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HONOUR’S ROLE
IN THE INTERNATIONAL STATES’ SYSTEM*
ALLEN Z. HERTZ*

INTRODUCTION AND SUMMARY

Studying the First World War’s origins, James Joll (1918-1994), Professor of International History at the University of London, offered this insight: “In the late 20th century we perhaps find it easier to conceive of foreign policy as being motivated by domestic preoccupations and by economic interests than by... considerations of prestige and glory. It does not necessarily follow that the men of 1914 thought in the same way as we do.” To recapture that age which ended during the First World War, this essay analyzes the meaning of “honour” as a staple of European political philosophy. The significance of the “word of honour” is then located in the context of European courtly society, where a king’s honour is explored in relation to that of his country and in the “international of kings” that was the European States’ system until 1917-18. Attention is then directed to discourse about “honour” and “interest” as rhetoric of British foreign policy. It is suggested that the idea of honour was at that time consciously exploited for political ends. Examples are used to show that countries actually fought for honour, which is portrayed as one of the causes of the First World War, and directly relevant to Great Britain’s decision to confront Germany in 1914. Thereafter, focus shifts to “national honour” as recognized by public international law, breach of which then met the sanction of dishonour. Attention is paid to wartime interest in a new legal paradigm and its reception by the governments in London and Washington. This is followed by a description of the architecture of the 1919 peace settlement, which embodied a new law-based order, antithetic to both honour and aristocratic diplomacy. Finally, the shift from honour to law is tested by looking at the discourse used at the League of Nations when Hitler unilaterally denounced key treaty provisions.

A. What is Honour?

An answer comes from French magistrate, parliamentarian, historian and

* B.A. (McGill University); M.A., Ph.D. (Columbia University); LL.B. (University of Cambridge); LL.M. (University of Toronto). Formerly with Canada’s Department of Foreign Affairs, Dr. Hertz is now a Senior Advisor in Canada’s Privy Council Office supporting the Prime Minister and the Federal Cabinet.

aristocrat, Alexis de Tocqueville (1805-1859):

(1) It first signifies the esteem, glory, or reverence that a man receives from his fellow men; and in this sense a man is said 'to acquire honour' (conquérir de l'honneur). (2) Honour signifies the aggregate of those rules by the aid of which this esteem, glory, or reverence is obtained. Thus we say that 'a man has always strictly obeyed the laws of honour'; or 'a man has violated his honour.'

According to German archivist and military historian Karl Demeter: "Honour can be either a condition or a reflex, subjective or objective: it can be purely personal or it can be collective." Similarly, University of Chicago anthropologist Julian Pitt-Rivers observed: "Honour is the value of a person in his own eyes, but also in the eyes of his society. It is his estimation of his own worth, his claim to pride, but it is also the acknowledgement of that claim, his excellence recognized by society, his right to pride." Honour is a manifestation of what U.S. political philosopher Francis Fukuyama describes when he points to man's desire for recognition: "People believe that they have a certain worth, and when other people treat them as though they are worth less than that, they experience the emotion of anger. Conversely, when people fail to live up to their own sense of worth, they feel shame, and when they are evaluated correctly in proportion to their worth, they feel pride."

Honour's significance is something the 21st century grasps poorly, because as honour, the concept is now virtually obsolete and the "vocabulary of honour has acquired archaic overtones in modern English." De Tocqueville shrewdly perceived that honour's obsolescence parallels the eclipse of aristocracy: "The dissimilarities and inequalities of men gave rise to the notion of honor; that notion is weakened in proportion as these differences are obliterated, and with them it would disappear." Thus, the shift from an aristocratic to a bourgeois culture caused aristocratic honour to fade in favour of middle-class public opinion—the latter perhaps featuring as frequently in modern political discourse as did the former in previous times. However, an important subset of what was once called

7. DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 242, supra note 2.
honour survives today in the narrower concept of prestige among States.9 In a
detailed examination of the goals of foreign policy, French political scientist
Raymond Aron (1905-1983) argued: “Political units are in competition: the
satisfactions of amour-propre, victory or prestige, are no less real than the so-
called material satisfactions, such as the gain of a province or a population.”10

The Duke of Wellington probably never said “the battle of Waterloo was won
on the playing-fields of Eton,” but élite education in Europe specifically tried to
inculcate a cult of honour, in part to support the officer corps.11 Thus, honour was
identified as an essential component of “the genius for war” by Prussian soldier
and writer Carl von Clausewitz (1780-1831):

Of all the noble feelings... in the exciting tumult of battle, none... are so
powerful and constant as the soul’s thirst for honour and renown, which the
German language treats so unfairly. ... in the words Ehrgeiz (greed of honour) and
Ruhmsucht (hankering after glory). ... Has there ever been a great Commander
destitute of the love of honour, or is such a character even conceivable?12

But, Clausewitz caustically criticised courtly 18th century generals so taken with
“the conception, Honour of Victory” that they failed to exploit their triumph by
vigorously pursuing the enemy.13

Proposing the Legion of Honour’s creation, Napoleon remarked (May 4,
1802): “I do not believe that the French people love liberty and equality. The
French are not changed by ten years of revolution. They are what the Gauls were,
proud and frivolous. They believe in one thing: Honor!”14 Similarly, Swiss
historian Jacob Christoph Burckhardt (1818-1897) observed that honour “has
become, in a far wider sense than is commonly believed, a decisive rule of conduct

CONCEPTUAL CHANGE 247-65 (Terence Ball et al. eds., Cambridge, 1989); Bernadotte E. Schmitt, The
Relation of Public Opinion and Foreign Affairs Before and During the First World War, in STUDIES IN
DIPLOMATIC HISTORY IN HONOUR OF G.P. GOOCH 322-30 (Arshag Ohan Sarkissian ed., London,
1961); for aristocratic honour’s replacement by a bourgeois moral code, see Elias, supra note 4, at 96-
97; see also Jean Renoir’s film La Grande Illusion (Home Vision Entertainment 1937).
9. See ROBERT GILPIN, WAR AND CHANGE IN WORLD POLITICS 30-34 (Cambridge Univ. Press
10. RAYMOND ARON, PEACE AND WAR: A THEORY OF INTERNATIONAL RELATIONS 91 (Richard
11. See ELIZABETH LONGFORD, WELLINGTON: THE YEARS OF THE SWORD 16-17 (Harper & Row
1969); for British officers’ honour at Waterloo, see JOHN KEEGAN, THE FACE OF BATTLE: A STUDY OF
AGINCOURT, WATERLOO AND THE SOMME 189-92 (The Viking Press 1976); for military honour, see
GERMAN OFFICER-CORPS, supra note 3, at 110-54; NORMAN DIXON, ON THE PSYCHOLOGY OF
MILITARY INCOMPETENCE 196-207 (Basic Books 1976); for élite education, see GWYN HARRIES-
JENKINS, THE ARMY IN VICTORIAN SOCIETY 277-78 (Univ. of Toronto Press 1977); D. C. B. LIEVEN,
RUSSIA AND THE ORIGINS OF THE FIRST WORLD WAR 83-86 (St. Martin’s Press 1983) [hereinafter
Russia]; DOMINIC LIoven, THE ARISTOCRACY IN EUROPE, 1815-1914 161-64, 171-72, 177, 191-92,
195-96 (Macmillan 1992) [hereinafter ARISTOCRACY IN EUROPE]; HAROLD NICOLSON, SIR ARTHUR
NICOLSON, FIRST LORD CARNOCK: A STUDY IN THE OLD DIPLOMACY 7-8 (Constable & Co. 1930).
12. CARL VON CLAUSEWITZ, ON WAR bk. I, ch. 3:146 (Anatol Rapoport ed. and J.J. Graham
13. Id. at bk. IV, ch. 12:352.
for the cultivated Europeans of our own day, and many who still hold faithfully by religion and morality are unconsciously guided by this feeling in the gravest decisions."

The same bourgeois experience was recently described by Yale University historian Peter Gay who indicts 19th century honour-fixated societies for spawning hatred:

Touchiness on the great matter of honor was extreme. All significant aspects of life—rites of passage, social intercourse, the choice of a mate, orders of rank and precedence, even commercial transactions—were meticulously regulated and subject to obsessively enforced rituals. Affronts, whether real or trumped up, had to be avenged with the most extreme remedies at hand. . . . Men felt compelled to display and continuously reaffirm their manhood from the time they were striplings, to prove their hardihood, their sheer physical strength, and their tenacious endurance of the bodily suffering that their risk-seeking lives necessarily entailed. For societies living by heroic codes, prestige was the cherished aim, pain the necessary test, disgrace a perpetual threat; autonomy was sacrificed to the good opinion of others.

B. Was Honour a Staple of Political Philosophy?

"Honour" was until the 20th century a central construct in European socio-political thought and a commonplace in works of law and political philosophy. Niccolò Machiavelli (1469-1527) was a Florentine public servant, diplomat and political writer. Following a 14th century trail blazed by Petrarch, Machiavelli deplored Christianity's emphasis on humility and heaven. He instead urged individual virtù (manliness, courage, pluck, fortitude, boldness, valour, steadfastness, tenacity) to gain honour and glory—perhaps man's highest pleasure. Machiavelli’s writings reveal honour’s several faces which are generally linked to virtù. According to U.S. political theorist Leo Strauss (1899-1973):

For Machiavelli, the honorable is that which gives a man distinction or which makes him great and resplendent. Hence extraordinary virtue rather than ordinary virtue is honorable. To possess extraordinary virtue and to be aware of one’s possessing it is more honorable than merely to possess it. To have a sense of

18. Relevant 16th century meaning survives in O. BULLE & GIUSSEPE RIGUTINI, DIZIONARIO ITALIANO-TEDESCO E TEDESCO-ITALIANO 905 (Leipzig-Milan, 1896); for Machiavelli, virtù was whatever qualities the prince needed "to keep his state," see, SKINNER supra, note 17, at vol. 1:138.
one's superior worth and to act in accordance with that sense is honorable. Hence it is honorable to rely on oneself and to be frank when frankness is dangerous. To show signs of weakness or to refuse to fight is dishonorable. To make open war against a prince is more honorable than to conspire against him. To lose by fighting is more honorable than to lose in any other way. To die fighting is more honorable than to perish through famine.

Although Machiavelli was outstanding in stressing dissimulation and even brutality, he was entirely with his contemporaries in seeing honour, glory and fame as the prince’s ultimate goal.

The image of the “gentleman,” including the cult of honour, was a Renaissance icon. Italian historian and statesman Francesco Guicciardini (1483-1540) included many references to honour, good name, reputation, dignity, greatness, glory and fame in his celebrated Ricordi composed over the years from 1512 to 1530. The emphasis on honour was also natural for Emperor Charles V who was steeped in chivalry as Grand Master of the Burgundian Order of the Golden Fleece. When chided for failing to follow Julius Caesar in fully exploiting victories, Charles replied: “The ancients had only one goal before their eyes, honor. We Christians have two, honor and the salvation of the soul.” In entrusting Spain to his son Philip II, Charles advised (1543) Philip “to take as examples all those who have made good their want in age and experience by their courage and zeal in the pursuit of honour” and to study as “the only means by which you will gain honour and reputation.”

Some years later, French lawyer and political philosopher Jean Bodin (1530-1596) divided social rewards into the profitable and the honourable, with a preference for the latter: “For as a generous and noble minded man doth more esteem honour than all the treasure of the world; so without doubt he will willingly sacrifice his life and goods for the glory he expects—and the greater the honours be, the more men there will be of merit and fame.” This was consistent with the understanding of French magistrate and essayist, Michel de Montaigne (1533-

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20. STRAUSS, supra note 19, at 235-236.
21. See SKINNER, supra note 17, at vol. 1:100-01, 118-21, 130-32.
1592): "Of all the delusions in the world, the most fully accepted and most universal is the seeking for fame and glory, which we espouse to the point of giving up wealth, repose, life, and health, which are real and substantial goods, to follow that airy phantom..."

In late 16th century England, Shakespeare’s plays put relatively strong emphasis on "honour." And, in the same English context, Oxford University Regius Professor of Civil Law, Alberico Gentili (1552-1608) included a chapter on "conflict between what is honourable and expedient" in his Three Books on the Law of War: "Honour (honestas) is so highly valued that it takes precedence over what is lawful, and may even be sought at the expense of a certain amount of injustice. For the sake of honour (honestatis caussa), says Augustine, we should give up what is lawful but would be advantageous only to a part of mankind." A generation later, Dutch diplomat, lawyer and father of international law Hugo Grotius (1583-1645) discussed, with reference to wartime, "with what meaning a sense of honour (pudor) may be said to forbid what the law permits.

English philosopher Thomas Hobbes (1588-1679) was preoccupied with honour which he carefully defined:

The manifestation of the value we set on one another is that which is called honoring and dishonoring. To value a man at a high rate is to honor him, at a low rate is to dishonor him. But high and low, in this case, is to be understood by comparison to the rate that each man sets on himself.

French lawyer, political philosopher and aristocrat Charles de Montesquieu (1689-1755) identified honour as the key principle distinguishing monarchies, from republics on the one hand, and from despotisms on the other. Honour was

28. See JOHN BARTLETT, A NEW AND COMPLETE CONCORDANCE OR VERBAL INDEX TO WORDS, PHRASES AND PASSAGES IN THE DRAMATIC WORKS OF SHAKESPEARE WITH A SUPPLEMENTARY CONCORDANCE TO THE POEMS (Macmillan and Co. 1896), e.g., in descending no. of cols. per entry: "love," "loved," "lover" & "loving" (28.5); "king" & "kingdom" (17.3); "speak" (13); "time" (13); "heart" (12); "true," "truly" & "truth" (11); "honour," "honourable" & "honoured" (10); "heaven" (9.2); "life" (9); "fear" & "fearful" (8); "word" (8); "world" (7.2); "woman" (7); "grace" (6); "soul" (5.5); "hope" (4.8); "desire" & "desired" (4.6); "wit" (4.6); "war" (4.5); "wisdom" & "wise" (4); "state" (4); "death" (4); "law" & "lawful" (3.5); "favour" (3); "home" (3); "spirit" (3); "faith" (2.5); "fault" (2.5); "sorrow" (2.5); "swear" (2.5).
33. See CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS bk. III, chs. 6-8,
portrayed as monarchy's actuating spring because nobles serving the king, were
motivated by the quest for position and precedence. But, Montesquieu also saw
honour as a common code limiting the power and guiding the conduct of king and
noble alike: “There is nothing so strongly inculcated in monarcies, by the law, by
religion and honour as submission to the prince’s will; but this very honour tells us
that the prince never ought to command a dishonourable action, because this would
render us incapable of serving him.”

German philosopher and mathematician Christian Wolff (1679-1754)
provides rich evidence showing that the 18th century was incapable of describing
the international system without referring to honour’s vocabulary. Setting out the
“duties of nations to themselves and the rights arising therefrom,” his systematic
treatise includes substantive paragraphs on “the necessity of not bringing disgrace
on one’s nation,” “zeal for the reputation (fama) of one’s nation,” “what fame
(gloria) is,” “the fame (gloria) of a nation,” “the desire for fame (gloria)” and
“how far this applies to the ruler of the State.”

“Which man is insensible to the attractions of glory? It is the last passion of
the sage. Even the most austere philosophers cannot uproot it. What are
exhaustion, troubles and dangers in comparison with glory? It is a passion so mad
that I cannot at all conceive how it does not turn everyone’s head.” These were
the words of Prussia’s King Frederick the Great (1712-1786) who believed:

A good prince’s true merit is to have a sincere attachment to the public good, to
love his country and glory: I say ‘glory’ because the happy instinct which
animates men with the desire for a good reputation is the real principle of heroic
actions; it is the soul’s nerve, awakening it from lethargy to carry it towards
useful, necessary and praiseworthy enterprises.

As early as 1790, British parliamentarian and political writer Edmund Burke
(1729-1797) denounced the French Revolution’s “grim and bloody maxims” as
antithetical to a unique European notion of honour drawn from medieval chivalry.
For Burke, “the spirit of a gentleman” was fundamental to Europe’s civilization:

It was this which, without confounding ranks, had produced a noble equality and
handed it down through all the gradations of social life. It was this opinion which
mitigated kings into companions and raised private men to be fellows with kings.
Without force or opposition, it subdued the fierceness of pride and power, it

10-11; bk. IV, ch. 2; bk. V, chs. 16-19; bk. VI, ch. 21; bk. VIII, ch. 9; bk. XII, ch. 27 (Thomas Nugent
trans., revised by J.V. Prichard Chicago 1952).
34. Id. at bk. IV, ch. 2.
35. CHRISTIAN WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTRACTUM ch. 1, §§ 45-51; vol.
1:17-19 (Latin); vol. 2:30-33 (English) (Otfried Nippold ed., Oxford 1934).
36. LES PLUS BELLES PAGES DE FREDERIC II 110-111 (Charles-Adolphe Cantacuzène ed. Paris,
1935).
37. Histoire de mon temps, avant-propos de 1775, in 1 MEMOIRES DE FREDERIC II, ROI DE
PRUSSE: ECRITS EN FRANCAIS PAR LUI-MEME 4-5 (E. Boutaric & E. Campardon eds., Paris, 1866)
[hereinafter MEMOIRES DE FREDERIC II]; Frederick to D’Alembert, Sep. 26, 1770, in 11 OEUVRES
POSTHUMES DE FREDERIC II, ROI DE PRUSSE 88 (Berlin 1788).
obliged sovereigns to submit to the soft collar of social esteem, compelled stern authority to submit to elegance, and gave a dominating vanquisher of laws to be subdued by manners.38

C. The "Word of Honour" and Courtly Society

Keeping a promise as "word of honour" was similar, but not identical to the pacta sunt servanda (agreements must be kept) of natural and canon law, which for a long time were less effective than honour in encouraging treaty compliance by successors. As long as there was a sense in which treaties remained the contracts of kings, performance profited from dynastic honour as a recognized framework for a son's feeling bound by his father's treaty. This consciousness of family obligation alleviated difficulties about succession to natural law promises and transcended the limitations of the oath, by which a king could imperil his own soul, but not that of his son.

With honour, the context was neither natural nor canon law, but rather a related socio-religious norm emerging from the ethical and aesthetic ideals of the late Middle Ages, when—according to Dutch historian Johan Huizinga (1872-1945)—the "thought of all those who lived in the circles of court or castle was impregnated with the idea of chivalry" and "permeated by the fiction that chivalry ruled the world."39 Pertinent here is the emphasis which medieval chivalry had placed on vows, steadfastness, "keeping faith" and "remaining true to one's word."40 This phenomenon was understood by De Tocqueville who perceptively saw the link with the key medieval institution of allegiance: "Every man looked up to an individual whom he was bound to obey; by that intermediate personage he was connected with all the others. Thus, in feudal society, the whole system of the commonwealth rested upon the sentiment of fidelity to the person of the lord; to destroy that sentiment was to fall into anarchy."41 Huizinga was understandably surprised that Belgian lawyer Ernest Nys (1851-1920), after so much study of international law's history,42 had missed the key contribution of chivalric ideas—including "fidelity to one's given word."43 Huizinga was convinced by 14th century sources that "the system of chivalric ideas as a noble game of rules of

41. DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 245-46, supra note 2.
42. See ERNEST NYs, LES ORIGINES DU DROIT INTERNATIONAL (Brussels-Paris 1894).
honor” was linked to international law: “The origins of the latter lay in antiquity and in canon law, but chivalry was the ferment that made possible the development of the laws of war. The notion of a law of nations was preceded and prepared for by the chivalric ideal of honor and loyalty.”

The enduring focus on honour was reflected in the European obsession with reputation. For example, scrupulous treaty performance was seen as giving rise to “true grandeur and solid glory” by Charles Rollin (1661-1741), classical historian and former Rector of the University of Paris. The importance of keeping promises was also affirmed by Francis Osborne, Duke of Leeds, who resigned (April 21, 1791) as Foreign Secretary after parliamentary pressure prompted Prime Minister William Pitt the younger to cancel planned naval demonstrations against Russia. Because the help of the warships had already been promised to Prussia’s King Frederick William II, Leeds saw personal and national honour lost by Britain’s volte-face. In 1864, future Prime Minister Lord Salisbury (as MP Lord Robert Cecil) emphasized: “One promise is as good as a hundred, and one disregarded promise casts upon the escutcheon of a country disgrace which is only increased in degree by multiplied repetitions.” Evidently, this was a sentiment understood by U.S. Supreme Court Associate Justice John Marshall Harlan (1833-1911) who opined:

Aside from the duty imposed by the constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact that the honor of the government and the people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected.

Lying for reasons of State was similarly condemned roundly by 18th century diplomat Lord Malmesbury:

No occasion, no provocation, no anxiety to rebut an unjust accusation, no idea, however tempting, of promoting the object you have in view, can need, much less justify, a falsehood. Success obtained by one is a precarious and baseless success. Detection would ruin, not only your own reputation forever, but deeply wound the

44. Id. at 203.
46. Sending ships was “manly and consistent conduct” in conformity with “honour,” the contrary “disgraceful” exhibition of “caution bordering upon timidity,” see THE POLITICAL MEMORANDA OF FRANCIS, FIFTH DUKE OF LEEDS ix-x, 150-174 (Oscar Browning ed., Camden Society, new ser., no. 35, London 1884); the reversal was arguably consistent with the explicitly defensive 1742 and 1788 Anglo-Prussian treaties, see 36 THE CONSOLIDATED TREATY SERIES 498-503, and 50 THE CONSOLIDATED TREATY SERIES 333-338, 354-358 (Clive Parry ed., Oceanna Publication 1969-1981) [hereinafter CTS]; FOUNDATIONS OF BRITISH FOREIGN POLICY FROM PITT (1792) TO SALISBURY (1902) 1 (Harold Temperley & Lillian M. Penson eds., Barnes & Noble 1966); for the “armament” against Russia, see JEREMY BLACK, BRITISH FOREIGN POLICY IN AN AGE OF REVOLUTIONS, 1783-1793 285-328 (Cambridge Univ. Press 1994).
47. Jul. 5, 1864, 176 PARL. DEB. (COMMONS) 851 (3rd ser.).
honour of your Court. 49

This rhetoric exemplifies the imperative of honouring both truth and promises that was a key ingredient of the chivalric archetype, perpetuated and transformed by the “courtly-aristocratic” society, which held sway in Europe until mostly swept away during the First World War. 50

D. Was the King's Honour Nationalized?

By the 18th century, the very old notion of the king’s honour had mingled with the closely related idea of the honour of the State or nation. 51 According to De Tocqueville: “In some nations the monarch is regarded as a personification of the country; and the fervor of patriotism being converted into the fervor of loyalty, they take a sympathetic pride in his conquests, and glory in his power.” 52 For example, King George III explicitly identified his personal honour with that of Britain—a sentiment seconded by the pseudonymous Junius: “The king’s honour is that of his people. Their real honour and real interest are the same.” 53 This link was no less compelling for soldier-diplomat and adventurer, Sir Robert Wilson who (1826) urged Parliament “to uphold with a strong hand the honour and interest

49. Sir James Harris, 1st Earl of Malmesbury (1746-1820), quoted by Algernon Cecil, The Foreign Office, in 3 THE CAMBRIDGE HISTORY OF BRITISH FOREIGN POLICY 1783-1919 551 (Sir A.W. Ward & G.P. Gooch eds., Cambridge 1923); “feelings of morality and honour” caused 2nd Earl of Malmesbury, James Edward Harris (1778-1841) to resign as Under-Secretary of State for Foreign Affairs because national security forced him to lie about Britain’s plans to seize the fleet of neutral Denmark, see 3rd EARL OF MALMESBURY, JAMES HOWARD HARRIS (1807-1889), 1 MEMOIRS OF AN EX-MINISTER: AN AUTOBIOGRAPHY 1-2 (London 1884).
52. DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 251, supra note 2; Hanna Fenichel Pitkin, Representation, in POLITICAL INNOVATION AND CONCEPTUAL CHANGE 132-154, at 138 (Terence Ball et al. eds., Cambridge Univ. Press) (“It is a medieval and mystical conception: the king is not merely the head of the national body, not merely the owner of the entire realm, but he is the crown, the realm, the nation.”).
of the Crown, which in this country are inseparable from the honour and interest of the people." Similarly, Lord Salisbury said on Prime Minister Benjamin Disraeli’s death: "The honour of the Crown and the honour of the country were in his mind inseparable: and in comparison to them, questions of internal policy occupied a secondary rank."

Christian Wolff had already taught that "the ruler of a state ought to direct the royal acts to the glory of his nation (gloria Gentis), consequently to do nothing to diminish or destroy it." For him, fame (gloria) meant "ein grosser Nahme" (a great name): "Fame (gloria) is primarily and of itself attributed to the nation, because it is considered as a single person, which has its own actions dependent upon intellectual and moral virtues; but even more is it attributed to it, because the renown (laus) of individuals is passed over to it on account of acts or deeds which are considered as those of the individuals." Similarly, Charles Jenkinson (later 1st Lord Liverpool) was in 1758 comfortable declaiming: "Great and wise governments have always been jealous of national glory: it is an active principle, which properly cultivated, operates in virtuous actions through every member of the State. To preserve this in its purity is the duty of everyone who loves his country."

It was entirely natural for France’s new National Assembly to speak (1792) of "the offended dignity of the French people" and for British Foreign Secretary Lord Grenville to defend "the dignity and honour of England." Similarly, "the glory of the French people" was rhetoric Napoleon used to encourage soldiers in the 1796 campaign in Italy. After Allied victory at Waterloo (1815), the Duke of Wellington and other British statesmen judged sparing France’s "national honour" to be a key consideration in framing peace terms. In the 19th century such

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54. 16 PARL. DEB. (2d ser.) (1826) 336.
55. Letter to Queen Victoria, Apr. 25, 1881, 3 THE LETTERS OF QUEEN VICTORIA 216 (2nd ser.) (George Earle Buckle ed., London 1926) [hereinafter LQV].
58. CHARLES JENKINSON, A DISCOURSE ON THE CONDUCT OF THE GOVERNMENT OF GREAT BRITAIN, IN RESPECT TO NEUTRAL NATIONS, DURING THE PRESENT WAR 7 (2d. ed., London 1759).
60. See Proclamation to the Army of Italy, Apr. 26, 1796, in DOCUMENTARY SURVEY, supra note 59 at 672-73.
61. See e.g., BRITISH DIPLOMACY 1813-1815: SELECT DOCUMENTS DEALING WITH THE RECONSTRUCTION OF EUROPE (C.K. Webster ed., G. Bell and Sons 1921). British Prime Minister Robert Banks Jenkinson, 2nd Earl of Liverpool, to Foreign Secretary Viscount Castlereagh negotiating peace in Paris, Jul. 15, 1815: "It is argued with much force that France will never forgive the humiliation which she has already received that she will take the first convenient opportunity of endeavouring to redeem her military glory," id. at 346; Liverpool to Castlereagh, Aug. 18, 1815: "An arrangement on this principle would have nothing in it which could really be considered as humiliating to France," id. at 368; Liverpool to Castlereagh, Aug. 23, 1815: "Such a stipulation need not, in our judgment, mortify the pride of the French nation," id. at 369; Castlereagh to Liverpool, Aug. 24, 1815: "...if you take part of old France and add it to Belgium, all France will, as a point of honour, be
references to national honour became increasingly common, especially in France, Britain and the few other countries where control of foreign policy was gradually shifting to a governing class which, according to British diplomat and historian Harold Nicolson (1886-1968), developed a corresponding feeling that "engagements entered into by the government pledged the honour of the class as a whole." Similarly, British historian A.J.P. Taylor (1906-1990) observed that pre-1914 treaties were no longer simply between monarchs, but "absorbed by public opinion" and therefore also between nations.

E. Honour in the International of Kings

During the 18th century, dynastic ties had been so important that mutual courtesies persisted even during wartime, when contending rulers exchanged letters of congratulation and condolence. Such monarchical solidarity was fortified by the challenge of the French Revolution. After France’s King and Queen were arrested (June 21, 1791) at Varennes, Marie Antoinette’s brother, Habsburg Emperor Leopold II wrote to his fellow rulers that the detention violated "the honor of all sovereigns and the security of all governments." In fact, 19th century European rulers were an interrelated family, mostly of German descent. According to British historian Eric Hobsbawm, these kings had "more in common with the other members of the international princes’ trade union . . . than with their own subjects." Similarly, Nicolson portrayed the post-1815 Concert of Europe as a system of trust operating via the creation of confidence and the acquisition of credit in an International of Monarchs—a freemasonry of kings. Accordingly, he saw 19th century international relations as resting on "a tacit understanding between the five Great Powers that there were certain common standards of dignity, humanity and good faith which should govern the conduct of these powers in their relations with each other and in their dealings with less potent or less civilized communities." Nicolson’s nostalgia matches the authoritative contemporary view of longtime Austrian Chancellor Clemens von Metternich

anxious to regain it,” id. at 371; British peace negotiator, the Duke of Wellington to Castlereagh, Paris, Aug. 31, 1815: “... the measure would afford to France a just pretence for war, and all the means which injured national pride could give for carrying it on,” id. at 374; Castlereagh to Liverpool, Sep. 4, 1815: "... for objects that France may any day reclaim from the particular States that hold them, without pushing her demands beyond what she would contend was due to her own honour,” id. at 376.


65. Padua Circular, Jul. 5, 1791, in DOCUMENTARY SURVEY, supra note 59, at 221-222; Adam Wandruszka, 2 LEOPOLD II 360-369 (Vienna 1965).


68. Nicolson, supra note 62, at 72.
whose philosophy of international relations was simply the principle of reciprocity in a community of States displaying *bon procédés*, i.e. "mutual consideration and honourable conduct."69

From the vantage point of the First World War, British international lawyer Coleman Phillipson reflected that the Concert had functioned tolerably well as long as governments continued to prize "honour, fidelity and good report" and have a strong "desire to stand well with their fellows."70 Consonant with these values was the dictum of former Foreign Secretary and future Prime Minister Lord Grenville (1802): "Loss of territory might be regained, commerce might be revived, and industry encouraged and invigorated; but honour and faith, once forfeited, could never [sic] be repaired but imperfectly."71 In the same vein, the future Lord Salisbury, as MP Lord Robert Cecil, insisted (1864) that "loss of dignity and honour is not a sentiment; it is a loss of power."72 Avoiding stain of dishonour was thus a key incentive promoting conformity with the rules making up a common code.

19th century monarchs and statesmen displayed real anxiety about peer judgment and frequently appealed to the standard of what would be honourable "in the eyes of Europe."73 For example, Queen Victoria facilitated British foreign

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71. May 4, 1802, LORDS, 36 *THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803* 588 (London, 1820).
73. See Letter to Prime Minister Lord John Russell, Jul. 28, 1850, 2 LQV 306 (1st ser.) (Arthur Christopher Benson & Viscount Esher eds., London 1907) ("expose herself to insults of other nations"); Letter from Duke of Cambridge, Apr. 28, 1854, LQV, 1st ser., vol. 3:31 ("such position being highly honourable and advantageous to us in the eyes of Europe"); Letter to Foreign Secretary Lord Clarendon, Jan. 15, 1856, 3 LQV 207 (1st ser.) ("The Queen... cannot be for peace now, for she is convinced that this country would not stand in the eyes of Europe as she ought"); Letter to Foreign Secretary Lord John Russell, Apr. 26, 1860, 3 LQV 505 (1st ser.) ("The Queen... must say that she would consider it the deepest degradation of this country if she was compelled to appear at the Emperor's [Napoleon III] Congress"); Letter from Foreign Secretary Lord Granville, Jul. 10, 1870, 2 LQV 24 (2nd ser.) ("the goodwill of Europe"); Letter from Foreign Secretary Lord Derby, May 5, 1875, 2 LQV 389-90 (2nd ser.) ("No French Government would be insane enough to put itself in the wrong in the eyes of all Europe," and "Moral force does for much in these days, and the sympathy of nations is always with the attacked party. In the last war, France was the aggressor, and the opinion of Europe went with Germany"); Letter from German Crown Princess, Dec. 19, 1877, 2 LQV 578 (2nd ser.) ("Ridicule and contempt England can very well stand, and laugh at the ignorance of the benighted people that know no better, but England cannot, or rather ought not to, afford to lose her position in Europe"); Letter from the Prince of Wales, Dec. 23, 1877, 2 LQV 580 (2nd ser.) ("We shall never again be able to hold up our head in the eyes of the world"); Queen's Priv. Secretary Sir Henry Ponsonby to Viscount Halifax, Jan. 5, 1878, 2 LQV 590 (2nd ser.) ("maintaining the high position which our nation holds in the world...the spectacle of indecision and weakness which lowers her in the esteem of the world"); Letter to Prime Minister Benjamin Disraeli, Jan. 16,1878, 2 LQV 595 (2nd ser.) ("We shall become the laughing-stock of Europe and the world!!"); Letter from Grand Duchess of Hesse, Mar. 1, 1878, 2 LQV 605 (2nd ser.) ("Is [Foreign Secretary] Lord Derby really going to remain? He it is who shakes the confidence of all the world in England’s policy").
policy by assiduously exploiting her private correspondence and family reunions to gather intelligence and cultivate influence in the exalted circle constituted by her royal relatives abroad.  

Reminding her Prime Minister of “the importance of keeping our foreign policy beyond reproach,” she said: “Public opinion is recognised as a ruling power in our domestic affairs; it is not of less importance in the society of Europe with reference to the conduct of an individual state. To possess the confidence of Europe is of the utmost importance to this country.” Victoria insisted that “the honour of England” touched her “more nearly than anyone else.” She explained: “What my Ambassador does, he does in my name, and I feel myself bound in honour thereby, but also placed under an obligation to take upon myself the consequences.” Moreover, the Queen claimed to have “public and personal obligations towards those Sovereigns with whom she professes to be on terms of peace and amity.”

At the beginning of the 20th century, King Edward VII was closely involved in British diplomacy, which ostentatiously exploited his encounters with other rulers, including the Habsburg, Hohenzollern and Romanov Emperors. Aimed at ending the old Anglo-French antagonism, his 1903 Paris visit was then seen as proof of his major role in foreign affairs. However, the resulting Anglo-French Entente Cordiale (1904), by resolving some bilateral differences, pointed to Europe’s fateful split into two hostile camps—Germany and Austria-Hungary on the one side, and Britain, France and Russia on the other. By then, the traditional pan-monarchic trust and confidence had waned, mainly because the balance among the European Powers had shifted so radically in Germany’s favour. Yet, kings kept their keen sense of personal and professional honour and pretended that diplomacy was still tied to their person, until they almost all lost their thrones during the First World War.

74. See Dr. F. Gosses, The Management of British Foreign Policy Before the First World War, Especially During the Period 1880-1914 102-04 (E.C. Van Der Gaaf trans., Leiden 1948).
75. Letter to Prime Minister Lord John Russell, Oct. 18, 1847, 2 LQV 156 (1st ser.).
76. Letter to Foreign Secretary Lord John Russell, Feb. 15, 1864, 1 LQV 158 (2nd ser.).
77. Letter to King of Prussia, Mar. 17, 1854, 3 LQV 21 (1st ser.).
78. Letter to Prime Minister Lord John Russell, Nov. 20, 1851, 2 LQV 397 (1st ser.).
80. On Apr. 8, 1904, France and Great Britain concluded in London three agreements comprising the Entente Cordiale, see CTS 195, Declaration respecting Egypt and Morocco, 198-204; Convention respecting Newfoundland and West and Central Africa, 205-12; Declaration concerning Siam, Madagascar and the New Hebrides, 214-16.
F. "Honour" and "Interest" as Rhetoric of British Foreign Policy

Compelling linguistic evidence shows that, at least until 1914-18, honour was one of the key categories for British thinking about foreign policy. Specifically, talk about international relations almost invariably involved doublets in which one element points to prestige (honour, glory, dignity, reputation, pride, position, standing) and another to a political assessment (interest, advantage, security, safety, victory, defeat, injury). This striking duplex featured in almost every foreign-policy debate in Parliament, and in a wide variety of State papers and political writing.

Burke's *Letters on a Regicide Peace* supported augmenting "national glory" and "public interest," and opposed sacrificing "national dignity" and "national acquisitions." Examples abound in the debate on the 1801 preliminaries of peace with Napoleon. King George III approvingly said "substantial interests of this country, and honourable to the British character" and "advantage and honour." "To maintain the honour and preserve the security of the British Empire" were the words of Prime Minister Henry Addington. Sir Edmund Hartopp used "beneficial to our interests and reputation." Foreign Secretary Lord Hawkesbury, Viscount Limerick, and naval heroes Earl St. Vincent and Lord Nelson said "honourable and advantageous." William Pitt the younger employed "strength to our security and lustre to our national character;" "to protect England's honour and maintain her interests;" and "sources of justifiable pride, but grounds of solid security." Charles James Fox offered "safe and honourable" and "defence of our honour and our independence." Thomas Grenville protested "neither safe nor honourable." Earl Temple warned "dangerous to safety, and degrading to honour." Sir William Windham reproved with "degrading and injurious." William Elliot and Richard Ellison deplored losing "our honour and interests." "Dishonourable and insecure" was Earl Carnarvon's verdict.

Debating whether to aid Portugal (1826), future Lord Chancellor Henry Brougham offered "security or honour" and "credit and safety." For foreign affairs, identical or similar doublets were favoured by Queen Victoria who got back the same from her Prime Ministers and Foreign Secretaries. These doublets

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Books 1982).

83. EDMUND BURKE, 2 THE WORKS OF EDMUND BURKE 265 (New York 1859).
84. 36 Parliamentary History of England 3 (King George); 16 (Addington); 30 (Hartopp); 39, 48 (Hawkesbury); 159 (Limerick); 184 (St. Vincent); 186 (Nelson); 58, 70-71 (Pitt); 72, 74 (Fox); 51-52 (Grenville); 54-55 (Temple); 130 (Windham); 146 (Elliot); 154 (Ellison); 187 (Carnarvon).
85. 16 PARL. DEB. (2d ser.) (1826) 383, 388.
86. For Victoria, see THE QUEEN AND MR. GLADSTONE: 1880-1898 (Philip Guedalla ed. Hodder & Stoughton 1933), ("dignity & honour as well as the safety of her British & Foreign Empire," id. at 353; "honour and welfare of her great Empire," id. at 437); see also LQV: 1st ser., vol. 2:235 ("character and honour of England" and "the peace of Europe"); 1st ser., vol. 2:397 ("interests of her people, honour and dignity of her Crown"); 1st ser., vol. 3:237 ("honour and interests of this country"); 1st ser., vol. 3:395 ("honour, power, and peace of this country"); 1st ser., vol. 3:429-430 ("security of my dominions and honour of my Crown"); 2nd ser., vol. 1:158 ("imaginary interests" and "a supposed point of honour"); 2nd ser., vol. 1:231 ("safety and dignity of this country"); 2nd ser., vol. 1:419 ("every consideration of honour and every consideration of interest"); 2nd ser., vol. 1:592
were also exchanged in the impassioned speeches sparked by the 1864 Austro-
Prussian attack on Denmark.  
And, finally, Prime Minister Herbert Henry Asquith and Foreign Secretary Sir Edward Grey joined other MPs in repeatedly referring to
Britain's "interest and honour" in the fateful August 1914 deliberations on war
with Germany.  

G. Was Honour Cultivated for Political Ends?

Still the centre of Western civilization, pre-1914 Europe had experienced a
curious "persistence of the old regime." This antediluvian age was marked by
the enduring social supremacy of court aristocracies, the presence of lesser
nobilities, and the co-optation of the upper middle classes which—in significant
social, cultural and political respects—still aped the conduct and discourse of their
"betters." Because so much of the social and political role of king, court and
aristocracy survived beyond 1900, perpetuated too was a matching ideology. For
example, English literature in the two generations before 1914 often displayed a
special rhetoric—a high, romantic diction that was "essentially feudal language"
for preparing young males for self-control, sacrifice, defence and aggression. The mid-Victorian cult of retrenchment, economy, rationality and utilitarianism had by the 1890's fully given way to an exaggerated love of pomp and show, including the invention of "traditional" ceremonies. Were these early 20th century societies seeking to popularize king and country by systematically cultivating an "archaic ethos of heroism, glory and honour"? 

Individual battlefield bravery could still be credibly characterized as glorious, honourable, and courageous, until heroism became largely irrelevant amidst the horrific mechanization of 1914-18 trench warfare—including barbed wire, machine guns, artillery barrages, poison gas, and tanks. By contrast, U.S. foreign relations scholar George F. Kennan referred to the halcyon pre-war decades which still cherished "the romantic-chivalric concept of military conflict: the notion that whether you won or lost depended only on your bravery, your determination, your sense of righteousness, and your skill." He said warfare was viewed as "a test of young manhood, a demonstration of courage and virility, a proving-ground for virtue, for love of country, for national quality." This dovetails with the 1880 view of Chief of the Great German General Staff, Count Helmuth von Moltke (1800-1891):

Perpetual peace is a dream, and not even a beautiful dream. War is an element of the world order established by God. In war develop mankind's most noble virtues: courage and self-denial, loyalty to duty and the spirit of sacrifice—the soldier gives his life. Without war, the world would stagnate and lose itself in materialism.

Similarly, Queen Victoria rhapsodized: "To die for one's country and Sovereign in the discharge of duty is a worthy and noble end to this earthly life for a soldier."


92. See CANNADINE, supra note 91, at 89-92.


94. See FUSSELL, supra note 91, at 21; GIROUARD, supra note 50, at 290; cinematographic expressions include Lewis Milestone, All Quiet on the Western Front (Universal Studios 1930); Stanley Kubrick, Paths of Glory (MGM/UA Studios 1957); Peter Weir, Gallipoli (Paramount Studios 1981).

95. KENNAN, supra note 93, at 423-424.


97. See Letter to India Viceroy, Lord Lytton, Dec. 6, 1878, 2 LQV 651 (2nd ser.).
H. War as Duel: Did Countries Fight for Honour?

In Europe, honour continued to hold an astonishingly strong grip on individual imagination and conduct, as evidenced by persistence into the 20th century of duelling—an elite practice sustained by several honour-related ideas, including the premium on readiness to risk life in a rite affirming masculinity, courage and character. An early juridical treatment of the well-known link between honour and duelling is afforded by Bologna University's Giovanni da Legnano who argued (1360) that duels are fought for one or more of three reasons—hatred, an accusation's compurgation, or glory (propter gloriarn). In the last case, the duellist seeks the joy of victory, i.e. "to win public glory by the strength of the body" and "from the disgrace of his fellow and neighbour." This assessment was confirmed by Francis Bacon (1561-1626) who was a scientist, philosopher, Gray's Inn barrister, and ultimately Lord Chancellor of England: "Honour that is gained and broken upon another hath the quickest reflexion, like diamonds cut with facets." His perception is particularly relevant because, turning to the international realm, Bacon specifically understood war as trial by combat.

The same metaphor caused Italian philosopher of law and cultural history, Giambattista Vico (1668-1744) to observe that the moral theologians' understanding of war's external justice was based on the custom of duelling observed by individuals in their private affairs. Through the fortune of arms, divine providence was said to legitimate the victor's conquests. Similarly, Clausewitz began his classic study On War by defining conflict between States as "nothing but a duel on an extensive scale."

Travers Twiss (1809-1897) was Professor of International Law at King's College, London. Using purum piumque duellum (unstained and upright duel) for war as international law's ultimate sanction, he insisted that the metaphor was "not a fiction of Jurists, but a stem reality of International Life" as "the ruins of


100. Essays or Counsels, Civil and Moral, § 55: Of Honour and Reputation, in 1 The Works of Francis Bacon, Baron of Verulam, Viscount St. Alban and Lord High Chancellor of England 505-06 (James Spedding et al. eds., London 1858-1874).

101. See Certain Observations Made Upon a Libel Published This Present Year, 1592, in 8 Works of Francis Bacon 146; for a late reference to wars as "suits of appeal to the tribunal of God's justice," see Considerations Touching a War with Spain, 1624, in 14 Works of Francis Bacon 470.


Sebastopol bear convincing testimony.\textsuperscript{104} The duel was also the metaphor for Edward Creasy (1812-1878) who was a Lincoln’s Inn barrister, judge and historian. He asserted a country’s “right to repel and to exact redress for injuries to its honour” as a “right of self-preservation,” because “among nations, as among individuals, those who tamely submit to insult, will be sure to have insults and outrages heaped upon them.”\textsuperscript{105}

French prelate and writer François Fénelon (1651-1715) was a bitter critic of France’s foreign policy. He pointed to Louis XIV’s desire for glory as one of the two causes of the Dutch War (1672-1678) said to have triggered a chain of conflicts impoverishing France.\textsuperscript{106} Even a shrewd Realpolitiker like Frederick the Great believed that some wars were fought for glory, reputation and honour. Frederick said seeking glory was partly his motive for beginning (1740) the War of the Austrian Succession and that of the Habsburg Emperor Joseph II for the 1778 War of the Bavarian Succession.\textsuperscript{107} Experience taught Frederick that respect accorded by fellow rulers was proportional to success on the battlefield.\textsuperscript{108} He classified countries as primarily seeking either “glory” or “wealth.” He said States preferring glory tended towards France, but those preferring wealth towards England. Differentiating interest from glory, he judged that for France to fight for the Rhine frontier was a matter of genuine interest, but for France to fight to be Europe’s arbiter sheer vanity.\textsuperscript{109}

Avenging insults and defending England’s honour was demanded by the “hard-hating, elegant polemicist” Junius who derided King George III for failing to fight Spain to enforce Britain’s claim to the Falkland Islands:

To depart, in the minutest article, from the nicety and strictness of punctilio, is as dangerous to national honour, as it is to female virtue. The woman who admits of one familiarity, seldom knows where to stop, or

\textsuperscript{104} SIR TRAVERS TWISS, THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES: ON THE RIGHT AND DUTIES OF NATIONS IN TIME OF PEACE vi, ix (Oxford 1861).

\textsuperscript{105} SIR EDWARD SHEPARD CREASY, FIRST PLATFORM OF INTERNATIONAL LAW 153 (London 1876).

\textsuperscript{106} Letter to Louis XIV, in 7 OEUVRES COMPLETES DE FENELON, ARCHEVEQUE DE CAMBRAI 510 (Paris, 1850). This “anonymous letter” circulated from around Dec. 1693 and then went to the King’s mistress, Françoise de Maintenon. See JEAN-CHRISTIAN PETITFILS, LOUIS XIV 536-539 (Paris, 1995). Saying gloire was one of the main “values behind decision making” does not mean that policy was not also aimed at enhancing France’s security. See John A. Lynn, A Quest for Glory: The Formation of Strategy under Louis XIV, in THE MAKING OF STRATEGY: RULERS, STATES AND WAR 178-204 (Williamson Murray et al. eds., Cambridge 1994); Ragnhild M. Hatton, Louis XIV and his Fellow Monarchs, in LOUIS XIV AND EUROPE 16-59 (Hatton ed. London 1976); JOHN B. WOLF, LOUIS XIV 214 (New York 1968); ARON, supra note 10, at 74.

\textsuperscript{107} Id. at 1 Histoire de mon temps 75-77; Mémoires de 1775 à 1778, in vol. 2: 443; Mémoires de la guerre de 1778, in vol. 2:469.

\textsuperscript{108} See MEMOIRES DE FREDERIC II, supra note 37, at 1 Histoire de mon temps 75-77; Mémoires de 1775 à 1778, in vol. 2: 443; Mémoires de la guerre de 1778, in vol. 2:469.

\textsuperscript{109} See FRIEDRICH MEINECKE, MACHIAVELLIANISM: THE DOCTRINE OF RAISON D’ETAT AND ITS PLACE IN MODERN HISTORY 316 (Douglas Scott tran., London 1957); SIR HAROLD NICOLSON, GOOD BEHAVIOUR: A STUDY OF CERTAIN TYPES OF CIVILITY 107 (London 1955) (“The idea of glory for glory’s sake never pushed deep roots into the thick soil of the English character. Yet in France such words as ‘gloire’ and ‘panache’ possess even today a certain sentimental value.”).
what to refuse; and when the counsels of a great country give way in a single instance, when they are once inclined to submission, every step accelerates the rapidity of their descent.\textsuperscript{110}

Otherwise pacific, Charles James Fox likewise believed: ‘Among individuals, and much more among nations, honour is the most essential means of safety, as it is the first, and I had almost said the only legitimate ground of war.’\textsuperscript{111}

Showing Napoleon III and William I with foils, \textit{Punch} portrayed the ‘point of honour’ and the duel as the metaphor for the war which France began against Prussia in July 1870.\textsuperscript{112} Prussia’s Chancellor Otto von Bismarck took lifelong pride in having won twenty-five student duels.\textsuperscript{113} This fact must be recalled in connection with the famous Ems telegram which he edited so as to produce the abrupt tone which was—according to the then prevailing code of honour (\textit{Ritterkodex})—tantamount to declaring war.\textsuperscript{114} With precisely this in mind, Britain’s Foreign Secretary Lord Granville said it was “inconceivable that, in the present state of civilisation, hundreds of thousands of Frenchmen should be hurled against like numbers of Germans, on a point limited to a matter of etiquette.”\textsuperscript{115} Also with reference to the Franco-Prussian War, Granville said: “It is sometimes useful to compare the action of nations and that of individuals, and very often the conduct of a high-spirited nation and of an honourable man is very much the same.”\textsuperscript{116} This discourse of honour was continued by the German Crown Prince Frederick: “It would surely be no shame to France that has fought bravely, to confess at last that she has been beaten by an Army equal to hers. No one would accuse France of cowardice, or believe that her military honour had not had justice done to it.”\textsuperscript{117}

The duel metaphor was also used by Prime Minister Disraeli to portray Foreign Secretary Granville’s conduct at the 1870-71 London Conference revising the 1856 Paris Treaty’s Black Sea clauses:

Why, the noble Lord went there to vindicate the honour and the interests of his country; and if the Russian Ambassador had refused the compensation which he demanded it would have been the noble Lord’s duty to coerce the Power which had first outraged England, and then refused to do the only act which the noble

\begin{footnotes}
\footnotetext[110]{110. Letter to the Printer of the \textit{Public Advertiser}, Jan. 30, 1771, No. 42, see 2 \textit{THE LETTERS OF JUNIUS} 48, \textit{supra note} 53; characterized by \textit{AYLING}, \textit{supra note} 53, at 164.}
\footnotetext[111]{111. Nov. 3, 1801, Commons, 36 \textit{PARLIAMENTARY HISTORY OF ENGLAND} 72.}
\footnotetext[112]{112. \textit{See} \textit{A Duel to the Death}, in \textit{59 Punch} 37 (Jul. 23, 1870) (France to Britannia: “Pray stand back, Madam. You mean well; but this is an old family quarrel, and we must fight it out!”).}
\footnotetext[113]{113. \textit{See \textit{GAY}}, \textit{supra note} 16, at 258.}
\footnotetext[114]{114. \textit{See} \textit{GOLO MANN, DEUTSCHE GESCHICHTE DES 19. UND 20. JAHRHUNDERTS} 379 (Frankfurt am Main 1958); \textit{KOPPEL S. PINSON, MODERN GERMANY: ITS HISTORY AND CIVILIZATION} 144-46, and 589 n.31 (New York 1955).}
\footnotetext[115]{115. Letter from Granville to Queen Victoria, Jul. 15, 1870, 2 LQV 35 (2nd ser.).}
\footnotetext[116]{116. 203 \textit{PRAIR. DEB.} (3d ser.) (1870) 1754.}
\footnotetext[117]{117. German Crown Prince to Queen Victoria, Jan. 3, 1871, 2 LQV 101-02 (2nd ser.).}
\end{footnotes}
Lord could devise in order to remove that stain on her reputation.  

In the Annual Message to Congress (1905), President Theodore Roosevelt proved that honour's rhetoric was not limited to Europe: "This mighty and free Republic should ever deal with all other States, great or small, on a basis of high honor, respecting their rights as generously as it safeguards its own." He believed that "if war is necessary and righteous then either the man or the nation shrinking from it forfeits all title to self-respect." A year later, he told Congress that "honorable men" and an "honorable nation" must choose to fight rather than buy peace through "sacrifice of conscientious conviction or of national welfare." He said "a beaten nation is not necessarily a disgraced nation; but the nation or man is disgraced if the obligation to defend right is shirked." Referring to the 1898 Spanish-American War, Roosevelt in 1917 reflected: "I believe that war should never be resorted to when or so long as it is honorably possible to avoid it. I advocate preparation for war in order to avert war, and I should never advocate war unless it were the only alternative to dishonor.

"Nations and States can achieve no loftier consummation than to stake their whole power on upholding their independence, their honour, and their reputation." With these words, German soldier, historian and diplomat Friedrich von Bernhardi (1849-1930) argued that the State has both the right and the duty to make war: "If sometimes between individuals the duel alone meets the sense of justice, how much more impossible must a universal international law be in the wide-reaching and complicated relations between nations and States!" He insisted that: "Even if a comprehensive international code were drawn up, no self-respecting nation would sacrifice its own conception of right to it. By so doing it would renounce its highest ideals; it would allow its own sense of justice to be violated by an injustice, and thus dishonour itself." Recalling Frederick the Great, Bernhardi argued: "Cases may occur where war must be made simply as a point of honour, although there is no prospect of success."

118. 232 PARL. DEB. (3d ser.) (1877) 725; Arts. 11 and 13, General Treaty for the Re-establishment of Peace between Austria, France, Great Britain, Prussia, Sardinia and Turkey, and Russia, Mar. 30, 1856, in 114 CTS 414-15.  
119. 5th Annual Message to Congress, Dec. 5, 1905, see A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1908 1150, 1152 (James D. Richardson ed., vol. 11, Bureau of National Literature 1908) [hereinafter Messages and Paper]; SIR NORMAN ANGELL, THE GREAT ILLUSION: A STUDY OF THE RELATION OF MILITARY POWER IN NATIONS TO THEIR ECONOMIC AND SOCIAL ADVANTAGE 139 (3d ed., Toronto 1911) (quoting President Roosevelt at Stationers' Hall, London, stating "We despise a nation just as we despise a man who submits to insult. What is true of a man ought to be true of a nation.").  
121. THEODORE ROOSEVELT, NATIONAL STRENGTH AND INTERNATIONAL DUTY 15 (Princeton 1917).  
123. BERNHARDI, supra note 122, at 25.  
124. Id. at 46-47.
Seeing the word *honneur* in the French text of the Preamble to the League of Nations Covenant, Oxford University Professor of International Relations Alfred Eckhard Zimmern (1879-1957) reflected: “*Honneur* suggests not ‘fair play’, with its spacious tolerance and comfortable associations with the world of sport, but the rigorous punctilio of the tournament and the duel.” Indeed, European foreign policy before 1914 was frequently formulated and executed by individuals who dueled or subscribed to the cult of dueling. According to Edinburgh University History Professor Victor Kiernan: “Just as the duelist claimed exemption in his chosen sphere from ordinary law, monarchs ... and almost equally the small cliques in control of foreign policy ... set their ‘honour’ above the common welfare of mankind.” Statesmen and duellists shared an obsession with peer standing that caused Kiernan to comment: “None of the diplomats and generals of 1914 could risk appearing the first to give way, any more than duellists could resist the pressure of social opinion.” It is difficult to escape the conclusion that, before 1914, the State was personified as a nobleman with a sense of honour, and that foreign relations were seen through the prism of the cult of honour accepted among gentlemen.

**I. Was Honour a Cause of the First World War?**

Looking at power structures, German sociologist Max Weber (1864-1920) pointed to prestige as a factor influencing foreign policy: “Prestige of power, as such, means in practice the glory of power over other communities; it means expansion of power, though not always by way of incorporation or subjection.” He saw the Great Powers as large, status-seeking political communities naturally challenging all other possible prestige bearers. On the eve of the First World War, Weber wrote:

> Experience teaches that claims to prestige have always played into the origins of wars. Their part is difficult to gauge; it cannot be determined in general, but it is very obvious. The realm of ‘honour’ which is comparable to the 'status order' within a political structure, pertains also to the interrelations of political structures.

Rejecting economic determinism, Fukuyama relies on interpretations of German philosopher Georg Wilhelm Friedrich Hegel (1770-1831) for the proposition that the “motor of history” is man’s desire for recognition, which along with “the accompanying emotions of anger, shame, and pride, are parts of the human personality critical to political life.” Fukuyama’s explanation of the development of international politics points to what amounts to honour:

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126. See GAY, supra note 16 at 258; MCALEER, supra note 90 at 34-35.
127. KIERNAN, supra note 98 at 316-17.
The desire for recognition that led to the original bloody battle for prestige between two individual combatants leads logically to imperialism and world empire. The relationship of lordship and bondage on a domestic level is naturally replicated on the level of states, where nations as a whole seek recognition and enter into bloody battles for supremacy.\(^1\)

Fukuyama sees the 1914-18 war as a battle for pure prestige. He invokes Platonic *thymos*—the soul’s spirited element offering courage, fierceness, and indignation tied to a sense of honour—to dub the war, a classic thymotic struggle.\(^2\) Joining historians pointing to the mass exhilaration that greeted the war’s outbreak, Fukuyama diagnoses an honour-related syndrome, a *megalothymia* (exuberance) of nations seeking “recognition of their worth and dignity” and of individuals rebelling against the *isothymia* (boredom) of everyday life.\(^3\) His focus on *thymos* coincides with the many references to honour in August 1914.\(^4\) This approach is particularly pertinent to the prestige orientation of both Austria-Hungary and Russia, the States most *directly* responsible for the catastrophe.

“You see in me the last monarch of the old school,” said eighty-year-old Habsburg Emperor Francis Joseph to former U.S. President Roosevelt.\(^5\) Indeed, honour and duty were central themes in Francis Joseph’s increasingly fatalistic understanding of statecraft:\(^6\)

The honour of the Monarchy [i.e. Austria-Hungary] still held pride of place in Franz Joseph’s *Weltanschauung*. And in a sense his policy was the same after 1866 [Austria’s defeat by Prussia] as before—to defend his position as long as possible, to do his duty, and if that failed, to go down with honour. But it was nevertheless for the emperor to judge when the honour of the Monarchy was being openly challenged. After 1866 he was

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2. See Fukuyama, supra note 5, at vi-vii; The Republic of Plato 63 (Francis MacDonald Cornford, ed., Oxford 1941); “This term [thymos] covers a group of impulses manifested in anger and pugnacity, in generous indignation allied to a sense of honour and in competitive ambition. Its virtue is courage.”
simply more long-suffering and more reluctant to go to war than in his earlier years. It was not until 1914 that he despaired of maintaining the honour of the Monarchy by diplomatic means.\textsuperscript{135}

After Serbian nationalist Gavrilo Princip killed the Habsburg heir apparent, retaliation was endorsed by Francis Joseph who knew that resort to arms would probably trigger a European war that might destroy Austria-Hungary.\textsuperscript{136} His ancien régime logic he explained to General Staff Chief Conrad von Hertzendorf: “If the Monarchy is already doomed, at least it ought to go down honourably (anständig).”\textsuperscript{137} The Sarajevo assassination caused Conrad to write in the same vein: “It will be a hopeless struggle, but nevertheless it must be, because such an ancient monarchy and such an ancient army cannot perish ingloriously.”\textsuperscript{138} After Francis Joseph declared war on Serbia, he asked his peoples to make “sacrifices for the honour, the majesty, the power of the Fatherland.” Justifying recourse to force, he explained: “The machinations of a hostile power, moved by hatred, compel me after many long years of peace to take up the sword to preserve the honour of my Monarchy...”\textsuperscript{139} Similarly, German Emperor William II called on his people to “stand, in resolute fidelity, by our ally,” Austria-Hungary “which is battling for its reputation as a great power, and with whose humiliation our power and honor, too, would be lost.”\textsuperscript{140}

Prestige was also crucial to Russia, trying to regain standing among the Great Powers after humiliating defeats in the 1904-05 Russo-Japanese War and the 1908-09 Bosnian annexation crisis. “We will not let ourselves be trampled upon,” said Russian Emperor Nicholas II in January 1914 to French Ambassador Théophile Delcassé.\textsuperscript{141} Upholding national honour drove Russia to support Serbia said British historian Dominic Lieven:

To understand why Russia went to war in 1914 it is... necessary to grasp the

\textsuperscript{135} F.R. BRIDGE, FROM SADOWA TO SARAJEWO: THE FOREIGN POLICY OF AUSTRIA-HUNGARY, 1866-1914 12 (London 1972).

\textsuperscript{136} See GEORGE R. MAREK, THE EAGLES DIE: FRANZ JOSEPH, ELISABETH AND THEIR AUSTRIA 441-42, 454-55 (New York 1974). Told Germany would be true even if Austria-Hungary’s planned attack on Serbia triggered “the big war” with France and Russia, Francis Joseph said “Now we can no longer turn back. It will be a terrible war.” See LUIGI ALBERTINI, 2 THE ORIGINS OF THE WAR OF 1914 142 (Isabella M. Massey trans., London 1953).

\textsuperscript{137} VIKTOR BIBL, 2 DER ZERFALL ÖSTERREICHS: VON REVOLUTION ZU REVOLUTION 498-99 (Vienna 1924); Francis Joseph repeated remarks circling around the words “to do one’s duty and—if it must be—to go down with honour [Ehre], see ENGEL-JANOSI, supra note 133, at 22; DEÁK, supra note 98, at 75 (“The final responsibility for what happened... lay with Francis Joseph, who... sensing that the monarchy was doomed, nevertheless consented to the issuing of an unacceptable ultimatum. He signed the fatal mobilization order so as to preserve the dignity of the house.”).


\textsuperscript{140} Appeal to the German People, Aug. 6, 1914, see GAY, supra note 16 at 515.

\textsuperscript{141} See FIGES, supra note 131 at 249.
values and mentality of the Russian ruling élites, including Nicholas II. In old regime Europe the nobleman was brought up to defend his public reputation and honour at all costs, if necessary with sword in hand. The ethic of the duel still prevailed in aristocratic and, in particular, military circles. No crime was worse than cowardice. Kings, aristocrats and generals were not used to being pushed about or humiliated. In contemporary parlance, they had a short fuse.

On war's outbreak, Nicholas II proclaimed that it was imperative "to protect the honour, dignity and safety of Russia and its position among the Great Powers." 142

Honour was also targeted by its critics. For example, Norman Angell (1874-1967) wrote (1910) *The Great Illusion*—an anti-war best seller deriding the idea of national honour and deploring the survival of the *code duello*, then "maintained as vigorously as ever in the relations of States." 143 This critical current flowed in Parliament on the eve of Britain's entry into the First World War. Labour Party Leader James Ramsay Macdonald argued:

There has been no crime [i.e. going to war] committed by statesmen of this character without those statesmen appealing to their nation's honour. We fought the Crimean War because of our honour. We rushed to South Africa because of our honour. The right hon. Gentleman [Foreign Secretary Sir Edward Grey] is appealing to us today because of our honour. 144

Exactly this view was echoed by Independent Labour Party Chairman James Keir Hardie. 145 Similarly, Liberal MP Sir William Byles said:

It is not a war to defend our hearths and homes. If it were I could understand this exultation. It is to defend our honour. . . . It is for honour that a German duellist fights his fellow officer. Whether he kills his opponent or is killed by him, honour is revenged. So it is to be now. We are to hire a number of men, a number of soldiers, to go and blow out the brains of another number of men, to vindicate our honour. 146

For Liberal MP John Annan Bryce, going to war was "a regular house that Jack built" because "we have the French joining the Russians on a point of honour and we are joining the French on a point of honour." 147

143. ANGELL, supra note 119, at 175-79.
144. 65 PARL. DEB., H.C. (5th ser.) (1914) 1830.
145. See id. at 1841.
146. Id. at 1873.
147. 65 PARL. DEB., H.C. (5th ser.) (1914) at 1876.
Prime Minister Asquith told Parliament that Belgium had refused Germany's August 2nd demand for "free passage through Belgian territory" as a "flagrant violation of the law of nations," a phrase pointing to infringement of Belgian sovereignty as a contravention of customary international law. This interpretation coincided with German Chancellor Theobald von Bethmann Hollweg's astonishing Reichstag admission that Germany's August 4th march into Belgium was an Unrecht (wrong, tort, delinquency) which "violates the precepts of international law." Treaty obligation aside, this customary law contravention was—according to international law as it was in 1914—merely matter for a bilateral dispute between Belgium and Germany. As for Britain's becoming a party to the dispute, her locus standi arose from the invasion's being simultaneously a violation of the neutrality guaranteed by the 1839 London agreements to which Britain was party. The fact that Britain's casus belli was breach of treaty understandably provoked discussion about the nature of treaty obligation which was consistently portrayed not as a matter of law, but of honour.

The consensus was that treaty obligation arose from a "good faith" promise, of which fulfillment was a matter of national honour, abandonment a national disgrace. A distinguished barrister, Asquith justified going to war to uphold the 1839 treaties:

If I am asked what we are fighting for I reply in two sentences. In the first place, to fulfil a solemn international obligation, an obligation which, if it had been entered into between private persons in the ordinary concerns of life, would have been regarded as an obligation not only of law but of honour, which no self-respecting man could possibly have repudiated. I say, secondly, we are fighting to vindicate the principle...

148. Id. at 1926.
149. Aug. 4, 1914, see MANN, supra note 114, at 577 ("Unsere Truppen haben Luxemburg besetzt, und vielleicht schon belgisches Gebiet. Das wiederspricht den Geboten des Völkerrechts .... Das Unrecht, das wir damit tun, werden wir wieder gutmachen, sobald unseres militärisches Ziel erreicht ist.").
150. Austria, France, Great Britain, Prussia and Russia guaranteed Belgium's neutrality in two 1839 treaties with the Netherlands and Belgium respectively, see 88 CTS 411-26; for 1870 and 1908 legal opinions, see 8 BRITISH DOCUMENTS ON THE ORIGINS OF THE WAR 1898-1914 371-79 (G. P. Gooch & Harold Temperley eds., London, 1932).
that small nationalities are not to be crushed, in defiance of international
good faith [i.e. *pacta sunt servanda*], by the arbitrary will of a strong and
overmastering Power.152

Asquith characterized as "infamous," "betrayal" and "dishonour of our
obligations" the proposal that Britain acquiesce in Germany’s march through
Belgium.153

Foreign Secretary Sir Edward Grey had studied law at Oxford University. He
recalled the government’s commitment that there would be “no secret
engagement” foisting “an obligation of honour upon the country.”154 A clear
picture of treaty obligation emerges from his description of the Franco-Russian
alliance:

I can say this with the most absolute confidence—no Government and no
country has less desire to be involved in war over a dispute between
Austria and Servia than the Government and country of France. They are
involved in it because of their obligation of honour under a definite
alliance with Russia. Well, it is only fair to say to the House that that
obligation of honour cannot apply in the same way to us. We are not
parties to the Franco-Russian Alliance. We do not even know the terms of
that Alliance. So far I have, I think, faithfully and completely cleared the
ground with regard to the question of obligation.155

Although the 1839 London Treaties guarantying Belgium’s neutrality were
the crux of debate, a “legal” obligation to help Belgium was not mentioned.
Rather the issue was whether the treaties had engaged Britain’s honour—posing
the terrible sanction of dishonour. Grey said: “If in a crisis like this, we run away
from those obligations of honour and interest as regards the Belgian Treaty . . . we
should, I believe, sacrifice our respect and good name and reputation before the
world.”156 This reasoning was supported by Conservative Opposition Leader
Andrew Bonar Law who spoke of “honour and security.”157 However, Labour
Party Leader Macdonald asked “whether the country is in danger.” Ignoring
treaties, Macdonald said neutrality alone is “in the deepest parts of our hearts”
consistent with the honour of the country and of the Liberal Party.158

contemptible if it should sit by and see this treaty violated. Its position would be
gone if Germany were thus permitted to dominate Europe.”159 Grey’s memoirs
repeated the theme of dishonour: “The real reason for going into the war was that,

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152. 65 PARL. DEB., H.C. (5th ser.) (1914) 2079.
153. Id. at 2076-77.
154. 65 PARL. DEB., H.C. (5th ser.) (1914) 1810.
155. Id. at 1814-15.
156. Id. at 1823-25.
157. Id. at 1828.
158. Id. at 1830-31.
Page & Co. 1922).
if we did not... stand up for Belgium against this aggression, we should be isolated, discredited, and hated; and there would be before us nothing but a miserable and ignoble future.”

Similarly, Britain’s Ambassador in Berlin pointed to honour to explain why England was willing to fight for the 1839 treaties:

In the same way, as he [Bethmann Hollweg] and [Foreign Minister] Herr [Gottlieb] von Jagow wished me to understand that for strategical reasons it was a matter of life and death to Germany to advance through Belgium and violate her neutrality, so I would wish him to understand that it was, so to speak, a matter of ‘life and death’ for the honour of Great Britain that she should keep her solemn engagement to do her utmost to defend Belgium’s neutrality if attacked. That solemn compact simply had to be kept, or what confidence could anyone have in engagements given by Great Britain in the future?

The link between treaty performance and honour was not just an élite perception, but widespread among that generation of Englishmen. London University Professor of French History, Alfred Cobban (1901-1968) said: “In 1914 there was still a general expectation that treaties would be kept until they were formally denounced. It is difficult to think back now to a time when the German disregard of Belgian neutrality was regarded as a shattering blow to normal conventions of international behaviour.” Poet Rupert Brooke (1887-1915) then thought Belgium “a thousand times enough” to fight for, and poet and writer Robert Graves (1895-1985) later recalled having been “outraged to read of the cynical violation of Belgian neutrality.” Streaming to the colours, recruits believed they were doing the right thing: “Few young English officers doubted that Germany had broken the code of European nations and deserved to be punished.” This violation of the 1839 treaties was condemned by British public opinion as a dishonourable breach of faith—a transgression helping religious denominations portray the Allied cause as a 20th century crusade.

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163. ALFRED COBBAN, 3 A HISTORY OF MODERN FRANCE 106 (Baltimore 1965).
166. See Lillian M. Penson, Obligations by Treaty: Their Place in British Foreign Policy, 1898-1914, in STUDIES IN DIPLOMATIC HISTORY AND HISTORIOGRAPHY IN HONOUR OF G.P. GOOCH 87 (Arshag Ohan Sarkissian ed., London 1961); ALBERT MARRIN, THE LAST CRUSADE: THE CHURCH OF ENGLAND IN THE FIRST WORLD WAR 131-32, 221, 251 (Durham N.C., 1974); HUBERT GEBELE, DIE PROBLEME VOM KRIEG UND FRIEDEN IN GROßBRITANIEN WÄHREND DES ERSTEN WELTKRIEGS:
K. Was "National Honour" Recognized by International Law?

Although our own fin de siècle finds appeals to honour pompous, affected and even ridiculous, pre-1914 juridical discourse abounds with sincere references to "honour" in speeches, diplomatic papers, private correspondence, books and treaties. Such language was not merely rhetorical because customary international law then recognized that a country had a "right to reputation," i.e. respect for its moral and juristic personality, including "the right to demand satisfaction for an offence against its honour."167 Scottish advocate and Glasgow judge, James Reddie (1773-1852) included among a nation's general permanent attributes its "national honour" or "reputation" defined as:

the right of a nation to the maintenance of its honour, character, and reputation—a right which is so difficult to define in the abstract; but which, in the concrete, and in the particular case, is so easily understood and felt, and the maintenance of which is so conducive to the security and prosperity of a nation.168

This "right to respect" was also described by Alphonse Pierre Octave Rivier (1835-1898) who was a Swiss diplomat and Professor of International Law at Brussels University: "The State's moral character, dignity, honour, credit, and good reputation are as much elements of its personality as its physical, economic and juridical condition. The State has the right to keep them intact against any slur."169 Similarly, the British editor of the Commentary of U.S. jurist James Kent (1763-1847) identified as the primary objects of international law, "the independence of nations, the inviolability of their several territories, and the maintenance of their honour."170 This kind of thinking helped 19th century States justify using force to defend their honour. For example, national dignity was offended by Venezuelan President de Castro's 1908 dismissal of Dutch Minister Resident de Reuss. In reprisal, Dutch cruisers captured two Venezuelan public ships which were held pending apology.171

Just as the aristocrat refused "to remit to the courts the settlement of his affairs of honour," so national honour was generally regarded as a matter of paramount concern beyond the bounds of arbitration.172 According to Argentine international lawyer, diplomat and historian Carlos Calvo (1824-1906):

REGIERUNG, PARTEIEN UND ÖFFENTLICHE MEINUNG IN DER AUSEINANDERSETZUNG ÜBER KRIEGS- UND FRIEDENZIELE 46 (Frankfurt 1987).
167. JOHANN KASPAR BLUNTSCHLI, EL DERECHO INTERNACIONAL CODIFICADO bk. II, § 85 at 95 (José Díaz Covarrubias trans. Mexico City, 1871).
168. JAMES REDDIE, INQUIRIES IN INTERNATIONAL LAW PUBLIC AND PRIVATE 198 (2d. ed. Edinburgh 1851).
169. ALPHONSE RIVIER, 1 PRINCIPES DU DROIT DES GENS 260 (Paris 1896).
170. See KENT, COMMENTARY, supra note 40, at 3.
171. See LASSA FRANCIS LAWRENCE OPPENHEIM, 2 INTERNATIONAL LAW § 34 at 40 and § 37 at 43 (2d. ed. London 1912).
172. See Honor and Social Status, supra note 4, at 30-31; KJERNAN, supra note 98, at 316: "What the duel had been for gentlemen... war was now for rulers who were infecting their peoples with the belief that it would be shameful to surrender 'national honour' to international laws or courts."
"Arbitration can settle every species of difference except those in which honor and national dignity are directly in play and which arise from a personal sentiment which no third state can properly judge, each nation being the sole judge of its dignity and the rights which guarantee its safety."173 The International Law Association’s 1893 arbitration plan accordingly distinguished arbitrable disputes from those involving national honour and independence.174 In 1896, British Prime Minister Lord Salisbury weighed the possibility of “establishing a system of international arbitration for the adjustment of disputes” with the United States. Sending to Washington the outline of a stillborn arbitration treaty, Salisbury noted: “Neither Government is willing to accept arbitration upon issues in which the national honour or integrity is involved.”175 Hardly surprising, therefore, was the inclusion in the 1899 Hague Convention for the Pacific Settlement of International Disputes of a provision limiting fact-finding commissions to “disputes of an international character involving neither honour nor vital interests.”176 Referring to the new Permanent Court of Arbitration at the Hague, Britain and France made (1903) an agreement excluding from compulsory arbitration, differences affecting “the vital interests, the independence, or the honour of the two Contracting States.”177 Although the Anglo-French treaty was hardly the first to exclude disputes affecting national honour,178 the tripartite exception—or variations thereof—was replicated in subsequent British and French treaties with other countries, and adopted by the United States and other States for many of the bilateral arbitration conventions signed before the First World War.179

L. Was Dishonour International Law’s Sanction?

Lincoln’s Inn barrister Mountague Bernard (1820-1882) was Professor of


174. See HINSLEY, supra note 81, at 138.


176. Art. 9, Convention for the Pacific Settlement of International Disputes, Jul. 29, 1899, in 187 CTS 415. The Article 9 “honour” exception originated with Russia, see 1 INSTRUCTIONS TO THE AMERICAN DELEGATES TO THE HAGUE PEACE CONFERENCES AND THEIR OFFICIAL REPORTS 306 (James Brown Scott ed. New York 1916) [hereinafter HAGUE PEACE CONFERENCES].

177. Art. 1, Agreement between France and Great Britain for the Settlement by Arbitration of Certain Classes of Questions which may arise between the two Governments, Oct. 14, 1903, in 194 CTS 194-95.

178. For example, disputes affecting “either the national honour or the national independence” are excluded by Article 1 of the Arbitration Treaty between Mexico and Spain, Jan. 11, 1902, in 190 CTS 334.

179. Re this self-judging “honour” clause, see 1 HAGUE PEACE CONFERENCES, supra note 176 at 78 and 329; HUDSON, INTERNATIONAL TRIBUNALS 7, 77; for the formula applied, see Article 1, Arbitration Convention between France and Italy, Dec. 25, 1903, in 194 CTS 365; and 206 CTS, Article 1 of U.S. treaties with Mexico (288-289), Italy (354), Britain (360), Norway (363-364), Portugal (368-369), and Spain (418-419).
International Law and Diplomacy at Oxford University. From the perspective of 19th century international law, he opined: “Honour—which in its higher sense means self-respect, in its lower sense respect for the opinion of a particular class—may and does help to supply, among nations as among individuals, the absence of those sanctions which wait upon municipal law.” Similarly, Yale University President Theodore Dwight Woolsey (1801-1889) included among international law’s sanctions each State’s “moral sentiment” as “a considerable and an increasing force... which comes into the recesses of palaces and cabinets; and which sometimes speaks in threatening tones against gross wrongs.” He believed that a whole country’s population could feel the sting of a national insult, and sense “the loss of a good name upon intercourse with other states, as well upon that self-respect which is an important element in national character. . . . Without such a value set on reputation, fear of censure could not exist, which is one of the ultimate bulwarks of international law.”

Sounding a more positive note, Swiss jurist Johann Kaspar Bluntschli (1808-1881) argued: “Any State—even the most powerful—will appreciably gain in honour before God and man, if it is found to be loyal and sincere in its respect for and compliance with the law of nations.”

In 1908, U.S. Secretary of State Elihu Root told the American Society of International Law that the conduct of States was judged by “the general opinion of the world” and that governments “dread the moral isolation created by general adverse opinion and unfriendly feeling.” This, the principal sanction of international law, he described through comparisons with his own domestic society, which from today’s perspective appears astonishingly preoccupied with propriety and honour—in Root’s words, “social esteem and standing, power and high place.” To deter against anti-social behaviour, he downplayed the role of “sheriff and policeman” and highlighted reputation as “nearly everything for which men strive in life.” So, in international relations, Root deprecated the sanction of war and focused on “the power of international opinion.” In essence, he believed that States are subject to “recognized rules of right conduct,” violation of which results in discredit and debilitating ostracism—“a nation which rests under the world’s condemnation is weak, however great its material power.”

M. The Rise of the Legal Paradigm

Former U.S. Secretary of State Henry Kissinger recently remarked: “World War I started not because countries broke their treaties, but because they fulfilled them to the letter.” His critique is that “every country was concerned above all
with living up to formal treaty obligations rather than to an overall concept of long-range common interest."\(^{185}\) However, the 1914-18 generation’s assessment was entirely opposite. Contemporaries were certain that failure to observe treaty obligations—or rather the absence of international machinery to compel treaty performance—had been the States’ system’s cardinal defect.\(^{186}\) They saw this as the lacuna that enabled Bethmann Hollweg to say “scrap of paper” for the 1839 London Treaty guarantying Belgium’s neutrality.\(^{187}\)

In repudiating the discredited honour-based diplomacy of kings, the 1914-18 generation had nowhere to turn but to a legal paradigm. This was a natural reflex because of the fundamental polarity between cultures of honour and legality.\(^{188}\) No longer willing to perpetuate the ancien régime, the middle class reached for the nearby analogies of domestic law—a realm entirely comfortable because the centuries-old legal profession had always had a bourgeois ethos.\(^{189}\) This borrowing was specifically advocated by France’s Prime Minister Georges Clemenceau. He expressed solidarity “with President Wilson who, by establishing the foundations of the League of Nations, has had the honor of transferring the essential principles of national law into international law.”\(^{190}\) Lawyers—including Wilson, British Prime Minister David Lloyd George and Italian Prime Minister Vittorio Emanuele Orlando—were prominent among the League’s founding fathers and a “legal, or rather legalistic, conception of international conflict” was embodied in the Covenant.\(^{191}\)

\(^{185}\) Henry Kissinger, *Diplomacy* 211 (Simon & Schuster 1994); for the alliance system’s ossification, see Klaus Hildebrand, *The Crisis of 1914*, in *German Foreign Policy from Bismarck to Adenauer* 90-93 (Louise Willmot trans., London 1989); Charles S. Maier, *Wargames: 1914-1919*, in *The Origin and Prevention of Major Wars* 254 (Robert I. Rotberg & Theodore K. Rabb eds., Cambridge Univ. Press 1989) (“It ... was not the binding nature of the alliances, but the possibility for defection, that proved more destabilizing. Vienna and St. Petersburg sought assurances beyond the letter of the texts, needed demonstrative state visits, and pursued pledges of support—and, in 1914, extracted them because Paris and Berlin feared that they would seem indifferent.”).

\(^{186}\) See *Taylor*, supra note 151, at 535-37. For adding international sanctions to the States’ system, see Hidemi Suganami, *The Domestic Analogy and World Order Proposals* 79-93 (Cambridge Univ. Press 1989).

\(^{187}\) Bethmann Hollweg said “Just for a word ‘neutrality’ a word which in wartime had so often been disregarded—just for a scrap of paper, Great Britain was going to make war on a kindred nation which desired nothing better than to be friends with her.” See No. 671, Letter from Sir Edward Goschen to Sir Edward Grey, Berlin, Aug. 6, 1914, 11 British Documents on the Origins of the War 351, supra note 122; *Diary of Edward Goschen, Appendix B: ‘A Scrap of Paper’*, supra note 161, at 298-302.

\(^{188}\) See *Honour and Social Status*, supra note 4, at 30-31, 510; Bernhardi, supra note 122, at 24-28; McAleer, supra note 90, at 30; *German Officer-Corps*, supra note 3, at 117-38; Deák, supra note 98, at 128-38.


Despite, or because of, Britain's complex global position, the Foreign Office assumed "diplomacy could solve most problems that arose in world affairs." In this context, pre-1914 British diplomacy was exceptionally committed to the principle of dispute settlement via arbitration. Viewing international relations as "consciously ruled by law," the Foreign Office had a marked "respect for legality." This characteristically British attitude, as ultimately expressed in the League of Nations as a war aim, reminded Cambridge University historian Herbert Butterfield (1900-1979) of the declining Habsburg Monarchy in the age of Metternich. The meaning of this unflattering comparison is elucidated by Kissinger's reflection: "Because law is the expression of the status quo, Austria stood for... the necessity of law and the sanctity of treaties." Such a realist critique sees peace treaties, like those of 1815 and 1919, as the codification of the outcome of the last hegemonic war, when the paramount power won legitimacy for its right to rule. This observation by Princeton University's Robert Gilpin is useful alongside A.J.P. Taylor's remark that the ideological exigencies of the First World War gradually drove the Entente Powers, "rather against their will, to the doctrine of an international order, based upon law instead of upon force." Fighting for survival as a Great Power, Britain in particular moved ever closer to the doctrine of "the rule of law" as a response to Germany's astonishing strength.

N. Was the United States Cooler to the Legal Paradigm?

Kissinger says the premise that the States' system should be governed by international law is a deep-rooted U.S. idea tied to the belief that the same ethical principles should regulate relations between countries and between individuals. However, official Washington was slower than London to abandon the rhetoric of honour for that of law. This reluctance is explained by several considerations. First, expanding the rule of law in international affairs was less urgent for the United States as a rising power than for Britain in decline. Second, the Wilson administration came later to detailed thinking about war aims because the United

192. KENNEDY, supra note 81, at 231.
194. For the League of Nations as a Metternichian "attempt to freeze the status quo," see HERBERT BUTTERFIELD, CHRISTIANITY, DIPLOMACY AND WAR 115-116 (Abingdon-Cokesbury Press 1953).
195. HENRY A. KISSINGER, A WORLD RESTORED: THE POLITICS OF CONSERVATISM IN A REVOLUTIONARY Age 7 (Grosset & Dunlap 1964).
196. See GILPIN, supra note 9, at 34; BERNHARDI, supra note 122, at 25-27.
197. See TAYLOR, supra note 151, at 535-537; KENNEDY, supra note 81, at 209-215, 231; EKSTEINS, supra note 96, at xv ("Britain was, in fact, the major conservative power of the fin-de-siècle world. First industrial nation, agent of the Pax Britannica, symbol of an ethic of enterprise and progress based on parliament and law, Britain felt not only her pre-eminence in the world but her entire way of life threatened by the thrusting energy and instability Germany was seen to typify.").
199. For the United States' geopolitical position, see, KISSINGER, supra note 185, at 18, 20, 30-39; on Britain's decline, see id. at 38; GILPIN, supra note 9, at 194-97; KENNEDY, supra note 81, at 224-32; WILSON, supra note 151, at 70-74.
States was neutral until April 1917. Third, the Senate’s constitutional role in treaty making taught presidents that firm commitments are less easily ratified than undertakings with broad exceptions, such as those referring to national honour. Wilson himself was certain the Senate would reject any treaty committing the United States to go to war pursuant to a decision by other countries or an international body. Finally, Wilson—perhaps due to his sad experience as an Atlanta lawyer—was antipathetic to the practising profession and quick to reject legalism. He said lawyers “as a rule immediately tie their hands or powers up in technical legal limitations.”

Wilson’s ambivalent attitude to law must also be seen in the light of U.S. politics. On the one side was the focus on democracy and social justice of U.S. “progressive internationalists” like Wilson who was a Democrat; on the other side, the legalism of “conservative internationalists” like Elihu Root and ex-President William Howard Taft who were Republicans. Believing law to be just one of the tools for upholding morality and realizing human progress, Wilson still “preferred to rely upon ‘diplomatic adjustment’ rather than ‘strict legal justice’ in resolving international disputes.” Thus, his idea for a League of Nations focused less on devising foolproof machinery for dispute settlement and collective security and more on opening a permanent political forum for the expression and coordination of world public opinion—the key Wilsonian concept. His plans were therefore developed with non-lawyer Colonel Edward Mandell House, rather than with Secretary of State Robert Lansing, an international lawyer whose

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201. Letter from Wilson to Edward Mandell House, Mar. 22, 1918, 47 PWW 105, supra note 200; William H. Taft re: Mar. 28, 1918 meeting with Wilson, id. at 200-201; for Wilson’s strenuous efforts to portray the League Covenant as a “moral, not a legal, obligation,” see Conversation with Members of the Senate Foreign Relations Committee, Conference at the White House, Aug. 19, 1919, 62 PWW 343, 350-351, supra note 200.


204. Jan. 8, 1919, quoted by U.S. Secretary of State Robert Lansing. See 54 PWW 4, supra note 200.


206. DUNNE, supra note 202, at 21.

“legalistic opinions” were distasteful to Wilson.\textsuperscript{208}

Although Wilson’s speeches frequently referred to international law, he never abandoned the discourse of honour. For example, in May 1916 Wilson talked about a “new and more wholesome diplomacy” resting on “the same high code of honour that we demand of individuals.”\textsuperscript{209} His April 1917 war message to Congress twice referred to the future world organization as a “League of Honour.”\textsuperscript{210} Honour also featured in his July 10, 1919 explanation of the League Covenant: “There is no provision for military action except upon advice of the [League] Council, advice given to the several governments. Of course it follows that the several governments will take that advice or not, as they please, and it will be a matter of honor with them whether they will or not. There is no legal obligation.”\textsuperscript{211} However, Wilson’s yardstick for measuring national honour was democratic public opinion rather than the ancien régime’s aristocratic values.

\textit{O. Was Honour No Longer Sufficient?}

As early as August 1915, Sir Edward Grey wrote to Colonel House about a “League of Nations that could be relied on to insist that disputes between any two nations must be settled by arbitration, mediation, or conference of others.” Grey said: “International Law has hitherto had no sanction. The lesson of this war is that the powers must bind themselves to give it a sanction.”\textsuperscript{212} A month later, he asked House: “Would the President propose that there should be a League of Nations binding themselves to side against any power which broke a treaty... or which refused, in case of dispute, to adopt some other method of settlement than that of war?”\textsuperscript{213}

Grey’s successor as Foreign Secretary, Arthur James Balfour asked: “If existing Treaties are no more than scraps of paper, can fresh treaties help us?” Relaying to Washington, British principles for peace, Balfour in January 1917 portrayed the pre-war “community of nations” as “plentifully supplied indeed with international laws, but with no machinery for enforcing them.” His three conditions for a durable peace included ensuring treaty compliance: “Behind International law and behind all Treaty arrangements for preventing or limiting hostilities some form of International sanction should be devised which would give

\textsuperscript{208} ARTHUR WALWORTH, WILSON AND HIS PEACEMAKERS: AMERICAN DIPLOMACY AT THE PARIS PEACE CONFERENCE 1919 8 (W. W. Norton & Co. 1986).
\textsuperscript{209} Address to League to Enforce Peace, May 27, 1916, 37 PWW 113, supra note 200; the League of Nations was then seen by U.S. “progressive internationalists” like Wilson as arising from stalemate and mediation, but by Sir Edward Grey and U.S. “conservative internationalists” as a war aim realizable via Entente victory, see KNOCK, supra note 205, at 57-58; DAVID FRENCH, BRITISH STRATEGY AND WAR AIMS 1914-1916 190-91 (Allen & Unwin 1986).
\textsuperscript{210} Address to Joint Session of Congress, Apr. 2, 1917, 41 PWW 524, supra note 200.
\textsuperscript{211} THE COMPLETE PRESS CONFERENCES 1913-1919 (Robert C. Hildebrand ed., Princeton 1985); 50 PWW 790, supra note 200.
\textsuperscript{213} Sir Edward Grey to Colonel House, supra note 212, at 89.
pause to the hardest aggressor.\textsuperscript{214} Re-establishing "the sanctity of treaties" was also the first of Lloyd George's three conditions for "a just and lasting peace" in his war aims speech to the Trades Union Congress on January 5, 1918.\textsuperscript{215}

The contrast between the U.S. focus on honour and the British fixation on law became explicit in June 1918. Sharing plans for a League of Nations, House copied to Wilson a letter written to Lord Robert Cecil, then British Minister of Blockade. With respect to treaty obligation, House's plan stayed within pre-war thinking by relying on dishonour as the sanction for breach of treaty:

One of the most essential features of any league seems to me to be the installation of a moral standard such as that maintained among individuals of honor. Even before Germany smashed the international fabric, reprehensible conduct was condoned under the broad cover of patriotism; actions which in individuals would have been universally condemned and the perpetrators ostracised from society. I believe that the most vital element in bringing about a world-wide reign of peace is to have the same stigma rest upon the acts of nations as upon the acts of individuals. When the people of a country are held up to the scorn and condemnation of the world because of the dishonorable acts of their representatives, they will no longer tolerate such acts. To bring this about will not I think be so difficult as it would seem, and when this condition is realized, a nation may be counted upon to guard its treaty obligations with the same fidelity as an individual guards his honor.\textsuperscript{216}

Now Assistant Secretary of State for Foreign Affairs with special responsibility for planning a League of Nations, Cecil took issue with House's emphasis on honour:

I notice that you propose that the components of the league should make a profession of faith to the effect that they will abide by a code of honour. I think it would be all to the good to have such a profession included in the instrument by which the league of peace was constructed, but I am afraid I do not think that by itself it could be relied upon.\textsuperscript{217} The example of Germany in this war shows that under the pressure of false teaching and national danger there is no crime which a civilized nation will not commit, and the same has been found true over and over again in history. I am convinced that unless some form of coercion can be devised which will work more or less automatically no league of peace will endure. You refer to the history of the civilization of individuals; but surely the great

\begin{footnotesize}
\begin{enumerate}
\item[214.] Jan. 16, 1917, British Ambassador Sir Cecil Arthur Spring Rice gave U.S. Secretary of State Robert Lansing a message which Balfour had written (Jan.13) to Rice, see 40 PWW 499-503, \textit{supra} note 200.
\item[215.] Cabled to Woodrow Wilson on Jan. 5, 1918, see 45 PWW 486, \textit{supra} note 200.
\item[216.] Edward Mandell House to Lord Robert Cecil, Magnolia, Massachusetts, Jun. 25, 1918, 48 PWW 424-26, \textit{supra} note 200; honour also features prominently in "Suggestion for a Covenant of a League of Nations" sent by House to Wilson on Jul. 16, 1918, see \textit{id.} at 630-637; \textit{NORTHEDGE, supra} note 191, at 31-33.
\item[217.] An echo of House's draft survived in the reference to "open, just and honourable relations between nations" in Preamble, Covenant of the League of Nations, Part 1, Treaty of Peace between Germany and the Allied and Associated Powers, Jun. 28, 1919, \textit{in} 225 CTS 195-205.
\end{enumerate}
\end{footnotesize}
instrument of law and order has been the establishment of the doctrine of the supremacy of law. So long as codes of law were only, or mainly codes of honour or good conduct they were always disobeyed by anyone who was sufficiently powerful to do so.—210

P. Honour Replaced by Law in 1919

As a fading theme, discourse about “honour” survived the Paris Peace Conference. For example, France’s honour was said to have been at stake in the June 1940 discussion about whether to abandon Great Britain and make a separate peace with Germany.219 But, after 1919-20 “honour” was largely vestigial, because—as told to the German delegation at the Paris Peace Conference—“the old era is to be left behind and nations as well as individuals are to be brought beneath the reign of law.”220 The Covenant of the League of Nations became part of each one of the 1919-20 peace treaties, which as a body established a new international order abandoning the old chivalric archetype for the paradigm of domestic law. Domestic legal systems were the model for the Covenant’s four interrelated innovations: “international peace and security”; a duty to seek peaceful settlement of international disputes; efforts to make treaties legally binding; and restraints on recourse to war.

First, Covenant provisions went a long way toward abrogating “privity of conflict”—i.e. the customary rule that a non-belligerent third party had no right to interfere (locus standi) in a bilateral international dispute.221 This was replaced by an entirely new juridical concept called “international peace and security”—a communitarian idea which insisted that “any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League.”222 The “peace of Europe” and the “general peace” had featured in earlier treaties.223 However, past references to “peace” pointed principally to the literal absence of war, in connection with the legal states of war and peace, then recognized by both international and domestic law.224 By contrast, the Covenant envisaged “international peace” both literally as


221. Elihu Root to Edward Mandell House, Clinton, New York, August 16, 1918, 49 PWW 269, supra note 200, read by President Wilson on Aug. 18, 1918.

222. See Article 11, Covenant of the League of Nations.

223. For “the general Peace of Europe,” see Preamble, Treaty between Great Britain and Prussia, Jan. 16, 1756, in 40 CTS 293, and Preamble, Treaty between Great Britain and Prussia, Apr. 11, 1758, in 41 CTS 18; “the General peace,” Art. 1, Treaty of Alliance between Austria, Great Britain, Prussia and Russia, Mar. 25, 1815, in 64 CTS 32; “the maintenance of the general peace,” Preamble and Title I, Convention for the Pacific Settlement of International Disputes, Jul. 29, 1899, in 187 CTS 410-11.

224. Helmut Rumpf, The Concepts of Peace and War in International Law, in 27 GERMAN
the absence of violence and figuratively as the name for the League of Nations’ new jurisdiction, consciously modeled on the “King’s peace” of the early English Common Law.\(^\text{225}\)

Second, the Covenant placed strong emphasis on seeking peaceful settlement of international disputes. There was to be the possibility of political settlement by the League Council and Assembly, and of resolution of justiciable disputes by binding third-party arbitration, including determinations by a new Permanent Court of International Justice, which began operating in 1922.\(^\text{226}\) During the first decade of its existence, this Court did important work which sustained an “element of idealism about the role of third party dispute settlement processes.”\(^\text{227}\)

Third, efforts to make treaties legally binding were encouraged by the memory that Germany’s 1914 invasion of Belgium had been a treaty violation—for Great Britain the casus belli. Although former German Emperor William II ultimately succeeded in staying in exile in Holland, the Versailles Treaty created an important precedent by demanding that he personally stand trial “for a supreme offence against the sanctity of treaties.”\(^\text{228}\) Moreover, the Covenant called for “scrupulous respect for all treaty obligations.” Because President Wilson wanted foreign relations democratized and subject to popular control, his Fourteen Points decreed that diplomacy “must proceed always frankly and in the public view.” The treaties ending the war were to be “open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind.”\(^\text{229}\) Implementation was via the Covenant stipulation that no treaty was to be “binding” unless registered with the Secretariat which had to publish a comprehensive League of Nations Treaty Series.\(^\text{230}\) Wilson argued that this “open diplomacy” would enable citizens to follow foreign affairs and monitor State compliance with international law.\(^\text{231}\) Moreover, the 1920 Statute of the Permanent Court of International Justice broke new ground by giving the treaty primacy among the sources of international law—before custom, general principles of law,

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\(^\text{227}\) Shabtai Rosenne, Breach of Treaty 9 (Grotius Publ. Ltd. 1985).

\(^\text{228}\) Versailles Treaty, at art. 227; see also JAMES WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR (London 1982).

\(^\text{229}\) The first of Wilson’s “Fourteen Points,” see An Address to a Joint Session of Congress, Jan. 8, 1918, in 45 PWW 536, supra note 200.

\(^\text{230}\) See The Registration and Publication of Treaties as Prescribed under Article 18 of the Covenant of the League of Nations: Memorandum Approved by the Council, Meeting in Rome, May 19, 1920, 1 LEAGUE OF NATIONS TREATY SERIES 7-13 (1920).

\(^\text{231}\) “One of the things that the League of Nations is intended to watch is the course of intrigue. Intrigue cannot stand publicity, and if the League of Nations were nothing but a great debating society, it would kill intrigue.” Address at the Metropolitan Opera, Mar. 4, 1919, 55 PWW 414, supra note 200.
judicial decisions, and the teachings of publicists. As an international legal device, the treaty had clearly risen since 1914, when Bethmann Hollweg had made his disparaging remark about a "scrap of paper."

Fourth, the League sought to place some international disciplines on a State's right to wage war, recourse to which had been largely unregulated by the international law of 1914. The strong condemnation of Germany's "criminal" behaviour was largely ex post facto—more the cause of international law than its result. Launching the First World War was by 1919 retroactively judged to have been a criminal act because of a visceral conviction rooted in the superadded horrors of 20th century war: "In the view of the Allied and Associated Powers, the war which began on August 1, 1914, was the greatest crime against humanity and the freedom of peoples that any nation, calling itself civilised, has ever consciously committed."

The Allies "regard this war as a crime deliberately plotted against the life and liberties of the peoples of Europe." King George V wrote about his cousin William II: "I look upon him as the greatest criminal known for having plunged the world into this ghastly war" and, in conversation with President Wilson, the King referred to "that unspeakable Kaiser whose crimes have scandalized the entire world." Elihu Root said the Habsburg and Hohenzollern rulers were "unrepentant professional criminals"; Supreme Allied Commander Ferdinand Foch looked on the German military as "an army of scientific and convinced hooligans"; and Wilson thought Germany an "outlaw nation."

In a letter underlined by Wilson, Root specifically pointed to domestic criminal law as the source for the new international order:

If I make a contract with you and you break it, it is no business of our neighbour. You can sue me or submit, and he has nothing to say about it. On the other hand, if I assault and batter you, every neighbour has an interest in having me arrested and punished, because his own safety requires that violence shall be restrained. At the basis of every community, lies the idea of organization to preserve the peace.


233. Parry, Foreign Policy and International Law, supra note 193 at 92-93.


237. Diary entry of Nov. 9, 1918, Kenneth Rose, King George V 229 (London, 1983); Diary of Wilson's personal physician, Rear Admiral Cary T. Grayson, Feb. 23, 1919, 55 PWW 228, supra note 200.

238. Elihu Root to Edward Mandell House, Clinton, New York, Aug. 16, 1918, read by President Wilson on Aug. 18, 1918, 49 PWW 270, supra note 200; Foch's note on the military frontier with Germany, Jan. 10, 1919, 55 PWW 504, supra note 200; Wilson's address at the Metropolitan Opera, Mar. 4, 1919, 55 PWW 414 and 417, supra note 200.
Without that idea really active and controlling there can be no community of individuals or of nations.\textsuperscript{239}

In this vein, the Covenant established machinery to help League Members deal with wars of aggression. Moreover, State responsibility for the commission of an offence was written into the leading article on “reparation” in the treaty with each one of the defeated Central Powers. Germany, Austria, and Hungary were compelled to “accept” that their “aggression” had “imposed” the war on the Allies.\textsuperscript{240} Bulgaria and Turkey were made to recognize that they had joined a “war of aggression which Germany and Austria-Hungary waged against the Allied and Associated Powers.”\textsuperscript{241} The 1919-20 peace treaties thus began modern international law’s progressive stigmatization of the “war of aggression” which was ultimately criminalized by the 1945 Charter of the Nuremberg International Military Tribunal, which instituted individual responsibility for “crimes against peace.”\textsuperscript{242}

\textit{Q. League of Nations’ Discourse on Hitler’s “Sports Palace” Diplomacy}

The United Nations International Law Commission in the 1960s used Sportpalast Diplomatie for German Chancellor Adolf Hitler’s “repeated, flagrant, and at times violent instances of deliberate breaches of treaty, not as a matter of minor administrative failing or of unanticipated judicial pronouncement, but as a matter of major politics conducted at the highest level and publicized through the mass media.”\textsuperscript{243} As foreshadowed in his 1925 book Mein Kampf, Hitler sought to break free of “the chains of the Versailles Treaty” and destroy the European order erected at the Paris Peace Conference.\textsuperscript{244} Calculated acts toward this end were his March 16, 1935 decree establishing universal military service to create a 550,000 man German army, and the March 7, 1936 German military occupation of the

\textsuperscript{239} Elihu Root to Edward Mandell House, Clinton, New York, Aug. 16, 1918, underlined by President Wilson on Aug. 18, 1918, 49 PWW 270, \textit{supra} note 200.


\textsuperscript{243} Rosenne, \textit{supra} note 227, at 11.

Rhineland—both measures violating the Versailles Treaty; the latter also contrary to the 1925 Locarno Pact. 

“Restoring the German people’s honour” was Hitler’s oft-repeated theme for domestic consumption. However, there was no honour-based argument in the very extensive League discussions about Germany’s treaty violations. In this League context, there were two tangential references to “honour,” both referring to the Rhineland. First, Hitler’s favourite foreign policy expert, Joachim von Ribbentrop justified the occupation before the Council with long “legal and practical political” arguments. However, he celebrated the “restoration of the sovereignty of the Reich over its whole territory,” saying, “a heavy moral and political burden has been removed from the German people, which now at last... sees itself re-established in honour and freedom.”

A sour note on honour, by contrast, sounded from France’s Prime Minister Léon Blum who assured the Assembly: “We have attacked the spirit of war, by which I mean those age-old conceptions of policy, morality and collective honour which were the justification of war.”

Reacting to Germany’s unilateral denunciation of the arms limitation provisions of the Versailles Treaty, diplomats said nothing to the Council about “honour” or “dishonour.” Instead, they portrayed Germany’s glaring treaty breach as a legal violation within the context of the League system. For example, France’s Foreign Minister Pierre Laval said: “The peoples of the world know that respect for plighted faith... is not only a moral principle but is the living law of the League of Nations.” He affirmed France’s devotion to the League which he recognized as “the highest international authority” which has “declared that no country can repudiate its international undertakings... and has envisaged a more effective repress of such infractions of international law in the future.”

Czechoslovakia’s Foreign Minister Edvard Beneš said: “All organised and civilised human society must be based on that most fundamental principle of international law: pacta sunt servanda. Without this principle, the League of Nations would cease to have any meaning, any foundations, or any possibility of working normally.”

245. Germany’s military forces were limited to 100,000 men by Versailles Treaty, Article 163. The Rhineland could be neither fortified nor occupied by German military forces by virtue of Versailles Treaty, Articles 42-43, “collectively and severally” guaranteed by the Treaty of Mutual Guarantee Between Germany, Belgium, France, Great Britain and Italy, Oct. 16, 1925, in 54 LEAGUE OF NATIONS TREATY SERIES 289-301; KERSHAW, supra note 244 at 549-52, 582-89.


Maxim Litvinov compared the international community to a town, and countries to individual townsmen:

Let us suppose that in a certain town private citizens are allowed to carry arms. Theoretically this right should be extended to all the inhabitants of such a town. Should, however, any citizen publicly threaten his fellow-townsmen... the municipality is scarcely likely to hasten to issue to such a citizen a licence to carry firearms, or quietly to tolerate his furnishing himself with such arms by illegal means.²⁵²

Using the same metaphor, Spain’s Ambassador Salvador de Madariaga added: “The important thing when a man in the street carries a revolver is not to know what is its caliber or even if he has other weapons in his pocket, but to know whether he is a policeman or a criminal.” He believed that each country should have “equality in the right to possess armaments” but also “in the duty of utilising them in a legal, a juridical manner within the framework of a civilised society.”²⁵³

Reacting to Germany’s unilateral remilitarization of the Rhineland, French Foreign Minister Pierre-Étienne Flandin pleaded violations of the Versailles and Locarno treaties and told the Council that “the law should be applied.”²⁵⁴ He argued that “under international law, no one has the right to take the law into his own hands” and offered to have the dispute “settled by the highest international court—namely, the Permanent Court of International Justice, which is placed under the highest authority of the League of Nations.”²⁵⁵ In the same vein, Prime Minister Blum told the Assembly: “Two breaches of international law have been committed—the breach of the Covenant and the breach of a solemn Treaty. Both have resulted in a de facto situation that is contrary to law.”²⁵⁶ A similar juridical vein marked British Foreign Secretary Anthony Eden’s address to the Council:

A patent and incontestable breach of the provisions of the Treaty of Versailles relating to the demilitarised zone has been committed. [...] The question before us does not concern a few Powers only. It is of concern to all who value the sanctity of treaty undertakings and the reign of law in international affairs.²⁵⁷

²⁵³. Id. at 559.
CONCLUSION

The 1935-36 League of Nations' response to Hitler's unilateral denunciation of key treaty provisions reminds us that, from 1919, discourse in the international States' system occurred principally inside, a largely new, law-based matrix which was consciously antithetic to aristocratic honour. The diplomacy of the preceding centuries had imagined the State as a gentleman with a highly developed sense of honour, readily vindicated on the battlefield. After the First World War, League of Nations diplomacy tended to view the State as a middle-class citizen in a world community, governed by law and committed to the peaceful settlement of international disputes. This Wilsonian Weltanschauung may have appeared somewhat naive from the standpoint of 1939, when there had to be amazement at the prescient realism of Marshall Foch, who in 1919 had known that the Versailles Treaty was just a twenty years' truce.258 Today, however, Woodrow Wilson seems the greater prophet, because his compelling vision is consistent with long-term historical trends showing victories for liberal democratic States which, by their nature, do not wage war against each other.259 In this light, the abandonment of the rhetoric of honour can be seen as a healthy step away from the warlike ethos of aristocratic societies which, at very great cost, inordinately emphasized ideas of greatness and glory.

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258. See MANN, supra note 114, at 903.
259. See FUKUYAMA, supra note 5, at 262-265.
THE NEWLY EXPANDED AMERICAN DOCTRINE OF PREEMPTION: CAN IT INCLUDE ASSASSINATION?

LOUIS RENÉ BERES*

On September 20, 2002, President Bush issued the National Security Strategy of the United States of America ("National Security Strategy").1 Expanding this country's right of preemption in foreign affairs - a right known formally as "anticipatory self-defense" under international law2 - the new American doctrine asserts, inter alia, that "[t]raditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocents..."3 The doctrine goes on: "We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."4 This "adaptation" means nothing less than striking first where an emergent threat to the United States is presumed to be unacceptable.5

Might the broadened right of preemption include assassination? Normally we think of preemptive strikes in terms of military operations against enemy forces and/or infrastructures.6 Moreover, there are substantial prohibitions of assassination in domestic and international law7 that would seem prima facie to rule out this use of

* Professor of International Law, Department of Political Science, Purdue University. Ph. D., Princeton, 1971. This article by Professor Beres was completed shortly before the start of Operation Iraqi Freedom.


4. Id.

5. See id.

6. See Comprehensive Terrorism Prevention Act of 1995, S. 735, 104th Cong. § 201(4) (1995). "The President should use all necessary means, including covert action and military force, to disrupt, dismantle and destroy infrastructures used by international terrorists, including terrorist training facilities and safe havens." Id.

force as an expression of anticipatory self-defense. Yet, when we examine the issues purposefully and dispassionately, it could well turn out that assassination would be the most humane and useful form of preemption. If this is indeed the case, we must now get beyond any deep-seated visceral objections to a reasoned and careful comparison with all other preemption options. To be sure, assassination is not “nice,” but neither is full-scale war.

International law is not a suicide pact. The right of self defense by forestalling an attack was already established by Hugo Grotius in Book II of The Law of War and Peace in 1625. Recognizing the need for present danger and threatening behavior that is “imminent in point of time,” Grotius indicates that self defense is to be permitted not only after an attack has already been suffered but also in advance, where the deed may be anticipated. Or as he says a bit further on in the same chapter, “It is permissible to kill him who is making ready to kill . . . .”

We may recall also Samuel Von Pufendorf’s argument in his On the Duty of Man and Citizen According to Natural Law:

[W]here it is quite clear that the other is already planning an attack upon me, even though he has not yet fully revealed his intentions, it will be permitted at once to begin forcible self-defense, and to anticipate him who is preparing mischief, provided there be no hope that, when admonished in a friendly spirit, he may put off his hostile temper; or if such admonition be likely to injure our cause. Hence he is to be regarded as the aggressor, who first conceived the wish to injure, and prepared himself to carry it out. But the excuse of self-defense will be his, who by quickness shall overpower his slower assailant. And for defense, it is not required that one receive the first blow, or merely avoid and parry those aimed at him.

But what particular strategies and tactics may be implemented as appropriate instances of anticipatory self-defense? Might they even include assassination?

jurisdiction over acts in violation of significant international standards has also been embodied in the principle of ‘universal’ violations of international law.”


10. See id. at 173.

11. Id.

12. See id.

13. Id. at 176.

14. SAMUEL VON PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 32 (Frank Gardner Moore trans., Oxford University Press 1927) (1673).

15. Jurisprudentially, of course, it would also be reasonable to examine assassination as a possible form of ordinary self-defense, i.e., as a forceful measure of self-help short of war that is undertaken after an armed attack occurs. Tactically, however, there are at least two serious problems with such an examination: (1) In view of the ongoing proliferation of extraordinarily destructive weapons technologies, waiting to resort to ordinary self-defense could be very dangerous or even fatal; and (2) assassination, while it may prove helpful in preventing an attack in the first place, is far less likely to be useful in mitigating further harm once an attack has already been launched.
Understood as tyrannicide,\textsuperscript{16} assassination has sometimes been acceptable under international law (e.g., Aristotle's \textit{Politics}, Plutarch's \textit{Lives}, and Cicero's \textit{De Officiis}).\textsuperscript{17} But we are concerned here not with the international law of human rights,\textsuperscript{18} but rather with those equally peremptory rights\textsuperscript{19} of legitimate self-defense\textsuperscript{20}

\begin{itemize}
\item[16.] Without appropriate criteria of differentiation, judgments concerning tyrannicide are inevitably personal and subjective. The hero of Albert Camus' \textit{The Just Assassins}, Ivan Kalayev, a fictional adaptation of the assassin of the Grand Duke Sergei, says that he threw bombs, not at humanity, but at tyranny. How shall he be judged? Seneca is reputed to have said that no offering can be more agreeable to God than the blood of a tyrant. But, who is to determine authoritatively that a particular leader is indeed a tyrant? Dante confined the murderers of Julius Caesar to the very depths of hell, but the Renaissance rescued them and the Enlightenment even made them heroes. In the 16th century, tyrannicide became a primary issue in the writings of the Monarchomachs, a school of mainly French Protestant writers. The best-known of their pamphlets was \textit{Vindiciae contra Tyrannos}, published in 1579 under the pen name of Junius Brutus, probably Duplessis Mornay, who was a political advisor to the King of Navarre.

The most well-known British works on tyrannicide are \textit{GEORGE BUCHANAN, DE JURE REGNI APUD SCOTOS (1597)} and \textit{EDWARD SExBY, KILLING NO MURDER (1657)}. Juan de Mariana, in \textit{The King and the Education of the King}, says:

\begin{quote}
[B]oth the philosophers and theologians agree, that the prince who seizes the state with force and arms, and with no legal right, no public, civic approval, may be killed by anyone and deprived of his life and position. Since he is a public enemy and, afflicts his fatherland with every evil, since truly, and in a proper sense, he is clothed with the title and character of tyrant, he may be removed by any means and gotten rid of by as much violence as he used in seizing his power.
\end{quote}

\textit{Juan de Mariana, The King and the Education of the King} (George Albert Moore trans., Country Dollar Press 1948) (1599).


\item[19.] According to Article 53 of the Vienna Convention on the Law of Treaties, "[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, May 22, 1969, at art. 53, U.N. Doc. A/CONF. 39/27 (1969), 8 I.L.M. 679.

\item[20.] The right of self-defense should not be confused with \textit{reprisal}. Although both are commonly known as measures of self-help short of war, an essential difference lies in their respective purpose. Taking place \textit{after} the harm has already been experienced; reprisals are punitive in character and cannot be undertaken for protection. Self-defense, on the other hand, is by its very nature intended to mitigate harm. The problem of reprisal as a rationale for the permissible use of force by states is identified in the U.N. Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States: "States have a duty to refrain from acts of reprisal involving the use of force." Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in
and national self-protection.

ASSASSINATION WHERE NO STATE OF WAR EXISTS

Normally, of course, the authoritative presumption obtains that assassination of officials in other states represents an incontrovertible violation of international law.\(^2\) Where no state of war exists, such assassination would likely exhibit the crime of aggression and/or the crime of terrorism.\(^2\) Regarding aggression, Article 1 of the Resolution on the Definition of Aggression defines this crime, \textit{inter alia}, as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."\(^2\)

In view of the \textit{jus cogens} norm of nonintervention\(^2\) codified in the U.N. Charter that would ordinarily be violated by transnational assassination, such killing would generally qualify as aggression. Moreover, assuming that transnational assassination constitutes an example of "armed force," the criminalization, as aggression, of such activity, may also be extrapolated from Article 2 of the Definition of Aggression:

The First use of armed force by a State in contravention of the Charter shall constitute \textit{prima facie} evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances....\(^2\)


\(^{25}\) Resolution on the Definition of Aggression, \textit{supra} note 23, at art. 2 (emphasis added). Strictly
In the absence of belligerency, assassination of officials in one state upon the orders of another state might also be considered as terrorism. Although it never entered into force because of a lack of sufficient ratifications, the Convention for the Prevention and Punishment of Terrorism warrants consideration and consultation.

Inasmuch as the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, is normally taken as a convention on terrorism, its particular prohibitions on assassination are also relevant here. After defining “internationally protected person” at Article 1 of the Convention, Article 2 identifies as a crime, inter alia, “The intentional commission of: (a) a
murder, kidnapping or other attack upon the person or liberty of an internationally protected person.30

The European Convention on the Suppression of Terrorism31 reinforces the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons. According to Article 1(c) of this Convention, one of the constituent crimes of terror violence is "a serious offense involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents."32 And, according to Article 1(e), another constituent terrorist crime is "an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons."33

ASSASSINATION WHERE STATE OF WAR EXISTS

When a condition of war exists between states, transnational assassination is normally considered as a war crime under international law.34 According to Article 23(b) of the regulations annexed to Hague Convention IV of October 18, 1907, respecting the laws and customs of war on land: "[I]t is especially forbidden . . . to kill or wound treacherously, individuals belonging to the hostile nation or army."35 The U.S. Army Field Manual, *The Law of Land Warfare* (1956), which has incorporated this prohibition, authoritatively links Hague Article 23(b) to assassination at Paragraph 31: "This article is construed as prohibiting assassination, proscription or outlawry of an enemy, or putting a price upon an enemy’s head, as well as offering a reward for an enemy ‘dead or alive.’"36 Whether or not a particular state has followed a comparable form of incorporation, it is certainly bound by the Hague codification and by the 1945 Nuremberg judgment that the rules found in the Hague regulations had entered into customary international law as of 1939.37

32. Id. at art. 1, para. c.
33. Id. at art. 1, para. e.
34. Convention Respecting the Laws and Customs of War on Land with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, art. 23(b).
35. Id.
37. Article 38(1)(b) of the Statute of the International Court of Justice describes international custom as "evidence of a general practice accepted as law." U.N. CHARTER art. 38(1)(b). In this connection, the essential significance of a norm’s customary character under international law is that the norm binds even those states that are not parties to the pertinent codifying instrument or convention. Indeed, with respect to the bases of obligation under international law, even where a customary norm and a norm restated in treaty form are apparently identical, the norms are treated as separate and discrete. During the merits phase of Military and Paramilitary Activities in and Against Nicaragua, the International Court of Justice (ICJ) stated that, "[E]ven if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence." The Case Concerning Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. U.S., 1986 I.C.J. 14, para. 178 (1986).
There is, however, a contrary argument. Here the position is offered that enemy officials, as long as they are operating within the military chain of command, are combatants and not enemies hors de combat.\textsuperscript{38} It follows, by this reasoning (reasoning, incidentally, which was accepted widely with reference to the question of assassinating Saddam Hussein during the 1991 Gulf War), that certain enemy officials are lawful targets, and that assassination of enemy leaders is permissible so long as it displays respect for the laws of war.\textsuperscript{39} As for the position codified at Article 23(b) of Hague Convention IV, which is also part of customary international law, this contrary argument, in practice, has simply paid it no attention.\textsuperscript{40}

In principle, adherents of the argument that assassination of enemy officials in wartime may be permissible could offer two possible bases of jurisprudential support: (1) they could argue that such assassination does not evidence behavior designed "to kill or wound treacherously" as defined at Hague Article 23(b); and/or (2) they could argue that there is a "higher" or \textit{jus cogens} obligation to assassinate in particular circumstances that transcends and overrides pertinent treaty prohibitions.\textsuperscript{41} "To argue the first position would focus primarily on a 'linguistic' solution; to argue the second would be to return to the historic natural law origins of international law."\textsuperscript{42}

But even if one or both of these positions could be argued persuasively, the conclusion would, by definition, have nothing to do with anticipatory self-defense. Because assassination during wartime can not be a measure of self help short of war, its "legality must be appraised solely according to the settled laws of war."\textsuperscript{43} It follows that any assassination of enemy officials in another state may be a lawful instance of anticipatory self-defense only in those cases wherein the target person(s) represents states with which there is no recognized belligerency.\textsuperscript{44}

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Moreover, in many states, customary international law is binding and self-executing but an act of the legislature is required to transform conventional law into internal law.


\textsuperscript{39} Id.

\textsuperscript{40} Id. at 354-355.

\textsuperscript{41} Id. at 355 (emphasis added).

\textsuperscript{42} Id. The idea of natural law is based upon the acceptance of certain principles of right and justice that prevail because of their own intrinsic merit. Eternal and immutable, they are external to all acts of human will and interpenetrate all human reason. This idea and its attendant tradition of human civility runs continuously from Mosaic Law and the ancient Greeks and Romans to the present day. For a comprehensive and far-reaching assessment of the natural law origins of international law, see Louis René Beres, \textit{Justice and Realpolitik: International Law and the Prevention of Genocide}, 33 AM. J. JURIS. 123 (1988) [hereinafter \textit{Justice and Realpolitik}]. This article was adapted from a presentation at the International Conference on the Holocaust and Genocide, Tel-Aviv, Israel, June 1982.


\textsuperscript{44} Under international law, the generic question of whether or not a state of war actually exists between states may be somewhat ambiguous. Traditionally, it was held that a formal declaration of war was a necessary condition before "formal" war could be said to exist. Hugo Grotius, for example, divided wars into declared wars, which were legal, and undeclared wars, which were not. \textit{See} Hugo Grotius, 3 \textit{The Law of War and Peace}, at ch. iii, V and XI (The Legal Classics Library 1984) (1646). By the beginning of the twentieth century, the position that war obtains only after a conclusive declaration of war...
The customary right of anticipatory self defense has its modern origins in the *Caroline* incident, which concerned the unsuccessful rebellion of 1837 in Upper Canada against British rule (a rebellion that aroused sympathy and support in the American border states). Following this case, "the serious threat of armed attack has generally been taken to justify militarily defensive action." In an exchange of diplomatic notes between the governments of the United States and Great Britain, then U.S. Secretary of State Daniel Webster outlined a framework for self defense which did not require an actual attack. "Here, military response to a threat was judged permissible so long as the danger posed was "instant, overwhelming, leaving no choice of means and no moment for deliberation."

"Today, some scholars argue that the [customary] right of anticipatory self defense articulated by the *Caroline* has been overridden by the specific language of Article 51 of the U.N. Charter." In this view, Article 51 fashions a new, and far more restrictive, statement of self defense, one that relies on the literal qualification contained at Article 51 "if an armed attack occurs." This interpretation ignores that international law cannot compel a state to wait until it absorbs a devastating or even lethal first strike before acting to protect itself. The argument against the restrictive view of self defense is reinforced by the apparent weaknesses of the Security Council in offering collective security against an aggressor, and, of course, by the National Security Strategy.

Of course, whether or not assassination would qualify as law-enforcing anticipatory self-defense in a particular instance could be a largely subjective judgment, and may also be affected by municipal law. Moreover, before any state

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45. The *Caroline* was an American steamboat accused of running arms to Canadian rebels. A Canadian military force crossed over into the United States and set the ship ablaze, killing an American citizen in the process. A Canadian was arrested in New York for the murder, and the British government protested. See JOHN B. MOORE, 2 A DIGEST OF INTERNATIONAL LAW 409-14 (1906).


47. Id.

48. Id.; Mr. Webster to Mr. Fox, April, 1841, in 29 British and Foreign State Papers 1129, 1138 (1840-41).

49. *Implications of a Palestinian State*, supra note 46, at 283.

50. Id.; U.N. CHARTER, art. 51.

51. *Implications of a Palestinian State*, supra note 46, at 283.

could persuasively argue any future instances of anticipatory self defense underinternational law, including assassination, a strong case would have to be made that it
had first sought to exhaust peaceful means of settlement. Even a broad view of the
dogma of anticipatory self defense does not relieve a state of the obligations codified
at Article I and at Article 2(3) of the U.N. Charter. 53

These obligations notwithstanding, we must return to the primary understanding
that international law is not a suicide pact, especially in an age of uniquely destructive
weaponry. The advent of the nuclear age may make it a form of suicide for a state to
wait for an actual act of aggression to occur. 54 Recognizing this, Wolfgang
Friedmann argued as follows long before today's growing threat of "rogue states" and
weapons of mass destruction:

The judgment as to when to resort to such [preemptive] measures now places an
almost unimaginable burden of responsibility upon the leaders of the major
Powers. But while this immensely increases the necessity for a reliable
international detection organisation and mechanism, in the absence of effective
international machinery the right of self-defence must probably now be extended
to the defence against a clearly imminent aggression, despite the apparently
contrary language of Article 51 of the Charter. 55

In somewhat similar fashion, Myres McDougal argued:

The more important limitations imposed by the general community upon this
customary right of self defense have been, in conformity with the overriding
policy it serves of minimizing coercion and violence across states lines, those of
necessity and proportionality. The conditions of necessity required to be shown
by the target state have never, however, been restricted to "actual armed attack";
imminence of attack of such high degree as to preclude effective resort by the
intended victim to non-violent modalities of response has always been regarded as
sufficient justification, and it is now generally recognized that a determination of
imminence requires an appraisal of the total impact of an initiating state's coercive
activities upon the target state's expectations about the costs of preserving its
territorial integrity and political independence. Even the highly restrictive
language of Secretary of State Webster in the Caroline case, specifying a
"necessity of self defense, instant, overwhelming, leaving no choice of means and
no moment for deliberation," did not require "actual armed attack," and the
understanding is now widespread that a test formulated in the previous century for
a controversy between two friendly states is hardly relevant to contemporary
controversies, involving high expectations of violence, between nuclear-armed
protagonists. 56

53. U.N. CHARTER art. I and art. 2, para. 3.
54. Louis René Beres, In a Dark Time: The Expected Consequences of an India-Pakistan Nuclear
55. WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 260 (1964),
56. See Myres McDougal, The Soviet-Cuban Quarantine and Self Defense, 57 AM. J. INT'L L. 597,
598 (1963), cited in JOSEPH M. SWEENEY ET AL., THE INTERNATIONAL LEGAL SYSTEM: CASES AND
But we are still left with the problem of demonstrating that assassination can be construed, at least under certain very limited circumstances, as an appropriate instance of anticipatory self-defense. To an extent, the enhanced permissibility of anticipatory self-defense that follows generally from the growing destructiveness of current weapons technologies in rogue hands may be paralleled by the enhanced permissibility of assassination as a particular preemptive strategy. Indeed, where assassination as anticipatory self-defense may actually prevent a nuclear or other highly-destructive form of warfare, reasonableness dictates that it would represent distinctly or even especially law-enforcing behavior.

Of course, for this to be the case, a number of particular conditions would need to be satisfied. First, the assassination itself would have to be limited to the greatest extent possible to those authoritative persons in the prospective attacking state. Second, the assassination would have to conform to all of the settled rules of warfare as they concern discrimination, proportionality and military necessity. Third, the assassination would need to follow intelligence assessments that point, beyond a reasonable doubt, to preparations for unconventional or other forms of highly destructive warfare within the intended victim’s state. And fourth, the assassination would need to be founded upon carefully-calculated judgments that it would in fact prevent the intended aggression, and that it would do so with substantially less harm to civilian populations than would the alternative forms of anticipatory self-defense.

At first glance, this argument may appear both manipulative and dangerous, permitting states to engage in what is normally illegal behavior under the pretext of anticipatory self-defense. A closer look, however, reveals that a blanket prohibition of assassination under international law could produce even greater harm, compelling states to resort to large-scale warfare that could otherwise be avoided. Although it would surely be the best of all possible worlds if international legal norms could always be upheld without resort to assassination as anticipatory self-defense, the dynamics of a decentralized system of international law may sometimes require such extraordinary methods of law-enforcement.

Let us be even more specific. Suppose, for example, that a particular state determines that another state is planning a nuclear or chemical surprise attack upon its population centers. Suppose, also, that carefully-constructed intelligence assessments reveal that the assassination of selected key figures (or perhaps just one leadership figure) would prevent such an attack altogether. Balancing the expected harms of the principal alternative courses of action (assassination/no surprise attack versus no assassination/surprise attack), the selection of preemptive assassination could prove manifestly reasonable and cost-effective.

What of another, more common form of anticipatory self-defense? Might a conventional military strike against the prospective attacker’s nuclear or chemical weapons launchers and/or storage sites prove even more reasonable and cost-effective? The answer to this question, in the abstract, can only be “perhaps.” As an answer, it is inevitably contingent upon the particular tactical and strategic circumstances of the moment and the precise way in which these circumstances are
configured. But it is entirely conceivable that conventional forms of preemption would generate far greater harms than assassination, and possibly with no greater defensive benefit, than assassination. This suggests, unambiguously, that assassination should not be dismissed out of hand in all circumstances as a permissible form of anticipatory self-defense under international law.

Now, what of circumstances where the threat to particular states does not involve higher-order military attacks? Could assassination represent a permissible form of anticipatory self-defense under these circumstances? Subject to the above-stated conditions, the answer might still be "yes." The threat of chemical or nuclear attack may surely enhance the legality of assassination as preemption, but is by no means an essential precondition. A conventional military attack might still, after all, be enormously destructive. Moreover, it could be followed, in certain circumstances, by later unconventional attacks.

**ASSASSINATION AS ANTICIPATORY SELF-DEFENSE AGAINST TERRORISM**

Another threat to be considered within our argument is terrorism. More precisely, it is important to ask the following question: "To what extent, if any, might assassination represent a permissible form of anticipatory self-defense as a strategy of counter-terrorism?" Here, the answer may be contingent upon whether the intended victim represents (1) leaders of a state that sponsors or supports terrorism against the state considering assassination; and/or (2) a terrorist group.

Before any answer can be offered, however, an antecedent question must be addressed - a question that still baffles and confuses students of international relations and international law: "When is the 'private' use of force lawful and when is it terrorism?"

International law has consistently proscribed particular acts of international terrorism. At the same time, however, it codifies the right of insurgents to use

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57. There is, of course, a certain ironic quality to this question. This is due to the argument, offered earlier here, that assassination may be a form of terrorism in certain instances. For discussions of assassination as terrorism, see generally, INTERNATIONAL TERRORISM: NATIONAL, REGIONAL, AND GLOBAL PERSPECTIVES 5, 57, 83-86, 125, 296, 329 (Yonah Alexander ed., 1976); LEGAL ASPECTS OF INTERNATIONAL TERRORISM 411-12, 605 (Alona E. Evans & John F. Murphy eds., 1978); TERRORISM: INTERDISCIPLINARY PERSPECTIVES 7-10, 12, 32-36, 50-51, 66-67, 83, 94-98, 101, 111, 188, 248, 292 (Yonah Alexander & Seymour Newell Finger eds., 1977); Aggression Against Authority, supra note 22, at 298-99.

certain levels and types of force when fundamental human rights are repressed and where non-violent methods of redress are unavailable.\textsuperscript{59} Inhabiting a sovereignty-centered system\textsuperscript{60} wherein the normative rules of the human rights regime are normally not enforceable by central global institutions, the individual victims of human rights abuse must seek relief in appropriate forms of humanitarian assistance or intervention by sympathetic states and/or in approved forms of rebellion. Indeed, without such self-help remedies, the extant protection of human rights in a decentralized legal setting would be entirely a fiction, assuring little more than the primacy of \textit{Realpolitik}.

The origins of the current human rights regime - which is highlighted by the

\begin{footnotesize}
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\item[60.] This system raises issues of "subjects of international law." On such subjects - that is, entities with legal personality - see \textit{generally}, IAN BROWNLINE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (4th ed. 1990); ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 74-104 (1986); JAMES CRAWFORD, \textit{The Creation of States in International Law} (1979); \textit{International Law: Being the Collected Papers of Hersch Lauterpacht} 487 (Eliahu Lauterpacht ed. 1975); DANIEL PATRICK O'CONNELL, \textit{International Law} (2d ed. 1970); CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC (1968); GEORG SCHWARZENBERGER, \textit{International Law} 89 (3d ed. 1957); MALCOLM N. SHAW, \textit{International Law} (3d ed. 1991); DR. J.H.W. VERZUL, \textit{International Law in Historical Perspective} (1969); Oliver J. Lissitzyn, \textit{Territorial Entities Other Than Independent States in the Law of Treaties}, 125 RECUEIL DES COURS 5 (1968).
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U.N. Charter, the U.N. Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1976), and the International Covenant on Economic, Social and Cultural Rights (1976) - lie in ancient Greece and Rome. From Greek Stoicism and Roman law to the present, the *jus gentium* (law of nations) and modern international law have accepted the right of individuals to overthrow tyrants and to oppose, forcefully if necessary, tyrannical regimes. This acceptance can be found primarily in international custom, the general principles of law recognized by nations, U.N. General Assembly resolutions, various judicial decisions, specific compacts and documents (e.g., the Magna Carta, 1215; the Petition of Right, 1628; the English Bill of Rights, 1689; the Declaration of Independence, 1776; the Declaration of the Rights of Man and of the Citizen, 1789), the writings of highly-qualified publicists (e.g., Cicero; Francisco de Vitoria; Hugo Grotius; and Emmerich de Vattel) and, by extrapolation, from the convergence of human rights law with the absence of effective, authoritative institutions in world politics.

This brings us to the first jurisprudential standard for differentiating between lawful insurgency and terrorism, one commonly known as "just cause." Where individual states prevent the exercise of human rights, insurgency may express law-enforcing reactions under international law. For this to be the case, however, the means used in that insurgency must be consistent with the second jurisprudential standard, commonly known as "just means."

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61. See generally U.N. CHARTER.
62. See generally Universal Declaration of Human Rights, supra note 18, at 71.
64. Id. at 49.
66. The standard of "just cause" maintains that an insurgency may exercise law-enforcing measures under international law. This argument is deducible from the existence of an authoritative human rights regime in international law and from the corollary absence of a central enforcement mechanism for this regime. It is codified, *inter alia*, at Report of the Ad Hoc Committee on International Terrorism, supra note 62; see also, Resolution of the Definition of Aggression, supra note 23, at art. 7. Article 7 refers to the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, supra note 18.
In deciding whether a particular insurgency is an instance of terrorism or law-enforcement, therefore, states must base their evaluations, in part, on judgments concerning discrimination, proportionality and military necessity. Once force is applied broadly to any segment of human population, blurring the distinction between combatants and noncombatants, terrorism is taking place. Similarly, once force is applied to the fullest possible extent, restrained only by the limits of available weaponry, terrorism is underway. For example, the consistently barbaric use of force by Palestinian insurgents against Israeli noncombatants is incontestably terroristic. There is no cause that can ever justify the fully premeditated murder of women and children.

The legitimacy of a certain cause does not legitimize the use of certain forms of violence. Under international law, "[t]he ends not justify the means." As in the
case of war between states, every use of force by insurgents must be judged *twice*; once with regard to the justness of the objective, and once with regard to the justness of the means used in pursuit of that objective."\(^74\)

"The explicit application of codified restrictions of the laws of war to non-international armed conflicts dates back only as far as the four Geneva Conventions of 1949."\(^75\) However, recalling that the laws of war, like the whole of international law, are comprised of more than treaties and conventions, "it is clear that the obligations of *jus in bello* (justice in war) comprise part of 'the general principles of law recognized by civilized nations'\(^76\) and are binding upon *all* categories of belligerents.\(^77\) Indeed, the Hague Convention (No. IV) of 1907 declared "in broad terms that in the absence of a precisely published set of guidelines in humanitarian international law concerning 'unforeseen cases,'" all belligerency is governed by all of the pre-conventional sources of international law.\(^78\)

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience.\(^79\)

This "'more complete code' became available with the adoption of the four 1949

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\(^74\) Prosecution, Not Celebration, of Arafat, supra note 73, at 577 (emphasis added); On International Law, supra note 65, at 8 (emphasis added); The Oslo Agreements, supra note 73, at 723.

\(^75\) Louis René Beres, Israel After Fifty: The Oslo Agreements, International Law and National Survival, 14 CONN. J. INT’L L. 27, 35 (1999) [hereinafter Israel After Fifty]; The Oslo Agreements, supra note 73, at 723; see Geneva Conventions, supra note 68.


\(^77\) Israel After Fifty, supra note 75, at 35.

\(^78\) Id. (citing the Convention respecting the Laws and Customs of War on Land, October 18, 1907, Hague Convention IV, 36 Stat. 2277, 2279, T.S. No. 539 [hereinafter Hague Convention IV]).

\(^79\) Hague Convention IV, supra note 78, at 2279-80. This "Martens Clause, named after the Russian delegate to the First Hague Conferences, is included in the Preamble of the 1899 and 1907 Hague Conventions," and "is designated a higher status" in the 1977 Protocol I, where "it is included in the main text of Article I." In Protocol II, however, "the Martens Clause was again moved to the Preamble." Louis René Beres, The Meaning of Terrorism—Jurisprudential and Definition Clarifications, 28 VAND. J. TRANSNAT’L L. 239, 245 n.19 (1995). See Helmut Strebel, 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 326-27 (R. Bernhardt ed. 1997) (Martens Clause). The Martens Clause purposefully extends the Law of Armed Conflict (standards of "just means") to all types of insurgencies and "liberation wars." Id.
These agreements contained "a common article (Article 3) under which the convention provisions become applicable to non-international armed conflicts."$^8$ Nevertheless, "the 1949 Geneva Diplomatic Conference rejected the idea that all of the laws of war should apply to internal conflicts, and in 1970 the [U.N.] Secretary General requested that additional rules relating to non-international armed conflicts be adopted in the form of a protocol or a separate convention."$^8$2

In 1974 the Swiss government convened in Geneva the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.$^8$3 On 8 June 1977 the Conference formally adopted two protocols additional to the Geneva Conventions of 12 August 1949.$^8$4 Protocol II relates to the protection of victims of non-international armed conflicts and develops and supplements common Article 3 of the 1949 Conventions.$^8$5 Although, in the fashion of common Article 3 and Article 19 of the 1954 Hague Cultural Property Convention, Protocol II does "not apply to situations of internal disturbances and tensions, such as riots [and] isolated and sporadic acts of violence,"$^8$6 it does apply to all armed conflicts:

[W]hich take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.$^8$7

Geneva Protocol 1 also constrains insurgent uses of force in "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."$^8$8 Thus, even where the peremptory rights to self-determination are being exercised, insurgent forces must resort to lawful means of combat. According to Article 35, which reaffirms longstanding norms of international law: "In any armed conflict, the right of

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82. On Assassination, supra note 80, at 340, n.38.
83. See Junod, supra note 81, at 32.
86. Protocol II, supra note 84, Part 1, art. 1, para. 2.
88. Protocol I, supra note 84, Part 1, art. 1, para. 4.
the Parties to the conflict to choose methods or means of warfare is not unlimited.\textsuperscript{89}

States also have an obligation to treat captured insurgents in conformity with the basic dictates of international law. Although this obligation does not normally interfere with a state's right to regard as common or ordinary criminals those persons not engaged in armed conflict (that is, persons involved merely in internal disturbances, riots, isolated and specific acts of violence, or other acts of a similar nature), it does mean that all other captives (according to the Geneva Conventions of August 12, 1949) "remain under the protection and authority of the principles of humanity and from the dictates of dictates of public conscience."\textsuperscript{90}

In cases where captive persons are engaged in armed conflict, it may mean an additional obligation of states to extend the privileged status of prisoner of war (POW) to such persons. This additional obligation is unaffected by insurgent respect for the laws of war of international law. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules do not automatically deprive an insurgent combatant of his right to protection equivalent in all respects to that accorded to prisoners of war. This right, codified by the Geneva Conventions, is now complemented and enlarged by the two protocols to those conventions.\textsuperscript{91}

These norms notwithstanding, we return again to the essential principle that international law is not a suicide pact,\textsuperscript{92} and that the jus cogens right to ward off annihilation may countenance assassination in certain residual instances as permissible anticipatory self-defense against terrorism. Just as states may have the right to resort to assassination as a method of preempting overwhelming harm threatened by other states, so may they reserve this right when confronted with the serious threat of international terrorism. Of course, such reservation will become even more reasonable to the extent that the expected threat of terrorism is of a WMD (e.g., chemical/nuclear/biological) nature. Recognizing this, the National Security Strategy affirms clearly: "Our priority will be first to disrupt and destroy terrorist organizations of global reach and attack their command, control, and communications; material support; and finances."\textsuperscript{93}

In assessing assassination as a permissible form of preemption against terrorism, we must recognize that the prospective target of assassination may be not only terrorists themselves, but also officials of states that support terrorism.\textsuperscript{94} From the point of view of international law, we must now ask, "Is there a difference?" Are

\textsuperscript{89.} Protocol I, supra note 84, Part III, sec. 1, art. 35, para. 1.
\textsuperscript{90.} On International Law, supra note 65, at 12 (referencing the Martens Clause). See also note 79 and accompanying text, supra.
\textsuperscript{91.} On International Law, supra note 65, at 12 (emphasis added). In this connection, and in particular reference to Geneva Protocol I, insurgent combatants captured after launching direct attacks upon innocent civilians should continue to be treated as prisoners of war, but should be prosecuted for the commission of war crimes.
\textsuperscript{93.} National Security Strategy, supra note 1.
\textsuperscript{94.} See, e.g., On Assassination, supra note 80, at 328.
individual officials of states that sponsor or sustain terrorism against other states legitimate objects of transnational assassination? For example, can we assassinate Saddam Hussein?

This question, of course, is exceedingly complex, involving, among other difficult issues, the matter of the lawfulness of the particular insurgency. Although state sponsorship of insurrections in other states may be lawful as an indispensable corrective to gross violations of human rights, such sponsorship is patently unlawful whenever its rationale lies in presumptions of geopolitical advantage. "Today the long-standing customary prohibition against foreign support for lawless insurgencies is codified in the U.N. Charter and in the authoritative interpretation of that multilateral treaty at article 1 and article 3(g) of the General Assembly's Definition of Aggression (1974)."

The legal systems embodied in the constitutions of individual states are an interest that all states must normally defend against aggression. This peremptory principle was expressed by Hersch Lauterpacht. According to Lauterpacht, the following rule concerns the scope of state responsibility for preventing acts of insurgency or terrorism against other states:

International law imposes upon the State the duty of restraining persons within its territory from engaging in such revolutionary activities against friendly States as amount to organized acts of force in the form of hostile expeditions against the territory of those States. It also obliges the States to repress and discourage activities in which attempts against the life of political opponents are regarded as a proper means of revolutionary action.

Lauterpacht’s rule reaffirms the Resolution on the Rights and Duties of Foreign Powers as Regards the Established and Recognized Governments in Case of

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98. In this connection, international law is founded upon the presumption of solidarity between all states in the struggle against criminality in all forms. It is mentioned in a number of the classics. Justinian, Corpus Juris Civilis (533 C.E.); Hugo Grotius, 2 De Jure Belli Ac Pacis Libri Tres ch. 20 (Francis W. Kesey trans., Clarendon Press 1925) (1690); Emmerich de Vattel, 1 Le Droit des Gens ch. 19 (1758). The case for universal jurisdiction, which stems from the principle of solidarity, is codified, inter alia, at the four Geneva Conventions of August 12, 1949. These Conventions impose upon the High Contracting Parties the obligation to punish certain “Grave Breaches” of their rules, regardless of where the infraction occurred or the nationality of the perpetrators. These Breaches are defined at Art. 147 of Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, signed on Aug. 12, 1949, at Geneva, Switzerland.

Insurrection adopted by the Institute of International Law in 1900. His rule, however, stops short of the prescription offered by Emmerich de Vattel. According to Vattel’s *The Law of Nations,* states that support terrorism directed at other states become the lawful prey of the world community:

If there should be found a restless and unprincipled nation, ever ready to do harm to others, to thwart their purposes, and to stir up civil strife among their citizens, there is no doubt that all others would have the right to united together to subdue such a nation, to discipline it, and even to disable it from doing further harm.

But what, precisely, are the proper jurisprudential boundaries of this “right”? Do they include assassination? And if they do, would the resort to assassination be a permissible instance of anticipatory self-defense?

Significantly, as we have already noted, the right of tyrannicide is well-established in political philosophy and international law. Indeed, this right may extend even to state-sponsored tyrannicide or transnational assassination as a form of humanitarian intervention. This is the case, for example, where such use of force is not directed against the territorial integrity or political independence of another state, but rather to assure peremptory human rights and/or self-determination within such a state.

Recalling that an individual state’s right to self-defense is also peremptory under international law, it would appear that where assassination is not undertaken against the territorial integrity or political independence of another state, but only to further its own self-defense, it may be permissible. Of course, where we are concerned with anticipatory self-defense in particular, assassination would have to be consistent, in part, with the tests set forth by the *Caroline* and in part by the broadened criteria identified in 2002 by the National Security Strategy. Moreover, it would have to follow a determination that assassination was the least generally injurious form of anticipatory self-defense and the exhaustion of all possible peaceful means of settlement.

**CONCLUSION**

In his *Utopia,* published in 1516, Thomas More offered a curious juxtaposition of foreign policy strategems and objectives. Although the Utopians are expected to be generous toward other states, they also offer rewards for the assassination of enemy leaders (Book II). This is not because More wished to be gratuitously barbarous,
but rather because he was a most realistic utopian. Sharing with St. Augustine (whose City of God had been the subject of his lectures in 1501) a fundamentally dark assessment of human political arrangements, More constructed a “lesser evil” philosophy that favored a pragmatic form of morality.

Looking over the current landscape of world power processes, it appears that Utopia still has a great deal to offer contemporary international legal theory. A fusion of Stoicism and Epicureanism, Utopian ethics recognize that intranational values (including what we now call human rights) require international security arrangements and that such arrangements must be based on realistic assessments of other states’ (what More calls “commonwealths”) intentions. Or to put it in the language of another, more modern expounder of St. Augustine - Reinhold Niebuhr - states must operate on the understanding of “moral man and immoral society.”

In the fashion of Niebuhr and St. Augustine, Sir Thomas More was aware that the tragic element of the political situation is constituted of conscious choices of evil for the sake of good. With regard to our current inquiry, this suggests that assassination must always be disagreeable in the best of all possible worlds (for example, the Leibnizian world satirized by Voltaire in Candide), but that it may be a necessary expedient of international law in a world that remains distressingly imperfect. As we have seen, this assuredly does not mean that assassination should now be embraced generally with enthusiasm instead of revulsion, but it does imply

108. Id.
109. Id.
110. See generally REINHOLD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY (1932).
112. This brings to mind the idea of utilitarian calculations. The utilitarian view is that human actions should be appraised in light of their consequences, and that only such a consequentialist approach will enable us to deal with complex moral and legal issues in a purposeful fashion. The principle of utility, which has its origins in Jeremy Bentham’s philosophy, is “that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question. . . to promote or to oppose that happiness.” See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 125 (W. Harrison ed., 1960) (1780). Technically, of course, we are not speaking precisely of “happiness” when we consider outcomes of anticipatory self-defense, but considerations of national security and survival are surely preconditions of happiness. Moreover, utilitarians argue forcefully against those who would base approval or disapproval of particular actions upon a non-comparative, visceral-type reaction. Utilitarian thinking would dismiss those who claim that assassination is always impermissible simply because it arouses antipathy: not on account of their tending to augment the happiness of the party whose interest is in question, but merely because a man finds himself disposed to approve or disapprove of them: holding up that approbation or disapprobation as a sufficient reason for itself, and disclaiming the necessity of looking out for any extrinsic ground. Id. at 138-39.
that assassination as a form of anticipatory self-defense may sometimes offer the best available remedy to aggression and terrorism in world law.\textsuperscript{114}

\textsuperscript{114} There are circumstances, of course, where anticipatory self-defense may not have to be expressed by any use of force whatsoever, and wherein judicial actions against individuals could be presumed adequately defensive. In such circumstances, U.S. federal courts could be the appropriate venue for international law enforcement. U.S. competence in these circumstances can be found in federal law, which confers jurisdiction of general court martial "to try any person who, by the law of war, is subject to trial by a military tribunal . . ." 10 U.S.C. § 818 (1988) (emphasis added). In addition, federal law grants jurisdiction to the federal district courts for all offenses against the laws of the United States. 18 U.S.C. § 3231 (1988). Since its founding, the United States has reserved the right to enforce international law within its own courts. The U.S. Constitution confers on Congress the power "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." U.S. CONST. art. I, § 8, cl. 10. Pursuant to this Constitutional prerogative, the first Congress, in 1789, passed the Alien Tort Statute, 28 U.S.C. § 1350 (1993). This statute authorizes the U.S. federal courts to hear those civil claims by aliens alleging acts committed "in violation of the law of nations or a treaty of the United States" when the alleged wrongdoers can be found in the United States. Understood in terms of American national obligations to prosecute terrorists, or to bring terrorists into American judicial venues as civil proceedings, this means that such terrorists, when found in U.S. territory, can be brought into this country's courts for civil remediation of terrorist crimes.
AN ANALYSIS OF FOREIGN SALES CORPORATION AND THE EUROPEAN COMMUNITIES’ FOUR BILLION-DOLLAR RETALIATION

JAMES JOSEPH SHALLUE*

I. INTRODUCTION

Located in Geneva, Switzerland, the World Trade Organization¹ is comprised of over 140 members.² Since its inception in 1994,³ the WTO has provided its members a forum for trade negotiations and disputes.⁴ Through the use of this dispute resolution process, the WTO’s ultimate goal is to ensure free trade and fair pricing throughout the world.⁵

Disputes in the WTO currently range from the European Communities’ dispute with India over anti-dumping violations⁶ to violations of Chilean alcohol taxation.⁷ One dispute currently before the WTO is particularly important because it involves over four billion dollars in compensatory measures.⁸

In a dispute entitled the “United States: Tax Treatment for Foreign Sales Corporations,”⁹ the European Communities allege that the United States is illegally

* James Joseph Shallue, Northwestern University- School of Law - LL.M. IN TAXATION (2003), University of Missouri-Columbia School of Law- Juris Doctor (2002), University of Wisconsin-Madison- Bachelor of Arts (1997). The author would like to thank Michelle Arnopol Cecil at the University of Missouri-Columbia and Robert J. Peroni at Northwestern University for their helpful comments on earlier drafts, and his wife Ann for all of her love and support.

¹ In this article, the World Trade Organization will be referred to as the WTO. See WTO, Welcome to the WTO website, at http://www.wto.org (last visited June 23, 2003).

² As of January 1, 2002, the WTO was comprised of 146 countries. See WTO, About the Organization, at http://www.wto.org/english/thewto_e/thewto_e.htm (last visited June 23, 2003).

³ See id.


⁵ See id.

⁶ WTO Doc. WT/DS141/R (Mar. 1, 2001). All WTO documents, unless specified otherwise, are found Disputes and Dispute Settlement, either at All the Panel Reports or All the Appellate Body Reports, at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

⁷ WTO Doc. WT/DS87/R (June 15, 1999).


subsidizing exporters through the use of the Internal Revenue Code,¹⁰ in violation of its WTO obligations.¹¹ The United States counters that the Code’s provisions are not subsidies, and that its tax legislation is currently meeting all WTO obligations.¹²

This dispute is the culmination of a long and heated battle between the United States and the European Communities over the exact definition of the term subsidy. A subsidy can generally be defined as a “non-tariff measures utilized by governments either to inhibit imports (so-called ‘domestic subsidies’) or to enhance exports (so-called ‘export subsidies’). Subsidies typically constitute direct or indirect economic benefits granted by governments to an industry or group of industries.”¹³ The United States and the European Communities, however, vehemently disagree over an exact definition of the term subsidy.

This disagreement, currently in its fourth decade, began in 1971 with the advent of Domestic International Sales Corporations (DISCs).¹⁴ At the time, American corporations were losing the export battle because double taxation and value added taxation caused their prices to be much higher than those of their foreign competition.¹⁵ In order to be competitive abroad, DISCs were developed so that American exporters could lower their overall prices. This was accomplished by deferring part of their tax liability through the use of a tax-free commission. Because exporters had lower tax liabilities through the use of DISCs, they could lower their prices and still maintain the same profit margins. These lower prices on exports eventually translated into a more competitive environment between American and foreign corporations.

Foreign countries affected by DISCs, however, felt that they were an illegal subsidy rather than a tax deferral. The United States argued that because DISCs mirrored territorial and value added taxation systems, they could not be considered subsidies. Eventually, under the General Agreement on Tariffs and Trade,¹⁶ DISCs were held to be subsidies.

In 1984, because DISCs could no longer be used as intended, the United States implemented the Foreign Sales Corporation (FSC) as a vehicle to increase

¹⁰. In this article, the term Code will refer to the Internal Revenue Code of 1986, as amended, unless otherwise noted.
¹⁴. For a discussion of DISCs, see infra notes 129-153 and accompanying text.
¹⁵. For a discussion of double taxation and value added taxation, see infra notes 107-121 and accompanying text.
AN ANALYSIS OF FOREIGN SALES CORPORATIONS

competition between American and foreign corporations. Unlike a DISC, a FSC was designed to be a foreign corporation that operated on a dividend-basis with its domestic parent corporation. The United States felt that FSCs complied with GATT, and were not an illegal subsidy because they mirrored territorial and value added taxation systems used by others in Europe and throughout the world.

Many foreign countries, however, argued that FSCs, like DISCs before them, were an illegal subsidy under GATT and other international trade agreements, including the Agreement on Subsidies and Countervailing Measures and the Agreement on Agriculture. These foreign countries, now formally known as the European Communities, again argued that FSCs provided an illegal subsidy rather than a tax deferral. They also argued that because FSCs were export-contingent, they were also an illegal subsidy under various other WTO agreements. The newly formed WTO agreed, effectively terminating the FSC method of taxation.

Still in need of a vehicle to facilitate competition between American and foreign corporations, the United States enacted its current method of taxation called Extraterritorial Income (ETI) in 2000. Unlike the previous methods of taxation, ETI allows both domestic and foreign corporations to take advantage of its tax benefits. This distinction between ETI and FSCs, the United States feels, should placate the European Communities’ previous arguments regarding illegal subsidies because this system is not export-contingent.

Unfortunately, the WTO disagreed. On August 20, 2001, the WTO held that ETI was in violation of the Agreement on Subsidies and Countervailing Measures and the Agreement on Agriculture because it was, in fact, export-contingent. This ruling was recently upheld by the WTO’s Appellate Body. In addition to these rulings, the WTO also allowed the European Communities to commence with four billion dollars in retaliation against the United States, equal to the savings afforded American exporters under FSCs.

This ruling, however, does not mean that there is a consensus on the exact definition of the term subsidy. The United States, being consistent with its argument throughout, feels that if the exact definition of a subsidy is simply a deferral of taxation, as the European Communities argue, then many other countries are also illegally subsidizing their exporters. These other countries

17. For a discussion on FSCs, see infra notes 154-213 and accompanying text.
20. For a discussion on the WTO decision, see infra notes 195-204 and accompanying text.
21. For a discussion on ETI, see infra notes 214-294 and accompanying text.
25. In fact, the Bush administration is considering bringing a dispute against the European
forego taxation on income by using value added taxation, a territorial taxation system, or a combination of those systems. The WTO and the European Communities argue that a subsidy is present when a country foregoes taxation on income because of the income's export nature.\footnote{26}

To understand this lack of consensus on an exact definition of a subsidy, this article will first provide background into various aspects of the international trade community and how these aspects affect the current dispute over the term. Specifically, Part II of this article will analyze the mechanics of the WTO dispute resolution process, and how countries settle trade issues. Part III will then discuss the evolution of GATT, the WTO, and various agreements signed by the United States defining subsidies. Part IV will compare and contrast the different methods of taxation in Europe and the United States. Next, this article will examine the heart of the current disagreement over the term subsidy. Part V will look at the evolution of American taxation methods from the advent of Subpart F\footnote{27} to the FSC Repeal Act and Extraterritorial Income Exclusion Act of 2000 (ETI).\footnote{28} It will also analyze the arguments made by the European Communities and United States to the WTO on each taxation method. Part VI will discuss the different options for the United States regarding compliance with its WTO obligations. Finally, Part VII will analyze the disparity between the world's tax systems and international obligations in general. This article will conclude that it is necessary to have meetings with European Communities and WTO representatives to address future United States tax legislation specifically, and determine whether this future legislation will be WTO compliant.

II. WTO AND THE DISPUTE RESOLUTION PROCESS\footnote{29}

As previously stated, the WTO attempts to enable free trade through the use of its dispute resolution process.\footnote{30} Governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes,\footnote{31} this process is divided into
five parts, culminating in a binding obligation between the WTO and its members. If the country in violation of WTO agreements cannot comply, or refuses to comply, with this binding obligation, the process allows for compensatory and retaliatory measures against the non-complying country. Each of the five parts of the dispute resolution process is discussed below.

A. Procedures for Resolving Trade Disputes

The first step in settling a trade dispute between members of the WTO is a formal consultation. The purpose of this consultation is to set the groundwork for a conclusion to the disagreement. Usually lasting two to three hours, it allows for confidential discussions about the trade dispute. If the countries are having difficulty reaching an agreement, they can request a WTO mediator to facilitate the discussion.

The majority of disputes that reach the consultation stage are resolved within a couple of months. Some are settled for practical reasons, while others are settled on the merits of the case. If the parties cannot settle the disagreement within sixty days of the consultation, the complaining party has the right to request a Panel from the Dispute Settlement Body to resolve the dispute.

The Panel is comprised of three to five experts in the field of the dispute. Independent from the countries in disagreement, the Panel’s members are well-qualified government and/or non-government individuals. Many of these individuals have taught or published in the field of international trade law or policy, or served as senior trade policy officials for a WTO member.

The Panel first hears the dispute between the disagreeing countries, making an objective assessment of the matter before it. This includes receiving briefs from
each party, and also hearing oral arguments, similar to opponents in an American court. The Panel concludes its debate, and issues a preliminary report within six months.43

The Panel then files its preliminary report with findings and recommendations with the Dispute Settlement Body for approval.44 This report is privately circulated among the body’s members for review.45 Eventually, the Panel will publicly release its report. In the interim period between private circulation and public release, the Panel does have the right to reconsider its findings and decision on the matter.46

Once the report is made public, the report is given to the Dispute Settlement Body for approval. After a brief discussion, the body then votes on the Panel’s recommendations by a one-member, one-vote format.47 The Dispute Settlement Body in the past has always accepted the decision of the Panel because the only way to override the Panel’s recommendation is by majority vote.48 This means that in order to override the Panel’s decision, the losing party has to persuade one-half of the members of the body, or seventy-three other countries, to agree with its argument. This is a nearly impossible task, considering the diverse views and backgrounds of the body’s members.

Once the Dispute Settlement Body has placed its approval on the Panel’s recommendation, it is binding on the losing party.49 The losing party, however, does have the right to appeal this decision to a higher authority: the Appellate Body.50

B. Appeal and Compliance by the Losing Party

As previously stated, the losing party does have the right to appeal the Panel’s decision. In fact, the majority of the disputes that have reached the Panel have been appealed.51 Made up of seven members,52 the Appellate Body is charged with addressing each of the Panel’s findings, and may uphold, modify or reverse

objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

43. See id. at art. 12(8).
46. This is a moot point, though, because no Panel has ever reversed itself during the interim period. See Extraterritorial Income: WTO Issues Final Ruling Maintaining Interim Findings Against U.S. FSC/ETI, 141 DAILY TAX REP., July 24, 2001 at GG-1.
47. See Pauwelyn, supra note 44, at 336.
48. See DSU, supra note 31, at art. 16(4).
49. See Clough, supra note 34, at 259.
50. See DSU, supra note 31, at art. 16(4).
51. See Clough, supra note 34, at 264.
52. See DSU, supra note 31, at art. 17(1).
any of the legal findings and conclusions of the Panel. The Dispute Settlement Body will adopt the Appellate Body’s ultimate conclusion, absent consensus to the contrary.

Once the Appellate Body adopts the Panel’s report, the losing party has to inform the Dispute Settlement Body of its plan of implementation. If the losing party cannot immediately comply, a reasonable time period will be established for compliance. This is determined by a time period (a) approved by the Dispute Settlement Body; (b) approved by the parties in dispute within forty-five days; or (c) approved by an arbitrator within ninety days from the adoption of the Panel’s recommendation by the Dispute Settlement Body. The DSU also states that a reasonable time cannot exceed eighteen months.

If the losing party does not implement a plan to cure the violation, the complaining party has the right to request compensation twenty days after the end of a reasonable time period. Generally, compensation involves the lifting of trade barriers by the losing party. This may include tariff reductions or increases in the losing party’s import quotas. It is generally understood that compensation is to be offered to all WTO members.

This compensation can also come in the form of retaliation. Unlike general compensation, “[r]etaliatory measures are directed primarily at concessions or other obligations applicable to the same sector as that in which the Panel or Appellate Body found an infringement.” This in essence means that retaliation is more specific than general compensation. The Dispute Settlement Body will authorize this retaliation unless there is a consensus against it. The losing party does have the opportunity to dispute the amount of retaliation or compensation by requesting an arbitrator.

To protect the Panel’s decision, the Dispute Settlement Body continuously monitors the implementation process used by the losing party. If the body and the losing party disagree on whether it is implementing a process to cure the violation, the losing party has the right to remand the disagreement back to the Panel for verification of its implementation process.

53. See id. at art. 17(13).
54. See id. at art. 17(14).
55. See id. at art. 21(3). The DSU specifically calls for prompt implementation and compliance with the body’s decision. See id. at art. 21(1).
56. See id. at art. 21(3).
57. See id. at art. 21(4). This eighteen month time period is important because current legislation will replace ETI over a five-year phase-in period. For a discussion on H.R. 1769, see infra, notes 314-332 and accompanying text.
58. See id. at art. 22(2).
59. See Pauwelyn, supra note 44, at 337.
60. See id.
61. Clough, supra note 3432, at 262.
62. See DSU, supra note 31, at art. 22(6).
63. See DSU, supra note 31, at art. 22(6).
64. See id. at art. 21(6).
65. See DSU, supra note 31, at art. 21(5). For a flow chart of the entire WTO dispute resolution
III. GATT, THE WTO, AND THE DEFINITION OF SUBSIDY

By way of background, this section will discuss the evolution of the WTO as an international organization. Because this article focuses specifically on a dispute between the European Communities and the United States regarding the definition of a subsidy, this section will also examine specific WTO agreements signed by the United States that define the term subsidy within the context of trade matters.

A. GATT: 1947

Established in 1947, and ratified in 1948, GATT was essentially a series of multilateral trade concession agreements, written to help regulate an expanding international marketplace.66 Signed by a majority of the leading industrial powers at the time,67 it was the framework used in building what is now the WTO.68

In order to aid the regulation of international trade, GATT's drafters included various articles specifically regulating certain business practices. Ranging from Cinematographic Films69 to Exchange Arrangements,70 these articles helped to define GATT members' obligations to one another. In their complaint against the United States, the European Communities base some of their argument on Article XVI of GATT, dealing with subsidies.

Specifically, Article XVI prohibits export subsidies of non-agricultural products because they hinder the objectives of GATT and affect international trade in general.71 This means that a GATT member cannot cause the sale of an export process, see WTO, Trading into the Future, Settling Disputes, The Panel Process, at http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm.


67. These nations included the United States, France, Australia, Canada and Great Britain. For a complete list of signatories, see GATT, supra note 16, at preamble.

68. In the establishment of the WTO, the final act of the Uruguay Round was to make binding on all WTO members all prior GATT agreements and legal instruments. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Annex 1A, at preface, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1125 (1994) [hereinafter Final Act], available at http://www.wto.org/english/docs_e/legal_e/06-gatt.pdf. See also Corona, supra note 66, at 366 n.27.

69. See GATT, supra note 16, at art. IV.

70. See id. at art. XV.

71. See GATT, supra note 16, at art. XVI, Section A - Subsidies in General:

1. If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.
product to be made at a lower price than that charged for a similar product in the domestic market because it violates GATT obligations. These types of subsidies can affect international trade in two respects.

First, hypothetically, if the United States is subsidizing its exports, this subsidy reduces the price of export goods by foregoing taxation on international transactions. This allows the American exporter to lower the price of its goods due to less tax liability to the United States. In a hypothetical export transaction in France, if this tax liability is less than the tax liability of a French company, the American exporter can sell a widget in France at a lower price than the domestic producer.

Due to lower taxes on the American exporter, other foreign exporters will be discouraged from competing with the United States in France’s widget market. This is because the foreign producer is in fact paying more taxes on its widget than the American exporter. The foreign exporter’s government may be forcing its exporters to pay taxes on the sale, whereas the United States is foregoing the tax due on the transaction.

Second, because the American widget is cheaper than the French widget, and there is no foreign competition in the French widget market, sales for the American widget will rise. This is basic economics: barring any outside factors such as quality or advertising, if the American widget is the cheapest on the French widget market, it should sell more rapidly than any other country’s widget.

Article XVI’s basic assumption is that it is illegal to subsidize exports to foreign markets. There is a problem though, because the term subsidy is not specifically defined within GATT.

B. The Tokyo Subsidies Code of 1980

To alleviate some of the confusion regarding the exact definition of subsidy, the Tokyo Subsidies Code first restated GATT’s rule prohibiting the subsidizing of

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2. The contracting parties recognize that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.

72. *See id.* at art. XVI, Section B - Additional Provisions on Export Subsidies:

4. Further, as from 1 January 1958 or the earliest practicable date thereafter, contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. Until 31 December 1957 no contracting party shall extend the scope of any such subsidization beyond that existing on 1 January 1955 by the introduction of new, or the extension of existing, subsidies. (emphasis added).


74. *See id.*

75. *See generally, GATT, supra note 16, at art. XVI.*

exports. It then added an illustrative list of practices that GATT considered to constitute subsidizing activities.

Within this illustrative list, paragraph (e) prohibited subsidies that were in essence tax deferral regimes, unless they charged interest on the deferral. In its text, paragraph (e) states that "the full or partial exemption, remission, or deferral specifically related to exports..." is considered a subsidy. This is very important because if the United States would choose to use a deferral method of taxation, it would need to charge interest to be in agreement with its GATT obligations, or make sure that the deferral is not export contingent. As is the case with the original GATT-1947 agreement, the Tokyo Round Subsidies Code did not specifically define subsidy; it simply provided a list of activities that were considered by GATT to be subsidies.

C. The Uruguay Round of Multilateral Trade Negotiations (1986-1994)

The main focus of the Uruguay Round was to create the WTO as an international organization. This, in effect, created binding legal obligations between its members to adhere to WTO rules, and bound members to the dispute resolution process, previous GATT agreements, and any future WTO agreements. The United States accepted the terms of this agreement in 1994.

One of these WTO agreements was the Agreement on Subsidies and Countervailing Measures. Part of the Uruguay Round, this agreement actually defined the term subsidy and expanded on the concept of a prohibited subsidy. According to this agreement, a subsidy must satisfy a two-part test. The first part of the test, deemed the subsidy existence test, states that a subsidy exists where there is a financial contribution by a government. This financial contribution can come...
from a variety of sources, including a government foregoing taxation on certain transactions.\textsuperscript{87} An example of this would be the United States foregoing taxation on FSCs.\textsuperscript{88} This was done by allowing a FSC to defer tax liability on a portion of its income.

The second part of the test, deemed the specificity test,\textsuperscript{89} states that a subsidy exists only when a certain portion of an enterprise or industry can meet it.\textsuperscript{90} Under this test, remedies are "only available against specific subsidies."\textsuperscript{91} An example of

\begin{enumerate}
\item[(a)] Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
\item[(b)] Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions\textsuperscript{90} governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.
\item[(c)] If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.
\end{enumerate}

\textsuperscript{87} See Agreement on Subsidies and Countervailing Measures, supra note 18, at art. 1.
\textsuperscript{88} For a complete discussion on FSCs and the foregoing of taxation, see infra notes 151-209 and accompanying text.
\textsuperscript{89} See Lopez-Mata, supra note 13, at 582.
\textsuperscript{90} See Agreement on Subsidies and Countervailing Measures, supra note 18, at art. 2 — Specificity:
\textsuperscript{91} See Lopez-Mata, supra note 13, at 582 (emphasis added).
this would be ETI because the United States agreed to forego taxation because the transaction was export-related.\textsuperscript{92}

As this test insinuates, the next step, once a subsidy is found, is to characterize it as either a prohibited, actionable, or non-actionable subsidy. Prohibited subsidies, as defined in the Agreement on Subsidies and Countervailing Measures, are those that are "contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods."\textsuperscript{93} This means that a country is somehow granting a subsidy to a domestic producer to lower the cost of its goods, making them cheaper than imported equivalents.

Actionable subsidies are those "that cause injury to the domestic industry of another member, a detriment to benefits pertaining to another member under GATT-1994, or serious prejudice to the interests of another member."\textsuperscript{94} This type of subsidy can be considered export-contingent because, due to the subsidy, the exporter can charge a lower price than a target country’s domestic producers.

Finally, non-actionable subsidies are those that are not serious enough to be considered actionable, but still meet the requirements of the Agreement on Subsidies and Countervailing Measures, Article 8.1.\textsuperscript{95} A non-actionable subsidy cannot be referred to the Dispute Settlement Body for consideration.\textsuperscript{96}

These three terms define subsidies generally. In order to clarify the use of subsidies in different industries, the Agreement on Subsidies and Countervailing Measures, like the Tokyo Round before it, added an annex with footnote examples of subsidies in various capacities.\textsuperscript{97} Under Annex I, paragraph (e), the agreement described an export subsidy as "the full or partial exemption, remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises."\textsuperscript{98}

To clarify further the meaning of an export subsidy, Footnote 59 to paragraph (e) goes on to state that "the members reaffirm the principle that prices for goods in transactions between exporting enterprises and foreign buyers under their or under the same control should for tax purposes be the prices which would be charges between independent enterprises acting at arm's length."\textsuperscript{99} This definition and clarification of paragraph (e) are central components of the disagreement between the United States and the European Communities. The European Communities state that the United States tax legislation fits within the meaning of Footnote 59 because its

\begin{footnotes}
\item[92] For a complete discussion on ETI and their export nature, see infra notes 214-294 and accompanying text.
\item[93] Agreement on Subsidies and Countervailing Measures, supra note 18, at art. 3(1)(b).
\item[94] Lopez-Mata, supra note 13, at 583.
\item[95] See Agreement on Subsidies and Countervailing Measures, supra note 18, at art. 8.
\item[96] See Lopez-Mata, supra note 13, at 583.
\item[97] See Agreement on Subsidies and Countervailing Measures, supra note 18, at Annex I.
\item[98] Agreement on Subsidies and Countervailing Measures, supra note 18, at Annex I, para. (e).
\item[99] Within this description of an export subsidy, direct taxes means "taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property." Id. at Annex I, para. (e) n.58.
\item[99] Agreement on Subsidies and Countervailing Measures, supra note 18, Annex I, para. (e) n.59.
\end{footnotes}
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legislation is a deferral of taxation specifically related to exports. The United States counters that its legislation fit within the arm's length language of Footnote 59.

The views of the two members are very different in the interpretation of subsidy, partly because of their fundamental beliefs of taxation. Part IV will discuss the different systems of taxation throughout the world, and outline the taxation of individuals versus territories.

IV. DIFFERENCE BETWEEN TAXATION SYSTEMS

Within international trade, there are two very different types of taxation: a worldwide system that bases taxation on individual citizens wherever they earn their income, and a territorial system that bases taxation on individuals and entities that earn income within the taxing entity's physical territory. This is important because the worldwide system can lead to double taxation on an overseas transaction without governmental assistance, while the territorial system only taxes the overseas transaction once.

The following sections will explain the differences between the two systems, and apply them to a hypothetical situation involving the United States (a worldwide tax system) and France (a territorial tax system). This hypothetical situation will conclude that in order to compete on the international market, worldwide systems of taxation should be allowed some sort of governmental assistance to compete with territorial taxation system exporters in order to avoid double taxation that is inherent in a worldwide taxation system.

A. The Worldwide System of Taxation

The United States is the leading country that uses a worldwide system of taxation. This system is deemed worldwide because the United States taxes its citizens on all of their income, irrespective of where they earn it. By focusing taxation on the individual, this means that the worldwide income of its citizens becomes subject to United States income tax, even when the income was not earned in the United States. Relating this theory to export taxation, this means that a corporation must include the income or losses of a foreign branch on its tax return.

Because the United States places tax liability on income regardless of where it is earned, it leads to double taxation of export goods. For example, by exporting widgets to France, a territorial taxation system, an American manufacturer pays tax to the United States on the sale because of the worldwide taxation system. As

100. See generally infra notes 186-187 and accompanying text.
101. See generally id.
103. See Engel, supra note 27, at 1529.
discussed below, it also pays French tax on the sale because it is earning income within French territory. This makes competition difficult for the American manufacturer because with more expenses involved in the sale of the widget, in the form of higher taxes, the American product will be more expensive than that of the French competitor.

In order to overcome this double taxation problem, the United States offers various tax relief mechanisms to ease the tax burden on exports. These mechanisms include tax credits, tax exemptions, tax reductions, or specific methods of calculating income. In other words, an American corporation can use these to offset any income tax liability on the foreign subsidiary’s income from the sale of widgets.

The point of these mechanisms is to relieve some of the income tax burden on American exporters, and place them on equal footing with other international exporters. The United States has also attempted to do this through various methods of taxation, including Domestic International Sales Corporations (DISCs), Foreign Sales Corporations (FSCs), and Extraterritorial Income (ETI). These tax methods are at the heart of the European Communities’ argument stating that the United States is illegally subsidizing its exports

B. Territorial System of Taxation

Unlike the worldwide system of taxation, a territorial system of taxation only taxes income earned within its physical territory. This means that a territorial tax country is asserting tax jurisdiction only over the domestic source income earned by its citizens and residents. Examples of countries using this type of taxation are Hong Kong, South Africa, and France.

Because these countries only tax domestic income, there is no risk of double taxation because they do not tax foreign source income. For example, if France is exporting widgets to Hong Kong, the French taxation system does not require the French exporter to pay taxes on the sale. This is because the income earned on the transaction is outside of France’s physical territory. The exporter may have to pay tax to the foreign country where the sale took place, but that depends on the taxation system used in that country. Here, because Hong Kong uses a territorial taxation system, the French exporter would owe tax to Hong Kong on the income earned from the sale of the widget there.

Along with using a territorial taxation system, many European countries also base their taxation on consumption rather than on income. This taxation method,
known as value added taxation, is usually applied to all goods and services.\textsuperscript{110} In the production of taxable goods, the value added tax is usually applied at a flat rate to the value added to the good at each stage of production.\textsuperscript{111} On average, this rate is approximately twenty percent of the value of the good.\textsuperscript{112}

For example, in making a television, a value added tax of twenty-percent would be imposed on the market value of all electrical components made by Company 1. This would, for analysis purposes, be a tax of twenty dollars on Company 1 ($100 value of the electrical components times twenty percent). Company 1 then sells the electrical components to Company 2. Company 2 places the components inside its housing for assembly. A different value added tax is added at this step in the television process. Company 2, for argument's sake, would be responsible for a forty dollar tax on the item (value of the television is now $200 (electrical components plus the television housing and assembly) times twenty-percent). This type of value added tax is present throughout the assembly process until the television is in the hands of the consumer.

In this scenario, double taxation is avoided by allowing each subsequent seller a credit in the amount of the value added tax previously paid.\textsuperscript{113} In this hypothetical, this means that Company 2 would be able to take a twenty dollar credit because Company 1 already paid twenty dollars on the value of the television at the time that Company 2 received the electrical components.

There are also products that are completely exempt from the value added tax. Goods that are basic or essential are not taxed by the value added tax. These are considered true exemptions.\textsuperscript{114}

Another type of exemption is the zero-rate exemption. Zero-rate exemptions apply "to articles on which the value added tax is collected and allows the seller a credit for the tax the seller previously paid."\textsuperscript{115} Thus, a company can receive a credit for all value added tax that it has paid throughout the manufacturing process. In terms of exportation, this potentially means that value added tax goods are cheaper than non-value added tax goods because exports are considered zero-rate exemptions.\textsuperscript{116} In essence, the company under a value added tax regime receives a credit for all taxes previously paid on the good, requiring it to only pay territorial income tax to the foreign country, if applicable.

In general, the value added tax has been considered an indirect tax by GATT.\textsuperscript{117} This is because the price of the good "remains constant because the tax

\textsuperscript{110} An exception is made for basic or essential goods such as food, children's clothing, and rent. See Hunter R. Clark et. al., The WTO Ruling on Foreign Sales Corporations: Costliest Battle Yet in an Escalating Trade War Between the United States and the European Union?, 10 MINN. J. GLOBAL TRADE 291, 311 (2001).
\textsuperscript{111} See Skeen, supra note 102, at 98.
\textsuperscript{112} See Clark, supra note 110, at 312.
\textsuperscript{113} See Clark, supra note 110 at 311.
\textsuperscript{114} See id.
\textsuperscript{115} Id.
\textsuperscript{116} See Clark, supra note 110, at 312.
\textsuperscript{117} See Skeen, supra note 102, at 99.
is really only paid when the consumer purchases the product.”

GATT also supports the value added tax method because it does not distinguish between domestic and export goods and their ultimate price to consumers.

Accordingly, countries with this type of tax are allowed broader exemptions on exports than non-value added tax countries. These exemptions amount to a full rebate of taxes paid on the goods up to the time that the goods are exported. Once exported, exporters are only liable for any tax incurred on the actual sale of the goods. Because this system allows value added tax countries a distinct advantage on the sale of exports, the United States argues that it is an illegal subsidy under the reasoning of the WTO in its conclusions regarding United States tax methods.

For example, assume that both the United States and France are exporting widgets to Hong Kong, a territorial tax country. Also assume that Hong Kong has a ten-percent territorial tax on any transactions within its physical territory. Both widgets cost $100 to manufacture. Both companies want to make a twenty-percent profit, so both will theoretically charge the Hong Kong consumer $120 (($100 times twenty-percent) plus $100).

Due to the value added tax, the French company has to pay a twenty-percent tax on the $100 widget before export, which equals a twenty dollar tax ($100 times twenty-percent). Remember, however, that because the widget is an exported good, the value added tax is credited to the French company because it is considered a zero-rate tax exemption due to its export status. This essentially means that the French company has yet to pay taxes on the widget. The American company also has not paid taxes on the widget because it does not have a value added tax; rather it bases taxation on income from the sale of the widget, not on its production.

Now that the goods are in Hong Kong, the consumer can purchase each widget for $120. Because this income is earned in Hong Kong’s physical territory, both companies will have to pay the additional ten-percent territorial income tax on the sale to Hong Kong. This requires a twelve-dollar tax from each company ($120 sale times ten-percent tax on the sale).

In addition to the tax due to Hong Kong, remember that the American company must also pay taxes to the American government on the sale (barring any credit or tax deferral) because it is subject to worldwide taxation on its income as a company residing in the United States. If the tax is also ten-percent, the American company will be charged twenty-four dollars in taxes (twelve dollars to Hong Kong and twelve dollars to the United States). The French company, on the other hand, is not subject to French taxation because the sale took place outside the French taxing jurisdiction. Therefore the company is only required to pay Hong

118. Skeen, supra note 102, at 99.
119. See id.
120. See id. at 100.
121. For a discussion on the value added tax as an illegal subsidy, see infra notes 175-182 and accompanying text.
Kong tax of twelve dollars.

Because both companies want to maintain a twenty-percent profit margin on the cost of goods sold, the French company will add its tax liability, or twelve dollars, to its base price. The American company will also add its tax liability to its base price. Because of the increased tax liability on the American company, it will be required to raise its price twenty-four dollars, rather than twelve dollars, to maintain its profit margin. Barring any other outside factors, the French widget will be twelve dollars cheaper than the American widget, giving the French company an advantage in the Hong Kong widget market.

In order to combat this inequitable tax treatment on its exporters, the United States has implemented various tax-saving methods throughout the decades. The European Communities have argued that these tax methods are subsidies under various GATT and WTO agreements. The following section will analyze these tax-saving methods, examine the validity of the European Communities' arguments, and conclude with the WTO's judgments in each case.

V. EVOLUTION OF THE FSC

Starting in the Kennedy administration, the United States attempted to level the playing field for American exporters by implementing various tax-saving mechanisms. All of these methods, in one way or another, allowed the deferral of any tax incurred in foreign transactions, sometimes for an indefinite period of time. The following sections will introduce three of these tax methods: Domestic International Sales Corporations (DISCs), Foreign Sales Corporations (FSCs), and Extra Territorial Income (ETI). It will then analyze their structures and how they affected international trade. Finally, it will discuss the WTO's stance on the method, and how the United States allegedly violated its WTO obligations by using these tax mechanisms.

A. Pre-DISC

Prior to the 1960's, foreign source income was not treated in the same fashion as it was in the previous hypothetical. In fact, the only way a corporation would be taxed on exports prior to 1960 was if it repatriated the foreign source income back to the United States. Due to this indefinite deferral of income, many exporters started to move their operations overseas to take advantage of this tax haven. This move allowed domestic exporters to earn unlimited tax-free income overseas. The only tax liability on this income occurred when it was repatriated to the United States, usually done on an as needed basis by the exporter.

To combat this movement overseas, the Kennedy Administration introduced legislation to tax foreign source income while still in the hands of a foreign

122. See generally Engel, supra note 27, at 1527.
123. See id.
124. See Engel, supra note 27, at 1527.
subsidiary. Entitled Subpart F, this legislation taxed certain transactions between a foreign subsidiary, known as a Controlled Foreign Corporation, and its parent company, a United States corporation. Subpart F taxed the CFC’s foreign-based income, and attributed this tax to the domestic parent company. In other words, shareholders of CFCs were now required to include as income any pro rata portion of CFC’s undistributed income, thus removing any tax benefits of owning a foreign-based company.

Subpart F worked to equalize taxation between domestic parent companies and their foreign subsidiaries. By doing this, however, the United States now subjected the domestic parent corporations to double taxation, similar to the previous hypothetical. In order to allow American exporters to compete in foreign markets, and to avoid double taxation, the United States implemented various tax methods to allow exporters to avoid this harsh double taxation. One of these methods was the DISC.

B. Domestic International Sales Corporations

Adopted in 1971, Congress enacted the DISC to enhance the competitiveness of American exporters. DISCs were intended to produce tax effects similar to tax methods used in Europe. Specifically tailored to emulate territorial tax systems, DISCs only taxed income produced by the domestic parent corporation, similar to a territorial tax system.

As in the previous hypothetical, a French company that sold a widget in France would have tax liability because the sale took place within France’s physical boundaries. Similarly, if the French company sold the same widget in Hong Kong, it would not have any French tax liability on the sale because the sale took place outside France’s physical territory. The United States felt that American exporters should receive the same tax treatment as foreign corporations.

This emulation of a territorial tax system by a DISC had a two-fold effect: it enabled exporters to lower their prices due to the reduction of their domestic tax

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125. See Lopez-Mata, supra note 13, at 589-90. In this article, the Controlled Foreign Corporation will be referred to as the CFC.
126. As defined, a CFC is a foreign corporation whose majority stockholder is an American shareholder. See I.R.C. § 957(a) (1962).
128. See Clark et. al., supra note 110, at 307. As with other taxation methods, there were ways that a domestic parent company could avoid paying taxes on its foreign subsidiary’s income. These methods included tax credits, tax exemptions, tax reductions, or specific methods of calculating income. See Lopez-Mata, supra note 13, at 586. Essentially, a domestic parent company could offset any income tax due on its foreign subsidiary’s income by using one of these credits or exemptions.
130. See Lopez-Mata, supra note 13, at 590.
131. See Skeen, supra note 102, at 72.
132. Since Hong Kong is also a territorial tax system, it would be able to tax the transaction. This point is ignored here for argument’s sake.
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burden, and increased the profitability of exporting. This, in turn, drew a greater number of American exporters into the exportation market.

Regarding the actual taxation effects of the legislation, DISCs were engineered to provide partial relief from Subpart F treatment. In order to be qualified as a DISC, a company had to be incorporated in any State, and have:

A. 95 percent or more of their gross receipts were qualified export receipts;

B. the adjusted basis of the qualified export assets of the corporation equals or exceeds 95 percent of all assets of the corporation at the close of the taxable year;

C. the corporation does not have more than one class of stock and the par or stated value of its outstanding stock is at least $2,500 on each day of the taxable year; and

D. the corporation has made an election to be treated as a DISC.

In this system, a DISC was established to do all exportation on behalf of the parent company. Without any further legislation, however, the parent corporation would still be liable for any income earned by the DISC due to Subpart F treatment.

To avoid this treatment, the DISC was allowed to take a commission on any foreign sales it made on behalf of the parent corporation. These commissions were treated as 100% deductible to the parent corporation, and partially deductible to the DISC. In other words, the DISC would sell the widgets on behalf of the parent corporation. At certain times of the year, it would repatriate the income to the parent corporation. The parent would then pay the DISC its commission.

133. See Clark et. al., supra note 110, at 298.
134. See id. at 298.
135. See Lopez-Mata, supra note 13, at 591.
136. I.R.C. § 992 (1971). In general, export receipts are “gross receipts from the sale, exchange, or other disposition of export property.” I.R.C. § 993(a) (1971).
137. For a discussion on the different systems of taxation, see supra notes 107-121 and accompanying text.
138. See Jelsma, supra note 7371, at 1332.
139. To calculate the amount of the commission, the DISC used one of three methods stated in I.R.C. § 994 (1971):

1) 4 percent of the qualified export receipts on the sale of such property by the DISC plus 10 percent of the export promotion expenses of such DISC attributable to such receipts,

2) 50 percent of the combined taxable income of such DISC and such person which is attributable to the qualified export receipts on such property derived as the result of a sale by the DISC plus 10 percent of the export promotion expenses of such DISC attributable to such receipts, or

3) taxable income based upon the sale price actually charged (but subject to the rules provided in section 482)
After the commission was distributed, both the parent corporation and the DISC owed tax on the commission. For the DISC, 57.5% of its export profits were considered income attributable to the DISC for the current year. Regarding the other 42.5%, it could be deferred until the DISC’s profits were distributed or the DISC ceased to exist. Because actual distributions were rarely necessary, this 42.5% profit could be deferred indefinitely, thus saving millions of dollars in yearly taxation for American exporters.

This method of taxation gave a distinct advantage to DISCs on the international exportation market. As expected, many European GATT members felt that the United States was illegally subsidizing DISCs. Specifically, France, Belgium, and the Netherlands, all of which were members of GATT, stated that DISCs violated GATT Article XVI:4. Essentially, these European countries argued that DISCs resulted “in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market.” This was a clear violation of GATT Article XVI.

The United States countered this argument by stating that DISCs were similar to territorial taxation used throughout Europe. The United States argued that, by taxing only income earned by the parent in the domestic market, DISCs were in effect a type of territorial taxation system. Because GATT implicitly endorsed territorial taxation, it should also endorse DISCs.

To settle this dispute, GATT established a Panel to examine the effects of DISCs on United States taxation. The GATT Panel concluded its study by stating that this lack of taxation on DISCs was not a mere deferral on income, but instead constituted “remissions or exemptions.” In reaching its conclusion, the Panel looked to the fact that the United States did not charge interest on the deferred income, and also to the fact that the United States could not state when the deferred 42.5% profit would ever be subjected to income tax. This conclusion meant that the United States was not in accord with its GATT obligations under Article XVI.

The United States vehemently denied that it was in violation of Article XVI, and restated its position that the DISCs were similar to territorial taxation systems. The United States also criticized the GATT Panel because it did not establish the

140. See Jelsma, supra note 73, at 1333 (citing Treas. Reg. §1.861-8 and I.R.C. § 995(b) (1971)).
142. See Jelsma, supra note 73, at 1333.
143. For discussion on GATT Art. XVI, see supra notes 71-72 and accompanying text.
144. GATT, supra note 16, at art. XVI(4).
145. See Lopez-Mata, supra note 13, at 592.
146. Although similar, remember that this dispute took place within GATT dispute resolution procedure, not WTO.
147. Jelsma, supra note 73, at 1333 (citing Report on United States Tax Legislation (DISC), 23 BISD (Supp. 1977)).
148. This requirement was not officially codified under GATT until the Tokyo Round. See Tokyo Round Subsidies Code, supra note 74, at Annex, para. (e).
149. See Jelsma, supra note 73, at 1334 n.47.
exact meaning of a subsidy,\textsuperscript{150} nor did it discuss which parts of DISCs the Panel considered to be a subsidy.\textsuperscript{151}

In the end, after increasing pressures from GATT and its European members, the United States complied with the Panel’s decisions on DISCs by implementing an interest charge on the deferred 42.5% of income.\textsuperscript{152} By doing this, the United States felt that it had appeased one of their arguments against DISCs. The United States also adopted new tax legislation that created an entity that would overcome any future GATT arguments: the Foreign Sales Corporation (FSC).\textsuperscript{153}

C. Foreign Sales Corporations

Enacted as part of the Deficit Reduction Act of 1984,\textsuperscript{154} FSCs were designed to provide American exporters with a substitute for DISCs. At the time of its enactment, Congress felt that FSCs would be compliant with GATT obligations, and would appease any European argument that they could be considered an illegal subsidy.\textsuperscript{155}

Unlike DISCs, FSCs were incorporated outside the United States,\textsuperscript{156} specifically in a jurisdiction considered to be a tax haven.\textsuperscript{157} This allowed a foreign subsidiary to pay minimal tax on any income earned in that country. Besides the requirement of international incorporation, a FSC also had to have (1) no more than twenty-five shareholders; (2) no preferred class of stock; and (3) economic substance.\textsuperscript{158}

In addition to meeting all of these requirements, a FSC also had to meet the “foreign management and economic process test.”\textsuperscript{159} This test required FSCs (1) to have all board of director meetings outside the United States; (2) to maintain their principal bank account outside the United States; and (3) to disburse all dividends, legal and accounting fees, and salaries of officers and directors from a bank account outside the United States.\textsuperscript{160} The point of the test was to ensure that

\textsuperscript{150} The exact definition of a subsidy was not codified until the Uruguay Round in 1994 under the Agreement on Subsidies and Countervailing Measures, a full 16 years after this decision. Even today, there is dispute as to the exact definition of a subsidy. For discussion on the Agreement on Subsidies and Countervailing Measures and its definition of a subsidy, see supra notes 84-100 and accompanying text.

\textsuperscript{151} See Lopez-Mata, supra note 13, at 593.


\textsuperscript{153} This does not mean that DISCs dissolved entirely. DISCs are still used today, but with much less tax savings due to the interest charge on deferred income. In fact, DISCs are used solely as a tax incentive for small exporters. See Lopez-Mata, supra note 13, at 596.


\textsuperscript{155} See Lopez-Mata, supra note 13, at 595, 598.

\textsuperscript{156} See id. at 597.

\textsuperscript{157} A tax haven is a country that has a nominal tax rate. Well-known examples of tax havens are the U.S. Virgin Islands, Barbados, and Guam. See Clough, supra note 34, at 265.

\textsuperscript{158} See I.R.C. § 922 (Supp. 1985).

\textsuperscript{159} See Corona, supra note 66, at 369.

\textsuperscript{160} Id.
FSCs were, in fact, international corporations.\textsuperscript{161}

Similar to DISCs in practice, FSCs were foreign subsidiaries of an American parent corporation that operated on a commission. Basically, the FSC would purchase goods from the domestic parent corporation, resell them abroad, and then repatriate a portion of this earned income back to the domestic parent corporation through the use of a dividend.\textsuperscript{162} This dividend was then subject to a one hundred-percent dividends-received deduction by the parent corporation. The income not returned to the parent (the FSCs commission) was treated as foreign trade income.\textsuperscript{164} Because foreign trade income was treated as foreign source income not effectively connected to the parent corporation, it was not subjected to United States taxation.\textsuperscript{165}

The export sales commission retained by the FSC was determined by using one of two different methods. The first was arm's length pricing under Section 482 of the Code.\textsuperscript{166} In practice, this meant that thirty-two percent of the FSC's income could be withheld for taxation purposes.\textsuperscript{167} The other way to determine taxation was by using an administrative price method.\textsuperscript{168} This method limited taxation to the greater of 1.83% of the foreign trade gross receipts\textsuperscript{169} from the transaction, or twenty-three percent of the combined taxable income of the transaction. These methods, in conjunction with Section 951(e) of the Code, allowed the FSC to use a different method of taxation than its parent corporation. This different method was used in order to avoid Subpart F treatment, thereby

\textsuperscript{161} This will become important because in fact, FSCs were not international corporations. \textit{See infra} note 203-204 and accompanying text.
\textsuperscript{162} \textit{See} I.R.C. § 245(c) (Supp. 1985).
\textsuperscript{163} \textit{See} id. \textit{See also} Jelsma, \textit{supra} note 73, at 1341.
\textsuperscript{164} \textit{See} I.R.C. § 245(c) (Supp. 1985).
\textsuperscript{165} \textit{See} I.R.C. § 882 (Supp. 1985).
\textsuperscript{166} \textit{See} I.R.C. § 482 (1985).
\textsuperscript{167} \textit{See} Jelsma, \textit{supra} note 73, at 1342.
\textsuperscript{168} \textit{See} I.R.C. § 925 (Supp. 1985).
\textsuperscript{169} For a definition of Foreign Trading Gross Receipts, \textit{see} I.R.C. § 924 (Supp. 1985):
(a) In general—Except as otherwise provided in this section, for purposes of this subpart, the term 'foreign trading gross receipts' means the gross receipts of any FSC which are—
1. from the sale, exchange, or other disposition of export property,
2. from the lease or rental of export property for use by the lessee outside the United States,
3. for services which are related and subsidiary to—
(A) any sale, exchange, or other disposition of export property by such corporation, or
(B) any lease or rental of export property described in paragraph (2) by such corporation
4. for engineering or architectural services for construction projects located (or proposed for location) outside the United States, or
5. for the performance of managerial services for an unrelated FSC or DISC in furtherance of the production of foreign trading gross receipts described in paragraph (1), (2), or (3). Paragraph (5) shall not apply to a FSC for any taxable year unless at least 50 percent of its gross receipts for such taxable year is derived from activities described in paragraph (1), (2), or (3).
avoiding double taxation.170

The FSC was different from a DISC because it was internationally based, not a domestic corporation. By making it an international entity, the FSC moved closer to a territorial taxation system because the United States was not taxing any income earned by an American corporation overseas. As compared to the previous hypothetical, France used its territorial taxation system to tax French corporations only on income earned within France's physical boundaries. FSCs were effectively doing the same thing.

FSCs were very successful with American corporations that exported many of their goods internationally. It was estimated that 6,000 American corporations benefited from FSC tax breaks, including such businesses as Boeing, General Electric, and Motorola.171 In 1998, Boeing alone saved approximately $130 million, or twelve percent of its earnings for the year, in U.S. taxes as a result of its FSC.172 This success was not limited to industrial giants. It was estimated that small and medium-sized manufacturers saved on average $124,000 annually due to FSC benefits.173 Overall, it was estimated that FSCs provided over four billion dollars per year in tax breaks to domestic corporations.174

Although this tax method seemed very similar to territorial taxation, the European Communities still argued that the FSC constituted an illegal subsidy under GATT.175 In general, the European Communities felt that because FSC benefits were available only to American exporters, they amounted to a subsidy.176 This subsidy, it argued, put European businesses at a distinct disadvantage because, through the use of FSCs, American exporters could lower the price of their goods in comparison to their European competition.177

The United States countered this argument by stating that FSCs were being treated similarly to exporters under European territorial taxation systems.178 In comparing FSCs to territorial taxation systems, the United States stated that both methods of taxation provided the domestic parent corporation with a partial exemption for income attributable to a foreign subsidiary.179 Both of these methods resulted in reductions in tax from a domestic corporation's export activities.180 The United States further argued that if the FSC was considered a tax

170. See Lopez-Mata, supra note 13, at 598.
172. See id.
175. See Skeen, supra note 102, at 75.
176. See id.
177. See Clark et. al., supra note 110, at 308.
180. See id.
subsidy, so too was the European territorial taxation system. As previously stated, the FSC deferred tax due on export income, very similar to the territorial taxation system prevalent in Europe. Because both systems exempted export taxation in one way or another, and the FSC was somewhat based on a territorial taxation idea, both tax systems should be held to the same standard of subsidization.

To clarify their argument, the European Communities specifically stated that they considered the FSC an illegal subsidy under the Agreement on Subsidies and Countervailing Measures and the Agreement on Agriculture. The European Communities first argued that FSC legislation violated the Agreement on Subsidies and Countervailing Measures, Article I:1 because the United States was foregoing taxes owed by the FSC. This illegal deferral of taxation was done by granting tax subsidies specifically contingent upon the exportation of goods.

The European Communities also argued that FSCs violated the Agreement on Subsidies and Countervailing Measures, Footnote 59 to paragraph (e), because FSCs were a deferral of direct taxes related to exports. As paragraph (e) states, a subsidy is prohibited if it gives "(1) exemptions (2) specifically related to exports (3) of direct taxes (4) payable by industrial or commercial enterprises." Finally, the European Communities argued that FSCs violated the Agreement on Agriculture Article III:3 by providing subsidies in excess of their reduction commitments. This meant that the United States was granting agricultural tax subsidies in excess of the levels it committed to by endorsing the Agreement on Agriculture.

The United States attacked these arguments, stating that FSCs were consistent with the language of Footnote 59 because "income generated from economic activity outside the territory of the taxing authority need not be taxed, and that a decision not to tax such income is not a prohibited subsidy." Specifically, Footnote 59's second sentence insinuated that a WTO member had the right not to tax a domestic corporation's foreign subsidiary as it saw fit. The second paragraph of Footnote 59 specifies that a WTO member had the right not to tax a domestic corporation's foreign subsidiary as it saw fit. The second paragraph of Footnote 59 specifies that a WTO member had the right not to tax a domestic corporation's foreign subsidiary as it saw fit.
sentence states that "the Members reaffirm the principle that prices for goods in transactions between exporting enterprises and foreign buyers under their or under the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm’s length." This meant that because this tax exemption did not violate Article III:1(a) of the Agreement on Subsidies and Countervailing Measures and Footnote 59 to paragraph (e), FSCs did not violate any United States obligations to GATT and the WTO.

Eventually, the European Communities and the United States placed this disagreement before a WTO Panel. The Panel, chaired by Crawford Falconer (New Zealand), and assisted by Seung Wha Chang (South Korea) and Didier Chambovey (Switzerland), agreed with the European Communities, and ruled against the United States.

The Panel first looked at the specific language of a FSC to determine whether it was a subsidy. In doing so, it used a "but for" test, and explained that if the scheme did not exist, and revenue would be due but for the scheme, the scheme should be considered a subsidy. The Panel added weight to this reasoning because the United States also uses a "but for" test to determine whether a subsidy exists.

It also found that a FSC was a subsidy under the Agreement on Subsidies and Countervailing Measures, Article III:1. The Panel first looked at Section 924 of the Code for the definition of export property. Applying this definition, the Panel concluded that because the subsidy was contingent upon export performance, and not available to domestic performers, it was an illegal subsidy.

Regarding the Agreement on Agriculture violations, the Panel felt that because the agreement did not have an official definition of subsidy, both parties must have relied on the definition used in the Agreement on Subsidies and Countervailing Measures. Because the Panel already found that the FSC was an illegal subsidy under this agreement, it therefore must also be a subsidy under the Agreement on

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193. Agreement on Subsidies and Countervailing Measures, supra note 18, at Annex 1, para. (e)
n.59.
196. See WTO Doc. WT/DS108/R, at para. 8.1. Regarding this or any other decision made by a WTO Panel, it will be very difficult for the United States to overcome any decision by the WTO, specifically those made by the Panel and the Appellate Body. As previously stated, the Dispute Settlement Body will accept their holdings absent consensus to the contrary. This means that unless the United States can persuade seventy-one other countries to agree with its argument, it has to abide by the WTO's decision.
197. See id. at para. 7.45.
198. See id. at para. 7.47. The United States Department of Commerce uses a "but for" test to identify and determine countervailable subsidies. As stated in 19 C.F.R. § 351.509:

Benefit
(1) Exemption or remission of taxes. In the case of a program that provides for a full or partial exemption or remission of a direct tax (e.g., an income tax), or a reduction in the base used to calculate a direct tax, a benefit exists to the extent that the tax paid by a firm as a result of the program is less than the tax the firm would have paid in the absence of the program.
Agriculture. The Panel also found that the FSC was a subsidy to reduce the costs of marketing exports of agricultural products under the Agreement on Agriculture Article IX:1(d). Because FSC subsidies reduced an exporter's income tax liability with respect to marketing activities, the Panel held that they effectively reduced the cost of marketing agricultural products.

Finally, the Panel stated that, although named as a foreign corporation, FSCs were not foreign in practice. In fact, over seventy-four percent of FSCs were located in American possessions, with the U.S. Virgin Islands accounting for sixty-six percent of FSC locations. The Panel also looked to the fact that citizens of the U.S. Virgin Islands were considered United States citizens for taxation purposes, yet FSCs located there were not.

After the Panel's final decision, the European Communities threatened the United States with countermeasures aimed at American exports. These countermeasures would impose an additional one hundred-percent ad valorem duty above the duty already paid. This would translate into the price of American exports suddenly doubling overnight, which obviously would hurt American exporters in European markets.

Before the European Communities were able to implement these countermeasures, the United States appealed the Panel's decision to the WTO's Appellate Body. Its primary argument was that the original Panel did not read the meaning of Footnote 59 in conjunction with the rest of the Agreement on Subsidies and Countervailing Measures. This led the Panel to misinterpret the meaning of subsidy within this agreement, thus wrongly ruling against the United States.

The Appellate Body disagreed, stating that the Panel correctly applied the "but for" analysis of the American export taxation system. It found that, to determine the definition of subsidy, the Panel did not need to read Footnote 59 in conjunction with the rest of the Agreement on Subsidies and Countervailing Measures. Therefore, on February 24, 2000, the Appellate Body upheld the Panel's ruling that a FSC was a subsidy under the Agreement on Subsidies and Countervailing Measures.
Article III:1.209 Regarding the actual taxation of export income, the Appellate Body stated that the United States could not carve out any exemptions that were export contingent.210 This, by nature, would be a violation of its Agreement on Subsidies and Countervailing Measures obligations.211

The Appellate Body, however, did reverse part of the Panel's decision.212 It stated that the United States was acting consistently with its obligations under Agreement on Agriculture because FSC taxation did not relate to the marketing of an export product.213

The WTO's final decision on FSCs dealt a serious blow to American exporters. Because of the WTO decision, exporters could no longer take advantage of the FSC, and thus reverted back to the harsh tax treatment of Subpart F. This reversion would weigh heavily on their opportunities in European markets because they would again be subjected to double taxation.

To remedy this situation, Congress enacted a new tax mechanism that applied to both domestic and export corporations. Because it was not export contingent, Congress felt that it should be WTO compliant. The next section of this article will analyze this new method of taxation, and discuss the WTO problems involved with its implementation.

D. Extraterritorial Income

In order to appease the European Communities' and WTO's concerns, Congress enacted legislation that was not export contingent, yet allowed for certain tax benefits for corporations to compete with the Europeans. Entitled the FSC Repeal and Extraterritorial Income Exclusion Act of 2000,214 it was considered the newest American taxation scheme in the long battle between the United States and the European Communities.

As the name insinuates, the FSC Repeal Act terminated all FSC legislation, and replaced it with Extraterritorial Income.215 Codified in Section 114 of the Code, ETI is defined as "the gross income of the taxpayer attributable to foreign trading gross receipts216 of the taxpayer."217 Any income considered ETI is

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209. See id. at para. 121.
210. See id. at para. 153.
211. See id. at para. 154.
212. See id. Specifically, the Appellate Body only reversed the Panel's discussion on the Agreement on Agriculture Art. IX:1(d).
214. FSC Repeal and Extraterritorial Income Exclusion Act of 2000, Pub. L. No. 106-519, 114 Stat. 2423 (codified in scattered sections of the Code). In this article, this Act will be referred to as ETI.
215. This is different than the transition between DISCs and FSCs. DISCs still exist, but the deferred income now has an interest charge in place. See supra note 153. As this act states, FSCs are no longer in existence.
216. ETI replaced FSC, which made I.R.C. §§ 921-927 void. Originally, foreign trade gross receipts were defined in I.R.C. § 924 (Supp. 1985). This section was replaced by I.R.C. § 942 (2000). The only language that was different between the sections was "gross receipts of any FSC which are" was changed to "gross receipts of the taxpayer which are."
excluded from gross income, thus avoiding United States taxation.\textsuperscript{218}

Foreign trading gross receipts are based on the sale of qualified foreign trade property.\textsuperscript{219} As defined, qualified foreign trade property is property that can be (1) manufactured \textit{within or outside} the United States;\textsuperscript{220} (2) held primarily for sale \textit{outside} the United States;\textsuperscript{221} and (3) not more than fifty percent of the fair market value can be attributable to foreign content.\textsuperscript{222} This means that American exporters are no longer required to set-up foreign subsidiaries such as FSCs to route their exports for sale. By doing this, Congress hoped to avoid any subsidization arguments from the WTO.\textsuperscript{223}

Another principle feature of ETI is that it is an exclusionary taxation method, and not a deferral taxation method, like FSC.\textsuperscript{224} In other words, unlike previous taxation methods, ETI does not count at all towards gross income. Instead, its income is characterized separately.

There are two ways of characterizing ETI income: qualifying foreign trade income and non-qualifying foreign trade income.\textsuperscript{225} Qualifying foreign trade income means the amount of gross income which, if excluded, will result in a reduction of the taxable income of the taxpayer from such transaction "equal to the greatest of: (A) thirty-percent of the foreign sale and leasing income . . . ; (B) 1.2 percent of the foreign trading gross receipts . . . ; or (C) fifteen-percent of the foreign trade income . . . ."\textsuperscript{226} "Non-qualifying foreign trade income is not excludable from gross income."\textsuperscript{227}

By making ETI a taxation exclusion method, and making sure that it was not export-contingent, Congress felt that it should be fully compliant with the WTO decision on FSCs. As stated by one United States official, "our proposal directly addresses the WTO Panel decision and it is both in fact and in law WTO compatible."\textsuperscript{228}

Remembering the past three decades of debate over the issue, United States officials anticipated a negative reaction from the European Communities over the ETI. In public remarks, United States officials preempted this reaction by openly criticizing the European Communities' previous information given to the United States. In one instance, the United States Legal Counselor in Geneva, Daniel

\begin{footnotes}
\textsuperscript{217} I.R.C. § 114(e) (2000).
\textsuperscript{218} See I.R.C. § 114(a) (2000).
\textsuperscript{222} See §943(a)(1)(C). See also Lopez-Mata, supra note 13, at 604.
\textsuperscript{223} See I.R.C. § 942 (2000). See generally Lopez-Mata, supra note 13. Instead of being export-contingent (FSC), ETI allows both domestic and foreign manufacturers to take advantage of this method of taxation.
\textsuperscript{224} See Lopez-Mata, supra note 13, at 603 (citing I.R.C. § 114).
\textsuperscript{225} See id. at 604.
\textsuperscript{227} See Lopez-Mata, supra note 13, at 604.
\textsuperscript{228} Murphy, supra note 174, at 533 (quoting comments made by Department of the Treasury Deputy Secretary Stuart E. Eisenstat).
\end{footnotes}
Brinza, accused the European Communities of failing to offer any views on what precise steps the United States could make to satisfy their concerns. 229 This lack of precise information, he stated, led to the past disagreements over the FSC, now being drawn out into its third decade. 230

Brinza also criticized the European Communities and the WTO for not seeing the similarities between European territorial taxation and American attempts to mimic this system. In an interview, Brinza stated that "the European Union refuses to recognize the indisputable fact that tax treatment of exports under the FSC Replacement Act is similar to the tax treatment of exports under existing European territorial systems." 231 This criticism seems justified because both the United States and the European Communities use non-taxation of exports to gain an advantage in pricing their exports. In fact, the European Communities have admitted to American officials that "exempting foreign income from taxation is a widely accepted tax practice that does not constitute a prohibited export subsidy." 232

As expected, the European Communities nevertheless filed a grievance against the United States, claiming that ETI constituted an illegal subsidy because it was export-contingent, similar to its previous grievance with FSCs. 233 Because ETI legislation states that property has to be held primarily for sale outside the United States, 234 the European Communities argued that qualified foreign trade property was export-contingent. This would become the primary focus in the European Communities' argument that the United States was still illegally subsidizing its exports. 235

In fact, some European Communities officials publicly stated that ETI is even worse than FSCs. At one point, the European Commission 236 declared that the law "not only maintains the violations found by the WTO in the FSC case, but may even aggravate them." 237 The Commission went on to state that "the new legislation continues to provide a significant illegal export subsidy to more than

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230. See id.
232. Id.
233. See generally WTO Doc. WT/DS108/RW.
235. For a discussion of the European Communities' arguments, see infra notes 239-248 and accompanying text.
236. The European Commission is not the same entity as the European Communities. The European Communities, synonymous with the European Union, is a formal group of countries bound by treaties and agreements. For more information on the European Communities, see generally http://www.europa.eu.int/index_en.htm. The European Commission, on the other hand, is actually a commission within the European Union, preparing legislation and representing the EU on various international issues. For more information on the European Commission, see generally http://www.europa.eu.int/commlindexen.htm.
half of total American exports, to the direct detriment of European companies.\footnote{See id.} Similar to the original FSC dispute, the European Communities argued that the FSC Replacement Act (ETI) resulted in the foregoing of tax revenue that is otherwise due.\footnote{See WTO Doc. WT/DS108/14/Corr.1.} This is because ETI is a tax exemption scheme, and but for the scheme, the United States would be taxing this income.\footnote{See WTO Doc. WT/DS108/RW, at para. 8.43.} It argued that by foregoing this taxation of income, the United States gave exporters a financial contribution, in direct violation of the Agreement on Subsidies and Countervailing Measures, Article I:1.\footnote{See WTO Doc. WT/DS108/RW, at para. 8.30.} As previously discussed, qualified foreign trade property is held for sale outside the United States.\footnote{For a discussion on qualified foreign trade property, see supra notes 219-223 and accompanying text.} This seems to make the subsidy export-contingent. In fact, the Panel even noted that according to the European Communities, "there would no longer be a prohibited subsidy within the meaning of Article III of the Agreement on Subsidies and Countervailing Measures if the United States eliminated the requirements that the property be held for use outside the United States and the fifty percent foreign content limitation."\footnote{See WTO Doc. WT/DS108/RW, at para. 8.1.} To expand the breadth of their argument, the European Communities also argued that ETI violated the Agreement on Subsidies and Countervailing Measures, Article III:1(a) “because it is only applicable to profits arising from export transactions.”\footnote{See id. at para. 8.50.} Therefore, because the ETI is conditioned upon exportation, the European Communities asserted that the subsidy is export-contingent in respect to American-produced goods.\footnote{See id. at paras. 8.59-60.} The European Communities also argued that ETI accords more favorable treatment to American domestic products than imported foreign products.\footnote{See id. at para. 3.1(e).} They claimed that because qualified foreign trade property’s fair market value cannot contain more than fifty-percent foreign content, ETI is not available to foreign corporations whose goods have one hundred percent foreign content.\footnote{See WTO Doc. WT/DS108/RW, at para. 8.160.} In essence, the European Communities argued that by discriminating against products with foreign content, ETI afforded domestic products favorable treatment, thus violating GATT-1994, Article III:4.\footnote{See GATT, supra note 16, at art. III - National Treatment on Internal Taxation and Regulation: The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.}
As previously discussed, the United States countered by stating that ETI is not export-contingent, and is in complete accord with the Agreement on Subsidies and Countervailing Measures and other WTO obligations. Because Section 114 of the Code is available to both domestic and foreign manufacturers, the United States argued that by definition, it could not be considered export-contingent under the Agreement on Subsidies and Countervailing Measures Article 1:1.

In addition, the United States commented that ETI “does not require the use of domestic rather than imported goods.” Within the language of ETI, the United States stated that goods could meet the foreign articles and labor limitation imposed by GATT Article III:4 “even if one hundred percent of the fair market value of their inputs is foreign.” Because ETI did not violate Article III:4 on its face, the United States argued that it did not constitute an illegal export subsidy.

Finally, the United States asserted that if legislation provided that “gross income does not include income generated from export activities,” as ETI does, the ordinary meaning of Article I:1(a) suggests that there would not be a financial contribution within the meaning of the Article. This is because the “tax revenue on export activities would not be ‘otherwise due’ under the law of the Member, which is the normative benchmark for an Article I analysis.”

Along with filing a grievance in the WTO, the European Communities criticized the United States defenses in the matter. European Communities officials publicly stated that the United States appeared to be basing its defense on a narrow definition of subsidy “that assumes that whatever is not specifically prohibited by the Agreement on Subsidies and Countervailing Measures is permitted.” This defensive strategy, they argued, was very similar to the original strategy in the FSC debate.

On August 20, 2001, the Panel decided against the United States, and found that the ETI is in fact an illegal subsidy. In looking at both arguments, the Panel first addressed whether ETI is export-contingent. Applying a “but for” analysis, similar to the reasoning in its FSC decision, the Panel concluded that the ETI exclusion foregoes revenue that is otherwise due within the meaning of Article I:1. This conclusion meant that only exporters are entitled to take the exemption, and thus, the United States government is not taxing income that it would normally tax but for the exemption.

The Panel also found that the United States was in violation of the Agreement

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249. See GATT, supra note 16, at para. 3.3.
251. Id. at para. 8.125.
252. Id. (emphasis added).
253. Id. at para. 8.39.
254. Id.
256. See generally, WTO Doc. WT/DS108/RW. As a note, the ETI Panel was the same as in the original FSC dispute.
257. See id. at para. 8.37.
on Subsidies and Countervailing Measures, Article III:1(a). Because qualifying foreign trade property had to be held a for ultimate use outside the United States, ETI is therefore only available in respect of income derived from transactions relating to that property.258 This meant that ETI was export-contingent because only exports could take advantage of the exemption, in clear violation of Article III:1(a).

Finally, the Panel found that ETI also violated GATT Article III:4 because American products would be more likely to take advantage of the exclusion than imported products.259 Although Section 114 of the Code states that products may be manufactured inside or outside the United States, the Panel concluded that an illegal subsidy existed even if only a small percentage of corporations using the exemptions had one hundred percent American content products.260 This meant that there was no possible way for foreign products to take advantage of ETI, thus violating Article III:4 by providing less favorable treatment to imported products.

This decision seemed to puzzle many American trade experts. For example, Fred Murray, Vice President for Tax Policy of the National Foreign Trade Council, Inc., told reporters that “the Panel’s decisions appears to ignore the fact that the United States fundamentally alters its tax system specifically to comply with the WTO’s rules and to move the United States system closer to territorial tax systems that are common in Europe and around the world.”261 This sentiment echoed the United States’ argument throughout the disagreement: DISCs, FSCs and ETI all, in one way or another, deferred or exempted export income, just like territorial taxation systems in Europe. Unfortunately, the WTO did not analyze these tax methods in the same manner.

On October 15, 2001, the United States filed an appeal of ETI Panel’s decision with the WTO Appellate Body.262 This was done in part because of pressure placed on United States Trade Representative, Robert Zoellick, by various congressmen. In a letter dated September 6, 2001, eleven House Democrats, led by Representatives Charles Rangel of New York and Sander Levin of Michigan, urged Zoellick to appeal the ETI decision because it was “deeply flawed.”263 President Bush received pressures from the private sector as well. In a letter dated August 8, 2001, chief executives of seventy-four leading American companies wrote him, urging an appeal of the ETI decision.264 These chief executives stated that an appeal “could serve to clarify the meaning of WTO rules and provide greater certainty about what needs to be done to resolve this ‘volatile

260. See id. at para. 8.123.
264. See id.
On November 26, 2001, the United States’ appeal was argued by Deputy Treasury Secretary Kenneth Dam. By having a high-ranking official take part, the Bush administration hoped that the WTO would realize how serious the United States was taking the appeal. While before the Appellate Body, Dam argued that ETI is not export-contingent because both foreign and domestic corporations can take advantage of its tax benefits.

Dam also stated that the Panel’s decision on ETI was so broad and subjective that it “calls into question measures incorporated in the tax systems of every (WTO) member.” This decision, he continued, not only undermined ETI, but “could place at risk other tax systems in Europe and the rest of the world.” In order to emphasize this point, Dam cited specific examples of European countries that give incentives to their exporters, similar to the United States and its use of ETI. These examples, particularly tax systems in Belgium, France, Germany, and Italy, exclude resident corporations from paying corporate tax on foreign income or are not taxed on foreign source dividend income. These examples are so similar to ETI that they can be considered one in the same.

In its appeal, the United States seems to be rehashing the same argument that has been the focus of American policy since the advent of DISCs in 1971: the system is not export-contingent, and therefore is not an illegal subsidy. As previously stated, Section 114 of the Code specifically provides that qualified foreign trade property must be sold outside the United States. This was one of the main points of the Panel’s decision.

On January 14, 2002, the WTO’s Appellate Body enforced this main point by affirming the Panel’s decision on ETI. As with previous decisions, this decision held that the United States was illegally subsidizing its exporters through the use of ETI. Specifically, the Appellate Body looked to previous decisions and their interpretation of “contingent.” As stated in the Canada-Aircraft decision in 1999, contingent means “‘conditional’ or ‘dependent’ for its existence upon something else.” In other words, the grant of a subsidy must be conditional or dependent upon export performance.

The Appellate Body then applied this definition to ETI. Because ETI requires qualified foreign trade property to be sold outside the United States, it is export...
contingent even though foreign-based corporations can take advantage of its provisions.\textsuperscript{274} The Appellate Body concluded that just because the “subsidies granted [to foreign-based corporations] might not be export contingent, [it] does not dissolve the export contingency arising in the first set of circumstances.”\textsuperscript{275}

The Appellate Body also looked to the fact that the United States was foregoing taxation due on the overseas transactions.\textsuperscript{276} As stated in SCM Article 1.1(a)(1)(ii), “the normative benchmark for determining whether revenue foregone is otherwise due must allow a comparison of the fiscal treatment of comparable income, in the hands of taxpayers in similar situations.”\textsuperscript{277}

Examining the Code, the Appellate Body first looked to Section 61(a), where gross income means “all income from whatever source derived.”\textsuperscript{278} In determining a taxpayer’s tax liability, gross income is then reduced by a credit, subject to limitations, with the amount of foreign taxes paid or deemed to have been paid by that taxpayer.\textsuperscript{279} These rules on the taxation of gross income, however, do not apply to any income received on the sale of qualified foreign trade property.

This income, known as qualified foreign trade income, is excluded from taxation altogether.\textsuperscript{280} Because of this, “the amount of tax paid by the taxpayer will very likely be less than the tax which the taxpayer would have paid, on that income, under the rules “otherwise” applicable to foreign-source income, if the taxpayer did not elect to use the ETI measure.”\textsuperscript{281}

The Appellate Body concluded, “This, too, confirms that the United States will forego revenue under the ETI measure that would be ‘otherwise due,’” violating SCM Article 1.1(a)(1)(ii).\textsuperscript{282}

Unlike previous decisions by a WTO dispute resolution body, this part of the Appellate Body’s decision was actually applauded by some United States officials. For example, Linnett Deily, the United States Ambassador to the WTO, applauded this part of the decision by stating that the Appellate Body “clarified the normative benchmark for determining whether revenue foregone is otherwise due.”\textsuperscript{283} This, he went on to say, “has made its standard clearer and more understandable.”\textsuperscript{284}

Like previous WTO decisions, Deily stated that the majority of the opinion lacks guidance, making it difficult for WTO members to avail themselves of a WTO subsidy exemption.\textsuperscript{285} This vagueness in WTO opinions, it seems, is making

\begin{enumerate}
\item See WTO Doc. WT/DS108/AB/RW, at para. 119.
\item WTO Doc. WT/DS108/AB/RW, supra note 274, at para. 119
\item See id. at paras. 81-107.
\item Id. at para. 98.
\item Id. at para. 99.
\item See id. at para. 100.
\item See id. at para. 102.
\item Id. at para. 104.
\item Id.
\item Id.
\item See Extraterritorial Income, supra note 283.
\end{enumerate}
it difficult for the United States to comply with its WTO obligations.

The European Communities, on the other hand, appear content with the Appellate Body's decision. At the time of the decision, it was unclear what the European Communities would do: they could have requested sanctions against American products, request direct retaliation against American exporters, or simply wait and see what the American Congress would do about ETI.

After waiting for fifteen months, the European Communities finally asked the WTO for over four billion-dollars in direct retaliation against American exporters and their goods. This retaliation is against everything from meatmeant and vegetables to paper and cotton. In essence, the American products mentioned in the retaliation would be slapped with additional duties of up to 100 percent ad valorem above bound customs duties.

Currently, there is no timeline when the European Communities will implement these sanctions. European Trade Commissioner Pascal Lamy, however, has said that the EU "will hold off imposing the sanctions as long as Congress appears to be making a good-faith effort to bring U.S. law into compliance with WTO rules." Previously, though, he stated that "if there is 'no sign that compliance is on the way' by this fall, the Commission will begin the 'legislative procedure' leading to the adoption of retaliatory trade measures by January 1, 2004."

Some officials in the U.S. have taken the pending retaliation as an escalation to the already-heightened tension between the U.S. and the European Communities. As stated by Senate Finance Committee Chairman Charles E. Grassley, "[s]anctions would needlessly elevate bilateral trade tensions in the targeted areas and derail our efforts to resolve this issue in a timely way." He went on to say that "[s]anctions could also lead to a deeper economic slowdown when we need to do all we can to expand world trade and economic growth."

Other officials, however, seem to look at the Appellate Body's decision and the following European Communities' retaliation as the U.S. being caught with its hand in the cookie jar. As stated by House Ways and Means Committee Chairman William Thomas:

> We’re in violation [of our GATT responsibilities]. ..[s]ome of these people who make these uppity comments about why can’t people give us a little bit of time—

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286. The original Appeals decision was on January 14, 2002. For reference, see WTO Doc. WT/DS108/AB/RW.
288. See id.
289. See id. See also EU Threatens to Impose Sanctions If NoNaif no U.S. Progress on Compliance by Fall, 89 DAILY TAX REP., May 8, 2003, at G-10.
290. Thomas May Post-Pone International Tax Bill; Crane-Rangel Measure Gets 100 Co-Sponsors, 108 DAILY TAX REP., June 5, 2003, at G-10.
291. Id.
292. EU Threatens to Impose Sanctions If No U.S. Progress on Compliance by Fall, 89 DAILY TAX REP., May 8, 2003, at G-10. As a note, Senator Grassley is a Republican from Iowa.
293. Id.
this was the fourth WTO decision against us. I know that the rest of the world is unfair to us but, at some point, when we’re wrong and, if we are the major importer and exporter in the world, we have to look at our responsibility to maintain the world trading order. Frankly, we have won far more cases than we have lost using that structure.294

Due to the previous decision against the U.S., ETI is currently considered an illegal subsidy by the WTO. The following section will look at what the United States should do to become WTO-compliant. Specifically, it will discuss revamping the American taxation system, as well as diplomatic pressures the United States could exert over the European Communities.

VI. REMEDYING THE EXPORT SUBSIDIES PROBLEM

In order to become WTO-compliant, the United States could change the focus of its tax system to a territorial system. In doing this, it should not try to introduce legislation similar to the FSC or ETI. The previous three decades of struggle between the United States and the European Communities should be enough of an incentive not to repeat prior mistakes. As echoed by House Ways and Means Committee Chairman Thomas, “We should accept the message of the WTO ruling, roll up our sleeves, and get down to work immediately to design a tax system that will make Americans competitive both at home and as they trade abroad.”295

One way to do this is to move the United States toward a value added tax-based system, reimbursing corporations throughout the manufacturing process. This would allow American exporters to take advantage of value added tax exemptions on taxation. Value added tax in the United States would also be WTO-compliant because, as stated previously, GATT has endorsed the value added tax as being compliant with the Agreement on Subsidies and Countervailing Measures and other GATT agreements.296 In fact, consumption-based taxes such as the value added tax are followed by a majority of nations, including all members of the Organization for Economic Co-operation & Development, except for the United States.297 Because the rest of the world uses a value added tax, there has been a major congressional effort to turn the American system of taxation from a worldwide system to one based on consumption, particularly one based on the value added tax.298

As previously discussed, consumption-based tax methods on exports such as

294. Thomas Says He Soon Will Introduce ETI Bill, Criticizes Crane-Rangel Approach, 90 DAILY TAX REP., May 9, 2003, at G-10. As a note, Congressman Thomas is a Republican from California.
296. See supra notes 142-143 and accompanying text.
298. For a discussion on these congressional efforts, see infra notes 299-310 and accompanying text.
value added taxation allow a domestic corporation to sell its exports free of domestic taxes. This is allowed because under value added taxation, exports are considered zero-rate exemptions. By the United States changing to a value added taxation system, American corporations, like the rest of the world, could use these exemptions to sell their exports free of domestic tax, thus lowering their overall prices and allowing them to be competitive in the international exportation market.

In fact, there have been several proposals to implement various value added taxation systems in the United States. One of these proposals, introduced in 1994 by Congressman Sam Gibbons, repealed both the individual and corporate income tax, and replaced them with a value added tax. This proposal was introduced because “we cannot afford the current system. It costs too much to operate. It destroys Americans’ confidence in their government and it hurts our economy by exporting American job opportunities.” Commonly referred to as the “business transfer tax,” the bill placed a twenty-percent value added tax on all stages of production, similar to value added taxes in Europe. The bill, however, died in the House Committee on Ways and Means, and was never re-introduced.

Other proposals have added a value added tax on top of already existing income tax liabilities. Introduced by Senator Ernest Hollings and Representative John Dingell, their proposal added a five-percent value added tax to each taxable transaction. This tax would be used to fund a national health care system. As with European value added taxes, food, housing and medical care were considered zero-rate exemptions. Both bills died in committee and were never re-introduced.

These bills were either outright denounced or never re-introduced because of the intense congressional distaste for value added taxes. In fact, in 1994, a number of congressmen joined an anti-VAT caucus to combat proposals that introduced any form of value added taxation. This distaste was due to the enormous administrative pressure placed on governments that imposed forms of value added

299. See supra notes 114-119 and accompanying text.
300. For a discussion on the repercussions of changing from a worldwide taxation system to one based on consumption, see generally Dale, supra note 297.
301. H.R. 4050, 104th Cong. § 101 (1996). As a note, Congressman Gibbons is a Democrat from Florida.
taxation. Many experts, including Daniel Mitchell, McKenna Senior Fellow in Political Economy at the Heritage Foundation, warn that a value added tax will increase the size and cost of government.\textsuperscript{307} He came to this conclusion because countries with value added taxation have on average a forty-percent heavier tax burden than those without value added taxation.\textsuperscript{308} These countries also consume about forty-two percent more national economic output to implement the tax than non-value added taxation countries.\textsuperscript{309}

Moreover, replacing the Code with a value added tax system would be an enormous congressional task. In order to implement a value added tax, Congress would have to re-work the entire Code with respect to all relevant parts of taxation dealing with exports and their inclusion in gross income. Congress would also have to debate whether the value added tax would apply only to exports, or to all individuals and corporations under the Code. In the event that the value added tax would apply only to corporations, specifically those engaged in exportation, the United States would risk the possibility that the WTO would consider this system an illegal subsidy because of its export nature, thus in violation of GATT and other WTO obligations.

Finally, a value added tax would move away from a fundamental of American taxation; namely that the Code allows taxpayers to customize tax liabilities to their individual needs. As previously discussed, the Code allows taxpayers incentives such as tax credits and deduction to avoid tax liabilities. These incentives, in turn, allow the taxpayer to tailor their business practices to obtain the most beneficial tax status. A value added taxation system, on the other hand, places a flat rate on all products during the production stage.\textsuperscript{310} This obviously does not allow for the same amount of tax planning as does a system with tax incentives.

Another way to become WTO-compliant is through the use of a pure territorial tax on foreign branches of domestic corporations. This could be achieved by not taxing any income earned outside the United States, exactly like the European Communities taxation system. This would allow American exporters to avoid double taxation because, unlike before, exporters are now only paying foreign tax in the country where the sale took place. It would also signal to the WTO that the United States is serious about becoming WTO-compliant and is ready, willing and able to work with the rest of the world on difficult and intricate problems.

This option, however, could possibly result in the mass exodus of American manufacturers overseas to low tax jurisdictions.\textsuperscript{311} This would be very similar to

\textsuperscript{308} See id.
\textsuperscript{309} See id.
\textsuperscript{310} Some systems allow exemptions for needed items such as food (true exemption) and others allow items to be taxed at zero percent (zero-rate exemptions). For a discussion on true and zero-rate exemptions within value added taxation, see supra notes 113-117 and accompanying text.
\textsuperscript{311} For a discussion on territorial taxation and American corporate decisions, see generally Rosanne Altshuler & Harry Grubert, \textit{Where Will They Go If We Go Territorial? Dividend Exemption}
the problem present in the 1950's, the pre-DISC era discussed above. This was the whole point behind the advent of Subpart F under the Kennedy Administration. Therefore, this too seems to be an implausible option to American lawmakers.

A large-scale change to the Code, however, seems very improbable because such a change “will take more than six months-well beyond the end-of-April date when the European [Communities] will be authorized to retaliate against the United States over the dispute.” Senate Finance Committee Chairman Max Baucus, echoed this sentiment by stating that the Bush administration should seek a resolution to the dispute “other than a major overhaul of the United States tax code.”

Currently, there is legislation being generated to replace ETI with a deduction for American manufacturers. Sponsored by Reps. Philip Crane and Charles Rangel, H.R. 1769 is intended to “help U.S. manufacturers and their workers maintain their international competitiveness.” This proposal currently has both widespread Congressional and manufacturing support.

If passed in its current form, H.R. 1769 would repeal ETI. In its place, a newly-created Code Section 250 would allow a deduction of ten percent for “qualified production activities income.” As currently defined, qualified production activities income is “(1) the portion of the modified taxable income of the taxpayer which is attributable to domestic production activities, and (2) the domestic/foreign fraction.” In essence, this means that a domestic manufacturer will receive a deduction against its gross income for making its products domestically rather than abroad. This deduction, however, is further reduced by multiplying the deduction by a fraction. Because a fraction is used to determine the final deduction allowed, some officials in the current administration think that


312. Extraterritorial Income: Complying With WTO Tax Ruling Will Take Over Six Month, Thomas Says, 27 DAILY TAX REP., Feb. 8, 2002 at G-8, citing comments made by House Ways and Means Committee Chairman Bill Thomas, a Republican from California.
313. Id. (citing 26 DAILY TAX REP., Feb. 7, 2002 at G-7). As a note, Senator Baucus is a Democrat from Montana.
315. Rangel, Crane Introduce Export Tax Bill With Domestic Manufacturers Rate Deduction, 71 DAILY TAX REP., Apr. 14, 2003 at G-9. As a note, Congressman Crane is a Republican from Illinois, and Congressman Rangel is a Democrat from New York.
316. Currently, there are 100 co-sponsors of the bill. See Thomas May Post-Pone International Tax Bill, Crane-Rangel Measure Gets 100 Co-Sponsors, 108 TAX REP., June 5, 2003 at G-10.
317. Some of the American companies in support of H.R. 1769 are Microsoft, Boeing, and Caterpillar. See EU Threatens to Impose Sanctions if no US Progress on Compliance by Fall, 89 TAX REP., May 8, 2003 at G-10.
319. See id at § 3(a).
320. Id.
321. See id. Within newly-created § 250(g), the ten percent deduction is multiplied by the value of domestic production/the value of worldwide production. Because the value of the worldwide production may be higher than the domestic production, it will then reduce the deduction allowed.
a newly-created Section 250 may be too difficult to administer.\textsuperscript{322}

Although intended to replace ETI, the current legislation does not offer American exporters the same economic incentive to help off-set double taxation abroad. In the current ETI legislation, almost any American exporter can take advantage of the exclusion of extraterritorial income from gross income.\textsuperscript{323} So long as the income is classified as extraterritorial income under Section 114, it is an exclusion from gross income. Under the current version of H.R. 1769, only a certain percent is deducted from gross income.\textsuperscript{324} This percentage is further reduced to almost zero if the corporation does a significant portion of its manufacturing overseas.\textsuperscript{325}

Similarly, ETI can be used by both manufacturers and service-providers.\textsuperscript{326} Under H.R. 1769, only domestic manufacturers can take advantage of the deduction.\textsuperscript{327} As stated by an anonymous staffer close to the current legislation, "[a]bout 25 percent of the companies that now benefit from ETI are service corporations, which get no relief at all under the Crane-Rangel [H.R. 1769] approach."\textsuperscript{328}

Finally, many legislators feel the bill in its current form should pass WTO scrutiny under the previous three decades of debate.\textsuperscript{329} This is because H.R. 1769 does not differentiate between exporters and domestic corporations, unlike ETI,

\textsuperscript{322} See Domestic Manufacturing ETI Replacement Raises Equity, Complexity Issues, Olson Says, 97 Tax Rep., May 20, 2003 at G-8, citing comments made by Assistant Treasury Secretary for Tax Policy Pamela Olson. This fraction may be difficult to administer because the corporation needs to clearly document all domestic production, including gross receipts, deductions and income attributable to domestic production. For reference, see H.R. 1769, 108th Cong. § 3 (2003), specifically newly-created §250(d).

\textsuperscript{323} See § 114, referring to § 942(a)(1), defining foreign trading gross receipts as receipts which are:

(A) from the sale, exchange, or other disposition of qualifying foreign trade property
(B) from the lease or rental of qualifying foreign trade property for use by the lessee outside the United States,
(C) for services which are related and subsidiary to—
   (i) any sale, exchange, or other disposition of qualifying foreign trade property by such taxpayer, or
   (ii) any lease or rental of qualifying foreign trade property described in subparagraph (B) by such taxpayer,
   (D) for engineering or architectural services for construction projects located (or proposed for location) outside the United States, or
   (E) for the performance of managerial services for a person other than a related person in furtherance of the production of foreign trading gross receipts described in subparagraph (A), (B), or (C).

\textsuperscript{324} See H.R. 1769, 108th Cong. § 2 (2003).
\textsuperscript{325} See id. at § 3.
\textsuperscript{326} See supra, note 323
\textsuperscript{327} Id.
\textsuperscript{328} Crane, Rangel Urge Lawmakers to Support Domestic Manufacturing ETI Replacement, 94 Tax Rep., May 15, 2003 at G-4.
\textsuperscript{329} See Thomas Says He Soon Will Introduce ETI Bill, Criticizes Crane-Rangel Approach, 90 Tax Rep., May 8, 2003 at G-10, citing a legal analysis written by the Democratic Staff to the Senate Finance Committee.
FSC and the DISC regimes.

It will fail WTO scrutiny, however, on other grounds. Under the DSU, the losing party must comply with the Panel/Appellate Body’s decision within eighteen months of the decision.\textsuperscript{330} Currently, H.R. 1769 phases in over a five-year period,\textsuperscript{331} in clear violation of the DSU’s requirements. As stated by EC spokeswoman Arancha Gonzales, “EU legal experts believe the five-year transition period proposed in H.R. 1769 ‘is clearly WTO-incompatible and therefore unacceptable.’”\textsuperscript{332}

As with any piece of legislation, what currently exists will not necessarily be the final result. In its current form, H.R. 1769 does not offer the same benefits to exporters as ETI, and should not be viewed as its replacement. Rather, H.R. 1769 should be viewed as an economic stimulus package to bring jobs back into the U.S. during a time of economic recession, and not as a means to help exporters. If that were the case, all exporters, including service providers, would be able to take advantage of the deduction offered in H.R. 1769. Similarly, the deduction would not be reduced by a fraction, and would generate roughly the same after-tax savings as ETI.

Instead of making changes to the Code or the United States system of taxation, there are other ways to combat this disagreement. As stated throughout this article, the United States has argued that FSCs and ETI are very similar to the European Communities’ taxation systems because they both either defer or exempt export income from taxation. To settle this debate, the United States could bring an action against the European Communities, claiming that their taxation systems are illegally subsidizing their exports.

In bringing this action, the United States could argue that because value added taxation allows a zero-rate exemption for exports, these systems are in violation of GATT and WTO obligations because they are export contingent. Like the European Communities arguments against FSCs and ETI, the United States could argue that because value added taxation defers tax liability specifically related to exports, it fits within the meaning of Footnote 59 to the Agreement on Subsidies and Countervailing Measures. Because of this, value added taxation is an illegal subsidy.

This may not be the best approach, however, because of the reaction by the European Communities and a possible favorable WTO holding in the action. In bringing an action, the United States’ actions may be viewed as vindictive rather than as an attempt to resolve the disagreement. The European Communities may interpret this action as a slap in the face, and that the United States is unwilling to progress towards a peaceful end to the thirty-year debate. Similarly, they could also see the action as an escalation to the disagreement, making future consultations more hostile than previous meetings.

\textsuperscript{330} See supra, note 57 and accompanying text.
\textsuperscript{331} See H.R. 1769, 108th Cong. at § 3 (2003).
\textsuperscript{332} See Thomas Says He Soon Will Introduce ETI Bill, Criticizes Crane-Rangel Approach, 90 TAX REP., May 8, 2003 at G-10
Bringing the action may not solve the disagreement because the WTO Panel, even if it finds in favor of the United States, may not clarify the situation. In its decisions on DISCs, FSCs, and ETI, the United States complained that the Panel’s holding did not give any meaningful direction to the United States. These holdings did not explain which parts of the tax method were considered to be subsidies, nor did it identify how the United States could change its method of taxation to become compliant with its WTO obligations. Such a holding in an action against the European Communities would frustrate further the relations between Europe and the United States, making future cooperation very difficult.

In the end, the best way for the United States to become WTO-compliant is to continue meeting with representatives from both the European Communities and the WTO. These meetings should be cooperative in nature, and very specific as to how the United States can become WTO-compliant. In this way, the United States can better understand what the WTO is looking for in compliance, and how territorial and value added taxation are not in violation of GATT and WTO obligations.

Although they are not occurring on a worldwide basis, there are some meetings already taking place between representatives of the United States and the European Communities. In early January, 2002, with the Appellate Body’s decision on ETI on the near horizon, United States Trade Representative Robert Zoellick began to meet with the European Trade Commissioner Pascal Lamy. These meetings, as characterized by Zoellick, were “a good faith effort to try to resolve the issue fairly and to put it to rest.”

These meetings, however, need to include the WTO and other nations such as India, Australia, and Japan. In order to end the current subsidies debate properly, the United States needs to present its argument to all WTO members, not just to a WTO Panel or Appellate Body. These organizations by definition do not change or make trade policy; they simply enforce them. By not including other nations in the discussions, the United States is only going to get half of the picture. It will only receive advice on how future legislative changes to the Code are WTO-compliant in the eyes of the European Communities; not in the eyes of who matters most: the WTO.

To present its argument, I suggest that the United States request that the WTO include the current debate over subsidies on its calendar for the next Ministerial Conference, held in Mexico in 2003. This will give the United States enough time to garner international support for its arguments. It will also allow the United States to consider its next move to become WTO-compliant. This Conference, known as the Fifth Ministerial Conference, will be similar to the Fourth Ministerial Conference.

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334. These nations were involved in the ETI decision as third-party participants. See generally WTO Doc. WT/DS108/AB/RW.
Conference, held last November in Doha, Qatar.\textsuperscript{336} At the Fourth Conference, WTO members discussed the admission of two bitter rivals to the WTO: Taiwan and mainland China.\textsuperscript{337} By admitting such members to the organization, the WTO’s current members proved that they can work together on a very difficult issue. Such cooperation will be imperative to end the current subsidies debate.

Such a Conference would also provide the opportunity for the United States to present its ideas on value added taxation and GATT agreements in a non-adversarial manner. It can present ideas on future legislation, and obtain input from the European Communities and the WTO. It could even ask the WTO for a preliminary holding on whether the proposed method of taxation is WTO-compliant.

Finally, such a Conference would also provide the United States a forum to request change from the WTO and GATT. Specifically, it could ask to amend the Agreement on Subsidies and Countervailing Measures so ETI could be included, making it compliant with WTO obligations. If this tactic does not work, the United States could try to garner international support for amending the Agreement on Subsidies and Countervailing Measures from a majority of WTO member nations.

VII. CONCLUSION

The European Communities and the United States are entering their fourth decade of debate over the exact definition of the term subsidy. This disagreement has led the United States to implement various methods of taxation in order to allow its exporters to compete with foreign exporters. In abiding by its goal of fair and equitable trade between countries, the WTO has held each of these methods of taxation to be in violation of various WTO and GATT agreements.

These WTO decisions have led to mass confusion regarding the exact definition of the term subsidy. To clarify this confusion, the United States, along with the European Communities and the WTO, should enter into formal consultations to clarify the situation. Doing so will not only clarify exactly how the United States subsidizes its exports, but also explain how territorial taxation does not. This should give the United States a blueprint for successful completion of their WTO obligations, and still allow American exporters to compete in the international market.

\textsuperscript{336} For more information on the Doha Conference, see Current Negotiations and Implementation, Doha Development Agenda, \textit{supra} note 335.\textsuperscript{337} See generally \textit{id}.
CONGRESS AND THE TREATY POWER:
AN ORIGINALIST ARGUMENT AGAINST UNILATERAL
PRESIDENTIAL TERMINATION OF THE ABM TREATY*

Christopher C. Sabis**

I. INTRODUCTION

Despite over 200 years of American legal jurisprudence and political precedent, the vital question of how the United States can legally terminate international treaties under the Constitution remains undecided. The Constitution of the United States is silent on this issue. Historically, the executive and legislative branches have each been inconsistent at best in their approaches to treaty termination. The Supreme Court balked in 1979 when given the opportunity to settle the issue, splitting badly and issuing no majority opinion. Academics have written widely on the topic, but with diverse approaches, considerations, and conclusions.

With this history of indecision and confusion, what proponents of legislative power might consider a worst-case scenario has unfolded. A president elected without a majority of the popular vote has pulled the United States out of a major nuclear arms control treaty that has been in force since 1972. To further complicate the scenario, the pullout occurred in the wake of the terrorist attacks of September 11, 2001. While the popularity that traditionally accompanies an American president during wartime has minimized the domestic political dissent surrounding the withdrawal, the legal questions remain.

* The author dedicates this paper to the memory of his beloved grandfather Edward Ciarleglio (1915-2002). "[H]e was an orphan...He was a strong-willed man, yet a gentle man... He was intelligent and smart, not school smart but self-taught. His mind was a sponge that eagerly soaked up every written word. Only when his eyes could no longer see did he lay down his books... He was a Marine who enlisted when others were called to serve... He was an intricate man who in some ways was difficult to know... I pray that you have found peace in the hands of God. May he bless you and keep you forever." Joyce E. Sabis, Eulogy for Edward Ciarleglio (Aug. 26, 2002). Edward, you personified an Invictus-like spirit. May the lessons you tried to teach enlighten the happy few who had the privilege of your company, counsel, and love.

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The purpose of this paper is to add a new perspective to the debate over the power to terminate treaties in the United States. Following this introduction, the second section of this paper will provide background and a much abbreviated policy analysis of the treaty at issue. This paper's third section will summarize the current law governing treaty withdrawal, including the seminal case of Goldwater v. Carter, and illustrate why this law does not effectively support the proposition that a President can terminate a treaty without Congressional action.

Once this analysis is completed, the fourth section of this paper provides originalist arguments for and against a legislative role in treaty termination, and a conclusion consistent with both policy considerations and intent of the Framers of the Constitution. While the majority and dissent in Goldwater v. Carter, and past academic works on the issue, have made practically every textual and policy argument feasible, this paper will analyze both direct and indirect originalist evidence from sources such as The Federalist and The Records of the Federal Convention of 1787. The paper will also put these arguments in the present context and illustrate why the policy concerns of the Framers are still relevant today. In its final section, the paper analyzes the options Congress had in addressing the termination of the ABM Treaty, and has in looking ahead to the potential termination of future treaties, and recommends a course of action based on the current legal and political climate.

In summary, this paper argues that terminating an international treaty is too important to world stability and to the national character of the United States to leave in the hands of a single individual (or party). If the Constitution were to permit the executive branch to terminate a treaty, it would allow one individual to destroy legally binding multilateral agreements on a whim, or in a moment of intense pressure. The termination of a treaty would be no different from that of an executive agreement. Such a construction of the Constitution would also eliminate the formal dialogue and debates that provide a check against the impetuosity of the party in power. Requiring an Act of Congress to terminate a treaty makes sense on legal, historical, policy, and political levels.

II. BACKGROUND

A. The ABM Treaty and its History

On October 3, 1972, the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems (hereinafter “ABM Treaty”) went into force. The parties agreed to limit themselves to two ABM deployment areas, and further agreed that these areas would be located so that they could not provide a full national defense, nor the

basis for developing one. The treaty went on to prescribe the possible locations for the two systems and the quantity of missiles that could be present at each one. The general idea behind these limitations was to maintain the doctrine of "mutual assured destruction" and, consequently, the balance of power. If one nation developed a defensive system that would render the other nation's nuclear arsenal useless, the theory held, that nation would no longer fear retaliation upon launching a first strike.

Two provisions of the ABM Treaty are of paramount importance. The first, Article I, Paragraph 2, provides the limitation that prompted President George W. Bush's desire to withdraw. The language reads, "Each Party undertakes not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense, and not to deploy ABM systems for defense of an individual region except as provided for in Article III of this Treaty." President Bush believes that this provision is fatal to his plans to develop a National Missile Defense system (hereinafter, NMD), an idea with its roots in the Reagan Administration's "Star Wars." Further discussion of this system and the arguments for and against it follow in the next part of this section.

The second relevant section of the ABM treaty bears on the legality of United States withdrawal. Paragraph II of Article XV reads:

Each Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests. It shall give notice of its decision to the other Party six months prior to withdrawal from the Treaty. Such notice shall include a statement of the extraordinary events the notifying Party regards as having jeopardized its supreme interests.

This Article raises several questions. Does this clause give the President of the United States the legal authority to terminate the ABM Treaty unilaterally, without any action from Congress? What are "extraordinary events?" What are a nation's "supreme interests?" Did the Senate, in giving its consent to a treaty with this escape clause, waive any rights it has under the Constitution to participate in

3. See ABM Treaty, supra note 2, at art. I, III.
4. See id. at art. III.
6. ABM Treaty, supra note 2, at art. I.
8. See ABM Treaty, supra note 2, at art. XV. It is common for modern treaties to contain such termination provisions. Thus, the issue discussed in this paper is important, not just in this case, but for future potential treaty termination procedures.
9. Some commentators have maintained that it does. See, e.g., Steven Mufson and Dana Milbank, U.S. Sets Missile Treaty Pullout; Bush to Go Ahead With Defense Tests, WASH. POST, Dec. 14, 2001, at A01. While the Post provides no reason for this conclusion, the DC Circuit made a similar argument in Goldwater v. Carter. See infra notes 61-68 and accompanying text of this paper for analysis and debunking of this argument.
the decision to withdraw from the Treaty? Would such a waiver also apply to the House of Representatives? These questions are all important to the analysis of the issue of treaty termination as it applies to this particular agreement.

B. Termination of the ABM Treaty.

1. Facts

On December 13, 2001, at 4:30 a.m. ET, the United States Ambassador to Moscow delivered formal word to Russia that President Bush was giving 6 months notice of United States termination of the ABM Treaty, invoking Article XV of that document. While Bush did not formalize this decision until December 13, he had been considering it long before that date. Secretary of State Colin Powell, throughout that year, had been in discussions with Russian President Vladimir Putin in an attempt to convince him that the termination of the ABM Treaty was in the best interests of both nations; these overtures failed. "This step was not a surprise for us," President Putin reflected following Bush's announcement, "However, we consider it a mistake."

The notice of termination also came without the consent or concurrence of either house of Congress. Bush maintained that the executive branch alone had the power to terminate treaties between the United States and foreign powers. However, many members of Congress expressed concern about the president's decision, and some legal scholars questioned the legality of the withdrawal.

2. Policy Arguments

While the policy arguments for and against adhering to the ABM Treaty are not determinant of the legal issues of unilateral presidential termination, they do provide a context in which to frame constitutional arguments for and against that power. The fact that there are different positions on the issue provides a reason to scrutinize the methods used to make a final decision on the termination of the

10. See Mufson, supra note 9.
12. See Mufson, supra note 9.
18. These arguments are not exhaustive of those presented in the debate over the ABM Treaty. The positions mentioned are some of the major arguments and are included here simply to provide very basic background information and context.
Treaty, since the final decision will be binding and will affect the international reputation of the United States.

a. Arguments for Termination

President Bush and those who support the decision to terminate the ABM Treaty argue that it is a relic; it is an anachronism from a Cold War over a decade past. This belief seemed to gain validity after the attacks on the World Trade Center and the Pentagon on September 11, 2001. While these were not missile strikes, supporters of the termination argue that no one knows what methods terrorists may use in the future, and that there is a threat of a nuclear attack from "rogue states." They maintain that developing nations like North Korea would not tax their economies by making weapons that the United States could destroy before they reach their targets. In this way, NMD will promote nonproliferation and protect the United States from a missile attack from a rogue-state. "I have concluded," said President Bush, "the ABM Treaty hinders our government's ability to develop ways to protect our people from future terrorist or rogue-state missile attacks." "It's a great move at a great time," believes Kenneth Adelman, Director of the Arms Control and Disarmament Agency under Ronald Reagan, "It shows we are sensitive to the greatest terrorist threat to the country, which is weapons of mass destruction on top of ballistic missiles." When confronted with the fear that the destruction of the Treaty will lead to a renewed arms race, particularly with Russian and China, proponents of the missile defense system give different responses. Some maintain that the ABM Treaty did not work as an arms reduction measure even when it was timely. They point to the fact that, after the signing of the ABM Treaty, the Soviet ballistic missile arsenal grew 10,000 missiles by 1990, while the number of U.S. missiles also

19. This is not a new argument. After the fall of the Soviet Union, the Clinton Administration was confronted with the question of whether the ABM Treaty was legally dissolved by the breakup, or whether the Treaty applied to the new relationship between Russia and the United States. While the Clinton Administration decided the Treaty was still valid, there are those who have argued that the abrogation by President Bush is meaningless because the ABM Treaty is inapplicable. See George Miron, Did the ABM Treaty of 1972 Remain in Force After the USSR Ceased to Exist in December 1991 and Did It Become a Treaty Between the United States and the Russian Federation?, 17 AM. U. INT'L L. REV. 189 (2002); David B. Rivkin, Jr., Lee A. Casey, & Darin R. Bartram, The Collapse of the Soviet Union and the End of the 1972 Anti-Ballistic Missile Treaty: A Memorandum of Law Prepared for the Heritage Foundation, 4 J. NAT'L SECURITY L. 1 (2000); see also Robert Stewart, ABM: NO PENALTY FOR EARLY WITHDRAWAL, ORLANDO SENTINEL, Dec. 31, 2001, (Editorial), at A9. But see, SAMUEL B CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 423-25 (2d ed. John Byrne & Company 1916).


21. See Spencer, supra note 5.


24. See, e.g., Spencer, supra note 5.
skyrocketed. Others simply maintain that the abrogation will not provide fuel for an arms race in today's international environment and cite the tame reactions to the termination of the ABM Treaty from Russia and China as evidence of this assertion.

Proponents of the termination also maintain that President Bush and Russian President Putin have a close relationship—President Bush has often referred to him as "my friend." "The United States and Russia have developed a new, much more hopeful and constructive relationship," Bush maintains. In fact, almost immediately following Bush's announcement of the termination, President Putin proposed that the United States and Russia reduce the size of their nuclear stockpiles to between 1,500 and 2,200 warheads. Putin has conceded, in spite of his opposition to the ABM Treaty termination, that it will not affect "the spirit of partnership and even alliance" between the two nations.

Proponents also believe that a renewed arms race with China is unlikely. President Bush phoned China immediately following his announcement of termination in an attempt to assure the Chinese that they should not interpret the termination as an offensive move toward China. Perhaps because of this gesture, Ralph A. Cossa, writer for The Orlando Sentinel, insists that conversations between Cossa and Chinese officials indicate that the Chinese are willing to talk about improved Sino-U.S. relations. In light of recent tensions between the two nations, this is a positive sign.

b. Arguments Against Termination

Opponents of the termination counter President Bush's arguments on several grounds. They contend that the missile defense system for which Bush has abandoned the ABM Treaty is impractical and that the termination will cause global instability and a renewed arms race. They further maintain that the termination has increased the danger of weapons proliferation and that the withdrawal has damaged the image and reputation of the United States among the nations of the world. "Winning the peace and achieving stability in the 21st century," write Robert McNamara and Thomas Graham, Jr., "is all about international cooperation and strengthening international law, not about U.S.

25. See, Spencer, supra note 5.
28. Milligan, supra note 15; see also Diehl, supra note 27.
29. See Milligan, supra note 15. See also Mufson, supra note 9; Stewart, supra note 19.
32. See id.
33. In recent months, the Chinese found 27 spying devices hidden in a Boeing 767 that it purchased from the United States. Even after the United State mistakenly bombed the Chinese Embassy in Belgrade, the Chinese said little upon finding the bugs. See Safire, supra note 26.
unilateralism."

Individuals opposed to the termination maintain that the proposed missile defense system will not work. On December 14, 2001, one day after the notice of intent to withdraw, the Pentagon cancelled one of the U.S. Navy’s missile-defense development programs because of “poor performance.” While this is not the only NMD program and many are still receiving funding with some measure of progress, the Hartford Courant claims this is evidence that, “A missile-defense system as conceived by military planners won’t work, can never be foolproof, and would be prohibitively expensive to deploy.” The Denver Post, after a missile defense test was delayed due to inclement weather, sarcastically lamented, “[H]eaven help us if our enemies decide to attack during a rain storm.”

Even assuming the United States could develop and deploy such a shield, opponents argue it would not be worth the costs for the limited protection it would provide. The National Intelligence Council estimates that by 2015, China will have enough nuclear missiles to overwhelm any such shield; Russia already has more than enough. However, it is true that “rogue nations” like Iran, Iraq, and North Korea will likely have long-range delivery systems by 2015, and Bush maintains that it is these nations, and not China and Russia, for which the United State should deploy NMD.

In response to this assertion, Australian diplomat and arms-control advocate Richard Butler argues that, if confronted with NMD, these nations, as well as Russia and China, will simply develop a better missile designed to penetrate America’s defense system. If nothing else, this would lead to a technological arms race. Moreover, while there is terrorism, the CIA disagrees with President Bush’s claim that terrorists provide an incentive to develop a missile defense. The CIA maintains that terrorists “are unlikely to employ long-range missiles, preferring non-missile delivery systems such as suitcases, trucks or ships.”

Termination supporters are quick to point out that the reactions to the termination of the ABM Treaty, by Russia and China in particular, have been tame, but opponents maintain that the ABM situation has increased tensions between the world powers. There are indications that Bush’s announcement has angered the

36. Id.
39. Jensen, supra note 38. For a brief argument maintaining that a missile defense system does not address the policy issues governing the U.S. relationship with any of these three countries see McNamara, supra note 34.
41. Jensen, supra note 38.
Russian Government beyond the reserved response from President Putin. On Wednesday, January 16, 2002, the lower house of Russia's parliament voted 326-3 for a resolution condemning the United States' withdrawal from the ABM Treaty. Termination opponents believe that President Bush might cause Putin to lose face with military commanders who have supported him. While President Bush and President Putin may appear to have a great relationship, the nations they lead will interact long after their terms in office. A short-term muted response does not forestall a medium or long-term negative response.

Symptoms of a potential rift have surfaced quickly. Even as the United States and Russia discussed decreasing their nuclear stockpiles, Col. Gen. Yuri Baluyevsky, the head of the Russian delegation, maintained that the American termination of the ABM Treaty had damaged the atmosphere for the talks. The Bush Administration fostered this distrust with its decision to put nuclear warheads into storage rather than destroy them as part of a U.S.-Russian agreement, a position that angered Russia because it would allow the United States to "unilaterally and rapidly reconstitute its arsenal of 6,000 strategic warheads." Eventually, the two nations did reach an agreement on an arms reduction treaty despite the Russian opposition to storage of warheads. It is clear, however, that the U.S.-Russian relationship is not without tension in light of Russian arms sales to Iran. Furthermore, Russia plans to form a new $40 billion economic pact with Iraq even as the U.S. contemplates war against Saddam Hussein's dictatorship.

Russia is not the only nation that seems uncomfortable. China is concerned about the possibility that an American missile shield will render its current arsenal useless. On December 26, 2001, China announced that it would increase its

43. See ABM Withdrawal Pains, supra note 37.
44. See McNamara, supra note 34; see also Mufson, supra note 9.
45. See McNamara, supra note 34.
46. See Richter, supra note 42.
47. McNamara, supra note 34; Robert Cottrell and Judy Dempsey, The Americas, US Plan to Store Nuclear Weapons Vexes Russia, FINANCIAL TIMES (LONDON), Jan. 11, 2002, at 6; see also Richter, supra note 42, Jensen, supra note 37.
49. See, e.g., id.
51. For further commentary on Russia's negative perceptions of U.S. intentions, see Howard Witt, News, U.S. Throws Wrench into Russia Ties; ABM, Disarmament Moves Irk Kremlin, CHI. TRIB., Jan. 17, 2002, at 3N.
52. See Vivien Pik-Kwan Chan, Mainland to Increase Budget for the Military, S. CHINA MORNING POST, Dec. 27, 2001, at 1; see also McNamara, supra note 34.
military spending this year. While this alone may not be news, Beijing sources indicated that China, "would like the news to serve as a warning to the United States over its recent decision to abandon the Anti-Ballistic Missile Treaty." Even Europe has shown anger toward the U.S. In what may have been an attempt to maintain his relationship with Putin, Bush proposed to include Russia in decision-making procedures of NATO. After criticism from Europe and Washington, Bush and Putin shelved the proposal.

III. THE CURRENT STATE OF THE LAW

A. The ABM Treaty

1. The Nature of the Treaty

In Goldwater v. Carter, the majority in the D.C. Circuit, and Justice Brennan at the Supreme Court level, maintained that the type of treaty involved could bear on how the United States should terminate. However, the situation involving the ABM Treaty does not contain the features of mutual defense or executive ability to recognize foreign nations that were present in the Goldwater case. Termination of the ABM Treaty does not change U.S. commitments to defending its allies, nor does it invoke any specific executive powers already recognized by the Supreme Court other than the president's authority in foreign affairs. Since the issue is tangential to the issue of the ABM Treaty, this paper will note it, but, for the sake of brevity, will not analyze it any further.

2. The Termination Clause

The termination clause of the ABM Treaty provides that each party shall have the right to terminate the Treaty on six months' notice if "extraordinary events related to the subject matter of [the] Treaty have jeopardized its supreme interests." For the purposes of this paper alone, the author concedes that the relatively new

53. See Chan, supra note 52.
55. See Diehl, supra note 27.
56. See id.
57. See Goldwater v. Carter, 617 F.2d 697, 707 (1979), vacated by 444 U.S. 996 (1979). This is particularly apparent in Justice Brennan's dissenting opinion, where he maintained that President Carter could terminate the Mutual Defense Treaty with Taiwan on the narrow grounds that, as a mutual defense treaty, it was inexorably connected with his derecognition of Taiwan and recognition of mainland China. See infra p. 252.
58. See infra p. 252.
59. See supra p. 227.
threat of rogue states developing ballistic missiles and the September 11, 2001
attacks were “extraordinary events related to the subject matter” of the Treaty, and
that they have jeopardized the “supreme interests” of the United States. Thus, the
prominent legal question for the purposes of this clause is whether a party has
properly terminated the ABM Treaty.

3. Does the ABM Language Support President Bush’s Termination?

Proponents of terminating the ABM Treaty, naturally, maintain that it does. However, the language of the ABM Treaty dictates that a “Party” shall have the power to terminate the Treaty. The Treaty Preamble defines the Parties as the nations involved in the Treaty, not their executives; thus, the United States is the party to the Treaty, not George W. Bush or the office of the presidency. No provision of the ABM Treaty provides for the executive having sole power to terminate the Treaty.

Since the ABM Treaty does not provide an answer to the question of what branch of the United States government has the power to terminate, it is necessary to turn to the Constitution to make this determination. After all, if the Senate already had the constitutional authority to play a role in the termination of the ABM Treaty during the ratification process, it would not need to reserve that right when it gave its advice and consent. It follows that President Bush can terminate the ABM Treaty only if he has the power to terminate treaties on behalf of the United States under the U.S. Constitution.


The Constitution is silent on how the United States should terminate a treaty. While it confers upon the President the power, “by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur,” it does not elaborate any further on the treaty power. However, the Constitution does proclaim that, “. . . all Treaties made, or which shall be made,
under the Authority of the United States, shall be the supreme law of the land; and
the Judges in every State shall be bound thereby,” thus associating treaties with the
Constitution and the laws of the United States. While these are the only clauses
that specifically address treaties, the lack of a specific procedure for treaty
termination also makes the Necessary and Proper Clause of interest in resolving
this issue. The Constitution dictates that the U.S. Congress has the power, “To
make all Laws which shall be necessary and proper for carrying into Execution the
foregoing Powers, and all other Powers vested by this Constitution in the
Government of the United States or in any Department or Officer thereof.”

C. The Restatement (Third) of Foreign Relations Law of the United States

1. The Restatement’s Position

The Restatement (Third) of Foreign Relations Law of the United States § 339
(1987) (hereinafter “Restatement”) maintains that the President of the United
States has the power, amongst other things, “[T]o suspend or terminate an
agreement in accordance with its terms.” In reaching this conclusion, the drafters
of the Restatement relied largely on United States v. Curtiss-Wright Export
Corp. The following section examines this case in relation to treaty
termination.

2. Does the Restatement Support President Bush’s Termination?

Restatements are not binding legal documents; they are attempts to
summarize the state of the law in the view of the majority of its authors. Thus, the
support the Restatement lends to President Bush’s unilateral termination of the
ABM Treaty depends upon the strength of its argument and the sources from
which it draws its conclusion.

Curtiss-Wright involved a conspiracy on the part of the appellants to sell arms
to Bolivia during that nation’s conflict in the Chaco. The United States asserted
that this violated both a Joint Resolution passed by Congress, which authorized
President Roosevelt to criminalize arms sales that would affect foreign conflicts,
and the subsequent proclamation issued by Roosevelt. The appellees challenged
the indictment, in relevant part, on the grounds that the Joint Resolution violated

67. U.S. CONST. art. VI, cl. 2.
68. U.S. CONST. art. I, § 8, cl. 18.
69. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 339 cmt. a
(1987) [hereinafter RESTATEMENT].
71. RESTATEMENT § 339 at cmt. a. The Comment cites only Curtiss-Wright. While the Reporter’s
Notes cite a couple of other cases, these cases (other than Goldwater) are tangential to the main
issue and are cited to support points not questioned in this paper.
72. See Curtiss-Wright, 299 U.S. at 311.
73. See id. at 311.
the Nondelegation Doctrine.  

The Court, in an opinion by Justice Sutherland, found that Congress had not violated the Nondelegation Doctrine. The Court, without deciding whether such an order concerning domestic affairs would violate Nondelegation, held that there was no delegation issue because of the president’s traditional powers in foreign affairs and the tradition of Congress passing such authorizing legislation in relation to foreign affairs. Justice Sutherland wrote,

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

The Restatement’s use of Curtiss-Wright as the only support for the position that the President can terminate a treaty unilaterally is weak. The actual issue had nothing to do with the power to make or terminate treaties. While the Court used broad-sounding dicta in discussing the power of the executive in foreign relations, the real question was one of Congressional authority to delegate such power to the President. If the Court hinted that the President would not have needed the Act of Congress to take action, it did not directly say or hold so. Even if it had, terminating a binding legal treaty between nations is different from criminalizing an arms sale. In fact, Justice Sutherland only mentioned the treaty power as one example of the President’s responsibilities in the area of foreign affairs. Nothing in the opinion that would support unilateral presidential termination of treaties is binding legal precedent.

74. See id. at 315. The Nondelegation Doctrine is the legal conception that Congress may not make excessive delegations of its power to make laws to another branch of Government. See, e.g., Whitman v. American Trucking Ass’ns, 531 U.S. 457, 472 (2001) (“Art. I, § 1 of the U.S. Constitution vests all legislative power in the Congress. Thus, when Congress confers decision-making authority it must lay down an "intelligible principle.").

75. See Curtiss-Wright, 299 U.S. at 329.

76. Id. at 319-20.


78. See id. at 315.

79. See id.

80. See Curtiss-Wright, 299 U.S. at 319.

81. While many sources cite the Curtiss-Wright dicta for the proposition of expansive executive authority in foreign relations, there are historical considerations that weigh against interpreting this case too broadly. Curtiss-Wright was decided in 1936. At that time, Franklin D. Roosevelt received an electoral mandate for his New Deal. The Supreme Court, since the 1930’s had struggled with the delegation powers to the Executive Branch essential to carrying out the New Deal. It is logical to
D. Historical Precedents

In a case such as this, where the Constitutional language is unclear, the methods of treaty termination the United States has used in the past may be important in determining how the Court will rule. Unfortunately, the United States has not developed a uniform method of treaty termination since its formation. There have been many different methods used to terminate treaties. However, the vast majority of these instances show that Congress has played an important role in treaty termination.

1. The First U.S. Treaty Termination

Congress carried out the first treaty termination accomplished by the United States through an Act passed on July, 7 1798. In Hooper v. United States, the court of claims validated the act. The case evolved from Congress' termination of the first series of treaties with France. A French frigate sunk a registered schooner from the United States. Hooper, the administrator of an estate of one of the co-owners of the schooner, claimed that the French Treaties of 1778 remained in force and could be used as the basis of a spoliation claim against the U.S. Government for the loss of the ship. The Government maintained, however, that Congress had terminated the treaties by its Act of July 7, 1798.

In rendering its decision, the court of claims held Congress was the correct U.S. authority to abrogate a treaty and had properly issued the terminating act, apparently on the grounds that a treaty was the supreme law of the land and thus, a legislative Act was needed for its termination. "The treaties therefore ceased to be a supreme law of the land," the court maintained, "...The annulling act issued from competent authority and was the official act of the government of the United States. So far as it was within the power of one party to abrogate these treaties it was undisputedly done by the Act of July 7, 1787."

While the facts of this case and that of the ABM Treaty are not identical, the case is particularly relevant because both the termination and the case took place soon after the Federal Convention of 1787. Courts have always viewed actions taken in close proximity to the framing of the Constitution "as a contemporaneous
exposition of the highest authority." In *Hooper*, the Court of Claims clearly stated that an Act of Congress, signed by the president, was the proper manner in which the U.S. could terminate a treaty.

2. Subsequent Precedents

In 1979, Senator Barry Goldwater’s attorney maintained that, “of 55 treaties terminated by the United States, 52 were broken with congressional approval.” President Jimmy Carter, in contrast, pointed to thirteen instances where the president, purportedly, had acted to terminate a treaty without Congress in an attempt to justify his unilateral termination of the Mutual Defense Treaty with Taiwan. Upon closer examination of these cases, it is evident that they do not provide precedent for unilateral presidential termination of a treaty.

In nine of these instances the other party or parties to the treaty either no longer existed, chose to terminate the treaty, violated the treaty, or the president at the time merely took notice of these conditions. In one, Congress never questioned the legality of the termination because the president had the approval of several prominent Congressmen before the termination of a minor treaty with Mexico, with whom U.S. relations in general had greatly deteriorated. In one other case Carter pointed to, no termination ever actually took place. Finally, in two of the occasions alluded to by Carter, Congress had already passed a law superceding the treaty or implicitly authorizing its termination. An example of such Congressional authorization, as well as examples of explicit Presidential acknowledgement of Congress’ authority to terminate treaties, will provide a foundation for the conclusion that historical precedent supports Congress’ authority in this field.

Carter claimed that President McKinley terminated the 1850 Convention of Friendship, Commerce, and Extradition with Switzerland after negotiating a

90. See *Hooper*, 22 Ct. Cl. at 416.
91. Lawrence Meyer, *Suit on Taiwan a Political Issue, Bell Tells Court; Bell Says Taiwan Treaty a Political Issue*, WASH. POST, May 9, 1979, at A1. See also Walter C. Clemens, Jr., *Who Terminates a Treaty*, BULL. ATOM. SCI., Nov./Dec., 2001, Vol. 57, No. 6. For more on Goldwater, see infra text accompanying notes 125-155. For examples of treaties terminated by Acts of Joint Resolutions of Congress, see, e.g., 37 Stat. 627 (1911) (Joint Resolution Providing for the termination of the treaty of 1832 between the United States and Russia); 22 Stat. 641 (1883) (Joint Resolution providing for the termination of certain articles of the treaty between the United States of America and Her Britannic Majesty); 13 Stat. 568 (1865) (Joint Resolution to terminate the Treaty of 1817, regulating the naval Force on the Lakes).
93. Goldwater, 617 F.2d at 727-32.
94. Goldwater, 617 F.2d at 728-32.
reciprocity agreement with France in the late Nineteenth Century. However, in the Tariff Act of July 24, 1897, Congress authorized the President to negotiate such agreements. This Act conflicted with the 1850 Treaty and, since Congress passed it after the ratification of the Treaty, it superseded the Treaty as the law of the land. Thus, this was not a case of unilateral presidential treaty termination, the President simply acknowledged the fact that the legislation superseded the Treaty.

In fact, the executive branch has acknowledged Congress’ power to terminate treaties on multiple occasions. For example, President Polk recognized Congress’ authority in this area in relation to the Oregon Territory Treaty in 1846. After President Polk had specifically asked Congress for its permission for him to terminate the Treaty, Congress responded with a joint resolution authorizing Polk to give notice to Great Britain.

Thirty years later, President Grant, in the context of the British Treaty of 1842, stated, “it is for the wisdom of Congress to determine whether the article of the treaty... relating to extradition is to be any longer regarded as obligatory on the Government of the United States or as forming part of the supreme law of the land.” Grant went further, maintaining that, even if Great Britain continued to act in counter to the spirit of the Treaty, he would not extradite any person “without an expression of the wish of Congress.”

In recent years, the United States has terminated few treaties. In 1985, President Reagan announced he was terminating the Treaty of Friendship, Commerce, and Navigation Between the United States and Nicaragua. However, he did so under the emergency provisions of the International Emergency Economic Powers Act of 1977, and, thus, with authorization from Congress. Looking back from today to the first treaty terminated by the United States, historical precedent establishes a congressional role in treaty termination.

95. Id. at 727
96. Id.
97. Id.
98. Id. at 724.
99. See 9 Stat. 109-10 (1846) (Joint resolution concerning the Oregon Territory).
100. Goldwater, 617 F.2d at 726 citing 9 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 4324, 4327 (1897). President Grant, during a June 20, 1876 message to Congress, asked if he should regard the treaty’s article on extradition as void on “account of certain acts of the British government.”
101. Id. at 726.
103. International Emergency Economic Powers Act, §202, 91 Stat. 1626 codified at 50 U.S.C. 1701 (1977). Congress specifically limited the Act to national emergencies in order to narrow the scope of the authority it granted to the president. “The authorities granted to the President. . . may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this title and may not be exercised for any other purpose. Any exercise of such authorities to deal with any new threat shall be based on a new declaration of national emergency which must be with respect to such threat.”
E. Other Supreme Court Precedents

*Goldwater v. Carter* is the primary Supreme Court precedent on this issue and will be discussed in the next section. However, only Justice Brennan's dissenting opinion reached the merits. Judges in the lower courts considered other Supreme Court cases relevant to the *Goldwater* case. It is important to consider these as legal precedents in considering the ABM Treaty case.

1. Neely v. Henkel

There is Supreme Court precedent that supports reading of the Necessary and Proper Clause to give Congress the treaty termination power. In *Neely v. Henkel*, Charles F.W. Neely was charged with embezzling funds in Cuba while the United States occupied the country after the Spanish-American War. Neely filed a writ of *habeas corpus*, arguing that the June 6, 1900 Act under which he was charged was unconstitutional on several grounds.

One of the major questions before the Court in determining if the Act was constitutional was whether the sections that gave effect to the provisions of the Treaty of Paris between the United States and the Kingdom of Spain were valid. In concluding that the June 6, 1900 Act was valid, Justice Harlan wrote:

> The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in section 8 of article I of the Constitution, as all others vested in the Government of the United States, or in any Department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power.

Justice Harlan used the Necessary and Proper Clause in reaching the decision in this case. The issue here is one of implementation, and not of treaty termination as in *Hooper*. However, since Bush's claim of authority comes, at least in part, from the termination clause in the ABM Treaty, the two cases read together form a strong argument for Congressional authority in the termination of the ABM Treaty.

In *Neely*, the Supreme Court acknowledged Congress' power to enforce clauses within ratified treaties. In the ABM Treaty case, Bush claims he has the

105. See Goldwater, 617 F.2d at 718; see also Van Der Weyde v. Ocean Transport Co., 297 U.S. 114, 116-18 (1936) (holding valid an Act of Congress that "requested and directed" the President to terminate treaty provisions inconsistent with the Seaman's Act of Mar. 4, 1915).
106. See Neely, 180 U.S. at 112-13.
107. Id. at 114.
108. Id. at 121.
110. Accord Hooper, 22 Ct. Cl. at 418 with Neely, 180 U.S. at 121.
111. See Neely, 180 U.S. at 122.
authority as president to affect the termination clause found in Article XV. This claim of authority contradicts the outcome in Neely, since the Court, through Justice Harlan, approved the Congress' claim of authority in executing treaty provisions. Unless both the executive and legislative branches, independently, have the power to enforce treaty provisions, a court reaching the merits would have to overturn or distinguish Neely, as well as Hooper, in order to maintain that Bush has the power to act under Article XV of the ABM Treaty.

2. Myers v. United States\textsuperscript{112}

In Myers, the Court decided a case involving the appointments clause of Article II, which reads in a similar manner as the Treaty clause and maintains that the president

\begin{quote}
. . . by and with the Advice and Consent of the Senate, . . . shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may be Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.\textsuperscript{113}
\end{quote}

The president removed Myers as a postmaster through an order from the postmaster general.\textsuperscript{114} Myers sued, maintaining that the President did not have the power to remove him.\textsuperscript{115} The Court, through Chief Justice Taft, held that, "In the absence of any specific provision to the contrary, the power of appointment to executive office carries with it, as a necessary incident, the power of removal."\textsuperscript{116}

\textit{Myers} stands for the proposition that, unless a power granted to the executive by the Constitution is specifically circumscribed, it belongs to that branch alone.\textsuperscript{117} Chief Justice Taft, in \textit{Myers}, maintained that, "The fact that the executive power is given in general terms strengthened by specific terms where emphasis is appropriate, and limited by direct expressions where limitation is needed and that no express limit is placed on the power of removal by the executive, is a convincing indication that none was intended."\textsuperscript{118} If one reads the treaty clause in light of \textit{Myers}, it would appear that the only power the Congress has related to treaties is the Senate's advice and consent power in creating them, since the wording of the two powers is nearly identical.

The issue of treaty termination is different in nature from that of executive

\begin{footnotes}
\item 112. Myers v. United States, 272 U.S. 52 (1926).
\item 113. U.S. Const. art. II, § 2.
\item 114. See Myers, 272 U.S. at 106.
\item 115. Id.
\item 116. Id. at 126.
\item 117. It is interesting to note that the Supreme Court has narrowed this opinion somewhat through its disposition in the case of Humphrey's Executor, Rathburn v. United States, 295 U.S. 602, 631-32 (1935).
\item 118. Myers, 272 U.S. at 128.
\end{footnotes}
appointments. The executive can argue that it needs the power to remove its own officials in order to manage its own internal bureaucracy. This control makes the president better able to carry out his duty to execute the laws of the United States. In contrast, the power to terminate treaties affects, not only the United States, but also the other nation(s) involved in the treaty. Furthermore, the Congress has historical claims to a role in treaty termination.

There is also a very concrete, textual difference between terminating a treaty and dismissing an executive official. An executive official may help the president execute a law and, thus, is important to the executive branch in executing the law as it reads it. In contrast, a ratified treaty is part of the supreme law of the land. It is one thing to change individuals that enforce the law, but another to change the law itself. Changing the law itself looks more like a legislative duty for the Congress.

Congress' function is to make laws, while the executive branch has the job of enforcing them. Giving the president power over confirmed executive officials furthers the president's capacity to perform the executive function of law enforcement. In contrast, giving the president total control over treaty termination extends the executive's power past this primary function. For this reason, unilateral presidential treaty termination requires closer scrutiny than the Court gave dismissal of executive appointees in Myers. Nevertheless, the judges in Goldwater clashed about the relevancy and scope of the Myers decision in respect to the treaty termination issue.

F. Goldwater v. Carter

1. The Case

The Supreme Court has faced the treaty termination power only once, in Goldwater v. Carter. The Court issued no majority opinion and declined to reach the merits. However, the district and circuit courts did issue opinions on the merits. While the Supreme Court decision is paramount in considering the issue of the ABM Treaty termination, a brief description of all of the opinions is useful for bringing out the textual and policy arguments as background for this

120. See Scheffer, supra note 120, at 990.
121. Id. at 990.
122. See supra pp. 241-55.
123. See Nelson, supra note 119, at 888.
125. Id.
paper’s analysis of the intent of the Framers.127

The District Court for the District of Columbia, in an opinion authored by Judge Gasch, held that President Carter’s notice of treaty termination needed to receive approval from two-thirds of the Senate or a majority of both houses of Congress in order to be effective under the Constitution of the United States.128 Gasch ruled that the senators challenging Carter’s termination of the Mutual Defense Treaty with Taiwan had standing.129 He also held that deciding the case on the merits would not violate the Political Question Doctrine.130 After addressing these preliminary issues, Gasch ruled that, under Article VI, clause 2 of the Constitution, treaties are part of the supreme law of the land that the president is responsible to execute.131 In order to repeal the supreme law of the land, the president needs Congress.132 Judge Gasch believed that the historical precedents, at the least, supported some form of cooperative action.133 He also refused to apply the Myers rational to treaty termination.134 As a matter of policy, the court was concerned about providing the president with such a broad, unchecked power as treaty termination.135 While the court decided that either two-thirds of the Senate or a majority vote of both houses of Congress could legally approve the action, Judge Gasch discussed only briefly, and somewhat unclearly, why he reached that exact determination.136

A divided DC Circuit Court reversed. Five of the judges wrote the per curiam opinion of the court.137 The majority agreed with Judge Gasch that the appellees had standing,138 but reversed on the merits.139 While they gave several reasons for this decision, all of these, in some part, revolved around the President’s

127. The facts of Goldwater are not very different from those at issue here. The two most relevant differences are that the Mutual Defense Treaty at issue in Goldwater did not contain a supreme interests clause within it termination provision and that President Carter terminated the Mutual Defense Treaty incident to derecognizing Taiwan, the other party to the Treaty, and recognizing China. Justice Brennan would have rendered an opinion on this narrow basis. For more details concerning the facts of Goldwater, see, e.g., Daniel Horwitch, The Unresolved Question of Unilateral Treaty Terminations: Goldwater v. Carter, 100 S.Ct. 533 (1979), 4 SUFFOLK TRANSNAT’L L. REV. (1980).
128. See Goldwater, 481 F. Supp. at 965.
129. Id. at 955-56. The basic requirements for standing are "(1) that he has suffered injury in fact; (2) that the interests being asserted are within the zone of interests to be protected by the statute or constitutional guarantee in question; (3) that the injury is caused by the challenged action; and (4) that the injury is capable of being redressed by a favorable decision." Id. at 951.
130. Id. at 956-58.
131. Id. at 962.
132. Id.
133. Id. at 960.
134. Id. at 960-61.
136. Id. at 965.
137. Two of the justices, Chief Judge Wright and Judge Tamm, concurred in the result but never reached the merits because they believed that appellees lacked standing. See Goldwater v. Carter, 617 F.2d at 699-709 (1979). For the sake of brevity, discussion of this opinion is omitted.
138. See Goldwater, 617 F.2d at 708. The majority did not believe the Political Question Doctrine applied because the issue before them, as they interpreted it, was extremely narrow.
139. Id. at 699.
power in foreign affairs. The majority specifically noted its disagreement with Judge Gasch on the Article VI issue, maintaining that by labeling treaties the "supreme law of the land," the Framers were merely telling state judges that they took precedence over state law.\textsuperscript{140} The majority also noted that this was a narrow decision, in light of the nature of the treaty and the fact that the Senate had ratified it with a termination clause and had not placed any special conditions on a possible future termination.\textsuperscript{141}

Judge MacKinnon wrote a lengthy and vigorous dissent in which he would have affirmed the District Court to the extent that its decision required a majority of both houses of Congress to effect the termination of a treaty.\textsuperscript{142} MacKinnon relied on Article VI, providing that treaties are the supreme law of the land, read in conjunction with the Necessary and Proper Clause in reaching his decision. MacKinnon saw treaty termination as "an implied power vested in the government." Since the Constitution did not expressly grant the Government the power to terminate treaties, it had to be implied under the Necessary and Proper Clause.\textsuperscript{143}

The Supreme Court vacated the decision of the DC Circuit and ordered the case to be dismissed. Six justices agreed that the Court should vacate the decisions below without reaching the merits, but only four agreed on the reasoning for the move. Of the three justices who disagreed with the outcome, two would have set the case for oral argument, and one would have affirmed the decision of the DC Circuit on very narrow grounds.\textsuperscript{144}

Then-Justice Rehnquist, writing for himself and three other justices, invoked the Political Question Doctrine.\textsuperscript{145} Rehnquist concluded that, since there is no constitutionally proscribed procedure for treaty termination and different types of termination procedures might be appropriate for different types of treaties, the issue should be decided by "political standards" rather than judicial ones.\textsuperscript{146} Justice Powell provided the fifth and decisive vote to vacate the judgment below. However, Justice Powell wrote that the issue was a matter of standing.\textsuperscript{147} Justice Powell expressly disagreed with the idea that the issue presented a Political Question that the Court could never address.\textsuperscript{148} Justice Brennan would have affirmed the Court of Appeals on the very narrow grounds that the termination of the treaty at issue was incidental to the power to recognize a nation, which belongs to the executive branch.\textsuperscript{149} The remaining justices would have scheduled the case

\textsuperscript{140} See Goldwater, 617 F.2d at 704.
\textsuperscript{141} Id. at 708.
\textsuperscript{142} Id. at 716-40.
\textsuperscript{143} Id. at 717 citing U.S. CONST. art. I, § 2, cl. 18.
\textsuperscript{144} While Justice Marshall concurred in the result, he did not write an opinion expressing his reasons, nor did he join the opinion of Justice Powell or that of Justice Rehnquist. See Goldwater, 444 U.S. at 996.
\textsuperscript{145} See Goldwater, 444 U.S. at 998.
\textsuperscript{146} Id. at 1003 citing Dyer v. Blair, 390 F. Supp. 1291, 1302 (N.D. Ill. 1975) (three-judge court).
\textsuperscript{147} Id. at 996.
\textsuperscript{148} Id. at 999.
\textsuperscript{149} See Goldwater, 444 U.S. at 1006. It is interesting to note that Justice Brennan wrote the
for oral argument.\textsuperscript{150}

2. Does The Court's Opinion Support Bush's Position?

Commentators often cite \textit{Goldwater} as supporting the ability of the president to terminate a treaty without Congress,\textsuperscript{151} but there was only one opinion on the merits given on very narrow grounds and no opinion commanded a majority. The Political Question Doctrine has fallen out of favor with the Supreme Court since it decided \textit{Goldwater v. Carter}.\textsuperscript{152} Thus, then-Justice Rehnquist's position is on even more questionable ground than it was in 1979, when it could not command a majority of the Court.

Aside from the Political Question Doctrine, Justice Powell’s opinion on standing received no other support from the Court, and that of only two judges at the appellate level.\textsuperscript{153} Justice Brennan’s opinion also stood alone.\textsuperscript{154} The \textit{Goldwater} case provides clues to both sides to a potential litigation on what issues to argue and how to argue them, as well as what Constitutional arguments may be convincing. However, the case does not appear to provide any specific or binding, legal support to either branch of the Federal Government on this issue, despite Carter's ultimate success in terminating the Taiwan Mutual Defense Treaty.

IV. AN ORIGINALIST ARGUMENT AGAINST UNILATERAL PRESIDENTIAL TERMINATION

The arguments concerning treaty termination traditionally center around policy. One can interpret the textual provisions like the majority of the Court of Appeals in \textit{Goldwater}, and say that the treaty power is an executive function under the president’s authority in foreign affairs.\textsuperscript{155} In the alternative, one can interpret the Necessary and Proper Clause, in conjunction with Article VI, section 2, to say that the Congress must play a role in terminating treaties.\textsuperscript{156} In either case, an evaluation of the typical constitutional policies of checks and balances and separation of powers drives the interpretation. Because of the need for this interpretation, it is useful to attempt to understand how the Framers of the Constitution balanced these considerations.
A. The Difficulty in Determining the Intent of the Framers

As Judge Gasch said in his opinion in Goldwater, the intent of the Framers concerning the termination of treaties is unclear. However, at least one author has formulated an argument that the Framers intended the Executive Branch to predominate in the realm of treaties based on Originalist evidence. The remainder of this paper will present the opposite thesis. It will illustrate that the Framers’ desire for treaties to be part of the supreme law of the land, their fear of the possibility that one faction or party might impose its views and positions on the whole nation, and their desire for the treaty power to be executed in such a way as to maintain the “national character” support a constitutional desire for a Congressional check on the termination of international treaties.

Yet, in formulating an argument from Originalist sources, one must be careful about what one takes as evidence of the intent of the Framers. The political positions of the Founders motivated their post-ratification statements and positions. Perhaps the best example is Thomas Jefferson, whom Judge MacKinnon cited as a source of originalist evidence in his dissent in Goldwater. However, Jefferson’s position changed from 1793, when he was the Secretary of State in the Executive Branch, to when he wrote A Manual of Parliamentary Practice for the Use of the Senate of the United States as President of the Senate during the presidency of John Adams. In 1793, six years after the framing of the Constitution, Secretary of State Jefferson told M. Genet that the Constitution, “had made the President the last appeal” concerning the termination of treaties, since the legislature was supreme in “making the laws only.” In contrast, in 1812, when Jefferson had a vested interest in the powers of the legislative branch, Jefferson’s manual reads, “Treaties being declared... to be the supreme law of the land, it is understood that an act of the legislature alone can declare them to be infringed and rescinded.”

Statements by Madison and Hamilton present similar issues of credibility when one tries to determine what the individual really thought at the time of the framing before their political stations influenced their judgment. Both changed positions on several issues, including the meaning of the text of the Constitution and methods of constitutional interpretation during the debates over the Jay Treaty in the first Congress. Both were attempting to gain political advantage for their

159. See JOHN NORTON MOORE, FREDRICK S. TIPSON & ROBERT F. TURNER, NATIONAL SECURITY LAW 798-99 (Carolina Academic Press 1990). Moore actually refers to the second edition of the Manual, which was released in 1812. However, Jefferson was Adam’s Vice President, and thus the President of the Senate in 1801.
160. See MOORE, supra note 159, at 798 for a full excerpt of Jefferson’s recollection of the conversation.
161. Id. at 799.
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newly formed parties in the forthcoming election. Madison, for example, argued that the treaty-making provision of Article II was in conflict with Article I. He maintained that the President and the Senate, if not subject to House consent, could use treaties to usurp the proper powers of the House to do things such as make the US a party to a foreign war, furnish troops for overseas use, and keep a standing army for mutual security projects. He argued for a construction of the Constitution in light of the overall theme of Separation of Powers and, thus, the House should have some power regarding the making of treaties.

This position, however, contradicted an argument Madison had made in 1793 under the pseudonym Helvidius. In the Helvidius writings, he had maintained that the President could not unilaterally pull out of a treaty, but that the consent of the Senate served as a proxy for that of the House. Thus, while denying the House any role in his earlier writing, he argued for giving the House a say in the treaty power when he served in that body. This tension between these two positions caused Madison to lose a great deal of respect from his fellow representatives.

In the end, Judge Gasch was right. There is no definitive originalist evidence that directly states how the United States should terminate treaties. Despite these difficulties, a wealth of indirect evidence indicates that unilateral presidential termination flies in the face of what the Framers would have wanted. While evidence from other sources is not rendered completely useless by post-ratification politics, this paper focuses on The Records of the Federal Convention of 1787 and The Federalist, sources not as tainted by post-ratification politics, in analyzing the intent of the Framers on this issue.

B. The Chronology of the Treaty Power in the Framing

The Federal Convention of 1787 opened on May 14, 1787. There was no treaty power mentioned in the Virginia Plan, the first outline of a Constitution proposed at the convention. A Constitutional provision on treaties did not appear in the work of the convention until the Committee on Detail conducted its work, which started on June 19, 1787. According to Madison’s papers, the final draft of the Committee of Detail that the Convention received on August 6, 1787, stated that, “The Senate of the United States shall have the power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court.”

163. Id. at 149.
164. Id. at 150.
165. Id.
166. See Lynch, supra note 162, at 157.
168. Id. at 20.
170. Id. at 183.
gave no power concerning treaties to the Executive Branch. This was very different from Alexander Hamilton's plan to put the treaty making power in the President, with the Senate playing the role of advice and consent, which he had proposed to the Convention.

The first mention of any form of Treaty power in the executive branch in any proposal did not come until August 20, 1787. On that day, the Committee of the Whole recommended to the Committee of Five that there be, “The Secretary of Foreign Affairs who shall also be appointed by the President during pleasure— It shall be his duty to correspond with all foreign ministers, prepare plans of Treaties, and consider such as may be transmitted from abroad.” This proposal, however, did not change the powers of the Senate. It is obvious that the Convention had difficulty with the powers of the Senate in general, as it often tabled such provisions until later in the Convention while it went through the other provisions of the work of the Committee on Detail mostly in order.

The Convention seemed to determine it did not like the treaty clause as it stood, giving sole power to the Senate, but did not know how to alter it. At the end of August 23, it referred it to the Committee of Five. On Tuesday, September 4, 1787, the Committee of Eleven reported to the House. This report included the language, “The President by and with the advice and consent of the Senate, shall have the power to make treaties... But no Treaty except Treaties of Peace shall be made without the consent of two thirds of the members present.” While the convention made other changes, the important alteration became permanent, and the treaty power moved to the executive branch, “by and with the advice and consent of the Senate.”

C. Arguments for Strong Presidential Authority in Treaties

Frances Fitzgerald argues that the evolution of the treaty power in the Federal Convention of 1787 supports the idea that the executive branch should dominate the treaty power. She maintains that, when the form of the Senate changed because of the Great Compromise, the idea of investing the treaty power in the Senate became distasteful to the Framers because it had less of an executive nature. To support this conclusion, she relied on some debates in the state conventions, other anti-Senate moves by the Framers near the end of the convention (such as taking away its role in electing the President) and a belief that

171. RECORDS, supra note 169, at 185-86.
173. RECORDS, supra note 169, at 336.
174. Id. at 176-339.
175. Id. at 394.
176. RECORDS, supra note 169, at 495.
177. US CONST. art. II, § 2, cl. 2.
178. See Fitzgerald, supra note 159, at 883.
180. See Fitzgerald, supra note 159, at 889, 898.
Hamilton specifically felt the treaty power was inherently executive and that the Senate was merely a "safeguard on executive power." Fitzgerald also relied on evidence of the traditional English treaty power, in which the Crown enjoyed a monopoly over treaty making but only Parliament could change domestic law related to the treaties.

Fitzgerald's position also receives some bolstering from Convention records that she does not cite. Delegate Mercer maintained that, "[The treaty] power belong[ed] to the Executive department," rather than the legislative. Pennsylvania Delegate Morris expressed the same view, saying that the Senate should have no power in relation to treaties. In spite of the statements of these delegates, however, a closer examination of the Convention records and a thorough analysis of The Federalist appear to create a more powerful argument for a congressional role in terminating treaties. This is especially true when one views the statements of these Framers in the context of the ABM Treaty controversy.

D. Arguments for a Check on Presidential Treaty Power

An assertion of a congressional role in treaty termination does not question the President's critical role in negotiating the formation of treaties. The Framers recognized the importance of the executive's ability to negotiate treaties for the reasons stated by John Jay in Federalist 64.

It seldom happens in the negotiation of treaties, of whatever nature, but that perfect secrecy and immediate dispatch are sometimes requisite. There are cases where the most usefull (sic) intelligence may be obtained, if the persons possessing it can be relieved from apprehension of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly. The convention have done well, therefore, in so disposing of the power of making treaties that although the President must, in forming them, act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest... Thus, we see that the Constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations, on the one hand, and from secrecy and dispatch on the other.

However, even while reinforcing the necessity of executive treaty making, Jay was careful to include the role of the Senate. Furthermore, while Fitzgerald claims that

181. See Fitzgerald, supra note 159, at 889-93.
182. Id. at 887.
183. RECORDS, supra note 169, at 297. Though Mercer qualified his position to state that, when domestic law was affected, the treaty would have to be ratified by law, which does not appear to apply in the case of the ABM Treaty. This is also true of Morris' position in the next sentence.
184. Id., at 392.
185. THE FEDERALIST NO. 64 (John Jay).
Hamilton believed in a purely executive treaty power, Hamilton’s own words in Federalist 75 prove that position an inaccurate one.

Though several writers on the subject of government place that power [treaties] in the class of executive authorities, yet this is evidently an arbitrary disposition; for if we attend carefully to its operation it will be found to partake more of the legislative than the executive character, though it does not seem strictly to fall within the definition of either of them. The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of society; while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to compromise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws nor to the action of new ones; and still less to an exertion of the common strength. Its objects are contracts with foreign nations which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department and to belong properly, neither to the legislative nor to the executive... However proper or safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to intrust (sic) that power to an elective magistrate of four year’s duration.\(^{186}\)

Of course, all of these passages refer to the treaty making power; the Framers never directly discussed the power to terminate treaties in the Federalist or in the Convention. Thus, in attempting to determine how the Framers would have reacted to the ABM Treaty termination, two questions are paramount. First, why did the Framers put the treaty power in Article II of the Constitution? This is important, not only in how we characterize the power, but also in determining how persuasive the Myers rationale relating to the President’s power to unilaterally remove his appointments should be in construing the treaty clause of the Constitution. The second question is what the Framers really intended concerning treaty termination. In answer to this question, the available evidence indicates that the Framers would have wanted a Congressional check on President Bush’s ability to terminate the ABM Treaty, though what type of Congressional action is unclear.

1. Why did the Framers Put the Treaty Power in the Executive Branch?

While Fitzgerald argues that the Framers intended the treaty power to be predominantly executive, Hamilton’s opinion in Federalist 75, and the majority of the other evidence available from reliable originalist sources, contradicts this theory. The Convention termed the treaty power as purely legislative until nearly the end of the Convention; and, even when they did move it into Article II, they maintained the role of the Senate in making treaties.\(^{187}\) Furthermore, analysis of

186. THE FEDERALIST NO. 75 (Alexander Hamilton) (italics added).
187. See RECORDS, supra note 167, at 495.
the Convention records indicates that the Framers did not intend this last-minute move to be a major change in policy. They moved the provision because of concerns about how much cumulative power the Senate had, not because of a sudden epiphany that the treaty power should be inherently executive. In addition, throughout the Convention, even those who wanted the power placed in the executive qualified that desire with a commitment to legislative checks on that executive authority, especially when international treaties would have a direct impact on existing domestic law.188

Fitzgerald’s argument also encounters difficulty in the reasons some of the delegates expressed for not wanting the treaty power vested in the legislature. For example, Delegate Mason expressed concern about giving the Senate power as related to the budget because the Senate “could already sell the whole Country by means of Treaties.”189 Mason later clarified that his concern was that the Senate could sell territories through treaties without action from the full Congress.190 This expresses less of a concern that the Executive did not have enough power, as that the Senate had too much. Changing the provision to share this power between the two branches, rather than giving it solely to the Senate, likely satisfied this concern. Putting the power to make (or terminate) a treaty solely in the hands of the executive would have caused precisely the inverse problem to the one that the Framers were attempting to remedy by moving the treaty provision to Article II.

This also explains the concern of many anti-Federalists, cited by Fitzgerald, that the Senate would become an aristocracy.191 In fact, this had little to do with the treaty power. On September 6, 1787, Delegate Wilson noted that, with all the powers the Senate was to have, including the Treaty power, there was a concern that an aristocracy would result. When Delegate Morris failed to understand this view, Mr. Williamson clarified that it came from the Senate’s role in selecting the President, which would make the President beholden to the Senate.192 The Convention, of course, subsequently eliminated this power. However, the discussion shows that concerns about the treaty power in the Senate stemmed more from the powers that had, to that point, been given to that particular body, not a belief that the treaty power was executive more than legislative.

In fact, while Delegate Mason expressed concerns about giving the Senate power over the budget and treaties, it is clear that he and Morris did not want the president to have any power over treaties. This is evident from Madison’s notes of August 7, reporting that they did not want treaties to be subject to the Executive veto.193 Though they seemed to disagree on how to accomplish this in the language of the Constitution, both agreed on the desired result.194 Thus, while there were members of the convention who felt the treaty power should be

188. See id., at 297.
189. See id.
190. Id. at 297.
191. See Fitzgerald, supra note 158 at 891.
193. Id. at 197.
194. Id. at 197.
executive, there were clearly those who believed that many of the state constitutions were correct in having the power vested in the legislature.\textsuperscript{195} The final treaty making power appears to be exactly what it sounds like, a compromise.

Then why did the Convention place the power within the executive article of the Constitution with so little debate? When the final draft came back, the only real issue questioned was whether consent should require two-thirds of the Senate or a majority.\textsuperscript{196} Perhaps the best answer to this comes from the foremost authority on the records of the Convention, Max Farrand.

It was evident that the convention was growing tired. The committee had recommended that the power of appointment and the making of treaties be taken from the senate and vested in the president 'by and with the advice and consent of the senate.' With surprising unanimity and surprisingly little debate, these important changes were agreed to. The requirement of the concurrence of two-thirds of the senate in treaties was amended at Madison's suggestion to except treaties of peace. It was then adopted and the next day reconsidered and re-adopted after striking out the exception of treaties of peace.\textsuperscript{197}

Farrand recognized that this debate would have been more heated if it had come earlier in the Convention. However, given the lateness in the convention and the amount of difficulty the convention had experienced with the powers of the Senate in general, it is not surprising that, what to us now appears as a major change went through with little debate. It was a compromise, and one that scholars today should not view as an endorsement of exclusive executive power over treaties.

In addition to the policy and textual critiques of using Myers to decide the issue of treaty termination,\textsuperscript{198} the condition of the convention at the time it adopted the treaty provision argues against expanding Myers to this area of law. The idea that limits on powers given to the executive under Article II should be construed as narrowly as possible is not evident from the Constitution itself, but is a Court-designed method of interpretation based on form, not substance.\textsuperscript{199} While Article II does contain express restrictions on the authority of the executive branch, the treaty provision entered this Article late in the Convention as part of a compromise. The absence of a termination clause is not an indication that the Convention meant to delegate that power to the executive branch, but was a result of exhaustion and an understandable lack of attention to detail and all possible scenarios. Even if one accepts the Myers interpretation of Article II in general, it would not be reasonable to apply this doctrine broadly to the treaty provision in light of its history.

\textsuperscript{195} See Fitzgerald, supra note 158, at 888.
\textsuperscript{196} See FARRAND, supra note 178, at 171.
\textsuperscript{197} Id.
\textsuperscript{198} See infra pp. 247-8.
\textsuperscript{199} See Myers, 272 U.S. at 128 (discussed, infra pp. 24-25); see also Randall H. Nelson, The Termination of Treaties and Executive Agreements by the United States: Theory and Practice, 42 MINN. L. REV. 879, 884-85 (1958).
Despite the move of the clause to Article II, passages from *The Federalist* indicate that the Framers still saw treaties as legislative in nature, though an executive role in creating them was necessary.\(^{200}\) Even if one dismisses *The Federalist*, the provision itself still required the ascent of the legislative branch. It is unlikely the Framers considered all the potential future interpretive implications of the form it was using when it put a still-shared treaty power in Article II. Given the evidence that the Framers did not see the treaty power as purely executive and that its placement in Article II did not effect such a belief, it is prudent to back off the Myers reasoning in the context of the treaty making power.

This reasoning gains support from the policy-oriented argument that U.S. involvement in international treaties is different from a President's ability to control his subordinates.\(^{201}\) It is important that the president be able to terminate purely executive officials in order to fulfill his charge of executing the laws. But even the Supreme Court recognized the limits to this broad executive power in the case of *Humphrey's Executor v. United States*,\(^{202}\) where the Court held that this unilateral power did not extend to officers whose duties were "quasi judicial or quasi legislative."\(^{203}\) However, if the treaty power were not a purely executive function, using the Myers rational to resolve the issue of treaty termination would actually defeat the intent of the Framers rather than affect it.

In sum, there is no direct evidence of why the Framers put the treaty power in Article II. However, it happened far too quickly and suddenly near the end of the Convention to think that it marked an abandonment of the consensus that the treaty power, even if not purely legislative, required the legislature to play a substantial role. While there is evidence that some delegates of the convention believed the treaty making power was executive in nature, even these individuals desired legislative checks on the president's authority. Furthermore, there were individuals who believed the power was purely legislative. Hamilton's statement above from *Federalist* 75 seems to indicate that the final decision was a compromise. In any case, it only concerns making treaties. Determining who the Framers intended to have the power to terminate treaties requires examining the whole of *The Federalist* to find all allusions to treaties, and putting these observations together to form coherent policy on international agreements.

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200. For the quotation and discussion of these passages in *The Federalist*, see infra p. 271-74.

201. See, e.g., Scheffer, *supra* note 119.

202. *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935). In this case, the plaintiff, the executor of an estate, filed suit against the Government for the deceased's salary from the time the president relieved him of his duties as Federal Trade Commissioner until his death. The plaintiff contended that the estate was entitled to the back pay because the president did not have the power to remove the Commissioner of the FTC under the Federal Trade Commission Act, 15 U.S.C. § 41. The Court held that the president had violated the Act, and that the Act was constitutional.

2. What was the Intent of the Framers Concerning Treaty Termination?

a. The Framers Wanted a Congressional Check

Some argue that a congressional check on unilateral presidential treaty termination would not make sense because it would make it too difficult for the United States to exit "international obligations." However, The Federalist provides evidence that the Framers believed that, once the United States entered into a treaty, it was important that it keep its bond and approach treaty issues with the utmost seriousness. This was not only a consideration for the future, but was important to the Framers as they wrote the Constitution.

The just causes of war, for the most part, arise either from violations of treaties or from direct violence. America has already formed treaties with no less than six foreign nations, and all of them, except Prussia, are maritime, and therefore able to annoy and injure us. She has also extensive commerce with Portugal, Spain, and Britain, and, with respect to the two latter, has, in addition, the circumstance of neighborhood to attend to. It is of high importance to the peace of America that she observe the laws of nations towards all these powers, and to me it appears evident that this will be more perfectly and punctually done by one national government than it could be either by thirteen separate States or by three or four distinct confederacies.

The Federalist No. 62 (James Madison).

Proponents of the termination of the ABM Treaty will quickly respond that the United States has not broken its bond, but has terminated the treaty in accordance with the termination clause in Article XV of the Treaty. However, as stated previously and restated in the subsequent argument, if the Constitution does not authorize the president to terminate a treaty, than Article XV has not been legally invoked. Furthermore, the seriousness with which the Framers approached treaty obligation is significant to how they should be terminated, as this paper argues in its subsequent analysis on pages 268-71.

204. See, e.g., Goldwater, 617 F.2d at 705.

205. The discussion that follows proves this point. However, Madison perhaps did the best job of explaining the need for stability in the Federal government in general.

In another point of view, great injury results from an unstable government. The want of confidence in the public councils damps every useful undertaking, the success and profit of which may depend on a continuance of existing arrangements. What prudent merchant will hazard his fortunes in any new branch of commerce when he knows not but that his plans may be rendered unlawful before they can be executed? What farmer or manufacturer will lay himself out for the encouragement given to any particular cultivation or establishment when he can have no assurance that his preparatory labors and advances will not render him a victim to an inconsistent government? In a word, no great improvement or laudable enterprise can go forward which requires the auspices of a steady system of national policy. But the most deplorable effect of all is that diminution of attachment and reverence which steals into the hearts of the people towards a political system which betrays so many marks of infirmity, and disappoints so many of their flattering hopes. No government, any more than an individual, will long be respected without being truly respectable; nor be truly respectable without possessing a certain portion of order and stability.

The Federalist No. 6 (James Madison).

Proponents of the termination of the ABM Treaty will quickly respond that the United States has not broken its bond, but has terminated the treaty in accordance with the termination clause in Article XV of the Treaty. However, as stated previously and restated in the subsequent argument, if the Constitution does not authorize the president to terminate a treaty, than Article XV has not been legally invoked. Furthermore, the seriousness with which the Framers approached treaty obligation is significant to how they should be terminated, as this paper argues in its subsequent analysis on pages 268-71.

206. The Federalist No. 3 (John Jay).
The Framers discussed the treaty power mostly in the context of Federalism, maintaining that one national government could better maintain treaties than 13 individual states. However, the principles applied by the Framers in their hypothetical discussions of Federalism are applicable to the unilateral presidential termination of treaties today. The evidence of the intent of the Framers, coupled with standard policy and textual arguments against presidential termination make a strong case that the withdrawal from the ABM Treaty should be more difficult to accomplish than through the unilateral action of George W. Bush or any other chief executive.

i. Treaties Are Part of the Supreme Law of the Land

A Congressional role in terminating a treaty, of course, does not guarantee that the United States will maintain all of its international obligations indefinitely. This would not a desirable result, since many treaties reach a point where they should be terminated. Furthermore, by providing a termination clause, the parties to the ABM Treaty acknowledged that the Treaty might not have a perpetual life. However, because the United States is party to the treaty, the dictates of the Constitution are paramount, and thus the intent of the Framers is a necessary consideration.

John Jay expressed the Framers’ belief that a treaty is binding compact

207. See, e.g. THE FEDERALIST NO. 22 (Alexander Hamilton).

The treaties of the United States under the present Constitution are liable to the infraction of the thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures. The faith, the reputation, the peace of the whole Union are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government? Is it possible that the people of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation?

208. It is of interest that Hamilton likely would have thought this provision to be an invitation to trouble. He believed that it was key that treaties leave nothing to future considerations. There is nothing absurd or impracticable in the idea of a league or alliance between independent nations for certain defined purposes precisely stated in a treaty regulating all the details of time, place, circumstance, and quantity, leaving nothing to future discretion, and depending for its execution on the good faith of the parties. Compacts of this kind exist among all civilized nations, subject to the usual vicissitudes of peace and war, of observance and nonobservance, as the interests or passions of the contracting powers dictate. In the early part of the present century there was an epidemical rage in Europe for this species of compacts, from which the politicians of the times fondly hoped for benefits which were never realized. With a view to establishing the equilibrium of power and peace of that part of the world, all the resources of negotiations were exhausted, and triple and quadruple alliances were formed; but they were scarcely formed before they were broken, giving an instructive but afflicting lesson to mankind how little dependence is to be placed on treaties which have no other sanction than the obligations of good faith, and which oppose general considerations of peace and justice to the impulse of any immediate interest or passion.

THE FEDERALIST NO. 15 (Alexander Hamilton). However, the wisdom of the termination clause is not the issue this paper addresses.
between nations that the United States should not dismiss lightly.

Others, though content that treaties should be made in the mode proposed, are averse to their being the supreme laws of the land. They insist, and profess to believe, that treaties, like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, and new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them absolutely, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, no doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both, and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding and just as far beyond the lawful reach of legislative acts now as they will be at any future period, or under any form of government.209

Proponents of the president's ability to terminate a treaty unilaterally will immediately point to the fact that the ABM Treaty has a withdrawal clause that authorizes both parties to terminate the Treaty at will with six months notice.210 Jay, obviously, did not contemplate such a clause in a treaty when he wrote this passage. However, even if today's readers cannot read the passage literally in light of the ABM Treaty withdrawal clause, especially the last sentence about treaties being out of the reach of legislative acts,211 it does serve as an illustration that the Framers labeled treaties as the supreme law of the land for reasons other than instructing judges that they were to supercede state law.212 Jay makes it clear that the Framers made treaties the Supreme Law of the Land so that they could not be “repealable at pleasure.”213

The situation concerning ABM Treaty termination justifies the fears expressed by Jay. If the President Bush can terminate the ABM Treaty without a congressional check, he is doing so at his pleasure. While he may or may not be deciding to terminate the ABM Treaty on a “whim” in this particular instance, if his legal interpretation of his powers is correct, there is no Constitutional mechanism to prevent a president from making such a decision based more on special or partisan interests than the merits of the treaty.214 This is precisely what

209. THE FEDERALIST No. 64 (John Jay).
210. See ABM Treaty, supra note 2.
211. It is likely that, with this phrase, Jay was really referring to state legislatures. This is especially true in light of the actions of the first Congress in terminating a treaty as is recounted by the Court of Claims in Hooper v. United States, 22 Ct. Cl. 408 (1887), see supra note 82.
212. Compare Jay, supra note 210 with Goldwater, 617 F.2d at 704.
213. Jay, supra note 209.
214. The ABM Treaty termination clause maintains that termination must be in the nation’s "supreme interests." See ABM Treaty, supra note 2. However, not all treaties will necessarily contain such a provision, this provision is not the issue addressed in this paper, and such a clause is open to interpretation based on partisan perceptions and interests.
Jay maintains the Framers wanted to avoid by making treaties part of the Supreme Law of the Land.

Jay correctly points out that a treaty is a "bargain" or contract between nations, and that our actions in terminating a treaty will reflect on the United States and, in part, dictate whether other nations will continue to enter agreements with us (and, if they do, if they will trust us to honor them and, thus, honor them themselves). If one individual has to power to terminate a treaty, how will other nations know with whom they are reaching an agreement? After all, making an agreement with a nation is only a valuable undertaking if you can trust that nation to maintain it.

A role for Congress does not preclude termination, but guarantees the representation of all citizens, states, and parties of the Federal Government in a considered deliberative process. Jay makes it clear that the Framers did not intend treaties to be repealable at will in the way President Bush has done, but to be repealed in a similar manner as other laws of the United States—with congressional authorization. This proposition gains support from other passages in the Federalist Papers.

ii. A Check on Treaty Termination Serves to Minimize the Impact of Partisanship

Much of the evidence that the Framers did not want the president to have unilateral treaty termination power stems from the basic conclusion long drawn from the Federalist papers that the Constitution, in part, was meant to minimize the impact of partisanship. Hamilton asked,

Is it not... the true interest of all nations to cultivate...benevolent and philosophic spirit? If this be their true interest, have they in fact pursued it? Has it not, on the contrary, invariably been found that momentary passions, and immediate interests, have a more active and imperious control over human conduct than general or remote considerations of policy, utility, or justice?\(^2^1^5\)

Madison and the rest of the Framers shared this fear of one party or faction taking control over the course of the nation, and that that controlling faction would routinely change, lending the nation to inconsistency and instability. Madison wrote, "Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction... our governments are too unstable."\(^2^1^6\)

While this fear of partisan control pervades the Federalist papers, only Jay discussed its role in the treaty power. The Framers, as noted by Jay, recognized that faction, if given an unchecked hand, could control foreign as well as domestic policy. Jay wrote,

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216. THE FEDERALIST NO. 10 (James Madison).
But the safety of the people of America against dangers from foreign force
depends not only on their forbearing to give just causes of war to other nations,
but also on their placing and continuing themselves in such a situation as not to
invite hostility or insult; for it need not be observed that there are pretended as
well as just causes of war. It is too true, however disgraceful it may be to human
nature, that nations in general will make war whenever they have a prospect of
getting anything by it; nay, that absolute monarchs will often make war when their
nations are to get nothing by it, but for purposes and objects merely personal, such
as a thirst for military glory, revenge for personal affronts, ambition, or private
compacts to aggrandize or support their particular families or PARTISANS. These
and a variety of other motives, which affect only the mind of the sovereign, often
lead him to engage in wars not sanctified by justice or the voice and interests of
his people. But, independent of these inducements to war, which are most
prevalent in absolute monarchies, but which well deserve our attention, there are
others which affect nations as often as kings; and some of them will on
examination be found to grow out of our relative situation and circumstances."217

This particular except speaks of war, but the paper dealt with foreign affairs in
general, including treaties.

Giving the President unilateral power to withdraw from a treaty gives
exclusive power to terminate treaties to a single ruling party, in President Bush’s
case, the Republican Party that Bush leads. By requiring action from Congress to
terminate a treaty, this executive power is controlled, but not eliminated. At the
time of the ABM termination, for example, Bush would only need to convince one
Democrat in the Senate that termination of the ABM treaty is the proper course,
and maintain his party base, in order to affect his desire to terminate the ABM
Treaty. This hardly seems an unreasonable or insurmountable check on executive
power. If the Republicans controlled the Senate as well, Bush’s task would be
even easier. There are, of course, instances in which one party will be in the
majority in each branch of the government.

Even in this situation, however, a legislative check would still bring the
debate to the forefront and allow all parties in the government a formal say in the
termination process. Legislative action is not warranted in order to prevent treaty
termination through gridlock, but to ensure that the Nation and its government
debate the issue thoroughly and that the Government makes its decision in the best
interests of the entire nation. Congressional action in treaty termination would not
preclude treaty termination, but it would recognize the Framers’ desire that United
States not be able to dismiss treaties on a whim, as illustrated by Jay and in Article
VI.

Treaties should be harder to vacate than by the stroke of one individual’s pen,
with or without a termination clause. If partisanship on any given issue is so great
that a president cannot get a simple majority in both houses of Congress or two-
thirds of the Senate, it is clear that there is no national consensus to terminate the
treaty in that case. The United States Constitution requires this procedure to repeal
its normal statutes and Congress passes bipartisan measures on a regular basis; it

makes sense to require it to repeal international treaties that are part of the Supreme Law of the Land.

The Framers put checks and balances into the Constitution to avoid the absolute power of parties, partisans, and individual branches of the Federal Government. Such checks were necessary concerning the treaties to accomplish the Framers' goal of improving on the monarchical system of treaty power in the British government. Hamilton, while discussing the treaty power, observed that under the Constitution, "there is no comparison between the intended power of the President and the actual power of the British sovereign. The one can perform alone what the other can only do with the concurrence of a branch of the legislature." Since the British Parliament had control over treaties only as they affected the law of the land, and not foreign relations, the Senate's role of advice and consent added a foreign relations power the legislature's role in treaties. It is difficult to believe that the Framers would have endorsed eliminating such a check in terminating treaties.

iii. A Congressional Role in Treaty Termination Will Help to Protect the National Character and the United States' Reputation Amongst Nations

Action by Congress in terminating a treaty is warranted, not only because of the importance of checks and balances on executive and factional power that Jay pointed to, or because of the desire to check the type of executive power exhibited by the British monarchy, but because presidents serve a term of four years, and a maximum of ten years. The Senate, in particular, but also Congress as a whole today, is a more continuous body. Some individuals are there for decades and, even when individuals leave, there are dozens of incumbents left behind within the body. Providing Congress with a role in treaty termination would help to assure that the character and image of the United States as perceived by foreign powers endures over time. Madison recognized the importance of this "national character" as a reason for giving the Senate such a prominent role in making treaties when he wrote,

A fifth desideratum, illustrating the utility of a senate, is the want of a due sense of national character. Without a select and stable member of the government, the esteem of foreign powers will not only be fortified by an unenlightened and variable policy. . . but the national councils will not possess that sensibility to the opinion of the world which is perhaps not less necessary in order to merit than it is to obtain its respect and confidence. An attention to the judgment of other nations

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218. Obviously, not everything should require a check. The Supreme Court in *Myers* and the constitution itself both recognize this. However, the preponderance of the evidence, as well as the binding and multilateral nature of international treaties, lends credence to the argument in this case.
221. A president would serve the maximum if he gained the office upon the death of a sitting president and, won the next two presidential elections.
is important to every government for two reasons: the one is that independently of
the merits of any particular plan or measure, it is desirable, on various accounts,
that it should appear to other nations as the offspring of a wise and honorable
policy; the second is that in doubtful cases, particularly where the national
councils may be warped by some strong passion or momentary interest, the
presumed or known opinion of the impartial world may be the best guide that can
be followed. What has not America lost by her want of character with foreign
nations; and how many errors and follies would she not have avoided, if the
justice and propriety of her measures had, in every instance, been previously tried
by the light in which they would probably appear to the unbiased part of
mankind?222

The case of unilateral executive treaty termination embodies these concerns of
the Framers about the character and image of the Nation at their zenith. Madison
points out that, without “a select and stable member of the government” involved
in making treaties, U.S. foreign policy will be inconsistent. He finds this
particularly important because it will affect the image of the United States among
other nations. Should a president have the power to terminate a treaty without
Congress, this potential for inconsistency reaches a zenith.

For example, if President Bush were to enter a similarly formatted treaty next
week and a Democrat who did not approve of the treaty was elected president in
the next election, there would be no legal impediment to that president terminating
that treaty. The idea that a president could unilaterally erase the ABM Treaty, a
fixture of nonproliferation and a supreme law of the land, violates the theory of

222. THE FEDERALIST NO. 63 (James Madison). It is interesting to note that Hamilton also saw the
importance of this national character as it related to the Senate’s role in appointing and relieving
advisors to the president.

It has been mentioned as one of the advantages to be expected from the co-operation of
the Senate, in the business of appointments, that it would contribute to the stability of the
administration. The consent of that body would be necessary to displace as well as to
appoint. A change of the Chief Magistrate, therefore, would not occasion so violent or
so general a revolution in the officers of the government as might be expected if he were
the sole disposer of offices. Where a man in any station had given satisfactory evidence
of his fitness for it, a new President would be restrained from attempting a change in
favor of a person more agreeable to him by the apprehension that a discountenance of the
Senate might frustrate the attempt, and bring some degree of discredit upon himself.
Those who can best estimate the value of a steady administration will be most disposed
to prize a provision which connects the official existence of public men with the
approbation or disapprobation of that body which, from the greater permanency of its
own composition, will in all probability be less subject to inconsistency than any other
member of the government.

THE FEDERALIST NO. 77 (Alexander Hamilton).
This seems to put the idea of applying the Myers rationale to the treaty power on even shakier ground,
since Myers is open to at least some measure of originalist criticism. Hamilton states that a Senate
check on the dismissal of executive officers would provide consistency and promote the national
character. He concludes that this, therefore, is a desirable characteristic of the Federal Government.
Myers maintains that this check is unnecessary in the interest of the president’s power over his own
employees. If the Framers believed applying the Constitution’s Congressional check on appointments
to dismissals as well, it makes no sense from an Originalist standpoint to extend the Myers rational to
the treaty provision.
checks and balances on the power of partisans in the United States and presents an opportunity for one man or party to damage the national character and image of the United States the Framers hoped to promote through a legislative role in making treaties.

Aside from these general concerns, which would apply in any case of presidential treaty termination, there are specific reasons to be concerned about Bush’s termination of the ABM Treaty. The United States, as a superpower, will always be subject to some criticism from other nations. The policy concerns the Framers expressed would apply to any president’s decision to terminate a treaty unilaterally. However, in discussing the ABM Treaty Specifically, Bush’s reputation as a unilateralist appears to be having a serious effect on the reputation of the United States in international affairs. While the specific criticisms vary, most have something to do with a perceived U.S. unilateralism and a belief that the U.S. has become “trigger-happy” since the September 11 attacks.

Even American commentators observe that, “Administration officials no longer offer even the pretense that the U.S.-Russia relationship is a partnership of equals.” Foreign commentators are less diplomatic. Many criticize the United States by looking at President Bush’s “unilateralist” moves as a representation of the mood of the American people. For example, a commentator in Singapore wrote:

History will one day judge the United States’ decision to withdraw from the Anti-Ballistic Missile treaty in the same way it views today the US failure in 1919 to join the League of Nations – as an abdication of responsibility, a betrayal of humankind’s best hopes, an act of folly... [T]he Bush administration has also displayed a cynicism which will adversely affect the mood of cooperation that has characterized international relations since the September 11 attacks. It was not by accident that the announcement came on the same day that the videotape of Osama bin Laden, confirming his complicity in the attacks, was released. That juxtaposition served at once to bury the ABM story, as well as provide missile defense with an altogether spurious emotional justification to cover up its intellectual and strategic nullity... President George W. Bush is doing well to make the world safe from terrorism, but under the cover of that good fight, he has...
just made the world a far more dangerous place.\textsuperscript{226}

Criticisms such as this one illustrate how a particular leader who makes a certain series of moves can make America’s international reputation better or worse at any given time.

A Congressional role in treaty termination will not ensure that the United States would never face international criticism. However, it would provide a necessary safeguard to ensure that, when the United States does make itself susceptible to criticism from the world community, it is doing so for the right reasons and on behalf of a clear majority of its citizens and representatives. The character and image of the United States in the ever-shrinking world we live in is at least as important as a small domestic spending bill. Madison and the rest of the Framers recognized this, and the evidence indicates they would be in favor of requiring an Act of Congress to terminate a treaty.

b. What kind of Congressional Check?

The words of the Framers, combined with the other evidence and arguments restated in this paper and those it cites, dictate that the President does not have the constitutional power to terminate a treaty without congressional action. However, this does not clarify what kind of congressional action the Constitution requires. In the \textit{Goldwater} case, Judge Gasch maintained that either the consent of two-thirds of the Senate, or an Act of Congress passed by a majority of each houses of Congress, would suffice. Judge MacKinnon disagreed, deciding that only an Act of Congress could accomplish the termination of a treaty. Again, originalist analysis provides no concrete answers. The necessary and proper clause and Article VI, section 2, read in light of the Framers’ statements about treaties being the supreme law of the land, support Judge MacKinnon’s position.

In ruling that two-thirds of the senate alone could authorize a termination, Judge Gasch, though he never explicitly said so, appears to have reasoned that giving that body power in making treaties also gave it power in terminating them. However, a ratified treaty is very different from one under consideration. A ratified treaty is binding, and under Article VI, section 2, is the supreme law of the land. The Senate has no power to repeal any kind of law on its own. However, Article I does grant Congress as a whole that power. Thus, by the terms of the Constitution and differences between treaties under consideration and those already made, MacKinnon has the better position on the question.

However, there is evidence that the Framers did not want the House of Representatives involved in making treaties. During the Constitutional Convention, the Pennsylvania Delegation moved unsuccessfully that the House of Representatives also be involved in the treaty-making process.\textsuperscript{227} The reason for this failure seemed to be, at least in part, that the representatives served such short

\textsuperscript{226} \textit{American Betrayal}, \textit{THE STRAITS TIMES} (SINGAPORE), Dec. 15, 2001, at 1.

\textsuperscript{227} See Lynch, \textit{supra} note 162, at 144.
CONGRESS AND THE TREATY POWER

They who wish to commit the power under consideration to a popular assembly composed of members constantly coming and going in quick succession seem not to recollect that such a body must necessarily be inadequate to the attainment of those great objects which require to be steadily contemplated in all their relations and circumstances, and which can only be approached and achieved by measures which not only talents, but also exact information, and often much time, are necessary to concert and to execute. It was wise, therefore, in the convention, to provide not only that power of making treaties should be committed to able and honest men, but also that they should continue in place a sufficient time to become perfectly acquainted with our national concerns, and to form and introduce a system for the management of them.\textsuperscript{228}

Many of the framers also expressed concerns that including the larger House of Representatives in treaty making would jeopardize the secrecy necessary in treaty negotiations.

The power of making treaties is an important one, especially as it relates to war, peace, and commerce; and it should not be delegated but in such a mode, and with such precautions, as will afford the highest security that it will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good.\textsuperscript{229}

These concerns are inadequate to deny the House of Representatives its role in treaty termination. First, while the members of the House serve short terms, many are there for many years in today's House, as modern politicians tend to be "career politicians." Furthermore, the United States now elects senators by popular vote in the same way it elects members of the House.\textsuperscript{230} This eliminates the main feature the Framers used to make the Senate a more secure, enlightened body than the House. These practical, modern-day considerations, coupled with the textual requirement that treaties be "considered as part of the law of the land,"\textsuperscript{231} validate Judge MacKinnon's conclusion that an Act of Congress is the proper step the United States should take in order to terminate a treaty.

V. WHAT SHOULD CONGRESS HAVE DONE?

This paper has put forth originalist evidence and argument to supplement standard policy and textual arguments that President George W. Bush cannot terminate the ABM Treaty without an Act of Congress. However, even after one accepts this argument, the question before Congress at the beginning of 2002 was what it could do to preserve its authority. This question is likely to resurface with future treaty terminations.

\textsuperscript{228} THE FEDERALIST NO. 64 (John Jay).
\textsuperscript{229} THE FEDERALIST NO. 64 (John Jay).
\textsuperscript{230} See U.S. CONST. amend. XVII.
\textsuperscript{231} THE FEDERALIST NO. 22 (Alexander Hamilton).
A. The ABM Treaty

As I see it, the members of Congress opposed to the termination of the ABM Treaty had four avenues they could have pursued. First, the members could have done nothing and allow the termination to take effect. While this would not have any definitive legal impact on the issue, it would set another, arguably a first, precedent of unilateral presidential termination of an international treaty.

A second option was that Congress pass legislation condemning President Bush's action and declaring that the United States may not withdraw from the ABM Treaty. This would have created the complete impasse between the branches that Justice Powell's deciding opinion maintained was necessary for members of Congress to have standing. Once one considers political reality, however, it becomes clear that it was impossible for opponents to the treaty termination to accomplish this feat.

The third option was that both houses pass legislation authorizing the termination of the ABM Treaty. It was feasible that the leadership in Congress could have formed a coalition of Democrats and Republicans who believed in legislative power in treaty termination. This would have prevented a precedent in favor of sole executive branch authority with respect to this issue. Proponents of multilateral international agreements and legislative power in foreign affairs, by forming what might have been an unappetizing coalition to some, would have prevented a dangerous precedent.

The fourth option was that a handful of members sue, as was the case in Goldwater v. Carter. On June 11, 2002, a group of representatives filed a complaint in United States District Court for the District of Columbia seeking a declaratory judgment that President Bush's termination of the ABM Treaty was unconstitutional. On December 30, 2002, Judge John D. Bates signed a memorandum opinion in Kucinich v. Bush dismissing the suit on both standing and political question grounds. While the plaintiffs decided not to appeal the case, Judge Bates' decision did acknowledge that Goldwater was not controlling and hinted that the president's authority to terminate a treaty unilaterally is justiciable, given the proper factual circumstances.

B. An Option for Future Treaties

Current authority indicates that the Senate has the power, in ratifying a treaty, to do so with conditions. Presumably, the Senate could assent to a treaty on the

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236. See RESTATEMENT § 303 at cmt. d.
condition that, should the president wish to affect a termination clause in the future, the executive would need the approval of the Congress (or a portion of the Senate) in order to do so. Should the Senate make this a standard procedure, it may avoid the constitutional question of treaty termination for future international agreements.\textsuperscript{237}

VI. CONCLUSION

Ultimately, neither historical precedent, the current state of U.S. law, nor the evidence of the Framers’ intent lends any strong support President Bush’s unilateral termination of the ABM Treaty. With the ever-shrinking world and the growing importance of multilateral agreements, it is more important than ever that the United States take its international obligations seriously. This paper has put forth evidence that unilateral presidential termination violates founding principles of American government.

However, treaty termination is a matter of politics as well as law. With the current political climate, President Bush was able to achieve his goal of terminating the ABM Treaty. Given the highly political nature of international treaties, the record of the judiciary branch not properly addressing the issue, and a majority of scholars moving toward acceptance of unilateral presidential termination\textsuperscript{238} it is of vital importance that when the Senate ratifies future treaties it requires congressional consent of some form in their termination. This is easier than being forced into court by the executive and, at least for treaties not yet ratified, will achieve the same ultimate result as the Supreme Court holding that Congress has a role in treaty termination.

There will be occasions when terminating a treaty will be necessary. However, the United State must recognize, as its Framers did, the importance on international agreements. The United States requires an Act of Congress to nullify its domestic laws. It is only fitting that it requires at least an equivalent procedure to eliminate its international ones.


"DE-JEOPARDIZING JUSTICE":
DOMESTIC PROSECUTIONS FOR INTERNATIONAL CRIMES
AND THE NEED FOR TRANSNATIONAL CONVERGENCE

Brent Wible*

INTRODUCTION

How should we feel about prosecuting Pinochet in Spain, Habre in Senegal, or Sharon in Belgium? Ambivalent. Even those who look most favorably on international criminal law and its potentially positive impact on human rights suffer conflicting responses to universal jurisdiction. The idea that some acts are so terrible as to compel international attention and an international solution satisfies our sense of justice. At the same time, something seems amiss when a defendant stands trial in country X for acts committed thousands of miles away. Victims in the home country often resent that their history is put on trial abroad,¹ and citizens of prosecuting states question why they should meddle in another country’s affairs.

These tensions subject national prosecutions for international crimes to great scrutiny, opening the proceedings’ legitimacy to question. The fact that these national proceedings are often idiosyncratic raises even more questions. Many international crimes are inadequately defined, leaving domestic courts leeway to fill in details, and it is rarely clear which procedural rules apply. Which punishments apply—those pertaining in the trial state or those of the state where the crime was committed—also remains a contested issue.

Universal jurisdiction will never be perfect; neither will people ever feel completely at ease with a borderless system of international criminal law. The sense of inequity resulting from courts in the north sitting in judgment on leaders from the south is most likely insurmountable in a world of asymmetrical power.²

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* J.D., Yale Law School 2003. Bernstein Fellow in International Human Rights, 2003-2004. I would like to thank Professor Michael Reisman for his helpful comments and academic supervision.

¹. For example, after Pinochet was indicted in Spain, Chile experienced a resurgence in nationalism as a response to perceived recolonization. See Anthony Faiola, Spanish Firms Revive Latin America Conquest, WASH. POST, Feb. 14, 2000, at A1; Sinikka Tarvainen, Straw Releases Spain from Tight Straits, DEUTSCHE PRESSE-AGENTUR, Mar. 2, 2000.

². Whatever one may think of this imbalance as a political or moral matter, the relative quality of
The potential for states to use universal jurisdiction prosecutions as a political tool of interstate conflict will remain. Likewise, those who believe that “trials from without” miss the point, by speaking to the wrong audience and failing to respond sensitively to a country’s political reality, will never be content with universal jurisdiction.

Despite these endemic concerns, work can be done to insofar as prosecutions under universal jurisdiction suffer from a lack of authoritative legitimacy and integrity as a legal matter. International mechanisms need to be put into place so that its exercise will be firmly grounded in international process. Domestic courts should incorporate as much international law, including both substantive and procedural standards, as possible into prosecutions for international crimes. They must engage in a structured international judicial dialogue along both vertical and horizontal dimensions to insure the development of consistent practices. While universal jurisdiction will never be perfect, it will be substantially better if informed by well-developed international standards.

Some scholars suggest that since few states are willing to prosecute non-nationals for atrocities committed abroad, a universal jurisdiction subject to prudential concerns will over-deter prosecutions under international law. If it appears legitimate and has integrity, however, states may be more likely to exercise universal jurisdiction. As a step toward this goal, it is important to narrow the gap between the theoretical application of universal norms and the variation across jurisdictions that exists in practice. National prosecutions for international crimes will have greater integrity and legitimacy, and the authority of international criminal law will benefit from transnational convergence. The resultant growth of international norms should increase accountability for terrible acts, deter the kind of atrocities that marked the twentieth century, and contribute to a greater degree of human dignity.

Part I of this article explores the difficulties that arise from application of universal norms in domestic courts without a harmonizing structure. Part II argues that the informal mechanisms that could influence exercise of universal jurisdiction and deter the most divergent practices are ineffective. Part III examines some of the costs of universal jurisdiction. The article concludes by suggesting some approaches for structuring an international criminal system that would allow domestic courts to play a central role without divesting universal norms of their courts and judges in, for example, Spain as opposed to the Sudan suggests that there may be reason to prefer this “sense of inequity” to the alternative. See Bruce Broomhall, Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law, 35 New Eng. L. Rev. 399, 417 (2001). States that have the power to use universal jurisdiction generally have the most independent judiciaries that ensure due process and respect the rule of law. Lack of abuse to date, however, may only be a reflection of the fact that universal jurisdiction is only nascent. Madeline H. Morris, Universal Jurisdiction in a Divided World: Conference Remarks, 35 New Eng. L. Rev. 337, 354 & 357 (2001).

3. Morris, supra note 2, at 356.
I. The Peculiar Difficulties of Prosecuting International Crimes in Domestic Courts

Many international crimes are loosely defined. Even where a convention has been adopted, as in the case of genocide and torture, many of the details are left to national jurisdictions. The applicable procedural rules are not mentioned in these instruments, and the non-hierarchical assembly of international tribunals and national courts applying this body of law reach different conclusions operating under different procedures. While some divergence among the jurisdictions prosecuting these crimes is inevitable, is it desirable that states be allowed to define procedures, and in large part, the crimes themselves? Is such proliferation pathologic in a system based on international norms? The difficulty arriving at a particularized set of rules in international criminal law became clear during the Treaty of Rome negotiations.

This section seeks to determine some limitations on the divergence of substantive prohibitions and procedural rules across jurisdictions. In the extreme, different procedural rules and judicial interpretations of definitions could so stretch the substance of the law as to raise the ex post facto issue. Precision in criminal prohibitions, like retroactivity, is a window onto the fairness and integrity of international criminal proceedings. National divergence must be adequately constrained so that prosecutions do not amount to and are not perceived as "victors' justice."

Some scholars hint that the lack of precision in international criminal law was

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6. The Genocide Convention broadly defines genocide as any of several enumerated acts committed "with intent to destroy, in whole or in part, a national, ethnic, racial or religious group."

Convention on the Prevention and Punishment of the Crime Genocide, September 12, 1948, art. 2. The burden of proof, defenses, evidentiary and procedural rules, and applicable penalties are left entirely to the states parties. Id. at art. 5. The Convention Against Torture likewise enumerates acts amounting to torture, but Article 4 leaves it to the contracting parties to "ensure that all acts of torture are offences under its criminal law." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, art. 4. Thus, even in the documents where international criminal law is most clearly expressed, all but the most general elements of the crimes are to be defined by national legislatures. See Leila Sadat Wexler, The Proposed Permanent International Criminal Court: An Appraisal, 29 CORNELL INT'L L.J. 665, 717 (1996) (arguing that the main problem with international crimes is their lack of precision and the failure of international instruments to mention penalties, mens rea, or defenses).

7. Wexler, supra note 6, at 717-718.

8. Some have criticized the ICC Statute for deliberately leaving the definitions of crimes to national legislatures, a gap that could lead to prosecutorial abuse and make any ICC prosecution the equivalent of a common law crime. See Alfred P. Rubin, The International Criminal Court: Possibilities for Prosecutorial Abuse, 64 LAW & CONTEMP. PROBS. 153, 158-59 (2001); Wexler, supra note 7, at 717. (arguing that one of the most serious criticisms of international criminal justice is the absence of a well-defined body of international criminal law); International Law Association, Report of the Thirty-Fourth Conference (1927) 179-80 (comments of Dr. Emil de Nagy, M.P. (Hungary) (questioning whether an international criminal code should precede the institution of an international criminal court or whether the ICC should function as a common law court).
consciously intended to deter a whole category of behavior rather than encouraging actors to legalistically tailor their actions in compliance with the law.\(^9\) Regardless, the argument does not go to the question of *procedural* protections and the divergence of procedural rules that might lead to *substantively* different crimes across jurisdictions.

A. Specificity in International Criminal Law: Analogy to the Common Law

Scholars argue that international criminal law cannot be precise.\(^{10}\) Rather, it develops necessarily like the common law, gradually applying the principles of previous decisions to new situations.\(^{11}\)

The expectations of specificity in international criminal law cannot, however, be the same as in national criminal legislation. . . . International law, like common law, develops gradually on the basis of states’ practices, conventions, and other manifestations of customary law, which in some cases also include “general principles of law.”\(^{12}\)

Analogizing international criminal law to the common law poses a number of problems. The specificity question cannot be swept away by analogizing to a highly contested category—the common law crime. Nonetheless, the analogy to the common law raises interesting issues relating to precision that are unique to international law.

Since international criminal law develops largely through conventions, which tend to lack specificity, and cases, as the recent history of the International Criminal Tribunal for the Former Yugoslavia (ICTY)\(^{13}\) and International Criminal Tribunal of Rwanda (ICTR)\(^{14}\) indicate, does the non-hierarchical structure of courts considering international criminal law pose any difficulties? Given a range of prior decisions from different courts and tribunals, is it easy for a court to disregard, distinguish, or rely only on cases it wants to?\(^{15}\) The notion of *stare decisis* has historically been foreign to international law.\(^{16}\) In the traditional

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10. Id. at 470-471.
11. Id. at 470.
12. Id. at 470.
15. The International Court of Justice [hereinafter “ICJ”], confronts divergent rulings in some areas of its work, and its current president has expressed the need to impose harmonization. Gilbert Guillaume, *Speech by his Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations* (October 2000), at http://www.lawschool.cornell.edu/library/cij/www/icj/www/ypresscom/ (last visited October 25, 2002).
16. Article 38(1)(d) of the ICJ Statute indicates that although ICJ decisions are not binding precedent, the ICJ may use past decisions when determining current disputes. Statute of the International Court of Justice, June 26, 1945, art. 38(1)(d); see also *RESTATAAMENT (THIRD) OF*
positivist framework, there could be no binding precedent because parties had to submit to an international court's jurisdiction to hear a particular case. While the positivist understanding of international law is no longer as dominant as it once was, international criminal law presents some novel problems in terms of precedent.

With so many criminal tribunals, separated by space, time, and historical context, precedent poses greater difficulties than at the ICJ, which has institutional continuity at least. The potential for divergence increases when domestic courts try defendants under universal jurisdiction. Limited attempts to impose hierarchy on the international criminal system have been made. For example, the ICTY and the ICTR share a common appeals chamber and theoretically apply consistent law. Moreover, the ad hoc tribunal in Sierra Leone is required to follow ICTY and ICTR precedent. There will be no common appeals chamber, however, and no formal mechanism to ensure consistency.

Harmonization could be imposed with common law crimes in a hierarchical judicial system, but no such overarching authority exists in international law. The provisions to encourage uniformity among the ad hoc tribunals will not effect domestic prosecutions under universal jurisdiction. With domestic courts, the informal mechanism of judicial globalization is the only thing akin to precedent that currently encourages harmonization of international criminal procedure and interpretations of the substantive law. At least one scholar considers the trend toward harmonization of procedural and evidentiary rules to be robust. Leaving

19. Article 20(3) of the Statute of the Special Court directs the judges of the Special Court’s Appeals Chamber to be guided by the decisions of the Appeals Chamber of the Yugoslav and Rwandan Tribunals. Statute of the Special Court for Sierra Leone, art. 20(3) (2002), available at http://sierra-leone.org/specialcourtstatute.html. Article 14(1) of the Statute adopts the Rwanda Tribunal’s rules of procedure and evidence “mutatis mutandis.” Id. at art. 14(1).
21. The term describes the phenomenon whereby judges from different jurisdictions cite and follow each others’ reasoning.
22. Theodor Meron, War Crimes Law Comes of Age, 92 AM.J.INT’L L. 462, 463 (1998) (stating that “the rules of procedure and evidence each Tribunal has adopted now form the vital core of an international code of criminal procedure and evidence that will doubtless have an important impact on the rules of the future international criminal court”). Others find evidence of increasing harmonization
aside the question of whether or not a convention creating a system of binding precedents is politically feasible, such a system would remain unenforceable in the absence of a supranational adjudicative body with appellate criminal jurisdiction.

B. Dealing with Imprecision: Fair Trial Standards and Judicial Integrity

International law recognizes a number of fair trial standards.\(^2\) These standards set a baseline of procedural fairness without confronting the subtler questions of the specificity of international criminal law or the distinct nature of prosecutions under it. Some scholars insist that international prosecutions require a different set of governing principles than criminal proceedings in a municipal setting.\(^2\) Between these two poles—guaranteeing defendants certain rights in every trial and recognizing the peculiarities of international criminal prosecutions—the clarity and details of the crimes at issue keep slipping through the cracks.\(^2\) This important issue must be more fully explored. Five guidelines are proposed below to introduce harmonization into domestic enforcement of international criminal law and to encourage an international criminal system with integrity.

First, a mechanism is required to ensure that domestic statutes that expand on customary international law are not applied retroactively. While the war crimes acts of most states are under-inclusive, failing to implement all of the Geneva Conventions and their protocols, the statutes in some states go beyond the parameters of those instruments.\(^2\) The question is not simply whether the

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\(^2^3\) These fair trial standards have been expressed in Article 14 the ICCPR, the ICC Statute, the Geneva Conventions, and a number of other international covenants. WARREN FREEDMAN, THE INTERNATIONAL RIGHT TO TRAVEL 342 (William S. Hein & Co., Inc. 1993); Rome Statute of the International Criminal Court, art. 67-68, U.N. Doc. A/CONF.183/9 (1998); Geneva Convention (III) Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, art. 99-108, 6 U.S.T. 3316, 75 U.N.T.S. 134.

\(^2^4\) While in absentia trials are unthinkable domestically, the rationales for that position may not hold in the international context. Ruth Wedgwood, War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal, 34 VA. J. INT’L L. 267, 268-69 (1994). Likewise, while anonymous witness testimony in domestic prosecutions would violate the defendant’s right to a fair trial, such testimony may be appropriate in international trials, both because witnesses have more to fear and because protection measures would be ineffectual. Arguing that the reasonable doubt burden is designed to ensure that erroneous judgments will more often set guilty defendants free than send innocent ones to prison, and judging that the social disutility of acquitting a guilty genocidaire is much greater than of convicting an innocent defendant on false charges of genocide, some find that, in human rights lawsuits, the prosecutor’s burden of persuasion should be considerably less. Developments in the Law—International Criminal Law, Fair Trials and the Role of International Criminal Defense, 114 HARV. L. REV. 1982, 1989 (2001) [hereinafter Fair Trials and the Role of International Criminal Defense].


\(^2^6\) For example, the Belgian statute takes the notion of war crimes beyond the traditional grave breaches of the 1949 conventions. See Jacques Verhaegen et al., Commentaire de la loi du 16 juin 1993 relative a la repression des infractions graves au droit international humanitaire, REVUE DE DROIT
development is positive. Rather, the question is whether the particular domestic institution has an international mandate to make innovations in international criminal law. Domestic courts should refrain from judicial lawmaking in the international criminal context. In the absence of an appellate court that could harmonize divergent national decisions, that work is better left to international tribunals, whose decisions will form part of the universal precedent upon which domestic jurisdictions can draw. International tribunals take into account a broader horizon of perspectives than would a domestic court, and their jurisprudence has the advantage of being informed by a non-parochial set of considerations. The International Court of Justice has adopted a similar position, approving the prioritization of international tribunals over domestic exercise of universal jurisdiction.

Second, statutes of limitations should not apply for serious abuses of human rights. In most jurisdictions, statutory limitations do not exist for murder and

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PENAL ET DE CRIMINOLOGIE 1114-1184 (1994); The Belgian statute extends the notion of war crimes beyond international conflict to civil wars and allows for individual criminal liability for acts that were “forbidden” but not explicitly criminal under the Geneva Conventions’ common article 3. E. David, La loi belge sur les crimes de guerre, REVUE BELGE DE DROIT INTERNATIONAL 668-684 (1995/2). The ICTR and the ICTY later found acts falling under that article to be prosecutable violations of customary international law.

27. Wedgwood, supra note 24, at 272-73 (arguing that “grave breaches” should be interpreted to include all the prohibited acts of common article 3, thus allowing universal jurisdiction, because these acts are just as profoundly disturbing as others that are prosecutable under international law).

28. National courts must be able to make some innovations, since the international community has proved willing in only limited circumstances to create ad hoc tribunals. M.O. Chibundu, Making Customary International Law Through Municipal Adjudication: A Structural Inquiry, 39 VA. J. INT’L L. 1069, 1148 (1999) (“if the international community of jurists is to create an enduring jurisprudence of international human rights law, it will be because those norms converge from adjudications in multiple jurisdictions each reflecting the socio-political structures of its constitution, while seeking to conform local practices to evolving international standards.”). Without a structured international judicial dialogue or authoritative hierarchy that can impose harmonization, however, domestic innovations may permanently unsettle the content of international criminal law and render prosecutions under it open to doubt.

29. Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) 441 I.L.M. 536 (2002) [hereinafter “Congo v. Belgium”] (holding that, while heads of state are immune from prosecution in domestic courts, those same officials may be prosecuted at an international criminal tribunal having jurisdiction).

30. Stephen Macedo, The Princeton Principles on Universal Jurisdiction, Principal 6, at http://www.princeton.edu/~lapa/univ Jur.pdf (last visited October 25, 2002) [hereinafter PRINCETON PRINCIPLES], states that “[s]tatutes of limitations or other forms of prescription shall not apply to serious crimes under international law. . . .” In 1968, the United Nations Convention on the Non-Applicability of Statute of Limitation to War Crimes and Crimes against Humanity was drafted, and in 1974, the Council of Europe concluded a corresponding convention. Adopted by Resolution 2391 (XXIII) of the United Nations General Assembly on Nov. 26, 1968, INTERNATIONAL LEGAL MATERIALS 68 (1969); European Convention on the Non-applicability of Statutory Limitation to Crimes against Humanity and War Crimes, Jan. 25, 1974, E.T.S. No. 82, reprinted in 13 I.L.M. 540 (1974). Relatively few states, however, have signed and ratified these conventions. Even if the states’ motivations for not ratifying these instruments does not affect the principle of the imprescriptibility of war crimes, the nonapplicability of statutory limitations does not emerge as a generally accepted principle of international criminal law.
other serious crimes.31 Such limitations should likewise not apply to acts that violate international criminal law.32 Although prosecutions often take place long after the fact, increasing the risk that international fair trial rights will be violated and raising issues about the availability of witnesses and evidence, among other things,33 these problems do not warrant the conclusion that prosecutions for acts that took place many years ago are per se unfair. Determining whether a fair trial is possible should remain the task of the prosecutor and the judge.34 In a well-functioning domestic judiciary, there is no reason to believe that courts are unable to perform this task. Domestic prosecutions under universal jurisdiction need not apply statutes of limitations in order to protect the integrity of their judicial proceedings.

Third, a threshold of similarity across jurisdictions as to the definition of crimes and the mens rea required for conviction would be a positive development.35 Although genocide has been little prosecuted, its legal contours were settled after the ratification of the Genocide Convention of 1948.36 The concept of crimes against humanity, on the other hand, has developed primarily through custom and adjudication, and its elements are consequently less certain.37

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32. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E. T.S. 155, art. 2. As long as the non-application of statutory limitations applies only to acts that were considered criminal at the time committed, there is no retroactivity concern here. The Council of Europe Convention was designed to overcome this hurdle by stipulating that it would only be applicable to offences committed after its entry into force. Id. This rule, however, seems over-inclusive. It is not clear why acts committed before its entry into force that were clearly criminal when committed should be subject to a statute of limitations since there is no foreseeability issue in this context.


35. Uncertainty as to the definitions of some international crimes remains. The most blatant example is the “crime of aggression” in the ICC statute. Even more settled crimes, however, have proved to be elastic. The Rome Statute’s drafters intended, through the language of Article 10, to encourage states to modify the Statute’s definitions through domestic legislation. The framers foresaw states adding to the list of protected groups under the Genocide Convention and expanding the definition of crimes against humanity. Sadat, supra note 5, at 256-57. While these drafters seem to have supported states’ conflicting views of the content of international law out of something like federalism concerns, this position is controversial. As states feel increasingly empowered to prosecute under universal jurisdiction, if a prosecuting state applies idiosyncratic interpretations of international law, that prosecution could violate the due process requirements of the criminal law and undermine international criminal law in general. Morris, supra note 2, at 352.

36. The Genocide Convention requires the intentional destruction of a “national, ethnic, racial or religious group.” Convention on the Prevention and Punishment of the Crime Genocide, September 12, 1948, art. 2. Recent cases have challenged this definition in an effort to include systematic attacks on political or cultural groups. William A. Schabas, Problems of International Codification—Were the Atrocities in Cambodia and Kosovo Genocide?, 35 NEW ENG. L. REV. 287 (2001); Harvard Law Review, Defining Protected Groups under the Genocide Convention, 114 HARV. L. REV. 2007 (2001).

When international criminal law is enforced at the domestic level, a more rigorous
definition is required than in an international tribunal. Due to their international
character and particular historical contexts, the various international tribunals have
operated with differing definitions without great harm. In the absence of a strict
definition, however, national courts and prosecutors have interpreted international
prohibitions in peculiar ways, undermining the notion that international criminal
law is a coherent body of universal norms. For domestic prosecutions of
international crimes, it is important that a clear, internationally accepted definition
of those crimes be applied. Domestic prosecutions are not the proper fora for
judicial innovation. The innovation will likely be questioned by the international
community and the integrity of the proceedings thrown into question.

Fourth, it is not self-evident which source of law should designate the
punishment to be applied. The punishment could be provided by the trial state's
law, the law of the state where the crime was committed, the law of the victim's
home state, or the court could choose to apply the least severe penalty. According
to the ICTY Statute, the Yugoslav Tribunal should follow the practice of the
former Yugoslavia regarding sentences. The rule was established to avoid
retroactive sentencing in violation of the maxim nullum crimen nulla poena sine
lege. Ultimately, because Yugoslavia had imposed the death penalty, the ICTY
decided that it would review the legal practices of the former Yugoslavia but

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38. Wexler, supra note 6, at 710. Finding that a national, ethnic, racial, or religious group was not
targeted as a group for eradication, but rather a number of political opponents from different countries,
the French courts did not find Pinochet's acts to amount to genocide. Brigitte Stern, French Tribunal
de Grande Instance (Paris), 93 AM.J.INT'L L. 696, 697-98 (1999). By contrast, Spanish courts found
that the definition of genocide under international law was inadequate and failed to capture the concept.
Thus, the genocide charges for persecution of political opponents stood. Morris, supra note 2, at 353.
In the French prosecution of Klaus Barbie for crimes against humanity, the Court of Cassation added an
element to the crime. The Court found that the perpetrator of a crime against humanity must have
carried out his crime on behalf of a "state practicing a hegemonic political ideology." This definition
remains unique to France, and the decision, which strikes at the universal nature of international
criminal law, undermines the integrity of national prosecutions of international crimes. See Wexler,
supra note 34, at 284.

39. Statute of the International Tribunal, Report of the Secretary-General Pursuant to Paragraph 2

40. The Tribunal encountered difficulties, however, because the former Yugoslavia allowed for
the death penalty but not life imprisonment, while the ICTY may impose life imprisonment but not the
death penalty. See William A. Schabas, Sentencing by International Tribunals: A Human Rights
would not be bound by them.\textsuperscript{41} If determining the source of punishments to be applied by international tribunals is a delicate matter, the stakes are even higher with national prosecutions. If trial states apply their own punishment, they encourage forum-shopping, since those interested in prosecuting the crime would seek the most favorable forum. From the standpoint of safeguarding the integrity of the proceedings, it would be best to discourage a system where a defendant could face the death penalty in one jurisdiction and life imprisonment in another. Such divergence would seem arbitrary and undermine the notion of universality.\textsuperscript{42}

As for applying the punishment of the state where the crime occurred, forum-shopping would not be an issue. Although adequate notice would exist and sentencing would seem less arbitrary, this regime would present substantial enforcement problems. European states would be reticent to apply another state's death penalty in a universal jurisdiction case. The third proposition, that the punishment of the victim's home state be applied, also might require imposition of the death penalty. The punishment could raise \textit{ex post facto} and notice issues as well.

Although problematic, the "least severe penalty" rule—judging between the trial state's law and the law of the state where the crime occurred—surpasses the others.\textsuperscript{43} While it avoids both the notice and enforcement issues, it introduces others. The Rwandan Tribunal confronted its difficulties.\textsuperscript{44} Those in leadership positions who devised and organized genocide have escaped capital punishment, while lower-ranking perpetrators appearing before Rwandan courts have been subjected to the death sentence.\textsuperscript{45} This problem of "vertical inequity" is a serious political and theoretical issue. In most cases of widespread violence, however, the state's judiciary would be in disrepair and the state would be unwilling or unable to carry out executions at all, making the issue purely theoretical. Even where the

\textsuperscript{41} Prosecutor v. Drazen Erdemovic, Case No. IT-96-22-T, Int'l Crim. Trib. For the Former Yugo., Trial Chamber, Sentencing Judgment (Nov. 29, 1996), at http://www.un.org/icty/erdemovic/trialc/judgment/erd-tsj961129c.pdf (last visited October 25, 2002). Many of the cases before the Human Rights Committee under Art. 15 of the ICCPR have concerned the retroactive imposition of punishments, i.e., punishments that are more severe than those on the books when the crime was committed. The ICTY approach comports with the standard enunciated in that instrument.

\textsuperscript{42} Hanna v. Plumer, 380 U.S. 460, 472-73 (1965). A comparison to federal systems is useful. While allowing states to develop and apply their own procedural rules for state crimes is inherent to the federal system of government, so is giving federal courts and legislatures exclusive power over the substantive and procedural laws relating to federal crimes.

\textsuperscript{43} Essentially, this rule would be a choice of law provision. The U.S. Supreme Court has suggested that the purpose of the Erie doctrine is to avoid "forum shopping" and the "inequitable administration of the laws." \textit{Id.} at 460. At the international level, that purpose is best achieved by the least severe penalty rule. As an example, the European Court of Justice, concerned by the divergent application of EU law in national courts, requires that a national court's application of procedural rules to an EU cause of action may not vitiate the substantive right nor render it impossible to exercise in practice. See PAUL CRAIG & GRAINNE DE BURCA, EU LAW: TEXT, CASES, AND MATERIALS 214-15 (Oxford University Press Inc. 1998).

\textsuperscript{44} Rwandans party to the debates preceding the establishment of the ICTR expressed concern that the Statute "establishes a disparity in sentences since it rules out capital punishment, which is nevertheless provided for in the Rwandese penal code." U.N. Doc. S/PV.3453, at 16 (1994).

\textsuperscript{45} \textit{Id.}
problem exists concretely, the "least severe penalty" rule is arguably justified if it increases the integrity of prosecutions under international criminal law, has a deterrent effect, and results in a general shift away from capital punishment in domestic courts.

The subtext is that no significant group of states would approve an international tribunal today with the power to impose capital punishment. Thus, it would be odd for a national prosecution of an international crime to result in the death penalty. On a case-by-case basis, the "extradition impact" may resolve this problem, with many states refusing to comply with extradition requests from states that plan to seek the death penalty. This informal regime is not perfect, however, and it will not lend national prosecutions the same integrity as the "least severe penalty" rule. States should reach an international agreement governing the imposition of sentences in universal jurisdiction cases.

Finally, the accused require adequate procedural protections. While it has been noted that the particular circumstances surrounding international criminal trials militate against having the same procedural protections that municipal criminal trials require, certain fundamental procedural protections like probative standards, the burden of proof, and available defenses must not be compromised. Also, peculiar double jeopardy problems arise from national prosecutions under international law, and efforts must be made to protect defendants from unfairness through multiple domestic prosecutions. As for amnesties and immunities, domestic courts prosecuting under universal jurisdiction have no authority to grant them. Considerable international consensus indicates that amnesties for serious abuses of human rights are improper. A foreign court—distanced from the social

46. See PRINCETON PRINCIPLES, supra note 30, Principle 10, states that a state may refuse to entertain a request for extradition based on universal jurisdiction if the person sought is likely to face the death penalty, to be subject to torture, or if international due process norms are likely to be violated. Stephen Macedo, The Princeton Principles on Universal Jurisdiction, Principal 10, at http://www.princeton.edu/~lapa/unive_jur.pdf (last visited October 25, 2002); See generally Ved P. Nanda, Bases for Refusing International Extradition Requests—Capital Punishment and Torture, 23 FORDHAM INT'L L.J. 1369 (2000).


50. Id.


52. See PRINCETON PRINCIPLES, supra note 30, Principle 7, at 31 (stating that amnesties are
and political context of the state where the crimes occurred—especially has no authority to grant amnesties or immunities, enforcement difficulties aside.53

The proliferation of jurisdictions available to prosecute international crimes presents new and interesting problems in criminal procedure.54 The Lotus paradigm continues to dominate this area of international law.55 Under that doctrine, each sovereign may apply its own law in a case unless there is a rule prohibiting it from doing so, and international law has not yet developed a system of conflict of laws to resolve the problem.56 Hardly enough attention has been paid to which body of procedural law the forum state should refer when exercising universal jurisdiction. At Nuremberg and in the first days of the ad hoc tribunals, procedural rules received scant attention.57 The international tribunals have their own rules of procedure that, while largely judge made, at least resulted from international debate, taking into consideration the needs of international criminal law.58 Domestically, many nations have passed laws enabling local prosecution of criminals from the Yugoslav or Rwandan conflicts found in their territories.59 In some cases, a difference in procedural rules between the domestic system and the international tribunal would be outcome determinative. The question then arises, which rule of procedure should apply? Deferring to the national rule could lead to war crime forum-shopping from a prosecutorial standpoint, with the prosecutor at the international tribunal relinquishing jurisdiction and victims bringing cases as inconsistent with the duty to punish serious abuses of human rights); Study on Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights, Prelim. Rept. By Louis Joint, Special Rapporteur, U.N. ESCOR, Commission on Human Rights, 38th Session, Provisional Agenda Item 9(a), at 15, U.N. Doc. E/CN.4/Sub.2/1985/16; General Comment No. 20(44) (art. 7), General Comment Adopted by the Human Rights Committee under Article 40, para. 4, of the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/21/Rev.1/Add.3, Oct. 3, 1992; Velasquez Rodriguez Case, Judgment of July 29, 1988, Case 4, Inter-Am. C.H.R. (Ser. C) (1988) (holding that states have a duty to investigate and punish serious abuses of human rights) available at http://www.corteidh.or.cr/seriecing/serie_c_4_ing.doc (last visited Oct. 22, 2002); Orentlicher, supra note 51, at 2543; Schabacker, supra note 51, at 53.

53. For serious abuses of human rights, courts' power is asymmetrical. Universal jurisdiction is meant to ensure that the victims will have justice. Courts vested with universal jurisdiction, while having the authority to prosecute, do not have the power to grant amnesties or immunities.

54. Domestic procedural regimes to enforce international criminal law vary considerably from state to state. A number of aspects of criminal procedure, including statutes of limitations, immunities, pardons, penalties, and the rights of the defendant are local in character. As of yet, there is scant relationship between national and international proceedings and virtually no integration of procedural rules. Sadat, supra note 5, at 257-58.

55. S.S. "Lotus" (Fr. V. Turk.), 1927 P.C.I.J. (Ser. A) No. 10 (Sept. 7).

56. Sadat, supra note 5, at 257-58.


59. Many states enacted laws to incorporate the obligations imposed by Security Council Resolution 827 establishing the international tribunal in Yugoslavia to prosecute accused persons discovered on their soil.
parties civiles in jurisdictions with procedural rules more favorable to their case. A possible solution is that the international tribunal's rule would override domestic rules. To assure integrity, however, adopting the rule most favorable to the defendant would be the best choice. Since no equivalent to the international debate producing the tribunals' procedural rules exists at the domestic level, adopting the rule most favorable to the defendant, judging between the rules of an international tribunal and a domestic court, would cast the best light on national prosecutions for international crimes.

Situations inevitably will arise where international law provides no rule on a problem and municipal law must apply. Some scholars suggest that municipal rules should be modified in consideration of the crime's international nature, drawing on the principles of private international law to inform criminal procedures. For the moment, however, when prosecutions under universal jurisdiction are regarded with great skepticism, relying on even these modified national procedures in international prosecutions will result in a loss of integrity and will undermine their universality. Judged against the procedural rules arrived at after painstaking international debate, whether those from Yugoslavia, Rwanda, or the ICC, the rule most favorable to the defendant should be applied. While this solution may not be exact, and international law still might not provide any clear answers, it is imperative that international standards set the baseline against which domestic prosecutions for international crimes are judged.

II. The "Invisible Hand" Encouraging Transnational Harmonization

The possibility for variation among the laws of jurisdictions hearing international criminal cases is vast. Procedural rules and sentences proliferate, as do interpretations of the definitions and elements of crimes. In the absence of a formal unifying structure, are there informal "checks and balances" in the international system that introduce, at best, an element of harmonization or, at least, some standards militating against the most divergent practices? Four informal mechanisms have the potential to serve this function. First, the rules on extradition could influence the fairness of national prosecutions for international

60. As explained by Judge Claude Jorda:
According to French law, any private individual or group of individuals may trigger a criminal prosecution by introducing a claim in court. This is referred to as "la constitution de parties-civiles" ("the formation of civil parties"). If anyone "se constitue partie-civile" against somebody else, the court must prosecute that individual.


61. This rule would be consistent with the spirit of Article 15 of the ICCPR, which provides that a heavier penalty may not be imposed if a lighter penalty was statutorily required at the time the act was committed. International Covenant on Civil and Political Rights, December 19, 1966, art. 15. France has adopted a similar rule for handling domestic prosecutions arising out of the Yugoslav conflict. See Wexler, supra note 34, at 298 n.157.

crimes. Second, the fact that prosecuting states must rely on other states' cooperation to gather evidence introduces the possibility of some checks. Third, the emergence of a transnational judicial dialogue whereby decisions in one jurisdiction gain authority by drawing on precedents from international tribunals and foreign courts is promising. Fourth, world opinion could substantially impact these prosecutions, although it is not clear whether the world's gaze is more likely to encourage fair prosecutions, deter exercise of universal jurisdiction altogether, or turn prosecutors into celebrities. An examination of these issues will reveal whether the central problems of domestic prosecutions of international crimes can be addressed through informal checks currently present in the international system.

Put differently, this section analyzes the possible affects of a "free market" of jurisdictions for international criminal prosecutions. Might this jurisdictional competition lead to a convergence of definitions and procedural rules, greater divergence, or no change at all? Others have argued that forum-shopping can materially benefit human rights law, leading to both greater vindication of victim's rights and a clearer exposition of the law. The multiplicity of fora might even encourage horizontal dialogue among jurists in different jurisdictions to both elucidate and harmonize the legal norms of international criminal law. For the moment, these predictions remain aspirational. Rather than heralding the growth of national prosecutions as unambiguously positive, this section will explore whether there is an "invisible hand" encouraging harmonization for national prosecutions under international criminal law.

A. The "Extradition Impact"

A custodial state receiving an extradition request for an indicted suspect is not required to comply. If it finds that the proceedings in the requesting state would be unfair or that the punishment would be overly severe, it can refuse to extradite. While such dialogue could influence the fairness of criminal proceedings, there is little indication that states scrutinize requesting states' procedures. Extradition treaties, negotiated with law enforcement in mind,

63. Theodor Meron has argued that the evolving rules of procedure and evidence in the ad hoc tribunals will coalesce into a well-defined body of rules of international criminal procedure. Meron, supra note 22, at 463.


65. Id. at 293.


67. Id.

68. As a general rule, countries require only that the conduct is criminal in both the requesting and sending states for an extradition to go forward. M. Cherif Bassiouni, Extradition: The United States Model, 2 International Criminal Law 405 (M. Cherif Bassiouni ed., 1986). Little attention is given to procedural details, and, under the rule of non-inquiry, the existence of an extradition treaty with the U.S. prevents courts from reviewing whether or not the trial would be fair in the requesting
provide a presumption that the extradition should go forward. In practice, refusals to extradite are made largely by European states opposed to the death penalty.\textsuperscript{69} Thus, extradition has limited impact on the application of international criminal law.\textsuperscript{70}

The broad powers of enforcement jurisdiction in American law further debilitate the extradition regime as a check on international criminal proceedings. After \textit{Alvarez-Machain}, American law enforcement officials may contemplate kidnapping as an alternative to requesting extradition even from a state with which the U.S. has an extradition treaty.\textsuperscript{71} While the cost in political capital may deter extra-territorial enforcement in most cases, the \textit{Alvarez-Machain} rule militates against a robust extradition principle as an international check on the substantive, procedural, and penal aspects of national prosecutions for international crimes.\textsuperscript{72}

The "extradition impact" as a tool for encouraging international dialogue in national prosecutions for international crimes is further weakened because, in many cases, extradition is not an issue. If the defendant arrives on the soil of the country that then seeks prosecution, the potential for transnational checks and balances through extradition is irrelevant.

Finally, as former dictators and human rights abusers learn the great lesson of the twentieth century, to forego travel or to travel only to those states where they are assured refuge, the likelihood of extradition decreases.\textsuperscript{73} Extradition from rogue states is unlikely. Even if extradition were granted, it is unlikely that such states would provide checks on the fairness of criminal proceedings in the requesting state. The prospect of human rights abusers receiving refuge in rogue states also raises the likelihood of \textit{Alvarez-Machain} solutions. The U.S. would be most likely to resort to kidnapping in cases where extradition would be justified but impossible for geopolitical reasons. In practice, this result could bear little positive for the development of a robust system of checks and balances through extradition rules.

\textsuperscript{69} Generally, when the U.S. seeks to extradite a criminal from Europe, it undergoes formal negotiations to assure that the criminal will not face the death penalty once extradited. Despite these guarantees, European states remain ambivalent about extraditing to the U.S. In the wake of the events of September 11, several European states have refused extradition. See Sam Dillon and Donald G. McNeil, Jr., \textit{A Nation Challenged: The Legal Front; Spain Sets Hurdle for Extraditions}, N.Y. TIMES, Nov. 24, 2001, at A1. States also negotiate treaties stating that any suspect extradited to a requesting state will not face the death penalty. See Topiel \textit{supra} note 66, at 396-97.

\textsuperscript{70} Pinochet showed the world that extradition proceedings can be drawn out and political without touching on the substantive legal issues. Broomhall, \textit{supra} note 2, at 415.


\textsuperscript{72} Id. at 666-67.

\textsuperscript{73} Broomhall, \textit{supra} note 2, at 415.
B. Mutual Legal Assistance

Because states prosecuting international crimes rely on mutual legal assistance to gather evidence, officials in the country where the evidence is located have a profound influence on the trial’s shape. In this context, two problems arise. First, evidence may be located in a state unwilling to cooperate with the prosecuting state. That state may impede visits to sites and witnesses and may prevent investigators from locating key documents. Second, where investigators have access to documents, the court may have difficulty determining their authenticity. Under the treaties governing mutual legal assistance, requested states generally have broad discretion to refuse assistance on a number of grounds.

Experience at the ad hoc tribunals indicates that refusals to cooperate have had a large practical impact on the proceedings. While refusal to grant mutual legal assistance could perform a regulatory function on the proceedings in the requesting state, its exercise depends largely on the character of the state that is requested to cooperate. In many cases, a despotic regime will simply refuse to cooperate whether or not the proceeding is just. The most likely result is a rhetorical battle, where the prosecuting state seeks to discredit the requested state’s position. The proceedings’ fairness will not be the focus in friction arising from mutual legal assistance requests, and this form of extraterritorial influence is unlikely to be a strong tool regulating national prosecutions for international crimes.

C. Transjudicialism: The International Judicial Dialogue

The “international judicial dialogue,” whereby domestic courts look to international tribunals and foreign courts to inform their decisions, has aroused scholarly interest. Some scholars see the ad hoc international tribunals, where judges on one court often cite decisions from the other, as a harbinger of a more wide-ranging judicial conversation about international criminal law. To date, however, this dialogue has primarily influenced the law of capital punishment and a limited number of courts have opted to engage in the conversation. Not

74. Broomhall, supra note 2, at 412.
75. Id.
77. Id. at 441.
80. Id.
surprisingly, U.S. courts have been particularly unwilling to consider international and foreign standards.

The possibilities for a fully international dialogue are narrow in the context of national prosecutions for international crimes, given the rarity of such prosecutions. Time will tell to what extent ICTY and ICTR precedents will impact domestic decision-making. The fact remains that most states of the South, which have been most receptive to judicial globalization, will not prosecute international crimes in their national courts. These countries would face substantial costs in terms of diplomatic and political capital, as well as the threat of informal economic sanctions, if they exercised universal jurisdiction to try anyone but their own former dictators.

This analysis suggests that the international judicial dialogue is a positive development but a weak means of harmonizing criminal standards across jurisdictions. Without a more formal mechanism encouraging transnational judicial interdependence that engages the most prosecutorial states, there is little evidence to suggest that the dialogue will prove to be robust. Some courts may find it in their interest to invoke the decisions of international tribunals and foreign jurisdictions as a means of legitimating their own rulings. Even courts sympathetic to that rationale would be reticent to recognize a systematic dialogue contributing to the development of a law that should, in order to maintain its integrity, retain its essentially international characteristics when enforced in domestic courts. Thus, in the absence of a more formal mechanism introducing a hierarchy of decision in international criminal law, the international judicial dialogue will remain a weak tool. It will not encourage the rigor and convergence that is needed if national prosecutions for international crimes are to become fully legitimate in the eyes of the international community.

D. World Opinion

Given the geopolitical context of national prosecutions for domestic crimes, one might suppose that world opinion in general and the potential for costly payouts of diplomatic capital might encourage responsible prosecutions for international crimes that fall closely in line with international standards of fairness. While this may be true to some degree, the impact of world opinion will most likely simply influence the number of prosecutions, leaving national
procedural rules and interpretations of international criminal prohibitions intact.\textsuperscript{85} Whether this international gaze will encourage too many prosecutions or deter national prosecutions for international crimes altogether is the crux of the problem. Whether there are too few or too many prosecutions depends on the legal rules determining who may prosecute and be prosecuted.

In a national jurisdiction where all criminal prosecutions must be brought by the sovereign, we expect few prosecutions for international crimes.\textsuperscript{86} Few prosecutors will expend judicial resources to prosecute defendants for crimes committed on foreign soil, and the world has seen few zealous prosecutors of international crimes. Baltasar Garzon is the exception that proves the rule.\textsuperscript{87} Garzon's actions have led to serious national debate in Spain about whether states should become involved in such cases.\textsuperscript{88} The exception aside, evidence indicates that prosecutions by the sovereign will tend toward too few national prosecutions for international crimes.

Civil law systems often allow alternative means of bringing criminal prosecutions. These states allow "civil parties" to institute proceedings,\textsuperscript{89} where the civil party acts as a private prosecutor to plead cases that the state may otherwise overlook. While this system provides a forum for plaintiffs to bring suits against human rights abusers, a state could pay a high political price for divesting itself of the sole authority to choose which defendants may be criminally prosecuted in its courts.\textsuperscript{90} While the civil party mechanism will increase the

\textsuperscript{85} Professor Harold Koh’s transnational legal process could be characterized as the force of world opinion changing the trajectory of the law or inducing compliance among states. As his examination of the Alvarez-Machain case and its aftermath indicates, however, the transnational legal process often does not reach holistic solutions. The United States now prohibits transborder kidnappings in Mexico but not as a general tool of law enforcement. While in a particular case, world opinion may achieve its goals, its ability to change the law in a systematic manner is unlikely. Harold Hongju Koh, Transnational Legal Process, 75 Neb. L. Rev. 181, 195-96 (1996).

\textsuperscript{86} David Scheffer, the former U.S. Ambassador at Large for War Crimes Issues, has noted that governments are almost universally determined not to use universal jurisdiction. David Scheffer, Universal Jurisdiction: Myths, Realities and Prospects, Opening Address Before the Universal Jurisdiction Conference at the New England School of Law (Nov. 3, 2000), 35 New Eng. L. Rev. 233 (2001).

\textsuperscript{87} See Judge Garzon: Spain’s Most Famous Investigator, BBC News, Sept. 13, 2000 (examining Judge Garzon’s extraordinary political career as a prosecutor and the international notoriety that Garzon gained from his role in the Pinochet affiar) at http://news.bbc.co.uk/hi/english/world/europe/923083.stm (last visited October 22, 2002).

\textsuperscript{88} See Tarvainen, supra note 1 (finding that Spain did not want to engage in international human rights enforcement, but that “it was unexpectedly forced into that role when ‘star judge’ Baltasar Garzon issued an arrest warrant against Pinochet in October 1998.”).


\textsuperscript{90} Under the Belgian universal jurisdiction statute, a number of criminal cases have been instigated by civil parties against defendants like Fidel Castro, Saddam Hussein, Ariel Sharon, Yasser Arafat, Pal Kagame, and Hisseine Habre. The Sharon case has caused diplomatic stress, resulting in
number of national prosecutions for international crimes, it might be so politically problematic as to result in a rejection of such prosecutions altogether.\textsuperscript{91}

No mechanism exists to encourage the optimal number of national prosecutions. In the absence of a nexus between the prosecuting state and the criminal, the victim, or the crime, such prosecutions will seem random, and no clear standard for adjudicating cases has yet emerged that satisfies both human rights and due process concerns. Perhaps the emergence of an international criminal prosecution and defense bar,\textsuperscript{92} as well as growth in the number of judges with experience in the field, will help solve some of these problems. In the meantime, it is unclear what steps may be taken to balance human rights concerns with procedural fairness and perceived judicial integrity. The force of world opinion is not a strong check on the procedural and fairness characteristics of national prosecutions for international crimes. On the contrary, world opinion is more likely to impact the number of such cases that are brought, and it is not a strong element of the “invisible hand” that could regulate international prosecutions.

E. Concluding Thoughts

Each of the informal mechanisms that could encourage transnational convergence of international criminal substantive and procedural law is unlikely to have much impact. A more formal means of harmonizing international criminal law is necessary to ensure that universal jurisdiction is not altogether undermined by idiosyncratic national prosecutions. The following section will highlight some of the political costs that universal jurisdiction poses and discuss the impact of the ICJ’s recent decision in \textit{Congo v. Belgium}—reviewing a prosecution under Belgium’s universal jurisdiction statute—on national prosecutions. The concluding section will present some suggestions that should lend greater integrity to international criminal prosecutions.
III. Some Costs of Universal Jurisdiction

While this article has assumed that universal jurisdiction will occupy an increasingly prevalent space in international decision-making, it has not considered explicitly the costs inherent in decisions that will have political implications. The article has generally suggested that one way to limit these costs is by harmonizing the procedural and substantive norms of international criminal law to minimize the possibility of aberrant decisions. This section seeks to point out more concretely some of the costs of universal jurisdiction. If universal jurisdiction is to become a productive addition to the toolbox of human rights and international politics, the costs acknowledged here must be taken into account.

A. Discounting Diplomacy and Interstate Relations

It would be imprudent to discuss universal jurisdiction without considering its potential use as a political tool of interstate conflict.\(^9\) Every prosecution using universal jurisdiction is certain to have an "irreducible element of controversy."\(^9\) One need not conjure hypotheticals presupposing destructive intent to recognize the potential havoc aggressive prosecution could wreak on international order. Those who pursue prosecutions because they believe it is the just thing to do could jeopardize political negotiations that might lead to less human suffering. Pundits and scholars alike have opined that the former ICTY Chief Prosecutor's efforts to indict Slobodan Milosevic made political negotiation impossible.\(^9\) Faced with the threat of indictment, Milosevic opted to continue the fighting that led to many more deaths.\(^9\)

While Milosevic's indictment may have been a poor exercise of prosecutorial discretion, this example should not be offered to justify jettisoning universal jurisdiction altogether. Although successful negotiations may reduce suffering more than criminal prosecutions in some instances, we should not prematurely limit non-violent solutions to international problems. What would be the advantage in restricting the toolbox so that, if negotiations fail, military engagement is the next best option? Other practical concerns reinforce the argument that universal jurisdiction, combined with a strong dose of prosecutorial discretion and institutional checks, should remain an option. First, negotiations are often used as a stalling tactic.\(^9\) Negotiations can send the wrong signal to those on

\(^9\) As Madeline Morris notes, "states may exercise universal jurisdiction as a means of gaining advantage over their opponents in interstate conflicts by prosecuting nationals of those opponent states . . . ." Morris, supra note 2, at 354.
\(^9\) Broomhall, supra note 2, at 419.
\(^9\) See, e.g., Mandel, supra note 95, at 95-97; Mirko Klarin, Arbour's Pre-Empitive Strike, MoJo Wire, June 1, 1999, at http://www.motherjones.com/total_coverage/kosovo/arbour.html (last visited October 22, 2002).
\(^9\) Samantha Power, A Problem from Hell: America and the Age of Genocide, Address Before the Human Rights Workshop, Yale Law School (March 1, 2002).
the ground who may continue to participate in genocide, torture, or other inhumane acts of violence. Without an affirmative signal—a condemnation that the acts are contrary to law—violence may continue as negotiations proceed. Moreover, the history of American and international responses to genocide, widespread torture, and war crimes indicates that negotiations will likely have little impact until after the fact. In many cases, there have been simply no negotiations at all until after the damage was already done. Against this background, removing prosecution as an option seems premature. Prosecutorial discretion and institutional checks are not sufficient to minimize the costs of universal jurisdiction, however. Doctrines like "head of state immunity" must be clearly conceived in order to avoid counter-productive consequences arising from national prosecutions.

i. Head of State and Ministerial Immunity

A number of doctrines, most importantly head of state immunity (a term which this article will use loosely to cover other sovereign, ministerial immunities), have historically been employed so that international political processes are not subjected to proceedings in national courts. The doctrine is rooted in the notion that one sovereign, of equal stature with all others, cannot sit in judgment of another. Today, the strongest rationale for head of state immunity is comity. Each state should respect the immunity of foreign heads of states so that its leaders will be granted similar protection while abroad. The scope of head of state immunity, once absolute, has contracted over time, and its contours have not yet settled. In recent years, courts have carved an exemption such that commercial transactions and other acts of a purely private character are no longer covered by immunity. Following this development, courts have begun to recognize a distinction between a head of state's official and unofficial conduct. The distinction remains unclear, however, and this jurisprudential ambiguity has been expanded by recent cases questioning whether any act in violation of international law can ever be official.

The Pinochet case, in which the British Law Lords held that Augusto Pinochet was not immune from prosecution as a former head of state for acts of

103. In Britain, for example, the State Immunity Act of 1978 curtailed the immunity of heads of state with respect to proceedings dealing with private commercial transactions and torts. State Immunity Act 1978, July 20, 1978, 17 I.L.M. 1123.
104. Watts, supra note 100, at 55.
torture committed under his authority, suggests that "official conduct" may not include acts criminal under international law. While that case is susceptible to both broad and narrow readings, its sister Chilean case and other international developments suggest that head of state immunity is not absolute in the international criminal context. Professor Wedgwood sees a familiar distinction in the division between official and unofficial acts. Analogizing to the difference between a soldier who kills in the course of combat and a soldier who commits a war crime, she discerns the parameters of what actions may fall within the "permissible portfolio" of a head of state, suggesting that acts violating international law do not constitute official conduct.

In the recent case between Belgium and the Congo before the International Court of Justice, the distinction between official and unofficial acts again came to the fore. The Congo contested the legality of a warrant issued under the Belgian universal jurisdiction statute in April 2000 against its incumbent Foreign Minister. The DRC originally challenged Belgium's claim to jurisdiction, but in its final pleadings before the court it dropped those arguments, focusing instead on obtaining "a finding by the Court that it has been the victim of an internationally wrongful act," the basis of which was the violation of the Foreign Minister's sovereign immunity. Belgium acquiesced in this tactical shift. Both countries, it seemed, feared losing on the universal jurisdiction issue.

Addressing the head of state immunity issue, the Court's opinion employed three primary analytical foci, distinguishing among incumbent ministers, former ministers, and the special rules applying in international tribunals as opposed to

106. Mary Margaret Penrose, It's Good to be the King!: Prosecuting Heads of State and Former Heads of State Under International Law, 39 COLUM. J. TRANSNAT'L L. 193, 203 (2000).

107. While a broad reading of the decision would classify acts criminal at international law as unofficial acts for which immunity is not available, the decision could be narrowly interpreted to apply only to the terms of the Torture Convention. Sison, supra note 105, at 1601; see also Ruth Wedgwood, International Criminal Law and Augusto Pinochet, 40 VA. J. INT'L L. 829, 841 (2000) (arguing that "[t]he reliance on the Torture Convention to parry official acts immunity narrows the reach of the Pinochet opinion...")

108. In August of 2000, the Chilean Supreme Court seconded the Pinochet precedent by holding that Pinochet's senatorial "immunity for life" did not protect him from prosecution for human rights violations. Pinochet Loses Immunity in Chile Ruling, Reuters, Aug. 8, 2000.

109. Wedgwood, supra note 107, at 844 (pointing out that the Rome Treaty expressly proscribes official status as a head of state as a defense against criminal liability, but that the issue has not been briefed to many signatory governments for fear that many would refuse to sign).

110. Lord Steyn, one of the Law Lords in Pinochet, left his imprint on this area of the law: [S]ome acts of a Head of State may fall beyond even the most enlarged meaning of official acts performed in the exercise of the functions of a Head of State... The normative principles of international law do not require that such high crimes should be classified as acts performed in the exercise of the functions of a Head of State.


111. Wedgwood, supra note 107, at 839.

112. Wedgwood, supra note 107, at 841.


114. Id. at para. 1.

115. Id. at para. 42.
national courts. As for incumbent foreign ministers, the Court held that they have absolute immunity from criminal, and by implication, civil suits while in office. The Court offered a functional argument for disregarding any distinction between acts taken in “official” capacity and in a “private” capacity. Allowing anything less than absolute immunity would deter ministers from traveling and have other, negative chilling effects on the performance of their official functions. Making the point about absolute immunity perfectly clear, the court noted that:

[i]t has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

Under the Court’s holding, former ministers benefit from a more limited immunity.

Provided that it has jurisdiction under international law, a court of one State may try a former Minister of 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.

The decision is unclear as to the distinction between official and private acts, or what can be classified as a “portfolio duty.” The Court left open the possibility, however, that national courts, provided that they have jurisdiction, could pursue cases against former ministers for violations of international human rights law committed during term of office.

In these rulings, the Court largely restated pre-existing jurisprudence. The Court made a new and important distinction, however, between national courts and international criminal tribunals. Finding that an incumbent or former minister may be subject to criminal proceedings before an international criminal court having jurisdiction, the Court noted that the exceptions to absolute immunity in those international tribunals has no bearing on the existence of such an exception in national courts.

117. Id. at para. 51.
118. Id. at para. 55.
119. Id. at para. 55.
120. Id. at para. 58.
121. Id. at para. 61.
122. Courts had frequently interpreted head of state immunity to be absolute with respect to proceedings initiated in foreign courts and former heads of state to be immune for official acts performed in the head of state’s public capacity. See Watts, supra note 100, at 54; see also Re Honecker, 80 I.L.R. 365 (F.R.G. Fed. Sup. Ct. (Second Criminal Chamber (1984))); Duke of Brunswick v. King of Hanover, 2 H.L.C. 1 (1848).
124. Id. at para. 58.
Perhaps reflecting the functional concern that political negotiations should not be threatened by national prosecutions and the belief that prosecutors in international courts would be more sensitive to international political conditions, the Court managed to state a strong limitation on the exercise of national universal jurisdiction without directly addressing the issue. At the very least, the Court expressed concern that national courts may act opportunistically and that their ability to prosecute ministers should be limited to prevent interference in international political processes. As noted, with regard to former ministers, the decision does not differentiate between prosecutions in national courts and international tribunals. This facet of the decision comports with the functional concerns outlined earlier—former heads of state no longer serve as “a plenipotentiary of the state in its negotiations.”

The ICJ opinion has immediate consequences. Its deference to international tribunals effectively limits the use of judicial prosecutions of incumbent ministers to those disputes where the international community has intervened to establish a criminal tribunal. The decision could be read simply as defining different roles for international tribunals and national courts in the context of international criminal law by concentrating prosecutorial discretion in ongoing political conflicts while permitting greater decentralization concerning former leaders.

While the decision seems formalistic and straightforward, it fails to crystallize recent developments in the doctrine of head of state immunity. It overlooks international instruments—not the customary international law that the Court invoked—that arguably or explicitly forbid immunity for crimes under international law. To the extent that the judgment cuts against these instruments, rather than interpreting them to apply only in international tribunals, the Court has left an issue for future cases. Thus, the opinion may have injected more confusion into the head of state immunity doctrine than is evident at first. This lack of clarity, rather than limiting the costs of universal jurisdiction, may well exacerbate them.

More immediately, Belgian courts have eagerly awaited the ICJ’s decision in

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125. *Congo v. Belgium*, supra note 29, at para. 58. The separate opinions discussed Belgium’s universal jurisdiction statute in detail. Nine of the justices would allow universal jurisdiction in some form. President Guillaume expressed a strong distrust of national courts, however, positing that international criminal courts have been developed in response to the deficiencies of national proceedings. *Id.* (separate opinion of President Guillaume, at para 11). He found no justification for exercise of universal jurisdiction *in absentia*. *Id.* (separate opinion of President Guillaume, at para. 13). Judge Koroma, by contrast, lamented the damage that this case may have done to national universal jurisdiction. *Id.* (separate opinion of Judge Koroma at para. 5). He applauded Belgium’s willingness to prosecute international crimes and cautioned against interpreting the Judgment as a rejection of universal jurisdiction. *Id.* (separate opinion of Judge Koroma, at para. 6).


129. *Id.* (arguing that the Torture Convention was explicitly directed at officials and that it is plausible to read the Convention to exclude immunity for sitting heads of state); *see also*, Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277, art. 4 (allows for a head of state’s criminal liability).
order to determine how its universal jurisdiction statute will be received internationally. The most notable of the ongoing universal jurisdiction cases in Belgian courts is the prosecution of Ariel Sharon and co-defendants for their roles in the incidents at Sabra and Shatilla.\textsuperscript{130} The ICJ decision has obvious consequences for the case against Sharon, an incumbent head of state. In a press release issued shortly after the Congo decision, the private prosecutors in \textit{Sharon} expressed their intent to pursue their case against those defendants who have no immunity and argued that the decision poses "no obstacle to the issuance of an arrest warrant against Mr. Sharon as soon as he stops exercising his present functions."\textsuperscript{131}

The ICJ case left a number of questions unanswered. While Belgium's exercise of universal jurisdiction \textit{in absentia} provoked controversy, it is not clear what further limitations the Court would seek to apply in a future case.\textsuperscript{132} What is the line between official and unofficial acts? How does the Court view universal jurisdiction statutes? How would the Court treat national prosecutions of incumbent ministers for torture and genocide, acts for which immunity may well be prohibited? In the immediate aftermath of this case, the Belgian Foreign Minister recognized that the law must be amended, but he insisted that "the basic principles—the punishment of severe breaches of international humanitarian law—remain applicable."\textsuperscript{133} Before the statute could be amended, however, Belgium's highest court decided the \textit{Sharon} case, holding that Sharon could face war crimes charges in Belgium after he leaves office.\textsuperscript{134} The Belgian high court thus adopted a liberal interpretation of the ICJ's decision, respecting immunity for sitting heads of state while finding that former heads of state can be prosecuted for certain acts taken during their term of office.\textsuperscript{135}

Rather than backing away from its progressive approach to universal

\textsuperscript{130} See the Complaint against Ariel Sharon, BADIL RESOURCE CENTER, June 18, 2001, available at http://www.lawsociety.org/sharon/complaint.htm (last visited October 22, 2002).

\textsuperscript{131} Chibli Mallat, Luc Walleyn, and Michael Verhaeghe, \textit{Press Statement by the Lawyers Representing the Victims of the Sabra and Shatilla Massacres}, BADIL RESOURCE CENTER, Feb. 14, 2002. The prosecuting attorneys plan to make two arguments that the ICJ did not consider. First, the decision only considered illegal the issuance of an international arrest warrant. In the Sharon case, there is no warrant, only a criminal investigation. The Court's decision gave no indication that an investigation alone is a violation of international law. Second, the warrant for Foreign Minister Yeroda was not based on acts of genocide. The pleadings in the Sharon case, following the General Assembly's characterization of the incidents at Sabra and Shatilla, allege genocide. The Genocide Convention does not provide for immunity. Article IV states that "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." ICJ jurisprudence has confirmed the universal character of the convention. BADIL RESOURCE CENTER, \textit{Belgian Appeals Court Agrees to New Hearing, Re-Opening of Arguments, in War Crimes Case Against Ariel Sharon and Other Israelis and Lebanese}, Mar. 7, 2002.

\textsuperscript{132} Douglass Cassel, \textit{World Court and Jurisdiction}, CHICAGO DAILY LAW BULLETIN, Feb. 21, 2002.

\textsuperscript{133} Id.


\textsuperscript{135} See supra note 121 and accompanying text.
jurisdiction in response to *Congo v. Belgium*, Belgium amended its universal jurisdiction statute in April 2003, limiting its breadth while maintaining its fundamental characteristics. Under the recent amendments, victims may file suits directly only if they can establish a link between Belgium and the crime. The new jurisdictional “nexus” requirement will be satisfied if the suspect is present in Belgium, the crime occurred in Belgium, or the victim is Belgian or has lived in Belgium for at least three years.\(^{136}\) The amendments also authorize the government to refer certain cases out of Belgium.\(^{137}\) Finally, the amendments harmonize the Belgian definitions of crimes with those in the ICC statute and adopt the international law standard on sovereign immunity.\(^{138}\)

While the ICJ’s ruling left a number of issues unresolved, it nevertheless has served as a catalyst, causing Belgium to institute a set of legislative reforms that should both minimize the costs of universal jurisdiction and serve as a model for other states adopting universal jurisdiction statutes. The next significant challenge to the Belgian statute may raise what is potentially the case’s most consequential effect—Belgium’s explicit rejection of immunity for former ministers who violated international human rights or humanitarian law while in office. No longer permitting prosecutions of incumbent ministers *in absentia*, the amended statute strikes a more appropriate balance between human rights concerns and minimizing the costs of universal jurisdiction.

### ii. The Special Challenge of Private Prosecutions

If extraterritoriality poses the danger of politicized prosecutions, one might suppose that an independent prosecution, in addition to doctrines like head of state immunity, would be an appropriate response. On the other hand, a prosecutorial system that is not subject to adequate checks and the veto power of political actors charged with foreign policy can lead to negative results. The risks of unrestrained prosecutorial discretion are exacerbated in many civil law systems where private parties can institute criminal proceedings.\(^{139}\) When a state divests itself of the sole authority to prosecute politically sensitive international cases, and where private individuals who are not subject to adequate governmental control may institute such cases, the consequences may be undesirable. The ICJ’s recent decision may well have been a response to the dangers of private prosecutors pursuing international cases.

The typical response to such worries is faith in prosecutorial discretion. At the international level, limited faith in prosecutors’ judgment may be warranted.\(^{140}\)

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\(^{137}\) Id.

\(^{138}\) Id.

\(^{139}\) International Encyclopedia of Comparative Law, Vol. 11 Part 2, ed. Andre Tunc. The Spanish legal system, for example, provides for an *accion popular*, whereby the victim of a crime may institute a proceeding and pursue the case. Likewise, Belgian law allows for universal jurisdiction cases brought by *parties civiles*. Id. See notes 68, 69 & text.

\(^{140}\) Former ICTY Chief Prosecutor Louise Arbour’s indictment of Slobodan Milosevic suggests
When prosecutors are part of the executive framework, their actions may be adequately constrained by political actors so as not to upset political settlements that would be more productive than a judicial proceeding. A similar review or veto power is necessary to limit the potentially destructive consequences of private prosecutions. States must develop standards to balance the competing interests. Guidelines outlining the factors to be considered and requiring judicial review of political discretion may be one response. Just as universal jurisdiction is an important tool in cases where negotiations are not forthcoming, are used as stalling mechanisms, or simply send the wrong message to the combatants, private prosecutions can also play an important role in international criminal law.

After the ICJ decision in Congo v. Belgium, the Belgian government amended its universal jurisdiction statute to place a set of constraints on private prosecutors requiring a “nexus” between Belgium and the alleged crime. The amendments also authorize courts to send certain pending cases to the accused’s home state or the state in which the accused is present if that state upholds fair trial rights and actually pursues the case. These amendments should minimize some of the potential political risks that private prosecutors create, providing a check on unrestrained prosecutorial discretion. If adequately constrained so as not to jeopardize political solutions to international problems, private prosecutions may serve an important function on the international level—prosecuting cases that would otherwise receive little diplomatic or prosecutorial attention. With the rapid development of universal jurisdiction, this subject deserves continuing consideration. Creative solutions will be necessary to ensure that overly aggressive private prosecutions do not lead to a rejection of universal jurisdiction altogether.

B. “Bad States” and the Threat of Universal Jurisdiction

Advocates characterize universal jurisdiction as a tool with which those responsible for heinous crimes can be prosecuted, deterring future mass crimes. Exercise of universal jurisdiction has dangers, however, extending extraterritorial adjudicative power to procedurally deficient and otherwise flawed judiciaries as well as to those that respect the rule of law.

As universal jurisdiction becomes more common, some states may exercise it as a political weapon. Of course, not all courts are equal. States refuse extraditions to other states that are procedurally infirm, and a number of

that prosecutorial discretion may lead to adverse results. Evidence indicates that she indicted Milosevic just when a political settlement was on the horizon, prolonging the conflict in the Balkans. See, e.g., Mirko Klarin, Arbour’s Pre-Empptive Strike, MOJO WIRE, June 1, 1999, at http://www.motherjones.com/total_coverage/kosovo/arbour.html (last visited October 22, 2002).

141. Broomhall, supra note 2, at 418.
142. See supra note 136 and accompanying text.
143. See supra note 137 and accompanying text.
144. Morris, supra note 2, at 354 (“In evaluating universal jurisdiction, careful consideration must be given to whether it is wise to augment the power and extraterritorial reach of all the judiciaries of the world, and to do so in a category of cases particularly prone to politicization.”).
organizations dedicate their efforts toward exposing unjust judicial systems. Thus, it is not clear that exercise of universal jurisdiction by a "bad state" will be taken seriously. Moreover, a minor public relations campaign could discount the seriousness of an international criminal trial undertaken in a country like Iraq or North Korea. Nonetheless, universal jurisdiction could become a tool of interstate conflict.

In the final analysis, the question must be posed whether universal jurisdiction’s benefits outweigh its costs. The potential for interstate conflict arising from prosecutions under universal jurisdiction could be minimized by an emphasis on uniform international standards. For a verdict to be legitimate, the procedural and substantive law applied would have to meet international standards. One might argue that this approach would open all prosecutions under universal jurisdiction to challenge in other national courts, undermining the authority of any single proceeding. An international mechanism could mitigate against this possibility. For example, an international body like the United Nations could institute a certification process, differentiating judiciaries that have adequate procedural protections to undertake prosecutions under universal jurisdiction from those that do not. Implementing an appellate system might also dampen the possibility for politically vexatious prosecutions.

If universal jurisdiction is to become a vital component of the international legal and political landscape, the possibility of the "bad state" prosecuting defendants under universal jurisdiction must be anticipated. The alternative is not only that universal jurisdiction may lose integrity, but that it could actually lead to international conflict. While this article has largely assumed that universal jurisdiction will continue to be a fact of international life, it must be fashioned in a way that acknowledges the risks and can manage the possibility that "bad states" will seek to manipulate this jurisdictional mechanism for opportunistic reasons.

C. The Tension between the ICC and Universal Jurisdiction

While this article has assumed that the International Criminal Court and universal jurisdiction could complement each other, the two may be in tension. The complementarity provision in Article 1 of the Rome Statute gives the ICC jurisdiction only when national courts prove unable or unwilling to prosecute. Some scholars have suggested that national prosecutions under universal jurisdiction could prevent cases from going before the ICC, divesting the new court of jurisdiction.\textsuperscript{148}

\textsuperscript{145} Morris, supra note 2, at 359.
\textsuperscript{146} See infra discussion in Conclusion (suggesting that the ICC’s jurisdiction could be expanded to include appellate review of national prosecutions for international crimes).
\textsuperscript{148} Douglass Cassel, Empowering United States Courts to Hear Crimes within the Jurisdiction of the International Criminal Court, 35 NEW ENG. L. REV. 421 (2001) (arguing that "the United States’ ability to prosecute is thus key to avoiding exercise of ICC jurisdiction over U.S. nationals or over other cases where the United States has an interest. . . ").
Despite this tension, universal jurisdiction seems deeply consonant with the aim of the ICC—achieving justice for international crimes. The ICC’s limited resources will be reserved for the most culpable offenders. Given that it will only prosecute a small number of cases, universal jurisdiction will remain an indispensable complement to it. Thus, it is not impossible to imagine an integrated international system where national prosecutions will not be in conflict with international courts. Rather, the ICC and national courts may engage in a structured dialogue or even appellate review. In this fashion, national courts’ decisions would gain authority and have integrity. This optimistic vision will not develop of its own accord, however. Measures will have to be taken to create the institutional arrangements to ensure that the two do not develop at odds with each other. The recent amendments to the Belgian universal jurisdiction statute take an important first step in this direction. By harmonizing the Belgian definitions of crimes with those in the ICC statute, the new law lays the groundwork for future cooperation between national court exercise of universal jurisdiction and prosecutions at the ICC.149

CONCLUSION

Universal jurisdiction remains a relatively novel basis for prosecution. Nonetheless, the events of recent years indicate that national prosecutions for international crimes will continue to increase. Vigorous prosecution in national courts has the advantage over ad hoc tribunals of being a permanent mechanism that can prosecute atrocities without great delay.150 Steps must be taken to ensure that these proceedings have integrity and are carried out according to international standards, however. If the peculiarities of national procedural rules and national interpretations of international substantive law begin to disintegrate the international characteristics of the crimes, the project as a whole could collapse. Thus, transnational rules must introduce a measure of harmonization and convergence across jurisdictions. This article concludes by proposing five suggestions that may contribute to this harmonization and lend greater integrity to national prosecutions for international crimes.

First, in the context of national prosecutions for international crimes, an international treaty should provide for a formal judicial dialogue along the lines developed in several African states.151 The details of this dialogue, including the weight to be accorded horizontal as opposed to vertical dialogues with international criminal tribunals, will require careful attention. Instituting such a formal conversation will ensure that national prosecutions do not diverge so much as to delegitimize the project altogether.

Second, as a long-term program, the ICC’s jurisdiction could be expanded to

149. Human Rights Watch, supra note 136.
150. Wexler, supra note 6, at 712.
include appellate jurisdiction over cases arising from national courts on jurisdictional, procedural, and interpretive issues of prosecution under international law. The International Law Commission ultimately rejected this proposal in its 1994 draft statute for an international criminal court as too intrusive of state sovereignty. Nonetheless, having such a supranational appellate body to harmonize interpretations of international criminal law while leaving to national tribunals the function of deciding cases on the merits the function of deciding cases on the merits would both give domestic prosecutions greater integrity and ensure that international criminal law develops in coherent fashion.

Third, the international community could begin negotiations to create a body of procedural rules for domestic prosecutions of international crimes. The rules could be based on the body of procedural rules already tested and modified in the ICTY and ICTR. The uniformity introduced into national prosecutions for international crimes by these rules will give them more legitimacy.

Fourth, a formal international agreement on the punishments, or at least the method of determining the punishment to be applied, would be a timely and useful effort. Much of the chafing against national prosecutions for international crimes could be resolved simply by instituting an international regime of punishments for international crimes.

Finally, prosecutorial discretion, especially the ability of civil parties to bring suit, must be adequately bounded. The recent amendments to the Belgian universal jurisdiction statute constitute an import effort in this direction. The emergence of an international criminal prosecutorial and defense bar, as well as a group of judges with experience trying such cases, also may mitigate this problem by selecting the cases most favorable to the development of international criminal law.


154. Meron, supra note 22, at 463 (arguing that the rules used in the ICTY and the ICTR should be useful in all prosecutions under international law); Wexler, supra note 36, at 363-66 (arguing that procedural rules employed in international business law could be adapted to international criminal prosecutions); E. M. Wise, I.L.A. Committee on a Permanent International Criminal Court, Report on General Rules of Law, December 27, 1996 draft, at 83 ("[T]here seems to be emerging broad agreement that not only offense definitions and penalties, but also the general rules of liability and exoneration to be applied by the court, cannot be left to national law, or otherwise permitted to vary from case to case, but must be settled in advance.").
The development of judicial and attorney expertise will be necessary if universal jurisdiction is to be practical. Private party prosecutions must not be allowed to undermine universal jurisdiction altogether.

While we may always feel ambiguous about prosecutions in domestic courts for international crimes, especially for crimes committed in other parts of the world, universal jurisdiction can be structured in order to provide considerable international oversight. Because the crimes at issue are violations of universal norms, it is essential that national prosecutions maintain an international character and that there be formal mechanisms to prevent divergence from certain core universal touchstones.

Harmonizing international criminal law will lead to a more coherent body of law, will better protect defendants from deficient prosecutions, and will act as a restraint on unjust exercise of extraterritoriality. If this body of law becomes more developed through an integrated inter-jurisdictional system, local courts will have the advantage of a strong set of international rules and precedents to draw on. This project must pay careful attention to the costs inherent in universal jurisdiction. Minimizing these costs is at least as important as expanding the power of national courts to prosecute international crimes, and a balance must be struck between the two. If done with requisite care, the development of a truly international and integrated regime for enforcing international criminal law in domestic courts will safeguard human rights, resulting in the greatest aggregate of justice and human dignity.

156. Expertise in national systems will mitigate the danger of peculiar interpretations of international law in national courts. Wexler, supra note 6, at 710.
As he has had with a number of other United Nations and international conferences, the author had the opportunity to attend the proceedings of the inaugural U.N. Social Forum as an observer and non-governmental delegate. The following article thus represents the author’s impressions of events as he observed them.

In the last few years a number of events have developed aiming at giving NGOs, the poor and civil society in general a voice in globalization and poverty reduction issues. The Davos World Economic Forum has opened its doors to at least a selective representation of certain Non-Governmental Organizations (NGOs); the “World Social Forum” counter-event to the World Economic Forum has now met thrice in Porto Alegre, Brazil; and there was even a small “World Civil Society” meeting which met in Geneva just before the U.N. Social Forum. With all these and other proliferating events, it might be properly asked of events, it might be properly asked of another ‘social forum’ is needed, and if so, why.

The U.N. Social Forum was conceived over several years as a platform within the U.N. system for the exchange of ideas and perhaps actions aimed at effectively incorporating human rights, especially economic, social, and cultural rights into policymaking, for the benefit of those members of the poor and vulnerable segments of society whose voices are not usually heard within that system. In a Working Paper submitted to the 2002 meeting of the U.N. Sub-Commission on the Promotion and Protection of Human Rights, the Sub-Commission member from Chile and the leading advocate for the Social Forum Mr. José Bengoa describes the years of discussion aimed at creating a “new forum for debate within the United Nations for analysis of the relationship between globalization and human rights, in particular economic, social, and cultural rights, in a globalized world.” The Social Forum complements the U.N.’s overall priorities of promoting and protecting peace, stability, human rights, sustainable development, and poverty eradication, including the specific anti-poverty priority that emerged from the Millennium Summit.

In her five year service as High Commissioner for Human Rights, Ms. Mary

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Robinson came to understand that poverty eradication is the most pressing human rights issue facing the world. Poverty both affects, and is affected by, other human rights violations. Ms. Robinson noted in her address to the Sub-Commission in 2001 that part of the motivation for the Social Forum was to contribute to ensuring that globalization will be positive for the world’s poor as well as the world’s rich. This basic objective has also been key to the thinking of Mr. Bengoa. He also continually has stressed the importance of inclusiveness, not only from the perspective of including (usually excluded) representatives of the poor in the discussion, but also in terms of engaging non-state actors such as private enterprise and international financial institutions (IFIs) in the dialogue. Bengoa is thus sympathetic to ideas for global policy networks for policy change.

I. GLOBALIZATION AND THE HISTORICAL CONTEXT FOR THE SOCIAL FORUM

Whether by globalization we mean increasing global economic exchange, or increased global exchanges of all sorts, globalization has proceeded for millennia, and has accelerated during the past 500 years. After World War II, however, with the institution of the General Agreement on Tariffs and Trade, economic growth exploded. This growth, however, disproportionately benefited developed industrial countries, as opposed to developing nations emerging from colonialism. By the late 1990’s, discontent with persistent poverty and perceived growing inequality reached a fever pitch with demonstrations at Seattle, then Prague, Genoa, and other cities against a global economic order that simply wasn’t working for many of the least well off in the world.

Consciousness of the new questions surrounding globalization resulted in a 1995 proposal by Norwegian Sub-Commission member Asbjørn Eide to study income distribution nationally and internationally. Mr. Bengoa was selected Special Rapporteur, and completed his preliminary report on the subject the same year, noting the links between income distribution and equality of opportunity in a given society.2 His subsequent and final reports found increases in inequality and poverty accompanying the late twentieth century globalization.3 Mr. Bengoa’s


methods of comparing national income between countries and households anticipated the more recent work of World Bank economist Branko Milanovic, who found that in the five year period between 1988 and 1993, global inequality increased 5%, with the real incomes of the richest 20% increasing and the poorest 5% decreasing—a result comparable to the growth in inequality in the United Kingdom during the Thatcher years or the United States during the Reagan years. Even adjusting for lower prices in developing countries to focus on real purchasing power, according to the Milanovic study almost 80% of the world would fall below the poverty lines established in the United States and Western Europe. Moreover, of the 83 million people added to the world each year, 82 million of them are reportedly in developing countries as opposed to developed countries. This does not augur well for reducing inequality. Neither does the fact that some regions, such as Sub-Saharan Africa, are notably worse off than they were before the last trade round. Nevertheless, the recommendations of the Copenhagen World Summit in 1995 that developed countries dedicate .07% of their GNP for developing countries have been implemented by only a handful of nations (notably Norway, Sweden, Denmark, and the Netherlands).

Bengoa’s report noted the association of persistent poverty with increasing concentrations of wealth occurring simultaneously with globalization. Since his report, the concentration has only increased. In a widely quoted World Health Organization and U.N. Development Program comparison, the net worth of the world’s richest 358 people in 1997 was greater than the combined net worth of the world’s poorest 2.3 billion people, and by 1998, the gap had grown to the point that the richest 200 individuals had a cumulative net worth surpassing the world’s poorest 2.5 billion people. As reiterated by the President of the World Bank, “[o]f the world’s 6 billion people, 2.8 billion live on less than $2 per day, and 1.2 billion live on less than $1 a day”. In other words, half the world’s people live for a whole year on less than what many would consider the cost of a single good suit or dress, a plane ticket, or a couple of nights in a good hotel.

Bengoa sees these trends aggravated by the infamous ‘race to the bottom’: the competition among developing countries to attract multinational corporations and foreign investment through lax social and environmental regulations, or deregulation, and what amounts to tolerance of human rights violations. Economic, social, and cultural rights (ESC rights) have at their core the same concerns regarding the right to life, to development of the human body, and to individual dignity that underlie civil and political rights. “ESC” rights may also be seen as a prerequisite to, and minimum condition for, the exercise of civil and political rights.
political rights. Globalization has focused attention on the minimum requirements for both clusters of rights. Bengoa endorses reasonable labor and environmental controls to foster ‘virtuous’ globalization (healthy for people in the countries concerned) as opposed to ‘perverse’ globalization (exploitative and unhealthy for those concerned). Presciently, Mr. Bengoa noted the link between growing social inequity and social instability and threats to both human rights and world peace. He viewed nondiscrimination in the sense of equal opportunity, both for countries and for individuals within societies, as central to addressing these threats.

Bengoa’s conclusion was that a Social Forum was needed to exchange information and insights regarding these issues.

II. SUB-COMMISSION’S CREATION OF THE SOCIAL FORUM

The Sub-Commission had devoted a day of its proceedings in 2001 to discussions on the purpose and effectiveness of such a Social Forum. During those discussions topics floated for consideration included shaping globalization so that it is more fair to the poor and vulnerable, the impact of international trade, and protection of labor rights and the environment. In addition to many distinguished members of the audience, including the Special Rapporteur for Economic, Social and Cultural Rights Paul Hunt and the Special Rapporteur for Housing Miloon Kothari, the Sub-Commission was assisted in selecting topics for the inaugural Social Forum by an expert panel of speakers including Hina Jilani, UN Special Representative of the Secretary-General on the Situation of Human Rights Defenders; George Abi Saab, a Member of the World Trade Organization’s Dispute Settlement Body; Andrew Clapham, a Professor at the Graduate Institute of International Studies in Geneva; and Rubens Ricupero, Secretary-General of the United Nations Conference on Trade and Development.

A major concern of the participants was to carve out a special, non-duplicative niche for the Social Forum as opposed to other U.N. bodies and mechanisms. The consensus was that the Social Forum’s unique role could be to give a voice within the U.N. to the poor and those otherwise excluded on these issues. Ideally, the Social Forum could thus contribute to democratizing global economic governance by encouraging prior consultation with and participation by those affected by crucial decisions underlying globalization. Significantly, the Sub-Commission invited not only NGOs in consultative status with the U.N., but also other actors including governments, intergovernmental organizations, and newly emerging actors (including business, but also and especially actors from the South) to participate. The mandate given this more public Social Forum was not only to “exchange information on the enjoyment of economic, social and cultural rights and their relationship with the processes of globalization”, but also to “follow up on situations of poverty and destitution throughout the world”. In other words, the Social Forum was envisioned from the outset as authorized not only to provide a platform for talk, but also for action. Specific authorization was

10. Id.
granted "to propose standards and initiatives of a juridical nature, guidelines and other recommendations for consideration by the Commission on Human Rights, the working groups on the right to development, the Committee on Economic, Social and Cultural Rights, the specialized agencies and other organs of the United Nations system". The Social Forum was also authorized to follow up on agreements at major international events and discussions of issues related to its mandate.

In order to begin with an appropriate and limited focus on a practical matter, the Sub-Commission decided by resolution that the primary topic of the first U.N. Social Forum would be "[t]he relationship between poverty reduction and the realization of the right to food." The appropriateness of this focus arguably stems from the basic nature of the subsistence right to food as a core ESC right, and one particularly susceptible to effective action through more sensible governmental policies. It is appalling that in the twenty-first Century, when humankind has learned how to produce adequate food and actually has abundant food in the world, famines and starvation continue to occur as a result of ignorant, irrational, and otherwise misguided decision-making. Food is also one of the least controversial ESC rights, as everyone immediately understands its importance to the right to life. It is also closely related to other rights, such as the right to water, and a part of and prerequisite to rights such as the right to health, or the right to education.

The discussion at the 2001 Sub-Commission also identified other themes for possible future consideration by the Social Forum, including (1) the interaction between civil and political and ESC rights; (2) the relationship between poverty, extreme poverty and human rights in a globalized world; (3) the effect of international trade, finance and economic policies on income distribution, and the corresponding consequences on equality and non-discrimination at the national and international levels; (4) the effect of international decisions on basic resources for the population, and in particular those affecting enjoyment of the right to food, the right to education, the right to the highest attainable standard of physical and mental health, the right to adequate housing and the right to an adequate standard of living; (5) the effect of the impact of international trade, finance and economic policies on vulnerable groups, especially minorities, indigenous peoples, migrants, refugees and internally displaced persons, women, children, older persons, people living with HIV/AIDS, people living with disabilities and other social sectors affected by such measures; (6) the impact of public and private, multilateral and bilateral international development cooperation on the realization of economic, social and cultural rights; (7) follow-up of agreements reached at world conferences and international summits, particularly the Copenhagen World Summit for Social Development, and by other international bodies, concerning the link between economic, commercial and financial issues and the full realization of human rights; and (8) the role of social and economic indicators and their role in the realization of economic, social and cultural rights.

12. Id.
III. ECOSOC VOTE THREATENS THE SOCIAL FORUM

In order to occur, the Social Forum depended on an affirmative vote of approval from the U.N. Economic and Social Council for the Commission (ECOSOC) on Human Rights’ recommendation authorizing the Social Forum. As of the day before the event, this vote had not yet taken place. The United States and certain other developed countries had never been too enthusiastic about authorizing a meeting or creating another U.N. mechanism that, in their views, could be at best an instrument for challenging the Northern-dominated global economic agenda, and at worst could be simply a wasteful, duplicative, and political forum for bashing developed countries and their interests. The NGO Preparatory Event described below thus took place under the cloud of not knowing whether the Social Forum would take place. While eventually the ECOSOC approval came through, it was over opposition from the U.S., Australia, and Japan, and with the European Union countries abstaining. The final vote was 33 favoring, 3 against, and 17 abstaining. While the Social Forum thus received eventual approval, this approval did not come in time for the planned July 25, 2002 opening day. So on that day, High Commissioner Mary Robinson regretfully announced that the Social Forum would be delayed. (While she voiced a hope that informal discussions could continue, enough governments protested proceeding in the absence of ECOSOC approval that this became impossible). The first full day of the Social Forum finally opened on July 26, but the planned second day had to be postponed until Friday of the following week. The net result was that the Social Forum, intended to serve as space for the voices of the poor, was hampered at the outset by uncertainty and a serious meeting delay undoubtedly prohibiting many of the poor who intended to participate from doing so.

IV. NGO PREPARATORY EVENT

A Preparatory NGO Meeting was held on 24 July, 2002, the day before the first U.N. Social Forum was supposed to begin, hosted by the Conference of Non-Governmental Organizations (CONGO) in Geneva, the U.N. NGO Liaison Service (UN-NGLS) and the Office of the High Commissioner for Human Rights. Hamish Jenkins of UN-NGLS served as Moderator, with Peter Prove of the CONGO’s Special Committee of NGOs on Human Rights and Sub-Commissioner Member José Bengoa playing prominent roles. Mr. Bengoa described the history and purpose of the Social Forum as sketched above. Citing the economic collapse of Argentina and difficulties in Thailand and elsewhere, he said that were he to conduct his study today the results would probably be even worse. His hope was that the new spirit seen in Porto Alegre, and outside the walls of the U.N., could infuse proceedings within the U.N. through the Social Forum. The focus on the ‘new’ economic, social, and cultural rights and the inclusion of new actors (the poor, businesses, and IFIs) in the dialogue presented possibilities of progress and even some accountability through the Social Forum. The Social Forum could also

achieve this end through proposing “juridical initiatives.” Mr. Bengoa’s comments were followed by presentations on human rights and globalization, poverty reduction, and the right to food. There were also working group meetings on Trade and Food Security, Trade in Services, and Voluntary Guidelines for the Right to Food, and key foundational documents were made available.

1. Globalization and Human Rights

Anne Christine Habbard from FIDH (Fédération Internationale des Ligues des Droits de l’Homme) gave a provocative presentation on globalization and human rights, suggesting that the two concepts were antagonistic. She traced the conflict to contrasting bodies of law and alleged that international economic law served private interests and the market, as opposed to the more universal public interests served by human rights and regulation tempering the market. (On the other hand, as she pointed out later, multinational corporations often have higher labor and environmental standards than local companies, e.g. in Bangladesh or Indonesia). Her view of globalization was that rather than spreading global human norms like those relating to human rights, it entrenched inequality and hypocritically claimed that it favored equal rules for all while actually carving out exceptions (e.g., agriculture, textiles) for the U.S. and rich countries in the E.U. She cautioned that developing countries like Malaysia, however, should not have lower standards for human rights in the name of economic development. Globalization should serve human rights, with international economic treaties and policies subordinated to the primacy of human rights law. Making human rights justiciable, e.g., through an additional protocol to the Economic, Social, Cultural Convention, would be a good step toward this end.

Chien Yen Goh from Third World Network also highlighted the gap between the neoliberal economic theory of globalization and the reality that the claimed beneficial results often do not materialize. He rightly pointed out that mere liberalization, or opening the economy to trade and investment, doesn’t work if the economic situation of the country is not right or if the conditions for success aren’t present. In fact, the exposure of vulnerable local factories to premature foreign competition could be counterproductive, resulting in closed factories, more poverty, and harm to rights including the right to work, to an adequate standard of living, to health, and to education. He pointed to certain African and Asian nations as examples of the devastation that could be wrought from unwise liberalization. In short, international trade rules should accommodate the needs of developing countries, in keeping with the human development goals of the global trade regime as set forth in the GATT preamble. Despite the current trade round at Doha, Qatar having been agreed to be a “Development Round”, the developed countries do not seem to be living up to their commitments. In the discussion that followed, Hamish Jenkins pointed out that in institutionalizing unequal relationships, a

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14. Not only higher labor and environmental standards, but also higher wages, can be brought by multinational companies. See, e.g., Brian Aitken et al., Wages and Foreign Ownership: A Comparative Study of Mexico, Venezuela, and the United States, 40 J. INT’L ECON. 345 (1996).
formal principle of equal and nondiscriminatory trade rules could actually have a discriminatory effect against developing countries.

2. Poverty Reduction Strategies

After this general discussion of globalization, trade, and human rights came a panel discussing poverty and poverty reduction strategies. From the Thailand Assembly of the Poor, Mr. Bamrung Kayotha and Dr. Suthy Prasartset cited statistics and discussed how the government’s agriculture liberalization development strategy, from their perspective, actually had the effect of disenfranchising and impoverishing small farmers. Their organization opposes the inclusion of agriculture within the framework of the WTO. They also linked liberalization of foreign investment laws to these conditions. M. Jean-Baptiste Anoman Oguié from ATD Quart Monde, Côte d’Ivoire, discussed an innovative program whereby he as a magistrate combined forces with a prison nurse to help prisoners who lived in atrocious conditions (which had been aggravated by privatization of the prisons) to help themselves by growing vegetables and generally becoming more self-sufficient. After these initial steps built trust, the prisoners moved on to create projects in the fields of literacy, health, and building skills.

Mr. Alfredo Sfeir-Younis of the World Bank called for greater precision in defining human rights aspects of poverty reduction, emphasized the primary responsibility of national governments (as opposed to the IFIs) to alleviate poverty, and endorsed the need for including civil society in the effort.

3. The Right to Food

Michael Windfuhr of Food First Information and Action Network led the presentation and discussion on the right to food, in which he emphasized the importance of a rights-based approach in the effort to build political will for policy change. He argued that the nature of the right “as a right” means that economic or other trade-offs are unacceptable, and that breaches of the minimum content required are violations requiring redress and compensation. As a right to be progressively fulfilled to the maximum extent of available resources (and with corresponding legal obligations and compensation for any violation), the right to food is integrally related to other rights (such as the right to water), and its content is authoritatively defined by General Comment 12 of the Committee on Economic, Social, and Cultural Rights (including the importance of access to land, credit, and income or other resources to realize the right). Windfuhr thus drew an implicit link between the right to food and a guaranteed minimum income for vulnerable groups in society. In addition to implications for governmental and intergovernmental policies, he pointed out the need for attention to the impact of multinational corporate decisions. The Voluntary Guidelines called for by the World Food Summit will provide guidance for all these varied actors, and the time is now ripe for NGO input into that document in advance of a more formal drafting conference in November 2002. He called for an even stronger Food & Agricultural Organization Code of Conduct (versus the contemplated Voluntary
Guidelines). The distinct poverty reduction papers he analogized more to a ‘cookbook’ informing practitioners how to proceed.

One of the afternoon’s Working Groups gave input into these Voluntary Guidelines. Some of the elements noted as missing from the current draft were rights of specific groups like farmers, fishermen, and pastoralists; another missing element identified was an emphasis on local production to assure access to food. The other two Working Groups came up with recommendations to the Social Forum on Trade and Food Security, and Trade in Services and Human Rights. Many of these questions and recommendations15 were ultimately adopted in the Conclusions and Recommendations of the Social Forum, so NGOs can take heart that they had a significant influence on the process.

V. PROCEEDINGS OF THE SOCIAL FORUM16

As noted above, due to the delayed and contentious ECOSOC approval, the Social Forum did not actually open on Thursday, July 25, as planned, but only on Friday, July 26, 2002. This meant that another date had to be found for the second day of the event, which finally took place on Friday, August 2. A number of members of the Sub-Commission attended at various times. In what follows, I have not tried to comprehensively describe all the speeches and interactions, but have tried to capture the main speakers and ideas discussed.

1. Opening by High Commissioner

High Commissioner Mary Robinson opened the Social Forum to great applause, expressing high hopes that it will provide a forum within the U.N. for new voices and new ideas for dealing with social issues including extreme poverty and the impact of trade on minorities and other vulnerable groups, such as women, indigenous peoples, older people, refugees, people with disabilities, and those living with HIV/AIDS. She also announced the inaugural Social Forum’s theme: extreme poverty and the right to food (both of which she traced to Universal Declaration Article 25’s right to an adequate standard of living, which also informs the U.N. Millennium Summit key development goals of eradicating extreme poverty and hunger). The World Food Summit enhanced understanding of this right and the fact that it is not a question of food supply, as there is enough food in the world to feed the hungry, but a question of other issues blocking implementation of the right. These issues include inattention to women’s rights, given the critical role women play both in economic development generally and in food issues in particular. Among other obstacles she listed were insufficient public and private investment, inadequate irrigation infrastructures, incomplete implementation of the Doha “development” trade round in agricultural matters,

16. This discussion draws on the author’s notes of the proceedings as well as the Report of the Chairman-Rapporteur, José Bengoa, id.
insensitivity to the environment (which forms the essential context for food production), and an unethical globalization (which does not do enough to protect the poor and promote economic opportunities). She thus called on the Johannesburg World Summit for Sustainable Development, due to occur within a month, to address food security, and called on the Social Forum to provide new ideas and practical suggestions to implement the right to food.

2. Bengoa as Chair Welcomes NGO Input on Globalization and Human Rights

Mr. Bengoa, elected Chair of the Social Forum by acclamation, reiterated its purpose of serving as a human rights forum within the U.N. for the poor: those “on the receiving end of globalization”. He referenced some of the prior studies and work of Sub-Commission experts leading up to the event, including those by Mr. Asbjørn Eide (on income distribution) and Mr. Leandro Despouy (on extreme poverty). Then, noting the vital input of NGOs from the Preparatory Meeting, he invited their representatives to present the outcomes of their deliberations.

Peter Prove of the Congress of NGOs expressed gratification that the “baby had finally been born” and welcomed the U.N.’s decision to look critically at globalization’s impact on human rights, including not only civil and political but also economic, social, and cultural rights including the right to development. The efforts within ECOSOC by those states hostile to these latter rights to block the Social Forum were lamentable, but not surprising.

Mr. Bamrung Kayotha and Dr. Suthy Prasartset from the Thailand Assembly of the Poor elaborated on how, from their perspective, globalization and state development policies can actually hurt the people they are nominally supposed to help. The financial speculation from liberalization of capital controls resulted in the Asian crisis of 1997, which they view as having resulted in foreign capital taking over parts of their country through long leaseholds (up to 99 years) and large dam projects and waste treatment plants. Not having a longstanding interest in or connection to the localities affected, these foreign actors (multinational corporations and IFIs) have—without consulting those affected—removed and/or destroyed the land, forest, marine resources and damaged the environment of indigenous people, women, and the rural poor, violating their human rights in the process. Mr. Kayotha and Dr. Prasartset thus view the World Bank, and institutions like the Food and Agricultural Organization, as illegitimate, merely creating jobs for bureaucrats in the name of fighting poverty. It is unclear how Northern rhetoric about democracy and freedom will be reconciled with Southern rhetoric about technology and exploiting resources for growth. Mr. Kayotha and Dr. Prasartset hope the Social Forum will contribute to solving these problems. In reaction, Ms. Robinson stated that such experiences explain the negative perceptions of globalization, and agreed that the Social Forum should strive to understand the issues and what to do about them.


Peter Prove pointed out that the development of such economic policies (in
isolation from human rights policies) did not occur in a vacuum or as a result of historical accident, but had elements of conscious deliberation. He thus raised the question of how to promote coherence between economic and human rights law, and infuse economic globalization with human rights values including dignity, given the political unwillingness to do so. Though “nondiscrimination” is a touchstone of each body of law, it means very different things in each context, and these differences require more attention. “Good governance” should mean more than mere accession to major trade and economic treaties; it should mean implementation of human rights as well. Liberalization and privatization policies sometimes negatively affect important rights, including the rights to water, health, and education, as user fees and commercialization hinder access or encourage discriminatory, “two-tier” systems with lower quality cheaper or free systems. Agricultural subsidies in rich countries continue to hinder human-centered development elsewhere. Human rights should instead be made a “friend of development” in each country. To this end, quality analyses and worthwhile reports like those from the High Commissioner on aspects of globalization and human rights deserve support and further distribution, as do efforts like that of the Sub-Commission’s Working Group on Transnational Corporations to enhance corporate accountability.

Ms. Robinson agreed that economic and financial decision makers (e.g., those from trade ministries, the IMF, and the World Bank) need to understand and respect the legal commitments contained in treaties concerning economic, social, and cultural rights (like the Economic, Social and Cultural Covenant itself as well as the Convention on the Rights of the Child). She also agreed that nondiscrimination is a much narrower principle in the economic sphere, and that the Social Forum could encourage economic decision makers to adopt the broader, human rights principle of nondiscrimination.

UNRISD Director Thandika Mkandawire also endorsed a rights-centered approach, suggesting three basic criteria for evaluating globalization: does it favor democratization? Development? Social equity? These touchstones, he argued, should guide reform efforts. Democratic institutions furthering the right to food, for example, are not only called for by the Rome Declaration; they are mandated by human rights considerations. Autocrats can no longer violate some human rights on the grounds that they are providing food (the “full belly fix”). Yet the present reliance on less accountable international institutions for development is often anti-democratic. Mobilizing resources for national as well as international development policies is key. Finally, although social policies must meet macroeconomic constraints, macroeconomic policies should also be constrained by social equity, democratic, and development considerations.

4. Open Discussion: Rights and Goods/Needs

Mr. Bengoa then opened up the discussion. Some governments defended their development policies in predictable and self-justificatory terms that were not very enlightening. Understandably proud of Mr. Bengoa’s role as a catalyst to and Chair of the Social Forum, his home government Chile pointed out that civil and
political rights were not necessarily in opposition to economic, social, and cultural rights, but could form part of a virtuous circle. Overcoming the myth that globalization is uncontrollable would require persuasively distinguishing between the public goods at the heart of the latter sorts of rights, and the content of rights-based approaches. Mr. Mkandawire of UNRISD reiterated that globalization was a human construct as opposed to an unstoppable natural force, and resulted from the cumulative effect of many economic and financial decisions regarding market rules, property rights, and trade flows. Thus, changing the rules can create another form of globalization.

The Chilean representative noted that none of these rights should simply be subjected to the laws of the market and unhindered competition. Somewhat ironically, Cuba’s representative focused on civil and political rights, pointing out that having economic resources to become literate, buy a TV or newspaper or to pay for an ad in the same are important prerequisites to civil and political rights. Mr. Mkandawire of UNRISD reiterated that the various types of rights are mutually constitutive.

The Thai representative, somewhat in response to the Thailand Assembly of the Poor, defended the good faith of its anti-poverty and development programs, arguing that attempts at participation, including public hearings prior to major projects, help to ensure effectiveness, transparency, and accountability. The representative, however, urged that developing countries still need special help. (The Assembly of the Poor representative later replied that the outcome of these hearings was pre-determined and that they were more for show than for genuine consultation with affected communities).

Peter Prove helpfully cautioned against thinking that the issues are reducible to a North-South conflict, as poor people exist and need help in both hemispheres. He urged the governmental representatives to bring their colleagues with economic and financial portfolios to the Social Forum, instead of relying on silos of human rights expertise for the Social Forum and economic expertise, e.g., for the IFI and economic treaty deliberations.

5. Right to Food and Poverty Reduction

Biotechnology and genetically modified (GM) foods came up at several points in the discussion, with NGO representative Pat Mooney taking the lead in making the point that biotechnology is not necessarily the panacea promised by its promoters, but that real risks are associated with some of the new technology, the public goods from which traditional farmers are excluded from on “intellectual property” grounds. He pointed to several studies showing that nutritional quality has actually declined with efforts toward biofortification of foodstuffs (e.g., apples and potatoes have declined as much as 50% in key nutrients). He cautioned against the growing corporate control of the traditional agricultural sector (seen in, e.g., increasing presence of GM maize in Mexico and Central America), and highlighted the expected marketing in 2003 or 2004 of patented “Terminator” seeds (that cannot be re-used by farmers after harvest) as examples of dangerous trends. The dystopian picture he paints is a world in which a billion and a half
people dependent on farmer-saved seeds would suddenly be at the mercy of multinational corporations. The government of Cuba later noted that not all biotechnology in agriculture is bad, pointing to its own use of some such technologies in increasing yields; but Cuba urged asking whether the particular use of technology in a given case is ethical, which seemed questionable in the case of the transgenetic seeds creating dependencies and strengthening corporate monopolies.

Jean-Baptiste Anoman Oguïé of ATD Quart Monde essentially repeated his presentation from the NGO Preparatory Event, providing through the prison project an illuminating example of self-help that can expand into other spheres through partnerships. Irma Yanni, of La Via Campesina peasants’ organization, lamented small farmers losing their land and thus their way of life to large multinational corporations and landowners. Rights including the right to life, to determine their own way of farming (including their own culturally preferred way of growing food) and to associate with others, were among the many rights being violated. She too expressed concern regarding GM technologies and IFI’s agricultural liberalization policies, and urged the international community to guarantee food sovereignty and take agriculture completely out of the WTO.

Mirian Masaquiza, of the National Confederation of Black and Indigenous Organizations in Ecuador, gave some impressive statistics on the persistence of poverty and inequality in the face of globalization, especially in Ecuador. There, she said, 80% of the rural populace and 50% of the urban populace are poor. The policy of pegging the currency to the dollar, and the tremendous external debt, has aggravated the situation. Like Ms. Yanni, Ms. Masaquiza advocated food sovereignty, which she sees as threatened by transnational corporations and neoliberal economic policies. She disfavored trade agreements, generalizing from NAFTA to conclude that they were all instances of U.S. aggression reinforcing powerful economic interests instead of including the vulnerable and the true public interest. The latter could include investment, but would be more focused against poverty.

Mr. Christophe Golay, assistant to the Special Rapporteur on the Right to Food Mr. Jean Ziegler, reiterated that the problem of implementing the right to food arose more from issues of food distribution than a lack of adequate production. The world today produced enough to feed roughly double its current population. He linked the issue to poverty, noting that if you do not have any money, you typically do not eat, and if you do not have enough money, you do not eat enough high-quality food. This in turn affects the right to education or the right to work in a vicious circle, since it is hard to work or study without adequate food. He pointed to the inequitable income structure in Brazil as an instance of the problem; there, 2% of the population has 56% of the wealth. The Brazilian Secretary of State for Social Affairs, Ms. Wanda Engel Andua, confirmed that economic growth alone was valuable, but insufficient to address the issue of extreme poverty, as revealed by Brazil’s experience of persistent extreme poverty despite its economic growth. Niger, another country visited by the Special Rapporteur, is even worse. There, 4.2 million out of the country’s populace of 11 million are hungry, with two thirds of the country being in absolute poverty. Both
the inhospitable climate and external conditions, like unsustainable debt levels and the legacy of misguided IMF policies, aggravate this situation.

Mr. Alfredo Sfeir-Younis of the World Bank welcomed the Social Forum as one receiving input from a broader variety of stakeholders. He expressed a wish, however, for a more meaningful, deeper, and sustained dialogue and debate than that allowed by the abbreviated structure of this first Social Forum, and also called for more empirical rigor in the discussions (pointing out some inaccuracies of some statements regarding the World Bank’s role). He pointed out that there are no policies neutral to all groups (or else we would have no need for a Social Forum like this). The centrality of poverty and the importance of addressing it are now increasingly accepted. Poverty eradication has been included in the Millennium Development goals and by the Bretton Woods institutions including the World Bank. Other issues are more controversial (and he voiced some views at odds with those of many of the participants, but which were important to hear though they might not have been the most politically correct). Economics, though not a favorite topic of many NGOs, has an important and potentially positive role to play in globalization; non-economic policies can have negative effects. Some social equity policies, he noted, can violate human rights (especially universality principles). Representatives of the poor are telling the World Bank that it is not just food production but purchasing power which is a big issue for them. Lack of access to other resources — land, water, credit, inputs to agriculture like forests, fertilizer and seeds — is a huge contributor to hunger, especially for women (who do not receive the rights they are formally guaranteed). If there was one area to prioritize, it would be the need for a gender perspective. While a focus on rural food production is necessary, going beyond this to urban-rural linkages, and broader economic development and wealth creation in both areas, would also help, as would wider recognition (including poverty reduction strategies) of the right to food as a public good, versus a private good.

Mr. Sfeir-Younis argued for a new paradigm of inclusive empowerment that goes beyond current paradigms of economic growth or even sustainable development. He also pointed out the interrelationship between the subjects of discussion, between for example poverty and the creation of wealth, and between the right to food and the need for access to energy resources (to cook food), between patterns of consumption in the developed world (e.g., $200B in alcohol consumed in rich countries) and low levels of overseas development assistance (e.g., $8B in total agricultural assistance). Still, he stated that actually building political will for getting the priorities right, and for example establishing the primacy of human rights over economic law, or infusing economic law with human rights values, would be a profound social change. Mr. Sfeir-Younis suggested that the Social Forum should focus on these crucial issues of political will, and noted that these are collective action problems requiring collective solutions. On the other hand, however, he asserted that coherence between economic and human rights policies will have to take place at the country level, as he viewed it as unrealistic to expect such a change to take place at the international level. He mentioned that the World Bank is open to dialogue on these issues, urges considering the value for economic development of all the General
Comments to the Economic, Social, and Cultural Covenant, and has in fact held a seminar and had discussions with both NGO representatives and High Commissioner Robinson on some of these topics. However, Mr. Sfeir-Younis believes that organizations, like his own, without an explicit mandate to promote human rights must receive guidance from society at large as to preferred policy directions.

Michael Windfuhr of Food First Information and Action Network, responding to a couple of Mr. Sfeir-Younis’s points, later stated that it is important not to play the game of which level has responsibility, as action is needed at all levels. Regarding “empowerment”, he welcomed the rhetoric, but asked how often it occurs in reality. For example, the fisher folk affected by European Union policies generally are not participating in the negotiations affecting them; likewise, mining communities in Nigeria and other places have little input, though the World Bank supports such mining. We do need a new development model, but the World Bank itself has cut monies intended for rural development. To do so and say we are looking for the political will is problematic at best. What some see as protectionist, the poor and vulnerable often see as empowerment to continue their lives and to provide for their sustenance.

Windfuhr emphasized the role of information regarding rights and human rights education in empowerment. He also pointed out that many policies with negative impacts on the poor, e.g., privatization, are also vulnerable to challenge even on grounds of economic rationality. The policies of IFIs and other organizations should not have a negative impact on the right to food, including the quality of nutrition and food. The World Bank’s market-based approach to land reform is one approach, but is not endorsed by, e.g., his organization (Food First), Via Campesina, or others. Overall, Windfuhr reiterated the importance of a rights-based approach. After all, he says, who would argue that some measure of torture is allowed if national security requires it? Windfuhr clarified that if the rights are violated, for example on utilitarian grounds, then the victims should be compensated – a position he views as required under the law to the maximum extent of available resources. Finally, he noted the importance of creating early warning and action systems, not only for famines, but also for war and other conflicts that impact the right to food.

Mr. Asbjørn Eide of the Sub-Commission also urged the increased democratic participation of real people, as opposed to faceless international institutions. He welcomed the World Bank’s new introspection on these issues, and noted the increased criticism of traditional approaches from World Bank elites (like former World Bank Chief Economist and Nobel laureate Joseph Stiglitz). The problem all too often is that people are becoming impoverished in the very process of attempting ongoing economic development, often with a “generational trap” of an underfed woman giving birth to an underfed child who is unable to learn and will

17. He is apparently unfamiliar with the arguments of Harvard Law Professor Alan Dershowitz and others, who have called for “torture warrants” from judges when national security is threatened. They argue that is the best way, e.g., in a “ticking bomb” situation, to get the information. See ALAN M. DERSHOWITZ, SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE 470 (2002).
continue to be poor in the next generation. Mr. Eide called for more attention not only to the challenge of poverty reduction, but also to stopping the active impoverishment of people which is so often rationalized as necessary on utilitarian grounds although it violates their rights. Discrimination against various groups (women, the indigenous, lower-caste groups), including within the household, also plays a tremendously negative role in this regard. National strategies to approach implementation and overcome such discrimination, with benchmarks toward progressive realization, are important means of addressing the issues.

The interrelationship of civil and political with economic, social, and cultural rights was also highlighted by examples of the justiciability of economic, social, and cultural rights from South Africa and India. Ms. Charlotte McClain of the South African Commission on Human Rights described how a vulnerable community living in squalid conditions outside Capetown was evicted, but received a court order from the highest court in South Africa (the Constitutional Court) holding the eviction unlawful and providing that the homeless parents and children must be given the right to housing, as provided in the South African Constitution. Similarly, Ms. Aparna Bhat described a surprisingly successful case she brought before the Indian Supreme Court which resulted in an order enforcing the international human right to food by ordering the central government to provide resources to the state government, thereby enabling the right to be implemented. Continuing issues include ceilings on those able to take advantage of the right, but the judicial recognition of the right is an important achievement.

In addition to access to the courts, Mr. Raj Kumar of Pax Romana also emphasized the relevance of other civil and political rights, especially the right to information (highlighted in Rio Principle 10), to the implementation of economic rights like the right to food and the fight against poverty. Calling for greater involvement of civil society in constructing the poverty reduction strategy papers, he said that “human rights is the grammar of the dialogue”, and lamented the fact that key organizations like the United Nations Development Program were not receptive to human rights language at the Bali preparatory conference for the Johannesburg World Summit for Sustainable Development. Sub-Commission member Florizelle O’Connor from Jamaica also endorsed a holistic approach to human rights, viewing the right to food as being as fundamental a right as civil and political rights. She also endorsed the cultural right to continue with organic farming, if desired, instead of being forced to use chemical fertilizers at potentially high nutritional cost.


6. Discussion of Draft Conclusions and Recommendations

The second day of the Social Forum, which took place on August 2, 2002 (a week after the first day), focused on discussion of draft conclusions and recommendations which Mr. Bengoa had prepared after the first day. Mr. Bengoa explained that after the day's discussion, the ten members of the Sub-Commission would discuss and finalize the document in private for the Sub-Commission's consideration and adoption.

Many suggestions to strengthen the draft document and correct some errors ensued. Ms. Terao, an alternative Sub-Commission member from Japan, made the positive suggestion that the Social Forum concentrate on what was new in globalization, which she noted had both positive and negative effects. She noted the persistent problem arising from excessively narrow circles of social concern -- in which problems of our immediate neighbors receive our attention, but those across oceans do not. Sub-Commission member Abdel Sattar, from Pakistan, noted the links between bad governance, corruption, and inefficient or useless projects (selected for their potential for kickbacks rather than for the public good). He called for an international regime to return to developing countries the wealth illicitly stashed away in developed country banks and tax havens, which he argued would make a real contribution to poverty reduction in developing countries.

Other comments were not as helpful as these, and one was left wondering whether commenting on the draft document represented the best use of time of those gathered. Mr. Eide made the useful comment that the globalization most people found objectionable (as creating losers as well as winners) was economic globalization; he also urged the Social Forum not to lose sight of the particulars, but to focus on what happens to specific human beings who are otherwise lost in the process of globalization.

7. Conclusions of the Social Forum

The Social Forum affirmed its mandate as described above, 20 emphasizing not only the ultimate objective to share "knowledge and experiences" through an interactive dialogue, but also "to suggest appropriate intervention by the concerned stakeholders" and to contribute to major international conferences and collaborate with other forums, like the Permanent Forum on Indigenous Issues. 21 Among the other major conclusions of the Social Forum were the following 22:

a. Globalization and Human Rights

- Economic globalization is human controlled and economic law and policy should accord with human rights law and values.

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20. See supra notes 8 and 9 and accompanying text.
22. Id. at 15 ¶¶ 52-69.
Unregulated globalization produces losers as well as winners, so measures must be taken to safeguard the rights of those who may become poor or marginalized.

Instead of taking into account poor, women, or indigenous peoples, globalization often takes away their resources, thus violating their rights.

Liberalization of trade in services may negatively affect human rights, including nondiscriminatory access to education, health, and water.

Liberalization of trade in agriculture may also have negative effects, including increasing food import bills, declining local production, undermining small farms and labor, and narrowing development options.

Women in particular are negatively affected, requiring a rights-based gender perspective in economic policies.

"Non-discrimination" in human rights and economic/trade law sound the same, but have different meanings needing clarification, as equal rules for unequal players may institutionalize discrimination against the weak and violate human rights when what's needed is affirmative action for the most vulnerable to ensure consistency with international human rights law.

b. The Right to Food and Poverty Reduction

Poverty reduction strategies require both preventing impoverishment and urgently bringing the poor out of poverty.

It is thus important to identify the poor, their locations, and the causes of poverty (as in the background paper “Who Are the Poor?”).

The nondiscriminatory participation and empowerment of the poor in a rights-based approach to development is of central importance.

Poverty is not only a cause, but also an effect of hunger and malnutrition – affecting the ability of individuals to escape poverty in what often becomes an inter-generational poverty trap.

Respect for social, cultural, and traditional ways of gathering food, and the spiritual as well as the physical well being of affected peoples including the indigenous should be considered.

All stakeholders should contribute to the World Food Summit’s Intergovernmental Working Group on voluntary guidelines for the right to food, with the ultimate purpose being to reflect nutritional well-being, and noting the NGO suggestions made at the Social Forum.

The Social Forum urges more consistency by states regarding
positions taken at various human rights and development forums.

- General Comment 12 of the Committee on Economic, Social, and Cultural Rights authoritatively interprets the right to food and how to achieve it, including the need for states to adopt an accountable, participatory, and transparent national strategy, identification of resources, framework legislation, benchmarks, and policies for implementation.

- Justiciability of economic, social, and cultural rights was illustrated by the South African and Indian cases; an independent judiciary, independent human rights commissions, and a vibrant civil society will strengthen these positive trends.

8. Recommendations of the Social Forum

The main Recommendations of the Social Forum were as follows:

a. Proposed Themes for 2003

The themes recommended for 2003 focused on the rural poor, i.e.,: (i) rural poverty and rural poor communities, including the rights of landless peasants' movements, pastoralists, and fishermen; (ii) the right to education in rural communities, including the importance of capacity-building and training; (iii) corruption and its impact on the rural poor; and (iv) the role of international cooperation in peasant agriculture and rural communities.

b. Poverty Reduction and the Right to Food

The main recommendations of the Social Forum after considering the issues pertaining to poverty reduction and the right to food were divided into national and international aspects.

At the national level, the Social Forum recommended that:

- States should adopt a national strategy on the right to food in accordance with General Comment 12, and also should take into consideration other General Comments including 13 (right to education) and 14 (right to health).

- States also should conform to the human rights principles of nondiscrimination, accountability, transparency, and participation by undertaking the following:
  - Establish early warning systems regarding threats to livelihood due to environmental degradation, production changes, or market instability;
  - Establish buffers to mitigate shocks and facilitate early

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recovery;
  o Avoid discrimination in giving support to farming communities, and consider affirmative action if necessary;
  o Avoid discrimination against women in particular, by giving full access to resources (land, credit, natural resources, technology, and the right of all pregnant and breastfeeding mothers to food and health care);
  o Protect rights of tenant farmers and promote effective land reform and indigenous peoples’ right to land;
  o Facilitate market access for small farmers;
  o Protect the rights of landless agricultural workers, including the right to organize and unionize;
  o Ensure conformity of private business activities with the progressive realization of the right to food;
  o Assist HIV/AIDS-affected communities.

At the international level, the Social Forum recommended that:

- International organizations, especially the IFIs, should incorporate human rights norms, including the right to food, into their work, activities and value systems with due respect to their respective mandates;
- States should give more emphasis in national poverty reduction strategies to the right to food and the urgent need for more institutionalized participation by stakeholders including representatives of the poor and civil society organizations;
- The High Commissioner for Human Rights’ Guidelines to incorporate human rights concerns into poverty reduction strategies should be field-tested as soon as possible;
- Actions that reflect the interrelationship between human rights, for example the right to food and the right to health, education and other rights, should be undertaken on a priority basis for women and young children;
- The High Commissioner for Human Rights’ reports on intellectual property, agriculture, and trade in services should all be formally transmitted to the WTO General Council and the relevant WTO committees and Director General;
- Human rights principles including nondiscrimination support targeted and enforceable differential treatment and affirmative action for developing countries, as opposed to mere ‘best endeavor’ commitments for such treatment;
- States should take steps (in existing as well as further international agreements and overseas aid) to facilitate access to food and respect for enjoyment of the right to food in other countries as well as their
Public funds should be made available through international cooperation to strengthen agricultural research aimed at improving productivity of small and marginal farmers.

VI. EVALUATION OF THE SOCIAL FORUM

It must be admitted that not all the high hopes for the first Social Forum were achieved. This was in part attributable to the disrupting delay, but in part to the planning for the event. Whether because of a preference for a relatively flexible and “free” space for debate, or because of inadequate attention, the event could have been planned to ensure more effective and higher quality debate, participation, and outcomes. The comments of some governments (mainly from the North) that the Social Forum did not hear the views of any poor people were clearly inaccurate and unfair. But the nagging question of whether and how to enhance quality remains.

The ultimate value of the Social Forum, if it continues its evolution into an effective body, would consist largely in informing the decisions of those shaping globalization with alternative perspectives relevant to concerns of the world’s poor and vulnerable groups. The importance of such alternative perspectives is not sufficiently appreciated. With the fallout from IMF decisions now widely recognized as contributing to recurring financial crises in Asia, Russia, and Latin America, and from corporate scandals similarly focused on the agenda of a small elite, the importance of taking broader and longer-term views into account in decision-making cannot be so easily ignored. Whenever a system develops into orthodoxy, as happened at the IMF and at now-failed corporations like Enron or WorldCom, the quality of decisions suffers because it does not adequately consider the full impact of those decisions on the ground. The shared goals of the U.N. system and the Social Forum (promoting peace, stability, and human rights, and eradicating poverty) would be better served by more democratic and participatory input from affected groups of society, especially those most adversely affected. Such views may be likened to early warning signals of stressed or weakened points in the system, which if not properly processed by the system will erupt in flawed or negative output. Decisional quality will thus be enhanced with broader input from affected constituencies, allowing more comprehensive and accurate assessment of risk and reward, of cost and benefit. In short, receiving views from those constituencies will nurture a systemic strength that comes not from rigid orthodoxy, but from resilience.

VII. RECOMMENDATIONS FOR FUTURE SOCIAL FORUM SESSIONS

1. Procedural Matters

As stated in the Minnesota Advocates for Human Rights intervention at this year’s Sub-Commission: the organizers of the Social Forum should “think boldly about new structures and new approaches to conducting its meetings – and not drift
into the same-old, customary modalities for holding UN-based human rights meetings."\textsuperscript{24}

\hspace{1cm} a. Participants

If the major purpose of the Social Forum is to give a voice to the voiceless,\textsuperscript{25} then major attention should be given to ensuring the participation of such actors. Many of the participants in the first Social Forum were, frankly, the same old Geneva-based nongovernmental organizations and actors who participate in other U.N. meetings. Not that they should be excluded, but examples of truly new voices were so rare as to be almost nonexistent. A fair and objective process of consultative outreach should be established, leading in cases of demonstrated financial need to financial support and participation of representative actors from unrepresented or underrepresented perspectives.

\hspace{1cm} b. Documentation

While the inaugural Social Forum included some excellent background materials,\textsuperscript{26} a more systematic approach to making such materials available would be preferable. Each topic could be accompanied by a packet of basic, key documentary materials (including a bibliography of common resources and websites on the topic). Such materials would encourage common understandings and usefully focus the debate. Since by its nature the Social Forum is delving into new, cross-sectoral topics, the normal information sources may miss some of the more valuable resources on the topic, making such documentary materials even more valuable to the participants.

Mr. Sfeir-Younis of the World Bank was correct to yearn for a structure in which deeper and more sustained dialogue about these issues could take place. Availability and greater use of such formal preparatory documents setting forth positions and data in advance of the meeting would help in this regard. The participants could then review these prior to the meeting, narrow the issues in dispute, and perhaps even refer open factual issues to other bodies to make the actual meeting more productive.

While greater availability of such documentation on the Internet is a positive trend that should be encouraged, the reality of continued limited access of most poor people to the Internet means that other innovative methods for including the poor in documentary dialogue should also be considered. A repeated and important theme of the inaugural Social Forum was the vital importance to the


\textsuperscript{25} "[T]he Social Forum seeks to give special voice to new actors, including the poor and the marginalized and their organizations, which have no space within the United Nations system." Report of the Chairman-Rapporteur, José Bengoa, supra note 15, at 14 ¶ 50.

\textsuperscript{26} See, e.g., the partial list of documents made available to participants in Report of the Chairman-Rapporteur, José Bengoa, supra note 15, Annex I, at 20.
poor of information regarding their rights, and much more strenuous efforts to enhance such access to information are required.

c. Preparation

During the discussions on the second day, Sub-Commission member Ms. O’Connor made the good point that if the Social Forum is to be truly innovative and useful, participants will have to do a better job of preparing presentations that reveal the disconnect between the current international approaches and the actual needs of villagers and the poor and vulnerable on the ground. She recommended, for example, that an NGO from her region ideally would be familiar with World Bank research and activities in the region, analyze the progress or lack thereof made in local development of the affected community, and come prepared to discuss ideas for improvement in actually meeting local needs. As she said:

I really challenge the NGOs that are here. Go back to your areas. Don’t just look at the UN treaties. Relate those to the day-to-day lives of the people. Come back next year with best practices, worst practices, with words, ideas, with solid stuff. That will allow all of us to come back with concrete ideas. To make dignity a reality for more people all over the world.

d. Speakers

Mr. Bengoa and others commented on the usefulness to the Social Forum of having a variety of speakers offering views not otherwise frequently heard within the U.N. system. He appealed at the end of the Social Forum for a greater number of governmental representatives, particularly those with social development portfolios, to attend. It must be said, however, that the representatives of governments who spoke inevitably had the least to say, usually repeating widely known facts or dispensing state propaganda. Since the Social Forum is intended to give a voice to those who do not have one elsewhere in the U.N. system, an even more limited role for states (unless they have truly value added content or original ideas to offer) would be preferable. On the other hand, the tendency of U.N. forums toward ideological and sometimes misinformed rhetoric would make it helpful, as several speakers including from the World Bank properly suggested, to have a greater number of true experts available to inform the discussions. In an intervention at the Sub-Commission, Minnesota Advocates for Human Rights suggested:

For example, on some of the important technical subjects affecting this field, perhaps a brief point-counterpoint debate could be held between recognized experts on different sides of these issues. If informed in advance, NGO’s and their advisors could anticipate and prepare counterpoints to the views of experts. This could be particularly beneficial in challenging with facts the views of the IFIs (the World Bank, IMF, and WTO) who in some cases continue to adhere to discredited
free-market economic orthodoxies that have not served the needs of the poor.  

The stature of the Social Forum should enable it to attract the world’s best experts on various subjects. Amartya Sen or Joseph Stiglitz could debate Milton Friedman on the causes and best approaches to solve world poverty, informed by concrete testimony from actual poor people who have experienced the results of IMF policies on the ground. In addition, the voice of the World Bank offered an interesting and valuable counterpoint to some of the other voices heard, and it and the other IFIs should be encouraged to play a continuing role if they are to be part of the solutions. The same could be said for multinational businesses. While the antipathy toward the corporate sector and economic globalization in general among some of the speakers might make this seem unattractive, the shift of power to businesses and other non-state actors means that they have greater responsibilities. It would thus be wise to include their perspectives to further discussion and mutual understanding and, again, make them part of the solution rather than part of the problem. The participation of both “international financial and economic institutions and development agencies” as well as “private sector entities” is thus rightly contemplated in the Social Forum’s conclusions.

e. Using New Information Technologies

Creative ways of interacting with participants should be considered, including simultaneous web-casts, video-conferencing, and (as Minnesota Advocates, again, suggested) “[p]erhaps idea-posters, audiotapes, and other alternative and/or culturally-rich communicative approaches to expressing . . . ideas and concerns.”

In some countries in poor regions, ranging from the savannahs of Africa to the jungles of Peru, the internet is increasingly used by farmers and vulnerable populations to “bridge the digital divide” and use information technologies to educate, inform, and empower people. A major problem in such initiatives is access to energy, as many of the poorest villages and regions do not have access to reliable electricity. But for those who do, these new technologies can provide information on more efficient irrigation, fertilizer, or soil replenishment techniques, weather conditions, conservation methods, market and transport conditions that can be useful both for rural and urban populations. During the first day of the Social Forum, the government of Mexico suggested that perhaps the best practices emerging from the Social Forum could be posted on the web to leverage the lessons for the benefit of those unable to attend the event. While the benefits of Internet communication will remain limited so long as access remains limited, those benefits should be shared with those with access to such methods. The Internet could also be a way of broadening the dialogue of the Social Forum to other parties, and to extend it throughout the year, through chat room and moderated or unmoderated discussion fora and listserves.

f. Interactive Methods

Since the Social Forum has also been conceived, from the outset, as a forum to build bridges between actors who do not normally talk to each other, ways of enhancing interactivity should be seriously considered.

One specific innovation used to good effect at the World Summit for Sustainable Development in Johannesburg in September of 2002 was the inclusion of various interactive dialogues between and among representatives of ‘major groups’ established over the years since the Rio Earth Summit a decade ago. The discussion between and among these groups was moderated by the Secretary General’s Special Envoy, Jan Pronk (the former Development Minister of the Netherlands). While much of the power of the resulting discussions came by virtue of the forceful personality and knowledge of Mr. Pronk, the existence of truly interactive dialogues within the U.N. system was both a refreshing change from the staid and self-justifying rhetoric so often prevalent, and a genuinely original means of advancing substantive ideas in difficult areas. Mr. Pronk, in the manner of a strong television talk show host, would challenge indefensible statements by representatives of civil society or business, or ask one U.N. agency why they have not been cooperating with another agency with whom they shared the podium. Such well-informed moderators are rare indeed, and it takes a bit of faith that they will guide the discussion in fair and profitable directions. But when it works, it results in new insights and shared understandings and would be well suited to addressing the issues confronted by the Social Forum. In fact, his familiarity with the issues and his obvious skills would make Mr. Pronk an ideal candidate to assist the Social Forum in some of its deliberations, if he could be persuaded to do so.

Another interactive means that was suggested by Minnesota Advocates for Human Rights was “impromptu, show-of-hand type straw votes on issues that arise during the session,” and this could also be valuable in some instances.

Still another creative suggestion from Minnesota Advocates is to literally promote interactivity by making networking opportunities available to participants either at dedicated breaks for that purpose, or informal receptions to do the same. Circulating a voluntary contact list to facilitate contact during and after the Social Forum, published and available before the last session, would be another means to this end. Such emphasis on interactivity could help fulfill the vision of the Social Forum as “the ultimate networking forum – connecting different actors and institutions together, to integrate their policies, inform each other’s views, and incorporate human rights concerns into the social and development policy making & programmatic functions in the UN and other institutions.”

33. Id.
g. Guiding the Discussion

Discussion could also be enhanced with an understanding, and perhaps vigorous action from the Chair or a moderator, against mere, fruitless repetition of points made by previous speakers. In the first Social Forum, there was far too much repetition of this sort, often for political reasons or simple grandstanding. Future meetings of the Social Forum could break the mold of U.N. meetings by more rigorously avoiding such traps, and focusing discussion on isolating and resolving the most intractable issues.

h. Punctuality

It should be unnecessary to recommend that the sessions begin on time, but unfortunately the meetings of the Social Forum in its inaugural year routinely began late, making this recommendation worthwhile. One would think that punctuality would have been seen as especially important given the delayed start of the Social Forum, and the consequent disruption and diminished participation in the proceedings. But, instead, tardiness was in fashion, in the worst tradition of U.N. meetings. Future meetings of the Social Forum would be more productive and respectful of the many participants traveling from distant lands if they would start on time.

i. Relationship with Other Bodies

It would also be worthwhile if the Social Forum could formally refer inquiries to other bodies of the U.N. system, or even outside of the U.N. system, for productive follow up on the issues discussed. Also, it is within the Social Forum’s mandate “to propose standards and initiatives of a juridical nature, guidelines and other recommendations for consideration by the Commission on Human Rights, the working groups on the right to development, the Committee on Economic, Social and Cultural Rights, the specialized agencies and other organs of the United Nations system.” Thus, it should cultivate capabilities, resources, and approaches that will enable it to do this in a high-quality fashion.

Among the many ways this could happen is for the Chair of the Social Forum and the ten Sub-Commission members formally attending the Social Forum to act as spokespeople for the Social Forum’s recommendations, to the treaty bodies, international conferences, both formal and informal meetings of other international bodies, and other forums.

j. Organizational Structure

Although this is a delicate matter, since too much structure could defeat the informal and creative exchange that marked the first Social Forum and should be preserved in the future, Mr. Bengoa and others correctly stated at several points that more organization could serve the purposes of the Forum. The search continues for the correct balance between more formal panels and debates between experts, and less formal interactive dialogues.
2. Substantive Matters

a. Topics

In selecting the topics of the Social Forum, more thought should be given to whether the issue is being adequately addressed in other fora, or whether the unique "competitive advantage" envisioned for the Social Forum will be able to make an original and value-added contribution to discussion and moving toward a resolution of the problem. It is important that the Social Forum not become just another U.N. talking shop. To this end, Ms. O'Connor's comments above about the value of preparation also have a substantive point. As stated in the Conclusions of Mr. Bengoa's report, "[t]he dialogue that takes place in the Social Forum must be based on the expressed concerns of those who experience the reality of social, economic, and cultural vulnerability."

From this perspective, the topics of the first Social Forum - globalization and human rights, and poverty and the right to food - were appropriate. Future topics should similarly focus on the most important global problems affecting vulnerable populations, many of which similarly relate to subsistence rights and severe situations. In addition to the right to food, the rights to water, health, education, and housing all come to mind as urgent topics. The focus in 2003 on rural poverty should provide useful insights, but the major problems pertaining to sustainable urbanization are also becoming acute. Thus, I would advocate an approach of selecting a specific right for each of the next few years, using discussion of that right as a prism to shed light on the interrelationship with other rights in the many varied contexts in which issues arise. I agree with those at the Social Forum who noted that certain issues, like the impact of globalization, are likely to remain cross-cutting underlying themes for the foreseeable future.

b. Metrics

Since the Social Forum's focus is on economic, social, and cultural rights, and since these are recognized as progressively attainable within national resources, it would be worthwhile for the Social Forum to adopt and use social metrics showing the status of achievement of the relevant rights. Some of the existing metrics would be of great use in this regard, for example the UNDP's Human Development Index. But it would be worthwhile for the Social Forum to devote some time to examining the appropriateness of the UNDP or other indices for measuring human rights achievements, considering modifications that might be appropriate and adopting and using uniform measures to evaluate national progress on a regular basis. In an intervention at the Sub-Commission this year, Minnesota Advocates for Human Rights suggested that this topic of metrics was so important that the Social Forum could even devote all or part of its proceedings one year to the topic, e.g., reviewing ways in which nations could measure and address issues

pertaining to child mortality. Of course, such metrics could also be used to follow up and evaluate the effect that the Social Forum and other activities and efforts have on the underlying issues.\textsuperscript{35}

**VIII. CONCLUSION**

In conclusion, the first-ever U.N. Social Forum offers a potentially important, if currently immature and unproven, forum for injecting much-needed critical thinking and imagination into the discussion of how to resolve some of the world's most pressing and difficult issues. For the effort to be successful, the Social Forum must avoid capture by traditional special interests, on one hand, while seeking out and giving a voice to unrepresented vulnerable interests, on the other. With proper discipline and creativity, however, the effort could prove worthwhile indeed.

COMPARATIVE U.S. & EU APPROACHES TO E-COMMERCE REGULATION:
JURISDICTION, ELECTRONIC CONTRACTS, ELECTRONIC SIGNATURES AND TAXATION

Christopher William Pappas*

INTRODUCTION

The beginning of the 21st century has brought with it explosive growth in a new medium for trade, namely: e-commerce as made practicable through the continued evolution of the Internet. Because major businesses have entered the realm of e-commerce, most firms believe that they must cater to the desires of the consumer, and that means doing business online. Increasingly, consumers are choosing to make purchases via the Internet and are skipping the trip to the store. A modern consumer can purchase a compact disc, a couch, or a new car at four in the morning without having to leave her house, deal with traffic and salespeople, or even change out of her pajamas. Furthermore, a consumer is no longer restricted to products available in one store, one town, or even one country because the Internet transcends boundaries and is accessible from anywhere in the world.

MEASUREMENT OF E-COMMERCE

While it is difficult to accurately measure the impact of the Internet on

* Chris Pappas received his B.S. in Business Management from Millersville University of Pennsylvania in 1997. He received his J.D. from the University of Denver College of Law in 2002, where he was a staff member of the Denver Journal of International Law and Policy, was the senior research associate for Dr. John T. Soma, and skied an average of twenty-five days per year. In 2002, Mr. Pappas received his M.A. in International Business Transactions from the University of Denver Graduate School of International Studies. The author would like to extend his sincere appreciation to his family, friends, and of course to Heidi, for their unwavering confidence, support and love.

1. See Larry J. Guffey, What Advice Should You Consider Giving to Your Clients Regarding Them?, 34 MD. B.J. 41, 43 (2001). See also William K. Slate II, Online Dispute Resolution: Click Here to Settle Your Dispute, DISP. RESOL. J. 8, 12 (2002).
commerce, some estimates report that at the end of 1999, there were nearly 260 million, and by mid 2002, over 580 million Internet users worldwide. By 2005, that number is estimated to reach more than 765 million. The Internet has evolved into a significant and accepted business medium through which consumers and businesses come together in the buying and selling process. Department of Commerce statistics conservatively estimate that e-commerce transactions totaled seventeen billion dollars in the first three calendar quarters of the year 2000. Even those estimates are much lower than individual company reports suggest.

**THESIS**

Growth in the use of the Internet has forced businesses to become familiar with, and understand the complexities of e-commerce. Lawyers have played, and will continue to play, a significant role in helping these businesses learn about doing business online. For a lawyer to adequately represent her clients, she must, therefore, understand the complicated legal ramifications of doing business online. Attorneys must understand and keep current with technology and business as well as legal developments. This paper will analyze and compare the approaches to the regulation of e-commerce taken by the two historically largest and most developed economic markets of the world: the United States and continental Western Europe (as represented by the European Union). Generally, the European Union will be analyzed as one governmental body, although the difficulties of this presumption will be investigated.

The primary goals of this paper are to compare the broad policies behind U.S. and EU approaches to the regulation of e-commerce and the specific means of regulation adopted for four of the main issues that modern lawyers are facing in regards to e-commerce: (1) jurisdiction, choice of law, and consumer protection; (2) electronic contracts; (3) electronic signatures; and (4) taxation of e-commerce. This paper does not purport to serve as an exhaustive analysis of the issues involved in e-commerce, but rather, aims to provide a general comparison of the regulatory approach taken by two of the leading markets in the world today.

**TYPES OF E-COMMERCE**

Traditional commerce occurs without the use of the Internet. "Bricks and
mortar businesses," called such in reference to the bricks and mortar that are used to construct their businesses, have no Internet component. There are few businesses remaining, most small and locally focused, that can be classified as true bricks and mortar businesses. Most firms have integrated e-commerce, defined for purposes of this analysis as "any business transaction that occurs over, or is enabled by, the Internet," at some level of their operations. Some are traditional companies that have incorporated the Internet into their business. American Airlines and L.L. Bean are examples of traditional brick and mortar businesses that are now classified as a "clicks and mortar" companies, because of their significant Internet presence. Over the past few years, another category of business has become recognized in the marketplace. "Clicks," more commonly referred to as "Dot-coms" in reference to their website urls, are businesses that are only involved in e-commerce on the Internet and do not have a physical retail presence.

There are several ways in which the Internet is used as a platform for commerce. E-commerce transactions between two businesses are referred to as business-to-business e-commerce, or "B2B." Government contracting between a business and a government falls under business-to-government e-commerce, or "B2G." Transactions in which the government offers its services to consumers through the Internet are designated government-to-consumer transactions, or "G2C." Lastly, the most familiar form of e-commerce takes place between businesses and consumers. This paper will focus on these business-to-consumer transactions, referred to as "B2C."

Business-to-Consumer (B2C)

Many key issues that arise from B2C transactions have direct analogies to traditional consumer transactions. Other issues are unique to e-commerce transactions. Jurisdiction, an issue as old as law itself, has been brought to the forefront once again as questions regarding appropriate jurisdiction arise with every cross-border e-commerce transaction. Nations want to be able to ensure the protection of local consumers and jurisdiction over e-commerce transactions is essential to effecting this protection. Similarly, electronic signature issues are a

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13. See Kennedy, supra note 3, at 20.
14. Id. at 17.
15. Id. at 20.
16. See id.
17. See id. at 18.
18. See id.
19. See id.
20. See id.
21. See id.
22. See id.
new twist on a traditional area of law.\textsuperscript{25} Lastly, the topic that has perhaps the greatest room for future evolution and adaptation is that of the taxation of B2C transactions.\textsuperscript{26}

THE UNITED STATES GENERALLY

The United States is a free-market, capitalist economy.\textsuperscript{27} This has become even more apparent as the U.S. attempts, through its role as the world's economic hegemon, to spread political and economic deregulation via treaties (both bilateral and multilateral), and its role in, and arguably control over, international organizations such as the United Nations, World Bank, and World Trade Organization.\textsuperscript{28} As a free-market economy, the U.S. subscribes, in principle, to a hands-off, minimalist approach to the regulation of commerce.\textsuperscript{29} The U.S. has attempted to implement this laissez-faire philosophy in the area of e-commerce as well.\textsuperscript{30} The White House, under former President Bill Clinton, issued a Framework for Global Electronic Commerce that purports to guide U.S. regulation in accordance with this attitude.\textsuperscript{31}

U.S. Framework for Global Electronic Commerce

This Framework lists five principles that the U.S., and other nations, should adhere to in attempting to regulate e-commerce: (1) "The private sector should lead,”\textsuperscript{32} (2) "Governments should avoid undue restrictions on electronic commerce;"\textsuperscript{33} (3) Where governmental involvement is needed, its aim should be to support and enforce a predictable, minimalist, consistent, and simple legal environment for commerce;”\textsuperscript{34} (4) Governments should recognize the unique qualities of the Internet;”\textsuperscript{35} and (5) "Electronic Commerce over the Internet should be facilitated on a global basis.”\textsuperscript{36}

\textsuperscript{26} See David E. Hardesty, Taxation of E-Commerce: Recent Developments, 618 PLI/PAT 177 (2000).
\textsuperscript{27} See generally BARRY EICHENGREEN, GLOBALIZING CAPITAL: A HISTORY OF THE INTERNATIONAL MONETARY SYSTEM (1996) (providing a history of the international financial system over the last 150 years).
\textsuperscript{28} See id.
\textsuperscript{29} See id.
\textsuperscript{32} Id. at 2.
\textsuperscript{33} Id. at 3.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
The private sector should lead. The expansion of the Internet has been primarily driven by the private sector. Regulatory policy should, as in the traditional marketplace, allow the market to generate innovation, expanded services, broader participation, and lower prices. As such, the government should welcome private sector participation as a formal part of the policy making process. The general goal of e-commerce regulation should be to encourage industry self-regulation and support private sector organizations.

Governments should avoid undue restrictions on e-commerce. By the time government regulation is put into force, it is often outdated due to the continued evolution of the technology driving the Internet and e-commerce. The resulting unsuitable regulation is likely to hinder the essential evolution of business models as they adapt to best utilize the Internet. As such, nations should refrain from unnecessary, restrictive involvement or intervention in e-commerce.

Where government involvement is necessary, its aim should be to support and enforce a predictable, minimalist, consistent, and simple legal environment for e-commerce. The twin aims of consumer protection and e-commerce facilitation should be weighed. Consumer protection should be realized through a predictable, contractual model. E-commerce will be best facilitated by regulation designed to ensure competition, protect intellectual property and privacy, prevent fraud, foster transparency, support commercial transactions, and facilitate dispute resolution. Because transactions based on contracts can ensure predictability and flexibility at the same time, this principle focuses on the appropriateness of the contractual model to the unique legal issues that arise from e-commerce.

The Framework for Global Electronic Commerce also recommends that nations should recognize the unique qualities of the Internet. Existing regulatory schemes designed to regulate traditional technologies and transactions may not be directly applicable to electronic commerce issues. Therefore, existing laws should be adapted to reflect the complexities of e-commerce. Where appropriate, new regulation may be necessary to address new issues raised by e-commerce. A recent example of this phenomenon at work is in the area of electronic signatures, where lawmakers approved new legislation regulating the use of electronic signatures.

38. See id.
39. See id.
40. See White House Framework, supra note 31.
41. See id.
42. See id. at 3.
43. See id.
44. See id.
45. See id.
46. See id.
47. See id.
48. See id.
49. See id.
50. See id.
51. See id.
signatures in commerce.\textsuperscript{52}

Lastly, electronic commerce should be facilitated on a global basis.\textsuperscript{53} While the U.S. unquestionably desires to lead in the facilitation of e-commerce, it is obvious that the evolution of the Internet, and electronic commerce specifically, depends on international agreement.\textsuperscript{54}

THE EUROPEAN UNION GENERALLY

The European Union faces unique difficulties in regulating e-commerce. At present, the EU is comprised of fifteen unique, sovereign, member states: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom.\textsuperscript{55} EU policy must necessarily address the concerns of its individual members, often resulting in an arduous process of negotiation and discussion before agreement is reached.

In 2000, the EU attempted to construct a basic framework for the future regulation of e-commerce.\textsuperscript{56} This, along with other official initiatives and reports, gives insight into the basic philosophy followed by the EU in the regulation of e-commerce.\textsuperscript{57} While the U.S. is attempting to drive the international marketplace into the Internet age, the EU approach appears to be more focused on growing the internal marketplace while protecting member state sovereignty and the rights of consumers.\textsuperscript{58}

A prime objective of the European Union in regulating e-commerce is to establish an integrated European internal market with access as an important component.\textsuperscript{59} The internal market in the U.S. is comprised of individual states that

\textsuperscript{52} See White House Framework, supra note 31, at 3. See also E-Sign discussion, infra p. 349.

\textsuperscript{53} See White House Framework, supra note 31, at 3.


\textsuperscript{58} See Accelerating E-Commerce: EU Actions, supra note 57; E-Commerce and Financial Services, supra note 57, at 2, 15; European Initiative, supra note 57, at 1, 4-5.

\textsuperscript{59} See E-Commerce and Financial Services, supra note 57, at 2, 15; European Initiative, supra note 57, at 4, 7-9.
are tightly joined in a federalist system. There are few roadblocks between states. The EU is attempting, through regulation, to increase the cohesion in its markets. This is especially true in the area of e-commerce, where many of the physical barriers to commerce are easily reduced to manageable degrees. To best bring about the desired harmonious marketplace, the EU is placing special emphasis on access to the Internet as an essential element to the stimulation of economic growth and investment in e-commerce. Similarly, the EU Directives guide regulation towards regional facilitation. Current divergences in legislation cause uncertainty and make e-commerce less attractive. Regulations that effect e-commerce should be coordinated in the same spirit as the EU Treaty with the internal market as the first priority.

EU Directives

In respecting individual member state sovereignty, the EU Directives instruct that the goal of e-commerce regulation should not be to harmonize criminal laws. Similarly, regulations concerning safety standards, labeling obligations, and liability for goods should be left to individual nations. Some areas that act as obstacles to e-commerce such as electronic contracts, however, are appropriate for concerted regulation which should be coordinated through the EU.

As mentioned above, the current primary focus of the EU is the unification of its member states, not interaction or competition with other markets. As such, regulatory measures should be strictly kept to the minimum levels needed to achieve the objective of proper functioning of e-commerce within the internal market. Regulation should be minimal, clear and simple, and predictable and consistent. While the goal is different, the means chosen by the EU to accomplish it are consistent with U.S. approaches to e-commerce regulation. Specifically, there are parallel desires for a minimalistic, simple, and consistent scheme for e-commerce transactions.

61. See generally Accelerating E-Commerce, supra note 57 (providing an overview of steps taken by the European Union to develop e-commerce).
62. See id.
63. See Accelerating E-Commerce, supra note 57; Directive on Electronic Commerce, supra note 56, at art. 2.
64. See Accelerating E-Commerce, supra note 57; Directive on Electronic Commerce, supra note 56, at art. 3.
65. See Accelerating E-Commerce, supra note 57; Directive on Electronic Commerce, supra note 56, at art. 5.
68. See id. at art. 6.
69. See id. at art. 58.
70. See id. at art. 6.
In the debate concerning the appropriate approach to jurisdiction over e-commerce transactions, two polar models have arisen. Jurisdiction can be based on the country of origin of the product at issue. For obvious reasons, this approach is preferred by businesses since it gives them certainty as to which laws will apply to their transactions. Conversely, consumer group advocates suggest another model where jurisdiction is based on a country of destination. This approach would "allow consumers to easily know what rules apply."

U.S. Approach

"At this point, the U.S. government has not taken a position on this issue." However, the executive branch has acknowledged the necessity of international agreement. The Clinton administration, through a government working group, reported its view on the future of e-commerce jurisdiction: "[The] global community must address complex issues involving choice of law and jurisdiction – how to decide where a virtual transaction takes place and what consumer protection laws apply."

While the legislative and executive branches have refused to legislate e-commerce jurisdiction, U.S. courts have continued with business as usual. The U.S. Supreme Court has attempted to adapt traditional jurisdiction approaches to e-commerce transactions. The 'minimum contacts' test sets forth the due process requirements that a defendant, not present in the forum, must meet in order to be subjected to personal jurisdiction: "He [must] have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

Since International Shoe, however, the evolution of e-commerce has caused the number of forums with which a business is likely to have contacts to increase dramatically. A company with an Internet presence has instant contacts with...
nearly every forum in the world. Therefore, the question becomes: what level of contacts between an e-commerce defendant and a possible forum will fulfill the 'minimum contacts' test? For e-commerce businesses without physical contacts in a forum, their chances of being subject to jurisdiction increase with their electronic presence: "[These companies are] more likely to be subject to jurisdiction in the forum state if [their website is] interactive and there is a history of interaction with residents of the state."

Zippo v. Zippo

The leading case dealing with e-commerce jurisdiction in the U.S. is *Zippo Mfg. Co. v. Zippo Dot Com, Inc.* In this case, the Western Pennsylvania District Court expanded on the *International Shoe* 'minimum contacts test' by stating that personal jurisdiction for e-commerce companies should be dealt with on a 'sliding scale'.

At one end (justifying jurisdiction) is a company that 'clearly does business over the Internet' such as 'entering into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files' and, at the other end (not subject to jurisdiction), is a purely passive website.

For companies in the middle of the scale, jurisdiction should be determined by the "level of interactivity and commercial nature of the exchange of information that occurs on [their] Web site." Factors such as online contracting (found on most e-commerce sites) can show a high level of interaction leading to the exercise of jurisdiction.

*EU Approach*

*Brussels I*

The application of traditional jurisdictional law to e-commerce transactions in the European Union poses more difficult challenges than in the United States. The European Union, as mentioned above, consists of 15 different sovereign nations. Each government, while attempting to utilize the collective power of the EU, also has a desire to ensure the autonomy of its government and courts as well as the protection of its population. Attempts have been made, however, to converge

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82. See Aciman & Vo-Verde, supra note 23, at 16.
85. See id. at 1124.
86. Cunard & Coplan, supra note 83, at 1090.
88. See Compuserve, Inc. v. Patterson, 89 F.3d 1257, 1260-61 (6th Cir. 1996) (discussing jurisdiction over defendant who entered into a clickwrap agreement with CompuServe via Internet).
89. See European Union Website, supra note 55.
jurisdictional approaches and offer a more consistent system to jurisdiction within the EU. An amendment to the 1968 Brussels Convention, called Brussels I or the Brussels Regulation, went into effect in March of 2002. Brussels I mandates that "online sellers be subject to suit in all fifteen EU states when they sell over the Internet." It is intended to apply to consumer contracts that are concluded with the use of an interactive website that is accessible in the State where the consumer is domiciled. Courts will be authorized to exercise jurisdiction over a merchant when he "pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State." Unlike EU Directives, which place an obligation on each member state to enact domestic legislation consistent with the Directives' provisions, treaties generally become the law of the land upon their adoption by signatory countries and are an historically recognized source of binding international law. As a result of the Brussels Regulation, e-commerce companies will have to comply with the laws of each of the EU member states unless they can prevent consumers from a given forum from utilizing their websites.

Yahoo! Inc.

Even prior to the Brussels I amendments going into effect, EU member states exercised jurisdiction over e-commerce companies without physical contacts in their forum. In Yahoo! Inc., the Paris Tribunal de Grande Instance exercised jurisdiction over Yahoo! Inc., an e-commerce company incorporated and physically located in the U.S. The court ruled that its jurisdiction was appropriate due to the harm suffered in France from the attempted sale of Nazi paraphernalia through the Yahoo! Auction site. The Paris Tribunal exercised jurisdiction under Art. 46 of the Nouveau Code de Procedure Civile. The French court based its final ruling, in part, on expert testimony concerning the availability and practicality of Yahoo! using a "blocking technology." The application of this type of technology, the court argued, would allow Yahoo! to

91. See id. See also Alastair Breward, Structuring, Negotiating & Implementing Strategic Alliances 2000, 1260 PLI/CORP. 391,423 (2001).
92. Goldstein, supra note 90, at 521.
96. See Goldstein, supra note 90, at 523.
98. Yahoo!, supra note 97, at 1184-85.
99. See id.
100. See Cunard & Coplan, supra note 83, at 1098-1099.
101. Id. at 1099-1100.
effectively block French nationals (or users based in the French territory) from accessing the sites involved. While there is still some debate in U.S. courts over the enforceability of the French court’s ruling in the U.S. and the practicality of blocking technology, Yahoo! Inc. is illustrative of the problems that arise for companies doing business via the Internet.

Distance Selling Directive

In addition to the Brussels I amendments, an EU directive has been utilized in an attempt to protect consumers who purchase goods and services online. The Distance Selling Directive was adopted on May 20, 1997 and was to be implemented by June 4, 2000. This directive, originally aimed at pyramid selling schemes, is only in force in ten of the fifteen member states including Austria, Belgium, Denmark, Finland, Germany, Greece, Italy, the Netherlands, and the UK. The Distance Selling Directive applies to most contracts where the seller and consumer never meet face to face, including contracts that are formed via the Internet. Requirements imposed on companies engaging in electronic transactions are intended to help to protect consumers. This directive allows a consumer to withdraw from a distance contract (including an electronic contract) for up to 7 days after entering with some exceptions.

Future of Jurisdiction, Choice of Law, and Consumer Protection

The future of jurisdiction over e-commerce companies in the EU seems muddled at best. With sovereign nations desiring to remain as such, it is unlikely that they will submit to a scheme that reduces their ability to exercise jurisdiction over companies offering potentially harmful products to local consumers. The European Commission, for its part, envisions the future evolution of the EU system: “[T]he European Commission envisions setting up a system of alternative dispute resolution procedures in each EU country, to which the commissioners hope consumers will resort rather than using expensive court litigation procedures.”

The result could be a more uniform dispute resolution system for all e-commerce lawsuits within the EU. Consumers would be better prepared to bring

102. See Cunard & Coplan, supra note 83, at 1099-1100.
103. See id.
106. See id.
107. See id. See also Distance Selling Directive, supra note 104, at annex. 1.
108. See Distance Selling Directive, supra note 104, at art. 14
109. See id. at art. 6.
110. Goldstein, supra note 90, at 523.
claims in their local forum. E-commerce businesses would be able to predict where they could be summoned and make informed decisions regarding whether or not to utilize blocking technology (such as that suggested in *Yahoo!* ) to reduce their likelihood of being hauled before a distant tribunal.

The future of jurisdiction on a global scale, within the next five years, will likely result in an international agreement of some sort. A new multilateral treaty orchestrated through the United Nations would help to converge jurisdiction schemes regarding e-commerce. The Brussels Convention is an example of the value of such an agreement. Consumer protection issues are of enough importance that politicians will be forced to enter into such agreements in order to ensure the safety of their constituents.

The future of e-commerce jurisdiction, within the next fifteen years, will potentially see the evolution of a multinational forum for the resolution of e-commerce disputes. While the issues of sovereignty and cultural relativism are obvious stumbling blocks, as the Internet continues to evolve and offer the sale of goods and services throughout the world without regard for international borders, governments will likely recognize their inability to use domestic courts to effectively resolve all e-commerce disputes. Assent to an international forum will be seen as a necessary sacrifice of policy autonomy and regulatory and judicial sovereignty in order to retain a competitive edge and an ability to protect one’s citizens in an increasingly globalized political economy.

**ELECTRONIC CONTRACTS**

One of the most significant legal issues in modern e-commerce is the ability of businesses and consumers to form contracts without ever touching a pen or shaking a hand.111 “It is common practice for websites to require users to enter into ‘clickwrap’ or online contracts by requiring the user to click on a box marked ‘I agree’ or to otherwise subject users to a website’s ‘Terms and Conditions of Use.’”112

Electronic contracts can take the form of shrinkwrap agreements, clickthrough agreements, and browsewrap agreements.113 For each of these types of contract, there are two principle issues.114 The first concerns the consumer’s acceptance or lack thereof.115 The second is the enforceability of the contract.116 While each of these issues is also significant in dealing with traditional paper-based contracts, electronic contracts introduce some unique difficulties.

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111. See Cunard & Coplan, supra note 83, at 1036.
112. Id.
113. See Kennedy, supra note 3, at 25. See also Cunard & Coplan, supra note 83, at 1036.
114. See Kennedy, supra note 3, at 25.
115. See id. at 25-26.
Shrinkwrap agreements are the type of ‘electronic contract’ most analogous to traditional contracts.117 These contracts are generally placed in retail software packaging.118 They ‘inform’ the consumer of the rights and obligations that are agreed upon with the consumer’s acceptance.119 The software purchaser generally is not furnished with the shrinkwrap agreement until the packaging is opened and acceptance is evidenced by beginning to use the software.120

U.S. courts have, in general, held these contracts to be binding.121 The Seventh Circuit addressed the enforceability of shrinkwrap agreements in *ProCD, Inc. v. Zeidenberg*.122 In this case, shrinkwrap agreements were determined to be enforceable, except where the “terms are objectionable on grounds applicable to contracts in general.”123

Clickthrough agreements introduce different problems.124 These contracts appear on a computer screen as a consumer attempts to utilize a service or make a purchase.125 They are similar to paper contracts except they are not physically on paper and acceptance is manifested by clicking on a symbol, generally the term “I accept.”126

U.S. courts have dealt with the acceptance and enforceability issues regarding clickthrough agreements.127 In *Hotmail Corp. v. Van$ Money Pie Inc.*., the Northern District Court of California held that the defendant accepted Hotmail’s “Terms of Service” through a clickthrough agreement.128 In a similar decision, the Sixth Circuit ruled that a defendant had assented to jurisdiction through the acceptance of a clickwrap agreement.129 In *In re Realnetworks, Inc.*, a court dealing with an arbitration requirement that the contract at issue be written went even further and ruled that the clickthrough agreement involved was of an “easily printable and storable nature . . . sufficient to render it ‘written’.”130

While it is clear that shrinkwrap and clickwrap agreements have generally been held as valid contracts in U.S. courts, browsewrap agreements present unique concerns.131 Browsewrap agreements “require less definite manifestations of user

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117. See Nimmer, supra note 25, at 34.
118. See id.
119. See id.
120. See id.
121. See ProCD Inc. v. Zeidenberg, 86 F.3d 1447, 1455 (7th Cir. 1996).
122. Id.
123. Id. at 1449.
125. See id.
126. See id. at 26.
129. See Compuserve, Inc. v. Patterson, 89 F.3d 1257, 1263-1269 (6th Cir. 1996).
131. See Cunard & Copland, supra note 83, at 1036, 1041-43.
assent."  Contrary to clickthrough contracts, these types of agreements are generally not binding. Unlike shrinkwrap agreements, they are often placed on websites in places that are not obvious to the consumer and proving that the client even saw the agreement is difficult. In this fast-growing area of interstate and international business sparked by the frictionless nature of e-commerce, it has become clear that some national legislation is necessary.

**UCC**

In the U.S., most electronic contracts are governed by traditional contract common law along with the Uniform Commercial Code (UCC). Without any standard statutory scheme for the regulation of electronic contracts, these conventional and often inappropriate tools are used.

**UCITA**

One attempt to create a standard statutory system that is more adequately suited to the unique issues that arise from virtual transactions is the Uniform Computer Information Transactions Act (UCITA). UCITA, which originated as a proposal for a new UCC Article 2 and was approved as a legislative model by the National Conference of Commissioners on Uniform State Laws on July 29, 1999, has only been adopted by two states, Maryland and Virginia. UCITA was authored with grand aspirations: "[UCITA was] designed to provide default rules, interpretations, and guidelines for transactions involving 'computer information,' including many, if not all, e-commerce transactions." As such, its scope is limited to "computer information" transactions, which are defined as agreements involving "information in electronic form which [are] obtained from or through the use of a computer or . . . capable of being processed by a computer." Under UCITA, much of the doubt as to the enforceability of electronic contracts is removed. In dealing with these types of agreements, UCITA mandates that they are generally enforceable if certain criteria are met. First,

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135. See, e.g., BILL GATES, BUSINESS @ THE SPEED OF THOUGHT: SUCCEEDING IN THE DIGITAL ECONOMY (2000).
137. See Cunard & Copland, supra note 83, 1045-1046.
138. See id. at 1046
139. Kennedy, supra note 3, at 27.
141. See id. at §§ 112, 209. See also UCITA, supra note 140, Prefatory Note at 1-3.
there must be "manifest assent." Assent can be evidenced by "intentionally engag[ing] in conduct." Finally, the assenting party must have been given an "opportunity to review" the terms of the contract at issue. UCITA recognizes the appropriateness of following industry standards and allowing for future changes in e-commerce: "[A] party may meet its evidentiary burden by developing 'commercially reasonable' internal procedures to create a reproducible record of terms, along with a record of user's response to those terms." In addition, UCITA applies to "computer information," which allows for its continued application as future technologies adapt.

EU APPROACH TO ELECTRONIC CONTRACTS – GENERALLY

E-Commerce Directive

The EU has progressed in its regulation of electronic contracts and e-commerce in general. The Electronic Commerce Directive (Directive 2000/31/EC) (e-Commerce Directive) required that all EU members be in compliance with its provisions by January 17, 2002. This directive "aims to bring some basic legal clarity and harmony to EU e-commerce laws." To accomplish this, the Directive mandates its application to all consumer transactions. The e-Commerce Directive governs contract formalities not governed by the Electronic Signatures Directive (discussed infra). Upon acceptance of an electronic contract, an acknowledgement of the order must be transmitted by electronic means without undue delay. Users must be given the ability to view and check all information prior to completing their order.

Another applicable directive that has been used to regulate electronic contracts is the Distance Selling Directive (as mentioned above). This directive imposes several requirements on businesses forming electronic (and other distance) contracts. Article 4(1) mandates that consumers be given information concerning the supplier, the goods or services being purchased, the price, and the

142. UCITA, supra note 140, at § 209(a).
143. Id. at § 112(a)(2).
144. See id. at § 112 (b).
148. Breward, supra note 91, at 422.
149. See id.
150. See id.
151. See id.
152. See Breward, supra note 91, at 422.
153. See Distance Selling Directive, supra note 104.
154. See id.
method of payment before the contract is made.\textsuperscript{155} In addition, Article 4(2) requires that all information be provided in a “clear and comprehensible manner . . . with due regard . . . to the principles of good faith.”\textsuperscript{156} Confirmation must be sent via durable medium to the consumer by the time of delivery.\textsuperscript{157} Vastly pro-consumer (as mentioned above), the Distance Selling Directive permits consumers to withdraw from distance contracts for up to 7 days after closing with some exceptions for services, perishable goods, and custom made goods.\textsuperscript{158}

**FUTURE OF ELECTRONIC CONTRACTS**

The future of electronic contracts will see an increased focus of legislation dealing with enhancing the reliability and appeal of e-commerce. As governments continue to see the advantages of a frictionless economy where purchases are made with great speed and ease, they will begin to realize that electronic contracts hold the key to the sustained growth of e-commerce. Legislative attention will be focused on protecting consumers while attracting business to domestic firms with the implementation of homogenized criteria for the formation of electronic contracts. While not e-commerce specific legislation, the Distance Selling Directive’s 7-day cooling off period is the type of regulation that attracts consumers. As nations see consumers fleeing to economies that offer more protections like these, perhaps a regulatory ‘race to the top’ could result in increased safeguards for consumers with less transactional friction.

**ELECTRONIC SIGNATURES**

**U.S. Approach to Electronic Signatures**

**UCITA & UETA**

One key concern pertaining to electronic contracts is the ability to assent to a contract electronically. Electronic signatures “encourage confidence in e-commerce as a means of trade” and ensure that on-line agreements are effective.\textsuperscript{159} In the U.S., UCITA regulates electronic signatures. Given that UCITA has only been adopted in two states to date, other legislation is necessary as well.\textsuperscript{160}

The federal Uniform Electronic Transactions Act (UETA) governs electronic signatures, as well as other e-commerce transactions that are not covered by, or in

\begin{footnotesize}
\begin{enumerate}
\item[155.] See Distance Selling Directive, \textit{supra} note 104, at art. 4(1).
\item[156.] \textit{Id.} at art. 4(2).
\item[157.] See Owen, \textit{supra} note 105, at 658.
\item[158.] See \textit{id.} at 658-659.
\item[159.] Owen, \textit{supra} note 105, at 653.
\end{enumerate}
\end{footnotesize}
states that have not adopted, UCITA.\textsuperscript{161} UETA allows for the formation of a contract where an electronic signature can be attributed to a party "if it can be shown in any manner, including use of a reliable security procedure, that it was the act of that person."\textsuperscript{162} As of March, 2001, UETA is widely accepted, having been adopted by the District of Columbia and some 36 states.\textsuperscript{163} In 2000 and 2001, nine other states introduced UETA legislation: Colorado, Connecticut, Illinois, Massachusetts, Missouri, New Jersey, Oregon, Vermont and Wisconsin.\textsuperscript{164} UETA differs from UCITA in that the former governs all electronic "transactions" and, therefore, does not deal directly with the substantive issues involved with electronic contracts.\textsuperscript{165} UCITA, as discussed above, does deal with the substantive contractual issues involved in computer information. Furthermore, UETA only applies if the parties agree to use electronic commerce with regard to the transaction in question.\textsuperscript{166} UCITA automatically applies unless the parties expressly opt.

E-Sign

Another piece of legislation also deals with electronic signatures.\textsuperscript{167} The Electronic Signatures in Global and National Commerce Act (E-Sign) was signed into law on June 30, 2000 and went into effect on October 1, 2000.\textsuperscript{168} E-Sign mandates that all electronic contracts relating to transactions in or affecting interstate or foreign commerce be given the same legal force as if they were written: "A signature, contract, or other record may not be denied effect, validity or enforceability solely because it is in electronic form."\textsuperscript{169}

While E-Sign is an example of Congress' application of its broad powers under the Commerce Clause of the U.S. Constitution, it does not pre-empt state laws (e.g., UCITA and UETA) that can modify, limit, or even supercede its provisions.

\textsuperscript{161} See Cunard & Coplan, supra note 83, at 1049-1050.
\textsuperscript{162} Id. at 1049. UETA, supra note 160, at § 9.
\textsuperscript{163} The 36 states are: Alabama, Arizona, Arkansas, California, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia and Wyoming. See Cunard & Coplan, supra note 83, at 1050.
\textsuperscript{164} See id.
\textsuperscript{165} See Nimmer, supra note 146, at 619.
\textsuperscript{166} See UETA, supra note 160, Prefatory Note at 2.
\textsuperscript{168} See Cunard & Coplan, supra note 83, at 1051.
\textsuperscript{169} E-Sign, supra note 167, at § 7001(a)(1).
EU APPROACH TO ELECTRONIC SIGNATURES

Electronic Signatures Directive

The EU Electronic Signatures Directive (Directive 1999/93/EC) marks the EU’s approach to the regulation of electronic signatures. The stated aim of this directive is to “create a harmonised and appropriate legal framework for the use and legal recognition of electronic signatures within the EU.” The Directive requires that member states enact legislation that affords legal recognition to “electronic signatures that are based on a ‘qualified certificate’” so long as they were “created by a ‘secure-signature-creation device...’” While a contract that fulfills Article 5 is per se valid, other contracts are not necessarily invalid. The EU Directive deals with future technologies in the same way as UCITA (as mentioned above). The EU Directive does not require a specific type of technology, but allows for technological adaptation that fulfills the secure-signature-creation requirement. Certification Service Providers (CSPs) will provide the service of fulfilling this requirement. In turn, “CSPs will be liable to anyone who relies upon an issued certificate.”

FUTURE OF ELECTRONIC SIGNATURES

The future treatment of electronic signatures regulation is likely to continue on the same track as current trends. That is, technology has taken the lead over legislation further than legislation has restrained or guided technology. The EU Electronic Signature Directive is an example of this relationship. The Directive utilizes the technology available, while remaining flexible to accept future technologies, to ensure that electronic contracts can be given the same evidentiary standing as traditional contracts. Technologies such as secure-signature-creation and the forethought to allow commercial CSPs to turn electronic contract verification into an industry are signs of future legislation. The type of adaptation that UCITA and the EU Directive explicitly allow for will provide room for future, more secure, and reliable technologies. While the EU Directive allows for non-EU CSPs to offer their services within the EU, there are no international agreements for global acceptance of such electronic contract verification. A multilateral convention or international consortium outlining standards for the global recognition of CSPs would support e-commerce growth on a larger international scale.

171. Owen, supra note 105, at 654.
173. See Electronic Signatures Directive, supra note 170, at art. 5.
174. See Breward, supra note 91, at 422.
175. Owen, supra note 105, at 655.
E-COMMERCE TAXATION

A consumer pays taxes when she purchases goods from a traditional retail outlet. States can generally levy taxes on interstate activity if such taxes only have an indirect burden on interstate commerce.\(^\text{176}\) They can easily justify collecting these taxes when the purchase was made within the governmental entity's jurisdiction. But, what happens when a Colorado resident visiting New Mexico purchases a good from Amazon.com? Furthermore, what are the tax consequences when a consumer from London sitting in a Japanese airport purchases a pair of Italian shoes from a French company via a web-site that is hosted in Spain, and the shoes are to be shipped from Portugal? There are several options available to governments in assessing the appropriate tax regimes.

U.S. APPROACH TO E-COMMERCE TAXATION

ITFA and ITNA

Currently, the U.S. has in place a moratorium on new or discriminatory Internet taxation.\(^\text{177}\) The Internet Tax Freedom Act (ITFA), which mandated a three-year moratorium on new Internet taxes, was set to expire in October, 2001.\(^\text{178}\) Following the terrorist attacks on the U.S., Congress rushed to extend ITFA and the Internet Tax Nondiscrimination Act (ITNA) was passed in November of 2001.\(^\text{179}\) ITNA extended ITFA until November 1, 2003.\(^\text{180}\) While the federal government has adopted a wait-and-see approach in regards to Internet taxation, state governors have explicitly lobbied for the power to tax e-commerce transactions. Forty-two governors had sent letters to Congress opposing ITNA or its equivalent as of September, 2001.\(^\text{181}\) States fear that they will lose sales tax revenues as consumers choose to purchase goods via the Internet and avoid paying state sales taxes.\(^\text{182}\) Currently, Internet transactions are taxed in the same manner as catalog sales – based on physical presence.\(^\text{183}\) This has motivated corporations like Amazon.com to locate, and in some instances relocate, distribution centers to states with small populations like Delaware, Georgia, Kansas, Kentucky, Nevada, and North Dakota.\(^\text{184}\) Many traditional companies with a physical presence in each

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176. See, e.g., United States Glue Co. v. Oak Creek, 247 U.S. 321, 326 (1918).
177. See Cundard & Coplan, supra note 83, at 1069.
180. See id.
183. See generally Get a Grip!, supra note 5.
184. See id.
state where they generate transactions are losing ground to low-overhead, non-tax-
burdened, e-commerce firms. "Governments can hardly expect bricks-and-
mortar companies to continue to pay taxes on the same sort of transactions that go 
untaxed with e-commerce companies."

**Quill v. North Dakota & the Uniform Act**

The Supreme Court, in *Quill v. North Dakota*, reaffirmed its position on state 
taxation: "[i]n the absence of some nexus of the vendor to the taxing state, no state 
can *compel* collection of its sales tax by an out of state vendor without 
authorization from Congress."

While a state cannot *compel* out of state firms to collect its sales tax, vendors 
can voluntarily do so. The Uniform Sales and Use Tax Administration Act 
(Uniform Act) is an attempt to motivate out of state companies to collect state sales 
tax. One incentive proposed in the Uniform Act is the use of "certified service 
providers" or "trusted third parties." Another incentive is that states would pay 
to have these entities, which would automatically collect and remit appropriate 
taxes, incorporated into a vendor’s e-commerce system. A further proposed 
temptation is to grant participating firms immunity from sales and use tax audits 
arising prior to participation.

**Streamlined Sales Tax Project**

An additional attempt by states to entice out of state vendors to collect sales 
taxes for e-commerce transactions with in-state consumers is the Streamlined Sales 
Tax Project (SSTP). Over thirty states have agreed to join the SSTP, which 
undertakes to simplify state sales tax systems and make it easier for e-commerce 
companies to collect taxes through the use of available technology. As with the 
Uniform Act, states would pay for the implementation of tax-collection systems.

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185. See *Get a Grip!*, supra note 5, at 18.
186. *Id.*
187. *Cunard & Coplan*, supra note 83, at 1070 (emphasis added). See also *Quill v. N. Dakota*, 504 
188. See *Cunard & Coplan*, supra note 83, at 1070 (emphasis added). See also *Quill*, supra note 187, at 298.
189. See *Cunard & Coplan*, supra note 83.
190. *Id.*
191. See *id.*
192. See *id.*
193. See *Structure and Operating Rules, Streamlined Sales Tax Project, adopted March 30, 2000, 
available at* http://www.streamlinesalestax.org (last visited Feb. 26, 2003). See also *Hardesty*, supra 

194. See *List of Participating States, Streamlined Sales Tax Project, adopted March 30, 2000, 
195. See *Multistate Tax Commission, Public-Private Sector Study of Cost of Collecting State and 
One SSTP proposal that could have a place in the solving of the international taxation question is the use of a centralized registration system. Vendors would register in each state, leaving states to allocate appropriate funds to each municipality within the state helping to minimize the 7,500 tax municipalities in the U.S. alone. 196

Bumpers' Bill

While Quill bars states from requiring out of state vendors to collect sales and use taxes without Congress' authorization, and it appears that the only options discussed so far rely primarily on the generosity of e-commerce companies, there is hope. After Quill, "Congress, is now free to decide whether, when, and to what extent the States may" make such regulation. 197 Senator Dale Bumpers introduced the Tax Fairness for Main Street Business Act of 1994 (the Bumpers' Bill): "[t]he Bumpers' Bill authorized the states to require interstate use tax collection, protected affected companies against unreasonable compliance burdens and insured that state governments distributed the appropriate amount of resulting revenues to their local jurisdictions." 198

While Congress failed to pass the Bumpers’ Bill, it is an example of possible future legislation that would create a more level playing field.

EU APPROACH TO E-COMMERCE TAXATION

Taxation in the European Union introduces unique issues. With 15 different nations, there are 15 different theories on the proper role of taxation in the political economy. 199 For example, states such as France and Sweden are heavily entrenched in a welfare state system requiring large amounts of funding which is supplied in the form of taxation. 200 Other nations are based on less welfarist regimes. In Europe, a Value Added Taxation (VAT) scheme is the norm. 201 At nearly 25%, the tax rate is much higher than normal U.S. sales taxes, promising to cause difficulty for any attempt at tax rate convergence.

198. Horn, supra note 182, at 44.
199. See European Union Website, supra note 55.
EU vendors of electronically delivered goods and services are required to affirmatively collect VAT. Until recently, non-EU companies were not required to register and collect this tax. Instead, business purchasers have been required to 'self-assess' their tax burden while non-business buyers were not required to pay VAT for electronically delivered goods and services at all. The result was similar to that of the Internet moratorium in the U.S. and, as in the U.S., many government officials and traditional firms have plead for a leveling of the playing field. Under a new set of rules applicable to the European VAT system, a revised comprehensive definition of services includes those delivered electronically and, as such, many non-EU companies have begun to collect VAT, as they will be required to do starting in July, 2003. The taxation of goods delivered by traditional means are already "governed by the existing import regime, under which VAT is collected when goods are imported into an EU country from outside the EU."

FUTURE OF E-COMMERCE TAXATION

Nations have competed for direct investment and trade since before World War I. Recent trends toward an increasingly globalized political economy have increased awareness of the need to remain competitive in order to successfully fend off capital flight. Nations have lowered environmental standards, labor regulations, and taxation levels. A regulatory race-to-the-bottom is underway. As with environmental and labor standards, taxation levels will need to be artificially sustained through international agreement. "Countries must unify conflicting tax laws to effectively tax e-commerce." An international taxation consortium is appropriate to ensure "international equity, efficiency, neutrality, international acceptance, and simplicity." The initial stages of such a system will probably be seen within the EU, or even between the U.S. and the EU, and will likely take the form of a multilateral convention on taxation or international tax consortium to collect and disperse taxes.

204. See id.
208. Id.
Speculation on the future of e-commerce is difficult, and even more so, foolish. Legislation that attempts to restrict its continued development is futile as that very development will circumvent the regulation. Much more wisely, regulation should allow and foster continued growth of e-commerce. As pertaining to U.S. and EU regulation of electronic commerce, differing approaches have emerged in some areas while surprisingly similar schemes have been the rule in others. Both should work together to ensure that a regulatory race to the bottom does not ensue. In forging future international arrangements, the U.S. and EU should continue to weigh political autonomy and ideals of sovereignty with the need to remain competitive and protect their citizens in an increasingly globalized political economy. As such, jurisdictional, electronic contract, electronic signature, and e-commerce taxation issues will be best dealt with in concert. Multinational organizations like the United Nations are well suited to take on some of these concerns, while newly-formed consortiums with specialized knowledge, skill, and tools are more appropriate for technically complex issues, such as e-contracts and taxation.