. Belgium*, at para. 60.

48. North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.) 1969 I.C.J. 3, 44 para. 77 (Feb. 20); *see also* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14, 97-98, para. 184 (June 27).

immunity in foreign jurisdictions to foreign ministers.[49] In fact, Judge Al-Khasawneh points to a "total absence of precedents with regard to the immunities of Foreign Ministers from criminal process."[50] Only one such case was brought to the attention of the Court, and it involved a foreign minister on an official visit.[51] Nevertheless, even if such a case were considered factually analogous to the circumstances in *Congo*, a single case certainly does not rise to the level of state practice and *opinio juris* described in *Continental Shelf*.

Instead of a rule of customary international law, the Special Rapporteur on Jurisdictional Immunities of States and Their Property maintains that the immunities of foreign ministers are granted in accordance with interstate comity.[52] Judge Van den Wyngaert suggests a greater range of factors than merely comity, "including courtesy, political considerations, practical concerns, and a lack of extraterritorial criminal jurisdiction."[53] The immunity granted to foreign ministers appears to be granted more out of non-binding considerations of mutual respect, and not by positive instances in which states act under the auspices of an international obligation.

To claim that these comity considerations amount to customary international law would contravene the holding of the Permanent Court of International Justice in the famous *Lotus* case,[54] which rejected the notion that mere abstentions of governmental actions rise to the level of being obligatory customs of international law. In *Lotus*, the Court rejected the French government's submission that it was a violation of customary international law for Turkey to institute criminal proceedings based on offences by foreigners abroad; rather, the Court held:

> Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom.[55]

A conscious obligation, *opinio juris*, cannot be established merely through abstention. In addition, while international conventions have crystallized the immunities granted to foreign heads of state and diplomatic representatives, the immunities granted to foreign ministers have no such direct link to a conscious

49. *Congo v. Belgium*, at para. 13 (dissenting opinion of Judge Van den Wyngaert); *id.* at para. 11 (dissenting opinion of Judge Al-Khasawneh).

50. *Id.* at para. 1 (dissenting opinion of Judge Al-Khasawneh).

51. *Id.* at para. 13 (dissenting opinion of Judge van den Wyngaert) (citing Chong Boon Kim v. Kim Yong Shik (Haw. Cir. Ct. Sept. 9, 1963), *summarized in* 58 AM. J. INT'L L. 186-87 (1964), as the only case that has been brought to the court's attention).

52. Report on the Draft Articles on the Jurisdictional Immunities of States and Their Property, U.N. Doc. A/46/10, *reprinted in* [1991] Y.B. INT'L L. COMM., Vol. II (2), at 17, *cited in Congo v. Belgium*, at para. 1 (dissenting opinion of Judge Al-Khasawneh).

53. *Id.* at para. 13 (dissenting opinion of Judge Van den Wyngaert).

54. S.S. Lotus Case (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

55. *Id.*

obligation.[56] What Judge Van den Wyngaert calls a "negative practice"[57] may exist, whereby states refrain from exercising jurisdiction over foreign ministers; however, customary international law provides no clear rule governing that abstention.[58]

(2) The Foreign Minister/Head of State Analogy

Faced with this "negative practice," the cause of which could be any number of non-obligatory considerations, the majority in *Congo* resorted to a flawed analogy between foreign ministers and heads of state. Citing the New York Convention on Special Missions of 8 December 1969, of which neither the DRC nor Belgium is a member, the Court noted,

> The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law.[59]

The Court drew this analogy between the immunities given to heads of state and the immunities afforded foreign ministers through the imperfect notion of the functional similarities between the two roles: "a Minister of Foreign Affairs . . . occupies a position such that, like the Head of State . . . he or she is recognized under international law as representative of the State solely by virtue of his or her office."[60] In the New York Convention, however, the parallel between foreign ministers and heads of state is problematic: foreign ministers are granted immunity only in the limited circumstance of an official visit, whereas heads of state enjoy full immunity during their tenure.[61] If, as the ICJ claims, the two positions were alike, there would be no reason to distinguish between the types of immunity granted to each respective office.

Customary international law recognizes no such equivalence between heads of state and foreign ministers. As Sir Arthur Watts notes, there is a clear rationale for distinguishing between the role of foreign minister and that of head of state:

> Heads of governments and foreign ministers, although senior and important figures, do not symbolize or personify their States in the way that Heads of States do. Accordingly, they do not enjoy in international law any entitlement to special treatment by virtue of qualities of sovereignty or majesty attaching to them personally.[62]

Foreign ministers do represent the state in important aspects of international relations, but they do not embody the state in the same manner as a head of state.

56. Diplomatic immunity, for example, is defined in the 1961 Vienna Convention. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 96.

57. *Congo v. Belgium*, at para. 13 (dissenting opinion of Judge Van den Wyngaert).

58. *See id.* at para. 52.

59. *Id.* at para. 52.

60. *Id.* at para. 53.

61. *See id.* at para. 52.

62. A. Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, 247 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 102-03 (1994).

Hence, the principle of sovereignty does not inhere to foreign ministers. Consequently, the immunities granted to such ministers reflect international standards of courtesy and respect, not adherence to any positive obligation.[63] As such, no reason exists for making "une analogie pure et simple" between heads of state and foreign ministers.[64] Furthermore, the New York Convention statement cited above simply postulates that foreign ministers should be given immunities already extant in international law—as this discussion has established, those immunities are not necessarily congruent with the immunities given to a head of state. For example, several scholars maintain that "members of a Government have not the exceptional position of Heads of States" and therefore do not merit the same treatment in the realm of foreign relations.[65] By failing to establish a clear analogy to heads of state, the majority in *Congo* was left without any custom of international law granting immunity to foreign ministers. As noted above, immunities for foreign ministers are often provided on the basis of comity, and do not rise to the level of customary international law under the *Continental Shelf* and *Nicaragua* criteria.[66] This absence of custom undermines the *Congo* Court's entire rationale, which presumed blanket immunity for foreign ministers, and then searched for exceptions to that general rule.[67] Rather than lay out exceptions to a rule, the Court should have taken a more rigorous approach by establishing custom first.

Accordingly, the following part will discuss customary international law concerning the immunity of foreign ministers accused of committing serious violations of international law. Relevant rules have arisen in several different fora, including domestic courts, ad hoc tribunals established by the United Nations, and the International Criminal Court. The following section will consider each of these in turn.

II.
CUSTOMARY INTERNATIONAL LAW CONCERNING IMMUNITY FOR CORE CRIMES

This part will focus on the establishment of customary international law concerning the immunities provided to foreign ministers accused of core crimes. It will discuss the findings of domestic courts, *ad hoc* tribunals, and the ICC. Examining these findings as a whole, this part will argue that a custom of inter-

63. *See id.* at 109.

64. J. Verhoeven, *L'immunité de juridiction et d'exécution des chefs d'Etat et anciens chefs d'Etat*, REPORT OF THE 13TH COMMISSION OF THE INSTITUT DE DROIT INTERNATIONAL, 46, para. 18, *cited in Congo v. Belgium*, at para. 14 (dissenting opinion by Judge Van den Wyngaert).

65. LAWRENCE OPPENHEIM & HERSCHT LAUTERPACHT, INTERNATIONAL LAW, A TREATISE, VOL. I, 358 (1955); Judge Van den Wyngaert also cites to the following jurists in support of this rule: ARRIGO CAVAGLIERI, CORSO DI DIRITTO INTERNAZIONALE 321-22 (2d ed. 1934); PHILLIPE CAHIER, LE DROIT DIPLOMATIQUE CONTEMPORAIN 359-60 (1962); BHAGEVATULA MURTY, THE INTERNATIONAL LAW OF DIPLOMACY: THE DIPLOMATIC INSTRUMENT AND WORLD PUBLIC ORDER 333-34 (1989); JEAN SALMON, MANUEL DE DROIT DIPLOMATIQUE 539 (1994).

66. *See supra* part I.B.1.

67. *See Congo v. Belgium*, at paras. 58, 61.

national law does in fact exist: one that does not grant immunity to a foreign minister accused of a core crime.

A. *Domestic Courts*

National case law worldwide provides a clear customary rule which removes functional immunity from all former state agents accused of committing international crimes while in office. Under this rule, state agents accused of war crimes, crimes against humanity, or genocide, may not defend these charges on the ground that they were performing their official duties at the time the crime occurred.[68]

The Israeli Supreme Court in *Eichmann* made one of the foundational holdings establishing this rule.[69] Adolf Eichmann had been a member of the Nazi police force during WWII, and was later charged with crimes against humanity after being abducted and brought to Israel. The court held that crimes against humanity were "banned by the law of nations and entail[ed] individual criminal responsibility."[70] In rejecting Eichmann's defense that his acts should be attributed solely to the state of Germany, the court stated,

> Of such odious acts it must be said that in point of international law they are completely outside the "sovereign" jurisdiction of the State that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them and cannot shelter behind the official character of their task or mission.[71]

While this statement was one of the first to clearly establish individual criminal responsibility for core crimes, it relied upon previous scholarly writings, which adopted this rule as already part of customary international law. The court, in fact, quoted Lauterpacht as follows: "The fact that the offender acts on behalf of the State is irrelevant. He is bound personally by rules of international law whether he is acting in his personal capacity, in order to satisfy private greed or lust, or as an organ of the State."[72] Admittedly, this holding does not bear directly on the position of foreign ministers; however, as it breaks down immunity for any state-actor who commits a core crime, it must be assumed that foreign ministers are included as well.[73]

Similar to *Eichmann,* the following cases in other domestic courts affirm the customary rule denying immunity to officials accused of core crimes: *Barbie* in France,[74] *Kappler* in Italy,[75] *Rauter* in the Netherlands,[76] *Pinochet* in the

68. Cassese, *supra* note 9, at 870.

69. Attorney-General for Israel v. Eichmann, 36 I.L.R. 277, 277-342, (Isr. S. Ct. 1962).

70. *Id.* at 287.

71. *Id.* at 310.

72. *Id.*

73. *See also In re* Rauter, Special Court of Cassation, The Hague, 1949 ANN. DIG. 526-48 (1949) (Dutch court finding the Supreme Chief of the German S.S. troops liable for crimes against humanity and war crimes).

74. Féderation National des Déportées et Internés Résistants et Patriots v. Barbie, 78 I.L.R. 125 (French Cour de Cassation 1985) (denying immunity to defendant).

75. *In re* Kappler, Military Tribunal of Rome, 1948 ANN. DIG. 471, 472 (1948) (denying immunity for war crimes and genocide).

United Kingdom,[77] *Fidel Castro* in Spain,[78] and *Filartiga* in the United States.[79] Furthermore, the U.N. Transitional Administration in East Timor unambiguously denies functional immunity to any person accused of committing core crimes.[80]

One of the most important and recent benchmarks in the establishment of this rule of customary international law arose in the famous *Ghaddafi* case before France's highest court of ordinary jurisdiction, the Cour de Cassation, in 2001. Mouammar Ghaddafi, considered the *de facto* head of state of Libya, was accused of bombing a commercial airline in 1989, killing 156 passengers.[81] The Court's decision, which ultimately granted Ghaddafi immunity, validated exceptions to the general rule of absolute immunity for high state officials from criminal prosecution. The Court held that these exceptions did not apply: "at this stage of development of international customary law, the crime charged [terrorism], no matter how serious, does not fall within the exceptions to the principle of immunity from jurisdiction of foreign Heads of State in office."[82] According to this statement, exceptions exist in customary international law, specifically for acts such as core crimes that cannot be considered part of the legitimate execution of official functions.[83] The fact that terrorism had not, at the time of *Ghaddafi*, reached the classification as a core crime confirms the Court's recognition that, if it had, Ghaddafi would not have been able to raise immunity as a defense.

In *Pinochet*, the House of Lords articulated the rationale behind the core crimes exception to the immunity doctrine. Lord Browne-Wilkinson noted that, if immunity *ratione materiae* (functional immunity) were granted to former state officials for torture, "the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention—to provide a system under which there is no safe haven for torturers—will have been frustrated."[84] Although this portion of the holding was limited to the torture committed under the Pinochet regime, four of the seven Law Lords explicitly considered this exception to functional immunity within the broader context of core crimes, and not only in the limited context of torture.[85] Lord Hope maintained, "the obligations which were

76. Trial Of Hans Albin Rauter, 14 L. REPS. OF TRAILS OF WAR CRIM. 89 (1949) (rejecting immunity as a defense against war crimes and genocide).

77. Regina v. Bow Street Magistrate, *Ex parte* Pinochet, [1999] 38 I.L.M. 581, 585 (H.L.).

78. Cassese, *supra* note 9, at 60-61 n.21.

79. Filartiga v. Peña-Irala, 630 F.2d 876 (1980).

80. UNITED NATIONS TRANSITIONAL ADMINISTRATION IN EAST TIMOR; ON THE ESTABLISHMENT OF PANELS WITH EXCLUSIVE JURISDICTION OVER SERIOUS CRIMINAL OFFENSES REGULATION, U.N. Doc. UNTAET/REG/2000/15 (2000), *available at* http://www.un.org/peace/et imor/untaetR/Reg0015E.pdf.

81. Zappalá, *supra* note 8, at 595 (citing *Arrêt* of the Cour de Cassation, 13 March 2001, No. 1414, at 1).

82. *Id.* at 601 (citing *Arrêt* of the Cour de Cassation, at 3).

83. *See* Zappalá, *supra* note 8, at 601 (linking the court's holding specifically to exceptions to functional immunity).

84. *Pinochet*, 38 I.L.M. at 595 (Lord Browne-Wilkinson, J.).

85. *See* Wirth, *Immunities, Related Problems, supra* note 2, at 435.

recognised by *customary international law* in the case of such *serious international crimes* . . . are so strong as to override any objection by it on the ground of immunity ratione materiae."[86] The argument follows a simple logic: international law cannot bestow immunity from prosecution for acts that the same international law has universally criminalized.[87]

B. International Courts and Tribunals

International courts have also recognized the exception to immunity for core crimes. The first explicit formulation of this rule arose in the Nuremberg Principles in 1950.[88] Principle III reads, "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law."[89] The attribution of individual acts to the state—which forms the entire framework for immunity *ratione materiae*—does not alleviate individual responsibility when core crimes are committed. The notion of individual versus state responsibility is at stake in this principle. To illustrate, Arthur Watts writes, "For international conduct which is so serious as to be tainted with criminality to be regarded as attributable only to the impersonal State and not to the individuals who ordered or perpetuated it is both unrealistic and offensive to common notions of justice."[90] Rather than consider which type of immunity arises in a given situation, Watts' approach assumes individual liability from the outset of an investigation and only then considers the possibility of attendant state liability.

The International Criminal Tribunal for the former Yugoslavia (ICTY) echoed this rule, while similarly focusing on the separate existence of individual and state responsibility. In *Prosecutor v. Blaskic*, the tribunal held, "[T]hose responsible for [war crimes, crimes against humanity, and genocide] cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity."[91] While this is an unequivocal abrogation of immunity for core crime allegations, it is important to note that the UN Security Council maintains the right to disregard immunities under international law in order to protect international peace and security. Therefore, the establishment of the international criminal tribunals in Rwanda and the former Yugoslavia, and the corresponding rules of those courts, do not necessarily constitute state practice or *opinio juris*.[92]

86. Wirth, *Immunities, Related Problems*, *supra* note 2, at 435-36 (arguing that the phrase "serious international crimes" by Lord Hope is an indication that all core crimes be included in the exception to functional immunity).

87. *See* Andrea Bianchi, *Immunity Versus Human Rights: The* Pinochet *Case*, 10 EURO. J. INT'L LAW 237, 240 (1999).

88. U.N. GAOR, 5th Sess., Supp. No. 12, U.N. Doc. A/1316 (1950) [hereinafter Nuremberg Principles].

89. *Id.*

90. Watts, *supra* note 62, at 82.

91. Prosecutor v. Blaskic, Case No. IT-95-14, para. 41 (Int'l Crim. Trib. for former Yugoslavia, Oct. 29, 1997) (July 18, 1997) [hereinafter *Blaskic Judgment*].

92. Wirth, *Immunities, Related Problems*, *supra* note 2, at 442.

However, under Article 38(1)(d) of the ICJ Statute, the Court must take into account the "judicial decisions and the teachings of the most highly qualified publicists of the various nations" as a means for making its decisions.[93] The international criminal tribunals clearly fall into this category. Therefore, the *Blaskic* decision should be considered as evidence of the status of international law.

Likewise, the most progressive statement about international criminal law, the Rome Statute of the ICC, expressly abrogates all immunities for persons accused of all international crimes, including core crimes. Article 27(1) of the Statute states:

> 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.[94]

Article 27 perhaps goes beyond current customary international law—which as previously noted, excludes core crimes from the functional immunity of foreign ministers—and recognizes "no case" for immunity from core crimes. For example, *Pinochet* only established the lack of functional immunity for state officials; personal immunity—which is also waived under the Rome Statute—was not contested. Interestingly, the waiver of immunity in the Rome Statute only applies to state parties, leaving personal immunities of the officials of non-state parties in effect.[95] The ICC thus operates as a testing ground for customary international law: states that have signed and ratified the Rome Statute have apparently agreed with the rule that no immunity—functional or personal—can be raised to defend against accusations of core crimes of genocide, war crimes, and crimes against humanity. This treatment of immunity and core crimes accords with the trend of international humanitarian law by abrogating all immunities. This trend will be discussed in the next part.

C. Conclusion: Individual Responsibility Arises out of Core Crimes

Judge Van den Wyngaert argues that the rule excluding those accused of committing core crimes from the umbrella of immunity must necessarily apply to both functional and personal immunities granted to foreign ministers.[96] In support of this argument, he cites the International Law Commission's (ILC) 1996 Draft Code of Crimes against the Peace and Security of Mankind, which states:

> The absence of any procedural [i.e. personal] immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive [i.e. functional] immunity or defence. It would be

93. Statute of the International Court of Justice, June 26, 1945, art. 38(1)(d), 59 Stat. 1055, 1060 (entered into force October 24, 1945) [hereinafter ICJ Statute].

94. Rome Statute of the International Criminal Court, art. 27(1), U.N. Doc. A/ CONF.183/9 (1998), *reprinted in* 37 I.L.M. 999, 1017 (1998) [herinafter Rome Statute].

95. *See* Wirth, *Immunities, Related Problems*, *supra* note 2, at 453.

96. *Congo v. Belgium*, at para. 31 (dissenting opinion of Judge Van den Wyngaert).

> paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility.[97]

Rather than focus on which type of immunity applies, the ILC states here that invoking *either* functional or personal immunity in the case of core crimes is paradoxical, because excluding one type of immunity from core crimes would be pointless if state officials could use the other to escape criminal liability. This understanding of core crimes adheres to the original formulation of the immunity rules by the Nuremberg Tribunal and the subsequent findings of national and international courts discussed above. Essentially, this recognizes what Micaela Frulli has termed "the irrelevance of official capacity," which "has always been a complement of the rule establishing individual criminal responsibility for [core] crimes."[98]

The final part will discuss the implications of this conclusion for core crime trials of foreign ministers and their respective states. Basing the discussion on the rule established in this part—that there is no immunity afforded to foreign ministers accused of core crimes—it will argue that the "either/or" holding in *Congo* should have been a "both/and" proposition: both individual *and* state responsibility are triggered by crimes against humanity.[99] The question thus becomes: What is the appropriate forum in which to prosecute a crime that implicates both a state and an individual?

III.
CRIMES AGAINST HUMANITY GENERATE BOTH STATE AND INDIVIDUAL RESPONSIBILITY

The preceding part established the customary rule of international law, which requires individual liability for foreign ministers accused of crimes against humanity. This part will more specifically examine the definition of crimes against humanity in current international legal jurisprudence. From that definition, it will argue that the commission of crimes against humanity necessarily generates state responsibility. This part concludes that the majority of the *Congo* Court failed to recognize that both individual and state responsibility inhere to each crime.

A. State Responsibility in the Definition of Crimes Against Humanity

The first legal formulation of the concept of crimes against humanity in the Nuremberg Tribunal explicitly limited the offenses to instances where "such acts are done or such persecutions are carried on in execution of or in connection

97. *Draft Code of Crimes Against the Peace and Security of Mankind, Report of the International Law Commission on the work of its forty-eighth session*, 6 May- 26 July 1996, GAOR, 51st Sess., Supp. No. 10, at 41, U.N. Doc. A/51/10 (1996), *cited in Congo v. Belgium*, at para. 32 (dissenting opinion of Judge Van den Wyngaert).

98. Micaela Frulli, *The ICJ Judgement on the* Congo v. Belgium *Case (14 February 2002): a Cautious Stand on Immunity from Prosecution for International Crimes*, 3 GERMAN L. J. 1, 6 (March 2002), *available at* http://www.germanlawjournal.com.

99. For a discussion of the "either/or" notion, see Spinedi, *supra* note 15, at 899.

with any crime against peace or any war crime."[100] This provision was originally designed as an accessory to genocide laws, a catch-all that was not bound to persecutions of particular groups.[101] While the United Nations War Crimes Commission of 1943 (UNWCC) broadly allowed for the possibility that crimes against humanity could occur in peacetime, the temporal jurisdiction restrictions of the Nuremberg Tribunal to crimes committed during WWII effectively rendered this provision moot.[102]

The requirements of Article 6(c) of the Nuremberg Charter formed a nexus between crimes against humanity and war crimes, effectively functioning as a "state action requirement."[103] Crimes against peace or war crimes were defined as those perpetrated by military officials, and were, therefore carried out on behalf of the state. Crimes against humanity were included in this definition and thus were also originally considered to be associated with the state.[104]

The ICTY attenuated this nexus between war crimes and crimes against humanity, by requiring only a showing that the crime against humanity be committed "in armed conflict, whether international or internal in character. . . ."[105] Nevertheless, the ICTY in its 1997 *Tadic* decision confirmed that the link to military and governmental entities was still foundational to the crime, by referring to "entities exercising *de facto* control over a particular territory but without international recognition of formal status of a *de jure* state, or by a terrorist group or organization."[106]

The civil war in Rwanda led to a fundamental weakening of the requirement of state action, primarily because uncontrolled civilians committed very large portions of the atrocities and did so in areas outside the civil war zones. In response, the International Criminal Tribunal in Rwanda (ICTR) Statute defines a crime against humanity simply as "a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds."[107]

Likewise, the Rome Statute adopted similar language, but eliminated the requirement that the attack be on any particular ground. To illustrate, the Rome

100. Nuremberg Principles, *supra* note 88, Principle VI (c).

101. MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES 462 (2002); *see also Second Report by J. Spiropoulos on the Draft Code of Offenses Against the Peace and Security of Mankind*, U.N. Doc. A/CN.4/44 (12 April 1951), *reprinted in* [1951] 2 Y.B. Int'l L. Comm'n 43, U.N. Doc. A/CN.4/SER.A/1951/Add.1.

102. Agreement for the Prosecution and Punishment of the Major War Criminal of the European Axis, and Charter of the International Military Tribunal, 82 U.N.T.S. 280, Part II, art. 6, entered into force Aug. 8, 1945 (limiting jurisdiction to "persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes").

103. Nuremberg Principles, *supra* note 87, Principle VI (c).

104. *Id.*

105. Statute of the International Tribunal for the former Yugoslavia, annexed to the Report of the Secretary-General pursuant to paragraph 2 of Security Council Res. 808 (1993), art. 5, U.N. Doc. S/25704, U.N. SCOR, 48th Year, Supp. for April- June 1993, at 117 (1995).

106. Prosecutor v. Tadic, Opinion and Judgment, Case No. IT-94-1-T para. 654 (May 7, 1991) *available at* http://www.un.org/icty/970507jt.htm [hereinafter *Tadic Judgment*].

107. Statute of the International Tribunal for Rwanda, annexed to S.C. Res. 955 (1994), art. 3, U.N. SCOR, 49th Year, Res. & Dec. of the Security Council 1994, U.N. Doc. S/INF/50 (1994).

Statute defines a crime against humanity as an act "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[108] The statute further defines such an attack as "a course of conduct involving multiple commission of acts . . . in furtherance of a State or organizational policy."[109] Many commentators have noted that the "course of conduct" provision in the Rome Statute might reintroduce the "systematic" element into the crime.[110] Specifically, a course of conduct could be interpreted to mean furthered by state institutions, or developed as part of an organizational policy.[111] Consequently, this interpretation would result in the requirement that the attack be both widespread *and* systematic, whereas the phrase was explicitly drafted with the word "or" in the Rome Statute.[112]

Ad hoc tribunals have similarly blurred the lines between the systematic criterion and the requirement of an institutional policy. For instance, in *Tadic*, *Akayesu*, and *Ruzindana*, the Trial Chambers of the ICTY and ICTR established the systematic requirement by showing a policy basis for the crime.[113] In fact, the *Kordic* Trial Chamber explicitly overlapped the systematic and policy elements, holding, "[T]he existence of a plan or a policy should better be regarded as indicative of the systematic character of offences charged as crimes against humanity."[114] In summary, the approaches of the *ad hoc* tribunals deduce the existence of a "plan" or "policy" from the widespread or systematic character of an attack, and vice versa.[115]

The unique formulation of crimes against humanity can be deduced by comparing it to the crime of genocide. Genocide is an intent-based crime, in which a single person who kills a member of a protected class with the intent to destroy that class partially or entirely can be found guilty.[116] That same person, however, could *not* be convicted of a crime against humanity under the current definition. To prove a crime against humanity, the court must determine if a person's acts fall within the policy of a state or other organizational body, a determination that can be made by applying the widespread and/or systematic test. As Machteld Boot notes, repeated commissions of acts alone do not satisfy this standard; in fact, there is no international standard concerning which acts rise to the level of crimes against humanity.[117]

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108. Rome Statute, *supra* note 94, art. 7(1).

109. *Id.*

110. D. Robinson, *Defining Crimes Against Humanity at the Rome Conference*, 93 AM. J. INT'L L. 43, 43-57 (1999); *see also* BOOT, *supra* note 99, at 480-81.

111. *See generally* Robinson, *supra* note 108.

112. *See* Rome Statute, *supra* note 94, art. 7(1).

113. *Tadic Judgment*, *supra* note 106, at para. 648; Prosecutor v. Akayesu, Case No. ICTR 96-4-T, para. 580 (Sept. 2, 1998); Prosecutor v. Kayishema, Case No. ICTR-95-1-T, para. 123 (May 21, 1999).

114. Prosecutor v. Kordic, Case No. IT-95-14/2-T, para 182 (Feb. 26, 2001); *see also Blaskic Judgment*, *supra* note 91, at para. 203 (holding that the systematic element could be established by "the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan").

115. *See* BOOT, *supra* note 101, at 482.

116. *See* Rome Statute, *supra* note 94, art. 6.

117. *See* BOOT, *supra* note 101, at 478.

While the nexus between the actions of an individual and the state that he or she represents has diminished over time, the above discussion confirms the requirement that some relationship between an actor and a state or political organization must be shown for actions to rise to the level of a crime against humanity. By treating the "systematic" and "policy" elements as interchangeable, the court actually operates to expand state liability which results from any widespread or systematic crimes within its borders. This conclusion accords with the common conception of a crime against humanity, where an abuse of official rank allows such widespread harm to be caused. As Cassesse argues, it is "hardly imaginable that [an official] may perpetrate or participate in the perpetration of an international crime 'in a private capacity.'"[118]

International conventions corroborate this notion of the dual liability of both the individual and the state in the case of core crimes. Under the International Military Tribunal Charter, the defenses of act of state, superior command, and command of law were abolished for war crimes and crimes against humanity.[119] Previously, these defenses formed the primary obstacle to holding individuals responsible for acts committed during war, and their abolition firmly established the existence of individual criminal liability for these acts.[120] Subsequent conventions formalized the individual's duty to refrain from such crimes by imposing obligations on states to prevent the acts from being committed at the hands of their own officials.[121] The Genocide Convention, for example, created both state responsibility for a state's failure to prevent the crime of genocide *and* individual criminal liability by declaring genocide an international crime.[122] This same rule applies to crimes against humanity. In sum, states have a responsibility to prevent atrocities and failure to do so can result in both individual and state responsibility.[123]

These conventions validate the findings of the *ad hoc* tribunals and the ICC. Widespread or systematic atrocities within a state's borders implicate the state, either by its failure to prevent, or its active support of the crimes. The interchangeability of "systematic" and "policy" in the definition of a crime against humanity allows the liability of the state to be more easily demonstrated. The state is thus held responsible for widespread and/or systematic atrocities within its borders, without eliminating the individual culpability of the actors.

This state culpability for crimes against humanity illustrates how the *Congo* majority's "either/or" proposition is erroneous. Instead of attributing responsibility to either the foreign minister or the state, the Court should have reached a "both/and" conclusion. Core crimes committed by state officials do not attach

118. Cassese, *supra* note 9, at 868.

119. Steven R. Ratner, *New Democracies, Old Atrocities: an Inquiry in International Law*, 87 GEO. L.J. 707, 712 (1999).

120. *Id.* at 712-13.

121. *Id.*

122. Convention on the Prevention and the Punishment of the Crime of Genocide, Dec. 9, 1948, arts. I, VI, 78 U.N.T.S. 277, 280-82.

123. *See* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 141-43 (1997).

to either the state or the individual; in fact, the notions of "private" and "official" capacity are not present in such a manner that allows that attribution process to occur. Furthermore, the Court's flawed reasoning leads to *de facto* impunity for former foreign ministers because crimes against humanity will almost invariably occur as part of a foreign minister's official duties. The ICJ's exception, which allows immunity for those duties, goes far beyond the immunities allowed under customary international law.[124] According to Cassesse, there "coexist[s] state responsibility and individual criminal liability" for crimes against humanity.[125]

B. Is It a Forum Problem?

This article has criticized the *Congo* Court's rationale for granting immunity to a foreign minister accused of crimes against humanity. As demonstrated above, the Court's holding clearly contravened the custom of international law denying immunity for core crimes accusations. This section will conclude, however, by asking whether using the ICJ, a forum of limited jurisdiction, to decide *Congo*, actually caused this erroneous holding. In addressing this question, this section will compare the ICJ to U.S. domestic courts, which have tried many cases concerning foreign sovereign immunity. In particular, the Foreign Sovereign Immunities Act's (FSIA)[126] restricted grant of immunity will be compared to the rule of customary international law, discussed above, which abrogates immunity for those accused of core crimes. This comparison will determine that the ICJ was a proper tribunal in which to try cases such as *Congo*.

(1) The United States' Grant of Immunity to Foreign Sovereigns

The FSIA was enacted in 1976 and currently provides the "sole basis for obtaining jurisdiction over a foreign state in the courts of [the United States]."[127] While courts may find that jurisdiction exists under one of the several exceptions listed in the FSIA,[128] a foreign sovereign is otherwise granted immunity from federal jurisdiction.[129] The purpose of the FSIA is to codify the "restrictive theory" of sovereign immunity, which grants the foreign state immunity for public acts, but not for private ones.[130] This restrictive grant of immunity accords with the evolution of customary international law post *Schooner*

124. *See Congo v. Belgium*, at para. 34 (dissenting opinion of Judge Van den Wyngaert).

125. Cassese, *supra* note 9, at 864.

126. Pub. L. No. 94-583, 90 Stat. 2892 (codified as amended at 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-1611 (2000)).

127. Arg. Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989).

128. 28 U.S.C. § 1605(a) (1976) (listing exceptions to immunity, which include, *inter alia*, commercial activity, implied waiver, and the taking of property).

129. Princz v. F.R.G., 26 F.3d 1166, 1171 (1994).

130. Keith Sealing, *"State Sponsors of Terrorism" is a Question, Not an Answer: the Terrorism Amendment to the FSIA Makes Less Sense Now Than It Did Before 9/11*, 38 TEX. INT'L L.J. 119, 122 (2003).

Exchange, which by 1976, did not recognize absolute immunity where the state acted in a private capacity.[131]

An important aspect of the FSIA is its relationship with international custom and *jus cogens* norms. To the extent the international community recognizes certain serious crimes as non-derogable, the U.S. Constitution incorporates those violations into its federal law.[132] Therefore, a violation of *jus cogens* norms not only breaks international customary law, but also United States law.[133] Despite the fact that both the FSIA and customary international law maintain the same status as U.S. federal law, it is generally agreed that the FSIA "trumps" custom when actually adjudicating claims in U.S. courts.[134] This power is given to the FSIA under Article 1 of the U.S. Constitution, which grants Congress the power to limit the jurisdiction of state and federal courts.[135] Therefore, even violations of *jus cogens* norms can only be adjudicated in U.S. courts to the extent permitted under the FSIA.

The FSIA does not have a core crimes exception. Therefore, plaintiffs trying to bring claims for serious human rights violations—such as injuries sustained during the Holocaust—have consistently failed to find any other exception with which to pierce the general grant of immunity to foreign sovereigns.[136] These plaintiffs have argued that the first exception (implied waiver) should apply when a state is accused of *jus cogens* violations. However, federal courts require a higher standard of proof in these situations by showing that the foreign state *intended* to waive its immunity in the United States.[137] The implied waiver exception is thus insufficient to capture all core crime allegations brought to U.S. courts.

The most promising exception for the purposes of adjudicating serious human rights abuses was added to the FSIA in 1996, which states:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency. . . .[138]

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131. *See generally* Jeffrey Rabkin, *Universal Justice: the Role of Federal Courts in International Civil Litigation*, 95 COLUM. L. REV. 2120, 2132 (1995) (*Schooner Exchange* "explained that the American sovereign immunity doctrine followed what was then the common practice of nations.").

132. Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on* Princz v. Federal Republic of Germany, 16 MICH. J. INT'L L. 403, 407 (1995); U.S. CONST. art. III.

133. *See* Reimann, *supra* note 132, at 407.

134. *Id.*

135. *Id.* at 407-08.

136. *See Arg. Republic*, 488 U.S. at 443; *see also Princz*, 26 F.3d at 1176 (finding that no exceptions to the FSIA applied in the case of a Holocaust survivor).

137. *See, e.g.* Sampson v. F.R.G., 975 F. Supp 1108, 1116 (1997) (noting that "[a]n implied waiver requires that the foreign sovereign express a willingness to appear in Unites States courts").

138. 28 U.S.C. § 1605(a)(7).

Courts, however, can only utilize this exception if the foreign state is designated as a sponsor of state terrorism, if local remedies have been adequately exhausted, and if one of the parties is a U.S. national.[139] This so called "terrorism exception" in the FSIA was meant to allow victims of terrorism to seek redress, and also to deter terrorists worldwide.[140] However, given that the exception itself does not include many serious human rights abuses—genocide and crimes against humanity, for example—and that only seven states have been designated as sponsors of terrorism,[141] this exception has very limited potential uses for most victims.

As the War on Terror continues, courts have expanded the rationales used to grant U.S. courts jurisdiction over foreign defendants in general. In *United States v. Yousef*, for example, a foreign defendant accused of plotting to bomb a U.S. commercial airliner was tried in a U.S. court.[142] The court reasoned that his plot was a politically motivated act because it was intended to change U.S. policy, and an act with the intent of interfering with U.S. "governmental functions" gives rise to jurisdiction under the protective principle of international law.[143] It is this author's opinion that this holding greatly broadens the scope of the doctrine of the protective principle and grants a much greater range of potential cases in U.S. courts. Regardless of the positive or negative implications of expanding jurisdiction to cover such an attenuated relationship with U.S. governmental functions, this trend in the law could further expand potential cases under the FSIA.

Overall, however, the FSIA is more generous in granting immunity to foreign sovereigns and their actors than that granted under customary international law. As discussed previously in this paper, customary international law abrogates immunity in the case of core crimes, whereas the FSIA only has limited exceptions to the blanket immunity granted to foreign sovereigns and their representatives.

(2) The ICJ as a Forum that Cannot Offer the Same Breadth of Immunity to Foreign Sovereigns as U.S. Domestic Courts

While domestic systems may create a more expansive foreign sovereign immunity, the ICJ does not have this freedom. The ICJ Statute does not contain a provision granting a sovereign immunity similar to that of the United States and, as discussed above, there is strong precedent removing immunity in instances of core crimes. The ICJ's jurisdictional limitations—discussed in this

139. *See, e.g.*, United States v. Yousef, 327 F.3d 56 (2d Cir. 2003).

140. Recent Case, *International Law – Foreign Sovereign Immunities Act – D.C. Circuit Holds that an International Agreement Bars Former Hostages' Suit Against Iran, Despite Legislation Aimed at Aiding the Suit* – Roeder v. Islamic Republic of Iran, *333 F.3d 228 (D.C. Cir. 2003)*, 117 HARV. L. REV. 743, 747-48 (2003).

141. Press Release, U.S. Dept. of State, Overview of State-Sponsored Terrorism (Apr. 30 2001), *available at* http://www.state.gov/s/ct/rls/pgtrpt/2000/2441.htm (naming Iran, Iraq, Syria, Libya, Cuba, North Korea, and Sudan as designated sponsors of terrorism).

142. *Id.*

143. *Id.* at 110-11 ("The protective (or 'security') principle permits a State to assume jurisdiction over non-nationals for acts done abroad that affect the security of the State.").

section—provide a possible explanation for the Court's outcome in *Congo*. An explanation, however, does not signify that the Court correctly decided the case in terms of international law; in fact, this section will conclude that the Court's limited jurisdiction did not provide an adequate excuse for its holding in *Congo*.

According to Article 34 of the ICJ Statute, "[o]nly states may be parties in cases before the Court."[144] However, Article 36(b) grants the Court jurisdiction to resolve "any question of international law."[145] However, as exemplified by the above discussion regarding the immunity granted to foreign ministers, the question of international law posed to the ICJ in *Congo* had implications beyond mere state interest. The issue of individual criminal liability—which was not satisfactorily discussed by the *Congo* majority—should be at the forefront of any question of diplomatic immunity concerning core crimes. Therefore, given the ICJ's mandate to consider only states as parties, with the concurrent impossibility of holding a state criminally responsible under international law, was the ICJ the appropriate forum for deciding this particular question of international law? Despite the Court's attempts to convert the question presented into a purely state-oriented discussion, this part will conclude that the ICJ was nevertheless a valid forum to adjudicate the claim.

The ICJ's most conspicuous attempt to turn the question into a debate concerning only sovereignty was the Court's analogy between heads of state and foreign ministers. As noted above, the Court stated, "[A] Minister of Foreign Affairs . . . occupies a position such that, like the Head of State . . . he or she is recognized under international law as representative of the State solely by virtue of his or her office."[146] While ministers of foreign affairs do represent their respective states in international relations, the discussion in part II showed that such ministers do not embody the state in the same manner and magnitude as heads of state.[147] The principle of sovereignty, which inheres logically and legally to the position of head of state, is only recognized in terms of comity regarding foreign ministers.[148]

The previous discussion regarding the difference between foreign ministers and heads of state focused upon the absence of a rule of customary international law granting immunity to foreign ministers. In the context of the current discussion, however, the ICJ's decision can be understood as an endeavor to turn the question presented into a purely sovereign issue: if foreign ministers are exactly the same as heads of state, then sovereign immunity attaches to them with equal force.[149] As the preceding argument demonstrated, however, that analogy fails, rendering the question as not being exclusively concerned with sovereign immunity. Rather, it is the absence of sovereign immunity, and the potential individ-

144. ICJ Statute, *supra* note 93, art. 34.
145. *Id.* art. 36.
146. *Congo v. Belgium*, at para. 53.
147. *See* Watts, *supra* note 62, at 102-103.
148. *See generally* Verhoeven, *supra* note 64.
149. Note that the New York Convention on Special Missions only draws the analogy when a foreign minister is participation in a special mission of the sending state. *Congo v. Belgium*, at para. 52.

ual liability of foreign ministers, that form the foundation for any question regarding core crimes.

The ICJ's misplaced emphasis on state, rather than individual liability, may have engendered the central fault in the *Congo* holding because the majority failed to accurately apply its own statute. Under Article 36(2), the Court must apply the following to evaluate questions presented:

> (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; and (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.[150]

The Court first conceded that no treaty bound either party, thereby deeming the first source of law to be considered under the Statute inapplicable; the Court then considered international custom.[151] As this article has shown, however, it was the Court's failure to accurately evaluate customary international law concerning immunities granted to foreign ministers accused of core crimes that precipitated its faulty holding. Not only did the Court inaccurately represent the status of customary international law regarding the immunities afforded to foreign ministers, but it also allowed for former foreign ministers to maintain *de facto* impunity for acts done while in office. The fact that the ICJ is bound to regard only states as parties does not establish justification for it to disregard the clear guidelines for evaluating customary international law.

In conclusion, the ICJ's holding in *Congo* should be seen as an erroneous exception to the established rule of customary international law. International customary law recognizes no obligation for states to extend immunity to foreign ministers in the same fashion as given to heads of state. Furthermore, as the above discussion showed, there is a definite abrogation of immunity when core crimes are involved. As the *Congo* Court should have recognized, a crime against humanity is a crime that constitutes a nexus of individual and state responsibility and against which no claim of immunity can be raised.

150. Rome Statute, *supra* note 94, art. 36(2).
151. *Congo v. Belgium*, at paras. 52-53.

Berkeley Journal of International Law

Volume 22 | Issue 3 Article 6

2004

Making State Sponsors of Terrorism Pay: A Separation of Powers Discourse under the Foreign Sovereign Immunities Act

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by
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INTRODUCTION

Although the events of September 11, 2001 painfully alerted the public to the risk of international terrorist attacks on U.S. citizens, terrorism is hardly a new issue for U.S. policymakers. Inherent in addressing international terrorism is the debate surrounding the limits and exceptions of sovereign immunity. The U.S. response to terrorism, as well as its application of sovereign immunity doctrine, has continued to evolve rapidly since the congressional adoption of the 1976 Foreign Sovereign Immunities Act (FSIA).[1]

Before the passage of the FSIA, the U.S. adhered to the classic theory of sovereign immunity; all states are equal sovereigns and one state cannot exercise jurisdiction over another state in its domestic courts.[2] However, this theory became less practical in the years before and after World War II, as foreign states increasingly became commercial actors. In response to this trend, many states began to follow the doctrine of "restrictive" sovereign immunity.[3] The United States also adopted a restrictive form of sovereign immunity after the State Department issued what became known as the "Tate Letter."[4] The State Department took this positive step after the Supreme Court deferred the question of sovereign immunity to the executive branch.[5]

* J.D., 2004, University of California, Berkeley (Boalt Hall). The author would like to thank Professor Richard M. Buxbuam for his guidance on the article. She would also like to thank her article editor, Angela Howe, and the BJIL editorial staff for all their hard work editing the article.

1. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-11(2004)).

2. The theory was first articulated in the United States by Chief Justice Marshall in *Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812) (holding that a French warship, although formerly taken on the high seas from its rightful, American owner, was not subject to libel action when weather forced it into a U.S. port).

3. *See* Flatow v. Iran, 999 F. Supp. 1, 11 (D.D.C. 1998).

4. Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments, Letter from Jack B. Tate, Acting Legal Advisor, to Philip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 Dep't St. Bull. 984 (1952).

5. *See, e.g., Ex parte* Republic of Peru, 318 U.S. 578 (1943) (holding that the judiciary will defer to the executive branch on questions of sovereign immunity).

In 1976, Congress shifted the burden of deciding whether sovereign immunity protected a given transaction or event from the executive branch to the judicial branch by codifying the restrictive sovereign immunity theory in the FSIA.[6] This gave the courts, rather than the executive, the power to determine relief for international commercial disputes. While the enactment of the FSIA was expected to be a major event in international commercial law, its impact on non-commercial areas, such as protection of human rights by national courts, was yet unclear.

As it stood in 1976, the FSIA did not permit suits against foreign states for state-sponsored crimes, including acts of torture and execution against U.S. citizens.[7] Congress amended the FSIA in 1996[8] to allow American victims of terrorist acts to sue countries designated as sponsors of terrorism. The same year, Congress passed legislation authorizing U.S. domestic courts to award money damages to victims of terrorism.[9] By passing the "State Sponsors of Terrorism" exception to sovereign immunity, Congress sought to achieve two primary purposes: ending terrorism and compensating American victims.[10] However, by placing the burden on U.S. courts to decide the proper compensation for terrorist victims, Congress failed to sufficiently meet either goal. Ironically, it appears now that attempts by U.S. courts to provide compensation for terrorist victims are actually undermining the executive branch's ability to fight terrorism through its foreign policy measures.

This dilemma is attributable to the incoherent nature of the FSIA. In the years since the terrorism exception was added to the FSIA, it has become clear that the inherent structure of the FSIA creates a difficult separation of powers problem. This article evaluates the state-sponsored terrorism exception to foreign sovereign immunity. Part I analyzes the development of legislation permitting suits against state sponsors of terrorism and the body of cases involving these suits, highlighting specific problems in victim compensation. Part II examines the foreign policy and diplomatic relations concerns raised by the executive branch surrounding the legality of the FSIA amendments in reference to international law. Part III highlights two recent cases where the federal district courts in the District of Columbia have begun to express their frustration at the incoherent legislation surrounding the FSIA and the way in which the statutory scheme leaves successful plaintiffs unable to collect compensation. Finally, this article specifically evaluates in part IV the separation of powers challenges to the constitutionality of the statute. It then proposes that recent development in

6. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891.

7. *Flatow*, 999 F. Supp. at 11; *see also* H.R. REP. No. 103-702 (1994), *available at* 1994 WL 449323.

8. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 221, 110 Stat. 1214, 1241-43 (codified at 28 U.S.C. § 1605(a)(7) (2003)).

9. Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, § 589, 110 Stat. 3009 (1996) (codified at 28 U.S.C. § 1605 note (2004)).

10. Recent Cases, *International Law - Foreign Sovereign Immunities Act - D.C. Circuit Holds That an International Agreement Bars Former Hostages' Suit Against Iran, Despite Legislation Aimed at Aiding the Suit*, Roeder v. Islamic Republic of Iran, 333 F.3d 228 (D.C. Cir. 2003), 117 Harv. L. Rev. 743, 747 n.39 (2003).

case law and foreign relations entreat an answer to a question left open by the Supreme Court: Whether there would be a constitutional issue — predicated on a supposedly illegal delegation to the executive branch of Congress' legislative power to define the jurisdiction of federal courts — in the event of a suit involving a country that was either added to or dropped from the executive branch's list of state sponsors of terrorism after the statute was enacted.

I.
EXCEPTIONS TO FOREIGN SOVEREIGN IMMUNITY: THE DEVELOPMENT OF LEGISLATION PERMITTING SUITS AGAINST STATE SPONSORS OF TERRORISM

The FSIA[11] is a complex legal instrument that subjects foreign states to the jurisdiction of U.S. courts in specific cases.[12] As originally enacted in 1976, the key exceptions to immunity included cases involving commercial activity, such as contracts involving the purchase of goods;[13] noncommercial torts, like car accidents;[14] and explicit and implicit waivers of immunity.[15] While the FSIA was expected to be a major event in international commercial law, the FSIA soon began to have an unanticipated impact on the protection of human rights by U.S. domestic courts.[16]

A. 1996 Amendments Allow Money Damages for Suits Against State Sponsors of Terrorism

The FSIA became the sole vehicle for redressing international human rights violations, since the only way to obtain jurisdiction over a foreign state defendant in a U.S. court is to bring suit under one of the immunity exceptions listed in the FSIA.[17] As it stood in 1976, however, the FSIA did not permit suits against foreign states for state-sponsored crimes, including the torture and execution of U.S. citizens.[18] Before the FSIA was amended in 1996, U.S. courts thus routinely dismissed cases against foreign states brought by U.S. citizen plaintiffs who alleged serious violations of human rights or international law.[19]

11. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891.

12. 28 U.S.C. §§ 1605, 1607; *see also* H.R. REP. No. 94-1487, at 7 (1976).

13. 28 U.S.C. § 1605(a)(2); *see also* Keith Sealing, *"State Sponsors of Terrorism" is a Question, Not an Answer: The Terrorism Amendment to the FSIA Makes Less Sense Now Than It Did Before 9/11*, 38 TEX. INT'L L.J. 119, 122 (2003).

14. 28 U.S.C. § 1605(a)(5); *see also* Sealing, *supra* note 13, at 122.

15. 28 U.S.C. § 1605(a)(1); *see also* Sealing, *supra* note 13, at 122.

16. *See* Jennifer A. Gergen, *Human Rights and the Foreign Sovereign Immunities Act*, 36 VA. J. INT'L L. 765, 770-71 (1996) (implying that the FSIA was not intended as human rights legislation); *see also* H.R. REP. No. 103-702 (1994), *available at* 1994 WL 449323 ("[T]he FSIA does not currently allow U.S. citizens to sue for gross human rights violations committed by a foreign sovereign on its own soil.").

17. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439 (1989); William P. Hoye, *Fighting Fire with. . . Mire? Civil Remedies and the New War on State-Sponsored Terrorism*, 12 DUKE J. COMP. & INT'L L. 105, 116 (2002).

18. *Flatow*, 999 F. Supp. at 11; *see also* H.R. REP. No. 103-702, *available at* 1994 WL 449323.

19. Hoye, *supra* note 17, at 108-109.

For example, before 1996, the families of the victims of the bombing of Pan Am Flight 103 over Lockerbie, Scotland, were unable to successfully sue Libya for its involvement because international terrorist activities did not fall under one of the exceptions listed in the FSIA at that time.[20]

Individuals who found themselves blocked in the courts[21] turned to the legislature to expand the restrictive exceptions of the FSIA so as to enable a subsequent judicial remedy. Notably, the families of the victims of the bombing of Pan Am Flight 103 and other victims of terrorist actions, including the families of the 1995 Oklahoma City bombing victims, lobbied Congress[22] and secured the passage of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[23]

The convergence of the two groups' objectives resulted in the "effective death penalty" component which narrowed the opportunities available to defendants for challenging their state convictions in federal courts,[24] while the "antiterrorism" component amended the FSIA to allow U.S. nationals to sue foreign states for violations of human rights deemed to be "terrorist activities."[25] Under this 1996 amendment to the FSIA, a foreign state is no longer immune from jurisdiction, specifically, where:

> money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources. . . . for such act if such an act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.[26]

The amendment thus allows a U.S. citizen to bring suit against a foreign state in a U.S. court for damages resulting from a state-sponsored act of terrorism.[27]

Congress enacted this legislation with two primary purposes: to provide victims of terrorist acts with previously elusive compensation,[28] and to make

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20. Smith v. Socialist People's Libyan Arab Jamahiriya, 886 F. Supp. 306 (E.D.N.Y. 1995), *aff'd*, 101 F.3d 239 (2d Cir. 1996).

21. The Supreme Court restricted the jurisdictional scope of the FSIA for potential human rights cases. *See, e.g., Amerada Hess Shipping Corp.*, 488 U.S. at 428.

22. *See, e.g.*, Aphrodite Tsairis, Chair, The Victims of Pan Am Flight 103, Comments from the Victims of Pan Am Flight 103 on proposed rulemaking (Dep't of Transp. Feb. 12, 1991) *at* http://dmses.dot.gov/docimages/pdf5/6523_web.pdf (last visited May 4, 2004); Laurie Kellman, *Families of Victims Seek to Limit Death-Row Appeals for Terrorists*, WASH. TIMES, May 24, 1995, at A3 ("Congress should enact legislation to speed the executions of convicted terrorists, according to the families of several Oklahoma City bombing victims."); Jim Myers, *Victims' Families Appeal to Senators*, TULSA WORLD, June 6, 1995, at N1, *available at* 1995 WL 5598440 ("Families of those killed in the Oklahoma City bombing made an emotional appeal Monday for Congress to speed up death sentences . . . .").

23. Pub. L. No. 104-132, 110 Stat. 1214 (1996), enacted at 28 U.S.C. § 1605(a)(7) (2003).

24. *See id.*

25. *See id.*

26. *Id.*

27. *Id.* The jurisdiction is further limited: courts can only utilize this exception if the foreign state is designated as a state sponsor of terrorism, if local remedies have been adequately exhausted, and if one of the parties is a U.S. national. *See, e.g.*, United States v. Yousef, 327 F.3d 56 (2nd Cir. 2003). *See also infra* text accompanying notes 88-89.

28. *See* Hoye, *supra* note 17, at 150.

foreign states more reluctant to sponsor acts of terror against U.S. citizens by forcing them to pay huge sums of money to those who won judgments.[29]

The AEDPA was accompanied a few months later by the Civil Liabilities for Acts of State Sponsored Terrorism Act ("Civil Liability Act"), passed as part of the 1997 Omnibus Consolidated Appropriations Act.[30] The Civil Liability Act, sometimes referred to as the "Flatow Amendment," creates a private cause of action for acts of state-sponsored terrorism, by providing, in relevant part, as follows:

> An official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency shall be liable to a United State national. . . for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under [28 U.S.C. § 1605(a)(7)] for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages . . . .[31]

Together, the AEDPA and the Civil Liability Act broadened the scope for judicial actions and increased potential liability for acts of terrorism.[32] First, AEDPA's new exception to the FSIA lowered the threshold of causality; a foreign state, if it provided material support to terrorists, could now be subjected to U.S. jurisdiction even if it only indirectly caused the specific act of terrorism at issue. Second, the new exception adopted the principles of agency; a foreign state could be subjected to U.S. jurisdiction on the basis of an act of terrorism of one of its agents or employees, acting within his or her scope of authority. Third, under the Civil Liability Act, plaintiffs no longer needed to incorporate the provisions of the Alien Tort Claims Act for a cause of action against individual agents or employees of a terrorist state. Finally, the Civil Liability Act specifically allowed recovery for pain and suffering, economic damages, solatium, and punitive damages.

B. First Attempts at Suing State Sponsors of Terrorism

After the passage of the 1996 Amendments, the AEDPA and the Civil Liability Act, U.S. plaintiffs could now receive awards of damages—and, potentially, very high awards—for certain human rights abuses. The Civil Liability Act introduced an element that had theretofore not been part of the emerging legislative ensemble: allowing recovery for punitive damages. At the time, this represented a significant departure from earlier practices because the FSIA expressly prohibited awarding punitive damages in all other cases against foreign

29. *See Flatow*, 999 F. Supp. at 25 (stating that the terrorism exception "was enacted explicitly with the intent to alter the conduct of foreign states, particularly towards United States nationals traveling abroad").

30. Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, § 589, 110 Stat. 3009 (1996) (codified at 28 U.S.C. § 1605 note (2004)).

31. 28 U.S.C. § 1605 note.

32. W. Michael Reisman & Monica Hakimi, *2001 Hugo Black Lecture: Illusion and Reality in the Compensation of Victims of International Terrorism*, 54 ALA. L. REV. 561, 567-68 (2003).

states.[33] However, until recently, this departure was more symbolic than practical because these new laws did not provide a means by which to satisfy those awards.[34] This section discusses the initial success by FSIA plaintiffs in procuring large-sum judgments against states designated as sponsors of terrorism.

The first case under the terrorism exception to the FSIA was brought in 1997 when three families sued the state of Cuba in *Alejandre v. Cuba*.[35] Cuba did not appear in the case, and the federal District Court for the Southern District of Florida found for the families of the men killed, awarding them $50 million in compensatory damages and $137 million in punitive damages.[36]

Following the plaintiffs' success in *Alejandre*, other victims of terrorism and their families initiated suits against state sponsors of terrorism. One of the most influential cases to be brought under the state-sponsored terrorism exception was *Flatow v. Iran*.[37] Pursuant to the state-sponsored terrorism exception and the "Flatow Amendment," Flatow's family filed suit against the government of Iran in the District Court for the District of Columbia.[38] Like Cuba, Iran did not appear in the proceedings.[39]

In *Flatow*, the court set precedent by broadly interpreting the terrorism-exception statutes. First, the court held that a plaintiff need only meet a minimum threshold of evidence to establish jurisdiction over a foreign state defendant. Specifically, a state's general sponsorship of the responsible terrorist group was enough to warrant jurisdiction under the state-sponsored terrorism exception,[40] and to establish agency.[41] Under this reasoning, the court found Iran responsible for Alisa Flatow's death and awarded her estate damages for lost earnings, pain and suffering, and compensation for emotional distress to her family—a total in excess of $20 million.[42] The court also awarded punitive damages in the amount of $225 million, or approximately three times Iran's annual expenditure for terrorist activities.[43]

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33. 28 U.S.C. § 1606 (2003). This provision specifically waives liability for punitive damages. *See* Richard Milin, *Suing Terrorists and Their Private State Sponsors*, N.Y.L.J., Oct. 29, 2001, at 1.

34. 28 U.S.C. § 1606 (2003).

35. Alejandre v. Cuba, 996 F. Supp. 1239 (S.D. Fla. 1997). This case arose after the Cuban Air Force shot down two planes belonging to the Florida-based exile Cuban group, Brothers to the Rescue, in 1996. The plaintiffs, the families of three men killed in the attack, alleged that the attack was a terrorist act sponsored by the Cuban government.

36. *Id.* at 1253-54.

37. Flatow v. Iran, 999 F. Supp. 1, 1 (D.D.C. 1998). *Flatow* was brought by the family of Alisa Flatow, a student at Brandeis University. In 1995, while she was on a study program in Israel, Alisa was killed in a suicide bomber attack. The Palestinian Islamic Jihad, an entity funded heavily by the Islamic Republic of Iran, claimed responsibility for the attack. *Id.*

38. *Id.* at 1-2.

39. *Id.* at 6 n.1.

40. *Id.* at 18.

41. *Id.* at 9-10.

42. *Id.* at 32.

43. *Id.* at 25-27, 33-34.

Flatow was the first of many cases against Iran.[44] Iraq and Libya have also been named as defendants in terrorist-exception cases.[45] Most plaintiffs who bring suit against state sponsors of terrorism easily win default judgments. As of January 2004, more than twenty cases have been decided against state sponsors of terrorism, and Iran, Iraq, Cuba, and Libya together owe hundreds of millions of dollars to plaintiffs.[46] Collecting these judgments, however, has been another matter.

C. *FSIA Amendments in 1998 and 2000: The Struggle between the Congress and the Executive over Frozen Assets*

While most of the plaintiffs who brought suits under the terrorist exception to the FSIA easily won default judgments, they were often unable to take the next step and collect the money awarded to them.[47] Recognizing this, Congress made several attempts, beginning in 1998, to amend the terrorist exception to help successful plaintiffs collect judgments levied against foreign states.

When Congress first decided to permit U.S. citizens to sue state sponsors of terrorism, it included a provision to also allow successful plaintiffs to attach diplomatic and other blocked assets in the United States belonging to the defendant state.[48] However, the executive branch resisted this attempt to facilitate collection by the successful plaintiffs.[49] The Clinton administration's position was that diplomatic assets could not be released because they were protected by international agreements,[50] and that frozen assets could not be released because

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44. *See, e.g.*, Cronin v. Islamic Republic of Iran, 238 F. Supp. 2d 222 (D.D.C. 2002); Surette v. Islamic Republic of Iran, 231 F. Supp. 2d 260 (D.D.C. 2002); Weinstein v. Islamic Republic of Iran, 184 F. Supp. 2d 13 (D.D.C. 2002); Sutherland v. Islamic Republic of Iran, 151 F. Supp. 2d 27 (D.D.C. 2001); Jenco v. Islamic Republic of Iran, 154 F. Supp. 2d 27 (D.D.C. 2001); Wagner v. Islamic Republic of Iran, 172 F. Supp. 2d 128 (D.D.C. 2001); Anderson v. Islamic Republic of Iran, 90 F. Supp. 2d 107 (D.D.C. 2000); Eisenfeld v. Islamic Republic of Iran, 172 F. Supp. 2d 1 (D.D.C. 2000); Elahi v. Islamic Republic of Iran, 124 F. Supp. 2d 97 (D.D.C. 2000).

45. *See, e.g.*, Hill v. Republic of Iraq, 175 F. Supp. 2d 36 (D.D.C. 2001) (a group of plaintiffs secured judgment against Iraq for their detention and use as "human shields" at the beginning of the Gulf conflict in 1990); *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 180 F. Supp. 2d 78 (D.D.C. 2001) (by cruise chip passengers held hostage in Libya after their ship was forced to stop in a Libyan port during a storm). For a discussion on recent case development in cases against Iraq and Libya, see *infra* part IV.

46. For a list of cases and detailed descriptions of damages awarded in each case, see Kristine Cordier Karnezis, Annotation, *Award of Damages under State-Sponsored Terrorism Exception to Foreign Sovereign Immunities Act (28 U.S.C.A.§ 1605(a)(7))*, 182 A.L.R. FED. 1 (2002).

47. David M. Ackerman, Congressional Research Service, *Suits Against Terrorist States*, at 6-21 (2002), *available at* http://fpc.state.gov/documents/organization/8045.pdf.

48. 28 U.S.C. § 1610(b)(2); *see also* Ackerman, *supra* note 47, at 4-5.

49. Ackerman, *supra* note 47, at 6-7; *see also* Bill Miller, *Terrorism Victims Set Precedent; U.S. to Pay Damages, Collect from Iran*, WASH. POST, Oct. 22, 2000, at A1. I will argue in the following sections that the Clinton administration had legitimate reasons for opposing so vehemently the collection of payments for terrorism victims using frozen assets. *See* discussion *infra* part II.

50. Ackerman, *supra* note 47, at 6-7. The administration specifically pointed to the Vienna Convention and the Iran-United States Claims Tribunal agreements as prohibiting the release of blocked assets. *Id.*

they were a valuable foreign policy tool and possibly subject to other claims by U.S. nationals.[51]

In response to "executive stonewalling,"[52] Congress again amended the FSIA in 1998 to facilitate compensation for the growing number of successful plaintiffs.[53] The resulting legislation specifically stated that frozen and diplomatic assets of foreign states could be attached to satisfy a judgment for a claim brought under the terrorist exception.[54] However, this legislation also included a provision that authorized the president to waive the requirements of this section "in the interest of national security," thereby protecting all frozen assets from attachment.[55] President Clinton signed the legislation, but then immediately invoked the waiver.[56] The frozen assets of terrorist states thus remained immune from attachment and beyond the reach of successful plaintiffs.[57]

After the 1998 amendment failed to help plaintiffs collect judgments, Congress passed section 2002 of the Victims of Trafficking and Violence Protection Act in 2000.[58] Under this act, specified claimants were to be paid compensatory, but not punitive, damages won in terrorism-exception suits against Iran and Cuba only.[59] In return, a claimant had to agree to relinquish rights to attach certain property of the defendant state.[60] Essentially, this act allowed payment of damages from the liquidation of frozen assets and the assistance of the U.S. Treasury in one case against Cuba and ten cases against Iran.[61]

The families who prevailed against Cuba in the *Alejandre* case arguably benefited the most from the new legislation because they were paid directly from frozen Cuban assets.[62] In 2001, the U.S. government liquidated approximately half of Cuba's $193.5 million in frozen assets to pay the three families.[63]

However, the Clinton administration held steadfast in its refusal to release Iran's frozen assets.[64] Instead, the U.S. Treasury paid over $350 million to par-

51. *Id.* at 7. For a discussion of other preexisting claims on Cuban and Iranian assets, see generally Roger Parloff, *Deep Freezing Terror's Assets*, AM. LAW., June 2002.

52. Allison Taylor, Note, *Another Front in the War on Terrorism? Problems with Recent Changes to the Foreign Sovereign Immunities Act*, 45 ARIZ. L. REV. 533, 540 (2003).

53. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 117, 112 Stat. 2681 (1998) (codified as amended at 28 U.S.C. § 1610(f)(2)(A) (2003)).

54. *Id.*; *see also* Ackerman, *supra* note 47, at 8.

55. 28 U.S.C. § 1610(f)(3) (2003).

56. Pres. Determination No. 99-1, 63 Fed. Reg. 59, 201 (Oct. 21, 1998) (invoking the waiver).

57. *See* Ackerman, *supra* note 47, at 9-10 (citing Statement by President William J. Clinton Upon Signing H.R. 4328, 34 WEEKLY COMP. PRES. DOC. 2108 (Nov. 2, 1998), *reprinted in* 1998 U.S.C.C.A.N. 576).

58. Pub. L. No. 106-386, 2002, 114 Stat. 1464 (2000) (codified as amended in 28 U.S.C. § 1606, 1610 (2003)).

59. *Id.*

60. *Id.*

61. Ackerman, *supra* note 47, at 10, 14-17 (*see* Appendix I for the list of cases); *see also* Joel Mowbray, *So You Want to Sue the Saudis?*, NAT'L REV., Nov. 25, 2002, *available at* 2002 WL 1177725.

62. *See Alejandre*, 996 F. Supp. at 1239.

63. Ackerman, *supra* note 47, at 17; Mowbray, *supra* note 61; *see also* Parloff, *supra* note 51.

64. *See* Sean K. Mangan, Note, *Compensation for "Certain" Victims of Terrorism Under Section 2000 of the Victims of Trafficking and Violence Protection Act of 2000: Individual Payments at an Institutional Cost*, 42 VA. J. INT'L L. 1037, 1052-54 (2002).

tially satisfy judgments in nine of the ten cases against Iran.[65] In just one of the cases against Iran, *Sethem v. Islamic Republic of Iran*,[66] the District Court for the District of Columbia awarded plaintiffs over $28 million in compensatory damages and $300 million in punitive damages.

Although some plaintiffs received payment, many other plaintiffs who had been awarded judgments did not. Because President Clinton was unwilling to sign legislation that would have made all frozen assets of designated terrorist states vulnerable to attachment,[67] Congress compromised and permitted only a few designated plaintiffs to receive payment.[68] Other plaintiffs, including those pursuing suits against Iraq and Libya, were not mentioned in the legislation, and were thus denied payment for their successful judgments.

Congress compromised even on the payments to the plaintiffs with claims against Iran. Rather than attempting to collect successful judgment awards from Iran, the 2000 legislation placed upon the executive branch the responsibility for collecting the money from the defendant foreign state, and in the meantime, Iran's judgment payments were funded by the U.S. Treasury.[69] Recalling Congress's dual purpose in introducing the terrorism exception to the FSIA, using taxpayer funds to compensate terrorism victims is problematic. While such a practice may achieve the goal of compensating select plaintiffs, it will have no deterrent effect against Iran at all—since Iran does no pay, the U.S. Treasury does—and arguably "defeats the whole purpose" of the suits under the terrorism exception.[70]

D. Terrorism Risk Insurance Act of 2002: Piecemeal Legislation, Piecemeal Compensation

Still struggling with the risk of future terrorism and loss allocation, Congress adopted most recently the Terrorism Risk Insurance Act of 2002 (TRIA).[71] This legislation was designed to "provide a new, powerful disincentive for any foreign government to continue sponsoring terrorist attacks on Americans."[72]

The act sought to help successful terrorism plaintiffs collect judgments by removing *some* barriers to the attachment of blocked assets.[73] It did this by

65. Neely Tucker, *Damages Awarded to Terror Victim's Family*, WASH. POST, Feb. 7, 2002, at A26. Tucker notes that the United States "has paid about $350 million from the general treasury to satisfy some claims" against Iran. *Id.*; *see also* Barry E. Carter, *Terrorism Supported by Rogue States: Some Foreign Policy Questions Created by Involving U.S. Courts*, 36 NEW ENG. L. REV. 933, 937 (2002).

66. Sethem v. Islamic Republic of Iran, 201 F. Supp. 2d 78 (2002).

67. *CBS News: 60 Minutes* (CBS television broadcast, Jan. 13, 2002), *available at* 2002 WL 8424859 [hereinafter *60 Minutes*].

68. *Id.*

69. Miller, *supra* note 49, at A1, A10.

70. Shawn Zeller, *Hoping to Thaw Those Frozen Funds*, NAT'L J., Oct. 27, 2001 (quoting Terry Southerland, former hostage).

71. Pub. L. 107-297, 116 Stat. 2322 (codified at 15 U.S.C. § 6701 note, 28 U.S.C. §§ 1606, 1610 (2003)).

72. 148 CONG. REC. S11, 524, S11, 527 (2002) (statement of Sen. Harkin).

73. Terrorism Risk Insurance Act § 201(b).

barring the president from waiving the attachment of *all* blocked assets in the interest of national security.[74] Instead, the TRIA requires the president to make "an asset-by-asset" determination that "a waiver is necessary in the general national security interest."[75] Furthermore, even if invoked, the presidential waiver can only protect certain limited types of diplomatic property specifically subject to the Vienna Convention.[76] All other types of blocked assets may be attached.[77] A conference report on the bill explains that the new act "eliminates the effect of any [previous] presidential waiver . . . making clear that all such judgments are enforceable" against blocked assets.[78]

The act also provides for the payment of some judgments against Iran.[79] However, this compensation is disbursed arbitrarily; payment is contingent upon the speed with which the plaintiffs were able to secure judgments. First, the act prioritizes payment to a few plaintiffs who secured judgments on specific dates.[80] Other successful plaintiffs are next in line, followed by those with decisions currently pending.[81] Future plaintiffs will theoretically be paid with whatever remains of Iran's frozen assets.[82] The result is that some plaintiffs will receive legislative priority and collect more than others, while the fate of future victims of terrorism who may bring suit in the coming years is uncertain at best.[83] Moreover, the system of payment under TRIA ensures that no plaintiff will receive the full amount of the judgment awarded by the courts since judgments will be paid on a by-share basis and payments are limited to compensatory damages only.[84] Also, the 2002 legislation fails to mention punitive damages.[85]

Although well-intentioned, this latest modification to plaintiffs' remedies is far from sufficient in addressing the problems with the terrorist exceptions to the FSIA. While the new legislation gives some plaintiffs the promise of payment, efforts to secure payment will continue to involve uphill battles as plaintiffs try to force the U.S. government to release frozen assets. This is because the act only limits but does not eliminate the presidential waiver, making it still difficult for terrorism victims to access frozen assets.[86] For example, the President could

74. *Id.*

75. *Id.* § 201(b)(1).

76. *Id.* Not all types of diplomatic property under the Vienna Convention can be protected. For example, any property that has been used "for nondiplomatic purposes," such as "rental property," can be attached. *Id.* § 201(b)(2)(A).

77. *Id.* § 201(a).

78. 148 CONG. REC. H8722, H8728 (2002).

79. Terrorism Risk Insurance Act § 201(c)-(d).

80. *Id.* § 201(c); Marcia Coyle, *Helping the Victims, Congress Drops Barriers to Seizing Foreign Assets by Lawsuit Winners*, NAT'L L.J., Nov. 25, 2002, at A1 [hereinafter Coyle, *Helping the Victims*].

81. Terrorism Risk Insurance Act § 201(d).

82. *Id.*

83. 148 CONG. REC. S11, 528 (statement of Sen. Harkin). At the same hearings, Senator Kyl noted that the remaining Iranian funds ($30 million not disbursed after the 2000 legislation) would be divided up among two plaintiffs, leaving everyone else with nothing. *Id.* at S11, 527.

84. Terrorism Risk Insurance Act § 201(c)-(d).

85. *See id.*

86. Coyle, *Helping the Victims, supra* note 80, at A7.

continue to hold on to a particular frozen asset if foreign policy goals so dictated. Further, the State Department strongly opposed permitting the attachment of blocked assets, and the State Department continues to intervene in litigation to prevent the unfreezing of assets.[87]

The terrorist exception to the FSIA and its subsequent amendments—including the TRIA—are particularly flawed in that they treat a select few plaintiffs very favorably, while other similarly situated plaintiffs are not even provided with a cause of action. This problematic unequal treatment of potential terrorism-exception plaintiffs is exacerbated by the fact that the FSIA only permits suits against the seven countries designated by the State Department as state sponsors of terrorism.[88] The seven countries designated by the U.S. State Department as state sponsors of terrorism are Sudan, Cuba, Iran, Iraq, North Korea, Syria, and Libya. As the State Department acknowledges, this list of "state sponsors of terrorism," has not changed since 1993 — although in 2003, President Bush suspended, with respect to Iraq, all sanctions applicable to state sponsors of terrorism, which had the practical effect of putting Iraq on a par with nonterrorist states.[89] These nations are not currently the world's only sponsors of terrorism. Some even argue that these seven countries have been singled out for policy reasons.[90]

Many victims of terrorism are therefore left without a remedy simply because some terrorist-sponsoring states do not happen to be on the State Department's list.[91] The plight of the September 11th plaintiffs highlights this problem, since the attacks on the Word Trade Towers have not been clearly connected to any of the seven designated states. Although the September 11th plaintiffs might be able to bring suit against non-state actors, such as al Qaeda, they cannot bring a successful FSIA suit because neither Afghanistan nor Saudi Arabia, the home of Osama Bin Laden, has been designated a state sponsor of terrorism.[92] Several lawsuits have been filed alleging the involvement of Iraq and Sudan, but no court has yet held either nation liable for the September 11th

87. *Id.*

88. Sealing, *supra* note 13, at 135-38.

89. *See* Introduction, U.S. Dep't of State, Patterns of Global Terrorism 1999 (Apr. 2000) *available at* http://www.state.gov/www/global/terrorism/1999report/intro.html (last visited June 19, 2004) [hereinafter Patterns of Global Terrorism 2003]. Although President Bush suspended sanctions against Iraq since May 7, 2003, Iraq remains "technically" a state sponsor of terrorism according to the State Department's annual report on terrorism released on April 29, 2004. *See* Overview of State-Sponsored Terrorism, U.S. Dep't of State, Patterns of Global Terrorism 2003 (Apr. 2004), *available at* http://www.state.gov/s/ct/rls/pgtrpt/2003/31644.htm (listing the same seven states) (last visited June 19, 2004) [hereinafter Patterns of Global Terrorism 2004].

90. Sealing, *supra* note 13, at 135-36. *See also* Peter G. Danchin, *U.S. Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative*, 41 COLUM. J. TRANSNAT'L L. 33, 115 (2002) (arguing that the countries designated as state sponsors of terrorism may have been selected as such because of their hostility toward religious freedom).

91. For example, at least one U.S. citizen has attempted to sue Saudi Arabia for state-sponsored terrorist acts including kidnapping and torture. Saudi Arabia v. Nelson, 507 U.S. 349 (1993). The U.S. Supreme Court dismissed the suit, holding that the Court had no jurisdiction over Saudi Arabia because the case did not come under any of the exceptions for immunity under the FSIA. *Id.* at 361.

92. *Foreign Policy by Lawsuit*, WASH. POST, Dec. 9, 2002, at A22.

attacks.[93] Stating that the lawsuit would harm "bilateral relations," the State Department has already intervened by seeking the dismissal of the September 11th plaintiffs' $1 trillion suit against the Saudi royal family.[94]

Another difficulty with the terrorist state exception is that even the terrorist victims who win cases will probably feel less than satisfied with their judgments. The current policy of using blocked assets to compensate terrorism victims is unworkable because it undercompensates plaintiffs who have been awarded favorable judgments. Remedies to these plaintiffs are limited by the availability of funds.[95] Although the total value of blocked assets of the seven countries that can be sued for acts of terrorism is approximately $3 billion, most of that amount comes from only two states: Iraq and Libya.[96] The most commonly sued state, Iran, has only $251.9 million in frozen assets,[97] and the State Department has warned that Iran's blocked assets are not sufficient to pay even compensatory damages for existing judgments.[98] The total number of judgments won or pending in all terrorism-exception cases is more than $2 billion,[99] and hundreds more U.S. citizens might still bring claims.[100] Distributing frozen assets to the first plaintiffs to win judgments would create "gross inequities in the amounts of compensation received by similarly situated U.S. nationals with claims against foreign governments" because there will simply not be enough funds to go around.[101] The blocked assets will eventually run out and leave future victims and their families without compensation.[102] Such a situation would likely increase the frustration of successful plaintiffs rather than provide the compensation and closure that the terrorism exception was intended to give victims and their families.

93. Marcia Coyle, *A Case of Terrorism: How Two Lawyers Brought a Suit They Just Might Win*, NAT'L L. J., Nov. 11, 2002, at A1; Alan Dowd, *Keep Legal Battles Off the Battlefield*, AM. ENTERPRISE, Jan. 1, 2003, at 38.

94. Mowbray, *supra* note 61.

95. Carter argues that "countries that might run athwart of U.S. foreign policy learned not to leave large assets in the United States after the United States froze about $12 billion of Iranian assets during the 1979-1981 hostage crisis." Carter, *supra* note 65, at 937.

96. U.S. Dep't of the Treasury, Office of Foreign Assets Control, Terrorist Assets Report: Calendar Year 2001 Annual Report to the Congress on Assets in the United States of Terrorist Countries and International Terrorist Program Designees, at 1, 10, *available at* http://www.treas.gov/offices/enforcement/ofac/reports/tar2001short.pdf [hereinafter Terrorist Assets Report 2001]. However, Pamela Falk contends that up to $7 billion lie in "much murkier reach" belonging to foreign terrorist organizations. *See* Coyle, *Helping the Victims*, *supra* note 80, at A7.

97. Terrorist Assets Report, *supra* note 96, at 10.

98. Coyle, *Helping the Victims*, *supra* note 80, at A7.

99. *Morning Edition: Congress Passes Legislation Making it Easier for Victims of Foreign Terrorism to Collect Money* (National Public Radio broadcast, Nov. 21, 2002), *available at* 2002 WL 3190264.

100. *Terror Victims Able to Collect Judgments*, FORT WORTH STAR-TELEGRAM, Nov. 27, 2002, at 18.

101. Victims' Access to Terrorist Assets: Hearing on Amendments to the Foreign Sovereign Immunities Act Before the Senate Comm. on the Judiciary, 106th Cong. (1999), *available at* 1999 WL 979521 (prepared statement of Stuart E. Eizenstat, Deputy Secretary, Department of the Treasury) [hereinafter Victims' Access Hearings].

102. *All Things Considered: New Federal Law Says Victims of Terrorism Can Lay Claim to Frozen Assets* (National Public Radio broadcast, Jan. 31, 2002), *available at* 2003 WL 5577935; 148 CONG. REC. S11, 528 (2002) (statement of Sen. Kyl).

This problem of unequal compensation becomes more complicated when one considers other claims by U.S. citizens against the same foreign states. For example, in opposing the release of blocked Cuban assets to the Brothers to the Rescue plaintiffs, former Treasury Secretary Stuart Eizenstat explained that thousands of other U.S. citizens have also lodged claims against Cuba.[103] Awarding half the total amount of blocked Cuban assets to only the three Brothers to the Rescue families would be unfair.[104]

Overall, the terrorism-exception suits create widely divergent results, leaving some plaintiffs with huge settlement payments and others with nothing. These inequities, along with other complications in securing payment, have left some plaintiffs understandably frustrated. As shown above, Congress has tried to alleviate this frustration by repeatedly passing legislations that attach blocked assets to pay terrorism victims. However, this creates a serious separation of powers problem of encroachment. Part II analyzes the foreign policy concerns caused by these multi-million dollar judgments against foreign sovereigns—albeit rogue states.

II.
FOREIGN POLICY AND DIPLOMATIC LEVERAGE CONCERNS OF THE EXECUTIVE BRANCH

In addition to the concerns of failing to provide equitable and efficient compensation, the mere fact that U.S. domestic courts are playing a role in securing compensation for international terrorism victims is problematic. Fighting terrorism and procuring diplomatic relations are traditionally within the powers of the executive branch. By placing the burden on U.S. courts to decide the proper compensation for terrorist victims, Congress is allowing the courts to disturb the delicate separation of powers construct.

Perhaps the most significant problem with permitting lawsuits against a few designated states is that the suits intrude on one policy area long considered outside the province of courts: U.S diplomacy.[105] At least one commentator argues that it is unwise at best to permit lawyers to act as "private secretar[ies] of state," who determine when and how to confront state sponsors of terrorism.[106]

Allowing domestic courts to adjudicate cases brought by terrorist victims is especially problematic because few foreign states have appeared to defend any aspect of the cases brought under the terrorist exception.[107] Despite the fact that judges must hear evidence before entering judgment, the fairness of these de-

103. Parloff, *supra* note 51.

104. *Id.*; *see also 60 Minutes*, *supra* note 67.

105. Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFF., Sept.-Oct. 2000, at 102 (analyzing new forms of litigation against states for violations of international law).

106. Parloff, *supra* note 51.

107. Slaughter & Bosco, *supra* note 105, at 114. See *infra* part VI for a discussion of cases where Libya and Iraq appeared in U.S. courts to raise constitutional challenges to the state-sponsored terrorism exception.

fault proceedings is questionable.[108] Judges who hear cases brought under the terrorist exception run the risk of becoming politicized and drawn into taking sides on foreign policy questions, thereby sacrificing their impartiality in their desire to bring justice to victims of terrorism.[109] The nature of these suits against designated pariah states gives foreign state defendants little incentive to participate in these trials, let alone pay any part of the huge default judgments routinely awarded to plaintiffs.[110]

A. Compensation Using Blocked Assets of Foreign States Raises Foreign Policy Concerns

Except for Libya, which has only very recently entered settlement negotiations to pay the victims of Pan Am Flight bombing, discussed in part IV.B., no foreign state defendant has yet paid any part of the judgments pending against it. Congress thus constructed the terrorist exception to provide for victim compensation by unfreezing blocked assets of states that sponsor terrorism. However, paying plaintiffs with the blocked assets of these foreign states creates a set of foreign policy problems when the depletion of blocked assets consequently reduces the executive branch's leverage over rogue states. Allowing the courts to render multi-million dollar judgments to terrorism-suit plaintiffs thus interferes with the foreign policy obligations of the executive and raises a constitutional question of separation of powers.

From the beginning, the Clinton administration strenuously objected to legislation allowing terrorist-suit plaintiffs to attach blocked assets, reasoning that the President's control over foreign assets is a necessary component of a flexible and responsive foreign policy.[111] As former Deputy Treasury Secretary Eizenstat argued, the loss of frozen assets would "seriously weaken" the President's ability to deal with "threats to our national security."[112] By permitting courts to interfere with U.S. foreign policy, suits against state sponsors of terrorism could potentially jeopardize U.S. relations with other nations and efforts to stabilize regions like the Middle East.

A second foreign policy problem presented by the terrorist-exception suits is that both the suits and the liquidation of blocked assets could hinder efforts to normalize relations with the designated state sponsors of terrorism. For example, at least one commentator has argued that a nation like Iran may feel unable

108. *Id.*

109. *Id.*

110. Carter, *supra* note 65, at 937.

111. *See* Mangan, *supra* note 64, at 1052-54. Congress had recognized the importance of frozen assets by giving the president statutory authority over frozen assets with two acts: the International Emergency Economic Powers Act, 50 U.S.C. § 1701-06 (2003), and the Trading with the Enemy Act, 50 U.S.C. App. §§ 1-6, 7-39, 41-44 (2003). For a discussion of the use of frozen assets in fighting terrorism, see Rudolph Lehrer, Comment, *Unbalancing the Terrorists' Checkbook: Analysis of U.S. Foreign Policy in its Economic War on International Terrorism*, 10 TUL. J. INT'L & COMP. L. 333 (2002).

112. Victims' Access Hearings, *supra* note 101, at 4 (prepared statement of Stuart E. Eizenstat, Deputy Secretary, Department of the Treasury).

or unwilling to pay the billions it owes due to terrorism suits, thereby preventing normalization of relations with the United States, no matter how desirable.[113]

This foreign policy concern is one of the main reasons for the U.S. government opposing payment to terrorist suit victims using blocked assets. As recently as April of 2004, Justice Department attorney Gregory Katsas argued for the D.C. Circuit to void the district court judge's award for U.S. POWs alleging torture by saying that "foreign policy interests were at stake, and that the POWs' claims should be handled through diplomatic channels rather than the courts."[114]

B. The Executive Leverage over Diplomatic Relations Undermined by the Questionable Legality of the FSIA under International Law

The courts' incursion into foreign policy is but one of several troubling problems with these lawsuits. Not only does the terrorist exception to the FSIA raise foreign policy concerns, its legality under international law is questionable. Suits against state sponsors of terrorism permit domestic courts to interfere with U.S. treaty obligations, thereby undermining U.S. diplomatic relations and jeopardizing international treaty obligations.

Allowing plaintiffs to attach defendant states' frozen assets permits courts to act in a way that violates U.S. treaty obligations, especially with respect to assets that are directly controlled by international agreements. The Vienna Convention on Diplomatic Relations requires the United States to protect the premises of diplomatic and consular missions, along with their personal and real property and archives.[115] Nonetheless, in direct contravention of the United States' international obligations, section 201 of the Terrorism Risk Insurance Act permits plaintiffs to attach some of this property.[116]

The most notable example of this issue is the group of suits against Iran. Congress and the courts have ignored specific international agreements that protect many Iranian assets. In order to secure the release of U.S. citizens who were held hostage in Iran for 444 days from 1979 to 1981, the United States signed the Algiers Accords, which expressly forbade suits against Iran for damages arising from the hostage crisis.[117] Pursuant to this agreement, all claims between the United States and Iran are now subject to the Iran-United States Claims Tribunal in the Hague.[118] Despite this binding bilateral agreement, U.S. plaintiffs have sued and won judgments against Iran through the FSIA terrorist exception.[119]

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113. Carter, *supra* note 65, at 938.

114. *White House Seeks to Void Judge's Award to POWs*, L.A. TIMES, April 8, 2004, at A11.

115. Victims' Access Hearings, *supra* note 101, at 6 (prepared statement of Stuart E. Eizenstat).

116. Terrorism Risk Insurance Act § 201.

117. Sean D. Murphy, *Lawsuit by U.S. Hostages Against Iran*, 96 AM. J. INT'L L. 463, 464 (2002). Bush encouraged the courts to act "in a manner consistent with the obligation of the U.S. under the Algiers Accords," but Congress states in a conference report that the former hostages have a claim against Iran "notwithstanding any other authority." *Id.*

118. Victims' Access Hearings, *supra* note 101, at 7 (prepared statement of Stuart E. Eizenstat).

119. *See* discussion *supra* part I; *see also* discussion *infra* part III.A for recent development in this issue, specifically surrounding suits against Iran.

Another problem with the terrorism-exception cases is that attempts by U.S. courts to compel distribution of foreign states' frozen assets could leave the United States vulnerable to retaliatory actions by other nations. For example, by ignoring the obligation to protect diplomatic property of other nations, U.S. property abroad becomes increasingly vulnerable. U.S. property abroad is valued at $12 to $15 billion.[120] If the United States refuses to guarantee protection to the diplomatic property of other nations, then other countries could also target U.S. diplomatic property in retaliation if relations with the United States deteriorate.[121] Given these foreign policy and diplomatic concerns, it is not only understandable that the executive branch opposes the payment of terrorism victims under the FSIA state sponsors exception, but it demonstrates how the Congress has unduly encroached upon the paramount powers of the president over foreign relations.

III.
THE COURTS AS THE BATTLEGROUND OF THE TERRORIST EXCEPTION EXPERIMENT:RECENT DECISIONS IN THE COURTS REFLECT THE TERRORISM VICTIMS' FRUSTRATION

The separation of powers concerns established above brought an ironic result in the courts: when Congress amended the terrorist exception to allow unfreezing of foreign defendants' blocked assets, the executive branch felt compelled to intervene against the U.S. plaintiffs because of concerns about foreign policy and reduced leverage over diplomatic relations. This created an odd situation where the U.S. plaintiffs found themselves litigating against the U.S. State Department on the side of the defendant state sponsor of terrorism. This counter-intuitive result did not go unnoticed in the courts. In recent cases, notably in *Roeder v. Islamic Republic of Iran*,[122] and *Acree v. The Republic of Iraq*,[123] the District Court for the District of Columbia has expressed frustration at the incoherent legislation that leaves successful plaintiffs unable to collect.[124] The court criticized lawmakers, stating that both the President and Congress have failed to provide effective compensation for the terrorist victims. Evident in the dialogue between the courts' articulation of frustration and Congress's legislative response are the missed opportunities for confronting the constitutionality of the terrorism exception to the FSIA.

120. Victims' Access Hearings, *supra* note 101, at 7 (prepared statement of Stuart E. Eizenstat).

121. Slaughter & Bosco, *supra* note 105, at 113.

122. Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140 (D.D.C. 2002).

123. Acree v. The Republic of Iraq, 271 F. Supp. 2d 179 (D.D.C. 2003) [hereinafter *Acree* I], *related proceeding at* Acree v. Snow 276 F. Supp. 2d 31 (D.D.C. 2003), *motion denied by* Acree v. Republic of Iraq, 276 F. Supp. 2d 95 (D.D.C. 2003) [hereinafter *Acree* II], *rev'd and vacated by* 2004 U.S. App. LEXIS 10972 (D.C. Cir. June 4, 2004) [hereinafter *Acree* III].

124. *Roeder*, 195 F. Supp. 2d at 145.

A. *Roeder v. Islamic Republic of Iran*

The facts surrounding the *Roeder* case highlight how the FSIA terrorist exception places the three branches of the U.S. government at odds. In *Roeder*, when the former hostages attempted to sue Iran under the terrorist exception, the United States intervened in the case, pointing out that the Algiers Accord expressly barred the suit.[125] While the decision regarding whether to permit the suit to go forward was still pending, the former hostages petitioned Congress to create a way for them to bring suit against Iran.[126] In response, Congress tried to make an end-run around the Algiers Accords, amending part of the terrorism-exception statute to specifically permit the hostages' suit.[127] The court took a dim view of Congress' attempt to interfere in the litigation and dismissed the case, stating that Congress had failed to clearly abrogate the Algiers Accords.[128]

The U.S. Court of Appeals for the D.C. Circuit unanimously affirmed the dismissal of the action against Iran, reasoning that it lacked the power to grant relief in the absence of an unambiguous statement by Congress overriding the executive agreement with Iran that barred such an action.[129] Given Congress's explicit reference to the *Roeder* case by docket number in a subsequent amendment to the FSIA, recognizing the clear legislative intent would have forced the court to ask whether Congress had impermissibly attempted to legislate the outcome of the *Roeder* case in favor of the plaintiffs.[130] Instead the court chose to read ambiguity into the legislation instead of confronting the difficult separation of powers concerns raised by the *Roeder* riders. The court thereby missed an

125. *Id.* at 144-46.

126. Murphy, *supra* note 117, at 465.

127. *Roeder*, 195 F. Supp. 2d at 152-54 (citing H.R. CONF. REP. No. 107-350, at 422-23). In riders to two appropriations acts passed in November and December 2001, Congress amended the FSIA to remove Iran's immunity from suit in the pending *Roeder* case, and in that case alone. *See* Department of Justice Appropriations Act of 2002, Pub. L. No. 107-77, 626(c), 115 Stat. 748, 803 (2001). This rider contained a typographical error in the case number, which was fixed in another rider passed as part of the Department of Defense Appropriations Act of 2002, Pub. L. No. 107-77, 208, 115 Stat. 2230, 2299 (2002).

128. *Roeder*, 195 F. Supp. 2d at 145. Describing Congress' attempt to legislate a cause of action for the former hostages, the court stated: "[R]ather than proceed with the requisite clarity and assurance of purposes needed when legislating in the realm of foreign affairs, Congress chose to enact two provisions about which only one thing is clear: Congress' intent to interfere with ongoing litigation." *Id.*

129. Roeder v. Islamic Republic of Iran, 333 F.3d 228, 238-39 (D.C. Cir. 2003) (holding that Congress's intent to override the immunity created by the Algiers Accords was not explicit enough to trump the executive agreement that it challenged implicitly). The court observed that Congress had acknowledged in its joint explanatory statements regarding the riders that "notwithstanding any other authority, [the *Roeder* plaintiffs] had a claim against Iran." *Id.* at 237 (quoting H.R. CONF. REP. No. 107-350, at 422 (2001)). The court noted that "this statement . . . is the type of language that might abrogate an executive agreement—if the statement had been enacted. But Congress did not vote on the statement and the President did not sign a bill embodying it." *Id.* The court announced that, in the absence of any such clear message, it could not hold that Congress had meant to abrogate an executive agreement; the Algiers Accords thus remained a substantive bar to judgment against Iran. *Id.* at 237-38.

130. *See* United States v. Klein, 80 U.S. 1128 (1871) (holding that Congress may not direct the outcome of a case before an Article III court by prescribing a rule of decision).

opportunity to signal to Congress that it had gone too far in its selective and inconsistent attempts to assist terrorist plaintiffs.

Commentators have argued that the *Roeder* riders represent the "unfortunate and inequitable trend" in which Congress selectively provides remedies for only a certain number of terrorist victims,[131] and that the courts since *Roeder* have shied away from adjudicating the possible separation of powers concerns.[132] However, what is more remarkable in a larger context of the development of FSIA exceptions is that the *Roeder* decision departs from a line of D.C. district court cases which uniformly recognize and honor Congress's intent to assist terrorism plaintiffs. For example, just a year earlier, the same court in *Price v. Socialist People's Libyan Arab Jamahiriya*[133] had treated the Flatow Amendment as creating a federal cause of action against foreign states although the language in the Flatow Amendment was even more ambiguous than that of the *Roeder* riders.[134] *Roeder* thus signified a decreased willingness on the part of the court to entertain terrorism victims as successful FSIA plaintiffs and consequently reflect a departure from the line of "easy" default judgments for terrorist-suit plaintiffs.

In sum, owing to the lack of a workable system of the payment of judgments, victims of terrorism have a cause of action under U.S. law but few remedies in practice. The *Roeder* court, while dismissing the terrorist-exception suit, has also expressed frustration at the incoherent legislation that leaves successful plaintiffs unable to collect.[135] The District Court for the District of Columbia criticized lawmakers, stating the U.S. legislative and executive branches "should not with one hand express support for plaintiffs and with the other leave it to this Court to play the role of the messenger of bad news."[136] Although the court specifically referred to the 1979 to 1981 hostages,[137] its criticism seems to apply to all plaintiffs who have yet to receive the payment they were promised. Thus, the many attempts to fix the terrorism exception have served more to placate some plaintiffs with partial payments but have failed to address significant problems with terrorist-exception suits.

B. Acree v. The Republic of Iraq

Following the disappointment of terrorism victim plaintiffs in *Roeder*, the D.C. Circuit overturned a district court ruling, in one of the most recent decisions on state-sponsored terrorism, and held that seventeen former U.S. prison-

131. Recent Case, *Roeder*, *supra* note 10, at 749.

132. *Id.* at 747.

133. Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 87 (D.C. Cir. 2002). This holding was essentially overruled by Cicippio v. Islamic Republic of Iran, 353 F.3d 1024 (D.C. Cir. 2004) (holding that the Flatow Amendment does not create a cause of action against foreign states themselves). See discussion *infra* in part III.B.

134. The Flatow Amendment only referred to "an official, employee, or agent of a foreign state," and not directly to foreign states. *See* Civil Liability for Acts of State Sponsored Terrorism Act, Pub. L. No. 104-208, § 589, 110 Stat. 3009 (1996).

135. *Roeder*, 195 F. Supp. 2d at 145.

136. *Id.*

137. *Id.*

ers of war and thirty-seven family members were not entitled to damages under the FSIA.[138] The line of cases in *Acree v. The Republic of Iraq*, shows the courts' increasing refusal to recognize the validity of FSIA terrorist exception in giving redress to terrorism victims, considering the important foreign policy interests at stake.

In *Acree* I,[139] former prisoners of war (POWs) during the Gulf War in 1991 and their close family members filed a lawsuit under the FSIA seeking damages for injuries from the torture inflicted on the POW plaintiffs while in Iraqi captivity. On July 7, 2003, the district court found that the subject matter jurisdiction requirements contained in section 1605(a)(7) were satisfied, and awarded punitive damages as well as compensatory damages against defendants Republic of Iraq, Saddam Hussein, and the Iraqi Intelligence Service.[140]

On July 21, 2003, two weeks after the district court entered its judgment for plaintiffs, the United States filed a motion to intervene for the purpose of contesting the district court's subject matter jurisdiction. The United States argued that recently enacted provisions of the Emergency Wartime Supplemental Appropriations Act [EWSAA][141] made the terrorism exception to the FSIA inapplicable to Iraq and thereby stripped the district court of its jurisdiction over plaintiffs' suit. The district court denied the United States' motion to intervene as untimely.[142]

Just before the United States moved to intervene, plaintiffs filed a second suit against the Secretary of the Treasury, seeking to satisfy their newly won judgment against Iraq by attaching funds from seized Iraqi bank accounts, pursuant to section 201 of the TRIA. In this proceeding, *Acree v. Snow*,[143] the plaintiffs were denied payment for the successful judgment in *Acree* I. On July 30, 2003, the same district court, which, less than a month before, had entered a judgment in favor of the plaintiffs, now denied the plaintiffs' motion to *collect* their judgment. The *Acree* court based its denial on the government's opposition to the attachment and held that the defendant was entitled to summary judgment on plaintiffs' TRIA claim because Congress and the president had acted to make the TRIA inapplicable to Iraq.[144]

This, the district court reasoned, was because in April of 2003, Congress had enacted the EWSAA to authorize the President to "make inapplicable with respect to Iraq . . . any other provision of law that applied to countries that supported terrorism."[145] On May 7, 2003, the President exercised the authority granted to him by Congress in the act and issued a Presidential Determination

138. *Acree* III, 2004 U.S. App. LEXIS 10972.

139. *Acree* I, 271 F. Supp. 2d at 179.

140. The district court awarded damages against Iraq totaling over $959 million. *See Id.*

141. Pub. L. No. 108-11. § 1503, 117 Stat. 559, 579 (2003).

142. *See Acree* II, 276 F. Supp. 2d 95.

143. Acree v. Snow, 276 F. Supp. 2d 31 (D.D.C. 2003). In *Acree v. Snow*, Plaintiffs were awarded judgment in the amount of $653,070,000 in compensatory damages and $306 million in punitive damages. *Id.*

144. *Id.*

145. *Id.* at 32 (quoting Emergency Wartime Supplemental Appropriations Act § 1503, Pub. L. No. 108-11, 117 Stat. 559 (2003)).

making "inapplicable with respect to Iraq . . . any other provision of law that applies to countries that have supported terrorism."[146] The court found that the new law affected the application of section 201 of TRIA to Iraq as a designated state sponsor of terrorism.[147] Since the act that had passed in April gave congressional authorization for the president to make TRIA prospectively inapplicable to Iraq, and the president exercised that authority when he issued his determination in May, the court thus held that TRIA was no longer an available mechanism for plaintiffs to use in order to satisfy their judgment in July.[148]

While noting that the U.S. government's position making the POWs unable to recover any portion of the judgment "seems extreme,"[149] the court implied that its hands were tied by the law. Judge Roberts, the presiding judge, ended his Memorandum Opinion with the quote: "Though the penalty is great and [the] responsibility heavy, [the Court's] duty is clear."[150] Judge Roberts was quoting from the last line of the 1953 Supreme Court opinion that vacated the stay of execution for the Rosenberg spies who had been convicted of espionage during the early days of the Cold War.[151] Much like Chief Justice Vinson in the *Rosenberg* case, Judge Roberts and the *Acree* court may have intended to comment on the nature of the judiciary and how the legislature and the executive branch can restrain as well as shape the duty of the court. In doing so, however, the court chose to avoid its duty to challenge the constitutional question of separation of powers as presented by the structure of victim compensation in the terrorism exception amendments to the FSIA.[152]

Upon appeal, the D.C. Circuit affirmed the district court's exercise of jurisdiction under FSIA and the "Flatow Amendment." When section 1503 is read in the context of other provisions of the EWSAA and its legislative history, that provision is best understood as applying only to legal restrictions on assistance and funding for the new Iraqi government. And thus, finding that section 1503 did not alter the jurisdiction of the federal courts under the FSIA, the district court properly exercised jurisdiction to hear the case under the FSIA.

However, having concluded that jurisdiction in the case was proper, the three-judge panel of the D.C. Circuit held that the plaintiffs failed to state a

146. *Snow*, 276 F. Supp. 2d at 32; *see also* Pres. Determination No. 2003-23, 68 Fed. Reg. 26,459 (May 16, 2003).

147. "Indeed, in his 'Message to Congress Reporting the Declaration of a National Emergency With Respect to the Development Fund for Iraq' issued May 22, 2003, the President stated specifically that the Determination made § 201 of TRIA inapplicable to Iraq." *Snow*, 276 F. Supp. 2d at 33.

148. *Id.*

149. *Id.* (referring to the defendant Secretary of Treasury's position).

150. Rosenberg v. United States, 346 U.S. 273, 296 (1953), *quoted in* Acree v. Snow, 276 F. Supp. 2d at 33.

151. *See Rosenberg*, 346 U.S. at 296.

152. There is also the canon of constitutional avoidance, a fundamental principle of American public law that courts should decide constitutional issues only when necessary. *See* Ashwander v. Tennessee Valley Authority., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). This might also explain the courts' reluctance to strike down a legislative act as unconstitutional. For more discussion on this specific question on constitutionality of the terrorist state exception, see *infra* part IV.

cause of action.[153] The court reasoned that it would be "utterly unseemly" to ignore the intervening decision in *Cicippio*.[154] Although the *Cicippio* decision was rendered three months after the district court's decision in *Acree* I, the circuit court in *Acree* III found that this qualified as an "exceptional circumstances" where a Court of Appeals may consider a non-jurisdictional question that have not been raised by the parties or passed on by the district court, considering the stakes: "appellees have obtained nearly a billion dollar default judgment against a foreign government whose present and future stability has become a central preoccupation of the United States' foreign policy."[155]

Given these high stakes, the court held that the *Acree* plaintiffs failed to state a legal cause of action. In *Acree* I, plaintiffs premised their claim of liability, and the district court similarly relied on section 1605(a)(7) and the Flatow Amendment, finding that those provisions "create a federal cause of action against officials, employees and agents of a foreign state, as well as the state and its agencies and instrumentalities themselves." This reading of the FSIA was contradictory to the intervening decision by the D.C. Circuit in *Cicippio*,[156] where the Court held that neither section 1605(a)(7) nor the Flatow Amendment, nor the two together, creates a cause of action against foreign states themselves. *Cicippio* also made clear that any suit against an official of a foreign state must be a suit in that official's personal capacity.[157] Thus, the *Acree* court in its decision on June 4, 2004, decided that the FSIA only allows lawsuits for pain and suffering if they are filed against *agents and officers* of those foreign states responsible for terrorism who are not acting on behalf of their government.[158]

In order to arrive at this new conclusion, departing from the line of FSIA cases since 1996, the D.C. Circuit frequently entertained the "weighty interests" of the U.S. foreign policy.[159] The court found it particularly important to note that the district court failed to weigh the importance of the case to the foreign policy interests when it dismissed the Justice Department's motion to intervene. Government's sole purpose in intervening was to raise a highly tenable challenge to the subject matter jurisdiction in a case with "undeniable impact" on the Government's conduct of foreign policy and to preserve that issue for appellate review.[160] In light of its clear foreign policy interests, the United States was entitled to intervene.[161] The court thus reaffirmed the decision in *Cicippio*, and held that FSIA does not give rise to a cause of action against a foreign state in its official capacity. Judge Harry Edwards stated in the opinion, "We are mindful of the gravity of the [POWs'] allegations in this case. That appellees endured this suffering while acting in service to their country is all the more sober-

153. *Acree* III, 2004 U.S. App. LEXIS 10972, at *49-50.
154. *Id.* at *52. *See Cicippio*, 353 F.3d 1024.
155. *Acree* III, at *51.
156. *Cicippio*, 353 F.3d 1024 at 1033.
157. *Id.* at 1034.
158. *Acree* III, 2004 U.S. App. LEXIS 10972, at *53-57.
159. *Id.* at *26.
160. *Id.*
161. *Id.* at *27, citing *Roeder*, 33 F.3d at 233 (permitting the United States to intervene in a case implicating foreign policy concerns).

ing."[162] The three-judge panel of the D.C. Circuit thought it more important, however, to narrow the reading of the state-sponsored terrorism exception in order to protect the U.S. foreign policy interests as raised by the executive branch. In holding so, however, the *Acree* court still failed to directly address the separation of powers concern, and no constitutionality question was raised. Part IV will examine the cases where the constitutional challenges were brought to the courts' attention.

IV.
A Separation of Powers Discourse: Constitutionality of the State-Sponsored Terrorism Exception to the FSIA

The constitutionality of the state-sponsored terrorism exception to the FSIA has been consistently upheld as to the question of whether the Congress may create subject matter jurisdiction for federal courts through the FSIA.[163] However, the question has been left open as to whether there would be a constitutional issue in the event of a suit involving a country that was either added to or dropped from the executive branch's list of state sponsors of terrorism after the statute was enacted. This part will argue that the Second Circuit in the case of *Rein v. Socialist People's Libyan Arab Jamahiriya* failed to realize the shortsightedness of the "static" view of the list of state sponsors of terrorism (that the membership in the list will not change) and concludes that the U.S. Supreme Court may soon be asked to answer whether there is a separation of power violation in the case that the State Department removes Iraq or Libya from the list.

A. Previous Challenges to the Constitutionality of the State-Sponsored Terrorism Exception

In *Rein v. Socialist People's Libyan Arab Jamahiriya*,[164] one of the rare cases where a state designated as a state sponsor of terrorism appeared in U.S. courts to defend itself against a FSIA suit, Libya challenged the constitutionality of the FSIA exception under the separation of powers doctrine. The Second Circuit found that there was no unconstitutional delegation in allowing the exis-

162. *Acree* III, 2004 U.S. App. LEXIS 10972, at *56.

163. Although the Congress of the United States is a legislature of enumerated and specific powers, and can only act in accordance with the limitations imposed by the Constitution, see *Marbury v. Madison*, 5 U.S. 137 (1803), the Constitution imposes no such limitation on the ability of Congress to waive the sovereign immunity of foreign countries: "Foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983). The Constitution grants Congress the power to create subject matter jurisdiction for federal courts through the FSIA: "The jurisdictional grant is within the bounds of Article III, since every action against a foreign sovereign necessarily involves application of a body of substantive federal law, and accordingly 'arises under' federal law, within the meaning of Article III." *Id.* at 497. Thus, the constitutionality of the state-sponsored terrorism exception has been held not to violate the provision of Article III of the Constitution limiting federal court jurisdiction to matters arising under federal law. *See* Price v. Socialist People's Libyan Arab Jamahiriya, 110 F. Supp. 2d 10 (D.D.C. 2000).

164. 162 F.3d 748 (2d Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999).

tence of subject matter jurisdiction over foreign sovereigns to depend on the State Department's determinations of whether particular foreign sovereigns are sponsors of terrorism.[165] The court thus rejected Libya's contention that the State Department's designations affect sovereign immunity and results in an unconstitutional delegation of a core legislative power: the power to determine the subject matter jurisdiction of the federal courts.[166] The *Rein* court based its reasoning in large part on a Supreme Court decision from 1890, which upheld the existence of federal court jurisdiction even though that jurisdiction depended on a factual determination that had been delegated to the Department of State.[167]

More importantly, although the court acknowledged that the Seventh and Eleventh Circuits "expressed doubts as to whether Congress can constitutionally delegate such a core power as the power to control the jurisdiction of the federal courts,"[168] the court did not engage in reconciling those concerns because in the particular case before it, "there was no delegation at all."[169] In *Rein*, the decision to subject Libya to U.S. jurisdiction under section 1605(a)(7) was made by Congress itself rather than by the State Department. This was because at the time that section 1605(a)(7) was passed, Libya was already on the list of state sponsors of terrorism. The *Rein* court found it persuasive that no decision whatsoever of the Secretary of State was needed to create jurisdiction over Libya for its alleged role in the destruction of Pan Am 103; "That jurisdiction existed the moment that the AEDPA amendment became law."[170]

Adopting the same reasoning as the *Rein* decision, the District Court for the District of Columbia also rejected Iraq's challenge of the state-sponsored terrorism exception as unconstitutional violation of separation of powers.[171] Since Iraq was also already on the list of states designated as state sponsors of terrorism at the time the AEDPA was enacted, the *Daliberti* court reasoned, "Congress simply chose to define the members of the class of 'terrorist states' by reference to a separate determination made by the Secretary of State. . . .The delegation by Congress of this decision to the Secretary of State does not violate separation of powers."[172]

This reasoning, however, is limited to the circumstances where the foreign sovereign subjected to a suit under the FSIA exception was already designated

165. *Id.* at 762-64.

166. *Id.* at 764.

167. *Id.* at 763, *citing* Jones v. United States, 137 U.S. 202 (1890). The *Rein* court also found relevant the reasoning in the Second Circuit decision in *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2nd Cir. 1997) (denying jurisdiction on the basis of an analogous finding by the executive branch).

168. *Rein*, 162 F.3d at 763.

169. *Id.* at 764.

170. *Id.*

171. Daliberti v. Republic of Iraq, 97 F.Supp. 2d 38, 49-51 (D.D.C. 2000). Iraq appeared in this § 1605(a)(7) case essentially to challenge the applicability of this FSIA exception on a motion to dismiss, and was unsuccessful. Iraq then appeared no further in the case, and a different judge held a hearing and entered a default judgment against Iraq. Daliberti v. Republic of Iraq, 175 F.Supp. 2d 36 (2001). Iraq did not appear in a later section (a)(7) case. Hill v. Republic of Iraq, 175 F.Supp. 2d 36 (2001).

172. *Daliberti*, 97 F.Supp. 2d at 50.

as a state sponsor of terrorism by the State Department at the time section 1605(a)(7) was passed. In its decision in *Rein*, the Second Circuit recognized that the issue of delegation might be presented in the event of a suit involving a country that was either added to or dropped from the executive branch's list of state sponsors of terrorism after the statute was enacted.[173] The subsequent section demonstrates how recent changes in Iraq and Libya may lead to the State Department's removal of the countries from the list.

B. Recent Changes in the Foreign Relations Regarding Iraq and Libya

As discussed above, the list of state sponsors of terrorism, has not changed since 1993, whereas the AEDPA amendment to the FSIA was passed in 1996. That is to say, every foreign sovereign subjected to the FSIA suit under section 1605(a)(7) so far was already on the list of state sponsors of terrorism when the amendment was enacted in 1996. Consequently, the courts could avoid answering the question of whether there was unconstitutional delegation of legislative power—as long as the list remained "static" and unchanged. However, for the first time since 1996, the landscape in foreign relations relating to state-sponsored terrorism is about to change drastically; Iraq and Libya may soon be removed from the list of state sponsors of terrorism.

In 1998 and 2000, U.S. courts were able to deny Iraq and Libya's motion to dismiss because Iraq and Libya were on the list and there was "no delegation at all" by the Congress in 1996. However, as discussed above, President Bush suspended in 2003, with respect to Iraq, all sanctions applicable to state sponsors of terrorism, which had the practical effect of putting Iraq on a par with non-terrorist states.[174] The State Department conclusively reports in its 2004 annual report on "Patterns of Global Terrorism" that "[t]he ousting of Saddam Hussein regime by Coalition forces removed a longstanding sponsor of terrorism in the Middle East region."[175] It further notes that "[Iraq's] name can be removed from the state sponsors list when the Secretary of State determines that it has fulfilled applicable statutory requirements, which include having a government in place that pledges not to support acts of terrorism in the future."[176] After months of "war" and U.S. military occupation of Iraq, sovereignty will be returned to Iraq on June 30, 2004.[177] Although it is unclear what form of Iraqi government will be in place July 1,[178] "such hypothetical cases" that the *Rein* court refused to entertain in 1998[179] may soon be brought before U.S. courts.

Libya may also be removed from the list of state sponsors of terrorism. On February 6, 2004, senior U.S. and Libyan officials met to discuss U.S. oil companies' return to Libya after years of stringent sanctions against the government

173. *Rein*, 162 F.3d at 764.
174. *See* Patterns of Global Terrorism 2004, *supra* note 89.
175. *Id.*
176. *Id.*
177. Paul Richter & Sonni Efron, *U.S. Firm on Iraq Handoff*, L.A. TIMES, Apr. 7, 2004.
178. *Id.*
179. *Rein*, 162 F.3d at 764.

of Libya.[180] Congress also sent a congressional delegation recently to visit Libya.[181] Under a contemplated compensation agreement, Tripoli will pay out $2.7 billion to families of victims of the Pan Am Flight 103 bombing in 1988 provided that the United Nations and the U.S. lift sanctions and Washington removes Libya from the list of state sponsors of terrorism.[182]

C. *Consequences of the Distincion Between the "Active" and "Static" View of the List*

If either Iraq or Libya is removed from the list of state sponsors of terrorism, a curious result will follow: As the *Rein* court hinted, the *plaintiff* to the FSIA suit may put forth a claim of unduly delegated authority.[183] This is interesting because the U.S. plaintiff will be raising the same argument to enforce a FSIA judgment against Iraq and Libya that Iraq and Libya unsuccessfully raised as a defense against a FSIA suit in *Rein* and *Daliberti*; that Congress may not delegate a core legislative power to the executive branch, the power to determine the subject matter jurisdiction of the federal courts.[184]

The failure to take account of the changing nature of foreign relations illustrates how the *Rein*'s reasoning in upholding the constitutionality of the FSIA exception based on a "static" view of the list is erroneous. The facts in *Rein* and *Daliberti* (Libya and Iraq were already on the list when the Congress designated them as state sponsors of terrorism subject to federal jurisdiction under the FSIA) provide a possible explanation for the courts' outcome (holding that there was no delegation of congressional power at all, since the Congress may use the State Department's factual determination to grant Art. III jurisdiction).[185] An explanation, however, does not mean the courts correctly decided the case in terms of constitutional law. The court's broad jurisdiction in determining Arti-

180. *US-Libya Meeting Could Open Door to US Oil Companies' Return*, THE OIL DAILY, Feb. 6, 2004, at No. 24, Vol. 54.

181. *Id.*

182. *Id.* At time of press, this agreement has not yet been reached nor entered into effect. The State Department names Libya as one of the countries that took significant steps to cooperate in the global war on terrorism:

> In 2003, the Libyan Government reiterated assurances to the UN Security Council that it had renounced terrorism, undertook to share intelligence on terrorist organizations with Western intelligence services, and took steps to resolve matters related to its past support of terrorism. In September 2003, Libya addressed the requirements of the United Nations relating to the bombing of Pan Am Flight 103, accepting responsibility for the actions of its officials and agreeing to a compensation package for the victims' families. As a result, UN sanctions, suspended since 1999, were lifted.

Patterns of Global Terrorism 2003, *supra* note 89.

183. *Rein*, 162 F.3d at 764. The hypothetical case would proceed like this. Iraq (or Libya) is removed from the list of state sponsors of terrorism. A terrorism victim is now denied the subject matter jurisdiction to sue Iraq under the FSIA terrorist exception since Iraq is no longer designated as a state sponsor of terrorism, as required under § 1605(a)(7). The executive branch has in fact removed the U.S. federal jurisdiction that the Congress had granted against Iraq in 1996 under AEDPA. The plaintiff then may bring a constitutional challenge to the FSIA exception arguing that there was an unconstitutional delegation of a core legislative power.

184. *See, e.g.*, *Rein*, 162 F.3d at 762-63.

185. *Id.*

cle. III subject matter jurisdiction did not provide an adequate excuse for its holding in *Rein*. Instead of upholding the delegation of congressional power to the executive branch because the Congress considered the same list of countries as state sponsors of terrorism, *at the time* AEDPA was passed, the court should have reached the conclusion that the FSIA terrorist exception unduly violated the separation of powers principle. The Supreme Court denied certiorari in *Rein*.[186] Once the list membership changes with the State Department determination that either Iraq or Libya is no longer a terrorist state, the U.S. Supreme Court may revisit the Second Circuit's reasoning in *Rein*.

The question of constitutional law posed in *Rein* had implications beyond whether the Congress may delegate a factual determination to the executive branch while granting federal jurisdiction over FSIA suits. As the courts recognized in *Roeder* and *Acree*,[187] considering the impact of the encroachment by the judicial branch into the executive branch's foreign policy should be at the forefront of any question of separation of powers concerning the state sponsors of terrorism exception. Given the courts' mandate to only consider cases based on facts before the court, the *Rein* court was perhaps not the appropriate forum for deciding this particular question of constitutional law. However, if Iraq and Libya are removed from the list of state sponsors of terrorism, the U.S. Supreme Court may be asked to answer the separation of powers challenge based on the "active" nature of the list. The question would be: Whether there is an unconstitutional delegation of congressional power when the executive branch removes (or adds) states from the list of state sponsors of terrorism. Once the State Department finalizes the removal of Iraq or Libya from the list of state sponsors of terrorism, the Supreme Court will have to consider these constitutional challenges in the light of their "undeniable impact" on the government's conduct of foreign policy.[188]

CONCLUSION

In response to international terrorism, the application of sovereign immunity has evolved rapidly since the congressional adoption of the FSIA in 1976. Since the inception of the Flatow Amendment in 1996, Congress has made various attempts at formulating the terrorist exception, in order to accomplish the twin goals of ending terrorism and compensating American victims. However, by placing the burden of deciding the proper compensation of victims in the hands of the U.S. courts, neither goal was satisfactorily met. While the legislature intended the courts to determine and award compensation to successful terrorist-suit plaintiffs, foreign policy and diplomatic concerns posed by the executive branch constrained the judiciary. This struggle between the legislative, executive, and the judiciary, leaves successful plaintiffs unable to collect, deprives the executive of its foreign policy prerogatives, and encourages legisla-

186. *Rein*, 1999 U.S. LEXIS 4043 (June 14, 1999) (denying certiorari).

187. *See, e.g.*, Acree III, 2004 U.S. App. LEXIS 10972, at *26 (recognizing the "undeniable impact" the FSIA suits have on foreign policy).

188. *Acree* III, 2004 U.S. App. LEXIS 10972, at *26.

tive interference in judicial determination of pending litigation. Most troubling is the fact that this separation of powers issue was born when Congress first shifted the burden of deciding sovereign immunity determination from the executive branch to the judicial branch by codifying the restrictive sovereign immunity theory in the FSIA in 1976.

As witnessed in the aftermath of September 11th, the war on terrorism is far from over. On June 2, 2004, President Bush described the war on terrorism as "the great challenge of our time, the storm in which we fly."[189] The emphasis placed on foreign relations before the 2004 presidential election shows how the war on terrorism is one of the central issues for the candidates and for the voters.[190]

Politics interplay with the President and the Congress's framing of the response to state sponsors of terrorism. The domestic political condition as evidenced by campaign politics as well as the diplomatic and economic policy considerations surrounding these "state sponsors of terrorism" are constantly changing. The government may take into consideration that particularly today, post-9/11, the national sentiment and support for fellow Americans is undeniable.[191]

"Politics as usual,"[192] however, is no excuse for failure to address the original goals of FSIA amendments. Legislative amendments to the terrorist exception will constitute only "cheap talk"[193] if no real compensation is made available to terrorism victims and there are no deterrence effects on international terrorism. Framing a coherent application of the sovereign immunity principles and developing an equitable, efficient response to terrorism is critical. There is an urgent need today for effective policy-making to actually tackle the separation of powers concerns in these matters.

James Madison in the Federalist No. 51 argued that the purpose of separating powers between two governments as well as within the federal government was to create a system "where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other — that the private interest of every individual may be the sentinel over the public rights."[194] Within the separation of powers jurisprudence there is the notion that separate branches of government should not encroach upon the duties assigned

189. Dan Balz, *Kerry Uses Iraq to Make Case*, THE WASH. POST, June 6, 2004, at A6.

190. *Id.*

191. Mona Conway, Comment, *Terrorism, the Law and Politics as Usual: A Comparison of Anti-Terrorism Legislation before and after 9/11*, 18 TOURO L. REV. 735, 767 (2002).

192. *Id.* at 773.

193. For a discussion on "cheap talk," distinguishable from the legislature's "sincere statements," see Barry Friedman, *Symposium: The New Federalism After* United States v. Lopez*: Panel II: Legislative Findings and Judicial Signals: A Positive Political Reading of* United States v. Lopez, 46 CASE W. RES. L. REV. 757, 780 (1996).

194. The Federalist No. 51, "The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments," [James Madison], *available at* http://www.constitution.org/fed/federa51.htm (last visited June 19, 2004).

other branches.[195] The court may invoke the separation of powers principle to strike down laws that threaten the balance of power between the three branches of the federal government.[196] Once membership in the list of state sponsors of terrorism is changed, which may happen in the imminent future with respect to Iraq and Libya, the U.S. Supreme Court will have the opportunity to revisit the reasoning in *Rein*. The Supreme Court then may not shy away from the separation of powers challenge and the issue of delegation, but must contemplate the "hypothetical case" that the *Rein* court refused to answer.[197]

The post-9/11 emotional pulse of the United States now defines an act of terrorism as something "evil."[198] The U.S. faces a difficult task in balancing this desire to make the "evil" state sponsors of terrorism "pay," with the government's commitment to the Constitution.[199]

195. For further discussion on the encroachment upon a coordinate branch's power, see Matthew Thomas Kline, Comment, *The Line Item Veto Case and the Separation of Powers*, 88 CALIF. L. REV. 181, 205-207 (2000).

196. *See* Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 535, 565 (1998). Her scholarship proceeds from the first principle that the Framers' notion of the primary goal of government was to "protect the liberty of the people from government invasion." *Id. at 535.* All government structures then, she argues - from the separation of power to popular participation in representative democracy - were designed to serve that end. *See id.* at 535-38, 570-77.

197. *Rein*, 162 F.3d at 764.

198. *See* Serge Schmemann, *U.S. Attacked; President Vows to Exact Punishment for "Evil"*, N.Y. TIMES, Sept. 12, 2001, at A1.

199. As government lawyers have explained, "a commitment to the rule of law should not be mistaken for weakness in the face of terrorist violence." Bill Miller & John Mintz, *Once-Supportive U.S. Fights Family Over Iranian Assets*, THE WASH. POST, Sept. 27, 1998, at A8.

Berkeley Journal of International Law

Volume 22 | Issue 3 Article 7

2004

The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgements

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The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgments

By
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INTRODUCTION

The twentieth century has brought significant progress for plaintiffs seeking to recover against state defendants in U.S. courts. Indeed, given the development of the restrictive theory of sovereign immunity in the middle of the twentieth century,[1] one would expect a growing number of effective adjudications and subsequent executions of judgments against foreign states. Although there has been an increase in such suits against foreign states, particularly in the area of terrorist related tort actions in the United States,[2] successful claimants

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1. The restrictive theory of sovereign immunity refers to the idea that foreign governments should not be able to claim a defense of sovereign immunity when a claim against them is based on private acts (*jure gestionis*) of the state. Up until the mid 1950s, the United States adhered to the absolute theory of sovereign immunity, which immunized almost all actions of foreign states from U.S. judicial scrutiny. *See* Schooner Exchange v. McFaddon, 7 Cranch 116 (1812). This immunity was extended to the property of a foreign government engaged in a commercial enterprise. Berizzi Bros. Co. v. Pesaro, 271 U.S. 562 (1926). Gradually, the Court relied more on the policy and practices of the State Department to determine whether immunity was appropriate. *See, e.g.*, Mexico v. Hoffman, 324 U.S. 30 (1945) (finding no sovereign immunity where the state department failed to recognize such a claim). However, given the increasing involvement of government actors in commercial undertakings, the State Department in 1952 officially adopted the restrictive theory of immunity, bringing its practice into line with the majority of jurisdictions. *See* Letter from Jack Tate, Legal Advisor of U.S. Department of State to the Office of the Attorney General, 24 DEP'T OF STATE BULL. (1952). After the adoption of the restrictive theory, U.S. courts struggled to discern between the public and private acts of foreign states. *See* Danny Abir, *Foreign Sovereign Immunities Act: The Right to a Jury Trial in Suits Against Foreign Government-Owned Corporations*, 32 STAN. J. INT'L L. 159, 165 (1996). This difficulty engendered the drafting and passage of the Foreign Sovereign Immunities Act.

2. Most readers will be familiar with the additions made to the foreign sovereign immunities regime by the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996) (codified at 28 U.S.C. § 1605(a)(7)). As a brief summary, the new exceptions allow for suit where "money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act." The section allows for these type of actions only against states that are listed on the State Department's list of state sponsor's of terror-

must eventually confront the rules of immunity from execution of judgments enshrined in the Foreign Sovereign Immunities Act of 1976 (FSIA).[3] This article considers particular aspects of the immunity from execution enshrined in the FSIA, which either diverge from the common practice of states, or create unnecessarily restrictive barriers on execution. By reference to the treatment of these same problems in foreign jurisdictions, and under regimes created by international bodies such as the International Law Commission, the article identifies specific areas where improvement is necessary to construct a coherent regime of immunity from execution.

Before turning to a comparative review, one must turn to the structure of the FSIA itself. The statutory scheme set up by the FSIA essentially presents two barriers to successful litigation: the first, more often discussed and assailed in recent years, relates to the necessity of obtaining proper jurisdiction over a foreign state; the second, a stringent limitation on the property of foreign states that will be available for execution. These two barriers are constructed by the interplay of several sections of the FSIA, found in Title 28 of the United States Code, sections 1605-1611. The adjudicatory barrier can be found in sections 1605-1608, which establish a general rule of immunity and enumerated exceptions, the most important being the commercial activity exception of the restrictive theory.[4] The execution barrier is enumerated in sections 1609-1611.[5] This

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ism. § 1605(a)(7)(A). The list currently includes Cuba, Iran, Iraq, Libya, North Korea, Syria, and Sudan. *See* United States Department of State, Patterns of Global Terrorism: Overview of State Sponsored Terrorism, (Apr. 30, 2003), *available at* http://www.state.gov/s/ct/rls/pgtrpt/2002/html/19988.htm.

3. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2892 (codified as amended at 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-1611 (2000)) [hereinafter FSIA].

4. *See* FSIA, §§ 1604 (declaring the general rule of immunity from jurisdiction); 1605 (establishing general exceptions to immunity from adjudicative jurisdiction); 1606 (prohibiting punitive damages); 1607 (allowing for counterclaim jurisdiction over a foreign state); 1608 (establishing provisions for service and default judgments).

5. *See* FSIA, §§ 1609 (establishing the traditional rule of immunity from execution of judgments); 1610 (establishing general exceptions to immunity from execution); 1611 (excepting specific types of property from execution). Since these provisions will be referred to continuously, the full text of the relevant portions is as follows:

> § 1609. Immunity from attachment and execution of property of a foreign state
> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.
> § 1610. Exceptions to the immunity from attachment or execution.
> (a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—
> (1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or
> (2) the property is or was used for the commercial activity upon which the claim is based, or
> . . .

article undertakes an analysis of how the application and interpretation of the latter sections results in, as one circuit court has acknowledged, an adjudicated "right without a remedy."[6]

In the United States, this set up has resulted in tortuous journeys for successful claimants against foreign states, the most famous being that of Stephen Flatow versus the Republic of Iran. Flatow's claim arose out of the death of his daughter in a terrorist bombing while she was visiting Israel.[7] Flatow alleged that the Government of Iran sponsored the bombing and, consequently, he brought suit in the District Court for the District of Columbia under section 1605(a)(7) of the FSIA. The court granted Flatow a default judgment against Iran in 1998 for $225 million.[8] This judgment consisted of approximately $25 million in compensatory damages and the balance in punitive damages.[9] Flatow subsequently attempted to execute this judgment against numerous properties of

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(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or
(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or
(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.
(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if—
(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or
(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or (7), or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.
. . .
§ 1611. Certain types of property immune from execution
. . .
(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—
(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or
(2) the property is, or is intended to be, used in connection with a military activity and
(A) is of a military character, or
(B) is under the control of a military authority or defense agency.

6. Letelier v. Republic Of Chile, 748 F.2d 790, 798 (2d Cir. 1984).
7. Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 7-9 (D.D.C. 1998).
8. *Id.* at 34.
9. The punitive damages portion, which would normally be disallowed under FSIA § 1607, was specifically allowed for by Congress in actions brought under § 1605(a)(7). *See* 28 U.S.C. § 1605, statutory note. This note is commonly referred to as the "Flatow Amendment."

Iran, including an expired arbitration award,[10] the former embassy property of Iran in the United States,[11] and U.S. Treasury funds owed to Iran.[12] In October 2000, after all of these attempts failed, Congress passed the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA),[13] which afforded certain victims of terrorist attacks an opportunity to recover funds from the U.S. Government in lieu of execution against the property of the foreign state. The Act allowed for recovery of one hundred percent of compensatory damages, in exchange for relinquishment of all claims to punitive damages.[14] Even after taking advantage of this extraordinary action by the Congress, Flatow continued his attempts to execute the punitive damage portions of the judgment, without any success.[15]

In response to cases arising after Flatow's,[16] which are not explicitly covered by the backward-looking VTVPA, Congress has continued to make *ad hoc* alterations to the FSIA, section 1610 enforcement regime. In the case of *Roeder v. Islamic Republic of Iran*,[17] Congress attempted to allow execution of a judgment against the frozen assets of the Iranian government for actions arising out of the Iranian embassy hostage-taking from 1979 to 1981, even though Iran was not deemed a terrorist state under 1605(a)(7) when the acts took place.[18] Regardless of this attempt by Congress, the Roeders were denied a remedy under the general provisions of the Algiers Accords, which absolved all claims on the part of both the United States and Iran.[19]

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10. Flatow v. Islamic Republic of Iran, 76 F. Supp. 2d 28, 29 (D.D.C. 1999).

11. Flatow v. Islamic Republic of Iran, 76 F. Supp. 2d 16, 18 (D.D.C. 1999).

12. Flatow v. Islamic Republic of Iran, 74 F. Supp. 2d 18, 19 (D.D.C. 1999).

13. Pub. L. No. 106-386, 114 Stat. 1464 (2000) [hereinafter VTVPA]. It should be noted that while Flatow did not receive any of his punitive damages claims under the VTVPA, at least one other frustrated plaintiff received an amount covering the entire compensatory award and some of the punitive award. *See* Christopher Marquis, *Families Win Cuban Money in Pilot's Case*, N.Y. TIMES, Feb. 14, 2001, at A1.

14. *See* VTVPA, § 2002(a).

15. *See* Flatow v. Islamic Republic of Iran, 305 F.3d 1249 (D.C. Cir. 2002) (refusing a claim to post-judgment interest on the punitive damages claim); Flatow v. Islamic Republic of Iran, 308 F.3d 1065 (9th Cir. 2001) (refusing execution against real estate owned by Iranian instrumentality).

16. A case of particular interest has been that relating to the death of Charles Hegna. *See* Sean Murphy, *Contemporary Practice of the United States Relating to International Law: 2002 Victims of Terrorism Law*, 97 A.J.I.L. 187 (2003). The Hegnas had presented an argument to the district court that the VTVPA, by distinguishing between two types of plaintiffs, those who had a final judgment as of July 20, 2000, and those who had not, violated the equal protection element of the Fifth Amendment. After upholding the government's arguments against this argument, Judge Henry Kennedy Jr. wrote a letter to Senate Majority Leader Tom Daschle, urging Congressional action that would allow Mrs. Hegna to recover on the $375 million judgment for the murder of her husband at the hands of Hezbollah terrorists during a hijacking. *Id.*

17. 195 F. Supp. 2d 140 (D.D.C. 2002).

18. In order to allow for jurisdiction over Iran in the *Roeder* case, Congress acted by making a specific fact based amendment section 1605(a)(7) allowing for jurisdiction over acts "related to Case Number 1:00CV03110 (ESG) in the United States District Court for the District of Columbia." Pub. L. 107-77, Title VI, § 626(c), 115 Stat. 803 (2001). Congress later amended the section again to correct a typo in the case number. Pub. L. 107-117, Div B, Ch. 2, § 208, 115 Stat. 2299 (2002).

19. *Roeder*, 195 F. Supp. at 184-85. For the Algiers Accords, see Declaration of the Government of the Democratic Republic of Algeria, 1 IRAN-U.S. CL. TRIB. REP. 3 (1981); Declaration of the Government of the Democratic Republic of Algeria Concerning the Settlement of Claims by the

Congress went one step further with the Terrorism Risk Insurance Act of 2002.[20] Under the provisions of that Act, successful plaintiffs may now execute judgments against frozen assets of terrorist states to the extent of compensatory damages, "[n]otwithstanding any other provision of law."[21] The President may still prevent the attachment of, or execution against, state property that is protected under an international treaty.[22]

The chronicle of Stephen Flatow, and the *ad hoc* Congressional splintering of immunity, reflects the hazards that execution of a judgment against a foreign sovereign can present and raises the question whether the structure of the FSIA as constituted should persist under the avalanche of terrorism related claims arising in U.S. courts. Indeed, there has been considerable discussion of altering the balance of deference to state property in recent years. The American Bar Association (ABA), in a broad discussion of amending the FSIA, was particularly acute in its criticisms of the execution portions of the Act,[23] finding them to be "among the most confusing and ineffectual in the statute."[24] Yet, the idea of a separate immunity from execution against sovereign assets has been long entrenched in international law.[25] Although the restrictive theory of sovereign immunity has expanded the reach of adjudicative jurisdiction quite liberally over time by allowing for claims against a state arising from commercial activities, *acta jure gestionis*, as opposed to sovereign activities, *acta jure imperii*, the principles of immunity from execution have been comparatively slow to evolve. Indeed, the International Law Commission (ILC), in promulgating its 1991 Draft Articles on the Jurisdictional Immunities of States and Their Property,[26] noted that the question of execution of judgments, because it arises only after successful litigation against a state party, presents the "last bastion of state immunity."[27] Yet, as with the national statutory regimes considered herein, the ILC's definition of execution immunity is quite broad, so much so that a judgment creditor will have "little hope . . . unless the state willingly consents."[28] Furthermore, the ILC has faced some criticism for the limited scope of its consider-

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Government of the United States and the government of the Islamic Republic of Iran, 1 IRAN-U.S. CL. TRIB. 9 (1981).

20. *See* Pub. L. No. 107-297, Title II, 116 Stat. 2322, 2337-40 (2002).

21. *Id.* § 201.

22. *Id.*

23. American Bar Association Working Group, *Report: Reforming the Foreign Sovereign Immunities Act*, 40 COL. J. TRANSNAT'L L. 489, 581-594 (2002) [hereinafter ABA Report].

24. *Id.* at 581.

25. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 346-47 (5th ed. 1998).

26. The Aricles themselves are contained in *Report on the Draft Articles on the Jurisdictional Immunities of States and Their Property*, U.N. Doc. A/46/10, *reprinted in* [1991] Y.B. INT'L L. COMM., Vol. II (2), at 17 [hereinafter ILC Draft Report]. They are also generally available on the ILC website. *See* The Draft Articles on Jurisdictional Immunities of States and Their Property (1991), *available at* http://www.un.org/law/ilc/texts/jimm.htm [hereinafter ILC Draft Articles].

27. *Id.* at 56.

28. M.P.A. Kindall, *Immunity of States for Noncommercial Torts: A Comparative Analysis of the International Law Commission's Draft*, 75 CAL. L. REV. 1849, 1863 (1987) (noting the breadth of execution immunity in a draft of the Articles).

ation,[29] having left out some of the most difficult problems of immunity from execution. Over time, the ILC's course in considering the issue of execution immunity has become increasingly more fractured. Indeed, a recent proposal to rely on the "development of voluntary compliance regimes," which were to include mandatory grace periods for a state,[30] seems to avoid the more complex issues put before the ILC, including pre-judgment attachment and the nature of commercial property for the purposes of execution.

There are, of course, tenable arguments for maintaining the strong structure of execution immunity when confronted with the restrictive theory of adjudicative immunity. First, the very nature of a state debtor (or tortfeasor) transcends normal concerns of restitution, compensation, or contractual expectations; indeed, the funds of a foreign state are subject to an individual political mechanism to which other foreign states—out of a sense of comity and a prediction of reciprocity—should give great deference. Second, while the announcement of a judgment against a foreign sovereign implicates a fair measure of that state's dignity, the arrest of and execution against a foreign state's assets have much stronger potential to upset diplomatic relations. It should be noted that many of the disputes arising between a private party and a foreign state involve concerns arising from distinctly political disputes—the Iranian and Cuban expropriations after their respective revolutions, for instance—that necessitate the allowance of some claim for immunity and thereby remove conflict with foreign states from the judicial forum.

These issues will be returned to later in this note. The core, however, will consider the manifestation of immunity from execution of judgments within the provisions of the FSIA in light of the treatment of execution against sovereign states in foreign jurisdictions. As depicted in *Flatow* above, the U.S. enforcement regime is quite permissive in some cases of tort claims, but also can be quite restrictive as regards the classification of a foreign states commercial property. Common law jurisdictions, particularly the United Kingdom, offer an interesting view into the parallel development of the law of sovereign immunity since the passage of the FSIA twenty-seven years ago. The United Kingdom's State Immunity Act,[31] passed only two years after the FSIA, is substantially simpler as a textual matter than the American statute, but offers a developed framework and jurisprudence on principles of immunity from execution.

29. *See, e.g,* HAZEL FOX, THE LAW OF STATE IMMUNITY 244-250 (2002). *See generally* Kindall, *supra* note 28, at 1863-1872 (commenting on an early version of the Draft Articles). The draft code does not address many of the more troubling issues in the area of execution of judgment of sovereign states. In particular, it does not contain express provisions regarding pre-judgment attachment, although this is the center of the 2002 reconsideration of the draft code by an Ad Hoc Committee. *See Report of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property*, U.N. GAOR, 57th Sess., Supp. No. 22, Art. XY, at 10, U.N. Doc. A/57/22 [hereinafter ILC Ad Hoc Report].

30. *Report of the Working Group On Jurisdictional Immunities Of States And Their Property*, ILC Report, A/54/10, 1999, U.N. Doc. A/CN.4/L.576 [hereinafter ILC 1999 Report].

31. State Immunity Act, 1978 c. 33 (Butterworth's 2003) [hereinafter UKSIA].

Two relatively more recent immunity statues, the Canadian State Immunity Act[32] and the Australian Foreign Sovereign Immunities Act,[33] offer through their preparatory works an interesting theoretical development of the issue of immunity from execution. Given the relative size of the jurisdictions, there is not the magnitude of common law interpretation of these statutes as there is in the United States; however, they still offer an interesting counterpoint to what is essentially a restrictive U.S. regime. These statutory enactments, taken in conjunction with the publications of the ILC and principal cases taken from some civil law jurisdictions, particularly France and Germany, can be used to construct improvements to the FSIA. As a comparative analysis, this paper will lay out the statutory and judicial frameworks concerning execution of judgments from each jurisdiction. Each section will present how the FSIA deals with a set of issues and then comment on the treatment of those same issues in the foreign jurisdictions mentioned above.

Along these lines, part I addresses specific procedural concerns of immunity from execution, the nature of appropriate waivers of execution immunity, an issue of great import for tort plaintiffs, and the propriety of pre-judgment attachment. Part II addresses the substantive scope of execution immunity, with special reference to the nexus requirement and the treatment of tort and terrorism-based claims. Part III considers the scope of specific state property that will be available for execution by a successful plaintiff party, including issues of distinctly sovereign property, such as central bank assets, military property, and most controversially, the accounts and properties of diplomatic entities.

Finally, part IV takes all of these comparative considerations in hand to discuss the reform of the execution provisions of the FSIA with reference to the policy underlying the act and the growing pressure of litigation involving the FSIA. A number of possible solutions, some of which have been proposed in the ABA Report mentioned above, can be developed, or should be adopted from the practice of other states for the foreign sovereign immunity regime to function more effectively in the United States. This final section takes note of all of the possibilities and considers the impacts each would have on the plight of plaintiffs and defendant states in U.S. courts.

I.
PROCEDURAL CONCERNS OF THE FSIA

Under traditional regimes of sovereign immunity, a state can be found to have waived its right to immunity in foreign courts.[34] Under the FSIA, a state can waive its adjudicative immunity under section 1605. However, this waiver is not considered consent to execution against the sovereign state's property; it

32. State Immunity Act, R.S.C. 1985, ch. S-18, §§ 1-16 (Lexis 2003) [hereinafter CSIA].

33. Foreign Sovereign Immunities Act of 1985 (AUS), *reprinted in* 25 I.L.M. 715 (1986) [hereinafter ASIA].

34. *See* BROWNLIE, *supra* note 25, at 343. A similar principle holds within the federal system of the United States. *See, e.g.*, Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959) (finding that a state may waive its sovereign immunity in federal court).

only suffices to draw the foreign state into court. The FSIA requires an entirely separate waiver of execution immunity, a requirement that places unknowing plaintiffs in danger of pursuing a successful case and finding no assets against which to execute the judgment.

This first section deals with two specialized issues of waivers of immunity from execution on a comparative level. On one hand, it presents the form that a waiver must take, that is, whether it must be explicit (rather than implicit) and whether a state may broadly waive its execution immunity through an international treaty instrument. This section will also deal with a corollary issue to waiver, that of pre-judgment attachment.[35] All formulations of sovereign immunity preclude this manner of attachment, absent a waiver, and this section will explore the manifestation of this in different jurisdictions, along with its theoretical justification in a modern immunity regime.

a. Waiver of Immunity from Execution

i. United States Practice

Separate waivers are required to submit a state to the adjudicative jurisdiction of U.S. courts and to pursue the execution of a judgment against that state. In other words, even an explicit waiver of immunity from adjudicative jurisdiction will not necessarily allow for execution against sovereign property that would otherwise be immune—assuming the waiver is the only grounds relied upon in pursuing execution. Note that, as with any waiver of rights belonging to an organization or state, there may still be issues of competency to waive that are particularly important given the numerous instrumentalities and agents of a foreign state, and issues related to the drafting of an express consent to jurisdiction.[36]

Despite the requirement of a separate waiver, which limits the recovery prospects of all but the most conscientious commercial actors, the FSIA has a somewhat broad means of establishing waiver. For instance, it is the settled practice of the Untied States that waiver of execution immunity may be established either explicitly or implicitly.[37] One of the most common roads to establish explicit waiver is through international agreement or convention.[38] Under the FSIA, an international agreement entered into after the passage of the Act

35. Pre-judgment attachment is dealt with specifically in § 1610(d). *See* discussion *infra* part I.b.i. Note that pre-judgment attachment solely for the purpose of acquiring jurisdiction is forbidden under the regime of *Shaffer v. Heitner*, 433 U.S. 186 (1977). However, attachment for other purposes, for example, in aid of execution, is possible.

36. *See* Georges R. Delaume, *The Foreign Sovereign Immunities Act and Public Debt Litigation: Some Fifteen Years Later*, 88 AM. J. INT'L L. 257 (1994).

37. FSIA, § 1610(a)(2). As noted above, to obtain pre-judgment attachment against a foreign sovereign requires an explicit waiver of rights. *Id.* § 1610(d)(2).

38. *See, e.g.*, Int'l Ins. Co. v Caja Nacional De Ahorro Y Seguro, 293 F.3d 392 (7th Cir. 2000) (relying, in part, on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) to establish waiver); *Gadsby & Hannah v. Socialist Republic of Romania*, 698 F. Supp. 483 (1988) (relying on U.S.-Romanian trade treaty to establish waiver).

likely can constitute an explicit, or implicit, waiver under section 1610(a)(2),[39] and there is an explicit allowance preventing the application of any of the FSIA's provisions in situations governed by international agreements signed before the passage of the Act.[40] Other implicit waivers have been provided for under the provisions of section 1610(f), particularly in cases when a foreign state agrees to arbitrate in a foreign country, agrees to a contract governed by the laws of a particular country, or if the state files a responsive pleading without raising the immunity defense.[41]

ii. Comparative Analysis

Section 13(3) of the UKSIA requires an express written waiver by a foreign state as to execution immunity.[42] The written consent may be contained in a treaty between the nations, or in any prior written agreement with the non-state party.[43] Furthermore, the head of a foreign state's diplomatic mission is assumed to have the power to consent to execution of that state's assets.[44]

Normally, the waiver of execution immunity will be construed to apply to both pre-judgment and post-judgment enforcement measures, including the use of a *Mareva* injunction against the state.[45] In one case, an English court allowed a waiver of execution to arise from a written waiver by a state of "whatever defence it may have of sovereign immunity for itself or its property (present or subsequently acquired)."[46] The court there found that while the statement was undoubtedly a reference to a waiver of adjudicative jurisdiction, the reference to

39. *See, e.g.*, Ferrostaal Metals Corp. v. S.S. Lash Pacifico, 652 F. Supp. 420 (S.D.N.Y. 1987) (holding that a trade agreement between the United States and Romania waived any claim to sovereign immunity by a state agency sued in the United States).

40. *See, e.g., Caja Nacional*, 293 F.3d at 399-400 (allowing pre-judgment security posting against an Argentine insurance company because the State of Argentina had signed both the New York and Panama Conventions).

41. *See* Enron Equip. Procurement Co. v. M/V Titan 2, 82 F. Supp. 2d 602, 611-12 (W.D. La. 1999); Coastal Cargo Co, Inv. v. M/V Gustav Sule, 942 F. Supp. 1082, 1087 (E.D. La. 1996). The language quoted in those cases concerning the nature of an implied waiver arising from arbitration agreements, choice of law clauses, and responsive pleadings comes from the House Report accompanying the passage of the FSIA. H.R. Rep. No. 1487, 94th Congress, 2d. Sess. 18 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6617. While the language on its terms referred to the waiver provisions of § 1605 relating to waiver of jurisdictional immunity, the fact that the FSIA requires a separate waiver for execution immunity does not require that the *types* of waivers allowed should be construed differently given the identical language regarding waivers found in sections 1605 and 1610.

42. UKSIA, § 13(3).

43. *Id.* § 13(5).

44. *Id.*

45. A *Mareva* injunction is a pre-judgment remedy intended to prevent a defendant's removal of specific assets, often those related to the underlying claim, from the jurisdiction. For a more thorough discussion, see *infra* part I.b.ii. Note that this does not apply to the provisions of § 13(4), where if the exception to execution is based on the commercial nature of the property, no pre-judgment attachment will be allowed. *See* Fox, *supra* note 29, at 379. *But see* Hispano Mercantil SA v. Central Bank of Nigeria [1979] 2 Lloyd's Rep. 277.

46. A Company v. Republic of X (1990) 2 Lloyd's Rep. 520, 523. Note that under the UKSIA, the *only* available method of obtaining execution against a foreign mission, state central bank, and probably against foreign military property is through express consent. *See* UKSIA, §§ 14(5) (central bank or other monetary authority property); 16(1)(b) (property of foreign mission); 16(2) (property of foreign soldiers in UK).

"property" was specific enough to constitute a waiver of execution immunity for the purposes of section 13.

As a corollary to this holding, the UKSIA does not allow implicit waivers of immunity from execution, particularly not in the case where the foreign state has consented only to adjudicative jurisdiction.[47]

The CSIA allows for both explicit and implicit waiver of immunity from execution. [48] Since the CSIA was modeled on the American FSIA,[49] this allowance is not particularly surprising. Unfortunately, there have been no reported cases exploring the possible breadth of an implicit waiver of immunity from execution. In the context of adjudication, states may waive their immunity in a variety of manners by submitting themselves to the jurisdiction of Canadian courts,[50] but these express provisions of implied waiver do not exist in the section dealing with execution immunity. In general, the Canadian courts borrow heavily from the rationale of more active U.S. commercial courts.[51]

Under the Australian State Immunity Act (ASIA), an exception from the general rule of immunity from execution may be had only by "agreement," although a written agreement is not specifically required.[52] It will be interesting to see, when the issue arises in a litigation context, what manner of actions constitutes an "agreement" for purposes of finding a waiver of immunity. As to issues of competence, the head of the Australian mission of the foreign state is assumed to have the power to waive immunity, but the Summary Recommendations relating to the ASIA specifically prohibit waiver by a party, such as an instrumentality, contracting on the part of the state.[53] Further, implied waiver of immunity is not allowed.[54]

Turning from the common law jurisdictions, one must consider first the ILC Draft Articles. Per Article 18, the Draft Articles establish a fairly basic

47. *See* A Company v. Republic of X, 2 Lloyd's Rep. at 522 (Saville, J.) (holding waiver by arbitration agreement sufficient because waiver clause separately discussed jurisdictional and execution immunity).

48. CSIA, § 12(1)(a).

49. Note, however, that the definition of commercial activity under the CSIA is not as narrowly construed as that under the FSIA. The U.S. Supreme Court decision in *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), relied partially on the text of the FSIA, which prohibits consideration of the purpose of a state act. *See* FSIA, § 1603. The Canadian act, however, contains no such prohibition, and Canadian courts have been willing to look to the purported purpose of a state act in determining whether it was commercial. *See United States v. The Public Service Alliance of Canada* [1992] 2 S.C.R. 50, *reprinted in* 32 I.L.M. 1 (1993).

50. *See* CSIA, § 4. There has been at least one case in Canada interpreting the meaning of the implied litigation waiver under the CSIA. *See* Schreiber v. Federal Republic of Germany [2002] S.C.C.D.J. 1816 (holding that request for extradition by foreign state does not constitute "initiation" of proceedings under § 4(4) sufficient to waive immunity from adjudicative proceedings).

51. *See, e.g.*, Re: Canadian Labor Code, [1992] 2 S.C.R. 50, 1992 S.C.R. Lexis 49 (relying on U.S. case law, in part, in disallowing a claim of immunity by the U.S. government).

52. ASIA, § 31(1). The ASIA provides further that the waiver may be subject to specific limitations, § 31(2), does not apply to diplomatic or military property absent a specific designation, § 31(4), and that the head of the diplomatic mission of the foreign State in Australia is assumed to have authority to waive execution immunity, § 31(5).

53. Summary of Recommendations and Draft Legislation on Foreign State Immunity, § 33, *reprinted in* 23 I.L.M. 1398 (1984) [hereinafter ASIA Commentary].

54. *Id.*

pattern of enforcement,[55] which is quite deferential to state defendants. As a preliminary, the Draft Articles state quite clearly that the waiver of execution immunity must be distinct from any waiver of jurisdictional immunity.[56] Although the ILC Commentary acknowledged that there is differing opinion and inconsistent case law on this issue,[57] it adopted the structure most deferential to the sovereign interests of the state.

Regarding the form of waiver, the Draft Articles expressly require explicit written consent to construct a waiver of execution immunity.[58] Written consent may be manifested in an international agreement, an arbitration agreement or written contract, or through a court declaration after the dispute has arisen between the parties.[59] Although the definition of waiver under the Draft Articles is rather narrow, once the waiver is given, it can only be withdrawn under the terms of the treaty or contract itself.[60]

In comparing the civil law tradition on these issues, one must realize that the nature of state immunity on the European continent is different than the statutory frameworks that have developed in most common law jurisdictions. First, the law of foreign sovereign immunity is primarily a concept of public international law, rather than a state based development.[61] Second, states import general principles of international law, including those of foreign sovereign immunity, into their domestic legal systems as necessary. Thus, almost all of the developments in the law of sovereign immunity, particularly in France and Germany, are based on case law. Although this makes for a less comprehensive set of rules due to the fact-based nature of such decisions, it allows for clear articulation of *how* to make a sovereign immunity decision, which complex statutory schemes sometimes avoid. As a starting point, both France and Germany have engaged the restrictive theory of sovereign immunity through their case

55. ILC Draft Articles, *supra* note 26, art. 18. Article 18 reads as follows:

Article 18: State Immunity from Measures of Constraint

> 1. No Measures of constraint, such as attachment, arrest, execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that
>
> a. The State has expressly consented to the taking of such measures
>
> . . .
>
> b. That State has allocated or earmarked property for the satisfaction of the claim which is the object of the proceeding
>
> c. The property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum and has a connection with the claim that is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed.
>
> 2. Consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint under paragraph 1, for which separate consent will be necessary.

56. *Id.*

57. ILC Draft Report, *supra* note 26, at 57, n. 171, 172.

58. *Id.*

59. ILC Draft Articles, *supra* note 26, art. 18(1)(a)(i)-(iii).

60. ILC Draft Report, *supra* note 26, at 58, para. 9.

61. *See generally* BROWNLIE, *supra* note 25, at 332-340.

law.[62] Therefore, the initial inquiry in all cases turns on whether the property to be executed against is, by its nature, public or private. In most cases, the distinction between public—or sovereign—property and private—or commercial—property turns on the nature of the property rather than the object or purpose of the transaction it is engaged in.[63] Thus, execution against public property must be contemplated before even considering an issue of waiver.

The case of *Eurodif v. Islamic Republic of Iran*[64] involved an attempt to attach loan payments owed by the French government and a French corporation to Iran, as potential satisfaction of an arbitral award arising out of Iran's termination of a nuclear power development project with the fall of the Shah.[65] In considering arguments of waiver of execution, the French Court de Cassation held that waivers of execution are generally allowed as long as such waivers are "certain and unequivocal,"[66] and that a separate waiver is required at both the adjudication and execution stages of a proceeding.[67] The Court then went on to hold that a clause consenting to arbitration could not be construed to waive immunity from execution, a result that other French courts have upheld.[68] In a relatively recent case, *Creighton Ltd. v. Qatar*,[69] the Court de Cassation again confronted the issue of an implied waiver in a construction contract dispute between Qatar and an American company. After Creighton attached various assets of the state of Qatar in France, the state objected and was successful in both the trial and appeals courts in overturning the attachment.[70] However, the Court, overturning previous precedent, did find that a waiver formulated under the rules of the International Chamber of Commerce would imply a waiver of execution in order to effectuate any resulting award.[71]

62. Eurodif Corporation v. Islamic republic of Iran, Court de Cassation (France), *reprinted in* 23 I.L.M. 1062 (1984); Philippine Embassy Case, Bundesverfassungsgericht (German Federal Constitutional Court) 46 BVerfGE 342 (Nov. 1977), *available at* http://www.ucl.ac.uk/laws/global_ law/german-cases/cases_bverg.shtml?13dec1977; *see also* Maurizio Ragazzi, *Italy: Constitutional Court Judgment on Sovereign Immunity with Regard to Measures of Constraint*, 33 I.L.M. 593 (1994) (considering the case of *Condor v. Nigeria*, which ended the de facto absolute immunity regime of Italian statute and ushered in a case by case consideration of the private versus public nature of property).

63. *See, e.g., Philippine Embassy Case*, 46 BverfGE 342.

64. Eurodif Corporation v. Islamic Republic of Iran, Court de Cassation (France), *reprinted in* 23 I.L.M. 1062 (1984) *rev'g* Court of Appeal (Paris), 1983 R.C.D.I.P. 101 (holding that an arbitration clause cannot itself imply a waiver of immunity from execution).

65. *Eurodif*, 23 I.L.M. at 1062.

66. *Id.* at 1068.

67. *Id.*

68. *Id.* at 1069; *see also* Soabi (Seutin) v. Senegal, Court de Cassation, *reprinted in* 30 I.L.M. 1167 (1991) (holding that recognition must be given to any award satisfying the requirements of ICSID, but such recognition does not necessarily imply execution, which is itself a separate issue under French law).

69. 2000 Journal du Droit Internationale, 1054 (6 Jul. 2000). Much of the discussion of *Creighton* here is derived from Nathalie Meyer-Fabre, *Enforcement of Arbitral Awards against Sovereign States, a New Milestone: Signing ICC Arbitration Clause Entails Waiver of Immunity from Execution Held French Court of Cassation in Creighton v. Qatar, July 6, 2000*, 15-9 MEALEY'S INTL. ARB. REP. 13 (2000).

70. Meyer-Fabre, *supra* note 69.

71. *Id.*

b. Pre-judgment Measures of Constraint

Pre-judgment measures of constraint, whether to establish jurisdiction or to secure assets for post-judgment execution, have been a persistent difficulty in the law of foreign sovereign immunity.[72] The very nature of such a remedy, by sequestering the assets of a party before a decision on the merits, has great potential to infringe the traditional immunities of a sovereign state. Indeed, due to this conflict with the traditional notion of immunity from execution, all of the jurisdictions considered here place significant limitations on the use of pre-judgment measures of constraint. It is one of the primary motivations of the discussion in part IV that the strict limitations on pre-judgment measures of constraint cannot be sustained.

i. United States Practice

The use of attachment jurisdiction as the sole basis for the assertion of jurisdiction over a foreign defendant ended with the Supreme Court's decision in *Shaffer v. Heitner*[73] just over twenty-five years ago.[74] Of course, the holding in *Shaffer* precluded attachment of a defendant's assets for the sole reason of establishing quasi in rem jurisdiction in a situation otherwise failing the minimum contacts analysis of constitutional due process.[75] As applied to foreign states, the FSIA also specifically prohibits the attachment of state assets solely as a means to obtain jurisdiction,[76] but given the constitutional holding of *Shaffer* and the explicit provisions of 28 U.S.C. §1330, included as part of the FSIA, this provision seems superfluous.

However, there are other legitimate reasons to seek a pre-judgment measure of constraint against an adversary, including attachment for security of judgment. This issue of pre-judgment measure of constraint is dealt with in the FSIA in a section separate from the one establishing post-judgment remedies. That section, 1610(d), allows attachment only if:

> (i) the foreign state has explicitly waived its immunity from attachment prior to judgment; and
> (ii) the purpose of the attachment is to secure satisfaction of a judgment against the foreign state and not to obtain jurisdiction.[77]

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72. Indeed, the members of the ILC found it so contentious that they did not confront the issue at all in the original Draft Articles. It was not until 1998 that they did so. *See* ILC Ad Hoc Report, *supra* note 29.

73. 433 U.S. 186 (1977).

74. The FSIA itself provided explicitly for personal jurisdiction over claims brought under the act. To this end, the language of 28 U.S.C. § 1330 provides that

> (a) The district courts shall have original jurisdiction . . . against a foreign state . . . as to any claim for relief in personam with respect to the foreign state is not entitled to immunity. . . .
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the courts have jurisdiction under subsection (a) where service has been made under section 1608. . . .

75. *Shaffer*, 433 U.S. at 207.

76. FSIA, § 1610(d).

77. *Id.*

Here we see a similar redundancy problem as with the *Shaffer* issue, but we are concerned more with the difficulty of obtaining a waiver of this specific form of immunity. Note that, unlike the general waiver provisions of 1610(a), this provision requires explicit waiver by the foreign state, and once again, the waiver of immunity from attachment must be given separately from the waiver of jurisdiction.[78] However, there are similarities to the general waiver provisions. In particular, once given, the waiver is irrevocable[79] and explicit waiver can be given by treaty.[80] If these sections are not satisfied, the FSIA precludes pre-judgment attachment under all circumstances.

ii. Comparative Analysis

In order to prevent the flight of a defendant's assets from the jurisdiction, U.K. courts issue a form of injunctive relief known as a *Mareva* injunction. The English common law had not allowed the use of pre-judgment security measures in private law actions. It was not until the 1975 case of *Mareva Compania Naviera SA v. International Bulkcarriers SA*[81] that English courts allowed any form of pre-judgment security relief. From this relatively late development in private law, some English courts jumped to allowing *Mareva* injunctions against state assets used for a commercial purpose.[82] In those early cases allowing *Mareva* relief against state assets, the English courts considered that there was no international law prohibiting pre-judgment attachment against a foreign state, and thus there was no reason to prevent it.

The UKSIA, which was being drafted and promulgated simultaneously with the advent of the *Mareva* injunction and its nascent application to sovereign states, contains language that would seem to prevent pre-judgment measures of constraint in most situations. The decision to limit remedies against foreign states was, of course, in line with the general view of international law at the time. The specific portion of the UKSIA that impacts measures such as the *Mareva* injunction is section 13(2). That section provides that:

> (a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and (b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.

78. Courts have had little trouble applying the clear statement of § 1610(d). *See* Venus Lines Agency v. CVG Industria Venezolana de Aluminio, 210 F.3d 1309 (11th Cir. 2000).

79. For an interesting issue concerning the breadth of the waivers of pre-judgment attachment when it concerns central bank property, see *infra* part III.b.

80. Behring International, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383 (D.C. NJ 1979) (finding no waiver under the 1979 Treaty of Amity between the United States and Iran); O'Connell Machinery Co. v. M.V. Americana, 566 F. Supp. 1381 (S.D.N.Y. 1983) (finding no waiver from treaty provision waiving immunity "from any other liability").

81. [1975] 2 Lloyd's Rep. 509.

82. *See, e.g.*, Trendtex Trading Corp. v. Central Bank of Nigeria, [1977] Q.B. 529, *aff'd* [1977] 2 W.L.R. 356; Hispano American Mercantil S.A. v. Central Bank of Nigeria [1979], 2 Lloyd's L.R. 277.

As is to be expected, the Act provides two specific exceptions to this general prohibition:

> (3) Subsection (2) above does not prevent the giving of any relief or the issue of any process *with the written consent of the State concerned* . . . a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.
> (4) Subsection 2(b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes.[83]

Under the construction given in these sections, the second omits the "giving of relief" language of the first. The effect of this construction is that pre-judgment attachment will be allowed where the state has given prior written consent, but not where attachment would be based on the commercial purposes exception of section 13(4). No English court has taken up this interpretation of these provisions but, as a textual matter, it appears to be required.

The construction found in the CSIA is a blend of the FSIA and UKSIA. Canadian courts have generally accepted the notion of the *Mareva* injunction, allowing it in cases where there is a "genuine risk of disappearance of assets" for the sole purpose of avoiding judgment.[84] However, the CSIA contains a general prohibition against the issuance of injunctions or orders of specific performance against a foreign state.[85] Further, a state may only consent to the issuance of injunctive relief of any kind, including pre-judgment remedies, in writing.[86] The CSIA also explicitly requires a separate written waiver pertaining to any form of injunctive relief, so even voluntary submission to the adjudicative jurisdiction of Canadian courts will not manifest consent to injunctive remedies.[87]

The ASIA is constructed similarly to the UKSIA. It is probably the most developed of the immunity acts, having been written nearly a decade after the English and American acts, but it has lacked proper interpretation by Australian courts. The rule of general immunity applies to both "interim or final" orders by Australian courts, so assumedly the drafters intended the same provisions to apply both pre and post-judgment.[88] As noted, waiver of such immunity by international agreement is possible. The ASIA also allows for the removal of execution immunity as to any commercial property, [89] which is defined as "property, other than diplomatic property or military property that is in use by the foreign state concerned substantially for commercial purposes."[90] However,

83. For the definition of commercial purposes, see UKSIA §§ 17, 3(3), excerpted in part below in part II.a.ii. For an example of a decision on an alternative issue, but containing an explicit written waiver, see Sabah Shipyard Ltd. v. Islamic Republic of Pakistan [2002] 2 Lloyd's Rep. 571.

84. Aetna Financial Services v. Feigelman, [1985] S.C.R. 2 (Can.).

85. CSIA, § 11.

86. *Id.*

87. *Id.* § 11(2).

88. *See* ASIA, § 30.

89. *Id.* § 32(1).

90. *Id.* § 32(3)(a). The term "commercial purposes" is not defined elsewhere within the act, and no case has yet taken it up. One possible definition might be had by reference to the ASIA adjudicative immunity provisions, which strip adjudicative immunity from claims concerning "commercial, trading, business, professional or industrial or like transaction" and specifically includes

if a foreign state had voluntarily submitted to the jurisdiction of Australian courts, it can limit the execution remedies allowed against it.[91]

It is slightly puzzling as to why the original ILC Draft itself contained no consideration of the issue of pre-judgment attachment, as the issue was surely in contention at the time. The only mention of the issue of pre-judgment attachment found in the ILC Draft Report[92] simply treats a pre-judgment measure as any other execution measure, requiring satisfaction of the terms of Article 19. The ILC has since considered the issue of pre-judgment attachment[93] and issued a proposed new article to deal with the issue.[94] However, the new article avoids the more difficult question of pre-judgment attachment against commercial property, allowing such attachment only in the case of a waiver identical to that required under Article 19, or against property that has been earmarked for satisfaction of the claim.[95] The first is the only exception of any practical significance; a cooperative state that has earmarked certain funds to satisfy a claim, assuming the funds are sufficient, will likely not be subject to such pre-judgment measures in any case. Thus, despite continuing difficulty with this topic, the ILC's additions to the debate seem to add little of value.

The French courts confronted the issue of pre-judgment measures of constraint directly in *Eurodif Corporation v. Islamic Republic of Iran*.[96] There, the Court granted the pre-judgment attachments Eurodif had sought, and Eurodif received a provisional measure attaching the assets of a corporation owned by Iran.[97] Although the Court went on to hold that there was no waiver of execution immunity as to the attached assets as part of its broader holding adopting a restrictive view of sovereign immunity,[98] in so doing the Court treated the pre-

"(a) a contract for the supply of goods and services; (b) an agreement for a loan or some other transaction for or in respect of the provisions of finance; and (c) a guarantee or indemnity in respect of a financial obligation." *Id.* § 11(3). Whether property used "substantially for a commercial purpose" would be the subject matter of these types of transactions (that is, the goods contracted for, the loan proceeds) or the instrumentalities of such transactions (such as all the property of the state trading company) is open to interpretation.

91. *See* ASIA, §§ 32(1), 10.
92. ILC Draft Report, *supra* note 26, at 56.
93. *See* ILC 1999 Report, *supra* note 30, para. 118-124.
94. *See* ILC Ad Hoc Report, *supra* note 29, at 1. The article reads:
Article XY
State Immunity from pre-judgment measures of constraint
No pre-judgment measures of constraint, such as attachment or arrest, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:
(a) The State has expressly consented to the taking of such measures as indicated
i. By international agreement
ii. By an arbitration agreement or in a written contract; or
iii. By a declaration before the court or by a written communication after a dispute between the parties has arisen; or
(b) The State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding.
95. *Id.*
96. 23 I.L.M. 1062 (1984).
97. *Id.* at 1070.
98. *Id.* at 1068.

judgment measure as any other execution measure would be treated. Therefore, the "analysis of the overall activity on which the claim is based" will be used to determine "the characterization of the public or private nature of the transaction involved," and thus determine whether the assets can be attached.[99] One would assume that the discussion of waiver would be identical as well.

These concerns of pre-judgment attachment are of special concern to plaintiffs pursuing claims that are uniquely political in nature. Such a plaintiff may have no problem establishing the need for pre-judgment measures of constraint on the assets of a typical, non-state, defendant, but may face additional obstacles in doing so for a state defendant. Indeed, the existence (or lack thereof) of a proper waiver, as to both pre- and post-judgment remedies, may close the door to recovery entirely. In this way, procedural concerns can blend into considerations of substance, and the import of recovery weighed against the sovereign rights of a foreign state, for an unwary party. Granted, most parties contracting with states are far from unwary and will suffer from these limitations less often, but there are substantive barriers (the most important being that commercial property to be executed against be related in fact to the claim itself), which apply to contractual and tort claimants equally. The next section addresses these concerns.

II.
SUBSTANTIVE SCOPE OF EXECUTION IMMUNITY

Perhaps the most controversial provision of the FSIA's execution provisions is the required "nexus" between any commercial property against which a judgment may be executed, and the underlying claim upon which the judgment to be executed is based. This burden of the nexus requirement falls harshly on plaintiffs because it forces them to rely on the fortuitous presence in the jurisdiction of some property related to the subject matter of their claim. While this may be reasonable for claims sounding in contract law, the nature of tort claims, being random occurrences of negligence, often without involving any tangible property, makes the establishment of a nexus in such cases unlikely.

The United States remains one of the few jurisdictions to apply the nexus requirement as part of its foreign sovereign immunity law. The differences between that regime and the others considered here, none of which apply the nexus requirement, are laid out in part (a) of this section. Part (b) will elaborate on this concept by looking directly at the treatment of tortious acts of foreign states under the various sovereign immunity regimes. Combined with the nexus requirement, the tort exception of the FSIA creates a *de facto* prohibition on recovery in the United States. Outside of the *ad hoc* additions of the terrorism amendments to the FSIA,[100] little has been done to address this issue. The parameters of this restrictive regime, present in the United States and the ILC Draft Articles and to an extent under French law, are compared below.

99. *Id.*
100. *See supra* Introduction.

a. The Nexus Requirement

i. United States Practice

The provisions of the FSIA relating to immunity against the execution of judgments are constructed parallel to the sections abrogating immunity for adjudication. While there are various means of overcoming execution immunity,[101] this section will focus on section 1610(a)(2), which provides an exception that excludes from immunity all property that is or was in use for the commercial activity[102] upon which the claim was based and is present within the territory of the United States.[103] This last exception, with an explicit qualification of a claim to the property nexus and requirement of physical presence within the United States, significantly narrows the enforcement possibilities for a successful plaintiff.[104]

This "nexus" requirement serves to (1) assure that an antecedent basis for adjudicative jurisdiction exists; and (2) limit the property at issue to satisfy the judgment to resources that had already been allocated to a commercial transaction. Of course this second justification has only limited application to claims of a tortious nature. For instance, in *Letelier v. Republic of Chile*,[105] the plaintiffs were unsuccessful in attaching the aircraft of the Chilean airline, LAN, to satisfy the wrongful death judgment resulting from the assassination of Letelier, the former Chilean ambassador to the United States.[106] The Court rejected the contention that LAN's activities in transporting the assassin were the relevant commercial activities, because politically motivated assassinations could not be considered commercial activities.[107]

It is important to note that the nexus requirement only applies to suits against the state proper, not against state instrumentalities.[108] Given that the definition of instrumentalities is fairly broad,[109] this exception does mitigate some of the harm done by the nexus requirement. After all, it is often the instru-

101. See the text of 28 U.S.C. § 1610(a), *supra* note 5, for a full listing of the exceptions to execution immunity.

102. The FSIA defines commerical activity in section 1603, which reads, in part:

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

The definition of commercial activity was clarified by the Supreme Court in *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992). The Court there looked to the nature of government issued debt instruments—which could be traded on the international market, were negotiable, and could be held by private parties—rather than to the purpose, which could in almost any case of state action be stated as a "sovereign" purpose. *See* FSIA, § 1603(d).

103. FSIA, § 1610(a)(2).

104. Note that the amendments to the FSIA in 1996, and later in 2000, remove the requirement that the property relate to the underlying claim to get attachment in situations of terrorism-related torts. § 1610(f).

105. 748 F.2d 790 (2d Cir. 1984).

106. *Id.* at 791.

107. *Id.* at 795-98.

108. FSIA, § 1610(a)(3).

109. *See* FSIA, § 1603 (defining, in part, an instrumentality as any entity "(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political

mentalities of the state that we find in U.S. courts.[110] In such situations, any property in the United States for a commercial purpose is available for execution.

ii. Comparative Analysis

Under the UKSIA, the second exception to the section 13 prohibition against execution, the first being waiver, deals with property "in use or intended for use" for commercial purposes."[111] The term "commercial purpose" is incorporated by reference to sections 17 and 3(3) of the UKSIA itself, where it is defined as anything with the purpose of a commercial transaction.[112] A "commercial transaction" is, in turn, defined as:

> (3) . . .
> (a) any contract for the supply of goods and services
> (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
> (c) any other transaction or activity (whether of a commercial, financial, professional, or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority[113]

As long as the property is in the United Kingdom for a commercial purpose, execution against that property is possible, because there is no statutory requirement of a nexus to the underlying claim or judgment, unlike the FSIA. However, section 13(4) imports a presumption against defining property as commercial in nature; indeed, if the head of the diplomatic mission of that state in the United Kingdom certifies that particular property is not for commercial use, such a claim amounts to sufficient evidence of non-commercial use.[114] The burden is then on the party claiming against the state to disprove the claim of immunity,[115] a difficult task given that the diplomatic entities making the claim cannot be hailed into court for examination.

Similarly, both the CSIA and ASIA are constructed to allow execution without any requirement of a nexus to the underlying claim.[116] Thus, any property in the forum nation for a commercial purpose can be executed against. The relevant provision of the CSIA is section 5, which allows for execution against property that "is used or is intended for a commercial activity." A "commercial

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subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state . . .")

110. *See, e.g., Letelier*, 748 F.2d 790 (considering execution against the assets of a national airline).

111. UKSIA, § 13(4).

112. *Id.* § 17.

113. *Id.* § 3(3).

114. *Id.* § 13(5).

115. *Id.*

116. *See* CSIA, § 12(1)(b) (allowing execution against property that "is used or is intended for a commercial activity"). The nexus requirement was explicitly rejected by the framers of the ASIA. *See* ASIA Commentary, *supra* note 53, § 34.

activity" is "any particular transactions, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character."[117]

For the purposes of the ASIA, commercial property is "property substantially in use for commercial purposes."[118] In turn, "[t]he term commercial purposes should be defined independently of the term commercial transactions, and as including a trading, business, professional, or industrial purpose."[119] Additionally, "property that is apparently vacant, or apparently not in use shall be taken to be being used for commercial purposes unless the court" is convinced otherwise.[120] This potentially creates a larger pool of commercial property that litigants may execute against, although, under the ASIA the certificate of a foreign mission will be admissible as evidence of the purpose of certain property,[121] an allowance that may limit any benefit from having a general rule of commercial nature for unused property.

The ILC Draft Articles explicitly adopted the nexus requirement of the FSIA, against the majority of state practice.[122] Also similar to the FSIA, the Draft Articles treat property of the state itself differently from property of a state instrumentality. Thus, execution can be had against an instrumentality as long as the property "has a connection with" the agency or instrumentality.[123]

In France, the *Eurodif* case also tacitly endorsed the requirement for a connection between the property to be attached and the subject matter of the claim.[124] The Court of Appeals, as noted above, vacated the execution authorizing attachment against assets owed to Iran in satisfaction of a judgment for breach of a nuclear power loan and construction agreement, because the funds to be attached were to be returned to Iran as purely public funds.[125] The Court of Cassation, in reversing, held that the loan funds represented the very funds allocated for the power development program, and thus execution would be allowed.[126]

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117. CSIA, § 2. In defining the definition of "commercial character," the Federal Court of Ottawa, Ontario, and Quebec adopted, from British case law, this gloss on the definition:

> The conclusion which emerges is that in considering, under the "restrictive" theory whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity.

TMR Energy Limite v. State Property Fund of Ukraine [2003] F.C.J. No. 1914; 2004 Fed.C.C. LEXIS 2, 154 (quoting Congresso del Partido, [1983] 1 A.C. 244 [opinion of Lord Wilborforce]).

118. ASIA, § 32(3)(a).

119. ASIA Commentary, *supra* note 53, § 35.

120. ASIA, § 32(3)(b).

121. *Id.* § 41.

122. *See* ILC Draft Articles, *supra* note 26, art. 18(1)(c) (requiring that property have a "connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed").

123. *Id.*

124. *Eurodif*, 23 I.L.M. at 1069.

125. *Id.* at 1065.

126. *Id.* at 1070.

This principle was confirmed in *Sonotarch v. Migeon*,[127] where the Court of Cassation stated that "the assets of a foreign state, which are in principle not subject to garnishment, with exceptions, especially when they are intended for economic or commercial activities of a private nature from which the claim of the creditor arises."[128] The Court did limit its holding somewhat by not extending the nexus requirement to include foreign state instrumentalities, which is similar to the treatment of such entities under the FSIA.[129] Thus, a state enterprise that keeps its own balance sheets and is engaged in private law activity could be subject to attachment even in the absence of a nexus to the claim.[130]

German courts, while not engaging the general requirement of a nexus between the claim and property, have embraced this distinction between property held by a foreign instrumentality and that held by the state itself, even if the property held by the instrumentality is attributable to the state. In the *Iranian Oil Company Case*,[131] the Federal Constitutional Court held that:

> there is no general rule of international law that a foreign state be considered as holder of claims to accounts . . . made out to the name of a legally responsible enterprise of the foreign state. The forum state is not prevented from regarding the enterprise concerned as entitled to claims and from seizing the claims concerned . . . [pursuant to] a writ that had been issued in an interlocutory relief proceeding concerning nonsovereign conduct of the enterprise. This applies independently of the fact whether the credit balances in these accounts are at the free disposal of the enterprise . . . or are earmarked for transfer to an account of the foreign State at the latter's central bank.[132]

These two principles relating to the execution against instrumentalities are, of course, the basis of the principles laid down in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* (*Bancec*),[133] discussed *infra* part III.b.2, regarding the presumed separate juridical status of an instrumentality.

The nexus requirement remains one of the greatest restrictions on recovery for plaintiffs under the FSIA regime. Although the nexus requirement does not apply to claims against foreign state instrumentalities, which greatly softens its impact, it is now against the general course of the international law of state immunity and should be reconsidered, particularly considering the *ad hoc* additions to the FSIA that have been necessary to circumvent it in the case of terrorism-related claims.

b. Tort Exceptions and Terrorist Activity

i. Ordinary Tort Actions

Section 1605(a)(5) of the FSIA allows for jurisdiction over a foreign state when a money damages claim is brought on the basis of wrongful death, prop-

127. Court of Cassation (France), 1 October 1985, 26 I.L.M. 998 (1987).
128. *Id.* at 1003.
129. *Id.*
130. *Id.*
131. Bundesverfassungsgerich (Federal Constitutional Court), 64 BVerfGE 1 (1983), *reprinted in* 22 I.L.M. 1279 (1983).
132. *Id.* at 1292.
133. 462 U.S. 611 (1983) [hereinafter *Bancec*].

erty damage, or injury, subject to a qualified immunity provision.[134] However, unlike all of the other jurisdictional prongs in section 1605, there is no concomitant provision of section 1610(a) that allows for execution of these judgments against the property of the foreign states. Thus, absent some manner of commercial property that satisfies the nexus requirement, a typical tort plaintiff—that is, one without a claim based on a terrorist act—is faced with recovering only under another prong of section 1610, most often related to insurance policy proceeds held by the foreign state.[135]

A similar outcome will result under the ILC Draft Articles. The articles allow for the removal of immunity from adjudicative proceedings for claims of "personal injuries and damage to property."[136] However, the only property that satisfies the nexus requirement, as discussed above, is available as a result of a waiver or "has been earmarked . . . for the satisfaction of the claim that is the object of the proceeding," may be executed against.[137] Taken together, these provisions represent a more parsimonious system for tort plaintiffs than that of the FSIA; if the Draft Articles were applied to such a case, recovery would depend simply on the benevolence of the foreign state.

Under the UKSIA, a state is not immune from proceedings related to "death or personal injury" or "damage to or loss of tangible property," as long as the causative act occurred in the United Kingdom.[138] As with all other suits, execution can be had under section 13 on the basis of waiver or the commercial purposes exception.

Both the CSIA and the ASIA also allow for jurisdiction over a claim involving death or personal injury that occurred in the forum state.[139] As noted above, neither country requires a nexus to the claim, so plaintiffs may recover against any property allowed under the general terms of the acts, either by attaching property which the state has otherwise waived immunity to, or to property that is commercial in nature. In the case of Australia, as mentioned, property available to be executed against may also include any property that has been left idle by the foreign state.

The simplicity of the execution provisions of the UKSIA, ASIA, and CSIA, compared to that of the FSIA, is perhaps best illustrated in considering the nexus requirement above and the considerations of tort litigants here.

ii. Terrorism Based Claims

Given the structure of restricted recovery for tort plaintiffs, U.S. courts routinely have applied principles of immunity from execution of judgments to situations involving terrorism plaintiffs. During the splurge of suits involving the

134. FSIA, § 1605(a)(5)(A)-(B).
135. *Id.* § 1610(a)(5).
136. ILC Draft Articles, *supra* note 26, art. 12.
137. *Id.* art. 18(b).
138. UKSIA, § 5 (a)-(b).
139. *See* CSIA, § 6; ASIA, § 13.

Alien Tort Claims Act[140] in the last decade, Congress began to take notice of these unrequited plaintiffs. As a result, the United States has been persistent in its *ad hoc* statutory approach to terrorist related exceptions to the rule of sovereign immunity.[141] Indeed, none of the other statutory regimes discussed so far make an attempt to deal with such actions by statute, preferring to take a separate route through international law to abrogate the general rule of state execution immunity in such cases. The FSIA, however, has been amended numerous times to deal with this question explicitly. Section 1605(a)(7) of the FSIA allows for jurisdiction over a foreign state for certain terrorist actions.[142] Section 1610(a)(7) provides that:

> The property in the United States of a foreign state . . . used for commercial activity in the United States, shall not be immune from attachment in aid of execution . . . upon a judgment entered by a court of the United States . . . [if] the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim was based.

This section dissolves the nexus requirement for actions under section 1605(a)(7), and coupled with the definition of a state found in section 1603,[143] it would seem that a successful plaintiff under the terrorist act exemption would have success in executing a valid judgment. Successful litigants may also have access to the protections of the VTVPA or the Terrorism Risk Insurance Act.[144] However, this seemingly positive outlook is dimmed by the limits of (1) the protections of embassy and military property; (2) the constraints of President Clinton's waiver of possible recovery against frozen foreign assets under section 1610(f), both discussed in part III.a; and (3) by the rule put forth by the Supreme Court in *Bancec*,[145] which established a basic presumption of separate juridical status for instrumentalities of foreign states—this, of course, removes any possibility of agency liability on the part of the foreign state.

Bancec involved a suit by an instrumentality of the Cuban government to recover on a letter of credit that had been issued in its favor by defendant Citibank. Citibank counterclaimed for the value of bank branches that had been expropriated by the Cuban Government. In considering whether Citibank could set off the actions of the sovereign government of Cuba against the claims of

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140. 28 U.S.C. § 1350 (2004).

141. Other jurisdictions, which more readily embrace principles of international law into municipal law, have confronted issues of whether some acts, in the nature of jus cogens violations, might abrogate sovereign immunity from execution. *See* Elisabeth Handl, *Introductory Note to the German Supreme Court: Judgment in the Distomo Massacre Case,* 42 I.L.M. 1027 (2003) (discussing the course of a claim before Greek and German courts arising from a WWII era claim against the Nazi government); Greek Citizens v. Federal Republic of Germany, Bundesgrichtshof (Federal Supreme Court), 42 I.L.M. 1030, 1034 (2003) (holding, in accordance with the European Court of Human Rights, that "it has not been proved that it has been accepted in international law that states are not entitled to immunity with regard to damage claims for crimes against humanity. . ."). This topic is too broad to be considered in sufficient detail here.

142. *See* discussion *supra* note 2.

143. FSIA, § 1603(b) (stating that the foreign state for purposes of the act includes "instrumentalities" of that state).

144. For a discussion of the terms of these acts, see *supra* Introduction.

145. 462 U.S. 611 (1983).

one of its instrumentalities, the Court in *Bancec* stated, "The language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state."[146] That original substantive law, according to the Court, established a presumption of separate juridical status for an instrumentality vis-à-vis a foreign state.[147] To overcome this presumption, the plaintiff bears the burden of showing (1) that the separate instrumentality is so extensively controlled by its owner that a principal-agent relationship is created, allowing for the veil of the corporate form to be pierced or (2) that the protection of the corporate form would work fraud or injustice, or defeat overriding public policies.[148] In *Bancec* itself, the Supreme Court found that Citibank had surmounted these requirements, and that to hold otherwise would allow Cuba "to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for the seizure of Citibank's assets."[149] This presumption of separate juridical status has found application in numerous FSIA decisions.[150] Obviously, this judicial construction of the structure of instrumentalities mitigates some of the power granted to plaintiffs under section 1610(a)(7) in particular.

So, although Congress has labored (to an extent) to provide a means for recovery in case of terrorism related tort actions, recovery against certain protected types of property, in particular diplomatic property and the assets of separate juridical entities, is still going to be limited. Coupled with the nexus requirement, which hangs over any claim against property that is "commercial" in nature, the lowering of the front-end barrier of execution immunity is countered by the persistence of requirements that no longer command consensus in the international arena. This trend can be seen further in a consideration of specific sovereign assets, in particular diplomatic and central bank property, which are considered next.

III.
Treatment of Specific Sovereign Assets

Parts I and II have dealt with issues of procedure and substance that all claims against foreign sovereign property must overcome. This section deals with specific classifications of property that receive additional protection under most regimes of sovereign immunity. These classifications, including diplomatic and embassy property and central bank property are treated specially because (1) they strongly implicate the distinctly sovereign powers of states, and

146. *Id.* at 620.
147. *Id.* at 629-30.
148. *Id.*
149. *Id.* at 632.
150. *See* Alejandre v. Telefonica Large Distancia de Puerto Rico, Inc., 183 F.3d 1277 (9th Cir. 1999) (applying *Bancec* to an attempted garnishment under § 1610(a)(7)); *Letelier*, 748 F.2d at 793 (applying to an execution of assets of a national airline); *see also* Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 446 (2d Cir. 1990) (applying *Bancec* principles to issue of immunity from jurisdiction).

(2) they constitute the state property most commonly present in a foreign jurisdiction. Although one might expect these classifications to be amply protected by the commercial property exception, the FSIA has from its inception treated them under a separate section.

a. The Special Problem of Embassies and Mixed Accounts

Under the Vienna Convention on Diplomatic Relations (VCDR), the fixed property of the embassy itself is generally immune from execution, absent a waiver.[151] A more complex question arises when dealing with bank accounts held on the account of diplomatic missions, and particularly when such accounts are used for commercial purposes, such as renting property or purchasing mundane objects like office supplies.

The leading case on the separation of diplomatic bank accounts is the *Philippine Embassy Case*,[152] which came before the German Federal Constitutional Court in 1977. There, a plaintiff landlord had successfully pursued a claim against the Philippine diplomatic mission for unpaid rent and subsequently garnished the embassy's bank account, which was used to pay daily operational expenses, including rent and employee salaries. This dual function of embassy accounts, acting concurrently to satisfy commercial obligations and to fund sovereign diplomatic activities, presents the essence of a "mixed accounts" problem. In refusing to allow garnishment, the Constitutional Court pointed to the preamble and article 3 of the VCDR[153] as precluding the impairment of the exercise of diplomatic duties. The Court had doubts as to whether the forum state could effectively discern which funds in a foreign embassy account were attributable to commercial versus non-commercial purposes, and in any case, such a determination would be contrary to the deference required under international law for the internal decisions of foreign states. The holding of the Court was clearly stated as follows:

> The financial settlement of the expenses and costs of an embassy through a general current account of the diplomatic functions of the sending State, irrespective of the fact that payments made through an account may in relation to the bank or

151. Vienna Convention on Diplomatic Relations, art. 22(3), Apr. 18, 1961, 500 U.N.T.S 85 [hereinafter VCDR].

152. Bundesverfassungsgericht (Federal Constitutional Court) 46 BverfGE 342 (Nov. 1977), available at http://www.ucl.ac.uk/laws/global_law/german-cases/cases_bverg.shtml?13dec1977.

153. Article 3 reads:

> 1. The functions of a diplomatic mission consist, inter alia, in:
> (a) representing the sending State in the receiving State;
> (b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
> (c) negotiating with the Government of the receiving State;
> (d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
> (e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.
> 2. Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission.

third parties come about within a framework of legal relationships or actions that by their legal nature may be described as *jure gestionis*.[154]

Although this rule has been widely accepted, it has been deviated from in the United States.

i. U.S. Practice

The only explicit prohibition in the FSIA that protects diplomatic property is found in section 1610(1)(4)(B), which relates to immovables within the United States. The prohibition protects property "used for purposes of maintaining a diplomatic or consular mission." It is established that under Article 22(3) of the VCDR,[155] and under the FSIA, on the terms of § 1610(1)(4)(B), the fixed property of the embassy itself is immune from attachment and execution. [156] As a final note to the consideration of physical diplomatic property, the TVTPA did ostensibly allow for recovery against the diplomatic properties of state-sponsors of terrorism through the addition of section 1610(f). However, the amendment also allowed for the waiver of such a possibility by the president in "the interest[s] of national security."[157] President Clinton exercised the waiver in October 1999 to address a concern about reciprocal execution against U.S. properties abroad and the threat such actions would pose to the leverage available to the U.S. from foreign properties.[158]

Outside of the physical property of diplomatic missions, U.S. courts have dealt with the question of mixed accounts in radically different ways. First, in *Birch Shipping Corp. v. United Republic of Tanzania*,[159] the court adopted a broad waiver rule for mixed accounts that serve both a commercial and sovereign purpose for an embassy. The court's rationale turned on the possibility that a defendant state might avoid all liability by maintaining nothing but mixed account funds in foreign states.[160] The court reasoned that the solution would be "segregation of public purpose funds from commercial activity funds."[161]

In *Liberian Eastern Timber Corp. v. Republic of Liberia*,[162] which concerned the attachment of bank accounts of the Embassy of Liberia, the court

154. 46 BVerfGE 342 (Nov. 1977), *available at* http://www.ucl.ac.uk/laws/global_law/ german-cases/cases_bverg.shtml?13dec1977.

155. Article 22(3) states that "the premises of the mission . . . shall be immune from . . . attachment or execution."

156. *See, e.g.*, United States v. County of Arlington, 669 F.2d 925 (4th Cir.1982), *cert. denied and app. dismd*, 459 U.S. 801 (1982) (denying county the power to execute tax lien against apartment complex owned by foreign state and operated to house diplomatic personnel); Flatow v. Islamic Republic of Iran, 76 F. Supp. 2d 16 (D.D.C. 1999); S&S Mach. Co. v. Masinexportimport, 802 F. Supp. 1109 (S.D.N.Y. 1992) (relying on both the VCDR and § 1610(1)(4)(B) to deny execution against a building considered property of the embassy of the Romanian government).

157. FSIA, § 1610(f)(3).

158. *See* Pres. Det. No. 01-03, 65 Fed Reg. 66483 (Oct. 28, 2000) (stating that § 1610 (f) "would impede the ability of the President to conduct foreign policy in the interest of national security").

159. 507 F. Supp. 311, 313 (D.D.C. 1980).

160. *Id.* at 313.

161. *Id.*

162. 659 F. Supp. 606, 610 (D.D.C. 1987).

held that partial commercial use did not invalidate a claim of sovereign immunity.[163] By specific reference to the VCDR, the court found the assets immune from attachment.[164] However, the court went even further and stated that the FSIA should be interpreted in harmony with the VCDR, and should produce the same result.[165] In *Liberian Eastern*, this meant that the commercial activity of the embassy should be interpreted narrowly, so as to not "cause the entire bank account to lose its mantle of sovereign immunity."[166] No U.S. appeals court has authoritatively resolved this issue of mixed accounts.

ii. Comparative Analysis

There is a general prohibition against attachment and execution against diplomatic premises and property under the UKSIA.[167] However, as in other jurisdictions, the issue of embassy bank accounts has required judicial resolution. The leading case on the subject of mixed funds in the United Kingdom is *Alcom Ltd. v. Republic of Colombia*.[168] The plaintiff there obtained a default judgment on an unpaid contract for security equipment sold to Colombia. While the trial court denied garnishment of the embassy bank account, an intermediate appellate court held that accounts were attachable as far as the money was to be used for the types of transactions listed in section 3(3).[169] In this situation, this included money set aside for the purchase of goods and services for the embassy offices. Using an analysis similar to the distinction made between nature and purpose in *Weltover* and section 1603(d) of the FSIA, the appellate holding focused on the nature of the transaction to find that the funds were for a commercial purpose.[170] The House of Lords reversed on the grounds that, while the bank account was property under sections 13(2)(b) and 13(4), it could not be bifurcated into commercial and non-commercial—that is, sovereign—purposes.[171] Here, the trial court and the House of Lords gave special notice to the ambassador's note that the account was for the day-to-day activities of the embassy, as provided for in section 13(4), discussed above.[172]

The CSIA does not contain an explicit prohibition on execution against embassy properties. Thus, execution turns on defining the property as "com-

163. *Id.* at 608.

164. *Id.*

165. *Id.*

166. *Id.* at 610.

167. UKSIA, § 16(1). This section is supplemented by the UK's obligations under the VCDR.

168. [1984] 2 All ER 6 HL, *reprinted in* 23 I.L.M. 719 (1984) [hereinafter *Alcom (House of Lords)*].

169. For the covered transactions, see the quoted text accompanying, *supra* note 170.

170. *See* Alcom Ltd. v. Colombia, [1984] 1 All ER 1, [1983] 3 W.L.R. 906, *reprinted in* 22 I.L.M. 1307, 1314 (1983) [hereinafter *Alcom (Court of Appeals)*]

171. *Alcom (House of Lords)*, 23 I.L.M. at 724-25. The Lords noted that taken in conjunction, § 16(1)(b) establishing general diplomatic immunity and Article 3 of the VCDR, there was a general obligation to act in a manner so as to not obstruct the functions of a foreign mission. *Id.* at 720-21.

172. The House of Lords was willing to accept the *bona fides* of the ambassador's note. *Id.* at 725. While the Court of Appeals recognized it, it refused to apply it on its terms. *Alcom (Court of Appeals)*, 22 I.L.M. at 1316.

mercial,"[173] which would depend on the kind of distinction made in the *Birch* and *Liberian Eastern* cases above, or on the unlikely finding of a waiver of immunity. Although the Supreme Court of Canada long ago addressed the propriety of taxation of diplomatic property,[174] it has not yet directly confronted the issue of mixed embassy accounts in its case law.

The ASIA, while allowing for execution against commercial property, explicitly classifies diplomatic property as non-commercial.[175] Diplomatic property includes "property that, at the relevant time, is in use predominantly for the purpose of establishing or maintaining a diplomatic or consular mission, or a visiting mission, of a foreign State to Australia."[176] Although the Australian courts have not explicitly interpreted this language, a diplomatic account used for some commercial transactions may easily be considered "maintaining" the diplomatic mission, and thus would be immune to execution.

ILC Draft Article 19 is unique because it explicitly exempts property that "is used or intended for use" by diplomatic missions and consular posts, "including any bank account."[177] While this language appears to resolve the issue of mixed accounts straight away, the ILC Commentary implies that purely commercial bank accounts of an embassy are not covered by the exclusion.[178] The ILC expresses no opinion on the issue of mixed accounts, except to note that "recent case law seems to suggest the trend that the balance of such a bank account . . . should not be subject to an attachment order."[179] The position of the ILC on this issue thus remains somewhat unclear.

b. Central Bank Property

Central banks are inherently more vulnerable to an execution claim against foreign governments than any other agency or instrumentality. Central banks are likely both to hold the assets of its home government and to have those funds present in many foreign countries in the course of its regular business. As discussed above, the *Bancec* court held that there may be circumstances in which an agency or instrumentality will attract liability for the acts or debts of its government, even where the separate juridical status of an agency or instrumentality is recognized. As with the case of diplomatic property, the key issue becomes how to classify funds held by or on behalf of a central banking authority.

i. United States Practice

The FSIA, per section 1611(b)(1), establishes special protections for the funds of central banking authorities. The accounts of central banks "held on

173. *See* CSIA, § 12(b)
174. *See* Re: Power of Municipalities to Levy Rates on Foreign Legations and High Commissioners' Residences [1943] 2 D.L.R. 481 (holding that foreign legations are immune from land taxes on their property).
175. ASIA, § 32(3)(a).
176. *Id.* § 3(1).
177. ILC Draft Articles, *supra* note 26, art. 19(1)(a).
178. ILC Draft Report, *supra* note 26, at 59, para. 1(3).
179. *Id.*

their own account" are immune from execution in U.S. courts, absent an explicit waiver of that immunity by the bank.[180] Although there is a preliminary concern of what is a central bank,[181] once applied, this section accords particular deference to the fiscal and monetary sovereignty of foreign states, and is almost universal in its application in foreign sovereign immunity law.[182] In the United States, section 1611 is particularly necessary considering the decision of the Supreme Court in *Republic of Argentina v. Weltover*, which relied on the plain language of section 1603.[183] Without section 1611, a foreign central bank engaged in almost any investment or deposit in the United States would, by the nature of such an activity be acting as a private player rather than as a regulator, and hence, its property would fall within the commercial exception.[184] Congress apparently was thinking along these same lines when it included section 1611, stating that funds held on a bank's "own account" would include funds held "in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or foreign states. . . . Moreover, execution against the reserves of foreign states could cause significant foreign relations problems."[185]

According to this language, the courts also would appear to be required to distinguish between central banking activities and non-central banking activities of the central bank. According to one commentator, section 1611(b)(1) is subject to at least four legitimate interpretations,[186] which can be briefly described as follows:

> The first interpretation, based on a literal reading of 1611(b)(1), would provide protection to any property held by or for the central bank as its beneficial owner. The second interpretation, relying on the House Report language relating to "central banking activities" and giving that language a liberal reading, would provide protection for any central bank property used for the account of the central bank or indirectly for the account of its parent state or any agency or instrumentality. The third interpretation, relying on the House Report language relating to funds used for "commercial transactions of other entities or of foreign states," would provide protection for central bank property used for the account of the central bank or for a public or governmental activity of the foreign state or its agencies and instrumentalities, but not for commercial transactions of a foreign state or its agencies or instrumentalities. The fourth interpretation, relying on the commercial activity exception to limit the meaning of "central banking activities," would provide protection only for property of the central bank used for a public or governmental activity and not for property used for "commercial transactions" for the account of the central bank.[187]

180. FSIA, § 1611(b). At least one court has held that the general immunity in § 1611 did not preclude a set-off of central bank funds held at a private bank to fund the commercial activities of private entities. *See* Banco Central de Reserva del Peru v. Riggs Nat'l Bank, 919 F. Supp. 13 (D.D.C. 1994).

181. *See generally* Paul L. Lee, *Central Banks and Sovereign Immunity*, 41 COLUM. J. TRANSNAT'L L. 327, 350-60 (2003).

182. *See* UKSIA, § 14(4); ASIA, § 35; CSIA, § 12(4).

183. See *supra* note 102 for the text of section 1603.

184. 504 U.S. 607, 617 (1992).

185. H.R. Rep. No. 94-1487, at 31 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6630.

186. Lee, *supra* note 181, at 379-81.

187. *Id.* at 381.

U.S. courts have yet to give a definitive interpretation to the terms of 1611(b); given the possibility of confusion in interpreting it in light of Congressional intent, a clarification of the issue is necessary.

Aside from the characterization problems of defining a central bank and characterizing funds, section 1611(b) also presents a question of central bank waiver. The provisions of section 1611(b) allow only for an explicit waiver of immunity from execution, but make no mention of a waiver of pre-judgment attachment. As noted in the discussion of pre-judgment attachment above, a foreign state may waive its immunity from pre-judgment attachment by explicit waiver only.[188] The question remains whether, under the explicit language of the FSIA, a central banking authority's explicit waiver of immunity can be construed to allow for pre-judgment attachment, given the lack of reference to this issue in the language of section 1611(b).

The only court that has decided this issue refused to extend a waiver of post-judgment execution by a bank to include pre-judgment remedies. In *Weston Compaigne de Finance et D'Investissement, S.A. v. La Republic del Ecuador*,[189] the Court considered a waiver of execution immunity contained in debt instruments issued by the Central Bank of Ecuador. Interestingly, the waiver covered both pre and post-judgment execution remedies, but the Court still found it insufficient, siding with the government of Ecuador and holding that section 1611(b) invalidated the waiver.[190] The court pointed to the legislative history of the FSIA in determining that Congress explicitly recognized the imposition of pre-judgment attachment elsewhere in the Act and purposefully omitted it from section 1611(b).[191]

In upholding a narrow interpretation of the central banks' waiver, the *Weston* court created a significant anomaly in the FSIA scheme. Central banks, under the court's interpretation, now are given broader deference than a state itself in relation to waiver of pre-judgment attachment immunity. Under section 1610(d)(1), as noted, a state may waive such immunity explicitly, and the waiver is irrevocable. Under the rule of *Weston*, a central bank may not waive this immunity at all as to funds held on its own account; indeed, given the facts of the case, it seems that a central bank may rely on section 1611(b) to free them even from an explicit contractual waiver. The broad interpretive gloss put on section 1611(b)(1) becomes even more troubling when one realizes that section 1611(b)(1) also allows for an explicit waiver of the central bank's property by the "parent foreign government," but under *Weston*, not even the state could

188. FSIA, § 1610(d).

189. 823 F. Supp. 1106 (S.D.N.Y. 1993).

190. The Court in *Weston* faced an additional difficulty in deciding what funds in a central bank's accounts are indeed held for its "own account." The accounts at issue there apparently commingled funds belonging to private parties and to the state entity itself. In deciding the issue, the court looked to the district court opinions in *Liberian Eastern* and *Birch*, but failed to adopt the position of either. Instead, the court toed the line, finding that the facts before it were sufficient to distinguish between funds held for embassy purpose, and those held for private purposes. Under those circumstances, the best view was "to apply the distinction, instead of finding the account entirely immune or entirely not immune." 823 F. Supp. at 1114.

191. *Id.* at 1110-11.

waive immunity for funds held for the bank's "own account." This, of course, countermands the most fundamental notions of sovereign immunity as a privilege of a state in foreign courts, but since no appeal was taken in the *Weston* case, no higher court has spoken on this issue.

ii. Comparative Analysis

The provisions of the UKSIA differ from the FSIA in two key ways with regards to central bank property. First, per the terms of section 13 discussed above, pre-judgment attachment of central bank assets will be allowed where the state has given consent.[192] Thus, the structure of the UKSIA, which is simpler in form than the FSIA, avoids the problem put forth by *Weston.* However, the UKSIA prohibits treating the funds of a foreign central bank as commercial in order to abrogate immunity.[193] Taking these provisions together, the protection of the English statute is slightly broader than the FSIA in allowing for waiver, a less common case, but slightly narrower in prohibiting a commercial characterization of bank assets, a much more common case.

Under the ASIA, which is patterned along the line of U.K. precedent, central banks and monetary authorities are treated identically to a state itself.[194] Thus, they are given more protection than other instrumentalities, termed "separate entities," which are afforded immunity from execution only when the judgment upon which execution is sought resulted from the case where the separate entity would have been entitled to adjudicative immunity but for a waiver of that immunity.[195] The result of this construction is a requirement of an explicit waiver by a central bank instrumentality, which assumedly could come from the state as well, allowing execution against bank assets.

Conversely, the CSIA is patterned directly after section 1611 of the FSIA. Thus, property of a central bank or monetary authority "held for its own account" will be immune from execution in Canada.[196] As with other sections, one can assume that the interpretation would be similar to that under the FSIA, and, given the discussion above, would not be entirely clear.

The language of the ILC Draft simply exempts all "property of the central bank or other monetary authority of the State,"[197] without any of the qualifying language of the national statutory regimes. This prohibition is particularly broad, and while it has the benefit of requiring minimal interpretation, it rejects all possible recovery in situations where banking institutions have engaged in an essentially private commercial transactions.[198]

192. Fox, *supra* note 29, at 393.
193. UKSIA, § 14(4).
194. ASIA, § 35(1).
195. *Id.* § 35(2).
196. CSIA, § 12(4).
197. ILC Draft Articles, *supra* note 26, art. 19(1)(c).
198. In drafting Article 19, the Special Rapporteur suggested adding the words "and used for a monetary purpose" to qualify the central banking exception, but that limitation was rejected. *See* ILC Draft Report, *supra* note 26, at 59.

This issue of execution against a central banking authority has not arisen in continental systems, most likely because the activities of a central bank are considered fundamental to the economic powers of the state, which under the European framework would be considered *acta jure imperii.* In such a framework, claims against sovereign funds are unlikely to be attempted. Nevertheless, there is no such constraint in the litigation environment of the United States. Thus, the issue continues to be of importance in the framework of the FSIA due to the general availability of foreign central bank funds in the capital markets of the United States and some clarity on the issues discussed above is necessary.

IV.
PROGRESSIVE DEVELOPMENT OF EXECUTION IMMUNITY

At the utmost extreme, the principle of sovereign immunity from execution relies on arguments of protecting state debtors or tortfeasors from excessive liability—and perhaps insolvency—for damages arising from their acts, or more precisely their state acts. On a simplistic level, this argument is sound, but on a higher level, it has little practical application for modern states, which have access to international capital markets and face a limited real risk of insolvency.

The comity argument for foreign sovereign immunity has more substantive application, because it is predicated on a political notion of supra-legal state interaction and that, as stated in the seminal American case of *The Schooner Exchange v. McFaddon*,[199] "mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require."[200] To some extent, implicit in this notion of comity is the fact that sovereign immunity in all its forms, but most pointedly in the arrest and execution of the tangible assets of a foreign state, raises issues more properly located in the political rather than judicial realm. It is one thing to require a state to appear and defend an action, but quite another to allow private parties to initiate the liquidation of state assets.

This same sense of comity cuts the other way, however, in that the forum state cannot be expected to deny its citizens the right to compensatory recovery. This competing sovereign duty—expressed in the absolute power of a state over its domestic judicial proceedings—was also recognized under traditional regimes like that delineated in *The Schooner Exchange.*[201] Indeed this notion of allowing courts to control the proceedings before them, and in particular, to govern the rules of enforcement of the judgments it renders, is not an extraordinary one.

Taking these two competing, relatively simple ideals, this final section advocates for a coherent system of execution under the FSIA, using a study by the ABA[202] as a basis for promoting changes to the FSIA regime and building on that study with reference to the above comparative study. As a preliminary mat-

199. 7 Cranch 116 (1812).
200. *Id.* at 136.
201. *Id.* at 135-36.
202. ABA Report, *supra* note 23.

ter, the section details the policy implications of changes in the execution immunity regime and then considers each of the major subtopics addressed above: procedural questions, including waiver and pre-judgment attachment; substantive questions, including the nexus requirement and tort claims; and finally, questions of specific state property, including diplomatic and central bank property.

a. Principles of Policy

Given the difficult nuances of defining and protecting state property, there are a number of obvious difficulties. One of the more difficult of these questions asks how to clarify the *international law* of sovereign immunity, which requires the coordination and integration of two opposing camps of states. The first camp contains mostly Western industrialized states that are unwilling to reconsider the principles of the restrictive theory of immunity. The second camp contains other, less developed states that still adhere to the principles of absolute immunity.[203] Within the first group, many of which have been considered here, there is a lack of clarity in the definition of commercial, or private, activity of states; a lack of clarity in the propriety and procedure of pre-judgment attachment; and an inconsistent application of the nexus requirement. Between the two groups, there is conflict over principles of the waiver of execution immunity, both pre- and post-judgment, issues of tort liability for terrorist acts, and the treatment of diplomatic and consular property. The ILC has proposed various solutions to this fairly intractable problem, many of which involve programs of voluntary compliance or state-to-state dispute resolution.[204] Whether such a regime based on the voluntary compliance of nations could function is questionable, but, regardless, a tenable solution to the *international* differences

203. The absolute theory of immunity, of course, does not invite much in terms of analysis. Under this traditional theory, which prevailed in most of the nations of the world until the mid-twentieth century, both immunity from adjudicative proceedings and immunity from execution of judgments were inviolable absent the consent of the foreign state. For the developments away from absolute immunity in the United States, see *supra* note 1.

204. ILC 1999 Report, *supra* note 30, ¶ 118. In discussing this voluntary compliance regime, the ILC report stated:

> First, it may be possible to lessen the need for measures of constraint by placing greater emphasis on voluntary compliance by a State with a valid judgment. This may be achieved by providing the State with complete discretion to determine the property to be used to satisfy the judgment as well as a reasonable period for making the necessary arrangements. Second, it may be useful to envisage international dispute settlement procedures to resolve questions relating to the interpretation or application of the convention which may obviate the need to satisfy a judgment owing to its invalidity. As a consequence of the first two elements, the power of a court to take measures of constraint would be limited to situations in which the State failed to provide satisfaction or to initiate dispute settlement procedures within a reasonable period. Since the State would be given complete discretion to determine the property to be used to satisfy a valid judgment and a reasonable period to do so, the court would have the power to take measures of constraint against any of the State's property located in the forum State which was not used for government non-commercial purposes once the grace period had expired.

Id.

in execution immunity is still lacking. It is beyond this article's scope to propose such a solution.

However, a more plausible undertaking is to reconsider the treatment of each of the difficulties discussed herein within the construction of the FSIA. Prior to addressing the statutory structure itself, it is necessary to construct a reasoned policy structure of the issues underlying the immunity from execution. Objectively, the development of the restrictive theory of sovereign immunity has proceeded with greater speed on the issue of adjudicative immunity than it has with execution immunity. This relatively limited development is based on a number of principles: (1) that the notion of execution immunity is more directly tied to the sovereign independence of states because it deprives a state of physical property; (2) that execution against sovereign assets causes a particular interference with the foreign relations of the forum state; and (3) and that developing nations, often the debtor-defendants in commercial transactions, are not protected by any measures of insolvency protection, necessitating deference to their sovereign responsibilities in some cases.

The first principle points to the distinction between adjudicative and execution immunity; in the prior case, a state, if it so chooses, simply may not appear or may ignore court orders, but in the latter case, the state may not simply ignore an order which attaches or seizes its property. By materially forcing the foreign sovereign to subject itself to the courts of another sovereign, limiting execution immunity infringes substantially on the traditional notions of sovereign activity. The second principle is implicated most clearly in the case of diplomatic and consular property, where seizure may limit the actual conduct of foreign relations, but also comes to the fore in cases regarding frozen assets and diplomatic leverage, as it has in recent U.S. cases. This principle may also apply to the activities of a foreign central banking authority acting within the United States, where such activity amounts to state action (for instance, in the case where state funds are held in an U.S.-based investment vehicle). The third principle actually cuts in both directions: on one hand foreign states are not given the same opportunity to absolve debts and get a fresh start as are private corporations and individuals but on the other hand creditors do not have the same rights against developing sovereign debtors.[205]

All three of these principles must be borne in mind when considering any alteration to the execution immunity regime, particularly given the trend to narrowing the scope of execution immunity. Typical concerns in a situation where a judgment creditor seeks enforcement must also be considered. These include the interest of the forum in enforcing their own decrees and the interests of the successful plaintiff in satisfying its settled expectations—in the case of commercial claims—or their compensatory interest—in the case of tort claims. The next section will first consider the ABA attempt to reformulate the FSIA execution provisions in light of these competing concerns, and, second, will analyze

205. ABA Report, *supra* note 23, at 590.

the problems highlighted above in the context of the impact of the ABA draft and the related policy concerns.

b. *Analyzing Possible Alterations*

The ABA Report put forth in 2002 recommended some sweeping changes to the FSIA provisions dealing with execution immunity.[206] Although the ABA suggestions do not present the only means of altering the FSIA structure, they do serve as an interesting launch point for the current discussion. In general, the alterations are intended to promote the clear development of the law of sovereign immunity, but in some specific cases, the suggested reforms do little or fail to incorporate issues with the proper level of detail.

The relevant provisions of the FSIA, as noted above, are sections 1609, 1610, and 1611.[207] For our purposes, the important provisions are those dealing with waiver, 1610(a)(1); the commercial nexus requirement, 1610(a)(2); insurance claims, 1610(a)(5); and 1611, which specifically exempts certain types of state property, will also be considered.

The ABA Report proposed the most significant changes to the first two provisions of section 1610(a). First, as to waiver, the ABA Report recommends removal of the language allowing for the possibility of an implied waiver of execution immunity from section 1610(a)(1). As to the remainder of section 1610(a), the ABA proposed a new section, section 1610(a)(2), to replace all of the remaining provisions. The proposed language reads:

> The judgment relates to a claim for which the foreign state is not immune under section 1605, provided that, where a judgment is based on an order confirming an arbitral award rendered against the foreign state, the attachment in aid of execution, or execution, shall not be inconsistent with any provisions in the arbitral agreement.[208]

By removing the enumerated exceptions, the ABA Report greatly simplifies the execution immunity provisions such that, if adopted, it would have a tremendous impact on litigation against foreign sovereigns. The new formulation has two major effects: (1) by removing the specific immunity exclusions under section 1610, other than waiver, the proposed section 1610(a)(2) would allow non-commercial tort plaintiffs to execute their judgments against commercial property of a foreign sovereign; and (2) the proposed section 1610(a)(2) does not contain the nexus requirement, which would benefit both commercial plaintiffs and non-commercial tort plaintiffs alike. In formulating these alterations, the ABA Report drafters noted that the new format would be more "consistent with the international law on the subject."[209]

However, the report did not significantly alter the other execution immunity provisions. It suggests that no changes be made to the provisions of the

206. *See id.* at 581-594.
207. The text of these sections is reproduced *supra* note 5.
208. ABA Report, *supra* note 23, at 587.
209. *Id.*

FSIA related to prejudgment attachment[210] or to concerns of central bank property. The report does suggest a minor alteration to section 1611(b) to clarify the position of diplomatic and consular property within the framework of the act. The modified language reads:

> Subject to section 1610(f), the property is protected from execution or attachment by the Vienna Convention on Diplomatic Relations (April 18, 1961, 23 U.S.T. 3227), the Vienna Convention on Consular Relations (April 24, 1963, 21 U.S.T. 77), or any treaty, international convention, other international agreement, or other federal statute of the United States related to property of foreign states or instrumentalities of foreign states.[211]

This section simply consolidates the provisions dealing with diplomatic and consular property, which now are contained in section 1610(a)(4)(B) and 1611(c), and makes a clear statement about the sources of international and domestic law that should be considered when applying the principle of diplomatic immunity. Having looked at these proposed alterations as a starting point, we can now explore whether the ABA Report goes far enough or whether more specificity is needed in each of the broad categories of difficulty described above. We first turn to the procedural concerns of waiver and pre-judgment attachment, then to the substantive concerns of the nexus requirement and treatment of tort plaintiffs, and finally to the treatment of specific types of sovereign property.

i. Procedural Concerns: Waiver of Immunity from Execution and Pre-Judgment Attachment

The ABA Report retains section 1610(a) pertaining to waiver of execution immunity, but removes the allowance for an implied waiver. Removing this language is reasonable, considering the circumstances in which waivers are relevant. Waivers only arise in commercial transactions engaged in by the foreign state, because waivers are typically contractual in nature. They do not, therefore, implicate many of the concerns of uncompensated plaintiffs because sophisticated commercial actors are expected to consider the terms of sovereign immunity when conducting business with foreign states. Furthermore, the typical size of state commercial contracts implicates concerns of sovereign insolvency, particularly in the case of development contracts and foreign bank debt.[212] Thus, the principle of waiver should likely be narrowed to explicit provisions where the state and private actor can collectively establish the contractual expectations, including the propriety of execution immunity.

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210. FSIA, § 1610(d)

211. ABA Report, *supra* note 23, at 589.

212. *See* A.I. Credit Corp. v. Government of Jamaica, 666 F. Supp. 629, 633 (S.D.N.Y. 1987) (refusing to consider claims by the defendant state, buoyed by evidence from the International Monetary Fund, that the entry of judgment on a defaulted loan would have a "devastating financial impact"); *see also* National Union Fire Ins. Co. v. Peoples Republic of Congo, 729 F. Supp. 936, 944-45 (S.D.N.Y. 1989) ("The mere recognition by a lender that enforcement of its contractual rights may have adverse effects upon a borrower (which in turn could be expected to place pressure on the borrower to comply with its contractual duties) does not render enforcement of its contractual rights 'illegitimate.'").

As noted, an explicit written waiver of execution immunity is generally required under the common law jurisdictions considered here.[213] Furthermore, in both France and the United States, where implied waivers are allowed, courts have had difficulty in interpreting and applying the concept of implied waivers.[214] Thus, the abolition of implied waivers under the FSIA is in accord with the reasoned practice of states and the policies underlying sovereign immunity.

Of course, a separate waiver is required for both adjudicative immunity and execution immunity, but this requirement is well accepted under international law.[215] Moreover, the commercial underpinning of waiver provisions, which implicates greater sophistication on the part of contracting parties, mitigates any difficulty that this requirement might cause. Under the FSIA, however, a separate waiver from that allowing for post-judgment attachment is required to allow for pre-judgment attachment.[216] This is also the established principle in the United Kingdom, Canada and under the ILC Draft Articles.[217] Under all of these regimes, waiver is the only means to obtain any prejudgment measure of constraint.

In this author's view, retaining section 1610(d) regarding prejudgment attachment is not tenable. Although the ABA Report notes that the "grounds for obtaining a pre-judgment attachment are even more limited" than post-judgment measures,[218] it fails to explore the issues in any more depth. There may be some justification for retaining this separate waiver regime, because prejudgment attachment threatens to violate the core of sovereign immunity by arresting state property before any adjudicative process takes place.

However, the fundamental problem with retaining the requirements of section 1610(d) is that it applies to any attempt to restrain state property within the United States. Under the ABA formulation, this would include both situations of waiver, under section 1610(a)(1), and under the new section 1610(a)(2). When a state has waived its post-judgment immunity, that same state should not be able to raise a sovereignty justification for requiring a separate waiver where it has already given consent to subject some measure of its property to execution. Allowing this would permit the state to effectively nullify that waiver by removing those assets in the absence of injunctive relief.[219] Even for the most sophisticated parties, allocating negotiation power to the treatment of assets along a time continuum strains our notions of contractual relations. Once a state duly consents to a waiver, it should apply.

The provisions of section 1610(d) also will apply where there is commercial property in the United States that may be subject to execution, but no waiver

213. *See* UKSIA, § 13(3); ASIA, § 31(1); ILC Draft Articles, *supra* note 26, art. 18(1).

214. See, for example in the United States, *Mangattu v. M/V Hayyan*, 35 F.3d 205 (5th Cir. 1994) and the discussion of the line of French cases, *supra* text accompanying notes 64-71.

215. *See* Philippine Embassy Case, *supra* note 61; ILC Draft Articles, *supra* note 26, art. 18(2).

216. FSIA, § 1610(d)(1).

217. See the discussion, *supra* part I.b.ii.

218. ABA Report, *supra* note 23, at 584.

219. It is this very possibility, the flight of assets from the jurisdiction considering the claim, which the ILC hoped to deal with through a voluntary compliance regime. *See supra* note 204.

has been granted as to that property. In this situation, the sovereign rights of a state would not likely be implicated to the extent necessary to outweigh the forum's interests in executing judgments or fulfilling the plaintiffs' interest in relief. Indeed, promoting such incentives for defendants is inimical to the basis of the restrictive theory of immunity; namely, when a state enters the commercial arena, it takes on the persona of a private actor and must face all of the ensuing limitations and responsibilities

This situation is especially likely to occur when considering that whatever potential infringement there is on the sovereign rights of the foreign state will be mitigated by the judicious application of section 1610(c), which requires a reasonable period of time to pass before the application of any execution measures under 1610(a) or (b).[220] By removing section 1610(d), this proposed provision would apply to prejudgment measures as well, and would present courts with a ready means to respect the ability of sovereign entities to order their assets before entry of judgment. Thus, commercial property should be treated the same at the pre and post-judgment stages of execution, in accordance with the practice of Australia and the proclamation of the French Court of Cassation in *Eurodif.*

ii. Nexus Requirement and Tort Claims

The primary concern of the drafters of the ABA Report, in terms of immunity from execution, was the removal of the nexus requirement. Recall that section 1610(a)(2) of the FSIA requires, in a claim against general commercial property, that such "property is or was used for the commercial activity upon which the claim is based." The problem with this requirement, as the Report notes, is that "[o]nly in rare instances would a foreign state have property in the United States, perhaps an office, warehouse, or goods awaiting export, 'used' for the activity giving rise to the claim."[221]

The ABA committee intended to remove the nexus requirement in order (1) to allow commercial creditors access to more property than that which their claim was based upon and (2) to allow for a remedy for tort claimants to execute against more than just insurance policies in the United States.[222] The complete construction put forth by the ABA would meet both these goals. Removing the nexus requirement allows execution against any commercial property within foreign states for both commercial and tort creditors. In the United States, this is a definitive boon for accidental tort creditors, such as a typical auto tort plaintiff, because they no longer have to rely solely on the fortuitous presence of an insurance policy covering their claim to recover under section 1610(a)(5).

220. The full text of § 1610(c) reads:
(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under § 1608(e) of this chapter.

221. ABA Report, *supra* note 23, at 585.

222. *Id.* at 586.

The abolition of the nexus requirement and the concomitant benefits to tort and contract claimants only makes sense in terms of the policy underpinning immunity from execution. By acting as a commercial actor, a state cedes its sovereign status and should be responsible for properly allocating its assets to commercial and sovereign practices. As with any actor, when engaging in a commercial area, the state would then be able to measure its potential liability and begin to form settled expectations regarding its exposure. Further, where property is commercial—by definition outside of the public sphere—it is unlikely that removing the nexus requirement would have detrimental effects on the foreign relations of the United States.[223] Finally, at least as to most tort plaintiffs, there is little likelihood of enabling typical plaintiffs to bankrupt a sovereign state or threaten its financial stability.

The simplification of requirements has an additional benefit of making the separate treatment of immunity of execution for instrumentalities superfluous. Section 1610(b)(2) currently exempts the commercial property of instrumentalities from the nexus requirement. Since a state includes all of its instrumentalities under section 1603 of the FSIA,[224] such property would be included under the general reformed provisions. Thus, the ABA reforms adapt the simplicity of the ASIA and the UKSIA, which do not make a distinction between states and their instrumentalities, while at the same time maintaining the power to execute against the property of instrumentalities. Of course, these reforms do not mean that there can be unbridled execution of judgments against the property of foreign instrumentalities operating within the United States; indeed, the reforms do not significantly change the treatment of instrumentalities. Instrumentalities would still be considered under the presumption of separate juridical status, as in the holdings of cases like *Bancec*[225] and *Sonotarch*.[226]

In all, the proposed changes to the commercial property exception are beneficial to the overall structure of the FSIA. Previously the balance tipped against plaintiffs who had to prove first that the property was commercial and then that it was related to the claim at hand. In this author's view, the second stage was an unnecessary infringement of a plaintiff's right to recovery when a foreign state is perfectly capable of ordering its affairs upon proper lines. The emergence of more stringent protections of the most common sovereign property emerging, as discussed below, makes it unlikely that sovereign rights will be destroyed by these proposed changes.

223. To assure such a result, the ABA offers a broader definition of immunity for certain property that at times has been deemed commercial, particularly diplomatic property. This extension, and its limitations, will be discussed below.

224. Section 1603(a) reads: "(a) A "foreign state," except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)."

225. 462 U.S. 611 (1983).

226. Court of Cassation (France), 1 October 1985, 26 I.L.M. 998 (1987).

iii. Specific Sovereign Assets

The ABA Report would make minor additions to section 1611, as noted above. Yet, given the changes proposed concerning the nexus requirement, which establish a general rule of execution against commercial property, there would be a need to adequately define exceptions to that general rule enumerated in section 1611. Under the proposed regime, there is a possibility that such property will be subject to a greater number of attachment and execution attempts. Even outside of that proposed new framework, however, section 1611 suffers from stilted and mixed judicial interpretation, particularly in the area of central bank property and mixed embassy accounts. Since these types of property go to the core of the sovereign identity of a state, and execution against them presents a legitimate threat to the facilitation of foreign relations, the boundaries of possible execution should be clearly delineated.

The structure of the FSIA was previously slightly askew in its treatment of diplomatic property, with relevant sections referring to the VCDR being found in section 1610(a)(4)(B) and a general diplomatic immunity provision in 1611(c). The ABA Report would amend section 1611(b) to include a more explicit definition of immune diplomatic and consular property.[227] This explicit addition is congruent with the structure of the UKSIA,[228] the ASIA,[229] and the ILC Draft Articles.[230]

While this amendment clarifies the location of the provisions of the FSIA dealing with diplomatic property, it does little to address the more specific problem of embassy bank accounts. While the VCDR itself arguably protects embassy bank accounts,[231] a specific statutory prohibition on the issue would be more effective. Without prejudice to the requirements of section 1610(f)(1), which allows execution against diplomatic property for claims based on the terrorism provisions of section 1605, the diplomatic property of a state should be protected in the core interest of the foreign relations of states. Only in the case of terrorist crimes arising to the level defined under the act should that core interest be infringed. A formulation like that in Article 19 of the ILC Draft Articles would be preferable.[232]

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227. *See* ABA Report, *supra* note 23, at 589.

228. *See* § 16(1).

229. *See* § 32(3).

230. *See* art. 19(1)(a).

231. *See* Philippine Embassy Case, Bundesverfassungsgericht (German Federal Constitutional Court) 46 BVerfGE 342 (Nov. 1977), *available at* http://www.ucl.ac.uk/laws/global_law/ german-cases/cases_bverg.shtml?13dec1977.

232. *See* ILC Draft Articles, *supra* note 26, art. 19. Article 19 reads:

> Article 19 Specific Categories of Property
>
> 1. The following categories . . . shall not be considered as property in use or intended for use by the State for other than government non-commercial purposes
>
> a. Property, including any bank account, which is use or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions, to international organizations, or delegations to organs of international organizations or to international conferences.
>
> . . .

Furthermore, while the concern of the *Birch Shipping*[233] court that all state funds could theoretically be mixed with diplomatic funds is reasonable, such a danger is unlikely in any situation where a state has anything but the most minimal contact with the United States. Instead, the impact of the VCDR, alluded to in *Liberian Eastern*,[234] and the foreign precedents of the *Philippine Embassy Case*[235] and *Alcom, Ltd*[236] establish that there should be a general rule against execution on embassy bank accounts.

The ABA report proposed no changes for central bank property. Unfortunately, as it stands, section 1611 currently presents difficulties in interpretation and structure; any attempt to broaden the terms of section 1610 should also make an attempt to clarify these difficulties. On its terms, section 1611(b)(1) precludes attachment of any funds held by a central bank "for its own account." In practice, the structure of the "own account" test probably reflects a watered down version of the commercial activity test, which allows for a reasoned case-by-case analysis of the nature of the property dealt with. As a matter of law, however, this test is subject to more than one interpretation, as discussed earlier in part III.b. Given the normally strict application of central bank immunity in the sovereign immunity regimes discussed above,[237] it is difficult to formulate a proper construction of this provision by comparative analysis. It is necessary to mesh the central banking exception with the broader idea of commercial property in the proposed change to section 1610. Along the lines of the third interpretation of section 1611(b)(1) and the supporting House documentation presented above,[238] the ideal formulation "would provide protection for central bank property used for the account of the central bank or for a public or governmental activity of the foreign state or its agencies and instrumentalities, but not for commercial transactions of a foreign state or its agencies or instrumentalities." This could be accomplished by reformulating section 1611(b)(1) with a clear definition of "own account," which would incorporate by reference the commercial/non-commercial distinction.

Even after clarifying this issue, the procedural anomaly created by *Weston*[239] remains. Recall that the Court there invalidated a waiver pre-judgment attachment because section 1611(b) did not allow for such waivers by a central bank, despite the fact that section 1610(d), dealing with pre-judgment attachment in general, would allow for such a waiver. Further, from the breadth of the interpretation, it appeared that the state owner of the bank could not have waived immunity to pre-judgment attachment either. Although defensible in accordance with the current text of the FSIA, this interpretation countermands the fundamental notions of state sovereignty it purports to protect. It also dismisses any

233. 507 F. Supp. 311 (D.D.C. 1980).
234. 659 F. Supp. 606 (D.D.C. 1987).
235. *See* Philippine Embassy Case, 46 BVerfGE 342.
236. [1984] 2 All ER 6 HL, *reprinted in* 23 I.L.M. 719 (1984).
237. See the discussion of UKSIA, §13, ASIA, § 35(1), and the ILC Draft Articles, *supra* note 26, art. 19(1)(c), *supra* part III.b.
238. *See* Lee, *supra* note 181, at 381.
239. 823 F. Supp. 1106 (S.D.N.Y. 1993).

possibility of central banks, the key state financial instrumentality, partaking of normal commercial relations in the private sphere. In accordance with the above discussion of pre-judgment waivers, this author proposes that a separate waiver as to pre-judgment remedies should never be required if the state entity has waived execution against specified assets prior to a conflict. Thus, removing section 1610(d) and specifically allowing for waivers of pre-judgment attachment in section 1611(b) would eliminate the anomaly of *Weston*.

CONCLUSION

The FSIA execution provisions have been described "as among the most confusing and ineffectual in the state,"[240] and are in dire need of reform. This note has undertaken an analysis of a preliminary effort to undertake such a reform. Yet, it can be difficult to measure where improvement can be made when doing so involves striking the proper equilibrium between the narrowing scope of sovereign immunity and the increasing presence of foreign plaintiffs in U.S. courts. It is clear that the older regimes of immunity, based on basic principles of comity and absolute state immunity, should not survive in a changing environment of international commercial interaction and international rogue states. However, a functional statutory regime to govern claims against foreign sovereigns is a complex beast, which at times needs to adjust to pressures put upon it, both procedural and substantive. As is apparent in the history of terrorism and the FSIA laid out in the introduction, execution immunity has been the last wall to be assailed. Unfortunately, changes to the execution regime have to this point been entirely *ad hoc*, in some cases applying only to specific claimants. A more complete reassessment of the statutory framework is necessary to achieve a comprehensive simplification of the execution provisions and can be developed with reference to the decisions of other jurisdictions.

240. ABA Report, *supra* note 23, at 581.

Berkeley Journal of International Law

Volume 22 | Issue 3 Article 8

2004

Iraq's Delictual and Contractual Liabilities: Would Politics or International Law Provide for Better Resolution of Successor State Resonsibility

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Iraq's Delictual and Contractual Liabilities: Would Politics or International Law Provide For Better Resolution of Successor State Responsibility?

By
Volinka Reina*

INTRODUCTION

Successor states emerge as the result of a multitude of political or economic processes. Whether one state continues the legal personality of a predecessor or instead rises as a new entity may hinge on issues of territorial integrity and governmental continuity or discontinuity. The contract and tort liabilities of successor states depend on a myriad of circumstances, such as their relationship to the territory, people and government of the predecessor state. These matters are further complicated by the various approaches and theories available to address the issues of state succession and state responsibility.

Two instances from recent history present a valuable opportunity for the examination of the practice of states with regard to succession. The 1978 revolution in Iran, which ended with the overthrow of Shah Pahlavi and the establishment of Ayatollah Khomeini's religious state, exemplifies a situation of state continuity following a government change. By contrast, the dismemberment of the former Yugoslavia invoked difficult questions as to whether the resulting situation was one of state continuity or state succession and if the former, which "new"[1] state would continue the legal personality of the predecessor federation.

Which characterization was given to the emerging states after the Iranian Revolution and the break-up of Yugoslavia was significant to the world community as it would determine the nature of their relationships with the successor states. State succession also affects membership in the United Nations and other

* J.D., 2004, University of California, Berkeley (Boalt Hall). I would like to thank my editor Véronique Laughlin for her invaluable insights and help as well as the associate editors who assisted her in this task.

1. I am placing the word "new" in quotation marks because the sucessor to the Socialist Federal Republic of Yugoslavia ("SFRY") was the Federal Republic of Yugoslavia ("FRY") consisting of Serbia and Montenegro, which was hardly a new state. The FRY was, however, the largest remnant of the old socialist federation.

international organizations such as the IMF and the World Bank. It also implicates the fate of treaties to which the predecessor state had become a party. This article focuses on a different aspect of succession, namely, successor state liability in contract and tort. The importance of resolving past liabilities is paramount to the aptitude of a newly-emerged state to move forward in a constructive manner.

The lessons of the recent changes in sovereignty in Iran and Yugoslavia lead to the conclusion that, despite the vital importance of international law to state succession, the most direct path to the resolution of disputes concerning responsibility for contracts and delicts incurred by the predecessor state is the political arena. The rules regarding successor state liability and responsibility are quite pliable and have been in flux since the issue came to the forefront of international law with the era of decolonization. International law has attempted to solidify rules, which have emerged through custom and practice in the two Vienna Conventions on State Succession. However, the first Vienna Convention[2] entered into force in 1996 but has only been ratified by nineteen countries. The fate of the second convention[3] is even more dismal.[4] Neither is widely-followed and states have generally sought to tailor the treatment of emerging states to the specifics of the particular situation. In light of past treatment it seems reasonable to speculate that the situation in Iraq would be addressed in a similar manner. The international community would have to negotiate with the future Iraqi government questions of common interest such as debt, pending or past contracts and the responsibility for delicts.

Approaching successor state liability at the political and diplomatic levels offers a better solution to potential disputes than invoking international law. The state of the law is perplexing and that is perhaps due to the misfit between the nature of the problem which entails very specific political conflicts, and the possible remedies or solutions which are based in broad principles for which law in general is suited. State succession usually results from fundamental political changes played out in the arena of national power struggles or international political disputes. Law, on the other hand, attempts to prescribe rules and norms in order to regulate behavior, in this case state behavior, in a systematic manner. Thus, the very stringent and structured nature of solutions proscribed by law often may not be amenable to the idiosyncratic needs of all players in situations following state succession.

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2. Vienna Convention on Succession of States in Respect of Treaties, Aug. 22, 1978, U.N. Doc A/Conf. 80/31, 17 I.L.M. 1488 (1978) [hereinafter Convention in Respect of Treaties]. For more information on status and declarations, see http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty2.asp.

3. Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, *opened for signature* Apr. 8, 1983, U.N. Doc. A/CONF.117/14, 22 I.L.M. 3066 (1983) [hereinafter Convention in Respect of State Property, Archives and Debts].

4. Only six countries have ratified the second Vienna Convention. *See* Multilateral Treaties Deposited with the Secretary-General, UNITED NATIONS, *available at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty37.asp (last modified March 31, 2004).

Iraq presents a paradigmatic example, which will require the cooperation of all international powers and all the various states whose interests have been affected. Cooperation will be necessary in order to determine whether and how this successor state may be responsible for delicts committed under the regime of Saddam Hussein. All major economic powers will have to initiate a dialogue with regard to the contracts pertaining to oil and/or pipeline concessions previously granted or revoked in order to tailor a solution which would satisfy the interests of all concerned. One possible framework within which this may be achieved is a proceeding resembling a bankruptcy, in which all unsatisfied creditors participate in order to negotiate a resolution.[5] As a historical example, the Allies arranged for the repayment of the German Reich's debts while helping its reconstruction following both world wars but especially World War II.

Part One of this note sets out the dynamics of the law on state succession as well as the U.S. law on sovereign immunity. Addressing the U.S. doctrine is important as it is foreseeable that the United States will be a crucial forum for some of the potential claims. Parts Two and Three survey state succession through cases arising out of the Iran-United States Claims Tribunal, and cases involving the dismemberment of the former Yugoslavia. Part Four attempts to predict future claims in tort and contract concerning Iraq, which is currently in a state of transition.

I.
SUCESSOR STATE RESPONSIBILITY UNDER INTERNATIONAL AND U.S. LAW

The law on state succession is bewildering because it does not follow a linear doctrinal path. The consequences of different circumstances following a change in sovereignty carry different results. It is important to classify the various causes of succession in order to determine the status of the emerging state because the origins of successions impact the fate of its obligations. International law treats transfers of sovereignty differently from changes in government and assigns separate treatment to state obligations under each situation. In the case of Iraq, U.S. law will also play a determinative role. The United States has been an important player in Iraq and many U.S. actors have been affected by the events surrounding the toppling of the former regime. It is foreseeable that some legal battles concerning contracts and delicts will be brought to U.S. courts.

A. The State of the Law

The Restatement Third on Foreign Relations, section 208 states, "When a state succeeds another state with respect to particular territory, the capacities, rights, and duties of the predecessor state with respect to that territory terminate

5. This is not meant to imply that Iraq is in any way a bankrupt state. Simply stated, the bankruptcy model is a convenient and efficient method to address unresolved conflicts where multiple interests are at stake.

and are assumed by the successor state . . . ."[6] It has already been noted that state succession is a complex area of international law involving issues of recognition of states and governments as well as the duties and obligations at stake. Moreover, questions arise as to the responsibility of the successor state with regard to the contractual and tort obligations of the predecessor. State succession is further complicated by the myriad of circumstances capable of bringing a situation of succession about. For instance, different issues of state succession arise in a situation in which a regime takes over a previous government by force and threat, as the Pinochet regime took over Chile in 1973, compared to the situation when one state secedes from the territory of another by mutual consent, as in the case of the former Czechoslovakia. The term "successor state" therefore may be used to describe very different situations of transfer of sovereignty.

The Restatement defines a "successor state" as one which "wholly absorbs another state, that takes over part of the territory of another state, that becomes independent of another state of which it had formed a part, or that arises because of the dismemberment of the state of which it had been a part."[7] The Restatement also points out that under international law, there is a marked difference in the succession of states versus governments. The succession of states may rupture the "continuity of statehood" whereas government succession leaves it unaffected.[8] A successor state not only undergoes a change in government but is also subject to a fundamental change in sovereignty. The term "successor state" is used loosely in this note to denote a state following a change both in government and in sovereignty.

The International Law Commission has designed two conventions relating to the succession of states. The codification efforts of the Commission resulted in the 1978 Convention on State Succession in Respect of Treaties[9] and the 1983 Vienna Convention on State Succession in Respect of State Property, Archives and Debts.[10] These attempts to codify international law on state succession have been viewed as unsuccessful because only the first convention has entered into force and because actual practice does not follow either of them.[11]

The various classifications used to describe a state mainly hinge on the end result—whether a new entity under international law emerged or whether an existing state split into fractions. A change in sovereignty over a territory could be the result of varying political processes, such as secession, dismemberment or unification. Secession occurs when a new state severs from a larger predecessor state.[12] An example of secession is the declarations of independence of the

6. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 208 (1987) [hereinafter RESTATEMENT THIRD].

7. *Id.* § 208 cmt. b.

8. *Id.* at reporters' note 2.

9. *See* Convention in Respect of Treaties, *supra* note 2.

10. *See* Convention in Respect of State Property, Archives and Debts, *supra* note 4.

11. PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 161-62 (7th Revised ed. 2003).

12. *Id.* at 165.

Baltic States[13] from the former Soviet Union.[14] Dismemberment is used to describe a situation where a larger state disintegrates into smaller separate states, such as the fate of the former USSR and Yugoslavia.[15] Whether the Russian Federation and the FRY are the continuators of the former states further complicated the issue of succession. Unification is a unique occurrence of succession in modern history as it has only occurred in the case of Germany in 1990.[16] The unification of the East and West German states followed the principle of "moving treaty boundaries" where one state transfers sovereignty over its territory to another. The treaties entered into by the predecessor state no longer bind that territory, while the treaties of the new successor state automatically apply.[17] International claims, however, are considered "personal" to a state and the rights of claimants or the obligations of defendant states do not transfer to the successor state.[18] This is the so-called doctrine of *tabula rasa*, or clean slate.[19]

An issue of great importance, and of great confusion, is the distinction between succession of states versus succession of governments. States, and not governments, are the subject of international law.[20] A state must possess a defined territory, a permanent population and a government capable of entering into international relations.[21] Some scholars have concluded that true state succession only occurs with "a transfer in sovereignty over a particular territory and a resultant discontinuity in statehood and its concomitant obligations."[22] A mere change in government does not result in state succession. The "capacities, rights and duties" of a state do not alter due to a change in government.[23] Examples of "radical changes in government" which have not resulted in state succession include the deposition of Napoleon III, the Bolshevik Revolution of 1917 in Russia, the revolution which brought about the People's Republic of China, and the military coups in Sudan in the 1980s.[24]

The law on state succession becomes even more complex with the issue of succession to contracts and contractual rights and obligations. It seems only fair that a successor state should be responsible for the contracts entered into by the

13. Estonia, Latvia and Lithuania.

14. MALANCZUK, *supra* note 11, at 165-66.

15. *Id.* at 166-67.

16. *Id.* at 167-68.

17. *Id.* at 163-64.

18. Thomas Ebenroth & Matthew James Kemmer, *The Enduring Political Nature of Questions of State Succession and Secession and the Quest for Objective Standards*, 17 U. PA. J. INT'L ECON. L. 753, 784 (1996).

19. *Tabula Rasa* simply refers to the concept that the successor state does not succeed to the rights or obligations of its predecessor. *Id.*

20. *See* MALANCZUK, *supra* note 11, at 2; Statute of the International Court of Justice, June 26, 1946, art. 34(1) ("Only states may be parties in cases before the Court."), *available at* http://212.153.43.18/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm#Article_1 [hereinafter ICJ Statute].

21. *See* MALANCZUK, *supra* note 11, at 75 (citing Montevideo Convention on Rights and Duties of States, 1933, art. 1, 165 L.N.T.S. 25 (1936)) (The characteristics of a state mentioned in the Convention follow the doctrine of three elements devised by Georg Jellinek).

22. Michael John Volkovitsch, *Righting Wrongs: Towards a New Theory of State Succession to Responsibility for International Delicts*, 92 COLUM. L. REV. 2162, 2165 (1992).

23. RESTATEMENT THIRD, *supra* note 6, at cmt. a.

24. Ebenroth & Kemmer, *supra* note 18, at 757-58.

predecessor where the territory has benefited from the transaction. The question whether contractual obligations are inherited by the successor state entails issues of private or acquired rights also known as "*droits aquis*."[25] This doctrine postulates that despite a transfer of sovereignty and the resulting state succession, private property rights remain unaffected.[26] International law imposes liability on successor states with regard to private rights existing against the predecessor state; the successor state may only cancel such rights to the extent permitted by international law.[27]

One international case addressing the problem, brought before the Permanent Court of International Justice, was the German Settlers case.[28] It entailed the eviction of German settlers by the Polish state from territory Poland had received after World War I. The court found that private rights obtained under a particular state's law do not terminate with a change in sovereignty.[29] The court emphasized that despite the change, the law of the predecessor state had continued to "operate in the territory" and that it would be nonsensical to maintain that private rights acquired under that law have "perished."[30]

The issue of the contractual liability of a successor state has also risen in U.S. courts. The case of *Jackson v. People's Republic of China*[31] concerned the liability of the People's Republic of China ("PRC") for bonds issued by the Imperial Chinese Government in 1911 for the financing of the Hukuang Railway construction. Chiang Kai-shek pledged to honor the bonds in 1947,[32] but once the Communist Party gained control in 1949, payments on the bonds ceased.[33] The suit was filed in the court for the northern district of Alabama, which entered a default judgment against the PRC.[34] The court also awarded damages and interest. The court in this case followed the well-established principle that a successor government is liable for the obligations of its predecessor.[35] A bond is a contract giving one party the benefit of current cash flow in exchange for future profits in the form of interest paid out to the other contracting party.[36]

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25. *Id.* at 776.

26. *Id.*

27. *See* 1 D.P. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 237-464 (1967).

28. Advisory Opinion No. 6, Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland, 1923 P.C.I.J. (ser. B) No. 6 (Sept. 10).

29. *Id.* at 42.

30. *Id.* at 36.

31. 550 F. Supp. 869 (11th Cir. 1982).

32. *Id.* at 872.

33. *Id.*

34. Monroe Leigh, *Foreign Sovereign Immunities Act - Liability of People's Republic of China for Defaulted 1911 Railway Bonds - State Succession*, 77 AM. J. INT'L L. 146, 147 (1983).

35. *Jackson*, 550 F. Supp. at 872 (citing Lehigh Valley R. Co. v. State of Russia, 21 F.2d 396, 401 (2d Cir. 1927) (quoting 1 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 249 (1906)).

36. For the definition of a bond, see ABOUT ECONOMICS, *available at* http://economics.about.com/ cs/ economicsglossary/g/bond.htm ("A bond is a fixed interest financial asset issued by governments, companies, banks, public utilities and other large entities. Bonds pay the bearer a fixed amount a specified end date. A discount bond pays the bearer only at the ending date, while a coupon bond pays the bearer a fixed amount over a specified interval (month, year, etc.) as well as paying a fixed amount at the end date.").

Since successor governments are responsible for the outstanding contracts of their predecessor, it necessarily follows that they are liable to retire the bonds. The court had jurisdiction pursuant to the "commercial activity exception" to the Foreign Sovereign Immunities Act ("FSIA")[37] since the case was based on the sale of bonds. The policy behind finding successor states liable for the debts they inherit is amplified in cases where the money generated by the sale of bonds is used to finance major infrastructure projects. Even though the new government or state did not directly negotiate the terms of the bonds or the debt, it has benefited from the cash flow. In *Jackson*, the money was used to build a major vein in China's transportation system. The railway is still in operation and the state and its populace have benefited from its use. Unjust enrichment would result if a successor state were both permitted to reap the fruits of its acquired bonds and pardoned from repaying its inherited debt because the state was not a part of the bargain.

Section 209 of the Restatement addresses this issue of succession to state property and contracts. Generally, property title is determined by the *situs*; that is, property belongs to the state, whether predecessor or successor, where it is located.[38] Conversely, responsibility for the public debt and contractual rights "remains with the predecessor state" subject to a few important exceptions.[39] For example, local public debt and rights and obligations under contracts "relating" to a particular territory pass with the territory now comprising the successor state regardless of whether it is based on only part or the entire territory of the predecessor state.[40] If a state is absorbed by another, contractual responsibilities and public debt are transferred to the absorbing state. The policy behind these rules is again the notion of possible unjust enrichment. On the other hand, where a state absorbs another, it is assumed that the new larger state would benefit from the expansion of territory and thus, must pay the price of taking responsibility for the obligations of the absorbed predecessor state.[41]

Contractual rights, for example, were respected in the cases brought before the Iran-United States Claims Tribunal in which private parties had come forward with claims arising under contracts negotiated and signed during the regime of the Shah. It follows that, under the current state of the law on state succession, private contractual or acquired rights survive the change in sovereignty or, by an analogy to property law, they "run with the land" in cases where there has not been a redistribution of territory.[42]

In the *Lighthouses Arbitration* between France and Greece, the Permanent Court of Arbitration addressed the issue of responsibility for delicts post-succes-

37. 28 U.S.C. § 1605(a)(2) (providing that states are not immune to suits in the United States when they are based on a commercial activity carried on in the United States). The issue of the character of an activity as commercial is determined by its nature rather than purpose. *Id.*

38. RESTATEMENT THIRD, *supra* note 6, § 209(1)(a)-(c).

39. *Id.* § 209(2).

40. *Id.*

41. *Id.*

42. *See supra* part II.

sion.[43] France sought compensation from Greece on three claims involving succession.[44] The tribunal found Greece liable on only one of those claims. After World War I, Greece took over the previously autonomous state of Crete. The Cretan government had granted a monopoly to a Greek shipping company whose ship was to be exempted from lighthouse fees.[45] The tribunal rested its decision on the fact that Crete's action was clearly delictual and was knowingly taken in breach of the terms of the concession. Moreover, there was an issue of attribution of knowledge to Greece, which the tribunal considered obvious, since it was the sole beneficiary of the grant of monopoly. [46] Greece succeeded to Crete and was therefore aware of the practices of the Cretan government subsequent to the change in sovereignty. Thus, from the result of the *Lighthouses Arbitration*, it is safe to conclude that in cases of succession where there is continuity of a practice, which is delictual to a third state by its nature, and the successor government perpetuates that practice instead of extinguishing it, it will be found liable for an international delict.

In sum, successor states generally inherit the liabilities of their predecessor under international law where there has not been a significant redrawing of the map. This approach is supported by the inherent logic that a state actor who benefits from the incurred liabilities ought to accept the responsibility of satisfying its obligations. Having examined the underlying issues of succession, the following section will address how liabilities in post-succession situations can be resolved in U.S. courts.

B. State Succession and U.S. Law on Sovereignty

U.S. sovereignty law is significant to state succession because parties who wish to adjudicate claims against a successor state in U.S. courts must satisfy the requisite jurisdictional requirements. The United States is a major player in the current situation of transition in Iraq. It is, therefore, foreseeable that certain claims will be addressed in this country. In anticipation of these claims, the following discussion will analyze how U.S. courts are likely to address the legal obligation of Iraq as a successor state/government.

In the seminal case of *Schooner Exchange*, Chief Justice Marshall wrote that immunity had its basis in the "perfect equality and absolute independence of sovereigns."[47] For many years, the principle of absolute immunity was followed worldwide and in the United States. This principle dictated that states

43. Lighthouses Arbitration (Fr. v. Greece) 23 I.L.R. 659 (Perm. Ct. Arb. 1956). France had negotiated to construct two new lighthouses as a result of which its concessionaire had made certain disbursements. The construction was to be financed by credits from the Ottoman government, which, in return, was to receive a stream of payments from the lighthouse revenues. There was a change in the arrangement when Crete directed the French company to render the share directly to the Ottoman government. The French firm could not satisfy this demand and had to halt work on the project without being able to recover its invested expenditures. Volkovitsch, *supra* note 22, at 2188.

44. Volkovitsch, *supra* note 22, at 2187.

45. *Id.*

46. *Id.*

47. The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 137 (1812).

were immune from the jurisdiction of a foreign court in practically any case. Gradually, with the development of commerce and with the increasing complexity of trade relations, this stringent doctrine was eroded in favor of more flexible rules. The first states to implement a "restrictive" principle of sovereign immunity were Belgium and Italy by denying immunity to states in cases where their operation of public vessels for commercial purposes or trade were brought before the courts.[48]

This early practice evolved into the "commercial" transaction exception currently recognized by many countries applying the restrictive theory of sovereign immunity. In American jurisprudence, this exception has been codified in section 1605(a)(2) of the Foreign Sovereign Immunities Act ("FSIA"), which allows U.S. federal courts to exercise jurisdiction in cases arising out of "commercial transactions" carried out by foreign states causing a "direct effect" in the United States. Also, the Restatement Third of Foreign Relations, section 451 reads, "Under international law, a state or state instrumentality is immune from the jurisdiction of the courts of another state, except with respect to claims arising out of activities of the kind that may be carried on by private persons."[49] Commercial activity is defined in section 1603(d)[50] to include both "a regular course of commercial conduct" such as the operation of a particular type of business, and "a particular commercial transaction or act" such as the purchase of equipment by a governmental instrumentality. An activity is deemed commercial according to the "nature" rather than "purpose" of the activity.[51]

However, exertions of power over foreign sovereigns still must satisfy U.S. constitutional requirements. The Supreme Court has ruled that, in order to subject an "absent defendant to a judgment *in personam*," due process mandates that he have certain minimum contacts with the forum court in such a way as to not offend "traditional notions of fair play and substantial justice."[52]

In *Helicopteros Nacionales de Colombia, S.A. v. Hall*,[53] the Supreme Court again examined the propriety of jurisdiction over a foreign defendant corporation in light of the Fourteenth Amendment's Due Process Clause. The Court addressed the difference between "specific jurisdiction" in suits "arising out of or related to the defendant's contacts with the forum" and "general jurisdiction" in suits "not arising out of or related to the defendant's contacts with the forum."[54] Thus, in order to assert jurisdiction over foreign defendants in the United States, courts must establish that the defendant has had at least "minimal

48. RESTATEMENT THIRD, *supra* note 6, ch. 5, subch. A, introductory note.
49. *Id.* § 451 (regarding the immunity of foreign states from jurisdiction to adjudicate).
50. Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(d) (1976).
51. *Id.*
52. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
53. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984). The case arose out of a helicopter crash in which four United States citizens were killed. The survivors and representatives of the victims brought suit in Texas against Helicol, a Colombian corporation, engaged in the business of helicopter transportation for oil and construction companies in South America. The Supreme Court of Texas ruled that Helicol's contacts with Texas were sufficient to assert *in personam* jurisdiction. The U.S. Supreme Court reversed. *Id.*
54. *Id.* at 413, 414 n.8, 415 n.9.

contacts" with the forum sufficient to show that the conduct of the defendant's business has a "direct effect" in the United States. It follows that parties who have signed contracts with the previous Iraqi government and wish to bring claims against the successor state must (1) show that they fall within the commercial activity exception and (2) establish the level of the sovereign's contacts with the United States in order to bring suit in a U.S. forum.

According to the Restatement, "[u]nder international law, a state is not immune from the jurisdiction of the courts of another state with respect to claims in tort for injury to persons or property in the state of the forum."[55] The injury may be a result of the foreign state's operation of a particular business in the forum state. Commonly, such suits arise out of injuries sustained in the operation of factories or airlines. Thus, the "commercial activity" exception and the concept of claims in tort are interrelated. Section 1605(a)(5) of the FSIA grants jurisdiction to U.S. courts over tort claims against foreign states only for damages "occurring in the United States" notwithstanding "where the act or omission causing the injury took place."[56] Therefore, U.S. claimants would need to demonstrate the ways in which a particular injury caused by Iraq's predecessor government occurred in the United States in order to have their claims heard and adjudicated by U.S. municipal courts.

An examination of the cases adjudicated by the Iran-United States Claims Tribunal shows how successor state liability has developed in practice. It also informs an understanding of how a U.S. court will adjudicate claims since the tribunal was comprised of Iranian as well as U.S. judges trained in the American tradition.

II.
IRAN-UNITED STATES CLAIMS TRIBUNAL

A. Cases Concerning Contracts

In *United States v. Iran*, Award 574-B36-2, the United States sued Iran pursuant to a contract between the two states for the purchase of "certain U.S. surplus military property after the Second World War."[57] In addition to the sales contract, the Iranian Ambassador in Washington, D.C. requested the United States extend Iran a U.S. $10 million line of credit to facilitate the purchase. The ambassador made the request acting on behalf of his government. [58] Iran asserted it was not in a situation of state succession and thus accepted responsibility for the obligations of the previous regime.[59] However, Iran argued that this particular debt was "personal to the former regime" and could also

55. RESTATEMENT THIRD, *supra* note 6, § 454(1).

56. *Id.* at cmt. e.

57. United States v. Iran, Award No. 574-B36-2, para. 1 (Dec. 3, 1996) [hereinafter Award No. 574-B36-2], *available at* 1996 WL 1171809.

58. *Id.* at para. 12.

59. *Id.* at para. 52.

be described as "odious,"[60] thereby making it non-transferable to the new government.[61] The tribunal held that the concept of "odious debts" belonged to the field of state succession, which it found irrelevant in this case.[62] The tribunal stated that the revolutionary events in Iran, resulting in the erection of a new government, cast the case into the realm of "state continuity."[63] The tribunal noted that "when a Government is removed through a revolution, the State, as an international person, remains unchanged and the new government generally assumes all the previous international rights and obligations of the State."[64] Therefore, the tribunal held that the new Iranian government was obliged to fulfill the state's financial obligations despite major "constitutional changes."[65] In dictum, the tribunal added that even if the law of state succession had applied, the "nature of the debt involved would lead to its passing to the new government" and thus to the successor government's "consequential duty to repay."[66] It follows that in cases involving debts, which are not considered odious in nature, subsequent governments, regardless of the extent of their political divergence from the predecessor government, are bound to respect the state's financial obligations pursuant to contracts.

In *Lockheed Corporation v. The Government of Iran et al.*,[67] the tribunal found in favor of the plaintiff corporation. The case arose out of claims asserted by Lockheed pursuant to contracts with various ministries of Iran.[68] The plaintiff alleged that it had become "increasingly concerned about the safety of [its] employees and their dependents because of the revolutionary events occurring in Iran."[69] The tribunal found that violence resulting from the revolutionary events had created a sense of anxiety and fear and had compelled a Lockheed director to evacuate his employees from the country. [70] The tribunal further found that Lockheed's "non-performance of the Contract . . . was excusable."[71] The "perception of imminent danger" was compelling enough, in the tribunal's view, to justify evacuation. The tribunal held that Lockheed had not abandoned its responsibilities under the contract.[72] The cross-allegation of abandonment of the

60. Odious debt is defined as "the genus, whereas 'war debts' and 'subjugation debts' constitute different species within [it]." War debts are contracted by a state in furtherance of a "war effort" against another sovereign. Subjugation debts are contracted "with a view to subjugating a people and colonizing its territory." Succession of States in Respect of Matters Other Than Treaties, [1977] 2 Y.B. Int'l L. Comm'n 67, U.N. Doc. A/CN.4/301 and Add. 1, para. 117-140; *see also* Award No. 574-B36-2, *supra* note 58, at para. 6.

61. Award No. 574-B36-2, *supra* note 57, at para. 54.

62. *Id.*

63. *Id.*

64. *Id.* at para. 54 (citing 1 OPPENHEIM'S INTERNATIONAL LAW 234-6 (Robert Jennings & Arthur Watts eds., 9th ed. 1992)).

65. Award No. 574-B36-2, *supra* note 57, at para. 55.

66. *Id.*

67. Lockheed Corp. v. Gov't of Iran, Award No. 367-829-2 (1988), *available at* 1988 WL 637268.

68. *Id.* at para. 1.

69. *Id.* at para. 33.

70. *Id.*

71. *Id.* at para. 39.

72. *Id.*

contract was undermined by the fact that the Iranian Air Force itself had provided an aircraft to facilitate the evacuation. The tribunal held that the contract either expired pursuant to its own terms or was terminated due to "frustration."[73] Seyed Khalilian filed a dissenting and concurring opinion in this award in which he disagreed with the panel's determination that the circumstances at Bandar Abbas airbase were dangerous and amounted to "*force majeure* conditions." [74] Mr. Khalilian viewed the case as one of breach of contract by Lockheed and not as one of frustration or failure to perform due to *force majeure*.[75]

In another case, Questech, Inc. sued the Ministry of National Defense of the Islamic Republic of Iran on a contract, which had formed part of a "project to modernize and expand Iran's electronic intelligence gathering system."[76] The claimant alleged that the respondent ministry had breached the contract by failing to pay on invoices and to evaluate the performance of the claimant under the contract's terms.[77] The tribunal concluded that although both parties were excused from performance for a certain period due to *force majeure*, ultimately, the "Iranian Government made a deliberate policy decision not to continue with American contractors in a project that related to secret military intelligence operations."[78] The contract contained a clause allowing the Respondent to terminate the contract due to "*clausula rebus sic stantibus*"[79] or "changed circumstances."[80] The tribunal observed that since one of the parties was a government entity, it would have been foreseeable that disruption of the contract may occur due to the changes in the political milieu in Iran at the time of the Revolution.[81] The tribunal found that the respondent was entitled to invoke the principle of changed circumstances.[82] However, it also held that the respondent was "obliged to compensate" the claimant for the damages, including only direct costs but not future profits,[83] which would "imply that the respondent was under an obligation to continue the Contract."[84]

Howard Holtzmann filed a separate opinion, which expressed his disagreement with the reasoning of the panel and the basing of its award on the doctrine of changed circumstances. Specifically, Mr. Holtzmann argued that changed circumstances could not derive from a deliberate policy decision of the Iranian government. Mr. Holtzmann noted, "As a matter of law, a party cannot avoid

73. *Id.*
74. *Id.* at para. 6 (Dissenting and Concurring Opinion of Seyed Khalil Khalilian).
75. *Id.*
76. Questech v. Ministry of Nat'l Def. of the Islamic Republic of Iran (Award No. 191-59-1), 9 Iran-U.S. Cl. Trib. Rep. 107 (1985), *available at* 1985 WL 324068 at *1.
77. *Id.* at *2.
78. *Id.* at *9-10.
79. *Clausula rebus sic stantibus* (Latin): the concept of changed circumstances. The Tribunal noted that "the concept derives from the Civilist maxim "*Conventio omnis intellgitur rebus sic stantibus*" (Every contract is to be understood as being based on the assumption of things remaining as they were, that is, at the time of its conclusion)." *Id.* at *11-12 n.2.
80. *Id.* at *11.
81. *Id.* at *13.
82. *Id.*
83. *Id.*
84. *Id.*

contractual obligations because of circumstances that it created or that are within its own control."[85] Where the aggrieving party controls the situation, such a conclusion would mean that "in a democratic republic a country could simply vote to repudiate its contracts."[86] Furthermore, Mr. Holtzman pointed out that, even in cases of state succession, the contractual obligations of the predecessor state emanating from private contracts pass to the successor state.[87]

The contracts cases suggest that successor states would be found responsible for contracts entered into by the predecessor state when the contract is governed by international law. This remains true in cases where, instead of state succession, the situation is one of state continuation. Particularly, in circumstances where an incumbent government is replaced by a new government as a result of a revolution or an insurrectional movement, the new government would be expected to fulfill the state's obligations even though it had not participated in the contract negotiation. If the new government has the support of the populace in overthrowing the predecessor government, it is still expected to perform pursuant to the contracts it inherits. In cases of private contracts, such as contracts entered into between a state or its instrumentality and a foreign private company, the terms of the contract would govern, including the forum and law selection clauses. Thus, if a tribunal or a court is faced with a contract providing for an exemption from non-performance, as in the *Questech* litigation, one should anticipate that the terms of the contract will be respected and enforced.

One issue complicating this emerging practice is the issue of changed circumstances and *force majeure* clauses. Regarding the question of succession to oil concessions granted by the Hussein regime, the parties involved will need to refer back to the contract to ascertain whether such clauses have been included. The presence of such provisions would create a presumption that the concessionaire anticipated the possibility of a major political change. This would favor a tribunal's inclination to hold the parties to the fruits of their negotiation and possibly excuse the revocation or breach of the previously granted concession. This problem has already surfaced with regard to Russian oil concessions, which are now being questioned due to the fact that they were acquired pursuant to bilateral negotiations with Saddam Hussein and not via competitive bidding.[88]

Another important category of disputes arising out of state succession is that concerning delictual responsibility. This is often brought about by physical or economic injuries sustained under the prior regime but on the "new" state's territory.

B. Cases Concerning Delicts

It has been widely recognized that a successor state is not responsible for the delicts of its predecessor.[89] According to O'Connell, however, the doctrine

85. *Id.* at *24.
86. *Id.* at *26.
87. *Id.* at *27.
88. *See* discussion in part IV, *infra.*
89. 1 O'CONNELL, *supra* note 27, at 482.

of delictual responsibility is unclear because there is confusion as to what constitutes a delict. A delict may be a breach of a duty under international law or, alternatively, a tort under municipal law.[90] O'Connell defines an international delict as "an injury for which a State is responsible."[91] It may consist of an injury sustained during a revolutionary uprising but it may also be a simple breach of contract or improper conduct of the judicial process.[92]

Whatever the definition, a few principles are clear. There is no recourse under international law until local remedies have been exhausted. The test as to whether there has been an international delict is two-fold. In addition to ascertaining whether an injury was suffered, one must also examine whether there has been a "denial of justice."[93] The following cases examine the level of proof necessary to establish the occurrence of a delictual act. In order to separate the discussion of delicts from that of contracts, this section focuses on questions of physical and economic injury before the Claims Tribunal.

In a case brought by the United States on behalf of a private individual involving a claim for wrongful expulsion from Iran, the tribunal dismissed the claim. The plaintiff, Mr. Jack Rankin, had been working in Iran for Bell Helicopter International ("BHI"). His employment had been discontinued upon leaving Iran. He claimed a right to compensation for property rights and personal property from the Islamic Republic of Iran.[94] The plaintiff claimed that due to the disorder and insecurity Americans had been experiencing during the revolution, BHI was compelled to repatriate much of its workforce.[95] The tribunal examined whether the actions leading up to the plaintiff's departure were indeed attributable to the State of Iran and then whether they could be characterized as delictual acts requiring compensation. The tribunal sought to determine (1) whether the plaintiff had been forced to leave Iran due to "acts or omissions" attributable to that country and "wrongful as a matter of law"; and (2) whether that potential wrongful expulsion had caused losses to the plaintiff.[96] The tribunal quoted article 15 of the Draft Articles on State Responsibility, stating that acts of an insurrectional movement, which then becomes the official government of the state, are attributable to the state.[97] The tribunal observed that Ayatollah Khomeini's call for "the departure of all foreigners" and the "implementation of this policy could, in general terms, be violative of both procedural and substan-

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* (citing D.P. O'CONNELL, INTERNATIONAL LAW 1024 (1965)).

94. Rankin v. Islamic Republic of Iran, Award No. 326-10913-2, para. 1 (Nov. 3, 1987), *available at* 1987 WL 503860 at *1.

95. *Id.* at para. 5.

96. *Id.* at para. 20.

97. The International Law Commission has completed work on the Draft Articles on State Responsibility. The acts of an insurrectional movement are attributable to the State if the movement is successful in establishing a new government. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), *available at* http://www.un.org/law/ilc [hereinafter ILC Draft Articles].

tive limitations on a State's right to expel aliens from its territory."[98] However, cases had to be decided on an individual basis to determine whether the "circumstances of each departure" could be attributed to Iran.[99] The tribunal found in favor of Iran due to the presence of conflicting evidence as to the motivations behind the plaintiff's departure, emphasizing that in cases of wrongful expulsion it is the plaintiff who bears the burden of proof.

In a related case of wrongful expulsion in which the United States espoused the claim of another individual, Mr. Yeager, the tribunal did award money compensation.[100] In this case, the plaintiff also worked for BHI and had been compelled to leave Iran before the expiration of his contract. He alleged that he had been subjected to intimidation and threats by his neighbors. The tribunal's findings in Mr. Yeager's case, however, established that various groups of Khomeini supporters organized in "Komitehs" served as "security forces in the immediate aftermath of the revolution."[101] Moreover, it found that Khomeini "stood behind them, and the Komitehs, in general, were loyal to him and the clergy."[102] These groups were assimilated "within the State structure and were eventually conferred a permanent place in the State budget."[103] The tribunal held that unlike Mr. Rankin, Mr. Yaeger had been able to establish that the men who escorted him out of his Iranian home belonged to the organized groups supporting the new government. The plaintiff was awarded some relief because the persons who had committed the wrongful act against him acted on behalf of the state.[104] The tribunal noted that because there was sufficient evidence to create a presumption that the "Komitehs" acted on behalf of the state, the burden of proof shifted to the latter to disprove any association.[105]

In a case brought by Arthur Young & Company for "wrongful actions of the Government of Iran" that compelled the plaintiff to close its business in Tehran,[106] the tribunal found for Iran.[107] Arthur Young claimed that U.S. citizens had been the subject of increasing hostilities and, as a result, it was required to close its offices. The threshold question again, was one of attribution. The tribunal stated that attribution of certain acts to a state is "justified only when the identity of acting persons and their association with the State is established with reasonable certainty."[108] The tribunal refused to grant relief on the claim that plaintiff was injured as a result of its clients' flight from Iran. The link between

98. *Rankin*, *supra* note 94, at para. 30(e).
99. *Id.*
100. Yeager v. Islamic Republic of Iran, Award No. 324-10199-1, para. 74(a) (Nov. 2, 1987), *available at* 1987 WL 503859.
101. *Id.* at para. 39.
102. *Id.*
103. *Id.*
104. ILC Draft Articles, *supra* note 97, at art. 8 (regarding the conduct directed or controlled by a state. The acts of a person or a group are attributable to a state if they are committed "on the instructions of, or under the direction or control of, that State in carrying out the conduct.").
105. *Yeager*, *supra* note 100, at para. 43.
106. Arthur Young & Co. v. Islamic Republic of Iran, Award No. 338-484-1, para. 7 (Dec. 1, 1987), *available at* 1987 WL 503871.
107. *Id.* at para. 59.
108. *Id.* at para. 48.

the breaches of contract by clients as a result of their departure from Iran, and plaintiff's claim for wrongful expulsion and injuries to its business was too attenuated and could not establish the necessary "proximate cause"[109] between the injury and the alleged wrongdoer-state.

Modern cases suggest that in circumstances of turmoil due to a revolution, the alleged wrongful acts are attributable to a state on a case-by-case inquiry. The burden is on the plaintiff to prove that the wrongdoer acted on behalf of the state, as defined in article 8 of the Articles on State Responsibility. If the plaintiff is successful in establishing that a wrongful act was committed with state sanction, then the successor state is responsible for compensating the victim of the delict.

The most recently decided case, which concerned claims based on personal injury and wrongful death, may set the tone for future adjudication of similar claims arising out of the acts of the Hussein regime. The case, which involved a U.S. national and the government of Iran, arose out of the Marine barracks bombing in Lebanon in 1983.[110] The case was brought under the FSIA; families of deceased servicemen and injured survivors sued the Islamic Republic of Iran for wrongful death, battery, assault, and intentional infliction of emotional distress, resulting from state-sponsored terrorism.[111] The court had jurisdiction based upon a provision in the FSIA, 28 U.S.C. § 1605 (a)(7), which creates an exception to the immunity of foreign states officially designated by the State Department as sponsors of terrorism.[112] The Antiterrorism and Effective Death Penalty Act of 1996 carved out an exception to the FSIA allowing civil actions based on commission of terrorist acts.[113] Because Iran was designated a terrorist-sponsoring state, thus falling within the bounds of the exception, the action could be brought under the FSIA. The alleged wrongful acts such as wrongful death and certain intentional torts inherently derive from the responsibility of states. The United States District Court for the District of Columbia found the Islamic Republic of Iran and the Iranian Ministry of Information and Security jointly and severally liable for both compensatory and punitive damages.[114]

The case came at a time when yet another change was arguably ripe within the political climate of Iran. The populace and the government of Iran were in a state of tension in which a majority of the people was highly resentful of the current government.[115] This case was not yet one of state succession. However, in the event that a change of government had taken place, it may have become a case where the plaintiffs would have sought to recover money damages from a potential new successor state. Similar claims may be brought

109. Proximate cause here is used as shorthand for the idea that the consequences or type of harm were reasonably foreseeable or that the victim was part of a class of foreseeable plaintiffs. This is arguably one of the leading tests for proximate cause under American tort law.

110. Peterson v. The Islamic Republic of Iran, 284 F. Supp. 2d 46 (D.D.C. 2003).

111. *Id.*

112. *Id.* at 59.

113. *Id.*

114. *Id.* at 60.

115. *Id.* at 3 n.24.

against Iraq by the families of victims who were killed in bombings by Saddam or by supporter insurgents. These claims would be allowed in district courts provided that they were based on injuries suffered due to terrorist acts. Still, plaintiffs would have to show the effect of the Iraqi sovereign's injurious actions in the United States to satisfy the "minimal contacts" requirements.[116]

The former Yugoslavia provides the next analogous example. During the transition from a federation to multiple states, many difficult questions arose regarding the status of the "successor" Federal Republic of Yugoslavia. The Yugoslavia situation is also relevant because the arrangements the new republics made with international institutions in order to satisfy their inherited obligations provide a model for other potential successor states, including Iraq.

III.
THE FORMER YUGOSLAVIA

On February 3, 2003 the International Court of Justice handed down a decision in *The Case of the Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia).[117] This stage of the litigation concerned whether there had been discovery of a new fact pursuant to article 61 of the Statute of the International Court of Justice ("Statute of the Court").[118] The Federal Republic of Yugoslavia ("FRY") argued that at the time of the court's judgment in July 1996,[119] it was not known that the FRY did not continue the personality of the former Socialist Federal Republic of Yugoslavia ("SFRY"). Because the FRY was formally admitted to the United Nations on November 1, 2000, it was not a member of the organization at the time of the judgment and was therefore not a state party to the ICJ nor was it "a State party to the Statute, and was not a State party to the Genocide Convention."[120] Bosnia and Herzegovina replied that no new fact existed and that the contention of the FRY was really based on "the consequences . . . of a fact, which is and can only be the admission of Yugoslavia to the United Nations in 2000."[121]

The Court examined the sequence of events leading up to the formal admission of the FRY to the U.N. The Court noted that, during the dismemberment of

116. See part I. B, *supra* for a discussion on § 1605 of the FSIA.

117. 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 (Preliminary Objections) (Bosn. & Herz. v. Yugoslavia), 2003 I.C.J. 122 (Feb. 3) [hereinafter *Application for Revision of the Judgment of 11 July 1996*].

118. ICJ Statute, *supra* note 20, at art. 61 (allowing for an application for a revision of a judgment when it is based upon the discovery of a fact whose nature renders it a decisive factor). The relevant fact must have been, at the time the judgment was given, unknown to the court and to the party claiming revision, providing such ignorance was not the result of negligence. *Id.*

119. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. &-Herz. v. Yugoslavia), 1996 I.C.J. 91, para. 46 (July 11) (holding that the Court has jurisdiction over the contention pursuant to art. IX of the Genocide Convention), *available at* http://212.153.43.18/icjwww/idocket/ibhy/ibhyjudgment/ibhy_ijudgment_19960711_frame.htm.

120. *Application for Revision of the Judgment of 11 July 1996*, 2003 I.C.J. 122, para. 18.

121. *Id.* at para. 21-22.

the former SFRY and the secession of the comprising republics, there was uncertainty as to whether the FRY continued the personality of its predecessor and much ambiguity regarding the status of the successor state. In Resolution 777, the Security Council announced that the SFRY had ceased to exist and considered that the FRY could not "continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations."[122] As a result, the Security Council recommended the FRY apply for new membership in the U.N. A few days later, the General Assembly adopted Resolution 47/1 agreeing with the Security Council's recommendation from Resolution 777.[123]

In response to these resolutions, the U.N. Legal Counsel drafted a letter to the representatives of Bosnia-Herzegovina and Croatia in which he elucidated the views of the U.N. Secretariat regarding the status of the FRY. He indicated that as a result of Resolution 47/1, the FRY would not participate in the work of the General Assembly. However, he added, "[T]he Resolution neither terminates nor suspends Yugoslavia's membership in the Organization."[124] The Court emphasized that the "legal position of the FRY remained complex" in the period between Resolution 47/1 and its admission to the U.N. in November of 2000.[125] Significantly, the court noted that General Assembly Resolution 47/1 was adopted for the purposes of establishing membership in the U.N. and in "the context of the Charter of the United Nations" but not as a determination that the FRY "was not to be considered a predecessor State."[126] The Court drew an analogy between the FRY and the former USSR and pointed out that although many of the former republics seceded from the union and became independent states, the Russian Federation (continuing the personality of the USSR) "continued to exist as a predecessor state" whose treaty obligations continued to apply to the remaining territory. [127]

The Court ultimately held that these same principles applied to the FRY. The FRY contested that it was a party to the Genocide Convention during the preliminary objections phase of the case in 1996. The Court observed that the SFRY had signed the Genocide Convention and ratified it without reservation. At the time of the FRY's proclamation of a new republic in 1992, the FRY declared it was "continuing the State, international legal and political personality" of the SFRY and would "strictly abide by all the commitments" the SFRY had assumed.[128] The Court concluded that because the former Yugoslavia was a party to the Convention, the FRY was also bound by it since the start of the case in 1993. The Court rejected the contention that a new fact was revealed following the FRY's admission to the U.N. in 2000. According to Article 61 of the Statute of the Court, the new fact must exist at the time of the judgment but

122. U. N. SCOR, 3116th mtg., U.N. Doc. S/RES/777 (1992) (citing U.N. SCOR, 3028d mtg., U.N. Doc. S/RES/757 (1992)).
123. G.A. Res. 47/1, 7th plen. mtg., U.N. Doc. A/RES/47/1 (1992).
124. *Application for Revision of the Judgment of 11 July 1996*, 2003 I.C.J. 122, at para. 31.
125. *Id.* at para. 33.
126. *Id.* at para 38.
127. *Id.*
128. *Id.* at para. 62.

remain unknown to the parties.[129] The Court observed that the alleged "new fact" occurred in November of 2000, after it had rendered its judgment in 1996.

The Court went on to address the difficulties in determining the legal position of the FRY in the period between the General Assembly's resolution and its admission to the U.N. The Court indicated that, because the circumstances of the FRY were so unique, "the precise consequences of this situation were determined on a case-by-case basis" such as the decision not to allow the FRY to participate in the work of the General Assembly and the fact that its continuation of the "international legal personality of the Former Yugoslavia was not 'generally accepted.'"[130] However, the Court made a distinction between the legal consequences of the U.N.'s non-acceptance of the FRY as the continuation of the SFRY and the consequences of the dismemberment of a state under international law. The Court found that the FRY was bound by the Convention, and its application was subsequently dismissed.

In a dissenting opinion, Judge Dimitrijevic asserted that the discontinuation of SFRY state personality and the resulting discontinuation of the FRY as a member of the U.N. or party to treaties "ratified by the SFRY (including the Genocide Convention), [were] 'unknown' [facts] to the Court and to the FRY."[131] Whether a state continues the personality of a predecessor state, he observed, is a result of "one of the decentralized acts of the international community."[132] The continuity of a predecessor state by a new one therefore is based not on the new state's "self-perception but on the perception of others."[133] Judge Dimitrijevic recalled the long and strained history of ascertaining the precise status of the FRY. For him, the admission of the new Yugoslavia to the U.N. in 2000 marked the end of the FRY's duty to carry the state personality of the SFRY. This, in turn, led to the "discovery" of the new fact, i.e. that the FRY had not been a member of the U.N. and had not been bound by Article IX of the Genocide Convention on which the court had solely based its jurisdiction. [134]

Judge Vereschetin also dissented on the ground that there had been "an incorrect or erroneous assumption" [135] of the legal status of a claimant and analogized to *Schreck's* case.[136] Judge Vereschetin found a conflict in the precarious position in which the FRY had found itself since its declaration to observe the commitments of the SFRY was "sufficient ground for its continued partici-

129. ICJ Statute, *supra* note 20, art. 61.

130. *Application for Revision of the Judgment of 11 July 1996*, 2003 I.C.J. 122, para. 70.

131. *Id.* at para. 12 (Dissenting Opinion of Judge Dimitrijevic).

132. *Id.* at para. 45.

133. *Id.*

134. *Id.* at para. 49.

135. *Id.* at para. 12 (Dissenting Opinion of Judge Vereschetin).

136. Schreck's case involved a decision by Sir Edward Thornton, which had been based on the assumption that the claimant was a Mexican citizen since he had been born in Mexico. In order to obtain relief, the claimant needed to have been an American citizen. The claimant was not a Mexican citizen and, upon discovering this unknown fact, the empire ruled for the claimant. *Id.* at para. 12 (referring to 2 JOHN BASSETT MOORE, INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY, 1357 (1898)).

pation in the Genocide Convention" but not enough for participation in other human rights treaties.[137]

This case strengthens the following proposition advanced by the international community since the conflict in Yugoslavia erupted: the situation of the former SFRY was one of complete dissolution or dismemberment where no single state continued the personality of the federation. This resolution in turn has presented questions regarding the succession to the contractual and delictual obligations of the predecessor state and their apportionment among the respective successors. The case is also significant because it elucidates the view of the ICJ with regard to the status of Yugoslavia and thus, its view with regard to obligations for which successor states may potentially be held liable. ICJ jurisprudence on issues emanating from the dissolution of the former Yugoslavia so far address matters under international human rights and criminal law. However, as will be demonstrated later, there have already been cases in the United States dealing with private contractual rights.[138] Most probably, disputes under international private law would be submitted to arbitration or a special tribunal. However, the position taken by the ICJ is significant because it demonstrates a willingness to hold the FRY liable for acts of its predecessor. One may predict that even though the FRY is not a continuator of the SFRY but a successor state resulting from dissolution, it may be held responsible for delicts and contracts incurred by its predecessor especially where the territory has benefited from the predecessor's acts.

Although Iraq's situation is not one of dismemberment, it entails some of the same dilemmas as Yugoslavia's. The international community will have to decide when and how an independent Iraq will be recognized and to what responsibilities and obligations its government will be held. As Judge Dmitrijevic pointed out, often issues of succession are "decentralized acts"[139] of the international community. States will have to resolve the status of Iraq with regard to its membership in international organizations and the fulfillment of its obligations under international treaties. Another important outstanding issue is that of Iraq's debt. The international community's decision to recognize an independent Iraq would bear on its ability to recover on debt owed by the former regime and also the extent to which sovereign lenders may be willing to forgive part of this debt. Diplomacy would best address these issues. The multiple interested parties, their sovereign character and the large stakes render these problems unsuitable for the international or municipal courts to resolve. The repayment of the Iraqi debt in times when the country's economy has been brought to a standstill would only be practically possible if lenders make compromises. Therefore, the politicians and diplomats are better equipped to accomplish a resolution through negotiations.

137. Application for Revision of the Judgment of 11 July 1996, 2003 I.C.J. 122, para. 17 (Dissenting Opinion of Judge Vereschetin).

138. *See* discussion of New York cases, *infra* text accompanying notes 143-151.

139. "Decentralized acts" in this context signifies the importance of recognition of a new state by individual members of the international community.

In June 2001, the five[140] successor states of the SFRY signed the Agreement on Succession Issues.[141] Specifically, annex G of the agreement provides "extensive guarantees for the protection of private property and acquired rights" and article 2(1)(a) makes a specific reference to international law with regard to the protection of property located in successor states.[142] There are, however, unresolved disputes concerning the private property rights of foreign citizens vis-à-vis the FRY. In a case decided by the Second Circuit, a group of landlords who had leased space to the SFRY for use by its consulate, brought actions against the successor states claiming that they were liable for the outstanding debt of the former SFRY and sought to allocate the debt among them.[143] The district court held that the issue presented a political question, which was non-justiciable in U.S. federal courts.[144] The Second Circuit upheld the lower court in this regard. However, it reversed the stay of action entered by the district court judge holding instead that the action must be entirely dismissed.[145] It is significant that the United States submitted a brief as *amicus curiae* supporting the appellee successor states. The executive branch was of the view that the resolution of various private interests and the allocation of responsibility to the successor states must be facilitated through international negotiation.[146] The brief stated that "[the] appropriate share of each successor state in such liabilities, and indeed whether successors will be held directly accountable at all for such debts incurred by the former sovereign, is simply not susceptible to judicial determination and can be decided only in the political arena."[147]

In an earlier case, a Cyprus corporation brought suit against Slovenia, one of the SFRY's successor states, in the Southern District of New York.[148] The issue presented by the case was "whether Slovenia [was] liable for the obligations of the former Yugoslavia and its state-controlled banking institutions."[149]

140. Bosnia and Herzegovina, the Republic of Croatia, the Republic of Macedonia, the Republic of Slovenia, and the Federal Republic of Yugoslavia.

141. Agreement on Succession Issues Between the Five Successor States of the Former State of Yugoslavia, June 29, 2001, 41 I.L.M. 3 (2002).

142. Carsten Stahn, *The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia*, 96 AM. J. INT'L L. 379, 395 (2002).

143. 767 Third Ave. Assoc. v. Consulate Gen. of Socialist Fed. Republic of Yugoslavia, 218 F.3d 152 (2d Cir. 2000).

144. The political question doctrine was set out by the Supreme Court in Baker v. Carr, 369 U.S. 186 (1962). The factors determining whether an issue raises a non-justiciable political question are: (i) whether the case involves a "textually demonstrable constitutional commitment of the issue to a coordinate political department;" or (ii) "a lack of judicially discoverable and manageable standards for resolving it;" or (iii) "the impossibility of deciding without an initial policy determination of a kind clearly of non-judicial discretion;" or (iv) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;" or (v) "an unusual need for unquestioning adherence to a political decision already made;" or (vi) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* at 217.

145. *767 Third Ave. Assoc.*, 218 F.3d at 156.

146. *Id.* at 157.

147. Brief of Amici Curiae United States of America at 10, Carlyle v. Consulate Gen. of the Socialist Fed. Republic of Yugoslavia, 218 F.3d 152 (2d Cir. 2000).

148. Yucyco, Ltd. v. Republic of Slovenia, 984 F. Supp. 209 (S.D.N.Y. 1997).

149. *Id.* at 212.

Yugoslavia had guaranteed $29.5 million in loans made to banks under a refinancing agreement. Following the dissolution of the SFRY, Slovenia had assumed a share of the former federation's debts in order to secure newly-issued debt to the successor republic by the same creditors.[150] The court held that as a successor state Slovenia was not bound by the predecessor's obligations. Particularly, the judge emphasized that Slovenia was a "full successor state" and not simply one which had experienced a change of government and thus it would not be held responsible for the contracts "executed by the former sovereign."[151]

The Agreement on Succession Issues coupled with the willingness of the successor states to accept pro rated responsibility for SFRY obligations stand for the proposition that issues of successor state liability in private international law are better left to the realm of negotiation and diplomacy. Slovenia opted for the "direct negotiation route" and reached agreements with both the Paris and London Club member creditors on restructuring its part of the predecessor state's debt.[152] Its active involvement as a successor state willing to carry its part of Yugoslavia's debt "heritage" has made it a model for the other successor states. The impetus for assuming responsibility is acceptance by the international financial community and the prospects for future financing as a new fledgling economy strives to stabilize.

The International Monetary Fund ("IMF") and World Bank are two other institutions with which successor states have had to negotiate. It is important for new economies to establish relationships with the World Bank in order to facilitate development. The Articles of Agreement of the Bank postulate that membership in the IMF is a prerequisite to membership in the bank.[153] The Articles of Agreement do not directly address issues of successor state membership.[154] The IMF therefore has the prerogative to decide whether membership would transfer to the successor state by continuity or whether the state must apply for admission pursuant to a decision by the organization's executive board.[155] Although issues of outstanding debt are not a direct way to examine contractual responsibility, they provide a channel for surveying international practice. Moreover, loans are generally extended under lending agreements, which are contracts. Thus, successor state responsibility in respect to national or territorial debt, and especially debts owing to major creditors, is instructive on the subject of contractual successor liability.

150. *Id.*

151. *Id.* at 217; *cf.* Trans-Orient Marine Corp v. Star Trading & Marine, Inc., 731 F. Supp. 619, 621 (S.D.N.Y. 1990), *aff'd*, 925 F.2d. 566 (2d Cir. 1991).

152. Mojmir Mrak, *Succession to the Former Yugoslavia's External Debt: The Case of Slovenia*, *in* SUCCESSION OF STATES 159, 166-170 (Mojmir Mrak ed., 1999).

153. International Bank for Reconstruction and Development, Articles of Agreement, art. II, § 1(a)-(b) (as amended Feb. 16, 1989), *available at* http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040600~menuPK:34625~pagePK:34542~piPK:36600~theSitePK:29708,00.html.

154. Ibrahim F. I. Shihata, *Matters of State Succession in the World Bank's Practice*, *in* SUCCESSION OF STATES 75, 79 (Mojmir Mrak ed. 1999).

155. *Id.*; *see also* International Monetary Fund, Articles of Agreement, art. II, § 2, art. III, § 1, art. XII, § 2(b) (as amended effective Nov. 11, 1992) [hereinafter IMF, Articles of Agreement], *available at* http://www.imf.org/external/pubs/ft/aa/index.htm.

The IMF determined that the SFRY had "ceased to exist" and allowed the transfer of membership to all the successor states subject to certain conditions.[156] The World Bank followed a similar approach, which also required the successor states to reach a final agreement on both their respective shares of the former Yugoslavia's debt to the bank and the "elimination of arrears of the republic concerned to the Bank," or an acceptable plan providing for the elimination of such arrears on the debt.[157] The redistribution of subscribed shares in the World Bank was accomplished pursuant to an agreement among all the successor states. This allocation of shares followed the IMF's approach in determining each state's quota.[158] The allocation of obligations was facilitated by agreements between the World Bank and the successor states. The agreements generally provided for the assumption of debts, which financed projects in a particular territory thereby ensuring their localization by the specific successor state as well as the "apportionment of national debt according to the assumed benefits accruing to each republic."[159] Thus, matters of allocation of Special Drawing Rights ("SDRs")[160] and debts owed to the World Bank were both resolved by way of negotiation among the successor states and between them and the bank. The agreements reached determined the future participation and responsibilities of each successor state upon the dissolution of the SFRY. Although the IMF and World Bank are both creatures of international cooperation and are not states subject to international law, the approaches adopted by them in matters of succession are telling. They have not adopted rigid rules which apply to all current and future members. Rather, they seem to have adopted a case-by-case approach tailored to fit the needs of each state while taking into consideration issues of economic status and payment capability with a view to ascertaining the financial interests of the institutions.

The IMF and the World Bank will also have to address issues pertaining to Iraq and examine its financial condition. Their interaction with the successor state will most probably follow the model discussed above. However, the situation in Iraq poses challenges different from those of the former Yugoslavia. The new state is not yet fully functioning nor represented by a national government with which institutions like the IMF and World Bank or other creditors may negotiate. In fact, the last loan to Iraq was approved in 1973 and in 1990 Iraq

156. Shihata, *supra* note 154, at 83 (The conditions generally required that each state (1) agree to an allocation of its share of both assets and liabilities of the former Yugoslavia as set by the IMF, (2) notify the IMF, (3) agree with the terms and conditions of the IMF enabling succession to membership and that it take the necessary steps to fulfill its obligations under the IMF's articles. The executive board must also make a determination that the state can meet its responsibilities under the articles and that the state has no "overdue financial obligations to the Fund.").

157. *Id.* at 84.

158. Each member is assigned a quota expressed in special drawing rights ("SDRs"). *See* IMF, Articles of Agreement, *supra* note 155, at art. III, § 1 (The subscription of each member in the IMF equals its quota and is paid in full to the fund. The original formula according to which quotas were calculated was the Bretton Woods formula, which was revised and updated in 1963.); *see also* Shihata, *supra* note 154, at 86.

159. *Id.* at 91.

160. For a definition of Special Drawing Rights, see *supra* note 158 and accompanying text.

attained a "non-accrual status" by virtue of its failure to service its debt.[161] Its current obligations to the World Bank amount to over $106 million.[162] IMF staff has already visited Baghdad to assess the economic and financial situation and to set priorities with regard to assistance.[163] It has been estimated that the overall stock of reconstruction needs approximate $36 billion over the next three years for fourteen priority sectors not including oil and security.[164] The relationship between Iraq and the IMF and World Bank will therefore require cooperation in order to satisfy each party's interests. The IMF and the World Bank are interested in repayment of loans previously and potentially made to Iraq, which would not be possible without their assistance in the reconstruction of the country since the economy has hardly commenced to function.

The fulfillment of all interests will require long-term arrangements, which can only be achieved through extensive negotiation. The overall lesson of this brief examination of IMF and World Bank practices leads to the inevitable conclusion that, where events specific to each country define matters of state succession, there is no one rule which may be uniformly applied. Instead, negotiation and agreement in the political arena may provide amicable solutions.

The valuable lesson of transition in Iran and, most recently, in Yugoslavia allow predictions about the fate of Iraq's liabilities. The following section will examine how post-conflict Iraq and the international community are approaching issues of the successor state's liabilities.

IV.
IRAQ: ANALYSIS OF THE SITUATION

The main problem potentially arising out of the situation in Iraq concerns oil contracts, also known as concessions. A concession is a type of contract, usually between a government and a private company. It is, by nature, an intangible asset. More specifically, it is the grant of a license, spanning a significant period of time, by a state to a private enterprise for the undertaking of economic activities requiring large outlays of initial capital.[165] A typical type of economic concession involves mining rights over state property. In the case of Iraq, the most predictable type of concession that will be in dispute is one concerning oil exploration and drilling as well as the construction and management of pipelines carrying oil from the Middle East to Europe. The main type of delict will probably involve breaches of contracts signed by the predecessor and injuries or

161. For debt information on Iraq, see *Status of Operations*, THE WORLD BANK GROUP, *at* http://lnweb18.worldbank.org/mna/mena.nsf/0/B159E92EFE1EBBC485256CF500753888?OpenDocument (last modified Jan. 2004).

162. For Iraq current debt info, see *Data Sheet for Iraq*, WORLD BANK, *at* http://lnweb18.worldbank.org/mna/mena.nsf/Attachments/Datasheet/$File/iraqprototype.pdf (last modified Jan. 28, 2004).

163. *The IMF and the Middle East and North Africa*, IMF, Aug. 2003, *at* http://www.imf.org/external/np/exr/ib/2003/081503.htm.

164. News Release No. 2004 /115/S, World Bank, World Bank Indicates Lending Framework for Iraq (Oct. 14, 2003), *available at* http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,menuPK:34463~pagePK:117705~piPK:34515~theSitePK:4607,00.html

165. 1 O'CONNELL, *supra* note 27, at 304.

wrongful death claims due to the former political or current insurgent movements.

A. *Concessions and Succession*

A dominant definition of concession, cited by O'Connell and used by Gidel, is "a contract by which one or several persons are engaged to execute a work on the consideration of being remunerated for their efforts and expenses, not by a sum of money paid directly to them by the administration after the completion of the work, but by a receipt of a return levied for a more or less lengthy period of time on the individuals who profit from the work."[166] A concession therefore is a contract between a government and a private corporation (the concessionaire) involving an investment by the latter for a major project or for the "exploitation of the public domain" for which the concessionaire is rewarded by profits from the undertaking.[167] The governing law is usually specified in the contract itself.

This section will show, however, that there may be instances under which international law operates and thereby protects the agreement "for its full maturity."[168] These will typically involve disputes regarding concessions where the successor state expropriates the rights granted by its predecessor. International law serves to protect those rights by exacting compensation. This rule is subject to the condition that the concession be bona fide and obtained "in observance of legal forms" and that it not have been conditioned upon the "survival of the predecessor" or any other factor which could not be fulfilled.[169]

The *Mavrommatis Concession* cases, which are still referred to in the literature on concessions, provide important precedent.[170] The cases dealt with concessions granted by the Ottoman Empire, before its fall, in territories, which were severed from the Empire following World War I. The Greek government espoused the claim of one of its nationals before the Permanent Court of International Justice. Mr. Mavrommatis, who held concessions to certain public works, sought to bind the British government to respect his concession during its administration of Palestine. The Court noted that "the Administration of Palestine would be bound to recognize the Jaffa concessions . . . in virtue of a general principle of international law to the application of which the obligations entered into by the Mandatory [British Government] created no exception."[171] This statement was made in dictum while the Court dismissed the issue with regard to the Jaffa Concession[172] due to a lack of jurisdiction. The opinion therefore does not give authority for international law. However, O'Connell points out that the

166. *Id.* (citing G. GIDEL, DES EFFETS DE L'ANNEXION SUR LES CONCESSIONS 123 (1904)).
167. *Id.* at 305.
168. *Id.*
169. *Id.* at 351.
170. *See* MALANCZUK, *supra* note 11, at 171 n.78 (discussing Mavrommatis Concessions, P.C.I.J. (ser. A), No. 5, at 28.).
171. *See* 1 O'CONNELL, *supra* note 27, at 325 (citing Mavrommatis Concessions, P.C.I.J. (ser. A), No. 5, at 28.)
172. The case concerned two concessions: Jerusalem and Jaffa.

pleading submitted by the Greek government showed its reliance on "principles taken from general international law"[173] because it stated that "all rights validly acquired by individuals in a given territory preserve their force and value despite any change of sovereignty which has come over [the] territory."[174] O'Connell concludes that the *Mavrommatis* cases demonstrate the existence of a principle in international law, which binds successors to respect the concessions granted by the predecessor government or state.

B. Subsisting Oil Contracts and Debts

Iraq holds more than 112 billion barrels of proven oil reserves. It commands just over 11% of world oil reserves,[175] the second largest after Saudi Arabia.[176] The country is at a strategic junction allowing access to pipeline routes spanning territories between the Mediterranean and Caspian Seas and the Indian Ocean. Reports concerning oil contracts under Saddam Hussein's Ba'athist regime vary with regard to dollar amounts and the exact extent to which certain countries were involved. Iraq had purportedly signed multi-billion dollar deals with oil companies from Russia, China, France and Germany.[177] The Energy Information Administration cites estimates by Deutsche Bank according to which there would be $38 billion of "greenfield," or new oil, development if the alleged deals were executed. This course of events is, however, doubtful because of the disputed status of some of the oil contracts negotiated by the Hussein government. The main players in this area will have to negotiate a mutually acceptable distribution of oil concessions once the fate of all existing contracts has been decided by the Iraqi government.

According to one account, only "three minor contracts" were signed under Hussein: China National Petroleum Corporation and Norinco, a state-owned arms manufacturer contracted to develop the al-Ahdab field and Petrovietnam, the Amara field.[178] The largest contract, worth $3.7 billion, was signed between Iraq and a Lukoil-led consortium of Russian oil companies for the development of the West Qurna field.[179] The contract is highly contested because it was signed in 1997 while U.N. sanctions against Iraq were implemented.[180] Saddam Hussein cancelled the contract in late 2002 due to suspicions that Lukoil was cooperating with opposition leaders in order to secure the viability of its concessions in case of a regime change.[181] A Russian Energy Ministry official expressed the view that projects signed with the previous regime, including those

173. 1 O'CONNELL, *supra* note 27, at 325.

174. *Id.*

175. *Iraq: Home to 11 Percent of the World's Oil*, AGENCE FRANCE-PRESSE, Sept. 24, 2003, *available at* http://quickstart.clari.net/qs_se/webnews/wed/ds/Qopec-oil-iraq-facts.Rx1b_DSO.html.

176. *Iraq Country Analysis Brief*, Energy Information Administration, *at* http://www.eia.doe.gov/emeu/cabs/iraqfull.html (last visited Dec. 1, 2003).

177. *Id.*

178. *Iraqi Oil Deals under Saddam*, REUTERS, Oct. 24, 2003.

179. *Id.*

180. *Russian Companies May Invest $4B in Iraq; $3B in West Qurna*, DOW JONES INT'L NEWS, Oct. 24, 2003.

181. *Update 2 – Russia Wants to Resume Talks on Iraqi Oil Deals*, REUTERS, Oct. 28, 2003.

of Lukoil, were concluded with "legitimate authorities" and should be respected.[182] However, Iraqi Oil Ministry Chief Executive Thamer al-Ghadhban stated that oil contracts approved between the Hussein government and Russian companies are "frozen" and the Governing Council, appointed by the United States, has the discretion to decide their fate.[183] Moreover, the Russian contracts were signed pursuant to bilateral negotiations with the previous regime, without being subject to competitive bidding.[184]

Another Russian company with outstanding contracts is Stroitransgraz, which had undertaken to develop "block four" in the Western Desert.[185] Under the oil-for-food program, Zarubezhneft, Tatneft and Mashinnoimort had also concluded agreements for oil drilling.[186] Both Iraq and Russia have an interest in resolving these issues as Iraq's debt to Russia amounts to $8 billion.[187] To resolve these pending issues, Vagit Alekperov, Lukoil's president, planned to visit Iraq in December while both countries, Iraq and Russia, simultaneously arranged a visit by Iraqi Oil Minister Ibrahim Bahr Al-Uloum to Russia.[188] Russia's Foreign Minister, Yuri Fedotov also expressed his country's intention "to play an active role in the rehabilitation of the Iraqi economy" at the Madrid Conference of Donor Countries.[189]

The French company TotalFinaElf ("Total") had also negotiated a deal for development rights in the Majnoon field potentially worth $4 billion.[190] Total, however, refused to sign the contract and in 2001 Iraq announced it would not give priority to French companies with respect to oil contracts due to France's support for sanctions against Iraq.[191] Instead, Iraq favored Russian companies.[192] Total's CEO has stated that the company will actively pursue participation in the Iraqi oil industry during the transition period.[193] The Iraqi Oil Ministry's Chief Executive has indicated that only three exploration contracts are still valid: Indonesia's Pertamina, Russia's Stroitransgas and India's Oil and Natural Gas Corporation.[194]

Another area where the new Iraqi government will have to negotiate the country's liability is foreign debt. Iraq's debt is estimated at $116 billion, not

182. *Id.*

183. *Iraqi Oil Minister Plans Russian Visit to Discuss Old Oil Deals*, DOW JONES CAPITAL MARKETS REPORT, Oct. 28, 2003.

184. *Iraq Oil Minister to Talk with Saudis on Pipeline*, DOW JONES ENERGY SERVICE, Oct. 30, 2003.

185. *Iraqi Oil Deals under Saddam*, *supra* note 178. The various sources often conflict as to which contracts the Hussein government actually signed—hence, the contentious nature of the agreements.

186. *Id.*

187. *Iraqi Oil Minister Plans Russian Visit to Discuss Old Oil Deals*, *supra* note 183.

188. *Moscow, Baghdad Coordinating Date of Iraqi Oil Minister's Visit*, ITAR-TASS WORLD SERVICE, Nov. 4, 2003.

189. *Id.*

190. *Iraq Country Analysis Brief*, *supra* note 176.

191. *Id.* (regarding the status of oil development deals with foreign companies).

192. *Id.*

193. *Id.*

194. *Id.*

including $200 billion in reparation payments owed to Kuwait due to the 1990 Gulf War.[195] The Paris Club[196] is considering writing off some of the $40 billion debt Iraq owes its members.[197] The outstanding debt is not held only by sovereign creditors but also by private companies, which have rendered services or signed contracts with Iraq. The country may have to appeal to the London Club[198] for possible debts owed to commercial banks under lending agreements and letters of credit.

In addition to debt obligations, Iraq may confront claims arising out of delictual acts. Some companies may seek to hold Iraq responsible under an international delict theory due to a breach of contract pertaining to oil. Other possible claims derived from international delicts could be brought by persons injured in the two Gulf Wars. Adjudicated claims by individuals stemming from the first Gulf War amount to approximately $25 billion and have been paid by subtracting 25 per cent of Iraqi oil export revenues.[199] Further, as indicated, Iraq owes burdensome amounts of reparations payments to Kuwait. There are also possible pending claims stemming from the Iran-Iraq war.[200]

The new Iraqi government will inherit significant obligations. This poses a burden on its already crumbling economy. The government and the "lenders"[201] will have to engage in a multilateral dialogue to resolve all claims.

C. *Future Developments*

The disputes regarding the successor state's obligations require the intervention of the political arena as opposed to the mechanical application of international law due to the ambiguity of the outstanding contracts and the heterogeneity of Iraq's debts. The Coalition Provisional Authority and the Governing Council are currently in charge of rebuilding Iraq and facilitating its transition to democracy. The United States has also devised the Office of Reconstruction and Humanitarian Assistance ("ORHA"), which appointed Mr.

195. *Id.*

196. The Paris Club is a group of creditors dating back to 1956. After the Peronist revolt, Argentina's financial crisis had put the country in dire straits. Argentina negotiated a rescheduling of its debt payments with certain of its sovereign creditors. Since then, the Paris Club has devised methods to facilitate timely debt payments by developing countries while insuring that creditor nations are repaid. The Club meets approximately 11 times per year at the French Treasury. Debtors reviewed by the Paris Club come upon recommendation by the IMF after they have already implemented austerity reforms. *Description of the Paris Club*, Paris Club, *available at* http://www.clubdeparis.org/en/presentation/presentation.php?BATCH=B01WP01 (last visited Apr. 29, 2004).

197. *Paris Club Could Consider Canceling Part Of Iraq's Foreign Debt*, AGENCE FRANCE PRESSE, Nov. 7, 2003, *available at* http://quickstart.clari.net/qs_se/webnews/wed/dc/Qus-iraq-debt.RJQs_DN7.html.

198. The London Club is a group of creditors constituting various commercial banks. The London Club does not hold scheduled meetings. Instead, it meets on an *ad hoc* basis. *Description of the Paris Club*, *supra* note 196.

199. Edwin M. Truman, *The Right Way to Ease Iraq's Debt Burden*, INSTITUTE FOR INTERNATIONAL ECONOMICS, April 28, 2003, *available at* http://www.iie.com/publications/papers/truman0403.htm.

200. *Id.*

201. "Lenders" here means any party to which Iraq may have outstanding obligations: under concessions or by virtue of delictual responsibility.

al-Ghadban as the Oil Ministry's Chief Executive.[202] The resolution of the debates regarding the oil contracts concluded under Saddam Hussein would entail the involvement of these institutions and the cooperation of a future Iraqi government. As already discussed above, initial steps have been made to undertake negotiations between Russia and Iraq. Complete settlement of all claims arising out of old oil contracts would require intricate negotiations among multiple sovereigns and private companies. Many of the claims currently pending involve competing interests such as those of France and Russia.[203] The bone of contention is obvious: a tremendous profit potential derived from oil exploration and development of the Iraqi oil reserves. Companies with existing contracts approved by the fallen regime will want to fight for their viability while the coalition powers and the future Iraqi government is more interested in redistributing the oil concessions on a clean slate.

There appears to be some precedent, albeit not universal, that concessionary rights are respected under international law.[204] Concession contracts, which cannot come to fruition, give the concessionaire some recourse by virtue of compensation. Then, per O'Connell's discussion, the concession is subject to the two-prong test of whether it was a bona fide concession and whether it was signed subject to the condition that the existence of the predecessor state perpetuate. The answers to both inquiries are vulnerable to differing interpretations. Some contracts may be detailed and provide answers to the questions. It is, however, doubtful that an agreement between the Hussein regime and a private company can resolve the issue of whether it is bona fide and executed according to proper legal form. The regime existing at the time of the contracts' conclusion must have perceived itself as legitimate and vested with the power to approve concessions on behalf of Iraq. The rest of the world, however, is likely to have viewed Saddam Hussein's government through a different lens. The resolution of these concessions' legitimacy may necessitate a search for answers not only under international law but also under the umbrella of foreign relations. Therefore, the disputes regarding the successor state's or the successor government's responsibility under the old oil concessions is best left to the international political arena.

Iraq's economy is burdened with a large amount of debt and is highly-leveraged as demonstrated by the country's foreign debt. The reconstruction bill for 2004 alone is currently estimated at $20 billion.[205] The Madrid Conference of Donor Countries for Iraq has demonstrated the international community's willingness to cooperate in order to rebuild Iraq in the aftermath of two wars. Moreover, Iraq's sovereign creditors are considering cancellation of part of its debt. The coalition powers, the United Nations, the European powers and Rus-

202. *Iraq Energy Chronology*, Energy Information Administration, *at* http://www.eia.doe.gov/cabs/iraqchron.html (March 2004).

203. They are important players and I assume that this will have to happen.

204. *See* discussion in part IV.A with regard to concessions.

205. *See Iraq Country Analysis Brief*, *supra* note 176. The United Nations Humanitarian Coordinator for Iraq, Mr. Ramiro Lopez da Silva quoted this number on August 8, 2003. *Id.*

sia all recognize that the successful reconstruction of Iraq and the satisfaction of all the lenders' interests require their common political will.

D. Approaches

One approach to resolving Iraq's liabilities would be to look at Germany post-World War II and the Allied effort to rebuild the Federal Republic while holding it responsible for reparations. Another approach would be to negotiate, unburdened by precedent, and tailor all agreements according to the needs of this particular country and its specific creditors. Iraq and post-war Germany are, to a certain extent, in analogous situations: they were both defeated in wars, they both carry large outstanding debts and they are both governed by provisional post-war coalition administrations. However, the circumstances are also somewhat different. Germany was in a strategic geopolitical position, one which was of great importance to the Allies in post-war bipolar Europe. The United States and the West were determined to curb Soviet expansion further west. Germany was important strategically in the era of the Cold War whose underlying contention was not only political and ideological but also economic. The West would not allow the Soviet Communist model to spread through the Continent and transform its *laissez faire* economies into planned state-enterprise establishments. The West had a vested interest in rebuilding Germany and creating a viable economic and political state in the heart of Europe. The Allies were successful. In fact, the famed Russian singer-poet Vladimir Visotsky is rumored to have exclaimed upon his visit to the then-Federal Republic of Germany, "My God, is this the defeated country?" comparing life there to the austere conditions in his native USSR.

While the Cold War has been over for over a decade, ideological, economic and political interests pervade. Iraq's most obvious importance is economic; it holds some of the world's largest oil reserves. It also has strategic-economic significance because of its location and its capacity to govern a network of pipeline routes carrying oil to major markets in Europe. Iraq has also increased geopolitical importance with the new political dynamic of the War on Terror. A successful Iraq in the heart of the Middle East has the potential to prove the coalition's critics wrong. It also has the capacity to grow a democracy among largely theocratic monarchies, which also would further the coalition's interest. The European Union and Russia would be interested in securing a steady flow of oil and in "fuelling" their economies. The countries in the Middle East would have an additional outlet for their oil through pipelines routes in Iraq. However, there may be possible conflicts with OPEC due to the organization's practice of restricting oil supply in order to maintain prices. Moreover, destabilization in the region is conceivable due to the presence of a Western-influenced nation in the midst of theocracies.

Iraq's interests tend toward establishing a sovereign government capable of conducting the country's affairs and resolving all the subsisting and potential claims. The future Iraqi government will arguably strive to spare the country from burdensome obligations incurred by the predecessor. According to inter-

national law, this posture is unacceptable because Iraq's legal position is one of continuation and not of succession since it has undergone only a change of government. International law would hold Iraq responsible in terms of its economic relations with other sovereigns and for contracts concluded with private parties. The only area in which a new democratic government may escape liability under international law is in the area of delicts resulting from injuries. Such cases will most likely arise due to injuries sustained in the battle against insurgent movements still supporting the former regime. The successor government will not identify itself with these movements, nor will the new state sanction their delictual acts or embrace them within its institutions. Thus, Iraq would not be found liable as a state for these delicts under international law. The situation in Iraq is different from that in Iran where Khomeini's regime had overtly and openly condoned the presence of the "Komitehs"[206] who harassed and drove foreign citizens out of the country.

The German approach may be an appropriate paradigm for the reconstruction of Iraq and the resolution of its outstanding liabilities. Just as the Allies were successful in restoring the German economy to an incredibly powerful functioning state, the Coalition Powers should be capable of doing the same for Iraq. The genius of the German approach was that the transitional government managed to rebuild the country while ensuring that it fulfilled its war obligations, which undoubtedly were derived from the exercise of authority by the Furer's regime. The successor state managed both to repair its economic engine and satisfy its liabilities.

One way to implement this approach would be to establish an international tribunal (possibly arbitral), following a bankruptcy law paradigm, which would resolve all claims pursuant to political and diplomatic negotiations.[207] The tribunal's task would be to inventory Iraq's assets, current and potential, as well as its outstanding debt, contractual liabilities and delictual obligations. Each creditor would have recourse only through the tribunal and, if entitled to recovery, would receive a share of the total asset "pool." The tribunal should not be bound to follow international law. Instead, it should facilitate negotiations between the government of Iraq and the relevant concerned creditors, preferably in multilateral talks. This approach would allow the parties to tailor custom solutions, thereby ensuring the satisfaction of each creditor, rather than attempting to "squeeze" the situation in the cast of international law. A proceeding of this type would be most suitable to Iraq since its economy is encumbered with heavy debts and subject to multiple claims. The only way each creditor could find satisfaction is by ensuring that Iraq's economy returns to full-fledged functioning status and is able to grow and generate revenues, which can then be used to settle all outstanding claims. Since a vital part of Iraq's economy is oil and oil revenues, multilateral negotiations should determine the parties best able to per-

206. See part II *supra*, for a discussion of cases adjudicated in the Iran-United States Claims Tribunal.

207. I would like to thank Professor Richard M. Buxbaum for his guidance and assistance. It is he who suggested the bankruptcy model.

form on oil concessions and the parties which can most efficiently explore and process crude oil, market it and then make payments to the new government. A percentage of the oil revenues could be used to satisfy the debt, the usage of the concessions would satisfy the demands of the concessionaires, and the remaining revenues could meet the needs of the new Iraqi state and economy.

CONCLUSIONS

The Iran-United States Claims Tribunal presents an example of how a well-structured tribunal is able to function and adjudicate claims by competing interests without engaging international law at the level of the International Court of Justice. The two parties, Iran and the United States, realized that their disputes, specific to a bilateral conflict would be best resolved by a body over which they had complete control and whose rules they could shape. Because of this "tailoring," the tribunal has been successful in curbing further conflict from claims arising from the Iranian Revolution and in rendering judgments respected by the claimants.

A more recent example is that of the former Yugoslavia's dismemberment. The successor states did not establish a tribunal to resolve the predecessor's obligations vis-à-vis its creditors. Instead, each nation undertook an active role in negotiating with the major international players, both state and institutional, in order to resolve its share of outstanding obligations. The negotiation model appears to have worked remarkably well for the new nations as they have been able to restructure the debts incurred by the former Yugoslavia and become active and functioning participants on the world financial scene.

The overall circumstances of post-war Iraq entail players of economic, political and international significance. There are both sovereign and private parties with claims against various assets and profitable contracts in Iraq, especially in the cases of oil concessions and reconstruction. While reconstruction is an issue brought about by the emergence of a new political entity—a new state—concessions disputes and claims have existed since before the toppling of Hussein's regime. Therefore, concessions disputes involve questions of successor state liability. These disputes would be best resolved in a political forum pursuant to multilateral negotiations. Bankruptcy law provides a suitable paradigm for the disposition of all claims. A proceeding of this type would be enormously complex and would require the establishment of an arbitral body to compile and review all outstanding claims. The major advantage of this type of arrangement is the opportunity for participation by all interested parties and the possibility of simultaneous resolution of all claims.