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MYRES S. MCDOUGAL DISTINGUISHED LECTURE

Accountability, Asylum, and Sanctuary: Challenging our Political and Legal Imagination

RICHARD FALK*

I. THE MCDOUGAL PRESENCE

Professor Ved Nanda and others here at the University of Denver College of Law deserve our gratitude for establishing an annual lecture bearing the name of this country's most distinguished international lawyer, ever. It is especially impressive that we are moved to acknowledge Professor McDougal's distinction while he is still very much with us as a live, active force. Myres McDougal is a teacher and scholar of extraordinary range and power who has inspired by now several generations of students of the most diverse national, cultural, and ideological background. All over the world one finds influential individuals who can pass the McDougal loyalty test by reciting the 8 base values in their proper order no matter what their state of sobriety. Many of us who have been strongly influenced by the depth and character of McDougal's overall approach often disagree with the foreign policy implications drawn by the master himself, or by some of his more conservative disciples. No matter. Far stronger than these disagreements are certain shared features of the McDougal orientation: above all, a commitment to the creative role of law and lawyers in carrying out their professional roles in such a way as to promote the values at stake, an attachment to law as a process that works toward a humane society for all of its members; and a realization that the final normative test of adequacy for any legal system is the ways in which it deals with issues of justice and freedom, especially as pertaining to the status and rights of individuals.

I am confident that Professor McDougal would be enthusiastic about

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* Alfred G. Milbank Professor of International Law and Practice, Princeton University; B.S., Wharton, University of Pennsylvania; LL.B., Yale Law School; J.S.D., Harvard. This article is the text of the tenth annual Myres S. McDougal Distinguished Lecture in International Law and Policy, presented at the University of Denver College of Law in May, 1986, chaired by Professor Ved Nanda.

a conference theme devoted to issues associated with the flow of refugees across international borders. McDougal has always encouraged legal analysis at the cutting edge of societal process, in settings of fundamental choice, where clashes of interests and policies are at stake.

II. POSING THE PROBLEM

In general, increases in refugee flows express rising tides of distress in countries of origin. Individuals seldom cut their roots unless escaping from something — poverty, repression, the absence of opportunity. Of course, the pattern is not invariable. Individuals, even segments of a whole society, are sometimes lured by the image of a promised land elsewhere, and leave the country of birth to fulfill dreams and ambitions, and possibly merely a quest for adventure and change. But we think of such persons as immigrants, not refugees; that is, as individuals who have acted out of a discretionary spirit rather than in response to some sort of felt necessity.

There is one category of refugee that brings joy to the hearts of many — the deposed dictator who flees from his country of origin to escape prosecution, imprisonment, and possibly, execution. It is the one kind of refugee for which, in general, an increase in volume can be taken as a sign of ameliorating world conditions, a reflection of democratizing tendencies.

There are two important types of states in the world these days that have opposed preoccupations with walls — those that build walls to keep people within (Berlin Wall); those that build walls to keep people out (the chainlink fences and patrolled areas of U.S./Mexico border). Neither kind of wall is pleasant, although the conditions of daily existence tend to be more attractive for those who are walling others *out* because they want to enjoy the benefits of getting *in*. Often the experience of the homeland is vividly dismal, but the image of the promised land is romanticized and apocryphal. The film *El Norte* explores this reality, contrasting the magical lure of the United States (the land of the North) for poor, persecuted Guatemalans with the humiliating and disillusioning rite of passage undergone by an Indian brother and sister who act on this imagery of emancipation and go North, bypassing the wall intended to keep them out, but then finding a far more disquieting reality on the other side than they had anticipated.

Nevertheless, the admission of illegitimacy that accompanies a wall to keep people in is a far more humiliating expression of political impotence on the part of reigning authorities, as it involves holding captive one's own citizenry. Both kinds of walls are constructed to coincide with the outer limits of territorial sovereignty and are complementary expressions of unhappiness and despair in the world. Ultimately, overcoming the challenge of refugees is to work toward a world order system where neither kind of wall is needed, where freedom of movement is assured, and no one is either denied entry or held captive. Obviously, such a goal is remote in a world of gross inequality and unevenness with respect to

human rights and the material conditions of life. So long as sovereignty combines with inequality, the issue of refugees is bound to arise, especially under conditions of crowding relative to resources. That is, the invisible influence of population pressures is one important background factor that leads individuals to move from one society to another.

I would like this evening to focus on an aspect of this problem that arises when United States official policy admits one kind of dubious alien seeking asylum and expels another kind who has not satisfied our government that refugee status or asylum are warranted. The deposed dictator is a kind of dubious alien who comes here after plundering his homeland and is fleeing for safety, often accompanied by a retinue of followers and a pile of wealth. An ill-considered receptivity to such victims of history generated the inflamed atmosphere that produced the Iranian Hostage Crisis in 1979-81 and is again presented in a more ambiguous form by the 1986 arrival and actions of the Marcos family in the state of Hawaii.

The other cluster of issues arises when individuals manage to reach our country to gain safety, especially these days from the war zones of Central America, particularly El Salvador, and then by the operation of government procedures these individuals are ordered to be returned to their country of origin. In this setting, individuals and communities have been intervening to provide refuge by reestablishing the ancient religious practice and tradition of "sanctuary." When Churches and their congregations confer "sanctuary" they are interposing their bodies and lives between the government and these beleaguered individuals from overseas. The government has reacted by charging criminal interference with the implementation of "the law," by claiming, in effect, that only the state is entitled to determine who is entitled to qualify as a legitimate refugee.

III. EXPLORING THE ISSUE OF ACCOUNTABILITY AND ASYLUM

The struggle for human rights and political democracy has over centuries centered upon the struggle by social movements to impose limits on the exercise and abuse of power by rulers. The most dramatic step occurred in 1215 when the English nobility, joined by some farming elements, moved England to the brink of civil war in its effort to place limits on King John's ability through royal prerogative to tax and commit the country to war -- this was a dramatic step in the direction of establishing constitutional order, formalized in the Magna Carta. In retrospect, the overall process of limiting the state has not been fully successful, although the principle of hereditary dynasty has been widely challenged.

After World War II another important innovation was introduced: the defeated leaders of Germany and Japan were prosecuted and held responsible for crimes of state committed in their official capacity. Sovereignty was no longer a shield behind which an individual, whether Head of State or policy-maker, could hide and obtain immunity. One category of crime prosecuted was Crimes against Humanity, an innovation, that was restricted to patterns of behavior somehow connected with illegal

warmaking, but which could theoretically be extended to include abuse of one's own citizenry in times of peace. Those carrying out these prosecutions claimed at the time that they were creating precedents for the future that would govern the victors as much as those judged in defeat. These promises were reinforced by the unanimous adoption by the United Nations General Assembly of the Nuremberg Principles as constituting an authoritative expression of legal obligation.

As often is the case with revolutionary legal principles, the seeds of Nuremberg have sprouted in expected ways. The main seed has not taken root as anticipated — the states that dominate international society have engaged in activity that would appear to constitute crimes of state in the Nuremberg sense, and have refused even to consider establishing procedures of accountability to judge allegations against their civilian and military leaders. The state has shut tight the Nuremberg door, and does not even invoke notions of criminal accountability against its most bitter adversaries, or even risk such a taunt for propaganda purposes. Nevertheless, the notion that international law binds governments and their leaders has struck a responsive chord in the moral sensibility of modern society, and a variety of efforts have been made to fill the institutional vacuum created by the withdrawal of governments from the scene.

During the Vietnam War, the famous British philosopher, Bertrand Russell, established "a tribunal of distinguished citizens" to inquire into the legal, moral, and political status of the American involvement in Vietnam (late 1960s). In the last ten years or so, inspired by this model, the Permanent Peoples Tribunal (PPT) has been established with its headquarters in Rome, and operating within a constitutional framework set forth in the 1976 Algiers Declaration on the Rights of Peoples.

The PPT was brought into being by an Italian parliamentarian named Lelio Basso, claiming its authority through spontaneous creation by citizens and jurists from various countries, through the quality of its proceedings and publications, and by its willingness to stand apart from partisan East-West geopolitics. The PPT, quite significantly, investigated and denounced both the Soviet intervention in Afghanistan and the United States intervention in Central America. Beyond this the PPT considered a number of grievances against governments, policies, and specific individuals. It assessed, for instance, Indonesia's conduct in East Timor, Armenian allegations of Turkish genocide in 1915-16, and Marcos' repressive rule in the Philippines. The proceeding was held in a third country. The accused government was invited to participate but never has, the defenses available to the accused government were put before the Tribunal, but perhaps not in a completely satisfactory manner. The Judgment of the Tribunal is not the outcome of a criminal proceeding against individuals, but is rather, in effect, a validation of a prospective criminal indictment, based on evidence of governmental wrongdoing.

We are now in the midst of two further dramas — the insistence by the new leadership in Haiti and the Philippines that Duvalier and Marcos face up to their crimes of state — and in Marcos' case that the property

plundered be returned. With apparent reluctance, France has accepted Duvalier, U.S. has accepted Marcos, (although it has sought a more serene place of asylum for the former Filipino leader, but without either any show of willingness by Marcos or receptivity by foreign governments.)

We extradite lesser criminals, but offer the prospect of a lavish life style to deposed dictators. Marcos, in a monumental display of imprudence, held a party for 1000 guests in Hawaii shortly after his U.S. arrival, inviting a reaction of fury by those victimized by his 15 years of plundering rule, but unlike the Khomeini government in Iran, the Aquino leadership has not played upon Marcos' criminal culpability during his period of Filipino rule.

In the case of Marcos and the Shah, the U.S. Government shielded rulers whom it has earlier supported, and even helped to remain in power. In the case of Iran, the CIA facilitated the disruption of the constitutional process by facilitating Mossadegh's overthrow in 1953; to many Iranians, even those outside the religious movement, the decision to admit the Shah was interpreted as a refusal by Washington to accept the outcome of the Iranian revolution. This interpretation enabled Ayatollah Khomeini to mobilize enormous popular enthusiasm about the retaliatory seizure of the American Embassy and the holding hostage of those of more than 80 Americans associated with the diplomatic facility. Such a development became an ordeal for those held hostage and for the United States generally. It revealed the anti-American fury that lay at the base of the Iranian revolutionary process. These events unfolded in reaction to the American grant of asylum, but they might have occurred in any event.

The Fernando Marcos case is quite different in many respects. True, he was our man in Manila, yet his ascent to power was perceived to be based on his own capabilities, including a ruthless attitude toward adversaries. Furthermore, the United States distanced itself from some of his abuses of state power and opposed his retention of power at the end in the face of a manifestly fraudulent election, mass civil disobedience, and large-scale mutiny in the armed forces. The United States was less implicated, and also had given to the Philippines a kind of political independence after World War II. What is more, by removing Marcos to this country at the time of deepening crisis, the United States enabled the transition to Aquino leadership without bloodshed, a major contribution to the new order in the Philippines dedicated to social justice and political democracy. What is more, the U.S. Government seems to be cooperating in the early efforts to impose accountability on the Marcos family for its vast economic plunder during its period of autocratic rule. This cooperation has taken various forms, including giving over evidence, freezing assets, and allowing the new leadership to pursue their claims in our courts. Of course, separation of powers here means that the courts are substantially free to determine their own rules of procedures, and those pose large obstacles. There is a need for both an international convention and domestic legislation that mandates assistance from banks and other fiduciary entities to public claimants of assets expropriated during prior

periods of dictatorial rule. In the early period of Marcos residency, U.S. officials tried to arrange a less inflammatory place of asylum, exploring without success, the willingness of Panama, Spain, and others to give secure asylum. In the light of the experience after the Shah's admission the United States naturally associated political risks with granting asylum to a former friendly dictator deposed by angry, populist action. Developments in the Philippines, as well as in Haiti, and even Argentina, suggest that the anti-American backlash in Iran that followed upon the admission of the Shah (and was invoked to justify the seizure of the U.S. Embassy and hold hostage its residents for more than a year) was a special case rather than a general pattern.

That, then, is the proper approach for the United States to adopt toward the grant of "asylum" to deposed dictator? What is the best overall approach for the world community? It is a complicated matter: it is desirable to have beleaguered dictators leave rather than stay behind and fight in the belief that they have no alternative. Jacopo Timmerman during the last years of Argentinean military rule told me that "the ghosts of Nuremberg" kept the generals in place long after they lost the will to govern. It is difficult to assess the impact of the Argentinean trials of former officials on the Chilean dictatorships. It might provide Chile with relief from repressive rule if Pinochet could be offered attractive asylum somewhere. But where? Do we want to make this country a center for extremist exile movements and politics? Experience with Batista exiles from Cuba and Somoza exiles suggests the destabilizing impacts on the host country. Johnny Carson, although not normally acknowledged as a noted political analyst, had a practical proposal — establishing an international island haven called *Fled* where deposed dictators could live out their years in slumber, being punished by the disagreeable company of their former colleagues. My own view is that we need a flexible approach that balance the importance of personal accountability for crimes of state against the desirability of promoting peaceful and rapid transitions to democracy. In effect, a case-by-case approach based on Executive discretion.

From the viewpoint of potential asylum-granting country that priority be given to peaceful transition, as was done in the instance of Marcos, but once the transition has occurred, or it is evident that it will not be democratic in any event, then it is important not to poison relations with a successor government by protecting a former tyrant from efforts to inflict punishment for crimes of state. Here, too, the issues are confused, and no rigid set of guidelines will suffice. A country should neither want to insulate a former ruler from inquiry and even prosecution for former wrongs, nor to deliver such a person to a legal process that offers no reasonable prospect of due process. Such a dilemma is made more acute if the former ruler acted in a repressive and dishonest manner, and yet was a close ally. This situation is made even more serious if the asylum country has been perceived by the new leadership as having practiced interventionary diplomacy that led to the installation of the displaced leadership in past years. All these elements were present in the aftermath of

the Shah's fall from power, as well as efforts by special banking interests and by such influential figures as Henry Kissinger and David Rockefeller to push for the Shah's admission, partly to provoke the crisis that ensued. Only by a crisis between post-Shah Iran and the United States did those with heavy credits gain the leverage needed to collect their debts. Perhaps, it would be helpful to draw a general distinction between *provocative asylum* to be avoided and *constructive asylum* to be granted, although in a specific instance a delicate judgment may be required.

In general, while accountability is important, the possible adverse consequences of refusing asylum in some instances seem paramount. Hence, the prospects of accountability should be subordinated at this stage of international relations whenever a grant of asylum contributes to a peaceful transition. It remains an option to impose responsibility *symbolically* by a legal process held in the country where the individual committed crimes of state. Furthermore, it should be a strict policy that the asylum state limit the activities of a deposed leader and his entourage (i.e. avoid *provocative asylum*) by forbidding the practice of exile politics. The asylum state could also extend friendship and aid to a new leadership that seemed committed to democratic governance and the restoration of human rights.

There are some additional issues. It is important to refrain from intervention in foreign societies on behalf of dictatorial political forces. The relation of the CIA to such rulers as the Shah and Pinochet creates resentment and suspicions on the part of democratic forces. If the United States renounced such covert operations on behalf of dictatorial rule the whole issue would largely disappear. Finally, there is a problem connected with counter-democratic movements that bring reverse considerations into play. Suppose that Ms. Aquino is deposed by military forces and is placed in a position of seeking asylum. In such a political setting, the grant of asylum would be appropriate even if it had some adverse repercussions on bilateral relations. Further, the considerations that militate against exile politics in the instance of a deposed dictator work in reverse if the deposed leader has been committed to democratic practices and human rights. Such "discrimination" is not meant to endorse pro-democratic intervention as a matter of foreign policy.

IV. SANCTUARY, CONSCIENCE, AND LAW

It might seem as if dealing with the vulnerability of the weak should be simple . . . or is it? In a world of mass poverty, ethnic persecution, and ideological strife, grounds of persecution are numerous and severe. The humanitarian case for easy admission of the persecuted seems strong, but so are the problems. The U.S. already feels its integrity and prosperity threatened by a flood of immigrants, many of whom are illegal. Furthermore, by granting asylum from persecution or conferring refugee status we pass a kind of judgment on the foreign government that may undermine foreign policy efforts to support that government. As might be expected during the period of Cold War, refugee laws have been loosely ap-

plied in relation to those who flee Communist rule because we seek to emphasize and manifest disapproval, and are rigidly applied in relation to anti-Communist regimes because we have not wanted to erode their claims of legitimacy, or to lessen grounds for support.

The issue of Sanctuary Movement represents an extremely determined attempt to wrest the initiative away from the State on these issues of rights of entry in a context of unusual harshness. The main context arises from official policies that have led to the return of refugees by deportation to Guatemala and El Salvador in circumstances where they face hardships and severe punishments and abuses. In effect, citizens relying on religious tradition challenge the monopoly of legal authority over issues of admission and exclusion. Ever since Antigone defied the Theban ruler Creon by burying her brother slain in battle has the issue of individual conscience and tradition versus state authority been posed in Western civilization. This issue is posed by civil disobedience and conscientious objection to unjust laws, as well as by performance of so-called "Nuremberg Actions."

Religious institutions have a particular role in acting as guardians of conscience and sacred tradition. The state, especially beneath the banner of national security, has come to exert unconditional claims over the obedience of its citizenry. More than ever before, even in democratic countries, we need the ethical safety valve provided by upholding the prerogative of churches to offer sanctuary to aliens threatened with dangerous and harsh deportation. In a sense, I am arguing for the other side of the separation of church and state, that the state respect a domain of conscience defined by the assertion of judgment by duly constituted religious bodies.

Of course, here too the general principle needs to be qualified by various special circumstances of application. It is not unimaginable that some churches would extend "sanctuary" to fascist and other anti-democratic elements, or to those seeking to avoid legitimate prosecution for crimes in their country of origin. The limits of sanctuary seems like an appropriate question for judicial assessment, but only within a context that acknowledges legitimate scope for grants of sanctuary based on the reasonable belief that the individuals involved face risks of persecution or severe hardship is forced to return to their country of origin.

There is, of course, room for extravagant claims, but all human arrangements are subject to abuse. These alleged concerns at this stage are mainly disguised forms of opposition to any derogation from the concentration to authority in the state. It is fair to inquire why should governments lose some of their authority over immigration policy. The broader constitutional issues here are several: establishing effective mechanisms for protecting human rights; restoring popular sovereignty and the role of the citizenry; de-centering political and legal authority. In the background is a search for greater internal balance between state and civil society, a search that reacts to the steady accretion of power at the governmental center of state power that has occurred over the decades. Sanc-

tuary is a creative embodiment of our earliest constitutional vision of "checks and balances" and it offers our society a way to moderate the exercise of power by government through the privileged inter-position of conscience validated by formal action of religious communities, as well as through taking account of spiritual considerations in the formulation of public policy.

V. CONCLUSION

The argument of this lecture has been a simple plea: to establish constitutional governance, given the expansion of state power and the uneven pattern of its application in context of entry and exclusion by those of foreign origin, we require considerable legal innovation, especially if, in the spirit of Myres McDougal, we regard the overarching mission of law to be the promotion of values associated with human dignity. Translating this generalized sentiment into practice at the doctrinal level suggests several policy conclusions. We need to strengthen procedures for personal accountability arising from alleged crimes of state by foreign leaders through national and international action. Additionally, we require a flexible doctrine of asylum that is sensitive to humanitarian issues, to the diplomatic conditions for positive international relations, and to the grievances of foreign societies against leaders who have been guilty of gross abuses of power. And finally, we need to give constitutional protection to principled practices associated with the provision of sanctuary to individuals threatened with deportation in circumstances where genuine risks of persecution and hardship exist. These complementary norms are designed to accommodate complex and contradictory issues bearing on whether entry or exclusion is the appropriate stance.

In dealing with the special, somewhat unusual, problems of deposed dictators exceedingly sensitive issues can be involved, especially here in the United States where the dictatorial regime has often been treated as a friend during its period of political tenure. One suggestion made here is to draw a distinction based on circumstances and probable effects between constructive and provocative asylum, and if a controversial former dictator or autocratic ruler is admitted, then his activities should be constrained to avoid provoking a successor government, especially if it frustrated in its efforts to apprehend a former ruler for prosecution. Even provocative asylum may be justified if the practices of the new government represents a deterioration of respect for human rights and democracy. However, such interpretations will be lacking incredibility if manipulated to reflect the geopolitical alignments of the Cold War.

As part of a process of domestic readjustment, it is necessary to reconsider United States policies and practices that encourage the emergence of dictatorial rule in foreign countries. To the extent this encouragement has become known, it has aroused strong anti-American resentment. In this regard, covert operations in particular and interventionary diplomacy in general have damaged the reputation of the United States as a friend of democracy and a promoter of human rights. It is a

matter of reassessing national interests so that the United States will not be regarded as the natural adversary of nationalist movements in the Third World.

Although it is difficult to document, there seems to be a connection between structures of oppression and recourse to desperate strategies of violent resistance, including various forms of terrorist practice. If we seek to break the connection we must as a political actor take human suffering seriously, both at home and abroad. Such a moral perspective underlies what I have had to say on these diverse issues of asylum for deposed dictators and protected entry for endangered aliens.

The law needs, in my judgment, to be guided by this understanding of the moral foundations of political order. It is time to associate the grant of asylum, the option of sanctuary with questions of suffering and the reduction of violence rather than with the abstract, and often misleading, calculations of geopolitics and ideological rivalry. Of course, there are gray areas where judgment is required and errors can occur, as when it becomes necessary to balance the claim of a deposed dictator for asylum and that of an aggrieved people for personal accountability, or to assess whether granting asylum is necessary to induce abdication and the avoidance of civil strife.

In the end, all those with the power of legal decision are encouraged to wrestle with the normative challenge of promoting the values of human dignity in a realistic and effective manner, but with a bias toward decentralist and grassroots solutions (sanctuary) and a skepticism about statist claims to dispose of issues of moral and political choice.

ARTICLES

Glasnost and Perestroika: An Evaluation of the Gorbachev Revolution and Its Opportunities for the West

HAROLD E. ROGERS, JR.*

I. INTRODUCTION

The Russian Bear is stirring from a long winter's nap, and to the surprise of the western world, is showing a new, friendly smile. The reason for the changed appearance, according to its new masters, is the effect of glasnost (openness) and perestroika (restructuring) now sweeping Russia. These changes are so broad and fundamental that they stir world speculation and hope that the cold war may be ending.[1]

The principal author of these changes is Mikhail Gorbachev who, in March, 1985, became General Secretary of the Soviet Communist Party.[2] Since his appointment as Party General Secretary, Gorbachev has startled the world with a dazzling succession of new plans and proposals aimed at slowing the arms race[3], democratizing Soviet society,[4] reforming

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* Harold E. Rogers, Jr. is an attorney practicing in San Mateo, California, a graduate of Stanford University (majoring in History) and of the Stanford Law School. For this article, Mr. Rogers has drawn on his personal observations and conversations in the Soviet Union during travels there in 1971, 1982, 1985, 1987, and 1988 and upon a variety of personal meetings in the United States in recent years with Soviet diplomats posted to the Soviet Consulate in San Francisco, and upon recent research conducted at Stanford University and its Hoover Institution.

1. *See* TIME, July 27, 1987, at 12.

2. After waiting patiently in the wings following the death of his mentor Yuri Andropov in 1984, Gorbachev on March 10, 1985, at age 54, was named General Secretary, within 24 hours of the death of Andropov's successor, Konstantin Chernenko. By April, 1985, the Central Committee had put its preliminary stamp of approval on Gorbachev's far-reaching proposals for opening Soviet society and restructuring its economy. It was obvious from the rapidity with which Gorbachev consolidated his position after Chernenko's death, that his plans had been formulated and his key allies selected well before his succession to the top Soviet post. *See generally* William G. Hyland, *The Gorbachev Succession*, 63 FOREIGN AFF. 800 (Spring 1985). *See also* C. SCHMIDT-HAUER, GORBACHEV—THE PATH TO POWER 112-114 (1986).

3. For an outline of his disarmament proposals *see* M. GORBACHEV, THE RESULTS AND LESSONS OF REYKJAVIK (1986).

4. In a speech to the Central Committee on January 27, 1987, Gorbachev discussed his

its long stagnant economy, and restoring Soviet influence in the world. While many in the West are applauding the fresh new winds emanating from Soviet Russia,[5] others are speculating that with a less menacing demeanor and in a more conventional western manner, Gorbachev could prove to be a far more dangerous threat than his predecessors.[6] To paraphrase the American Bolshevik admirer John Reed, the Russian Revolution created by Gorbachev[7] is "shaking the world," and because of its implications and opportunities for the West, deserves to be examined in some detail.

II. ECONOMIC REFORM

A. *Background*

The centerpiece of perestroika in the Soviet Union is economic reform.[8] The utopian promises of Marx and Lenin[9] have not materialized.[10] Gorbachev and his supporters recognize that the Soviet economy has reached a pre-crisis state and that unless fundamental, far-reaching

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proposals for democratizing Soviet society, including the replacement of incompetent leaders at the top with an influx of new faces, and secret ballot elections of local officials and factory bosses. Pravda and Izvestia, January 28, 1987, at 1-5; *The Current Digest of the Soviet Press*, XXXIX, No. 6., 1987, at 8-10.

5. British Prime Minister Margaret Thatcher, upon the occasion of Gorbachev's first visit to Britain in 1984 remarked: "I like him. We can do business together." SCHMIDT-HAUER, *supra* note 2, at 8.

6. Moscow News, July 19, 1987, at 6, reporting on an article by Egon Bahr, in the West German magazine *Vorworts* (No. 24).

7. John Reed, an American journalist sympathetic to Lenin and the Bolshevik revolution of 1917, wrote an account of the revolution entitled TEN DAYS THAT SHOOK THE WORLD. He is buried in the Kremlin wall in Moscow. *See* Moscow News, *supra* note 6, at 13.

8. In his newly published book Mikhail Gorbachev has outlined the historical development and application of restructuring in the Soviet Union, in amplification of the detailed outline of his new economic program set out in his June 25, 1987, speech to the Central Committee. M. GORBACHEV, PERESTROIKA—NEW THINKING FOR OUR COUNTRY AND THE WORLD (1987).

9. For a very readable account of the life and writings of both Marx and Lenin see J. K. GALBRAITH, THE AGE OF UNCERTAINTY (1977).

10. The promise of Communism as portrayed by Marx and Lenin is that if workers take control of government, and free from exploitation, supply all man's economic requirements, class conflict will cease and government will wither away. Marx postulated that there would first be required a dictatorship of the proletariat (workers) who would overthrow the exploiting bourgeoisie (capitalist class). Initially there would be socialism during which workers would be paid in accordance with their contribution ("to each according to his work") Ultimately when material wants were satisfied, a state of communism would ensue in which each worker would contribute according to his ability and receive according to his needs. Jealousy and competition would presumably disappear, along with the achievement of plenty provided by the new economy. Socialism required that the government (workers) would own and control the means of production to prevent exploitation of workers by the bourgeoisie owners of capital. *See* J. BARRON, KGB TODAY—THE HIDDEN HAND 10 (1983). In contrast to today's reality, the Twenty Second Congress of the Communist Party in 1961 declared that by 1980 the Soviet Union would achieve the utopia of true communism. Little is heard about this boast today.

changes are made, Russia will continue to fall further behind the West in almost every measure of economic development, technology, standard of living and military.[11] In addition, since Communism is becoming an evident failure at home, it is increasingly difficult for the Soviets to sell it as the wave of the future to third world and other countries.

Gorbachev recognizes likewise that more than cosmetic changes will be required—that the problems are endemic to the system. Since the Communist Party rulers have invested their entire political capital in the sanctity of Marxist-Leninist theory and its Stalinist legacy as the ultimate scientific truth about the behavior of society and the economy,[12] enormous skill in theory[13] and politics will be required to orchestrate a credible about-face in the thrust of the Soviet economy without simultaneously creating a political revolution.[14]

Because of the long totalitarian tradition beginning with the early Czars and Russian princes, and continuing with the Communists, changes in the Soviet Union have quite often been accomplished by violence, including assassination.[15] Through draconian measures, including terror im-

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11. For an excellent discussion of the general economic problems facing Gorbachev, see M. Goldman, *Gorbachev and Economic Reform*, 64 FOREIGN AFFAIRS 56 (1985). A particular problem of the Soviets with their centrally planned economy has been their failure to master the new high technology sweeping the world. Since the life cycle of many new products is only two or three years, by the time the Soviets have learned a new process, it often is already obsolete. *Id.* at 58.

12. Professor Richard Pipes of Harvard argues that among the ruling elite in the Soviet Union (the "nomenklatura," some 40,000 strong), there is a nostalgia for the order and discipline of Stalinism. Over the years these ruling party members have maintained their power and privilege by fear and strict control (through the KGB and its predecessors), and through aggressiveness and threats of war. Democratization will thus require the nomenklatura to give up power. Gorbachev must overcome this legacy of fear and control to free creative energies of the Soviet people. *See* R. Pipes, *Can the Soviet Union Reform*, 63 FOREIGN AFF. 47 (1984). *See also* Ford, *The Soviet Union: The Next Decade*, 62 FOREIGN AFF. 1137 (1984).

13. A. N. Yakovlev, orchestrator of Gorbachev's international publicity for glasnost and recently appointed by him to the Politburo, set out the guidelines for the change in theory in a report published in Pravda, April 18, 1987: Our task today ". . . involves enriching Marxist thought at a qualitatively new stage of world development and constantly renewing and upgrading our world outlook . . . Lenin . . . summarized . . . natural sciences at the beginning of the century. It is our duty to collectively develop Marxist-Leninist teaching just as dynamically, keeping in mind that the amount of information available now doubles every 20 months as opposed to 50 years in K. Marx's times. . . We need to be aware that no one has a monopoly on truth in either raising new questions or finding answers."

14. Following Khruschev's speech to the Central Committee in 1956 attacking Stalin and his brutality, a democratic Hungarian regime declared itself independent of the Warsaw Pact. And after duplicitous reassurances from Russia, Hungary's efforts to achieve freedom were snuffed out by Soviet tanks and troops sent in to overthrow the new government and to quell the rebellion. *See* BARRON, *supra* note 10, at 7. Likewise in 1953 following Stalin's death, riots occurred in East Germany.

15. Ivan the Terrible and Peter the Great are accused of personally eliminating political enemies. Czar Paul I, son of Catherine the Great, was assassinated in 1801 in favor of his son Alexander I when he displeased the ruling Boyar class. In 1825 the Decembrists (a revolutionary group opposed to the harsh policies of Czar Alexander I and his brother and suc-

posed by secret police and slaughter of kulaks and appropriation of their farms, Stalin created his socialist-industrial dictatorship.[16]

Changes as fundamental as those proposed by Gorbachev, while not portending the terror or bloodshed of earlier eras, do carry with them severe risks to the Soviet regime itself; among them are loss of Marxism-Leninism, loss of moral power among Soviet citizens, and loss of control over the Socialist world.[17]

B. Gorbachev's Call For Change

1. Generally

Gorbachev was a known reformer when he assumed office in March, 1985. Under the tutelage of Yuri Andropov among others, his rise from humble beginnings in Stavropol at the base of the Caucasus Mountains, to Moscow and the Politburo was swift.[18] Following Brezhnev's death in

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cessor Nicholas I), were caught and executed or exiled in accordance with the degree of their participation. In 1905 the palace guards of Nicholas II massacred peacefully petitioning citizens led by Father Gapon to the Winter Palace in Leningrad. The ensuing uproar finally led Nicholas to create the First Duma, an advisory legislative body. The Duma was in turn abolished (1918) by the Bolsheviks through armed threat, following the abdication of Nicholas II in 1917. *See generally* B. PARES, A HISTORY OF RUSSIA (1965).

16. So pervasive was the use of mass terror to accomplish reform, particularly during the Stalin era, that by some estimates some 20 million innocent Soviet citizens were annihilated in prisons and forced labor camps. *See* W. CORSON & R. CROWLEY, THE NEW KGB—ENGINE OF SOVIET POWER 41 (1986). Stalin is alleged to have said "One man's death is a tragedy; 10,000 deaths is merely a statistic." *Id.* Alexandre I. Solzhenitsyn confirmed the brutality in THE GULAG ARCHIPELAGO 435-439 (1973). Based on reports of prisoners who presumably witnessed the events or were in a position to develop accurate information, Solzhenitsyn estimates that in the 16 month period between June, 1918 and October 1919, more than 16,000 persons were shot (more than 1,000 per month, compared to about 10 executions per month during the peak years of the Inquisition in Spain (1420-1498) by burning at the stake. During the period of NKVD chief Yezhov's purges of 1937-1938, execution by shooting increased to more than 500,000 political prisoners, plus 480,000 habitual thieves. According to other Solzhenitsyn sources, 1,700,000 condemned prisoners had been shot by 1939.

17. A realist, Gorbachev is said to have proclaimed to visiting rulers of the Communist satellites during the recent 1987 November Communist celebration that Moscow is no longer the center for world communism and that each communist country is on its own and must tailor its own policy. China, Yugoslavia and Rumania, have been following such a course for some time. While Polish leader Wojciech Jaruzelski has become an ideological ally of Gorbachev, hardline leader Erich Honecker of East Germany and Gustav Husak of Czechoslovakia are lukewarm, and Rumania's Nicolae Ceausescu is clearly opposed to Gorbachev's new ideas. The Hungarians under Janos Kadar experimented with their economy for two decades. *See* Szulc, *How East Europeans View Gorbachev's Reforms*, San Francisco Chron., August 12, 1987, at C-5.

18. *See generally* SCHMIDT-HAUER, *supra* note 2. Under Andropov's wing Gorbachev became a candidate member of the Politburo in 1979, and a year later became a full member, six months before his 50th birthday. This rapid ascension was startling in view of the fact that the average age of Politburo members at that time was over 70. *See generally* Breslauer, *The Nature of Soviet Politics and the Gorbachev Leadership*, in THE GORBACHEV ERA: THE PORTABLE STANFORD 11-29 (Dallin & Rice eds. 1986).

1982, Andropov was elected his successor, but soon fell ill. Gorbachev, as his crowned prince, appeared to independently take over Andropov's duties during his illness in order to continue the momentum for reform, particularly against alcoholism[19] and corruption, started by Andropov.[20] When Andropov died on February 9, 1984, there was speculation that Gorbachev might become his successor. The old guard, however, had been alarmed by the Andropov reforms, and felt the pace of change should be slowed. It felt safer with Chernenko, who was too old and frail even at that time to make any dramatic changes.[21] As a result of the wholesale sacking of Party officials in Andropov's campaign against corruption, the old guard and its proteges where frightened and anxious about their tenure, privileges, and benefits.[22] In addition it feared that any sudden changes might lead to loss of control, a weakening of planning, and a host of other unpredictable consequences if Gorbachev were allowed to assume power at that time.[23] To credit his political skills,[24] Gorbachev was willing to make a deal with the older generation and wait a while longer, until Chernenko finally died on March 10, 1985 of complications resulting from emphysema.[25]

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19. Alcoholism, always a serious social problem in Russia, seemed to become worse as workers faced increasing hopelessness of bettering their lot through increased personal efforts. BARRON, *supra* note 10, at 12. It has been estimated that as many as 40 million Soviet citizens are alcoholics. US NEWS AND WORLD REPORT, Oct. 19, 1987, at 36. Murray Feshbach of Georgetown University estimates that urban families in the Soviet Union spend nearly the same proportion of their weekly budget on alcohol as American families do for food. Gorbachev was shocked to learn that government tax returns on liquor sales grew to 169 billion rubles (about $253 billion) in the 11th five year plan period, from only 67 billion rubles in the 8th five year plan. Moscow News Supp. No. 27, p. 7. Also it was reported recently in the Soviet press, that the government battle against alcoholism has extended to a crackdown on illegal home distilling of moonshine. San Francisco Chron., *supra* note 17, at 91.

20. SCHMIDT-HAUER, *supra* note 2, at 91; BARRON, *supra* note 10 at 18, gives examples of wide-spread corruption. In one case, local newspapers in January, 1983 reported the trial of Stanislav Ivanov and 14 conspirators who allegedly embezzled millions of rubles by registering a nonexistent factory and collecting wages for 515 phantom employees over a three year period. Bribes and kickbacks kept officials quiet. *Id.* at 21.

21. According to Harvard professor Richard Pipes, the Soviet leadership and the party evolved into a self serving privileged class which became parasitic and "Corrupted by privilege and peculation, it [had] lost, since Stalin's death, any sense of service or obligation, whether to the ideal of communism or to the nation; it so [dreaded] any change in the Stalinist system, from which its power and privilege largely derive, that it [chose] ever weaker secretaries as Party leaders."Pipes, *supra* note 12, at 49-50.

22. *See* US NEWS AND WORLD REPORT, Oct. 19, 1987, at 36.

23. As it turned out, some of their worst fears were soon to be realized.

24. Zdenek Mlynar, a Czechoslovak Communist and law school classmate of Gorbachev's in the early 1950's regards him as a person with great political skill to have survived the Brezhnev years while still retaining his independence and outspokenness. Said Mlynar: "If he could live under Brezhnev for 18 years with these exceptional ideas and then come to the top, that's proof that he is a man who knows what steps he can afford to take." San Francisco Chron., Nov. 7, 1987.

25. SCHMIDT-HAUER, *supra* note 2, at 97. At the time of Chernenko's death, three of the ten Politburo members were away from Moscow. The remaining members gathered together

Moving quickly on his agenda for reform, before the end of 1985, Gorbachev had removed 16 of the Soviet Union's 64 ministers and had replaced about 20 percent of all local Party officials. Four months after his ascension, his champion Gromyko was moved out of the foreign ministry and pushed upstairs to become Head of State. His rivals Grishin and Romanov were quickly forced into retirement. Truly, he was demonstrating his passion for restructuring and "his teeth of iron," so aptly described by Gromyko.[26]

The principal outline of Gorbachev's proposals for economic reform began to emerge almost immediately following his ascension in speeches before the Central Committee and to various interest groups within and from outside the Soviet Union.[27]

2. Speech to the Central Committee, June, 1987

In a major address to the Central Committee on June 25, 1987, Gorbachev provided the details of his economic proposals, and sought and received Committee approval for his extensive program.[28] He outlined his proposals as follows:[29]

a. *Outline of Proposals*

1) Factories and amalgamations are to be given substantially greater independence, and will
a) be converted to full profit and loss accounting,
b) become self-financing, and
c) have increased responsibility for end results, including direct link-

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at about 10:30 PM, less than three hours after he had died. Gorbachev's leading opponent Grigori Romanov of Leningrad proposed Viktor Grishin, the 70 year old party chief of Moscow, as the new General Secretary. But Foreign Minister Gromyko countered by successfully arguing in favor of Gorbachev, to be seconded by KGB chief Viktor Chebrikov. The next day with only 200 of 300 representatives of the Central Committee Plenum in attendance, the Politburo choice of Gorbachev was ratified. At the party Plenum, Gromyko described Gorbachev as a man with a nice smile, but "he has teeth of iron." After his election, opposition to Gorbachev collapsed. *Id.* at 112-114.

26. *Id.* at 114, 115, 120.

27. On January 27 and 28, 1987, at a plenary session of the Central Committee, Gorbachev delivered a report on the draft U.S.S.R. Law on the State Enterprise. Copies of the draft had previously been circulated among committee members for review. During his report Gorbachev noted that the April, 1985 session of the Committee had initiated restructuring. *The Current Digest of the Soviet Press*, Vol. XXXIX, No. 4, Feb. 25, 1987, at 1, 2. Steps toward reform were discussed with U.S. Congressional leaders in Moscow on April 15, 1987. *See* Pravda, April 16, 1987.

28. MOSCOW NEWS, No. 28 (Supp. 1987) (hereinafter MN Supp. No. 28). The Gorbachev address was printed in Pravda on June 27, 1987. Virtually all statements in this section have been drawn from the Gorbachev speeches delivered to the Central Committee, whether or not specifically documented, and represent Gorbachev's characterizations of the state of the Soviet economy, and proposed solutions. These statements take on significance in that they were endorsed by the Central Committee and were delivered to party members, rather than being generated for propaganda purposes for the western press.

29. MOSCOW NEWS, No. 27 (Supp. 1987) at 8 (hereinafter MN Supp. No. 27).

ing of income to work performance
2) Centralized command and control will be radically reduced.
a) Central planning bodies are not to interfere in the day-to-day activities of subordinate economic units.
b) Management is to become more democratic and self administering.
3) Planning, pricing, financing and crediting will be reformed, including
a) transition to wholesale trade, and
b) reorganization of foreign economic activities.

b. *Justification For Program—Weakened Economy*

To justify the radical new programs to his comrades on the Central Committee, Gorbachev painted a rather grim picture of the Soviet economy. Restructuring is necessary, he said, because of accumulating contradictions in the development of Soviet society. Such contradictions, which have remained unsolved, have assumed "pre-crisis forms."[30]The Soviet economy as it entered the 1980's was in a state of virtual stagnation.[31] This dire state of affairs, brought tension and turmoil in national finances.[32]

Production growth assignments were not met, according to Gorbachev, during the past 3 five year plans. Wages substantially exceeded plan budgets. Due to shortages of everything—metal, fuel, cement, machinery and consumer goods, together with a chronic shortage of manpower,[33]—it became clear that the economy would not be able to develop

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30. *Id.*, at 1. Quotations are from and references are to the speech reported in Supp. No. 27, unless otherwise stated.

31. "We began to concede one position after another, and the gap in production efficiency, output, quality and in technology as compared with the most developed countries began to widen." "The desire to shore up declining growth rates by extensive methods brought exorbitant outlays for the fuel and energy branches and the hasty commitment of new natural resources to production, their irrational use, an excessive growth in demand for additional labour, and an acute shortage thereof in the national economy, with a decline in the out-put-per-asset ratio." *Id.* at 7.

Gorbachev's assessments are generally consistent with statistics derived from Western intelligence sources. Although Soviet per capita consumption nearly tripled between 1950 and 1970, it was only about one third the U.S. level, and less than half that of France and Germany in the late 1970's. Soviet per capita consumption growth rates averaged about 3.4% annually from 1950, but slowed to less than 2% in 1981, and to under 1% in 1982. *See* G. SCHROEDER, SOVIET LIVING STANDARDS: ACHIEVEMENTS AND PROSPECTS 367, 368; SOVIET ECONOMY IN THE 1980'S: PROBLEMS AND PROSPECTS, Part 2, Selected Papers (Joint Economic Committee, Congress of the United States, December 31, 1982) cited as *Joint Economic Committee*. Despite periodic shortages of food throughout the Soviet Union, roughly 25% of its labor force is employed in agriculture. By contrast, the U.S. so employs only 3.4% of its labor force, yet has a continuing problem of excess production. BARRON, *supra* note 10, at 12, 13.

32. "Outwardly everything looked fine" (in the State budget). But the budget was balanced not by increasing economic efficiency but by extensive selling of oil and other fuel and raw material resources on the world market. MN Supp. No. 27, *supra* note 29, at 7.

33. Labor shortages are likely to become more acute in the future. Between 1964 and 1980, the mortality rate in the Soviet Union increased almost 50% from 6.9 deaths to 10.3

normally. The housing industry failed to meet demands,[34] as had industries producing consumer goods.[35] Gorbachev admitted that a shadow economy had emerged to provide for unmet consumer services.[36]

He expressed alarm that the U.S.S.R. had begun to lag in scientific and technical development during a period when Western countries had begun large-scale restructuring of their own economies. He confirmed that economic incentives necessary to raise quality and efficiency were not operating, and that this created fuel for inflation. Furthermore, hard currency earned from exports of oil and raw materials is not being used to modernize the economy, but to meet current needs. The Soviet economy is so bad, conceded Gorbachev, that revolutionary in-depth transformations are needed to get it out of the pre-crisis situation it is in.

Present management difficulties, he said, stem from the Stalin era, when the U.S.S.R. was attempting to pull its backward economy forward in the face of isolation from the capitalist world.[37] Dramatic strides in industrialization were made during the Stalin period.[38] Following adop-

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deaths annually per 1000 people, due primarily to poor medical care. Barron, *supra* note 10, at 10. In the past, Communist leaders had been able to show increases of production by adding more workers to the work force. However, recently declining population, particularly among the northern Russians, has deprived the economy of important necessary motive power which can be replaced only through innovation, efficiency and new technology. *See* Urban, *Perestroika versus Oblomov*, The Times (London), July 23, 1987.

34. Notwithstanding a housing shortage, Gorbachev asserts that there is unused housing construction capacity of about 20% in the country. Brickyards and building materials plants, he says, should be operated continuously and not be operated on half day shifts nor shut down on weekends.

35. "We need . . . more goods of better quality and wider range . . . service standards are low . . . there are many queues because the number of shops is . . . insufficient" MN Supp. No. 27, *supra* note 29, at 7. Studies conducted in 1982 found that a typical Moscow worker must labor 53.5 hours to provide a family of 4 with basic groceries needed for a week, while comparable work time in Washington would be 18.6 hours, and in London, 24.7 hours. BARRON, *supra* note 10, at 12. These figures cited by Barron are slightly misleading because of government subsidies and the relative cost of housing, utilities and recreation for Soviet citizens is substantially lower than comparable costs in the West.

36. The Central Statistical Board estimates that 1.5 billion rubles (about $2.25 billion) is paid annually by Soviet citizens for such services in the shadow economy. "Let us call a spade a spade and stop feigning innocence. Individual enterprise has always existed in our economy. Illicit, underground, the black economy, call it what you like . . . . This phenomenon has assumed a mass scale. We are not introducing individual enterprise, we are just giving this practice civilized and organized forms . . . We are legalizing individual enterprise, and introducing a system of taxation and elements of planning to it." Interview with Lionid Abalkin, Director of the Institute of Economics at the U.S.S.R. Academy of Sciences, in New Times (Moscow), July 20, 1987 at 3.

See H. SMITH, THE RUSSIANS 106-134 (1976) for a very readable account of how the shadow or counter economy works.

37. "The foundations for the present system of management were laid down . . . in the 1930's. In that difficult period our country, which was far from the most developed economically and which was up against the whole capitalist world, needed to rapidly overcome the technic-economic lag and to bring about quick structural changes in the national economy." MN Supp. No. 27, *supra* note 29, at 7.

38. Gorbachev states that in the pre World War II period, gross industrial output grew

tion of the five-year plans beginning in 1928, the number of industrial workers tripled over the next twelve pre-war years. Sixty percent of the national income was redistributed through the State budget. Great resources were channeled into heavy industry. A highly centralized, rigid, over-regimented management system was devised to direct these changes in the economy. Such a system permitted the Soviet Union, according to Gorbachev, to achieve strategic tasks which took capitalist countries decades to achieve. But, over the years this system has clashed with the requirements of modern economics including the technological revolution, emphasis on quality and the consequence of social conditions. Although since the 1950's attempts to change the management system were made, such efforts were short lived.[39] The prevailing system thus continued to stifle rather than to stimulate the economy.

c. *Proposed Solutions and Benefits of Changes*

The solution to the problem, according to Gorbachev, is more socialism combined with greater democracy. What we are planning, he said, does not weaken socialism, but rather will strengthen it, and remove barriers holding it back.[40] The most difficult challenge, is to create under socialism more powerful stimuli than those of capitalism, which will promote economic, scientific, technological and social progress. In addition, Soviets must learn how best to blend planned guidance with the interests of the individual and society.

The worker must become the real master of the workplace.[41] Income

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6.5 times and the Soviet Union moved from fourth to first place in Europe and to second in the world.

39. The seeds of change were beginning to be sown upon the death of Stalin. Khruschev made efforts to revitalize the economy, boasting to then Vice President Nixon in the late 1950's at a Moscow trade fair: "We will bury you." Khruschev instituted a disastrous effort to improve grain harvests through a "virgin lands" policy by plowing up new lands which added little to grain production.. FODOR'S SOVIET UNION 1985 103 (1984). He attempted other reforms but without sufficient political skills, stepped on too many toes and in 1964 was deposed. *See also* US NEWS AND WORLD REPORT, *supra* note 20, at 42. Andropov, upon the death of Brezhnev in 1982, made a determined effort to crack down on bureaucratic corruption and alcoholism, but died too soon to effect any substantial changes. Chernenko was too frail and old to initiate any major reforms before his death in March 1985, little more than a year after taking the helm of the Soviet Communist Party.

40. The changes will bring out the immense potential of socialism and "lend it the most modern forms. . .socialism should not be seen as an ossified, unchanging system, or the practical work to refine it as a means of adjusting complex reality to fit ideas, notions and formulas adopted once and for all." "We should strive after Lenin's ability to creatively develop the theory and practice of building socialism, adopt scientific methods. . ." MN Supp. No. 27, *supra* note 29, at 8.

41. [This] "means giving collectives and individual workers broad possibilities to manage public property and increase their accountability for how efficiently it is used." ". . . man with his real interests and motives is central to our economic policy. . ." "We must realize that the time when management consisted of orders, bans and calls has gone . . . such methods can no longer be employed for they are simply ineffective." *Id.* at 8. Under the new enterprise law ". . . the actual pay of every worker [should] be closely linked to his

of working people should be geared to individual performance. The criterion for performance and material rewards should be whether the enterprise will help meet peoples' vital needs and help eliminate the shadow economy.

Under the new price and credit system, the market is to be "won and controlled in accordance with its laws. . ." Competition is central to activating the forces of socialism. There should be competition between government-run and cooperative factories. The winners should be rewarded with tangible economic benefits. This, he said, "is in line with the principles of socialism. . . ." There should also be competition in science and technological development.[42]

Gorbachev noted that the present Soviet economic system has suffered from an inherent weakness of internal stimuli for the proper development of the enterprise.[43] Under the new program, the factory itself, guided by public requirements, will draw up its own production and marketing plans. The plan will not be based on detailed targets handed down by superior agencies, but rather on commercial orders placed by state agencies, by enterprises operating on a self-supporting basis, and by trading establishments. Factories should compete economically to meet consumer demand and state contract orders should be awarded, as a rule, on a competitive basis.

Planning target figures should serve as a guide to the factory regarding the social need for products. Such figures should not serve as directives and thus shackle the work collective in drafting its plans.

Factories should pay their own way. From their own revenues and profits, they should cover their current expenses, including wages and salary, make investments for modernization and increased capacity, and pay for social amenities for their collectives. State budget funding will only be used for important state tasks. Factories will be allowed to draw bank credits. They will make payments to the state for interest on credits, land, water, manpower and other basic resources. Supplies to factories will no longer be provided by central authorities but rather from wholesale trade, to be paid for from earnings. Work collectives individually should determine all production matters at their factories, including election of their top managers.

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personal contribution to the end result, and that no limit be set. There is only one criterion of justice: whether or not it is honestly earned." *Id.* at 11.

42. ". . . Experience has convinced us that monopoly for individual organizations is a serious drag on scientific and technological progress. . ." *Id.* at 8.

43. "A factory is given production quotas and resources through a system of directive-like indices. Virtually all costs are covered and the marketing of products is effectively guaranteed . . . workers' incomes are connected poorly with the end result of work . . . (In this situation) manufacturers find it disadvantageous to use cheap . . . materials and unprofitable to improve product quality and apply research innovation. Under such an economic mechanism, the line between effective and systematically lagging enterprises is virtually erased." *Id.* at 8.

Gorbachev recognized that excess labor will be a necessary by-product of the changes, particularly with the resulting scientific and technological progress.[44] Part of the surplus labor forces will be absorbed into expanded public service, education, medicare, recreational and cultural jobs to be created. The dislocations must be handled with due regard for workers' rights.[45]

He also touched on the critical problem of bankruptcy.[46] If a factory has been mismanaged and cannot make guaranteed payments to the state or payments for labor, aid can be provided initially from a bank or the industrial branch of which the failing enterprise is a part. If there is no improvement, the enterprise can be reorganized or terminated; in such circumstances, the state should help dismissed workers find new jobs.

d. *Providing A Theoretical Base For Changes*

Gorbachev recognized the need for a solid theoretical underpinning to his bold initiatives, to keep at bay his detractors who would argue that he was abandoning the precepts of the fathers of Socialism.[47] Both Marx and Lenin, said Gorbachev, had early practical experiences in analyzing the problems of society and in developing theories for building socialism, but over the years basic socialist principles have been oversimplified and corrupted, and this has resulted in negative influences on the Soviet economy.[48]

Management of the economy has mistakenly been attempted by decree and resort to enthusiasm[49], Gorbachev asserted, we have tended to

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44. It is anticipated that some 16 million workers might be displaced by the end of the century. US NEWS AND WORLD REPORT, *supra* note 19, at 38.

45. We must pay close attention to the rearrangements, and ". . . ensure social guarantees for employment of the working people, for their constitutional right to work." MN Supp. No. 27, *supra* note 29, at 9. It was reported that the Politburo has approved plans for a government-run placement service and for greater unemployment benefits to ease the shock of job losses expected under the economic reforms. About half of all government ministry jobs are to be terminated by 1990. San Francisco Chron., Nov. 20, 1987, at A31.

46. According to recent Pravda reports, 13 percent of Soviet state-owned businesses are unprofitable and may be closed under the new economic reforms. San Francisco Chron., Aug. 20, 1987, at 14.

47. We need a "real breakthrough on the theoretical front . . . a scientific substantiation of the aims and prospects of our movement." MN Supp. No. 27, *supra* note 29, at 2.

48. "[Our] task now is to make a profound analysis of the practice of socialist development, the wealth of experience accumulated by us." In making "the transition to full profit-and-loss accounting, to remunerate according to the end result" the socialist principle of "from each according to his abilities, to each according to his work" was often sacrificed in the name of a simplified concept of equality. "Equality does not mean levelling off" (i.e. paying similar wages to all). This, states Gorbachev, has " generated sponging, negatively influenced the quality and quantity of work and reduced incentives to increase productivity". *Id.* at 2-3.

49. The Central Committee annually promulgates slogans to be used for May Day celebrations to whip up enthusiasm among Soviet citizens for party programs. Some of those promulgated for May Day, 1987, are as follows: "Toilers of the Land of Soviets! More broadly develop competition . . . Communists! Be in the vanguard of restructuring . . . Ex-

forget about Lenin's precepts that the growth of production can be ensured on the basis of personal interest[50] and material incentives. To demonstrate the validity of the gospel he was propounding, he lauded new, capitalistic family contracts that were initiated to help boost agricultural production.[51] Advantages of the contract system, utilizing small unused plots, are substantially lower costs and higher production, all of which benefit the community generally.

Although his reforms sound very capitalistic,[52] he does not see these new procedures as contradicting or corrupting socialism.[53] Socialism he said, is a system of working people for working people, which provides a high degree of social protection to the Soviet citizen. Work, and work alone should be the basis of a person's material and moral standing in socialist society. "Every encouragement should be given to creative, highly productive work, to talent, to real contribution to the common

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pand Soviet democracy and the Socialist self-government of the people!" *The Current Digest of the Soviet Press*, XXXIX No. 17 (May 27, 1987).

50. "[U]nshackled grass roots initiative and departure from over-organization and from excessive reliance on centralized management make it possible, with the same resources, to achieve a breakthrough in increasing food stocks." MN Supp. No. 27, *supra* note 29, at 5. He cites an example of workers on a farm collective in the Novosibirsk region of Siberia who say they were attracted "not only by high wages, but, in no lesser degree, independence, realization of their human significance, and pride that they are doing really useful work." MN Supp. No. 27, *supra* note 29, at 4.

51. He described a contract in which A. A. Volochensky, a state farm machinery operator is assigned 40 hectares of land, some calves and feed, and with the help of his family of four will produce 11 tons of meat. After reimbursing the state farm 23,000 rubles for rent, seed, fuel and other resources, the family business will retain wages (profit) of 8,000 rubles, about $12,000. This spare time return is substantial considering that the average Soviet citizen earns 200 rubles (about $300) per month ($3600 per year) at his regular job. Thus in comrade Volochensky's case, since both he and his wife work at the state farm and presumably earn about $7,200 annually between them, and with the help of their two children, who are students, they can more than double their family yearly income by their spare time livestock business. In another calf producing operation by a small group of workers, the average monthly wage per team member was 534 rubles (about $800) per month. "Gorbachev responds . . . there is nothing wrong with that because the money is for work, for real products. Let me ask: has this undermined the collective farm system? No it hasn't. . .So this is nothing other than socialism, effective, creative and labour-minded." *Id.* at 4-5.

52. Soviet economist Leonid Abalkin in the *New Times* interview, *supra* note 36, was asked whether capitalism and socialism were converging under the new economic program. He stated: ". . . there exist certain universal forms of social and economic progress . . . without competition any advance is unthinkable . . . the economy must be geared to the needs of the consumer. . ." It is on the producer's ". . . ability to meet consumer demand that the income of a self-supporting factory, the earnings of its collective and social welfare funds depend. What is this: capitalist competition or a manifestation of certain universal economic laws?. . .The difference between our society and capitalism lies not in the form, but in the social and class essence of production relations. What really matters is who reigns supreme in the country, who owns the means of production. I see no convergence here . . . As for the forms, we ought to adopt the best of them." *Id.* at 5.

53. "Rather, the old practice, when negligence in work was paid from the budget, corrupted the farmer." *Id.* at 4.

cause."[54]

e. *Democratization*

Democratization, according to Gorbachev, is the key to successful restructuring; this is in accordance with Leninist principles.[55] Revitalization cannot be successful without massive support of Soviet citizens. This in turn, can be achieved only through a general democratization of society.[56] Democratization in all spheres of life is expanding; it includes a cultural revival, and extends to science, literature and art. Soviet citizens are more keenly interested in the ethical problems of their society and want to know more about their country's past,[57] present and future. As a consequence of these positive changes in attitude, labor productivity and industrial output have increased noticeably during the last two years. Democratization affects all aspects of Soviet life. Soviet citizens "[n]o longer want decisions related to their interests to be taken without their participation, no matter who takes them." Party committees and state authorities must stay constantly in touch with public opinion and use it to verify decisions that they are about to make.

He recognizes that the new democratic procedure will not be easy for everybody.[58] Gorbachev sees democracy as a way of holding the feet of

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54. Perhaps in preparation for his speech on revitalizing the Soviet economy, Gorbachev and his advisors read T. PETERS & R. WATERMAN, IN SEARCH OF EXCELLENCE—LESSONS FROM AMERICA'S BEST-RUN COMPANIES 14 (1982). Among the authors' findings is that the most productive and profitable companies foster autonomy and entrepreneurship. One of the successful companies, 3M, was described as "so intent on innovation that its essential atmosphere seems not like that of a large corporation but rather a loose network of laboratories and cubbyholes populated by feverish inventors and dauntless entrepreneurs who let their imaginations fly in all directions. . .They encourage practical risk taking, and support good tries." *Id.* For a capitalistic view of factors leading to the renewal of business organizations, *compare* R. WATERMAN, THE RENEWAL FACTOR (1987).

55. Democracy according to Gorbachev, appears to be involvement of the masses in the decision making process, not necessarily through voting as we in the west think of it. Quoting Lenin, he says: "The more profound the change we wish to bring about, the more we must rouse an interest in and an intelligent attitude towards it, and convince more millions and tens of millions of people that it is necessary." MN Supp. No. 27, *supra* note 29, at 6.

56. "Comrades, I want to stress once again that our economic work, the reorganization in the national economy can be successful only if [it] attract[s] millions of working people. So it can be said that our course of fundamentally restructuring management actually merges with the course of further democratization and not only of economic life, but of the entire life of society. Progress in the economy and development of socialist democratization are indivisible." *Id.* at 7.

57. Gorbachev has laid the foundation for a correction of Soviet history books which had been tampered with, particularly during the Stalin years: ". . . there should be no forgotten names or blank spots in either history or literature. Otherwise, what we have is not history and literature but artificial, opportunistic constructs. . .The Party has spoken about the painful matters. We do not intend to portray them in a rosy light today. . .History must be seen as it is. Everything happened, there were mistakes—grave mistakes—but the country moved forward." *Current Digest of the Soviet Press*, XXXIX, No. 7 (1987) at 7.

58. "Some have difficulties with openness; others find it hard to accept criticism and unfavorable press reports, still others have come to believe that only their own opinion is

wayward public officials to the fire in order to bring about desired changes in the bureaucracy.[59]

He has made some bold pronouncements concerning the virtue of unfettered debate in a democratic society, and the need for changes in the Party control mechanism.[60] Though recent events demonstrate that there are limits to democratic expression in the Soviet Union,[61] and that the Party leaders are still feeling their way through the minefields of glasnost.

f. *Planning*

Gorbachev foresees a radical reformation of central planning in the Soviet Union.[62] He anticipates a greater role for economic contracts between enterprises to balance the economy.[63] The national economic plan should define basic priorities and objectives for the country's socio-economic development, trends in investment policy and targets for scientific, educational, cultural and defense capability. The plan should provide targets for the ministries and the republics and, over a 15 year period, should balance all major programs. Yearly goals should be set in the five-year plans.[64]

g. *Pricing*

Radical reform in pricing is contemplated. According to Gorbachev,

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'infallible?' " MN Supp. No. 27, *supra* note 29, at 6.

59. Such officials "understand perfectly well that they can talk their way out of it when brought to account by their superiors, but the people will hold them responsible in full measure." *Id.*

60. "To live and work in conditions of extended democracy means to have no fear of debates and of the collision of views and positions. All this is natural and essential in the quest for truth. . ." Under the new democracy, control mechanisms must change. Without giving up the predominant guiding role of the Party in Soviet society "We should master in full the Leninist principle of socialist control combining broad democratization with Party guidance. We regard people's inspection both as an efficient tool for detecting new issues which demand urgent solution and as one of the most important forms of bringing the masses into the process of self government, into running the affairs of society and the State." *Id.*

61. Particularly the highly publicized demotion of one of Gorbachev's supporters, Boris Yeltsin, former Party boss of Moscow for his outbursts at a Party gathering in which he decried the slow pace of restructuring. *See* San Francisco Chron., November 14, 1987. For overstepping the boundaries of glasnost in his enthusiasm to push reforms, Yeltsin was given a public dressing down by party leaders, led by Gorbachev himself, and the proceedings were given full coverage by the Soviet press. TIME, Nov. 23, 1987, at 34.

62. "It is an illusion to think that everything can be foreseen from the centre within the framework of such a huge economy as ours." MN Supp. No. 27, *supra* note 29, at 9.

63. The new "genuinely democratic centralism as Lenin understood it . . . possesses a far greater potential than centralism thorned by attempts to regulate all and everything." *Id.*

64. This planning process appears to be moving more closely toward our own in the United States where the President and Congress establish national long term goals through various legislative pronouncements, and then as a part of the budgeting process, particularly in military procurement, provide for expenditures over a multi-year period.

price must be an important stimulus for lowering costs, improving use of resources product quality, and in speeding up technological progress. Pricing has been geared to cheap natural resources. Existing low prices of coal, gas, oil and electricity keep an illusion of inexhaustibility of natural resources and promote increased production, consumption and export. Low pricing has resulted in rapid growth of subsidies.[65] Poor pricing has provided an unjustifiably high level of profit for many goods and does not contribute to efficient production. Those who understate prices have no incentive to increase output.

Pricing must be radically reformed to interconnect the entire price system—wholesale, purchase and retail prices together with tariffs. The price of the most important products must be centrally set as a part of the state plan. But the sphere of contract prices must be widened to promote economic independence. Wholesale price reform must promote higher production efficiency, resource savings and quality. Much work and discussion must ensue before the price system can be reformed and the new five year plan is prepared.[66]

h. *Wholesale Trade*

Wholesale trade will become more dependent upon direct contacts between suppliers and consumers, with the state playing only a regulatory role. The present system is wasteful and results in large stocks of commodities being stored. Wholesale trade would normalize stocks.[67]

i. *Finance and Crediting*

Gorbachev observed that the national economy is oversaturated with money[68] and that monetary funds are thus divorced from movement of material values. The ruble therefore does not fulfill its role of active financial control over the economy.[69] Cooperatives should be established to

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65. It has been estimated that to keep rents at 1928 levels and meat prices at those prevailing in 1964, the government must now pay annual subsidies of some $115 billion. US NEWS AND WORLD REPORT, *supra* note 19, at 38.

66. Soviet citizens have displayed anxiety about potential price reforms. For many years they have been used too low, highly subsidized basic commodities, not to mention housing and utilities. US NEWS AND WORLD REPORT, Oct. 19, 1987, at 37 As Gorbachev has observed however, the failure of the Soviets to permit the market to regulate prices has brought about shortages and waste. Polish citizens, socialist neighbors of the Soviets, are alarmed over the prospect of price reform in their country, fearing that price increases contemplated by the government may be beyond many family budgets. San Francisco Chron., Nov. 16, 1987.

67. There are complaints about shortages. However stockpiles of metals grow, observes Gorbachev. The surplus stocks are scattered around the economy. "Therefore the sooner we establish direct ties and embark on wholesale trade, the quicker we shall get rid of shortages in supply and of surplus stocks. . ." MN Supp. No. 27, *supra* note 29, at 10.

68. Excess money supply developed from 1971 through 1985, when the volume of money in circulation grew 3.1 times while consumer goods production only doubled.

69. "The national financial system has grown largely out dated." MN Supp. No. 27, *supra* note 29, at 10.

provide public services, and Soviet citizens should invest surplus funds in such enterprises. In addition, personal funds should be used to finance cooperative and individually constructed housing, as well as leisure and tourist facilities.[70]

j. *International Trade*

Gorbachev recognized that because of the vast size of the Soviet economy and the increasing interdependence of world economies, the Soviet union is increasingly linked economically to the outside world. The U.S.S.R. must deepen its participation in the international division of labor. External ties will impact the quality of Soviet products and the scientific and technological progress of Soviet industries through increased competition with world class products and technology transfers. In addition, Gorbachev foresees that restructuring will increase the integration of Soviet industries with those of other socialist countries.[71]

k. *Organization of Amalgamations and Enterprises*

New forms of business organization should be permitted to increase the efficiency of the economy. Labor has been wasted by irrational organization and lack of specialization. Switching to profit and loss accounting must be combined with allowing enterprises to form joint ventures and to provide for shareholding. Mergers should be permitted if dictated by economic expediency. Under the contemplated new conditions, enterprises can be expected to form all sorts of new organizations such as computing centers, social and environmental protection facilities, and transport and training schools.

Presently 37,000 industrial enterprises are controlled by the state plan, directly from the center.[72] The ministries should be relieved of operational economic management and concentrate instead on broad stimula-

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70. To some extent private savings are already being tapped to provide housing, particularly in instances where parents wish to assist their newly married children. Increasingly, Gorbachev's recommendations as to how citizens should utilize their savings would seem to open up vast possibilities of investment akin to capitalistic stock or bond holding. Perhaps socialist principles can remain untarnished if the government controls the amount of return payable for the use of capital. Such control however, would quite often be authorizing a subsidy for the user of the capital if he borrows below what would otherwise be market rates.

71. "We must study the experience of our friends closely and profoundly, and apply everything that can be used in the interests of the national economy of the U.S.S.R.." MN Supp. No. 27, *supra* note 29, at 10. The Hungarians have been experimenting with capitalism for at least several decades. In addition, the Soviets have been closely watching the economic restructuring going on in China in recent years.

It was recently reported that a U.S.-Hungarian institute will be established in Budapest for the study of capitalistic management techniques. San Francisco Chron., Nov. 15, 1987.

72. Marshall Goldman of Harvard's Russian Research Center estimates that Gosplan, the central planning committee which administers the economy, handles 7 million documents a year and makes 83 million calculations, most of them without the benefit of computers. US NEWS AND WORLD REPORT, *supra* note 19, at 36.

tion of new products, achieving world standards, and promoting science and technology. As a consequence, their large staffs can be reduced. As the economy is restructured, the roles and functions of state ministries will change significantly in order to help industries within their oversight to work out new forms and mechanisms. The U.S.S.R. State Planning Committee should concentrate on determining prospects for development, realizing fundamental and social tasks and insuring overall balance in the economy.

1. *Implementation of the New Program*

The Soviet Communist Party, with the assistance of the country's economic managers, will be responsible for implementing the reform. Gorbachev warned that unless managers behind restructuring are supported and those opposed are reassigned, reform will proceed with difficulty. Discussion of the new procedures is to take place at all Party levels. National progress on restructuring was reviewed at the 19th All-Union Party conference which began June 28, 1988. The principal reforms are to be in place as a part of the 13th, five year plan, beginning in 1991.[73]

In charging his communist cadres to spread the new gospel throughout the land, Gorbachev stated that a ground swell of support by the ordinary citizen is essential, to be achieved by prompt tangible benefits to the common man.[74] While tremendous hopes have been aroused, he says, the benefits of restructuring have not yet become evident to the masses. The Party must make sure that these hopes are effectuated by its leaders.

A principal roadblock to renewal and creativity, according to Gorbachev, is the conservatism, inertia, and selfish interests of the bureaucracy.[75] As a part of his campaign to pressure recalcitrant officials to get on-board with his program, along with encouraging the press to put pressure on laggards[76] and encouraging workers to participate in workplace elections, Gorbachev has adopted a practice of publicly criticizing responsible Party members for their failures.[77] A basic problem of change

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73. The June, 1987 plenary meeting of the Central Committee approved the Gorbachev sponsored "Guidelines for Radical Restructuring of Economic Management." He had proposed that they should become the Party directives for all work in that area and that the Supreme Soviet of the U.S.S.R. adopt the "Law of the U.S.S.R. on the State Enterprise (Amalgamation)" which he explained to the Committee in his address. Gorbachev expects that beginning in 1988, the new principles will apply to about two thirds of all Soviet industrial output and that transition to the new system will be completed by 1989.

74. "People should feel that perestroika is spreading, deepening and beginning to bear real fruit in all spheres of life and above all in what concerns meeting daily, essential needs of the working people." *Id.*

75. *See* US NEWS AND WORLD REPORT, *supra* note 19 at 36, 37.

76. *Current Digest of the Soviet Press*, *supra* note 57, at 7. "The press is called upon to be even more active, to give no rest to idlers, self-seekers, time servers and suppressors of criticism, and to more actively help those who are fighting for restructuring." "Criticism is a bitter pill. But the illness makes it necessary. You wince but you take it." *Id.* at 6.

77. Gorbachev provided examples to the Central Committee of national targets in cer-

at local levels is the historical predisposition to wait for commands to originate from above—a necessary side-effect of dictatorship.[78]

Time is running out warns Gorbachev: "That beautiful tomorrow" may not happen if everyone does not work today by the sweat of his brow, changing his way of thinking, overcoming inertia and accepting new approaches.

III. SOVIET TRADE OFFENSIVE

As a part of his efforts to implement restructuring of the economy, Gorbachev has launched a new foreign trade offensive. On December 8, 1986, some 50 top trade officials from the Soviet Union, headed by Minister of Foreign Trade Boris Aristov descended on New York City for the annual meeting of the U.S.-U.S.S.R. Trade and Economic Council. The Russians were joined by more than 250 American businessmen, largely chief executive officers of major American corporations interested in trading with the Soviet Union.[79] Among the American participants was Armand Hammer, chairman of Occidental Petroleum Corporation, and Donald Kendall, chairman of Pepsico. Both companies are heavily involved in trade with the Soviet Union.

The purpose of the December meeting was to continue the dialogue which had been initiated upon formation of the Trade and Economic Council in 1973, but at a more intense pace. Following the Moscow summit meeting between President Nixon and General Secretary Brezhnev in 1972, a number of accords were entered into in order to give substance to the new detente which had developed. Among them was the creation of the U.S.-U.S.S.R. Trade and Economic Council. Its purpose was to bring together leading American businessmen and heads of Soviet foreign trade, industrial, and service organizations on an annual basis. The Council

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tain industries which were not met. Serious miscalculations were made, but problems could have been foreseen and prevented. Primarily responsible were Comrade N. V. Talyzin of the State Planning Committee and other ministers named by Gorbachev. Armenia and its party boss Demirchyan, according to Gorbachev is showing ". . . totally unjustified tranquility" and "no effective efforts are being made against bribery, profiteering and protectionism." Similar problems exist in the Gorky region. In a veiled threat to improve performance, Gorbachev states: "It may be presumed that . . . party officials there (will) . . . draw conclusions from the criticism and put things right." MN Supp. No. 27, *supra* note 29, at 3.

78. "Many local officials show the most deep-seated parasitic attitudes. Even in cases when a minimum of effort and attention would be enough, officials keep shifting the burden onto the central authorities, and waiting for assistance from those higher up. Such an attitude . . . should be resolutely condemned. . ." *Id.* at 3. According to Arkady N. Shevchenko, Soviet Under Secretary General of the United Nations, who defected to the United States in the early 1980's: "Official Soviet pedagogy prescribed that independent behavior or thinking means above all the ability to understand orders and carry them out in the best way possible. What this means in practical terms is that any initiative which might go beyond established limits should be viewed as dangerous and suppressed." A. SHEVCHENKO, BREAKING WITH MOSCOW (1985).

79. *See The U.S.S.R. Trade Supplement*, The Journal of Commerce (Moscow) Dec. 8, 1987, at 10.

seeks ways to improve trade and cooperation between the two countries and, in so doing, facilitates the exchange of trade delegations, the conduct of seminars and joint scientific research, participation in trade exhibitions, and the conduct of joint scientific research. It also helps organize joint ventures and promotes the exchange of technology and products. The Council helps U.S. companies find Soviet partners and gives advice on how to deal with Soviet counterparts.[80]

At the 1986 Council meeting in New York, Trade Minister Aristov and his associates sought to capitalize on the thaw in Soviet-U.S. relations brought about by the Geneva and Reykjavik summit meetings between Gorbachev and President Reagan. They also sought to reinforce impressions in the West that the Soviets were truly changing their demeanor through massive restructuring of their economy and glasnost, and that they wanted to become full fledged members of the world community through trade,[81] including admission to GATT.[82]

During the course of the two days of official meetings (plus additional days of informal meetings to permit trading companies to conclude deals), the Soviets explained the new economic policies emanating from

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80. During the 1985-86 period the Council helped conduct in the Soviet Union some 70 scientific seminars sponsored by U.S. companies concerning agriculture, oil processing and drilling, tobacco, foodstuffs and other products. And in the same year, 16 Soviet trade delegations visited the United States. Furthermore, in 1986, Soviet foreign trade organizations and U.S. companies concluded some $1.8 billion in contracts. *Id.* at 34.

81. The West for many years has sought to use trade as a means of taming the Russian bear. In 1922 British Prime Minister Lloyd George said: "I believe we can save her [Russia] by trade. Commerce has a sobering influence. . . Trade, in my opinion will bring an end to the ferocity, the rapine, and the crudity of Bolshevism surer than any other method." H. SMITH, THE RUSSIANS 655 (1976).

82. *The Journal of Commerce*, *supra* note 79, at 25.

GATT (General Agreement on Tariffs and Trade) was initiated in 1947, following the post war failure of the U.S. proposed International Trade Organization. Twenty three nations met in Geneva, Switzerland and negotiated an extensive set of bilateral trade concessions which they incorporated into the GATT agreements. *See* P. T. ELLSWORTH, THE INTERNATIONAL ECONOMY 512 (1964). *See also* K. DAM, THE GATT LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970). Since then the signatory parties have met periodically to negotiate additional trade concessions.

They have adopted a set of rules to protect their rights and obligations. Meetings are to be held annually or oftener. The organization provides for a secretariat and a permanent Council of Representatives. Among the rules are the following: 1) trade is to be conducted in a non-discriminatory manner, 2) use of qualitative restrictions is condemned, and 3) disagreements are to be resolved through consultation.

To ensure against discrimination, the parties have agreed to apply the most favored nation principle to all import and export duties (each nation is to be treated as well as the most favored nation). Dumping and export subsidies may be countered by measures limited to the offending country. Customs unions or free trade areas are permitted if they do not raise barriers to the trade of other parties. Though import quotas are not allowed, countries confronted with balance of payments problems may use quantitative restrictions to forestall a serious decline in reserves. In addition, underdeveloped countries may apply quantitative restrictions to further economic development but only under GATT approved procedures. Import restrictions are also allowed under certain other conditions relating to domestic market controls imposed by the importing country. ELLSWORTH, *supra* note 82.

the Kremlin. They also engaged in joint bi-lingual study sessions with U.S. businessmen, their lawyers and other advisors, provided detailed discussions of the new joint venture law, and reminded Americans of the continuing impediments to U.S.-Soviet trade. Their efforts were well orchestrated to appeal to the sense and sensibilities of American businessmen, and their demeanor was business-like and free of propagandistic bombast. One of the benefits the Soviets are deriving from the Council meetings is the development of a high-powered American constituency for easing trade barriers which exist between the two countries.[83]

While launching the trade offensive, the Soviets, with the help of their American supporters, portrayed Russia as a potentially excellent trading partner.[84] Assuming that political and other problems can be solved, there is no doubt that the Soviet Union represents a large, relatively untapped market for American businessmen and politicians eager to reduce the mounting foreign trade deficit.[85]

IV. JOINT ENTERPRISES

A. *Background*

Among his proposals to restructure the economy, Gorbachev has called for new forms of economic and industrial organizations to permit the Soviet economy to become more efficient and benefit from world technology. In order to implement this aspect of his program, the U.S.S.R. Council of Ministers, on January 13, 1987, adopted a resolution permitting the establishment of joint enterprises in the Soviet Union with capi-

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83. In attendance at the meeting were not only the CEOs of major American corporations whose checkbooks and political influence are strongly felt in Washington, but also leading officials of the U.S. Department of Commerce, the Soviet Ambassador to the United Nations and Claiborne Pell, chairman of the Senate Foreign Relations Committee, the principal dinner speaker. In April, 1988, a delegation of more than 500 U.S. business leaders, headed by Secretary of Commerce Verity, traveled to Moscow for the annual Trade Council meeting and were hosted at dinner in the Kremlin by Gorbachev and the Politburo.

84. Considerable expansion of the Soviet economy is anticipated in the current 12th five year plan. Much of the expansion will require imports from abroad. Stressed will be the development of scientific and technological products in the areas of electronics, comprehensive automation, biotechnology, and nuclear power generation, as well as the development of raw materials. Computer hardware and software capacity is to be increased during the plan period 230%. Development of new metal and plastic materials is to increase 25%; machine building will increase 40-45% and investment in engineering is to increase 80%. There will be special emphasis on the development of Siberia and the Soviet Far East, in the search for and processing of new supplies of oil, gas and other natural resources, in the development of hydroelectric power, in completion of the BAM (Baikal-Amur) main railway line, and the new rail lines through Tommot and Yakutsk in Soviet Siberia. *The Journal of Commerce*, *supra* note 79, at 3.

85. Of the total present (1985) Soviet foreign trade turnover (exports and imports combined) of 141.6 billion rubles, the U.S. enjoyed only 1.5% of such trade. Presently the U.S. ranks 15th among Soviet trading partners in terms of volume. *Id.* at 11. Energy and fuel exports accounted for 52.8% of Soviet exports in 1985. By the year 2000, the Soviets expect to double their gross national product. *Id.* at 24, 29.

talist and developing country partners. Although the Soviet Union had, since the beginning of its history some 70 years ago under Lenin, entered into various joint venture arrangements with capitalists (particularly during the time of the New Economic Policy beginning in 1921) such arrangements were rare under Stalin. Following the rapprochement between the United States and Russia in 1972, a variety of limited joint venture agreements were entered into with Americans and others.[86] Notable among the ventures created were the development of a trade center in Moscow by the Soviets and Armand Hammer, an old friend of Lenin, and a marketing agreement with Pepsico.

The new Joint Enterprise (Venture) law[87] is part of a wide ranging restructuring of the entire Soviet economy and represents a well thought-out effort on the part of the Soviet leadership to tap, in a systematic and sustained way, the technology of the West to help revitalize the national economy.[88] Among its stated aims is to develop trade, economic, scientific and technical cooperation with the capitalist and developing countries on a stable and mutually advantageous basis.[89]

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86. Over the past 20 years the Soviet Union has entered into more than 50 licensing agreements with companies in capitalist countries. *See* article by Yuri Dryomov, Head of the Joint Ventures Department, U.S.S.R. Ministry of Foreign Trade, prepared for The Wall Street Journal, Aug. 24, 1987.

87. For a discussion of Soviet perspectives on this new law, *see* G. Zubov, *Legal Aspects of Improvement of Foreign Economic Activity of the USSR.* Paper presented to the Legal Committee, US-USSR Trade and Economic Council in New York (December 8, 1986).

88. Although the present joint venture law is new to the Soviets, the U.S.S.R. has had many years of experience in working with western capitalists, beginning with Lenin's New Economic Policy in 1921. It also has had the benefit of studying the successes and failures of other socialist countries in developing a joint venture program, particularly Yugoslavia, Hungary and China. The new Soviet law appears to have anticipated some but not all of the problems encountered by the Chinese who were years behind the Soviets in developing a modern legal system. *See*, H. Rogers, Jr., *Deterrents to Joint Venturing in China: A Look at Shanghai Real Estate Projects*, 8 EAST ASIAN EXECUTIVE REPORTS (July 15, 1986) (discussion of problems which have arisen in China under a similar law). Such problems included: 1) lack of confidence by westerners that profits will be adequate, 2) lack of capital security, 3) shortage of foreign exchange, 4) political risks, 5) lack of an adequate legal structure, 6) problems in valuing contributions, and 7) the high cost of doing business in China.

Similarly see comments and detailed recommendations made to the Soviets in papers presented to the US-USSR Trade and Economic Council on December 8, 1986, *supra* note 87: Shillinglaw, *New Soviet Decree Permitting Joint Ventures of Western Firms and the Experience of Western Firms with Joint Ventures in P. R. China*, and Hitch, *August 19, 1986 Soviet Decree Permitting Joint Enterprises between Soviet Organizations and Foreign Firms From Capitalist Countries—Recommendations to Avoid Practical Problems.*

89. Initial reactions among western businessmen to the new law have been guarded. Many feel that they need more assurances that they will be allowed to tap the large Soviet domestic market, and that clarifications will be provided with respect to presently vague provisions of the law regarding labor costs, reserves and other matters. The Soviets are putting the best face on the reception of their new program. Deputy Prime Minister Vladimir Kamentsev reported that by April, 1987, the Soviets had received 200 proposals for deals. Various U.S. companies have shown an interest. The Wall Street Journal, Apr. 6, 1987, at 20. By November, 1987 it was announced that Occidental Petroleum Company would enter into a joint venture including the Soviets and Italian and Japanese firms for the construc-

B. Formation[90]

To form a joint enterprise, the Soviet partner must present to its supervising ministry a copy of the proposed articles of incorporation or charter and substantiating technical and economic documents. Following clearance of the documents with the State Planning Committee, the Ministry of Finance and other concerned ministries or departments, the proposal will be submitted to the U.S.S.R. Council of Ministers for approval. The approving authorities will be guided in their review by the need of the country for the specific types of industrial output, raw materials, food products, equipment and technology proposed to be provided by the venture and its capability to help the U.S.S.R. develop its export base and reduce irrational imports.[91]

C. Participants, Property and Rights of the Venture

The Soviet partner must own at least a 51% share of the initial capitalization and may include one or more legal entities under U.S.S.R. law. The other partner likewise may consist of one or more foreign legal entities.

The venture will be a legal person under Soviet law, fully responsible to the extent of its assets for its own obligations, but not responsible for liabilities of the Soviet state or any of its entities. Conversely, the Soviet government is not responsible for the obligations of the joint venture. The enterprise may enter into contracts, acquire rights in property, sue and be sued. It must be financially independent. Its charter or articles of incorporation will define its objectives, composition of its participants, initial capitalization and governing procedure and will contain various other provisions governing the rights and duties of the participating parties. Upon approval and registration of the articles by the Ministry of Finance, the venture will become a legal entity.

D. Capitalization

Contributed capital may be in the form of money or property such as

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tion of a chemical complex to be built near the Caspian sea, valued at $6 billion. San Francisco Chronicle, Nov. 20, 1987. In addition Combustion Engineering had completed arrangements for a joint venture to provide control systems for oil refineries and petro-chemical plants. TIME, Nov. 23, 1987, at 57.

90. The January 13, 1987 resolution adopted by the U.S.S.R. Council of Ministers, was published in Pravda on January 27, 1987. Pravda, *On the Procedure Governing the Creation, on USSR Territory, and the Activities of Joint Enterprises With the Participation of Soviet Organizations and Firms of Capitalist and Developing Countries*, Jan. 27, 1987. *See The Current Digest of the Soviet Press* XXXIX, No. 6 (1987) at 15.

91. Ivan Ivanoff, the Deputy Chairman of the State Foreign Economic Commission of the Council of Ministers, stated that when applications for joint ventures were processed the government would take into account three goals: 1) to attract new technology and managerial experience, 2) to stimulate import substitution, and 3) to expand Soviet exports. Wall Street Journal, Aug. 24, 1987.

buildings, equipment, rights to use land, water or other natural resources and patents, technology or other property rights.[92] Contributions will be valued in rubles at contractually agreed-upon values, bearing in mind world market prices if applicable. Contributions of the foreign partner of property or goods will be exempt from customs duties. The property of the venture will be governed according to Soviet law and may not be requisitioned or confiscated by administrative procedures. Any Party to the venture may transfer its shares to third parties with the prior approval of Soviet authorities, provided that the Soviet partner will have the right of first refusal.

E. Dispute Resolution and Governance

Disputes between the venture and the Soviet state or its entities, or disputes between the joint venturers, are heard by courts of the U.S.S.R. or by consent in an arbitration court, either within or outside the Soviet Union, as determined by the partners.[93]

The governing body of the enterprise will be appointed by the participants, which will follow decision-making procedures provided in the articles. While the chairman of the board and general director of the enterprise must be Soviet citizens, general management may be provided by both Soviet and foreign citizens.

The venture will adopt its own business plan, free from interference of state agencies;[94] this, however, will not guarantee sale of its output.[95] The venture may independently conduct import and export operations through its own foreign marketing operations or through Soviet foreign trade organizations.[96]

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92. Yuri Dryomov observes that while adequately capitalized large corporations seeking joint venture opportunities in the Soviet Union have expressed concerns about creating a foreign subsidiary which would compete with the home corporation, small businesses, on the other hand, while possessing useful technology, often lack sufficient capital. The U.S.S.R. Ministry of Foreign Trade has explored the possibility of inviting certain foreign banks to provide needed capital to such small businesses in exchange for an ownership share. Dryomov, *supra* note 86.

93. Ivanoff, *supra* note 91.

94. However, the U.S.S.R. Ministry of Foreign Trade will provide general supervisory control over the joint venture. Dryomov, *supra* note 86.

95. To the extent that the Foreign Trade Ministry determines to make purchases of products from the joint venture, it will pay the going world market price. If the product is resold on the domestic market, the Soviet Government will price the product reflecting social goals. This might involve payment of subsidies, if products are resold domestically below cost. Mathias, *Turn Left Off Wall Street Into Red Square*, International Herald Tribune, July 22, 1987.

96. The joint venture will operate in foreign markets under a general license from the Ministry of Foreign Trade. For domestic trade within the Soviet Union, the joint venture will sell and be supplied through the appropriate Soviet foreign trade organization on freely contracted prices in competition with domestic producers. The competition is introduced deliberately to force Soviet domestic firms to produce more efficiently and with higher quality. *See* Ivanoff, *supra* note 91.

F. Finances

All foreign exchange requirements of the venture must be derived from sale of its products on the foreign market.[97] Sale of output on the Soviet market and delivery to the venture of raw materials and supplies from the local market[98] must be paid for in rubles.

The enterprise may borrow from the U.S.S.R. Foreign Trade Bank, or, with its consent, from foreign banks or firms[99] for its foreign exchange needs, or it may borrow from the U.S.S.R. State Bank or the Foreign Trade Bank if it requires a loan in rubles. Commercial terms may be negotiated. Interest will be paid on deposits made to the banks.

Reserves must be established by the venture to cover its operations and requirements for the social development of its labor collective. Profits available after payment of expenses and deductions to necessary reserves are distributed to the participants in accordance with their proportionate ownership. Foreign participants are guaranteed the right to extract their profits in foreign exchange.

G. Taxation

A tax amounting to 30 percent of the net income of the joint enterprise, following deductions for reserves[100] and research and development,

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97. Soviet financial planners are conservative and wary of incurring hard currency debt, and thus are unwilling to subsidize joint ventures with otherwise difficult to earn convertible or hard currency. A principal source of hard currency for the Soviets (oil revenues) deteriorated sharply after world oil prices dropped in the early 1980's. Also reserves have been used up to pay for necessary grain and food imports and to help Poland through the Solidarity crisis. *See* Joan P. Zoeter, "U.S.S.R: Hard Currency Trade and Payments" *Joint Economic Committee*, *supra* note 31, at 479.

Legal practitioners (e.g. Thomas Shillinglaw) have expressed concerns that the sections of the joint venture law dealing with foreign exchange requirements are overly restrictive. Although the law requires the venture to be self sufficient in foreign exchange (all foreign exchange needs must be derived from proceeds of export sales) such needs for a new venture can be substantial, considering required machinery, employee salaries, debt service, royalty payments for foreign technology and eventual dividend repatriation. A start up venture would have difficulty penetrating foreign markets quickly enough to cover operational needs. Ventures should be able to sell to domestic markets in the U.S.S.R. and convert ruble proceeds if the product sold, replaces what would otherwise be imported. Also ventures which produce foreign exchange surpluses ought to be permitted to sell its foreign exchange to those which are deficient.

98. Mathias, *supra* note 95. The joint venture may purchase raw materials and other supplies wherever it chooses.

99. Although joint ventures must finance their own operations, lenders are likely to look to the credit history of the Soviets, generally, in evaluating risks; the Soviet government has had an excellent repayment record of its debts. During 1986, western banks made nearly $4 billion in untied (general) loans to the Soviets. Total Soviet debt to western banks is now nearly $36 billion, up from $21.8 billion in 1984. To help finance their proposed new trade deals, the Soviets have indicated their desire to enter the Eurobond market and to seek membership in the World Bank and International Monetary Fund. *Editorial*, Wall Street Journal, July 23, 1987.

100. *Supra* note 92. Tax free reserves may be accumulated up to an amount equal to 25

is assessed by the Ministry of Finance. The venture is exempt from tax for the first two years of its operations. Tax appeal procedures are provided. An additional tax of 20 percent of the amount transferred abroad is levied on the foreign partner at the time of transfer. Wages earned by foreign employees are assessed an income tax of 13 percent.[101]

H. Auditing and Oversight

The participants are entitled to receive financial and other data necessary to carry out their supervision of the venture. The enterprise must maintain records required by U.S.S.R. state enterprises on forms provided by the Ministry of Finance and the Central Statistical Administration. Auditing is done for a fee by a Soviet auditing organization. Information and reports concerning the joint venture may not be provided to foreign state agencies.

I. Personnel

The venture will be primarily staffed by Soviet citizens, although management is free to hire foreign technicians on terms and conditions to be negotiated by the parties.[102] Contracts for Soviet employees must be concluded with local collectives and must include provisions for social development, terms of labor compensation, work and rest schedules, and social security and insurance for the workers. The enterprise will remit payments for social insurance coverage and pensions to the U.S.S.R. State Budget Office.

J. Liquidation

The joint enterprise may be wound up in accordance with its articles or terminated by the U.S.S.R. Council of Ministers if its activities conflict with its articles. After payment of debts, the residual value will be distributed proportionately to the participants, and may be withdrawn from the country.[103]

V. HISTORY OF U.S.-SOVIET TRADE

A proper evaluation of trade and joint venture proposals, now being tendered by the Soviets, cannot be made without an understanding of the history of U.S.-Soviet trade relations. Trade between the two superpowers got off to a rocky start 70 years ago when the Bolsheviks came to power and promptly repudiated the debts of the Czarist regime.[104] The U.S. and Britain, among others, offended the Bolsheviks by landing

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percent of authorized capital.

101. *Id.*

102. *Id.*

103. *Id.*

104. *See generally*, J. GIFFEN, THE LEGAL AND PRACTICAL ASPECTS OF TRADE WITH THE SOVIET UNION (1971).

troops on Russian soil during the chaotic period following the Bolshevik revolution, when the Red and White armies were vying for control. From 1917, when Russia abandoned the war, until 1921, the Russian economy was in a shambles.[105] Lenin's decrees to confiscate industry and other measures designed to establish the communist state nearly ruined what was left of trade following the turmoil brought about by the war. By 1923, U.S. trade with the Soviets amounted to only 3.9 million rubles. In 1921, Lenin recognized that his new nation was about to starve to death if drastic and immediate changes were not made in the economy. As a consequence, he instituted the New Economic Policy (NEP) which reinstated capitalistic practices, but retained political control in the hands of the Bolsheviks.

Although the United States did not recognize the Soviets until 1933 when Roosevelt came into office, it did become involved in trade through private efforts before then. Armand Hammer and others established, with Lenin's blessing,[106] a variety of joint venture trading and manufacturing businesses in Russia.[107] Immediately following the revolution, Herbert Hoover (later U.S. Secretary of Commerce and President) headed up an effort in Russia to provide food to the millions of starving people there.

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105. Armand Hammer traveled by train from Moscow to Ekaterinburg in the Urals in August, 1921. In his book HAMMER (1987) he describes what he saw along the way: "Everywhere we went we met the same condition—tremendous mills, factories and mine works standing idle and the workers hanging about, hungry and despairing. Even if the mills and factories could be put into operation, there was no market for their products, owing to the economic stagnation of the entire country. . ." *Id.* at 108.

106. Hammer described his meeting with Lenin at the Kremlin in the summer of 1921, in which Lenin urged Hammer to become one of the first foreign concessionaires under the new economic policy: "Our two countries, the United States and Russia, Lenin explained, were complementary. Russia was a backward land with enormous treasures in the form of undeveloped resources. The United States could find here raw materials and a market for machines, and later for manufactured goods. Above all, Russia needed American technology. . ." According to Hammer, Lenin went on to say: "We need the knowledge and spirit that has made America what she is today." *Id.* at 116. And in describing Lenin's demeanor Hammer said: "To talk with Lenin was like talking with a trusted friend, a friend who understood. His infectious smile and colloquial speech, his sincerity and natural ways, put me completely at my ease." *Id.* at 118.

107. Fresh out of medical school, Armand Hammer, traveled to Russia in the summer of 1921 before beginning practice as a resident in New York City. He brought with him a complete field hospital, paid for with his own funds, and sought to help alleviate some of the suffering he had read about, taking place in the land of his forbearers. Before the summer was out, he had arranged a business deal to provide $1 million worth of grain to starving peasants in exchange for Russian furs, and had come to the attention of Lenin himself. Hammer decided to forsake his medical practice and stay in Russia to do business. He remained there until the late 1920's and because of his special ties to Lenin, has remained a friend and business benefactor of the Soviets ever since. At age 89, he is still active in concluding massive trading deals with the Soviet Union. *Id.* at 109.

In 1973, with Brezhnev's help, his Occidental Petroleum Corporation, entered into long term joint venture contracts with the Soviets to exchange fertilizer for urea and ammonia (valued at $8 billion over a 20 year period), and to build an international trade center and hotel in the heart of Moscow. *Id.* at 400. *See also, The American Review of East West Trade*, May-June, 1973, at 15.

In exchange for food, Hoover and his agents collected tons of books and papers documenting the Bolshevik revolution which, happily for Western posterity, he transported to his alma mater, Stanford University, for safekeeping and study by scholars from around the world.

Lenin encouraged trade with the U.S.: "We are resolutely for economic accord with America, with all the countries, but especially with America."[108] In 1924, Amtorg Trading Corporation, a private company, was established in New York to act as purchasing and selling agent for Soviet trade corporations in the United States. By 1931, the Soviet Union was the principal foreign purchaser of U.S.-made machines and equipment. Some 1500 assorted American experts were in the Soviet Union. In 1937 a trade agreement was signed with Russia,[109] giving it Most Favored Nation status. During the lend-lease program to Russia, American companies shipped huge amounts of munitions and supplies to the Soviets in a joint effort to defeat Hitler during the Second World War.

As the cold war descended over Europe and Asia following defeat of the Nazis, trade relations took a sharp turn for the worse. In 1947, Congress passed the Export Control Act[110] to limit the types of goods which could be shipped to the Soviets and their allies; in 1951, following the Soviet inspired invasion of South Korea, the U.S.-Soviet trade agreement was cancelled altogether.[111] Trade nearly came to a standstill.[112]

With the beginning of the thaw in the Cold War in the 1970's, trade began to increase. Nixon and Brezhnev signed a trade agreement in 1972 which reinstated Most Favored Nation status for the Soviets and a settle-

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108. The Journal of Commerce, *supra* note 79, at 11.

109. However formal trade relations were initiated earlier on July 13, 1935 in "An Agreement Regarding Commercial Relations with The USSR, 49 Stat. 3805, pt. 2.

110. Under the Export Administration Act of 1985, 50 U.S.C. app. 2401 *et seq.*, successor to the 1947 Act, the U.S., through the Department of Commerce, may control exports, reexports, and trans-shipments of goods and technical data. This is handled through a licensing procedure. The purpose of the controls, among others, is to 1) protect U.S. national security, 2) further U.S. policy, and 3) protect the U.S. domestic economy from shortages and the inflationary impacts of abnormal foreign demand for goods. Export licensing applies to a) export of commodities and technical data from the U.S., b) reexport of U.S. origin commodities and technical data from one foreign destination to another, c) U.S. origin parts and components used in a foreign country to manufacture a foreign end product for export and d) in some instances, a foreign produced product using U.S. technical data.

Most U.S. exports require no specific U.S. approval. They are exported under a "general license." No license application is needed if the goods in question are not on a restricted control list maintained by the Department of Commerce. If a "validated license" is required, the proposed transaction is reviewed to determine if the commodity or technology in question would contribute to significant military use or promote the military-industrial base of the importing country. *See* R. Starr, *The Evolving U.S. Legal Framework for US-USSR Trade*," in BUSINESS TRANSACTIONS WITH THE USSR 16 (1975). *See also* GIFFEN, *supra* note 104, at 9-42. Under the Act, the U.S. may cooperate with other nations having common strategic interests to restrict exports of goods and technology. 50 U.S.C. App. 2402.

111. Trade Agreements Extension Act of 1951, sec. 5, 65 Stat. 73 (1951).

112. *Id.*

ment of the long outstanding lend lease debt was reached.[113] The trade bill was, however, subject to ratification by both Congress and the Supreme Soviet. After much debate,[114] Congress attached a rider to the trade bill making its approval conditional upon Soviet acceptance of the so-called Jackson-Vanick amendment, which required them to halt certain human rights violations, principally their restrictions upon the emigration of Soviet jews. Although during the 1970's the Soviets did permit substantial emigration, they refused to formally agree to the provisions of the Jackson-Vanick amendment, and the trade bill never took effect.[115] A side casualty was cessation of payment by the Soviets of the lend-lease debt, made conditional upon effectiveness of the trade bill.

While other trade accords did go into effect,[116] the failure of the

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113. The U.S.S.R. had agreed to pay a small percentage of the total due on the lend lease account. The settlement amounted to $722 million, payable $24 million per year until the year 2001. *See The American Review of East-West Trade* (Dec. 1972).

114. Not only the Congressional, but the national debate over trade included wide ranging considerations concerning U.S. policy toward the Soviets and its effectiveness in promoting peace. *See* G. BALL, DIPLOMACY FOR A CROWDED WORLD 110 (1976) for a discussion of some of the issues surrounding U.S. participation in Soviet trade.

115. While the Trade Agreement of October 18, 1972 did not become effective, in light of the new Soviet trade offensive, renewed efforts will be made to resurrect and debate some of its key provisions. These should be noted here.

Included in the 1972 agreement was a provision that MFN status would be provided to each party. Other provisions set up a procedure for preventing disruption of domestic markets, provided for payment of goods to be made in freely convertible currencies, and for the establishment of reciprocal commercial offices and business facilities. In addition the agreement provided for arbitration of commercial disputes. Both the U.S. and the Soviet Union are parties to the "United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards," concluded in New York in 1958. *See* Starr, *supra* note 110, at 14.

The agreement also provided a waiver by the Soviet Union of sovereign immunity claims by its foreign trade organizations (FTO's) *See* Paper presented to the US-USSR Trade and Economic Council, supra, on December 8, 1986, prepared by Stephen A. Oxman and Margery S. Bronster, "Foreign Sovereign Immunities Act of 1976—an Overview." Under the Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1391 (f), 1441 (d) and 1602-1611. Foreign states are not granted immunity from suit in U.S. courts in cases involving their commercial activities. This question becomes important in dealing with socialist countries, where virtually all businesses are owned by the government. As to the origin of the doctrine, *see* The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812) and Verlinden, B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983). *See also*, Osakwe, *A Soviet Perspective on Foreign Sovereign Immunity: Law and Practice*, LAW IN THE SOVIET UNION (1984).

See Starr, *supra* note 110, at 1-24, for a discussion of the evolution of Soviet trade agreements.

116. A grain agreement was signed on July 8, 1972. This agreement provided for the purchase of at least $750 million worth of U.S. grain by the Soviets for delivery over a three year period. The grain agreement also permitted the Commodity Credit Corporation to provide credit to the Soviet Union. Soviet purchases in 1963 and 1971 had been for cash. Starr, *supra* note 110, at 1. A lend lease settlement and a credit agreement, were signed in October, 1972. These agreements contemplated tripling trade over the next three years. *Id.* at 2, 3.

A Maritime Agreement was signed on October 14, 1972 permitting access by each of the parties to 40 specified ports in the others's territory. This agreement and others negotiated during the "thaw" of the 1970's have been renegotiated, or in some cases suspended as trade

trade bill itself has denied the Soviets the coveted Most Favored Nation status and U.S. government trade credits. In response to Soviet misbehavior, the Carter administration in, 1978, imposed export controls on oil and gas equipment destined for the Soviet Union and instituted a variety of boycotts, embargoes and sanctions.[117] In 1980, following the Soviet invasion of Afghanistan, the United States boycotted the Moscow Olympic Games, placed an embargo on grain shipments to the Soviets and took other measures which reduced trade by some 50 percent.[118] Additional restrictions were imposed by the Reagan administration in 1982, following Soviet intervention in Poland at the time of the Solidarity crises there.[119] Among other sanctions, the U.S. sought to dissuade its European allies from participating in Soviet efforts to construct a gas pipeline from Siberia to Western Europe.[120]

Sensing that it was time to cool down the Cold War rhetoric which had been building up during his first term, President Reagan in January, 1984, declared his intention to seek an expansion of trade with the Soviets. In May, 1985 the joint U.S.-U.S.S.R. Commercial Commission met in Moscow after a hiatus of seven years. And in December, 1985, more than 400 U.S. businessmen travelled to Moscow as part of the U.S.-U.S.S.R. Trade and Economic Council, for meetings with Soviet trade officials, highlighted by a welcoming banquet hosted by Gorbachev at the Kremlin.[121]

As part of their trade offensive, the Soviets are making concerted efforts to influence the American Administration and Congress to remove outstanding trade barriers. They recognize that improvement of trade is closely linked to improvement of political relations between the two countries. Assuming satisfactory progress in this area, they cite specific barriers which must be removed:[122]

> 1. DENIAL OF MOST FAVORED NATION (MFN) STATUS. As a result of the absence of MFN status, the cost to U.S. consumers of may Soviet goods is 3 or 4 times higher than comparable goods from other countries, This makes it extremely difficult for the Soviets to find satisfac-

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sanctions were imposed following the Soviet invasion of Afghanistan and other events. *See* Brougher, *Joint Economic Committee, supra* note 31, at 419-453.

117. The Journal of Commerce, *supra* note 79, at ll.

118. J. CARTER, KEEPING FAITH—MEMOIRS OF A PRESIDENT 471-489 (1982). *See also* Brougher, *1979-82: The United States Uses Trade to Penalize Soviet Aggression and Seeks to Reorder Western Policy, Joint Economic Committee, supra* note 31, at 419-453 (for an excellent summary of sanctions imposed on the Soviet Union).

119. U.S. Department of the Treasury, *US Government Policy on Economic Relations with the Soviet Union, Joint Economic Committee, supra* note 31, at 398.

120. Holliday, *Foreign Economic Relations—Overview, Joint Economic Committee, supra* note 31, at 392.

121. The Journal of Commerce, *supra* note 79, at 29. The Trade and Economic Council was scheduled to convene for its annual 1987 meeting in Moscow in December, but was postponed until after the Washington, D. C. summit between Reagan and Gorbachev.

122. *Id.* at 29, 32.

tory products to ship to the U.S. in order to earn dollars it needs to purchase U.S. goods. The Soviets claim that the U.S. is its only trading partner not granting MFN status.

2. FAILURE TO GRANT GOVERNMENT SUPPORTED CREDITS, SUCH AS EXPORT-IMPORT BANK GUARANTEES.[123] The Soviets say that such credits are granted by the Western Europeans and Japanese, and, as a consequence they are much more competitive as sellers than the U.S.

3. IMPOSITION OF RIGID EXPORT CONTROLS.[124] Such controls are imposed, among other reasons, to deny the Soviets access to U.S. products deemed to assist them in their military efforts. The Soviets contend that such controls are too broad, and that many of the products denied to them by the U.S. are easily obtainable from Western Europe or Japan.

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123. Under the 1972 credit agreement (later aborted by Soviet refusal to accept emigration provisions of the Jackson-Vanick amendment) the U.S. agreed to extend Export-Import Bank credits and guarantees to the Soviets. Relations with the Bank were to be handled on the Soviet side by the Soviet Bank of Foreign Trade (Vneshtorgbank of the USSR). For a good general discussion of Vneshtorgbank and the Soviet banking structure, see *Journal of the US-USSR Trade and Economic Council* (New York and Moscow), Vol. 11, No. 5/6 (1986), at 17, 28. *See also* article by Victor Gerashchenko, First Deputy Chairman of the Board, USSR Bank for Foreign Trade, Wall Street Journal, Aug. 24, 1987. The Soviet government agreed to guarantee repayment of all Exim Bank credits extended to any of its trading organizations. The U.S.S.R. also agreed to finance its exports to the U.S.. *See* Starr, *supra* note 110, at 5.

124. In addition to controls imposed under the Export Administration Act discussed above, the U.S. has controlled the sale of goods to the Soviet Union under a number of other laws. For example, licenses are required for the export of certain military sensitive products by U.S. government agencies including the State Department (arms), the Atomic Energy Commission, Maritime Administration and others. *See* Starr, *supra* note 110, at 19. *See also* Giffen, *supra* note 104, at 10. *See generally* J. BARTON & B. FISHER, INTERNATIONAL TRADE AND INVESTMENT—SELECTED DOCUMENTS (1986), for an overview of applicable trade acts.

Also controls are imposed through COCOM (The International Coordinating Committee on Strategic Trade with Communist Countries). COCOM is an organization created by the United States and 14 other NATO countries (except Iceland), and including Japan. COCOM provides for voluntary export restraint by its members to help preserve mutual security. Though control mechanisms are in place, COCOM members have been ambiguous in their support of the program. While they recognize the need to restrict transfer of technology to the Soviets which would be of military value, western industry is anxious to do business with Russia. *See* TIME, Nov. 30, 1987, at 42. As a consequence COCOM has been under funded, and under staffed, and this in turn has contributed to such inadequate oversight as the recent sale by Norwegian (Kongsberg) and Japanese (Toshiba) companies of ship propeller manufacturing equipment to the Soviets which permitted radical reduction in the detectability of Soviet submarines. (*See* Perle, *Keeping Western Technology Western*, Wall Street Journal, July 23, 1987). COCOM publishes a list of embargoed items and "watches" other commodities which it feels may become worthy of embargo in the future. Starr, *supra* note 110, at 17. For a good discussion of the operation of COCOM and of related controls, *see* Bayard, Pelzman & Perez-Lopez, *An Economic Model of United States and Western Controls on Exports to the Soviet Union and Eastern Europe*, Joint Economic Committee, *supra* note 31, at 511-519.

Attempting to show some flexibility in technology sales to the Soviets, the Reagan administration recently removed its objections to sale of basic "no frills" personal computers. San Francisco Chron., August 19, 1987.

4. A U.S. POLICY OF BOYCOTTS, EMBARGOES, SANCTIONS AND BROKEN CONTRACTS, ALL OF WHICH MAKES THE U.S. AN UNRELIABLE TRADING PARTNER. The U.S., unlike many of its allies, has used trade policy with the Soviets to register its displeasure with Soviet political behavior, such as invasion of Afghanistan, intervention in Poland, and human rights violations.)

5. IMPOSITION OF OTHER TYPES OF RESTRICTIONS. Since 1951, the U.S. has embargoed 7 types of fur skins produced in the Soviet Union and has banned the importation of nickel, contending that it was produced through the of slave labor. Also the U.S. has imposed antidumping and countervailing duties[125] on products from the Soviet Union, including titanium, potassium chloride,and urea, based on the U.S. belief that these products are disruptive to the U.S. market and are sold in the U.S. at prices below cost in the Soviet Union.[126]

VI. LESSONS AND OPPORTUNITIES FOR THE WEST

Economic restructuring in the Soviet Union presents the West, particularly the United States (as Russia's principal rival), with an opportunity to radically change its relationship with the U.S.S.R. and to reap substantial benefits which have eluded it for the 70 years the Communists have been in power.

The most obvious immediate benefits on the horizon are substantial cuts in armaments and a reduction in present heavy costs for defense. Additional benefits are opportunities for increased mutual trade and a general normalization of the U.S.-U.S.S.R. relationship, including increased cultural, scientific and social exchanges. In many ways, all of these benefits are interdependent. However all of them arise from the new Soviet consciousness that its economic system is not working and that if it wishes to keep pace economically and culturally with the rest of the world it, must make significant changes.

The West, with proper caution, should applaud and encourage the changes, not simply to show the Soviets good will, but rather to help to reduce ever-spiraling arms budgets, to increase foreign trade, to reduce the U.S. trade deficit, and to benefit from increased interchange with Soviet artists, scholars and scientists.[127]

A. Reducing U.S. Defense Costs

On December 9, 1987, President Reagan and General Secretary Gorbachev signed an agreement eliminating intermediate range nuclear

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125. Under the Anti-Dumping Act of 1921, 19 U.S.C. §§ 1671 *et seq.*, the U.S. may levy countervailing duties pursuant to the Tariff Act of 1930, 19 U.S.C. §§ 1202 *et seq.*(the Smoot-Hawley Act), as amended.

126. *See* Lazarus, *Perspectives on the U.S. Role in East-West Trade*, THE AMERICAN REVIEW OF EAST-WEST TRADE, May-June, 1973, at 31.

127. *See* Editorial by Zukerman, *Should the West Help Gorbachev?*, US NEWS AND WORLD REPORT, October 19, 1987.

missiles. Although the agreement does not significantly reduce nuclear arms stockpiles held by each nation,[128] it is an important first step in contributing to mutual trust.[129] Hopefully it is also a prelude to a second step in disarmament—a 50 percent reduction in strategic nuclear missiles preliminarily, agreed to at Reykjavik.[130]

Impetus for restructuring in the U.S.S.R. has come in large part because the Soviets find they cannot finance both "guns and butter."[131] Large standing armies are depriving the civilian economy of necessary manpower. Gorbachev and his advisors fear SDI not only because of the nuclear risk, but also because of the cost.[132] They find themselves being drawn into an economic race they have no hope of winning.

Following Khruschev's humiliation in 1963, when he was forced by President Kennedy to withdraw his missiles from Cuba, the Soviets embarked on a military buildup without parallel in modern history.[133] Its purpose was to prevent future embarrassment and to project Soviet power world-wide. But because military industries were starving civilian production and industrial renewal, the Soviets realized by the late 1970's that their economy was not only failing to meet civilian demands, but also threatened to curtail future military requirements.[134] Thus, economic restructuring became a matter of national necessity, rather than a manifestation of Soviet good will. To restructure the Soviet economy and to provide necessary reindustrialization, Gorbachev needs a period of repose.[135] He cannot achieve his goals of meeting promises to Soviet citizens if his

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128. The INF treaty will affect only about 4 to 6 percent of the nuclear arsenals held by the superpowers in Europe. San Francisco Chron., November 26, 1987, at A29.

129. The Wall Street Journal, November 25, 1987, at 2. Under the proposed INF treaty, the U.S. would eliminate missiles containing 350 warheads and the Soviets would destroy missiles containing 1500 warheads.

130. M. GORBACHEV, THE RESULTS AND LESSONS OF REYKJAVIK 24 (1986).

131. US NEWS AND WORLD REPORT, October 19, 1987, at 32.

132. U.S. DEPARTMENT OF DEFENCE, SOVIET MILITARY POWER—1987 10 (1987).

133. *See* R. STARR, *Soviet Union*, THE UNITED STATES IN THE 1980'S 744-749 (1980). Over the decade prior to 1980, the U.S.S.R. spent about $150 billion for strategic offensive weapons, about 3 times the amount spent by the U.S. By 1979 the Soviets outnumbered the U.S. in nearly every class of military hardware and forces. Among twenty indices of military power, the U.S. had an advantage in only four. For example the Soviets had 270 attack submarines to our 77, 761 medium bombers to our 66, 4,690 fighter aircraft to our 3,400, 169 ground divisions to our 16, 53,000 tanks to our 10,500, 40,700 artillery to our 17,500, 1398 ICBM's to our 1054, and 90 ballistic missile submarines to our 41. The U.S. led the Soviets in carriers, 12 to 3, heavy bombers 573 to 156, total warheads 8,526 to 6,132, and naval aircraft 1,464 to 1,310. Starr, p. 745. This imbalance has been redressed in part by significant increases in U.S. military expenditures during the Reagan administration. For example, by 1989 the U.S. navy fleet will have grown from 479 to 600 battle force ships. SOVIET MILITARY POWER—1987, *supra* note 132, at 149. Notwithstanding, it has been estimated that military expenditures in the U.S.S.R. have averaged 15 to 17 percent of the Soviet GNP, about three times the comparable U.S. figure. *See* Sybert, *The Reality of Strategic Defense*, LOS ANGELES LAWYER, July-August, 1987, at 22.

134. SOVIET MILITARY POWER—1987, *supra* note 132, at 10.

135. *See* Broening, *U.S. Debates how to Handle Soviets as Moscow Grapples with Reform*, San Francisco Chron., Aug. 30, 1987, at A-5.

limited resources and productive capacity must be redirected to a continuation of the arms race, particularly an open-ended pursuit of "star wars."[136] The economic turmoil in Russia is of direct benefit to the West in encouraging the Soviets to enter into meaningful disarmament agreements.

The cost of arms has not been easy for the U.S. Since 1980, President Reagan, largely through his efforts to build up U.S. military might, has added more than $1 trillion to the U.S. national debt,[137] consequences include consequent repercussions in foreign trade deficits, the plummeting dollar on foreign exchanges and the recent crash of the stock market in October.[138]

While President Reagan has denied that SDI is a bargaining chip,[139] the Pentagon has conceded that it will provide the basis for deep reductions in offensive weapons.[140] Due to the highly questionable merits of the star wars program[141], there is reason to believe that the Reagan adminis-

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136. The Soviets see the SDI proposal as a snare to force them into an unending, economically debilitating arms race and a means to enable the U.S. to gain a first strike capability over the Soviet Union. *See* McReynolds, *Star Wars: Logic of the Past, reprinted from* The Bulletin of the War Resisters' League (USA), in SOVIET PEACE COMMITTEE, XX CENTURY AND PEACE (1986). *See*, in addition, M. GORBACHEV, THE RESULTS AND LESSONS OF REYKJAVIK (1986). Discounting Reagan's arguments that SDI would be deployed only for defensive purposes, they point out that once the U.S. had emplaced space satellites capable of locating and destroying Soviet missiles after launch, the U.S. could easily use these same lasers or missile destroying guns to destroy Soviet missiles on the ground and thus force the Soviets to capitulate to U.S. demands. *See* Manheim, *Star Wars: A Dangerous Strategic Gamble*, LOS ANGELES LAWYER, July/August, 1987, at 25, and McReynolds, *supra*.

137. For a good discussion of the military buildup during the Reagan administration and the cost of the SDI program *see* N. COUSINS, THE PATHOLOGY OF POWER 179, 167-190 (1987).

138. TIME, Nov. 30, 1987, at 44.

139. The Wall Street Journal, Nov. 25, 1987, at 2.

140. SOVIET MILITARY POWER—1987, *supra* note 132, at 148.

141. Star wars detractors not only see merit in Soviet suspicions, but point out that the scientists charged with developing SDI technology state publicly that technology does not presently exist to provide any credible umbrella against Soviet missile attacks, and even if sufficient progress is made to create such technology, substantial numbers of missiles would still get through the defenses, and new counter-defensive measures would in the meantime be developed. Manheim, *supra* note 136, at 23, states: "The overwhelming consensus of the nation's technical community is that in fact there is no prospect whatever that science and technology can, at any time in the next several decades, make nuclear weapons "impotent and obsolete." *quoting from* McGeorge Bundy, Kennan, McNamara, and Smith, *The President's Choice: Star Wars or Arms Control*, 63 FOREIGN AFFAIRS 264, 265 (1984).

Even after the expenditure of sums estimated to be up to $1 trillion (about ⅓ our present GNP), we would still have no effective defense against nuclear missiles launched from submarines or bombers. *See* Manheim, *supra* note 136, at 23. "SDI will be designed to intercept only ballistic missiles taking a trajectory that puts them above the earth's atmosphere. It could not handle cruise missiles, short or intermediate-range missiles (e.g., submarine or air launched), bombs dropped from aircraft, or those delivered by any other means (e.g., smuggled by terrorists)." A Congressional study of SDI released in August, 1987 concluded that depending on what countermeasures are taken by the Soviets, SDI could cost up to $1 trillion. Quoting from the Pentagon's Science Board the report stated: ". . . as a conse-

tration has pushed SDI precisely because of its belief that the Soviets cannot afford the race, and are being compelled to negotiate seriously on arms.

B. *Increasing Trade*

As part of their trade offensive toward the U.S., the Soviets hold out the prosect of greatly expanded trade and mutual benefits. Although the Soviet Union is one of the largest potential markets in the world, the U.S. must recognize that aside from certain commodities, the Soviets manufacture or produce very few products of the type or quality which would be of interest to the U.S. Furthermore, they presently have little available foreign exchange with which to purchase U.S. products.

The U.S. should, however, look to the long term and attempt to cultivate a political and economic climate which will permit it to increase its sales of products and services to the Soviets and also to augment its purchases from them. The greater its trade with the U.S.S.R., the stronger the mutual reasons are for remaining peaceful so that trade and intercourse will remain uninterrupted. The U.S. must recognize, however, that while the Soviets have historically sought trade with it, they likewise have used trade, and their desire for advanced technology, to increase espionage activities.[142]

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quence of the current gaps in system design and key technologies, there is presently no way of confidently assessing system performance system cost; or schedule." San Francisco Chron., Aug. 2, 1987. *See also* San Francisco Chron., Aug. 8, 1987.

142. In order to obtain intelligence from countries which desired trade, but which would not concede Soviet respectability by granting diplomatic status, the Soviets immediately following the revolution, began establishing trade missions and small trading companies to serve as covers for espionage. Such trading outposts were established in the early 1920's in Great Britain, Germany, the United States, and other countries. The U.S. company, Amtorg, was formed in 1924, through a merger of several smaller firms. It was headquartered in New York and charged with the task of coordinating Soviet trading activities in the United States. As a collateral task, it could operate as a fully integrated Soviet foreign intelligence station with its own funding, and serve as a base for hundreds of visiting "engineers," "inspectors," "accountants," and "trade experts." A Soviet trading company in Britain called Arcos (All-Russian Cooperative Society) was believed by the British to be the center for espionage in England. Within three years of its establishment in London, Arcos was raided by the police and its officers and the Soviet embassy and diplomatic personnel were expelled from Britain. W. CORSON & R. CRAWLEY, *supra* note 16, at 282, 283.

Corson, reports that beginning in 1941, under the cover of the US-Soviet lend lease program, the head of the NKVD (Soviet secret police) dispatched approximately one thousand NKVD and GRU (Armed Forces intelligence agency officers) to the United States to serve as "purchasing specialists" along with various "experts" from Amtorg in New York. While their mission was to buy anything thought necessary for Russia to win the war, as a collateral duty, they were to bribe and attempt the subornation of any interesting, influential, or powerful American with whom they came into contract, and to obtain designs, drawings, and patents of military and industrial secrets. *Id.* at 209.

Beginning in 1967 when Yuri Andropov became head of the KGB (later General Secretary) the Soviets began a massive world-wide espionage effort to acquire Western and particularly U.S. military and industrial secrets. The North Vietnamese were used as surrogates to capture and transport to Moscow for evaluation, U.S. military equipment. Through such

As the United States evaluates how to respond to new Soviet trade overtures, it must bear in mind that the KGB and its agents are an ever present part of the Soviet government and foreign policy. While the U.S., through the CIA, does its best to keep tabs on the Soviets and their latest technological achievements,[143] it must be aware that industrial espionage within the United States and every other Western country is a fact of life; therefore, in its dealings with its trading partners, the U.S. must continue to take all reasonable steps to guard against industrial espionage.

C. *Increasing Cultural, Scientific and Social Exchanges*

Coincident with the Gorbachev revolution in the economy has been a substantial increase in scientific and cultural exchanges with the West. Gorbachev has recognized that the Soviet economy cannot be restructured without changing fundamental beliefs and practices among Soviet citizens.[144] Unless the Soviets are open to new ideas and methods, creativity and motivation will remain low. Western ideas in all aspects of society are increasingly dominating the changing Soviet culture. The Soviets are hosting diverse cultural and scientific delegations in greater numbers[145] and are straining domestic hotels and travel facilities in the process.[146]

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means including intelligence obtained from American traitors, Andropov was successful in providing the Soviet armed forces with a guide to upgrading its conventional forces without the high costs of research and development. *Id.* at 340-344.

During Andropov's tenure as KGB chief, the Soviets greatly widened their acquisition of Western technology. Part of the program involved subscribing to and acquiring every available Western technical journal, including doctoral dissertations. This information would be analyzed by Directorate T of KGB headquarters in Moscow, from which would be developed a shopping list of high-tech hardware for acquisition. Everything on the list which could be acquired legitimately would be purchased through normal channels. Items which could not be so purchased would be acquired by illegal means, including 1) setting up dummy corporations and purchasers to get around export restrictions, and 2) outright industrial theft. *See* BARRON, *supra* note 10, at 161-206 for a description of military and industrial thefts which have been perpetrated by the Soviets in the United States. Barron estimates that the KGB and its military subsidiary the GRU have more than 400 officers permanently stationed in New York, Washington and San Francisco to spy and conduct active measures. Since 1975 at least 54 persons have been accused of espionage against the United States. The recent trials of Marine Moscow Embassy guard Clayton Lonetree (accused of fraternizing with a Soviet woman who turned out to be a spy), and of former Navy men Jerry Whitworth and the Walker family (who stole cryptographic information), have captured the headlines. *See* San Francisco Chron., Aug. 30, 1987.

143. The CIA uses many of the same techniques as the KGB to secure vital industrial and military information. *See* S. TURNER, SECRECY AND DEMOCRACY—THE CIA IN TRANSITION at 48-60 (1985). *See also* P. AGEE INSIDE THE COMPANY—CIA DIARY (1975).

144. *See* Bialer, *Marx had it Wrong. Does Gorbachev?*, US WORLD AND NEWS REPORT, Oct. 19, 1987, at 42.

145. *See Information Moscow 1987-88*, Western Edition (San Francisco, US Information Moscow, 1987) at xxvi.

146. *See* article by Vladimin Lebedev, Wall Street Journal, Aug. 24, 1987. Intourist, the official Soviet travel agency runs 107 hotels, motels and camping sites in the U.S.S.R. and can accommodate 55,000 guests. By 1990 Intourist expects that 30 new hotels will be built and that 13 older hotels will have been refurbished.

Likewise, delegations of Soviet citizens, ranging from members of the press, television, radio, government, science and the arts are finding their way with regularity to Western capitals and outlying areas.[147] The U.S. should encourage all such intercourse. As the Soviets learn more about the West, and the West about them, there is a possibility of giving up the sense of mutual hostility.

VII. CONCLUSION

The changes presently taking place within the Soviet Union are perhaps the most significant since Stalin initiated the five year plans in 1928, and arguably could have consequences as sweeping as the 1917 Bolshevik revolution itself. The utopian Communist society envisioned by Marx and Lenin has proved to be hopelessly elusive, and the socialist economy instituted as a precursor to the "beautiful tomorrow" is failing to provide Soviet society with the goods and services it needs to keep pace with the more dynamic economies of the West.

Stalin proved that terror and oppression could compel fundamental changes in Russian society and the economy, but the Soviets have learned to their dismay that the innovation and creativity required by a modern economy cannot be forced through dictates from the top; they have to be generated through individual enterprise from the bottom.

While the comprehensive reforms now underway in Russia will most likely prove successful over time, the benefits have not yet reached the average citizen in terms of higher standards of living. The reforms, however, are being widely discussed and appear to have the approval of the rank and file. Members of the bureaucracy and the Party which have not been performing satisfactorily, stand to lose their jobs, power and perquisites, and as a consequence are not enthusiastically embracing the Gorbachev revolution. To counter this foot-dragging and to inject a sense of meaning and life into the system, Gorbachev has enlisted elements of democracy, including a critical press and local elections in the workplace and in political units to pressure recalcitrants to get in line and remain accountable.

Under the new laws proposed by the Party and approved by the Supreme Soviet, the Soviet economy is moving substantially closer in tone and form to the Western capitalist economies. Central planners will set goals for industry and explore ways to help them to achieve those goals. Decisions as to buying, selling and pricing of commodities are to be made, for the most part, by the local industrial unit, which now will have the responsibility of remaining profitable without government subsidies. Government entities will place orders for their requirements with local manufacturers and, to the extent feasible, bids will be awarded competitively.

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147. For example a contingent of high level Soviet scientists and others met with American counterparts recently at Chautauqua in up-state New York to discuss among other things, the dangers of nuclear war. TIME, Oct. 5, 1987, at 69.

Soviet theorists say the U.S.S.R. remains a socialist economy because the principal means of production will continue to be owned by the State. Under the new rules, however, workers can be paid whatever their services are worth, without limitation.

Although there remain substantial differences between the new Soviet and Western economies, the differences have narrowed considerably. While small entrepreneurial businesses constitute a large part of a Western, particularly the U.S., economy, these economies have become mixed with substantial socialist elements.[148] Another element of convergence in the two economic systems arises in the manner in which ownership interests are controlled. Under the new Soviet system, while the government will continue to own principal industries, managers and workers will have substantial freedom in establishing business plans, wages, salaries and other benefits, including the distribution of profits. Such an evolution in corporate structure and management is not essentially different from that which presently exists in many large U.S. enterprises.[149]

Soviet economic reform will provide increased opportunities for Western trade. The United States should carefully review its policies toward the Soviet Union, especially in view of their efforts to make progress toward the solution of some of the central problems separating the two

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148. Consider, for example social security, medicare, unemployment insurance, social welfare, and government subsidies to farmers, maritime interests and through military orders to defense industries. At least one third of the U.S. gross national product (GNP) can be said to be subject to planning from central governmental authorities, since at least that much of the GNP is taxed by federal, state and local governments and redistributed to citizens in the form of government services, military orders, health care and so on. Further, through our tax system our government has vast influence over other parts of the economy. Certain types of construction are encouraged through tax exempt treatment of municipal bonds; subsidies in the form of tax write-offs such as depreciation and various exemptions encourage other types of economic activity. While our society can be said to be planned through governmental intervention, such intervention up to now, is essentially different from that of the socialist dictatorships. Our planning has tended to provide incentives to induce private conduct to satisfy governmental goals, rather than dictating quotas, wages and the like. Galbraith argues that capitalism as an economic system, has essentially failed to provide adequate housing, health care and transportation facilities needed particularly by an urban society and that Western Europe and Japan have largely accepted that reality. GALBRAITH, *supra* note 9, at 319.

149. To the average worker or manager of a large American corporation such as IBM, General Motors or General Electric, it makes little difference who owns the shares of his corporation, so long as he gets what he considers fair compensation. A worker or manager may or may not have any ownership interest in the firm he works for. His union will help him bargain for what he hopes is a fair wage. Ownership of large corporations for the most part is diversified throughout the economy and held by pension funds, other corporations and individuals around the country. So long as the shareholders receive what they feel is a fair and predictable dividend, they are usually happy. This is not substantially different from Soviet ownership by the government (the proletariat or workers as a whole). Under the new Soviet system, although the government will remain the sole shareholder, it will impose a tax for its share of the industrial output (its dividend) and the balance can be distributed as management thinks best among workers in accordance with their productivity, without artificial limitations as to amount of compensation.

societies, such as arms control, internal freedom for their citizens and easier emigration.

Although Russia has endured a difficult and complex history, its traditions have been primarily Western. But for the skill and determination of Lenin and the Bolsheviks in turning the revolution to their favor in 1917, Russia might well have succeeded in becoming a stable democratic government following the turmoil of the First World War and the revolution. Those same democratic impulses are again being felt, and they may become irresistible. The United States cannot forget that through the use of the KGB and its predecessors, and consequent terror and rigid control over its citizenry, the Soviets have remained in power for 70 years. They are not likely to give up control easily, and there appears to be no substantial movement within the U.S.S.R. to overthrow the central authority. Thus change in the Soviet Union will be gradual and at a pace approved by Communist Party leaders.[150] Only time will tell whether the forces of change now in play will irresistibly transform the communist society into something substantially different, and similar in essential respects to evolving Western societies and economies.

Both the Soviets and the West have common interests—survival[151] and, to the extent possible, prosperity. Through social intercourse, trade and mutual reductions in armed might, The West should encourage the Soviets to continue their quest for greater democracy and freedom, but remain vigilant not to drop its own guard or reduce its strength to unacceptable levels while the transformation is taking place.

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150. At an historic meeting of the Community Party beginning on June 28, 1988, Gorbachev proposed and got approval for a radical new government structure. The party will continue to guide the country, but substantial power will be shifted to a new super legislature called the Congress of People's Deputies, composed of 1500 nationally elected delegates and 750 representatives of various trade unions and party committees. This Congress would in turn select a standing legislature of 400 to 450 members, and a president to oversee it. The president would have broad powers over domestic and foreign policy. *See* N.Y. Times, June 30, 1988, at A6.

151. *See* Nixon, *Superpower Summitry*, 64 FOREIGN AFFAIRS 1 (1985). In his new publication, *Perestroika*, *supra* note 8, Gorbachev has stated "Everyone seems to agree that there would be neither winners nor losers in [a nuclear] war. There would be no survivors. . .We are all passengers aboard one ship, the Earth, and we must not allow it to be wrecked. There will be no second Noah's Ark." *Id.* at 11, 12.

Walvis Bay: South Africa's Claims to Sovereignty

EARLE A. PARTINGTON*

I. INTRODUCTION

After more than a century of colonial domination, the Mandated Territory of South West Africa/Namibia[1] is close to receiving its independence. South Africa continues to administer the Territory as it has since its military forces conquered and occupied it in 1915 during World War I. In the negotiations between South Africa and the United Nations over Namibian independence, differences have arisen between the parties over whether the Territory includes either (1) the port and settlement of Walvis Bay, an enclave of 1124 square kilometers in the center of Namibia's Atlantic coast, or (2) the Penguin Islands, twelve small guano islands strung along 400 kilometers of the Namibian coast between Walvis Bay and the Orange River, the Orange River being part of the boundary between South Africa and Namibia. South Africa claims both Walvis Bay and the Penguin Islands as parts of its Province of the Cape of Good Hope, and thus under South African sovereignty. The United Nations, speaking for the people of Namibia, claims that Walvis Bay and the Penguin Islands are part of the Mandated Territory and thus must be part of an independent Namibia. A number of articles have been written about the legal status of these disputed areas[2], and this article will take a

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1. Formerly known as German South West Africa, then the Mandated Territory of South West Africa, and since 1968 it has been called Namibia by virtue of a United Nations General Assembly Resolution which changed the name. G.A. Res. 2372, 22 U.N. GAOR Supp. (No. 16A) at 1, U.N.Doc. A/6176/Add. 1 (1968), 1968 U.N. Y.B. 787; South Africa still calls the Territory by the name of South West Africa. This article will use the name Namibia when speaking currently of the Territory and South West Africa when speaking historically. Maps of Namibia and the Penguin Islands follow this article immediately preceding the Appendices.

2. Note, *The Legal Status of Walvis Bay*, 2 SOUTH AFRICAN YEARBOOK OF INTERNATIONAL LAW 187 (1976)(hereinafter SAYIL); D.S. PRINSLOO, FOREIGN AFFAIRS ASSOCIATION, *Walvis Bay and the Penguin Islands: Background and Status* (1977); Huaraka, *Walvis Bay and International Law*, 18 IND.J.INT'L L. 160 (1978); Botha, *Walvis Bay: miscellany*, 12 COMP. & INT'L L. J. S. AFR. 255 (1979) (hereinafter CILSA); Note, *Namibia, South Africa, and the Walvis Bay Dispute*, 89 YALE L.J. 903 (1980)(hereinafter Note, *Namibia*); E. Landis, If it Quacks Like a Duck . . . Walvis Bay, Namibia and Estoppel (June 19, 1981)(unpublished paper provided by the United Nations Council for Namibia); K. Asmal, *Walvis Bay: Self-Determination and International Law*, 37 U.N. GAOR Council for Namibia 29, U.N.

critical look at the positions taken and legal issues presented in these disputes.

It is important to first examine why these disputed areas are important enough to warrant the controversy that has been generated. The explanation is both economic and political. Walvis Bay is the only deep water port on the southwest coast of Africa between Cape Town in South Africa over 1000 kilometers to the south and Lobito in Angola over 1000 kilometers to the north. Walvis Bay's sheltered anchorage is the principal trade route for Namibia's seaborne exports and imports. Its modern port facilities are connected by paved road and railroad with the principal towns, mines, and farming areas of Namibia as well as with South Africa. It is the base of a sizeable fishing fleet and associated fish processing industry and is used as a base by Eastern European fishing fleets.[3] There is no other location, including the southern shallow water port of Luderitz, Namibia's only other port, which can serve the vital role for Namibia's economy that is served by Walvis Bay. In other words, the nation that controls Walvis Bay, in effect, controls Namibia.[4]

Walvis Bay has a significance far beyond that of Namibia's port. There is a proposal to connect the railway system of Namibia via Botswana with the railway system serving Botswana, Zimbabwe, and Zaire which is presently served by the ports of Angola (via the Benguela Railway), Tanzania (via the Tazara or TanZam Railway), Mozambique, and South Africa.[5] The Benguela Railway is presently unreliable because of the Angolan civil war, and the Tanzanian and Mozambique ports cannot handle the existing traffic.[6] This leaves South Africa with enormous economic power over the black states of southern Africa which are dependent upon the South African railway system and ports for international trade.[7] The construction of this direct rail link to Walvis Bay in an independent Namibia would be an important step in lessening this dependence by providing a modern port on the Atlantic Ocean closer to North and South American and north European ports than the South African, Tanzanian, and Mozambiquan ports.

As for the Penguin Islands, South African sovereignty over them after Namibian independence would include extensive fishing zones in Namibian waters and the potential for economic development in island

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Doc. A/AC.131/SLI/L.2 (1982); R. MOORSOM, INTERNATIONAL DEFENSE AND AID FUND FOR SOUTHERN AFRICA, *Walvis Bay, Namibia's Port*, (1984).

3. MOORSOM, *supra* note 2, at 10-11, 27-30; J. J. J. WILKEN & G. J. FOX, THE HISTORY OF THE PORT AND SETTLEMENT OF WALVIS BAY 28-37, 55-65 (1978); DEPARTMENT OF FOREIGN AFFAIRS OF THE REPUBLIC OF SOUTH AFRICA, SOUTH WEST AFRICA SURVEY 1967, 82. The author visited a Polish fishing vessel at Walvis Bay in 1978.

4. This situation is well documented in MOORSOM, *supra* note 2, at 58-70.

5. *Id.* at 69.

6. AFRICA SOUTH OF THE SAHARA 1986 209, 232, 679-80, 954 (15th ed. 1985).

7. MOORSOM, *supra* note 2, at 68-70. All of these rail lines are of the same gage and are connected to the South African rail system. Malawi, Swaziland, and Lesotho are also connected to this common gage rail system.

coastal waters by dredging for diamonds.[8] Further, two of the islands — Penguin and Seal — sit at the entrance of Luderitz Bay thereby having a commanding position over Namibia's only other port.

II. LEGISLATIVE AND CONSTITUTIONAL HISTORY OF WALVIS BAY

Walvis Bay[9] has a rich history[10] beyond the scope of this article. It is only the legal history that will be examined here. That history began on March 12, 1878, when the officer commanding the H.M.S. *Industry* of the Royal Navy landed at Walvis Bay, hoisted the British flag, and proclaimed the annexation to the British Empire of the "Port or Settlement of Walfisch Bay", the boundary of the annexed territory being described in the Proclamation[11].

This annexation was confirmed on December 14, 1878, by Letters Patent from Queen Victoria.[12] These Letters Patent authorized the Governor and Parliament of the British Colony of the Cape of Good Hope to annex Walvis Bay, and that with such annexation Walvis Bay would form part of the Colony of the Cape of Good Hope. At this time Walvis Bay was inhabited by some European merchants as well as some Hottentots

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8. G.- M. COCKRAN, SOUTH WEST AFRICAN MANDATE 2 (1976); Letter from the British Consul in Lüderitz to the Prime Minister of the Colony of the Cape of Good Hope (Feb. 20, 1910). Cape of Good Hope (Cape Colony) Original Correspondence, 1807-1910, Document 8939, CO 48/606, (microfilm pages 162-166) Public Record Office, Kew, Richmond, Surrey, England. MOORSOM, *supra* note 2, at inside back cover, shows the 200 mile fishing zones in the Atlantic Ocean claimed by South Africa westward from the Penguin Islands; *see also* J. PRESCOTT, THE MARITIME POLITICAL BOUNDARIES OF THE WORLD 332 (1985). Such exclusive economic zones may be challenged by virtue of the principle set out in the 1982 United Nations Convention on the Law of the Sea, U.N. Doc. A/Conf.62/122 art. 121(3) (1982), which provides that:

Rocks, which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

9. In its history, Walvis Bay had many spellings — Walfish, Walfisch, Walvisch, Walvich, Walwitch, Walwich, Woolich, Woolwich, Walewich, Walfischbaai, and Whale Bay. WILKEN & FOX, *supra* note 3, at 22-22; PRINSLOO, *supra* note 2.

10. *See* WILKEN & FOX, *supra* note 3.

11. That boundary was described as follows:

> . . . on the south by a line from
> a point on the coast 15 miles south
> of Pelican Point to Scheppmansdorf;
> on the east by a line from
> Scheppmansdorf to the Rooibank,
> including the Plateau, and thence
> to 10 miles inland from the
> mouth of the Swakop River; on the
> north by the last 10 miles of the
> course of the said Swakop River.

69 BRITISH AND FOREIGN STATE PAPERS 1177 (hereinafter cited as 82 B.F.S.P. 35). *See* Appendix "A". Because the "Plateau" was in fact a riverbed, the Germans disagreed with the British interpretation of this description, 82 B.F.S.P. 35, 40; 173 CONSOLIDATED TREATY SERIES 271, 277 (1978)(hereinafter 173 C.T.S. 271).

12. 70 B.F.S.P. 495. *See* Appendix "A".

and Damaras, indigenous tribes.[13] Following the annexation, a British resident magistrate was appointed.[14] In 1884, the Parliament of the Colony of the Cape of Good Hope enacted legislation authorizing the Governor of the Colony to proclaim that Walvis Bay, as described in the 1878 Letters Patent, is annexed to and forms part of the Colony.[15] On August 7, 1884, the Governor of the Cape of Good Hope duly signed a Proclamation declaring that Walvis Bay and the surrounding territory, as described in the 1878 Proclamation, the 1878 Letters Patent, and the 1884 Cape Statute, had become and was part of the Colony of the Cape of Good Hope.[16] Walvis Bay had become part of the Colony of the Cape of Good Hope.

Germany, in the meantime, moved to build a colonial empire of its own in Africa, and South West Africa became Germany's first colony. In August and September 1884, ahead of efforts by the Colony of the Cape of Good Hope to annex the territory between the Orange River and Walvis Bay, Germany claimed the coast of South West Africa from the Orange River north nearly to the frontier of Portuguese Angola (excepting Walvis Bay).[17] Germany also proceeded to acquire colonies in East and West Africa adjacent to other British colonies. As a result, in 1890, Germany and Great Britain entered into an Agreement whereby the respective spheres of influence in Africa were recognized including British sovereignty over Walvis Bay, and the boundaries between their colonies were fixed. The Germans, however, had been unwilling to accept the southern boundary of Walvis Bay which had been precisely fixed by a British survey in 1886; and, thus, the Agreement provided that the delimitation of the southern boundary would be reserved for arbitration, unless it had been settled by consent within two years.[18] In 1909 the dispute over the southern boundary of Walvis Bay, not having been settled by consent, was referred to the King of Spain for arbitration.[19] In 1911, the arbitrator announced his award confirming the previously fixed British

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13. WILKEN & FOX, *supra* note 3, at 6; H. VEDDER, THE NATIVE TRIBES OF SOUTH WEST AFRICA 115 (1928). For a history and description of the native tribes and peoples of South West Africa/Namibia, *see also* H. VEDDER, SOUTH WEST AFRICA IN EARLY TIMES (1966); I. GOLDBLATT, HISTORY OF SOUTH WEST AFRICA FROM THE BEGINNING OF THE NINETEENTH CENTURY (1971); Counter-Memorial of South Africa, South West Africa Cases (Eth. v. S. Afr./ Lib. v. S. Afr.), 1966 I.C.J. Pleadings, vol. 2, 311-380.

14. WILKEN & FOX, *supra* note 3, at 12.

15. Walfish Bay and St. John's River Territories Annexation Act 35 of 1884; 75 B.F.S.P. 408. The St. John's River Territory was another territory outside of South West Africa annexed to the Colony of the Cape of Good Hope in the same Act. *See* Appendix "A".

16. Proclamation 184 of 1884, Colony of the Cape of Good Hope Government Gazette No. 6519, (Aug. 8, 1884); 75 B.F.S.P. 407. *See* Appendix "A".

17. 75 B.F.S.P. 546-49. The diplomatic correspondence between Germany and Britain regarding the establishment of the German Colony of South West Africa can be found at 75 B.F.S.P. 528-53. *See also* W. O. AYDELOTTE, BISMARCK AND BRITISH COLONIAL POLICY, THE PROBLEM OF SOUTH WEST AFRICA (1974).

18. 82 B.F.S.P. 35, 40; 173 C.T.S. 271, 277. *See* Appendix "A".

19. 102 B.F.S.P. 91, 3 AM. J. INT'L L. SUPP. 306 (1909).

boundary.[20]

Meanwhile, in 1910 the British forged the Union of South Africa out of four of its colonies in southern Africa: the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony (the Orange Free State).[21] In creating the Union, a unitary rather than a federal state, the British Parliament provided that the four colonies would become provinces of the Union with "the same limits as . . . at the establishment of the Union."[22] Thus, the Union of South Africa had become a British Dominion, and Walvis Bay was part of that Dominion.

In August 1914, Britain's declaration of war against Germany put the entire British Empire at war, South Africa and the other British Dominions not receiving an independent status in international law until 1919 with their signing of the Treaty of Versailles.[23] On Christmas Day 1914, South African forces landed at Walvis Bay as part of an invasion force against German South West Africa[24], and in July 1915, following the South African invasion, the Germans surrendered.[25]

By Article 119 of the Treaty of Versailles which formally ended World War I, Germany renounced her colonies[26], Article 22 of the Covenant of the League of Nations (which was part of the Treaty of Versailles) establishing a system of mandates for them under the League of Nations which also had been created in the Treaty.[27] South Africa, with the signing of the Treaty of Versailles, enacted legislation to carry the Mandate for German South West Africa into effect pending formal establishment of the mandate system.[28] In 1920, the Council of the League of Nations confirmed the South African Mandate over South West Africa. That Mandate provided in part:

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20. Walfish Bay Boundary (Ger. v. U.K.), 11 U.N.R.I.A.A. 263, 104 B.F.S.P. 50 (1911); *see* I. BROWNLIE, AFRICAN BOUNDARIES, A LEGAL AND DIPLOMATIC ENCYCLOPEDIA 1273-88 (1979); Barnard, *Die Walvisbaai Grensbeskil (1884-1911)*, 1 TYDSKRIF VIR AARDYKSKUNDE (No.10) 46 (1962).

21. South Africa Act of 1909; 9 Edward VII c. 9, 102 B.F.S.P. 5.

22. South Africa Act of 1909, ¶¶ 4, 6; 102 B.F.S.P. 7. The Cape of Good Hope Parliament was succeeded by the Union Parliament, South Africa Act of 1909, ¶19; 102 B.F.S.P. 8. The Provinces were granted very restricted powers by way of Provincial Councils. South Africa Act of 1909, ¶85; 102 B.F.S.P. 22-23. H. R. HAHLO & E. KAHN, THE UNION OF SOUTH AFRICA, THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION 129 (1960).

23. Schaffer, *Succession to Treaties: South African Practice in the Light of Current Developments in International Law*, 30 INT'L & COMP. L.Q. 593, 612-14 (1981). During the Anglo-German diplomatic exchange over the establishment of the German Colony of South West Africa, the German Embassy in London apologized to the British Foreign Office because German officials had communicated directly with officials of the Colony of the Cape of Good Hope instead of through the British Government in London. 75 B.F.S.P. 550.

24. WILKEN & FOX, *supra* note 3, at 195.

25. GOLDBLATT, *supra* note 13, at 201-04.

26. 112 B.F.S.P. 1, 73.

27. 112 B.F.S.P. 13, 22.

28. Treaty of Peace and South-West Africa Mandate Act 49 of 1919; 113 B.F.S.P. 313; *see* Verein Für Schutzgebietsanleihen e.V. v. Conradie, N.O., 1937 A.D. 113, 142-45.

Article 1:

> The territory over which a Mandate is conferred upon His Britannic Majesty for and on behalf of the Government of the Union of South Africa (hereinafter called the Mandatory) comprises the territory which formerly constituted the German Protectorate of South-West Africa.

Article 2:

> The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require.
>
> The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate.
>
> * * *

Article 7:

> The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate.[29]

Now, instead of Walvis Bay being an enclave surrounded by foreign territory, South Africa found itself with Walvis Bay in the center of the coast of its newly acquired Mandated Territory. South Africa viewed the Mandate as only a prelude to eventual annexation of South West Africa.[30] In 1922, the South African Parliament enacted legislation which provided that:

> From a date to be fixed by the Governor-General by proclamation in the *Gazette* (which date shall also further be notified by the Administrator of the mandated territory in the *Official Gazette* thereof) the port and settlement of Walvis Bay which forms part of the province of the Cape of Good Hope shall be administered as if it were part of the mandated territory and as if inhabitants of the said port and settlement were inhabitants of the mandated territory; . . . .[31]

Accordingly, the Governor-General of the Union of South Africa proclaimed October 1, 1922, as the effective date of the transfer of

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29. 113 B.F.S.P. 1109. *See* Appendix "C".

30. J. DUGARD, THE SOUTH WEST AFRICA/NAMABIA DISPUTE, DOCUMENTS AND SCHOLARLY WRITINGS ON THE CONTROVERSY BETWEEN SOUTH AFRICA AND THE UNITED NATIONS 82 (1973). And, in fact, South Africa sought unsuccessfully in 1946 to obtain United Nations permission to annex South West Africa. *Id.* at 96-112.

31. The South-West Africa Affairs Act 24 of 1922, ¶1(1); 116 B.F.S.P. 399. *See* Appendix "A". This Act provided in ¶1(4) that no act of the Union Parliament would apply to Walvis Bay unless expressly so declared by the act or by proclamation. In 1944, this section of the South-West Africa Affairs Act of 1922, was amended to provide that acts of the Union Parliament in force in the Mandated Territory would also be in force in Walvis Bay unless the act or proclamation otherwise provided. South-West Africa Affairs Amendment Act 28 of 1944, ¶1.

administration.[32]

In 1925, the South African Parliament enacted a constitution for South West Africa.[33] That constitution provided in part that:

> Notwithstanding anything to the contrary contained in any law —
>
> (a) The port and settlement of Walvis Bay shall be deemed to form part of the territory [of South West Africa] for the purposes of this Act; . . . .[34]

In 1949, South West Africa was granted representation in the Parliament of the Union of South Africa for the first time[35], and in granting such representation the following definition was used: "the territory" means the territory of South-West Africa, and includes the port and settlement of Walvis Bay.[36] This was the first parliamentary representation for Walvis Bay in either the Union Parliament[37] or the Parliament of the Colony of the Cape of Good Hope.[38]

The Union of South Africa severed its ties to the British Crown and the Commonwealth in 1961 when it became the Republic of South Africa, the boundaries of the respective provinces remaining unchanged.[39] In 1968, South West Africa was given a new constitution by the South African Parliament.[40] This Constitution had the identical provision as the

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32. Proclamation 145 of 1922, Union of South Africa Government Gazette No. 1262 (Sept. 15, 1922). *See* Appendix "A". On October 2, 1922, the Administrator of the Mandated Territory issued his own Proclamation pursuant to the South-West Africa Affairs Act of 1922, which extended the law of South West Africa to Walvis Bay. Walvis Bay Administration Proclamation 30 of 1922, South West Africa Government Gazette No. 94, (Oct. 2, 1922). *See* Appendix "A".

33. South-West Africa Constitution Act 42 of 1925, ¶43; 121 B.F.S.P. 687.

34. *Id.* at ¶43(a).

35. South-West Africa Affairs Amendment Act 23 of 1949, ¶¶27-33. This Act provided that the territory of South West Africa, defined to include Walvis Bay (1), would have six members in the House of Assembly and four members in the Senate of the Parliament of the Union of South Africa.

36. *Id.* at ¶1.

37. The white adult population of Walvis Bay was taken into consideration for determining the numbers of members to represent the Province of the Cape of Good Hope in the House of Assembly of the Parliament of the Union of South Africa because the original quota of members was based on population figures which included this population. *Report Presented by the Government of the Union of South Africa Concerning the Administration of South West Africa for the Year 1929*, 10 LEAGUE OF NATIONS O.J. 1655, paras. 750-51 (1929). The statement in Note, *Namibia*, *supra* note 2, at 906, that "[t]he residents of Walvis Bay had never been granted South African voting privileges" is incorrect insofar as the white adult population is concerned because that group has had representation in the South African Parliament (through the members from South West Africa) since 1949, South-West Africa Affairs Amendment Act 23 of 1949, ¶¶27-33.

38. The population of Walvis Bay was too insignificant to warrant representation in the Cape Parliament. HOUSE OF ASSEMBLY DEBATES, COLONY OF CAPE OF GOOD HOPE 279-80 (1899).

39. Republic of South Africa Constitution Act No. 32 of 1961, ¶1.

40. South-West Africa Constitution Act 39 of 1968.

1925 Constitution deeming Walvis Bay to be part of South West Africa.[41]

In anticipation of Namibia being granted independence, South Africa in 1977 transferred the administration of Walvis Bay from that of South West Africa back to that of the Province of the Cape of Good Hope.[42] The white electorate of Walvis Bay were transferred to a Province of the Cape of Good Hope electoral district until 1982 when Walvis Bay became a separate parliamentary constituency.[43] This is the situation as of today, the South African government maintaining the position that Walvis Bay is an integral part of the Republic of South Africa; and that it will remain so notwithstanding that from 1922 until 1977 Walvis Bay had been integrated into South West Africa to such an extent that it had become by design the port through which the lifeline of Namibia's trade must flow.[44] As we shall see, the South African position has been rejected by the United Nations which maintains that an independent Namibia must include Walvis Bay.

III. LEGISLATIVE AND CONSTITUTIONAL HISTORY OF THE PENGUIN ISLANDS

The Penguin Islands have a shorter legal history than Walvis Bay. In the mid-nineteenth century, guano was a valuable commercial commodity. The Government of the Colony of the Cape of Good Hope, concerned about the exploitation of guano found on the coastal islands of the Colony, enacted an ordinance in terms of which all guano found in the Colony which was not on private property would be property of the Crown.[45]

North of the Orange River (and, thus, outside of the Cape Colony) lay a number of guano islands along what is now the coast of Namibia. De Pass, Spence and Company of Cape Town, in the business of exploiting

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41. *Id.* at ¶36.

42. Walvis Bay Administration Proclamation R.202 of 1977, Republic of South Africa Government Gazette No. 5731 (Aug. 31, 1977). For a summary of other changes in the law resulting from this transfer of administration, *see* 1977 ANNUAL SURVEY OF SOUTH AFRICAN LAW 42, 1978 ANNUAL SURVEY OF SOUTH AFRICAN LAW 51, 1979 ANNUAL SURVEY OF SOUTH AFRICAN LAW 41, 1980 ANNUAL SURVEY OF SOUTH AFRICAN LAW 41, 1981 ANNUAL SURVEY OF SOUTH AFRICAN LAW 32, and 1982 ANNUAL SURVEY OF SOUTH AFRICAN LAW 24.

43. Walvis Bay Administration Proclamation R.202 of 1977, §5, Annexule, Republic of South Africa Government Gazette No. 5731 (Aug. 31, 1977); Walvis Bay Administration Proclamation 248 of 1977, Annexule sec. 5, Republic of South Africa Government Gazette No. 5752 (Sept. 30, 1977); Constitution Amendment Act 99 of 1982, ¶2; *see also* 1982 ANNUAL SURVEY OF SOUTH AFRICAN LAW 24.

44. MOORSOM, *supra* note 2, at 14-15.

45. Ordinance for Declaring Certain Guano to be the Property of Her Majesty the Queen 4 of 1845. ¶5 of this Ordinance was repealed by the South African Parliament in 1934, Cape Statute Law Revision Act 25 of 1934, and the remainder of the Ordinance was repealed by the Pre-Union Statute Law Revision Act 78 of 1967. For a brief history of guano exploitation in southern Africa at this time, *see* J. A. S. PHILLIPS, DEUTSCH-ENGLISCHE KOMÖDIE DER IRRUNGEN UM SÜDWESTAFRIKA 26-29 (1986). The United States of America, in the nineteenth century, enacted legislation, subject to the President's discretion, allowing guano prospectors to claim guano islands for the United States. Guano Islands Act, 48 U.S.C. ¶¶1411-19 (1982).

guano islands, urged the Cape Government to annex these islands to the Cape Colony.[46] In 1861, the Governor of the Colony of the Cape of Good Hope issued a Proclamation which provided:

> . . . whereas it is expedient that, subject to the pleasure of Her Majesty in that behalf, Her dominion shall also be declared over a cluster of small Islands or Rocks adjacent to the said Island of Ichaboe, now therefore, I do hereby proclaim, declare, and make known, that the sovereignty and dominion of Her said Britannic Majesty, Queen Victoria, shall be, and the same are hereby declared over the following Islands or Rocks adjacent to Ichaboe, that is to say, Hollamsbird, Mercury, Long Island, Seal Island, Penguin Island, Halifax, Possession, Albatross Rock, Pomona, Plumpudding, and Roastbeef or Sinclair's Island. This Proclamation of Her Majesty's sovereignty and dominion to take effect forthwith, but to be subject to Her Majesty's gracious confirmation and disallowance.[47]

The geography recited in this Proclamation was rather inaccurate because Ichaboe Island is not adjacent to the other eleven islands which are spread along 400 kilometers of the coast and hardly can be said to be clustered.[48] Further, Sinclair Island and Roast Beef Island are shown on modern South African maps as different islands approximately 30 kilometers apart.[49]

For unknown reasons, this Proclamation was not forwarded to London for confirmation by Queen Victoria. In 1863, during the American Civil War, an American warship, the U.S.S. *Vanderbilt*, during pursuit of the Confederate raider, the C.S.S. *Alabama*, seized a British merchant ship at Penguin Island carrying cargo which the *Alabama* had taken from an American merchant ship. Coal which had been likewise taken by the

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46. PRINSLOO, *supra* note 2, at 8; 60 B.F.S.P. 1122-23. Law and order was needed on these islands because of often violent competition between guano prospectors. Watson, *The Guano Islands of Southwestern Africa*, 20 GEOGRAPHICAL REV. 631, 638-640 (1930). These islands are small. The largest is Possession Island with a surface area of only 90 hectares. MOORSOM, *supra* note 2, at 36.

47. Proclamation 53 of 1861, Colony of the Cape of Good Hope Government Gazette No. 3277 (Aug. 13, 1861); 60 B.F.S.P. 1123. *See* Appendix "B". Hollamsbird has been spelled Hollam's Bird, Hollams Bird, Hollandbird, Holland's Bird, and today the Island is known as Hollandsbird Island. Mercury Island has been known as Merkur Island. Ichaboe has been spelled Itschabo, Itshabo, and Ichabod. Halifax Island is also known as Guano Island. Albatross Rock has been known as Albatros Rock, Albatross Rocks, Albatross Island, Albatros Island, and Bol Island. Plumpudding has been shown as Plum Pudding, Plumpudding, and Plumpuding. Sinclair's Island is also known as Sinclair Island. Roastbeef Island is sometimes written as Roast Beef Island. In referring to specific maps, the name as shown will be used in this article.

48. The British Government noted this discrepancy in 1864. 60 B.F.S.P. 1121-22.

49. PRINSLOO, *supra* note 2, after listing the islands as set out in Proclamation 53 of 1861, (at 5), shows Sinclair Island and Roast Beef Island as separate islands, (at 9) without explaining the discrepancy. There is a question as to whether the modern maps correctly identify Roast Beef Island because Sinclair and Roast Beef Islands were identified as one and the same in years past in both literature and maps. *See* L. GREEN, ON WINGS OF FIRE 52-53 (1967); 2 RAND MCNALLY & CO.'S INDEXED ATLAS OF THE WORLD 228 (1907).

Alabama and left on Penguin Island was also seized. During the seizure, an American naval officer killed an officer on the British ship, and the British Government made an unsuccessful effort to obtain compensation for the British officer's widow.[50] Because of this incident, the 1861 Proclamation was brought to the attention of the British Government, and the Proclamation was disallowed.[51]

In 1866, the Royal Navy landed on Penguin Island and proclaimed sovereignty over all of the twelve islands named in the 1861 Proclamation except Ichaboe Island, and the Governor of the Colony of the Cape of Good Hope proclaimed all twelve of these islands again annexed to the Colony of the Cape of Good Hope.[52] This was confirmed in 1873 by an Act of the Parliament of the Colony of the Cape of Good Hope (which made no mention of the other eleven islands clustering adjacent Ichaboe Island).[53] However, this Act was passed in ignorance of the Letters Patent issued in 1867 which (1) authorized the Parliament of the Colony of the Cape of Good Hope to annex these twelve islands and (2) appointed the Governor of the Cape Colony as Governor of the "Island of Ichaboe and the Penguin Islands."[54] As a result of the oversight as to the 1867 Letters Patent, the Parliament of the Colony of the Cape of Good Hope in 1874 repealed the 1873 Act and authorized the Governor to reannex all twelve islands at which time the laws of the Colony of the Cape of Good Hope would be in effect thereon.[55] Accordingly, the Governor once again proclaimed the islands annexed to the Colony of the Cape of Good Hope.[56]

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50. The diplomatic correspondence arising from the incident can be found at 60 B.F.S.P. 1118-30. *See also* PHILLIPS, *supra* note 45, at 31 *et seq.*

51. Proclamation 27 of 1864, Colony of the Cape of Good Hope Government Gazette No. 3573 (May 10, 1864). *See* Appendix "B".

52. Proclamation 66 of 1866, Colony of the Cape of Good Hope Government Gazette No. 3814 (July 17, 1866). The twelve islands listed are identical to the listing in the 1861 Proclamation except that "Hollamsbird Island" is now "Hollandsbird Island". *See* Appendix "B". PRINSLOO, *supra* note 2, at 10, is incorrect in asserting that the Captain of the H.M.S. *Valorous* proclaimed sovereignty over all twelve of the islands in 1866. The 1866 Proclamation did not include Ichaboe Island over which sovereignty had been proclaimed in 1861. *See Preamble* to the Ichaboe and Penguin Islands Act 4 of 1874.

53. Annexation of Ichaboe and Penguin Islands Act 1 of 1873. The twelve islands listed are identical to those of the 1866 Proclamation. *See* Appendix "B".

54. 67 B.F.S.P. 554.

55. Ichaboe and Penguin Islands Act 4 of 1874; 67 B.F.S.P. 557. The islands were, however, "deemed" to be foreign ports for the purposes of the Colony's customs laws. Ichaboe and Penguin Islands Customs Act 5 of 1874; 67 B.F.S.P. 559. This same provision had been included in the repealed 1873 Act. *See* Appendix "B". Walvis Bay was only exempted from the Colony's customs law from 1885. Walfish Bay Customs Act 34 of 1885; Proclamation 129 of 1885, Colony of the Cape of Good Hope Government Gazette No. 6636 (Aug. 14, 1885). This exemption was granted in order to encourage the Germans to use its port, but this exemption drew opposition in the Cape Parliament. HOUSE OF ASSEMBLY DEBATES, COLONY OF CAPE OF GOOD HOPE 229 (1890) and HOUSE OF ASSEMBLY DEBATES, COLONY OF CAPE OF GOOD HOPE 219 (1894). This exemption was repealed by Proclamation 363 of 1898, Colony of the Cape of Good Hope Government Gazette No. 8090 (Jan. 3, 1899).

56. Proclamation 45 of 1874, Colony of the Cape of Good Hope Government Gazette No. 4674 (July 10, 1874). *See* Appendix "B".

The Penguin Islands, as these twelve islands had become known, were finally a part of the Colony of the Cape of Good Hope, but then came the Germans.

The establishment of the Colony (or "Protectorate" as the Germans called their colonies) of German South West Africa in 1884 was the product of diplomatic maneuvering during a time of constant correspondence between not only the British and German Foreign Offices, but also between the British Foreign Office and the British Colonial Office.[57] A Mr. De Pass of De Pass, Spence and Company, the guano exploiters, was concerned about company rights acquired in the territory which was to become German South West Africa; and in 1883, the Colonial Office responded to a query from the Foreign Office in response to a German query noting DePass's claims as well as the British claim to the Penguin Islands based on the 1867 Letters Patent, which response in turn was communicated to the German Foreign Office.[58] At the end of 1883, the German ambassador in London replied to the British Foreign Secretary, noting the British claims to Walvis Bay and the Penguin Islands and questioning whether the British Government had sanctioned the annexation of the Penguin Islands.[59]

The British continued to claim sovereignty over the Penguin Islands, but suggested the Establishment of an Anglo-German commission to settle all conflicting claims[60] which included claims on the mainland of South West Africa. The German Proclamation of August 7, 1884, however, over the first part of South West Africa annexed extended German sovereignty

> . . . from the north bank of the Orange River to the 26 degrees south latitude, 20 geographical miles inland, including the islands belonging thereto by the law of nations.[61]

The area encompassed in this Proclamation included on its face all of the Penguin Islands except Hollandsbird and Mercury Islands which are north of 26 degrees south latitude. The following month Germany extended its claim north nearly to the border of Portuguese Angola excluding *only* the British territory of Walvis Bay.[62] Thus, it appeared that the Germans had not accepted the British claim to the Penguin Islands.

The British Foreign Secretary responded to this Proclamation on September 19, 1884, with instructions to the British Embassy in Berlin to call attention to the German Government that the Penguin Islands were a part of the British Colony of the Cape of Good Hope as well as to suggest a mixed commission to settle the claims of British subjects in South West

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57. 75 B.F.S.P. 528-53. *See also* PHILLIPS, *supra* note 45, at 65-66, 90-92.
58. *Id.* at 528-31.
59. *Id.* at 531-34 (British translation from the German).
60. *Id.* at 536-37.
61. *Id.* at 546. *See* Appendix "B".
62. *Id.*

Africa.[63] Four days later, the Foreign Office communicated to the Colonial Office that the Germans had recognized that their Proclamation of annexation did not include the Penguin Islands.[64]

On October 8, 1884, the German Charge d'Affairs in London communicated acceptance of the British proposal for a mixed claims commission and that note stated that:

> The duties incumbent on the Mixed Commission will, in the opinion of His Majesty's [German] Government, include the investigation of the question what islands off the coast referred to, shall, as being subject to British sway, be excepted from the German Protectorate. The Undersigned has given expression to the views that His Majesty's [German] Government lays no claim to the several islands which, according to the information then at hand, had been already in the year 1874 incorporated with Cape Colony. More recent information, which has reached the Government of the Undersigned, however, leaves it doubtful whether the premises on which the statement made reposed were correct, and whether the facts, title of acquisition on which the

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63. *Id.* at 547.

64. *Id.* at 549. The Germans referred to ten islands as being excluded. Ten of the Penguin Islands are south of 26° south latitude, only Hollandsbird and Mercury Islands lie north of that latitude. Nine days later, on October 2, 1884, the British Foreign Secretary sent the following instructions to the British Embassy in Berlin:

In my despatch of the 19th ultimo, referring to my earlier despatch of the 13th ultimo, on the subject of Baron Plessen's announcement in regard to the establishment of the German Protectorate over the south-west coast of Africa from the 26th degree of south latitude northwards to Cape Frio, with the exception of Walfish Bay and the other British Possessions, you were instructed to make a communication to the German Government to the effect that the islands on the coast form part of Cape Colony, and are consequently British territory.

I now enclose a copy of a despatch from the Governor of the Cape to the Secretary of State for the Colonies, accompanied by a Minute of Ministers to the Governor, referring to the Proclamation by the Captain of the German ship *Elisabeth* of the assumption, by Germany, of the Protectorate of the coast from the Orange River to the 26th degree of south latitude, including the islands on that portion of the coast.

The representation which in my despatch of the 18th ultimo, above referred to, you were instructed to make to the German Government, with special reference to their Protectorate north of the 26th degree of south latitude in regard to the claim of Her Majesty's Government to the islands on the coast, will apply equally to the case of the islands between the 26th degree and the Orange River, and of which the principal are Ichaboe, Long Island, Seal Island, Penguin Island, Halifax, Possession Island, Albatross Rock, Pomona, Plum Pudding, and Roast Beef (or Sinclair Island). These islands have, as you will see by the accompanying correspondence, been acquired by the Cape Colony under the authority of Her Majesty's Letters Patent of the 27th February, 1867, and the Act of the Cape Parliament No. 4 of 1874, and are no doubt identical with the 10 islands referred to by Baron Plessen in his verbal communication recorded in the letter to the Colonial Office of which a copy is hereto annexed.

I have accordingly to request that you will make a communication to the German Government in the sense of the foregoing remarks, and you will at the same time say that a further communication will be made to them with reference to Baron Plessen's verbal statement of the 20th ultimo in regard to Shark Island, and probably some islets and other territory in the same vicinity.

Id. at 550-51.

> British claims were founded, are to be deemed legally valid. The Mixed Commission will, according to the view of His Majesty's [German] Government, have to examine and report upon these points.[65]

A joint Anglo-German claims commission was appointed with notice being given in both London[66] and Cape Town[67] of the Commission's meetings. Meanwhile, the British Foreign Secretary continued to correspond with the German Foreign Office via the German Embassy in London and noted that the commission would have to decide the validity of a lease given by the Governor of the Colony of the Cape of Good Hope to De Pass, Spence and Company to exploit guano deposits on a number of unnamed rocks and islets off the coast of South West Africa.[68] The joint Anglo-German claims commission was unable to reach agreement, but the British and German Governments agreed to have a new joint claims commission in Berlin try again to reach a settlement.[69] On July 15, 1886, the new joint claims commission reached agreement and signed a five paragraph Protocol disposing of claims arising out of activity by British subjects in what had become German South West Africa.[70] Only the fourth paragraph of the Protocol which dealt with the "unnamed rocks and islets" is of interest here. That paragraph provided:

> That Messrs. De Pass, Spence and Co., and their assigns, be free to make use, as they have hitherto done, of these islets and rocks, including Shark Island, without payment until the expiry of their lease, that is to say, until the 30th June, 1895; and if the British Government waive all claim to the sovereignty of these islands and rocks, and acknowledge the sovereignty of Germany over them, then that the latter Power should consent to confer no private rights over them to any persons other than the lessees for the time being of the 12 British islands named in the Letters Patent of the 27th February, 1867.
>
> Upon this understanding the British Commissioner will recommend his Government to acknowledge forthwith the sovereignty of Germany in these islets and rocks.[71]

By November 13, 1886, the British and German Governments had exchanged notes accepting this Protocol.[72]

This Protocol is significant because of the reference in the fourth

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65. *Id.* at 552 (British translation from the German).

66. 76 B.F.S.P. 1009. This notice stated that the Commission would not concern itself with claims arising at ". . . the British territory of Walfish Bay and the Penguin and Ichaboe Islands (forming part of the Cape Colony)," *Id.*

67. 77 B.F.S.P. 8-9. This notice did not have the limitation contained in the notice issued in London. 76 B.F.S.P. 1009 and PHILLIPS, *supra* note 45, at 105 *et seq.*

68. 77 B.F.S.P. 1283-84.

69. 77 B.F.S.P. 1287-88.

70. 77 B.F.S.P. 1042-44, 168 C.T.S. 129-32. *See* Appendix "B".

71. 77 B.F.S.P. 1043, 168 C.T.S. 131. *See* Appendix "B". On the same day, the British Commissioner forwarded the Protocol to London recommending that the British Government approve the settlement. 77 B.F.S.P. 1289.

72. 77 B.F.S.P. 1044-45, 168 C.T.S. 132-33. *See* Appendix "B".

paragraph to "the twelve British islands named in the Letters Patent of the 27th February, 1867." Although indirect, this is clear recognition by Germany of British sovereignty over the Penguin Islands. A review of the unpublished German Memorandum prepared for the negotiations which resulted in this Protocol as well as the unpublished British Memorandum in response and the unpublished British Report to the Protocol makes this quite clear.[73] It is surprising, however, that the 1890 Agreement between Germany and Great Britain[74], by which the respective spheres of influence in Africa and the joint colonial boundaries were fixed with precision, contains no mention of the Penguin Islands. Territory north of the Orange River was reserved to the German sphere of influence with only Walvis Bay in that area being identified as British territory. As the Penguin Islands lie north of the Orange River, from the face of the 1890 Agreement, one would conclude that the Penguin Islands were German. Notwithstanding this clear implication that the Penguin Islands were German territory, in fact, both the British and the Germans continued to regard them as British.[75]

The Penguin Islands faded from public view until 1962 when the South African Government published a map of southern Africa showing South Africa's claims to the Penguin Islands[76], a map which was corrected and republished in 1965.[77] In 1980, South Africa took the position with the United Nations that, since their annexation, the Penguin Islands had been part of the Cape of Good Hope; and upon the granting of independence to Namibia, South Africa will retain them along with Walvis Bay.[78]

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73. The German Memorandum only challenged British claims to the islands off the coast of South West Africa other than the Penguin Islands. The British Memorandum argued that these other islets and rocks were British by virtue of the British annexation of the Penguin Islands to which they are "adjacent". The British Commissioners' Report spoke of the twelve Penguin Islands as being "unquestionably British". The original of the Protocol, the German and British Memoranda, and the British Commissioners' Report can be found in the Embassy and Consular Archives Germany (Prussia) Correspondence, 1784-1913, FO 244/415, Public Record Office, Kew, Richmond, Surrey, England. In 1897, the German Colonial Company of South West Africa leased these unnamed islets and rocks to the Government of the Colony of the Cape of Good Hope for a period of ten years. 103 B.F.S.P. 983. The Germans were very insecure about their claim to these islets and rocks and wanted this lease in part to obtain British recognition of German sovereignty over them. 1 SANDER, GESCHICHTE DER DEUTSCHEN KOLONIAL-GESELLSCHAFT FÜR SÜDWEST-AFRIKA VON IHRER GRÜNDUNG BIS ZUM JAHRE 1910 117-18 (1912).

74. 82 B.F.S.P. 35, 40; 173 C.T.S. 271, 277. *See also* Appendix "A".

75. *See infra* pp. 273-278; Letter from British Consul, *supra* note 8.

76. *Infra* note 162.

77. *Infra* note 163.

78. Letter from South African Permanent Representative to United Nations Secretary-General (May 29, 1980), U.N. SC Doc. S/13968, Annexure ¶¶1-3. This letter also erroneously bases South Africa's claim to the Penguin Islands on the 1866 Proclamation. Likewise, M. Shaw, *Title to Territory in Africa*, INT'L LEGAL ISSUES 137 (1986), erroneously states that the Penguin Islands were annexed by the Colony of the Cape of Good Hope in 1866.

IV. LEGAL FACTORS TO BE APPLIED IN DETERMINING SOVEREIGNTY

A. *Introduction*

In the previous sections, the legal and constitutional history of Walvis Bay and the Penguin Islands was presented. So far, this article has ignored the political, economic, and other non-legal factors involved in the disputes in question. This has been done solely to give a legal perspective to the issues. South Africa's domestic policies, which were also imposed on South West Africa[79], arouse very strong emotional responses which clutter an objective legal analysis and tend to cause observers to first take their position and then justify it. That many people outside of South Africa find the South African determination to retain Walvis Bay and the Penguin Islands to be politically unwise and bound to leave a legacy of ill-feeling between South Africa and an independent Namibia is not a basis for deciding for or against South Africa as to the legal issues here. If the rule of law is to have meaning in the international sphere, analysis must be objective and South Africa's domestic policies must be ignored except to the extent (and no further) that these policies violate relevant international law. In this section, these other factors will be examined to the extent they impact on the legal issues presented.

B. *The Acquisition of Walvis Bay and the Penguin Islands*

The manner of acquisition of Walvis Bay has been the subject of dispute, the South African view being that Walvis Bay was *terra nullius* in 1878; that is, it belonged to no state.[80] Others have taken the position that Walvis Bay was not a *terra nullius*.[81] What is the significance of whether Walvis Bay (or the Penguin Islands) was *terra nullius* at the time of annexation?

Traditionally, it has been said that there are five modes of acquiring territory in international law — accretion, cession, conquest, occupation, and prescription.[82] This nice compartmentalization appears to lend itself to easy application. One looks to the requirements of each mode and unless the acquisition in question fits one of the modes, there has been no valid acquisition. Accretion, cession, and conquest have no application here. The first is obviously inapplicable; it is undisputed that no one ceded Walvis Bay to the British; and there certainly was no resistance by anyone to British occupation which resulted in a conquest. As for occupation, that mode has the requirement that the territory be a *terra nullius*.[83] Thus, if a land was inhabited, as the Walvis Bay area was by the

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79. DUGARD, *supra* note 30, at 431-33.

80. PRINSLOO, *supra* note 2, at 20; SAYIL, *supra* note 2, at 189.

81. Huaraka, *supra* note 2, at 164; Note, *Namibia*, *supra* note 2, at 912.

82. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 134 (2nd ed.1973); 1 D. P. O'CONNELL, INTERNATIONAL LAW 465 (1965).

83. 1 J. B. MOORE, A DIGEST OF INTERNATIONAL LAW 300 (1906); 1 O'CONNELL, *supra* note 82, at 468-70. M. F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRI-

Topnaar Namas, an indigenous African tribal group, it could not have been a *terra nullius*.[84]

This "analysis", however, is not only arbitrary, but it is based on a selective application of international law as espoused by the writers. By the late nineteenth century, many writers had construed the term *terra nullius* to include lands inhabited by natives which were not considered as states by European standards.[85] Also, in determining whether land was *terra nullius*, it was necessary to find the "critical date" at which the determination is to be made.[86] As will be seen, "critical date" is irrelevant to the issues here.

Modern writers reject this arbitrary classification of modes of acquisition because (1) it is often little more than a poor substitute for analysis, and (2) when tribunals decide cases these classifications are ignored because the facts of any given case rarely permit such organization.[87] In particular, occupation and prescription are often indistinguishable or interwoven; and, in reality, the *right* to sovereignty is often established by nothing more than the *fact* of sovereignty.[88] This is the situation in the case of Walvis Bay where it is undisputed that there has been an unopposed, effective, and unbroken administration since 1878 by the British Empire and then its successor, South Africa.[89] The question really is whether the mode of acquisition is important, or is the fact of an effective occupation and administration the key?

Possession and administration are the two essential facts that consti-

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TORY IN INTERNATIONAL LAW 43-44 (1926).

84. This is the argument of Huaraka, *supra* note 2, at 164. He ignores prescription as a mode of acquisition, *see infra* note 92, and thus concludes that South Africa never acquired sovereignty over Walvis Bay. That the Walvis Bay area was so inhabited, *see supra* note 13, and MOORSAM, *supra* note 2, at 17. For a description of the Nama people and their social organization, *see* Counter-Memorial of South Africa, South West Africa Cases (Eth. v. S.A./ Lib. v. S.A.), 1966 I.C.J. Pleadings Vol. II, 336-40.

85. 1 L. OPPENHEIM, INTERNATIONAL LAW 555 (Lauterpacht 8th ed. 1955); 1 O'CONNELL, *supra* note 82, at 470; M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 143 (5th ed. 1984); Cooper v. Stuart, (1889) 14 A.C. 286, 291 (P.C.)(treating Australia, by implication, as having been *terra nullius*). Contrast Cooper v. Stuart with *In re* Southern Rhodesia, [1919] A.C. 211, 215-16 (P.C.)(natives of Southern Rhodesia, now Zimbabwe, not destitute of any recognizable form of sovereignty). Shaw, *supra* note 78, at 31-38, has a good discussion of the various positions taken on this issue.

86. BROWNLIE, *supra* note 82, at 133-34; Clipperton Island (Mex. v. Fr.), 2 U.N.R.I.A.A. 1105 (1931) (decision in French), 26 AM. J. INT'L L. 390 (1932) (english trans.). Note, *Namibia*, *supra* note 2, at 913. The Note even rejected 1878 as a possible "critical date", choosing instead 1884, but then 1884 was rejected in favor of 1810.

87. BROWNLIE, *supra* note 82, at 134-35; 1 O'CONNELL, *supra* note 82, at 465.

88. O'CONNELL, *supra* note 82, at 465-68.

89. MOORSOM, *supra* note 2, at 13-15; Huaraka, *supra* note 2, at 170; Asmal, *supra* note 2, at 29. The Germans, however, did play havoc with Walvis Bay in late 1914 after the outbreak of World War I. WILKEN & FOX, *supra* note 3, at 171-96. That there has been an effective occupation of Walvis Bay was expressly recognized in the 1911 boundary arbitration. Walfish Bay Boundary (Ger. v. U.K.), 11 U.N.R.I.A.A. 263, 307-08, 104 B.F.S.P. 50, 101-02 (1911).

tute an effective occupation of a territory, the formal mode of acquisition sometimes being uncertain.[90] It has been argued that the failure to obtain an agreement of cession from the natives at Walvis Bay is fatal to South African claims of sovereignty,[91] a view that exhalts form over substance. As one writer has pointed out, such an agreement is usually neither understood nor appreciated by the natives, and even if understood, it has moral value only.[92] In the final analysis, sovereignty is determined by evidence of the display of state activity.[93] This was formally recognized by the European powers in the 1885 Act of Berlin by which the European powers set the rules for the completion of the colonial occupation of Africa.[94] The South African argument that sovereignty over Walvis Bay is theirs by virtue of effective occupation appears to be unassailable.[95]

The fifth mode of acquisition requires some elaboration. Prescription is the acquisition of the territory of another whereas occupation is the acquisition of *terra nullius*.[96] For one writer, the basis of prescription in international law is recognition of a fact by the family of nations.[97] An-

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90. 1 OPPENHEIM, *supra* note 85, at 557-58; BROWNLIE, *supra* note 82, at 141-42; 1 O'CONNELL, *supra* note 82, at 471-80. This question is important, as O'Connell notes, because the international law which applies to the creation of rights (i.e., occupation as a mode of acquisition) is the law at the time the rights are created while the international law to be applied to the existence of rights (i.e., effective occupation) is the law applicable during the existence of those rights. Island of Palmas (Neth. v. U.S.), 2 U.N.R.I.A.A. 829, 845-46, 22 AM. J. INT'L L. 867, 883-84 (1928); BROWNLIE, *supra* note 82, at 131-33.

91. Huaraka, *supra* note 2, at 164-65.

92. 1 OPPENHEIM, *supra* note 85, at 558; *but see* Shaw, *supra* note 78, at 37, where it is noted that such agreements negate the possibility of a territory being *terra nullius*. The absence of such an agreement, however, does not foreclose the acquisition of inhabited territory by other modes of acquisition such as prescription. *Id.* at 38; LINDLEY, *supra* note 83, at 45.

93. Walfish Bay Boundary (Ger. v. U.K.), 11 U.N.R.I.A.A. 263, 307-08, 104 B.F.S.P. 50, 101-02 (1911); Island of Palmas (Neth. v. U.S.), 2 U.N.R.I.A.A. 829, 838-40 22 AM. J. INT'L L. 867, 874-77 (1928); Honduras Borders (Guat. v. Hon.), 2 U.N.R.I.A.A. 1307, 1327-29 (1933); Minquiers and Ecrehos (Fr. v. U.K.), 1953 I.C.J. 47, 20 I.L.R. 94; Rann of Kutch (Ind. v. Pak.), 17 U.N.R.I.A.A. 1, 481-82, 50 I.L.R. 2, 446-54 (1968); Munkman, *Adjudication and Adjustment - International Judicial Decision and the Settlement of Territorial and Boundary Disputes*, 46 BRIT. Y.B. INT'L L. 1, 99-100, 103, 106 (1972-73); Murty, *Evidence of Traditional Boundaries and Some Problems in its Interpretation*, 8 IND. J. INT'L L. 479, 486-89 (1968). Shaw, *supra* note 78, at 17-24.

94. 3 AM. J. INT'L L. SUPP. 7 (1909); 1 O'CONNELL, *supra* note 82, at 479-80; *see* S. CROWE, THE BERLIN WEST AFRICAN CONFERENCE 1884-1885 (1942).

95. PRINSLOO, *supra* note 2, at 20; SAYIL, *supra* note 2, at 189; CILSA, *supra* note 2, at 271 n.89; the assertion by Huaraka, *supra* note 2, at 170, that effective occupation is a political consideration not based on international law existing at the time of acquisition makes no sense. The determination as to Walvis Bay is made as of today, not as of a past date. He appears to have confused "occupation" as a mode of acquisition with the concept of "effective occupation" in which the mode of acquisition is sometimes uncertain. *See supra* note 90.

96. AKEHURST, *supra* note 85, at 144. For a discussion of the role of prescription in international law, *see* Y. Z. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW 6-37 (1965).

97. 1 OPPENHEIM, *supra* note 85, at 576; *see* 1 O'CONNELL, *supra* note 82, at 489-91; Munkman, *supra* note 93, at 95, 105. It has been said that every act of recognition creates

other writer rejects prescription as a mode of acquisition by finding that, for our purposes, its role can be assumed by acquiescence and estoppel, the former, along with recognition, supplementing effective occupation.[98] In reality, this is just another way of applying the concept of an effective occupation, i.e., who is in fact sovereign has sovereignty.

This brings us to an important point overlooked by the opponents of South Africa's claim to sovereignty over Walvis Bay. Modes of acquisition are irrelevant where the original acquisition is not challenged.[99] In viewing the dispute over Walvis Bay and the Penguin Islands, there seems to be little realization that the issue is not whether and how the British (and thus South Africa) acquired sovereignty; but whether, upon Namibia being granted independence, will Walvis Bay and the Penguin Islands be part of Namibia or South Africa. The issue is in essence prospective only, the past providing relevant evidence in determining this question, but not being determinative in and of itself without regard to the prospective issue. And the issue arises as to Walvis Bay solely because of South Africa's *de facto* integration of Walvis Bay into South West Africa in 1922.

The issue is, in fact, reduced to determining whether Walvis Bay and the Penguin Islands were part of the Mandated Territory of South West Africa at the time the Mandate was established in 1920. The Mandate, as noted previously, was defined as comprising the territory which constituted German South West Africa. The record seems clear as to both Walvis Bay and the Penguin Islands that Germany had recognized them as British territory and thus they were part of South Africa in 1920.

The next question is whether anything has occurred since the establishment of the Mandate which would have resulted in the Mandate being increased in size by the addition of Walvis Bay or the Penguin Islands. As for the Penguin Islands, there is no difficulty because the South Africans did virtually nothing which could be construed as a renunciation of sovereignty. It is as to Walvis Bay that the problem arises because of South Africa's *de facto* integration of Walvis Bay into South West Africa so totally that Namibia has become and will remain overwhelmingly dependent upon the port for its economic survival. Here, the political and economic issues must be noted, but it is the legal issues that concern us. It is appropriate to start with an examination of the status of Walvis Bay

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an estoppel. MacGibbon, *Estoppel in International Law*, 7 INT'L & COMP. L.Q. 468, 473 (1958). *See* Schwarzenberger, *Title to Territory: Response to a Challenge*, 51 AM. J. INT'L L. 308, 316-18 (1957).

98. BROWNLIE, *supra* note 82, at 159, 164-65. Acquiescence, recognition, and estoppel and their interrelationship in international law are discussed at length in BLUM, *supra* note 96, at 38-98. *See also* Rann of Kutch (Ind. v. Pak.), 17 U.N.R.I.A.A. 1, 449-54, 498, 549, 50 I.L.R. 2, 409-15, 466, 494-95 (1968); Honduras Borders (Guat. v. Hon.), 2 U.N.R.I.A.A. 1307, 1327-29 (1933). Acquiescence may give rise to an estoppel. MacGibbon, *supra* note 97, at 501; Bowett, *Estoppel Before International Tribunals and its Relation to Acquiescence*, 33 BRIT. Y.B. INT'L L. 176 (1957).

99. AKEHURST, *supra* note 85, at 142; Western Sahara,(Advisory Opinion,) 1975 I.C.J. 12, 123, 59 I.L.R. 30, 140(Sep. Op. J. Dillard).

in South African municipal law.

C. *Walvis Bay in South African Municipal Law*

It has been argued that Walvis Bay was never formally incorporated into the Colony of the Cape of Good Hope.[100] The basis of this argument is not clear, but this assertion is certainly incorrect. There is no suggestion that the incorporation was not properly promulgated; and it is undisputed that Walvis Bay was administered as part of the Colony or Province of the Cape of Good Hope from 1884 until 1922. It has been further argued that Walvis Bay was never accorded the treatment or status as an integral part of the Colony of the Cape of Good Hope or the Union of South Africa, the inhabitants of Walvis Bay, for example, never having the vote.[101] This argument does not withstand examination and is factually incorrect.

The Colony of the Cape of Good Hope expanded gradually in pieces with periodic annexations steadily increasing its size. With these annexations, the franchise was sometimes extended to white adults at the time of annexation[102] and sometimes not.[103] In this regard, Walvis Bay was treated no differently than some other territories annexed to the Cape. Further, the laws of the Colony of the Cape of Good Hope were not made uniformly applicable throughout the Colony. Some laws were excluded from parts of the Colony with provision for extension to those excluded parts at a later date.[104] And in 1949, Walvis Bay finally gained representation in the Union Parliament.[105]

That Walvis Bay was part of the Cape of Good Hope, at least prior to

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100. Note, *Namibia*, *supra* note 2, at 904 n.5.

101. *Id.* at 917.

102. The British Kaffraria Incorporation and Parliamentary Representation Amendment Act 3 of 1865; Griqualand West Annexation Act 39 of 1877; British Bechuanaland Annexation Act 41 of 1895.

103. Xesibe Country Annexation Act 37 of 1886; Transkeian Annexation Act 38 of 1877; Pondoland Annexation Act 5 of 1894. For an act extending the franchise to previously annexed territory, *see* Transkeian Territories Representation Act 30 of 1887.

104. *E.g.*, Act 12 of 1890 To Provide for the Registration of Brands, and to facilitate the identification and recovery of Lost or Stolen Horses, Cattle and Ostriches; and Act 28 of 1886 to More effectually Prevent the Spread of Scab Disease in Sheep and Goats, Act 25 of 1889 to Extend the provisions of the "Scab Acts" to Field-Cornetcies adjoining areas or districts wherein the said Acts are in force, and Act 7 of 1890 to Amend the "Scab Acts Extension Act, 1889." Even when a law was brought into effect throughout the Colony on the same date, sometimes separate proclamations were made for some parts of the Cape. *E.g.*, Proclamations 222 and 223 of 1903, Colony of the Cape of Good Hope Government Gazette No. 8568 (Aug. 7, 1903). The first Proclamation extended a new customs law to Walvis Bay and five other parts of the Cape; the second Proclamation set the same date as the first for the same law to go into effect generally in the Colony. 96 B.F.S.P. 1225. Some parts of the Colony of the Cape of Good Hope had their laws made by the Governor pursuant to a grant of power by statute, *e.g.*, the Transkeian Territories, Tembuland and Pondoland Laws Act 29 of 1897.

105. South-West Africa Affairs Amendment Act 23 of 1949, §§ 27-33.

1922 according to South African municipal law, can be seen in the criminal case of *Rex v. Mahoney*[106] in which the defendant was convicted in an inferior court in Walvis Bay of an offense under a South West Africa law, which by a 1921 proclamation provided that the laws enacted for South West Africa would have effect in Walvis Bay. The case was sent for review to the High Court of South West Africa which refused to review it on the ground that Walvis Bay was not part of the Mandated Territory. The case was then sent to the Cape Provincial Division of the Supreme Court of South Africa, the jurisdiction of which was limited to the Province of the Cape of Good Hope.[107] The Cape Provincial Division reviewed the case and reversed the conviction because of an improper promulgation of the law in question in Walvis Bay which was "Union territory" and not part of the Mandated Territory of South West Africa.[108]

With the transfer of the administration of Walvis Bay to that of South West Africa in 1922, the port and settlement was "deemed" to be part of South West Africa, and it became *de facto* part of South West Africa. The leading case concerning the status of Walvis Bay after 1922, a criminal prosecution from Walvis Bay involving the evasion of customs duties, is *Rex v. Offen*[109] in which the Appellate Division of the Supreme Court of South Africa, South Africa's highest court, was called upon to construe the 1922 Act transferring the administration of Walvis Bay. The Chief Justice of South Africa in that case said:

> . . . If we examine the words of sec. 1 of the Act of 1922 we do not find that Walvis Bay is made a part of the mandated territory. The section says: "(1) . . . the port and settlement of Walvis Bay, which forms part of the Province of the Cape of Good Hope, shall be administered as if it were part of the mandated territory and as if the inhabitants of the said port and settlement were inhabitants of the mandated territory."[110]

This construction is consistent with the use of the word "deemed" generally in South African law where it has been recognized that the word can mean ". . . that the persons or things to which it relates are to be considered to be what really they are not, . . . "[111]

The final case is *Regina v. Akkermann*[112] in which the defendant was convicted of entering the territory of South West Africa without a required permit, the accused having entered Walvis Bay. The High Court of South West Africa, in construing the 1922 Act and the Proclamation thereunder, held that:

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106. 1921 C.P.D. 557.

107. South Africa Act of 1909, ¶98; 102 B.S.F.P. 25.

108. 1921 C.P.D. 557, 562.

109. 1935 A.D. 4, *aff'g* 1934 S.W.A. 73.

110. 1935 A.D. 4, 6.

111. Chotabhai v. Union Government, 1911 A.D. 13, 33, citing Rex v. Norfolk County Council (1891), 65 L.T.R.(n.s.) 222, 224, 60 L.J.Q.B. 379, 380-81 (Cave, J.).

112. 1954 (1) S.A. 195 (S.W.A.) at 196.

> . . . this legislation, passed by virtue of Act 24 of 1922 (Union), was intended to state and did in fact state that for all practical, legal, statutory, legislative and procedural purposes whether civil or criminal, the port and settlement of Walvis Bay shall, as from a certain date, be regarded, unless specifically excluded, as if it were an integral part of the Territory of South West Africa. . . . . Put differently, for the purposes of criminal law, this legislation in my opinion proclaimed that after a certain date any act or omission which would, if committed within the Territory constitute a crime, would, under the same law, likewise constitute a crime, if committed or omitted within the port and settlement of Walvis Bay. When this interpretation is applied to [the law allegedly violated], the word "Territory" must be interpreted to include the port and settlement of Walvis Bay.[113]

These court decisions were made years before sovereignty over Walvis Bay became an international issue so that there can be no suggestion that they were influenced by political or other nonlegal factors. The gist of these decisions interpreting the statutes and proclamations in question is that Walvis Bay, while part of the Province of the Cape of Good Hope and thus under the sovereignty of South Africa, was for all purposes other than sovereignty part of the Mandated Territory of South West Africa.

A close analogy in international law is found in Article III of the 1903 Panama Canal Treaty whereby Panama, in ceding the Canal Zone to the United States of America in perpetuity, granted to the United States ". . . the rights, power and authority . . . which the United States would possess and exercise if it were the sovereign of the territory [the Canal Zone] . . ."[114] There was never any doubt that Panama had retained sovereignty during the 75 years that the United States of America administered the Canal Zone.[115] The use of "if" in both of these cases was intended to describe a situation *de facto* which was not intended to change the situation *de jure*.[116]

D. *Walvis Bay in International Law Since 1922*

Until 1977, when South Africa transferred the administration of

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113. *Id.* at 196 (Claassen, J.). By virtue of Walvis Bay Administration Proclamation 30 of 1922, ¶3, South West Africa Government Gazette No. 94 (Oct. 2, 1922), judicial review of inferior court cases was transferred from the Cape Provincial Division of the Supreme Court of South Africa to the High Court of South West Africa.

114. 96 B.F.S.P. 553, 554-55; 194 C.T.S. 263, 264.

115. 1 OPPENHEIM, *supra* note 85, at 458-59; BROWNLIE, *supra* note 82, at 116-17; *see* Canal Zone v. Coulson, 1 C.Z. 50, 55 (1907), although careless language can be found in cases to the effect that the United States of America acquired sovereignty (rather than just the powers of the sovereign) over the Canal Zone. General Petroleum Corp. v. S.S. "David", 3 C.Z. 601, 604 (1925); Dixon v. Goethals, 3 C.Z. 23, 24, *appeal dismissed per curium*, 221 F. 1021 (5th Cir. 1915), *aff'd per curium*, 242 U.S. 616 (1916); Wilson v. Shaw, 204 U.S. 24, 32-33 (1907) (by implication).

116. J. GAYNER, COUNCIL ON AMERICAN AFFAIRS, *Namibia: The Road to Self-Government*, 35-36 (1979).

Walvis Bay back to that of the Province of the Cape of Good Hope, there was no issue concerning South African sovereignty over Walvis Bay. During the Third Session of the Permanent Mandates Commission of the League of Nations in 1923, a member of the Commission observed that Walvis Bay, although not part of the Mandated Territory, was included in the coverage of South Africa's Annual Report to the League, and a South African representative replied that Walvis Bay had been attached to the Mandated Territory for administrative reasons.[117] In its Report to the Council of the League of Nations following the Third Session, "[t]he Commission . . . noted that the territory of Walvis Bay had been treated as if it formed part of the Mandated Territory, whereas it was not, in fact, included in that territory."[118]

Five years later, during the Fourteenth Session of the Permanent Mandates Commission, there was an extensive discussion of the administration of Walvis Bay as part of the Mandated Territory when, in fact, as one member of the Commission noted, Walvis Bay was not part of that Territory.[119] The South African representative reiterated that Walvis Bay " . . . was merely included in the territory of South-West Africa for administrative purposes." Another member questioned what right the voters of Walvis Bay had to vote as part of the Mandated Territory when it was part of the Union, a concern shared by a third member of the Commission. The importance of the port to South West Africa was discussed, the South African representatives confirming that the port of Swakopmund just north of Walvis Bay had fallen into disuse and Walvis Bay had been developed as the principal port of South West Africa. The South African representative stated that Walvis Bay was essential to the economic development of South West Africa, and he expressed concern that if the inhabitants of Walvis Bay did not have a voice in the affairs of South West Africa, they might seek to transfer the administration of Walvis Bay back to that of the Union which would result in South West Africa losing control of its most important port.

In 1929, during the Fifteenth Session of the Permanent Mandates Commission, the Commission, after one member questioned the South

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117. Permanent Mandates Commission Minutes 6A, 103 (3rd Sess., 1923). Presumably, this observation was the result of the following paragraph in the *Report of the Administrator of South West Africa for the Year 1922* to the UNION PARLIAMENT, (at 3), (which Reports until 1922 or 1923 were also submitted to the Council of the League of Nations as South Africa's annual Report on South West Africa):

By Proclamation No. 30 the laws of the territory of South West Africa as existing on the 2nd October, 1922, were proclaimed in force at Walvis Bay which was declared to be a portion of the district of Swakopmund, all laws hereafter enacted in the mandated territory to operate at Walvis Bay unless expressly excluded.

(The Permanent Mandates Commission Minutes were published in both English and French with the pagination corresponding in both editions.)

118. 4 LEAGUE OF NATIONS O.J. at 1394 (1923).

119. Permanent Mandate Commission Minutes 6A, 68-71 (14th Sess., 1928). The Commission's Report to the Council of the League of Nations, to which the Minutes were appended, made no mention of Walvis Bay. 10 LEAGUE OF NATIONS O.J. 505 (1929).

African representatives about voting rights,[120] requested ". . . clear explanations as regards the right of the inhabitants of Walvis Bay — administered as an integral part of the Mandated Territory — to participate in the elections to the Parliament of the Union and in those of the Legislative Council of South West Africa respectively."[121] And in 1938, during the 34th Session of the Permanent Mandates Commission, in response to

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120. Permanent Mandates Commission Minutes 6A, 75 (15th Sess., 1929).

121. *Id.* at 294. In the *Report Presented by the Government of the Union of South Africa Concerning the Administration of South West Africa for the Year 1929*, 10 LEAGUE OF NATIONS O.J. 1655, paras. 748-52 (1929), South Africa gave the following response to this request:

REPLIES TO SPECIAL OBSERVATIONS OF THE PERMANENT MANDATES COMMISSION.

1. Legal Relations Between the Mandatory Power and the Mandated Territory.

* * *

2. General Administration.

(a) *Right of the inhabitants of Walvis Bay to participate in the elections to the Parliament of the Union.*

748. Section 1 of the South West Africa Affairs Act No. 24 of 1922 (see page 20, Laws of South West Africa, 1915-22), has been interpreted as empowering the complete disassociation of Walvis Bay judicially, administratively, and in consequence, electorally, from the Cape Province. In terms of Proclamation No. 145 of 1922,issued under Section 1(1) of Act No. 24 of 1922, the port and settlement of Walvis Bay was administered as from the 1st October, 1922, as if it were part of the mandated territory of South West Africa, and as if the inhabitants of the said port and settlement were inhabitants of the said territory. Subsequently, it was provided in terms of Section 43(a) of the South West Africa Constitution Act No. 42 of 1925, that the port and settlement of Walvis Bay shall be deemed to form part of the territory for the purposes of that Act. The Schedule to Act No. 42 of 1925, provides for the registration of voters for the election of elective members of the Assembly of the territory.

749. In so far as Walvis Bay, in its relation to the Union, is concerned,it may be stated that Act No. 35 of 1884 (Cape), provided for the annexation to the Colony of the Cape of Good Hope of the port and settlement. Section 1 provided that the territory should be subject to the laws of the Colony and Section 2 *inter alia*, that those laws might, unless otherwise provided by Act of Parliament, be repealed, altered, amended and modified, and new laws applicable to the territory might be made and might be repealed, altered, amended and modified by the Governor, and that no Act thereafter passed by the Parliament of the Colony should extend or be deemed to extend to the territory unless expressly so stated.

750. It may be pointed out, that at no time, have the electoral laws of the Union or of the Colony of the Cape of Good Hope been applied by Act or Proclamation to Walvis Bay, as required by Section 2 of Act No. 35 of 1884 (Cape), and no Delimitation Commission has at any time assigned Walvis Bay to any electoral division in the Union. The British residents at Walvis Bay cannot, therefore, in the absence of the requisite machinery, be enrolled as voters in the Union.

751. The European adult population of Walvis Bay was taken into consideration by the Fifth Delimitation Commission, but only for the purpose of determining the number of members to represent the Cape Province in the Union House of Assembly, as the original quota was based on figures which included the Walvis Bay European male adult population.

(b) *Right of the inhabitants of Walvis Bay to participate in the elections to the Legislative Assembly of South West Africa.*

752. By virtue of Section 43(a) of the South West Africa Constitution Act No. 42 of 1925, the inhabitants of Walvis Bay are entitled to participate in the elections to the Legislative Assembly of the Mandated Territory.

a question from a member of the Commission, the South Africans reiterated that Walvis Bay came under South West Africa for "administrative purposes".[122]

Quite clearly the Permanent Mandates Commission was concerned about South Africa administering Walvis Bay as part of South West Africa when it was not part of the Mandated Territory.[123] Of far more importance is that South Africa could not unilaterally alter the Mandate by adding Walvis Bay (or the Penguin Islands) to the Mandated Territory, the consent of the Council of the League of Nations being required for any modification of the terms of the Mandate.[124] Had South Africa wished to enlarge the Mandate by adding Walvis Bay (or the Penguin Islands) to South West Africa, there was the precedent in 1923 whereby the Mandate for the Belgian portion of German East Africa (now Rwanda and Burundi) was increased in size and the Mandate for the British portion of German East Africa (now the Tanganyika portion of Tanzania) correspondingly decreased in size by resolution of the Council of the League of Nations following an Anglo-Belgian request for such modification.[125] There was never a request to the Council of the League of Nations to enlarge the Mandate for South West Africa, and no such modification was ever made.

When the League of Nations dissolved itself in 1946 recommending that the League of Nations Mandates be transformed into United Nations Trusteeships,[126] South Africa refused to comply and found itself in conflict with the United Nations. In 1966, the United Nations General Assembly terminated the South African Mandate over South West Af-

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122. Permanent Mandates Commission Minutes 6A, 82-83 (34th Sess., 1938).

123. The statement in the Note, *Namibia*, *supra* note 2, that the Permanent Mandates Commission had been persuaded by 1929 that Walvis Bay "was an integral part of South West Africa" is incorrect because it is clear from reading the Minutes, (See sources cited *supra* notes 117-122,) that the Commission considered Walvis Bay *not* to be part of South West Africa even though it was administered as if it were.

124. Rex v. Christian, 1924 A.D. 101, 111; Art. 7, Mandate for German South West Africa, 113 B.F.S.P. 1109, 1110, 17 AM. J.INT'L L. SUPP. 175, 176 (1923); LINDLEY, *supra* note 83, at 262. *See* Appendix "C". The Mandate continued in force notwithstanding the dissolution of the League of Nations in 1946. International Status of South-West Africa (Advisory Opinion), 1950 I.C.J. 128, 138, 17 I.L.R. 47, 55; South West Africa Cases (Eth. v. S.A./Lib. v. S.A.), Preliminary Objections, 1962 I.C.J. 319, 341, 37 I.L.R. 3, 22-23. The United Nations General Assembly terminated the Mandate in 1966. G.A. Res. 2145, 21 U.N. GOAR Supp. (No. 16) 2, U.N. Doc. A/6316 (1966); 1966 U.N.Y.B. 606. The validity of this termination was upheld by the International Court of Justice in 1971 which found that South Africa's continued occupation in Namibia is illegal. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion), 1971 I.C.J. 16, 49 I.L.R. 3. It is evident that South Africa could hardly acquire a greater right to alter the boundaries of South West Africa/Namibia by virtue of its illegal occupation.

125. 4 LEAGUE OF NATIONS O.J. 1273 (1923). The diplomatic correspondence relating to this modification can be found at 118 B.F.S.P. 899-905.

126. DUGARD, *supra* note 30, at 96-97.

rica.[127] That same year, the International Court of Justice ruled against Ethiopia and Liberia in cases they had brought against South Africa concerning the administration of the Mandate.[128] The merits of these cases, which were consolidated, are not significant here, but the conduct of the parties is very significant.

Ethiopia alleged that South Africa had construed a "military landing field" in the Swakopmund District of South West Africa in violation of Article 4 of the Mandate prohibiting military bases.[129] South Africa answered this allegation by stating that the landing ground in question was in Walvis Bay which is not ". . . within the territorial boundaries of South West Africa", but which is South African territory not included in the Mandate.[130] In reply, Ethiopia and Liberia stated "[w]ith respect to the military landing ground in the Swakopmund District, [Ethiopia and Liberia] accept [South Africa's] geographical explanation."[131] They went on to argue, however, that ". . . Walvis Bay must, in a military sense, be considered to be 'in' South West Africa, inasmuch as it is completely surrounded by territory subject to the Mandate. . . ."[132] In the separate opinion by the South African judge *ad hoc* in these cases, this admission was noted as well as the obvious fact that Walvis Bay is not completely surrounded by the Mandated Territory.[133] This was the only mention of Walvis Bay by any of the judges.[134] This admission is another example of acquiescence and recognition by other nations of South Africa's sovereignty over Walvis Bay.

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127. G.A. Res. 2145, 21 U.N. GOAR Supp. (No. 16) 2, U.N. Doc. A/6316 (1966); 1966 U.N.Y.B. 606.

128. South West Africa Cases (Eth. v. S.A./Lib. v. S.A.), 1966 I.C.J. 4, 37 I.L.R. 243.

129. Memorial of Ethiopia, South West Africa Cases (Eth. v. S.A./Lib. v. S.A.), 1966 I.C.J. Pleadings vol. 1, at 183. *See* Appendix "C".

130. Counter-Memorial of South Africa, South West Africa Cases (Eth. v. S.A./Lib. v. S.A.), 1966 I.C.J. Pleadings, vol. 4, at 57-58, and *id.* at vol. 2, at 309.

131. Reply of Ethiopia and Liberia, South West Africa Cases (Eth. v. S.A./Lib. v. S.A.), 1966 I.C.J. Pleadings, vol. 4, at 560. It is significant that, at this time, no nation disputed South Africa's sovereignty over Walvis Bay. *E.g.*, the United States of America has consistently recognized South Africa's sovereignty over Walvis Bay. Map of Southwest Africa, Department of State, Division of Map Intelligence and Cartography, No. 10459 (Sept. 1946); U. S. DEPARTMENT OF STATE FACT BOOK OF THE COUNTRIES OF THE WORLD 590-91 (1970); U.S. DEPARTMENT OF STATE COUNTRIES OF THE WORLD 733-34, 743-44 (1974); and DEPARTMENT OF STATE BULLETIN 3 (Sept. 1986) and *id.* map preceding p. 1.

132. Reply of Ethiopia and Liberia, South West Africa Cases (Eth. v. S.A./Lib. v. S.A.), 1966 I.C.J. Pleadings, vol. 4, at 560.

133. South West Africa Cases (Eth. v. S.A./Lib. v. S.A.), 1966 I.C.J. 4, 206-07, 37 I.L.R. 243, 394 (Sep. Op. J. Van Wyck). On the west, Walvis Bay is bounded by the Atlantic Ocean.

134. The only mention of the Penguin Islands in the judgment or record of the South West Africa Cases was a note in the South African Counter-Memorandum mentioning the British annexation of the Islands by way of the 1867 Letters Patent. Counter-Memorandum of South Africa, South West Africa Cases (Eth. v. S.A./Lib. v. S.A.), 1966 I.C.J. Pleadings, vol. 2, at 364 n.10. The South African map included at the end of this volume shows none of the Penguin Islands, but Walvis Bay is expressly identified as South African territory.

E. *The Significance of Maps as to Walvis Bay and the Penguin Islands*

Maps are playing a greater role in international law today than ever before. The International Court of Justice has had three opportunities to discuss the significance of maps in territorial dispute cases. In the *Minquiers and Ecrehos (Fr. v. U.K.)* case[135] involving the issue of sovereignty over some islets and rocks near the Channel Islands, the Court considered a French Government map which the French had provided to the British Government and which showed the Minquiers to be British territory.[136] In the judgment, only one judge commented on the map noting that while maps are not always decisive in the settlement of legal questions relating to sovereignty, they ". . . may . . . constitute proof that the occupation or exercise of sovereignty was well known."[137]

In the *Case Concerning Sovereignty Over Certain Frontier Land (Belg. v. Neth.)*,[138] Belgium and the Netherlands both claimed two small plots of land which if recognized as Belgian would create an enclave entirely surrounded by Netherlands territory. In the settlement of their boundary by a convention in 1893, there was a special map which showed clearly that these plots in question were Belgian. There was also contradictory language between a written description of the boundary, which incorporated the maps and stated that the plots were Belgian, and an earlier document which was also purportedly incorporated in the convention, but which in fact stated the plots were Dutch. The Court found, however, that on the map signed by the boundary commissioners, these plots ". . . stood out as a small island in Netherlands territory coloured to show, in accordance with the legend of the map, that they did not belong to the Netherlands but to Belgium. The situation of those plots must have immediately arrested attention."[139] In addition, the court relied on Belgian military staff maps which, since their first publication in 1874, had shown the plots as Belgian territory.[140] In this case, maps were decisive in the court deciding in favor of Belgium.

In the third case, the *Temple of Preah Vihear (Camb. v. Thai.)*,[141] the 1904 boundary treaty between France and Siam (now Thailand) stated that the boundary between Siam and Cambodia (now Kampuchea, then part of French Indo-China), would follow the watershed line. A mixed commission fixed the boundary by survey; and maps were subsequently prepared by the French based on the survey and at the request of Siam, but these maps were not part of the boundary delimitation. The

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135. 1953 I.C.J. 47, 20 I.L.R. 94.

136. *Id.* at 71, 20 I.L.R. at 114-15.

137. *Id.* at 105, 20 I.L.R. at 141-42 (Sep. Op. J. Carneiro).

138. 1959 I.C.J. 209, 27 I.L.R. 62.

139. *Id.* at 225, 27 I.L.R. at 75.

140. *Id.* at 227, 27 I.L.R. at 77. J. Armand-Ugon, dissenting, disagreed with giving these military maps any significance because there had been no showing that the Netherlands knew of them. *Id.* at 247, 27 I.L.R. at 90.

141. 1962 I.C.J. 6, 33 I.L.R. 48.

Temple of Preah Vihear was on the Siamese side of the watershed line, but the French map of the area in question put the Temple in Cambodia. Siamese officials received these maps and distributed them widely. In 1937, Siam published a map showing the Temple to be in Cambodia. And in 1947, Thailand submitted a map to the Franco-Siamese Conciliation Commission, dealing with areas other than the Temple, which showed the Temple to be in Cambodia. The Court found that Thailand was precluded from challenging the map evidence and ruled for Cambodia holding that the map line prevailed over the treaty line.[142]

It would seem clear that maps produced by a state, or utilized or accepted by it, are going to be strong evidence, if not conclusive of boundaries or sovereignty as described thereon;[143] although if the governmental agency which drew the map did not have the "authority to draw boundaries", the map in question would not be given "decisive weight for the purpose of ascertaining or determining sovereign rights."[144] The question here then is what does the map evidence, especially official maps, show as to Walvis Bay and the Penguin Islands.[145]

Turning to the maps published by the South African Government, the first map, circa 1914,[146] shows Walvis Bay separated from South West Africa by an international boundary;[147] and of the Penguin Islands, only Hollam's Bird and Possession Islands are shown and they are not identified as South African territory. In 1923,[148] 1935,[149] 1937,[150] 1938,[151] and 1940,[152] maps were published which showed either no boundary[153] or only

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142. *Id.* at 32-33, 33 I.L.R. at 70-71.

143. *See also*, Rann of Kutch (Ind. v. Pak.), 17 U.N.R.I.A.A. 1, 566-67, 50 I.L.R. 2, 514-15 (1968); Island of Palmas (Neth. v. U.S.), 2 U.N.R.I.A.A. 829, 852, 22 AM. J. INT'L L. 867, 891 (1928); Weissberg, *Maps as Evidence in International Boundary Disputes: A Reappraisal*, 57 AM. J. INT'L L. 781 (1963). In Honduras Borders (Guat. v. Hon.), 2 U.N.R.I.A.A. 1307, 1360-61 (1933), Guatemala was held to be estopped (although called "acquiescence" by the tribunal) to deny the boundary was where it had placed it on one of its official maps.

144. Rann of Kutch (Ind. v. Pak.), 17 U.N.R.I.A.A. 1, 540, 50 I.L.R. 2, 485 (1968).

145. All maps cited in this article were found at one or more of the following institutions: Geography and Map Division, Library of Congress, Washington, D.C., U.S.A.; Public Record Office, Kew, Richmond, Surrey, England; Institut Géographique Nationale, Saint Mandé, Val de Marne, France. The maps cited in this article are by no means exhaustive of all published maps on this subject.

146. War Map of German South-West Africa, Government Printing Works, Pretoria (undated), scale 1:1,900,800 (30 miles = 1 inch). As South African forces conquered South West Africa in a campaign that began in December 1914 and ended in July 1915, this map was probably produced right after the outbreak of World War I in August 1914.

147. But without the color shading that is found on the other international boundaries on the map.

148. Map of the Union of South Africa, Surveyor-General, Cape Town (1923), scale 1:1,000,000 (hereinafter Map 1923).

149. South Africa, C.M. 04.500-35, 1000-35 (rev.), scale 1:1,400,000.

150. South Africa, C.M. 0104-1937, scale 1:4,000,000.

151. South Africa, C.M. 0104-1938, scale 1:4,000,000 (hereinafter Map 1938).

152. South Africa, C.M. 0104-1940, scale 1:4,000,000 (hereinafter Map 1940).

153. *See* maps cited *supra* notes 150-152. Of these maps, the latter two maps, Map 1938, *supra* note 151 and Map 1940, *supra* note 152, have color shading added to interna-

a magisterial[154] boundary between Walvis Bay and South West Africa. The 1923 map shows none of the Penguin Islands. The other four maps show all of the Penguin Islands except Seal, Penguin, and Long Islands, plus a Roast Beef Island separate from Sinclair Island (as is the case on all South African maps which show Sinclair Island). On none of these maps are any of the islands identified as South African territory. The maps attached to the annual Reports submitted by South Africa to the Council of the League of Nations for the years 1937 to 1939, however, do show an international boundary between Walvis Bay and South West Africa.[155] Of the Penguin Islands, these maps show only Ichaboe Island and it is not identified as South African territory.

Then, from 1940,[156] international (or provincial) boundary lines are shown on the South African Government maps between Walvis Bay and South West Africa, and such boundary lines are found on the maps of 1943,[157] 1944 (two maps),[158] 1950,[159] 1952,[160] 1955,[161] 1961,[162] 1962,[163] and

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tional boundary lines to highlight them. On these two maps this shading runs along the Atlantic coast of South West Africa through Walvis Bay, thus showing it distinctly as part of the Mandated Territory.

154. *See* maps cited *supra* notes 148 and 149. The color coding on Map 1923, *supra* note 148, indicates that Walvis Bay is not Union territory.

155. The same map was used for all three years. Reports Presented By the Government of the Union of South Africa to the Council of the League of Nations Concerning the Administration of South West Africa for the Years 1937, 1938, 1939. However, para. 1 (as read with the errata) of the 1930 annual Report, which gave a description of the boundaries of South West Africa which was confirmed in the nine subsequent annual Reports, states that the western boundary is the Atlantic Ocean, Walvis Bay not being mentioned and thus by implication included within the Mandated Territory. In the one and only Report to the United Nations, "Report by the Government of the Union of South Africa on the Administration of South West Africa for Year 1946", the same western boundary description was given in para. 2, but para. 3 stated:

> . . . Walvis Bay, which is 374 square miles (96,867 hectares) in extent, is administered by the Administration of South West Africa, but the area remains nevertheless an integral part of the Province of the Cape of Good Hope.

156. South West Africa, Sheet No. South F-33-5, Government Printer, Pretoria (1940), scale 1:5,000,000. The boundary shown is designated as Mandated Territory boundary. South West Africa, Sheet No. South G-33-2 shows Hollams Bird and Mercury Islands. The sheet (South G-33-5) showing the remaining Islands was not found by the author.

157. South Africa, Conical Projection with Two Standard Parallels (18° and 32° S. Lat.), drawn in the Trigonometrical Survey Office (1935, rev. 1943), scale 1:4,000,000.

158. Map of the Union of South Africa, 1944, reprinted [from 1923 map]: G.P.W. - Directorate of Map Printing. U.D.F., (1944), scale 1:1,000,000, which shows a provincial boundary between Walvis Bay and South West Africa; and South Africa, UDF 655/447, Survey Depot (Tech.) S.A.E.C. (1944), scale 1:2,000,000.

159. South West Africa, 1950, Surveyor-General, Windhoek (1950), scale 1:800,000. This map shows Hollam's Bird, Ichabo, and Possession Islands, but does not identify them as South African territory.

160. South Africa, Survey Depot (Tech.) S.A.E.C. 1944, Revised Trigonometrical Survey Office (1952), scale 1:2,000,000.

161. South West Africa, 1955, Surveyor-General, Windhoek (rev. ed. 1955), scale 1:800,000. This map shows Hollam's Bird, Ichabo, and Possession Islands, but does not identify them as South African territory.

1965.[164] As to the Penguin Islands, maps from 1926-1927[165] show all of the Islands except Mercury and Long Islands. The 1943 map shows all of the Islands except Seal, Penguin, and Long Islands. The 1944 and 1952 maps do not show the Penguin Islands. The 1950, 1955, and 1961 maps show only Possession Island. On none of these maps are any of the Penguin Islands identified as South African territory. The 1962 and 1965 maps show all of the Penguin Islands, the 1962 map showing fourteen islands specifically identified as South African territory (Long Island is shown as North and South Long Islands, and Sinclair and Roastbeef Islands are shown as separate islands). The 1965 map is identical to the 1962 map except that Long Island has become one island and the separate Roastbeef Island is not identified as South African territory.

When we look at the German maps of South West Africa, both official and non-official, published in 1892,[166] 1894,[167] 1896,[168] 1899,[169] 1904,[170]

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162. South West Africa, 1961, Surveyor-General, Windhoek (rev. ed. 1961), scale 1:800,000. This map shows Hollam's Bird, Ichabo, and Possession Islands, but does not identify them as South African territory.

163. Southern Africa 1962, Trigonometrical Survey, Government Printer, Pretoria (1st ed. 1962), scale 1:2,500,000. For a non-official South African map showing the same territorial claims as this map shows, *see* South West Africa, 1966, lithographed by Keartland Press (Pty.) Ltd., Johannesburg, scale 1:1,000,000.

164. Southern Africa 1965, Trigonometrical Survey, Government Printer, Pretoria (2nd ed. 1965), scale 1:2500,000. The third (1972), fourth (1979), and fifth (1983) editions of this map show the same territorial claims. For a non-official South African map showing the same territorial claims, *see Namibia/SWA Prospectus*, Africa Institute of South Africa 31-32 (1980), *but see* the map of South West Africa, Surveyor-General's Office, Windhoek (1964), scale 1:3,000,000, which shows only a magisterial boundary between Walvis Bay and South West Africa. All of the Penguin Islands are shown plus a separate Roastbeef Island, but none are identified as South African territory. The same map was published in 1960, but without showing the Penguin Islands. For commercial and official South African maps showing all of the Penguin Islands (excluding Roast Beef Island) as South African territory with Long Island shown as North and South Long Islands, *see* READER'S DIGEST ATLAS OF SOUTHERN AFRICA 138 and 196 (1984), and map sheets 2314 Rehoboth, 2514 Lüderitz, and 2714 Alexander Bay, Government Printer, Pretoria (1st ed. 1977), scale 1:500,000.

165. South West Africa, Sheets No. South G-33-2 and South G-33-5, drawn in the Surveyor General's Office, printed at the Ordnance Survey, Southampton (1926 and 1927 respectively), scale 1:500,000. The sheet in this series (South F-33-5) which shows Walvis Bay was not found by the author.

166. Deutsch-Südwest-Afrika, Map No. 3, 1892, R. KIEPERT, DEUTSCHERKOLONIAL-ATLAS (Berlin 1893), scale 1:3,000,000. This map shows Hollams Bird, Mercury, Ichaboe, Seal, Halifax, Long, Possession, Pomona, Plumpudding, and Roast Beef Islands as British territory.

167. Südwestafrikanisches Schutzgebiet, Blatt 3, 1894, LANGHANS' DEUTSCHER KOLONIAL-ATLAS, Nr. 17, (1897), scale 1:2,000,000. This map shows Hollam's Bird, Mercury, Ichabo, Guano or Halifax, Long, Possession, Plumpudding, Pomona, Sinclair, and Roast Beef Islands as British territory. Seal, Penguin, and Shark Islands (as well as Halifax Island) are color coded as British territory on the inset map of Lüderitz Bucht.

168. Übersichtskarte von Deutsch-Südwest-Afrika, Map No. 5, KLEINER DEUTSCHER KOLONIALATLAS, GEOGRAPHISCHE VERLAGSHANDLUNG DIETRICH REIMER (1896, 1898, 1899, 1900, 1905, 1906, 1908, 1910, 1911, 1913, 1914, and 1918), scale 1:500,000. Through 1906 all of the Penguin Islands plus a separate Roast Beef Island are identified as British territory. The 1908 edition does not show Seal, Penguin, or Halifax Islands. The 1910, 1911, and 1912

1909,[171] 1910,[172] 1911 (5 maps),[173] and 1914,[174] we find that Walvis Bay is

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editions, under the title *Deutscher Kolonialatlas mit illustriertem Jahrbuch*, restore Albatros Island, but does not identify it as British territory. The 1913 edition shows Albatros Island as British territory, but Seal and Penguin Islands are not shown. The 1914 and 1918 editions are identical to the 1910, 1911, and 1912 editions except that the map is renumbered as no. 6.

169. Politisch-militärische Karte von Süd-Afrika zur Veranschaulichung der Kämpfe zwischen Buren und Engländern bis zur Gegenwart, Habenicht, Spezialkarte v. Afrika u. Langhans, Deutscher Kolonial Atlas, Gotha: Justus Perthes (1899), scale 1:4,000,000. This map shows all of the Penguin Islands as British territory.

170. Kriegskarte von Deutsch-Südwestafrika, Berlin (1904), scale 1:800,000. This set of eight strip maps shows all twelve Penguin islands plus a separate Roast Beef Island as British territory on the single sheet key for the eight strip maps. The second map is Karte von Deutsch-Südwestafrika nach amtlichen und anderen verlässlichen Quellen bearbeitet von Otto Herkt, Carl Fleming, Verlag, Buchund Kunstdruckerei, A.G., Glogau (1904 ?),scale 1:3,000,000. All of the Penguin Islands plus a separate Roast Beef Island are shown as British territory.

171. Verwaltungs u. Verkehrskarte von Deutsch-Südwestafrika, Ofraudeuz and Schindler, *Die Deutschen Kolonien* (1982), scale 1:6,000,000. Halifax, Penguin, and Seal Islands are not shown and Plumpudding Island is not identified as British territory.

172. Deutsch-Südwestafrika, Sheets No. 19 "Kuiseb - Unterlauf", No. 23 "Lüderitzbucht", and No. 27 "Pomona", bearbeitet in der Topographischen Abteilung der Kgl. Preuss. Landes-Aufnahme, Berlin (1910), scale 1:400,000. All of the Penguin Islands are shown on this map, but only Possession, Albatross, Pomona, Sinclair, and Roastbeef Islands are identified as British territory. Long Island is shown as North and South Long Islands.

173. The first map is entitled Karte des Landbesitzes und der Minenberechtsame in Deutsch-Südwestafrika, map no. 3 from the inside back cover of 2 L. SANDER, *supra* note 73, scale 1:5,000,000. This map does not show Penguin and Seal Islands, and Halifax Island is called Guano Island. Albatros Island is not identified as being British. Penguin Island is shown on map 6 (Karte der Weichbildgrenze der Ansiedlung Lüderitzbucht, scale 1:16,000), also from the inside back cover, but it is not identified as British territory. The second and third maps from 1911 are a set, Karte des Gebiets längs der Lüderitzbahn zwischen Lüderitzbucht und Schakalskuppe nach Aufnahmen des Regierungsgeologen Dr. Paul Range, Mitteilungen aus den deutschen Schutzgebieten, Band XXIV (1911), scale 1:200,000, and Karte der Namib zwischen dem 27° südl. Breite und dem Oranje-Fluss nach Aufnahmen des Regierungsgeologen Dr. Paul Range, Mitteilungen aus den deutschen Schutzgebieten, Band XXIV (1911), scale 1:400,000. Hollandsbird and Mercury Islands as well as Walvis Bay are not shown on this map's coverage. Halifax Island is not identified as British territory. Long Island is shown as three islands, the two in the north identified as North Long Island and the one in the south as South Long Island. Both North and South Long Islands are identified as British territory. The fourth map is entitled Übersichtskarte der Wildreservate von Deutsch-Südwestafrika nach dem stand vom 1. Oktober 1911, Karte 3, from the Kleiner Kolonialatlas, Verlag von Gustav Fischer, Jena (1911), scale 1:5,000,000. This map shows Hollam's Bird, Mercury, Itschabo, Guano [Halifax], Long, Possession, Pomona, Plumpudding, Sinclair, and Roast Beef Islands as British territory. Albatros Island is shown, but it is not identified as British territory. The fifth map is an official admiralty chart, Süd-Atlantischer Ozean, Westküste von Afrika, Sao Paulo de Loanda bis Kapstadt, herausgegeben vom Reichs-Marine-Amt, Berlin (1911), scale 1:3,000,000. This chart shows Hollams Bird, Mercury, Possession, Sinclair, and Roastbeef Islands as British territory. Ichabo Island and Albatros Rock are also shown, but they are not identified as British territory. There is also an undated map circa 1911 which shows Long Island as three islands in the same fashion as the previous map as well as identifying Seal, Penguin, and Halifax Islands as British territory. Karte des Sperrgebietes, Blatt 3 [of 10], Lüderitzbucht, Verlag der Geographischen Verlagshandung Dietrich Reimer (Ernst Vohsen) Berlin (undated).

174. Deutsch-Südwestafrika from the Kleiner Kolonialatlas 1914, Geographische

shown as British territory as well as nearly all of the Penguin Islands — and Sinclair and Roast Beef Islands are shown as separate islands, both being identified as British territory. There is also a French military map,[175] a British military map,[176] and a Portuguese military map[177] of interest, the first identifying ten of the Islands as British territory, the second showing only two of the Islands and identifying neither as British territory, and the third showing five of the Islands as British territory.

Looking at the non-governmental and commercially produced maps from the United Kingdom, South Africa, and the United States of America, one finds maps which identify, by clear implication or better, the Penguin Islands as German territory,[178] fail to identify them as Brit-

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Verlagshandlung Dietrich Reimer (Ernst Vohsen) Berlin (1914), scale 1:5,000,000. This map shows Hollam's Bird, Mercury, Itschabo, Guano [Halifax], Long, Possession, Albatros, Pomona, Plumpudding, Sinclair, and Roast Beef Islands as British territory.

175. Afrique (Region australe), Windhoek, Flle No. 53, Publié par le Service géographique de l'armée (1897), scale 1:2,000,000. Seal and Penguin Islands as well as Albatross Rock are shown but not named. Plumpudding Island is shown *north* of Pomona Island instead of south where it actually lies. Sinclair and Roastbeef Islands are shown as separate islands. Walvis Bay is shown as British territory.

176. (Provisional) Map of German South West Africa, reproduced and printed for the Geographical Section, General Staff, at the Ordnance Survey Office, Southampton (1914), scale 1:3,000,000. Only Hollam's Bird and Possession Islands are shown. Walvis Bay is clearly marked as falling outside of German South West Africa.

177. Esboço Geographico do Sudoeste Africano Allemão e Colonias Limitrophes, Braga (1915), scale 1:5,772,000. This map shows Holland's Bird, Mercury, Ichaboe, and Pomona Islands as British territory. Roast Beef Island is shown but is not identified as British territory. Walvis Bay is shown as British territory.

178. Map of Africa Shewing the Territories in Dispute between Great Britain & Germany Prior to the Arrangement Just Arrived at (July 1890) and the Exact Nature of the Arrangement, Stanford's Library Map of Africa (1890), scale 1:5,977,382. This map shows Hollandsbird, Mercury, Ichaboe, Seal, Penguin, Halifax, Possession, Albatross, Plumpudding, Pomona, and "Sinclair or Roast Beef" Islands as German territory. Another map is the lower half of a map of Africa of unknown title by Edward Stanford (1890), but approximately the same as the previous map. This map shows Hollandsbird, Mercury, Ichaboe, Seal, Penguin, Halifax, Possession, Albatross, Pomona, and "Sinclair or Roast Beef" Islands. A third map is 2 RAND MCNALLY & CO.'S INDEXED ATLAS OF THE WORLD (1907), which both lists (at 231) and shows (by implication at 228) all of the Penguin Islands except Long and Plumpudding Islands (which are neither listed nor shown) as part of German South West Africa, but the map of Africa (at 224-225) shows Hollams Bird and Ichaboe Islands as British territory. Sinclair and Roast Beef Islands are shown as the same island. Walvis Bay is shown as British territory on all of these maps. It should be kept in mind that maps customarily do not specifically identify coastal islands which belong to an adjacent state as part of that state except by color coding. The Penguin Islands are so small that they usually appear as dots on maps, so color coding is generally of no assistance. Thus, there is a certain element of subjectivity in determining the significance of a failure to identify the Penguin Islands as British territory on a map. One can draw a clear implication that these 1890 maps show the Penguin Islands as German territory because they are of such a scale that the Penguin Islands would not normally be shown. In addition, the first of these maps was made for the purpose of showing the consequences of the 1890 Agreement. However, when one looks at the two Juta maps, *see* maps cited *infra* note 179, it is not so easy to determine the significance of the failure to identify the Penguin Islands as British territory, especially when other Juta maps of the period do identify some of the Penguin Islands as British

ish territory,[179] or identify them as British territory.[180] This confusion is of limited evidentiary value in view of the German maps, both official and commercial, which identify the Penguin Islands as British territory. Some of this confusion arises out of the failure of the 1890 Anglo-German Agreement to mention the Penguin Islands, thereby allocating them to Germany by implication. However, in both Germany and South Africa, there seems to have been no doubt that the Penguin Islands remained British as part of the British Colony of the Cape of Good Hope and then the British Dominion of the Union of South Africa.[181]

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territory. *See* maps cited *infra* note 180.

179. Same map, two editions. Juta's Enlarged Map of South Africa from the Cape to the Zambesi (1898 and 1900), scale 1:1,900,800 (30 miles = 1 inch), and Juta's Map of South Africa from the Cape to the Zambesi (1899), scale 1:2,534,400 (40 miles = 1 inch). These maps show Hollands Bird, Mercury, Ichaboe, Seal, Penguin, Halifax, Possession, Albatross, Plum Pudding, Pomona, and "Sinclair or Roast Beef" Islands, but do not identify them as British territory. By implication, these islands appear to be German territory. *See also* Stanford's Map of British South Africa (1895), scale 1:5,977,382. This map shows all of the Penguin Islands (Sinclair and Roast Beef Island being shown as one island) except for Long and Plumpudding Islands. Walvis Bay is always identified as British territory.

180. Same map, four editions. Central & South Africa, Edinburgh Geographical Institute (1891, 1894, 1896, and 1899), scale 1:5,600,000. These maps show Mercury, Ichaboe, Penguin, Halifax, Possession, Pomona, Plumpudding, and Roast Beef Islands as British territory. Hollam's Bird Island is shown but not identified as British territory. Also, Bartholomew's Special Map of South Africa, Edinburgh Geographical Institute (1899), scale 1:2,500,000. This map, covering the region south of 27° south latitude, shows Plum Pudding, Pomona, Sinclair, and Roast Beef Islands as British territory. Also, A Map of Africa Showing the Boundaries Settled by International Treaties & Agreements, published for the Proceedings of the Royal Geographical Society (1890), scale 1:18,000,000. This map shows Hollam's Bird, Mercury, Ichaboe, Penguin, Seal, Halifax, Possession, Pomona, Plumpudding, and Roast Beef Islands as British territory. Finally, four British publications identify one or more of the Penguin Islands as British territory. In the first, Hollams Bird and Mercury Islands are identified as British territory, and Ichaboe, Halifax, Long, Possession, Plumpudding, Pomona, and Roast Beef Islands are shown but not so identified. NEW ENCYCLOPEDIC ATLAS AND GAZETTER OF THE WORLD 71 (special 1910 census ed. 1911). In the second, the twelve islands so identified include Roast Beef Island, but not Sinclair Island. 2 ENCYCLOPEDIA BRITANNICA 42 (11th ed. 1910). The Britannica map of South Africa shows Hollams Bird, Ichaboe, Possession, Plumpudding, and Roast Beef Islands, none of which, however, are identified as British territory. Plumpudding Island is misidentified and the island identified as Roast Beef is the same as the Roast Beef Island identified on modern South African maps lying approximately 30 kilometers south of Sinclair Island. 25 ENCYCLOPEDIA BRITANNICA following 466 (11th ed. 1911), scale 1:7,500,000. In the third, over half of the Penguin Islands are shown on very small maps and the islands are color coded as British territory. They are identified as the Guano Islands, but are not individually named except on the last map in each Part where Possession Island is identified. 4 C. LUCAS, A HISTORICAL GEOGRAPHY OF THE BRITISH COLONIES, SOUTH AFRICA, Part I at 309, and maps following 310, 320, and 331, Part III at map following 332 (new ed. 1913), and 4 C. LUCAS, A HISTORICAL GEOGRAPHY OF THE BRITISH DOMINIONS, SOUTH AFRICA, Part II at maps facing title page and following 533 (new ed. 1915). The fourth, THE STATESMAN YEARBOOK 1901 at Plate 1, identifies Ichaboe Island as British territory on a world map which shows the European colonial empires. Walvis Bay is shown or described as British territory in all of the above publications.

181. In 1899, the Cape Prime Minister stated in the House of Assembly of the Colony of the Cape of Good Hope, that the Penguin Islands were ". . . a valuable possession of the Colony." HOUSE OF ASSEMBLY DEBATES, COLONY OF THE CAPE OF GOOD HOPE 280 (1899).

Finally, there are a number of official United Nations maps of South West Africa/Namibia, none of which show the Penguin Islands. Nineteen such maps have been found and the thirteen maps dating from May 1950 to March 1977 show an international boundary between Walvis Bay and South West Africa/Namibia while the six maps dating from October 1977 to March 1984 show no boundary at all.[182]

What conclusions can be drawn from these maps? As South Africa could not unilaterally alter the terms of the Mandate,[183] the official South African maps showing Walvis Bay as part of South West Africa as well as those failing to identify the Penguin Islands as South African territory are of very limited value.[184] Further, since 1940, the South African maps

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182. These United Nations maps have the following numbers and dates:

238	May	1950
559	May	1954
560	May	1954
1109	Sep	1958
1208	Nov	1959
1417	Apr	1963
1548	Sep	1964
1688	Nov	1966
1689	Nov	1966
1765	Dec	1967
1689 Rev 1	Jan	1969
1765 Rev 1	Jan	1969
2927	Mar	1977
2947	Oct	1977
2947	Nov	1977
3124	Dec	1980
3168	May	1982
3228	Mar	1983
3228 Rev 1	Mar	1984

All but the first map and the last two maps carry either of the following disclaimers: "The boundaries on this map do not imply official endorsement or acceptance by the United Nations," or "The boundaries and names shown on this map do not imply official endorsement or acceptance by the United Nations." The disclaimer on the last two maps is more extensive, but of the same nature. The boundary of Walvis Bay was settled in 1911, and there has been no dispute since. It can be fairly argued that these disclaimers only relate to the "delimitation" of the boundaries shown and not to the "allocation" of territory shown. Thus, the United Nations maps which show an international boundary between Walvis Bay and South West Africa/Namibia show acquiescence and recognition by the United Nations to South African sovereignty over Walvis Bay. The first map, which lacks any disclaimer, even identifies Walvis Bay as belonging to the Union of South Africa. The next twelve maps just show an international boundary between Walvis Bay and South West Africa/Namibia. Map No. 1765 Rev 1 (1969) was republished with the same number in 20 U.N. Chronicle (No. 3) at 18 (1983), but without the international boundary between Walvis Bay and Namibia. The international boundary, however, was on the map when it was published in 1969. The copies of the United Nations maps of Namibia collected by the author are now at the Geography and Map Division, Library of Congress, Washington, D.C., U.S.A. The United Nations Map Library in New York does not have a complete set of these maps.

183. 4 LEAGUE OF NATIONS O.J. 1273 (1923).

184. *But see* Island of Palmas (Neth. v. U.S.), 2 U.N.R.I.A.A. 829, 852, 22 AM. J. INT'L L. 867, 891 (1928), where the arbitrator said ". . . official or semi-official maps . . . would be

almost always have shown Walvis Bay as not part of South West Africa/ Namibia, a situation acquiesced in and recognized by the United Nations and the world, at least until 1977. It is difficult to see any basis at this time, predicated on the map evidence, to deny South African sovereignty over Walvis Bay. As to the Penguin Islands, the situation is similar although the record is much more scanty. Although South Africa did not note its claim on its maps until 1962, South Africa's claim to the Penguin Islands had been previously recognized; and so long as South Africa administered South West Africa, it just did not matter. Once South Africa's claim was asserted in 1962, it was not challenged until 1977 when the issue was raised in the United Nations. If anything, the case for South Africa is even stronger as to the Penguin Islands.[185]

F. *The Role of Estoppel in International Law*

It has been argued that principles of estoppel in international law bar South Africa's claim of sovereignty over Walvis Bay.[186] The argument is predicated on South Africa's conduct in severing Walvis Bay from the Province of the Cape of Good Hope and incorporating it into South West Africa so totally that an independent Namibia is not economically viable without Walvis Bay. Having caused the people of Walvis Bay and Namibia to rely on the integration as a *fait acompli*, the argument goes, South Africa is now estopped to claim sovereignty over Walvis Bay.

The principal problem with this argument is that estoppel, like acquiescence and recognition, is not a mode of acquisition of territory, but rather forms a part of the evidence of sovereignty — acquiescence, recognition, admissions, and estoppel often blurring together in any given case.[187] This means that the place of estoppel in international law, especially in territorial issues, serves as an aid in the interpretation of the facts and legal instruments.[188] In other words, although estoppel has been called a principle of substantive law,[189] it is essentially procedural in that there must be a recognized basis for claiming sovereignty over disputed territory or estoppel has no application. One writer[190] has pointed out that the attitude of international law towards estoppel is not consistent, sometimes requiring the English law prerequisite of reliance and detri-

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of special interest in cases where they do not assert the sovereignty of the county of which the Government has caused them to be issued."

185. It is interesting that the exhaustive study of African boundaries by BROWNLIE, *supra* note 20, makes no mention of the Penguin Islands.

186. Note, *Namibia*, *supra* note 2, at 904-910; Landis, *supra* note 2; Asmal *supra* note 2, at 29-31.

187. BROWNLIE, *supra* note 82, at 164-65; AKEHURST, *supra* note 85, at 148-50. *See also* Rann of Kutch (Ind. v. Pak.), 17 U.N.R.I.A.A. 1, 449-54, 549, 50 I.L.R. 2, 409-15, 494-95 (1968).

188. BROWNLIE, *supra* note 82, at 165.

189. Argentine-Chile Frontier Case, 16 U.N.R.I.A.A. 11, 164, 38 I.L.R. 10, 76-77 (1966).

190. AKEHURST, *supra* note 85, at 149.

ment[191] and sometimes not.[192] Further, sometimes estoppel in international law has the effect of making it impossible for a party to contradict his previous statement, as in English law;[193] other times it is merely evidentiary, that is, its effect is simply to make it difficult for a party to contradict his previous statement.[194]

A quick review of the leading international law cases on this issue demonstrates that estoppel is not a mode of acquisition of territory, but it can prevent the acquisition of territory. In the *Preah Vihear Temple (Camb. v. Thai.)* case, estoppel (called recognition and acceptance) was invoked to prevent Thailand from denying that the boundary was that as shown on a map[195] — this was a delimitation of a boundary case, not an acquisition of territory case, the Court finding that the boundary that was established was the map boundary, not the treaty boundary. In the *Legal Status of Eastern Greenland (Den. v. Nor.)* case, estoppel (called recognition) was invoked to prevent Norway from denying its own recognition of Danish sovereignty over the disputed territory[196] — here estoppel was used to prevent the acquisition of territory. In the *Right of Passage Over Indian Territory (Port. v. Ind.)* case, estoppel (called recognition) was invoked to prevent India from denying Portugal's effective occupation of Portuguese enclaves in Indian territory.[197] In the *Arbitral Award of the King of Spain (Hon. v. Nic.)* case, estoppel (called recognition) was invoked to prevent Nicaragua from denying that the boundary fixed by the King of Spain in prior arbitration and accepted by Nicaragua was in fact

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191. Preah Vihear Temple (Camb. v. Thai.), 1962 I.C.J. 6, 63-64, 33 I.L.R. 48, 91-93 (Sep. Op. J. Fitzmaurice). The opinion of the Court spoke only of acceptance and recognition. *Id.* at 32-33, 33 I.L.R. at 70-71.

192. Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 68-69, 3 WORLD CT. R. 148, 189.

193. Preah Vihear Temple (Camb. v. Thai.), 1962 I.C.J. 6, 63-64, 33 I.L.R. 48, 91-93 (Sep. Op. J. Fitzmaurice); Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 68-69, 3 WORLD CT.R. at 189; Right of Passage Over Indian Territory (Port. v. Ind.), 1960 I.C.J. 6, 39, 31 I.L.R. 23, 51-52; Arbitral Award Made By the King of Spain (Hon. v. Nic.), 1960 I.C.J. 192, 213, 30 I.L.R. 457, 473-74; Honduras Borders (Guat. v. Hon.), 2 U.N.R.I.A.A. 1307, 1327-29, 1360-61 (1933).

194. Miniquiers and Ecrehos (Fr. v. U.K.), 1953 I.C.J. 47, 71, 20 I.L.R. 94, 114-15; Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 138-39, 18 I.L.R. 86, 101-02.

195. 1962 I.C.J. 6, 63-64, 33 I.L.R. 48, 91-93 (Sep. Op. J. Fitzmaurice). It is important to distinguish in boundary delimitation situations between boundaries fixed upon readily identifiable geographical features, such as the center of a river, and boundaries fixed upon non-readily identifiable features, such as lines of longitude and latitude or the watershed in Preah Vihear Temple, *id.* In the latter situation, the boundary remains inchoate until it is marked upon the ground or upon a map of such a scale that one using the map can readily determine where on the ground (or water) the boundary is. There is the further question, in a boundary determination case, of whether the final decision fixing the boundary amounts to a mere delimitation of the boundary or is an allocation of territory. The Supreme Court of India in Patel and Others v. Union of India, 1969 A.I.R.(S.C.) 783, opted for the former viewpoint in interpreting Rann of Kutch (Ind. v. Pak.), 17 U.N.R.I.A.A. 1, 50 I.L.R. 2, (1968).

196. 1933 P.C.I.J. (ser. A/B) No. 53, at 68-69, 3 WORLD CT. R. 148, 189.

197. 1960 I.C.J. 6, 39, 31 I.L.R. 23, 51-52.

its boundary[198] — another delimitation of a boundary case. In *The Minquier and Ecrehos (Fr. v. U.K.)* case, estoppel (by admission, i.e., recognition) was invoked to prevent France from denying that the boundary between France and the Channel Islands was where France had previously said it was[199] — still another delimitation of a boundary case, but here estoppel acted to prevent France from acquiring territory. In the *Fisheries Case (U,K, v. Nor.)*, estoppel (called acquiescence) was invoked to prevent the United Kingdom from claiming that the fishing zone boundary set by Norway had not been set according to a valid principle of international law[200] — yet another delimitation of a boundary case. And in the *Honduras Borders (Guat. v. Hon.)* case, estoppel (called acquiescence and recognition) was invoked to (1) bar Honduras from denying Guatemala's sovereignty over territory over which there had been a continued and long unopposed assertion of Guatemalan authority which should have invited opposition,[201] and (2) bar Guatemala from denying that another part of its border with Honduras was where Guatemala had placed it on one of its official maps[202] — yet another delimitation of a boundary case where estoppel acted to prevent the acquisition of territory by both parties. There is just no authority in the international law cases that estoppel may act to *effect* the transfer of territory from one state to another.

Turning to the prerequisites of estoppel, one writer, after noting that estoppel in international law is procedural, sets out the following essential elements of international estoppel:

> (1) the right was apparently actionable;
> (2) the party actually seised of the right ought to have been aware that it was actionable;
> (3) that party ought to have been aware that his silence might be construed by others as a communication of assent to their behavior, arguably contrary to the right;
> (4) that party ought to have communicated, unequivocally in all processes available to him, that he did not accede to such behavior and that he reserved his right to action;
> (5) under the circumstances, others could not have been expected to be informed of such intentions or to consider them serious or prima facie valid;
> (6) others did not, manifestly or tacitly, attempt to defer or prevent authoritative resolution of the conflicting claims;
> (7) subsequent action on the initial right will be prejudicial to the interests of either the community or to its individual members.[203]

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198. 1960 I.C.J. 192, 213, 30 I.L.R. 457, 473-74.
199. 1953 I.C.J. 47, 71, 20 I.L.R. 94, 114-15.
200. 1951 I.C.J. 116, 138-39, 18 I.L.R. 86, 101-02.
201. 2 U.N.R.I.A.A. 1307, 1327-29 (1933).
202. *Id.* at 1360-61.
203. W. M. REISMAN, NULLITY AND REVISION 385-86 (1971). Note, *Namibia, supra* note 2, at 904, purports to rely on Reisman for its estoppel argument, but it fails to note the procedural aspect of estoppel and recasts Reisman's elements eliminating some of them without explanation. For a discussion of estoppel in international law, *see* MacGibbon,

Putting aside any difficulties[204] other than applying these criteria to the status of Walvis Bay, we find that these criteria cannot be met.

> (1) *the right was apparently actionable*: South Africa's right to keep Walvis Bay as a part of the Cape Province cannot be said to have been actionable. By the terms of the Mandate, South Africa had the right to administer South West Africa as an integral part of the Union.[205] Including Walvis Bay in the administration of South West Africa is within the confines of the Mandate and was acquiesced to by the League of Nations, the only body that would have any right to bring an action.[206]
>
> (2) *the party actually seised of the right ought to have been aware that it was actionable*: The right not being actionable, this element has no application.
>
> (3) *that party ought to have been aware that his silence might be construed by others as a communication of assent to their behavior, arguably contrary to the right*: The right not being actionable, this element has no application. Here, South Africa was not silent as it repeatedly asserted that the administration of Walvis Bay had been transferred to the Mandated Territory only for administrative purposes and that it remained part of the Province of the Cape of Good Hope.
>
> (4) *that party ought to have communicated, unequivocally in all processes available to him, that he did not accede to such behavior and that he reserved his right to action*: By expressly stating that Walvis Bay remained part of the Province of the Cape of Good Hope, by only treating it "as if" it were part of South West Africa, and by never petitioning the Council of the League of Nations to include Walvis Bay in the Mandated Territory, South Africa adequately preserved its sovereignty over Walvis Bay.
>
> (5) *under the circumstances, others could not have been expected to be informed of such intentions or to consider them serious or prima facie valid*: As South Africa, in effect, informed the entire world that Walvis Bay remained under South African sovereignty, a position acquiesced to by the League of Nations and unchallenged by the United Nations until 1977, this element has no application.
>
> (6) *others did not, manifestly or tacitly, attempt to defer or prevent authoritative resolution of the conflicting claims*: As there were no conflicting claims to be resolved until 1977, this element has no application.

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supra note 97; Bowett, *supra* note 98; Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AM. J. INT'L L. 1, 16-23 (1977).

204. As previously noted, South Africa was forbidden to unilaterally alter the terms of the Mandate, *see* sources cited *supra* note 124. In addition, there is no recognized basis or mode of acquisition whereby Namibia would have a claim to Walvis Bay.

205. In 1960, South African legal scholars considered that ". . . while not a portion of the Union as such, the territory, whose exact juridical status is a mystery, is so closely connected with the Union as to be practically a fifth province." HAHLO & KAHN, *supra* note 22. *See also* AFRICA SOUTH OF THE SAHARA 1986, at 693-94 (15th ed.1985).

206. *See* sources cited *supra* notes 123-24.

> (7) *subsequent action on the initial right will be prejudicial to the interests of either the community or to its individual members*: Here is the only element where one can present an argument against South Africa retaining Walvis Bay. South African retention of Walvis Bay could adversely affect the economy of Namibia. However, is this effect any different for any landlocked country that must depend upon its neighbors for seaborne trade? In other words, is this the kind of prejudice which counts, especially when Walvis Bay is just as dependent economically as Namibia is on Namibia's continued use of the port.

Even if the last element is conceded, this is insufficient for the application of estoppel in international law to the question of South African sovereignty over Walvis Bay.[207]

Turning to the Penguin Islands, there is no basis whatever to apply estoppel. The Penguin Islands were never administered as part of the Mandated Territory, and there is nothing to link them to Namibia other than their geographical proximity.[208]

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207. It should be noted in passing that the proponents of estoppel against South Africa over Walvis Bay assume that sovereignty is the only issue. Little thought has been given to the application of estoppel to the way South Africa will administer Walvis Bay after Namibian independence. Likewise, there is the issue of whether South Africa's obligations under the Mandate might continue after Namibian independence insofar as Walvis Bay is vital to the economic survival of Namibia. An argument can certainly be made that South Africa, having created this situation of dependance, is bound by a residual duty under the Mandate to maintain Walvis Bay for the benefit of the people of Namibia. These issues of estoppel and residual duty under the Mandate are beyond the scope of this article. The only conduct of South Africa relevant to the issue of sovereignty over Walvis Bay relates to the maps produced by South Africa which failed to show an international boundary between Walvis Bay and South West Africa, *see* maps cited *supra* notes 148-154. This is hardly sufficient to invoke estoppel against South Africa. In view of South Africa's administration of the Mandate, it is questionable whether these maps were intended to ascertain sovereign rights.

208. In its annual Reports to the Council of the League of Nations Concerning the Administration of South West Africa which were submitted from 1920 until 1939, there was a section in each Report (except for the first three or four years) entitled "Mining" which contained statistics and other data on guano production in the Mandated Territory. Not once did this section ever include any data on the Penguin islands. The Penguin Islands (also known as the Northern or Ichaboe Group of the Government Guano Islands) were under the administration of the Departments of Agriculture of the Cape or Union Governments from 1895 until 1951 when the administration was transferred to the Department of Commerce and Industry of the Union Government. *See The Guano Islands of South Africa*, in Official Yearbook of the Union and of Basutoland, Bechuanaland Protectorate and Swaziland, No. 9, 1926-1927, at 41-43 (1928), and *id.* at No. 29, 1956-1957, at 668 (1958). There are other islands like the Penguin islands which lie in or near the territorial waters of another state, but are an integral part of the nation to which they belong; *e.g.*, the French Department of St. Pierre and Miquelon off the south coast of Newfoundland, Canada; the numerous Greek islands in the Aegean Sea adjacent to Turkey; and the Vietnamese island of Phu Quoc off the coast of Kampuchea.

G. *Walvis Bay as a Non-Self-Governing Territory*

It has been argued that, if Walvis Bay is not part of the Mandated Territory of South West Africa and thus not subject to the trust imposed on South Africa by the Mandate, it is a non-self-governing territory within the meaning of Article 73 of the United Nations Charter which imposes a duty on South Africa to administer Walvis Bay as a "sacred trust".[209] If Article 73 applies to Walvis Bay, then the principle of self-determination also applies and South Africa has the duty to abide by the desires of the inhabitants[210] as to whether they wish to be part of South Africa or part of Namibia.[211]

This argument has been predicated upon two United Nations General Assembly Resolutions by which the following criteria were established for determining if a territory is non-self-governing: (1) the territory must be geographically separate from the administering state; (2) its people must be ethnically or culturally distinct from those of the administering state; and (3) its status must be arbitrarily subordinate to that of the administering state.[212] Applying these criteria, Walvis Bay does not qualify as a non-self-governing territory.

The first of the three criteria is established by virtue of Walvis Bay's geographical separation from the rest of South Africa. However, it must be noted that such a situation is not unique in Africa. Three other similar coastal enclaves forming integral parts of their respective nations exist on

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209. Note, *Namibia*, *supra* note 2, at 916-20; Asmal, *supra* note 2, at 6-12. Note that this principle can have no application to the Penguin Islands because they are uninhabited.

210. What these desires would be has never been determined, but a majority of the population of Walvis Bay is non-white and thus may wish to be incorporated into an independent Namibia. The 1980 population of Walvis Bay was 18,735 of which there were 5,772 whites, 4,751 "Coloureds" (persons of mixed race), and 8,212 Africans. *See* MOORSOM, *supra* note 2, at 8.

211. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion), 1971 I.C.J. 16, 31, 49 I.L.R. 3, 21.

212. Note, *Namibia*, *supra* note 2, at 916, and Asmal, *supra* note 2, at 33, citing to G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960); 1960 U.N. Y.B. 49; G.A. Res. 1541, 15 U.N. GAOR Supp. (No.16) at 29, U.N. Doc. A/4684 (1960); 1960 U.N. Y.B. 509. G.A. Res. 1514 is a declaration of the right to self-determination for non-self-governing territories. It sets out no criteria for determining what is a non-self-governing territory. Paragraph 6 of G.A. Res. 1514 provides that "any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." This paragraph can be utilized by both sides in the Walvis Bay dispute to support their respective positions. It is the Annex to G.A. Res. 1541, entitled *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73e of the Charter of the United Nations*, which set out the criteria. G.A. Res. 1541, *supra* Annex at Principles IV, V. The question naturally arises as to whether this "guide" can be said to state positive international law because General Assembly Resolutions are nonbinding recommendations only. U.N. CHARTER arts. 10-11, 13-14. But note that the General Assembly had the power to terminate South Africa's Mandate over South West Africa. *See supra* note 124.

the continent — the Angolan enclave of Cabinda and the Spanish Mediterranean enclaves of Ceuta and Melilla.[213] This criterion is not particularly helpful here.

Turning to the second, this is somewhat difficult to apply. As to the majority white and "coloured" populations of Walvis Bay, there clearly is ethnic and cultural identity with the same population groups in South Africa.[214] As to the minority black African population, what is the ethnic and cultural test and how can it be applied on a continent where national boundaries as a matter of practice ignore ethnic and cultural identity?[215] This problem of the cultural or ethnic arbitrariness of African boundaries has been addressed by the independent nations of Africa on two occasions — the first in 1964 when the member states of the Organisation of African Unity by resolution pledged themselves to respect their frontiers which existed at their independence,[216] and the second in 1969 in the Manifesto on Southern Africa (the Lusaka Declaration) approved by the Conference of East African and Central African States and adopted by the Heads of State and Government of the Organisation of African Unity in which it was stated that "the present boundaries of the states of Southern Africa are the boundaries of what will be free and independent African states."[217] Quite clearly, the African nations themselves have taken the position that colonial boundaries override ethnic or cultural distinctions, and specifically so in southern Africa. To apply this criterion to Walvis Bay and not to the rest of Africa would be wholly arbitrary.[218]

It is with the third of these criteria that this argument truly fails. Apart from the problem of determining exactly what is meant by "arbi-

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213. On the Arabian Peninsula, there is the Omani enclave on the Musandam Peninsula separated from the rest of Oman by the United Arab Emirates. In Europe, there is the German enclave of Büsingen am Hochrhein, surrounded entirely by Switzerland, and the Belgian enclave of Baerle-Duc, surrounded entirely by the Netherlands. As to the latter, the International Court of Justice ruled in favor of Belgium in its dispute with the Netherlands over the question of sovereignty over this enclave thereby implicitly rejecting the principle of contiguity as a rule of positive international law which grants contiguous states paramount claims to enclaves and adjacent territories (the argument of contiguity not having been raised). Case Concerning Sovereignty Over Certain Frontier Land (Belg. v. Neth.), 1959 I.C.J. 209, 27 I.L.R. 62. *See also* Island of Palmas (Neth. v. U.S.), 2 U.N.R.I.A.A. 829, 854-55, 869, 22 AM. J. INT'L L. 867, 893-94, 910 (1928); BROWNLIE, *supra* note 82, at 153; AKEHURST, *supra* note 85, at 153. For some more enclaves, past and present, *see* F. E. KRENZ, INTERNATIONAL ENCLAVES AND RIGHTS OF PASSAGE (1961).

214. Whites and "Coloureds" (persons of mixed race) constituted 56.2% of the population of Walvis Bay in 1980. *See* MOORSOM, *supra* note 2, at 8.

215. Note *Namibia*, *supra* note 2, at 917 n.83, solves this dilemma by deciding that the relevant ethnic and cultural group in Walvis Bay is the entire population while that of South Africa is only the white population. Such an arbitrary choice defies logic.

216. BASIC DOCUMENTS ON AFRICAN AFFAIRS 360, para. 2 (I. Brownlie ed. 1971).

217. 1 BASIC DOCUMENTS OF AFRICAN REGIONAL ORGANIZATIONS 141, para. 11 (L.B. Sohn ed. 1971).

218. This criterion is sound in the context of a colonial power located far from the African continent. It is when it is applied to a wholly African context that it has little validity.

trarily subordinate", the status of Walvis Bay is not in any significant manner any more subordinate than any other part of South Africa. Here, it is irrelevant to look at the status of Walvis Bay prior to the establishment of the United Nations in 1945 because the concept of non-self-governing territory did not exist prior to that time, at least as used in the modern context here. This concept, along with the corresponding concept of self-determination, is the product of a gradual evolutionary development which manifested itself in Article 73 of the United Nations Charter and has continued to develop and mature since.[219]

With the granting of parliamentary representation to South West Africa in 1949,[220] the Government of South Africa gave the people of South West Africa and Walvis Bay rights virtually identical to those of the people of the four provinces of South Africa; in effect, South West Africa had become a *de facto* fifth province.[221] Considering the political framework of the unitary state predicated upon parliamentary supremacy which South Africa has been since the formation of the Union in 1910,[222] it is difficult to see how South Africa's administration of Walvis Bay through Windhoek from 1922 until 1977 instead of through Cape Town provides the basis for arguing that the status of Walvis Bay was or is "arbitrarily subordinate". And since 1977, with the transfer of administration back to that of the Province of the Cape of Good Hope, the argument for the third criterion collapses completely.[223]

Finally, the argument that South Africa's imposition of apartheid in Walvis Bay provides a basis under Article 73 for depriving South Africa of Walvis Bay, a position predicated on the proposition that apartheid deprives the South African government of any internal legitimacy at all,[224] is a fallacious argument. One could easily use this argument to justify dismembering not only the rest of South Africa, but a number of other countries in the world with oppressed minorities. Governmental legitimacy and territorial sovereignty are not the same thing, and there is no basis for applying the criteria of the former to that of the latter.[225]

In the final analysis, the degree of subjectivity here should make the international lawyer hesitate. How can one validly argue that Walvis Bay

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219. Asmal, *supra* note 2, at 10-12; G.A. Res. 1541, Principle II, Annex, 15 U.N. GAOR Supp. (No. 16) at 29, U.N. Doc. A/4684 (1960); 1960 U.N. Y.B. 509.

220. South Africa never *de jure* incorporated South West Africa as it was permitted to do. *Mandate for German South West Africa*, art. 2. *See* Appendix "C".

221. Honduras Borders (Guat. v. Hon.), 2 U.N.R.I.A.A. 1307, 1327-29 (1933).

222. The author accepts that if Walvis Bay was a non-self- governing territory in 1977, South Africa's action in transferring the administration of Walvis Bay back to that of the Cape of Good Hope would have no effect on that status. It is submitted that the argument in favor of such status was hopelessly weak in 1977, and that the 1977 transfer and subsequent internal developments as to Walvis Bay have destroyed this argument completely.

223. Asmal, *supra* note 2, at 16-22.

224. *Id.*

225. 1 OPPENHEIM, *supra* note 85, at 131 *et seq.* (recognition of governments) and *id.* at 451-52 (territorial sovereignty).

is a non-self-governing territory subject to the right of self-determination in terms of these United Nations General Assembly Resolutions when the United Nations General Assembly refuses to accord such status to Gibraltar and the Falkland Islands, colonies which would so obviously qualify but for their neighbors' questionable claims to sovereignty?[226] In the context of Walvis Bay, the arguments premised on Article 73 are not legally valid.[227] They form no basis for taking Walvis Bay from South Africa under any claim predicated on rules of international law.

V. Conclusion

From the foregoing, it is difficult to draw any conclusion based on law other than that South Africa's claims to sovereignty over Walvis Bay and the Penguin Islands[228] are valid. Since annexation in the last century, sovereignty over both Walvis Bay and the Penguin Islands by the British Empire and its successor, South Africa, has been continuous, effective, and internationally recognized. No action by South Africa has altered this state of affairs. While the United Nations General Assembly[229] has condemned South Africa for its 1977 transfer of the administration of Walvis Bay from that of South West Africa/Namibia to that of the Province of the Cape of Good Hope, calling it an "annexation", this characterization is legally erroneous. Annexation of territory is a method of acquiring territorial sovereignty.[230] As sovereignty over Walvis Bay has been vested in South Africa (or its predecessor, the British Empire) for more than a century, the 1977 transfer of administration had no effect on that sovereignty which continued to be vested in South Africa. For better or worse, as to

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226. R. PERL, THE FALKLAND ISLANDS DISPUTE IN INTERNATIONAL LAW AND POLITICS 36-40 (1983). The argument against self-determination for Gibraltar is predicated on the doctrine of "colonial enclaves" which holds that territory detached by a colonial power from the surrounding territory should be returned to the surrounding state. It could be argued that Walvis Bay is a "colonial enclave" although South Africa is not a colonial power in the traditional sense. *See* Shaw, *supra* note 78, at 134-40. Note, however, that this doctrine is inconsistent with self-determination. The difficulty here is that the status of Walvis Bay is no different than that of the Angolan enclave of Cabinda or the Spanish African enclaves of Ceuta and Melilla.

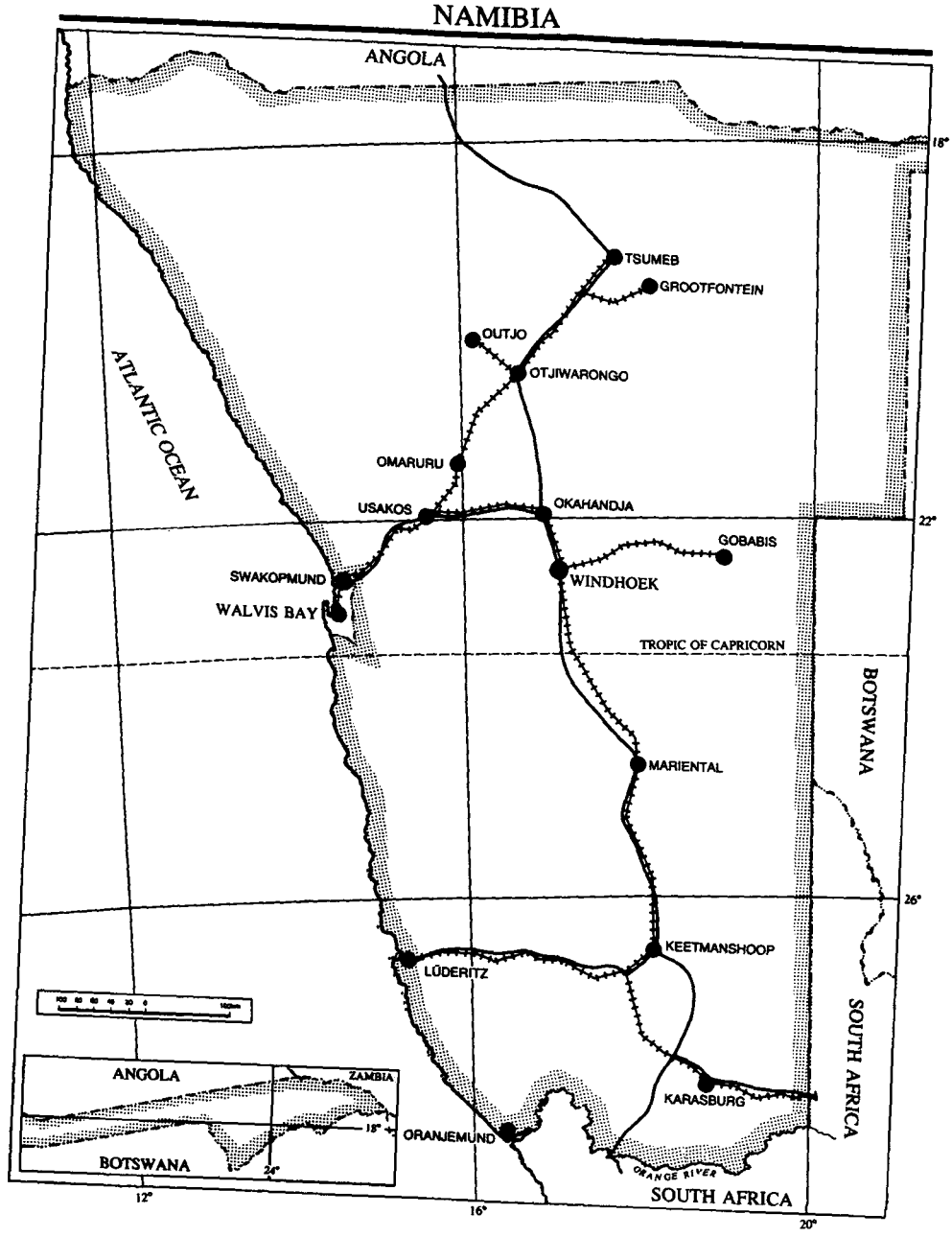
227. Other nonlegal reasons have been advanced for giving Walvis Bay to Namibia such as economic and military necessity, but these reasons have little or no legal basis and are in fact political reasons; and thus they are beyond the scope of this article. For a discussion of these other considerations, *see* MOORSOM, *supra* note 2, at 58-66; Note, *Namibia*, *supra* note 2, at 920-22; Dore, *Self-Determination of Namibia and the United Nations: Paradigm of a Paradox*, 27 HARV.INT'L L.J. 159, 173-76 (1986); Munkman, *supra* note 93, at 99-100.

228. Any problem over there being one island too many (a Roast Beef Island separate from Sinclair Island) has been eliminated because South Africa is not claiming Roast Beef Island. The problem of how many islands constitute Long Island should be only a question of evidence.

229. G.A. Res. 32/9D, U.N. Doc. A/32/2.7 paras. 6-8 (1977) and *id.* at Add. 1-3 (1977); 1977 U.N. Y.B. 918. The Security Council Resolution only called for the "reintegration" of Walvis Bay into Namibia. S.C. Res. 432, U.N. Doc. S/RES/432 (1978).

230. J. G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 160 (9th ed. 1984); 1 O'CONNELL, *supra* note 82, at 432-33.

both Walvis Bay and the Penguin Islands, this time South Africa stands in the legal right.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OUTJO
OTJIWARONGO
ATLANTIC OCEAN
OMARURU
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OKAHANDJA
GOBABIS
SWAKOPMUND
WINDHOEK
WALVIS BAY
TROPIC OF CAPRICORN
BOTSWANA
MARIENTAL
KEETMANSHOOP
LÜDERITZ
KARASBURG
ORANJEMUND
ORANGE RIVER
SOUTH AFRICA
ANGOLA
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22°
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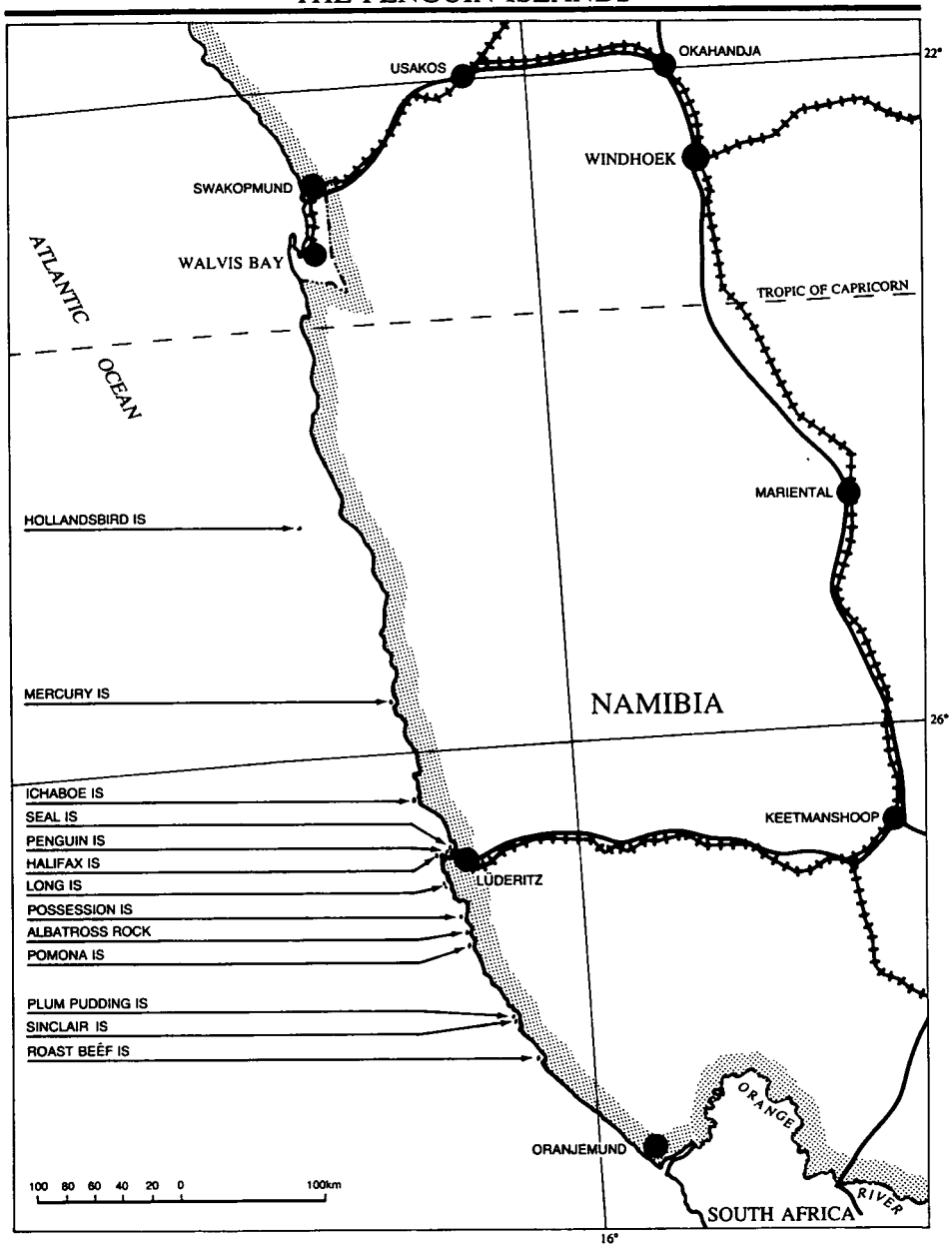
20°

THE PENGUIN ISLANDS



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APPENDIX "A"

1. BRITISH PROCLAMATION, taking possession of the Port or Settlement of Walfisch Bay. — Walfisch Bay, Mar. 12, 1878. [69 B.F.S.P. 1177]

PROCLAMATION by Richard Cossantine Dyer, Esquire, Staff-Commander in command of Her Majesty's ship Industry, at present lying at anchor off the Port or Settlement of Walfisch Bay.

WHEREAS it is expedient that the Port or Settlement of Walfisch Bay, together with a certain portion of the territory surrounding the same, shall be taken possession of on behalf of Her Britannic Majesty Queen Victoria, and, subject to the pleasure of Her Majesty in that behalf, be declared a dependency of the United Kingdom of Great Britain and Ireland: Now, therefore, I, Richard Cossantine Dyer, the officer in command of Her Majesty's ship Industry, at present lying at anchor off the said settlement, do, in the name of Her said Britannic Majesty, Queen Victoria, take possession of the said port or settlement of Walfisch Bay, together with the territory hereinafter described and defined, in token whereof I have this day hoisted the British flag over the said port, settlement, and territory, and I do proclaim, declare, and make known that the sovereignty and dominion of Her said Britannic Majesty shall be and the same are hereby declared over the said port, settlement, and territory of Walfisch Bay; and I do further proclaim, declare, and make known that the said territory of Walfisch Bay so taken possession of by me as aforesaid shall be bounded as follows: that is to say, on the south by a line from a point on the coast 15 miles south of Pelican Point to Scheppmansdorf; on the east by a line from Scheppmansdorf to the Rooibank, including the Plateau, and thence to 10 miles inland from the mouth of the Swakop River; on the north by the last 10 miles of the course of the said Swakop River.

This Proclamation of Her Majesty's sovereignty and dominion shall take effect forthwith, but shall be subject to Her Majesty's gracious confirmation and disallowance.

God save the Queen!

Given under my hand and seal at Walfisch Bay, this 12th day of March, 1878.

RICHARD C. DYER, Staff-Commander in command.

2. BRITISH LETTERS PATENT, for the Annexation to the Colony of the Cape of Good Hope of the Port or Settlement of Walfisch Bay, on the West Coast of South Africa, and of certain Territory surrounding the same. — Westminster, Dec. 14, 1878. [70 B.F.S.P. 495]

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, Empress of India: To all to whom these presents shall come, greeting:

WHEREAS the port of settlement of Walfisch Bay, situated on the West Coast of South Africa to the north of the Tropic of Capricorn, together with certain territory surrounding the same, and bounded as follows, viz.: — On the south by a line from a point on the coast 15 miles south of Pelican Point to Scheppmansdorf; on the east by a line from Scheppmansdorf to the Rooibank, including the plateau, and thence to 10 miles inland from the mouth of the Swakop River; on the north by the last 10 miles of the course of the said Swakop River, and on the west by the Atlantic Ocean; was, on the 12th day of March, 1878, by Proclamation duly taken possession of for us and on our behalf:

And whereas it is expedient to provide that the said port, settlement, and territory may be annexed to and form part of our Colony of the Cape of Good Hope:

Now we do, by these our Letters Patent, under the Great Seal of Our United Kingdom of Great Britain and Ireland, ratify and confirm the aforesaid Proclamation of the 12th day of March, 1878. And we do further authorize our Governor for the time being of our said Colony of the Cape of Good Hope, by Proclamation under his hand and the public seal of the said Colony, to declare that, from and after a day to be therein mentioned, the said port, settlement, and territory shall be annexed to and form part of our said Colony. Provided always that our said Governor issues no such Proclamation as aforesaid until the Legislature of our said Colony of the Cape of Good Hope shall have passed a law providing that the said port, settlement, and territory shall, on the day aforesaid, become part of our said Colony, and subject to the laws in force therein. Provided also that the application of the said laws to the said port, settlement, and territory may be modified either by such Proclamation as aforesaid, or by any law or laws to be from time to time passed by the Legislature of our said Colony for the government of the said port, settlement, and territory so annexed.

2. And we do hereby reserve to us, our heirs and successors, full power and authority, from time to time, to revoke, alter, or amend these our Letters Patent as to us or them shall seem meet; and we do hereby further reserve to us, our heirs and successors, full power and authority to erect by Letters Patent the said port, settlement, and territory into a separate Colony, with or without any adjacent territory, or to include the same in any adjacent British Colony or Colonies for the time being established in South Africa.

3. And we do further direct and enjoin that these our Letters Patent shall be read and proclaimed at such place or places as our said Governor shall think fit within our said Colony of the Cape of Good Hope.

In witness whereof we have caused these our letters to be made patent. Witness ourself at Westminster, the 14th day of December, in the 42nd year of our reign.

By warrant under the Queen's Sign Manual.

C. ROMILLY.

3. ACT of the Government of the Cape of Good Hope, to provide for the Annexation to that Colony of the Port or Settlement of Walfish Bay, on the West Coast of Africa, and of certain Territory surrounding the same, and of certain British Territories on the St. John's River, in South Africa. [Act 35 of 1884]

WHEREAS it is expedient that the Port or Settlement of Walfish Bay, situated on the west coast of South Africa, to the north of the Tropic of Capricorn, together with certain territory surrounding the same, and bounded as follows, viz.: on the south by a line from a point on the coast 15 miles south of Pelican Point to Scheppmansdorp; [on the east by a line from Scheppmansdorp] to the Rooibank, including the plateau, and thence to 10 miles inland from the mouth of the Swakop River; on the north by the last 10 miles of the course of the said Swakop River, and on the west coast by the Atlantic Ocean, be annexed to this Colony; and whereas by Her Majesty's Letters Patent, bearing date at Westminster the 14th day of December, 1878, and passed under the Great Seal of the United Kingdom of Great Britain and Ireland, the Governor for the time being of this Colony was authorized by Proclamation under his hand and the public seal of this Colony to declare that, from and after a day to be herein mentioned, the said Port, Settlement, and territory, as in the said Letters Patent described, should be annexed to and form part of this Colony: And further whereas it is expedient that the port and tidal estuary of the St. John's River in South Africa, and certain lands on the banks of the said river forming part of Her Majesty's dominions be also annexed to this Colony; and whereas by Her Majesty's Letters Patent, bearing date at Westminster, 10th day of October, 1881, and passed under the Great Seal of the United Kingdom of Great Britain and Ireland, the Governor for the time being of this Colony was authorized by Proclamation under his hand and the public seal of this Colony to declare that, from and after the day to be therein mentioned, the said territories should be annexed to and form part of this Colony, and by Proclamation to signify the limits of the said territory so annexed, provided that in the case of either of the territories to be so annexed, no such proclamation should be issued until the Legislature of this Colony should have passed a law providing that the said territories shall, on the day aforesaid, become part of this Colony and subject to the laws in force therein: and provided also, that the application of the said laws to the said territories might be modified either by such Proclamation as aforesaid or by any law or laws to be from time to time passed by the Legislature of this Colony for the government of the said territories so annexed: And whereas it is expedient that a law should be enacted providing that the said respective territories shall, on the day to be mentioned in that behalf in a Proclamation or Proclamations of the Governor as aforesaid, become part of this Colony: Be it enacted by the Governor of the Cape of Good Hope, with the advice and consent of the Legislative Council and House of Assembly thereof, as follows:

1. From and after such day as the Governor shall, pursuant to the powers in that behalf contained in the said Letters Patent, by Proclamation under his hand and the public seal of this Colony, fix in that behalf the Port or Settlement of Walfish Bay on the West Coast of Africa, and certain territory surrounding the same, the limits of which are defined in the Letters Patent of the 14th December, 1878, aforesaid, and the British territories on the St. John's River, with the limits and name in any such Proclamation signified, shall respectively become and be part of the Colony of the Cape of Good Hope, and subject to the laws in force therein, except as the application of the same to the said respective territories may be modified by any such Proclamation.

2. From and after the annexation of the said respective territories to this Colony as aforesaid, the laws which may be in force therein under and by virtue of the last preceding section may, until it shall be otherwise provided by Act or Parliament, be repealed, altered, amended, and modified, and new laws applicable to the said territories respectively may be made, and may be repealed, altered, amended, and modified by the Governor; and no Act hereafter passed by the Parliament of this Colony shall extend or be deemed to extend to the said territories or any or either of them unless such Act shall be extended thereto in express words either contained therein or in some other Act of Parliament, or unless the operation thereof shall be extended to any or either of such territories by the Governor, and no Proclamation published in the Gazette after any Proclamation or Proclamations as in the last preceding section mentioned shall be deemed to extend or apply to the said territories, or any or either of them, unless the same shall be declared in express words contained in such or some other Proclamation as aforesaid to extend or apply thereto.

3. The Court of the Eastern Districts shall have the jurisdiction concurrent with that of the Supreme Court in and over all causes arising, and persons residing and being, within the territory of St. John's River so to be annexed as aforesaid.

4. This Act may be cited as the "Walfish Bay and St. John's River Territories Annexation Act, 1884."

4. PROCLAMATION by the Governor of the Cape of Good Hope and High Commissioner for South Africa, annexing Walfish Bay to the Colony of the Cape of Good Hope. — Aug. 7, 1884. [75 B.F.S.P. 407]

PROCLAMATION by his Excellency the Right Honourable Sir Hercules George Robert Robinson, a Member of Her Majesty's Most Honourable Privy Council, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Governor and Commander-in-chief of Her Majesty's Colony of the Cape of Good Hope in South Africa, and the Territories and Dependencies thereof, and of Tembuland, Emigrant Tambookieland, Bomvanaland and Galekaland, and Her Majesty's High Commissioner, &c.

WHEREAS it is enacted by the Act No. 85 of 1884, intituled "An Act to provide for the annexation to the Colony of the Cape of Good Hope of the Port or Settlement of Walfish Bay on the West Coast of Africa, and certain territory surrounding the same, and of certain British territories in the St. John's River in South Africa," that from and after such day as the Governor shall, pursuant to the powers in that behalf contained in Her Majesty's Letters Patent, bearing date at Westminster the 14th day of December 1878, by Proclamation under his hand and the public seal of this Colony, fixed in that behalf, the Port or Settlement of Walfish Bay on the Port or Settlement of Walfish Bay on the West Coast of Africa, and certain territory surrounding the same, the limits of which are defined in the Letters Patent aforesaid, shall become and be part of the Colony of the Cape of Good Hope, and subject to the laws in force therein, except as the application of the same to the said Port or Settlement of Walfish Bay and certain territory surrounding the same may be modified by any such Proclamation;

Now, therefore, I, the Governor aforesaid, under and by virtue of the powers aforesaid, do hereby proclaim, declare, and make known, that I have fixed the date hereof as the day from and after which the said Port or Settlement of Walfish Bay and certain territory surrounding the same, and included under the following limits, that is to say: on the south by a line from a point on the coast 15 miles south of Pelican Point to Scheppman's Dorp; on the east by a line from Scheppman's Dorp to the Rooibank, including the plateau, and thence to 10 miles inland from the mouth of the Swakop River; on the north by the last 10 miles of the course of the Swakop River, and on the west by the Atlantic Ocean, shall, under the name, designation, and title of Walfish Bay, become and be part of the Colony of the Cape of Good Hope, and subject to the laws in force therein.

2. I do further proclaim a Court of Resident Magistrate to be erected, constituted, and established for and within the said territory of Walfish Bay, and the said Court shall be holden by and before the Resident Magistrate for the territory aforesaid.

God Save the Queen!

Given under my hand and the public seal of the Colony of the Cape of Good Hope, this 7th day of August, 1884.

(L.S.) HERCULES ROBINSON, Governor.

By command of his Excellency the Governor in Council, THOMAS UPINGTON.

5. AGREEMENT between Germany and Great Britain Respecting Zanzibar, Heligoland and the Spheres of Influence of the Two Countries in Africa, signed at Berlin, 1 July 1890. [82 B.F.S.P. 35, 173 C.T.S. 271]

THE Undersigned,

Sir Edward Baldwin Malet, Her Britannic Majesty's, Ambassador

Extraordinary and Plenipotentiary;

Sir Henry Percy Anderson, Chief of the African Department of Her Majesty's Foreign Office;

The Chancellor of the German Empire, General von Caprivi;
The Privy Councillor in the Foreign Office, Dr.Krauel;

Have, after discussion of various questions affecting the Colonial interests of Germany and Great Britain, come to the following agreement on behalf of their respective Governments:

* * *

III. In South-west Africa the sphere in which the exercise of influence is reserved to Germany is bounded —

1. To the south by a line commencing at the mouth of the Orange River, and ascending the north bank of that river to the point of its intersection by the 20th degree of east longitude.

2. To the east by a line commencing at the above-named point, and following the 20th degree of east longitude to the point of its intersection by the 22nd parallel of south latitude, it runs eastward along that parallel to the point of its intersection by the 21st degree of east longitude; thence it follows that degree northward to the point of its intersection by the 18th parallel of south latitude; it runs eastward along that parallel till it reaches the River Chobe; and descends the centre of the main channel of that river to its junction with the Zambezi, where it terminates.

It is understood that under this arrangement Germany shall have free access from her Protectorate to the Zambezi by a strip of territory which shall at no point be less than 20 English miles in width.

The sphere in which the exercise of influence is reserved to Great Britain is bounded to the west and northwest by the above-mentioned line. It includes Lake Ngami.

The course of the above boundary is traced in general accordance with a Map officially prepared for the British Government in 1889.

The delimitation of the southern boundary of the British territory of Walfish Bay is reserved for arbitration, unless it shall be settled by the consent of the two Powers within two years from the date of the conclusion of this Agreement. The two Powers agree that, pending such settlement, the passage of the subjects and the transit of goods of both Powers through the territory now in dispute shall be free; and the treatment of their subjects in that territory shall be in all respects equal. No dues shall be levied on goods in transit. Until a settlement shall be effected, the territory shall be considered neutral.

6. ACT to make provision as to certain matters in respect of the relations between the Union and the Mandated Territory of South-West Africa. [Act 24 of 1922]

1. Administration of and legislation for Walvis Bay as if it were part

of the mandated territory. —

> (1) From a date to be fixed by the GovernorGeneral by proclamation in the *Gazette* (which date shall also further be notified by the Administrator of the mandated territory in the *Official Gazette* thereof) the port and settlement of Walvis Bay which forms part of the province of the Cape of Good Hope shall be administered as if it were part of the mandated territory and as if inhabitants of the said port and settlement were inhabitants of the mandated territory; and the powers conferred upon the Governor-General by Section 2 of Act No. 35 of 1884 of the Cape of Good Hope to repeal, alter, amend or modify any law in force in that port and settlement and to make new laws applicable thereto may be delegated by the Governor-General to the Administrator of the mandated territory to the intent that the said Adminisrator may, by the repeal, alteration, amendment or modification of laws and the making of new laws, bring the laws in force in that port or settlement into conformity with the laws of the mandated territory.
>
> (2) Every proclamation by the said Administrator making such a law and every regulation made by him in respect of the said port and settlement shall be deemed to be sufficiently promulgated and published in the *Official Gazette* of the mandated territory.
>
> * * *
>
> (4) No Act of the Union Parliament passed after the date fixed as aforesaid shall apply to the said port and settlement unless by such Act it is specifically expressed so to apply or unless it is declared to apply by proclamation of the Governor-General in the *Gazette*.
>
> (5) As from the date fixed as aforesaid the said port and settlement shall for all judicial purposes be regarded as forming part of the mandated territory and not as forming part of the province of the Cape of Good Hope.
>
> * * *
>
> (10) This Act may be cited for all purposes as "The South-West Africa Affairs Act, 1922."

7. Walvis Bay Administration. By His Royal Highness the Governor-General. [Proclamation 145 of 1922]

UNDER and by virtue of the authority vested in me by subsection (1) of Section 1 of the South-West Africa Affairs Act, 1922, I do hereby fix the First day of October, 1922, as the date from which the port and settlement of Walvis Bay, which forms part of the Province of the Cape of Good Hope, shall be administered as it were part of the mandated territory of South-West Africa and as if inhabitants of the said port and settlement were inhabitants of the said territory.

I do further, under and by virtue of the authority aforesaid, as from the said First day of October, 1922, delegate to the Administrator of the mandated territory of South-West Africa the powers conferred upon the Governor-General by Section 2 of Act No. 35 of 1884 of the Cape of Good

Hope, to repeal, alter, amend or modify any law in force in the port and settlement of Walvis Bay and to make new laws applicable to that port and settlement to the intent that the said Administrator may, by the repeal, alteration, amendment or modification of laws and the making of new laws bring the laws in force in the port and settlement of Walvis Bay into conformity with the laws of the mandated territory of South-West Africa.

GOD SAVE THE KING

Given under my Hand and the Great Seal of the Union of South Africa at Durban this 11th day of September, One Thousand Nine Hundred and Twenty-Two.

ARTHUR FREDERICK,
Governor-General.

By Command of His Royal Highness the Governor-General-in-Council.

J. C. SMUTS.

8. Walvis Bay Administration. [Proclamation 30 of 1922]

WHEREAS His Royal Highness the Governor-General of the Union of South Africa has under and by virtue of the authority vested in him by sub-section (1) of section one of the South-West Africa Affairs Act, 1922, been pleased to fix by Proclamation dated at Durban on the 11th day of September, 1922, and published in the Gazette of the Union dated 15th September, 1922, the First day of October, 1922, as the date from which the port and settlement of Walvis Bay, which forms part of the Province of the Cape of Good Hope of the Union, shall be administered as if it were part of the Mandated Territory of South-West Africa and as if its inhabitants were inhabitants of the said Territory;

AND WHEREAS under and by virtue of the authority aforesaid, His Royal Highness the Governor-General of the Union has been pleased as from the said First day of October, 1922, to delegate to me as Administrator of the Mandated Territory of South-West Africa, the powers conferred upon him by section two of Act No. 35 of 1884 of the Cape of Good Hope, to repeal, alter, amend or modify any law in force in the port and settlement of Walvis Bay and to make new laws applicable to that port and settlement to the intent that I may, by the repeal, alteration, amendment or modification of laws and the making of new laws bring the laws in force in the port and settlement of Walvis Bay into conformity with the laws of the Mandated Territory of South-West Africa;

NOW THEREFORE, I do hereby proclaim, declare and make known as follows: —

1. The said port and settlement of Walvis Bay shall be deemed to form portion of the District of Swakopmund created within this Territory under the provisions of section two of the Magistrates' Courts Act, 1917, of the Union Parliament as applied to this Territory by

section nine of the Administration of Justice Proclamation, 1919, and Proclamation No. 40 of 1920, dated the 2nd day of September, 1920, shall be and is hereby amended accordingly.

2. (1) From and after the First day of October, 1922, all laws now enforced within the said port and settlement of Walvis Bay shall be and are hereby repealed and from that date the law as existing and applied in the Mandated Territory of South-West Africa on that date shall be of force and effect within the said port and settlement.

(2) From and after the said First day of October, 1922, every enactment issued by the Administrator of the Territory of South-West Africa having the force of law within the said Territory shall be of force and effect within the said port and settlement unless the operation thereof within the said port and settlement is expressly excluded.

3. Every suit and proceeding civil or criminal pending in the Court of the Magistrate of Walvis Bay or in the Cape of Good Hope Provincial Division of the Supreme Court of South Africa at the date of the taking effect of this Proclamation shall be regarded as having by virtue of this Proclamation been removed into the Court of the Magistrate of the District of Swakopmund or the High Court of South-West Africa as the case may be and may be carried on, tried, heard and determined in such lastmentioned courts in like manner as nearly as may be as if they had been instituted or taken in those courts subsequent to the date of the taking effect of this Proclamation provided that —

(a) All suits and proceedings relating to rights, privileges, obligations or liabilities acquired, accrued or incurred prior to the First day of October, 1922, shall be determined according to the law in force in the said port and settlement at the time of acquisition, accrual or incurrence; and

(b) All offenses committed prior to the taking effect of this Proclamation shall be tried and determined according to the criminal law in force in the said port and settlement prior to the First day of October, 1922.

4. (1) Any license, permit or authority issued under the authority of any law in force in the said port and settlement before the First day of October, 1922, shall remain valid for the period for which it was issued and any duty, charge, fee or payment payable thereunder shall remain payable but no additional duty, charge, fee or payment shall become payable thereon by virtue of the provisions hereof.

(2) When any such licence, permit or authority is renewable or the issue of a similar licence, permit or authority is permissible under the law in force in the said port and settlement after the 30th day of September, 1922, but such renewal or issue cannot be immediately granted it shall be lawful for the person having lawful authority to grant such renewal or issue to grant a temporary licence, permit or authority for such period as may elapse before such renewal or issue is possible subject to such payment as the Administrator may direct.

5. All taxes, duties, dues and revenue of every kind and nature payable within the said port and settlement and due to or claimable by the Union Government or the Provincial Administration of the Province

of the Cape of Good Hope at the date of the taking effect of this Proclamation shall become, be and continue claimable by and payable to the Administration of South-West Africa and shall be collected and accounted for in the like manner as the taxes, dues and revenue according to the nature and kind thereof respectively are or ought to be collected in the Territory of South-West Africa.

6. This Proclamation may be cited for all purposes as the Walvis Bay Administration Proclamation, 1922, and shall commence and take effect on the First day of October, 1922.

GOD SAVE THE KING.

Given under my Hand and Seal at Pretoria this 2nd day of October, 1922.

GIJS. R. HOFMEYR,
Administrator.

9. ACT to amend the South-West Africa Affairs Act, 1922. [Act 24 of 1922]

1. Section *one* of the South-West Africa Affairs Act, 1922, is hereby amended by the substitution for sub-section (4) of the following sub-section:

(4) Any Act of Parliament or proclamation by the Governor General, passed or issued after the date fixed as aforesaid, which is in force or which may come into operation in the mandated territory, shall, as long as and to the extent to which it is in force also in the said port and settlement, unless the Act or proclamation otherwise provides.

2. This Act shall be called the South-West Africa Affairs Amendment Act, 1944.

10. NEW PROVISION for the Administration of Walvis Bay. [Proclamation R.202 of 1977]

Whereas from 7 August 1884 the port and settlement of Walvis Bay formed part of the Colony of the Cape of Good Hope and was administered and legislated for as such until 30 May 1910;

And whereas from 31 May 1910 the said port and settlement has formed part of the Province of the Cape of Good Hope and was administered and legislated for as such until 30 September 1922;

And whereas from 1 October 1922 and in terms of the South-West Africa Affairs Act, 1922 (Act 24 of 1922), the said port and settlement was for reasons of expediency administered and legislated for as if it were part of the Territory of South-West Africa and as if inhabitants thereof were inhabitants of the said Territory;

And whereas it is expedient and desirable again to administer and legislate for the said port and settlement as part of the Province of the Cape of Good Hope;

Now, therefore, under section 38 of the South-West Africa Constitution Act, 1968 (Act 39 of 1968), I make the laws set out in the Annexure.

Given under my Hand and the Seal of the Republic of South Africa at Pretoria this Thirtieth day of August, One thousand Nine hundred and Seventy-seven.

N. DIEDERICHS: State President.

By Order of the State President-in-Council:

B. J. VORSTER.

ANNEXURE

Definitions

1. In this Proclamation, unless the context otherwise indicates —

* * *

(iii) "province" means the Province of the Cape of Good Hope; (v)

* * *

(v) "territory" means the Territory of South-West Africa;(ii)

(vi) "Walvis Bay" means the port and settlement of Walfish Bay mentioned in the Walfish Bay and St. John's River Territories Annexation Act, 1884 (Act 35 of 1884 of the Cape of Good Hope), and includes the territory surrounding it and bounded as described in the said Act. (vi)

Administration of Walvis Bay, and application of laws in force therein and in the province

2.

(1) Walvis Bay shall cease to be administered as if it were part of the territory and as if inhabitants thereof were inhabitants of the Territory and shall again be administered as part of the province.

(2) Any law in force in the said Walvis Bay on the date immediately prior to the date of coming into operation of this subparagraph shall, subject to the provisions of paragraph 4, continue to apply therein until repealed, or except in so far as it may be amended or modified, in terms of this Proclamation or any other law.

(3) Any law in force in the province and not already in operation in Walvis Bay or any law coming into force in the province shall, subject to the provisions of paragraph 3, also apply in the said Walvis Bay.

* * *

Electoral matters

5. Walvis Bay shall cease to be part of the Electoral Division of Omaruru for the election of members of the House of Assembly and be deemed not to have been part thereof at all relevant times, and shall become part of the Electoral Division of Namakwaland and be deemed to

have been part thereof at all relevant times.

* * *

Short title and commencement

8. This Proclamation shall be called the Walvis Bay Administration Proclamation and shall come into operation on 1 September 1977.

SCHEDULE
LAWS REPEALED OR AMENDED

No. and year of Law	Title	Extent of repeal or amendment
Act 24 of 1922	South-West Africa Affairs Act, 1922	The repeal of the whole.
Act 39 of 1968	South-West Africa Constitution Act, 1968	The repeal of section 36.

APPENDIX "B"

1. ORDINANCE for declaring certain Guano to be the Property of Her Majesty the Queen. [Ordinance 4 of 1845]

WHEREAS considerable quantities of the substance commonly called "guano" have been found in and upon certain islands or rocks in the sea within the limits of this Colony and its dependencies: And whereas it is possible that further quantities of the said substance may exist and be hereafter discovered at other places within the said limits: And whereas doubts exist whether the said substance being merely or mainly the dropping of unreclaimed birds of a base nature can in law, though a merchantable article, be deemed to be property or possessed of legal value: And whereas it is expedient that such doubts should be removed and that all of the said substance lying and being in and upon any place or territory within the limits aforesaid, and not granted or belonging to any private individual, should be declared to be the property of Her Majesty the Queen, and that provision should be made for preventing or punishing the unauthorized removal of the same: Be it therefore enacted and declared by the Governor of the Cape of Good Hope, with the advice and consent of the Legislative Council thereof, that all of the said substance commonly called guano which may now or at any time hereafter be found lying and being in or upon any island, rock, or other place not being the property of any private person or persons and within the limits of this Colony and its dependencies, shall be deemed and taken to be property and to belong to and be in the lawful possession of Her Majesty the Queen, her heirs and successors.

* * *

6. And be it enacted that this Ordinance shall commence and take effect from and after the date of the promulgation thereof [Jan. 30, 1845].

2. PROCLAMATION by His Excellency Sir George Grey. [Proclamation 53 of 1861]

Knight Commander of the Most Honourable Order of the Bath, Governor and Commander-in-Chief of Her Majesty's Colony of the Cape of Good Hope in South Africa, and of the Territories and Dependencies thereof, and Vice-Admiral of the same, and Her Majesty's High Commissioner, &c., &c., &c., &c.

WHEREAS, the Island of Ichaboe was, on the 21st day of June last past, taken possession of for and in the name of Her Britannic Majesty Queen Victoria, and declared a dependency of the Cape of Good Hope: And whereas it is expedient that, subject to the pleasure of Her Majesty in that behalf, Her dominion [sic] shall also be declared over a cluster of small Islands or Rocks adjacent to the said Island of Ichaboe, now therefore, I do hereby proclaim, declare, and make known, that the sovereignty

and dominion of Her said Britannic Majesty, Queen Victoria, shall be, and the same are hereby declared over the following Islands or Rocks adjacent to Ichaboe, that is to say, Hollamsbird, Mercury, Long Island, Seal Island, Penguin Island, Halifax, Possession, Albatross Rock, Pomona, Plumpudding, and Roastbeef, or Sinclair's Island. This Proclamation of Her Majesty's sovereignty and dominion to take effect forthwith, but to be subject to Her Majesty's gracious confirmation and disallowance.

GOD SAVE THE QUEEN!

Given under the Public Seal of the Settlement of the Cape of Good Hope, this 12th day of August, 1861.

G. GREY, Governor.

By command of His Excellency the Governor,

RICHARD SOUTHEY,
Acting Colonial Secretary.

3. PROCLAMATION by His Excellency Sir Philip Edmond Wodehouse. [Proclamation 27 of 1864]

Knight Commander of the Most Honourable Order of the Bath, Governor and Commander in Chief of Her Majesty's Colony of the Cape of Good Hope in South Africa, and of the Territories and Dependencies thereof, and Vice-Admiral of the same, and Her Majesty's High Commissioner, &c., &c., &c.

WHEREAS, by a Proclamation bearing date the 12th day of August, 1861, it was proclaimed and declared that the Sovereignty of Her Britannic Majesty Queen VICTORIA should be, and the same was thereby, declared over certain Islands on the Coast of Africa, that is to say, Hollamsbird, Mercury, Long Island, Seal Island, Penguin Island, Halifax, Possession, Albatross Rock, Pomona, Plumpudding and Roastbeef, or Sinclair's Island, and that such Proclamation should be subject to Her Majesty's gracious confirmation and disallowance; and whereas such Proclamation has been recently brought to the knowledge of Her Majesty's Government:

Now, therefore, I do hereby proclaim and declare that Her Majesty has been pleased to disallow the said Proclamation, and that the several Islands, Islets, and Rocks referred to therein are not to be viewed as British Territory.

GOD SAVE THE QUEEN!

Given under the Public Seal of the Settlement of the Cape of Good Hope, this 9th day of May, 1864.

P. E. WODEHOUSE, Governor.

By command of His Excellency the Governor,

RAWSON W. RAWSON,
Colonial Secretary.

4. PROCLAMATION by His Excellency Sir Philip Edmond Wodehouse. [Proclamation 66 0f 1866]

Knight Commander of the Most Honourable Order of the Bath, Governor and Commander-in-Chief of Her Majesty's Colony of the Cape of Good Hope, in South Africa, and of the Territories and Dependencies thereof, and Vice-Admiral of the same, and Her Majesty's High Commissioner, &c., &c., &c.

WHEREAS the Island of Ichaboe was, on the 21st day of June, 1861, taken possession of for and in the name of Her Britannic Majesty Queen Victoria, and declared a dependency of the Cape of Good Hope: And whereas by a Proclamation bearing date the 12th day of August in the same year, it was proclaimed and declared that the Sovereignty of Her said Majesty should be, and the same was thereby declared over certain Islands, Islets, or Rocks on the Coast of Africa, adjacent to the said Island of Ichaboe, that is to say: Hollamsbird, Mercury, Long Island, Seal Island, Penguin Island, Halifax Possession, Albatross Rock, Pomona, Plumpudding and Roastbeef, or Sinclair's Islands, and that such Proclamation should be subject to Her Majesty's gracious confirmation or disallowance: And whereas Her Majesty was pleased on such lastmentioned Proclamation being brought to her knowledge to disallow the same: And whereas by a Proclamation bearing date the 9th day of May, 1864, such disallowance was publicly notified, and it was thereby declared that the said several Islands, Islets, or Rocks in the said Proclamations of the 12th day of August, 1861, and the 9th day of May, 1864, respectively, should not be viewed as British territory: And whereas it has, since the date of the Proclamation lastly hereinbefore recited, seemed good to her said Majesty that the same Islands, Islets, or Rocks should be taken possession of for and on behalf of Her Majesty: And whereas it has also seemed and does seem to Her Majesty that it is expedient, and that it is for the interest as well of Her Majesty's dominions and subjects, especially of Her said Colony of the Cape of Good Hope and the inhabitants thereof, that the same Islands, Islets, or Rocks, and the said Island of Ichaboe, should be annexed to and become and form part of the Colony of the Cape of Good Hope: And whereas, pursuant to orders in that behalf received, CHARLES CODRINGTON FORSYTH, Esquire, Captain of Her Majesty's Steam Frigate *Valorous*, did on the 5th day of May last past proceed to Penguin Island aforesaid, being one of the said Islands, Islets, or Rocks, and did there, by Proclamation bearing date the 5th day of May, take possession of the same, in the name of all the said Islands, Islets, or Rocks hereinbefore and in the said Proclamations of the 12th day of August, 1861, and the 9th day of May, 1864, respectively mentioned, for and on behalf of Her Majesty, and did thereby declare the sovereignty and dominion of Her Majesty over all the same Islands, Islets, or Rocks: Now,

therefore, I do hereby proclaim and make known that the said Island of Ichaboe, and the said Islands, Islets, or Rocks adjacent thereto, that is to say: Hollamsbird, Mercury, Long Island, Seal Island, Penguin Island, Halifax Possession, Albatross Rock, Pomona, Plumpudding and Roastbeef, or Sinclair's Islands, shall be from the day of the date hereof, and the same are hereby annexed to and form part of the said Colony of the Cape of Good Hope.

GOD SAVE THE QUEEN!

Given under the Public Seal of the Settlement of the Cape of Good Hope, this 16th day of July, 1866.

P. E. WODEHOUSE, Governor.

By command of His Excellency the Governor,

R. SOUTHEY,
Colonial Secretary.

5. ACT to Confirm the Annexation to this Colony of the Islands, Islets, or Rocks, on the South-West Coast of South Africa, Called Ichaboe, Holland's Bird, Mercury, Long Island, Seal Island, Penguin Island, Halifax, Possession Island, Albatross Rock, Pomona, Plumpudding and Roast Beef or Sinclair's Island. [Act 1 of 1873]

WHEREAS the Island of Ichaboe on the southwest coast of South Africa was, on the twenty-first day of June, 1861, duly taken possession of for behoof of Her Britannic Majesty Queen Victoria, and on her behalf: And whereas on the fifth day of May, 1866, certain other islands, islets, and rocks on the said southwest coast of South Africa, that is to say: — Holland's Bird, Mercury, Long Island, Seal Island, Penguin Island, Halifax, Possession Island, Albatross Rock, Pomona, Plumpudding and Roast Beef or Sinclair's Island, hereinafter called the Penguin Islands, were also duly taken possession of for behoof of her said Majesty and on her behalf: And whereas by a proclamation dated the sixteenth day of July, 1866, by His Excellency Sir Philip Edmond Wodehouse, Knight Commander of the Most Honourable Order of the Bath, then the Governor of this Colony, the said island of Ichaboe and the said Penguin Islands were declared to be annexed to and form part of this Colony: And whereas it is expedient that the declarations in the said proclamation contained should be confirmed by the Parliament of this Colony by an Act thereof: Be it therefore enacted by the Governor of the Cape of Good Hope, with the advice and consent of the Legislative Council and House of Assembly thereof, as follows:

I. The declarations contained in the said proclamation of the sixteenth day of July, 1866, shall be, and the same are hereby confirmed; and the said Island of Ichaboe and the said Penguin Islands shall be held to have been duly annexed to and have formed part of the Col-

ony from and after the date of the said proclamation.
II. Notwithstanding such annexation as in this Act is contained, the said Islands shall for the purposes of the laws relating to the Customs of this Colony be deemed to be foreign ports respectively, until the Parliament shall otherwise determine.
III. This Act may be cited for all purposes as the "Annexation of Ichaboe and Penguin Islands Act, 1873."

6. BRITISH LETTERS PATENT appointing the Governor of the Colony of the Cape of Good Hope to be Governor of the Island of Ichaboe and the Penguin Islands, and authorizing the Annexation of the aforesaid Islands to that Colony. — Westminster, February 27, 1867. [67 B.F.S.P. 554]

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to all to whom these presents shall come, greeting:

Whereas the Island of Ichaboe, on the southwest coast of South Africa, was on the 21st day of June, 1861, duly taken possession of for us and on our behalf;

And whereas on the 5th day of May, 1866, certain other islands, islets, and rocks on the said southwest coast of South Africa, that is to say, Hollandsbird, Mercury, Long Island, Seal Island, Penguin Island, Halifax Possession, Albatross Rock, Pomona, Plumpudding and Roast Beef or Sinclair's Island, which said islands, islets, and rocks are hereinafter called the Penguin Islands, were also duly taken possession of for us and on our behalf;

And whereas, by Proclamation, dated the 16th day of July, 1866, by his Excellency Sir Philip Edmund Wodehouse, Governor and Commander-in-chief of our Colony of the Cape of Good Hope and of the territories and dependencies thereon and Vice-Admiral of the same, the said Island of Ichaboe and the said Penguin Islands were declared to be annexed to, and to form part of, the said Colony of the Cape of Good Hope;

And whereas doubts are entertained touching the legality of the said annexation of the said Island of Ichaboe and the said Penguin Islands by Proclamation and it is expedient that such doubts should be removed;

And whereas it is further expedient that the said Island of Ichaboe and the said Penguin Islands should be annexed to, and form part of, the said Colony of the Cape of Good Hope, if the Legislative Council and House of Assembly thereof should desire such annexation;

And whereas it is expedient that, until such annexation, the affairs of the said Island of Ichaboe and of the said Penguin Islands should be administered by a Governor, to be for that purpose appointed by us;

Now know ye, that in consideration of the premises, we, of our special grace, mere motion, and certain knowledge, have thought fit to constitute and appoint, and by these presents do constitute and appoint, the

Governor and Commander-in-chief for the time being of our said Colony of the Cape of Good Hope to be the Governor of the said Island of Ichaboe and Penguin Islands, and we do hereby invest in him all the powers and authorities which by these presents are given and granted to the Governor for the time being of the said Island of Ichaboe and Penguin Islands.

And we do hereby further declare our pleasure to be, that in the event of the death or incapacity of the said Governor and Commander-in-chief of the said Colony of the Cape of Good Hope, or, in the event of his absenting himself from the said Colony otherwise than for the purpose of visiting the said Island of Ichaboe or the said Penguin Islands, then and in either of these cases the officer for the time being who may be administering the Government of the said Colony of the Cape of Good Hope shall be and he is hereby constituted and appointed Governor for the time being of the said Island of Ichaboe and Penguin Islands.

And we do hereby further authorize and empower the said Governor of the said Island of Ichaboe and the Penguin Islands to make all such rules and regulations as may lawfully be made by our authority for the order, peace, and good government of the said Island of Ichaboe and Penguin Islands, subject, nevertheless, to any instructions which may from time to time be hereafter given him under our sign manual and signet, or through one of our Principal Secretaries of State.

And we do hereby further authorize and empower the said Governor of the said Island of Ichaboe and Penguin Islands, so long as he shall be Governor thereof, by any instrument under his hand and seal, to make leases and other dispositions for a term or terms of years, of any of the said Islands of Ichaboe or Penguin Islands, as aforesaid, or any part or parts thereof, and to issue licenses authorizing the person or persons designated therein to take guano or other fertilising substances or produce from the said Islands of Ichaboe or Penguin Islands, or any of them, and to insert in such leases, dispositions, or licenses, as the case may be, all such reservations by way of rent, or royalty, or otherwise, and all such conditions, exceptions, and stipulations as may to him seem advisable: Provided always that, in the execution of the powers hereby conferred on him, he shall conform to such instructions as he may from time to time receive from us, under our sign manual and signet, or through one of our Principal Secretaries of State.

And we do hereby further authorize and empower the said Governor, as he may deem expedient, under his hand and seal, to confirm any grant, disposition, lease or license, which may have been made or issued before the date of these presents, to any person or persons in respect to the said Island of Ichaboe or the said Penguin Islands, or any of them, or any part thereof, by any Governor of the said Colony of the Cape of Good Hope, or to accept a surrender of any such grant, disposition, lease, or licence, and to make and issue any new disposition, lease, or licence to the persons surrendering the same, or their nominees, under the powers and in the manner hereinbefore declared.

And we do hereby further declare our pleasure to be that if any time hereafter the Legislative Council and House of Assembly of the said Colony of the Cape of Good Hope shall, by resolution or otherwise, request the said Governor of the said Island of Ichaboe and Penguin Islands to transfer the same to the said Colony of the Cape of Good Hope, for the purpose of their being annexed to and forming part of the said Colony, and shall by law provide that upon such transfer and annexation all laws which may be in force in the said Colony on the day on which the said Island of Ichaboe and Penguin Islands shall be annexed thereto shall immediately upon such annexation take effect and be in force in and upon the said islands so annexed, then the said Governor shall, and he is hereby authorized and empowered to transfer to the said Colony the said Island of Ichaboe and the said Penguin Islands, and from and after the date of such transfer the said islands so transferred shall be deemed and taken to be, and shall be, annexed to and form part of the said Colony of the Cape of Good Hope.

And we further declare our pleasure to be that the said Governor of the said Island of Ichaboe and Penguin Islands shall declare by Proclamation the said transfer, and from and after the date of such Proclamation these presents shall cease and be of none effect so far as relates to the appointment of a Governor of the said Islands of Ichaboe and Penguin Islands and his powers thereunder, but not further or otherwise, and not so as to affect any instruments, acts, matters, or things made or done by him while such Governor as aforesaid, in pursuance of the powers hereby conferred on him.

And we do hereby reserve to us, our heirs and successors, full power and authority from time and time to revoke, alter, or amend these our Letters Patent, as to us or them shall seem meet.

In witness whereof we have caused these our Letters to be made Patent. Witness ourself at Westminster, the 27th day of February, in the 30th year of our reign.

By warrant under the Queen's sign manual.

C. ROMILLY

7. ACT to repeal "The Annexation of Ichaboe and Penguin Islands Act, 1873," and to make other provisions in lieu thereof. [Act 4 of 1874]

WHEREAS the Island of Ichaboe, on the southwest coast of South Africa, was, on the 21st day of June, 1861, duly taken possession of for and on behalf of Her Majesty Queen Victoria: And whereas, on the 5th day of May, 1866, certain other islands, islets, and rocks on the said coast, viz., Hollandsbird, Mercury, Long Island, Seal Island, Penguin Island, Halifax Possession, Albatross Rock, Pomona, and Plumpudding and Roast Beef, or Sinclair's Island, hereinafter called the Penguin Islands, were also duly taken possession of for and on behalf of Her said Majesty: And whereas, by a Proclamation dated the 16th day of July, 1866, by his

Excellency Sir Philip Edmund Wodehouse, the then Governor of this Colony, the said Island of Ichaboe and the said Penguin Islands were declared to be annexed to and to form part of this Colony: And whereas doubts having been entertained touching the legality of the said annexation by the said Proclamation, Her said Majesty, by Her Letters Patent dated the 27th day of February, 1807, after reciting (amongst other things the said doubts) that it was expedient that the same should be removed, and that the said islands should be annexed to and form part of this Colony, if the Legislative Council and House of Assembly thereof should desire such annexation, and that until such annexation the affairs of the said islands should be administered by a Governor, to be for that purpose appointed by Her said Majesty, did constitute and appoint the Governor and Commander-in-chief for the time being of this Colony to be the Governor of the said islands, with certain powers therein mentioned, and did declare her pleasure to be that if at any time thereafter the said Legislative Council and House of Assembly should by resolution or otherwise request the said Governor of the said islands to transfer the same to this Colony for the purpose of their being annexed to and forming part thereof, and should by law provide that upon such transfer and annexation all laws which might be in force in this Colony on the day on which the said islands should be annexed thereto should immediately upon such annexation take effect and be in force in and upon the said islands so annexed, the said Governor should and was thereby authorized and empowered to transfer to this Colony the said islands, and from and after the date of such transfer the said islands so transferred should be deemed and taken to be, and should be, annexed to and form part of this Colony: And whereas it is expedient that the said islands shall be annexed to and form part of this Colony, and that, for the purpose of enabling the said annexation to be carried out according to the said Letters Patent, the said "Annexation of Ichaboe and Penguin Islands Act, 1873," which was passed in ignorance of the said doubts and of the said Letters Patent, should be repealed: Be it enacted by the Governor of the Cape of Good Hope, with the advice and consent of Legislative Council and House of Assembly thereof, as follows: —

> 1. "The Annexation of Ichaboe and Penguin Islands Act, 1873," is hereby repealed.
>
> 2. Upon the transfer and annexation of the said Island of Ichaboe and the said Penguin Islands to this Colony, all laws which may then be in force in this Colony shall immediately upon such annexation take effect and be in force in and upon the said islands so annexed.
>
> 3. This Act may for all purposes be cited as "The Ichaboe and Penguin Islands Act, 1874."

8. ACT to exempt temporarily the Island of Ichaboe and Penguin Islands from the operation of the Customs Laws of that Colony. [Act 5 of

1874]

WHEREAS in case of the annexation of the Island of Ichaboe and certain other islands, islets, and rocks following, and hereafter called the Penguin Islands, to wit: Hollandsbird, Mercury, Long Island, Seal Island, Penguin Island, Halifax Possession, Albatross Rock, Pomona, and Plumpudding and Roast Beef, or Sinclair's Island, it is expedient that the Customs Laws of this Colony should not at present be in force therein: Be it enacted by the Governor of the Cape of Good Hope, with the advice and consent of the Legislative Council and House of Assembly thereof, as follows: —

1. Notwithstanding that the said Island of Ichaboe and the said Penguin Islands may be annexed to this Colony, the said islands shall, for the purposes of the laws relating to the Customs of this Colony, be deemed to be foreign ports respectively until the Parliament shall otherwise determine.

2. This Act may for all purposes be cited as "The Ichaboe and Penguin Islands Act, 1874."

9. PROCLAMATION by His Excellency Sir Henry Barkly. [Proclamation 45 of 1874]

Knight Grand Cross of the Most Distinguished Order of St. Michael and St. George, Knight Commander of the Most Honourable Order of the Bath, Governor and Commander-in-Chief of Her Majesty's Colony of the Cape of Good Hope in South Africa, and of the Territories and Dependencies thereof; and Her Majesty's High Commissioner, &c., &c., &c.

WHEREAS by Letters Patent of Her Majesty Queen Victoria bearing date the 27th day of February, 1867, after reciting, amongst other things, that the Island of Ichaboe, on the Southwest Coast of South Africa, had been duly taken possession of for her said Majesty and on her behalf, on the 26th day of June, 1861, and that on the 5th day of May, 1866, certain other Islands, Islets, and Rocks, on the said Southwest Coast of South Africa, that is to say, Hollandsbird, Mercury, Long Island, Seal Island, Penguin Island, Halifax, Possession, Albatross Rock, Pomona, and Plumpudding and Roastbeef, or Sinclair's Island (therein and hereinafter called the Penguin Islands), had also been duly taken possession of for her said Majesty and on her behalf; and that by a Proclamation dated the 16th day of July, 1866, by His Excellency Sir Philip Edmond Wodehouse, the then Governor and Commander-in-Chief of the Colony of the Cape of Good Hope, and of the Territories and Dependencies thereof, and Vice-Admiral of the same, the said Island of Ichaboe and the said Penguin Islands were declared to be annexed to and form part of the said Colony; and that doubts were entertained touching the legality of the said annexation of the said Islands by Proclamation, and that it was expedient that such doubts should be removed, and that the said Islands should be annexed to and form part of the said Colony, if the Legislative Council and House of Assembly thereof desire such annexation, and that

until such annexation it was expedient that the affairs of the said Island should be administered by a Governor to be for that purpose appointed by her said Majesty: her said Majesty did in and by the said Letters Patent constitute and appoint the Governor and Commander-in-Chief for the time being of the said Colony of the Cape of Good Hope to be the Governor of the said Island of Ichaboe and Penguin Islands, and did thereby vest in him all the powers and authorities which by the said Letters Patent were given and granted to the Governor for the time being of the said Island of Ichaboe and Penguin Islands, and did, (amongst other things), declare her pleasure to be that if at any time thereafter the Legislative Council and House of Assembly of the said Colony of the Cape of Good Hope should by resolution or otherwise request the Governor of the said Island of Ichaboe and Penguin Islands to transfer the same to the said Colony for the purpose of their being annexed to and forming part of the said Colony, and should by law provide that upon such transfer and annexation, all laws which might be in force in the said Colony on the day on which the said Island of Ichaboe and Penguin Islands should be annexed thereto, should immediately upon such annexation take effect and be in force in and upon the said Islands as annexed, then the said Governor should be and he was thereby authorized and empowered to transfer to the said Colony the said Island of Ichaboe and Penguin Islands, and from and after the date of such transfer the said Islands so transferred should be deemed and taken to be and should be annexed to and form part of the said Colony of the Cape of Good Hope: And whereas her said Majesty did by the said Letters Patent further declare her pleasure to be that the said Governor of the said Island of Ichaboe and Penguin Islands should declare by Proclamation the said transfer, and from and after the date of such Proclamation the said Letters Patent should cease and be of none effect, so far as related to the appointment of a Governor of the said Islands of Ichaboe and Penguin Islands and his powers thereunder, but not further or otherwise, and not so as to affect any instruments, acts, matters, or things, made or done by him while such Governor as aforesaid in pursuance of the powers thereby conferred on him.

And whereas the said Legislative Council and House of Assembly of the said Colony of the Cape of Good Hope have, by resolutions bearing date respectively the 16th and 11th days of June, 1874, requested me to transfer the said Island of Ichaboe and Penguin Islands to the said Cape of Good Hope for the purpose of their being annexed to and forming part of the said Colony, and have by law, to wit, by the "Ichaboe and Penguin Islands Act, 1874," provided that upon such transfer and annexation all laws which may then be in force in the said Colony shall immediately upon such annexation take effect and be in force in and upon the said islands so annexed.

I do hereby, pursuant to the said Letters Patent, proclaim, and make known, and declare, that I have, by an instrument bearing even date herewith, executed under and by virtue of the powers and authority vested in me by the said Letters Patent, transferred the said Island of

Ichaboe and the said Penguin Islands to the said Colony of the Cape of Good Hope, and that the said Islands shall henceforth be deemed, and taken to be, and shall be, annexed to and form part of the said Colony.

GOD SAVE THE QUEEN!

Given under my hand and the Public Seal of the Colony of the Cape of Good Hope, this 9th day of July, 1874.

By command of His Excellency the Governor in Council,

HENRY BARKLY, Governor.

J. C. MOLTENO,

Colonial Secretary.

10. GERMAN PROCLAMATION placing under the Protection of the German Emperor the Territory acquired by M. Luderitz on the South-west Coast of Africa. — Aug. 16, 1884. [75 B.F.S.P. 546]

(Translation.)

His Majesty the German Emperor William I, King of Prussia, has commanded me to proceed to Angra Pequeña with His Majesty's two-decked corvette the *Elisabeth*, to place under the direct protection of His Majesty the territory belonging to M. A. Luderitz on the West Coast of Africa.

The territory of M. A. Luderitz will, according to official communication, be taken to extend from the north bank of the Orange River to the 26° south latitude, 20 geographical miles inland, including the islands belonging thereto by the law of nations.

In carrying out His Majesty's commands I herewith hoist the Imperial German flag, and thus place the abovementioned territory under the protection and sovereignty of His Majesty the Emperor William I, and call upon all present to give three cheers for His Majesty.

Long live his Majesty the Emperor William I. SCHERING,

Captain at Sea, and
Commandant of His Imperial Majesty's ship Elisabeth.

11. PROTOCOL between Germany and Great Britain for the Settlement of British Claims in Territories under German Protection in South-West Africa, signed at Berlin, 15 July 1886. [77 B.F.S.P. 1042, 168 C.T.S. 129]

The undersigned Commissioners, having met and discussed fully those British claims in the territories placed under German protection in South-West Africa, upon which Messrs. Bieber and Shippard, the Commissioners at Cape Town, had disagreed, agree to submit to their Governments the following recommendations: —

1. *Ebony Mines.*

That if Robert Lewis or his assigns desire to work this mine, he or they be at liberty to do so, and to convey the ore to the coast, until the 21st of September, 1898, without payment to, and without hindrance or interference by, the Colonial Company.

2. *Sandwich Harbour.*

That Mr. Anders Ohlson (trading as A. Ohlson and Co.) and Messrs. De Pass, Spence, and Co., respectively, be held to have acquired a full title in perpetuity for themselves and their assigns to the lands and buildings which they respectively have heretofore occupied in Sandwich Harbour for the purposes of the fishery, together with the right to each firm of taking at any time any other sites on the shore of this harbour, and of erecting buildings thereon, should the sand, as has happened before, shift so as to render useless the land which is now, or at any future time may be, occupied by the buildings; it being understood that any site so taken becomes the absolute property of Messrs. De Pass, Spence, and Co., or of Mr. Ohlson, or their respective assigns, as the case requires, and that they have no further claim to the land which they previously occupied; but that neither firm nor their assigns are entitled to take any site occupied by other persons, nor to take any site the occupation of which would interfere with other persons.

That it should be further recognized that the firms of A. Ohlson and De Pass, Spence, and Co. have the right of coast fishery in Sandwich Harbour, and along the coast between Sandwich Harbour and the point 23° 20' south latitude, 14° 31' east longitude, with the right of landing on and using for fishery purposes any part of the coast not in the private possession of third parties, subject always to the observance of any laws and regulations which may be issued by the competent authorities. The said firms shall not, however, have any right to hinder other persons from also fishing there, or from establishing themselves in Sandwich Harbour.

3. *Hottentot Bay.*

That Messrs. De Pass, Spence, and Co. have in like manner acquired a full title in perpetuity for themselves and their assigns to the guano deposits at Hottentot Bay, and to the land which they now occupy there for carrying on fishery or collecting of guano.

4. *Unnamed Islets and Rocks.*

That Messrs. De Pass, Spence, and Co., and their assigns, be free to make use, as they have hitherto done, of these islets and rocks, including Shark Island, without payment until the expiry of their lease, that is to say, until the 30th June, 1895; and if the British Government waive all claim to the sovereignty of these islands and rocks, and acknowledge the sovereignty of Germany over them, then that the latter Power should consent to confer no private rights over them to any persons other than the lessees for the time being of the 12 British islands named in the Letters Patent of the 27th February, 1867.

Upon this understanding the British Commissioner will recommend his Government to acknowledge forthwith the sovereignty of Germany in these islets and rocks.

5. *Mainland Claims.*

That Messrs. De Pass, Spence, and Co. should be held to have acquired for themselves and their assigns a full title in perpetuity to the Pomona mine, with 2 English miles of land round the mine on every side; and that they should have the right to use the lagoon for their vessels, and to make use of the land round the lagoon for all purposes as they have done hitherto, without payment and without hindrance or disturbance by the Colonial Company, and if irreconcilable disputes between the firm and the Company should arise as to the proper exercise of these rights on land, then that the chief officer of the German Government within the Protectorate shall allot to Messrs. De Pass, Spence, and Co., or their assigns, sufficient land for the purposes of their business, conveniently situated on the shore of the lagoon, and that the land so allotted shall become the absolute property in perpetuity of the persons to whom the same is allotted, but that such allotting of land shall in no way affect or lessen their right to use the lagoon for their vessels.

Berlin, July 15, 1886.

CHARLES S. SCOTT.

R. KRAUEL.

Sir E. Malet to Count Bismarck

M. LE SECRETAIRE d'ETAT, Berlin, October 23, 1886.

Her Majesty's Government have had under their consideration the Protocol signed by Dr. Krauel and Mr. Scott, containing the joint recommendations of the Imperial and British Commissioners for a settlement of certain outstanding British claims in the Imperial Protectorate of South-west Africa, in regard to which the Commissioners at Cape Town failed to arrive at an agreement. I have now the honour to inform your Excellency, by direction of Her Majesty's Principal Secretary of State for Foreign Affairs, that the arrangements embodied in the Protocol in question are approved and accepted by Her Majesty's Government. In acquainting your Excellency with this decision, I am directed to add that Her Majesty's Government would be glad to be informed whether the Imperial Government in like manner approve and accept the arrangement in question.

I have, &c.,

Count Bismarck. EDWARD B. MALET.

Count Hatzfeldt to the Earl of Iddesleigh.

(Translation.)

MY LORD,

German Embassy, London, November 13, 1886.

In a note of the 23rd ultimo the British Ambassador in Berlin in-

formed the Imperial Government that his Government agreed to the proposals contained in the Protocol, the German version of which is herewith inclosed, respecting the rights of British subjects in the South-West African territories under German protection, which Protocol was signed on the 15th July last by Mr. Scott, the First Secretary of the English Embassy in Berlin, and Dr. Krauel, Privy Councillor of Legation.

Sir Edward Malet stated at the same time that the British Government wished to be informed whether the Imperial Government also agreed to the proposals in question.

In reply, I am instructed to express the concurrence of my Government in the proposals made in the inclosed Protocol.

The Imperial Government is prepared to take the necessary steps to communicate the provisions of the Protocol to those interested, and as far as necessary to superintend the execution of those provisions through the Imperial officials in the protected territory.

I have, &c.,

The Earl of Iddesleigh. v. HATZFELDT.

APPENDIX "C"

Mandate for German South West Africa

The Council of the League of Nations:

Whereas by Article 119 of the Treaty of Peace with Germany signed at Versailles on June 28th, 1919, Germany renounced in favour of the Principal Allied and Associated Powers all her rights over her oversea possessions, including therein German South-West Africa; and

Whereas the Principal Allied and Associated Powers agreed that, in accordance with Article 22, Part I (Covenant of the League of Nations) of the said Treaty, a Mandate should be conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa to administer the territory aforementioned, and have proposed that the Mandate should be formulated in the following terms; and

Whereas His Britannic Majesty, for and on behalf of the Government of the Union of South Africa, has agreed to accept the Mandate in respect of the said territory and has undertaken to exercise it on behalf of the League of Nations in accordance with the following provisions; and

Whereas, by the aforementioned Article 22, paragraph 8, it is provided that the degree of authority, control or administration to be exercised by the Mandatory not having been previously agreed upon by the Members of the League, shall be explicitly defined by the Council of the League of Nations:

Confirming the said Mandate, defines its terms as follows:

Article 1

The territory over which a Mandate is conferred upon His Britannic Majesty for and on behalf of the Government of the Union of South Africa (hereinafter called the Mandatory) comprises the territory which formerly constituted the German Protectorate of South-West Africa.

Article 2

The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require.

The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate.

Article 3

The Mandatory shall see that the slave trade is prohibited, and that no forced labour is permitted, except for essential public works and services, and then only for adequate remuneration.

The Mandatory shall also see that the traffic in arms and ammunition is controlled in accordance with principles analogous to those laid down in the Convention relating to the control of the arms traffic, signed on September 10th, 1919, or in any convention amending the same.

The supply of intoxicating spirits and beverages to the natives shall be prohibited.

Article 4

The military training of the natives, otherwise than for purposes of internal police and the local defence of the territory, shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications erected in the territory.

Article 5

Subject to the provisions of any local law for the maintenance of public order and public morals, the Mandatory shall ensure in the territory freedom of conscience and the free exercise of all forms of worship, and shall allow all missionaries, nationals of any State Member of the League of Nations, to enter into, travel and reside in the territory for the purpose of prosecuting their calling.

Article 6

The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5.

Article 7

The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate.

The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

The present Declaration shall be deposited in the archives of the League of Nations. Certified copies shall be forwarded by the Secretary-General of the League of Nations to all Powers Signatories of the Treaty of Peace with Germany.

Made at Geneva the 17th day of December, 1920.

The Legality of Military Bases in Non-Self-Governing Territory: the Case of United States Bases in Puerto Rico

JOHN QUIGLEY*

I. INTRODUCTION

A state administering a non-self-governing territory is obliged to act in the best interests of the local population. Since this norm emerged in the early twentieth century, regulation has not been uniform as to whether an administering state may establish military bases in the non-self-governing territory. An administering state that establishes military bases not to defend the non-self-governing territory, but for its own purposes, may violate its obligations to the non-self-governing territory.

Such bases can cause economic harm by diverting land and sea areas from traditional uses. They may involve the non-self-governing territory against its will in military conflicts with neighboring states. They may impair the non-self-governing territory's opportunity of achieving self-determination because the administering state may be reluctant to jeopardize its bases.

This article asks whether establishment of military bases in a non-self-governing territory is consistent with an administering state's obligations to the non-self-governing territory. It analyzes applicable customary law, developed largely through the League of Nations and United Nations. It examines United States military bases in Puerto Rico as a case study, to permit a more detailed examination of the question of whether bases are used for the administering state's benefit, and of the question of whether a territory is non-self-governing.

Finally, the article examines the state responsibility of an administering state that establishes unlawful military bases towards the people of a non-self-governing territory. Here it draws on the Puerto Rico case to explore the damage that may be caused to a non-self-governing territory by military bases.

II. QUESTION OF WHETHER MILITARY BASES VIOLATE THE RIGHTS OF THE POPULATION OF A NON-SELF-GOVERNING TERRITORY

A state holding a non-self-governing territory must assist it in achiev-

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* Professor of Law, Ohio State University. The author is grateful to his colleague Prof. Stanley Laughlin for consultation, and to Anne Hoke, J.D., Ohio State University 1987, and Olga Bosques, J.D. Ohio State University 1986, for research in an international law seminar that contributed to the writing of this article.

ing self-determination.[1] Until that occurs, the state must so administer the territory as to maximize the interests of the local population.[2] As a corollary, it may not exploit the territory for its own benefit.[3] An example of use for the benefit of the administering state is South Africa's intensive mining in Namibia, in an apparent effort to extract valuable minerals before granting Namibia independence. This action has been condemned as a violation of the rights of the people of a non-self-governing territory.[4]

A. *The "Sacred Trust" Norm*

Establishment of military bases to benefit the administering state may conflict with the right of the population of a non-self-governing territory to have it administered for its benefit. That right emerged in the late nineteenth century.[5] The European colonial states recognized an obligation to benefit colonized populations. Britain called it the "white man's burden,"[6] France the *mission civiliatrice*. That obligation is reflected in an 1885 treaty regarding the Congo: "All the powers exercising rights of sovereignty or influence in the said territories agree to protect the indigenous populations and to ameliorate their moral and material conditions of existence."[7]

1. *League of Nations*

This obligation was expanded and regulated by the League of Nations, which decided that states taking colonies from Turkey and Germany in World War I had no right to accept them as colonies.[8] The League determined that the international community carried an obligation to these territories, and that administering states bore a "sacred trust of civilization" to benefit the local population, and to aid it in achieving self-determination.

The League concretized this concept in a system it called "mandates":

> To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern

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1. U.N. CHARTER, art. 1, para. 2.
2. U.N. CHARTER, art. 73.
3. A. MARGALITH, THE INTERNATIONAL MANDATES 1 (1930).
4. G.A. Res. 37/233A, preambular para. 18, Dec. 20, 1982, 37 U.N. GAOR Supp. (No. 51) at 40, U.N. Doc. A/37/51 (1983) (Vote: 120-0-23).
5. A. MARGALITH, *supra* note 3, at 50-68.
6. R. ANAND, NEW STATES AND INTERNATIONAL LAW 27 (1972). The phrase is that of Rudyard Kipling.
7. General Act of the Conference of the Plenipotentiaries of Austria-Hungary, Belgium, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, Sweden-Norway, and Turkey (and the United States) respecting the Congo, Feb. 26, 1885, art. 6, 165 (1885), CONSOLIDATED TREATY SERIES 485 (C. Parry ed. 1978).
8. A. MARGALITH, *supra* note 3, at 1-17.

> world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.[9]

2. *American States*

A "sacred trust" norm emerged among the American states as well. The United States recognized that obligation towards Cuba, over which it acquired jurisdiction in 1898. The U.S. President said that the United States would "give aid and direction to its people to form a government for themselves."[10] The U.S. Supreme Court characterized Cuba as

> territory held in trust for the inhabitants of Cuba to whom it rightfully belongs and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action.[11]

At the outset of World War II, the American states established an international commission to administer any European-held Western Hemisphere territory over which Germany might try to assume administration. They decided that such administration should be carried out "for the benefit of the region under administration, with a view to its welfare and progress." They included one specific guarantee of rights, obliging the prospective inter-state administration to "guarantee freedom of conscience and worship."[12]

3. *United Nations*

The United Nations Charter identifies pursuit of self-determination of peoples as a purpose of the Organization. It views the right to self-determination as necessary not only to protect peoples, but as well "to strengthen universal peace." The Charter takes the position that peace cannot be secure so long as peoples are deprived of their right to self-determination.[13]

Consonant with its emphasis on self-determination, the Charter expanded the applicability of the "sacred trust" norm. It applied it to all states administering non-self-governing territory. Article 73 provided:

> Members of the United Nations which have or assume responsibilities

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9. LEAGUE OF NATIONS COVENANT, art. 22, para. 1. 2 F. ISRAEL, MAJOR PEACE TREATIES OF MODERN HISTORY 1648-1967 1274, 1283 (1967).

10. *Quoted in* Neely v. Henkel, 180 U.S. 109, 120, 21 S.Ct. 302, 306, 45 L.Ed. 448, 455 (1901).

11. *Id.*

12. Convention on the Provisional Administration of European Colonies and Possessions in the Americas (Act of Havana), July 30, 1940, arts. 3-4, 56 Stat. 1273, T.S. No. 977, 161 U.N.T.S. 254, 3 Bevans 623. For diplomatic correspondence leading to adoption of the Convention, *see* 5 FOREIGN RELATIONS OF THE UNITED STATES: 1940 180-256 (1961).

13. U.N. CHARTER, art. 1, para. 2.

> for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories.[14]

As one method of enforcing the "sacred trust" obligation, the Charter established a system equivalent to the League's mandate system, which it called trusteeship. States were invited to place their non-self-governing territories under supervision of a Trusteeship Council.[15] The Charter required a "trustee" state

> to promote the political, economic, social, and educational advance of the inhabitants of the trust territories, and their progressive development towards self-government or independence. . .[16]

States accepting trusteeship remained bound by their Article 73 "sacred trust" obligation.[17]

B. Legality of Military Bases Under the "Sacred Trust" Norm

Existence of a "sacred trust" norm raises the question of whether an administering state may use a non-self-governing territory to its military benefit.

1. *League of Nations Practice*

The League of Nations prohibited administering states from maintaining military bases in mandate territory. But it did not apply that principle consistently.

In resolving this issue, the League distinguished on the basis of whether a mandate territory was an "A," "B," or "C" mandate. The League designated as "B" and "C" mandates those it deemed less ready for independence than those it designated "A" mandates. "B" mandates were those in Central Africa. "C" mandates were Pacific Ocean territories, plus South West Africa. The only "A" mandates, those territories considered closest to independence, were Palestine and Syria.[18]

The Covenant mentioned military bases only with respect to "B" territories. It required the mandatory state to "prevent. . .establishment of fortifications or military and naval bases."[19] That language was evidently intended to apply as well to "C" territories, because the League's agreements with mandatory states regarding all "B" and "C" territories pro-

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14. U.N. CHARTER, art. 73.
15. U.N. CHARTER, art. 75.
16. U.N. CHARTER, art. 76(b).
17. *Yearbook of the United Nations: 1946-47*, at 570 (1947).
18. A. MARGALITH, *supra* note 3, at 82-83.
19. COVENANT, *supra* note 9, art. 22, para. 5.

hibited military bases.[20] For example, the League's agreement with New Zealand respecting German Samoa, a "C" mandate, provided: "[N]o military or naval bases shall be established or fortifications erected in the territory."[21] When Japan established fortifications in certain of its "C" territories in the Pacific Ocean, in violation of similar provisions, protests were made to the League's Mandates Commission.[22]

With "A" mandates, however, military bases were not prohibited. The League's agreement with Great Britain for Syria authorized military bases. This limited their purpose to local defense: "The Mandatory may maintain its troops in the said territory for its defence."[23]

The League's agreement with Great Britain for Palestine did not authorize military bases but included provisions that assumed British military activity in Palestine. An article limiting Britain's recruitment of local militia provided,

> "Nothing in this article shall preclude the administration of Palestine from contributing to the cost of the maintenance of the forces of the Mandatory in Palestine. The Mandatory shall be entitled at all times to use the roads, railways and ports of Palestine for the movement of armed forces and the carriage of fuel and supplies."[24]

Britain established a naval base in Palestine at Haifa.[25] The League's exception regarding Palestine is likely attributable to Britain's strong interest in providing military protection for approaches to the Suez Canal.[26]

2. *United Nations Practice*

Practice under the United Nations Charter rejects the permissibility of military bases in a non-self-governing territory to benefit the administering state.

a. *Charter Provisions*

The negotiating history of the Charter provisions on trusteeship shows an intent to prohibit such bases. Drafters rejected a proposal that administering states establish military bases only with Security Council approval. The concern underlying the proposal was that bases might be established for the benefit of the administering state.[27] It was argued in opposition to this proposal that supervision of trusteeship came under

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20. Q. WRIGHT, MANDATES UNDER THE LEAGUE OF NATIONS 471 (1930).

21. Mandate for German Samoa, art. 4, in A. MARGALITH, *supra* note 3, at 211.

22. H. HALL, MANDATES, DEPENDENCIES AND TRUSTEESHIP 69, 210 (1948). Akzin, *The Palestine Mandate in Practice*, 25 IOWA L. REV. 32, 34 (1939).

23. Syria and the Lebanon, art. 2, in Q. WRIGHT, *supra* note 20, at 608. "Its" refers to "territory," meaning that Britain was forbidden to establish bases for its own purposes.

24. PALESTINE CONST., art. 17, in Q. WRIGHT, *supra* note 20, at 603-604.

25. Akzin, *supra* note 22, at 34.

26. S. ZEBEL, BALFOUR: A POLITICAL BIOGRAPHY 240 (1973).

27. L. GOODRICH, E. HAMBRO & A. SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 513 (1969).

Security Council jurisdiction.[28] It was anticipated that the Security Council would ensure that administering states not establish military bases for their own benefit.

The final Charter language was silent on military bases. The intent was to permit military bases, but for two purposes only. The first was defense of the non-self-governing territory, since lack of fortifications in League of Nations mandate territories had facilitated Axis takeovers.[29] The second was participation in international peacekeeping, since non-self-governing territories were expected to participate in the peacekeeping envisaged by the Charter.[30]

The General Assembly has construed the Article 73 "sacred trust" norm to prohibit military bases established to benefit the administering state. It finds military bases inconsistent with the obligation to benefit the local population and to move a territory towards self-determination:

> Member States shall oppose all military activities and arrangements by colonial and occupying Powers in the Territories under colonial and racist domination, as such activities and arrangements constitute an obstacle to the full implementation of the Declaration, and shall intensify their efforts with a view to securing the immediate and unconditional withdrawal from colonial Territories of military bases and installations of colonial Powers.[31]

b. *General Assembly Restrictions in Trusteeship Agreements.*

In agreements with states placing non-self-governing territories under trusteeship, the General Assembly has permitted military bases. However, the purpose is limited to: (1) defense of the non-self-governing territory; (2) participation in United Nations peacekeeping. The Assembly's trusteeship agreement with the United Kingdom for Tanganyika is typical. The United Kingdom was given the right,

> to establish naval, military and air bases, to erect fortifications, to station and employ his own forces in Tanganyika and to take all such other measures as are in his opinion necessary for the defence of Tan-

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28. U.N. CHARTER, art. 83; R. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945, 836 (1958).

29. H. HALL, *supra* note 22, at 68-69.

30. It was on this basis that the United Kingdom and Australia proposed that trustee States be permitted to station troops in trust territories. R. RUSSELL, *supra* note 28, at 836.

31. G.A. Res. 35/118, Annex: Plan of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, art. 9, Dec. 11, 1980, 35 U.N. GAOR Supp. (No. 48) at 21, U.N. Doc. A/35/48 (1981); *reprinted in* 1983 U.N.Y.B. 1057, (Vote: 120-6-20). *Cf.* G.A. Res. 41/405, para. 1, Oct. 31, 1986, *Advance Text of Resolutions and Decisions Adopted by the General Assembly at Its 41st Session from 16 September to 19 December 1987*, Press Release GA/7463, Jan. 12, 1987, at 559, *reported in* U.N. MONTHLY CHRON., Feb. 1987, at 130. (Vote: 124-13-15). The Special Committee on Decolonization has similarly characterized bases as an impediment to self-determination and called for their removal. *See, e.g.*, Resolution, paras. 11-12, Aug. 8, 1979, U.N. Doc. A/AC.109/584 (1979).

> ganyika and for ensuring that the territory plays its part in the maintenance of international peace and security.[32]

Thus, the United Kingdom was not authorized to establish military bases for its own benefit.

c. *General Assembly Criticism of Particular Bases*

The General Assembly has on several occasions criticized administering states for bases in non-self-governing territory. It has condemned South Africa for maintaining military bases in Namibia.[33] In 1960 it criticized Belgium for using bases in its trust territory of Ruanda-Urundi to send troops into the Congo. The Assembly called on Belgium "to refrain from using the Territory [Ruanda-Urundi—J.Q.] as a base, whether for internal or external purposes, for the accumulation of arms or armed forces not strictly required for the purpose of maintaining public order in the Territory."[34]

3. *Conclusion as to Permissibility of Military Bases*

The "sacred trust" norm prohibits military bases for the benefit of an administering state in a non-self-governing territory. This prohibition precludes not only bases whose purpose is offensive but those designed for defense of the administering state. Bases even for defense of the administering state involve a use of the non-self-governing territory for a purpose that does not benefit the local population.

III. QUESTION OF WHETHER BASES ARE DESIGNED TO BENEFIT THE ADMINISTERING STATE

If an administering state establishes military bases in a non-self-governing territory, it may assert that the aim is to defend that territory from attack. A base may serve both to defend that territory and to further interests of the administering state. This mixture of motives is illustrated by the United States bases in Puerto. The United States has acknowledged that its bases serve its own interests, though it views benefits flowing to Puerto Rico as well.

The United States has administered Puerto Rico since 1898.[35] It first

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32. Trusteeship Agreement for the Territory of Tanganyika, art. 5(c), 1947 U.N.Y.B. 193.

33. *See, e.g.*, G.A. Res. 35/227A, para. 21, March 6, 1981, 35 U.N. GAOR Supp. (No. 48) at 40, U.N. Doc. A/35/48 (1981); *reprinted in* 1981 U.N.Y.B. 1149 ("strongly condemns South Africa for its ever-increasing military build-up in Namibia"). (Vote: 114-0-22). *See also* G.A. Res. 36/121A, 36 U.N. GAOR Supp. (No. 51) at 29, U.N. Doc. A/36/51 (1982); *reprinted in* 1981 U.N.Y.B. 1154 ("condemns South Africa for. . .the massive militarization of Namibia") (Vote: 120-0-27). On South Africa's military presence in Namibia, see I. DORE, THE INTERNATIONAL MANDATE SYSTEM AND NAMIBIA 168 (1985).

34. G.A. Res. 1579, 15 U.N. GAOR Supp. (No. 16) at 34, U.N. Doc. A/4684 (1961) (Vote: 61-9-23).

35. Treaty of Paris, Dec. 10, 1898, Spain-United States, 30 Stat. 1754, T.S. No. 343.

established military bases there in 1938, in a program of founding naval bases "for purposes of national defense" in various of its "territories and possessions."[36] In that year Congress appropriated $30 million to construct air and naval bases in Puerto Rico.[37]

The United States governed Puerto Rico at that time through appointed governors. In 1939 President Roosevelt appointed an Admiral, William D. Leahy, to govern Puerto Rico, because of base construction plans.[38] No local authority had a role in the base-construction decision.

A. *Extent of Military Use of Puerto Rico*

In 1943 the U.S. Assistant Secretary of War characterized Puerto Rico as "largely a garrison."[39] Between 1939 and 1944 the United States Navy had acquired land for base construction on Vieques, an off-shore island of Puerto Rico. On the western end of the main island, it had built Borinquen Fields (later Ramey Air Base), and on the eastern end Roosevelt Roads Naval Base, which it equipped to accommodate the British fleet should Britain fall to Germany.[40] It had built another naval base in San Juan harbor.[41]

A naval ammunition depot on Vieques that the Navy had closed after World War II was re-activated following the United States' 1962 confrontation with Cuba over the stationing of Soviet missiles there.[42] By 1966 the U.S. Navy was using 44,249 acres in Puerto Rico.[43] The Roosevelt Roads base became one of the largest naval bases in the world[44] and "one of the most exclusive and sophisticated control centers for weapons training in the world."[45] It uses an "electromagnetic environment" for military training that extends into the ocean, covering 194,000 square miles that, according to the U.S. Navy, cannot be duplicated at any other location to which it has access.[46] Roosevelt Roads has docking facilities for United States nuclear-armed vessels, which it harbors there.

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36. Pub. L. No. 528, sec. 10(a), 52 Stat. 401 (1938).

37. THE PUERTO RICANS: A DOCUMENTARY HISTORY 185 (K. Wagenheim ed. 1973). N.Y. Times, Nov. 12, 1939, at 43, col. 5 (on base construction).

38. THE PUERTO RICANS' *supra* note 37, at 185. N.Y. Times, May 14, 1939, at 42, col. 4. N.Y. Times, June 7, 1939, at 2, col. 2.

39. *A Bill to Provide for the Withdrawal of U.S. Sovereignty Over the Island of Puerto Rico and for the Recognition of Its Independence, 1943: Hearings on S. 952 Before the Senate Comm. on Territories and Insular Affairs*, 78th Cong., 1st Sess. 12 (1943) (statement of John McCloy, Ass't Sec. of War).

40. R. CARR, PUERTO RICO: A COLONIAL EXPERIMENT 310 (1984).

41. *Hearings on S. 952, supra* note 39, at 15 (statement of Sen. Taft).

42. R. CARR, *supra* note 40, at 310-311.

43. United States-Puerto Rico Commission on the Status of Puerto Rico, *Inventory of Federal Agencies with Offices in Puerto Rico*, in *Status of Puerto Rico: Selected Background Studies* 947 (1966

44. R. CARR, *supra* note 40, at 310.

45. *Id.* at 311 (citing U.S. Navy documents).

46. *Id.*

By the 1970s, the U.S. Navy had acquired title to 76% of Vieques Island, which is 20 miles long by four miles wide.[47] It upgraded its facilities there in the 1980s.[48]

While most U.S. military use of Puerto Rico is done by the Navy, its Army and Air Force have established smaller bases. The Army established there its Antilles Command in the late 1930s and by 1966 used 14,660 acres of land.[49]

The Air Force began operations in Puerto Rico in 1939. In 1952 it established there the 72nd Bomb Wing of its Strategic Air Command,[50] which came to use 4169 acres.[51] The Air Force withdrew the Command in the early 1970s but used its Puerto Rico bases for exercises in the 1980s.[52]

Because of the scope of United States military activity in Puerto Rico, the governor of Puerto Rico described it in 1982 as a "land super carrier."[53]

B. Defense of the Administering State

Depending on its own military situation, an administering state may find it useful to employ bases in the non-self-governing territory for its own defense. This consideration has been prominent in U.S. military policy in Puerto Rico.

1. *Protection of Panama Canal*

In 1939 the U.S.-appointed governor of Puerto Rico called the bases "the keystone of our eastern defense."[54] A major purpose of bases then under construction was protection of the Panama Canal.[55] Stated President Franklin Roosevelt:

> When the island [Puerto Rico] was brought under our flag, the Panama Canal had not yet been dug, and the airplane had not yet been invented. . . .When the present war became imminent, however, it was obvious that the chain of islands. . .formed a vast natural shield for the Panama Canal, suited in distance and conformation to the uses of the military plane. And of this island shield, Puerto Rico is the

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47. Romero-Barceló v. Brown, 643 F.2d 835, 837 (1st Cir. 1981), *rev'd*, 456 U.S. 305 (1982).

48. Lidin, *Navy's Signal Tower for Carib Upgraded*, San Juan Star, May 6, 1983, at 1, col. 1.

49. U.S.-Puerto Rico Commission, *supra* note 43, at 915.

50. Strategic Air Command, General Order No. 32, 1952, in U.S.-Puerto Rico Commission, *id.* at 914.

51. *Id.* at 915.

52. Turner, *Ramey Part of Response to Russians*, San Juan Star, Apr. 25, 1983, at 1, col. 2.

53. R. CARR, *supra* note 40, at 315 (quoting Feb. 1, 1982, speech of Gov. Romero-Barceló).

54. Gov. Blanton Winship (1934-1939), *quoted in* N.Y. Times, May 14, 1939, at 42, col. 4. *See* similar comments of Gen. George Marshall, N.Y. Times, May 15, 1939, at 3, col. 7.

55. The Puerto Ricans, *supra* note 37, at 185.

center.[56]

Puerto Rico became "an Atlantic Gibraltar for defense of the Panama Canal."[57]

2. *Protection of the Eastern Seaboard of the United States*

The U.S. Navy considers Puerto Rico vital for defense of the eastern United States.[58] This factor was cited by a United States federal judge to deny a requested injunction to suspend Navy exercises on Vieques Island in *Romero-Barceló v. Brown*.[59] The Governor of Puerto Rico, acting on behalf of Puerto Rico, had sued the U.S. Secretary of Defense, to stop exercises on and around Vieques Island, on the grounds of harm to the environment. Puerto Rico alleged violation of environmental protection statutes. U.S. District Judge Juan R. Torruella found that the Navy had violated such statutes but denied the injunction, citing the importance to the United States of the exercises. Judge Torruella said:

> The Atlantic Fleet is responsible for providing naval forces throughout a geographic area that extends from as far north as the Arctic, to as far south as the Antarctic, as far east as Turkey and as far west as Mexico.[60]

Its most important function, Judge Torruella said, is to protect sea lanes used by U.S. vessels:

> From an economic and defense standpoint, the United States is an island which must import 90% of its strategic materials over the sea lanes of the World. Petroleum is the single most important commodity moved by sea, the primary sources in the Atlantic seaboard being the Middle East, and secondarily, South America. These sea lanes are also of vital importance in allowing the United States to meet its international obligations with 41 of the 43 nations with which it has mutual defense treaties.[61]

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56. *An Act to Amend the Act to Provide a Civil Government for Puerto Rico, 1944: Hearings on S. 1407 Before the House Comm. on Insular Affairs*, 78th Cong., 2d sess. 14-15 (letter of Pres. Franklin Roosevelt). Roosevelt's 1941-46 governor of Puerto Rico also saw Puerto Rico as protection against threats to the Panama Canal:

> The source was Germany, the objective was the Panama Canal, and the direction was through the Caribbean island arc from Florida to Trinidad. In this arc Puerto Rico was central. Bases there were, in the strict sense, strategic and essential. Puerto Rico therefore had to be maintained as a controlled and, if possible, friendly base.

R. TUGWELL, THE ART OF POLITICS 150 (1958).

57. N.Y. Times, Apr. 3, 1943, at 7, col. 1.

58. R. CARR, *supra* note 40, at 310. Immediately after World War II and prior to the Cold War, some U.S. officials thought that Puerto Rico would no longer be necessary in U.S. military strategy. R. TUGWELL, *supra* note 56, at 150-151.

59. Romero-Barceló v. Brown, 478 F.Supp. 646 (D. P.R. 1979), *aff'd in part, vacated in part, remanded in part*, 643 F.2d 835 (1st Cir. 1981), *rev'd sub nom.* Weinberger v. Romero-Barceló, 456 U.S. 305, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982).

60. Romero-Barceló v. Brown, 478 F.Supp. at 708.

61. Romero-Barceló v. Brown, 478 F.Supp. at 707.

C. *Military Training Exercises*

Because major military exercises disrupt civilian activity, a non-self-governing territory may provide a more convenient location than sites in the administering state, since citizens of the territory are less able effectively to object.

The U. S. Navy has used Puerto Rico for its own exercises and for N.A.T.O. exercises.[62] A U.S. military commander wrote of Vieques Island:

> Actually the island is a part of Puerto Rico, but the U.S. Navy and Marine Corps had established something of a squatters right over it. They used it as a target area for the long guns of the Caribbean Fleet and as a place where the marines could practice their amphibious landings.[63]

The United States military finds Puerto Rico more appropriate for training than other available areas for military exercises using sophisticated weaponry:

> The island of Vieques is the only place presently available wherein the Atlantic Fleet can conduct the full range of exercises under conditions similar to simulated combat. It is the only place which possesses the potential or existing capability to conduct combined exercises involving air-to-ground ordnances delivery, Marine amphibious assaults, anti-submarine warfare, surface-to-air missiles, close support bombardment, and electronic warfare; in short everything that a battle group would undertake to secure our sea lanes from interdiction by hostile forces.[64]

Judge Torruella, who made that finding, stated that "the continued use of Vieques by Defendant Navy for naval training activities is essential to the defense of the Nation."[65] He therefore denied the injunction requested by Puerto Rico:

> [T]he injunctive relief sought would cause grievous, and perhaps irreparable harm, not only to Defendant Navy, but to the general welfare of this Nation. It is abundantly clear from the evidence in the record, as well as by our taking judicial notice of the present state of World affairs, that the training that takes place in Vieques is vital to the defense of the interests of the United States.[66]

On appeal in that case, the U.S. Supreme Court cited with approval this finding of fact.[67] Noting that the Navy had used Vieques Island for weapons training for many years, it concurred as to the unique utility of Vie-

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62. *Vieques Fishermen Fight Back* (interview with Carlos Zenon, President, Fishermen's Association of Vieques), 1 PUERTO RICAN JOURNAL OF HUMAN RIGHTS 16, 18 (no. 2, 1978).

63. W. HARRIS, PUERTO RICO'S FIGHTING 65TH U.S. INFANTRY 15 (1980).

64. Romero-Barceló v. Brown, 478 F.Supp. at 708.

65. *Id.*

66. *Id.* at 707.

67. Weinberger v. Romero-Barceló, 456 U.S. at 310.

ques Island for training exercises: "Currently all Atlantic Fleet vessels assigned to the Mediterranean Sea and the Indian Ocean are required to complete their training at Vieques because it permits a full range of exercises under conditions similar to combat."[68]

The United States military has used Puerto Rico not only for military training aimed at defense of the United States, but as well for training in intervention, taking advantage of Puerto Rico's situation as a Caribbean island. In the early 1980s the U.S. Atlantic Command conducted exercises in and around Puerto Rico to simulate the type of landing that it carried out in Grenada in 1983. The exercise was called Ocean Venture.[69] Its objective was to install a "government friendly to America" in a Caribbean island state that was "exporting terrorist activities to neighboring islands."[70] In its 1983 invasion of Grenada, the U.S. Navy assembled part of its assault force in Puerto Rico.[71] The U.N. Special Committee on Decolonization has expressed concern about U.S. use of military facilities in Puerto Rico as part of its Central America policy.[72]

IV. QUESTION OF WHETHER A TERRITORY IS SELF-GOVERNING

The question of whether a territory is self-governing may not be clear. An administering state's power with respect to military use of the territory is a factor relevant in answering that question. If an administering state has power of military use, that fact casts doubt on whether the territory is self-governing. This section uses Puerto Rico to examine the question of how it is determined whether a territory is non-self-governing.

When the United Nations established supervision over non-self-governing territories, the United States listed Puerto Rico as non-self-governing.[73] Beginning in 1946, it annually submitted to the United Nations information about Puerto Rico, as required by Article 73 of the United Nations Charter.[74] Submission of these reports constituted recognition by the United States that Puerto Rico was non-self-governing. The United

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68. *Id.* at 307.

69. Wash. Post, Oct. 23, 1983, at A24, col. 3. For a view that Ocean Venture 1981 was intended as practice for intervention in Grenada, see London Times, Nov. 7, 1983, at 5, col. 1. *See also* Quigley, *The United States Invasion of Grenada: Stranger than Fiction*, 18 INTER-AMERICAN L. R. 271, at 318-319 (1986-87).

70. C. SEARLE, GRENADA: THE STRUGGLE AGAINST DESTABILIZATION 37-38 (1983).

71. N.Y. Times, Oct. 26, 1983, at A1, col. 2.

72. *Resolution*, para. 5, Aug. 24, 1983, U.N. Doc. A/AC.109/751 (1983), *reported in* U.N. MONTHLY CHRONICLE, Jan. 1984, at 83 (Vote: 10-2-10) (links strengthening of the U.S. military apparatus in P.R. with U.S. policy in Central America).

73. 1946-1947 U.N.Y.B. 572. The listing had been requested by G.A. Res. 9, Feb. 9, 1946, *Resolutions Adopted by the General Assembly During the First Part of Its First Session from 10 January to 14 February 1946* 13, U.N. Doc. A/64 (1946).

74. *Resolutions Adopted by the General Assembly During the Second Part of Its First Session from 23 October to 15 December 1946*, G.A. Res. 66, preambular para. 2, U.N. Doc. A/64/Add.1, at 124 (1947). Axtmayer, *Non-Self-Governing Territories and the Constitutive Process of the United Nations: A General Analysis and the Case Study of Puerto Rico*, 45(3-4) REVISTA JURÍDICA DE LA UNIV. DE P.R. 211, 236 (1976).

States approved a 1946 General Assembly resolution that listed all non-self-governing territories held by member states. The resolution included Puerto Rico.[75] Thus, at that period the United States' position was that Puerto Rico was non-self-governing.

Since Puerto Rico was non-self-governing when the bases were founded, their establishment violated the United States' obligations as an administering state. This illegal situation could be corrected, at least for the future, however, if Puerto Rico were to achieve self-governing status and then to agree to the bases. A state has the right to permit other states to establish military bases.[76] While international law provides guidance in determining whether a territory is non-self-governing, application of the law to specific situations is hazardous.

A. 1950-52 Legislation on Puerto Rico's Status

The position of the United States is that it made Puerto Rico self-governing in 1952. This section examines that position. In 1953 the United States informed the United Nations that it would stop sending annual reports regarding Puerto Rico. It asserted that Puerto Rico was no longer non-self-governing.[77] The General Assembly discussed the United States communication and adopted by a narrow vote Resolution 748, in which it agreed with the United States' assertion that Puerto Rico had become self-governing.[78] It,

> recognize[d] that. . .the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity. . . ." and "consider[ed] that, due to these circumstances, the Declaration regarding Non-Self-Governing Territories and the provisions established under it in Chapter XI of the Charter [Article 73—J.Q.] can no longer be applied to the Commonwealth of Puerto Rico.[79]

The basis for the United States' assertion that Puerto Rico had become self-governing was that in 1950 the U. S. Congress adopted P.L. 600, authorizing the drafting in Puerto Rico of a constitution, to be ap-

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75. G.A. Res. 66, *supra* note 73.

76. *See, e.g.*, Defense Agreement, art. 2, Sept. 26, 1953, Spain-United States, 4 U.S.T. 1895, 207 U.N.T.S. 83 (providing for U.S. military bases in Spain).

77. *Report of the Committee on Information from Non-Self-Governing Territories*, 8 U.N. GAOR Supp. (No. 15), U.N. Doc. A/2465 (1953). On events surrounding this submission, *see* García Muñiz, *Puerto Rico and the United States: The United Nations Role 1953-1975*, 53 REVISTA JURÍDICA DE LA UNIV. DE P.R. 1, at 13-18 (1984); and Axtmayer, *supra* note 74, at 238-46.

78. G.A. Res. 748, Nov. 27, 1953, 8 U.N. GAOR Supp. (No. 17) at 25, U.N. Doc. A/2630 (1953). Vote: 26-16-18. Leibowitz, *The Commonwealth of Puerto Rico: Trying to Gain Dignity and Maintain Culture*, 11 GA. J. INT'L & COMP. L. 211, at 278 (1981).

79. G.A. Res. 748, *supra* note 78, para. 5. On U.N. discussion leading to adoption of Res. 748, see García Muñiz, *supra* note 77, at 26-48.

proved by referendum there.[80] The constitution so drafted would be subject to the approval of the U.S. Congress.[81] A constitution was drafted by a constituent assembly. That constitution used the term "commonwealth" to describe Puerto Rico.[82] The constitution was approved by a referendum in Puerto Rico and then by the U.S. Congress, which, however, demanded certain changes as condition of its approval.[83]

States voting against Resolution 748 argued that the 1950-1952 changes left Puerto "non-self-governing" and that the 1952 referendum offered a choice only between the new proposed arrangement and the *status quo*, leaving no option of independence.[84]

They also cited the unlimited power of the U.S. government to legislate for Puerto Rico.[85] Despite adoption of the Puerto Rico Constitution, United States law retained an earlier provision that federal U.S. legislation applies in Puerto Rico.[86] There was no requirement that Puerto Rico accept existing or future federal legislation.[87]

B. United Nations Standards for Self-Determination

A strong indication of the customary law standard is provided by criteria formulated by the General Assembly to determine whether a territory has attained self-determination. The Assembly has drawn up a list of factors.[88]

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80. Pub. L. No. 81-600, July 3, 1950, 64 Stat. 319, 48 U.S.C. 731b, 731c (1950).

81. 48 U.S.C. 731d.

82. PUERTO RICO CONST. art. 1, sec. 1, re-produced as appendix in Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. PITT. L. REV. 1, 20-33 (1953).

83. H.R.J. Res. 567, 66 Stat. 327 (1952). For a fuller account of the 1950-1952 legislation and adoption of the Puerto Rico constitution, see W. REISMAN, PUERTO RICO AND THE INTERNATIONAL PROCESS: NEW ROLES IN ASSOCIATION 31-35 (1975); J. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 152-159 (1985); Magruder, *supra* note 82, at 1-33; Muñiz, *supra* note 77, at 8-9.

84. Leibowitz, *supra* note 78, at 278. *See also* Muñiz, *supra* note 77, at 41-43.

85. Leibowitz, *supra* note 78, at 278; Rodriguez-Orellana, *In Contemplation of Micronesia: The Prospects for the Decolonization of Puerto Rico Under International Law*, 18 U. MIAMI INTER-AM. L. R. 457, 460-461 (1987). Congress' power is limited in certain respects by the U.S. Constitution, as construed by the U.S. Supreme Court, Harris v. Rosario, 446 U.S. 651, 100 S.Ct. 1929, 64 L.Ed.2d 587 (1980), but that limitation is irrelevant for present purposes. The significant point is that the three branches of the U.S. government collectively hold plenary legislative power over Puerto Rico. On limitations imposed by the U.S. Supreme Court on the basis of the U.S. Constitution, *see* Laughlin, *The Burger Court and the United States Territories*, 36 U. FLA. L.R. 755-816 (1984).

86. 48 U.S.C. 734, *construed in* Feliciano v. U.S., 297 F.Supp. 1356, 1361 (D. P.R. 1969).

87. Caribtow Corp. v. Occupational Safety and Health Review Commission, 493 F.2d 1064, 1066 (1st Cir. 1974). W. REISMAN, *supra* note 83, at 36. Ortiz-Alvarez, *The Compact between Puerto Rico and the United States: Its Nature and Effects*, 24 REVISTA DE DERECHO PUERTORRIQUEÑO, nos. 91-92, 179, 258-259 (1984-85).

88. The factors appear in two resolutions: (1) G.A. Res. 742, Nov. 27, 1953, 8 U.N. GAOR Supp. (No. 17) at 21, U.N.Doc. A/2630 (1953); (2) G.A. Res. 1541, Dec. 15, 1960, 15 U.N. GAOR Supp. (No. 16) at 29, U.N. Doc. A/4684 (1960).

1. *Indigenous Legislation*

One factor is "enactment of laws for the Territory by an indigenous body."[89] While Puerto Rico enacts laws on many important topics,[90] it has less legislative power than is typical of entities in "free association."[91] U.S. courts have power to construe Puerto Rico's statutes, regardless of the construction given by the Supreme Court of Puerto Rico, if they find construction by the latter "inescapably wrong."[92] The U.S. Congress retained the power to change the law applicable in Puerto Rico.[93] Puerto Rico remains in United States law a "territory,"[94] and Congress has unlimited power to legislate for territories.[95]

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89. G.A. Res. 742, *supra* note 88, Annex, Part II: Factors Indicative of the Attainment of Other Separate Systems of Self-Government, para. C(1). For agreement that it is Part II of Res. 742 that is applicable to Puerto Rico, *see* García Muñiz, *supra* note 77, at 49.

90. W. REISMAN, *supra* note 83, at 33-34.

91. *Accord* Axtmayer, *supra* note 74, at 246. Several U.N. member states so asserted in opposing the draft of G.A. Res. 748; García Muñiz, *supra* note 77, at 42, 49-50; Note, *Puerto Rico: Colony or Commonwealth?*, 6 N.Y.U. J. INT'L L. & POL. 115, 130-131 (1973). Berrios Martinez, *Self-Determination and Independence: The Case of Puerto Rico*, 67 PROC. AM. SOC. INT'L L. 11, 13-15 (1973). *Contra* W. REISMAN, *supra* note 83, at 49, 113 (that despite defects, status is one of "free associated state"). For analysis of relations between "associated states" and metropolitan states, *see* T. FRANCK, CONTROL OF SEA RESOURCES BY SEMI-AUTONOMOUS STATES 7-26 (1978). Unlike most such states, Puerto Rico does not, for example, have the right to establish an exclusive economic zone around its shore, that power being retained by the United States. *Id.* at 28-29.

92. Fornaris v. Ridge Tool Co., 400 U.S. 41, 43, 91 S.Ct. 156, 157, 27 L.Ed.2d 174, 177 (1970).

93. Ortiz-Alvarez, *supra* note 87, at 258-259. R. CARR, *supra* note 40, at 83. J. TORRUELLA, *supra* note 83, at 167-195, 200.

94. Torres v. Puerto Rico, 442 U.S. 465, 469-470, 99 S.Ct. 2425, 2429, 61 L.Ed.2d 1, 7 (1979). Harris v. Rosario, 446 U.S. at 651, in which the Court stated: "Congress, which is empowered under the Territory Clause of the Constitution, U.S. CONST., art. IV, sec. 3, cl. 2, to 'make all needful Rules and Regulations respecting the Territory. . .belonging to the United States,' may treat Puerto Rico differently from States so long as there is a rational basis for its actions." The U.S. Supreme Court's treatment of Puerto Rico as a "territory" deprives of any force the *dictum* that Puerto Rico since 1952 is not a "territory." The District Court of Puerto Rico had stated: "[T]he Fifth Amendment of the Constitution of the United States is no longer applicable on the basis that Puerto Rico is a possession, dependency or territory subject to the plenary power of Congress. But it continues to be applicable to Puerto Rico as part of the compact referred to." Mora v. Torres, 113 F.Supp. 309, 319 (D. P.R. 1953), *aff'd on other grounds sub nom.* Mora v. Mejias, 206 F.2d 377 (1st Cir. 1953).

95. "The Congress shall have Power to. . .make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONSTITUTION, art. IV, sec. 3. construed in Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 377-378 (1949) ("While . . . great respect is to be paid to the enactments of a territorial legislature by all courts . . . the position of the state [state of the United States—J.Q.] as sovereign over matters not ruled by the Constitution requires a deference to state legislative action beyond that required for the laws of a territory. A territory is subject to congressional regulation.") In light of that statement, which has never been repudiated by the Court, the view of the U.S. District Court in Mora v. Mejias, 115 F.Supp. 610, 612 (D. P.R. 1953) that "Puerto Rico is, under the terms of the compact, sovereign over matters not ruled by the Constitution of the United States," is incorrect.

As part of its plenary legislative power over Puerto Rico, the United States retains the exclusive right over military installations. This right was evident in *Romero-Barceló v. Brown.* Puerto Rico had no option for stopping damaging military exercises other than by suing in court, and then only by alleging environmental harm.[96] And even when it demonstrated violation of environmental legislation, the U.S. Supreme Court upheld the denial of an injunction.[97]

The United States' plenary rights over military use of Puerto Rico was demonstrated as well in *Feliciano v. United States.* In that case the District Court of Puerto Rico denied a requested injunction against the U.S. President's designation as a "defensive sea area" of a sea sector off Culebra, an offshore island of Puerto Rico.[98] The President had forbidden entrance into Culebra's territorial waters without authorization by the Navy.[99] Residents of Culebra sought the injunction to gain access without Navy authorization, asserting that Navy denials prevented them from earning a livelihood.[100]

The district court found the power of the United States to designate a "defensive sea area" unlimited by any power of the government of Puerto Rico. Even had Puerto Rico attempted legislatively to countermand the designation, it could not have done so.[101] The court found, moreover, that the U.S. Congress has no power to divest itself of the right to make military decisions affecting Puerto Rico, because of the Congress' power over U.S. territory:

> [A]s long as Puerto Rico remains a part of the United States, it would probably be unconstitutional for Congress to allow Puerto Rico any say whatever over maritime regulations involving national defense.[102]

Puerto Rico has no voice in decisions regarding military operations in Puerto Rico, since it has no voting representation in the U.S. Congress that appropriates funds for the operations,[103] and no role in the electoral college that elects the president who carries them out.[104] Lack of Puerto Rico representation in Congress also relieves the Defense Department of pressure in Congress from Puerto Ricans whose lives are disrupted by military activities. The Navy has acknowledged that one reason it conducts weapons testing offshore from Puerto Rico is that Puerto Rico has

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96. 478 F.Supp at 707.

97. Weinberger v. Romero-Barceló, 456 U.S. at 305.

98. Executive Order No. 8684, Feb. 14, 1941, *Federal Register*, Feb. 18, 1941, at 1016.

99. *Id.*

100. Feliciano v. U.S., 297 F.Supp. at 1356.

101. *Id.* at 1361.

102. *Id.* at 1362.

103. It has a "resident commissioner" who participates in Congress on a non-voting basis. 48 U.S.C. sec. 891, 5 U.S.C. sec. 2106. R. CARR, *supra* note 40, at 320-321.

104. U.S. CONST., art. II, sec. 1. Helfeld, *How Much of the United States Constitution and Statutes Are Applicable to the Commonwealth of Puerto Rico?*, in *Proceedings of the First Circuit Judicial Conference: Applicability of the United States Constitution and Federal Laws to the Commonwealth of Puerto Rico*, Nov. 4-6, 1985, 110 F. R. D. 449, at 475.

no representation in the United States Congress.[105]

2. *Indigenous Constitution*

"The associated territory should have the right to determine its internal constitution without outside interference," recites one of the General Assembly's criteria.[106] The U.S. Congress, as indicated above, demanded changes as condition of its approval.[107] Among them was addition of a provision to require that amendments conform to existing and future Congressional legislation on Puerto Rico.[108] The Puerto Rico assembly made the required changes and submitted them to a second referendum, which approved them.[109] Thus, amendments to the Puerto Rico Constitution must conform to whatever statutes Congress may enact on the Puerto Rico-U.S. relationship.[110]

Moreover, P.L. 600 gave Congress unlimited power to change Puerto Rico statutory or constitutional law by stating that "the statutory laws of the United States not locally inapplicable. . .shall have the same force and effect in Puerto Rico as in the United States."[111] The U.S. representative to the General Assembly's Fourth Committee told the Committee in 1953 that Puerto Rico's Constitution "stem[s] from their [the people of Puerto Rico—J.Q.] own authority."[112] In fact, it stemmed from the U.S. Congress. She further asserted that the Puerto Rico Constitution was a document "which only they [the people of Puerto Rico—J.Q.] can alter or amend."[113] But the Puerto Rico Constitution is overridden by contrary U.S. legislation.[114]

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105. R. CARR, *supra* note 40, at 313.

106. G.A. Res. 1541, *supra* note 88, Annex: Principle VII(b).

107. *See supra* note 83.

108. Pub. L. No. 477, 66 Stat. 327 (July 3, 1952).

109. W. REISMAN, *supra* note 83, at 33. R. CARR, *supra* note 40, at 79, 347. Reisman finds the factor of U.S. approval of the Puerto Rico Constitution insignificant as part of "a process in which there are two parties, for both of whom the contemplated relation must be voluntary. Surely the principal may state the *minima* it will demand in the organization of the associate." W. REISMAN, *supra* note 83, at 44-45.

110. García Muñiz, *supra* note 77, at 9. W. REISMAN, *supra* note 83, at 34. Amendments do not, however, require prior approval of the U.S. Congress. Carrión v. Gonzalez, 125 F.Supp. 819, 825-826 (U.S.D.C. D. P.R. 1954). Reisman ignores those limitations enumerated in the text apart from U.S. approval and concludes that the relationship was voluntary.

111. Act, sec. 9, 48 U.S.C. sec. 34. W. REISMAN, *supra* note 83, at 36.

112. Statement of Frances Bolton, U.S. representative, Fourth Committee, Nov. 3, 1953, 29 DEP'T ST. BULL. 804 (1953), *summarized in* 8 U.N. GAOR C.4 (350th mtg.) at 225, U.N. Doc. A/C.4/SER/350 (1953).

113. *Id.*

114. U.S. v. Quinoñes, 758 F.2d 40, 42-43 (1st Cir. 1985); U.S. v. Pérez, 465 F. Supp. 1284 (D. P.R. 1979). (In both cases, an accused, prosecuted in federal court, moved to suppress telephone conversation on grounds that the interception violated an anti-wiretap provision of the Puerto Rico Constitution. The interception was lawful under an Act of Congress. *Held:* the Act of Congress prevails. The conversation may be used in evidence even if, as the courts assumed, the interception violates the Puerto Rico Constitution.) In Figueroa v. Puerto Rico, 232 F.2d 615, 620 (1st Cir. 1956), the First Circuit stated that the people of

3. *Freedom to Modify Status*

Another factor established by the General Assembly is "the freedom of the population of a Territory which has associated itself with the metropolitan country to modify at any time this status through the expression of their will by democratic means."[115] Resolution 748 mentioned a "compact agreed upon with the United States of America.[116] A preambular clause indicates that the resolution was adopted

> considering that the agreement reached by the United States of America and the Commonwealth of Puerto Rico. . .maintains the spiritual bonds between Puerto Rico and Latin America.[117]

As several United Nations members noted, however,[118] there was no "compact" in the sense of a bilateral agreement. P.L. 600, to be sure, recited that it was "adopted in the nature of a compact,"[119] and the Puerto Rico Constitution referred to the relationship as based on a "compact."[120] But neither term correctly characterized the post-1952 Puerto Rico-United States relationship.

The U.S. Congress adopted P.L. 600 and gave the voters in Puerto Rico a choice of approving or disapproving it on a take-it-or-leave-it basis. There was no agreement between Puerto Rico and the United States.[121] The absence of an agreement is further indicated by the fact that twice since 1952 bills have been introduced in the U.S. Congress to conclude such an agreement. Neither bill was adopted.[122]

Puerto Rico were free to amend the Puerto Rico Constitution, if they were to decide to do so, to delete from it the right to trial by jury. While the Court was to that extent correct, the U.S. Congress has the right to require Puerto Rico to use trial by jury. Reisman construes Figueroa as holding that if an Act of Congress conflicts with the Puerto Rico Constitution, the Act would be "inapplicable." W. REISMAN, *supra* note 83, at 36. Figueroa does not so hold. Reisman construes to the same effect Moreno Rios v. U.S., 256 F.2d 68 (1st Cir. 1958). Moreno Rios does not so hold either.

115. G.A. Res. 742, *supra* note 88, para. A(3). Similar language appears in G.A. Res. 1541, Annex: Principle VII(a), *supra* note 88.

116. G.A. Res. 748, *supra* note 78, para. 5.

117. *Id.*, preambular para. 5.

118. Leibowitz, *supra* note 78, at 278.

119. 48 U.S.C. sec. 731b.

120. COMMONWEALTH OF PUERTO RICO CONST., art. 1, sec. 1, in Magruder, *supra* note 82, at 21.

121. For a view that in Pub. L. No. 600 Congress ceded powers that it may not re-take, thereby making the law a "compact," *see* Ortiz-Alvarez, *The Compact between Puerto Rico and the United States: Its Nature and Effects*, REVISTA DE DERECHO PUERTORRIQUEÑO, nos. 91-92, at 185-287 (1984-85). For a position that Congress did not give up its legal power over Puerto Rico but created for itself a moral obligation not to intervene in Puerto Rican domestic affairs, *see* Helfeld, *Las Relaciones Constitucionales entre Puerto Rico y los Estados Unidos*, REVISTA DE DERECHO PUERTORRIQUEÑO, no. 93, at 297, 316 (1985); and to the same effect, *see* Helfeld, in *Proceedings of the First Circuit Judicial Conference*, *supra* note 104, at 465-466.

122. (1) H.R. 5945, Fernós-Murray bill, 1959. R. CARR, *supra* note 40, at 82-84. (2) *Puerto Rican Compact: Hearing On the compact of Permanent Union between Puerto Rico*

A U.S. representative, endeavoring to convince the U. N. Committee on Information from Non-Self Governing Territories that Puerto Rico was self-governing, had told the Committee that a "compact" had been concluded: "A compact, as you know, is far stronger than a treaty. A treaty usually can be denounced by either side, whereas a compact cannot be denounced by either party unless it has the permission of the other."[123] Another U.S. representative had told the Fourth Committee that the United States and Puerto Rico had "a compact of a bilateral nature whose terms may be changed only by common consent."[124]

The U.S. representative to the General Assembly told that body of a commitment by the U.S. President that "if, at any time, the Legislative Assembly of Puerto Rico adopts a resolution in favor of more complete or even absolute independence, he will immediately thereafter recommend to Congress that such independence be granted."[125] No commitment was made on behalf of the Congress; the intent behind the statement was to lead Assembly delegates to believe that introduction of such a bill by the President would result in favorable legislation. Thus, the statement, while not false, was misleading.[126]

4. *Free Expression of Opinion as to Status*

Related to the freedom to modify status is another factor: "the opinion of the population of the Territory, freely expressed by informed and democratic process, as to the status or change in status which they desire."[127] International supervision of status referenda has been deemed necessary to guarantee fairness in ascertainment of opinion.[128]

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and the United States Before the Senate Comm. on Interior and Insular Affairs, 94th Cong., 1st sess. 47-87 (1975). Leibowitz, *supra* note 78, at 247-248.

123. Statement of Mason Sears, U.S. representative to U.N. Committee on Information from Non-Self-Governing Territories, Aug. 28, 1953, 29 DEP'T ST. BULL. 392 (1953), *quoted in* Mora v. Mejias, 115 F.Supp. 610, 612 (1953).

124. Statement of Bolton, *supra* note 112.

125. Statement of Henry Cabot Lodge, U.S. Representative to U.N. General Assembly, Nov. 27, 1953, 29 DEP'T ST. BULL. 841 (1953), *summarized in* 8 U.N. GAOR (459th mtg.) para. 66, U.N. Doc. A/PV.459 (1953).

126. Reisman construes the statement as importing an obligation on the President, binding under international law. W. REISMAN, *supra* note 83, at 45. Reisman misconstrues it in the way the U.S. delegation apparently intended it to be misconstrued, stating that "President Eisenhower's 1953 communication to the General Assembly made express, despite equivocation, that Puerto Ricans could go their own way if and when they wanted to." *Id.* at 118. The statement is also misconstrued as importing an agreement to grant independence by R. TUGWELL, *supra* note 56, at 148, and by Crawford, who cites it for the proposition that "Puerto Rico has been regarded by the United States Government since 1952 as entitled to opt for a different status—either complete independence or integration with the United States." J. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 372 (1979).

127. G.A. Res. 742, *supra* note 88, para. A(1).

128. *Puerto Rico: Colony or Commonwealth*, *supra* note 91, at 130-131. *See, e.g.*, plebiscites organized by U.N. in Northern Cameroons and Southern Cameroons to determine future status, mentioned in Case Concerning the Northern Cameroons (Cameroon v. U.K.), Preliminary Objections, Dec. 2, 1963, 1963 I.C.J. 15, 23. Practice has also been for the Gen-

In Puerto Rico, the 1952 referendum was not internationally supervised and did not include options involving less connection to the United States than the one that carried a majority. The absence of international supervision has been characterized as "only a formal flaw, since there appears to be no substantial criticism of the quality of the referendum conducted."[129] However, without international supervision one cannot be certain that possible defects were uncovered.

In 1967, the United States conducted in Puerto Rico a plebiscite on status, also not internationally supervised. That plebiscite offered three options: independence, *status quo*, or statehood (as a state of the United States); 425,081 voted for the *status quo*, 273,315 for statehood, and 4204 for independence.[130]

It is questionable whether the 1967 plebiscite represents "the opinion of the population. . .freely expressed," since: (1) there was no international supervision;[131] (2) the United States had not promised to abide by the most popular choice, which must have made voting for "independence" seem a wasted vote;[132] (3) expression of opinion is not free so long as Puerto Rico is occupied by a large U.S. military force, viewed as an intimidating factor;[133] (4) no option of true "free association" was on the ballot, since the *status quo* fell short of "free association."[134]

Pro-independence forces boycotted the plebiscite,[135] arguing that the United States must first transfer power to local authority, so that the people could choose status without the pressure of U.S. presence.[136] The Federal Bureau of Investigation, considering most of the pro-independence groups "subversive," tried to undermine this boycott by disrupting these groups.[137] The boycott nonetheless apparently achieved some suc-

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eral Assembly to approve the plebiscite after determining that it was fairly conducted. *Id.*

129. W. REISMAN, *supra* note 83, at 44.

130. N.Y. Times, July 24, 1967, at A1, col. 1.

131. *See, e.g.*, plebiscite conducted under United Nations observation in Palau in 1986 to decide on future status. U.N. MONTHLY CHRONICLE, at 93, (April 1986).

132. Berrios Martinez, *supra* note 91, at 15. "[B]efore the Puerto Ricans can possibly take a significant constitutional initiative, they must be given explicit and detailed guarantees about the possible political responses from Washington in the event particular options are chosen." Cabranes, in *Proceedings of the First Circuit Judicial Conference*, *supra* note 104, at 484.

133. R. CARR, *supra* note 40, at 314. Martinez, *supra* note 91, at 15.

134. Muñiz, *supra* note 77, at 62. R. CARR, *supra* note 40, at 88.

135. N.Y. Times, July 24, 1967, at A1, col. 1.

136. Muñiz, *supra* note 77, at 63. Withey, *Puerto Rico and the United Nations 1977*, 1 PUERTO RICAN JOURNAL OF HUMAN RIGHTS 12, 14 (1977). R. CARR, *supra* note 40, at 89.

137. Berrios Martinez, *supra* note 91, at 15. Gautier Mayoral, *La Elevación del Caso de Puerto Rico ante la Asamblea General de las Naciones Unidas en la Decada Actual*, 45 REVISTA DEL COLEGIO DE ABOGADOS DE P.R. 69, 77 (1984). *See, e.g.*, F.B.I. memorandum describing a plan, based on information that an official of one pro-independence group had called an official of another pro-independence group "a coward," to compose and send a flyer to members of the Movement for the Independence of Puerto Rico, the Puerto Rican Socialist League, and the Nationalist Party of Puerto Rico stating, "You have two weeks to prove or retract your statement that [name deleted in version released] is a coward." The

cess, as 34% of eligible voters did not cast ballots.[138] That represented a 30% higher abstention rate than in general elections in Puerto Rico.[139] The F.B.I. efforts cast further doubt on whether the plebiscite represented a free expression of opinion.

On the basis of the 1967 plebiscite, the United States moved in the U.N. Special Committee on Decolonization, which by then had taken up the question of whether Puerto Rico remained non-self-governing, to remove Puerto Rico from its agenda. But the Special Committee postponed indefinitely a vote on that motion, apparently disagreeing with the U.S. position that the plebiscite had provided an adequate opportunity for Puerto Rico to determine its status.[140]

C. *United Nations Re-Consideration of Puerto Rico's Status*

In the 1970s, the United Nations' Special Committee on Decolonization has characterized Puerto Rico in terms that suggest non-self-governing status.[141] In 1972 it "recogniz[ed] the inalienable right of the people of Puerto Rico to self-determination and independence."[142] The General Assembly approved the work of the Committee, an action that endorsed the Committee's finding on Puerto Rico.[143] In 1973 the Special Committee

> request[ed] the Government of the United States of America to refrain from taking any measures which might obstruct the full and free exercise by the people of their inalienable right to self-determination and independence.[144]

The General Assembly again approved the report.[145]

In 1978 the Special Committee "[a]ffirm[ed] that self-determination by the people of Puerto Rico in a democratic process should be exercised

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memorandum recited: "it is believed this flyer will further the conflict between the groups there by diverting their energies from the issue of the upcoming plebiscite." Memorandum, June 16, 1967, to F.B.I. Director, from Special Agent in Charge [of the F.B.I.], San Juan [Puerto Rico], re "Groups Seeking Independence for Puerto Rico, Counterintelligence Program (Subversive Control Section)," in Scholarly Resources, (Wilmington, Delaware), *Cointelpro: The Counterintelligence Program of the F.B.I.* (microfilm), File No. 105-93124, Nationalist Groups, Reel 1 (1978).

138. Total number of eligible voters was 1,067,000. N.Y. Times, July 24, 1967, at A1, col. 1.

139. *Id.* at A18, col. 1.

140. Gautier Mayoral, *supra* note 137, at 77.

141. Leibowitz, *supra* note 78, at 278-279. Axtmayer, *supra* note 74, at 252-253.

142. Aug. 28, 1972, U.N. Doc. A/AC.109/419 (1972) (Vote: 12-0-10).

143. G.A. Res. 2908, para. 3 (Nov. 2, 1972), 27 U.N. GAOR Supp. (No. 30) at 2, U.N. Doc. A/8730 (1973) (Vote: 99-5-23). Withey, *supra* note 136, at 14-15; Muñiz, *supra* note 77, at 146-147. "Approval of the Special Committee's report signifies approval of its determinations and recommendations." *Puerto Rico: Colony or Commonwealth*, *supra* note 91, at 120.

144. Resolution, Aug. 30, 1973, U.N. Doc. A/AC.109/438 (1973) (Vote: 12-2-9). *See also* García Muñiz, *supra* note 77, at 128-129; Withey, *supra* note 136, at 15.

145. G.A. Res. 3163, art. 2, Dec. 14, 1973, 28 U.N. GAOR Supp. (No. 30) at 5, U.N. Doc A/9030 (1974) (Vote: 104-5-19).

through mechanisms freely selected by the Puerto Rican people in complete and full sovereignty."[146] In 1982 it

> reaffirm[ed] the inalienable right of the people of Puerto Rico to self-determination and independence and urged once again the Government of the United States to adopt all necessary measures for the full and effective transfer of all sovereign powers to the people of Puerto Rico.[147]

In 1985 it expressed the hope that Puerto Rico might exercise its right to self-determination and independence "without hindrance" and "with the express recognition of the people's sovereignty and full political equality."[148]

The Special Committee in 1981 asked the General Assembly to "examine the question of Puerto Rico,"[149] but the Assembly declined, following objection by the United States[150] that included threats of economic assistance cuts to member states.[151]

D. Conclusion as to Status of Puerto Rico

The 1950-52 legislation effected no fundamental change in the Puerto Rico-United States relationship. It increased Puerto Rico's control over internal affairs "within the established colonial system."[152]

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146. Resolution, para. 3 (Sept. 12, 1978), U.N. Doc. A/AC.109/574 (1978). Vote: 10-0-12. In 1979 the Special Committee, referring back to the resolutions cited in the text "[n]ot[ed] with preoccupation that so far the Government of the United States has not taken any concrete steps to comply with the mandate of the above-mentioned resolutions with respect to Puerto Rico, including, *inter alia*, the complete transfer of all powers to the people of the said Territory, and urge[d] that concrete measures be taken in that direction without further delay." Resolution, para. 2, Aug. 15, 1979, U.N. Doc. A/AC.109/589 (1979) (Vote: 11-0-12).

147. Resolution, para. 1 (Aug. 4, 1982), U.N. Doc. A/AC.109/707 (1982) (Vote: 12-2-9). Identical language appears in Resolution, paras. 1-2, (Aug. 24, 1983), U.N. Doc. A/AC.109/751 (1983), *reported in* U.N. MONTHLY CHRONICLE, at 83 (Jan. 1984) (Vote: 10-2-10).

148. Resolution, para. 2 (Aug. 14, 1985), U.N. Doc. A/AC.109/844 (1985), *reported in* U.N. MONTHLY CHRONICLE, at 14 (July-Aug 1985) (Vote: 11-1-10).

149. Resolution, para. 3 (Aug. 20, 1981), U.N. Doc. A/AC.109/677 (1981), *reported in* 1981 U.N.Y.B. 1113-1114 (Vote: 11-2-11).

150. R. CARR, *supra* note 40, at 363. *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples* (Nov. 20, 1981), U.N. Doc. A/36/L/20 (approval of Special Committee resolution that included request for General Assembly consideration of Puerto Rico question on understanding that Assembly would not examine Puerto Rico question). A vote against inclusion of Puerto Rico question on Assembly agenda was taken Sept. 24, 1982 (Vote: 70-30-43). 1982 U.N.Y.B. 1276; Wash. Post, Sept. 25, 1982, at A1, col. 2.

151. R. CARR, *supra* note 40, at 363. Wash. Post, Sept. 25, 1982, at A10, col. 1 (*quoting* U.S. Deputy Representative Kenneth Adelman that U.S. mission had indicated to states considering abstention that abstention "would be unfavorably met in bilateral relations and on Capitol Hill.")

152. Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine* (Book Review) 100 HARV. L. REV. 450, 460 (1986) (reviewing J. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL (1985)). To the same effect, *see* Rodriguez-

The legislative history of P.L. 600 indicates an intent to retain in the U.S. Congress the power unilaterally to modify Puerto Rico's status.[153] The State Department told Congress that P.L. 600 would have "great value as a symbol" in response to " 'colonialism' and 'imperialism' in anti-American propaganda."[154] The Secretary of the Interior, seeking to assure Congress that under P.L. 600 it would retain control over Puerto Rico, stated that it "would not change Puerto Rico's political, social, and economic relationship to the United States."[155]

"The island's basic political status has not changed since the turn of the century."[156] "No word other than 'colonialism,' " states one commentator regarding the United States and Puerto Rico, "describes the relationship between a powerful metropolitan state and an impoverished overseas dependency disenfranchised from the formal lawmaking processes that shape its people's daily lives."[157]

For Puerto Rico, "[i]nternal autonomy is restricted, especially in legislative and judicial matters."[158]Puerto Rico is "still subject to the laws and regulations adopted by the political branches of the national government before which they appear only as supplicants; and that national government retains virtually unlimited discretion to determine whether or how the island will fit into national policy."[159]

The fact that Puerto Rico remains non-self-governing means that the military use of Puerto Rico remains a violation of the United States' "sacred trust" obligation.

V. STATE RESPONSIBILITY OF AN ADMINISTERING STATE FOR UNLAWFUL MILITARY BASES IN A NON-SELF-GOVERNING TERRITORY

A variety of harms may befall a non-self-governing territory from military use of it by an administering state.

A. Risk of Becoming a Military Target

Military use of a non-self-governing territory makes that territory a

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Orellana, *supra* note 85, at 462-463.

153. TORRUELLA, *supra* note 83, at 155-159.

154. Letter to Chairman, Committee on Interior and Insular Affairs, U.S. Senate, from Jack K. McFall, Asst. Secretary of State (for the Secretary of State), Apr. 24, 1950, 81st Cong., 2d sess., *reprinted in* 1950 U.S. CODE CONG. SERVICE 2688, 2689.

155. Letter to Chairman, Committee on Interior and Insular Affairs, U.S. Senate, from Oscar L. Chapman, Secretary of the Interior, May 19, 1950, *id.* at 2685. For views to the same effect of other executive branch and Congressional sources, *see* Cabranes, *Puerto Rico and the Constitution*, in *Proceedings of the First Circuit Judicial Conference*, *supra* note 104, at 483.

156. Cabranes, *supra* note 152, at 461.

157. Cabranes, in *Proceedings of the First Circuit Judicial Conference*, *supra* note 104, at 480.

158. CRAWFORD, *supra* note 126, at 372.

159. Cabranes, *supra* note 152, at 461.

potential target in a military confrontation of the administering state with other states. Puerto Rico is particularly at risk because of the importance of the installations to defense of the United States.

The existence and moveability of nuclear weapons poses a special risk to non-self-governing territories. United States vessels with nuclear armaments dock in Puerto Rico. This makes Puerto Rico a potential nuclear target.[160] A 1967 treaty established a nuclear-free zone in Latin America and the Caribbean to keep the region free of nuclear war.[161] The treaty prohibits "receipt" or "possession" of nuclear weapons.[162]

B. *Potential for Offensive Use*

Military bases subject a non-self-governing territory to the possibility that aggressive attacks may be launched against other states. Aggression was launched from Puerto Rican bases in 1983 against Grenada.[163] The General Assembly has asked administering states "not to involve those Territories in any offensive acts or interference against other States."[164] The Special Committee on Decolonization

> deplor[ed] the decision of the United States to enlarge and reinforce its military installations in Puerto Rico and establish new facilities, as well as the increasing militarization of the United States National Guard in Puerto Rico and its participation in United-States sponsored manoeuvres in Central America.[165]

C. *Displacement of Economic Activity and Population*

The General Assembly has "deprecat[ed] the continued alienation of land in colonial Territories for military installations."[166] Land use for bases has displaced residents and agriculture in Puerto Rico. The bases occupy 13% of Puerto Rico's arable land.[167] Many farmers have lost their livelihood; 60% the population has received food stamps in recent years.[168]

Objecting in 1948 to the establishment of bases on Vieques Island, U.S. Rep. Vito Marcantonio said:

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160. R. CARR, *supra* note 40, at 314.

161. Treaty for the Prohibition of Nuclear Weapons in Latin America, (Treaty of Tlatelolco), Feb. 14, 1967, *entered into force* Dec. 31, 1979, 634 U.N.T.S. 281, *reprinted in* 6 ILM 521 (1967).

162. *Id.*, art. 1, sec. 1. The United States is a party to Additional Protocol I, which requires application of art. 1 of the Treaty in territories for which it is internationally responsible. Additional Protocol I, art. 1, T.I.A.S. No. 10147, 634 U.N.T.S. 361.

163. See *supra* note 71; Quigley, *supra* note 69, at 271-352.

164. G.A. Res. 41/405, *supra* note 31, para. 2.

165. Resolution, Aug. 24, 1983, *supra* note 147, para 5.

166. G.A. Res. 41/405, *supra* note 31, para. 11.

167. *Independencia*, Newsletter of the Puerto Rico Subcommittee, National Lawyers Guild, 1986, at 7.

168. R. CARR, *supra* note 40, at 215.

> The United States is depopulating the Puerto Rican island of Vieques and turning it into a military training base. . . .Vieques is a fertile spot. . . .Despite the frantic opposition of the Puerto Ricans, the Navy has already ordered the complete evacuation of the inhabitants of Vieques by the early part of this year. This order will affect some 5,000 people and will cripple an agricultural economy which supported 4 sugar mills—producing 20,000 tons of sugar annually—and an extensive grazing industry. To the people of Puerto Rico who do not have nearly enough arable land to support their dense population the removal of Vieques as a source of agricultural products is a national calamity.[169]

Weapons firings on Vieques Island have removed most of its land area from productive agriculture. The U.S. Court of Appeals found that "[s]ince the mid 1940's. . .the sugar cane industry [on Vieques Island] has declined to a point where it is of no current importance to the island."[170] As a result, the Court stated, "the islanders now derive their livelihood from the same sources relied upon by their ancestors more than one hundred fifty years ago—fishing, subsistence farming and ranching.[171]

D. Disruption of Economic Activity

In Puerto Rico, economic activity is hampered by military operations. The United States Navy operates its Atlantic Fleet Weapons Training Facility from Roosevelt Roads and from Vieques Island.[172] If its training, which employs an electromagnetic field, were conducted in the United States, the Navy acknowledges, it would interfere with television signals for many residents.[173]

The Navy typically conducts weapons firing 200 days per year.[174] The U.S. Supreme Court found that "[d]uring air-to-ground training. . .pilots sometimes miss land-based targets, and ordnance falls into the sea. That is, accidental bombings of the navigable waters and, occasionally, intentional bombings of water targets occur."[175]

That training has engendered local protest because of disruption to economic activities, particularly fishing.[176] Protests were directed at disruption caused by weapons exercises, as mentioned, on Culebra Island.[177]

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169. 94 CONG. REC. 9283 (1948). On previous economic activity on Vieques, *see also Vieques Fishermen*, *supra* note 62, at 20.

170. Romero-Barceló v. Brown, 643 F.2d at 838.

171. *Id.*

172. *Id.* at 838-839.

173. R. CARR, *supra* note 40 at 311 (citing his interview with Chief of Staff, Roosevelt Roads Naval Base). On the electronic warfare range, *see also* Romero-Barceló v. Brown, 643 F.2d at 839.

174. Romero-Barceló v. Brown, 643 F.2d at 839.

175. Weinberger, v. Romero-Barceló, 456 U.S. at 307.

176. R. CARR, *supra* note 40, at 311-313. *Vieques Fishermen*, *supra* note 62, at 16-23.

177. Rousseau, *Chronique des Faits Internationaux*, 75 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 465, 521-523 (1971). *See also supra* note 100.

In 1975 the Navy stopped the firings on Culebra Island.[178]

According to Carlos Zenon, President of the Vieques Fishermen's Association, which has been prominent in protests, these exercises "destroy fish and fishing equipment. Our lives are in constant danger, due to unexploded bombs in the water."[179] Many Vieques fishermen had to quit fishing: "we have to go to the Food Stamp lines."[180] The United Nations Special Committee on Decolonization

> demand[ed] that the armed forces of the United States terminate permanently their operations in the island municipality of Vieques, thus allowing the people of that island to live in peace in their own land and to enjoy fully the results of the exploitation for their benefit of the natural resources in the land and sea of the island municipality.[181]

E. Damage to the Environment

Base use may damage the environment. Judge Torruella found (and the U.S. Supreme Court did not question) that the Navy had violated environmental protection laws in its weapons firing on Vieques Island.[182] The Court of Appeals ordered issuance of an injunction to the Navy to cease these violations until it obtained statutorily-required permits.[183] The Court of Appeals found that the Navy had, before firing weapons around Vieques Island, failed to secure a biological opinion on the impact on various endangered species, including pelicans, turtles, and manatees.[184]

F. Possible Benefits to the Non-Self-Governing Territory

Even if an administering state uses a non-self-governing territory for military purposes of its own, benefit may accrue to the non-self-governing territory. The United States' military use of Puerto Rico provides employment for Puerto Ricans. Judge Torruella said, in explaining the importance of keeping sea lanes open, that "the ability to maintain free sea lanes to and from the Mainland [of the United States] would seem of some interest to the residents of this Commonwealth."[185] The governor of Puerto Rico said in 1982 that the Roosevelt Roads base "boosts island

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178. Rousseau, *Chronique des Faits Internationaux*, in 78 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 1096, 1183 (1974). *Vieques Fishermen, supra* note 62, at 22. *See also* Romero-Barceló v. Brown, 643 F.2d at 839.

179. *Vieques Fishermen, supra* note 62, at 17. *See also id.* at 18. Zenon was a plaintiff in suit accompanying that of Romero-Barceló v. Brown, 478 F.Supp. at 650.

180. *Vieques Fishermen, supra* note 62, at 18.

181. Resolution, para. 6, Aug. 15, 1979, U.N. Doc. A/AC.109/589 (1979).

182. Weinberger v. Romero-Barceló, 456 U.S. at 309-310.

183. Romero-Barceló v. Brown, 643 F.2d at 837.

184. *Id.* at 857. The U.S. Supreme Court reversed, finding that the district court had discretion to refuse an injunction, even in the face of statutory violations. Weinberger v. Romero-Barceló, 456 U.S. at 311.

185. Romero-Barceló v. Brown, 478 F.Supp. at 707, n. 119.

security."[186] Where an administering state operates military bases for its own benefit, however, benefits to the non-self-governing territory are incidental. The administering state is using the non-self-governing territory for its own purposes.

G. Bases as an Impediment to Self-Determination

Military use of a non-self-governing territory may affect the administering state's promotion of self-determination. The General Assembly, as noted, characterizes military bases as an "obstacle" to self-determination.[187] The military significance of Puerto Rico influences United States policy as to its status.[188] In 1943 the Puerto Rico legislature asked for a referendum on independence:

> The colonial system of government ought to be totally and definitely abolished in Puerto Rico, and the form of this definite political status ought to be democratically decided through the free vote of the people themselves.[189]

A bill was introduced in the U.S. Senate to grant independence; but it stipulated that the United States was to maintain the right to its bases.[190] One senator stated that Puerto Rico must, as a condition of independence, give guarantees "as to military and naval installations and means of egress and ingress."[191] The Navy Department opposed independence without guarantees for "retention of naval and military and air bases and reservations by the United States and for such expansion of naval and military and air facilities as may be required in the future for hemisphere defense."[192]

Objecting to independence, the War Department stated: "For military reasons, we believe that would be unwise."[193] One senator opposed independence even with guarantees:

> I can understand a certain amount of autonomy, but I cannot understand how you can reconcile complete independence of the Island with the effective and necessary use of Puerto Rico for a military control of the Caribbean.[194]

The United States' hostile relationship with Cuba has solidified its position that it must keep Puerto Rico as a military outpost.[195] Antici-

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186. R. CARR, *supra* note 40, at 315 (quoting Feb. 1, 1982, speech of Gov. Romero-Barceló).

187. *See supra* note 31.

188. R. CARR, *supra* note 40, at 311.

189. N.Y. Times, Feb. 11, 1943, at 6, col. 4. THE PUERTO RICANS, *supra* note 37, at 190.

190. N.Y. Times, Apr. 3, 1943, at 7, col. 1.

191. *Hearings on S. 952*, *supra* note 39, at 20 (statement of Senator Bone).

192. *Id.* at 41-42 (statement of Capt. Paul Foster, Navy Dept.).

193. *Id.* at 10 (statement of John McCloy, Asst. Secretary of War).

194. *Id.* at 15 (statement of Senator Taft).

195. R. CARR, *supra* note 40, at 310.

pated removal of United States bases from Panama in the year 2000 heightened the perception that Puerto Rico is important in United States military strategy: "the U.S. military's growing interest in Puerto Rico stems from the pending removal of U.S. military operations in the Canal Zone."[196] Finally, the increasing sophistication of weaponry has rendered Puerto Rico useful, as indicated, as a test firing site.[197]

Bases are a sector not controlled by nascent self-governing institutions. Whatever portion of a non-self-governing territory is devoted to military use is outside the reach of those institutions.

Bases may skew the economy to the extent that whatever self-governing authority emerges may find it difficult to administer the domestic economy.[198] Finally, the presence of a significant military apparatus may intimidate the people of a non-self-governing territory in expressing their opinions on territorial status.

H. Obligation to Make Restitution and Compensation

Military use of a non-self-governing territory violates the rights of the people of that territory, giving rise to state responsibility.[199] The standard for state responsibility is that an administering state must restore the *status quo* before the breach and, to the extent this is not possible, compensate for harm.[200]A "people," even one that has not achieved self-determination, can carry rights and bear obligations under international law.[201] In Puerto Rico, the United States is obliged to remove its bases, return the land to its owners, and compensate for damage to individuals.[202] Compensation should be sufficient to make farmers, fishingpeople,

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196. Lidin, *Navy's Signal Tower for Carib Upgraded*, San Juan Star, May 6, 1983, at 1, col. 1. Reisman questioned the military importance of Puerto Rico to the United States, W. REISMAN, *supra* note 83, at 118, as did former Secretary of State Henry Kissinger, *quoted in* Friedman, *P.R. Not Vital to Security of U.S., Kissinger Says*, San Juan Star, March 16, 1981, at 3, col. 3.

197. *See supra* note 63.

198. *See, e.g.*, the situation in South Vietnam after 1975, where previous dependency of the economy on the U.S. military made economic management difficult. J. QUIGLEY, *Vietnam's First Modern Penal Code* 9 N.Y. LAW SCHOOL J. INT'L. & COMP. L. (1988).

199. On state responsibility, *see generally* C. EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW (1928); I. BROWNLIE, SYSTEM OF THE LAW OF NATIONS—STATE RESPONSIBILITY PART I (1983); Draft Articles on State Responsibility, in *Report of the International Law Commission to the General Assembly*, 35 U.N. GAOR, Supp. (No. 10), at 59, U.N. Doc. A/35/10 (1980), *reprinted in* 2 Y.B. INT'L L. COMM. 30, U.N. Doc. A/CN.4/SER.A/1980/Add.1, part 2 (1980); Quigley, *Complicity in International Law: A New Direction in the Law of State Responsibility*, 57 BRIT. Y.B. INT'L L. 77-131 (1986).

200. C. EAGLETON, *supra* note 199, at 182. Case Concerning the Factory at Chorzów (Claim for Indemnity) (Merits) (Germany v. Poland), 1928 P.C.I.J. ser. A No. 13, at 47 (Judgement of Sept. 13), *reprinted in* 1 M. Hudson, WORLD COURT REPORTS 578, at 677-678 (1922-26).

201. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Request for Advisory Opinion), 1971 I.C.J. 31, para. 52.

202. *See* resolution of the Puerto Rican Bar Association making these three points.

and others whole for their losses. Fixing monetary compensation for damage to the environment will be difficult.

I. Procedure for Effectuating Restitution and Compensation

Were the United States to grant Puerto Rico self-governing status, as it is also obliged to do under international law, then it could negotiate with a Puerto Rican government for continued military use. It could negotiate return of land and compensation to individuals. Third-party arbitration might provide a method of evaluating claims.

The mechanism would vary depending on the form of self-determination chosen by the people of Puerto Rico—whether integration into the United States, a status of free association, or independence. Without attainment by Puerto Rico of self-determination, no entity can represent it vis-à-vis the United States.

So long as a territory remains non-self-governing, its only protection comes from United Nations supervision over the administering state. With Puerto Rico, as indicated, the Special Committee on Decolonization has noted problems created by United States military bases. But the General Assembly has not addressed the issue of those bases. The United States has been able to prevent the Assembly from exercising supervision.[203]

VI. CONCLUSION

The "sacred trust" norm protects the right of a people to achieve self-determination. Military bases for an administering state's benefit in a non-self-governing territory may cause significant hardship and may prevent a people from achieving self-determination.

A non-self-governing people is unable to protect itself from an administering state. The international community must take seriously its obligation of supervision over administering states, to ensure that military bases do not cause present harm and that they do not jeopardize achievement of self-determination.

Colegio de Abogados de Puerto Rico, Comisión para el Estudio del Sistema Constitucional de Puerto Rico, *Informe de 1980 para el Comité de Descolonización de las Naciones Unidas*, Aug. 15, 1980, in 47 *Revista del Colegio de Abogados de P.R.* 281 (1986).

203. *See supra* note 150.

The Concept of Neutrality in International Law*

ALFRED P. RUBIN**

I. ORIGINS

A. *Religious and Secular Obligations*

Earliest written records show an interesting contrast between the notion of war as the imposition on another religious-political organization of a tribe's "law" in obedience to the directions of a tribal god, presumably as interpreted by a priestly caste spokesman, and imposition of "law" by asserting secular "jurisdiction." By the first notion, "neutrality," non-involvement in the struggle for life and dominance, was a temporary political fact but inconceivable as a legal status; a state could not opt out of the struggle for survival any more than a person could. The only path to avoid the struggle was to die.

Illustrations of this abound. In the Old Testament, God commands the Jews:

> When you draw near to a city to fight against it, offer terms of peace to it. And if its answer to you is peace and it opens to you, then all the people who are found in it shall do forced labor for you and shall serve you. But if it makes no peace with you, but makes war against you, then you shall besiege it; and when the Lord your God gives it into your hand you shall put all its males to the sword . . . Thus you shall do to all the cities which are very far from you, which are not cities of the nations here. But in the cities of these peoples that the Lord your God gives you for an inheritance, you shall save alive nothing that breathes, but you shall utterly destroy them . . . that they may not teach you to do according to all their abominable practices which they have done in the service of their gods, and so to sin against the Lord your God.[1]

This command was in fact obeyed literally, according to the Bible, except for the one case of the Hivites from Gibeon who, masquerading as people "from a far country," concluded a treaty with the secular leader Joshua and the leaders of the Hebrew congregation under which peace with forced labor was provided as a matter of what seems secular Jewish law.[2]

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1. *Deuteronomy* 20:10-18 (Revised Standard Version).

2. *Joshua* 9:3-27. It is possibly evidence of one of the underlying roots of the modern

This religious conception of the impossibility of neutrality with regard to holy commands is carried on in the New Testament where the universality of monotheism and the conception of life as a continuing battle between good and evil, between the Kingdom of God and the Kingdom of Satan, is summed up by Jesus: "He who is not with me is against me, and he who does not gather with me scatters."[3]

As to the second notion, just as the secular needs of even a conqueror like Joshua overrode the religious commandments passed to the nation by the priests, so notions are anciently evident of the limits of legal prescription even when uttered by sacerdotal rulers sharing religious worship with their neighboring kings. The earliest known example of this is about two centuries after the events narrated in the Book of Joshua; it is in an Egyptian papyrus of the early Twenty-first dynasty, in the llth century B.C. An Egyptian priest, Wen-Amon, on a religious tribute-collecting mission at Dor, on what the translator calls the Syrian coast, was robbed on his ship in the harbor. He appealed to Beder, the local ruler, also a worshipper of Amon and under Egyptian political influence (although not legal control):

> I have been robbed in your harbor. Now you are the prince of this land, and you are its investigator who should look for my silver. Now about this silver — it belongs to Amon-Re, King of the Gods, the lord of the lands . . . It belongs to you . . .

Beder replied:

> Whether you are important or whether you are eminent —look here, I do not recognize this accusation which you have made to me! Suppose it had been a thief who belonged to my land who went on your boat and stole your silver, I should have repayed it to you from my treasury, until they had found this thief of yours — whoever he may be. Now about the thief who robbed you — he belongs to you! He belongs to your ship! Spend a few days here visiting me, so that I may look for him.[4]

The underlying legal conception seems to be that Beder, as the secular ruler of Dor, alone had the legal power to search out and arrest the thief in the territory of Dor, but only Wen-Amon and the ship's authorities could make rules to govern what happened on board the ship; that the limited extent of Beder's jurisdiction made him legally "neutral" with regard to affairs on board the ship regardless of religious and moral arguments, but that his neutrality could be interpreted to permit, or even to

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concept of the bindingness of treaties that this one, procured by fraud, was considered to supersede even the express command of God. The degree to which any "Jewish" law in the biblical period can properly be called "secular" is, of course, unclear. But that the treaty was inconsistent with the religious command is certain. The job of reconciling the two sources of law, and the two elites responsible for uttering "law" and enforcing it, is best left to historians and theologians.

3. *Matthew* 12:30.

4. PRITCHARD, THE ANCIENT NEAR EAST 17-18 (5th ed. 1971).

require, him to search out an accused thief escaping to his territory and hand him back to the ship's authorities for legal disposal.[5]

This conflict between religious obligations to side with God and a conception of the limits to secular authority and political bases for action and inaction became most notoriously significant during the days of declining religious influence and expanding secularity in ancient Greece. In its origins in 435 B.C., the Peloponnesian War was a struggle by Corcyra to remain unentangled, "neutral," in the internal affairs of Epidamnus. In Epidamnus, the defeated nobility had sought allies against the popular party that had taken control of the constitution of the town. When Corcyra would not intervene, the popular party of Epidamnus got help from Corinth. Corcyra, to maintain what she regarded as her rightful external relationship with Epidamnus, attacked Corinth. After winning a battle at Epidamnus, Corcyra admonished Corinth to withdraw from involvement in affairs between Corcyra and Epidamnus, and called vainly on Sparta to help. Corcyra, after further defeating Corinth, and not being a member of either the Athenian or Lacedaemonian League, then appealed to Athens and offered to join its League. Corinth appealed to Athens to remain "neutral."[6] The arguments by Corcyra before the Athenian Assembly were based on (1) morality and the glory of helping the oppressed against their oppressors; (2) future interests and the store of gratitude that would make of Corcyra a reliable ally if Athens later needed help; and (3) current interest and the strength of the Corcyran Navy, the second largest navy in Greece at the time. Corinth also put first emphasis on their moral stature, denying that Corcyra was an oppressed state but considering her "criminal" in her acts regarding Epidamnus; secondly, Corinth argued that admitting Corcyra to the Athenian League would make Athens an enemy of Corinth and necessarily and legally involve war: "For if you become the allies of the Corcyraeans you will be no longer at peace with us but will be converted into enemies. But you ought in common justice to stand aloof from both . . ." The decision by Athens was cynical: Corcyra was not taken into the full alliance, but a defensive commitment was made in case of an attack in its territories or the territory of an "ally" of either. The reason, according to Thucydides, was the military calculation regarding the strength of the Corcyran navy and Corcyra's strategic location between the Peloponnesus and Italy.[7]

The most famous dispute regarding neutrality in the ancient writings

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5. It is not suggested that this natural law underpinning to an early, perhaps the earliest, non-political extradition arrangement is in any way involved with modern extradition practice or conceptions. Something like the assumed moral obligation to search out thieves and hand them over to the territorial authority of the place in which the rights of property had been violated by them is apparent in a lot of the current rhetoric about terrorists. It might be noted that Beder denied any legal obligation in this transaction, only promised out of grace to search for the thief.

6. THUCIDYDES, I THE PELOPONNESIAN WAR 24, 33, 40, in 1 THE GREEK HISTORIANS 565 (F. R. B. Godolphin, ed., 1942).

7. *Id.* at 44.

is, of course, the Melian Dialogue of 416 B.C.[8] The people of Melos, a small island, were linked legally and politically to Sparta, but tried to maintain neutrality in the Peloponnesian war. The Athenians rejected the Melian argument that Melos, having maintained a strict neutrality in its actions, there was no justification in law or morality for Athenian action against it. The Athenian "justification" was that other client states of Athens would be tempted to "neutrality" if Melos could opt out of the struggle, and that disintegration of the Athenian system was an even greater threat to the well-being of Athens than defeat; the primary argument was thus not military or moral, but expediency and political interest. Eventually the discussion turned towards religion; the Melians argued that the gods would likely favor the righteous against the unrighteous, so Athens should think twice about her threat. The response by the Athenians was that by a law of nature reflecting the gods' will as perceived by common opinion, it is in the nature of man to rule wherever he can. This natural law, perceived by physical observation, was said to justify Athens. Moreover, the Athenians argued, the Spartans themselves could be seen to identify whatever is expedient with "justice" in their own transactions outside of their municipal sphere, so the Spartans themselves were not likely to believe that they had any obligation to come to the aid of Melos against Athens. The Melians disagreed on an analysis of the deeper interest of Sparta in supporting its colonists even when "neutral," but concluded that in any case it should be seen to be in the interest of Athens to leave Melos unmolested. The Athenians made their own decision and shortly afterwards killed all the military age men, enslaved the women and children, and colonized with 500 of their own settlers the island of Melos.

B. Positivism and Natural Law

This is not the place for a deeper analysis, but it is important to an understanding of the legal and moral underpinnings of the concept of "neutrality" to know that Aristotle, lecturing in Athens in the middle of the fourth century B.C., after Athens had lost the Peloponnesian War, adopted the Athenian view identifying natural law with the observable physical laws of nature. He rejected the sophists' argument that similar municipal laws of many states reflect a natural overarching law such as the physical law that a flame burns upright both in Greece and Persia, pointing out that notions of "justice" shift and change.[9] Cicero, about 300 years later, on the other hand, adopted a view that identified the moral law, the "*vera lex*" discoverable by right reason and inherently universal and eternal, with an overarching and binding system superior to the "positive" laws of the Roman Senate, and thus superior to the laws of any single municipal order.[10] To the Athenian-Aristotelian "positivist," neu-

8. *Id.* at V, 84-114, 116.
9. ARISTOTLE, NICHOMACHEAN ETHICS 1134b18 sec. 7.
10. CICERO, DE RE PUBLICA, III, xxii, 33.

trality is permissible when acceptable to the legislator of the system within which it is asserted; when legislation is by such use of force as seems expedient to the dominant force possessing actor, "neutrality" is made a permissible legal status only within whatever bounds that legislating actor allows. In the horizontal, tribal-council-like, legislative structure of the current international legal order, where legislation is induced from customary behavior or from treaty commitments, no single state has legislative authority; therefore the bounds of what is "neutral" remain subject to counter-assertion and change. When legislation is conceived as the adoption of moral rules perceived by right reason, then "neutrality" is a matter of each state's claiming the clearest insight into the implicit rules of the community and quarreling with its neighbors as to which perception is deepest or reflects the higher values. In neither the physical-naturalist Aristotelian or "positivist," nor the Ciceronian-moralist "naturalist," framework is "neutrality" a uniform conception, although to those who claim a monopoly of moral insight, it does appear to them as if it were so and they are likely to feel very frustrated by the obtuseness of their neighbors.

II. THE EVOLUTION OF DOCTRINE

A. "Just war" Doctrine and Neutrality

To "naturalist"-moralist jurists and historians, like the Melians and the Roman Livy (d. 17 A.D.), breach of "neutrality" in circumstances in which "law" required neutrality could be seen as a reason for defeat. Thus, to Livy the Fabian Ambassadors to the Gauls in Etruria (386 B.C.) violating their legal obligation to abstain from participating in the military struggle between Clusium and the Gauls committed an unjust action worse than the injustice of the Gauls' attack on Clusium. That delict, in Livy's view, justified the sack of Rome itself by the Gauls.[11] The gods took care of enforcing the law.

With the development of political influence in the moral institution of the Church, moral-natural law theory was strengthened and became more abstract. The notion that God enforces "justice" was too simplistic to survive in a world that read the Biblical book of Job, and the religious notion of "just war" became part of the currency of legal as well as moral thought.

In order to clear away some confusion in modern literature, it should be pointed out that the phrase itself, "just war," is not a correct translation of the pre-renaissance Latin "bellum justum." "Jus" in Ciceronian Latin related to "law," not "justice;" "lex," as in "vera lex," the eternal and universal rules superior to positive law, more nearly approximated

11. LIVY, HISTORY OF ROME V, 36-49. Modern scholarship regards the entire narrative as baseless in fact except for the sack of Rome. *See* OGILVIE, A COMMENTARY ON LIVY BOOKS 1-5, at 716 (1965).

our concept of "justice." But the reception into English, via clerical scribes, of the Latin genitive "legis" as the root of our word "legislation," and the insistence of natural law scholars that their conceptions of "justice" were binding as "law" universally, and their appropriation of the word "jus" to emphasize the legally binding effect of "lex," seem to have led to a reversal of meanings in English.

The first use of the phrase "just war" in a sense that has survived and had direct influence was by St. Augustine,[12] who suggested about 420 A.D. that the injustice of an opposing side might require a wise man to wage war, and that no other war than such an one is morally defensible. But, if moral law is binding not only on conscience but in action, and injustice can morally require a military response, then surely "neutrality" in some cases is not only morally reprehensible, but also illegal.

It would serve no point to trace in detail the elaboration of this thesis in medieval legal theory. Those aspects of the definition of "just war" that relate to the legal authority of the parties to engage in duels or wars are of no concern to the concept of "neutrality," nor are questions of personal capacity to bear arms in feudal theory. But the idea that there must be a "just cause" (e.g., a prior injury) and a "just object" (i.e., no better way to resolve the dispute) to the recourse to arms, and that there must be a "just intention" (i.e., a personal commitment to the righting of a moral wrong as the dominant motivation for the war), notions that speak to the belligerents and imply some need for *jus standi*, some legal interest in the struggle, presume an underlying concept of neutrality. Those who lack the standing; the just cause, object or intention, have no moral or legal basis for participating in the armed struggle. Neutrality for them would not be a right, but an obligation.

Interestingly, Islamic legal theory seems to have paralleled Christian thought in this regard, as Ibn Khaldun, writing about 1377 A.D., also divides wars into categories of "just" and "unjust." He reserved for the "just war" category only wars required by religious law (which included rules of normal behavior, since the Koran, to Muslims, is the primary source for legal rules as well as a religious work in the secular Western sense)[13] and "dynastic war," presumably war based on vindicating a right to inherit authority, which also has at least overtones of religious law.[14]

Now, if wars within the legal order could be classified as "just" or "unjust" and "neutrality" was an obligation in most cases even with regard to "just wars," the situation was quite different with regard to wars fought with those outside the order. In Western legal theory, Crusades,

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12. St. AUGUSTINE, DE CIVITATE DEI XIX, 7.

13. To translate this conception into more familiar terms, the Koran might be compared to the Pentateuch in Jewish society; the rules of behavior in Leviticus and here and there elsewhere, like the rules explicit and implicit in the New Testament, are binding in daily life to those within the religious worship; to those who, in St. Augustine's felicitous phrase, live in the City of God.

14. IBN KHALDUN, THE MUQADDIMAH 224 (Rosenthal, trans., Dawood, ed., abr. ed. 1967).

religious wars, were a moral obligation and to establish a legal right to abstain from such a war seems to have involved strains and ultimately a rejection of the bindingness of the order itself. Quite apart from the struggles within Europe between Church and State authorities for the ultimate power to make law, it is probably not merely coincidental that the split between the Eastern Church and Rome occurred formally in 1054 A.D. and relations between the Byzantine rulers and the "Franks" ("Kelts" to Anna Comnena) were established on strictly secular lines with the Empire feeling no obligation at all to help in the struggle of "Christendom" to "recover" the Holy Land.[15] Byzantium remained "neutral" as suited her political situation.

In Islamic theory such "neutrality" would have been hard to justify, and the classical distinction between the Dar-al-Salaam and the Dar-al-Harb, the lands in which applied the laws of peace based on the Koran and the lands in which Islamic peoples were bound by the laws of struggle, seem to allow of no intermediate status.[16] On the other hand, there is ample evidence that in practice Islamic rulers did in fact conclude armistices and treaties with non-Islamic authorities, and "neutrality" was practiced regardless of the "natural" or "divine law" theories.

The Christian theory was necessarily modified as the balance of influence in daily affairs changed between the secular legal order on the one hand, and the religious legal order interpreted by the Papacy on the other. The moral requirement of a crusade lost its persuasiveness over time, and the struggle among temporal rulers for empire assumed a larger role in statecraft, although until the 16th century in Europe the major rationalizers of policy remained clergymen. Even in countries faithful to the Catholic institutions, like Spain, by the early 1500s, difference in religion was rejected by influential advisers as a cause of "just war."[17] Indeed, the only just cause admitted by Vitoria was response to a wrong received, and then only a proportional response limited to righting the wrong.[18] The wars of conquest in the New World were rationalized by this enlightened writer as vindicating the legal rights of trade, transit and peaceful sojourn found in natural law, evidenced by various analogies and the *jus gentium* adopted as municipal law in many European nations. Religious wars, to protect native converts from their neighbors, and to end the abominable practices of the Indians, which were viewed as violating natural and divine law at least when they involved human sacrifice, were also permissible.[19] But from the point of view of this brief study, the most significant basis found for engaging in a "just war" was to assist

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15. COMNENA, THE ALEXIAD, 309 sq. (1148 A.D.) (Sewter, trans., 1979); *Cf.* BERMAN, LAW AND REVOLUTION 104-105 (1983).

16. SHAYBANI, SIYAR 75 sq. (c. 800 A.D.) (Translated as KHADDURI,THE ISLAMIC LAW OF NATIONS (1966)).

17. VITORIA, DE INDIS, §§ 427-429 (1532, 1557, 1580 rev., Carnegie Endowment, 1917).

18. *Id.* at 430.

19. *Id.* at 386-403.

"allies and friends." Support for this was found in Roman practice and Biblical incident when Abraham was said to have fought with the "King of Salem" and others against four kings who had done Abraham himself no injury.[20] This expansion of "just war" theory, to allow for collective action by those who had not suffered injury taking part of one who had, was to have major consequences.

B. The Resurgence of Positivism

Positivism makes a resurgence as the authority of the institution of the Church broke down. Doctrinally, it might be a significant marker that by 1612 even the Catholic jurist Suarez, by some viewed as the founder of modern international law, distinguished between the *jus gentium* reflecting natural law perceived by all or many societies and *jus gentium* as the coincidental prescriptions of different municipal legal orders reflecting only similar policy choices, thus part of the human or positive law and not necessarily reflecting natural law.[21] But the great founder of modern positivism was Alberico Gentili, an Italian Protestant Civil law expert teaching at Oxford. His pleas as an advocate for Spain in the Royal Council sitting in Admiralty[22] evidence the long and complex evolution of Maritime law as applied to questions of belligerent rights and neutrality. It was in this area that technical rules of neutrality arose and found their greatest elaboration.

In the earliest days of recorded European civilization north of the Alps, private reprisals were the normal way of resolving conflicting assertions of right. "Just war" theory under a feudal political organization made the natural law of reprisal, taking back that which has been unjustly taken away by another, available to equals on the feudal scale nearly at all levels. With the growing centralization of authority in the 13th century, one of the areas into which royalty moved at the expense of its magnates was control of activity outside the boundaries of a county. In England, by the end of the 14th century this took the form of the King appointing an "Admiral" as his direct subordinate to issue "letters of

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20. *Id.* at 405. The Biblical incident is cited by Vitoria to *Genesis* 14. In that place, the incident is justified on the basis of the aggressive Kings (against Sodom, not Salem) having taken prisoner Lot, Abram (not yet Abraham's) nephew. Obviously, in the light of kinship ties in the society described in the Old Testament, Abram did have standing based on the injury to Lot, his nephew. Vitoria's conclusion thus seems unsupported by his appeal to Divine Law. Distortion of the facts to create a legal argument is not uncommon in publicists of international law, even today, but this seems egregious.

21. SUAREZ, DE LEGIBUS, AC DEO LEGISLATORE, II, 187-188 (1612) (1944 ed.).

22. English Admiralty law was based on the code of judicial decisions of the Island of Oleron adopted by statute in England about the end of the 12th century. It was supplemented by Roman law principles and the Admiralty advocates were all trained in Roman (Civil) law. Gentili seems routinely to have had his Spanish clients sell their interests to English people, so he could always appear to be arguing English interest as the ultimate beneficiary of the Spanish claims. *See* GENTILI, HISPANICAE ADVOCATIONIS (pleas of 1605-1608, published 1613) (1921 ed.).

marque and reprisal" to private individuals authorizing reprisals. The Admiral then conducted a tribunal before which "prizes" were brought and title adjudged according to the rules promulgated by the Admiral. Since title, to be useful with regard to ships and articles in international commerce, had to be accepted as valid in foreign countries, the "natural law" basis for the rules of Admiralty, particularly the rules of "prize," was vigorously asserted. The rules of Admiralty were asserted to be of universal validity; argumentation before Admiralty tribunals rested on Roman law and on scholarly writings that seemed to have wide appeal. Since the statutory laws of Oleron dealt in the main with distributing the risks of a voyage among persons all subject to the laws of the "flag" state of the vessel, and not with the laws of naval prize, there was no serious conflict between the statute law and the natural law as they both evolved, and eventually they evolved together.

The elaboration of the rules of prize reached major levels of interest and complexity during the 16th century. During that century privateering as an act of private reprisal authorized by a state, and privateering as a belligerent act of the state by which mariners were encouraged by the potentialities of great private profit to risk their ships and lives in naval adventures, lost their distinction. By about 1600, it had become clear that privateering was an act of the state and implied that the special laws of naval warfare applied and the special Admiralty laws of prize. This meant that specification of the permissible targets of privateering was essential if the sovereign were not to get embroiled in naval struggles against the whole maritime world at the discretion of a profit-seeking privateer under an imprecise letter of marque. But, to say that no ship flying a "neutral" flag, or a flag not specified as a proper target in the letters of marque, could go entirely free was to invite foreign and even domestic merchants to fly false neutral flags in order to protect their cargoes and ships. The answer adopted by England as she became the strongest sea power in the world was the elaboration through judicial pronouncements in Admiralty and prize of the validity at law of certain captures from neutrals and the invalidity of others.

Gentili was a central figure in this rapid evolution. While this is not the place to analyze his logic in any depth, his Spanish advocacy is filled with argumentation about the limits of neutral and belligerent rights as a matter of law. For example, in one case an English ship (with apparent, but unstated, Spanish connections) taking some militarily useful material to Constantinople was captured by privateers from Sardinia and Malta. It was in the interest of Gentili's clients that the taking be held improper. Gentili states the arguments against his clients by citing Justinian's code as forbidding trade with heathendom, thus holding the Civil Law against them. He then finds religious Canon Law to the same effect. Turning to the "jus gentium," the "law of nations," he finds a precedent against his clients in English complaints to the Hanseatic League trading in military supplies to Spain at a time when Spain was at war with England, a complaint based on the logic of reciprocity and the Golden Rule. He even

finds a treaty between England and Spain under which each party undertook to prevent its nationals trading in munitions of war with an enemy of the other. He then turns the arguments around, principally on the basis that most of the goods carried by his clients were not "contraband," i.e., that the goods had no significant military use, and construing the prior arguments to be valid only in the case of a short list of military hardware. Thus, he argued for the return of the bulk of the cargo and of the ship itself. As to the militarily useful material, he argued that it was part of the ship's own store, not for distribution to the Turks in Constantinople, and therefore, not subject to confiscation in prize.[23]

This particular case does not illustrate any great jurisprudential shift from naturalism to positivism, but such a shift was in fact under way and is made more evident in a series of three cases argued by Gentili concerning the proper classification of the Barbary states: Pirates or Sovereign equals of England?[24] The progression is clear. In the first case, Gentili argued that the Barbary authorities should be classified as pirates, thus in law unable to change title to captured goods; in the second he dithered on the point, and in the third he came to precisely the opposite conclusion, that those who purchase captured goods and ships in Algiers get good title, therefore the Barbary states must be classified as sovereign, able to make and enforce the law, and not as "pirates." In all three his logic is invincibly "positivist." He finds his legal categories to suit the policy ends: In the first, to inhibit legally the establishment of markets able to pass good title in a place close to the lines of trade where captures of doubtful validity are likely to occur; by the third, that the need for certainty of title in goods and ships purchased dictates the need for markets able to establish valid title close to the lines of trade where such questions are likely to arise. The notion that the legal rule is not the abstraction perceived by moral reasoning and applied in order to do "justice" is impliedly rejected. Instead, the basic logic rests on expediency, political choice by the law-maker, in this case by the English Royal Council able by its decision to determine the law that will be applied in England with regard to such title transfers.

The jurisprudential battles raged throughout the 17th century, but by the early eighteenth century it was clear that in practice the "positivists" had won and it was important then to find a way to "legislate" the rules in the community of sovereign equals that emerged from the religious and dynastic wars and the constitutional shifts of authority within the leading European trading states of the 17th century. The way found was by treaty. In the elaborate series of treaties that formed the Peace of Utrecht at the end of the War of the Spanish Succession in 1713, rules were bargained for and agreed through a negotiating process that took account of the needs of both belligerents and neutrals, because each

23. *Id.* at I. The actual decision in the case is not known, only Gentili's argument.
24. *Id.* at iv, xv, xxii.

party could imagine itself in either position in some future war. The holding of "prize courts" was agreed by the parties to those treaties addressing the matter to be a belligerent right; states undertook that when neutral in a conflict in which the other party to the treaty was a belligerent, not to permit the other belligerent to disencumber itself of its naval captures in any of the neutral's ports. The rule argued for by Gentili was adopted by treaty between England and France that free (neutral) ships and their cargoes are free to trade with an enemy without fear of capture and condemnation in prize except with regard to contraband on board the vessel: "Free ships shall make free goods except contraband" was the phrase. A separate article defines "contraband." Yet another article specifies items that are by the parties deemed in law not to be contraband, and that list includes "all Provisions which serve for the Nourishment of Mankind and the Sustenance of Life," and all things proper either for building or repairing ships "and all other Goods whatever, which have not been worked into the form of any Instrument or Thing prepared for War, by Land or by Sea."[25] Obviously, the specification of precisely what the belligerent's rights are against neutrals, and what the neutral's rights are against belligerents, and the definitions of contraband, are matters that would vary from negotiation to negotiation, and the positive law would determine in each case with regard to each incident what the respective rights were. In the absence of treaty, the questions would be left to diplomatic discussion and prize cases in which the national policy interest in universal uniformity of the law might dictate reference to an otherwise inapplicable treaty, but in which such a reference would not necessarily produce the uniformity that would be wanted because the judge in prize would not have his interpretation tested by the possible remonstrances of the actual parties to the treaty and their adjustment of its terms by supplemental negotiation. And treaty texts negotiated in different political contexts had different terms. There was no necessary uniformity in the treaties taken as a group.

To expand the authority of belligerents with strong navies, the rules surrounding naval blockade had been elaborated in prize courts to permit complete interdiction of neutral trade with an enemy port when the blockade was publicly declared and could be maintained effectively, i.e., not merely imposed by paper to give a legal basis for sporadic captures of neutral vessels engaged in non-contraband trade with the enemy. But by the end of the century it had become clear that reference to even identical texts of different treaties could not create a uniform law. When France and Spain declared war on Great Britain in 1780, the Baltic states found their trade interrupted by British privateers and naval ships.

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25. 28 *Cons. Tr. Series* 3 (French text). The English text used here is from a book of EXTRACTS FROM THE SEVERAL TREATIES SUBSISTING BETWEEN GREAT-BRITAIN AND OTHER KINGDOMS AND STATES, OF SUCH ARTICLES AND CLAUSES AS RELATE TO THE DUTY AND CONDUCT OF THE COMMANDERS OF THE KING OF GREAT-BRITAIN'S SHIPS OF WAR 1, arts. 17, 19, 20 at 5, 7-8 (London 1741).

Under the leadership of Russia, they, ie., Denmark and Sweden, later joined by Prussia, declared their own interpretation of the privileges of neutrals in maritime war, and began to defend those rights by force.

The "armed neutrality" episodes of 1780 and 1800, coupled with an evolution of British administration and centralized authority over an increasing area impossible to govern effectively from London alone, can be argued to have ended the practice of licensing privateers in Europe. If "free flags" really covered "enemy goods except contraband," there was every incentive for even belligerent traders to ship their goods on neutral vessels, and the profits dropped out of privateering.[26] By 1856, the pertinent rules of naval warfare could be reduced to a simple prohibition of privateering and three statements of principle: Neutral flag covers enemy goods except contraband; neutral goods other than contraband are free on board even enemy ships; and a blockade, to have legal effect against neutral trade, must be effective, i.e., maintained by a force sufficient really to prevent access to the coast of the enemy.[27]

III. CODIFICATION

As the positivist impulse ground itself more deeply into the legal order during the 19th century, the utility of neutrality as a concept, and the possibility that it might be expedient to use that concept to accomplish humanitarian purposes, thus to satisfy "natural law" in its "morality" guise, became apparent. In 1863 the United States issued its General Orders 100 to the Union Armies in the Field which recited that honorable belligerents allow themselves to be guided by flags or signals of protection to avoid firing on hospitals.[28] The next year in Geneva the first multilateral convention directed solely toward the amelioration of the condition of the wounded in war was concluded. Most of the major states of Europe were signatories, although such important signatory states as France and Spain ultimately failed to ratify it. It provided for "Ambulances and Military hosptials" to be "neuter" and as such to be protected and respected by belligerents as long as used by the sick or wounded and not by military forces as such.[29] In 1868 an additional convention amended the 1864 convention somewhat and extended the applicable provisions to naval warfare. It also adopted the "white flag with a red cross" as the protecting symbol.[30]

The positivist impulse to codify and transform whatever principles might be derived from practice, diplomatic correspondence, moral insight

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26. At least, that is the conclusion in BERGBOHM, DIE BEWAFFNETE NEUTRALITÄT, 1780-1783 (1884), (*translated and extracted* in 2 SCOTT, THE ARMED NEUTRALITIES OF 1780 AND 1800 2, at 4 (1918)).

27. Declaration of Paris, 16 April 1856, 46 *Br. and For. St. Papers* 137.

28. SCHINDLER & TOMAN, THE LAWS OF ARMED CONFLICT 18 (2nd rev. ed. 1981) (The "Lieber" Code, arts. 115, 116).

29. 129 CTS 361.

30. 138 CTS 189.

and other sources into law binding because of the form in which produced probably hit its peak with regard to the law relating to neutrality with the great 1899 and 1907 partial codifications of the laws of war at The Hague. It cannot be the function of this study to examine the extraordinarily complex role that neutrality had assumed in the legislative thinking of the framers of the 1899 and 1907 conventions, or, for that matter, the 1904 convention regarding hospital ships, the 1906 convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, the 1909 London Declaration concerning the Laws of Naval Warfare, or, indeed, any of the other documents attempting with ever increasing particularity to provide detailed rules which would distinguish between legitimate military targets and targets that should be "neutral." All the conventions presume a legal status of "neutrality" and provide for rights of neutrals against belligerents, and obligations of "neutrals" owed to belligerents. In a positivist legal order, states assert rights for themselves and obligations for others on the basis of autointerpretation, municipal tribunals are bound by national constitutions to interpret the law as accepted for purposes of adjudication by the particular constitutional order creating the municipal tribunal. They are not bound (in most cases barely influenced) by the opinions of sister tribunals pronouncing interpretations of municipal law or the municipal version of international law for other states. Even with regard to the uniform law adopted by language formulations in multilateral conventions, national interpretations by the organs of states deriving their authority from municipal constitutions and answerable to municipal constituents, are the rule. From this point of view it is impossible to generalize about "neutrality" in the abstract; to conceptualize principles from the evidence of particulars even in multilateral conventions negotiated wholly within the international legal order. The political process by which the formulations are negotiated does not reflect attempts to approximate an abstract law dimly perceived by mankind's fallible reasoning powers and susceptible to scholarly refinement; it reflects political compromise based on perceptions of national expediency in a negotiating context, similar to the political process by which individual municipal systems legislate. Suarez's valid stated distinction between the *jus gentium* and "natural law" blocks the analysis.

But the other meaning of *jus gentium* familiar to naturalist jurists and now codified in article 38.1.c of the Statute of the International Court of Justice, the search for general principles of law recognized by civilized nations as evidence of general principles binding states in the international legal order, can proceed.

IV. THE REVIVAL OF NATURALISM AND NEUTRALITY

Natural law thinking was never wholly overcome by the rise of positivism. Whatever the logical weaknesses of the approach, it is also possible to seek some abstract conception of "neutrality" by examining municipal legislation to see if the political legislative processes of different countries, reflecting different political pulls, still come to the same result,

reflecting perhaps some consistent common thread. It is also possible to engage directly in moral argument, weighing the values protected by competing rules and deriving an ideal conception of what "neutrality" should be if it is to maximize the values implicit in the moral system of the international order. The first job, weighing the national statutes of many different countries to look for their common base, is at this point impossible. The groundwork has been done[31] but the job of collating the data reflected in the form of legislation in many different countries is far too big for a single researcher with limited time. It might, however, be of some interest just to note some of the more significant points of United States neutrality legislation. It should be borne in mind that this legislation is the product of a constitutional order in which the authority of the legislative branch of government is restricted. Thus, it cannot be pretended that the restrictions placed by legislation on the activities of American nationals abroad or any persons within American territory necessarily exhaust the legal obligations of the United States under the international law regarding neutrality; there may be international legal obligations which the United States is bound to observe in the international legal order, but which it cannot enforce against persons within its prescriptive jurisdiction for constitutional reasons. Nor can it be argued convincingly that all the restrictions adopted by the American Congress to avoid foreign entanglements represent the translation into municipal law of abstract principles of international law. The debates in the United States concerning the legislation rarely referred to international obligations, but reflected predominantly the opinions of the American legislators as to the expedient interests of the United States.

The first "Neutrality" legislation of the United States was the Act of 5 June 1794.[32] Under this statute, it was made subject to criminal penalties for "any citizen of the United States" acting "within the territory" or "jurisdiction" of the United States, to exercise a commission to "serve a foreign prince or state in war by land or sea." The dual qualification of citizenship and territoriality would have left John Paul Jones, a citizen, free to accept a naval commission from Russia because his service in war by sea was outside the territory or jurisdiction, as jurisdiction was then conceived, of the United States. Jones had in fact accepted such a commission as Rear Admiral in the Russian Navy and fought against Turkey in 1788-1789 without renouncing his American citizenship. He had died in Paris in 1792. Many other Americans accepted commissions as privateers against Spain from Buenos Aires during the second decade of the 19th century without running afoul of the Neutrality Act.

Section 2 of the Act of 1794 made it a crime in American law for any person, regardless of citizenship, to enlist in foreign military or privateeering service in the territory of the United States, or to hire another

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31. F. DEAK & P. JESSUP, NEUTRALITY LAWS, REGULATIONS AND TREATIES (2 vols.) (1939).

32. 1 Stat. 381; *Id.*, at 1079.

person within United States territory to go abroad and enlist. Exceptions were made for enlisting in a friendly foreign privateer or warship transiently in the United States, and for a *locus poenitentiae*, an exemption for persons illegally enlisting who, within thirty days, came home and gave information leading to the conviction of the person soliciting enlistments for the foreign state. This last exception was deleted by a superseding statute in 1818.

Section 3 forbade the arming or fitting out within the United States of a foreign privateer or naval vessel knowing it to be for employment against another foreign country with which the United States was at peace. It did not apply to the acts of American citizens abroad.

Section 4 forbade in the United States the augmenting of existing armaments on a foreign vessel merely owned by foreigners whose prince was at war with another country at peace with the United States.

Section 5 forbade any person within the United States to "prepare the means for any military expedition or enterprise to be carried on from thence gainst the territory . . . of any foreign prince or state with whom the United States are at peace." In 1917, this provision was augmented by forbidding also the furnishing of money in the United States for military or naval expeditions against friendly foreign states.[33]

All these provisions, with the amendments noted, and with some minor technical modifications, are still in force in the United States.

It seems noteworthy that this original view of "neutrality" maintained since 1794 emphasizes the territory of the United States as the limit of prescriptive authority. The only provisions dealing with activity outside the United States relate to enlistments set in motion under arrangements made within the United States. The only mention of citizens of the United States does not extend jurisdiction to actions abroad, but, in section 1, limit the territorial prescription to exempt foreigners who have foreign commissions from their scope; foreigners with foreign commissions can legally "exercise" those commissions within the territory of the United States or on board American vessels, subject, of course, to other laws of the United States which might make criminal here any of the particular actions that might be required by some foreign government under its commissions.

The continued validity of section 5, and its place in the basic network of criminal law certainly raises questions about unlicensed fundraising and other private activities in the United States in support of foreign "freedom fighters" against the governments of countries with which

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33. The augmentation was merely to insert the words "or furnishes the money for, or who takes part in" between "prepare the means for" and "any military expedition." F. DEAK & P. JESSUP, *supra* note 31, at 1097, *reprinting* 18 U.S.C. § 25 (1934 ed.). The current codification appears in 18 U.S.C. § 960 (1976 ed.). The history of this language is summarized by the Editor's Note in F. DEAK & P. JESSUP, *supra* note 31, at 1081. The key amendment was made in the Act of 15 June 1917, § 8, 40 Stat. 217 at 221.

the United States is at peace, like Nicaragua. Whether or not permitting such fund-raising to continue is a violation of the public international law regarding neutrality, a question as to which the municipal statute is not determinative and, in theory, not even very persuasive, there are certainly questions about the apparent failure to enforce the law by those officials in the United States who are charged with constitutional responsibility under the President to "take care that the laws be faithfully executed."[34] It is, of course, possible that the fund-raising and other activities in the United States of supporters of the Nicaraguan "contras" have not been supporting any "military or naval expeditions" but only activities unrelated to the ongoing hostilities in Nicaragua, despite the talk of helicopters and support for the struggle that the fund-raisers are reported to have used so freely. And activities by our government directly are authorized by later statutes which, to the degree inconsistent with the 1794 statutes as occasionally re-enacted, would supersede them.

An Act of 14 June 1797 forbidding the fitting out of privateers by citizens of the United States outside the territory of the United States for employment against friendly foreign powers or against citizens of the United States or their property, extended the jurisdictional conception beyond territoriality. The Act specifically applied to the actions of American citizens abroad only. It was renewed in 1818 but repealed in 1909.[35] Presumably the repeal was based upon the almost universal abolition of privateering by the middle of the 19th century, and not any return to a strict territorial conception of prescriptive jurisdiction, any perceived loosening of the international legal obligations of a neutral state, or any change in the perceived expediency of preventing citizens entangling the United States in foreign complications or preying on their fellow-citizens.

On 20 April 1818 a new "Act for the Punishment of Certain Crimes Against the United States"[36] reenacted the provisions of the Act of 1794 and the Act of 1797 summarized above making one significant change; section 2 of the Act of 1794 was extended to forbid, within the territory of the United States, entering into the service of a foreign "colony, district, or people" as well as a foreign prince or state. The purpose was to forbid the use of the United States territory as a recruiting ground for foreign revolutions. In 1818, Latin American wars of independence were at issue and, as noted, above, many Americans in fact enlisted in the revolutionary cause and took out privateers' licenses from unrecognized revolutionary authorities to fight against Spain.[37]

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34. U.S. CONST. art. II, sec. 3.

35. F. DEAK & P. JESSUP, *supra* note 31, at 1083.

36. 3 Stat. 447, DEAK & JESSUP, *supra* note 31, at 1085.

37. This caused significant legal problems in the United States when the authority of the Latin American authorities to condemn Spanish vessels in prize arose. *See* U.S. v. Palmer *et al.*, 16 U.S. (3 Wheat.) 610 (1818). Nor does it appear that the United States had provided by the neutrality legislation the legal means necessary to enforce against American citizens United States obligations under Pinckney's Treaty with Spain dated 27 October 1795, 11 Bevans 516, 53 CTS 9. Article 14 of that Treaty obliged each party to punish as a

The first legislation authorizing an American official abroad to use "such force as may at the time be within his reach, belonging to the United States" to "prevent the citizens of the United States from enlisting in the military or naval service" of foreign countries to make war against a third state with which the United States was at peace, i.e., extending the reach of the Neutrality Act of 1794 provisions to the actions of Americans outside the territory of the United States, related only to American Ministers and Consuls in China, Japan, Siam, Persia and other countries where by treaty the United States officials had the authority to apply American law directly to citizens through consular courts.[38]

Limitations on the export of what some belligerent might want to call contraband do not appear in American municipal legislation until 1898, when the Congress authorized the President to prohibit by Executive Order the "export of coal or other material used in war."[39] It was repealed in 1922. Meantime, in 1912, 1915, 1916 and 1917, by a series of statutes Congress authorized wider and wider discretion in the President to control American trade in the interest of "neutrality." The 1912 Act recites only concern about "domestic violence" in Latin America,[40] but the succeeding statutes related much more generally to "the existence of war to which the United States is not a party,"[41] "the existence of a war in which the United States is not engaged,"[42] and "a war in which the United States is a neutral nation."[43] Since the last of these three statutes was passed after the United States joined in the European War of 1914-1918, presumably it reflects the experience of the United States as a neutral in the changed world of the twentieth century, and is not bound to the immediate "expediency" considerations of the statutes passed in response to ongoing crises. Indeed, the 1917 Act, slightly modified in parts, served the United States neutrality interest during the first two years of the 1939-1945 war in Europe and the first four years of the 1937-1945 war in the Far East.

"pirate" its citizens taking letters of marque to act against the subjects or property of the other in times of peace between the United States and Spain. No prosecutions for "piracy" have been found in which this language was significant, and the one famous case in which the Executive officials of the United States thought it should apply resulted in an acquittal. Lewis, *John Quincy Adams and the Baltimore "Pirates"*, 67 A.B.A.J. 1011 (1981).

38. 12 Stat. 72 at 77, The Act of 22 June 1860, § 24, *reproduced in* F. DEAK & P. JESSUP, *supra* note 31, at 1086.

39. 30 Stat. 739; F. DEAK & P. JESSUP, *supra* note 31, at 1088. There are other statutes, not reproduced by Deak & Jessup, which involved conceptions of "neutrality." But they seem to have been more a response to political pressures than the implied acceptance of any particular obligation as a matter of natural law. *E.g.*, the Act supplementary to the Act of 20 April 1818 "for the prevention of American Armed expeditions against certain Foreign Territories [in Canada] conterminus with those of The United States," 10 March 1838, *reproduced in* 26 B.F.S.P. (1837-1838) 1349. The Act expired in 1840 and was not renewed.

40. 37 Stat. 630; F. DEAK & P. JESSUP, *supra* note 31, at 1089.

41. 38 Stat. 1226 (Act of 4 March 1915); F. DEAK & P. JESSUP, *supra* note 31, at 1089.

42. 39 Stat. 756 (Act of 8 September 1916); F. DEAK & P. JESSUP, *supra* note 31, at 1090.

43. 40 Stat. 217 (Act of 15 June 1917) at p. 221, Title V of the Act; F. DEAK & P. JESSUP, *supra* note 31, at 1092.

Somewhat modified, it is still in force.

The 1917 Act authorizes but does not compel the President to forbid the departure from the jurisdiction of the United States of any vessel, domestic or foreign, which "is about to carry fuel, arms, ammunition, men, supplies, dispatches, or information to any warship . . . of a foreign belligerent nation in violation of the laws, treaties, or obligations of the United States under the law of nations." It is not entirely clear what the Congress thought the "law of nations" might require in this regard. Moreover, since the authority granted to the President is discretionary in him, it would seem that the Congress was actually authorizing him to permit acts which would place the United States in violation of the "law of nations."[44]

Section 2 of the Act authorizes the President to forbid the departure from the United States of any vessel owned in part by an American, or any foreign vessel not a public vessel at the time it entered an American port, which is "manifestly built for warlike purposes."

Section 3 forbids the delivery from American jurisdiction of any vessel potentially a vessel of war to be delivered under contract to a belligerent nation. It does not authorize any Presidential discretion in this regard and can be viewed as implementing a view of neutral obligations which the United States had adopted during the American Civil War when the Confederate forces bought ships and supplies in England. The United States had then strongly protested the English breach of "neutrality," which the British had denied was a breach of "neutral" obligations at all.[45]

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44. The President's obligation to faithfully execute the laws was probably felt to assure that he would not permit the departure of vessels in violation of other laws of the United States; the statute of 1917 certainly does not supersede obligations of the President, only authorize further action to implement his obligations. By Article VI of the Constitution, treaties are also law in the United States and subject to the same obligation in the Executive. It is an unresolved question whether the obligations of the United States under general international law are part of the legal order established by the Constitution. *See* Rubin, *Professor D'Amato's Concept of American Jurisdiction is Seriously Mistaken*, 79 AM. J. INT'L L. 105 (1985).

45. The British Government eventually agreed to the United States position for the purpose of re-establishing friendly relations with the victorious Union, and an international arbitration instructed as to this view of the law awarded the United States an indemnity of $15.5 million in 1872. *See* 1 MOORE, INTERNATIONAL ARBITRATIONS 315, 343 (1898). In the attempted codification of the law in 1907, The Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in War on Land, art. VII, it is provided that "A neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet." On the other hand, in the Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, while this article is repeated in substance, it is immediately followed by another article: VIII: "A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace." How the two articles can be reconciled seems to lie more in the realm of metaphysics than law. *See*

The next several sections prescribe technical rules for the enforcement of the first three sections

Title VI of the 1917 Act authorizes officials designated by the President to confiscate "any arms or munitions of war, or other articles" attempted to be exported from the United States "in violation of law" and does not relate that enforcement authority only to laws designed to protect the "neutrality" of the United States. This provision has been expanded over the years, and given ever increasing substance to the point that it now amounts to a general authority in the president to control entirely and for any foreign policy purpose the export of arms, ammunition and implements of war. In its current incarnation (1988) this authority of the President to control the import and export of defense articles and defense services involves inscribing the categories of controlled items and services in a "Munitions List" and authority to issue or refuse licenses is lodged in the State Department with discretion to be exercised in coordination with the Director of the Arms Control and Disarmament Agency. In fact, the bureaucratic coordination of munitions export license applications is a complex matter in which issues of the legal restraints on "neutrals" have little if any role.[46]

V. CONCLUSIONS

Looking back at the American legislation, it seems clear that conceptions of international law played little if any role in the drafting of the Neutrality Act of 1794 and its successors. The current controls on the export of arms, ammunition and implements of war are related solely to policy, not at all to legal or moral considerations, except perhaps such legal considerations, like treaty obligations, that are embedded in policy by the operation of municipal American law under our Constitution. But the fact that legislation is the product of political choice does not mean that the uniform political choices of many countries, or the political choices that seem likely to be uniform because compelled by similar political factors in the foreign relations of many countries, do not reflect a legislative process in the international legal order. There is no reason why international law cannot be made by political decisions on the part of states as legislators; the analogy is to municipal law processes in which the personal motivations of members of a legislative body are irrelevant to considerations of whether the product of their actions, legislation, is binding as law within the legal order in which they function as legislators.

From this point of view, reviewing the overall conceptions that seem to be reflected in the treaties and in American legislation, and in the light of about three thousand years of jurisprudential thought in which the ba-

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Rubin, *The Laws of War*, 76 PROC. AM. SOC. INT'L L. 139, 142-143 (1982).

46. *See* Rubin, *United States Export Controls: An Immodest Proposal*, 36 GEO. WASH. L. REV. 633 (1968), for some indication of the coordination process as of 1968 and the lack of any role for lawyers in it. The current statute is, if anything, more complex.

sic principles seem remarkably stable, it is possible to attempt some generalizations.

The first would be that the basic underlying principle is not one of substance at all, but one of a distribution of authority. Under that principle, pretentions to universal legislative authority exist only when "universal" religions or political organizations exist which in fact persuade their subjects of their authority. That condition does not exist today, when statesmen might pay lip-service to some common substantive ideals, such as a commitment to human rights, but absolutely deny the legislative authority of any body beyond their municipal constitutional orders to translate those ideals into "law." The legislative authority of the international legal order does not rest on dominant, or even near universal, acquiescence or practice, but on express or implied consent. It is true that an implied consent can be derived from rather distant evidence, but in the final analysis, the more indirect the evidence of that consent, the less likely it is to convince the statesmen who must be convinced in order actually to affect the conduct of states. Moral suasion can be used, but claims, diplomatic correspondence, appeals to tribunals and the other enforcement mechanisms of the international legal order do not flow from mere moral positions, however widely held.

From this it can be concluded that there is now no overarching natural law of "neutrality."

Nonetheless, it can be seen that there is a distinction in positive law, and possibly in natural law, between the acts of states as such and the acts of individuals. Obligations relating to neutrality contained in treaties and derived from any analysis of custom as evidence of law seem to emphasize territoriality. Even in the export control laws of the United States, which do affect the legal liability of Americans acting outside the territory of the United States by defining "export" to include such things as the imparting of "technical data," mere information, to foreigners in any place,[47] there is implicit a limit to American authority to make rules. It is the international legal order that defines the limit of that authority. It would probably be undisputed, if ever anything were undisputed among international lawyers, that there can be no obligations under international law that would require a state to act outside of its legal capacity to act. Thus, while there might be some disagreement as to precisely what actions taken by a state within its own territory represent "unneutral" behavior of that state, and that determination is made by reference to treaties and general international law subject to a great deal of interpretation and dispute,[48] it is probably correct that in its essence the law of

47. This was the principal basis for the conviction and imprisonment of one former CIA agent and the indictment of another in 1982 for activities that they argued occurred entirely in Libya. *See* Rubin, *To Prosecute Qaddafi's American Mercenaries*, N. Y. Times, Nov. 13, 1981, at A34, for citation and some quotations from the relevant statutes.

48. For example, the United States regarded as within its concept of "neutrality" the exchange of fifty overage armed naval vessels for control over British bases in the Western

neutrality fixes obligations on a state but not directly on its nationals. Thus direct transfer of military vessels, legislation favoring one party to a foreign war, the use of public land to support one party's military effort, and similar public acts of the public authority seem to engage the public international law of neutrality. The failure to control the acts of nationals abroad probably does not, and it might even be questioned whether historically the failure to control the "unneutral" commercial acts of any persons within the territory of the "neutral" state involves any degree of state responsibility in the absence of treaty relating to the subject. The inhibition on individual activity favorable to one or another belligerent was historically the risk of loss; the capture of transferred property and its condemnation in prize.

On the other hand, the extension of state authority into realms of commerce hitherto thought distinct,[49] and the general extension of conceptions of municipal prescriptive jurisdiction to include acts done by foreigners abroad with only some (ever diminishing) impact on the territory of the prescribing state, can be argued to have expanded the conception of state responsibility. But many states have reacted to new assertions of legislative authority by the United States, whose legislature, after all, does not contain British, West German, Japanese or other foreign representatives, not by imitation and expanding their own legislative purview to create a new pattern of overlapping jurisdictions, but by resisting the new assertions as beyond the legal authority of the United States in the

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Hemisphere in 1940. At that time the United States was not yet a belligerent in the Second World War. The exchange clearly favored the British in their fight with Germany on both ends of the deal; it increased their naval capacity and relieved them of a defense burden in an area of the Empire into which German military planners might have wanted to move because of the bases' strategic locations near important shipping lanes through which contraband cargo was being sent to England. The American reasoning rested on the assertion that the vessels "were not built, armed, equipped as, or converted into vessels of war with the intent that they should enter the service of a belligerent." 39 Op. Att'y Gen. 484 (1940). I suppose the Attorney General (Robert Jackson) was living in the same world as Sir Winston Churchill. *See* 2 W. CHURCHILL, THE SECOND WORLD WAR 353 (3rd ed., rev. 1951). Churchill was entirely aware that the United States action was "unneutral," but drew a fine distinction between *unneutral* acts and *belligerent* acts. *Cp. id.* at 358: "The transfer to Great Britain of fifty American warships was a decidedly unneutral act by the United States," with his explanation to the Parliament that "Only very ignorant persons would suggest that the transfer of American destroyers to the British flag constitutes the slightest violation of international law, or affects in the smallest degree the non-belligerency of the United States." *Id.* at 367. Because the qualification of an act by one state cannot legally bind another, and Nazi Germany was legally as capable as the British and Americans of categorizing the deal in legal terms, and a qualification as "belligerent" act would not have been inconsistent with the facts, I confess to being a very ignorant person, but nonetheless thankful that the deal was consummated.

49. This point has frequently been exaggerated in legal argument. The Dutch United East India Company established in 1602 was in all significant ways an arm of the state; the English East India Company had the legal authority under English municipal law both to trade and, in some cases, to go to "war," and did so in India and elsewhere, where the niceties of European classifications were not appreciated.

international legal order.[50] Thus, the degree to which state responsibility will be engaged by the failure of states to control the commerce or overseas activities of their nationals seems very questionable at the moment. It is entirely possible that the United States, with its great claims to legislative authority over both its nationals and foreigners based on minimal territorial contacts with the United States, has a higher standard of behavior if it wants to avoid international claims, than other states which do not make equivalent claims to jurisdiction. If that is so, then United States assertions of authority, denial of responsibility, and apparent disregard of the views of other states on the issues, threaten the equal application of the law to all its subjects and with it the stability and security that the law provides.

From this point of view, an entire new vista is opened for study, in which the law of "neutrality" re-enters the natural law domain as a mere aspect of the ancient rule, *res inter alios acta* reflected in the law regarding *jus standi*. There is irony in this, since the modern spokesmen for natural law theory seem the most inclined to disregard national sovereignty as part of the law-making process, substituting reason and moral perception for formal consent as an exercise of national discretion. But since the trend led by the United States seems to have hit serious opposition, and some retreat will be compelled either by the politics of international trade and our alliance structure, or by direct acknowledgment of the limits the international legal order places on national jurisdiction, further analysis of this aspect of the modern law of "neutrality" seems premature.

A final implication of all this is not premature to mention. If the legal responsibility of a state under evolving conceptions of jurisdiction is expanding to make a state legally responsible for the acts of others, including other states whose activities could have been prevented by the "neutral's" exercise of its jurisdiction, serious questions can arise about the failure of "neutral" states, like Austria and Sweden, to exercise that jurisdiction. For example, would it be a breach of Austrian neutrality for Austria to fail to erect a missile defense system that could deny overflight

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50. *See, e.g.*, Amicus Curiae Brief submitted by Australia, Canada, France and the United Kingdom in Matsushita Electric Industrial Co. v. Zenith Radio Corporation, 24(5) I.L.M. 1293 (1985). The petitioners and Japan argue that the United States antitrust laws cannot properly extend to forbid acts of foreign defendants mandated by the foreign state within whose territory those acts occurred, even if the result of those acts has an effect within American territory. Instead of adopting a universal "effects" doctrine as the basis for overlapping jurisdictions, the petitioners deny the doctrine justifies the reach abroad of the American prescriptions. *Cf.* British Airways Board v. Laker Airways Ltd., 3 W.L.R. 413 (H.L. 1984), *summarized in* 79 AM. J. INT'L L. 141 (1985). The House of Lords in that case held that the alleged conspirators against Laker Airways, accused of violating the American antitrust laws, could be tried by each country involved with regard to that part of their actions that fell within the jurisdiction of each country. The Lords' conception of actions falling within each country's jurisdiction was not based on remote impacts, but on actual physical activities by licensees of the petitioners carried out within the territory of the United States.

of Austrian airspace to NATO cruise missiles? Or Soviet equivalents aimed at NATO bases in Italy? Must Austrian nationals in West Germany be prevented by Austrian legislation from participating in any aspect of West German industry that contributes to NATO defense? It seems to me that a "natural-moral" law case can be made out that extensions of national jurisdiction have created these new responsibilities.

On the other hand, if a fundamentally "positivist" view is taken of the law, then what constitutes "neutral" behavior is not susceptible of grand generalities. As long as Austria's obligations are codified in the basic treaty,[51] then the treaty means whatever its parties intend it to mean, and references to general international conceptions in the documents related to the treaty and in Austrian municipal law are meaningless in the absence of diplomatic correspondence to clarify what interpretation of general international law is intended. To the degree that state practice "accepted as law" is a source of clarification, differences in interpretations of the practice and the degree to which any particular practice is accepted as "law" or merely asserted by one party to be "law" are immediately apparent. Are Sweden's obligations under Sweden's own interpretation of neutrality identical with the obligations equally strongly asserted for itself by Finland? Are Soviet interpretations, or American, under which all acts favorable to the one side are considered consistent with neutrality, and all acts unfavorable considered questionable, in anyway binding on anybody? Yet, because as a matter of politics those assertions cannot be totally disregarded, the adjustments in national policy made in consideration of the views and anticipated sensitivities of others can be viewed as part of the legislative process of positive international law.

Some closer analysis of the evolution of practice seems also necessary. For example, if the Soviet explanation for its submarines' presence in Swedish waters beyond the scope of the rules of "innocent passage" assumed in the Corfu Channel Case, or "transit passage" as negotiated in the 1982 UNCLOS III Convention, is to deny that presence or to excuse it on the ground of navigational error or accident, then there is some persuasive evidence that Swedish "neutral" obligations toward the Soviet Union do not extend to allowing Soviet naval penetration of the closed areas; but perhaps the situation would be different if NATO submarines were permitted access analogous to that which Sweden denies to the Soviet Union. But these are questions which I believe bring us to the frontiers of the current law-making process, where assertions of law are based more on perceptions of political advantage than on any analysis of values agreed to or inherent in the legal order.

51. State Treaty for the Reestablishment of an Independent and Democratic Austria, Vienna, 15 May 1955, 217 U.N.T.S. 223.

Compulsory Jurisdiction and Defiance in the World Court: A Comparison of the PCIJ and the ICJ

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I. INTRODUCTION

Recently, scholarly literature concerning the International Court of Justice has exhibited great concern over increasing state defiance of the Court. This growing concern for the effectiveness of the World Court peaked following the United States withdrawal and subsequent flouting of the Court's decision in the *Nicaragua* case.[1]

Concern over the increased defiance of the Court seems justified, some literature on the subject notwithstanding, and searches for a solution to this defiance seem timely, for while the effectiveness of the Court may at times have been threatened, it is now in danger of being rendered impotent. But, while there has been considerable state defiance of the Court during the recent ICJ years, the PCIJ years were relatively free of this phenomenon.[2]

We intend to explore the trend toward defiance of the Court in the

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1. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27, 1986).

2. Though the instances of defiance of the Court are well documented and have been given a great deal of scholarly attention, (*See* H. THIRLWAY, NONAPPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE, 3-20 (1985). *See also* Highet, *Litigation Implications of the U.S. Withdrawal from the Nicaragua Case*, 79 AM. J. INT'l L. 992 (1985)) there is some disagreement regarding what constitutes defiance and what should be regarded as "normal behavior" provided for in the statute. (THIRLWAY, *id.* at 1-20). Rather than debate the merits of the various perspectives, we will classify defiance as any behavior where a state is legally bound to the Court's jurisdiction but disregards the orders of the Court in a *willful* manner. Thus, judgments about states' attitudes, as seen in their responses to the Court, become an important criterion for our determination. Our definition of defiance includes both non-appearance and non-performance. Albania's non-payment of the damages assessed in the *Corfu Channel* case is an example of the former; France's behavior in the *Nuclear Tests* cases (Nuclear Tests (Austl. v. Fr.; NZ v. Fr.) 1974 I.C.J. Rep. 253 and 457 (Judgments of December 20)) is an example of the latter and the United States behavior in the *Nicaragua* case is an example of both willful non-appearance and non-performance. This categorization excludes then, instances like Soviet behavior toward the Court in The Aerial Incident of October 7th, 1952, (U.S. v. U.S.S.R.) 1956 I.C.J. 9 (Order of Mar. 14) and the non-appearance by the representative from Bulgaria in the *Electric Co.of Sofia and Bulgaria* case, (*see infra* note 57) who was unable to attend because of the war.

postwar years - in comparison with the low incidence of defiance of the Court in the interwar period - with the intent of assessing why the PCIJ seemed relatively more able to avoid outright defiance than the ICJ. An assessment of the apparent success of compulsory jurisdiction under the PCIJ may provide some prescriptions for an ailing ICJ.

In discussing the possible explanations for the increased defiance of the Court, we will argue that, although many factors are contributory, it is primarily a changed attitude toward international adjudication in the post World War II system that is responsible for the recent instances of defiance of the ICJ. Most importantly, present attitudes toward third party adjudication do not seem conducive to any form of compulsory jurisdiction, not even the "optional" acceptance of compulsory jurisdiction.

We will also argue that the apparent progress made toward compulsory jurisdiction in the period of the PCIJ was illusory and reflected no more than an immediate postwar legal idealism that is likewise reflected in the early years of the ICJ immediately following World War II.

II. COMPULSORY JURISDICTION AND THE PCIJ

In order to provide an adequate comparison of the success of compulsory jurisdiction under the two incarnations of the World Court, we shall first proceed with a discussion of the cases brought before the PCIJ involving compulsory jurisdiction. For comparative purposes we will rely on a recent analysis of the compulsory jurisdiction cases under ICJ auspices.[3] To analyze the effect of compulsory jurisdiction on the outcome of ICJ cases, the universe of these cases was divided into four categories: Category I cases, in which the respondent state made no preliminary objections; Category II cases, in which there were preliminary objections that were upheld by the Court; Category III cases, in which the preliminary objections were overruled by the Court, but the merits decision supported the respondent state's submissions; and Category IV cases, in which the Court upheld the applicant state's case on both objections and merits.[4]

From this distribution of ICJ cases, it is evident that compulsory jurisdiction does not enhance the Court's role in Category I cases, which would probably have been submitted to the Court eventually even without compulsory jurisdiction, nor in Category II cases, because in these cases the Court simply finds it lacks jurisdiction. Thus only Category III and IV cases provide a test of the Court's compulsory jurisdiction. The record for the ICJ in these categories is rather dismal.[5]

Defiance of the Court's compulsory jurisdiction and judgments in recent years seems more the rule than the exception. A cursory look at the

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3. The following analysis of the effects of compulsory jurisdiction under the I.C.J. is based on, Scott & Carr, *The I.C.J. and Compulsory Jurisdiction: The Case of the Closing Clause*, 81 AM J. INT'L L. 57 (1987).

4. *Id.* at 60.

5. *Id.* at 62-66.

PCIJ cases, on the other hand, reveals apparent success for the Court's compulsory jurisdiction during the interwar period. It is this apparent success, as compared with the failure of the ICJ, that we intend to explore and explain below.

The cases submitted to the Permanent Court of International Justice under its compulsory jurisdiction, based either on the optional clause or compromissory clauses in treaties, also can be categorized like those of the ICJ above. One discovers, through such a categorization, that the distribution of PCIJ cases is somewhat different from ICJ cases. Not only were there a greater number of joint submissions under the PCIJ than the ICJ,[6] but even in compulsory jurisdiction cases there seems to have been a general desire for peaceful dispute settlement, either legal or negotiated, and the Court apparently was seen to have a role in that settlement process.

Even a state lodging preliminary objections to the Court's jurisdiction may not have been seen as seriously questioning the Court's role. The Court in the *Case Concerning Minorities in Upper Silesia*[7] overruled Poland's objections to its jurisdiction, noting that Poland had already participated in the case, thereby acknowledging the jurisdiction of the Court.[8] In other words, Poland must have initially seen the Court as a means for resolving the dispute before it lodged its preliminary objections.

Another example, to be discussed more fully below, is Germany's withdrawal of the *Factory at Chorzow Indemnity* case from the Court's list before the Court had made a decision.[9] Germany and Poland reached an agreement through negotiations and rather than pursuing a judicial resolution, Germany agreed to withdraw the case once a negotiated settlement had been reached. The PCIJ seems then, to have afforded states a desirable means of dispute resolution, even when the cases were submitted unilaterally on the basis of the Court's compulsory jurisdiction.

A. Category I Cases

It is difficult to distinguish Category I cases from those that are brought to the Court by joint submission. In 1931 Denmark requested that the PCIJ, on the basis of the optional clause, declare that Norway's latest action in a long-standing debate with Denmark was contrary to international law.[10] Since 1919, Denmark and Norway had disagreed over

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6. Coplin & Rochester, *The Permanent Court of International Justice, The International Court of Justice, The League of Nations, and The United Nations: A Comparative Empirical Survey*, 66 AM. POL. SCI. REV. 529 (1972).

7. Rights of Minorities in Upper Silesia (Ger. v. Pol.) 1928 P.C.I.J. (ser. A) No. 12 (April 26).

8. *Id.* at 24.

9. 5 P.C.I.J. ANN. R. (ser. E) No. 5, at 200.

10. Memorial of Denmark, Legal Status of Eastern Greenland (Den. v. Nor.) 1933 P.C.I.J. (ser. C) No. 62 (October 31, 1931).

the sovereignty of Eastern Greenland. Denmark claimed that Eastern Greenland was its sovereign territory and Norway claimed that Eastern Greenland was *terra nullius*.[11] Before submitting the case to the PCIJ, Denmark suggested to Norway that both submit the case to the PCIJ by special agreement, and Norway initially agreed.[12] However, Norway wanted a guarantee that if the Court decided that Denmark did not have sovereignty, Denmark would then acknowledge that Greenland was *terra nullius*. Denmark refused, on the grounds that this would prejudge the case.[13] Norway thereupon refused to submit the special agreement and issued a proclamation of its own occupation of Eastern Greenland.[14] But, even in Norway's act of proclamation, there appears a desire for a settlement of the dispute, a desire to ensure that if the Court did not decide in Denmark's favor the dispute would not merely be returned to its status before adjudication.[15] Norway raised no preliminary objections to the Court's jurisdiction and immediately complied with the Court's decision that Norway revoke its proclamation.[16]

The other cases in Category I also were cases in which both parties seemed favorably disposed toward adjudication, even though the cases were submitted to the Court unilaterally. In the *South-Eastern Greenland* case,[17] Norway and Denmark separately appealed to the Court on the basis of the optional clause. The Court joined the two cases, saying that they were equivalent to *one special agreement*.[18]

The Diversion of Water from the River Meuse[19] also resembles cases submitted by special agreement — while the Netherlands brought the case to the Court by means of the optional clause, Belgium entered counterclaims accusing the Netherlands of equivalent breaches of the 1863 Treaty that had been designed to settle all previous and future difficulties with regard to both states' interests in the River Meuse.[20]

A fourth case that falls under this first category concerns Czechoslovakia's appeal to the PCIJ to revoke a decision of the Hungaro-Czechoslovakian Mixed Arbitral Tribunal.[21] While this case does not necessarily

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11. Preuss, *The Dispute between Denmark and Norway over the Sovereignty of East Greenland*, 26 AM. J. INT'L L. 472 (1932).

12. *Id.* at 486.

13. *Id.*

14. *Id.*

15. *Id.*

16. 9 P.C.I.J. ANN. R. (ser. E, No. 9), at 141.

17. Case Concerning the Legal Status of the South-Eastern Territory of Greenland (Nor. v. Den.; Den. v. Nor.) 1932 P.C.I.J. (ser. A/B) No. 48 (Aug. 2).

18. *Id.* at 270.

19. Diversion of Water from the Meuse (Neth. v. Belg.) 1937 P.C.I.J. (ser. A/B) No. 70 (June 28).

20. *Id.* at 7.

21. Appeal from Judgment of the Hungaro-Czechoslovakian Mixed Arbitral Tribunal (The Peter Pazmany University v. The State of Czechoslovakia) (Czech. v. Hung.) 1933 P.C.I.J. (ser. C) No. 72, at 15.

resemble a special agreement, Hungary, nonetheless, raised no preliminary objections, thus also appearing to desire a judicial resolution to the dispute.[22]

The remaining case in this category, the *Société Commerciale de Belgique*,[23] was submitted to the Court by Belgium against Greece, on the basis of a compromissory clause. Greece refused to submit the case jointly, but over the course of the hearings, Belgium so altered its case that the Court declared that differences no longer existed between the parties.[24] As Belgium altered its position, the case came more closely to resemble a negotiated settlement or one submitted by *ad hoc* agreement rather than compulsory jurisdiction.[25]

PCIJ Category I cases resemble those heard by the ICJ; Category I cases heard by both Courts are primarily cases that both parties identify as amenable to adjudication. States' recognition of the Court as a legitimate part of the dispute settlement process, as illustrated by the cases in this first category, does not necessarily differentiate the PCIJ from the ICJ in its early years. The differentiation becomes more clear in the categories in which states would be expected to be more adversarial when faced with the Court's compulsory jurisdiction.

B. Category II Cases

Cases in this category are cases in which preliminary objections are lodged and upheld by the Court.[26] The respondents' objections to a legal resolution of the dispute are thus supported by the decision of the Court. These cases then, whether heard by the PCIJ or ICJ, are designated by the Court as falling outside of its compulsory jurisdiction. For example, in the *Phosphates in Morocco* case,[27] France responded to Italy's application to the Court by objecting that the dispute over licenses to prospect for phosphates in Morocco arose before France and Italy accepted the optional clause.[28] Therefore, France claimed, the dispute fell outside of the jurisdiction of the Court. The Court agreed with France in this case and there was no further action.[29]

The other two cases that fit this category are slightly more compli-

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22. Appeal from Czechoslovak-Hungarian Mixed Arbitral Tribunal (The Royal Hungarian Peter Pazmany University) (Czech. v. Hung.) 1933 P.C.I.J. (ser. A/B) No. 61 (December 15).

23. Societe Commerciale de Belgique (Belgium v. Greece) 1939 P.C.I.J. (ser. A/B) No. 78 (June 15).

24.. *Id.* at 175.

25. Although Greece did not compensate Belgium in accordance with the Court's ultimate declaration, this failure was due to inability to pay rather than any willful noncompliance. Judicial Decisions, *Sovereign Immunity - Seizure of State Property*, AM. J. INT'L L. 508 (1953).

26. Scott & Carr, *supra* note 3, at 62-63.

27. Phosphates in Morocco (Italy v. Fr.) 1938 P.C.I.J. (ser. A/B) No. 74 (June 14).

28. *Id.* at 17.

29. *Id.* at 40.

cated, because in each the Court joined the preliminary objections and merits phases, saying that in order to make a decision upon the preliminary objections it had to consider facts impinging upon the merits of the cases. The Court ultimately decided, in each case, that it lacked jurisdiction. In the *Panevezys-Saldutiskis Railway* case,[30] the Court overruled one of Lithuania's preliminary objections, only to then agree with Lithuania that Estonia had not exhausted local remedies.[31] Similarly, in the *Pajzs, Csaky and Esterhazy* case[32] the Court joined the preliminary objections and merits phases, but ultimately agreed with Yugoslavia that it lacked jurisdiction.[33]

C. Category III Cases

The only PCIJ case in which there were preliminary objections overruled by the Court, but where the decision on the merits supported the respondent, is the *Interpretation of the Statute of Memel.*[34] This case was brought to the Court by Britain, France, Italy, and Japan against Lithuania. Lithuania objected that the basis for jurisdiction, the *May 8, 1924 Convention Relating to Memel,*[35] indicated that any dispute must first be referred to the League Council. The Court overruled Lithuania's objection, saying that a hearing by the Council was not a prerequisite to the Court's jurisdiction under the Convention. However, the Court decided the merits of the case in favor of Lithuania's submissions.[36]

Two points may be raised in considering this case. The first is that Lithuania did not object to the jurisdiction of the Court per se, but rather to the interpretation of the 1924 Convention.[37] Perhaps then, the compulsory nature of the Court's jurisdiction did not compel Lithuania to comply with the adverse ruling on its preliminary objections, but since its objections were not directed toward the jurisdiction of the Court it may have had little reason not to pursue the case as directed by the Court. The other point to consider is the possibility that a small state such as Lithuania may have realized that it had greater bargaining power before the Council *or the Court* than it might otherwise have had in ordinary negotiations with more powerful states such as Britain, France, Italy or Japan. This possibility could make even an unwanted court decision appear to be more desirable than certain other alternatives.

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30. Panevezys-Saldutiskis Railway (Est. v. Lith.) 1939 P.C.I.J. (ser. A/B) No. 76, at 4 (February 28).

31. *Id.* at 22.

32. Pajzs, Csaky, Esterhazy Case, (Hung. v. Yugo.) 1936 P.C.I.J. (ser. A/B) No. 68 (December 16).

33. *Id.* at 65.

34. Interpretation of the Statute of the Memel Territory (Brit., Fr., It. and Jap. v. Lith.) 1932 P.C.I.J. (ser. A/B) No. 49 (August 11).

35. Convention Relating to Memel, May 8, 1924, 29 L.N.T.S. 85.

36. *Supra* note 34, at 337.

37. *Supra* note 34, at 247.

D. Category IV Cases

None of the cases in Category IV were brought under the optional clause - all three were brought to the PCIJ based upon compromissory clauses in treaties.[38] Interestingly, all three cases in this category were submitted to the Court in the early years of its existence. Not only were the disputes ones in which the respondents had specifically agreed to submit to the jurisdiction of the Court in recent treaties, but both the treaties and the disputes themselves followed closely on the heels of the Court's creation, thus creating an ideal situation for compulsory jurisdiction. That is, state consent to the jurisdiction of the Court was quite proximate to the issues involved in the dispute.[39]

The *Mavrommatis Concessions* case is only the second case decided by the PCIJ and the first to fall under Category IV.[40] The case began as a dispute between a Greek national, M. Mavrommatis, and the U.K. concerning public works concessions in the mandated territory of Palestine. After negotiations between Mavrommatis and the British Colonial and Foreign Offices, followed by negotiations between Greece (on the part of Mavrommatis) and Britain; Greece applied to the PCIJ on the basis of Article 26 of the Mandate for Palestine.[41] Both the preliminary objections and the merits phases of the case were decided against Britain.[42] This decision would seem to support a contention that the compulsory jurisdiction of the Court was beneficial in bringing Britain and Greece to a peaceful resolution of their dispute. However, the judgment did not entirely favor Greece's submission over the contentions of the U.K. In fact, the decision closely resembled one of the proposals made by the British Foreign Office to the Greek Legation *before Greece submitted the case to the Court.*[43] Thus, the decision, albeit one that did not fully support Britain's submission, seemed to be one that Britain had already expressed a certain willingness to accept in its early negotiations with Greece. That the case was resubmitted to the Court, once again unilaterally by Greece, may suggest that the U.K. did not wish to go beyond what it had already expressed a willingness to abide with, i.e., that it would accept the Court's judgment insofar as that decision corresponded with Britain's own range of possible solutions to the dispute, expressed in the bargaining with Greece. However, whether this is true is difficult to speculate, since in the *Case of the Readaptation of the Mavrommatis Jerusalem Concessions* the Court agreed with Britain that it lacked jurisdiction.[44]

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38. *See supra* note 7, and *infra* notes 40 and 45.

39. *See* Scott & Carr, *supra* note 3, at 73-74.

40. Mavrommatis Palestine Concessions (Greece v. Gr. Brit.) 1924 P.C.I.J. (ser. A) No. 2 (August 30).

41. *Id.* at 12.

42. Mavrommatis Palestine Concessions (Greece v. Gr. Brit.) 1925 P.C.I.J. (ser. A) No. 5 (March 26).

43. Borchard, *The Mavrommatis Concessions Cases*, 19 AM. J. INT'L L. 728 (1925).

44. Readaptation of the Mavrommatis Jerusalem Concessions (Greece v. Gr. Brit.) 1927

The second case in Category IV is the *German Interests in Polish Upper Silesia and The Factory at Chorzow*.[45] This case might also seem, as did *Mavrommatis*,[46] to support the efficacy of compulsory jurisdiction. More likely, it is another example of the different attitude directed toward the PCIJ. This was a rather protracted case consisting of a series of eight orders and judgments; the apparent attempt to use the Court to work toward a negotiated settlement of the dispute. Upon the Court's decision for Germany in the first question submitted to it regarding the dispute over the alienation of properties in upper Silesia, the parties attempted to reach a friendly settlement through negotiation.[47] When the negotiations failed, Germany informed Poland that the only recourse was the PCIJ; thus the PCIJ addressed a new question concerning this problem.[48] A third question arose over the matter of any indemnity owed by Poland to the individuals alienated from their properties. This question was likewise submitted to the Court and decided in Germany's favor.[49] Yet, in the final phase of the case (the question over the amount of the indemnities) Germany informed the Court that the parties had concluded an agreement and it terminated the case.[50]

The third PCIJ case that falls under Category IV is the *Rights of Minorities in Upper Silesia*. [51] This case concerned the exclusion of some children from minority schools in Upper Silesia in 1926 and shortly thereafter. Germany submitted the case to the PCIJ in 1928.[52] Poland challenged the jurisdiction of the Court, but did so at such a late point in the proceedings that the Court decided that Poland had already indicated a desire for a decision by the Court.[53] Even though it had objections to the Court's jurisdiction, Poland had used the Court initially. Thus it seems as though Poland, as respondent, at some point in the case must have felt that the Court could play a reasonable part in the bargaining process with Germany - it was only at some later point in the proceedings that Poland decided to contest the jurisdiction of the Court.

Unlike the ICJ in Category IV cases, the PCIJ experienced no defiance from the losing respondent states. It is likely that international pressures to uphold treaties created in the near aftermath of World War I, as well as pressures to support legal institutions created to further peace,

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P.C.I.J. (ser. A) No.11 (October 10).

45. Concerning Certain German Interests in Polish Upper Silesia (Ger. v. Pol.) 1926 P.C.I.J. (ser. A) No. 7 (May 25).

46. *Supra* note 40.

47. Interpretation of Judgments Nos. 7 and 8 Concerning the Case of the Factory at Chorzow (Germany v. Poland) 1927 P.C.I.J (ser. A) No. 13, at 7 (December 16).

48. *Id.* at 7.

49. Case Concerning the Factory at Chorzow (Ger. v. Pol.) 1928 P.C.I.J. (ser. A) No. 17 (Jud. of Sept. 13).

50. *Judgments and Orders*, 5 P.C.I.J. Ann. R., ser. E, No. 5, at 193 (1928-1929).

51. *Supra* note 7.

52. *Id.* at 4.

53. *Supra* note 7, at 24.

made defiance of the Court a relatively non-viable alternative at the time. But simply to say that states during the interwar years did not defy the Court, even in Category IV cases, does not fully address the difference between states' behavior toward the PCIJ and the ICJ.

E. Terminated Cases

Several cases like the *Factory at Chorzow Indemnity case*[54] were submitted to the PCIJ and later terminated by the parties. These terminated cases, while not fitting specifically into the categories used in this article, nonetheless support the contention that states often used the PCIJ as one alternative in their negotiations. Cases in which the applicant agreed to withdraw the case from the Court after the respondent's preliminary objections, or when progress had been made in bargaining between the parties outside the Court, indicate a desire on the part of the states for dispute settlement rather than a specifically judicial resolution.[55] These cases support the contention, based upon an examination of the cases in the four categories above, that during the interwar years, states approached the Court with an attitude different from the more recent years in the postwar period.

In the *Losinger* case, Switzerland and Yugoslavia reached an agreement outside of court and agreed to terminate their case before the Court had an opportunity to hand down any judgment.[56] In the *Electricity Company of Sofia and Bulgaria*,[57] Bulgaria refused to participate in the case following the Court's decision for Belgium on jurisdiction. However, Bulgaria's refusal to participate was based upon the refusal of the government to force its representative to travel across Europe during the war.[58] In light of Bulgaria's refusal, Belgium ultimately agreed to withdraw the case from the Court's list.[59]

A third case, and another instance that might be construed as defiance of the Court, also illustrates the attitudinal difference toward dispute settlement in the interwar period. In the *Denunciation of the Treaty of November 2, 1865 between China and Belgium*,[60] Belgium sub-

54. *Supra* note 50 at 193.

55. This excludes several cases - those that were terminated when Germany left the League : Case Concerning the Prince von Pless, (Ger. v. Pol.) 1933 P.C.I.J., (ser. C) No.70 (Dec. 2); and Case Concerning the Polish Agrarian Reform and the German Minority (Ger. v. Pol.) 1933 P.C.I.J. (ser. A/B) No.60 (Dec. 2). The Polish Agrarian Reform is a case wherein Poland did not appear, however it can be distinguished from cases of nonappearance before the I.C.J. because the reason for Poland's nonappearance was the inability to meet time limits rather than defiance of the Court.

56. Losinger and Co., (Switz. v. Yugo.) 1936 P.C.I.J. (ser. A/B) No. 69 (Dec. 14).

57. Electricity Company of Sophia and Bulgaria (Belg. v. Bulg.) 1939 P.C.I.J. (ser. A/B) No. 77 (April 4).

58. 16 P.C.I.J. ANN. R.,(ser. E) No. 16, at 152.

59. *Id.* at 153.

60. Application of Belgium, Denunciation of the Treaty of November 2nd, 1865, Between China and Belgium (Belg. v. China) 1927 P.C.I.J. (ser. A) No. 8, at 4 (Nov. 25).

mitted the case to the Court because it was engaged in negotiations with China over a new treaty and feared that in the interim it would be left without any treaty.[61] China refused to participate in the case, but suggested that the League was the proper forum for the matter.[62] Although China refused to participate in the case before the PCIJ, it did continue to negotiate with Belgium. As soon as a new treaty was negotiated, Belgium withdrew the case from the Court's list.[63]

The review of PCIJ cases above, involving the compulsory jurisdiction of the Court, illuminates several points about the role of the PCIJ in the dispute settlement process. First, we do not find instances of outright defiance of the PCIJ as we do with the ICJ.[64] Further, in those cases that might be construed as defiance as with the Bulgaria and China cases above, the applicant state sought to work out an amicable solution and did not press the case. Second, there are a number of instances where parties to the disputes worked out an amicable solution to the problem even before the Court had the opportunity to act. Third, in those cases of unilateral application involving compulsory jurisdiction, the applicant state did seem genuinely to desire a settlement of the dispute. We shall argue below that this fact alone is enough to distinguish PCIJ submissions from many of the submissions to the ICJ. Finally, it should be noted that all of the cases involving a true test of compulsory jurisdiction were submitted in the early years of the PCIJ under what we have termed ideal conditions for compulsory jurisdiction.

III. THE END OF LEGAL IDEALISM

At the end of each of the two major world wars the world seemed captured by a sense of post-war legal euphoria. Struck by the need to end war for all time, statesmen and scholars alike sought solutions in the legal realm for the settlement of international disputes. The birth of the PCIJ, and its reincarnation in the ICJ after World War II, were accompanied by a feeling amongst many states that disputes were best settled rather than allowed to continue and possibly erupt into armed conflict. Third party adjudication seemed a reasonable means to accomplish this. Debates over compulsory jurisdiction notwithstanding, there did seem to be a commitment, by most states, to this form of dispute resolution.[65]

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61. *See* Woolsey, *China's Termination of Unequal Treaties*, 21 AM. J. INT'L L. 289 (1927).

62. *Id.* at 292.

63. 5 P.C.I.J. ANN. R. (ser. E) No. 5, at 203.

64. For a discussion of defiance in both the PCIJ and the ICJ, see THIRLWAY, *supra* note 2. *See also* HIGHET, *supra* note 2; J. ELKIND, NONAPPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE: FUNCTIONAL AND COMPARATIVE ANALYSIS (1984).

65. *See, e.g.*, Lloyd, *"A Springboard for the Future": A Historical Examination of Britain's Role in Shaping the Optional Clause of the Permanent Court of International Justice*, 79 AM. J. INT'L L. 28 (1985); S. ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 364-67 (1965).

Up to a certain point, we can see great similarities in state behavior toward third party adjudication between the PCIJ and the ICJ. Both Courts saw their busiest periods in the decade or decade and one-half after their creation. At this point, both Courts began to experience a decline in the number of cases presented to them. The reasons for the decline in the numbers of cases for the two Courts seem to be similar, and both seem to be related to the perceived instability of the international system at the time. With the PCIJ, the decline in business is coincident with, and seems dependent upon, the uncertainties generated by the major international financial crisis begun in 1929 and the rise of National Socialist Germany after 1933. With the ICJ, the decline in business seems tied to the intensification of the cold war and the proliferation of new states following the period of rapid decolonization. But beyond this point in the life cycle of each Court, the similarities end.

The business of the PCIJ was ended by the onset of World War II, while the ICJ was able to continue into its next phase. It is during this next phase in the life of the ICJ, beginning approximately in the early 1970's, that we begin to notice the serious phenomenon of defiance of the Court. It is a period for which there is no corollary in the life of the PCIJ. This period, that we shall call, for want of a better name,"normal" international politics, may provide a truer test of the readiness of the international system to rely on third party adjudication and to accept the Court's compulsory jurisdiction. If this is correct, then the apparent progress toward a genuine acceptance of compulsory jurisdiction made during the entire period of the PCIJ and during the early years of the ICJ may be illusory. Rather than a true commitment during times of "normal" international politics, it represents a post-war commitment to legal idealism that did not have a chance to phase out normally with the PCIJ but did with the ICJ.

There are several reasons that may account for the inability of third party adjudication generally, and compulsory jurisdiction particularly, to become viable dispute resolving mechanisms in this period of post-legal idealism or normal international politics. Significant changes occurred during the period of normal international politics in the later ICJ years that affected state behavior toward the Court. In part, the changes seem to reflect a normal phasing out of postwar legal idealism. Beyond that, there were changes in the international system, changes in the submission patterns of cases that reflected a different attitude toward international adjudication, and changes in the issues brought before the Court, all of which may have affected the success of the ICJ.

IV. ISSUE DIFFERENCES

One possible explanation accounting for the different behaviors of states toward the PCIJ and the ICJ might be found in the kinds of issues brought before the two Courts. If the PCIJ dealt with less politically charged issues than the ICJ, then one might expect states to be more compliant under the PCIJ, at least in the matter of accepting the Court's

jurisdiction and decisions.

Coplin and Rochester, in some earlier quantitative research on the Court, compared issues presented to the PCIJ and the ICJ on the basis of "salience," i.e., high political significance.[66] Coplin concluded that salience of issues was an important dimension for analysis regarding state behavior toward the Court because,

> . . . nothing inherent in the issue makes a dispute legal rather than political but that indeed the determination is made by the actors themselves. A dispute is legal if the parties choose to consider it a legal dispute. By implication, then, the decision to consider a dispute primarily in the legal dimension, particularly for the side with the weaker legal argument, occurs *when the state stops attaching great importance to the issue.*[67] (emphasis added)

Coplin and Rochester discovered that the issues presented to the ICJ were of higher salience than those presented to the PCIJ.[68] Though it is possible to suggest that this means a higher degree of confidence in the ICJ than in the PCIJ, the record does not warrant such a conclusion. Rather, as Coplin and Rochester suggest, ". . . the Court has been frequently used by parties for propagandizing or legitimizing purposes rather than with the expectation of settlement."[69] This behavior has been far more frequently exhibited in ICJ submissions than in submissions to the PCIJ.

V. LEGAL AND POLITICAL USES OF THE COURT

Perhaps blatant political use of the Court was popularized by the United States during the cold war period with the numerous submissions made against Warsaw Pact states.[70] Though the United States was surely aware of the Communist states' position regarding third-party adjudication,[71] it nonetheless brought several issues before the Court, only to have them later removed from the list when the Warsaw Pact states refused to participate. It is also likely that the United States enlisted the support of the Court in just such a political way in the *Iran Hostages* case[72] and that Nicaragua did, as well, in its recent case against the United States.[73]

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66. Coplin & Rochester, *supra* note 6, at 541-542.

67. *Id.* at 541.

68. *Id.* at 542.

69. *Id.* at 538.

70. *See*, Treatment in Hungary of Aircraft and Crew of U.S.A. (U.S. v. Hung. and U. S. v. U.S.S.R.) 1954 I.C.J. 99; Aerial Incident of March 10th, 1953 (U.S.A. v. Czech.) 1956 I.C.J. 6; Aerial Incident of October 7th, 1952 (U.S. v. U.S.S.R.) 1956 I.C.J. 9 (Mar. 14); Aerial Incident of 7 November 1954 (U.S. v. U.S.S.R.) 1959 I.C.J. 276.

71. For a discussion of Soviet views toward third-party adjudication, see J. TRISKA & R. SLUSSER, THE THEORY, LAW AND POLICY OF SOVIET TREATIES 381-388 (1962).

72. United States Diplomatic and Consular Staff in Teheran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

73. Nicaragua, *supra* note 1.

While this politically loaded behavior toward the Court may arguably have been learned from American actions toward the Communist bloc, there is a marked difference between cases where the Court was able to deny jurisdiction, in the absence of prior consent, and those cases where the Court was virtually compelled to accept jurisdiction because of some form of prior agreement to the Court's compulsory jurisdiction (i.e. compromissory clauses or the optional clause). In the former instance, while this might still be construed as an improper use of the Court, it is unlikely that these submissions damage the Court or its authority because the Court is left with an escape position. That is, the Court is not faced with having no reasonable alternative but to assert its jurisdiction over a state that simply refuses to participate. In the latter instance however, the Court is left with little choice but to assert its jurisdiction because of the prior consent of the parties. It is in these instances where the Court has encountered the recent difficulty of state defiance.

A. Submission Style: A Typology of Submissions

We can divide all of the submissions made to the Court into two major categories and four subcategories, based upon the intended use made of the Court by the applicant(s): The first major category is where the party or parties genuinely desire and expect a resolution of the dispute - we shall call these "legal submissions." The other major category of submissions is where no resolution is expected but where the submitting state is attempting to make political use of the Court for the state's own benefit - we will call these "political submissions."[74]

Legal submissions can be divided further, into those submissions where the desired outcome is a judicial resolution and those where the desired outcome is any kind of mutually agreeable resolution to the problem, as through bargaining. The former we will call "adjudicatory submissions" and the latter will be called "bargaining submissions."[75]

Political submissions also can be divided into two sub-categories. The first category, characterized by the U.S. submissions against the Warsaw Pact states, we will label "symbolic submissions." In symbolic submissions a state attempts to enlist the *symbolism* of the Court and legal dispute settlement against another state. In these instances the Court is free to deny jurisdiction, upon refusal of the respondent state to participate, because there is no prior state consent to the Court's jurisdiction. The submitting state has, nonetheless, gained politically because it has appeared to desire a legal solution to the problem. In other words, the submitting state has juxtaposed itself, as a law-abiding state, against the respondent, as a non-law-abiding state.

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74. *See*, Coplin & Rochester, *supra* note 6, at 538.

75. For a discussion of the role of the Court in the international bargaining process, *see, e.g.*, Coplin, *International Organizations in the Future of the International Bargaining Process: A Theoretical Projection*, 25 J. INTL. AFF. 87.

The second kind of submission we call a "leverage submission." In this instance the submitting state uses the Court itself as an "ally" against the respondent state.[76] Leverage submissions differ from symbolic submissions because of the presence of compulsory jurisdiction. The Court is relatively unable to deny jurisdiction because of a state's unwillingness to participate, because there has been prior consent to the Court's jurisdiction.[77]

Both symbolic submissions and leverage submissions indicate an attitude on the part of submitting states that is not indicative of a desire for either a legal or a bargaining resolution of the dispute.[78] Though it is difficult to judge motive initially, once it becomes clear that the respondent state will not submit to the Court's jurisdiction, further pursuit of the case by the applicant can only serve political ends. It has been sufficiently demonstrated in recent cases that when defiance occurs, the judicial settlement, should it be rendered, has little impact upon the dispute. The dispute has not been settled. As our major category name indicates, these become purely political submissions intended for self-gain. As such, they are damaging to the Court. Submissions to the PCIJ all fall into our category of legal submissions, as do most of those in the early years of the ICJ. Those political submissions that were made in the early years of the ICJ were all of the symbolic variety. Unfortunately, in recent years the ICJ has been faced with a number of submissions that seem to be of the leverage variety. Respondent states have been unwilling to submit to the Court's jurisdiction, even though there was prior consent, and the Court has found itself increasingly facing the problem of accepting jurisdiction in the face of defiant states.

Political submissions are likely to occur in any political system where a legal edifice exists but where there is no common understanding amongst states to submit important disputes for third-party adjudication, and where there is a lack of mutually understood norms, rules and principles governing dispute settlement. This may occur because no common understanding ever existed in the system or because the common understanding that once existed has eroded.

> The legitimacy which states attach to international organizations today is less than it was during the pre-World War II period. . . . the legitimacy necessary for the ICJ and U.N. to develop distributive roles is insufficient and accounts for the unwillingness of contemporary states to accept the distributive function of these organizations. [79]

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76. Coplin & Rochester, *supra* note 6 at 533.

77. We are presuming here that the dispute can be construed as a legal matter and not purely a political issue. In the latter instance, of course, the Court is free to deny jurisdiction. *See*, Statute of the International Court of Justice, Art. 36, para. 6.

78. There are times when a leverage submission will result in a judgment by the Court as in the Iran Hostages Case and in the Nicaragua case, but the judgment does not necessarily solve the dispute since, as in both of these cases, the offending state continued to defy the Court's orders.

79. Coplin, *supra* note 76, at 298-299.

The erosion of common understandings of proper methods for dispute settlement may be caused by the entry of new states to the system (systemic changes), by changes in the perceptions of states regarding the level of acceptable conflict in the system and the desirability of eliminating or controlling conflict,[80] or it may result from a change in attitude concerning where in the system distributive decisions should be made. According to Coplin,

> In the pre-World War II period, the higher percentage of joint submissions can be interpreted as an indication of a greater willingness on the part of the participants to allow the organizations to make distributive decisions.[81]

Though Coplin may be correct in his interpretation of joint submissions, we can see from the Scott/Carr Category I cases that there is really little difference between these unilateral submissions brought under the optional clause and joint submissions. This then, raises the number of cases under ICJ jurisdiction that might be said also to be indicative of a desire on the part of states to have the Court make distributive decisions. Additionally, the recent *Gulf of Maine* case[82] is one where the United States and Canada quite obviously desired a distributive decision by the Court, albeit in the more narrow forum of Chambers.[83] Clearly there are times when states in the contemporary system do want the Court to make distributive decisions. States are unwilling, however, to have distributive decisions forced upon them *without an immediate expression of their consent*. It might safely be said that the Court *can* play a distributive role whenever both parties wish it to do so, but it can *never* play such a role when one of the conflicting states objects. As Susan Strange has pointed out, "the world lacks a . . . world court to act as the ultimate arbiter of legal disputes that also have political consequences."[84] Perhaps, after all, what we are witnessing in the defiance of the ICJ is nothing more than proof that "the political" always takes precedence over "the legal" when the two realms conflict. States are unlikely to seek legal resolution over issues that are of high political significance or "salience" as Coplin calls it.

VI. CONCLUSION

It is not revelatory to state that the international system has changed

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80. For a discussion of variations in systemic tolerances of conflict, see Haas, *Regime Decay: Conflict Management in International Organizations, 1945-1981*, 37 INT'L ORG. 81 (1983).

81. Coplin, *supra* note 76, at 298.

82. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. Rep. 246 (Oct. 12) *reprinted in* 23 I.L.M. 1197 (1984).

83. For a discussion of this case, see Schneider, *The Gulf of Main Case: The Nature of an Equitable Result*, 79 AM. J. INT'L L. 539 (1985).

84. Strange, *Cave! hic dragones: A Critique of Regime Analysis*, 36 INT'L ORG. 479, 487 (1982).

considerably since World War II. The classic balance of power system gave way to bipolarity in its various forms. There has also been a great proliferation of states in the post-war system, creating not only more actors, but widening the existing wealth and power disparities as well. Of these factors, the best indicator of likely defiance seems to be "power differential," since the most recent instances of defiance have occurred between states of great power disparity. Interestingly, *where* the power lies does not seem to be a significant determinant of which states defy the Court - The United States[85] and Iceland[86] merely represent the power extremes of a wide spectrum of states that have exhibited defiance toward the ICJ. Nor should this be surprising, for it is precisely in arrangements of great power disparity where a state might resort to a political leverage submission. Weak states stand to gain as they otherwise could not in direct confrontation with powerful states. Powerful states can gain without appearing to bully the weak. In both instances the submitting states are risking little, since they are reasonably sure that the respondent state will refuse to come before the Court.

When compulsory jurisdiction is part of this formula, states of all kinds see the opportunity for gain through leverage submissions. The only real loser is the Court itself. Beginning in the 1970s the ICJ clearly entered a period for which there is no parallel in the PCIJ. It is a period characterized by a generally low submission rate, by a high rate of political leverage submissions involving high salience issues amongst those cases submitted, and by an extremely high rate of defiance of the Court.

We have argued that the contemporary period is a natural outgrowth of "politics as usual" in a system of sovereign states. We have also argued that the apparent progress toward compulsory jurisdiction and judicial settlement during the PCIJ years and the early years of the ICJ, was chimerical and attributable primarily to a temporary attitude about judicial settlement brought on by the legal idealism following the two world wars.

It should be clear by now that, given the absence of the necessary state attitudes to make compulsory jurisdiction work, and given the political role into which the Court has been pressed by conflicting states, we believe that visionary insistence on continuing or strengthening the Court's compulsory jurisdiction can only further damage the efficacy of the Court as an international dispute settlement mechanism. The case history of the PCIJ, alas, offers no remedy for an ailing Court.

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85. Nicaragua, *supra* note 1.

86. Iceland refused to comply with an exchange of notes with The Federal Republic of Germany and the United Kingdom done on July 19, and March 11, 1961 respectively. Fisheries Jurisdiction (U.K. v. Iceland; FRG v. Iceland), 1974 I.C.J. Rep. 3, 175 (July 25).

STUDENT COMMENT

International Securities Markets: Will 24-Hour Trading Make a Difference?

I. INTRODUCTION

Telecommunication advancement is having great impact on the international business world allowing transactions to take place in a matter of hours, and at times minutes, that in the past have taken days, weeks, or even months. We are an inter-connected world; no longer can we rely on the cushion of time from which to determine if our actions have been the correct ones. The capital and securities markets reflect these advancements fully; allowing international trading in securities markets instantaneously, permitting liquidity, increased volume and greater choice of investments.

The effect of these developments on international markets has been great; in 1981, the dollar volume of United States securities traded on the international markets was $75.5 billion.[1] The amount increased to $277.3 billion in 1986.[2] Investments in foreign equity securities by United States investors was $102 billion, with United States' pension funds holding $45 million in foreign assets in 1986.[3] Euro Bond Trading volume jumped from $2.2 trillion in 1985, to $3.2 trillion in 1986.[4] United States' issues raised $36.5 billion in 1985, increasing to $38.6 billion in 1986.[5]

Increased demand and capacity have led to longer trading hours. In October of this year, the Chicago Mercantile Exchange (the "Merc") approved the first 24-hour financial futures trading market in the United States using an automated trading system.[6] Many international exchanges have expanded or are considering expansion of trading hours. Twenty-four hour books are maintained by some of the larger firms, allowing for trading at all times.[7] With the advent of increased activity in the markets, in terms of time, volume and numbers of participants, the

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1. Mann & Sullivan, Current Issues in International Law Enforcement 2, International Bar Association, Section on Business Law, in London, England (Sept. 18, 1987).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. Jouzaitis, *Merc Okays 24-Hour Trading*, Chicago Tribune, Oct. 7, 1987, § 3, at 7.
7. Mann & Sullivan, *supra* note 1.

adequacy of the securities laws to meet the increased demands must be considered. The potential for violation of regulations through manipulation, churning, insider trading and material misrepresentation, just to list a few, is in direct correlation with the increases of these influencing factors. A balance must be maintained between access to the international markets for the United States' investor allowing development of world economic growth, and making sure the investor has access to adequate information about the securities from which he is to make an investment decision.

This article will address the development of the international markets, their purpose and function in the international economic community as well as the United States securities laws and subsequent changes in response to the international markets both in terms of enforcement as well as regulation. Finally, it will consider potential problems and solutions in response to these developments especially in light of around-the-clock trading.

II. UNITED STATES SECURITIES REGULATIONS

The purpose of the securities laws and regulations is not to prevent the investor from making an investment, or a mistake in investment. Rather, the Securities and Exchange Commission ("SEC") has formulated certain minimal requirements a company wanting to raise capital by selling stock shares to the public must meet.[8] The company must also be willing to disclose fully, information about itself to the potential investor, resulting in an informed decision to invest.[9] The regulation of securities and investments is not new, nor did it originate in this country. Individual states had their own regulations a full generation prior to the passage of the 1933 Securities Act, and England had been controlling through legislation and the courts for centuries.[10] The earliest known English law was passed in the year 1285 under Edward I, authorizing the Court of Alderman to license brokers in London.[11]

Perhaps the most famous of the early regulations was the so-called "Bubble Act" of 1720, set up to control fraudulent stock promoters, and joint stock companies.[12] This Act was the result of England and France, as a means of paying public debt, allowing two companies, the Mississippi Company of Paris, which was set up to exploit the Louisiana Territory by the French Court, and the South Sea Company of London, given exclusive trading rights by the British government in the Pacific islands and South America to promote and sell stock to a non-suspecting public. In-

8. The requirements that an issuer must meet depends on the particular offering that is being made. *See*, Securities Act of 1933, 15 U.S.C. § 77(a) *et seq.* (hereinafter "Securities Act").

9. *See* Securities Act, §§ 7, 10.

10. L. LOSS, FUNDAMENTALS OF SECURITIES REGULATION 1 (1983).

11. *Id.*

12. 6 Geo. 1, c. 18.

vestors rushed to purchase the worthless stock, and in 1720, the bubble burst, resulting in financial ruin for investors and severe financial set backs for governments; France being the hardest hit. Its economy all but collapsed; with a Regent being forced out of office as a result.[13] The "Bubble Act", with striking similarities to the fraud provisions in current United States' securities regulations[14], was repealed in 1825.[15]

British Parliament passed the first prospectus requirement through the Company's Act in 1844. A little less than 50 years passed before the enactment of the Director's Liability Act of 1980.[16] This gave directors and promoters civil liability for untrue statements in the prospectus without the defrauding party having to prove scienter.[17]

The first United States statute dealing with securities regulation appeared about 1900.[18] However, the rapid growth of the American financial community in the late Nineteenth and early Twentieth century went almost unchecked.[19] Capital raised from individual investors was used to promote businesses resulting in broad diversity and absentee ownership of the entity, with very little or no protection for the people who invested.

The collapse of the stock market in 1929 was the "bursting bubble effect" on a world-wide scale. Prior to the crash, Wall Street had continued on its way with few legislative restraints. The crash shook the federal government from its securities regulations sleep, resulting in the passage of the Securities Act of 1933 (S.A.). The various states had securities reg-

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13. GAY, AGE OF ENLIGHTENMENT, GREAT AGES OF MAN 74, 75 (1971).

14. Securities Act, § 11; §§ 12(2), 17; Liability Provisions Covering Fraud or Misrepresentation in the Interstate Sale of Securities in General for Individuals Connected with the Initial Public Offering, Whether or Not the Offering was Registered with the SEC.

Securities Exchange Act of 1934,; Rule 10b-5. Probably the most well known of the Anti-Fraud Provisions of the Securities Act, this Section makes it unlawful for anyone to employ any devised scheme or artifice to defraud, or to make any untrue statement of material fact, or to omit to state a material fact necessary, or to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person. Rule 15(c)(1-2) and c 1-3. These are general anti-fraud provisions applicable to broker/dealers who are involved in interstate, over-the-counter securities transactions. Another liability provision of the Securities Exchange Act is § 16, which is known as the insider trading liability provision. This is designed to prevent corporate insiders from using inside information to realize profits on the short term purchase and sale of their corporations securities. Rule 10 b-5 is also applicable in this area.

15. 6 Geo. 4, c. 91.

16. L. LOSS, *supra* note 10, at 2-3.

17. *Id.*

18. *Id.* at 3.

19. The corruption and bungling in both the public as well as private sectors was notorious. A prime example was the cooperation of President Grant's Treasury Department with Jay Gould and John Fisk, enabling them to manipulate the government selling of bullion. Literally cornering the gold market for a short period of time in 1869, the two men forced anyone needing gold to deal with them, causing a panic in the money market. They personally profited very highly and when caught, little was done by the administration to punish the two; A. WEINSTEIN & R.J. WILSON, FREEDOM AND CRISIS, AN AMERICAN HISTORY 472 (1978).

ulations, but these were limited because of the individual state's sovereignty.[20] The federal courts had addressed the issue upholding state regulations on the basis of the Fourteenth Amendment and regulatory power under the Commerce Clause.[21]

With the passage of the 1933 Act, the Securities Exchange Commission (SEC) was created along with a subsequent barrage of federal regulation. From 1933 to 1940, no less than six complicated far-reaching statutes were passed; the seventh and most recent being the Securities Investor Protection Act of 1970, The various Acts have been modified through the years, with much of the most recent changes being made in the area of international regulations.

The SEC role in maintaining the securities market is complex and broad. It is an independent agency consisting of five members by presidential appointment, possessing executive as well as quasi-legislative and quasi-judicial powers. It oversees the application, modification and enforcement of the complex system of securities regulations. Additionally, it supervises the Self-Regulatory Agencies (SRO's) including the National Association of Securities Dealers (NASD), and the various stock exchanges.

A. Securities Act of 1933

The objectives of the Securities Act (SA) of 1933 are two; to insure full disclosure of information about the security to potential investors, and the prevention of fraud and misrepresentation in the inter-state sale of securities through its liability provisions.[22] If a business entity is planning to raise capital through an offering of equity securities to the public, it must register with the SEC unless an exemption is found.[23] The regis-

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20. Kansas was the first state to develop a strong securities control statute. It was passed in 1911, and is felt to be the first to coin the phrase "Blue Sky", Mulvey, *Blue Sky Law*, 36 CAN. L.T. 37 (1916). The regulation of securities is now in every state, the District of Columbia and Puerto Rico, forcing issuers to not only comply with the federal securities laws, but the various state regulations as well.

21. The Commerce Clause, U. S. CONST., art. I, sec. 8, cl. 3, grants Congress the power to "regulated commerce with foreign nations, and among the several states, and with the Indian tribes". Using the Fourteenth Amendment, § 1 and the Commerce Clause, the federal courts in cases involving securities transactions, applied the securities provisions of the Interstate Commerce Act; 49 U.S.C. § 1131. L. LOSS, FUNDAMENTALS OF SECURITIES REGULATIONS 26 (1988).

22. Securities Act, § 11, Issuer liability for misrepresentation or omission in the registration statement; § 12, Issuer or underwriter liability for the improper offer to a potential purchaser in the pre-filing period, including liability whether or not the securities were registered; § 17, Fraud liability provisions under the 1933 Act.

23. Securities Act; exemptions include:

A. Private offerings under Regulation D;

1. Rule 504 for small companies and exempting the offer and sale of up to $500,000 in twelve months.

2. Rule 505 exempts offers and sales of issuers other than investment companies of securities in an amount not excluding $5 million during a twelve month

tration process is a long and expensive procedure with numerous forms and difficult regulations to be complied with. The forms for the Initial Public Offering (IPO) vary somewhat depending on the size of the offering and related business, but all are lengthy and complicated. It is due in part to these complex and expensive requirements that many foreign corporations do not attempt registration in the United States. The SEC has responded to this problem by modifying the amount of information required from foreign issuers[24] but many firms, both here and abroad feel more leniency is required.[25]

In March of 1985, the SEC sought comments from the United States, United Kingdom and Canada as to the best way to coordinate registration procedures. The two approaches suggested were the "reciprocal prospectus approach" in which a prospectus in one country would be accepted in another country; and the "common prospectus approach" which would set uniform standards acceptable to all countries. The United Kingdom preferred the reciprocal approach, but recognized that a difference in requirements may be difficult to reconcile, especially in terms of accounting principals and financial statements needed. The Canadian reaction was that a common prospectus would be more easily accomplished between the United States and Canada than between the United Kingdom and either the United States or Canada. The United States' response was in favor of the common prospectus. As can be seen, resolution of the differences in international securities markets will be long in coming.[26] However, a pilot effort allowing the use of the reciprocal prospectus between the United States, United Kingdom and Canada is underway, but will probably initially be limited to investment-grade debt, because those securities trade primarily on yield and rating, therefore accounting and auditing requirement differences between the countries should not present a major problem.[27]

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period.

3. Rule 506 is available to all issuers under certain limitations and any amount of securities, with no limit on the number of accredited investor purchasers.

B. Private offerings under § 4(2) and § 4(6).

C. Broker exemption, § 4(4).

D. Intrastate exemption § 3(a)(11), Rule 147.

E. Sale of a business or business merger, Rule 145.

F. Resale of privately offered (restricted) securities, Rule 144.

24. Thomas, *Increased Access to the United States Cap. Markets: A Brief Look at the SEC's New Integrated Disclosure Rules for Foreign Issuers*, 1985 J. COMP. BUS. CAP. MARKET L. 5.

25. H. BLOOMENTHAL, INTERNATIONAL CAPITAL MARKETS AND SECURITIES REGULATION § 503(2), 5-16, Release No. 4-2/87.

26. J. Brooks, The Emerging Asia Dollar Market 44-54. Presentation at the Thirteenth Annual Securities Regulation Institute (Jan. 1986).

27. C. Cox, Commissioner, Securities and Exchange Commission, The Securities and Exchange Commission's Experience in International Capital Markets, Remarks to the Swiss-American Chamber of Commerce, Zurich, Switzerland (Aug. 1987).

B. Securities Exchange Act of 1934

The Securities Exchange Act (SEA) regulates the trading of securities in the market, subsequent to their initial distribution. Its purpose is to protect interstate commerce and national credit, and to insure a fair and honest market for the trading of securities. The SEA has three main themes; the regulation of the exchange of the over-the-counter market[28] the prevention of fraud and market manipulation;[29] and control of securities credit by the Board of Governors of the Federal Reserve System as part of its authority over the nation's credit.[30]

Companies whose stocks are listed on a National Exchange, or have assets of $5 million or more, and a cost of equity securities held by 500 or more persons must register its equity securities under § 12 of the SEA. This includes foreign issuers. Subsequently, all registered companies are required to make periodic reports to the SEC to be in compliance with the Act.

C. The Trust Indenture Act of 1939

This Act controls distribution of debt securities. With the exception of a few well-monitored companies, mostly Canadian, foreign issuers are not allowed to register under this Act.

A trust indenture is commonly used when a corporation floats bonds. The trust indenture document contains the obligations of the trustee, and rights of the beneficiaries of the trust. The Trust Indenture Act was designed to protect investors in large debt securities by creating certain provisions the trustee must comply with, and eliminating the ability to use certain exculpatory clauses. The trustee ordinarily has to be independent of the corporation issuing the bonds.

D. The Investment Advisor's Act and the Investment Company Act of 1940

Both the United States and foreign investment advisors are required to register under the Investment Advisor's Act. The same information is required of foreign advisors, as of their domestic counterparts. The Commission also requires that foreign investment advisors appoint the SEC as agent in case a complaint is filed.Under the Investment Company Act, registration of all non-exempt investment companies is compelled. Section 7(d) of the Act disallows registration, selling or delivering of securities of foreign investment companies, through the mails or interstate

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28. L. Loss, *supra* note 10, at 40. The major theme of the 34 Act is self regulation under the general supervision of the SEC. There are four types of self regulatory organizations: the National Securities Exchanges, the National Association of Securities Dealers, Inc., "N.A.S.D." registered clearing agencies, and the Municipal Securities Rule making Board.

29. *Id.*

30. *Id.* at 39.

commerce unless the Commission finds, by order, "it is both legally and practically feasible to enforce the provisions of the Act against the company".[31] Canadian companies have usually been found to meet the standards, but it is very difficult for other foreign companies to be approved.[32] The Commission is considering alternative means to allow these companies to register and sell their securities in the United States markets.[33]

III. EXTRA-TERRITORIAL APPLICATION OF THE UNITED STATES SECURITIES LAWS

With the increasing growth of international capital markets, come the complex problems of comity and conflicting application of each sovereigns laws in case of non-compliance with regulations. Under certain conditions, securities sold in the United States may be exempt from registration under the Securities Act of 1933, but the Anti-Fraud Provisions of the Securities Exchange Act of 1934 may apply.[34] This raises the complicated matter of jurisdiction. Both subject matter and in personam jurisdiction over defendants must be had before the United States can apply its securities laws.

A. Jurisdiction

1. *Subject Matter Jurisdiction*

International law recognizes five bases to achieve subject matter jurisdiction. Under the Restatement (Second) of Foreign Relations law of the United States subject matter jurisdiction may be had under the nationality principle in which a nation has jurisdiction over the conduct of its citizens, whether the conduct plays inside national borders or not; Section 10.

It can also be had under the passive personality principle, which permits a sovereign to exercise jurisdiction over conduct and activity injuring its citizens, no matter where the act occurred. It is related usually to criminal matters and is not recognized in the United States; Section 30. Under the protective principle, if the extra-territorial activity threatens national security or governmental operations, the government can promulgate laws granting itself jurisdiction to govern that activity; Section 33. The universal principle grants jurisdiction if a person commits an act, and the state has custody of that person; Section 34.

Sovereigns have jurisdiction to punish crimes committed within its territory, regardless of the nationality of the actor, under the territorial principle; this is further divided into the objective territorial principle and the subjective territorial principle; Section 10.

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31. D. Goelzer & K. McGrath, *The SEC Speaks in 1987*, II Practicing Law Institute 591-92.

32. *Id.*

33. *Id.*

34. Securities Exchange Act of 1934, *supra* note 14

Under the objective principle, as defined in Section 18 of the Restatement, jurisdiction is allowed a state to formulate a rule of law regarding conduct that occurs outside its territory but which has an effect within its territory if the effect within the territory is substantial, the conduct occurs as a direct and foreseeable result of the conduct outside the territory, the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems, and the conduct and its effect are constituent elements of activity to which the rule applies.

The objective principle is known as "the effects" doctrine, and cases have distinguished between jurisdiction based on conduct and effect, as compared to effect alone in determining jurisdiction; *Schoenbaum v. First Brook.*[35] This case was the first case to consider jurisdiction based on effects alone; and established that jurisdiction could be had under these circumstances. This case involved domestic activity; however, the question remained as to whether jurisdiction could attach absent domestic conduct. *Bersch v. Drexel Firestone, Inc.*,[36] addressed the issue and upheld jurisdiction over a foreign accountant who had certified financial statements used in an offering in the United States. As required by the Restatement, the effects must be substantial, direct and foreseeable.

The subjective territorial principle is based on the conduct of the actor. The Restatement grants that nation jurisdiction over acts which occur within its boundaries, even if the effects of such conduct are felt only outside the nation's territory. Under *IIT v. Vencap, Ltd.*,[37] the court determined jurisdiction exists if the facts showed the United States had been used as perpetuation for the fraudulent acts themselves. This distinguishes perpetuation of the act, as opposed to preparation to commit the acts. Mere preparation may limit the SEC's power to sue.[38]

According to case law, subject matter jurisdiction is determined by four variables; the nationality or residence of the plaintiff, the nationality or residence of the defendant, the country in which the fraudulent activity occurred, and the country in which the fraudulent conduct was manifested.[39]

The court in *Bersch* distinguished United States residents, United States citizens residing abroad and foreigners; or persons who were neither United States Citizens nor United States residents. It determined that there could not be jurisdiction for foreign plaintiffs in cases "where

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35. Schoenbaum v. First Brook, 405 F.2d 200 (2d Cir. 1968), *revised on re-hearing on other grounds*, 405 F.2d 215 (2d Cir. 1968) *cert. den.* 395 U.S. 906 (1969).

36. Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir. 1975).

37. IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975).

38. Loomis, *The U.S. Securities and Exchange Commission, Financial Institutions Outside the U.S. and Extra-Territorial Application of the U.S. Securities Laws*, J. COMP. L. & SEC. REG. 1, n. 47 (1975).

39. Morgenstern, *Extra-Territorial Application of the United States' Securities Laws: A Matrix Analysis*, 7 HASTINGS INT'L COMP. L.R. 4 (1983).

the United States' activities are merely preparatory to take the form of culpable non-feasance and are relatively small in comparison to those abroad".[40] Therefore, under *Bersch*, an American resident plaintiff needs to establish only minimum statutory requirements while a non-resident American asking the protection of the United States securities laws is required to show materially important conduct occurring within United States which significantly contributed to the foreign fraud.[41]

In later cases, the courts have granted jurisdiction over activities it determined to be preparatory. In *Zoelsh v. Arthur Anderson & Co.*[42] accountants from the United States made representation to a foreign auditor which were determined to be preparatory to a foreign offering made by a foreigner.[43] In looking to the substantial conduct of a defendant (brokerage firm) in the United States, the court in *Psimenos v. E.F. Hutton & Co.*[44] upheld subject matter jurisdiction where the United States was used as a based for fraudulent sales of United States commodity contracts to foreign investors.[45] In both objective and subjective jurisdiction, the main factor of the courts appeared to consider its the degree of impact on the United States interests and investors.

2. *Personal Jurisdiction*

In personam jurisdiction is fundamental to our legal process. One accused must have notice and opportunity for hearing. In order to achieve this basic due process, personal jurisdiction over the defendant is necessary. Section 27 of the Exchange Act provides for service of process "where ever the defendant may be found". In *Lesco Data Processing Equipment Corp. v. Maxwell*,[46] the court interpreted section 27 as extending personal jurisdiction to the fullest reach permitted by the due process clause.[47]

Sections 35, 36 and 37 of the Restatement (Second) of Conflict of Laws sets forth the boundaries of due process in case of a defendant absent at the time of service of process. Section 35 permits jurisdiction over persons doing business in a state; section 36 confers jurisdiction over persons committing an act in the state; and section 37 permits jurisdiction over persons causing effects in a state by accident elsewhere. Sections 47, 49 and 50, applies these principles to corporations allowing the court broad discretion in obtaining personal jurisdiction.[48]

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40. Loomis, *supra* note 38, at 9.
41. Morgenstern, *supra* note 39, at 22.
42. Zoelsh v. Arthur Anderson & Co., F.2d Law Rptr. (CCH) para. 93, 317 (D.C. Cir. No. 86-5351, July 17, 1987).
43. Mann & Sullivan, *supra* note 1, at 16.
44. Psimenos v. E.F. Hutton & Co., 722 F.2d 1041 (2d Cir. 1983)
45. Mann & Sullivan, *supra* note 1, at 16.
46. Lesco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972).
47. G. Loomis, *supra* note 38, at 14.
48. *Id.*

IV. THE INTERNATIONAL MARKETS

In April, 1985, the SEC, through SEC release 34-21958, sought comments from individuals and firms involved in the securities and capital markets on the internationalization of investments.[49] The comments were solicited in response to what the Commission termed the "accelerating movement towards global trading markets for certain securities and increasing flow towards national borders . . ."[50]

The various categories for comment included the relationship between securities trading in different countries; quotations for internationally traded securities; 24-hour trading, and linkages between different national markets; processing securities transactions; and international enforcement matters and related issues.[51]

The responses to the release came from six countries including Japan, Canada, the United Kingdom, Netherlands, the United States and Australia. The comments were wide-ranging and varied, but generally took a conservative stand regarding the extension of securities laws in the international markets. The commentators felt that the majority of trading was usually done by in-house market professionals, therefore, the private individual investor was not critically affected at this point, reducing the need for regulation. While cautioning that international markets should be allowed to develop on their own, the respondents did indicate that facilitation of international, inter market trading linkages and international clearance and settlement facilities should be addressed by the Commission.[52] They also suggested that the Commission might assume a negotiator's role in encouraging minimum standards for automated clearance and settlement systems among the active trading markets.[53]

Regarding trading in the 24-hour markets, Japan responded by saying that because of time zone differences, it saw no possibility of simultaneous trading by establishing market linkages between Japan and markets in New York and London. However, in October of 1985, the Chicago Board of Trade (SBT) and the London International Financial Futures Exchange signed a memorandum of intent to develop a yen futures contract based on a Japanese government yen bond. By allowing dealers to trade yen bonds in Chicago, London and Japan, trades can be done 24 hours a day.[54] Generally, there is support for around-the-clock trading among the international securities and investment markets.[55]

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49. J. Brooks, The Emerging Asia Dollar Market 56. Presentation at the Thirteenth Annual Securities Regulation Institute, San Diego, California (Jan. 1986).

50. Fed. Sec. L. Rep. (CCH) para. 83, 759, (Apr. 24, 1985).

51. Brooks, *supra* note 49, at 56.

52. Goelzer & McGrath, *supra* note 31, at 576-77.

53. *Id.*

54. Brooks, *supra* note 49, at 56-57.

55. Twenty-four hour markets are well-developed for trading foreign currencies and U.S. Treasury Securities, and are developing in the Eurobond market. However, the equity markets are still lagging far behind. Cox, *supra* note 27, at 7.

A. International Linkages

Market linkages between international exchanges to facilitate trading are being developed, with five currently operational. The first linkage established was the Boston Stock Exchange-Montreal Stock Exchange (BSE-ME) linkage. This allows for ME specialists to send orders for execution by BSE specialists and that small number of Canadian issues listed in the United States, and all of the United States securities listed on the inter market trading system.[56] It is contemplated in the future that the BSE and ME will jointly execute orders from the United States broker-dealers in Canadian national issues directly on the ME's automated small order execution system terminals (MORRE) placed in their order rooms. This phase has not been approved by the Commission.[57]

The American-Toronto Stock Exchange linkage (AMEX-TSE) currently only executes marketable limit orders of up to 1,000 shares at the best available "on the receiving exchange". This was the first linkage established between a primary market in the United States and a primary market in a foreign jurisdiction. Trading is done by each exchange is playing on its trading floor the quotes given by the other exchange in the seven duly listed stocks. It is anticipated the linkage will be expanded to include all issues. Orders are executed through the automated trading systems located on each floor.[58]

The Mid-West-Toronto Stock Exchange (MSE-TSE) linkage, established in March of 1986, operates in similar manners as the AMEX-TSE linkage with the exception of different stocks being listed.[59]

The International Stock Exchange-National Association of Securities Dealers (ISE-NASD) operates as a quotation exchange arrangement for approximately 300 securities listed on the National Association of Securities Dealers Automated Quotation System (NASDAQ) quoted on the ISE, with a reciprocal 300 securities listed on the ISE quoted on the NASDAQ. The system has been in operation since April of 1986.[60]

The American-European Options Exchange (AMEX-EOE) link open in August of 1987. It is the licensing agreement, approved by the SEC, permitting EOE to trade options on the major market index (XMI) that are fungible with the XMI contracts traded on the AMEX. The Dutch security and banking laws are very protective of the identity of account holders, however, in order to obtain SEC approval, the EOE now requires a waiver of the Dutch secrecy laws, allowing customer identification for surveillance purposes.[61]

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56. Mann & Sullivan, *supra* note 1, at 3. The intermarket trading system is the formal securities trading which occurs between the markets.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 4.

61. *Id.* at 4, 5. Other linkages currently being considered are:

The various linkages have resulted in dramatic increases in the United States trading of foreign securities; which has forced the SEC to consider questions of adequacy and need of the United States securities laws to deal with a developing foreign markets.

B. The Securities and Exchange Commission and International Markets

The SEC has recognized that accommodations for foreign issuers are necessary if the United States is to maintain its standing in the world securities markets. The aforementioned reciprocal prospectus agreement between the United Kingdom, Canada and the United States is one way in which the SEC is accommodating foreign issuers.

The SEC is also considering a territorial boundary, rather than a national boundary standard for enforcement of securities regulations. Under the application of the national boundary standard, registration requirements were applicable to any issuer who sold securities to any United States' citizen no matter their location. Under a "territorial approach", the registration requirements would be applicable to anyone who sold securities within the United States' territorial boundaries, no matter the nationality of the purchaser.[62]

The regulation of tender offers for companies which have United States investors is another concern of the SEC.[63]

The Commission realizes that potential problems in trying to maximize access to foreign markets for domestic investors, yet protect them, while at the same time not placing domestic issuers at a disadvantage.[64]

Put quite simply, according to Commissioner Charles Cox in his address to the Swiss-American Chamber of Commerce, in 1987, the Com-

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a. International Futures Exchange (Bermuda) Limited-Pacific Stock Exchange (INTEX-PSE); allowing for futures and options from financial news composite index to be traded simultaneously on the INTEX and PSE.

b. Futures NYSE-Amsterdam Stock Exchange (NYSE-ASE); with the ASE agreeing to trade United States' securities according to United States Securities Regulations data.

c. New York-London Stock Exchange (NYSE-LSE), would involve a joint venture in securities trading and reporting of trade data.

d. Ruters-Quadrex Securities Corporation Joint Venture. Ruters, a fully owned subsidiary of Insta-Net, has been granted exclusive rights to represent Insta-Net outside the United States.

e. AMEX-Quadrex Securities Joint Venture, Quadrex is a London-Based private corporation part. This joint venture if allowed by the SEC would permit private placement in the United States by foreign issuers, with resales limited to institutional investors. Companies involved would be allowed to by-pass the disclosure requirements of the U.S. Securities Regulations, and the facility would provide quotations and a settlement mechanism.

f. NASD-Singapore Stock Exchange-ISE. This would provide a 24-hour quotations system.

62. Cox, *supra* note 27, at 4.

63. *Id.* at 4-5.

64. *Id.* at 6.

mission sees its task as ". . . merely coordinate, develop, survey and police the world securities market".[65]

V. BARRIERS TO INTERNATIONALIZATION OF THE SECURITIES MARKETS

The promotion of the free flow of trade through internationalization of the capital market stands to benefit the world society as a whole. Resulting in a shifting of the concentration of wealth between nations.

For the investor, the broader market allows for greater portfolio diversity, decreasing investment risk. This diversity also allows for maximization of returns on the investment through the mixing of holdings.

For a corporation, it broadens its ownership base, thus allowing for greater capital stability. Tax incentives may be available, interest rates may be lower for borrowers, and foreign issuers generate foreign currencies to be used in local operations.[66] Other overall advantages include technology and information exchanges.

However, there are a number of barriers hindering the internationalization and free flow of the capital markets. Some, such as language, are relatively easy to deal with. Others are more complex. Protectionist impediments take various forms and are applied to both directly and indirectly. Foreign investment is restricted in certain types of industry, such as natural resources, and the communications field. Investment in that in which is deemed to affect national security will be prohibited in almost every country. Foreign taxes may be applied to dividend and interest payments, and admission to stock exchanges can be limited by regulations.

Compliance with each individual country's securities requirements can pose a more formidable obstacle. Foreign issuers wanting to enter the United States' market must comply with the SA (1933) and the SEA (1934) as well as any of the legislative regulations determined to be applicable. This can prove to be a major disincentive for foreign issuers due to the high cost, plus the conflicting requirements between what is demanded under their own country laws as compared to demands under the United States' laws. A specific problem area is the accounting information and the auditing procedures of financial statements.[67]

In October of 1982, the SEC promulgated an integrated disclosure system for foreign issuers; form 20-F. Under this system, an issuer wanting to put forth a new issue already would have a form 20-F on file. Pursuant to the requirements of the 1934 SEA, that issuer can incorporate by reference, information previously disclosed on the form 20-F.[68] This system is structured around the foreign registration documents; F-1, F-2 and F-3. These correlate with the requirements under forms S-1, S-2, and S-3

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65. *Id.* at 10.

66. Merlowe, *Internationalization of Securities Markets: A Critical Survey of U.S. and EEC Disclosure Requirements*, 8 J. COMP. BUS. CAP. MARKET L. 252 (1986).

67. Securities Act, § 7, Schedule B.

68. Thomas, *supra* note 24, at 3.

for domestic issuers. Factors determining which form to use include the type of offering, the reporting history, the amount of assets of the issuer, and the amount of voting stock held by non-affiliates.[69] Reaction to this system has ranged from viewing it as a small step in promoting world-wide markets;[70] to being much too permissive and adaptable.[71]

VI. INVESTIGATION AND DISCOVERY IN INTERNATIONAL SECURITIES CASES

This area of internationalization of securities is ripe for additional directives and information sharing. Protectionist laws can thwart even the most carefully conducted investigation. In particular, laws protecting the confidentiality of information given banks, blocking statutes used by foreign governments to prohibit or control distribution of information, and secrecy laws establishing rights individuals may use to compel others to keep certain information secret create barriers in gathering information.

The Restatement (Second) of Foreign Relations Law of the United States (1965) provides assistance in this area, and has given criteria for consideration when apparent conflict arises between two nation states as to discovery under foreign law. When there is concurrent jurisdiction, the existence of a foreign law which presents a conflict does not necessarily divest one state of jurisdiction. Each state is to consider the vital national interests of each of the nations; the extent and nature of the hardship inconsistent enforcement actions from the different nations would impose on the parties; the degree and extent of the necessary conduct to take place in the territory of the nation; the nationality of the party; and the extent to which action by either state is expected to achieve compliance with the regulations as set forth by that particular state. Restatement (Second) Foreign Relations Law § 40.

Through bilateral mutual assistance agreements,[72] memoranda of understanding (MOU) and agreements with foreign governments, the Commission has approved its ability to gain information from foreign sources. To date, three MOU's have been signed; the first in Switzerland in 1982.[73] Agreements with the United Kingdom Department of Trade and Industry, and most recently with the Japanese Ministry of Finance are also in existence. These agreements allow each of the government's mechanisms by which information related to the market surveillance and enforcement of their securities laws may be gained. If the offense is criminal in nature, the United States can use treaties it has with various countries to obtain the needed cooperation and information. Treaties are in effect in Switzerland, the Netherlands, Turkey, Italy, Canada, and the United Kingdom.[74]

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69. *Id.*
70. Merlowe, *supra* note 66, at 275, n. 69.
71. *Id.* at 275, n. 70.
72. Mann & Sullivan, *supra* note 1, at 42.
73. Cox, *supra* note 27, at 10.
74. Mann & Sullivan, *supra* note 1, at 55-57.

The Swiss agreement is unique in that it mandates a provisional arrangement to provide the SEC with information based on a private agreement between members of the Swiss Bankers Association.[75] The Agreement permits bank disclosure of information under certain circumstances, and grants an exception that such disclosure violates Swiss banking secrecy laws.[76]

Many of the recent cases involving foreign law and potential conflict of laws have revolved around insider trading, including *SEC v. Dennis Levine, et al.*, 86 CV 3726 (ro) (S.D.N.Y. 1986). In this case, the SEC alleged Levine had made millions in profit over a period of approximately six years by trading on material non-public information regarding tender offers, mergers, leveraged by-outs and other business-related information. During the investigation, the Commission was able to obtain information by working with the attorney general of the Bahamas in Bank LEU International (BLI) a Bahamian financial institution through which the SEC alleged Levine placed orders relating to these transactions. The orders were placed in either the name of two Panamanian corporations or by using code.

After being assured by the Bahamian attorney general that criminal charges would not ensue, BLI turned over the needed documents to the Commission, greatly assisting in their investigation.

Another agreement which facilitates investigation of securities transactions is the Hague Convention on the Taking of Evidence Abroad.[77] This is a multi-lateral treaty which provides a means for the taking of evidence in countries other than the one desiring to obtain the evidence.[78] Even though using the treaty is costly and time consuming, the Commission has resorted to it on occasion to obtain the needed information; most notably, *SEC v. Certain Unknown Purchasers of the Common Stock of and Call Options for the Common Stock of Santa Fe International Corporation*, 81 CV 6553 (S.D.N.Y. 1981); (the "Santa Fe" case) and *SEC v. Banca Della Svizzera Italiana, et al.*, 81 CV 1836 (MP. S.D.N.Y. 1981) also known as the "St. Joe" case.[79] However, because of the cost and time involved in using the Hague treaty, the Commission prefers to support and use the bilateral and multi-lateral assistance agreements.[80]

To further assist in case investigation discovery, the Commission has required foreign and domestic market places through market linkages to develop surveillance and information sharing agreements. Known as Self-Regulatory Organizations (SRO) they are expect to assure the integrity of trading through linkages they have developed with minimal SEC

75. *Id.* at 50.
76. Goelzer & McGrath, *supra* note 31, at 597.
77. Mann & Sullivan, *supra* note 1, at 58.
78. Goelzer & McGrath, *supra* note 31, at 601.
79. *Id.*
80. *Id.* at 603.

supervision.[81]

VII. THE GLOBAL MARKET AND 24-HOUR TRADING

A one-world securities market is no longer fantasy; it's reality. Due to advances in communications technology and travel, barriers that were so formidable 50 years ago have been dissolved. A recent article by Professor Peter F. Drucker[82] focussed on the changed world economy, and argued that the "world's economy is not changing, but has changed".[83] One of the fundamental reasons, according to Professor Drucker, is that movements of capital, rather than trade, have become the driving force behind the world's economy; that while the connection between the two has not been totally severed, it has been loose, creating instability in the economy.[84] He further refers to the world economy as being in control, rather than the separate nation-states, individually.[85] Nothing more clearly emphasizes this point than the present state of the securities and investment markets.

In soliciting comments about international trading in secondary markets from those who deal in the securities and capital markets, the SEC, through release number 34-21958,[86] in April of 1985, found general agreement among respondents that transnational trading will continue to increase.[87] However, there was disagreement as to the future structure of those markets and the role the SEC should play. Some felt trading around-the-clock would occur through a network of inter-connected exchanges, while others commented that 24-hour trading would be more likely through in-house trades by U.S. based and large foreign securities firms.[88] They also generally supported increased dissemination of quotation and information as well as development of inter-market linkages. The commentators considered these developments to be appropriate areas for Commission involvement, but cautioned generally that the markets should be allowed to develop on their own.[89] Because most rating is done by market professionals and international investors, the need for increased commission surveillance and regulation is decreased. The respondents did suggest that the SEC should play an active role in encouraging agreements between active trading markets in setting minimum criteria for an automated clearance and settlement system.[90]

As with any uncharted territory in which changes are occurring rap-

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81. *Id.* at 605.
82. Drucker, *The Changed World Economy*, 64 FOREIGN AFF. 768-91 (Spring, 1986).
83. *Id.*
84. *Id.*
85. *Id.*
86. Fed. Sec. L. Rep., *supra* note 50.
87. Goelzer & McGrath, *supra* note 31, at 602.
88. *Id.* at 576.
89. *Id.*
90. *Id.* at 577.

idly an numbers of participants are increasing, it is difficult for those charged with overseeing compliance to maintain pace with the changes. Part of what makes this so complex and difficult is the broad spacial area in which the transactions occur. The body of law encompassing securities regulation in the United States was written for defined number of players with a commonality of geographical space and legal understanding. In applying those laws to international transactions, consideration must be given to differing standards of regulation; i.e., only recently has Switzerland made insider trading illegal; as well as different legal systems. The European system of civil law can differ significantly in is application and procedure as compared to the common law systems of the United States, Great Britain and Canada.

The overriding concern of the Commission is the balance needed to facilitate and encourage the growth of the international economic markets while protecting the United States' investor. Of particular concern is the after-hours, over-the-counter (OTC) trade reporting, and the possible gap in information to the investor. However, most market respondents to the SEC's survey indicated that investors prefer to trade during regular business hours[91], so far creating less of a problem than anticipated.

Another consideration is the increase in the volatility of the markets due to the ability, through communication advances to respond more rapidly. A prime example of this was the "Black Monday Wall Street Crash" which occurred in October of 1987. This event emphasized the inter-dependence of the world's financial markets like no other. It created violent swings in stock prices as a daily occurrence on a world-wide scale. These swings were reflected in the apprehension of the people involved, not only the professionals in the market, but in the small individual investor planning to send his children to school on returns from his investment. Of greater far-reaching concern is the effect this type of reaction has on the world's economic stability, especially among the underdeveloped nations struggling to survive. Of some comfort is the knowledge that mechanisms were in place to allow appropriate responses to ward off a world-wide depression, in comparison to the 1929 crash.[92]

In considering 24-hour trading, most professionals in the securities market comment that the Commission is simply recognizing what it has been incurring for quite sometime.[93] As far as the need and ability of the SEC to deal with these changes, it is felt that methods to handle these changes are in place, but the ability on the part of the Commission to do

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91. *Id.*

92. Most notably was federal reserve Chairman Alan Greenspan's move to loosen the money supply. Inflation could have been the result, but the possibility of a depression loomed far greater if the national supply of money was not relaxed. The SEC also has the power to close the National Trading Exchanges if the trading volume becomes too rapid and too high over a limited period of time.

93. Interview with V. Baruttia, Registered Investment Advisor (October, 1987).

so is not.[94]

There is an inability of the current laws to properly govern multinational corporations and their foreign subsidiaries, as well as inadequate and improper supervision of broker dealers who deal in international securities.[95] A prime example of a developing problem is the off-shore fund.[96] Off-shore funds are those funds organized under the laws of a foreign county, selling its securities exclusively outside of the United States to non-nationals, then investing in American securities and real estate.[97] While no registration is required at this point, cases within the past few years have pointed at the ability of these funds to severely affect the United States' markets.[98] The Commission has imposed administrative sanctions on registered broker/dealers and investment advisors because of misleading information and prospectus disseminated to potential investors of off-shore funds.[99]

Obtaining jurisdiction over foreign issuers through broker/dealers remains a problem. The American Law Institute (ALI) is considering revisions of the Restatement (Second) Foreign Relations Law in the area of obtaining jurisdiction. It is looking to a "reasonableness test" as opposed to the "conduct-effect test" in determining when the United States' law will apply. The office of the general counsel to the SEC is opposed to the adoption of the reasonableness standard as being too vague and uncertain.[100] As a result, in May of 1986, the ALI conformed its jurisdictional standards for its revision to be more in line with the traditional concepts. Alternatives to the present standards are still being considered by the Commission.[101]

VIII. CONCLUSION

Internationalization of the securities and capital markets continue to be both boon and bane. As to affect the advent of 24-hour trading will have, it is generally felt it is too soon to tell. Because of the advancements in technology, the markets can do more in less time; and with around-the-clock markets, there is more time in which to do more, potentially creating more problems.

As is recognized by the Commission, there is a need for bilateral and multi-lateral agreements for cooperation between nations in the discovery process and the exchange of information concerning enforcement of securities laws. In July of 1986, a meeting of the International Organization

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94. Interview with G. Scott, Professor of Securities Law, Denver University College of Law (November 1987).

95. *Id.*

96. BLOOMENTHAL, *supra* note 25, at § 5.02(3), 5-13, Release No. 4-2/87.

97. BLOOMENTHAL, *supra* note 25, at 5-13.

98. *Id.* at 5-12.

99. *Id.* at 5-13.

100. Mann & Sullivan, *supra* note 1, at 35.

101. Goelzer & McGrath, *supra* note 31, at 605.

of Securities Commissions (IOSC) took place in Paris, France. Fifty-eight countries attended, excluding Japan,[102] and agreed to a proposal offered by the then SEC Chairman John Shad to form committees to consider such issues as the growth of developing nations, securities markets, acceleration in clearing and settlement systems, changing and modernizing prospectus requirements, access of foreign issuers, broker/dealers and investors to national markets and exchange of information concerning the enforcement of the securities laws.[103]

Subsequent to the meeting, the executive committee of the IOSC adopted a resolution to provide assistance on a reciprocal basis to obtain market over-sight and guard against fraudulent transactions, and to specify contact persons to assure processing of request for assistance from other members in a timely manner.[104]

The difficulty continues to be striking the balance between laws which are too restrictive in their application and inadequate protection of the United States' investor. There is no doubt that trans-national trading in capital markets will continue to increase. The question of the securities laws' ability to effectively grapple with this increase remains.

Carolyn B. Clawson

102. L. Loss, *supra* note 10, at 55.
103. Mann & Sullivan, *supra* note 1, at 72.
104. *Id.* at 73.

LEONARD v.B. SUTTON AWARD PAPER

International Cooperation in Protection of Atmospheric Ozone: The Montreal Protocol on Substances that Deplete the Ozone Layer

I. INTRODUCTION

On September 14, 1987, in Montreal, Canada, 24 countries signed a landmark Protocol[1] to the Vienna Convention for the Protection of the Ozone Layer,[2] thereby taking a large step toward solution of the global environmental problem posed by the depletion of atmospheric ozone. The importance of this Protocol is two-fold: it serves to reduce the production of pollutants responsible for atmospheric ozone destruction, and it represents a milestone in the field of international environmental cooperation—it is the first time the international community has banded together to eliminate an environmental threat *before* serious damage has occured. As such, the Protocol might help set a precedent for solving other environmental challenges faced by the global community.

By focusing on both these aspects of the Protocol, this article will attempt to provide a thorough analysis of the ozone problem. After a summary of the scientific background of the current threat to atmospheric ozone, the article will discuss the Protocol's historical background, analyze its provisions, and highlight its significance for the field of international environmental law in general. It is hoped that this discussion will serve to demonstrate just how unique and revolutionary the Protocol is, as well as emphasize the scope and severity of the problem of atmospheric ozone depletion.

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1. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, *reprinted in* 26 I.L.M. 1541 (1987) [hereinafter Protocol].

2. Vienna Convention for the Protection of the Ozone Layer, March 22, 1985, *reprinted in* 26 I.L.M. 1516 (1987) [hereinafter Vienna Convention].

II. THE PROBLEM OF DEPLETION OF THE OZONE LAYER: AN OVERVIEW

A. *The Chemistry of Atmospheric Ozone*

Ozone is a relatively unstable variety of oxygen consisting of three atoms of that element bonded together to form a molecule; its chemical formula is O3.[3] Ozone is constantly being created in the upper atmosphere by the action of sunlight on diatomic oxygen molecules (O2), and is simultaneously destroyed by a number of complex reactions involving several gaseous elements.[4] The total concentration and vertical distribution of atmospheric ozone is determined by the combined effect of these processes, which may create and remove ozone at different rates and at different altitudes.[5] Atmospheric ozone absorbs short-wave ultraviolet solar radiation, preventing most of it from reaching the Earth's surface.[6] Ozone also absorbs varying amounts of infrared radiation, and is thus an important factor in the maintenence of atmospheric temperature.[7]

Normally, chemical processes in the upper atmosphere produce and destroy ozone at roughly equal rates, maintaining a balance. In recent years, however, scientific studies have shown that this balance is no longer being maintained, and that the ozone layer is suffering a relatively high rate of depletion.[8] More recently, public attention has been focused on the ozone problem by the discovery of a "hole"[9] in the ozone layer over Antarctica, which occurs at certain times of the year and seems to be growing. This is a manifestation of the unique atmospheric conditions which prevail in the Antarctic, and of recently observed trends, which seem to indicate that ozone depletion is occuring more rapidly at higher latitiudes (above 40 degrees north and south) than near the equator.[10]

Scientific studies[11] have linked ozone depletion to a number of chemical agents, some of which occur naturally, but all of which are by-products of industry. These include nitrogen oxides (NO2), nitrous oxide

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3. This discussion of the scientific basis of the ozone problem is derived mainly from *Causes and Effects of Changes in Stratospheric Ozone: Update 1983* [hereinafter *Update 1983*], prepared by the Environmental Studies Board of the National Research Council, and published by the National Academy Press in 1984. For more detailed information on scientific aspects of the ozone problem, *see* the bibliographies in this book and its predecessor, *Causes and Effects of Stratospheric Ozone Reduction: An Update* [hereinafter *An Update*, as well as, *generally*, Whitten & Prasad, *Ozone in the Free Atmosphere* (1985).

4. *Update 1983*, *supra* note 3, at 3.

5. *Id.*, at 50-94.

6. *See* Bruce, *Man's Impact on Earth's Atmosphere*, in 1 J. TITUS, EFFECTS OF CHANGES IN STRATOSPHERIC OZONE AND GLOBAL CLIMATE 35, 44 (1986).

7. *See* Environmental Assessment of the Vienna Convention for the Protection of the Ozone Layer, *reprinted in* 26 I.L.M. 1524 (1987).

8. *See An Update*, *supra* note 3, at 2.

9. The famous "hole" observed in the ozone layer over the Antarctic in the 1970's and '80's is not a true hole, but is rather an area of seasonal 40-50% thinning in the stratospheric ozone layer. *See* Bruce, *supra* note 6, at 44.

10. *Id.* at 48.

11. *See generally*, *An Update* and *Update 1983*, *supra* note 3.

(N2O), methane (CH4), carbon dioxide (CO2), and the chlorofluorocarbons (abbreviated as CFCs), which are the worst offenders.[12] CFCs are man-made chemicals used primarily in aerosols and in cooling systems, such as refrigerators and air conditioners. These chemicals are especially harmful to atmospheric ozone because they are not easily destroyed by natural processes in the upper atmosphere, and may remain in the stratosphere, continually breaking down ozone molecules, for 100 years or more.[13] Due to the fact that other agents linked to ozone depletion, such as carbon dioxide and methane, are less persistent, and are produced by natual processes in significant quantities,[14] the Montreal Protocol imposes controls on chemicals in the CFC family only.[15]

B. Environmental Effects of Ozone Depletion

Since atmospheric ozone absorbs short-wave ultraviolet radiation (UV-B radiation),[16] any depletion results in higher levels of these harmful rays penetrating the atmosphere and reaching the Earth's surface.[17] It appears that short-wave ultraviolet radiation has a variety of detrimental effects on animal and plant life, especially on aquatic organisms.[18] Studies show that increased levels of UV-B at the surface may stunt the growth of certain crop types, and may also inhibit plant reproduction.[19]

While a number of studies have attempted to measure the effects of increased UV-B on animals,[20] the majority have focused on humans. UV-B radiation produces a variety of effects in humans, ranging from suntan to skin cancer, according to the amount of exposure and sensitivity of the individual.[21] UV-B has been shown to be causally linked to suppression of

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12. *See Update 1983, supra* note 3, at 5.

13. *Id.*, at 96; *see also* Bruce, *supra* note 6, at 41.

14. Carbon dioxide is, of course, a by-product of animal respriation as well as product of industry. Methane is produced by various decomposition processes. For a more complete discussion of the sources and effects of these and other gases on ozone depletion, *see* Bruce, *supra* note 6, at 41.

15. Annex A to the Montreal Protocol contains a list of chemicals covered by the treaty's controls, these are divided into two groups: chlorofluorocarbons and halons; these two classes are lumped together and abbreviated for convenience's sake throughout this paper as CFCs.

16. *See* Bruce, *supra* note 6, at 44.

17. *Id.* For every one percent depletion in atmospheric ozone, there is a corresponding two percent increase in the amount of UV-B radiation which reaches the earth's surface.

18. The organisms which are affected by increased UV-B radiation are generally those which live at or near the ocean's surface, and include plankton, fish larvae, and larval shrimp and crabs. UV-B appears to disrupt the reproductive viability of these creatures, and may also shorten their lifespans. *See Update 1983, supra* note 3, at 218; Letter of Submittal from the Department of State to the President of the Vienna Convention for the Protection of the Ozone Layer, August 22, 1985, *reprinted in* 26 I.L.M. 1518 (1987).

19. *See Update 1983, supra* note 3, 209-215, *see generally*, Teramura, *Overview of Our Current State of Knowledge of UV Effects on Plants*, in J. TITUS, EFFECTS OF CHANGES IN STRATOSPHERIC OZONE AND GLOBAL CLIMATE, 65.

20. *Update 1983, supra* note 3, at 191.

21. *See generally*, Emmett, *Health Effects of Ultraviolet Radiation*, J. TITUS, EFFECTS

the human immune system as well as to various types of skin cancer.[22] Since the ozone layer normally prevents a large percentage of UV-B radiation from reaching the Earth's surface, any depletion of atmospheric ozone leads directly to a higher incidence of skin cancer and immune system suppression in humans. While the exact figures are as yet undertermined, it is estimated that for each one percent decrease in the amount of atmospheric ozone there will be a corresponding increase of between two and four percent in the incidence of human skin cancer.[23]

III. INTERNATIONAL RESPONSE TO THE OZONE DEPLETION PROBLEM: THE ROAD TO THE MONTREAL PROTOCOL

The depletion of the stratospheric ozone layer was first noticed by scientists in 1974.[24] Over the next few years, as the scientific community began to realize the potential threat to mankind and the environment posed by this problem, international attention and concern increased.[25] In 1977, in response to this growing concern, the United Nations Environmental Program (UNEP) convened an International Conference on the Ozone Layer, and shortly thereafter established a Coordinating Committee on the Ozone Layer.[26] This committee, composed of representatives from a consortium of international, governmental, and non-governmental organizations, conducted and coordinated research on the depletion of atmospheric ozone, published assessments of the problem, and made recommendations for its solution.[27] Additionally, in 1980, the Governing Council of the United Nations convened a working group to discuss possible international action.[28]

The work of these two groups[29] reached its culmination at a conference in Vienna in March 1985, where twenty-one nations signed the Vienna Convention for the Protection of the Ozone Layer.[30] This document, which the U.S. Senate ratified in 1986,[31] contains no significant substantive provisions regarding reduction of CFCs, but instead sets up a framework for internationally coordinated study of the ozone problem.[32] The

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OF CHANGES IN STRATOSPHERIC OZONE AND GLOBAL CLIMATE 129 (1985).

22. Emmet, *supra* note 21, at 138; *An Update*, *supra* note 3, at 241.

23. *See* BRUCE, *supra* note 6, at 44.

24. Golubev, *Global Environmental Change: The UNEP Perspective*, in J. TITUS, EFFECTS OF CHANGES IN STRATOSPHERIC OZONE AND GLOBAL CLIMATE 22 (1985).

25. Benedick, *Global Environmental Change: The International Perspective*, J. TITUS, EFFECTS AND CHANGES IN STRATOSPHERIC OZONE AND GLOBAL CLIMATE 32 (1985).

26. Golubev, *supra* note 24, at 22.

27. *Id.*

28. Benedick, *supra* note 25, at 32.

29. For an overview of the process which led to the Montreal Protocol, *see* Reports of the Ad Hoc Working Group of Legal and Technical Experts for the Elaboration of a Protocol on Chlorofluorocarbons to the Vienna Convention for the Protection of the Ozone Layer, UNEP Doc. WG.151/L.4, UNEP Doc. WG.167.

30. Vienna Convention, *supra* note 2.

31. *Sen. Treaty Doc.* 99-9, ratification deposited Aug. 27, 1986.

32. Vienna Convention, *supra* note 2, arts. 3, 4.

Vienna Convention also provides for transfer of information regarding the problem, promotes regular conferences of the parties, and sets up a secretariat to encourage the adoption of measures to prevent further depletion of the ozone layer.[33] In short, the Convention was designed to foster an atmosphere of international cooperation in order to enable substantive measures to be developed at a later date, if they were found to be necessary. The Convention's effectiveness in reaching this goal is evidenced by the relative ease with which the Montreal Protocol was adopted two years later.

IV. MONTREAL PROTOCOL ON SUBSTANCES THAT DEPLETE THE OZONE LAYER

A. Background

As the above discussion of the genesis of the Vienna Convention indicates, the signatories and sponsors of the treaty recognized the probable need for a Protocol to impose substantive controls on the production and consumption of CFCs. In order to assess this need, UNEP arranged for a summarization of the findings of the Coordinating Committee,[34] and sponsored two workshops of the Working Group, in May and September, 1986, in order to assess the need for and outline the form of a Protocol.[35] Among the findings[36] were a number of dire predictions, which indicated that even if immediate action were taken to freeze CFC production and consumption levels ozone depletion would continue for at least one hundred years.[37] It was apparent that the only way to stabilize the stratospheric ozone situation was to mandate deep cuts in global consumption and production of CFC's. The Montreal Protocol was the international community's response to this challenge.

B. Analysis of Substantive Provisions

In order to slow and eventually end the process of atmospheric ozone depletion, the Montreal Protocol imposes a variety of controls on the production, consumption, importation, and export of a number of harmful chemicals, mostly chlorofluorocarbons.[38] The controls are based on 1986 levels of production and consumption of two groups of ozone-depleting chemicals,[39] as calculated according to a formula in Article 3.[40] Parties are

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33. *Id.*, arts. 2,5-7.

34. Golubev, *supra* note 24, at 23.

35. *Id.*

36. For a report of these findings, *see generally* TITUS, supra note 6.

37. *See generally* Hoffman, *The Importance of Knowing Sooner*, J. TITUS, ed., *supra* note 6, at 53.

38. See Annex, *supra* note 9. The controls apply to two groups of chemicals, CFCs and halons. Halons are chemically related to CFCs, and are suspected to have even higher ozone-depleting potential than the more common chlorofluorocarbons.

39. *Id.*

40. Protocol, *supra* note 1, art. 3. This formula assigns a numerical factor to each con-

required[41] to limit production and consumption of the specified CFCs and halons to 1986 levels by the beginning of the second six month period following the entry into force of the Protocol.[42] Article 2 of the Protocol limits production and consumption of the controlled chemicals to 80%[43] of 1986 levels for a five-year period beginning on July 1, 1993, and further imposes a limit of 50%[44] of 1986 levels as of July 1, 1998.

Taking into account the special circumstances of several of the parties, Article 2 of the Protocol provides for a number of variations on and exceptions to the general controls described above. Article 2(6), for example, allows the Soviet Union to complete CFC production facilities provided for in its most recent five year plan, and to have any additional production from such facilities counted as part of 1986 production and consumption levels for purposes of the Protocol.[45] Article 2(7) allows the member states of the European Community, once they have all individually ratified the Protocol, to apportion production and consumption of the controlled chemicals among the member states in such a way that consumption or production may exceed the prescribed limits in one or more states, so long as the Community *taken as a whole* meets the general requirements of Article 2.[46] A similar provision[47] allows small producers of CFCs to cooperate to apportion production between themselves, provided that overall combined production of these states does not exceed the control levels.

The major exception to the Article 2 controls applies to developing

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trolled substance according to its ozone-depleting potential. Using these factors, a party computes its 1986 production and consumption levels, arriving at a numerical figure. While the party's consumption and production of the controlled substances may not normally exceed this figure, the party may, subject to the limitations of the Protocol, substitute larger amounts of CFCs with a lower rating for smaller amounts of CFCs with a higher rating. A party's total production of controlled substances may thus conceivably increase under the Protocol, although this increased production will consist of substances with a lower ozone-depleting potential.

41. Protocol, *supra* note 1, art. 2(1), 2(2).

42. *Id.*, at art. 16. Article 16 provides that the Protocol shall enter into force on January 1, 1989, so long as at least 11 signatories have ratified it. Otherwise, it becomes effective 90 days after this ratification is accomplished.

43. *Id.*, at art. 2(3). Developed countries are allowed to exceed their 80% production limits by up to 10% if this excess production is required for the advancement of developing countries.

44. *Id.*, at art. 2(4). This section provides a 15% overproduction exception at this stage, under the same conditions described.

45. This concession was apparently necessary to obtain the acceptance of the Protocol by the Soviet Union and other planned economies, who wished to be allowed to complete potentially proscribed CFC production facilities in the planning or construction stages. *See* [Reference File] INT'L ENVT. REP. (BNA) 531 (Oct. 14, 1987).

46. The Eurpopean Community as a whole is bound by the Protocol, although the individual member states must also ratify it. For a discussion of the special circumstances of the EEC vis-a-vis the Protocol, *see* 10 INT'L ENVT. REP. 531 (Oct. 14, 1987).

47. Protocol, *supra* note 1, art. 2(5).

countries,[48] as is outlined in the provisions of Article 5. The drafters of the Protocol recognized[49] the special requirements of these countries for CFC use,[50] and Article 5 thus entitles developing countries to delay compliance with the controls of Article 2 by ten years, so long as per capita consumption of the controlled substances does not exceed 0.3 Kg per annum.[51]

For ten years following the entry into force of the Protocol developing countries party to the Protocol will have the opportunity to increase their production of CFCs and halons in order to enhance economic development.[52] As an additional aid to development, Article 2 also allows developed nations, covered in full by the controls, to exceed production limits by up to 10%, so long as this excess production is used to "satisfy the basic domestic needs" of the developing nation parties.[53]

Apart from direct controls on important sources of ozone depletion, the Montreal Protocol also attempts indirectly to bring about a global reduction in production of these harmful substances. It does this by imposing import and export restrictions on the parties to the Protocol.[54] First, all parties are required to ban the import of controlled substances from non-party states within one year after entry into force of the Protocol.[55] This provision seems intended to curtail production of controlled substances in non-party countries by eliminating a large percentage of the export market for these producers. This may indirectly provide an incentive for CFC-producing countries to become a party to the Protocol, in order to regain a wider market for their products.

Further requirements of Article 4 include a ban on the importation from non-party nations of products *containing* CFCs or halons, to come into effect within 4 years from the entry into force of the Protocol.[56] Article 4(4) goes even further, providing for the possibility of a ban on the import from non-party nations of goods *produced with the aid of controlled substances*, but not actually containing them.

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48. "Developing Country" is never defined for purposes of the Protocol—an omission which could conceivably cause problems in the future.

49. *See* Protocol, *supra* note 1, Preamble.

50. Most developing countries are located in tropical or subtropical regions, and the "special requirements" mentioned in the Protocol refer to the need for refrigeration equipment in these regions. CFCs are utilized as coolants in refrigerators and air conditioners. *See* Golubev, *Global Environmental Change: The UNEP Perspective*, in J. TITUS, *supra* note 6, at 21.

51. Protocol, *supra* note 1, art. 5(1).

52. *Id.* at art. 5(1). Unlike developed countries party to the Protocol, the basis for controls in the developing countries will not be 1986 production and consumption levels, but rather the average level of consumption and production over the three-year period 1995-1997, or 0.3 Kgs per capita.

53. Protocol, *supra* note 1, art. 2(1)-(4).

54. *Id.*, at art. 4.

55. *Id.*, at art. 4(1).

56. *Id.*, at art. 4(3).

The Protocol takes a more liberal stance in regard to export of controlled substances and related goods from party states to non-party states. While developing countries are flatly prohibited.[57] from exporting controlled substances and related goods to non-party countries, there is apparently no prohibition whatsoever on such exports when they involve a developed nation and a non-party. While developed parties are prohibited from granting to non-parties any sort of economic assistance that might "facilitate the production" of controlled substances,[58] they are nevertheless not prohibited from exporting technology for producing and utilizing CFCs and halons; they are only discouraged from doing so.[59] In keeping with the spirit of the Protocol, party states are in no way prohibited or discouraged from exporting" . . . products, equipment, plants or technology that improve the containment, recovery, recycling, or destruction of controlled substances, promote the development of alternative substances, or otherwise contribute to the reduction of the emissions of controlled substances."[60]

Cognizant of the possibility of new developments in scientific knowledge of the relationship between man's activities and the depletion of atmospheric ozone, the drafters of the Protocol included several provisions designed to ensure that the controls contained in the document are coordinated with the latest research developments. The agreement provides that the parties shall research and exchange information on the ozone problem,[61] provide each other with technical and scientific information to facilitate the goals of the Protocol,[62] and hold regular meetings to discuss and assess its implementation.[63] Perhaps most importantly, Article 6 provides for quadrennial meetings of party representatives and scientific experts to assess the efficacy of the Protocol's controls in the light of current information. On the basis of conclusions reached at these meetings, controls will be adjusted according to the procedure outlined in Articles 2 and 9. These controls are designed to promote flexibility, in the hopes that the Protocol will not become quickly outdated.

V. THE MONTREAL PROTOCOL'S PLACE IN THE INTERNATIONAL ENVIRONMENTAL LAW TRADITION

A. Historical Overview of Transfrontier Pollution Law

In order to fully appreciate the Montreal Protocol, it may be helpful to look at the development of international environmental law, specifically that area of law dealing with state responsibility for transfrontier pollution. The unique nature of the Protocol can be fully appreciated

57. *Id.*, at art. 4(2).
58. *Id.*, at art. 4(5).
59. *Id.*, at art. 4(6).
60. *Id.*, at art. 4(7).
61. *Id.*, at art. 9.
62. *Id.*, at art. 10.
63. *Id.*, at art. 11.

only through contrast with its precursors, without which it could not have come into existence. It is hoped that a brief overview of transnational evironmental law will help to put the Protocol in its proper perspective.

International attempts to control transfrontier air and water pollution are relatively recent phenomena; indeed, they seem to be unique to the latter half of the Twentieth Century.[64] There are, however, a few early cases which seem to have initiated the trend toward an internationally-accepted, customary body of law in this area: the Trail Smelter case[65] and the Corfu Channel Case.[66] The opinion in the latter recognized ". . .every state's obligation not to allow knowingly its territory to be used contrary to the rights of other states."[67] The Trail Smelter case, concerned specifically with an incident of transfrontier air pollution, contains a more authoritative statement: "No state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the property or persons therein. . ."[68]

For more than two decades, the narrow decisions discussed above were virtually the only authority available for cases involving transfrontier pollution.[69] With the increasing awareness of environmental concerns that characterized the Sixties and Seventies came the realization that pollution does not stop at national frontiers, and that any real solution to the problem could only be reached through international efforts.[70] Out of this realization came the first multilateral declaration on state responsibility for transfrontier pollution, the Stockholm Declaration, which provides:[71]

Principle 21

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their own jurisdiction or control do not cause damage to the environment of other

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64. *See generally*: V. NANDA, WORLD CLIMATE CHANGE: THE ROLE OF INTERNATIONAL LAW AND INSTIUTIONS, (ed. Ved P. Nanda 1983); Hoffman, *State Responsibility in International Law and Transboundary Pollution Injuries*, 25 INT'L & COMP. L. Q. 509 (1976); J. SCHNEIDER, WORLD PUBLIC ORDER OF THE ENVIRONMENT: TOWARDS AN INTERNATIONAL ECOLOGICAL LAW AND ORGANIZATION, (1979).

65. Trail Smelter Arbitration (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905 (1941).

66. Corfu Channel Case (Alb. v. U.K.), [1949] I.C.J. 4.

67. *Id.* at 22.

68. Trail Smelter, *supra* note 65, at 1965.

69. *See* Bankes & Saunders, *Acid Rain: Multilateral and Bilateral Approaches to Transboundary Pollution Under International Law*, 33 U. NEW BRUNSWICK L. REV. 155 (1985).

70. *See generally*, Bleicher, *An Overview of International Environmental Regulation*, 2 ECOLOGY L. Q. 1 (1972).

71. Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF. 48/14 & Corr. 1 (1972), *reprinted in* 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration].

States or of other areas beyond the limits of national jurisdiction.

Principle 22

States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction and control of such States to areas beyond their jurisdiction.

It must be noted that the Stockholm Declaration states general principles only; it has not proved strong enough to be relied upon in most cases.[72] Commentators have interpreted the above principles to allow imposition of liability on a state for transboundary pollution only where there has been a serious injury, and where a direct causal chaim linking the pollution to the injury can be discerned.[73] The above Principles are thus of limited applicability as regards cases of injury caused by transboundary pollution of an uncertain origin, as with the effects of acid rain.[74] This is especially true where a complex causal chain is involved, as it is where problems caused by ozone depletion are concerned. Despite its shortfalls, the Stockholm Declaration nevertheless remains the only widely-accepted statement of transnational environmental principles, although efforts to devise a more comprehensive body of substantive law have had some success in some specialized areas, notably transnational water pollution.[75]

While the body of substantive law regarding transnational pollution is very limited in extent, there has been a rapid expansion of internationally-accepted procedural norms applicable to the field, norms which are at least tacitly adopted in the Montreal Protocol. Some procedural obligations owed by one state to another have been included in bilateral and multilateral treaties so often that they now enjoy the status of customary norms of international law. For example, it is well-accepted that a state has the duty to notify other states of its activities which may have extraterritorial effects.[76] This duty was made specifically applicable to cases of transfrontier pollution in the Athens Resolution of the Institute of International Law.[77]

An extension of the duty to notify is the duty of states to exchange information. When one state plans a project that may cause harmful ef-

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72. Bankes & Saunders, *supra* note 69, at 163.

73. *Id.*

74. *See, e.g.*, A. ALTSHULLER & G. MCBEAN, SECOND REPORT OF THE UNITED STATES-CANADA RESEARCH CONSULTATION GROUP ON THE LONG-RANGE TRANSPORT OF AIR POLLUTANTS, 6-11 (Nov. 1980).

75. *See, e.g.*, Helsinki Rules of the Uses of Waters of International Rivers, *Report of the Fifty-Second Conference of the International Law Association Held at Helsinki*, (1969); Resolution on the Utilization of Non-Maritime International Waters (except for Navigation), adopted by the Institute of International Law at its session in Salzburg, Sept. 4-13, 1961, *reprinted in* 49 *Annuaire de l'Institut de Droit International* Tome II 381; and Bourne, *International Law and Pollution of International Rivers and Lakes*, 6 U. BRITISH COLUMBIA L. REV. 115 (1971).

76. *See* Bankes & Saunders, *supra* note 69, at 164.

77. Athens Resolution of the Institute of International Law, art. VII.

fects in neighboring states, it is not enough just to notify those states of the project; sufficient information about the project must accompany the notice to enable the neighbor country to make a valid assessment of the possible damage.[78] While the status of this duty as a rule of international environmental law is only firmly established in the area of water law, recent developments have confirmed that the duty may be extended to cases involving transfrontier air pollution.[79] It has been suggested that the duty to exchange information also includes the setting up of joint monitoring and research stations by the affected countries.[80] Evidence of the broad acceptance of these and similar duties can be gleaned from the fact that they are explicitly included in many recent international treaties involving transfrontier pollution.[81]

International support has been growing for yet another procedural duty—the duty of a state planning a project with possible extraterritorial effects to consult and negotiate with other states which might be affected.[82] This duty implies that the state which might be affected by transfrontier pollution should be allowed to suggest possible alternatives to the prospective polluter, and negotiate a mutually acceptable solution to the problem.[83] This duty cannot be said to be an accepted norm of customary international law, however. While international lawyers tend to agree that the duty to consult and negotiate *should* be a customary norm, and some support for it can be found in the opinions of the International Court of Justice,[84] the principle has binding effect only when it is included in treaties,[85] such as the Montreal Protocol.

Having examined the substantive and procedural antecedents of the Montreal Protocol, it may also be helpful to look at two relevant predecessors of that treaty, in order to fully appreciate the Protocol's significant innovations. These include the Geneva Convention on Long-Range Transboundary Air Pollution[86] (more conveniently known as the ECE

78. UNEP Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Resources Shared by Two or More States (1978), *reprinted in* 17 I.L.M. 1097.

79. *See* OECD Recommendation on Principles Concerning Transfrontier Pollution, Nov. 14, 1974, *reproduced in* Ruster & Simma, *International Protection of the Environment*, vol. 1.

80. *Id.*

81. *See*, Convention on Long-Range Transboundary Air Pollution ("E.C.E. Convention), Geneva, Nov. 13, 1979, *reprinted in* 18 I.L.M. 1442; Vienna Convention, *supra* note 2; Montreal Protocol, *supra* note 1.

82. *See* Bourne, *Procedure in the Development of International Drainage Basins: the Duty to Consult and Negotiate* (1972), 10 CANADIAN YEARBOOK INT'L L. 212.

83. *See* OECD Recommendation, *supra* note 79; Athens Resolution *supra* note 77.

84. Bankes & Saunders, *supra* note 69, at 168.

85. It should be noted that neither the Vienna Convention nor the Montreal Protocol recognize this duty to negotiate, although consultation between the parties is required. This is no doubt due to the fact that these documents are meant to prevent problems associated with ozone depletion, not remedy them after they have occured.

86. E.C.E. Convention, *supra*, note 81.

Convention) and the previously mentioned Vienna Convention for the Protection of the Ozone Layer.[87] Both of these treaties are multilateral efforts to come to grips with transboundary pollution of the atmosphere, and both are almost exclusively procedural in nature. The ECE Convention is primarily concerned with the study and exchange of information about acid rain and other transnational effects of air pollution.[88] Its only substantive provision is a vague exhortation that the parties "gradually reduce and prevent air pollution including long-range transboundary air pollution."[89] Similarly, the Vienna Convention requires only that the parties promise to cooperate in the exchange of information and research on the ozone problem, and "Promote. . .the harmonization of appropriate policies, strategies and measures for minimizing the release of substances causing or likely to cause modification of the ozone layer. . ."[90] These two treaties, while admirable efforts to increase international awareness and knowledge about the serious problem of transnational pollution, are unlike the Montreal Protocol in that they have little or no effect on the solution of the problem itself.

B. Significance of the Montreal Protocol

The text of the Montreal Protocol, upon close examination, can be seen to incorporate virtually all of the law concerning transboundary pollution, both procedural and substantive, which has attained customary status over the past few decades, and also adopts major porvisions of the treaties mentioned above. The Protocol is written in the spirit of the maxim *sic utere tuo ut alienum non laedas*;"[91] that is, a state may use its own property freely only so long as such use does not cause harm to other states or their citizens. The depletion of the atmospheric ozone layer harms the citizens of all countries; therefore producers of harmful substances such as CFCs and halons are obligated to alleviate the threat to human health posed by their activities. The Protocol's provisions thus follow the lead of earlier treaties in the field by ensuring that parties will be bound to perform their procedural dutues of information exchange,[92] cooperation, and consultation with one another in order to avert the potential harm of ozone depletion.

Along with the more traditional provisions just listed, the Montreal Protocol binds the parties to a number of unique requirements. It is these which make the Protocol a true landmark in international environmental law. First and foremost, the treaty is unique in that it imposes controls on

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87. *See* Vienna Convention, *supra* note 2.

88. *See* Bankes & Saunders, *supra* note 69, at 171-179 for commentary on the ECE Convention V(1).

89. E.C.E. Convention, *supra* note 81, art. 2.

90. Vienna Convention, *supra* note 2, art. 6(4)(c).

91. *See* BLACK'S LAW DICTIONARY (5th Ed.), at 1238 for a complete explication of the phrase.

92. Montreal Protocol, art. 9.

polluters *before* the pollution has caused major damage.[93] Prior treaties have always come into being after the environmental damage had taken place, and were designed to either repair or alleviate that damage.[94]

While scientific evidence clearly shows substantial stratospheric ozone depletion in recent years, it has not yet been conclusively shown that this depletion has caused damage such as increases in the occurence of human skin cancer.[95] The rates of incidence of several kinds of skin cancer are on the rise, but it is by no means certain that this is due to the increase in UV-B which accompanies ozone depletion.[96] The increases may have been caused by other factors, such as changes in lifestyle (more time spent in the sun, for example), or added exposure to other carcinogens.[97] It will probably be several years before a definate causal link can be conclusively established between CFC use and increased skin cancer, and it is likely to take even longer for the effects of ozone depletion to be readily noticeable, in the way that effects from acid rain are noticeable in Central Europe or Eastern North America. Nevertheless, it was not impossible to obtain the international consensus necessary for the drafting and acceptance of the Montreal Protocol.

A second aspect of the ozone situation which makes it surprising that the Protocol ever came into being is the fact that it is almost impossible to pinpoint the source of chemicals which break down atmospheric ozone.[98] The body of law concerning transboundary pollution grew up in response primarily to water and air pollution. Since it is relatively easy to determine the source of these types of pollution, it is correspondingly easy to apportion blame.[99] Once the source is determined, international pressure may be applied to the perpetrator, often resulting in a negotiated solution to the problem. It is, however, virtually impossible to pinpoint the sources of the chemicals which cause ozone depletion; CFCs and halons are used all over the globe, and the worst damage to the stratospheric ozone layer seems to be occuring over the one place on Earth where we can be almost certain that no CFCs are being produced—Antarctica. Since there is no definitive way to trace the cause of ozone depletion to its source, there is no way to apportion blame and liability for the damage caused by increased UV-B radiation.[100] There is therefore likely to be considerable less pressure on CFC-producing states to alleviate the problem than, for example, on states which pollute the

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93. *See* Benedick, *Global Environmental Change: the International Perspective*, in 1 TITUS, EFFECTS OF CHANGES IN STRATOSPHERIC OZONE AND GLOBAL CLIMATE 31, 32 (1986).

94. *See* E.C.E. Convention, *supra* note 81, and Helsinki Rules, *supra* note 75.

95. *Update 1983*, *supra* note 3, at 10, 169.

96. *See Update 1983*, *supra* note 3, at 168-191.

97. *Id.* Cancer rates in general have been rising, and it is difficult to determine whether the increased incidence of skin cancer is due to ozone depletion or merely part of this overall trend.

98. *Id.*, at 15.

99. *See* Bankes & Saunders, *supra* note 69, at 163.

100. *Id.*

water supply of another nation. This being the case, it seems amazing that the Montreal Protocol came into existence at all, especially when one considers the stringent controls contained in its provisions.

The strength and thoroughness of the substantive controls imposed by the Protocol constitute the third unique aspect of this treaty. As was described above, the provisions of the Protocol commit the parties to a 50% reduction in production of several substances which are suspected to be involved in ozone-layer depletion, and impose as well as strict controls on the import and export of controlled substances and related technologies between parties and non-parties.[101] Such controls are unprecedented in the field of international environmental law; even treaties drafted in response to obvious and well-understood transfrontier pollution problems do not impose on parties controls which are nearly as strict and far-reaching.[102] As noted above, previous treaties were limited primarily to procedural provisions; the Montreal Protocol incorporates these *and* strong substantive provisions.

Yet another unique characteristic of the Protocol is its amenability to revision and amendment. Indeed, the document's procedural provisions are designed to ensure that its substantive provisions continue to reflect the latest developments in scientific study of the ozone layer.[103] The scientific community is engaged in ongoing research regarding the dynamics of ozone depletion and its effect on humans and the environment in general, and it may be years or decades before definitive conclusions can be reached. Realizing that the controls imposed in Article 2 were based on scientific knowledge likely to change,[104] the drafters of the Protocol incorporated a mechanism allowing Article 2 controls to be altered to reflect new data on ozone depletion. This mechanism is outlined in Article 6 and Article 2(10), which provide for periodic review of the adequacy of Protocol controls in light of the latest scientific data, in order to ensure that controls continue to reflect environmental needs.

VI. IMPLICATIONS OF THE MONTREAL PROTOCOL

The above discussion serves to establish the unique place the Montreal Protocol holds in the field of international environmental law: it represents a huge leap forward from previous efforts made to counteract transboundary pollution. That being the case, the Protocol may well have a strong influence on further developments in the international environmental field. The Protocol could be looked to as a precedent in the solution of several other environmental problems of worldwide scope.

One such problem, Global air pollution and its product, acid rain, comes immediately to mind. Although it tends to be easier to pinpoint

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101. *See* text accompanying notes 38 through 63.
102. *See*, Vienna Convention, *supra* note 2; E.C.E. Convention, *supra* note 81.
103. Montreal Protocol, Preamble.
104. Montreal Protocol, Annex A.

the source of air pollution than to determine the origin of ozone-depleting substances, acid rain caused by air pollution also tends to cause its ill effects at great distances from its source. This makes it difficult to assess fault and apportion blame, especially in places like Europe, where many countries produce pollutants in a relatively small area.[105] Numerous attempts have been made among small groups of countries to solve this and similar problems, with only a limited amount of success.[106]

Nevertheless, it would seem likely that really significant gains such as those arising from a comprehensive treaty like the Montreal Protocol cannot be expected from a number of uncoordinated controls on pollutants: the European Community has made admirable efforts to reduce sulfur dioxide and nitrogen oxide emissions, yet a major source of these components of European acid rain is pollution in Eastern Europe, where no controls exist.[107] Also, regional efforts tend to get bogged down in unrelated political differences, as is illustrated by the interminable struggle between Canada and the United States for a workable agreement to alleviate the North American acid rain problem.[108]

The fact remains that compared to stratospheric ozone depletion the mechanics of acid rain damage are relatively well-understood, and this damage is easily observed by anyone who visits the forests of eastern North America or Central Europe. It can be hoped, therefore, that global support can be obtained for a worldwide treaty to control acid rain in the same way that the Montreal Protocol controls substances which cause the less obvious damage accompanying ozone depletion.

There are a number of other environmental problems of global concern which might prove amenable to multilateral solutions modelled on the Montreal Protocol. These include the pressing problem of nuclear waste disposal, and growing concerns over the pollution of Earth's orbital space by old satellites, discarded boosters, and other types of "space junk."[109] The Protocol demonstrates that a far-reaching, comprehensive agreement to eliminate an environmental threat can be attained before the threat becomes a reality. This treaty also shows that political differences need not be a stumbling block to finding a solution to a problem which is of concern to all.[110] It seems probable that future multilateral efforts to solve international environmental problems will be influenced by the Protocol; it is to be hoped that they are as successful.

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105. *See generally* Cleutinx, *European Community Air Pollution Abatement Policy*, 17 U. TOLEDO L. REV. 113 (1985).

106. *Id.*, at 116-119.

107. *Id.*, at 116.

108. *See generally*, Harris, *Canadian Positions, Proposals, and the Diplomatic Dilemma: Acid Rain and Emerging International Norms*, 17 U. TOLEDO L. REV. 121 (1985).

109. *See generally*, Goedhuis, *Some Recent Trends in the Interpretation and Implementation of the Rules of International Space Law*, 19 COLUM. J. TRANSNAT'L L. 213 (1981).

110. *See* N.Y. Times, Sept. 17, 1987, at A1, col. .

VII. EVALUATION AND ASSESSMENT OF THE PROTOCOL

In order to assess the value and efficacy of the Montreal Protocol, it is necessary to look at both the likely effect of its provisions as well as the overall value of the agreement. As should be evident from the preceding discussion of various individual provisions, the drafters of the Protocol deserve to be applauded for the thorough, almost visionary nature of the agreement, which goes so far beyond any previous attempt to control a serious global environmental problem. There is little doubt that the Protocol will serve to reduce consumption and production of CFCs and halons, but whether this will be enough to halt the depletion of the ozone layer remains to be seen.[111] The Protocol could have gone farther in some respects, such as prohibiting the developed state parties from exporting controlled substances and related technology to non-parties, and by imposing sanctions on parties found in non-compliance with the control provisions. Nevertheless, in the final analysis the controls imposed by the Protocol are all that environmentalists could reasonable hope for, and go far beyond what could have been expected in the light of prior attempts to come to grips with global pollution.

Looking at the Montreal Protocol as a whole, it is difficult to come up with any major criticisms. Not only does the treaty serve admirable to promote the goals of CFC and halon reduction, but it also stands as a milestone in the field of international environmental law. It represents the first time the world community has put aside its differences to face a global threat before that threat's effects become widespread and obvious, and in a manner which guarantees that cooperative efforts will continue to reflect the latest scientific developments. It is to be hoped that this agreement will not stand as an isolated example of worldwide cooperation, but instead will serve as a paradigm for future agreements on other threats and problems faced by the world community, environmental or otherwise.

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111. Judging from some studies, the controls contained in the Montreal Protocol are likely to be inadequate to halt the depletion of the ozone layer. Some projections indicate that immediate cuts on the order of 85% are required to accomplish this goal. *See* Hoffman, *The Importance of Knowing Sooner*, in TITUS *supra* note 6, at 53. It is to be hoped that as studies continue to show the necessity for more stringent controls, the parties to the Protocol will respond to the findings by using the document's amendment process to bring controls into line with the latest scientific assessments.

BOOK REVIEW

The Law of War

*Reviewed by Linda A. Malone**

De Lupis, Ingrid Detter, THE LAW OF WAR, Cambridge University Press, New York, New York (1987); $64.50 (cloth), $24.95 (paper), ISBN 0-521-34337-2, 411 pp.; bibliography, index, preface by the author.

As the Iran-Iraq War continues into its eighth year of noncompliance with international law, it is reassuring to read a book asserting the necessity for laws regulating war. A preface claims that THE LAW OF WAR is the first substantive treatment of the area in the English language since 1952. As such, the book is useful in relating recent incidents in warfare to the laws of warfare and as a general reference book in international law.

The author is very careful from the beginning to define her terms, including "war," "terrorism," and "armed conflict," although her definitions are not always satisfactory. For example, De Lupis poses the following definition of "terrorism":

> "International terrorism implies either isolated assassination and 'hostility' missions or the intermittent use or threat of force against person(s) to obtain certain political objective of international relevance from a third party."

This definition, however, does not address perhaps the most important element to identification or "terrorism": the identity of the party against whom the violence is directly addressed. Although the author does include in the text an excellent analysis of this aspect of terrorism, the definition itself in referring to demands on third parties does not make this distinction between targets clear. Perhaps the author cannot be faulted for failing to define a term that is indefinable so long as one person's freedom fighter is another person's terrorist. In any event, a more valuable aspect of the book is its careful distinction between prohibition of war, restrictions on weapons, prohibitions on methods of warfare, and the humanitarian rules of war.

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On the one hand, the author quite convincingly critisizes the outdated notion of war as separate and distinct from belligerencies or insurgencies, and attempts to distinguish between "guerilla warfare" and "terrorism." At other times, however, the author fails to note modern innovations in international law, particularly in relation to prohibitions on the use of force such as reprisals. For example, in the discussion of consent as justifying intervention, the author accepts that voluntary consent by a state can legitimize intervention that would otherwise be unlawful, although pointing out the difficulties of evaluating the legitimacy of the consent given. Also somwhat frustrating is that the author sometimes ends a section without coming to any ultimate conclusions, as with the chapter on the concept of war. This occasional reticence to draw conclusions is puzzling, particularly insofar as the author at other opportunities in the text does not hesitate to reach difficult conclusions, as in her determination that the use of nuclear weapons, and perhaps even their possession, violate international law.

The incorporation of recent events into the narrative, however, is excellent. Frequently, current developments in the Iran-Iraq War, Nicaragua, the "Star Wars" program, and the Middle East are discussed in connection with well established rules of war. In this regard, much of the book's discussion, in particular its evaluation of the PLO as a belligerent and the invasions of Grenada and Kampuchea as humanitarian intervention, is thoughtful and provocative. One striking example of the author's use of recent events is the disturbing parallel she draws between Iran's refusal to appear before the International Court of Justice in the Iranian hostages case and the United States' refusal to defend itself in *United States v. Nicaragua.*

The most compelling section of the book is the chapter on restrictions of weapons. None of the minor failings in the rest of the book are apparent in the author's discussion of prohibited weapons. The chapter includes a history of weapons that cause indiscriminate suffering, technical descriptions of weapons of mass destruction, and evaluation of the current state of international law regarding chemical, biological, and environmental weapons. The analysis manages to be comprehensive yet maintain a depth of detail that is useful even to someone already familiar with the area.

In her conclusion, De Lupis points out two emerging trends in the law of warfare: application of international law to intra-state conflicts and recognition of the rights of groups and individuals during war. Cynics frequently critisize international law for failing to accommodate the "realities" of war, yet THE LAW OF WAR demonstrates the oppisite conclusion, that international law flexibly adjusts to developments in warfare while preserving humanitarian concerns and interests of national security. For example, article 2 (4) of Protocol III to the 1981 *Weaponry Convention* prohibits attacks on forests or "other kinds of plant cover" except if such "natural elements" are used to cover, conceal, or camouflage combatants or their military objectives. De Lupis quite correctly asserts that this so-

called "jungle exception" undermines the application of Protocol III in any countries covered by jungle vegetation. The end result is that a state covered by jungle vegetation has no protection under the Protocol from weapons such as napalm. In instances such as this, the rules of war transform theaters of war into theatres of the absurd. Yet we have only to see the alternative, a war waged in the Persian Gulf with little or no respect for human life and the environment, to agree with the author's call for renewed adherence to international laws regulating warfare.