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## FACULTY COMMENT



In this Comment, Philip C. Jessup, a member of the International Court of Justice from 1961 to 1970, examines developments in the international legal order since the writing of his *A Modern Law of Nations* in 1945. The more encouraging developments have not yet saved mankind from "the scourge of war," but have borne fruit. Judge Jessup explores specific examples from both the national and international arenas. He then discusses "the importance of the International Court of Justice as a developer or clarifier of rules of international law." Because the Court plays such an important role, Judge Jessup regrets the fact "that some states have sought to evade their proper part in arguing cases before the Court," especially in cases involving a request for provisional measures of interim protection. He cites the case of the United States hostages in Iran as the latest example of the failure of a state to "do its duty." Judge Jessup's conclusion, however, is optimistic: "The functioning of the United Nations and its organs and conferences gives justification for the conviction that revisions of international law will continue to develop in such a way as to meet the needs of our international society."

## ARTICLES



The South African Government's policy of apartheid or separate development has achieved considerable notoriety over the past thirty years. Since 1976, South Africa has resorted to the fictional use of statehood and nationality to resolve its constitutional problems and to deprive all Blacks in the country to their South African nationality. Professor Dugard traces the development of the homelands policy and describes the creation of the "independent" homelands. His primary focus, however, is on the denationalization of South African Blacks and on the important role of denationalization in the ideology of separate development, issues he describes as "central to the political future of South Africa."



The dramatic growth in the use of flags of convenience by the maritime industry has become an issue of international concern. A variety of fac-

Root, B.A., J.D.; Paul E. Scott, B.A., M.D., J.D.; Daniel J. Sears, B.S., J.D.; Martin Semple, B.A., J.C.B., J.L.L., J.C.D., J.D.; Harley W. Shaver, A.B., J.D.; Martin H. Shore, B.A., J.D.; Gerald D. Sjaastad, B.S., M.S.C.E., Ph.D., J.D.; Harry M. Sterling, B.S., LL.B.; Janice R. Tanquary, B.A., J.D.; Mark A. Vogel, B.B.A., J.D., LL.M., C.P.A.; John Watson, B.S., J.D.; Elizabeth Wills, B.A., J.D.; Michael O. Wirth, B.S., M.A., Ph.D.; Brooke Wunnicke, B.A., LL.B.; James R. Young, B.S.C.E., J.D. Adjunct Lecturers in Judicial Administration: Stephen P. Ehrlich, B.S.B.A., J.D.; Barbara J. Gletne, B.A., M.A.; Maureen M. Solomon, B.A., M.P.A.; Bernard D. Steinberg, B.Mus., J.D.; Daniel R. Vredenburg, B.S., M.S.J.A.

# FACULTY COMMENT

## Revisions of the International Legal Order

PHILIP C. JESSUP

Thirty-five years ago, I attempted "to explore some of the possible bases for a modern law of nations."[1] In particular, two points were singled out as keystones of a revised international legal order.

> The first is the point that international law, like national law, must be directly applicable to the individual. It must not continue to be remote from him, as is the traditional international law, which is considered to be applicable to states alone and not to individuals. The second point is that there must be basic recognition of the interest which the whole international society has in the observance of its law. Breaches of the law must no longer be considered the concern of only the state directly and primarily affected. There must be something equivalent to the national concept of criminal law, in which the community as such brings its combined power to bear upon the violator of those parts of the law which are necessary to the preservation of the public peace.[2]

It was a time for the burgeoning of a new international legal order. The Charter of the United Nations had just been signed at San Francisco. The Charter provided for a reconstituted International Court of Justice. It charged the General Assembly of the United Nations with the duty of "encouraging the progressive development of international law and its

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In this Comment, the discussion of the role of the International Court of Justice in developing international law is based in part on the writer's Foreword to Dr. Jerome B. Elkind's forthcoming book, *A Functional Approach to Interim Protection*, to be published by Sijthoff & Noordhoff, Alphen aan den Rijn, The Netherlands. The writer acknowledges with thanks the publisher's permission to use this material.

1. P. JESSUP, A MODERN LAW OF NATIONS 2 (1946).
2. *Id.*

codification."[3] In 1947 the General Assembly discharged this obligation by creating a commission which drafted a statute for the International Law Commission that has functioned admirably. The world-wide interest in that development of international law has led to publication of translations of my little book into German, Korean, Japanese, and Thai. Many national societies of international law now flourish. More than a hundred law schools in more than twenty countries participate annually in an international law moot court competition under the auspices of the American Society of International Law. Important new journals of international law like this Denver Journal are now being published.

All of this ferment has not yet saved us "from the scourge of war" but it has borne fruit. I suggest simply two examples, one from the international and one from the national arena.

When the American diplomatic and consular personnel in the United States Embassy in Teheran were taken hostage by a group of Iranian militants with the approval of one who claimed to be their spiritual and political leader, the outrage was not "the concern of only the state directly and primarily affected"; it was denounced by the entire international community whose members felt and recorded the conviction that all were threatened by this breach of the time-honored rules of international law. Although it has sometimes been argued that customary international law is the creature and weapon of the "imperialist" states, all states felt injured by the illegal acts in Iran.

Look at the record:

The hostages were seized on November 4, 1979.

On November 20, the President of the United Nations General Assembly, Salim A. Salim of Tanzania, issued a statement which called for the release of the hostages and said:

> The President is convinced that the call for the release of the hostages represents the collective concern of the international community who clearly feel strongly that the sanctity of diplomatic premises and diplomatic personnel must be respected, without any exceptions, at all times . . . . It is crucial that international law and practice governing the treatment of diplomatic missions and their agencies be scrupulously observed.[4]

On November 27, Sergio Palacios de Vizzio of Bolivia, the President of the United Nations Security Council, said: "I must emphasize that the principle of the inviolability of diplomatic personnel and establishments be respected in all cases in accordance with internationally accepted norms."[5]

On December 4, 1979, the Security Council *unanimously* adopted a

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3. U.N. CHARTER art. 13(1)(a).
4. 34 U.N. GAOR, U.N. Doc. A/6096 (1979).
5. 34 U.N. SCOR (2172d mtg.), U.N. Doc. S/13616 (1979).

Resolution reaffirming "the solemn obligation of all States parties to both the Vienna Convention on Diplomatic Relations of 1961[6] and the Vienna Convention on Consular Relations of 1963[7] to respect the inviolability of diplomatic personnel and the premises of their missions," and calling upon "the Government of Iran to release immediately the personnel of the Embassy of the United States of America being held in Teheran, to provide them protection and to allow them to leave the country."[8] It is important to note the composition of the Security Council which acted unanimously since here indeed was a cross-section of the international community. The states represented were Bolivia, Bangladesh, China, Czechoslovakia, France, Gabon, Jamaica, Kuwait, Nigeria, Norway, Portugal, Soviet Union, United Kingdom, United States, and Zambia.

It is true that the international community as such did not bring "its combined power to bear upon the violator."[9] On January 13, 1980, when the Security Council voted on a resolution which would have imposed sanctions on Iran, the resolution was vetoed by the Soviet Union and lacked the approval also of four other states.[10] But none of these retreated from the earlier affirmation of international law and the call on Iran to release the hostages.

My second example has to do with the status of the individual in international law. The case shows that it is now recognized that states owe duties not only to other states but also directly to individuals.

In an action which may well be considered to have come before its time, the Congress of the United States in 1789 enacted a law which provided that the federal courts would have jurisdiction where an alien sues for "a tort only, committed in violation of the law of nations or a treaty of the United States."[11] In a recent case, Paraguayan citizens brought an action in a district court alleging that "defendant, acting under color of his authority as a Paraguayan official, tortured and killed Joel Filartiga, a Paraguayan national, and that this conduct was a tort in violation of the law of nations."[12]

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6. Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

7. Vienna Convention on Consular Relations, *done* Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261.

8. S.C. Res. 457, 34 U.N. SCOR (2178th mtg.), U.N. Doc. S/OR/34 (1979).

9. For a discussion of the possible responses under international law of the world community to the actions of an outlaw nation such as Iran, see chapter 7, *The Legal Regulation of the Use of Force*, in JESSUP, note 1 *supra*.

10. U.N. Doc. S/13735 (1980).

11. 28 U.S.C. § 1350 (1976).

12. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). This quotation and others to follow are taken from the magnificent Memorandum for the United States as Amicus Curiae in this case. (Memorandum *reprinted in* 19 INT'L LEGAL MAT. 585 (1980)). The Memorandum was prepared in the Office of the Legal Adviser of the Department of State with the concurrence of the Department of Justice. Only those aspects of the case which deal with the definition of international law are treated here.

According to the *amicus curiae* memorandum of the Department of State which was solicited by the court of appeals after the district court held it had no jurisdiction:

> The district court dismissed the complaint because it believed that the torture of a foreign citizen by an official of the same country does not violate the law of nations as that term is used in 28 U.S.C. 1350. If Section 1350 reached only those practices that historically have been viewed as violations of international law, the court's decision would very likely be correct. Before the turn of the century and even after, it was generally thought that a nation's treatment of its own citizens was beyond the purview of international law. But as we demonstrate below, Section 1350 encompasses international law as it has evolved over time. And whatever may have been true before the turn of the century, today a nation has an obligation under international law to respect the right of its citizens to be free of official torture . . . . [C]ustomary international law evolves with the changing customs and standards of behavior in the international community. . . . This evolutionary process has produced wide recognition that certain fundamental human rights are now guaranteed to individuals as a matter of customary international law.[13]

This official position of the United States will go down in the history of international law as an epochal event. It is the realization of the first keystone of a revised international legal order which I envisioned thirty-five years ago. From the point of view of the proof of international law, the assertion by the State Department is even more important than the fact that the United States Court of Appeals for the Second Circuit agreed with the State Department, holding that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties."[14]

No attempt is made in this Comment to discuss or outline all the various ways in which international law is developed. The literature on that subject is extensive. The attempt is made here to stress the importance of the International Court of Justice as a developer or clarifier of rules of international law whether the rules be found in international conventions or in the more elusive customary law. The influence of the Court in this role is great and can be recognized without asserting that the judgments of the Court constitute "sources" or "evidence" of international law. That problem, which at times seems to be involved in semantic distinctions, has recently been well explored by Professor Nawaz.[15]

Because the Court is playing an important role, as particularly exem-

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13. 19 INT'L LEGAL MAT. 585, 587-89 (1980).

14. 630 F.2d at 878. For those who wish to follow in detail the evolution of the law of human rights, there is now available the magisterial volume by Messrs. Myres McDougal, Harold Lasswell, and Lung-chu Chen, HUMAN RIGHTS AND WORLD PUBLIC ORDER (1980).

15. Nawaz, *Other Sources of International Law: Are Judicial Decrees of the International Court of Justice a Source of International Law?*, 19 INDIAN J. INT'L L. 526 (1979).

plified in the *North Sea Continental Shelf Cases*[16] where it had to interpret the 1958 Convention on the Continental Shelf,[17] it is regrettable that some States have sought to evade their proper part in arguing cases before the Court. The case of the *Hostages*,[18] aspects of which are discussed above, is the latest example of a state's failure to do its duty by appearing in Court, especially in a case where there is a request for provisional measures of interim protection. One regrets especially that France, which with the United Kingdom had been perhaps the most important supporter of the Hague Courts, abandoned that role when made a defendant in the *Nuclear Tests* cases[19] which will be mentioned later.

The International Court of Justice, like its predecessor, the Permanent Court of International Justice, is authorized by Article 41(1) of its Statute to "indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." This is potentially one of the most important and actually one of the most controversial functions of the Court. It is thoroughly analyzed in a forthcoming book by Dr. Jerome B. Elkind of the Faculty of Law of the University of Aukland, New Zealand.[20] Orders for interim protection, as they are commonly called, may take the form of simple exhortations to "ensure that no step of any kind is taken capable of prejudicing the rights claimed . . . or of aggravating or extending the dispute submitted to the Court."[21] This was the type of the Permanent Court's order in the dispute between Belgium and Bulgaria.[22] Or the order may involve an elaborate plan for regulating the situation pending final judgment as was the case in the action of the International Court of Justice in the *Anglo-Iranian Oil* dispute.[23]

Orders for interim protection have been sought from the Permanent Court of International Justice in six cases and from the International Court of Justice in seven cases. The request for such an order was denied by the Permanent Court in four cases and by the International Court in three cases.[24] The issue which is still the subject of differing opinions is

16. (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), [1969] I.C.J. 3.

17. Convention on the Continental Shelf, *done* at Geneva, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

18. Case Concerning United States Diplomatic and Consular Staff in Teheran (United States v. Iran), 35 U.N. SCOR, U.N. Doc. S/13989 (1980); Communique No. 815, May 24, 1980. The action was commenced by the United States on Nov. 29, 1979. On Dec. 16, the Court ordered Iran to release the American hostages being held in the U.S. Embassy in Teheran. The Court's final judgment was delivered on May 24, 1980.

19. Nuclear Tests Cases (Australia v. France), [1974] I.C.J. 253; (New Zealand v. France), [1974] I.C.J. 457.

20. J. ELKIND, A FUNCTIONAL APPROACH TO INTERIM PROTECTION (forthcoming).

21. *Id.*

22. The Electricity Company of Sofia and Bulgaria Case (Belgium v. Bulgaria), [1939] P.C.I.J., ser. A/B, No. 79, at 194, 199.

23. Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), [1951] I.C.J. 89.

24. For a discussion of the power of the I.C.J. and the P.C.I.J. to grant or deny interim

whether any such orders are "binding" in the sense that judgments are binding under Article 60 of the Statute and Article 94 of the Charter. In chapter six of his valuable study, Dr. Elkind weighs the pros and cons and soundly concludes that such orders are binding.

In only one of the seven cases in the International Court of Justice did the party named as respondent appear and argue its position; this was the *Interhandel Case*,[25] in which the United States defended its objection against an appeal by Switzerland. In other cases, the respondent has communicated to the Court its objection to the jurisdiction through letters or telegrams. Compliance with Article 38 of the Rules of Court would have required the respondents to appear and file a preliminary objection to the jurisdiction as has been done in many other cases. There have been arguments concerning the finality with which the Court must determine its jurisdiction before proceeding to issue an order. The refusal to appear in court or to appoint an agent as required by the Rules may be due to fears that the Court might extend its use of the doctrine of *forum prorogatum* and hold that the respondent, by appearing, had consented to the jurisdiction. Such an overly cautious attitude had been traced to the language used by the Permanent Court of International Justice in the *Rights of Minorities in Upper Silesia (Minority Schools) Case*:

> And there seems to be no doubt that the consent of a State to the submission of a dispute to the Court may not only result from an express declaration, but may also be inferred from acts conclusively establishing it. It seems hard to deny that the submission of arguments on the merits, without making reservations in regard to the question of jurisdiction, must be regarded as an unequivocal indication of the desire of a State to obtain a decision on the merits of the suit. . . .[26]

One would suppose that the clause "without making reservations in regard to the question of jurisdiction" was sufficient safeguard, but Legal Advisers are cautious and the subject has been debated.[27] It is particularly in cases where interim measures of protection are being considered that states (or their Legal Advisers) are reluctant to do anything which may subject them, almost immediately, to adverse judicial process; where it is a matter of judgment on the merits, months and months often elapse before all pleadings are filed and oral hearings held and judgment delivered after the Court's deliberations. But the telegraphic or postal substitute for a memorial has frequently contained arguments of a substantive nature.[28] In this writer's opinion, the Court should not, as it has, refer to

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protection, see J. ELKIND, note 20 *supra*, and E. MCWHINNEY, THE WORLD COURT AND THE CONTEMPORARY INTERNATIONAL LAW-MAKING PROCESS 98-103 (1979).

25. (Switzerland v. United States), [1959] I.C.J. 6.

26. (Germany v. Poland), [1928] P.C.I.J., ser. A, No. 12, at 4, 24.

27. *See* C. JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION 135-35 (1964); 1 S. ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 344-46 (1965).

28. *See, e.g.*, Letter from the Republic of France, May 16, 1973, 2 Nuclear Tests Cases, [1978] I.C.J. Pleadings 347-48; Letters from India, May 23, 1973 & June 4, 1973, Trial of Pakistani Prisoners of War, [1976] I.C.J. Pleadings 117-18, 139 (while refusing to appoint an

or answer such evasive pleadings. However, the Court traditionally, and not without some justification, has been mindful of the fact that the parties involved are sovereign states and entitled to some latitude in procedural matters.

Article 40(2) of the 1978 Rules of Court provides that "[w]hen proceedings are instituted by means of an application, the name of the agent for the applicant shall be stated. The respondent, upon receipt of the certified copy of the application, or as soon as possible thereafter, shall inform the Court of the name of its agent."[29] Before the Court adopted the 1978 Rules, it was suggested to the Court that to avoid fears of *forum prorogatum,* Article 67 of the 1972 Rules, dealing with Preliminary Objections to the jurisdiction, might well include a provision to the effect that a preliminary objection limited to the question of the jurisdiction of the Court will not be considered as an acceptance or recognition of the jurisdiction within the meaning of Article 36 of the Statute.[30] Such a provision

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agent or to appear, India in fact kept up a stream of correspondence with the Court, answering Pakistan's arguments as they were made); Letter from Iran, Dec. 9, 1979, Case Concerning United States Diplomatic and Consular Staff in Teheran, [1979] I.C.J. Pleadings, C.R. 79/1, Public Sitting, Dec. 10, 1979, at 10-11.

By a telegram dated August 25, 1976, the Secretary-General of the Ministry of Foreign Affairs of Turkey transmitted "the observations of the Turkish Government on the Request of the Government of Greece for provisional measures" to the Registrar of the International Court of Justice. The Secretary-General noted therein that:

> [o]n the assurance which was given by the President of the International Court of Justice to the Turkish Ambassador at The Hague during their informal conversation on 18 August 1976, it is understood that the presentation of the attached observations to the International Court of Justice shall not imply any commitment by the Turkish Government as to the jurisdiction of the Court.

Aegean Sea Continental Shelf Case (Greece v. Turkey), [1976] I.C.J. Pleadings 576. On August 30, 1976, the Registrar replied, stating that "due note has been taken of the statement" regarding the assurance of the President of the Court. *Id.* at 579.

29. Rules of Court, art. 40(2), adopted Apr. 14, 1978, *reprinted in* DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE 233 (2d ed. S. Rosenne 1979). Article 40(2) amended article 38(3) of the original Rules of Court, adopted on May 6, 1946. Article 38(3) read: "The party against whom the application is made and to whom it is notified shall, when acknowledging receipt of the notification, or failing this, as soon as possible, inform the Court of the name of its agent."

30. Article 36 of the I.C.J. Statute reads:

> 1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
>
> 2. The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
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> a. the interpretation of a treaty;
>
> b. any question of international law;
>
> c. the existence of any fact which, if established, would constitute a breach of an international obligation;
>
> d. the nature or extent of the reparation to be made for the breach of an international obligation.

would have been comparable to the treatment of the like problems arising in suits against foreign states in national courts. When that question was studied by the Harvard Research Project on the Competence of Courts in Regard to Foreign States, it was stated that "a specific appearance for the purpose of pleading immunity as a State will not be a basis for making a State a respondent."[31] The problem has also been met in the United States Foreign Sovereign Immunities Act of 1976.[32]

Attention should be paid to the type of situation for which interim protection has or will be asked. It is not only the Great Powers which have sought interim protection against the small. In the Permanent Court of International Justice, Belgium sought protection against China and Bulgaria, and Norway asked for protection against Denmark.[33] In the International Court of Justice such help has been sought by Switzerland, Australia, New Zealand, Pakistan, and Greece.[34] The first case in which the International Court of Justice gave an order for interim protection raised the issue of alleged damage to the interests of a foreign enterprise by nationalization of its properties in the host state. Since the *Barcelona Traction Case*[35] was decided by the Court in 1970, doubts have been raised about the validity of the established international law of state re-

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Article 67 of the 1972 Rules, renumbered article 79 in 1978, was not changed in the 1978 amendments.

31. Harvard Research Project, *Competence of Courts in Regard to Foreign States*, 26 AM. J. INT'L L. 455, 543 (Supp. 1932).

32. The Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(1) (1976), has merged the immunity and jurisdictional issues in actions against foreign states. United States law recognizes a right of special appearance to contest jurisdiction, provided the specially appearing party does not argue the merits of the complaint. *See* Baker v. Götz, 408 F. Supp. 238 (D. Del. 1976); Regents of the Univ. of New Mexico v. Superior Court of Los Angeles, 52 Cal. App.3d 964, 125 Cal. Rptr. 413 (1975); Boye v Mellerup, 229 N.W.2d 719 (Iowa 1975); Maner v. Maner, 279 Ala. 652, 189 So.2d 336 (1966).

Thus, a foreign state may appear specially to raise the claim of sovereign immunity. It would only waive that claim implicitly by filing a responsive pleading without raising the defense of sovereign immunity. *See* Kahale & Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 COLUM. J. TRANSNAT'L L. 211, 232-33 (1979).

33. *See, e.g.*, Order of Jan. 8, 1927, Denunciation of the Treaty of November 2nd, 1865, Between China and Belgium (Belgium v. China), [1927] P.C.I.J., ser. A, No. 8, at 6-8 (*see also* Order of Feb. 15, 1927, making previous order inoperative, [1927] P.C.I.J., ser. A, No. 8, at 9-11); Order of Dec. 5, 1939, The Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria), [1939] P.C.I.J., ser. A/B, No. 79, at 194; Order of Aug. 3, 1932, Case Concerning the Legal Status of the South-Eastern Territory of Greenland (Norway v. Denmark), [1932] P.C.I.J., ser. A/B, No. 48, at 277.

34. Order of Oct. 24, 1957, Interhandel Case (Switzerland v. United States), [1957] I.C.J. 105; Orders of June 22, 1973, Nuclear Tests Cases (Australia v. France), [1973] I.C.J. 99, (New Zealand v. France), [1973] I.C.J. 135; Order of July 13, 1973, Case Concerning Trial of Pakistani Prisoners of War (Pakistan v. India), [1973] I.C.J. 328; Order of Sept. 11, 1976, Aegean Sea Continental Shelf Case (Greece v. Turkey), [1976] I.C.J. 3.

35. Case Concerning the Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain), Judgment, [1970] I.C.J. 4.

sponsibility and diplomatic protection. In *Barcelona*, the separate opinions of Judges Padilla Nervo[36] and Ammoun[37] particularly called attention to the possible evolution of the law in the light of alleged abuses of diplomatic protection and the increased awareness of the problems of the developing countries—the "Third World." The proposed "New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation" has been analyzed with balance and thoroughness by Professor García-Amador[38] and cannot be discussed in detail here. In my opinion, the basic law of state responsibility has not yet been revised or altered although it has been well examined by the International Law Commission.[39] If the International Court of Justice is again asked for interim protection against the feared results of nationalization, it might hesitate to go as far as it did in the *Anglo-Iranian Oil Company Case*.[40] On the other hand, in the *Case Concerning United States Diplomatic and Consular Staff in Teheran*,[41] the Court's unanimous interim order of December 16, 1979[42] and final judgment of May 24, 1980[43] rest on impeccable rules of international law and on crystal-clear treaty bases of jurisdiction. Hesitancy in such a case would be highly unlikely.

As illustrated by the now pending case of *Continental Shelf—Tunisia/Libyan Arab Jamahiriya*,[44] disputes about the location of oil deposits in the seabed may arise between two Third World states as well as between other states. Interim protection might be sought if the resource was threatened where there is an imbrication of a single geological structure, of the type which I discussed in my separate opinion in the *North Sea Continental Shelf Cases*.[45] As arguments of the parties in that case pointed out, the same problems can arise where a river basin resource is to be shared.[46] The 1960 Indus Waters Treaty between India

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36. *Id.* at 244-67.

37. *Id.* at 287-334.

38. García-Amador, *The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation*, 12 LAW. AM. 1 (1980); *see also* Schachter, *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT'L L. 1 (1976).

39. *See* [1978] 2 Y.B. INT'L. COMM'N, Part 2, at 74, containing a discussion of the work of the Commission on state responsibility and the texts of the previously approved draft articles on state responsibility.

40. [1951] I.C.J. 89. In that case, the Court ordered interim measures of protection for the United Kingdom against Iran. The Court ordered that Iran should permit the Anglo-Iranian Oil Company to continue operations and that the Iranian Government should not interfere, by executive, legislative, or judicial process, with those operations pending final judgment. (Final judgment was entered at [1952] I.C.J. 93.)

41. 35 U.N. SCOR, U.N. Doc. S/13989 (1980).

42. *Id.*

43. *Id.*

44. I.C.J. Communique No. 78/7, Jan. 12, 1978, *cited in* [1978] BULL. LEGAL DEV. 20. Malta and Libya have agreed to submit a similar dispute to the I.C.J.

45. [1969] I.C.J. 3, 67, 81-82.

46. *Id.*

and Pakistan serves as an example.[47] Such situations might well justify an order by the Court for provisional measures. Even the invocation of such protection from the Court may lead the parties to reach an agreement on preserving the status quo until the merits of the claim are finally adjudged.

As noted in the Resolution of the Security Council in the case of the *Hostages*,[48] the community interest in the rule of diplomatic immunity was registered in two great multilateral conventions, signed at Vienna.[49] The developments in the law of human rights are being registered in international conventions, both regional and global. As stated by Professors McDougal, Lasswell, and Chen, "agreements between states play a most important role in the development of customary international law."[50] The International Court of Justice could make a significant contribution if national courts were authorized to ask that Court for advisory opinions on the interpretation of multipartite conventions. Such references would tend to provide uniformity in the interpretation of such agreements. The idea has been advocated before[51] and is now gaining support from resolutions introduced in the Congress by Senator Cranston and by Representatives Bingham and Pritchard.[52]

As suggested in *A Modern Law of Nations*, there has been a trend in the use of the term "law-making treaties" which "supports the view that . . . there is a growing acknowledgement of a basic community interest which contrasts with the traditional strict bilateralism of law."[53] The functioning of the United Nations and its organs and conferences gives justification for the conviction that revisions of international law will continue to develop in such a way as to meet the needs of our international society.

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47. Indus Waters Treaty, India-Pakistan, Sept. 19, 1960, 419 U.N.T.S. 125.

48. Note 8 *supra*.

49. Notes 6 & 7 *supra*.

50. M. MCDOUGAL, D. LASSWELL, & L. CHEN, *supra* note 14, at 266-67.

51. *See* P. JESSUP, THE PRICE OF INTERNATIONAL JUSTICE 76 *passim* (1970); Jessup, *Diversity and Uniformity in the Law of Nations*, 58 AM. J. INT'L L. 341, 350 (1964).

52. *See, e.g.*, S. Con. Res. 85, 96th Cong., 2d Sess. (1980) (statement of Sen. Cranston); 126 CONG. REC. E3684-85 (daily ed. July 30, 1980) (statement of Rep. Bingham on expanding utilization of the World Court by national courts). Rep. Bingham included in his remarks the text of a letter written by me in support of the proposal.

53. P. JESSUP, *supra* note 1, at 133.

# ARTICLES

## South Africa's "Independent" Homelands: An Exercise in Denationalization

JOHN DUGARD

The South African Government's policy of apartheid or separate development has achieved considerable notoriety over the past thirty years. To most informed persons the term apartheid conjures up a discriminatory legal order in which personal, social, economic, political, and educational rights are distributed unequally on the basis of race. Recent developments on the apartheid front are less notorious. Since 1976, the South African Government has resorted to the fictional use of statehood and nationality in order to resolve its constitutional problems. New "states" have been carved out of the body of South Africa and been granted independence, and all black[1] persons affiliated with these entities, however remotely, have been deprived of their South African nationality. In this way the government aims to create a residual South African state with no black nationals. The millions of Blacks who continue to reside and work in South Africa will be aliens, with no claim to political rights in South Africa. In this way, so the government believes, Blacks will be given full political and civil rights in their own states and a hostile international community will be placated. A number of studies have examined this exercise in political fantasy from the perspective of statehood in international law.[2] Although the present study will trace the development of the homelands policy and describe the creation of "independent" homelands,

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1. In 1978 the word "Black" replaced "Bantu" as the official term to describe the African people of South Africa. Second Black Laws Amendment Act 102 of 1978. This creates certain difficulties as the "non-white" people of South Africa—*viz* African, Colored, and Indian—generally prefer to use the word "Black" to describe all such peoples. In this study, however, the term "Black" is used to describe the African people alone as this is the term used in the statutes and official documents which are featured prominently in this article. Sometimes the word "Bantu" is used in an historical context.

2. Norman, *The Transkei: South Africa's Illegitimate Child*, 12 NEW ENGLAND L. REV. 585 (1977); Witkin, *Transkei: An Analysis of the Practice of Recognition—Political or Legal?*, 18 HARV. INT'L L.J. 605 (1977); Richardson, *Self-Determination, International Law and the South African Bantustan Policy*, 17 COLUM. J. TRANSNAT'L L. 185 (1978).

the main focus will be upon denationalization and upon the important role it plays in the ideology of separate development. Since this issue has already given rise to much bitterness in South Africa, it is essential that the international community appreciate more fully an issue which threatens the already fragile racial peace that exists in South Africa.

## I. HOMELANDS POLICY AND IDEOLOGY

The National Party Government of South Africa is clearly and firmly opposed to the sharing of political power in a unitary South Africa. On the other hand, it accepts the fact that both internal and external forces require the extension of political rights to Blacks. Hence, it has developed the homelands policy by which Blacks will be given political rights in their own "states" and Whites will retain exclusive political control over the remaining part of the Republic of South Africa, comprising eighty-seven percent of the original territory of South Africa.

The homelands policy evolved slowly in the early years of National Party rule, accelerated after 1959, and reached its peak in 1976 on the granting of independence to Transkei. At that stage, and indeed until the retirement of Mr. B.J. Vorster as Prime Minister in 1978, the final goals were clear: all homelands would become independent states; the entire black population of the Republic would be granted political rights and citizenship in these independent states; and, consequently, there ultimately would be no black citizens of the Republic of South Africa requiring accommodation in South Africa's political order. The "purity" of this ideology has been abandoned by the Government of Mr. P.W. Botha. There is now talk of a constellation or confederation of states in southern Africa in which Blacks will possess the nationality of the proposed confederation while exercising their citizenship rights mainly within black member states of the confederation. Moreover, the permanency of the black urban population appears to have been recognized at long last as a political fact. Mr. Botha's plans are at present confined largely to rhetoric, however, and the institutional structure of 1976 still dominates the statute book. This accounts for the difficulty in describing the present homelands policy.

For a clear understanding of homelands policy and ideology *as reflected in the present legal order*, it is necessary to examine the evolution of this policy in the context of the internal and external forces which have shaped it.

### A. *The Period 1948 to 1976*

Race separation has been a dominant feature of policymaking in South Africa since the advent of the white man. On occasion this resulted in separate areas being set aside for exclusive occupation by Blacks. But until recent times there was no suggestion that separate states should be created for Blacks. On the contrary, the historical trend in South Africa in the first part of this century was towards unity and expansion in state-building, as evidenced by the Union in 1910 and by the attempts, albeit unsuccessful, on the part of successive South African governments to in-

corporate the High Commission Territories (comprising Basutoland, Bechuanaland, and Swaziland), South West Africa, and Southern Rhodesia into a greater South Africa.

When the National Party came to power in 1948 it promised, and practiced, more separation and more discrimination. The Bantu Authorities Act of 1951,[3] which provided for the establishment of tribal, regional, and territorial authorities, was certainly aimed at strengthening the power of tribal authorities in the "reserves," as the homelands were then known, but there was still no hint of territorial fragmentation of South Africa.

National Party spokesmen argue that the notion of independent homelands was a logical evolutionary consequence of apartheid or separate development. A more realistic explanation, however, is that this radical change in direction was a result of the new international order and its expectations.

Toward the end of the 1950's it had become clear that the *baaskap* (boss-ship) form of apartheid could no longer be retained as official policy. The government was compelled to produce a new version of apartheid in line with contemporary international standards or to accept the inevitability of a common society. It chose the former. In 1959 the Promotion of Bantu Self-Government Act[4] was introduced to pave the way for "self-governing Bantu units." At this stage there seemed to be no certainty that self-government would lead to independence, though the Prime Minister, Dr. H.F. Verwoerd, did tell Parliament that "if it is within the power of the Bantu and if the territories in which he now lives can develop to full independence, it will develop in that way."[5] This act was premised heavily on the principle of self-determination of nations, a principle enshrined in the Charter of the United Nations and constituting the cornerstone of the powerful decolonization movement. Thus, in introducing this legislation, Dr. Verwoerd informed Parliament that "the choice of separate Bantu development" was "in line with the objects of the world at large."[6]

In the early 1960's, external pressure intensified as a result of the Sharpeville tragedy (which led to the first Security Council resolution on apartheid) and of the institution of legal proceedings against South Africa over South West Africa before the International Court of Justice. Consequently, the new idealism of self-development, inherent in the notion of self-government for "Bantu national units," was emphasized with new vigor. At the same time Dr. Verwoerd admitted that it was a policy that had been imposed as a result of external pressure. In 1961 he told Parliament that South Africa was compelled to choose between sacrificing

3. Act 68 of 1951.
4. Act 46 of 1959.
5. 101 *House of Assembly Debates*, col. 6221, May 20, 1959.
6. *Id.* col. 6236.

apartheid completely or making concessions within the framework of the policy of separate development by allowing the different "Bantu nations" in South Africa to develop into "separate Bantu states." Then he added:

> That is not what we would have liked to see. It is a form of fragmentation which we would not have liked if we were able to avoid it. In the light of the pressure being exerted on South Africa there is, however, no doubt that eventually this will have to be done, thereby buying for the white man his freedom and his right to retain domination in what is his country . . . . If the Whites could have continued to rule over everybody, with no danger to themselves, they would certainly have chosen to do so. However, we have to bear in mind the new views in regard to human rights, . . . the power of the world and world opinion and our desire to preserve ourselves.[7]

The next step in the evolution of self-development and the appeasement of world opinion was the hurried granting of self-government to Transkei in 1963[8] in order to provide evidence before the International Court of Justice of the sincerity of South Africa's intentions under its separate development program. In the proceedings before the Court in 1965 relating to the dispute over South West Africa, South Africa referred to the constitutional development of Transkei as evidence of its intention to grant independence to the different ethnic groups in South Africa.[9] In his testimony before the Court, Dr. Eiselen, one of the architects of the policy of separate development, cited as an example of the government's homelands policy the "legislation . . . passed by Parliament so that the Transkei is now an independent part of South Africa, still belonging in certain ways to the Republic of South Africa but independent in most ways."[10] Constitutionally, it was a gross exaggeration to describe the Transkei of 1965 as "independent in most ways," but this statement illustrates quite clearly the purpose that Transkeian self-government was meant to serve.

The pace of separate development slowed down considerably in the mid-1960's. This was probably due to the death of its creator, Dr. H.F. Verwoerd, and to the technical victory achieved in the *South West Africa Cases*, which removed the fear of an adverse judgment enforceable by the Security Council of the United Nations.

In the late sixties and early seventies new international forces prompted a further acceleration of self-government for "Bantu national units." Protests against apartheid at the United Nations continued unabated, and the Security Council first exercised jurisdiction over South West Africa in 1968, but the South African Government had now decided to outmaneuver the United Nations by means of its "outward policy," which was primarily aimed at winning friends in Africa. While the stick

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7. 107 *House of Assembly Debates*, cols. 4191-93, Apr. 10, 1961.
8. TRANSKEI CONST. Act 48 of 1963.
9. Ethiopia and Liberia v. South Africa (Second Phase), [1966] I.C.J. 6.
10. 10 South West Africa Cases, [1966] I.C.J. Pleadings 103.

of world opinion had been responsible for the initial move toward self-government for black nations, it was the carrot of African support and "dialogue" which led to an acceleration of this policy. South Africa dropped its rigid refusal to discuss domestic policy and indicated that dialogue with African leaders included discussion of South Africa's racial policies. If such discussions were to be meaningful, however, it would become necessary for self-development to be presented in a more positive manner.[11] The notion of self-government for Black nations was thus revived.

The first step was the Bantu Homelands Citizenship Act of 1970,[12] which provided that every Black who was not a "citizen" of a self-governing territory would become a "citizen" of the territorial authority area to which he was attached by birth, domicile, or cultural affiliation. Then, in 1971, came the Bantu Homelands Constitution Act,[13] which empowered the government to grant constitutions substantially similar to that conferred on the Transkei in 1963 to territorial authorities, after consultation with them. Although no provision was made for the granting of independence to homelands in this 1971 Act, both its preamble and the White Paper accompanying it affirmed the intention of the government to lead the homelands to self-government and independence.

After 1971 the homelands advanced rapidly toward self-government: by January 1977, Bophuthatswana, Ciskei, Lebowa, Venda, Gazankulu, Qwaqwa, and KwaZulu had become self-governing. Meanwhile, in 1974, the Transkei indicated that it would opt for independence, and constitutional planning to that end was soon set in motion.

B. *The Period 1976 to 1978*

In 1976 Transkei was granted independence. Prior to the granting of independence to Transkei it was generally believed that international recognition of the homelands was of fundamental importance to the South African Government. Transkeian independence was primarily aimed at the assuagement of world opinion. Recognition must, therefore, have constituted one of the main objectives of independence, in much the same way as recognition is viewed as essential to the creation of an independent Namibia.

Although the General Assembly of the United Nations had already called upon its members to refuse recognition to Transkei or to any other homeland before 1976,[14] it seems that both Transkei and South Africa believed that recognition would be forthcoming, at least from South Africa's Western friends. This is evidenced by the fact that the South Afri-

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11. Barratt, *South Africa's Outward Policy: From Isolation to Dialogue, reprinted in* SOUTH AFRICAN DIALOGUE 543, 559-61 (1972).

12. Act 26 of 1970, now termed the Black States Citizenship Act.

13. Act 21 of 1971, now termed the Black States Constitution Act.

14. G.A. Res. 3151G, 28 U.N. GAOR, Supp. (No. 30) 32, U.N. Doc. A/9030 (1973); G.A. Res. 3411D, 30 U.N. GAOR, Supp. (No. 34) 37, U.N. Doc. A/10034 (1975).

can Department of Foreign Affairs set about training Transkeian diplomats for posts in the main Western countries before independence. To many familiar with the international scene this appeared to be misplaced optimism, but it was a gamble that might have succeeded had the new state of Transkei been structured in such a manner that it would not look like a means of achieving the ultimate goal of separate development: a South Africa in which there are no black South Africans, but only black "guest workers" linked through the bond of nationality to a number of black mini-states carved out of the original boundaries of South Africa. This is why the nationality issue assumed such important dimensions in the pre-independence period. If Transkeian nationality had not been compulsorily extended to all persons connected with Transkei, however remotely, it might have been possible to view Transkeian independence as a simple achievement of statehood. But once South Africa set the denationalization of all persons ethnically or culturally linked with Transkei as the price for independence, the goal of recognition became impossible.

Transkei was not recognized by any state other than South Africa. Moreover, both the General Assembly[15] and the Security Council[16] condemned Transkeian independence and called upon states not to recognize Transkei. This was obviously a disappointment to the South African Government, but as a result of the experience, it appears to have dropped all interest in recognition. Consequently, there was little talk of recognition at the time of Bophuthatswana's independence in December 1977, and the subject was not raised at all when Venda became independent in 1979. One must conclude, therefore, that while recognition remains a top priority for Namibia, the South African Government has abandoned all such hopes for its own homelands.

Despite the failure to secure international recognition of the homelands, support for this policy continued up to the end of the Vorster Administration. Indeed, in the twilight months of this administration, the most extreme formulation of the homelands policy was enunciated by Dr. C.P. Mulder, in his capacity as Minister of Bantu Administration and Development. On February 7, 1978, Dr. Mulder stated in Parliament:

> [I]f our policy is taken to its full logical conclusion as far as the black people are concerned, there will be not one black man with South African citizenship . . . . [E]very black man in South Africa will eventually be accommodated in some independent new state in this honourable way and there will no longer be a moral obligation on this Parliament to accommodate these people politically.[17]

C. *Homelands Policy under Mr. P.W. Botha*

It is difficult to describe the extent to which Mr. P.W. Botha remains

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15. G.A. Res. 31/6A, 31 U.N. GAOR, Supp. (No. 39) 10, U.N. Doc. A/31/39 (1976).

16. S.C. Res. 402, 31 U.N. SCOR, Supp. (Jan.-Dec. 1976) 13, U.N. Doc. S/INF/32 (1976).

17. 72 *House of Assembly Debates*, col. 579, Feb. 7, 1978.

committed to the homelands policy of his predecessors. The following evidence suggests that the Vorster homelands policy still prevails.

1. A "Twelve-Point" policy plan, announced by Mr. Botha in 1979 and approved by National Party Provincial Congresses, appears to confirm the homelands policy, albeit in highly ambiguous language. Points two and three of this plan affirm:

> (2) The acceptance of vertical differentiation with the built-in principle of self-determination on as many levels as possible.
> (3) The creation of constitutional structures for the black nations to make possible the highest degree of self-government, within States that have already been consolidated as far as is practicable.[18]

That these points are in line with the policy of his predecessor was confirmed by Mr. Botha himself in Parliament on April 30, 1980.[19]

2. The Status of Venda Act[20] conferred independence on Venda on September 13, 1979 on the same terms as Transkei and Bophuthatswana. From this it appears that the denationalization of all persons ethnically or linguistically linked to a homeland still remains the price for independence.

3. Dr. C.P. Mulder's statement of February 7, 1978 remains unaltered, despite many demands, particularly from black leaders, for its repudiation. Dr. P.G.J. Koornhof, the Minister of Co-operation and Development and Dr. Mulder's successor, has on occasion expressed guarded criticism of denationalization, but he has yet to repudiate Dr. Mulder's statement. In any event, such rhetoric can hardly be taken seriously in the light of the enactment of the Status of Venda Act, which confirms the policy of denationalization on the ground of race. In passing, it might be mentioned that in February 1979, Dr. Schalk van der Merwe, then Minister of Health, questioned the correctness of Dr. Mulder's statement when he said, first, that he could not foresee the day when there would be no black South Africans, and second, that no black man would be forced to give up his citizenship.[21] It would, however, be wrong to attach too much significance to this statement as Dr. van der Merwe has not been closely involved with black administration and cannot be said to have been pronouncing on government policy on the occasion in question.

4. The Interim Report of the Commission of Inquiry on the Constitution of 1980[22] and the legislation flowing from this report[23] make no provision for Black participation in the central political process of the

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18. The "Twelve Points" are fully set out in ____ *House of Assembly Debates*, cols. 3278-79, Mar. 21, 1980.

19. ____ *House of Assembly Debates*, col. 5149, Apr. 30, 1980.

20. Act 107 of 1979.

21. 79 *House of Assembly Debates*, col. 972, Feb. 19, 1979.

22. Republic of South Africa Commission of Inquiry on the Constitution, Interim Report 6 (Chairman, Hon. A.L. Schlebusch, M.P.) (unpublished pamphlet).

23. REP. S. AFR. CONST., 5th Amend., Act 101 of 1980.

Republic. This legislation creates a nominated President's Council, with advisory powers, whose membership is confined to Whites, Coloreds, Asians, and Chinese. By implication, Blacks are still expected to exercise their political rights only in independent or self-governing homelands.

At present there appears to be a lull in the implementation of the homelands policy. This may be ascribed to a number of factors. First, there is currently no self-governing homeland willing to opt for independence. Ciskei, which was widely believed to be the next in line for independence, appears to be reconsidering its position in the light of the Quail Commission Report which labelled independence an "unattractive option" unless a number of strict conditions are met. These included the condition "that citizenship on satisfactory terms is negotiated which gives non-resident Ciskeians the choice of either Ciskeian or South African status or both."[24] Second, aspirant independent homelands appear to have been deterred from opting for independence by the failure of Transkei, Bophuthatswana, and Venda to secure international recognition.[25] Third, the South African Government is awaiting the report of a commission of inquiry on the consolidation of the homelands, under the chairmanship of Mr. H.J.D. van der Walt, M.P., before pressing ahead with the creation of new independent homelands. As the Prime Minister has indicated that the government is prepared to consider a consolidation involving more land than that set aside in the 1936 Land Act, this commission's report may have far-reaching implications.[26]

It is not impossible that the Botha Government is reconsidering the homelands policy in the light of altered circumstances. Mr. Botha has spoken repeatedly in the past months of a "constellation" of states for southern Africa, but as yet he has declined to spell out the full implications of such an arrangement.[27] Such a constellation or confederation of states is, of course, compatible with a policy of acceleration of independence for self-governing territories. This was emphasized by Mr. van der Walt, Chairman of the Consolidation Commission, in May 1980. Speaking during the vote on the Department of Co-operation and Development, he said:

> The stated policy and priorities of the Government are to develop the various national States into full-fledged States . . . . The National Party has a specific policy, a policy which amounts to a division of power . . . . [W]e cannot share power in a unitary State in South Africa. Therefore the National Party's policy of the division of power gives rise to the Black national States.
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24. CISKEI COMMISSION, THE QUAIL REPORT 127 (1980). *But see* Postscript to this article, page 36 *infra*.

25. *Id.* at 120-23.

26. 33 SURVEY OF RACE RELATIONS IN SOUTH AFRICA 302 (1979).

27. For a general discussion of this proposal, see THE CONSTELLATION OF STATES (W. Bretenbach ed. 1980).

> The effect of the National Party's policy . . . will require a further thorough investigation into the confederal approaches in order to achieve what we would like to achieve. We shall have to determine what that would involve for us. If that is indeed our policy, the system of a constellation of States on a confederal basis could only develop to its full potential if we were dealing with independent States in which everyone sharing in that option is equal.[28]

This statement must, however, be compared with statements by Mr. P.W. Botha himself suggesting that the government might be prepared to accept a confederation comprising independent homelands and a South Africa which would include non-independent homelands.[29] This suggests that some form of participation may yet be envisaged for Blacks attached to non-independent homelands in the South African political system itself, a possibility that derives some support from the recent recognition on the part of the government of the permanency of the urban black community in the Republic.

The above examination of the present situation shows that it is at least possible that the Botha Government is not irrevocably committed to the pursuit of the Verwoerd/Vorster homelands ideology envisaging a South Africa in which there are no black nationals with claims to participation in the Republic's political system. On the other hand, the homelands legislative structure, which has been augmented since 1978, continues to show support for this ideology. In these circumstances the outside observer can only conclude that Dr. C.P. Mulder's statement of February 7, 1978 continues to reflect long-term National Party policy.

## II. HOMELANDS INDEPENDENCE

To date three homelands have become independent: Transkei (1976), Bophuthatswana (1977), and Venda (1979). In all three instances the same procedure has been followed for the granting of independence.[30] The South African Parliament passed a statute providing for the independence of the territory with effect from the day of independence; and the legislative assembly of the territory itself enacted a constitution which became effective on the date of independence. The three independence-conferring statutes were substantially similar in content, but the constitutions adopted by the new states varied in form and substance.

### A. *Independence-Conferring Statutes*

The standard form of independence-conferring statute is the concise Status of Transkei Act 100 of 1976, which served as a model for subse-

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28. ____ *House of Assembly Debates*, cols. 5737-38, May 7, 1980.

29. ____ *House of Assembly Debates*, col. 250, Feb. 6, 1980; ____ *House of Assembly Debates*, cols. 5162-63, Apr. 30, 1980 (Mr. P.W. Botha); ____ *House of Assembly Debates*, cols. 577-78, May 7, 1980 (Dr. P.G.J. Koornhof).

30. For a discussion of this subject, see Dugard, *Transkei Becomes Independent*, 30 ANNUAL SURVEY OF SOUTH AFRICAN LAW, 26 (1976); Booysen, Wiechers, van Wyk, & Bretenbach, *Comments on the Independence and Constitution of Transkei*, [1976] S. AFR. Y.B. INT'L L. 1.

quent grants of independence to Bophuthatswana and Venda. It provided, *inter alia*:

> 1. Transkei is 'hereby declared to be a sovereign independent State and shall cease to be part of the Republic of South Africa' (section 1);
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> 2. Any law in force in Transkei prior to independence shall continue in force in Transkei until repealed or amended by the competent authority in Transkei (section 2);
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> 3. All treaties binding on the Republic prior to independence of Transkei and capable of being applied to Transkei shall be binding on Transkei, but the Government of Transkei may denounce any such treaty (section 4);[31]
>
> 4. All agreements entered into between the Government of the Republic and the Government of Transkei before independence shall remain in force as international treaties (section 5);
>
> 5. Every person falling into certain defined categories shall be a citizen of Transkei and shall cease to be a South African citizen (section 6).[32]

B. *Homelands Constitutions*

The Transkei Constitution[33] is modelled substantially on that of South Africa. The President of Transkei has powers similar to those of the State President of South Africa and is advised by an Executive Council composed of Ministers of State. He is not therefore an Executive President *de jure*, but since Chief Kaiser Matanzima became President of Transkei in 1979 it appears that he has played an important *de facto* political role which goes beyond that contemplated by the Constitution. The Parliament of Transkei, which is declared to be a sovereign legislature, consists of the President and a single house designated as the National Assembly. The Assembly has 150 members, comprising 75 chiefs and 75 elected members.

The Republic of Bopthuthatswana Constitution Act[34] differs substantially from that of Transkei. The Head of State is the President, who is also executive head of the government. The legislature—the National Assembly—comprises forty-eight nominated members, forty-eight elected members, and three members designated by the President who must be persons with special knowledge or experience, but need not be citizens of Bophuthatswana. Significantly, the constitution contains a bill of rights modeled on the European Convention on Human Rights, which guarantees equality before the law and the most fundamental human freedoms.

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31. For additional treatment of the subject of succession to treaties, see Dugard, *Matters Affecting Succession*, 30 ANNUAL SURVEY OF SOUTH AFRICAN LAW 26 (1976).

32. This citizenship provision is fully examined in section III *infra*.

33. REP. TRANSKEI CONST. ACT OF 1976, *reprinted in* 15 INT'L LEGAL MAT. 1136 (1976). The Constitution is closely examined by Booysen *et al.*, note 30 *supra*.

34. *See* Wiechers & van Wyk, *The Republic of Bophuthatswana Constitution*, [1977] S. AFR. Y.B. INT'L L. 85.

The Republic of Venda Constitution Act[35] provides for an Executive President and a National Assembly, the latter which is to constitute the "sovereign legislative authority." The National Assembly is to comprise forty-two nominated members (chiefs and designated members), forty-two elected members, and three members nominated by the President by reason of their special knowledge or experience. Like the Transkei Constitution, this constitution contains no bill of rights.

C. *Treaties*

South Africa entered into a number of agreements with each homeland prior to its independence. Broadly, these agreements[36] deal with matters affecting agriculture, forestry, economic and industrial development, the accession of officials, the employment of the new state's citizens in the Republic and vice versa, educational aid, defense, the supply of electricity, health services, travel documents and ports of entry, mining rights, postal and telecommunication services, welfare institutions, public roads, transportation, air services, and railways. The non-aggression pacts concluded with each independent homeland are of special interest. In these agreements, the parties renounce the use of force in their relations with each other and agree that neither party shall allow its territory to be used as a base by any state, government, organization, or person for military, subversive, or other hostile actions against the other party. Extradition agreements have also been entered into between South Africa and each independent homeland.[37] These agreements follow the normal pattern and exclude the extradition of political offenders.

## III. HOMELANDS AND CITIZENSHIP

A. *Citizenship and Nationality*

There is much confusion in South Africa today over the policies of the South African Government with respect to citizenship. In part this confusion results from the failure of legislation to draw a distinction between "nationality" and "citizenship." Neither the South African Citizenship Act 44 of 1949, nor the Black States Citizenship Act 26 of 1970, which together constitute the governing "citizenship law," draws any such distinction, and both use the term "citizenship" where "nationality" would be more correct.[38]

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35. The text is reprinted in CONSTITUTIONS OF DEPENDENCIES AND SPECIAL SOVEREIGNTIES (A. Blaustein & E. Blaustein eds. 1977).

36. The agreements with Transkei are published in Government Notice 1976, Government Gazette 5320, Oct. 22, 1976 (Regulation Gazette 2384); Government Notice 2496, Government Gazette 5823, Dec. 6, 1977 (Regulation Gazette 2569); Government Notice 2014, Government Gazette 6652, Sept. 12, 1979 (Regulation Gazette 2861).

37. Transkei: Proclamation R329, Government Gazette 5813, Nov. 25, 1977 (Regulation Gazette 2565); Bophuthatswana: Proclamation R375, Government Gazette 5846, Dec. 30, 1977 (Regulation Gazette 2582); Venda: Proclamation R210, Government Gazette 6652, Sept. 12, 1979 (Regulation Gazette 2861).

38. For further views on this subject, *see* Barrie, *A Legal View of Transkeian Recognition and So-called Statelessness*, 33 POLITIKON 1 (1976); Dean, *A Citizen of Transkei*, 11 COMP. & INT'L L.J. S. AFR. 57 (1978); Heyne, *A Transkeian Citizen of South African Na-*

Nationality[39] is essentially a term of international law and denotes that there is a legal connection between the individual and the state. In practice this means that a South African national may travel on a South African passport and is entitled to protection by the South African Government if he is injured in another country. Citizenship, on the other hand, is a term best used to describe the status of an individual who enjoys civil and political rights in a particular state.[40] In South Africa, Blacks are not really citizens since they do not exercise full civil and political rights in the central political process. In order to overcome this injustice, the South African Government has resorted to the device of giving Blacks citizenship, that is, political rights, in the homelands.

The present situation can be summarized in the following way: all white, colored, and Indian South Africans are South African nationals. Similarly, all black South Africans who are not ethnically connected with Transkei, Bophuthatswana, or Venda are South African nationals. Within South Africa there are, however, different types of citizens: those who exercise political rights in the central political process (Whites); those whom the government plans to incorporate into the central political process (Coloreds and Indians); and those who have political rights in the non-independent homelands (Blacks). From this it will be seen that nationality is a wider concept than citizenship. All South Africans are South African nationals, but Blacks and Whites enjoy different citizenship rights.

When a homeland becomes independent the persons connected with it become nationals of the new state. This is in essence what happened when Transkei, Bophuthatswana, and Venda became independent. All persons who had previously been "citizens" of these homelands, or who were ethnically or linguistically connected with them, however remotely, ceased to be South African nationals. By losing their nationality in this way Blacks connected with Transkei, Bophuthatswana, and Venda not only lost their right to exercise the privileges of South African nationality (such as diplomatic protection and passports), but in addition they lost all claim to participate in the central political process in South Africa as

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*tionality*, 26 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG. 44 (1963); Norman, note 2 *supra*; Olivier, *Bophuthatswana Nationality*, [1977] S. AFR. Y.B. INT'L L. 108; Olivier, *Statelessness and Transkeian Nationality*, [1976] *id.* at 143; Venter, *Bantoe Burgerskap en Tuisland Burgerskap*, 38 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG. 239 (1975).

39. For a clear analysis of the distinction between nationality and citizenship, see Koessler, *"Subject," "Citizen," "National," and "Permanent Allegiance,"* 56 YALE L.J. 58 (1946). *See also* P. WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 4 (2d ed. 1979).

40. According to Koessler:

> 'Citizenship' in modern usage is not a synonym of nationality or a term generally used for the status of belonging to a state, but means specifically the possession by the person under consideration, of the highest or at least of a certain higher category of political rights and (or) duties, established by the nation's or state's constitution.

Koessler, *supra* note 39, at 63.

full South African citizens at some future date. The main objection to denationalization of the kind that occurred when Transkei, Bophuthatswana, and Venda became independent is thus that Blacks become foreigners in South Africa with as little claim to participation in the political process in South Africa as visiting Germans or Malawians. This objection to homelands independence was eloquently stated by Bishop Desmond Tutu shortly before Transkei became independent:

> Overnight they will become foreigners in what for many of them has been the land of their birth and be forced to adopt the citizenship of a country that many do not know at all and in whose creation they have played no part at all. They have contributed in their various ways to the prosperity of this beloved South Africa and now it seems at the stroke of a pen they will forfeit a cherished birthright.[41]

An emotional argument, perhaps. But it captures the real mood of Blacks toward independence and it is one that unites both urban and homeland Blacks in their opposition to the National Party Government.

Government policy toward Coloreds, Indians, and Blacks in South Africa appears to be as follows. Coloreds and Indians will be accomodated in some new political dispensation which will give the appearance of political participation. Thus they will become full nationals and citizens. Blacks, on the other hand, cannot be given political rights in South Africa so they cannot become full citizens of South Africa. Consequently, they must be forced to become nationals, with full citizenship rights, of some new state. In the fullness of time, if government policy succeeds, all homelands will become independent and there will no longer be any black nationals in South Africa with claims to political rights. Blacks, particularly urban Blacks, will thus occupy the same position politically as, for example, British nationals in South Africa who retain their British nationality and therefore cannot vote in South Africa.[42] This will allow the South African Government to argue that there are no black South Africans, that all Blacks in South Africa are foreigners in much the same way as there are foreign migrant workers from Turkey in Germany and from Algeria in France. This will be the argument used to counter hostile attacks from the international community over the denial of political rights to Blacks in South Africa.

### B. *Citizenship and the Independence-Conferring Statutes*

All three independence-conferring statutes contain a provision (section 6) which reads as follows:

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41. Rand Daily Mail (Johannesburg), May 1, 1976, at 6.

42. A denationalized black South African is in fact worse off than a British national. While the latter may become a South African national by Naturalization, the former will not be able to do so, since only a person who "is likely to become readily assimilated with the European inhabitants of the Republic" is eligible for citizenship by naturalization. Sec. 4(c)(b) of the Aliens Act 1 of 1937, read with sec. 10(1)(c) of the South African Citizenship Act 44 of 1949. *See* van Wyk, *The Ebb and Flow of South African Citizenship*, [1978] S. AFR. Y.B. INT'L L. 148.

> Every person falling in any of the categories of persons defined in Schedule B shall be a citizen of the Transkei [Bophuthatswana, Venda] and shall cease to be a South African citizen. . . .
>
> . . . .
>
> No citizen of the Transkei [Bophuthatswana, Venda] resident in the Republic at the commencement at this Act shall, except as regards citizenship, forfeit any existing rights, privileges or benefits by reason only of the other provisions of this Act.

Schedule B varies according to the ethnic composition of each homeland. Schedule B of the Status of Transkei Act 100 of 1976 provides:

> Categories of persons who in terms of section 6 are citizens of the Transkei and cease to be South African citizens:
> (a) every person who was a citizen of the Transkei in terms of any law at the commencement of this Act;
> (b) every person born in the Transkei of parents one or both of whom were citizens of the Transkei at the time of his birth;
> (c) every person born outside the Transkei whose father was a citizen of the Transkei at the time of his birth;
> (d) every person born out of wedlock (according to custom or otherwise) and outside the Transkei whose mother was a citizen of the Transkei at the time of his birth;
> (e) every person who has been lawfully domiciled in the Transkei for a period of at least five years, irrespective of whether or not such period includes any period prior to the commencement of this Act, and, on application in the prescribed manner, has been granted citizenship of the Transkei by the competent authority in the Transkei;
> (f) every South African citizen who is not a citizen of a territory within the Republic of South Africa, is not a citizen of Transkei in terms of paragraph (a), (b), (c), (d) or (e), and speaks a language used by the Xhosa or Sotho speaking section of the population of the Transkei, including any dialect of any such language;
> (g) every South African citizen who is not a citizen of a territory within the Republic of South Africa, and is not a citizen of the Transkei in terms of paragraph (a), (b), (c), (d), (e) or (f), and who is related to any member of the population contemplated in paragraph (f) or has identified himself with any part of such population or is culturally or otherwise associated with any member of part of such population.

Schedule B of the Status of Venda Act 107 of 1979, which is substantially similar to that of Bophuthatswana, provides:

> Categories of persons who in terms of section 6 are citizens of Venda and cease to be South African citizens:
> (a) every person who was a citizen of Venda in terms of any law at the commencement of this Act;
> (b) every person born in or outside Venda, either before or after the commencement of this Act, of parents one or both of whom were citizens of Venda at the time of his birth, who is not a citizen of a territory within the Republic of South Africa and is not a citizen of Venda in terms of paragraph (a);
> (c) every person who has been lawfully domiciled in Venda for a period of at least five years, irrespective of whether or not such period

> includes any period prior to the commencement of this Act, and, on application in the prescribed manner, has been granted citizenship of Venda by the competent authority in Venda;
> (d) every South African citizen who is not a citizen of a territory within the Republic of South Africa, is not a citizen of Venda in terms of paragraph (a), (b) or (c) and speaks a language used by members of any tribe which forms part of the population of Venda, including any dialect of any such language;
> (e) every South African citizen who is not a citizen of a territory within the Republic of South Africa and is not a citizen of Venda in terms of paragraph (a), (b), (c) or (d) and who is related to any member of the population contemplated in paragraph (d) or has identified himself with any part of such population or is culturally or otherwise associated with any member of such population.

Paragraph (a) in these schedules requires a special explanation. Prior to Transkeian independence "every Xhosa-speaking Bantu person in the Republic" not belonging to another homeland (for example, Ciskei) was a "citizen" of Transkei in terms of section 7 of the Transkei Constitution Act 48 of 1963. Similarly, before Venda and Bophuthatswana became independent, every person connected with the homeland in question by language, culture, or race became a "citizen" of that homeland in terms of section 3 of the Black States Citizenship Act 26 of 1970. Consequently, prior to independence all persons linguistically or culturally connected with the homeland were already *citizens* of the territory but *nationals*[43] of South Africa. On independence such persons became both citizens and nationals of the homeland and ceased to be South African nationals.

The independence-conferring statutes carefully refrain from depriving persons of South African nationality on grounds of race. Instead they prescribe language and culture as the criteria for denationalization.[44] There can, however, be no doubt that in practice they are intended to apply to Blacks only as this accords with declared government policy. Certainly there is no known instance in which a white, colored, or Asian person connected with Transkei, Bophuthatswana, or Venda has been deprived of his nationality since the conferment of independence on these states.

The Status of Bophuthatswana Act differs from the other two independence-conferring statutes in that it provides that a citizen of Bophuthatswana may renounce his citizenship after independence on

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43. This is made clear by section 3(4) of the Black States Citizenship Act 26 of 1970, which reads in pertinent part:

> A citizen of a territorial authority area [homeland] shall not be regarded as an alien in the Republic and shall, by virtue of his citizenship of a territory forming part of the Republic, remain for all purposes a citizen of the Republic and shall be accorded full protection according to international law by the Republic.

44. Olivier, *Statelessness and Transkeian Nationality*, *supra* note 38, at 152-54, emphasizes this point, but takes no account of the practical implementation of these statutes.

conditions agreed upon between the governments of South Africa and Bophuthatswana.[45] This measure, envisaging a reversion to South African nationality, has been rendered largely unnecessary by a 1978 amendment to the Black States Citizenship Act which allows a national of an independent homeland to recover his South African nationality by becoming a citizen of a non-independent homeland.[46] Reversion to South African nationality in such a case is, however, contemplated only as a temporary measure which will continue until the homeland whose citizenship he has acquired itself becomes independent.[47] By December 31, 1979, 1,474 persons had regained their South African nationality in this way.[48]

C. *Denationalization on the Ground of Race as a Violation of International Law*

Although traditional international law regards both the conferment of nationality and the withdrawal of nationality as falling within a state's domestic domain, in recent times it has been authoritatively argued that "denationalization measures based on racial, ethnic, religious, or other related grounds are impermissible under contemporary international law."[49] This view is disputed by some South African writers.[50] Nevertheless it is a widely accepted emerging norm or customary rule which derives support from:

> 1. the widespread opposition to the 1941 Nazi decree which denationalized German Jews;[51]
> 2. Article 15 of the Universal Declaration of Human Rights,[52] which declares that 'no one shall be arbitrarily deprived of his nationality';
> 3. Article 5(d)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination,[53] in which states undertake to guarantee the right of everyone, without distinction as to race, equality before the law, 'notably in enjoyment of the right to nationality'; and
> 4. Article 9 of the Convention on the Reduction of Statelessness,[54] which provides that a 'Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or

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45. Sec. 6(3), Status of Bophuthatswana Act 89 of 1977.

46. Sec. 1 of the Black States Citizenship Amendment Act 13 of 1978, *amending* sec. 3 of the Black States Citizenship Act 26 of 1970.

47. 72 *House of Assembly Debates*, cols. 558, 560, 579, Feb. 7, 1978.

48. ____ *House of Assembly Debates*, Questions, col. 327, Mar. 10, 1980.

49. McDougal, Lasswell, and Chen, *Nationality and Human Rights: the Protection of the Individual in External Arenas*, 83 YALE L.J. 900, 958 (1974). *See also* P. WEIS, *supra* note 39, at 123, 125, 126.

50. Barrie, *supra* note 38, at 34; Olivier, *Statelessness and Transkeian Nationality*, *supra* note 38, at 147, 154.

51. Mann, *The Present Validity of Nazi Nationality Laws*, 89 L.Q. REV. 194, 199-200 (1973).

52. G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).

53. *Opened for signature* Mar. 7, 1966, *entered into force* Jan. 4, 1969, 660 U.N.T.S. 195, *reprinted in* 5 INT'L LEGAL MAT. 352 (1966).

54. Convention on the Reduction of Statelessness, Aug. 29, 1961, art. 9, U.N. Doc. A/Conf. 9/15 (1961). This convention has not entered into force.

political grounds.'

As shown above, none of the independence-conferring statutes expressly provides for denationalization on the ground of race, but by implication they are designed to apply to Blacks only. And this is borne out by their implementation in practice. Consequently, it is highly arguable that the compulsory denationalization of some seven million persons[55] connected with Transkei, Bophuthatswana, and Venda by the South African legislature violates international law. Certainly this factor contributed to the non-recognition of the homelands in question as independent states.

D. *Homelands Independence and Statelessness*

That contemporary international law disapproves of statelessness if shown by attempts to prevent it through multilateral conventions. Most important is the Convention on the Reduction of Statelessness,[56] which was opened for signature in 1961 but has not yet come into force. Other treaties are the Convention Relating to the Status of Stateless Persons,[57] the Convention Relating to the Status of Refugees,[58] and the Protocol Relating to the Status of Refugees.[59] South Africa is not a party to any of the above conventions save for the Convention Relating to the Status of Stateless Persons.[60]

As far as the South African Government is concerned, statelessness does not occur as a result of denationalization caused by homelands independence. This argument is premised on the fact that the independence-conferring statutes all confer the nationality of the newly independent state upon persons deprived of their South African nationality.[61] The South African Government might even argue that in granting independence it has complied with the spirit of Article 10 of the Convention on the Reduction of Statelessness, which provides:

> (1) Every treaty between contracting states providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer . . . .
> (2) In the absence of such provisions the contracting state to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition.

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55. The 1978 population estimates for the three territories were: Transkei, 4,142,800; Bophuthatswana, 2,219,600; and Venda, 473,200. 33 SURVEY OF RACE RELATIONS IN SOUTH AFRICA 71 (1979).

56. Note 54 *supra*.

57. Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117. This convention came into force in June 1960.

58. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137. This convention came into force in April 1954.

59. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

60. Van Wyk, *The South African Passport*, [1976] S. AFR. Y.B. INT'L L. 212, 221.

61. *See* Olivier, *Statelessness and Transkeian Nationality*, *supra* note 38, at 154.

Two arguments may, however, be raised in support of the view that homelands independence results in statelessness. First, it may be argued that a black person who has never lived in the independent homeland lacks the necessary "genuine link" or "social fact of attachment" prescribed as a requirement for the bond of nationality by the International Court of Justice in the *Nottebohm* case.[62] Such a person would not become a national of the newly independent state, but would nevertheless cease to be a South African national. Under international law he would therefore be stateless. Second, independent homelands are inevitably doomed to non-recognition. Consequently, third states will not recognize their competence to protect their "nationals" abroad, as their very existence is denied. At the same time, South Africa is unlikely to exercise any diplomatic protection over them. Thus for practical purposes, nationals of Transkei, Bophuthatswana, and Venda are stateless. They are no longer South African nationals and their own states are unrecognized. By promoting such a situation, in the knowledge that independence will not be accompanied by recognition, it may be argued that the South African Government is creating a large-scale situation of statelessness.

E. *Privileges Retained by Denationalized Persons with Special Reference to "Section 10 Rights"*

All three independence-conferring statutes provide in section 6 that no citizen of the Transkei, Bophuthatswana, or Venda, resident in the Republic of South Africa at the time of independence, "shall, except as regards citizenship, forfeit any existing rights, privileges or benefits."

This provision is generally viewed as preserving the so-called section 10 rights of denationalized Blacks. Section 10(1) of the Blacks (Urban Areas) Consolidation Act of 1945[63] prohibits every Black from being in any prescribed urban area for more than seventy-two hours unless:

> (a) he has resided in that area continuously since birth; or
> (b) he has worked continuously in that area for the same employer for ten years; or he has lawfully resided continuously in that area for at least fifteen years; or
> (c) the Black is the wife, unmarried daughter or minor son of a male falling under (a) or (b); or
> (d) permission has been granted for him to be in the area by a labour bureau.

As employment opportunities outside the cities are limited, those Blacks who qualify to remain permanently in an urban area in terms of section 10(1)(a), (b), or (c) constitute a privileged class. These rights are becoming even more precious as government policy makes its increasingly diffi-

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62. (Liechtenstein v. Guatemala), [1955] I.C.J. 4, 23. Weis states: "The tendency to assimilate *de facto* stateless persons . . . to *de jure* stateless persons, is further evidence of the importance of the question whether the nationality which an individual possesses in law is effective." P. WEIS, *supra* note 39, at 202.

63. Act 25 of 1945, as amended. Section 10 in its present form was first inserted in 1952.

cult for rural Blacks to acquire section 10(1) rights. This is because rural Blacks are generally admitted to urban areas by labor bureaus under section 10(1)(d) for one-year contract periods only and, although this contract period may be renewed, the technical interruption in employment prevents a rural Black from acquiring rights under section 10(1)(b).[64] Section 10(1) is not constitutionally guaranteed, but it has acquired a special status in the black community as it offers a semblance of security in an insecure world. Hence the saving provision in section 6 of the independence-conferring statutes is of great importance.

Although section 6 does preserve the "section 10 rights" of Transkeians, Bophuthatswanans, and Vendans who were alive at the time of independence, it does not extend its protection to the children of such persons born in South Africa after independence. This is the result of a 1978 amendment[65] to the Blacks (Urban Areas) Consolidation Act which places the children of denationalized persons in the position of foreigners in respect of their right to remain in urban areas. This enactment seriously undermines recent initiatives of the government to give greater security to urban Blacks.

In 1978 the government, which has vigorously opposed the granting of freehold rights to Blacks in urban areas, introduced a major concession: home ownership on a ninety-nine year leasehold basis. According to this scheme, Blacks who qualify to remain in urban areas in terms of section 10(1)(a) or (b) may obtain ninety-nine year leasehold rights to property in such areas.[66] This plan is designed to afford permanency of residence to black urban dwellers, but it has been seriously undermined by the fact that the children of denationalized Blacks will apparently not be able to take advantage of the lease.[67] As the veteran civil rights parliamentarian, Mrs. Helen Suzman, M.P., stated when this matter was debated in Parliament: "The child born after independence . . . is not a South African citizen and therefore cannot enter or be in a prescribed area. How can that person then acquire rights of leasehold when . . . that person may not even be in the area?"[68] Government spokesmen insist that it is not the intention of the government to deny leasehold rights to

64. Proclamation 74, Government Gazette 2029, Mar. 29, 1968 (Regulation 13(d)).

65. Sec. 2 of the Black Laws Amendment Act 12 of 1978 *amending* sec. 12 of Act 25 of 1945. For a discussion of the implications of this measure, see 72 *House of Assembly Debates*, cols. 470, 519, 629, 639, 648, Feb. 6-8, 1978.

66. Sec. 6A of the Blacks (Urban Areas) Consolidation Act 25 of 1945, as introduced by sec. 2 of the Blacks (Urban Areas) Amendment Act 97 of 1978. For further material on this subject, see 32 SURVEY OF RACE RELATIONS IN SOUTH AFRICA 325 (1978).

67. Section 1 of the Blacks (Urban Areas) Consolidation Act 25 of 1945, as amended by section 1(d) of the Blacks (Urban Areas) Amendment Act 97 of 1978, provides that a qualified person in relation to a right of leasehold means a black person qualified to remain in an urban area in terms of section 10(1)(a) or (b) of Act 25 of 1945. As descendants of denationalized Blacks do not acquire section 10(1)(a) or (b) rights in terms of section 12(1) of Act 25 of 1945 it follows logically that they do not qualify for 99-year leasehold rights.

68. 74 *House of Assembly Debates*, col. 9252, June 13, 1978.

the descendants of denationalized persons,[69] but they have consistently refused to bring the law into line with declared intent.[70] This problem illustrates the dilemma posed by denationalization to "progressive" Nationalists determined to advance the position of urban Blacks. All reforms aimed at improving the quality of life of urban Blacks relate to the granting of greater security of residence, yet at the same time these proposed reforms are undermined by denationalization which inevitably promotes the maximum degree of insecurity.

To date, the section providing for the non-forfeiture of "existing rights, privileges or benefits" has come before the Supreme Court in only one instance and was on this occasion interpreted generously. In *Ex Parte Moseneke*,[71] the Transvaal Provincial Division held that the bar to the admission of aliens or persons not lawfully admitted to the Republic for permanent residence to practice as attorneys in the Republic did not apply to a national of Bophuthatswana resident in Pretoria, as he did not forfeit any existing rights, other than citizenship, when he was deprived of his South African citizenship.

F. *Privileges Acquired by Denationalized Persons*

Under international law a state is required to accord a certain minimum standard of treatment to aliens admitted to its territory. This means that where a state has a low standard of justice towards its own nationals, an alien's position is a privileged one.[72] This "minimum standard of civilization"[73] is not an exacting one and has been described as simply "the standard of the 'reasonable state,' reasonable, that is to say, according to the notions that are accepted in our modern civilization."[74] Although the precise limits of this standard are not clear, it is accepted that a state violates its international obligations, and thus incurs responsibility to the state of which the alien is a national, when it denies an alien basic human rights on the ground of his race.[75]

While the "minimum standard of treatment" is scrupulously observed by the South African Government in the case of aliens from most states, it is certainly not respected in the case of Transkei, Bophuthatswana, and Venda — and possibly Lesotho, Botswana, and Swaziland. The reasons for this are twofold.

First, most of South Africa's discriminatory laws apply to Blacks per se and not to Blacks as South African nationals. In terms of the Population Registration Act, which governs race classification in South Africa, a "black person" (previously "Bantu") is defined as a "person who is, or is generally accepted as, a member of any aboriginal race or tribe of Af-

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69. *Id.* col. 9234 (Dr. C.P. Mulder); The Star (Johannesburg), Mar. 2, 1979, at 3.
70. 74 *House of Assembly Debates*, cols. 9251, 9261, June 13, 1978.
71. 4 S. AFR. L. REP. 884 (1979).
72. J. BRIERLY, THE LAW OF NATIONS 278 (6th ed. H. Waldock 1963).
73. L. OPPENHEIM, 1 INTERNATIONAL LAW 350 (8th ed. H. Lauterpacht 1955).
74. J. BRIERLY, *supra* note 72, at 279-80.
75. 8 DIGEST OF INTERNATIONAL LAW 376 (M. Whiteman ed. 1967).

rica."[76] This definition is referred to in a number of discriminatory statutes. Other statutes contain their own definitions of "Black" but follow the formula employed by the Population Registration Act. Thus most discriminatory laws apply *not* to black South African citizens but to any persons who are members of any aboriginal race or tribe of Africa. The following statutes, for example, affect black aliens as well as South African Blacks: the Blacks (Abolition of Passes and Co-ordination of Documents) Act,[77] which obliges Blacks to carry identity documents (passes) which must be produced on demand by a policeman; the Blacks (Urban Areas) Consolidation Act,[78] which regulates the residence rights of Blacks in urban areas; the Education and Training Act,[79] which provides for separate schools for Blacks; and the Black (Prohibition of Interdicts) Act,[80] which deprives Blacks of the right to obtain court interdicts pending a determination of their legal rights affecting residence.

It is possible, however, that Transkei, Bophuthatswana, and Venda waived the protection against discriminatory treatment afforded by the international minimum standard in their pre-independence agreements with South Africa. In the Agreement between the Government of the Republic of South Africa and the Government of Transkei relating to the Employment of Citizens of Transkei in the Republic of South Africa, it is agreed in Article 1 that:

> No citizen of Transkei *engaged in Transkei for employment in the Republic of South Africa* shall enter the Republic of South Africa for the purpose of taking up employment unless
> (a) he complies with the laws and regulations relating to the admission to, residence in, and departure from the Republic of South Africa. . . .[81]

Similar agreements apply in respect of Bophuthatswana[82] and Venda.[83] Another accord, the Agreement between the Government of the Republic of South Africa and the Government of Transkei relating to the Movement of Citizens of Transkei and of the Republic of South Africa across the Common Borders, provides in Article 1: "The movement to and the sojourn in the Republic of South Africa of citizens of Transkei . . . shall be governed by the laws and regulations governing the admission to, *resi-*

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76. Act 30 of 1950, sec. 1. For a full description of the system of race classification in South Africa, see J. DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 59-63 (1978).

77. Act 67 of 1952, §§ 1, 3(1)(b)(ii), 13, 15.

78. Act 25 of 1945, §§ 1, 10, 12.

79. Act 90 of 1979.

80. Act 64 of 1956.

81. GN 1976, Government Gazette No. 5320, Oct. 22, 1976, at 16 (Regulation Gazette 2384). Emphasis added.

82. GN R2496, Government Gazette No. 5823, Dec. 6, 1977, at 22 (Regulation Gazette 2569).

83. GN R2014, Government Gazette No. 6652, Sept. 12, 1979, at 142 (Regulation Gazette 2861).

*dence in* and departure from the country. . . ."[84] There are corresponding provisions in the agreements with Bophuthatswana[85] and Venda.[86]

These agreements are apparently intended to deal only with migrant laborers in, and visitors to, the Republic of South Africa from Transkei, Bophuthatswana, and Venda, but they are so widely phrased that it may be contended that they constitute an agreement between South Africa and her independent homelands to subject all the latters' nationals to South Africa's discriminatory laws.

The second reason for noncompliance with the international minimum standard probably is that the new black states in southern Africa lack the political power to insist on compliance with the standard by the South African authorities. In order to appreciate this, one has only to compare and contrast the treatment of American Blacks visiting South Africa with that of Transkei Blacks in the Republic. In this respect it should be recalled that the failure of the South African Government to accord the minimum standard of treatment to Transkeian nationals contributed to Transkei's decision to break off diplomatic relations with South Africa in 1978.[87] More recently, Prime Minister George Matanzima appealed to the South African Government to show the world that it recognized Transkei's sovereignty by treating Transkei nationals in the same way as it treats other foreigners.[88] South Africa and Transkei resumed diplomatic relations in 1980.

It might be argued that nationals of Transkei, Bophuthatswana, and Venda are placed in a privileged position *vis-à-vis* other aliens in South Africa by reason of the fact that they retain all their "rights, privileges or benefits" that existed at the time of independence in terms of the independence-conferring statutes. This is an untenable argument, as the rights, privileges and benefits that accrue to black South Africans fall short of the international minimum standard of treatment by virtue of their discriminatory nature. In any event, as shown above, there is so much uncertainty as to the scope and duration of these "existing rights, privileges or benefits" that urban Blacks can hardly draw much comfort from them. The meagre scope of the "preferential treatment" accorded to citizens of Transkei, Bophuthatswana, and Venda is apparent from the statement made in 1978 by Dr. C.P. Mulder (then Minister of Bantu Administration and Development) to the effect that such persons enjoyed "preferential treatment over foreign Blacks as to employment opportunities, extended right of entry, *viz* 14 days instead of 72 hours, admission to

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84. GN 1976, Government Gazette No. 5320, Oct. 22, 1976, at 58 (Regulation Gazette 2384). Emphasis added.

85. GN R2496, Government Gazette No. 5823, Dec. 6, 1977, at 78-79 (Regulation Gazette 2569).

86. GN R2014, Government Gazette No. 6652, Sept. 12, 1979, at 17 (Regulation Gazette 2861).

87. 12 S. AFR. RECORD 34 (1978).

88. The Star (Johannesburg), Mar. 22, 1979, at 4.

RSA through any place of entry while foreigners have to enter at specific points which are manned by officials of the Department of the Interior, etc."[89] Such "preferential treatment" makes no attempt to exempt black aliens from discriminatory and repressive laws and thus fails to meet the requirements of the international minimum standard.

One must, therefore, conclude that denationalized Blacks from Transkei, Bophuthatswana, and Venda are not accorded the minimum standard of treatment required by international law. Consequently, they get the worst of both worlds: loss of their "birthright" to participate in the government and power processes of South Africa at some future date, and denial of the standards of fair treatment which normally accrue to aliens.

G. *Deportation of Aliens*

A number of statutes confer wide powers of deportation of aliens upon the South African Government. These powers may be, and indeed already have been, used in order to remove political opponents who have been denationalized as a result of homelands independence. The two main statutory provisions which permit action of this kind are the Admission of Persons to the Republic Regulation Act and the Internal Security Act.

Section 45 of the Admission of Persons to the Republic Regulation Act empowers the Minister of the Interior "if he considers it to be *in the public interest*" to order the removal from the Republic of "any person who is not a South African citizen."[90] The decision of the Minister as to whether such removal is or is not in the public interest "shall not be subject to appeal or to review by any court of law and no person shall be furnished with any reasons for such decision." This provision has already been invoked against a denationalized urban dweller from Transkei. In August 1978 Mr. Pindile Mfeti, a trade unionist from Germinston who had previously been detained without trial under the security laws for 366 days, was deported to Transkei "in the public interest."[91]

Section 14 of the Internal Security Act[92] permits the deportation of a non-South African citizen who is convicted of certain offenses under this act or who is deemed by the state president to be an undesirable inhabitant "because he is a communist." No prior notice to the person concerned is required in the latter case. To date there is no record of this act having been invoked against denationalized persons. Although little use has been made of the deportation weapon in respect of denationalized Blacks, it remains a constant threat to the security of those denationalized urban Blacks who actively oppose the South African Government.

89. 72 *House of Assembly Debates*, col. 542, Feb. 7, 1978.
90. Act 59 of 1972. Emphasis added.
91. The Star (Johannesburg), Aug. 2, 1978, at 5.
92. Act 44 of 1950 (formerly called the Suppression of Communism Act).

H. *Dual Nationality*

International law accepts the notion of dual nationality, according to which an individual may possess the nationality of more than one state.[93] If the South African Government had applied this principle to homelands independence and allowed persons connected with Transkei to retain their South African nationality while at the same time becoming nationals of Transkei, it would have avoided much hostile criticism.[94] On the other hand, that course would not have furthered the ultimate goal of a South Africa with no black South African nationals. Hence such a solution was rejected.

More recently, there have been developments in several quarters which suggest that the possibility of dual nationality has not been completely discarded. The initial impetus for this revival of interest in dual nationality came from the report of the Quail Commission of Inquiry into the future of the non-independent homeland of Ciskei. This report recommended that Ciskei should opt for independence only if "citizenship on satisfactory terms is negotiated which gives non-resident Ciskeians the choice of either Ciskeian or South African status or both."[95]

The idea of a constellation or confederation of states for southern Africa,[96] which has figured prominently in the speeches of Prime Minister Botha during the past year, carries with it implications for nationality.[97] It has been suggested[98] that the government is considering a confederal South African or southern African nationality in addition to homelands nationality as a solution to the problem of denationalization which has created so much bitterness among Blacks. Presumably some form of dual nationality is contemplated in such a case, in terms of which Blacks from independent homelands will retain their South African nationality or acquire the nationality of a Confederation of Southern Africa, while at the same time becoming nationals with full citizenship rights of the independent homeland. This would be a recognizable form of dual nationality and might be acceptable to Blacks—provided that it is not presented as a final exclusion of Blacks from the South African body politic but rather as a method for maintaining the link between such persons and South Africa itself while a more viable political solution is planned. In this re-

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93. 2 D. O'CONNELL, INTERNATIONAL LAW 685 (2d ed. 1970). Dual nationality gives rise to a number of problems with the result that some states and jurists regard such a status as undesirable. It is not disputed, however, that dual nationality is tolerated and permitted by international law. *See generally* N. BAR-YAACOV, DUAL NATIONALITY (1961); P. WEIS, *supra* note 39, at 169-204.

94. As late as 1975 a leading academic lawyer, Dr. F. Venter of the University of Potchefstroom, stated that dual nationality was a possible solution in the case of urban Africans. Venter, *supra* note 38, at 252.

95. THE QUAIL REPORT, *supra* note 24, at 127, para. 348(2).

96. For further information, *see* THE CONSTELLATION OF STATES, note 27 *supra*.

97. ____ *House of Assembly Debates*, cols. 250-51, Feb. 6, 1980.

98. For the statement by the National Party Member of Parliament for Krugersdorp, Mr. L. Wessels, M.P., *see* ____ *House of Assembly Debates*, cols. 5835-36, May 7, 1980.

spect it differs fundamentally from the concept of "associate citizenship" which is currently being mooted by the right-wing faction of the National Party. According to this suggestion denationalized Blacks will qualify for certain revocable privileges, such as passports, but will be denied any expectation of political participation in the government of South Africa. Neither the concept of "confederal nationality" nor that of "associate citizenship" has been fully spelled out so at this stage it is premature to speculate as to the extent to which either resembles traditional dual nationality.

Another factor which points in the direction of some form of dual nationality is the government's declared intention of extending the powers of the elected black local government councils, known as Community Councils. These councils, which have been established for Blacks in the main urban areas of South Africa, provide evidence of the growing acceptance of the permanency of black urban residents and constitute recognition of the fact that the homelands governments cannot adequately represent the interests of their "citizens" in the cities. Already nationals of independent homelands who are resident within the area for which a Community Council has been established enjoy the right to vote in Community Council elections.[99] This is an anomalous situation as normally aliens are denied the right to participate in local government as well as national government. If the Community Councils are to become more powerful it becomes still more anomalous to permit aliens, *viz* nationals of independent homelands, to vote for and hold office in such councils. On the other hand, if dual nationality were accorded to such persons there would be nothing unusual about the exercise of citizenship rights in local government in South Africa coupled with the exercise of full citizenship rights in an independent homeland.

## IV. CONCLUSION

The issue of nationality is central to the political future of South Africa. If Blacks are accorded dual nationality when "their" homelands become independent, or are allowed to opt to retain South African nationality, this will amount to an acknowledgement that Blacks are to be considered for political rights in the South African body politic, albeit in the future. On the other hand, if the present policy of denationalization is continued, this will be seen as evidence of a determination to implement the homelands policy along the lines expounded by Dr. C.P. Mulder in his notorious statement of February 7, 1978.[100] The National Party is clearly locked in debate on this issue. A committee under the chairmanship of Professor Charles Nieuwoudt of Pretoria University has recently examined the matter, but the outcome of the committee's deliberations is unknown. In the meantime, the *verligte* (relatively moderate) faction of the National Party advocates some form of confederal nationality, while

99. Sec. 3(5), Community Councils Act 125 of 1977.
100. Text accompanying note 17 *supra*.

*verkramptes* (reactionaries) within the party press for "associate citizenship," which from the available evidence seems to be nothing more than denationalization in disguise. As the policy of denationalization is so fundamental to orthodox separate development ideology, any modification of this policy will call in question the loyalty of the present government to separate development (apartheid). This is why the future of separate development itself hinges upon the debate over the issue of nationality for Blacks in South Africa.

## POSTSCRIPT

Ciskei, at present a self-governing homeland, recently elected to become independent. December 4, 1981 has been set for the inauguration of the new "state." The independence-conferring statute has yet to be enacted and it is therefore not known what agreement has been reached between the South African Government and the Ciskeian authorities on the issue of nationality. Will Ciskeians be summarily deprived of their South African nationality as has happened in the case of millions of Blacks connected with Transkei, Bophutatswana, and Venda? Or will a more equitable solution be found? The answer to these questions will not only throw light on the future of separate development, but will demonstrate the extent to which the South African Government is prepared to take cognizance of contemporary norms of international law governing nationality.

# Oil Pollution by Ocean Vessels — An Environmental Tragedy: The Legal Regime of Flags of Convenience, Multilateral Conventions, and Coastal States

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## I. INTRODUCTION

The West depends on a thin and vulnerable string of tankers to transport the narcotic fuel to which its wheels of industry are addicted, and without which the West would most surely suffer an intense and painful withdrawal. Not only does this excessive dependence of the industrialized world upon the oil of the Persian Gulf pose severe economic,[1] political and foreign policy problems,[2] but it also creates vehement con-

1. The economic impact of the increased cost of OPEC oil upon the world economy has been severe. The United States, with less than six percent of the world's population, consumes thirty percent of its energy; the nation's balance-of-payments deficit reached $14 billion in 1977, and exceeded $13.5 billion in 1978. The price surge of 1979 that placed the OPEC per-barrel price at $30 will raise the U.S. cost of oil by an additional $18 billion. Fuel import costs reached exhorbitant proportions in the 1980's, which reversed prior favorable trends in our balance of payments, at a time when the U.S. embargo on sales to the Soviet Union and Iran diminished export earnings. *United States: The Long Awaited Slump Will Finally Hit*, BUS. WEEK, Feb. 4, 1980, at 57, 60. *See* Dempsey, *Book Review*, 9 GA. J. INT'L & COMP L. 464, 464 (1979). The Organization for Economic Cooperation and Development (OECD) predicts that the recent 60% increase in the price of imported oil will insure 12 months of economic stagnation for the U.S. and a correspondingly declining growth in other western nations. This will, in turn, lead to increased inflation, increased unemployment, and severe balance-of-payments problems. Achnacarry, *Breaking the Saudi Connection*, THE NATION, Oct. 13, 1979, at 327-28. The medium term problem facing the world energy system is the avoidance of financial crises. Major new shocks to the system such as sharp oil price increases or prolonged economic recession may be beyond the capacity of the current world economic system to absorb. J. SAWHILL, K. OSHIMA, & M. MAULL, ENERGY: MANAGING THE TRANSITION 67, 68 (1978) [hereinafter cited as SAWHILL, OSHIMA & MAULL].

2. These are dangerous times. With the recent invasion and occupation of Afghanistan by Soviet troops, the overthrow of the Shah by a vehemently anti-Western regime, the insecurity faced by Saudi Arabia, the general political instability which pervades Southwest Asia, extraordinary increases in the price of OPEC crude, and the inability or unwillingness of the Israeli government to satisfactorily resolve the Palestinian issue, the Middle East is the tinderbox of the world. It is the region of the planet where the potential for direct superpower confrontation (and the frightening thermonuclear possibilities arising therefrom) is greatest. *See generally*, Adelman, *International Oil*, 18 NAT. RESOURCES J. 725 (1978); Conant & Kratzer, *International Dimensions of Energy*, 27 AM. U.L. REV. 559 (1978); McKelvey, *World Energy: The Resource Picture*, 10 CASE W. RES. J. INT'L L. 597 (1978); McKie, *Oil Imports: Is Any Policy Possible?*, 18 NAT. RESOURCES J. 731 (1978); Mead, *Political-Economic Problems of Energy — A Synthesis*, 18 NAT. RESOURCES J. 703 (1978); M. TANZER, THE POLITICAL ECONOMY OF INTERNATIONAL OIL AND THE UNDERDEVEL-

cerns over the tragic consequences which have, and will continue to, adversely affect a fragile marine and coastal environment.

It is this environment which produces most of the oxygen and much of the food the living beasts of the planet consume. Surely, the loss of either would be even more devastating to Homo sapiens than the loss of his precious fuel. Hence, it would seem that man would seek to ensure that the massive quantities of fuel to which he has grown accustomed would be transported in a manner which is least destructive of his environment.

Garrett Hardin has succinctly described the environmental problems associated with what may be the inherent tendency of man to waste that over which he may assume only collective (as opposed to individual) ownership as the "tragedy of the commons":

> The rational man finds that his share of the cost of the wastes he discharges into the commons is less than the cost of purifying his wastes before releasing them. Since this is true for everyone, we are locked into a system of "fouling our own nest," so long as we behave only as independent, rational, free-enterprisers.[3]

Because our oceans cannot be fenced and hence made private property, Hardin argues that "tragedy of the commons as a cesspool must be prevented by different means, by coercive laws or taxing devices that make it cheaper for the polluter to treat his pollutants than to discharge them untreated."[4] This article will examine these coercive laws and taxing devices to discern whether they can prevent the possibility of having rational man make cesspools of our oceans. Specifically, it is the complex legal labyrinth which has evolved to govern the transportation of oil by sea and seeks thereby to protect our marine and coastal environment, to which this article is addressed. The legal regimes which have exercised jurisdiction over such pollution are three — flag states, coastal states, and the international community — each of which has a separate, but nevertheless legitimate, interest in regulation.

The dramatic growth in the use of flags of convenience by the maritime industry since World War II[5] has become an issue of international concern, one for which the application of customary rules of international law may be unsatisfactory. Essentially, a flag of convenience constitutes

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OPED COUNTRIES (1969); M. WILLRICH, ENERGY AND WORLD POLITICS (1975); R. KEOHANE & J. NYE, POWER AND INDEPENDENCE 24-29 (1977); Dempsey, *Economic Agression & Self-Defense in International Law: The Arab Oil Weapon and Alternative American Responses Thereto*, 9 CASE W. RES. J. INT'L L. 253 (1977); Weaver, *Our Energy Predicament*, NATIONAL GEOGRAPHIC, ENERGY 2 (Feb. 1981).

3. Hardin, *The Tragedy of the Commons*, in G. HARDIN & J. BADEN, MANAGING THE COMMONS 22 (1977).

4. *Id.*

5. *See* UNCTAD, Committee on Shipping, Economic Consequences of the Existence or Lack of a Genuine Link Between Vessel and Flag of Registry, 23, 26, U.N. Doc. TD/B/C.4/168 (1977) [hereinafter cited as UNCTAD Report].

"the flag of any country allowing the registration of foreign-owned and foreign-controlled vessels under conditions which, for whatever the reasons, are convenient and opportune for the persons who are registering the vessels."[6] The nations presently noted for granting flags of convenience are principally those of the third world, with Panama, Liberia, and the Honduras being among the most notorious.

Fleets of ships bearing these flags are characterized by their poor condition,[7] inadequately trained crew, and frequent collisions, which have too often resulted in disastrous oil spills, among the most significant of which have been the *Torrey Canyon*,[8] the *Argo Merchant*,[9] and the *Amoco Cadiz*.[10] It is in this framework that the legal dilemma has arisen.

International law has long recognized the free access to and use of the high seas by all nations. As the legal regime of maritime transportation has developed, ships have been ascribed a nationality, an attribute which enables them to freely use and enjoy the oceans without being subjected to the jurisdiction of another nation anywhere on the high seas. The abuse of this established regime of international law by flag of convenience ships, notably in the area of pollution of the sea by oil and other hazardous substances, has given rise to a pressing need to regulate this hitherto unrestricted use of the sea in order to protect the international environment from irreparable injury. Such regulation has been attempted both by international organizations and by coastal states. Nevertheless, their success in preserving the marine environment has repeatedly been

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6. B. BOCZEK, FLAGS OF CONVENIENCE 2 (1962). As the term suggests, the conditions of registration are, above all, convenient for both the vessel owner and the registering state. However, flags granted under these favorable conditions have gone by other terms as well, such as "flags of necessity," "tax-free flags," "flags of attraction," etc. For a survey of the various terms and the reasons for them, see *id.* at 4-6.

7. It is interesting to note that during the early 1960's, when the topic of flags of convenience had attracted the attention of several publicists, a large number of flag of convenience fleets boasted new vessels that were in better condition than the ships of established national fleets. However, in the intervening years, these ships have become rusting hulks, but are still sailing the seas. Panama is even noted for accepting for registry ships that are unacceptably old to other registering countries. Consequently, one advantage that at one time could be ascribed to flag of convenience ships has become, in the course of twenty years, a major disadvantage. *See* UNCTAD Report, *supra* note 5, at 27-31.

8. Juda, *IMCO and the Regulation of Ocean Pollution from Ships*, 26 INT'L & COMP. L.Q. 558 (1977); Cusine, *Liability for Oil Pollution Under the Merchant Shipping (Oil Pollution) Act 1971*, 10 J. MAR. L. & COMM. 105, 106-07 (1978); Nanda, *The "Torrey Canyon" Disaster: Some Legal Aspects*, 44 DEN. L.J. 400 (1967).

9. Herman, *Flags of Convenience — New Dimensions to an Old Problem*, 24 McGILL L.J. 1, 2 (1978).

10. *See In re* Oil Spill by "Amoco Cadiz," 471 F. Supp. 473 (J.D.M.D.L. 1979); Inter-Governmental Maritime Consultative Organization (IMCO) Maritime Safety Committee, 38th Sess., Doc. No. msc. xxxviii/21/Add. 1 (1978), *reprinted in Oil Tanker Pollution: Hearings Before the Subcomm. on Government Activities and Transportation of the House Comm. on Government Operations*, 95th Cong., 2d Sess. 268-70 (1978); For a brief account of other major tanker spills, see OFFICE OF TECHNOLOGY ASSESSMENT, OIL TRANSPORTATION BY TANKERS: AN ANALYSIS OF MARINE POLLUTION AND SAFETY MEASURES 32-37 (1975) [hereinafter cited as OIL POLLUTION BY TANKERS].

hampered by the traditional legal regime which has afforded broad protection to the activities of ships flying flags of convenience.

How does one balance the rights and interests of flag states to insure freedom of commerce on the high seas, and to defend their customary international legal rights of exclusive sovereignty over their vessels, against the rights and interests of coastal states to protect the commercial well-being of their tourism and fishing industries, as well as their aesthetic and environmental interests in being free of pollution? Should there be a genuine link (*i.e.*, an adequate legal relationship) between the owner of the vessel and the state of registry? Should coastal states be permitted to require that vessels serving their ports and traversing their territorial waters comply with minimum standards of construction and safety? Or should such obligations, if imposed at all, be the sole and exclusive responsibility of the world community acting under mutually agreed principles embodied in multilateral conventions?

This article will examine the conflicting claims that have been presented, to determine whether this conflict can be resolved within the existing international legal framework, and to evaluate the methods that have been adopted by the international community and coastal states to deal with the serious environmental problems presented by flag of convenience ships. The principal focus will be on the U.S. commercial interests in flags of convenience, balanced against the need to protect the nation's coastal environment. The United States, perhaps more than any other country, is in an anomalous position with regard to the conflict at issue. A large portion of the U.S. tanker fleet is registered under flags of convenience,[11] particularly Liberian and Panamanian.[12] Such registry is sanctioned by U.S. law[13] and mandated by U.S. economic conditions.[14] An important purpose of registering under a flag of convenience is to avoid U.S. regulation of safety, taxation, construction, and employment obligations. However, recently promulgated environmental laws have been designed to regulate the standards and activities of all vessels entering U.S. ports, including those flying flags of convenience. Paradoxically, having sanctioned the transfer of many United States-owned vessels to flag of convenience registry, thereby losing direct control over the activities of those ships, the United States is now attempting to invoke regulation indirectly as a coastal state which it cannot impose directly as a flag state.

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11. *See* UNCTAD Report, *supra* note 5, at 33. *See also Oil Pollution Liability: Hearings on H.R.776, H.R.1827, H.R.1900, H.R.3711, and H.R.3926 Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess. 83-84 (1977) (statement of O.R. Menton).

12. *OECD Study on Flags of Convenience*, 4 J. MAR. L. & COMM. 231, 234 (1973).

13. Shipping Act of 1916, § § 9, 37, 41; 39 Stat. 730, *as amended*, 46 U.S.C. § § 808, 835, 839 (1976). For an explanation of the U.S. vessel transfer policy under the Maritime Administration, *see* B. BOCZEK, *supra* note 6, at 33-36.

14. *See infra*, notes 62, 63, 66-83, and accompanying text.

## II. ENVIRONMENTAL DAMAGE AT SEA — OUR OCEANS IN DIRE STRAITS

Every year, one and one-half billion gallons of oil are spilled into the oceans. While routine deballasting and cleaning operations are responsible for the bulk of the oil which has been lost or dumped at sea, it is the major spills which have become the focus of world press and public attention.[15]

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15. STAFF OF HOUSE COMM. ON PUBLIC WORKS AND TRANSPORTATION, COMPENSATION FOR VICTIMS OF WATER POLLUTION, 96th Cong., 1st Sess. 20 (1977). It is estimated that 80 to 85% of oil spillage is caused by intentional dumping. *Id. See* Roady, *Remedies in Admiralty for Oil Pollution*, 5 FLA. ST. U.L. REV. 361, 362 (1977); and Bergman, *No Fault Liability for Oil Pollution Damage*, 5 J. MAR. L. & COM. 1, 7 (1973). For example:

> NEW ORLEANS (UPI) - Crude oil oozed into the Mississippi River Thursday from a 100-foot slit in the side of a Liberian tanker that collided with two barges and erupted in flames on the foggy waterway.
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> . . .
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> The vessel was partially filled with 2.4 million gallons of oil, and 30,000 gallons spilled out.
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> . . .
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> Flames up to 300 feet high rose from the tanker, which was moving upriver several miles above the New Orleans French Quarter when the collision occurred. "The river was on fire for about a mile," said Arman Alleman, a volunteer fireman in Marrero, La., a community across the river from New Orleans. "Almost the entire river was on fire."

UPI, *Crippled Tanker Leaks Crude*, ROCKY MTN. NEWS Dec. 21, 1979, at 45, col. 1. The above excerpts are taken from the account of a recent collision on the Mississippi River involving an oil tanker. The inferno which resulted, however, is small in comparison to the cataclysm which could potentially erupt from a collision with a fully loaded Liquefied Natural Gas (LNG) tanker.

> If spilled on water in a large-scale accident, it is unlikely the water would freeze. Instead, the water would continue to warm the floating LNG, vaporizing it and forming a spreading cloud. Researchers currently disagree on the shape, size, movement, and composition of the vapor cloud and the factors which will affect it. It is believed that the concentration of LNG vapor within the cloud is not homogeneous. At the edge of the cloud, where the greatest mixing with ambient air occurs, the concentration of gas is lowest. At the core of the cloud, the cencentration is highest. Where the cloud falls within the flammable limits of 5 to 15 percent, the cloud may be ignited and burn back toward the source of the spill. It is generally agreed that, if the vapor from a large LNG spill ignites, it would be beyond the capability of existing firefighting methods to extinguish it. Therefore, the key to reducing the hazard of an LNG fire is a strong prevention program.

OFFICE OF TECHNOLOGY ASSESSMENT, TRANSPORTATION OF LIQUIFIED NATURAL GAS 8 (1977). This article continues to describe the only major incident to date involving an LNG spill:

> That accident occurred at the first LNG installation in 1944. At that time, a storage tank owned by East Ohio Gas Company in Cleveland ruptured, spilling 6,200 cubic meters of LNG into adjacent streets and sewers. The liquid evaporated, the gas ignited and where confined, exploded. The disaster remains the most serious LNG accident anywhere in the world. It resulted in 128 deaths, 300 injuries, and approximately $7 million in property damage.

*Id.* at 8-9. LNG tankers such as those currently under construction by General Dynamics have a capacity of 125,000 cubic meters. *Id.* at 15. Speculation as to the potential explosive force of this large a quantity of LNG lies beyond the scope of this article; however it is clearly awesome.

A. *The Cost of Oil Pollution — Major Oil Spills*

The alarming number of collisions and other accidents involving tanker ships has become, in recent years, a major topic of concern. The potential for loss of life and property damage, as well as pollution damage to the environment is clearly tremendous. This potential is magnified incalculably where a mishap occurs within a crowded harbor near a large metropolitan area.

Major oil spills that have attracted substantial public attention date back to the *Torrey Canyon* disaster of 1967 in which 117,000 tons of oil were spilled into the English Channel, at a clean-up cost of some $5 million.[16] Such disasters continued throughout the past decade. Among these were: (a) the Santa Barbara Channel incident of 1969 (oil well blowout) in which 13,888 tons of oil were spilled into the waters along the California coast, at a cost of $8.5 million;[17] (b) the 1974 *Metula* sinking in the Strait of Magellan in which 50,000 tons of oil were lost;[18] (c) the 1976 Chesapeake Bay spill in which 256,000 gallons were lost in Virginia inland waters; (d) the *Argo Merchant* spill off Nantucket, Massachusetts, in which 7.2 million gallons of oil were lost, costing $5.2 million to clean up;[19] and (e) the sinking of the supertanker *Amoco Cadiz,* which dumped 69 million gallons of oil off the coast of Britanny in 1978.[20] The last was

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16. Gundlach, *Oil Tanker Disasters* 19 ENVIRONMENT 18 (No. 9 1977). Environmental damage to the coasts of Cornwall and Brittany was extensive. It is suspected, however, that the application of of untested detergents contributed significantly to the damage.

17. *Id.* The oiling of waterbirds received the greatest attention in the press. Overall, however, the damage was not as great as initially expected. The spill occurred in the winter when many organisms were dormant or at low population levels.

18. *Id.* at 19. The spill covered 1,000 sq. miles. No cleanup was attempted since the spill occurred in a remote area.

19. *Compensation for Victims of Water Pollution,* note 15 *supra.* The sinking of the *Argo Merchant* caused the largest spill in U.S. history. The 30,000 ton tanker had a long history of structural problems. She sank 29 miles from shore in international waters.

20. Other major oil disasters at sea have included the following:

(a) On September 16, 1969 in Buzzards Bay, Massachusetts, a "small oil spill" discharged 200,000 gallons of oil into the bay and its surrounding marshes. Studies of the spill showed an expansion from five hundred acres originally affected to five thousand offshore acres together with five hundred acres of marsh;

(b) In 1971 the *Wafra* lost 26,000 tons of oil off the coast of South Africa in the Stilbaii oil spill, affecting at least nine miles of beaches;

(c) Two tankers collided outside of San Francisco Bay resulting in a loss of 1,000,000 gallons of oil; this spill affected beaches and wildlife sanctuaries for fifty miles;

(d) The *Arrow* lost 4.8 million gallows of oil off the coast of Nova Scotia in 1973, which spread over one-hundred fifty miles of shoreline;

(e) The Mizushima oil spill in 1974 was the result of a rupture of a refinery storage tank off the coast of Japan; the amount of oil spilled in this incident was approximately 43,000 tons;

(f) 40,000 tons of oil were spilled in the Straits of Magellan in 1974 in the *Metula* oil spill — the spill affected over 1,000 square miles;

(g) One year later, near Oporto, Portugal, the *Jakob Maersk* spill washed 15,000 tons of oil onto recreational beaches;

(h) One-hundred thirty miles of coastline were affected in the May 1976 wreck of the

considered to be by far the worst shipwreck in history, the cost for cleanup is estimated to have been $30 million.[21] There, oil mixed with water to form a thick chocolate-colored emulsion called "mousse." This mousse-covered sea slopped ashore fouling beaches for 130 miles, besmearing fisheries and seaweed harvests. It was estimated that there was enough mousse on the Breton coast to fill 17,700 railroad cars. Only fifteen to twenty percent of the 250,000 tons of crude oil spilled was recovered,[22] the rest remains in the ocean.

It is understandably difficult to comprehend the magnitude of a spill

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*Uriquiola* in La Coruna Harbor, Spain. 100,000 tons of oil were lost;

(i) In April of 1977 the Bravo 14 Platform, southeast of Norway, lost 28,000 tons of oil and resulted in a slick covering an area seventy miles by forty miles;

(j) Later that year, in December, the *Esso Bernicia* incident off the coast of the Shetland Islands affected ten kilometers of coastline;

(k) In November 1979 the *Berma Agate* excreted oil into the Gulf of Mexico, which oil formed a slick over 10 kilometers long;

(l) One month later the *Soe Alaska* lost 100,000 gallons of oil affecting 1200 kilometers of shoreline;

(m) In March 1980 the *Tanio* lost oil in the Brittany Channel, resulting in a 100 mile long slick; and

(n) At the end of the same month, on March 24, 1980, the Ixtoc I Project, offshore in Campeche Bay, lost 140 million gallons, 28.5% of which formed a slick along the Texas coast.

*See* Wertenbaker, *A Reporter at Large: A Small Spill*, NEW YORKER, Nov. 26, 1973, at 68. The incidents referred to in paragraphs (j) through (n) are described in the April 1979 to the May 1980 issues of *Marine Pollution Bulletin*. *See* 10 MARINE POLLUTION BULL. (No. 4, 1979)(News Section) to 11 MARINE POLLUTION BULL. (No. 5, 1980) (News Section).

21. Keichel, *The Admiralty Case of the Century* 99 FORTUNE, Apr. 23, 1979, at 86. Thirty million dollars is the limit of Intergovernmental Maritime Consultative Organization's clean-up liability.

Obviously, as another result of the spills, extensive costs are incurred for cleanup and retribution. The actual costs have ranged from the over $0.5 million spent in the Buzzards Bay clean-up to the $133 million spent for control and cleanup in the more recent Ixtoc I spill. Wertenbaker, *supra* note 20, at 53. Editorial, *Ixtoc I Stopped*, MARINE POLLUTION BULL. 115 (No. 5, 1980). Subsequent to the Santa Barbara Spill, a judge fined each oil company $500.00 in criminal penalties, when $812,000 in fines could have been assessed pursuant to state statutes. In that same incident, $6 million was awarded in civil suits and $10.5 million was spent to clean beaches. The actual clean-up costs expended for workers, detergents and equipment, as shown above, are extensive, but almost always ascertainable. At the other end of the spectrum, however, are those indeterminable costs. What is the cost of a limpet, a cormorant, a sea otter? Efforts have been made to price the plant and animal life, but the ascertainment of such costs is administratively not feasible. *See* Editorial, *What Price Pollution?* 26 BIOSCIENCE 603 (1976). Cleanup of the Ixtoc I oil spill (the largest oil spill in history) which spewed 3.1 million gallons of oil into the Gulf of Mexico cost $8 million. *Counting Costs of an Oil Spill*, NEWSWEEK, Aug. 4, 1980, at 8. Bermuda spends $100,000 a year sifting the sands of its beaches to rid them of tar balls, the end product of frequent tanker flushing. Roady, *supra* note 15, at 362.

22. Keichel, note 21 *supra*. Three auk species, guillonot, razorbill, and puffin were devastated, delcining from 3,000 breeding pairs to 500 in the *Torrey Canyon* disaster. The recent spill of the *Amoco Cadiz* probably means the end of the auk populations. *See* Bourne, *Amoco Cadiz Seems Likely To Exterminate the French Auks*, 9 MARINE POLLUTION BULL. 145 (No. 5, 1978).

of 50,000 to 200,000 tons of oil. Eldon Greenberg of the Center for Law and Social Policy, testifying before a House Subcommittee of the Committee on Government Operations, stated that a spill in South America of over 50,000 tons covered seventy-five miles of coastline with crude oil one to four inches deep.[23]

B. *Massive Destruction of Wildlife — "Death to All Dumb Animals" is the Insane Decree of Man*

As can be discerned from these statistics, the spills over the past fifteen years have increased in frequency and magnitude, damaging a substantial area of coastline. What has not yet been adequately explored, however, is the extensive biological injury suffered as a result of these disasters. Birds have been killed in great numbers due to suffocation and poisoning,[24] and have also suffered serious long-term damage due to delayed toxic effects on the hatchability of eggs and chicks.[25] The *Torrey Canyon* disaster in 1967 resulted in the loss of more than 25,000 seabirds, most of which were killed by the toxic detergents used to break down the slick.[26] In the Santa Barbara blowout, at least 3,600 birds were killed. Likewise, the *Metula* spill caused the death of 3,000 to 4,000 birds.[27] The oil in the *Wafra* incident was particularly lethal; "tens of thousands" of Jackass Penguins on Dyer Island were drowned and poisoned.[28] More fatalities were reported in the San Francisco Bay Spill where ninety-four percent of the 4,629 cormorants, grebes, ducks, and coots recovered and treated were lost. A final estimate of the bird population killed in that incident was 20,000.[29] Another avian disaster made itself apparent in the *Esso Bernicia* incident when 3,533 corpses of forty-eight species of birds were found.[30] Oil spillage caused the death of a quarter of a million auks in a single Newfoundland nesting colony.[31] Studies have shown that the deaths of the birds were the result of oil coating their feathers, making them less buoyant and, therefore, susceptible to drowning. Birds were also poisoned when the oil was ingested or aspirated as they preened or fed upon other affected animals.

The short-term effects may include the unpleasant smell of ship's

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23. *Oil Spill Contingency Plan; Hearings Before the Subcomm. on Environment, Energy, and Natural Resources of the House Comm. on Government Operations*, 95th Cong., 1st Sess. 5-7 (1977) (Statement of Eldon Greenberg) [hereinafter cited as *Contingency Plan Hearings*].

24. Milne, *The Last Survivors*, 5 INT'L WILDLIFE 12 (No. 5, 1975).

25. Grau, Roudybush, Dobbs & Wathen, *Altered Yolk Structure and Reduced Hatchability of Eggs from Birds Fed Single Doses of Petroleum Oils*, 195 SCIENCE 779 (1974); Miller, Peakall & Kinter, *Ingestion of Crude Oil: Sublethal Effects in Herring Gull Chicks*, 199 SCIENCE 315 (1978).

26. J. SMITH, TORREY CANYON: POLLUTION AND MARINE LIFE (1968).

27. J. BAKER, AN OIL SPILL ON THE STRAIGHTS OF MAGELLAN, MARINE ECOLOGY AND OIL POLLUTION (1976).

28. Milne, *supra* note 24, at 12.

29. Watkins, *The Day the Birds Wept*, 78 AUDUBON 21 (No. 1, 1976).

30. Richardson, *Esso Bernicia Incident*, 10 MARINE POLLUTION BULL. 97 (No. 4, 1979).

31. Bergman, *supra* note 15, at 2.

garbage and dead fish on the beaches, for many sea birds are scavengers. Without them, the possibility of disease near our oceans is likely to increase.[32] The long-term effects, as noted above, are demonstrated by decreased hatchability of the eggs produced by oil-affected birds, and high chick mortality rates.

Floundering in the same sinking biological vessel are algae, plankton, shellfish, fish, and large mammals. The *Amoco Cadiz* accident alone temporarily destroyed over 2,000 acres of oyster beds, which constituted one-third of France's commercial seafood market.[33] Sixteen days after the same spill the bodies of dead urchins littered one and one-half miles of beach.[34] The Santa Barbara spill substantially decreased the surrounding phytoplankton biomass, and large mammals and their young, including seals, sea elephants, and one porpoise, were found dead, presumably from oil poisoning. Also killed in this incident were shore plants and animals which were smothered by the oozing oil.[35]

The devastating effects of oil spillage on the marine environment differ with various factors. Erich Gundlach, together with a team of researchers for the Coastal Research Division Oil Spill Assessment Team (University of South Carolina), determined that the extent of damage caused by a spill depends upon its proximity to coastal areas, time of year, weather, tidal conditions, wave activity, and toxicity of the spilled crude oil. Vulnerability to extensive damage increases in coastal areas where biological productivity is high, particularly in those areas where wave action is diminished.[36] Such findings are well substantiated by the tragic environmental damage which resulted from the sinking of the *Metula* in the Strait of Magellan and the sinking of a barge carrying Bunker C oil in Chesapeake Bay. Victims of the Chilean episode included mussel beds, marsh life, fish, and approximately 4,000 birds. The spilled crude oil solidified in tidal flats and marsh areas into an asphalt-like strip fifty feet wide along the rim of the flats. The effects of the disaster are expected to remain visible for at least ten years.[37] The Chesapeake Bay disaster took even more victims — 30,000 to 50,000 birds. In addition, the spill resulted in the destruction of many oyster beds.[38]

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32. *Id.*

33. Grove, *Black Day for Brittany*, NAT'L GEOG., July, 1978, at 133.

34. Editorial, *Amoco Cadiz: A Lasting Disaster*, 144 SCI. NEWS 85 (No. 6, 1978).

35. Holme, *Effects of Torrey Canyon Pollution on Marine Life*, OIL ON THE SEA 25 (1969).

36. Grundlach, *supra* note 16, at 21. In order of increasing vulnerability, the environments by classification are (1) exposed, steeply dipping or cliffed rocky shores, (2) eroding wavecut platforms, (3) fine sand beaches, (4) coarse sand beaches, (5) exposed tidal flats, (6) mixed sand and gravel beaches, (7) gravel beaches, (8) sheltered rocky coasts, (9) sheltered tidal flats, and (10) salt marshes and mangroves.

37. *Id.* at 19. Vegetation in the area, of course, has been totally devastated.

38. J. REIGER, JUST ANOTHER OIL SPILL 145 (1977). James Hill, in describing the incident stated, "It was awful. As fast as the children brought the ducks, others would crawl up on the beach to die. Some were so covered with gunk you couldn't tell the species."

Perhaps the most disturbing description of wildlife devastation was written by William Wertenbaker with respect to the spill of 700 tons of fuel oil into Buzzards Bay, off the Massachusetts coast. Shortly after the incident, piles of dead lobsters were washed upon the shore. "In scientific generalities, the marine animal population of the area, in the course of the next week or so, declined from about 200,000 animals per square metre to about two animals per square metre."[39] In one dredge, ninety-three percent of all organisms were either dead or dying.[40] One of the marshes affected by the spill remained incapable of sustaining life for at least two years subsequent thereto. The shellfish industry was closed twice due to the oily taste of the fish, and a harvest which would have resulted in a profit of $150,000 was foreclosed. The fishing industry also suffered a severe blow in the *Uriquiola* incident when seventy percent of the edible cockel were killed.[41] A study has shown that polar bears are also adversely affected by oil. Two bears died from kidney and liver damage as a result of licking oil from their coats and paws.[42] These frightening statistics demonstrate the biological devastation brought about by oil. "Interference at an extremely low concentration level may have a disastrous effect on the survival of many marine species and on any other species to which it is tied by the marine food chain."[43]

### C. *The Long-Term Impact of Oil Spillage and Dumping — The Potential Destruction of the Planet*

Although the full environmental effects of tanker pollution are not yet known, certain effects are obvious: the tarring of beaches, the endangering of seabird species, and the modification of benthic communities, to name a few. In correspondence with the Senate Committee on Commerce, the Cousteau Society has stated that the long-range effects of such spills may be particularly devastating, warning that such spills affect the reproductive capacity of various species of marine life and also interfere with the ocean food chain link by killing important food sources of otherwise unaffected marine life.[44]

Such warnings are now being substantiated by studies undertaken by the scientific community. Most recently, in a study of the effects resulting from the *Argo Merchant* oil spill, scientists found the killing of sand launce larvae, an important food source for fish, to have affected the en-

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39. Wertenbaker, *supra* note 20, at 49.

40. Bergman, *supra* note 15, at 3.

41. Gundlach, *The Black Tide of La Coruna*, 10 OCEANS 56 (1977). *See* Roady, *supra* note 15, at 363.

42. Editorial, *Polar Bear Deaths from Oil*, 11 MARINE POLLUTION BULL. 117 (No. 5, 1980).

43. Blumer, *Oil Pollution of the Ocean*, OIL ON THE SEA 11 (1969).

44. *Recent Tanker Accidents: Hearings Before the Senate Comm. on Commerce*, 95th Cong. 1st Sess. 235 (1977) (letter to President-Elect Carter from the Cousteau Society and the Union of Concerned Scientists). The letter, in discussing short range effects of oil spills, noted that oil uptake by fish can make them carcenogenic to man.

tire ecosytem of the area.[45] Other disturbing reports have indicated that oil spillage has caused decreased reproductivity in marine life,[46] decreased hatchability of eggs of various seabirds,[47] has inflicted physiological and behavioral damage on affected animals,[48] and has had long-lasting effects on phytoplankton and zooplankton survival.[49] Taking into consideration the extensive short-term damage which has occurred and the forecasted long-term damage yet to be manifested, it has been predicted that the oceans will soon become biological deserts.[50] That forecast is particularly disturbing in that the food chain, of which man is a part, has its significant beginnings in the oceans. "More is at stake here than birds or fish, of course; rents are being made in the web of life upon which man depends, and of which he is a part."[51]

One commentator has summarized the impact of continued oil pollution as follows:

> Oil . . . coats the seaweed causing it to be easily torn free by wave action, resulting in beach erosion. At the same time, some oil begins to biodegrade, reducing the life supporting dissolved oxygen in the water available to living organisms . . . . The slick itself interferes with phytoplankton photosynthesis, the food source for much of the world's protein and a source of oxygen for the atmosphere. Interference with water evaporation may cause reduced water vapor in the air with a proportionate decrease in rainfall.
>
> In addition to genetic changes and deformities, observers have reported increasing cancerous lesions of fish in areas of high oil pollution, raising the specter that oil pollution may induce cancer in man.[52]

Jacques Piccard has stated: "If nothing is done, all the oceans will be dead before the end of the century."[53]

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45. *Contingency Plan Hearings, supra* note 23, at 76. Among the wildlife affected by the *Argo Merchant* spill included: blackback and yellowtail flounder and shellfish (adverse effects on respiratory systems), cod and pollack embryos (increased mortality rate), and plankton (contaminated with petroleum hydrocarbon).

46. *Id.*

47. *Effects of Oil on Birds*, 32 CALIFORNIA AGRICULTURE 16 (1978); *see also* Grau, *et al., supra* note 25, at 779.

48. *Aftermath of an Oil Spill: A Black Seven Years*, 112 SCI. NEWS 84 No. 6, 1979). This seven-year study was conducted following a No. 2 fuel oil spill into Buzzards Bay, Massachusetts in 1969. Populations have not recovered to pre-spill levels and significant behavioral aberrations are common in the survivors.

49. James, *Xenobiotic Metabolism in Marine Species Exposed to Hydrocarbons*, ENERGY/ENVIRONMENT 11 NATIONAL CONFERENCE ON THE INTERAGENCY RESEARCH & DEVELOPMENT PROGRAM, 2d EPA RPT. No. 600/9-77-012 (1977).

50. *Oil Is Pouring on Troubled Waters*, TIME, Jan. 10, 1977, at 47.

51. Editorial, *Pity the Birds*, NATION, Feb. 8, 1971, at 166.

52. Anderson, *National and International Efforts to Prevent Traumatic Vessel Source Oil Pollution*, 30 U. MIAMI L. REV. 985, 992-93 (1976) [citations omitted].

53. Piccard, *Dying Oceans, Poisoned Seas*, TIME, Nov. 8, 1971, at 74.

D. *Oil Pollution — Its Cause and Cure*

As has been indicated, there are essentially two sources of oil pollution from ships: (1) pollution from routine vessel operations, such as tank cleaning, deballasting, and periodic discharge;[54] and (2) tanker accidents, such as collisions or running aground.[55] Of the two, by far the greatest amount of pollution is caused by routine operations.[56]

In order to deal with the problem, there must be a sophisticated and effective legal system governing the high seas, ports, territorial waters and the contiguous zone. The objectives of this regime would be fourfold:

1. To prevent or minimize intentional discharges of oil from ships;
2. To prevent accidents which result in the discharge of oil into the sea;
3. To establish procedures for dealing with pollution or the threat of pollution from accidents; and
4. To establish procedures for assigning liability for damage arising from pollution, and ensuring compensation to victims of the damage.[57]

The key to the prevention of oil discharge either from accidents or routine operations lies in establishing minimum standards for construction and maintenance of vessels, training and licensing of crews, and information and navigational controls.[58] A necessary corollary to establishing these standards is the creation of a legal regime that will effectively enforce them. The types of modifications to vessel structure and operation that reduce pollution and improve safety[59] include: (a) fitting the ship with a double bottom and a double hull; (b) constructing segregated ballast tanks apart from cargo tanks; (c) implementing an inert gas system to reduce the danger of explosion; (d) using a load-on-top method of

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54. Approximately 80-85% of all oil spillage is caused by intentional dumping. *See* note 15 *supra*.

55. Of the five to ten million tons of oil floating upon the seas in 1971, an estimated one million tons were spilled as a result of tanker collisions and groundings. One third of these accidents were the product of structural defects in the vessels involved. Carter, *Amoco Cadiz Incident Points Up the Elusive Goal of Tanker Safety*, 200 SCIENCE 515 (1978).

Moreover, concern over increased tanker traffic and the potential for an increasing number of catastrophic tanker accidents is far from unfounded. From the 1950's until 1965, the number of tankers ranging in size from 50,000 deadweight tons (dwt) to 199,999 dwt increased from 1 to 471. By the early 1970's, the number of tankers measuring more than 200,000 dwt registered at 131. Today tankers twice the size of the *Amoco Cadiz* weighing 250,000 dwt are in use, and the number promises to increase as the Western world's dependency on oil from the Middle East climbs at a disturbing rate. Gundlach, *supra* note 16, at 18. The growth in both the use and size of supertankers began after the closing of the Suez Canal during the Arab-Israeli conflict of 1967. *See* Anderson, *supra* note 52, at 998.

56. OIL TRANSPORTATION BY TANKERS, *supra* note 10, at 27. As of 1975, approximately 1,000,000 tons of oil per year are dumped in standard operations, while 200,000 tons are spilled through casualties. *Id.* at 1.

57. Mensah, *International Environment Law: International Conventions Concerning Oil Pollution at Sea*, 8 CASE W. RES. J. INT'L L. 110, 112 (1976).

58. OIL TRANSPORTATION BY TANKERS, *supra* note 10, at 1-7.

59. For further elaboration and analysis of these methods of pollution prevention, *see id.* at 38-57.

discharging ballast; and (e) limiting tanker size.

A large number of serious accidents resulting in disastrous spills are attributable to inadequately trained crews. This problem may be resolved by establishing minimum skill and training requirements for licensing of tanker crews.[60] In addition, adequate information and control systems should be required to facilitate the operation of a massive tanker in an unfamiliar port, or in unusual weather conditions. These systems may be classified in the following categories: navigational aid, communications, information, control, vessel traffic, and collision avoidance.[61] In the event of the failure or nonimplementation of these preventive measures, there must be a mechanism for cleaning up pollution when it does occur, and allocating liability for the resulting damage. With these objectives in mind, let us now examine the existing legal framework to discern whether there is any promise for alleviation of the enormous tragedy described in this section.

## III. FLAGS OF CONVENIENCE

### A. *The Advantages of Registry Under a Flag of Convenience*

The advantages derived by U.S. shipowners as a result of registry under flags of convenience are numerous, and can be attributed both to the competitive conditions of the world shipping trade, and the nature of relevant United States legislation vis-à-vis that of flag of convenience states such as Liberia, Panama, and Honduras. The attributes of flag of convenience registry have been summarized as follows:

1. Transfer to a foreign flag increases the market value of the ship.
2. Transfer reduces operating costs, particularly for wages and maintenance of good working conditions, due to lower standards permissible under foreign flags.
3. Transfer makes possible operating in world trade with easy currency conversion.
4. Transfer allows the owner to avoid United States Coast Guard requirements governing the condition of the vessel.
5. The owner may effect repairs abroad at less cost than the same repairs in the United States.
6. The owner can save money by avoiding United States income tax.
7. And ultimately, as a result of increased earnings, the owner's financial ability to acquire new tonnage is improved.[62]

All of these advantages are essentially financial in nature. By avoiding United States labor, tax, and regulatory laws through the use of flags of convenience, the cost of transporting foreign oil is dramatically

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60. *Id.* at 57-63.

61. *Id.* at 63-71. *See generally,* Greenwald, *LNG Carrier Safety: A Guide to the System of Federal Regulation,* 9 J. MAR. L. & COM. 155 (1978).

62. *Study of Vessel Transfer Trade-in & Reserve Fleet Policies: Hearings Before the Subcomm. on the Merchant Marine of the House Comm. on Merchant Marine & Fisheries,* 85th Cong., 1st Sess. 140 (1957), *reprinted in* B. BOCZEK, *supra* note 6, at 29-30. *See* Herman, *supra* note 9, at 4-5.

decreased.[63]

Decreased transportation expense, however, is not the only result of widespread flag of convenience registration. The recent number of oil spills involving flag of convenience tankers has led one publicist to conclude, regarding what he described as "The 'Argo Merchant' Syndrome," that, "these incidents have contributed to a general recognition of the inadequacy of present international rules that allow ancient, poorly-repaired, ill-equipped or inadequately manned and navigated vessels into ocean-borne trade service."[64] Data clearly indicate that losses and casualties of flag of convenience vessels exceed those of vessels registered in the country of ownership.[65] Hence, the need for stringent safety regulation by coastal states of foreign as well as domestic vessels is manifest.

1. *General Economic Considerations*

The costs of ship construction, maintenance, and operation in the United States are so high that a domestically registered vessel cannot compete with foreign ships without substantial government subsidy. The transportation of oil on the world market is intensely competitive, and U.S. operating costs are as much as seventy percent higher than those of foreign vessels. Hence, in the absence of government subsidization, U.S.-owned oil tankers can remain competitive only by operating under flags of convenience.[66] In addition, U.S.-registered vessels are required to employ American crews, operating under American labor standards, wages, and fringe benefits. This represents an economic disadvantage of ninety to ninety-five percent to a nonsubsidized U.S. vessel owner.[67] Under a flag of convenience, the shipowner may hire an alien crew with substantially less maritime experience at a substantially lower cost.[68] Finally, repair costs performed in the United States average almost twice what they cost abroad. Under U.S. law, a U.S.-registered vessel must have its repairs performed in the United States, or pay an additional tax for having it done abroad.[69] The result of all of these factors is "to bring the high operating costs incurred by ships registered in the United States down to a level nearer that of the general run in the countries of their foreign com-

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63. *Recent Tanker Accidents: Legislation for Improved Tanker Safety: Hearings on S.182, S.568, S.715, S.898, Before the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., 1st Sess. 812-14 (1977) (Cost Appendix Tables in Statement of Lawrence C. Ford. Lawrence Ford spoke for the American Petroleum Institute). *See also* Wittig, *Tanker Fleets and Flags of Convenience: Advantages, Problems, and Dangers*, 14 TEXAS INT'L L.J. 115 (1979) for a discussion of the economic motives for flag of convenience vessel registration.

64. Herman, *supra* note 9, at 2.

65. *See Proposed Amendments to the Energy Transportation Security Act of 1977: Hearings on H.R. 1037 Before the Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess. 294-96, 304 (1977) (Research report of Prof. R.S. Doganis, and Dr. B.N. Metoxas).

66. *See* B. BOCZEK, *supra* note 6, at 27-32.

67. *Id.*

68. *Id.*

69. 19 U.S.C. § 1466 (1976).

petitors. In a sense, therefore, it is the removal of a handicap rather than the gaining of an advantage . . . ."[70]

In addition to the economic advantages of operating under a flag of convenience, there are also a number of disincentives to U.S. registry. For example, in order for a vessel to obtain United States registry, it must: (a) be certified by the Bureau of Marine Inspection and Navigation and be constructed in the United States;[71] (b) primarily employ an American crew;[72] (c) have its repairs performed in the United States or face additional taxation;[73] and (d) be wholly owned by American citizens or a corporation chartered under American law.[74]

British law is not as stringent as U.S. law in its requirements for re-

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70. *Quoted in* B. BOCZEK, *supra* note 6, at 31.

71. 46 U.S.C. § 11 (1976):

> Vessels built within the United States and belonging wholly to citizens thereof . . . and seagoing vessels, whether steam or sail, which have been certified by the Bureau of Marine Inspection and Navigation as safe to carry dry and perishable cargo, wherever built, which are to engage only in trade with foreign countries . . . may be registered as directed in this title. Foreign-built vessels registered pursuant to this title shall not engage in the coastwise trade . . . .

In 1946 the Bureau of Marine Inspection and Navigation was abolished, and its functions transferred to the Commandant of the Coast Guard. 46 U.S.C. § 1 (1976).

72. 46 U.S.C. § 672a:

> Nationality of crews —
> (a) [A]ll licensed officers and pilots of vessels of the United States shall be citizens of the United States, native born, or completely naturalized.
> (b) [U]pon each departure of any such vessel from a port of the United States, 75 per centum of the crew, excluding licensed officers, shall be citizens of the United States, native-born or completely naturalized . . . .
> (d) The owner, agent, or officer of any such vessel, who shall employ any person in violation of the provisions of this section, shall be subject to a penalty of $500 for each offense.

73. 19 U.S.C. § 1466(a):

> Equipment and repairs of vessels —
> (a) The equipment . . . or the repair parts or materials to be used, or the expenses of the repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade . . . shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country; and if the owner or master of such vessel shall willfully and knowingly neglect or fail to report, make entry, and pay duties as herein required, such vessel, with her tackle, apparel, and furniture, shall be seized and forefeited.

*See also id.* § 1466(b).

74. 46 U.S.C. § 11:

> Vessels . . . being wholly owned by citizens of the United States or corporations organized and chartered under the laws of the United States, or of any State thereof, of which the president or other chief executive officer shall be citizens of the United States and no more of its directors than a minority of the number necessary to constitute a quorum shall be noncitizens, may be registered as directed in this title.

*See also id.* § 802.

gistration, in that it does not require a national crew, or construction and maintenance to be performed within the United Kingdom or the Commonwealth. The primary requirement for registration is that of British ownership[75] (which includes ownership by corporations established under the laws of any of the British dominions, although foreigners may be stockholders in such corporations).[76] As a result, British ships may be registered under the laws of Commonwealth countries (*e.g.*, Bermuda or the Bahamas),[77] and many such ships have substantial foreign ownership.

The registration laws of flag of convenience states are much more liberal, however, particularly with respect to ownership requirements. For example, under the Liberian maritime code, the requirement that the vessel be owned by a citizen or national of Liberia may be waived if "the owner of the vessel qualifies for, secures and maintains registration in the Republic of Liberia as a foreign maritime trust or corporation and either maintains at all times an operating office in the Republic or appoints a qualified business agent in the manner prescribed by law."[78] Honduras has no national ownership provision.[79] Panamanian law requires whole or partial ownership by Panamanian citizens, or foreigners domiciled in Panama with more than five years residence, or a company with its headquarters in Panama.[80] In practice, U.S. shipowners have formed Pana-

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75. Merchant Shipping Act 1894, Part I, § 1:

> Qualification for owning British Ship. A ship shall not be deemed to be a British ship unless owned wholly by persons of the following description (in this Act referred to as persons qualified to be owners of British ships); namely, —
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> (a) . . . British subjects:
> (b) . . .
> (c) . . .
> (d) Bodies corporate established under and subject to the laws of some part of Her Majesty's dominions, and having their principal place of business in those dominions:

*Reprinted in* 31 HALSBURY'S STATUTES OF ENGLAND 74 (3d ed. 1971) [hereinafter cited as HALSBURY'S STATUTES].

76. Now it appears to us that the British corporation is, as such, the sole owner of the ship, and a British subject within the meaning of the Act . . . notwithstanding some foreigners may individually have shares in the company, and that such individual members of the corporation are not entitled, in whole or in part, directly or indirectly, to be owners of the vessel. . . .

> It seems to us that the British corporation is to all intents the legal owner of the vessel, and entitled to the registry, and that we cannot notice any disqualification of an individual member which might disable him, if owner, from registering the vessel in his own name.

R. v. Arnaud, [1846] 9 Q.B. 806, 817-18.

77. *See* B. BOCZEK, *supra* note 6, at 88-89.

78. LIBERIAN CODE OF LAWS, tit. 22 § 51 (1973), *reprinted in* UNCTAD Report, *supra* note 5, at 10.

79. Honduras, Organic Act of the National Merchant Marine No. 55 of 2 March 1943, § 2, art. 5, *reprinted in* UNITED NATIONS LEGISLATIVE SERIES, LAWS CONCERNING THE NATIONALITY OF SHIPS, 76, U.N. Doc. ST/LEG/SER.B/5 (1955).

80. Panama, Commercial Code of 22 August 1916, art. 1080, *reprinted in id.* at 129.

manian subsidiaries to meet the ownership requirements.

2. *Taxation*

An accompanying attraction to the registration laws of flag of convenience states is the absence of income or corporate taxation on maritime operations.[81] A United States shipowner can couple this advantage with favorable U.S. tax laws by creating a "foreign corporation" in the flag of convenience state. Under section 883(a)(1) of the U.S. Internal Revenue Code, "[e]arnings derived from the operation of a ship or ships documented under the laws of a foreign country which grants an equivalent exemption to citizens of the United States and to corporations organized in the United States" are exempt from U.S. taxation. Although Liberia does not impose a national ownership requirement, many American companies create a foreign subsidiary in Liberia in order to take advantage of this tax provision. This provision does not entirely exempt a U.S. shipowner from paying taxes on profits, since such taxes must be paid on profits distributed as dividends to stockholders. However, it does enable the shipowner to use the law to his advantage by waiting to pay the tax at an advantageous time, or by using the profits to expand his fleet.

In addition to the absence of income and corporate taxation in flag of convenience states, the registration fees and taxes of such nations are relatively insignificant. The registration fee ranges from $0.25 per net registered ton in Honduras, to $1.00 and $1.20 per ton in Panama and Liberia, respectively. The annual tax is $.05 per ton in Honduras, and $.10 per net ton in Liberia and Panama.[82] While these fees are deemed moderate by American shipowners, they represent a considerable source of revenue for flag of convenience states.

3. *Safety Standards*

Finally, another traditional advantage to U.S. shipowners registered under flags of convenience is that they have not been required to meet the safety regulations imposed by the U.S. Coast Guard. It need not be assumed that tanker owners, in registering under a flag of convenience, would be motivated by the desire to operate substandard, high risk ships.[83] Nevertheless, they could still operate ships which, while safe, do not quite meet Coast Guard standards, and may thereby be operated more competitively. However, as will be explained in detail below, the ability of shipowners to serve U.S. ports with unsafe vessels has been significantly constricted by recently promulgated U.S. legislation.[84]

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81. Wittig, *supra* note 63, at 121 (1979).

82. These figures represent charges in the 1950's. Presumably they have increased somewhat in the course of twenty years. *See* B. BOCZEK, *supra* note 6, at 57.

83. Flag of convenience vessels are subject to international safety standards. and it is not in the best interests of owners to operate high-risk vessels. *See* Wittig, *supra* note 63, at 119 n.17. Furthermore, as will be seen *infra*, the new wave of domestic environmental legislation being put into effect by coastal states makes it imperative for vessels serving their ports to operate safe vessels.

84. *See* text accompanying notes 234-65 *infra*.

B. *United States Maritime Policy*

Among the reasons for the growth in U.S. ownership of flag of convenience fleets is the United States' vessel transfer policy. In order to prevent the U.S. Merchant Marine from becoming obsolete, the Maritime Administration allows a United States owner to transfer a U.S.-registered ship to foreign ownership and/or registry provided that the owner undertakes to replace the transferred vessel with a newly constructed vessel which satisfies the size, design, speed, and capacity criteria of the Maritime Administration. The owner of the vessel transferred to foreign flag registry must be a United States citizen or a corporation organized under the laws of either the United States, Liberia, Panama or Honduras. The registry and flag are also to be transferred to Liberia, Panama or Honduras.[85] It can easily be seen that this policy promotes a new and modern United States Merchant Marine, while unloading obsolete, substandard vessels onto flag of convenience states.

There is considerable opposition to the practice of registering vessels under flags of convenience by United States and international seamen's unions and European maritime nations. The seamen's unions are generally concerned about the lower wages paid on flag of convenience ships and the low standards for working conditions and safety that may be imposed with impunity on seamen. Labor organizations have been active opponents of flags of convenience: failing the abolition of these shipping practices, they have attempted to make favorable U.S. labor laws applicable to workers on flag of convenience ships, and to create international labor standards.[86]

European maritime nations, notably the United Kingdom and Norway, are also concerned with the shipping policies of the United States which promote the use of flags of convenience.[87] Since both of these nations rely heavily on the stability and success of their merchant fleet in international commerce, they are disturbed by international practices that make deep inroads into their shipping activities, and render them incapable of effective competition without drastic change in their national laws. The practice of using flags of convenience to utmost advantage is directly attributable to the United States, and has fostered many tensions in foreign relations. On the one hand, European nations fully understand the advantages of flags of convenience and can appreciate a nation's de-

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85. See B. BOCZEK, *supra* note 6, at 33-34.

86. For further analysis of the labor problems associated with flag of convenience ships and attempts to minimize them *see, inter alia*, B. BOCZEK, *supra* note 6, at 156-87; Goldie, *Recognition and Dual Nationality — A Problem of Flags of Convenience*, [1963] BRIT. Y.B. INT'L L. 220, 227-54; McDougal, Burke & Vlasic, *The Maintenance of Public Order at Sea and the Nationality of Ships*, 54 AM. J. INT'L L. 25, 30-34 (1960) [hereinafter cited as McDougal *et al.*]; Wittig, *supra* note 63, at 127-30. Efforts to extend the protection of U.S. labor laws to seamen who serve aboard flag of convenience vessels have proven unsuccessful. *See* McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963).

87. For an account of the tensions that have evolved between Europe and the United States over U.S. shipping policies, *see* B. BOCZEK, *supra* note 6, at 81-90.

sire to use them. On the other, the practice appears to them to be unconscionable and not in the spirit of international comity and use of the seas for the benefit of mankind.

The basis of the dispute appears to lie in the structure of national taxation laws. A major reason for resorting to flags of convenience is the tax benefits that may be derived therefrom. Consider the experience of two coastal states. Costa Rica, one of the traditional flag of convenience states, signficantly reformed its vessel registration laws in 1958 to curb abuses that were taking place. One of the aspects of the reform was an increase in taxation. As a result, shipowners were discouraged from registering in Costa Rica, and the country has effectively ceased to be a flag of convenience state.[88] Conversely, there had been a long tradition of registering Greek-owned vessels under flags of convenience, due to heavy taxation, fears of nationalization, and outdated shipping laws. In 1953 there was a general reform of Greek shipping laws, which provided major tax benefits to shipowners registered under the Greek flag. The result has been a return to the Greek flag by many Greek shipowners.[89]

Although the essence of the dispute between European maritime states and the United States is economic in nature, the political and strategic overtones should not be ignored. A major incentive to flag of convenience use by American shipowners is the structure of U.S. shipping and taxation laws, which, in the interests of harmonious foreign relations, should be amended to make American registry more attractive.[90]

C. *The Legal Significance of a Flag of Convenience*

An essential element in determining how to deal with the tragedy of oil pollution at sea is to comprehend the concept of a flag of convenience under international law. There are two fundamental principles of international law which are directly applicable to ships on the high seas. The first involves the maxim that there shall be free use of the seas.[91] As stated in Article 2 of the Convention on the High Seas,[92] "[t]he high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty." A corollary to this principle is that a state holds exclusive competence to grant nationality to ships. Article 5 of the High Seas Convention provides, *inter alia*, that "[e]ach State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. . . ."

Hence, an integral aspect of the right of a state to grant nationality is

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88. *Id.* at 46-49.

89. *Id.* at 36-38; and McDougal *et al.*, *supra* note 86, at 36 n.32.

90. B. BOCZEK, *supra* note 6, at 87-90; and McDougal *et al.*, *supra* note 86, at 35-36.

91. *See, inter alia,* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 233-36 (2d ed. 1973); C. COLOMBOS, INTERNATIONAL LAW OF THE SEA 47-86 (6th ed. 1967); 1 L. OPPENHEIM, INTERNATIONAL LAW 588-94 (8th ed. H. Lauterpacht ed. 1955).

92. *Done at* Geneva, Apr. 29, 1958, [1963] 2 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 [hereinafter cited as High Seas Convention].

that such nationality will be recognized by other states. These basic principles of international law have become well established by state practice and confirmed by bilateral and multilateral agreements. However, the practice of granting flags of convenience has led to certain incursions into these basic theories, such as the practice of effective United States control of certain flag of convenience ships, and the theory of the "genuine link," which appears in Article 5 of the High Seas Convention. Moreover, the status of flag of convenience states in the world shipping community was hotly disputed by members of the Intergovernmental Maritime Consultative Organization (IMCO) when it came time to choose the membership of the Maritime Safety Committee. The dispute ultimately was submitted to the International Court of Justice for an advisory opinion. These considerations will be discussed below, as they apply generally to flags of convenience, and as they have risen to prominence as a result of the extensive use of these flags.

1. *The Right of a State to Grant Nationality to Ships*

It has become an established tradition to international law, first, that a ship on the high seas must have a national character, and second, that states have exclusive, unilateral competence to grant nationality. The outward sign of nationality is the flag flown by the ship, which must be supported by the necessary registration and documentation on board.[93] However, the right to determine exactly what criteria must be met for a ship to be entitled to nationality is a matter of domestic law of individual states.[94]

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93. *See generally* B. BOCZEK, *supra* note 6, at 91-124; C. COLOMBOS, *supra* note 91, at 264-68; H. MEYERS, THE NATIONALITY OF SHIPS 122-43 (1967); R. RIENOW, THE TEST OF THE NATIONALITY OF A MERCHANT VESSEL (1937); McDougal *et al.*, note 86 *supra*.

94. This proposition was stated as an accepted principle in *The Muscat Dhows* case between France and Great Britain; "generally speaking it belongs to every sovereign to decide to whom he will accord the right to fly his flag and to prescribe the rules governing such grants. . . ." Award of the Tribunal, The Hague, Aug. 8, 1905, *reprinted in* SCOTT, HAGUE COURT REPORTS 93, 96 (1916). The case of *Lauritzen v. Larsen* in the United States Supreme Court also accepted as a general principle that "[e]ach state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ships papers and its flag." 345 U.S. 571 (1953).

The grant of nationality, therefore, gives a state jurisdiction over the ship on the high seas, where no other sovereign may exercise that power, and also the right to protect the ship on the high seas. Furthermore, the right to determine whether a ship has fraudulently acquired nationality is an exclusive matter for the flag state. *See The Virginius*, (1873), 2 J. MOORE, INTERNATIONAL LAW DIGEST 895 (1906). As evidenced in several international conventions, the criterion for establishing the nationality of a ship is by registration. *See, e.g.*, International Load Line Convention, art. 3(a), *done at* London, July 5, 1930, T.S. 858, 47 Stat. 2228, 135 L.N.T.S. 301: "[A] ship is regarded as belonging to a country if it is registered by the Government of that country." International Convention for the Prevention of Pollution of the Sea by Oil, art. 2, *done at* London, May 12, 1954, 12 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3: "The present Convention shall apply to sea-going ships registered in any of the territories of a Contracting Government . . . ."

2. *Recognition of the Nationality of Ships*

A necessary corollary to the right of a state to grant nationality to a ship is that other states will conclusively recognize that nationality as evidenced by the flag. This grant has been called an act of state,[95] entitled to recognition among sovereign equals; the rule has been praised as promoting order on the high seas.[96] It follows that documentation by the proper authority and registration are the only elements of nationality required by international law to support recognition.[97] As has been indicated, the requirements that may be imposed on a ship to be granted registration are a matter of domestic concern, and this principle of recognition has generally been followed in a number of treaties.[98]

Although the principles of nationality and recognition have long been followed and supported, they have not been free from controversy. One commentator has gone so far as to assert that a ship's nationality is but a legal fiction, that registration does not afford nationality, and that nationality is not a valid basis for either recognition or the right of a state to protect its ships.[99] As the practice of using flags of convenience has grown, with the concurrent growth in opposition to the practice, the idea of requiring a "genuine link" between a ship and its flag state has developed. As will be seen, this has become a hotly discussed and much

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95. See B. BOCZEK, *supra* note 6, at 93 for the proposition that granting nationality is an act of state, conclusive for all purposes. *But see* Goldie, *supra* note 86, at 277-79, who disputes this assertion, maintaining that it is an unwarranted extension of the doctrine.

96. *See generally*, B. BOCZEK, *supra* note 6, at 106-16; Goldie, *supra* note 86, at 262-64; Herman, *supra* note 9, at 8-9; McDougal *et al.*, *supra* note 86, at 26-28, 53-66; Watts, *The Protection of Merchant Ships*, [1957] BRIT. Y.B. INT'L L. 52, 56.

97. "[I]nternational law does not require that a vessel, in order to be considered of the nationality of a certain State, be built in such State, be navigated by a crew who are nationals of such State, be owned in whole or in part by its nationals. . . ." R. RIENOW, *supra* note 93, at 116.

98. There is actually no correlation between ownership and nationality; the treaties and correspondence of States do not indicate the need for national ownership; and although some States refuse to consider as of their own respective nationalities, vessels, the titles to which are not held by nationals, their practice indicates that they do not deny other States the privilege of dispensing with this requirement.

*Id.* The United States has entered into numerous bilateral treaties of friendship, commerce, and navigation which provide for reciprocal recognition of national ships based on registration. For example, article XV of the treaty between the United States and Liberia provides:

> Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

Treaty of Friendship, Commerce, and Navigation, United States-Liberia, *done at* Monrovia, Aug. 8, 1938, 45 Stat. 1739, 1745 T.S. No. 956, 201 L.N.T.S. 163. *See also* Treaty of Friendship, Commerce and Consular Rights, United States-Honduras, art X, Dec. 7, 1927, 45 Stat. 2618, T.S. No. 764, 87 L.N.T.S. 421. There is no comparable treaty between the United States and Panama.

99. *See* Watts, note 96 *supra*.

disputed concept.

3. *The Genuine Link*

The concept of the genuine link was originally proposed by the International Law Commission.[100] The draft that was finally agreed upon and presented to the Geneva Conference provided that:

> Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. Nevertheless, for purposes of recognition of the national character of the ship by other States, there must exist a genuine link between the State and the ship.[101]

This version of the concept of the genuine link was conceived shortly after the appearance of the *Nottebohm* decision by the International Court of Justice,[102] which found a necessity for a "genuine connection" between an individual and a State as a condition precedent to conferring nationality. The purpose of the genuine link concept in maritime law was to extend the application of *Nottebohm* from individuals to ships. Hence, in order for the nationality of a ship to be recognized by other States, there must be a "real and effective link" between the ship and the state whose flag it flies. After considerable discussion both by the International Law Commission and at the Geneva Conference, the concept was finally adopted in Article 5 of the High Seas Convention: "There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."[103]

There is no definition of what constitutes a genuine link anywhere in the text, principally because there is no agreement as to precisely what it is.[104] The requirement of a genuine link "for purposes of recognition" has been dropped, but the vague terminology of effective exercise of jurisdiction has been added. A major reason for proposing a requirement of a genuine link was dissatisfaction by many maritime states with the increasing and illegitimate employment of flags of convenience. It was contended that flag of convenience ships had essentially no meaningful link with their states of registry, and that, therefore, other states should not be required to recognize their nationality.[105]

Both the positive and negative reaction to the genuine link controversy has been voluminous. Professor McDougal maintained that the concept was entirely unsupported by customary international law, that it

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100. For the evolution of the concept by the International Law Commission and later at the Geneva Conference, *see* McDougal *et al.*, *supra* note 86, at 104-14; and B. BOCZEK, supra note 6, at 232-86.

101. *Quoted in* McDougal *et al.*, *supra* note 86, at 105.

102. Liechtenstein v. Guatamala, [1955] I.C.J. 4.

103. Note 92 *supra*. See *Herman*, *supra* note 62, at 11.

104. *See* McDougal *et al.*, *supra* note 86, at 110-11.

105. *See* B. BOCZEK, *supra* note 6, at 240-42.

would in no way solve the problems supposed to exist; furthermore, carried to its logical conclusion, it would produce unnecessary chaos in an already irrational system.[106] In recommending that states should reject the genuine link provision in Article 5, he asserted: "It is yet to be demonstrated that any conceivable good for the common interest of peoples could attend the introduction of this new-found requirement of genuine link. . . . On the contrary, it would seem reasonably clear that the only purposes it would serve are those of disruption, controversy and anarchy.[107]

Other writers, however, have maintained that not only does *Nottebohm* establish the need for a genuine link with respect to flags of convenience, but it also provides authority for concluding "that the mere grant of nationality to individuals by some States does not bind others to an unlimited obligation to recognize those grants. . . . Recognition may . . . be dependent upon a regime of the reciprocity or of the community of law between the creating and recognizing States."[108] It has also been suggested that the necessary link, rather than being merely registration, is in reality beneficial ownership.[109] Dr. Boczek concludes that:

> [T]he Geneva conference has not solved the problem of the flags of convenience and . . . it is not likely to reduce the tonnage of ships sailing under flags of convenience. Article 5 does not take into account

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106. The introduction into this rational process of decision of the new-found contrivance of genuine link could do incalculable harm. It could make statelessness commonplace when so far it has existed only as an extreme rarity; it could undermine, if not render worthless, an enormous number of bilateral treaties of commerce and navigation, which require recognition of unilateral competence to determine national character; it could result in assertions of an unrestricted right of visit and search against vessels navigating on the high seas suspected of the absence of a genuine link with the state whose flag they otherwise lawfully fly; it could encourage arbitrary and uncontrollable discrimination by states against vessels of other states; it could create international tension by authorizing unilateral interferences in matters hitherto regarded as of strictly national competence, to wit: the comprehensiveness or appropriateness of a state's shipping legislation; . . . and so on, in realistic horribles in expectation.

McDougal *et al.*, *supra* note 86, at 114-15.

107. *Id.* at 115.

> A foretaste of the wide possibilities for abuse which the doctrine of genuine link provides is afforded by a news item reporting the first concrete application of this innovation. The report states that the U.S.S.R. has issued an order which imposes upon all ships flying supposed flags of convenience harbor fees approximately three times higher than those applicable to vessels of traditional maritime countries. New York Times, Aug. 31, 1958, § 5, p. 11. Since it is commonly known that 40 percent of these ships are owned by American corporations, it is easy to see that the genuine link's first practical test has taken place on the cold-war battlefield.

*Id.* n.280.

108. Goldie, *supra* note 86, at 268-69.

109. Watts, *supra* note 96, at 78-84. This position has been sharply criticized by McDougal, Burke, and Vlasic, and by Boczek.

> the criterion of ownership, confirming thus the established principle of international law that foreign-owned vessels may be registered under the flag of any state.[110]

In the final analysis, perhaps the concept of the genuine link has only created a furor in academia, without having a significant impact on the course of international law. It has been asserted that, in spite of the elusiveness of the genuine link theory, most ships do have the requisite link, even those registered in such countries as Liberia.[111] Furthermore, in terms of regulating flag of convenience ships and exercising jurisdiction over them, it has been suggested that coastal states are well enough able to provide adequate regulation. Thus, the existence of a genuine link is pragmatically irrelevant.[112]

Nevertheless, the concept of a genuine link is becoming ever more firmly established. The provision of Article 5 of the High Seas Convention reappears in Articles 91 and 94 of the Informal Composite Negotiating Text of the Third Conference on the Law of the Sea.[113] In addition, the United Nations Conference on Trade and Development has conducted an extensive study on the consequences of the existence or lack of a genuine link between a ship and its nation of registry.[114] The Conference recommended that there should be some definition of what constitutes a genuine link, suggesting as elements:

> (a) the fact of registration;
> (b) a substantial share of beneficial ownership in the vessel by nationals (individuals or legal entities) of the flag state;
> (c) the principal place of business and effective management of the legal entity which has beneficial ownership of the vessel should be in the flag state; and
> (d) the principal officers of the legal entity beneficially owning the vessel should be nationals of the flag state.[115]

Hence, it may safely be concluded that the genuine link will remain a concept in international law, in some form, for some time to come. However, it may equally be asserted that the existence of flag of convenience states has also become firmly established.[116] At this point in time, the

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110. B. BOCZEK, *supra* note 6, at 285 [citations omitted].

111. *See* H. MEYERS, *supra* note 93, at 275-99.

112. *See* Herman, *supra* note 9, at 3.

113. United Nations Third Conference on the Law of the Sea: Informal Composite Negotiating Text from the Sixth Session, U.N. Doc. A/CONF.62/WP.10 (1977), *reprinted in* 16 INT'L LEGAL MAT. 1108 (1977).

114. UNCTAD Report, note 5 *supra.*

115. *Id.* at 20.

116. The *Torrey Canyon* incident provides an illustration of the difficulty of ascertaining wherein lies the genuine link. The ship was registered under a Liberian flag, owned by a Bermuda corporation, which was a subsidiary of a U.S. corporation, chartered to a British oil company, and manned by an Italian crew. The accident occurred off the west coast of England, and the events which followed the accident were handled by the affected coastal states, Great Britain and France. *See* Cusine, *supra* note 8, at 106; Juda, *supra* note 8, at

issue of whether the genuine link requirement will pose a significant constraint on the illegitimate employment of the flag of convenience shield from liability remains unanswered.

4. *The IMCO Controversy*

A dispute arose during the late 1950's within the membership of the Intergovernmental Maritime Consultative Organization concerning the composition of its Maritime Safety Committee. Article 28(a) of the constitution of the Maritime Safety Committee provides in part: "The Maritime Safety Committee shall consist of fourteen Members elected by the Assembly from the Members, governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations . . . ."[117] When it came time to elect the Committee, disagreement arose as to how to determine the eight largest ship-owning nations, and whether, once determined, those eight members were automatically on the Committee. According to *Lloyd's Register of Shipping Statistical Tables* for 1958, the eight largest ship-owning countries, determined by gross registered tonnage, included Liberia in third place and Panama in eighth.[118] A number of countries, opposed to flag of convenience registry, asserted that Panama and Liberia were not really ship-owning countries, that they were not adequately interested in maritime safety, and that, at any rate, they should not automatically be elected to the Committee.[119] Several other methods of determining the largest ship-owning nations were proposed, and ultimately an election was held in which neither Panama nor Liberia were elected to the Committee. The validity of the election was challenged, and the dispute was submitted to the International Court of Justice for an advisory opinion. The Court determined that "where in Article 28(a) 'ship-owning nations' are referred to, the reference is solely to registered tonnage. The largest ship-owning nations are the nations having the largest registered ship tonnage."[120] Therefore, by not electing Liberia and Panama to the Committee, the Assembly failed to comply with the requirements of the IMCO constitution.[121]

This decision strongly supports the relationship between registration and nationality. However, there is some disagreement over the significance of the opinion. Professor Boczek asserts that it "will certainly be an argument for the case of flag of convenience states not only in direct application to the constitution of the Maritime Safety Committee of the IMCO . . . but also in the international legal situation of the flag-of-con-

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117. *Quoted in* B. BOCZEK, *supra* note 6, at 154.

118. *Id.* at 131.

119. For a general discussion and analysis of the case, *see id.* at 125-55.

120. Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion of 8 June 1960, [1960] I.C.J. 150, 170.

121. *Id.* at 171.

venience fleets in general."[122] On the other hand, Goldie maintains that "[t]he IMCO advisory opinion was . . . a decision which turned on a question of treaty interpretation, not of the substantive rights of States under general international law."[123] The Court carefully avoided any political implications and made it clear that "any further examination of the contention based on a genuine link is irrelevant for the purpose of answering the question which has been submitted to the Court . . . ."[124] Nevertheless, the opinion unquestionably affirms the status of such flag of convenience states as Liberia and Panama as equal members of the world maritime community.

5. *Jurisdiction Over Ships*

a. *On the High Seas*[125]

It is a well established rule of international law relating to jurisdiction that:

> [V]essels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them.[126]

This general principle has been embodied in Article 6 of the High Seas Convention: "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas." The exceptional cases include such things as piracy, slave trade, hot pursuit, and collisions.[127] As will be seen below, certain international conventions dealing with oil pollution provide for intervention on the high seas by nations other than the flag state.

In view of customary exclusive jurisdiction by the flag state, it is of general international concern that flag of convenience states do not exercise effective jurisdiction over their registered ships on the high seas, in part because they are incapable of doing so, and in part because effective regulation of such ships by flag states would pose a disincentive for flag of convenience registry.[128] It is impossible for a flag of convenience state to enforce any construction or safety standards on its ships because the ships rarely sail into its national ports, and its navy is far too small to police its massive merchant flag fleet.[129] As will be discussed in detail below, this problem may be minimized by regulations imposed by coastal

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122. B. BOCZEK, *supra* note 6, at 155.

123. Goldie, *supra* note 86, at 271.

124. [1960] I.C.J. at 171.

125. *See generally* C. COLOMBOS, *supra* note 91, at 272-86.

126. The S.S. Lotus, [1927] P.C.I.J., ser. A, No. 10, at 25.

127. I. BROWNLIE, *supra* note 91, at 249.

128. *See* UNCTAD Report, *supra* note 5, at 71-74; and MEYERS, *supra* note 93, at 291-98.

129. H. MEYERS, *supra* note 93, at 292-95.

states.[130]

b. *In Territorial Waters*

When a ship enters territorial waters, or the port of a coastal state, it is subject to that state's sovereignty and its concurrent jurisdiction over it.[131] Generally speaking, the coastal state's right to exercise jurisdiction is limited to matters which have an effect on that state's interests, and does not extend to the strictly internal management of the ship's affairs. However, as will be discussed, a coastal state does have jurisdiction to protect its environment, and may lawfully impose environmental and safety obligations upon any ship that enters its territorial waters and uses its ports.

c. *"Effective United States Control"*

One of the customary rules of international law is that during times of emergency, a state has the right to requisition ships of its registry.[132] However, the United States has also developed a theory that in times of national emergency the government may requisition ships in which there is beneficial ownership in United States citizens.[133] In fact, a large portion of the U.S. flag of convenience fleet has been included in mobilization capability plans for American defense.[134] The power of the U.S. Government is based on the Merchant Marine Act of 1936, which provides that: "Whenever the President shall proclaim that the security of the national defense makes it advisable . . . it shall be lawful for the Commission . . . to requisition or purchase any vessel or other watercraft owned by citizens of the United States. . . ."[135]

The assertion of this right is based entirely on domestic law and is against the weight of international law. In any cases where the U.S. has directed the movements of a U.S.-owned ship of foreign registry, it has been by virtue of the friendly acquiescence of the flag state.[136] If a situation were to arise in which both the U.S. and the flag state asserted a right to requisition certain ships, the flag state would have the primary right under international law. While this situation has not yet arisen, it is not inconceivable; hence, the effectiveness of the doctrine of "effective U.S. control" is open to question.[137]

Another method of asserting jurisdiction over U.S.-owned ships (which is somewhat related to the doctrine of "effective U.S. control") is analogous to piercing the corporate veil. The basis of the claim is an assertion of jurisdiction over United States citizens and their activities, re-

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130. *Id.* at 297.

131. *See generally* I. BROWNLIE, *supra* note 91, at 204; C. COLOMBOS, *supra* note 91, at 290-305; McDougal *et al.*, *supra* note 86, at 84-88.

132. *See* McDougal *et al.*, *supra* note 86, at 63, 65-66.

133. For an exposition and analysis of the doctrine of "effective U.S. control" *see* B. BOCZEK, *supra* note 6, at 188-208.

134. *Id.* at 190-91.

135. Merchant Marine Act of 1936, 46 U.S.C. § 1242(a) (1976).

136. *See* B. BOCZEK, *supra* note 6, at 194.

137. *See id.* at 202-08.

gardless of where or under what guise they occur. An example is *Gerradin v. United Fruit Co.*,[138] which involved the application of the Jones Act[139] to a seaman's injury occurring on a ship on the high seas. The ship was flying a Honduran flag, but was owned by U.S. citizens. In asserting jurisdiction, the court stated:

> There can be no doubt about the power of Congress to impose liability upon its own citizens for acts done on the high seas or at other places outside its territorial jurisdiction. . . . [I]t seems but a slight disregard of the symbol of foreign registry to apply an ordinary rule of torts to a shipowner who bears such an illusory shield.[140]

A logical extension of this rationale would allow American courts to enforce a multitude of U.S. statutes against U.S. shipowners, regardless of the flag of registry or the location of the ship.

## IV. MULTILATERAL EFFORTS TO SOLVE THE PROBLEM OF MARITIME OIL POLLUTION

### A. *The Nature and Scope of the Problem*

Pollution of the sea by oil is a multi-faceted problem of ever-increasing dimension, which requires a comprehensive regulatory regime if it is to be adequately contained, and ultimately, eliminated. The tremendous growth in the transportation of oil and the number and size[141] of tankers[142] has led to the necessity for establishing international standards for all aspects of tanker operations. While the preceding discussion reviewed the traditional notions of the law of the seas which placed the right and obligation of regulating ships upon the flag state, contemporary experience has proven that this regime is wholly inadequate. The example of Liberia is sufficient to illustrate the problem. In view of the fact that Liberia has the largest single tanker fleet in the world — twenty-five percent of the world total[143] — of which most ships rarely, if ever, sail into Liberian ports, it is impossible for Liberia to enforce any national legislation over its registered ships, even if it should choose to do so. Nevertheless, there must be some enforceable regulation of transportation on the high seas, preferably by international cooperation, before the seas irre-

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138. 60 F.2d 927 (2d Cir. 1932).

139. Jones Act, 46 U.S.C. § 688 (1976).

140. 60 F.2d at 929. The U.S. Supreme Court, however, has more recently concluded that U.S. labor laws may not be imposed upon flag of convenience vessels. McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963).

141. *See* OIL TRANSPORTATION BY TANKERS, *supra* note 10, at 18 and 92.

142. A tanker is defined as a "self-propelled ship designed for carrying liquid oil cargo in bulk." The capacity of a supertanker is in excess of 100,000 deadweight tons (dwt). The typical size categories of supertankers are classified as very large crude carriers (VLCC) - 200,000-400,000 dwt, and ultra-large crude carriers (ULCC) - greater than 400,000 dwt. The dimensions of an average 100,000 dwt supertanker are approximately 1,000 feet in length and 50 feet in draft. There are supertankers under construction of 533,000 dwt, 1,360 feet long, 208 feet wide, and 93 feet in draft. One ton of crude oil is the equivalent of 311 gallons. *Id.* at xvii.

143. *See id.* at 17.

trievably fall prey to what may be referred to as "the tragedy of the commons."[144]

B. *The International Conventions of IMCO*

There have been a number of multilateral efforts to deal with the serious problem of oil pollution by maritime vessels at sea.[145] For example, Article 24 of the High Seas Convention attempts to place the burden upon individual nations to address this problem, by providing that "[e]very State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships . . . taking account of existing treaty provisions on the subject."

Most international conventions dealing with the environmental regime of the seas have been drafted by IMCO and presented to the governments of member states for ratification and implementation. IMCO is among the smallest of the United Nations' specialized agencies.[146] Its functions are stipulated to be no more than "consultative and advisory."[147] Thus, it may convene conferences, make recommendations to the world community in the form of draft conventions, and may generally facilitate intergovermental cooperation on technical matters, including

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144. This phenomenon has been related to pollution by Garrett Hardin as follows:

> In a reverse way, the tragedy of the commons reappears in problems of pollution. Here it is not a question of taking something out of the commons, but of putting something in. . . . The calculations of utility are much the same as before. The rational man finds that his share of the cost of the wastes he discharges into the commons is less than the cost of purifying his wastes before releasing them. Since this is true for everyone, we are locked into a system of 'fouling our own nest,' so long as we behave only as independent, rational, free enterprisers.

*Quoted in* Juda, *supra* note 8, at 579 n.115. *See* G. HARDIN & J. BADEN, MANAGING THE COMMONS (1977).

145. *See generally* Juda, note 8, *supra;* Mensah, note 57 *supra; Note, International Conventions on Ship-based Pollution,* 10 J. WORLD TRADE L. 389 (1976); *Conventions and Amendments Relating to Pollution of the Sea by Oil: Hearings on Executive G, Before the Subcomm. on Oceans and International Environment of the Senate Comm. on Foreign Relations,* 92d Cong., 1st Sess. (1971).

146. Juda, *supra* note 8, at 559.

147. *Id.* One commentator has focused on the weakness of the IMCO organizational structure:

> At present, IMCO is the primary international agency studying the oil pollution area. But IMCO has organizational and political drawbacks. It has no real regulatory powers; it can only make recommendations to its members. It seems likely that effective regulation is the most important aspect in the effort to control pollution. IMCO also is very limited financially and, as a result, cannot undertake ambitious research and planning projects. IMCO is certainly not independent of the shipping industry in general and relies heavily on research done by private and public organizations. It is questionable whether such an organization could ever be effective in controlling pollution regardless of the expressed position of the international community of states. Thus, a new organization or a reconstituted IMCO may be required.

Hunter, *Possibilities and Problems of Preventing Oil Pollution of the Oceans,* 4 TRANSP. L.J. 21, 55 (1972) [citations omitted].

safety and navigation.[148] However, it may not adopt a legally binding instrument; it may do no more than submit proposals to states, which may or may not be adopted as binding conventions. And although a number of conventions addressing the subject of maritime pollution and liability have been drafted and presented by IMCO to the world community for ratification,[149] many have not yet entered into force.

The first convention to be ratified was the 1954 International Convention for the Prevention of Pollution of the Sea by Oil.[150] In order for it to enter into force, assent was required by ten governments, including five having not less than 500,000 gross tons of tanker tonnage.[151] While the United States, Liberia, and Panama were not among the first ten to ratify, they have since done so. The Convention applies to seagoing vessels registered in any of the contracting states,[152] and prohibits the discharge of oil or oily mixtures from tankers of 500 tons or larger within 50 miles of land.[153] Every ship must carry on board an oil record book[154] in the form provided by the Convention,[155] which may be inspected by the proper authorities of any contracting state.[156] Any violations of the standards of the Convention must be reported to the government of the state of registry,[157] which is then obliged to exact appropriate penalties according to its national laws.[158]

In 1962, a conference was convened by IMCO to review this convention. The conference adopted amendments extending its application to vessels of smaller gross tonnage, and extending the prohibited zones (where no discharge is allowed).[159] There are currently fifty-two states party to the convention (including flag of convenience states), which account for ninety-five percent of the world tanker fleet.[160] The IMCO Assembly adopted additional amendments to the 1954 convention in 1969[161] and 1971.[162] The 1969 amendments provide for further reduction and limitation of the amount of oil that may be discharged. They strictly prohibit

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148. Juda, *supra* note 8, at 559-60. Jurisdiction over economic maritime matters rests with UNCTAD. *Id.* at 560.

149. Actually, it was not until the *Torrey Canyon* disaster that ocean pollution became a major focus of concern for IMCO. *Id.* at 562. *See generally* Nanda, note 8 *supra.*

150. *Entered into force* July 26, 1958, [1961] 1 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3.

151. *Id.* art. XV.

152. *Id.* art. II.

153. *Id.* art. III and Annex A.

154. *Id.* art. IX(1).

155. *Id.* Annex B.

156. *Id.* art. IX(2).

157. *Id.* art. X.

158. *Id.* art. VI. *See generally* Juda, *supra* note 8, at 560-61.

159. The text of the Amendments which were adopted in 1962 and ratified by the United States in 1966 appears at 17 U.S.T. 1523, T.I.A.S. No. 6109, 600 U.N.T.S. 332.

160. Mensah, *supra* note 57, at 116.

161. 12 U.S.T. 2989, 17 U.S.T. 1523, *reprinted in* 9 INT'L LEGAL MAT. 1 (1970).

162. *Reprinted in* 11 INT'L LEGAL MAT. 267 (1972).

the discharge of more than sixty liters of oil per nautical mile anywhere in the ocean, even at distances more than fifty miles from shore.[163] Also, flag state governments which have been notified of violations by their ships are required to report to IMCO what action, if any, has been taken against the ship. The 1971 amendments establish construction standards based upon the ship's dimensions, providing for compartmentalization, limitations of tank sizes, and requirements involving the arrangement of tanks. However, neither of these amendments has yet received adequate ratification to enter into force.

In 1973 IMCO convened on International Conference on Marine Pollution,[164] whose purpose was to update the 1954 Pollution Convention to make it more responsive to current tanker practices. The Conference produced the International Convention for the Prevention of Pollution from Ships.[165] When the convention enters into force, it will supersede the 1954 convention between those countries that ratify it. In essence, it incorporated the 1954 convention with amendments, but provides for complete elimination of intentional pollution and minimization of accidental discharges.[166] It addresses not only the discharge of oil at sea, but also prevents the discharge of any "harmful substance," a term which is defined to include "any substance which, if introduced into the sea, is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea . . . ."[167] Each nation which becomes a party to the Convention must promulgate legislation which prohibits and imposes sanctions on such violations by vessels flying its flag wherever such violations occur. On the high seas the state of registry will continue to have sole jurisdiction; but if a violation occurs in the territorial waters of a contracting state, that state may assert jurisdiction, regardless of the registry of the ship (provided, of course, that the violator flies the flag of a contracting state).[168]

In the aftermath of the *Torrey Canyon* disaster, the International Convention Relating to Intervention of the High Seas in Cases of Oil Pollution Casualties[169] was adopted in 1969. The purpose of this convention is to permit a coastal state to intervene on the high seas in the case of a casualty or the threat of one in order to prevent or minimize harm to its

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163. *See* Juda, *supra* note 8, at 567.

164. *See* Mensah, *supra* note 57, at 117-22; *see also 1973 IMCO Conference on Marine Pollution from Ships, Hearing Before the Senate Comm. on Commerce*, 93d Cong., 1st Sess. (1973).

165. *Done at* London, Nov. 2, 1973, *opened for signature* Jan. 15, 1974, *reprinted in* 12 INT'L LEGAL MAT. 1319 (1973) [hereinafter cited as 1973 Convention].

166. *Id.* Preamble.

167. *Id.* art. 2.

168. *Id.* arts. 4 and 6.

169. *Done at* Brussels, Nov. 29, 1969, 26 U.S.T. 765, T.I.A.S. No. 8068, *entered into force* for the United States, May 6, 1975; *reprinted in* 9 INT'L LEGAL MAT. 25 (1970) [hereinafter cited as Intervention Convention].

coastal environment. A coastal state is required to notify and consult the flag state, IMCO, and neighboring coastal states which may also be affected prior to such intervention, except in the case of an extreme emergency when action may be taken without prior notification or consultation. Any intervention must be proportionate to the threat of harm involved. The Intervention Convention entered into force for the United States in 1975, and has also been ratified by Liberia.[170]

The primary convention relating to liability for oil pollution is the International Convention on Civil Liability for Oil Pollution Damage.[171] This Convention places strict liability on the shipowner for oil pollution damage, but in the absence of fault or privity of the shipowner in causing the damage, he may limit his liability based on the tonnage of the ship to a maximum of approximately $16.8 million. The Convention requires shipowners of contracting states to maintain adequate insurance to cover the full extent of their liability under the Convention. The ship is further required to carry a certificate evidencing such insurance coverage. A contracting state may deny access to its ports of any ship that does not have the required insurance certificate, including a ship of a state that is not party to the convention.[172] Presumably, this convention would apply to U.S. shipowners, regardless of the registry of the ship, but for the fact that the United States has not ratified it.

In view of the fact that the Civil Liability Convention does not provide adequate compensation to victims of oil pollution casualties, in 1971 IMCO drafted the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.[173] This convention establishes a compensation fund of up to thirty million dollars for oil pollution casualties. The fund is established and maintained by oil companies in contracting states and provides reimbursement to tanker owners. However, a tanker owner or his insurer will not be reimbursed in the event of his failure to comply with IMCO conventions, which itself provides a strong incentive for compliance. While this convention contains some very effective provisions for ensuring compliance and compensating losses, it has not yet entered into force.[174]

There are, in addition, two voluntary liability plans that have been implemented by tanker owners. In 1969 the Tanker Owners' Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP)[175] was

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170. *See* Mensah, *supra* note 57, at 124-26; Juda, *supra* note 8, at 566; Wittig, *supra* note 63, at 134 n.112.

171. *Done at* Brussels, Nov. 29, 1969, *reprinted in* 9 INT'L LEGAL MAT. 45 (1970) [hereinafter cited as Civil Liability Convention]. *See generally,* Watson, *The 1976 IMCO Limitation Convention: A Comparative View,* 15 HOUS. L. REV. 249 (1978).

172. *See* Mensah, *supra* note 57, at 126-28; Wittig, *supra* note 63, at 134-35. The carrier is not, however, liable for damages caused by an act of God, act of war, hostilities, civil war or insurrection — the traditional common law defenses to liability for common carriers.

173. *Done at* Brussels, Dec. 18, 1971, *reprinted in* 11 INT'L LEGAL MAT. 284 (1972).

174. *See* Juda, *supra* note 8, at 566-67; Wittig, *supra* note 63, at 135-136 n.115.

175. *Signed* Jan. 7, 1969, *reprinted in* 8 INT'L LEGAL MAT. 497 (1969).

agreed to, and now embraces ninety-nine percent of the world's tanker tonnage. The Agreement requires participating tanker owners to reimburse governments for the clean-up costs of oil spills at the rate of $100 per gross registered ton or $10 million per incident.[176] A second agreement, the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL),[177] was entered into in 1971 and increases liability coverage to thirty million dollars per incident. Both of these agreements are intended to be temporary measures, pending the entry into force of the IMCO conventions.

C. *The Law of the Sea Treaty*

The draft Law of the Sea Treaty[178] includes several provisions significantly affecting the rights and duties of vessels on the high seas and in territorial waters. As of the date of this writing, the draft convention had not yet been completed and opened for signature; nevertheless, it was contemplated that it would be tendered to the world community during 1981.[179] Although its emphasis is on matters other than the environment, and it was drafted outside the framework of IMCO, the Law of the Sea Treaty will, when consummated, have an important role in restricting maritime pollution. It strongly reaffirms many of the principles to which this article is addressed.

Although the draft Law of the Sea Treaty extends the territorial limits of coastal states to twelve nautical miles,[180] it provides for the right of innocent passage through waters.[181] This right may be circumscribed by the coastal state where the vessel engages in "willful and serious pollution. . . ."[182] Moreover, the coastal states may adopt measures which regulate innocent passage through territorial waters where necessary to ensure the "preservation of the environment of the coastal state and the prevention, reduction and control of pollution. . . ."[183] Ships in transit have the coordinate obligations to comply with international standards regarding both safety[184] and environmental pollution.[185]

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176. *See* Wittig, *supra* note 63, at 136.

177. *Id.*

178. Draft Convention on the Law of the Sea (Informal Text); Third U.N. Conference on the Law of the Sea, Resumed Ninth Session, Geneva (July 28-Aug. 29, 1980), U.N. Doc. A/Conf.62/WP.10/Rev.3/Add.1 (1980) [hereinafter cited as the Law of the Sea Treaty]. *See generally*, Rusk & Ball, *Sea Changes and the American Republic*, 9 GA. J. INT'L & COMP. L. 1 (1979); Charney, *Law of the Sea: Breaking the Deadlock*, 55 FOREIGN AFF. 598 (1977).

179. United States Delegation, Report of the Resumed Ninth Session of the Third U.N. Conference on the Law of the Sea, at ii (July 28-Aug. 29, 1980).

180. Law of the Sea Treaty, art. 3.

181. *Id.* art. 17. *See id.* art. 52.

182. *Id.* art. 19, § 2(h).

183. *Id.* art. 21, § 1(f). The coastal state may impose regulations designed to conserve "the living resources of the sea . . .," *id.* art. 21 § 1(d). Such requirements shall not, however, "apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards." *Id.* art. 21 § 2. *See id.* art. 24.

184. *Id.* art. 39, § 2(a).

Freedom of navigation on the high seas also is reaffirmed by the Law of the Sea Treaty.[186] The right of flag states to issue standards regulating the granting of "nationality to ships . . . the registration of ships in its territory, and . . . the right to fly its flag . . . " is limited to the requirement of a "genuine link between the state and the ship."[187] Moreover, the Treaty imposes specific obligations on flag states to insure that ships flying their flags meet minimum safety standards.[188]

Throughout the Treaty, the right of coastal states to take such measures "as may be necessary to prevent, mitigate or eliminate grave and immediate danger to their coastlines, or related interests from pollution or threat thereof or from hazardous occurrences . . . "[189] is explicitly reaffirmed.[190] Further, all states have the obligation, either individually or jointly, to take such measures as are necessary "to prevent, reduce and control pollution from any source . . ."[191] including "[p]ollution from vessels, in particular measures for preventing . . . intentional and unintentional discharges. . . ."[192] States are collectively bound to consummate multilateral negotiations leading to the establishment of "international rules and standards for the prevention, reduction and control of pollution of the marine environment from vessels. . . ."[193]

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185. *Id.* art. 39, § 2(b). *See id.* art. 43.

186. *Id.* art. 87, § 1(a).

187. *Id.* art. 91, § 1. *See id.* art. 90. *See also* text accompanying notes 100-116, *supra.*

188. *Id.* art. 94. Specifically, the flag state must impose safety regulations involving:

> (a) The construction, equipment and seaworthiness of ships;
>
> (b) The manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments:
>
> (c) The use of signals, the maintenance of communications and the prevention of collisions.

*Id.* art. 94, § 3. These regulations shall embrace those measures essential to ensure:

> (a) That each ship . . . is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship;
>
> (b) That each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering . . .;
>
> (c) That [they] are fully conversant with and required to observe the applicable international regulations concerning . . . the prevention of collisions, [and] pollution. . . .

*Id.* art. 94, § 4.

189. *Id.* art. 142, § 3.

190. *See id.* arts. 145, 211 §§ 4-6, 200. Such measures may include activities beyond the territorial waters of a coastal state where necessary, under circumstances consistent with general principles of international law, and proportionate to the injury threatened, "to protect their coastlines or related interests, including fishing, from pollution or threat of pollution or threat of pollution following upon a maritime casualty. . . ." *Id.* art. 221, § 1. The circumstances under which a coastal state may examine a foreign flag vessel are limited. *See id.*, art. 226.

191. *Id.* art. 194, § 1.

192. *Id.* art. 194, § 3(b).

193. *Id.* art. 211, § 1.

## V. THE UNILATERAL EFFORTS OF COASTAL STATES

A number of coastal states, having been the victims of dumped oil, have grown dissatisfied with both the traditional flag of convenience doctine,[194] and the general failure of the world community to achieve agreement on means to resolve the continuing crisis through multilateral conventions. This dissatisfaction has led to the unilateral promulgation of legislation to deal with the problem. The laws of two such nations, the United Kingdom and the United States, will be explored here.

### A. *The United Kingdom*

The United Kingdom has enacted a series of statutes dealing with oil pollution, ranging from laws asserting jurisdiction over ships causing pollution to legislation imposing liability for any damage caused. Several of these statutes represent domestic enactments of international conventions, one of which has not yet entered into force internationally.

The Oil in Navigable Waters Act of 1971[195] amended previous acts of 1955 and 1963 to give effect to the amendments to the 1954 International Pollution Convention in the United Kingdom. It further enables the British Government to take action against any ship in its territorial or internal waters, regardless of registry, which has caused an oil pollution casualty.

The Merchant Shipping (Oil Pollution) Act of 1971[196] enacts into British law the International Convention on Civil Liability for Oil Pollution Damage.[197] As mentioned above, the act provides for strict liability and under certain circumstances allows for limitation of liability for oil pollution damage. Such liability is imposed on the owner of the ship, regardless of state of registry; access to British ports is dependent upon compliance with the required certification of adequate insurance coverage.

The Prevention of Oil Pollution Act of 1971[198] is a consolidation of previous Oil in Navigable Waters Acts. It primarily provides jurisdiction over territorial waters to prevent oil pollution, as well as over British ships causing pollution anywhere. Its enforcement mechanisms are carried out by use of oil records, power of inspection, enforcement of applicable conventions, prosecution, and imposition of fines for violations.

Finally, the Merchant Shipping Act of 1974[199] is an enactment of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. Although this Convention

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194. It is ironic that coastal states such as the United States would be dissatisfied with the flag of convenience doctrine, since U.S. tax and labor laws provide a significant economic incentive for U.S. Shipowners to register their vessels abroad. *See* note 271 *infra*.

195. 1971, ch. 21, 41 HALSBURY'S STATUTES at 1330.

196. 1971, ch. 59, *id.* at 1345.

197. For an analysis of the 1971 act, *see* Cusine, note 8 *supra*.

198. 1971, ch. 60, 41 HALSBURY'S STATUTES at 1361.

199. 1974, ch. 43, 44 *id.* at 1415 (1974).

has not yet entered into force in the international sphere, it has been implemented in the United Kingdom, and provides compensation from the Fund to any victim of oil pollution damage who is unable to obtain complete recovery from the person liable under the Merchant Shipping (Oil Pollution) Act of 1971.

As can be seen, the legal regime in force in the United Kingdom corresponds very closely to the international framework, and is in the forefront of implementing the most recent international conventions. The statutory scheme allows assertion of jurisdiction in territorial waters over any vessel, regardless of registry, which threatens to cause oil pollution. In addition, a liability scheme has been established which ensures the victim as complete compensation as possible, and places liability on the parties who most fairly should bear it — the ship owner and the owner of the oil cargo.

B. *The United States*

The United States has enacted a substantial body of law to deal with oil pollution in U.S. waters, establishing minimum standards for ships using U.S. ports, jurisdiction over ships in U.S. waters, and liability for pollution damage. This statutory scheme partially embodies existing international conventions, and is in part unilateral.

1. *Early U.S. Legislation*

The first legislation to provide a basis for the regulation of both domestic and foreign ships in United States harbors was enacted by Congress in 1917. This legislation conferred upon the Secretary of the Treasury the power to control "anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States" during times of national emergency due to war or threatened war.[200] The 1917 legislation was amended in 1950 to place the regulatory power under the President, as well as the Secretary of the Treasury.[201] Although this act established substantial authority for the control of movement and anchorage of foreign flag vessels in United States waters, it may be invoked only "when

200. Act of June 15, 1917, Pub. L. No. 24, Title I, § 1, 40 Stat. 220 (1917).

> Whenever the President by proclamation or Executive order declares a national emergency to exist by reason of actual or threatened war, insurrection, or invasion, or disturbance of international relations of the United States, the Secretary of the Treasury may make, subject to the approval of the President, rules and regulations governing the anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States, may inspect such vessel at any time, place guards thereon, and, if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of the rights and obligations of the United States, may take, by and with the consent of the President, for such purposes, full possession and control of such vessel and remove therefrom the officers and crew thereof and all other persons not specially authorized by him to go or remain on board thereof.

201. Act of August 9, 1950, 50 U.S.C. § 1 (Supp. IV 1980). A 1979 amendment deletes the Panama Canal Zone from the jurisdiction of the Act. 50 U.S.C. § 191 (Supp. IV 1980).

the national security of the United States is endangered."[202] This legislation, therefore, does not provide an adequate basis for the regulation of vessel safety and operations in the normal course of activity.

As a consequence, in 1936 Congress enacted a law governing the inspection of vessels, which for the first time provided a basis for federal safety regulation of the carriage of "inflammable or combustible liquid cargo in bulk."[203] The 1936 act created a "Board of Supervising Inspectors" under the Secretary of Commerce, which was empowered to establish rules and regulations basically concerning the design, construction, alteration and repair of vessels which come within the purview of the act.[204]

Further, the 1936 act prohibited the carriage of inflammable or combustible cargo, unless the carrying vessel had been issued a "certificate of inspection . . . and . . . a permit has been endorsed on such certificate of inspection by a board of local inspectors, indicating that such vessel is in compliance with the provisions of this section and the rules and regulations established hereunder. . . ."[205] Although the 1936 act specifically applied to "all vessels," an express exception was carved out with respect to foreign vessels: "the provision of this subsection shall not apply to vessels of a foreign nation having on board a valid certificate of inspection recognized under law or treaty by the United States. . . ."[206] Therefore, this legislation provided no basis for the regulation of foreign vessels.

A second weakness of the 1936 act was in the area of crew certification. The act provided for crew member certification only where "the certificate of inspection does not require at least two licensed officers."[207] However, even where crew member certification was mandated, the "number of the crew required to be certificated as tankermen,"[208] was entirely left to the discretion of the board of local inspectors. Also, the criteria for certification were ill-defined by the Act, and could be imposed on a discretionary basis by the Board of Supervising Inspectors. Therefore, the 1936 act, while providing a valuable legislative basis for tanker

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202. S. REP. No. 2118, 81st Cong., 2d Sess., *reprinted in* [1950] U.S. CODE CONG. & AD. NEWS 2954, 2954.

203. Act of June 23, 1936, Pub. L. No. 765 § 1, 49 Stat. 1889 (1936) [hereinafter cited as 1936 act].

204. *Id.* § 2:

> In order to secure effective provision against the hazards of life and property created by the vessels to which this section applies, the Board of Supervising Inspectors, with the approval of the Secretary of Commerce, shall establish such additional rules and regulations as may be necessary with respect to the design and construction, alteration, or repair of such vessels . . . .

205. *Id.* § 4.

206. *Id.* § 1.

207. *Id.* § 4.

208. *Id.* § 6a. "In all cases where the certificate of inspection does not require at least two licensed officers, a board of local inspectors shall enter in the permit issued to any vessel under the provisions of this section the number of the crew required to be certified as tankermen." *Id.*

design and construction requirements, did not establish a sufficient means for the regulation of foreign flag vessels, or the certification of tank ship crew members.

2. *Contemporary U.S. Legislation*

In 1961 Congress promulgated the Oil Pollution Act,[209] which implemented the 1954 International Pollution Convention.[210] The act was amended in 1973[211] to bring into force as to the United States the aforementioned 1969 and 1971 amendments. The only other international convention to be implemented by the United States is the Convention Relating to Intervention on the High Seas,[212] which has been enacted as the Intervention on the High Seas Act.[213]

For the purpose of establishing the extent of United States territorial jurisdiction over all ships, the U.S. is a party to the Convention on the Territorial Sea and the Contiguous Zone.[214] The convention establishes the jurisdiction of a coastal state over its territorial waters,[215] and the extent of jurisdiction permissible in the contiguous zone,[216] which is twelve miles from the baseline.[217] In the case of a ship entering internal waters, the coastal state has "the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to those waters is subject."[218] A foreign ship "exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation."[219] The convention, therefore, allows a coastal state to enforce its environmental and navigation laws against all ships entering its territorial waters or contiguous zone, regardless of registry. This allows a coastal state to create, in essence, a twelve-mile pollution control zone.[220]

The first significant attempt in the United States to promulgate comprehensive legislation concerning tanker safety was the Ports and Waterways Safety Act of 1972.[221] Congress recognized the growing dependence

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209. 33 U.S.C. §§ 1001-1016 (1976).

210. Note 150 *supra*.

211. Oil Pollution Act Amendments of 1973, Pub. L. No. 93-119, § 1, 87 Stat. 424 (1973) (codified in scattered sections of 33 U.S.C. §§ 1001-1016 (1976)).

212. Note 169 *supra*.

213. 33 U.S.C. §§ 1471-87 (1976).

214. *Done at* Geneva, Apr. 29, 1958, 15 U.S.T. 1607, T.I.A.S. No. 5639. *Entered into force* for the United States on September 10, 1964.

215. *Id.* art. 1.

216. *Id.* art. 24(1).

217. *Id.* art. 24(2).

218. *Id.* art. 16(2).

219. *Id.* art. 17.

220. *See* Wulf, *Contiguous Zones for Pollution Control: An Appraisal Under International Law*, SEA GRANT TECHNICAL BULLETIN No. 13 (Univ. of Miami Sea Grant Program 1971).

221. Pub. L. No. 92-340, Titles I and II, 86 Stat. 424 (1972) (prior to the 1978 amend-

of the United States on imported oil, and the increased threat to the environment and risks which would naturally result therefrom.[222] Hence, the primary emphasis of the 1972 Act was the prevention of pollution rather than compensation or liability. In reviewing the 1972 legislation, Congress concluded that: "Unfortunately, no amount of after-the-fact reporting, liability, and efforts at cleanup will effectively prevent the growing incidence of oil spill tragedies, or restore environmental and ecological resources once destroyed."[223]

The 1972 act was divided into two parts.[224] The first dealt with waterway and port safety, and provided a legislative basis for the regulation of navigable waters, ports, and harbors.[225] The second consisted of an extensive revision of the Tank Vessel Act of 1936.[226] Thus, the 1972 act attacked the problem from two directions: traffic control procedures, and vessel design and construction.[227] This two-pronged approach however, was to prove inadequate, in that it perpetuated one of the principle weaknesses of the Tank Vessel Act of 1936. The 1972 act left virtually unchanged the provision of the 1936 act dealing with crew certification. Additionally, the problem of absence of effective control over foreign vessels remained.

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ment) [hereinafter cited as 1972 act].

222. S. REP. No. 92-724, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2766, 2772 [hereinafter cited as S. REP. No. 92-724]:

> Other data received indicated that the importation of an incremental 10 to 11 million barrels per day of overseas crude oil and products projected by the National Petroleum Institute by 1985 would require more than 350 tankers, each of 250,000 deadweight tons. In gas, the importation of 4 trillion cubic feet of liquid natural gas annually by 1985 would require the building of 120 tankers each having a maximum capacity of the equivalent of approximately 790,000 barrels.
>
> Even if the foregoing projections prove to be greatly overstated, there is no question that the increase in waterborne movement of oil and hazardous cargoes which will occur has grave implications for the quality of the marine environment and requires positive action now.

223. *Id.* at 2769.

224. Titles I and II, Pub. L. No. 92-340, 86 Stat. 424 (1972).

225. Title I of the 1972 act was captioned "Ports and Waterways Safety and Environmental Quality." Regulations promulgated pursuant to Title I were set forth in 33 C.F.R. §§ 160-62, 164, 165 (1973). Title I was codified in 33 U.S.C. §§ 1221-1227.

226. Title II of the 1972 act was captioned "Vessels Carrying Certain Cargoes in Bulk." Title II was codified at 46 U.S.C. § 391a.

227. S. REP. No. 92-724, *supra* note 222, at 2773.

> Although concurring in the need for vessel traffic services, systems and controls contained in H.R. 8140, the committee believed that a comprehensive approach to the prevention of pollution from marine operations and casualties required, in addition, improvement of the vessels themselves: their design, construction, maintenance, and operation. The testimony and data received at the committee's hearings in September made this conclusion inescapable. It is clear that a systems approach to prevention of damage to the marine environment requires not only better control of vessel traffic but an improvement in the vessels themselves.

More recent environmental regulations of the United States regarding pollution control in the territorial sea are quite comprehensive and stringent, and apply to all ships entering U.S. territorial waters, regardless of state of registry. The Deepwater Port Act of 1974[228] concerns the construction, operation, location, and ownership of deepwater ports beyond U.S. territorial limits. The act prohibits the discharge of any oil into the sea from a vessel within the safety zone.[229] A penalty for violation may be assessed against the vessel owner or operator in the amount of $10,000.[230] In the event of an oil discharge, the owner and operator of the vessel are jointly and severally liable for clean-up costs, without regard to fault, in the amount of the lesser of $150 per gross ton or $20 million, unless gross negligence and wilfull misconduct with privity of the owner is shown.[231] A foreign vessel may not use a deepwater port unless its state of registry has specifically agreed to recognize U.S. jurisdiction over vessels in deepwater ports, and has designated an agent in the U.S. for receipt of service of process in the event of a claim against the vessel or its personnel.[232]

However, the inadequacies of both the 1972 and 1974 acts became painfully apparent after a rash of tanker accidents in U.S. waters and in the coastal waters offshore.[233] In response to these inadequacies, Congress in 1978 enacted the most comprehensive and far reaching legislation in U.S. history, the Port and Tanker Safety Act.[234] This 1978 act sought to improve on the 1972 act not only in the areas of construction and operations, but also in the areas of personnel qualifications and control over foreign flag vessels.[235] Perhaps the two most significant additions to the

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228. 33 U.S.C. §§ 1501-1524 (1976).

229. *Id.* § 1517(a)(1). *See id.* §§ 1502(16), 1509(d)(1).

230. *Id.* § 1517(a)(2).

231. *Id.* § 1517(d).

232. *Id.* § 1518(c).

233. H.R. REP. No. 95-1384, 95th Cong., 2d Sess. 5, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 3270, 3273 [hereinafter cited as H.R. REP. No. 95-1384]:

> On occasion, proposed regulations have been criticized as weak and ineffective, and the Coast Guard's reluctance to proceed expeditiously has resulted, in at least one occasion, in a law suit by environmental interests to mandate more rapid implementation by the Coast Guard.
>
> This was the overall situation in December of 1976 when a rash of tanker accidents in U.S. waters and in the coastal waters offshore focused public and congressional attention on the problem.

*See also Recent Tanker Accidents: Hearings Before the Sen. Comm. on Commerce*, 95th Cong., 1st Sess. (1977).

234. Port and Tanker Safety Act of 1978, Pub. L. No. 95-474, 92 Stat. 1471 (to be codified in 33 U.S.C. 1222, -24, -28, -32, and 46 U.S.C. 214 and 391) [hereinafter cited as 1978 act].

235. H.R. REP. No. 95-1384, *supra* note 233, at 3270-71.

> It is obvious that improvements can be made in the supervision and control over all types of vessels, foreign and domestic, operating in the navigable waters of the United States; and in the safety of all tank vessels, foreign and domestic, which transport and transfer oil or other hazardous cargoes in ports

1978 act are its provisions to regulate more effectively both foreign vessels and crew qualifications.

The 1978 act significantly amends Title I of the 1972 act. Under the new amendments, the Secretary of the department in which the Coast Guard is operating (*i.e.* as of the date of this writing, the Department of Transportation) is authorized to issue regulations compelling compliance with the vessel traffic service in each area of operation.[236] Most significant, however, is the inclusion of enforcement provisions which provide for civil and criminal penalties, *in rem* liability, injunction, and withholding of clearance (by the Secretary of the Treasury).[237] The liability provision is included to insure the enforcement of civil penalties so that "the vessel involved shall be liable *in rem* and proceeded against wherever found."[238] In addition to these enforcement powers, the Secretary is also given investigatory powers,[239] and the power to condition entry to ports of the United States.[240]

Among the important exceptions to these powers, which allow the Secretary to deny entry, is that such denial shall be "subject to recognized principles of international law."[241] This rather vague limitation is only somewhat clarified by the legislative history. The legislative history of the act specifies *force majeure* as one recognized principle of international law to which the Secretary's power of denial is subject; nevertheless, it leaves open the question of other "recognized principles of international law" which may compel entry, *e.g.* entry in distress.[242]

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or places subject to the jurisdiction of the United States. Improvements can also be made in the control and monitoring of vessels operating in offshore waters near our coastlines. There is also a demonstrated need for improved personnel qualifications, including improved pilotage standards for the issuance of Federal licenses, as well as realistic manning standards for vessels using our ports.

236. Regulations promulgated under the amended Title I are contained in 33 C.F.R. §§ 160-62, 164 and 165 (1979).

237. 1978 act, § 13.

238. Any vessel subject to the provisions of this chapter, which is used in violation of this chapter, or any regulations issued hereunder, shall be liable *in rem* for any civil penalty assessed pursuant to subsection (a) of this section and may be proceeded against in the United States district court for any district in which such vessel may be found.

*Id.* § 13(c).

239. *Id.* § 8.

240. Id. § 9.

241. *Id.* § 13(e). 33 U.S.C. § 1232(e) sets forth:

Except as provided in section 9, the Secretary may, subject to recognized principles of international law, deny entry into the navigable waters of the United States or to any port or place under the jurisdiction of the United States to any vessel not in compliance with the provisions of this Act or the regulations issued hereunder.

242. H.R. REP. No. 95-1384, *supra* note 233, at 3285. "[T]he Secretary may deny entry to any vessel not in compliance with the act or regulation, subject to such recognized international principles as *force majeure*." *Id.*

Therefore, even under the present limitation of *force majeure*, query if a tanker, badly damaged in a storm and capable only of making a United States port, could be turned away, regardless of the danger to the harbor or potential of catastrophe. The doctrine of *force majeure* would appear to compel entry in such a situation.[243] A second notable exception, also presumably included in a deference to international law, permits free passage through U.S. territorial waters of vessels originating at and destined to foreign ports.[244]

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243. *See* Hoff, Administratrix (United States v. United Mexican States), 4 U.N. Rep. Int'l Arb. Awards 444, *reported in* N. LEECH, C. OLIVER, & J. SWEENEY, THE INTERNATIONAL LEGAL SYSTEM 167, 169 (1973).

> [T]here appears to be general recognition among the nations of the world of what may doubtless be considered to be an exception, or perhaps it may be said two exceptions, to this general, fundamental rule of subjection to local jurisdiction over vessels in foreign ports.
>
> Recognition has been given to the so-called right of "innocent passage" for vessels through the maritime belt in so far as it forms a part of the high seas for international traffic. Similarly, recognition has also been given — perhaps it may be said in a more concrete and emphatic manner — to the immunity of a ship whose presence in the territorial waters is due to a superior force. The principles with respect to the status of a vessel in "distress" find recognition both in domestic laws and in international law.

*But see* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 48 (1965):

> (1) A foreign vessel or aircraft has the right to enter the territory of a state when such entry is necessary for the safety of the vessel, aircraft or persons aboard, and to leave the territory once the conditions that made the entry necessary have ceased to exist.
>
> (2) The territorial state may not exercise its jurisdiction under the rule stated in § 20 to enforce rules prescribed by it with respect to
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> . . . .
>
> (b) the possession or carriage of property aboard a foreign vessel or aircraft entering in distress, bona fide and without intent to evade the customs and antismuggling laws of the coastal state, *except in so far as such regulation may reasonably be necessary for reasons of health or safety of the coastal state* [emphasis supplied].

244. 1978 act § 2(4)(d), 33 U.S.C. § 1223(d):

> Except pursuant to international treaty, convention, or agreement, to which the United States is a party, this chapter shall not apply to any foreign vessel that is not destined for, or departing from, a port or place subject to the jurisdiction of the United States and that is in —
>
> (1) innocent passage through the territorial sea of the United States, or
>
> (2) transit through the navigable waters of the United States which form a part of an international strait.

*See* H.R. REP. No. 95-1384, *supra* note 233, at 3282, which states that:

> Subsection (d) exempts from the applicability of the Act any foreign vessel in innocent passage through the territorial sea of the United States or any foreign vessel in transit through navigable waters of the United States which form a part of an international strait, unless that vessel is destined for or departing from a port or place subject to the jurisdiction of the United States. This exemption of foreign vessels is consistent with international law and may, of course, be lifted pursuant to any international treaty, convention, or agreement to which the United States is a party and by which the flag state of the vessel involved is bound.

The significance of these two exceptions will largely depend upon the volume of tanker traffic plying the waters off the coast of the United States, but not destined for any United States port. The development of Mexican oil may well result in a significant increase in traffic of this nature, which passes through United States waters (*e.g.*, destined for Europe), endangering valuable environmental and ocean resources, yet which is nevertheless exempted from the reach of this legislation. This would appear to be an instance where the national interests of the United States are so great as to warrant some degree of regulation even of innocent passage through United States territorial waters.

The 1978 act also significantly amends Title II of the 1972 act. The importance of this part of the 1978 act is in its recognition of the inadequacy of existing international standards, and willingness to unilaterally enact stricter standards.[245] The Secretary has been given broad power to issue, amend, or repeal regulations relating,[246] *inter alia* to:

> (i) superstructures, hulls, cargo holds or tanks, fittings, equipment, appliances, propulsion machinery, auxiliary machinery, and boilers;
> (ii) the handling or stowage of cargo, the manner of such handling or stowage of cargo, and the machinery and appliances used in such handling or stowage;
> (iii) equipment and appliances for lifesaving, fire protection, and prevention and mitigation of damage to the marine environment;
> (iv) the manning of such vessels and the duties, qualifications, and training of the officers and crew thereof . . . ;
> (v) improvements in vessel maneuvering and stopping ability and other features which reduce the possibility of collision, grounding, or

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245. To the extent feasible, the committee elected to endorse standards internationally agreed to. However, it declined to await the ratification of any international agreement on this subject and established specific dates on which certain standards would go into effect, whether or not there is a final convention in force at the time of such effective dates. Furthermore, the committee indicated its concern that the international conference chose not to require certain modifications of existing vessels which it would require for certain new vessels. . . .

The Committee has elected to impose additional requirements on all U.S. vessels beyond those which, present indications are, would be imposed by international agreement. It makes the same additional requirements applicable to foreign vessels which elect to operate within the navigable waters of the United States.

*Id.* at 3289-90.

Actually, this concept is anolagous to the domestic transportation concept of the "land bridge exemption," which exempts from U.S. economic regulation surface movements in foreign commerce which have both an origin and destination outside the territory of the United States. *See* Dempsey, *The Contemporary Evolution of Intermodal and International Transport Regulation Under the Interstate Commerce Act: Land, Sea and Air Coordination of Foreign Commerce Movements*, 10 VAND. J. TRANSNAT'L L. 505, 513-18 (1977); Dempsey, *Foreign Commerce Regulation Under the Interstate Commerce Act: Intermodal Coordination of International Transportation in the United States*, 5 SYR. J. INT'L L. & COM. 53, 66-71 (1977).

246. H.R. REP. No. 95-1384, *supra* note 233, at 3289-90. *See* note 225 *supra*.

other accidents;
(vi) the reduction of cargo loss in the event of a collision, grounding, or other accident; and
(vii) the reduction or elimination of discharges during ballasting, deballasting, tank cleaning, cargo handling, or other such activity.[247]

In addition to the regulations which may be issued by the Secretary, minimum standards are also established under the 1978 act. These standards place specific requirements on "vessels between 20,000 and 40,000 deadweight tons which reach an age of 15 years by January 1, 1985,"[248] new tank vessels,[249] and self-propelled vessels.[250]

Other provisions of the 1978 act require certification of compliance and establish personnel and manning standards for both U.S. and foreign vessels.[251] Thus, the 1978 act establishes "a procedure whereby the Secre-

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247. 1978 act § 5(6)(A), 46 U.S.C. § 391a(6)(A). Regulations promulgated pursuant to this section are contained in volume 46 of the Code of Federal Regulations.

248. H.R. REP. No. 95-1384, *supra* note 233, at 3290.

249. Under the 1978 act § 5(7)(K), 46 U.S.C. § 391a(7)(K), a vessel complies with minimum U.S. standards,

(K) if a new tanker of 10,000 gross tons or above, be equipped with —
(i) two remote steering gear control systems operable separately from the navigating bridge; . . .
(ii) main steering gear control in the steering compartment;
(iii) means of communications and rudder angle indicators on the navigating bridge, remote steering gear control station, and the steering gear compartment;
(iv) two or more identical and adequate power units for the main steering gear;
(v) an alternative and adequate power supply, either from an emergency source of electrical power or from another source of power located in the steering gear compartment; and
(vi) means of automatic starting and stopping of power units with attendant alarms at all steering stations.

250. Additionally, the 1978 act § 5(7)(J), 46 U.S.C. § 391a(7)(J), sets forth the following minimum standards:

(J) if of 10,000 gross tons or above, not later than June 1, 1979, [a vessel] be equipped with —
(i) a dual radar system, with short-range and with long-range capabilities and each with true-north features;
(ii) an electric relative motion analyser, which is at least functionally equivalent to such equipment complying specifications established by the United States Maritime Administration;
(iii) an electronic position fixing device;
(iv) adequate communications equipment;
(v) a sonic depth finder;
(vi) a gyrocompass; and
(vii) up-to-date charts:
Provided, That the effective date of compliance with the requirement of clause (ii) shall be July 1, 1982 or such earlier date as agreed to internationally and accepted by the United States.

251. Subsection 8 of Section 5 requires certificates of compliance for both United States and foreign vessels. Subsections 9 and 10 establish personnel and manning standards for United States and foreign vessels respectively. Subsection 10(B) provides that:

tary can be assured that foreign crews on foreign flag tankers do not constitute an unacceptable threat to U.S. waters and the marine environment."[252] The act provides for enforcement,[253] and establishes a national program of inspection to insure compliance.[254] Finally, in an attempt to decrease nontraumatic sources of oil pollution, the 1978 act imposes controls on lightering,[255] and prohibits the "discharge of tank washings by dumping at sea." These two final provisions are of tremendous importance considering the large amount of pollution which results solely from normal tanker operations.[256]

A final area which remains to be examined is the possibility of state regulation where federal regulation is found to be wanting. In *Ray v. Atlantic Richfield Co.*,[257] the Supreme Court held unconstitutional sections of the Washington tanker law, which placed size limitations and operating restrictions on tankers entering Puget Sound. The Court essentially held those provisions of the state legislation invalid which interfered with a "uniform national rule," such as those regarding design, construction, and size limitations. The Court, however, upheld provisions requiring tug escorts, and to some extent, local pilotage.

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> Any foreign vessel having on board oil or hazardous materials in bulk as cargo or in residue shall have a special number of personnel certificated as tankermen, or equivalent, as may be required by the Secretary, when the vessel transfers oil or hazardous materials in any port or place to the jurisdiction of the United States; and such requirement shall be noted in applicable terminal operating procedures. No transfer operations may take place unless the crew member in charge is capable of clearly understanding instructions in English.

*Id.*, § 5(10)(B), 46 U.S.C. § 391a(10)(B).

252. H.R. REP. No. 95-1384, *supra* note 233, at 3294.

253. 1978 act, § 13.

254. As is explained in the legislative history;

> With respect to foreign flag vessels, the procedures would be similar and consistent with existing procedures, except that a foreign-issued certificate would not be automatically accepted as adequate. The Secretary would be required to examine the vessel and may, as a basis for the issuance of a certificate of compliance, accept in whole or in part a foreign-issued certificate.

H.R. REP. No. 95-1384, *supra* note 233, at 3296.

255. *Id.* at 3297-98:

> This subsection provides new legislative authority for the control of lightering operations; that is, the practice of transferring cargoes at sea from large deep-draft vessels to shallow-draft vessels for subsequent transfer to shoreside terminals, a practice which has proliferated due to the inability of the larger tankers to enter our shallow ports. It prohibits a tanker from unloading any cargo of oil or hazardous material at any port or terminal under the jurisdiction of the United States, unless such cargo has been transferred in accordance with any lightering regulations that have been promulgated by the Secretary.

256. S. REP. 92-724, *supra* note 222, at 2779. "Even more important than accidental spills, is pollution occuring from the normal, everyday operation of tankers, primarily from deballasting operations and tank flushing. According to the Environmental Protection Agency, this accounts for 11 percent of the total oil pollution of the sea." *Id.*

257. 435 U.S. 151 (1978). For a discussion of this case, *see* Note, *Oil Spills — State Prevention and the Possibility of Pre-Emption*, 30 MERCER L. REV. 559 (1979); Note, *Oil Tanker Regulation: A State or Federal Area?* 19 NAT. RESOURCES J. 701 (1979).

The 1978 act contains two provisions with respect to state law. The first permits states to impose more stringent safety standards than those imposed by the federal government.[258] The second allows the Secretary to license pilots under circumstances where the relevant state government has not imposed licensing requirements.[259] It must be borne in mind that vessels under 10,000 tons are not required to be equipped with electronic devices designed to prevent collisions from occurring.[260] The 1978 act has left the States with the freedom to impose more stringent safety standards. The states, therefore, must independently evaluate the safety standards and requirements imposed under the 1978 act.

Turning to the issue of carrier liability, the United States has not ratified the International Convention on Civil Liability for Oil Pollution Damage, which contains provisions for civil liability for oil pollution, as well as for limitation of liability. The overall scheme is extremely complex and confusing to apply, largely because of the fine line that must be trod with regard to federal-state jurisdiction. While a detailed discussion of liability provisions is beyond the scope of this article, it is necessary to mention the federal acts that are applicable. The act which has been in existence for the longest period of time, and still survives in some form, is the Limitation of Liability Act.[261] The scope of its application has been somewhat narrowed by the Water Pollution Control Act.[262]

Part of the difficulty in the regulation of oil pollution lies in the concurrent competence of both the federal statutory scheme and that of the individual coastal states. Coastal states are allowed to implement and enforce pollution control regulations in their territorial waters,[263] but in areas where there exists a uniform federal policy, the coastal states may not enact any conflicting legislation.[264] There may be some hope for clarification of the current confusion should the Comprehensive Oil Pollution

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258. 1978 act § 2(6)(b), 33 U.S.C. § 1225(b), which provides: "Nothing contained in this section, with respect to structures, prohibits a State or political subdivision thereof, from prescribing higher safety equipment requirements or safety standards than those which may be prescribed by regulations hereunder."

259. *Id.* § 2 (7), 33 U.S.C. § 1226, which provides:

> The Secretary may require federally licensed pilots on any self-propelled vessel, foreign or domestic, engaged in the foreign trade, when operating in the navigable waters of the United States in areas and under circumstances where a pilot is not otherwise required by State law. Any such requirement shall be terminated when the State having jurisdiction over the area involved establishes a requirement for a State licensed pilot and has so notified the Secretary.

260. 1978 act, § 5(7)(k).

261. For further analysis of the complexity of liability for oil pollution, *see* Sisson, *Oil Pollution Law and the Limitation of Liability Act: A Murky Sea for Claimants Against Vessels*, 9 J. MAR. L. & COMM. 285 (1978); Post, *Private Compensation for Injuries Sustained by the Discharge of Oil from Vessels on the Navigable Waters of the United States*, SEA GRANT TECHNICAL BULLETIN No. 22 (Univ. of Miami Sea Grant Program 1972).

262. 46 U.S.C. §§ 181-96 (1976).

263. 33 U.S.C. §§ 1251-1376 (1976).

264. Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973).

Liability and Compensation Act[265] be consummated.

## VI. CONCLUSION

The conduct of the United States Government in the area of international environmental and transportation law relating to oil tankers deserves no applause from the world community. Paradoxically, U.S. labor and tax interests have created an economic regime which frequently makes it imprudent for U.S. vessel owners to register their ships domestically unless subsidized by U.S. taxpayers.[266] U.S. commercial interests, coupled with the demands of sovereign equality by flag states, have insured that the flag of convenience option remains a viable alternative to U.S. tax and labor encroachments on the profit margin.[267] United States military and environmental interests have assured that only the most modern fleet of tankers will fly the U.S. flag[268] and serve U.S. ports,[269] while the rusty hulks of aged U.S.-owned vessels will be scattered throughout the rest of the world to serve foreign ports and pollute foreign seas.[270] At the same time the United States refuses to cooperate with the world community in ratifying many of the major multilateral conventions now pending before it.[271] From a global perspective, such preoccupation with domestic interests is reprehensible.

While such conduct is not desirable, if may be understood as a logical response to an international legal regime whose rules were developed at a time when significant pollution by ocean vessels neither existed nor was

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265. Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978).

266. *See* Sisson, *supra* note 261, at 338-41.

267. Actually, because the flag of convenience option is available, such labor and tax laws are self-defeating. They create economic incentives for shipowners to register their vessels outside the United States. Only vessels which transport commodities or passengers between points in the United States are precluded from utilizing the flag of convenience option. *See* 46 U.S.C. § 883 (1976). *See generally* Dempsey, *Legal and Economic Incentives for Foreign Direct Investment in the Southeastern United States*, 9 VAND. J. TRANSNAT'L L. 247, 254 (1976). Thus, it is for the federal government to relax its tax burden and labor regulations on maritime vessels so as to encourage additional U.S. registry.

268. *See* notes 62, 63, 66-83 *supra* and accompanying text.

269. *See* notes 85-86 *supra* and accompanying text.

270. *See* notes 247-50 *supra* and accompanying text.

271. The United States unquestionably has developed a body of law that effectively copes with the problems of oil pollution by tankers which serve its ports, and which corresponds with the existing international framework. However, U.S. policy, as evidenced by its overall statutory scheme, may be viewed as being unduly exploitive of the existing international system. On the one hand, the United States promotes the use of flag of convenience registry by U.S. vessel owners by virtue of its strict registration and taxation laws. However, U.S. environmental and pollution laws, which have been enacted independently from international conventions, ensure that only the newest ships with the highest construction standards serve U.S. ports. Assuming that it is advantageous for a shipowner to serve U.S. ports and to maintain a vessel that meets American standards, U.S. law may have a beneficial effect on world shipping standards and the reduction of oil pollution. Nevertheless, it is submitted that the United States should implement this policy in cooperation with the international community, rather than enacting its own laws so to ensure that substandard ships, many of which may be U.S.-owned, serve other ports.

contemplated. One could argue that as a result of significantly changed circumstances in which the ecological balance in our oceans and coastal tidewaters is seriously threatened, and in which a continuation of the contemporary trend could lead to disastrous consequences for both marine life and man, the customary notion of flags of convenience should no longer be given determinative weight. Such archaic notions of national sovereignty over ships which fortuitously happen to be registered in a state with which they have absurdly little in common must be rendered subordinate to the legitimate interests of both coastal states and the international community in protecting a fragile and seriously threatened marine environment.

The law appears to be evolving in a way which relects this challenge to our existence. Flag states are losing significant elements of their sovereignty when their vessels enter a coastal state's territorial waters. Coastal states are now unilaterally imposing their own notions of safety as obligations upon vessels which serve their ports.[272] Moreover, it may be desirable to further limit the exclusive sovereignty that flag states assert in such a way as to confine it to freedom of navigation, vesting jurisdiction over safety and environmental pollution in the international community.[273] The concept of a "genuine link," if it is to be employed, should be carefully and clearly defined to require a significant nexus between the flag state and its registrants (*e.g.*, a requirement of fifty-one percent ownership by resident nationals of the flag state as a condition precedent to registration). Perhaps coastal and flag states could resolve their difference

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272. In terms of regulation of oil pollution in territorial waters, and providing liability for pollution damage, both the United Kingdom and the United States have enacted comprehensive and effective statutory schemes. The United Kingdom has traditionally acted in cooperation with the international community, being among the first countries to ratify the 1954 Pollution Convention and the 1971 Compensation Fund Convention. Collectively, the international conventions drafted by IMCO provide an effective means of dealing with all aspects of oil pollution on the basis of international cooperation, and the United Kingdom, as one of the major maritime nations, has consistently put them into force.

The United States, on the other hand, has only ratified two international conventions, although it has developed a substantial body of law unilaterally. As another of the major maritime nations, this lack of participation in the international community is unfortunate.

The United States can and should be an active participant in the international maritime community, and should ratify such agreements as the 1973 International Convention for the Prevention of Pollution from Ships, and the 1971 International Convention Establishing an International Fund for Compensation of Oil Pollution Damage. Ratification of these conventions would serve to further both U.S. and international interests.

273. The existing international framework for dealing with oil pollution has largely eliminated the problems created by extensive use of flags of convenience. Since coastal states are allowed to assert jurisdiction over any vessel in their territorial waters to prevent pollution, the issue of a ship's nationality has become essentially irrelevant. The existing international conventions which provide for enforcement by the flag state are not effective for sanctioning flag of convenience vessels which violate international conventions. However, the conventions which allow the coastal state to take any necessary enforcement measures will minimize this problem, if and when they enter into force.

through the vehicle of the multilateral conventions proposed by IMCO.[274] But having witnessed (and contributed to) the failure of the most promising of these proposals to secure sufficient assent to enter into force, coastal states, notably the United States, have been compelled to act, albeit unilaterally.[275]

The U.S. Port and Tanker Safety Act of 1978 is a step in the right direction.[276] It defines clear and fairly stringent safety standards for vessels of any flag serving U.S. ports.[277] This legislation, however, is only the attempt of one nation to deal with a problem which is by definition multinational. Nevertheless, so long as the industrial world is addicted to the herion of oil, perhaps the best that can be done is to develop every avenue of regulation available, at all levels (state, national, and international), so as to reduce the risks associated with tanker operation to the lowest level economically and technologically feasible.[278]

Perhaps only a combined multilevel regime can effectively deter continued environmental pollution by maritime vessels. Customary principles of international law do not now permit coastal states to regulate oil spillage by foreign flag vessels at points beyond their territorial waters. Thus, unilateral coastal state legislation, alone, may be unable to prohibit intentional pollution on the high seas. Multilateral efforts, such as those drafted by IMCO, will continue to be the principal means of deterring oil pollution beyond the territorial waters of a coastal state. These are efforts which the United States should enthusiastically embrace. Further, it may be desirable for IMCO to become more than a mere *consultative* organization. Perhaps it should be permitted to evolve into an international organization with the authority to issue binding, mandatory rules over environmental pollution and safety of maritime vessels.

The problem of maritime pollution is sufficiently severe that these efforts, both unilateral and multilateral, should have teeth; they should impose strong sanctions on intentional dumping at sea, including both

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274. It appears that the most effective method of minimizing oil pollution on the high seas lies in enforcing high construction and safety standards in territorial waters and ports by coastal states. A vessel that must have a double hull, segregated ballast tanks, a highly trained crew, etc. will be less likely to cause an accident on the high seas and will not cause pollution by its routine operations. The effectiveness of this enforcement mechanism is, of course, dependent on the economic considerations involved in improving tanker construction and refurbishing old tankers. Nevertheless, it is a solution that may become increasingly effective over the course of time.

275. *See* notes 234-60 *supra* and accompanying text.

276. The one major loophole of this legislation exempts from its provisions those vessels traveling through U.S. territorial waters but originating at and destined for foreign ports. *See* note 244 *supra*, and accompanying text. Although this exemption comports with customary international legal notions of free passage, it nevertheless may result in coastal state injury. *See* Rusk & Ball, *Sea Changes and the American Republic*, 9 GA. J. INT'L & COMP. L. 1 (1979).

277. *See* Anderson, *supra* note 52, at 985. This article discusses international efforts to prevent traumatic source oil tanker pollution.

278. *But see* note 256 *supra* and accompanying text.

fines and imprisonment. Companies which are repeated offenders should be prohibited from engaging in ocean trade. Corporate veils should be pierced to insure that both vessel owners and the oil companies which own the cargo are held jointly and severally liable, indeed, strictly liable, for the costs of cleanup and reimbursement to the affected fishing and tourist industries. Insurance rates are likely to rise dramatically for unsafe vessels and notoriously unsafe operators. This will give both oil companies and ocean shipping companies a pecuniary incentive to employ the safest ocean vessels with highly trained crews.

Certainly, the ultimate consumer of imported oil will pay the price of such stringent regulation, but the ecological benefits to be realized therefrom may well be worth the price. These increases will fuel inflation, but they will decrease in a small way domestic demand for imported fuel, thereby ultimately reducing growth in oil importation and, hence, sailing frequencies. Fewer ships at sea or a reduction in volume shipped will, again in a small way, reduce the likelihood and impact of collision. Every drop of oil which we keep out of our oceans is one which will not injure the fragile maritime environment. Not only does international environmental policy dictate that we prevent oil from entering the oceans of our planet, but with our collective contemporary awareness of both the cost and the relative scarcity of fossil fuels, and the burdens imposed by such excessive dependence upon foreign energy sources, U.S. energy policy requires that we do so as well.

# Legal Effects of the Multilateral Trade Negotiations: Agricultural Commodities

REX J. ZEDALIS

## I. INTRODUCTION

On April 12, 1979, ministers from a majority of developed and developing nations initialed various multilateral and bilateral agreements concluded in Geneva during the course of the Tokyo Round of the Multilateral Trade Negotiations (MTN). Consonant with the Tokyo Declaration of September 14, 1973,[1] which commenced the round, many of the agreements reflect the desire of the negotiators to deal with the particularly troublesome problems created by non-tariff barriers (NTB's) and international trade in agricultural commodities. Given the earlier preoccupation with efforts to reduce tariff levels and the reluctance of the European Economic Community (EEC) to negotiate issues affecting the fledgling Common Agricultural Policy (CAP),[2] it is not surprising that NTB's and agriculture were not dealt with sooner.

The objective of this article is to discuss briefly the multilateral codes of conduct, bilateral trade concessions, and international commodity agreements concluded during the MTN which will affect both imports into and exports from the United States of agricultural commodities. Since some of these measures serve to elaborate established principles of the General Agreement on Tariffs and Trade (GATT), and other measures which have been enshrined in U.S. municipal law through the various provisions of the Trade Agreements Act of 1979 (TAA),[3] this article analyzes a selected MTN measure, with reference to the relevant GATT principles. Those portions of the MTN measure dealing explicitly with international trade in agricultural commodities will be emphasized. The analysis concludes with some observations about the provisions of the TAA designed to implement the MTN measure domestically. A special effort will be made throughout to call attention to those instances where the provisions of the TAA change previously existing municipal law.

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1. *Declaration of Ministers Approved At Tokyo on 14 September 1973,* GATT BASIC INSTRUMENTS AND SELECTED DOCUMENTS 19 (Supp. 20, 1974).

2. CAP consists of several measures designed to protect and promote the EEC agricultural community.

3. Trade Agreements Act, Pub. L. No. 96-39, 93 Stat. 144 (1979) (to be codified in scattered sections of 19 U.S.C.).

## II. MULTILATERAL CODES OF CONDUCT

Six major agreements designed to reduce or restrict the adverse consequences of NTB's were produced during the course of the MTN.[4] Four of these will be discussed in this article: the Agreement on Government Procurement (Government Procurement Code),[5] the Agreement on Technical Barriers to Trade (Standards Code),[6] the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (Subsidies/Countervailing Duties (CVD) Code),[7] and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Antidumping Code).[8] The other measures are unquestionably of some importance, but it is unlikely they will affect international trade in agricultural commodities quite as much as the four to be addressed.

### A. *The Government Procurement Code*

The laws, regulations, procedures, and practices of several nations concerning government procurement of items for public use either require or result in suppliers of domestic products being given preference over suppliers of imported foreign products.[9] The GATT generally prohibits importing nations from engaging in discriminatory practices,[10] but article III, paragraph 5 explicitly sanctions discrimination of the sort mentioned. Specifically, it states that the other provisions of article III, particularly that of paragraph 2, which prohibits across-the-board discrimination against foreign products in respect of all laws, regulations, and requirements affecting internal sale, offering for sale, or purchase,[11] do not apply in those instances where such laws, regulations, and requirements concern government procurement of items for public use.[12] The effect of this is to except current discriminatory government procurement practices from

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4. *Multilateral Trade Negotiations,* GATT BASIC INSTRUMENTS AND SELECTED DOCUMENTS 3 (Supp. 26, 1980), *also in* AGREEMENTS REACHED IN THE TOKYO ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS, H.R. DOC. NO. 153, PART 1, 96th Cong., 1st Sess. (1979) [hereinafter cited as MTN AGREEMENTS].

5. MTN/NTM/W/211/Rev.2 and Add. 1 [hereinafter cited as GOVERNMENT PROCUREMENT CODE], *also in* MTN AGREEMENTS, *supra* note 4, at 69.

6. MTN/NTM/W/192/Rev.5 [hereinafter cited as STANDARDS CODE], *also in* MTN AGREEMENTS, *supra* note 4, at 211.

7. MTN/NTM/W/236 and Corr. 1 [hereinafter cited as SUBSIDIES/COUNTERVAILING DUTIES CODE], *also in* MTN AGREEMENTS, *supra* note 4, at 259.

8. MTN/NTM/W/232 [hereinafter cited as ANTIDUMPING CODE], *also in* MTN AGREEMENTS, *supra* note 4, at 311.

9. One such law is the Buy American Act, 41 U.S.C. §§ 10a-10d (1976). For similar foreign laws, regulations, procedures, and practices, *see* Comment, *Eliminating Nontariff Barriers to International Trade: The MTN Agreement on Government Procurement,* 12 N.Y.U. J. INT'L L. & POL. 315, 328-33 (1980).

10. General Agreement on Tariffs and Trade, Oct. 30, 1947, arts. I, III, 61 Stat. 73 (1947), T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as General Agreement on Tariffs and Trade]. Article I contains the most-favored-nation obligation and article III contains the national-treatment obligation.

11. *Id.* art. III, para. 2.

12. *Id.* art III, para. 5.

the national treatment obligations of article III.

The Government Procurement Code, which takes effect on January 1, 1981,[13] attempts to deal with the adverse effects caused by government entities giving preference to domestic products when purchasing items for public use. Part II of the Code states rather explicitly that all laws, regulations, procedures, and practices of states parties shall accord products originating within the customs territory of another state party treatment no less favorable than that accorded to domestic producers and suppliers.[14] In order to reduce or eliminate the discriminatory effect of procedures and practices utilized in awarding contracts, the Code prescribes specific rules for drafting specifications for items to be procured,[15] giving notice of proposed purchases,[16] the preparation and submission of bids and the awarding of contracts,[17] and the review of protests concerning rejected bids.[18]

While all of these provisions promise to increase the opportunities for suppliers of imported foreign products to sell to government entities, it must be noted that the provisions of the Code apply to contracts of purchase by the government entities listed in Annex I,[19] and then only when such contracts involve an amount which equals or exceeds 150,000 SDR's[20] (Special Drawing Rights).[21] The provisions of the Code do not apply to purchases by entities not listed in Annex I, purchases of less than 150,000 SDR's, or purchases by regional or local government entities,[22] even though such purchases may be made with funds granted by the national government.[23] Nevertheless, states parties are required to inform all regional and local government entities, and all national government entities not listed in Annex I, of the objectives, principles, and rules of the Code and to draw attention to the benefits of the liberalization of government procurement.[24]

It has been estimated that the Government Procurement Code will produce twenty billion dollars worth of new markets for exporters of United States products.[25] However, it seems unlikely that it will affect the

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13. GOVERNMENT PROCUREMENT CODE, *supra* note 5, Part IX(3).

14. *Id.* Part II(1)(a). Even though not so stated, this provision presumably refers to "like" products.

15. *Id.* Part IV.

16. *Id.* Part V(3).

17. *Id.* Part V(14).

18. *Id.* Part VI.

19. *Id.* Part I(1)(c).

20. *Id.* Part I(1)(b).

21. A unit of measurement used by the International Monetary Fund. 150,000 SDRs equals approximately $190,000.

22. This appears from the fact that such are not included in Part I(1)(c) of the Code.

23. SENATE COMM. ON FINANCE, TRADE AGREEMENTS ACT, S. REP. No. 249, 96th Cong., 1st Sess. 130 (1979) [hereinafter cited as SENATE FINANCE COMM. REPORT].

24. GOVERNMENT PROCUREMENT CODE, *supra* note 5, Part I(2).

25. SENATE FINANCE COMM. REPORT, *supra* note 23, at 128.

U.S. agricultural community to any significant degree. As previously mentioned, the provisions of the Code apply only to those national government entities listed in Annex I. A perusal of the entities subsumed under the various states parties listed in Annex I reveals that, in a great many cases, entities involved in purchasing agricultural commodities have explicitly excepted such purchases from their commitments under the Code.[26] For instance, purchases of agricultural products[27] by most ministries of agriculture (including the U.S. Department of Agriculture) in futherance of agricultural support programs or food programs have been excepted.[28] Similarly, purchases of agricultural supplies[29] by some ministries of defense (especially the U.S. Department of Defense) have been excepted from the provisions of the Code.[30] Government purchases from the U.S. agricultural community will thus remain relatively insulated and new market opportunities abroad will exist only to the extent that states parties have seen fit to subject national government entities which purchase agricultural commodities to the liberalizing provisions of the Government Procurement Code.

In implementing the obligations of the United States under Part II of the Government Procurement Code, section 301 of the TAA[31] authorizes the President, effective January 1, 1981,[32] to waive the applicability of all laws, regulations, procedures, or practices regarding procurement for public use which would, if applied, result in an imported foreign product being treated less favorably than a domestic product.[33] According to the terms of section 301, however, the President is authorized to issue such waivers only with respect to: a country which is a state party to the Government Procurement Code;[34] a non-major industrial country which, though not a state party, will otherwise assume the obligations of the

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26. For example, under the United States it reads: "Department of Agriculture (This Agreement does not apply to procurement of agricultural products made in furtherance of agricultural support programmes or human feeding programmes.)" GOVERNMENT PROCUREMENT CODE, *supra* note 5, Annex I.

27. The term "agricultural product" is not defined in the Code. Does it mean "raw" commodities or "processed" commodities?

28. *See* GOVERNMENT PROCUREMENT CODE, *supra* note 5, Annex I, European Economic Community, Part I, n.2. These items were obviously excepted because it would be absolutely impossible to support domestic agriculture by purchasing foreign commodities.

29. In some places the term "food stuffs" is utilized. This difference in terms could lead to dispute about what items have been excepted from the Code's coverage.

30. *See* GOVERNMENT PROCUREMENT CODE, *supra* note 5, Annex I, European Economic Community, Finland, Japan, Norway, Sweden, United States. In contradistinction to the exception pertaining to support programs, the exception of agricultural supplies by ministries of defense appears to be based on the notion that required purchases of foreign food would imperil the ability of the military to operate during times of crises.

31. Trade Agreements Act, Pub. L. No. 96-39, § 301, 93 Stat. 236 (1979).

32. *Id.* § 309(2) 93 Stat. 242.

33. Though not explicitly stated, this presumably applies to "like" products.

34. Trade Agreements Act, Pub. L. No. 96-39, § 301(b)(1), 93 Stat. 236 (1979) (to be codified in 19 U.S.C. § 2511(b)(1)).

Code;[35] a non-major industrial country which, though not necessarily assuming the obligations of the Code, will provide competitive government procurement opportunities to U.S. products;[36] or, a "least developed country."[37] Furthermore, such waivers apply only to those entities and products covered by the Government Procurement Code. In essence, this provision has the effect of precluding the issuance of waivers involving agricultural commodities purchased by the Department of Defense or the Department of Agriculture since, as we have already seen, both have excepted from the Code their purchases of agricultural commodities.

Apparently, it is not anticipated that agricultural products should forever remain beyond the coverage of the liberalizing provisions of the Code. This is evidenced by the fact that section 304 of the TAA states that in the renegotiations contemplated by Part IX, paragraph 6(b) of the Code the President "shall" seek improved market access abroad with a view to maximizing the economic benefits to the United States through efforts to maintain and enlarge foreign markets for products of, *inter alia*, U.S. agriculture.[38] It is difficult, however, to imagine that foreign states will acquiesce in U.S. efforts to obtain unilateral concessions designed to benefit the U.S. agricultural community. More than likely, if the Code is eventually altered so as to cover purchases of agricultural commodities, this will come about as a result of concessions which will either have to be mutual in nature or at least entail some *quid pro quo*.

B. *The Standards Code*

Product standards are perhaps the most troublesome of the various NTB's affecting international trade in agricultural commodities. The standards generally relate to quality, nutritive value, wholesomeness, and other specifications which an item must meet before it may be shipped to or sold in the importing country.[39] Product standards often are designed to attain some legitimate objective such as the protection of human, animal, or plant health or safety. There have been instances, however, where product standards have been deliberately used to obstruct the free flow of goods in international commerce.[40]

Certain provisions of the GATT would seem to prohibit the use of

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35. *Id.* § 301(b)(2), 93 Stat. 236 (to be codified in 19 U.S.C. § 2511(b)(2)).

36. *Id.* § 301(b)(3), 93 Stat. 236 (to be codified in 19 U.S.C. § 2511(b)(3)).

37. *Id.* § 301(b)(4), 93 Stat. 236 (to be codified in 19 U.S.C. § 2511(b)(4)).

38. Specifically, § 304(a) of the Trade Agreements Act, Pub. L. No. 96-39, 93 Stat. 238 (1979), states in pertinent part: "The President shall seek in . . . renegotiations . . . more open and equitable market access abroad . . . with the overall goal of maximizing the economic benefit to the United States through maintaining and enlarging foreign markets for products of United States agriculture . . . ."

39. *See generally* United States Cotton Standards Act, 7 U.S.C. §§ 51-65 (1976); United States Grain Standards Act, 7 U.S.C. §§ 71-87h (1976); Naval Stores Act, 7 U.S.C. §§ 91-99 (1976); Federal Plant Pest Act, 7 U.S.C. §§ 150aa-150jj (1976); Plant Quarantine Act, 7 U.S.C. §§ 151-167 (1976); Federal Meat Inspection Act, 21 U.S.C. §§ 601-695 (1976).

40. *Technical Analysis of the Technical Barriers to Trade Agreement*, 12 L. & POL'Y INT'L BUS. 179, 183 (1980).

standards in a fashion which discriminate between or against foreign trading partners. Specifically, article I provides that the treatment which is accorded to products imported from the territory of one state party shall also be accorded immediately and unconditionally to like products imported from the territory of all other states parties.[41] Article III, paragraph 4, goes even further and provides that products imported from the territory of any state party shall be accorded treatment no less favorable than that accorded to like domestic products.[42] Neither of these two provisions, however, addresses standards which, though not discriminating between or against foreign trading partners, actually have the effect of erecting barriers to international trade. In short, articles I and III of the GATT proscribe discriminatory standards but say nothing of nondiscriminatory standards which obstruct international trade.

The Standards Code,[43] effective January 1, 1980,[44] reiterates the obligations extant in the opening provisions of the GATT by stating that technical regulations, standards,[45] testing methods and procedures,[46] and certification systems shall accord products imported from the territory of a state party no less favorable treatment than that accorded to like products of domestic origin or like products imported from the territory of another state party.[47] Of much greater significance than this nondiscriminatory obligation, article 2.1 of the Code provides that states parties shall ensure that technical regulations, standards,[48] and certification systems[49] are not prepared or adopted "with a view to creating obstacles to international trade" or applied so as to create "unnecessary obstacles to international trade." In essence, unlike GATT, article 2.1 of the Standards Code proscribes the adoption of standards for the purpose of intentionally obstructing international trade as well as the application of standards which, though not adopted with such an intention in mind, have the effect of unnecessarily obstructing international trade. Since the term "unnecessary" is not defined, it would seem that whether a standard unnecessarily obstructs international trade turns upon an evaluation of factors such as the nature of the standard itself, the extent of the impact of the standard on international trade, the importance of the objective which the standard seeks to attain, and the availability of equally efficacious yet less restrictive alternative methods of accomplishing the same objective.[50]

In addition to the foregoing, the Code requires states parties, "[w]herever appropriate," to state "technical regulations and standards in

41. This is known as the most-favored-nation (MFN) obligation.
42. This is known as the national treatment obligation.
43. STANDARDS CODE, *supra* note 6.
44. *Id.* art. 15.5.
45. *Id.* art. 2.1.
46. *Id.* art. 5.1.
47. *Id.* art. 7.2.
48. *Id.* art. 2.1.
49. *Id.* art. 7.1.
50. *See* text accompanying notes 81 and 82 *infra*.

terms of performance rather that design or descriptive characteristics."[51] Further, states parties are required—except where inappropriate for reasons of national security, prevention of deceptive practices, or protection of human health or safety, animal or plant life or health, or the environment—to use relevant international standards as a basis for standards of central government bodies.[52] If relevant international standards do not exist and technical regulations or standards are being considered which may have a significant impact on trade of other states parties, then the state party interested in promulgating such regulations or standards is required to publish the proposal for comment, notify all states parties through the GATT Secretariat of the products to be covered, provide copies of the proposal to states parties upon request, and allow a reasonable time during which states parties may submit written comments on the proposal.[53] Article 7.3 makes the same rulemaking procedure applicable to certification systems.[54] Finally, the Code obligates each state party to accept, "whenever possible," the results of tests conducted by relevant entities located in other states parties,[55] and to establish an "enquiry point" for answering questions from entities located in other states parties concerning adopted or proposed technical regulations, standards, or certification.[56]

Unlike the Government Procurement Code, the provisions of the Standards Code apply to both industrial and agricultural products.[57] Since they are not explicitly limited, it would appear that the provisions of the Code govern mandatory as well as voluntary technical regulations, standards, and certifications systems.[58] The Code distinguishes between standards-related activities engaged in by central government bodies[59] and those engaged in by local[60] or nongovernmental bodies.[61] Specifically, while central government bodies are required to adhere to the obligations of the Code, local or nongovernmental bodies are not. However, central government bodies are obligated to take "such reasonable measures as may be available" to ensure that local and nongovernmental bodies abide by the terms of the Code.[62] If such efforts prove unsuccessful, it would appear that states parties adversely affected might be entitled to subject the state party in whose territory the local or nongovernmental body is located to international dispute resolution proceedings spelled out in the

51. STANDARDS CODE, *supra* note 6, art. 2.4.
52. *Id.* art. 2.2.
53. *Id.* art. 2.5.
54. *Id.* art. 7.3.
55. *Id.* art. 5.2.
56. *Id.* art. 10.1.
57. *Id.* art. 1.3.
58. SENATE FINANCE COMM. REPORT, *supra* note 23, at 149.
59. STANDARDS CODE, *supra* note 6, Annex I, art. 6.
60. *Id.* Annex I, art. 7.
61. *Id.* Annex I, art. 8.
62. *Id.* art. 3.

Code and, if appropriate, legitimate retaliation.[63]

Articles 13 and 14 establish the procedures for resolving disputes arising under the provisions of the Code. Basically, these articles provide for the creation of a Committee on Technical Barriers to Trade composed of representatives of each state party to the Code.[64] Disputes incapable of being resolved by the states concerned[65] can be referred to the Committee, which shall meet within thirty days of a request received from any party to the dispute.[66] Investigations of the matter in dispute shall proceed expeditiously and in the case of perishable (for example, agricultural) products "in the most expeditious manner possible with a view to facilitating a mutually satisfactory solution within three months of the request for the Committee investigation."[67] The Committee will make "every effort" to resolve within a twelve month period disputes affecting products with a definite crop cycle of twelve months.[68] The Committee may enforce its decisions concerning matters in dispute by authorizing the suspension of obligations established by the Code with respect to any party.[69]

Article 14.25[70] provides that any state party who "considers that obligations under this Agreement are being circumvented" by the drafting of standards-related requirements in terms of processes and production methods (PPM), rather than product characteristics, is entitled to invoke the dispute settlement procedures set out in articles 13 and 14. In essence, this provision would seem to permit a party to a dispute to request the Committee on Technical Barriers to Trade to exercise jurisdiction over the matter whenever the party itself "considers" that circumvention is taking place. The jurisdictional standard would appear to be purely subjective and based totally on the perception of the aggrieved party. Once the Committee has assumed jurisdiction, it would seem that if a

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63. The language of article 5.1 of the Code somewhat confuses this point, however. Since it appears only to fix an obligation on central government bodies (states parties) to avoid violations with respect to testing methods and procedures, it might be argued that violations committed by local or nongovernmental bodies are not actionable under the Code. On the other hand, to the extent that article 2.1 states the controlling principle applicable to all sorts of standards-related activities, it would appear to make violations of article 5.1 by local or nongovernmental bodies actionable.

64. STANDARDS CODE, *supra* note 6, art. 13.1.

65. *Id.* art. 14.2.

66. *Id.* art. 14.4.

67. *Id.* art. 14.6.

68. *Id.* art. 14.7.

69. *Id.* art. 14.21.

70. In view of the fact that it was not definitively settled until December of 1978 that standards for agricultural products would be covered by the Code, most of the Code's provisions are drafted in language reflecting a preoccupation with industrial products. Given the fact that many of the standards applicable to agricultural products are drafted in terms of processes and production methods (PPM), rather than product characteristics as is the case with industrial goods, there is some question as to whether the Code will effectively restrain the use of standards as an NTB to international trade in agricultural commodities. It would appear, however, that article 14.25 should go a long way toward accomplishing such a result.

circumvention is in fact occurring, then it could, where appropriate, authorize the retaliatory suspension of obligations under the Code.[71]

The provisions of the Standards Code are implemented domestically through Title IV of the TAA. Specifically, section 402 of the TAA states that federal agencies are prohibited from engaging in standards-related activities that create unnecessary obstacles to the foreign commerce of the United States. No comparable prohibition exists with respect to standards-related activities of state agencies and private persons.[72] Standards-related activities which create unnecessary obstacles include: tests or test methods subjecting imported products to treatment less favorable than that accorded to like domestic or imported products;[73] domestic standards which fail to take into consideration relevant international standards;[74] domestic standards based on design rather than performance criteria;[75] and certification systems which fail to give foreign suppliers access on the same basis as suppliers of like domestic or imported products.[76]

In addition to these obstacles, which are considered *per se* unnecessary, it would appear that there are other standards-related activities which might well be considered violative of Title IV. Specifically, section 401 intimates that any standards-related activity having a great enough impact on the foreign commerce of the United States, which does not have as its demonstrable purpose the attainment of a legitimate domestic objective[77] or which operates to exclude imported products that fully meet such an objective, may also be viewed as creating an unnecessary obstacle.[78] The explicit language of section 401 indicates that legitimate domestic objectives include "the protection of legitimate health or safety, essential security, environmental, or consumer interest. . . ."[79] Standards-related activities unquestionably designed to accomplish some legitimate domestic objective may still be found to create an unnecessary obstacle to foreign commerce if they operate to exclude imported products which fully meet the legitimate objective.[80]

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71. This would seem to result from the broad language in article 14.2, which speaks of "any benefit" under the Code being "nullified or impaired" and the fact that article 14.25 invokes the dispute settlement procedures set out in the Code. The retaliatory suspension of obligations under the Code is provided for in article 14.21 which authorizes the Committee to suspend "the application of obligations including those in Articles 5 to 9, in order to restore mutual economic advantage and balance of rights and obligations."

72. Trade Agreements Act, Pub. L. No. 96-39, § 403, 93 Stat. 243 (1979) (to be codified in 19 U.S.C. § 2533).

73. *Id.* § 402(1), 93 Stat. 242 (to be codified in 19 U.S.C. § 2532(1)).

74. *Id.* § 402(2), 93 Stat. 242 (to be codified in 19 U.S.C. § 2532(2)).

75. *Id.* § 402(3), 93 Stat. 243 (to be codified in 19 U.S.C. § 2532(3)).

76. *Id.* § 402(4), 93 Stat. 243 (to be codified in 19 U.S.C. § 2532(4)).

77. SENATE FINANCE COMM. REPORT, *supra* note 23, at 152.

78. Trade Agreements Act, Pub. L. No. 96-39, § 40, 93 Stat. 242 (to be codified in 19 U.S.C. § 2531).

79. *Id.*

80. *Id.*

The approach intimated in section 401 comports with the multi-factor-oriented configurative analysis suggested for determining whether, under article 2.1 of the Code, some standards-related activity creates an unnecessary obstacle to international trade.[81] More precisely, it will be recalled that since the Code does not define "unnecessary," it was suggested earlier that in order to determine whether a standards-related activity creates an unnecessary obstacle to international trade, one should look at a host of factors associated with the activity itself and its impact on international trade. Standards-related activities are to be designed to accomplish legitimate domestic objectives, such as *legitimate* health and safety, essential security, environmental or consumer interests, and yet to avoid excluding products which fully meet any such objective. Thus it appears that the Congress recognizes that many factors considered during the course of evaluating standards-related activities under article 2.1 of the Code should also receive consideration when evaluating standards-related activities undertaken pursuant to U.S. municipal law. The value of such an approach would seem to be in the liberalization of international trade. The requirement that a health and safety standards-related activity be designed to protect "legitimate" health and safety interests would indicate that standards establishing unreasonably high health and safety levels might create unnecessary obstacles in violation of section 402 if the impact on foreign commerce of the United States is great enough.[82] Similarly, a standards-related activity which has an indiscriminate impact on international trade, resulting in the exclusion of wholesome products, might also be of questionable validity. In each case it would appear that the concern is to strike a balance between the protection of legitimate domestic interests and the liberalization of international trade.

Section 414 of the TAA requires the Secretary of Commerce to establish a standards information center within the Department of Commerce.[83] This assures compliance with article 10 of the Standards Code which requires that each state party establish an "enquiry point" for the collection and dissemination of information concerning technical regulations, standards, or certification systems which have been adopted or proposed within the territory of the state party. Further, with the standards information center serving as the national collection and dissemination facility for standards-related information, whether public or private, domestic or foreign, or international, regional, or local, entities located in the United States should have ready access to materials which cast light on all types of standards-related activities affecting the foreign commerce of the United States.[84]

If a federal agency engages in some standards-related activity which

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81. *See* text accompanying notes 48-50 *supra*.

82. This, of course, assumes that there is some impact on international trade.

83. Trade Agreements Act, Pub. L. No. 96-39, § 414(a), 93 Stat. 245 (1979) (to be codified in 19 U.S.C. § 2544).

84. *Id.* § 414(b), 93 Stat. 245 (to be codified in 19 U.S.C. § 2544(b)).

creates an unnecessary obstacle to international commerce or violates some provision of the Standards Code, then any state party to the Code may make a "representation" to the Special Representative for Trade Negotiations so long as it can provide some reasonable indication that the standards-related activity is having a significant trade effect.[85] Since section 421 speaks only of standards-related activities "engaged in within the United States," it would appear that representations could also be made with respect to activities by state agencies or private persons. Title IV does not provide for the receipt of representations from domestic entities interested in assuring that federal agencies comply with the TAA's proscription of standards-related activities which create unnecessary obstacles to foreign commerce.[86] Alleged violations of the Standards Code by other states parties which impact U.S. commerce may be remedied in two distinct fashions. First, in accordance with articles 13 and 14 of the Code, the United States may proceed through international channels, including the Committee on Technical Barriers to Trade.[87] Second, any interested domestic person may petition the Special Representative for Trade Negotiations[88] to request the President to take whatever actions are necessary under section 301 of the Trade Act of 1974[89] to enforce the rights of the United States under the Code.[90] These enforcement provisions should go a long way toward obtaining the benefits of efforts to reduce or eliminate standards-related activities as an effective NTB.

C. *The Subsidies/Countervailing Duties (CVD) Code*

The granting of subsidies has been described as one of the most pernicious practices in international trade.[91] Since subsidies are frequently used by governments to support the domestic agricultural community, it is only fitting that some discussion in this article be devoted to the modifications in the rules governing the use of subsidies and the circumstances under which countervailing action is permissible.

The GATT does not proscribe the utilization of subsidies in all instances. Rather, it simply provides guidelines which must be followed if subsidies are to be consonant with accepted international principles. Specifically, article XVI states that export subsidies are permitted on primary products—including agricultural commodities—so long as they do not result in the subsidizing state obtaining more than an equitable share of the world export trade in such product, with account being taken of trade during a previous representative period.[92] Export subsidies on non-

85. *Id.* § 422, 93 Stat. 247 (to be codified in 19 U.S.C. § 2552).

86. *Id.* § 421, 93 Stat. 247 (to be codified in 19 U.S.C. § 2551).

87. *See* text accompanying notes 64-69 *supra.*

88. Trade Agreements Act, Pub. L. No. 96-39, § 901, 93 Stat. 296 (1979) (amending 19 U.S.C. § 2412 (1976)).

89. *Id.* § 901, 93 Stat. 295 (amending 19 U.S.C. § 2411 (1976)).

90. *Id.* § 424(b), 93 Stat. 248 (to be codified in 19 U.S.C. 2554(b)).

91. SENATE FINANCE COMM. REPORT, *supra* note 23, at 37.

92. General Agreement on Tariffs and Trade, *supra* note 10, art. XVI, para. 3, *as amended by* Protocol Amending The Preamble and Parts II and III of the General Agree-

primary products are permitted so long as they do not result in the subsidized product being sold in the importing country at a price below the domestic market price of like domestic products.[93] Article XVI also provides that states parties granting any form of subsidy which operates to increase exports or decrease imports must notify other states parties of the nature and extent of the subsidy.[94] If such subsidy causes or threatens to cause "serious prejudice" to the interests of another state party, then the subsidizing state must, upon request, consult with the affected state with a view to limiting the subsidization.[95]

The Subsidies/CVD Code, effective January 1, 1980, and applicable only between states parties, changes the GATT rules on subsidies in three pertinent respects. First, article 9 of the Code specifically prohibits states parties from granting export subsidies on non-primary products.[96] The prohibition no longer turns on whether subsidization results in the product being sold at a price below the domestic market price of like domestic products. Second, while export subsidies on primary products continue to be permitted, they are compatible with the obligations of article 10 of the Code only so long as they neither result in the subsidizing state obtaining more than an equitable share of the world export trade in such product,[97] or the subsidized product being sold at prices materially below those of other suppliers to the same market.[98] The prohibition of subsidies resulting in the subsidized product being sold at prices materially below those of other suppliers is new and should be subject to less dispute than the earlier GATT standard. Also new is a provision which attempts to define the phrases "equitable share of world export trade" and "previous representative period."[99] Third, article 12 provides that states parties granting any form of subsidy which causes "injury" to the domestic industry of another state party or "nullification or impairment of benefits" accruing to that state party under the GATT must, upon request, enter into consultations with the affected states as soon as possible so that they can achieve a mutually satisfactory solution.[100] Though article 12 also requires consultations whenever the subsidy causes "serious prejudice" to the interests of another state party, it would appear that the Code increases access to the kind of consultation mechanism initially set out in article XVI of the GATT. Violations of any of the obligations of the Code which are not satisfactorily resolved may result in the Committee of Signato-

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ment On Tariffs and Trade, Mar. 10, 1955, 8 U.S.T. 1767, T.I.A.S. No. 3930, 278 U.N.T.S. 168.

93. *Id.* art. XVI, para. 4.

94. General Agreement on Tariffs and Trade, *supra* note 10, art. XVI, para. 1.

95. *Id.*

96. SUBSIDIES/COUNTERVAILING DUTIES CODE, *supra* note 7, art. 9.

97. *Id.* art. 10(1).

98. *Id.* art. 10(3).

99. *Id.* art. 10(2).

100. *Id.* art. 12.

ries[101] making "recommendations to the parties as may be appropriate" and, if such recommendations are not followed, authorizing countermeasures as may be appropriate.[102]

Traditionally, whenever states have subsidized the export of products to make them more attractive to foreign purchasers, the country of importation has responded by imposing a CVD equal to the amount of the subsidy. Article VI of the GATT states the principles applicable to the imposition of such CVD's. In essence, article VI provides that a CVD may be imposed on an imported product only if it can be demonstrated that a subsidy is being bestowed on the manufacture, production, or exportation of the product and that such subsidization is causing or threatening to cause material injury to a domestic industry or materially retarding the establishment of such an industry.[103] Though it would seem that article VI establishes a relatively precise principle, in practice it has not served to promote a great deal of uniformity in the imposition of CVD's by the various states parties to the GATT.

The provisions of the Subsidies/CVD Code applicable to the imposition of CVD's on products imported from other states parties are designed to correct this deficiency. Specifically, notwithstanding the fact that states parties to the GATT may have had some perfectly legitimate reasons in the past for not complying with the terms of article VI when assessing CVD's,[104] the Code now makes it eminently clear that a CVD may be imposed on a product imported from another state party only after it has been demonstrated that the product is being subsidized and that this results in material injury to a domestic industry.[105] Further, articles 2 through 5 of the Code establish extensive procedural requirements incident to the imposition of CVD's and article 6 enumerates factors to be considered when attempting to determine whether a domestic industry is being materially injured. Article 6 states essentially that injury should be determined by examining the volume of imports and the effects of such on domestic prices of like products, as well as the consequent impact of such imports on domestic producers of like products. With particular respect to agricultural products, article 6(3) provides that when examining the impact on domestic producers, special consideration should be given to determining whether the economic conditions created by the subsidized imports have increased the burden on government support programs. The mere fact that producers of agricultural products are not experiencing a decline in output, sales, market share, or productivity does not alone indicate that imported agricultural commodities benefitting

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101. *Id.* art. 16.

102. *Id.* art. 13(4).

103. General Agreement on Tariffs and Trade, *supra* note 10, art. VI.

104. Under the Protocol of Provisional Application to the GATT, states parties to that agreement were permitted to continue to operate under antedating municipal laws inconsistent with the principles stated in GATT.

105. SUBSIDIES/COUNTERVAILING DUTIES CODE, *supra* note 7, art. 1.

from subsidies are not having any impact on the domestic industry. The absence of a decline in any of these areas may be attributable to increased government price support activity and such activity may be indicative of injury warranting imposition of a CVD. Article 4(1) of the Code, however, makes it clear that the imposition of a CVD on agricultural products, or any other type of imported item, is not mandatory.

The provisions of the Subsidies/CVD Code are implemented domestically by title I of the TAA, which adds a new title VII to the Tariff Act of 1930.[106] However, since there would be serious questions about the legislative jurisdiction, not to mention the efficacy and political propriety, of Congress enacting a statute designed to proscribe foreign entities from granting subsidies on products imported into the United States, title I of the TAA merely purports to establish when subsidies will warrant the imposition of a CVD and does not provide for the prohibition of subsidies granted by foreign entities.

Title I of the TAA,[107] apart from establishing extensive procedural requirements which must be followed whenever a CVD is to be imposed, provides for countervailing action only in those instances where an imported product is benefitting from a subsidy which is resulting in material injury or threat of material injury to a domestic industry producing like products.[108] The application of the standard enunciated in title I is limited to those products imported from countries which are states parties to the Code or which extend the benefits of the Code to products imported from the United States.[109] Products imported from the territory of other countries will not be accorded such treatment but will remain subject to CVD's imposed pursuant to section 303 of the Tariff Act of 1930.[110] In essence, this means that products imported from countries which are not states parties to the Code or do not extend the benefits of the Code to products imported from the United States will continue to be subject to CVD's without regard to whether subsidization is resulting in material injury or threat of material injury to a domestic industry.[111] This dichotomy between treatment accorded products imported from countries which adhere to the obligations of the Code and products imported from all other countries is consistent with the commitments of the United States under both the Subsidies/CVD Code and the GATT.[112]

In explication of the standard stated in title I of the TAA, section

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106. Trade Agreements Act, Pub. L. No. 96-39, § 101, 93 Stat. 150 (1979) (amending 19 U.S.C. §§ 1202-1654 (1976)).

107. *Id.* §§ 101-107, 93 Stat. 150-93 (to be codified in 19 U.S.C. §§ 1671-1677(g)).

108. *Id.* § 101, 93 Stat. 150 (to be codified in 19 U.S.C. § 1671).

109. *Id.*

110. *Id. See also* Tariff Act of 1930, § 303, 19 U.S.C. § 1303 (1976).

111. Trade Agreements Act, Pub. L. No. 96-39, § 101, 93 Stat. 151 (1979) (to be codified in 19 U.S.C. § 1671(c)). SENATE FINANCE COMM. REPORT, *supra* note 23, at 43-44.

112. Article 1 of the Code makes it clear that the provisions of the Code apply only between States Parties. Other states will continue to be treated under section 303 of the Tariff Act of 1930, 19 U.S.C. § 1303 (1976).

771 of the Tariff Act of 1930, as added by title I, defines several pertinent terms. Specifically, the term "subsidy" is defined as including those export subsidies described in Annex A of the Code and certain enumerated domestic subsidies paid or bestowed directly or indirectly on the manufacture, production, or export of any product.[113] The term "domestic industry" is defined as including domestic producers as a whole, producers whose collective output constitutes a major proportion of the total domestic production, and, in certain limited situations, regional producers.[114] Perhaps most importantly, however, the term "material injury" is defined as harm which is not inconsequential, immaterial, or unimportant.[115] In determining whether the requisites of this definition have been satisfied, section 771 directs that consideration be taken of the volume of imports, the effect of such imports on domestic prices of like products, and the impact of such imports on domestic producers.[116]

Of particular interest to this discussion, section 771 provides, consistent with article (3) of the Code, that when attempting to determine whether imports of subsidized agricultural products are causing material injury, consideration "shall" be given to whether there has been any increased burden on government income or price support programs.[117] As a corollary, section 771 states further that it "shall not" be determined that there is no material injury or threat of material injury to domestic producers of like agricultural products merely because the prevailing market price is at or above the minimum support price.[118] Both principles should prove significantly helpful in attempting to deal with the difficulties incident to efforts to determine whether producers of supported agricultural products are being injured by imported agricultural products.[119]

D. *The Antidumping Code*

Frequently, imported products are sold in the country of importation at prices below their fair value or home market price. When such sales cause or threaten to cause material injury to a domestic industry, or retard materially the establishment of such an industry, article VI of the GATT entitles the country of importation to assess a duty on such products equal to the difference between the fair value and the price at which the products are actually being sold.[120] This duty, known as a dumping duty, is designed to increase the price of the imported product to a more representative level thereby averting the economic dislocations associated with unfair price advantage.

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113. Trade Agreements Act, Pub. L. No. 96-39, § 101, 93 Stat. 177 (1979) (to be codified in 19 U.S.C. § 1677(5)).

114. *Id.* § 101, 93 Stat. 176 (to be codified in 19 U.S.C. § 1677(4)).

115. *Id.* § 101, 93 Stat. 178 (to be codified in 19 U.S.C. § 1677(7)).

116. *Id.*

117. *Id.* § 101, 93 Stat. 179 (to be codified in 19 U.S.C. § 1677(7)(D)(ii)).

118. *Id.* § 101, 93 Stat. 179 (to be codified in 19 U.S.C. § 1677(7)(D)(i)).

119. SENATE FINANCE COMM. REPORT, *supra* note 23, at 87-88.

120. General Agreement on Tariffs and Trade, *supra* note 10, art. VI.

The Antidumping Code, recently completed in Geneva,[121] reiterates the GATT standard for the imposition of dumping duties by stating that such duties may not be imposed unless the requisites of article VI of the GATT have been satisfied.[122] In addition, articles 3 and 4 of the Code go further than article VI of the GATT and attempt to suggest definitions for both material injury and domestic industry. These definitions are essentially identical to those used in the Subsidies/CVD Code. In one respect, however, the definition of material injury in article 3 differs from that in article 6 of the Subsidies/CVD Code. Specifically, it will be recalled that article 6(3) of the Subsidies/CVD Code states that whenever attempting to determine whether domestic producers of agricultural products have suffered material injury, consideration should be given to whether the importation of the subsidized agricultural products has increased the burden on government support programs. Article 3 of the Antidumping Code contains no reference to special factors deserving consideration when the dumped products are agricultural. It should be noted, however, that by stating that the definition of material injury does not list all the factors to be examined, the last sentence of article 3(3) would seem to indicate that the impact of dumping on government support programs may be considered in determining whether material injury exists.

The provisions of the Antidumping Code, effective January 1, 1980,[123] are implemented domestically by title VII of the Tariff Act of 1930, as added by title I of the TAA. As we have seen previously, title VII also implements the Subsidies/CVD Code. Section 731 of the Tariff Act of 1930 provides, consistent with the Antidumping Code, that imported products sold or likely to be sold at less than fair value—that is, normal value or home market price—are subject to dumping duties if such sales result in material injury or threat of material injury to a domestic industry or retard materially the establishment of such an industry.[124] In most respects this standard is identical to that used pursuant to section 701 when determining whether the imposition of a CVD is warranted. More precisely, both standards refer to the fact that the improper activity must result in or threaten to result in material injury to a domestic industry. For this very reason, the terms "material injury" and "domestic industry" as used in that portion of title VII dealing with the imposition of dumping duties have the same meaning as when used in that portion dealing with the imposition of CVD's.

One important consequence proceeds from the fact that the term "material injury" is given the same meaning under section 731 of the

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121. During the Kennedy Round of the MTN an Antidumping Code was formulated. Subsequently, Congress enacted municipal measures severely restricting the significance of that Code for the United States.

122. ANTIDUMPING CODE, *supra* note 8, art. 1.

123. *Id.* art. 16(4).

124. Trade Agreements Act, Pub. L. No. 96-39, § 101, 93 Stat. 162 (1979) (to be codified in 19 U.S.C. § 1673).

Tariff Act of 1930 as it is under section 701 dealing with CVD's. Section 731 states that whenever imported agricultural products are the concern, consideration "shall" be given to whether imports of such products have resulted in any increased burden on government income or price support programs. Thus it is made explicitly clear that even though article 3 of the Code does not require that consideration be taken of such concerns, section 731 does. This would seem to rectify the omission which was previously alluded to in the language of article 3 of the Code, thus eliminating questions that might arise over the discrepancy between material injury in the case of CVD's and material injury in the case of antidumping.

Apart from this, two other matters deserve consideration before moving to a discussion of the bilateral trade concessions granted by the United States during the course of the Tokyo Round of the MTN. First, it would appear that even though section 731 of the Tariff Act of 1930 uses the term "material"[125] to describe the type of injury requisite to the imposition of a dumping duty, Congress' expectation is that this should not increase the quantum of injury one is required to show over what was previously required under section 202 of the Antidumping Act of 1921.[126] That former provision did not contain the adjective "material" but was applied in a fashion equally as strict as section 731.[127] Second, the standard enunciated in article VI of the GATT and reaffirmed in the Antimping Code, unlike that pronounced in the Subsidies/CVD Code, applies to products imported from all countries, including those which are not states parties to the Code. It is uncertain exactly why this distinction exists. The two most probable reasons, however, are that section 731 is seen largely as a re-enactment of the basic standard in section 202 of the Antidumping Act—a standard of general applicability—and that the language in article 1 of the Antidumping Code might very well require such a result. In particular, article 1 of the Antidumping Code does not provide for application only between states parties. On the other hand, it is perfectly clear that the liberal treatment accorded by article 1 of the Subsidies/CVD Code is limited to states parties.

## III. BILATERAL TRADE CONCESSIONS

The bilateral trade concessions concerning agriculture granted by the United States during the recent round of trade negotiations concluded in Geneva are reflected in a host of agreements on meat, chocolate crumb, and cheese. While each agreement has indisputable importance to the parties affected, only the agreements on cheese merit more than passing reference in this brief survey.

### A. *Agreements on Meat*

Under the Meat Import Act of 1964,[128] and the voluntary restraint

125. *Id.* § 101, 93 Stat. 178 (to be codified in 19 U.S.C. § 1677(7)(A)).
126. 19 U.S.C. § 161 (1976).
127. SENATE FINANCE COMM. REPORT, *supra* note 23, at 87.
128. Meat Import Act, Pub. L. No. 88-482, 78 Stat. 594 (1964) (codified in 19 U.S.C.

agreements negotiated under section 204 of the Agricultural Act of 1956,[129] the United States has for years managed to limit the amount of foreign meat entering the country. In response to requests and concessions from Australia, New Zealand, and Canada during the recent trade negotiations, the United States entered into bilateral agreements affecting foreign meat importation.[130] These agreements do two things: increase the access level for all suppliers of foreign beef and reduce the duty on certain high quality foreign beef imported from Canada.[131] More precisely, the agreements with Australia and New Zealand commit the United States to a global access level of no less than 1.2 billion pounds of beef annually,[132] and the agreement with Canada provides that the United States will reduce the duty on high quality control cuts of beef from ten to four percent.[133]

B. *Agreements on Chocolate Crumb*

Chocolate crumb is basically chocolate containing up to approximately nine percent butterfat. Quotas have existed on chocolate crumb for some time, since imports might displace significant quantities of domestic butterfats, thus depressing the domestic price support programs.[134] The agreements negotiated in Geneva with Australia and New Zealand are designed to permit these countries to participate with Ireland, the United Kingdom, and the Netherlands in supplying chocolate crumb to the United States. Specifically, the agreement with Australia entitles it to supply 4.4 million pounds to the United States annually.[135] The agreement with New Zealand entitles it to supply 2.2 million pounds annually.[136] While the amount granted New Zealand is admittedly small, the fact that New Zealand is granted a specifically assigned quota share permits it to participate in country of origin adjustments made as a result of any of the other four countries being incapable of supplying their own quota share. Section 703[137] of the TAA implements the provisions of the two agreements on chocolate crumb.

C. *Agreements on Cheese*

Under section 22 of the Agricultural Adjustment Act of 1933,[138] the President is authorized to issue proclamations limiting the amount of any

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§ 1202, sched. 1, pt. 2 (1976)).

129. 7 U.S.C. § 1854 (1976).

130. MTN AGREEMENTS, *supra* note 4, at 460, 510.

131. SENATE FINANCE COMM. REPORT, *supra* note 23, at 192-93.

132. Trade Agreements Act, Pub. L. No. 96-39, § 704, 93 Stat. 273 (1979) (to be codified in 19 U.S.C. § 1202 note).

133. *Id.* § 506, 93 Stat. 252 (to be codified in 19 U.S.C. § 1202, sched. 1, pt. 2).

134. HOUSE COMM. ON WAYS AND MEANS, TRADE AGREEMENTS ACT OF 1979, H.R. REP. No. 317, 96th Cong., 1st Sess. 141 (1979) [hereinafter cited as HOUSE COMM. REPORT].

135. *Id.* at 142.

136. *Id.*

137. Trade Agreements Act, Pub. L. No. 96-39, § 703, 93 Stat. 272 (1979) (to be codified in 19 U.S.C. § 1202 app. note).

138. 7 U.S.C. § 624 (1976).

agricultural product imported into the United States whenever the U.S. International Trade Commission (ITC) determines that the importation of any such product is interfering with a domestic price support program. Modifications increasing or decreasing the limitation so proclaimed may be made following similar consideration by the ITC.

Pursuant to section 22, the United States has long maintained a quota limiting the amount of imported cheese which may enter the country annually. However, since the quota on imported cheese essentially was designed to protect domestic dairy products benefitting from price support programs, the United States has largely refrained from limiting the importation of cheese not jeopardizing such programs. This is perhaps best indicated by the fact that the quota on imported cheese existing prior to the implementation of the results of the Tokyo Round did not cover certain foreign specialty cheeses (goat's milk and sheep's milk cheese, and certain soft-ripened cow's milk cheese) or imported cheese priced higher than the support price for domestic cheddar cheese ($1.16/lb.) plus seven cents per pound—a figure known as the "price-break."[139] In 1978 only about fifty percent of the roughly 100,000 metric tons of imported cheese entering the United States was subject to the quota.[140]

During the recent trade negotiations the United States concluded bilateral agreements on cheese with Austria, Norway, Finland, Israel, New Zealand, Canada, Switzerland, Portugal, Sweden, Iceland, Australia, Argentina, and the EEC.[141] Each of these agreements commits the United States to permit the importation of a specified amount of cheese annually. The sum of the amounts stated in each of the agreements represents approximately all the quota and above price-break cheese imported during 1978, plus a small increase conceded by the United States during the course of the negotiations.[142] In addition, each of the agreements, with the exception of those with Australia, New Zealand, Israel, and Argentina,[143] commits the United States to refrain from imposing CVD's on any of the cheese supplied in satisfaction of the amounts permitted under the agreements. In return for these commitments the United States received written assurances from the countries involved that they would not grant subsidies on such cheese in a manner which would result in the undercutting of the domestic wholesale price of like domestic cheese.[144]

The commitments to permit the importation of a specified amount of cheese annually are implemented domestically by section 701 of the TAA.[145] Section 701 directs the President to issue a proclamation, to be

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139. SENATE FINANCE COMM. REPORT, *supra* note 23, at 193-94.

140. HOUSE COMM. REPORT, *supra* note 134, at 135.

141. *Id.*

142. *Id.*

143. SENATE FINANCE COMM. REPORT, *supra* note 23, at 191.

144. *See, e.g.*, the agreement with the EEC in MTN AGREEMENTS, *supra* note 4, at 417, paras. 3, 4.

145. Trade Agreements Act, Pub. L. No. 96-39, § 701, 93 Stat. 268 (1979) (to be codified

considered as issued under section 22, limiting the amount of quota cheese which may enter the United States annually to an amount of not more than 111,000 metric tons. The need for such a Congressional directive existed for two distinct reasons. First, the quota level under U.S. law in 1978 and 1979 was considerably lower than the quota level needed in order to permit the United States to comply fully with the thirteen bilateral agreements on cheese concluded in Geneva. And second, it was unclear whether the time consuming consultations with the ITC required by section 22 would produce the kind of result necessary to authorize the President to issue an amending proclamation increasing the quota level above that then existing. In order to bring the quota level under U.S. law into line with the international commitments of the United States, avert potential problems accompanying consultations with the ITC, and at the same time assure the domestic dairy industry of the continuing viability of section 22, Congress simply required the issuance of a proclamation establishing a quota roughly equal to the sum of the amounts specified in all of the bilateral agreements.[146] Presumably, interest in protecting the price support programs received some consideration by Congress prior to its approval and implementation of the bilateral agreements entered into by the executive branch.

Apart from altering the method by which quotas on cheese have traditionally been established, section 701 changes the cheese quota system in another significant respect. Since 1968 imported cheese priced higher than the price-break has been permitted to enter the United States free of quota. By directing the issuance of a proclamation limiting the amount of quota cheese which may enter the United States annually and then defining the term "quota cheese" without reference to any support price figure,[147] section 701 effectively eliminates the price-break. As a result, rather than having a system comprised of quota cheese, above price-break cheese, and non-quota cheese, section 701 creates a system comprised of only quota cheese and non-quota cheese. This change, which will bring about eighty-five percent of all cheese imported into the U.S. within the quota system, represents concern with projected increases in importations of above price-break cheese. The only cheese now entitled to enter the United States free of quota will be the specialty cheese.[148]

The commitments of the United States to refrain from imposing CVD's on quota cheese imported from countries which have obligated themselves not to undercut the domestic wholesale price of like domestic

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in 19 U.S.C. § 1202 note).

146. If one looks closely at figures, it is apparent that only approximately 109,000 of the 111,000 metric tons authorized by Congress to be allocated had, as of August 1, 1980, actually been allocated.

147. Trade Agreements Act, Pub. L. No. 96-39, § 701(c), 93 Stat. 269 (1979) (to be codified in 19 U.S.C. § 1202 note).

148. SENATE FINANCE COMM. REPORT, *supra* note 23, at 194-95.

cheese are implemented by section 702(f) of the TAA.[149] In view of the fact that section 702(f) applies only to quota cheese imported from countries which have agreed not to engage in price-undercutting, nothing in the TAA would seem to prohibit the imposition of CVD's on items of non-quota cheese or items of quota cheese imported from countries, such as Australia, New Zealand, Israel, and Argentina, which have not obligated themselves to avoid price undercutting. However, before CVD's may be imposed in such cases, it must at least be demonstrated that the imported cheese is benefitting from a subsidy. Whether the subsidy must also cause or threaten to cause material injury to the domestic industry will depend upon whether section 303 of the Tariff Act of 1930 or section 701 of the Tariff Act of 1930, as added by title I of the TAA, applies.

The commitment to refrain from imposing CVD's on quota cheese imported from countries agreeing not to engage in price undercutting does not leave the domestic dairy industry subject to foreign depredation. Subsections (b) through (e) of section 702 provide the President authority to penalize transgressions of the international obligations to avoid sales undercutting the domestic wholesale price of like domestic cheese. Specifically, these subsections provide that the President may impose fees or quantitative limitations on subsidized quota cheese imported into the United States whenever such cheese is being offered for sale at a duty-paid wholesale price below the domestic wholesale market price of similar domestic cheese. Fees imposed pursuant to this authority are clearly distinct from CVD's in that they do not exceed what is necessary to eliminate the price undercutting. Furthermore, it would appear that they are consonant with the bilateral agreements, since the bilaterals do not prohibit the United States from penalizing violations of the international obligations to avoid price undercutting.

## IV. INTERNATIONAL COMMODITY AGREEMENTS

Two international commodity agreements, both effective January 1, 1980, deserve passing consideration in concluding this brief survey of the results of the Tokyo Round of the MTN which affect international trade in agricultural commodities. These agreements are the Arrangement Regarding Bovine Meat[150] and the International Dairy Arrangement.[151] In general, both agreements are designed primarily to establish an informational and consultative network. Attached to the International Dairy Arrangement, however, are three protocols containing substantive economic provisions.

### A. *Arrangement Regarding Bovine Meat (ARBM)*

The purpose of the ARBM, which covers trade in live bovine animals, as well as fresh, chilled, frozen, salted, dried, smoked, and prepared

149. Trade Agreements Act, Pub. L. No. 96-39, § 702, 93 Stat. 269 (1979) (to be codified in 19 U.S.C. § 1202 note).

150. MTN/ME/8, *also in* MTN AGREEMENTS, *supra* note 4, at 585.

151. MTN/DP/8, *also in* MTN AGREEMENTS, *supra* note 4, at 339.

or preserved meat and edible offals of bovine animals,[152] is to facilitate the expansion, liberalization, and stability of the international meat and livestock market.[153] This purpose is to be accomplished by assisting in the progressive dismantling of obstacles and restrictions to world trade in bovine meat and live animals.[154]

The fundamental instrument established by the ARBM to satisfy its stated purpose is the International Meat Council.[155] The Council is to be comprised of representatives from all states parties to the agreement and shall meet at least twice each year or at any other time requested by its chairman upon his own initiative or following the urging of a state party.[156] If a state party urges the chairman to call a meeting of the Council to consider a matter affecting the ARBM, the Council shall meet within fifteen days of such request.[157]

Article III of the ARBM provides that states parties are to transmit regularly to the Council information which will permit the Council to monitor and access the overall situation of the world market for meat.[158] Such information shall include data on the past performance and current situation with respect to meat, and an assessment of the outlook regarding meat production, consumption, prices, stocks, and trade.[159] States parties are also required to provide the Council with information concerning domestic policies and trade measures in the bovine sector.[160] Based on such information the Council shall evaluate the world supply and demand situation and outlook.[161] If such evaluation indicates the existence of a "serious imbalance" or threat thereof in the international meat market, then the Council will proceed by "consensus"[162] to identify possible solutions to remedy the situation.[163] These possible solutions are merely for the "consideration" of the states parties to the ARBM and need not be adopted or implemented.[164]

B. *International Dairy Arrangement (IDA)*

The IDA, which covers trade in milk and cream, butter, cheese and curd, as well as casein,[165] is designed to promote the expansion and liberalization of world trade in dairy products.[166] In order to attain this objec-

152. Arrangement Regarding Bovine Meat, *supra* note 150, art. II.
153. *Id.* art. I.
154. *Id.*
155. *Id.* art. V(1).
156. *Id.* art. V(2).
157. *Id.* art. IV(6).
158. *Id.* art. III(1).
159. *Id.* art. III(3).
160. *Id.*
161. *Id.* art. IV(1)(a).
162. *Id.* art. V(3) (indicating that "consensus" means unanimity).
163. *Id.* art. IV(2).
164. HOUSE COMM. REPORT, *supra* note 134, at 150.
165. International Dairy Arrangement, *supra* note 151, art. II.
166. *Id.* art I.

tive, the IDA establishes an International Dairy Products Council comprised of representatives from all states parties,[167] vests the Council with responsibilities and powers virtually identical to those assigned by the ARBM to the International Meat Council,[168] and obligates states parties to the IDA to adhere to the provisions of three protocols attached thereto.[169] The Protocols Regarding Certain Milk Powders, Milk Fat, and Certain Cheeses enunciate minimum price levels for sales to commercial markets.

Specifically, the Protocol Regarding Certain Milk Powders sets prices of $425, $725, and $425 per metric ton for skimmed, whole, and buttermilk powders respectively.[170] The price levels per metric ton established by the Protocol Regarding Milk Fat are $1100 for anhydrous milk fat and $925 for butter.[171] The price stated in the Protocol Regarding Certain Cheeses is $800 per metric ton.[172] The minimum price levels provided for in the three protocols do not apply to sales made to non-commercial markets.[173] Further, each of the protocols provides that the price levels stated therein are subject to annual review and adjustment[174] by one of the three appropriate committees set up by the Council under the authority of article VII(2) of the IDA to assure compliance with and implementation of the provisions of each of the various protocols.

## V. CONCLUSION

Though it is still far too early to assess the real impact of the results of the Tokyo Round on United States international agricultural trade, it seems safe to posit one obervation. Unlike previous rounds of trade negotiations conducted under the auspices of the GATT, the round concluded in Geneva in April of 1979 makes an attempt to deal comprehensively with the issues which have plagued U.S. international agricultural trade during the post-World War II era. Most of these issues have developed out of the use of various NTB's and the absence of an effective informational and consultative network between trading partners. The four multilateral codes of conduct and two international commodity agreements discussed here should contribute substantially to the resolution of these issues and the promotion of agricultural trade in general.

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167. *Id.* art. VII.
168. *Id.* art. V.
169. *Id.* art. VI.
170. *Id.* Annex I, art. 3(2)(b).
171. *Id.* Annex II, art. 3(2)(b).
172. *Id.* Annex III, art. 3(2)(b).
173. HOUSE COMM. REPORT, *supra* note 134, at 149.
174. International Dairy Arrangement, *supra* note 151, Annex I, art. 3(3)(b); *id.*, Annex II, art. 3(3)(b); *id.*, Annex III, art. 3(3)(b).

# STUDENT COMMENT

## Peacekeeping Aspects of the Egyptian-Israeli Peace Treaty and Consequences for United Nations Peacekeeping

RICHARD W. NELSON

## I. INTRODUCTION

On 26 March 1979, in Washington D.C., President Mohamed Anwar El-Sadat and Prime Minister Menachem Begin signed the Treaty of Peace Between the Arab Republic of Egypt and the State of Israel.[1] United States President Jimmy Carter signed the Treaty as its witness. The Treaty came into force, in accordance with its terms, on 25 April 1979.[2]

This historic Treaty constitutes a "major step forward in the seemingly endless search for a resolution of the Arab-Israeli conflict."[3] This Comment focuses on the Treaty's peacekeeping[4] arrangements for the Sinai Peninsula, which raise issues relating both to United Nations peacekeeping forces and observers and to non-U.N. multinational peacekeeping arrangements. The discussion will begin with an overview of the Treaty's provisions, including its prescriptions for permanent security arrangements in the Sinai. Implementation of the peacekeeping provisions will then be addressed in their three phases: Israel's interim withdrawals, during the course of which the United Nations force in the Sinai was disbanded; the period prior to Israel's scheduled final withdrawal from the Sinai in 1982, when the concerned parties fashioned their response to the refusal of the U.N. Security Council to act in accordance with their request; and the period following Israel's final withdrawal, at which time President Carter's pledge concerning an "alternative multinational

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1. Hereinafter referred to as "the Treaty." For text, *see* EGYPTIAN-ISRAELI PEACE TREATY (1979) (U.S. Dep't of State, Selected Docs. No. 11, Pub. No. 8976); 18 INT'L LEGAL MAT. 362 (1979). Accompanying the Treaty were three annexes, an appendix, agreed minutes, and six letters. Also, the United States exchanged Memoranda of Agreement with Israel. These materials are *reprinted in Middle East Peace Package: Hearings on S. 1007 Before the Sen. Comm. on Foreign Relations*, 96th Cong., 1st Sess. 71-184 app. (1979).

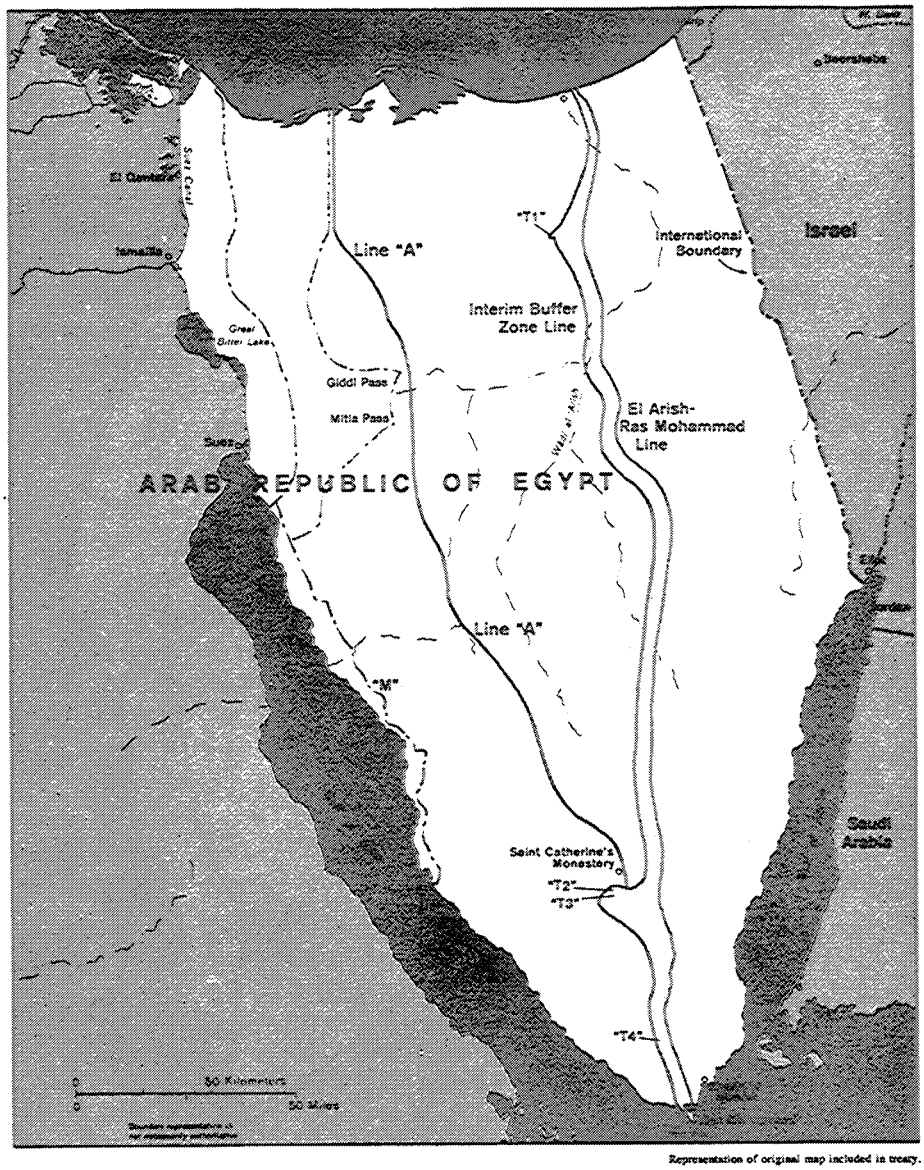
2. Treaty art. IX, para. 1. The exchange of documents of ratification took place at Umm Khisheib, in the Sinai. N.Y. Times, Apr. 26, 1979, at 8, col. 3 (city ed.; all citations *infra* to The New York Times are to the city edition).

3. Murphy, *To Bring to an End the State of War: The Egyptian-Israeli Peace Treaty*, 12 VAND. J. TRANSNAT'L L. 897, 941 (1979). Professor Murphy's article offers an excellent evaluation of the Treaty, as well as a survey of the entire process leading up to its conclusion and of the future Middle East agenda for peace. He acknowledges the difficulties facing the concerned parties. Another scholar, Professor Bassiouni, has concluded, in view of the responses of Egypt, Israel, and the United States to the Western European initiative to recognize the Palestine Liberation Organization as the sole legitimate representative of the Palestinian people, that "[t]his signifies the end of the Camp David Peace Process which has now served its historic usefulness." Bassiouni, *An Analysis of Egyptian Peace Policy Toward Israel: From Resolution 242 (1967) to the 1979 Peace Treaty*, 12 CASE W. RES. J. INT'L L. 3, 26 (1980).

4. On the use of the term "peacekeeping," *see* note 69 *infra*.

**The Situation During the Interim Period Prior to Final Withdrawal (January 1980 to April 1982)**

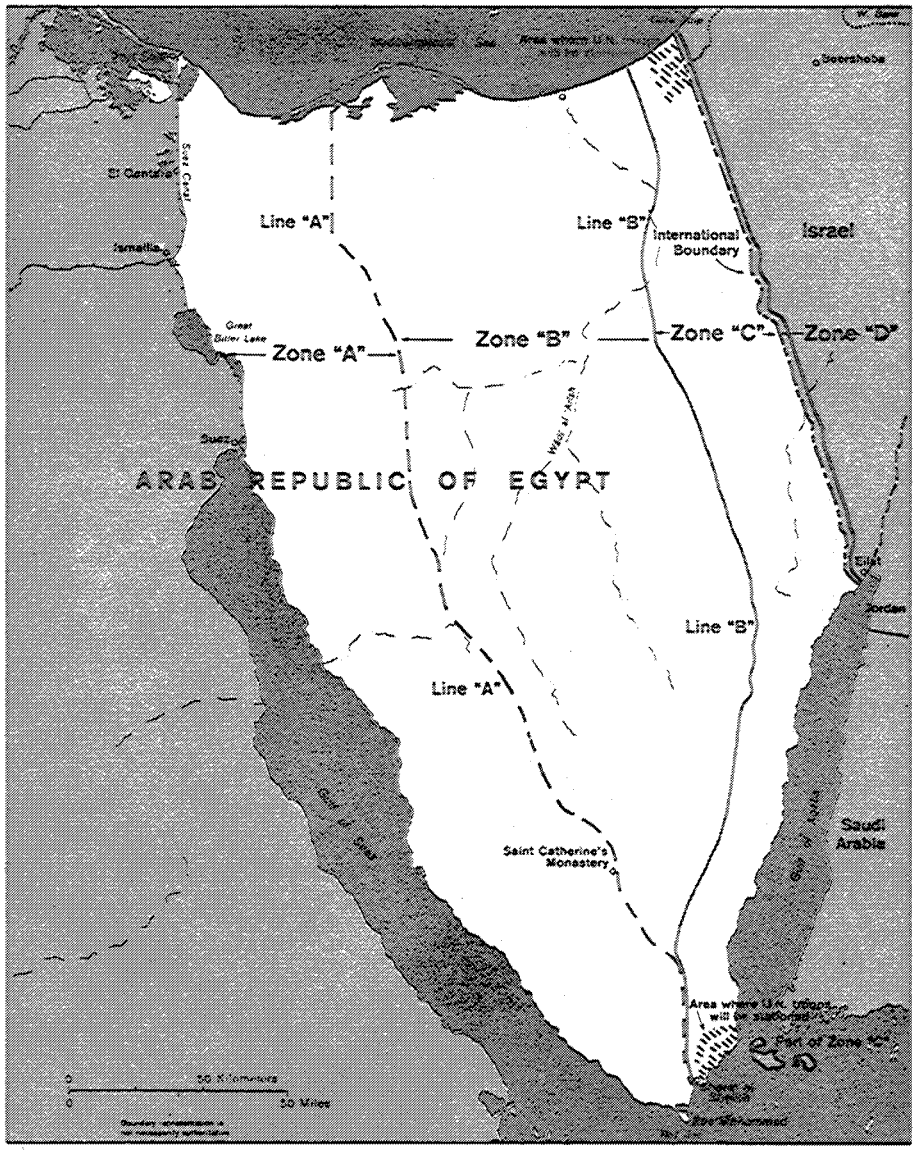
**MAP 1**




Representation of original map included in treaty.

**Permanent Arrangements in the Sinai (from April 1982)**

**MAP 2**




Representation of original map included in treaty.

Source: The Egyptian-Israeli Peace Treaty (1979) (U.S. Dep't of State, Selected Docs. No. 11, Pub. No. 8976).

force"[5] may come into play. Conceivable courses of events during this final, indeterminate period will then be explored, including the possibility of a United States-sponsored peacekeeping force. The effects of the dissolution of the United Nations Sinai force on U.N. peacekeeping efforts will then be considered in the course of general comments, in light of the Treaty and its aftermath, on the prospects for U.N. peacekeeping.

## II. OVERVIEW OF THE TREATY'S PROVISIONS[6]

### A. *Comprehensive Provisions*

#### 1. *Peaceful Relations*

The Treaty terminated the state of war existing between Egypt and Israel since 15 May 1948.[7] The parties agreed to apply between them the provisions of the United Nations Charter and the principles of international law governing international relations among states in times of peace.[8] They agreed, in particular, to recognize and respect each other's sovereignty, territorial integrity, and political independence, and to respect each other's right to live in peace within their recognized boundaries.[9] They also agreed to refrain from the direct or indirect threat or use of force against each other, and to peaceably settle all disputes arising out of the application or interpretation of the Treaty by negotiation or, failing that, by conciliation or arbitration.[10] A claims commission was to be

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5. *See* text, section II(B)(4) *infra*.

6. The Treaty did not deal at length with the Middle East conflict as a whole; neither will this Comment. Rather, it "postponed the confrontation." Abba Eban (paraphrased), *Camp David—The Unfinished Business*, 57 FOREIGN AFF. 343 (1978-79). *See* Murphy, *supra* note 3, for an analysis of the Treaty's place in the Middle East peace process. Issues concerning the status of the Palestinian people, and the situation in the West Bank, the Gaza Strip, and Jerusalem, were addressed in the Preamble and in the letters attached to the Treaty between President Sadat, Prime Minister Begin, and President Carter. The parties recognized the need to create a first step toward a comprehensive peace based on United Nations Security Council Resolution 242, 22 U.N. SCOR, Supp. (Res. & Dec.) 8-9, U.N. Doc. S/INF/22/Rev.2 (1967); on Security Council Resolution 338, 28 U.N. SCOR, Supp. (Res. & Dec.) 10, U.N. Doc. S/INF/29 (1973); and on the Camp David Agreements. The two documents which together constitute the Camp David Agreements are: 1) A Framework for Peace in the Middle East, *agreed at* Camp David, Sept. 17, 1978 [hereinafter cited as Camp David Framework for Peace], and 2) Framework for the Conclusion of a Treaty Between Egypt and Israel, *agreed at* Camp David, Sept. 17, 1978 [hereinafter cited as Camp David Conclusion of Treaty]. For texts, *see* THE CAMP DAVID SUMMIT (1978) (U.S. Dep't of State, Pub. No. 8954), *reprinted in* 17 INT'L LEGAL MAT. 1463 (1978). By the Camp David Agreements, the parties initiated negotiations designed to lead to an agreement defining the powers and responsibilities of a "self-governing authority (administrative council)" in the West Bank and Gaza. Camp David, Framework for Peace, *supra*, sections A.1(b)-(c). For recent opposing studies on the Camp David Agreements, *see* D. ELAZAR, THE CAMP DAVID FRAMEWORK FOR PEACE: A SHIFT TOWARD SHARED RULE (Am. Ent. Inst. Stud. Foreign Pol'y, No. 236, 1979); CAMP DAVID: A NEW BALFOUR DECLARATION (A. Arab-Am. U. Grads, Spec. Rep. No. 3, F. Zeadey ed. 1979).

7. Treaty art. I, para. 1.

8. Treaty art. III, para. 1.

9. Treaty art. III, para. 1(a)-(b).

10. Treaty art. III, para. 1(c) (these provisions reflect those embodied in U.N. CHARTER art. 2, paras. 3 & 4), and art. VII, paras. 1-2 (reflecting U.N. CHARTER art. 33, para. 1).

established for the settlement of all financial claims.[11]

The parties agreed to fulfill in good faith the obligations imposed by the Treaty, without regard to the action or inaction of the other party, and independently of any other instrument.[12] They agreed not to enter into any obligation in conflict with the Treaty,[13] and specified that in the event of a conflict between an obligation under the Treaty and any other obligation, the former would be binding and implemented.[14]

Each party agreed to ensure that acts or threats of belligerency, hostility, or violence directed against the population or property of the other party would not originate in its territory.[15] The parties also agreed that upon completion of Israel's interim withdrawal from the Sinai,[16] they would establish normal and friendly relations.[17] Those relations were to include full recognition, diplomatic, economic, and cultural relations, and

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Neither the Treaty nor any of the accompanying documents specifies who or what organization would arbitrate a dispute.

11. Treaty art. VIII.

12. Treaty art. VI, para. 2.

13. Treaty art. VI, para. 4.

14. Treaty art. VI, para. 5. This provision was stated to be subject to article 103 of the U.N. Charter, which states that the Charter prevails over any other international agreement.

The intent of the parties in article VI, paragraphs 2 and 5, is not clear. Paragraph 2 may be read to mean that regardless of what other Arab states may do concerning the West Bank/Gaza negotiations and regardless of the outcome of those negotiations, the Treaty remains binding; thus, there is no "linkage" between the Treaty and those negotiations. A second possible interpretation is that the Treaty is binding and takes precedence over any other treaties or agreements (save for the U.N. Charter). The Agreed Minutes to article VI, paragraph 2, state that article VI as a whole shall not be construed so as to contradict the Camp David Framework for Peace, and that that rule of construction should not be viewed as contravening article VI, paragraph 2.

During the negotiations leading to the conclusion of the Treaty, Israel insisted that the Treaty should take precedence over Egypt's other treaties, such as the Arab League's Pact, its Joint Defense Treaty, or its Council's resolutions, particularly that of April 13, 1950. *See* H. HASSOUNA, THE LEAGUE OF ARAB STATES AND REGIONAL DISPUTES, at 34, 311, 406 (1975). These documents preclude a "separate peace" with Israel and would require Egypt to go to the defense of an Arab state at war with Israel. Arab League Council Res. of Apr. 13, 1950, made mandatory by Arab League Pact art. 7, para. 1; Joint Defense Treaty art. 2. Egypt maintained that the Treaty would not necessarily take precedence over these obligations. N.Y. Times, Apr. 11, 1979, at 3, col. 1. The Agreed Minutes to article VI, paragraph 5, state that neither party asserts that the Peace Treaty prevails over any other treaty or that another treaty prevails over the Peace Treaty. "Not surprisingly," writes Professor Murphy, "armed with this ambiguous language, Egypt and Israel have taken conflicting positions." Murphy, *supra* note 3, at 923. For a more comprehensive treatment of these questions, see Bassiouni, *supra* note 3, at 20-22; Murphy, *supra* note 3, at 920-24.

15. Treaty art. III, para. 2.

16. Israel's interim withdrawal is dealt with in Annex I to the Treaty; see text *infra*. Annex I is entitled Protocol Concerning Israeli Withdrawal and Security Arrangements.

17. Treaty art. I, para. 3. The process for achieving these relations was set out in Annex III to the Treaty (Protocol Concerning Relations of the Parties). By Annex III, the parties agreed, among other things, to establish diplomatic relations and to exchange ambassadors, to recognize international conventions on aviation, to open roads and railways, and to establish postal, telephone, television, and other services. They also reaffirmed their commitments to respect human rights and fundamental freedoms.

termination of economic boycotts and discriminatory barriers to the free movement of people and goods.[18] The parties further agreed to guarantee the mutual enjoyment by their citizens of the due process of law.[19]

2. *Permanent Boundary*

Israel agreed to withdraw all its military and civilian elements from the Sinai peninsula,[20] Egypt thereupon resuming the exercise of full sovereignty over the area.[21] The Treaty established as permanent and inviolable the boundary drawn between Egypt and Israel in 1906 by Turkey (then sovereign over Palestine) and Great Britain (then sovereign over Egypt).[22] It was stated that the border provision was "without prejudice to the issue of the status of the Gaza Strip."[23]

Israeli nationals, vessels and cargoes were to enjoy the right of free passage through the Suez Canal, on the basis of the 1888 Constantinople Convention,[24] and were to be accorded non-discriminatory treatment in all matters relating to use of the Canal.[25] The parties also agreed that the Strait of Tiran and the Gulf of Aqaba were international waterways, open

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18. Treaty art. III, para. 3.

19. *Id.*

20. Treaty art. I, para. 2. Details of the withdrawal are covered in Annex I to the Treaty and in the Appendix to Annex I. [The latter document, entitled Organization of Movements in the Sinai, is hereinafter cited as Appendix.] Egypt considers that implementation of this Treaty clause will constitute a partial implementation of U.N. Security Council Resolution 242 (1967), note 6 *supra*, which states that Israel must withdraw from the territories occupied in 1967. Egypt's Prime Minister Khalil said in March 1979 that withdrawal from the Sinai will set a precedent for total withdrawal from the Golan Heights, the West Bank, including Jerusalem, and the Gaza Strip. Prime Minister Begin said in his speech opening the Knesset debate on ratification of the Treaty that Israel would never withdraw from all the occupied territories, that it would never give up Jerusalem, and that there would never be a Palestinian state in the West Bank and Gaza. N.Y. Times, March 21, at A1, col. 1, & A9, col. 1. Yehuda Blum, currently Israel's Permanent Representative to the United Nations, has considered the topic of withdrawal in the following terms: "It will be noted that nowhere does Security Council Resolution 242(1967) contain any reference to the *status quo ante* June 5, 1967. Instead, it speaks of 'withdrawal of Israel armed forces from territories occupied in the recent conflict,' omitting the definite article before the word 'territories . . . .'" Y. BLUM, SECURE BOUNDARIES AND MIDDLE EAST PEACE 72 (1971).

21. Treaty art. I, para. 2. Egypt will resume sovereignty over each area as Israel withdraws. Agreed Minutes to art. I. Full Egyptian sovereignty was the subject of vociferous debate in Israel, because many Israelis wanted to retain sovereignty over the civilian settlements in the Sinai. On 28 September 1978, the Knesset voted to remove the Israeli settlements. N.Y. Times News Service, Supp. Mat., Sept. 28, 1978, at 24.

22. Treaty art. II.

23. *Id.* Sovereignty over the Gaza Strip is thus unsettled. Egypt administered the area from 1949 to 1967, but did not claim sovereignty over it. Israel has administered Gaza since the 1967 war.

24. Treaty art. V, para. 1. The Constantinople Convention Respecting the Free Navigation of the Suez Maritime Canal, Oct. 29, 1888, *reprinted in* THE SUEZ CANAL PROBLEM, JULY 26-SEPT. 22, 1956, at 16-20 (1956) (U.S. Dep't of State, Pub. No. 6392). Article I of the Convention states that the Canal shall be open to ships of war or commerce, in time of peace or war, to all nations. Article X gives Egypt the right to defend the Canal. Egypt has cited article X as its justification for closing the Canal to Israeli ships since 1948.

25. Treaty art. V, para. 1.

to all nations for free navigation and overflight.[26]

B. *Security and Peacekeeping Provisions*[27]

1. *General Provisions*

The parties, in order to provide for their maximum security on the basis of reciprocity, agreed to establish security arrangements, including limited force zones in Egyptian and Israeli territory.[28] They agreed to the stationing of United Nations forces and observers in the buffer zones between Egyptian and Israeli forces, and agreed not to request withdrawal of these personnel.[29] They further agreed that the U.N. personnel would not be removed without the approval of the U.N. Security Council, that approval to require the affirmative votes of the five permanent Council members.[30] The Treaty also provided that these arrangements could be reviewed at the request of either party, and amended by mutual agreement.[31]

2. *Interim Withdrawals*

Annex I to the Treaty, the implementation of which will be dealt with in section III below, provided details of Israeli withdrawal from and security arrangements in the Sinai Peninsula. Israel was to withdraw from the Sinai under the supervision of an Egyptian-Israeli Joint Commission,[32] first to an interim line within nine months from the date of ratification,[33] then to the international border within three years.[34] The final withdrawal would include all Israeli armed forces and civilians.[35] The parties agreed that, notwithstanding their stipulation that the Treaty superseded the Agreement between Egypt and Israel of September 1975,[36] all

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26. Treaty art. V, para. 2. The fact that Egypt and Israel agree that the Strait and the Gulf are international waterways does not necessarily make them so, particularly since the other affected states, Jordan and Saudi Arabia, have not so agreed.

27. A number of separate security agreements, intertwined with the Treaty's provisions, were signed by the United States and by Egypt and Israel respectively. For a discussion of these agreements, *see* Murphy, *supra* note 3, at 915-16.

28. Treaty art. IV, para. 1.

29. Treaty art. IV, para. 2.

30. *Id.*

31. Treaty art. IV, para. 4. A review would commence within three months of a party's request. Agreed Minutes to art. I.

32. Annex I, art. I, para. 4; *see also* Treaty art. IV, para. 3. The Joint Commission was to function from the date of exchange of instruments of ratification until the date of completion of final Israeli withdrawal. Appendix, art. IV, para. 1. It was to be composed of representatives of each country under a senior officer, and would, among other things, coordinate military activities, assist U.N. forces and observers, and organize the demarcation of the international boundary and all lines and zones. Appendix, art. IV, paras. 2, 3(a), 3(c), 3(d).

33. Annex I, art. I, para. 3(a). Israeli withdrawal to the interim line (the El Arish-Ras Mohammad Line, Map 1) was completed in five subphases, in accordance with Appendix art. II, para. 1.

34. Annex I, art. I, para. 3(b).

35. Annex I, art. I, para. 1.

36. Treaty art. IX, para. 2. For text of Agreement of Sept. 1, 1975, its Annex, and the United States proposal for an early warning system in the Sinai, *see* DEP'T OF STATE, NEWS

applicable military arrangements under that Agreement would remain in effect until Israeli armed forces completed withdrawal from lines "J" and "M" in the western Sinai established by the Agreement (see Map 1) up to the interim withdrawal line (that running from El Arish to Ras Mohammad; see Map 1).[37]

During the period of withdrawal of Israeli armed forces, the parties agreed that United Nations forces were to immediately enter each evacuated area and establish interim and temporary buffer zones (see Map 1), for the purpose of maintaining a separation of Egyptian and Israeli forces. The deployment of these forces was to precede the movement of any other personnel into these areas.[38] Deployment of Egyptian armed forces, border units, and civil police in the Sinai, and of naval units in the Gulf of Suez, was to follow the stationing of the U.N. forces.[39]

An interim buffer zone was to be established west of and adjacent to the interim withdrawal (El Arish-Ras Mohammad) line after Israeli withdrawal to the area east of that line. Egyptian civil police were to perform normal police functions in the buffer zone,[40] while United Nations forces were to operate check points, reconnaissance patrols, and observation posts.[41] Israeli personnel were to operate military technical installations at four locations in the zone.[42] These installations were to be withdrawn when Israeli forces withdrew from the interim line, or at another time agreed to by the parties.[43] Israeli and Egyptian liaison and technical teams were to inspect all installations (for example, utilities, airfields, roads, pumping stations, ports, and water sources) to be transferred to Egypt following Israeli withdrawals.[44]

The parties requested the United States to continue surveillance

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RELEASE, Sept. 1, 1975, *reprinted in* Report by the Secretary-General concerning the Agreement between Egypt and Israel, Annex, 30 U.N. SCOR, Supp. (July-Sept. 1975) 54, U.N. Doc. S/11818/Add.1 (1975); THE ARAB-ISRAELI CONFLICT—READINGS AND DOCUMENTS 1208 (abridged & revised ed. J.N. Moore 1977) [hereinafter cited as J.N. Moore]. The U.S. proposal on the early warning system is also found at 26 U.S.T. 2271, T.I.A.S. No. 8155.

37. Appendix art. I, para. 2(a).

38. Appendix art. I, para. 2(b).

39. Appendix art. I, para. 2(c)-(f).

40. Appendix art. V, para. 1.

41. Appendix art. V, para. 2.

42. Appendix art. V, para. 3. See Map 1 for the locations of the Israeli military technical installations, sites "T 1-4." These installations were to be manned by technical and administrative personnel equipped with small arms (including rifles, sub-machine guns, and hand grenades) required for their protection. Only officers were to be allowed to carry weapons outside the sites. A third party (unidentified in the Treaty) was to conduct random inspections of the sites at least once a month to verify compliance with Treaty obligations. Access to and exit from the sites was to be monitored by U.N. forces. Appendix art. V, para. 3(a)-(c), (g).

43. Appendix art. V, para. 5.

44. Appendix art. VI, paras. 1 & 2. Israel was to remove all military barriers and mines prior to withdrawal, or to provide maps and technical data for those not removed. Appendix art. VI, para. 4(a)-(b).

flights until the completion of final Israeli withdrawal. Special inspection flights were to be allowed at the request of either party or of the United Nations.[45] The United States was also requested to continue to operate the Sinai Field Mission until the completion of Israel's withdrawal from the area east of the Giddi and Mitla Passes,[46] whereupon its activities were to be terminated.[47]

The parties agreed to request that United Nations forces be deployed as necessary until the completion of final Israeli withdrawal, and agreed to the use of the United Nations Emergency Force (UNEF) for that purpose.[48] The U.N. forces were to "employ their best efforts" to prevent

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45. Appendix art. VII, para. 1(a)-(b).

46. *See* Map 1. This, the last phase of the interim withdrawal, was to be completed within nine months from the date of ratification. The withdrawal was completed on time. *See* note 70 *infra*.

47. Appendix art. VII, para. 2. The Sinai Field Mission was authorized by a Joint Resolution of Congress on 13 October 1975 (Pub. L. No. 94-110, 89 Stat. 572, codified in 22 U.S.C. 2348(n) (Supp. III 1979)), and was established on 13 January 1976 by Exec. Order No. 11,896, 41 Fed. Reg. 2067 (1976). It became operational on 22 February 1976. For a summary history of the Sinai Field Mission and its Washington-based headquarters, the Sinai Support Mission, *see* WATCH IN THE SINAI (1980) (U.S. Dep't of State, Pub. No. 9131, General Foreign Policy Series 321).

48. Appendix art. III, para. 1. The U.N. force referred to is that created by the Security Council by Resolution 340, 28 U.N. SCOR, Supp. (Res. & Dec.) 11, U.N. Doc. S/INF/29 (1973). The resolution was adopted by 14 votes in favor to 0 against, with the People's Republic of China not taking part in the vote. [1973] U.N.Y.B. 202. On China's position on this vote, *see* note 215 *infra*. *See also* Resolution 341, 28 U.N. SCOR, Supp. (Res. & Dec.) 11, U.N. Doc. S/INF/29 (1973), by which the Council mandated the operations of the force in approving the Secretary-General's initial report thereon. This force will hereinafter be referred to as UNEF. (It is often referred to in the literature as UNEF II.) A predecessor United Nations Emergency Force (UNEF I) was created by the General Assembly at its First Emergency Special Session in 1956. On UNEF I, *see generally* A. ELKORDY, THE UNITED NATIONS PEACE-KEEPING FUNCTIONS IN THE ARAB WORLD 167-203 (1967); 1 R. HIGGINS, UNITED NATIONS PEACEKEEPING 1946-67, at 221-529 (1967); E. LAUTERPACHT, THE UNITED NATIONS EMERGENCY FORCE—BASIC DOCUMENTS (1960); G. ROSNER, THE UNITED NATIONS EMERGENCY FORCE (1963).

The parties' request to employ UNEF was consistent with what one long-time peacekeeping expert described as "the two salient principles that have governed the creation and implementation of United Nations peacekeeping operations" in the period following the creation of UNEF I. Harbottle, *The October Middle East War: Lessons for UN Peacekeeping*, 50 INT'L AFF. (London) 544, 545 (1974), *reprinted in* J.N. Moore, *supra* note 36, at 615. These principles are: 1) that peacekeeping operations "should be of a peaceful, not of an enforcement nature," and 2) that they should be used "only at the request, or with the consent, of those who are a party to the dispute." *Id.* at 545-46.

This use of UNEF would also fulfill existing expectations concerning peacekeeping under terms described by James, since it would fit into two of the three broad categories of U.N. peacekeeping operations he identified. First, its general purposes would be to maintain peace and security and to prevent a deterioration in the situation, with the more specific aims of maintaining calm and preventing violence. Second, it would assist in the execution of the political settlement. A. JAMES, THE POLITICS OF PEACE-KEEPING 7-9, 15 *passim*, 177 *passim* (1969). *But*, on the political settlement aspect of peacekeeping, *see* Saksena, *Not by Design: Evolution of UN Peace-Keeping Operations and its Implications for the Future*, 16 INT'L STUD. 459, 473 (1977). (James' third category is neither a conciliatory nor a pre-

violations of the withdrawal terms,[49] and to verify troop limitations, operate check points, send out reconnaissance patrols, and man observation posts.[50]

3. *Permanent Arrangements*

The Treaty also dealt at length with security in the Sinai following Israel's final withdrawal in April 1982. Four zones, three in the Sinai and one in Israel—each with specified limitations on military installations and fortifications, weapons, troops, equipment, aircraft, and naval vessels—were to be set up.[51] Egypt and Israel were to be allowed to establish early warning systems in specified zones.[52] A liaison system was to replace the Joint Commission[53] after full withdrawal.[54]

The parties agreed to request the United Nations to provide forces and observers following final withdrawal to operate check points, reconnaissance patrols, and observation posts along the international boundary and along line B—a line running from a point about midway between El Arish and the Gaza Strip in the north to Sharm el Sheikh in the south—and within Zone C, that area between the international boundary and line B (see Map 2).[55] The United Nations forces were also to carry out verifications of the implementation of pertinent Treaty provisions twice monthly or on the request of either party.[56] They were also to ensure the freedom of navigation through the Strait of Tiran.[57]

The U.N. forces were to be deployed in Zone C[58] and stationed mainly in camps located in two areas, shown in Map 2, near the Gaza Strip and Sharm el Sheikh respectively.[59] Only United Nations observers, as opposed to forces, were to be permitted on the Israeli side of the border, in Zone D, a thin band of territory adjacent to the border running from the Mediterranean Sea at the southern end of the Gaza Strip to the

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ventative role. Rather, the peacekeeping unit is designed to "upset certain aspects of the established order of things," with the United Nations attempting to act as an instrument of change. A. JAMES, *supra*, at 9, 371 *passim*.) Other United Nations peacekeeping operations have engaged in both peace maintenance/violence prevention and settlement assistance, notably those in Kashmir, Indonesia, and Cyprus. *See generally* 2 R. HIGGINS, *supra*; D. WAINHOUSE *et al.*, INTERNATIONAL PEACE OBSERVATION (1966); D. WAINHOUSE *et al.*, INTERNATIONAL PEACEKEEPING AT THE CROSSROADS (1973).

49. Appendix art. III, para. 2.

50. Appendix art. III, para. 3.

51. Annex I, arts. II, III, & IV. The zones are depicted in Map 2.

52. Annex I, art. V. Egypt was to be allowed to set up systems in Zone A; Israel, in Zone D. *See* Map 2.

53. *See* note 32 *supra* and accompanying text.

54. Annex I, art. VII.

55. Annex I, art. VI, para. 2(a).

56. Annex I, art. VI, para. 2(b)-(c).

57. Annex I, art. VI, para. 2(d). *See also* Treaty art. V; note 26 *supra* and accompanying text.

58. Annex I, art. II, para. 1(c)(4); Annex I, art. VI, para. 3.

59. Annex I, art. II, para. 1(c)(5).

Gulf of Aqaba near Eilat.[60] The forces and observers were to enjoy freedom of movement, and were to be allowed any necessary facilities.[61] They were not to be empowered to authorize the crossing of the international boundary.[62] The parties were to agree at a later date on the countries from which the United Nations forces and observers would be drawn; nationals of permanent members of the U.N. Security Council were not to be included.[63] The parties stipulated that if they could not reach an agreement on the composition of the U.N. forces and observers, they would "accept or support" a United States proposal on that matter.[64]

4. *President Carter's Letters*

On the same day on which the Peace Treaty was signed, President Carter addressed to President Sadat and Prime Minister Begin virtually identical letters by which he "confirm[ed]" certain aspects of United States obligations arising from the Treaty.[65] The President stated in the letters that in the event of an "actual or threatened violation" of the Treaty, the United States would, on the request of one or both parties, consult with the parties and take such action as it might deem appropriate and helpful to achieve compliance with the Treaty.[66] The President also confirmed that the United States would conduct aerial monitoring as requested by the parties.[67]

Also by these letters, and of primary importance for the purposes of this Comment, President Carter expressed the conviction of the United States that the Treaty provision for permanent stationing of United Nations personnel in the designated limited force zone[68] could and should be implemented by the Security Council, and stated that the United States would exert its utmost efforts to obtain the requisite action by the Council. If the Council failed to establish and maintain the arrangements called for in the Treaty, the letters continued, "the President [would] be prepared to take those steps necessary to ensure the establishment and maintenance of an acceptable alternative multinational force." All of these confirmations were made "subject to United States Constitutional processes."

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60. Annex I, art. II. para. 1(d)(2); Annex I, art. VI, para. 3.

61. Annex I, art. VI, para. 6.

62. Annex I, art. VI, para. 7.

63. Annex I, art. VI, para. 8.

64. Agreed Minutes to Annex I.

65. The letters, dated 26 March 1979, are published in the State Department publication referred to in note 1 *supra*, at 23, and at 18 INT'L LEGAL MAT. 532 (1979). The only difference between the two letters is the ordering of the Treaty's parties in their texts. The legal and political nature of these letters and the extent of the obligation they impose is discussed in section IV(A) of this Comment.

66. An interesting work on this general topic is A. DOWTY, THE ROLE OF GREAT POWER GUARANTEES IN INTERNATIONAL PEACE AGREEMENTS (Jerusalem Papers on Peace Problems, 1974).

67. Appendix art. VII, para. 1(a).

68. Annex I, art. VI.

## III. IMPLEMENTATION OF THE TREATY'S PEACEKEEPING[69] PROVISIONS

### A. *International Action: The Situation During the Initial Withdrawals (April 1979 to January 1980)*

Between 25 April 1979 and 23 January 1980,[70] Israel withdrew, in accordance with the Treaty's provisions, to the interim (El Arish-Ras Mohammad) line. During this period, however, considerable problems concerning the peacekeeping provisions of the Treaty arose. Initially, the problems centered on UNEF, which was called on by the parties to execute tasks similar in many ways to those it had been performing, but over larger areas.

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69. The term "peacekeeping" is used neither in the Treaty nor in any of its accompanying documents. Nor does it appear in the United Nations Charter. Professor Inis Claude has written that "the term may come to be generally employed as a designation for whatever may be done or recommended to promote or uphold stability in international relations." Claude, *The Peace-keeping Role of the United Nations*, in THE UNITED NATIONS IN PERSPECTIVE 49 (E. Tompkins ed. 1972). Professor Higgins has noted that the term may refer to "the entire role of the UN in maintaining, or restoring, international peace," but that it may also be used with reference to U.N. forces and observer groups or solely to U.N. forces. "There is, of course, no one 'correct' definition." 1 R. HIGGINS, *supra* note 48, at ix.

The use of the term "peacekeeping" derives from the escape fashioned by Secretary-General Dag Hammarskjöld and others from the problems presented by the failure of the United Nations to live up to the Charter's conception of collective security in the enforcement of peace. Hammarskjöld's doctrine of "preventive diplomacy" employed as its central component the proposition that the United Nations could provide an alternative to peace-enforcement in the form of peacekeeping, whereby the Organization, through the employment of somewhat modest forces, would intervene in a situation which threatened international peace. In the words of Brigadier Michael Harbottle:

> [P]eacekeeping by definition must be a third party intervention, peaceful and impartial—the task of a referee, equipped with a whistle rather than a gun with which to control the violence. UN peacefeeping is exactly that: an operation that is conducted without force, coercion or undue persuasion, but with tactful reasoning, quiet diplomacy and above all patient restraint.

Harbottle, *supra* note 48, at 545.

Much has been written about whether peacekeeping is action taken under Chapter VI or Chapter VII of the Charter, or whether it is an autonomous function, arising from practice, which in effect lies between those chapters. *See generally* D. BOWETT, UNITED NATIONS FORCES 266-312 (1964); J. BOYD, UNITED NATIONS PEACE-KEEPING OPERATIONS: A MILITARY AND POLITICAL APPRAISAL 5-13 (1971); L. FABIAN, SOLDIERS WITHOUT ENEMIES 1-12 (1971); L. GOODRICH, THE UNITED NATIONS IN A CHANGING WORLD 138-58 (1974); L. GOODRICH, E. HAMBRO & A. SIMONS, CHARTER OF THE UNITED NATIONS 290-317 (3d rev. ed. 1969); J. GUTTERIDGE, THE UNITED NATIONS IN A CHANGING WORLD 28-47 (1969); R. KHAN, IMPLIED POWERS OF THE UNITED NATIONS 58-73 (1970); A. LEGAULT, RESEARCH ON PEACE-KEEPING OPERATIONS—CURRENT STATUS AND FUTURE NEEDS 9-28 (Int'l Information Center on Peacekeeping Operations Monograph No. 5, 1967); M. NAIDU, COLLECTIVE SECURITY AND THE UNITED NATIONS 75-82 (1974); Halderman, *Legal Basis for United Nations Armed Forces*, 56 AM. J. INT'L L. 971 (1962).

70. Israel's interim withdrawal was completed two days before the date anticipated by the Treaty. Wash. Post, Jan. 24, 1980, at 1, col. 1.

1. *The Authority of the Secretary-General vis-à-vis the Security Council*

a. *Trends in United Nations Practice*

By the Treaty's terms, Egypt and Israel agreed to request the redeployment of UNEF to enable it to perform during the interim withdrawals the functions called for in the Treaty.[71] The parties did not indicate to whom this request was to be directed. There are two possibilities: the Security Council and the Secretary-General. UNEF was a creation of the Security Council,[72] and in modern practice, there is little disagreement that the Council is the United Nations entity which possesses ultimate and dominant power in all matters concerning international peace and security. Arguments over the extent to which the Secretary-General must defer to the Council's authority nevertheless persist.

It was not Mr. Kurt Waldheim, but rather the United States, which asserted that the Secretary-General possessed the authority to order the redeployment of UNEF even lacking a specific decision to that effect by the Council.[73] The Secretary-General, while not delving into the matter of his legal right to order redeployment, declined to do so. To one senior United Nations official, it was "a question of prudence." This official feared that the Organization would be "torn apart" if the Secretary-General acted without at least the tacit consent of the U.S.S.R.[74]

There is today no dispute that the Secretary-General cannot establish a peacekeeping force even if all involved parties give their consent. The question of the Secretary-General's authority over existing forces then centers on two issues: whether in some circumstances a significant change in the functioning of an existing force is tantamount to the creation of a new force; and the extent of the authority over existing forces that may in fact be exercised by the Secretary-General.

With regard to the first issue, the clear trend has been and continues to be towards fairly extreme deference to the prerogatives of the Council. In 1965, for example, when U Thant "felt that a further deployment of United Nations personnel was required to contain the Indo-Pakistan dispute he was careful to get the approval of the Security Council."[75] Also,

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71. Appendix art. III, para. 1.

72. *See* note 48 *supra*. By contrast, UNEF I was created by the General Assembly, to which the matter had been transferred from the Council under the "Uniting for Peace" procedure, where the veto does not operate. (The Uniting for Peace procedure was adopted by G.A. Res. 377, 5 U.N. GAOR, Supp. (No. 20) 10, U.N. Doc. A/1775 (1950).)

73. N.Y. Times, Mar. 27, 1979, at 10, col. 2. This contrasts with the United States position on the *permanent* deployment of a U.N. force during the period following Israel's *final* withdrawal from the Sinai. On that matter, President Carter confirmed in his letters to President Sadat and Prime Minister Begin that the United States would "exert its utmost efforts to obtain the *requisite* action by the Security Council" for the permanent stationing of United Nations forces in the Sinai. (Emphasis added.)

74. *Id.* The official was not named in this report. *See also* Samuels, *The UN vs. the Treaty*, THE NEW LEADER, Apr. 9, 1979, at 7.

75. Higgins, *A General Assessment of United Nations Peace-keeping*, in UNITED

in October 1967, following an exchange of hostilities between Egypt and Israel, Thant enlarged the United Nations Truce Supervision Organization in Palestine (UNTSO) in the Suez Canal area, thereby creating "a new role in a different geographical area by an adaptation of an existing body."[76] The United Kingdom and the United States regarded this action as within the discretion of the Secretary-General so long as the directly interested parties consented.[77] The Soviet Union disagreed, and the Secretary-General awaited Security Council action. The Council used the technique of approval by informal consensus, with the President of the Council issuing a statement, thus avoiding a formal vote.[78]

On the question of the extent in fact of the Secretary-General's authority over existing forces, a similar trend can be identified, though the matter is not yet settled to the same degree as that regarding force creation. Evolving customary practice in this area, as in the entire United Nations experience in peace and security matters, has been determined largely on an ad hoc basis. In the main, the Secretary-General is allowed to take all necessary "day-to-day" decisions on military and administrative matters; the problem, of course, is that no agreed definition of "day-to-day" matters exists. Thus, when a Secretary-General has acted so as to deny wide discretion to the Council, that body—or more to the point, those of its permanent members opposed to the particular actions taken or proposed—have reacted strongly and negatively. In 1960, for example, the controversy over Secretary-General Dag Hammarskjöld's control over the United Nations Operations in the Congo (ONUC) culminated in a Soviet demand for his dismissal.[79] And, as Jackson has stated:

> Since the death of Hammarskjöld, the Soviets have been more determined in their efforts to limit the role of the Secretary-General on peace and security issues. France and, since 1971, the People's Republic of China have also opposed any actions on the part of the Secretary-General reminiscent of the Hammarskjöld model. Moreover, . . . [w]hile Lie and Hammarskjöld could usually count on U.S. support for their initiatives, Thant and Waldheim have not been able to do so.[80]

Nevertheless, the refusal of Secretary-General Waldheim to redeploy UNEF as called for in the Treaty is most accurately explained in terms of political realities. The joint political will of the United States and the U.S.S.R., a necessary element of effective Security Council action, was lacking. A comparison with events that took place in 1975 and 1976 pro-

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NATIONS PEACE-KEEPING: LEGAL ESSAYS 1, 7 (A. Cassese ed. 1978) [book hereinafter cited as A. Cassese].

76. *Id.*

77. 1 R. HIGGINS, *supra* note 48, at 62.

78. *Id.* at 62-63, and Higgins, *supra* note 75, at 7.

79. R. SIMMONDS, LEGAL PROBLEMS ARISING FROM THE UNITED NATIONS MILITARY OPERATIONS IN THE CONGO 75 n.6 and accompanying text (1968).

80. Jackson, *The Political Role of the Secretary-General under U Thant and Kurt Waldheim: Development or Decline?*, 140 WORLD AFF. 230, 242-43 (1978).

vides an illustration of the fact that it was not so much evolving custom in United Nations practice as practical politics that determined the extent of the Secretary-General's authority vis-à-vis the Council.

In September 1975, Egypt and Israel entered into an Agreement,[81] supplemented by a detailed Protocol,[82] whereby UNEF was asked to undertake responsibilities more varied and extensive than those it had been performing. The force also was to operate in new and larger areas.[83]

In his periodic reports on UNEF to the Security Council, the Secretary-General described the new functions the force had in fact taken on.[84] Among the changes made necessary by the Agreement and Protocol was extensive alteration of UNEF's deployment.[85] The Council implicitly approved this redeployment after the fact in its resolutions of 23 October 1975[86] and 22 October 1976.[87]

In this case, of course, virtually none of the opposition of the kind displayed towards the 1979 Peace Treaty was present.[88] Since the September 1975 Agreement and Protocol were politically acceptable, the Secretary-General was free to act in accord with their terms. In addition, the United Nations had been actively involved in the formulation of the 1975 accords. General Siilasvuo, Chief Coordinator of the United Nations Peace-keeping Missions in the Middle East, actually signed the Egyptian-Israeli Agreement as witness, and he chaired the Military Working Group that negotiated the Protocol.

The question of the authority of the Secretary-General and of the Security Council in peacekeeping was also clarified to some degree by an important initiative by Secretary-General Waldheim. Mr. Waldheim's first report to the Security Council on UNEF[89] contained a statement of

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81. *See* note 36 *supra*.

82. The text of the Protocol is reproduced as an annex to the 10 October 1975 Report of the Secretary-General concerning the Agreement between Egypt and Israel, 30 U.N. SCOR, Supp. (Oct.-Dec. 1975) 5, U.N. Doc. S/11818/Add.5 (1975).

83. Report of the Secretary-General on the United Nations Emergency Force for the period 15 July to 16 October 1975, 30 U.N. SCOR, Supp. (Oct.-Dec. 1975) 12, at para. 20, U.N. Doc. S/11849 (1975).

84. *Id.*; Report of the Secretary-General on the United Nations Emergency Force for the period 17 October 1975 to 18 October 1976, 31 U.N. SCOR, Supp. (Oct.-Dec. 1976) 7, U.N. Doc. S/12212 (1976).

85. During the period under review, the deployment of UNEF changed considerably following the implementation of the new Agreement. This redeployment, which was executed in 15 separate phases, began in November 1975 and was completed on 22 February 1976 in accordance with the time-table set out in the Protocol to the Agreement.

Report of the Secretary-General on the United Nations Emergency Force for the period 17 October 1975 to 18 October 1976, 31 U.N. SCOR, Supp. (Oct.-Dec. 1976) 7, at para. 10, U.N. Doc. S/12212 (1976).

86. S.C. Res. 378, 30 U.N. SCOR, Supp. (Res. & Dec.) 6, U.N. Doc. S/INF/31 (1975).

87. S.C. Res. 396, 31 U.N. SCOR, Supp. (Res. & Dec.) 3, U.N. Doc. S/INF/32 (1976).

88. *See* note 111 *infra* and accompanying text.

89. Report of the Secretary-General on the Implementation of Security Council Resolu-

certain broad principles to be applied to that force. The approval of these principles was "hailed by many States, including the two major powers, as a good example of the long sought compromise solution."[90] The Secretary-General's report stated in part that the force "must have at all times the full confidence and backing of the Security Council,"[91] and that "[a]ll matters which may affect the nature . . . of the Force, shall be referred to the Council for its decision."[92] Thus, whether or not the Council's approval of the report established the ultimate authority of the Security Council in peacekeeping,[93] it certainly justified Secretary-General Waldheim's insistence that the redeployment of UNEF called for by the Treaty would have required the Council's approval. The issue of future redeployment is much less military than political in nature, and probably cannot be categorized as a day-to-day operation.

b. *The Special Committee on Peacekeeping*

The issue of authority over peacekeeping operations, including the question of the Secretary-General's powers, and of all other matters concerning peacekeeping, are dealt with on an ongoing basis by the General Assembly's Special Committee on Peace-Keeping Operations (the Special Committee).[94] The Special Committee was mandated to undertake a "comprehensive review of the whole question of peace-keeping operations in all their aspects,"[95] and it proceeded in that task by attempting to formulate principles and guidelines for the practice of United Nations peacekeeping. That mandate is far from fulfillment in many respects, including the matter of the extent of the responsibilities of the Secretary-

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tion 340(1973), 28 U.N. SCOR, Supp. (Oct.-Dec. 1973) 91, U.N. Doc. S/11052/Rev. 1 (1973) [hereinafter cited as Report of the Secretary-General].

90. Cassese, *Recent Trends in the Attitude of the Superpowers towards Peace-keeping*, in A. Cassese, *supra* note 75, at 223, 233. Cassese cites the statements of the representatives of the U.S.S.R., 28 U.N. GAOR, C.121 (62d mtg.) 4, U.N. Doc. A/AC.121/SR.62 (1973); France, *id.* at 5, 7; the United States, 29 U.N. GAOR, C.121 (63d mtg.) 15, U.N. Doc. A/AC.121/SR.63 (1974; and that of the Chairman of the Special Committee, *id.* at 3-4.

91. Report of the Secretary-General, *supra* note 89, at para. 3.

92. *Id.* at para. 4(a).

93. There is compelling evidence that the effect of the Council's action was to do precisely that. A United States representative at the United Nations spoke of the "absence of any argument over the primacy to the Security Council in peace-keeping operations" in the aftermath of the Council's decision. 28 U.N. GAOR, Special Political Committee (899th mtg.) 16, U.N. Doc. A/SPC/SR.899 (1973). A Soviet representative said that the decision "established officially that all principal United Nations peace-keeping operations [are] entirely the responsibility of the Security Council." 28 U.N. GAOR, Special Political Committee (898th mtg.) 7, U.N. Doc. A/SPC/SR.898 (1973).

Cassese observes that this development met "the essential demands of the Soviet Union to a far greater extent" than those of the United States. He suggests that the United States "gave in" partly because it "could no longer control the other United Nations bodies on which it had previously been able to count for the furtherance of its own interests and goals." Cassese, *supra* note 90, at 236-37.

94. The Special Committee was established by G.A. Res. 2006, 19 U.N. GAOR, Supp. (No. 15) 7, U.N. Doc. A/5815 (1965).

95. *Id.*

General and the Security Council.

In 1974, the Committee's Working Group "was able to prepare a number of alternative or complementary draft formulae for articles of agreed guidelines . . . ."[96] Using these draft articles as a basis for its further discussions, the Working Group in 1976 refined some of them, reaching "a measure of agreement"[97] on the introduction and first four articles, dealing with "the authority and responsibilities of the Security Council and the possible establishment by the Security Council of a committee under Article 29 of the United Nations Charter."[98]

Article 1, paragraph 2 of these guidelines provided a list of twelve responsibilities to be exercised directly by the Council. Among the items included in this list was "ultimate direction and control during the operation."[99] This provision still leaves the controversy quite unclear.[100] Indeed, this and each of the other responsibilities on the list were described by the Working Group as "headings for questions of substance which will be discussed at length . . . ."[101]

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96. [1974] U.N.Y.B. 102. The draft formulae are contained in the Eighth Report of the Working Group, reproduced in the 1974 Report of the Special Committee, 29 U.N. GAOR, Annexes (Agenda Item 39) 1, 2, U.N. Doc. A/9827 (1974).

97. Tenth Report of the Working Group, reproduced in the 1976 Report of the Special Committee, 31 U.N. GAOR, Annexes (Agenda Item 54) 2, at para. 5, U.N. Doc. A/31/337 (1976) [hereinafter cited as Tenth Report of Working Group].

98. [1976] U.N.Y.B. 110. Article 29 of the Charter reads: "The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions."

99. Tenth Report of Working Group, *supra* note 97, at Appendix I (draft articles), art. 1, para. 2(h).

100. An illustration of the lack of clarity is shown by reference to the views expressed in the General Assembly's Special Political Committee on the draft guidelines:

> Indonesia believed that in the interests of efficiency the Secretary-General should be given authority to oversee day-to-day operations. Canada considered it desirable that the Secretary-General be in a position to direct the operations under the broad authority of the Security Council. Pakistan held a similar view: responsibility and ultimate control must rest with the Security Council, but the Secretary-General within the over-all mandate established by the Council should direct the activities of the forces.

[1977] U.N.Y.B. 128.

Voting requirements in the Security Council's exercise of its "ultimate direction and control" are also unclear. The Special Committee's draft guidelines are silent on the question of voting in the Council. The United Kingdom has made "a major effort to change the frame of reference by seeking to recast the debate not so much in terms of Secretary-General versus Security Council, but of simple majority vote in the Council votes requiring the concurrence of the permanent Members." Higgins, *supra* note 75, at 8. The United Kingdom proposed in 1973 that the Special Committee adopt an approach to limit use of the veto to certain questions, including force creation, mandate, duration, and termination. The proposal would nonetheless have allowed any member of the Council to challenge a move by the Secretary-General, whereupon a decision, categorized as substantive in nature (the veto therefore operating), would be required. There was no clear response to this initiative, though it seemed to have made an "imprint" in the Special Committee. *Id.* at 8-9. *See* letter of 6 September 1973 from the representative of the United Kingdom to the Secretary-General, U.N. Doc. A/9144 (1973).

101. Seventh Report of the Working Group, at para. 3, "reiterated" and reproduced in

In 1977, while it could not "finalize an agreed set of guidelines, the Working Group produced a draft text" of the remaining articles.[102] There was still substantial "absence of agreement"[103] in this draft. One article, however, contained a sentence which serves to reemphasize the primacy of the Security Council: "It is essential that throughout the conduct of a United Nations peace-keeping operation it shall have the full confidence and backing of the Security Council."[104] This sentence provides a basis for understanding Secretary-General Waldheim's insistence that the Council was required to give its consent to the desired redeployment of UNEF.

Through October 1980, with the Special Committee still using its 1976 and 1977 draft guidelines, there had been no substantial progress. As expressed in the 1979 report of the Committee's Working Group, "[l]aborious discussions reaffirmed that long-standing basic differences remain and that the task of achieving agreed guidelines will continue to be a difficult one, owing to the fundamental nature of the issues with which the Working Group is faced."[105]

2. *The Expiration of UNEF's Mandate*

a. *The U.S.-U.S.S.R. Compromise*

A further problem in the implementation process involved the fact that UNEF's mandate was to expire, failing its renewal by the Security Council, on 24 July 1979. On 22 May, news reports from Cairo indicated that the U.S.S.R. had informed the United States that it planned to veto any attempt to expand the mandate to allow the force to police the

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Tenth Report of Working Group, *supra* note 97, at para. 6.

102. Interim Report of the Working Group, reproduced in 1977 Report of the Special Committee, 32 U.N. GAOR, Annexes (Agenda Item 56) 2, at para. 6, U.N. Doc. A/32/394 (1977). These draft articles appear in the Eleventh Report of the Working Group, reproduced in *id.* at 4, Appendix I (draft articles) [hereinafter cited as Eleventh Report of Working Group].

103. Eleventh Report of Working Group, *supra* note 102, at para. 7. For example, article 7, dealing with the powers of the Secretary-General, provided:

> The Secretary-General, under the authority of the Security Council, [shall direct peace-keeping operations] [is in charge of the implementation of peace-keeping operations, receiving guidance from a subsidiary body of the Security Council], within the mandate entrusted to him by the United Nations Charter, contributing with all means at his disposal to giving effect to relevant decisions of the Security Council.

*Id.* at Appendix I (draft articles), art. 6. The brackets indicate the "absence of agreement."

104. *Id.* at Appendix I, art. 9.

105. Twelfth Report of the Working Group, reproduced in the 1979 Report of the Special Committee, 34 U.N. GAOR, Annexes (Agenda Item 52) at Annex, para. 4, U.N. Doc. A/34/592 (1979). *See also* the 1980 Report of the Special Committee, which contained the following statements: "The course of discussions, both in the Special Committee and in the Working Group, reaffirmed the wide disparity of members' views . . . and the great difficulty in finding any compromise at all. . . . The Special Committee . . . could not reach agreement on how to carry out its mandate." 35 U.N. GAOR, Annexes (Agenda Item 54) at paras. 7, 9, U.N. Doc. A/35/532 (1980).

Treaty.[106] Indeed, on 6 April, the Soviet Ambassador to the United Nations, Oleg Troyanovsky, had said that to extend UNEF's mandate would "signify approval of the U.S.-Israeli-Egyptian peace pact."[107] Thus, while the Soviet Union grounded its refusal to approve the redeployment of UNEF called for in the Treaty in its opposition to the Treaty, it deemed it a practical necessity to terminate the mandate of the force altogether.[108]

The United States, trying to convince the U.S.S.R. to allow UNEF to remain, argued among other things that since one of the goals of Resolution 242 was the withdrawal of Israeli forces from territories occupied in 1967,[109] the Israeli pullout from the Sinai and the use of U.N. troops would constitute steps towards achieving the Security Council's aims, requiring UNEF's continued presence in the Sinai.[110] The Soviets and most of the Arab countries, however, disapproved of Egypt's willingness to negotiate a treaty which left unsolved the Palestinian questions, and felt also that linking the operation of UNEF with the Treaty would imply United Nations endorsement of the Camp David Agreements as well as of the Treaty itself. Some reports indicated that the U.S.S.R. may in fact not have wanted to block an extension of UNEF's mandate, partly because of President Carter's promise to arrange an alternative force—possibly involving a United States presence—and because of the possibility that the action could adversely affect the ongoing Strategic Arms Limitation Talks. It did so, according to these reports, mainly to appease the Arab states opposed to the Treaty.[111]

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106. LIBRARY OF CONGRESS CONGRESSIONAL RESEARCH SERVICE, EGYPTIAN-ISRAELI PEACE TREATY 12 (Issue Brief No. IB79076, 1979) [hereinafter cited as C.R.S. Issue Brief].

107. N.Y. Times, Apr. 6, 1979, at 29, col. 1. *See also* N.Y. Times, June 18, 1979, at 14, col. 6.

108. Indeed, without redeployment, UNEF would have been rendered unable to perform any peacekeeping functions as Israeli forces withdrew beyond the former buffer zones. Its mandate would then have lapsed in fact, if not in law, as it became incapable of practical application.

109. S.C. Res. 242, note 6 *supra*, operative para. 1(i).

110. N.Y. Times, Apr. 8, 1979, at 11, col. 5. The Christian Science Monitor also reported that the United States had argued that the Security Council was "morally obliged" on this ground to support the Treaty. Christian Sci. Mon., Apr. 9, 1979, at 10, col. 1. For the views of Egypt and Israel on this point, see note 20 *supra*.

111. *See* N.Y. Times, Mar. 27, 1979, at 10, col. 1, and May 6, at 11, col. 1. *See also* Seale, *The Egypt-Israel Treaty and its Implications*, 35 THE WORLD TODAY 189, 193-96 (1979). In a recent article, Raymond Sommereyns provides a list of citations to the reactions in the United Nations of Iraq, Jordan, Syria, the United Arab Emirates (speaking for the Arab group of states at the U.N.), the Council of the League of Arab States, the Co-ordinating Bureau of Non-Aligned Countries, the Palestine Liberation Organization, and the Chairman of the General Assembly's Committee on the Exercise of the Inalienable Rights of the Palestinian People. Sommereyns, *United Nations Peace-keeping Forces in the Middle East*, 6 BROOKLYN J. INT'L L. 1, 50 n.14 (1980). It was also reported that the Soviet Union "[did] not seem particularly inclined to lend a hand to the implementation of a peace treaty that it [felt] . . . would reduce its own influence in the Middle East and, in fact, lead to its expulsion from the area." Christian Sci. Mon., Apr. 9, 1979, at 10, col. 2.

The prospect of a Security Council refusal to renew UNEF's mandate presented the United States and the parties to the Treaty with the problem of reaching agreement on alternative arrangements. By 18 July, six days prior to the expiration of UNEF's mandate, Egypt, Israel, and the United States had not agreed on an alternative to UNEF.[112] One day later, however, the United States and the Soviet Union finished working out a formula that would permit the United Nations to play a role in the withdrawal of Israel from the Sinai. The compromise was to allow the military observers of UNTSO—reinforced in numbers—to replace the troops of UNEF.[113]

b. *Israel's Objections*

On 22 July, Egypt announced its agreement with the U.S.-U.S.S.R. compromise proposal to station U.N. observers between Egyptian and Israeli forces in the Sinai.[114] On the same day, however, Israel rejected the plan.[115] Israel cited several objections to the employment of the observers of UNTSO. Foremost among these was the argument that UNTSO was under the direct control of the Secretary-General, who could, in Israel's view, withdraw the observers at any time.[116] Israel made reference in that regard to Secretary-General U Thant's withdrawal of UNEF I from the Sinai just prior to the outbreak of hostilities in June 1967.[117] Israel also considered that UNTSO was not capable of carrying out the duties assigned to U.N. forces under the Treaty. It was a very small unit in comparison to UNEF,[118] and consisted entirely of unarmed officers. Moreover,

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112. N.Y. Times, July 19, 1979, at 10, col. 3.

113. N.Y. Times, July 20, 1979, at 3, col. 6. U.N. sources were cited as having said that the unit might be expanded from about 300 to 500 men. Wash. Post, July 24, 1979, at 1, col. 4. Officials in Cairo were reported to have said that 700 to 1,000 observers would be required. N.Y. Times, Aug. 2, 1979, at 3, col. 4. A U.S. Defense Department study concluded that 600-800 observers would be sufficient. N.Y. Times, July 28, 1979, at 3, col. 1.

114. N.Y. Times, July 23, 1979, at 5, col. 1; *see also* N.Y. Times, July 24, 1979, at 9, col. 2.

115. N.Y. Times, July 23, 1979, at 5, col. 1.

116. *Id.*; Wash. Post, July 29, 1979, at 1, col. 5, and at 9, col. 1.

117. On U Thant's withdrawal of UNEF I, *see* the Report of Secretary-General U Thant to the 5th Emergency Session of the General Assembly, 21 U.N. GAOR, Annexes (Agenda Item 5) 4, U.N. Doc. A/6730 and Add. 1-3 (1967), *reprinted in* 1 R. HIGGINS, *supra* note 48, at 344-62. *See also,* among other works, A. KARAOSMANOĞLU, LES ACTIONS MILITAIRES COERCITIVES ET NON COERCITIVES DES NATIONS UNIES 65-68 (1970); A. LALL, THE UN AND THE MIDDLE EAST CRISIS, 1967, at 11-21 (1968); A. ROVINE, THE FIRST FIFTY YEARS: THE SECRETARY-GENERAL IN WORLD POLITICS 1920-1970, at 393-400 (1970); L. SOHN, THE UNITED NATIONS IN ACTION 169-94 (1968); Di Blase, *The Role of the Host State's Consent With Regard to Non-Coercive Actions by the United Nations,* in A. Cassese, *supra* note 75, at 55, 73; Elaraby, *United Nations Peacekeeping by Consent: A Case Study of the Withdrawal of the United Nations Emergency Force,* 1 N.Y.U. J. INT'L L. & POL. 149 (1968); Garvey, *United Nations Peacekeeping and Host Country Consent,* 64 AM. J. INT'L L. 241 (1970); Malawer, *The Withdrawal of UNEF and a New Notion of Consent,* 4 CORNELL INT'L L.J. 25 (1971).

118. The Sinai contingent of UNTSO consisted of about 120-130 officers; UNEF was a 4,178-man force in mid-1979. *See* N.Y. Times, July 25, 1979, at 8, col. 2; Wash. Post, July 29, 1979, at 9, col. 1; U.N. CHRONICLE, July-Oct. 1979, at 24.

its use would be inconsistent with the duties specified in the Treaty, which spoke of "forces," not "observers," in the context of the withdrawal from the Sinai.[119] Also, Israel argued that by definition, UNTSO was authorized to supervise a "truce," whereas the present situation involved a "peace."[120] A further Israeli objection concerned the presence of Soviet officers among the UNTSO observers.[121]

Israel's complaints also included a general assertion that the United States, and not the United Nations, was the ultimate guarantor of the Treaty. Israel considered the peacekeeping issue to be a "test case"—an indication of whether the United States would stand by its commitments concerning the Treaty.[122] Related to this was Israel's conviction that the failure of the Security Council to establish the arrangements called for in the Treaty gave it, as a party to the Treaty, the right to invoke President Carter's pledge to establish an alternative force.[123]

c. *The U.S. Response*

In response to Israel's objections to the U.S.-Soviet compromise, a State Department spokesman stressed that the use of UNTSO was "fully in accord with the peace treaty and the Camp David framework which preceded it."[124] The spokesman also stated that "through the months of discussions with all of the parties concerned, UNTSO [had] always been considered a viable alternative to UNEF."[125] Other officials were also quoted as saying that Israeli officials, including Defense Minister Ezer Weizman, were familiar with the plan to use UNTSO as an alternative to UNEF and "did not object."[126]

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119. Wash. Post, July 29, 1979, at 9, col. 1.

120. British Broadcasting Corporation radio newscast, July 23, 1979. Although this point was largely ignored by the print media as well as by official spokesmen and presumably the governments they represented, it may have some validity. "Grotius used truce to mean an agreement by which warlike acts are for a time abstained from, though the state of war continues—'a period of rest in war, not a peace.' " Bailey, *Cease-Fires, Truces, and Armistices in the Practice of the U.N. Security Council*, 71 AM. J. INT'L L. 461 (1977), *citing* H. GROTIUS, THE LAW OF WAR AND PEACE, Book III, Ch. XXI (F. Kelsey trans. 1925). *See also* D. BOWETT, *supra* note 69, at 73-74: "[A] 'truce' . . . incorporates a complex of mutual undertakings and conditions; it is, however, a temporary state of affairs as opposed to an 'armistice.' "

121. N.Y. Times, July 23, 1979, at 5, col. 1. However, the United States and the U.S.S.R. reached an understanding that Soviet and American officers would not serve in the Sinai area. N.Y. Times, July 25, 1979, at 8, col. 2.

122. N.Y. Times, July 25, 1979, at 8, col. 1.

123. *Id.* at 8, col. 2. Some reports quoted Israeli government sources as saying that the United States should send NATO forces to the Sinai to police the Treaty. C.R.S. Issue Brief, *supra* note 106, at 10.

124. N.Y. Times, July 24, 1979, at 9, col. 1, *quoting* State Department spokesman Hodding Carter III.

125. *Id. See also* N.Y. Times, July 25, 1979, at 8, col. 1.

126. N.Y. Times, July 28, 1979, at 3, col. 1. In this report, Secretary of State Cyrus Vance was described as "furious" about Israel's distortions of the U.S. position, and as "particularly stung by the allegation of Israel officials that the plan to use UNTSO . . . had been abruptly sprung on their Government. . . ."

The United States contended that Israel's objections to UNTSO were "either irrelevant or based on misconceptions."[127] UNTSO, a United States official noted, had not been withdrawn on the occasion of the 1967 hostilities nor at any other time in its 31-year existence. The Secretary-General would be able to expand and equip the unit such that it would be able to carry out adequately the functions specified in the Treaty.[128] Finally, it was "clear" to the United States that the Secretary-General would not withdraw the unit "on his own authority without consulting the Security Council."[129] The official "conceded" that the United States would not be able to veto the withdrawal of UNTSO, but said that if relations between Egypt and Israel deteriorated to such a degree that a party demanded withdrawal, the Treaty would be "dead" and the controversy irrelevant.[130] A United Nations official, Under-Secretary-General for Special Political Affairs Brian Urquhart, indicated his agreement with the United States' conviction that the Secretary-General would not withdraw UNTSO unilaterally, while disputing the United States' "concession" on the Council's control over the unit. Urquhart wrote that "new dispositions of [the] observers or any major change in their function requires, by long usage, a decision or at least the concurrence of the Security Council."[131]

With regard to Israel's argument that, with the expiration of UNEF's mandate, it could demand that the United States establish an alternative force, the United States insisted that President Carter's pledge to that effect "applie[d] to the period after final withdrawal," and would therefore come into effect, if necessary, in 1982.[132] There is support for this position in the text of the President's message, which refers to "the Treaty provision for *permanent* stationing of United Nations personnel. . . ."[133] However, some reports indicated that the United States had approached several countries in an attempt to form a multinational force,

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127. N.Y. Times, July 26, 1979, at 3, col. 1.

128. *Id.* This point was clarified when an unidentified State Department official stated: "We have an understanding with all the members of the Security Council, including the Soviet Union, that the secretary general shall be free to establish the number of troops necessary and the equipment and placement necessary to carry out the functions which we spelled out in the treaty." Wash. Post, July 27, 1979, at 17, col. 3.

129. N.Y. Times, July 26, 1979, at 3, col. 1.

130. *Id.*

131. Letter to the editor, N.Y. Times, July 27, 1979, at 22, col. 4. In another letter to the editor, Professor Seymour Maxwell Finger, Director of the Ralph Bunche Institute on the United Nations at the City University of New York and a former United States representative on the Special (Peacekeeping) Committee, pointed out that one of the basic differences between UNEF and UNTSO was that the former had a fixed term, renewable only by Council action, while the latter's mandate continued in force unless ended by the Council, where the United States could veto UNTSO's termination. N.Y. Times, Aug. 11, 1979, at 18, col. 5.

132. Letter from David A. Korn, Director, Office of Israeli and Arab-Israeli Affairs, Department of State, to the present writer (Aug. 29, 1979).

133. President Carter's letters, note 65 *supra*. (Emphasis added.)

but was unsuccessful in winning support.[134]

On 24 July 1979, at midnight (New York time), the mandate of UNEF expired. The Secretary-General ordered the force to suspend its operations and await transportation out of the Sinai. Seven hours earlier, the Security Council had reached an agreement—avoiding an actual vote—by which UNEF was to be pulled out of the Sinai, with UNTSO's observers remaining to monitor Israel's withdrawal.[135] In his report to the Council on the expiration of UNEF, Secretary-General Waldheim stated that in view of the fact that the withdrawal of the force was without prejudice to the continued presence of UNTSO in the area, he would make the necessary arrangements for the latter's further functions.[136] On 1 August, UNTSO observers—minus U.S. and Soviet officers—took over checkpoint and patrol duties in the Sinai from the departing UNEF troops, assuming the "most essential positions."[137]

B. *National Action: The Situation During the Interim Period Prior to Final Withdrawal (January 1980 to April 1982)*

1. *The Haifa Agreement*

The displacement of UNEF by UNTSO, over Israeli objection, took place during the month of August and into September. On 5 September, at a meeting at Haifa, President Sadat and Prime Minister Begin reached an agreement, not fully detailed, to station joint Israeli-Egyptian patrols as a temporary self-policing mechanism in the Sinai.[138] This agreement represented a compromise on the part of Egypt, which had theretofore opposed the stationing of Israeli military forces on Egyptian soil.[139] The agreement was "temporary" in that it left undecided any future United States or United Nations involvement or direct participation in Sinai peacekeeping. These questions were to be discussed at an upcoming meeting in Washington.

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134. C.R.S. Issue Brief, *supra* note 106, at 3 (noting reports to this effect from Cairo, and stating also that Egypt had tried to recruit an all-African force); N.Y. Times, Sept. 6, 1979, at 1, col. 3 (specifying that the United States had contacted "Scandinavian countries and others"); Christian Sci. Mon., Apr. 9, 1979, at 10, col.2 (stating that most of the countries contributing troops to UNEF, including some NATO countries, were "unlikely" to agree to station their troops except under United Nations auspices).

135. Letter of 24 July 1979 from the Secretary-General to the Security Council, U.N. Doc. S/13468 (1979); N.Y. Times, July 25, 1979, at 1, col. 1; U.N. CHRONICLE, July-Oct. 1979, at 24.

136. U.N. Doc. S/13468, *supra* note 135, summarized in U.N. CHRONICLE, July-Oct. 1979, at 24.

137. N.Y. Times, Aug. 2, 1979, at 3, col. 1, quoting Major Jorgen Jansen of Denmark, an UNTSO observer. The final, official termination of UNEF's work came on 24 April 1980. Den. Post, Apr. 26, 1980, at 10, col. 1.

138. British Broadcasting Corporation radio newscast, Sept. 5, 1979; N.Y. Times, Sept. 6, 1979, at 1, col. 4. This solution had been mentioned earlier in the press. A 20 May report from Israel stated that Egypt and Israel had agreed at that time to create joint patrols.

139. N.Y. Times, Sept. 6, 1979, at 1, col. 4. In what appeared to be the Israeli part of the compromise, Prime Minister Begin pledged to advance the Treaty timetable by returning Mt. Sinai to Egypt two months ahead of schedule.

2. *The Washington Agreement*

The Washington meeting, involving Secretary of State Vance, Foreign Minister Dayan, and Defense Minister Hassan Ali, was held 18-19 September. It produced the arrangements which are now in existence and which will probably prevail until the end of the interim period in April 1982, when Israel will complete its withdrawal from the Sinai. Those arrangements called for the United States to exercise "overall supervisory responsibilities, possibly augmented by United Nations observers,"[140] in monitoring compliance with the Treaty in areas relinquished by Israel. The agreement was described as "tentative" in that it would require the approval of the U.S. Congress and of the Egyptian and Israeli Governments. The United States was to increase its current ground and air surveillance of the Sinai and, in particular, to extend and broaden the mandate of its Sinai Field Mission. It was not envisioned that the number of personnel at the Mission—200 unarmed civilians—would be altered.[141] The Mission had been operating an early-warning system for three years. By a provision of the Treaty, it was to have been disbanded in late January 1980.[142] Regarding air surveillance, the United States agreed to increase the number of flights to improve the accuracy of the monitoring.[143] The United States had already agreed to operate air surveillance during the interim period.[144]

The arrangements would also require Egyptian and Israeli patrols to operate checkpoints in the interim buffer zone. This provision apparently served to clarify the nature of the agreement reached by President Sadat and Prime Minister Begin at Haifa.

While the status of UNTSO was not defined at the time these agreements were reached, it was clarified somewhat in December by Egypt's Ambassador to the United States, Ashraf Ghorbal, who stated that UNTSO "will have equally a role of supervision within the context of [the September] agreement." The Ambassador also indicated that other details of peacekeeping arrangements for the interim period were still being "thrashed out" in meetings between Egypt, Israel, and the United States.[145]

## IV. THE TREATY'S FRAMEWORK FOR PERMANENT PEACEKEEPING ARRANGEMENTS IN THE SINAI (FROM APRIL 1982)

### A. *President Carter's Letters*

The Treaty provisions concerning peacekeeping arrangements during the indeterminate period following final Israeli withdrawal in April 1982

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140. N.Y. Times, Sept. 20, 1979, at 1, col. 6.

141. *Id.* This report inaccurately indicated that military personnel would be introduced. The error is corrected in N.Y. Times, Sept. 21, 1979, at B1, col. 8.

142. *See* notes 46-47 *supra* and accompanying text.

143. N.Y. Times, Sept. 20, 1979, at 1, col. 6, and at 6, col. 5.

144. *See* notes 45 and 67 *supra* and accompanying text.

145. Response to question posed by the present writer during interview on radio station KOA (Denver, Colorado, Dec. 4, 1979).

envisioned substantial United Nations involvement.[146] The parties did not make specific mention of UNEF or of any other existing U.N. force or observer group for this period, as they had for the period prior to final withdrawal.[147] Given the fact that it is unlikely that a United Nations force for the Sinai will be recreated,[148] President Carter's letters to President Sadat and Prime Minister Begin may take on added importance. By those letters, among other things, the President confirmed that, should the Security Council fail to establish and maintain the peacekeeping provisions called for in the Treaty, the U.S. President would, "subject to United States Constitutional processes . . . be prepared to take those steps necessary to ensure the establishment and maintenance of an acceptable alternative multinational force."[149]

1. *The Extent and Commencement of the Obligation*

Israel had been steadfast in its position that the United States must in fact form such a force to take over the peacekeeping role in the Sinai before the final withdrawal in 1982.[150] The posture of the United States, however, was equally firm: "[The United States'] commitment to establish a multinational force will come into effect only at the time of Israel's final withdrawal, in April, 1982."[151] At the same time, the United States acknowledged that "any agreements reached for arrangements during the interim period would be without prejudice to the assurance concerning [the] permanent arrangements."[152] Thus, the obligations incurred by the letters are not necessarily to be viewed within the context of the Haifa and Washington agreements.

Moreover, a further agreement between Egypt, Israel, and the United States was reached at the September 1979 Washington meeting, to the effect that the three countries would meet "one year before the beginning of final Israeli withdrawal from the Sinai (that is, April, 1981) to begin discussing arrangements for the establishment of this force."[153] The United States' "first preference, in accordance with the Treaty and the President's letter, would be a U.N. force."[154]

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146. The main provisions are in Annex I, art VI; see the text accompanying notes 55-63 *supra*.

147. Appendix art. III, para. 1, whereby the parties specifically requested UNEF's redeployment during the interim period.

148. *See* text, section IV(B)(1) *infra*.

149. Note 65 *supra*.

150. N.Y. Times, Oct. 8, 1979, at 8, col. 2.

151. Letter from David A. Korn, Director, Office of Israeli and Arab-Israeli Affairs, Department of State, to the present writer (Nov. 9, 1979).

152. Letter from Hodding Carter III, Assistant Secretary of State for Public Affairs and Department spokesman, to the present writer (Nov. 5, 1979).

153. Letter from David A. Korn, note 151 *supra*. The words in parentheses form part of the quotation.

154. Letter from Hodding Carter III, note 152 *supra*.

2. *The Legal Status of the Obligation*

a. *Under International Law*

The precise nature under international law of the United States "confirmation" set forth in President Carter's letters is subject to debate. First, it is not absolutely certain whether they in fact form part of the Treaty.[155] Article IX, paragraph 3 of the Treaty provides that "[a]ll protocols, annexes, and maps attached to this treaty shall be regarded as an integral part hereof." The letters could be considered "annexes" in that they are "added statements";[156] however, the term "annex" must be presumed to refer to those documents attached to the Treaty proper which specifically carry the title "Annex."

If the letters are not part of the Treaty itself, it remains to ask what kind of documents they do constitute. A recent volume on the law of treaties[157] lists thirty-two different "Types of Treaties and Instruments Resembling Treaties,"[158] two of which—unilateral declaration and unilateral note—might describe President Carter's letters. It is submitted, however, that regardless of the term employed to describe the letters, the effect in international law would be the same: the United States would be bound.[159]

This proposition is supported by a holding of the International Court of Justice in the *Nuclear Tests Cases*.[160] In that case, France had conducted atmospheric tests of nuclear devices during the years 1966-1968 and 1970-1972 at a site in the South Pacific. Australia and New Zealand had protested the tests through diplomatic exchanges, but France refused to refrain from testing. Australia and New Zealand brought the dispute to the Court, which in 1973 declined France's request that the cases be removed from the list and indicated interim measures to the effect that France should avoid nuclear tests which would cause the deposit of radio-

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155. Though apparently bilateral, the Treaty has multilateral features. The Treaty was witnessed by the United States. It refers to the U.N. peacekeeping forces and aditional documents referring to it commit the United States to certain undertakings. Thus, the Treaty embodies certain multilateral aspects which tend to give it a *sui generis* multilateral character even though it is labelled a bilateral agreement between Egypt and Israel.
Bassiouni, *supra* note 3, at 19.

156. WEBSTER'S NEW COLLEGIATE DICTIONARY 46 (1973).

157. THE TREATY MAKER'S HANDBOOK (H. Blix & J. Emerson eds. 1973).

158. *Id.* at 7-8.

159. It is possible to argue that the President's "confirmation" is not in fact a declaration, but a promise, if the latter is defined as a specific subset of the former: "a declaration in which the maker commits himself to another subject to a specific action." W. LEVI, CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION 214 (1979). Some writers have argued that promises, declarations, and other unilateral acts should be consolidated under the conceptual heading "legal acts," which would be binding if intent was shown to exist. *See, e.g.*, E. SUY, LES ACTES JURIDIQUES UNILATÉRAUX EN DROIT INTERNATIONAL PUBLIC 22 (1962).

160. (Australia v. France), Judgment, [1974] I.C.J. 253; (New Zealand v. France), Judgment, [1974] I.C.J. 457.

active fallout on Australia or New Zealand.[161]

France recommenced atmospheric testing in 1973-1974. In 1974, however, the President of the Republic and other French government officials unilaterally declared that following the completion of tests planned for that year, France would discontinue atmospheric testing. These declarations were made publicly and were transmitted officially to Australia and New Zealand.

The Court, in deciding the issue whether it possessed jurisdiction to consider the merits of the dispute, noted that while the Applicants had formally asked for a judicial determination of the issue, they had also "repeatedly sought from the Respondent an assurance that the tests would cease."[162] The Court found that France's unilateral declarations—and particularly those of the President[163]—that it would discontinue atmospheric testing "constitute[d] an undertaking possessing legal effect."[164] The objectives of the Applicants in bringing the dispute to the Court thus having been achieved, and "the dispute having disappeared,"[165] the Court then held, by nine votes to six, that it was "not called upon to give a decision . . . ."[166]

In reaching this decision, the Court examined "the status and scope on the international plane" of unilateral declarations, stating that it was "well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations."[167] The Court's criteria were set forth as follows:

> When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect . . . .[168]

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161. Order of 22 June 1973 on Request for the Indication of Interim Measures of Protection, [1973] I.C.J. 99, 106; [1973] I.C.J. 135, 142.

162. [1974] I.C.J. 271; [1974] I.C.J. 476.

163. "There can be no doubt, in view of his functions, that his public communications or statements, oral or written, as Head of State, are in international relations acts of the French State." [1974] I.C.J. 269; [1974] I.C.J. 474.

164. *Id.* It has been argued that the Court erred in holding that France's statement that it would cease its atmospheric nuclear testing was intended to be legally binding. M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 121 (3d ed. 1977). Even if true, the Court's factual error would not affect its legal holding that statements which do reflect actual intent are binding.

165. [1974] I.C.J. 271; [1974] I.C.J. 476.

166. [1974] I.C.J. 272; [1974] I.C.J. 478.

167. [1974] I.C.J. 267; [1974] I.C.J. 472.

168. *Id.*

Judge Jessup, in his separate opinion in the *South West Africa Cases* (Preliminary Objections),[169] also made these points and cited other instances of judicial approval of them.[170]

The most important criterion, of course, is that concerning intent to be bound.[171] President Carter, in the letters addressed to President Sadat and Prime Minister Begin, referred not to himself personally, but rather to "the United States" and to "the President." Moreover, Carter Administration officials made it very clear that the government considered itself bound. One official stated that should the situation depicted in the President's letters arise, the United States "will of course be prepared to fulfill this commitment."[172] The International Court indicated, moreover, that a unilateral declaration "made within the context of international negotiations"[173] would be more likely to embrace the required intent to be bound than would, for example, a declaration made *erga omnes*. President Carter's letters did emanate from negotiations and were directed specifically towards Egypt and Israel and not to the world at large.[174]

While no *quid pro quo* was specified in the letters, and while none is required, the fact is that the Treaty could not have been concluded in their absence. Israel in particular has made clear its reliance on and expectations with regard to the commitments they impose on the United States. Both parties have acted in direct reliance on the U.S. "guarantees": witness the fundamental changes in the status of the Sinai.[175]

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169. (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, [1962] I.C.J. 319, 387.

170. The examples included the Case of the Free Zones of Upper Savoy and the District of Gex (France v. Switzerland), [1932] P.C.I.J., ser. A/B, No. 46 (unilateral manifesto issued by a domestic Sardinian organ had the character of a treaty obligation); and the Interpretation of the Statute of the Memel Treaty Case (United Kingdom, France, Italy, and Japan v. Republic of Lithuania), [1932] P.C.I.J., ser. A/B, No. 49 (the Statute, even if a Lithuanian enactment, had the juridical nature of a treaty). [1962] I.C.J. at 403.

171. This point is stressed by Sir Gerald Fitzmaurice. A unilateral declaration, even if lacking a specific *quid pro quo*, will "create binding legal obligations . . . if clearly intended to have that effect, and held out, so to speak, as an instrument on which others may rely and under which the declarant purports to assume such obligations." Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-4*, [1957] BRIT. Y.B. INT'L L. 203, 230.

172. Letter from David A. Korn, note 132 *supra*. Moreover, the letters are listed in the State Department's most recent compilation of United States treaties in force. TREATIES IN FORCE AS AT 1 JANUARY 1980, at 56, 106 (1980) (Dep't of State, Pub. No. 9136).

173. [1974] I.C.J. 267; [1974] I.C.J. 472.

174. While the import of the declarations in the *Nuclear Tests Cases* was transmitted officially to the Governments of Australia and New Zealand, the Court seemed to rely primarily on statements made *erga omnes;* hence the Court's requirement that the undertaking be "given publicly." *Id.*

175. Fitzmaurice stated that a unilateral declaration would be binding

> particularly . . . where other countries have, on the faith of the Declaration, changed their position or taken action on the basis of it. It seems clear that once a Declaration of this kind is established as containing binding obligations, its terms will, *mutatis mutandis*, fall to be interpreted much as if they figured in an actual treaty text.

These facts operate to strengthen the binding character of the letters.

b. *Under United States Law*

The "confirmations" expressed in President Carter's letters were prefaced by the phrase "subject to United States Constitutional processes." This raises questions regarding the legal status and extent of the obligations set forth in the letters under United States law.

The phrase makes one thing clear: the letters are not self-executing instruments. It is not clear whether they should be categorized as "sole" executive agreements[176] or congressional-executive agreements,[177] the most likely descriptions in United States constitutional terminology.[178]

While the constitutional foundations of both of these kinds of agreements are uncertain,[179] the viability of each is "widely accepted" and largely unquestioned.[180] The President's power to make at least certain "sole" agreements in the area of foreign affairs was upheld by the United States Supreme Court in 1937.[181] These agreements, moreover, have been concerned with a wide variety of issues in foreign affairs.[182] Arguments

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Fitzmaurice, *supra* note 171, at 230.

176. *See generally* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 176-88 (1972). Professor Henkin's book is an excellent reference work for this area of the law.

177. *See generally id.* at 173-76; THE CONSTITUTION AND THE CONDUCT OF FOREIGN POLICY 126-27 (F. Wilcox & R. Frank eds. 1976) [hereinafter cited as Wilcox & Frank]. A congressional-executive agreement requires approval by a simple majority of both houses of Congress. For an analysis of historical factors in the development of the practice of using congressional-executive agreements, *see* Slonim, *Congressional-Executive Agreements*, 14 COLUM. J. TRANSNAT'L L. 434 (1975).

178. Professors McDougal and Lans have argued convincingly that, save for procedural aspects, there are "no significant criteria" under international law or United States constitutional law or practice for making terminological distinctions among international instruments. The term "treaty" is thus described strictly in terms of the Senate advice and consent requirement, while the term "executive agreement" is used "as a convenient catch-all to subsume all other international agreements intended to bind the United States and another government." McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181, 198-99 (1945) (Part II is published in 54 YALE L.J. 534 (1945)), *reprinted in* M. MCDOUGAL & ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER 404 (1960). For a reply, *see* Borchard, *Treaties and Executive Agreements*, 54 YALE L.J. 616 (1945). The McDougal & Lans article was itself written in response to an article by Professor Borchard. Note 183 *infra*.

179. L. HENKIN, *supra* note 176, at 174, 176.

180. *Id.* at 175-77.

181. United States v. Belmont, 301 U.S. 324 (1937). Belmont involved the making of the "Litvinov Agreement" subsequent to United States recognition of the U.S.S.R. Since recognition is a concern exclusively of the Executive, the agreement was found to be "incidental" to such a power and hence valid. In dicta, however, Justice Sutherland "seemed to find authority for the Litvinov Agreement not in the President's exclusive control of recognition policy but in his authority as 'sole organ,' his 'foreign affairs power' which supports not only recognition but much if not most other foreign policy." L. HENKIN, *supra* note 176, at 178-79.

182. Professor Henkin provides two examples of interest for present purposes. The Root-Takahira and Lansing-Ishii Agreements "defined American policy in the Far East," much as the Egyptian-Israeli Peace Treaty and the Camp David Agreements sought to define United States foreign policy in the Middle East. Second, President McKinley by execu-

have been made on the limitations on "sole" executive agreements; among these is the notion that it is effective only for the President who makes it.[183] Professor Henkin asserts, however, that these arguments have no "apparent basis relevant to the scope of Presidential power generally, or to the Treaty Power, where any limitations on the power to make executive agreements should lie."[184]

Congressional-executive agreements are normally made pursuant to a ratified treaty or to "either a prior or subsequent grant of authority by Congress."[185] They amount, in effect, to "a complete alternative to a treaty."[186] Professor Henkin writes, in sum, that "[o]ne is compelled to conclude that there are agreements which the President can make on his sole authority and others which he can make only with the consent of the Senate, but [no one] has told us which are which."[187]

The prospects for President Carter's pledge itself are clearly foreseeable through political, if not legal lenses. Neither the Congress nor a successor Administration is likely to challenge the pledge as ultra vires. Rather, and this is probably a major reason why the "Constitutional processes" phrase was included, the Congress would accept the obligation as externally binding, but would exercise its legislative and appropriative authority to play its important role in the making of United States foreign policy.[188] Congress could, therefore, preempt the effect of the pledge. In addition, President Carter or a successor executive would be free to seek to renegotiate the obligation with Egypt and Israel in light of changing conditions.

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tive agreement agreed to contribute American troops during the Boxer Rebellion in China; President Carter, in his letters to President Sadat and Prime Minister Begin, agreed to arrange for multinational troop contributions if necessary. L. HENKIN, *supra* note 176, at 179-80.

183. *Id.* at 181, *citing* Borchard, *Shall the Executive Agreement Replace the Treaty?* 53 YALE L.J. 664, 678-79 (1944).

184. L. HENKIN, *supra* note 176, at 181.

185. Wilcox & Frank, *supra* note 177, at 127.

186. L. HENKIN, *supra* note 176, at 175.

187. *Id.* at 179.

188. Congress has, in fact, gone on record as neither approving nor disapproving the United States commitments contained in President Carter's letters. The Special International Security Assistance Act of 1979 reads in part as follows:

> § 3401. Congressional findings and declaration of policy
>
> (a) Policy of support for peace treaty
>
> It is the policy of the United States to support the peace treaty concluded between the Government of Egypt and the Government of Israel on March 26, 1979. . . .
>
> . . . .
>
> (c) Other agreements, understandings, or commitments
>
> The authorities contained in this chapter to implement certain arrangements in support of the peace treaty between Egypt and Israel do not signify approval by the Congress of any other agreement, understanding, or commitment made by the executive branch.

22 U.S.C. § 3401 (Supp. III 1979) (enacted by Pub. L. No. 96-35, § 2, 93 Stat. 89).

3. *The Nature of a U.S.-Sponsored Force*

It would be overly speculative to attempt to forecast the nature of a United States-sponsored alternative multinational force. It is quite probable that the United States would find it a very difficult task to organize such a force,[189] though there are examples of peacekeeping forces—some much less successful than others—established outside United Nations auspices.[190]

B. *Other Possible Developments*

Answers to questions concerning the permanent situation in the Sinai as envisioned by the Treaty and its accompanying documents must await crucial upcoming events. Meetings on peacekeeping issues between Egypt, Israel, and the United States are scheduled for April 1981.[191] Also, the United States presidential election will predate that event, and Israeli elections may do so.[192]

1. *A United Nations Force*

It is extremely doubtful that by the end of the interim period in April 1982 the situation will have changed such that extensive United Nations involvement will have become practicable.[193] For this to eventuate, the political climate will have to have improved to the point that the Soviet Union could find itself able at least to abstain in a vote to recreate a United Nations force in the Sinai. This would probably require one or more other parties in the overall Middle East dispute to have joined the process initiated by Egypt and Israel. It is also possible, of course, that a United Nations force could result from a further outbreak of hostilities. UNEF itself was an offspring of the 1973 war.

2. *Status Quo*

Egypt and Israel might find that outside peacekeeping mechanisms, beyond those established initially at the Washington conference of Sep-

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189. *See* note 134 *supra* and accompanying text. An additional complicating factor is the possibility that the United States, facing the difficulty of organizing an "acceptable" multinational force, might consider sending U.S. troops as a complete or partial alternative to a United Nations force in the Sinai. (*But see* note 121 *supra*, concerning the agreement between the United States and the Soviet Union that American and Soviet officers would not serve in the UNTSO Sinai contingent.) In that event, the War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1976), and perhaps other statutes might come into play, the Congress asserting its intention to "insure that the collective judgment of both the Congress and the President" is applied where United States armed forces become involved in foreign conflicts. 50 U.S.C. § 1541(a).

190. Many of these would not qualify as peacekeeping operations under the standard definitions of United Nations operations. They include, for example, the peacekeeping mission in Kuwait under the League of Arab States (1961-1963), the Inter-American Armed (later Peace) Force in the Dominican Republic under the Organization of American States (1965-1966), the International Commission for Supervision and Control in Vietnam (1954).

191. *See* text accompanying note 151 *supra*.

192. National elections in Israel are due in November 1981 but, depending on political conditions, may be held earlier.

193. For a brief discussion of the conditions necessary for the creation of a U.N. force, *see* note 48 *supra*.

tember 1979, are not necessary. If the current status quo, with accomodation as required, were to be maintained in the period following withdrawal to the international border in April 1982, the United States would continue to "exercise overall supervisory responsibilities."[194] It would conduct ground and air surveillance, and its Sinai Field Mission and early-warning system would continue to operate. In addition, UNTSO would continue to play a role.

## V. THE EFFECT OF THE PASSING OF UNEF ON UNITED NATIONS PEACEKEEPING

### A. *The UNEF Consensus*

The passing of a United Nations peacekeeping force will always give rise to questions concerning the future of peacekeeping generally. This was the case, it will be recalled, upon the withdrawal by Secretary-General U Thant of UNEF I in 1967. In some ways, that event was more foreboding for the future of peacekeeping than is the termination of UNEF's mandate.[195] Peacekeeping has shown remarkable resiliency, indicating perhaps that in the right circumstances it is very much needed and indeed wanted by states, and that it has simply not yet matured to the point of becoming fully institutionalized in a form acceptable to states. UNEF itself is a prime example of this resiliency. One key question on the matter of the future of United Nations peacekeeping, therefore, is whether whatever consensus on the use of peacekeeping that may have emerged in the period following the October 1973 war can survive the death of UNEF.

The creation of UNEF in 1973 constituted an important revitalization of peacekeeping generally. It came nearly ten years after the establishment of the last United Nations force, that in Cyprus.[196] To some observers, it appeared that the Cyprus force would be the U.N.'s last.[197] That feeling was resoundingly shattered when the United States and the Soviet Union, along with the other Security Council members, decided to use the Council and the United Nations to seek a settlement of the immediate and ongoing crises in the Middle East.[198]

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194. See text at note 140 *supra*.

195. "[UNEF I] had remarkable success in maintaining stability in Israel-Egypt relations, and . . . there can be no doubt that it ranked among the most effective of all UN peacekeeping operations. But the manner and occasion of its withdrawal caused widespread doubt about the overall efficacy of UN peacekeeping." 1 R. HIGGINS, *supra* note 48, at 481.

196. The United Nations Force in Cyprus (UNFICYP) was created by the Security Council by Resolution 186, 19 U.N. SCOR, Supp. (Res. & Dec.) 2 U.N. Doc. S/INF/19/Rev.1 (1964). *See generally* J. STEGENGA, THE UNITED NATIONS FORCE IN CYPRUS (1968).

197. *See, e.g.*, I. RIKHYE, M. HARBOTTLE & B. EGGE, THE THIN BLUE LINE 334 (1974) [hereinafter cited as RIKHYE *et al.*].

198. The establishment of UNEF

> followed a Soviet invitation to the United States to jointly intervene to stop the fighting . . . with a warning that the USSR might intervene unilaterally if the United States refused. This threat impelled President Nixon to order an alert of United States armed forces. Thus the proposal of UNEF II by nonper-

The Secretary-General submitted his initial report on the implementation of the Security Council's decision to create UNEF only two days after that decision was taken.[199] This document contained a set of "general considerations" to be applied to UNEF. These broad principles, together with the draft formulae for peacekeeping guidelines contained in the 1976[200] and 1977[201] reports of the Special Committee on Peace-Keeping Operations, still constitute the basic working documents of U.N. peacekeeping. It is to these documents that one must look to find areas of consensus among states, and most importantly among the major powers.

It has been argued that, owing to the Security Council's acceptance[202] of the principles set forth in the Secretary-General's report, they should be thought of as applicable to peacekeeping generally.[203] The principles avoided seriously offending any major power,[204] incorporated all elements agreed upon over a number of years in the forum of the Special Committee, and "[drew] up a *modus operandi* in which all powers [could] acquiesce even though they would not specifically endorse some of its features."[205] Professor Finger, a long-time United States representative on the Special Committee, suggested for these reasons that "the future of peacekeeping might be better served by using UNEF II as a model or precedent, as in common law, rather than to attempt to codify guidelines."[206]

Desirable as such a course of action might be, the fact remains that the Special Committee struggles on to codify official guidelines. It is in-

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> manent members of the Security Council . . . might also have prevented a very dangerous Soviet-American confrontation in the Middle East.

Finger, *The Maintenance of Peace*, in THE CHANGING UNITED NATIONS 195, 197 (D. Kay ed. 1977) [book cited hereinafter as Kay].

199. Report of the Secretary-General, note 89 *supra*.

200. Tenth Report of Working Group, *supra* note 97, Appendix I (draft articles).

201. Eleventh Report of Working Group, *supra* note 102, Appendix I (draft articles).

202. The Council approved the Secretary-General's report by its Resolution 341, note 48 *supra*. The vote was 14 to 0; the People's Republic of China did not participate in the vote. [1973] U.N.Y.B. 214.

203. A high-ranking U.N. official, James O.C. Jonah, has written (in his private capacity) that "[b]y its acceptance of the Secretary-General's report in its resolution 341, the Security Council endorsed . . ." its terms. Jonah, *Peacekeeping in the Middle East*, 31 INT'L J. 100, 114 (1975-76). *See also* Pelcovits, *UN Peacekeeping and the 1973 Arab-Israeli Conflict*, 19 ORBIS 146, 161 (1975), where it is stated that

> the UNEF 'terms of reference,' drafted by the Secretary-General and approved by the Security Council, pragmatically settled certain issues on the conduct of peacekeeping operations that had long been deadlocked in the UN's peacekeeping committee. . . . [T]he UNEF guidelines provide a practical model that is likely to become the general pattern for future operations.

*But see* Wiseman, *United Nations and UNEF II: A Basis for a New Approach to Future Operations*, 31 INT'L J. 124, 133 (1975-76): "[A]greement there is on UNEF II, but not necessarily as a precedent for future operations." However, the overall tenor of Wiseman's article is much more optimistic than this isolated statement would seem to indicate.

204. *See* note 90 *supra* and accompanying text.

205. Finger, *supra* note 198, at 200.

206. *Id.*

teresting, however, to note the similarities in language in several instances in the Secretary-General's report on the one hand and the Special Committee's draft guidelines on the other. For example, the report reads in part as follows:

> Three essential conditions must be met for the Force to be effective. Firstly, it must at all times have the full confidence and backing of the Security Council. Secondly, it must operate with the full cooperation of the parties concerned. Thirdly, it must be able to function as an integrated and efficient military unit.
>
> . . . .
>
> The Force must enjoy the freedom of movement . . . necessary for the performance of its tasks.
>
> . . . .
>
> In performing its functions, the Force will act with complete impartiality . . . .[207]

Article 9 of the draft guidelines, which contains no brackets indicating "absence of agreement,"[208] reads:

> It is essential that throughout the conduct of a United Nations peace-keeping operation it shall have the full confidence and backing of the Security Council. Such forces must operate with the full cooperation of the parties concerned, particularly of the Government of the host country, due account being taken of its sovereignty. Such forces must function as integrated and efficient military units and act with complete objectivity. It is also of the utmost importance to secure freedom of movement for each unit irrespective of its nationality.[209]

The correspondence in language in other instances varies, and each document touches on certain aspects of peacekeeping not mentioned in the other.[210] The point, however, is that very substantial progress in institutionalizing the regime of United Nations peacekeeping was made in the UNEF era, and a good deal of consensus was either established or identified.

One area of consensus, discussed above, is the relationship between the Secretary-General and the Security Council.[211] Other fundamental aspects of peacekeeping operations upon which some degree of consensus

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207. Report of the Secretary-General, *supra* note 89, at paras. 3, 4(b), 4(e).

208. Eleventh Report of Working Group, *supra* note 102, at para. 7.

209. *Id.* at Appendix I (draft articles).

210. For example, the Secretary-General's report stated that UNEF "will be provided with weapons of a defensive character only. It shall not use force except in self-defence." Report of the Secretary-General, *supra* note 89, at para. 4(d). The Special Committee's draft guidelines do not yet offer guidance on use of force questions. The draft guidelines go beyond the Secretary-General's report in numerous respects, as would be expected. *See, e.g.*, note 98 *supra* and accompanying text, on the possible establishment by the Security Council of a subsidiary body to assist it.

211. *See* text section III(A)(1) *supra*.

seems to have been reached include financing and force composition.[212] On the question of financing, the Council, in accepting the Secretary-General's initial report on UNEF, agreed that the costs of that force should be "considered as expenses of the Organization to be borne by the Members in accordance with Article 17, paragraph 2, of the Charter."[213] However, this agreement was limited to the case of UNEF when the General Assembly adopted a resolution embodying a Soviet-sponsored amendment to the effect that UNEF financing was strictly *"ad hoc"* and did not constitute a precedent.[214] Nevertheless, UNEF was the first force for which the Soviet Union and France agreed to pay proportionate shares. The People's Republic of China refused to bear any part of the costs, but did acquiesce in the creation of the force rather than using its veto as it might have wished to do.[215] Moreover, the financing arrangement adopted proved workable, as it was reconfirmed in the periodic renewals of UNEF's original mandate.[216] The Special Committee is yet undecided on the question of financing.[217]

On the matter of composition, UNEF was the first force to achieve "equitable geographical balance," long demanded by the U.S.S.R. Poland became the first Warsaw Pact country to serve in a United Nations force, and it shared, with Canada, the important responsibility for logistic sup-

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212. Consensus has not been reached on other matters, including for example the appointment of the force commander. The Secretary-General felt that he ought to make that appointment, "with the consent of the Security Council." Report of the Secretary-General, *supra* note 89, para. 4(a). The Special Committee has not yet been able to agree whether the commander would be appointed "on the proposal of the Secretary-General," "by the Secretary-General," "with the consent of the Secretary-General," or "by the Security Council." Eleventh Report of Working Group, *supra* note 102, Appendix I (draft articles), art. 8.

213. Article 17, paragraph 2 of the Charter reads: "The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly." *Id.* The Council's statement accords with the holding of the International Court of Justice in its Advisory Opinion on Certain Expenses of the United Nations, [1962] I.C.J. 151.

214. G.A. Res. 3101, 28 U.N. GAOR, Supp. (No. 30) 122, U.N. Doc. A/9030 (1973).

215. In explaining its non-participation in the creation of UNEF, the representative of China stated:

> With regard to the draft resolution before us, the Chinese delegation understands the good desire of the sponsors. However, we deem it necessary to point out that the dispatch of a United Nations emergency force will be of no avail. . . .
>
> China has always been opposed to the dispatch of the so-called "peacekeeping forces". . . . Such a practice can only pave the way for further intervention and control with the super-Powers as the behind-the-scenes boss. . . . It is only out of consideration for the requests repeatedly made by the victims of aggression that China is not in a position to veto the draft resolution. China has decided not to participate in the voting on that draft.

28 U.N. SCOR (1750th mtg.) 2, U.N. Doc. S/p.v. 1750 (1973).

216. Wiseman, *supra* note 203, at 136.

217. Article 11 of the Committee's draft guidelines would establish that the costs of peacekeeping operations would be governed by Article 17 of the Charter, but additional clauses still under consideration would allow the Council to decide to employ any other method of financing. Eleventh Report of Working Group, note 102 *supra*.

port. The Secretary-General's report described "equitable geographical balance" as an "accepted principle,"[218] and the Special Committee's draft guidelines termed it "one of the guiding principles" in force composition.[219] UNEF also served to clarify, in a positive way, the meaning of "host country consent." Working from the assumption that Israel, though not in fact a host country, had to consent to the stationing of the force, an expansive interpretation might have meant that Poland and the other participating states which had no diplomatic relations with Israel would have been barred.[220] A more permissive interpretation was followed, to the benefit of the institution of peacekeeping.

Beyond these elements of consensus on peacekeeping furthered by the UNEF experience, significant new tasks were assigned to UNEF and to another new peacekeeping unit in the Middle East, the United Nations Disengagement Observer Force (UNDOF),[221] thereby developing the functions of peacekeeping. It was UNEF that "moved from the concept of an inter-position force to a buffer force,"[222] meaning among other things that in addition to manning positions and observation posts, it verified force and armament limitations in specified areas on each side of the buffer zone. The success of UNEF, in both its military and diplomatic roles, helped make possible the separation of forces agreement in the Golan Heights and the creation of UNDOF. As evidenced by its name, UNDOF combined the two different types of peacekeeping operations: forces and observers. The same was true of UNEF.

It is also a "tribute to the conciliatory role played by UNEF"[223] that two states at war for over thirty years explicitly recorded their desire to employ United Nations forces and observers, and that this intention was defeated by political events largely unconnected with confidence in United Nations peacekeeping.[224] The withdrawal of UNEF did not adversely affect the status of UNTSO, and the use of the latter unit has served to maintain a United Nations peacekeeping presence in the Si-

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218. Report of the Secretary-General, *supra* note 89, para. 4(c).

219. Eleventh Report of Working Group, *supra* note 102, Appendix I (draft articles), art. 10. Another "guiding principle," the overall efficiency of the operation, does not yet enjoy consensus in the Special Committee. *Id.*

220. States which contributed troops to UNEF were: Australia, Austria, Canada, Finland, Ghana, Indonesia, Ireland, Nepal, Panama, Peru, Poland, Senegal, and Sweden.

221. UNDOF was established by Security Council Resolution 350, 29 U.N. SCOR, Supp. (Res. & Dec.) 4, U.N. Doc. S/INF/30 (1974).

222. Jonah, *Importance of UN Peace-Keeping Operations Emphasized,* U.N. CHRONICLE, July 1979, at 78, 81.

223. Sommereyns, *supra* note 111, at 53.

224. Sommereyns also remarked that:

> It would be wrong . . . to interpret UNEF's disappearance as detrimental to the role of the United Nations in the field of peace-keeping. . . . The real measure of success of a temporary United Nations peace-keeping operation is not the length of time the operation can be maintained, but the fact that the peace-keeping force can be withdrawn under durable peaceful circumstances.

*Id.* at 48, 53.

nai.[225] Moreover, another United Nations peacekeeping force in the Middle East was brought into existence during the UNEF era. In March 1978, the United Nations Interim Force in Lebanon (UNIFIL) was established after the outbreak of hostilities in southern Lebanon.[226] This force, in the words of one U.N. official, "represents the most difficult peace-keeping operation ever launched by the Organization."[227] UNIFIL has encountered serious obstacles, but has performed a very difficult task admirably.[228]

One other UNEF-era hopeful sign was the preparation by the International Peace Academy of a pragmatic peacekeeping handbook.[229] For some time, a complaint of both participants in and observers of peacekeeping forces was the lack of a handbook or guide to peacekeeping. "If the fault lies anywhere," wrote Harbottle, "it lies with the United Nations for not giving member states the information they need to prepare themselves."[230] The Academy's handbook was developed by military experts, lawyers, diplomats, and scholars from twenty countries, and is now used by all governments participating in the UNIFIL operation.

All of these progressive developments, it seems reasonable to say, are undiminished by the dissolution of UNEF, since the cause of UNEF's demise was completely unrelated to them. It was not opposition to a peacekeeping force in the Sinai nor to peacekeeping generally that caused the blockage of the extension and expansion of UNEF's mandate. Rather, it was opposition, on the part of the U.S.S.R. and of the majority of the Arab governments, to the Egyptian-Israeli Peace Treaty.

B. *Prospects for United Nations Peacekeeping*

To cite progressive developments is not, however, to imply that there are no problems with peacekeeping. Many of the inadequacies and inefficiencies in the machinery of peacekeeping involve force preparation and organization, and center on a general conception of peacekeeping as com-

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225. *See generally* text sections III(A)(2) and III(B) *supra*.

226. S.C. Res. 425 & 426, 33 U.N. SCOR, Supp. (Res. & Dec.) 5, U.N. Doc. S/INF/34 (1978).

227. Jonah, *supra* note 222, at 81.

228. *See* Sommereyns, *supra* note 111, at 10-14.

229. INTERNATIONAL PEACE ACADEMY, PEACEKEEPER'S HANDBOOK (1978). The Academy's President is General Indar Jit Rikhye, formerly a military advisor to Secretaries-General Hammarskjöld and Thant. The Academy is technically outside the aegis of the United Nations, but its membership comprises many individuals in the United Nations community.

230. Harbottle, *supra* note 48, at 549. The writer continues: "The need for such a handbook is strongly supported by almost all those who have a wide experience of international peacekeeping, particularly those who have held senior command and staff appointments." *Id.* at 549-50. *See also* RIKHYE *et al.*, *supra* note 197, at 336:

> The impression obtained from talking to those who are meeting the responsibilities of peacekeeping for the first time [in service in UNEF] is that a basic manual of peacekeeping covering all its operational aspects of organization, administration, standing operating procedures, preparation, and training, as well as status of force agreements and international law as it affects international peacekeeping, would be of inestimable value to all concerned.

pletely *ad hoc* and hence inevitably disorganized.[231] Harbottle has written that "the biggest limitation to the effective implementation of peacekeeping is the Charter itself,"[232] which makes no provision for modern peacekeeping, and therefore serves as a constraint on the institutionalization of peacekeeping.

Prospects for the future are neither bright nor dim, but uncertain and largely indeterminable. Like all political-legal institutions, peacekeeping's future is subject to unpredictable developments. In negotiations on the situation in southern Africa, the possibility of United Nations peacekeeping machinery has been mentioned. The Western proposals for settlement in Namibia (South-West Africa) called for "comprehensive arrangements for a United Nations peace-keeping force in the context of the United Nations Transition Assistance Group (UNTAG)."[233] Both sides in the Namibia conflict—the liberation movements, notably the South-West Africa People's Organization, and the Republic of South Africa—"have reconciled to the fact that if a cease-fire is to be maintained in Namibia, United Nations peace-keeping forces will have to provide the guarantees."[234]

The establishment in the future of other United Nations peacekeeping operations will depend most fundamentally on the existence of the requisite political will in the given circumstances on the part not only of the parties in the dispute, but also of the permanent members of the Security Council and of other involved states. There is no particular reason to expect expeditious and material progress on guidelines in the Special Committee.[235]

While the Egyptian-Israeli Peace Treaty could conceivably have made a significant contribution to United Nations peacekeeping, it was not afforded that opportunity.[236] Indeed, in this case, the political will of

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231. Wiseman has coined a phrase to describe "the law of U.N. peacekeeping": "Adhocracy." *Supra* note 203, at 124.

232. The 1971 Memorial Lecture of the David Davies Memorial Institute of International Studies, *reprinted in* R. HIGGINS & M. HARBOTTLE, UNITED NATIONS PEACEKEEPING: PAST LESSONS AND FUTURE PROSPECTS 18 (1971).

233. Jonah, *supra* note 222, at 82.

234. *Id.* The Anglo-American proposals for a settlement of the war in Zimbabwe contained provisions for a United Nations role in the transitional period. As part of the actual settlement of that conflict, the United Kingdom acceded partially to a demand of the Patriotic Front that an international peacekeeping force be brought into the country by agreeing to assemble an international force consisting of some 1,000 British and Commonwealth soldiers. Den. Post, Nov. 11, 1979, at 32, col. 1.

Also, though one might well and rightly be skeptical, news reports from London indicated that the Soviet Union might be willing to accept United Nations troops in Afghanistan as part of a plan to "neutralize" the country. The reports specified that these comments were made "unofficially" by "high-level sources close to President Brezhnev." Den. Post, Feb. 27, 1980, at 4, col. 1.

235. *See* note 105 *supra*.

236. It is possible that the Treaty actually contributed to a loss in credibility for United Nations peacekeeping since, "[a]ccording to UN officials, those who wrote the provisions

certain states came into conflict with that of certain others, and the result was the discontinuance of a major United Nations force and harm to the institution of peacekeeping. In its almost six-year life, however, UNEF helped make possible the achievement of a measure of consensus theretofore unreachable. Today, there is "sufficient consensus for the United Nations to stay in the business of peacekeeping."[237] This is encouraging, since peacekeeping can, as it has proven in practice, offer an invaluable contribution to the cause of the peaceful settlement of international disputes.[238] Its contribution in fact goes beyond keeping the peace: it also constitutes an aid to peacemaking and peacebuilding.[239] The future of peacekeeping is uncertain, but since it is one of the few multinational institutions states have entrusted with a role in the area of peace and security, one must hope for positive developments in the years to come.

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referring to the UN role in the peace treaty appear to have hastily and inadvertently assumed that the UN would simply go along with their plan." Christian Sci. Mon., Apr. 9, 1979, at 10, col. 2.

237. Higgins, *supra* note 75, at 12.

238. It has been argued, too, that "[t]he peace-keeping function of international organization is peculiarly appropriate to such an era as our own . . . . The very features of the contemporary international system and situation that make collective security irrelevant bolster the relevance of peace-keeping." Claude, *supra* note 69, at 53-54.

239. *See, e.g.*, Forsythe, *United Nations Peacemaking*, in Kay, *supra* note 198, at 206; Jonah, *supra* note 203, at 118-19; Gordon, *In the Mideast, the UN keeps the peace but doesn't make it*, INTERDEPENDENT, Apr. 1979, at 3; Wiseman, *supra* note 203, at 553.

# DEVELOPMENTS

## The Refugee Act of 1980

Although the grand purposes of the Refugee Act of 1980[1] were to give statutory meaning to our "history of welcoming homeless refugees to our shores" and to signify our "national commitment to human rights and humanitarian concerns,"[2] the American public's reaction to this past summer's dramatic influx of Cuban refugees[3] coupled with the Carter Administration's decision to use traditional executive parole powers to admit Cuban and Haitian refugees[4] promise to compromise the Act's utility.

The Refugee Act, which became law in March of 1980,[5] was intended to provide a "permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern."[6] Prior to this enactment, immigration legislation contained no explicit procedures for the general admission of economic or political refugees. To the contrary, previous legislation was expedient in nature and reflected America's geo-

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1. Pub. L. No. 96-212, 94 Stat. 102 (to be codified in scattered sections of 8 U.S.C. (1976)).

2. *See* S. REP. No. 256, 96th Cong., 2d Sess. 1 (1979), *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 515.

3. Some immigration lawyers forecast that the resettlement difficulties of the Cuban refugees, such as the riots of 1 June 1980 at Fort Chaffee, Arkansas, will prompt Congress to reevaluate U.S. refugee policy. *See* Slonim, *Freedom Flotilla from Cuba: Will the Harbor Stay Open?*, 66 A.B.A.J. 823, 825 (1980). Although local resentment of those in Arkansas, Idaho, and other resettlement states primarily may be related to a fear of economic competition and the sentiment that "charity begins at home," racial opposition to the admission of Latin and Vietnamese refugees has been noted. Doris Meissner, Deputy Associate Attorney General, has expressed concern that the Cuban/Haitian refugee dilemma will reinforce negative racial attitudes toward U.S. immigration policy in the future: "I'm quite worried about a heavy-handed approach because of the political atmosphere. It think the long-range impact is going to be to add to the already strong fear that most Americans have about lots of new people of other colors being in the United States." *Id.* at 824.

4. On 19 June 1980, the administration announced that the 114,000 Cubans who arrived between 21 April and 19 June and those Haitians who arrived before 19 June would be classified as Cuban/Haitian Entrants (Status Pending). This allows them six months admission on a parole basis under the 1952 Immigration and Nationality Act, 8 U.S.C. § 212(d)(5) (1976). This admission route, however, is only a stopgap measure which requires that special legislation be passed to normalize the status of these immigrants. Senator Kennedy, chief architect of the 1980 Refugee Act, has argued that the administration's reluctance to use the admission procedures of the Act will compromise its future. *See* Slonim, *Cuban Refugee Crisis: Quick Test for New Law*, 66 A.B.A.J. 826 (1980).

5. *Id.*

6. Pub. L. No. 96-212, § 101(b), 94 Stat. 102.

political position rather than our humanitarian concerns. For example, prior to 1965, all refugees were admitted under such special legislation as the 1948 Displaced Persons Act (for a limited number of "eligible displaced persons"),[7] the Refugee Relief Act of 1953 (for three classes of displaced Eastern Europeans),[8] or the 1960 Fair Share Act (for "refugee-escapees").[9] In 1965, the Immigration and Nationality Act was revised so that, to be admitted, a refugee had to prove that he departed from a communist or communist-dominated country or that he came from a country in "the general area of the Middle East."[10] Because these sharp geographical and ideological limitations allowed limited political flexibility, the majority of refugees during these years were admitted through the Attorney General's special parole authority, *i.e.*, special admission "for emergent reasons or for reasons deemed in the public interest."[11]

The use of parole authority as the mainstay of the United States refugee policy, however, has been criticized as being ad hoc, discriminatory, and inefficient.[12] As was demonstrated by the case of Uganda in 1972, the requirements of U.S. immigration law often stymie executive desire for

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7. Pub. L. No. 83-203, 67 Stat. 411 (1953)(expired in 1956). The act permitted the special admission of 205,000 displaced persons. *Id.* § 20.

8. Pub. L. No. 86-648, 74 Stat. 504, *amended by* Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, § 6, 76 Stat. 124 (1962), *repealed by* Act of Oct. 3, 1965, Pub. L. No. 89-326, § 16, 79 Stat. 919.

9. 8 U.S.C. § 1153(a)(7) (1976).

10. Pub. L. No. 89-236, § 203(a)(7), 79 Stat. 913 (1965).

11. 8 U.S.C. § 1182(d)(5). Over one million refugees have been admitted under the Attorney General's parole authority:

HISTORICAL SUMMARY OF REFUGEE PAROLE ACTION

| Year | Country and Class of people | Total |
|---|---|---|
| 1956 | Orphans from Eastern European countries | 925 |
| 1957-57 | Refugees from Hungary | 38,045 |
| 1960-65 | Refugees-escapees from Eastern European countries | 19,754 |
| 1962 | Chinese refugees from Hong Kong and Macao | 14,741 |
| 1962-79 | Refugees from Cuba | 692,219 |
| 1973-79 | Refugees from the Soviet Union | 35,758 |
| 1975-79 | Indochinese refugees | 208,200 |
| 1975-77 | Chilean detainees | 1,310 |
| 1975-77 | Chilean refugees from Peru | 112 |
| 1976-77 | Latin American refugees (Chileans, Bolivians, and Uruguayans) | 343 |
| 1978-79 | Lebanese refugees | 1,000 (est.) |
| 1979 | Cuban prisoners and families | 15,000 (est.) |
| | Total: | 1,027,407 |

S. REP. No. 256, 96th Cong., 2d Sess. 6 (1979). For an excellent survey of the role of parole authority under previous immigration legislation, see Evans, *The Political Refugee in United States Immigration Law and Practice*, 3 INT'L LAW. 204 (1968).

12. *See, e.g.*, Mackler, *Fleeing Political Refugee's Final Hurdle—The Immigration and Nationality Act*, 5 N. KY. L. REV. 9 (1978); Note, *Immigration Law and the Refugees—A Recommendation to Harmonize the Statutes with the Treaties*, 6 CAL. W. INT'L L.J. 129 (1975); Note, *Refugees Under United States Immigration Law*, 24 CLEV. ST. L. REV. 528 (1975).

expeditious parole admission. Because Uganda was neither communist nor in the Middle East, the 1,550 Orientals who were expelled upon General Amin's threat of extermination were admitted only after great procedural difficulties and, upon entry, they enjoyed fewer resettlement privileges than they would have had they been refugees from such "preferred" countries as the Soviet Union of Lebanon.[13]

In an attempt to redirect this muddled policy, the Refugee Act seeks to accomplish five objectives. First, it repeals the current immigration law's discriminatory treatment of refugees by providing a new definition of refugees, drawn from the 1967 Protocol Relating to the Status of Refugees,[14] that recognizes the plight of homeless people all over the world regardless of their national, regional, or political origin. This definition is significant because it recognizes the obligations of the United States under the 1967 Protocol. Prior to the new act, the government's attitude had been that accession to the Protocol did not enlarge our immigration responsibilities toward refugees.[15] Second, the Act raises the annual limitation for admission of regular refugees ("normal-flow refugees") from 17,400 to 50,000.[16] Third, it provides an orderly procedure for meeting emergency refugee situations if the needs of displaced people cannot be met within the regular 50,000-person limit.[17] It is hoped that these last two revisions will add needed flexibility to the Immigration and Nationality Act and reduce the need for ad hoc parole admission. Fourth, to ensure congressional control over the admission and resettlement process, the Act requires that Congress be consulted before refugees are admitted.[18] Lastly, the Act provides for federal support for the resettlement of refugees - including cash and medical benefits for up to a two-year period following admission.[19]

The Refugee Act was designed to provide maximum flexibility to cope with both political asylum and "emergency refugee situations," which have been considered by the legislative committees as "an unforeseen combination of circumstances or the resulting state that calls for immediate action."[20] The unexpected arrival of more than 114,000 Cuban refugees during the three months following the bill's enactment severely tested the utility of the new law. Although the Act outlines admission

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13. For a general discussion of the treatment of expellees under international law, see 2 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW § 244 (1972).

14. *Done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577. The Protocol entered into force with respect to the United States on 1 November 1968.

15. *See* Letter of Transmittal From President Johnson to the Senate (Aug. 1, 1968), S. EXEC. K., 90th Cong., 2d Sess. 111 (1968). *See also* Note, *Political Asylum in the United States: A Failure of Human Rights Policy*, 9 RUT.-CAM. L.J. 133, 147-49 (1977).

16. Pub. L. No. 96-212, § 207(a)(1), 94 Stat. 103.

17. Pub. L. No. 96-212, § 207(b), 94 Stat. 103.

18. Pub. L. No. 96-212, § 203(f), 94 Stat. 104.

19. Pub. L. No. 96-212, Titles III-IV, 94 Stat. 109-18.

20. S. REP. No. 256, 96th Cong., 2d Sess. 10 (1979), *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 524.

procedures for refugees who are either of "special concern" or who seek admission because of a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion"[21] (which is a definition certainly broad enough to include the Cuban and Haitian refugees), President Carter chose to bypass these asylum provisions on the assumption that "[o]ur laws never contemplated and do not adequately provide for people coming directly to our shores the way the Cubans and the Haitians have done recently."[22] The administration instead chose to admit the refugees on a six-month parole basis which will require special legislation to be passed in the future to normalize the status of those immigrants.[23]

Although it is understandable that the administration would wish to delay use of the Refugee Act in an election year, especially considering its potential expense and probable conflict with current immigration sentiment, President Carter's interpretation of the Act runs contrary to the intention of the drafters. The Senate Judiciary Committee defines an emergency refugee situation in terms of a sudden exodus of people from a country where there had been no refugee flow before, a substantial increase in the number of people from an area where normal-flow refugees were never expected, or a flow of refugees resulting from any catastrophic circumstance.[24] Despite having flexible legislation tailored for such emergency situations, the Carter Administration refused to use the new law and has thus, in the eyes of its drafters, imperiled its usefulness for the coming years.

President Carter's indecisiveness is not the only factor endangering the bill, however. The hardening political atmosphere within the United States toward illegal immigration from Mexico and elsewhere promises to spawn a legislative movement to reevaluate our asylum policy. Senator Kennedy's euphoric rhetoric of 1977 that it is our "national commitment to welcome homeless refugees to our shores"[25] may not be shared in the 1980's by many of his fellow senators such as Arkansas Democrats Dale Bumpers and David Pryor who have had to cope with strong local resentment toward refugees in the wake of the riots at Fort Chaffee.[26] Moreover, the Presidential-Congressional Select Commission on Immigration and Refugee Policy, which will issue its report in March of 1981, has preliminarily indicated that it will propose various programs to inhibit the flow of immigrants—including stricter border enforcement, sanctions against those hiring illegal aliens, and an employee identification card to

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21. Pub. L. No. 96-212, § 202(a), 94 Stat. 102.

22. Statement of President Carter, May 14, 1980, *quoted in* Slonim, *supra* note 4, at 826.

23. *Id.*

24. S. REP. No. 256, 96th Cong., 2d Sess. 10 (1979), *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 524.

25. S. REP. No. 256, 96th Cong., 2d Sess. 1 (1979), *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 515.

26. Slonim, *supra* note 3, at 824.

be carried by all Americans.[27] Given this changing political situation and the Carter Administration's refusal to utilize the flexibility offered by the Refugee Act, it is probable that the new law is already antiquated and an inaccurate statement of our refugee policy.

*Peter T. Moore*

27. *Id.* In 1980 alone, an estimated two million people migrated to the United States. Although 800,000 of this number came legally as immigrants and refugees, at least 1,200,000 violated U.S. laws to enter. No country has ever absorbed as many new residents in one year during peacetime. Accordingly, it is understandable that many Americans feel threatened under a seeming barrage of legal and illegal immigration. The report of the Select Commission on Immigration and Refugee Policy is expected to reflect this hardened attitude. *See* Goldenberg, *Bursting through the Golden Door,* Rocky Mtn. News, Jan. 19, 1981, at 43, col. 1.

# Rosado v. Civiletti Tests the United States-Mexico Prisoner Transfer Treaty

The United States-Mexico Prisoner Transfer Treaty[1] has spawned a handful of *habeas corpus* suits in its short life.[2] One of the most recent cases is *Rosado v. Civiletti,* which concerned the situation of three United States nationals imprisoned in Mexico who were transferred to the United States under the Treaty and who subsequently petitioned for *habeas corpus* relief from United States custody. The petitioners' case was ultimately rejected in the face of overwhelming policy considerations.[3] This decision displays a critical weakness in the Treaty as it is applied by the courts.

In response to public concern for the treatment of American prisoners in Mexico, Congress undertook extensive hearings and eventually approved a treaty proposed by Mexico, under the terms of which nationals of either nation would be allowed to serve out the remainder of their prison terms in their state of nationality. Although the transferred prisoners may benefit from amelioration of the condition of their incarceration under the Treaty,[4] the transferring state retains exclusive jurisdiction over any proceedings to challenge, modify, or set aside a conviction or sentence.[5] Primarily, the prisoners must consent to the transfer.[6]

In this case, the petitioners were arrested for alleged narcotics offenses[7] in various Mexican airports as they were starting on their respective vacations. For several days, they were violently tortured in order to draw out confessions. Transferred to prison after interrogation, they paid large sums of money extorted for the basic necessities of life, for protection, and for "dormitory fee[s],"[8] in addition to suffering continual torture[9] and lack of heat and toilet facilities. Their imprisonment in Mexico lasted about twenty-five months. They lived "in daily fear of bodily harm

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1. Prisoner Transfer Treaty, Nov. 25, 1976, United States-Mexico, 28 U.S.T. 7399, T.I.A.S. No. 8718 [hereinafter cited as the Treaty]. The enabling statute is contained in 18 U.S.C. § 3244 (Supp. II 1978).

2. *See, e.g.,* Mitchell v. United States, 483 F. Supp. 291 (E.D. Wis. 1980); Pfeifer v. Bureau of Prisons, 468 F. Supp. 920 (S.D. Cal. 1979), *aff'd* 615 F.2d 873 (9th Cir. 1980).

3. 621 F.2d 1179 (2d Cir. 1980).

4. Advantages to the prisoner also include: (1) being held in a familiar cultural setting with better accessibility by families; (2) the receiving state's law governs parole, which is unavailable to drug offenders in Mexico; and (3) challenges to the constitutionality of the Treaty will be heard by the receiving state.

5. Treaty, art. VI, 18 U.S.C. § 3244(1).

6. Treaty, art. VI(2), 18 U.S.C. § 3244(2).

7. No evidence was ever found or produced against any of the petitioners.

8. 621 F.2d at 1185 n.12.

9. Velez v. Nelson, 475 F. Supp. 865, 870 n.12 (D. Conn. 1979).

and believ[ed] that they would be killed if they remained incarcerated in Mexico."[10]

The petitioners were accorded minimum legal process. One week and a half after their arrest and interrogation, they were briefly informed of the cocaine importation charges as they stood crowded in a pen "separated from the courtroom by a chain link fence."[11] A sort of arraignment followed, and the officiating law secretary offered to help them at that time for a fee, but they did not have enough money.[12] Next, there was an appearance, without the opportunity for confrontation, by the officers who had arrested just one of the petitioners.[13] Seven months later the petitioners were sentenced to nine years imprisonment.[14]

Petitioners initiated *habeas corpus* proceedings in the United States after their return, challenging that their consent to custody in the hands of the United States was obtained under extreme coercion and duress. The district court granted their petitions,*Velez v. Nelson,*[15] extensively reiterating testimony regarding conditions of their Mexican imprisonment, and saying that "under the unique facts of this case, petitioners' consents were not truly voluntary, and are therefore, invalid."[16] On appeal by the United States, the Court of Appeals, Second Circuit, reversed, holding that: (1) access to a United States Court is available where petitioners are incarcerated under federal authority pursuant to foreign convictions and make a persuasive showing that their convictions were obtained without benefit of any process whatsoever;[17] but, (2) petitioners were denied *habeas corpus* relief, on the principle of estoppel, by their consent to the Treaty's assignment of jurisdiction.

The court's rationale was threefold. First, a desire to protect our relations with Mexico colors adjudication of the question since Mexico would not have accepted the Treaty if the United States had required the right to review Mexican criminal convictions.[18] Second, the statutory requirement that prisoners' consents be given freely and knowingly was fulfilled to the satisfaction of the United States magistrate after interviewing the prisoners.[19] And third, in the interest ("of paramount importance"[20]) of

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10. 621 F.2d at 1183.

11. *Id.* at 1185.

12. *Id.*

13. *Id.* at 1186.

14. "At no time did they see the judge who sentenced them, obtain the assistance of counsel, or confront the witnesses against them." *Id.*

15. 475 F. Supp. at 865.

16. *Id.* at 874.

17. The court expressly declined to impose the United States standard of process on foreign systems. 621 F.2d at 1197-98. *Cf.* United States *ex rel.* Bloomfield v. Gengler, 507 F.2d 925, 928 (2d Cir. 1974) (normally a court will not inquire into internal legal procedures which await an offender upon extradition).

18. 621 F.2d at 1200.

19. 621 F.2d at 1187. *See also* 18 U.S.C. § 4108.

20. 621 F.2d at 1200.

other Americans imprisoned in Mexico, now and in the future, the petitioners can and must be held to their original agreements since their consents were found free from coercion.[21]

Problems in this decision rest in large measure with the Treaty itself and its enabling legislation. Congress was concerned with obtaining consents, or waivers, that would stand up to constitutional challenge in order to ensure the validity of the Treaty[22] and the smooth processing of the transfers. The intention was to place transferring prisoners in an estoppel posture by their acceptance of the stated conditions, especially regarding Mexican jurisdiction over challenges to convictions.[23] They therefore approved a "voluntary and with full knowledge of the consequenses thereof"[24] standard by which to judge validity of consent. This court applied the standard very strictly, whereas the district court had found as a matter of fact that petitioners' consents were the result of duress produced by brutality and were thus constitutionally suspect.[25] Under the "unique" facts of the case, the consents were invalidated in the district court and writs granted.[26] But the Second Circuit, taking their authority from *North Carolina v. Alford*,[27] said of these petitioners, "[i]f [their] consents to transfer are viewed in light of the alternatives legitimately available to them, it cannot be seriously doubted that their decisions were voluntarily and intelligently made."[28] The *Alford* standard they asserted was: "not whether the defendant's decision reflected a wholly unrestrained will, but rather whether it constituted a deliberate, intelligent choice between available alternatives."[29] In contrast, the district court had said the extent of duress was so great that "petitioners would have signed anything, regardless of the consequences, to get out of Mexico,"[30] a fact recognized by the Second Circuit, but given no weight by them. In light of their acceptance of this finding by the lower court, the appellate court's holding amounts to a rule that a criminal defendant who is offered a choice between two alternatives, and chooses either, waives his right to relief on the ground of duress, no matter what the circumstances.[31] It

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21. "We refuse to scuttle the one certain opportunity open to Americans incarcerated abroad to return home, an opportunity, we note, the benefit of which [the petitioners] have already received." *Id.*

22. *Id.* at 1198.

23. *Id.*

24. Treaty, art. V, para. 1, 18 U.S.C. § 3245.

25. 475 F. Supp. at 873. *See also* Brown v. Mississippi, 297 U.S. 278 (1936).

26. 475 F. Supp. at 874.

27. 400 U.S. 25 (1970).

28. 621 F.2d at 1191.

29. *Id.*

30. *Id.* at 1183.

31. 621 F.2d at 1190.

> If, here, the conduct of Mexican officials on Mexican soil were held to be determinative of the voluntariness of an American prisoner's consent to transfer, those prisoners most desperately in need of transfer to escape torture and extortion, including the petitioners at bar, would never be able to satisfy a

must follow that if no consent or waiver of constitutional rights can be found to be involuntary, under its own facts, then no consent can be found to be voluntary. To that extent, the Treaty's standard is applied unconstitutionally by this court. By limiting the possibilities of an invalid consent, the holding impairs the protection that the Treaty provides by requiring a valid consent for waiver of challenge to the Mexican conviction in other than Mexican courts. It seems especially unfair to use consent in this context against a *habeas corpus* petitioner on the basis of a theory of estoppel.[32]

The causes of international human rights and of the fundamental rights of persons in foreign prisons would be better served if the United States assiduously pursued other nations' acknowledgement of and adherence to those rights rather than by such application of this particular treaty. Although the idea is a good one, its execution leaves unchallenged a gross violation of rights by avoiding the issue and thus keeping it out of international focus. Perhaps the other treaties entered into in this same area[33] will be administered so as to vindicate Americans' rights, but in the case of the Mexican treaty, as *Rosado v. Civiletti* shows, there is just too much strain on the law's integrity for it to stand as is.

*Katharine J. Kunz*

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magistrate that their consents were voluntarily given.

*Id.*

32. The estoppel theory requires reliance by the United States to its detriment. Granting that there is no law enforcement interest claimed by the government, the court upheld two other interests: (1) the government's interest in relations with Mexico by honoring its criminal convictions and recognizing the integrity of its criminal justice system (*but cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (act of state doctrine)); and (2) the interest of those who will similarly become victims in the future. 621 F.2d 1190.

33. In addition to the treaties with Mexico and Canada, the Senate has approved a similar treaty with Bolivia. Treaties with Panama, Peru, and Turkey have been approved for ratification, but have not yet become effective. Each of these treaties contains a provision similar to article VI of the Mexican Treaty, which confers exclusive jurisdiction over challenges to convictions and sentences to the courts of the transferring nation. *See, e.g.*, Treaty on the Execution of Penal Sentences, Feb. 10, 1978, United States-Bolivia, T.I.A.S. No. 9219, *reprinted in* S. EXEC. DOC. No. 6, 95th Cong., 2d Sess. (1978).

# The European Convention on Contractual Obligations

On June 19, 1980, seven of the nine members of the European Economic Community[1] signed the Convention of the Law Applicable to Contractual Obligations.[2] The purpose of the Convention is to establish uniform rules on conflicts of law within the Community and to help solve commercial disputes between businesses and individuals from different states. A Joint Declaration attached to the Convention declares that member states are ready to examine the possibility of conferring jurisdiction on the European Court of Justice over matters covered by the Convention.[3] After the Convention is ratified by at least five national parliaments (which from past experience may take a number of years), it will become the law for the E.E.C. countries.[4]

The Convention has a broad scope with world-wide application. The courts of the member states will have to apply the rules of the Convention to decide the applicable substantative law for an individual case, or a choice of law between several member states, or of several non-member states, or of both member and non-member states.[5] Certain categories of matters are excluded from the scope of the Convention because there are other international conventions already in existence covering the subject, or because the excluded matter does not fall within the scope of a European Economic Community, or because instruments are already in force or being prepared which directly relate to the subject matter excluded.[6]

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1. Although the United Kingdom and Denmark were not among the original signatories, they are expected to sign shortly. [1980] 2 COMM. MKT. REP. (CCH), The Euromarket News, July 1, 1980, at 3.

2. [1980] 2 COMM. MKT. REP. (CCH) ¶ 6311 [hereinafter cited as the Convention].

3. *Id.* Common Declaration No. 3.

4. The Convention will enter into force on the first day of the third month after the seventh instrument of ratification has been deposited. For signatory states ratifying at a later date, the Convention will enter into force on the first day of the third month after deposit of the instruments of ratification. *Id.* art. 29.

5. This general rule is found in Article 1(1) of the Convention, which provides that "[t]he rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different legal systems." Article 2 adds that "[a]ny law specified by this Convention shall be applied whether or not it is the law of a Contracting State."

6. The Convention does not apply to the status or legal capacity of natural persons; to contractual obligations arising out of wills and succession; to property rights arising out of a multinational relationship; to rights and dutines duties arising out of a family relationship or marriage, and the maintenance of illegitimate children; to bills of exchange, checks, promissory notes, and other negotiable instruments; to arbitration agreements or agreements on the choice of court; to the creation, organization, and dissolution of companies or to the relationship between agent and principal; to the creation of a trust and the relationship between settlors, trustees, and beneficiaries; or to contracts of insurance convering risks

The basic rule of the Convention is that the parties themselves may select the substantative law that is to be applied to their contract, or part of it, except where all the elements relevant to the situation are connected with one country only.[7] In this instance, the fact that the parties have chosen a foreign law should not prejudice the application of the mandatory rules of the law of that country. This rule is particularly innovative since it may result in the application of rules of law other than the Convention rules being applied to a contract.[8] Article 3(2) provides that the parties at any time may agree to make their contract subject to some law other than the one that previously governed it, provided that any variation made after the agreement shall not adversely affect the rights of third parties.

If the parties have made no election as to the applicable law, the contract will first be governed by the law of the country with which it is "most closely connected," and it allows for severance of any severable parts of the contract.[9] Thus, if a severable part of the contract has a closer connection with another country, it may be governed by the law of that other country. Second, the Convention provides, as a rebuttable presumption, that the "country with which the contract is most closely connected" is presumed to be the country where the party performing the contract has his habitual residence, or, if a firm, its central administration or principal place of business.[10] Third, if the subject matter of the property is immoveable property, the "close connection" is presumed to be with the country where the immoveable is situated.[11] Fourth, in a contract for the carriage of goods, the "close connection" in such contracts is presumed to be with the country where the carrier has his principal place of business if that country is also the country in which the place of loading or the place of discharge, or the principal place of business of the consignor is located.[12] In the absence of any of the previous rules being applicable, the contract may be deemed to be more closely connected with another country if the circumstances as a whole so dictate.[13]

Specific provision is made for choice of applicable law in the case of contracts of employment and certain contracts involving the interests of consumers.[14] In both cases, the choice of law made by the parties may not have the effect of depriving the employee or consumer of the protection he receives under the law that would normally be applicable or of the protection of the laws of the country in which he has his habitual resi-

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within the territory of the European Economic Community. Convention art. 1(2), note 2 *supra*.

7. *Id.* art. 3(3).

8. *See* Hartley, *Beyond the Proper Law*, 4 EUROPEAN L. REV. 236 (1979).

9. Convention art. 4(1), note 2 *supra*.

10. *Id.* art. 4(2).

11. *Id.* art. 4(3).

12. *Id.* art. 4(4).

13. *Id.* art. 4(5).

14. *Id.* arts. 5, 6.

dence.[15] With respect to the burden of proof and other legal presumptions, they are to be governed by the law applicable to the contract under the Convention.[16] Rules of evidence may be admissable under the law governing the substance of the contract or the law of the place where the contract was performed.[17]

Article 20 provides that the Convention shall not impair the application of the acts adopted by the institutions of the European Communities or harmonized national laws. In addition, the Convention does not bar the application of other Conventions that the member states may have entered into or may enter into in the future.[18] If a member state wishes to become a party to another convention that covers matters dealt with in the Convention, it may do so.[19]

The text of the Convention is the result of more than thirteen years work by the Commission of the European Communities and experts in private international law from the member states. The idea of a unification of private international law and codification of the rules on the conflicts of law within the Community date from about 1967, when the Benelux countries suggested to the Commission that conflicts of law rules in the then six member states should be unified.[20] A preliminary draft convention on the law applicable to contractual and non-contractual obligations was completed in 1972 and submitted to the governments of the member states, but the accession of three new member states necessitated its renegotiation.[21] The preliminary draft of the Convention was subsequently revised so as to limit its scope to contractual obligations.[22]

Article 3(h) of the Treaty of Rome states that the activities of the Community shall include "the approximation of their respective municipal law to the extent necessary for the functioning of the Common Market."[23] Chapter Three of the treaty ("Approximation of Laws") which comprises Articles 100-102, provides that directives issued by the Commission are the instruments most commonly used to fulfill the objectives of Article 3(h). Article 220 implicitly provides for the use of Conventions,[24] with an eye towards "the simplification of the formalities governing the reciprocal recognition and execution of judicial decisions and

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15. *Id.* arts. 5(2), 6(1).

16. *Id.* art. 14.

17. *Id.*

18. *Id.* art. 20.

19. *Id.* art. 24.

20. *See* O. LANDO, EUROPEAN PRIVATE INTERNATIONAL LAW OF OBLIGATIONS (1975); R. VANDER ELST, JOURNAL DES TRIBUNAUS 250 (1973).

21. Sollins, *Contractual Obligations—The E.E.C. Preliminary Draft Convention on Private International Law*, 25 INT'L COMP. L.Q. 35 (1976).

22. Thus, the original convention became two draft conventions, the first relating exclusively to contracts, and the other relating exclusively to non-contractual obligations. The latter draft convention is still in a preliminary stage. *Id.*

23. Treaty Establishing the European Economic Community, 298 U.N.T.S. 15 (1958).

24. *See id.* art. 220.

of arbitral awards."[25]

In the past, the difference in private international law rules has given rise to discrimination and consequent hardship in individual cases, in the sense that two identical problems could be solved in two different ways, depending on the country or legal system in which each problem had been considered. The Convention aims to avoid such hardship by introducing in all member states a set of uniform rules governing conflicts, and thus, to standardize the method of determining the proper law to apply. Identical rules of conflicts will apply in the member states' relations both with one another and with non-Community states. By virtue of these sets of uniform rules, confidence in the stability of European legal relations will be strengthened, agreements on jurisdiction will be facilitated, and civil and commercial acts occurring in the context of this economic framework and containing a foreign element will become legally more certain. In the absence of the approval of the European Court of Justice as the final interpretative body, a substantive provision of the Convention risks being interpreted in different ways by national courts in the different member states.

*S. Hadley Ruston*
*John H. Works, Jr.*

25. *Id.*

# The Proposed United States-Canada Income Tax Treaty

A new income tax treaty between the United States and Canada was signed on September 26, 1980,[1] culminating a seven-year effort to revise the current treaty which dates back to 1942. While there are notable advantages to both American and Canadian taxpayers with the new treaty, Senate ratification of the treaty in its present form is far from certain. Natural resources companies and real estate developers with holdings in Canada are potential losers under the 1980 treaty and can be expected to lobby intensively for modification when the treaty comes up for approval in 1981.

All sides agree that a new treaty was needed because the old one is outdated.[2] Current investment attitudes of individuals and businesses differ dramatically from the pre-World War II investment attitudes expressed in the current treaty. Yet, while the new treaty may be welcomed as more reflective of the investment climate of the 1980's, one expressed concern with the new treaty is that it is a "labyrinth of detail, far more so than most tax treaties."[3] Nevertheless, the 1980 treaty contains numerous potential benefits and losses to be enjoyed and suffered by investors.

In many respects, the new treaty does not significantly change the existing treaty. The 1980 treaty continues the joint American-Canadian effort to avoid double taxation and to prevent fiscal evasion with respect to taxes on income and capital.[4] In addition, the treatment of income

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1. Income Tax Treaty, Sept. 26, 1980, United States-Canada, *reprinted in* [1980] 12 FED. TAX TREATIES (P-H) 22,030 [hereinafter cited as 1980 Treaty]. *See also* Treas. Dept. Release M-678, Sept. 26, 1980.

2. *Hurdles Ahead for the U.S.-Canada Tax Treaty*, BUS. WEEK, Oct. 27, 1980, at 125. Current law consists of the original 1942 treaty and three supplemental treaties. Convention and Protocol for the Avoidance of Double Taxation and Prevention of Fiscal Evasion in the Case of Income Taxes, March 4, 1942, United States-Canada, 56 Stat. 1399, T.S. No. 983 [hereinafter cited as 1942 Treaty]; Convention Modifying and Supplementing the Convention and Accompanying Protocol of March 4, 1942 for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion in the Case of Income Taxes, June 12, 1950, United States-Canada, 2 U.S.T. 2235, T.I.A.S. No. 2347 [hereinafter cited as 1950 Treaty]; Convention Further Modifying and Supplementing the Convention and Accompanying Protocol of March 4, 1942 for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion in the Case of Income Taxes, *as modified by* the supplementary convention of June 12, 1950, Aug. 8, 1956, United States-Canada, 8 U.S.T. 1619, T.I.A.S. No. 3916; Convention Further Modifying and Supplementing the Convention and Accompanying Protocol of March 4, 1942 for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion in the Case of Income Taxes, *as modified by* the supplementary conventions of June 12, 1950 and August 8, 1956, United States-Canada, 18 U.S.T. 3186, T.I.A.S. No. 6415.

3. *Hurdles Ahead for the U.S.-Canada Tax Treaty*, note 2 *supra*.

4. *Compare* 1980 Treaty, *supra* note 1, Preamble *with* 1942 Treaty, *supra* note 2, Preamble.

from government sources,[5] income for educational maintenance,[6] exempt organizations,[7] capital,[8] and the income of artists and athletes[9] remains virtually unchanged. The treaty also preserves the important goal of cooperation between the United States and Canada, particularly with the exchange of tax-related information.[10] However, despite these similarities, important articles of the current treaty have been altered—these changes warrant close scrutiny by existing and potential investors on both sides of the border. The areas that have been changed include income derived from pensions and life annuities, pension fund income, capital gains, royalties, interest, branch office profits, and dividends.

*Income derived from pensions and life annuities*

Under the existing treaty, income from pensions (including government pensions) and life annuities derived from within one of the contracting states by a resident of the other contracting state is exempt from taxation in the former state.[11] The 1980 treaty, on the other hand, provides that pensions and annuities arising in one contracting state may be taxed in the other state.[12] The new treaty does, however, place a fifteen percent limit on the tax of the gross amount of pension income.[13] This provision of the 1980 treaty will probably encourage Americans and Canadians to seek pension and annuity sources which are on their own respective side of the border. If the 1980 treaty is ratified in its present form, potential investors looking for a pension or annuity investment opportunity will be forced to consider not only financial but also geographical factors.

*Pension fund income*

The 1980 treaty exempts interest and dividends paid in one contracting state to a pension fund resident in the other contracting state if the fund's income is generally exempt from tax in the other contracting state.[14] Canadian dividends, for example, which are paid to an American pension fund would be exempt from any Canadian tax if the American fund is a United States Treasury-qualified pension fund. This is a notable change from the existing treaty which contains no such provision for pen-

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5. *Compare* 1980 Treaty, *supra* note 1, art. XIX *with* 1950 Treaty, *supra* note 2, art. VI.

6. *Compare* 1980 Treaty, *supra* note 1, art. XX *with* 1942 Treaty, *supra* note 2, art. IX.

7. *Compare* 1980 Treaty, *supra* note 1, art. XXI *with* 1942 Treaty, *supra* note 2, art. X.

8. *Compare* 1980 Treaty, *supra* note 1, art. XXIII *with* 1942 Treaty, *supra* note 2, art. V.

9. *Compare* 1980 Treaty, *supra* note 1, art. XVI *with* 1950 Treaty, *supra* note 2, art. VII.

10. *Compare* 1980 Treaty, *supra* note 1, art. XXVII *with* 1942 Treaty, *supra* note 2, arts. XX, XXI.

11. *Compare* 1980 Treaty, *supra* note 1, art. VI *with* 1950 Treaty, *supra* note 2, art. VI(A).

12. 1980 Treaty, *supra* note 1, art. XVIII.

13. *Id.* art. XVIII, para. 2.

14. *Id.* art. XI, para. 3.

sion dividend and interest income exemption. This particular exemption should increase the movement of investment dollars across the border,[15] and it is unlikely that this aspect of the 1980 treaty will meet any Senate resistance.

*Capital gains*

The 1942 treaty provides that "gains derived in one of the contracting states from the sale or exchange of capital assets by a resident . . . of the other contracting state are exempt from taxation in the former state, provided such resident . . . has no permanent establishment in the former state.[16] Therefore, most capital gains realized in Canada by American investors are exempt from Canadian taxation. The 1980 treaty, meanwhile, divides capital gains into real estate gains and gains derived from the sale of securities. Real estate capital gains will be hit hard by the new treaty which states that "gains derived by a resident of a contracting state from the alienation of real property situated in the other contracting state may be taxed in that other state."[17] There is no limit on the amount of such taxation, and real estate capital gains will be subject to the maximum Canadian and American capital gains tax.

Real estate capital gains will probably be one of the more contested issues when the treaty comes before the Senate. Real estate developers with American and Canadian holdings would be subject to taxation on both sides of the border for real estate capital gains under the new treaty and will undoubtedly lobby for modification. This aspect of the 1980 treaty, if passed would certainly slow the amount of American dollars invested in Canadian real estate.

Capital gains from the sale of securities is generally exempt from double taxation under both the current and new treaties.[18] The new treaty, however, does change the treatment of such capital gains in one important area: capital gains derived from the sale of shares of real estate companies are subject to double taxation.[19]

*Royalties*

Royalties are exempt under the 1942 treaty if the party was not engaged in trade or business in the foreign state through a permanent establishment.[20] However, if an American did carry on a trade or business in Canada at a permanent establishment, then royalties from either personal or real property could be taxed at a maximum of fifteen percent.[21] Income from royalties receives a different treatment under the 1980 treaty. Royalties derived from personal property "arising in a contracting

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15. *Hurdles Ahead for the U.S.-Canada Tax Treaty*, note 3 *supra*.
16. 1942 Treaty, *supra* note 2, art. VIII.
17. 1980 Treaty, *supra* note 1, art. XIII, para. 1.
18. *Compare* 1942 Treaty, *supra* note 2, art. VIII *with* 1980 Treaty, *supra* note 1, art. XIII.
19. 1980 Treaty, *supra* note 1, art. XIII, para. 3(a).
20. 1942 Treaty, *supra* note 2, art. XIII(C).
21. *Id.* art. XI.

state and paid to a resident of the other contracting state may be taxed in that other state,"[22] but this tax cannot exceed ten percent of the gross amount of the royalties.[23] Personal property royalties taxation, then, would decrease five percent if the new treaty is ratified.[24] This should encourage American companies to view Canada as a more attractive ground for licensing.

Royalties from real property, meanwhile, are taxable at the maximum Canadian rates under the new treaty.[25] Natural resources companies which derive income from oil and mineral royalties will be subject to the Canadian tax in addition to the American tax. American oil companies with land holdings in Canada will likely lead an intensive lobbying effort to change this portion of the treaty.

*Interest*

Under both the existing and new treaties, interest accruing in a contracting state and paid to a resident of the other contracting state may be taxed in the accruing state at a rate not to exceed fifteen percent.[26] However, the 1980 treaty exempts interest paid on government, provincial, and local bonds.[27] Since a United States investor who buys Canadian government bonds will now receive interest payments not subject to Canadian or American taxation, and at the same time, interest paid to Canadians on United States Treasury, state, and local bonds is to be exempt from United States, as well as Canadian, taxation, this change could help broaden the American and Canadian markets for such issues.

*Branch office profits*

Branch office profits receive a more favorable treatment under the new treaty, with the maximum tax lowered from fifteen to ten percent with the first $500,000 exempt.[28] The 1980 treaty provides that this exemption applies if one company "directly or indirectly controls the other, or both companies are directly or indirectly controlled by the same person or persons, or if the two companies deal with each other not at arm's length."[29] This decrease of five percent realized under the 1980 treaty may lead to the expansion of companies across the United States-Canada border.

*Dividends*

At present, dividends paid by a Canadian corporation to an Ameri-

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22. 1980 Treaty, *supra* note 1, art. XII, para. 1.

23. *Id.* para. 2.

24. For example, an American company that licenses patents in Canada will be taxed in Canada at 10%, instead of the present 15% of income received from the patent.

25. 1980 Treaty, *supra* note 1, art. XII, para. 4.

26. 1950 Treaty, *supra* note 2, arts. XI, XII.

27. 1980 Treaty, *supra* note 1, art. XI, para. 3.

28. *Compare* 1942 Treaty, *supra* note 2, art. XII, *with* 1980 Treaty, *supra* note 1, art. X, para. 6.

29. 1980 Treaty, *supra* note 1, art. X, para. 6(d).

can are subject to Canadian taxation of fifteen percent.[30] However, dividends paid by an American corporation whose business is "not managed and controlled"[31] in Canada to a non-Canadian recipient is exempt from all taxes imposed by Canada.[32] The new treaty provisions state that dividends paid by a Canadian company to an American investor may be taxed in the United States and in Canada, but if an American is the beneficial owner of such dividends, the rate charged shall not exceed:

> (a) 10 percent of the gross amount of the dividends if the beneficial owner is a company which owns at least 10 percent of the voting stock of the company paying the dividends;
> (b) 15 percent of the gross amount of the dividends in all other cases.[33]

Several general comments about the new Canada-United States income tax treaty should be made. The new treaty changes the treatment of income derived in various ways from real property. Real estate capital gains, royalties from real property, and capital gains derived from the sale of real estate company stock are all subject to some form of double taxation. This will obviously encourage Canadian and American investors looking across the border to seek non-real estate investment opportunities.

The treaty is indeed a "labyrinth of detail." Extreme caution should be exercised when the treaty is read because different articles interact in subtle ways, for example, dividends and capital gains treatments make investment decisions difficult to make. It is suggested that this treaty be read only after the earlier ones are studied and understood.

Finally, until the treaty is ratified and its final form ascertained, great care should be used by potential investors. For example, a decision to speculate in Canadian securities because of the adverse treatment that real property capital gains receive might later prove to be the incorrect financial decision if the Senate modifies the real estate capital gains section of the treaty. Indeed, the hurdles ahead for this treaty should place the potential investor on guard and possibly cause him to postpone any decisions until ratification.

*Bernie M. Tuggle*

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30. 1942 Treaty, *supra* note 2, art. XII.

31. In a letter from the Canadian Under-Secretary of State for External Affairs to the American Ambassador, the Under-Secretary wrote that "so long as the stock control of the corporation is not in Canada, its directors' meetings and shareholders' meetings are not held in Canada and its 'management-control' is not in Canada, the corporation is not managed and controlled in Canada." Letter of Feb. 20, 1951, *reprinted in* 2 U.S.T. 2246.

32. 1950 Treaty, *supra* note 2, art. XII.

33. 1980 Treaty, *supra* note 1, art. X, para. 2.

# The European Monetary System and the European Currency Unit

Probably the most significant event in the European Economic Community in 1978 was the decision to enact the European Monetary System (EMS) in 1979.[1] During the long, technical arguments in the autumn of 1978, all nine heads of government of the European Community moved to and fro across the continent in the most intensive period of bilateral diplomacy in at least six years.[2] In fact, the efforts that went into the preparation for the EMS kept the European Commission so occupied during the second half of 1978 that it fell behind in proposing major legislation it had planned to submit.[3] The EMS could be the most significant development in the world of international finance since President Nixon officially launched floating exchange rates in 1971 by cutting the dollar free from gold.[4]

The EMS is the European Community's latest effort to come to grips with exchange rate stability as a means toward full integration and harmonization of the economies of the member states.[5] It is three steps in one towards a European central bank, a European monetary union, and a common European currency. The EMS aims to replace national control over domestic economic policy, particularly monetary policy, within the European Economic Community by multinational control. Each country will surrender a part of its sovereignty in economic affairs in return for help from, and a say in, the policies of the others.

The EMS is composed of a parity grid, a divergence indicator, and credit mechanisms. The parity grid defines the bilateral central rates[6] and the permitted margins of fluctuation on either side of these central rates. The EMS specifies a band of 2.25 percent above and below the central rates for all EMS currencies, except for the Italian Lira, which is permit-

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1. [1979] COMM. MKT. REP. (CCH), The Euromarket News, Jan. 4, 1979, at 1.
2. EUROPE, Jan./Feb. 1979, at 8.
3. [1979] COMM. MKT. REP., *supra* note 1, at 1.
4. BUSINESS WEEK, Nov. 6, 1978, at 68.
5. The United Kingdom decided not to join the EMS as a full member. However, it forms a part of the ECU, it has transferred its share of its reserves to the European Monetary Fund, and it has pledged to maintain a "stable" exchange rate. THE ECONOMIST, Mar. 17, 1979, at 74. Ireland is also a member of the EMS. The move was particularly interesting because it marked the end of the one-for-one parity between the British and Irish pounds, a relationship that had been unbroken for nearly 160 years. Wall St. J., Dec. 18, 1978, at 19, col. 1.
6. Bilateral central rates are defined by governments. Market exchange rates are those at which currencies are actually traded against one another by banks, corporations, or indirectly in foreign exchange markets. To keep market exchange rates where they want them, governments must influence their supply of and demand for their currencies by intervening directly in the foreign exchange markets.

ted a six percent band.[7] When the market rate for any currency pair reaches its limit, both central banks are obliged to intervene in participating currencies, to keep the currency within the band.[8] The system expressly provides for adjustments of exchange rate relationships between participating countries by means of changes in central rates, which are subject to the consent of all participants.[9]

The European Currency Unit (ECU) is at the heart of an alternative exchange rate mechanism to the parity grid system, called the divergence indicator. The ECU is not a true currency, but rather a "basket" of currencies, containing specific quantities of the European currencies. They are chosen according to criteria that supposedly reflect the relative size of their economies, of their intra-European trade, national productivity and quotas in support mechanisms.[10] These accounts are also subject to change by unanimous agreement of the member states. The maximum divergence represents an outer limit of permissible foreign exchange rate movement, and the EMS has fixed a "trigger" at seventy-five percent of the maximum. The divergence indicator obliges no government to take specific action, although there is a "presumption" that adequate corrective measures will be taken.[11]

The EMS also provides for credit mechanisms in order to intervene in the foreign exchange markets. Credit to support the EMS is dispersed through three mechanisms ranging from very short-term credit to medium-term financial assistance. About twenty-five billion ECU's are effectively available for credit.[12] To create an initial stock of ECU's, each member was required to deposit at least twenty percent of its holdings of dollars and gold in a "European Monetary Fund," against which it receives and equivalent amount of ECU's.[13]

In its two-year history, the EMS has performed rather well. Despite the sharp crude oil price rises, the average fluctuation of each national currency in 1979 amounted to only 1.9 percent compared to 5.2 percent during the preceding six years. That made 1979 the most stable year for EEC currencies since 1972.[14] Aside from two minor adjustments in the exchange rates in September and November 1979, there have been no other events to mar the system's operation.[15] Additionally, the New Com-

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7. Wall St. J., Dec. 13, 1978, at 10, col. 3.

8. Intervention in participating currencies is compulsory when the intervention points defined by the fluctuation margins are reached. Res. No. 32/1978, Dec. 8, 1978, of the European Council, [1978] 3 COMM. MKT. REP. (CCH), ¶ 10,095.

9. *Id.*

10. Carreau, *Vers Une Zone de Stabilité Monétaire: la Création du System monétaire Europeen au Sein de la CEE*, REVUE DU MARCHÉ COMMUN, Sept. 26, 1979, at 413.

11. *See* note 8 *supra.*

12. MONETARY REPORT OF THE DEUTSCHE BUNDESBANK, Mar. 1979.

13. *See* note 8 *supra.*

14. THE ECONOMIST, Mar. 8, 1980, at 56.

15. The finance ministers of the EMS raised the value of the Deutsche Mark two percent against six other EMS currencies and five percent against the Danish Krone in the first

munity Instrument (NCI or the Ortoli Facility), was officially instituted by a decision of the European Council on October 16, 1978.[16] It was decided to allow less prosperous member states to borrow a maximum of five million ECU's for a period of five years, divided into annual installments of one million ECU's, and to allow member states a three percent interest rate subsidy. The first loans from the resources of the NCI were signed in Brussels on December 17, 1979, and were made to Ireland, Italy, and the United Kingdom. The loans are for investments in energy schemes, water and sewerage infrastructures, and road and telecommunication improvements.

The concept of a European monetary system is neither new nor novel. Informal arrangements linking European currencies have existed in one form or another since the beginning of the twentieth century, and more formal arrangements have existed since the Second World War. In fact, one of the ultimate goals of the European Economic Community, which came into existence on January 1, 1958, was the attainment of a European Monetary System. But one of the fundamental obstacles in examining the Articles of the Treaty of Rome relating to monetary policy is the very limited nature of the commitments they contain in contrast to other often exacting obligations of other sections of the Treaty. Article 107 is the only treaty provision relating directly to foreign exchange rate policy.[17]

The EMS is a sign that Europe's slow march toward greater economic unity has not yet been arrested. By tying their currencies together and by creating a new reserve unit, the Europeans may hope to build a new global monetary order composed of three currency blocs: the dollar, the ECU, and the yen.[18] In addition, a common currency, which will undoubtedly become attractive to others for private transactions and official reserve purposes, might enhance Europe's bargaining strength in international monetary discussions. To do this, the ECU would have to move from its present status as an accounting unit, designed to help the eight members maintain a reasonably stable exchange rate system, and into the

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realignment of the six-month old EMS, on September 24, 1979. Wall St. J., Sept. 24, 1979, at 4, col. 1. The second realignment of the EMS currencies took place on November 30, 1979, when the Danish government devalued its krone by five percent against the other currencies of the EMS. BULL. EUR. COMM. (CCH), Nov. 1979, at 30.

16. O.J. EUR. COMM. 298, Oct. 25, 1978.

17. Article 107 provides:

> Each member state shall treat its policy with regard to rates of exchange as a matter of common concern. If a member state makes an alteration in its rate of exchange which is inconsistent with the objectives set out in Article 104 and which seriously distorts conditions of cooperation, the Commission may, after consulting the Monetary Committee, authorize other member states to take for a strictly limited period the necessary measures, the conditions and details of which it shall determine, in order to counter the consequences of such alternatives.

Treaty Establishing the European Economic Community, Mar. 25, 1958, 298 U.N.T.S. 57.

18. LE NOUVEL OBSERVATEUR, Mar. 12, 1979, at 44.

hands of commercial banks. From there it would not be a large step for the ECU to become real money. It would, however, be a considerably larger step for it to become a world-wide reserve currency. The development in the past fifteen years of various units of account (official ones like the Special Drawing Rights of the International Monetary Fund, and a number of privately computed ones) for such purposes has not been particularly encouraging; acceptance has been slow and halting on the whole. Yet, the possibility cannot be ruled out that after a certain lead-in period the ECU might do better.

Though timely exchange rate adjustments will be required to make the EMS work in the medium term, over a longer period the ambition is to move forward to a system requiring fewer and fewer adjustments and eventually into a ture monetary union. Real progress toward that goal will require a very considerable harmonization of economic policies, of which the coordination of monetary policy will be paramount. The real bar to European economic integration is the fact that the currencies of the member states are still not fully convertible with each other. The strength of Western Europe as a political and economic entity depends upon their ability of member states to perceive common problems and to act together toward their solution, and to create in a concrete way a factual solidarity among them to establish common bases for their economic, social, and political development. In view of the instability in the world economy, it seems that full economic and monetary integration in Western Europe will remain a long-term aim, rather than a practical consideration in the 1980's.

*John H. Works, Jr.*

# BOOK REVIEWS

## Human Rights and World Public Order

*Reviewed by George W. Shepherd*

*Human Rights and World Public Order*, subtitled *The Basic Policies of an International Law of Human Dignity*, by Myres S. McDougal, Harold D. Lasswell, and Lung-chu Chen. Yale University Press, 92A Yale Station, New Haven, Connecticut 06520 (1980). ISBN 0300023448, LC 79-18149. Pages xxiv, 1016. Preface, footnotes, appendix, table of cases, name index, subject index. $45.00 (clothbound).

Despite the enormous amount of attention given to the gross violation of human rights, there is a broad basis of respect for an implementation of human rights throughout the world. One of the reasons we fail to perceive this greening of the globe in human rights is that our perception is too restrictive and ethnocentric.

Much of the past and contemporary literature on human rights attempts to document the way in which international law or ideology applies to certain rights and the way in which governments or international authorities fail to uphold human rights commitments. A cynical view of human rights perceives it as a definition of human freedom applicable to only a few privileged Western nations. This view disputes the possibility of making the enhancement of human rights a viable public policy goal for people other than the citizens of one's own state. It is especially regarded as dangerous and misleading for a major power like the United States to include human rights goals in its foreign policy.[1] Another inhibited view is propounded on the left by those who see the major Western powers, especially the United States, hopelessly committed to the use of human rights ideology either as an anticommunist crusade or as a legitimization instrument for its own nonsocial and individualistic perceptions of human rights.[2]

Both of these perceptions are narrow because they view, from different perspectives, human rights as essentially the projection of the nation-

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1. Buckley, *Human Rights and Foreign Policy: A Proposal*, 58 FOREIGN AFF. 775 (1980).

2. For a discussion of this perspective, *see* Falk, *Comparative Protection of Human Rights, Capitalist and Socialist Third World Countries*, UNIVERSAL HUMAN RIGHTS, April-June 1979, at 3.

state or the class struggle. Professors Myres McDougal, Harold Lasswell, and Lung-chu Chen, in a major integrated work on human rights,[3] succeed in going beyond the limits of the national cultural and class perceptions to a global standpoint of theory and implementation. They do this by basing human rights primarily on universal values with individuals as the direct recipients of the dignity and respect derived from these values. The state and social groups are not the origins of these values and this basic respect, but they are the instruments for the realization or the repression of human rights. The authors maintain that there is a rising demand for these rights throughout the world today. This is stimulated by the findings of modern science which add to our comprehension of the legitimacy of the increasing claims of various movements from the Renaissance to the abolition of slavery, the foundation of democratic states, the inauguration of egalitarian movements, and the recognition of demands for self-determination. These demands, human and historical in origin, are brought to bear against the state and its international dimensions in world order:

> The important fact is that the people of the world, whatever their differences in cultural traditions and styles of justification, are today increasingly demanding the enhanced protection of all those basic rights, commonly characterized in empirical reference as that of human dignity, by the processes of law in all the different communities of which they are members, including especially the international or world community.[4]

The book has an enormous compass and demonstrates the growth of human rights demands in eight major value categories: "respect, power, enlightenment, well-being, wealth, skill, affection, and rectitude . . . accompanied by a detailed specification of the content of these categories in terms of particular institutional practices (as in terms of participation, perspectives, situations, bases of power, strategies, and outcomes)."[5] This is a staggering intellectual task, particularly since it details implementation by various authoritative actors, including nongovernmental organizations, states, and international authorities. Yet all this is done convincingly and with precision.

One of the most important discussions concerns a "policy-oriented perspective," distinct from other, eschewed frameworks. The authors point out the limitations of the historical, positivist, and scientific approaches to the analysis of human rights. It is not surprising to find Professor McDougal expounding the limitations of the positivist view, which cannot define human rights by law because "the fatal weakness of the positivist approach is in its location of authority in the perspective of

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3. M. MCDOUGAL, H. LASSWELL, & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER (1980).

4. *Id.* at 6.

5. *Id.* at 143.

established officials."[6] It is interesting to note, however, that Professor Lasswell concurred in the judgment of

> exponents of the social science approach [who] characteristically underestimate the importance of deliberately postulating and clarifying human rights goals, as distinct from justifying those goals by trans-empirical postulates of faith or by outright incorporation of community preferences . . . . Obviously, the most conspicuous task is that of scientific enquiry, but lacking a comprehensive map of human rights and a realistic conception of the interrelations between law and social process, it is impossible to perform even this task adequately.[7]

One problem, however, is that the authors' "policy-oriented approach" is not sufficiently delineated or defended. It is basically a global perspective incorporating several procedural approaches. As important as the perspective of the "whole of humankind" is, the authors do not specify how this provides a unique historical or philosophical insight lacking in other perspectives. One can agree that "[i]t is indispensable that both the scholarly inquirer and the established decision-maker achieve an observational standpoint, as free as possible from parochial interests and biases, which will enable them to ascertain and clarify for the active participants in the different communities common interests that they themselves have not been able to perceive."[8] This universality, however, has no better claim than the historical materialism the authors reject.

Both Marxism and the scientific approach are narrow in their claims to rights based on either a class perception or verifiable community acceptance. However, elements of these approaches might well be incorporated into the authors' global policy orientation in a way which would give it both a greater relevancy to contemporary issues and a method of distinguishing between rhetorical proclamations about the rights of man and reality. If a concern for human rights in policy is to emerge from the shadows of academia into the central offices of policymaking in this nation-state era, it has to become something more than morality or even law. These two worthy concepts are often proclaimed by states as the basis of policy when in fact the reality of rule is the repression of human rights. The strength of *Human Rights and World Public Order* is that it is a major step in the direction of demonstrating that human rights grow and proceed in spite of government and nation-state repression. The authors provide a map showing how political and social rights are finding global expression and limited recognition. They do not, however, fully provide the intellectual equipment needed to establish priority and direction or a point by point progression to higher ground. This is the task of others.

There is, for example, a Third World perspective on human rights

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6. *Id.* at 74.
7. *Id.* at 81-82.
8. *Id.* at 83.

represented by such writers as Fouad Ajami[9] and Ali Mazrui,[10] both with the Institute for World Order. Neither of these writers are Marxists but they give primary attention to the economic and social basis of the global demands of Third World peoples who believe that the right to eat is more important that the right to dissent.[11]

While the authors are fully cognizant of the important Third World dimension to human rights, they do not give it the priority of emphasis that Ajami and Mazrui do. For example, a great deal of attention is given to racial discrimination and *apartheid,* which is very appropriate particularly since United Nations bodies and instruments have made these issues a modern priority. However, detailed attention is not given to such basic human rights as employment, social security, and health. These are rights which, from the Third World and socialist perspectives, are as fundamental as freedom from racial discrimination. There are of course Western theorists who have long maintained that such rights are of a different category because they can only be provided by the state.[12] Such rights are really privileges, it is argued, which may or may not be provided depending upon the circumstances of economic prosperity. This view is not limited to Western philosophers. A prominent Ghanaian educator who coordinated the rewriting of Ghana's Constitution, went to great pains to see to it that such social rights were not incorporated into the Constitution. He believed that the state could not always be expected to provide these costly necessities to its citizens.[13]

This is not the view of Professors McDougal, Lasswell, and Chen, who assert that the dichotomy is false and that social rights are on a par with political rights. Yet the authors fail to demonstrate fully how this is the case with reference to the worldwide movement in this direction. Although it is hard to see how they might have added to this 1,016-page volume, a second volume will be needed. Social rights have begun to be codified in the constitutions of many Third World and socialist states and, of course, in the International Covenant on Economic, Social and Cultural Rights.[14] The means by which these rights can be provided, and

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9. Ajami, *Human Rights and World Order Politics,* 3 ALTERNATIVES 351 (1978).

10. A. MAZRUI, A WORLD FEDERATION OF CULTURES: AN AFRICAN PERSPECTIVE (1976).

11. Fouad Ajami has four major priorities:

(1) The right to survive;

(2) The right not to be subjected to torture;

(3) The condemnation of *apartheid;* and

(4) The right to food.

Ajami, *supra* note 9, at 378-79.

12. *See, e.g.,* M. CRANSTON, HUMAN RIGHTS, REAL AND SUPPOSED (1978); POLITICAL THEORY OF THE RIGHTS OF MAN (I. Raphael ed. 1967).

13. Comments of Prof. B.D.G. Fulson, Vice Chancellor of the University of Legon, Ghana, at a panel discussion on human rights in Accra, November 1979, attended by the author of this review.

14. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1967) (entered into force Jan. 3, 1976).

the resulting priorities established remain controversial, but the global demand for them is unquestionable. Movement towards implementation of these rights through various political forms of world order will undoubtedly take place during the next century.

One of the most useful aspects of the empirical approach to human rights is the capability it offers for assessing progress towards realization of the demands of people throughout the world for greater human rights. The Carter Administration dramatized the way in which a major power can place human rights achievements at the center of its foreign policy goals, but this remains in the realm of rhetoric until the extent of its reality is tested by empirical analysis. This has been begun by a number of social scientists and has proven to be very useful in policy assessment.[15] It has helped set aside the argument that such values cannot be meaningful in policy, and has also shown the limitations of this policy to date. The work of social scientists like Richard Claude[16] and John McCamant[17] has helped transform human rights from simply "doing good" into the practical realm of enhancing the national interest through advancing the rights of man.

*Human Rights and World Public Order* is primarily concerned about world order, and this focus is its greatest strength. Discussions of topics such as intervention are especially timely and useful. In the last analysis, the power of the state has been employed to carry out particularly gross violations of human rights, such as in South Africa and Uganda. There will likely be numerous situations in the future such as the seizure of hostages by Iran, in which the humanitarian doctrine of human rights protection expounded by the authors may be needed to comprehend the limits and possibilities of action "until there is a better world."

The book is a major landmark in that it brings social science and law back together again in the investigation of one particular subject. It is high time for resources to be combined in common substantive concern for this immense human task. This is a new era, as Professor Ved Nanda has commented,[18] and the challenge to younger scholars to continue the work so ably begun by Professors McDougal, Lasswell, and Chen is unmistakable.

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15. *See, e.g.*, Part II, *Comparative Measures*, edited by James Scarritt, in GLOBAL HUMAN RIGHTS (V. Nanda, J. Scarritt, & G. Shepherd eds. 1981).

16. *See, e.g.*, COMPARATIVE HUMAN RIGHTS (R. Claude ed. 1976).

17. *See, e.g.*, E. DUFF & J. MCCAMANT, VIOLENCE AND REPRESSION IN LATIN AMERICA (1976).

18. Nanda, *Book Review—Human Rights and Public World Order*, 13 VAND. J. TRANSNAT'L L. 503 (1980).

# The International Law and Policy of Human Welfare

*Reviewed by Ved P. Nanda*

The International Law and Policy of Human Welfare, edited by Ronald St. John Macdonald, Douglas M. Johnston, and Gerald L. Morris, Sijthoff & Noordoff International Publishers, Alphen aan den Rijn, The Netherlands (1978); available in the U.S. from Sijthoff, 20020 Century Blvd., Germantown, MD 20767. ISBN 9028608087. Pages xviii, 690. $92.50 (clothbound).

*The International Law and Policy of Human Welfare*,[1] a collection of twenty-five essays, is a thoughtful and probing commentary on many critical issues the world community is likely to face during the last two decades of the twentieth century. The editors, Dean Macdonald and Professors Johnston of Dalhousie and Morris of Toronto, are all distinguished Canadian international lawyers.[2] They and their associates from various disciplines, most of them also from Canada, present an all encompassing study of "human welfare," a concept they interpret broadly as referring to "all the psychic aspects of individual welfare, such as those normally encompassed under the international law of human rights, as well as to physical needs and aspirations now placed at the center of concern with the development of the new international order."[3] Their purpose is "to provide, chiefly for the benefit of international lawyers, a conspectus on the overlapping areas of human rights, national development, social welfare, and human needs."[4]

The editors join a select group of contemporary scholars who can be singled out for their visionary approach to the role of international law and institutions in meeting individual and societal needs. Their inquiry extends beyond the widely accepted perception of traditional international law as a body of rigid rules governing relations among states and of rather limited relevance to individuals and groups. They explore, in an interdisciplinary context, major issues which are likely to be of immediate and long term concern to all those who seek solutions to global problems

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1. THE INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE (R. Macdonald, D. Johnston and G. Morris eds. 1978) [hereinafter cited as INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE].

2. Ronald St. John Macdonald is Weldon Professor and Dean of the Faculty of Law at Dalhousie University, Douglas Johnston is Professor of Law and director of the marine and environmental programs at Dalhousie University, and Gerald Morris is Professor of Law at the University of Toronto.

3. INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE, *supra* note 1, at vi.

4. *Id.*

related to human rights and basic human needs, food and population, environment, and national development. Their search is for creative use of international law in furtherance of the twin objectives of ensuring human survival and establishing an international order under which human needs are met and human dignity is secured.

The most perceptive essay in the book is the introductory essay in part one, written by the editors and entitled *The International Law of Human Welfare: Concept, Experience, and Priorities.*[5] The writers provide a historical perspective and draw upon various disciplines in relating the concept of welfare policies and programs in Britain, Sweden, the United States, the Soviet Union, and India, "five countries which have produced a more than usually voluminous literature on welfare theory and practices."[6] These countries' national experiences are compared primarily to examine if and how the "welfare state" can be elevated to a "welfare world."

The authors review the last three hundred years of international law, focusing their inquiry on the "capacity of the international legal system to respond appropriately to welfare demands and aspirations in the world community."[7] They conclude that "it is very difficult to arrive at other than pessimistic conclusions, if it is assumed that amelioration of human welfare at the international level can be effected only within the existing structure of intergovernmental agencies."[8] Their study leads them to consider the desirability of acting outside current international organizations in order to provide effective international planning for the advancement of human welfare. Specifically, they propose "the establishment of an agency which, above all, would exist and operate entirely outside the system of the United Nations, free from all the inhibitions, complexities, and distortions which have sapped that organization's vitality in recent years."[9] They envisage combining in this agency the best features of the presently available alternative semi-official sources: the "accredited" non-governmental organizations, the academic community, and independent research agencies.[10] The funding for the proposed agency would come from public and private sources, and the agency would have technical and advisory links with established U.N. bodies. Its purposes would include "legal planning" for the world community, and it would presumably be able to draw upon a similar pool of scholars and distinguished citizens, as do other privately initiated organizations of a comparable nature, such as the Club of Rome, The World Academy of Arts and Science, the World University, and the Independent Commission on International Develop-

5. *Id.* at 3-79.
6. *Id.* at 23.
7. *Id.* at 46-47.
8. *Id.* at 63.
9. *Id.* at 64.
10. *Id.* at 64-65.

ment Issues (the Brandt Commission).[11]

In the second essay in part one, entitled "The Elusiveness of Development and Welfare,"[12] Professor Timothy Shaw analyzes inequalities in the Third World and sets the stage for the subsequent discussion of the issues of equity and justice in international law by Professor Johnston and for the following chapters on the structure and process necessary to achieve it. Shaw describes the dilemma caused by the elusiveness of welfare and cautions that "changes in international and internal relations are inevitable; the question is whether these will be pacific or violent, ready or tardy."[13] His basic proposition is that "the beneficiaries of any new world order will be limited both between and within states. The poverty of the resource-poor Third World states will probably be intensified by increased prices of oil and minerals, manufactures and food, unless [they are accorded] preferential treatment."[14] He observes that "[u]neven development in the Third World has made general propositions and prescriptions about international human welfare hazardous."[15]

In Johnston's words, his essay "The Foundations of Justice in International Law"[16] is an attempt "to respond to the demand by exploring the ethical basis of international law through theories of justice in moral, political and legal philosophy, and in particular by applying the concepts of retributive and distributive justice to the welfare deficient states."[17] He makes a strong plea for not abandoning "entirely the traditions of natural right and positive law in the search for international justice"[18] and concludes that "an integration rather than a selection of values is more likely to provide the best mix of ideas to save mankind from the ultimate failure."[19] Copithorne, legal advisor to the Canadian Department of External Affairs, paints with a broad brush a view of the existing structural law of the international human welfare system at the United Nations, including the U.N. human rights laws and institutions, ECOSOC, U.N. Specialized Agencies, and UNEP.[20] He identifies the inadequacies of the existing institutions and mechanisms and foresees continued uncertainties about the shape of these structures "as the world community seeks to pursue human welfare on a universal scale."[21]

Eric Suy, the Legal Counsel of the United Nations, outlines some of the innovative processes of international lawmaking, such as lawmaking

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11. *Id.* at 65.
12. *Id.* at 81-109.
13. *Id.* at 82. This assertion is by President Julius Nyerere of Tanzania whose views Professor Shaw endorses.
14. *Id.* at 85.
15. *Id.* at 83.
16. *See id.* at 111-46.
17. *Id.* at 111.
18. *Id.* at 134.
19. *Id.*
20. *See id.* at 147-85.
21. *Id.* at 171.

by the General Assembly and proceeding by concensus.[22] He offers useful suggestions for (1) involving the sixth committee (legal committee) of the General Assembly in substantive work on all draft treaties, and (2) strengthening the work of the Codification Division of the Office of the Legal Affairs of the United Nations, for the International Law Commission and Codification Conference rely heavily on research done by the Codification Division.[23]

The second part, entitled "Human Dignity," consists of seven studies on selected aspects of human rights. It opens with an essay by Dean Macdonald offering a comprehensive overview of the broad range of activities undertaken by the United Nations since its inception toward the promotion and implementation of human rights:[24] setting standards; performing advisory and educational services; conducting studies; and engaged in the implementation of the International Covenants on Economic, Social and Cultural Rights[25] and Civil and Political Rights[26] and the International Convention on the Suppression and Punishment of the Crime of Apartheid.[27] He asks the pertinent question: "What is the relevance of human rights to governments coping with energy shortages, crises of raw materials, and 'north-south' confrontations?"[28] Noting that "human rights are of the essence because they have to do with the type of society we are seeking to build,"[29] he urges practitioners of human rights to get the message across that human rights are not fringe issues but core issues by taking initiatives and seeking "to put across at major international conferences the central relevance of human rights to issues of development, disarmament, maintenance of peace and security, and environment."[30] The sections on integrating the implementation procedures[31] and exploring new approaches for further promotion and encouragement of human rights,[32] contain useful suggestions. For example, he endorses a review of the U.N. Charter and a restructuring of the economic and social structure of the United Nations.[33] He recommends that the "search for universality" be encouraged, existing procedures be improved, procedural propriety and elements of due process be introduced into human rights bodies which are called upon to investigate allegations of human rights violations, "a genuine partnership" be sought with the nongovernmental

22. *See generally id.* at 187-200.
23. *See id.* at 195-200.
24. *Id.* at 203-37.
25. G.A. Res. 2200A(XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966).
26. G.A. Res. 2200A(XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966).
27. G.A. Res. 3068(XXVIII), 28 U.N. GAOR, Supp. (No. 30) 75, U.N. Doc. A/9030 (1973).
28. INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE, *supra* note 1, at 231.
29. *Id.*
30. *Id.*
31. *See id.* at 215-23.
32. *See id.* at 223-31.
33. *Id.* at 231.

organizations, and better coordination be achieved between the United Nations, the specialized agencies, and regional intergovernmental organizations concerned with human rights.[34] This thirty-five page essay provides a most cogent and incisive account of the challenges and prospects of international human rights.

In a historical context, Professor L.C. Green discusses selected contemporary efforts to control actions of barbarism against groups and individuals, such as genocide, apartheid, war crimes, hijacking, torture, and cruel, inhuman or degrading treatment of individuals.[35] He points to the ineffectiveness of the United Nations machinery in controlling many of these reprehensible acts, and emphasizes that "the whole idea of 'barbarism' is highly subjective and depends upon one's ideological approach."[36] Drawing upon his expertise as the Canadian delegate to the recently concluded Geneva Conference on Humanitarian Law in Armed Conflicts,[37] he illustrates the inadequacies of the current efforts to control barbarism. Contrasting the universal efforts with a regional approach such as the one offered by the European Commission and Court of Human Rights, he suggests that "multilateral action on a more restricted scale, when the participants have somewhat similar views as to moral conduct, the rule of law, standards of civilization, and the like," show a more hopeful prospect.[38] He offers a sobering thought: "Those countries which believe in the possibility of real international legal control of barbarism may have to pursue simultaneously less grandiose but effective schemes confined to themselves, even though the number participating be extremely small."[39] Concluding on a pessimistic note, he suggests that it is perhaps time to acknowledge that we are moving into an area of two international laws: that which we have to subscribe to for the sake of universal public opinion, though we know it will never operate as law; and that more restricted collection of rules of law that we believe in and will carry out, ensuring a reduction and suppression of barbarism at least among ourselves.[40]

"Migration and Resettlement under International Law"[41] is the subject of John Hucker's essay. A discussion of the right of a citizen to leave and return to his or her country, constraints on states regarding expulsion and detention, and multilateral and regional laws and institutions concerned with refugees and asylum leads him to conclude that "divergent political and socioeconomic perspectives have hampered the development

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34. *Id.* at 234.

35. *See id.* at 239-71.

36. *Id.* at 258.

37. For recent commentaries on the outcome of the conference, see Green, *New Law of Armed Conflict*, [1977] CAN. YB. INT'L L. 3; *Symposium issue on Law of War*, 9 CASE W. RES. J. INT'L L. 7-116, 175-424 (1977); Law of War Panel, *Directions in the Development of the Law of War*, 82 MIL. L. REV. 3 (Fall 1978).

38. INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE, *supra* note 1, at 267.

39. *Id.* at 267-68.

40. *Id.* at 268.

41. *See id.* at 327-45.

of international institutions exercising any degree of effective control over transnational population movement."[42] While he is not optimistic about "the emergence of a system of world order which would curtail in any fundamental way the exclusive competence of states to decide who will be admitted or allowed to remain in their territory,"[43] he echoes Professor Green's thoughts about the prospects of success for regional systems, for he does envisage a gradual surrender of authority, primarily confined to regional groupings such as the European Economic Community "in which the members share compatible political systems, a reasonable equivalence in economic development, and a largely homogeneous ethnic and relatial composition."[44] This is followed by an overview of the recent efforts toward ensuring international protection of the welfare of migrant workers by Professor John Claydon.[45] He identifies areas which demand further attention, such as, preparation for integration in the country of origin; special needs in housing, health and education; social security benefits; reunification of families; and security and duration of stay in the receiving country.[46] Other chapters in this part are concerned with education,[47] women's rights,[48] and the right to travel.[49]

The opening essay in the third part, a series of seven essays on legal and economic aspects of national development and entitled, "Economic Development," is by Louis Sabourin, president of the OECD Development Center in Paris.[50] He discusses theories, methods, and prospects of international economic development, concluding that "no matter what measures the developed countries accede to, most of the responsibility lies ultimately with the countries of the Third World themselves [which] can only expect as much co-operation from the industrialized nations as they are prepared to exhibit among themselves."[51] This is followed by two perceptive essays[52] which specifically address the myriad of political, economic, and legal issues associated with the demand for a New International Economic Order (NIEO) in a historical setting.[53] The authors outline significant trends and discuss major problems, both perceived and real, which must be addressed before the NIEO concept could be translated into concrete actions. Each of the four other studies in this chapter

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42. *Id.* at 340.
43. *Id.*
44. *Id.*
45. *See id.* at 347-71.
46. *See id.* at 362.
47. *See id.* at 273-90.
48. *See id.* at 291-325.
49. *See id.* at 373-96.
50. *See id.* at 399-424.
51. *Id.* at 421.
52. *See id.* at 425-69.
53. For two recent commentaries, see Garcia-Amador, *The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation*, 12 LAW. AM. 1 (1980); Ferguson, *The New International Economic Order*, 1980 U. ILL. L. FORUM 693.

examines an important aspect of economic development—international law and foreign investment,[54] producer cartels,[55] labor and employment,[56] and the international transfer and promotion of technology.[57] Obviously, it is not easy to suggest solutions to the formidable problems the world community faces on these issues, but to the credit of these authors the studies provide a balanced appraisal of the controversial issues and suggest specific recommendations in each area.

The fourth part, comprising six essays, addresses issues in the promotion of physical welfare. The opening essay[58] is by Professor Nathan Keyfitz, a Harvard sociologist who offers a demographic perspective and concludes that based on present trends, "the majority of the population will have to wait long years, perhaps generations, until prosperity trickles down to them. They will be increasingly impatient, of course, and one must hope that their impatience will be channeled along peaceful and constructive lines."[59] Professor Mary Ellen Caldwell examines the legal factor in the food-population equation,[60] concluding that only multidisciplinary and multinational solutions will work.[61] This is followed by essays on public health and the human environment,[62] energy and international economic welfare,[63] and the 1975 U.N. Congress on the Prevention of Crime and the Treatment of Offenders.[64] The concluding essay is by Professor J.W. Samuels, an advisor to the Canadian Red Cross Society, on "Organized Responses to Natural Disasters."[65] Based on the trends of the last sixty years he suggests that at the international level, "there must be coordination through the U.N. Disaster Relief Office and the League of Red Cross Societies. The former would be primarily responsible for direct government assistance, the latter for aid from nongovernmental institutions."[66] Essays in this part address several issues on which the United Nations has sponsored many international conferences in the recent past. Some of these essays, unlike those in parts one to three, however, offer no more than a survey of the events of the recent past without delving into major problems and appraising alternatives and discussing specific recommendations. Perhaps constraints of space were responsible, for it is not easy to discuss such wide-ranging subjects in just a hundred pages.

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54. INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE, *supra* note 1, at 471-500.
55. *See id.* at 501-23.
56. *See id.* at 525-48.
57. *See id.* at 549-81.
58. *Nation, City, and the World Community: A Demographic Perspective*, in *id.* at 585-600.
59. *Id.* at 600.
60. *See id.* at 601-14.
61. *See generally id.* at 610-14.
62. *See id.* at 615-38.
63. *See id.* at 639-57.
64. *See id.* at 659-74.
65. *See id.* at 675-90.
66. *Id.* at 687.

It is impossible to do justice in a short review to the wealth of material presented by the twenty-seven authors, a reason responsible for my not taking account of each contribution. I would reiterate, however, that the overall quality of the collection is remarkably high, the credit for which goes to the editors. I concur with the hope expressed by the editors that "the cumulative effect of these essays will be a contribution to the organization of the field, which might be designated as the international law and policy of human welfare."[67]

67. *Id.* at vii.

# BOOK NOTES

ARANGIO-RUIZ, G., THE UN DECLARATION ON FRIENDLY RELATIONS AND THE SYSTEM OF THE SOURCES OF INTERNATIONAL LAW; Sijthoff & Noordhoff International Publishers, Alphen aan den Rijn, The Netherlands (1979); available in the U.S. from Sijthoff & Noordhoff, 20010 Century Blvd., Germantown, MD 20767; $27.50 (cloth); ISBN 902860149x; available in Italian and French; xiii, 301 p.; footnotes, bibliography, appendix, index. The second of three Hague Courses. Revised edition.

This is a revised edition of *The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations,* published in Volume 137 (1972-III) of the *Collected Courses* of The Hague Academy of International Law. The revision is justified, according to the author, first because some general problems have been recently reconsidered by the author. Second, the resultant variations in his views are of such a kind as to increase the weight of the data upon which he based his 1972 conclusions with respect to the nature of international organization and the normative role of the United Nations.

The book analyzes the theoretical basis in customary law and other sources of international law of United Nations General Assembly declarations. Chapter I is devoted to a critical analysis of the view that General Assembly declarations are a special, new lawmaking process, contemplated as such by custom and the views otherwise implying a special lawmaking force of the declarations. Chapter II discusses the material role of General Assembly resolutions within the framework of the main conventional "sources" (custom and treaty) or alleged "sources" (general principles), and the role of General Assembly resolutions in legal determination. Chapter III discusses, in the light of the results achieved thus far, the status of General Assembly Resolution 2625(XXV), which embodies the principle of "Friendly Relations." Chapter IV, devoted to the contents of the declaration, consists of the proposed first reading and commentary of the formulations of the seven principles. Chapter V discusses the function of the declaration in the light of the objectives assigned to it by the General Assembly and by some member states and in the light of some of the scholarly assessments of that function. In particular, the chapter considers the doctrine and law of peaceful coexistence. The essay is devoted to the illustration of some of the juridical problems raised by the "Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations" (the document unanimously adopted by the General Assembly as Resolution 2625(XXV) on 24 October 1970).

The book contains the text of General Assembly Resolution 2625(XXV) approving The Declaration on Principles of International

Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations in an Annex. Fully indexed, the book also contains a rather extensive bibliography of over 300 references.

Gaetano Arangio-Ruiz is Professor of International Law at the University of Rome, and Legal Consultant with the Italian Ministry of Foreign Affairs. He has taught at the Universities of Padua and Bologna, and was the representative of Italy on the United Nations special committee which drafted the Declaration of Principles of Friendly Relations and Cooperation Among States.

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BYSTRICKY, R., LE DROIT DE L'INTEGRATION ECONOMIQUE SOCIALISTE; Sijthoff & Noordhoff International Publishers, Alphen aan den Rijn, The Netherlands (1979); available in the U.S. from Sijthoff & Noordhoff, 20010 Century Blvd., Germantown, MD 20767; $48.00 (cloth); ISBN 9028603395; foreword, footnotes, texts of documents, charts, bibliographies, index. In French. No. 6 in the series *Collection de Droit International,* Graduate Institute of International Studies, Geneva, Switzerland.

The aim of this book, *The Law of Socialist Economic Integration,* is to explain economic integration among the member countries of the Council for Mutual Economic Assistance (Comecon). Professor Bystricky examines theoretical and practical issues of economic integration in the socialist countries of Eastern Europe, working from the premise that terminological similarities do not hide the fact that the community of socialist countries pursue fundamentally different political objectives than do the Western states. According to the basic documents of socialist economic integration, all aspects of social life are bound up in the process of integration. Therefore, while the book is primarily concerned with juridical issues, the analysis includes certain economic, political, and social problems. Law, politics, and economics are said to be inseparable in the process of socialist economic integration.

The basic documents reproduced as annexes in the book are the Comecon Charter (including the 1962 and 1974 amendments), a detailed organizational chart of Comecon, and the complete text of the 1971 Complex Program for Socialist Economic Integration.

The analysis is in five parts. The first part deals with the definition, origins, causes and objectives, and sources of socialist economic integration, and with the participation of the member states of Comecon in the integration process. Second, the ideological bases and juridical characteristics of socialist economic integration are discussed. The place of the law of socialist economic integration in the international legal system is also treated. The third section concerns juridical principles. The principles of the 1971 Complex Program are analyzed in light of public international law; this includes a discussion of Soviet doctrines towards general inter-

national law and towards the principle *jus cogens* in particular. The discussion then centers on the principle of socialist internationalism, including the evolution and contents of the concept and divergences within and among Western communist parties. The Soviet conception of the principle of sovereignty is also discussed. Finally, the supranationality of economic integration—from both Western and socialist perspectives—is treated.

The fourth part of the book deals with ways and means for economic collaboration and planning within the socialist group. This discussion covers the juridical aspects of cooperation in science, technology, industrial property, monetary and financial relations, agriculture, transport, and other areas. It also describes the organs of socialist economic integration. The fifth section provides perspectives for the future. Relations between Comecon and the European Economic Community and between economics, politics, law, and social life from Western and socialist viewpoints are discussed.

This book will be of interest to students and teachers of international law, economics, and international relations, practicing professionals in these fields, diplomats, and others interested in the juridical, economic, and political problems facing the Comecon countries.

Rudolf Bystricky, Visiting Professor at the Graduate Institute of International Studies in Geneva and at the Law School of the University of Fribourg (Switzerland), is a former professor of international law at Charles University in Prague. He served as chief of the Czechoslovak economic service and as Ambassador to the United Kingdom.

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CAMPBELL, D.L. (editor), COMPARATIVE LAW YEARBOOK (Volume III-1979); Sijthoff & Noordhoff International Publishers, Alphen aan den Rijn, The Netherlands (1980); available in the U.S. from Sijthoff & Noordhoff, 20010 Century Blvd., Germantown, MD 20767; $52.50 (cloth); ISBN 9028603409, LC 79-649337; v, 287 p.; footnotes. Issued by the Center for International Legal Studies.

The thirteen papers collected in this third volume of the *Comparative Law Yearbook* are diverse in author-background and subject matter. The editor has selected such international topics as the international impact of United States antitrust laws, international commercial arbitration, a comparative analysis of employee creditor's rights, and Western legal efforts to suppress terrorism. In addition, a discussion of recent law reform in China by Professor Chiu of the University of Maryland School of Law, recent Polish constitutional developments by Professor Garlicki, visiting Professor of Law at Saint Louis University from Warsaw University, and German merger controls and the oil industry by Patrick J. Hines, Professor of Law at McGeorge School of Law, University of the Pacific are included. The editor's own paper analyzes the English *Sunday*

*Times Case*, based upon the American doctrine against prior restraint, which may have been structured on a misreading of English law and history. Another article by Phiroza Anklesaria, an Indian advocate and English soliciter, describes the Indian law of contempt. Two other articles discuss the practicality of the Hague Sales Law of 1964 and the similarities and differences between the development of English and Scottish contract law and Continental contract law.

Dennis Campbell is Professor of Law, McGeorge School of Law, University of the Pacific, and Director of European Programs at that institution.

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CARREAU, D., JUILLARD, P., & FLORY, T., DROIT INTERNATIONAL ECONOMIQUE; Librarie Générale de Droit et de Jurisprudence, 20 & 24, Rue Soufflot, Paris 5e (1980); ISBN 2275011439; xx, 631 pp.; footnotes, bibliographies, tables, index. Second edition. In French.

The second edition of *International Economic Law* updates and expands the earlier version, and certain sections have been eliminated. The aims of the authors remain the same: to present in a synthesized form a judicial study of contemporary problems of the international economy, and to render that presentation as accessible as possible, so that it would be useful to law students and practitioners and to adherents of other related disciplines. The book illuminates the practical importance of international economic law.

The introductory section of the book concerns the legal structure of the international legal order. Topics include alternative definitions of international economic law, the multidisciplinarity and diversity of the subject, and the contents of its norms. Sanctions, actors, organizations, historical developments, and the "new international economic order" are also discussed.

The first section of the text proper deals with the economic interdependence of states. The world monetary system is treated in terms of the limits of the monetary sovereignty of states and the law of international monetary cooperation. The monetary systems of the European Economic Community and of the Council of Mutual Economic Cooperation are also discussed. The General Agreement on Tariffs and Trade is treated in depth. Other commercial regimes, including the Oil Producing and Exporting Countries, the "Stabex" system of the Lomé Convention, and the United Nations Conference on Trade and Development, are also covered.

The second broad section deals with the residual economic sovereignty of states. Legal aspects of private investment are discussed at length. Topics include nationalization and transfer of technology.

Dominique Carreau is Professor of Law and former Dean of the Faculty of Law, University of Paris X and is a member of the Advisory

Board of the *Denver Journal of International Law and Policy*. Patrick Juillard is Professor of Law, University of Paris. Thiébaut Flory is Charge de Conférences in the Faculty of Law, University of Paris.

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CASSESE, A. (editor), U.N. LAW/FUNDAMENTAL RIGHTS: TWO TOPICS IN INTERNATIONAL LAW; Sijthoff & Noordhoff International Publishers, Alphen aan den Rijn, The Netherlands (1979); available in the U.S. from Sijthoff & Noordhoff, 20010 Century Blvd., Germantown, MD 20767; $38.00 (cloth); ISBN 9028608281; x, 258 p.; footnotes.

This is a collection of lectures delivered at the Faculty of Political Science at the University of Florence in 1976-77. The fifteen guest lecturers were international law professors and United Nations officials from twelve Eastern, Western, and Third World Countries. The editor has organized their work into two broad subject areas of international law: the legal principles affected by the existence and functioning of the United Nations, and the international protection of human rights and of the rights of peoples.

Within these two general areas the topics treated and the approaches taken are as diverse as the authors' nationalities. Professor Richard Falk of the United States analyzes the response of the 1976 Algiers Declaration of the Rights of Peoples to the structure of internal political repression around the world. Mr. Youri Rechetov, United Nations Division of Human Rights Senior Human Rights Officer, a citizen of the Soviet Union, describes state responsibility for the violation of the rights of citizens as being strictly limited to obligations of convention. Professor Jean J. A. Salmon of the University of Brussels, constructs an academic model of the political nature of judicial and administrative fact finding in international conflict resolution. Judge José Sette Camara of the International Court of Justice, who served as the President of the Florence symposium, reviews the negotiating history and the principal provisions of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations. Other contributors include: Bertrand G. Ramcharan of Guyana, and Adjunct Professor of Law at Dalhousie University; Dan Ciobanu of Romania, Lecturer in International Law at the Fletcher School of Law and Diplomacy; and Bert V.A. Röling, Professor of International Law and Peace Research at the University of Gröningen, who was a judge in the International Military Tribunal for the Far East, a member of the Dutch delegation to the United Nations General Assembly, and co-founder and Secretary-General of the International Peace Research Association.

Each article is from twelve to twenty-five pages in length. Because of their lecture format they are not heavily footnoted, but they do provide for a succinct and convenient survey and synthesis of each area.

Antonio Cassese is Professor of International Organization, Univer-

sity of Florence. He has been a member of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, as well as a member of the Italian delegations to the United Nations General Assembly and the Geneva Diplomatic Conference on the Development of Humanitarian Law of Armed Conflict.

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ELIAS, T.O., NEW HORIZONS IN INTERNATIONAL LAW; Sijthoff & Noordhoff International Publishers, Alphen aan den Rijn, The Netherlands, and Oceana Publications, Inc., Dobbs Ferry, N.Y. (1979); available in the U.S. from Oceana Publications Inc., Dobbs Ferry, N.Y. or from Sijthoff & Noordhoff, 20010 Century Blvd., Germantown, MD 20767; $32.50 (cloth); ISBN 0379204991 (Oceana), ISBN 9028600396 (Sijthoff); xxii, 206 p.; footnotes, bibliography, appendices.

This book consists of a series of studies designed to highlight a number of the more significant aspects of public international law that have emerged in the past thirty years. Written by Judge Elias of the International Court of Justice, the book endeavors to explore new trends in the horizons of public international law.

The theme of the book is presented in three main divisions. In the first part, certain aspects of the new trends in contemporary international law are examined. The contributions made by the Third World, especially Asia and Africa, to international law are outlined with regard to the new initiatives taken by the United Nations in establishing the International Law Commission and certain economic bodies like the UNCTAD and the UNCITRAL, which have been called into being largely by the needs of the developing countries. An attempt is made to look at the growth of modern diplomatic law within the framework of the International Law Commission and the General Assembly of the United Nations. Probably the most significant development of the period has been the adoption by a Diplomatic Conference of the Vienna Convention on the Law of Treaties, which is important because of its reformulation and progressive developments of aspects of the Law of Treaties. An interesting aspect of the same subject is the draft Convention on State Succession which attempts to modernize the law of the rights and duties of new States in relation to the Treaties they inherited at independence. Lastly, an important new development is the Third United Nations Conference on the Law of the Sea, which is an attempt to recodify existing law and to codify new law of the sea.

The second part of the book is devoted to the judicial process. Examined are present trends and future prospects of the International Court of Justice, especially the problem of the varied composition of the Court, the jurisdiction of the Court in regard to whether it should be expanded to entertain entities other than sovereign states. Another development which is analyzed is the judicial review function of the International

Court of Justice, made important in view of the development of new areas, such as international constitutional law and appeals from other tribunals like the United Nations Administrative Tribunal.

The third part of the book is devoted to the development and analysis of human rights and humanitarian law. The question of human rights is discussed in the context of the Universal Declaration of Human Rights and the two Protocols adopted in Geneva in December 1977 to update the inadequacies of the Geneva Conventions of 1949. A brief outline of the development of international humanitarian law concludes the study.

Judge Taslim Olawale Elias of Nigeria is Vice President of the International Court of Justice, and is a member of the Curatorium of the Hague Academy of International Law. As a supplement to *New Horizons in International Law*, Judge Elias will publish an article entitled *New Perspectives and Conceptions in Contemporary Public International Law* in volume 10, number 2 (Winter 1981) of the *Denver Journal of International Law and Policy*.

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EXTAVOUR, W.C., THE EXCLUSIVE ECONOMIC ZONE: A STUDY OF THE EVOLUTION AND PROGRESSIVE DEVELOPMENT OF THE INTERNATIONAL LAW OF THE SEA; Graduate Institute of International Studies, 132, Rue de Lausanne, Geneva, Switzerland (1979); $30.00 (cloth); ISBN 9028608389; xv, 369 p.; footnotes, tables, bibliography, appendices.

The author traces the development of the concept of the exclusive economic zone from its inception through its expansion. He begins with an introductory chapter dealing with the earliest forms of state jurisdiction over adjacent seas, the concepts of territorial seas and the contiguous zone. He emphasizes the use by the major maritime states of the concept of the contiguous zone to restrain seaward expansion of state jurisdiction.

Part I deals with state practice, and how it has contributed to the evolution of the exclusive economic zone. Included are a unilateral declaration and a bilateral treaty, and the Truman Proclamations. Following is a discussion of the progeny of the Truman proclamations and their early codification in the framework of the United Nations.

Part II deals with the expansion of the concept of the exclusive economic zone itself. Beginning with its emergence within the United Nations, the author discusses the concept in terms of the draft treaty before the Third United Nations Conference on the Law of the Sea. He also treats the present validity of the draft principles as rules of customary international law.

In later chapters the author describes the state of the law as it existed at the date of the writing, and what the future of the exclusive economic zone may be should the Conference not approve the principles of the zone.

The appendices contain the Revised Standard Negotiating Text draft articles on the exclusive economic zone and the continental shelf. The bibliography is impressive, and is organized by type of authority, such as: cases, conventions, regional declarations, books, and articles.

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KLEPACKI, Z., THE ORGANS OF INTERNATIONAL ORGANIZATIONS; Sijthoff & Noordhoff International Publishers, Alphen aan den Rijn, The Netherlands, and PWN-Polish Scientific Publishers, Warsaw, Poland (1978); available in the U.S. from Sijthoff & Noordhoff, 20010 Century Blvd., Germantown, MD 20767; ISBN 9028602283; available in Polish; xii, 137 p.; footnotes, bibliography.

This work describes the structure and workings of the organs of public international organizations in four chapters, which deal with classification, history and development, composition, and present functions. Each chapter contains a detailed outline, so that the reader can quickly reference to a subtopic. Since the work is primarily descriptive, with few footnotes, it serves as a general introduction to the institutional aspect of foreign relations.

In the conclusion, the author highlights the evolution of international organizations since World War II as consisting of, first, the explosion in the number, size, and functions of such organizations, and second, the relatively greater importance of the administrative organs within such organizations. International administrators now not only have far more resources at their disposal, and many more tasks to address, but they also have acquired a degree of legislative power from the "top" organs.

Zbigniew Klepacki is Professor of Law at the Polish Institute of International Affairs in Warsaw. He is a frequent representative of the Polish Government at international conferences, and has served as Editor-in-Chief of *Encyclopaedia of International Organizations* (1975) and of *Socialist Economic Integration* (1974).

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KOHLS, S. (editor), DICTIONARY OF INTERNATIONAL ECONOMICS; Sijthoff & Noordhoff International Publishers, Alphen aan den Rijn, The Netherlands (1976); available in the U.S. from Sijthoff & Noordhoff, 20010 Century Blvd., Germantown, MD 20767; $32.50 (cloth); ISBN 9028605053; 619 p.; indices.

This dictionary has been compiled for all those concerned with the practice and theory of external economy in foreign trade enterprises, as well as those learners who desire to acquire some specialized knowledge in foreign economic terms. This dictionary offers the user over 9,300 English economic terms and their equivalents in German, French, Spanish, and

Russian. The main entries have been chosen with a view towards providing the user with the most essential and frequently used terms.

The main text is alphabetically offered in German, followed by indices in Russian, English, French, and Spanish. An abbreviations table shows the user the correct form of the word or phrase he or she desires to use. To enable the user to safely find the correct technical term, numerous word phrases have also been included. The vocabulary has been chosen from trade journals, manuals, lexicons, and other reference works as well as from various documents employed in the external economy. Currently in its third printing, many of the misprints and lexicographical inaccuracies of previous editions have been corrected and some important words have been added in this edition.

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McGOWAN, P. & KEGLEY, C.W., JR., (editors), THREATS, WEAPONS, AND FOREIGN POLICY; Sage Publications, Inc., 275 South Beverly Drive, Beverly Hills, CA 90212 (1980); $20.00 (cloth); ISBN 0803911548, ISBN 0803911556 pbk., LC 79-266659; 324 p.; bibliography, index of persons. Fifth volume of *Sage International Yearbook of Foreign Policy Studies.*

This volume integrates the theoretical and empirical divisions presently existing between scientific foreign policy and national security/defense studies. "By focusing on *Threats, Weapons, and Foreign Policy Behavior,* our intention was to bring together . . . studies by foreign policy and defense experts on the interface between national security and foreign policy behavior that were unique because of their application of newer social science methodologies to the perennial questions of defense and security."

Part I, *Threats and Foreign Policy,* defines threats as the conceptual link between foreign and defense policy studies. Threats are anticipations of aproaching harm triggering feelings of stress that lead to adaptive behavior. The three chapters in this section center upon threat with respect to overt behavior of states in conflict, Soviet perceptions of international crises (1946-75), and United States public opinion and military spending (1930-90).

Part II, *Weapons and Foreign Policy,* presents four chapters that examine the impact of weapons and weapons systems procurement on foreign policy and the policymaking process. Important areas addressed include security implications of arms sales by France, legislative control in the United States and the United Kingdom of weapons systems acquisition, military hardware production in the Third World, and the proliferation of nuclear armament through the growing availability of nuclear technology.

Part III, *Modeling Arms Races,* concludes the study with two chapters on arms races from different perspectives. The first article analyzes

military spending by the United States and the Soviet Union over the period 1950-76. The second article develops a model of an optimal defense policy incorporating national goals and objectives for any nation involved in an arms race.

Part IV includes a bibliography of recent foreign policy studies covering the period 1975-79.

Pat McGowen is Professor of Political Science at Arizona State University. Charles W. Kegley, Jr. is Professor of Government and International Studies at the University of South Carolina.

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McWHINNEY, E., THE INTERNATIONAL LAW OF DETENTE, ARMS CONTROL, EUROPEAN SECURITY, AND EAST-WEST COOPERATION; Sijthoff & Noordhoff International Publishers, Alphen aan den Rijn, The Netherlands (1978); available in the U.S. from Sijhoff & Noordhoff, 20010 Century Blvd., Germantown, MD 20767; $37.50 (cloth); ISBN 9028603387; xi, 254 p.; footnotes and index.

This book is an in-depth legal, philosophical, and historical analysis of detente. As a formal judicial concept, detente originated in the 1960's. General de Gaulle offered the concept as the keynote of a new period in intra-European relations succeeding the Cold War era. But detente is more than a mere political platitude. The concept of detente, while descriptive of the general relaxation of tension in Europe across the old Cold War territorial frontiers, is philosophically dynamic: envisioning itself as a transitory stage towards a larger, Pan-European spirit of entente and cooperation. The special Gaullist conception of detente has ceased to be a viable operational idea. Detente has emerged under a number of different rubrics, in a number of different problem areas, and at different or varying levels of generality and philosophic abstraction. The author offers this study in the firm belief that the spirit of detente, at its moment of apparent greatest success as demonstrated in a plethora of highly concrete East-West accords that are actively being followed up and implemented, is being contested and challenged either out of a sense of misunderstanding of the detente concept or a sense of desuetude through unfamiliarity with the concept's parameters.

The book is the result of three years of lectures given by the author from 1975 through 1977. The ideas were preliminarily presented to the Institute of International Public Law and International Relations at the Aristotelian University in Thessalonica. The ideas presented in this book took their final form as graduate course lectures at the University of Nice, in the Institut du Droit de la Paix and at the Institut Européen de Hautes Etudes Internationals. In exploring the philosophy, methodology, and sanctification of detente, the author seeks to reveal why detente is still a viable concept capable of transforming East-West relations to the betterment of all the world and not just Europe in the short run.

Chapter I explores the comparative (Soviet and Western) philosophy of detente. Chapter II examines the legal theory of the methodology of detente through the interaction of its legal method and its legal objectives. Chapter III reveals the road to detente through nuclear disarmament coupled with arms control and Chapter IV follows through with the key to detente—Strategic Arms Limitations (SALT I and SALT II). Chapter V shows the relationship of detente to the legitimation of territorial frontiers in Central and Eastern Europe. Chapter VI shows the conservative face of detente by discussing Europe's intra-bloc solidarity and the formulation of the Brezhnev Doctrine. Chapter VII discusses the positive aspects of detente in East-West cooperative efforts in space. The sanctification aspects of detente are explored through the formulation and application of the Helsinki Conference on Security and Cooperation in Europe. The book closes with a chapter on the normalization of detente followed by a historical retrospective and prospects.

The breadth and scope of detente are explored through the analytical devices of theory, law as enacted, philosophical foundations, and historical rewards and frustrations. Such an approach yields a balanced analysis of the concept of detente and, coupled with the author's desire to keep detente a viable forum in which to continue East-West cooperation and negotiations, a timely study of detente's continuing utility.

Edward McWhinney is a member of l'Institut de Droit International.

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RAMAZANI, R.K., THE PERSIAN GULF AND THE STRAIT OF HORMUZ; Sijthoff & Noordhoff International Publishers, Alphen aan den Rijn, The Netherlands (1979); available in the U.S. from Sijthoff & Noordhoff, 20010 Century Blvd., Germantown, MD 20767; $35.00 (cloth); ISBN 9028600698; 180 p.; footnotes, maps, appendices, documentary index. Third in the series *International Straits of the World.*

This work is the third in a series of studies organized and edited at the Center for the Study of Marine Policy on the topic of international straits. The purpose of the series is to explore the political, economic and physical characteristics of certain straits, in light of the Third United Nations Conference on the Law of the Sea, which will promulgate rules affecting such straits.

The author describes the importance of the Strait of Hormuz to Western and Soviet foreign policy, and to the foreign relations of the states adjacent to the Persian Gulf. He calls the Strait of Hormuz a "global checkpoint," closure of which would disrupt oil supplies and bring economic disaster to the Western world and Japan. He predicts that such closure would lead to military actions, creating far-reaching consequences for the United States, the Soviet Union, and the Persian Gulf states.

The author discusses the historical evolution of the present crises

and conflicts, highlighting the 1973 Arab-Israeli War. He shows how domestic issues are intertwined with foreign rations. relations. Conservative Arab states being sometimes aligned with and sometimes at odds with more radical Arab states, but over all the local rivalries looms the threat of world war between the United States and the Soviet Union. He describes several oil disruption scenarios and the effect of military forces on them, while arguing for the peaceful settlement of disputes and political stability.

Concluding, the author examines the prospects for conflict or cooperation in the Persian Gulf and the Strait of Hormuz in particular, reviewing the options of the superpowers. The documentary appendices contain twelve bilateral and multilateral agreements between the Persian Gulf states relating to the boundaries of the Continental Shelf, marine pollution, security of the Strait of Hormuz and other topics.

Rouhollah K. Ramazani is Professor of Government and Foreign Affairs at the University of Virginia. He was winner of the 1964 prize of the American Association for Middle East Studies, and in 1967 was the Aga Kahn Professor of Islamic Studies at the American University of Beirut.

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SHAKER, M.I., THE NUCLEAR NON-PROLIFERATION TREATY: ORIGIN AND IMPLEMENTATION 1959-1979, Volume I; Oceana Publications, Dobbs Ferry, NY (1980); ISBN 0379204703, LC 80-17359; xxiv, 470 p.; footnotes.

This first of two volumes describes the history of the Nuclear Nonproliferation Treaty (NPT) beginning with the "Irish Resolution" adopted by the United Nations General Assembly in 1959. It then analyzes General Assembly Resolution 2028 (XX) which contains the five principles upon which the NPT was to be negotiated. In discussing the negotiations themselves, Shaker relates the procedures, occurences in the international community, General Assembly resolutions, and other factors which had an impact on the negotiations.

The author analyzes the provisions of the NPT and their implementation, on the basis of the first two principles of General Assembly Resolution 2028 (XX) (the other provisions relating to the last three principles are discussed in the second volume). Principle (*a*), requiring that there be no loopholes allowing nuclear or nonnuclear powers to proliferate nuclear weapons in any form, is discussed in light of the relevant NPT provisions, and especially the plan for nuclear sharing within NATO and the Multilateral Nuclear Force (MLF). Extensive treatment is given to the positions of the states potentially involved in nuclear sharing.

The provisions of the NPT dealing with the peaceful uses of nuclear energy, application of nuclear explosions, and the nuclear security guarantees as handled by Security Council Resolution 255 are discussed in light of Principle (*b*), which states that the Treaty should embody an ac-

ceptable balance of mutual responsibilities and obligations of the nuclear and nonnuclear powers.

Mohamed I. Shaker is Minister and Deputy Chief of Mission, Embassy of the Arab Republic of Egypt to the United States. He was a member of the Egyptian delegation to the Conference of the Eighteen Nation Committee on Disarmament (ENDC) in Geneva from 1965 to 1968, and was a participant in the 1975 NPT Review Conference.

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SIMONS, W.B., (editor), THE CONSTITUTIONS OF THE COMMUNIST WORLD; Sijthoff & Noordhoff International Publishers, Alphen aan den Rijn, The Netherlands (1980); available in the U.S. from Sijthoff & Noordhoff, 20010 Century Blvd., Germantown, MD 20767; $92.50 (cloth); ISBN 9028600701, LC 80-65005; xvii, 644 p.; footnotes, comparative index.

This book contains a collection of constitutions adopted by communist states. Included are the constitutions of Albania, Bulgaria, China, Cuba, Czechoslovakia, the German Democratic Republic, Hungary, Kampuchea (regime of Pol Pot), the Democratic People's Republic of Korea, Mongolia, Poland, Romania, the U.S.S.R., Viet-Nam, and Yugoslavia.

The editor notes in his preface that most of the states listed have promulgated new or revised constitutions in the last decade, allowing this book to retain its usefulness for some time. Only the new or revised texts are included in this volume.

The majority of the constitutions contained in the book were especially translated by jurists. Each translator has supplied an introduction to each constitution, briefly describing its elements. The book is a useful reference work, offering numerous communish constitutions in a single volume translated into English.

A valuable addition to this volume is the systematic index, which cites provisions of each constitution comparatively. For each of many subjects, such as military service, treason, deprivation of citizens' rights, and centralized economy, the applicable provisions of each constitution are listed, permitting easy reference to the documents themselves.

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WEIS, P., NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW; Sijthoff & Noordhoff International Publishers, Alphen aan den Rijn, The Netherlands (1979); available in the U.S. from Sijthoff & Noordhoff, 20010 Century Blvd., Germantown, MD 20767; $62.50 (cloth); ISBN 9028603298, LC 79-89781; xiii, 337 p.; footnotes, bibliography, appendices. Revised Edition. Forward by Sir Hersch Lauterpacht.

This is the second revised edition of a work that looks at nationality from an international as well as national viewpoint. The book contains a study of the relationship between municipal and international law in the area of nationality, and reviews restrictions on the sovereign jurisdiction of states, including bilateral and multilateral treaties. In the author's view it is the conflict among nationality laws, resulting from the domestic character of those laws, which creates statelessness. The author predicts that the United Nations Convention on the Reduction of Statelessness, adopted in 1961 but as yet ratified by only a few states, may result in a decline in statelessness. Further evidence of this trend is found in recent nationality laws in several countries. Throughout the book, the celebrated *Nottebohm* case decided by the International Court of Justice is discussed.

The appendices include many new treaties and legislative enactments affecting nationality in over fourteen countries. Also included are two important United Nations Conventions, one relating to the nationality of married women, the other to statelessness. In addition to thirty-five entries of general works on nationality published since 1955, the bibliography lists fifty-five books specifically on the *Nottebohm* case.

Dr. Weis has worked with the International Refugee Organization and the United Nations High Commissioner for Refugees.