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Linguistic Equality in International Law: Miscommunication in the Gulf Crisis

*Christopher B. Kuner**

I. INTRODUCTION

Despite the fact that language is "the main vehicle of communication between nations"[1] and "serves as either the bridge or the barrier upon which the organized relations between States are built,"[2] little attention has been devoted to its place in international law.[3] However, evidence of a communications gap in the recent Persian Gulf Crisis, fueled particularly by profound linguistic and cultural differences[4]

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* Of the New York and Illinois Bars. J.D., Notre Dame Law School; LL.M. in International Legal Studies, New York University School of Law.

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1. M. TABORY, MULTILINGUALISM IN INTERNATIONAL LAW AND INSTITUTIONS 1 (1980) [hereinafter TABORY]. In this article "language" is used in the sense of words, whether spoken or written. It is of course true that in diplomacy actions may also be viewed as a form of language. *See* S. GASELEE, THE LANGUAGE OF DIPLOMACY 9 (1939).

2. TABORY, *supra* note 1, at 1.

3. One exception is the interpretation of multilingual treaties. *See, e.g.*, M. HILF, DIE AUSLEGUNG MEHRSPRACHIGER VERTRÄGE (1973) [hereinafter HILF]; *see also* TABORY, *supra* note 1, at 168-226; Kuner, *The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning*, 40 INT'L & COMP. L.Q. 953 (1991).

It must be emphasized that the use of language in international relations is governed by international law, not just by diplomatic practice. HILF, *supra* at 27 n. 104; 2 A. OSTROWER, LANGUAGE, LAW, AND DIPLOMACY 769-774 (1965) [hereinafter OSTROWER]. Diplomatic practice, as distinguished from international law, reflects "the forms of diplomacy as it is practiced, the accepted form of intercourse between states within diplomatic protocol, rules of etiquette, and *deanat* of the accredited envoys to a given country," without constituting "an integral part of official international practices of states in the furtherance of their mutual relations." *Id.* at 770.

4. *See, e.g.*, Dart, *Why One Muslim's 'Jihad' is not Seen by All as 'Holy War'*, LOS ANGELES TIMES, Sept. 22, 1990, at F16 (explaining that the Arabic word "jihad" is often mistranslated as "holy war," when, in fact, "in Islam, the word holy applies only to Allah. And the word jihad (literally 'striving') primarily describes spiritual and intellectual efforts to become better Muslims and to spread the faith through peaceful means. . . ."); *see* Leroux, *Arabs' Culture and Language Help Shape Crisis in Middle East*,

between the main antagonists, Arabic-speaking Iraq and the English-speaking United States, has thrown the spotlight on legal issues relating to the use of language like few events in recent times. A review of several incidents that occurred during the crisis raises troubling questions about the chance of miscommunication in international relations and the primitive state of international law regarding language usage.

II. LANGUAGE IN THE GULF CRISIS

Linguistic Equality in International Law

In past centuries diplomacy and communication between States were conducted by means of a common diplomatic language, most

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CHICAGO TRIBUNE, Aug. 19, 1990, at 12 (quoting interview with Prof. M. Cherif Bassiouni):

> The word 'no' in English means 'no'. . . . But in Arabic, 'no' has a range of meanings including 'yes'. When a host offers a guest some coffee and sweets, the guest is expected to refuse so the host can insist. The language is less blunt than English or even French, and the language of Arab politics is especially flowery and ambiguous, full of possibilities for a dignified retreat.
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> The action of Iraq against Kuwait was almost universally called tadakhol, an act of intervention, rather than oudwan, an act of aggression. With tadakhol, there is no stigma, no name-calling. The subtleties of the language allow Arabs to voluntarily drift out of a position they may seem to have held.

See also MacNeil/Lehrer Newshour, Nov. 23, 1990, Friday Transcript #3909 (hereinafter *MacNeil/Lehrer*) (quoting interview with Queen Noor of Jordan):

> When the Arab point of view is expressed, or when there is an attempt at negotiating or communicating ideas with other cultures and particularly we're seen them in recent weeks with Western cultures over issues that are as emotional and vital, important to the welfare of the Arab community as well as to our relations to the West, I think that we've had a great deal of miscommunication or communication that's been out of synch.
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> . . . .
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> It's [Arabic] a much richer language. It's a language that is used in a much more poetic and rhetorical, flowery fashion than English, which tends to perhaps reflect very well today a much more Western, businesslike, direct, definite approach to issues. It is not a language that is, has yet—we haven't yet developed the means to accommodate or synchronize it to the sound byte, if you will. And seeing as that was the mechanism by which so much of the dialogue has been carried out, I think there are many misunderstandings and many mistakes and many problems and that exacerbation of confusion and of fear and anxiety and emotions on both sides that led to an escalation of the crisis on all levels.

See also Said, *Embargoed Literature*, THE NATION, No. 8, Sept. 17, 1990, at 278 (asking "is it too much to connect the stark political and military polarization with the cultural abyss that exists between Arabs and the West?"); *see also* A. BOZEMAN, THE FUTURE OF LAW IN A MULTICULTURAL WORLD 25-26 (1971) (regarding the difficulties of translation from Arabic); TABORY, *supra* note 1, at 88.

prominently Latin, Castilian Spanish, or French.[5] French eventually gained the upper hand and remained the predominant language of diplomacy until English was granted the status of an official language at the 1919 Paris Peace Conference.[6] But while States still use diplomatic languages such as English or French a great deal in their relations,[7] international law now recognizes that the doctrine of State equality[8] entitles a State to communicate in its own language (referred to here as the "rule of linguistic equality").[9] This rule seems to be based mainly on nationalism,[10] perhaps given added impetus by decolonization and resultant pressures toward cultural diversity in the international system.[11]

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5. TABORY, *supra* note 1, at 4-5.

6. *Id.* at 5.

7. Ajulo, *Law, Language and International Organisation in Africa: The Case of ECOWAS*, 29 J. AFRICAN L. 1, 16-17 (1985) [hereinafter Ajulo]; *see also* Pitamic, *Linguistik im Völkerrecht*, 21 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 305, 305 (1971) [hereinafter Pitamic]; SATOW'S GUIDE TO DIPLOMATIC PRACTICE 40 (Lord Gore-Booth ed. 1979) [hereinafter SATOW] (stating that "there is no universal rule making obligatory the use of one language rather than another and practice varies.").

8. The UN General Assembly has resolved that sovereign equality is an essential right of all States. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8082 (1970). Sovereign equality has been called "the linchpin of the whole body of international legal standards, the fundamental premise on which all international relations rest." A. CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 129-30 (1986).

9. HILF, *supra* note 3, at 27; *2* OSTROWER, *supra* note 3, at 73; SATOW, *supra* note 7, at 40 (stating that the "right of the representative of every nation to use the official language of that nation is now generally accepted"); A. SERENI, *III Diritto internazionale* 1318-19 (1962); 2 K. STRUPP, WÖRTERBUCH DES VÖLKERRECHTS UND DER DIPLOMATIE 570 (1925); Ajulo, *supra* note 7, at 16; Pitamic, *supra* note 7, at 305. *See, e.g.*, Kempster, *The Bush Letter: Aziz Refused to Touch the Sealed Envelope*, LOS ANGELES TIMES, Jan. 11, 1991, at A7. Describing meetings in Geneva between Iraqi Foreign Minister Tariq Aziz and Secretary of State James Baker, the author notes that "although Aziz and several members of his delegation speak fluent English, the talks were conducted in both English and Arabic, using consecutive translation, which required each statement to be recited in full in the other language."

10. *See, e.g.*, TABORY, *supra* note 1, at 39 (noting in relation to the use of languages in the United Nations system that "the intense chauvinism of individual nations in favoring their own language even in procedural, nonsubstantive matters, such as the choice of language used to determine the alphabetical order of delegations, is illustrated by numerous instances.").

11. *Id.* at 46: "Third world nations in particular emphasize the notion of universality in international organizations, and insist that the diversity of the peoples represented must be taken into account." *See also* T. FRANCK, THE POWER OF LEGITIMACY

The problem with the rule of linguistic equality is that it sanctions a diplomatic Babel; there is evidence, for example, that the proliferation of languages in the United Nations system has been a source of friction and confusion.[12] During the Gulf Crisis, Iraq attempted to expand the rule even further when President Saddam Hussein alleged that the outrage over Iraq's use of Westerners as "human shields" was caused by misunderstanding of an Arabic word:

> We in our communique used the word darᶜ in Arabic, which means to put away or to prevent or to avoid the scourge of war or the injure [sic] of war. We used the word darᶜ, which means in Arabic to prevent, but when we used this word, Western media used — misunderstood the pronunciation of the word darᶜ into darᵒ which means "shield". And they thought that we were using people as a darᵒ, which means "shield", rather than as a darᶜ, which we meant, which means to prevent war. So there was perhaps a deliberate misinterpretation of our wording of the communique.[13]

This argument must obviously be rejected; though confusion over translations may indeed give rise to honest misunderstandings,[14] that

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AMONG NATIONS 116 (1990) [hereinafter FRANCK]:

> Understandably. . .it is the weaker states which most value the symbols of equality. . . . Less privileged nations believe that ritual incantation of their symbolically validated status as sovereign equals at least narrows the options of the powerful when they are tempted to take advantage of their military and economic pre-eminence.

12. TABORY, *supra* note 1, at 47:

> Indeed, through the proliferation of official and working languages, the United Nations, which was intended as a forum for greater understanding, has become perhaps more representative of the true state of the world, where people talk *at* each other in their own language, rather than *with* each other through a common language.

An example of a misunderstanding caused by the use of Arabic in the UN is described *id.* at 89-90.

13. *MacNeil/Lehrer*, *supra* note 4. The two Arabic words, which were transliterated as "derr" and derr respectively in the quoted passage, have been corrected to dar' and darᶜ.

14. *See, e.g.*, Sciolino, *U.S. Says It Has Tape of Arafat Threat*, N.Y. TIMES, Jan. 19, 1989, at A12. In early 1989 the State Department threatened to break off talks with Palestinian leader Yasir Arafat following a speech he gave in Arabic which, according to a translation made by the U.S. embassy in Riyadh, contained the following threat: "Whoever thinks of stopping the intifada before it achieves its goals, I will give him ten bullets in the chest." However, Arafat denied that any threat was made,

Iraq is entitled to express itself in Arabic does not mean that the legality of its actions is judged by the linguistic meaning of the Arabic word it uses to describe them,[15] especially when violations of basic human rights are involved.[16] However, the present emphasis on linguistic equality may encourage disregard of the fact that the right of a State to express itself in its own tongue does not allow it to remove its actions from scrutiny under international law.

Use (and Nonuse) of Translators

There appear to be virtually no rules regulating the use of interpreters and language specialists[17] in international relations. Since their use is controlled by diplomatic practice rather than international law,[18] States are free to make any arrangements they please concerning language interpretation,[19] such as using translators provided by other States. As has occurred in the past,[20] the United States government was dependent on a translation provided by a foreign State when it had to evaluate the Iraqi proposal to withdraw from Kuwait after the war had begun in mid-February:

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and a Kuwaiti newspaper provided the following, considerably more benign, translation of the passage: "Nobody can stop the uprising, and any Palestinian leader who calls for stopping it will expose himself to our people's bullets." *Id.*

15. *See* Meron, *Prisoners of War, Civilians and Diplomats in the Gulf Crisis*, 85 AM. J. INT'L L. 104, 105 (1991) [hereinafter Meron] (stating that applicability of the Fourth Geneva Convention to civilians in Kuwait is not determined by "how Iraq characterizes the invasion" of Kuwait.).

16. *See id.* at 107 on the detention of foreign hostages by Iraq as a violation of international human rights law.

17. While strictly speaking an interpreter is "one who translates orally from one language to another" (AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 685 (1969)), in this article the terms "interpreter" and "translator" will be used synonymously to signify one who expresses a thought in another language while retaining the original sense.

18. 1 OSTROWER, *supra* note 3, at 516; *see supra* note 3 (regarding the distinction between international law and diplomatic practice).

19. 1 OSTROWER, *supra* note 3, at 520-526 (regarding differences in the use of language specialists in the American, British, and French diplomatic services).

20. *See, e.g.*, P. SIMON, THE TONGUE-TIED AMERICAN 59-60 (1980) [hereinafter SIMON] (quoting N.Y. TIMES, Feb. 2, 1979, at A24). A meeting between Chinese leader Teng Hsiao-ping and President Carter at the White House would not have been possible without the presence of a Harvard-educated interpreter from the Chinese Foreign Ministry, since "the United States Government. . .does not employ anyone fully-qualified as a simultaneous interpreter from English to Chinese." Simon goes on to state that "we have no qualified translators for most of the world's languages in the United States government, an incredible commentary." *Id.*

> His [President Bush's] doubts were confirmed a short time later by Prince Bandar ibn Sultan, Saudi Arabia's ambassador to the United States, who sources said translated the Arabic document into English for the President and his top aides over the telephone.
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> The White House had awakened Bandar about 7 a.m. (EST) with news of the Iraqi proposal. About 30 minutes later, King Fahd and the Saudi minister of information [sic] telephoned their embassy here saying they had a copy of the Iraqi proposal.
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> There followed an extraordinary scene in which the minister of information read the document, with all its conditions, to Bandar in Arabic on one telephone, while the ambassador used a second telephone to translate it for Bush and his aides, including National Security Adviser Brent Scowcroft and his deputy, Robert M. Gates.[21]

It is disturbing when a State involved in a military conflict, especially a leading power such as the United States,[22] is either unable or unwilling to translate communications from the enemy. Reliance on translations provided by a foreign State, even one as close an ally as Saudi Arabia was to the United States in the Gulf Crisis, not only implies a less than whole-hearted commitment to the peaceful resolution of the crisis,[23] but also suggests a failure to appreciate the fact that translation errors can give rise to serious misunderstandings,[24] and

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21. Nelson, *Bush Waging Personal War, Associates Reveal*, LOS ANGELES TIMES, Feb. 17, 1991, at A1.

22. *See* Reisman, *Some Lessons from Iraq: International Law and Democratic Politics*, 16 YALE J. INT'L L. 203, 205 (1991): "The system of world order, as conceived in the United Nations Charter, continues to depend centrally on the United States."

23. It is noteworthy that "[t]he White House steadfastly rejected Iraqi calls for a negotiated end to the Persian Gulf Crisis." Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 AM. J. INT'L L. 516, 531 n.90 (1991) [hereinafter Weston].

24. *See, e.g.*, SIMON, *supra* note 20, at 8-9: "When President Jimmy Carter visited Poland, the world guffawed at the translation errors. President Carter's wish to 'learn your opinions and understand your desires for the future' came out 'I desire the Poles carnally.'" *See also* Grossfeld, *Language and the Law*, 50 J. AIR L. & COM. 793 (1985) (regarding the difficulties of legal translation); *see also* Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* (pt. 1), 39 AM. J. COMP. L. 1, 20 (1991): "The complexity of the problems involved in legal translation makes the carelessness with which they are approached seem incredible"; Schroth, *Legal Translation*, 34 AM. J. COMP. L. SUPP. 47 (1986).

presents the risk that the foreign State may color the translation to suit its own interests. Finally, communications from a military opponent must often be evaluated quickly, and it may not always be possible to call on another State to supply translations on short notice.[25]

Provocative Rhetoric in a Crisis

States involved in a military confrontation often engage in provocative rhetoric which, if sufficiently virulent, may rise to the level of war-mongering,[26] subversive,[27] or defamatory propaganda,[28] all of which are prohibited under international law. The period from the invasion of Kuwait to the commencement of military action by the allies was characterized by intense rhetoric on both sides.[29] The United States government made several statements that seemed to skirt the edge of the permissible under international law, including comments by President Bush that the United States would welcome the ouster of President Saddam Hussein,[30] and that Hussein was in certain ways

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25. An example in a different context is described by SIMON, *supra* note 20, at 41-42, *quoting in part* WASHINGTON STAR, Feb. 18, 1979:

> The kidnappers of U.S. Ambassador to Afghanistan Adolph Dubs took him to the Kabul Hotel. Before the tragic slaying, so the *Washington Star* reports: '[U.S.] Embassy officials had a brief chance to seize the initiative because they reached the hotel before Afghan police. But no one in the American party spoke fluent Dari or Pushtu, the two most widely used Afghan languages, or fluent Russian.

26. "War-mongering propaganda is propaganda calculated to implant in the minds of peoples a disposition or desire to engage in an international armed conflict." A. LARSON & J. WHITTON, PROPAGANDA: TOWARDS DISARMAMENT IN THE WAR OF WORDS 62 (1964) [hereinafter LARSON & WHITTON]; "[s]uch propaganda is a violation of international law." *Id.* at 82.

27. "Subversive propaganda consists of communications calculated to overthrow the existing internal political order of a state." *Id.* at 83. "As to subversive propaganda, there is an impressive degree of consensus among the sources of international law establishing the illegality of such propaganda." *Id.* at 103.

28. "Defamatory propaganda consists of those communications which tend to degrade, revile, and insult foreign states, or their institutions, leaders or agents, especially when such attacks are of a nature as to disturb peaceful relations between the states concerned." *Id.* at 104. "Defamatory propaganda by one state against another is generally considered to be a violation of international law." *Id.* at 110.

29. *MacNeil/Lehrer*, *supra* note 4 (remarks of Charlayne Hunter-Gault): "Since the beginning of the crisis back in August, there's been no lack of strong public rhetoric on both sides."

30. *See, e.g.*, Hundley, *Egypt Sends Troops to Aid Saudis*, CHICAGO TRIBUNE, Aug. 12, 1990 1, 12. President Bush stated to reporters when asked about the possibility of Hussein's overthrow "that sometimes happens when leaders get so out of touch

worse than Hitler.[31] Calling for the overthrow of President Hussein might be regarded as war-mongering or subversive propaganda, while the Hitler analogy could constitute "name-calling whose object is to incite a foreign people against its leader,"[32] and thus defamatory propaganda. Ironically, the Hitler analogy is unlikely to have had the same degree of resonance in the Middle East as it had in the United States.[33]

For their part, the Iraqis were hardly models of rhetorical restraint, especially given the poor quality of their translations into English. For example, the speech to the American people by President Hussein carried on television on September 25, 1990, which was delivered in Arabic with English subtitles provided by an Iraqi translator,[34] contained passages such as the following:

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with reality that they commit their country to outrageous acts." Asked later if the United States would support such a move, the President stated:

> No, we're not prepared to support the overthrow. But I hope that these actions that have been taken (to boycott Iraq) result in an Iraq that is prepared to live peacefully in the community of nations. And if that means that Saddam Hussein changes his spots, so be it. And if he doesn't, I hope the Iraqi people do something about it so that their leader will live by the norms of international behavior that will be acceptable to other nations.

31. *See* Press Conference with President Bush, FEDERAL NEWS SERVICE, Nov. 1, 1990. In response to a question asking how Saddam Hussein's actions compared with those of Hitler, President Bush replied:

> Worse than that. . . . I mean, that is outrageous, but I think brutalizing young kids in a square in Kuwait is outrageous, too. And I think if you go back and look at what happened when the Death's Head Regiments went into Poland, you'll find an awful similarity. I was told, and we've got to check this carefully, that Hitler did not stake people out against military targets and that he did indeed respect—not much else—but he did indeed respect the legitimacy of the embassies. So we've got some differences here, but I'm talking—when I'm talking about—there—I see many similarities, incidentally.

32. LARSON & WHITTON, *supra* note 26, at 104.

33. *See MacNeil/Lehrer*, *supra* note 4 (quoting interview with Thomas Friedman of the New York Times):

> Hitler, of course, was a very ambiguous figure in Arab history. . .not because he was a mass murderer, but because he was opposing the British and French for that matter. And so at a time when these people were occupied by the British and French, they—you know—they looked up to him. So the whole image just doesn't work in the Arab world. It doesn't resonate the same way it's been resonating with an American audience.

34. Carman, *Saddam's Show on CNN a Fizzler*, SAN FRANCISCO CHRONICLE, Sept. 27, 1990, at E1.

> When a sow of vitality sets foot upon the moon of perfidy, it is with moral judgment of the God-fearing faithful legion that the cradle of God's messenger is reached in the hearts of resiliences and will be repelled through good example in the path of misguidances and cursed 'til the day of judgment.[35]

While this excerpt may be little more than gibberish, the presence of the flowery imagery characteristic of Arab politics[36] indicates that President Hussein was trying to impress the American people with the same type of rhetoric he was accustomed to using successfully in the Middle East,[37] just as President Bush probably would have expected his analogy to Hitler to be as powerful to a Middle Eastern audience as to a Western one.

Strong arguments could be advanced that the statements made by Presidents Bush and Hussein did not violate international law. Warmongering propaganda does not apply to "preparing people for use of force when under the United Nations Charter the use of force is a legitimate one,"[38] and it is widely held that Security Council Resolution 678[39] provided such authorization.[40] Subversive propaganda is illegal only in peacetime[41] and it seems that the period of military buildup which preceded the attack to free Kuwait should be characterized not as peace, but as a "gray zone between peace and war."[42] Fair comment on a State's violations of its obligations under international law, such

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35. *Id.*

36. Post, *Don't Misjudge Saddam*, CHRISTIAN SCIENCE MONITOR, Jan. 9, 1991, at 18: "Defiant rhetoric has been a hallmark of this conflict and lends itself to misinterpretation. The Arab world places great stock on expressive language and the very act of expressing brave resolve against the enemy."

37. *MacNeil/Lehrer*, *supra* note 4 (remarks of journalist Hisham Melham): "[H]e's [Saddam Hussein] not necessarily only talking to you in the West—but he's also talking to his people. He is playing on his own cultural and metaphorical devices that are understood by the average Iraqi or the average Arab."

38. LARSON & WHITTON, *supra* note 26, at 65.

39. S.C. Res. 678 (Nov. 29, 1990), 29 I.L.M. 1565 (1990).

40. Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 459 (1991): "As of January 16, Resolution 678 was treated as the legal basis of the large-scale military action by the coalition of states that brought about the defeat of Iraq. . . ."; *see* Weston, *supra* note 23 (criticizing Resolution 678 as a legal basis for the use of force).

41. LARSON & WHITTON, *supra* note 26, at 95.

42. *See* Meron, *supra* note 15, at 106-07. Given that war is apt to be the natural result of such propaganda, it could be argued that the existence of such a "gray zone" should not affect its illegality. *See* LARSON & WHITTON, *supra* note 26, at 83.

as the Iraqi invasion of Kuwait,[43] does not constitute defamatory propaganda.[44]

Nevertheless, the rhetoric of the United States and Iraq, even if it was not strictly illegal under international law, remains a cause for concern. The use of comparisons with Hitler and warlike imagery derived from Islam indicates that each leader was relying on symbols that would likely inflame public opinion in his own country, but which were culturally unintelligible to his opponent, and therefore were unlikely to have any effect on the crisis other than escalating the level of tension. Though the United States and Iraq were not engaged in direct negotiations in the period leading up to the war,[45] it could be argued that their leaders still had a duty under international law not to make statements which would frustrate a peaceful resolution of the crisis.[46]

III. CONCLUSIONS

The incidents discussed above are evidence of a communications gap which existed between Iraq and the United States during the Gulf Crisis. While there is no evidence that they were the "cause" of the crisis, or that had the United States and Iraq spoken the same language and understood each other perfectly the war would not have occurred, this is not really the issue. Linguistic differences have only rarely been the direct cause of wars,[47] but do tend to disrupt communication between States even under normal circumstances.[48] If international disputes are

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43. Weston, *supra* note 23, at 517 n.3 for a listing of the various Security Council resolutions condemning Iraqi breaches of international law.

44. LARSON & WHITTON, *supra* note 26, at 118: "If a given state has violated its treaty obligations, or has transgressed an accepted norm of customary international law, other states are entitled to enter a protest or express their disapproval."

45. States negotiating with each other have an obligation to conduct themselves so that the negotiations are meaningful. North Sea Continental Shelf Cases (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 4, 47.

46. UN Charter art. 2, para. 3: "All members shall settle their international disputes by peaceful means *in such a manner that international peace and security, and justice, are not endangered*" (emphasis added).

47. One example was the first Italian-Ethiopian war, which was precipitated by a discrepancy between the Italian and Amharic texts of the Treaty of Uccialli. TABORY, *supra* note 1, at 5; I LA PRASSI ITALIANA DI DIRITTO INTERNAZIONALE 153-57 (2nd series 1979).

48. 2 OSTROWER, *supra* note 3, at 808; *see also* PROCESSES OF INTERNATIONAL NEGOTIATIONS PROJECT, INTERNATIONAL NEGOTIATION: ANALYSIS, APPROACHES, ISSUES 48 (V. Kremenyuk ed. 1991): "Cultural differences, of which communication and language patterns are part, may be considered a central issue in international nego-

to be settled peacefully, as they must be according to international law,[49] and if "war between large groups is as much a problem of philosophy and language as of politics and economics,"[50] then any instance in which communication between antagonists on the brink of a military confrontation is needlessly complicated because of a language gap is a cause for concern. That there are so few rules of international law dealing with the very means by which disputes are to be peacefully resolved, namely language, cannot be justified on the basis that State equality allows each State to cling fast to its own language practices; as has been noted in another context, it is "much too late to put forward a view of sovereignty which involves the assertion that it is a matter for each State's discretion whether or not it has a certain right."[51] Modifying the doctrine of linguistic equality in order to further the peaceful resolution of disputes need not undermine State equality as a fundamental principle of international law.[52]

The fact that more detailed rules regarding language usage in the settlement of international disputes do not already exist does not mean that there are no sources from which they could be derived. For instance, principles set forth in multilateral treaties could give rise to new rules of customary international law more consistent with international stability.[53] There is currently a trend toward codification of international

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tiations"; *see also* L. Rangarajan, THE LIMITATION OF CONFLICT: A THEORY OF BARGAINING AND NEGOTIATION 64-65 (1985):

> The problem of loss of information in transmission is relevant to international negotiation because negotiators from different countries speak different languages. . . . Linguistic difficulties sometimes produce insuperable political problems.

49. U.N. Charter art. 2, para. 3; art. 33.

50. Q. WRIGHT, A STUDY OF WAR 1448 (2d ed. 1965).

51. F.A. MANN, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 9, 17 (1964).

52. 2 OSTROWER, *supra* note 3, at 745:

> Even if the use of a national language in official intercourse constitutes a recognized right and an exclusive prerogative of a state as an attribute of sovereignty, no reason can be advanced why states may not agree on certain linguistic practices or why the law may not regulate such usages.

See FRANCK, *supra* note 11, at 114:

> Most informed observers of the international system understand. . .that the notion of sovereign equality must be taken *cum grano salis*: its meaning being restricted to such a degree of sovereignty and equality as is commensurate with the international system's objectives of peace, human survival, and socio-economic development.

53. R. BAXTER, *Treaties and Custom*, 129 RECUEIL DES COURS 25, 57, 73 (1971):

legal standards for the peaceful resolution of disputes between States, and these efforts can provide a framework for the development of norms designed to prevent language-related misunderstandings. One such instrument is the Report of the Conference on Security and Co-Operation in Europe (CSCE) Meeting of Experts on Peaceful Settlement of Disputes,[54] adopted at Valletta on February 8, 1991. The CSCE Report, which was drafted by the representatives of thirty-three States,[55] sets forth the following principles for dispute settlement which might be of significance for the development of rules regarding linguistic practices: that recourse to a settlement procedure "is not incompatible with the sovereign equality of States";[56] that the participating States will develop "mechanisms designed to prevent disputes from occurring";[57] that they will take care "not to let any dispute among them develop in such a way that it will endanger international peace and security";[58] that they will "refrain throughout the course of a dispute from any action which may aggravate the situation";[59] that they will make arrangements "enabling the maintenance of good relations";[60] that disputes should be settled "in good faith";[61] and that the participating States will "consider whether or not there is an appropriate role for a third party."[62]

Another significant instrument is the recently-released United Nations Draft Handbook on the Peaceful Settlement of Disputes between States.[63] While the Draft Handbook states that it is "descriptive in

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"Treaties that do not purport to be declaratory of customary international law at the time that they enter into force may nevertheless with the passage of time pass into customary international law" if the relevant norms are "taken up by non-parties in such a way that State practice is 'extensive and virtually uniform'"; *see* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(3) (1987).

54. 30 I.L.M. 382 (1991).

55. Austria, Belgium, Bulgaria, Canada, Cyprus, the Czech and Slovak Federal Republic, Denmark, Finland, France, Germany, Greece, the Holy See, Hungary, Iceland, Italy, Liechtenstein, Luxembourg-the European Community, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the USSR, the United Kingdom, the United States, and Yugoslavia. *Id.* at 384.

56. *Id.* at 387.

57. *Id.*

58. *Id.*

59. *Id.* at 388.

60. *Id.*

61. *Id.*

62. *Id.* at 389.

63. U.N. Doc. A/AC.182/L.68 (1990) [hereinafter DRAFT HANDBOOK]; *see* 30 I.L.M. 261 (1990) for a description of the Draft Handbook.

nature, is not a legal instrument, and does not commit States in any way,"[64] it is of great value in discerning contemporary practice relating to dispute resolution. Among the principles recognized in the Draft Handbook are that States must settle disputes peacefully in such a manner that international peace and security are not endangered;[65] that international disputes must be settled on the basis of the sovereign equality of States,[66] but that use of a freely-agreed settlement procedure is not incompatible with this principle;[67] that dispute settlement is governed by the principle of "good faith";[68] and that States are obligated to conduct negotiations in a meaningful fashion and in a spirit of cooperation.[69]

Rules of international law relating to language practices could be developed out of the principles delineated above. For instance, the concept of good faith could include a duty to maintain a staff of competent interpreters and translators; the obligation to solve disputes in a manner that will not endanger international peace and security could contemplate a reasonable effort to deal with linguistic and cultural differences, and to refrain from bellicose rhetoric in a time of crisis; and the restrictions placed on the sovereign equality of States could force States to recognize that their right to use their own languages is not unlimited, and does not excuse reliance on sophistic linguistic distinctions to frustrate the resolution of a dispute. If it is objected that a concept such as good faith is too vague to serve as a basis for more specific obligations, it should be remembered that the function of this principle in international law has been described as:

> [c]omparable to that of a catalyst in a chemical reaction. Alone, the catalyst is completely passive. It must be added to other elements for a reaction to occur; without it, nothing will happen, even if all the necessary components are present in sufficient quantities. It is a bit the same with good faith. It is never taken into consideration by law in the abstract, as a purely psychological disposition. It is always related to specific behavior or declarations and it invests them with legal significance and legal effects.[70]

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64. DRAFT HANDBOOK, *supra* note 63, at 12.
65. *Id.* at 14.
66. *Id.* at 16.
67. *Id.* at 18.
68. *Id.* at 17.
69. *Id.* at 27-29.
70. Virally, *Good Faith in Public International Law*, 77 AM. J. INT'L L. 130, 133-34 (1983) (reviewing E. Zoller, LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC (1977)).

Indeed, neither of the treaties described above would be of much practical value if the obligations they contain were not susceptible to serving as the source for more specific rules integral to dispute settlement. Taking these suggestions as a starting point for the progressive development of international law, States could begin to implement language practices which, over time, might crystallize into principles of customary international law.[71]

Since the development of customary law is likely to be a laborious process, in the interim resort could be made to the institution of "good offices" to prevent language-related misunderstandings.[72] While at one time good offices referred to a process of dispute resolution with specific rules derived from treaties and customary international law,[73] the term is now defined more broadly to include all actions "which aim, in some way or another, at bridging the gap in international controversies, at smoothing out difficulties resulting therefrom, at peacefully settling differences or at least at alleviating conflicts and, in a more general sense, at helping to maintain peace among nations."[74] This can include the provision of technical assistance to the parties,[75] which could be

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71. 2 OSTROWER, *supra* note 3, at 808-09: "Linguistic usages, like any other international practices, may harden into customary rules of law through continued, uninterrupted practice." *See, e.g.*, SATOW, *supra* note 7, at 38-41 for a description of how this process occurred with respect to the doctrine of State equality in language usage; *see also* 2 OSTROWER, *supra*, at 807:

> As in other international situations in which interest of particular states has given way to that of the community of states, so also has there been a change in the general attitude regarding international linguistic practices. . . . The adoption of language rules and procedures by various international organizations—the League of Nations, the United Nations, the international courts and tribunals—are [sic] also suggestive of the new official attitude toward the development of general linguistic rules for the mutual benefit of all states.

72. *See* DRAFT HANDBOOK, *supra* note 63, at 45-54 for a review of good offices as a method of resolving international disputes.

73. *See* R. PROBST, *"Good Offices" in International Relations in the Light of Swiss Practice and Experience*, 201 RECUEIL DES COURS 211, 225 (1988) [hereinafter PROBST].

74. *Id.* at 235.

75. *See* BINDSCHEDLER, *Good Offices*, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 67, 67 (1981) [hereinafter BINDSCHEDLER]: "Technical good offices include inviting the parties to conferences, convening and organizing such conferences as host State, making the necessary facilities available, organizing transport and communication, providing security arrangements and possibly finances. . . ." For example, Switzerland provided "the necessary means of communication and information" to Algeria in 1962 while using its good offices to resolve the dispute between Algeria and France during meetings in Geneva. PROBST, *supra* note 73, at 263.

interpreted to mean the provision of translation services by an impartial third party in a crisis.[76] Use of neutral language services would be preferable to States relying on their allies for them,[77] and objections based on nationalism could be answered by pointing out that use of good offices is fully compatible with State sovereignty.[78]

An obvious candidate for the provision of such services through the good offices procedure would be the Secretary General of the United Nations. The UN has accumulated great experience in the interpretation between languages,[79] and the Secretary General has used his good offices to resolve international conflicts on a number of occasions.[80] While it is not known whether the UN has provided language services in the past to States involved in a crisis, it is settled that "the Secretary-General can avail himself of the specialized services of other United Nations institutions whose participation is likely to reinforce the potential and strengthen the resources of his good offices,"[81] which seems to contemplate this possibility. Providing language services would be a

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76. DRAFT HANDBOOK, *supra* note 63, at 45-46 (stating that one of the purposes of good offices is to provide a channel of communication between the parties); *see* PROBST, *supra* note 73, at 362 (finding that the present trend is to define good offices liberally as any action by a third party which can promote better understanding between States).

77. *After the Storm*, NEWSWEEK, Mar. 11, 1991, at 26 (for an example of how reliance on allied States for translation assistance may lead to miscommunication in a crisis situation). The author states that conciliatory messages from Iraqi Foreign Minister Tariq Aziz near the end of the war

> [l]ost clarity because the destruction of Iraq's infrastructure required the communications to pass through Soviet hands on their way to the United Nations. Aziz's first letter was written in Arabic, translated into Russian and then into English. When the Americans showed it to an Iraqi delegate at the United Nations, he had it translated back into Arabic and found that its meaning had been warped, as if in some giddy parlor game.

Id. While Iraq may have relied on the Soviet Union out of necessity rather than choice, this situation could have been avoided had Iraq been able to relay its messages directly to the United Nations.

78. *See* BINDSCHEDLER, *supra* note 75, at 67; PROBST, *supra* note 73, at 256.

79. *See* TABORY, *supra* note 1, at 71-90 for a description of language services in the United Nations.

80. *See* V. PECHOTA, THE QUIET APPROACH: A STUDY OF THE GOOD OFFICES EXERCISED BY THE UNITED NATIONS SECRETARY-GENERAL IN THE CAUSE OF PEACE 79 (1972): "The legitimacy of the Secretary General's good offices as a means of settling disputes peacefully within the meaning of Article 33 of the Charter has been clearly established."

81. *Id.* at 70.

promising method of reducing tensions in a crisis,[82] and would have been particularly appropriate in the Gulf Crisis since a Security Council Resolution called on the Secretary General to "make available his good offices" to reach a peaceful solution to the conflict.[83]

Whatever specific means are chosen, one of the lessons of the Gulf Crisis is that current principles of international law relating to communication between States with different languages and cultures are insufficient to cope with the ever-increasing enthusiasm for the peaceful resolution of international disputes. However, sufficient bases exist upon which to construct more detailed rules that can minimize the effect of linguistic differences in the international community.

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82. *Id.* at 81:

> The possibility of mobilizing all the resources of the United Nations is bound to strengthen the mediatory potential of the Secretary-General's good offices, particularly in situations which require for their solution expertise and administrative skills that are non-partisan and truly international in character.

See BINDSCHEDLER, *supra* note 75, at 68: "Technical good offices have the most favourable chances of success because here political considerations recede into the background."

83. S.C. Res. 674 (Oct. 29, 1990), 29 I.L.M. 1563 (1990); *see* Nanda, *The Iraqi Invasion of Kuwait: The U.N. Response*, 15 S. ILL. U. L.J. 431, 441, 451 (1991), (for an account of the Secretary General's fruitless efforts to use his good offices to resolve the conflict).

Hard Cases and Human Judgment In Islamic and Common Law

by
*John Makdisi**

Every legal system in tune with the living practical reality of societal change experiences the need for corresponding change within. This change does not proceed in a predetermined orderly fashion. Human judgment plays a significant role in the reasoned elaboration of the law, in order to address the multivarious situations presented by the human condition; yet this change must be implemented within channels of reform that are recognized as legitimate in order to maintain acceptance and stability. Arbitrary personal opinion is never acceptable in a legal system where the rule of law prevails.

This article will explore different modes of legal reasoning in Islamic law. After defining and rejecting arbitrary decision-making as a recognized mode of legal reasoning, it will discuss three other modes that are recognized as legitimate in Islamic law — *qiyās*, *istihsān*, and *istislāh*. These modes of legal reasoning involve human judgment and may generate different results when applied by different jurists. The purpose of this discussion is to compare similar modes of legal reasoning in the common law with those in Islamic law. Such a comparison will reveal the tension between flexibility and constraint that defines the whole legal process.

I. Arbitrary decision-making

There is reported in the Criminal Law Quarterly[1] a fictional opinion by Blue, J., that despite its light-hearted character paints a poignant picture of arbitrariness. It reads as follows:

> This is an appeal by the Crown by way of a stated case from a decision of the magistrate acquitting the accused of a charge under the Small Birds Act, R.S.O., 1960, c.724, s.2.

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* Dean and Professor of Law, University of Tulsa College of Law.

1. Note, *Judicial Humour-Construction of a Statute*, 8 Crim. L. Q. 137 (1965) (reproduced in a memorandum prepared by W. Barton Leach and printed in Cases and Text on Property (A. James Casner & W. Barton Leach eds., Supp. 1980)).

The facts are not in dispute. Fred Ojibway, an Indian, was riding his pony through Queen's Park on January 2, 1965. Being impoverished, and having been forced to pledge his saddle, he substituted a downy pillow in lieu of the said saddle. On this particular day the accused's misfortune was further heightened by the circumstances of his pony breaking its right foreleg. In accord with Indian custom, the accused then shot the pony to relieve it of its awkwardness.

The accused was then charged with having breached the Small Birds Act, s.2 of which states:

> 2. Anyone maiming, injuring or killing small birds is guilty of an offence and subject to a fine not in excess of two hundred dollars.

The learned magistrate acquitted the accused holding, in fact, that he had killed his horse and not a small bird. With respect, I cannot agree.

In light of the definition section my course is quite clear. Section 1 defines "bird" as "a two legged animal covered with feathers." There can be no doubt that this case is covered by this section.

Counsel for the accused made several ingenious arguments to which, in fairness, I must address myself. He submitted that the evidence of the expert clearly concluded that the animal in question was a pony and not a bird, but this is not the issue. We are not interested in whether the animal in question is a bird or not in fact, but whether it is one in law. Statutory interpretation has forced many a horse to eat birdseed for the rest of its life. . . .

Counsel relied on the decision in *Re Chicadee*, where he contends that in similar circumstances the accused was acquitted. However, this is a horse of a different colour. A close reading of that case indicates that the animal in question there was not a small bird, but, in fact, a midget of a much larger species. Therefore, that case is inapplicable to our facts.

Counsel finally submits that the word "small" in the title Small Birds Act refers not to "Birds" but to "Act", making it The Small Act relating to Birds. With respect, counsel did not do his homework very well, for the Large Birds Act, R.S.O. 1960, c. 725, is just as small. If pressed, I need only refer to the Small Loans Act R.S.O. 1960, c. 727 which is twice as large as the Large Birds Act.

It remains then to state my reason for judgment which, simply, is as follows: Different things may take on the same

meaning for different purposes. For the purpose of the Small Birds Act, all two-legged, feather-covered animals are birds. This, of course, does not imply that only two-legged animals qualify, for the legislative intent is to make two legs merely the minimum requirement. The statute therefore contemplated multi-legged animals with feathers as well. Counsel submits that having regard to the purpose of the statute only small animals "naturally-covered" with feathers could have been contemplated. However, had this been the intention of the legislature, I am certain that the phrase "naturally-covered" would have been expressly inserted just as 'Long' was inserted in the Longshoreman's Act.

Therefore, a horse with feathers on its back must be deemed for the purposes of this Act to be a bird, and *a fortiori*, a pony with feathers on its back is a small bird.

Counsel posed the following rhetorical question: If the pillow had been removed prior to the shooting, would the animal still be a bird? To this let me answer rhetorically: Is a bird any less of a bird without its feathers?

Appeal allowed.[2]

This opinion demonstrates rather sardonically how the law can be twisted to accommodate unintended objectives. The judge may have been intent on protecting what he considered to be the right to life of ponies. Of course, it does not take much horse sense to see that the statute was misinterpreted. The statute's definition of a bird does not include ponies, no matter how many characteristics a bird and a pony have in common. The result may have been considered desirable in terms of animal protection, but it was decided in a manner that would permit almost any rule or principle to be interpreted for other than the true intent behind its formulation. If such a technique were to prevail in our legal system, it would tear apart the fabric of the law and ultimately destroy its original identity. Judges would no longer be governed by law; rather, the law would be governed by a judge's own personal inclinations. Judge and former Professor Robert E. Keeton has succinctly stated, "Judges are not free to make choices expressing their own personal values. Their professional obligation is one of reasoned choice — or as it is often described — principled adjudication."[3]

Arbitrary personal opinion is similarly rejected in Islam. Shāfi'ī, one of the founding fathers of Islamic jurisprudence in the ninth century,

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2. *Id.*

3. ROBERT E. KEETON, JUDGING 19 (1990) (footnote omitted).

stated that no decisions by arbitrary personal opinion of jurists were allowed. He declared that a jurist must use *ijtihād*, a concerted personal effort to decide cases through the use of *qiyās*, a form of reasoning by analogy.[4] This reasoning is based on solutions found in the sources of the law and excludes whim and personal preference.[5]

II. QIYĀS

The primary sources of Islamic law are the Koran (the sacred scripture collecting revelations made to the Prophet between 609-632) and the sunna (the decisions, words, actions, and tacit approvals of the Prophet, which are related in traditions called *hadiths*). Because Islamic law is generally conceived as a divine law, all law derives from God's commands within these two sources, rather than from nature as derived from only the human mind.[6] Nevertheless, the Koran and sunna directly address relatively few human situations. When situations arise that are not directly covered in the sources, there must be some way of deriving solutions to the problems they present. The primary mode of legal reasoning to solve these problems is *qiyās*.

Qiyās is a form of reasoning by analogy from cases found in the Koran and sunna. According to Shāfi'ī,[7] where there is no case on point in the Koran or sunna to govern a new case, a similar case in the sources may be found whose ruling is extended to the new case if both have a common basis (*asl*), otherwise known as an efficient cause (*'illa*).[8] For example, the case of a child hitting one's parents is not directly covered in the Koran or sunna. However, there is a ruling in the Koran (XVII:23) that forbids children to speak disrespectfully to their parents: "Say not 'Fie' to them (parents) neither chide them, but speak to them graciously." The common basis (*asl*) in both cases is harm to the parents, that is, by battery and disrespectful language.

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4. JOSEPH SCHACHT, THE ORIGINS OF MUHAMMADAN JURISPRUDENCE 122, 127 (1953)[hereinafter SCHACHT].

5. *Id.* at 127. According to Shāfi'ī, "[o]n all matters touching the [life of a] Muslim there is either a binding decision or an indication as to the right answer. If there is a decision, it should be followed; if there is no decision, the indication as to the right answer should be sought by *ijtihād*, and *ijtihād* is *qiyās*." MALCOLM H. KERR, ISLAMIC REFORM: THE POLITICAL AND LEGAL THEORIES OF MUHAMMAD 'ABDUH AND RASHĪD RIDĀ 76 (1966)[hereinafter KERR].

6. *See* KERR, *supra* note 5, at 76.

7. Died 820.

8. SCHACHT, *supra* note 4, at 125; KERR, *supra* note 5, at 67.

Therefore, the prohibition in the Koran is applied to the new case.[9]

There are two premises in the above analogy. The first premise is that the common basis (*asl*) in the Koranic case of parental disrespect is harm to the parents. The second is that striking a parent is harmful. Neither premise is likely to give rise to dispute in this situation, but other situations are less clear. For example, there is a rule that a sale entailing risk is prohibited. The sale of a non-existent commodity is arguably a case entailing risk and therefore null and void, but it could also be argued that such a case does not entail risk. Ghazālī,[10] a twelfth century jurist, discusses such a disagreement:

> If there is disagreement concerning the second premise — that is, concerning the existence of the cause in the assimilated case subsequent to admitting that the [existing] property is the cause — the cause may be identified either through sensory perception if the property is sensory, or through custom or language. It may also be identified through seeking definition (*hadd*) and conceptualizing (*tasawwur*) the inner reality of the thing, or through revealed scriptural evidence.[11]

Ghazālī then proceeds to explain that in the case of the risky sale, an adversary who disagrees on the risk aspect of the sale of non-existent commodities "may be answered that this is known through custom (*'āda*) in which practice (*'urf*) decides."[12] Ghazālī highlights the discretionary element of legal reasoning in this passage. Because not every risk can be named in the law, jurists must determine whether a situation is risky by using their experiential or conceptual judgment.

The common law has a similar approach for determining the applicability of the common basis (*asl*) or cause (*ma'nā*) of a decided case. *Pierson v. Post*,[13] a well-known decision in the area of property law, held that there was no ownership of a wild animal when a hunter failed to kill or capture a fox he was chasing before another person

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9. *See* Hallaq, *Non-Analogical Arguments in Sunni Juridical Qiyās*, 36 ARABICA 286, 289-96 (1989)(discussing the Islamic jurists' arguments for and against including this case as one of *qiyās*) [hereinafter Hallaq]. For other examples of *qiyās*, *see* KERR, *supra* note 5, 66 (discussing the ban on intoxicating drinks and the guardianship rights over women seeking marriage).

10. Died 1111.

11. Ghazālī, *Concerning the Explication of the Modes of Analytical Demonstration used in Legal Matters*, translated in Hallaq, *Logic, Formal Arguments and Formalization of Arguments in Sunnī Jurisprudence*, 37 ARABICA 315, at 342 (1990)[hereinafter ARABICA].

12. *Id.* at 343.

13. 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

killed and carried it off. The cause (*ma'nā*, in Islamic law) of ownership was stated to be possession based on an analysis of previous cases. The question in the case was whether pursuit of the fox was sufficient to give the original hunter possession so as to produce the legal effect of ownership. It was decided that pursuit alone was insufficient although mortal wounding might have been found sufficient. Deprivation of natural liberty as an element of possession was a consideration in determining that pursuit was not enough for possession. The dissent in the case was inclined to submit the case for arbitration by sportsmen, advocating the use of custom to determine the applicability of the possession concept.

Pierson illustrates the need for human judgment in common law decisions as in Islamic law decisions to determine the second premise: the applicability of an existing common basis (*asl*) or cause (*ma'nā*) to a new case. Human judgment is also needed to determine the first premise: what the common basis is. For example, it is reported in the sunna that the sale of wheat for a different quantity of wheat is usurious.[14] In determining whether a similar sale of quince is usurious, it may be argued that the cause of wheat being subject to the rules on usury is its edibility, and since quince is edible, it too is subject to the rules on usury. Ghazālī comments on the nature of disagreement in this case:

> Disagreement may be assumed to arise concerning the first premise, while the second premise is agreed upon. The adversary may argue: "I agree that quince is edible but I do not agree that edibility is the cause of [prohibiting] usury, or that edible objects are usurious. Rather, some edible objects are usurious but not due to their being edible."[15]

Ghazālī also discusses how the cause of a given ruling in any one case in the sources may be determined:

> If there is disagreement concerning the first premise, it cannot be settled except through legal evidence, for what is being argued, namely, edibility being the cause, is legal. This cause may be established by the revealed, unambiguous texts, by textual allusions (*īmā'*), by the setting of the case, by the occurrence [of the effect] with the occurrence of the property, or by effectiveness (*ta'thīr*). The latter, as has been previously

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14. Schacht, *Ribā*, 6 FIRST ENCYCLOPAEDIA OF ISLAM 1913-1936 1148 (1987).
15. ARABICA, *supra* note 11, at 341.

> mentioned, is establishing the effect of the cause in the essence of the judgment in another case through a text, consensus, relevance (*munāsaba*), or coextensiveness and coexclusiveness. Or through consensus reached on the indispensability of a sign (*'alāma*), or, subsequently, through investigation (*sabr*). This is in order to negate all signs aside from that which has been stipulated — as we have mentioned concerning the premises of *argumentum a simile*. [The stipulated sign] is also termed a cause (*'illa*) according to the majority of legal theoreticians. Shāfi'ī also pointed to this cause when speaking of edibility and cash.[16]

This determination is one based on the sources of the law but still requiring the exercise of human judgment to determine what the law is. The cause (*'illa*) is not always revealed explicitly in the sources. Therefore examination and interpretation are necessary. It is possible in these circumstances to produce a mistaken opinion, but the jurisconsult who makes a sincere effort is still rewarded in the Hereafter despite the mistake. If his opinion is correct, he is doubly rewarded.[17] However, some interpretations based on human judgment eventually may be rejected as false, and new interpretations adopted.

III. ISTIHSĀN[18]

Islamic law contains within itself a mechanism for self-correction. When the process of reasoning by analogy in a particular case is determined to be wrong, it is corrected through the process of *istihsān*. This mode of legal reasoning is really no different than *qiyās* except that the new *qiyās* is considered a better *qiyās* than the one previously used in the same case. Ibn Taymīya, a jurist of the fourteenth century, provides one of the best explanations of this concept.

For Ibn Taymīya, reasoning by analogy must be based on a valid cause (*'illa sahīha*), and a valid cause may not stand in contradiction to a text from the sources of the law. If it does, the text stands and

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16. *Id.* at 341-42 (footnotes omitted). For an explanation according to Qarāfī (died 1285) of these means of identifying the *'illa* (cause) in a given case, *see* KERR, *supra* note 5, at 68-72.

17. GEORGE MAKDISI, THE RISE OF COLLEGES: INSTITUTIONS OF LEARNING IN ISLAM AND THE WEST 277 (1981); *see also* KERR, *supra* note 5, at 63.

18. This section is reprinted (with minor modifications) from J. Makdisi, *Legal Logic and Equity in Islamic Law*, 33 AM. J. OF COMP. L. 63, 83-87 (1985).

the reasoning by analogy is invalid (*fāsid*).[19] Any concept of *istihsān* which allows reasoning by analogy to stand in contradiction to a text from the sources is invalid.[20] The rationale for invalidating the reasoning by analogy in such a case is that the texts of the Islamic law sources do not always specify the cause or explain the meaning behind it which produces the legal norm in a particular case. There may be an indication (*dalīl*) in the sources as to what the cause may be, such as an affinity (*munāsaba*) or some other type of relationship between cause and legal effect which is considered the determinant of the norm (*manāt al-hukm*),[21] but human opinion which is subject to error ultimately determines the meaning behind the cause on which the legal norm is based. Therefore, when the cause is found to exist in a new case and the legal norm cannot be applied without contradiction of another text from the sources, the cause may accordingly be limited in the sense that the meaning by which the cause was originally determined to exist may be modified or completely changed.

The factor which determines whether the cause is to be completely discarded or only modified to include certain cases is the existence of a meaning (*ma'nā*) for that cause which can be derived from the sources and which distinguishes the new case from the original case. If the two cases can be so distinguished, the cause may be limited without changing the legal solutions to cases which still fall within the now restricted meaning of the original cause. If no separation in principle can be

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19. IBN TAYMĪYA, MAS'ALAT AL-ISTIHSĀN, edited by G. Makdisi, *Ibn Taimīya's Autograph Manuscript on Istihsān: Materials for the Study of Islamic Legal Thought*, in GEORGE MAKDISI (ed.), ARABIC AND ISLAMIC STUDIES IN HONOR OF HAMILTON A.R. GIBB 455 (6-8) (1965) [hereinafter ISTIHSĀN].

20. *See id.* at 454 (22-24), 455 (2-5).

21. Note the concordance of Ibn Taymīya with Ghazālī's concept of *'illa*, described in Brunschvig, *Valeur et fondement du raisonnement juridique par analogie d'après al-Gazālī*, 2 ROBERT BRUNSCHVIG (ed.), ÉTUDES D'ISLAMOLOGIE 363, at 370-371 (1976):

> The *qiyās al-'illa*, which is by far the more important and the more elaborated [as opposed to the *qiyās ash-shabāh*], recognizes in turn an internal hierarchy founded on that which decides the existence or the choice, in the basic case, of a "cause" or 'illa, which is the "determinant of the norm" (*manāt al-hukm*). Of course, it is not a question of physical nor purely rational cause, but of legal motive, *ratio legis*, on the juridico-religious plane which is that of Islam. The ways by which this *'illa* is recognized and established — operation called ta'līl — are of three sorts, by decreasing order of prestige and authority, recalling the ordinary classification of sources of Islamic law: textual source (*naql*), consensus (*ijmā'*), rational deduction (*istinbāt*). [Author's translation from the French]

For an explanation of these three types, *see id.* at 371-386.

made between the two cases, the cause must fail for not being universally valid. Ibn Taymīya calls *istihsān* the limitation of the cause either with its modification, or with its complete nullification. It is not possible to admit an exception to the application of a legal norm in a case where its cause exists and cannot be explained by a distinguishing factor.[22]

The true reasoning by analogy is the equalization between similar things and the separation between different things. *Istihsān* fits within this framework as a methodological device for correcting a mistake or omission which has been made in studying the sources.[23] It limits the cause which has been conceived too broadly and redefines it to allow for the exceptional case.[24] As Ibn Taymīya puts it, "[t]here is nothing

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22. *See* ISTIHSĀN, *supra* note 19, at 459 (21), 460 (4-11), 463 (1), 464 (6-8, 13-19), 468 (7-10), 469 (9-13). *Compare* Ghazālī's idea of *takhsīs al-'illa*, described in Brunschvig, *supra* note 21, at 383-384.

23. *See* ISTIHSĀN, *supra* note 19, at 464 (20-23), 469 (2-13).

24. With this clarification of the nature of *istihsān*, Ibn Taymīya proceeds to reexamine the cases of *istihsān* which Ahmad ibn Hanbal had interpreted as contrary to reasoning by analogy. He reaches the following conclusions:

(a) In the case of the *mudāraba* contract, the reasoning by analogy and the *istihsān*, as well as the cause of the former and the separating meaning of the latter, are derived (*mustanbat*). One or both causes — that of the original *qiyās* and that of the new *qiyās* (*istihsān*) — might be invalid. In this case, it is the *istihsān* which is followed, because the reasoning by analogy is based on the idea that the agent is like one acting for hire, but he is really a partner in the profit. This is the separating meaning. The one acting for hire is not authorized to do other than he is directed, but this does not mean that his act is without effect. It is conditional on the ratification of the hirer. To get his profit the hirer must ratify the free disposal by the agent; otherwise the sale is null and void. Once the act of the agent is ratified, the hired one gets his right, i.e., his wage, and the hirer gets his profit. Yet ratification in the case of the agent who is a partner in the profit means that he is authorized to take his right, i.e., a share in the profit. Therefore he takes his share rather than the fair wage. ISTIHSĀN, *supra* note 19, at 472 (16) - 474 (17). *But see* ABRAHAM UDOVITCH, PARTNERSHIP AND PROFIT IN MEDIEVAL ISLAM at 245-246 (1970), in which Shaybānī (died 803) is cited for treating the *mudāraba* contract as a contract for hire (*ijāra*) when the agent violates a legitimate restriction placed on him by the investor.

(b) In the case of the *tayammum*, the reasoning by analogy is correct and not the *istihsān*. ISTIHSĀN, *supra* note 19, at 469 (19) - 472 (15).

(c) In the case of the one who usurps land and plants it, the *istihsān* is based on a *hadīth* (tradition) and the reasoning by analogy which is inconsistent with the *istihsān* is invalid because there is no text which shows its authenticity. Concerning the cost owing the planter, reasoning by analogy considers him a usurper, but in fact he is not because the seed with which he planted belongs to him. Therefore, he is entitled to receive back what he put into the land.
ISTIHSĀN, *supra* note 19, at 475 (10) - 476 (9).

(d) In the case of the purchase of the land of Sawād, a separation is made between

in the sharī'a [Islamic Law] opposed to a true reasoning by analogy."[25] Thus, *istihsān* is a method for choosing between two or more conflicting solutions for a case at hand where those solutions are based on different sources of Islamic law.[26] Furthermore, the method for making this choice must be rational, based on a consistent set of priorities or on the logical analysis of the meaning underlying the rules.

The idea of conflict resolution, inherent in the nature of law, exists not only between opposing parties through dispute settlement, but also between opposing legal norms through legal decision-making. If conflict arises between established legal principles, the notions of consistency, coherence and certainty in the law require a reconciliation of these principles or a rejection of one in favor of the other. In the common law, this conflict may occur between a case precedent and a newly enacted statute, in which case the statute will prevail as the source of law having greater priority. Conflict may also occur between two case precedents. In such an instance, an attempt is made to reconcile their principles before resorting to the rare phenomenon of overruling one in favor of the other.[27] The process of reconciling the principles of two conflicting case precedents uses a widely-recognized technique of legal reasoning in the common law. This technique was described in 1958 by Henry Hart and Albert Sacks as the "reasoned distinction of precedent."[28] In order to provide a comparative basis on which to evaluate *istihsān* as a rational method of legal reasoning, we will examine this technique as illustrated in *Berenson v. Nirenstein*.[29]

Berenson involved a defendant who offered "to act as agent and broker for the plaintiff in seeking to buy"[30] all the shares of stock of

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the purchase and the sale because the cause is existing in the latter and not the former. The purchase is not for a worldly objective, so it is permissible. ISTIHSĀN, *supra* note 19, at 476 (10) - 477 (1).

25. "*Laysa fi 'sh-shari'a mā yukhālifu qiyāsan sahihan.*" IBN TAYMĪYA, AL-QIYĀS FI 'SH-SHAR' AL-ISLĀMĪ WA ITHBĀT ANNAHU LAM YARID FI 'L-ISLĀM NASS YUKHĀLIFU 'L-QIYĀS AS-SAHĪH 7 (5-6) (1346 H.), translated into French by Laoust in CONTRIBUTION À UNE ÉTUDE DE LA MÉTHODOLOGIE CANONIQUE DE TAKĪ-D-DĪN AHMAD B. TAIMĪYA 113, at 115 (1939); *see also* ISTIHSĀN, *supra* note 19, at 465 (4-5).

26. The four recognized sources of Islamic law are the Koran, sunna, consensus and reasoning by analogy. JOSEPH SCHACHT, THE ORIGINS OF MUHAMMADAN JURISPRUDENCE at 1, 135 (1950, 1953).

27. Respect for the doctrine of "stare decisis" severely restricts the inclinations of judges to overrule case precedents.

28. HART & SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW at 407-426 (unpublished ed., 1958).

29. 326 Mass. 285, 93 N.E.2d 610 (1950) (the case used to illustrate the technique of the "reasoned distinction of precedent" in the HART & SACKS materials).

30. *Id.* at 610.

a certain corporation. The plaintiff "'retained the defendant [Nirenstein] as his broker and agent to effect a purchase of the shares . . . and the defendant [Nirenstein] agreed to act as such broker and agent on behalf of the plaintiff and to use his best efforts to purchase said shares of stock for him.'"[31] A firm offer of $70/share to be made for 4704 shares was authorized by the plaintiff, but thereafter, the defendant, still representing to the plaintiff that he was acting on his behalf, entered into a written agreement with certain trustees of the corporation for the purchase of the shares himself. Plaintiff prayed for injunctive and other relief, but the trial court denied his request, citing *Salter v. Beal*,[32] among other cases, as precedent.[33] The case reached the Supreme Judicial Court of Massachusetts, which addressed the issue of an apparent conflict between the *Salter* line of cases and another set of cases, including *Spritz v. Brockton Savings Bank*.[34]

The *Salter* case held that no fiduciary obligation was shown by a defendant who, despite the fact that he was employed by a plaintiff to appraise certain machinery which the latter contemplated buying, bought the machinery for himself.[35] The principle of the case on which this decision was based was "that a mere engagement to buy in behalf of another without more is not deemed . . . to create a fiduciary relation."[36] On the other hand, the *Spritz* line of cases established that the relation of broker to principal involves certain obligations:

> The plaintiff [broker] was bound to act solely for the benefit of the defendant [principal] in procuring a customer and in effecting a sale of the property. He could not himself become the purchaser, and he could not secretly enter into an agreement with the buyer that would conflict in any way with the obligation he had assumed of acting in entire good faith in the interest of the defendant.[37]

Faced with reconciling these two lines of cases, the Supreme Judicial Court of Massachusetts reversed the lower court's decree by qualifying the *Salter* line of precedent and classifying the instant case under the *Spritz* line of precedent. Its legal argument reads as follows:

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31. *Id.* at 611.
32. 321 Mass. 105, 71 N.E.2d 872 (1947).
33. 93 N.E.2d at 611.
34. 305 Mass. 170, 25 N.E.2d 155 (1940).
35. 71 N.E.2d at 874.
36. 71 N.E.2d at 873.
37. 25 N.E.2d at 156 (1940).

> The fiduciary obligation toward his principal of one who is acting in the full sense as a broker in the sale or purchase of property rests upon fundamental principles of business morality and honor which are of the highest public interest, and which it is the bounden duty of courts to preserve unimpaired. We do not believe that in deciding the cases [in the *Salter* line of precedent] the court had in mind a case where the full relation of principal and broker existed. . . . [A]t least where, by the conduct of the parties, the full relation of principal and broker has come into existence, including the carrying on of a negotiation between seller and buyer, there has come into existence with it a confidential and fiduciary relation which gives rise to a constructive trust in favor of the principal in property which the broker has acquired for himself in violation of his duty to his principal. We by no means suggest that all of the cases in the first list were wrongly decided, but we do hold that in so far as broad expressions in some of them might be thought at variance with what has just been stated such expressions must be deemed to be qualified by what is here said.[38]

Thus the court found that the distinguishing factor between the two lines of precedent existed in the nature of the relationship between the parties in the cases. For a fiduciary relation to exist, the court reasoned that there must be a sufficient relationship between broker and principal. There existed here a "full relation of principal and broker" which was found to exist in the *Spritz* line of cases but not the *Salter* line. Therefore, the principal was allowed to bring suit against the broker in this case.

Human judgment, used to extend the decision in one case to another, can be wrong. The reasoned distinction of precedent in the common law and *istihsān* in Islamic law are corrective devices that permit a better reasoning by analogy to be substituted for a faulty one. There are situations that arise, however, where no reasoning by analogy is possible from an existing case in the sources. There is a gap in the specific directives of the law and some device is needed to fill the gap. This mode of legal reasoning is called *istislāh*.[39]

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38. 93 N.E.2d at 612.

39. Emile Tyan in *Méthodologie et sources du droit en Islam*, 10 STUDIA ISLAMICA 79, at 96 (1959), describes the concept of *istislāh* as follows:

> In its original conception, this method can be summarized in the

IV. ISTISLĀH

In the common law a gap in the specific directives of the law is often filled by recourse to the notion of public policy, a determination based on what is right, just, fair, convenient or conducive to order and harmony in society. The principles on which a public policy decision is made are imbedded in the culture and, for that matter, the fabric of the common law. In Islam a similar phenomenon occurs through the concept of *istislāh* (also *maslaha*). In Islamic law the general principles of application are found imbedded in the sources of the law — the Koran and the sunna.

Ghazālī defines *maslaha* broadly as the implementation of the intent of the law (*Shar'*), which is to preserve religion, life, reason, progeny and property.[40] The rules that exist in the primary sources are an implementation of this intent. For example, the punishment of the apostate preserves religion, and the *hadd*[41] punishments for wine drinking, unlawful intercourse and theft preserve reason, progeny and property respectively.[42] *Maslaha* implements the intent of the law where there are no existing rules.

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following terms. The matters, the general "interests" (*masālih*) which, in the government of the community, can prove the object of regulation, are divided into three categories. The first have been effectively recognized and regulated by determined and precise texts of law, — the others, cited in the law, have been nevertheless rejected by a precise text, — the third category is represented by the matters which have not been the object of a determined and precise regulation neither in one sense nor in the other.

The interests of this last category are called *masālih mursala* (lit.: "interests not tied" to a precise text). Therefore, in default of texts, the human reason finds itself reduced to its own resources to find the diverse rules of law which the protection of its interests necessitate; as well, the reasoning which, under such conditions, results in the establishment of norms and juridical solutions, is qualified as a method of research "not tied: *istidlāl mursal*". [Author's translation from French]

40. 1 GHAZĀLĪ, AL-MUSTASFĀ MIN 'ILM AL-USUL at 286-87 (Cairo: Bulāq, 1322-24H.) [hereinafter MUSTASFĀ]. These goals are known as the "five universals" (*al-kullīyāt al-khams*); *see* KERR, *supra* note 5, at 69 (discussing Qarāfī). *Maslaha* literally means that which aims at promoting a benefit or preventing a harm, but Ghazālī emphasizes that while these aims are goals for the good of mankind, they do not fit within the legal meaning of the term. KERR, *supra* note 5, at 92-93.

41. For a summary discussion of the *hadd* offences, *see* JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW at 175-81 (1964); *see also*, Safwat, *Offences and Penalties in Islamic Law*, 26 ISLAMIC Q. 149 (1982).

42. MUSTASFĀ, *supra* note 40, at 287-88; *see* KERR, *supra* note 5, at 93.

More specifically, *maslaha mursala* refers to the implementation of these five interests where there is no one indication in the sources to govern a particular case, but rather many without number.[43] In such a case where there is no support for a legal principle from one particular source, Ghazālī limits the determination of the principle with three requirements. It must be (1) necessary (*darwā*), (2) definitive (*qat'īya*), and (3) universal (*kullīya*).[44] For example, if infidels shield themselves with a group of Muslim prisoners and restraint from action by the Muslim army will mean defeat and slaughter for all the Muslims, it is permitted to kill an innocent Muslim used as a shield, despite the fact that this case is not mentioned in the Law.[45]

> The preservation of all the Muslims is closer to the intent of the Law because we know definitively (*qat'an*) that the intent of the Law is the minimization of killing, just as it intends its termination if possible. . . . And this would be the consideration of a *maslaha* known as necessity.[46]

By way of contrast, Ghazālī points out that the killing of an innocent Muslim used as a shield by the infidel in a fortress is not permitted since it is not a necessity and victory is not certain. Likewise the throwing of a passenger overboard to save the rest of the people on a boat is not permitted since the destruction of people is not contemplated universally for all Muslims, even though it be for a number. Nor is the eating of a person permitted to prevent a group of people from dying of hunger because the *maslaha* is not universal.[47] Ultimately, Ghazālī states that we know by *ijma'* that the many are not preferred over the few.[48]

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43. MUSTASFĀ, *supra* note 40, at 311. *Maslaha mursala* means "unrestricted, undefined, independently arrived at benefit" and may be contrasted with *maslaha mu'tabara* (recognized benefit) and *maslaha mulghāh* (excluded benefit). KERR, *supra* note 5, at 70, 80, 85.

44. MUSTASFĀ, *supra* note 40, at 295-96; *see* KERR, *supra* note 5, at 93-94.

45. MUSTASFĀ, *supra* note 40, at 294.

46. *Id.* at 295 (Author's translation from the Arabic). Compare translation in KERR, *supra* note 5, at 93.

47. MUSTASFĀ, *supra* note 40, at 296-97; *see* KERR, *supra* note 5, at 94. Ghazālī also discusses the situation where one *maslaha* may outweigh another and be preferred. He opposes the beating of one accused of theft (which is a *maslaha* approved by Malik) because there is another *maslaha* which considers the potential innocence of the accused. The torture of an innocent person outweighs the deterrence factor of the beating. MUSTASFĀ, *supra* note 40, at 297-98.

48. MUSTASFĀ, *supra* note 40, at 314. *Ijma'* (consensus) is a confirmatory device in Islamic law.

An objection is raised that to permit the killing of an innocent Muslim used as a shield when it involves the welfare of the whole Islamic nation contravenes two Koranic provisions[49] against the killing of believers. Ghazālī answers that, while it is not permitted to contravene a textual source, it is permitted to limit it to exclude a case which is universal and not merely a matter of numbers:[50]

> The Law prefers the universal over the particular, and the preservation of the Islamic people from the pillage of the infidel is more important in the intent of the Law than the preservation of the blood of one Muslim. This is settled (*maqtu' bihi*) from the intent of the Law and that which is settled does not need evidence from a source.[51]

Ghazālī demonstrates from this discussion an essentially conservative approach to upholding the law but mitigated in one important respect. Where a necessary, definitive and universal *maslaha* exists, it may be used as a rule of Law even when it requires the limitation of a Koranic text. This *maslaha* is not derived by personal opinion or policy judgment but rather from the intent of the Law derived from the sources as a whole.

In the common law we find similar solutions to the problems raised by Ghazālī. During the Canadian rebellion of 1837, British forces attacked the ship "Caroline" in American territory with innocent people on board in an attempt to block reinforcements and supplies to the rebels and to deprive them of their means of access to the mainland of Canada. The ship was destroyed and two people were killed. Daniel Webster, the American Secretary of State, sent a note on July 27, 1842, to Lord Ashburton, a special minister of the British government, in which he called upon the British Government to show:

> [a] necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of The United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and

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49. *See* KORAN IV:93 and VI:151.

50. MUSTASFĀ, *supra* note 40, at 302-03.

51. *Id.* at 303 (Author's translation from the Arabic). Compare translation of KERR, *supra* note 5, at 95.

> kept clearly within it. It must be shown that admonition or remonstrance to the persons on board the *Caroline* was impracticable, or would have been unavailing; it must be shown that day-light could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some and wounding others, and then drawing her into the current, above the cataract, setting her on fire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate which fills the imagination with horror. A necessity for all this, the Government of The United States cannot believe to have existed.[52]

Self-preservation against innocent people on a national scale is permitted in the case of necessity. Webster stresses that the necessity must be inevitable. By way of contrast, the eating of an innocent person has not been permitted to prevent a group of people from dying of hunger, although the question is debated.[53] In *Queen v. Dudley*,[54] two seamen, drifting in the ocean in an open boat without food for several days and with no reasonable prospect of relief before death by starvation, killed and ate a boy who was also on the boat. For this act they were convicted of murder. Although self-defense is permitted against the acts of a person whose life is taken, the Court held that the life of an innocent person may not be taken. The defense of necessity was rejected. In this case of private homicide the Court indicated that there would be no definitive method for determining how the rule was to apply if necessity were permitted as an excuse:

> It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which

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52. *Quoted in* Jennings, *The Caroline and McLeod Cases*, 32 AM. J. OF INT. L. 82, 89 (1938).

53. *See* A. W. B. SIMPSON, CANNIBALISM AND THE COMMON LAW (1984).

54. 14 L. Rep. 273 (Q.B.D. 1884).

> will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be "No"—
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> "So spake the Fiend, and with necessity, The tyrant's plea, excused his devilish deeds."
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> It is not suggested that in this particular case the deeds were "devilish," but it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime.[55]

The English court in *Queen v. Dudley* is in accord with Islamic law; the American court in *U.S. v. Holmes*[56] is not. The *Holmes* court would have permitted the throwing of a passenger overboard to save the rest of the people on a boat if it had been done fairly. However, it found in that case that it was not done fairly. It charged the jury:

> But the case does not become "a case of necessity," unless all ordinary means of self-preservation have been exhausted. The peril must be instant, overwhelming, leaving no alternative but to lose our own life, or to take the life of another person. An illustration of this principle occurs in the ordinary case of self-defense against lawless violence, aiming at the destruction of life, or designing to inflict grievous injury to the person; and within this range may fall the taking of life under other circumstances where the act is indispensably requisite to self-existence. For example, suppose that two persons who owe no duty to one another that is not mutual, should, by accident, not attributable to either, be placed in a situation where both cannot survive. Neither is bound to save the other's life by sacrificing his own, nor would either commit a crime in saving his own life in a struggle for the only means of safety.
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> . . .
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> But, in addition, if the source of the danger [sic] have been obvious, and destruction ascertained to be certainly about to arrive, though at a future time, there should be consultation, and some mode of selection fixed, by which those in equal relations may have equal chance for their life. By what mode,

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55. *Id.* at 287-88.

56. United States v. Holmes, 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383).

> then, should selection be made? The question is not without difficulty; nor do we know of any rule prescribed, either by statute or by common law, or even by speculative writers on the law of nature. In fact, no rule of general application can be prescribed for contingencies which are wholly unforeseen. There is, however, one condition of extremity for which all writers have prescribed the same rule. When the ship is in no danger of sinking, but all sustenance is exhausted, and a sacrifice of one person is necessary to appease the hunger of others, the selection is by lot. This mode is resorted to as the fairest mode, and, in some sort, as an appeal to God, for selection of the victim.[57]

There is much similarity between the Islamic and common law systems in the discussion of the substantive aspects of these issues. Homicide is excused in the case of inevitable necessity where self-preservation is a universal concern. Where homicide is a particular concern, it is debatable, with the English law paralleling the Islamic law theory that necessity is not a defense.[58]

The common law and Islamic law justifications for the doctrine of necessity differ. Common law refers to a doctrine of necessity without more; Ghazālī takes particular pains to limit and define his doctrine of necessity within the context of a textual source. His approach is to find this doctrine based on the intent of the Law as gathered from the sources as a whole. His approach is not entirely foreign to a similar mode of reasoning in the common law system, even though this mode of reasoning is not used to justify the common law doctrine of necessity. There is precedent in the common law for the constitutional limitation of specific statutes based on the intent of the law as gathered from the Constitution as a whole. In *In re Quarles and Butler*[59] the United States Supreme Court recognized the right of a citizen to inform federal officers that the defendant was violating the internal revenue laws:

> The right of a citizen informing of a violation of law, like the right of a prisoner in custody upon a charge of such violation, to be protected against lawless violence, does not depend upon any of the Amendments to the Constitution, but arises out of the creation and establishment by the Constitution

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57. *Id.* at 366-367.

58. For further discussion on this issue, *see* J. Makdisi, *Justification in the Killing of an Innocent Person*, 38 CLEV. ST. L. REV. 85 (1990).

59. 158 U.S. 532, 15 S.Ct. 959, 39 L. Ed. 1080 (1895).

> itself of a national government, paramount and supreme within its sphere of action. Both are, within the concise definition of the Chief Justice in an earlier case, "privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States."[60]

Such an approach is essentially the method of reasoning by *maslaha* in Islamic law. It is not prevalent in common law development because it is considered legitimate to expand notions of common law justice through judicial decree which is ultimately sanctioned as precedent by the mere fact of stare decisis (to stand by the decision). In Islamic law, the concept of judge-made law is rejected in favor of God-made and jurist-elaborated law. Adherence to the textual sources is thus a necessary part of legal argument in order to legitimize development in the law. In particular, when there is no textual provision to justify a certain legal principle, the concept of *maslaha* permits a more expansive reading of the textual sources as a whole — but legitimacy still derives from these sources.

Thus we find Ghazālī, the arch-conservative, advocating even the limitation of a general Koranic provision through the concept of *maslaha*. In the same way as *Quarles* found a right to report violations of the law based on the Constitution as a whole, Ghazālī asserts the ability to expand one's vision of the flexible reaches of the Law to include the principle of national self-preservation, despite the killing of innocent Muslims used as shields, based on the sources as a whole where there is no one single provision to govern. However, he is careful to limit it to include only cases of necessity, definitiveness and universality.

In general, Ghazālī advocates restraint in the development of Islamic law. *Maslaha* does not operate as a principle of public policy to alter the principles of law in the sources. Ghazālī provides an example in the case of the ruler who broke the rules of the month of Ramadan fast. The prescribed penalty of manumitting a slave could not be rejected in favor of a penalty requiring a fast of two consecutive months, even if the prescribed penalty was not a deterrent from breaking the rules and the two-month fast was. Ghazālī finds:

> This position is invalid and contrary to the text of the Book by [this invalid method of reasoning by] *maslaha*; and the opening of this door leads to changing all the restraints in

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60. *Id.* at 536 (citations omitted).

> the laws and their textual sources by reason of a change in circumstances. If that were then discovered in the doings of the scholars, the confidence of sovereigns in their legal opinions would not be obtained and they would think that everything they gave a legal opinion on would be a corruption by personal opinion (*ra'y*).[61]

Ghazālī is adamant that *maslaha* is the preservation of the understood intent of the Koran, sunna and consensus. The use of this concept for anything else is legislating[62] — a function that belongs to God alone. Therefore, there should be no dispute over the concept except in the case of two opposing *maslaha*s or two opposing intents, in which case the stronger is to be preferred.[63] For example, the existence of coercion permits the declaration of apostasy, the drinking of wine, the consumption of another's good, the breaking of the fast and the abandonment of prayer, because the prohibition of bloodshed carries more weight than these other prohibitions.[64] The consumption of another's goods in the state of coercion is known to be preferred by many indications in the Law.[65]

Ibn Taymīya[66] has another concept of *maslaha*. Rather than confining *maslaha* to the case of necessity defined by Ghazālī's five principles, he permits the use of *maslaha* generally to obtain a benefit or avoid a harm, as long as it does not contradict anything in the sources. According to Ibn Taymīya, the sources indicate in some way a complete guide for the proper behavior of mankind because God has provided a complete religion for His people through the Prophet Muhammad.[67] However, there are times when a benefit is not the subject of a direct text or *qiyās*. In such a case the benefit may be perceived through the use of reason, because reason can distinguish between truth and falsehood, what is beneficial and what is vitiating. This method of developing rules of law, neither prescribed by nor in contradiction to the sources, is called *maslaha mursala*.[68] In the absence of such a *maslaha*, the situation is permitted (*ibāha*).[69]

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61. MUSTASFĀ, *supra* note 40, at 285-86 (Author's translation from Arabic); *see* KERR, *supra* note 5, at 92.

62. MUSTASFĀA, *supra* note 40, at 310-11, 315.

63. KERR, *supra* note 5, at 96.

64. MUSTASFĀ, *supra* note 40, at 311-12.

65. *Id.* at 314.

66. Died 1328.

67. 5 IBN TAYMĪYA, MAJMŪ'AT AR-RASĀ'IL WA MASĀ'IL 23 (n.d.); *see* KERR, *supra* note 5, at 87.

68. 5 IBN TAYMĪYA, MAJMŪ'AT AR-RASĀ'IL WA MASĀ'IL 22 (n.d.).

69. Regulation (*siyāsa shar'iya*) in Islam. KERR, *supra* note 5, at 88.

It is interesting to note the development in the concept since Ghazālī. Ibn Taymīya appears to define *mursala* as not textually specified, while Ghazālī defines it as not specified by one particular text but rather by many combined. Benefit is dictated by the sources for Ghazālī; it is dictated by reason within bounds set by the sources for Ibn Taymīya. The latter is an important step toward making the law more flexible. Giving reason free play within certain bounds to deal with new situations, without trying to fit them within a preconceived system, makes it easier to implement the needs of a changing society. The *muftī*, the giver of legal opinions, must use his knowledge of society and life in general to apply the broad values of the legal sources to the specific instances of particular cases. The Koran and sunna prescribe rights and values in general abstract terms; the *muftī* helps specify how these general rights and values are to be weighed in particular circumstances given other principles, social goals or political aims.

On the other hand, the degree of flexibility actually permitted in the development of law is a function of interpretation. Although Ibn Taymīya opens the way for a more flexible concept of legal reasoning, he is careful to observe his own cardinal principle that nothing in the law should contradict a textual source.[70] With a well-developed concept of *qiyās* (reasoning by analogy based on textual sources) this limitation still means a severe restriction on the use of reason as a basis in itself for legal development. A jurist is not permitted to stride off on his own to fill in gaps in the law, using his own arbitrary personal discretion, or even discretion based on some theory of utilitarianism or natural justice inherent in his conscience. This would be contradictory to the very nature of Islamic law as a system of revelation. Rather the *muftī* is bound to determine a legal rule by reference to general principles of human welfare in the Koran and sunna.

There is one jurist, however, who represents a very liberal view. Tawfī[71] claims that every human interest is a necessity and the supreme determining factor in constructing a rule of law. He bases his claim on the tradition of the Prophet which says, "Do not inflict injury nor repay one injury with another."[72] If a human interest conflicted with a provision in the Koran or sunna, then, he says, the latter would be

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69. Regulation (*siyāsa shar'īya*) in Islam. KERR, *supra* note 5, at 88.

70. ISTIHSĀN, *supra* note 19, at 455 (6-8); *see* KERR, *supra* note 5, at 79.

71. Died 1316. Tawfī's views as described here are elaborated in KERR, *supra* note 5, at 97-102.

72. *Id.* at 97.

restricted or clarified. This position adopts a natural or social justice approach to Islamic law which finds its ultimate reference point not in the Koran or sunna, but rather in human reason. It leaves the door wide open for the use of human discretion in the determination of legal rules. Not surprisingly, Tawfi's position is considered an extreme exception to the traditional view.[73] However, it has become in modern times a major source of support for a new concept of *maslaha*.

V. THE ROLE OF HUMAN JUDGMENT IN THE DECISION OF HARD CASES

Qiyās, *istihsān* and *istislāh* are three methods by which Islamic law is elaborated. Each method has the potential for abuse as the vehicle for arbitrary personal opinion, but such abuse is rejected in legal theory. In practice each of the three methods encourages the use of human judgment respectively to assimilate, distinguish and plug the gaps between legal cases.

Discretion is needed to work these methods, much the same as it is needed in the common law, but discretion is not to be confused with arbitrary opinion. In the case of *Norway Plains Co. v. Boston & Maine R.R.*,[74] two parcels of merchandise were destroyed by an accidental fire after they were deposited on the railroad platform at the point of destination by the railroad transporting the parcels. The question raised in the case was whether the railroad continued its status as a common carrier of the goods after the deposit or became merely a warehouseman. The settled rule of law was that railroads in transit were strictly liable for accidental fires regardless of fault because of their status as common carriers. As a warehouseman the railroad would have been liable only for failure to exercise care in the custody of the goods. Because the railroad had not breached any duty of due care it would have been liable in the status of a common carrier but not in the status of a warehouseman. In this case the court decided that the railroad was no longer a carrier but rather a warehouseman after its deposit of the goods on the platform. The court determined that the common basis (*asl* in Islamic law) behind the common carrier rule was the state of being in transit.

Such judgment was ultimately a matter of opinion, but it was not arbitrary so long as the court sought the reason behind the different duties of common carriers and warehousemen. It would have been

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73. *Id.* at 100-01.

74. 1 Gray 263 (Mass. 1854).

arbitrary if the court had decided the case based on personal preference or whim. In the same way, two Islamic jurists may disagree over whether the sale of unripe fruit is a risky sale and both may use reasoning by *qiyās* legitimately to arrive at different conclusions. Their experiences may be different and each may define the term "risk" differently, although it may be the best way their experiences permit. If either or both of the jurists are inclined to define "risk" in such a way as to satisfy a personal preference or whim, then their decision would be arbitrary personal opinion.

Turning from *qiyās* to *istihsān*, we find the same leeway for the use of discretion. Take, for example, the *Berenson* case mentioned earlier.[75] By narrowing the broadly stated principle in the *Spritz* line of cases so that it did not conflict with the principle in the *Salter* line, the court reconciled the cases without disturbing the concept of precedent. Yet, the manner by which the legal principles in these cases were narrowed or broadened demonstrates the role of human discretion in giving weight to factual similarities and differences that did not necessarily have the same weight in the original cases. The judge has a certain leeway for using his discretion in distinguishing between and choosing from the principles of prior cases those which he will apply to the case at hand; and the limits to which he may go are not clearly defined. As Hart and Sacks point out:

> Assuming that either some of the plaintiff's cases or some of the defendant's cases had to be qualified or overruled, which party's? Is it an overstatement to say that, considering the function in primary private activity of the arrangements in question, considering known community attitudes, and considering established policies of the law in relation to comparable problems, this question could be answered with great assurance?[76]

The discretion which the judge uses in deducing a legal decision from precedent requires a distinct separation to be made between the absolute syllogism and the legal syllogism. The former may be exemplified in the statements: All men are mortal; Socrates is a man; therefore, Socrates is mortal. Legal logic does not work in this manner since there are a number of competing variables that must be taken

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75. This section from here through text at footnote 77 is reprinted (with minor modifications) from J. Makdisi, *Legal Logic and Equity in Islamic Law*, 33 AM. J. OF COMP. L. 63, 87-89 (1985).

76. HART & SACKS, *supra* note 28, at 420.

into account. The priority of these variables in the decision-making process may be determined ultimately by the judge's own inclinations in the matter. The process appears to be a combination of two approaches:

> As a matter of fact, men do not begin thinking with premises. They begin with some complicated and confused case, apparently admitting of alternative modes of treatment and solution. Premises only gradually emerge from analysis of the total situation. The problem is not to draw a conclusion from given premises; that can best be done by a piece of inanimate machinery by fingering a keyboard. The problem is to *find* statements, of general principle and of particular fact, which are worthy to serve as premises. As matter of actual fact, we generally begin with some vague anticipation of a conclusion (or at least of alternative conclusions), and then we look around for principles and data which will substantiate it or which will enable us to choose intelligently between rival conclusions. No lawyer ever thought out the case of a client in terms of the syllogism. He begins with a conclusion which he intends to reach, favorable to his client of course, and then analyzes the facts of the situation to find material out of which to construct a favorable statement of facts, to *form* a minor premise. At the same time he goes over recorded cases to find rules of law employed in cases which can be presented as similar, rules which will substantiate a certain way of looking at and interpreting the facts. And as his acquaintance with rules of law judged applicable widens, he probably alters perspective and emphasis in selection of the facts which are to form his evidential data. And as he learns more of the facts of the case he may modify his selection of rules of law upon which he bases his case.
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> I do not for a moment set up this procedure as a model of scientific method; it is too precommitted to the establishment of a particular and partisan conclusion to serve as such a model. But it does illustrate, in spite of this deficiency, the particular point which is being made here: namely, that thinking actually sets out from a more or less confused situation, which is vague and ambiguous with respect to the conclusion it indicates, and that the formation of both major premise and minor proceed tentatively and correlatively in the course of analysis of this situation and of prior rules. As soon as acceptable premises are given and of course the judge and jury have eventually to do with their becoming accepted —

> and the conclusion is also given. In strict logic, the conclusion does not follow from premises; conclusions and premises are two ways of stating the same thing. Thinking may be defined either as a development of premises or development of a conclusion; as far as it is one operation it is the other.[77]

Istislāh provides the most open-ended means for the development of Islamic law. The concept is generally one of strict adherence to the revealed sources of law, without intervention by human reason to form values or rights; value judgments are provided by the Koran and sunna. But human reason is used to derive from these scriptural values specific rules to govern human behavior, and it is in this process that human discretion plays a role. *Maslaha* is used primarily to fill the gaps in the matrix of specific rules. Furthermore, this process also leaves room for change once specific rules are decided. There might be a change in social circumstances. Although the primary texts are considered divine and immutable, interpretation of these texts must change in light of changed customs, needs, interests, conditions, times and environments.[78] Human discretion not only ascribes weights to particular events and circumstances but may change these weights when circumstances change.

The problem in all of this is the fact that no amount of restraint can effectively prevent the use of arbitrary opinion if a judge or jurist so chooses. Because legitimate differences of opinion may exist in a particular case, it is difficult for an observer to determine whether a jurist has decided a case legitimately or arbitrarily. Some scholars, such as Roberto Unger, see law as a form of politics, in which objective legal rationality is an illusion and the most that should be hoped for is the "potential rationality of the normal modes of moral and political controversy."[79] Others, such as Ronald Dworkin, feel that there is a sense of community morality according to which the judge feels com-

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77. Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, at 23 (1924). Dewey later compares this process to an ocean in a storm with a series of waves: "suggestions reaching out and being broken in a clash, or being carried onwards by a cooperative wave." JOHN DEWEY, ART AS EXPERIENCE 38 (1934).

78. *See* KERR, *supra* note 5, at 84, abstracting from Khallāf's summary of the position of the proponents of *istislāh* as follows: "Times change and new problems arise; what was once *maslaha* becomes an evil. Unless the *mujtahids* are allowed to use *istislāh*, the Sharī'a will fail to provide for the people's interests, which would clearly be contrary to its intent."

79. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, at 579 (1983).

pelled to decide cases.[80] This debate applies to Islamic and common law alike.

VI. OBSERVATIONS ON THE FUTURE OF ISLAMIC LAW

After the thirteenth century, creativity in Islamic legal development was stifled.[81] Rigid adherence to given rules of law became more the norm than the exception. The reasons given are varied. The important point is that after several centuries of stagnation there is now a concerted effort in many parts of the Islamic world to return to a dynamic system of Islamic law. One of the means used to loosen the rigid formalism of the law that developed in these last years has been a rejuvenation of the concept of *maslaha*; only, *maslaha* now takes on a new meaning.

One of the leading advocates for social reform in the Muslim world around the turn of this century was Rashīd Ridā.[82] His philosophy is based on a utilitarian methodology which defines justice in Islamic law as natural justice reflected in the revealed law as well as determined through independent contemplation.[83] The emphasis thereby shifts from a legal system conceived as totally dependent on revelation to one that uses a combination of reason and revelation as a legal foundation. Ridā holds that there is no conflict between the rights and obligations of Islamic law as dictated by the scriptural sources and those dictated by natural human moral disposition. The primary purpose of both is to secure man's welfare, and man can do that for himself as well as be instructed by the Koran and sunna. Hence, Islam does not create justice, it teaches men how to conform to it.[84] Ridā attempts to break the pattern of strict reliance on the primary sources, and he pushes the concept of *maslaha* to the limit. He finds support for this theory in part based on Tawfī's work, a liberal thirteenth century view.[85]

The broadly-applied *maslaha* advocated by Ridā was not embraced wholeheartedly by Islamic jurists.[86] One of the reasons may be in the

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80. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY Chp. 4: Hard Cases 81-130 (1978); *see* H.L.A. HART, THE CONCEPT OF LAW 121-150 (1961).

81. GEORGE MAKDISI, THE RISE OF COLLEGES: INSTITUTIONS OF LEARNING IN ISLAM AND THE WEST at 289-91 (1981).

82. Muhammad Rashīd Ridā (1865-1935) was Muhammad 'Abduh's leading biographer and the founder and editor of the journal *Al-Manār*.

83. *See* KERR, *supra* note 5, at 157.

84. *Id.* at 156-57.

85. *Id.* at 207; *see* text at *supra* note 73.

86. *Id.* at 195-197, 219-223.

failure of Islam to separate the judicial from the executive branch of government. Contrary to the common law system where judges who are responsible for the development of doctrine through case law are independent of the governing power, the Islamic jurists who developed doctrine had no formal authority of office except at the pleasure of the sovereign. Therefore, it was necessary to find sufficient constraints on changing the law itself to restrain the otherwise unbridled power of government. This reason for the limited success of *maslaha* among the jurisconsults is suggested by the following passage from Rashīd Ridā 's book *Yusr al-Islam*:

> Most of the 'ulamā' of the Community avoided explicit reference to the principle [of *maslaha*] because of their fear — as Qarāfī says — that tyrannical leaders would take it as an excuse for following their own desires and imposing their absolute power on the property and persons of the population. The 'ulamā' therefore thought to guard against this by tracing all laws back to revealed sources, even when this necessitated recourse to [so-called] hidden analogies. They converted the notion of *masālih mursala* into one of the most technical forms of the *'illa* in *qiyās*, so that it was not subject to the interpretation of princes and governors. This fear was justified at the time, but the Community did not thereby guard itself sufficiently against the desires of its rulers, for every tyrant could always find corrupt 'ulamā' to prepare the way for him to follow his own inclinations to some extent.[87]

Whether or not the Muslim accepts a natural law theory of justice, there will most likely continue to be significant dependence put on the Koran and sunna as sources for a framework of human values and rights. The meaning of Islam is submission to God through the law, the path provided by the Revelation in the Koran and sunna. The Islamic tradition has flourished and floundered but has never really given up this idea which gives legitimacy to Muslim values. The problem, then, is to focus on the manner in which principles are interpreted in the Koran and sunna today, if these sources still provide a basis for legitimacy in the law. A hard look must be taken not at the general provisions of these sources but at the concrete applications of principles from these general provisions, the area in which human discretion has and continues to play a significant role.

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87. RASHĪD RIDĀ, YUSR AL-ISLĀM WA USŪL AT-TASHRĪ' AL-'AMM 75-76 (Cairo 1928), translated in KERR, *supra* note 5, at 195 (footnote omitted).

There is much room for discussion, debate and disagreement in this sphere. Disagreement is not something new to Islam. In fact *khilaf* (difference of opinion) was and continues to be an important part of the vitality of Islamic law. What cannot be done is to impose principles from without. One who is a stranger to a given culture and legal system cannot dictate what is right and wrong in the concrete applications of human rights and values in another culture. While the cutting of a hand for theft may appear to be barbaric and inhumane to one culture at one point in time, is it any more barbaric than the execution of criminals in an electric chair? Perhaps both are violations of human rights and values, but to determine this, the discussion must move from the abstract to the concrete instance. In the decision of the concrete instance, it has to probe for the efficient cause and even further for the *hikma*, the wisdom of the legal rule.[88] Sometimes this probe arises not by direct indications in the sources but by the jurist's own judgment as *maslaha mursala*.[89] In any case the attempt should be made for a reasoned elaboration of the law. It is at this point that the discussion will lead to true understanding and that social and political philosophies will be laid bare.

In other words, it is not enough to talk about general principles of human rights and values. The flexible reaches of the law which lie in the consideration of *'illa* and *hikma* must be examined to determine the real blocks to a practical implementation of perceived human rights and values. Ultimately, it will be seen that it is not the law that is doing the blocking. It is either misunderstanding or an opposed social or political philosophy. The law can be manipulated within the bounds permitted by its flexibility to express the currently felt needs of society.

Even the most conservative view of *maslaha* held by Ghazālī permitted a direct contradiction of the Koranic prohibition on killing by permitting the killing of Muslim prisoners used as shields in wartime. Other views were more liberal, and modern times offer the most liberal views. However, Islamic law has been stagnant to the extent that it has not followed the classical system of legal reasoning, it has abandoned it, or has been forced to abandon it in favor of Western modes of thought. As parts of Islam attempt to reinstitute these traditions, they find that the law has lost touch with the reality of present-day concerns.

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88. The underlying reason for an efficient cause of a rule is called *hikma*. The *hikma* explains the rational comprehensibility of the rule. For example, the *'illa* in the prohibition of wine is intoxication; the *hikma* is that intoxication is bad. KERR, *supra* note 5, at 67, 73.

89. KERR, *supra* note 5, at 81.

What would it be like if we tried to adapt our Constitution to modern social needs two hundred years after the doors of creative legal development were closed? The attempt to identify presently felt needs and problems with the legal solutions of an outdated legal system may prove too high a price to pay for tradition. The Muslim people are presently wrestling with this problem as they throw off the yoke of foreign domination, an imposition which has done much to destroy their cultural identity. It may be that a new legal system is needed, one which retains the primary sources but which no longer conforms to the classical model in methodology. New techniques and methods of legal reasoning may be instituted to accommodate social change.

The deliberate misinterpretation and suppression of Islamic legal principles in the same vein as our fictional judge who found the Indian guilty of violating the Small Birds Act should never be permitted. This obfuscation leads to confusion and misunderstanding not only among foreign cultures but within the Islamic culture itself. It will ultimately lead to unrestrained arbitrariness and inevitable unjustness. What is needed is an educated self-disciplined approach to the law by those who are well-versed in the law and in tune with society.

The lawyers, jurists, and judges of society are the builders of its legal system. They are empowered with a sacred trust because within the flexible reaches of the law they have a chance to incorporate, modify or remove that which is not in accord with the theory of the legal system and society, a theory promoting human welfare in accord with societal change and evolution. Without a total denial of the Islamic legal system, it is still possible to trace this path without too much rigidity nor too much flexibility. The system itself prescribes such a path in the very concept of Shari'a. But it will be the Muslim who understands *both* the law and culture who will decide this question.

Apartheid Outside Africa: The Case of Israel

*John Quigley**

The term "apartheid" evokes South Africa, but systematic racial discrimination is not unique to that nation. Charges have emerged from many quarters. Some aboriginal peoples claim they are victims. Religious-based states may violate the rights of racial groups that do not adhere to the religion. Racial groups not reflected in the power base are found in Africa and the Middle East, where colonial-drawn boundaries threw racial groups together in a single state. As Eastern Europe changes its political face, racial animosities are surfacing that may yield systematic oppression of minorities.

The apartheid claim has been leveled in Israel, whose treatment of its minority population of Arabs has been the subject of controversy. The United Nations General Assembly called Zionism, the national ideology of Israel, "a form of racism and racial discrimination," a charge prompted primarily by Israel's treatment of the Arabs within its borders.[1] British historian Arnold Toynbee called Israel "a racialist state. . ." and said that "it is wrong that people feel differently about the rights and wrongs of the existence of the state of Israel versus white South Africa. . . ."[2]

Others have challenged this charge. Thomas Franck wrote that "[t]he South African problem has almost nothing in common" with that of Israel.[3] The term "racism" in the General Assembly resolution,

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* Professor of Law, Ohio State University. LL.B., M.A. 1966, Harvard Law School; M.A.

1. G.A. Res. 3379, U.N. GAOR, 30th sess. Supp. No. 34, at 83, U.N. Doc. A/10034 (1976).

2. *Arnold Toynbee on the Arab-Israeli Conflict: Interview*, 2 *J. Palestine Stud.* 3, 11-12, no. 3 (1973). For other authors characterizing Israel's treatment of the Palestinian Arabs as apartheid-like, *see* Brice Harris, Jr., *The South Africanization of Israel*, 6 ARAB STUD. Q. 169-189 (1984); Shawky Zeidan, *A Human Rights Settlement: The West Bank and Gaza*, HUMAN RIGHTS AND THIRD WORLD DEVELOPMENT 170 (George Shepherd & Ved Nanda eds. 1985) [hereinafter Zeidan]; LEFTEN STAVRIANOS, GLOBAL RIFT: THE THIRD WORLD COMES OF AGE 784 (1981).

3. THOMAS M. FRANCK, NATION AGAINST NATION: WHAT HAPPENED TO THE U.N. DREAM AND WHAT THE U.S. CAN DO ABOUT IT 219 (1985).

he said, "has been misapplied, egregiously, to Zionism."[4] John Norton Moore denied "that a class of citizens within Israel is denied self-determination as with apartheid in South Africa. . . ."[5]

Israel itself has strenuously denied that its policy towards the Arabs in its borders is one of apartheid. When Iraq leveled the charge at the United Nations in 1961, Israel's representative replied, "[t]o say the Jews deny ordinary rights is one of the most astonishing statements heard in the history of the United Nations."[6]

In the wake of the Persian Gulf War of 1991, resolution of the Palestinian-Israeli conflict is high on the international agenda. The major issue to be resolved is the situation of those Palestinian Arabs residing in the Gaza Strip and the West Bank, who came under Israel's control in 1967. But the question of Israel's treatment of the Arabs in its own territory has also sharpened of late. When in 1987 the Arabs of the Gaza Strip and West Bank initiated an uprising against Israel, the Arabs in Israel undertook sympathy actions in their support. They advocated not only Palestinian statehood for the Gaza Strip and West Bank but improvements in their own treatment.

This article assesses the two conflicting views about Israel's policy towards the Palestinian Arabs in the territory of Israel. It examines aspects of Israel's policy that are alleged to constitute apartheid. The internationally agreed definition of apartheid will serve as the guidepost.

I. APARTHEID DEFINED

Racial discrimination is prohibited by both the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination.[7] This prohibition includes apartheid, which is an aggravated form of racial discrimination. The International Court of Justice has said, referring to South African policy in Namibia, that race-based distinctions "which constitute a denial of fundamental human rights" are a "flagrant violation of the purposes

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4. *Id.* at 210.

5. John N. Moore, *The Arab-Israeli Conflict and the Obligation to Pursue Peaceful Settlement of International Disputes*, 19 KAN. L. REV. 403, 429 (1971).

6. *Iraqi UN Delegate Compares Zionism to Apartheid*, JERUSALEM POST, Nov. 8, 1961, at 2, col. 2.

7. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 2(1), 999 U.N.T.S. 171, 6 I.L.M. 368, 369 (1967); *see also* International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, art. 2, 660 U.N.T.S. 195, 5 I.L.M. 350, 354 (1966) [hereinafter Elimination of All Forms of Racial Discrimination].

and principles of the [United Nations] Charter,"[8] and that "[t]he norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law."[9] The American Law Institute, in its *Restatement of Foreign Relations Law*, says, "[r]acial discrimination is a violation of customary law when it is practiced systematically as a matter of state policy, e.g., apartheid in the Republic of South Africa."[10]

While it is clear that apartheid is unlawful, defining it is complicated, because apartheid involves a series of policies. McDougal, Lasswell, and Chen defined apartheid as "a complex set of practices of domination and subjection, intensely hierarchized and sustained by the whole apparatus of the state, which affects the distribution of all values."[11]

A more detailed definition of apartheid appears in the International Convention on the Suppression and Punishment of the Crime of Apartheid, a treaty that holds those who perpetrate apartheid individually responsible.[12] The Convention has wide adherence.[13] Nonetheless, the American Law Institute, referring to the Apartheid Convention's definition of apartheid, said, "[p]resumably the same definition would obtain for purposes of the prohibition of apartheid."[14]

The Convention defined apartheid as "the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them."[15] The listing that follows covers

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8. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 57.

9. South West Africa Cases (Ethiopia v. S. Africa; Liberia v. S. Africa), Second Phase, 1966 I.C.J. 6, 293 (Tanaka, J., dissent).

10. 2 REST. 3RD, RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 165 (1986). *See also Apartheid*, 8 ENCYCLOPEDIA OF PUBLIC INT'L L. 37, 39 (Max Planck Inst. for Comp. Pub. L. and Int'l L. 1985).

11. MYRES S. MCDOUGAL, *et al.*, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 523 (1980).

12. International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243, 13 I.L.M. 50 (1974) [hereinafter Apartheid Convention].

13. States of the industrialized West have not ratified the Apartheid Convention. This is so not because they consider apartheid lawful, but because they object to characterizing it as a crime. Many of these states have ratified the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination. Israel is not a party to the Apartheid Convention.

14. RESTATEMENT, *supra* note 10, at 172 (reporter's note).

15. Apartheid Convention, *supra* note 12, art. 2.

the murder of members of a racial group, the infliction on them of serious bodily or mental harm, arbitrary arrest and imprisonment, the imposition of conditions calculated to cause a racial group's complete or partial physical destruction, measures that keep a racial group from participating in the political, social, economic, or cultural life of a state, measures that physically segregate a racial group, the expropriation of the land of a racial group, the subjection of a racial group to forced labor, and the persecution of persons who oppose apartheid.[16]

The Convention was drafted as its focus Rhodesia, Namibia, and South Africa. Article 2 defined the crime of apartheid as "similar policies and practices of racial segregation and discrimination as practiced in southern Africa. . . ."[17] But delegates of states involved in the drafting contemplated that the Convention would prohibit apartheid anywhere.[18] According to the United Nations Commission on Human Rights, "although southern Africa is the chief concern of the Convention," its "implementation is general," owing to "concern that apartheid be recognized and dealt with for what it is, regardless of where it occurs."[19]

II. DISPLACED PALESTINIAN ARABS

In 1948 the state of Israel was established in a portion of the territory formerly called Palestine. The new state included what had been Palestine, less the Gaza Strip and the West Bank of the Jordan River. The population was predominantly Arab, but during the hostilities that surrounded the establishment of Israel in 1948, most of them were displaced. A small number of Arabs remained, as a minority within a majority Jewish population.

The Palestinian Arabs felt aggrieved by the displacement of their fellow countrypeople, and by their reduction from the predominant population group to a minority. The Jews who established Israel viewed it as a state for the Jews of the world, which implied less than full

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16. *Id.*

17. *Id.*

18. Roger S. Clark, *The Crime of Apartheid*, in 1 INTERNATIONAL CRIMINAL LAW: CRIMES 299, at 303 n.20, 311 n.45 (M. Cherif Bassiouni ed. 1986).

19. U.N. Commission on Human Rights, *Implementation of the International Convention on the Suppression and Punishment of the Crime of Apartheid: study on ways and means of insuring the implementation of international instruments such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, including the establishment of the international jurisdiction envisaged by the Convention* 1 (Introduction, ¶7), U.N. Doc. E/CN.4/1426 (Jan. 19, 1981).

status for others. For Israel, the Palestinian Arabs were a potential fifth column, hostile to the concept of a Jewish state in territory they deemed wrongfully taken from them. The government instituted and maintained martial law in the Arab-populated areas until 1966.

The first manifestation of an Israeli policy towards the Palestinian Arabs came in 1948, during the hostilities that led to the formation of Israel as a state. As Israeli military units captured Arab towns, they compelled many of their residents to vacate. They frightened away many others by heavy bombardment. The Arabs' fear was heightened by executions of substantial numbers of Arab civilians perpetrated by right-wing elements among the Israeli forces. Over 85% of the 900,000 Arabs who at the start of 1948 lived in the territory that came to be Israel were gone by the end of that year, having become refugees in nearby states.[20]

Count Folke Bernadotte, who visited the region as United Nations mediator in September 1948, urged Israel to repatriate the Arab refugees. Israel was bringing Jews into the country as migrants, thereby adding to the settlers who had brought the Jewish segment of Palestine's population from less than 5% in the nineteenth century to 30% by 1947. Bernadotte found something wrong in this Jewish migration coupled with the refusal to repatriate the Arabs. "It would be an offence against the principles of elemental justice," Bernadotte said, "if these [Palestinian Arab] victims of the conflict were denied the right to return to their homes while Jewish immigrants flow into Palestine."[21] But David Ben Gurion, Israel's first prime minister, said of the Arab refugees, "[w]e must do everything to ensure that they never do return!"[22] The United Nations General Assembly called on Israel to repatriate the Arab refugees.[23] To date, it has not done so.

The Apartheid Convention prohibits measures "designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group."[24] If relocation to

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20. SIMHA FLAPAN, THE BIRTH OF ISRAEL: MYTHS AND REALITIES 42 (1987); BENNY MORRIS, THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, 1947-1949 235-36, 297-98 (1987); JOHN QUIGLEY, PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE 57-65 (1990).

21. Progress Report of the United Nations Mediator on Palestine, 3 U.N. GAOR, Supp. (No. 11), at 14, U.N. Doc. A/648 (1948).

22. MICHAEL BAR-ZOHAR, BEN GURION: THE ARMED PROPHET 148 (1967) (David Ben Gurion, diary entry, July 18, 1948) [hereinafter BAR-ZOHAR].

23. G.A. Res. 194, art. 11, 3 U.N. GAOR, *Res.* at 21, U.N. Doc. A/810 (1948).

24. Apartheid Convention, *supra* note 12, art. 2(d).

reserves within a state constitutes apartheid, then, per force, relocation out of the state must as well, since it separates the population even more definitively.

The Convention requires that the dividing of the population be undertaken to establish domination by one racial group over another. That would seem to have been the intent behind the forced relocation of the Palestinian Arabs. The aim of the political movement that established Israel was to form a Jewish state in a territory that was Arab. A Jewish state was not possible so long as an Arab majority remained. When Ben Gurion, in December 1947, planned the military campaign that would give Palestine over to his movement, he said that the offensive would "greatly reduce the percentage of Arabs in the population of the new state."[25]

As a result of the forced relocation and refusal to repatriate, Jews in Israel enjoy a numerical predominance over Arabs (83% to 17%). This numerical advantage alone would give the Jews a preponderant role. However, the Israeli government uses exclusionary legislation directed against the Arabs in important aspects of social life. To these measures the following sections of this article are addressed.

III. IDEOLOGY OF THE STATE

Israeli legislation reflects an official ideology that Israel is a Jewish state. Israel defines itself as a state of the Jews.[26] The Declaration of the Establishment of the State of Israel called Israel a "Jewish State." The signers identified themselves as "representatives of the Jewish Community of Eretz-Israel and of the Zionist Movement."[27] While the Declaration does not carry the force of law,[28] it has been held by the courts to define Israel's "fundamental credo."[29]

Israeli legislation identifies Israel as a Jewish state. In a 1952 law, the Knesset declared that Israel "regards itself as the creation of the

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25. BAR-ZOHAR, *supra* note 22, at 103.

26. CLAUDE KLEIN, LE CARACTÈRE JUIF DE L'ÉTAT D'ISRAËL 14 (1977) [hereinafter KLEIN]; Yehuda Savir, *The Definition of a Jew under Israel's Law of Return*, 17 SW. L. J. 123, 124 (1963).

27. Declaration of the Establishment of the State of Israel, paras. 9-10, 1 LAWS OF THE STATE OF ISRAEL 3 (1948).

28. ELIAHU S. LIKHOVSKI, ISRAEL'S PARLIAMENT: THE LAW OF THE KNESSET 13-14 (1971); Izhak Englard, *Law and Religion in Israel*, 35 AM. J. COMP. L. 185, 190 (1987).

29. DAVID KRETZMER, THE LEGAL STATUS OF THE ARABS IN ISRAEL, 17 (1990) [hereinafter KRETZMER].

entire Jewish people."[30] In a 1985 law the Knesset prohibited from standing in Knesset elections any candidates "rejecting the existence of the State of Israel as the state of the Jewish people."[31] The Knesset also prohibited its members from tabling a bill that "negates the existence of the State of Israel as the state of the Jewish people."[32]

In the Flag and Emblem Law, Israel's parliament (Knesset) used a Jewish symbol, the Star of David, in the state flag, and another Jewish symbol, the menorah, as the official emblem of the state.[33] The menorah is connected to the remembrance of the destruction of the Second Temple in Jerusalem by the Roman Emperor Titus. Its use, said one scholar, signifies that the establishment of Israel was "a return of the Jews to political existence as an independent nation."[34]

Judges in Israel refer to Jewish religious law in construing Israeli law.[35] One statute adopted by the Knesset requires a judge "faced with a legal question requiring decision" who "finds no answer to it in statute law or caselaw or by analogy" to "decide it in the light of the principles of freedom, justice, equity and peace of Israel's heritage."[36] Since Israel is defined legislatively as a Jewish state, "Israel's heritage" means Jewish heritage.[37]

In legislative drafting, said a former attorney general of Israel, "[w]henever our experts find in Jewish law a provision which we can adapt to the needs of our modern and progressive country, we give it priority over the provisions of other law systems."[38] The Ministry of

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30. WORLD ZIONIST ORGANIZATION—JEWISH AGENCY (STATUS) LAW, 7 LAWS OF THE STATE OF ISRAEL 3 (1952).

31. Basic Law: The Knesset (amend. No. 9), SEFER HA-HUKIM [Primary Legislation], no. 1155, at 196, Aug. 7, 1985; Sammy Smooha, *Political Intolerance: Threatening Israel's Democracy*, NEW OUTLOOK, at 27, 29 (July 1986).

32. 5746 YALKUT HAPIRSUMIM [Public Notices] 772 (1985, amendment to art. 134, Knesset Rules); KRETZMER, *supra* note 29, at 29; Asher Wallfish, *Knesset expected to bar racist bills*, JERUSALEM POST, Nov. 13, 1985, at 1, col. 2. Aryeh Rubinstein, *Knesset Forbids Racist and Anti-Zionist Bills*, JERUSALEM POST, Nov. 14, 1985, at 2, col. 2.

33. Flag and Emblem Law, 3 LAWS OF THE STATE OF ISRAEL 26 (1949).

34. KLEIN, *supra* note 26, at 25.

35. HAIM H. COHN, HUMAN RIGHTS IN JEWISH LAW 17 (1984); Izhak Englard, *The Problem of Jewish Law in a Jewish State*, 3 ISRAEL L. REV. 254, 272 (1968)(division of partnership property) [hereinafter England]; *see also id.* at 273-274 (validity of deathbed will).

36. Foundations of Law, 34 LAWS OF THE STATE OF ISRAEL 181 (1980).

37. KRETZMER, *supra* note 29, at 20.

38. SHABTAI ROSENNE, THE CONSTITUTIONAL AND LEGAL SYSTEM OF ISRAEL 11 (1957).

Justice set up a Jewish Law department to advise the Knesset committees on Jewish law as it relates to bills under consideration.[39] The drafters' commentary on the Succession Law of 1952 states: "In the essentials of the rules we have endeavoured to rest our proposals as far as possible upon Jewish Law, and in a number of matters—and among them the more basic, such as maintenance out of the estate—we regard our proposals as a kind of continuation of Jewish Law."[40] "Israel's specific mission is to constitute the national state of the Jews and to preserve and further Jewish national culture," explained one specialist in Jewish law.[41]

The Apartheid Convention includes as an act of apartheid "legislative measures" that are "calculated to prevent a racial group" from "participation in the political, social, economic and cultural life of the country."[42] A state's self-definition as a state of a single racial group impliedly excludes others, and where another substantial racial group is present, it is impliedly excluded. The state's self-definition is reflected in legislation on citizenship and on the role of Jewish organizations in national life. It is also seen in legislation on land-holding, political parties, housing, education, and child support.

IV. LAWS ON CITIZENSHIP

Preference for Jews is seen in Israel's laws on immigration and citizenship. The 1950 Law of Return gave "every Jew. . .the right to come to this country,"[43] while the 1952 Nationality Law conferred Israeli citizenship automatically on a Jew who settles in Israel.[44] An Israeli jurist-diplomat viewed this unrestricted immigration by Jews as an integral part of the aspiration for a Jewish state.[45] Ben Gurion, explaining the Law of Return, said, "[t]his is not a Jewish State only because Jews constitute a majority, but a State for Jews wherever they are, and for every Jew who wants to be here." He said that the Law

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39. Englard, *supra* note 35, at 268.

40. Menachem Elon, *The Sources and Nature of Jewish Law and Its Application in the State of Israel*, 4 ISRAEL L. REV. 80, 82 (1969).

41. Englard, *supra* note 28, at 187.

42. Apartheid Convention, *supra* note 12, art. 2(c).

43. Law of Return, art. 1, 4 LAWS OF THE STATE OF ISRAEL 114 (1950).

44. Nationality Law, art. 2, 6 LAWS OF THE STATE OF ISRAEL 50 (1952) [hereinafter Nationality Law].

45. Shabtai Rosenne, *The Israel Nationality Law 5712-1952 and the Law of Return 5710-1950*, 81 JOURNAL DU DROIT INTERNATIONAL 5, 7 (1954) [hereinafter Rosenne].

of Return embodied "a central purpose of our state, the purpose of the ingathering of exiles."[46]

Palestinian Arabs displaced in 1948 have no right to return under Israeli law: They are excluded from citizenship by a provision in the Nationality Law that permits acquisition of nationality by a person who maintained continuous residence in Israel from May 14, 1948, to July 14, 1952, or who legally returned during that period, if, in addition, the person registered as an inhabitant, by March 1, 1952.[47] This provision was intended to apply to Palestinian Arabs,[48] and it excluded from citizenship those Palestinian Arabs who departed in 1948, unless they returned legally before July 14, 1952.

The provision had little practical effect, however, because the Israeli government permitted few Arabs to return legally. The government's justification for this exclusion was that Palestinian Arabs who departed in 1948 were working against Israel:

> Insofar as relates to all non-Jews, the test of residence is the primary element, to be coupled with some external and easily ascertainable evidence of lack of disloyalty towards the State of Israel, for example by not having participated in the Arab exodus from Palestine organized by the Arab leaders in 1948 as part of the war plans of those days. . . .[49]

This rationale was based on a mischaracterization of the circumstances of the Palestinian Arabs' departure, which, as indicated above, was precipitated by the Israeli military.[50] Even if the departure had been voluntary, that fact would not be decisive. A voluntary departure to escape a military conflict does not imply a forfeiture of nationality.

For Jews, proof of continuous residence from May 14, 1948, to July 14, 1952, was not required by the Nationality Law, since any Jew from any state was automatically entitled to Israeli citizenship.[51] Thus, the proof requirement imposed on the Palestinian Arabs an obstacle not placed on Jews. Even for Arabs who never departed, the proof requirement was a serious impediment, because many Arabs could not prove residency to the satisfaction of authorities and thus

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46. 6 KNESSET DEBATES 2035 (July 3, 1950).
47. Nationality Law, *supra* note 44, art. 3.
48. Rosenne, *supra* note 45, at 9; KLEIN, *supra* note 26, at 93.
49. Rosenne, *supra* note 45, at 9.
50. *See supra* note 20.
51. Haim Margalith, *Enactment of a Nationality Law in Israel*, 2 AM. J. COMP. L. 63-66 (1953).

became stateless.[52] A child born of stateless parents was also stateless.

In 1968 the Nationality Law was amended to grant citizenship to such a stateless child if the child applied between the ages of 18 and 21 and had not been convicted of a security offense, or been sentenced to a term of five or more years imprisonment.[53] In 1980 the Nationality Law was amended again to remove the requirement of residency between 1948 and 1952 for those Arabs who were residents of Israel and to grant them citizenship from that time.[54]

Even with the 1968 and 1980 amendments, the Nationality Law retained distinctions between Jew and Arab. The legal route for acquiring Israeli nationality remained governed by different legislation.[55] The 1980 amendment permitted acquisition of Israeli nationality by only those Arabs who were citizens of Palestine at the time of the establishment of Israel, and many had held other citizenship.[56]

Apart from its implications for immigration, the Law of Return is used in legislation on import duties in a fashion that discriminates between Jew and Arab. The Specified Goods Tax and Luxury Tax Law of 1952 authorized the Minister of Finance to designate classes of persons for favorable treatment when they bring goods into Israel after a period of residence abroad.[57] Under this authorization, the Minister issued the Purchase Tax Order (Exemption) 1975, which required less import duty from a "returning national" than from a "returning resident."[58] The Order defined "returning national" to include only a person who "if the person were not an Israeli national the Law of Return would apply to him."[59] Thus, only a Jewish citizen of Israel qualified as a "returning national."[60] An Arab citizen of Israel

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52. Israeli League for Human and Civil Rights, *Citizenship in the State of Israel Today* (Aug. 1971), DOCUMENTS FROM ISRAEL, 1967-1973: READINGS FOR A CRITIQUE OF ZIONISM 88 (Uri Davis & Norton Mezvinsky eds. 1975).

53. Nationality (Amendment No. 2) Law, art. 3, 22 LAWS OF THE STATE OF ISRAEL 241 (1968).

54. Nationality (Amendment No. 4) Law, 34 LAWS OF THE STATE OF ISRAEL 254 (1980) [hereinafter Nationality (Amendment No. 4) Law].

55. KRETZMER, *supra* note 29, at 39.

56. Nationality (Amendment No. 4) Law, *supra* note 54, art. 2; KRETZMER, *supra* note 29, at 39.

57. Specified Goods Tax and Luxury Tax Law, Sept. 3, 1952, art. 26, 6 LAWS OF THE STATE OF ISRAEL 150 (1952).

58. 5736 KOVETZ HATAKANOT 36; DAVID KRETZMER & OSAMA HALABI, THE LEGAL STATUS OF THE ARABS IN ISRAEL 59 (1987) [hereinafter KRETZMER & HALABI].

59. Purchase Tax Order (Exemption) 1975, Definition 15 (returning resident), Definition 20 (returning national).

60. KRETZMER & HALABI, *supra* note 58, at 59.

was, for this purpose, not a citizen, and was obliged to pay higher customs duty.[61]

The U.S. Department of State, in a human rights report, said that the two laws "confer an advantage on Jews in matters of immigration and citizenship."[62] It has been argued in reply that these laws are not discriminatory, since a number of states favor certain ethnic groups in citizenship, and human rights law does not preclude such preference.[63] While certain states do grant ethnic preference,[64] that is permissible only "provided that such provisions do not discriminate against any particular nationality."[65] The Law of Return and the Nationality Law disadvantage the Palestinian Arabs and therefore violate human rights norms.

The Law of Return and Nationality Law have been called a reflection of "legal apartheid."[66] By discriminating against the indigenous inhabitants, both those who were displaced and those who were not, the two statutes constitute apartheid legislation. They prevent a racial group from participating in the political and social life of the state.

V. NATIONAL INSTITUTIONS

A legislatively mandated preference for Jews is found as well in the role accorded by Israeli law to the so-called national Jewish institutions.[67] The Jewish National Fund, the Jewish Agency (J.A.), and several other Jewish bodies perform important governmental functions

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61. Purchase Tax Order (Exemption) 1975, art. 7 (duties assessed on a returning resident), art 7A (duties assessed on a returning citizen).

62. U.S. Dept. of State, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1983 1286 (1984); *see also* Roselle Tekiner, *On the Inequality of Israeli Citizens*, 1 WITHOUT PREJUDICE 48, 51-54 (1987).

63. Ruth Lapidoth, *The Right of Return in International Law with Special Reference to the Palestinian Refugees*, 16 ISRAEL Y.B. ON HUMAN RIGHTS 103, 121 (1986). Asa Kasher, *Justice and Affirmative Action: Naturalization and the Law of Return*, 15 ISRAEL Y.B. ON HUMAN RIGHTS 101-112 (1985); KRETZMER, *supra* note 29, at 36 (n. 6) (reviewing views of Israeli authors).

64. Castro, *La Nationalité, la Double Nationalité et la Supra-Nationalité*, 1961(1) RECUEIL DES COURS 515, 566-68.

65. Elimination of All Forms of Racial Discrimination, *supra* note 7, art. 1(3).

66. URI DAVIS, ISRAEL: UTOPIA INCORPORATED 96 (1977); *see also* MAXIM GHILAN, HOW ISRAEL LOST ITS SOUL 174 (1974) [hereinafter GHILAN].

67. Nancy Jo Nelson, *The Zionist Organizational Structure*, 10 J. PALESTINE STUD. 80, no. 1, (1980).

in Israel.[68] They take as their function the furtherance of the interests of Jews.[69] This is problematic under the Apartheid Convention, because the government in effect delegates some of its authority to agencies that serve only the predominant racial group.

The Jewish Agency was created in the 1920s as the political arm of the World Zionist Organization (W.Z.O.).[70] In 1948 the Agency established the Israeli state. After 1948 the two organizations continued to function, to mobilize Jewish support for Israel. They coordinated the migration of Jews to Israel and financed their settlement there.[71]

The immigration of Jews, as indicated,[72] was viewed by Israel's government as one of its key functions. By statute the Knesset authorized the W.Z.O. and J.A. to handle this activity. The World Zionist Organization/Jewish Agency (Status) Law stated that the executive arm of the W.Z.O. was a "juristic body"[73] that "takes care as before of immigration and directs absorption and settlement projects in the State."[74] Thus, the 1952 statute made the W.Z.O. and J.A. responsible for one of the government's most vital activities.[75] A W.Z.O./J.A. resolution characterized the work of the two organizations as being "conducted in the interests of the State of Israel within the Diaspora."[76]

In 1971 the J.A. and W.Z.O. were separated into two organizations. The W.Z.O. assumed responsibility for Zionist political activity, and for promotion of immigration to Israel from Western states. The Jewish Agency took activities in Israel—rural settlement, immigrant absorption, youth training, and later, urban rehabilitation.[77] Policy for

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68. KRETZMER, *supra* note 29, at 96.

69. KRETZMER, *supra* note 29, at 97.

70. Nathan Feinberg, *The Recognition of the Jewish People in International Law*, JEWISH YEARBOOK OF INTERNATIONAL LAW 1948 1, 19-24 (1949).

71. TOM SEGEV, 1949: THE FIRST ISRAELIS 77, 103-05 (1986) [hereinafter SEGEV].

72. *See supra* notes 45-46.

73. World Zionist Organization—Jewish Agency (Status) Law, art. 11, 7 LAWS OF THE STATE OF ISRAEL 3 (1952).

74. *Id.*, art. 3.

75. ELMER BERGER, THE UNAUTHENTICITY OF 'JEWISH PEOPLE' ZIONISM, in JUDAISM OR ZIONISM: WHAT DIFFERENCE FOR THE MIDDLE EAST? 133, 141 (1986).

76. Resolution, *Status for the Zionist Organization*, para. c, Organization Department of the Zionist Executive, *Fundamental Issues of Zionist at the 23rd Zionist Congress* 135-136 (1952), W. Thomas Mallison, *The Legal Problems Concerning the Juridical Status and Political Activities of the Zionist Organization/Jewish Agency*, 9 WILLIAM & MARY L. REV. 556, at 583 (1968).

77. Abraham Rabinovich, *Expanded Agency Opens Founding Session Today*, JERUSALEM POST, June 21, 1971, at 8, col. 3.

the two organizations was set by a single body—the World Zionist Congress.

The governmental role of the W.Z.O. and J.A. is reflected by the fact that the 1971 division required an amendment of the 1952 Status Law. The amendment stated that the two bodies should coordinate their activities with the government of Israel through a government-W.Z.O. committee and a government-J.A. committee: "Two committees shall be set up for the coordination of activities between the Government and the World Zionist Organization and the Jewish Agency for Israel."[78]

Until 1968 the two organizations alone were responsible for immigrant absorption, to the exclusion of the government. In that year the government established a Ministry of Immigrant Absorption,[79] but the J.A. continued to handle the bulk of the task, administratively and financially.[80]

The J.A. performs other statutory duties that involve it in governmental decisions. It nominates (for appointment by the Minister of the Interior) one member to the National Board for Planning and Building, which oversees building construction in Israel.[81] It nominates a member to the Committee for the Protection of Agricultural Land, which prevents encroachment on agricultural land.[82] The major role of the national institutions is in the control and management of land.

VI. LAND-HOLDING

In 1901 the W.Z.O. established the Jewish National Fund (J.N.F.) (Keren Kayemeth LeIsrael) to acquire land in Palestine,[83] and, in 1920, the Palestine Foundation Fund (Keren Hayesod), to finance settlement

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78. World Zionist Organization—Jewish Agency for Israel (Status)(Amendment) Law, art. 7, 30 LAWS OF THE STATE OF ISRAEL, 43 (1975).

79. ISRAEL GOVERNMENT YEAR BOOK 5729 (1968/69) 255 (Prime Minister's Office, 1969).

80. Hasan Amun, Uri Davis & Nasr Dakhlallah San'allah, *Deir Al-Asad: The Destiny of an Arab Village in Galilee: A Case Study towards a Social and Political Analysis of the Palestinian-Arab Society in Israel*, PALESTINIAN ARABS IN ISRAEL: TWO CASE STUDIES 1, 59 (Hasan Amun et al. eds. 1977).

81. Planning and Building Law, art. 1(2)(b)(11), 19 LAWS OF THE STATE OF ISRAEL 331 (1965).

82. *Id.*, First Schedule, sec. 2(5).

83. ABRAHAM GRANOTT, THE LAND SYSTEM IN PALESTINE: HISTORY AND STRUCTURE 275-85 (1952).

on land purchased by the J.N.F.[84] Headquartered in New York, the J.N.F. continues to function as a subordinate body of the W.Z.O./J.A.[85] Like the W.Z.O./J.A., the J.N.F. operates in Israel on the basis of a statute recognizing it and its functions. The Jewish National Fund Law of 1953 made the J.N.F. an Israeli corporation "to continue the activities of the existing company."[86]

The J.N.F. describes its role as using "charitable funds" in ways "beneficial to persons of Jewish religion, race or origin."[87] Like the J.N.F., the Keren Hayesod was transformed after 1948 into an Israeli corporation by special legislation. It was renamed "Keren Hayesod—United Israel Appeal."[88]

The government of Israel expropriated the land of the Arabs who left as refugees in 1948, and thereafter expropriated most of the land of those who remained.[89] This would seem to violate the Apartheid Convention's prohibition against "the expropriation of landed property belonging to a racial group."[90]

The Knesset legislated a land tenure system that ensured exclusive use by Jews of most of Israel's land. The government and the J.N.F. own 75% and 17.6%, respectively, of Israel's land, for a total of 92.6%.[91] Of the remaining 7.4%, some is encumbered by deed clauses prohibiting sale to persons other than Jews.[92] The U.S. State Department, reporting on human rights in Israel, stated, "[t]itle to 93 percent of the land in Israel is held by the State or quasi-public organizations in trust for the Jewish people. According to law, anyone may purchase the remaining seven percent of privately-owned land through ordinary commercial transactions."[93]

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84. ARIEH L. AVNERI, THE CLAIM OF DISPOSSESSION: JEWISH LAND-SETTLEMENT AND THE ARABS 1878-1948 111 (1948).

85. LEE O'BRIEN, AMERICAN JEWISH ORGANIZATIONS & ISRAEL 130-34 (1986).

86. Keren Kayemeth LeIsrael Law, art. 2, 8 LAWS OF THE STATE OF ISRAEL 35 (1953).

87. Keren Kayemeth LeIsrael, Head Office, *Report on the Legal Structure, Activities, Assets, Income and Liabilities of the Keren Kayemeth LeIsrael*, (1973), *in* NOAM CHOMSKY, TOWARDS A NEW COLD WAR 247-48 (1982) [hereinafter Chomsky].

88. Keren Hayesod Law, art. 2, 10 LAWS OF THE STATE OF ISRAEL 24 (1956).

89. IAN LUSTICK, ARABS IN THE JEWISH STATE: ISRAEL'S CONTROL OF A NATIONAL MINORITY 179 (1980) [hereinafter LUSTICK].

90. Apartheid Convention, *supra* note 12, art. 2(d).

91. LUSTICK, *supra* note 89, at 99.

92. Uri Davis & Walter Lehn, *And the Fund Still Lives: The Role of the Jewish National Fund in the Determination of Israel's Land Policies*, 7 J. PALESTINE STUD. 3, 23-25, no. 4, (1978) [hereinafter Davis & Lehn].

93. U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1984 1266 (1985).

Neither the government nor the J.N.F. may sell land they own. By statute, "[t]he ownership of Israel lands, being the lands in Israel of the State, the Development Authority or the Keren Kayemet Le-Israel [J.N.F.], shall not be transferred either by sale or in any other manner."[94] The J.N.F. Memorandum of Association also prohibits it from alienating any of its land.[95]

As result of the prohibition against alienation much land confiscated from Palestinian Arabs is inalienable, and therefore cannot be re-acquired by them, even by purchase.[96] "Thus," as explained by a former Chairman of the Board of the J.N.F., "a great rule was laid down, which has a decisive and basic significance—that the property of absentees cannot be transferred in ownership to anyone but national public institutions alone, namely, either the State itself, or the original Land Institution of the Zionist Movement."[97]

The J.N.F. promotes Jewish settlement on its land. Its Memorandum of Association (corporate charter) requires it to use its land and resources to benefit Jews, namely, "to purchase. . .land. . .for the purpose of settling Jews on such lands" and "to make donations. . .and to provide means, to promote the interests of the Jews."[98]

The fact that by legislation most of the land of Israel is reserved for use by Jews is comparable to the legislative situation in South Africa when apartheid was instituted. The Native Land Act of 1913 set aside 7% of the territory for Africans and prohibited them from acquiring land in the other 93%.[99] In 1936 the Native Trust and Land Act increased the amount of land available to Africans to 13%.[100] The South African law protected the 13% as indigenous land, whereas the Israeli legislation excludes the indigenous population from the settlers'

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94. Basic Law: Israel Lands, art. 1, 14 LAWS OF THE STATE OF ISRAEL 48 (1960).

95. Keren Kayemeth LeIsrael, Memorandum of Association, art. 3(h), May 20, 1954, approved by Minister of Justice, *reprinted in* 2 PALESTINE Y.B. INT'L L. 206 (1985) [hereinafter Leisrael].

96. Even before the enactment in 1960 of the Basic Law: Israel Lands, this result was achieved by the Development Authority Law. 4 LAWS OF THE STATE OF ISRAEL 151 (1950).

97. ABRAHAM GRANOTT, AGRARIAN REFORM AND THE RECORD OF ISRAEL 104 (1956).

98. Leisrael, *supra* note 95, art. 3(a)(g).

99. Bantu Land Act, No. 27, 9 STATUTES OF THE REPUBLIC OF SOUTH AFRICA 21 (1913).

100. Bantu Trust and Land Act, No. 18, 9 STATUTES OF THE REPUBLIC OF SOUTH AFRICA 371 (1936).

land but does not exclude the settlers from the indigenous land: In this respect, Israel's land tenure system is less favorable to the indigenous population than South Africa's.

Legislation does not prohibit the leasing of state or J.N.F. land to non-Jews. However, the J.N.F. controls both categories of land and does not lease to non-Jews. Land owned by the J.N.F. has, since 1960, been administered by the Israel Lands Administration.[101] The J.N.F. participates in management of the Administration. The J.N.F. has leased much land for construction of housing for Jews[102] and for kibbutzim, collective farms that accept only Jews as members.[103] However, it does not lease to Arabs, except on occasion for short terms.[104] Thus, Arabs "are excluded from using or living on those large tracts of their own country which belong to the Jewish National Fund."[105]

A prohibition against lease of J.N.F. land to non-Jews was contained in the J.N.F. 1907 Memorandum of Association, which included among J.N.F. objectives: "to let any land. . .of the Association to any Jew or to any unincorporated body of Jews" or to a company "under Jewish control."[106] The proviso was omitted from a revised charter when the J.N.F. was incorporated in Israel in 1954. The 1954 Memorandum of Association, however, directed the Fund to purchase land "for the purpose of settling Jews on such land,"[107] implying that it would be leased to Jews.

The earlier proviso permitting leasing to Jews was omitted, according to a Fund internal memorandum, only because "[t]he undesirable impression might be created of so-called racist restrictions." The memorandum continued: "even without these explicit prohibitions, the J.N.F. Board of Directors will know how to administer the work of the institution in accordance with the explicit object as specified in the aforementioned clause [the restriction regarding leasing to Jews only] which remains unchanged."[108]

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101. Israel Lands Administration Law, art. 2(a), 14 LAWS OF THE STATE OF ISRAEL 50 (1960).

102. David Tanne, *Housing*, IMMIGRATION AND SETTLEMENT IN ISRAEL 122, 125 (Israel Pocket Library, 1973) [hereinafter IMMIGRATION AND SETTLEMENT IN ISRAEL].

103. J. Weisman, *The Kibbutz: Israel's Collective Settlement*, 1 ISRAEL L. REV. 99, 101 (1966).

104. KRETZMER, *supra* note 29, at 62.

105. Editorial, *Struck Off the Israeli List*, THE TIMES (London), June 20, 1984, at 11, col. 1.

106. Keren Kayemeth Leisrael Limited, Memorandum of Association, art. 3(3), March 28, 1907, *reprinted in* 2 PALESTINE Y.B. INT'L L. 195 (1985).

107. Keren Kayemeth LeIsrael, *supra* note 95, art. 3(a).

108. *The JNF, Association Limited by Guarantee and Not Having a Capital Divided into Shares* (1952), Davis & Lehn, *supra* note 92, at 9.

Regarding state land, there is no statutory limitation as to the race of a lessee. However, the government follows the same practice as the J.N.F., which takes a primary role in administering state land. Lands owned by both the state and Fund are administered together by the Israel Lands Administration, which is directed by the Israel Lands Council, which in turn is appointed by the government.[109] The government has appointed six J.N.F. representatives and seven government representatives.[110] The J.N.F. thus wields considerable influence in the administration of state land.

In 1961 the government and J.N.F. concluded between them a "land covenant" that gave the Fund the exclusive right and obligation for land development in Israel. Accomplished by the J.N.F. Land Development Administration, this task includes land reclamation, drainage, afforestation, and the opening of new border areas for settlement.[111] The J.N.F. is also the joint operator, along with the Ministry of Agriculture, of the Israel Lands Administration, which controls all state-owned land.[112] Its regulations limiting use of land to Jews apply to this state land as well as to J.N.F. land. Power exercised by the J.N.F. over state land means that the J.N.F. exclusivist principles became official policy.[113] A 1973 J.N.F. report indicated that the 1960 land legislation had been enacted by the Knesset only on J.N.F. agreement and that the legislation made its exclusivist policies into state policy.[114]

The J.N.F. Memorandum of Association provided that once the Fund leases land, "no lessee shall be entitled to effect any sublease. . . ."[115] Nevertheless, in the 1950s and 1960s some Jewish lessees of Fund and state agricultural land sublet it to Arab farmers. In 1967 the Knesset enacted a law that prohibited subleasing. As a penalty it provided for the forfeiture of lease rights in land a Jew might sublet.[116] One Knesset member objected that the purpose was to prevent

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109. Israel Lands Administration Law, arts. 2-3, 14 LAWS OF THE STATE OF ISRAEL 50 (1960).

110. Jacob Tsur, *The Jewish National Fund*, IMMIGRATION AND SETTLEMENT IN ISRAEL, *supra* note 102, at 112, 115.

111. Covenant between the State of Israel and Keren Kayemeth LeIsrael, art. 10, Nov. 28, 1961, 2 PALESTINE Y.B. INT'L L. 214 (1985) [hereinafter Covenant]; LUSTICK, *supra* note 89, at 99.

112. Covenant, *supra* note 111, art. 2; LUSTICK, *supra* note 89, at 99.

113. CHOMSKY, *supra* note 87, at 248.

114. Keren Kayemeth LeIsrael Head Office, Jerusalem, *Report on the Legal Structure, Activities, Assets, Income and Liabilities of the Keren Kayemeth LeIsrael* 6 (1973), CHOMSKY, *supra* note 87, at 249.

115. Keren Kayemeth LeIsrael, *supra* note 95, art. 3(e).

116. Agricultural Settlement (Restrictions on Use of Agricultural Land and of Water) Law, art. 7, 21 LAWS OF THE STATE OF ISRAEL 105 (1967).

subleasing to Arabs.[117] Another member said that this law reflected "racism and national discrimination."[118]

Under the 1967 law the government has confiscated land sublet to Arab farmers.[119] The Director of the Galilee office of the Jewish Agency's Settlement Department sent a notice in 1975 to settlements established by the Department in Galilee, which has a large Arab population, warning of the illegality of leasing state or J.N.F. land to Arabs to be cultivated by them as share-croppers, or of renting orchards to Arabs for picking and marketing of fruit. To bolster its warning, the Department noted that it had in 1974 pressed charges against violators.[120]

The legislation providing for performance of governmental functions by the W.Z.O./J.A., the J.N.F., and the Keren Hayesod "means that the Zionist doctrine is professed officially by the state."[121] The governmental character of these organizations is reflected in the fact that the Israeli penal code includes employees of the W.Z.O., J.A., J.N.F., and the Keren Hayesod—United Israel Appeal in its definition of "public servant."[122] This definition applies to such offenses as bribery, abuse of office, and impersonation or insult of a public servant.[123]

In 1989 the National Labor Court ruled that the World Zionist Organization was a "public body" and was therefore bound by Israel's administrative law as regards the dismissal of its staff workers. The W.Z.O. had dismissed a worker for political reasons, but the Court ordered reinstatement. The Court treated the W.Z.O. as a governmental institution.[124]

While the national institutions perform tasks of a governmental nature, their mandate restricts them to dealing with the Jewish sector.[125] A J.N.F. official acknowledged that "[t]he Government would have to look after all citizens if they [the Government] owned the land; since the JNF owns the land, let's be frank, we can serve just the Jewish

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117. 47 KNESSET DEBATES 165 (Oct. 31, 1966) (MK Uri Avnery).

118. *Id.* at 168 (MK Tawfiq Toubi).

119. Uri Davis, *Palestine into Israel*, 3 J. PALESTINE STUD. 88, 97-98, no. 1 (1973).

120. Meir Hareuveni, *The Israeli Settlement Authorities Are Taking Action Against the Leasing of Lands to Arabs*, MA'ARIV, July 3, 1975, at 4.

121. KLEIN, *supra* note 26, at 22.

122. Penal Law, art. 2, arts. 277-297, LAWS OF THE STATE OF ISRAEL: SPECIAL VOLUME, 5737-1977 9 (1977).

123. *Id.*, arts. 277-280, 283-285, 290.

124. BULLETIN OF LEGAL DEVELOPMENT (British Institute of International and Comparative Law), no. 23, Dec. 1, 1989.

125. KRETZMER, *supra* note 29, at 96-97.

people."[126] Since it acquires and protects land for the Jewish sector of the population only, the J.N.F. acts in a discriminatory fashion.[127]

The Apartheid Convention prohibits "legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country," if such measures are undertaken to maintain "domination by one racial group" over another.[128]

Performance of governmental functions by the national institutions is an act of apartheid in two ways: first, these institutions promote the interests of Jews; second, the Palestinian Arabs are not permitted participation in the management of the institutions and thus they are excluded from a role in important governmental activity.

VII. PARLIAMENTARY REPRESENTATION

The Apartheid Convention prohibits the exclusion of a racial group from the political process.[129] The Palestinian Arabs in Israel have the right to vote and to be elected to the Knesset.[130] As a result of the 1948 expulsion, however, the number of Arabs eligible to vote (17% of the electorate) is too small to threaten Jewish control.[131] The 17%, moreover, includes the 100,000 Arabs of East Jerusalem, few of whom vote because they object to the attempted annexation of East Jerusalem by Israel in 1967.[132] The confiscation of Arab land cut the economic base of the Arab population and thereby reduced its political power. Arabs have never held more than eight of the 120 seats in the Knesset.[133]

Although the Palestinian Arabs, because of their numbers, have no possibility of controlling the Knesset, Israel's government has moved

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126. LUSTICK, *supra* note 89, at 106.

127. *Id.* at 100 (As "a convenient instrument for an acquisitive, exclusivist land policy. . .the JNF contributes to the segmentation of Israeli society between Jews and Arabs").

128. Apartheid Convention, *supra* note 12, art. 2.

129. Apartheid Convention, *supra* note 12, art. 2(c).

130. Basic Law (The Knesset), arts. 5-6, 12 LAWS OF THE STATE OF ISRAEL 85 (1958).

131. GEORGE JABBOUR, SETTLER COLONIALISM IN SOUTHERN AFRICA AND THE MIDDLE EAST 81 (1970); Mohammed Aly El Ewainy, *Racial Ideology in Israel and Southern Africa*, 29 REVUE ÉGYPTIENNE DE DROIT INTERNATIONAL 279, 282 (1973); John Dugard, Review of *Israel: An Apartheid State*, 4 PALESTINE Y.B. INT'L L. 366, 367 (1987-88).

132. Henry Kamm, *Most Arabs Boycott Jerusalem Election*, N.Y. TIMES, Jan. 1, 1974, at A2, col. 4.

133. U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1984 1266 (1985).

administratively to keep them from playing an important political role. For example, in the 1950s, using its martial law powers, Israel's government prevented Arab political organizing. The military administration did not permit travel by Arabs from one town to another without a permit, and it routinely denied permits to political activists.[134] It issued house arrest orders against some activists.[135] It prevented meetings and public speeches of a nationalist group called the Popular Front.[136]

In national elections, the military administration coerced Arabs to vote for the party in power, which was called Mapai.[137] Military authorities threatened land confiscation or loss of work permits to persons supporting non-Zionist parties.[138] "[T]hrough the military government," said Teddy Kollek, later the mayor of Jerusalem, "Arab votes were secured."[139]

The Mapai Party pressured Arabs to put together lists of Arab candidates for the general elections, to co-opt the Arabs.[140] A 1959 Mapai internal memorandum explained that through the lists Mapai "ensured that those lists would not consolidate into an independent Arab bloc."[141]

In local politics in Arab areas, the Israeli government thwarted election to municipal councils of nationalist-minded candidates.[142] In some instances when such candidates were elected, the Ministry of the Interior dissolved the council or cut allocations to the municipal budget.[143]

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134. LUSTICK, *supra* note 89, at 192-93.

135. Michael Saltman, *The Use of the Mandatory Emergency Laws in Israel*, 10 INT'L J. SOCIOLOGY OF L. 385, 392 (1982) [hereinafter Saltman].

136. JACOB M. LANDAU, THE ARABS IN ISRAEL: A POLITICAL STUDY 94 (1969).

137. Atallah Mansour, *Israel's Arabs Go to the Polls*, NEW OUTLOOK, at 23-24 (Jan. 1960); ELIA ZUREIK, THE PALESTINIANS IN ISRAEL: A STUDY IN INTERNAL COLONIALISM 120 (1979) [hereinafter ZUREIK]; RAFIK HALABI, THE WEST BANK STORY 237 (1982); SABRI JIRYIS, THE ARABS IN ISRAEL 50-51 (1976) [hereinafter JIRYIS].

138. WALTER SCHWARZ, THE ARABS IN ISRAEL 67 (1959) [hereinafter SCHWARZ]; GHILAN, *supra* note 66, at 197-198; *see also* MOSHE MENUHIN, THE DECADENCE OF JUDAISM IN OUR TIME 194 (1965) (statement by Third Force Movement to U.N. Commission on Human Rights, Nov. 21, 1961: "The Governor will also see to it that a worker who has expressed sympathy with the anti-Zionist party should get no permit to go to look for work, and he and his family should remain unemployed and hungry").

139. TEDDY KOLLEK, FOR JERUSALEM 121 (1978).

140. SEGEV, *supra* note 71, at 66.

141. SEGEV, *supra* note 71, at 66 (Recommendations for Dealing with the Arab Minority in Israel, Sept. 1959).

142. JIRYIS, *supra* note 137, at 248.

143. LUSTICK, *supra* note 89, at 142-143.

The official who served in the 1950s as the Israeli government's advisor on Arab affairs used apartheid terminology to describe the government's exclusion of Arabs from the political process: "I behaved toward them [Arabs] as a wolf in sheep's clothing—harsh, but outwardly decent. I opposed the integration of Arabs into Israeli society. I preferred separate development."[144] "Separate development" is the term used in English by the South African government to translate "apartheid". The Israeli official understood that "separate development" excluded Arabs from the political process: "True, this prevented the Arabs from integrating into the Israeli democracy. Yet they had never had democracy before. Since they never had it, they never missed it. The separation made it possible to maintain a democratic regime within the Jewish population alone."[145]

Despite the pressures of the government and of Mapai, Arab nationalists tried to form political parties of their own, but the government moved to stop them. In the late 1950s, the military government prevented the operation of a nationalist group called the Arab Front.[146] In 1960, the military government confiscated publications of the nationalist political organization called Al-Ard (The Land) and arrested its leaders.[147] In 1964, Al-Ard presented a list of candidates for Knesset elections under the name Arab Socialist List. The district commissioner of Haifa denied the group the right to form on the ground that "its aim was to undermine the existence and security of the State of Israel."[148] The Supreme Court upheld the denial, with Judge Witkon stating that Al-Ard's platform "expressly and totally negates the existence of the state of Israel in general and its existence within its present boundaries in particular."[149] Following the Supreme Court decision, the Minister of Defense declared Al-Ard an "illegal association."[150]

In 1965 ten candidates sought to run for the Knesset as the Arab Socialist List. The Central Elections Committee rejected the List as

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144. SEGEV, *supra* note 71, at 67 (interview with Yehoshua Felmann (Palmon), Advisor on Arab Affairs, June 6, 1983).

145. *Id.*

146. SCHWARZ, *supra* note 138, at 90-92.

147. ZUREIK, *supra* note 137, at 173.

148. Sabri Jiryis v. Haifa District Commissioner, High Court Case No. 253/64, 18(4) Piskei Din 673 (1964), *summarized in Law Report*, JERUSALEM POST, Nov. 17, 1964, at 4, col. 1.

149. *Id.* (Witkon, J.).

150. ORI STENDEL, THE MINORITIES IN ISRAEL: TRENDS IN THE DEVELOPMENT OF THE ARAB AND DRUZE COMMUNITIES, 1948-1973 143-44 (1973).

"an unlawful association, because its promoters deny the integrity of the State of Israel and its very existence."[151] The Supreme Court affirmed the rejection. Judge Agranat said that the Committee could not disregard "the continuity and perpetuity" of Israel as a "sovereign Jewish state."[152] Judge Sussman said that the List's aim was "destruction of the state."[153] Judge Cohn dissented on the ground that the election law did not authorize the exclusion of prospective candidates on the basis of their views.[154]

In 1980 the government banned two political congresses, planned to be held in the towns of Nazareth and Shfar'am, that might have led to the founding of an Arab political party.[155] In 1980 the Knesset amended the Prevention of Terrorism Ordinance to prohibit:

> any act manifesting identification or sympathy with a terrorist organization in a public place or in such manner that persons in a public place can see or hear such manifestation of identification or sympathy, either by flying a flag or displaying a symbol or slogan or by causing an anthem or slogan to be heard, or any other similar overt act clearly manifesting such identification or sympathy as aforesaid.[156]

This provision effectively outlawed any political activity to support the Palestine Liberation Organization, which the Israeli government deemed terrorist.

In 1984 the Central Elections Committee disqualified a list of Knesset candidates presented by an Arab-Jewish coalition called the Progressive List for Peace, which advocated a West Bank-Gaza Palestinian state and negotiations between Israel and the Palestine Liberation Organization.[157] The candidates stood, after a favorable ruling by the Supreme Court on their appeal of the Committee action.[158] The Court

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151. Yaridor v. Central Elections Committee, 19(3) Piskei Din, 369 (1965).

152. *Id.* at 386.

153. *Id.* at 389.

154. *Id.* at 381-82.

155. U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1980 998 (1981); Saltman, *supra* note 135, at 393.

156. Prevention of Terrorism Ordinance (Amendment) Law, 34 LAWS OF THE STATE OF ISRAEL 211 (1980).

157. Christopher Walker, *Inter-racial Party Forced Out of Elections by Second Israeli Ban*, THE TIMES (London), June 20, 1984, at 6, col. 1.

158. Naiman v. Chairman of the Central Elections Commission for the Eleventh Knesset, 39(2) Piskei Din 233 (1984); U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1984 1266 (1985).

found that the Progressive List for Peace did not aim to destroy Israel or deny its existence.[159]

The legislative and administrative restrictions on Arab political activity have prevented Arabs from exercising an effective political role in Israel. While these limitations have not kept Arabs entirely out of politics, they violate the Apartheid Convention's prohibition against "any legislative measures and other measures calculated to prevent a racial group. . .from participation in the political. . .life of the country."[160] That language prohibits not only a total exclusion from politics, but also any official measures intended to marginalize a racial group's political participation.

VIII. HOUSING

The Apartheid Convention prohibits measures that limit a racial group's participation in the social or economic life of the country.[161] In a number of social-service areas, the law and governmental practice in Israel discriminate against Palestinian Arabs. One of those areas is housing.

In the late 1940s and early 1950s, the government allocated to Jews the houses of displaced Palestinian Arabs,[162] including the houses of Arabs displaced outside Israel and of other Arabs (numbering several tens of thousands) displaced from their home areas, but not out of Israel. The government did not permit these Arabs to re-occupy their homes, even after they formally petitioned the government. Ben Gurion explained, "[w]e do not want to create a precedent for the repatriation of refugees," meaning those outside Israel.[163] Confiscating the housing of a racial group and giving it to a favored racial group would seem to be an act of apartheid under the Convention's definition.

Subsequent housing policy has also been of dubious legality. Some housing in Israel is constructed by the national institutions, which sell to Jews only.[164] Other housing is constructed by the Ministry of Hous-

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159. Naiman, *supra* note 158, at 243, 275-276 (Shamgar, J.), at 288 (Elon, J.), at 304, at 307 (Barak, J.), at 324 (Beiski, J.).

160. Apartheid Convention, *supra* note 12, art. 2(c).

161. *Id.*

162. Tanne, IMMIGRATION AND SETTLEMENT IN ISRAEL, *supra* note 102, at 129; DON PERETZ, ISRAEL AND THE PALESTINE ARABS 156 (1958).

163. Peter Grose, *Villagers Lose Appeal in Israel*, N.Y. TIMES, July 24, 1972, at A2, col. 4.

164. Tanne, IMMIGRATION AND SETTLEMENT IN ISRAEL, *supra* note 102, at 125. The Histadrut is a labor and economic development organization.

ing, which also sells to Jews only.[165] From 1948 to 1968 the government and national institutions built twenty-eight new towns for Jews in the Negev and Galilee, much of it for recent migrants.[166] In the Galilee, as explained by the J.A., the aim was "to convert the territory to a region with a large Jewish population."[167] The Ministry built two major urban settlements in the 1950s—Upper Nazareth and Carmiel. Although no statute requires the Ministry to sell its housing to Jews only, by its regulations the Ministry sells only to persons who have served in the Israel Defense Force or in the prison service. This is disguised discrimination, because few Arabs serve in these institutions.[168] Asked in the Knesset why the Ministry did not sell to Arabs, Joseph Almogi, the Minister of Housing, replied, "Carmiel was not built in order to solve the problems of the people in the surrounding area."[169]

In 1967 the government expanded the Jewish quarter of the Old City of Jerusalem, evicting several thousand Arab residents from surrounding Arab areas.[170] A government corporation, the Company for the Restoration and Development of the Jewish Quarter in the Old City of Jerusalem, Ltd., built new housing. In a public offering, the Company stated that it would sell to new immigrants who were residents of Israel, or to resident citizens of Israel who had served in the I.D.F. (or received an exemption from I.D.F. service, or served in a Jewish organization prior to May 14, 1948).

Muhammed Bourkan, an Arab and a former resident of the Jewish Quarter, applied to purchase an apartment, although, like most East Jerusalem residents, he was a citizen not of Israel but of Jordan. The Company refused to sell to Bourkan. He sued in the Israel Supreme

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165. Arabs may, however, purchase housing from Jews who have purchased it from the Ministry. Ya'acov Friedler, *Upper Nazareth—A Mixed Town*, JERUSALEM POST INTERNATIONAL EDITION, week ending Aug. 16, 1986, at 20, col. 1.

166. Jacob Dash, *Planning and Development*, IMMIGRATION AND SETTLEMENT IN ISRAEL, *supra* note 102, at 117; Tanne, IMMIGRATION AND SETTLEMENT IN ISRAEL, *supra* note 102, at 128; the government has built some public housing for Arabs, but very little. AZIZ HAIDAR, SOCIAL WELFARE SERVICES FOR ISRAEL'S ARAB POPULATION 50 (1987); LUSTICK, *supra* note 89, at 291 (n. 19).

167. *Proposal for a General Development Program in the Galilee Hills* (1973); CHOMSKY, *supra* note 87, at 436.

168. Akiva Orr, *Socialism and the Nation-State*, DEBATE ON PALESTINE 40, 41 (Fouzi el-Asmar, Uri Davis & Naim Khader eds. 1981); Abraham Rabinovich, *The Two Nazareths: Too Close for Comfort*, JERUSALEM POST INTERNATIONAL EDITION, week ending Mar. 5, 1988, at 12, col. 1.

169. 41 KNESSET DEBATES 486 (Dec. 2, 1964).

170. DONALD NEFF, WARRIORS FOR JERUSALEM 324 (1984).

Court, where the Company acknowledged its policy to sell to Jews only. The Court found no unlawful discrimination, reasoning that the expulsion and exclusion of Arab residents was justified by 1948 expulsions of Jewish residents by Arab authorities.[171]

By administrative action the government has tried to keep Arab and Jewish housing separate. Meir Shamir, Director of the Israel Land Registration Office, said his office received governmental guidelines "not to encourage mixed peripheral areas."[172] The Ministry of Housing extends loans to individuals. It makes two kinds of housing loans to Jews on favorable terms.[173] One is loans to persons immigrating under the Law of Return, who are permitted to rent at a low rate, and then to purchase on preferential terms.[174] These immigrants can be Jewish only. The other type of loan is offered to the general public. If, however, the applicant is a "veteran," according to the Ministry's regulations, the loan is given for a larger percentage of the purchase price, part of the loan is interest-free, and the applicant is relieved of a requirement that interest be adjusted for inflation.[175]

"Veteran" is defined in the regulations as a person who holds a military identification number. No particular length of service is required. Thus, anyone who entered the military qualifies, even if they never served. The regulations include as a "veteran" not only a person who holds a military identification number but also the parent, sibling, child, or spouse of such a person. The regulations further include as a "veteran" a person who has received an individual exemption from military service. The Ministry of Defense issues individual exemptions only to persons subject to the draft, which means, with minor exceptions, to Jews only. The regulations also include as a "veteran" a person who has been issued a military service postponement, which the Ministry of Defense typically gives to Orthodox Jews. This expansive definition

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171. Muhammad Said Bourkan v. Minister of Finance, Company for the Restoration and Development of the Jewish Quarter in the Old City of Jerusalem, Ltd., and Minister of Housing, Supreme Court sitting as a High Court of Justice, June 14, 1978, opinions of Cohn, Shamgar, Bechor, JJ., 32(2) Piskei Din 800-808 (1978).

172. Moshe Lichtman, *An Arab Kept Separately Is a Good Arab*, MONITIN, at 110, 111 (March 1983).

173. HENRY ROSENFELD, THE CONDITION AND STATUS OF THE ARABS IN ISRAEL 53 (1985) [hereinafter ROSENFELD].

174. OFFICE OF THE PRIME MINISTER, ISRAEL GOVERNMENT YEAR BOOK 5729 (1968-69) 250 (1969); OFFICE OF THE PRIME MINISTER, ISRAEL GOVERNMENT YEAR BOOK 5732 (1971-72) 222 (1972).

175. SARAH GRAHAM-BROWN, EDUCATION, REPRESSION AND LIBERATION: PALESTINIANS 39 (1984) [hereinafter GRAHAM-BROWN].

of "veteran" indicates that the preference is not a reward for military service. The preference discriminates against Arabs, because, with minor exceptions, the Ministry of Defense does not draft Arabs.[176]

The Ministry of Housing by regulation gives preferences in financing of housing it builds in "development areas," which are Jewish-inhabited. These preferences are available, according to regulation, to "a person who has served, or whose father, mother, brother, sister, son or daughter has served, in the Israel Defence Force, police or prison service."[177]

Such persons are eligible for grants or loans to purchase the housing, or for rent subsidies in rental housing.[178] Persons not falling into this category get no such preferences. The broad definition—requiring no minimum military service and including the designated relatives—indicates that this benefit is not a reward to military service. The definition includes most Jews and excludes most Arabs.

Under a 1963 statute, persons employed for at least one year in the public or private sector are entitled to severance pay if "dismissed." A person who resigns voluntarily to take up residence in an "agricultural settlement" or "development area" is deemed to have been dismissed and therefore is entitled to severance pay. The statute authorizes the Minister of Labor to define "agricultural settlement" and "development area."[179]

By a 1964 regulation, the Minister defined "development area" to include 60 named areas, all Jewish-inhabited. He defined "agricultural settlement" to mean either a *kibbutz* or *moshav* (both of which are inhabited only by Jews), or other settlement (*yishuv*) most of whose inhabitants are employed in agriculture.[180] Because of land confiscation, Arab towns do not have enough inhabitants employed in agriculture to qualify under this definition. The effect of the regulation is that only a Jew may take up residence in one of the specified locations and receive severance pay.

The housing restrictions in Israel's legislation and regulatory practice do not achieve a total separation of the races. However, they

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176. KRETZMER, *supra* note 29, at 98-100; David Shipler, *Israeli Arabs: Scorned, Ashamed and 20th Class*, N.Y. TIMES, Dec. 29, 1983, at A2, col. 3 [hereinafter Shipler].

177. KRETZMER, *supra* note 29, at 105.

178. *Id.* at 105.

179. Severance Pay Law, arts. 1, 8, 30, 17 LAWS OF THE STATE OF ISRAEL 161 (1963).

180. MINISTER OF LABOR, SEVERANCE PAY REGULATIONS, CALCULATION OF COMPENSATION AND RESIGNATION THAT IS DEEMED DISMISSAL (1964), Regulation 12(b).

seriously discriminate against Arabs and in favor of Jews. By discriminating against Arabs and in favor of Jews, these measures limit the Arabs' participation in the economic and social life of Israel and thus constitute acts of apartheid.

IX. HIGHER EDUCATION

Limitations on Arab participation in social and economic life are found in the government's policy on higher education. Universities in Israel are private. They are forbidden by government regulation to discriminate in the admission of students on the basis of "race, sex, religion, national origin or social status."[181] But the universities do not admit Arab applicants to certain faculties, on security grounds.[182] Certain scholarships are given by the Office of Absorption of the J.A. Arabs are not eligible to compete for the scholarships.[183] Certain privately funded scholarships are open only to students with I.D.F. service.[184]

The government provides tuition loans and grants to a "veteran" and to persons who reside in a "development town" or "renewal neighborhood." Guidelines for these loans and grants were adopted by a commission appointed in 1982 by the Minister of Education and Culture and chaired by Moshe Katzav, Deputy Minister of Housing.[185]

The commission defined "veteran" as including the parent or sibling of a person who has served in the I.D.F. A student from a family with four or more children and who is eligible as a veteran for a supplemental allowance for a child is eligible for a grant covering half tuition. "Development towns" and "renewal neighborhoods" are inhabited only by Jews. A resident of either is eligible for a loan for one third of the university tuition. The loan is forgiven if the student resides in the "development town" or "renewal neighborhood" after graduation.[186] The criterion of the "development town" or the "renewal neighborhood" residence and the expansive definition of "veteran" allows most Jews to qualify, but few Arabs.

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181. Council for Higher Education (Recognition of Institutions) Rules (1964), Rule 9; KRETZMER, *supra* note 29, at 170.

182. ZUREIK, *supra* note 137, at 155; GRAHAM-BROWN, *supra* note 175, at 57.

183. ROSENFELD, *supra* note 173, at 53-54.

184. *Arab Students in Israeli Universities*, AL-AUDEH ENGLISH WEEKLY, July 20, 1986, at 11.

185. KRETZMER, *supra* note 29, at 105-06.

186. *Id.* at 106 n.37.

X. CHILD SUPPORT PAYMENTS

As a birth-encouragement measure, the Ministry of Labor and Social Welfare makes child support payments to parents. This is done under the National Insurance Law, which provides child support payments without regard to the status of the parents.[187] However, a 1949 law, the Discharged Soldiers (Reinstatement in Employment) Law,[188] was amended in 1970 to authorize the Ministry, through the National Insurance Authority, to make supplemental child support payments to persons qualifying on the basis of military service.[189]

The Minister adopted Regulations on Grants for Soldiers and Their Families (1970), which provides grants for a third child and additional children at a level approximately equal to the amount payable under the National Insurance Law.[190] Thus, a qualifying person receives double the amount of others.[191]

The 1970 amendment defined "soldier" as "a person who is serving or has served in the Israeli Defence Force, the police or the prison service" or who served in one of the Zionist military formations (Haganah, Etzel, or Lehi) prior to the establishment of Israel.[192] The Minister's 1970 Regulation broadened this definition to include the "[s]pouse, children, or parents of a soldier."[193] Eligibility does not turn on length of military service and thus is not a reward for service. The expansion of the definition to include children means that a person whose parent served at any time in the past qualifies.

Further, the Ministerial Committee on the Interior and Services, acting without statutory authorization, provides the extra child support

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187. National Insurance Law (Consolidated Version), arts. 104-105, 22 LAWS OF THE STATE OF ISRAEL 114 (1968), as amended; *see National Insurance Law (Consolidated Version) 5728—1968 in English Translation Incorporating All Amendments, Up to and Including Amendment No. 60*, (A.G. Publications Ltd., 1986).

188. 3 LAWS OF THE STATE OF ISRAEL 10 (1949).

189. Discharged Soldiers (Reinstatement in Employment)(Amendment No. 4) Law, art. 1, 24 LAWS OF THE STATE OF ISRAEL 126 (1970).

190. KRETZMER, *supra* note 29, at 100; Shipler, *supra* note 176; Sabri Jiryis, *Israeli Law and the U.N. Universal Declaration of Human Rights*, THE LEGAL ASPECTS OF THE PALESTINE PROBLEM WITH SPECIAL REGARD TO THE QUESTION OF JERUSALEM 258-59 (Hans Köchler ed. 1981) [hereinafter LEGAL ASPECTS].

191. ROSENFELD, *supra* note 173, at 53; GRAHAM-BROWN, *supra* note 175, at 39.

192. Discharged Soldiers (Reinstatement in Employment)(Amendment No. 4) Law, 24 LAWS OF THE STATE OF ISRAEL 126 (1970).

193. Regulations on Grants for Soldiers and Their Families, art. 1, KRETZMER, *supra* note 29, at 100.

payments to parents who have not served in the I.D.F. but who are students in Jewish seminaries.[194] The impact of the 1970 amendment, the 1977 Regulation, and the Committee decision for seminarians is that nearly all Jews qualify for the additional payment while few Arabs qualify. The provision of the supplemental child support payments to Jews but not to Arabs is another limitation on the participation by Arabs in the economic and social life of the country, hence an act of apartheid.

XI. CONCLUSION

Israel's policy towards the Arabs, explained Israeli diplomat Abba Eban, "should not be one of integration."[195] Race separation was perhaps inevitable in Israel, given the manner of its creation. There was no inclination on the part of the Arabs to assimilate into the Jewish population that had taken over Palestine and forced out the majority of their countrypeople, just as Africans in southern Africa were not inclined to assimilate into the European groups that took those areas.

If separation could not be avoided, discrimination could. The legislative and administrative actions to keep Arabs subordinate find no justification in human rights principles. Some analysts find Israel's racial discrimination less formal than South Africa's.[196] Yet the enumerated instances of discrimination in Israel's legislation effect a difference in treatment in major aspects of state policy. South African legal scholar John Dugard identified the franchise, education, housing, and land allocation as the "major areas of statutory discrimination" in South Africa.[197] As indicated, Israel by statute and administrative regulation discriminates against Arabs in these areas. Regarding the franchise, the exclusion was not so complete as in South Africa. Re-

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194. *Id.* at 106-07.

195. ABBA EBAN, VOICE OF ISRAEL 76 (1969).

196. Alfred T. Moleah, *Violations of Palestinian Human Rights: South African Parallels*, LEGAL ASPECTS, *supra* note 190, at 263, 269 ("Whereas South Africa has laws clearly identifiable as racist, Zionist racism is informal, *de facto* and deceptive"); ZUREIK, *supra* note 137, at 16 ("While official *de jure* apartheid of the South African variety does not exist in Israel, national apartheid on the latent and informal levels—as manifested in segregation in housing, land ownership (although. . .because of land regulation laws, which are strictly based on national criteria, a case could be put forward that this is an example of official apartheid), education, interpersonal contact, modes of political organization and occupational distribution, not to mention the area of marriage—is a characteristic feature of Israeli society").

197. John Dugard, review of Uri Davis, *Israel: An Apartheid State*, in 4 PALESTINE Y.B. INT'L L. 366, 367 (1987/88).

garding land, the separation was more complete, however, since no percentage of the land was set aside for Arabs.

In two other respects, Israel's discrimination was more severe than South Africa's. The national institutions, as a device to institutionalize preferences for Jews over Arabs, had no counterpart in South Africa. In addition, Israel was more efficient in separating out the indigenous population. Whereas South Africa tried to move Africans into "bantustans," Israel forced Palestinian Arabs out. "The regime in Pretoria since 1948 has often dreamt of the day when the heartland of South Africa would be completely white," said Ali Mazrui, an analyst of apartheid, "but the regime has yet to engineer a nightmare to send Blacks fleeing to their homelands. On this issue of demographic manipulation there is little doubt that Zionism since 1948 has been more ruthless and cynical than [South African] apartheid."[198]

Under the Apartheid Convention, Israel's discriminatory practices qualify as apartheid policy. The discriminatory practices are not isolated phenomena, but part of a whole whose purpose is to keep the Palestinian Arabs in a subordinate status. The Palestinian Arabs became second-class citizens of Israel.[199] Israel's self-definition as Jewish shows the intent to make a state for Jews and indicates that the various acts of discrimination are carried out with the purpose to maintain domination by one racial group over another.

The Jewish state that was formed in Palestine in 1948 shared an historical similarity with South Africa, in that European settlers established themselves and then, to take control, fought Britain, which in both cases ruled the territory. The Organization of African Unity said that the two states "have a common imperialist origin."[200] Former South Africa Prime Minister John Vorster drew this historical parallel and said that Israel had an "apartheid problem" with its Arab in-

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198. Ali Mazrui, *Zionism and Apartheid: Strange Bedfellows or Natural Allies?*, 9 ALTERNATIVES 73, 91, no. 1 (1983) [hereinafter Mazrui]; *see also* Glenn E. Perry, *The Reality and Distorting Lenses*, PALESTINE: CONTINUING DISPOSSESSION 3, at 4 (Glenn E. Perry ed. 1986) ("[w]hile the victims of the White settlers in South Africa still constitute the overwhelming majority—albeit a disenfranchised, segregated one—of their country's population, the victims of the Jewish state are mainly exiled from their homeland").

199. SYDNEY D. BAILEY, THE MAKING OF RESOLUTION 242 189 (1985); Zeidan, *supra* note 2, at 170; GHILAN, *supra* note 66, at 165.

200. Assembly of the Heads of State and Government of the Organization of African Unity, *Resolution on the Question of Palestine*, O.A.U. Doc. AHG/Res. 77 (XII), *reprinted in* 30 U.N. GAOR, *Letter dated 13 October 1975 from the Permanent Representative of Dahomey to the United Nations addressed to the Secretary-General* at 9, U.N. Doc A/10297, annex 2 (1975).

habitants. He said, "we view Israel's position and problems with understanding and sympathy."[201] In 1919 Morris Cohen, an American Jew who opposed the idea of a Jewish state in Palestine, worried aloud that "a national Jewish Palestine must necessarily mean a state founded on a peculiar [sic] race."[202] The goal of establishing a Jewish state, said historian Maxime Rodinson, "could not help but lead to a colonial-type situation and to the development. . . of a racist state of mind."[203]

In both Israel and southern Africa, the racial group in charge established conditions that went beyond holding the other group at arm's length. It set up legal obstacles to keep the other group in a subordinate role in the national life. In both instances, the group in charge was motivated by an ideology that proclaimed its right to the land. Mazrui said, "[t]hey are both discriminatory ideologies whose implementation inevitably and logically necessitated strategies of repression and ethnic exclusivity."[204]

If, as part of a political settlement, the Palestinian Arabs in the Gaza Strip and West Bank gain autonomy or independence, some of the Arabs in Israel might move there, but the vast majority will stay. Thus, the issue of the Arabs in Israel is not likely to disappear. With the increased Jewish population in Israel as a result of Soviet migration in the 1990s, Arab economic status is in further jeopardy in Israel.

The international community has exerted considerable effort to eliminate apartheid in southern Africa. It has been eliminated in Namibia and Rhodesia (Zimbabwe), and South African reform has been initiated. The demise of apartheid in South Africa is viewed as essential to peaceful relations in that region. If equality were established in Israel, there too it would set a powerful precedent for a broader political settlement in the region. Apartheid is a system of governance that severely inhibits a racial group in its pursuit of living a normal life. As apartheid in Southern Africa diminishes, the international community cannot become complacent. Systematic racial discrimination remains an actual or potential phenomenon in many locations. Eradicating such discrimination must remain a high priority.

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201. C.L. Sulzberger, *Strange Nonalliance*, N.Y. TIMES, Apr. 30, 1971, at A39, col. 1.

202. Morris R. Cohen, *Zionism: Tribalism or Liberalism?*, MORRIS R. COHEN, THE FAITH OF A LIBERAL 329 (1946), *originally published in* 18 NEW REPUBLIC 182 (March 8, 1919).

203. MAXIME RODINSON, ISRAEL: A COLONIAL-SETTLER STATE? 77 (1973).

204. Mazrui, *supra* note 198, at 92.

The Availability of Temporary Injunctive Relief for Protecting U.S. Intellectual Property Rights from Infringing Imports Under Section 337 of the Tariff Act of 1930

I. INTRODUCTION

The United States closed out the 1980s having suffered through six consecutive years with annual trade deficits of over $100 billion.[1] In 1990 the United States showed signs of continuing that trend with a reported trade deficit of $101 billion.[2] Even if the United States is so fortunate as to drop its trade deficit below the magic $100 billion mark in 1991, many Americans will have little reason to rejoice. Any significant trade deficit in 1991 will continue to erode the American way of life because each billion dollars in America's trade imbalance results in the loss of 25,000 jobs.[3] This loss of jobs translates into additional unemployment, lost opportunity, and a general lowering of the standard of living for many citizens of the United States.

On February 27, 1988, Clayton Yeutter, U.S. Trade Representative, told reporters that United States firms may be losing as much as $43 billion to $61 billion a year through foreign piracy of intellectual property.[4] Estimates prepared by the International Trade Commission (the Commission) indicate that industries in the United States lose approximately $6.1 billion annually, in exports alone, due to infringement of United States intellectual property rights by foreign companies.[5] Thus, reducing infringing imports would directly reduce the trade deficit and provide more jobs for United States citizens.[6] As a result of the

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1. 136 CONG. REC. S5920 (daily ed. May 9, 1990)(statement of Sen. Hollings).

2. 137 CONG. REC. E1220 (daily ed. April 11, 1991)(statement of Rep. Toby Roth).

3. 136 CONG. REC. S5920 (daily ed. May 9, 1990)(statement of Sen. Hollings).

4. *U.S. Firms Lose Billions Annually to Foreign Piracy, ITC Intellectual Property Survey Finds*, 5 Int'l Trade Rep. (BNA) No. 9, at 290 (1988).

5. Foreign Protection of International Property Rights and the Effect on United States Industry and Trade, USITC Pub. No. 2065 at 4-8, Inv. No. 332-TA-245 (Feb. 1988) (report to the United States Trade Representative based upon 1986 statistics declassified on Feb. 26,1988, in which one hundred forty six firms responded to the Commission's questionnaire).

6. *Id.* at 4-15. Over one-third of the 115 United States firms surveyed reported lost workers resulting from intellectual property protection inadequacies. At least half of the chemical, entertainment, farm, and textile industries reported worker loss. Approximately one-third of the computer and electronic firms reported worker loss. *Id.*

United States' trade vulnerability, Congress has enacted statutes to protect against the unfair and illegal trade practices employed against American industry.[7]

Section 337 of the Tariff Act of 1930,[8] as amended, is one of the United States' more effective means for enforcing intellectual property rights against infringing imports.[9] Section 337 applies only to imports because of special difficulties in enforcing rights against unfairly traded imports.[10] These procedural rules are necessary to effectively enforce intellectual property rights of United States industries against infringing imports.[11] Section 337 also provides strict time limitations to compel the Commission to provide expeditious relief to an injured domestic industry and it allows the administrative proceedings under section 337 to exercise *in rem* jurisdiction and *in rem* orders[12] against suspected infringing products.[13]

However, section 337 is not without its limitations. The small number of firms seeking temporary relief under section 337 indicates the difficulty in obtaining this form of immediate protection from the damage resulting from infringing imports.[14] As a result, section 337 provides little deterrence to the practice of importing infringing articles.[15] Some legislators feel that the time has come to increase the availability of temporary relief to United States industries, and thereby reduce the

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7. 136 CONG. REC. S5920 (daily ed. May 9, 1990)(statement of Sen. Hollings).

8. 19 U.S.C. § 1337 (1988) (current version as amended by The Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1342, 102 Stat. 1107 (1988); H.R. 4848, 100th Cong., 2d Sess. (1988)).

9. In the matter of Certain Aramid Fiber Honeycomb, Unexpanded Block or Slice Precursors of Such Aramid Fiber Honeycomb, and Carved or Contoured Blocks or Bonded Assemblies of Such Aramid Fiber Honeycomb, Inv. No. 337-TA-305, 1990 ITC LEXIS 56, at *18 (Mar. 1990) [hereinafter Fiber Honeycomb] (opinion of Administrative Law Judge).

10. *Id.*

11. *Id.*

12. *See* Bello, *U.S. Trade Law and Policy Series No. 16: Settling Disputes in the GATT: The Past, Present, and Future*, 24 INT'L LAW. 519 (Summer, 1990). Unlike section 337, the provisions of U.S. patent law in Title 35 are absent of substantial *in rem* relief and pose greater difficulty in obtaining *in personam* jurisdiction. *Id.*

13. *See* Fiber Honeycomb, Inv. No. 337-TA-305, 1990 ITC LEXIS 56, at *18 (Mar. 1990).

14. 136 CONG. REC. E1333 (daily ed. May 2, 1990)(statement of Rep. Tom Campbell) ("In the first 215 cases initiated since the 1974 amendment, only 15 firms even tried to seek temporary relief, despite the fact that they are suffering damage from the imports.").

15. *See infra* text accompanying note 47 for a discussion on the ineffectiveness of permanent relief in providing immediate deterrence.

trade deficit and improve the quality of life of all United States citizens.[16]

Section II of this Note introduces the aspects of an administrative proceeding under section 337. Section III discusses section 337 provisions relating to United States intellectual property protection, which includes discussions on industry requirements and the powers granted to the Commission. Following this background material, Section IV of this Note turns to the current status of section 337 temporary relief. Included in this section are discussions regarding the request for temporary relief, the role of the Administrative Law Judge (ALJ), review of the ALJ's preliminary determination by the Commission, appellate review of temporary relief determinations, and the aspects of and the events giving rise to the temporary relief dilemma. Section V discusses the future of temporary relief in light of a recent legislative proposal. The proposal is analyzed in terms of its positive aspects and the challenges, both domestic and foreign, which face a bill of this nature.

II. ADMINISTRATIVE PROCEEDINGS UNDER SECTION 337

The Commission investigates alleged violations of section 337 upon the receipt of a complaint under oath, or on its own initiative.[17] Public notice of the investigation is published in the Federal Register. The Commission then appoints an ALJ to preside over the initial hearings.[18] At the hearings evidence is taken and arguments are heard for the purpose of determining whether there was a section 337 violation.[19] At the conclusion of the initial hearings, the ALJ files an initial determination of the alleged section 337 violation with the Commission.[20]

The Commission may review the ALJ's initial determination upon receiving a review petition,[21] or on its own initiative.[22] During the investigation, the Commission consults with, seeks advice and gathers information from, the Department of Justice, Federal Trade Commission, Department of Health and Human Resources, and any other

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16. *See infra* note 94 and accompanying text for a discussion on a recent legislative attempt to improve the effectiveness of section 337.

17. 19 U.S.C. § 1337(b)(1) (1988).

18. 19 C.F.R. § 210.41(e) (1991).

19. 19 C.F.R. § 210.41(a)(2) (1991).

20. 19 C.F.R. § 210.53(f) (1991); *see* 19 C.F.R. § 210.53(a)(1991). The ALJ has nine months, or fourteen months in more complicated cases, from the date of publication to make its initial determination. *Id.*

21. 19 C.F.R. § 210.54(a) (1991).

22. 19 C.F.R. § 210.55 (1991).

department or agency it deems appropriate.[23] The Commission must conclude its investigation, and make its determination upon the alleged violation, as soon as is practicable.[24] Upon making its determination, the Commission serves the determination to each party of the investigation.[25] Any party may petition the Commission for reconsideration within fourteen days of service of the determination.[26] A Commission determination of a section 337 violation, or suspected violation, is immediately published in the Federal Register and transmitted to the President.[27]

If the President does not disapprove the Commission's determination for policy reasons, the Commission's determination becomes final.[28] Any party adversely affected by a final determination resulting in the exclusion of articles, or cease and desist orders, may appeal the determination to the United States Court of Appeals for the Federal Circuit[29] within sixty days of the final determination.[30]

III. SECTION 337 PROVISIONS RELATING TO UNITED STATES INTELLECTUAL PROPERTY PROTECTION

Unlike an action in federal court for patent infringement, a section 337 action is one for unfair trade practices relating to infringing imports. Section 337 protects valid and enforceable United States patents, copyrights, trademarks, and semiconductor mask works from infringing articles imported into the United States, sold for importation, or sold within the United States after importation by the owner, importer, consignee,[31] or their agent.[32] However, section 337 protection only applies to qualifying United States industries.

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23. 19 U.S.C. § 1337(b)(2) (1988).

24. 19 U.S.C. § 1337(b)(1) (1988). The Commission must make a determination within one year from the date of publication of notice. However, in complicated investigations the Commission must make a determination within eighteen months. *Id.*

25. 19 C.F.R. § 210.57(a) (1991); *see* 19 C.F.R. § 210.61 (1991). The Commission may affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part. *Id.*

26. 19 C.F.R. § 210.60 (1991).

27. 19 C.F.R. § 210.57(b) (1991).

28. 19 C.F.R. § 210.57(d) (1991); *see* 19 U.S.C. § 1337(j) (1988). The President has sixty days to intervene. *Id.*

29. 19 C.F.R. § 210.71 (1991); *see* 19 U.S.C. § 1337(c) (1988).

30. 19 U.S.C. § 1337(c) (1988).

31. 19 U.S.C. § 1337(a)(1)(B) (1988).

32. 19 U.S.C. § 1337(a)(4) (1988).

A. *Requirements for Industry Eligibility*

To be eligible for section 337 relief, the complaining industry which possesses rights to the patent allegedly infringed must either exist in the United States, or be in the process of being established in the United States.[33] A qualifying industry shall be considered to exist in the United States if the industry has within the United States, relating to the patented article: (1) significant investment in plant and equipment, (2) significant employment of labor or capital, or (3) substantial investment in its exploitation, including engineering research and development, or licensing.[34] However, the United States industry is not required to be operated economically, nor is it required to show substantial injury resulting from the alleged infringement.[35] Thus, to be eligible to establish a section 337 claim warranting relief, the United States based industry must be actively involved with the article which was covered by a valid United States patent. The appropriateness of relief is determined by the Commission.

B. *The International Trade Commission Powers*

Section 337 grants power to the Commission to invoke both temporary and permanent relief. However, the most common remedy granted under section 337 relates to the two forms of permanent relief, the permanent exclusion order,[36] and the permanent cease and desist order.[37] If the Commission determines that a section 337 violation occurred, "it shall direct that the articles concerned . . . be excluded from entry into the United States . . . ."[38] However, in arriving at the decision to exclude, the Commission considers the effects of such an exclusion on the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and the potential effect on United States consumers. Enforcement of the Commission order to exclude is directed by the Secretary of the Treasury.[39]

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33. 19 U.S.C. § 1337(a)(2) (1988).
34. 19 U.S.C. § 1337(a)(3) (1988).
35. The Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1342, 102 Stat. 1107 (1988), H.R. 4848, 100th Cong., 2d Sess. (1988), 134 CONG. REC. 5547-5579 (1988) (removing the injury requirement from section 337).
36. 19 U.S.C. § 1337(d) (1988).
37. 19 U.S.C. § 1337(f) (1988).
38. 19 U.S.C. § 1337(d) (1988).
39. *Id.*

The Commission may elect to use cease and desist orders in addition to, or in lieu of, the exclusion order.[40] Cease and desist orders direct the parties involved to refrain from engaging in the unfair competition violating section 337.[41] The Commission traditionally issues cease and desist orders on evidence that the respondents have built inventories of the infringing article sufficient to substantially injure the domestic industry even after an importation prohibition of the articles.[42] Thus, the cease and desist orders are used to insure that the exclusion order is not undermined by sales of infringing imports out of large inventories built by domestic importers during the pendency of the proceeding.[43] In arriving at its decision, the Commission considers the same mitigating factors which it considered with regard to the exclusion order.[44] Any person who violates a cease and desist order is subject to a civil penalty accruing to the United States government. The penalty is recovered for the United States by the Commission.[45]

Permanent relief forms the heart of the remedies available under section 337. These remedy provisions of section 337 provide equitable relief to the affected industry. However, permanent relief under section 337 can only protect an industry's future interests, and cannot correct past and present unascertainable damages.

The United States industry's loss of present and future business due to infringing imports can occur at any time and may never be fully overcome. Furthermore, unquantifiable damages to the industry's reputation and the loss of consumer confidence can result from infringing imports of inferior quality.[46] Therefore, the wait of up to eighteen

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40. 19 U.S.C. § 1337(f)(1) (1988).

41. *Id.*

42. *See* In the Matter of Certain High Intensity Retroreflective Sheeting, USITC Pub. 2121 at 9, Inv. No. 337- TA-268, 1988 ITC LEXIS 75, at *22 (September 1988); *see also* In the Matter of Certain Compound Action Metal Cutting Snips and Components Thereof, USITC Pub. 1831 at 9, Inv. No. 337-TA-197, 1986 ITC LEXIS 325, at *36 (Mar. 1986).

43. *See* In the Matter of Certain Compound Action Metal Cutting Snips and Components Thereof, USITC Pub. 1831 at 9, Inv. No. 337-TA-197, 1986 ITC LEXIS 325, at *37 (Mar. 1986) ("The facts of this investigation compel the Commission to issue both a general exclusion order and cease and desist orders if effective relief is to be afforded complainant. As we have noted, there have been importations of large numbers of infringing metal snips, which have yet to be sold. These inventories are a potential cause of substantial injury to the domestic industry.").

44. 19 U.S.C. § 1337(f)(1) (1988); *see supra* note 39 and accompanying text for a discussion of exclusion considerations.

45. 19 U.S.C. § 1337(f)(2) (1988).

46. 136 CONG. REC. E1333 (daily ed. May 2, 1990)(statement of Rep. Tom

months for permanent relief could destroy an industry. Permanent relief possesses little deterrence to other present violators or future violators. The violators can simply continue until a complaint is filed against them, and then continue for up to eighteen months or until the Commission issues a final determination.[47] Temporary relief provisions in section 337 could provide deterrence against the importation of infringing articles; however, temporary relief in a section 337 proceeding is rarely sought.

IV. TEMPORARY RELIEF UNDER SECTION 337

If section 337 possesses any deterrent force, it exists in the availability of temporary relief. The temporary relief provisions were intended to protect the affected industry's immediate concerns. The two types of temporary relief are cease and desist orders and exclusion orders. Congress contemplated circumstances meriting the issuance of cease and desist orders where there was evidence of "stockpiling during the pendency of investigation."[48] Temporary cease and desist orders prevent the sale of infringing goods which have entered the United States prior to the issuance of an exclusion order.[49] Temporary exclusion orders serve to prohibit the entry of goods into the United States during the pendency of the investigation.[50] When granted as temporary relief, both the exclusion order and the cease and desist order allow the prohibited act to continue under bond.[51] To obtain temporary relief under section 337, the complainant must maneuver through a maze of restrictive regulations.

Campbell) ("[I]n addition to simple sales losses, there is often substantial damage to consumer confidence due to the inferior quality and thousands of lost American jobs."); *see also* Foreign Protection of International Property Rights and the Effect on United States Industry and Trade, USITC Pub. No. 2065 at 4-1, Inv. No. 332-TA-245 (Feb. 1988). Other factors that would result in unascertainable damages are benefits of research forgone, diminished value of company name, difficulty in doing business in an efficient and straightforward manner, and opportunity losses. *Id.*

47. Foreign Protection of International Property Rights and the Effect on United States Industry and Trade, USITC Pub. No. 2065 at 4-7, Inv. No. 332-TA-245 (Feb. 1988) ("Economic theory suggests that any activity, including infringement of intellectual property rights, will be carried out as long as the marginal benefits exceed the marginal costs of the activity. . . . [O]ne should expect to see the largest damage from intellectual property infringement.").

48. S. REP. No. 71, 100th Cong., 1st Sess. 131 (1987); H.R. REP. No. 40, 100th Cong., 1st Sess. 159 (1987).

49. *See* In the Matter of Certain Crystalline Cefadroxil Monohydrate, Inv. No. 337-TA-293, 1990 ITC LEXIS 12, at * 17 (Jan. 1990) (Commission opinion).

50. *Id.*

51. *Id.*

A. *The Motion for Temporary Relief*

Any request for temporary relief must be made by a motion filed with the Commission prior to the institution of the investigation.[52] The motion requesting temporary relief *must* contain detailed information concerning the complainant's probability of success on the merits, the immediate and substantial harm to the domestic industry in the absence of the temporary relief, any possible harm to the respondents if the relief is granted, and the effect, if any, that the granting of temporary relief would have on the public interest (emphasis added).[53]

In addition, if the complainant specifically requests a temporary exclusion order, the complaint must include detailed information on whether the complainant should be required to post bond as a prerequisite to the issuance of a temporary exclusion order and the appropriate amount of such bond.[54] "The Commission's policy is to favor the posting of a bond in every case."[55] Bonding deters the complainant from "filing frivolous motions for temporary relief. . ." or using temporary relief to harass the respondents.[56] Factors that the Commission considers in determining the appropriateness of a complainant bond include the strength of the complainant's case; the burden on the complainant; whether respondents have filed responses to the request for temporary relief; the burden on the respondents; and any other relevant legal, equitable, or public interest considerations.[57] Having received the above described information, the Commission forwards the motion for temporary relief to an ALJ for an initial determination.[58]

B. *The Role of the Administrative Law Judge*

At this time, the Commission or the ALJ may designate the case as "more complicated" to allow time to investigate the request for temporary relief.[59] The ALJ can rule on the motion for temporary relief and the issue of bonding without a hearing if the summary determination

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52. 19 C.F.R. § 210.24(e)(3) (1991).
53. 19 C.F.R. § 210.24(e)(1)(i) (1991).
54. 19 C.F.R. § 210.24(e)(1)(ii) (1991).
55. 19 C.F.R. § 210.24(e)(1)(iii)(E) (1991).
56. *See* In the Matter of Certain Crystalline Cefadroxil Monohydrate, Inv. No. 337-TA-293, 1990 ITC LEXIS 12, at *12 (Jan. 1990) (Commission opinion).
57. 19 C.F.R. § 210.24(e)(1)(iii) (1991).
58. 19 C.F.R. § 210.24(e)(10) (1991).
59. 19 C.F.R. § 210.24(e)(11) (1991).

favors the respondents.[60] If a hearing is conducted, the ALJ shall determine whether there is reason to believe a section 337 violation occurred, whether temporary relief is appropriate, whether the complainant should post bond as a prerequisite for issuing the temporary exclusion order, and whether to require a complainant bond, and if so, the amount of the bond.[61] The ALJ may, but is not required to, take evidence at the preliminary hearing pertaining to the remedy, the public interest, and the bond under which the respondent's articles would be permitted to enter the United States during the pendency of any temporary relief order issued by the Commission.[62]

The ALJ must issue an initial determination on the temporary relief motion on the 70th day after publication of notice in an ordinary case, or on the 120th day after publication of notice in a more complicated case.[63] The Commission reviews the ALJ's initial determination. Failure of the Commission to act on the initial determination within 20 days after issuance, or 30 days after issuance in more complicated cases, results in the initial determination becoming the determination of the Commission.[64] No review would be given solely on the basis of alleged error of fact.[65] However, the Commission possesses the power to modify or vacate the initial determination on the bases of errors of law or for policy reasons.[66]

C. *Review of the ALJ's Initial Determination by the Commission*

The Commission must determine what form of relief is appropriate on or before the 90 or 150 day statutory deadline.[67] The Commission must consider whether public interest factors preclude issuance of relief and the amount of bond under which the respondent's articles may enter the United States during pendency of the temporary relief.[68] The Commission may exclude articles from entry during the course of a section 337 investigation if there is reason to believe that any party, as a result of importing these articles, is in violation of section 337.[69]

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60. 19 C.F.R. § 210.24(e)(13) (1991).
61. *Id.*
62. *Id.*
63. 19 C.F.R. § 210.24(e)(17)(i) (1991).
64. 19 C.F.R. § 210.24(e)(17)(ii) (1991).
65. *Id.*
66. *Id.*
67. 19 C.F.R. § 210.24(e)(18)(iii) (1991).
68. *Id.*
69. 19 C.F.R. § 210.24(e)(17)(i) (1991).

The Commission may exercise the option of allowing the entry of the articles under bond and set the amount of respondent's bond at a level sufficient to nullify any advantage or benefit gained by the persons importing the alleged infringing articles.[70] In determining whether to exclude the articles during the full investigation, the Commission must consider the *same* mitigating factors used to determine the appropriateness of permanent relief (emphasis added).[71]

The Commission *may* grant temporary exclusion of the articles unless they determine that the articles should not be excluded after considering public policy concerns (emphasis added).[72] These policy provisions restrict the granting of temporary relief when exclusion would adversely affect other United States interests. In addition, section 337 provides that the Commission's exclusion orders and cease and desist orders may be granted to the same extent such orders may be granted under the Federal Rules of Civil Procedure governing preliminary injunctions and temporary restraining orders.[73]

Under the Federal Rules of Civil Procedure, a temporary restraining order may be granted without notice if the adversely affected party can demonstrate immediate and irreparable harm, a certified effort to give notice to the opposing party, and reasons notice should not be required.[74] The granting of a preliminary injunction requires both notice and a hearing.[75] The Federal Rules do not contain a textual requirement for the demonstration of irreparable harm for the remedy of injunctive relief, although a showing of irreparable harm is required by the courts. During the hearing, evidence which would be admissible in a trial on the merits becomes part of the record on the trial and need not be repeated at trial.[76] A security bond must be provided by the applicant to cover costs and damages that may be incurred by the adversely affected party in the event it is found that the party was wrongfully enjoined or restrained.[77]

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70. 19 C.F.R. § 210.58(a)(3) (1991).

71. *See supra* note 39 and accompanying text for a discussion of the permanent exclusion considerations.

72. 19 U.S.C. § 1337(e)(1) (1988).

73. 19 U.S.C. § 1337(e)(3) (1988); *see* 19 U.S.C. § 1337 (n)(2)(C) (1988). A general exclusion, unlike an injunction, is enforced by United States Customs against all articles found to be infringing without regard to whether the entity responsible for the infringing articles was a party to the suit.

74. FED. R. CIV. P. 65(b).

75. FED. R. CIV. P. 65(a).

76. *Id.*

77. FED. R. CIV. P. 65(c).

If the Commission decides that there is reason to believe that a violation of section 337 has occurred and that temporary relief is warranted, the Commission's determination and proposed remedy is published in the Federal Register and forwarded to the President of the United States.[78] The temporary exclusion order becomes final if the President has not taken adverse action within 60 days from the date of delivery.[79] Thereafter, the final determination of temporary relief may be appealed to the United States Court of Appeals for the Federal Circuit.

D. *Appellate Review of Temporary Relief Under Section 337*

The United States Court of Appeals for the Federal Circuit applies the district courts' test for determining the appropriateness of injunctive relief to determine the appropriateness of temporary relief under section 337. In *Rosemount, Inc. v. United States International Trade Commission, and SMAR Equipment and SMAR International Corp.*, an ALJ determined that "temporary relief was warranted in view of Rosemount's strong showing of [the] likelihood of success on the merits of its charge of infringement and the public policy in favor of protecting patent rights."[80] However, the Commission vacated the ALJ's finding and held that the presumption of irreparable harm[81] to which Rosemount was entitled was rebutted by SMAR's evidence of actual market conditions and other factors.[82]

In affirming the Commission's finding, the court agreed with the Commission that section 337 "now requires that the exercise of its temporary relief authority should generally parallel that of the district

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78. 19 U.S.C. § 1337(j)(1) (1988); *see* 19 C.F.R. § 210.57(b) (1991).

79. 19 U.S.C. § 1337 (j)(2) (1988).

80. Rosemount, Inc. v. United States International Trade Commission, and SMAR Equipment and SMAR International Corp., 910 F.2d 819, 820, 15 U.S.P.Q. 2d 1569 (Fed. Cir. 1990).

81. Illinois Tool Works, Inc. v. Grip-Pak, Inc., 906 F.2d 679, 681, 15 U.S.P.Q. 2d 1307 (Fed. Cir. 1990) ("A patentee's entitlement to a presumption of irreparable harm would not in itself and in every case be dispositive of the irreparable harm question."); *see also* Roper Corporation v. Litton Systems, Inc., 757 F.2d 1266, 1272 (Fed. Cir. 1985), 225 USPQ 345, 349 (holding that presumption of irreparable harm to a patentee is rebuttable); *see also* Apple Computer, Inc. v. Formula International, Inc., 725 F.2d 521, 525-526 (9th Cir. 1984) (stating that the reasonable showing of success on the merits in a copyright infringement claim establishes a rebuttable presumption of irreparable harm).

82. *Rosemount, Inc.*, 910 F.2d at 820.

courts."[83] The district courts consider and balance four factors: (1) the movant's likelihood of success on the merits, (2) whether the movant will suffer irreparable injury during the pendency of litigation if the preliminary injunction is not granted, (3) whether the injury outweighs the harm to the other parties if the preliminary injunction is issued, and (4) whether the grant or denial of the preliminary injunction is in the public interest.[84] The factors cited by the court generally parallel those factors listed in the Commission's adjudicative procedures.[85] However, these factors are not textually present in section 337 or in the Federal Rules of Civil Procedure. Thus, the availability of section 337 temporary relief is governed by case law, and not by specific section 337 legislative provisions.

E. *The Section 337 Temporary Relief Dilemma*

A major reason a complainant would choose to pursue a section 337 unfair competition action is that the difficulty in proving actual damages necessitates the pursuit of injunctive relief. A patent holder could seek injunctive relief against infringing imports under the United States patent laws.[86] However, an injunctive relief determination would be achieved more quickly in a Commission proceeding than in a federal district court proceeding. In any event, specific harm to an industry may be difficult to identify. The absence of the usual indicators of immediate damage, such as a decline in sales, profits, or employment, does not necessarily indicate that the unfair acts do not have a tendency to substantially injure an industry.[87] In a small business, many of the traditional factors may not be present.[88] Non-traditional damage factors, such as injury to the industry's reputation and the loss of consumer

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83. *Id.* at 821.

84. *Id.*

85. 19 C.F.R. § 210.24(e)(1)(i) (1991); *see also* In the Matter of Certain One Piece Cold Forged Bicycle Cranks, Inv. No. 337-TA-227, 1985 ITC LEXIS 9, at *22 (Dec. 1985) (initial determination for complainant's motion for temporary relief). The Commission had previously incorporated into the Commission rules factors to address the issues of: "1. Has the petitioner made a sufficient showing that it is likely to prevail on the merits? 2. Has the petitioner shown that without such relief it will suffer immediate and substantial harm? 3. Would the issuance of temporary relief substantially harm other parties interested in the proceedings? 4. Where lies the public interest?" *Id.*

86. 35 U.S.C. § 283 (1988).

87. *See* In re Certain Surveying Devices, USITC Pub. 1085, Inv. No. 337-TA-68, 1980 ITC LEXIS 143, at*52 (July 1980).

88. *Id.*

confidence resulting from infringing imports of inferior quality can threaten the survival of both small and large industries.[89] Congress recognized the difficulty of the burden on the complainant in proving injury and amended section 337 to remove the injury requirement.[90]

To obtain permanent relief, the United States industry is not required to show substantial injury resulting from the infringement, nor is it required to be operated economically.[91] In contrast, the Commission and the United States Court of Appeals for the Federal Circuit have adopted standards for section 337 temporary relief which make temporary relief a virtual impossibility because of the difficulty in establishing actual and specific harm. Most complainants cannot satisfy the present requirements for granting temporary relief. "In the first 215 cases initiated since the 1974 Amendment, only 15 firms even tried to seek temporary relief, despite the fact that they are suffering damage from the imports."[92] The complainants are forced to suffer continued infringement throughout the term of the proceeding, which could be as long as eighteen months. Ironically, *Rosemount*, which required a showing of irreparable harm resulting in a denial of temporary relief,[93] was decided three months after the introduction of legislation which would reduce the existing barriers to section 337 temporary relief.

V. THE FUTURE OF TEMPORARY RELIEF FOR U.S. INDUSTRY

The frustration created by the reluctance of the Commission and the courts to grant temporary relief has escalated into an attempt for legislative reform to the temporary relief provisions to section 337. On May 2, 1990, a bill was introduced to the House of Representatives which would alleviate the difficulty in obtaining section 337 temporary relief.[94]

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89. *See supra* note 46.

90. The Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1341, 102 Stat. 1107 (1988), H.R. 4848, 100th Cong., 2d Sess. (1988); 134 CONG. REC. 5547-5579 (1988); *see also* Terry L. Clark, *The Future of Patent-based Investigations Under Section 337 After the Omnibus Trade Act of 1988*, 38 AM. U.L. REV. 1149 (1989).

91. *See supra* note 35.

92. 136 CONG. REC. E1333 (May 2, 1990)(extension of remarks by Rep. Tom Campbell of California).

93. *See supra* notes 80-82 and accompanying text for a discussion of *Rosemount*.

94. H.R. 4710, 101st Cong., 2d Sess. at 1 (1990). Since this Note was written, H.R. 4710 became listed as "not enacted." For the Bill Tracking Report for H.R. 4710, *see* LEXIS, Genfed library, BLT101.

A. *Congressional Support for Section 337 Temporary Relief*

The purpose of the House Report 4710 (H.R. 4710) is to exclude alleged infringing articles from entry into the United States during the course of any unfair import trade practice investigation which involves the infringement of a patent, copyright, trademark, or mask works upon a prima facie showing of infringement.[95] Proponents of the bill attempt to accomplish their goal by amending section 337(e)(1) of the Tariff Act of 1930 to exclude the infringing article, on a temporary basis, as soon as the Commission makes a determination that there is "reason to believe" that a violation has occurred.[96] The bill's sponsor, Rep. Tom Campbell, adamantly argues,

> [t]his would eliminate the uncertainty that American firms now face when they plead for protection from the ITC [Commission]. If their patent, copyright, trademark, or semiconductor mask is being infringed, they will receive meaningful relief as quickly as possible. Our firms will know that its government is doing everything it can to protect technical innovations, the very core of our national ability to compete in the international marketplace.[97]

The proposed amendment would modify the language dealing with the Commission's response to articles infringing a patent, trademark, copyright, or mask work from "*may* direct . . ." to "*shall* direct the articles concerned, imported by any person with respect to whom there is reason to believe that such person is violating . . . [to] be excluded from entry into the United States until the investigation is completed or terminated" (emphasis added).[98] Furthermore, the bill would retain the public policy exception as it exists in section 337, and restrict the "entry under bond" exception to the granting of temporary relief to situations involving United States industries suffering from the unfair methods of competition and unfair acts in the importation of non-intellectual property articles.[99]

B. *Positive aspects of H.R. 4710*

The bill would serve to provide United States industries with enhanced protection from infringing imports by changing the rebuttable

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95. *Id.*

96. *Id.*

97. 136 CONG. REC. E1333 (daily ed. May 2, 1990) (statement of Rep. Tom Campbell).

98. H.R. 4710, 101st Cong., 2d Sess. at 2 (1990).

99. *Id.*

presumption of irreparable harm, in a strong showing of the likelihood of infringement, to a conclusive presumption[100] of irreparable harm. The effect would be a legislative reversal of the court's decision in *Rosemount.*[101] To temper the harshness of the the conclusive presumption, the bill specifically retains the public policy concerns addressed in the present version of section 337(e).

The bill provides public policy exceptions to the granting of temporary relief for all section 337 actions, which include both non-intellectual and intellectual property. The retention of this language textually considers and draws attention to the potential effects of an exclusion upon the public health and welfare, the competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and the United States consumer.[102] By incorporating public policy into H.R. 4710, the bill not only portrays a noble and unyielding intent to save United States industries, it also portrays sensitivity to the concerns of the American public and related United States industries. By incorporating this traditional balancing test into the bill, confidence in the protection of all United States interests is increased, and the bill's chances of survival increase correspondingly. However, some aspects of the bill certainly would come under attack.

C. *Challenges Facing H.R. 4710 Congressional Action*

The bill promises to be globally controversial due to its attempt to increase the effectiveness of the enforcement of United States intellectual property rights against infringing imports. The bill sounds a clear message from Congress that section 337 will likely continue to protect those United States interests even though section 337 has come under increased attack from abroad. In light of the trend toward a world economy, section 337 will be changing; it is only a matter of who's influence will prevail and by how much. Those who are satisfied with the current protection afforded by section 337 are bound for disappointment on either score.

The following discussion highlights some of the deficiencies of H.R. 4710 and also considers likely responses from influential groups outside Congress. In its present form, H.R. 4710 will likely be challenged

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100. BLACK'S LAW DICTIONARY 1067 (5th ed. 1979)("A conclusive presumption is one in which proof of basic fact renders existence of the presumed fact conclusive and irrebuttable.").

101. *See supra* notes 80-82 and accompanying text for a discussion of *Rosemount.*

102. H.R. 4710, 101st Cong., 2d Sess. at 2 (1990).

from both pro-complainant and pro-respondent forces. The well intentioned bill: (1) fails to address the primary limiting language in section 337, (2) would restrict the application of allowing "entry under bond," (3) would likely face stiff opposition from those who allege that even the current status of section 337 violates the General Agreement on Tariffs and Trade (GATT), (4) would face a questionable response from the Office of the United States Trade Representative, and (5) would not be automatically accepted under the current American Bar Association stance on section 337.

1. *The Bill's Failure to Address the Primary Limiting Language of Section 337(e)*

The language of H.R. 4710 attempts to create a conclusive presumption of irreparable harm. A conclusive presumption would provide the means for requiring exclusion when there is reason to believe that a section 337 violation has occurred.[103] To achieve the result of a conclusive presumption, the bill would need to eliminate all possibility that the courts could resort to a district court test for determining appropriateness of temporary relief. District Courts currently use a rebuttable presumption of irreparable harm.[104]

Incorporating the amending language, the section 337(e)(1) text would read, "the Commission *shall* direct the articles concerned, imported by any person with respect to whom there is reason to believe that such person is violating this section, be excluded from entry into the United States until the investigation is completed or terminated" (emphasis added).[105] The language sounds sufficient to achieve the conclusive presumption, however, the bill does not address section 337(e)(3).

Section 337(e)(3) provides that the Commission's exclusion orders and cease and desist orders may be granted to the same extent that temporary relief may be granted under the Federal Rules of Civil Procedure governing preliminary injunctions and temporary restraining orders.[106] The result is that if, during the course of investigation, the Commission has reason to believe that there is a violation to subparagraphs (B), (C), or (D), the Commission *shall* direct the articles to

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103. *See supra* note 100.

104. *See supra* note 84 and accompanying text for a discussion of the four factors balanced by the Commission and the United States Court of Appeals for the Federal Circuit.

105. H.R. 4710, 101st Cong., 2d Sess. at 2 (1990).

106. 19 U.S.C. § 1337(e)(3) (1988).

be excluded *to the extent* that such relief may be granted under the Federal Rules of Civil Procedure (emphasis added). The court would still consider and balance the four factors: (1) of whether the movant is likely to prevail on the merits, (2) whether the movant will suffer irreparable injury during the pendency of litigation if the injunction is not granted, (3) whether the injury outweighs the harm to the other parties if the preliminary injunction is issued, and (4) whether grant or denial of the preliminary injunction is in the public interest.[107] The second and third factors preserve the rebuttable presumption of irreparable harm which destroys the intent of the bill. Therefore, a major technical flaw exists in the bill due to its failure to block the court from resorting to the four-part test.

As discussed, *supra*, the intent of the amending language in H.R. 4710 is to provide a test which would create a conclusive presumption of irreparable harm. The conclusive presumption test could incorporate only two of the federal district courts' four factors: the complainant's likelihood of success on the merits and the United States public policy concerns. Therefore, the bill requires modification to achieve the desired result. This major technical flaw in achieving the bill's intent could be rectified by striking subsection (e)(3), and thereby eliminating the court's ability to resort to the four-part test through the Federal Rules of Civil Procedure loophole.

2. *The Restriction of the Availability of "Entry Under Bond"*

H.R. 4710 would eliminate the availability of "entry under bond" during section 337 investigations concerning infringement of intellectual property.[108] The bill would restrict the availability of article entry under bond to situations involving a United States industry which suffers from unfair methods of competition and unfair acts resulting from the importation of *non-intellectual property* articles (emphasis added). Bonding represents the middle ground between exclusion and unencumbered entry. Restricting the bonding exception would eliminate the last obstacle in the quest to require a temporary exclusion when the Commission has reason to believe that the import infringes the rights of a valid United States industry.

Removal of the availability of "entry under bond" would result in less complicated preliminary hearings, and allow the ALJ and the

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107. *Rosemount, Inc.* 910 F.2d at 821.

108. H.R. 4710, 101st Cong., 2d Sess. at 2 (1990).

Commission to concentrate on the issue of whether they have reason to believe that the respondent violated section 337. However, it is questionable as to whether the restriction on "entry under bond" is advisable. Even with a provision allowing article entry under bond, exclusion would be the principal means of enforcing temporary relief because "entry under bond" is discretionary. Therefore, the restriction may not be necessary. Also, "entry under bond" is the only pro-respondent provision in an otherwise pro-complainant statute. Therefore, restriction on the scope of the bonding exception may unnecessarily heighten the tensions between some GATT participants and the United States regarding 337.

3. *Likely Response by the GATT Panel to an Amendment of Section 337 by H.R. 4710*

The General Agreement on Tariffs and Trade[109] (GATT) is a multilateral agreement aimed at expanding and liberalizing world trade. GATT provides specific discipline for the use of trade barriers, and provides a forum for the resolution of trade disputes and negotiations for the reduction of trade barriers.[110] GATT achieved the status of valid law in the United States when it was accepted by the President of the United States pursuant to the Reciprocal Trade Agreements Act.[111] However, GATT has not obtained the status of a treaty which would take precedence over federal laws because Congress never ratified the agreement.[112] Furthermore, a GATT panel report criticizing section

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109. General Agreement on Tariffs and Trade, Oct. 30, 1947 [hereinafter GATT], 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (1948). For a general discussion of GATT, *see* Jackson, *The General Agreement of Tariffs Trade in Domestic Law*, 66 MICH. L. REV. 249 (1967).

110. PTC Newsletter Published by the A.B.A. SEC. PAT, TRADEMARK AND COPYRIGHT L., Vol. 8, No. 4 Sum. 1990 at 9.

111. 19 U.S.C. § 1351 (1988); *see* Omnibus Trade and Competitiveness Act of 1988, 133 CONG. REC. S8641 (daily ed. June 25, 1987) (statement of Sen. Moynihan) ("The Congress, the Senate Finance Committee, specifically gave this negotiating power [the authority to continue international trade negotiations] to the President in 1934, with the Reciprocal Trade Agreement Act . . . ."); *see also* 19 U.S.C. § 2901 (1988) (overall and principal negotiating objectives of the United States include the "[i]mprovment of GATT and multilateral trade negotiation agreements.").

112. *See* Fiber Honeycomb, Inv. No. 337-TA-305, 1990 ITC LEXIS 56, at *17 (Mar. 1990); *see also* 19 U.S.C. § 2131 (1988) (authorization by Congress for the United States to pay its share of GATT expenses does not imply approval or disapproval by the Congress of all articles of GATT).

337[113] was flatly rejected by some members of Congress.[114] Therefore, subsequent federal law passed in the United States can supercede GATT.[115] Amendments to section 337, such as H.R. 4710, would control over GATT provisions.

However, even though the United States did not accept the GATT panel report, GATT has the potential of exerting considerable influence on the shaping of United States law under section 337, which was demonstrated by the overall United States response to the GATT panel's recent objections to section 337.

On January 16, 1989, the GATT Panel issued a report[116] concerning the complaint by the European Community (EC)[117] that section 337[118] violated article III:4[119] and was not excepted by article XX(d).[120]

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113. *See infra* note 116 and accompanying text for a discussion of the GATT panel report.

114. 135 CONG. REC. S16203 (daily ed. Nov. 19, 1989) (statement of Sen. Heinz) (regarding intellectual property protection afforded by section 337, "the U.S. Government should maintain that the GATT panel report on section 337 is legally faulty, and will not be accepted by the United States.").

115. Fiber Honeycomb, Inv. No. 337-TA-305, 1990 ITC LEXIS 56, at *17 (Mar. 1990) (opinion of Administrative Law Judge).

116. U.S. Section 337 of the Tariff Act of 1930, Report by the GATT Panel (Nov. 23, 1988). For an in-depth analysis of the GATT panel findings *see* Abbott, *GATT Settlement Dispute Panel*, 84 A.J.I.L. 274 (1990).

117. *See* In re A Certain Aramid Fiber, USTIC Pub. 1824, Inv. No. 337-TA-194 (Mar. 1986) The EC Commission complaint with GATT was a response to the Commission determination in November 1986 that the importation of aramid fiber into the United States by Akzo N.V., a Netherlands Corporation, infringed Du Pont's patent rights to aramid fibers. The Commission banned Akzo from the sale of aramid fibers in the United States. The basis of EC's complaint was that due to section 337 procedures, Akzo could not file a counterclaim alleging that Du Pont infringed Akzo's patent on aramid fibers. *Id.; see also* Akzo N.V. v. E. I. Du Pont de Nemours, 635 F. Supp. 1336 (E.D. Va. 1986) (Akzo sues in U.S. district court and loses).

118. *See supra* note 8. The basis for the GATT panel objection was the pre-1988 version of section 337.

119. GATT, 62 Stat. 3680, 3681 article III:4 (Sept. 14, 1948), ("The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.").

120. GATT, 61 Stat. Part 5, A60, A61 (Oct. 30, 1947) (article XX, General Exceptions: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption

Acting on presentations made by the EC, Japan, Korea, Canada, and Switzerland, the GATT Panel found that section 337 was inconsistent with article III:4 of the General Agreement because imported products alleged to infringe United States patents under section 337 were treated less favorably than domestically produced products accused of patent infringement in federal court.[121] In summary, the reasons given for the ruling are as follows:[122]

> 1) Complainants have a choice of forum with regard to import actions whereas no such choice is available in domestic actions.[123]
> 2) The short and fixed time periods of a section 337 action disadvantages the respondents from adequate trial preparation.[124]
> 3) Counterclaims by respondent are unavailable in a section 337 action, whereas counterclaims are available in federal district court.[125]
> 4) General exclusion orders can result from proceedings brought before the Commission under section 337, whereas no com-

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or enforcement by any contracting party of measures . . . (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this agreement, including those relating to . . . the protection of patents, trademarks, and copyrights . . . .").

121. *United States Section 337 of the Tariff Act of 1930*, Report by the GATT Panel, § III (ii)(a) para. 6.3 (Nov. 23, 1988). Section 337 applies only to imported goods and parties whereas the majority of intellectual property laws of Title 35 of the United States Code applies to both imported and domestic goods and parties. *Id.*

122. *See United States Section 337 of the Tariff Act of 1930*, Report by the GATT Panel, § V(iv)(d) para. 5.20 (Nov. 23, 1988) (summary of reasons the GATT panel found section 337 violated the agreement).

123. *United States Section 337 of the Tariff Act of 1930*, Report by the GATT Panel, § V(iv)(d) para. 5.18 (Nov. 23, 1988). The GATT panel reasons that the complainant will tend to choose a forum in which public interest or policy determinations would be most likely to intervene in their favor. *Id.*

124. *Id.* at para. 5.19. The GATT panel reasons that the complainant has a greater opportunity to prepare its case before the actual filing of the complaint, thus gaining an adjudicative advantage over its adversary. The slight time savings which result from a determination favorable to the respondent does not out-weigh the damage to the respondent during discovery and the hearing. *Id.*

125. *Id.* at para. 5.19. The GATT panel notes that the points which might be subject to counterclaims might be raised as a defense. However, the complainant is not subjected to the risk of an adverse ruling, nor would it need to litigate in respect to unrelated issues. A complainant could be subjected to both if a counterclaim was permissible. *Id.*

parable remedy is available in domestic infringement suits.[126]
5) United States Customs Service automatically enforces section 337 exclusion orders.[127]
6) The respondents could be required to defend themselves in both federal court and at the Commission proceedings.[128]

However, the GATT panel ruled that variations of three of these reasons could be justified as a necessary substitute for the equivalent federal procedure. First, with regard to exclusion orders, the panel found that limited exclusion orders may be a necessary substitute for the federal injunction[129] and that general exclusion orders may be necessary when it is difficult to identify the source of the infringing import.[130] Second, the panel found that automatic enforcement of exclusion orders by U.S. Customs may be necessary in light of the foreigner's lack of incentive to comply with federal district court orders.[131] Third, short time periods for preliminary relief, but not permanent relief, may be necessary.[132] Fortunately, the GATT panel found a general necessity for the type of remedy provisions afforded by section 337.

The GATT panel specifically mentioned the possible necessity for short term temporary relief, but subsequent changes in the temporary relief provisions in section 337 could invoke a negative response. Representative Campbell argues that H.R. 4710 "can fairly be viewed as a change only in procedures of 337, not in its substantive scope and thus would not violate GATT any more than the present 337."[133] Even the use of a procedural argument may risk GATT and domestic criticism. The GATT panel report addressed solely procedural issues and

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126. *Id.* at para. 5.19. General exclusion orders apply to all infringing articles without regard to the party responsible for their entry into the United States. Limited exclusion orders apply only to the respondent's infringing articles. *Id.*

127. *Id.* at para. 5.19. The GATT panel notes that enforcement of injunctive relief in infringement suits in federal district courts requires an individual proceeding brought by the successful complainant. *Id.*

128. *Id.* at para. 5.19. The GATT panel found that although the likelihood that a respondent would have to defend itself in two fora simultaneously was small, the existence of the possibility is inherently less favorable. *Id.*

129. *United States Section 337 of the Tariff Act of 1930*, Report by the GATT Panel, § V(v)(c) para. 5.31 (Nov. 23, 1988).

130. *Id.* at para. 5.32.

131. *Id.* at para. 5.33.

132. *Id.* at para. 5.34.

133. 136 CONG. REC. E1333 (daily ed. May 2, 1990) (statement of Rep. Tom Campbell).

acknowledged the necessity of certain relief procedures. A change in procedure at this time may open these "necessary" areas to attack. However, by framing H.R. 4710 as a procedural change, the bill momentarily avoids the direct criticism that it would face if the amendment was framed as a substantive change.

A strong argument can be made that H.R. 4710 would result in a substantive change to section 337. The Commission and the United States Court of Appeals for the Federal Circuit hold that irreparable harm which must be proved in order for temporary relief to be granted.[134] Thus, irreparable harm is a substantive element. The bill provides a change from a rebuttable to a conclusive presumption on the substantive element of irreparable harm, which means the proposed amendment represents a substantive change.[135]

As a result, the bill would create a substantive difference between actions for temporary relief in the district courts and actions filed with the Commission. The bill's creation of a difference in substantive law would provide additional reasons for a firm to resort to forum shopping. Thus, when framed as a substantive change, the bill fails to address the concerns within the GATT panel report[136] and would directly violate article III:4[137] by creating law which potentially would treat foreign parties in a manner less favorable than United States parties.

In addition to the change of presumption which could be viewed as either a procedural or substantive change, the bill also proposes a clearly procedural change in section 337 by restricting the ability to permit "entry under bond." A change in bonding could induce a negative response from many GATT participants since the GATT report was already critical of procedural aspects of relief under section 337. Furthermore, restricting the "entry under bond" provision lessens the effect of the only pro-respondent provision in section 337.[138] Therefore, GATT participants other than the United States would likely protest any attempt to remove the pro-respondent temporary provision of "entry under bond."

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134. *See supra* note 81 and accompanying text.

135. *See* BLACK'S LAW DICTIONARY 1067 (5th ed. 1979) ("[T]he majority view is that a conclusive presumption is in reality a substantive rule of law . . . .").

136. *See supra* notes 122-128 and accompanying text for a discussion of the GATT panel concerns.

137. *See supra* note 119.

138. *See supra* note 108 and accompanying text for a discussion of "entry under bond" with regard to H.R. 4710.

4. *Likely Response to a Bill such as H.R. 4710 by the Office of the United States Trade Representative*

The report issued by the GATT panel prompted a negative response from the Office of the United States Trade Representative (USTR).[139] However, a November 1989 memo from President Bush[140] resulted in a softening of the USTR stance regarding GATT.[141] On February 1, 1990, the USTR requested written comments from the public concerning possible amendments to section 337 of the Tariff Act of 1930.[142] The USTR stated that the current system for patent enforcement could be improved to facilitate procedures, provide more comprehensive relief in a single action and also to bring the United States into conformity with its international obligations.[143] The USTR also provided several proposals for section 337 amendments and are as follows:

> (1) Congress could establish a trial-level patent court which would have jurisdiction over all patent-related litigation and amend section 337 to require that patent-based complaints be brought before the new patent court. Congress could authorize

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139. Office of the United States Trade Representative statement (Nov. 7, 1989). (Although the United States "did not block GATT Council adoption of the panel report on section 337, the United States did not join that consensus or accept the report's findings.").

140. Written Statement from the Office of the United States Trade Representative, *Possible Amendments to Procedures for Enforcement of Patent Rights* at 2, (Jan. 1990) (statement introducing the request for public comment) (In a November 1989 memo the President stated, "I am committed to the adequate and effective protection of U.S. intellectual property rights. This Administration places the highest priority on strengthening the enforcement of intellectual property rights in the Uraguay Round [of GATT] and in bilateral negotiations. . . . I appreciate your assurance that the USTR-led interagency process will give the highest priority to working with Congress, the U.S. International Trade Commission, and the private sector to develop an effective, GATT-consistent section 337 mechanism.").

141. 55 Fed. Reg. 3503 (1990). The Office of the United States Trade Representative stated that the GATT panel report during the Uruguay Round of negotiations provides an incentive and an opportunity to improve the current mechanism for enforcement of patent rights under U.S. law. *Id.*

142. 55 Fed. Reg. 3503 (1990); *see* , Written Statement from the Office of the United States Trade Representative, *Possible Amendments to Procedures for Enforcement of Patent Rights* at 2, (Jan. 1990) (statement introducing the request for public comment) (Submissions should "address both internal and border enforcement of patents. . . . Submissions should also address whether a particular approach is practicable, whether there are legal or procedural obstacles that have not been identified or appropriately addressed, and whether a particular approach would appropriately address issues raised in the GATT panel report on section 337.").

143. 55 Fed. Reg. 3503 (1990).

the patent court to issue limited and general exclusion orders, temporary exclusion orders (TEOs) and temporary cease and desist orders (TCDs). These authorities would supplement the powers exercised by other article III courts.[144]

(2) Congress could create a new division of the United States Court of International Trade (CIT) with jurisdiction over section 337 patent-based actions and collateral claims. District courts would continue to hear patent litigation not involving imports. The new division of the CIT could issue limited and general exclusion orders, TEOs, and TCDs and exercise all other article III authorizations. All related court actions, such as declaratory judgments requests, would be consolidated into a single proceeding.[145]

(3) Congress could provide respondents with an option to transfer patent-based section 337 cases to a specialized division of the CIT or to designated district courts. Section 337 would be amended to allow the patent owner to obtain damages from the court after the Commission's patent-based section 337 proceeding without a de novo hearing by the court on infringement issues. Consolidation of actions into a single proceeding would also be a part of this approach.[146]

(4) Congress could provide for transfer of a patent-based section 337 action to court after a Commission hearing on preliminary relief. The Commission's portion of the proceeding would be subject to statutory deadlines and presidential review. Provisions for the consolidation of actions and obtaining damages would be the same as those described above.[147]

(5) Congress could amend section 337 to require transfer of patent-based section 337 cases to court for a hearing on certain issues, such as damage claims and counterclaims, which cannot be adjudicated by the Commission. Transfer would occur after the Commission determined whether valid and enforceable U.S. patents were infringed by the importation of articles in violation of section 337, after the Commission decided whether to issue TEO and/or TCD orders.[148]

These proposals each deal with procedural issues asso-

144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*

ciated with section 337. The importance of whether the amendment of section 337 is framed as procedural or substantive becomes important when considering the bill with regard to the USTR proposals. By framing H.R. 4710 primarily as a substantive change in section 337, the bill appears inconsistent with USTR proposal (1) due to problems associated with applying different substantive laws to domestic and import cases by a single court. Also, the bill appears to be inconsistent with USTR proposals (2), (4), and (5) due to an overall desire for substantive consistency between the district courts and any special court. In contrast, by framing H.R. 4710 as a procedural change in section 337, USTR proposals (2), (4), and (5), which provide for a separate court to hear import cases in determination of preliminary matters, would create sufficient latitude for the adoption of a conclusive presumption of irreparable harm.

One can conclude from the content of these proposals that the United States Trade Representative has no intention of seeking elimination of section 337 as a result of the GATT criticism. Furthermore, three of the five proposals specifically mention temporary relief. One can conclude that temporary relief will remain as a device available to the United States for controlling infringing imports.[149] But, it is not clear whether the USTR would embrace an amendment which would make temporary relief conclusive in certain situations. However, the American Bar Association (ABA) position on amendments such as H.R. 4710 is more clear.

5. *The ABA Position Concerning Section 337 and Future Amendments*

In a statement submitted to the USTR, the ABA advanced the position of the ABA Section of Patent, Trademark and Copyright Law (PTC) on Section 337 of the Tariff Act

149. Written Statement from the Office of the United States Trade Representative, *Possible Amendments to Procedures for Enforcement of Patent Rights* at 2, (Jan. 1990) (statement introducing the request for public comment) ("Remedies should include damages sufficient to compensate patent owners fully and to deter future infringement. In addition, patent owners should be able to seek to enjoin infringing activity on both a preliminary and permanent basis.").

of 1930.[150] Excerpts from the statement read as follows:

> The American Bar Association supports effective measures in United States Law, of a type currently provided by section 337, to permit expeditious enforcement of intellectual property rights at the border, regardless of what steps are taken to deal with the purported violation found in the GATT Panel Report. The ABA also encourages the United States government to urgently press for a TRIPS [Trade-Related Intellectual Property] agreement as a part of the Uruguay Round of GATT negotiations establishing standards for the protection of intellectual property, effective measures in member nations for the enforcement of such standards, and an effective dispute resolution mechanism. . . .
> The Patent system, including the enforcement provisions of section 337, has served our nation well. The flood of imported products infringing the rights of U.S. patent holders shows no sign of abatement. Therefore, any changes in section 337 should be approached with considerable caution.[151]

The ABA recognizes the complexities of balancing the effective border enforcement mechanism in section 337 with the counter-force of expanded and liberalized trade supported by GATT. However, the statement goes on to suggest that any changes should focus *only* on provisions where revision is necessary to meet the GATT Panel Report's objections (emphasis added).[152] H.R. 4710 would not fit into that category.

In the 1990 annual meeting of the ABA Section of Patent, Trademark and Copyright Law, members discussed proposed Resolution 405-1 which was intended to deal with both the section 337 objections raised by the GATT Panel Report and the proposals by the U.S. Trade Representative made in response to the panel report.[153] Resolution 405-1 favors, in principle, amendment of section 337 and related statutes as may be necessary and appropriate to: provide expeditious

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150. Thomas F. Smegal, Jr., *Chairman's Letter,* PTC Newsletter Published by the A.B.A. SEC. PAT, TRADEMARK AND COPYRIGHT L., Vol. 8, No. 4 Sum. 1990 at 1. (PTC 1989 resolutions NB 1, 2, 3, and 4 adopted by the ABA in amended form Feb., 1990).

151. *Id.*

152. *Id.*

153. *1990 Summary of Proceedings*, 1991 A.B.A. SEC. PAT, TRADEMARK AND COPYRIGHT L., 86.

permanent relief within specified time frames; allow defensive counterclaims and reserve other counterclaims for subsequent district court proceedings, and stay parallel proceedings in federal court involving the same patent-based unfair trade practices, while preserving the opportunity to seek additional relief that may be available in that court.[154] However, Resolution 405-1 was neither adopted nor rejected; rather it was recommitted. The decision to recommit was intended to give the USTR greater latitude in the Uruguay round of GATT and was based upon the belief that it was premature to take any further position on the matter.[155] Although Resolution 405-1 was not adopted, the text of the resolution shows a commitment to permanent relief, while failing to address temporary relief. Based upon the ABA action taken thus far, any proposed amendment of section 337 in the spirit of H.R. 4710 would likely fail to gain important ABA support.

VI. CONCLUSION

Although section 337 provides a means for industry in the United States to obtain temporary relief, as a practical matter, such relief is elusive because of the difficulty in establishing irreparable harm. Industry's failure to pursue temporary relief in a market acknowledged as flooded with infringing imports indicates the over restrictiveness of the current status of section 337(e) in curbing these importation atrocities. H.R. 4710 attempts to ease this restrictiveness and make temporary relief more accessible by eliminating the necessity of establishing irreparable harm. H.R. 4710 would mandate temporary relief on the showing of a "reason to believe" that an import infringes United States intellectual property rights. Unfortunately, passage of H.R. 4710 would be ill-advised for both domestic and international reasons.

From a domestic perspective, the bill's present form is self-defeating. The intent of the bill is to provide mandatory temporary relief on the showing of a "reason to believe" that an import infringes a United States intellectual property right. The bill's failure to remove section 337's reference to the Federal Rules of Civil Procedure regarding injunctive relief would prevent H.R. 4710 from achieving its intended purpose. Furthermore, H.R. 4710 falls outside the section 337 amendment boundaries stated by the ABA and would fail to gain their support.

From an international perspective, H.R. 4710 generally runs counter to GATT article III:4 by creating a conclusive presumption of irrep-

154. *Id.* at 25.
155. *Id.* at 86.

arable harm in a Commission action. Such a presumption is inconsistent with the rebuttable presumption of irreparable harm used in federal district courts. Also, the unnecessary restriction of "entry under bond" to non-intellectual property cases would likely result in additional criticism from the GATT community.

However, the bill addresses an important point recognized by the International Trade Commission, the Office of the United States Trade Representative, the American Bar Association, and many members of Congress: the damage caused by the relentless flood of infringing imports. Infringing imports result in serious economic losses for industry in the United States which in turn directly correlates to a significant loss of American jobs. Protecting American interests requires an effective means for deterring infringing imports.

The deterrent capabilities of section 337 could be improved through legislation incorporating the spirit of H.R. 4710. Providing accessible temporary relief would be a step toward insuring the survival of American industry and American jobs by providing protection against the irreparable harm that is sure to exist when infringing imports enter the United States. Any amendment to section 337 making temporary relief more accessible would be denounced by many GATT participants, but welcomed by American industry. Therefore, Congress must balance the necessity of protecting United States concerns with the desire to remove international annoyances from the law of the United States. Due to the nature of the dilemma, striking a balance which protects the interests of both sides may prove to be an exercise in futility.

*Ronald K. Aust**

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* J.D. Candidate, 1992, Indiana University School of Law—Indianapolis.

Another Inning in Cuban-United States Relations: Capital Cities/ABC Inc. v. Brady

I. INTRODUCTION

When baseball teams from the United States and Cuba met in the finals of the 1987 Pan American Games (Games), the heavily-favored Cubans won their fifth straight gold medal in a 13-9 victory over the United States.[1] Although the 1991 Games were scheduled to be held in Cuba, a dispute in the negotiation for television broadcast rights between Capital Cities, Inc./ABC (ABC) and the Treasury Department raised doubts that American fans would be able to witness the next baseball game between the two countries or any other events of the 1991 Games. The result was a suit filed by ABC against the Treasury Department for denial of the specific license necessary to broadcast the Games.[2]

The case illustrates the interaction between the courts and the Executive in foreign policy areas. The executive branch was willing to litigate for policy reasons to preserve its control over contacts with Cuba as an enemy of the United States. Courts tend to defer to the executive branch in foreign policy areas. After winning in court, the Treasury Department was then willing to settle with ABC to promote other executive branch policy goals. As a result, parties desiring contact with Cuba may be best guided by an awareness of overall foreign policy goals.

After explaining the facts of the case in more detail, this Note will set out the history of the Games, Cuban internal affairs, and United States foreign policy toward Cuba, and will describe the relevant law, the Trading With The Enemy Act (TWEA),[3] by which the United States has applied an embargo against Cuba. The embargo affects informational material such as television sports broadcasts. In addition, this Note will review the constitutional implications for free speech and separation of powers which were raised by the TWEA. An analysis of the court's reasoning in *Capital Cities/ABC* will show why judicial def-

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1. Dave Garlick, *Cuba Wins Baseball Gold*, INDIANAPOLIS STAR, Aug. 23, 1987, *microformed on* Int'l, 1987, Fiche 150, A-2 (NewsBank).

2. Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007 (S.D.N.Y. 1990).

3. 50 U. S. C. § 5 (Supp. 1990).

erence to the Office of Foreign Assets Control (OFAC) is appropriate in the situation of live coverage of the Games and does not offend First Amendment rights or due process rights. Nevertheless, ABC did televise portions of the 1991 Games, illustrating the subtle interplay between the judicial and executive branches of government in the foreign policy arena.

The case arises as a result of a bid by ABC television to the Pan American Sports Organization (PASO) for live broadcasting rights for the 1991 Games to be held in Cuba.[4] PASO granted the rights to ABC for $8.7 million with the express understanding that approximately seventy-five percent of this sum, $6.5 million, would be passed through to Cimesports, S.A., the Cuban host organizer of the Games.[5] Because an embargo under the TWEA is in effect against Cuba, the Treasury Department requires a specific license for such a transaction.[6] In a letter dated June 12, 1989 to OFAC, ABC applied for "a license covering all necessary transactions involving Cuba in connection with the television coverage and transmission of the 1991 Pan American Games."[7] OFAC responded that a specific license was necessary. ABC believed the transaction did not require a specific license and furthermore thought the requirement was contrary to the intent of the Berman Amendment to TWEA.[8] ABC thought that a general license for travel connected with news gathering should be granted.[9] OFAC agreed to grant ABC a license if royalty payments were made into a blocked account,[10] and if travel expenses were kept to a minimum. In addition, OFAC defined sports broadcasts as entertainment and not news, but agreed to extend ABC a news gathering general license if no royalty payment were made. The only other choice for ABC, according to OFAC, was to import videotapes of the Games, providing that ABC did not pay for services in connection with the production of such

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4. Capital Cities/ABC, 740 F. Supp. at 1009.
5. *Id.* at 1009, 1010.
6. *See infra* notes 84-92 and accompanying text.
7. Capital Cities/ABC, 740 F. Supp. at 1010.
8. *Id.*; *see infra* notes 93-99 and accompanying text.
9. Capital Cities/ABC, 740 F. Supp. at 1010.
10. 31 C. F. R. § 515.508 (a) (1989). *See* De Cuellar v. Brady, 881 F. 2d 1561 (11th Cir. 1989). Blocked funds are retained by the United States for possible vesting to the United States and for use in negotiation discussions with the Cuban government. The United States has a long history of compensating our own citizens out of foreign assets in this country for wrongs done to them by foreign governments abroad. Such action against Iran was upheld in Dames & Moore v. Regan, 453 U.S. 654 (1981).

tapes. The effective result was that OFAC denied the request because the transaction would result in a very substantial payment to Cuba, contrary to the current foreign policy of the United States.[11] ABC decided that none of those alternatives was satisfactory and instituted suit.

II. THE PLAYERS: HISTORICAL BACKGROUND OF THIS CASE

A brief explanation of the history of the Pan Am Games, the recent history of Cuba, and the United States' foreign policy regarding Cuba will establish the context for *Capital Cities/ABC v. Brady*.[12]

A. The Pan American Games

The idea of Pan American Games was conceived in 1932 during the Los Angeles Olympic Games, but the first officially sanctioned Pan Am Games did not take place until 1951.[13] World politics interfered from the start.[14] As a prelude to the Games originally planned for 1942, a festival called the 1937 Pan American Games was held in Dallas, Texas. At least 21 nations of South, Central and North America were invited, but only about a half dozen actually attended.[15] Then in 1940 the Olympic Games to be hosted by Finland were cancelled because of the war in Europe. As a result, plans were made to organize another Pan Am Games as a substitute "to reward American athletes who had trained for the Olympics"[16] and to "solidify relations of the Americas."[17] Cuba indicated an interest in staging the games. The games did not occur, however, and American athletes participated in a national week of sports instead. Organization was attempted again in 1942, but the United States withdrew because of war involvement. Avery Brundage expressed the goals of the Pan Am Games when he wrote in 1942:

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11. Capital Cities/ABC, 740 F. Supp. at 1010.

12. *Id.* at 1007.

13. James G. Newland, Jr., *Games Have Survived, Flourished Despite Turmoil*, INDIANAPOLIS STAR, Aug. 4, 1987, *microformed on* Int'l. 1987, Fiche 132, G7 (NewsBank).

14. *See* Jeffrey M. Marks, Comment *Political Abuse of Olympic Sport—DeFrantz v. United States Olympic Committee*, 14 N. Y. U. J. INT'L. LAW & POLITICS 155, 156 (1981) (intertwining of sports and politics also has been apparent in Olympic Games history).

15. Newland, *supra* note 13, at 7. This event was sponsored by the Amateur Athletic Union and billed in A.A.U. documents as the 1937 Pan American games. *Id.*

16. *Id.*

17. *Id.*

> After the last great war, revulsion from the horrors of conflict and the chicanery of politics, and the desire for something clean and honest, something idealistic and inspiring, led to a tremendous worldwide sport development. The same thing will occur after the present conflict ceases, and those who have worked to keep the fine spirit of amateur sport alive will be hailed as patriots of the highest rank.[18]

In 1951, the first Pan Am Games took place in Buenos Aires. They have been held every four years since with the most recent Games in 1991.[19] In that event a United States team competed with teams from 39 other countries in North, Central, and South America.[20]

Although the host country of the Games may benefit politically from the interaction with other countries, economists hold differing views regarding the financial impact on host locations of sports events.[21] Indianapolis, host city of the 1987 Games estimated the economic impact to be $175 million for the 21-day event.[22] It has been recently reported, however, that the 1987 Pan Am Games were able to break even only because creditors forgave $736,000 in debts.[23] Nevertheless, some Indianapolis officials believe there have been big benefits in public relations and image making "that go beyond bottom line numbers."[24] Fidel Castro believes the Games can have positive benefits for Cuba "from the social point of view."[25]

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18. *Id.* at 8. (Brundage served amateur athletics and the international Olympic movement in a variety of positions and was one of the main backers of the Pan American Games idea).

19. *Id.*

20. Bill Benner, *Pan Am Race*, INDIANAPOLIS STAR, July 28, 1991, at B-2.

21. Bill Koenig, *Economists Question Impact of Events*, INDIANAPOLIS STAR, Oct. 16, 1990, at D-1. *See also* Susan Hanafee, *Pan Am Games' Impact Significant, Survey Says*, INDIANPOLIS STAR, Oct. 2, 1987, *microformed on* Int'l., 1987, Fiche 162, D-1 (NewsBank); Scott L. Miley, *Pan Am*, INDIANAPOLIS STAR, July 13, 1986, *microformed on* Int'l. 1986, Fiche 66, E-12 (NewsBank); Rob Schneider, *Pan Am Games Spur Aid to Blighted Areas*, INDIANPOLIS STAR, Feb. 3, 1985, *microformed on* Int'l. 1985, Fiche 12, F-8 (NewsBank).

22. Koenig, *supra* note 21, at D-1 (stating the annual impact by the Indianapolis Colts professional football team to be $25 million).

23. Robert Rice, *Olympic Group Wants Facilities for Pan Am Games*, DESERT NEWS (Salt Lake City, Utah), Jan. 16, 1990, *microformed on* Int'l. 1990, Fiche 16, B-6, 7 (NewsBank).

24. Koenig, *supra* note 21, at D-1. Sports economists acknowledge the intangible benefits but believe sports are not an economic panacea. *Id.*

25. *Castro: Cuba Came Close to Not Playing Pan Am Host,* INDIANAPOLIS STAR, July 29, 1991, at B-1 (Castro himself had a brief career as a pitcher in the Cuban baseball leagues and once declined a major league contract from the Giants).

Cuban participation in the Games has been frequently interrupted by political expressions. At the 1971 Games a scuffle between Canadian, American, and Cuban athletes developed into a melee in which several were injured. Later at that event chaos broke out again when several Cubans attempted to defect into the "no man's land" in the center of the track and field stadium. Four Cubans managed to defect, and two who were prevented from doing so committed suicide. At the 1975 Games the water polo match between Cuba and the United States erupted into a brawl.[26] When the 1987 Pan Am Games were held in Indianapolis, relations with Cuban organizers and athletes were sometimes strained. "A small plane flew over the opening ceremonies, trailing a banner that urged Cuban athletes to defect and gave a phone number for assistance."[27] Leaflets were circulated that said, "Cuban brothers, welcome to the land of freedom."[28] Demonstrators burning a Cuban flag incited the Cuban boxing team to charge into the stands after them.[29]

Cuba's participation in recent international sports activities has been unpredictable.[30] In 1987 there was speculation that Castro might boycott the Pan Am Games in Indiana unless his nation was named to host the 1991 Games.[31] Indeed that award was made to Cuba by

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26. Nafziger & Strenk, *The Political Uses and Abuses of Sports*, 10 CONN. L. REV. 259, 278-79 (1978).

27. *Games Countries Play*, Newsweek, Aug. 24, 1987 at 25 [hereinafter *Games*]. *See Pan Am Start Disrupted by Anti-Castro Political Ploys,* INDIANAPOLIS STAR, Aug. 10, 1987, *microformed on* Int'l. 1987, Fiche 132, B-9 (NewsBank). One Spanish-language leaflet that was circulated offered $25,000 reward to the first intelligence agent to defect from Cuba or Nicaragua. Indianapolis Games planner, Theodore Boehm, declined to control the exercise of free speech, saying, "That's life in the United States, thank God." *Id.*

28. *Pan Am Start Disrupted by Anti-Castro Political Ploys*, INDIANAPOLIS STAR, Aug. 10, 1987, *microformed on* Int'l. 1987, Fiche 132, B-9 (NewsBank).

29. *Games, supra* note 27, at 25.

30. Christine Brennan, *U.S. Government Plays Hardball With Cuba, Pan American Games,* WASH. POST, Feb. 6, 1990, *microformed on* Int'l. 1990,
Fiche 16, B-4 (NewsBank). "Castro has angered the Olympic community by boycotting the last two Olympic Games. Cuba joined the Soviet boycott of the 1984 Los Angeles Olympics and skipped the 1988 Games for political reasons." *Id.*

31. Linda G. Caleca, *'Healing' Will Mean Fewer Boycotts, PAX-I Officials Say*, INDIANAPOLIS STAR, Nov. 18, 1986, *microformed on* Int'l. 1986, Fiche 134, D-5 (NewsBank). *See* George Stuteville & Linda G. Caleca, *Cuba Joyous About Coming to Games*, INDIANAPOLIS STAR, Aug. 15, 1986, *microformed on* Int'l. 1986, Fiche 75, E-2 (NewsBank). Robert H. Helmick, President of the United States Olympic Committee wrote a letter to PASO saying that if Cuba intended to bid for the 1991 Games, he would not place a bid for the United States.

PASO, giving Fidel Castro the opportunity he had wanted for years.[32] "For the now-shrinking Communist world, the Games became a symbol. For Castro and his people, the Games became a cause. And for the United States government, they became a problem."[33] Because of the rectrictions under TWEA, officials and athletes who traveled to Havana for the Games had to report how much cash they took in and brought out. They were not allowed to use credit cards. Few families and friends of athletes were able to attend.[34]

Policies that had been in place for decades in the United States with regard to Cuba were under attack because of the Pan Am Games. The State Department declared, "We support U.S. participation in a sporting event, but we are not going to turn our foreign policy upside down for it."[35]

B. Cuba

A brief look at Cuba's recent history will trace the development of Cuba's present relationship with the United States. Soon after coming to power in 1959, Castro expropriated land and other properties, including United States' holdings, and set about establishing ties with the Soviet Union and the Eastern bloc countries. By 1961 the United States had broken off relations with Cuba and in April of that year thirteen hundred Cuban exiles, trained and armed by the CIA, attempted to invade Cuba at the Bay of Pigs. They were defeated after the United States failed to provide the promised air support. In October of 1962 President Kennedy confronted Soviet President Khruschev over nuclear missles in Cuba. Kruschev backed down, but not until Kennedy promised not to invade Cuba.[36]

Cuba has received much aid in the form of trade subsidies.[37] Until recently "Fully 70 percent of Cuba's foreign trade [was] conducted

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32. Caleca, *supra* note 31, at D-5. PASO assured the other contender, Mar del Plata, Argentina, that it would be a leading contender to host the 1995 Games and would be the alternate site for the 1991 Games. *See* Stuteville & Caleca, *supra* note 30, at E-1 (Cuba's sports training facilities are excellent. Cuba makes athletic training an educational component and eighty percent of her athletes are at the university level).

33. Brennan, *supra* note 30, at B-4.

34. *Id.* at B-5.

35. *Id.* at B-4.

36. LOUIS A. PEREZ, JR., CUBA: BETWEEN REFORM AND REVOLUTION, 315-81 (1988).

37. Susan K. Purcell, *Cuba's Cloudy Future,* 69 FOREIGN AFFAIRS 113, 114 (1990).

with the Soviet Union; estimates of Soviet economic aid range from 16 percent to 29 percent of Cuba's gross national product . . . ."[38] Cuba has been useful to the Soviets as an "important outpost and ideological ally in the U.S. sphere of influence."[39] Cuba has served as a Soviet military base and advanced Soviet causes that would be unacceptable if done by the Soviets directly.[40] However, "as the Cold War winds down, Havana's value to Moscow has declined."[41] Soviet President Gorbachev has announced a planned withdrawal of troops from Cuba in a move to improve Soviet relations with the United States.[42] The Soviet Union's internal politics contribute to reduced enthusiasm for Soviet-Cuban ties.[43] The Soviet press is questioning the wisdom of sustaining Cuba at the expense of the Soviet domestic economy.[44] Reductions in Soviet aid are beginning to be felt in Cuba.[45]

> Since the late 1970's, Moscow has allowed Havana to import more oil than it consumes and to sell the excess on the world market at commercial rates. As a result petroleum sales have become the single most important source of foreign exchange for Cuba. The Soviet Union also buys sugar from Cuba at prices that have averaged between three and five times the world market price. Cuba's dependence on subsidized trade with the Soviet Union has grown since 1981, when 60 percent of its trade was with Moscow; today that share is nearly 75 percent. Almost 90 percent of Cuba's trade is with socialist countries, an increase from 74 percent nine years ago.

Id. at 114.

38. *The Revolution at 30*, NEWSWEEK, Jan. 9, 1989 at 37 [hereinafter *Revolution at 30*].

39. Purcell, *supra* note 37, at 115.

40. *Id.* Cuba has engaged in the training and arming of guerrillas and the deploying of tens of thousands of troops to prop up third world regimes friendly to the Soviet Union. *Id.*

41. *Id.*

42. Elizabeth Shogren & Carey Goldberg, *Gorbachev Wins Nobel, But Falters at Home*, INDIANAPOLIS STAR, Sept. 12, 1991, A-3.

43. Purcell, *supra* note 37, at 116.

44. *Id.* The Soviet press reported in early 1990 on debts owed to Moscow by foreign borrowers. "Cuba was at the top of the list, with a cumulative debt of 15 billion rubles, or more than $24 billion at the official exchange rate of one ruble for $1.60. Cuba's debt was more than double that of the second-place debtor, Vietnam." *Id. See* Mimi Whitefield, *Soviet Journalists Open Fire on Lack of Reforms in Cuba,* MIAMI HERALD, Mar. 8, 1990, *microformed on* Int'l. 1990, Fiche 21, D-12 (NewsBank) (reporting criticism by a Soviet deputy of Soviet foreign aid spending commitments when Soviet citizens experience rations in soap and sugar and Izvestia's account that Cuba was the largest socialist debtor with a debt of about $24.78 billion).

45. Purcell, *supra* note 37, at 117. In April 1990 in a new annual trade agreement, trade and technical assistance was increased by 8.7 percent over 1989. Military aid was decreased from $1.5 billion to $1.2 billion. In 1989 the Soviets delivered six new

Eastern European socialist countries have accounted for about 15% of Cuba's trade in the past, but the collapse of communism in Eastern Europe is proving destabilizing economically to Cuba as well.[46] "Eastern Europe is racing to recapture its capitalistic past . . . [and] feel[s] no gratitude or responsibility toward Cuba."[47] As a result, Cuba is being left alone defending a system that her former allies are repudiating.[48] Nevertheless, Castro still has some strengths which protect him from the sorts of recent revolution in Eastern Europe. Castro notes, "Cuba is not a country where socialism arrived behind victorious divisions of the Red Army."[49]

In the 1970's Cuba extended its influence into Africa and the Middle East. These involvements received general support among Third World nations; but when Cuba failed to support Afghanistan in a United Nations resolution condemning the Soviet invasion, Cuba's prestige in the Third World suffered great harm.[50] Castro's assertion that he enjoys strong popular support in the Western Hemisphere was undermined by elections in Nicaragua in which the Sandinistas lost to

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MiG-29s to Havana to replace Cuba's aging jets. *Id. See* Lee Hockstader, *Preparing for Harder Times, Cuba Tries to Become More Self-Sufficient,* WASH. POST, July 29, 1990, *microformed on* Int'l. 1990, Fiche 71, B-11 (NewsBank). The real pinch is expected to be felt in January of 1991. "Moscow's new posture may cost Cuba as much as $150 million in lost subsidies in 1991, according to foreign diplomats in Havana." *Id.*

46. Purcell, *supra* note 37, at 117.

47. *Id.* at 118. In March of 1990 Czechoslovakia, Poland, Bulgaria, and Hungary all joined the United States in voting against Cuba at the U.N. Commission on Human Rights. The resolution, co-sponsored by Czechoslovakia and Poland and vigorously opposed by Cuba, asked the Cuban government to comply with its pledge not to detain, repress or otherwise mistreat Cuban human rights activists. It asked for answers to questions raised by a 1988 delegation that visited Cuba. Prior to 1989, Eastern Europe had always voted as a bloc with Cuba on the Human Rights Commission. *Id.*

48. *Id. See* Lee Hockstader, *Preparing for Harder Times, Cuba Tries to Become More Self-Sufficient*, WASH. POST, July 29, 1990, microformed on Int'l. 1990, Fiche 71, B-11 (NewsBank) (Eliot Abrams, former State Department Assistant Secretary for Inter-American Affairs commented, "It's very striking, in this moment of mass democratization around the world, that the Games will be held in one of the very few dictatorships in the hemisphere." *Id.*).

49. Julia Preston, *East Bloc Turmoil Bodes Ill For Trade and Aid in Cuba,* WASH. POST, Jan. 22, 1990, *microformed on* Int'l. 1990, Fiche 8, A-5 (NewsBank). *See* Susan Benesch, *Castro May Be Slipping, But His Fall Remains in Doubt,* ST. PETERSBURG (Fla.) TIMES, June 7, 1990, *microformed on* Int'l. 1990, Fiche 58, A-4 (NewsBank).

50. PEREZ, *supra* note 36, at 379-80. For example, Cuban troops were sent to assist Syria in the Yom Kippur War of 1973 and an estimated 36,000 Cuban troops assisted the liberation forces in Angola in 1975-76. *Id.* at 378.

a candidate promising democracy and a market economy. Costa Rica, El Salvador and Honduras also elected conservative presidents, lessening Castro's influence in Central America.[51]

In 1980 the Mariel Boatlift brought 125,000 Cubans to the United States. At the present time the United States allows the immigration of only political prisoners and their families and as many as 20,000 other Cubans a year. In 1990, after 30,000 Cubans had completed the paperwork to emigrate to the United States, Castro urged the United States and other European countries to send visas and boats to pick up the emigrants. In addition, Cuba has lowered the age limit for citizens permitted to travel outside Cuba to men over age 55 and women over age 50.[52] The State Department has indicated there are no plans to change immigration policy to allow a new mass exodus of Cubans.[53]

Cuba has suffered economic decline and serious internal political problems.[54] Many food items are rationed and there are severe restrictions on the sale of household items, clothing, and electrical appliances. Castro has warned his country of hard times to come when the Cuban economy would be very bleak.[55] Castro fans the flames of Cuban nationalism in order to divert attention from Cuba's internal diffi-

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51. Purcell, *supra* note 37, at 119.

52. Gladys Nieves, *Cuba Lowers Its Age Limit on Travelers*, MIAMI HERALD, March 6, 1990, *microformed on* Int'l. 1990, Fiche 21, D-8 (NewsBank). *See* Mimi Whitefield, Sandra Dibble, & Elinor Burkett, Castro May Ease Migration, MIAMI HERALD, May 6, 1990, *microformed on* Int'l. 1990, Fiche 44, F-12 (NewsBank). A Cuban who comes to the United States with a temporary travel visa may become a permanent resident after remaining in the country for a year. More liberal travel would permit more Cubans to settle in the United States. Some analysts believe Cuba is seeking a way to allow dissidents to leave, having the effect of a legal Mariel. *Id.* at F-13.

53. Mimi Whitefield, *Castro's 'Send Boats' Is No Mariel,* MIAMI HERALD, July 28, 1990, *microformed on* Int'l. 1990, Fiche 85, E-1 (NewsBank).

54. Purcell, *supra* note 37, at 121. In 1986 Castro launched a rectification campaign aimed at reversing an experiment with market mechanisms. The campaign, still in effect, recentralizes the economy and substitutes moral incentives for material incentives. *Id.*

55. Mimi Whitefield, *Shortages in Cuba Force Stringent Rationing Plan*, MIAMI HERALD, Sept. 27, 1990, *microformed on* Int'l. 1990, Fiche 100, F-7 (NewsBank). *See* Ron Casey, *Castro's Cuba: An Island in Pain*, BIRMINGHAM (Ala.) NEWS, Oct. 31, 1990, *microformed on* Int'l. 1990, Fiche 112, B-6 (NewsBank); Andres Oppenheimer, *Visit to Cuba: Anxiety But No Hint of Rebellion*, MIAMI HERALD, Oct. 21, 1990, *microformed on* Int'l. 1990, Fiche 112, B-8 (NewsBank) (detailing recent visits by journalists to Cuba and telling of the evident hard times the people suffer there).

culties.[56] When the United Nations Security Council voted to impose sanctions on Iraq in August, 1990, Cuba remained an implacable foe of the United States. Cuba preferred to abstain rather than vote with the Soviet Union and the United States.[57] Later Cuba voted against military action against Iraq[58] and supplied Iraq with air shipments of military-related equipment.[59]

C. *The United States: Foreign Policy Toward Cuba*

Against this background, attention focuses on United States policy toward Cuba. In 1963 the United States imposed an economic embargo on trade with Cuba.[60] Economic pressure is a major tool in general United States foreign policy.[61] Use of economic sanctions, which dates back to the ancients, has been used throughout United States history, and with increasing frequency since World War II.[62] "Sanctions do not involve the violence and destruction of armed force, yet they provide a nation's leader with the appearance, and often the reality, of taking decisive steps. They are also more acceptable in the international community. . . [and] more concrete than diplomatic protests or other diplomatic moves."[63] The general rationales for imposing sanctions

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56. Purcell, *supra* note 37, at 124. In a 1989 speech Castro said:
> Destiny assigns the role of one day being among the last defenders of socialism. . . . In a world in which the Yankee empire was able to make a reality of Hitler's dreams of dominating the world, we would know how to defend this bastion until the last days of blood. . . . Socialism or death! Fatherland or death! We will win!

57. John M. Goshko, *Security Council Approves Package With a 13-0 Vote*, WASH. POST, Aug. 7, 1990, *microformed on* Int'l. 1990, Fiche 89, G-2 (NewsBank).

58. Warren Strobel, *U. N. Approves Use of Force, Gives Iraq Jan. 15 Deadline*, WASH. TIMES, Nov. 30, 1990, *microformed on* Int'l. 1990, Fiche 129, F-12 (NewsBank).

59. Bill Gertz, *Cuba, Libya Ignore Sanction*, WASH. TIMES, Aug. 30, 1990, *microformed on* Int'l. 1990, Fiche 89, E-6 (NewsBank).

60. *See infra* notes 77-84 and accompanying text.

61. Barry Carter, *International Economic Sanctions: Improving the Haphazard U. S. Legal Regime*, 75 CALIF. L. REV. 1162, 1163 (1987). Recent examples include trade and investment sanctions against South Africa, financial and other sanctions against Panama, measures against Libya, a trade embargo against Nicaragua, controls on high-technology exports, sanctions against Poland and Soviet Union (including the grain embargo and attempt to stop exports of pipeline equipment), and a ban on trade and freezing assets of Iran during hostage crisis. *Id. See* John Goshko, *U. N. Tightens Sanctions, Bans Air Traffic to Iraq*, WASH. POST, Sept. 26, 1990, *microformed on* Int'l., 1990, Fiche 106, C-1 (NewsBank) (noting the United States also used sanctions against Iraq in an attempt to force Iraq out of Kuwait).

62. Carter, *supra* note 61, at 1168-70.

63. *Id.* at 1163.

include: to influence a country's policies or government; to punish a country for its policies; or to indicate a symbolic protest of a country's policies.[64] Debate centers around embargo effectiveness.[65] The actual rationale for the particular embargo is often difficult to discern and the extent to which the embargo contributes to change is difficult to measure.[66]

In the past it has been argued that the United States should lift the economic embargo against Cuba and take steps to normalize relations.[67] Different viewpoints on the matter have existed within the State Department.[68] "[T]he U.S. embargo on trade with Cuba has

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64. *Id.* at 1170. *See* Nafziger & Strenk, *supra* note 26, at 261. This article examines six political uses of international athletic contests, including "diplomatic recognition and nonrecognition, protest, ideology and propaganda, official prestige, international cooperation, and conflict." *Id.* at 261 (footnote omitted).

65. Carter, *supra* note 60, at 1163.

> Despite significant failures, . . . detailed studies suggest that sanctions have been successful in some situations. For example, U.S. economic sanctions helped to topple Haiti's Duvalier in 1986, Uganda's Idi Amin in 1979, Chile's Allende in 1973, and the Dominican Republic's Trujillo in 1961. . . . While the evidence is still unclear, comprehensive U.S. sanctions probably helped free the hostages from Iran in 1981. Similarly, sanctions against South Africa . . . appear to be having an impact on the economy and on the political climate.

Id. (footnotes omitted).

66. *Id.* at 1171-2. A comprehensive study by Hufbauer and Schott which evaluated the effectiveness of sanctions against specific foreign policy objectives. To measure success the study considered "the extent to which the policy outcome sought . . . was in fact achieved" and "the contribution made by sanctions to a positive outcome." *Id.* at 1172. The result was that in the sixty-two cases since 1945 in which the United States was the sanctioning country, the success rate was about 40%. The success rate declined somewhat in recent years in the areas where the United States was *seeking* modest policy results. This is due to two factors: recent targets are less dependent on trade with the United States and other countries, such as the Soviet Union, have stepped forward to assist the target countries. *Id.* (footnotes omitted).

67. Alfonso Chardy, *Havana: U.S. Cool to Improving Ties*, MIAMI HERALD, April 3, 1989, *microformed on* Int'l, 1989, Fiche 33, D-8 (NewsBank). *See* Carla Ann Robbins, *The Graying of a Revolution*, U. S. NEWS & WORLD REPORT, Jan. 9, 1989 at 41 (reporting on a poll of Cuban Americans which found that 73 percent favor negotiations between the United States and Cuba); *cf. Revolution, supra* note 38, at 37 (calling Cuba the rallying cry for the United States political right, making it unlikely Bush will risk loss of that political support by normalizing relations with Cuba).

68. WAYNE SMITH, THE CLOSEST OF ENEMIES: A PERSONAL AND DIPLOMATIC ACCOUNT OF U.S. - CUBAN RELATIONS SINCE 1957 (1987). Wayne Smith, a diplomat, served in Cuba until 1982. He indicates that the Cubans made preliminary gestures in 1981 that could have led to talks between the United States and Cuba, but those low-level openings were rebuffed by the State Department.

inflicted economic damage, but only in discrete areas such as technology and Western consumer products. In short, Cuba has paid a price for being a Soviet ally, but U.S. interests have not advanced accordingly."[69] Nevertheless, in March of 1989, Secretary of State James Baker dispatched a confidential memo to all United States embassies saying that the Bush administration planned no change in relations with Cuba because "Cuban behavior has not changed sufficiently to warrant a change in U.S. attitudes."[70] President Bush has said, "I am not about to shift our policy towards Fidel Castro."[71] Specifically Bush has challenged Castro to:

> Free all political prisoners; Conform to accepted international standards regarding human rights and allow the United Nations and other organizations unrestricted access to monitor compliance. Stop intervening in the internal affairs of other nations; Hold free and fair elections. . . . Allow Cubans who wish to leave the country to do so; Show Cuba is truly independent by sharply reducing the
> Soviet military presence.[72]

The mood of Congress does not appear to be particularly sympathetic either. In 1989 Congress moved to tighten the embargo against Cuba with the passage of a bill that would bar foreign subsidiaries of United States companies from trading with Cuba. This action "closes a loophole" and brings additional economic pressure to force reform in Havana.[73]

III. THE GAME RULES: UNITED STATES LAW DEALING WITH EMBARGOES AGAINST HOSTILE NATIONS

The relevant law regarding ABC's broadcast of the Games from Cuba is the Trading With the Enemy Act as amended. Because this

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69. PAMELA S. FALK, CUBAN FOREIGN POLICY, 164 (1986).

70. Chardy, *supra* note 67, at D-8.

71. Andres Oppenheimer, *President Sees No Improvement in Havana Ties,* MIAMI HERALD, June 29, 1989, microformed on Int'l. 1989, Fiche 61, G-14 (NewsBank).

72. Frank J. Murray, *Bush Scorns Soft Line Toward Cuba,* WASH. TIMES, May 23, 1989, *microformed on* Int'l. 1989, Fiche 50, C-6 (NewsBank). Bush said, "As president, I am unalterably committed to a free, united, democratic Cuba, and I'm not going to ever falter in that support. . . . This I pledge: Unless Fidel Castro is willing to change his policies and behavior, we will maintain our present policy toward Cuba." *Id.*

73. Karen Riley, *Loophole Closing in Trade With Havana,* WASH. TIMES, July 27, 1989, *microformed on* Int'l. 1989, Fiche 76, G-13 (NewsBank) (describing how the amendment to a 1975 trade law bars subsidiaries of United States companies from circumventing the United States embargo against Cuba).

law restricts speech, questions are raised with regard to both First Amendment rights and executive powers under the separation of powers doctrine.

A. Trading With the Enemy Act

The Trading With the Enemy Act[74] was passed on October 6, 1917, exactly six months after the United States declared war on Germany. Congress invested the President with the power "to determine what disposition should be made of enemy properties in order effectively to carry on the war."[75] The Act was passed by Congress "to prevent the enemy from using any property it owns or controls in the United States, to make that property available for use by the United States, and to weaken enemy countries by depriving their supporters of the ability to aid them through trading."[76]

TWEA originally applied to both wartime and peacetime emergencies. President Kennedy declared Cuba a hostile nation in 1963 during peacetime and instituted an embargo.[77] A 1977 amendment to TWEA narrowed its scope so that only "[d]uring the time of war, the President may . . . prohibit or regulate any transaction in which any foreign country or a national thereof has any interest."[78] "[T]he amendment limited the power of the President to regulate domestic and international economic transactions via the national emergencies pro-

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74. 50 U. S. C. at § 5.

75. Richardson v. Simon, 560 F. 2d 500, 503 (2d. Cir. 1977) (quoting United States v. Chemical Foundation, 272 U.S. 1, 10-12 (1926)).

76. Note, *Licensing of Journalists Under the Trading With the Enemy Act: An Impermissible Form of Censorship*, 3 B. U. INT'L. L.J. 457, 459-60 (footnotes omitted) (1985).

77. De Cuellar, 881 F.2d at 1563.

78. 50 U. S. C. at § 5 (b) (1) provides in pertinent part:

> During the time of war, the President may, through any agency that he may designate, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise— (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
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> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States. . . .

vision of the act and provided safeguards giving Congress a role in declaring and terminating national emergencies."[79] Nevertheless, Congress still intended to give the President broad discretion in administering the Act.[80] The amendment acted prospectively. If a national emergency, such as the one with Cuba, had been declared by the President before 1977, it could be extended one year at a time if the President thought it in the national interest.[81] Congress recognized that it might be embarrassing for the President to have to declare new national emergencies in the case of Cuba and Vietnam.[82] Thus, the Cuban economic embargo was grandfathered, and every year since that time Presidents Carter, Reagan, and Bush have determined that such an extension is in the national interest.[83] "Emergencies, by definition, require a quick, decisive response. Of the three branches of government, only the Executive has a continuing, spontaneous capability for mounting such a response."[84]

B. Implementation by the Treasury Department Through the Office of Foreign Assets Control

The authority given the President in TWEA to administer the Cuban embargo is delegated to the Treasury Department's Office of Foreign Assets Control. In turn, OFAC created and administers the Cuban Assets Control Regulations (Regulations).[85] The Regulations prohibit transactions with Cuba or Cubans unless the transactions fall within the scope of either a general or specific licensing provision. General licenses allow transfers that are needed by "common carriers incident to the receipt and transmission of mail,"[86] that are incident to the "use of satellite channels for the transmission of television news

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79. Note, *Regulation Prohibiting Transactions Incident to Travel To, From, or Within Cuba Held Constitutional*, 17 TEX. INT'L. L. J. 529, 532 (1982).

80. Richardson, 560 F. 2d at 503.

81. Tagle v. Regan, 643 F. 2d 1058, 1059 (5th Cir. 1981).

82. *Id.* at 1060. Sponsors of the bill wished to pass it without the controversy which they believed would arise if the President were required to declare a new national emergency.

83. ___ Fed. Reg. ___(1990); ___Fed. Reg.___ (1989); 53 Fed. Reg. 35,289 (1988); 52 Fed. Reg. 33,397 (1987); 51 Fed. Reg. 30,201 (1986); 50 Fed. Reg. 36,563 (1985); 49 Fed. Reg. 35,927 (1984); 48 Fed. Reg. 40,695 (1983); 47 Fed. Reg. 39,797 (1982); 46 Fed. Reg. 45,321 (1981); 45 Fed. Reg. 59,549 (1980); 44 Fed. Reg. 53,153 (1979); 43 Fed. Reg. 40,449 (1978).

84. United States v. Yoshida Int'l, Inc., 526 F.2d 560, 582 (C. C. P. A. 1975).

85. 31 C. F. R. § 515 (1989). *See* Regan v. Wald, 468 U.S. 222 (1984).

86. 31 C. F. R. § 515.542 (a) (1989).

and news programs originating in Cuba by the United States news organizations,"[87] that are related to "travel to Cuba for the purpose of gathering news, making news or documentary films, or professional research and similar activities."[88]

Transactions which do not fall within the general licensing categories are approved or disapproved on a case by case basis upon application for specific licenses.[89] The Regulations explicitly prohibit the issuance of specific licenses for transactions involving the payment to Cuba for television rights, appearance fees, royalties, pre-performance expenses, or other such payments in connection with or resulting from any public exhibition or performance in Cuba.[90]

Courts have described the purposes of the Regulations as:

> (1) To deny to Cuba or its nationals hard currency which might be used to promote activities inimical to the interests of the United States; (2) To retain blocked funds for possible use or vesting to the United States should such a decision be made; and (3) To use blocked funds for negotiation purposes in discussions with the Cuban government. [91]

Such action provides an important bargaining tool for negotiations with the Cuban government. Not infrequently, outstanding claims of nationals of one country against the government of another country have been a source of friction sufficient to prompt agreements to settle such claims.[92] It has been a consistent policy of OFAC to keep all Cuban assets blocked, pending a decision regarding all claims. Eventually, all

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87. *Id.* at (b).

88. *Id.* at 515.560 (a)(i-ii).

89. *See, e.g., Id.* at § 515.542 (c) (requiring specific licenses for transactions entering into traffic agreements to provide and charge for telephone and telegraph services); *Id.* at § 515.560 (b) (requiring specific licenses for persons wanting to travel to Cuba for humitarian purposes, public performances, or public exhibitions, etc.); *Id.* at § 515.565 (b) (requiring specific license for transactions incident to participation by a U. S. national in a public exhibition or performance in Cuba).

90. *Id.* at § 515.565 (c) (l). In pertinent part:

> Specific licenses will not be issued authorizing any: (1) Payment to Cuba or any national thereof for television rights, appearance fees, royalties, pre-performance expenses, or other such payments in connection with or resulting from any public exhibition or performance in the United States or in Cuba.

91. De Cuellar, 881 F. 2d at 1569 (quoting Real v. Simon, 510 F. 2d 557, 563 (5th Cir. 1975)).

92. *Id.* (quoting Dames & Moore v. Regan, 453 U.S. 654, 673 (1981)).

blocked assets will be disposed of according to an overall plan.[93]

C. *Berman Amendment*

In 1988 Congress amended TWEA, narrowing the President's authority to regulate or prohibit importation of "publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, or other informational materials. . . ."[94] The purpose was to promote the free exchange of ideas across national borders.[95] Before the amendment, according to amendment sponsors, TWEA had "been used by the Government to restrict the importation of information. Under this authority, the executive branch . . . embargoed informational materials such as films, posters, and phonograph records. These restrictions are inconsistent with the philosophy underlying the first amendment [sic]."[96]

As a result of the Berman Amendment, the OFAC Regulations were also changed. "[I]nformational materials" are currently authorized under a general license,[97] but specifically exclude "intangible items such as telecommunication transmissions,"[98] and prohibit "transactions related to informational materials not fully created and in existence at the date of the transaction."[99] The "remittance of royalties or other payments relating to works not yet in being" is proscribed.[100]

D. *Constitutional Implications*

The restrictions set out in the Regulations raise free speech questions. Because the context in which these Regulations operate is that

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93. *Id.*

94. 50 U.S.C. § 5 (b) (4) (Supp. 1990), known as the Berman Amendment.

95. 132 CONG. REC. 6,550, 6,551 (1986).

96. *Id.*

97. 31 C. F. R. at § 515.206 (a), "The importation from any country, and the exportation to any country, whether commercial or otherwise, of informational materials, as defined in § 515.332, are exempt from the prohibitions and regulations of this part"; and § 515.545 (b),

> Transactions relating to the dissemination of informational materials are authorized, including remittance of royalties paid for informational materials that are reproduced, translated, subtitled, or dubbed. This section does not authorize the remittance of royalties or other payments relating to works not yet in being, or for marketing and business consulting services, or artistic or other substantive
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> alteration or enhancements to informational materials . . . .

98. *Id.* at § 515.332 (b) (2). "The term 'informational materials' does not include: . . . (2) Intangible items such as telecommunications transmissions." *Id.*

99. *Id.* at § 515.206 (c).

100. *Id.* at § 515.545 (b).

of foreign affairs, questions relating to separation of powers are also raised. "The mere incantation of 'national emergency' cannot . . . sound the death-knell of the Constitution."[101] Therefore, these restrictions must be carefully measured by Constitutional standards.

1. First Amendment Free Speech

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[102] When government abridges free speech, its reasons for doing so may be in one of two broad classes: because of its content or because the government wants to avoid some evil unrelated to the speech content that is merely an incidental byproduct.[103] The focus in Capital Cities/ABC is the latter in which the government's regulation of speech does not relate to the communication itself, but rather to the time, place, or manner of the speech.[104] The closing of a channel of free speech must be narrowly tailored to serve a significant governmental interest. The government's restriction of speech must be "no greater than is essential to the furtherance of that interest."[105] This test was recently clarified and applied in *Ward v. Rock Against Racism*.[106] The Court reaffirmed that "a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but . . . need not be the least-restrictive or least intrusive means of doing so."[107] A regulation is narrowly tailored if it "promotes a substantial governmental interest that would be achieved less effectively absent the regulation."[108] A balance "between the values of freedom of expression and the government's regulatory interests is struck on a case-by-case basis, guided by whatever unifying principles may be found in past decisions."[109] Issues of speech restriction were addressed by the District Court in *Capital Cities/ABC* as it examined the regulation of television broadcast rights.

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101. Yoshida, 526 F. 2d at 583.
102. U. S. CONST. Amend I.
103. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 580 (1978).
104. Capital Cities/ABC, 740 F. Supp. at 1007.
105. TRIBE, *supra* note 103, at 580.
106. 491 U. S. 798, 781 (1989).
107. *Id.* at 798.
108. *Id.* at 799.
109. TRIBE, *supra* note 103, at 582.

2. Separation of Powers

In *Capital Cities/ABC* the court's treatment of executive authority considers potential problems of separation of powers. While the Constitution allocates powers to the three branches of government,[110] the actual relationship of the branches may be determined more by practical realities and custom than by formal constitutional language.[111] A brief examination of the doctrine shows how it is still effective in sorting out the decision-making relationships such as those which will be discussed later in *Capital Cities/ABC*.

In 1952 Justice Jackson provided a helpful formula for distinguishing situations involving Presidential action and authority:

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .
> 2. When the President acts in absence of either a Congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . .
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.[112]

More recently, in *Dames & Moore v. Regan*[113] the Court drew on implicit approval by Congress of an executive practice, long in place and not before questioned. The past practice itself could not give rise to the executive power, but the fact that it was known to and acquiesced in by Congress would give rise to a presumption of consent.

In *United States v. Curtiss-Wright*[114] the Supreme Court described the Executive's power in foreign affairs: "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of

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110. U. S. CONST. arts. I, II, III.
111. ROSCOE POUND, SPIRIT OF THE COMMON LAW, 173-4 (1921).
112. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952).
113. 453 U. S. 654, 688 (1981).
114. 299 U. S. 304 (1936).

the nation."[115] In Regan v. Wald,[116] the Court held that American citizens desiring to travel could be restricted under TWEA. The Court held that TWEA gave the President broad authority to impose comprehensive embargoes. The Court pointed to deteriorated relations between Cuba and the United States, Cuban efforts to destabilize governments throughout the Western Hemisphere, and Cuban deployment of 40,000 troops in various African and Middle Eastern countries. With a nod to *Curtiss-Wright,* the Court concluded:

> Given the traditional deference to executive judgment '[i]n this vast external realm,' we think there is an adequate basis under the Due Process Clause of the Fifth Amendment to sustain the President's decision to curtail the flow of hard currency to Cuba—currency that could then be used in support of Cuban adventurism. . . .[117]

The same deference to the executive branch was expressed in *Haig v. Agee.*[118] Especially in the areas of foreign policy and national security, a "consistent administrative construction of [a] statute must be followed by the courts 'unless there are compelling indications that it is wrong.'"[119]

The Supreme Court has regarded as nonjusticiable any issue clearly committed by the Constitution to another branch of government.[120] The court announced a series of factors related to the separation of powers which may make an issue nonjusticible, including a "lack of respect due co-ordinate branches of government" and the potential for "embarrassment from multifarious pronouncements by various departments on one question."[121] The federal government needs to speak with a single, unified voice in foreign affairs.[122] This does not mean, however, that certain provisions are out of bounds for judicial interpretation, but rather they call for a mixture of constitutional interpretation and judicial discretion.[123]

The courts often decline to decide matters which affect foreign policy, particularly those which might involve separation of powers

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115. *Id.* at 319.
116. 468 U. S. 222, 242 (1984).
117. *Id.* at 243.
118. 453 U. S. 280 (1981).
119. *Id.* at 291 (quoting E. I. du Pont de Nemours & Co. v. Collins, 432 U. S. 46, 55 (1977)).
120. Baker v. Carr, 369 U. S. 186, 209 (1961).
121. *Id.* at 217.
122. Goldwater v. Carter, 444 U. S. 996 (1979).
123. TRIBE, *supra* note 103, at 79.

issues between the President and Congress. Courts will avoid the substantive issues by ruling that the case is not justiciable or raises a political question better addressed by the Congress.[124] References to Presidential foreign affairs power may derive from John Marshall's early characterization of the President as the "sole organ" of foreign policy. [125] "From the beginning, the founders realized that the division of power would operate very differently in two distinctive areas of policy-making—domestic and foreign policy."[126] The "chief executive would have to assume more or less a leading role . . . and by virtue of such a role, possess much more power and influence than the other two branches in [foreign policy]." [127]

The historic tension between the branches has resulted in few landmark Supreme Court decisions regarding separation of powers in foreign policy areas.[128] When Congress delegates power to the Executive branch and the Executive branch exercises that power for a bona fide reason, the courts do not look behind the exercise of discretion nor apply a balancing test, even when First Amendment interests are at stake.[129] In such cases, the administrative interpretation controls unless it is plainly erroneous or inconsistent with the regulation.[130] Courts should not make foreign policy any more than they should make domestic policy, but should not decline to review merely because a case involves foreign relations.[131]

IV. THE GAME: THE PLAYERS COME TO COURT

ABC requested a judgment declaring that 1) the Berman Amendment and/or the Constitution authorized its transaction with PASO; 2) the Regulations were null and void to the extent that they regulate

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124. Carter, *supra* note 61, at 1247. Cf. Baker, 369 U. S. at 211 (noting that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance").

125. LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION, 45. It has sometimes been said that the President has power to conduct foreign relations but not to make foreign policy. That was Madison's view, but President Truman is reported to have said, "I make American Foreign Policy." *Id.* at 302, n. 24.

126. MOORE & TURNER, CONGRESS, THE PRESIDENT, AND FOREIGN POLICY A. B. A. Sec. Int'l. Law & Practice, 7 (1984).

127. *Id.*

128. *Id.* at 17.

129. Kleindienst v. Mandel, 408 U. S. 753, 770 (1972).

130. Bowles v. Seminole Rock & Sand Co., 325 U. S. 410, 414 (1945).

131. THE CONSTITUTION AND THE CONDUCT OF FOREIGN POLICY, American Society of Int'l. Law, 70 (1976).

the importation of television signals and related informational materials; and 3) the Berman Amendment, the Administrative Procedures Act and/or the Constitution bar the government from initiating any proceeding to prohibit ABC from televising the 1991 Games.[132] In addition, ABC sought an injunction barring the Treasury Department from regulating ABC's televising of the 1991 Games.[133]

The United States District Court for the Southern District of New York reviewed the Berman Amendment and examined the President's authority to regulate or prohibit the importation or exportation (commercial or otherwise) of publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes or other informational materials. The court held that the refusal of the Treasury Department to license an agreement for the exclusive live broadcasting rights of the 1991 Pan Am Games is consistent with the Trading with the Enemy Act and does not offend the First Amendment or due process.[134]

The main issues were whether the Regulations were so ambiguous as to make judicial deference to the Executive inappropriate; whether the Executive power to regulate speech when dealing with foreign affairs is subject to scrutiny under the First Amendment; and whether certain due process rights were violated.

A. Ambiguity

First, the court considered whether the Regulations were so ambiguous that judicial deference to the executive branch would be inappropriate. The Berman Amendment provides that the President has no authority under the TWEA to regulate or prohibit transactions involving several types of publications, films, photos, "or other informational materials."[135] OFAC interpreted the term, "or other informational materials," to exclude live coverage of the Games. ABC argued that judicial deference to OFAC is not appropriate because the term is ambiguous. The court relied on *Chevron v. Natural Resources Defense*

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132. Capital Cities/ABC, 740 F. Supp. at 1010.

133. *Id.*

134. Capital Cities/ABC, 740 F. Supp. at 1015.

135. 31 U. S. C. § 5 (b) (4), providing in pertinent part:

> (4) The authority granted to the President in this subsection does not include the authority to regulate or prohibit, directly or indirectly, the importation from any country, or the exportation to any country, whether commercial or otherwise, of publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, *or other informational materials*, which are not otherwise controlled for export . . . [emphasis added].

Council, Inc.[136] for a standard of review of an agency's construction of its own regulations.

Chevron involved the Environmental Protection Agency's construction of a term used in the Clean Air Act Amendments.[137] In that case the Supreme Court considered whether Congress had spoken directly on the precise question at issue. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[138] If the court determines that Congressional intent is not clear, "the court does not simply impose its own construction on the statute as would be necessary in the absence of an administrative interpretation."[139] Instead, if the statute is either silent or ambiguous on the specific issue, the court must decide "whether the agency's answer is based on a permissible construction of the statute."[140] The power of an administrative agency includes the formulation of policy and the making of rules to fill any gaps left by Congress. If Congress explicitly allows the agency to fill the gaps by regulation, then those regulations are to be given controlling weight, "unless they are arbitrary, capricious, or manifestly contrary to the statute."[141] If Congress implicitly allows for such regulation, a court "may not substitute its own construction of a statutory provision for a reasonable interpretation"[142] made by the administrative agency. The Court emphasized that considerable weight should be given to the executive department's adminstrative scheme and interpretations, especially when the meaning involves reconciling conflicting policies.[143]

Legislative intent proved meager assistance in determining the meaning of "or informational materials." At the time of the bill's passage, the sponsors recognized an inconsistency with the philosophy underlying the First Amendment and the use of executive authority under the TWEA to restrict films, posters, and phonograph records. The sponsors sought a "free trade in ideas legislation [which] applies the ideal embodied in the first amendment of the Constitution to the

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136. 467 U. S. 837 (1984), *reh'g denied*, 468 U. S. 1227 (1984).
137. *Id.* at 840.
138. *Id.* at 842.
139. *Id.* at 843.
140. *Id.*
141. *Id.* at 844.
142. *Id.*
143. *Id.*

laws governing . . . the movement of information."[144] In *Walsh v. Brady*[145] the court noted that the amendment was intended generally to liberalize a perceived need for information exchange, but found no intent to alter the existing hard currency controls that had been developed in national policy regarding a particular country. "Such an intrusion on presidential authority in the field of foreign policy cannot be inferred, particularly where the policy was fully known and well established when the amendment was enacted."[146] The result in *Capital Cities/ABC* was that the district court found no insight in legislative history as to the precise meaning intended for "or informational materials."[147]

Parsing the terms of the regulation, the court considered the dictionary meaning of "materials" and "material" and concluded the term was susceptible to more than one reasonable interpretation.[148] Since the phrase was part of a list, the court applied the traditional rule that words in a list should be given a similar or related meaning.[149] However, this phrase was set apart from the other words in the phrase by the disjunctive "or" which "indicates a congressional intent to broaden, not limit, the preceding class."[150] The court found that OFAC could reasonably have interpreted the phrase to include a television broadcast.

Finally, the court concluded that there was no reason to render judicial deference inappropriate, "unless such deference is precluded by the First Amendment or unless those Regulations as construed by the agency are so arbitrary and irrational as to violate substantive due process."[151]

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144. 132 U. S. CODE CONG. & ADMIN. NEWS at 6,551. The bill's sponsor quoted Justice Oliver Wendell Holmes, "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." Abrams v. United States, 250 U. S. 616, 630 (1919).

145. 729 F. Supp. 118 (D. D. C. 1989)(involving a suit brought by an importer of political posters challenging a decision by OFAC that denied him a specific license to enter Cuba to arrange for importing such posters).

146. *Id.* at 120.

147. Capital Cities/ABC, 740 F. Supp. at 1011.

148. *Id.*

149. *Id. See* Dole v. United Steelworkers, 110 S. Ct. 929, 935 (1990).

150. Capital Cities/ABC, 740 F. Supp. at 1011. *See* F. C. C. v. Pacifica Found., 438 U. S. 726, 739-40 (1978) (holding that the plain language of a statute determines that words written in the disjunctive imply that each has a separate meaning. *Cf.* United States v. Powell, 423 U. S. 87, 90 (1975).

151. Capital Cities/ABC, 740 F. Supp. at 1012.

B. First Amendment Arguments

ABC argued that the executive power to regulate speech when dealing with foreign affairs is subject to the same scrutiny and limitations as the First Amendment would impose in the domestic context. Relying on *Teague v. Regional Commissioner of Customs*,[152] the court disagreed. In that case, the addressees of publications originating in North Vietnam and mainland China were required to obtain licenses before being allowed to receive such publications. Instead of applying for licenses, they brought an action claiming their First Amendment rights had been abridged. The court balanced the vital interest of the government in limiting the flow of hard currency, a "weapon in the struggle between the free and communist worlds,"[153] with the limited availability of some publications originating in China, North Korea, and North Vietnam. All publications from those nations were excluded from importation. The court acknowledged that regulation impinges on First Amendment freedom, but that restriction "is only incidental to the proper general purpose of the regulations: restricting the dollar flow to hostile nations."[154] The court concluded "that the infringement of first amendment freedoms is permissible as incidental to the proper, important and substantial general purpose of the regulations."[155]

In *Capital Cities/ABC* the court noted that in *Teague* the Second Circuit "upheld the constitutionality of the Cuban embargo although it entirely prohibited the importation of all 'informational materials,' which is now permitted by the Berman Amendment."[156] Since such restrictions would have been clearly invalid in a domestic context, ABC argued that when dealing with foreign affairs, the same scrutiny should be applied as in domestic contexts. In response, the court relied on *Ward v. Rock Against Racism*,[157] in which a flexible standard of restriction on First Amendment rights is permitted even in a domestic context.

In *Ward* the sponsor of a rock concert brought suit against New York City for use guidelines regarding sound equipment and technicians at the bandshell in Central Park. The Court reaffirmed that the regulation of free speech must be narrowly tailored to serve the govern-

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152. 404 F. 2d 441 (1968), *cert. denied* 89 S. Ct. 1457 (1969).

153. *Id.* at 445. The United States was at the time engaged in armed conflict with North Vietnam and not in a friendly relationship with either mainland China or North Korea.

154. *Id.*

155. *Id.* at 446.

156. Capital Cities/ABC, 740 F. Supp. at 1013.

157. 109 S. Ct. at 2746.

ment's interests, and that the required tailoring is satisfied if the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation."[158] The regulation may not burden more speech than is necessary or regulate in a way in which the burden to the speech does not advance the government's goals.[159] As long as the means chosen are not more broad than necessary, the regulation will not be invalid just because some less-restrictive alternative was not chosen.[160] The Court held that the guidelines were narrowly tailored to serve the city's interest in avoiding excessive sound and yet left open channels for ample communication.[161]

In *Capital Cities/ABC* the district court avoided an overly expansive interpretation of the Berman Amendment with regard to issues of separation of powers and the authority of the Executive to conduct foreign affairs. When the court considered the choice between restriction on First Amendment freedoms or latitude for the Executive in the conduct of foreign affairs, it decided in favor of the Executive.[162]

C. *Due Process*

ABC claimed due process violations in the OFAC restrictions in three areas: (1.) discrimination between print and broadcast media; (2.) discrimination between works in existence and works not yet in being; (3.) misapplication of OFAC's own rulings. The applicability of concepts of due process to the exercise of the Executive's power in foreign affairs is not entirely clear.

First, ABC alleged that the Regulations impermissibly discriminated between print and broadcast media. *Richardson v. Simon*[163] was a due process challenge to OFAC Regulations applied to prevent a United States citizen from inheriting from a Cuban relative whose assets were in a blocked account.[164] The court declared due process was not violated "when the statutory classification, as implemented by the Regulations, is 'the product of a deliberate and rational choice' by Congress."[165]

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158. *Id.* at 2758 (quoting United States v. Albertini, 472 U. S. 675, 689 (1985)).
159. *Id.*
160. *Id.*
161. *Id.* at 2760.
162. Capital Cities/ABC, 740 F. Supp. at 1013.
163. 560 F. 2d. at 500.
164. *Id.* at 502. Before 1963 Cuban citizens had placed cash and stock certificates in a New York City bank. In 1963 when President Kennedy declared Cuba a hostile nation, these funds were blocked. *Id.*
165. *Id.* at 505 (quoting Alexander v. Fioto, 430 U.S. 634, 640 (1977)).

The court refused to be limited by the purposes of the Act which Congress articulated, but also included purposes Congress could reasonably have held. The final disposition of the interests depended on the outcome of the relationship between the United States and Cuba as determined by the Congress and the President.[166]

In *Capital Cities/ABC* the court pointed out that OFAC had not permitted either print or broadcast media to pay the Cuban government for exclusive coverage of the 1991 Games. In fact, both media could obtain videotapes by paying appropriate royalties after the tapes were produced, but no royalty payments could be made by either entity to the Cuban government.[167] Therefore, there was no showing of impermissible discrimination between print and broadcast media because ABC was not denied a benefit that was enjoyed by other media. ABC relied on cases in which content-based restrictions outweighed compelling state interest.[168] The court found the content-neutral position in *Teague* to be more analogous; as well as the result because "there is no censorship of selected materials; all publications from the specified nations are treated alike."[169] OFAC was restricting the time, place, and manner of the Games broadcasts, not the content of the broadcasts, and in *Teague* such regulation was permitted.

Next, ABC argued that OFAC discriminated against works not yet in being. ABC was denied a license to import live broadcast of the Games, but would have been allowed to import a completed version of the Games after the fact.[170] The court relied on a line of cases which held that "matters relating to the conduct of foreign relations . . . are so exclusively entrusted to the political branches as to be largely immune from judicial inquiry or interference."[171]

The Supreme Court has articulated a very low standard for upholding the exercise of executive power, that is, a basis that is facially

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166. *Id.*

167. ABC/Capital Cities, 740 F. Supp. at 1013.

168. Smith v. Daily Mail Publishing Co., 443 U. S. 97 (1979) (protecting the publication of an alleged juvenile offender's name did not justify the imposition of criminal sanctions on a newspaper). *See* Florida Star v. B.J.F., 109 S. Ct. 2603, 2613 (1989) (only state interest of the highest order may overcome the right of newspaper to publish truthful information which it has lawfully obtained).

169. Teague, 404 F. 2d at 445.

170. Capital Cities/ABC, 740 F. Supp. at 1014.

171. Wald, 468 U. S. at 242 (quoting Harisiades v. Shaughnessy, 342 U. S. 580, 589 (1952)). *See* Agee, 453 U.S. at 292; Curtiss Wright Export Corp., 299 U.S. at 319-20.

legitimate, a bona fide reason.[172] In *Kleindienst v. Mandel* the Court held that "when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against . . . First Amendment interests . . . ."[173] Applying this standard in *Capital Cities/ABC*, the court could not say that it was irrational for OFAC to conclude that payments for a live work represented more potential for assisting a hostile nation than payments for a completed work.[174]

Lastly, ABC charged that OFAC had misinterpreted its own regulations in determining that ABC's agreement to broadcast the Games did not fall within the general licensing provision for travel related to news gathering. The court found that, unless contrary to the plain language of the regulation, the agency's interpretation was entitled to controlling weight.[175] The regulation on its face did not deal with agreements such as ABC's agreement with PASO. The court noted that the regulation was internally consistent with other regulations that expressly exclude telecommunication transmissions from the scope of informational materials,[176] prohibit payment of royalties not yet in being,[177] and prohibit payment for television rights.[178] Therefore, OFAC had not misinterpreted its own regulations.

D. Judgment and Settlement

The district court decided in favor of the Treasury Department. The court held that the refusal of OFAC to license the broadcast agreement between ABC and PASO was consistent with TWEA and the First Amendment. That decision could have been a significant setback for the 1991 Games. However, in December of 1990, following the decision of the District Court, a settlement was reached between ABC and the Treasury Department which will allow ABC to compensate Cuba for goods and services involved in the live broadcast.[179] The settlement details are not available to the public. However, ABC was

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172. Kleindienst, 408 U. S. at 770.
173. *Id.*
174. Capital Cities/ABC, 740 F. Supp. at 1014.
175. *Id.*
176. 31 C. F. R. at § 525.332 (b) (2).
177. *Id.* at § 515.206 (c); § 515.545 (b).
178. *Id.* at § 515.565 (c) (1).
179. Indianapolis Star, Dec. 14, 1990, p. ____.

able to broadcast twenty hours of coverage of the competition.[180] Cuba again won the gold medal in baseball with a win over Puerto Rico, while the United States had to be satisfied with the bronze.

V. CONCLUSION: THE FINAL SCORE

Hosting the Games was a dream realized for Fidel Castro, his symbol that communism is still vital in the Western Hemisphere. While the Games could have some economic benefit, they will not provide a long term solution to the economic or political difficulties in Cuba. Cuba has gained some long-lasting facilities, but most of the benefit will be intangible.

The government's case in *Capital Cities/ABC* seemed formidible, with the separation of powers issue looming large and tilted toward the Executive in foreign affairs. The President was acting within power specifically delegated to the Executive under the TWEA and its amendments. The Congress had ample opportunity to consider United States relations with Cuba when the TWEA was amended in 1977. At that time the Congress specifically considered the national emergency status of Cuba and allowed for the extention of that status. In this posture, the President has significant strength. Even if Congress were not held to have specifically granted this power to the President, Congress had acquiesced to a long-standing exercise of power by the President. In addition, the court could even have found this case nonjusticiable because of the need for the Executive to speak as the "sole organ" of the nation in this area of foreign policy.

The court worked through the arguments cautiously, deciding only what was necessary, declining to get into larger issues. The interpretation was found to be not plainly erroneous or inconsistent or offensive to constitutional rights. If the court had considered separation of powers issues regarding the TWEA, then the delegation of authority to the President to regulate Cuban trade could have been deemed a practical, historic, and appropriate action. The court could have found the Presidential power at its maximum, combining all the President's authority with that delegated by Congress. The United States has enjoyed some success with economic sanctions. Involving no violence, embargoes provide a symbolic protest that is politically valuable to President Bush. Changes in Europe, the Soviet Union, and South and Central America strengthen the United States' position because those changes effectively erode Cuba's military threat and Communist prestige. Within the

180. Indianapolis Star, Aug. 2, 1991, C-1,2, col. 1.

parameters set by TWEA as amended, the United States can continue to use embargo pressure for change in Cuba. Given the present diminished stature of Cuba in relation to other countries and her desperate internal situation, perhaps the time is ripe for a gesture from the United States. Perhaps the opportunity is at hand for a loosening of the embargo to the benefit of both the United States and Cuba.

This case seems to illustrate the delicate position of each branch of government in the area of foreign policy. The Executive branch, through the Treasury Department and OFAC, fought to preserve the embargo set out by Congress against Cuba through court enforcement of TWEA. Nevertheless, after winning, the Treasury Department was evidently willing to negotiate in order to pursue some more limited foreign policy objective. Parties, such as ABC, desiring interaction with Cuba will have to be satisfied with the limited contacts which fit within the Executive's policy goals. Such goals may even vary from time to time.

Capital Cities/ABC is also an illustration of the mix of politics and sport in the Games. Because the details of the settlement are not available, one can only speculate on its meaning. The compromise reached between the parties could signal a shift in affairs between the United States and Cuba; and if so, the Pan American Games will live up to its noble ideal of improved relations in the Americas.

*Suanne C. Milligan**

* J. D. candidate, May 1992, Indiana University School of Law—Indianapolis.

The Act of State Doctrine and the Demise of International Comity

I. INTRODUCTION

The act of state doctrine was once referred to as an airy castle.[1] If so, it is a stronghold which has endured many changes in occupancy. The courts' interpretations of the doctrine's effect and underlying reasons have evolved considerably from its introduction into American jurisprudence nearly a century ago.[2] A recent Supreme Court case,[3] however, may have created a crack in the foundation of the structure that will eventually lead to its demise.

It is the purpose of this note to examine the reasoning the Court used in *W.S. Kirkpatrick & Co., Inc v. Environmental Tectonics Corp., International*[4] to reach its unanimous decision that the act of state doctrine only applies to foreclose United States courts from adjudicating otherwise valid claims when the validity of a foreign act of state must be examined. The decision will be compared with prior cases in which the same or substantially similar issues were addressed. Finally, the effect this case is likely to have on the reach of the act of state doctrine will be discussed.

II. THE ACT OF STATE DOCTRINE

The act of state doctrine requires the courts of the United States to refrain from judging the validity of sovereign acts of a foreign State which have effect within that country's borders by refusing to adjudicate cases where such sovereign acts must be examined.[5] This judicially created doctrine first appeared in United States law in its modern form in *Underhill v. Hernandez*.[6] In *Underhill*, the plaintiff, a United States citizen, was living and working in Venezuela when the Venezuelan Revolution began. He was detained for some time by the revolutionary government before being allowed to return to the United States. He then filed suit, seeking damages for the detention.[7]

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1. Callejo v. Bancomer, S.A., 764 F.2d 1101, 1113 (5th Cir. 1985).
2. Underhill v. Hernandez, 168 U.S. 250 (1897).
3. W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l, 110 S. Ct. 701 (1990).
4. *Id.*
5. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 (1986).
6. *Underhill*, 168 U.S. 250.
7. *Id.* at 251.

Writing for the majority, Chief Justice Fuller stated, "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of another done within its own territory."[8] The Court referred the aggrieved party to an alternate solution "through the means open to be availed of by sovereign powers as between themselves,"[9] that is, through mechanisms established by the Executive Branch, and not through the court system.

This first act of state case was grounded in international comity and respect for the sovereign acts of foreign States. The cases that followed reflected these concerns,[10] viewing the doctrine as resting on "the highest considerations of international comity and expediency."[11]

The next milestone in the evolution of the doctrine came in 1964 with *Banco Nacional de Cuba v. Sabbatino* (Sabbatino).[12] *Sabbatino* involved the rights to American owned sugar expropriated by the Cuban government in response to the lowering of the sugar quota by the United States.[13] The Court held that the act of state doctrine applied to bar the Court from adjudicating the case.[14] To do so would require the Court to declare invalid the law of a foreign sovereign State which had effect only within the territorial boundaries of that State, which government was extant and recognized by the United States as valid, there being no controlling treaty or other unambiguous agreement.[15]

To reach its decision, the *Sabbatino* Court applied a balancing test[16] to determine whether the act of state doctrine should apply. The Court weighed foreign policy concerns and potential separation of powers problems "to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."[17] The Court refused to lay down "an inflexible and all-encompasing rule" in the case.[18] Instead, after weighing the relevant factors, the Court decided that the act of state doctrine should

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8. *Id.* at 252.
9. *Id.*
10. Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Ricaud v. American Metal Co., Ltd., 246 U.S. 304 (1918).
11. *Oetjen*, 246 U.S. at 303-04.
12. 376 U.S. 398 (1964).
13. *Id.* at 401-06.
14. *Id.* at 428.
15. *Id.*
16. *Id.* at 427-28.
17. *Id.*
18. *Id.* at 428.

apply to foreclose judicial determination of the validity of the acts of the Cuban Government.

The *Sabbatino* court also relied on the competency of the judiciary to decide such cases.[19] This was probably due, in large part, to the increased complexity of the world climate. Considerations of international comity subsequently gave way to internal concerns such as separation of powers. Accordingly, the policy behind the act of state doctrine underwent similar changes in emphasis and application.

The Court noted that "[t]he text of the Constitution does not require the [existance of an] act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state."[20] The Court did state, however, that the doctrine has Constitutional underpinnings. "The basic relationship between branches of the government in a system of separation of powers" is a rationale for the doctrine.[21]

Of secondary concern to the *Sabbatino* Court was the "competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations."[22] The competency issue is related to, yet distinct from, the separation of powers issue. The former is concerned with consistency in the ordering of relations with foreign States, while the latter focuses on the relative quantity and quality of resources available to each branch of the government to make determinations that will ultimately affect those relations.

The doctrine began as a bar to judgment by United States courts when the validity of a foreign sovereign act was at issue, based on notions of international comity. Its current application is grounded in separation of powers, its scope, the subject of dispute.

A. The Foundation for Kirkpartick

A line of cases beginning early in the twentieth century explored an aspect of the act of state doctrine which was not resolved definitively by the Supreme Court until *Kirkpartick* in 1990. At issue in these cases was whether the act of state doctrine barred inquiry into the purpose or motivation of foreign acts of state, rather than the validity of such acts.

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19. *Id.*
20. *Id.* at 423.
21. *Id.*
22. *Id.*

B. The Pre-Sabbatino Cases

The first case to examine this dichotomy was *American Banana Co. v. United Fruit Co.* (*American Banana*).[23] The plaintiff was seeking damages from the defendant, a New Jersey corporation operating outside the United States, for, *inter alia*, allegedly monopolizing the banana trade in the regions of Panama, Columbia and Costa Rica. Plaintiff asserted that it was injured by the acts of the Costa Rican government which allegedly acted at the instigation of the defendant to further its anti-competitive efforts.[24]

The holding of *American Banana* was based on the extraterritorial reach of the United States antitrust laws.[25] The act of state language was purely dicta. The Court had already acted to foreclose judicial inquiry on jurisdictional grounds.[26] The Court employed the classic formulation of the act of state recited in *Underhill*.[27] Though the validity of the Costa Rican government's actions was not at issue, the Court refused to hear the merits of the case because to do so would require the Court to expose the potentially corrupt motive of the government.[28]

That language in *American Banana* was overruled less than twenty years later in *United States v. Sisal Sales Corp.* (*Sisal Sales*).[29] The Court in *Sisal Sales* allowed an action against the defendant for alleged violations of the Sherman Act[30] and the Wilson Tariff Act[31] where the defendant had secured anticompetitive legislation from the Mexican Government to further the defendant's activities.[32]

The Court was again called upon to examine the motive of defendant's activities which included securing the discriminatory legislation. The Court reasoned that the defendant's acts, and not those of the Mexican Government, were being questioned. Viewed in this context, the Court allowed the case to go forward.[33]

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23. 213 U.S. 347 (1909).
24. *Id.* at 353-55.
25. *Id.* at 355.
26. *Id.* at 357.
27. Underhill v. Hernandez, 168 U.S. 250 (1897).
28. 213 U.S. at 353-55. It is unlikely that the case would have been decided differently if the sole issue were the applicability of the act of state doctrine. The possibility of insult to a foreign sovereign, the paramount consideration of the doctrine at that time, would likely have mandated application of the doctrine on the facts of this case.
29. 274 U.S. 268 (1927).
30. Comp. Stat. § 8820 et seq.
31. Comp. Stat. §§ 8831, 8832.
32. *Sisal Sales*, 274 U.S. at 271-74.
33. *Id.* at 276.

The next significant case was *Continental Ore Co. v. Union Carbide and Carbon Corp.* (*Continental Ore*).[34] The Court followed *Sisal Sales* by holding that the reach of United States anti-trust legislation extended extraterritorially.[35] The case also has significance in the context of the act of state doctrine.

The plaintiffs accused defendants of influencing the Canadian Government, through a government agent, "to direct the elimination of Continental from the Canadian market."[36] Defendant contended that the Court's holding in *American Banana* shielded it from liability.[37] The Court refused to follow *American Banana*, citing instead *Sisal Sales*.[38]

The Court found it significant that "[i]n the present case [plaintiffs] do not question the validity of any action taken by the Canadian Government. . . . Nor is there left in the case any question of the liability of the Canadian Government's agent, for [it was not served process]."[39] Instead, the Court held that "[defendants] are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government."[40]

In each of the two cases following *American Banana*, the Court appears to have drawn an artificial distinction between the acts of the defendants and those of the foreign government. This reasoning was substantially discarded with the next series of cases, the probable cause of which was the impact of the *Sabbatino* opinion.[41] The courts began to implement a version of the balancing test outlined in *Sabbatino* to determine if and when the act of state doctrine should apply.[42]

III. USE OF THE BALANCING TEST TO EXAMINE MOTIVE

The balancing test was applied in 1971 in *Occidental Petroleum Corp. v. Buttes Gas and Oil Co.* (*Buttes*).[43] The court cited *American Banana* and

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34. 370 U.S. 690 (1962).
35. *Id.* at 706.
36. *Id.*
37. *Id.* at 704.
38. *Id.*
39. *Id.* at 706.
40. *Id.*
41. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).
42. The balancing test introduced in *Sabbatino* weighed foreign policy concerns to determine whether the act of state doctrine should apply when validity of a sovereign act was at issue. The lower courts expanded the test to balance the issues when not only validity but also motive was being questioned.
43. 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972).

held on facts similar to those in *American Banana* that "[t]he act of state doctrine bars a claim for antitrust injury flowing from foreign sovereign acts allegedly induced and procured by the defendant."[44] The court cited *Sisal Sales* and *Continental Ore* only to distinguish the reach of antitrust laws from those enunciated in *American Banana*, and not as impacting the reach of the act of state doctrine.[45] The *Buttes* court distinguished both cases on their facts, stating that, "[b]oth the *Sisal Sales* and *Continental Ore* cases steer clear of attaching anti-trust liability to sovereign conduct or its inducement."[46] The cases were allowed to go forward because defendants, in each case "by their own deliberate acts, here and elsewhere, brought about forbidden results within the United States."[47]

The *Buttes* court also made the express distinction between examining the validity and the motive of a sovereign act. The court applied the act of state doctrine and refused to examine the motivation behind the sovereign act, based on potential "diplomatic friction and complication that the act of state doctrine aims to avert."[48] The court thus applied a balancing approach rather than a rigid, formalistic rule.

The court again applied the balancing test in a later case. *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.* (*Timberlane*)[49] was decided five years after *Buttes* and distinguished that case on its facts without specifically rejecting the court's formulation of the act of state doctrine.[50] Timberlane alleged that the defendants conspired with a bank which held a mortgage on Timberlane's property to drive Timberlane out of the Honduran lumber business. Defendants succeeded in obtaining a court order to foreclose on the Timberlane mortgage, despite Timberlane's repeated efforts to clear its title.[51]

First, the *Timberlane* court distinguished between sovereign acts and non-sovereign acts for purposes of the act of state doctrine.[52] An example of the former is laying claim to offshore waters which was the issue in *Buttes*.[53] An example of the latter is the application of neutral Honduran

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44. *Id.* at 110.
45. *Id.* at 109.
46. Id. at 109 n.4.
47. *Id.* at 109.
48. *Id.* at 110.
49. 549 F.2d 597 (9th Cir. 1976).
50. *Id.* at 605.
51. *Id.* at 604.
52. *Id.* at 606-07.
53. 331 F. Supp. 92, 95 (1971).

laws by its courts and their agents. Clearly, if no sovereign act is at issue, the act of state doctrine lacks the elemental predicate for application.[54]

Second, the court applied the foreign policy balancing test and stated, "[Timberlane] does not challenge Honduran policy or sovereignty in any fashion that appears on its face to hold any threat to relations between Honduras and the United States."[55] Finally, the court stated that even if, *arguendo*, the act of state docrtine should apply to bar inquiry into some acts of the defendant due to the involvement of the Honduran government, the plaintiff alleged other agreements and actions by the defendant which were independent of the Honduran government, and were clearly unprotected by the act of state doctrine.[56]

Thus, the *Timberlane* court did not disturb the proposition that courts may not inquire into the validity or motive of foreign sovereign acts when the balance weighs against such inquiry. Instead, it adhered to the balancing test approach, weighing foreign policy concerns against the goals sought by enforcement of the Sherman Act to determine whether the act of state doctrine should apply when either validity or motive is at issue.[57]

In both *Buttes* and *Timberlane,* the courts distinguished between motive and validity. In neither, however, did the courts apply a rigid rule approach. Instead, in each case all of the relevant factors were weighed to determine whether the act of state doctrine should apply despite the fact that motivation behind a sovereign act, and not validity of the act, was at issue.

A. Balancing Test Not Applied

The Second Circuit failed to distinguish between motive and validity for purposes of applying the act of state doctrine in *Hunt v. Mobil Oil Corp.* (*Hunt*).[58] The court failed to apply the balancing test, and instead stated that the act of state doctrine is necessarily applicable when not only validity but also motive is at issue.[59]

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54. *See infra* note 119.

55. *Id.* at 608.

56. *Id.*

57. *Id.* at 607. (The court stated, "we do not wish to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action. On the other hand, repeating the terms of *Sabbatino*, [376 U.S. at 423] 'the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.'")

58. 550 F.2d 68 (2d Cir. 1977).

59. *Id.* at 77.

The facts in *Hunt* required the court to examine the motive of the Libyan Government in nationalizing plaintiff's Libyan crude oil production. The defendants had allegedly combined and conspired to preserve the competitive advantage of Persian Gulf crude oil over Libyan crude oil.[60] In so doing, the plaintiff was requested by the defendants to comply with the terms of an agreement in which Hunt was to refuse to market crude oil according to Libya's demands. As a result of Hunt's refusal, Libya nationalized Hunt's crude oil production. The court was not called upon to invalidate the effect of the expropriation scheme, only to punish defendant Mobil for its anticompetitive activities.[61]

The factual setting in *Hunt* appears to be well suited for the application of the balancing test. The volatile situation between Libya and the United States at that time would have likely demanded application of the act of state doctrine. The court did not take this approach, however. Instead, while reaching the same result, the court formulated a broad rule of law holding that validity and motive of a sovereign act may not be distinguished for purposes of applying the act of state doctrine.[62]

B. The Return to the Balancing Test

Just two years later in *Industrial Investment Development Corp. v. Mitsui Co., Ltd.* (*Mitsui*),[63] the Fifth Circuit departed from the broad holding of *Hunt* which fused validity and motive and placed them under the protective umbrella of the act of state doctrine. The *Mitsui* court determined that the relevant factors (potential friction with the executive branch and the foreign sovereign, and the goals sought to be furthered by the law defendant is trying to avoid) should be weighed to decide whether the act of state doctrine should apply when motive of a foreign act must be examined.[64]

Industrial Development alleged violations of the Sherman Act against Mitsui for its activities alleged to have caused the plaintiff to be denied a timber cutting license.[65] The court cited *Sisal Sales* stating that, in this case, as there, "The instigation of foreign government involvement does not mechanically protect conduct otherwise illegal in this country

60. *Id.* at 70-72.
61. *Id.* at 72.
62. *Id.*
63. 594 F.2d 48 (5th Cir. 1979).
64. *Id.* at 53.
65. *Id.* at 49-50.

from scrutiny by the American courts."[66] The court suggested that the failure of the Indonesian Government to issue a cutting license did not rise to the level of a sovereign act contemplated by the act of state doctrine. Such involvement was not sufficient to allow the defendant to invoke the doctrine.[67]

While this aspect of the court's decision followed the analysis of past cases delineating acts as sovereign and within the scope of the act of state doctrine, or not sovereign and thus outside the fatal reach of the doctrine, this court carried the opinion one step further. It demanded application of the foreign policy balancing test to determine applicability of the act of state doctrine when inquiring into motive. Thus, this court stated its disagreement with *Hunt* that motivation and validity are equally protected by the act of state rubric.[68]

The balancing test was again successfully employed in *Mannington Mills Inc. v. Congoleum Corp.* (*Mannington Mills*).[69] The plaintiffs alleged that defendants had violated section two of the Sherman Act by securing foreign patents through fraudulent means.[70] The court employed the analysis from *Timberlane* to hold that "The granting of patents *per se* . . . is not the kind of governmental action contemplated by the act of state doctrine. . . ."[71] That is, certain acts do not rise to the level of sovereign action.

The so-called commercial act exception[72] was also offered to distinguish between commercial acts, probably not protected by the act of state doctrine, and non-commercial acts, which would be covered unless they are of a non-sovereign nature. Finally, the court applied the now familiar balancing test and concluded that the lack of significant impact on American foreign relations would justify the non-application of the doctrine in this case.[73]

The balancing test was revitalized in *Mitsui* and *Mannington Mills*. In both cases, the courts rejected the broad language in *Hunt*, and

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66. *Id.* at 52.

67. *Id.* at 53.

68. *Id.* at 55.

69. 595 F.2d 1287 (3d Cir. 1979).

70. *Id.* at 1290.

71. *Id.* at 1294. (That is to say that when the actions of foreign States are not the "result of a considered policy determination by a government to give effect of its political and public interests," the act of state doctrine is not applicable.)

72. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (plurality opinion).

73. 595 F.2d at 1294.

determined from the facts of the cases whether the act of state doctrine should apply.

C. *When Validity is in Issue*

International Ass'n of Machinists and Aerospace Workers v. The Organization of Petroleum Exporting Countries (IAM)[74] applied the act of state doctrine to bar plaintiff's suit, but can be clearly distinguished from the preceding cases on its facts. The plaintiffs were seeking injunctive relief and damages against the member nations of OPEC, "alleging that their price-setting activities violated United States anti-trust laws."[75] The court would have been required to declare the effect of the price-setting policies of the OPEC nations invalid for the plaintiffs to prevail, which is clearly impermissible under the act of state doctrine.

IAM does have significance on the issue of motive, however. In dicta, the court restated its commitment to applying the act of state doctrine in cases questioning the motive of a sovereign act when such application is called for by a determination that a failure to do so would result in an affront to a foreign State's sovereignty.[76]

IV. THE BALANCING TEST REVISITED

In the next series of cases, the courts weighed all the relevant factors in each case because motive was again at issue. In *Williams v. Curtiss-Wright Corp. (Curtiss-Wright)*,[77] defendants were accused of coercing foreign governments into purchasing engine parts from the defendant to the exclusion of all other vendors in violation of the Sherman Act.[78] The court held that "[t]he act of state doctrine should not be applied to thwart legitimate American regulatory goals in the absence of a showing that adjudication may hinder international relations."[79] Again the court allowed for the possibility that the act of state doctrine may or may not apply to inquiries of motivation, and recognized that the crucial determination is the impact on foreign relations.

The court held the act of state doctrine inapplicable in *Northrup Corp. v. McDonnell Douglas Corp. (Northrup)*.[80] The defendant, Northrup,

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74. 649 F.2d 1354 (9th Cir. 1981).
75. *Id.* at 1355.
76. *Id.* at 1360.
77. 694 F.2d 300 (3d Cir. 1982).
78. *Id.* at 301-02.
79. *Id.* at 304.
80. 705 F.2d 1030 (9th Cir. 1983), *cert. denied*, 464 U.S. 849 (1983).

accused McDonnell Douglas of deliberately monopolizing the foreign market for a certain type of aircraft manufactured by both plaintiff and defendant by influencing foreign procurement decisions.[81] On the facts of this case, the court reasoned that neither validity nor motive of the foreign procurement decision need be examined. The court added that "[w]hether Northrup can eventually establish the amount of damages without implicating foreign procurement decisions, and whether that implication is permissible are disputed questions which we need not address at this stage of the proceedings."[82]

Thus the court in *Northrup* did not address the validity-motive distinction in its holding. In dicta, however, it adhered to the balancing approach, weighing the potential impact on United States foreign policy against the goals furthered by the enforcement of anti-trust legislation.

Curtiss-Wright and *Northrup* represent further dedication to the balancing test by the lower courts, even though in both cases, the courts found that the act of state doctrine did not apply.

Balancing Test Ignored

In *Clayco Petroleum Corp. v. Occidental Petroleum Corp. (Clayco)*,[83] the court stated a broad approach to inquiry into motivation. Plaintiff Clayco alleged that the defendant had bribed foreign officials in order to secure a valuable offshore oil concession. The court held that where the very existence of the claim depends upon establishing that the motivation of the sovereign act was bribery, the act of state doctrine bars all inquiry because embarrassment would result from adjudication.[84] The *Clayco* opinion represents an obvious departure from the careful weighing of relevant factors seen in previous cases, and has been criticized for its conclusory treatment of the motive-validity dichotomy.[85]

Thus, most of the cases preceding the Court's 1990 opinion in *Kirkpatrick* have a common thread: in each instance courts have applied a balancing test to determine whether inquiry into the motive of a foreign sovereign act was proper, or whether foreign policy concerns mandated application of the act of state doctrine.[86]

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81. *Id.* at 1036-37.

82. *Id.* at 1048.

83. 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

84. *Id.* at 407.

85. *See, e.g.*, Note, *The Act of State Doctrine: A Shield for Bribery and Corruption*, 16 U. MIAMI INTER-AMERICAN L. REV. 167 (1984).

86. Arguably, in both *Clayco* and *Hunt* the courts failed to apply the balancing

V. FACTS OF KIRKPATRICK

In 1980-81 the Republic of Nigeria began accepting bids for the construction and equipment of an aeromedical center at Kaduna Air Force Base.[87] Harry Carpenter, then Chairman of the Board and Chief Executive Officer of W.S. Kirkpatrick & Co., Inc. (Kirkpatrick), was interested in obtaining the contract. Carpenter set up a deal with Benson "Tunde" Akindele, a Nigerian citizen, in which Akindele would secure the contract for Kirkpatrick in return for a "commission" consisting of 20 percent of the contract price. The "commission" was to be paid to two Panamanian entities controlled by Akindele, who in turn would release the majority of the funds to officials of the Nigerian Government in the form of a bribe. The Nigerian Government awarded the contract to Kirkpatrick which paid the money according to the plan.[88]

Environmental Tectonics Corporation, International (ETC) had entered a lower bid on the Kaduna project but was nonetheless unsuccessful in obtaining the contract. ETC learned of the 20 percent "commission" paid by Kirkpatrick and brought the matter to the attention of the proper United States authorities. Both Carpenter and Kirkpatrick were indicted under provisions of the Foreign Corrupt Practices Act of 1977,[89] to which both pled guilty.[90]

On October 2, 1985 the United States attorney for the District of New Jersey filed an offer of proof in the Carpenter matter which was signed by Carpenter. The offer established the Akindele agreement and payment of the "commission," but did not establish the payment or promise of payment of bribes to Nigerian Government officials.[91]

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test. But while the *Clayco* court spoke in broad language, there is some support for the balancing test approach. The court acknowleged that "judicial scrutiny of sovereign decisions allocating the benefits of oil development would embarass our government in the conduct of foreign policy." 712 F.2d at 407. Instead of balancing, however, the court appears to have concluded that embarrassment would result. Similarly, in *Hunt*, the court used general language to suggest that it would not apply a balancing test. The State Department's involvement in the Libya seizure, however, necessarily indicates that the court was aware of the foreign policy implications. It is thus uncertain whether the court would weigh foreign policy into the balance in another situation. 550 F.2d at 73.

87. W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l, 110 S. Ct. 701, 702-03 (1990).

88. W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l, 659 F. Supp. 1381, 1386-87 (D.N.J. 1987).

89. 15 U.S.C. § 78dd-1 et seq. (Supp. V 1981) [hereinafter FCPA].

90. *Kirkpatrick*, 659 F. Supp. at 1386.

91. *Id.* at 1386-87.

ETC then filed the present civil action alleging violations of the Robinson-Patman Act,[92] RICO,[93] and the New Jersey Anti-Racketeering Act.[94]

VI. HOLDINGS AND PROCEDURAL HISTORY OF KIRKPATRICK

The United States District Court for the District of New Jersey held that the act of state doctrine barred the court from adjudicating the claim.[95] The defendants contended, and the court agreed, that in order to prove violations of the Robinson-Patman Act,[96] RICO,[97] or the New Jersey Anti-Racketeering Statute,[98] plaintiffs would have to "establish [that] officials of the Government of Nigeria were paid, or knew they would be paid bribes for awarding the Nigerian contract to Kirkpatrick, and that but for the payment of the bribes or promise of payment, ETC would have been awarded the Nigerian contract."[99] Such examination, it was decided, would either require inquiry into a foreign act of state or impede the Executive Branch in the conduct of foreign affairs, either of which is barred by the act of state doctrine.[100]

The Court of Appeals reversed, holding that the act of state doctrine did not bar plaintiff's suit. The court balanced the relevant considerations, and found that the reasons for applying the doctrine were outweighed by those opposed to it.[101]

The Supreme Court affirmed, but refused to balance the factors involved.[102] Instead, the court held that when validity is not at issue, the Court will not apply the act of state doctrine.[103]

A. The District Court's Reasoning in Kirkpatrick

After discussing the evolution of the act of state doctrine and its policy rationales, the district court in *Environmental Tectonics Corp. (ETC),*

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92. 15 U.S.C. § 13(c) (1988).
93. 18 U.S.C. §§ 1962-1968 (1988).
94. 2C N.J.C.S. §§ 41-1 et seq. (1991).
95. *Kirkpatrick*, 659 F. Supp. at 1381.
96. *See supra* note 92.
97. *See supra* note 93.
98. *See supra* note 94.
99. *Kirkpatrick*, 659 F. Supp. at 1391-92.
100. *Id.* at 1398.
101. Environmental Tectonics Corp., Int'l v. W.S. Kirkpatrick & Co., Inc., 847 F.2d 1052 (3d Cir. 1988).
102. W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l, 110 S. Ct. 701, 705 (1990).
103. *Id.*

International v. W.S. Kirkpatrick & Co., Inc. (*Kirkpatrick*),[104] indicated its intent to follow the balancing test approach by stating,

> [t]he act of state doctrine should not be imposed without due consideration. In determining whether it is applicable, a court must analyze the precise nature of the conduct at issue, the effect upon the parties, and the effect upon the internal affairs of the foreign sovereign and the foreign policy of this country.[105]

Ultimately, however, the court relied on the broad language of *Clayco*.[106] The facts in *Clayco* were similar to those in *Kirkpatrick*, and the *Kirkpatrick* court embraced the conclusory application of the rule to bar inquiry into the motivation of the acts in question.

ETC asserted that the *Bernstein* exception[107] should operate to exclude act of state application. The exception requires the courts to apply the act of state doctrine unless the Executive Branch issues a letter to the court indicating that the foreign policy interests of the United States would not be served by its application.[108] The court reviewed the contents of the letter from the State Department which provided the opinion of the legal advisor as to whether adjudication of the case would interfere with any Executive Branch function. While the court noted that the letter expressly stated that the act of state doctrine should not bar the case from going forward, it nonetheless refused to allow adjudication. Using a rigid separation of powers analysis, the court stated, "The suggestion of the State Department that this court conduct the litigation with an eye to foreign policy concerns is not appropriate. Such a precedent poses a serious threat to the authority of the Executive Branch to conduct foreign policy."[109]

B. Kirkpatrick on Appeal

The Court of Appeals reversed, stating, "The formulation of the act of state doctrine outlined in *Mannington Mills* and *Curtiss-Wright* does

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104. 659 F. Supp. 1381 (D.N.J. 1987).

105. *Id.* at 1393 (citing RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 comment d).

106. *Id.* at 1393-94.

107. The *Bernstein* case from which the exception was derived is Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d 71 (2d Cir. 1949). In the case, the plaintiff, a German national, brought suit to recover property confiscated by the Nazi Government. The court initially dismissed the case on act of state grounds, but reversed itself after receiving a letter from the State Department permitting the case to go forward. 210 F.2d 375 (2d Cir. 1954).

108. In First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972), a plurality of the Supreme Court adopted the *Bernstein* exception.

109. 659 F. Supp., 1381, 1397 (1987).

not allow a court to invoke the doctrine on the basis of mere conjecture about the effect that the disclosure of certain facts might have on the sensibilities of foreign governments."[110] The district court's dismissal for act of state reasons was based on such speculation.[111]

The court emphasized the need to weigh all factors to determine the applicability of the act of state doctrine. It considered the letter from the legal advisor to the State Department, and held the act of state doctrine inapplicable on the facts of the case.[112]

The Supreme Court affirmed the Third Circuit in result.[113]

VII. SUPREME COURT'S ANALYSIS OF KIRKPATRICK

Justice Scalia delivered the opinion for a unanimous Court in what is likely to be a landmark act of state doctrine case. After discussing the doctrine's policy and the various exceptions which have been proposed,[114] the Court issued its opinion.

The Court's Opinion

The parties in the case "argued at length about the applicability of the possible exceptions [to the act of state doctrine], and more generally, about whether the purpose of the act of state doctrine would be furthered by its application in this case."[115] The Court focused its determination on whether to apply the doctrine, however, on neither an exception nor any policy considerations. Instead, the Court drew a bright line distinction between the validity of a foreign act and the motivation behind the act. In the former, the Court stated, the doctrine is technically available, while in the latter, "the factual predicate for application of the act of state doctrine does not exist."[116]

The Court next included a brief history of some significant act of state cases[117] in an attempt to illustrate that its decisions have consistently adhered to the validity-motive distinction, stating, "In every case in

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110. Environmental Tectonics Corp., Int'l v. W.S. Kirkpatrick & Co., Inc., 847 F.2d 1052, 1061 (3d Cir. 1988).

111. *Id.*

112. *Id.*

113. *Id.* at 1052.

114. W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l, 110 S. Ct. 701, 702-05 (1990).

115. *Id.* at 704.

116. *Id.*

117. *Id.* at 704-05.

which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory."[118]

An analysis of Supreme Court cases does tend to support this assertion.[119] The Court appears to have rejected the policy reasons expressed in the lower court opinions which applied the act of state doctrine when motive and not validity was at issue. The most obvious of these cases is *Clayco*,[120] relied on heavily by the district court. In *Clayco*, the court clearly was not required to invalidate or make ineffective the act of the sovereign in granting the offshore oil concession.[121] That court dismissed the action under the act of state doctrine citing embarrassment to the sovereign as the justification for its action.[122]

The Court next examined the arguments made by the defendant asserting applicability of the act of state doctrine. First, Kirkpatrick argued that in order for ETC to prevail, the Court must find that the bribes were made. If made, such bribes would be in violation of and thus invalid under Nigerian law.[123] The Court adhered to its validity-motive distinction stating, "act of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon the effect of official action by a foreign sovereign." (emphasis in original)[124] That situation, the Court decided, is not present here.[125]

Defendant Kirkpatrick next cited *American Banana*,[126] where the Court barred an action, using act of state language from *Underhill*,[127] where motive but not validity was at issue.[128] The Court decidedly struck down this argument, using a two point analysis. First, the Court

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118. *Id.* at 704.

119. In all of the Supreme Court cases relied upon by the *Kirkpatrick* Court where the act of state doctrine was applied, the validity of an act was involved. In both *Sisal Sales* and *Continental Ore*, the Court refused to apply the act of state doctrine, and in each of those cases, validity was not being questioned. *Id.* at 705-06.

120. Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404 (9th Cir. 1983).

121. *Id.*

122. *Id.* at 407.

123. W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l, 110 S. Ct. 701, 705 (1990).

124. *Id.*

125. *Id.*

126. 213 U.S. 347 (1909).

127. 168 U.S. 250 (1897).

128. 110 S. Ct. at 705.

stated that any act of state language in *American Banana* was dicta, and second, that dicta was overruled by *Sisal Sales*.[129]

Finally, Kirkpatrick fell back on policy considerations. Citing international comity, respect for the sovereignty of foreign nations within their own territory, and the avoidance of embarrassment to the Executive Branch in the conduct of foreign relations, Kirkpatrick argued the applicability of the act of state doctrine.[130] Kirkpatrick received some dubious help on this argument from the United States as *amicus curiae*. The United States argued that the Court "should not . . . 'attach dispositive significance to the fact that this suit involves only the 'motivation' for, rather than the 'validity' of, a foreign sovereign act,'[131] and should eschew 'any rigid formula for the resolution of act of state cases generally.' "[132]

While the United States advocated continued use of the balancing test applied by lower courts, it nonetheless urged non-application of the act of state doctrine in *Kirkpatrick*. The United States argued that the letter from the legal advisor of the State Department to the district court, "gives sufficient indication that, 'in the setting of this case,' the act of state doctrine poses no bar to adjudication."[133]

In response to these arguments, the Court focused on the *Sabbatino* balancing test, which arguably requires the validity of an act to be called into question before the act of state doctrine can be invoked.[134] It did not consider the foreign policy balancing test employed by the lower courts which allows application of the doctrine when motive alone is at issue if the facts of the case permit. The factual setting of *Sabbatino* required that the Court inquire into the validity of the Cuban expropriation.[135] The test used in that case, the Court pointed out, was to determine whether, "despite the doctrine's technical availability, it should nonetheless not be invoked."[136] In this way, the Court precluded usage of the balancing approach for issues of motive because the threshold issue, validity, was not satisfied.

The Court concluded with a broad holding: "The act of state doctrine does not establish an exception for cases and controversies

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129. *Id.* at 706.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401-06 (1964).
136. *Kirkpatrick*, 110 S. Ct. at 706.

that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid."[137]

VIII. THE EFFECT ON THE ACT OF STATE DOCTRINE

It is likely that some parties and commentators will argue that the act of state doctrine underwent no changes as a result of the *Kirkpatrick* decision. Others will argue that the Court was merely narrowing the expansive application of the doctrine in the circuits, and getting back to its originally intended application. Proponents of a third school of thought will assert that the act of state doctrine has been narrowed considerably as a result of *Kirkpatrick*. Each of these three positions will be examined.

A. The Act of State Doctrine Remains Intact

There are at least two bases for the position that the act of state doctrine has not been changed by the Court's opinion in *Kirkpatrick*. First, if the decision turned on the specific facts of the case, its holding would be so narrow as to only apply to another case with substantially similar facts. There is some support for this in the case, where the United States urged the Court to balance the relevant factors involved. In doing so, the act of state doctrine would not apply in this case, but the holding would be specific to the facts such that the Court would "resolve this case on the narrowest possible ground."[138]

While the Court agreed with the United States in result, it is relatively clear that the holding was not based solely on the unique facts of this case. Throughout its opinion, the Court made a distinction between inquiry into motive as opposed to validity of foreign sovereign acts; accordingly, the holding is stated in broad language. It was intended that the act of state doctrine would not be applied in any case when motive alone is at issue.[139] The *Kirkpatrick* holding will undoubtedly be relied on in future cases to foreclose use of the act of state defense.

The second point that could be made in favor of this position is the Court's statement that,

> [i]n every case in which *we* have held the act of state doctrine applicable, the relief sought or defense interposed would have

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137. *Id.* at 707.
138. *Id.* at 706.
139. *Id.* at 701.

> required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory. (emphasis supplied)[140]

The Court's use of the word "we" in the first part of the quoted sentence creates an ambiguity as to whether the Court is making reference to Supreme Court cases only, or to United States courts in general. It may indicate cases decided by the Supreme Court alone. If that were true, the believability of the argument would be enhanced. A review of Supreme Court cases supports that view because in each case where the act of state doctrine was applied, validity of a foreign sovereign act was at issue.[141]

The latter part of the quoted sentence, which says "would have required *a court* in the United States to declare invalid . . ." (emphasis supplied),[142] reveals the probable meaning to be courts in general, and not the Supreme Court specifically. If this meaning is correct, the statement not only refutes the idea that the act of state doctrine has not been altered by the opinion, but appears to be flatly wrong as well.

It is unlikely that the Court intended for this opinion to have little or no precedential value. Such would be the case if the reach of the act of state doctrine were not altered as a result of this decision. The language reveals some change in the doctrine as a consequence of the *Kirkpatrick* decision.

B. Clarifying the Act of State Doctrine

The second possible interpretation is that the Court granted *certiori* not only to clear up conflicts in the circuits, but also sought to return to the purity of application espoused by the original act of state cases. *Underhill*, *Oetjen*, and *Sabbatino* were principally relied on by the Court for asserting the inflexible distinction between validity and motive.[143] In each of those cases, the validity of a foreign act was at issue. Furthermore, the doctrine did not preclude the high Court from adjudicating *Sisal Sales* or *Continental Ore*, both of which arguably involved the foreign sovereign's motive, but not the validity of the act.

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140. *Id.* at 704.

141. The possible exception to that is *American Banana*, but the act of state language there was dicta, and was later overcome by the Court's holding in *Sisal Sales*.

142. *Kirkpatrick*, 110 S. Ct. at 704.

143. *Id.* at 704-05.

The lower courts were the sole employers of the foreign policy balancing test when motive alone was at issue. This case, then, served only as a reminder to the circuits that the act of state doctrine applies only when validity is at issue.

This argument has more merit, and is more persuasive than the previous one. There is some comfort in the application of the rule in such a fixed manner because it leads to uniformity of application and predictability of result. Such a conclusion about the result of the decision, however, tends to exclude a major tenet of the doctrine—the policy which underlies it.

Where the reasons behind the rule end, there too, ends the rule. It was upon this axiom that the lower courts justified expanding the doctrine beyond its original reach to include motive. If the original policy reason for the doctrine, international comity, continued to be a viable reason for its application, the expanded scope of the doctrine would be justified. If the courts determined that the motive of a foreign sovereign should not be examined in the interests of international comity, then the act of state doctrine should be applied. Similarly, the courts could cite separation of powers concerns to foreclose adjudication of cases involving sensitive political issues.

The high Court in *Kirkpatrick* ignored these arguments, favoring an inflexible rule which precludes application of the act of state doctrine whenever validity is not at issue. This interpretation of the *Sabbatino* balancing test tends to prevent the natural growth of the law. Those who fashioned the Constitution, created a broad, general framework, to withstand changes that would necessarily result from a dynamic society. Similarly, the judiciary, in introducing the act of state doctrine, likely intended it as a broad base on which to build and adapt to the demands of increasingly complex fact situations.

The lower courts built on the framework introduced in *Underhill*, and, guided by policy, created a balancing test to weigh all relevant factors. The Supreme Court's characterization of the *Sabbatino* balancing test and its resultant sharp distinction between validity and motive provide fuel for the second argument. The void created by the Court's refusal to weigh policy into the balance, however, weakens the argument by giving the appearance that policy is no longer an issue when determining whether to apply the act of state doctrine.

C. *The Act of State Doctrine Narrowed*

The third possibility concerning the effect of the *Kirkpatrick* decision, posits that the scope of the doctrine has been considerably narrowed. While the original application of the doctrine was tailored to the fact

situation of *Underhill*, where validity of an act was at issue, the policy reasons put forth in that case and in later cases justify the expansion of the rule to include motive.[144] The lower courts have applied this broader interpretation with some consistency. The Supreme Court in *Kirkpatrick* clearly opposed this reasoning, and stated,

> It is one thing to suggest, as we have, that despite the doctrine's technical availability, it should nonetheless not be invoked; it is something quite different to suggest that those underlying policies are a doctrine unto themselves, justifying expansion of the act of state doctrine . . . into new and uncharted fields.[145]

Thus, under this approach, the Court would only require a balancing of policy concerns in cases involving a validity issue. It would never weigh policy when only motive is at issue because the threshold test of validity is not met.

The third argument is persuasive if the proponent adheres to the belief that the law must change to adjust to a changing society, and that the Court should weigh policy reasons in any case involving motive or validity, and determine on that basis whether the act of state doctrine should apply. Assuming that to be true, the *Kirkpatrick* decision clearly narrowed the scope of the doctrine by eliminating the possibility that the doctrine would be applied when motive alone is at issue.

IX. PROBLEMS RESULTING FROM KIRKPATRICK

The *Kirkpatrick* decision signals the beginning of the end for the act of state doctrine. The doctrine has been narrowed considerably, opening the door for overly zealous commentators to urge its abandonment.[146] The policy reasons for the introduction of the doctrine and those espoused by the courts through the years since that time, however, demand that the doctrine not only remain extant, but that it be resuscitated.

In purporting to adhere to the *Sabbatino* precedent, the *Kirkpatrick* Court did precisely what the *Sabbatino* opinion warned against. The Court laid down a rigid, all-encompassing rule which foreclosed use of

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144. Expansion of the doctrine to include motive is justified only in those cases where the balancing test is applied, that is, where foreign policy, international comity, etc., are weighed and the scale tips in favor of application.

145. *Kirkpatrick*, 110 S. Ct. at 706-07.

146. *See, e.g.*, Hoagland, *The Act of State Doctrine: Abandon It*, 14 DENVER J. INT'L LAW AND POLICY 317 (1986); Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PENN. L. REV. 325 (1986).

the act of state doctrine when the validity of a foreign sovereign act is not at issue. The Court further eliminated the potential for legitimate application of the doctrine based on policy concerns by stating that the policies behind the doctrine are not in themselves a doctrine.[147]

This narrow reading of the act of state doctrine is tantamount to a death knell. The usefulness of the doctrine has now effectively been limited to situations where the courts of the United States are called upon to invalidate foreign acts of state. In those situations, moreover, the court may still employ the *Sabbatino* balancing test and decide not to apply the act of state doctrine even though technically available.[148]

By failing to recognize motive as a means of successfully asserting the act of state doctrine, the Court has closed its eyes to the policy for its existance in many cases. International comity was the original goal of the doctrine, and should be no less so today. By limiting the doctrine as it has, the Court is sending a message to foreign States. It is saying that the United States will not respect the laws, customs and practices of foreign States except to the extent that United States courts would be called upon to repeal the official acts of those States. This statement demonstrates the attitude of the United States in the arena of foreign policy and presents some troubling issues.

A. Diplomacy

One could imagine a situation in which, similar to *Kirkpatrick*, officials of a foreign state accept bribes and grant preferential treatment in awarding government contracts. But suppose that country is one with whom diplomatic relations are already volatile. While punishing a wrongdoer in United States courts, a court could also interrupt the work of the State Department in seeking to secure more favorable relations with that State. If this country were located in the Middle East, for example, the repercussions of this policy could be disasterous. This hypothetical demonstrates the liklihood of violating not only relations abroad but also of constitutionally mandated separation of powers. It would inexorably confuse the functions of the judiciary and the political branches in the area of foreign relations.

B. Democracy

Another problem with the *Kirkpatrick* Court's narrowing of the act of state doctrine is that a single set of standards, based on the collective

147. 110 S. Ct. at 706-07.

148. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

conscience of a single country, would be applied to the acts of foreign States, regardless of that State's own ideas of acceptable practice. The act of state doctrine as originally applied gave great deference to the varied practices of other countries. Comity was the paramount goal of the doctrine.[149] Over time, however, the courts of the United States have become less and less tolerant of standards of conduct practiced by other countries. This attitude has coincided, not surprisingly, with the emergence of the United States as a superpower among nations, at least in the military arena. The *Kirkpatrick* decision, moreover, came at a time shortly after the Soviet Union proved to be little more than a paper tiger by revealing a crumbling economy and infrastructure.

This attitude currently held by the United States is dangerous. Not only must other States submit to these standards, but ultimately our highly-regarded notions of democracy will be jeopardized. It is not the mark of a democratic nation to promulgate rules and standards of conduct for those who have no voice in or influence over their content. Even the smallest minority group in the United States has voting rights, lobbying rights, and access to other accepted channels through which to effect change in the desired direction (however slowly that change may occur in fact). But to require members of foreign States to adhere to standards which are quite possibly unacceptable to them is unacceptable to our own democratic ideals.

Proposals for change need not be sought beyond the boundaries of our own country. Rather, it need only be recognized that comity is, and must continue to be, the ultimate goal of the doctrine. To allow all of these factors to be considered, and still effetuate the ultimate goal of the system—to resolve conflicts among parties—the Court need only turn to the balancing test successfully employed by several lower courts.[150] It is likely that fair results would be obtained by the consistent use of the balancing approach. The policy considerations on both sides of the equation could be weighed—policy in favor of applying the doctrine such as international comity and respect, separation of powers and ensuring preservation of democratic ideals—against preserving respect for the laws, resolving conflicts and deterring future wrongful conduct by punishing wrongdoers. The facts of each case should determine the applicability of the doctrine.

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149. Underhill v. Hernandez, 168 U.S. 250 (1897).

150. *See, e.g.*, Williams v. Curtiss-Wright Corp., 694 F.2d 300 (3rd Cir. 1982); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied* 409 U.S. 950 (1972).

Instead, the rigidity of the rule espoused in *Kirkpatrick*, combined with a refusal to recognize why the doctrine was introduced, have foreclosed application of the balancing test successfully employed by the lower courts. The act of state doctrine was likely not meant to be a rigid, inflexible rule, mechanically applied the same in each fact situation. Such is the role and the fate of the Foreign Sovereign Immunities Act,[151] which has been labeled "a remarkably obtuse doctrine" and "a statutory labyrinth."[152] The act of state doctrine and the Foreign Sovereign Immunities Act have similar policy reasons, and some commentators have compared the two and suggested exceptions to the act of state doctrine based on those enumerated in the Foreign Sovereign Immunities Act.[153] For the act of state doctrine, however, its utility lies in its flexibility. Once it is limited in the manner done by the *Kirkpatrick* Court, its usefulness is at least diminished, if not eliminated.

The rigidity of the *Kirkpatrick* decision appears to have restricted the doctrine beyond its original scope. The imprudence of the *Kirkpatrick* opinion will be felt in subsequent act of state cases, which will almost certainly be more numerous as a result of this opinion. It seems likely, moreover, that use of the balancing test in the manner suggested, would not lead to an increase in foreign criminal activity among United States citizens.

Applicability of the doctrine would remain dependent upon substantial involvement of a foreign sovereign acting in an official capacity. The immunity or not of the United States citizen acting in concert with the foreign sovereign would likely not influence the conduct of the sovereign since, in any case, such official would be immune from prosecution in the United States courts under the Foreign Sovereign Immunities Act.[154]

X. CONCLUSION

In the *Kirkpatrick* case, the Court restricted the application of the act of state doctrine. The policy reasons for the doctrine, separation

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151. Jurisdictional Immunities of Foreign States, 28 U.S.C. §§ 1602-1611.

152. Callejo v. Bancomer, 764 F.2d 1101, 1107 (1985).

153. *See, e.g.*, Leigh, *Foreign Sovereign Immunities Act—Act of State Doctrine—Treaty Exception*, 82 AM. J. INT'L LAW 585 (1988); Angulo and Wing, *Proposed Amendments to the Foreign Sovereign Immunities Act of 1976 and the Act of State Doctrine*, 14 DENVER J. INT'L LAW AND POLICY 299 (1986); Hannon, *Foreign Sovereign Immunity and the Act of State: The Need for a Commercial Act Exception to the Commercial Act Exception*, 17 U. SAN FRANCISCO L. REV. 763 (1983); Zimmerman, *Applying an amorphous doctrine wisely: the viability of the act of state doctrine after the Foreign Sovereign Immunities Act*, 18 TEXAS INT'L L.J. 547 (1983).

154. *See supra* note 151.

of powers and international comity, appear to have been largely discarded. The Court disguised its decision in the language of precedent, but has probably gone beyond any past cases. The furthering of American objectives may be advanced by the decision, as defendants will most often not be able to use the doctrine to shield themselves from liability; but the price to be paid for the conviction of those few defendants is, *inter alia*, the already dubious reputation of the United States in the eyes of sovereign States whose policies are being examined.

*Susan M. Morrison**

* J.D. candidate, 1992, Indiana University School of Law-Indianapolis.