HOW SUPREME IS THE SUPREME LAW OF THE LAND?
COMPARATIVE ANALYSIS OF THE INFLUENCE OF INTERNATIONAL HUMAN RIGHTS TREATIES UPON THE INTERPRETATION OF CONSTITUTIONAL TEXTS BY DOMESTIC COURTS

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We emphasize that it is American standards of decency that are dispositive . . . . While “the practices of other nations, particularly other democracies, can be relevant . . .” they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.1

The [Australian] Constitution is our fundamental law, not a collection of principles amounting to the rights of man, to be read and approved by people and institutions elsewhere. The approbation of nations does not give our Constitution any force, nor does its absence deny it effect. Such a consideration should, therefore, have no part to play in interpreting our basic law.2

The provisions of the Charter, though drawing on a political and social philosophy shared with other democratic societies, are uniquely Canadian. As a result, considerations may point, as they do in this case, to a conclusion regarding a rights violation which is not necessarily in accord with those international covenants.3

International human rights (IHR) law and constitutional law (CL) share similar social functions and goals. Still, courts in a number of influential legal systems, most notably in the United States, have long resisted attempts to construe their constitutional texts in light of binding IHR instruments. The Article explores the largely inadequate degree of incorporation of IHR treaty norms in the CL of six common law countries (the United States, Canada, Australia, Israel, the United Kingdom,

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and South Africa) and identifies the causes for judicial reluctance to incorporation. The Article then challenges the view that incorporation could violate constitutional principles, introduce legal disharmony, and raise cultural and political objections. It posits that numerous legal policy considerations support incorporation at the constitutional level. Most importantly, it asserts that IHR law requires such incorporation.

I. INTRODUCTION

IHR norms bear great resemblance to many constitutional norms found in the domestic constitutions of many nations. Both bodies of norms define and delimit the relations between the government and the governed, protect comparable social and moral values of fundamental importance, and transcend day-to-day legal and political processes (e.g., they are endowed with norm-entrenching features). In fact, the language of IHR law often mirrors that of constitutional norms. Given their similar purpose, substance, and form, it is only natural to expect that the two bodies of law will cross-fertilize each other, i.e., that international instruments would be utilized to inform the interpretation and application of constitutional instruments and vice versa. International law may in fact compel

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International law is particularly helpful in interpreting the Bill of Rights where the Constitution uses language which is similar to that which has been used in international instruments. The jurisprudence of the International Covenant on
such interaction in order to guarantee effective implementation of IHR norms.\footnote{7}

Alas, despite these hospitable background conditions, the actual relations between IHR and domestic CL\footnote{8} have often been tenuous or non-extant.\footnote{9} In a number of influential legal systems, most notably that of the United States, there exists deeply imbedded resistance to the idea that texts of a super-legislative nature, such as the Constitution, ought to be construed in light of international law in general, and IHR law in particular\footnote{10} (notwithstanding the reference in the U.S. Constitution to international treaties as “the supreme law of land”).\footnote{11} Other jurisdictions have tended to ignore the issue altogether, opting \textit{de facto} for a non-incorporative regime.\footnote{12}

The Article discusses the judicial reluctance to incorporate IHR treaties into CL and criticizes the principal objections to incorporation raised by courts and academics. Furthermore, it presents a host of arguments in favor of applying IHR law as an influential interpretive tool, which should inform the contents of domestic CL. In particular, it argues first that IHR treaties require states to integrate IHR law into all facets of do-

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\item This idea is encapsulated by the \textit{pacta sunt servanda} principle enshrined in customary international law and in the Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) [hereinafter VCLT].
\item In the United States, CL has sometimes been defined as: “1. The body of law deriving from the U.S. Constitution and dealing primarily with governmental powers, civil rights, and civil liberties. 2. The body of legal rules that determine the constitution of a state with an [sic] flexible constitution.” \textsc{Black’s Law Dictionary} 307 (7th ed. 1999). In this article, CL comprises the body of law governing the application and interpretation of supra-legislative instruments, such as constitutions, basic law, and other instruments allowing national courts to review the validity of primary legislative instruments. Other legal functions of CL (such as the interpretation of secondary legislation, regulation of the method of operation of government institutions, etc.) will be excluded from the purview of discussion.
\item See infra Part IV.C.1.
\item U.S. Const. art. III, § 2.
\item See discussion below on the legal situation in Israel and, to a lesser degree, on the situation in the United Kingdom.
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A state’s failure to integrate IHR law into CL might thus lead to a breach of its international obligations. Second, a host of substantive moral, social, and legal policy considerations support, even from a domestic law perspective, the need to increase the influence of constitutional-like IHR norms upon CL.13

Consequently, the Article posits that binding IHR treaties should always be considered by courts in CL cases and that CL ought to be construed, if possible, as consistent with such treaty norms (although lack of ability to harmonize might result in international liability). This approach promotes the incorporation of IHR into domestic CL while preserving a healthy degree of judicial discretion as to the scope and pace of integration. It therefore facilitates the adaptation of international norms to the particularities of domestic legal systems and strikes a balance between competing legal and policy considerations. By contrast, the failure to apply IHR law at the constitutional level has severe adverse implications. Rejection of IHR law’s relevance to the CL discourse results in the exclusion of IHR from crucial legal debates pertaining to the judicial review of legislation, the structuring of social institutions, and the definition and realization of fundamental social tenets, values, and interests. This renders IHR law powerless to challenge deeply imbedded objections to the values it purports to defend.

Hopefully, the work presented here will contribute to a better understanding of the international obligation to incorporate IHR into CL and the various challenges and jurisprudential problems associated with such incorporation. Recognition of the similar nature of the objections raised in different jurisdictions could also advance a comparative analysis of the contested issues and stimulate cross-fertilization across national borders. Although there is a considerable body of literature focusing upon the role of international law within national law and upon constitutional methods of interpretation in specific jurisdictions,14 little has been written on the topic from a de-localized or international perspective. The present Article aims to fill this void.

Part II of the Article discusses the question of incorporation from an international law perspective and analyzes the relevant incorporation ob-

13. Neuman, supra note 6, at 85 (“The prominence of this suprapositive aspect distinguishes human rights law from many other fields of positive law.”).

14. See, e.g., INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS (Thomas M. Franck & Gregory H. Fox eds., 1996); ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS, supra note 6; WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION (3d ed. 2003); CRAIG R. DUCAT, CONSTITUTIONAL INTERPRETATION (7th ed. 2000); CONTEMPORARY PERSPECTIVES ON CONSTITUTIONAL INTERPRETATION (Susan J. Brisson & Walter Sinnott-Armstrong eds., 1993).
ligations introduced by the main IHR treaties. Part III undertakes a short discussion of various techniques for incorporating IHR law into CL and argues that a number of common law countries fail to meet the required international standard of incorporation. Part IV identifies the main objections raised, explicitly and implicitly, by domestic judges and academics against enhancing the role of IHR treaties within the CL discourse. These objections are critically examined and counter-arguments are presented. The final segment of the Article concludes that interpreting constitutional texts in light of IHR treaties is, generally speaking, good law and good policy.

Before embarking on a substantive review of relevant law and policy, two methodological comments should be made. First, the focus below is on one category of positive IHR law—validly ratified IHR treaties. The more complicated issue of the domestic effect of customary IHR law is dealt with only incidentally. The treaties’ precise language, the extensive practice of international bodies in construing them, and the manifest consent to their binding effect on the part of ratifying states, facilitate incorporation and remove objections which could be directed against customary law—primarily, normative ambiguity and questionable legitimacy. Of course, doctrinal assertions developed with respect to the domestic status of IHR treaties would also have implications for the status of customary law.

Second, the Article focuses primarily upon the law and practice of a limited number of common law countries. Not only are legal materials from the selected countries more accessible to the present writer, but there is also considerable evidence that the problems identified in this Article are more acute in common law than in civil law jurisdictions. This can be attributed, inter alia, to the dualist traditions of many common law countries and, at least in some cases, to the limited historical


18. Although it is sometimes believed that civil law countries tend to be monists, while common law countries lean towards dualism, in reality many legal systems have
influence of IHR standards on the creation of their constitutional instruments. It is in encouraging debate in these common law legal systems that the Article can hope to be most useful.

opted for a mixed regime containing monist and dualist elements. For example, in England and in other countries sharing its legal tradition, such as Canada and Israel, customary international law is automatically part of the law of the land. See, e.g., Trendtex Trading Corp. v. Central Bank of Nigeria, [1977] 1 Q.B. 529 (U.K.); CrimA 474/54 Shhtamper v. Attorney-General, [1956] IsrSC 10 5 (Isr.). However, treaties do not have any formal legal status until incorporated. In contrast, the U.S. Constitution regards international treaties as the “supreme Law of the Land,” U.S. Const. art.VI, cl. 2, and U.S. courts have held customary international law to be part of the law of the land. Restatement (Third) of Foreign Relations Law of the United States § 1 reporters’ note 5 (1987) ("The courts have held that other international agreements and federal determinations and interpretations of customary international law are also supreme over State law."). Nevertheless, this monist veneer is misleading, as judge-made distinctions between self-executing and non-self-executing treaties have diminished the monist disposition of U.S. law and have led courts to treat many treaties—especially IHR treaties—under a de facto dualistic paradigm. See Foster v. Nielson, 27 U.S. 253, 314 (1829); Carlos Manuel Vázquez, The Four Doctrines of Self-Executing Treaties, 89 Am. J. Int’l L. 695 (1995); Richard B. Lillich, The United States Constitution and International Human Rights Law, 3 Harv. Hum. Rts. J. 53, 62–69 (1990); Buergenthal, supra note 5, at 368–82; John C. Yoo, Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding, 99 Colum. L. Rev. 1955, 1969–73 (1999). Reluctance to apply customary law by U.S. courts and theoretical challenges to its applicability at the federal level have brought about a similar outcome with regard to customary norms. See Fernandez-Roque v. Smith, 622 F. Supp. 887, 903 (N.D. Ga. 1985) (“[T]he President has the authority to ignore our country’s obligations arising under customary international law . . ."). See also Henkin, supra note 6, at 192; Gordon A. Christenson, Problems of Proving International Human Rights Law in the U.S. Courts: Customary International Human Rights Law in Domestic Court Decisions, 25 Ga. J. Int’l & Comp. L. 225, 232–41 (1996); Bradley & Goldsmith, supra note 16, at 852–53 (observing that 19th century judicial precedents declaring customary international law to be part of the federal common law have been rendered obsolete by the famous Supreme Court decision in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), which ruled out the existence of a federal common law). But see Lillich, supra, at 69–71.

Both the U.S. and the Australian Constitutions predate the creation of the IHR movement. At the same time, the United Kingdom and Israel have no comprehensive constitutions and the limited scope of their constitutional texts left little room for interaction with IHR norms.

20. Similarities in legal thinking and conceptualization, combined with cultural and political affinities, make the mutual experience of common law countries perhaps more relevant and persuasive to one another. See, e.g., Knight v. Florida, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting) (“[T]he Court has found particularly instructive opinions of former Commonwealth nations insofar as those opinions reflect a legal tradition that also underlies our own Eighth Amendment.”).
II. THE OBLIGATION TO INCORPORATE HUMAN RIGHTS TREATIES INTO DOMESTIC LAW: DOES IT APPLY TO CONSTITUTIONAL LAW?

The nature of the duty to incorporate international norms into domestic law that arises from IHR treaties, such as the International Covenant on Civil and Political Rights (ICCPR)21 or the European Convention on Human Rights (European HR Convention),22 has been the subject of extensive consideration. The conservative view adopted by influential scholars23 and human rights bodies24 is that the treaties do not introduce a duty to incorporate human rights by way of specific legislation, and that states have a wide margin of discretion in determining how to give effect to their treaty obligations in this area.25 This approach, which mirrors the

25. However, this margin of discretion is reviewable by international monitoring bodies. See CECR General Comment 3, supra note 24, para. 4 (“[T]he ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make.”); CRAVEN, supra note 23, at 125.
general attitude towards international obligations of result,\textsuperscript{26} is supported by a number of policy considerations. Flexibility in incorporation strategies defers to the states’ superior ability to determine how best to implement treaty obligations within the framework of domestic law-making procedures and constitutional constraints. It also marks respect for the sovereignty of the state over the law applicable in its territory and deference to diversity in domestic legal arrangements employed by states participating in IHR treaties. The language of article 2(2) of the ICCPR supports this flexible position:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.\textsuperscript{27}

Similar discretionary language can be identified in the other global IHR treaties\textsuperscript{28} and the European HR Convention.\textsuperscript{29} However, as the fol-


\textsuperscript{27} ICCPR, supra note 21, art. 2(2) (emphasis added).


\textsuperscript{29} European HR Convention, supra note 22, art. 1 (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Sec-
lowing paragraphs indicate, a closer look at the language of IHR treaties in light of their context, object, and purpose, challenges the accuracy of the conservative approach towards incorporation.

Any discussion on the nature of the incorporation obligations introduced by IHR treaties should first acknowledge the principles that treaty obligations must be performed in good faith and that states are unable to rely upon domestic law to justify failures to fulfill their international obligations. These principles support the proposition that failure to incorporate IHR treaties into domestic law, including CL, could, in theory, be viewed as a violation of international law if a good faith reading of the treaties so requires.

Another relevant principle is that of effective interpretation (“effet utile”), which supports reading international treaties in a manner designed to give effect to their provisions. In the context of IHR treaties, there can be little doubt that enforcement of IHR norms through domestic courts could be far more effective than methods of enforcement available at the international level (e.g., through treaty bodies such as United Nations (UN) Committees, or inter-state communications), which are less accessible to individual victims and less likely to generate compliance by the state in question (note that the decisions of UN treaty bodies...
are not even legally binding). The weakness of the inter-state formal and informal enforcement mechanisms existing under UN treaties highlights the advantages of domestic fora. Indeed, domestic courts in democracies committed to the rule of law often function as the most accessible and effective human rights enforcers. This is because the familiarity of such courts with local conditions facilitates the issuance of politically acceptable decisions; further, their judgments are routinely enforced by the executive branch, and proceedings before them are widely perceived as legitimate.

The involvement of domestic courts also has important long-term educational and preventive effects. While the record of many domestic courts in upholding IHR law is far from perfect, even in well-respected democracies, their role as a first instance forum for airing human rights grievances is indispensable. However, domestic procedures could be deemed effective from an IHR law perspective only if individuals are able to invoke before municipal courts legal norms which correspond to their internationally recognized human rights. Hence, incorporation of IHR standards into domestic law (directly or through elaboration of analogous domestic standards) goes a significant way towards ensuring their effectiveness.

The centrality of domestic enforcement of IHR law is underscored by the right to effective remedy enumerated in a number of IHR treaties. For example, article 2(3) of the ICCPR provides:

Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated


shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.37

Similar effective remedy clauses can be found in the texts of other IHR treaties38 and in other instruments related to the work of international

37. ICCPR, supra note 21, art. 2(3) (emphasis added). There is some confusion regarding the necessary sequence of events under article 2(3) of the ICCPR. The earlier case law of the Human Rights Committee (HRC) supported the proposition that the application of the “effective remedy” provision depends upon an initial finding that a violation took place. See, e.g., Mbenge v. Zaire, Commc’n No. 16/1977, para. 18, U.N. Hum. Rts. Comm., 18th Sess., U.N. Doc. CCPR/C/18/D/16/1977 (1983). For criticism, see NOWAK, supra note 23, at 62. However, more recent case law has adopted a more flexible approach. See Kazantzis v. Cyprus, Commc’n No. 972/2001, para. 6.6, U.N. Hum. Rts. Comm., 78th Sess., U.N. Doc. CCPR/C/78/D/972/2001 (2003) (“[A]rticle 2, paragraph 3, provides protection to alleged victims if their claims are sufficiently well-founded to be arguable under the Covenant.”).

38. See, e.g., European HR Convention, supra note 22, art. 13 (“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority . . . .”); CERD, supra note 28, art. 6 (“States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention . . . .”); CAT, supra note 28, art. 2(1) (“Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”) (emphasis added); J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN AND DEGRADING PUNISHMENT 123 (1988); AHCIEN BOULESBAAA, THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT 58 (1999). See also Universal Declaration of Human Rights, G.A. Res. 217A, art. 8, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”). Note that this last affirmation of the right to effective remedy might pertain only to incorporated human rights. The right to effective remedy is also consistent with the obligation to exhaust domestic remedies before resorting to international litigation under IHR compliance mechanisms. See, e.g., ICCPR OP I, supra note 33, art. 2. Such an obligation (which applies with regard to individual complainants and states exercising diplomatic protection) assumes that the allegedly violating state should attempt to offer adequate solutions to the problem through its domestic legal procedures. Cf. Anne F. Bayefsky, INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS, supra note 6, at 295, 296.
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treaty bodies. Still, the CESCR Committee has held that the principle is part of the general corpus of IHR law. CESCR General Comment 9, supra note 24, para. 3.

40. For a division between “first order” and “second order” rights, endowed with an individuating operative function, see JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM 155 (2d ed. 1980).


42. See supra note 24, para. 3.

43. HRC General Comment 3, supra note 24, para. 1 (“[States’] obligation . . . is not confined to the respect of human rights, but . . . States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights.”) (emphasis added); General Comment No. 28: Equality of Rights Between Men and Women (Article 3), para. 2, U.N. Hum. Rts. Comm., 68th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) (providing that states shall undertake steps to remove “obstacles to the equal enjoyment” of rights); Thomas Buergenthal, To Respect and to Ensure: State Obligations and Permissible Derogations, in THE INTERNATIONAL BILL OF HUMAN RIGHTS, supra note 23, at 72, 77.

44. HRC General Comment 3, supra note 24, para. 2 (“[I]t is very important that individuals should know what their rights under the Covenant (and the Optional Protocol, as the case may be) are and also that all administrative and judicial authorities should be aware of the obligations which the State party has assumed under the Covenant.”).
tion granted to states in deciding how to incorporate IHR into their domestic system. Incorporation must be appropriate and effective. Hence, it must enable individuals to approach domestic courts in the event of a breach of IHR treaty norms, a process that must lead to an enforceable remedy.

These general policy considerations apply with special force to some specific norms and principles of IHR law that have been identified by the treaties themselves, the treaty bodies, and scholars as necessitating explicit incorporation. Consider, for example, article 20 of the ICCPR, which requires specific legislation prohibiting incitement to racism, and article 4 of the CAT, which requires a specific criminal prohibition against torture. In the same vein, the UN Committee on Economic, Social and Cultural Rights opined that anti-discriminatory policies as well as policies in the field of health and education should be backed up by proper legislation. More generally, it has been argued that legislation is indispensable in order to apply IHR norms to relations between private individuals (e.g., in the area of labor relations), to override inconsistent legislation, or to remedy situations where non-legislative measures have been proven ineffective. Hence, while states have some discretion as to the method and perhaps also the pace of legislative reform (e.g., whether to rely upon existing law and buttress it with an interpretive presumption or to enact new statutory instruments), they are obliged to ultimately

45. ICCPR, supra note 21, art. 2; CAT, supra note 28, art. 4. Other treaty clauses that incorporate an explicit or implicit obligation to legislate are ICCPR, supra note 21, arts. 6, 17, 26; ICESCR, supra note 28, art. 10(3); CERD, supra note 28, art. 4; CEDAW, supra note 28, art. 2; CAT, supra, art. 14(1); CRC, supra note 28, arts. 16(2), 32; European HR Convention, supra note 22, art. 2; Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 22, 1984, E.T.S. 117.

46. In relevant part, the Committee’s comment reads:

The Committee recognizes that in many instances legislation is highly desirable and in some cases may even be indispensable. For example, it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures. In fields such as health, the protection of children and mothers, and education, as well as in respect of the matters dealt with in articles 6 to 9, legislation may also be an indispensable element for many purposes.


47. CRAVEN, supra note 23, at 126.

48. See discussion in Schachter, supra note 23, at 320.
bring their domestic laws into full compliance with the IHR treaties to which they are a party.

The need to incorporate IHR law into domestic legislation through one or another means finds support in the case law and periodic reports of the UN treaty bodies49 and the European Court of Human Rights (ECtHR). In Lithgow, the ECtHR held:

Although there is thus no obligation to incorporate the Convention into domestic law, by virtue of Article 1 of the Convention the substance of the rights and freedoms set forth must be secured under the domestic legal order, in some form or another, to everyone within the jurisdiction of the Contracting States . . . . 50

The argument regarding the need for incorporation applies with extra force at the CL level. As human rights violations are often the product of domestic legislation,51 an incorporation strategy which fails to offer adequate constitutional remedies might be viewed as inappropriate and ineffective. Further, the obligation to ensure compliance with human rights standards or to secure their realization also applies with respect to constitutional norms because these norms might themselves be amenable to an interpretation that is incompatible with IHR law.52 If courts are unable or unwilling to rectify this impediment through interpretative means, they might perpetuate their state’s failure to comply with its international obligations. Finally, it is questionable whether CL that fails to incorporate IHR in a meaningful manner can “ensure” future implementation, i.e., provide human rights the necessary degree of security and protection


51. For example, see Toonen v. Australia, Commc’n 488/1992, U.N. Hum. Rts. Comm., 50th Sess., U.N. Doc CCPR/C/50/D/488/1992 (1994), in which Tasmania’s Criminal Code was challenged as violative of the ICCPR because it criminalized various forms of sexual contact between men, including all forms of sexual contact between consenting adult homosexual men in private. Indeed, a number of IHR treaties require states to repeal legislation inconsistent with their provisions. See, e.g., CERD, supra note 28, art. 2(1)(c).

52. See Neuman, supra note 6, at 85.
from future legislative encroachment. Consequently, an incorporation strategy that stops at the CL level cannot be deemed fully effective and might even be considered an independent violation of the IHR obligations of the relevant state. Of course, states have considerable discretion in deciding how to incorporate IHR treaties at this level. They may resort to direct incorporation, interpretation strategies, or any other method of indirect incorporation. However, in my view, this margin of discretion does not include the right to ignore the application of IHR treaties when construing CL.

53. See Drzemczewski, supra note 50, at 4; Schachter, supra note 23, at 329–30.

54. For some support, consider the following passage:

The Committee notes with regret that, although some rights provided for in the Covenant are legally protected and promoted through the Basic Laws, municipal laws, and the jurisprudence of the courts, the Covenant has not been incorporated in Israeli law and cannot be directly invoked in the courts. It recommends early action in respect of recent legislative initiatives aimed at enhancing the enjoyment of a number of the rights provided for in the Covenant, including proposals for new draft Basic Laws on due process rights and on freedom of expression and association. It also recommends that consideration be given to enacting further laws to give effect to any rights not already covered by Basic Laws.


55. See Laura Dalton, Note, Stanford v. Kentucky and Wilkins v. Missouri: A Violation of an Emerging Rule of Customary International Law, 32 WM. & MARY L. REV. 161, 204 (1990) (arguing that failure by courts to consider IHR law in analyzing the constitutionality of a measure is in itself a violation of customary international law).

56. A parallel argument has been advanced by the Supreme Court of India:

These international instruments cast an obligation on the Indian State to gender sensitize its laws and the Courts are under an obligation to see that the message of the international instruments is not allowed to be drowned. This Court has in numerous cases emphasized that while discussing constitutional requirements, Court and counsel must never forget the core principle embodied in the international conventions and Instruments and as far as possible give effects to the principles contained in those international instruments. The courts are under an obligation to give due regard to international Conventions and Norms for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law.

III. THE PRACTICE OF INCORPORATING HUMAN RIGHTS TREATIES INTO DOMESTIC CONSTITUTIONAL LAW

Having established the existence of an international obligation to harmonize IHR treaties and domestic CL, this Part turns to examine, by way of comparative analysis, incorporation strategies adopted by six common law countries: the United States, the United Kingdom, Canada, Australia, South Africa and Israel. These strategies will be situated on a spectrum of possible incorporation techniques ranging from explicit incorporation, facilitating the constitutional status of IHR treaties, to discretionary reliance on IHR treaties by judges that construe domestic CL. On the basis of this comparative analysis, this Part argues that, with the possible exception of Canada, the incorporation strategies adopted by the surveyed countries fall short of the international standard identified in Part II. Finally, this Part suggests a variety of reasons which underlie states’ preferences for different incorporation strategies.

A. Possible Techniques for Incorporating International Law into Constitutional Law

1. Explicit Incorporation

Several legal techniques could endow IHR treaty norms with constitutional status, which entails, at least in some cases, the power to override ordinary legislation. The first and most straightforward method of incorporation is by way of an explicit constitutional provision specifying the constitutional status of international law in general, or IHR treaties in particular. Such specification could entail three alternative CL regimes: a) supra-constitutionalism, whereby international law overrides constitutional instruments; b) constitutionalization, whereby international law has a status equivalent to the constitution or similarly binding constitu-

57. It should be noted that even countries lacking a constitution, such as the United Kingdom, have legal mechanisms designed to review the lawfulness or propriety of primary legislation. See Human Rights Act, 1998, c. 42, §§ 4, 10; Ex parte Factortame Ltd., [1991] 1 A.C. 603, 659.

58. This is essentially the status of European Community (EC) law—which includes several human rights norms—in most EC countries. See Case 6/64, Costa v. E.N.E.L., 1964 E.C.R. 585; Case 11/70, Internationale Handelsgesellschaft GmbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R. 1125; Case 106/77, Amministrazione Delle Finanze dello Stato v. Simmenthal SpA, 1978 E.C.R. 629. To the extent that state constitutions in the United States are subject to federal law, one could also view the status of international treaties in the United States as supra-constitutional.
tional instruments;\textsuperscript{59} or c) quasi-constitutionalization, whereby international law overrides ordinary legislation but is subject to constitutional limits found in the constitution.\textsuperscript{60} When viewed from an IHR perspective, all three methods of direct incorporation are highly desirable as they underline the direct effect and relative supremacy of IHR treaties. Many legal systems around the world, however, including all of the surveyed common law countries,\textsuperscript{61} have refrained from incorporating IHR treaties into their constitutional instrument as directly enforceable norms.\textsuperscript{62}

\textsuperscript{59} See, for example, the status of the European HR Convention in Austria, Bundesverfassungsgesetz [B-VG] [Constitution] BGBl I No. 1/1930, as amended by BGBl No. 59/1964 (Austria). See also Holly Jarmul, \textit{The Effect of Decisions of Regional Human Rights Tribunals on National Courts}, 28 N.Y.U. J. INT’L L. & POL. 311, 334 (1996) (discussing the status of the European HR Convention as constitutional law). See also the status of various IHR Treaties under the 1994 amendment to the Argentine Constitution, ARG. CONST. art. 75, cl. 22.

\textsuperscript{60} See, e.g., Bruno Simma et al., \textit{The Role of German Courts in the Enforcement of International Human Rights, in ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS}, supra note 6, at 71, 89–92; Rett R. Ludwikowski, \textit{Supreme Law or Basic Law? The Decline of the Concept of Constitutional Supremacy}, 9 CARDOZO J. INT’L & COMP. L. 253, 283–84 (2001) (discussing the status of international law in France); COSTA RICA CONST. art. 7; INSTRUMENT OF GOVERNMENT, 1974 [Constitution] ch. 2, art. 23 (Swed.) (providing that the European HR Convention may not be contravened by ordinary laws); RUSS. FED’N CONST. art. 15, § 4; CZECH REP. CONST. art. 10; SLOVK. CONST. art. 7, § 4; BULG. CONST. art. 5; Grundwet voor het Koninkrijk der Nederlanden [GW] [Constitution] art. 94 (Neth.) (however, in reality, Dutch courts do not exercise constitutional review over treaties); Buergenthal, supra note 5, at 352–53 (discussing the scope of treaty supremacy in the Netherlands); Ryan Goodman, \textit{Human Rights Treaties, Invalid Reservations, and State Consent}, 96 AM. J. INT’L L. 531, 541, 547–48 (2002) (discussing new democracies in Eastern Europe and the system of the Nordic countries and the Netherlands). Under German law, only customary law enjoys a super-legislative status. See Grundgesetz für die Bundesrepublik Deutschland (federal constitution) GG art. 25 (providing that general rules of international law take precedence over ordinary legislation). The courts of several other civil law systems have opted for the quasi-constitutionalist model, endowing treaties with super-statutory status, without explicit constitutional authorizations. This is for example the law in France, Belgium and Argentina. Buergenthal, supra note 5, at 347–49, 358.


\textsuperscript{62} For example, in the United States, treaties enjoy a status similar to federal legislation, and in the event of conflict between treaties and the Constitution, the latter prevails. De Geofroy v. Riggs, 133 U.S. 258, 267 (1890); Reid v. Covert, 354 U.S. 1, 16–17 (1957). See also Peter J. Spiro, \textit{Treaties, International Law, and Constitutional Rights}, 55 STAN. L. REV. 1999, 2004 (2003); Buergenthal, supra note 5, at 344; Louis Henkin, \textit{International Law as Law in the United States}, 82 MICH. L. REV. 1555, 1562–63 (1984). However, IHR treaties have been viewed by U.S. courts as non-self-executing, thereby
Two caveats to the last observation could be noted. First, some of the surveyed countries include CL norms whose contents mirror IHR treaty norms. Thus, some of the older CL norms, like the U.S. Constitution, have influenced the contents of IHR treaties, while modern CL norms have been inspired by IHR law. Obviously, similarity in the language of CL instruments and IHR treaties reduces the need for explicit incorpo-
ration, since existing CL may be viewed as an implicit form of incorporation. Alas, in all surveyed legal systems there are considerable gaps between the scope of coverage of CL and the country’s IHR treaty obligations, therefore, supplementary incorporation strategies are required. Furthermore, similarly worded CL and IHR instruments might be differently construed by the respective domestic and international norm-appliers. Hence, the interpretive influence of IHR treaties ought to be examined even with relation to similarly worded CL norms.

Second, the UK Human Rights Act of 1998 may be viewed as a form of direct incorporation of an IHR treaty into domestic CL. The Act consolidates the status of the European HR Convention in UK law and confers a quasi-constitutional status upon rights recognized in the European HR Convention. If the courts find primary legislation to be incompatible with a Convention right, they must uphold it, but they may make a “declaration of incompatibility,” upon which a relevant government minister or the Queen in Council can rely to introduce amending legislation, by way of order. Judicial review of existing legislation under European HR Convention standards, as expounded in the jurisprudence of the ECtHR (which UK courts should consider, though not necessarily follow), is thus a viable option under current UK CL. The recent decision of the House of Lords in A v. Secretary of State on the unlawfulness of

66. For example, the ICESCR, which is binding upon the United Kingdom, Canada, Israel and Australia, has not been incorporated into their domestic CL. The specific provisions of CERD had not been incorporated into the U.S. or South African Constitution.
67. See, e.g., David P. Stewart, United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations, 42 DePaul L. Rev. 1183, 1192–93 (1993) (discussing differences between the prohibition of torture in international treaties and the U.S. Constitution); Heckman & Sossin, supra note 65 (discussing potential difference in Canada between the constitutional and international standards of quasi-judicial independence).
69. Still, some doubt whether this reform signifies a radical departure from the past. See id.
71. Id. § 2(1).
administrative detentions under the post-September 11th anti-terror legislation aptly demonstrates the potential effectiveness of the process.72

Still, it is important to note the limits of this incorporation strategy. The UK Human Rights Act authorizes, but does not require, courts to review the compatibility of domestic legislation with the European HR Convention,73 and it does not authorize courts to invalidate primary legislation. Instead, the question is relegated to the political branches, which may ultimately choose to leave the incompatibility in place. Furthermore, no similar acts of incorporation were undertaken with relation to other IHR treaties to which the United Kingdom is a party (e.g., ICCPR, ICESCR, CERD, CEDAW, CAT and CRC).74

2. Incorporation Through Interpretation

A second possible incorporation strategy is indirect incorporation through canons of constitutional interpretation.75 Under this legal strategy, national courts may be obliged, or at least encouraged, to construe domestic CL in light of IHR treaties that the state had ratified. Such an indirect form of incorporation could substitute or supplement direct incorporation measures.

The harmonizing effect of incorporation by way of interpretation may depend upon three key factors: the formal source of the interpretive doctrine, the degree of flexibility in its application, and the relationship between an interpretive presumption of conformity—requiring harmonization of IHR treaties and CL—and other CL interpretive presumptions. The following sections address manifestations of the first two factors in the laws of the surveyed states. The third factor has not yet been thor-

73. See David Bonner et al., Judicial Approaches to the Human Rights Act, 52 INT’L & COMP. L.Q. 549, 561–62 (2003). Bonner notes that there is marked judicial reluctance to utilize the extraordinary quasi-constitution procedure introduced by the act, i.e., declarations of incompatibility. Id. at 554.
74. It may also be noted that EC law has been accorded an even stronger constitutional status under UK law by virtue of the European Communities Act, 1972. Hence, UK statutes that are incompatible with EC law and cannot be reconciled with the latter through interpretative means are inapplicable. See, e.g., Perceval-Price v. Dep’t of Econ. Dev., [2000] NICA 141 (Civ) (N. Ir.); Shields v. E. Coomes (Holdings) Ltd., [1979] 1 All E.R. 456, 461. To the degree that EC law includes IHR protections, this is another important potential avenue of incorporation of IHR law into the UK constitutional discourse. However, no British court has attempted to date to construe Brussels law according to IHR treaties (other than the European HR Convention).
oughly discussed in any of the surveyed legal systems. Hence, it suffices, at present, merely to note its potentially disruptive effect, which might hinder the effective incorporation of IHR treaties into CL. The relative nature of an interpretive presumption designed to give effect to IHR treaties enables skeptical judges, apprehensive about the suitability of international law to govern domestic affairs, to prefer recourse to alternative interpretive presumptions.76

i) Explicit Constitutional Directive versus Judge-Made Canon of Interpretation

In some legal systems, the constitution explicitly requires domestic courts to use international law in general, and IHR treaties in particular, as an interpretive source when construing CL.77 Two of the surveyed common law countries, South Africa and the United Kingdom, have explicit CL provisions to that effect. Section 39(1) of the 1996 South African Constitution requires courts to consider international law when interpreting the Bill of Rights.78 Article 3(1) of the UK Human Rights Act


77. For example, article 10(2) of the Spanish constitution provides: “Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain.” Constitución Española art. 10(2) (Spain). See also CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA OF 1977 art. 9(f) (“[T]he state authority and all its agencies are obliged to direct their policies and programmes towards ensuring . . . that human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights.”). Acting upon this provision, the High Court of Tanzania construed the constitutional right of equal legal protection as encompassing a broad right of access to courts, in accordance with IHR treaties. Ng’omango v. Mwangwa, Civil Case No. 22/1992, unreported (High Ct. of Tanz., Dodoma) (on file with author). The Court of Appeals, the highest court in Tanzania, also accepted the relevance of IHR law for constitutional interpretation purposes in Pumbun v. Attorney General, [1993] 2 L.R.C. 317. In another case, the High Court construed the constitutional right to equality as consistent with IHR treaties to which Tanzania is party. Ephrahim v. Pastory, 87 I.L.R. 106, 110 (1992).

78. Section 39(1) provides: “When interpreting the Bill of Rights, a court, tribunal or forum—(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c)
provides: “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.” Although, formally speaking, this last presumption of conformity mainly applies to ordinary legislation, the unique structure of the UK legal system would facilitate its application to ‘quasi-constitutional’ human rights norms protected by statutes and common law principles, including constitutional-like European Union (EU) legislation.

At the same time, one can also identify judge-made canons of constitutional interpretation which refer to IHR treaties without clear constitutional mandate to do so. Among the surveyed countries, such a canon may consider foreign law.” S. Afr. Const. 1996 s. 39(1) (emphasis added). In practice, IHR treaties and the international jurisprudence relating to their application have been invoked in a number of influential constitutional cases. See S v Makwanyane 1995 (6) BCLR 665 (CC) para. 35 (Chaskalson, J.) (stating that international human rights agreements should be considered in interpreting the right to life); Brink v Kitshoff NO 1996 (6) BCLR 752 (CC) (construing the right to equality in light of IHR law); In re: The Sch. Educ. Bill of 1995 (Gauteng) 1996 (4) BCLR 537 (CC) (construing the right to equality in light of IHR law); Nat’l Coal. for Gay & Lesbian Equal. v Minister of Justice 1998 (12) BCLR 1517 (CC) paras. 40–46 (considering developments in IHR law in finding the anti-sodomy laws unconstitutional). It is interesting to note that part of the process of adopting the 1996 Constitution included certification by the Constitutional Court that the Constitution comports with IHR standards. In re: Certification of the Constitution of the Republic of S. Afr. 1996 1996 (10) BCLR 1253 (CC). See also Ronald C. Slye, International Human Rights Law in Practice: International Law, Human Rights Beneficiaries and South Africa: Some Thoughts on the Utility of International Human Rights Law, 2 Chi. J. Int’l L. 59, 67 (2001).

79. For discussion, see Grosz et al., supra note 61, at 28.
80. Id. at 43.
81. See Simma et al., supra note 60, at 95. A number of civil law countries also habitually use international human rights standards when interpreting their constitutions. See, e.g., Polakiewicz & Jacob-Foltzer, supra note 17, at 125, 140 (discussing Liechtenstein and Turkey respectively). In the common law world, it is notable that New Zealand’s High Court has been willing to construe the Bill of Rights Act 1990 (which incorporates numerous civil and political rights in New Zealand law and introduces a weak system of quasi-constitutional review) in light of the ICCPR, without explicit authorization. Ministry of Transp. v. Noort Police [1992] 3 N.Z.L.R. 260 (C.A.), 1992 NZLR LEXIS 657, at *33. Similarly, the Indian Supreme Court has shown in recent years increasing willingness to construe domestic law, including the Indian Constitution, in light of IHR instruments, although the Constitution gives no clear mandate to do so. Note that article 51 of the Indian Constitution of India instructs the Indian State to “foster respect for international law and treaty obligations in the dealings of organized people with one another.” India Const. art. 51, cl. c. Nevertheless, Indian courts have refrained from construing it as encompassing a duty to incorporate international law into domestic law. See, e.g., Quamar v. Tsavliris Salvage (Int’l) Ltd., (2000) 3 L.R.I. 886, para. 32 (S.C.). For example, in one case the Indian Supreme Court relied on a number of international
has been accepted by the Canadian judiciary. A number of Canadian Supreme Court decisions have consciously used IHR treaties to construe Canada’s supreme constitutional instrument, the Charter, although some academic and judicial criticism of these decisions persists.


82. For example, the Canadian Supreme Court held in one case that the right to freedom of expression under the Charter should be limited in order to facilitate the right to work, enshrined in the ICESCR to which Canada is party. Slaight Comm’ns Inc. v. Davidson, [1989] 1 S.C.R. 1038, 1056–57 (Dickson, C.J.). In another case, it used IHR instruments to support the invalidation of a law reversing the burden of proof in certain drug-related criminal cases. R. v. Oakes, [1986] 1 S.C.R. 103, 120–21. In yet another case the Court relied upon the ICCPR and CERD to exclude hate speech from the scope of constitutionally protected freedom of speech. R. v. Keegstra, [1990] 3 S.C.R. 697. In another more recent case the Court cited abolitionist trends in international law to support construing the Charter prohibition against cruel and unusual punishment as prohibiting extradition of suspects to death-penalty countries without assurances that the death penalty would not be requested. United States v. Burns, [2001] S.C.R. 283, 332–35. See also In Re Pub. Serv. Employee Relations Act (Alta.), [1987] 1 S.C.R. 313, 358–59 (Dickson, C.J., dissenting) (stating that freedom of association encompasses the right to strike which is protected by the ICESCR and other treaties to which Canada is party); Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779, 827–28 (Cory, J., dissenting) (arguing that the constitutional prohibition against cruel and unusual punishment and the scope of protection of the Charter should be construed in light of Canada’s international obligations); B. v. Children’s Aid Soc’y of Metro. Toronto, [1995] 1 S.C.R. 315, para. 38 (Lamer, C.J.) (arguing that article 7 of the Charter should be construed in light of the ICCPR and other international instruments); R. v. Advance Cutting & Coring Ltd., [2001] 3 S.C.R. 209, 232–36 (Bastarache, J., dissenting) (arguing that freedom of association should be construed in light of the ICESCR and other international instruments providing for the right not to join unions). See also Bayefsky, supra note 38, at 323–24 (citing governmental officials supportive of this legal development). It is notable that those few occasions in which international law was applied to aid in the interpretation of the Canadian Charter involved IHR treaties. See id. at 319 (“Human rights cases in Canadian courts might turn out to be sui generis.”). This supports the argument developed below, that special considerations support the incorporation of IHR treaties, and not other international law instruments, into CL.

83. See In Re Pub. Serv. Employee Relations Act (Alta.), 1 S.C.R. at 314–17 (concluding that freedom of association does not include a right to strike notwithstanding the ICESCR); Prof’l Inst. of the Pub. Serv. of Can. v. Northwest Territories (Comm’t), [1990] 2 S.C.R. 367, 404 (holding that freedom of association does not include the right to collective bargaining, which is protected in numerous ILO conventions to which Canada is party); Keegstra, 3 S.C.R. at 702 (McLachlin, J., dissenting); Baker v. Canada, [1999] 2 S.C.R. 817, 865 (Iacobucci, J., concurring) (opposing the view that the court should look to unimplemented international treaties in statutory interpretation). See also Stephane Beaulac, Arretons de dire que les tribunaux au Canada sont lies par le droit international [Let’s Stop Saying that Canadian Tribunals are Bound by International
By contrast, in the other surveyed common law jurisdictions, the United States, Australia and Israel, the permissibility of resort to IHR treaties when construing CL instruments is rather controversial. Although in the 2005 Roper case a majority of U.S. Supreme Court justices accepted the relevance of IHR treaties to a dynamic interpretation of the Eighth Amendment,\(^8^4\) the resort to international law sources was acerbically criticized by some minority justices.\(^8^5\) Since application of IHR treaties by the U.S. Supreme Court in CL cases can be described as sporadic and controversial at best,\(^8^6\) the existence of a canon of interpretation incorporating IHR into CL is doubtful. The fact that the U.S. constitutional debate over the status of IHR treaties has largely taken place in footnotes, and not in the body of the opinions, may attest to the marginality of this canon of interpretation in the Supreme Court’s CL discourse.\(^8^7\)


\(^8^5\) Roper, 125 S. Ct. at 1226 (Scalia, J., dissenting) (“[T]he basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.”). See also Thompson v. Oklahoma, 487 U.S. 815, 869 n.4 (1988) (Scalia, J., dissenting); Foster v. Florida 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring); Atkins v. Virginia, 536 U.S. 304, 324–25 (2002) (Rehnquist, J., dissenting); id. at 347–48 (Scalia, J., dissenting) (“[T]he Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’ must go to its appeal . . . to the views of . . . members of the so-called ‘world community’ . . . . I agree with the Chief Justice that [their] views . . . are irrelevant.”) (citations omitted); Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).


\(^8^7\) For example, in Thompson both the majority and the dissent addressed the relevance of foreign and international sources in footnotes. See Thompson, 487 U.S. at 831 n.31, 869 n.4. See also Foster, 537 U.S. at 990 n.*. However, lower federal courts and state courts might prove more hospitable fora. See, e.g., Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981); Lipscomb v. Simmons, 884 F.2d 1242, 1244 n.1 (9th Cir. 1989); Lareau v. Manson, 507 F. Supp. 1177, 1187–88 n.9 (D. Conn. 1980);
In Australia too, the permissibility of relying upon IHR treaties when construing the Constitution remains controversial. While one High Court judge, Michael Kirby, has forcefully argued in favor of a presumption of conformity encouraging interpretation of the Constitution in light of IHR law,88 no other High Court judge has yet voiced explicit support of the theory89 (although several judges have made occasional references to IHR standards in their CL decisions, without expounding a coherent interpretive theory).90 On the contrary, some High Court judges have explicitly rejected the applicability of the presumption of conformity to the Constitution.91 It is thus fair to conclude that the constitutional status of IHR treaties in Australia is still very much unsettled.

The constitutional status of IHR treaties in Israel is also uncertain. Although Israel’s Supreme Court has used IHR treaties to inform its interpretation of constitutional rights in several recent cases,92 there has yet to


90. See, e.g., Minister for Immigration and Ethnic Affairs v. Teoh (1995) 183 C.L.R. 273, 304–05 (Gaudron, J.). However, it should be noted that in most cases recourse was made to non-binding treaties and jurisprudence, confirming the dominance of the comparative law paradigm for using international law. See, e.g., Polyukhovich v. Commonwealth (1991) 172 C.L.R. 501, 611–12; Nationwide News Pty. Ltd. v. Wills (1992) 177 C.L.R. 1, 47 n.53 (referring to a decision by the ECtHR regarding the freedom of expression under the European HR Convention).

91. Western Australia v. Ward (2002) 213 C.L.R. 1, 390 (Callinan, J., dissenting); Kartinyeri, 195 C.L.R. at 384 (Gummow & Hayne, JJ.) (arguing that courts should interpret statutes in conformity with international law as far as their language permits, but otherwise “the provisions of such a law must be applied and enforced even if they be in contravention of accepted principles of international law”); AMS v. AIF (1999) 199 C.L.R. 160, 180 (Gleeson, C.J., McHugh & Gummow, JJ.); Al-Kateb v. Godwin (2004) 208 A.L.R. 124, paras. 62–73 (Gleeson, C.J.).

be a decision delineating a coherent theory of incorporation by way of interpretation of the Basic Laws.

**ii) Presumption of Conformity Versus Discretionary Weighing**

A second factor for assessing the ability of interpretative canons to harmonize CL and IHR treaties is the existence of judicial discretion, i.e., whether courts may or should harmonize CL and IHR treaties. One common model for incorporating international law in domestic law is the “presumption of conformity” doctrine. Many domestic legal systems

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Anonymous v. Minister of Def., [2000] IsrSC 54(1) 721; HCJ 2599/00 YATED—Non-Profit Org. for Parents of Children with Down Syndrome v. Minister of Educ., [2002] IsrSC 56(5) 843, translated in [2002–2003] IsrlR 57. An analogous trend can be identified in cases involving the situation in the Occupied Territories. See HCJ 7015/02 Ajuri v. IDF Commander in West Bank, [2002] IsrSC 56(6) 352, translated in [2002] IsrlR 1; HCJ 3278/02 Ctr. for the Def. of the Individual v. Commander of the IDF Forces in the West Bank, [2002] IsrSC 57(1) 385; HCJ 5591/02 Yassin v. Ben David—Commander of the Kziot Military Camp—Kziot Detention Facility, [2002] IsrSC 57(1) 403; HCJ 3239/02 Marah v. IDF Commander in the West Bank, [2003] IsrSC 57(2) 349. However, reference to international law in these cases should be evaluated against the backdrop of legal doubts pertaining to the applicability of Israeli CL in the Territories. See, e.g., Marah, [2003] IsrSC 57(2) 349, para. 12. Hence, the value of these cases in providing guidance on the interaction between Israeli CL and IHR treaties is limited.

93. The doctrine has also been referred to as the “presumption of compatibility,” “presumption of compliance,” or, in the United States, as the *Charming Betsy* canon of interpretation. See Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804) (“[A]n act of [C]ongress ought never to be construed to violate the law of nations if any other possible construction remains . . . .”). The doctrine has been viewed as indicative of respect for other nations. Ma v. Reno, 208 F.3d 815, 830 (9th Cir. 2000); United States v. Thomas, 893 F.2d 1066, 1069 (9th Cir. 1990); Hong Kong & Shanghai Banking Corp. v. Simon, 153 F.3d 991, 998 (9th Cir. 1998). The same rule has since been adopted in numerous other decisions. See, e.g., Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984); Weinberger v. Rossi, 456 U.S. 25, 32 (1982); Lauritzen v. Larsen, 345 U.S. 571, 578 (1953); Cook v. United States, 288 U.S. 102, 120 (1933); Heong v. United States, 112 U.S. 536, 540 (1884); United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1465 (S.D.N.Y. 1988). See also Henkin, supra note 6, at 192; William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 604 (1992). At the same time, courts also sometimes attempt to construe treaties in light of statutory law, in order to avoid the repeal of earlier statutes. See, e.g., Johnson v. Browne, 205 U.S. 309, 321 (1907); United States v. Lee Yen Tai, 185 U.S. 213, 222–23 (1902); Blanco v. United States, 775 F.2d 53, 61 (2d Cir. 1985).

The *Charming Betsy* canon has also been codified in the [Third Restatement of Foreign Relations Law: “Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987). Note, however, that the Restatement introduces an element of rea-
(including all of the surveyed common law legal systems) apply a rule of interpretation prescribing that ordinary legislation be construed, as far as possible, in harmony with the international obligations of the state. This presumption is often presented as reflective of a hypothetical parliamentary intent—that, barring contrary evidence, judges must assume that legislators had not intended to compromise their state’s international obligations via legislation.

However, courts in most of the surveyed legal systems do not apply this canon of interpretation to their CL, even when they are prepared to seek guidance from international law sources. Instead, references to IHR treaties often seem to be based on a weaker, comparative law framework of analysis, based upon the inherent persuasiveness of IHR law (whether binding or not upon the relevant jurisdiction), and not on a recognized duty to incorporate it into CL. Under this interpretive model, courts retain considerable discretion on whether or not to harmonize CL and IHR treaties. For example, in the rare cases where IHR instruments and their treaty bodies’ case law were invoked by U.S. Supreme Court justices, they were addressed within a weak interpretive framework alluding to the informative value of comparative law or non-binding international sonableness in the application of the doctrine, which the original canon lacked. It is also questionable whether the doctrine applies at the non-federal level, i.e., in state courts. Bradley & Goldsmith, supra note 16, at 827–32. It may be noted that Bradley and Goldsmith even question the applicability of the presumption of compliance at the federal level. Id. at 871–72.

94. See, e.g., Higgins, supra note 34, at 47; Mabo v. Queensland (1992) 175 C.L.R. 1, 42 (Austl.); Daniels v. White, [1968] S.C.R. 517, 541 (Pigeon, J., concurring) (Can.); S. AFR. CONST. 1996 s. 233 (“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”). While the present article focuses on common law systems, the presumption of conformity is also well known in civil law countries. See, e.g., Simma et al., supra note 60, at 94; Buergenthal, supra note 5, at 366.

95. See, e.g., Henkin, supra note 6, at 192; Curtis A. Bradley, The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law, 86 GEO. L.J. 479, 495–98 (1998). However, a distinction can be made between two possible standards of conformity with international law: normative construction that corresponds to the norms of international law, or normative construction that merely refrains from violating international law. See id. at 500–02. Bradley argues that, in the field of constitutional interpretation, adoption of the more restrictive approach will minimize any impact of international law upon the Constitution, as the latter almost never requires (as opposed to facilitates) the violation of international law. Id. at 503–04.

96. See, e.g., Knop, supra note 35, at 520 (“Because . . . relevance is not based on bindingness, the status of international and foreign law becomes similar . . . ”).
law, 97 and not within the stronger Charming Betsy canon. 98 Indeed, references to IHR law usually fail to distinguish between norms binding upon the United States and other sources, such as ECHR standards and jurisprudence, which are clearly non-binding. 99

97. See Roper v. Simmons, 125 S. Ct. 1183, 1200 (2005) (“The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”); Knight v. Florida, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting) (“[T]his Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances.”); Foster v. Florida, 537 U.S. 990, 993 (2002) (“Just as ‘attention to the judgment of other nations’ can help Congress determine ‘the justice and propriety of [America’s] measures,’ so it can help guide this Court when it decides whether a particular punishment violates the Eighth Amendment.”) (alteration in original) (quoting The Federalist No. 63 (James Madison)); Thompson v. Oklahoma, 487 U.S. 815, 831 n.31 (1988); Harmelin v. Michigan, 501 U.S. 957, 1019 (1991) (White, J., dissenting); Oyama v. California, 332 U.S. 633, 649–50 (1948) (Black, J., concurring); id. at 670 (Murphy, J., concurring). There have been many other cases in which the practice of foreign nations was cited in approval in order to support a particular interpretation of the Constitution. See, e.g., Trop v. Dulles, 356 U.S. 86, 102–03 (1958); Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977); Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982); Boos v. Barry, 485 U.S. 312, 324 (1988); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002); Lawrence v. Texas, 539 U.S. 558, 576 (2003) (discussing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (Ser. A) (1981) and citing with approval three other ECtHR cases). See also Harold Hongju Koh, International Law as Part of Our Law, 98 Am. J. Int’l L. 43, 46 (2004); Neuman, supra note 6, at 89–90; Alford, supra note 9, at 775–80 (noting that while the U.S. Supreme Court has considered practices of foreign nations, it has done so only to bolster an existing national consensus).

98. See Koh, supra note 97, at 53 (noting that Justices of the transnationalist persuasion do not “distinguish sharply between the relevance of foreign and international law”). Another approach to the use of international law is to utilize it as a negative test, i.e., in order to refute claims that U.S. standards are unworkable or inherently incompatible with fundamental human rights notions. Michael D. Ramsey, International Materials and Domestic Rights: Reflections on Atkins and Lawrence, 98 Am. J. Int’l L. 69, 75–76 (2004).

Similarly, in Israel, the Supreme Court has tended to use international law only to confirm conclusions which the Court independently deduced from Israeli CL. To date, there has been no conscious attempt to construe the latter in conformity with IHR treaties. The only exception is the YATED case that involved judge-made CL, which has limited constitutional status under Israel’s legal system. Furthermore, the Court’s relevant jurisprudence did not clearly distinguish between binding and non-binding international treaty law.

Even in South Africa, whose Constitution requires the judiciary to consider IHR law, no presumption of conformity exists with relation to interpretations of the Constitution. In the words of South Africa’s Constitutional Court: “We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.” Still, in

but not interpretations of the ICCPR); Thompson, 487 U.S. at 830–31 (reviewing the growing objection to the death penalty, in general, and to putting minors to death, in particular, in numerous foreign countries, and noting that two international treaties to which the United States was not party at the time, the ICCPR and the I/A CHR prohibit sentencing juveniles to death, but not discussing their potential customary law status); Lawrence, 539 U.S. at 576 (discussing ECtHR cases on anti-sodomy laws but failing to mention the parallel jurisprudence of the HRC on the incompatibility of such laws with the ICCPR). An exception can be found in Knight, 528 U.S. at 996 (Breyer, J., dissenting) (noting the criticism expressed by the HRC on “disturbingly long” delays in execution of convicts).

100. In fact, the Supreme Court seemed to implicitly reject, in a recent case, the relevance of IHR treaties to interpretation of the Basic Laws. HCJ 4128/02 Adam, Teva Va-Din (Isr. Union for Envtl. Def.) v. Prime Minister of Isr., [2004] IsrSC 58(3) 503.


102. For example, in Public Committee Against Torture the Supreme Court relied, inter alia, upon a judgment of ECtHR, by which Israel is not bound. HCJ 5100/94 Public Comm. Against Torture in Isr. v. Gov’t of Israel [1999] IsrSC 53(4) 817, translated in HCJ 5100/94 Isr. L. Rep. 1, 28. In Anonymous, the Court equally cited ratified and non-ratified IHR treaties. CrimA. 7048/97 Anonymous v. Minister of Def., [2000] IsrSC 54(1) 721. In another recent case, involving the delineation of a constitutional right to a satisfactory environment, the Supreme Court seems to have accorded IHR treaties the same status it accorded comparative constitutional law. HCJ 4128/02 Adam, Teva Va-Din (Isr. Union for Envtl. Def.) v. Prime Minister of Isr., [2004] IsrSC 58(3) 503.

103. S v Makwanyane 1995 (6) BCLR 665 (CC) para. 39 (Chaskalson, J.). Indeed, in that case, the Constitutional Court indiscriminately cited a variety of IHR sources—binding and not binding upon South Africa—in support of its decision that the right to life protected by the interim 1993 Constitution does not allow capital punishment:

In the context of section 35(1) [now 39(1)], public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary inter-
subsequent cases, the Constitutional Court seems to have edged towards a rebuttable presumption of conformity.  

Unlike the South African Constitution, the UK Human Rights Act introduced an unmistakable duty to harmonize domestic law and the European HR Convention. It remains unclear, however, how the residual judge-made presumption of conformity will apply to other IHR treaties to which the United Kingdom is a party (e.g., whether it introduces discretionary or obligatory standards).

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national law accordingly provide a framework within which Chapter 3 [the Bill of Rights] can be evaluated and understood . . . .

Id. para. 35. For a discussion of the case, see Ann-Marie Slaughter, *A Typology of Transjudicial Communication, in International Law Decisions in National Courts*, supra note 14, at 37, 67–69. This stance can be contrasted to the more robust function of international law under the general presumption of conformity which applies to ordinary legislation, according to section 233 of the Constitution, which prescribes courts to always strive to construe ordinary legislation in accordance with international law. S. Afr. Const. 1996 s. 233.

104. The following passage illustrates the Court’s leaning towards the presumption:

International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, relevant only in the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the State in terms of international law.

Azanian Peoples Org. (AZAPO) v President of the Republic of S. Afr. 1996 (8) BCLR 1015 (CC) para. 26 (Mahomed, J.). However, at another part of the same decision, the Court opined that it should only “have regard” to international law when construing the Constitution. Id. para. 27. For other decisions influenced by IHR treaties, see *Christian Educ. S. Afr. v Minister of Educ.* 2000 (10) BCLR 1051 (CC) para. 39 (holding that prohibition against corporal punishment is consistent with the provisions of the Constitution); *NUMS4 v Bader Bop (Pty) Ltd.* 2003 (2) BCLR 182 (CC) para. 26 (finding that right to strike should be construed in accordance with ILO). For similar interpretative strategies in the decisions of lower South African courts, see, for example, *Prince v President of the Law Society, Cape of Good Hope* 1998 (8) BCLR 976 (C) (holding that ban on ritual use of marijuana is not unconstitutional); *Residents of Bon Vista Mansions v S. Metro. Local Council* 2002 (6) BCLR 625 (W) (holding that disconnecting of water supply is unconstitutional); *S v K* 1997 (9) BCLR 1283 (C) (finding anti-sodomy law unconstitutional); *Nyamakazi v President of Bophuthatswana* (1994) (1) BCLR 92 (B) (restrictions upon freedom of association of aliens held unconstitutional).


106. Uncertainties relating to the application of the general presumption of conformity include:

a) Doubts whether the presumption applies to all legal interpretation projects, including common law doctrines, to statutes only, or solely to the interpretation of stat-
utes which explicitly or implicitly refer to international standards. The following passages illustrate these doubts:

I readily accept that if the question before me were one of construing a statute enacted with the purpose of giving effect to obligations imposed by the Convention, the court would readily seek to construe the legislation in a way that would effectuate the Convention rather than frustrate it. However, no relevant legislation of that sort is in existence. It seems to me that where Parliament has abstained from legislating on a point that is plainly suitable for legislation, it is indeed difficult for the court to lay down new rules of common law or equity that will carry out the Crown’s treaty obligations, or to discover for the first time that such rules have always existed.


Further cases in which the court may not only be empowered but required to adjudicate upon the meaning or scope of the terms of an international treaty arise where domestic legislation, although not incorporating the treaty, nevertheless requires, either expressly or by necessary implication, resort to be had to its terms for the purpose of construing the legislation.


b) Doubts whether the presumption of conformity permits judges to alter the ordinary meaning of statutory instruments, or only applies when the existing legislation is demonstrably open to more than one meaning. Cf. GROSZ ET AL., supra note 61, at 34.

c) Conflicting decisions have been rendered on whether the presumption of conformity applies in the field of administrative law so as to govern the acts of public officials. Compare Ex parte Singh, [1976] 1 Q.B. 198 (requiring immigration officers to bear in mind the principles of the European HR Convention), Ex parte Phansopkar, [1976] 1 Q.B. 606, 626 (Scarman, L.J.) (public authorities should have regard to the European HR Convention), and Rantzen v. Mirror Group Newspapers, [1994] Q.B. 670, 691 (“It is also clear that article 10 of the European HR Convention may be used when the court is contemplating how a discretion is to be exercised.”), with Ex parte Bibi, [1976] W.L.R. 979 (C.A.) (holding that immigration officers are not required to know about the European HR Convention), Fernandes v. Sec’y of State for the Home Dep’t, [1981] Imm. A.R. 1 (determining that the Home Secretary is not obligated to consider the European HR Convention), and Ex parte Brind, [1991] 1 A.C. 696 (H.L.) (finding no presumption that the executive must exercise its discretion in conformity with the European HR Convention). Cf. Tavita v. Minister of Immigration, [1994] 2 N.Z.L.R. 257, 266 (C.A.) (N.Z.) (noting that respondent’s argument that the Crown is entitled to ignore international conventions is “unattractive” and implies “that New Zealand’s adherence to the international instruments has been at least partly window-dressing”).

107. Compare Maclaine Watson & Co. v. Dep’t of Trade, [1988] 3 All E.R. 257, 269, 291 (C.A.) (referring to freedom of courts to invoke international treaties), with Guardian Newspapers, 3 W.L.R. at 798, and Times Newspapers, 3 W.L.R. at 44–45 (both cases referring to the duty of judges to construe English law in accordance with the Crown’s international obligations).
The only surveyed jurisdiction that applies a general presumption of conformity at the CL level is Canada. In *Slaight Communications*, the majority of Canada’s Supreme Court embraced Judge Dickson’s opinion that:

[C]anada’s international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the Charter but also the interpretation of what can constitute pressing and substantial s.1 objectives which may justify restrictions upon those rights . . . . [T]he fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective.¹⁰⁸

Judge Dickson, the main proponent of incorporating IHR treaties into Canadian CL, did not explicitly link the “general principles of constitutional interpretation [which] require that these international obligations be a relevant and persuasive factor in Charter interpretation”¹⁰⁹ to the presumption of conformity relevant to the construction of ordinary legislation.¹¹⁰ Yet, there can be little doubt that he was of the view that the presumption of conformity has some place within Canadian constitutional discourse. Equating ratification of treaties with social endorsement of the norms expounded in them, which, in turn, supports their importation into the Charter, comes very close to advocating a reading of the Charter that conforms to Canada’s international obligations. The difference between the two modes of reasoning—one focusing on embracing values and the other on international legality—could be viewed as rhetorical or tactical.


B. Assessment of Compliance of the Surveyed Jurisdictions with the Duty to Incorporate Human Rights Treaties into Constitutional Law

The short study of the law and practice undertaken above suggests that the majority of the surveyed common law systems fail to offer a satisfactory degree of incorporation of IHR treaties into their CL. CL in all six jurisdictions explicitly reflects only some IHR norms. For example, in the United Kingdom, the Human Rights Act only covers IHR norms enshrined in the European HR Convention, but not in other binding IHR instruments. Additional harmonization measures are therefore necessary. Nevertheless, most countries have failed to establish effective canons of interpretation capable of harmonizing domestic CL and IHR treaty norms. In the United States, resort by the Supreme Court to IHR treaties has been sporadic and conducted within a weak “comparative law” analytical framework, and not within the stronger Charming Betsy canon. In Israel and Australia, the applicability of a presumption of conformity to CL remains unsettled. Even in South Africa, whose Constitution mandates consideration of IHR treaties in CL cases, the Constitutional Court is not bound to follow their prescriptions, and may prefer other interpretations of the Bill of Rights. Hence, the study reveals deficiencies in the rules designed to incorporate IHR treaties into CL, which might lead, in turn, to violation of the international duty to harmonize the two bodies of law.

Of the surveyed countries, only Canada offers good prospects of harmonization across-the-board at present, as the Canadian Supreme Court is inclined to construe domestic CL in the light of the various IHR norms binding upon Canada. But even there, judicial resistance to the role of IHR can be identified. Further, some confusion still surrounds the manner of applying the presumption of conformity to CL. In particular,

111. It is an open question whether other IHR treaties to which the United Kingdom is party could be utilized in order to influence a UK court’s interpretation of European HR Convention rights enumerated in the 1998 Act. There is yet no definite answer to this question, although preliminary indications do not indicate any tendency to utilize such an elaborate interpretive construction. See Bonner et al., supra note 73, at 582 (describing misapplication of the Convention on the Rights of the Child by the English judiciary in the context of a case under the Human Rights Act). But see A v. Sec’y of State, [2005] 2 A.C. 68, para. 62 (utilizing non-European HR Convention sources to delineate a right under the convention).

112. First, there remains some controversy as to whether the presumption of conformity applies only with respect to patently ambiguous statutes which necessitate interpretive aids or with regard to all statutes, including clearly worded statutes (which could, however, when compared to international law, be viewed as ambiguous). Compare Schavernoch v. Foreign Claims Comm’n, [1982] 1 S.C.R. 1092, 1098, and Capital Cities Commc’ns Inc. v. Can. Radio-Television Comm’n, [1978] 2 S.C.R. 141, 173 (in both
there is no clear authority on whether the very resort to the presumption of conformity is mandatory or discretionary.\textsuperscript{113}

\begin{footnotesize}
\textsuperscript{113} Slaight Commc’ns, 1 S.C.R. at 1056 (“Canada’s international human rights obligations should inform . . . the interpretation of the content of the rights guaranteed . . . .”) (emphasis added). \textit{But see In Re Pub. Serv. Employee Relations Act (Alta.),} 1 S.C.R. at 349 (Dickson, C.J., dissenting) (“[T]hough I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source for interpretation of the provisions of the Charter . . . .”). The relatively modest number of cases in which the presumption was applied in the constitutional context in Canada perhaps suggests that despite occasional suggestions to the contrary, the presumption is not being applied in a systematic manner, and judges do in fact exercise considerable discretion in the matter. Bayefsky, \textit{supra} note 38, at 318; Knop, \textit{supra} note 35, at 512–13. Similar ambiguity can be found in the decisions of Judge Kirby in Australia. \textit{See, e.g., Austin v. Australia} (2003) 215 C.L.R. 185, 291–92 (Kirby, J., partly concurring) (“It is at least as useful in considering questions of basic legal principle concerning the content of Australian law to have regard to this source as it is to examine the non-binding expositions of the law appearing in English cases of centuries ago, often dealing with problems in a context quite different from that of the contemporary world.

\textit{See also} Council of the Shire of Ballina v. Ringland, 1994 NSW LEXIS 14010, at *82 (C.A.) (N.S.W.) (Kirby, J.) (“If there be any ambiguity or uncertainty about the state of our common law it is, in my opinion, permissible for this Court to seek to resolve the ambiguity or uncertainty with the assistance of the applicable international law of human rights.”) (emphasis added). See discussion in Walker, \textit{supra} note 89, at 95.
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C. Why Do Different Legal Systems Select Different Incorporation Strategies?

The question of what considerations underlie the choice of an incorporation regime is essentially a political theory topic (e.g., the choice relates to the cosmopolitan or isolationist nature of the relevant society) that exceeds the scope of the present Article. However, a few rudimentary observations may be offered at this stage.

First, the older the constitutional instrument is, the more developed is the idiosyncratic jurisprudence relating to its interpretation. As a result, courts construing such primordial instruments are expected to be less receptive to engaging new interpretive materials derived from IHR law than are courts operating in relatively new constitutional orders, which were often influenced by IHR law during their formation. A second factor is the degree of confidence domestic courts have in their ability to deliver justice. Well-established democracies might view the introduction of additional safeguards to their constitutional order as redundant, while new states and states emerging from non-democratic experiences might feel that such reliance is beneficial and involves a legitimizing effect, which could protect them from future backsliding.114 Third, it appears that domestic courts subject to an international system of review, such as the ECtHR, would be keener to harmonize domestic law, including CL, with IHR law, than would courts of countries not subject to similar oversight.115 The desire to avoid embarrassing adverse findings, as well as the ongoing inter-judicial dialogue between national and international courts and the accelerated transnational legal process that ensues, serve as powerful incentives to pay close attention to IHR requirements.116

Finally, the inclination to resort to IHR law in constitutional interpretation is sometimes judge-dependent. In some common law legal systems, individual judges play a pivotal role in promoting the integration of IHR into the CL discourse. Consequently, a variety of factors relating to the judges’ cultural or educational background, idiosyncratic beliefs, values and exposure to the IHR law discourse could also be relevant to the out-

114. Goodman, supra note 60, at 541 (national systems with discredited human rights records try to “lock in liberal gains” through accession to international instruments and procedures, with greater perceived legitimacy); Neuman, supra note 6, at 85.
115. Cf. Neuman, supra note 6, at 86.
116. See Slaughter, supra note 103, at 61–62; Buergenthal, supra note 5, at 361, 394 (availability of appeals to international tribunals affects the attitude of courts towards non-incorporated IHR treaties).
Of course, an explicit constitutional provision mandating courts to consult IHR norms neutralizes many of these subjective elements and sends courts a clear message on the political desirability of invoking IHR law. This is why constitutionally-based canons of interpretation offer better prospects for increasing the influence of IHR treaties on constitutional interpretation than judge-made interpretive doctrines.

IV. IS CONSTITUTIONALIZING HUMAN RIGHTS TREATIES A GOOD IDEA?
THE POLICY IMPLICATIONS OF INCORPORATION

The practice of the surveyed common law countries reveals skepticism, reluctance, and sometimes outright hostility on the part of domestic judges to the idea of incorporating IHR treaty standards into the national system of constitutional guarantees. The explicit and implicit resistance to incorporation of IHR norms into constitutional texts cannot be simply dismissed as a manifestation of hostility to internationalism on the part of domestic courts; neither is the issue subsumed in the ordinary monism versus dualism debate. On the contrary, there are discrete arguments, supported by scholarly work, which challenge the applicability of IHR norms to the CL discourse that ought to be confronted. These arguments can be grouped into four categories: a) separation of powers and democratic accountability concerns, b) fears of undermining legal coherence, c) cultural objections, and d) political reluctance to implement IHR law. The following Part discusses these objections and introduces counterarguments in favor of applying IHR law as an influential interpretative tool that should inform the contents of domestic CL. Hence, policy arguments relating to the welfare of the surveyed domestic legal systems independently support the incorporation of IHR treaties into CL in a way that supplements the international law arguments presented in Part I.

Before delving into the specific arguments and counter-arguments, two premises of the discussion undertaken in this Part ought to be acknowledged. First, the interpretive methodology here recommended accepts the ultimate supremacy of CL in national courts, a concession which leaves in place the conditions for chronic conflicts in outcome between domestic and international judicial fora. This approach skirts many of the virtually insoluble theoretical debates over hierarchy of norms (e.g., whether international law is the source of legitimacy of national law or

117. These considerations comport with the transnational legal process literature, which views the projection of ideas and values across national borders through global interaction and discourse as a central factor in ensuring compliance with international law. See, e.g., Koh, supra note 97, at 56.

118. Note that under international law, reliance upon domestic law can never justify a violation of international obligations. VCLT, supra note 7, art. 27.
vice versa), and advocates a role for international law even in conditions of limited applicability. Needless to say, arguments in support of the incorporation of IHR law into CL would apply a fortiori under a monistic paradigm, which fully integrates national and international law and accords the latter precedence over the former.

Another premise is the rejection of originalism or interpretivism—i.e., theories which preclude construing CL instruments in light of any post-constitutional legal source, including IHR law—as the sole bases for constitutional interpretation projects.

In the alternative, the following three general propositions are put forward: (1) binding legal sources, which have legal effect within national legal systems, ought to be harmonized with one another through norm interpretation; (2) constitutional interpretation projects should, generally speaking, share similar pro-harmonizing aims; and (3) interpreta-

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119. As is well known, there are two main theories and, consequently, practical approaches to the relations between national and international law. Monism advocates the integration of international and national law, while dualism supports the separate existence of the two legal orders. Ultimately, the two theories differ in identifying the source of legitimacy of law. Traditionally, monism posits that all legal norms derive from a single source—a common gründnorm. Indeed, according to Kelsen, national legal systems derive their ultimate legitimacy from the principle of sovereignty, which is a fundamental principle of customary international law. See HANS KELSEN, GENERAL THEORY OF LAW AND STATE 369 (Anders Wedberg trans., 1949); HANS KELSEN, PURE THEORY OF LAW 337–38 (Max Knight trans., 1967); HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 61–62 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., Oxford Univ. Press 1992) (1934). In contrast, dualism views domestic laws and institutions as deriving their authority exclusively from a self-contained domestic legal system, corresponding to a sovereign polity, founded upon its own independent gründnorm. As a result, domestic courts can apply international law only to the degree it was positively imported into the domestic legal system through domestic rules of incorporation. A third pluralist approach that dismisses any pretensions to identify a common starting point for law and advocates a multi-faceted vision of law, is also available. See, e.g., William Ewald, Comment on MacCormick, 82 CORNELL L. REV. 1071, 1078 (1997); Neil MacCormick, Institutions and Laws Again, 77 TEX. L. REV. 1429, 1432 (1999).

120. See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST 1 (1980) (“[Interpretivism indicates] that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution.”). But see Hughlett, supra note 15, at 181.


tion of constitutional texts should take cognizance of changing social values, pursuant to “living constitution” theories accepted in the surveyed jurisdictions.123 These propositions could, in theory, facilitate the consideration of IHR treaties in the course of CL interpretive projects. If IHR treaties form part of domestic law by virtue of a domestic law rule of incorporation, then they may be viewed under propositions (1) and (2) as candidates for harmonization with CL. In the alternative, treaty ratification by democratically elected bodies could be viewed as manifestation of the relevant polity’s social values and deemed relevant for CL interpretation projects under proposition (3).124

A. Upsetting the Separation of Powers and Undermining Democratic Accountability

A traditional objection against empowering courts to resort to international treaties when construing constitutional texts is that such authorization might disrupt fundamental constitutional principles.125 These include the need to maintain the separation of powers (or the constitutional balance of powers) within the relevant polity126 and to resist any democratic accountability-eroding features which appertain to a pro-incorporation rule. The following segment analyzes the distinct claims which comprise this group of anti-incorporation arguments.

1. Fears of Judicial Activism

Two specific separation of powers issues may arise. The ability of courts to step outside of the ‘four corners’ of the text and to fill an existing normative cast with contents derived from international law sources liberates judges from the obligation to abide by the original intent of the norm’s drafters. This necessarily amplifies their law-creating role, which

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126. See Bradley & Goldsmith, supra note 16, at 861.
is inherent in any law-interpretation or law-application project, and provides rhetorical tools which enable judges to mask their individual preferences with innovative interpretative doctrines. This criticism is particularly influential at the CL level. If judges are entrusted with the de facto authority to reshape the constitution, they might be able to override democratically elected legislatures and executives. Hence, objections to the use of IHR law for the interpretation of CL are directly linked to fears of judicial activism and theories of constitutional interpretation that seek to curb judicial discretion.

These objections are hardly convincing. First, it is questionable whether empowering judges to apply IHR treaties when construing constitutional texts liberates judges or, rather, constrains them. Most modern theories of constitutional interpretation refer judges to elusive concepts such as “local standards of decency,” “national consensus,” “original intent,” “basic principles of the legal system,” “basic rights” and “justice,” which leave judges almost unrestricted interpretive discretion. The image of the work of the judiciary as a mechanical law-applying exercise or the automatic identification and implementation of the original drafters’ intent, involving little discretion, is nothing more than a dated myth. One could, therefore, argue that reference to the more precise legal standards found in IHR instruments and the case law of international monitoring bodies restricts the ability of judges to mold consti-
tutional texts in accordance with their idiosyncratic personal or institutional preferences. At the very least, reference to international law helps judges to articulate their preferences in a politically acceptable manner and provides them with guidance in cases where they do not have strong preferences.

Second, the fact that accession to international treaties is executed through the fiat of other branches of government (the executive, the legislative or both) implies that these branches can influence judicial discretion by way of treaty ratification. Such influence is augmented by the widely accepted rule that courts should give weight to the way in which the executive branch interprets treaties. The result is that the presump-

133. In Re Pub. Serv. Employee Relations Act (Alta.), [1987] 1 S.C.R. 313, 349 (Can.) (Dickson, C.J., dissenting) (“As the Canadian judiciary approaches the often general and open textured language of the Charter, ‘the more detailed textual provisions of the treaties may aid in supplying content to such imprecise concepts as the right to life, freedom of association, and even the right to counsel.’”) (citation omitted). See also Hughlett, supra note 15, at 180 (“[E]ven reasonable people disagree on how the Supreme Court should interpret the Constitution. Some external interpretive tool is necessary at times to resolve constitutional questions.”); Neuman, supra note 6, at 90 (noting that proscribing the use of international law as an interpretive aid would hardly prevent judicial activism); Strossen, supra note 6, at 830.

134. See, e.g., Roper v. Simmons, 125 S. Ct. 1183, 1200 (2005) (“The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”).

135. See, e.g., Foster v. Florida, 537 U.S. 990, 993 (2002) (“Just as ‘attention to the judgment of other nations’ can help Congress determine ‘the justice and propriety of [America’s] measures,’ so it can help guide this Court when it decides whether a particular punishment violates the Eighth Amendment.”) (citation omitted). Cf. Bradley, supra note 95, at 508 (discussing defenses of canons of interpretation as useful for articulating policy preferences); Neuman, supra note 4, at 1896 (“[T]he availability of external precedents offers guidance in interpreting constitutional rights, and may bolster the authority of the reviewing court against other political forces.”).

136. Cf. Bradley, supra note 95, at 525 (“[T]he presumption of conformity] is a means by which the courts can seek guidance from the political branches concerning whether and, if so, how they intend to violate the international legal obligations of the United States.”); Kirby, supra note 89, at 16.

137. Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982) (“Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) (courts ascribe great weight to the meaning given to treaties by departments of government charged with negotiation and enforcement). See also Jaffer, supra note 125, at 1099–1100; Bradley, supra note 95, at 532; Eyal Benvenisti, Judicial Misgivings Regarding the Application of International Law: An Analysis of the Attitudes of National Courts, 4 EUR. J. INT’L L. 159, 167–68 (1993); Eskridge & Frickey, supra note 93, at 618. There are of course limits to the degree in which the legislature or the executive can restrict judicial discretion regarding the interpretation of trea-
tion of conformity, even when applied at the CL level, protects the power of the political branches of government to conduct effective foreign policy by minimizing the number of judicially created conflicts between domestic law and international law. By contrast, courts’ application of CL without considering IHR law might result in treaty violations and could complicate international relations. In this respect, incorporation of IHR treaties into CL serves to strengthen rather than undermine the balance of powers between the branches of government.138

2. Empowerment of Treaty-Ratifying Agencies

A second separation of powers concern relates to the expected increase in the power of treaty-ratifying agencies. If courts are required to construe the constitution in an international law-friendly manner, the domestic actors directly involved in the creation of the international law binding upon the relevant polity—mainly, by negotiating and acceding to international treaties—become exceptionally empowered. By making new international law, these actors can indirectly affect the meaning of their national constitution and increase their relative power at the expense of the other branches of government.139 In other words, recourse to international law under direct or indirect incorporation theories provides a detour to constitutional amendment procedures that enables a small, and perhaps conjectural, political majority in one branch of government to place its stamp upon constitutional instruments, which ought to reflect deeply imbedded social tenets not susceptible to temporal vagrancies.140 Such a development is also arguably awkward from a theoretical perspective. It enables the same entities whose power is checked by the constitution to tamper with the very means of control, thereby undermining the hierarchical superiority of CL.141

Nonetheless, this argument carries little weight in jurisdictions such as the United States and most civil law legal systems, where virtually all

cites. Cf. Jaffer, supra note 125, at 1104–10; Buergenthal, supra note 5, at 347–48 (the French Conseil d’Etat may interpret treaties independently of the interpretations of the Ministry of Foreign Affairs).

138. See, e.g., Bradley, supra note 95, at 525–26 (the presumption of conformity reduces the number of violations which are contrary to the wishes of the political branches); Kirby, supra note 89, at 15 (“Far from being a negation of sovereignty, this is an application of it . . . .”).

139. Alford, supra note 125, at 61.

140. See, e.g., Kirby, supra note 89, at 13 (“[Treaties negotiated by the Executive Government] may or may not reflect the will of the people, expressed by their representatives in Parliament . . . .”); Walker, supra note 89, at 98–99.

141. Alford, supra note 125, at 62.
branches of government are involved in the process of treaty ratification and incorporation. The executive negotiates the treaty and submits it for ratification; the legislative branch is free to give or withhold its consent; and the judiciary is invested with the authority to oversee the implementation of international instruments within the domestic legal system. The checks and balances inherent in the process seem to facilitate the maintenance of the pre-existing institutional equilibrium.

Still, one must acknowledge that a more serious separation of powers problem might arise in common law states, such as the United Kingdom, Canada, Australia or Israel, where ratification of international treaties is the prerogative of the executive branch. In such states, incorporating treaties into CL not only sidesteps the normal constitutional amendment process, but it also circumvents the normal legislative process. Through treaty ratification, the executive branch can influence CL and encourage interpretations thereof that override statutory instruments adopted by the legislative branch. In addition, incorporation by interpretation might result in granting international treaties binding effect in the domestic legal system through the backdoor, in contravention of the dominant dualistic paradigm applicable in these countries. Arguably, these develop-

142. For example, judges may determine whether the treaty is self-executing or non-self-executing, what is the precise meaning of the treaty terms, and how to best reconcile treaty norms with the existing constitutional text.

143. One could also argue that, in theory, any interpretation of the constitution influenced by IHR law could be reversed by constitutional amendments introduced by non-judicial branches of government. See T. Alexander Aleinikoff, International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate, 98 Am. J. Int’l L. 91, 95 (2004). However, in reality the process of constitutional amendment might be prohibitively cumbersome.

144. The following passage describes the problem:

[T]he submission by HREOC would undermine the long settled principle that provisions of an international treaty do not form part of Australian law unless validly incorporated by statute. It has repeatedly been held that the separation of the legislative and executive arms of government necessitates that treaties be implemented domestically under statute. However, HREOC’s approach would effectively reverse that principle. By giving priority to the principles assumed by the Executive, by permitting judges to construe legislation in a way that violated the intention of Parliament, it would elevate the Executive to a position that it has never enjoyed under our Constitution. That is another reason for rejecting the submission.


145. Justice Iacobucci of Canada’s Supreme Court encapsulates this argument:
ments might adversely affect the existing system of checks and balances between the different branches of government.\footnote{146}

It would seem that such countries warrant a nuanced rule of incorporation, which would enable the judiciary to maintain the inter-institutional balance of power. Since the weight attributed to IHR treaties in the course of CL interpretation is always relative, courts should be entitled to consider the compatibility of international standards with their own domestic constitutional concepts and notions of justice. If, on balance, judges believe that incorporation of IHR treaty norms will corrupt or disrupt the constitutional order within the relevant polity, they should be able to reject them (although this might put their country in breach of international law).\footnote{147} Courts thus serve as important filtering agencies, supervising the constitutional lawfulness and desirability of giving effect to treaty obligations entered into by the executive.

[The approach advocating a role for unincorporated IHR treaties in construing the Charter] is not in accordance with the Court’s jurisprudence concerning the status of international law within the domestic legal system.

In my view, one should proceed with caution in deciding matters of this nature, lest we adversely affect the balance maintained by our Parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch . . . . [T]he result will be that the appellant is able to achieve indirectly what cannot be achieved directly, namely, to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament.


One may question, however, the consistency of Kirby’s approach, as in the same case he relied upon the non-incorporated Universal Declaration on Human Rights, notwithstanding that, in Australia, customary law is not part of the law of the land without incorporation. See Walker, supra note 89, at 87. A comparable argument could be made in the United States in relation to non-self-executing treaties. Their incorporation to CL allegedly bypasses the rule concerning their lack of direct effect.

\footnote{146. See, e.g., Benvenisti, supra note 137, at 174.}

Notwithstanding, it should be emphasized that distinct policy considerations—the inherent persuasiveness of IHR treaties, their straightforward adaptability at the CL level and the duty to effectively incorporate them into domestic law—support the incorporation of IHR treaties in all legal systems, even at the price of a minor shift in the inter-branch balance of power. These considerations apply with special force to IHR treaty norms endowed with customary international law status because such norms usually reflect deeply imbedded and widely supported interests and values. The international consensus underlying customary norms is often indicative of their inherent persuasiveness and legitimacy. In addition, the method of creation of customary law is more pluralist from a domestic perspective as it builds upon the practice of all branches of government. No single government can create customary law at will and, as a result, purposefully circumvent ordinary constitutional or legislative processes. Hence, erosion of the separation of powers principle as a result of incorporating IHR treaties that also reflect customary standards is minimal.

3. Accountability-Eroding Implications

A pro-incorporation CL interpretive rule empowering non-elected judges and government officials at the expense of parliaments and constitutional assemblies might also be viewed as incompatible with notions of popular sovereignty. Skepticism directed against such accountability-decreasing measures might therefore be justified. The democratic defi-
cit associated with a pro-incorporation rule is also reflected in the record of the surveyed states, which often reveals inadequate levels of public debate on the desirability of ratifying IHR treaties in general, and on the implications of such ratification on the CL discourse in particular. This lack of accountability is exacerbated in federal states such as the United States, Canada or Australia, where expanding the substantive scope of application of the constitution by way of IHR-compatible interpretation might infringe upon the rights and interests of the constitutive federal units. Since the interests of these units might be unrepresented or underrepresented in the treaty ratification process, political pressures against incorporation could escalate.

The accountability-eroding argument is also unpersuasive. Once it is established that incorporation of IHR treaties into CL does not result in judicial empowerment (in fact, one could argue that the presumption of critiques of customary international law as an extraconstitutional norm binding democratic branches of the government).

152. Kirby, supra note 89, at 13.


154. A classic example demonstrating the potential of international law to manipulate the balance of power between the center and the periphery in a federal state is Missouri v. Holland, 252 U.S. 416 (1920). In that case, the U.S. administration bypassed a constitutional ban on the regulation of migratory bird hunting through federal legislation, through the conclusion of an international treaty on the same matter with Great Britain. Id. at 432–33. This sort of consideration has led the United States to introduce in the process of ratification of the ICCPR a “federalism understanding,” subjecting the implementation of the Covenant to the distribution of power among the federal and constitutive states. See Brad R. Roth, Understanding the “Understanding”: Federalism Constraints on Human Rights Implementation, 47 Wayne L. Rev. 891 (2001).

155. In Canada and Australia, the federal government is authorized to ratify treaties without involvement of the regional units; in the United States, the ratification process normally involves the Senate and the President. Cf. Bradley & Goldsmith, supra note 16, at 868 (arguing that state interests are not represented in the application of international customary law by federal judges). Under U.S. constitutional law, the President may also enter independently into “executive agreements.” See Louis Henkin, Foreign Affairs and the U.S. Constitution 215 (2d ed. 1996) (observing that presidential authority to enter into these agreements continues to be debated); Sharon G. Hyman, Executive Agreements: Beyond Constitutional Limits?, 11 Hofstra L. Rev. 805, 822–32 (1983) (discussing the constitutional bases for executive agreements). This, however, bears little relevance to the present topic as human rights treaties have been traditionally subject to the ordinary ratification process.
conformity restricts judicial discretion), the objection, insofar as it relates to judicial non-accountability, fails. In any case, arguments against judicial empowerment run contrary to the notion that, in the area of human rights protection, judges bear a special responsibility for protecting individuals and minorities from the tyranny of the majority. Hence, even if judges were to become empowered by a pro-incorporation legal doctrine which governs IHR treaties, this would not necessarily conflict with democratic principles.

Furthermore, the claim that a pro-incorporation interpretive presumption might lead to the circumvention of more popularly representative constitutional amendment procedures is oblivious to the law-creating quality of any interpretive project. Expanding the range of permissible sources for interpretation of CL texts hardly changes the nature of the interpretive process. In other words, CL interpretation necessarily implies a degree of innovation regardless of whether courts resort to IHR treaties or not. Further, one should realize that constitutional instruments which entrench the political choices of past majorities also have inherent democratic deficit problems. Mechanisms which facilitate the periodic updating of constitutional texts in light of contemporary political choices, expressed, inter alia, through treaty ratification, could thus have a positive accountability-enhancing effect.

Similar observations would also mitigate the aforementioned concern that incorporation of IHR treaties into CL might disrupt the federal division of powers in some countries. In effect, the federal argument cuts

156. Beatty, supra note 131, at 100–01.
158. See, e.g., Spiro, supra note 62, at 2023; Kirby, supra note 89, at 16 (“[I]n so far as courts give effect at least to fundamental rights, they are assisting in the discharge of their governmental functions to advance the complex notion of democracy as it is now understood . . . .”).
159. Eskridge & Ferejohn, supra note 123, at 1267.
160. In addition, it may be claimed that the influence of federal actors upon the division of powers between the federation and its components through treaty ratification is not radically different from their influence upon theses relations through federal legislation (which is also a generally permissible source of input in the CL interpretive process) or executive practices. Cf. Thompson v. Oklahoma, 487 U.S. 815, 865 (1988) (Scalia, J., dissenting) (referring to the merits of reliance upon legislation when construing CL). In federal countries, such as the United States, where the Senate comprises of delegates.
in both ways. The promotion of international law at the CL level will ensure that constitutive federal units would not have the freedom to violate the international obligations of the federation. This comports with the organizing principle of most federal states, according to which the central authorities—and not the federal units—are invested with exclusive power to conduct foreign relations on behalf of the federal polity. Interpreting the constitution in accordance with the international obligations of the federation reinforces this principle, whereas failure to consider the same obligations undermines it and complicates the ability of the central government to adequately perform at the international level.

4. Empowering International Adjudicators

A final accountability concern that needs to be addressed involves the impact of the case law of treaty-monitoring bodies under a pro-incorporation rule. According to the Vienna Convention on the Law of Treaties, international treaties ought to be construed, inter alia, in light of the practice of the parties thereto. One manifestation of such practice, growing in its importance, is the work of treaty-monitoring bodies such as the ECtHR and the UN Human Rights Committee (HRC). Indeed, when discussing IHR treaties, domestic courts increasingly refer to the jurisprudence of such bodies. Incorporation of IHR treaties into CL would thus, most probably, facilitate the importation of the work of in-

from the States of the Union, these concerns are even less significant, as the interests of the constitutive units may be represented during the treaty ratification process (which is conditioned upon a two-thirds super majority—a requirement which compensates, in part, for the under-representation of some federal units in Senate).


162. See, e.g., Yoo, supra note 18, at 1964 (“[T]he Constitution divests the states of any power in the field [of international agreements].”). See also Bradley, supra note 95, at 525; Aleinikoff, supra note 143, at 94 (discussing the internationalist argument that international law cases constitute one area where federal common law survives the Erie doctrine because “they concern a preeminently federal interest”).

163. A parallel argument was raised with regard to the impact of the Charming Betsy doctrine upon division of powers between the legislature and the executive. Alford, supra note 9, at 733–34.

164. VCLT, supra note 7, art. 31(3)(b).

165. See, e.g., S v Makwanyane 1995 (6) BCLR 665 (CC) para. 35 (S. Afr.) (Chaskalson, J.) (“[D]ecisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, . . . and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter 3 [of the South African Constitution].”). See discussion in Slaughter, supra note 103, at 67–69.
ternational human rights bodies into the constitutional interpretive process. This, in turn, might empower non-popularly elected international bodies at the expense of directly accountable domestic legislators and drafters of the constitution.  

This argument, couched in somewhat more general terms, has been addressed in a recent article written by Professor Mark Tushnet. Tushnet persuasively argued that treaty language that confers the power to settle disputes to an international tribunal (such as the WTO Appellate Body) presents no constitutional problem under U.S. CL, since the power of the President and Congress to create obligations for the Union also encompasses the power to undertake open-ended and dynamic obligations. Further, the mediating role of domestic judges in interpreting and applying such decisions in domestic legal contexts mitigates any alleged loss of sovereignty.

While Tushnet’s general argument is valid, delegation of judicial authority is even less of a problem in the IHR sphere, at least with respect to the surveyed countries. This is because most of the relevant IHR monitoring bodies—the HRC, which state parties have normally met with approval, and other UN treaty bodies—do not have the authority to generate binding decisions. Hence, domestic courts may derogate from their views if deemed necessary, although the high quality of the decisions, the fairness of the procedure, the expertise of the Committee members and the acceptance of the decisions by other parties could generate considerable compliance pull. The ECtHR is, of course, a differ-

166. Goldsmith, supra note 36, at 333; Barak, supra note 122, at 162 (the international judge is less accountable than the domestic judge); Ramsey, supra note 98, at 79.


168. Id. at 253–57.

169. Id.

170. As the Federal Court of Australia has stated:

Although the views of the Committee lack precedential authority in an Australian court, it is legitimate to have regard to them as the opinions of an expert body established by the treaty to further its objects by performing functions that include reporting, receiving reports, conciliating and considering claims that a State Party is not fulfilling its obligations. The Committee’s functions under the Optional Protocol to the International Covenant on Civil and Political Rights, to which Australia has acceded (effective as of 25 December 1991) are particularly relevant in this respect. They include receiving, considering and expressing a view about claims by individuals that a State Party to the Protocol has violated covenanted rights.

ent matter, as its decisions are legally binding upon parties litigating before it, but carry no *stare decisis* effect vis-à-vis third parties. However, the only country surveyed in this article which is subject to its jurisdiction, the United Kingdom, may exercise considerable judicial, executive and legislative discretion in determining the effect of such judgments within its legal system. In short, fears concerning the power of IHR monitoring bodies to dictate the contents of domestic law, much less of CL, seem to be exaggerated.

Finally, it could also be argued that the wide international consensus underlying most IHR norms and the international jurisprudence relating to their application provides some degree of international accountability and legitimacy which supports adherence to these standards. While this does not entirely alleviate the concerns of those lamenting the erosion of domestic accountability as a result of the internationalization of the CL discourse, it does reduce the risk of arbitrariness introduced by domestic judges during CL interpretation processes.

**B. Fears of Undermining Legal Coherence**

Another concern raised by opponents of incorporation is that the introduction of international law at the CL level might disrupt the existing legal discourse and create disharmonizing tensions. Incorporation would require the importation into the domestic legal system of foreign normative concepts that are not based upon local notions of justice and specific social structures. Differences between national and international
law—from differences in legal drafting techniques to differences in the methods of balancing competing social interests—further complicate integration efforts. For example, IHR law might require a more intrusive standard of governmental involvement in social life (through the introduction of positive human rights obligations) than what is acceptable within a given society. The introduction of such far-reaching reforms through judicial action, without correlative changes in the structure and machinery of government, might be ineffective and disruptive. When linked to the argument addressed below regarding the lack of familiarity of domestic judges with IHR law, the formidability of the task of incorporation becomes apparent. Arguably, a more prudent course of action would be to encourage legislators and other constitutional actors to gradually introduce constitutional amendments necessary to meet the state’s international obligations. Such a process would not only meet separation of powers and accountability concerns, but it would also ensure smoother integration of international norms into the domestic legal system.

This group of arguments is also untenable. The opposition’s arguments are premised on a dubious image of a uniform and harmonious law-creating mechanism which international law allegedly subverts. In truth, domestic norms are generated over time by different individual lawmakers and a variety of social institutions, such as constitutional assemblies, federal legislatures, provincial legislatures, courts, and administrative agencies. In some legal systems, customs, such as lex mercatoria, and religious edicts also apply. Consequently, courts are well-accustomed to harmonizing assorted norms derived from diverse sources and coming in different shapes and forms, such as statutes, judicial decisions, administrative orders, etc. It is difficult to see why the introduction of international law, especially of treaty norms which the state has freely chosen to ratify—a fact suggesting a good fit between the treaty norms and domestic notions of justice—should be treated in a radically different manner.

177. Christenson, supra note 18, at 242.
180. For example, in Israel, religious law governs personal status matters (marriage, divorce and many associated legal issues).
The disharmony argument is particularly weak with regard to norms of international law which have already been incorporated within the domestic legal system as part of the law of the land by virtue of incorporating legislation or a general constitutional rule. In such cases, courts are expected to apply international norms directly and to synchronize their application with other legal norms.\textsuperscript{181} It would be odd to exclude international law norms endowed with direct effect within the national legal system from the purview of CL interpretation, while, at the same time, factoring in other domestic law sources, such as domestic legislation.\textsuperscript{182}

However, even where ratified IHR treaties are not part of the law of the land—either by reason of their non-self-executing character or because of a dualistic constitutional rule of incorporation—important policy considerations related to the promotion of legal coherence support harmonizing CL with such treaties. The first and foremost consideration is that harmonization could avoid some of the political costs incurred by the state on the international plane by reason of inconsistencies between its domestic law and international obligations. These costs might include formal or informal sanctions, reputation costs (e.g., public shaming), and the risk of deteriorating relations with other members of the international community.\textsuperscript{183} As argued in Part I, failure to harmonize IHR treaties into CL might even constitute an independent violation of these treaties. It thus seems sensible to encourage courts to opt for an interpretive methodology that reduces these costs by way of harmonization.

Another consideration is that IHR treaties that have been accepted by democratically elected actors—members of the government or the legis-

\textsuperscript{181} See Jaffer, supra note 125, at 1099.

\textsuperscript{182} And yet, that is exactly what the following passage espouses:

The most reliable objective signs [for identifying evolving standards of decency in constitutional cases] consist of the legislation that the society has enacted. It will rarely if ever be the case that the Members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives.

Thompson v. Oklahoma, 487 U.S. 815, 865 (1988) (Scalia, J., dissenting). See also Stanford v. Kentucky, 492 U.S. 361, 369–73 (Scalia, J.) (reviewing a variety of State capital punishment law in order to ascertain the evolving standards of decency in an Eighth Amendment case); Alford, supra note 125, at 60.

\textsuperscript{183} See, e.g., LOUIS HENKIN, HOW NATIONS BEHAVE 320–21 (2d ed. 1979); Koh, supra note 97, at 56. This might eventually lead to the destabilization of international legal regimes. Cf. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S.D. of Iowa, 482 U.S. 522, 567 (1987) (Blackmun, J., concurring in part) (“The final component of a comity analysis is to consider if there is a course that furthers, rather than impedes, the development of an ordered international system.”).
lature—normally represent socially acceptable values. Unless we embrace a wholly cynical view of international law, the act of ratification must be deemed to signal some degree of agreement with the object, purpose and the contents of the norms enumerated in the ratified instruments. Courts invested, inter alia, with the task of constantly updating constitutional texts in order to meet changing realities, new challenges and emerging social perceptions, should take into account the espousal of norms and values by treaty-ratifying agencies as important indicia of contemporary standards of what the law should be. So, the ability of courts to consider norms enshrined in international treaties while interpreting constitutional instruments might help to minimize conflicts between legally binding norms and societal values and may therefore increase legal harmony.

Finally, it should be noted that IHR treaties have the potential to enrich domestic law since they often represent more progressive and enlightened approaches to human rights protection than constitutional instruments, sometimes drafted many decades or even centuries ago. Furthermore, they often provide more specific guidance on human rights protection than comparable CL provisions. Learning from the experience of other legal orders and societies also opens new horizons and introduces new perspectives which could improve the quality of judicial decision making. This potential for improvement of CL through invocation of IHR law should also support a pro-incorporation strategy.

185. Cf. S v Makwanyane 1995 (6) BCLR 665 (CC) para. 362 (S. Afr.) (Sachs, J.) (“Reference in the Constitution to the role of public international law (sections 35(1) and 231) underlines our common adherence to internationally accepted principles.”).
186. See Hughlett, supra note 15, at 190.
187. See, e.g., Goldsmith, supra note 32, at 331 (“Some of [the ICCPR] rights clearly go further than US law.”); Hughlett, supra note 15, at 183 (“If the Constitution is not interpreted to guarantee at least those individual freedoms protected by international consensus, the United States will fall far behind the rest of the world in the protection of human rights.”); Neuman, supra note 6, at 87 (“In the United States, such reexamination may be especially beneficial where doctrinal structures preserve vestiges of long-vanished historical conditions.”). See also Henkin, Constitutionalism, supra note 5, at 394 (listing areas in which IHR law could contribute to U.S. CL).
189. See Bradley, supra note 95, at 507 (noting that proponents of normative canons of interpretation concede that the canons are “not policy neutral”).
C. Cultural Objections to Internationalizing the Constitutional Discourse

Another set of objections derives from cultural and ideological animosity towards IHR standards. This set of objections may be grouped in two categories: objections that IHR are not adaptable to local conditions, and objections that domestic courts may be ill-equipped to apply IHR standards.

1. Suitability to Local Conditions

Cultural objections are sometimes related to parochial “we know best” sentiments, which contest the wisdom of international regulation, especially its adaptability to local conditions. Justice Scalia expounded such objection in Thompson:

We must never forget that it is a Constitution for the United States of America that we are expounding. The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so ‘implicit in the concept of ordered liberty’ that it occupies a place not merely in our mores but, text permitting, in our Constitution as well. But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution. In the present case, therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no more relevance than the fact that a majority of them would not impose capital punishment at all, or have standards of due process quite different from our own.

Thompson v. Oklahoma, 487 U.S. 815, 869 n.4 (1988) (Scalia, J., dissenting) (citation omitted). See also Roper v. Simmons, 125 S. Ct. 1183, 1226 (2005) (Scalia, J., dissenting); Foster v. Florida, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring) (“While Congress, as a legislature, may wish to consider the actions of other nations on any issue it likes, this Court’s Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.”); Atkins v. Virginia, 536 U.S. 304, 325 (2002) (Rehnquist, J., dissenting) (“For if it is evidence of a national consensus for which we are looking, then the viewpoints of other countries simply are not relevant.”); id. at 347–48 (Scalia, J., dissenting); Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (characterizing court’s discussion of foreign nations’ treatment of sodomy as meaningless and dangerous dicta); McKenzie, 57 F.3d at 1466. See also R. v. Keegstra, [1990] 3 S.C.R. 697, 702 (Can.) (McLachlin, J., dissenting) (“The provisions of the Charter, though drawing on a political and social philosophy shared with other democratic societies, are uniquely Canadian. As a result, considerations may point, as they do in this case, to a conclusion regarding a rights violation which is not necessarily in accord with those international covenants.”). Similar views have been espoused by an Australian judge:

The provisions of the Constitution are not to be read in conformity with international law. It is an anachronistic error to believe that the Constitution, which was drafted and adopted by the people of the colonies well before international
viewed as offering an apposite level of human rights protection. As a result, recourse to the less-familiar system of international protection might be viewed as a redundant gesture, entailing more potential risks of diluting local standards than potential benefits for normative progress. 191

Further, some have challenged the legitimacy of super-imposing IHR law upon national constituencies, 192 regarding such imposition as imperialistic 193 and offensive to local traditions and moral tenets. 194 The debate about the appropriateness of resorting to international law could indeed be framed in the language of identity politics, as a contest between cosmopolitan and communal visions of social life. 195

Naturally, such cultural objections are harder to address than other more pragmatic and doctrinal objections, as they pertain to deeply entrenched conventions and identities. Admittedly, attempts to reinforce the status of IHR treaties could be contextualized as part of the reemergence of cosmopolitan citizenship as a non-exclusive form of identity. 196 So,

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191. See Simma et al., supra note 60, at 108; Alford, supra note 125, at 58 (“[A] robust use of international sources could have the unintended consequence of undermining rather than promoting numerous constitutional guarantees.”).


195. See, e.g., Bradley, supra note 95, at 523 (“The approach of the political branches to the human rights treaties is, for better or worse, a rejection of internationalism.”).

196. Cf. Treaty on the European Union pmbl., Dec. 24, 2002, O.J. (C 325) 9 (“[R]esolved to implement a common foreign and security policy . . . thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world . . . .”). This essentially Kantian notion identifies cross-border ties, values and needs which constitute an apolitical community that exists independently of statal structures. Hence, according to writers such as Joseph Weiler, one should speak nowadays of overlapping circles of identities rather than of a single exclusive or even dominant identity. JOSEPH H.H. WEILER, THE CONSTITUTION OF EUROPE 344–
integration of IHR treaties into CL reflects a political choice, since it facilitates the conditions for harmonious co-existence of cosmopolitan and national identities. The political act of treaty ratification, however, signifies the state’s residual power to control the pace and scope of the integration and multiple-identity building process. Once a state has ratified an IHR treaty, it has arguably accepted its contents as reflecting both national and international values. In such circumstances, the cultural opposition to incorporation seems theoretically indefensible.

It must be conceded, nonetheless, that a persistent value gap between international standards and domestic constituencies (elites and masses)—notwithstanding the formal act of ratification—could generate political pressures which might undermine the project of incorporating IHR law into CL. One specific risk might be that even if domestic courts acknowledge the relevance of IHR law, they will construe it in an idiosyncratic manner, so as to conform to preexisting constitutional notions and national agendas. This construction, in turn, might lead to multiple interpretations of IHR law and threaten its unity. In the long run, however, incorporation involving the embrace of common norms across national boundaries is likely to narrow cultural and ideological gaps between domestic legal systems and international law. The increasing proc-
nity of cross-fertilization between different national systems and between national and international law in particular, would eventually exert harmonizing pressures which tend to minimize culture gaps.

2. Lack of Judicial Familiarity with International Human Rights Law

Another distinctively cultural issue is judges’ lack of familiarity with international law, particularly IHR law. The long-running marginalization of international law from legal education and judicial training programs, exacerbated no doubt by the growing complexity of both municipal and international law, has resulted in a considerable lack of expertise among many (though certainly not all) members of the judiciary in the substance and methodology of international law. Under these conditions, the hesitancy of judges to step outside the boundaries of their judicial expertise and introduce IHR norms into CL is understandable and perhaps commendable given the dangers of incorrect application.

Nevertheless, one could maintain that this objection amounts to a self-fulfilling prophecy. The more courts refrain from invoking IHR treaties in important cases, including, by necessity, cases raising significant CL issues, the less judges will be motivated to familiarize themselves with these instruments. In other words, the marginalization of IHR has a self-perpetuating quality which reflects upon legal education and legal practice. There are several ways to break this vicious cycle: legislators could explicitly incorporate IHR treaties into CL; judges could lead the way and develop more international law-friendly canons of interpretation; academics could press for reform of legal education, etc. Most probably, a combination of some of these measures, including special measures designed to improve the fluency of judges in IHR law, would be necessary to effect a significant change. In all events, lack of familiarity should encourage improved knowledge and not inertia. Still, it is sensible to require that the introduction of IHR treaties into domestic law in gen-

199. This is sometimes referred to as the “transnational legal process.” Koh, supra note 97, at 56.
200. Bradley & Goldsmith, supra note 16, at 874–75; Henkin, supra note 6, at 199; Simma et al., supra note 60, at 107.
201. Alford, supra note 125, at 64–65 (the U.S. Supreme Court lacks the “institutional capacity” to apply international law systematically).
203. Kirby, supra note 89, at 13.
eral, and into the politically sensitive domain of CL in particular, ought to be undertaken with prudence.\footnote{204}

\textit{D. Political Reluctance to Empower IHR Law within the National Legal System}

Finally, one could identify unique political objections directed against the incorporation of IHR treaty norms into CL. The inherent sensitivity of many human rights issues, the political costs of reforming local arrangements in order to conform to international standards and the embarrassing implications of finding national authorities to be in violation of IHR standards, all produce an inhospitable legal climate for promoting IHR through judicial means. Special problems relate to the introduction of economic, social and cultural human rights, as the implementation of such rights often entails significant economic costs.\footnote{205}

Because IHR law introduces limitations upon the freedom of action of governmental structures and presents courts with an additional yardstick by which to measure the performance of the other branches of government, incorporation of IHR treaties into CL could put courts on a collision course with the executive and legislative branches.\footnote{206} The fear that judges might adopt interpretations of international law which diverge from those adopted by other branches of government presents yet another complication.\footnote{207} Courts might therefore be understandably reluctant to alienate the other branches of government and might refrain from invoking IHR standards altogether. This tendency might be encouraged by perceptions of IHR as a highly politicized body of law seeking to impose one set of values and interests (anti-hegemonic, anti-imperialistic, pro-market economy, etc.),\footnote{208} over competing values or interests which can be viewed as no less legitimate. Domestic courts, whose intuitive loyalty lies with their nation’s values and interests, might be loath to join international critics and legitimate such a disapproving discourse.\footnote{209}

\footnote{204. For a variety of mostly justified methodological concerns, which ought to govern international law analysis by domestic courts, see Ramsey, supra note 98.}

\footnote{205. See, e.g., Yoram Rabin & Yuval Shany, \textit{The Israeli Unfinished Constitutional Revolution: Has the Time Come for Protecting Economic and Social Rights?}, 37 Isr. L. Rev. 299 (2004).}

\footnote{206. Cf. Spiro, supra note 62, at 2015–16. See also Neuman, supra note 6, at 88–89 (“Entrenching positive human rights standards as constitutional interpretation . . . would deprive the political branches of their authority to choose methods of treaty implementation, and would not be consistent with current constitutional understandings.”).}


\footnote{208. See Rajagopal, supra note 193, at 292.}

\footnote{209. See Christenson, supra note 86, at 6; Benvenisti, supra note 137, at 173–74.}
Once again, these criticisms of incorporation are ultimately unconvincing. First, as treaty ratification is undertaken by the non-judicial branches of government, any criticism directed against the courts for implementing the obligations entered into by the other branches is unjustified. It amounts to an attempt by the ratifying actors to shirk the domestic political costs of their actions on the international plane. In the same vein, the costs of any embarrassment associated with a finding by domestic courts of failure on the part of the state to respect its international obligations should not be attributed to the courts, but to the legislature or government agency responsible for the incompatible measure. In fact, by enforcing international standards courts actually minimize international criticism against the state.

Second, courts often face the unpopular task of introducing rule-of-law constraints on the operations of the other branches of government. Inevitably, they sometimes need to rule against what some domestic actors perceive to be the community interest. Still, the unpopularity of such measures or their inherent potential for inter-branch conflict should not deter courts from fulfilling their constitutional role. As a result, the non-judicial branches of government can expect only limited support from the judicial branch in their endeavors to evade the dictates of the rule of international law, by way of rejecting the implementation of the state’s international obligations.

210. Cf. Jaffer, supra note 125, at 1111 (arguing that Congress and not the courts should pay the political costs for adopting incorporating legislation inconsistent with international treaties); Kirby, supra note 89, at 16 (“Giving effect to international law . . . does no more than give substance to the act which the executive government has taken.”). But see Yoo, supra note 18, at 1979 (contending that direct judicial enforcement of international obligations “robs the President and Congress of the flexibility they might need in conducting the nation’s foreign affairs”).

211. See Slaughter, supra note 103, at 64 (arguing that separation of powers considerations support putting additional curbs on the path of the executive). Justice Landau, of Israel’s High Court of Justice, has remarked:

I regard myself here, as a person who must meet the obligation to rule in accordance with law in any matter properly brought before the court, knowing well in advance that the general public would fail to pay attention to our legal reasoning, but only note the final outcome; this might adversely affect the status of the court as an institution situated above divisive public conflicts. But what can we do? This is our role and obligation as judges.


212. See Knop, supra note 35, at 532.

Finally, in many democracies, courts serve as protectors of the constitution and guardians of human rights. Incorporation of IHR treaties into CL, to the degree that they enhance the protection of human rights, promotes this vision of the role of courts in a democracy.\(^\text{214}\) Inevitably, this is a political argument.\(^\text{215}\) This does not, however, necessarily detract from its force since the political system in all of the surveyed countries is a liberal democracy which promotes, or at least tolerates, judicial activism in the area of human rights. Moreover, as indicated above, the accession of states to IHR treaties signifies their political support of these very same normative values.\(^\text{216}\)

V. CONCLUSION: A CALL FOR EXPANDING THE PRESUMPTION OF CONFORMITY TO CONSTITUTIONAL TEXTS

This Article has advanced a variety of policy considerations that support the incorporation of IHR law into CL from a domestic law perspective: limitation of unchecked judicial discretion, protection of the power of the executive to conduct foreign policy, necessity of harmonizing domestic law with self-executing international norms, promotion of the desirable social values reflected in IHR norms, confirmation of an emerging cosmopolitan identity, minimization of international criticism, etc. Still, from an international law perspective, the debate on the pros and cons of incorporation is mostly academic. Under most IHR treaties, states must incorporate some or all of the norms enumerated thereby into their domestic law, including, as argued in Part I, into their CL. Surely, the fact that international law—a system of law which binds the polity—requires a certain outcome, ought to be considered a relevant factor by the courts of the same polity.\(^\text{217}\)

\(^{214}\) Strossen, supra note 6, at 806. Some writers have criticized the selective utilization of right-enhancing international standards, and have challenged internationalists to accept “the bitter with the sweet.” See, e.g., Alford, supra note 125, at 67. However, the nature of IHR law is such that it lays a “floor” for human rights protection, and not a “ceiling.” The often invoked assertion that U.S. Constitutional law adopts higher human rights standards in freedom of speech matters, and that harmonization of the First Amendment with IHR law would, for instance, have a right-diluting effect, Ramsey, supra note 98, at 77, is problematic, as it fails to acknowledge the right-enhancing implications of prohibitions on hate speech.

\(^{215}\) Dworkin, supra note 121, at 127.

\(^{216}\) Cf. In Re Pub. Serv. Employee Relations Act (Alta.), [1987] 1 S.C.R. 313, 349 (Can.) (Dickson, C.J., dissenting) (“The content of Canada’s international human rights obligations is, in my view, an important indicia of the meaning of ‘the full benefit of the Charter’s protection.’”).

\(^{217}\) Id. (“The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in Charter interpretation.”).
The survey of the law and practice of six common law countries on the incorporation of IHR treaties into their CL, undertaken in Part II, suggests that most of them fail to meet the required standard of incorporation. In practice, resort to IHR treaties in the course of interpreting CL instruments is discretionary and haphazard. Further, even when mentioned, IHR treaties are usually addressed within a weak “comparative law” framework, and not under a stronger presumption of conformity.

Therefore, a legal reform is needed in order to solidify the influence of IHR treaties upon the CL of the surveyed common law countries. The most natural basis for introducing such a reform is the development of a coherent judicial canon of constitutional interpretation. This legal tactic does not require constitutional or legislative amendments and can be applied under existing law. It draws its legitimacy from the inherent power of the judiciary to construe constitutional instruments and to resort to all relevant materials that could facilitate this endeavor.

An important methodological question that needs to be explored in this regard is whether it is desirable to link the incorporation of IHR treaties into CL to the long-standing presumption of conformity doctrine. Arguably, such linkage could improve the legitimacy of the discussed interpretive strategy because all of the surveyed legal systems recognize and apply the presumption with regard to primary legislation. It would also offer judges a body of precedents concerning the incorporation of international law into domestic law.

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218. Lillich, supra note 18, at 78 (“[T]aking advantage of this ‘indirect incorporation’ approach seems to be a sensible strategy for human rights lawyers and a wise policy for United States courts concerned with developing the promising relationship between the United States Constitution and international human rights law.”); Hughlett, supra note 15, at 174; Connie de la Vega, Comments, 18 INT’L LAW. 69, 69 (1984); Spiro, supra note 62, at 2025–26. See also Harry A. Blackmun, The Supreme Court and the Law of Nations, 104 YALE L.J. 39, 45 (1994) (“International law can and should inform the interpretation of various clauses of the Constitution . . . .”).


220. Cf. Bradley, supra note 95, at 533 (“[T]he long-standing existence of the canon, without a reaction from the political branches, may suggest some sort of acquiescence that further reduces the separation of powers problem.”).
Interestingly, however, those judges who have resorted to IHR treaties as sources of constitutional interpretation have not explicitly created such linkage.\textsuperscript{221} This can probably be explained by reference to the limits the presumption of conformity imposes upon judicial discretion. According to the presumption, courts \textit{should} construe domestic law in a manner consistent with the state’s international obligations. It may be assumed that even pro-incorporation judges felt that in the field of CL, where the constitutional stakes are particularly high, such a rigid formulation might be politically untenable. The question is thus whether the doctrine can accommodate the particular sensitivities of CL and allow for some flexibility in its application, or whether it should be excluded from the purview of CL altogether.

Analysis of the traditional rationales offered for applying the presumption of conformity divulges legal policy choices that might be more complicated than apparent at first glance, a fact that might bear upon the willingness to employ the doctrine in the context of CL. The presumption is normally premised upon a legislative intent theory, according to which it can never be presumed that legislators had intended to place their country in breach of its international obligations. Hence, only explicit legislative language can justify overruling IHR treaty norms. Although the presumption is based upon a legal fiction, as legislators often do not consider the effect of legislative measures upon international law and are arguably less concerned about international obligations than the presumption supposes,\textsuperscript{222} the presumption could, over time, create a self-fulfilling prophecy.\textsuperscript{223} The mere knowledge that courts apply such a presumption induces legislators to consider its potential effect upon the interpretation of legislation and to select, where necessary, explicit language overriding the international obligations of the polity. Thus, as the interplay between international and national law becomes more and more visible, the theory of legislative intent becomes less and less fictional.

Nevertheless, this development has little or no bearing on CL instruments. Sometimes, such instruments were concluded before the presumption was even enunciated. In all events, given the uncertainties regarding

\textsuperscript{221} An exception could be found in the dicta adopted by Judge Mahomed of the South African Constitutional Court. \textit{See Azanian Peoples Org. (AZAPO) v President of the Republic of S. Afr.} 1996 (8) BCLR 1015 (CC) para. 26 (Mahomed, J.) ("[T]he lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the State in terms of international law.").

\textsuperscript{222} \textit{See} Bradley, \textit{supra} note 95, at 522 (noting that as an empirical matter, the claim that the political branches wish to comply with international law may be suspect, especially with respect to new international customary law).

\textsuperscript{223} \textit{Id.} at 497.
the status of international law on the constitutional sphere, it is more likely than not that the drafters of constitutional instruments were unaware that the presumption might apply vis-à-vis their brainchild. The infrequency of constitutional amendment procedures further reduces the chances of factoring in the effects of international law. In short, the fictitiousness of the presumption is more apparent in relation to constitutional instruments than to ordinary legislation. The problematic legitimacy of relying upon drafter intent theories as part of the CL discourse could justify, from a domestic law perspective, caution in the application of the presumption of conformity to CL instruments.

Another important concern is the relationship between the presumption of conformity and other interpretive presumptions. All systems surveyed in this Article do not apply the presumption to the exclusion of other rules of interpretation. On the contrary, other rules of construction are regularly applied. Hence, even if the presumption is to be applied at the CL level, it may not exclude the application of other canons of interpretation designed to protect fundamental constitutional values (such as federal organizing principles, separation of powers, etc.); nor can it override the clear meaning of the constitutional text. While from an international law perspective this outcome might be unacceptable (as it might result in non-compliance with IHR norms), it would meet the concerns of legal systems which view compliance with international law as merely one among numerous competing systematic values.

224. But see Cunard S.S. Co. v. Mellon, 262 U.S. 100, 132–33 (1923) (Sutherland, J., dissenting) (“It does not seem possible to me that Congress, in submitting the Amendment or the several States in adopting it, could have intended to vest in the various seaboard States a power so intimately connected with our foreign relations and whose exercise might result in international confusion and embarrassment.”).

225. See, for example, the presumption that legislation should be construed in a manner which does not raise serious constitutional problems. INS v. St. Cyr, 533 U.S. 289, 299–300 (2001); Crowell v. Benson, 285 U.S. 22, 62 (1932); United States v. Del. & Hudson Co., 213 U.S. 366, 407 (1909). See also supra note 76.


227. See Kartinyeri v. Commonwealth (1998) 195 C.L.R. 337, 418 (Austl.) (Kirby, J., dissenting) (“There is no doubt that, if the constitutional provision is clear and if a law is clearly within power, no rule of international law, and no treaty (including one to which Australia is a party) may override the Constitution or any law validly made under it.”).

228. See Hughlett, supra note 15, at 188 (“[I]nternational law should be only one interpretive tool used by the courts, and the courts should not apply international law when the application is inconsistent with the result of all other interpretive approaches.”). Cf. Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed, 3 VAND. L. REV. 395, 401 (1950) (“[T]here are two opposing canons on almost every point.”); Simma et al., supra note 60,
Therefore, if the presumption of conformity is to apply to CL, it should be applied with caution and deference to other constitutional doctrines as well as sensitivity to the needs and concerns of domestic legal systems. Nevertheless, a number of reasons justify resort to the presumption in the course of CL interpretation. First, resort to a presumption of conformity underscores the international obligation to comply with IHR treaties and has, as a result, important symbolic value. Second, considerations of legitimacy and stability support the incorporation of IHR into CL in the context of the well-accepted presumption of conformity. Courts would therefore be able to build upon existing practice in the field of statutory construction when harmonizing CL and IHR treaties. Finally, the presumption is sufficiently flexible to accommodate the necessary degrees of caution and sensitivity, as well as the protection of other constitutional values.

While my position might also accommodate incorporation into CL of non-IHR international obligations through interpretive means, there are unique policy arguments supporting integration of IHR norms. Most importantly, IHR law has intellectual and historical affinity to CL. Second, IHR instruments impose an explicit or implicit duty to incorporate. Hence, a stronger presumption of conformity is apposite in relation to IHR treaties.

The proposed approach may be summarized as follows. Explicitly or implicitly, IHR treaties require states to bring domestic law into conformity with the human rights norms enunciated by them. This requirement also applies at the CL level. As a number of civil and common law countries have adopted such an approach (e.g., Canada and Germany),

at 95 (“[T]he limits of constitutional interpretation . . . still define a borderline beyond which divergent international human rights standards may not be considered.”).

229. It can be noted that several attempts have been made in recent years at the international level to call upon national courts to adopt a more hospitable attitude towards the utilization of IHR treaties when construing national law, including CL. For example, in 1998, a high-level meeting of members of the judiciary from Commonwealth and South Asian countries convened in Bangalore and issued a joint proclamation asserting that:

It is the vital duty of an independent, impartial and well-qualified judiciary, assisted by an independent, well-trained legal profession, to interpret and apply national constitutions and ordinary legislation in harmony with international human rights codes and customary international law, and to develop the common law in the light of the values and principles enshrined in international human rights law.

hard to contend that this represents an unrealistic threshold of compliance with international standards. In most common law legal systems, this outcome could be largely achieved through the development of canons of CL interpretation by the domestic judiciary à la the presumption of conformity applicable to statutory construction. Although these proposals are hardly revolutionary, they could encourage courts to take IHR law more seriously and to improve the level of human rights protection under domestic law.

It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes—whether or not they have been incorporated into domestic law—for the purpose of removing ambiguity or uncertainty from, national constitutions, legislation or common law.

Concluding Statement of the Judicial Colloquium Held in Bangalore, India from 24–26 February 1988, 62 AUST. L.J. 531, para. 7 (1988). While sources such as the Bangalore Statement are clearly aspirational in nature, they do suggest that there is a growing awareness of the importance of incorporating IHR treaties into CL instruments.
WALKING AN INTERNATIONAL LAW TIGHTROPE:
USE OF MILITARY FORCE TO COUNTER TERRORISM—WILLING THE ENDS

Jackson Nyamuya Maogoto*

The UN Charter reflects the drafters’ singular focus on creating a political system to govern conflicts between states. It does not directly address the subtler modes in which terrorists began to operate in the post-World War II period. The drafters did not contemplate the existence of international terrorists nor their tenacity and access to technology. In view of the fact that terrorist groups appear to have reached a global sophistication, there is little doubt that international terrorism presents a threat with which traditional theories for the use of military force are inadequate to deal with, and were not contemplated when the UN Charter was drafted. This Article is premised on the theme that the right to self-defence is enrolled in a process of change. The focal point of state practice in the Article is the United States, which has long sought to articulate, through official policy, use of force as a counter-terrorism measure.

I. INTRODUCTION

The senseless mayhem of World War I—the destruction of economic structures, dissipation of financial resources, and undermining of political stability—wiped the gloss from the traditional notion of war as a rational political act. The war was disastrous to both its initiators and victims. Millions died pointlessly and whole regimes fell. The carnage forced modern industrial societies to question war as an instrument of

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1. Treaty Providing for the Renunciation of War as an Instrument of National Policy art. 1, opened for signature Aug. 27, 1928, 46 U.S.T. 2343, 94 L.N.T.S. 57 (entered into force July 24, 1929) [hereinafter Kellogg-Briand Pact]. By the time it entered into force, the Kellogg-Briand Pact had been signed and ratified/acceded to by a total of fifty-nine States (including all the States (major and minor) that were subsequently to comprise the Axis Powers), almost all the States comprising the international community at that time.
national policy; where the benefits of conquest (a major incentive in previous centuries) seemed trivial by comparison with the costs of war—large scale death and destruction, political instability and economic turmoil for all involved—it seemed obvious that war was no longer a profitable enterprise.

In response to the destruction of World War I, the League of Nations formed as an international organization to usher in collective security and replace a centuries old militaristic balance of power, and was an ambitious move to curb sovereign military excesses and guarantee world peace. However, it was during the League’s chequered existence that two issues of significance fell on the international agenda—terrorism and the limitation of the use of military force. With the formation of the League of Nations, and renewed efforts to prevent future violence, the freedom of states to resort to military force became more and more restricted, while the right of self-defence gained in significance, displacing the expansive right of self-preservation.

One of the League’s most significant efforts was the creation and adoption of the International Treaty for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact) in 1928. The Pact prohibited war as an instrument of national policy and recognized the right of self-defence as a legal right, thus tacitly excluding other previously accepted forms of self-help as avenues legitimating the use of military force.

2. Kellogg-Briand Pact states:

[P]ersuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated;

Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty . . . 

Have decided to conclude a Treaty;

Article I: The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article II: The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.
Despite these efforts, the Kellogg-Briand Pact had its shortcomings. The prohibition of war, for instance, failed to be linked to a system of sanctions. Its preamble simply declared that a state violating the Pact “should be denied the benefits furnished by the Treaty.” An even more serious deficiency was the Pact’s failure to outlaw the use of force in general, as well as war. The Pact was eventually ratified by sixty-two states, and made an exception for self-defence, but failed to define it—with the result that the customary criteria set out in the Caroline case remained the only legal bases for the use of force in international affairs. Strong on principle but lacking an enforcement mechanism, the Pact was doomed to have little practical effect, and the League of Nations’ authority was challenged and whittled by a series of aggressive acts carried out by some of the then major powers (Japan, Italy and a resurgent Germany) during the mid- to late 1930s. The League’s utility was finally terminated by the outbreak of World War II in 1939.

It was only after the destruction of World War II that the UN, the UN Charter, and the Nuremberg and Tokyo Tribunals were established. The primary purpose of the new organization was “to maintain international order,” although it was invoked in 1929 with some success when China and the U.S.S.R. reached a tense moment over possession of the Chinese Eastern R.R. in Manchuria. Ultimately, however, the pact proved to be meaningless, especially with the practice of waging undeclared wars in the 1930s (e.g., the Japanese invasion of Manchuria in 1931, the Italian invasion of Ethiopia in 1935, and the German occupation of Austria in 1938). See generally ROBERT H. FERRELL, PEACE IN THEIR TIME 260 (Lewis P. Curtis ed., Yale Univ. Press 1952) (1968).

4. In 1945, six years after the start of World War II, the Axis Powers were on the verge of total defeat and one of the blackest pages in human history was about to close. By May 1945, Hitler’s envisaged Thousand-Year Reich lay in ruins. By August, Japan was devastated, as the atomic bombs the United States dropped on Hiroshima and Nagasaki destroyed Japan’s receding hope of carrying on its war of conquest. World War II was the most cruel and devastating conflict in history. In terms of lives lost, geographical extent, and cities reduced to ashes, the struggle defies rational comprehension. Over 17 million combatants were killed, 27 million wounded and nearly 20 million captured or missing. Civilian populations were more affected by this war than any other in the past. JACKSON NYAMUYA MAOGOTO, WAR CRIMES AND REALPOLITIK: INTERNATIONAL JUSTICE FROM WORLD WAR I TO THE 21ST CENTURY 83 (2004).

5. The final step in making the UN Charter was taken at Yalta, in 1945, by the “Big Three” (the United States, the United Kingdom and Russia) with victory in sight. All the Allied States, great and small, were invited to the United Nations Conference on International Organization, which met in San Francisco on April 25, 1945, to prepare the final instrument for the new international organization. LEELAND M. GOODRICH, EDWARD HAMBRO & ANNE PATRICIA SIMONS, CHARTER OF THE UNITED NATIONS 4–8 (3d ed. 1969).
peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.\textsuperscript{6}

Until the adoption of the UN Charter, there had been no customary prohibition on the unilateral resort to force if circumstances warranted it, and in many instruments states reserved the right to resort to force. While customary international law had previously accepted reprisal, retaliation, and retribution as legitimate responses, the UN sought to impose limitations on the unilateral use of force in resolving international disputes. Under the UN Charter, the right of self-defence was the only included exception to the prohibition of the use of force.\textsuperscript{7}

Thus, the UN Charter introduced to international politics a radically new notion: a general prohibition of the unilateral resort to force by states,\textsuperscript{8} as encapsulated in its most authoritative form in Article 2(4). The UN Charter identified the structural defect of the international political system and created a network of institutions and procedures. Rather than standing by itself, Article 2(4) was part and parcel of a complex security system.\textsuperscript{9} Under the UN Charter, unilateral acts of force not characterized as self-defence, regardless of motive, were made illegal.\textsuperscript{10} Individual or collective self-defence became the cornerstone relating to use of force, and, since then, has been invoked with regard to almost every use of external military force.\textsuperscript{11}

However, during the Cold War, it was increasingly clear that terrorists were using technology to “exploit the vulnerabilities of modern socie-

\textsuperscript{6} See U.N. Charter art. 1, para. 1. The “Dumbarton Oaks Proposals” were taken as the basis for the discussions that were to lead to the UN Charter.

\textsuperscript{7} See U.N. Charter arts. 39–51.

\textsuperscript{8} Various legal instruments have reinforced the prohibition of the use of force since the adoption of the UN Charter. These include: Article 5 of the Pact of the Arab League, reaffirmed by the Inter-American Treaty of Reciprocal Assistance, signed in Rio de Janeiro on September 2, 1947; Charter of the Organization of American States (Bogota Charter), article 5 condemns aggression, article 15 forbids intervention, and article 18 prohibits use of force except in self-defence; the Five Principles of Peaceful Co-Existence (known as Pancha Sila), first formulated in April 29, 1954 between India and the PRC; the final communiqué of the Afro-Asian conference at Bandung of April 24, 1955 which gave approval to ten principles as the basis for promotion of world peace and cooperation.

\textsuperscript{9} The Charter included provisions for collective and regional defence arrangements, and provisions on self-defence.

\textsuperscript{10} See U.N. Charter arts. 2, 39–51.

ties.\textsuperscript{12} With citizens tending to live, work, and travel in close proximity providing concentrated targets, modern societies are particularly susceptible to large-scale attacks and weapons of mass destruction.\textsuperscript{13} This fact was not lost on perpetrators of terrorism, as witnessed by its growing capabilities and lethality throughout the Cold War era.\textsuperscript{14} The United States and Israel led the way in seeking to co-opt use of military force as a countermeasure against terrorism. The stance of the United States of “passive, reactive and patient defense” to terrorism in the early 1970s shifted to a “no compromise and very proactive approach” in the early 1980s, encapsulated in the “Reagan” and “Shultz Doctrines.”\textsuperscript{15} Subsequent U.S. presidents have relied on a similar tenet of swift, effective retribution to counter terrorism, often wrapping it up together with the right of anticipatory self-defence.

Though terrorism has always been high on the international agenda, it was the attacks on September 11, 2001 that brought the issue of terrorism and the international regime on the use of force into a new, urgent, and sustained debate. The magnitude of the September 11th attacks went beyond terrorism as it was known, and statements from various capitals around the world pointed to a need to develop new strategies to confront a new reality. The attacks had seemingly generated the momentum for the international legal system to formally co-opt military response to counter-terrorism within the regime of lawful force contained in the UN Charter.

The Bush administration prepared the ground for pre-emptive attacks by seeking to engage the accepted right of self-defence as a justification for military action against rogue states. Because of the new threats, the United States claimed, a proper understanding of the right of self-defence should now extend to authorizing pre-emptive attacks against potential aggressors, cutting them off before they would be able to launch strikes that might be devastating in their scale and scope.\textsuperscript{16} This aggressive ap-
proach became a central tenet of the United States’ strategic posture known as the “Bush Doctrine.”

Like the aggressive national policies before it, the “Bush Doctrine” seeks to “effectively clos[e] down dangerous regimes before they become imminent threats" and, thus, represents a usurpation of the Security Council’s role in global affairs.

This Article commences with an overview of the UN Charter regime on the use of military force. It then proceeds to tackle its central theme—an examination of the genesis of the current U.S. policy of proactive action through military force to counter terrorism. Overall, the Article is premised on the theme that the right to self-defence is visibly enrolled in a process of change and evaluates this process within the uncertain and indeterminate framework of state practice and the legal regime articulated in the UN Charter. The focal point of state practice in the Article is the United States, which has long sought to articulate, through official policy, use of force as a counter-terrorism measure. Though a handful of states (especially Israel) have treaded this path, it is the United States that has sought to articulate it as part of government policy.

II. USE OF FORCE AND THE UN CHARTER

Despite a general prohibition of force, the UN Charter recognizes that force may be necessary to restore order, and that states are entitled to defend themselves against aggression. This right is “inherent,” and customary international law is the yardstick upon which the degree and
manner of self-help should be measured. In the face of the UN Security Council’s inability to control the spread of international terrorism, debate as to the status of previously accepted military responses under customary international law remains strong, and many states have urged for an expansion of the legitimate use of force under the Charter.

A. Article 2(4): Proscription of Force

Article 2(3) of the Charter provides that “[a]ll members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” Article 2(4) elaborates on the need for peaceful resolution of disputes: “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.” Article 2(4) is the provision on which present day jus ad bellum hinges. The use of force in international relations proscribed in the article includes both war and other forcible measures short of war. Its significance has been emphasized by international law scholars who label it “the cornerstone of this new regime” that “promote[s] peace by prohib-

20. The UN Charter provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. Charter art. 51 (emphasis added).


22. U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”) (emphasis added).

23. See Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (noting that Article 2(4) articulates the “principle of the prohibition of force” in international relations and avoids the term “war”).


iting the use of force and protecting the sovereignty of the member states” 26 and “the heart of the United Nations Charter.” 27 Undoubtedly, the wording of Article 2(4) constitutes a considerable improvement when compared with Article I of the Kellogg-Briand Pact. In Article 2(4) the use of force in general is prohibited, rather than only war as in the Kellogg-Briand Pact. Furthermore, under the Charter, the prohibition is not confined to the actual use of force but extends to the mere threat of force. 28 Finally, the prohibition is, at least in theory, safeguarded by a system of collective sanctions against any offender. 29 

The terms “territorial integrity” and “political independence” include most forms of armed force, and are not intended to restrict the scope of Article 2(4)’s prohibition of the use of force. 30 Rather, the two given modes of the use of force cover any possible kind of trans-frontier use of armed force. Thus, an incursion into the territory of another state constitutes an infringement of Article 2(4), even if it is not intended to deprive that state of part of its territory or if the invading troops are meant to withdraw immediately after completing a temporary and limited operation. In other words, “integrity” has to be read as “inviolability,” proscribing any kind of forcible trespassing. 31 Gaps that may possibly be left by these terms are filled by the remaining clause in Article 2(4), which outlaws the threat or use of force “in any other manner inconsistent with the purposes of the United Nations.” 32

Notably, under Article 2(4) the prohibition of interstate force is not applicable to UN members only. The provision forbids use of force by UN members against any state. Recourse to force by non-member states is dealt with in Article 2(6). 33 Article 2(6) is a radical provision that seeks to bind even non-signatories to the UN Charter in contravention of Arti-

29. See U.N. Charter arts. 39–51 (providing the Security Council with the right to decide where there is a “threat to the peace, breach of the peace, or act of aggression” and permitting necessary action to address such acts; furthermore, the Charter provides the rights of individual or collective self-defence).
30. Id.
32. U.N. Charter art. 2, para. 4.
33. Id. art. 2, para. 6.
cile 35 of the 1969 Vienna Convention on the Law of Treaties which states that an obligation inures on a third state only if it accepts the obligation in writing.\textsuperscript{34} However, as Article 38 of the Vienna Convention on the Law of Treaties sets forth, treaty norms may become binding on third states as rules of customary international law.\textsuperscript{35} When conventional international law crystallizes as customary law, the norm which has its genesis in a treaty becomes binding on a third state.

The principle of prohibition of the threat or the use of force, well enshrined in Article 2(4) of the UN Charter, has been further elaborated by several consensual law-making decisions of the UN General Assembly including, in particular, the 1970 Declaration on Friendly Relations\textsuperscript{36} and the 1974 Declaration on the Definition of Aggression.\textsuperscript{37} The 1970 Declaration on Friendly Relations, besides restating Article 2(4) of the UN Charter,\textsuperscript{38} emphasizes that such threat or use of force “shall never be employed as a means of settling international issues.”\textsuperscript{39}

\textbf{B. Article 51: The State’s Right to Respond in Self-Defence}

Having proscribed forcible self-help, the UN Charter nevertheless permits state actions that are reasonably necessary as self-defence in the face of an “armed attack.”\textsuperscript{40} The starting point for any discussion on the

\begin{itemize}
  \item acts of self-defence;
  \item acts of collective self-defence;
  \item actions authorised by a competent international organ (e.g., the United Nations Security Council);
  \item where treaties confer rights to intervene or where an ad hoc invitation or consent is given by the territorial sovereign;
  \item actions to terminate trespass;
\end{itemize}
subject of self-defence is Article 51 of the UN Charter, which states that “nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” Although the wording of the article appears clear—the right of self-defence is generated when an attack occurs, i.e., the attack must be occurring before the use of force is legitimate—practice has shown that the picture can be more complicated.

In particular, the use of the term “inherent” has polarized commentators and states. Though the Charter does not indicate what rights are “inherent,” the inclusion of this term was considered significant enough by the drafters of the Charter to warrant its inclusion when revising Article 51. The initial draft of Article 51 made no mention of this “inherent right,” but it was changed to make the definition of self-defence acknowledge that right. Despite the ongoing debate, a major question remains whether the right of self-defence under Article 51 is limited to cases of armed attack or whether there are other instances in which self-defence may be available under Article 51. Two schools of thought have developed with regard to the scope of Article 51: those who take the literal, or restrictive, approach and those who take the view that Article 51 is considerably broader than its terms.

1. The Restrictionist Approach

The Restrictionist approach cites the absolute prohibition of forcible self-help, as set out in Article 2(4), subject only to the limited exception contained in Article 51. Under this reading, the exception permits recourse to self-defence only when faced with actual “armed attack,” and Article 51 does not contemplate anticipatory or pre-emptive actions by a...
state so threatened.\textsuperscript{46} Rather, it requires a state to refrain from responding with like force unless actively involved in repelling an armed attack.\textsuperscript{47} A significant number of writers argue that an armed attack is the exclusive circumstance in which the use of armed force is sanctioned under Article 51.\textsuperscript{48} In fact, one commentator has gone so far as to state that “the leading opinion among scholars” is that the right of self-defence in Article 51 does not extend beyond armed attack.\textsuperscript{49} Furthermore, the International Court of Justice in the \textit{Nicaragua Case} clearly stated that the right of self-defence under Article 51 only accrues in the event of an armed attack.\textsuperscript{50} Also, it is a traditional requirement of self-defence that a triggering event justifying a military response has already occurred or at least be imminent.\textsuperscript{51}

Restrictionists argue that by the time of the drafting of the UN Charter, “self-defense was understood to be justified only in case of an attack by the forces of a state.”\textsuperscript{52} Professor Brownlie notes that if Article 51 of the UN Charter is the authoritative definition of the right of self-defence and it is not qualified or supplemented by the customary law, then states are bound by the black-letter law of the Charter and have less extensive grounds to support armed force undertaken outside the framework of the UN Charter.\textsuperscript{53}

Though the Charter “may be regarded as objective or general international law,”\textsuperscript{54} most recognized independent states have expressly accepted the principles and obligations of the Charter.\textsuperscript{55} Furthermore, the “provisions of the Charter have had strong influence on state practice

\begin{itemize}
\item \textsuperscript{46} U.N. Charter art. 51.
\item \textsuperscript{47} STONE, supra note 45.
\item \textsuperscript{48} See, e.g., YORAM DINSTEIN, \textit{WAR, AGGRESSION AND SELF-DEFENCE} 168 (3d ed. 2001). Dinstein concludes that the choice of words in Article 51 was deliberately restrictive and that the right to self-defence was limited to an armed attack.
\item \textsuperscript{49} Id. at 168. See also Michael Franklin Lohr, \textit{Legal Analysis of U.S. Military Responses to State-Sponsored International Terrorism}, 34 NAVAL L. REV. 1, 18 (1985).
\item \textsuperscript{50} In paragraph 195 of its Opinion, the Court said that the exercise of the right of self-defence by a state under Article 51 “is subject to the state concerned having been the victim of an armed attack.” \textit{Nicar. v. U.S.}, 1986 I.C.J. at 103.
\item \textsuperscript{51} See HILAIRE MCCOUBREY \& NIGEL D. WHITE, \textit{INTERNATIONAL LAW AND ARMED CONFLICT} 91–92 (1992).
\item \textsuperscript{52} BROWNLIE, supra note 40, at 280.
\item \textsuperscript{53} Id. at 279.
\item \textsuperscript{54} Id. at 280.
\item \textsuperscript{55} Id. at 280.
\end{itemize}
since 1945, and the terms of Article 51 or very similar terms, have appeared in several important multilateral treaties and draft instruments.\footnote{Id. Thus, article 3 of the Inter-American Treaty of Reciprocal Assistance of 1947 provided for individual or collective self-defence in case of an “armed attack.” Inter-American Treaty of Reciprocal Assistance, \textit{opened for signature} Sept. 2, 1947, 62 U.S.T. 1681, 324 U.N.T.S. 21 (entered into force Dec. 3, 1948). Though articles 18 and 25 of the Bogotá Charter are primarily concerned with reaction to the use of force, the latter article refers ambiguously to “an act of aggression that is not an armed attack” and is concerned only with the application of “measures and procedures,” whilst the former merely refers to “the case of self-defence in accordance with existing treaties or in fulfilment thereof.” Charter of the Organization of American States arts. 18, 25, \textit{opened for signature} Apr. 30, 1948, 2 U.S.T. 2394, 1609 U.N.T.S. 119 (entered into force Dec.13, 1951). The Draft Declaration on Rights and Duties of States, adopted by the International Law Commission in 1949, provides in article 12 that “[e]very State has the right of individual or collective self-defence against armed attack.” International Law Commission, Draft Declaration on Rights and Duties of States art. 12, \textit{available at} http://www.un.org/law/ilc/texts/declar.htm (last visited Jan. 17, 2006).}

2. The Counter-Restricctionist Approach

The Counter-Restrictionist approach adopts an expansionist view. Proponents interpret the Charter to recognize and include those rights of self-defence that existed under customary international law prior to its drafting.\footnote{See Yehuda Z. Blum, \textit{The Legality of State Response to Acts of Terrorism, in Terrorism: How the West Can Win} 133, 137–38 (Benjamin Netanyahu ed., 1986).} Oliver Schachter concisely states this position thus:

On one reading [of Article 51] this means that self-defense is limited to cases of armed attack. An alternative reading holds that since the article is silent as to the right of self-defense under customary law (which goes beyond cases of armed attack), it should not be construed by implication to eliminate that right . . . . It is therefore not implausible to interpret Article 51 as leaving unimpaired the right of self-defense as it existed prior to the Charter.\footnote{Schachter, \textit{supra} note 27, at 1633–34.}

Customary law traditionally recognized a limited right of pre-emptive self-defence according to the “\textit{Caroline criteria}”:\footnote{Michael Byers, \textit{Iraq and the “Bush Doctrine” of Pre-Empitive Self-Defence}, \textit{CRIMES OF WAR PROJECT}, Aug. 20, 2002, http://www.crimesofwar.org/expert/bush-byers.html.} the necessity of self-defence “must be instant, overwhelming, leaving no choice of means, and no moment of deliberation” and the action taken must not be “unreasonable or excessive.”\footnote{Id.} Martti Koskenniemi notes that the right of self-defence articulated in the UN Charter “should be read rationally against
some useful purpose that the rule serves . . . .”61 Koskenniemi argues that the purpose of Article 51 was “to protect the sovereignty and the independence of the state,”62 and that if a state feels its sovereignty and independence threatened by the actions of another country, it might be entitled to use force against that country, even if the country’s hostile actions had not yet risen to the level of an actual armed attack.63 Counter-Restrictionist advocates hold the view that Article 2(4) left the right of self-defence unimpaired and that the right implicitly accepted was not confined to reaction to “armed attack” within Article 51 but permitted the protection of certain substantive rights:

Action undertaken for the purpose of, and limited to, the defense of a state’s political independence, territorial integrity, the lives and property of its nationals (and even to protect its economic independence) cannot by definition involve a threat or use of force “against the territorial integrity or political independence” of any other state.64

In line with Counter-Restrictionist proponents, it can be said that apart from the restrictive phrases in Article 2(4), Article 51 and Article 2(4) were not intended to, and do not, restrict the right of member states to use force in self-defence as defined by customary international law. According to this position, Article 51 refers merely to “armed attack” because it was inserted for the particular purpose of clarifying the position of defence treaties which are concerned only with external attack.65 Therefore, despite apparent specificity, the Charter leaves the broader customary right, which is always implicitly reserved, intact.

3. Anticipatory Self-Defence

Contrary to the permissive and expansive reading of the Charter by some scholars, international opinion on the impermissibility of anticipatory self-defence was never clearer than Israel’s 1981 attack on Iraq.66 Fearing that it might eventually be a target of Iraq’s efforts to develop nuclear weaponry, Israel reduced Iraq’s Osirak nuclear reactor to rub-

62. Id.
63. See id.
65. See Maogoto, Rushing to Break the Law, supra note 31, at 26.
ble. Israel argued vehemently that the attack was justified based on the right of anticipatory self-defence. The world was outraged and rose up in one voice to condemn the act.

The world was outraged by Israel’s raid on June 7, 1981. “Armed attack in such circumstances cannot be justified. It represents a grave breach of international law,” Margaret Thatcher thundered. Jeane Kirkpatrick, the U.S. ambassador to the UN and as stern a lecturer as Britain’s then prime minister, described it as “shocking” and compared it to the Soviet invasion of Afghanistan. American newspapers were as fulsome. “Israel’s sneak attack . . . was an act of inexcusable and shortsighted aggression,” said the New York Times. The Los Angeles Times called it “state-sponsored terrorism”.

The greatest anger erupted at the UN. Israel claimed Saddam Hussein was trying to develop nuclear weapons and it was acting in self-defense, which is legal under Article 51 of the UN Charter. Other countries did not agree. They saw no evidence that Iraq’s nuclear energy programme, then in its infancy and certified by the International Atomic Energy Agency as peaceful, could be described as military, aggressive or directed against a particular country. In any case, preemptive action by one country against another country which offers no imminent threat is illegal.

The Security Council condemned Israel’s bombing of the Osirak reactor and unanimously passed Resolution 487, strongly denouncing the Israeli action as illegal. In addition to condemning the attack, the United States, under the authority of the Arms Control Act of 1968, suspended arms shipments to Israel on the grounds that those arms were to be used for defensive purposes only. Invoking the standards of customary international law in general, and the Caroline factors in particular, the international community’s opposition to the bombing as self-defence

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70. S.C. Res. 487, U.N. Doc. S/RES/487 (June 19, 1981). This was especially compelling given that the United States was a party to the resolution. See id.
was based on the fact that the Iraqi threats, as well as their construction of the reactor, did not amount to an “armed attack” on Israel.72

Politicians, policymakers, and the world at large were unanimous in sensing that Israel’s pre-emptive strike was taking the world down a slippery slope.73 If pre-emption was accepted as legal, the fragile structure of international peace would be undermined. Any state could attack another under the pretext that it detected a threat, however distant. Notwithstanding the clear position taken by the Security Council and the international community, the parameters of a state’s “inherent” right to defend against armed attack is far from settled.

C. Reprisals and the UN Charter

In the heyday of anticipatory self-defence, states dealt with each other on the basis of reciprocity.74 There were no supranational institutions to make or enforce international law. States had the right to retaliate against states that failed to honor bilateral or multilateral arrangements through use of reprisals (retaliation by force) in ways that would otherwise have been considered illegal. “In the absence of a supranational authority, this


74. Reciprocity was fundamental to the international law regime on the use of war in its formative stages in the sense that rules were recognized to be binding legal obligations owing to the centrality of war as a legal sanction. In all instances that armed conflict arose, states routinely claimed legitimacy of armed measures on the enforcement of some international obligation or entitlement. The ever-present possibility of war and the measures taken by states to prepare for and carry out military security meant that that the apprehension of discord and hostility between the States championed self-interest. The relationship between the balance of power and the law of nations was intimately tied in with the balance of power system as a part of the law of nations. States could punish another state that threatened the balance, and armed attack, in whatever context, triggered all the rights of self-preservation. International law was in essence primarily enforced through reciprocal entitlement violations (underpinned by military force)—if state A violated an entitlement of state B, state B was justified in violating an entitlement of state A. However, development of military technology exposed the danger of potential escalations of entitlement violations leading to international anarchy, hence the need to replace politics with legal principles as the yardstick for governing war or resort to war. See HEDLEY BULL, THE ANARCHICAL SOCIETY (2d ed. 1995).
form of self-help was a way for states to get compensation for their losses, punish their offenders, and deter future violations.\textsuperscript{75}

The purpose of international bodies such as the League of Nations and the United Nations was to limit this use of force, and to provide a forum for the resolution of conflict in international matters so as to prevent the need for war. The text of the UN Charter reflects this intent and represents a conventional rejection of the just war theories of retribution; to permit reprisals would thwart the very goal to which states have committed themselves by membership in the United Nations.\textsuperscript{76}

Many commentators believe retaliation and reprisals to be illegal under the UN Charter, citing the specific language of Articles 2 and 51.\textsuperscript{77} Taken together, Articles 2 and 51 comprise a minimum order in the sense that they protect only the primary interest in freedom from aggression and the right of self-defence.\textsuperscript{78} “The provisions of the Charter relating to the peaceful settlement of disputes and non-resort to the use of force are universally regarded as prohibiting reprisals which involve the use of force.”\textsuperscript{79} These authorities conclude that the UN Charter requires states to settle disputes peacefully under Article 2(3) and prohibits all forms of forcible self-help other than the exercise of self-defence within the meaning of Article 51.

The Security Council expressed its view of the status of reprisals in 1964 when it censured Great Britain for carrying out a reprisal against the Yemeni town of Harib in retaliation for alleged Yemeni support of the anti-colonial struggle in Aden.\textsuperscript{80} After several Yemeni attacks on the South Arabian Federation, the British commenced air attacks on Yemen in 1964.\textsuperscript{81} The United Kingdom Representative, after discussing the series of Yemeni attacks, stated:

\begin{itemize}
  \item \textsuperscript{77} Roberts, supra note 76, at 282.
  \item \textsuperscript{78} McDOUGAL & FELICIANO, supra note 42, at 121–24.
  \item \textsuperscript{79} BROWNLE, supra note 40, at 281.
  \item \textsuperscript{80} Lohr, supra note 49, at 32.
  \item \textsuperscript{81} Derek Bowett, \textit{Reprisals Involving Recourse to Armed Force}, 66 Am. J. Int’l L. 1, 8 (1972).
\end{itemize}
It will also be abundantly plain that, contrary to what a number of speakers have said or implied, this action was not retaliation or a reprisal . . . . There is, in existing law, a clear distinction to be drawn between two forms of self-help. One, which is of a retributive or punitive nature, is termed “retaliation” or “reprisals;” the other, which is expressly contemplated and authorized by the Charter, is self-defense against armed attack . . . it is clear that the use of armed force to repel or prevent an attack—i.e. legitimate action of a defensive nature—may sometimes have to take the form of a counter-attack.82

Despite the United Kingdom Representative’s delicate attempt to cloak the reprisals in the acceptable language of self-defence, the Security Council refused to be hoodwinked, denounced the actions as reprisals, and “deplor[e]d” the British action. By a vote of 9-0, with two abstentions, the Security Council determined that it “[c]ondemns reprisals as incompatible with the purposes and principles of the United Nations.”84 The Council’s rationale was that the members of the United Nations contracted not to use force to achieve solutions to international controversies.85 A reprisal, not considered as the use of force in self-defence, was, therefore, considered an illegal use of force.86 Clearly the Security Council took the dominant restrictionist view in international law in rejecting the legitimacy of any reprisal or anticipatory self-defence.

“This de jure prohibition on reprisal found its way into documentary form in 1970”87 when the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the UN Charter was adopted.88 The Declaration on Friendly Relations tenor was emphatic that members of the United Nations have legally renounced the use of peacetime reprisals.89 The first principle

86. Falk, supra note 84, at 429.
89. See Declaration on Friendly Relations, supra note 36, at 121–24.
provides that “[s]tates shall refrain in their international relations from
the threat or use of force against the territorial integrity or political inde-
pendence of any state, or in any other manner inconsistent with the pur-
poses of the United Nations.”90 One of the duties imposed under this
principle is to refrain from acts of reprisal involving the use of force.91

On its face, the Declaration on Friendly Relations seems to flatly reject
the use of reprisals under all circumstances. This assertion is borne out
by subsequent condemnations of reprisals by the international commu-
nity. In 1972, in reaction to constant terrorist attacks by Palestine Libera-
tion Organization (PLO) elements based in neighboring Lebanon, it re-
mined and in the same breath warned Lebanon that it had an interna-
tional legal obligation to prevent its territory from being used as a base
for armed attacks against Israel by the PLO.92 A few weeks later on Feb-
uary 25, 1972, Israel sent forces, tanks, armored cars, heavy artillery,
and air support into Lebanon to attack PLO bases.93 In response, the Se-
curity Council issued Resolution 313. When debating Resolution 313,
France denounced “these intolerable reprisals.”94 The final Resolution
did not mince words demanding “that Israel immediately desist and re-
frain from any ground and air military action against Lebanon and forth-
with withdraw all its military forces from Lebanese territory.”95 Israel
adopted a blasé attitude towards this Resolution and was soon back in
Lebanon attacking PLO bases. The Security Council was once again
seized of the matter. Belgium stated that “[t]he Belgian Government has
never ceased to repudiate energetically the military reprisal actions un-
dertaken by Israel against Lebanon.”96 The final Resolution of June 26,
1972 denounced Israel’s actions as violating the UN Charter.97

About a decade later, on December 27, 1985, simultaneous bombings
of airline offices in Rome and Vienna left twenty innocent people dead,
including five Americans, with over eighty people injured.98 Four months
later on April 5, 1986, a bomb explosion in a West German discotheque
frequented by American servicemen killed two American servicemen

90. Id. at 122.
91. Id. at 123.
93. Id. at 427.
94. Id. at 436 n.87.
96. O’Brien, supra note 76, at 436 n.87.
97. Id. at 427–28.
98. Lary Rohter, Airlines Say They had Warnings About Possible Move by Terrorists,
and wounded 154 persons—fifty to sixty were Americans. In both instances, intelligence traced the perpetrators back to Libya. In the early hours of April 15, 1986, U.S. Air Force and Naval aircraft simultaneously bombed targets in Libya. Despite the positive reaction from the U.S. Congress, both the Security Council and General Assembly condemned the U.S. attacks. While the Resolution to condemn the attack by the Security Council failed owing to vetoes by the United States, United Kingdom, and France, the vote in the General Assembly was successful.

However, the clear stance of the international community on the legality of reprisals wavered in the late 1980s. Beginning in July 1987, during the course of the Iran-Iraq War, the United States conducted escort operations of tankers in the Gulf. After months of volatility and gunboat diplomacy in the Persian Gulf, on April 14, 1988 Iranian submarine mines damaged a U.S. naval ship. Four days later, the United States retaliated with attacks that decimated two Iranian oil platforms. The next day, President Reagan stated that the United States’ action was “to make certain the Iranians have no illusions about the cost of irresponsible behavior.” The Reagan administration claimed the strike was in “retaliation” for mine laying by Iran and that “any further mining by Iran would bring harsher military reprisals.” In this instance:

There was no Security Council debate on these hostilities. In some cases, the U.S. forces clearly acted in self-defense. In other cases, as in the retaliatory strikes of October 19, 1987 and April 18, 1988, U.S. attacks were not immediate. These actions could easily be characterized as preventive, deterrent measures and, just as readily, as punitive measures.

The seeming indifference by the United Nations in this instance, buttressed by other subsequent incidents, forms the basis of the view that the Charter does not prohibit reprisals entirely. In the late 1980s, the General

Assembly and the Security Council appear to have adopted a policy inconsistent with their spoken opposition to reprisals. The Council has generally not condemned acts of reprisal which it considered "reasonable," while voting to condemn actions considered excessive or disproportionate. In so doing, the Council has appeared to indicate its tolerance of some proportional acts of reprisal. As one scholar observes:

There is, however, a contrary view that the Charter does not prohibit forcible self-help, i.e., reprisals entirely. An argument can be made that resorts to reprisals are both legal and desirable under the Charter. First, Security Council practice implies the recognition of the legitimacy of some type of reasonable reprisal. There is an inconsistency between the Security Council's alleged principle of the illegality of all armed reprisals and the Council's practice in not condemning a particular reprisal because it appeared reasonable. A practice of condemning only unreasonable or disproportionate reprisals is, in effect, an affirmation of the right of states to resort to reasonable reprisals.

Therefore, under recent UN practices, the status of reprisals may be viewed as illegal de jure but accepted de facto, provided they meet the requirement of proportionality. The troubling question of whether any other forcible form of self-help outside of self-defence is permitted under the Charter thus persists.

Having canvassed the various avenues regarding the use of force, the author resists the temptation to move straight to the matter of the use of force and terrorism without addressing the controversial issue of humanitarian intervention. Though this does not strike a direct chord with the central theme of the Article, the most explicit form of unilateral action in the post-UN Charter era without UN authority has been premised in large part on the doctrine of humanitarian intervention. Vestiges of this doctrine have an increasing resonance in the plethora of justifications for the unilateral decision by the United States at the head of the "Coalition of the Willing" to invade Iraq in 2003 without explicit UN authority. It is

107. Id.
108. Lohr, supra note 49, at 32–33.
110. Christopher Hobson notes:

With America’s primary claims for invading Iraq—weapons of mass destruction (WMDs) and links to terrorism—being largely discredited, bringing de-
therefore only appropriate that the doctrine of humanitarian intervention gets mention.

D. Humanitarian Intervention and the UN Charter

It is significant that under the UN Charter, the third explicit exception to the general prohibition on the use of force, found in Chapter VIII of the Charter, permits actions undertaken by “regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security.” 111 Significantly, this is not a carte blanche, since regional alliances may undertake any action in this regard that is “consistent with the Purposes and Principles of the United Nations.” 112

In general, humanitarian intervention entails a unilateral or multilateral intervention by a foreign power in a third country in reaction to serious and systematic violations of human rights by the government. Prior to the twentieth century, a general custom and practice of humanitarian intervention existed. 113 The legal doctrine finds scholarly support as early as the seventeenth century, when Hugo Grotius wrote that “where [tyrants] . . . provoke their own people to despair and resistance by unheard of cruelties, having themselves abandoned all the laws of nature, they lose the rights of independent sovereigns, and can no longer claim the privilege of the law of nations.” 114 This historical doctrine is strengthened by an emerging notion of a duty to protect civilians that has its genesis in the horrors of post-World War II.

mocracy to the country has increasingly become the central justification by President Bush and his supporters for overthrowing Saddam Hussein’s regime.

111. U.N. Charter art. 52, para. 1.
112. Id.

Proponents of intervention . . . cite the British, French, and Russian intervention in Greece (1827–1830), the Russian intervention in Turkey (1877–1878), and the Greek, Bulgarian, and Serb intervention in Macedonia (1903) as examples of humanitarian interventions that were regarded as legal operations.

For almost the entire history of the UN, it has recognized that certain human rights violations are beyond the pale of state sovereignty and constitute a threat to peace and security. Consequently, proponents of humanitarian intervention argue that the UN has endorsed the notion that sovereignty is secondary in importance to the basic human right to life.\(^ {115}\)

However, the matter of humanitarian intervention in the post-UN Charter era was brought strongly to the fore with NATO’s reaction to the ethnic cleansing in Kosovo by Serbian forces.\(^ {116}\) On March 24, 1999, without the benefit of a UN Security Council resolution expressly authorizing military action, NATO began a seventy-eight day air campaign over the Former Republic of Yugoslavia (FRY).\(^ {117}\) The Kosovo operation was preceded by months of diplomatic efforts to resolve the region’s problems peacefully. The United Nations, OSCE, NATO, and the United States all participated in a multitude of diplomatic moves aimed at curbing the violence and reaching a political solution. “The legal debate over humanitarian intervention in Kosovo has been posed as a tension between two competing principles: respect for the ‘territorial integrity’ and ‘political independence’ of states and the guarantees for human rights . . . .”\(^ {118}\)

Opponents of humanitarian intervention argue that the use of force against a sovereign state violates the most imperative international legal norms, not to mention the UN Charter.\(^ {119}\)

The major argument against a legal doctrine of humanitarian intervention is that it would open the door to “pretextual” intervention . . . this

\(^{115}\) Id. at 122.

\(^{116}\) It should of course be noted that there have been previous acts premised on some form of pseudo-humanitarian intervention, but this has been largely within the framework of UN authorisation. One need only recall the acts in relation to the first Gulf War and the no fly zone, Somalia, Bosnia and East Timor. Though these actions may sit uncomfortably within the UN regime on the use of force, they nonetheless found some sort of legitimacy via subsequent Security Council resolutions. For a concise overview of these military operations, see Jackson Maogoto, People First, Nations Second: A New Role for the UN as an Assertive Human Rights Custodian, AUSTL. INT’L L.J. 120, 133–38 (2000).

\(^{117}\) The operation’s objective was “to degrade and damage the military and security structure that President Milosevic (Yugoslav President) has used to depopulate and destroy the Albanian majority in Kosovo.” William S. Cohen, Secretary of Defense, Prepared Statement to the Senate Armed Services Committee (Apr. 15, 1999), available at http://www.defenselink.mil/specials/kosovo/.


\(^{119}\) See Merriam, supra note 114, at 119–21.
legal doctrine is founded in the custom and practice of states, and because it is so controversial, there has never been a universally accepted standard established for regulating and evaluating humanitarian interventions. Whatever standard exists is only that which can be drawn from the past practice of intervening states, and as such is vague and malleable.120

Proponents of the doctrine argue that despite the general prohibition on the use of force encapsulated in the UN Charter, a legal doctrine of humanitarian intervention survives, embodied in the custom and practice of state actors in the international arena.121 This argument is based in large part on the fact that the United Nations was formed to prevent the use of force as a means of settling disputes and to protect universal human rights.122 “Some states have opted to use force as a means of last resort to prevent humanitarian tragedy, while at the same time seeking to establish a self-defense argument in order to avoid UN sanction.”123 Traction for this argument can also be found in the observation that the UN Charter not only permits intervention on humanitarian grounds, it requires it in cases of gross and systemic human rights abuses.124 Articles 55 and 56 of the UN Charter implore “[a]ll Members [to] pledge themselves to take joint action in cooperation with the Organization for the achievement of . . . universal respect for, and observance of, human rights and fundamental freedoms for all . . . .”125

A key point that undermined NATO’s claims that the Kosovo action was a permissible use of force was the foggy and often incoherent grounds it provided as justification. Despite its seemingly humanitarian dimensions, the Kosovo action was not a textbook example of the doctrine, and was dressed up with other justifications at odds with the central ground of humanitarian intervention. Professor Julie Mertus notes:

120. Id. at 126.
123. Merriam, supra note 114, at 114.
125. U.N. Charter arts. 55, para. (c), 56.
NATO did not act only in the name of human rights. Instead, leaders of NATO countries offered a cafeteria of justifications for their actions. The Clinton Administration considered but refused to base its actions in Kosovo solely on humanitarian rights grounds. Instead, the Administration offered an array of justifications. Humanitarian concerns were rolled together with other factors: the need for regional stabilization, the stemming of refugee flows, and the need to protect NATO’s reputation.126

Mertus goes on to note that “by failing to specify clearly the legal parameters of their actions, the NATO allies exposed themselves to criticism suggesting that NATO was not operating under any legal grounds at all.”127 Mertus follows this concern by noting that by failing to provide clear legal justifications for intervention on human rights grounds, human rights advocates opened themselves up to similar criticism that they were outside the law.

As this part of the Article has shown, the vagueness and confusion of conceptual elements and malleable past precedent clouds the UN Charter regime on the use of force. Having canvassed the various avenues regarding the use of force, the Article now turns to consider the use of military force as a counter-measure against terrorism in view of the fact that it is generally held to be inconsistent with the UN Charter regime on the use of force.

III. THE COLD WAR ERA: TERRORIST ACTION AND REACTION

During the Cold War Era, increased terrorist attacks focused attention on the capabilities of elite forces trained for anti-terrorist operations. The 1976 Israeli hostage rescue at Entebbe in the aftermath of the hijacking of Air France Flight 139 marked the opening salvo in the use of military force to counter terrorism.129 About three years later, on November 4, 1979, a mob of Iranians seized the U.S. embassy in Tehran, taking a large group of employees hostage and sparking the Iranian hostage crisis.

127. See Mertus, Reconsidering the Legality of Humanitarian Intervention, supra note 118, at 1748–49.
Five months later, the impotence of diplomatic efforts led the Carter administration to order a rescue effort by helicopter, but the mission was aborted. In 1981, following the release of the Iranian Embassy hostages, Reagan warned that when the rules of international behavior are violated, the U.S. policy would be one of “swift and effective retribution.” The Reagan administration was sending initial indications that a hard line, conceivably involving the use of military force, would be taken with terrorists in the future.

Two years later on April 18, 1983, sixty-three people were killed and one hundred twenty were injured in a 400-pound suicide truck-bomb attack on the U.S. embassy in Beirut, Lebanon. Six months later, on October 23, 1983, in another terrorist attack, a large Mercedes truck exploded with such terrific force that the headquarters of the First Battalion, Eighth Marine Regiment was instantly reduced to rubble with the loss of 242 Americans. The Islamic Jihad claimed responsibility for both attacks. The bombings precipitated renewed debate over whether U.S. military forces were adequately prepared to deal with terrorism and whether the United States would use force either in anticipation of, or in response to, terrorism.

The Long Commission, in commenting upon the devastating attack on the U.S. Marine Headquarters in Beirut, concluded:

[S]tate sponsored terrorism is an important part of the spectrum of warfare and . . . adequate response to this increasing threat requires an active national policy which seeks to deter attack or reduce its effectiveness. The Commission further concludes that this policy needs to be supported by political and diplomatic actions and by a wide range of timely military response capabilities.

The Long Commission report proved to be a turning point for U.S. counter-terrorism policy. Despite definitional concerns and fundamental issues concerning the kind of responses the United States could lawfully

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133. Id.
134. Id.
take within the rubric of international law, the United States had grown
tired of attacks against its interests and citizens and soon formally em-
braced military force against terrorist violence. In opting to use force, the
United States took the position that it was necessary to accept some risks
to ensure that every terrorist success attracted the military might of the
United States. From the position of the United States, deterrence was
premised on terrorists fearing a forceful response from the victim state.

A. New Frontiers on the Use of Force? Development of the Reagan and
Shultz Doctrines

On April 3, 1984, President Reagan signed the National Security Deci-
sion Directive (NSDD), which assigned responsibility for developing
strategies to counter terrorism and made clear that, while use of all the
non-military options would be made, the United States was also prepared
to respond within the parameters set by the law of armed conflict. De-
fense Department official Noel Koch explained that the NSDD “repre-
sent[ed] a quantum leap in countering terrorism, from the reactive mode
to recognition that proactive steps [were] needed.” Significantly, the
document incorporated some key elements: the United States has a re-
sponsibility to take protective measures whenever evidence arises that
terrorism is about to be committed against U.S. interests; and the threat
of terrorism constitutes a form of aggression and justifies acts in lawful
self-defence. With this directive, the ground was formally laid for the
“Reagan Doctrine” of swift, effective retribution.

The NSDD signaled that, as far as the executive branch was concerned,
the debate over whether military force was inside or outside the range of
counter-terrorism measures was over. Henceforth, the United States
would use military force in both pre-emptive and retaliatory scenarios.
Although then U.S. Secretary of State George Shultz had initially advo-
cated only “an active defense” against terrorists, growing frustration
over the inability of the United States to effectively counter the accelerat-
ing frequency and violence of terrorist attacks prompted him to re-

136. Brian M. Jenkins, The U.S. Response to Terrorism: A Policy Dilemma, ARMED
137. Robert C. Toth, Preemptive Anti-Terrorist Raids Allowed, WASH. POST, Apr. 16,
1984, at A19.
138. Robert C. McFarlane, Terrorism and the Future of Free Society, Speech Deliv-
ered at the Defence Strategy Forum (Mar. 25, 1985), in 8 TERRORISM 315, 321 (Yonah
evaluate his views on the nature of appropriate responses to international terrorism, further expanding the controversial new U.S. policy.

In late 1984 at the Park Avenue Synagogue in New York City, Shultz asserted that the United States must be ready to use military force to fight terrorism and retaliate even before all the facts are known. 140 This was the beginning of what later became known as the “Shultz Doctrine,” a corollary of the “Reagan Doctrine.” Shultz predicted that the increased terrorist attacks against strategic U.S. interests around the world in the years ahead would necessitate a willingness to combat it using military force. 141 This signaled that an active policy of response by armed force to terrorist attacks would be followed by the United States. In the same speech, Shultz claimed a broad right on behalf of the United States to use force against terrorist threats abroad, including a policy of pre-emptive strikes in foreign countries. 142 Although arguably effective and temporarily satisfying, the important concern was whether a policy of armed response was wise in view of its probable violation of international law. The United States ran the risk of incurring the massive condemnation that would accompany a policy of systematic use of armed force against terrorist attacks and the possibility of being branded an international outlaw. 143

Even as the “Reagan” and “Shultz Doctrines” were forming, Israeli action was actively providing a practical manifestation of the tenet underlying these doctrines with regular military actions to counter terrorism outside its territory—in Lebanon, Syria, and Tunisia—throughout the 1980s. The U.S. position that “[a]s a matter of U.S. policy, retaliation against terrorist attacks is a legitimate response and an expression of self-defense” 144 was practically expressed in 1985 by Israel. On October 1, 1985, six F-15 Israeli fighter-bombers unleashed a barrage of bombs on the headquarters of the PLO in a suburb of Tunis, the capital of Tunisia, responding to alleged terrorist attacks. 145 Israel Defense Minister Yitzhak


141. Id. at 16.

142. Id.

143. ERNEST EVANS, CALLING A TRUCE TO TERROR 122 (1979).


145. The Israeli attack by six F-15 fighter-bombers apparently left seventy men, women and children dead and more than one hundred Tunisians and Palestinians wounded. See Donald R. Morris, Cycle of Terrorism Will Continue with Retaliatory Strikes, HOUS. POST, Jan. 2, 1986, at 2B.
Rabin seemed to echo Reagan and Shultz when he stated: "[w]e decided the time was right to deliver a blow to the headquarters of those who make the decisions, plan and carry out terrorist activities." The UN Security Council was swift to vigorously condemn the act as a flagrant violation of the UN Charter, international law, and norms of conduct.

Three days after the attack, a single session of the Security Council produced Resolution 573 (with only one abstention by the United States), which condemned the Israeli attack; demanded that Israel "refrain from perpetrating such acts of aggression or from threatening to do so;" urged member states to "dissuade Israel from resorting to such acts;" and supported Tunisia’s right to reparations.

The international community in general condemned the Israeli Tunis raid as an act of aggression and a violation of Tunisia’s sovereignty and territorial integrity. Israel’s argument of self-defence against terrorism was dismissed. Israel’s attack and the U.S.’s subsequent support in the face of vitriolic condemnation by most countries was symptomatic of the revolution in policy that the United States was undertaking. The United States abstained from the string of condemnations that followed every Israeli action debated in the Security Council, and began to veto consideration of those resolutions, effectively ending discussion of the matter within the Security Council. This change in U.S. reaction was not just the result of a new, hawkish conservative administration; it was also a response to the targeting of U.S. citizens and interests by state-sponsored

148. Id.
terrorists. U.S. Ambassador Vernon Walter’s explanation of the U.S. abstention in the Security Council Resolution condemning Israel’s bombing in Tunis is instructive:

[W]e recognize and strongly support the principle that a state subjected to continuing terrorist attacks may respond with appropriate use of force to defend against further attacks. This is an aspect of the inherent right of self-defense recognized in the United Nations Charter.\textsuperscript{152}

Two months after the Israeli counter-terrorist attacks, the U.S. frustration with the international regime on the use of force in countering terrorism was captured clearly by Secretary of State Shultz’s outburst:

It is absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace; from attacking them on the soil of other nations, even for the purpose of rescuing hostages; or from using force against states that support, train, and harbor terrorists or guerrillas. International law requires no such result.\textsuperscript{153}

With these words, Shultz laid down more building blocks for the “Shultz Doctrine” and its highly controversial position advocating the use of military force not only against terrorists, but also against states that support, train, or harbor terrorists.\textsuperscript{154} This Doctrine was formally fleshed out on January 15, 1986, in the Secretary’s speech on terrorism at the National Defense University.\textsuperscript{155} In that speech, the Secretary added: “a nation attacked by terrorists is permitted to use force to prevent or preempt future attacks, to seize terrorists, or to rescue its citizens, when no other means is available.”\textsuperscript{156} This is so, the Secretary said, even though others have “asserted that military action to retaliate or pre-empt terrorism is contrary to international law.”\textsuperscript{157}

Worldwide opposition to the new policy was swift in coming. Surprisingly, even some senior officials in the U.S. State Department expressed

\begin{thebibliography}{9}
\bibitem{154} See Don Oberdorfer, \textit{Abraham Sofaer; State’s Legal Adviser Deals with Policy, Then the Law}, WASH. POST, Mar. 10, 1986, at A13.
\bibitem{155} Gwertzman, \textit{Shultz Supports Armed Reprisals}, supra note 153.
\bibitem{156} Id.
\bibitem{157} Id.
\end{thebibliography}
reservations.\textsuperscript{158} U.S. Secretary of Defense Casper Weinberger, in charge of the machinery that would be tasked with affecting the doctrine, opposed responsive military strikes that needlessly “kill women and children.”\textsuperscript{159} Additionally, Robert Oakley, Ambassador-at-Large for Counter Terrorism, opined that the President’s Commission on Terrorism had recommended that the United States not use military force to retaliate against states supporting terrorists.\textsuperscript{160} International and domestic opposition in the United States was a result of a number of difficult issues raised by the doctrine, and the difficult questions raised by the United States’ new policy:

\begin{quote}
[Is] the responding coercion still a use of force in self-defense against an armed “attack”? Is the responding coercion primarily pre-emptive, retaliatory, or for the purpose of imposing sanctions against a violation of international law? And if among the latter, are any of these forms of responsive coercion ever permissible?\textsuperscript{161}
\end{quote}

The United States was determined not to back down, and a few weeks after Shultz had fleshed out his doctrine, the Vice President’s Task Force on Combating Terrorism found: “Terrorism has become another means of conducting foreign affairs. Such terrorists are agents whose association the state can easily deny. Use of terrorism by the country entails few risks, and constitutes strong-arm, low-budget foreign policy.”\textsuperscript{162} This statement echoed the Reagan administration’s concerns over new and unconventional challenges to U.S. foreign policy in critical areas of the world.

Though it was evident that this threat of low-intensity conflict raised a host of new legal, political, military, and moral issues, it was not long before the United States demonstrated that it was not overly concerned with the questions that its new policy engendered and that the “Reagan” and “Shultz Doctrines” were not just hollow rhetoric. On April 5, 1986, Le Belle discotheque in West Germany, a spot popular with off-duty American servicemen, was bombed, leaving two Americans dead and

\begin{enumerate}
\item See \textit{id}.
\end{enumerate}
over 154 persons injured. U.S. intelligence indicated Libya sponsored this terrorist attack. President Reagan responded to this threat by bombing military targets in Tripoli and Benghazi, Libya on April 14, 1986. The attack was met with condemnation. Critics claimed the time lapse and proportionally of the attacks, as well as the choice of targets undermined the primary justification of self-defence. As Major Phillip A. Seymour notes:

Although President Reagan cited self-defense under Article 51 of the UN Charter as the legal basis for the air strike, his explanation implicitly included retaliation (i.e., reprisal) as an additional justification. In deciding to use military force against Libya, deterrence certainly was a major, if not the primary, consideration. This interpretation is supported by then-Vice President George Bush’s comments a month prior to the Libyan raid when he stated that American policy in combating terrorism would be one of a willingness to “retaliate.”

The Tripoli bombing was far from a one off event; it was part of a crystallizing U.S. policy. This was despite the fact that international law relating to self-defence did not accord with the American viewpoint. The United States seemed determined to co-opt the use of military force against terrorism within the infirm concept of anticipatory self-defence. Two years after the air raid on Tripoli, on December 21, 1988, while cruising at an altitude of 31,000 feet, Pan American Flight 103 (Flight 103) exploded in the skies over Lockerbie, Scotland. Two hundred fifty-eight passengers and crew died in the explosion; another seventeen townspeople died on the ground as a result of the fiery debris.

163. 2d U.S. Soldier Dies from Bombing of Disco, CHI. TRIB., June 8, 1986, at C8.
167. See Kelly, supra note 87, at 17.
168. Seymour, supra note 103, at 223.
170. Id. at 17.
dent Reagan ordered an inquiry into the circumstances of the Flight 103 disaster and directed the preparation of a report intended to be “a comprehensive study and appraisal of practices and policy options with respect to preventing terrorist acts involving aviation.” Among the recommendations of the President’s Commission were “active measures—pre-emptive or retaliatory, direct or covert—against a series of targets in countries well-known to have engaged in state-sponsored terrorism.” These recommendations reinforced the vitality of the “Reagan” and “Shultz Doctrines” as part of the U.S. policy of pre-emption. It was, however, not until the end of the Cold War that the United States had the opportunity to fully pursue this new national policy.

IV. POST-COLD WAR: PROACTIVE ACTION TO COUNTER TERRORISM

In 1993, following the discovery of an Iraqi plot to assassinate then U.S. President George Bush Sr. on a visit to Kuwait, the United States fired twenty-three cruise missiles at Iraqi intelligence targets within Iraq. Though the attack came after those involved in the plot in Kuwait had been apprehended and President Bush had completed his planned visit, the justification presented to Congress by the President was that the action was within the right of self-defence under Article 51.

The next significant case of American action to counter terrorism through military action came on August 7, 1998 when U.S. Embassies in Kenya and Tanzania were bombed, killing at least 252 (including twelve U.S. citizens) and injuring more than five thousand. Secretary of State Albright pledged to “use all means at our disposal to track down and punish” those responsible. On August 20, 1998, the United States responded by launching seventy-nine Tomahawk cruise missiles from U.S. warships. This attack was directed at an Osama bin Laden bankrolled Al Qaeda terrorist training camp in Afghanistan and a Sudanese pharma-

The American justification for their military action was based on both reprisal and anticipatory self-defence. In his address to the nation, then U.S. President Bill Clinton told the American people that the strikes against the “terrorist-related facilities in Afghanistan and Sudan” were necessary because of the “imminent threat they presented to [U.S.] national security.” Thus the Clinton administration, like the Reagan administration before it, justified its response to terrorist strikes by claiming self-defence. In a report sent to Congress, President Clinton claimed that the strikes were justified under the “inherent right of self-defense consistent with Article 51 . . .” and at the same time were intended to “prevent and deter additional attacks . . . .” Moreover, President Clini-

177. Many critics later raised doubts about the quality of the evidence relied upon by the Clinton Administration in its decision to strike the Sudanese pharmaceutical plant. For a discussion of such doubts, see Sara N. Scheideman, Standards of Proof in Forcible Responses to Terrorism, 50 SYRACUSE L. REV. 249, 257–60 (2000).
178. See Maureen F. Brennan, Avoiding Anarchy: Bin Laden Terrorism, the U.S. Response, and the Role of Customary International Law, 59 LA. L. REV. 1195 (1999). It should be noted that Clinton’s reasons for striking Afghanistan and Sudan (in an effort to reach bin Laden) are analogous to Reagan’s reasons for attacking Libya (in an effort to reach Qadhafi). See O’Brien, supra note 76, at 463–65 (suggesting that the Reagan administration attacked Libya in 1986 as a reprisal for Qadhafi’s suspected support of terrorist attacks on U.S. targets). As Brennan explains:

[Though a]dmitting that the bin Laden terrorist “network” was not sponsored by any state, Clinton outlined four reasons for the action: 1) overwhelming evidence showed bin Laden “played the key role in the embassy bombings”; 2) his network had been responsible for past terrorist attacks against Americans; 3) officials had “compelling information” that bin Laden was planning future attacks and 4) his organization was attempting to obtain chemical weapons. In a second statement, President Clinton carefully characterized the strikes as necessary to defend against the threat of “imminent” and “immediate” future attacks, and not as retribution or punishment.

See Brennan, supra, at 1195–96.
ton invoked the traditional *Caroline* requirements of imminence, necessity, and proportionality, claiming that all three had been met.\(^{182}\) Indeed, when Bill Richardson, then U.S. Ambassador to the United Nations, wrote the letter notifying the UN Security Council of the U.S. missile attacks on Afghanistan and Sudan, he clearly laid out the U.S. arguments in support of the attacks in the familiar language of self-defence.\(^{183}\) Clinton’s Secretary of Defense, William S. Cohen, went further by warning terrorist organizations that the United States would not limit itself to “passive defense” when faced with choosing either to “fight or fold in pathetic cowardice . . . .”\(^{184}\)

Many of the same critiques of the Reagan administration’s bombing of Libya in 1986 were lodged at the Clinton administration’s cruise missile attacks in Afghanistan and Sudan, and many observers concluded that the cruise missile attacks violated the rules of international law.\(^{185}\) Indeed, one commentator suggested that the Clinton administration foresaw this criticism: “The care with which . . . President [Clinton] and U.S. officials characterized the justification for the missile attacks show[ed] . . . .”

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182. *See id.* at 1464.

183. Ambassador Richardson’s letter to the President of the UN Security Council, dated August 20, 1998, stated in part:

> These attacks were carried out only after repeated efforts to convince the Government of Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the bin Laden organization. That organization has issued a series of blatant warnings that ‘strikes will continue from everywhere against American targets, and we have convincing evidence that further such attacks were in preparation from these same terrorist facilities. The United States, therefore, had no choice but to use armed force to prevent these attacks from continuing. In doing so, the United States has acted pursuant to the right of self-defence confirmed by Article 51 of the Charter of the United Nations. The targets struck, and the timing and method of attack used, were carefully designed to minimize risks of collateral damage to civilians and to comply with international law, including the rules of necessity and proportionality.


their concern that the actions of the United States could be perceived as a violation of international law.\textsuperscript{186}

In characterizing the cruise missile strikes as “retaliation rather than legitimate self-defense,”\textsuperscript{187} critics took issue with the fact that the targets of the attacks in both Afghanistan and Sudan had no direct link to any “imminent” attack against the United States.\textsuperscript{188} Furthermore, it was unlikely that the destruction of the terrorist training camps in Afghanistan, and the leveling of the pharmaceutical plant in Sudan, met the proportionality requirement regulating uses of force in self-defence.\textsuperscript{189} Thus, no matter how the Clinton administration chose to justify the attacks—whether as retaliation or as self-defence—the equation simply did not add up to an acceptable use of force under international law.\textsuperscript{190} Most notably,

\begin{quote}
this is the first time the U.S. has given such primary and public prominence to the preemptive, not just retaliatory, nature and motive of a military strike against a terrorist organization or network. This may be signaling a more proactive and global counter-terrorism policy, less constrained in targeting terrorists, their bases, or infrastructure.\textsuperscript{191}
\end{quote}

In a warning to terrorist groups who may seek weapons of mass destruction, President Clinton cited past efforts by the Al Qaeda terrorist network to acquire chemical and other dangerous weapons as one of the reasons for the U.S. attack. The Clinton administration had not only declared war on terror, but had also laid down the framework which the George W. Bush administration would take to the next level in the aftermath of the September 11th attacks.

\textbf{A. September 11, 2001: Crossing the Rubicon?}

In a coordinated operation, whose breadth and audacity stunned the world, terrorists believed to be part of the Al Qaeda network carried out the worst terrorist attack in modern times, targeting various symbols of

\begin{itemize}
\item \textsuperscript{186} See Brennan, \textit{supra} note 178, at 1197.
\item \textsuperscript{187} \textit{Id.} at 1210.
\item \textsuperscript{188} \textit{Id.} at 1209–10.
\item \textsuperscript{189} See Leah M. Campbell, \textit{Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan} 74 TUL. L. REV. 1067, 1095 (2000).
\item \textsuperscript{190} \textit{Id.} at 1096 (“If the purpose of the strikes was retaliatory, it contravened conventional international law. If the strikes were motivated by self-defence, it appears that the necessary elements [an armed attack, necessity, immediacy, and proportionality] were not present.”).
\item \textsuperscript{191} Perl, \textit{supra} note 175.
\end{itemize}
U.S. supremacy and leaving over three thousand people dead. The day after the attacks, the UN Security Council tersely stated that “[t]he magnitude of [the] acts goes beyond terrorism as we have known it so far . . . . We therefore think that new definitions, terms and strategies have to be developed for the new realities.” On the same day, the UN General Assembly, at its first plenary meeting of the year, adopted Resolution 56/1 without a vote, urgently calling for international cooperation to prevent and eradicate acts of terrorism and stressing that those responsible for aiding, supporting, or harboring the perpetrators, organizers, and sponsors of such acts would be held accountable.

Nine days later, on September 20, 2001, President George W. Bush pledged: “Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.” The UN Security Council agreed with President Bush on the urgent need to fight terrorism. In addition, every major regional organization, including the Arab League, agreed that the September 11th hijackings and attacks on the World Trade Center and Pentagon were acts of terrorism in violation of international law.

192. Four commercial aircraft were hijacked, two of them were flown into the twin towers of the World Trade Center in New York City, causing both buildings to collapse. A third aircraft crashed into the Pentagon building in Arlington, Virginia, which houses the headquarters of the U.S. Department of Defense and the U.S. armed forces. The fourth aircraft crashed near Somerset, Pennsylvania. See RAPHAEL PERL, CONG. RESEARCH SERV., ISSUE BRIEF FOR CONGRESS: TERRORISM, THE FUTURE, AND U.S. FOREIGN POLICY 1, 3 (Mar. 6, 2003), available at http://www.cnie.org/nle/crsreports (order code IB95112).


UN Security Resolution 1368, passed a day after the September 11th attacks, unequivocally condemned the attacks, calling on all states to “work together urgently to bring to justice the perpetrators, organizers and sponsors”\(^{198}\) of the attacks, and thus reaffirmed the inherent right of self-defence in accordance with Article 51 of the UN Charter.\(^{199}\) The U.S. right of self-defence was often mentioned in the same breath as the terrorist attacks. “Given the circumstances, this affirmation was significant: it implied that the attacks triggered the right even if, at the time of adoption, the UN Security Council knew almost nothing about who or what had launched them.”\(^{200}\)

The shift in the law of pre-emption was evident. The international response to retaliatory military strikes made by Israel against Tunisia in 1985 had been strongly condemnatory, despite Israel’s argument that Tunisia’s acts of harboring, supplying, and assisting non-state actors who they claimed committed terrorist acts in Israel should be sufficient to attribute the acts to the state.\(^{201}\) Notwithstanding Israel’s claims of self-defence, in Resolution 573 the Security Council condemned the 1985 air attack on PLO headquarters as an “act of armed aggression . . . in flagrant violation of the Charter of the United Nations, international law and norms of conduct.”\(^{202}\) The fact that Resolution 573 condemned Israel’s attack as contrary to the UN Charter implied that no justification based on self-defence was recognized. Subsequently, the claim of self-defence was also rejected by states as justification for the U.S. bombing of Tripoli and the 1993 bombing of the Iraqi Secret Service.\(^{203}\) The international response to the September 11th attack was an important departure from the reasoning in Resolution 573.

Amidst a swell of international support, the United States quickly identified the Al Qaeda terrorist network, with the support of the Taliban

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198. S.C. Res. 1368, supra note 196, ¶ 3.
199. Id. pmbl.
201. Admittedly, the situation differs in exact factual circumstances from the September 11th attacks, but does reflect the general stance of the international community prior to that event. The Security Council was obviously faced with a situation that profoundly differs from the previous incidents where there were limited casualties.
government, as the perpetrators of the September 11th attacks. This was coupled with the recognition that the modern threat to U.S. power and security rises not from one particular organization, but from the growing threat of international terrorism, particularly terrorism that enjoys active or tacit state support. The Security Council’s resolutions following the U.S. attacks on Afghanistan explicitly mention the right of individual and collective self-defence and do not contain any condemnation of the military strikes.206

“Operation Enduring Freedom” in Afghanistan signaled a renewed determination on the part of the United States to combat international terrorism and states that sponsor it; the operation laid fertile ground for debate on the strategic or legal approach that states should adopt in responding to such threats. Strategically, the U.S. military action was based on the “Reagan Doctrine” of swift and effective retribution against terrorist organizations that strike U.S. interests, as well as the “Shultz Doctrine” of active military engagement of terrorists and states that sponsor or support them. Though legally the U.S. justified “Operation Enduring Freedom” under the established doctrine of self-defence, talk from Washington suggested pre-emptive self-defence.

Essentially, the United States did not consider military action against Afghanistan as a formal war against the state but pre-emption of further attacks by terrorists based in that state. As the United States moved against Afghanistan, the highest levels of military, legal, and diplomatic policymakers in Washington began debating how the country should confront states that sponsor terrorism and proliferate weapons of mass destruction. The immediate focus of the debate was U.S. policy towards

204. See Response, supra note 195, at 1140 (“The evidence we have gathered all points to a collection of loosely affiliated terrorist organizations known as Al Qaeda.”).
205. The war on terror “will not end until every terrorist group of global reach has been found, stopped, and defeated . . . From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.” Response, supra note 195, at 1141–42.
207. See Crelinsten & Schmid, supra note 15, at 307, 316. The policy described by Crelinsten and Schmid has clearly been continued by Reagan’s successors. This is evident in Clinton’s air strikes against Iraq for the attempted assassination of George H.W. Bush and his strikes against Sudan and Afghanistan following the embassy bombings in Tanzania and Kenya.
208. For a discussion of the international legal validity of U.S. military action “Operation Enduring Freedom” in Afghanistan, see Beard, supra note 173, at 559.
Iraq. Soon after the military action in Afghanistan, President Bush provoked heated reaction with his “Axis of Evil” speech and its strong overtones of the use of unilateral military action by the United States against countries that support terror, and an intimation of expanding the theatre of operations beyond Afghanistan without Security Council approval.

B. The “Bush Doctrine”

Though the genesis of the “Bush Doctrine” can be traced to the immediate aftermath of the September 11th attacks, it was five months after the “Axis of Evil” speech, on June 1, 2001, that President Bush delivered the fullest exposition of the doctrine in a speech at West Point. Warning that the United States faced “a threat with no precedent” through the proliferation of weapons of mass destruction and the emergence of global terrorism, President Bush stated that the traditional strategies of deterrence and containment were no longer sufficient. Because of the new threats that the United States faced, he claimed that a proper understanding of the right of self-defence would now extend to authorizing preemptive attacks against potential aggressors, cutting them off before they are able to launch devastating strikes. Under these circumstances, he concluded that “[i]f we wait for threats to fully materialize, we will have waited too long.” Expounding on the strategic aspect of the doctrine, President Bush stated that there was a need to “take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge.” In the same address, he went on to tell future U.S. military officers at West Point that “[t]he military must be ready to strike at a moment’s notice in any dark corner of the world. All nations that decide for aggression and terror will pay a price.” That doctrine carried an explicit warning for Iraq and other states that pursue weapons of mass destruction: if a hostile regime pursues the acquisition or development of

210. See id.
211. Nine days after the attacks, U.S. President George Bush announced the new aggressive national policy towards terrorism. See Response, supra note 195, at 1141–42.
212. See West Point Commencement Address, supra note 16.
213. See id.
214. See id.
215. Id.
216. Id.
217. Id.
chemical, biological, or nuclear weapons, the decisive use of pre-emptive military force is a legitimate response.

President Bush spent months building the case for war against Iraq, however his justifications were often confusing and long on rhetoric but short on substance. His primary argument, however, invoked a sweeping new foreign policy based on the right of the United States to pre-emptive self-defence, the need to punish Iraq for not complying with the Security Council resolutions to which it had agreed in exchange for an end to the Gulf War, and the need for massive retaliation. President Bush seemed unsure of the exact contours of his doctrine, tying up pre-emptive strikes with retaliation (which the author avers falls under the rubric of peace time reprisal).

The National Security Strategy document, issued by President Bush in September 2002, asserted:

Deterrence—*the promise of massive retaliation against nations*—means nothing against shadowy terrorist networks with no nation or citizen to defend . . . . Containment is not possible when unbalanced dictators with weapons of mass destruction can deliver those weapons or missiles or secretly provide them to terrorist allies . . . . *If we wait for threats to fully materialize, we will have waited for too long . . . .* In the world we have entered, the only path to safety is the path of action. And this nation will act.219

Though the more modest argument of retaliation may have been the strongest, the U.S. response was increasingly articulated more firmly in favor of anticipatory self-defence:

*For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack.* Legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack . . . .

The U.S. has long maintained the option of pre-emptive actions to counter a sufficient threat to our national security. *The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack.* To fore-


stall or prevent such hostile acts by our adversaries, the U.S. will, if necessary, act pre-emptively.\footnote{220}

The National Security Strategy document referred to the longstanding policy as an option, not a principle.\footnote{221} Interestingly though, the UN Charter, the centre point of the legal framework on the international use of force, was not mentioned, and no attempt was made to anchor the formal articulation of the option within the umbrella of the Charter.

Despite the United States’ maneuverings while formulating a post-September 11th security strategy, it had Iraq firmly in its sights. The United States and its allies continued to put forward what even then was regarded by many as faulty intelligence,\footnote{222} in an attempt to link Iraq to the September 11th attacks.\footnote{223} Before the war, despite international and domestic skepticism, the hawkish Bush administration had already decided that the tragic events of September 11th had altered the context of

\footnote{220. See id.}

\footnote{221. Id. at 15.}

\footnote{222. Dana Priest, \textit{U.S. Not Claiming Iraqi Link to Terror}, WASH. POST, Sept. 10, 2002, at A1 (reporting that CIA analysts are unable to validate allegations that the Iraqi government has ties to Al Qaeda); Walter Pincus, \textit{No Link Between Hijacker, Iraq Found, U.S. Says}, WASH. POST, May 1, 2002, at A9; Kenneth M. Pollack, \textit{The Threatening Storm: The Case for Invading Iraq} xxi–xxiii (2002); see also John Kampfner, \textit{Blair’s Wars} (2003); No 10 Denies Straw Had War Doubts, GUARDIAN (U.K.), Sept. 15, 2003, available at http://www.guardian.co.uk/uk_news/story/0,3604,1042511,00.html; Matthew Tempest, Hoon Regrets “Misunderstanding,” GUARDIAN (U.K.), Sept. 11, 2003, available at http://politics.guardian.co.uk/iraq/story/0,12956,1039958,00.html (alleging that documents used to bolster the United States’ claims that Iraq presented a nuclear threat were crudely-forged documents relating to Iraqi attempts to buy uranium from Niger).}

\footnote{223. Secretary of State Colin Powell admitted that he was unaware of any “smoking gun” linking Iraq to the September 11th attacks. Notwithstanding Powell’s admission, President Bush and other senior U.S. government officials continued to rally around questionable intelligence. They sheepishly admitted months later, after the war in Iraq was officially over, what most states suspected all along—there was no link between Iraq and the September 11th attacks. Bill Keller, \textit{The World According to Colin Powell}, N.Y. TIMES MAG., Nov. 25, 2001, at 61. On September 17, 2003, President Bush stated that there was no evidence that Saddam Hussein was involved in the terrorist attacks of September 11, 2001, disputing an idea held by many Americans. This came a day after his hawkish Defense Secretary, Donald Rumsfeld, said he had not seen any evidence that Saddam was involved in the attacks. The National Security Adviser came out in support of the Bush and Rumsfeld sentiments, saying “[w]e have never claimed that Saddam Hussein had either direction or control of 9/11.” Greg Miller, \textit{No Proof Connects Iraq to 9/11, Bush Says}, L.A. TIMES, Sept. 18, 2003, available at http://www.globalpolicy.org/security/issues/iraq/justify/2003/0918proof.htm.}
The United States-Iraq confrontation. The resulting U.S. shift to an aggressive Iraq policy forced it to advance rather dubious legal justifications for a full-scale invasion. Relying on the multifaceted “Bush Doctrine,” the policy advocates pre-emptive or preventive strikes against terrorists, states that support terrorists, and hostile states possessing weapons of mass destruction.

The United States’ new aggressive anti-terror campaign began with multilateral condemnation of terrorism. The United States and the United Kingdom successfully encouraged the UN Security Council to pass Resolution 1441, which gave Iraq a final opportunity to comply with its disarmament obligations through weapons inspections. Impatient with the slow pace of the UN weapons inspection process, the United States soon assumed that Iraqi was involved in terrorist activity and that Iraqi capacity for weapons of mass destruction persisted.

The U.S. national security officials were adamant in their commitment to act fast and to act alone and increasingly balked at UN control over the use of force against rogue states that present perceived security threats. The end-game of this debate was cemented by President Bush when he announced that “the policy of [the U.S.] government is the removal of Saddam [Hussein].” This announcement effectively cut off all future multilateral activities with the UN.

Possibly, in light of the dubious intelligence linking Iraq to the September 11th attacks, the United States cited Iraq’s capacity to use weapons of mass destruction as an additional justification for self-defensive anticipatory intervention against Iraq. Self-defence, it was suggested,

224. Pollack, supra note 222, at xxi–xxii.
225. S.C. Res. 1441, ¶¶ 1, 13, U.N. Doc. S/Res/1441 (Nov. 8, 2002). The UN Security Council unanimously passed Resolution 1441. The resolution declares Iraq to be in material breach of its obligations under past UN mandates. It also informs Iraq it will face “serious consequences” if it fails to cooperate. It is questionable whether it authorises a member-state to unilaterally take action in the event of further non-compliance.
226. Much debate abounds about the credibility of the U.S. evidence regarding Iraq’s links to Al Qaeda. The issue of the possession of weapons of mass destruction, the quantity and nature is yet another controversy. Admittedly, it is difficult to conclude one way or the other but what stands out is the fact that the international community remained divided over the matter right up to the day of military action.
227. See generally National Security Strategy, supra note 16.
229. Traditionally, anticipatory or pre-emptive self-defence has not been favoured under international law. See Byers, supra note 203, at 410. However, the notion of pre-emptive “counter-proliferation” forms an important part of the new U.S. national security strategy. See National Security Strategy, supra note 16.
also fueled the need for internal “regime change” in Iraq and U.S. support of such change.\textsuperscript{230} In March 2003, without waiting for the UN Security Council to declare Iraq in breach of Resolution 1441 and, thus, a threat to international peace and security for which the Council could explicitly authorize military intervention,\textsuperscript{231} the United States and its allies proceeded with military action against Iraq premised on pre-emptive or anticipatory self-defence. The technologically superior U.S. army waged a highly-organized, technical “shock and awe” campaign that impressed an otherwise angry international community, and drove Saddam Hussein out of power.\textsuperscript{232} The war against Iraq was to be the defining moment in the evolution of the “Bush Doctrine,” marking a growing coherence and confidence in the strategy of “offensive defense.”

Despite the United States’ focus on pre-emptive intervention, the action against Iraq and the United States’ subsequent occupation was undertaken against a background of vehement opposition from a large section of the international community, including some major powers.\textsuperscript{233} If Afghanistan had set the stage for the evolution of anticipatory self-defence, the overbreadth of the U.S. action in Iraq action dismantled it.

The regime on force does not support the operationalisation of pre-emptive self-defence against Iraq as it did in Afghanistan, and the circumstances surrounding U.S. intervention in Iraq differ fundamentally from those in Afghanistan. The United States did not conclusively prove that Al Qaeda maintained Iraqi training bases or that it received financial, logistic, or military support from the Iraqi government.\textsuperscript{234} The strategic and legal calculus for action in Iraq did not compare favorably to that which motivated U.S. action in Afghanistan in late 2001. Unlike the


\textsuperscript{231} See U.N. Charter arts. 39, 42. A plain reading of Resolution 1441 suggests that there would be another UN Security Council meeting in the event of an Iraqi breach, at least to discuss the inspectors’ report, at which point the use of force could be authorised. On the other hand, the use of fuzzy and ambiguous language could be read as supporting the notion that the Security Council is allowing individual states greater interpretive latitude in deciding when force can be used.

\textsuperscript{232} Maogoto, \textit{Rushing to Break the Law}, supra note 31, at 17.

\textsuperscript{233} \textit{Id.} at 11.

\textsuperscript{234} \textit{Id.} at 9.
questionable connection between Iraq and the September 11th attacks, there were clear ties between the terrorists involved in the U.S. attacks and the government of Afghanistan.\textsuperscript{235}

Not surprisingly, military action against Iraq has split the international community and inflamed the world’s major powers, as it raises both policy and legal matters. Considering that the use of armed force can only be justified under the international law regime when used in self-defence, can the United States go beyond the rhetoric and actually carry the war on terror to those rogue nations who are identified as supporters and sponsors of terrorist activities, but have not physically engaged in an act of aggression against the United States?\textsuperscript{236} The convergence of international terrorism and weapons of mass destruction presents a grave threat to international peace, security, and prosperity by threatening the survival of entire nations. This threat multiplies exponentially when governments foster and encourage these dual scourges. However, the aggressive “Bush Doctrine” is disturbing because an old problem in contemporary international law (anticipatory self-defence) is being touted as a newly appropriate vehicle in the war against international terrorism, despite the prevailing view in the international community that the “armed attack” requirement in Article 51 of the UN Charter superseded any pre-existing right of anticipatory action.

The old truism that “international law is not a suicide pact,” may be forceful in “an age of uniquely destructive weaponry,”\textsuperscript{237} however, “strategically, there is little precedent for a major U.S. military offensive against a state that has not proximately used force against [the United States].”\textsuperscript{238} While a number of legitimate justifications might permit the use of force, the international legal system does not currently provide a legal outlet for such force.\textsuperscript{239} “An international law doctrine, under which the [United States] could execute the military campaign it successfully launched against Iraq, does not currently exist. That lacuna was seemingly plugged with the ‘Bush Doctrine,’ that advocates pre-emptive strikes against rogue states and/or entities involved in terrorism.”\textsuperscript{240}

\textsuperscript{235} Id. at 11.

\textsuperscript{236} See generally Jeffrey F. Addicott, \textit{Legal and Policy Implications for a New Era: The “War on Terror,”} 4 SCHOLAR 209 (2002).


\textsuperscript{238} Maogoto, \textit{New Frontiers, Old Problems: The War on Terror}, supra note 11, at 14.

\textsuperscript{239} Id.

\textsuperscript{240} Id.
Doctrine’s reliance on the premise of pre-emptive self-defence resurrects the idea of a “right of self-preservation” that fell into disuse in the early part of the twentieth century with the prohibition of war and the legal demarcation of the limits of the right to self-defence outlined in the UN Charter.\(^{241}\)

C. Reflections on the Use of Force as a Counter-Terrorism Measure in Light of the UN Charter

1. Armed Attack and Self-Defence

Contrary to the intentions of the authors of the UN Charter, the system of collective security has been of little practical significance, and state aggression continues to be determined by the unilateral use of force by states.\(^{242}\) Commentators argue that, because the customary right of self-defence includes action beyond armed attack, military force may be legally available as an option against terrorists, even if an armed attack has not occurred.\(^{243}\)

This view holds that the presence of an armed attack is one of the bases for the exercise of the right of self-defence under Article 51, but not the exclusive basis.\(^{244}\) The sentiments of these commentators are also reflected by some major states.\(^{245}\) In support of such an expansive interpretation of “armed attack,” certain international legal scholars “believe that state sponsorship and support of international terrorists constitutes a use of force contemplated by Article 2(4).”\(^{246}\) This is not an entirely idle argument considering that the scope and content of the prohibition of the use of force in contemporary international law cannot be determined by

\(^{241}\) See id.

\(^{242}\) See Schachter, The Right of States to Use Armed Force, supra note 27, at 1620.

\(^{243}\) See, e.g., Christopher Greenwood, International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaeda and Iraq, 4 SAN DIEGO INT’L L.J. 7, 12 (2003) (“Although Article 51 refers to the right of self-defense “if an armed attack occurs,” the United Kingdom and the United States have consistently maintained that the right of self-defense also applies when an armed attack has not yet taken place but is imminent. This view of self-defense can be traced back to the famous Caroline incident of 1837.”).

\(^{244}\) See James P. Terry, Countering State-Sponsored Terrorism: A Law-Policy Analysis, 36 NAVAL L. REV. 159, 170–71 (1986); Schachter, supra note 27, at 1633–34.

\(^{245}\) See Maogoto, New Frontiers, Old Problems: The War on Terror, supra note 11, at 30–32 (“... Israel and the U.S. have been particularly notorious in seeking to rely upon the concept of anticipatory self-defence on numerous occasions ...”).

\(^{246}\) See Richard Erickson, Legitimate Use of Military Force Against State-Sponsored International Terrorism 113 (1989).
an interpretation of Article 2(4) alone. Rather, the provision must be read in context with Articles 39, 51, and 53. These articles contain a number of terms that, though related to one another, differ considerably in their meaning. Thus notions such as “use or threat of force,” “threat to the peace,” “breach of the peace,” “act of aggression,” “armed attack” and “aggressive policy” are used but do not receive any further explanation in the Charter. Neither legal writing nor state practice has clarified these terms beyond doubt. Nor have attempts within the framework of the United Nations led to a satisfactory interpretation. Therefore, there is still no sound basis for redefining the Charter’s prohibition of the use of force.

State practice (albeit restricted to only a few states, notably the United States and Israel) seems to support the view that terrorist bombings may constitute an armed attack justifying self-defence under Article 51. For example, the United States justified its cruise missile attack against Sudan and Afghanistan following the 1998 terrorist bombings of the U.S. embassies in Tanzania and Kenya as an exercise of self-defence. The United States has considered terrorist bombings to be armed attacks for some time and has accordingly justified several U.S. military actions against states that have supported terrorists.

It is significant that the Security Council characterized the terrorist acts as “armed attacks.”

In the aftermath of the events of September 11, 2001, it is also necessary to ask whether the concept of “armed attack” in Article 51 of the Charter is capable of including a terrorist attack . . . . There is, however, no a priori reason why the term should be so confined. There is no doubt that terrorist acts by a state can constitute an armed attack and thereby justify a military response. The UN General Assembly included certain types of terrorist activity committed by states in its definition of aggression in 1974. Similarly, the International Court of Justice, in its judgment in the Nicaragua case in 1986, considered that covert military action by a state could be classified as an armed attack if it was of suf-

The level of violence employed on September 11, 2001 undoubtedly reached that level of gravity. This view was expressly affirmed by other international bodies including NATO and the OAS. This characterization may lead one to conclude that:

The international reaction to the events of September 11, 2001 confirms the commonsense view that the concept of armed attack is not limited to state acts. The UN Security Council, in its resolutions 1368 and 1373 (2001), adopted in the immediate aftermath of the attacks, expressly recognized the right of self-defense in terms that could only mean it considered that terrorist attacks constituted armed attacks for the purposes of Article 51 of the Charter, since it was already likely, when these resolutions were adopted, that the attacks were the work of a terrorist organization rather than a state.

By recognizing the “inherent right of individual or collective self-defence” in the preambles of Resolution 1368 and Resolution 1373, the Security Council acknowledged that self-defence motivated the military strikes against the Taliban in 2001.

Nothing in the language of Article 39 or the rest of the Charter suggests that only threats emanating from states can fall within its scope. In recent years, the Security Council has had no hesitation in treating acts of international terrorism, whether or not “state-sponsored,” as threats to the peace for the purposes of Chapter VII of the Charter. Thus, even before September 11, 2001, the Council had characterized as a threat to international peace and security Libyan support for terrorism.

252. Greenwood, supra note 243, at 17.
254. Greenwood, supra note 243, at 19.
The main question is how the events of September 11th affect the interpretation of the “armed attack” requirement under the UN Charter. Despite the assertion above, in the author’s view, the Security Council’s statement implies that the difficult question of whether the terrorist attacks constituted “armed attacks” depends on interpretation. As this author has noted:

Resolution 1368 is ambiguous on the issue. In its preamble, Resolution 1368 “recognises the inherent right of individual or collective self-defense in accordance with the Charter,” but in the operative part of the resolution describes the attacks as “terrorist attacks” (not armed attacks) that “represent a threat to international peace and security.” In summary, Resolution 1368 . . . does not explicitly recognise that the right of self-defense applies in relation to any parties as a consequence of the September 11 attacks.255

Even if the right of self-defence extends beyond the “armed attack” of Article 51, serious hurdles must be overcome before a traditional theory of self-defence can be used to justify attacks against terrorists or terrorist facilities located in another state. If the anticipated action by terrorists is not sufficiently imminent, the right to use force is not available for purposes of deterrence.256 Some argue that even if the right of self-defence extends beyond the “armed attack” requirement of Article 51, the UN Charter would not permit the use of force to punish an aggressor after a threat had passed, nor permit the use of force to deter a less than imminent threat.257 In any case,

if past terrorist actions by a group are too remote in time, the response by force is likely to be characterized as an illegal reprisal. It appears that if a right to use force in self-defense exists apart from an armed at-

255. Jackson Maogoto, War on the Enemy: Self-Defense and State-Sponsored Terrorism, 4 MELB. J. INT’L L. 406, 434 (2003). By “recognizing the inherent right of individual or collective self-defense in accordance with the Charter,” the preambular paragraph of Resolution 1368 appeared to imply that the terrorist acts in New York, Washington, and Pennsylvania represented an “armed attack” within the meaning of Article 51 of the UN Charter. A similar preambular paragraph was also included in Resolution 1373. Resolution 1373, supra note 253.

256. Terry, supra note 244, at 171. In his article, Terry makes the point that, given the rapid delivery capabilities of terrorist organisations, it is unrealistic to require that a state wait until an attack is imminent before responding. The Israelis used similar arguments to justify their attack on the Iraqi nuclear facility at Osirak and these arguments were rejected by the United Nations and the world community. See O’Brien, supra note 76, at 450–51.

tack, it is a right that presents a very narrow window of opportunity. In fact, this window of opportunity, under the traditional criteria for self-defense, will almost never exist in the context of terrorist attacks. The traditional requirements for self-defense are simply too restrictive to reasonably respond to the threat posed by international terrorism. 

2. Pre-emptive Self-Defence

Under customary international law, the right of self-defence was judged by the standard first set out in the 1837 case of the Caroline, which established the right of a state to take necessary and proportional actions in anticipation of a hostile threat. Based on the Caroline incident, anticipatory self-defence must be “necessary,” “proportional,” and take place “immediately.” As noted elsewhere in this Article, Article 51 of the UN Charter is generally taken as an authoritative definition of the right of self-defence. However, scholars and states alike have continued to debate whether the enactment of Article 51 subsumed customary international law and extinguished the concept of anticipatory self-defence, or whether it simply codified a right that continues to exist with all its attendant doctrines under customary international law. The answer is in the interpretation.

Proponents of the continuing customary right to pre-emptive self-defence have cited the impracticability of applying a literal interpretation of Article 51 in an age of advanced weapons, delivery systems, and heightened worldwide terrorist activity. Adherents argue the absurdity

258. Id. at 165–66.
259. 2 J OHN BASSET MOORE, A DIGEST OF INTERNATIONAL LAW 409–14 (1906). The “affair of the Caroline” involves a U.S. ship, the Caroline, being used by U.S. citizens to transport reinforcements to Canadian territory in support of insurgents battling Great Britain’s rule. Id. at 409. A small British force crossed into U.S. territory and destroyed the Caroline. Id. at 409–10. Great Britain defended its action on the grounds that it was a necessary act of self-defence. Id. at 410. The case is illustrative of a state’s right to undertake necessary actions in “anticipatory” self-defence of an impending, though not necessarily imminent, hostile attack. Another case on point is the Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9), which has been cited for the proposition that the International Court of Justice recognised a residual right to reprisal remaining in the international legal order, the Charter of the United Nations notwithstanding. Roda Mushkat, Is War Ever Justifiable? A Comparative Survey, 9 L OY. L.A. INT’L & COMP. L. REV. 227, 252 (1987).
of requiring a state to refrain from taking action on its own behalf when an opposing state is preparing to launch an attack.262 Given the devastating potential of modern weapons and the swiftness of delivery to their intended targets, denying a state the right to act in advance of a pending attack effectively denies any defence at all. The same rationale applies to states threatened with impending terrorist attacks on their citizenry or property.

Some scholars have noted that it cannot be supposed that the inviolability of territory is so sacrosanct as to mean that a state may harbor within its territory the most blatant preparation for an assault upon another state’s independence with impunity; the inviolability of territory is subject to the use of that territory in a manner which does not involve a threat to the rights of other states.263 Further supporting this position is that there is no literal requirement under Article 51 that a foreign government itself directly undertake the attack to which a state responds. Thus, the harboring of terrorists may give rise to legitimate, legal justification for anticipatory military intervention. Any such claim, however, is still fundamentally one of self-defence, and still restricted by threshold requirements, including imminence, necessity, and proportionality.264

Some scholars have gone as far as to argue that a right of truly anticipatory self-defence has emerged outside of Article 51, based not on pre-existing customary law, but on the availability of weapons capable of mass destruction.265 Thomas Franck accounts for the emergence of a viable doctrine of anticipatory self-defence through

the transformation of weaponry to instruments of overwhelming and instant destruction. These [weapons] brought into question the conditionality of Article 51, which limits states’ exercise of the right of self-

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263. BOWETT, supra note 64, at 191–92; see also ERICKSON, supra note 245, at 109.
265. BOWETT, supra note 64, at 191–92; see also ERICKSON, supra note 246, at 142–43.
defense to the aftermath of an armed attack. Inevitably, first strike capabilities begat a doctrine of “anticipatory self-defense.”

Other scholars opine that in a nuclear age, there are potentially devastating consequences for prohibiting self-defence unless an armed attack has already occurred, leading states to prefer the interpretation permitting anticipatory self-defence. Christopher Greenwood argues further that this view accords better with state practice and with the realities of modern military conditions than with the more restrictive interpretation of Article 51, which would confine the right of self-defence to cases in which an armed attack had already occurred.

Greenwood goes on to undertake a critical analysis of “Operation Enduring Freedom” against the benchmarks of “necessity,” “proportionality” and “imminence.” He notes:

The pre-emptive action that the United States and its allies took against Al-Qaeda in Afghanistan was a lawful exercise of the right of self-defense. It would, however, be a mistake to assume that self-defense would cover every military action that the United States or an ally might want to take against Al-Qaeda (or other terrorist groups) in other countries. The use of force in Afghanistan fell within the concept of self-defense because the threat from Al-Qaeda was imminent and because Afghanistan was quite openly affording sanctuary to large numbers of Al-Qaeda personnel. These considerations will not necessarily be present in every case.

There are, of course, debates as to whether “Operation Enduring Freedom” met the benchmark of proportionality. The U.S. case is not helped by calls for “regime change” in relation to rogue states which the United States is keen to put out of business, especially when they seek to develop or acquire weapons of mass destruction. Assuming for the moment that the U.S.-led operation in Afghanistan simply altered the balance of power in the civil war, when we juxtapose “Operation Enduring Freedom” against “Operation Iraqi Freedom,” significant legal questions are left open. As Michael J. Kelly notes:

Unilaterally, the United States articulated its right to act preemptively to eliminate the threat posed by a potentially nuclear-armed Iraq. How-

268. Id.
269. Id. at 25.
ever, because the existence of an imminent threat could not be estab-
lished, when the president brought the old anticipatory self-defense
document back to life, he eliminated that threshold and replaced it with
the showing of only an “emerging” threat.270

Kelly further avers that, in the absence of a link between Iraq and Al
Qaeda, the United States sought a doctrine that would legitimize an at-
tack on Baghdad.271 Considering that

a plain reading of Article 51 disallows striking Iraq absent an armed at-
tack, the Bush Administration is required to return to the legal history
books and pull out another disused doctrine to justify any unilateral
military action it may take. The one that seems to fit best, albeit imper-
fectly, is the doctrine of anticipatory self-defense.272

Notwithstanding the allure of a policy of anticipatory self-defence,
there is little basis for such an extension of the UN Charter’s right to self-
defence. In justifying its attacks on Iraq, the United States relied on the
concept of anticipatory self-defence, while seeking to dilute the Charter’s
prohibition with customary international law. UN Charter aside, there is
no basis in international law to support the doctrine of “pre-emption”
embracing a right to respond to threats that might materialize at some
time in the future. The test is clear—imminence, which connotes imme-
diacy, is required to trigger self-defensive actions. A broad right of an-
ticipatory self-defence premised on a new standard of “emerging threat”
would introduce dangerous uncertainties relating to the determination of
potential threats justifying pre-emptive action. With this determination
being state-based, the probability of opportunistic interventions justified
as anticipatory self-defence will rise. After all, the reality is that only
states with the military muscle will be able to make use of this avenue,
and unilateral action will inevitably be colored by national interest con-
siderations. The development of such a right will likely prompt potential
targets into striking first—to use rather than lose their biological, chemi-
cal, and nuclear weapons.

3. Reprisals

With regard to reprisals, the text of the UN Charter represents a con-
ventional rejection of the just-war theories of retribution abandoned in

271. Id. at 22.
272. Id.
the seventeenth century. The purpose of the United Nations is to limit the use of force in international matters and to provide a forum for the resolution of conflict so as to prevent the need for war. In the history of the United Nations, there have been authoritative condemnations of both pre-emptive and retaliatory reprisal actions. It seems safe to conclude that both are widely expected to be inconsistent with the purposes of the United Nations and are, therefore, proscribed under Article 2(4) of the UN Charter.

Previous military actions by the United States against terrorist-supporting states elicited varying responses from the international community and the United Nations. In the case of the 1986 raid on Libya, the United States was largely condemned. The UN General Assembly adopted a resolution condemning the United States for the attack by a vote of 79-28, with 33 abstentions. The UN Secretary General, Javier Perez de Cuellar, stated that the U.S. action violated international law. Though a UN Security Council resolution echoing the General Assembly’s sentiment was vetoed by the United States, the United Kingdom, and France, France did call the air strikes “reprisals that itself revives the chain of violence.” In contrast, the United States’ 1993 cruise missile attack on Baghdad in response to the foiled Iraqi assassination attempt on former President Bush was met with support or tacit acquiescence.

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273. See U.N. 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.”); U.N. Charter art. 2, para. 4 (“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).


275. Maogoto, New Frontiers, Old Problems: The War on Terror, supra note 11, at 34.


response to the U.S. presentation before the UN Security Council, the representatives of other member states either expressed support for the U.S. action or refrained from criticizing it; only China questioned the attack.280 The General Assembly took no action.

Five years after the cruise missile attacks on Baghdad, world reaction to the 1998 U.S. strikes against terrorist targets in Afghanistan and Sudan was mixed. Western European nations supported the U.S. actions to varying degrees, while Russian President Boris Yeltsin declared he was “outraged” by the “indecent” behavior of the United States.281 China issued an ambiguous statement condemning terrorism, and Japan said it “understood [the United States’] resolute attitude towards terrorism.”

The aforementioned incidents were wrapped up in the rhetoric of self-defence and retaliation, leading to the observation that, although the prevailing view is that reprisals are illegal, states may still engage in them.

For example, the 1986 bombing of Libya is cited as a peacetime reprisal and not an act of self-defense. Therefore, while writers state emphatically that reprisals are illegal, state practice continues to resort to them on occasion, cloaking them in terms of self-defense while remaining careful to comply with Naulilaa criteria.

V. CONCLUSION

The international community has long been uneasy with the use of military action as a counter-measure against terrorism. In 1986, when the United States bombed Libya in response to a terrorist act, President Reagan called the action “pre-emptive” on the ground that there was already a pattern of Libyan terrorist actions.284 The justification did not go over well with the international community. Roughly a decade later, in 1998, after terrorist attacks on U.S. embassies in Kenya and Tanzania, the United States fired cruise missiles on Sudan and Afghanistan.285 President Clinton argued that there was compelling evidence that the Al Qaeda terrorist network was planning to mount further attacks against

282. See id.
284. Reagan: We Have Done What We Had to Do, WASH. POST, Apr. 15, 1986, at A23.
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Americans, and he was thereafter entitled to act. 286 Apart from a few western governments, which approved or kept quiet, most states condemned the Clinton air strikes. 287 Conversely, the 2001 U.S. bombing of Afghanistan was widely supported by the international community. But in 2003, when the United States launched military action against Iraq, it did so against a background of protests from a large section of the international community, “squandering away the legal and moral capital it had gained in the action against Afghanistan.” 288

The attacks of September 11th, the response by the United States, and the international community’s approval of the military action in Afghanistan represent a new paradigm in international law relating to the use of force. Previously, acts of terrorism were seen as criminal acts, carried out by private, non-governmental entities. 289 In contrast, the September 11th attacks were regarded as an act of war. 290 This effectively marked a turning point in the long-standing premise in international law that force, aggression, and armed attacks are instruments of relations between states. 291 Terrorism was no longer merely a serious threat to peace and stability to be combated through domestic and international penal mechanisms; use of force is now seen as an attractive and satisfying countermeasure in managing terrorism. However, subsequent U.S. military action in Iraq was shrouded in confusing legal justifications and questionable, even faulty evidence. This has raised skepticism among scholars and the international community that self-defence was used and misused, thus preventing the evolution of any meaningful state practice.

As a result of the United States’ aggressive policy, certain discarded pre-UN Charter doctrines are being revived in one form or the other, notably the concept of pre-emptive or anticipatory self-defence. Some critics have warned against the inherent dangers of resurrecting such pre-Charter doctrines, noting that:


287. Maogoto, New Frontiers, Old Problems: The War on Terror, supra note 11, at 32.


290. Id. at 431, 433.

One of the very reasons the world community decided to do away with them was to reduce legal justifications for, and thus the possibility of, unilateral military action. The pre-Charter doctrines were used erratically and unreliably prior to 1945. Now, if these doctrines are returned to service by the world’s superpower and are allowed to pass into customary practice once again, we will find ourselves in a time warp back to 1945—a period of fear, uncertainty and suspicion; a period of global dominance by a handful of nations; a period defined by the geopolitics of raw power and militaristic influence; a period of instability devoid of collective security. Even more disturbingly, some of the re-articulated rules have been watered down to allow more latitude in unilateral action.292

However in a spirited defence of pre-emptive action, other scholars assert: “Waiting for an aggressor to fire the first shot may be a fitting code for television westerns, but it is unrealistic for policy-makers entrusted with the solemn responsibility of safeguarding the well-being of their citizenry.”293 However, these critics are missing the central point—when military action is undertaken, things get real—real bombs, real missiles, real deaths. Unilateral state sponsored military action must not be based on mere apprehension backed by dubious or unclear intelligence. Once the military action is over it cannot be unmade by commissions of inquiries or concessions that perhaps a few facts were overstated. UN Secretary General Kofi Annan, in remarks regarding anticipatory self-defence during the opening of the 58th session of the UN General Assembly in September 2003, summed up the dilemma thus:

Article 51 of the Charter prescribes that all States, if attacked, retain the inherent right of self-defense. But until now it has been understood that when States go beyond that, and decide to use force to deal with broader threats to international peace and security, they need the unique legitimacy provided by the United Nations.294

Annan concluded that in light of the reality of weapons of mass destruction, “We have come to a fork in the road. This may be a moment

292. Kelly, supra note 87, at 3.
no less decisive than 1945 itself, when the United Nations was founded.”

The UN Charter seems to present a neat and tidy regime on the use of force. Nonetheless it reflects the drafters’ singular focus on creating a political system to govern conflicts between states and does not directly address the subtler modes in which terrorists began to operate in the post-World War II period. The drafters did not contemplate the existence of international terrorists nor “fully anticipate the existence, tenacity and technology of modern day terrorism.” In view of the fact that terrorist groups appear to have reached a global sophistication, there is little doubt that international terrorism presents a threat with which traditional theories for the use of military force are inadequate to deal, and were unanticipated when the UN Charter was drafted. The international community has no option but to develop new strategies within the rubric of international law to deal with terrorism and the reality that international law seems to restrict the use of military force to actions in self-defence.

295. Id.
IMMUNITY OR IMPUNITY?
THE POTENTIAL EFFECT OF
PROSECUTIONS OF STATE OFFICIALS FOR
CORE INTERNATIONAL CRIMES IN STATES
LIKE THE UNITED STATES THAT ARE NOT
PARTIES TO THE STATUTE OF THE
INTERNATIONAL CRIMINAL COURT

Mark A. Summers*

I. INTRODUCTION

Hugo Grotius, often called the father of international law,¹ would
be shocked to learn that in the 21st century the international
community asserts the right to prosecute state officials for international
crimes. Only since World War II has international law expanded to im-
pose individual criminal responsibility on state officials.² A series of in-
ternational criminal law conventions has been adopted which obligates
states to extradite or prosecute international criminals found within their
territories, regardless of where the crimes were committed.³ International
tribunals have been created to deal with the most heinous crimes and the
most prominent wrongdoers, while national tribunals, which are left to
prosecute the lesser malefactors, remain an integral part of this develop-
ing system of international criminal law enforcement.⁴

This substantial progress notwithstanding, few convictions of interna-
tional criminals would have been possible if traditional concepts of state

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2. See, e.g., infra Part II.D, Part V.
3. See, e.g., Single Convention on Narcotic Drugs art. 36(2)(a)(iv), Mar. 30, 1961,
520 U.N.T.S. 151; Convention for the Suppression of Unlawful Acts Against the Safety
of Civil Aviation art. 6(1), Sept. 23, 1971, 974 U.N.T.S. 177; International Convention
Against the Taking of Hostages art. 6(1), Dec. 17, 1979, 1316 U.N.T.S. 205; Convention
Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art.
4. See infra notes 127–28 and accompanying text.
immunity had continued to be recognized by the courts, because until the middle of the last century, the immunity of a state and its ruler from the jurisdiction of another state’s courts was regarded as absolute, as per Louis XIV’s famous quip, “L’état c’est moi.” Fortunately, in the latter half of the 20th century, cracks began to appear in the doctrine of absolute immunity for states and state officials. Accordingly, a state’s immunity was limited to its noncommercial, public, or in other words, official acts. As a result, the immunity of state officials developed into two branches: absolute immunity, known as *ratione personae* or inviolability, which applied to heads of state and some other state officials during their terms in office, and a more limited form of immunity, known as *ratione materiae* or subject matter or functional immunity, which shielded all state officials from the jurisdiction of another state’s courts for acts committed in their “official capacities.” In 2002, the International Court of Justice (ICJ) had its first opportunity to address the issue of state official immunity in *Democratic Republic of Congo v. Belgium*. Faced with the question whether Belgium’s issuance of an arrest warrant for Congo’s foreign minister violated international law, the Court held that the inviolability from the jurisdiction of another state’s courts that attached to an incumbent foreign minister prohibited another state from engaging even in preliminary acts of investigation and prosecution for core international crimes during the foreign minister’s term of office. In so doing, the Court rejected the argument that a customary law of state official immunity had developed since World War II so as to include an exception applicable in national courts for the most serious, or core in-

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5. See Tachiona v. Mugabe, 169 F. Supp. 2d 259, 279 (S.D.N.Y. 2001) (“Efforts to define the concept of international crime and the reach of human rights, and to hold violators accountable, would amount to no more than emblematic gestures unless those reforms were accompanied by a corresponding dismantling of the long-standing doctrinal bastions that have impeded the exercise of domestic and international jurisdiction over state officials for violation of the new standards.”).


7. Yoram Dinstein, *Diplomatic Immunity from Jurisdiction Ratione Materiae*, 15 Int’l & Comp. L.Q. 76, 80 (1966) (“[D]iplomatic immunity *ratione materiae* and *ratione personae* became sharply distinguished from one another: the former consists of a permanent substantive immunity from the applicability of local law while the latter merely comprises a transitory procedural exemption from judicial process.”).


9. See id. at 21.
international crimes, treating state official immunity as an area of settled law, instead of a developing rule with parameters that are still unclear.

This Article will focus on the impact of the ICJ’s decision on the immunity of state officials from prosecution for core international crimes in national courts and its interrelationship with the jurisdiction of the International Criminal Court (ICC). Its basic premise is that the decision in Congo v. Belgium can plausibly be read to mean that the immunities of state officials from prosecution for core crimes in national courts remains intact. As a result, there is a danger that national courts will apply Congo v. Belgium to immunize state officials charged with core crimes. And, since the jurisdiction of the ICC is complementary, or secondary, to that of the states, it must defer to any state, even a non-party to the treaty, that in good faith investigates and/or prosecutes a crime within its jurisdiction. In these circumstances the ICC can claim the right to prosecute, only when a state is “unwilling or unable genuinely to carry out the investigation or prosecution.” The ICC Statute, while it abrogates state official immunity for the core crimes within its jurisdiction, preserves those same immunities for non-party states. In light of Congo v. Belgium, could it plausibly be argued that a state prosecution lacked genu-

12. Cf. Joseph W. Dellapanna, Head-of-State Immunity—Foreign Sovereign Immunities Act—Suggestion by the Department of State, 88 AM. J. INT’L L. 528, 531 (1994) (“We are left, then, with an at best amorphous legal doctrine [(head of state immunity)] whose very existence is not entirely settled in U.S. law and whose reach is almost completely uncertain.”); Jerrold L. Mallory, Note, Resolving The Confusion Over Head of State Immunity: The Defined Rights of Kings, 86 COLUM. L. REV. 169, 177 (1986) (“While a survey of the international community’s approach to head of state immunity reveals wide agreement that heads of state are entitled to some immunity, there is no consensus on the extent of that immunity.”).
14. Id. art. 17(1)(a).
15. Id.
16. Compare id. art. 27 (stating the irrelevance of official capacity with regard to criminal liability), with art. 98(1) (asserting the ICC’s inability to require States to act inconsistently with their international obligations).
ineness if it extended immunity to a state official who committed international crimes?

The Article will first briefly trace the development of state official immunity until the passage of the Foreign Sovereign Immunities Act (FSIA) by the United States Congress in 1976. At this watershed, state immunity diverged from state official immunity. Thereafter, until the decision in *Congo v. Belgium*, courts in the United States struggled with and divided over how to resolve questions of state official immunity, demonstrating the need for clear guidance on this issue. Instead of providing the needed clarity, *Congo v. Belgium* did the opposite since it is susceptible to equally possible interpretations: 1) that there is no exception to state official immunity for core crimes in national courts; or 2) that there is an exception to the immunity of state officials in national courts when they are charged with core crimes. A dissection of the sources on which the ICJ relied resolves this quandary by revealing that the latter interpretation is the more viable. Finally, the Article will examine the immunity provisions of the ICC Statute and demonstrate how officials from states, like the U.S., that are not parties to the ICC Statute could permanently escape the jurisdiction of the ICC.

II. THE CUSTOMARY INTERNATIONAL LAW OF SOVEREIGN IMMUNITY

A. The State and the Sovereign are One

Initially, there was no distinction between the immunities that a state and its ruler enjoyed from the jurisdiction of foreign courts. In this form of “absolute” immunity, the term “absolute” had dual significance: 1) there was “absolute” identity between the state and its ruler; and, 2) both were “absolutely,” i.e., without exception, immune from the juris-

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18. Since the passage of the FSIA, U.S. courts have struggled with the question whether it or a common law immunity controls in suits naming sitting heads of state. See infra Part II.C–D.
20. For example, in the seminal United States Supreme Court case, *The Schooner Exchange v. McFaddon*, Chief Justice Marshall refers to the state (France) anthropomorphically as “NAPOLEON, the reigning emperor of the French,” or the “prince,” or by the personal pronoun, “he.” *The Schooner Exchange v. McFaddon*, 11 U.S. 116 passim (1812).
diction of another state’s courts. At this stage of the development of sovereign immunity, it was a rule based on reciprocity, convenience, and practicality predicated on the consent of all sovereigns not to exercise the absolute sovereignty they enjoyed over conduct within their territories.

B. The Twentieth Century: Separation Anxiety

Over the next century, the model of the United States—anti-monarchical and pro-democratic—led to a rapid decline in the number of monarchies, and, even in countries like Great Britain where monarchs remained, the powers and functions of government shifted away from the king or queen to an elected government. Thus, by the middle of the twentieth century, state immunity had begun to separate from head of state immunity, and diplomatic immunity emerged as a distinctly separate branch of the law.

As states, or state-created entities, entered increasingly into commercial transactions with one another, they needed to be able to enforce these commercial agreements in court. The result was the doctrine of

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21. *Id.* at 136–40. There were three instances of immunity from the “absolute and complete jurisdiction within their respective territories which sovereignty confers”: 1) “the exemption of the person of the sovereign from arrest or detention within a foreign territory;” 2) “the immunity which all civilized nations allow to foreign ministers;” and, 3) “a sovereign is understood to cede a portion of his territorial jurisdiction . . . where he allows the troops of a foreign prince to pass through his dominions.” *Id.*

22. Marshall wrote:

   The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

*Id.* at 136.


24. *Id.* § 447 n.2 (“The law relating to the position of Heads of State abroad has affinities with, but is now separate from, that relating to state immunity (which has a common origin in the identification of a sovereign with his state) and the treatment of diplomatic envoys (who also represent sovereign states).”).

“restricted” sovereign immunity, exemplified by the 1952 Tate Letter, which exempted a state’s purely commercial activities from absolute immunity in the courts of another state.26 The Tate Letter reflected the United States’ position that restricted immunity was emerging as a feature of customary international law.27 Moreover, it suggested that at least four exceptions to absolute immunity already existed in U.S. practice—disputes in contract and tort, disputes relating to its merchant vessels, and disputes based on a government’s “commercial activities.”28

Following the Tate Letter, whether foreign states were accorded immunity in U.S. courts became a political matter because the State Department began to issue “suggestions of immunity” which were binding on the courts.29 It was primarily to eliminate the problems that had arisen as a result of the suggestion of immunity procedure,30 that Congress

It is thus evident that with the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity. There are evidences that British authorities are aware of its deficiencies and ready for a change. The reasons which obviously motivate state trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy. Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department’s policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

Id.

26. Id.

27. Id.

28. Restricted state immunity was recognized by the Supreme Court in cases such as Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 487 (1983), which states, “[I]mmunity is confined to suits involving the foreign sovereign’s public acts, and does not extend to cases arising out of a foreign state’s strictly commercial acts.”


30. Suggestions of immunity invaded the province of the court by determining questions of fact or mixed questions of fact and law, i.e., whether a state’s acts were public (jure imperii) and therefore immune, or whether its acts were private (jure gestionis) and therefore not. See, e.g., George, supra note 19, at 1058 (“This method, however, was flawed because judicial reliance on State Department ‘suggestions’ led to inconsistent, and often politically-motivated results.”).
passed the Foreign Sovereign Immunities Act in 1976, transferring the
determination of questions of sovereign immunity to the federal courts. 31
Some states, particularly those with a common law legal tradition, fol-
lowed the United States’ statutory approach to restricted state immu-
nity, 32 while others reached the same position via court decisions. 33

C. Post-FSIA State Immunity

The FSIA codified restrictive sovereign immunity. 34 Structurally, it re-
tained immunity for a “foreign state,” 35 which includes its “political sub-
division[s]” 36 and “agenc[ies] or instrumentali[ties].” 37 States are im-
mune from the jurisdiction of the U.S. courts, except in those cases pro-
vided for in the statute. 38 The exceptions are: 1) waiver, 2) disputes over
commercial activities, 3) disputes over rights to property “taken in viola-
tion of international law,” 4) disputes over rights to immovable property
or property acquired by succession or gift in the U.S., 5) torts committed

henceforth be decided by courts of the United States and of the States in conformity with
the principles set forth in [the FSIA].”).
[hereinafter State Immunity Act 1978]; State Immunity Act, R.S.C., c. S-18 (1985), re-
printed in 21 I.L.M 798 (1982); Foreign States Immunities Act, 1985, pt. 5, § 42 (Austl.),
33. E.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 12,
1983 (F.R.G.), translated in 22 I.L.M. 1279; Cour de cassation [Cass. 1e civ.] [Court of
593 (1994).
35. Id. § 1602 (“Under international law, states are not immune from the jurisdiction
of foreign courts insofar as their commercial activities are concerned, and their commer-
cial property may be levied upon for the satisfaction of judgments rendered against them
in connection with their commercial activities.”).
36. Id. § 1603(a).
37. Section 1603(b) defines an “agency or instrumentality of a foreign state” as:

any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a ma-

jority of whose shares or other ownership interest is owned by a foreign state or

political subdivision thereof, and

(3) which is neither a citizen of the United States . . . , nor created under the

laws of any third country.

Id. § 1603 (b).
38. Id. § 1604.
in the U.S. by a foreign state, 6) enforcement of agreements to arbitrate, and 7) terrorist acts (including torture, extrajudicial killing, aircraft sabotage, and hostage taking) that result in the personal injury or death of a U.S. national committed by states that have been designated as state sponsors of terrorism.39

The FSIA represents a functional (ratione materiae) approach to state immunity that is no longer absolute but rather is linked to the legitimate, public functions of the state. But, because it authorizes jurisdiction over a foreign state only in a limited and carefully circumscribed number of circumstances,40 it has stunted the growth of a more expansive approach to the liability of foreign states in U.S. courts.41

The FSIA does contain two exceptions, torts and terrorism, both of which can be based on conduct that is also a crime. This suggests that Congress regarded such acts as non-public, because otherwise it would have exempted them from the immunity that shields state acts.42 Moreover, in two cases in which the FSIA’s jurisdictional prerequisites were met,43 U.S. courts held that states sponsoring core crimes are not immune

41. The FSIA exceptions require that the tort be committed in the United States under section 1605(a)(5), and that the terrorist act be committed outside the territory of a terrorist state and have as its victim a U.S. national under section 1605(a)(7)(B). In almost all of the post-World War II cases where states have been accused of international crimes, those crimes involve acts committed in those states against their nationals. By definition, then, they would fail the FSIA’s jurisdictional tests. See, e.g., Mathias Reimann, A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz v. Federal Republic of Germany, 16 Mich. J. Int’l L. 403 (1995).
42. Cf. Letelier v. Rep. of Chile, 488 F. Supp. 665, 671 (D.D.C. 1980) (“Nowhere is there an indication that the tortious acts to which the Act makes reference are to only be those formerly classified as ‘private,’ thereby engrafting onto the statute, as the Republic of Chile would have the Court do, the requirement that the character of a given tortious act be judicially analyzed to determine whether it was of the type heretofore denoted as jure gestionis or should be classified as jure imperii.”).
43. In Letelier v. Republic of Chile, the court held that Chile was not immune from suit in tort for assassinations, allegedly the work of the Chilean national intelligence service, which took place in the United States, thus satisfying the “tort” exception to the FSIA. Id.; see 18 U.S.C. § 1605(a)(5). Rejecting Chile’s contention that the killings fell within exceptions to the “tort” exception because they were “discretionary function[s]”
from suit.\textsuperscript{44} By hypothesis, this reasoning would apply to state officials whose immunity \textit{ratione materiae} is no more or less than the state’s.\textsuperscript{45}

\textbf{D. State Official Immunity}

The restrictive theory of sovereign immunity applied to state officials as well; that is, they were immune from the jurisdiction of foreign courts in so far as they acted in their “official” capacities on behalf of the state. In that case, the state official’s act is attributable solely to the state that bears responsibility for it.\textsuperscript{46} As a consequence, this form of immunity and therefore immune under the FSIA, the court stated: “Whatever policy options may exist for a foreign country, it has no ‘discretion’ to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law.” \textit{Letelier}, 488 F. Supp. at 673 (emphasis added). In \textit{Alejandre v. Republic of Cuba}, the court found that the “extrajudicial killings” of American nationals over international waters by the Cuban Air Force not only satisfied the FSIA terrorism exception but also provided a basis for plaintiffs to seek punitive damages because “[t]he ban on extrajudicial killing . . . rises to the level of \textit{jus cogens}, a norm of international law so fundamental that it is binding on all members of the international community.” \textit{Alejandre v. Republic of Cuba}, 996 F. Supp. 1239, 1252 (S.D. Fla. 1997) (citing, inter alia, \textit{Restatement (Third) of Foreign Relations Law of the U.S.} § 702(c) (1986) [hereinafter \textit{Restatement (Third)}], which states, “A state violates [customary] international law if, as a matter of state policy, it practices, encourages, or condones . . . the murder or causing the disappearance of individuals . . .”).


\textsuperscript{45} Cf. \textit{Oppenheim}, \textit{supra} note 23, at § 509 n.11 (“In respect of official acts it may not be so much a question of immunity from the jurisdiction of the local courts, but rather a matter of those courts being without competence \textit{ratione materiae} over the acts, which pertain to the public activities of a foreign state.”).

\textsuperscript{46} Cassese, \textit{Comments}, \textit{supra} note 10, at 862 (“The first category [immunity \textit{ratione materiae}] is grounded on the notion that a state official is not accountable to other states for acts that he accomplishes in his official capacity and that therefore must be attributed to the state.”).
ratione materiae applies both during and after an official’s term of office.47 It is debatable whether a separate doctrine of head of state immunity even existed prior to the passage of the FSIA.48 In the rare pre-FSIA cases where a head of state was sued individually, courts seemed to apply the restrictive theory of state immunity.49 A state’s functional immunity (ratione materiae) did not, however, fully cover its head of state in situations in which she or he traveled abroad and while in a foreign country might be faced with arrest or service of civil process.50 Not surprisingly then, the concept of inviolability from arrest or suit (immunity ratione personae) was imported from the law of diplomatic immunity and adapted to heads of state.51

Because the FSIA does not refer specifically to heads of state or state officials, U.S. courts have divided over the question of the scope of their immunities. Some, like the court in Lafontant v. Aristide,52 have concluded that incumbent heads of state are inviolable from either criminal or civil process, because individuals are not “agencies or instrumentalities” as defined by the FSIA.53 Thus, State Department “suggestions of

47. Id. at 863.
48. See, e.g., Tachiona v. Mugabe, 169 F. Supp. 2d 259, 276 (S.D.N.Y. 2001) (“At the time of the FSIA’s adoption, no widely accepted international practice established a separately standing principle of head-of-state immunity. In fact, prior to 1976 the doctrine of sovereign immunity was generally understood to encompass solely state immunity. Consequently, any reference to a head-of-state immunity ‘doctrine’ as a concept distinct from foreign state immunity is a construct that does not arise in the case law and commentary as a specifically identified and widely recognized legal principle until after 1976.”).
49. See, e.g., Ex-King Farouk of Egypt v. Christian Dior, S.A.R.L., 24 I.L.R. 228, 228, Cour d’appel [CA] [regional court of appeal] Paris, Apr. 11, 1957 (finding sitting king immune from suit in France for cost of wife’s wardrobe but could be sued after he was deposed); see also RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 66 (1965) (under the restrictive theory, head of state immunity is the same as state immunity).
50. See, e.g., Tachiona, 169 F. Supp. 2d at 308–09 (dealing with an attempt to serve Zimbabwe’s president with civil process while visiting New York to attend a U.N. conference).
51. See RESTATEMENT (THIRD), supra note 43, § 464, Reporters’ Notes 14 (“Heads of state or government. Ordinarily, a proceeding against a head of state or government that is in essence a suit against the state is treated like a claim against the state for purposes of immunity. When a head of state or government comes on an official visit to another country, he is generally given the same personal inviolability and immunities as are accorded to members of special missions, essentially those of an accredited diplomat.”).
53. See also Estate of Domingo v. Republic of Philippines, 808 F.2d 1349, 1350 (9th Cir. 1987) (finding sitting head of state immune from claim based on murder of two op-
immunity” remain binding on the courts in those cases and cases of diplomatic and consular immunity, which likewise are not covered by the FSIA. The opposite approach, adopted by the Ninth Circuit in Chuidian v. Phillipine National Bank, is that a suit against a state official acting in his official capacity was tantamount to a suit against the state itself. Accordingly, under this approach, the determination of state immunity questions belongs exclusively to the courts, applying the rules found in the FSIA. A third strain in the U.S. case law is illustrated by Tachiona v. Mugabe, where the court allowed service of civil process on a sitting head of state in his “private” capacity as an officer of an organization accused of the murder, torture, terrorism, rape, and beatings of his political opponents. In so holding, the court rejected both the absolute inviolability approach of Aristide and Chuidian’s holding that the FSIA had completely supplanted the pre-FSIA procedure of using suggestions of immunity in cases involving sitting heads of state:

While [there are] . . . valid grounds for the courts to honor the State Department’s suggestions of immunity . . . over a recognized sitting head of state that would subject the foreign official to be hauled into position union leaders); Lafontant, 844 F. Supp. at 129 (finding incumbent Haitian president immune from civil suit based on assassination of political opponent); Saltany v. Reagan, 702 F. Supp. 319 (D.D.C. 1988) (finding British prime minister immune from suit for damages arising from U.S. bombing of Libya).

55. Chuidian v. Phillipine Nat’l Bank, 912 F.2d 1095 (9th Cir. 1990). In Chuidian, the government filed a “statement of interest.” Id. at 1099. Unlike a “suggestion of immunity,” which was binding on the court, a “statement of interest” merely suggests “that courts decline to exercise jurisdiction in particular cases implicating sovereign immunity.” Republic of Austria v. Altmann, 541 U.S. 677, 701 (2004).
56. Chuidian, 912 F.2d at 1102. While the term “official capacity” is not used in § 1603(b) of the FSIA, it is that element, according to the Chuidian court, which makes a “suit against an individual . . . the practical equivalent of a suit against the sovereign directly.” Id. at 1101. Thus, “Daza must be granted immunity as an instrumentality of the Republic of the Philippines . . . .” Id. at 1106. However, “[p]lainly Daza would not be entitled to sovereign immunity for acts not committed in his official capacity.” Id.
57. Id. at 1103. According to the Chuidian court,

The principal distinction between pre-1976 common law practice and post-1976 statutory practice is the role of the State Department. If individual immunity is to be determined in accordance with the [former], presumably we would once again be required to give conclusive weight to the State Department’s determination of whether an individual’s activities fall within the traditional exceptions to sovereign immunity.

Id. at 1102.
court and potentially be exposed to personal liability, the Court finds uncompelling the further contention that the doctrine requires courts to give conclusive effect to the State Department’s advice with regard to the appropriateness of service of process upon a head-of-state as it arises in this case.59

By this view, immunity *ratione personae* does not mean absolute inviolability from all judicial processes of foreign courts.60

While all of the above are civil cases, application of the contrasting approaches represented by *Lafontant* and *Chuidian* might lead to different results in criminal cases.61 According to the former, the incumbent official would be entitled to absolute immunity regardless of the nature of her crime.62 On the other hand, the result under *Chuidian* would depend upon whether the official’s crime was deemed “public” and therefore immune, or “private” and therefore not immune.63 *Chuidian* is thus clearly at odds with the prevailing view of immunity *ratione personae* exemplified by *Congo v. Belgium*64 and more closely resembles the analysis that would be appropriate in cases involving immunity *ratione materiae*, where only “official” conduct would be immune. In the few U.S. cases that do deal with the immunity of a state official charged with conduct that resembles a core violation of international law, the trend appears to be away from deeming any such conduct as “official.”65

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59. *Id.* at 305; see also *Estate of Domingo*, 808 F.2d at 1350 (finding an order immunizing President of the Philippines from civil suit did not shield him from a deposition subpoena in the same action).

60. See Vienna Convention on Diplomatic Relations art. 31(1)(c), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 [hereinafter VCDR] (“[A diplomatic agent] shall also enjoy immunity from [the receiving State’s] civil and administrative jurisdiction, except in the case of: . . . (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.”).

61. A court following *Tachiona* presumably would reach the same result as in *Lafontant*, i.e., that the State Department’s suggestion of immunity would be binding in cases where there was an attempt to exercise the territorial jurisdiction of the court in order to arrest or prosecute an incumbent head of state. *Cf. Tachiona*, 169 F. Supp. 2d at 270, *with Lafontant*, 844 F. Supp. at 132.

62. *Lafontant* v. Aristide, 844 F. Supp. 128, 139 (E.D.N.Y. 1994) (“We need not consider whether an act of President Aristide in ordering the killing [of a political opponent] would be official or private because he now enjoys head-of-state immunity.”).

63. *See Chuidian*, 912 F.2d at 1104.

64. *See infra Part III*.

The doctrine of state immunity is in disarray in the United States. First, the FSIA has blocked a number of civil actions based on the commission of core crimes that could have contributed to the development of a rule that such acts are not the public acts of states. Second, the courts are divided on the impact of the FSIA on suits against individuals. As the divergent approaches in *Lafontant v. Aristide*, *Chuidian v. Phillipine National Bank*, and *Tachiona v. Mugabe* illustrate, the courts have yet to conceive of or apply a consistent doctrine in deciding whether individuals are immune from suit or not. This may be due, in part, to the fact that U.S. courts almost never use the terms immunity *ratione personae* and immunity *ratione materiae*, and, as a result, they have not clearly identified the distinctions between the two doctrines. Thus, a definitive opinion on state immunity from the ICJ could have benefited the development of the law in the U.S.

III. ENTER CONGO V. BELGIUM

On April 11, 2000, a Belgian investigating magistrate issued an international arrest warrant for Adbulaye Yerodia Ndombasi (Yerodia), then the incumbent foreign minister of the Congo. Yerodia was alleged to have made “speeches inciting racial hatred during the month of August...
1998, which constituted grave breaches of the Geneva Conventions of 1949 and their two 1977 Additional Protocols. These international crimes were punishable in Belgium pursuant to a 1999 law that gave its courts jurisdiction over such offenses “wherese The Court proceeded to the merits of the immunity question “assuming” that the Belgian judge had jurisdiction to issue the arrest warrant in the first place. The Court reasoned that the immunities of incumbent diplomatic and consular agents, and “certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister of Foreign Affairs,” must be sufficient so that the official will not be hindered “in the performance of his or her duties.” Sitting foreign ministers and heads of state must therefore be accorded both “full immunity”

69. Id.
72. Id. art. 7.
73. Id. at 9.
74. Id. at 10.
and “inviolability” from the criminal jurisdiction of another state because any assertion of another state’s criminal process could affect their ability to travel internationally, one of their essential job functions.76

Next, the Court had to dispose of Belgium’s argument that an exception to “full immunity” and “inviolability” ratione personae now exists for those incumbent state officials accused of war crimes or crimes against humanity.77 The Court flatly rejected the contention that there was state practice78 that supported the existence of such an exception. Nor did the statutes of the various international criminal tribunals established since World War II, all of which specifically abolished “official position” immunity, amount to “state practice” because “these rules . . . do not enable [the Court] to conclude that any such exception exists in customary international law in regard to national courts.”79 Similarly, none of the cases of the international tribunals deals with “the question of the immunities of Ministers of Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity.”80

Thus, the Court was “unable to deduce . . . that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.”81 The Court then ventured even further to outline the exceptions to “the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs.”82

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76. See id. at 20. See, e.g., VCDR, supra note 60, at art. 29 (“The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention.”); id. art. 31(1) (“A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State.”).


78. Belgium had specifically cited the Pinochet case in the United Kingdom and the Qaddafi case in France as examples of such state practice. Id. The ICJ accepted Congo’s contention that neither of these cases stood for the abrogation of absolute immunity for “incumbent” heads of state and foreign ministers. Id. at 21.

79. Id. (emphasis added).

80. Id.

81. The Court did not mention or refer to the commentators who have urged that such an exception exists. See, e.g., Cassese, Comments, supra note 10, at 866–69. But see Congo, 2002 I.C.J. at 20 (joint separate opinion of Judges Higgins, Kooijmans and Buergenthal), available at http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214_higgins-kooijmans-buergenthal.PDF.

82. The “exceptions” are: 1) “such persons enjoy no criminal immunity under international law in their own countries;” 2) they cease to enjoy immunity from the jurisdiction of another state “if the State they represent or have represented decides to waive that immunity;” 3) a former Minister for Foreign Affairs may be prosecuted by another state
Although this portion of its opinion is clearly obiter dictum, binding only the parties to the case and therefore has no formal precedential value, there is no doubt that *Congo v. Belgium* will substantially affect the development of the law of state official immunity in both international and national courts.83

IV. IS THERE AN EXCEPTION TO STATE OFFICIAL IMMUNITY FOR CORE INTERNATIONAL CRIMES?

The *Congo v. Belgium* decision might be read narrowly as applying only to the immunities *ratione personae* of incumbent foreign ministers. However, its sweeping conclusion—that there is no customary international law exception "to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers of Foreign affairs, where they are suspected of having committed war crimes or crimes against humanity"84—may not be so neatly cabined in future cases.85 Indeed, a broader reading of *Congo v. Belgium* is also plausible: There is no customary law exception to the immunity, *ratione personae or ratione materiae*, of state officials from the "criminal jurisdiction" of foreign courts, even for core international crimes.86 And, while a careful examination of the sources relied upon by the Court does not support such an

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83. As Henkin writes, “A decision of the International Court of Justice is not binding on states other than the parties to the case, but judicial decisions are ‘subsidiary means for the determination of rules of law’ (article 38 of the Statute of the Court), and decisions of the court are highly authoritative.” LOUIS HENKIN ET AL., RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 49 (2d ed. 1991) (discussing the *Nicaragua* case).


85. See infra Part VI.

86. Even one of the most distinguished scholars of international law has read this portion of the Court’s opinion differently at different times. Compare Cassese, Comments, supra note 10, at 865 (“Although the Court’s proposition is very sweeping, the context of the Court’s ruling would seem to indicate that the Court did not intend to deny the possible existence of a customary rule lifting functional immunities for state officials in the case of international crimes. In fact, it did not take any stand on such a customary rule.”), with Antonio Cassese, *The Belgian Court of Cassation v. The International Court of Justice: The Sharon and Others Case*, 1 J. INT’L CRIM. JUST. 437, 444 (2003) (“As I pointed out at the outset of this paper, the ICJ held, although not in explicit terms, that the functional immunity accruing to a minister of foreign affairs . . . does not cease when the person is accused of an international crime.”) [hereinafter Cassese, *The Sharon and Others Case*].
expansive reading of the case, regrettably, the opinion itself leaves us to
guess the Court’s actual position.

A. State Practice

The Court said it had analyzed the state legislation that does exist and
found it wanting in its support for the existence of an exception to state
official immunity for core international crimes. The Court also appar-
ently accepted Congo’s interpretation that Regina v. Bartle and the
Commissioner of Police for the Metropolis and Others Ex Parte Pino-
chet88 and the Qaddafi89 case “confirm the absolute nature of the immu-
nity from criminal process of Heads of State and Ministers for Foreign
Affairs.”90 A closer analysis of the cases is necessary in order to appreci-
ate the import of this conclusion.

First, since Pinochet was a former head of state, the extent of incum-
bent head of state immunity for torture was not squarely before the two
different panels of the House of Lords that considered the case.91 None-
theless, altogether seven of the Law Lords posited that an exception to

87. In this regard, it is telling that the Court did not refer to the 1999 Belgian law, Act
Concerning the Punishment of Grave Breaches of International Humanitarian Law
(Belg.), Feb. 10, 1999, translated in 38 I.L.M. 918, 924 (1999), on which Congo v. Bel-
gium itself was based and which specifically abolished head of state immunity for core
crimes. See also Convention on the Prevention and Punishment of the Crime of Genocide
art. IV, Dec. 9, 1948, 78 U.N.T.S. 277, 280 (“Persons committing genocide . . . shall be
punished, whether they are constitutionally responsible rulers, public officials or private
individuals.”); Convention Against Torture and Other Cruel, Inhuman or Degrading
Treaties art. 1, Dec. 10, 1984, 1465 U.N.T.S. 113 (“[T]orture means any act by which severe pain or suffering . . . is intentionally inflicted on a person . . . by
or at the instigation of or with the consent or acquiescence of a public official or other
person acting in an official capacity . . . .”). There are currently 137 state parties to the
Genocide Convention and 140 state parties to the Torture Convention. Multilateral Trea-
ties Deposited With the Secretary-General, http://untreaty.un.org/ENGLISH/bible/
englishinternetbible/partI/chapterIV/treaty1.asp (last visited Jan. 15, 2006). For a discus-
sion of the significance of state ratifications of international conventions as state practice,
see infra text accompanying notes 126–39.

88. Regina v. Bartle & the Comm’r of Police for the Metropolis & Others Ex Parte
89. Cour de Cassation (Fr.), Mar. 13, 2001, Judgment No. 1414, reprinted in 105
REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 473 (2001); see also Salvatore Zappalà,
Da Heads of State in Office Enjoy Immunity from Jurisdiction for International
Crimes? The Ghaddafi Case Before the French Cour de Cassation, 12 EUR. J. INT’L L.
595, 596 (2001) (discussing the Qaddafi case).

91. The question was also considered in Regina v. Bow St. Stipendiary Magistrate &
Belgium, the ICJ referred only to Pinochet II.
immunity exists when a head of state is charged with a serious international crime. Although on this view, head of state immunity is no longer absolute, four of the Pinochet judges limited the exception to immunity *ratione materiae*, opining that immunity *ratione personae* would shield a sitting head of state, even one charged with torture.93

In Qaddafi, the Libyan leader was sued in France based on his government’s involvement in terrorist acts that caused the crash of a French airliner and the death of French nationals. Although highly critical of the French Cour de Cassation’s decision, one commentator’s interpretation of it is far more nuanced than the ICJ’s:

The decision . . . implicitly admits the possibility of exceptions to immunity from jurisdiction of Heads of State in office. The Court concluded: ‘at this stage of development of international customary law, the crime charged [i.e., terrorism], no matter how serious does not fall within the exceptions to the principle of immunity from jurisdiction of foreign Heads of State in office.’ An *a contrario* interpretation of this passage leads to the conclusion that there are crimes that constitute exceptions of the jurisdictional immunity of Heads of State. This passage, however, does not shed any light on the type of immunity involved.96

Thus, the Pinochet and Qaddafi cases actually evince the views of those courts that an exception to state official immunity exists for at least

92. *Pinochet II*, 38 I.L.M. at 594 (Lord Browne-Williamson); id. at 626 (Lord Hope of Craighead); id. at 637 (Lord Hutton); id. at 661 (Lord Phillips of Worth Matravers); *Pinochet I*, [2000] 1 A.C. at 108–09 (Lord Nicholls of Birkenhead); id. at 115 (Lord Steyn); id. at 118 (Lord Hoffman); but see id. at 79–82 (Lord Slynny of Hadley); id. at 96–97 (Lord Lloyd of Berwick).

93. *Pinochet II*, 38 I.L.M. at 641–42 (Lord Saville of Newdigate); id. at 643–45 (Lord Millett); id. at 661 (Lord Phillips of Worth-Matravers); *Pinochet I*, [2000] 1 A.C. at 107–09 (Lord Nicholls of Birkenhead).


95. The French high court’s opinion has been described as a “three-page terse and poorly reasoned decision.” Zappalà, *supra* note 89, at 596. Zappalà criticizes this holding, inter alia, for failing to consider whether Qaddafi was in fact a head of state; failing to distinguish between immunity *ratione personae* and *ratione materiae*; failing to “clarify whether it considered that exceptions to functional immunity for international crimes are provided for only by conventional texts or also by customary rules”; and failing to explain why terrorism is not an international crime. Id.

96. Id. at 600–01. The French version of the excerpt quoted above reads: “*[E]n l’état du droit international, le crime dénoncé, quelle qu’en soit la gravité, ne relève pas des exceptions au principe de l’immunité de juridiction de chefs d’Etats étrangers en exercice.” Id. at 601 n.30.
B. The Post-World War II International Tribunals

The Court next analyzed post-war international practice. Since World War II, the statutes of every tribunal created to prosecute core crimes have abolished official position immunity. In *Congo v. Belgium*, the ICJ limited the significance of these developments to international courts, stating that “the rules concerning the immunity or criminal responsibility of persons having an *official capacity* . . . do not enable it to conclude that any such exception exists in customary international law in regard to *national* courts.”

A plausible interpretation of the quoted language might be that the Court meant only that it found that no such exception exists in national courts only with regard to immunity *ratione personae*. This position is at least defensible because immunity *ratione personae* (inviolability) does shield incumbent officials and diplomats from prosecution, even for crimes. However this reading is rendered less tenable because of the Court’s use of the phrase “persons having an official capacity,” which would have been superfluous if the Court were referring only to immunity *ratione personae*, which covers all acts, official and unofficial. And, significantly, “official capacity” is the term used in the statutes of the international tribunals to refer to immunity *ratione materiae*. Is the ICJ then saying that no customary law exception for international crimes exists with regard to immunity *ratione materiae* in national

97. Torture cases were also initiated against Pinochet in France and Germany, presumably because he was not believed to be immune as a former head of state. *See* *Summers*, *supra* note 74, at 90–91 n.142.


99. *Id.* (emphasis added). From a purely logical perspective, this statement is curious indeed. Absolute sovereign (including head of state) immunity was a rule of customary international law that prohibited the courts of one state from sitting in judgment on the acts of another; that is, by definition it was applicable only in national courts. How then could any exception to that customary rule not apply in national courts?

100. *See supra* Part II.D.
That would create a substantial jurisdictional loophole in national courts prosecuting international crimes.

1. Nuremberg

The exception to absolute state official immunity for core international crimes first appeared in the Nuremberg Charter, which was a response to the largely failed attempt to judicially punish those responsible for World War I. During the peace negotiations following the First World War, a divided Commission on Responsibility of the Authors of the War and Enforcement of Penalties recommended to the Preliminary Peace Conference that criminal charges be brought against the German emperor. The novelty of this proposal was reflected by the objection interposed by the U.S. representatives on the Commission that:

[they were] unable to agree with this conclusion, in so far as it subjects to criminal, and therefore, to legal prosecution, persons accused of offenses ‘against the laws of humanity,’ and in so far as it subjects Chiefs of States to a degree of responsibility hitherto unknown to municipal or international law, for which no precedents are to be found in the modern practice of nations (emphasis in the original).

Thereafter, in what was evidently compromise language, the Treaty of Versailles charged Kaiser William II with “a supreme offence against international morality and the sanctity of treaties.” Commentators, writing shortly before the Nuremberg Charter was adopted in 1945, disagreed whether the Versailles Treaty charged the Kaiser with a “crime” or whether it merely alleged “breaches not of international law


102. Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference (Mar. 29, 1919), reprinted in 14 AM. J. INT’L L. 95, 95–104 (1920). The Commission wrote, “All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution . . . .” Id. at 117.


but of international morality . . . ”  

In any event, the dispute went unresolved because the Netherlands, where the Kaiser had sought refuge after the war, refused to surrender him for trial.

There were, nonetheless, some war crimes prosecutions following World War I. The disappointing results were six convictions and six acquittals with the longest sentences of four years imprisonment imposed on two German sailors who intentionally fired upon the survivors of a British hospital ship. However, even this prosecution was frustrated by the assertion of the “superior orders” defense, according to which a soldier is not guilty of a war crime committed on the orders of a superior officer, unless such commands are “manifestly and undisputably [sic] illegal.”

A superior order can also be what Hans Kelsen referred to as an “act of State” if it was “issued by the government (Head of State, cabinet, member of cabinet, parliament), or issued at the command or with the authorization of the government.” Thus understood, the two defenses—superior orders and act of State—could operate in tandem to shield those both up and down the chain of command from individual criminal responsibility. Equally important is the fact that these defenses were customary international law rules applicable in national courts:

108. U.S. DEPARTMENT OF THE ARMY, PAMPHLET NO. 27-161-2, 2 INTERNATIONAL LAW 221–22 (1962). Three German officers, one of whom did not stand trial, agreed to destroy all 234 survivors of the British hospital ship, Llandovery Castle, because they witnessed the sinking. They were acquitted of sinking the ship based on the “superior orders” defense but convicted of killing the survivors because this was the “rare and exceptional case” where “it was perfectly clear to the accused that killing defenceless people in the lifeboats could be nothing else but a breach of the law.” Kelsen, supra note 105, at 558–59 n.30.
110. As Kelsen uses the term “act of State,” it means simply an official act of the sort over which foreign courts would not have jurisdiction by virtue of immunity ratione materiae. Id. at 541–42.
111. This is true even if the ordered act violated international law. Id. at 556.
112. Kelsen also recognized that these defenses would frustrate most war crimes prosecutions since a state “is nearly always in a position to justify its acts from the point of view of national law by the necessities of war” and in “autocratic states like Nazi Germany” the “legal power conferred by national law . . . upon the head of the State as commander-in-chief of the armed forces with respect to the conduct of war is almost unlimited.” Id. at 557.
The collective responsibility of a State for its own acts excludes, according to general international law, the individual responsibility of the person who, as a member of the government, at the command or with the authorization of the government, has performed the act. This is a consequence of the immunity of the State from the jurisdiction of another State.113

To avoid the problems that had arisen in the post-World War I prosecutions,114 the drafters of the Nuremberg Charter115 made explicit the exception to immunity based on “official position” and the elimination of the superior orders defense.116 And, despite substantial evidence to the contrary, at least one commentator of the time concluded that “the law stated in Articles 7 [official position] and 8 [superior orders] of the Charter . . . was amply supported by general principles of law which constitute a source of international law.”117

113. Id. at 540–41.
114. According to Kelsen’s rigidly positivist view, individuals could not be prosecuted for war crimes “[having] the character of acts of State” unless their state of nationality consented in the peace treaty. Nevertheless, he believed that Article 228 of the Treaty of Versailles could be “interpreted as the necessary consent,” though he recommended “insert[ing] into a future international treaty conferring upon a national or international court jurisdiction over war criminals, an express provision including war crimes which have the character of acts of State.” Id. at 561.
115. Kelsen also doubted that “the rules of general internation[al] law . . . are favorable” to the establishment of tribunals to try war criminals by occupying powers on the territory of their defeated enemy. Despite that potential objection, that was the procedure adopted by the Allies in the London Agreement which created the Nuremberg tribunals. Id. at 561–62 n.35.
116. Charter of the International Military Tribunal art. 7, Aug. 8, 1948, 59 Stat. 1544, 1548 (“The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.”); id. art. 8 (“The fact that the Defendant acted pursuant to Order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment . . . .”). In addition to the United States, the Soviet Union, France, and Great Britain, by whose agreement the Charter was adopted, it was subsequently ratified by nineteen other states. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 562 (4th ed. 1990).
117. Quincy Wright, The Law of the Nuremberg Trial, 41 AM. J. INT’L L. 38, 71 (1947). But see Kelsen, supra note 105, at 543–44. Kelsen, a contemporary of Wright’s, criticizes as “very questionable” the use of “general principles of law . . . as sources of international law.” Another of Wright’s contemporaries flatly contradicts him: “However, if foreign law may be applied in this situation without violating the rule against ex post facto criminal punishment, its application is, of course, limited by the defenses act of state [immunity ratione materiae] and superior orders since they are part of the law of war.” Manner, supra note 106, at 419.
The Charter was an “exercise of the sovereign legislative power of the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world.” In an article written shortly after the Nuremberg trials ended, Quincy Wright argued that the parties to the Charter were justified in exercising jurisdiction over the Nuremberg defendants as an extraterritorial application of their criminal jurisdictions or as a derivative of their temporary sovereignty over Germany. Either way, the trials were examples of “national” courts sitting in judgment of charges of core international crimes, as to which the official position immunity defense was unavailable because it had been abrogated by the Charter.

In 1946, the UN General Assembly unanimously affirmed the principles of the Nuremberg Charter and Judgment. In 1950, the General Assembly recalled this affirmation and received the International Law Commission formulation of these Principles, which included the abolition of state official immunity for core international crimes. This action swiftly led to the universal recognition that the Nuremberg principles were customary international law. Thus, whatever uncertainty

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119. Wright, supra note 117, at 49–51. In Pinochet II, Lord Millet described in some detail how the tribunals administered “Nuremberg law”:

The great majority of war criminals were tried in the territories where the crimes were committed. As in the case of the major war criminals tried at Nuremberg, they were generally (though not always) tried by national courts or by courts established by the occupying powers. The jurisdiction of these courts has never been questioned and could be said to be territorial. But everywhere the plea of state immunity was rejected in respect of atrocities committed in the furtherance of state policy in the course of the Second World War; and nowhere was this justified on the narrow (though available) ground that there is no immunity in respect of crimes committed in the territory of the forum state.

Pinochet II, at 647.
120. Genocide was not defined as a separate crime in the Nuremberg Charter.
124. See Brownlie, supra note 116, at 562.
may have existed prior to World War II regarding the customary law status of an exception to state official immunity for war crimes and crimes against humanity, it had been completely erased shortly after the war. And, since the law of Nuremberg was an exercise of national legislative authority administered in national courts by national authorities, it is difficult to see how it could be construed as other than “state practice” evidencing the abrogation of head of state immunity in “national” courts.

2. Post-Nuremberg

Since then, all of the other tribunals created by the international community to prosecute core crimes have explicitly abolished head of state immunity. The language in each of these statutes is almost identical with that in the Nuremberg Charter. This consistent and frequent reaffirmation by the international community of a principle of law only reinforces its customary stature. But, does it represent “state practice” that the rule is applicable in national courts?

Although these statutes are not directly applicable in national tribunals, they do represent the consensus of the international community that war

125. In all, 1,416 defendants were convicted by the tribunal established by the United States to try war criminals within its “zone.” Similar tribunals were established by France, Great Britain and the Soviet Union who controlled the other zones into which Germany was divided in the immediate post-war period. These zonal tribunals were the equivalent of state courts. Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10 (1949), reprinted in Paust et al., supra note 107, at 633–35.

126. Compare Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(2), Annex to the Report of the Secretary-General Pursuant to Paragraph 2 of U.N. Security Council Resolution 808 (1993) at 39, U.N. Doc. S/25704 (1993) (“The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”), with Statute of the International Tribunal for Rwanda, art. 6(2), S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, at 6, U.N. Doc. S/RES/955 (1994) (“The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”), and ICC Statute, supra note 13, art. 27 (“This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as Head of State or Government . . . shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.”), and Statute of the Special Court for Sierra Leone, art. 6(2), Annex to the Agreement on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, U.N.-Sierra Leone, 2178 U.N.T.S. 145, 147 (“The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”).
criminals, regardless of their official position, should not escape justice no matter where they are prosecuted.\textsuperscript{127} Like the international tribunal at Nuremberg, these courts were set up to prosecute the most prominent wrongdoers, leaving the others for prosecution in the national courts.\textsuperscript{128} It would be ironic indeed if the statutes of the international tribunals evidence only that state official immunity has been abolished in international courts, since if that were so, a head of state would not be immune in the international court, whereas those carrying out his orders, if tried in a national court, would be. This is precisely the outcome in reverse that the changes in the law of immunities initiated by Nuremberg were intended to preclude.

This outcome is also not supported by the ICJ’s analysis of the post-war tribunals as “state practice,”\textsuperscript{129} because the Court did not consider the significance of the voting in the Security Council for the resolutions that created the International Criminal Tribunal for the former Yugoslavia (ICTY),\textsuperscript{130} the International Criminal Tribunal for Rwanda (ICTR),\textsuperscript{131} and the Special Court for Sierra Leone.\textsuperscript{132} Nor did it refer to the number of state ratifications of the ICC treaty.\textsuperscript{133} While scholars argue over the

\begin{footnotesize}
\begin{enumerate}
\item[127.] Cf. Dapo Akande, \textit{International Law Immunities and the International Criminal Court}, 98 AM. J. INT’L L. 407, 420 (2004) (“[B]y providing that the ICC Statute applies to state officials, Article 27(1) establishes that those officials are subject to prosecution by the ICC even when they acted in their official capacity.”).
\item[129.] Interestingly, the Court limited its examination to “state practice” and did not mention “\textit{opinio juris},” the other element necessary for the formulation of a rule of customary international law. See Anthea Elizabeth Roberts, \textit{Traditional and Modern Approaches to Customary International Law: A Reconciliation}, 95 AM. J. INT’L L. 757, 757 (2001). As the inquiry is usually formulated, in order to be recognized as customary international law, a rule must be supported by “general and consistent practice by states” that is “followed out of a belief of legal obligation [\textit{opinio juris}].” \textit{Id.}
\item[133.] The ICC treaty, which went into force July 1, 2002, currently has 100 parties and 139 signatories. None of the parties or signatories has submitted reservations or interpretive declarations regarding Article 27 of the treaty which abolishes official position im-
\end{enumerate}
\end{footnotesize}
weight to be attached to such votes\textsuperscript{134} or ratifications\textsuperscript{135} or even whether voting and ratification amount to “state practice” [action] or “\textit{opinio juris}” [statements of legal obligation].\textsuperscript{136} in this case all of the assenting states were self-consciously voting for or ratifying a body of legal rules that they understood were customary international law.\textsuperscript{137} Thus their votes or ratifications are by definition expressions of their beliefs in the validity of the legal principles contained in the statutes of the tribunals. Finally, when the Appeals Chamber of the ICTY considered the question whether “official position” immunity insulates state officials from community. Status of Multilateral Treaties Deposited with the Secretary-General, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/part1/chapterXVIII/treaty11.asp.


\par \textsuperscript{135} In the \textit{North Sea Continental Shelf} cases, the ICJ famously opined:

\begin{quote}
With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.
\end{quote}


\par \textsuperscript{136} \textit{Cf.} Roberts, \textit{supra} note 129, at 758, where the author argues that:

\begin{quote}
[M]odern custom is derived by a \textit{deductive} process that begins with general statements of rules rather than particular instances of practice. This approach emphasizes \textit{opinio juris} rather than state practice because it relies primarily on statements rather than actions. Modern custom can develop quickly because it is deduced from multilateral treaties and declarations by international fora such as the General Assembly, which can declare existing customs, crystallize emerging customs, and generate new customs.
\end{quote}

\par \textsuperscript{137} When they voted unanimously for U.N. Security Council Resolution 827, the members of the Council clearly understood that they “would not be creating or purporting to ‘legislate’ that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.” Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), para. 8, U.N. Doc. S/25704 (May 3, 1993). \textit{See Zappalà, supra} note 89, at 603. The same would hold true for the other tribunals since their statutes, as noted above, contained nearly identical language regarding the abrogation of “official position” immunity.
plying with the orders of international tribunals to produce evidence, it concluded that the exception to state official immunity for core crimes is customary law applicable in national as well as international courts.138

The general rule under discussion [“official position” immunity] is well established in international law and is based on the sovereign equality of States (par in parem non habet imoperium). The few exceptions relate to one particular consequence of the rule. These exceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.139

The need for the ICJ to clarify whether there is a customary international law exception to “official position” immunity in national courts should be apparent. As the above analysis demonstrates, the same authorities on which it relied in Congo v. Belgium support the existence of such a rule. Moreover, it is especially important for the Court to affirm in clear terms that the exception applies in national courts because the failure to do so could not only deleteriously affect the prosecution of core crimes in national courts, but also the ICC’s ability to do so as well.

V. STATE OFFICIAL IMMUNITY AND THE ICC STATUTE

The ICC statute has three separate provisions pertaining to state official immunity. Article 27(1) contains language nearly identical to that in statutes of the other post-war tribunals.140 It abolishes immunity ratione materiae in cases before the court. Article 27(2) is new and it eliminates immunity ratione personae: “Immunities or special procedural rules

140. ICC Statute, supra note 13, art. 27(1) (“This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.”).
which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.” 141 Some commentators have asserted that Article 27(2) applies to immunity *ratione materiae* as well as immunity *ratione personae*. 142 However, this reading of the statute seems unlikely, since it would render Article 27(1) surplusage. Moreover, Article 27(1) makes a specific reference to exemption from “criminal responsibility,” the theoretical basis of immunity *ratione materiae*, whereas Article 27(2) refers to exercise of the Court’s “jurisdiction,” the concept behind immunity *ratione personae*. 143 If this narrower reading of Article 27(2) is accepted, then the Court would have jurisdiction over the defendant by virtue of the waiver of her immunity *ratione personae* and she would be precluded from raising immunity *rationae materiae* as a defense to any of the substantive charges levied by the Court by virtue of Article 27(1). 144

In addition, Article 27, when read in conjunction with Article 98(1), 145 is asserted by some to constitute a state party’s waiver of all the immunities of their officials even before the national courts of other state parties. 146 The counter interpretation is that the state parties to the ICC Statute have waived state official immunity only with regard to the cases before the ICC. 147 The adherents of both positions seem to agree that

141. *Id.* art. 27(2).
143. *See supra* text accompanying note 67.
144. *But see* Akande, *supra* note 127, at 420 (“Article 27(2) conclusively establishes that state officials are subject to prosecution by the ICC and that provision constitutes a waiver by states parties of any immunity that their officials would otherwise possess vis-à-vis the ICC.”).
145. ICC Statute, *supra* note 13, art. 98(1) (“The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.”).
147. *See* Cassese, *The Sharon and Others Case*, *supra* note 86, at 442 (“Under another, more convincing interpretation, immunities are lifted only in proceedings before the ICC.”).
state officials of non-parties retain all their immunities before the national courts of other states, even those that are parties to the ICC statute.\textsuperscript{148} As will be demonstrated below, in tandem with the decision in \textit{Congo v. Belgium}, this could result in total impunity from prosecution for core crimes for non-party state officials.

Two examples will illustrate this point:

\textit{Case 1.} Following the U.S. withdrawal from Afghanistan and a change in its government, Afghanistan\textsuperscript{149} could refer to the Court an allegation that a former U.S. Secretary of Defense had authorized the use of torture in the interrogation of prisoners captured in Afghanistan during the Afghan conflict, and therefore had committed “grave breaches” of the Geneva Prisoners of War Convention.\textsuperscript{150}

If the U.S. requests that the ICC defer to its investigation,\textsuperscript{151} under the “complementarity” provisions in Article 17 of the ICC Statute, the Court must defer even to a non-party state, like the U.S., unless “the State is unwilling or unable genuinely to carry out the investigation or prosecution.”\textsuperscript{152} A zealous U.S. Attorney, who is a veteran of the ICTY, indicts, and the former Secretary moves to dismiss the indictment because he was acting in his official capacity when he authorized the interrogations in Afghanistan. The U.S. judge, unable to resolve the immunity question under U.S. law because there are no cases directly on point, turns to the customary international law of immunity, which is applicable in U.S. courts.\textsuperscript{153} She reads \textit{Congo v. Belgium} to mean that there is no customary law exception to immunity for core crimes in national courts and grants the motion to dismiss the indictment.

\textit{Case 2.} The newly recognized state of Palestine accedes to the ICC Statute. Thereafter, it charges that a former Israeli prime minister committed a war crime when he authorized the Israeli air force bombing of civilian targets in Gaza. Palestine requests that the United Kingdom, another state party to the ICC Treaty, arrest and extradite the former prime minister, who is in London to give a speech.

\textsuperscript{148} See \textit{supra} notes 146–47.
\textsuperscript{149} Afghanistan is a party to the ICC Statute and could therefore make such a referral under Article 14.
\textsuperscript{150} Geneva Conventions, \textit{supra} note 70.
\textsuperscript{151} See ICC Statute, \textit{supra} note 13, art. 17(1).
\textsuperscript{152} Id.
\textsuperscript{153} See The Paquete Habana, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”).
The former prime minister challenges the extradition request in the British courts on the ground that he was acting in his official capacity when he authorized the bombing of Gaza targets. The British judge reads *Congo v. Belgium* to mean that there is no customary law exception to immunity for core crimes in national courts and refuses the extradition request. In either of these cases could the judges’ immunity decisions provide bases for the ICC to assert its jurisdiction because the states are “unwilling” to prosecute?154

The answer to this question is arguably, “No.” The ICC Statute defines “unwillingness in a particular case” as “proceedings . . . undertaken . . . for the purpose of shielding the person concerned from criminal responsibility,” or “proceedings . . . not conducted independently or impartially” or “in a manner . . . inconsistent with an intent to bring the person concerned to justice.”155 These standards are simply inapposite in a case where a judge, based on a plausible interpretation of a less than pellucid decision of the ICJ, determines that a former state official has immunity.156 This is especially true since in these cases the courts’ decisions are based on immunity *ratione materiae* which, unlike immunity *ratione personae*, does not simply temporarily defeat an assertion of jurisdiction but rather provides a complete, permanent defense because the alleged criminal act is chargeable only to the state and not to the individual acting on its behalf.157

VI. CONCLUSIONS

It might be argued that the results predicted above are not ineluctable. Fortunately, hypothesis is not limited by probability. Even so, it is significant that at least one post-*Congo v. Belgium* court has read the case precisely this way. In *Prosecutor v. Charles Ghankay Taylor*,158 the Special Court for Sierra Leone said, “the International Court of Justice [in *Congo v. Belgium*] upheld immunities in national courts even in respect

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154. Professor Cassese has suggested that this should be the outcome. See Cassese, *The Sharon and Others Case*, supra note 86, at 442–43.
155. ICC Statute, supra note 13, art. 17(2)(a),(c).
156. The other ground for invoking the ICC’s jurisdiction—when a state is unable to prosecute because of a “total or substantial collapse or unavailability of its national judicial system”—is obviously inapplicable on these facts. See id. art. 17(3).
of war crimes and crimes against humanity relying on customary international law.”

Given this, it cannot be said that the potential for misinterpretation of *Congo v. Belgium* in national tribunals is illusory. This is particularly unfortunate since if one accepts the proposition that the states most likely not to ratify the ICC treaty are those most likely to engage in conduct it prohibits, then it follows that non-party state officials will also be those who most frequently commit core crimes. In such cases, the courts in their nationality states, where they are most apt to be found, may be motivated to shield them from prosecution by an international court, which they abjure, by applying a rule of immunity based on a colorable reading of *Congo v. Belgium*.

Moreover, the effects will not be limited to non-parties to the ICC Statute. For even in cases involving state parties, the ICC will be precluded from requesting the surrender of the officials of non-party states because, if *Congo v. Belgium* means that non-party state officials have immunity for core crimes, such a request would require the state party “to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State . . . .” In either situation it is unlikely that the ICC will ever be able to assume jurisdiction by invoking the exception to the rule of complementarity for a prosecution that lacks “genuineness.”

Equally unfortunate is the opportunity missed to bring some clarity to an underdeveloped area of international law. Instead, in *Congo v. Belgium*’s wake the status of state official immunity is even more in doubt. After more than a half century of erosion in the rule of absolute immunity from prosecution for core international crimes, it appears that state officials in national courts can still plead, “L’état c’est moi.”

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159. *Id.* para. 50. In this case, the defendant, the exiled former president of Liberia, moved to quash an indictment issued by the U.N.-supported Special Tribunal for Sierra Leone charging him with core international crimes. *Id.* para. 8.

160. ICC Statute, *supra* note 13, art. 98(1).
THE SELECTIVE “WAR ON TERROR”: EXECUTIVE DETENTION OF FOREIGN NATIONALS AND THE PRINCIPLE OF NON-DISCRIMINATION

Daniel Moeckli*

We have never had a trial. We were found guilty without one. We are imprisoned indefinitely and probably forever. We have no idea why. We have not been told what the evidence is against us. We are here. Speak to us. Listen to us.¹

[T]he message [of a culture of formalism] is that there must be limits to the exercise of power, that those who are in positions of strength must be accountable and that those who are weak must be heard and protected. . . . ²

The detention of suspected terrorists at the instance of the executive, without charge or trial, is one of the most draconian measures a state can adopt to combat terrorism. Winston Churchill famously described the power of the executive to imprison an individual as “in the highest degree odious.”³ U.S. Supreme Court Justice Stevens called it “the hallmark of the totalitarian state.”⁴ Nevertheless, the two leading forces of the “war on terror,” the United States and the United Kingdom, found it necessary to resort to this particularly extreme form of deprivation of liberty after September 11, 2001. What is perhaps even more remarkable is that both these states made their respective detention powers applicable to foreign, but not to domestic, terrorist suspects.

The recent landmark decision of the British House of Lords in A v. Secretary of State for the Home Department highlighted the fundamental problems that the reliance of contemporary anti-terrorism measures on

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distinctions according to citizenship raises with regard to the international human rights principle of non-discrimination.\(^5\) The Law Lords held that the preventive detention powers of the Anti-Terrorism, Crime and Security Act (ATCSA),\(^6\) passed by British parliament in November 2001, violated the non-discrimination guarantee of Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,\(^7\) because no reasonable and objective justification existed for limiting the scope of their application to foreign terrorist suspects.\(^8\) As a reaction to the judgment, the British government repealed the detention scheme and replaced it with lesser forms of restriction that are applicable irrespective of nationality.\(^9\) In contrast, the parallel U.S. system providing for asymmetric detention powers remains in force.

The purpose of this Article is to assess whether unequal treatment of non-citizens with regard to anti-terrorism detention may ever be compatible with the international human rights principle of non-discrimination. An analysis of executive detention powers from a non-discrimination perspective may not only reveal possible inconsistencies of domestic anti-terrorism regimes with the framework of international law, but, as the reactions of the British government and public to the House of Lords decision demonstrate,\(^10\) it can also have a profound political impact: insisting on non-discriminatory powers can pave the way for a more principled debate about the acceptability of restrictions of liberty in the fight against terrorism. Requiring political actors to articulate their claims in terms of universally applicable rules is an important instrument of restraining state power and helps protect those who are most likely to be subjected to its worst excesses. Justice Jackson stressed this crucial function of the equality guarantee more than fifty years ago:

\[\text{[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can}\]

\(^8\) A v. Sec’y of State for the Home Dep’t, [2005] 2 A.C. 68, paras. 67–68.
\(^9\) Prevention of Terrorism Act, 2005, c. 2, §§ 1, 2 (U.K.).
\(^10\) For these reactions, see infra text accompanying notes 195–97.
take no better measure to assure that laws will be just than to require
that laws be equal in operation.11

Part I of this Article will illustrate that it is far from a new phenomenon
that executive detention powers are mainly directed against non-citizens.
Even though efforts to curb the power of the executive branch to deprive
people of their liberty were made as early as in medieval times, certain
grounds have always been seen as sufficient to justify this far-reaching
measure. Historically, the most important justification relied upon by
governments was national security: foreign citizens thought to pose a risk
to the security of the nation have regularly been preventively detained in
times of crisis. More recently, states have often invoked their power to
regulate immigration to justify the detention of foreigners.

Just like executive detention powers in general, so has the more spe-
cific power to preventively detain suspected terrorists normally been tar-
geted at groups viewed as alien. The U.S. Antiterrorism and Effective
Death Penalty Act of 1996 made this focus explicit by linking counter-
terrorism to immigration control.12 The detention powers adopted after
September 11 in both the United Kingdom and the United States con-
tinue this tradition of making the detention of terrorist suspects ancillary
to the enforcement of immigration law. Part II will set out the relevant
legal schemes of these states.

Whether detention powers conform to legal guarantees of the principle
of non-discrimination cannot be answered without consideration of the
objectives they are designed to achieve. The central elements of any dis-
crimination analysis, comparability and proportionality, must be judged
in relation to the actual aim pursued by the measure in question. Part III
will therefore analyze the policy rationales behind the British and U.S.
powers of preventive detention. Although they have been placed in an
immigration context, these powers, it is argued, in fact serve to counter
terrorism rather than to enforce the immigration laws.

Part IV will demonstrate that the United Kingdom and the United
States are bound by international law to respect the principle of non-
discrimination and that this obligation is reinforced by corresponding
domestic norms of both states, requiring equal treatment. Importantly,
this common standard of equality includes a prohibition of differential
treatment on the basis of citizenship.

son, J., concurring).
more detailed description, see infra Part II.A.
Part V will assess the compatibility of asymmetric detention powers with this requirement of non-discrimination. Three sub-tests are particularly critical to this assessment: What is the applicable standard of review? Are foreign terrorist suspects in a comparable situation to suspected terrorists who are nationals? Is there an objective and reasonable justification for the difference in treatment? Answering these questions in relation to the detention powers in issue enables the elaboration of a set of standards that can be applied to the preventive detention of terrorist suspects in general.

I. EXECUTIVE DETENTION

The expression “executive detention” or “administrative detention” is commonly used to mean detention at the behest of the executive branch of government without charge and without trial, often for an indefinite period. Since the purpose of such detention is typically the prevention of future harm rather than punishment, the term “preventive detention” is equally apposite. This is also true for the detention of terrorist suspects, and, accordingly, the adjectives “executive,” “administrative” and “preventive” can be used interchangeably in the present context. The term “internment” more specifically describes confinement ordered by the executive during wartime.

Already these summary descriptions reveal the two critical elements that distinguish executive detention from imprisonment for criminal offences. First, the detainees are not held because they have done anything wrong, but because they might do something wrong in the future. Second, the decision that someone poses a threat is the result of an administrative process, rather than of a public trial before a court. Both the fact that the assessment as to dangerous propensity is inherently discretionary and that there is a lack of judicial involvement in the decision-making process make executive detention a particularly serious deprivation of liberty, placing individuals under the complete control of the state. As a consequence, such detainees are in an especially vulnerable position that may be further exacerbated by the secrecy that often surrounds this form of detention.

It is therefore not surprising that efforts to establish basic safeguards against arbitrary detention date back a long time. With the Magna Carta 1215\(^\text{13}\) and the Petition of Right 1628\(^\text{14}\) as its pillars, the common-law...

\(^{13}\) Magna Carta provides: “No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land.” Magna Carta 1215, 17 John, c. 39, reprinted in JAMES CLARKE HOLT, MAGNA CARTA 461 (2d ed. 1992).
tradition produced, very early on, a system of procedural devices and norms designed to prevent the abuse of detention powers. In this sense, freedom from arbitrary detention could be called the oldest of human rights.15 Today, the fundamental importance of the right to personal freedom is reflected in its widespread codification in the Universal Declaration of Human Rights,16 the International Covenant on Civil and Political Rights (ICCPR),17 such international “soft law”18 standards as the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment19 and the U.N. Standard Minimum Rules for the Treatment of Prisoners,20 regional human rights treaties including the European Convention for the Protection of Human Rights and Fundamental Freedoms,21 the American Convention on Human Rights22 and

18. The term “soft law” is commonly used to describe non-binding international instruments, often adopted by way of UN General Assembly resolutions. They exercise a considerable influence on the international decision-making process as states frequently rely on them and are reluctant openly to contravene them. Thus, they engender legal expectations and may entail a presumption of illegality when action is taken contrary to them. See Gerald Fitzmaurice, Hersch Lauterpacht—The Scholar as Judge (pt. 2), 38 BRIT. Y.B. INT’L L. 1, 8–12 (1962); Christoph Schreuer, Recommendations and the Traditional Sources of International Law, 20 GERMAN Y.B. INT’L L. 103, 115–18 (1977); Contemporary Views on the Sources of International Law: The Effect of U.N. Resolutions on Emerging Legal Norms, 73 AM. SOC’y INT’L L. PROC. 300, 327–28 (1979) (comment made by Myres S. McDougal during discussion of Oscar M. Garibaldi’s discussion of The Legal Status of General Assembly Resolutions); Michael Bothe, Legal and Non-Legal Norms—A Meaningful Distinction in International Relations?, 11 NETH. Y.B. INT’L L. 65, 85–86 (1980); Tadeusz Gruchalla-Wesierski, A Framework for Understanding “Soft Law,” 30 McGill L.J. 37, 46 (1984).
21. European Convention, supra note 7, art. 5.
the African Charter on Human and Peoples’ Rights, as well as numerous national constitutions.

It should be noted, however, that all these standards do not guarantee a right to be free from executive detention but rather impose limits on the use of this far-reaching power by restricting the permissible grounds for detention or providing for certain procedural safeguards. Executive detention is thus not generally prohibited. In fact, it is, in one form or another, a common feature of most legal systems. Executive detention powers are employed, for example, against criminal suspects, vagrants, the mentally ill, drug addicts, those believed to pose a risk to national security, and immigrants. It is the last two categories of persons who have been the subjects of the most pervasive instances of executive detention.

States have generally been seen as allowed to restrict the right to liberty in times of crisis, and the internment of those thought to pose a national security risk has a long history. In the United Kingdom, the first of a series of Habeas Corpus Suspension Acts, allowing the executive to hold individuals on treason charges without bringing them to trial, was introduced as early as 1688. During the second part of the nineteenth century, Ireland was governed with the use of detention powers which were shielded from any form of judicial supervision. The British government again relied upon preventive detention powers in both world wars to intern 30,000 and 28,000 “enemy aliens” respectively. Finally, as Brian Simpson has pointed out, the power of executive detention was “always valued in the colonies” and, even in the waning years of the

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24. See, e.g., U.S. CONST. amend. V.
25. See European Convention, supra note 7, art. 5(1).
26. See ICCPR, supra note 17, art. 9.
27. See European Convention, supra note 7, art. 5(1) (expressly authorizing the detention of all these categories of persons except those thought to pose a risk to national security). See id. art. 15(1) (stating with regard to this latter group, however, that states can provide for executive detention by derogating from the right to liberty on the ground that there is a public emergency threatening the life of the nation).
30. SIMPSON, HIGHEST DEGREE ODIOUS, supra note 3, at 15, 163.
31. SIMPSON, HUMAN RIGHTS, supra note 29, at 876.
British Empire, used to incarcerate tens of thousands of troublesome political opponents.32 In the United States, the Enemy Alien Act, adopted in 1798 and still on the books today, authorizes the President during a declared war to detain or expel any citizen of a country with which the United States is at war.33 This power was invoked against the British in the War of 1812 and to detain about 2,300 Germans and Austro-Hungarians during World War I.34 In the Second World War, executive orders issued by President Roosevelt were relied upon in addition to the Enemy Alien Act to intern 110,000 persons of Japanese descent in isolated desert camps.35 Internment initiatives such as these have later been heavily criticized and are now widely regarded as excessive. Today, contemporary international human rights instruments guaranteeing the right to liberty put important restrictions on the ability of states to adopt executive detention powers for national security reasons,36 even though the right to liberty can be derogated from when there is a public emergency threatening the life of the nation.37

The fact that detention based on national security has become less accepted by the international community may be one of the reasons why the existence of another type of crisis has frequently been asserted in more recent years to justify executive detention powers: the perceived immigration crisis. The right of the state to control immigration and to detain non-nationals pending either their admission or expulsion is generally recognized in international law,38 and immigration detention is a common practice among states today. As the influx of immigrants into western countries has come to be seen as a serious danger requiring restrictive and deterrent action, many states have enacted legislation to en-
hance their powers to detain foreign citizens and to authorize longer periods of detention. As a consequence, in the United States, for example, the immigration authorities detained more than 230,000 non-citizens in the fiscal year 2003; the corresponding figure for the United Kingdom has been put at approximately 35,000. Despite stable or falling rates of asylum-seekers entering western countries, and even though relevant guidelines of the United Nations High Commissioner for Refugees provide that as a general rule asylum-seekers should not be detained, recent years have also seen an increase in the number of this category of foreign nationals being detained.

As this short account demonstrates, foreign citizens have always been the main target of executive detention powers. While states have often invoked threats to national security to justify the preventive detention of non-nationals, in recent years they have also relied upon the far-reaching powers linked to the right to control immigration. In fact, these two grounds for detention, national security and immigration control, which were originally seen as separate though closely related areas, are now becoming increasingly intertwined. For reasons to be explained in Part III of this Article, some states have adopted detention powers pursuing national security aims within an immigration context. The executive detention of suspected foreign terrorists is the prime example of this approach.


II. EXECUTIVE DETENTION OF SUSPECTED TERRORISTS

One national security matter that has regularly led states to resort to powers of executive detention is terrorism. Governments often claim that they cannot bring suspected terrorists to trial because of the sensitivity of the evidence involved in these sorts of cases or the high standard of proof required. The authority to disable, or at least isolate suspects despite a lack of evidence admissible in court is an alternative to trial that many states have not been willing to forego. Both the United Kingdom and the United States had deployed this instrument already before September 11 to target particular groups of alleged terrorists. Since the attacks of that date, states all over the world have reinforced their respective powers.

A. Before September 11

In the United Kingdom, the power of detention without trial had already been in force for decades prior to September 11. However, it was never applied universally, but remained limited to Northern Ireland, where it was primarily deployed against the Republican minority. It was a regular feature of a series of anti-terrorism laws both during the fifty years under the Northern Ireland government and under “direct rule,” even though it was not used after 1975 and finally repealed in 1998.

The United States has also limited the scope of application of its executive detention powers, but has done so by placing them within an...
immigration context. The Antiterrorism and Effective Death Penalty Act of 1996 was passed in response to the Oklahoma City bombing in 1995 and is still in force today.\textsuperscript{50} Although a U.S. citizen had perpetrated the attack, the most draconian measures of the Act are only applicable to foreign terrorist suspects. In this sense, it can be seen as a precursor to the post-September 11 anti-terrorism laws. The Act authorizes the Attorney General to initiate special “Alien Terrorist Removal Procedures” against non-citizens allegedly involved in terrorism and to detain them until removal.\textsuperscript{51} If no country is willing to receive them, they may be held indefinitely.\textsuperscript{52}

\textbf{B. After September 11}

The attacks of September 11 led not only the United Kingdom and the United States, but also numerous other countries to introduce new (or strengthen existing) executive detention powers. This can be seen as characteristic of a wider trend towards the reliance on preventive policies to counter terrorism. Since the current terrorist threat is generally perceived as an unprecedented, diffuse ideological challenge that is increasingly difficult to attribute to individual perpetrators, laws and strategies adopted in the wake of September 11 are primarily designed to anticipate this indeterminate danger, including by disabling potential terrorists, rather than to bring terrorist perpetrators to justice.\textsuperscript{53} Countries that have,

\textsuperscript{50} Jennifer A. Beall, \textit{Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996’s Answer to Terrorism}, 73 IND. L.J. 693, 693 (1998).


\textsuperscript{52} 8 U.S.C. § 1537(b)(2)(C).

\textsuperscript{53} Evidence for this trend towards ever more prophylactic measures can be found in the major new anti-terrorism laws of both the United Kingdom and the United States. Apart from authorizing preventive detention, the British ATCSA introduced measures intended to prevent the financing of terrorism (Parts I and II), facilitate the sharing of information between different public authorities and the retention of communications data (Parts III and XI), and improve the security of dangerous substances that may be used or targeted by terrorists (Part VII). Furthermore, it tightened the asylum proceedings (Part IV). Anti-terrorism, Crime and Security Act, 2001, c. 24, §§ 1–32, 58–75, 102–07 (U.K.). The core parts of the USA Patriot Act expanded surveillance and intelligence sharing powers (Title II), introduced new measures to prevent the financing of terrorism (Title III), and tightened the immigration laws (Title IV). Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. 107-56, §§ 201–25, 301–03, 311–30, 351–66,
accordingly, adopted new laws authorizing the administrative detention of terrorist suspects include Australia, Canada, India, Indonesia, and Pakistan.

In these states, anyone can be detained at the instance of the executive, albeit only for limited periods of time. In contrast, the United States and, at least originally, the United Kingdom chose, in line with their previous legislative measures, to provide for stringent indefinite detention powers, but to restrict the scope of their application: they were made ancillary to immigration control and thus limited to foreign terrorist suspects. After the House of Lords had ruled that the detention of only foreign nationals was discriminatory, the British government eventually replaced the executive detention powers with lesser forms of restriction of liberty that


54. In 2003, the Australian Security Intelligence Organisation Act 1979 was amended to authorize the detention for questioning by the Australian Security Intelligence Organisation of persons who are believed to be able to provide information that will “substantially assist the collection of intelligence that is important in relation to a terrorism offence.” Australian Security Intelligence Organisation Act, 1979, § 34C(3)(a). Detention under such a “warrant for questioning” can last for a period of seven days. Id. § 34HC. Further warrants may be issued, which can in turn be used as the basis for further periods of seven day detention. Id. § 34D(1)(a).

55. Under the Anti-Terrorism Act, if there are reasonable grounds to believe that a terrorist activity will be carried out and reasonable grounds to believe that this is necessary to prevent the carrying out of a terrorist activity, a peace officer may ask a judge to order a person to enter into recognizance to keep the peace and be of good behavior. If the person refuses to enter into the recognizance, he or she can be detained for up to one year. Anti-Terrorism Act, 2001 S.C., ch. 41, § 83.3 (Can).

56. The Prevention of Terrorism Act, passed by Parliament in 2002, authorizes the detention of terrorist suspects without charge or trial for 90 days. The Prevention of Terrorism Act, No. 15 of 2002; India Code (2002), § 49(2). A Special Court can extend this period to 180 days on application by the Public Prosecutor. Id. § 49(2)(b).


58. The Anti-Terrorism (Amendment) Ordinance, promulgated in 2002, provides that any person suspected of affiliation with a terrorist organization or with any group or organization suspected to be involved in terrorism or sectarianism can be arrested and detained without charge for a period which may be extended for up to one year. Anti-Terrorism (Amendment) Ordinance, 2002, § 11EE (Pak.), available at http://www.satp.org/satporgtp/countries/pakistan/document/actsandordinences/anti_terrorism_ordin_2002.htm.
are applicable to both citizens and foreign nationals. In the United States, however, the detention powers are still in force.

1. United Kingdom

Following the U.S. detention model, rather than the internment scheme previously deployed in Northern Ireland, the British government placed their post-September 11 detention powers within an immigration context. The legal basis for the detention of foreign terrorist suspects without charge and trial was created by the ATCSA, which came into force on December 14, 2001. Part 4 of the ATCSA authorized the Home Secretary to certify a person as a “suspected international terrorist” if he “reasonably (a) believes that the person’s presence in the United Kingdom is a risk to national security, and (b) suspects that the person is a terrorist.” The only means of challenging the Home Secretary’s certification was by way of appeal to the Special Immigration Appeals Commission (SIAC). Upon certification as a “suspected international terrorist,” a non-British citizen could be detained without charge or trial for an unspecified period of time if his or her removal or deportation was prevented as a result of the United Kingdom’s international obligations or for practical reasons. Because Article 5(1)(f) of the European Convention only allows member states to detain non-nationals as long as deportation proceedings are in progress and there is a realistic prospect of removal, the United Kingdom had to derogate from this part of the European Convention.


61. Id. §§ 21(8), 25.

62. Id. § 23. Detainees cannot be removed where, for example, removal or deportation to a country where the individual concerned may face the death penalty is prevented by the United Kingdom’s obligation under Protocol No. 6 to the European Convention concerning the Abolition of the Death Penalty. Further, the European Court of Human Rights has ruled that no one can be removed to a state where he or she would face a real risk of being subjected to treatment contrary to the prohibition of torture. See Chahal v. United Kingdom, App. No. 22414/93, 23 Eur. H.R. Rep. 413, para. 1 (1997); Soering v. United Kingdom, App. No. 14038/88, 11 Eur. H.R. Rep. 439 (1989), paras. 90–91. Finally, removal or deportation could be impossible for practical reasons, for instance, because the individual concerned is a stateless person or because the authorities are unable to find a country willing to accept him or her.


The then Home Secretary, David Blunkett, certified and detained sixteen persons under the ATCSA powers.\(^65\) Two of them chose to leave the United Kingdom, as the detainees are entitled to do.\(^66\) Eleven detainees challenged the lawfulness of the derogation order and Part 4 of the ATCSA before SIAC.\(^67\) In July 2002, SIAC quashed the derogation order and granted a declaration that the detention powers contained in the ATCSA were incompatible with Articles 5 and 14 of the European Convention insofar as they permitted detention of suspected international terrorists in a way that discriminated against them on the ground of nationality.\(^68\)

Upon appeal by the Home Secretary, the Court of Appeal overturned the decision of SIAC, holding that there were objective and justifiable grounds for selecting only non-British citizens for detention.\(^69\) Finally, on December 16, 2004, in their remarkable decision in \textit{A v. Sec'y of State for the Home Dep't}, an almost unprecedented nine-member bench of the House of Lords allowed the appeals of the detainees against the Court of Appeal’s decision.\(^70\) Although eight of the nine Law Lords were satisfied that the government was entitled to take the view that there was a public emergency justifying derogation from the European Convention,\(^71\) the majority also ruled that the derogating measure, i.e., the indefinite detention without trial of foreign terrorist suspects, was not a proportionate means to address the terrorist threat and therefore violated the right to liberty.\(^72\)

Furthermore, the House of Lords held that in providing for the detention of foreign, but not British, terrorist suspects, Part 4 of the ATCSA breached the prohibition of discrimination contained in Article 14 of the European Convention.\(^73\) Accordingly, it quashed the derogation order and made a declaration that Section 23 of

\(^{65}\) \textit{SECRETARY OF STATE FOR THE HOME DEPARTMENT, COUNTER-TERRORISM POWERS: RECONCILING SECURITY AND LIBERTY IN AN OPEN SOCIETY: A DISCUSSION PAPER, 2004, Cm. 6147, at 6, http://www.archive2.official-documents.co.uk/document/cm61/6147/6147.htm} [hereinafter \textit{COUNTER-TERRORISM POWERS}]. A further individual was certified, but detained under other powers. \textit{Id.}

\(^{66}\) \textit{Id.}

\(^{67}\) \textit{Id. at 10.}

\(^{68}\) \textit{A v. Sec'y of State for the Home Dep't}, 2002 WL 31676209, at *1277 (Special Imm. App. Comm'n July 30, 2002) (U.K.).


\(^{70}\) \textit{A v. Sec'y of State for the Home Dep't}, [2005] 2 A.C. 68, paras. 96–97.

\(^{71}\) \textit{Id.} paras. 25–29 (Lord Bingham), 75 (Lord Nicholls), 115–20 (Lord Hope), 154 (Lord Scott), 166 (Lord Rodger), 208 (Lord Walker), 226 (Baroness Hale), 240 (Lord Carswell). The only Law Lord to deny the existence of a public emergency was Lord Hoffmann. \textit{Id.} paras. 95–97.

\(^{72}\) \textit{Id.} paras. 30–44 (Lord Bingham).

\(^{73}\) \textit{Id.} paras. 45–73.
the ATCSA was incompatible with Articles 5 and 14 of the European Convention.\footnote{Id. para. 73.}

As a consequence of the ruling of the House of Lords, the government saw itself forced to repeal Part 4 of the ATCSA and to replace it with anti-terrorism powers that are equally applicable to foreign and British citizens. The Prevention of Terrorism Act, adopted in March 2005, gives the Home Secretary the power to impose so-called control orders on those he believes are involved in terrorist activities, subjecting them to restrictions such as curfew, electronic tagging, a ban on the use of telephones or the internet, restrictions on those the subject may associate with, and house arrest.\footnote{Prevention of Terrorism Act, 2005, c. 2, §§ 1, 2 (U.K.).}

2. United States

Following September 11, the United States created several new legal authorities that allow the executive branch to detain terrorist suspects. First, the major piece of legislation introduced as a reaction to the events of September 11, the USA Patriot Act, gives the Attorney General wider authority to detain immigrants who endanger national security.\footnote{USA Patriot Act, Pub. L. 107-56, § 412. \textit{See infra} text accompanying notes 82–86.} Second, a regulation issued by the Department of Justice (DOJ) on September 20, 2001, extends the detention powers of the immigration authorities.\footnote{Disposition of Cases of Aliens Arrested Without Warrant, 8 C.F.R. § 287.3(d) (2001). \textit{See infra} text accompanying notes 88–89.} Third, on September 18, 2001, Congress enacted the Authorization for the Use of Military Force Joint Resolution, entitling the President “to use all necessary and appropriate force” against those associated with the terrorist attacks of September 11.\footnote{Authorization for the Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001).} It is this authorization that the President has relied upon to designate over 650 foreign nationals as “enemy combatants” and to detain them indefinitely at the military base in Guantánamo Bay, Cuba.\footnote{In \textit{Hamdi v. Rumsfeld}, 542 U.S. 507 (2004), the U.S. Supreme Court upheld, in principle, the executive’s authority to detain “enemy combatants” captured abroad, whether they be foreign or U.S. citizens.} The “enemy combatant” treatment was later extended to two U.S. citizens.\footnote{The two are Yaser Hamdi and José Padilla. Timothy Lynch, \textit{Power and Liberty in Wartime}, 2004 \textit{CATO SUP. CT. REV.} 23, 25–29 (2004). After almost three years of military detention, Hamdi was released on October 11, 2004. Jerry Markon, \textit{Hamdi Returned to Saudi Arabia}, \textit{WASH. POST}, Oct. 12, 2004, at A02.} The fact that the U.S. authorities claim that those designated as “enemy combatants” were captured in the course
of an armed conflict makes their detention a special case, a detailed analysis of which would go beyond the limited scope of this Article. Rather, the discussion here centers on the detention of immigrants based on the two first-mentioned legal authorities. It should, however, be noted that the basic principles resulting from the present analysis are equally applicable to detention during armed conflict.81

Title IV of the USA Patriot Act introduced a number of amendments tightening the Immigration and Nationality Act. Most importantly, Section 412 of the Patriot Act82 authorizes the Attorney General to certify and detain non-citizens if he has “reasonable grounds to believe” that they are engaging, or have engaged, in a terrorist activity or otherwise endanger national security.83 The Act allows for detention for a period of seven days, after which the Attorney General must begin deportation.
proceedings, bring criminal charges against the detainees, or release them.\textsuperscript{84} For non-citizens against whom the government initiates deportation proceedings, detention must continue until they are “decertified” by the Attorney General. This requirement applies even if the detainee is granted relief from removal.\textsuperscript{85} A non-citizen whose removal is unlikely in the “reasonably foreseeable future” may be detained for additional six-month periods if his or her release would “threaten the national security of the United States or the safety of the community or any person.”\textsuperscript{86} The Act thus permits the Attorney General to certify foreign nationals as threats to national security and to hold them indefinitely. There is no guidance as to the process the Attorney General must follow in making the decision to certify an individual as a suspected terrorist; in particular, the Act does not provide for a hearing or for notice of the basis of certification.\textsuperscript{87}

In practice, the U.S. authorities have mainly relied on an interim immigration regulation, adopted shortly after the September 11 attacks, to detain foreign nationals in connection with the investigation of the attacks. For, this regulation on custody procedures, issued by the DOJ on September 17, 2001, grants even more far-reaching powers than the USA Patriot Act.\textsuperscript{88} It allows immigration authorities to detain non-citizens suspected of being in violation of an immigration law without charge for up to forty-eight hours and for an “additional reasonable period of time” in the event of “emergency or other extraordinary circumstance.”\textsuperscript{89} The regulation fails to define the terms “reasonable period of time,” “emergency” or “extraordinary circumstance” and does not require that the non-citizen’s detention relate to the external circumstances. Notably, no link with alleged terrorism needs to be made. The immigration authorities may even indefinitely detain individuals who are not charged with any crime or immigration law violation and against whom no deportation proceedings have been initiated. The detainees do not have to be in-

\begin{footnotes}
\footnote{84. USA Patriot Act, Pub. L. 107-56, § 412(a)(5) (codified at 8 U.S.C. § 1226a(a)(5)).}
\footnote{85. Id. § 412(a)(2) (codified at 8 U.S.C. § 1226a(a)(2)).}
\footnote{86. Id. § 412(a)(6) (codified at 8 U.S.C. § 1226a(a)(6)).}
\footnote{87. See Sinnar, supra note 83, at 1432–33.}
\footnote{88. Compare Disposition of Cases of Aliens Arrested Without Warrant, 8 C.F.R. § 287.3(d) (2001) (“... a determination will be made within 48 hours of the arrest, except in the event of an emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time, whether the alien will be continued in custody or released...”), with USA Patriot Act, Pub. L. 107-56, § 236A(6) (“An alien... whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months...”).}
\footnote{89. Disposition of Cases of Aliens Arrested Without Warrant, 8 C.F.R. § 287.3(d) (2001).}
\end{footnotes}
formed of the reasons for their detention and are not guaranteed a right to contest it.\textsuperscript{90}

Exactly how many foreign terrorist suspects have been detained in connection with the September 11 investigation, and on what legal basis, is unclear because the executive shrouded much of its detention program in secrecy. The DOJ stopped publishing figures in November 2001 when the number of non-citizens held by law enforcement agencies at the federal, state and local levels had reached around 1,200.\textsuperscript{91} The Inspector General of the DOJ, who carried out an investigation into allegations of mistreatment of the September 11 detainees, identified 762 foreign nationals who were detained by the Immigration and Naturalization Service on immigration law violations.\textsuperscript{92} Taking advantage of its wide powers under the new regulation on custody procedures, the immigration authorities held many of them for weeks or even months without charging them.\textsuperscript{93} Once charges were filed, they were mostly because of minor immigration law violations such as visa overstaying which would not normally warrant arrest.\textsuperscript{94} Moreover, the detainees were subject to the so-called “hold until cleared” policy that the government adopted after September 11, requiring the immigration authorities not to deport or release detainees until the FBI has cleared them of any connection to terrorism.\textsuperscript{95} This clearance process lasted an average of eighty days from the time of arrest and in many cases considerably longer.\textsuperscript{96} As the review by the Inspector General established, the policy was applied in an indiscriminate manner, resulting in the continued detention of many individuals for whom there were no reasonable grounds for suspicion of a connection to terrorism.\textsuperscript{97} Even numerous detainees who had agreed to leave the country and whose immigration cases had been completed were kept in deten-

\textsuperscript{91.} Amy Goldstein & Dan Eggen, U.S. to Stop Issuing Detention Tallies, WASH. POST, Nov. 9, 2001, at A16.
\textsuperscript{93.} Id. at 27–36. The OIG identified five detainees who were served with a charge, on average, 168 days after their arrest. Id. at 31.
\textsuperscript{94.} Id. at 195.
\textsuperscript{95.} Id. at 37–71.
\textsuperscript{96.} Id. at 51–52.
\textsuperscript{97.} Id. at 70.
tion as a consequence of the policy. Ultimately, almost all of those detained in the first few weeks after the attacks were cleared of terrorist ties and removed or released. Only three of the foreign nationals arrested by the immigration authorities were charged with terrorism-related crimes; two of them were acquitted, one was convicted. Despite this lack of established effectiveness, the U.S. authorities have in recent years continued to heavily rely on immigration law as part of their anti-terrorism efforts.

III. RATIONALES FOR THE DETENTION POWERS

The conformity of the executive detention powers described in Part II with the principle of non-discrimination can only be assessed in relation to the objectives the detention powers pursue. The considerations set out below led both the United Kingdom and the United States to adopt their new anti-terrorism detention powers within an immigration context. However, it is argued that this choice of an immigration context cannot conceal the real primary aim of these powers: they serve to protect national security rather than to enforce the immigration laws.

The first reason why terrorism is dealt with in an immigration context is linked to the emergence of a new kind of threat perception in the wake of September 11: the contemporary terrorist threat is increasingly seen as a fundamental civilizational challenge emanating from abroad. This perception was reinforced by the immigration history of the September 11 hijackers who had all entered the United States on valid visas, and some of whom had, unnoticed by the authorities, overstayed. Accordingly, new counter-terrorism measures such as preventive detention powers are primarily targeted at those who try to enter the country or have entered recently, serving not only to incapacitate potential terrorists, but also to deter them from entering or staying in the first place. This rationale has been made explicit, for example, by a senior civil servant of the British

98. Id. at 108. See also Christopher Drew & Judith Miller, A Nation Challenged: The Detainees; Though Not Linked to Terrorism, Many Detainees Cannot Go Home, N.Y. TIMES, Feb. 19, 2002, at A01.
100. See COLE, supra note 34, at 26.
Home Office who argued that the detention powers under the ATCSA were needed to prevent the perception in other countries, particularly Muslim countries, “that the United Kingdom was weak in its response to international terrorists operating in its territory.”\footnote{A v. Sec'y of State for the Home Dep’t, [2005] 2 A.C. 68, paras. 125, 181 (paraphrasing a statement by Mr. Whalley, witness before the House of Lords).} In a similar vein, the Home Secretary has claimed that “the existence and use of the powers have helped to make the UK a far more hostile environment for international terrorists to operate in, with the result that some have been deterred from coming here, and others have left entirely, to avoid being certified and detained.”\footnote{COOUNTER-TERRORISM POWERS, supra note 65, at 9.} These statements not only reveal from where the terrorist threat is perceived to emanate, but also highlight the symbolic purpose of detention powers. At the same time, this policy of deterrence corresponds to the rationale underlying the general tightening of immigration controls.

Second, the adoption of security measures that only apply to those without a voice in the democratic process is, for governments, the least politically costly way of reacting to terrorist incidents. Preventive detention powers applicable to both foreign nationals and citizens, in contrast, would be unlikely to find the support of a majority. It was again the British Home Office that has put this point most clearly, when explaining its reasons for limiting executive detention to non-citizens:

> While it would be possible to seek other powers to detain British citizens who may be involved in international terrorism it would be a very grave step. The Government believes that such draconian powers would be difficult to justify. Experience has demonstrated the dangers of such an approach and the damage it can do to community cohesion and thus to the support from all parts of the public that is so essential to countering the terrorist threat.  

\footnote{430 PARL. DEB., H.C. (6th ser.) (2005) 306.}

As far as non-citizens are concerned, “such draconian powers” are, however, seen as justifiable; the support from the foreign part of the public is apparently considered less essential. Accordingly, the detention powers of the ATCSA were passed with a comfortable majority in the House of Commons.\footnote{The vote was 341 to 77. 375 PARL. DEB., H.C. (6th ser.) (2001) 404.} The suggested control orders under the new Prevention of Terrorism Act 2005, applicable to both British and foreign citizens, on the other hand, caused a political storm, compelling the government to make important concessions.\footnote{See infra text accompanying notes 196–97.} Similarly, in the United
States, the preventive detention campaign directed at more than one thousand immigrants and the incarceration of hundreds of foreign nationals at Guantánamo Bay have generated only little public attention and have faced hardly any political opposition. In stark contrast, there was a public outcry when the first two U.S. citizens were taken into military custody.  

Third, immigration law has traditionally been treated as a distinct area where the state is accorded particularly far-reaching powers and where fewer safeguards (such as access to a lawyer or to a court) apply than in criminal law. The imposition of especially stringent rules and enforcement measures on individuals on the basis of their nationality is, of course, inherent in immigration law and, as explained in Part I above, the executive detention of foreign nationals has accordingly been a longstanding and accepted feature of immigration law. The justification for new detention powers may thus be enhanced if they can be presented as being rooted in this tradition, i.e., as pursuing immigration control purposes.  

In fact, however, the main objective pursued by the detention powers considered here is not enforcement of the immigration laws but protection of national security. This is already apparent from the legislative history of these powers: they are part of wider anti-terrorism packages adopted as a reaction to the attacks of September 11. As a matter of fact, the former U.S. Attorney General, John Ashcroft, has freely admitted that the new immigration regulation, described in Part II.B.2 above, serves to authorize the executive detention of foreign terrorist suspects for purposes of criminal investigation and prevention of further attacks: “We seek to hold them as suspected terrorists, while their cases are being processed on other grounds.” This point was reemphasized by the Assistant Attorney General who stated that the government’s policy was to “use whatever means legally available” to detain persons who might present a threat. The “hold until cleared” policy must also be seen in this light: the fact that even foreign nationals who had agreed to leave were kept in detention confirms that the government’s aim was not enforcement of the immigration laws but investigation and prevention of criminal activity. Equally, with regard to the detention powers under the British ATCSA, the House of Lords has made clear that it would be wrong to

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110. OIG, supra note 92, at 13.
view them as an immigration issue. Instead, it pointed out that, “[t]he undoubted aim of the relevant measure . . . was to protect the UK against the risk of Al-Qaeda terrorism.” In other words, the powers at issue were adopted for national security reasons and not for the control of immigration. This raises the question of whether executive detention powers that have, for different reasons, been adopted in an immigration context, and are thus only applicable to foreign nationals, but that are in fact designed to counter terrorism, conform to the principle of non-discrimination.

IV. THE PRINCIPLE OF NON-DISCRIMINATION

The United Kingdom and the United States both have an obligation under international law to respect the principle of equality or non-discrimination. They have both ratified the ICCPR, which prohibits discrimination in its Articles 2(1) and 26. The body tasked with monitor-

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111. A v. Sec’y of State for the Home Dep’t, [2005] 2 A.C. 68, paras. 54 (Lord Bingham), 103 (Lord Hope).
112. Id. para. 54.
113. ICCPR, supra note 17, art. 2, para. 1 (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); id. art. 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”). The United States has made a declaration that Articles 1 through 27 of the ICCPR are not self-executing and thus not enforceable in U.S. courts until implemented by congressional legislation. 138 CONG. REC. 8068, 8071 (1992) (discussing the U.S. Senate Resolution of advice and consent to the ratification of the International Covenant on Civil and Political Rights). The legal validity of such declarations is disputed. See, e.g., Symposium, Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate, 42 DEPAUL L. REV. 1169 (1993); Louis Henkin, U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker, 89 AM. J. INT’L L. 341, 348 (1995). They can, in any event, not affect the United States’ obligations under international law. Furthermore, the United States has made an Understanding that it interprets Articles 2(1) and 26 to permit distinctions that “are, at minimum, rationally related to a legitimate governmental objective.” 138 CONG. REC. 8068, 8071 (1992). It is, however, not clear that this test differs in any respect from the “reasonable and objective” test used by the U.N. Human Rights Committee. General Comment 18: Non-discrimination, para. 13, U.N. Hum. Rts. Comm., 37th Sess., in COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, U.N. Doc. HRI/GEN/1/Rev.1, at 4 (1994) [hereinafter HRC General Comment 18].
ing the implementation of the ICCPR, the U.N. Human Rights Committee, has pointed out that the latter provision “prohibits discrimination in law or in fact in any field regulated and protected by public authorities.”\textsuperscript{114} The ICCPR thus imposes a general obligation on party states neither to enact legislation with a discriminatory content nor to apply laws in a discriminatory way.\textsuperscript{115} Furthermore, the basic (but non-binding) statement of human rights, the Universal Declaration of Human Rights, guarantees equality in several of its provisions.\textsuperscript{116} Finally, more specific “soft law” standards governing the treatment of persons in detention, including Principle 5(1) of the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment\textsuperscript{117} and Rule 6(1) of the Standard Minimum Rules for the Treatment of Prisoners,\textsuperscript{118} also prohibit any kind of discriminatory treatment.

Importantly, the authoritativeness of this international law obligation is strengthened by the existence of constitutional norms prohibiting discrimination in both states. In the United Kingdom, equality before the law has traditionally been regarded as forming part of the rule of law, one of the fundamental principles of the constitution.\textsuperscript{119} In addition, the principle of non-discrimination provided by Article 14 of the European Convention has now been incorporated into domestic law by way of the Human Rights Act 1998.\textsuperscript{120} Even though Article 14 is a subordinate norm, prohibiting discrimination only in the enjoyment of the rights and freedoms otherwise set forth in the Convention, this is of no relevance in the particular context of detention, since those detained can claim differential treatment with regard to the Convention’s right to liberty. In the United States, non-discrimination is guaranteed by the equal protection clause of the Fourteenth Amendment of the Constitution as far as classifications by state governments are concerned.\textsuperscript{121} The Supreme Court has

\begin{footnotesize}
\begin{enumerate}
\item[114.] Id. para. 12.
\item[115.] Id.
\item[116.] See, e.g., Universal Declaration of Human Rights, supra note 16, art. 1 (“All human beings are born free and equal in dignity and rights.”); id. art. 2, para. 1 (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); id. art. 7 (“All are equal before the law and are entitled without any discrimination to equal protection of the law.”).
\item[117.] G.A. Res. 43, supra note 19.
\item[118.] Standard Minimum Rules for the Treatment of Prisoners, supra note 20.
\item[120.] Human Rights Act, 1998, c. 42, § 1 (U.K.).
\item[121.] U.S. CONST. amend. XIV.
\end{enumerate}
\end{footnotesize}
interpreted the due process clause of the Fifth Amendment to test federal classifications under the same standard of review.  

Under both international law and the domestic law of the United Kingdom and the United States, the guarantee of non-discrimination, as well as the substantive right to liberty, are not confined to citizens, but extend to foreign nationals, irrespective of their legal status in the host country. Furthermore, the equality norms at issue are open-ended as to the prohibited grounds of distinction. Consequently, differential treatment on the basis of citizenship is also prohibited, except with respect to a


123. The Human Rights Committee has stated that the guarantees of the ICCPR “apply to everyone . . . irrespective of his or her nationality or statelessness.” General Comment 15: The Position of Aliens under the Covenant, para. 1, U.N. Hum. Rts. Comm., 27th Sess., in COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, U.N. Doc. HRI/GEN/1/Rev.1, at 4 (1994) [hereinafter HRC General Comment 15]. The Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live expressly guarantees a list of rights to non-citizens, including the right not to be arbitrarily arrested or detained and the right to equality before the courts. G.A. Res. 40/144, arts. 5(1)(a) & 5(1)(c), U.N GAOR 116th plen. mtg., U.N. Doc. A/RES/40/53 (Dec. 13, 1985). Article 1 of the European Convention obliges the contracting states to secure the Convention rights “to everyone within their jurisdiction.” European Convention, supra note 7, art. 1. For the United Kingdom, see A v. Sec’y of State for the Home Dep’t, [2005] 2 A.C. 68, para. 106 (Lord Hope holding that the right to liberty “belongs to everyone who happens to be in this country, irrespective of his or her nationality or citizenship.”); Khawaja v. Sec’y of State for the Home Dep’t, (1983) 2 WKLY. L. REP. 321, 344 (H.L.) (Lord Scarman holding that “[e]very person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others.”). For the United States, see Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that the Fourteenth Amendment applies “to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . .”); Kwong Hai Chew v. Colding, 344 U.S. 590, 596-97 n.5 (1953) (holding that the Fifth Amendment does not allow “any distinction between citizens and resident aliens”); Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (holding that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”).

124. Article 26 of the ICCPR prohibits discrimination “on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” ICCPR, supra note 17, art. 26 (emphases added). Similarly, Article 14 of the European Convention lists “any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” European Convention, supra note 7, art. 14 (emphases added). The Equal Protection clause of the Fourteenth Amendment to the U.S. Constitution does not refer to the prohibited grounds of distinction. U.S. CONST. amend. XIV.

125. For the ICCPR, the Human Rights Committee has expressly held that nationality is included in the reference to “other status.” Communication, U.N. Human Rights Committee, Decision of the Human Rights Committee Under Article 5(4) of the Optional
few specific rights that only apply to nationals, such as political rights and the right to enter or reside in a country. 126

Nevertheless, the fact that the executive detention powers considered in this Article make distinctions on the basis of nationality does not necessarily mean that they violate the principle of non-discrimination. Government actions inevitably classify persons; the crucial question is whether these classifications are justified or not. When assessing a discrimination claim, international human rights bodies and national courts will first examine whether there has actually been a difference in treatment, i.e., the applicant will need to identify others who, although in a comparable position, are treated better. 127 Once it is established that persons in analogous situations have been treated differently, the focus of the assessment shifts to the existence of a justification for the unequal treatment.

The first part of this justification test requires that the difference in treatment pursue a legitimate aim. 128 In the case of anti-terrorism measures, states will normally be able to meet this requirement quite easily by referring to national security interests. The assessment as to whether differential treatment is justified is thus, in practice, mainly controlled by the second leg of the justification test, requiring a reasonable relationship of proportionality between the difference in treatment and the legitimate aim sought to be realized. While proportionality is expressly referred to in the caselaw of the European Court of Human Rights, 129 and is indeed a general principle present throughout the European Convention, 130 the


126. See HRC General Comment 15, supra note 123, para. 2.


128. For the ICCPR, see HRC General Comment 18, supra note 113, para. 13. For the European Convention, see Belgian Linguistics Case (No. 2), 1 Eur. Hum. Rts. Rep. 252, 284 (Eur. Ct. H.R. 1968). According to the caselaw of the U.S. Supreme Court, the nature of the aim required depends on the applicable standard of review and is described as either a “legitimate,” “important,” or “compelling government interest.” See, e.g., POLYVIOS POLYVIOS, THE EQUAL PROTECTION OF THE LAWS 177–298 (1980).

129. See the formula used in Belgian Linguistics Case (No. 2), 1 Eur. Hum. Rts. Rep. at 284, which has become part of the consistent caselaw of the European Court.

130. See Marc-André Eissen, The Principle of Proportionality in the Case-Law of the European Court of Human Rights, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF
same concept also emerges in the Human Rights Committee’s formula that the criteria for differential treatment must be “reasonable and objective” and in the caselaw of the U.S. Supreme Court, which requires a varyingly close relationship between the differential treatment and the aim pursued, depending on the applicable standard of review.

The strictness with which discrimination claims are reviewed by courts can range from a “mere rationality” requirement to a “strict scrutiny” test and will generally depend on such criteria as the public aim pursued, the individual interest at stake, and the ground on which differential treatment is based. While the Human Rights Committee and the European Court of Human Rights make the determination of the applicable strictness of review largely dependent on an ad hoc consideration of the factors involved in the individual case, the U.S. Supreme Court has elaborated a system of three different, fairly fixed, standards of review, requiring a “rational,” “substantial,” or “narrowly tailored relationship” of the difference in treatment to the government end.

In sum, the United Kingdom and the United States are bound under international law to comply with a common standard of equality that corresponds in important respects to their respective domestic norms prohibiting discrimination.


131. HRC General Comment 18, supra note 113, para. 13.

132. For a summary of the Supreme Court’s relevant jurisprudence see, for instance, POLYVIOU, supra note 128.


134. In the context of the European Convention, the strictness of review corresponds to the doctrine of the margin of appreciation. For cases concerning discrimination, the European Court has expressed this doctrine in the following terms:

[T]he Contracting States enjoy a certain ‘margin of appreciation’ in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States.

Rasmussen v. Denmark, App. No. 8777/79, 7 Eur. H.R. Rep. 371 (1985), para. 40. Although the Human Rights Committee does not normally expressly refer to the doctrine of the margin of appreciation, its jurisprudence with regard to the strictness of review reveals a similar approach to the one of the European Court.

135. See POLYVIOU, supra note 128, at 177–298.
V. CONFORMITY WITH THE PRINCIPLE OF NON-DISCRIMINATION

This Part assesses the conformity of the post-September 11 detention powers of the United Kingdom and United States against the common standard of non-discrimination elaborated in Part IV. The basic principles emerging from this assessment can be applied to the executive detention of terrorist suspects by any state that has an obligation under international law to respect the principle of non-discrimination.

The British and U.S. legal frameworks considered here treat foreign nationals suspected of terrorism involvement differently from domestic terrorist suspects insofar as only the former can be preventively detained. This difference in treatment must be assessed according to the criteria set out in Part IV. One criterion that is relatively unproblematic in the case of detention powers is the legitimate aim requirement: states can easily meet this requirement by asserting that the detention of foreign terrorist suspects serves the protection of national security. The outcome of discrimination challenges to the preventive detention of foreign terrorist suspects will thus mainly turn on the following questions: With what scrutiny must the detention powers be reviewed? Are foreign terrorist suspects in a comparable situation to suspected terrorists who are nationals? Is the preventive detention of only those terrorist suspects who are non-citizens a proportionate means to achieve the legitimate goal of countering the terrorist threat? These questions are now considered in turn.

A. Standard of Review

That the degree of scrutiny applied by courts to review detention powers can be of decisive importance for the outcome of respective legal challenges is demonstrated by the case concerning the British ATCSA. Whereas the Court of Appeal relied on a deferential approach and, consequently, upheld the detention scheme, the House of Lords subjected it to close scrutiny, concluding that it violated fundamental guarantees of the European Convention. A closer examination of the proper standard of review courts should apply to assess the issues of comparability and proportionality is therefore required before entering into a substantive analysis of those issues.

The detention of foreign terrorist suspects is at the intersection of two areas where courts have traditionally exercised great deference towards the executive and the legislature: national security and immigration. As far as national security is concerned, international courts and bodies have

137. See infra text accompanying notes 157–60.
often accorded domestic authorities a wide margin of appreciation, mainly out of respect for national sovereignty, of which the state’s right to defend itself in times of crisis is seen as the bedrock.\textsuperscript{138} Two further reasons explain the traditional deference given by national courts to the executive, the military and the legislature: first, the idea that, according to the democratic principle, public interest considerations should be made by elected representatives, not by unelected judges; and, second, what has been termed “institutional capacity,” i.e., the notion that other branches of government may have special expertise in national security matters and are better equipped than the judiciary to know and evaluate risk in this area.\textsuperscript{139} Accordingly, examples of judicial self-restraint in national security matters can be found in the caselaw of both British\textsuperscript{140} and U.S. courts.\textsuperscript{141} In the field of immigration, judicial deference stems from the perception that the power to exclude and deport foreigners is an important incident of sovereignty properly belonging to the government, due to its close relationship with national security, foreign relations and other highly political issues.\textsuperscript{142} This power has therefore traditionally been seen in the United Kingdom as a prerogative of the Crown\textsuperscript{143} and in

\begin{itemize}
\item \textsuperscript{138} For an explanation of the approach of the European Court of Human Rights, see, for example, Ireland v. United Kingdom, (1979–1980) 2 Eur. Hum. Rts. Rep. (ser. A) 25, 91 (1978) (Court opinion) (holding that “[i]t falls in the first place to each Contracting State, with its responsibility for ‘the life of [its] nation’, to determine whether that life is threatened by a ‘public emergency’ and, if so, how far it is necessary to go in attempting to overcome the emergency.”). For a thorough analysis of the margin of appreciation doctrine in cases of derogation from European Convention guarantees, see Michael O’Boyle, The Margin of Appreciation and Derogation under Article 15: Ritual Incantation or Principle?, 19 HUM. RTS. L.J. 23 (1998).
\item \textsuperscript{139} Jeffrey Jowell, Judicial Deference: Servility, Civility or Institutional Capacity, PUB. L., 2003, at 592, 595 (U.K.).
\item \textsuperscript{140} See, e.g., R v. Sec’y of State for the Home Dep’t, ex parte Cheblak, (1991) 1 WKLY. L. REP. 890, 906–08 (A.C.); Sec’y of State for the Home Dep’t v. Rehman [2001] UKHL 47, para. 62 (Lord Hoffmann stating, “It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process.”).
\item \textsuperscript{141} See, e.g., Korematsu, 323 U.S. at 223–24 (upholding the evacuation of all persons of Japanese descent from the West Coast military area by reference to the military dangers at stake).
\item \textsuperscript{143} The two leading cases are Musgrove v. Chun Teeong Toy, [1891] A.C. 272 (P.C.) (appeal taken from Can.) (U.K.) and Attorney-General for the Dominion of Canada v.
the United States as a “plenary power” of Congress. Stephen Legomsky has demonstrated how these doctrines have resulted in strikingly similar patterns of judicial self-restraint in the immigration caselaw of British and U.S. courts.

However, the following two reasons call for strict scrutiny as far as the review of powers authorizing the preventive detention of foreign terrorist suspects is concerned. First, in a rights-based system, the judiciary is tasked with reviewing governmental actions for their compliance with certain fundamental rights and it cannot simply abdicate this supervisory responsibility by invoking a lack of institutional capacity or arguing that governmental powers in the fields of national security and immigration are inherent in sovereignty. In national security matters, both international and domestic, including British and U.S., courts have increasingly come to recognize this and have generally been moving towards a more stringent review: the mere fact that national security interests are involved, they have held, does not automatically entail a lenient standard of review. A similar trend can be observed in cases concerning immigration, so that even if the detention of foreign terrorist suspects was to be seen as an immigration matter, it would have to be subject to strict scrutiny. For although the regulation of immigration, i.e., the setting of admission and removal terms, may be a matter for the legislature and the executive, it does not follow that detention pursuant to immigration con-


144. For a summation of the plenary power doctrine, see, for example, Kleindienst v. Mandel, 408 U.S. 753, 766–69 (1972); Fiallo v. Bell, 430 U.S. 787, 792 (1977).

145. See generally STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA, pt. IV (1987) (explaining that, in general, the U.K. and U.S. judiciaries have both produced highly deferential immigration decisions, even though the two countries possess quite different political environments and disparate social norms).

146. See Jowell, supra note 139, at 597–99.

trol should not be subject to substantive judicial control.\textsuperscript{148} This has been recognized by the U.S. Supreme Court in its recent decision in \textit{Zadvydas v. Davis}, holding that the plenary power of Congress in immigration matters "is subject to important constitutional limitations."\textsuperscript{149}

Second, according to the established practice of both international and domestic courts, the intensity of review must be particularly great where fundamental interests are at stake.\textsuperscript{150} That the right to personal liberty is one of the most fundamental human rights is already apparent from its long history and widespread codification,\textsuperscript{151} and has been repeatedly recognized by international,\textsuperscript{152} British,\textsuperscript{153} and U.S. courts.\textsuperscript{154} Even in a terrorist context, the European Court of Human Rights has stressed the importance of the protection against arbitrary deprivation of liberty and has insisted on a strict review.\textsuperscript{155} On this basis, the House of Lords, in the case concerning detention under the ATCSA, decidedly rejected the government’s argument—previously accepted by the Court of Appeal—that it should be allowed a considerable margin in deciding whom to subject to powers of preventive detention.\textsuperscript{156} Although the executive may be better placed than the judiciary to assess the existence of a terrorist threat, the Law Lords held, the measures it adopts in response to this threat must be subject to close scrutiny by the courts, particularly if they affect the


\textsuperscript{149} Zadvydas v. Davis, 533 U.S. 678, 695 (2001).


\textsuperscript{151} See \textit{supra} Part I.

\textsuperscript{152} The European Court of Human Rights has referred to “the fundamental importance of the guarantees contained in Article 5” and the consequent need to narrowly construe any exception. Kurt v. Turkey, App. No. 24276/94, 27 Eur. H.R. Rep. 373, 447 (1998).

\textsuperscript{153} See, e.g., In Re S.-C. (Mental Patient: Habeeas Corpus), [1996] Q.B. 599, 603 (U.K.).

\textsuperscript{154} The Supreme Court has stressed: “We have always been careful not to ‘minimize the importance and fundamental nature’ of the individual’s right to liberty.” Fouche v. Louisiana, 504 U.S. 71, 80 (1992) (quoting United States v. Salerno, 481 U.S. 739, 750 (1987)).


\textsuperscript{156} A v. Sec’y of State for the Home Dep’t, [2005] 2 A.C. 68, para. 29.
right to liberty.157 For the courts are, as Lord Bingham put it, “specialists
in the protection of liberty,”158 and the more far-reaching the deprivation
of liberty at issue, the closer the scrutiny applied by the courts must be.159
These considerations led even the only Law Lord who sided with the
government, Lord Walker, to conclude: “Measures which result in the
indefinite detention in a high-security prison of individuals who have not
been tried for (or even charged with) any offence, and who may be inno-
cent of any crime, plainly invite judicial scrutiny of considerable inten-
sity.”160 This must hold true not only for the British context but for the
executive detention of terrorist suspects in general.

B. Comparability

Under the detention powers at issue, foreign terrorist suspects are
treated differently from nationals suspected of involvement in terrorism.
For a discrimination claim to succeed, it must, however, first be estab-
lished that this latter group is a suitable comparator. Are suspected ter-
rorists who are citizens in a comparable, i.e., analogous or relevantly simi-
lar, situation to those who are foreign nationals?

The question of comparability cannot be answered in the abstract but
must be judged in relation to the actual aim pursued by the measure un-
der consideration.161 As far as detention is used to enforce deportation,
i.e., as an instrument of immigration control, it could be argued that for-
eign citizens and nationals are not comparable groups because only the
former can be deported. However, the purpose of the detention of foreign
terrorist suspects is not enforcement of deportation. Rather, as has been
demonstrated in Part III, the British and U.S. detention powers are de-
dsigned to prevent terrorism and mainly apply to precisely those foreign
nationals who cannot be removed. Thus, in an anti-terrorism context, the
difference between the two groups in terms of deportability becomes
merely theoretical and therefore, irrelevant.

Nevertheless, the British Court of Appeal concluded that, even though
they cannot be deported, the foreign terrorist suspects falling under the
powers of the ATCSA were still not in a comparable situation to British
terrorist suspects: they had only a right not to be removed, whereas the

157. *Id.* paras. 39–42 (Lord Bingham), 79–81 (Lord Nicholls), 107–08 (Lord Hope),
196 (Lord Walker).
158. *Id.* para. 39 (quoting Judge La Forest in RJR-MacDonald Inc. v. Attorney Gen. of
159. *Id.* para. 178 (Lord Rodger).
160. *Id.* para. 192 (Lord Walker).
161. See, e.g., *id.* para. 235 (Baroness Hale) (United Kingdom); Tussman & tenBroek,
_supra_ note 127, at 346 (United States).
latter had a right of abode. Therefore, foreign terrorist suspects fell into a different legal class.¹⁶² This argument was decidedly rejected by the House of Lords. For, as Lord Rodger correctly pointed out, as far as detention in the present context is concerned, the critical factor is not the immigration status of those to be detained but the threat they are suspected of posing.¹⁶³ More precisely, those subject to the detention powers are chosen on the basis of the following characteristics: (i) they are suspected international terrorists; (ii) they cannot be successfully prosecuted; and (iii) they cannot be deported.¹⁶⁴ Both the terrorist suspects who are non-citizens and those who are nationals share these relevant characteristics. Thus, they are in an analogous situation. To hold otherwise would be to accept the choice of immigration control as a means to address the terrorist threat, when it is the correctness of that choice that is the disputed issue.

In sum, distinctions in terms of immigration status can only matter where the purpose of the detention is removal and those detained can actually be deported in timely fashion. The European Convention, for example, explicitly authorizes detention that is only applicable to immigrants, but only insofar as “action is being taken with a view to deportation or extradition.”¹⁶⁵ By contrast, where detention is used to prevent criminal activity or to protect national security, the mere legal difference between foreign nationals and citizens is not a relevant characteristic of distinction, and states cannot make it more relevant simply by placing their detention powers within an immigration context.

C. Objective and Reasonable Justification

Once it is established that persons in a comparable situation have been treated differently, it must be judged whether an objective and reasonable justification for the differential treatment exists. Are there objective and reasonable grounds for singling out foreign terrorist suspects for preventive detention? The mere fact that states have generally been seen as allowed under international law to make distinctions on the ground of nationality in an immigration context and to detain foreign citizens in times of crisis does not in itself provide a sufficient justification. It is, as the House of Lords observed in A v. Secretary of State for the Home Department, “indeed obvious that in an immigration context some differen-
tiation must almost inevitably be made between nationals and non-
nationals . . . "166 Yet foreign citizenship cannot justify every difference
in treatment. Rather, the question as to the existence of an objective and
reasonable justification must be answered in relation to the concrete aim
and effects of the differential treatment under consideration.167 The aim
in the present case is the prevention of terrorism, and the relevant ques-
tion is whether it is necessary and appropriate to focus on immigration
control in response to the danger posed by international terrorism.

In other words, the assessment as to whether differential treatment is
justified or not is mainly controlled by the proportionality requirement.
This principle, which is applied in one form or another under all the in-
ternational and domestic legal systems at issue,168 requires that there is a
reasonable relationship of proportionality between the difference in
treatment and the aim sought to be realized. This complex assessment as
to whether a fair balance between individual rights and a public interest,
here national security, has been struck may involve a whole range of dif-
ferent sub-tests. For the present purpose, it is helpful to group them into
two chronologically successive stages of inquiry. First, in the shorter
term, the distinction according to citizenship on which the detention
powers are based, must be a suitable and effective means to address the
terrorist threat. Second, the wider impacts of the differential treatment
must be evaluated, particularly insofar as the long-term effectiveness of
preventive detention is concerned.

1. Short-Term Suitability

The perception that the post-September 11 terrorist threat constitutes a
qualitatively new phenomenon reflective of wider cultural differences
has led states to increasingly rely on broad criteria to determine the scope
of application of anti-terrorism regimes. The executive detention powers
of both the United Kingdom and the United States are evidence of this
approach: they are not even limited to presumed members of al-Qaeda,
but extend to all foreign nationals who are suspected of having links with
terrorist groups. However, is the citizenship status of the suspected ter-
rorists a suitable criterion to determine the applicability of detention
powers?

166. A v. Sec’y of State for the Home Dep’t, [2005] 2 A.C. 68, para. 56 (Lord Bing-
ham).
167. See, e.g., the European Court of Human Rights decision in the Belgian Linguistics
168. See supra Part IV.
This question could only be answered in the affirmative if there was a difference in terms of dangerousness between citizens and non-citizens, i.e., if the terrorist threat stemmed exclusively, or at least almost exclusively, from the foreign section of the population. Yet the available evidence suggests that this is not the case. For the United Kingdom, the Newton Committee, a committee of Privy Counsellors set up under Section 122 of the ATCSA to review the operation of the Act, stated in their report to Parliament: “We have been told that, of the people of interest to the authorities because of their suspected involvement in international terrorism, nearly half are British nationals.” SIAC, who were also allowed to consider the material classified as confidential by the government, observed that it was clear that in the opinion of the Home Secretary there were suspected British terrorists at liberty in the United Kingdom. And the House of Lords concluded that the material submitted by the government showed a “high level of involvement of British citizens . . . in the terrorist networks.” The London bombings of July 7, 2005 provided chilling evidence for these assessments. Equally, it cannot be said that the terrorist threat to the United States stems only from foreign nationals. In fact, a large part of those charged by the U.S. authorities with terrorist offences allegedly related to al-Qaeda since September 11 are U.S. citizens as are some of those held without charge as “enemy combatants.”

The scope of application of both the British and U.S. detention powers is thus based on an inappropriate criterion, and it is not surprising that the

172. All the four suicide bombers were British citizens. Duncan Campbell & Sandra Laville, British Suicide Bombers Carried Out London Attacks, Say Police, GUARDIAN, July 13, 2005, available at http://www.guardian.co.uk/attackonlondon/story/0,,1527404,00.html.
corresponding detention initiatives have produced hardly any results in
the form of terrorism charges. It is, of course, very difficult to assess the
effectiveness of preventive detention campaigns, since governments will
claim that they are targeted at exactly those against whom there is not
sufficient evidence for bringing charges. Nevertheless, it would not seem
completely unreasonable to expect that after months, or even years of
detention, the authorities would be able to bring at least some of these
cases before the courts. Yet of the more than one thousand foreigners
preventively detained in the United States immediately after September
11, only three have been charged with any terrorism-related crime. 175
This contrasts starkly with the “success rate” from prior to September 11
when, on average, charges were brought against more than fifty percent
of the U.S. citizens and foreign nationals arrested under criminal law on
suspicion of terrorism involvement. 176 As far as the United Kingdom is
concerned, none of the detainees held for more than three years under the
ATCSA powers have ever been charged. These poor “success rates” to
some extent also reflect the fact that the incapacitation of potential terror-
ists is not even the main purpose of the detention powers: as explained in
Part III above, they serve just as much as a symbolic instrument of deter-
rence. Yet this policy of deterrence is flawed for the same reasons: citi-
zenship is not a suitable criterion to define its target group; preventive
detention would need to deter potential terrorists rather than immigrants.

The perception of the contemporary terrorist threat as being rooted in a
broader civilizational conflict, considerations of political feasibility, and
the traditional susceptibility of the immigration law to far-reaching re-
strictions of personal liberty have thus led both the British and the U.S.
governments to rely on a criterion that is not only extremely broad, but
also unsuitable to determine the applicability or non-applicability of pre-
ventive detention powers. The group targeted by the respective powers is
not only broadly, but wrongly defined. In the words of the Newton
Committee: “What is important is the nature of the threat, not the ideol-
ogy behind it or the nationality of the perpetrator.”177

2. Long-Term Consequences

The effectiveness, and therewith proportionality, of the citizenship dis-
tinction employed by the detention powers under consideration not only
hinges on its short-term suitability to address the terrorist threat. Rather,

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176. See Christopher Hewitt, Understanding Terrorism in America: From the
Klan to al Qaeda 93 (2003).
the effects that this distinction produces in the longer term must also be taken into account. And in this regard there is evidence to suggest that preventive detention powers that are reserved to foreign citizens contribute to the alienation of exactly those communities whose co-operation with the police would be crucial in anti-terrorist investigations.

As far as the United Kingdom is concerned, the House of Lords did not enter into an analysis of the long-term implications of preventive detention—perhaps because it simply did not have a reason to do so, given its clear finding that the detention powers were in any event an unsuitable means to counter international terrorism. Other sources do, however, point to their potentially alienating effects. The Newton Committee stated that they had “heard evidence that the existence of these powers, and uncertainty about them, has led to understandable disquiet among some parts of the Muslim population.” 178 The Commissioner for Human Rights of the Council of Europe wrote that the powers clearly have had “a negative affect [sic] on both the perception of Muslims by the rest of the population and the confidence of many Muslims in the fairness of the executive,” 179 and both the Leader of the Muslim Parliament of Great Britain and the President of the Muslim Association of Britain have criticized them as stigmatizing Muslims and fuelling extremism. 180 Similarly, the U.S. detention initiatives have reportedly contributed to a feeling of alienation and stigmatization among the Muslim and Arab communities in the United States. 181 The resulting disengagement may have important implications for the success rate of anti-terrorism investigations since, as the Newton Committee has correctly pointed out, “[i]t is important that legislation against terrorism should attract wide public acceptance to maximise its effectiveness.” 182 Communities who feel unjustifiably targeted by stringent anti-terrorism measures are less likely to trust, and therefore cooperate with, law enforcement agencies.

The conclusion that, in the long term, executive detention powers directed against specific groups may have a counter-productive effect is

178. Id. para. 196.


182. PRIVY COUNSELLOR REVIEW COMMITTEE REPORT, supra note 169, para. 196.
further supported by the experiences made with previous internment initiatives in both the United Kingdom and the United States. A review of the Northern Ireland (Emergency Provisions) Act, for example, concluded that the Northern Irish internment powers, which were used almost exclusively against the Catholic community,\textsuperscript{183} had been “a cause of distress and bitter resentment, so that people were provoked into sympathising with the terrorists and so internment acted as a recruitment boost.”\textsuperscript{184} And a former Home Secretary stated during the debate on the ATCSA that internment “is undoubtedly thought to have exacerbated rather than contained the IRA terrorist threat.”\textsuperscript{185} In fact, the first year following reintroduction of internment, 1972, was the most violent in Northern Irish history.\textsuperscript{186} Similarly, the available evidence suggests that the U.S. mass internment of persons of Japanese descent during the Second World War contributed little to the security of the nation, instead engendering significant resentment among the Japanese part of the population.\textsuperscript{187}

\textit{D. Result}

Powers of executive detention that only apply to foreign terrorist suspects treat two groups who are in a comparable situation differently: suspected terrorists who are nationals and foreign terrorist suspects share all the relevant characteristics in relation to the aim of preventing terrorism. Both international human rights bodies and domestic courts would be likely to employ strict scrutiny to review claims that such powers are discriminatory. Thus, weighty reasons would have to be put forward to justify the difference in treatment on the basis of nationality. Such reasons do not exist. The distinction according to citizenship is an unsuitable means to prevent terrorism where the threat stems not exclusively from the foreign part of the population. Furthermore, the long-term negative

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{183} See Spjut, Internment and Detention, supra note 45, at 735–38.
\item\textsuperscript{185} 629 PARL. DEB., H.L. (5th ser.) (2001) 199 (statement of Lord Jenkins of Hillhead).
\item\textsuperscript{186} LORD GARDINER ET AL., REPORT OF A COMMITTEE TO CONSIDER, IN THE CONTEXT OF CIVIL LIBERTIES AND HUMAN RIGHTS, MEASURES TO DEAL WITH TERRORISM IN NORTHERN IRELAND 61 (1975).
\end{enumerate}
\end{footnotesize}
effects of detention powers limited to foreign citizens support the conclusion that the difference in treatment is ineffective and disproportionate.

The principle of non-discrimination does not prevent states from detaining non-nationals where this is necessary to enforce the immigration laws since only they, but not citizens, are subject to immigration control. Yet where the aim pursued by detention is not enforcement of the immigration laws but protection of national security, differential treatment on the ground of citizenship can only be justified if there is a difference in terms of dangerousness between nationals and non-nationals. It is conceivable that such a difference might exist in a traditional war situation where states are pitted against each other, although any wartime internment would still necessitate derogation from the right to liberty guaranteed by international human rights instruments and would thus have to be "strictly required by the exigencies of the situation."188 In contrast, in the so-called war on terror—where the battle lines are not drawn along the borders of states—the criterion of nationality cannot be of any relevance for the definition of the scope of application of detention powers. Consequently, differential treatment of non-citizens with regard to preventive anti-terrorism detention violates the international human rights principle of non-discrimination.

VI. CONCLUSION

This Article has argued that the post-September 11 detention powers targeting foreign nationals should be understood as a symbolic instrument of deterrence directed at a perceived civilizational threat, as a politically convenient way of demonstrating a strong reaction to terrorist attacks, and as steeped in a long tradition of reserving the most severe restrictions of the right to liberty to foreign citizens. These powers were passed as part of legislative packages propelled through parliaments in record time, without thorough consideration of the need for them or their effectiveness.189 In fact, they are not even intended to address the terror-

188. ICCPR, supra note 17, art. 4(1); European Convention, supra note 7, art. 15(1).
189. The USA Patriot Act was approved by Congress less than four weeks after the first version had been introduced into the House of Representatives, bypassing much of the normal committee process. The Senate passed the bill after only three hours of debate; the bill was never considered by the Senate Judiciary Committee, and members were not given a report explaining its provisions. See Elizabeth A. Palmer, House Passes Anti-Terrorism Bill That Tracks White House’s Wishes, CONG. Q. WKLY. REP., Oct. 13, 2001, at 2399. In the House, a bill that had been discussed in the Judiciary Committee was replaced with a new one which was whisked through the plenary on the same day. See id. Representative Scott complained in the relevant House debate: “This is not the bill that was reported and deliberated on in the Committee on the Judiciary. It came to us late
ist threat in a sustained and global manner, but merely to dislocate it: those subject to the powers can evade detention by opting to leave the country. In other words, the new preventive detention powers are part of a risk management strategy relying on exceptional short-term measures, rather than a principled approach to combating terrorism within clear legal constraints.

A critical analysis of these powers from a non-discrimination perspective makes it not only possible to highlight these flaws, but also to thereby pave the way for a debate about anti-terrorism measures that is framed in terms of generally valid rules and principles rather than short-term utilitarian arguments—a debate, in other words, that is grounded in a culture of formalism and universalism, guided by Kant’s categorical imperative. This (re)turn to formalism, recently and most prominently advocated by Martti Koskenniemi for the international law field, should not be seen as apolitical. Rather, it is adopted as a strategy of constraining state power and protecting the weak. In Koskenniemi’s words, “nothing has undermined formalism as a culture of resistance to power, a social practice of accountability, openness, and equality whose status cannot be reduced to the political positions of any one of the parties whose claims are treated within it.” In many ways, such a use of formalism also borrows from the work of historian E.P. Thompson, who

on the floor. No one has really had an opportunity to look at the bill to see what is in it since we have been out of our offices. The report has just come to us. It would be helpful if we would wait for some period of time so that we can at least review what we are voting on, but I guess that is not going to stop us, so here we are.” 147 CONG. REC. H7179, H7200 (2001). The British Anti-Terrorism, Crime and Security Bill was pushed through the upper and lower houses with similar speed. The Commons had only sixteen hours to scrutinize the 129 sections and eight schedules; they failed to consider many important elements of the bill at all and did not impose a single amendment on the government. See the critical assessments by Lord Stoddart of Swindon, 629 PARL. DEB., H.L. (5th ser.) (2001) 1155 and the JOINT COMMITTEE ON HUMAN RIGHTS, FIFTH REPORT, ANTI-TERRORISM, CRIME AND SECURITY BILL: FURTHER REPORT, 2001–2002, H.L. 51, 2001–2002 H.C. 420, para. 2, available at http://www.publications.parliament.uk/pa/ht00405/jtselect/jtrights/35/3504.htm. The House of Lords was granted somewhat more time, but even there the bill completed all the stages in eight days. This led the Joint Committee on Human Rights to express concern at the fact “that Parliament is being given insufficient time to examine such an important piece of legislation” and to criticize the process as “not a proper or sensible way to make legislation.” Id. para. 2.

190. Kant’s first formulation of the categorical imperative reads as follows: “Act only in accordance with that maxim through which you can at the same time will that it should become a universal law.” IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 31 (Mary Gregor ed. & trans., Cambridge University Press 1998) (1785).

191. KOSKENNIEMI, supra note 2, at 494–509.


193. KOSKENNIEMI, supra note 2, at 500.
similarly embraced the rule of law as a bulwark for the defense of popular rights.194

The political conflict over new anti-terrorism measures in the United Kingdom, which was triggered by the House of Lords’ finding that the original detention powers violated the principle of non-discrimination, illustrates the point. The first post-September 11 anti-terrorism law, the ATCSA, had been passed with a comfortable majority195 and without attracting great public attention. The limitation of the scope of its preventive detention powers to foreign terrorist suspects was a politically convenient way of avoiding a discussion of the fundamental issues raised by this most severe form of deprivation of liberty. This paucity of principled debate stands in stark contrast to the history of the Prevention of Terrorism Act 2005—the government’s response to the Law Lords’ ruling.

The proposed measures, which, in order to comply with the ruling, were made applicable to both foreign and British citizens, led to a major public debate on the balance between security and liberty and to “parliament’s longest and sometimes rowdiest sitting for 99 years.”196 The two major opposition parties opposed the Home Secretary’s authority to subject anyone suspected of terrorism involvement to control orders as a matter of principle, claiming that it violated central tenets of justice going back to the Magna Carta.197 The Act was only passed after the government had made substantial concessions, in particular by providing for greater involvement of the judiciary in the control order process.

The extension of the scope of anti-terrorism powers to British citizens due to the House of Lords decision thus reshaped the debate in crucial ways. The discussants were forced to consider the possibility of the law being applied against themselves (or at least their constituents), and, as a consequence, the discussion became not only more substantive but now had to be articulated in terms of generally valid rules and principles. This shift towards formal legal rules resulted in a curtailment of the executive’s powers: preventive detention was replaced with lesser forms of


restrictions of liberty, which, in addition, are subject to greater judicial control.

The import of a culture of formalism should not be overestimated: universally applicable, non-discriminatory rules are not necessarily good rules. The new Prevention of Terrorism Act still raises a number of important human rights concerns. But at least “a practice that builds on formal arguments that are available to all under conditions of equality” can protect those in the political minority from being subject to the unrestrained power of the state.

198. See, e.g., Office of the Commissioner for Human Rights, supra note 180, paras. 9–25 (detailing some of these concerns).

199. Koskenniemi, supra note 2, at 501.
CROSSING THE RUBICON:
THE NETHERLANDS’ STEADY MARCH
TOWARDS INVOLUNTARY EUTHANASIA

I. INTRODUCTION

In December of 2004, administrators at a Dutch hospital announced a new policy that would allow pediatricians to kill severely handicapped newborn infants.1 In early 2005, the Royal Dutch Medical Association revealed that it had asked the government to propose new rules to facilitate the killing of “disabled children, the severely mentally retarded and patients in irreversible comas.”2 To foreign observers who have not been following developments in the Netherlands, these news stories may have seemed shocking. Modern, liberal democracies are supposed to protect the mentally challenged and physically handicapped, not kill them. For those who have been paying attention, however, these latest news reports merely represent the next logical step3 in the Netherlands’ quixotic attempt to regulate euthanasia.4

The Netherlands became the first country in modern history to formally decriminalize euthanasia, the controversial practice in which a physician terminates the life of a patient upon the patient’s request.5 The

1. Michael Horsnell, Netherlands Hospital Started to Kill Terminally Ill and Severely Disabled Babies with the Consent of their Parents, TIMES LONDON, Dec. 4, 2004, at 13. The administrators at Groningen Academic Hospital in the Netherlands have issued procedural guidelines to guide physicians as they provide euthanasia to infants. Id. The clinical guidelines are not yet available in English.


3. Ian Traynor, Secret Killings of Newborn Babies Traps Dutch Doctors in Moral Maze: Call for New Rules to End Dilemma for Medical and Legal Professions, GUARDIAN, Dec. 21, 2004, at 3 (“From the point of view of the Netherlands, this debate about newborns is a logical development,” says Professor Henk Jochemsen, a medical ethicist and Christian critic of euthanasia. “It’s another step in the wrong direction.”).

4. Euthanasia typically refers to an act of a physician that is primarily intended to cause, and in fact causes, the death of a patient. Euthanasia was archaically referred to as ‘mercy killing,’ however, that term is generally avoided due to its highly pejorative connotation. See, e.g., Lara L. Manzione, Is There A Right to Die?: A Comparative Study of Three Societies (Australia, Netherlands, United States), 30 GA. J. INT’L & COMP. L. 443, 444–46 (2002).

5. The Dutch define euthanasia as “the termination of life by a doctor at the patient’s request, with the aim of putting an end to unbearable suffering with no prospect of improvement.” MINISTRY OF HEALTH, WELFARE AND SPORTS, INFORMATION AND COMMUNICATIONS DEPARTMENT, EUTHANASIA: THE NETHERLANDS’ NEW RULES (2002), available at http://www.minvws.nl/en/folders/ibe/euthanasia_the_netherlands_new_rules.asp [hereinafter NETHERLANDS’ NEW RULES]. The generic term “euthanasia” derives from ancient Greek for “good death,” meaning a wholesome and honorable end of one’s exis-
Termination of Life on Request and Assisted Suicide (Review Procedures) Act\(^6\) encapsulates within a single regulatory system developments in Dutch medical practice and case law dating from 1984.\(^7\) Although the Dutch criminal code continues to prohibit the intentional killing of another individual,\(^8\) a physician who performs euthanasia may invoke the defense of \textit{noodtoestand}\(^9\) and escape criminal prosecution, provided the physician complies with specific statutory requirements.\(^10\)

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7. NETHERLANDS’ NEW RULES, supra note 5, at 5 (“The new Act on euthanasia does not change the legal status of termination of life on request or physician assisted suicide.”).

8. Article 293 of the Dutch Penal Code states, “any person who terminates another person’s life at that person’s express and earnest request shall be liable to a term of imprisonment not exceeding twelve years or a fifth-category fine.” Termination of Life Act, ch. 4-A (2002) (Neth.). Article 294 states, “any person who intentionally incites another to commit suicide shall, if suicide follows, be liable to a term of imprisonment not exceeding three years or a fourth-category fine.” Id. ch. 4-B.

9. The Dutch term, “noodtoestand,” refers to “circumstances in which, faced with a conflict between two interests, a person sacrifices the lesser interest to serve the greater interest.” Julia Belian, Comment, Deference to Doctors in Dutch Euthanasia Law, 10 EMORY INT’L L. REV. 255, 260 n.36 (1996), citing L.H.C. Hulsman et al., The Dutch Criminal Justice System From a Comparative Legal Perspective, in INTRODUCTION TO DUTCH LAW FOR FOREIGN LAWYERS, 289, 303 (D.C. Fokkema et al. eds., 1978). In the Netherlands, Article 40 of the Dutch Penal Code provides a general waiver of criminal
The Dutch government asserts that its approach to euthanasia brings the debate about euthanasia out into the open, protects “physicians and other people” who are “concerned with the limits of human suffering,” and promotes physician compliance with the law. Some Dutch physicians and international observers, on the other hand, express concern and outright outrage. Not only has the Netherlands rejected centuries of conventional Western morality, which counsels that the intentional killing of another individual is always morally wrong, the new law potentially opens the door to non-consensual mercy killings and state-sanctioned murder.

The Dutch attempt to regulate euthanasia is significant for three reasons. First, the decriminalization of euthanasia, initially by the courts and subsequently by Parliamentary sanction in 2002, offers researchers access to the most complete and detailed data ever assembled regarding the practice of euthanasia in a modern industrialized society. Second, the liability for any individual who has committed a crime but was compelled to do so out of moral or psychological necessity. Jos V.M. Welie, Why Physicians? Reflections on the Netherlands’ New Euthanasia Law, 32 HASTING CTR. RPT. 42, 44 (2002).

10. The statutory requirements of due care are discussed in Part II of this Note.

11. NETHERLANDS’ NEW RULES, supra note 5, at 1 (“Thanks to the new Act, doctors and terminally ill patients know now exactly what their rights and obligations are.”). Paradoxically, even some opponents of the Termination of Life Act admit that the new law finally provides clarity to a previously confusing mix of euthanasia statutes and cases. See, e.g., Welie, supra note 9, at 44.


14. See, e.g., Welie, supra note 9, at 44.

15. Paul van der Maas et al., Euthanasia, Physician-Assisted Suicide, and Other Medical Practices Involving the End-of-Life in the Netherlands, 1990–1995, 335 NEW ENG. J. MED. 1699 (1996) [hereinafter Van der Maas Report]. In response to the protests of pro-euthanasia citizen groups, political pressure from the Royal Dutch Medical Association (KNMG), and several controversial euthanasia court decisions, the government instituted a series of studies in order to quantify the frequency of euthanasia in the Netherlands and assess physician attitudes towards euthanasia. The first nationwide study, known as the Remmelink Report, was commissioned in 1990 and chaired by the former attorney general of the Supreme Court, Professor Jan Remmelink. Additional studies were produced in 1995 and 2001. Although the original studies are not available in English, summaries of the 1995 and 2001 reports have been published by the original authors in The New England Journal of Medicine and the British medical publication The Lancet, respectively. See generally Van der Maas Report, supra. See also Bregie D. Onwuteaka-Philipsen et al., Euthanasia and other End-of-Life Decisions in the Netherlands in 1990,
arguments raised in the Netherlands parallel the arguments currently being raised in other European nations and the United States. Finally, the Termination of Life Act’s post-euthanasia reporting procedure and general reliance on voluntary physician compliance provides a concise case study from which legislators and jurists may extract useful lessons of law and public policy.

According to the Dutch government’s own research, physicians intentionally kill patients without those patients’ request or consent in approximately one thousand cases each year. Other researchers, pointing to the narrow definition of euthanasia used in the Netherlands and the government’s own admission that physicians significantly under-report the incidence of euthanasia, estimate that physicians intentionally end the life of their patients in as many as six thousand cases annually without consultation or consent. The staggering high incidence of non-consensual euthanasia, as reported by the Dutch government’s own experts, suggests a systemic flaw in the government’s approach to euthanasia law.

This Note will argue that the Dutch attempt to regulate euthanasia fails, both conceptually and practically, to prevent non-consensual killing of patients. Dutch physicians and jurists appear reluctant to face the empirical evidence of widespread non-consensual or “involuntary” euthanasia. By relying on the principle of noodtoestand or necessity, the Dutch
shift the focus of the legal inquiry to the physician instead of the patient and thereby damage the foundational principle of patient autonomy. By disavowing the principle of patient-autonomy in favor of the principle of physician beneficence, the current approach to euthanasia regulation creates a system in which there appears to be no logical reason to prohibit the non-consensual killing of sick or marginalized patients.22

Part II of this Note will present a brief overview of the Netherlands’ healthcare and legal systems and discuss early euthanasia case law. Part III will critique the Termination of Life Act and the efficacy of the Act’s due care requirements. Part IV will review empirical data from the Netherlands and other scholars’ research regarding the prevalence of euthanasia and other end-of-life medical decisions. Part V will critique the Netherlands’ euthanasia regulatory scheme and explain how its conceptual approach permits and even encourages involuntary euthanasia.

II. INTRODUCTION TO THE NETHERLANDS’ LEGAL AND PUBLIC HEALTH SYSTEMS

A. Explanation of Terms and Phrases used in this Note

Despite voluminous academic writings and legal discourse on the subject, there is no universally accepted definition of “euthanasia.”23 In common usage, the term typically refers to an act of a physician that is primarily intended to cause, and in fact causes, the death of a patient.24 Significantly, the generic definition of euthanasia does not imply anything regarding the physician’s motives, the patient’s physical or emotional condition,25 or the imminence of death.26 Unless preceded by a descriptive modifier such as “voluntary” or “active,” the appearance of the word “euthanasia” in this Note refers to the generic definition.
One conceptual dichotomy that has arisen is the distinction between “active” and “passive” euthanasia. “Active” euthanasia refers to situations in which a physician performs an affirmative act, such as injecting a lethal dosage of opiates into the patient, with the intent of causing the patient’s death.27 In contrast, “passive” euthanasia refers to the physician’s inaction or omissions, such as withholding life-sustaining hydration and nutrients or refusing to initiate potentially life-sustaining therapies.28


28. Many Western societies have implicitly accepted the legality of, or more accurately, have refused to recognize the illegality of, passive euthanasia, although legislators and physicians scrupulously avoid using the technical term. Only the Netherlands, Belgium, and the state of Oregon have legalized active euthanasia, although recent court rulings in Japan hint that active euthanasia could be permitted in certain circumstances. Mendelson & Jost, supra note 6, at 130 n.121.

On the other hand, passive euthanasia in the form of physicians withdrawing life-sustaining treatment from competent, adult patients is permitted in the United Kingdom, Australia, Canada, Poland, Germany, France, Japan, and the United States. The Supreme Court of the United States and the United Kingdom’s House of Lords have expressly authorized physicians to withdraw life-sustaining care for the purpose of hastening death. Id. at 133.


Similarly, in the British Tony Bland case, the parents of an accident victim who had lapsed into a persistent vegetative coma sought to have his medical and nutritional care stopped in order to facilitate his death. When a public magistrate sought to prevent the hospital from withdrawing life-sustaining medical treatment, a majority of the five Law Lords who heard the case refused to enjoin the hospital from following the parents’ wishes. Although the House of Lords preferred not to characterize the proposed withdrawal of life-support as euthanasia, which they understood to be illegal in English common law, their decision implicitly recognized a moral and legal distinction between active and passive euthanasia. KEOWN, PUBLIC POLICY, supra note 23, at 12–15.
“Voluntary” euthanasia refers to euthanasia performed upon the explicit and affirmative request of a patient.\textsuperscript{29} In contrast, “involuntary euthanasia” signifies an act of euthanasia performed without the request or consent of the patient.\textsuperscript{30} The term involuntary euthanasia itself is subject to confusion. For some, involuntary euthanasia implies situations where the patient did not provide consent but possessed the capacity to do so.\textsuperscript{31} As such, involuntary euthanasia is different from “non-voluntary” euthanasia, which involves patients who lack the legal or physical capacity to provide consent.\textsuperscript{32} Under this approach, non-voluntary euthanasia is the correct term to describe euthanasia performed on adult patients who are mentally incapacitated or infants who therefore lack the legal capacity to either provide or withhold consent. Other commentators reject this approach and characterize any euthanasia performed without an explicit and affirmative request as involuntary euthanasia.\textsuperscript{33} Because of the host of conceptual problems raised by the distinction between involuntary and non-voluntary euthanasia, this Note will avoid the term non-voluntary euthanasia.\textsuperscript{34}

When the House of Lords Select Committee on Medical Ethics, in a reply to the Tony Bland decision, issued their Report one year later, the Law Lord’s reluctance to refer to the withdrawal of care as “passive euthanasia” was only partly remedied. The Report of the House of Lords Select Committee on Medical Ethics chaired by Lord Walton of Detchant, characterized the term “passive euthanasia” as “misleading” and adopted the phrase “treatment-limiting decision.” Keown, Public Policy, supra note 23, at 96–100.

\textsuperscript{34} For example, consider the case of an adult, healthy individual who records a written request to receive euthanasia should the individual ever enter into a “lengthy” coma. One year later, the individual suffers an accident and lapses into a coma. Complying with the patient’s earlier written request, the physician provides euthanasia to the comatose patient. Has the physician provided involuntary or non-voluntary euthanasia? Would the answer change if the patient had only been in the coma for two hours? What if the patient had lain comatose for two years? While the precise characterization of this and comparable examples are certainly open to debate, that debate provides only limited insight into the broader discussion of legalized euthanasia. Consequently, this Note will classify all cases where the patient has not made an explicit, affirmative request for euthanasia as involuntary euthanasia.
Physicians, legislators and social commentators frequently distinguish between euthanasia and physician-assisted suicide (PAS). In the case of active voluntary euthanasia, a physician performs the actual step of administering the lethal treatment. Individuals who request PAS perform the actual, volitional act of suicide but require the assistance of a physician to prescribe a suitable pharmaceutical agent to bring about death and to be present during the actual suicide to ensure the correct and effective utilization of that agent. Although many of the same moral and legal issues arise under both PAS and euthanasia, this Note will not directly address PAS. Moreover, because the Termination of Life Act treats PAS and voluntary euthanasia similarly, the legal distinctions between active voluntary euthanasia, on the one hand, and passive euthanasia or PAS on the other, have been rendered moot.

“Palliative care” is the technical term for the medical care given to relieve the pain and symptoms caused by severe illness, but not intended to cure the underlying disease or condition itself. “Terminal sedation” refers to the administration of high doses of pain relieving medications for the primary purpose of alleviating a patient’s suffering, but with reasonable awareness that death may result.

Dutch physicians, as well as the Ministry of Health, Sports, and Welfare, which is responsible for monitoring compliance with the Termination of Life Act, do not distinguish among passive and active euthanasia.

36. Id.
38. For example, opponents of euthanasia sometimes assert that efforts to decriminalize PAS represent political palatable tactics to pave the way for decriminalized voluntary euthanasia. Wesley J. Smith, Continent Death: Euthanasia in Europe, Lifenews.com, http://www.lifenews.com/oped24.html (last visited Feb. 16, 2006). Jeff McMahan, a bioethicist, asserts, “[s]uicide and euthanasia are concepts with blurred edges. It is often unclear whether a certain act counts as suicide or whether an act is an instance of euthanasia.” Jeff McMahan, The Ethics of Killing: Problems at the Margins of Life 455–56 (2002).
39. See Termination of Life Act, chs. 4-A, 4-B. See also Euthanasia: The Netherlands’ New Rules, supra note 5, at 5.
40. See New York State Task Force, supra note 5, at 35.
41. In Japan, courts refer to terminal sedation as “indirect” euthanasia, a classification not adopted in this Note. Mendelson & Jost, supra note 6, at 130 n.23.
The Termination of Life Act defines euthanasia as the “termination of a life on request” and regulates both euthanasia and PAS. Thus, the Dutch have eliminated the legal distinction between “active” and “passive” euthanasia. The official stance of the Dutch government is that all cases of euthanasia are, by definition, active and voluntary. The Dutch government prosaically refers to cases that foreign observers would characterize as involuntary euthanasia as “ending of life without explicit request.”

B. The Dutch Historical Experience

The Netherlands’ enthusiastic acceptance of euthanasia invariably prompts the question, of all of the liberal democracies of Western Europe and industrialized nations of the modern world, why has the Netherlands taken the bold step of decriminalizing voluntary euthanasia? Many commentators explain Netherlands’ acceptance of voluntary euthanasia as a natural outgrowth of the country’s historical tradition of progressive politics and religious tolerance.

The Netherlands is a constitutional monarchy with a population of over 16.3 million inhabitants. The Dutch won their independence from the...
Hapsburg Kings of Spain in the seventeenth century and, in the subsequent years, proceeded to develop a robust system of mercantilism and broad civic equality. The Netherlands was an early center of Calvinist activism and, in later centuries, was renowned for its religious tolerance of both Jews and Roman Catholics. Occupied by the Germans during World War II and a central member of the North Atlantic Treaty Or-


50. Hendin, supra note 47, at 135–36.

51. Until relatively recently, the collective memory of the Nazi occupation shaped many civilian attitudes towards euthanasia. In October 1939, German Chancellor Adolph Hitler signed an executive order instituting the T4 Euthanasia Program, named after the program’s administrative offices at Tiergarten Strasse 4. Unlike the modern conception of voluntary euthanasia, which envisions the termination of a sick and suffering patient upon the patient’s affirmative request, the Nazi euthanasia program represents an extreme manifestation of involuntary euthanasia as official government policy.

Administered by the Reich Chancellery under the direction of Philip Bouhler and Dr. Karl Brandt, the program targeted German nationals suffering from mental incapacity, insanity, or severe congenital birth defects. Various estimates put the number of patients killed between 50,000 and 250,000 German civilians, representing both adults and children. Physicians performed the medical screenings and selections. Patients selected for euthanasia were transferred to one of several state-run hospitals located inside the borders of pre-war Germany. Patients were killed either by lethal injection or by suffocation by carbon monoxide gas, delivered in specially constructed gas chambers designed to look like communal showers. Typically, the victims’ relatives were later informed that the patients had died of communicable diseases.

Although no foreign prisoners and only one thousand German Jews were killed by the Nazi euthanasia program, T4 was a crucial testing period in which Nazi physicians and bureaucrats developed the techniques later used in the extermination camps in Poland and Eastern Europe. For example, the T4 program perfected the use of gassings to kill large numbers of prisoners, while Franz Stabgl, commandant of the Sobibor and Treblinka extermination camps, and Christian Wirth, commander of the Chemlno extermination camp, both received their operational training as T4 euthanasia technicians. The T4 program was discontinued in August 1941, shortly before Germany’s invasion of Russia, largely due to massive public protests lead by Germany’s Catholic and Protestant religious communities. In 1942, S.S. Reichsfuhrer Heinrich Himmler reassigned the entire former staff of the T4 program to Operation Reinhard, the Nazi campaign to exterminate Polish Jewry.

Germany invaded the Netherlands on May 10, 1940 and continued to occupy the Netherlands until 1945, by which point over 107,000 Dutch Jews had been deported. Approximately 102,000 died in the Auschwitz, Sobibor, and Bergen-Belsen death camps. Many thousands of other Dutch civilians were also deported to concentration camps in Nazi-occupied Europe, however, aside from the Jewish population, Dutch deportees were not generally targeted for extermination. Although no Dutch nationals died in the T4 program, the Nazi occupation of the Netherlands continues to shape opinions regarding euthanasia, and in the minds of many elderly Dutch citizens, euthanasia remains synonymous with state-sanctioned murder. See generally Smith, supra note 13, at
ganization, Netherlands was later a founding member of the European Union. More recently, the country has adopted progressive policies in its regulation of recreational drug use and prostitution, and remains at the forefront in developments of international human rights law.

Like many other nations of the European Union, the Dutch are committed to the principle of universal access to health care and health insurance. Health care is financed via a mixture of mandatory employment-related health insurance and population-wide coverage of long-term care. Private health care providers deliver the bulk of health care services. Unsurprisingly, advocates for legalized euthanasia point to the availability of universal health and long-term care as evidence that the financial pressure of continuing treatment has not improperly influenced patients who request euthanasia. On the other hand, some physicians have noted that the Netherlands currently faces a shortage of nursing homes and nursing staff.

The Dutch enjoy one of the highest life expectancies and lowest death rates of the industrialized world. Between 120,000 and 140,000 people die each year in the Netherlands, compared to an estimated 9.2 million in the United States. The current average life expectancy is 76.68 years at birth, while the Dutch suffer 0.67 deaths per 1,000 inhabitants. In comparison, Americans suffer 8.34 deaths per 1,000 inhabitants and enjoy an average life expectancy of 77.43 years, while the United King-
died each year from 2000 to 2003, while 55,000 of those typically expired from non-acute disease. According to official estimates, approximately 44 percent of all deaths involved end-of-life medical decisions while less than 3 percent of all deaths involve active voluntary euthanasia.

C. Overview of the Dutch Legal System

The Netherlands’ legal system is a relatively typical European civil code system. Unlike the American adversarial system, the Dutch legal system is consensual, meaning that public prosecutors, judges, and litigators work together to arrive at decisions that meet the needs of the entire community. Public prosecutors play a role in implementing public policy, and may waive prosecution of any criminal offense on the grounds that the criminal offense could be more effectively dealt with using non-prosecutorial measures, for example, resorting to community involvement. Prosecutors are expressly required to refrain from prosecution if such prosecution does not serve the public interest, a subjective standard that the prosecutor alone has authority to determine. Although active voluntary euthanasia remained technically illegal until the enactment of the Termination of Life Act in 2001, for almost two decades prosecutors declined to charge doctors who performed active euthanasia within the limits suggested by the Dutch Supreme Court in 1984.

As a member state of the European Union, the Netherlands’ national laws are subject to the European Convention on Human Rights and Fun-
As such, Dutch courts are bound by the decisions of the European Court of Human Rights. Significantly, in the same month that the Termination of Life Act went into effect, the European Court of Human Rights held inPretty v. United Kingdom that the Convention does not confer upon citizens an affirmative right to euthanasia, although apparently the Convention does not preclude the Dutch government from permitting voluntary euthanasia.

Before the Termination of Life Act went into effect on April 1, 2002, Article 293 of the Dutch criminal code, theWetboek van Strafrecht, prohibited any individual from killing another at the latter’s request. An


70. Mendelson & Jost, supra note 6, at 130.

71. Diane Pretty, a British subject, suffered from motor neurone disease, a degenerative illness. As the disease progressed and she became paralyzed, Mrs. Pretty decided that she wanted to commit suicide but lacked the physical capacity to do so. Id. at 68. She petitioned the British Director of Public Prosecutions for an exception that would allow her husband to escape criminal sanction if he assisted her in committing suicide. Id. at 68–69. After the prosecutor refused her petition and the House of Lords denied her appeal, Mrs. Pretty sued the British government in the European Court of Human Rights, alleging that the British government’s position amounted to violations of Articles 2, 3, 8, 9 and 14 of the Convention. Id. at 67.

Mrs. Pretty alleged that, because the United Kingdom had abolished the felony of suicide in 1961, the British law prohibiting a person from assisting in another’s suicide constituted discrimination against individuals who, like Mrs. Pretty, were paralyzed and could not take their own lives. Id. at 88. Moreover, Article 2 of the Convention, which protects the “right to life” and narrowly regulates the permissible deprivation of life by state actors, also guaranteed a converse right to die. Id. at 75. Finally, Mrs. Pretty alleged that, by failing to provide assistance in her attempt to commit suicide, the United Kingdom was subjecting her to “inhuman or degrading treatment” in violation of the Article 3 prohibition against the use of torture. Id. at 77.

In a widely read and much anticipated decision, the European Court of Human Rights in a unanimous decision held against Mrs. Pretty on every count. The court rejected the contention that Article 2 contained a “negative aspect.” Id. at 77. In other words, the Convention protects individuals’ rights to life from violation by the government or individuals, but does not create a right to choose the manner of one’s own death. Id. at 81. The court affirmed that Article 3 pertained to the intentional use of state power and imposed a obligation on states not to inflict serious harm on persons within their jurisdiction. Article 3 does not establish the countervailing responsibility to prevent all harm to such persons. Id. Finally, the court declined to recognize Mrs. Pretty’s class of persons, namely those who are physically unable to commit suicide, as a class warranting protection under the Convention. Id. at 86. In short, the European Court on Human Rights held that the Convention did not confer a “right to die” and therefore upheld the authority of signatory states to proscribe active euthanasia. See In the case of Pretty v. United Kingdom, Eur. Ct. H.R. 423 (2002), reprinted in 18 Issues L. & Med. 67, 71 (2002).
individual found guilty of such an offense may have been sentenced to up to twelve years of imprisonment. Article 294 of the code prohibited an individual from assisting or inciting another person to commit suicide, with a possible sentence of three years of imprisonment.

The Dutch criminal justice system recognizes the *noodtoestand* defense, variously translated as force majeure, choice-of- evils, or the defense of necessity. The *noodtoestand* defense states that an individual, when faced with two conflicting duties, may violate one law in order to avoid violating another law or principle of greater moral significance. Alternatively, the choice may be characterized as one in which the individual chooses the “least unacceptable” option available. Thus, an innocent bystander, seeing a pedestrian about to be run over by a speeding car, may be excused for the crime of battery when the bystander pushes the pedestrian out of the way in order to prevent the pedestrian’s death. Article 40 of the Dutch Penal Code codifies the *noodtoestand* principle. The Dutch concept of *noodtoestand* remains significant because Dutch courts have come to rely on it, as codified in Article


73. See Sr art. 294 (Neth.), translated in AMERICAN SERIES OF FOREIGN PENAL CODES, supra note 72, at 200. Indeed, the criminal prohibition of assistance with or incitement to suicide predated the adoption of the Dutch Penal Code in 1886. See also Mendelson & Jost, supra note 6, at 130.

74. See Sr art. 294 (Neth.), translated in AMERICAN SERIES OF FOREIGN PENAL CODES, supra note 72, at 200.

75. E.g., GOMEZ, supra note 16, at 37–38. “Force majeure” is French for “a superior force” and in Anglo-American jurisprudence refers to “[a]n event or effect that can be neither anticipated nor controlled.” BLACK’S LAW DICTIONARY 657 (7th ed. 1999).

76. See GOMEZ, supra note 16, at 37–38.

77. Some commentators have asserted that the passage of the Termination of Life Act merely provided statutory basis for physicians’ previously recognized de facto immunity from prosecution. E.g., Nicholson, supra note 12, at 9.

78. See KEOWN, PUBLIC POLICY, supra note 23, at 84–85.


80. See generally Belian, supra note 9, at 261. Unlike English and American legal systems, the Dutch do not appear to distinguish among legal excuses, defenses, and excuses. See generally AMERICAN SERIES OF FOREIGN PENAL CODES, supra note 72, at 73–74 (listing statutory provisions which may either decrease or increase liability for otherwise criminal conduct).

81. See Sr art. 40 (Neth.), translated in AMERICAN SERIES OF FOREIGN PENAL CODES, supra note 72, at 73.
40, as the doctrinal justification for the legality of both active voluntary and, as will be seen, active involuntary euthanasia.82

One last feature of the Dutch legal system concerns the Medical Assistance Act of 1994, which entered into force in 1995.83 The Medical Assistance Act codifies the principle of informed consent, the common law doctrine that all legally competent adult patients must consent to treatment prior to undergoing medical care.84 As a corollary, the doctrine of informed consent states that patients enjoy the right to refuse unwanted medical care, including potentially life-saving care.85 Physicians have the duty to explain, in lay terms, the nature of a patient’s condition, a description of any proposed treatment or therapy, the risks associated with the proposed treatment, and the availability of any alternative treatments.86 Patient rights law in the Netherlands therefore mirrors the informed consent laws of most other developed nations.87

III. THE DUTCH APPROACH TO REGULATING EUTHANASIA

A. Euthanasia Case Law

Prior to 2002, active euthanasia remained technically illegal under Article 293 of the Dutch Penal Code.88 Public prosecutors and the courts therefore turned to the principle of noodtoestand to justify euthanasia and excuse physicians from criminal penalties.89 The first case that expressly decriminalized euthanasia occurred in the town of Alkmaar in 1984. In the Alkmaar case, the Dutch Supreme Court reversed the conviction of a
physician who had performed euthanasia on a ninety-five year old woman whose health was deteriorating. The woman suffered from moderate but not “acute” pain and was not facing imminent death. In pronouncing the defendant guilty but imposing no punishment, the district court rejected the physician’s attempt to establish a *noodtoestand* defense. The defendant argued that he had attempted in good faith to resolve his conflicting duties, namely, to observe the Article 293 prohibition against killing another individual and his duty to respond to the patient’s request to alleviate her unbearable suffering. The defendant, with assistance from the Netherlands Society for Voluntary Euthanasia, appealed to the Dutch Supreme Court, which overturned his conviction and ordered the district court to reconsider the *noodtoestand* defense.

Interestingly, the Dutch Supreme Court rejected the defendant’s initial theory of the case. The defendant had argued that the ethical conflict involved his duty to obey Article 293, on the one hand, and his professional responsibility to respect his patient’s right to personal autonomy, on the other. Disposing of the personal autonomy argument, the court noted that the district court had overlooked the physician’s duty to alleviate his patient’s suffering according to the prevailing standards of medical ethics.

The Supreme Court’s line of reasoning significantly influenced the conceptual development of euthanasia law. First, the court expressly denied the significance, as a determinative factor in euthanasia cases, of the patient’s right to personal autonomy, manifest here as her right to determine the course of her own medical treatment. Secondly, the *Alkmaar* case established the precedent in which Dutch courts would turn to the medical profession itself to develop the ethical standards through which the courts would legitimize physician conduct. The court’s adoption of

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90. This case is variously referred to as the “*Schoonheim* case,” after the name of the physician defendant, or the “*Alkmaar* case,” after the name of the town where the events occurred. E.g., Belian, *supra* note 9, at 267–68.
91. *Id.*
92. Mendelson & Jost, *supra* note 6, at 130.
96. KEOWN, *PUBLIC POLICY*, *supra* note 23, at 85. The Dutch Supreme Court appears to have relied on the beneficent approach to medical ethics, which holds that it is the physician’s prerogative, as opposed to the patient’s right, to decide the proper course of medical treatment.
98. Belian, *supra* note 9, at 270.
these two principles would later result in increased legal acceptance of involuntary euthanasia.

Soon after the Alkmaar case was decided, the Royal Dutch Medical Association (KNMG) published a set of “due care” guidelines that purported to define the circumstances in which Dutch physicians could ethically perform euthanasia.99 The KNMG guidelines stated that, in order for a physician to respond to a euthanasia request with due care, the euthanasia request must be voluntary, persistent, and well-considered.100 The patient must suffer from intolerable and incurable pain and a discernable, terminal illness.101 Thereafter, Dutch courts adopted the KNMG guidelines as the legal prerequisites of due care in a series of cases between 1985 and 2001.102

Despite the integration of the KNMG’s due care provisions, courts remained confused regarding what clinical circumstances satisfied the requirements of due care. In 1985, a court acquitted an anesthesiologist who provided euthanasia to a woman suffering from multiple sclerosis.103 The court thereby eliminated the due care requirement that a patient must suffer from a terminal illness. By 1986, courts decided that a patient need not suffer from physical pain; mental anguish would also satisfy the “intolerable pain” due care requirement.104 Similarly, all reported prosecutions of euthanasia prior to 1993 involved patients who suffered from either physical or mental pain.105 Then, in the 1993 Assen case, a district court acquitted a physician who had performed active voluntary euthanasia on an otherwise healthy, forty-three year old woman.106 The patient did not suffer from any diagnosable physical or mental condition, but had recently lost both of her sons and had divorced her husband.107 With the Assen case, Dutch courts seemed to abandon the requirement that a pa-

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100. Id.
101. Id.
105. Hendin, supra note 47, at 48.
106. The 1993 case against Dr. Chabot is frequently referred to as the “Assen case,” after the city in which the trial was held. Id. at 47–48.
107. Id.
tient suffer from intolerable pain or, for that matter, from any discernable medical condition as a pre-condition for the *noodtoestand* defense.\footnote{108}

By 1999, Dutch euthanasia case law seemed to have weakened the “voluntary and well-considered request” requirement as well. Public prosecutors declined to bring charges against a physician who acquiesced to a request for PAS from a seventy-one year old male patient with vascular dementia.\footnote{109} Because the patient was suffering from a degenerative psycho-organic disorder, the patient’s hospital organized a consultation by the hospital’s chief psychiatrist, a committee of independent medical professionals, and an external psychiatric consultant.\footnote{110} After the review committee and other consultants concluded that the patient possessed the requisite mental competence to make a PAS request, the patient’s doctor prescribed a high-dose barbiturate solution.\footnote{111} However, the patient did not actually drink the solution and commit suicide until four months after his psychiatric evaluation.\footnote{112} In those four months, there appears to have been no effort to continue to monitor the patient’s mental capacity.

Through these series of decisions, Dutch courts diluted most of the due care requirements first articulated by the KNMG guidelines.\footnote{113} Indeed, foreign critics saw incontrovertible evidence that the Netherlands had descended the slippery slope towards completely unfettered euthanasia-on-demand.\footnote{114} Other detractors went further, arguing that the Dutch at-

\footnotetext[108]{108} Since the *Assen* court acquitted Dr. Chabot in 1993, the court’s holding that a patient need not suffer from a diagnosable medical condition is no longer valid under Dutch case law. In 2003, after the Termination of Life Act went into effect, the Dutch Supreme Court ruled in the *Sutorius* case that “being tired of life” was not a sufficient reason for assenting to a patient’s request for active euthanasia. In that decision, the court upheld the conviction of Dr. Sutorius, who had performed euthanasia on former Dutch senator Edward Brongersma. An Amsterdam court had convicted Dr. Sutorius under Article 293 of the Dutch Penal Code but had imposed no penalty. Responding to his appeal, the Dutch Supreme Court held that a patient’s suffering must be linked to a recognized physical or mental condition. Tony Sheldon, *Being Tired is Not Grounds for Euthanasia*, 326 *Brit. Med. J.* 71 (2003).


\footnotetext[110]{110} Id.

\footnotetext[111]{111} Id.

\footnotetext[112]{112} Id.

\footnotetext[113]{113} See id.

\footnotetext[114]{114} For example, one witness, testifying before the Canadian Senate Committee on Euthanasia and Assisted Suicide, asserted, “Netherlands is no longer on the slippery slope; it has turned into Niagara Falls. . . .” Downie, *supra* note 31, at 119 n.2; Gómez, *supra* note 16, at 38–39.

There are three different types of slippery slope arguments that critics of the Dutch euthanasia system rely upon. First, some critics argue that legalization increases the frequency and volume of cases of voluntary euthanasia. As Jocelyn Downie demon-
tempt to regulate euthanasia failed to prevent involuntary euthanasia as well.\footnote{Hendin, supra note 47, at 23.}

The Dutch appeared to have crossed the Rubicon when, in December 2004, the Groningen Academic Hospital announced new guidelines that would permit physicians to perform involuntary euthanasia on severely handicapped newborn infants.\footnote{Horsnell, supra note 1, at 13.} Equally troubling, the hospital revealed that it had already performed four such killings in 2004\footnote{Id. at 136.} and had been performing similar procedures since at least 2000.\footnote{Casey Research, supra note 118.} The revelation coincided with reports that the KNMG had asked the Ministry of Health, Sports, and Welfare to recommend new guidelines that would permit involuntary euthanasia for “children, the severely mentally retarded and patients in irreversible comas.”\footnote{The Dutch Ponder “Mercy Killing” Rules, CNN.COM (Dec. 1, 2004), http://www.cnn.com/2004/HEALTH/12/01/netherlands.mercykill/index.html.} Predictably, this latest evidence of involuntary euthanasia has engendered a fresh wave of alarm among international observers.\footnote{E.g., Casey Research, supra note 118.}

Netherlands’ euthanasia case law suggests three primary findings. First, rather than addressing euthanasia as a question of patients’ rights or self-determination, Dutch courts frame the euthanasia debate as a question of prevailing medical ethics.\footnote{Gomez, supra note 16, at 36–37.} Second, by defining the extent of a physician’s duty in terms of “prevailing standards of medical ethics,” and by adopting the KNMG’s proposed practice guidelines as binding law, Dutch courts institutionalized a broad degree of deference to the opinions strates, the empirical data provided by three consecutive studies indicates that this argument is not valid; after an initial increase in the number of voluntary euthanasia cases between 1990 and 1995, the number of voluntary euthanasia cases appears to have stabilized from 1995 through 2001.\footnote{Downie, supra note 31, at 135.}

The second slippery slope argument, dubbed the comparative international argument, asserts that the Netherlands’ euthanasia policy has resulted in a relative higher incidence of euthanasia in Netherlands compared to other nations. Although Ms. Downie asserts that data exists that suggests this argument is false with respect to Australia, there is simply insufficient reliable data regarding the incidence of euthanasia in most other countries to prove the veracity or falsehood of this argument.\footnote{Id. at 136.}

Finally, a third version of the slippery slope is the argument that, by decriminalizing voluntary active euthanasia, the Dutch approach has inoculated Dutch physicians, the courts, and society against the unacceptability of involuntary euthanasia.\footnote{E.g., Keown, Public Policy, supra note 23, at 70.}
and social judgments of the medical community. Finally, the KNMG guidelines, originally intended to safeguard against physician abuse, have consistently failed to prevent Dutch physicians from performing euthanasia in a widening array of clinical circumstances. These findings indicate that the courts have abrogated at least some of their responsibility to serve as an independent check on physician conduct.

B. The 2002 Termination of Life on Request and Assisted Suicide Act

As previously noted, the Termination of Life Act codifies, with several minor but important modifications, substantially all of the due care requirements adopted by Dutch courts since 1984. Technically, both active voluntary euthanasia and PAS remain criminal offenses under the Dutch Penal Code. However, the Act grants a statutory exemption for a physician who performs active voluntary euthanasia when the physician satisfies the requirement of due care and subsequently notifies the municipal pathologist. Significantly, the Act does not address involuntary euthanasia or terminal sedation. Presumably, both practices remain illegal, but as with active voluntary euthanasia prior to 1984, physicians who perform involuntary euthanasia or terminal sedation rarely face serious criminal penalties.

The first requirement of due care states that the physician who seeks to perform euthanasia must “hold the conviction that the request by the patient was voluntary and well-considered.” The Act thus dispenses with the requirement, first suggested in the 1984 KNMG guidelines, that the

122. See generally Belian, supra note 9.
123. As one vocal Dutch critic of the legalization of euthanasia has stated, “[i]f we today accept the intentional killing of a patient as a solution for one problem, then tomorrow we will find a hundred problems for which killing must be accepted as a solution.” Gunning, supra note 12.
124. See generally Mendelson & Jost, supra note 6, at 130.
125. Termination of Life Act, chs. 4-A, 4-B.
126. Id.
127. For example, Dr. Wilfred van Oijen, an active euthanasia advocate who appeared in a 1994 television documentary on euthanasia, was convicted of murder in November of 2004. Dr. van Oijen had injected a lethal dose of alcuronium chloride into an eighty-four year old comatose patient. The patient had made no previous euthanasia request and was expected to die within 48 hours. The Dutch Supreme Court held that Dr. van Oijen’s conduct failed to satisfy both the due care requirements of the Termination of Life Act and the prevailing standards of palliative care, and therefore was guilty of murder. After seven years of trials and appeals, Dr. van Oijen received a one week suspended sentence. Tony Sheldon, Two Test Cases in Netherlands Clarify Law on Murder and Palliative Care, 328 BRIT. MED. J. 1206 (2004).
128. Termination of Life Act, ch. 2, art. 2(1)(a).
patient’s request was “durable” and “persistent.” More importantly, the earlier KNMG guidelines indicated that the patient’s request must be free and voluntary, while the new Termination of Life Act only requires that the physician “hold the conviction” that the patient’s request is free and voluntary. The Act, therefore, appears to adopt a less rigorous standard than the KNMG guidelines.

Similarly, the second requirement of due care states that the physician must “hold the conviction that the patient’s suffering was lasting and unbearable.” Like the “voluntary and well-considered” element, the emphasis on the “lasting and unbearable suffering” requirement is not on the patient’s actual state of suffering, but rather the physician’s subjective belief. Moreover, the Termination of Life Act does not define “suffering” as either physical or emotional pain, nor does the Act provide objective criteria or clinical indicators that would assist physicians or prosecutors in determining whether a patient’s actual suffering fits the statutory standard.

The clinical due care requirement states that the patient must “hold the conviction that there was no other reasonable solution for the situation he was in.” Unlike the “voluntary and well-considered” and “lasting and unbearable suffering” requirements, the “no other solution” criteria places the emphasis on the patient’s subjective beliefs. Ironically, the availability of other medical solutions represents the one due care requirement that physicians, by virtue of their professional training and clinical expertise, are better positioned than patients to decide. Once again, the Termination of Life Act appears to have misallocated the responsibilities between the physician and the patient.

Regarding the Act’s procedural requirements, a physician must, as a preliminary step, have informed the patient about the “situation he was in and his prospects.” This procedural protection represents a reaffirmation of the doctrine of informed consent first codified in the Medical Assistance Act of 1994. Finally, the Act also requires that the physician consult with a colleague prior to performing the requested euthanasia.

129. Keown, Public Policy, supra note 23, at 85. The old standard of “durable and persistent” incorporated the important dimension of time, whereas the new standard presumably dispenses with the requirement that a patient’s desire to undergo euthanasia be maintained for any discernable length of time.
130. Termination of Life Act, ch. 2, art. 2(1)(a).
131. Id. ch. 2, art. 2(1)(b).
132. Id. ch. 2, art. 2(1)(d).
133. Id. ch. 2, art. 2(1)(c).
134. Koster, supra note 83.
135. Termination of Life Act, ch. 2, art. 2(1)(e).
The Act stipulates that the physician consulted must actually see the patient and provide a written opinion as to whether the patient meets the statutory requirements of due care. Once the requirements of due care are met and the euthanasia is performed, the physician must notify the municipal pathologist and document the patient’s death as termination from non-natural causes. The pathologist, in turn, is required to perform an autopsy to determine how the euthanasia was performed and to provide independent documentation of the event. Finally, all cases of euthanasia must be reported to one of five regional euthanasia review committees who are charged with ensuring physician compliance with the due care requirements.

The due care provisions are striking for what basic procedural protections appear to be missing. First, it remains unclear what specific information or technical details regarding euthanasia the physician must disclose to the patient. Likewise, the physician is not obligated to obtain formal documentation of consent. There is no mandatory waiting period. Patients are not required to undergo a psychiatric screening or other mental competency evaluation. The Act does not specify what types of physicians are permitted to perform euthanasia. Finally, the only procedural protections that involve non-physicians, namely, the post-mortem evaluation by the pathologist and documentary review by the regional review committees, occur after the patient has already died. In other words, the Termination of Life Act relies solely on physician self-regulation and after-the-fact review to identify and prevent cases of involuntary euthanasia.

136. Id.
138. Id.
139. The review committees consist of, at a minimum, one lawyer, one bioethicist, and one physician. Members are paid for their services, may be removed at any time without cause, and serve as a clearinghouse for euthanasia data and liaison among the physician community, national government, and local public prosecutors. Termination of Life Act, ch. 3, arts. 3–19.
140. For example, Dutch physicians have noted that the euthanasia procedure itself sometimes results in clinical complications, including failure to induce coma, induction of coma followed by the patient’s re-awakening, and longer-than-expected time until death. Johanna H. Groewoud et al., Clinical Problems with the Performance of Euthanasia and PAS in the Netherlands, 34 N.E. J. Med. 551 (2000).
141. Apparently, radiologists, dermatologists, and foot surgeons may perform euthanasia with equal competence as internists or anesthesiologists. The only limitation appears to be the general standard of due care which, as previously noted, represents a completely self-defining standard for the medical profession.
142. Termination of Life Act, ch. 3, art. 3.
A. Source of Data and Methodology

The preceding sections traced the decriminalization of euthanasia by Dutch courts, the adoption and subsequent deterioration of the due care requirements recommended by the leading Dutch medical society, and the expansion of the situations and circumstances in which euthanasia might be considered accepted medical practice. Growing public support for euthanasia culminated in the passage of the Termination of Life Act in 2002. When the Dutch Supreme Court first decriminalized euthanasia in 1984, however, physicians, patient advocates, and the Dutch government all lacked hard data concerning the frequency and nature of actual euthanasia practice.

In response to the public debate and growing body of case law, the Dutch government commissioned the first nationwide study of euthanasia and PAS in the Netherlands in 1990. The resultant Remmelink Report constituted a comprehensive study of end-of-life medical decision. The government commissioned similar studies in 1995 with the Van der Maas Report and again in 2001 with the Onwuteaka-Philipsen Report. These reports provide unparalleled information regarding the frequency of euthanasia during the specific years studied and general trends regarding euthanasia and end-of-life treatment decisions in a modern industrialized society.

For each study, the researchers conducted a series of interviews with approximately 400 general practitioners, specialists, and nursing home

143. Id. ch. 2, art. 2.
144. Id.
145. Id. chs. 3, arts. 4-A, 4-B. It is perhaps significant that, although the Netherlands' euthanasia regime is the most far reaching and therefore classically liberal regulatory regime of all developed nations, the legalization of voluntary active euthanasia was ultimately achieved through the electoral political process. In the United States, developments in the law relating to end-of-life medical decisions have typically occurred through litigation. Cf. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 287 (1990) (passive voluntary euthanasia); Roe v. Wade, 410 U.S. 113 (1973) (abortion); Oregon v. Ashcroft, 192 F. Supp. 2d 1077 (D. Or. 2002) (PAS).
146. The commission was chaired by the attorney general of the Dutch Supreme Court, Professor Jan Remmelink. Van der Maas Report, supra note 15.
148. See Van der Maas Report, supra note 15 at 1699; Onwuteaka-Philipsen Report, supra note 15, at 1. In addition, the original 272-page Dutch version of the Onwuteaka-Philipsen Report has been translated and analyzed by Dr. Richard Fenigsen for his own research. His findings were published in 2004. Fenigsen, supra note 20.
The researchers adopted strict procedural safeguards to ensure the anonymity of both the physician interview subjects and the deceased patients. In addition to the interview component of each study, researchers analyzed large samples of death certificates provided by the Dutch government, representing over 40,000 deaths in each of the three studies and encompassing the entire universe of natural and non-natural deaths.

Foreign observers note that the government-ordered studies reflect the distinct usages and phrases of the Dutch approach to euthanasia. For example, the studies eschew the term involuntary euthanasia in favor of the phrase, “ending of life without a patient’s explicit request.” Likewise, the authors avoid the term “terminal sedation” in favor of “alleviation of symptoms with possible life-shortening effect.” “Euthanasia” in the official reports refers to active voluntary euthanasia, while cases which might otherwise be classified as passive voluntary euthanasia are generally described as “non-treatment decisions.” Consequently, foreign observers may interpret the empirical data differently than the studies’ authors.

B. Voluntary Euthanasia and PAS

In 2001, almost two out of every five deaths in the Netherlands were at least partly attributable to a medical decision to hasten the patient’s death. Patients made 9,700 explicit requests for euthanasia. Of the documented requests for euthanasia, less than one-third resulted in a physician actually performing euthanasia. It remains unclear, however, how many of the remaining two-thirds of patients died from natural causes before the treating physician could act on those requests. The fact that at least some patients died from natural causes prior to receiving euthanasia appears to rebut the principle argument in favor of active euthanasia, namely, that it is necessary to relieve patients’ suffering. Defenders of Dutch euthanasia practices argue that the consistently low proportion of euthanasia cases to euthanasia requests belies the charge that Dutch physicians are overeager to perform euthanasia, and reflects the seriousness and caution with which physicians undertake end-of-life treatment decisions. However, the 1995 Van der Maas
physicians actually performed euthanasia 3,500 times, representing 2.6 percent of all deaths.\textsuperscript{158} Compared to previous years, the number of requests for euthanasia increased slightly, from 8,900 requests in 1990 to 9,700 requests in 1995.\textsuperscript{159} Thereafter, the number of euthanasia requests stabilized.\textsuperscript{160} Interestingly, PAS is generally unpopular in the Netherlands, accounting for only 0.2 percent of all deaths in 2001. Together, the official figures for voluntary euthanasia and PAS account for less than 3 percent of all deaths.

The Ministry of Health, Welfare and Sports reports that between 4 percent and 10 percent of all deaths occurred following terminal sedation in 2002.\textsuperscript{161} These official figures probably understate the actual incidence of terminal sedation, which the authors refer to as “alleviation of symptoms with possible life-shortening effect,”\textsuperscript{162} as the reports indicate that an additional 20 percent of all deaths involved alleviation of symptoms with the foreseeable potential side effect of shortening the patient’s life.\textsuperscript{163} Therefore, assuming that the relative percentage of deaths due to terminal sedation could not have changed dramatically between 2001 and 2002, the actual number of cases of terminal sedation may account for between 24 percent and 30 percent of all deaths each year.

While the official government report concludes that only 2.6 percent of all deaths involve active voluntary euthanasia, that figure probably understates the actual incidence of euthanasia in the Netherlands. The Dutch government has indicated that physician self-reporting of euthanasia and other end-of-life treatment decisions has consistently declined.


\textsuperscript{159} Onwuteaka-Philipsen Report, supra note 15, at tbl. 1.

\textsuperscript{160} Id. tbls. 1–2.


\textsuperscript{162} Onwuteaka-Philipsen Report, supra note 15, tbl. 4.

\textsuperscript{163} Id. tbl. 1.
between 1990 and 2001.\textsuperscript{164} Currently, the Ministry of Health, Welfare, and Sports estimates that physician self-reporting reflects only half of the actual cases of euthanasia.\textsuperscript{165} Consequently, the actual incidence of active voluntary euthanasia could be double the official estimates.

\begin{flushleft}
\textit{C. Involuntary Euthanasia}
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All three studies explicitly addressed the practice of involuntary euthanasia, obliquely referred to in the official reports as “ending the life of patients without explicit request.”\textsuperscript{166} Involuntary euthanasia occurred in approximately 900 cases each year from 1995 through 2001.\textsuperscript{167} These cases represented 0.7 percent of all deaths in 1995 and 0.6 percent in 2001.\textsuperscript{168} In general, the official estimates of involuntary euthanasia suggest that the practice is a relatively rare but stable component of Dutch medical practice.

The 1995 Van der Maas Report reported that in about half the involuntary euthanasia cases the patient had previously expressed a wish for euthanasia in the event that the patient’s suffering became unbearable.\textsuperscript{169} Likewise, in slightly less than half of all involuntary euthanasia cases, the patient had not discussed euthanasia with the physician nor expressed a wish to be relieved of suffering.\textsuperscript{170} Significantly, in 79 percent of these cases, the patient was mentally incompetent.\textsuperscript{171} The same figures also lead to the inescapable conclusion that, in approximately 210 cases each year, Dutch physicians intentionally terminated the lives of mentally competent patients without consultation or consent.

The Van der Maas Report further reported that, in about 95 percent of cases of termination without explicit consent, the physician discussed the decision to terminate the life of the patient with either a colleague or the patient’s relatives.\textsuperscript{172} Relatives were consulted 70 percent of the time,
while in at least 5 percent of all involuntary euthanasia cases, the physician failed to discuss either the patient’s prognosis, the availability of alternative therapies or palliative care, or the moral propriety of terminating the patient’s life.173 Significantly, the study fails to document how many, if any, of these physicians faced either professional disciplinary sanction or criminal investigation.

If the rate of physician self-reporting for voluntary euthanasia, which is decriminalized, is only 50 percent,174 the physician self-reporting rate for involuntary and non-voluntary euthanasia, which remains illegal under the criminal code, may be similar or greater. Presumably, the official estimate of 1,000 involuntary euthanasia cases per year may significantly understate the actual incidence of involuntary euthanasia.

In addition, the 1990 Remmelink Report revealed that slightly less than 5,000 patients were killed by terminal sedation without explicit request.175 Although described as cases of terminal sedation by the report’s authors, some of these deaths probably represent instances of involuntary euthanasia.176 Not surprisingly, although subsequent reports provided aggregated estimates of the number of cases of terminal sedation, the 1995 and 2001 reports do not indicate whether informed consent was obtained.177 If the actual number of involuntary euthanasia cases in 1990 was closer to 6,000 deaths instead of 1,000, and the relative frequency of involuntary euthanasia remained constant through 2001, then approximately 5 percent of all deaths in the Netherlands result from physicians

173. Id. tbl. 4.
174. Sheldon, supra note 164.
176. Because the researchers relied on documentation provided by the physicians themselves, there is no independent corroboration of their classification of individual cases. Smith, supra note 13, at 111. A physician who knowingly performs involuntary euthanasia may simply indicate that the primary purpose of the treatment was to relieve the patient’s pain, while the secondary or ancillary intention was to perhaps hasten death. In other words, the government’s classification of marginal cases depends entirely on how the physician characterizes the treatment. The physician, in turn, has a significant incentive to classify marginal situations as cases of terminal sedation, which is essentially unregulated, rather than involuntary euthanasia, which is technically illegal. Of course, the government’s hair-splitting contradicts the government’s purported goal in legalizing active euthanasia. According to the government’s own publications, the primary purpose of euthanasia was to allow physicians to alleviate patient’s pain and suffering. To refuse to classify cases where a doctor attempts to relieve pain by hastening death as something other than euthanasia is somewhat disingenuous.
177. Id.
performing non-consensual euthanasia on unwilling or unknowing patients.\textsuperscript{178}

For several years, Western media sources have provided anecdotal evidence of widespread euthanasia of mentally retarded or physically deformed infants.\textsuperscript{179} The recent admission by the administrators at Groningen Hospital that they have been performing euthanasia on infants, allegedly with parental consent, lends credence to the earlier reports.\textsuperscript{180} Following the hospital’s disclosure of the new policy permitting infanticide, fresh reports have surfaced that physicians who perform euthanasia on infants engage in “secret deals” with public prosecutors to avoid prosecution.\textsuperscript{181} Although Dutch physicians claim that approximately fifteen children are killed at birth each year,\textsuperscript{182} other researchers have claimed that as many as 8 percent of all infant deaths, corresponding to 80 children each year, are due to euthanasia.\textsuperscript{183} Of the minority of such cases that were reported to local prosecutors, none resulted in a criminal conviction.\textsuperscript{184}

Finally, the authors of the Onwuteaka-Philipsen Report noted that the proportion of physicians who had performed an act of involuntary euthanasia decreased between 1990 and 2001.\textsuperscript{185} Despite that decrease, however, 13 percent of physician respondents admitted that they could conceivably engage in the termination of a patient without request.\textsuperscript{186}

\textit{D. Other Research Regarding Euthanasia in the Netherlands}

A separate and independent study by the Netherlands Institute for Health Services Research (NIVEL) utilized data from a sample of sixty general practitioners.\textsuperscript{187} This trend analysis covered a much broader pe-

\textsuperscript{178} Id. The figure of 6,000 deaths includes the official estimate of 1,000 cases of “ending of life without explicit request” and 5,000 cases of terminal sedation without request. Since between 120,000 and 140,000 deaths occur each year, roughly 5 percent of all deaths appear to involve non-consensual killings.


\textsuperscript{180} Horsnell, supra note 1, at 13.

\textsuperscript{181} Traynor, supra note 3, at 3.

\textsuperscript{182} Id.

\textsuperscript{183} Smith, supra note 13, at 61.

\textsuperscript{184} Traynor, supra note 3, at 3.

\textsuperscript{185} Onwuteaka-Philipsen Report, supra note 15, at 3.

\textsuperscript{186} Id.

\textsuperscript{187} R.K. Marquet et al., Twenty Five Years of Requests for Euthanasia and Physician Assisted Suicide in Dutch General Practice: Trend Analysis, 327 BRIT. MED. J. 201 (2003) [hereinafter NIVEL Report].
period, from 1977 through 2001, than the government-sponsored sur-
veys. In addition to tracking the overall frequency of euthanasia re-
quests, the trend analysis also traced the reasons that patients made such
requests. As such, the study provides a valuable patient-centered com-
plement to the government-sponsored studies, which focused on physi-
cian attitudes and practices, not patient concerns.

Regarding the reasons that patients gave for requesting euthanasia or
PAS, the NIVEL researchers reported that fear of pain decreased in sig-
nificance from 1979 through 2001, while general deterioration of health
and physical ability rose in importance in the same period. The NIVEL
researchers deemed the incidence of dyspnoea (e.g., difficulty with
breathing) and hopelessness statistically insignificant. Overall, the
NIVEL researchers concluded that the Dutch approach to active volun-
tary euthanasia did not increase the risk that individuals would request
euthanasia before all palliative options were exhausted. Significantly,
the NIVEL Report only analyzed patient requests for euthanasia, and
therefore did not address questions regarding the frequency or clinical
context of involuntary euthanasia in the Netherlands.

E. Analysis of the Government’s Findings

The government-sponsored studies suffer from one primary conceptual
shortcoming. As the authors of the Onwuteaka-Philipsen Report concede,
all three studies were limited to the experiences and attitudes of physi-
cians, not patients. As such, the studies do not provide evidence of ei-
ther patient views regarding euthanasia and end-of-life treatment deci-
sions or the quality of end-of-life care. Furthermore, the government
studies do not address the vitally important issue of what factors influ-
ence an individual patient or doctor to consider euthanasia as a treatment
option. Therefore, the reports contribute little to the substantive analysis
of the merits of the due process requirement of the Netherlands’ euthana-
sia regulations.

One critic of Dutch euthanasia practice, citing the Van der Maas sur-
vey and the Commission Report’s observation that palliative care train-
ing, knowledge, and research in the Netherlands lag behind comparable
medical knowledge in other European states, asserts that euthanasia is

188. Id.
189. Id.
190. Id. at 200.
191. Id. at 201.
192. Id. at 202.
193. Id.
194. See Onwuteaka-Philipsen Report, supra note 15, at 5.
routinely used as an alternative, rather than an infrequent supplement, to palliative care. Similarly, opponents of euthanasia assert that the legalization of euthanasia serves as a disincentive to the Dutch government to invest in palliative care education and may increase the risk of patients requesting euthanasia because of undue influence or duress.

The empirical evidence of euthanasia practice in the Netherlands reveals a number of troubling conclusions. First, the government’s narrow definition of euthanasia excludes many deaths that could fairly be classified as passive voluntary euthanasia, active voluntary euthanasia, and active involuntary euthanasia. Second, the fact that fewer than half of all physicians report cases of voluntary euthanasia, which has been a legal requirement of due care since the late 1990s, indicates that the government should not rely on voluntary physician compliance with the statutory due care requirement. Arguably, the self-reporting requirement for voluntary euthanasia patients is the least arduous of the due care requirements. Thus, the failure of almost half of all Dutch physicians to comply with this basic procedural requirement suggests that large numbers of physicians may regularly violate the other requirements of due care, such as waiting for a patient’s repeated and persistent request for euthanasia or obtaining a physician consultation prior to performing euthanasia. Finally, the widespread non-compliance with the reporting requirement suggests that the government’s purported objective in passing the Termination of Life Act, namely, to promote physician compliance with the legal requirements of due care, has not succeeded.

V. CRITIQUE OF THE DUTCH ATTEMPT TO REGULATE EUTHANASIA

A. Historical Overview of the Moral Debate

The Netherlands’ debate regarding the proper approach to euthanasia regulation reflects the natural tension between individual mortality, traditionally an intensely personal subject, and government policy, which is

195. KNOW, PERSPECTIVES, supra note 27, at 281.
197. The studies do not consider terminal sedation or the withholding of life-sustaining medical treatment to constitute euthanasia. As previously noted, the characterization of each particular course of treatment as either terminal sedation or active euthanasia is entirely dependant on how each treating physician chooses to classify the patient encounter. Moreover, physicians possess a strong incentive to classify marginal cases as terminal sedation, which is unregulated, rather than involuntary euthanasia, which is nominally illegal. As such, because of the obvious evidentiary concerns, it remains difficult for researchers to draw clear distinctions in many cases.
198. See Sheldon, supra note 164.
naturally public, open, and impersonal. Whether an individual believes that euthanasia should be outlawed, legalized, or simply unregulated by the state, the debate invariably touches upon profound personal beliefs regarding religion, morality, and the sanctity of life. Consequently, any analysis of the Netherlands’ particular approach to euthanasia requires a brief explanation of the moral principles that underlie the public debate.

Virtually every legal system in history recognized the principle that the intentional killing of another individual is usually wrong. It is significant, however, that the rationale for that principle varies dramatically depending upon time and place. The general prohibition against murder may be derived from religious tenets, utilitarian practicality, or other philosophical grounds. Indeed, humanity’s historical inability to agree on a universally valid basis for the prohibition against killing underlies modern societies’ failure to agree on an appropriate approach to euthanasia.

The euthanasia debate also relates to the question of suicide. Although different cultures believed that suicide could be justified in spe-
pecific circumstances, the general condemnation of suicide extends back at least to the early Greek philosophers.207 The Judeo-Christian proscription of suicide resulted in the criminalization of suicide during the Middle Ages, and continues to inform most Western societies’ views of, if not their responses to, suicide.208 Today, few states consider it a felony to commit suicide, however, many states, including the Netherlands, prohibit laypeople from assisting in a suicide.209

Aside from the general proscriptions of killing and suicide, the historic prohibition of euthanasia derives from a precept first articulated by the founder of medical ethics, Hippocrates.210 His Hippocratic Oath, first articulated in the fourth century B.C.E. and repeated by thousands of medical school graduates each year around the globe, includes the injunction, “to give no deadly medicine to anyone if asked.”211 Of course, the Hippocratic Oath is a professional code of ethics, not a rule of law or belief system. Moreover, the Dutch medical community has apparently rejected that aspect of the Oath, at least to the extent that the official position of the KNMG is that euthanasia constitutes a legitimate feature of modern medical practice. However, the Hippocratic Oath and the legacy of traditional medical ethics continue to inform the international debate as well as individual practitioners’ attitudes regarding euthanasia.212

207. The Vikings, for example, coveted death in violent battle and allegedly preferred death by suicide over natural causes. NEW YORK STATE TASK FORCE, supra note 5, at 78. The Greek philosopher Plato argued that suicide was cowardly, but could be acceptable if an individual was particularly immoral. Id. at 78–79. See generally THE LAWS OF PLATO (Thomas L. Pangle trans., 1988). Plato’s student Aristotle believed that suicide was always morally wrong. NEW YORK STATE TASK FORCE, supra note 5, at 78 n.6. See generally ARISTOTLE, NICOMACHEAN ETHICS, (Terence Irwin trans., 1999). Feudal Japan’s code of bushido, on the other hand, made seppuku, or ritual suicide, obligatory for the samurai class in certain circumstances. Seppuku, ENCYCLOPAEDIA BRITANNICA PREMIUM SERVICE, http://www.britannica.com/ebc/article?tocId=937825 (last visited Feb. 22, 2006).

208. See, e.g., McMahan, supra note 38, at 10 (reviewing the approaches of Thomas Aquinas and Rene Descarte to the problem of the soul, as those approaches relate to Catholic and other Christian teachings regarding death and killing); see also NEW YORK STATE TASK FORCE, supra note 5, at 81–82 (discussing justifications for euthanasia articulated during the late nineteenth century).

209. See Sr arts. 293–94 (Neth.), translated in AMERICAN SERIES OF FOREIGN PENAL CODES, supra note 72, at 200.

210. SMITH, supra note 13, at 19–20 n.55.

211. See TABERS’S CYCLOPEDIC MEDICAL DICTIONARY 832 (C.K. Thomas ed., 16th ed. 1989); see also SMITH, supra note 13, at 19–20 n.55.

Unsurprisingly, most, but not all, belief systems consider involuntary euthanasia to be always morally unacceptable. However, an influential group of academics and bioethicists argue that involuntary euthanasia may not only be morally acceptable but actually a moral imperative. Like belief systems in favor of voluntary euthanasia, belief systems that sanction involuntary euthanasia are quite varied. Briefly, some ethicists argue that spending healthcare resources on comatose or vegetative patients, who lack the capacity to either feel pain or desire life, constitutes a crime against those individuals who suffer for lack of medical care. Others argue that infants, comatose patients, or adults with severe cognitive defects, including elderly patients with advanced Alzheimer’s disease, are not “persons” and that it cannot be morally wrong to kill non-persons. Finally, if euthanasia represents an appropriate clinical response to the problem of unbearable pain and suffering, then it is morally indefensible to deny that clinical response to infants, comatose patients, or individuals with severe mental retardation simply because those individuals cannot request euthanasia for themselves. Although perhaps shocking or morally repugnant to some, these theories in favor of involuntary euthanasia are internally consistent and therefore no less logically sound than belief systems that disavow involuntary euthanasia.

In the end, the relative merits and shortcomings of the various religious, philosophical, and legal arguments relating to death, suicide, and abortion, could easily fill multiple libraries. However, a few generalities are common to each argument. First, each religious, philosophical, or legal argument constitutes a self-defining belief system that may or may
not be compatible with competing belief systems. Second, the degree to which an individual adheres to a particular belief system, aside from environmental or sociological pressures, depends upon an individual’s intuition. Third, all modern legal systems, as well as the vast majority of modern belief systems, recognize that the intentional killing of another individual is usually wrong and therefore the practice of euthanasia must be justified as an exception to the general rule. Finally, each belief system answers the questions of why and when euthanasia may or may not be morally permissible; they do not answer the question of who gets to decide.

B. Conceptual Approaches to Regulation of Euthanasia

Generally, there are three primary responses to the moral question of euthanasia. These approaches are the prohibitionist view, the patient-autonomy perspective, and the beneficence principle. Each view constitutes a procedural response to the regulation of euthanasia. As such, these approaches are separate and distinct from the moral, religious, or philosophical justifications that underlie any individual’s personal beliefs. Instead, these conceptual approaches answer the question, who gets to decide whether or not to perform euthanasia?

The prohibitionist view considers all forms of euthanasia to be morally unacceptable. Consequently, prohibitionists believe that active euthanasia, whether voluntary or involuntary, should never be legal. This view forecloses any discussion regarding the merits of specific attempts to regulate euthanasia, and therefore adds little insight into the discussion regarding the Netherlands’ euthanasia law.

An alternative approach is the patient-autonomy perspective, in which the question of euthanasia relates to an individual’s right to self-determination, namely, the right to determine, to the fullest extent possible, the circumstances of one’s own death. In this view, the propriety

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218. E.g., Keown, Public Policy, supra note 23, at 80.
219. In other words, at a certain point, an individual’s acceptance that a moral distinction does or does not exist between active and passive euthanasia, for example, rests on what the individual intuitively feels. See Ladd, supra note 33, at 166. Admittedly, this formulation is incredibly unsatisfying; however, the formulation explains why the core philosophical questions of euthanasia, as well as of life itself, remain unsolved despite thousands of years of religious and philosophical discourse.
220. E.g., New York State Task Force, supra note 5, at 77–78.
222. Supporters of euthanasia from the patient’s rights point of view frequently frame their arguments in terms of the right to die with dignity. Hill & Shirley, supra note 85, at 7–8.
of euthanasia is linked to each patient’s individual moral and religious beliefs. Consequently, the decision to permit euthanasia, although guided by societal standards of conduct and the realities of the medical situation, must ultimately rest upon the individual patient’s voluntary and affirmative choice. Significantly, the patient-autonomy perspective accommodates the prohibitionist’s beliefs, inasmuch as the patient-autonomy advocate does not accept the validity of involuntary euthanasia. Thus, individuals who believe that euthanasia is morally wrong but live in a patient-autonomy system may simply choose not to request euthanasia. A legal regime that strongly adopts patient-autonomy principles may also accommodate the beneficent approach as well. For example, a patient that accepts that the doctor, not the patient, should determine the course of treatment may simply acquiesce to any course of treatment, including euthanasia, which the doctor recommends.

The third general approach to euthanasia, the beneficence principle, states that physicians’ primary duty is to cure disease and alleviate suffering. In this view, patient self-determination is ancillary, or perhaps irrelevant, to the primary goal of alleviating suffering. Accordingly, the physician, not the patient, acts as the primary decision maker regarding the proper course of medical treatment.

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223. E.g., COHEN-ALMAGOR, supra note 209, at 82.
224. Patient autonomy may be understood as the manifestation in medical ethics of the more general principle of self-determination on which most modern legal systems are based. Thus, the patient autonomy perspective not only underlies the common law doctrine of informed consent, but also has been adopted by the European Convention on Human Rights. Article 2 of the Convention states, “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court . . . .” Convention on Human Rights, art. 2, Sept. 3, 1953, 213 U.N.T.S. 221.
226. In this respect, a purely beneficent approach to euthanasia regulation is incompatible with the patient autonomy perspective. In an overtly beneficent legal regime, once a physician decides that euthanasia is the medically appropriate response to a patient’s condition, the patient’s consent is irrelevant. A less rigid beneficent regime values patient self-determination, however, when faced with a choice between two contradictory courses of treatment, the beneficent principle tips the balance in favor of the doctor’s professional judgment and the standards of accepted medical practice. In other words, in a mixed regime that emphasizes beneficence over patient autonomy, a practitioner may take into consideration the patient’s preferences so long as those preferences do not contradict the physician’s considered clinical judgment.
227. The beneficence approach to medical ethics is based upon the ethical principles first established by Hippocrates and, therefore, traditionally prohibited euthanasia. More recently, beneficent principles have been used to rationalize both voluntary and involuntary euthanasia. The important feature of the beneficence principle is not whether it per-
ples spring from the beneficent approach to euthanasia. First, the beneficent approach assumes that physicians always act in the best interests of their patients. In addition, the pro-euthanasia physician who operates in a beneficent regime accepts the proposition that certain lives are not worth living and that painless death from euthanasia is more dignified than painful death from terminal disease. Since physicians, not patients, are viewed as the most qualified actors to evaluate the relative value of patients’ lives, physicians should be free to perform both voluntary euthanasia and involuntary euthanasia in an overtly beneficent regime.

mits or precludes euthanasia, but rather that the physician, not the patient, is the most appropriate decision maker. Dieter Giesen, Dilemmas at Life’s End: A Comparative Legal Perspective, in Euthanasia Examined: Ethical, Clinical, and Legal Perspectives 321 (John Keown ed., 1995).

228. The beneficent principle is best summed up by the expression, “the doctor knows best.” One example of how physicians internalize the beneficent approach to medicine is the response given by a Dutch euthanasia advocate, Rob Houtepen. Faced with the question as to whether the existing due care provisions protect against involuntary euthanasia, Dr. Houtepen argued that, although there was a need to improve the notification procedure, if the guidelines are followed, then there is no danger of abuse. Of course, Dr. Houtepen’s answer missed the point. It did not occur to the doctor that some physicians might simply prefer to ignore the due care requirements. Dr. Cohen-Almagor’s interviews occurred in 1999, one year before the Dutch Ministry of Health implemented more rigorous euthanasia notification procedures and three years before the passage of the Termination of Life Act. See Cohen-Almagor, supra note 47, at 168.

229. Smith, supra note 13, at 10–19.

230. For example, the bioethicist Roger Dworkin believes that most legal systems’ embrace of patient autonomy principles constitutes more “rhetoric” than “fact.” Roger Dworkin, Medical Law and Ethics in the Post-Autonomy Age, 68 Ind. L.J. 727, 727–28 (1993). In a pure patient autonomy regime, patients could auction away internal organs to the highest bidder, agree via contract to pay less for healthcare in return for their waiver of the right to sue for medical malpractice, and request and receive euthanasia on-demand. Such bioethicists also believe that, since the death of some people, for example, a beloved father of a large family, causes greater grief than the death of other people, for example, an anti-social hermit, it is acceptable to measure the value of individual human lives in relative terms. Smith, supra note 13, at 18. It remains unclear whether Dworkin accepts involuntary euthanasia or merely argues for a diminished role for blind adherence to patient-autonomy principles in euthanasia cases. Pete Singer’s advocacy in favor of involuntary euthanasia represents a more extreme articulation of the beneficent approach to euthanasia. See generally Singer, supra note 194.
C. Intersection of Dutch Law and the Conceptual Approaches to Regulating Euthanasia

Admittedly, few legal systems fully incorporate either the patient-autonomy perspective or the beneficence principle. Rather, most legal systems attempt to strike a balance between patients’ rights to determine the course of their own medical care and physicians’ prerogatives to provide care in accordance with their professional medical judgment. The Dutch approach to euthanasia reflects this internal balancing act. For example, the Termination of Life Act and an accompanying Ministry of Health, Sports, and Welfare publication assert that the Act’s primary purpose is to further the goal of protecting patients’ rights and autonomy. Likewise, the 1994 Medical Assistance Act and the country’s ratification of the European Convention on Human Rights indicate that the Dutch government is committed to the principle of patient autonomy.

However, ample evidence suggests that beneficence, not patient autonomy, is the primary motivation behind the Dutch approach to euthanasia regulation. For example, only one of the five substantive due care provisions in the Act actually corresponds to the patient’s subjective statements and beliefs. The remaining due care provisions address what the physician’s convictions must be in order to satisfy the requirements of due care. Other Dutch government statements also suggest that allevia-

231. For example, the Dutch government asserts, “Thanks to the new Act, doctors and terminally ill people know exactly what their rights and obligations are. . . . The voluntary nature of the patient’s request is crucial: euthanasia may only take place at the explicit request of the patient.” NETHERLANDS’ NEW RULES, supra note 5, at 1–2.
232. Koster, supra note 83.
234. See Gunning, supra note 12 (“Many people think that legalizing euthanasia will make them autonomous. But, in fact, it is the doctor who is made free to do as he thinks right. In the end, it is not the patient, but the doctor who decides when life should be ended.”); see also de Vries, supra note 82, at 378 (“[T]he law allows for a medical exception because only doctors are allowed to entertain a request for euthanasia. Another reason for the medical exception stems from the fact that considerations about the request—specifically whether the patient’s suffering has been hopeless and unbearable—are medical or clinical considerations and considerations upon which the courts must rely.”).
235. “The patient must hold the conviction that there was no other reasonable solution for the situation he was in.” Termination of Life Act, ch. 2, art. 2 (1)(d).
236. These due care requirements include the “voluntary and well-considered” request requirement, the “lasting and unbearable” suffering requirement, and the consultation with another colleague requirement, and the requirement that the physician perform the euthanasia according to the prevailing standards of acceptable medical practice. For each
tion of patient suffering, not respect for individual patient autonomy, was the primary motivator behind the Termination of Life Act.  

Meanwhile, the Dutch Supreme Court’s construction of the noodtoestand principle in the Alkmaar decision represents a strong commitment to physician beneficence.  The supreme court specifically discounted the legal significance of the patient’s right to self-determination as the controlling factor in euthanasia cases. That construction indicates that, from a doctrinal point of view, physician beneficence is more important than patient-autonomy principles. Moreover, the overall history of the due care provisions, from the original KNMG guidelines through the Termination of Life Act requirements, indicates that Dutch courts consistently turn to the medical profession to decide what constitutes acceptable euthanasia practice. Indeed, current Dutch euthanasia law requires judges to focus the factual inquiry on the physician’s, not the patient’s convictions. The law then proceeds to evaluate the physician’s convictions according to a standard of conduct developed by the medical community itself. Thus, the case law since 1984 reveals a marked predilection for the beneficent view, as the alleviation of pain, prevailing standards of medical care, and physicians’ professional judgments are far more important factors than any individual patient’s right to self-determination.

of these due care provisions, the Act focuses on the physician’s convictions, not the patient’s. Id. ch. 2, art. 2 (1).

237. For example, the government asserts that “[m]ost requests for euthanasia come from patients who are suffering unbearably with no prospect of improvement and see death as the only way out.” NETHERLANDS’ NEW RULES, supra note 5, at 3. However, as the NIVEL study indicated, more patients requested euthanasia because of general quality of life concerns than for fear of pain; fear of pain decreased in significance from 1979 through 2001. Marquet, supra note 178, at 201.

238. The Dutch Supreme Court’s articulation of the noodtoestand principle in the Alkmaar decision was that of the conflict between Article 294 of the Dutch Penal Code, the article that prohibits the intentional killing of a patient upon the latter’s request, and the physician’s professional medical duty to alleviate suffering. Belian, supra note 9, at 260.

239. As the Sutorius case indicates, an individual’s claim of being “tired of life” remains legally insufficient to justify euthanasia. Sheldon, supra note 108.
VI. CONCLUSION

The Dutch approach to euthanasia regulation fails because it relies upon a doctrinal justification for permitting active euthanasia that does not distinguish between voluntary and involuntary euthanasia. Although the Dutch legal system pays lip service to the principle of patient autonomy, the determinative factor in all euthanasia cases remains the alleviation of pain according to prevailing medical standards.240

The courts have shifted the focus of the legal inquiry away from the patient’s affirmative and voluntary request for euthanasia and towards the physician’s professional medical judgment, a self-defining standard that makes the medical community, not the individual patient or the Dutch citizenry at large, the ultimate arbiter of euthanasia policy. Moreover, because the majority of the Termination of Life Act’s due care provisions regulate physicians’ beliefs, not the patients’ wishes, the Act in reality denigrates patients’ interests rather than protects them. In other words, by relying on the legal mechanism of noodtoestand, and the Dutch Supreme Court’s formulation of the noodtoestand defense in the Aklmaar case,241 the Dutch courts have institutionalized a legal slight of hand.

In the current legal formulation, euthanasia is legally valid because “[t]he principle of avoiding suffering thus overrides the principle of autonomy.”242 If that is true, then physicians cannot logically deny the benefits of euthanasia to mentally challenged, severely disabled, or comatose patients who lack the capacity to make a formal request. The Dutch medical establishment has already recognized the veracity of that statement, as indicated by the KNMG’s recent request to the government for additional involuntary euthanasia guidelines.243 Notice, even the recent infanticide protocols announced by Groningen Academic Hospital are cloaked in the language of patient autonomy.244 Yet, to the extent that these cases of involuntary euthanasia involve patients who were never given a chance to formulate or vocalize their own views with regard to euthanasia, the Dutch legal system has engaged in a legal fiction.245

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240. Belian, supra note 9, at 267–68.
241. Id.
244. Horsnell, supra note 1, at 13.
245. Smith, supra note 13, at 94. Of course, because encephalitic infants are born with only a lower brain stem and no frontal lobes, they cannot, as a matter of medical certainty, ever develop consciousness. Accordingly, the euthanasia of encephalitic infants can never be explained on patient-autonomy principles.
the courts recognize the validity of euthanasia requests by proxy, they will have stripped the concept of informed consent of any meaningful potency.

In addition, Dutch courts have abrogated their responsibility to serve as independent and impartial guardians of the interests of patients. The courts repeatedly defer to the medical judgment of the medical community.\(^{246}\) This deference has been manifest in the Dutch Supreme Court’s articulation of the standard of care in the *Aklmaar* case, the courts’ subsequent adoption of the KNMG due care guidelines after 1985, and the codification of those guidelines in the Termination of Life Act. In addition, the Act itself relies exclusively on physician voluntary compliance in order to prevent abuse.\(^{247}\)

As a practical matter, the empirical evidence indicates that the government’s attempt to prevent non-compliance has failed, as less than half of all physicians report cases of active voluntary euthanasia,\(^{248}\) which is legal, while as many as 5 percent of all Dutch deaths appear to result from the non-consensual killing of patients by their physicians.\(^{249}\) Despite substantial international criticism of Dutch euthanasia practices, the medical community continues to rationalize any criticism of the Dutch approach to euthanasia.\(^{250}\)

By doctrinally rejecting the personal-autonomy argument in favor of the prevailing medical standard approach, and relying exclusively on physician self-regulation to prevent abuse, the courts weaken the only ethical barrier to non-consensual killings, namely, the right to informed consent. Since the Dutch legal system purports to recognize the doctrine of informed consent,\(^{251}\) involuntary euthanasia can never be legally justified because killing an innocent individual who neither requests nor consents to such killing would necessarily infringe upon that individual’s fundamental right to justice.\(^{252}\)

In the end, the balance that the Dutch government has attempted to strike between patient-autonomy principles and physician beneficence has not succeeded. Their approach to euthanasia regulation does not protect vulnerable individuals from potential abuse, fails to provide physicians with incentives to comply with the statutory reporting require-

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247. Termination of Life Act, ch. 2, art. 2.


249. See *supra* text accompanying note 178.

250. See Hendin, *supra* note 19, at 238.

251. See Koster, *supra* note 83.

ments, and as a practical matter, fails to prevent involuntary euthanasia. Although the Dutch government speaks the language of patient rights, relief from suffering, and death with dignity, it has created a system in which physicians, not patients, control the circumstances of death. If Dutch society believes that involuntary euthanasia is both morally acceptable and socially desirable, then the law should be modified to reflect that conviction.

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I. INTRODUCTION

Water has been called the last frontier of privatization around the world.1 Public bodies still supply over 90 percent of the world’s water2 and finance around 90 percent of the developing world’s investment in water and sewage systems.4 Yet, by the end of 2000, municipalities in at least ninety-three countries underwent partial privatization of water or wastewater services, including communist countries such as China and Cuba.5 Municipalities in still other countries are in the process of privatizing or evaluating the prospects of private sector involvement.6 Furthermore, international financial institutions such as the World Bank


3. The terms “developing world” and “developing countries” refer to recipients, rather than donors, of international aid and assistance. This usage is adopted out of convenience, although it is important to note that the customary distinction between “developed” and “developing” countries is problematic in view of recent rethinking of the term “development,” such as in the work of the Nobel prize-winning economist, Amartya Sen. Sen’s approach to development as “a process of expanding the real freedoms that people enjoy” and, conversely, of “poverty as a deprivation of basic capabilities rather than merely as lowness of incomes” blurs the customary distinction between “developed” and “developing countries.” See AMARTYA SEN, DEVELOPMENT AS FREEDOM 1, 87 (2000). For instance, Sen points out that although in terms of income African-Americans are many times richer compared to populations of developing countries, their “capability” to live long lives is comparatively lower than that of populations in some developing countries. Id. at 96. I am thankful to Professor Samuel Murumba for pointing me to the work of Amartya Sen.


5. Brubaker, supra note 1 (observing that some form of water privatization took place in the three countries of North America, twenty-three countries in Latin America and the Caribbean, twenty countries in Europe, thirty countries in Africa and the Middle East, and seventeen countries in Asia and the Far East).

have consistently supported privatization, especially in developing countries, often making privatization of utilities a precondition for loans, debt reprogramming, or loan forgiveness.\footnote{A study of World Bank loans between 1996 and November 2002 by the International Consortium of Investigative Journalists reported that the World Bank conditioned loans on the privatization of water services in about one third of its projects. Center for Public Integrity, Promoting Privatization, Feb. 3, 2003, http://www.publicintegrity.org/water/report.aspx?ID=ch&nID=44&alD=45. The study considered 276 long-term investment loans and short-term structural adjustment loans that the Bank had labeled “water supply,” and did not include combined loans. Id. Furthermore, the study also found that the number of loans conditioned on privatization had tripled in the period after 1996 compared to the period before 1996. Id. The International Monetary Fund (IMF) has supported similar policies. See, e.g., Varsha Gupta D’Souza, Development: IMF’s Chief New Economist Could Signal Policy Shift, INTER PRESS SERV., July 14, 2003 (remarking that an IMF loan to Nicaragua required the privatization of water, despite contrary domestic legislation).}

Accompanying the global trend of water privatization, water services have been consolidated within the hands of a few powerful multinational companies.\footnote{See Marty Logan, Finance: Corporations Said to Eye Water Privatization in U.S., INTER PRESS SERV., Feb. 4, 2003 (noting that while Europe-based multinational companies operated in a mere dozen countries in 1990, they were present in fifty-six countries and two territories by 2003).} Each of the two largest water multinationals provides water services to about 110 million people.\footnote{The Center for Public Integrity has documented the international presence of the major multinational water companies, including their former and present subsidiaries. See generally Center for Public Integrity, The Water Barons, http://www.icij.org/water/db.aspx?ID=db (last visited Feb. 4, 2006) (noting that Vivendi Environment (now Veolia Environment) operates in over one hundred countries and provides water services to 110 million people, Suez operates in forty-one countries and provides water to 115 million people, while the third largest provider of water services, RWE AG, serves more than 70 million people worldwide).} The combined revenue potential of multinational water companies measures close to $3 trillion.\footnote{Logan, supra note 8 (noting also that Vivendi Universal’s revenues from water-related services increased from $5 billion in 1990 to $12 billion in 2002). See also Bill Marsden, Cholera and the Age of the Water Barons, Feb. 3, 2003, http://www.icij.org/water/report.aspx?ID=ch&nID=44&alD=44 (observing that RWE’s revenues from water grew “a whopping 9,786 percent,” from $25 million in 1990 to $2.5 billion in 2002).}

Despite this clear global pattern, privatization of water services has not gone unopposed. Large protests have attended governments’ attempts to privatize water in many countries.\footnote{See, e.g., Provinces Protest Proposed Water Law, BUS. NEWS AMERICAS, July 27, 2004 (reporting that farmers and indigenous groups protested privatization proposals by Ecuador’s government fearing that privatization would endanger local community practices). In Paraguay, protests forced the government to postpone the reinstatement of a privatization bill, including provisions for the sale of the national water authority, which
in Cochabamba, Bolivia in 2000 resulted in the “water war,” forcing the Bolivian government to repeal the water law allowing for privatization, and to revoke the concession contract with a multinational consortium. Furthermore, some governments have rejected water privatization despite pressure by international financial institutions. In another remarkable development, a 2004 referendum in Uruguay approved a constitutional reform defining water as a public good and a human right, and ensuring had been previously repealed in 2002 due to public unrest. Kate Joynes, *Paraguayan Government Concedes to Anti-Privatization Protesters*, WMRC DAILY ANALYSIS, Aug. 20, 2004. In Thailand, a series of protests at a local and international level stalled the privatization of water in 2004. See, e.g., *Labor Unions Launch Nationwide Anti-Privatization Roadshow*, FNWEB DAILY NEWS, June 17, 2004, available at 2004 WLNR 7272488 (describing Thailand’s labor unions’ strategy of garnering popular support against the privatization of state water and electricity utilities); *Protest at Thai Embassy in Brussels over Privatisation; ICEM’s Executive Interrupts Session for Protest*, M2 PRESSWIRE, May 27, 2004, available at Westlaw: 5/27/04 M2PW (reporting a demonstration against the Thai government’s privatization plans by 120 trade union leaders from forty countries in front of the Embassy of Thailand in Belgium); Pravit Rojanaphruk, *10,000 Rally Against Plan to Privatise Utilities*, NATION (Thail.), Mar. 28, 2004 (reporting an anti-privatization rally organized by 135 non-governmental and grass-roots organizations, which drew about 10,000 people). Public protests had also accompanied earlier instances of privatization in Indonesia, Pakistan, India, South Africa, Poland, and Hungary. See William Finnegan, *Leasing the Rain*, NEW YORKER, Apr. 8, 2002, at 43, 53.


that its management would remain in public hands. Commentators have said the reform sets a strong political precedent globally for the use of referenda to protect against privatization.

The controversy surrounding water privatization reflects different responses to what the international community has recognized as a world water crisis. Over one billion people lack access to safe drinking water, while over two billion lack access to adequate sanitation. Illnesses caused by lack of safe water, such as diarrheal diseases, kill over two million people each year. Water conditions have been tied to 60 percent of the world’s illness. Africa, Asia, Latin America and the Caribbean comprise the most severely affected regions.


15. See id. (quoting from a letter by the environmental group Friends of the Earth, signed by 127 organizations from 36 countries, which stated that the referendum “sets a key precedent for the protection of water worldwide, by enshrining these principles into the national constitution of one country by direct democracy”). Activists in Thailand have similarly called on the government to organize a referendum to decide the issue of privatization. Labor Unions Launch Nationwide Anti-Privatization Roadshow, supra note 11; Rojanaphruk, supra note 11.


19. THE RIGHT TO WATER, supra note 17, at 6. According to quoted data, more children have died from diarrhea in the ten years preceding 2000 than from armed conflict since the Second World War. Id. at 7.


21. The situation is particularly acute in Africa, where up to 40 percent of the population remains with inadequate access to water and sanitation, while only 3 percent of the continent’s renewable water is put to use, 6 percent of its land is irrigated, and less than 5 percent of its hydropower potential is used. JAMES WIPPENNY, WORLD PANEL ON FINANCING WATER INFRASTRUCTURE, FINANCING WATER FOR ALL 5 (2003) [hereinafter CAMDESSUS REPORT, after Michel Camdessus, former managing director of the IMF, who chaired the panel]. In Asia, 19 percent of the population remains without water, and 52 percent without sanitation, while in Latin America and the Caribbean the respective figures are 15 percent and 22 percent. Id.
The international community has determined to combat the water crisis at the global level. In the United Nations Millennium Declaration, the General Assembly vowed “to halve the proportion of people who are unable to reach or to afford safe drinking water” by 2015.\textsuperscript{22} At the Johannesburg World Summit in 2002, the world community further agreed to reduce by half the proportion of people without access to basic sanitation.\textsuperscript{23} Progress toward achieving the Millennium Development Goals has varied.\textsuperscript{24} In part, this is due to the increase of the world’s population, which offsets the increasing number of people who have obtained access to water.\textsuperscript{25} According to some estimates, reaching the Millennium Goals by the target date would require increasing investments from the current $30 billion to $75 billion to cover the costs of providing universal access to water.\textsuperscript{26} The United Nation estimated in 2002 that Asia, Latin America, and Africa should not expect universal access to safe drinking water before 2025, 2040, and 2050 respectively, at then-current rates of investment.\textsuperscript{27}

Against this backdrop, proponents of privatization look to private sector involvement as a way to improve water access and sanitation, espe-

\textsuperscript{22} United Nations Millennium Declaration, G.A. Res. 55/2, para. 19, U.N. GAOR, 55th Sess., 8th plen. mtg., U.N. Doc. A/RES/55/2 (Sept. 18, 2000). In addition, the Millennium Declaration resolved to “stop the unsustainable exploitation of water resources by developing water management strategies at the regional, national and local levels, which promote both equitable access and adequate supplies.” \textit{Id.} para. 23.


\textsuperscript{24} \textit{See UN MILLENNIUM PROJECT, INVESTING IN DEVELOPMENT: A PRACTICAL PLAN TO ACHIEVE THE MILLENNIUM DEVELOPMENT GOALS 3} (2005), available at \text{http://www.unmillenniumproject.org/reports/index_overview.htm}. For example, the target of halving the proportion of people without clean drinking water in urban areas has been met in most regions, except for Eastern Asia. On the other hand, with respect to rural areas, the progress toward achieving the target is lagging in Sub-Saharan Africa, Eastern, South-Eastern and Western Asia, as well as in Latin America and the Caribbean. \textit{Id.}

\textsuperscript{25} \textit{See CAMDESSUS REPORT, supra note 21, at 5} (observing that, because of population growth, coverage for urban water has decreased despite the fact that, during the 1990s, 800 million people obtained access to water and 750 million to sanitation).

\textsuperscript{26} Brubaker, \textit{supra} note 1 (noting that although estimates tend to vary, they usually surpass current or planned public spending). A report completed in 2000 under the auspices of the World Water Council and the Global Water Partnership estimated that in poor countries, about $75–80 billion were invested in water annually, an amount that would have to be raised to $180 billion to reach the Millennium Goals. \textit{Priceless, supra note 20.}

cially in cash-strapped less developed countries. Opponents contend that water governance should not be left to market forces. They argue that water is a human right and should remain under the control of public bodies taking into account social fairness and environmental sustainability.

Taking account of this debate, this Note examines the nascent developments of human rights law regarding corporate accountability for human rights and the human right to water. While the Note starts from the premise that water is a human right, it also proceeds from the descriptive proposition that water privatization is, for better or worse, a global reality. The Note proposes that corporate accountability for the human right


29. Mario Osava, South Could Become Scenario of Water Wars, Inter Press Serv., Mar. 21, 2003 (setting forth the positions of the organizers of the World Social Forum, an alternative gathering designed to compete with the World Water Forum, which some activists see as forwarding a corporate agenda).

30. Id. It is important to note, however, that although opponents of water privatization invariably cite that water is a human right, not all human rights proponents oppose water privatization. See infra Part V.A and notes 204–05.

31. This Note does not examine other corollaries of the global trend of water privatization and commodification of water, such as the impact of the international trade regime
to water may assuage the problems raised by water privatization, without dispensing with privatization per se. This challenge is twofold to the extent that both corporate liability for human rights violations and the human right to water are relatively recent and still contested notions. Taking up these developments, the Note contends that, especially where host governments may be weak, corrupt, or otherwise unable to regulate private water providers, it is of utmost importance that multinational water companies are bound by a duty to the local populations they serve.

Part II describes the global trend to privatize water, theories underpinning this trend, and critiques. Part III expounds the legal basis and the scope of the human right to water. Part IV sets forth the current developments in theories of corporate accountability for international human rights violations. Part V analyzes in greater detail the scope of the human rights liability of private water providers for the human right to water and defends its desirability, while also setting forth objections and potential difficulties in enforcement.

II. WATER PRIVATIZATION: HISTORY, JUSTIFICATIONS, AND CRITIQUES

A. Water Privatization in a Historical Context

During the 1970s and 1980s, the principal source of funding water infrastructure in the developing world came in the form of aid by international development agencies, international financial institutions such as the World Bank, and government agencies such as the U.S. Agency for International Development.\(^3^{22}\) Privatized water systems in the 1980s were the rare exception rather than the rule, and international funding was directed entirely at public entities until 1990.\(^3^{33}\) In 1989, the sale of water utilities in Great Britain by the government of Margaret Thatcher\(^3^{34}\) set off the global trend of privatization of water utilities.\(^3^{35}\)
Few other countries, however, have followed the British model,\textsuperscript{36} adopting instead a variety of public-private combinations.\textsuperscript{37} The so-called French model\textsuperscript{38} consists of various concession arrangements under which different portions of the water system, such as operation and management, are granted to private entities on a long-term basis.\textsuperscript{39} Public water corporations with private and public shareholders (with the latter usually being the majority) exemplify a third model of privatization, which some have extolled as successfully combining private shareholders’ efficiency goals with public shareholders’ goals of equitable access and affordability.\textsuperscript{40} Finally, under a fourth model, the government contracts out operation and management to private bidders in a competitive bidding process.\textsuperscript{41}

of capital that can be put to alternative uses, but that regulation and public protection may be lacking).

35. CAMDESSUS REPORT, supra note 21, at 7.
36. Id.
37. See, e.g., Patricia Grogg, Cuba: Havana Improves Water Supply with Spanish Investment, INTER PRESS SERV., Feb. 26, 2003. Cuba has retained ownership of assets in public hands. Id. The Cuban-Spanish company Aquas de la Habana started upgrading Havana’s water system in 2000, and now runs the piped water, drainage, and sewer services in multiple districts of Havana. Id.
38. This model known as “affermage” originated in the nineteenth century, with the establishment of Generale des Eaux, now owned by Veolia, by Napoleon III in 1852, and the establishment of Lyonnaise des Eaux, now owned by Suez, in 1880. See Savoir Faire, ECONOMIST, July 19, 2003, at 7.
39. See Nardone, supra note 31, at 191. For instance, the Build-Operate-Transfer model (BOT), as its name suggests, allows a private company to build and operate a particular project for a certain time period, after which it will transfer ownership to the host country. See generally Kerr, supra note 32 (arguing in support of the BOT model for funding water infrastructure in developing countries). The prime advantage of this model is that cash-strapped governments in developing countries do not have to tap into their scarce budgets for funding or taking out loans. Id. at 92–93. This model envisions an important role for international financial institutions, ranging from risk insurance to debt or equity assistance. Id. at 95–96. Indeed, the heads of Suez and Veolia have favored the public-private partnership of the French model. Savoir Faire, supra note 38. However, the United Nations Special Rapporteur on Adequate Housing, Miloon Kothari, has pointed out that a French official audit report discredited this model in 1997. Miloon Kothari, Privatizing Human Rights—The Impact of Globalisation on Access to Adequate Housing, Water and Sanitation, n.10 (2003), http://socialwatch.org/en/informes Tematicos/66.html. The model’s major shortcomings were corruption, lack of transparency, lack of competition, and the concentration of immense power within the hands of conglomerates at the expense of elected public officials. Id.
41. See id. See also Robert Glennon, Water Scarcity, Marketing, and Privatization, 83 TEX. L. REV. 1873, 1892 (2005) (noting that this is the least controversial form of privatization). Glennon also mentions a fifth possibility of giving private companies ownership
In the mid-1990s, the domestic public sector accounted for up to 70 percent of investment in water and sanitation. Participation by the domestic private sector comprised a mere 5 percent, while international private companies and international donations accounted for between 10 and 15 percent each. In a parallel development, by the late-1990s, international aid for water and sanitation had fallen slightly compared to aid in the mid-1990s, while aid for irrigation, drainage, and hydropower had declined substantially. The World Panel on Financing Water Infrastructure has described the peaks and drops of private investment and bank lending in water and sanitation as part of the general decline in financial currents since the mid-1990s. However, the remaining factors accounting for the decline in water investment stem from risks specific to the water sector.

Following the economic crises in Argentina and other countries, the trend to private operation had “come to a virtual stand-still.” The newest trend is to combine the expertise and management skills of private companies with other bodies, with the private company having a small equity stake. Recent reports warn that companies increasingly divest from developing countries and look to the American market instead because of high investment risks and significant losses that some multinational water companies suffered during the economic collapses in developing countries.

In view of these developments, international financial institutions have increased their calls for privatization. A 2003 World Bank paper called for more private sector involvement in water. A declaration by minis-
ters adopted at the Third World Water Forum in Kyoto in March 2003 also focused on the concept of “public-private partnership” to ensure safe water and provide revenue for better water sanitation, environmental protections, and irrigation systems. In January 2004, a proposal by the European Commission to allocate $1.2 billion to improve water access and sanitation of a block of countries in Africa, the Caribbean, and the Pacific, called for the adoption of innovative solutions, including expansion of private sector involvement.

B. The Case for Water Privatization

The global trend of water privatization has been explained in part as a result of “sheer, desperate need” of developing countries for investment in water. Another contributing factor is the global support of international financial institutions and political bodies. To understand its appeal, however, it is necessary to delve into the failures of prior models of international aid to public entities prevalent until the early-1990s.

The funding needs of the water sector have consistently outstripped available aid, constituting a major setback of the international aid model prevalent before the 1990s. In addition, multilateral aid programs have suffered from inattention to local input by affected residents, have financed projects that have been both environmentally and economically unsustainable, and have failed to help the world’s poorest countries. Bilateral aid programs have been critiqued for adversely affecting competition, and hence quality of services, by tying aid to specific goods and services from designated countries.


52. European Commission Communication, supra note 28, at 11. The proposal explicitly incorporates the findings of the *Camdessus Report*. See id. Critics have expressed fears that the proposal is more about protecting corporate welfare than the people of the world’s poorest nations. See Julio Godoy, Analysis, *Politics—G8: Activists Fear Summit Agenda Could be Hijacked*, INTER PRESS SERV., May 28, 2003.

53. Brubaker, supra note 1 (noting also that developed countries are attracted to the private sector as well, despite the fact that they have more resources available, because reliance on the private sector frees up funds for alternative uses, moves risks away, and reduces costs due to the private sector’s greater efficiency).

54. See supra notes 7 and 28 and accompanying text.

55. See Kerr, supra note 32, at 94.

56. Id.

57. Id. at 95.
Furthermore, defenders of privatization point out that public utilities have largely failed to provide water access to those who most need it, namely the poor. This failure has been tied to a host of factors ranging from corruption, inefficiency, and lack of investments, to frequent leakages of old infrastructures. Public management of water has also been criticized for grossly underpricing water, with most of the de facto subsidies in developing countries accruing to the middle classes who have access to piped water, leaving poor residents at the mercy of private vendors who charge as much as ten times higher. The opportunity cost on time spent to obtain water comprises an additional burden on the poor.

Proponents of privatization argue from a market perspective that private sector involvement increases efficiency, attracts more finance, and thus helps build new and much needed infrastructure, especially in developing countries. Perhaps most importantly, privatization depoliticizes the regulation of water and allows for a better reflection of costs in prices, since governments can shift the responsibility for pricing onto the private sector. Proper pricing is critical because it encourages sustainable use of water. According to a World Bank senior executive, “water pricing is an essential instrument to enhance the sustainability of the resource.” A further advantage of private sector involvement and the proper pricing that comes with it is that lenders are more willing to fi-

59. Id.
60. See Sheila M. Olmstead, What’s Price Got to Do with It?, ENV’T, Dec. 1, 2003, at 22 (noting that in many instances subsidies end up being misdirected both because they benefit wealthier residents already connected to the water network, but also because subsidies supported by taxes impose a heavier burden on low-income households).
62. Olmstead, supra note 60.
63. Brubaker, supra note 1 (contending that the private sector “enjoys greater latitude to pursue efficiencies” because of market discipline, better expertise, economies of scale, and its freedom from social goals such as creation of jobs, which in the author’s view hinder productivity); Kerr, supra note 32, at 92–93. See also CAMDESSUS REPORT, supra note 21, at 32.
64. Brubaker, supra note 1.
65. See CAMDESSUS REPORT, supra note 21, at 18 (arguing that “full cost recovery from users is the ideal long-term aim”). See also Priceless, supra note 20 (noting that water has been “colossally underpriced,” which leads to its overuse and misuse, and contending that these problems would be best corrected by sensible pricing, which should reflect costs, including environmental ones).
nance water projects without requiring large equity at the outset by focusing instead on expected revenue for repayment. 67

Despite the fact that proponents of privatization highlight cost recovery, many concede that water is more than a mere commodity. 68 Because water is so essential, proponents of private-sector involvement acknowledge that pricing has to take into account such social factors as the inability of poor residents to pay. 69 The World Panel on Financing Water Infrastructure has coined the concept of “sustainable cost recovery” which embraces the goal of full cost recovery in the long term, while supporting targeted “pro-poor” subsidies in the meantime. 70 Finally, even in the case of full privatization of assets, commentators have pointed out that privatization is in fact a misnomer, considering the heavy governmental regulation ranging from tariffs to limitations on the use of assets such as sewers and public stations. 71 As one commentator has put it, “the choice is really between regulated public monopolies and regulated private monopolies, not between upstanding private service institutions and profiteering capitalists.” 72

C. The Case Against Water Privatization

Opponents of privatization frequently cite the mixed, and in some cases dismal record of private companies in developing countries. 73 One

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68. See, e.g., CAMDESSUS REPORT, supra note 21, at vii (“[A]ccess to water is a right and a basic need.”). A Suez official had even said that “water is too essential to life to be a commodity,” and that “it is absolutely irresponsible to privatise in developing countries,” prompting comments that he “sounds like an anti-market activist.” A Few Green Shoots, supra note 27. See also Marwaan Macan-Markar, Cambodia: At last, Tap Water, Tap Water Everywhere, INTER PRESS SERV., Feb. 18, 2003 (quoting the chief financial officer of Manila Water, one of the two private companies supplying water to Manila, as saying that “governments must not give up holding the right to water” and that companies “are only leasing it”).
69. See To Market, to Market, supra note 61 (pointing to the Chilean government’s policy of charging full prices for water, but giving stamps to poor residents to pay their bills, and to the South African policy of providing a minimum supply of water for free). See also Olmstead, supra note 60 (arguing that uniform tariffs with rebates for low-income households are best suited to meet distributional goals).
70. CAMDESSUS REPORT, supra note 21, at 18–19.
71. Private Passions, supra note 2.
72. Olmstead, supra note 60 (adding that the key issue is regulation).
73. The Center for Public Integrity has published a series of reports discussing developing countries’ experiences with water privatization. See, e.g., Andreas Harsono, Water and Politics in the Fall of Suharto, Feb. 10, 2003, http://www.publicintegrity.org/water/report.aspx?id=52 (discussing at length the process of privatization in Jakarta, Indonesia under the Suharto dictatorship, backed by the World Bank, and noting that the
study based on a year-long investigation in various countries concluded that multinational companies in the water business constantly push for higher prices, frequently fail to meet their commitments, and will abandon the project if returns are too low.\textsuperscript{74} Privatizing water is likely to reduce access to clean water because of rate increases.\textsuperscript{75} Making people pay the full cost of water has in one instance directly caused a cholera epidemic infecting more than 250,000 people and killing nearly 300.\textsuperscript{76} In the Philippines, for instance, five years after the privatization of Manila’s water system in 1997,\textsuperscript{77} residents still complained that the price of water kept going up even under the supposedly more efficient system.\textsuperscript{78} Aside from rate increases, observers also cite the concessionaires’ failures to meet their contractually-set service targets.\textsuperscript{79} According to commenta-

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companies’ record of providing water access to the poor and improving finances was mixed); Daniel Santoro, \textit{The ‘Aguas’ Tango: Cashing in on Buenos Aires’ Privatization},\textsuperscript{74} supra note 8.

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\textsuperscript{74} See Grogg, \textit{supra} note 37. But cf. CAMDESSUS REPORT, \textit{supra} note 21, at 7 (observing that it is public authorities, and not private multinationals, that supply the underserved regions comprising the 1.1 billion people who still lack access to water, and the 2.4 billion who lack sanitation).

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\textsuperscript{75} See e.g., Jacques Pauw, \textit{Metered to Death: How a Water Experiment Caused Riots and a Cholera Epidemic}, Feb. 5, 2003, http://www.publicintegrity.org/water/report.aspx?aid=49. The total cost recovery principle adopted in South Africa has led to ten million South Africans having their access to water cut off for various periods between 1994 and 2002, while two million had been evicted from their homes because of not being able to pay their utility bills. \textit{Id.} According to South Africa’s Human Sciences Research Council, the cutoffs forced poor people to obtain water from polluted streams and rivers, directly causing an outbreak of cholera. \textit{Id.} See also Logan, \textit{supra} note 8. Cf. \textit{Soweto Residents Protest Against Water Meters}, S. Afr. Press Ass’n, Sept. 15, 2004 (recounting reports of people refraining from flushing their toilets until they had been used several times, and storing dirty water for flushing, because the government’s free allocation of the first 6000 liters was insufficient).

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\textsuperscript{76} The Philippine government privatized the publicly owned Metropolitan Waterworks and Sewerage System in 1997, at the advice of the World Bank. Marites Sison, \textit{Philippines: Awash in Water Bills After Privatization}, INTER PRESS SERV., Jan. 22, 2003. Manila Water, a partnership between the International Water Consortium and a Philippine oligarch family was awarded the concession for the East Zone area, while Maynilad Water Services, a partnership between Lyonnaise des Eaux and another Philippine family runs the West Zone area. \textit{Id.}

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\textsuperscript{77} Macan-Markar, \textit{supra} note 68. Manila residents served by Maynilad were paying 30 cents per cubic meter of water in 2002, which constitutes a 76 percent increase from the pre-privatization price four years earlier. Sison, \textit{supra} note 77.

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\textsuperscript{78} In 2002, Maynilad terminated its 25-year concession after the government failed to approve further rate increases. Diana Mendoza, \textit{Politics: Water Woes of Poor a Key Issue in Pilipino Election}, INTER PRESS SERV., Mar. 26, 2004, available at Westlaw: 3/26/04 INTERPS. In 2004, the Philippine government agreed to cancel $142 million of
tors, the Philippine experience with water privatization shows that privatization does not automatically improve efficiency, and disregards the economic and social costs to citizens in favor of generating profits and cost-recovery for multinational water companies.80

Critics also highlight the power disparity between developing countries and powerful multinational companies.81 Multinational companies are protected by multilateral trade agreements from termination of their contracts and may seek compensation.82 The costs of compensation would be prohibitively expensive for governments seeking to terminate contracts detrimental to the needs of their citizenry.83 On the other hand, companies may often coerce governments into renegotiating contracts because contract cancellation adversely affects countries’ abilities to attract foreign investment.84 The power disparity between multinational water companies and the governments of developing countries often results in closed-door negotiations with little input by citizens, which has been seen as contributing to a climate of corruption and bribery.85 In some

unpaid concession fees and to convert them into government-held shares, which prompted opponents in the presidential campaign to call the government action a “bailout” and a “scandalous deal.” Id.

80. Sison, supra note 77.
81. See Kothari, supra note 39.
82. See id. For example, Aguas del Tunari, the concessionaire in Cochabamba, Bolivia brought a proceeding against Bolivia before the International Centre for Settlement of Investment Disputes (ICSID), and invoked a bilateral investment treaty between the Netherlands and Bolivia as the basis for jurisdiction. Aguas del Tunari v. Republic of Bol., ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, para. 4 (Oct. 21, 2005), http://www.worldbank.org/icsid/cases/AdT_Decision-en.pdf. The arbitration tribunal rejected Bolivia’s objections to jurisdiction, with one dissent. Id. paras. 334–37. No decision on the merits had been reached before the publication of this Note.
83. Kothari, supra note 39.
84. For example, the two multinational concessionaires providing water in Manila asked the Philippine government in 2001 to amend their contracts to allow them to set rates without going through the state regulatory agency, and to lower or postpone their performance targets. Sison, supra note 77. According to one NGO spokesperson commenting on the situation in the Philippines, “street-smart companies [may be] making unrealistic and unsustainable bids just to win the tender, and gambling on the possibility that the rules of the game could change later in their favor, given the weakness of regulation in the country . . . .” Id.
85. Kothari, supra note 39 (noting that negotiations behind closed doors have encouraged bribery and pointing to the convictions of Suez and Vivendi in France for paying bribes to obtain water concessions). See also Sylvestre Tetchiada, Development—Cameroon: Water Projects Plagued by Corruption, May 18, 2004, available at Westlaw: 5/18/04 INTERPS (recounting accusations against Cameroonian officials for demanding
instances, multinational companies have also cooperated with authoritarian regimes.86

In light of the problems plaguing privatization, opponents have called on the international community to put its resources into reforming the public sector of developing countries. Activists argue that international assistance confers de facto subsidies to private companies,87 and point out that in many cases water companies invest very little of their own capital,88 relying instead on loans from the World Bank and other financial institutions.89 For instance, transnational civil society groups commenting on the EU proposal for improving water access and sanitation in underdeveloped countries critiqued the proposal for assuming, without evidence, “that the role of the private water industry needs to be expanded.”90

Instead, these groups have called on the European Union to use its funds to strengthen management skills in the public sector in poor countries, and to help upgrade publicly-run water.91 Under this view, public management fosters local and community-based participatory decision-making. Community participation is better suited to respond to local needs than big privatization agendas, which force-feed the same policies on developing nations.92 Some have also pointed to the successes of water delivery run by public bodies.93 The public water system in Phnom Phen, Cambodia has increased tap-water delivery from 25 percent of

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86. See, e.g., Harsono, supra note 73 (discussing the relationships between the Sukarno regime in Indonesia and the global multinationals Thames and Suez, which obtained concessions without public bidding). See also John Burton, Malaysia to Spend Dollars 13bn on Overhaul of Water, Sewage Services, FIN. TIMES, Aug. 19, 2004, available at 2004 WLNR 9779449 (reporting on possible renegotiations of concessions granted to multinational companies under the regime of Mahatir Mohamad behind closed doors and without competitive bidding).
87. See Bianchi, supra note 28.
88. Logan, supra note 8.
89. See, e.g., Santoro, supra note 73 (observing that Aguas Argentinas obtained at least 75 percent of its investment in Buenos Aires’s water system from the World Bank and similar international financial institutions).
91. Id.
93. See Kothari, supra note 39 (asserting that public enterprises operate “some of the best practices found in water and sanitation provision”).
homes in 1993, to 80 percent by the end of 2002.94 Similarly, Bogotá’s publicly managed Water and Sewage Company has risen out of practical bankruptcy in 1993 and transformed itself into the most respected utility in Colombia.95

Critics also contend that market-based arguments about efficiency and pricing according to the laws of supply and demand are misplaced, in light of the fact that water is a public good,96 as well as a natural monopoly.97 The concept of markets for water belies the fact that water consumers cannot choose the best or lowest-priced provider amongst many.98 Pricing of water is principally an administrative decision.99

Finally, from a human rights perspective, the acceleration of privatization has been seen to constitute essentially a privatization of human rights, including the human right to water.100 Privatization of rights results in their erosion and, in particular, leads to violations of the rights of

94. Macan-Markar, supra note 68 (noting, however, that the city’s poor still paid only a fraction less than what they used to pay to private vendors). See also Kothari, supra note 39 (pointing to the successes of public enterprises in São Paulo, Brazil; Debrecen, Hungary; Lilongwe, Malawi; and Tegucigalpa, Honduras).

95. Ronderos, supra note 13. Bogotá has refused to privatize its utility despite repeated pressure by the World Bank. Id. In eight years, the company reduced by half the number of households without sanitation, and by 75 percent the number of households without water. Id.

96. See generally Joseph W. Dellapenna, The Importance of Getting Names Right: The Myth of Markets for Water, 25 WM. & MARY ENVTL. L. & POL’Y REV. 317 (2000). A “public good” is characterized by “indivisibility,” which means that it cannot be divided up so that some consumers would buy more of it, while others would be excluded, and “publicness,” which means that “it is impossible to keep others from accessing and enjoying the good so long as it is accessible and enjoyable by anyone.” Id. at 330. While Dellapenna concedes that water is not physically indivisible and public in a strict sense, he argues that it should be treated as such considering its economic and social characteristics. Id. at 331–36.

97. The concept “natural monopoly” has been traced to a 1670 treatise, De Portibus Maris, in which England’s Lord Chief Justice defended governmental regulation of seaports on the principle that they were “affected with a public interest.” See Joseph P. To- main, The Persistence of Natural Monopoly, 16 NAT. RESOURCES & ENV’T 242, 243 (2002). To main defines “natural monopoly” as the idea that a single supplier will provide services at a lower cost by realizing economies of scale. Id. at 242. The usual solution to natural monopolies, however, has been not public ownership, but rather the so-called “regulatory compact” between the state and a private utility, under which “a monopoly on service in a particular geographical area . . . is granted to the utility in exchange for a regime of intensive regulation, including price regulation, quite alien to the free market . . . .” Id. at 243 (quoting Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168, 1189 (D.C. Cir. 1987)).


99. Id. at 323.

100. Kothari, supra note 39.
the poor. As argued below, holding private water companies liable for the human right to water may present one avenue for preempting such violations.

III. WATER AS A HUMAN RIGHT

A. Historical Development of the Human Right to Water

The human right to water has been inferred recently and has since then been relatively contested. The Universal Declaration of Human Rights does not expressly mention a human right to water. The two fundamental human rights treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), also do not explicitly refer to a right to water. The only express references to a right to water in human rights treaties are in the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child. International humanitarian law also contains specific pro-

101. Id. (contending that “corporate globalisation, and its clear expression of privatisation of services, is one of the greatest threats to universal access to clean drinking water and sanitation” because it reduces accountability to the public and undermines services to the poor by emphasized profits and cost recovery). But see infra notes 204–05 and accompanying text.


visions about the right to water. In addition, the human right to water has been enshrined in several national constitutions.

In 2002, the Committee on Economic, Social, and Cultural Rights (ESCR Committee) issued Comment 15 addressing specifically the human right to water. In the aftermath of Comment 15, references to the human right to water appeared in multiple reports of the United Nations and other entities, and in the official remarks of world leaders. However, a declaration of government ministers adopted at the Third World Water Forum in Kyoto in 2003 notably lacked language recognizing the right to water as a human right, indicating a lack of international consensus on the issue.

107. See, e.g., Geneva Convention III, supra note 106, arts. 20, 26 (providing that the detaining power shall provide sufficient drinking water to prisoners of war).

108. For example, the Constitution of South Africa explicitly recognizes a right to water:

(1) Everyone has the right to have access to

(b) sufficient food and water;

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

S. Afr. Const. 1996 art. 27. The passing of a constitutional amendment recognizing water as a human right in Uruguay in 2004 provides another example. See supra note 14 and accompanying text.


110. See, e.g., The Right to Water, supra note 17.

111. For example, at the Third World Water Forum in 2003, French President Jacques Chirac stated in a video presentation that “water should be recognized as a human right.” Marwaan Macan-Markar, Egypt Urges Programs Not Promises in Blue Revolution, Inter Press Serv., Mar. 16, 2003. See also The Right to Water, supra note 17, at 6 (quoting remarks by United Nations Secretary-General Kofi Annan that “access to safe water is a fundamental human need and, therefore, a basic human right”).

112. See Ministerial Declaration, supra note 51, para. 1 (stating, instead, that “water is a driving force for sustainable development including environmental integrity, and the eradication of poverty and hunger, indispensable for human health and welfare”); Macan-Markar, supra note 92. The Ministerial Declaration as well the organizers of the World Water Forum have been criticized for sidestepping the United Nations, and seeking to
B. Scope and Legal Basis of the Human Right to Water

Although the ICESCR does not refer explicitly to a right to water, the ESCR Committee has stated that a right to water is implicit in other enumerated rights in the ICESCR. Specifically, the ESCR Committee has declared that the right to water is implicit within the right to an adequate standard of living under article 11(1) of the ICESCR because it “clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.”

Furthermore, the ESCR Committee has stated that the right to water is “inextricably related” to the right to the highest attainable standard of health under article 12(1) and the rights to adequate housing and adequate food under article 11(1) of the ICESCR. Finally, the right to water “should be seen in conjunction with other rights enshrined in the International Bill on Human Rights, foremost among them the right to life and human dignity.”

In view of the aspirational articulation of the guarantees of the ICESCR, grounding the right to water in this covenant has distinct implications on what kind of responsibilities are conferred on state and non-state actors.

Some scholars have pointed to customary international law as a basis for the right to water. According to this argument, states have engaged bestow international legitimacy on what critics view as a privatization agenda through a ministerial meeting. See Marwaan Macan-Markar, Critics Accuse Water Forum of Side-stepping U.N., INTER PRESS SERV., Mar. 20, 2003.

113. See Rothfeder, supra note 12, at 85–90 (reviewing debates at other international conferences regarding the question whether water should be viewed as a legal right or a need).

114. General Comment 15, supra note 109, para. 3.

115. See also The Right to Water, supra note 17, at 3 (stating that the human right to the highest attainable standard of health encompasses the “underlying determinants of health,” including safe water and adequate sanitation).

116. Comment 15, supra note 109, para. 3. The United Nations Special Rapporteur on Adequate Housing has stated that “without access to potable water the right to adequate housing loses its meaning.” Kothari, supra note 39.

117. Comment 15, supra note 109, para. 3.

118. Earlier commentators on the right to water writing before Comment 15 have explored the argument that the right to water should be seen as implicit within the right to life under article 6(1) of the ICCPR. See Stephen C. McCaffrey, A Human Right to Water: Domestic and International Implications, 5 Geo. Int’l Envtl. L. Rev. 1, 9–12 (1992).

119. Sánchez-Moreno & Higgins, supra note 12, at 1727–28. Cf. McCaffrey, supra note 118, at 8 (exploring, but ultimately rejecting an argument that a right to water could be binding as customary law if read into the right to an adequate standard of living under the Universal Declaration because it is not clear that so-called “welfare rights” under the
in a consistent practice of ensuring water provision for their citizens.  

Secondly, the numerous world conferences and summits that have recognized water as a human right may be seen as indicating *opinio juris*, that is, belief by states that they have a legal obligation to ensure access to clean and affordable water.

The right to water, as elaborated in Comment 15, encompasses both substantive and procedural components. The substantive components comprise availability, quality, and accessibility, including the principle that “water, and water facilities and services, must be affordable for all.”

The procedural components consist of the right to information concerning water issues, the right to participate, and the right to effective remedies.

Comment 15 provides for general and specific obligations on state parties. Notwithstanding article 2(1) of the ICESCR, which provides for a progressive achievement of rights recognized under the covenant, the ESCR Committee has stated that state parties have some “immediate obligations” in relation to the right of water, “such as the guarantee that the right will be exercised without discrimination of any kind . . . and the obligation to take steps . . . toward the full realization of [the rights to an adequate standard of living and to the highest attainable standard of

Declaration constitute binding customary law). The concept of “welfare” rights is discussed below. *See infra* Part III.C.


121. *Id.* The authors recognize, however, the obstacles to this argument evident in such documents as the Dublin Statement on Water and Sustainable Development, Principle No. 4, which designates that water should be recognized as an economic good. *Id.*


123. *Id.* para.12(c)(iv) (“[A]ccessibility includes the right to seek, receive and impart information concerning water issues.”); *id.* para. 48 (“The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water. Individuals and groups should be given full and equal access to information concerning water . . . held by public authorities or third parties.”); *id.* para. 55 (“Any persons or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies at both national and international levels.”). *See also* Sánchez-Moreno & Higgins, *supra* note 12, at 1675.


125. Article 2(1) of the ICESCR provides: “Each state party . . . undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized . . . by all appropriate means, including particularly the adoption of legislative measures.” ICESCR, *supra* note 103, art. 2(1).
health].”126 Furthermore, Comment 15 provides for a “constant and continuing duty” on states “to move as expeditiously and effectively as possible towards the full realization of the right to water.”127 Finally, it introduces a “strong presumption that retrogressive measures taken in relation to the right to water are prohibited . . . .”128

Comment 15 divides the specific obligations of states into three categories. First, “obligations to respect” essentially impose a negative duty on states to refrain from interfering with the enjoyment of the right to water.129 Second, “obligations to protect” impose affirmative duties on states to prevent third parties from interfering with the enjoyment of the right to water.130 Third, “obligations to fulfill” require states to adopt a variety of measures empowering individuals and groups to exercise their right to water.131 Finally, Comment 15 introduces the concept of “core obligations,” which include the obligation to “ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease.”132

With respect to non-state actors, states’ obligations to protect encompass safeguards against the actions of corporations operating water facilities.133 In particular, “where water services . . . are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water.”134 Furthermore, Comment 15 explicitly provides that “arbitrary or unjustified disconnection from water services or facilities,” and “discriminatory or unaffordable increases in the price of water” constitute prima facie violations of states’ obligation to respect the right to water.135 These protections are directly relevant to potential violations that might arise from water privatization. As discussed below, however, safeguarding the human right to water from the potential violations by privatized water utilities through the mechanism of state responsibility may be in-

126. Comment 15, supra note 109, para. 17. For an earlier discussion of the legal bases of a right to water and an argument that the right to water should be “an immediate obligation” of the state party encompassing a positive duty to supply safe water sufficient to sustain life, see McCaffrey, supra note 118, at 13.
127. Comment 15, supra note 109, para. 18.
128. Id. para. 19.
129. Id. paras. 21–22.
130. Id. paras. 23–24.
131. Id. paras. 25–29 (further dividing the obligations to fulfill into obligations to facilitate, promote and provide).
132. Id. para. 37.
133. Id. paras. 23–24.
134. Id. para. 24.
135. Id. para. 44(a).
adequate in light of the power differential between multinational water companies and the governments of developing countries. Governments of developing countries may be weak, corrupt, or fearful of detracting foreign investment.\textsuperscript{136} It is therefore necessary to elaborate and support the legal mechanisms for holding private water providers directly liable for infringing the human right to water.

C. Objections to the Right to Water

The right to water and its proper legal basis has aroused some controversy. In the view of two U.S. scholars, Michael J. Dennis and David P. Stewart, “the derivation of a separate right to water is virtually without precedent.”\textsuperscript{137} They see the inference of a right to water from the provisions of the ICESCR as part of a larger revisionist program by the ESCR Committee.\textsuperscript{138} In their view, the Committee has unduly rewritten provisions of the ICESCR and expanded the liability of state parties in a way neither borne out by the text of the covenant, nor by the history of its negotiation.\textsuperscript{139}

In particular, Dennis and Stewart direct the brunt of their critique at the pronouncements made by the ESCR Committee concerning the affirmative duties on states to “fulfill” the rights provided for by the ICESCR, and the idea that states have immediately applicable core obligations—from which no derogation is permitted—to provide “minimum essential levels” of the rights to water, housing, food, and health.\textsuperscript{140} These interpretations of the ICESCR articulate “unmistakably mandatory” obligations that, according to the authors, directly conflict with the aspirational and progressive nature of state obligations as articulated by article 2(1) of the ICESCR and evident in the treaty’s negotiating history.\textsuperscript{141}

In addition, Dennis and Stewart object to some of the implementation procedures provided for by Comment 15, in particular the requirement that states adopt a national water strategy to be reviewed for compliance with the ICESCR requirements.\textsuperscript{142} Subjecting the distribution and priorities of state resources to judicial determination would inappropriately result in judicial second-guessing of what are essentially legislative deci-

\textsuperscript{136} See supra notes 81–86 and accompanying text.
\textsuperscript{138} Id. at 491–500.
\textsuperscript{139} Id. at 494.
\textsuperscript{140} Id. at 491–92.
\textsuperscript{141} Id.
\textsuperscript{142} Id. at 497.
sions of sovereign governments. 143 Judicial determinations are especially inappropriate in the context of scarce resources because they would subject governments to liability for mere bad luck. 144

This skepticism regarding the legal basis of, inter alia, the right to water and, consequently, its normative content and implementation procedures, stems from the larger jurisprudential and political debates regarding the differences between the so-called “liberty rights” under the ICCPR, and the so-called “welfare rights” under the ICESCR. 145 Liberty rights have been traditionally understood as negative rights, requiring the state merely to refrain from interfering with the enjoyment of such rights. 146 Welfare rights, on the other hand, require positive state action and significant expenditure of state resources. 147 This dichotomy has been challenged, however, as misplaced and reflective of the ideology of the Cold War era. 148 A closer examination reveals that liberty rights are not absolutely dissimilar from welfare rights in two respects. Liberty rights impose affirmative duties on state parties to organize governmental institutions—such as a legislature and a judiciary—that would ensure the rights’ realization, which requires spending resources. 149 Second, liberty rights have been interpreted to require affirmative steps by states to ensure the protection of rights from private infringement by third parties. 150 Moreover, at a conceptual level, the privileging of negative “liber-

143. Id. at 498 (“Who is to say when a government has spent enough money to ensure a complaining individual’s highest attainable standard of physical or mental health?”). 144. Id. 145. See id. at 463–64 (“In light of Article 2(1) [of the ICESCR], can it cogently be argued that the ICESCR articulates real rights, or does it merely set forth hortatory goals, programmatic objectives, or utopian ideals?”). 146. McCaffrey, supra note 118, at 14–15 (explaining and critiquing this assumption as misplaced). 147. Id. 148. See Amnesty International, The UN Human Rights Norms for Business: Towards Legal Accountability, at 10, AI Index 0-86210-350-9 (2004), available at http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/IOR420022004ENGLISH/$File/IOR4200204.pdf (observing that when the Universal Declaration of Human Rights was elaborated into treaty form, the two treaties were split as a result of the “ideological divisions of the Cold War,” and that after the Cold War, “it again became possible to view human rights obligations as interdependent”). Cf. Jeffrey L. Dunoff, Does Globalization Advance Human Rights?, 25 BROOK. J. INT’L L. 125, 135 (1999) (observing that during the 1980s the US rejected economic, social and cultural rights “in part as an element of larger Cold War strategies”). 149. McCaffrey, supra note 118, at 15; Dunoff, supra note 148, at 129. 150. Dunoff, supra note 152, at 129.
ties” over economic needs has been forcefully critiqued by Amartya Sen as rooted in an unduly narrow concept of freedom and justice.\footnote{151}

Concededly, even if the distinction between liberty and welfare rights is viewed as untenable, one still has to grapple with a textual difference in the ICCPR and the ICESCR. Whereas the ICCPR binds state parties to an “immediate obligation” to respect and ensure the proclaimed rights,\footnote{152} the ICESCR only obligates a state party to take steps “to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the . . . Covenant . . . .”\footnote{153} This difference between the ICESCR and the ICCPR lends support to the view that the ICESCR sought to articulate “aspirational” goals rather than enforceable and justiciable state obligations. Because of their aspirational nature, the argument goes, economic, social, and cultural rights are difficult to implement through judicial mechanisms.

In response, some have pointed out that some of the rights under the ICESCR, including the right to water, are so fundamental as to require immediate, rather than progressive obligations on state parties.\footnote{154} Furthermore, the inference of immediately applicable core obligations to provide minimum essential levels of water may be seen as consistent with the obligation of good faith compliance with treaties.\footnote{155} Immediate obligations with respect to the right to water would not be unduly burdensome, insofar as they incorporate a “due diligence”\footnote{156} standard suffi-

\footnote{151. Sen traces the precedence of “liberty” over economic needs to John Rawls’ theory of justice, and libertarian variants of that theory, as exemplified in the work of Robert Nozick. See \textit{Sen, supra} note 3, at 63–67. Instead, Sen proposes a “capability” oriented approach to justice, which emphasizes a person’s freedom to choose a life she values. \textit{Id.} at 74. Sen defines “capability” as “the substantive freedom to achieve alternative functioning combinations,” where functioning “reflects the various things a person may value doing or being,” ranging from basic sustenance to participating in communal life. \textit{Id.} at 75. Thus, within the capability framework, both “liberty” and economic and social needs are theoretically accorded equal importance.}

\footnote{152. See ICCPR, supra note 103, art. 2.}

\footnote{153. ICESCR, supra note 103, art. 2(1).}

\footnote{154. See McCaffrey, supra note 118, at 13. \textit{See also} Comment 15, supra note 109, para. 1 (stating that the human right to water “is indispensable for leading a life in human dignity” as well as “a prerequisite for the realization of other human rights”); Amnesty International, \textit{supra} note 148, at 10 (“Without protecting basic subsistence rights (such as food, water or shelter), it is difficult to exercise civil and political rights (such as free speech, fair trials or electoral participation).”).}


\footnote{156. It should be noted that human rights law does not indicate what the standard of care should be with respect to the right to water. \textit{See} Sánchez-Moreno & Higgins, \textit{supra} note 12, at 1730. It has been argued, however, that strict liability would be undesirable}
ciently elastic to take into account the capabilities of the particular state. 157

With respect to the alleged difficulty of judicial determination of violations of the right to water, it should be attributed to the absence of national or international caselaw, rather than to some inherent non-justiciability of economic, social, and cultural rights. 158 Therefore, empowering the ESCR Committee to hear individual cases would allow it to elucidate the standard of care applicable to violations of the right to water. 159 Furthermore, attention should be focused on the procedural rights attendant to the right to water because violations of procedural rights lend themselves more readily to easy identification and monitoring. 160

Finally, regarding the argument that judicial adjudication of the human right to water encroaches on what are essentially legislative decisions about distribution of state resources, one might argue that Dennis and Stewart are unduly formalistic. Judicial bodies have always engaged in the balancing of resources, to the extent that such balancing is implicit in protecting the minimum of rights that states and legislatures may not transgress.

IV. CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS

A. Justification of Corporate Liability for Violations of International Human Rights

Corporate activities have been brought into the ambit of international human rights law only recently. Historically, the human rights regime emerged to protect the rights of individuals from abuse by their governments; therefore, states have the principal duty to enforce international human rights law. 161 Although the development of international criminal law had focused international attention on the human rights responsibili-

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158. See Sánchez-Moreno & Higgins, supra note 12, at 1672 n.20 (“The lack of national case law directly related to economic, social, and cultural rights has itself perpetuated the idea that those rights are not capable of judicial enforcement.” (quoting MATTHEW CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 10 (1995))).
159. Sánchez-Moreno & Higgins, supra note 12, at 1791.
160. Id. at 1794.
ties of individual non-state actors, attention to the human rights violations by corporations had remained scant until recently.\footnote{162}{David Weissbrodt \& Muria Kruger, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 97 Am. J. Int’l L. 901, 901 (2003).}

The case for corporate liability for violations of international human rights remains controversial.\footnote{163}{See generally Ratner, supra note 161 (describing the jurisprudential debates surrounding corporate liability for human rights, and making the case that corporate liability is desirable and justified).} The omission of private actors from the purview of international human rights law reflects the broader notion that only actions by states constitute the proper subject matter of international law, whereas violations by private actors fall within the purview of domestic laws.\footnote{164}{Id. at 466.} Holding corporations liable for violations of international human rights departs from this traditional doctrine. The departure has been justified on the ground that the increasing economic\footnote{165}{In 2000, the production output of transnational corporations amounted to one fourth of the world’s total output, and 5 percent more of the output of all developing countries combined. Ann Marie Erb-Leoncavallo, The Road From Seattle, 37 UN Chron., Jan. 1, 2000, at 2831. The direct investments of transnational corporations in developing countries have surpassed official aid and net lending by international banks. Id.} and political influence of corporations\footnote{166}{See Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, pmbl., U.N. Sub-Comm’n on the Promotion and Protection of Hum. Rts., 55th Sess., U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) [hereinafter Norms] (noting that global trends have greatly increased the influence of transnational corporations and that these entities have both “the capacity to foster economic well-being” as well as to “cause harmful impacts on the human rights and lives of individuals”). See also Amnesty International, Submission by Amnesty International under Decision 2004/116 on the “Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights”, AI Index: POL 34/006/2004, Sept. 29, 2004, http://web.amnesty.org/library/index/engpol340062004 (noting that companies exercise “tremendous influence and power” and that government regulation may be inadequate in many countries to protect individuals from adverse corporate actions).} in a globalized market requires that corporations comply with human rights.\footnote{167}{Weissbrodt \& Kruger, supra note 162, at 901 (“[W]ith power should come responsibility. . . .” (quoting Mary Robinson, U.N. High Comm’r for Hum. Rts., Second Global Ethic Lecture: Human Rights, Ethics and Globalisation, University of Tübingen, Germany (Jan. 21, 2002), http://www.ireland.com/newspaper/special/2002/robinson)).} Governments, especially those of underdeveloped and developing countries, may be reluctant to regulate corporate activities for fear of discouraging foreign investments.\footnote{168}{Sean D. Murphy, Taking Multinational Corporate Codes of Conduct to the Next Level, 43 Colum. J. Transnat’l L. 389, 392–93 (2005); Ratner, supra note 161, at 462. Ratner describes the historical shifts of power between governments and companies as a}
the global operations of corporations in multiple countries have made them more independent of government control\textsuperscript{169} and outside the reach of any single government.\textsuperscript{170}

B. The Evolution of Corporate Responsibility: From Voluntary Codes Towards Binding Norms

The first initiatives for corporate accountability for international human rights violations consisted of voluntary codes of conduct.\textsuperscript{171} The Organization for Economic Cooperation and Development (OECD) issued Guidelines for Multinational Enterprises (OECD Guidelines) in 1976, applicable to enterprises operating in OECD member countries and eight non-members.\textsuperscript{172} The OECD Guidelines provide that enterprises should “respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”\textsuperscript{173} Although the OECD Guidelines are not legally enforceable, but rather voluntary and aspirational,\textsuperscript{174} they do, nevertheless, provide for a monitoring apparatus consisting of National Contact Points set

\textsuperscript{169} Ratner, supra note 161, at 463.

\textsuperscript{170} See Amnesty International, supra note 148, at 5.

\textsuperscript{171} One of the earliest and best known voluntary codes of conduct, the “Sullivan Principles,” was elaborated for transnational corporations operating in South Africa during apartheid. See Sullivan Principles for U.S. Corporations Operating in South Africa, 24 I.L.M. 1496 (1985). For an overview of the various initiatives for developing corporate codes of conduct, including a brief review of the Sullivan Principles, see Murphy, supra note 168, at 403–20.


\textsuperscript{173} Id. at 19.

\textsuperscript{174} Id. at 17.
up by adhering states and an overseeing Investment Committee. The main critique of the OECD Guidelines concerns their implementation. Their monitoring mechanism has been viewed as inadequate because its bodies lack investigative or remedial powers and are susceptible to abuse because state officials may refrain from actions that would alienate business from the economic interests of their government. Secondly, it has been argued that the human rights provision in the OECD Guidelines is too general to provide meaningful guidance for companies.

In January 1999, United Nations Secretary-General Kofi Annan articulated nine principles for corporate responsibility at the World Economic Forum. With the addition of a tenth principle against corruption in 2004, these principles have come to be known as the Global Compact. With respect to human rights, the Global Compact articulates two principles: (1) “Businesses should support and respect the protection of internationally proclaimed human rights;” and (2) “make sure that they are not complicit in human rights abuses.” The inclusion of a pledge to support human rights and to avoid complicity with human rights violations reflects an expansion of the role of business enterprises regarding human rights over and above that implicit in the OECD Guidelines, which provided only that business enterprises should “respect” human rights. Companies may participate in the Global Compact by sending a letter to the Secretary-General, followed by a change in corporate operations “so that the Global Compact and its principles become part of strategy, culture and day-to-day operations” of the company. Still, the Global Compact has been criticized for being too general, for failing to encourage companies to consider best practices compliant with the prin-

175. Id. at 32, 35–37.
176. See Amnesty International, supra note 162 (expressing concern that government officials may be too close to business interests, potentially allowing the government’s economic interest to influence its consideration of corporate behavior).
177. Id.
180. Id.
ciples, and for lacking any oversight mechanisms or means to contest the participation of companies that fail to abide by its principles.  

Responding to increased international scrutiny of corporate activities, many companies have adopted voluntary internal codes of conduct. Although around 1,000 internal company codes have been estimated to exist, according to Amnesty International, fewer than fifty make explicit references to human rights. The shortcomings of voluntary schemes in ensuring that corporations abide by human rights norms have led to deliberations of binding measures.

C. The Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises

In 2003, the United Nations Sub-Commission on the Promotion and Protection of Human Rights adopted a landmark instrument of corporate human rights obligations, the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Norms). The Norms have been written as the first

182. Amnesty International, supra note 166. See Murphy, supra note 168, at 413. It should be also pointed out that a search of the Global Compact participant database reveals only 889 business participants worldwide. United Nations Global Compact, COP Search Results, http://www.unglobalcompact.org/CommunicatingProgress/cop_search.html?reset=1 (click “Business participants only”; then click “Search”) (last visited Jan. 8, 2006).

183. For a discussion of the rise of corporate codes of conduct, see Fiona McLeay, Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations—A Small Piece of a Large Puzzle (2005), http://www.nyulawglobal.org/workingpapers/documents/GLWP0105McLeay.pdf. For a discussion of corporate responses to international scrutiny from a legal-sociological standpoint, especially in the wake of human rights claims against corporate actors under the Alien Torts Claims Act, see generally Ronen Shamir, Between Self-Regulation and the Alien Torts Claims Act: On the Contested Concept of Corporate Social Responsibility, 38 LAW & SOC’Y REV. 635 (2004). Shamir argues that companies have responded with a twofold strategy. The first part of companies’ strategy is to undermine the identity and motives of Western public interest lawyers who bring the cases, and the second part consists of the adoption of internal voluntary codes. The adoption of voluntary codes allows companies to “stabilize” the meaning of the concept “social responsibility” around voluntary, rather than binding, schemes. Id. at 660. As the author puts it, “corporate voluntarism has become . . . a crucial frontline in the struggle over meaning and an essential ideological locus for disseminating the neoliberal logic of altruistic social participation that is to be governed by goodwill alone.” Id. For an example of a voluntary code of a multinational water company, see RWE, RWE CODE OF CONDUCT, http://www.rwe.com/generator.aspx?property=Data/id=266710/en-download.pdf.


186. See generally Norms, supra note 166.
non-voluntary scheme for international corporate accountability for human rights abuses.\textsuperscript{187} Their legal authority has been hotly contested. The Norms’ principal drafter argues that “[t]he legal authority of the Norms derives principally from their sources in treaties and customary international law, as a restatement of international legal principles applicable to companies.”\textsuperscript{188} Critics have disputed this characterization, charging that the Norms “are presented as a set of norms or standards when in fact many of the instruments from which they are drawn are not themselves legally binding and those that are heavily qualify the rights they are supposed to address.”\textsuperscript{189} While the Norms have been overwhelmingly supported by international human rights organizations and civil society representatives in numerous countries,\textsuperscript{190} multiple business associations

\textsuperscript{187} Weissbrodt & Kruger, supra note 162, at 903. See also Amnesty International, supra note 148, at 6–7 (noting that the Norms are “self-consciously normative,” and lack clauses characteristic of voluntary schemes that would highlight their non-regulatory character). In April 2004, however, the Commission on Human rights issued a decision, in which it “affirm[ed] that [the Norms] has not been requested by the Commission and, as a draft proposal, has no legal standing, and that the Sub-Commission should not perform any monitoring function in this regard.” Report of the Sub-Commission on the Promotion and Protection of Human Rights, U.N. Comm’n on Hum. Rts., 60th Sess., U.N. Doc. E/CN.4/2004/L.73/Rev.1 (Apr. 16, 2004).

\textsuperscript{188} Weissbrodt & Kruger, supra note 162, at 913; Amnesty International, supra note 148, at 7 (“All of the substantive human rights provisions in the UN Norms are drawn from existing international law and standards. The novelty or the UN Norms is to apply these . . . to private enterprises, but even in doing so to draw on a wide range of international practice . . . .”). See also Norms, supra note 166, pmbl. (recalling that the Universal Declaration of Human Rights is addressed to every organ of society, including transnational corporations and other business enterprises). Weissbrodt and Kruger concede that there is no consensus on the place of businesses within the international legal order as of yet that would make possible the Norms’ incorporation into treaties as “hard law,” but argue that the further refinement and implementation of the Norms by higher bodies in the United Nations will develop their binding nature. Weissbrodt & Kruger, supra note 162, at 913–15. See also Amnesty International, supra note 148, at 6 (“The process leading to the UN Norms is similar to that resulting in other ‘soft law’ standards, some of which are now seen as part of customary international law.”).


have criticized the Norms rigorously, principally on the ground that they shift human rights obligations from governments to private actors.\(^{191}\)

Reflecting this tension, the future of the Norms remains uncertain.\(^{192}\) At its session in April 2005, the United Nations Commission for Human Rights refrained from endorsing the Norms. Instead, it requested that the Secretary-General appoint a special representative for a period of two years, with a mandate to clarify further the standards of corporate accountability, and decided to continue consideration of the question at its next session.\(^{193}\)

Under the Norms, transnational corporations have the general obligation to “promote, secure the fulfillment of, respect, ensure respect of, and protect human rights recognized in international as well as national law” within their spheres of activity and influence.\(^{194}\) This obligation embraces a standard of “due diligence” that companies’ activities “do not contribute directly or indirectly to human abuses” or “benefit from abuses of which they were aware or ought to have been aware.”\(^{195}\) In relevant part, the Norms obligate corporations specifically to “respect economic, social


\(^{192}\) See Murphy, supra note 168, at 408 (“Initial enthusiasm for the [Norms] . . . has been muted.”).


\(^{194}\) Norms, supra note 166, para. 1 (noting, also, that states have the primary responsibility of protecting human rights and ensuring their observance by businesses). See also Ratner, supra note 161, at 508–10 (explaining the “corporate sphere” theory as a set of concentric circles, where the greatest duty runs to those with most ties to the corporation, while lesser duties run to those with less ties to the corporation).

and cultural rights . . . and contribute to their realization, in particular the rights to . . . drinking water,” as well as to “refrain from actions which obstruct or impede the realization of those rights.”

The Norms provide for implementation by various entities, ranging from internal self-regulation by business enterprises to monitoring by other United Nations bodies, intergovernmental organizations, nongovernmental organizations, investors, lenders and consumers, states, and so forth. In particular, the Norms require businesses to adopt the provisions of the Norms in internal codes of conduct, disseminate them to stakeholders and the public, incorporate them into their business contracts, and undertake monitoring and periodic reports. As part of their monitoring obligations, businesses are required to study the human rights impact of major projects they undertake, within the limits of their resources and capabilities, to make the results available to stakeholders, and to consider stakeholder reactions. Moreover, the Norms require corporations to engage in periodic assessments of their compliance with the Norms and to make these assessments available to stakeholders to the same extent as their annual reports. Where assessments show inadequate compliance, the Norms call upon businesses to develop a plan of action for reparation and redress. In addition to actions by the companies, the Norms provide for judicial determination of damages and criminal sanctions against incompliant companies, in accordance with national and international law.

The Norms impose substantive obligations and detailed implementation procedures that go well beyond the general guidelines of prior voluntary models. With respect to the right to water, the Norms could provide an invaluable tool for ensuring that water privatization will not endanger—and, indeed, that it will contribute to the realization of—the right to water.

196. Norms, supra note 166, para. 12. As the Commentary explains, this provision explicitly obligates corporations to “observe standards which protect the right to water and are otherwise in accordance with [General Comment 15].” Commentary, supra note 195, para. 12(b).
197. For an overview of the implementation procedures envisioned by the Norms, see Weissbrodt & Kruger, supra note 162, at 915–21.
198. Norms, supra note 166, paras. 15–16; Commentary, supra note 195, paras. 15–16.
199. Commentary, supra note 195, para. 16(i).
200. Id. para 16(g).
201. Id. para 16(h).
V. ANALYSIS AND CONCLUSION

A. Analysis of the Possible Scope of Liability of Private Water Providers for Violations of the Right to Water and its Enforcement

Reading the provisions of Comment 15 and the Norms on corporate accountability together, it is possible to examine hypothetically the scope and nature of corporate responsibility for violations of the human right to water in the context of privatized water utilities. Maria McFarland Sánchez-Moreno and Tracy Higgins have argued that privatization should not constitute a *per se* violation of the right to water.204 Instead, in their view, privatization might indeed contribute to the realization of the right to water.205 Nevertheless, the particular circumstances in which privatization is carried out might give rise to substantive and procedural violations of the right to water.206

Commenting on the privatization of water in Cochabamba, Bolivia, Sánchez-Moreno and Higgins have argued that the Bolivian government might have violated substantive provisions of the right to water, in particular the principles of equity and affordability,207 by approving rate increases without providing for mechanisms to protect its poor residents.208 Furthermore, the failure of the Bolivian government to create timely op-

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204. Sánchez-Moreno & Higgins, *supra* note 12, at 1775–76 (describing, but rejecting the view that privatization might be seen as a *per se* violation of the human right to water). Drawing on William Finnegan’s article on Cochabamba in *The New Yorker*, the authors note that the peasants in Cochabamba viewed the concessionaire as inherently interfering with their customary habit of using water for free. *Id.* at 1775. This view was captured in the expression that the concessionaire attempted to “lease the rain.” *Id.* See also Finnegan, *supra* note 11.


207. Comment 15, *supra* note 109, paras. 12(c)(ii), 27.

208. *Id.* para. 44(a)–(b). See Sánchez-Moreno & Higgins, *supra* note 12, at 1776–79. The authors also observe that the concession arrangements between the Bolivian government and the concessionaire might have interfered with customary uses of water by Cochabamba peasants, but note that such interference would only give rise to a violation if carried in an arbitrary manner. *Id.* at 1779. They argue that arbitrariness may be inferred from the fact that the interference “was merely a byproduct of the deal [between the government and the consortium] structured to serve other purposes.” *Id.*
opportunities for citizens to participate in the passing of water laws violates the procedural rights of participation and information.\textsuperscript{209}

Applying the requirements of Comment 15 and the Norms in this context would extend analogous obligations to a private water provider, qualified by the limiting standard of “due diligence,” which is expressly stated in the Norms. Thus, under the standard of “due diligence” a private water provider would be liable for violating the substantive right to affordable water by designing rate increases without mitigation mechanisms for poor households, to the extent that the company knew or should have known of the consequences of rate increases on the poorest residents that it serves.\textsuperscript{210} Since the Norms also impose an affirmative duty on companies to inform themselves of the effect of their activities on human rights, a company that was unaware of the consequences of rate hikes on the poor residents that it serves would also arguably violate its duty of due diligence.\textsuperscript{211}

The procedural rights of information and participation by relevant stakeholders promulgated in Comment 15 as components of the right to water are supplemented by the implementation procedures of disclosure and monitoring envisioned by the drafters of the Norms. Under the monitoring obligations of the Norms, a private water provider has an affirmative duty to conduct studies of the human rights impact of proposed privatization contracts. Such duty would compel private water providers to put their superior institutional resources into designing innovative pricing solutions, such as differential pricing and subsidies for low-income users to ensure affordability and access to minimum amounts of water for all. In addition, since Comment 15 provides for procedural rights to information and participation\textsuperscript{212} of affected people, water providers would be required not only to make available the results of human rights studies to stakeholders, but to consult the local communities affected by their activities. Imposing a relationship of correlative duties and rights between multinational water providers and sub-sovereign entities, such as affected communities, could fill in regulatory gaps resulting from weak or corrupt governments and prevent cooperation with authoritarian ones. The requirements further ensure that corporations will refrain from dealing with

\textsuperscript{209} Sánchez-Moreno & Higgins, supra note 12, at 1781–86.

\textsuperscript{210} See Commentary, supra note 195, para. 1(b). See also Sánchez-Moreno & Higgins, supra note 12, at 1786–87 (discussing the potential liabilities of the consortium involved in Cochabamba).

\textsuperscript{211} See Commentary, supra note 196, para. 1(b).

\textsuperscript{212} The right to public participation under Comment 15 extends to groups and individuals, over and above the participation by national and local officials. Sánchez-Moreno & Higgins, supra note 12, at 1782.
governments behind closed-doors without public input, thereby increasing the transparency of the negotiations between water companies and governments.

Enforcement of corporate responsibility of the human right to water may prove difficult. Although a discussion of enforcement strategies and possible forums is beyond the scope of this Note, it will suffice to point out two main barriers. First, the passage of time is necessary before the Norms and Comment 15 mature into “hard law.” In this respect, future support by the United Nations and the community of states is critical. Second, although the Norms envision enforcement by international tribunals and national courts, there is presently no complaint mechanism to bring violations of economic, social and cultural rights to the attention of the ESCR Committee. Nevertheless, violations of the right to water might be brought before regional human rights forums, where the relevant treaties cover economic, social and cultural rights, provided that other jurisdictional requirements are satisfied. Enforcement by national courts has been utilized, for example, in South Africa, although it should be borne in mind that the right to water is enshrined in the South African Constitution. Despite the difficulties of enforcement through litigation, using the Norms and Comment 15 as a publicity tool may be a powerful means of bringing international pressure on private water providers to incorporate human rights provisions in their contracts with governments and to adopt internal self-regulation policies.

B. The Desirability of a Human Rights Approach to Water Privatization

Considering the degree to which private water operators supplant or replace public entities in the delivery of water services, especially in developing countries, the elaboration of global mechanisms to protect and ensure access to water becomes paramount. As commentators on both sides of the private-public debate have recognized, the global scope of

213. Norms, supra note 166, para. 18.
214. See, e.g., Organization of African Unity, Banjul Charter on Human and Peoples’ Rights art.16(1), June 27, 1981, 21 I.L.M. 58 (1982) (“Every individual shall have the right to enjoy the best attainable state of physical and mental health.”).
the water crisis requires global solutions. The exploration of public-private partnerships, extolled by international financial institutions, must go hand-in-hand with developing mechanisms for holding multinational water companies responsible for the human right to water.

A human rights approach to water privatization is desirable for several reasons. First, by bringing the scrutiny of the international community to bear upon the activities of multinational water companies, the human rights approach alleviates the power inequity between transnational corporations and governments of developing countries. Moreover, a human rights approach to water privatization would ensure the participation of the local people as “stakeholders” affected by privatization. Such participation not only protects the interests of affected communities, but also reduces the political risk for private investors, possibly preempting some of the privatization fiascos, like the water war in Bolivia.

Second, a human rights approach contributes to the goal of universal access to water by clarifying that water is “a legal entitlement, rather than a commodity or service provided on a charitable basis.”216 Imposing a binding duty for the human right to water on private water providers is necessary to ensure that the right will not be violated where the host governments are unable or unwilling to regulate.

Nevertheless, some of the objections pertaining to corporate responsibility for human rights in general may attain heightened force in the context of a “welfare” right such as the human right to water. For example, an objection may be raised that companies should not be forced to assume responsibilities that have traditionally been accorded to states, such as providing for the welfare of the citizenry.217 Countering such objections, the Norms clearly state that states remain the primary addressees of human rights law.218 In addition, the Norms limit corporate accountability through the theory of the corporate sphere, ensuring that corporations are not subjected to a sweeping obligation to the general citizenry.219 Thus, under the Norms, a transnational company that operates in a host

216. THE RIGHT TO WATER, supra note 17, at 9 (also noting that the human rights approach empowers individuals to realize their human rights, rather than seeing them as “passive recipients of aid”).

217. Indeed, it is still contested whether states have such responsibilities. See supra Part III.C.


219. See High Commissioner Report, supra note 191, para. 36 (“In contrast to the limits on States’ human rights obligations, the boundaries of the human rights responsibilities of business are not easily defined by reference to territorial limits. . . . Defining the boundaries of business responsibility for human rights therefore requires the consideration of other factors, such as the size of the company, the relationship with its partners, the nature of its operations, and the proximity of people to its operations.”).
state, but does not otherwise provide water services, does not—like its host state—have a general affirmative duty to undertake positive steps toward the realization of the right to water of the citizens of the host state. However, a transnational corporation that is engaged in the provision of water services would be bound by an affirmative duty running not to the general citizenry, but to those water consumers affected by corporate activity. 220

The recent developments regarding the elaboration of a human right to water and corporate responsibility for human rights may go some way toward addressing the problems posed by the privatization of a resource essential to human life, while at the same time preserving the benefits of privatization. Whether the Norms will develop into “hard law” that would be binding and enforceable against private water providers remains to be seen.

Violeta Petrova*

220. In this respect, it should be noted that corporate responsibility for the human right to water is not a panacea to all of the problems attendant to water privatization. For instance, because of the corporate sphere theory, the human rights approach may be of limited use in addressing the problem of “unbundling” of services central to many privatization schemes, which allows the separation of profitable from unprofitable regions. See Kothari, supra note 39. By definition, unbundled unprofitable regions which remain in the public sector would be outside the corporate sphere.

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SOLVING TAXPATRIATION:
“REALIZING” IT TAKES MORE THAN AMENDING THE ALTERNATIVE TAX

I. INTRODUCTION

Oliver Wendell Holmes once said, “[t]axes are what we pay for a civilized society . . . .” As the U.S. Constitution states, tax revenue allows Congress to “pay the Debts and provide for the common Defence and the general Welfare of the United States.” Taxes fund public goods such as police and fire departments, highway construction, public education and scientific research. Taxes also fund administrative activities such as the enforcement of laws to protect our natural resources and the environment. Without taxation, governments would have to resort to either the issuance of debt or the issuance of additional currency as the means to fund public programs and governmental activities. Despite the myriad benefits, some people are willing to travel great lengths to reduce or eliminate their taxes.

For some, the benefits of avoiding U.S. taxes are great enough that they are willing to renounce their U.S. citizenship to do so. How should our society react to expatriation to avoid taxation? The renunciation of

4. Id.
5. Id.
6. One example is Michael Dingman, chairman of a company which makes aerospace and industrial products. Mr. Dingman is now a citizen of the Bahamas which has a low tax rate. Mr. Dingman renounced his U.S. citizenship in June of 1994 because he had been living in the Bahamas in one form or another since 1964 and wanted a pleasant place to raise his three children. Mr. Dingman claims avoidance of U.S. taxes was not a factor in his decision to expatriate. However, his opinion is that if he is investing money in other countries, he should not have to pay U.S. taxes on money he invests because no other country taxes this way. Mr. Dingman also does not want his heirs to pay estate taxes on money he has already paid taxes on when he dies. Karen De Witt, Some of Rich Find a Passport Lost is a Fortune Gained, N.Y. TIMES, Apr. 12, 1995 (Late Edition), at A1.
7. For purposes of this Note, the terms “expatriation” will refer to the legal renunciation of one’s citizenship by an individual and “expatriate” will refer to one who has renounced his or her citizenship. Corporate expatriation, including corporate inversion, is beyond the scope of this Note.
U.S. citizenship to save taxes is like flag burning: it offends people. However, though offensive to patriotic Americans, flag burning is protected by the Constitution. What restrictions can or should be placed on the ability to expatriate?

As discussed, taxes fund the cost of maintaining a civilized society. Loss of tax dollars from expatriates means the loss of tax revenue to fund public and governmental programs. But as Judge Learned Hand commented:

Over and over again courts have said that there is nothing sinister in so arranging one’s affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant.

However, moral sentiments and patriotic principles seem to be a driving force behind efforts to curb “taxpatriation.” Recent congressional

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12. *See supra* notes 3–4 and accompanying text for examples of public and governmental programs funded by taxes. The loss of tax revenue from those most likely to expatriate to avoid taxes (i.e., individuals in the upper echelons of society with wealth estimated in the millions or billions of dollars) constitutes the largest base of taxable dollars. *See supra* note 6.
14. “Taxpatriation” refers to the act of renouncing one’s citizenship to avoid taxes. The term “taxpatriation” comes from Robert Lenzner, *And Don’t Come Back: U.S. Citizens Who Renounce Their Citizenship for Tax Purposes Face Obstacles*, FORBES, Nov. 18, 1996, at 44. Although loss of revenue is probably the greatest concern, the Congressional debate regarding taxpatriation seems fueled by anger over the ease former citizens have with severing allegiances and ties to their home country. While speaking on the floor of the House, Representative Neil Abercrombie passionately argued:
revisions to the Internal Revenue Code make avoiding U.S. taxes more difficult, but they still fall short of achieving the ultimate goal—stopping tax-motivated expatriation.\footnote{15}

This Note examines recent amendments the United States made to provisions dealing with expatriation to avoid taxes and their ineffectiveness in keeping capital within the United States. Part I examines the history of taxation as well as expatriation and the current system of taxation employed by the United States. Part II explores the potential tax benefits gained from expatriating and the procedure to formally renounce citizenship. This section also discusses previous efforts by Congress to curb expatriation. Lastly, this section will examine the American Jobs Creation Act of 2004 and its intended objectives to ease administration and increase enforcement of provisions dealing with expatriation to avoid taxation. Part III explores the weaknesses still present in the American Jobs Creation Act of 2004 amendments to Internal Revenue Code section

877 and the alternative tax regime as a means for deterring tax-motivated expatriation. In furtherance of Congressional objectives and goals, this Note will propose a mark-to-market regime, which “realizes” accrued gains in property, as a better solution for eliminating purely tax-motivated expatriation while simultaneously upholding the inherent right of expatriation for those who truly want to renounce citizenship.

A. History of Taxation

In the 1800s, the federal government limited taxes to tariffs on imported goods. The bulk of taxes imposed by state and local governments were mainly on real property supplemented by excise taxes on items such as slaves, carriages, and personal property. As the United States shifted from an agrarian economy to an industrialized one, developments in the financial and social systems were reflected in contemporaneous changes to personal wealth. The composition of individual estates has evolved from being mainly real property to including commercial paper, stocks and other evidences of debt, to becoming primarily income. In short, the wealth of individual Americans came from sources untouched by the federal government’s import tax or the property tax imposed by state and local governments. In response to an economic crunch caused by financing the Civil War, the federal government turned towards taxing income. This first tax on income evolved into our current tax system, which includes exemptions, deductions and the progressive rate structure. After many battles over the federal government’s ability to tax, the Sixteenth Amendment to the U.S. Constitution was passed in 1913 allowing Congress to establish a federal system of taxation on “income from whatever source derived.” Recently, individual income tax receipts equaled $927.2 billion in 2005 (43 percent of

16. See Nantell, supra note 1, at 40–42.
17. Id. at 41–42, citing LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 185 (2d ed. 1985).
18. Id. at 42
19. Id.
20. Id.
21. Nantell credits the income tax law of 1862 with providing the basic structure for today’s current tax system. Id. at 43. The progressive rate structure means a system of taxation which imposes higher rates of tax at higher levels of income. See generally I.R.C. § 1.
22. Nantell, supra note 1, at 38; U.S. CONST. amend. XVI. See also I.R.C. § 22 (West 1913) (current version at I.R.C. § 61 (West 2006)).
23. Office of Management and Budget (OMB), Budget of the U.S. Government for 2007, Table S-11 (Receipts by Source—Summary), http://www.whitehouse.gov/omb/
receipts by source)\textsuperscript{24} and are estimated to equal $997.5 billion for 2006\textsuperscript{25} (43.6 percent of receipts by source).\textsuperscript{26}

B. The Current United States System of Taxation

The United States is among the minority in its system of taxation.\textsuperscript{27} It utilizes the “worldwide taxation” system, which taxes persons based on citizenship.\textsuperscript{28} In contrast, most other nations around the world utilize a system of “territorial taxation,” which taxes persons based on residency.\textsuperscript{29} U.S. citizens are subject to U.S. income tax on their worldwide income regardless of its source.\textsuperscript{30} For an increasingly globalized society, this could have serious implications since the income tax rate for individuals can be as high as 35 percent.\textsuperscript{31} Additionally, nonresident citizens
may be subject to double taxation on income derived from their host
country due to the conflict between the two systems of taxation.32

In contrast, nonresident noncitizens33 only pay U.S. taxes on U.S.-
source income or income connected to the conduct of trade or business
within the United States.34 Nonresident noncitizens are taxed at a flat rate
of 30 percent for income not connected with U.S. business35 or at the
same progressive rate structure applicable to U.S. citizens for income
connected with a U.S. business.36 Nonresident noncitizens are able to
avoid many of the burdensome taxes imposed on U.S. persons.37 Status

32. Renee S. Liu, Note, The Expatriate Exclusion Clause: An Inappropriate Response
to Relinquishing Citizenship for Tax Avoidance Purposes, 12 GEO. IMMIGR. L.J. 689, 694
referred to as their “home” country while the country where the person resides, derives
income or owns property is referred to as the “host” country if different from their
“home” country. The risk of double taxation also extends to a nonresident citizen’s estate
if the estate includes property situated within the host country. This double taxation may
be abated or eliminated by income tax and estate tax treaties with other nations. As of
April 30, 2004, the United States had fifty-four income tax treaties (one of which is the
Commonwealth of Independent States which consists of the countries of Armenia, Azer-
bajian, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan
to bring the total number of countries the United States has income tax treaties with to
sixty-two). See Department of Treasury Publication 901, U.S. Tax Treaties, at 48, tbl. 3
(last visited Feb. 16, 2006). Treaties serve to lessen or maintain the tax burden, never to
raise the tax burden. Ernest R. Larkins, U.S. Income Tax Treaties in Research and Plan-
ing: A Primer, 18 VA. TAX REV. 133, 189 (1998). However, some U.S. tax treaties con-
tain “savings clauses” which reserves a country’s right to tax its citizens or residents not-
withstanding the existence of the treaty. Id. at 186. Moreover, tax burdens on U.S. citi-
zens living abroad may decrease if they qualify for foreign income tax credits on foreign
income taxes paid on income earned outside the United States. Heath, supra note 30, at
545 n.95. See I.R.C. §§ 901–07.

33. Expatriated Americans living abroad are considered nonresident noncitizens. See
Heath, supra note 30, at 545.

34. I.R.C. § 871; Heath, supra note 30, at 545. The United States does not tax non-
resident aliens on income derived from a source outside the United States. See generally
I.R.C. § 871. Resident aliens are taxed comparably to U.S. individuals. See I.R.C. § 1;
Heath, supra note 30, at 545.

35. I.R.C. § 871(a). Income not connected with U.S. business is basically income
from U.S. sources. These sources include interest, dividends, rents, salaries, wages, pre-
miums, annuities, compensations, remunerations, emoluments, and the like, generated
from within the United States. See generally id. § 871(a)(1)(A)–(D).

36. See id. § 871(b). This means conducting business within the United States. More-
over, the federal estate tax is not imposed on nonresident noncitizens except for assets
within the United States. Id. § 2107.

37. See infra Table 1 for a comparison.
as a nonresident noncitizen allows an expatriate to avoid any U.S. tax liability on foreign source income and capital gains tax on appreciated U.S. securities by selling them and reinvesting outside the United States. Consequently, the U.S. tax structure creates an incentive for many wealthy American individuals to expatriate for tax-avoidance purposes.

C. The Battle Over Expatriation

To trace the history of expatriation, one must turn to English common law. In recognizing the English doctrine of “perpetual allegiance,” U.S. common law disallowed renunciation of U.S. citizenship. “Perpetual allegiance” espoused the principle that an individual had no legal right to renounce his or her sovereign. In the mid-nineteenth century, however, the United States, perhaps recognizing the inconsistency of admitting expatriates of other countries while disallowing expatriation of its own citizens, enacted the Expatriation Act of 1868. Consequently, the United States formally acknowledged the freedom to renounce one’s citizenship as “a natural and inherent right of all people indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness.” Since then, the roots of the right to expatriate have grown deep in American soil. Only recently has Congress promulgated legislation to curb expatriation for tax-avoidance purposes.

38. Heath, supra note 30, at 545. Nonresident noncitizens are also not subject to the U.S. Estate Tax on their estates except on property situated within the United States. I.R.C. § 2101.
41. Dagrella, supra note 40, at 365.
42. Heath, supra note 30, at 543.
45. This is evidenced by the consideration taken by Congress in fashioning a regime to tax individuals who wish to renounce citizenship by employing objective standards and to allow individuals to cut all ties with the United States and completely renounce citizenship if not done primarily for tax avoidance reasons. See STAFF OF JOINT COMM. ON TAXATION, 108TH CONG., 1ST SESS., REVIEW OF THE PRESENT—LAW TAX AND IMMIGRATION TREATMENT OF RELINQUISHMENT OF CITIZENSHIP AND TERMINATION OF
In the early 1990s, heavy media coverage familiarized Americans with tax-motivated expatriation. Commentators and proponents of stronger expatriation laws appealed to people’s sense of patriotism and loyalty to the United States by emotionally charging citizens who expatriate to avoid taxes as “financial draft evaders” or “Billionaire Benedict Arnolds.” In 1996, Congress responded to the growing uneasiness over “taxpatriating” by passing key provisions for dealing with the avoidance of income tax in two pieces of legislation. The first, the Health Insurance Portability and Accountability Act (HIPAA), amended provisions of Internal Revenue Code (I.R.C.) section 877 which governs tax-motivated expatriation. The amended provision taxes income of expatriates as if they were still U.S. citizens for ten years following the date


46. Congress first enacted the alternative tax regime in 1966 when it passed the Foreign Investors Tax Act. 2003 JCT Report, supra note 45, at 76, citing Pub. L. No. 89-809. The United States is also not alone in its taxation of expatriates. Eritrea, Finland, France, Germany, the Netherlands, Norway, the Philippines, Sweden and others all impose some form of taxation on former residents. Liu, supra note 32, at 700, citing STAFF OF JOINT COMMITTEE ON TAXATION, 104TH CONG., 1ST SESS., ISSUES PRESENTED BY PROPOSALS TO MODIFY THE TAX TREATMENT OF EXPATRIATION, at B4–B7 (Comm. Print 1995). See also 2003 JCT Report, supra note 45, at 140–52 (Summary of Other Countries’ Taxation of Citizenship Relinquishment, Residency Termination, and Immigration).


49. During a House discussion regarding the Health Insurance Portability and Accountability Act of 1996, Representative Neil Abercrombie referred to billionaires who expatriated to avoid taxes as, “Benedict Arnolds who would sell out their citizenship, sell out their country in order to maintain their wealth. [J]et set[ters] who are able to . . . enjoy the full benefits of all the wealth that they have accumulated in the United States of America as citizens, and renounce.” Abercrombie Decrees Recession of Expatriate Tax Provision from Health Deduction Bill, TAX NOTES TODAY, Apr. 11, 1995, available at 95 TNT 70-27 (Lexis). See also Liu, supra note 32, at 690; Jeffrey M. Colon, Changing U.S. Tax Jurisdiction: Expatriates, Immigrants, and the Need for a Coherent Tax Policy, 34 SAN DIEGO L. REV. 1, 3 (1997); Kirsch, supra note 14, at 923.


of expatriation if they are found to have expatriated for tax-avoidance purposes. The second, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), amended and expanded part of the Immigration and Nationality Act (INA) to deny expatriates re-entry into the United States if the U.S. Attorney General determines that the former citizen renounced U.S. citizenship for purposes of avoiding taxes. Under the provisions of the IIRIRA, frequently referred to as the “Reed Amendment,” the “taxpatriate” is deemed “inadmissible” alongside

52. See generally I.R.C. § 877(a) (as amended by HIPAA). The I.R.C. also addresses expatriating to avoid estate taxes in section 2107 which imposes U.S. estate taxes for ten years following the date of death of the former citizen if it is established that the former citizen had a principal purpose of avoiding income taxes as determined under section 877(a)(2). I.R.C. § 2107(a).


55. INA § 1182(a)(10)(E) (“Any alien who is a former citizen of the United States who officially renounces United States citizenship and who is determined by the Attorney General to have renounced United States citizenship for the purpose of avoiding taxation by the United States is inadmissible.”); Liu, supra note 32, at 690–91.

56. See generally Carter, supra note 50. The Reed Amendment is intended to impose a significant direct cost on a tax-motivated expatriate by foreclosing the former citizen’s ability to return to the United States. Kirsch, supra note 14, at 896. Representative Reed, in proposing the amendment, stated, “in an instrumental way, I would hope in the future if those very slick and smart tax lawyers advising their clients about how to avoid their taxes suggest expatriation they should also indicate very clearly that the consequences are you cannot return at will to the United States.” Id. (citing Hearing Before the House Judiciary Committee: Mark-up of Immigration Legislation, 104th Cong. (Nov. 15, 1995) in Fed. News Serv., Nov. 15, 1995, at 50). According to Kirsch, Representative Reed introduced this amendment in response to a particular tax-motivated expatriate, Kenneth Dart, an owner of Dart Container Company, surrendered his citizenship to avoid U.S. taxes and became a citizen of Belize. Kirsch, supra note 14, at 892 n.133. Mr. Dart reportedly convinced the Belize government to appoint him as a consular official to the United States where he would have opened a consular office in Sarasota, Florida, Mr. Dart’s former hometown and city where his family still lived. Id. If Mr. Dart had been allowed to enter the United States as a diplomatic representative of Belize, he could have resided in there for the entire year without becoming a resident alien for U.S. income tax purposes. Id. (citing I.R.C. § 7701(b)(5)(A)(i), (5)(B) (West 2000), which exempts foreign diplomats and consular officials from the substantial presence test for income tax residence). After Representative Reed’s introduction of the Reed Amendment, but before it was enacted by HIPAA, Belize withdrew its request to appoint Mr. Dart as a consular official. Id. (citing State Dept. Briefing (Apr. 5, 1996), in Fed. News Serv., Apr. 5, 1996).

57. The terms “admission” and “admitted” in the IIRIRA supplanted the term “entry” in INA section 1101(a)(13) and effectively treated all aliens not “admitted” as applicants for admission even if the applicant possessed an immigrant visa issued by a consular officer in his or her home country. The visa only constitutes prima facie evidence of ad-
terrorists,\footnote{See INA § 1182(a)(3)(B).} former-Nazis,\footnote{See id. § 1182(a)(3)(E).} international child abductors\footnote{See id. § 1182(a)(10)(C).} and government officials who severely violated religious freedom,\footnote{See id. §1182(a)(2)(G).} to name a few.\footnote{See generally id. § 1182(a) for a complete list.}

More recently, Congress passed the American Jobs Creation Act of 2004 (2004 Jobs Act)\footnote{See infra note 108.} which revised the amendments made by HIPAA to ease administration and increase enforcement of the anti-taxpatriation provisions within the I.R.C.\footnote{See 2003 JCT Report, supra note 45, at 204.} The new provisions are also meant to further deter taxpatriation while allowing those who truly wish to sever ties with the United States to do so.\footnote{See id. at 204–07.}

II. BACKGROUND

A. Income Tax Benefits of Expatriation

The combined effect of the United States’ current tax structure (i.e., the “worldwide taxation” system), and the mechanisms employed by the federal government to curb taxpatriation, ensures that this problem will remain unless drastic changes occur.\footnote{See supra note 46. Additionally, the stricter HIPAA provisions dealing with renunciation of citizenship for tax avoidance purposes has been in effect since 1996. See supra Part I.D. Since then, the problem of taxpatriating has not abated but continued to be a source of debate within Congress. See 2003 JCT Report, supra note 45. See also infra note 106. This is a partisan issue with many house Democrats calling for “punishments” of sorts to deal with taxpatriation and house Republicans calling for more “neutral” solutions. See generally De Witt, supra note 6; Lars-Erik Nelson, The Happiest Billionaires—Abroad, NEWSDAY, Apr. 2, 1995, at A34.} Table 1 compares the tax treatment of U.S. resident and nonresident citizens versus nonresident non-citizens.\footnote{See infra Table 1.} As Table 1 demonstrates, in a world surrounded by the territorial taxation system, the United States’ worldwide taxation system rewards, rather than discourages taxpatriation.\footnote{The effects are even clearer when comparing income tax rates for U.S. corporations versus foreign corporations. For U.S. corporations, income originating in the United
States is taxed by the United States at a maximum rate of 35 percent. On the other hand, income of U.S. corporations originating in a foreign country is taxed by the United States at the maximum rate of 35 percent plus the applicable foreign tax rate. Foreign corporations, on the other hand, while taxed at the 30 percent tax rate for income originating in the United States, do not pay foreign taxes on that income. For income originating in a foreign country, they pay only the applicable foreign tax rate and no U.S. tax. See generally I.R.C. §§ 11, 881–882. Furthermore, when an individual factors in the effects of the U.S. estate taxes, the benefits become greater. The United States imposes estate tax on the worldwide estates of its citizens at a maximum rate of 46 percent in 2006. See generally id. at § 2001. Comparability of tax rates or even tax systems do not really provide a suitable benchmark. Unlike the United States, many developed nations do not impose capital gains tax. Michael G. Pfeifer & Joseph S. Henderson, Expatriation: The Ultimate Estate Planning Tool?, A.L.I-A.B.A COURSE OF STUDY, Course No. SJ027, Aug. 21–22, 2003, available at WL SJ027 ALI-ABA 575, 598 n.56. Others, although considered “high” tax jurisdictions may impose no estate or inheritance tax or impose taxes at rates far below applicable U.S. rates. Id.


70. Id. Nonresident citizens may also be able to exclude foreign earned income up to $80,000 and housing costs from their gross income. Id. § 911.

71. Id. § 871(a). This section only applies to income not connected to U.S. business. See supra note 35. Tax rates for effectively connected income from the conduct of trade or business within the United States are the same progressive tax rates as citizens in I.R.C. sections 1 and 55. I.R.C. § 871(b). See supra note 36. A discussion of effectively connected income is beyond the scope of this Note. Generally, gain on the sale of U.S. real property or income from regular, substantial and continuous profit-oriented activities will be considered connected to a trade or business. Eva Farkas-DiNardo, Is the Nation of Immigrants Punishing its Emigrants: A Critical Review of the Expatriation Rules Revised by the American Jobs Creation Act of 2004, 7 FLA. TAX REV. 1, 10 n.11 (2005).

72. I.R.C. § 1. In addition, the taxable income may be subject to tax of the source country.

73. Id.

74. See id. § 871.
B. Renunciation of Citizenship by Individuals

The procedure for expatriation is governed by the INA. An individual must undertake to renounce U.S. citizenship. An individual must either: naturalize in a foreign state, formally declare allegiance by oath or affirmation to a foreign nation, enlist in the military service of another country either as an officer or in a state that is engaged in hostilities against the United States, commit treason, renounce citizenship at a U.S. diplomatic or consular office, or provide renunciation in writing to the Attorney General when the United States is engaged in war. Pursuant to statute, a U.S. citizen can only renounce her citizenship on foreign territory.

C. Previous Efforts to Curb Tax-Motivated Expatriation


As discussed above, HIPAA imposed an alternative tax regime on former citizens determined by the Attorney General to have expatriated for

75. See supra notes 54–56 and accompanying text.
77. Id. § 1481(a)(1) (“obtaining naturalization in a foreign state upon his own application or upon an application filed by a duly authorized agent, after having attained the age of eighteen years”).
78. Id. § 1481(a)(2) (“taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof, after having attained the age of eighteen years”).
79. Id. § 1481(a)(3) (“entering, or serving in, the armed forces of a foreign state if (A) such armed forces are engaged in hostilities against the United States, or (B) such persons serve as a commissioned or noncommissioned officer”).
80. Id. § 1481(a)(7) (“committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States”).
81. Id. § 1481(a)(5) (“making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State”).
82. Id. § 1481(a)(6) (“making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense”).
83. Id. § 1483(a) (except as provided under INA § 1481(a)(6)–(7) which provides that a former citizen renounces citizenship if he or she commits treason or provides writing to the Attorney General renouncing citizenship while the United States is at war). See also Liu, supra note 32, at 692.
HIPAA sets a statutory presumption of expatriation for tax-avoidance purposes if the former citizen’s “annual net income tax for the period of five taxable years ending before the date of the loss of United States citizenship is greater than $100,000, or the net worth of the individual as of such date is $500,000 or more.” Former citizens can contest the statutory presumption of tax-avoidance. However, they bear the burden of showing that the expatriation was not tax-motivated. I.R.C. section 877(c) (as amended by HIPAA) provides that the statutory presumption of tax-avoidance in section 877(a)(2) (as amended by HIPAA) does not apply if the expatriating individual: (1) has dual citizenship; (2) is a long-term foreign resident; or (3) renounces citizenship before reaching the age of majority. Additionally, within a year from the date of expatriation, the former citizen must appeal the presumption by submitting a ruling request for the Secretary’s determination as to whether avoidance of U.S. taxes was one of the principal purposes for the renunciation of citizenship. If this procedure is followed, the former citizen is not presumed to have expatriated for tax avoidance purposes until the Secretary makes a ruling regarding the matter.

If the Secretary finds that an individual expatriated to avoid taxes within the meaning of section 877(a), the individual must file a statement pursuant to I.R.C. section 6039G, to either the Secretary or a competent court, with information regarding the expatriated individual’s address of

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84. I.R.C. § 877(b) (as amended by HIPAA).
85. See id. § 877(a)(1).
87. See I.R.C. § 877(c) (as amended by HIPAA).
88. See id. § 877.
89. The category of dual citizenship is broader than the traditional notion of holding citizenship in two countries simultaneously. Under I.R.C. § 877(c)(2)(A) (as amended by HIPAA), it includes an individual who became, at birth, a citizen of the United States and another country and continues to be a citizen of that country and an individual who becomes a citizen of his or her spouse’s or either parents’ country of birth.
90. See id. § 877(c)(2)(A)–(C). The age of majority is eighteen and a half years. Id. § 877(c)(2)(C).
91. “Secretary” in the I.R.C. refers to the Secretary of the Treasury or his or her delegate. See id. § 7701(a)(11)(B).
92. See id. § 877(c)(1)(B).
93. See id. § 877; Liu, supra note 32, at 697.
foreign residence, information detailing the assets and liabilities of such individual, the foreign country in which the individual is a citizen and the taxpayer’s TIN,94 among other requirements.95 The Secretary is then required to publish the name of the expatriated individual in the Federal Register.96

Another purpose for amending I.R.C. section 877 was “to equalize the United States tax burdens of expatriates with their United States tax liabilities had they not expatriated.”97 Though much legislation was written and many changes were made to stop “taxpatriation,” the provision has largely been ineffective due to the scores of exceptions available to counter the presumption of tax-motivated expatriation.98 With careful planning, even if a citizen considering expatriation does not qualify for an exception now, he or she may qualify at a later date.99

2. Illegal Immigration Reform and Immigrant Responsibility Act of 1996

The IIRIRA’s amendment to the INA (Reed Amendment) works in conjunction with HIPAA’s amendment to the I.R.C.100 The Reed Amendment, which denies admission to expatriates who renounced citizenship to avoid taxes, is only invoked after the Attorney General determines that the citizen expatriated for tax-avoidance reasons under I.R.C. section 877 (as amended by HIPAA).101 As discussed above, a section 877 determination of tax-motivated expatriation is rarely found.102 Additionally, as of February 2006, the Reed Amendment has never been enforced.103

94. See I.R.C. § 7701(a)(41) (as amended by HIPAA) (“TIN” means the identifying number assigned to a person under § 6109).
95. Id. § 6039G(b).
96. Id. § 6039G(e)(3).
97. Colon, supra note 49, at 44–45. It may also have been in response to media coverage admonishing “taxpatriation.” See supra notes 6, 14, 47–48.
98. Liu, supra note 32, at 698. See also 2003 JCT Report, supra note 45; infra Part III.A.
99. Liu, supra note 32, at 698. The same goes for avoiding the tax placed upon unrealized gains from assets which have appreciated. A patient expatriate who is able to wait the ten years before selling his or her assets can defer in part, and avoid in part, the capital gains tax. Id. at 699.
100. Id. at 698.
101. INA § 1182(a)(10)(E).
102. Carter, supra note 50, at 839. See also 2003 JCT Report, supra note 45, at 100.
103. See 2003 JCT Report, supra note 45, at 72. There is also an issue as to the constitutionality of such a provision. See generally Carter, supra note 50.
In response to the deficiencies and failures of HIPAA and the IIRIRA, Congress authorized the Joint Committee on Taxation to investigate their effectiveness.\footnote{2003 JCT Report, supra note 45, at 1.} In February 2003, the Joint Committee on Taxation published its findings.\footnote{Id.} As a result, Congress commenced another round of legislative drafting.\footnote{See generally S. 260, 108th Cong. (2003) (Senator Thomas Harkins sponsored this bill which introduced a mark-to-market regime to “amend the Internal Revenue Code of 1986 to prevent the continued use of renouncing U.S. citizenship as a device for avoiding U.S. taxes”); S. 1054, 108th Cong. § 340 (2003) (Senator Charles Grassley sponsored this bill to reconcile the budget for fiscal year 2004 and included revised tax rules on expatriation and also called for a mark-to-market regime).} As a result of these efforts, many of the Joint Committee’s recommendations to increase enforcement, ease the administration of I.R.C. section 877, and deter expatriation\footnote{See 2003 JCT Report, supra note 45, at 72–74 (identifying impediments to effectively removing avoidance of taxes from a former citizen’s decision to renounce citizenship).} are codified in the 2004 Jobs Act\footnote{H.R. 4520, 108th Cong. (2004) (enacted).}.

\textit{D. Current Efforts to Reduce Taxpatriation—The American Jobs Creation Act of 2004}

As Congress’s most recent attempt to curb tax-motivated expatriation, the 2004 Jobs Act amends the I.R.C. to remove its shortcomings.\footnote{See generally American Jobs Creation Act of 2004 (2004 Jobs Act), Pub. L. No. 108-357, §§ 801–06 (2004). See also 2003 JCT Report, supra note 45, at 72–74 (identifying impediments to effectively removing avoidance of taxes from a former citizen’s decision to renounce citizenship).} It modifies the provisions enacted by HIPAA and section 877 to generally follow the recommendations made by the Joint Committee on Taxation in its 2003 report.\footnote{For the Joint Committee recommendations, see generally 2003 JCT Report, supra note 45, at 204 (Part XI: Joint Committee Staff Recommendations).} First, it institutes objective rules regarding whether a U.S. citizen who desires to relinquish citizenship should be subjected to the alternative tax regime established by I.R.C. section 877.\footnote{See I.R.C. § 877(a)–(b) (as amended by the 2004 Jobs Act). See also infra Part III.B.1; 2003 JCT Report, supra note 45, at 205–08.} Second, it provides a tax-based, instead of immigration-based, set of rules for de-
terminating when an individual is no longer a U.S. citizen for federal tax purposes. 112 Third, the 2004 Jobs Act subjects individuals determined to have expatriated to avoid taxes to full U.S. taxation if they return to the United States for extended periods of time. 113 Lastly, it provides that an annual information return 114 be filed for each of the ten years following expatriation. 115

1. Objective Rules for Determining Applicability of the Alternative Tax Regime

The Joint Committee recommended instituting an objective standard to determine whether a citizen has renounced U.S. citizenship to avoid taxes. 116 The former provisions made administering the alternative tax regime difficult since it required the Internal Revenue Service (IRS) to determine the subjective intent of taxpayers who wished to expatriate. 117 The 2004 Jobs Act replaces the subjective test established by the HIPAA amendments to section 877 by establishing a presumption of tax-avoidance. 118

Similar to HIPAA, the 2004 Jobs Act subjects the taxpayer to the alternative tax regime for the ten years following renunciation of citizenship if the taxpayer meets certain requirements. 119 If the individual’s average annual net income tax for the five taxable years prior to the date of the loss of U.S. citizenship is greater than $124,000, 120 the net worth of the individual is $2,000,000 or more, 121 or the individual either fails to make

113. See I.R.C. § 877(g) (as added by the 2004 Jobs Act). See also infra Part III.B.3; 2003 JCT Report, supra note 45, at 210–12.
114. See supra note 94–95 and accompanying text for requirements for an information statement under I.R.C. § 6039G.
117. Id.
118. See 2004 Jobs Act, Pub. L. No. 108-357, § 804(a)(1)–(2). The HIPAA amendments to section 877 only established tax-avoidance as a principle purpose of expatriation if certain factors were established by the IRS. The principal purpose of tax-avoidance could also be rebutted by numerous exceptions. See supra Part II.D.
120. Id. § 877(a)(2)(A).
121. Id. § 877(a)(2)(B).
certain certifications or fails to submit evidence of compliance as the Secretary may require, then the individual will be taxed under the alternative tax regime. Unlike the HIPAA amendments, if the monetary thresholds described above are met, the 2004 Jobs Act applies the alternative tax regime of I.R.C. section 877 unless the former citizen meets certain exceptions. The 2004 Jobs Act also lessens the number of exceptions available to avoid the alternative tax regime. There are only two exceptions recognized which allow an expatriate to escape the monetary thresholds before imposition of the alternative tax regime. The individual must either be a dual citizen or a “certain minor.”

Dual citizenship for purposes of the 2004 Jobs Act changed from the definition employed by HIPAA. Dual citizenship, as defined by the 2004 Jobs Act, is any individual who became at birth a citizen of both the United States and another country, continues to be a citizen of such other country, and has had no substantial contacts with the United States. An individual will be treated as having no substantial contacts with the United States only if the individual (i) was never a resident of the United States (as defined in section 7701(b)), (ii) has never held a

122. The individual must certify under penalty of perjury that he or she has met the requirements set out in the 2004 Jobs Act for the five preceding taxable years. Id. § 877(a)(2)(C).
123. Id.
126. See generally I.R.C. § 877(c) (as amended by the 2004 Jobs Act). The number of exceptions available in the past has been seen as a major point of inefficiency of I.R.C. § 877. 2003 JCT Report, supra note 45, at 204–10.
127. The two exceptions are dual citizenship and minority. I.R.C. § 877(c) (as amended by the 2004 Jobs Act).
128. Id.
129. See supra note 89 and accompanying text.
130. See I.R.C. § 877(c)(2)(A) (as amended by 2004 Jobs Act). In addition, an individual is considered a dual citizen under HIPAA when such individual becomes (not later than the close of a reasonable period after loss of U.S. citizenship) a citizen of the country in which: such individual was born; if such individual is married, such individual’s spouse was born; or either of such individual’s parents were born. I.R.C. § 877(c)(2)(A)(i)–(III) (as amended by HIPAA).
131. I.R.C. § 7701(b)(1) defines resident alien and nonresident alien. In general, a resident alien individual shall be treated as a resident of the United States with respect to any calendar year if (and only if) such individual: (i) is a lawful permanent resident of the United States at any time during such calendar year; (ii) meets the substantial presence test of paragraph (3); or (iii) makes the first year election. Id. § 7701(b)(1)(A). An indi-
U.S. passport, and (iii) was not present in the United States for more than thirty days during any calendar year for each of the ten calendar years preceding the individual’s loss of U.S. citizenship.132

The second exception allows “certain minors” to avoid the alternative tax regime.133 An individual qualifies as a “certain minor” if he or she became at birth a citizen of the United States, neither parent of such individual was a citizen of the United States at the time of such birth, the individual’s loss of U.S. citizenship occurs before such individual attains the age of eighteen and a half years, and the individual was not present in the United States for more than thirty days during any calendar year for each of the ten calendar years preceding the individual’s loss of U.S. citizenship.134

2. Tax-Based Rules For Determining Date of Expatriation

The 2004 Jobs Act amends the definitions set out in I.R.C. section 7701 by adding a new subsection. The new subsection (n) states that an individual who wishes to be treated as a nonresident noncitizen of the United States shall continue to be treated as a citizen or resident of the United States until the individual (1) gives notice of an expatriating act135 or termination of residency to the Secretary of State or the Secretary of Homeland Security, and (2) provides an information statement in accordance with I.R.C. section 6039G.136 The Joint Committee submitted this recommendation to Congress because a former citizen could previously

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132. See id. § 877(c)(2)(B) (as amended by 2004 Jobs Act).
133. Id. § 877(c)(3).
134. See id. § 877(c)(3)(A)–(D). To achieve uniformity, the 2004 Jobs Act also amends I.R.C. § 2107(a) which applies to estate taxes. See I.R.C. §§ 2001, 2101, 2107, 2501 for taxation of estates. The Joint Committee recommended changes to the estate tax provisions dealing with expatriates because of the difficulty of enforcement by the IRS. See 2003 JCT Report, supra note 45, at 104. This lack of enforcement is due to the lack of information the IRS had access to regarding former citizens. Id.
135. See supra Part II.B for the statutory requirements for giving notice of an expatriating act.
136. See generally I.R.C. § 7701(n) (as added by 2004 Jobs Act); id. § 6039G. See also supra note 95 and accompanying text relating to section 6039G of the Internal Revenue Code of 1986.
convert his or her federal tax status to that of a nonresident noncitizen without notifying the IRS.\textsuperscript{137}

3. Imposition of Full U.S. Taxation Liability

As recommended by the Joint Committee on Taxation, Congress added a new subsection to I.R.C. section 877 which defines “physical presence.”\textsuperscript{138} The new subsection (g) generally subjects an expatriate to full U.S. taxation if the individual returns to the United States for more than thirty days during any taxable year in which the individual is subject to the alternative tax.\textsuperscript{139} There is, of course, an exception.\textsuperscript{140} An individual can disregard counting up to thirty days of “physical presence” within the United States in any calendar year if the individual is in the United States to perform services for their employer and the individual either has ties to another country or has minimal prior physical presence in the United States.\textsuperscript{141} The exception does not apply, however, if the individual is related to the employer or fails to meet requirements determined by the Secretary to prevent the avoidance of U.S. tax liability.\textsuperscript{142}

The purpose of this amendment is to deter an individual who wishes to expatriate to avoid U.S. taxes but wishes to retain significant ties to their interests in the United States.\textsuperscript{143} By shortening the periods allowed before imposition of full U.S. taxation, the drafters of the amendment hoped to catch taxpatriates while not unduly interfering with individuals who truly wish to sever all ties with the United States.\textsuperscript{144}

4. Annual Information Return-Filing Requirement

The 2004 Jobs Act amends section 6039G of the I.R.C. to ease the administrative burden of enforcing the alternative tax by imposing stricter

\textsuperscript{137} Under previous law, the INA governed the determination of when a U.S. citizen was treated for U.S. federal tax purposes as having relinquished citizenship. INA § 1481. See also 2003 ICT Report, supra note 45, at 209 n.585. Additionally, the information form requirement under I.R.C. § 877 (as amended by HIPAA) did not require that the individual renouncing U.S. citizenship give the information to the IRS on the form itself. It only required information be given to the Department of State. As a consequence, the IRS has had many difficulties receiving timely information to help administer the alternative tax regime. See 2003 ICT Report, supra note 45, at 81, 209.
\textsuperscript{139} See I.R.C. § 877(g)(1) (as added by the 2004 Jobs Act).
\textsuperscript{140} See id. § 877(g)(2).
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} See 2003 ICT Report, supra note 45, at 210–12.
\textsuperscript{144} See id.
requirements and a higher frequency for filing information statements.145 As amended by the 2004 Jobs Act, I.R.C. section 6039G now requires an annual information filing directly to the IRS,146 as well as information regarding the annual income, assets and liabilities, and information regarding the number of days the former citizen was physically present in the United States for each taxable year.147 Previously, section 6039G only required former citizens to file an information statement if they owed U.S. federal income tax.148 The new amendments are meant to give the IRS more information regarding the relocation activities of former citizens, as well as more information regarding income generated by assets, and any dispositions of assets that would result in the imposition of U.S. taxes.149

III. ANALYSIS

A. Weakness of the HIPAA Alternative Tax Regime

As previously discussed, the problem of taxpatriation can be attributed to the United States’ system of worldwide taxation and its high tax rates.150 The 2004 Jobs Act is designed to help abate tax-motivated expatriation.151 Congress identified five desirable purposes to guide revisions

145. See also supra Part II.C.1.
146. I.R.C. § 6039G(a) (as amended by the 2004 Jobs Act).
147. Id. §§ 6039G(b)(5)–(6). The amendment also removed the monetary threshold the former citizen had to reach before providing information regarding their assets and liabilities. See I.R.C. § 6039G(b) (as amended by HIPAA).
149. See id.
150. See Daniel J. Mitchell, An OECD Proposal to Eliminate Tax Competition Would Mean Higher Taxes and Less Privacy, HERITAGE FOUNDATION BACKGROUNDER, Sept. 18, 2000, at 1, available at http://www.heritage.org/Research/Taxes/BG1395.cfm (last visited Mar. 6, 2006). Although this article focuses on the impact of tax havens and the relocation of assets offshore, it can be likened to the problem of expatriation to avoid taxes. The same tax havens where offshore capital is sheltered and kept private are where former citizens attain new citizenship. See id. Although U.S. tax rates are considered high when compared to the tax rates of countries where former U.S. citizens have now attained citizenship, they are considered low compared to the other industrialized nations of the European Union. Id.
151. As previously discussed, 2004 Jobs Act amends HIPAA. HIPAA itself was enacted due to prior ineffective legislation such as the Foreign Investors Act of 1966, Pub. L. No. 89-809; the Deficit Reduction Act of 1984, Pub. L. No. 98-369; and the Tax Reform Act of 1986, Pub. L. No. 99-514 and was in response to the Joint Committee on Taxation’s report in 1995 regarding its findings on the treatment of expatriates. 2003 JCT
of inadequate provisions prescribed by section 877.\textsuperscript{152} The five goals that the alternative tax regime seek to accomplish are: (1) to express official disapproval of tax-motivated expatriation; (2) to deter or punish tax-motivated expatriation; (3) to remove unintended tax incentives from expatriation; (4) to tax appreciation and asset value that accrue while a person is a U.S. citizen or resident; and (5) to ensure that individuals cannot enjoy any tax benefits that may arise from expatriating while maintaining significant ties to the United States.\textsuperscript{153} Although intended to deter tax-motivated expatriation and remedy the shortcomings of section 877 (as amended by HIPAA),\textsuperscript{154} Congress has yet to pass legislation to adequately address the problem of taxpatriation and offer a solution.\textsuperscript{155} These amended provisions fall short of achieving the five Congressional goals\textsuperscript{156} and, as with the HIPAA amendments, essentially represent a tiger with no teeth.\textsuperscript{157}

\textsuperscript{152} See 2003 JCT Report, supra note 45, at 75. These purposes were found by the Joint Committee on Taxation and also included a sixth purpose—to achieve a combination of and variations of the other five purposes. \textit{Id.}

\textsuperscript{153} \textit{Id.} These purposes are identified as important because Congress primarily intended the alternative tax regime to be “neutral.” \textit{Id.} Neutrality of the alternative tax regime means that Congress wanted to eliminate the possible tax incentives in renouncing citizenship. \textit{Id.}

\textsuperscript{154} See H.R. 4520, 108th Cong. pmbl. (2d Sess. 2004) (proposing the bill “to amend the Internal Revenue Code of 1986 to remove impediments in such Code. . . .”). See also 2003 JCT Report, supra note 45, at 103–39. Examples of shortcomings are loopholes caused by an abundance of exceptions available to remove a former citizen from the reach of the alternative tax regime, the inability of the IRS to establish a former citizen’s intent to avoid taxes, and the under-enforcement of the alternative tax regime. \textit{Id.}

\textsuperscript{155} Although the future impact of the 2004 Jobs Act amendments have yet to play out, a look at the past serves as a prediction of its inadequacy. Like the HIPAA amendments to I.R.C. section 877, the amendments from the 2004 Jobs Act also have problems with enforceability and ease of administration. See infra Part III.B. See also Brigid McMenamin, \textit{Home Free}, FORBES, July 26, 1999, at 110. \textit{See generally} Liu, supra note 32; Kirsch, supra note 14; Richard A. Westin, \textit{Expatriation and Return: An Examination of Taxdriven Expatriation by United States Citizens, and Reform Proposals}, 20 VA. TAX REV. 75 (2000).

\textsuperscript{156} For reasons discussed infra Part III.B, the amended provisions of the 2004 Jobs Act, although remedying some inadequacies of the HIPAA amendments, do not offer the best solution to deter tax-motivated expatriation. See 2003 JCT Report, supra note 45, at 75 (finding that the alternative tax regime would not be the most effective regime to reduce tax-motivated expatriation). See also id. app. 26.3 (Letter from Jonathan Talisman, Acting Assistant Secretary (Tax Policy), Department of the Treasury to Lindy Paull, Chief of Staff, Joint Committee on Taxation, dated May 5, 2000) stating that problems inherent in the current law cannot fully be addressed through the mere modification of the
In a letter to the Joint Committee on Taxation, the Treasury Department found that for the United States’ worldwide system of taxation, a mark-to-market regime would more effectively deter taxpatriation, be a more appropriate and administrable method of taxing expatriates, and would eliminate many of the problems inherent under section 877.\footnote{158} The Treasury Department’s recommended mark-to-market regime would

existing regime). See also McMenamin, supra note 155. The HIPAA provisions do not seem to have deterred tax-motivated expatriation. Under I.R.C. § 6039G(d), the Secretary is required to publish the names of individuals who have been determined to have expatriated to avoid taxes. The names of 2,735 former citizens were published in the Federal Register between 1995 to 1999. \footnote{2003 JCT Report, supra note 45, at 122.}


\footnote{157} See McMenamin, supra note 155, at 110 (quoting tax and estate lawyer F. Bentley Mooney in describing the effectiveness of the HIPAA amendments). The weaknesses described regarding HIPAA also apply to the Reed Amendment which bars a former citizen from re-entering the United States since the IRS has never enforced this provision.\footnote{Id. See generally Carter, supra note 50 (arguing that the Reed Amendment is unconstitutional). Additionally, many individuals do not even formally renounce citizenship, believing they can evade the bar on visiting the United States. McMenamin, supra note 155, at 110.}

\footnote{158} Other bills before Congress included S. 260, 108th Cong. (2003), which introduced a mark-to-market regime and S. 1054, 108th Cong. § 340 (2003), which also introduced a mark-to-market regime. This is not the first time Congress has rejected realization. Even amid the Clinton Administration’s support of a this type of system, the 104th Congress rejected proposals in both the Senate and House of Representatives that introduced mark-to-market regimes for taxing expatriates because it was seen as an “exit tax” like the one imposed by the former Soviet Union. See Liu, supra note 32, at 701.
have imposed tax liabilities at the time a wealthy expatriate leaves the U.S. tax jurisdiction.\textsuperscript{159} The tax base for this “exit tax” would have included foreign assets and focused on unrealized gains accrued during citizenship.\textsuperscript{160} While recognizing that a better tax system existed, the Treasury Department nonetheless made recommendations to improve the alternative tax regime if Congress chose to do so.\textsuperscript{161} Congress did choose to retain the alternative tax regime\textsuperscript{162} and followed most of the recommendations of the Joint Committee on Taxation when amending the alternative tax in an attempt to increase its effectiveness.\textsuperscript{163} Congress made this decision despite the Treasury Department’s determination that “mere modifications” to the alternative tax system could not fully address inherent problems with the current law,\textsuperscript{164} and that alternative avenues of taxation would be more effective in deterring tax-motivated expatriation.\textsuperscript{165}


\textsuperscript{160} \textit{Id.} Gains accrued while a U.S. citizen represent unrealized gains. The United States only taxes gains which are “realized.” \textit{See I.R.C. § 61(a) (definition of income); Treas. Reg. § 1.61-1(a) (1960) (taxable income includes income realized in any form, whether in money, property, or services); Eisner v. Macomber, 252 U.S. 189 (1920) (holding that a taxpayer who received a stock-split was not subject to taxation on the additional shares of stock because the taxpayer’s proportion of the corporation remained the same and did not have a greater ability to pay the tax). \textit{See also I.R.C. §§ 7190 (items specifically included in income); id. §§ 101–40 (Items specifically excluded from income). The realization requirement is illustrated by the rules for calculating gains from property. For property, gain equals amount realized minus basis. Basis equals the cost of the property and the amount realized equals money received from the sale or disposition of property plus the fair market value of property (other than money) received. \textit{Id. § 61(a)(3) (gain from property equals income); id. § 1001(a) (definition of basis); id. § 1001(b) (definition of amount realized).}

\textsuperscript{161} 2003 JCT Report, \textit{supra} note 45, app. 26.4 (Letter from Jonathon Talisman).

\textsuperscript{162} \textit{See I.R.C. § 877(b) (as amended by the 2004 Jobs Act) (alternative tax).}

\textsuperscript{163} \textit{Compare I.R.C. § 877 (as amended by the 2004 Jobs Act), with 2003 JCT Report, \textit{supra} note 45, pt. XI.}


\textsuperscript{165} Such other measures include either imposing a mark-to-market system or simplifying the tax code. \textit{Id. See also supra note 106; H.R. 269, 108th Cong. (2003) (proposing to simplify the current tax code). President George W. Bush has set reforming the tax code as one of his goals during his second term. Howard Gleckman, \textit{Three Roads to Reform: A Bush Panel Homes in on Ways to Make Taxes Fairer and Simpler}, BUS. WEEK, Aug. 1, 2005, \textit{available at} 2005 WLNR 11830849. President Bush appointed an advisory panel to provide recommendations for making the tax code simpler, fairer and more conducive for economic growth. \textit{Id. Among other things, the panel recommended the elimination of the alternative minimum tax. Edmund L. Andrews, \textit{Your Taxes; Tax Reform}}
B. Weaknesses and Strengths of the 2004 Jobs Act

1. Objective Rules for Determining Applicability of the Alternative Tax Regime

Passed in response to the Joint Committee’s hearings and recommendations, the 2004 Jobs Act addressed some of the concerns regarding the difficulty in administering section 877 (as amended by HIPAA) due to its subjective nature and its numerous exceptions. Primarily, the 2004 Jobs Act presumes a principal purpose of tax-avoidance when an individual expatriates, if the individual meets the objective monetary standards. The 2004 Jobs Act amendments also reduced the number of exceptions that allow a former citizen to escape the alternative tax regime from four to two. The increased chance of being placed in the alternative tax regime should act as a further deterrent from taxpatriating since there are fewer loopholes. However, though arguably less so, the prior weaknesses associated with the alternative tax regime are still present. Even if an individual is determined to have taxpatriated and is subjected to the alternative tax regime, the problems of enforcement and


166. See generally I.R.C. § 877 (as amended by HIPAA).
167. See supra text accompanying notes 120–24.
168. Compare HIPAA, Pub. L. No. 104-191, § 511(b), with 2004 Jobs Act, Pub. L. No. 108-357, § 804(a)(2). See also supra note 126 and accompanying text. Additionally, it is striking that these are the only exceptions available to long-term residents. These exceptions seem to only except “accidental” Americans from the alternative tax. Farkins-DiNardo supra note 71, at 33. In contrast, long-term residents seek to establish a close connection with the United States and therefore would not qualify for the exceptions. See id. An argument exists as to whether it is even fair to subject residents to the alternative tax let alone not provide exceptions comparable to those available to U.S. citizens since long-term residents in general choose not to gain U.S. citizenship and have not completely divested themselves of their former identity with another country. One could argue that the exceptions are only applicable to U.S. citizens who seemingly did not choose citizenship and have stayed away but on the other hand, long-term residents chose not to become citizens and did not avail themselves of the full benefits available to U.S. citizens. See also id. at 33–34, 36.
effectiveness remain. If a former citizen is patient or has foreign assets, which are outside the reach of section 877, he or she can escape much of the U.S. tax burden. In short, while the new objective standards theoretically deter tax-motivated expatriation and express official disapproval, they neither remove unintended tax incentives from expatriation nor tax appreciation and asset value accrued during citizenship or residency.

2. Tax-Based Rules For Determining Date of Expatriation

The new subsection (n) of I.R.C. section 7701 (as added by the 2004 Jobs Act) establishes special rules for when an individual is no longer a U.S. citizen or long-term resident. It tries to ensure that former citizens will not be able to renounce citizenship and enjoy the tax benefits of non-resident noncitizens without informing the IRS. However, new subsection (n) does not address the treatment of former citizens who simply leave without formally renouncing citizenship to avoid the alternative tax regime. Subsection (n) does not put in place a procedure to catch those individuals who try to quietly slip away. Although subsection (n) requires filing of an information statement, an individual can avoid imposi-

169. See Liu, supra note 32, at 699. See generally 2004 Jobs Act, Pub. L. No. 108-357, § 804 (amending only subsections (a) and (c) of I.R.C. § 877 (as amended by HIPAA) and not subsection (d) which lists the source rules of income and gain taxed by the alternative tax regime). See also 2003 JCT Report, supra note 45, at 204. It also taxes the resources of the IRS to monitor tax-motivated expatriates for a period as long as ten years.

170. Since these are new standards, we will have to wait to see if the new amendments to section 877 actually deter expatriation. But looking at past trends, it does not look likely.

171. The goal of ensuring that individuals cannot enjoy the tax benefits of expatriating while maintaining significant ties to the United States (goal number five discussed supra note 107 and accompanying text) is not applicable here since it does not regulate physical presence of a former citizen in the United States. See generally § 877(a), (c) (as amended by the 2004 Jobs Act). 172. See supra Part II.D.2.


174. See Beckett G. Cantley, Taxation Expatriation: Will the FAST Act Stop Wealthy Americans From Leaving the United States?, 36 Akron L. Rev. 221, 238 n.95 (2003). Cantley states that “after the last attempt to legislatively deter tax expatriation, many tax expatriates deliberately lost their citizenship without formally renouncing it, believing that was a simple way to avoid the legislation.” Id.

175. See generally I.R.C. § 7701(n) (as added by the 2004 Jobs Act).
tion of the alternative tax regime by failing to file.\textsuperscript{176} Furthermore, the new tax-based rules for determining expatriation do not address the main concerns seen by the IRS and the Treasury Department.\textsuperscript{177} Primarily, the unaddressed concerns include patient expatriates selling assets after the ten year alternative tax period, the non-taxation of foreign assets, and the labor intensive process of monitoring expatriates for ten years after a determination of tax avoidance.\textsuperscript{178}

3. Imposition of Full U.S. Taxation Liability

Not all changes made by the 2004 Jobs Act are ineffective. The addition of subsection (g) to I.R.C. section 877 furthers the Congressional goal of ensuring that individuals cannot enjoy any tax benefits that may arise from expatriating while maintaining significant ties to the United States. Subsection (g) subjects a former citizen to full U.S. taxation if he or she spends more than thirty days in any calendar year within the United States.\textsuperscript{179} This way, only those who truly wish to expatriate, sever considerable ties with the United States, and re-establish or strengthen ties with another country will avoid getting caught in the net of section 877(g).\textsuperscript{180}

\textsuperscript{176} See Kirsch, supra note 14, at 905–06. When coupled with the effects of the Reed Amendment, discussed supra note 56, an individual, even if willing to pay the taxes imposed by I.R.C. section 877, may be motivated to avoid the alternative tax regime by not filing a tax return to decrease his or her chances of being denied entry because the individual was deemed to have expatriated for tax-motivated purposes.

\textsuperscript{177} See generally 2003 JCT Report, supra note 45, at 103–25 (Part VIII: Effectiveness of Present Law Treatment of Citizenship Relinquishment and Resident Termination).

\textsuperscript{178} 2003 JCT Report, supra note 45, app. 27 (Letter from Charles Rosotti, U.S. Department of Justice, to Lindy Paull, Chair of the Joint Committee on Taxation, dated May 5, 2000).

\textsuperscript{179} See supra note 107 and accompanying text (the fifth goal established by Congress). Subsection (g) defines “physical presence” and shortens the amount of time a nonresident noncitizen can be present in the United States without being subject to U.S. taxes. See supra note 141 and accompanying text regarding the exceptions to counting days of physical presence with the United States.

\textsuperscript{180} But see Farkins-DiNardo supra note 71, at 42 (arguing thirty days is not enough to establish a requisite connection for imposition of full U.S. tax liability). However, this fails to consider that the requirement is for former citizens who did not qualify for an exception due to their ties with the United States, and who still continue to maintain ties to the United States requiring presence within the United States for more than thirty days. See also supra Part II.D.3 for exceptions to the thirty day rule.
4. Annual Information Return-Filing Requirement

The amendment to section 6039G of the I.R.C. provides more information to the IRS by facilitating inter-agency exchange. The requirement of filing an annual return may alleviate one of the main problems of administering the alternative tax for ten years after the date of expatriation because it will ease the labor required to find information regarding transactions in which the former citizen is currently engaged.181

C. A Mark-to-Market Regime

Tax-motivated expatriation is born from the unequal treatment of non-resident noncitizens as compared to citizens and residents182 and the realization principle.183 The combination of these two policy decisions creates the temptation for affluent citizens to discard their citizenship and exploit the differing tax treatment before they realize gains on property.184 Ideally, a system to curb expatriation should effectively remedy these issues by removing the benefits. The principal benefits of taxpatriation are the non-taxation of unrealized gains185 on foreign assets and the lower tax rate afforded to nonresident noncitizens of U.S. assets.186 Therefore, if the United States treats assets of former citizens as being “realized,” and subject to U.S. taxation before expatriation becomes official, the benefits of taxpatriation are greatly reduced.

181. This is assuming that the former citizen will adhere to the rules established by I.R.C. § 6039G. If the former citizen does not file information statements with the IRS after expatriating, U.S. courts may not be able to establish personal jurisdiction over non-citizens outside the territorial borders of the United States if the former citizen no longer has “minimum contacts” with the United States. See Int’l Shoe Co. v. Washington, 326 U.S. 310 (1945) and progeny. See generally William S. Dodge, Breaking the Public Law Taboo, 43 HARV. INT’L L.J. 161 (2002) (stating foreign courts routinely refuse to enforce foreign public law).

182. See supra notes 30–36 and accompanying text.


184. The differing tax treatment also includes differer estate tax treatment which is outside the scope of this Note.

185. An “unrealized gain” is a gain where there is still uncertainty as to whether there will be a definite gain or loss. See Burnet v. Logan, 283 U.S. 404 (1931) (where the taxpayer sold shares in an ore mine in exchange for a sum of money, less than their basis, plus the promise of future income based on the amount of ore produced. The court held the gain as “unrealized” and the transaction as still open due to the uncertainty of gain or loss). See also infra note 188 (discussion of basis).

186. I.R.C. § 871 The United States does not impose a capital gains tax on nonresident noncitizens. See Abreu, supra note 8, at 1106 (“[A]dvantages of expatriation are . . . the result of the operation of a tax system that combines the realization requirement with a virtual exemption from tax for appreciation in foreign capital.”).
To effectuate neutrality in the tax system, the United States should replace the alternative tax regime with a mark-to-market regime. This would deem a former citizen’s accrued but unrealized gains on property as “realized” or marked to market, and therefore taxable, on the date the individual seeks to renounce citizenship.\(^{187}\) While more effective than the alternative tax regime, this solution is not without controversy.\(^{188}\) However, modifying a pure realization system to alleviate some of the harsh results from realizing unrealized gains could produce a more effective, as well as fairer, system.\(^{189}\)

Marking to market would require an individual to pay taxes on any unrealized gains above a certain threshold amount (i.e., $1 million) before renunciation of citizenship becomes effective.\(^{190}\) Only taxing unrealized gains above the threshold amount would allay the perceived unfairness of realizing these accrued gains.\(^{191}\) A reasonable threshold amount would

\(^{187}\) “Realizing gains” or marking property to market means treating the asset as if it were sold for its fair market value on the date the individual renounces citizenship and taxes the alleged gain on the property. See supra note 160 for a discussion of “realization.”

\(^{188}\) See Abreu, supra note 8, at 1146–47 (arguing that realizing gains on assets poses a problem to taxpayers because it forces them to determine the basis of their assets). In spite of its difficulty, this places the burden on the individual taxpayer who desires to expatriate rather than on the IRS. Furthermore, conflicts which arise regarding the calculation of basis fall within the regular auditing duties of the IRS and do not require using special resources. See generally Lawrence Zelenak, Taxing Gains at Death, 46 VAND. L. REV. 361 (1993) (illustrating Canada’s system of using a National Appraisal Date to determine the basis of property at death. Canadian officials reported only slight difficulty with calculating basis). “Basis” is needed to determine “Adjusted Basis” which determines the amount of gain or loss. See I.R.C. § 1001 (determination of amount and recognition of gain or loss), § 1011 (adjusted basis for determining gain or loss), § 1016 (adjustments to basis). “Basis” is generally the cost of the asset. I.R.C. § 1012. See also I.R.C. § 1014 (basis of property acquired by descent), § 1015 (basis of property acquired by gift and transfers in trust). Another issue which may arise from realizing unrealized gains is the dispute over valuation of an asset. See 2003 JCT Report, supra note 45, at 198–99. However, this also comes under the regular duties of the IRS and does not require additional resources.

\(^{189}\) But see Farkins-DiNardo, supra note 71, at 40 (arguing that taxing gains on the date of expatriation avoids the problem of double taxation). Even assuming this is true, applying a straight mark-to-market approach is harsh. The mark-to-market approach should be modified to provide a way to deal with illiquidity. See infra note 192 and accompanying text.

\(^{190}\) See supra Part II.B for a discussion on the procedure to renounce U.S. citizenship.

\(^{191}\) One of the reasons for requiring a tax only on gains that are realized is that the gains are tangible. Without realization, there is uncertainty as to whether the asset will produce a gain at all. Burnet, 283 U.S. at 413.
also be more likely to catch wealthy Americans with an incentive to tax-patriate, while allowing average Americans with less of a tax-motivated incentive to escape the tax. The individual would be taxed on those accrued gains above a threshold amount and subject to the same progressive rates as during citizenship.

Another issue raised by implementing a realization regime is the taxpayer’s liquidity.192 If most of the tax-patriate’s wealth is derived from those unrealized gains, then the taxpayer may have difficulty paying the tax assessed. One way to alleviate this problem is to allow, at the option of the taxpayer, installment or deferred payments.193 In either situation, the IRS will most likely also need to receive a security interest in collateral located in the United States to assure payment of the tax.

As stated, the realization regime would further many Congressional purposes as well as eliminate many problems stemming from the alternative tax regime.194 For instance, one of the primary defects in the alternative tax regime is the difficulty in administration. Requiring the IRS to monitor former citizens determined to have expatriated to avoid taxes for ten years after the date of expatriation is a substantial task.195 The proposed realization regime would eliminate the need to monitor former citizens because the taxable gain on property will have been paid. This furthers the Congressional goal of administrative ease by creating a one time tax event for the IRS to administer instead of ten annual ones as required by the alternative tax.196 Taxing gains before an individual expatriates also solves the lack of information dilemma for the IRS since the individual will still be present in the United States to provide it.

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192. 2003 JCT Report, supra note 45, at 199. The term liquidity refers to the taxpayer’s ability to pay the tax using cash or cash equivalents.

193. With interest accruing on unpaid taxes.


196. Another benefit is that the IRS does not have to deal with information statements required by I.R.C. § 6039G and the calculation of days of physical presence under I.R.C. § 877(g).
The realization regime furthers the Congressional goal of taxing appreciation and asset value of property while an individual is a citizen. Since property is deemed “realized” for individuals who wish to expatriate, any gain in value will be taxed. Additionally, the realization tax removes any unintended incentives to expatriation caused by the U.S. tax code and promotes tax neutrality for expatriation by realizing gains upon expatriation. This way, it is more likely that only those with pure desires to expatriate will do so. Lastly, the realization regime would also accomplish Congress’s goals of expressing official disapproval and deterring tax-motivated expatriation.

IV. CONCLUSION

Taxation is a complex machine with many interrelated parts. One component will undoubtedly affect the performance of another. On occasion, the interaction of our system of taxation and the rules used by our society to accomplish certain policy objectives creates undesirable loopholes. Expatriation, when used as a tool to avoid taxation, is one such example. It offers an escape from taxation on gains accrued during a citizen’s lifetime because of a combination of the realization principle and the different treatment afforded foreigners.

In the quest for a solution, Congress developed the alternative tax. The alternative tax regime in existence prior to the 2004 Jobs Act fell short of deterring tax-motivated expatriation. It was ineffective in many ways. First, the regime was difficult to administer and placed the burden of proving subjective intent to avoid taxes on the IRS. Additionally, there were many exceptions which negated the statutory presumption of tax-motivated expatriation. Third, information regarding whether or not a citizen expatriated, and thus left the U.S. taxing jurisdiction, rarely reached the IRS. Finally, a patient expatriate could wait ten years and leave the alternative tax regime before realizing gains.

By passing the 2004 Jobs Act, Congress tried to remedy these deficiencies. Although solving a few inadequacies, many remained. For example, a patient expatriate can still wait ten years before realizing gains.

197. If above the threshold amount suggested supra text accompanying notes 190–91. Taxing appreciation and asset value of property while an individual is a citizen is Congress’s fourth goal. See supra note 107 and accompanying text for a discussion of Congressional goals.

198. See supra note 107. The accomplishment of these two goals is quite clear. The whole purpose in having a law subjecting an expatriate to a separate taxation regime is to deter the expatriation and act as a symbol of disapproval by the regulating body (i.e., Congress).
Also, although less difficult, the alternative tax is still administratively burdensome on the IRS. Furthermore, although more narrow, exceptions still remain to take an expatriate out of the alternative tax regime. With all the complexities and nuances the I.R.C. contains, the simplest and most effective technique for remedying a disapproved course of action is to recognize the benefits of that action and promulgate legislation to directly counter it. To eradicate the benefits from taxpatriating, there should be a realization event which occurs at the time a former citizen attempts to renounce citizenship. Realizing these accrued gains eliminates the desire to taxpatriate, yet does not interfere with those who truly wish to renounce their U.S. citizenship for that of another country. This mark-to-market system would also further many Congressional goals, such as deterrence, disapproval and administrative ease. To mitigate some of the harshness of a pure mark-to-market system, Congress should impose threshold amounts of gain before the tax is imposed. Moreover, Congress should allow deferred or installment payments to ease the taxpayer’s potential lack of liquidity. Additionally, a mark-to-market system would combat one of the toughest inadequacies to remedy—a patient expatriate. Until a time when tax-motivated expatriation ceases to enrage the citizenry as unfairly benefiting the wealthy, the realistic option would be to change a flawed system.

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