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Traveling Violation: A Legal Analysis of the Restrictions on the International Mobility of Athletes

Mike Salerno*

I. Introduction

It is midseason, and LeBron James receives a phone call from his agent that brings a multimillion-dollar grin to the superstar athlete's face.[1] He has the opportunity to sign a 50-million-euro contract to play with Montespachi Siena[2] in Italy for one year. Although LeBron has a contractual obligation to the Cleveland Cavaliers, he figures that the National Basketball Association cannot stop him from signing with the Lega Basket Serie A,[3] a completely separate league in another country. Contrary to his belief, however, LeBron must receive written consent from the Cavaliers before he can ink his new deal.[4]

Suppose now that instead of LeBron James, we have James LeBron the computer chip engineer.[5] He has an employment contract with Company X for a fixed term of years. His experience with the Company has been mixed, and he has no clear prospect of future employment. Months before the end of his contract term, James interviews with Company Y, a competitor in China, and receives an offer for twice his current salary. Company X informs him, however, that an agreement between Companies X and Y precludes him from leaving his cur-

1. This is not a true story; it is merely a hypothetical to highlight the topic of this article.

2. *See Montespachi Siena,* EUROLEAGUE BASKETBALL.COM, http://www.euroleague.net/competition/teams/showteam?clubcode=SIE (last visited Oct. 15, 2011) (indicating that the Montepaschi Siena, also known as the Mens Sana Basket, is a professional basketball team in the Turkish Airlines Euroleague).

3. *See* Alvaro Martin, *State of Playing Opportunities Abroad*, ESPN.COM (July 25, 2011), http://espn.go.com/nba/story/_/id/6781979/nba-lockout-international-options-players (stating that the Lega Basket Serie A is the second-strongest European basketball league as well as the third-strongest overall professional basketball league behind only the NBA and Spain's ACB league).

4. *See* Agreement by and Between National Basketball Association (NBA) and Federation Internationale de Basketball (FIBA), reprinted in INTERNATIONAL SPORTS LAW AND BUSINESS 753–758 (Aaron N. Wise & Bruce S. Meyer eds. 1997) (NBA-FIBA Agreement); *see also* Stephen A. Kauffman, *Entertainment Industry Contracts*, Form 10-210 Entertainment Industry Contracts FORM 210-1, in ENTERTAINMENT INDUSTRY CONTRACTS ¶ 17 (Donald C. Farber ed., LexisNexis 2011) (governing professional athletes' participation in other sports where a basketball player may not engage in any game or exhibition of basketball, football, baseball, hockey, lacrosse, or other athletic sport without facing a penalty imposed by the club and/or the commissioner of the association except where the player has the club's written consent).

5. Again, this is a fictional scenario as a means of serving an example; the author apologizes for any accidental coincidences.

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rent position without Company X's written approval. The prohibition seems to be an unfair restriction on James LeBron; Company X is challenging his right to quit his job and resume employment with a competitor.[6] The law would undoubtedly determine this agreement to be an illegal restraint of trade.[7] Why does the law treat these two analogous scenarios differently?

Restrictions on the international movement of basketball players are common. The National Basketball Association (NBA) and the Federation Internationale de Basketball (FIBA) have an agreement limiting the terms on which a player can sign with the other league.[8] The same two professional organizations also limit the amount of time NBA players are allowed to practice with their country's national teams.[9] Restrictions extend beyond the professional level; the National Collegiate Athletic Association (NCAA) limits college athletes' international mobility through amateur status regulations.[10]

This article will suggest the NBA-FIBA Agreement regulating professional athletes' international mobility is a potential antitrust violation. It will next examine the NBA-FIBA restrictions on national team players as grounds for an antitrust challenge. Finally, the article will analyze the NCAA's extension of its rule of amateurism to international athletes and argue that the NCAA needs to adapt to the realities of international basketball.

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6. Assume for the sake of the hypothetical that there have been no restrictive employee covenants, such as a non-competition agreement, signed.

7. *See* 15 U.S.C. § 1 (2011) (explaining that every contract in restraint of trade or commerce with foreign nations is illegal); *see, e.g.*, *Licocci v. Cardinal Associates, Inc.*, 445 N.E.2d 556, 561 (Ind. 1983) (holding that because employment noncompetition agreements restrain trade and are not favored by the law, these agreements are to be strictly construed against the employer).

8. *See* AARON N. WISE & BRUCE S. MEYER, INTERNATIONAL SPORTS LAW AND BUSINESS 753–58 (Kluwer Law International, Vol. 1, 1997) (reprinting the Agreement Between the NBA and the FIBA, which states that both leagues will seek to enact procedures that respect the commitments made between players and teams in the other's respective league); *see, e.g.*, Lewis Kurlantzick, *The Tampering Prohibition and Agreements Between American and Foreign Sports Leagues*, 32 COLUM. J.L. & ARTS 271, 301–2 (2009) (noting that both leagues respect each other's existing contractual commitments with players by requiring permission from the FIBA for a FIBA player to sign a contract with a NBA team).

9. *See* Requirements Regarding NBA Player Participation with National Teams, *available at* http://www.fiba.com/pages/eng/fc/FIBA/ruleRegu/p/openNodeIDs/916/selNodeID/916/fibaRegu.html; *see also* Kauffman, *supra* note 4 (explaining that all players must be cleared by FIBA to play basketball in another country); *see, e.g.*, Federal Internationale Basketball Ass'n, *Chapter 1.—Eligibility and National Status of Players*, BOOK 3—PLAYERS AND OFFICIALS ¶ 9, *available at* http://www.fiba.com/downloads/v3_expe/agen/docs/3-ELIGIBILITY-NATIONAL-STATUS-of-%20PLAYERS.pdf (articulating that FIBA encourages players to make themselves available for competitions for both their club and their national team where national member federations are encouraged to enact regulations requiring all players participate for their respective national teams).

10. *See* Nat'l Collegiate Athletic Ass'n, *2011-2012 NCAA Division I Manual*, in NAT'L COLLEGIATE ATHLETIC ASS'N ¶ 2.9, *available at* http://www.ncaapublications.com/productdownloads/D112.pdf (explaining that NCAA regulations protect student-athletes from professional exploitation by upholding the principle of amateurism where student-athletes' athletic participation should be motivated by education); *see, e.g.*, Purdue Univ., *Foreign Tours and Competition Approval*, PURDUE UNIV., http://www.purdue.edu/athletics/compliance/pdf_forms/ Foreign_Tour_Approval_Form.pdf (requiring the coach, director of athletics, and office of compliance to complete and sign this form in compliance with NCAA regulations regarding athletics competition on foreign tours).

II. The NBA-FIBA Agreement

The 15-round 1970 NBA Draft marked a historic moment for the NBA. The Atlanta Hawks used two picks to select the first international players ever drafted: Manuel Raga of Mexico[11] and Dino Meneghin of Italy.[12] However, the Hawks did not pay the $35,000 to buy out their international contracts and the players never played in the NBA.[13] The international trend continued: players such as Manute Bol,[14] Arvydas Sabonis,[15] and Toni Kukoc[16] paved the way for today's international stars Tony Parker,[17] Dirk Nowitzki,[18] and Manu Ginobili.[19] The market for NBA talent continually expanded, and by 2010 the opening-day rosters of NBA teams featured 84 international players.[20] Realizing that the leagues were in competition for players, the NBA and FIBA sought protection from the poaching of each other's players. In

11. *See* Manuel Raga—(1963-1977), EUROLEAGUEBASKETBALL.COM, http://www.euroleague.net/history/50-years/the-archive/i/26219/1609/item (last visited Oct. 15, 2011) (reviewing Manuel Raga's 14-season career in the FIBA, where he helped the Italian club Varese attain three Italian league crowns, three Italian cups, and three Euroleague titles).

12. *See* Dino Meneghin—(2010 Class), FIBA HALL OF FAME, http://www.halloffame.fiba.com/pages/eng/hof/indu/play/2007/p/lid_17904_newsid/42701/bio.html (last visited Oct. 15, 2011) (noting that Dino Meneghin played professionally in Italy for 28 seasons and helped the Italians grab the silver medal in the 1980 Olympic Games. He was elected to both the FIBA Hall of Fame and the Naismith Professional Basketball Hall of Fame).

13. *See* Darren Rovell, *Searching for the Next Pau Gasol*, ESPN.COM (Jun. 22, 2004, 2:21 PM), http://sports.espn.go.com/nba/draft2004/news/story?id=1826128 (reporting that the Atlanta Hawks' general manager did not come up with the money to buy out the professional contracts of either Manuel Raga or Dino Meneghin).

14. *See* Manute Bol Biography, DRAFT REVIEW, http://www.thedraftreview.com/index.php?option=com_content&task=view&id=2159 (last visited Oct. 15, 2011) (reporting that Manute Bol was initially drafted by the San Diego Clippers in the 1983 NBA Draft, but the selection was declared ineligible. He ultimately was drafted by the Washington Bullets after one season at the University of Bridgeport).

15. *See* Arvydas Sabonis, NAISMITH MEMORIAL BASKETBALL HALL OF FAME, http://www.hoophall.com/hall-of-famers/tag/arvydas-sabonis (last visited Oct. 15, 2011) (stating that Arvydas Sabonis, a native of Lithuania, played in Europe for 15 seasons before being drafted in 1986 by the Portland Trail Blazers).

16. *See* Melissa Isaacson, *Toni Kukoc Is Right at Home in Chicago*, ESPN CHICAGO (June 9, 2007, 7:36 PM), http://sports.espn.go.com/chicago/nba/columns/story?columnist=isaacson_melissa&id=6643046 (recognizing that Toni Kukoc played in Europe as a teenager, before the Yugoslavian native signed a contract with the Chicago Bulls in 1993, where he won three consecutive NBA championships with the famous Michael Jordan-led team).

17. *See Tony Parker Biography*, ESPN.COM, http://espn.go.com/nba/player/_/id/1015/tony-parker (last visited Oct.15, 2011) (listing Tony Parker's birthplace as Bruges, Belgium).

18. *See Dirk Nowitzki Biography*, ESPN.COM, http://espn.go.com/nba/player/bio/_/id/609/dirk-nowitzki (last visited Oct.15, 2011) (listing Dirk Nowitzki's birthplace as Wurzburg, West Germany).

19. *See Manu Ginobili*, ESPN.COM, http://espn.go.com/nba/player/_/id/272/manu-ginobili (last visited Oct.15, 2011) (listing Manu Ginobili's birthplace as Bahia Blanca, Argentina).

20. *See Record 84 International Players as 2010–11 NBA Season Opens*, INTERBASKET.NET (Oct. 31, 2010, 3:47 PM) http://www.interbasket.net/news/7229/2010/10/record-84-international-players-as-2010-11-nba-season-opens/ (reporting that a record 84 international players from 38 countries will be on opening night rosters for the 2010–11 NBA season).

May of 1990, the leagues drafted an agreement between the NBA and FIBA to narrow the terms under which each league could sign players (the Agreement).[21]

The Agreement implements procedural protections that restrict the free flow of athletes between international leagues. A player seeking a transfer between leagues must receive a letter of clearance from his current organization.[22] Under the Agreement, the NBA and FIBA may properly deny a request based solely on the existence of an existing, valid player contract.[23] Moreover, teams from both leagues are required to use their best efforts to discourage negotiating and signing players who are under existing contracts with their respective leagues.[24]

A. Applicability of the Sherman Act to International Agreements

The Agreement is vulnerable to attack as an unreasonable restraint of trade prohibited by the Sherman Antitrust Act. The restraint clearly falls within the act's plain language, which states, "Every contract, combination, . . . or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[25] Furthermore, the act explicitly states that it applies to conduct that has a "direct, substantial, and reasonably foreseeable effect" on exports of goods or services from the United States.[26] In this case, the restrictions on the mobility of players seeking to play in Europe will substantially affect commerce of the NBA and therefore the commerce of the United States.[27] Players will not have the autonomy to move freely among leagues, thereby affecting the NBA's market for players.[28] The

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21. *See* NBA-FIBA Agreement, reprinted in INTERNATIONAL SPORTS LAW AND BUSINESS 753–58 (Aaron N. Wise & Bruce S. Meyer eds. 1997); *see also* Jeffrey A. Mishkin, *Dispute Resolution in the NBA*, 35 VAL. U. L. REV. 449, 458–59 (2001) (presenting the Agreement between NBA and FIBA as an exemplar for addressing contract disputes with foreign basketball players); *see also Twenty Years of Cooperation Between FIBA and NBA*, FIBA.COM (Oct. 5, 2010), http://www.fiba.com/pages/eng/fc/news/lateNews/-arti.asp?newsid=39915 (explaining how the Agreement regulated how professional players transfer between the NBA and FIBA).

22. *See* NBA-FIBA Agreement, *supra* note 21; *see also* AARON N. WISE & BRUCE S. MEYER, EDS., INTERNATIONAL SPORTS LAW AND BUSINESS 755 (1997) (providing the language of the provision that requires players to obtain a letter of clearance); *see also* Lewis Kurlantzick, *The Tampering Prohibition and Agreements Between American and Foreign Sports Leagues*, 32 COLUM. J.L. & ARTS 271, 301–2 (2009) (describing how the NBA and FIBA's agreement requires players to obtain a letter of clearance to transfer organizations).

23. *See* WISE & MEYER, *supra* note 22, at 754–55 (agreeing to deny a request for transfer if a valid player contract exists).

24. *See id.* at 756–57 (limiting negotiations with players under contract but not prohibiting them. However, 5.3 of the Agreement clarifies that this is not an outright prohibition against negotiations or signings so long as the new Player Contract is not to take effect until the old contract is no longer binding).

25. *See* 15 U.S.C. § 1 (1890) (establishing the illegality of restraining international and nation trade or commerce).

26. *See* 15 U.S.C. § 6a (2000) (defining conduct applicable under the statute); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987) (declaring a state's right to create laws governing conduct outside the state if that conduct has substantial effects within the state).

27. *See* 15 U.S.C. § 6a (2000) (defining conduct applicable under the statute); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987) (declaring a state's right to create laws governing conduct outside the state if that conduct has substantial effects within the state).

28. *See* Kurlantzick, *supra* note 22, at 303 (explaining how player mobility restrictions limit player bargaining positions by creating less competition for employers and negatively affecting commerce); *see also* Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 U. ILL. L. REV. 519, 571 (arguing that player restraints negatively impact competitive balance).

NBA-FIBA Agreement therefore passes the "substantial effect test" and is reached by U.S. antitrust law.

1. Extraterritorial Application of the Sherman Act

Despite the fact that the conduct falls within the language of the statute, a preliminary issue is whether the Sherman Act applies to international agreements. Although the broad language of the act, "with foreign nations,"[29] does little to define limits to the act's reach, it has been clarified by government agencies and the judiciary. The Department of Justice and the Federal Trade Commission offer guidance, stating, "Anticompetitive conduct that affects U.S. domestic or foreign commerce may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved."[30] Justice Souter elaborated further in *Hartford Fire Insurance Co. v. California*, noting that it is "well established by now that the Sherman Act applies to foreign conduct that was meant to produce, and did in fact produce, some substantial effect in the United States."[31] In addition, the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) clarified the Sherman Act's language "with foreign nations."[32] The FTAIA essentially expands the Sherman Act's scope to cover imports or exports that will have an effect on U.S. commerce.[33] The FTAIA's concern was to tighten the scope of the Sherman Act to remove situations where only foreign parties are injured.[34]

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29. *See* Archer Daniels Midland Co. v. Seven Up Bottling Co. of Jasper, Inc., 746 So.2d 966, 983–84 (Ala., 1999) (discussing how court decisions have expounded upon the "jurisdictional reach" of the Sherman Act, expanding it beyond the intent of the drafters).

30. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement Guidelines for International Operations § 3.1 (1995) (stating that there may be a violation of U.S. antitrust laws when anticompetitive conduct affects U.S. domestic and foreign commerce); *see also* 2 A.B.A. SEC. OF ANTITRUST L., ANTITRUST LAW DEVELOPMENTS 1518 (5th ed. 2002) (discussing the U.S. antitrust laws are violated when anticompetitive conduct affects foreign and domestic commerce).

31. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) (indicating that the Sherman Act applies to foreign conduct that affects the United States).

32. *See* 15 U.S.C. § 6(a) (2000) (explaining that the Act does not apply to conduct involving trade or commerce with foreign nations unless such conduct affects domestic trade with foreign nations); *see also* Den Norske Stats Oljeselskap As v. Heeremac Vof, 241 F.3d 420, 421–22 (5th Cir. 2001) (observing that Congress enacted the FTAIA "to clarify the application of United States Antitrust laws to foreign conduct").

33. *See* 15 U.S.C. § 6(a) (2000) (expanding the scope to include trade or commerce with foreign nations that affects domestic trade or commerce or foreign import trade or commerce); *see also* Fond du Lac Bumper Exchange, Inc. v. Jui Lui Enterprise Co., Ltd., No. 09C0852, 2011 WL 2632214, at *2 (E.D. Wis. July 6, 2011) (noting that "Congress enacted the FTAIA because . . . it became concerned that the Sherman Act was excessively hospitable to suits alleging foreign injuries rather than injuries to American consumers").

34. *See* 15 U.S.C. § 1 (2000) (expanding the act's scope to include "[e]very contract . . . or conspiracy, in restraint of trade or commerce among the several states"); *see also* In re Potash Antirust Litigation, 667 F. Supp. 2d 907, 925 (N.D. Ill. 2009) (explaining that the FTAIA enabled the Sherman Act to cover conduct that "affects American commerce" and has a "harmful" effect under Antitrust law).

2. Procedural Requirements

The reach of U.S. antitrust laws is reinforced procedurally through Rule 4(k)(2) of the Federal Rules of Civil Procedure.[35] The rule provides for worldwide service of process over a defendant on a federal claim if the defendant is not subject to jurisdiction in any state's court of general jurisdiction.[36] It alleviates previous state constitutional limitations on the filing of federal suits against a foreign defendant that did not have sufficient contacts with any one state.[37]

The only remaining issue is whether a suit satisfies the due process requirement of the Fifth Amendment. The due process standard, laid out in *International Shoe v. Washington*, requires an examination of whether a foreign party has sufficient contacts with the United States.[38] FIBA has long-standing contacts with the United States through the NBA-FIBA Agreement, sending players to NCAA institutes, and as a regulatory body for national team competition of which USA Basketball is a member.[39] Additionally, the NBA-FIBA Agreement has a choice of law clause that provides that all disputes will be governed by New York law.[40] As such, FIBA has appropriate notice that any disagreement will be subject to the jurisdiction of American courts.[41]

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35. *See* Sea-Roy Corp. v. Parts R Parts, No. 1-94CV00059, 1995 U.S. Dist. LEXIS 21859, at *37 (D.N.C. Aug. 15, 1995) (discussing an antitrust conspiracy in which the defendants did not have enough contacts to meet the requirements of Fed. R. Civ. P. 4(k)(2)); *see also* In re Vitamins Antitrust Litig., 94 F. Supp. 2d 26, 34 (noting that an antitrust plaintiff did not satisfy the burden of proving the defendant had sufficient contacts to satisfy Rule 4(k)(2)).

36. *See* Fed. R. Civ. P. 4(k)(2) (providing that personal jurisdiction can be established when the defendant is not subject to general jurisdiction in any state court as long as it is consistent with U.S. law).

37. *See* Porina v. Marward Shipping Co., 521 F.3d 122, 126 (2d Cir. 2008) (stating that under Rule 4(k)(2) courts may assess parties' contacts with the United States as a whole, instead of limiting their analysis to particular states); *see also* Christopher Ryan, Note, *Has the Long Arm of the Federal Government Reached Too Far? Federal Long Arm Jurisdiction in the Wake of United States v. Swiss American*, 23 T. JEFFERSON L. REV. 319, 326 (2001) (explaining that Rule 4(k)(2) was designed to protect foreign defendants).

38. *See* Int'l Shoe v. Washington, 326 U.S. 310, 316 (1945) (providing that a defendant must have certain minimum contacts with the forum such that the suit does not offend "traditional notions of fair play and substantial justice"); *see also* Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 619 (1992), (showing that the International Shoe minimum contacts test can be applied to a foreign entity).

39. *See Inside USA Basketball*, The Official Site of USA Basketball, http://www.usabasketball.com/about/inside.html (last visited Oct. 15, 2011) (stating that USA Basketball is a nonprofit organization responsible for training and fielding U.S. teams); *see also* Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. De Equip. Medico, 563 F.3d 1285, 1297 (Fed. Cir. 2009) (proclaiming that a foreign manufacturing company is subject to specific jurisdiction because of its connection to the United States); *see also* Behagen v. Amateur Basketball Assoc., 744 F.2d 731, 734 (10th Cir. 1984) (providing that an international basketball association maintained continuous and substantial activity in Colorado).

40. *See* NBA-FIBA Agreement, at § 9 (1990) (quoting "This Agreement shall be governed by the substantive laws of the State of New York, without reference to conflict of law rules"); *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 482 (1985) (remarking that choice of law analysis should be incorporated into the minimum contacts test); *see also* Goodman Co., L.P. v. A & H Supply, Inc., 396 F. Supp. 2d 766, 772 (D. Tex. 2005) (proclaiming that a choice of law provision, along with an expansive guaranty, is enough to establish minimum contacts).

41. *See Behagen*, 744 F.2d at 734 (holding that personal jurisdiction over FIBA was established through the continuous and substantial activity of its U.S. constituent organization); *see also* Lewis Kurlantzick, *The Tampering Prohibition and Agreements Between American and Foreign Sports Leagues*, 32 COLUM. J.L. & ARTS 271, 305–6 (2009) (asserting that the nature and quantity of FIBA's contacts with the United States are sufficient to meet the constitutional requirements for service of process and personal jurisdiction).

Accordingly, the Agreement is clearly subject to U.S. antitrust law, and FIBA is subject to suit thereunder.

3. The Nonstatutory Labor Exemption

While the NBA-FIBA Agreement is not shielded from the application of U.S. antitrust law, it also receives no shelter from the "non-statutory labor exemption."[42] The exemption has garnered judicial approval through interpretation of federal labor laws and allows collectively bargained agreements to avoid interference from antitrust laws despite restraining effects on trade.[43] Although it does not apply in this case, many sports leagues have taken advantage of the exemption to bargain for restraints that would otherwise be antitrust violations.[44]

The nonstatutory labor exemption developed from the tension between protecting competitive markets from restraint and allowing labor and business to come to agreeable terms of employment.[45] Originally, unions organizing boycotts and strikes in support of labor interests were at risk of violating the Sherman Act.[46] In response, Congress created the exemption to provide labor unions more freedom to negotiate employer-employee arrangements governing

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42. With the exception of Major League Baseball, the Supreme Court has not specifically exempted professional sports leagues from antitrust laws. However, other professional sports leagues do find protection from antitrust lawsuits through the nonstatutory labor exemption. *See* Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953) (affirming the decision of the lower court on the basis of congressional intent not to include baseball within the scope of federal antitrust laws); *see also* Brown v. Pro Football, Inc., 518 U.S. 231, 234 (1996) (holding that federal labor laws shielded defendant club owners' collective bargaining agreement from attack under antitrust law).

43. *See Brown*, 518 U.S. at 237 (explaining how restraints on competition are shielded from antitrust sanctions in order to allow collective bargaining to take place); *see also* Abraham Spira, *Almost Three Decades Later, Is* Mackey *Still Viable?*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 805, 806 (2007) (discussing management's incentive to include all major issues in negotiations in order to afford protection from antitrust scrutiny). The nonstatutory labor exemption is distinguishable from the statutory labor exemption, 15 U.S.C. § 17 (2006), which exempts labor organizations from antitrust laws. The statutory labor exemption allows unions to enter into agreements that might eliminate competition from other unions and create a monopoly in the union; businesses cannot claim this statutory labor exemption. *See* In re Detroit Auto Dealers Ass'n, Inc., 955 F.2d 457, 463–64 (6th Cir. 1992) ("[T]he statutory labor exemption] may only be asserted by a labor organization itself, not by employers.").

44. *See* Mackey v. Nat'l Football League, 543 F.2d 606, 623 (8th Cir. 1976) (concluding that a rule allowing the league commissioner to require the club acquiring a free agent to compensate the free agent's former club is not exempt from antitrust laws); *see also* Sheet Metal Div. v. Local 38 of the Sheet Metal Workers Int'l Ass'n, 208 F. 3d 18, 22–23 (2d Cir. 2000) (demonstrating that an agreement with terms "so intimately related to wages, hours and working conditions" may not be exempt from antitrust scrutiny).

45. *See* Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975) (explaining how, despite its effect on price competition among employers, the nonstatutory exemption favors eliminating employee competition over wages and working conditions); *see also* Amalgamated Meat Cutters v. Jewel Tea, 381 U.S. 676, 689–90 (1965) (finding that wage, hour, and working condition restrictions fall within the protection of national labor policy and are restricted from antitrust law).

46. *See* Daralyn J. Durie & Mark A. Lemley, *The Antitrust Liability for Labor Unions for Anticompetitive Litigation*, 80 CAL. L. REV. 757, 769 (1992) (stating that group boycotts and exclusive-dealing arrangements may constitute antitrust violations); *see also* Ernest H. Schopler, *Refusals to Deal as Violations of the Federal Antitrust Laws (15 U.S.C.A. §§ 1, 2, 13)*, 41 A.L.R. FED. 175 (1979) (asserting that refusing to deal has been considered as a violation the Sherman Act).

such terms as wages and working conditions.[47] Years later, Congress passed the National Labor Relations Act of 1935 (NLRA) to extend the exemption to collectively bargained agreements between unions and businesses, which were also restraints of trade.[48] The NLRA expressly endorses the practice of collective bargaining as a solution to impediments of commerce,[49] and lists wages, hours, and working conditions as deserving of protection.[50]

Faced with seemingly conflicting federal policies, collective bargaining agreements, and unrestricted competition in business markets, the Supreme Court confirmed the necessity of granting some union-employer agreements a limited exemption from antitrust scrutiny.[51] Collectively bargained agreements are given protection because both parties are able to negotiate the terms of the agreement.[52] The law assumes that any restraint by one party on another has been recognized and accepted by the restricted party.[53]

A pertinent example is *Brown v. Pro Football, Inc*.[54] There, the Court of Appeals for the District of Columbia held that the NFL's unilateral conduct in imposing fixed salaries for developmental squad players fell within the scope of the exemption from antitrust liability.[55] The 1987 NFL Collective Bargaining Agreement had expired, and good faith bargaining between the NFL and the National Football League Players Association (NFLPA) had reached

47. *See* 15 U.S.C. § 17 (2010) (claiming that antitrust laws do not prohibit the formation of labor organizations); *see also* 29 U.S.C. § 102 (1988) (suggesting that additionally Congress intended that workers "have full freedom of association, self-organization, and designation of representatives . . . to negotiate the terms and conditions of his employment").

48. *See* Shepard Goldfein & William L. Daly, *The Elimination of the "Antitrust Lever" From Collective Bargaining Negotiations in Professional Sports Is a "Return to Normalcy,"* 10 ANTITRUST 35, 39 (1995) (arguing the National Labor Relations Act excluded the application of antitrust laws to the collective bargaining process); *see also* Derek D. Yu, *The Reconciliation of Antitrust Laws and Labour Laws in Professional Sports*, 6 SPORTS LAW. J. 159, 163 (1999) (maintaining that the application of antitrust laws to collective agreement would violate the policies of the National Labor Relations Act).

49. *See* 29 U.S.C. § 151 (1947) (stating that it is the policy of the United States to remove all obstacles inhibiting collective bargaining).

50. *See* 29 U.S.C. § 158 (d) (1988) (explaining that collective bargaining requires that both parties confer in good faith to negotiate conditions of employment).

51. *See Connell Constr. Co*., 421 U.S. at 622 (insisting that "labor unions are not combinations or conspiracies in restraint of trade" and are exempt from antitrust laws); *see also Amalgamated Meat Cutters*, 381 U.S. 676, 691 (1965) (stating that a restraint involving a matter of immediate and direct concern to the union members was exempt from the Sherman Act).

52. *See* Beth Bates Holiday et al., *§ 543. Employers' Associations*, 39A OHIO JUR. 3D EMP'T RELATIONS § 543 (suggesting that group bargaining is beneficial for both employers and employees); *see also* Charles B. Craver, *Why Labor Unions Must (and Can) Survive*, 1 U. PA. J. LAB. & EMP. L. 15 (1998) (proclaiming that workers represented by collective bargaining agents benefit economically).

53. *See generally* Timothy L. Epstein, *Sports' Unions Help Maintain Integrity of Competition,* 157 CHI. DAILY L. BULL. 150 (2011) ("Courts have carved out nonstatutory labor exemptions for restraints that would otherwise be considered illegal, as long as such restraints are collectively bargained for.").

54. *See* Brown v. Pro Football, Inc., 50 F.3d 1041, 1058 (D.C. Cir. 1995) (specifying that the nonstatutory labor exemption is applicable when the alleged restraints are in labor markets that are governed by collective bargaining agreements).

55. *See id.* at 1046 (reversing the decision of the District Court and finding that the nonstatutory labor exemption applies to the negotiations between the NFL and the NFLPA).

a deadlock with respect to salaries for a new squad of six "practice players," a new term in the renegotiations.[56] The case is significant in that it not only recognized that the nonstatutory labor exemption applied, but that it applied to a term that was not in the previous agreement, which applied after the previous agreement had expired.[57] The court emphasized that the challenged conduct had a substantial nexus to the bargaining process:

> The conduct took place during and immediately after a collective-bargaining negotiation. It grew out of, and was directly related to, the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. Furthermore, it concerned only the parties to the collective-bargaining relationship.[58]

The NBA-FIBA Agreement does not find protection in the nonstatutory labor exemption.[59] For the exemption to apply, the subject matter of the negotiation and agreement must be of the kind for which the parties could have bargained and typically do bargain.[60] However, the National Basketball Players Association (NBPA) union was not a party to the NBA-FIBA Agreement.[61] The lack of involvement by the NBPA seems to preclude application of the exemption, as the players were not aware of the restrictions being placed on them by the inclusion of the Agreement.[62] As the *Brown* court articulated, the antitrust laws should apply when

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56. *See id.*(pointing to discussions between the NFLPA and the NFL where the NFLPA rejects the concept of fixed wages for any group of players, including those on developmental squads).

57. *See* JOHN O. SPENGLER ET AL., INTRODUCTION TO SPORT LAW 247–48 (2009) (explaining that while it is unclear how long the exemption actually lasts, it is now likely that the exemption will apply as the parties are negotiating or while they may still be able to negotiate). *Cf.* Bridgeman v. Nat'l Basketball Ass'n, 675 F. Supp. 960, 965 (D.N.J. 1987) (quoting "[C]ourts have generally applied the nonstatutory exemption only where the challenged practices are authorized by a collective bargaining agreement, rejecting broad arguments that labor principles should automatically override antitrust principles as long as an exclusive bargaining representative is in place").

58. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996) (explaining that the conduct arose from a lawful collective-bargaining process).

59. *See* Reed v. Advocate Health Care, No. 06-C3337, 2007 WL 967932, at *3 (N.D. Ill. Mar. 28, 2007) (pointing out that an employer is not immune from suit under the antitrust laws solely because it is a party to a CBA, when it is in fact bargaining outside of the CBA with other employers); *see also FIBA/NBA—Impact of NBA Lockout on 2011 FIBA Competitions*, INT'L BASKETBALL FED'N. (Jan. 7, 2011), http://www.fiba.com/pages/eng/fc/news/lateNews/p/newsid/47668/arti.html (discussing that the NBA-FIBA Agreement is ineffective during the NBA lockout but would immediately become effective if a collective bargaining agreement were reached).

60. *See* Nat'l Basketball Ass'n v. Williams, 45 F.3d 684, 686 (2d Cir. 1995) (referencing that when a collective bargaining relationship exists the nonstatutory labor exemption will apply); *see also* Clarett v. Nat'l Football League, 369 F.3d 124, 136 (2d Cir. 2004) (reasoning that the nonstatutory exemption is applicable when the agreement being challenged concerns mandatory subjects of bargaining).

61. *See* Lewis Kurlantzick, *The Tampering Prohibition and Agreements Between American and Foreign Sports Leagues*, 32 COLUM. J.L. & ARTS 271, 309 (2009) ("[The NBPA's] participation was never solicited, it did not participate in negotiations, and it never formally approved the pact.").

62. *See* GLENN M. WONG, ESSENTIALS OF SPORTS LAW 491–92 (4th ed. 2010) (discussing that the nonstatutory labor exemption requires a restraint on trade that affects the bargaining parties, concerns the primary subject of the bargain, and is made at arm's length); *see also* Mackey v. Nat'l Football League, 543 F.2d 606, 614 (8th Cir. 1976) (finding that in order for the exemption to apply, the agreement must be the product of a "bona fide arm's-length bargaining").

the agreement at issue is "sufficiently distant in time and in circumstances from the collective-bargaining process . . . [so that] permitting antitrust intervention would not significantly interfere with that process."[63] Without the players' involvement, the negotiation of the Agreement with a third party is fundamentally different from the collective-bargaining process.[64] In conclusion, although restraints on labor are involved here, it is clear that the nonstatutory labor exemption does not apply.

B. Analysis of the Applicable Antitrust Law

The next step in the analysis is to evaluate the Agreement under the applicable antitrust law. With a relatively skeletal source of statutory guidance, antitrust law has developed its authoritative muscle through judicial application.[65] The judiciary has three approaches for antitrust analysis: the *per se* violation, reserved for violations that are clearly restraints of trade on their face;[66] the *quick look* approach;[67] and the fully intensive *rule of reason* approach.[68] The most appropriate approach to analyze the NBA-FIBA Agreement and to balance the procompetitive and anticompetitive effects of the Agreement is the rule of reason approach.[69]

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63. *See Brown*, 518 U.S. at 250 (holding the antitrust exemption applies when employer conduct is directly related to the bargaining process and occurred in close proximity to the negotiations).

64. *See* Powell v. Nat'l Football League, 930 F.2d 1293, 1297 (8th Cir. 1989) (finding that the nonstatutory labor exemption can be used by employers only when there is a challenge to a restraint of an existing agreement); *see also* Leading Cases, *Nonstatutory Labor Exemption*, 110 HARV. L. REV. 327, 328 (1996) (explaining that the nonstatutory labor exemption can only apply if no third parties are affected outside of the collective bargaining relationship).

65. For an interesting perspective on the reasoning behind such limited statutory direction, *see* WILLIAM E. FORBATH, *Politics, State-Building, and the Courts, 1870-1920, in* 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE LONG NINETEENTH CENTURY (1789–1920) 643, 661–62 (Michael Grossberg & Christopher Tomlins eds., 2008) (using the 1888–90 congressional debates to show that Congress intentionally left the statute for courts to determine which forms of business conduct violated the act and encourage competition).

66. *See* Northern Pac. Ry. v. U.S., 356 U.S. 1, 5 (1958) (noting that an inquiry as to the legality of an agreement is unnecessary when it threatens competition for no reason); *see also* United States. v. Addyson Pipe & Steel Co., 175 U.S. 211, 238 (1899) (finding that if an agreement exists, it does not matter how reasonable the fixed prices are or the level of competition, it is a per se violation and is presumed an illegal restraint on trade and tending to a monopoly); *see also* William H. Page, *Ideological Conflict and the Origins of Antitrust Policy*, 66 TUL. L. REV. 1, 46 (1991) (noting that the per se rule changed the common law by creating the presumption that all restraints on trade are unlawful).

67. *See* California Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 770 (1999) (noting that a quick look is appropriate only when the agreement on its face has obvious anticompetitive tendencies); *see also* United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993) (holding that a quick look analysis requires a court to determine the reasonableness of an inherently illegal agreement if the defendant can offer market analysis to argue that it is "pro-competitive").

68. *See* 15 U.S.C. § 1 (stating that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal"); *see also* William Kolasky, *Chief Justice Edward Douglass White and the Birth of the Rule of Reason*, 24 ANTITRUST 77, 81 (2010) (noting that the rule of reason requires the court to analyze whether a restraint on competition was reasonable or not, in the context of the Sherman Act).

69. *See* Standard Oil Co. v. U.S., 221 U.S. 1, 58 (1911) (holding that the rule of reason requires an analysis on whether the agreement is unreasonably restrictive on competition or on trade); *see also* Kolasky, *supra* note 68 (describing that the rule of reason prohibits any contract that was unreasonably anticompetitive, which was entered against the public good to limiting the free flow of commerce).

The "rule of reason" approach reflects the court's retreat from the strict application of a per se rule, recognizing that some agreements may indeed be reasonable and have procompetitive effects.[70] Under this analysis, only *unreasonable* restraints of trade are prohibited.[71] This analysis can be quite burdensome, however, because it involves heavy economic analysis and becomes a battle of market analysis experts.[72] As a result, it can be expensive and time intensive.[73] The courts accommodated these fiscal concerns by developing a less intensive "quick look" approach that does not require the full market analysis of the rule of reason.[74]

1. The Global Market for Professional Basketball

The definition of the relevant market is a central component of antitrust analysis and will affect the relative weight of the procompetitive and anticompetitive effects of a restrictive covenant.[75] Markets can be determined by identifying the product and defining the geographic reach of the product.[76] Once the market is properly defined, the courts can analyze the market power of an entity.

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70. *See* Continental T.V., Inc v. GTE Sylvania Inc., 433 U.S. 36, 49 (1997) (noting that the rule of reason analysis is used to determine whether a restraint is being placed on competition and if that restraint should be prohibited); *see also* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 66 (1911) (establishing the rule of reason as the guide for determining whether an act places a restraint on trade).

71. *See* Standard Oil Co. of N.J., 221 U.S. 1, at 89–91 (1911) (explaining that combinations and contracts unreasonably restraining trade are subject to actions under the antitrust laws). *But see* Bd. of Trade of City of Chicago v. United States, 246 U.S. 231, 239–40 (1918) (holding that an agreement between rival grain salesmen limiting rivalry on price after an exchange was closed was reasonable and did not violate the Sherman Act).

72. *See* California ex rel. Harris v. Safeway, Inc., No. 08-55671, 2011 WL 2684942, at *22 (9th Cir. July 12, 2011) (Reinhardt, J., dissenting in part and concurring in part) (rejecting the majority opinion that it is necessary to apply the "rigorous and exhaustive 'rule of reason' analysis"); *see also* Thomas A. Piraino, Jr., *Proposed Antitrust Approach to High Technology Competition*, 44 WM. & MARY L. REV. 65, 132 (2002) (stating that judges and juries may not be capable of making appropriate decisions based on the complex market analysis under the rule of reason approach).

73. *See* Peter Nealis, Note, *Per Se Legality: A New Standard in Antitrust Adjudication Under the Rule of Reason*, 61 OHIO ST. L.J. 347, 379 (2000) (suggesting that factual inquires are expensive endeavors); *see also* Victor Vital, *Leegin: All Bark, No Bite?*, MONDAQ BUS. BRIEFING, Nov. 26, 2010 (alleging that the "time, cost and risk" of antitrust cases increased when the analysis shifted from the per se rule to the rule of reason).

74. *See* United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993) (commenting that the "quick look" rule of reason analysis applies to cases where the per se rule is inappropriate and the rule of reason analysis is unnecessary); *see also* Santana Prods., Inc. v. Bobrick Washroom Equip., Inc., 249 F. Supp. 2d 463, 511 (M.D. Pa. 2003) (opining that the "quick-look" rule of reason analysis is useful in helping a layperson conclude that an act has anticompetitive effects).

75. *See* Los Angles Mem'l Colesium Com'n v. Nat'l Football League, 726 F.2d 1381, 1392 (9th Cir. 1984) (stating that relevant market evidence helps to balance the procompetitive and anticompetitive effects of a restrictive covenant); *see also* Smith Kline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1063 (3d Cir. 1978) (validating the importance of defining the relevant market in an antitrust analysis).

76. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 324–29 (1962) (delineating the product market and the geographic market as the two components of a relevant market); *see also* Kaplan v. Burroughs Corp., 611 F.2d 286, 291 (9th Cir. 1979) (illustrating that competition in a market depends on the geographic reach of a product and the product's identity).

Market power reflects an ability to affect price and thereby restrain trade. If a business holds substantial market power it is transformed from a price taker to a price setter.[77] Price setters can easily disrupt a free market economy and require antitrust scrutiny.[78] The NBA and FIBA are in the same market for elite professional level basketball players and are the only two significant competitors in the market.[79] Any arrangement to restrict the terms on which each league will sign players warrants antitrust scrutiny.[80]

The Agreement is a clear restraint on the trade of signing athletes; it curbs the freedom of clubs to sign players at will.[81] There is a horizontal covenant that the parties will "buy" players on certain restrictive terms.[82] The leagues have agreed not to sign players currently signed with a professional team in another league without completing certain procedural hurdles.[83] The

77. *See* BLACK'S LAW DICTIONARY 110 (9th ed. 2009) (defining *market power* as "the ability to raise prices without a total loss of sales"); *see also* Benjamin Klein, *Market Power in Antitrust: Economic Analysis After Kodak*, 3 SUP. CT. ECON. REV. 43, 72 (1993) (explaining that when an entity has sufficient market power it can price set without losing significant sales).

78. *See* David S. Evans & Anne Layne-Farrar, *Software Patents and Open Source: The Battle Over Intellectual Property Rights*, 9 VA. J.L. & TECH. 10, 40 (2004) (detailing antitrust involvement in price-setting entities); *see also* Elbert L. Robertson, *A Corrective Justice Theory of Antitrust Regulation*, 49 CATH. U. L. REV. 741, 766 (2000) (discussing the negative effects price setters can have on a free market economy).

79. *See* Dustin C. Lane, *From Mao to Yao: A New Game Plan for China in the Era of Basketball Globalization*, 13 PAC. RIM L. & POL'Y J. 127, 141 (2004) (establishing the NBA as the elite market for professional basketball players); *see also* Heather E. Morrow, *The Wide World of Sports Is Getting Wider: A Look at Drafting Foreign Players Into U.S. Professional Sports*, 26 HOUS. J. INT'L L. 649, 689–92 (2004) (acknowledging FIBA as the leading basketball association in international markets).

80. *See* Paul R. Genender, *A Transcontinental Alley-Oop: Antitrust Ramifications of Potential National Basketball Association Expansion Into Europe,* 4 DUKE J. COMP. & INT'L L. 291, 296 (1994) (affirming that professional sports leagues have accepted free agency rules to a greater extent because of antitrust fears); *see also* Lewis Kurlantzick, *The Tampering Prohibition and Agreements Between American and Foreign Sports Leagues*, 32 COLUM. J.L. & ARTS 271, 299, 330 (2009) (discussing the restrictive arrangements between the NBA and the FIBA, which raise antitrust issues).

81. *See* Brandi Bennett, *Emerging Contract Buyout Conflicts Between the NBA and European Teams Over Elite International Players*, 2008 DENV. UNIV. SPORTS & ENT. L.J. 177, 180–82 (2008) (highlighting the NBA's and FIBA's lack of cohesive regulation, and the Collective Bargaining Agreement's impact on keeping European talent out of the NBA). *See generally* Sean Deveney, *Imports Come With a Price*, SPORTING NEWS, Oct. 6, 2003, http://findarticles.com/p/articles/mi_m1208/is_40_227/ai_108649712/ (discussing the danger of the contract lengths that young international athletes sign and the impediments to later trading those athletes to other teams).

82. *See* Kurlantzick, *supra* note 80, at 311 (noting that the parties of the NBA-FIBA Agreement agree to buy only on certain terms, resulting in an anticompetitive effect). *See generally* Morrow, *supra* note 79, at 704 (exploring the relationship between the NBA and FIBA as it pertains to trading players).

83. *See* Jeffrey A. Miskin, *Dispute Resolution in the NBA: The Allocation of Decision Making Among the Commissioner, Impartial Arbitrator, System Arbitrator, and the Courts*, 35 VAL. U. L. REV. 449, 458–59 (2001) (clarifying the relationship between FIBA and the NBA and the process through which the NBA can sign FIBA players); *see also* Scott R. Rosner & William T. Conroy, *The Impact of the Flat World on Player Transfers in Major League Baseball*, 12 U. PA. J. BUS. L. 79, 103–4 (2009) (citing the procedure that the NBA-FIBA Agreement requires for trading players).

"buying" club must first get written consent from the player's current professional organization.[84] In addition, the Agreement requires that teams use their best efforts to avoid negotiations with players of other leagues.[85] The teams also have the ability to halt the athlete's capacity to sign with the other league by refusing consent.[86]

2. A Restrictive Agreement Supplementing Existing Protections

Several potential justifications can be proffered to validate the NBA-FIBA Agreement, but all fall short. The leagues could attempt to justify their Agreement as reinforcement against potential breaches of contract; the Agreement recognizes the commitment of players to their respective leagues. Efforts to supplement existing legal protections through restrictive agreements have been repeatedly rejected by courts.[87] One such rejection is exemplified in the holding by the Supreme Court in *Fashion Originator's Guild of America v. FTC*.[88] The Fashion Originator's Guild of America (FOGA), concerned that manufacturers were producing "knock-off" garments and selling them at a cheaper price to retailers, formed an arrangement to police against the stealing of the intellectual property of their garments.[89] FOGA communicated to retailers that it would refuse to deal if the retailer sold the pirated garments.[90] In addition, FOGA assembled informants to shop at the retailers' stores to scout for replicated products.[91] The Court, finding the agreement among manufacturers a violation of antitrust law, expounds upon the concern of allowing agreements to serve a supplemental policing function, stating, "the combination is in reality an extra-governmental agency, which prescribes

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84. *See* Marc Edelman & Brian Doyle, *Antitrust and "Free Movement" Risks of Expanding U.S. Professional Sports Leagues Into Europe*, 29 NW. J. INT'L L. & BUS. 403, 430 (2009) (indicating that a collective agreement in a trade must be in writing); *see also* NBA Collective Bargaining Agreement art. X: Player Eligibility and NBA Draft (2005), http://www.nbpa.org/cba/2005/article-x-player-eligibility-and-nba-draft (explaining that an international player must, among other things, express his desire to be selected in the NBA Draft in a writing received by the NBA at least 60 days in advance).

85. *See* Howard Beck & Pete Thamel, *Nets' Star Point Guard Strikes a Deal With Turkish Team; Escape Clause Would Let*, INT'L HERALD TRIB., July 9, 2011, at 9 (explaining that all NBA player contracts are suspended and players are free to negotiate and sign with FIBA teams until the NBA's July 1, 2011, lockout dispute resolves); *see also* Kurlantzick, *supra* note 80, at n.102 (noting that the Agreement requires teams and players to honor binding NBA and FIBA player contracts).

86. *See* Athletic Union of Constantinople v. NBA (Official Transcript), [2002] 1 All E.R. (Comm) 70, [5] (Eng.) (stating that the Agreement allows players to transfer to another league upon clearance from their last league); *see also Yao's Status Could Shake Up Draft: Rockets May Trade Away No. 1 Pick if Chinese Center Doesn't Receive Clearance*, ST. PAUL PIONEER PRESS, June 26, 2002, at D6 (explaining that China's Yao Ming needed consent from his national federation for FIBA to allow him to play on an NBA team).

87. *See* FTC v. Sup. Ct. Trial Lawyers Ass'n, 493 U.S. 411, 424 (1990) (finding "social justifications" for attorneys' group boycott inadequate to escape antitrust liability); *see also* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984) (holding that although the NCAA's rule aimed to avoid decreased game attendance, the NCAA's limitation on live broadcasts of college football games violated antitrust laws).

88. *See* 312 U.S. 457, 468 (1941) (explaining that the boycott of retailers selling pirated designs by original manufacturers is an antitrust violation).

89. *See id.* at 462–63 (showing FOGA's use of secret shoppers, design registries, fines, and tribunals to monitor pirated designs).

90. *See id.* at 461 (suggesting that FOGA coerced retailers to submit to its demands by banning sales to noncomplying retailers).

91. *See id.* at 462 (stating that FOGA sends employees to both member and nonmember retailers in order to determine if their stocks contain imitations of registered designs).

rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute.'"[92] The Court notes that intellectual property rights are governed through tort law and combinations are not allowed to exceed the protection Congress has already offered.[93]

Similarly, if the leagues attempted to justify their restrictions through advancing their contract reinforcement value, it would likely fail a rule of reason analysis. In addition to the adequate breach of contract remedies available,[94] both the NBA and FIBA player contracts contain arbitration procedures.[95] The Court would not look favorably upon an agreement justifying its anticompetitive effects by claiming protection beyond successful and efficient procedures.

3. The Competitive Relationship and Horizontal Nature of the Agreement

Another potential justification centers on the relationship between the two leagues. The justification is based on the belief that the NBA and FIBA are not in fact competitors for athletes. Instead, the argument contends that the international leagues are seen as both the nursery and graveyard for professional basketball players, serving as an opportunity for athletes to develop their skills and a location for athletes to continue their playing careers when they can no longer compete in the NBA.[96] This argument, if valid, would be consequential as it would shift the Agreement between the two leagues from a horizontal agreement, of which antitrust law is particularly suspicious, to a vertical arrangement. Simply finding a vertical relationship does not clear the Agreement from potentially violating antitrust law, but making the case for a violation is much more difficult.

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92. *See id.* at 465 (explaining that FOGA was exercising rule-making and enforcement powers that belong to Congress and the courts).

93. *See id.* at 468 (holding that even if every state declared that copying registered designs, the FOGA would still not be justified in acting as an extragovernmental agency).

94. In many European countries, employment claims are resolved through specialized labor courts or administrative tribunals. For a more elaborate study of the differing forms of dispute resolution *see* Jean R. Sternlight, *Is the U.S Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV 831, 850 (2002) (indicating during a study of various forms of dispute resolution that several European countries often settle employment claims before labor or administrative courts).

95. The NBA settles its disputes according to Article XXXI of the Collective Bargaining Agreement providing the dispute to be resolved exclusively by the Grievance Arbitrator. *See* National Basketball Association Collective Bargaining Agreement, art. XXXI (2005) (providing that all NBA disputes be resolved by the Grievance Arbitrator). Article 9.5 of the FIBA General Statutes (2010) requires that national member federations establish a system for resolution of disputes by independent arbitration while promoting recourse to and recognizing the decisions of the Court of Arbitration for Sport (CAS) and the awards of the Basketball Arbitral Tribunal (BAT). *See* FIBA General Statutes, art. 9.5 (2010) (mandating that member federations recognize decisions made by the Court of Arbitration for Sport and awards given by Basketball Arbitral Tribunal but must also develop their own independent dispute resolution systems.

96. *See* Lewis Kurlantzick, *The Tampering Prohibition and Agreements Between American and Foreign Sports Leagues*, 32 COLUM. J.L. & ARTS 271, 313–14 (2009) (arguing that foreign professional basketball leagues do not compete for but instead supply the NBA with players).

Competition is defined in *Merriam-Webster* as "the effort or action of two or more commercial interests to obtain the same business from third parties," here the players.[97] Essentially the vertical/horizontal determination is settled by determining if the two leagues compete for players or if the international leagues, serving collectively as a "minor" league, enhance the NBA product.[98] If the leagues compete for players, the Agreement is likely to be considered an unreasonable restraint. Conversely, if the international leagues are considered preparatory leagues, the Agreement can be justified on grounds that it is necessary to ensure the international leagues remain in business by limiting the signing period to after the season.

The argument that the international leagues serve collectively as a supplier league is not convincing. The "minor league" argument is predicated on the basis that the Agreement's purpose is to insure that the developmental league of FIBA is able to survive without the "parent league" stealing the FIBA players.[99] The construction of the Agreement weakens the "parent league protecting the minor league" argument. The arrangement is not a unilateral restriction prohibiting the NBA from stealing the FIBA organizations' players, but rather a mutual restriction from either league signing players under contract with the other league.[100] If the Agreement was intended to protect the minor league from the parent league, the restriction prohibiting the NBA from signing players in FIBA leagues would be unnecessary. The counterargument would be that the reciprocity of the document could be a sign of respect from the NBA to FIBA. It would follow that the provisions' construction refrains from diminishing the legitimacy of the league by treating it as an equal with a complementary restriction. The Agreement, however, is a joint agreement that reflects a legitimate fear of FIBA taking NBA players

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97. *See* MERRIAM-WEBSTER ONLINE DICTIONARY, s.v. "competition," http://www.merriam-webster.com/dictionary/competition (last visited Feb. 10, 2011).

98. *See* Marc Edelman, *Does the NBA Still Have "Market Power?" Exploring the Antitrust Implications of an Increasingly Global Market for Men's Basketball Player Labor*, 41 RUTGERS L.J. 549, 581–82 (2010) (demonstrating that there is no competition between the NBA and FIBA because players who choose to go to European teams are not elite players but those who are less skilled, ineligible for the NBA, or not originally from the United States); *see also* Robbi Pickeral & Larry Bratcher, *Overseas Not Just a Backup Plan Anymore*, CHARLOTTE OBSERVER, June 14, 2009, at 12 (citing players who have chosen international leagues over immediately pursuing NBA careers and the reasons behind their decision).

99. *See* Kurlantzick, *supra* note 96, at 301 (explaining that the agreements between international sports leagues like the one between FIBA and the NBA regulate their interactions to avoid conflicts and provide dispute resolution methods when issues arise); *see also* Heather E. Morrow, Comment, *The Wide World of Sports Is Getting Wider: A Look at Drafting Foreign Players Into U.S. Professional Sports*, 26 HOUS. J. INT'L L. 649, 690–91 (2004) (quoting the FIBA General Statutes as the source establishing FIBA as the controlling body that oversees basketball organizations worldwide).

100. *See* GLENN M. WONG, ESSENTIALS OF SPORTS LAW 648 (4th ed. 2010) (asserting that the FIBA arbitration system established by the 1997 Agreement between the NBA and FIBA has been mutually beneficial for resolving disputes); *see also* Brandi Bennett, Note, *Emerging Contract Buyout Conflicts Between the NBA and European Teams Over Elite International Players*, 2008 DENV. U. SPORTS & ENT. L. J. 177, 180–81 (2008) (explaining that because fines are imposed when buying international players out of their contracts, players may remain in international leagues instead of transferring to the NBA).

under contract without written consent.[101] The fear is legitimate because during the two leagues' history, players have opted to play for FIBA organizations in lieu of playing in the NBA.[102]

There has been direct evidence of NBA-level players who have chosen to play for FIBA organizations over playing for NBA franchises. Players who are drafted by NBA teams often find it more beneficial for their career to remain in Europe rather than head to the NBA.[103] Ricky Rubio was the fifth overall pick in the 2009 NBA Draft, but chose to remain with FC Barcelona for the remainder of his contract before joining the Minnesota Timberwolves.[104] The talented young Spanish point guard has yet to play a game for the Timberwolves.[105] The Timberwolves, understanding the competition from the foreign league, used the next pick (sixth) of the draft to take another point guard in John Flynn of Syracuse University.[106] In 2005 the Orlando Magic used their 11th pick to draft talented Fran Vazquez.[107] Vazquez has not

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101. *See* Edelman, *supra* note 98, at 570–71 (noting that in the summer of 1989, the Roman team Il Messaggero aggressively pursued and signed two premier NBA players who were mired in contract disputes with their NBA teams); *see also* Rainer Josef Meisterjahn, "Everything Was Different": An Existential Phenomenological Investigation of US Professional Basketball Players' Experiences Overseas (May 2011) (Ph.D. diss., University of Tennessee), http://trace.tennessee.edu/cgi/viewcontent.cgi?article=2113&context=utk_graddiss (explaining that athletes may gravitate toward FIBA teams over NBA teams because of the shorter schedule, which "might provide [the player] with an opportunity to spend more time with their families, [enjoy] extended rest and recovery, train, travel, or engage in other activities").

102. *See Carlos Delfino Became the BC Khimki Player*, BC KHIMKI (July 18, 2008), http://en.bckhimki.ru/news/clubnews/2008/july/455/ (reporting that in 2008, Carlos Delfino, a guard for the Toronto Raptors, signed a three-year contract with Russian Club BC Khimki despite interest from other NBA and European teams); *see also Navarro Returns Home to Barcelona*, FC BARCELONA (June 19, 2008), http://www.euroleague.net/news/i/33228/180/item (announcing that in 2008, Carlos Navarro chose to return to his former team, FC Barcelona, after playing for the Memphis Grizzlies for only one season, despite shooting the second most three-pointers in Memphis franchise history for a single season).

103. *See Ex-Hawk Childress Signs With Greek Club Team*, ESPN (July 25, 2008, 12:14 PM), http://sports.espn.go.com/nba/news/story?id=3501488 (reporting that in 2008, Josh Childress rejected an unspecified offer from the Atlanta Hawks and signed a three-year $20 million contract with Greek club Olympiakos, which at the time was the most lucrative contract in European basketball); *see also Dejan Bodiroga*, FIBA EUROPE, http://www.fibaeurope.comcid_KNce8jInH7Qj1EsyH5rjn2.teamID_390.compID_qMRZdYCZI6EoANOrUf9le2.season_1995.roundID_2265.playerID_8684.html (last visited Oct. 15, 2011) (indicating that Bodiroga, often compared to NBA player Magic Johnson, declined to sign with the Sacramento Kings in 1995, and chose to play in Europe following the draft).

104. *See* Iain Rogers, *Spanish Point Guard Rubio to Join Timberwolves*, REUTERS (June 17, 2011, 2:22 PM), http://www.reuters.com/article/2011/06/17/us-nba-rubio-idUSTRE75G1OC20110617 (reporting that Rubio, who was selected fifth in the 2009 NBA draft by the Timberwolves, decided to play for Spanish team FC Barcelona before playing in the NBA).

105. *See* Meritxell Infante, *Ricky Rubio: "I'm off to the NBA,"* FC BARCELONA (June 17, 2011, 1:10PM), http://www.fcbarcelona.com/web/english/noticies/basquet/temporada10-11/06/17/n110617118044.html (At the time of publication Rubio has expressed his desire to play in the NBA, but as a result of the 2011 NBA Lockout he is unable to do so).

106. *See* Howard Beck, *On Day of Trades, Draft Highlight Is Griffin and Guards*, N.Y. TIMES, June 26, 2009, at B13 (discussing the Minnesota Timberwolves' draft pick of Jonny Flynn and various highlights of the draft).

107. *See* Bethlehem Shoals, *Remember Fran Vazquez? The Orlando Draft Pick That Got Away*, BUS. INSIDER, Mar. 8, 2011, at ¶ 5, *available at* 2011 WLNR 4534771 (acknowledging the Orlando Magic's draft pick of Fran Vazquez and explaining his subsequent decision to play in Europe and any future prospects he has in the NBA).

donned the Magic jersey in a game, and remains in Europe playing professionally alongside Rubio with FC Barcelona.[108] The Orlando Magic used another pick in the 2007 draft on Russian Milovan Rakovic,[109] who re-signed in Europe in lieu of playing for the NBA.[110] In 1995 Dejan Bodrioga was drafted by the Sacramento Kings.[111] Regarded universally as a very talented small forward, Bodiroga did not play on U.S. soil and instead played for several FIBA organizations.[112] Most notable perhaps is the journey of American Josh Childress.[113] At the end of a contract with the Atlanta Hawks, Childress chose to take his talents abroad and play for high-powered Olympiakos of Greece.[114] Before making the move, Childress considered signing with such teams as the Phoenix Suns, San Antonio Spurs, Oklahoma City Thunder, and Cleveland Cavaliers.[115] That same off-season the NBA saw four other players leave NBA franchises for FIBA teams: Primo Brezec, Carlos Delfino, Juan Carlos Navarro, and Bostjan Nachbar.[116] NBA teams were interested in all these players, and yet these players all signed with FIBA organizations.[117] The two leagues were in competition for their services.

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108. *See* Tim Warren, *EuroLeague Gets a Boost From Influx of U.S. Talent: Former Hawk Childress, Other American Players Lift Level of Competition*, WASH. POST, May 7, 2010, at D01 (describing the strength of FC Barcelona in Vazquez and Rubio).

109. *See* Ken Hornack, *Magic Go Overseas for Help*, DAYTONA NEWS-J., June 29, 2007, at D02 (noting the Orlando Magic's decision to acquire Rakovic from the Dallas Mavericks as its final pick even though the earliest he can play is the summer after the draft).

110. *See* Evan Dunlap, *Reports: Milovan Rakovic, Former Orlando Magic 2nd-Round Pick, Signs in Italy*, ORLANDO PINSTRIPED POST, June 21, 2010, at ¶ 3, *available at* http://www.orlandopinstripedpost.com/2010/6/21/1527961/reports-milovan-rakovic-former (announcing that Rakovic declined to join the Orlando Magic because of a paperwork issue and has since signed in Italy).

111. *See* Peter May, *It's What They Bargained for League, Players Are in Legal Limbo*, BOSTON GLOBE, Sept. 6, 1998, at D2 (commenting that although many teams were interested in acquiring the rights to Bodiroga, it was the Sacramento Kings who selected him in the 1995 NBA draft).

112. *See* Scott Howard-Cooper, *Getting Excited About Spurs Can Be Difficult*, SACRAMENTO BEE, June 17, 2007, at C8 (comparing Bodiroga's skills to those of Magic Johnson and stating that Bodiroga chose to remain a popular basketball star in Europe rather than attempt to succeed in the NBA); *see also* Ailene Voisin, *The Man Who Wouldn't Be King: Why Highly Skilled Dejan Bodiroga Resists the Lure of Playing in the NBA*, SACRAMENTO BEE, Sept. 1, 2002, at C1 (attributing Bodiroga's great success playing in Europe to why he never joined the NBA).

113. *See* John Hollinger, *Ex-Hawk Childress Signs with Greek Club Team,* ESPN (July 25, 2008), *available at* http://sports.espn.go.com/nba/news/story?id=3501488 (suggesting that Childress could reverse the course of international stars signing with the NBA); *see also* Mark Schwarz, *Outside the Lines: For Childress, Greece Is the Word*, ESPN (Aug. 6, 2009), *available at* http://sports.espn.go.com/nba/columns/story?columnist=schwarz_mark&page=jchill-081106 (identifying Childress's move from the NBA to the European league as groundbreaking and labeling him a "trailblazer").

114. *See* Pete Thamel, *Big, Fat Greek Contract Makes Europe Irresistible*, N.Y. TIMES, Oct. 11, 2008, at SP1 (explaining why Childress chose to play in Greece, attributing much to his three-year, $20 million contract).

115. *See* Pete Thamel, *A Conversation With Josh Childress*, N.Y. TIMES, Oct. 12, 2008, http://query.nytimes.com/gst/fullpage.html?res=9506E2D71730F931A25753C1A96E9C8B63 (describing Childress's NBA options and his decision-making process in choosing Olympiakos over numerous NBA teams).

116. *See* Sekou Smith, *Migratory Hawk: Josh Childress Leaves NBA for Greece*, ATLANTA J.- CONST., Jul. 24, 2008, at C1 (highlighting that seven players on NBA rosters from the previous year rejected NBA offers to play in Europe; *see also* John Holliinger, *Childress' Move to Greece Hurts Hawks on Many Levels*, ESPN (July 23, 2008), http://sports.espn.go.com/nba/columns/story?columnist=hollinger_john&page=Hawks-080723 (noting that Childress is the first American to choose Europe over the NBA in the recent exodus).

117. *See* Chris Sheridan, *Ex-Nets F Nachbar, Dynamo Moscow Agree to 3-Year, $14.3 Deal*, ESPN (July 21, 2008), http://sports. espn.go.com/nba/news/story?id=3497994 (indicating that European-based teams have lured NBA players with more lucrative deals than those offered by their NBA counterparts).

What makes Europe such an attraction to talented basketball players? The basketball teams in Europe are often parts of sports clubs and are particularly affluent.[118] For example, Real Madrid's and FC Barcelona's basketball teams are run through the same organization that supports their soccer teams and have a net worth of $1.32 billion and $1 billion respectively, ranking them among the top 25 most valuable sports franchises.[119] "I get paid double, my role increases, I have no expenses and I move to a nice city? How many guys wouldn't do that, regardless if you're a lawyer or a doctor? In a business sense, if I were to tell people that I passed on that deal, I would be stupid. That would be the next headline: 'Josh Childress Shouldn't Have Gone to Stanford. He's an Idiot.'"[120] Teams often pay for the player's amenities; in Childress's case the team provided a personal chef, a Mercedes, a luxurious apartment, and paid his taxes on top of offering a substantial salary of $20 million for three years' service.[121]

These tax incentives may be a legitimate draw for American athletes to Europe; as Henrik Kleven, Camille Landais, and Emmanuel Saez noted, "Tax-induced international mobility of talent is a crucial public policy issue, especially when tax rates differ substantially across countries and migration barriers are low as in the case of the European Union."[122] It is suggested that the relaxed tax incentives could have played a role in LeBron James's decision to sign in Miami, and it is not so far-fetched to consider the combination of a massive contract and tax freedom as factors possibly drawing LeBron to Europe.[123] He did not rule out the possibility

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118. *See* Tom Van Riper, *The Most Valuable Team in Sports*, FORBES (Jan. 12, 2010), http://www.forbes.com/ 2010/ 01/12/manchester-united-yankees-cowboys-business-sports-valuable-teams.html (citing Real Madrid and FC Barcelona as billion-dollar organizations); *see also* Ian Thomsen, *Euroleague Wary of Signing NBA Players With Existing Contracts*, SPORTS ILLUSTRATED (Aug. 9, 2011), http://sportsillustrated.cnn.com/vault/article/web/ COM1189213/3/index.htm (indicating that certain Euroleague teams have budgets twice the size of the Lakers').

119. *See* Ben Klayman, *Soccer Club Values Off, ManU Still Tops—Forbes*, Reuters, April 21, 2010, http:// www.reuters.com/article/2010/04/21/forbes-soccer-idUSN2119290320100421 (enumerating Real Madrid and FC Barcelona as clubs with large net values); *see also* Michael K. Ozanian and Kurt Badenhausen, *The World's Most Valuable Teams and Athletes*, FORBES (July 21, 2010), http://www.forbes.com/2010/07/20/most-valuable-athletes-and-teams-business-sports-sportsmoney-fifty-fifty.html (attributing Manchester United's ability to pursue athletes like David Beckham to their large budgets).

120. *See*Thamel, *supra* note 115.

121. *See* Mark Schwarz, *Outside the Lines: For Childress, Greece Is the Word*, ESPN (Nov. 6, 2008), http:// sports.espn.go.com/nba/columns/story?columnist=schwarz_mark&page=jchill-081106 (describing the benefits Childress received while playing in Greece).

122. *See* Henrik Kleven et al., *Taxation and International Migration of Superstars: Evidence of the European Football* (Nat'l Bureau of Econ. Research, Working Paper No. 16545, 2010).

123. *See* David F. Baer, *LeBron James Is Going to Play in Europe! (If He's Smart)*, BLEACHERREPORT.COM (May 28, 2010), http://bleacherreport.com/articles/397922-lebron-james-is-going-to-play-in-europe-if-hes-smart (arguing that because LeBron James has "made it clear that his ultimate goal is to become a billionaire," he should market himself globally by playing in Europe); *see also* Marc Edelman, *Sports and the Law: Lebron James to Europe?*, ABOVETHELAW.COM (July 8, 2010, 11:49 AM), http://abovethelaw.com/2010/07/sports-and-the-law-lebron-james-to-europe (suggesting that Greek team Olympiakos Piraeus could probably give LeBron James a $50 million contract for one year to play only one or two games per week).

during his free agency;[124] in an interview with a source close to James, ESPN reported that LeBron would strongly consider playing in Europe for a salary of about $50 million a year.[125] LeBron confirmed the possibility of signing in Europe when questioned if he ever imagined the possibility of playing abroad, saying, "Is it a possibility? Yes."[126] In addition, higher-profile players toward the end of their careers may consider playing in Europe.[127] They find the cultural benefit, the money, and the different style of play to be draws.[128] High-profile players such as Jason Kidd have seen the virtues in finishing a career in Europe: "Hey, why wouldn't I play in Italy or somewhere (else)? That might be a great experience. . . . We saw the Euro players coming here, and now it's kind of flip-flopping."[129] There is no doubt Kidd is at the end of his playing career, but as a starting point guard on a champion contender team and highly regarded as an effective player, he is a coveted asset for any league.

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124. *See* Sam McPhee, *Shaquille O'Neal Predicts MVP Season for LeBron James. Europe?*, KINGJAMESGOSPEL.COM (July 21, 2011), http://kingjamesgospel.com/2011/07/21/shaquille-oneal-predicts-mvp-season-for-lebron-james-europe/ (indicating that LeBron James might consider playing in Europe for the unrestricted salary and because James has said it would be good way to expand the game); *see also* Matt Watson, *Report: LeBron James Would Consider Playing in Europe for $50 Million a Year*, AOLNEWS (Aug. 5, 2008, 10:30 PM), http://www.aolnews.com/2008/08/05/report-lebron-james-would-consider-playing-in-europe-for-50-mi/ (reiterating that LeBron James could earn $100 million playing for two years in Europe).

125. *See* Chris Broussard, *Source: LeBron Would Consider European Offer of $50M a Year or More*, ESPN: THE MAGAZINE (Aug. 6, 2008, 8:50 PM), http://sports.espn.go.com/nba/news/story? id= 3520860 (also noting that the source explicitly states that LeBron does not consider the European leagues to be "minor leagues").

126. *See* Roy Hewitt, *Cleveland Cavaliers' LeBron James Admits Playing Overseas Is a Possibility*, CLEVELAND.COM (Aug. 8, 2008, 6:21 AM), http://www.cleveland.com/olympics/index.ssf/2008/08/cleveland_cavaliers_lebron_jam.html (quoting LeBron James, "With the right opportunity, you never know. I love basketball. So I'll play basketball anywhere.").

127. *See* VyShaey Mitchell, Note, *Will NBA Players Go to Europe?,* 6 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 221, 230–31 (2010) (finding that prominent NBA players, such as Dominique Wilkins and Bob McAdoo, historically looked to sign with European leagues right before retirement); *see also* Janny Hu, *More Pro Players Are Taking Their Game Overseas*, S.F. CHRONICLE, Aug. 13, 2008, at D9 (claiming that pursuing a career in Europe was once for players who no longer had a chance in the NBA, but that times are changing and veteran players are considering it as well).

128. The "European Style" of basketball is widely accepted as a dramatic departure from the NBA style. In addition to rule variations that alter the play of the game, the players stress defense, rebounding, and fundamentals as opposed to the high-flying athleticism and scoring ability stressed in the NBA. This cuts against the "minor league" argument. If the arrangement were truly vertical and seen as a development opportunity for NBA players they would want the players to develop in the same style as the NBA. Otherwise what would they be developing, inapplicable skills? *See* BALLIN EUROPE, http://www.ballineurope.com/specials/interview/general-questions-about-international-and-european-basketball/ (last visited Oct. 15, 2011) (establishing that European basketball emphasizes a team effort and the fundamentals of basketball, rather than individual superstars who can set picks and dunk).

129. *See* Adrian Jojnarowski, *Europe Offers More Than Vacation to Players*, YAHOO SPORTS, July 23, 2008, http://sports.yahoo.com/nba/news?slug=aw-nbaeurope072308 (illustrating that American players are opting to play in Europe in their prime, which makes a statement and is a testament to the increasing value of European franchises).

Debates will certainly continue whether LeBron (or any other NBA superstar for that matter) ever *seriously* considered playing in Europe;[130] however, the fact remains that the two leagues need not be in competition for the upper echelon of players to be considered "in competition for players." Players such as Childress, Brezec, and Delfino, while not NBA all-stars, are still integral parts of NBA franchises and teams compete for their services. An analogy to car sales is instructive. Mercedes and Ferrari are two elite automotive companies. There are certain buyers who may be able to afford the Ferrari, but decide for one reason or another to purchase the high-class Mercedes. Would Ferrari consider itself in competition with Mercedes for these sales? Undoubtedly it would. In the same vein it could be argued that the NBA and FIBA organizations are not in competition for the LeBron Jameses or the Kobe Bryants of the world, but they are certainly in competition for players. At a bare minimum the contract offers from FIBA can be used by ballplayers as leverage in their NBA contract negotiations.[131] Any level of professional player should be free to engage in contract negotiations with either league to generate the fair market value of his salary. The restrictions in the NBA-FIBA Agreement create an unreasonable restraint on this freedom.

In balancing its procompetitive with its anticompetitive effects, the NBA-FIBA Agreement raises antitrust concerns. The extragovernmental function of protecting breach of contract has been explicitly rejected by the Supreme Court. The two leagues are in competition for players, and player contracts can be used as leverage in negotiations with the other league. The NBA-FIBA Agreement is an unreasonable restraint of trade and should be condemned as an antitrust violation.

III. NBA-FIBA Agreement Limiting Playing Time on National Teams

On April 13, 2010, the NBA and FIBA reached an agreement to limit the amount of time NBA players are allowed to participate with their national team with various restrictions on the training activities that are allowed.[132] Once again, the NBPA was not involved in the agree-

130. *See* Player X, *If There's a Lockout, I'm Going to China to Work. And I Won't Be Alone*, ESPN: THE MAGAZINE, May 30, 2011, at 14 (explaining the benefits of playing overseas from an anonymous NBA superstar's point of view). The article lists exchange rates, lower taxes, shoe deals, large contracts, better coaches, and the leagues' receptiveness to "trouble players" as particular attractions of foreign leagues to NBA players. "Lock the players out and we'll leave, a lot of us, to play overseas. And many of us won't come back."

131. *See* Tom Haberstroh, *Wade Would "Consider" Playing Overseas,* ESPN (July 11, 2011, 10:10 AM), http://espn.go.com/blog/truehoopmiamiheat/post/_/id/9268/wade-open-to-playingoverseas-lebron-next (finding that players threaten to play overseas as a negotiation tactic to gain leverage in bargaining an agreement with league owners).

132. *See* Kurt Helin, *NBA, FIBA Negotiating Reduced International Play for NBA Stars*, NBC SPORTS (Apr. 24, 2010, 2:30 PM), http://probasketballtalk.nbcsports.com/2010/04/24/nba-fibanegotiating-reduced-international-play-for-nba-stars/ (emphasizing that the NBA and FIBA are negotiating restrictions on the time players spend with their national teams due to concerns about injuries and physical exhaustion); *see also* Ian Thomsen, *Weekly Countdown*, SPORTS ILLUSTRATED, http://sportsillustrated.cnn.com/2010/writers/ian_thomsen/04/23/countdown.euroleague/1.html (explaining that league sources said that the NBA is discussing new restrictions on the time the players spend with their national teams in the summer with FIBA).

ment.[133] The anticompetitive restraint is that the NBA players are unduly restricted in the amount of time they are permitted to train with their individual national teams. While seemingly innocuous, the restriction can have a substantial effect on the athletes' marketing opportunities in their home countries.

As the NBA brand expands into worldwide markets, players are continuously taking advantage of international marketing opportunities. Kobe Bryant was signed as the global brand ambassador of Turkish Airlines and will be part of a global ad campaign.[134] In 2004 China banned a Nike television commercial showing LeBron James fighting kung fu masters and dragons because the government claimed it offended China's national dignity.[135] The Chinese state administration for radio, film, and television said the commercial was not received well by Chinese viewers.[136] LeBron, however, is very aware of the marketing opportunities China provides, and his top endorsement contract, Nike, has plans to maximize his earning potential among the 300 million Chinese basketball fans with new marketing schemes.[137] Players recognize the need to take advantage of major marketing dollars internationally. Sixteen of *Sports Illustrated*'s 50 top-earning U.S. athletes in 2010 were professional basketball players.[138] This list takes into consideration endorsement contracts as well as salaries.[139] The endorsement contracts often rival or exceed league salaries.[140] Therefore, players are well aware of the bene-

133. *See FIBA Will Clear NBA Players to Play Overseas*, CHI. TRIB. (July 29, 2011), http://articles.chicagotribune.com/2011-07-29/sports/chi-fiba-will-clear-nbaplayers-to-play-overseas-20110729_1_billy-hunter-nba-fiba (positing that the NBPA was not involved in the agreement between the NBA and FIBA, but endorsed the idea); *see also* Mike Prada, *FIBA Clears NBA Players to Play Overseas During NBA Lockout*, SB NATION (July 29, 2011, 11:26 AM), http://www.sbnation.com/2011/7/29/2338652/fiba-clears-nba-players-to-playoverseas-during-nba-lockout (affirming that the NBA and FIBA worked out an agreement regarding players playing abroad while under contract, but does not mention involvement by the NBPA).

134. *See Kobe Now a Turkish Delight*, N.Y. SPORTS JOURNALISM (Dec. 14, 2010, 9:12 AM), http://nysportsjournalism.squarespace.com/kobe-now-a-turkish-delight-121/?SSScrollPosition=0 (stating that Kobe Bryant took advantage of international marketing opportunities brought about by the global expansion of the NBA brand).

135. *See* M. Neil Browne, Justin Rex & Curtis Bunner, *Concealment of Information in Consumer Transactions in the United States, Sweden, and China: A Window to the Relationship Between Individualism and Regulation*, 20 LOY. CONSUMER L. REV. 270, 293 n.55 (2008) (asserting that the defeat of iconic Chinese figures by LeBron James in a Nike advertisement not only violated a commercial regulation, but also caused public outrage).

136. *See* Alex Brysk, *Nike Ad With LeBron James Banned in China*, EPOCH TIMES, Dec. 9, 2004, http://www.theepochtimes.com/news/4-12-9/24817.html (assessing the strong reactions to the Nike commercial from the Chinese people and media-controlling government).

137. *See* David Helene, *Nike Looks to China to Make LeBron a Billion Dollar Athlete,* SPORTS GRID (June 22, 2010, 2:23 PM), http://www.sportsgrid.com/nba/nike-to-look-to-china-to-make-lebron-billion-dollar-athlete/ (emphasizing the importance of embracing the enormous basketball market in China as a key point in becoming a billion-dollar athlete).

138. Interestingly this number is down from over 25 in 2008, not indicative that the Agreement is the reason for the fall, but certainly can be considered as one of many factors. *See* Jonah Freedman, *The 50 Highest-Earning American Athletes*, SPORTS ILLUSTRATED, http://sportsillustrated.cnn.com/specials/fortunate50-2010/index.html (last visited Oct. 15, 2011) (listing the 50 highest-earning American athletes in 2010 and the sports profession they pursue).

139. *See id.* (listing the endorsements, salaries, and winnings of each of the 50 highest-earning U.S. athletes of 2010).

140. *See id.* (reporting the endorsements for the 50 highest-earning American athletes in 2010 as ranging from $75,000 to $70 million).

fits of expanding their marketing horizons and capitalizing on opportunities. Europe's basketball market has always been receptive to NBA megastars, as evidenced by substantial merchandise sales. Kobe Bryant's jersey has been the top-selling NBA jersey in Europe.[141] Out of the top 15 most popular jerseys in Europe there are six internationally bred players in Pau Gasol (4th), Andrea Bargnani (6th), Jose Calderon (7th), Dirk Nowitzki (9th), and Tony Parker (10th).[142] In addition, there is a seventh player of European descent; Joakim Noah (12th) is the son of French tennis star Yannick Noah and former Miss Sweden Cecilia Rodhe and holds French citizenship.[143] Some of these European players are not household names in the United States, never mind having top-selling jerseys stateside. The European NBA merchandise market strength is evident and players should have the ability to take full advantage of the opportunities.

European players in the NBA may use their time with the national teams to strengthen their ties with their local marketing resources. Players have recognized the importance of forming or reinforcing these European ties after leaving the markets for professional opportunities in the NBA. Dirk Nowitzki inked a deal through German sports marketer Laurens Lipperheide with Nike Germany, which pushes specific German editions of Nike products.[144] Tony Parker has linked with a French online poker website to become the site's spokesman.[145] NBA players, both American born and European, have a legitimate incentive to maximize their face time in international markets and can use their time participating with their national teams to expand this exposure. In this sense, by limiting how and when NBA players are allowed to play with their national teams, the Agreement can be seen as putting a restraint on the NBA players' marketing opportunities, and therefore a restraint on trade.

However, in this scenario, the negative effects of this restraint are outweighed by reasonable justifications. The Agreement is most reasonably proffered as a means for efficiently regulating players' off-season activities for the safety of the athletes. The standard NBA Player

141. *See* Steve E. Cavezza, *"Can I See Some ID?": An Antitrust Analysis of NBA and NFL Draft Eligibility Rules*, 9 U. DENV. SPORTS & ENT. L. J. 22, 41 (2010) (indicating that Kobe Bryant's jersey was not only the most popular jersey between 2008 and 2009, but also one of six all-time-selling NBA jerseys); *see also* Darren Rovell, *The NBA's Best-Selling Jerseys in Europe*, CNBC (Oct. 1 2009, 9:41 AM), http://www.cnbc.com/id/33117616/The_NBA_s_Best_Selling_Jerseys_ In_Europe (declaring that Kobe Bryant's jersey was the top selling NBA jersey in Europe for two years covering the 2007–8 season and the 2008–9 season).

142. *See Kobe Bryant's Jersey Most Popular in Europe for Third Straight Season*, LIMA (Sept. 30, 2010), http://www.licensing.org/news/press-releases/kobe-bryants-jersey-most-popular-in-europe-for-third-straight-season/ (recognizing that six of the 15 most popular NBA jerseys for the 2009–10 season belonged to basketball players from Europe); *see also Most Popular Jerseys in Europe: Top 10 Half European; Kobe, LeBron, D-Wade Still Rule,* BALLINEUROPE (Oct. 1, 2010), http://www.ballineurope.com/us-basketball/nba/most-popular-nba-jerseys-in-europe-5442/ (providing a list of the top 15 most popular NBA jerseys in Europe for the 2009–10 season).

143. *See* Bryan Smith, *Joakim Noah's Turnaround*, CHICAGO MAG, Nov. 2010, *available at* http://www.chicagomag.com/Chicago-Magazine/November-2010/Chicago-Bull-Joakim-Noahs-Turnaround/ (discussing the upbringing of Chicago Bulls player Joakim Noah).

144. *See Marketing Magnate Laurens Lipperheide Describes His Route to the Top*, SPORTSPRO MEDIA (Sept. 27, 2010), http://www.sportspromedia.com/quick_fire_questions/laurens_lipperheide_describes_his_route_to_the_top/ (providing background on Laurens Lipperheide's deal with Dirk Nowitzki).

145. *See* Gerry Poltorak, *NBA Star Tony Parker Signs Deal With French Online Poker Room*, POKER NEWS BOY (Feb. 26, 2010), http://pokernewsboy.com/poker-player-news/nba-star-tony-parker-signs-deal-with-french-online-poker-room/2224 (describing the deal between NBA player Tony Parker and Bet Clic, a French online poker site).

Contract has a provision limiting the players' mandatory participation in off-season training to two weeks.[146] The NBPA has agreed to the restrictions within the standard contract. Applying the *Brown*[147] court's holding, the bargained restriction between FIBA and the NBA limiting off-season activities is "sufficiently similar in circumstance" to the provisions in the standard contract, and therefore antitrust law does not apply. Perhaps the biggest reason the Agreement has not been attacked as an antitrust violation is that it benefits the players.[148] Most likely the players are ultimately happy that they have a prohibition against being required to participate in a grueling training period after the grind of a full NBA season. Therefore an antitrust challenge to this Agreement seems unlikely to arise, and if a challenge is brought, the justifications will likely outweigh the anticompetitive effects.

IV. Mobility Restrictions on College Athletes

The NCAA, the governing body for intercollegiate athletics, implements its regulations with a draconian and practically unchecked authority. The rules, often criticized and deeply confusing, indirectly restrict international basketball players' mobility through "amateurism" regulations.[149] By joining the NCAA, each college and university agrees via contract to abide by and enforce the rules of the NCAA.[150] The NCAA elects a council that oversees the enactment of the association's rules and imposes sanctions for violations by member institutions.[151] These rules have a significant negative impact on student-athletes and are vulnerable to legal challenges. The success of these challenges, however, will prove to be rare.

While student-athletes do not have a direct or express contractual relationship with the NCAA, they do have the ability to bring a claim.[152] The NCAA has a contractual relationship with its member institutions as it provides rules and regulations governing the institutions' par-

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146. *See* National Basketball Players Association Collective Bargaining Agreement, § 11(h)(i), https://www2.bc.edu/~yen/Sports/NBA%20CBA.pdf.

147. *See* Brown v. Pro Football, Inc., 50 F.3d 1041, 1048 (D.C. Cir. 1995).

148. *See* Salil K. Mehra & T. Joel Zuercher, *Striking Out "Competitive Balance" in Sports, Antitrust, and Intellectual Property*, 21 BERKELEY TECH. L.J. 1499, 1507–8 (2006) (surmising that restraints, such as limiting the movement of players between teams, might violate antitrust laws were it not for ostensible perks).

149. *See* Sarah M. Konsky, *An Antitrust Challenge to the NCAA Transfer Rules*, 70 U. CHI. L. REV. 1581, 1582 (2003) (contending that the NCAA transfer rules violate the Sherman Act). *See generally* Matthew J. Mitten, *Book Review*, 22 J.C. & U.L. 1081, 1082 (1996) (noting that Walter Byers, the executive director of the National Collegiate Athletic Association, provided a "stinging indictment" of the current system of NCAA rules in his book, UNSPORTSMANLIKE CONDUCT—EXPLOITING COLLEGE ATHLETES).

150. *See* Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 183 (1988). *See generally* Encyclopedia of Everyday Law, *Athletics*, ENOTES, http://www.enotes.com/everyday-law-encyclopedia/athletics (last visited Oct. 15, 2011) (observing that colleges and universities have to follow NCAA rules in order to remain NCAA members).

151. *See* ERNEST R. ALEXANDER, HOW ORGANIZATIONS ACT TOGETHER: INTERORGANIZATIONAL COORDINATION IN THEORY AND IN PRACTICE 162 (1995) (noting that in 1951 the NCAA drafted the first legislation that made its rules binding on all members, and made noncompliance subject to penalties).

152. *See* Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621, 624 (2004) (concluding that the student-athlete had standing to sue within the guidelines of the NCAA); *see also* NCAA v. Brinkworth, 680 So. 2d 1081, 1083 (Fla. Dist. Ct. App. 1996) (highlighting the ability of a student athlete to successfully sue for injunctive relief as a third-party beneficiary against the NCAA).

ticipation in intercollegiate athletics. As such, all third-party beneficiaries to the contract have the right to assert a claim.[153] Student-athletes are third-party beneficiaries as

> [t]he purpose of the NCAA (see Bylaws 1.2 and 1.3.1), and the obligation of member institutions (see Obligations of Member Institutions, Article 1.3.2), form a contract in which the [NCAA] promises, among many things, to initiate, stimulate, and improve intercollegiate athletic programs for student athletes, [*sic*] see Article 1.2(a).[154]

Therefore, student-athletes that are harmed by the NCAA's rules and regulations have standing to pursue claims against the NCAA. International student-athletes can challenge the NCAA's amateur rules, claiming that they are a violation of due process, are applied inconsistently to international student-athletes, and are constructed so as to prejudice international student-athletes.[155]

A. Deprivation of Eligibility as a Violation of Due Process

Student-athletes' attempts to claim a deprivation of eligibility as a violation of the right to due process will not be successful. Although the NCAA may regulate public universities, the U.S. Supreme Court has determined that the NCAA is a private association.[156] Therefore, student-athletes' only available claim is to assert a due process claim against a public university.[157] However, this claim must display a deprivation of a property or liberty interest.[158] Courts do not consider intercollegiate athletic competition to be a constitutionally protected property

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153. *See* RESTATEMENT (SECOND) OF CONTRACTS § 302 (showing that in the law of contracts an incidental or unintended party may be a beneficiary and therefore have a right to sue for injunctive relief or damages).

154. Oliver v. NCAA, 920 N.E.2d 203, 211 (C.P. 2009); *see also* Chris Deubert, Glenn M. Wong, Warren Zola, *Going Pro in Sports: Providing Guidance to Student-Athletes in a Complicated Legal and Regulatory Envrionment*, 28 CARDOZO ARTS & ENT. L.J. 553, 598 (2011) (establishing a basis for why the NCAA bylaws exist and also why they create certain legal problems); *see also* National Collegiate Athletic Association, NCAA BYLAWS MANUAL, http://www.ncaapublications.com/productdownloads/D110.pdf (delineating the NCAA bylaws with regards to conduct of student-athletes and universities).

155. *See* Maureen A. Weston, *Internationalization in College Sports: Issues in Recruiting, Amateurism, and Scope*, 42 WILLAMETTE L. REV. 829, 851 (2006) (showing that international student-athletes have been caught in a particular quagmire with regards to how NCAA bylaws apply to them); *see also Boise State Receives Penalties From NCAA COI* CBSSPORTS.COM (Sept. 13, 2011, 2:53 PM), http://www.cbssports.com/mcc/blogs/entry/24156338/31954214 (illuminating an example of how NCAA bylaws can create unintended and unfair effects on international student athletes).

156. *See* NCAA v. Tarkanian, 488 U.S. 179, 195 (1988); *see also* Ricardo J. Bascuas, *Cheaters, Not Criminals: Antitrust Invalidation of Statutes Outlawing Sports Agent Recruitment*, 105 YALE L.J. 1603, 1636 (showing that the NCAA is indeed a private actor in antitrust cases).

157. *See* Katherine E. Maskevich, *Getting Due Process Into the Game: A Look at the NCAA's Failure to Provide Member Institutions With Due Process and the Effect on Student-Athletes*, 15 SETON HALL J. SPORTS & ENT. L. 299, 315 (2005) (discussing the use of the 14th Amendment to challenge NCAA decisions); *see also* Jose R. Riguera, *NCAA v. Tarkanian: The State Action Doctrine Faces a Half-Court Press*, 44 U. MIAMI L. REV. 197, 203 (1989) (determining that NCAA regulation of public schools and universities is a state action for constitutional purposes).

158. *See* Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) (defining the criteria for deprivation of a personal interest in liberty or property).

interest.[159] Student-athletes could claim that deprivation of the ability to compete is affecting their future earnings as a professional.[160] The courts, however, find the argument that participation is necessary to develop skills for potential professional earnings to be unconvincing and too speculative.[161] Therefore a student-athlete who is ruled ineligible is unlikely to be successful on a deprivation of due process claim.

B. Arbitrary and Capricious

Courts generally implement a very deferential review of the NCAA's rulings,[162] as they do not want to interfere with the manner in which private associations implement their policies.[163] The courts, hesitant to overturn an NCAA decision, will often review the NCAA's findings utilizing an arbitrary and capricious standard.[164] The arbitrary and capricious standard is borrowed from administrative law, and requires that the rule or regulation be reasonably related to the intended purpose.[165] Inconsistent application of rules may be sufficiently arbitrary to

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159. *See* Spath v. NCAA, 728 F.2d 25, 25 (1st Cir. 1984) (holding that the student did not have a property interest in playing on the university ice hockey team); *see also* Rutledge v. Ariz. Bd. of Regents, 660 F.2d 1345, 1345 (9th Cir. 1981) (determining that deprivation of scholarship did not implicate a section 1983 claim); *see also* Marcum v. Dahl, 658 F.2d 731, 731 (10th Cir. 1981) (finding that due process is not violated even when no hearings are held when students' athletic scholarships are not renewed); *see also* Hall v. NCAA, 985 F. Supp. 782, 783 (N.D. Ill. 1997) (concluding that the loss of an athletic scholarship did not to entitle student to relief); *see also* Lesser v. Neosho Cnty. Cmty. Coll., 741 F. Supp. 854, 854 (D. Kan. 1990) (clarifying that the student did not have a liberty interest in playing on the college basketball team).

160. *See* Brian L. Porto, *Balancing Due Process and Academic Integrity in Intercollegiate Athletics: The Scholarship Athlete's Limited Property Interest in Eligibility*, 62 IND. L.J. 1151, 1151 (1987) (classifying continued athletic eligibility as a property interest). *See generally* Robin J. Green, *Does the NCAA Play Fair? A Due Process Analysis of NCAA Enforcement Regulations*, 42 DUKE L.J. 99, 110 (1992) (discussing the deprivation of a property interest in an athletic scholarship and future career opportunity when student-athletes are suspended).

161. *See generally* Colo. Seminary v. NCAA, 417 F. Supp. 885, 887 (D. Colo. 1976), *aff'd,* 570 F.2d 320 (10th Cir. 1978) (denying student's claim that a property or liberty interest existed in his eligibility to participate in intercollegiate athletics).

162. *See* Josephine R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws That Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 266–73 (2010) (discussing the court's view of the effectiveness of NCAA self-regulation and internal procedures). *See generally* Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 72 (2008) (detailing the governing bodies that regulate students' participation in sports).

163. *See* Ratner v. Loudon Cnty. Pub. Sch., 16 Fed. App'x. 140, 142 (4th Cir. 2001) (discussing the federal court's reluctance to pass judgment on a school's policy applicable to student-athletes); *see also* Mitchell v. Bd. of Trustees of Oxford Mun. Separate Sch. Dist., 625 F.2d 660, 664–65 (5th Cir. 1980) (describing the internal regulatory power vested in school boards); *see also* Marsh v. Del. State Univ., No. Civ.A. 05-00087JJF, 2006 WL 141680, at *5 (D. Del. 2006) (contesting the NCAA's decision regarding a track scholarship).

164. *See* Joel Eckert, *Student–Athlete Contract Rights in the Aftermath of Bloom v. NCAA*, 59 VAND. L. REV. 905, 912–15 (2006) (explaining the arbitrary and capricious standard of review used with regards to the NCAA). *See generally* Stephen F. Ross & S. Baker Kensinger, *Judicial Review of NCAA Decisions: Evaluation of the Restitution Rule and a Call for Arbitration* (May 2009), http://works.bepress.co m/stephen_ross/1 (discussing standards for judicial review of NCAA decisions).

165. *See* Mayo Found. for Med. Educ. and Research v. U.S., 131 S. Ct. 704, 711–12 (1911) (noting that a regulation that is construed to be substantially related to the congressional intent can be disturbed only if it is arbitrary or capricious itself, or if it is in conflict with the statute).

invite judicial review.[166] The arbitrary and capricious application of otherwise reasonable rules warrants judicial intrusion into the affairs of a private, voluntary organization.[167] International basketball players are in a position different from that of the typical American student-athlete. The foreign players can attack the NCAA's "amateurism" rules, claiming the rules are constructed unfairly toward foreign basketball players and are applied inconsistently among athletes from different sports.[168] To correct this unfair application and construction of the rules, the NCAA needs to look no further than the way they handle Olympic athletes.

1. The NCAA Applies Its Rules Inconsistently Between Athletes of Different Sports

Enes Kanter is a 6'11'' 272-pound center from Turkey who has an advanced skill set for a 17-year-old basketball player.[169] Kanter put these skills on display at the Nike Hoop Summit in 2010, scoring 34 points and grabbing 13 rebounds, breaking Dirk Nowitzki's previous record.[170] His performance left professional scouts drooling at his potential. Kanter, however, was not interested in a professional career with potential lucrative contract offers. Instead Kanter wished to pursue a college education in the United States. He signed a National Letter of Intent to attend the University of Kentucky on a full basketball scholarship.[171] Shortly after he signed, the NCAA launched an investigation into Kanter's basketball history in Europe to see if he violated the NCAA's rules governing amateur status.[172] As the Kanter investigation illustrates, the NCAA may not be as lenient with European players as it is with U.S. players.

Basketball opportunities in Europe vastly differ from the opportunities granted to U.S. athletes. Young European basketball players do not have high school or university teams to

166. *See, e.g.,* N.A.A.C.P. v. Golding, 679 A.2d 554, 561 (1996) (finding that while the court would ordinarily refrain from reviewing decisions of unincorporated private associations, the court notes that if an organization acts inconsistently with its own rules, its action may be sufficiently arbitrary to invite judicial review).

167. *See, e.g.*, King v. Grand Chapter of R.I. Order of Eastern Star, 919 A.2d 991, 997–98 (R.I. 2007) (holding that judicial intervention is warranted when rules of private corporations are applied arbitrarily because the private corporation has a duty to the employee to enforce those rules fairly).

168. *See, e.g.,* Eric Crawford, *Leveling the Foreign Domestic Amateurism Playing Field*, COURIER-JOURNAL (Jan. 8, 2011), http://blogs.courier-journal.com/ericcrawford/2011/01/08/leveling-the-foreign-domestic-amateurism-playing-field (noting that domestic players can keep their eligibility status despite receiving loans, free housing and other "benefits beyond expenses" by simply repaying, while foreign players cannot).

169. *See* Jonathan Givony, *Finding a Niche for Enes Kanter*, DRAFT EXPRESS (Jun. 8, 2011), http://www.draftexpress.com/article/Finding-a-Niche-for-Enes-Kanter-3743 (describing Kanter as a unique athlete at 6'11'' with solid agility, good body control and excellent touch on his jump shot).

170. *See 2010 Nike Hoops Summit*, INSIDEHOOPS (Apr. 10, 2010), http://www.insidehoops.com/hoop-summit.shtml (describing Kanter's 13-of-21 shooting performance from the field as setting the World Team Nike Hoop Summit record for field goals made and attempted and that his 34 points broke the individual World Team scoring record of 33 points set by Dirk Nowitzki in 1998).

171. *See Kanter Signs to Play at Kentucky*, UK ATHLETICS (Apr. 14, 2010), http://www.ukathletics.com/sports/m-baskbl/spec-rel/041410aaa.html.

172. *See NCAA to Investigate Top Kentucky Recruit from Turkey*, GANT DAILY (Sep. 8, 2010), http://gantdaily.com/2010/09/08/ncaa-to-investigate-top-kentucky-recruit-from-turkey (explaining that the NCAA launched its investigation to see if Kanter received a salary and other benefits from Turkish club Fernerbache Ulker).

develop their skills.[173] The basketball opportunities for athletes are limited to teams that fall under the organizational umbrella of professional teams.[174] The professional squads and the youth teams are part of the professional organization.[175] Therefore, the more advanced the player is, the higher up the organization that will want that player. The organizations pay their players only at the professional levels, not at the lower levels.[176] FIBA, understanding the complications of paying basketball players who may want to play collegiately in the United States, has enforced an 18-year-old age restriction on when clubs are allowed to offer their first professional contract to the player.[177] If a player under the age of 18 wishes to play in another region, away from his academic institution, FIBA has required authorization of the transfer.[178] The criteria for authorization include payment for academic, school, or vocational training to prepare the player for life after basketball, the appropriate basketball training to prepare the player for a professional career, and assurances that the transfer does not disrupt the player's schooling.[179] The FIBA governing body has clearly put an emphasis on the importance of education. Likewise the NCAA lists as one of its core values "the pursuit of excellence in both academics and athletics."[180]

The NCAA, however, has attempted to distinguish itself from professional sports leagues with its commitment to "amateurism." The Supreme Court has recognized the legitimacy of

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173. *See* Athanasios Laios, *School Versus Non-school Sports: Structure, Organization and Function in Greece, Europe and the USA*, 9 INT'L J. OF EDUC. 4, 6 (1995) (noting that a minimal portion of money spent on education in Europe supports school sports); *see also* Marc Isenberg, *A Thorough Exam of the Euro*, BASKETBALL TIMES, 28 (2009), http://www.moneyplayersblog.com/files/bt-eurocamp-0906.pdf (acknowledging that Europe does not have college basketball).

174. *See* Isenberg, *supra* note 173 (discussing that European players are the property of clubs and federations, and that they are traded, bought and sold); *see also* Brian McCormick, *The Economics of Basketball Development*, YAHOO! ASSOCIATED CONTENT (Sep. 21, 2006), http://www.associatedcontent.com/article/61177/the_economics_of_basketball_development.html?cat=3 (arguing that basketball players are signed by professional teams at a young age and are developed through the club's youth system).

175. *See* Andrepoiss, *European Basketball System,* HUBPAGES, http://andrepoiss.hubpages.com/hub/European-Basketball-System (last visited Oct. 15, 2011) (stating that European basketball organizations start with younger age brackets and continue to older age brackets); *see also WorldWide Development Systems*, CROSS OVER MOVEMENT, http://thecrossovermovement.wordpress.com/the-manifesto/player-development-worldwide (last visited Oct. 15, 2011) (asserting that several basketball teams in Europe sign young players and place them within their club system or academy).

176. *See* Wladimir Andreff & Paul D. Staudohar, *The Evolving European Model of Professional Sports Finance*, 1 J. SPORTS ECON. 257, 258 (2000) (expressing that an amateur club's purpose is to develop young players and to gather members who are interested in the practice of the sport).

177. *See* INT'L BASKETBALL FED'N, INTERNAL REGULATIONS 2010, § H.3.4.2 (2010) (declaring that on or after the player's 18th birthday, the club or other organization for which a player is licensed at his 18th birthday has the right to sign the first contract with that young player).

178. *See id.* at § H.3.4.1 (requiring the approval of the Secretary General of FIBA for players under eighteen to transfer); *see also* INT'L BASKETBALL FED'N, NATIONAL FEDERATION MANUAL, § 1.6.4 (2011) (stating that the approval of the Secretary General of FIBA is needed for a player to transfer internationally before their eighteenth birthday).

179. *See* INTERNAL REGULATIONS 2010, *supra* note 177, at § H.3.4.1.1(b).

180. *See Core Values*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Who+We+Are/Core+Values+landing+page (last visited Oct. 15, 2011).

the NCAA's goal to differentiate collegiate athletics from professional athletics in *NCAA v. Board of Regents of the University of Oklahoma*.[181] The Court heard the case in an appeal of an antitrust violation ruling involving the restrictions in television broadcast agreements.[182] In applying a rule of reason test to the agreements, the Court articulated the special function collegiate athletics offer and the importance of maintaining the athlete's amateur status:

> [T]he NCAA seeks to market a particular brand of football—college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable. . . . In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like.[183]

The NCAA has promulgated rules to protect the amateur status of its athletes.

Enes Kanter, however, has encountered a significant barrier to his goal of playing for the University of Kentucky: the NCAA has permanently banned Enes from playing.[184] The NCAA defines a professional team as an organization that provides for its players more than "actual and necessary expenses for participation on the team."[185] This vague standard leaves the NCAA investigatory body broad discretion to determine which athletes can continue their careers as amateurs and which are barred from the NCAA as professionals. The rule prescribes that the expenses must be limited to such things as meals, lodging, apparel, equipment and supplies, health insurance, transportation, and other reasonable expenses.[186] The NCAA found that Kanter's parents received $33,000 in excess of what was necessary for expenses from the professional club of Fenerbahce.[187] As a result, the NCAA banned Kanter permanently from collegiate basketball.[188]

Enes Kanter's father, Mehmet Kanter, has vehemently supported his son throughout the NCAA's investigations. He claims that they did not receive beyond what was necessary for

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181. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 101-2 (1984) (recognizing the NCAA's goal of distinguishing its product from professional sports through its academic tradition).

182. *See id.* at 97-98 (summarizing the previous Court of Appeals finding that NCAA practices violated antitrust laws).

183. *Id.* at 101-2 (1984).

184. *See* Pete Thamel, *Decision on Kanter Upheld*, N.Y. TIMES, Jan. 8, 2011, at D5 (discussing the NCAA's final decision to deny Enes Kanter eligibility to play college basketball).

185. NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA 2010-11 DIVISION I MANUAL, art. 12.02.4, at 65, http://www.texastech.com/manual/graphics/compliance/NCAA%20Manual%2010-11.pdf.

186. *See id.* (providing an itemized list of actual and necessary expenses that players are limited to receiving from their team).

187. *See* Press Release, The National Collegiate Athletic Association, Kanter Ruled Permanently Ineligible (Jan. 7, 2011), http://www.ncaa.org/wps/wcm/connect/ncaa/ncaa/media+and+events/press+room+news+release+archive/2011/infractions/20110107+kanter+rls (announcing that Kanter has been found permanently ineligible for receiving improper benefits from a professional basketball team).

188. See *id.*

expenses, and that Enes was not even aware of the money being transferred.[189] The NCAA, in ruling that the money exchanged is beyond what is necessary, has applied this standard in a potentially unfair way to European youth basketball players when compared to Amateur Athletic Union (AAU) basketball programs.[190] AAU basketball programs involve select teams of elite basketball players who compete on a national scale during the high school basketball offseason.[191] None of the players are paid, but to say that the AAU programs are amateur programs is misleading. AAU teams hand select players from all over the country to play for their travel team.[192] Teams lure these elite players to their programs with national playing schedules, national media exposure, and cutting edge and popular athletic apparel.[193] Media outlets vie for access to national AAU tournaments.[194] Sports apparel giants like Nike and Adidas will competitively bid for the exclusive apparel agreements with the teams;[195] they know that their product will be seen on a national scale and perhaps on a future NBA superstar. Even NBA stars will maximize marketing opportunities by sponsoring teams such as team King of The Court (LeBron James), Team Melo (Carmelo Anthony), and the CP3 All Stars (Chris Paul).[196] The programs shower their players with apparel and pay for the expenses of traveling all around the country.[197] The AAU Code prohibits the payment of any athletes but does not place boundaries on the excessiveness of expenses; they can spend as much as they want on apparel, travel, and meals.[198] Therefore the NCAA is left to its discretion once again to determine what is necessary. NCAA investigations of AAU programs for providing beyond what is necessary are

189. *See* Mike DeCourcy, *Enes Kanter's Father Says Turkish Club Is "Trying to Make an Example" of His Son*, AOL SPORTING NEWS, http://aol.sportingnews.com/ncaa-basketball/feed/2010-09/enes-kanter/story/enes-kanters-father-says-turkish-club-is-trying-to-make-an-example-of-his-son (last visited Oct. 15, 2011) (reporting that Kanter's father claimed to have turned down million-dollar offers from the team and denied allegations that his son received a $100,000 salary).

190. *See* Eric Crawford, *Leveling the Foreign-Domestic Amateurism Playing Field*, COURIER-JOURNAL BLOG (Jan. 8, 2011), http://blogs.courier-journal.com/ericcrawford/2011/01/08/leveling-the-foreign-domestic-amateurism-playing-field/ (arguing that the NCAA is unfairly harsh in its enforcement against players in European leagues in contrast to its leniency regarding American players).

191. *See* Welch Suggs, *Tragedy and Triumph in Title IX*, 7 VAND. J. ENT. L. & PRAC. 421, 424 (2005) (describing AAU basketball programs as complex series of tournaments and camps that increasingly prioritize athletic skills to the detriment of academic and social development).

192. *See* David Noonan & N'Gai Croal*, Fast Break to the Big Time*, NEWSWEEK, June 28, 2004, at 40 (noting that AAU is a nationwide program comprised of hundreds of teams around the country and gateway to professional leagues).

193. *See* Erick S. Lee, *A Perception of Impropriety: The Use of Package Deals in College Basketball Recruiting*, 17 VILL. SPORTS & ENT. L.J. 59, 59, 65 (2010) (criticizing the use of "package deals" by coaches to lure elite athletes to their teams).

194. *See* W. Burlette Carter, *Student-Athlete Welfare in a Restructured NCAA*, 2 VA. J. SPORTS & L. 1, 22–24 (2000) (explaining how NCAA institutions and schools enter into agreements to limit media coverage of sports games).

195. *See* Derrick Goold & Michael Smith, *Shoe Wars,* THE TIMES-PICAYUNE, Aug. 9, 1998, at C1 (demonstrating the competition between Nike and Adidas to sponsor the best basketball players in exchange for their loyalty to their product).

196. *See* Tim Povtak, *NBA Stars Giving Back to AAU: Several Players Like Amare Stoudemire Are Sponsoring the Youth Teams*, ORLANDO SENTINEL, July 26, 2007, at D2 (emphasizing how players like Amare Stoudemire and Carmelo Anthony use their commercial power to sponsor local AAU teams).

197. *See* Sharon Fink et al., *A Battle for Heart and Sole*, ST. PETERSBURG TIMES, Mar. 22, 1998, at C1 (illustrating the benefits that AAU teams receive from competing sport apparel manufacturers).

198. *See* AMATEUR ATHLETIC UNION, 2011 AAU OFFICIAL CODEBOOK, http://www.aausports.org/AAUInfo/CodeBook.aspx (last visited Oct. 15, 2011) (detailing the official codebook for 2000).

rare; the violations generally stem from universities providing improper benefits to a player, not the AAU program.[199] Investigations into international players, however, are more prevalent. To eliminate the inconsistencies in investigations, the NCAA should either apply its rules consistently between international athletes and domestic athletes or should reevaluate the construction of its amateurism rules to adapt to the realities of international basketball.

Mehmet Kanter, a successful doctor, has offered to pay the money back.[200] To the Kanters, the situation was not about the money; the stipend they were receiving was going to help pay for education expenses, travel, and training for Enes. In fact, Enes turned down lucrative contract offers from several professional clubs to ensure he maintained his amateur status to achieve his goal of playing collegiate basketball.[201] He also turned down the chance to cash in on a share of $18 million and a free luxury condominium the Turkish national team players received for finishing in second place at the FIBA World Championships.[202] Upon appeal, the NCAA stood by its permanent ban on Enes regardless of whether he was aware of any rule breaking.[203]

In 2010, the NCAA was not as stringent with its investigation of Auburn University quarterback Cameron Newton. Newton was in the midst of a Heisman Trophy season and leading his university to a BCS National Championship, when news broke that schools had offered him and his family money in return for the signing of his national letter of intent to play at that school.[204] The NCAA discovered that his father, Cecil Newton, was part of the scheme that offered to pay upwards of $100,000 in exchange for a commitment to play, clearly a violation

199. There have been many investigations regarding the payment of money and other benefits (cellular phones, cars, etc.) to AAU players. *See, e.g.*, Eric Crawford, *The Vault: The Marvin Stone-NCAA Saga*, COURIER-JOURNAL BLOG (May 31, 2010), http://blogs.courier-journal.com/ericcrawford/2010/05/31/the-vault-the-marvin-stone-ncaa-saga (discussing an NCAA investigation into an AAU basketball player who allegedly received improper benefits from a university)

200. *See* Pete Thamel, *Turkish Team Says It Paid a Top Kentucky Recruit,* N.Y. TIMES, Sept. 8, 2010, at B11(referring to Dr. Mehmet Kanter as a prominent professor in Turkey); *see also* Mike DeCourcy, *NCAA Denies Kanter Appeal; Kentucky Center Ruled Permanently Ineligible,* AOL SPORTING NEWS (Jan. 7, 2011, 5:21 PM), http://aol.sportingnews.com/ncaa-denies-kanter-appeal-kentucky-center-ruled-permanently-ineligible (noting that Dr. Mehmet Kanter's offered to return $30,000 that his family received from a Turkish basketball club while his son played for the club for three years).

201. *See* Mike DeCourcy, *Enes Kanter's Father Says Turkish Club Is "Trying to Make an Example" of His Son,* AOL SPORTING NEWS, http://aol.sportingnews.com/ncaa-basketball/feed/2010-09/enes-kanter/story/enes-kanters-father-says-turkish-club-is-trying-to-make-an-example-of-his-son (last visited Oct. 15, 2011) (explaining that Dr. Enes Kanter declined to accept contract offers from Turkish Clubs because he intended for his son to play and study at a U.S. college).

202. *See id.* (stating that members of the Turkish team received lavish rewards for their performance in the FIBA World Championship and Enes Kantor declined to play because it would have required him to miss nearly one month of classes in the United Kingdom rendering him academically ineligible to compete in the 2010–11 season).

203. *See* Pete Thamel, *N.C.A.A. Denies Kentucky's Appeal Over Kanter's Eligibility,* N.Y. TIMES, Jan. 7, 2011, at D5 (reporting that the University of Kentucky's eligibility appeal for Enes Kanter was denied by the NCAA reinstatement committee because he received a significant amount of money, greater than his actual expenses, from a professional team prior to college).

204. *See Cam Newton Cleared to Play,* ESPN (Dec. 3, 2010), http://sports.espn.go.com/ncf/news/story?id=5870788 (affirming that Cam Newton is eligible in spite of earlier findings that a violation of Newton's amateur status had occurred when his father solicited Auburn University for a six-figure payment).

of NCAA amateur rules.[205] Nevertheless, the NCAA ruled that the human highlight reel with unending marketing charisma was eligible to play for the national title in January 2011.[206] The NCAA justified its decision through Cameron Newton's claim that he was unaware of these solicitations.[207] The governing body came to the determination that Cameron Newton was unaware that his father received, or could potentially receive, hundreds of thousands of dollars for his services to particular colleges.[208] Yet that same governing body has permanently banned a young student-athlete from Turkey who has expressed a genuine interest in attending an institution of higher learning over already available hundreds of thousands of dollars.

Kanter can seek recourse from the courts, asserting that the NCAA is applying its rules in an inconsistent manner among its members.[209] The jurisdiction where Kanter would bring his claim has recently heard a similar case in *NCAA v Lasege*.[210] *Lasege* involved a basketball player at the University of Louisville, Muhammed Lasege, who was suspended by the NCAA for entering into professional contracts and receiving preferential benefits.[211] Lasege is a citizen of Nigeria and enrolled at the University of Louisville during the 1999–2000 academic year.[212] The NCAA investigation of his past determined that Lasege signed a contract with New Sport in Russia to represent Lasege in negotiations with a professional basketball team in Moscow, and as a result Lasege received a $9,000-a-year salary, an apartment, meals, a driver, a cook, a visa to Russia, clothing, and round-trip tickets from Moscow to Nigeria.[213] The NCAA also found that Lasege signed a second professional contract, with a furnished apartment, a salary, utilities, use of a car, and two round-trip tickets between Nigeria and Moscow.[214] Additionally,

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205. *See* Pete Thamel, *Auburn Star's Father Sought Signing Money, Recruiter Says*, N.Y. TIMES, Nov. 12, 2010, at B16 (alleging that Cam Newton's father solicited Mississippi State for monetary amounts ranging between $100,000 and $180,000 for his son to sign with the school).

206. *See* Cindy Boren, *NCAA Rules Cam Newton Eligible to Play Football but Questions Still Linger*, WASH. POST BLOG (Dec. 1, 2010, 1:09 PM), http://www.washingtonpost.com/blogs/early-lead/post/ncaa-rules-cam-newton-eligible-to-play-football-but-questions-still-linger/2010/12/20/ABIcuGG_-blog.html (emphasizing that although the NCAA ruled Auburn quarterback Cam Newton eligible to play in the SEC and BCS championship games, Newton's name was not completely cleared).

207. *See* Steve Wieberg, *NCAA Clears Auburn's Newton* , USA TODAY, Dec. 2, 2010, at C1(reporting that the NCAA did not find evidence that Cam Newton had participated in his father's "pay-for-play" scheme during his recruitment).

208. *See* Pete Thamel, *NCAA Declines to Punish Newton*, N.Y. TIMES, Dec. 2, 2010, at B14 (noting that the NCAA did not find that Cam Newton or anyone at Auburn University was aware of Newton's father's solicitation of money).

209. *See* Dick Vitale, *No Consistency in NCAA Rulings*, ESPN.COM (Jan. 13, 2011, 4:26 PM), http://sports.espn.go.com/espn/dickvitale/news/story?id=6019166 (arguing that the NCAA has been very inconsistent with its rulings and that Kanter was punished more harshly than necessary).

210. *See* Nat'l Collegiate Athletic Ass'n v. Lasege, 53 S.W.3d 77, 80–81 (Ky. 2001).

211. *See id.*

212. *See id.* at 80.

213. *See id.* at 81.

214. *See id.*

Lasege was provided an airline ticket and visa to Canada, where an individual provided him lodging, meals, transportation, as well as paying for the transportation for an unofficial visit to Louisville.[215] After the NCAA's ruling, Lasege appealed to the NCAA Subcommittee, which affirmed the NCAA's decision.[216]

Lasege filed a motion and complaint in Jefferson Circuit Court seeking a temporary injunction requiring the NCAA to reverse its decision to ban Lasege from competition.[217] The trial court, finding that the court was presented with a question as to whether the NCAA's ruling was arbitrary and capricious, suggested the NCAA had ignored economic and cultural disadvantages, coercion associated with execution of the contracts, and complete ignorance of NCAA regulations.[218] Additionally, the court noted the NCAA's decision that ruled Lasege ineligible to conflict with its own amateurism guidelines and past eligibility determinations regarding athletes who had engaged in similar violations.[219] The court found that Lasege would suffer substantial collateral consequences if his eligibility was erroneously determined to be permanently destroyed.[220] The NCAA sought interlocutory relief, but the Court of Appeals found the trial court's findings to be supported by substantial evidence.[221]

The Kentucky Supreme Court was unmoved by the trial court's findings. The court noted that a mere disagreement with the NCAA's ruling cannot render the decision arbitrary or capricious.[222] The arbitrary and capricious standard has been used by the Kentucky court in situations where the rule is clearly erroneous as being unsupported by substantial evidence.[223] In balancing the interests at stake, the court found that while Lasege has important interests at risk, "[t]he NCAA . . . has an interest in enforcing its regulations and preserving the amateur nature of intercollegiate athletics."[224] Ultimately the court found the NCAA "should be allowed to 'paddle their own canoe' without unwarranted interference from the courts."[225]

The NCAA has adopted exceptions for student athletes receiving compensation.[226] Its Operation Gold Grant program awards stipends each year to athletes who finish in the top eight places in that year's qualifying event in every year except an Olympic year.[227] During an

215. *See Lasege*, 53 S.W.3d at 81.

216. *See id.*

217. *See id.*

218. *See id.*

219. *See id.* at 81-82.

220. *See id.* at 82.

221. *See Lasege*, 53 S.W.3d at 85.

222. *See id.* at 84–85.

223. *See id.* at 85.

224. *See id.*

225. *See id.* at 83.

226. *See* THE BUSINESS OF SPORTS 654 (Scott R. Rosner & Kenneth L. Shropshire eds., 2d ed. 2011) (noting the various ways in which the NCAA has compensated amateur athletes).

227. *See* U.S. Olympic Committee, *2008-2009 Athlete Support Programs: Information Sheet*, TEAMUSA.ORG, http://www.teamusa.org/resources/teamusanet/athlete-services/athlete-support-progams (last visited Oct. 15, 2011) (providing a detailed description of the Operation Gold Grant program and its parameters).

Olympic year, the qualification becomes the top three places at the Olympic Games.[228] These are sizable stipends; gold receives $25,000, silver receives $15,000, and bronze receives $10,000.[229] The NCAA explicitly exempts these payments from destroying an athlete's amateur status via Rule 12.1.2.1.4.1.2.[230] The exception exhibits inconsistent logic; the NCAA allows Olympic athletes to be compensated during their collegiate careers, but not international basketball players before their collegiate careers commence.[231]

For Enes Kanter to have a chance of success on a legal challenge he will have to argue that the NCAA has applied its rules arbitrarily and capriciously to his situation. He would have to parallel his scenario to that of Cameron Newton, who was reinstated a single day after being declared ineligible, and highlight the unequal treatment international athletes receive compared to AAU clubs and Olympic athletes. While the Kanters acknowledge receiving benefits, they were under the impression that the money for educational expenses was under the NCAA limits for necessary expenses. He will have to plead with the court that the standard of "necessary expenses" is both vague and applied inconsistently by the NCAA.

2. Exceptions to the Rules Create Unequal Application Among Different Sports

The amateur status regulations of the NCAA have served to frustrate young European basketball players hoping to attend a U.S. institution. Parsing through the complex web of amateur rules has become a difficult task. Players have been suspended without ever receiving any compensation. Such was the case with Deniz Kilicli of Samsun, Turkey. Kilicli played for Pertevniyal in 2007–8 in the Turkish Second Basketball League.[232] Pertevniyal is the farm club for the Istanbul first division Efes Pilsen and generally is a developmental team for talented Turkish youths.[233] Neither Kilicli nor any of his Turkish teammates had signed a professional contract.[234] When the first division team reassigned one of their professional Americans, Lamar Butler, to play 20 games for Pertevniyal, however, Kilicli was unknowingly paying a price.[235] Kilicli then signed with West Virginia University on a full basketball scholarship.[236] The NCAA, however, entered a ruling that West Virginia violated an NCAA rule by playing Kilicli

228. *See id.* (charting the Operation Gold payment schedule over several years).

229. *See id.* (listing the stipends offered to medalists).

230. *See* NAT'L COLLEGIATE ATHLETIC ASS'N, 2011-12 NCAA DIVISION I MANUAL art. 12.1.2.1.4.1.2, at 64 (2011), http://www.ncaapublications.com/productdownloads/D112.pdf (permitting student-athletes and prospective student-athletes to accept funds through the Operation Gold program).

231. *See id.* (failing to exempt funds granted by foreign Olympic committees).

232. *See* Luke Winn, *Is Turkish Beast Deniz Kilicli the Missing Piece for West Virginia?*, SPORTS ILLUSTRATED (Feb. 2, 2010 11:44 AM), http://sportsillustrated.cnn.com/2010/writers/luke_winn/02/02/deniz.kilicli/index.html (recounting Kilicli's precollegiate basketball experience).

233. *See* Luke Winn, *New Rule Could Clear Way for Canter*, SPORTS ILLUSTRATED (Mar. 24, 2010), http://sportsillustrated.cnn.com/basketball/ncaa/mens-tournament/blog/2010/03/24/new-rule-could-clear-way-for-kanter/index.html (characterizing Pertevniyal as a farm team for the "powerhouse" Efes Pilsen).

234. *See* Winn, *supra* note 232 (explaining Kilicli's contractual history with Pertevniyal).

235. *See* Winn, *supra* note 233 (explaining that Kilicli was penalized for playing 13 games with Butler).

236. *See Deniz Kilicli Player Profile*, ESPN.COM, http://espn.go.com/mens-college-basketball/player/_/id/45966/deniz-kilicli (last visited Oct. 15, 2011) (listing Kilicli's player attributes, including position played on the West Virginia University's men's basketball team, height, weight, place of birth, and experience).

and must suffer a penalty.[237] NCAA Rule 12.2.3.2 prohibits playing basketball on a team with professional athletes;[238] Kilicli was suspended one NCAA game for every game Butler played alongside him.[239] He eventually returned to the Mountaineers' team and has become a crucial part of the team's success.[240]

The NCAA has effectively forced the European players to refrain from playing at the highest level, even if it is without compensation. The harm cannot be the fact that these international players are gaining some advantage by merely playing with professionals, because the NCAA permits college athletes to play alongside professionals as long as the professionals are not being paid for that particular game.[241] The European players do not have the same access to basketball playing opportunities; they are limited to the club divisions and national tournaments to develop their skills. If the player was able to transfer to another superior team, FIBA requires that the new team pay for the player's education.[242] The NCAA prohibits the payment of educational expenses prior to collegiate enrollment by professional teams or organizations.[243] This rule, however, does not bar high school athletes from receiving full athletic scholarships, top-notch training equipment, sponsored apparel, and room and board at preparatory

237. *See* Bob Hertzel, *WVU Recruit Kilicli Suspended 20 Games*, TIMESWV.COM (Oct. 31, 2009), http://timeswv.com/bob_herzel/x546415656/WVU-recruit-Kilicli-suspended-20-games (explaining that Kilicli was suspended 20 games for violating the NCAA rule prohibiting college players from playing on the same teams as professionals).

238. *See* 2010-11 NCAA DIVISION I MANUAL, art. 12.2.3.2, *supra* note 230, at 68 (stating an athlete is ineligible from playing intercollegiate sports if that student ever competed on a professional team).

239. However, Rule 12.2.3.2.5 of the NCAA DIVISION I MANUAL creates an exception for amateur athletes who compete alongside professional athletes who are being compensated to play for Olympic or national teams by governing bodies, so long as the amateur does not accept any compensation for playing. Why the inconsistency? Olympic and national teams have higher degrees of transparency, making it easier and more efficient for the NCAA to monitor the compensation of players. *See* 2010-11 NCAA DIVISION I MANUAL, art. 12.2.3.2, *supra* note 230, at 68 (citing rule which allows student athletes to participate on Olympic or national teams that compete for prize money, provided that the student athlete does not accept any prize money or compensation).

240. *See* Michael Sanserino, *West Virginia Blows Out Robert Morris, 82-46*, PITT. POST-GAZETTE (Dec. 8, 2010), http://www.post-gazette.com/pg/10342/1109063-144.stm (stating that Kilicli led all West Virginia scorers with 14 points for the game, with 12 of the points coming in the ever-important fourth quarter).

241. *See* 2010-2011 DIVISION I MANUAL art. 14.7.4(a) (explaining that student-athletes may compete in a summer league if the league is certified per bylaw 14.7.4.1); 2010-2011 DIVISION I MANUAL art. 14.7.4.1(stating the requirements for a summer basketball league to receive certification by the NCAA, which include a payment prohibition); *see also* 2010-2011 DIVISION I MANUAL art. 12.2.3.2.2 (asserting that an individual can play alongside a professional on the same team, provided the professional is not being paid by a professional team or league to play, citing summer basketball leagues as an example); for a list of NCAA certified summer leagues visit http://www.ncaa.org/wps/wcm/connect/ae025600472b2a42af83ffc110a6426c/League+-+Men.pdf?MOD=AJPERES&CACHEID=ae025600472b2a42af83ffc110a6426c; *see, e.g.*, The EBC Rucker Park Summer League.

242. *See* INT'L BASKETBALL FEDERATION, INTERNAL REGULATIONS 2010 § H.3.4.1.1, at 72 (2010), http://www.fiba.com/downloads/v3_expe/agen/FIBA_FAT_IR_H123_100501.pdf (stating that if a player makes a basketball related transfer, his new team shall guarantee the player adequate educational training).

243. *See* NAT'L COLLEGIATE ATHLETIC ASS'N, 2011–12 NCAA DIVISION I MANUAL art. 12.1.2.1.4.1.2, at 66–67 (2011), http://www.ncaapublications.com/productdownloads/D112.pdf (providing that professional sports teams or organizations are prohibited from paying educational expenses for any player prior to the player's collegiate enrollment).

schools.[244] Once again, the NCAA seems to apply its rules unevenly to U.S. and international basketball players.

A potential justification from the NCAA is that the geographical separation and lack of direct influence on the FIBA leagues provides for deficient oversight of international leagues' compensation procedures. The NCAA may be hesitant to allow nonprofessionals to compete with professionals because of a fear that the league will not be able to monitor whether teams are providing compensation to nonprofessional players.

Therefore, a young talented European basketball player is not left with many ways to achieve his goal of playing in the NCAA. The athlete has the option of competing against players of a lesser caliber with the European youth teams, but choosing this route will stymie the development of basketball skills. A player can hope he will receive enough exposure through national youth tournaments to receive interest from a collegiate program, but this hope presupposes that the athlete will be able to develop sufficient skills to compete against top international competition. Lastly, the athlete can move to the United States to play at a U.S. high school, but traveling overseas requires a substantial financial investment and raises potential concerns, including unfamiliar living situations or the lack of cultural maturity to handle living abroad.[245]

The NCAA's rules prevent basketball players from participating on a team with professional players, while carving out an exception for certain other sports.[246] An individual may compete on "a tennis, golf, two-person sand volleyball, or two-person synchronized diving team with persons who are competing for cash or a comparable prize, provided the individual does not receive payment of any kind for such participation."[247] The NCAA created these exceptions to keep abreast of the evolution of sport. Athletes in these various sports have become talented at a young age. To remain competitive, they needed to allow these athletes to compete against professionals within their sport. Similarly, foreign basketball players are seeking higher levels of competition to stay competitive. The nature of foreign basketball leagues requires the NCAA to reevaluate the construction of its amateur rules and create exceptions for international basketball players. As it stands, the NCAA has constructed amateur rules that unfairly restrict international basketball players' mobility.

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244. *See id.* (listing the entities that may not provide amateur athletes education expenses and services prior to college).

245. We have seen the reverse migration occur when current NBA star Brandon Jennings was an 18-year-old athlete. Jennings decided not to attend the University of Arizona and was too young to be eligible for the NBA draft. He signed a contract for over $1 million to play for Lottomatica Roma in Italy. He also received a $2 million contract from Under Armour. With the financial stability he was able to provide for his mother and brother to live with him during his stay, something that European youths looking to play in the United States do not always have the luxury of doing. *See* Bob Ryan, *Jennings Owes a Bow to Garnett*, BOSTON GLOBE, Dec. 8, 2009, at 1 (reporting that Brandon Jennings did not go to the University of Arizona and received $1.2 million from his Italian team and an additional $2 million from Under Armour).

246. *See* 2010–2011 DIVISION I MANUAL art. 12.2.3.2, *supra* note 243, at 71 (declaring that all athletes are prohibited from playing on intercollegiate teams if they have competed on a professional team, except for tennis players, golfers, volleyball players, and synchronized divers).

247. *See id.* (listing the exceptions to the prohibition on athletes with professional experience participating on intercollegiate teams).

Should the NCAA consider reconstructing the amateurism regulations to accommodate international basketball players' situations, it can borrow concepts from another amateur athletics governing body—the U.S. Olympic Committee (USOC). If the NCAA creates an exception to allow international basketball players to compete in FIBA leagues alongside professionals, the NCAA could adopt the USOC's trust fund program.[248] The trust fund program allows athletes to withdraw money as necessary to satisfy the athlete's expenses.[249] The NCAA can promulgate rules regulating when an athlete can withdraw funds and appoint a trustee to oversee the withdrawal of the funds. This program would eliminate the difficult burden for international basketball players to predict what the NCAA considers a "necessary expense." This will allow the NCAA to consider each athlete's personal needs before issuing a judgment.

IV. Conclusion

It is clear that sports have complicated the efficient operation of law. The unique arrangements that leagues and sports organizations have to develop to generate a successful competitive product sometimes seem to be in conflict with statutes or legal rights. The leagues have placed various restrictions on players to limit their freedom of movement. The NBA will likely skirt an antitrust violation for their agreement with FIBA over limiting the training time for NBA players with their national teams. The courts will likely never hear this claim because the limitation is for the players' own benefit. The NBA-FIBA Agreement, however, constitutes a horizontal restriction upon the signing of athletes, and the two organizations could be at risk for an antitrust violation should a player bring forward such a claim. Lastly, international athletes who face restrictions by way of the NCAA regulations on amateurism undertake the difficult burden of proving the NCAA has applied its rules in an arbitrary manner, and the courts have been reluctant to interfere with the association's enforcement of its rules. The NCAA can borrow from its amateur athletic kin, the Olympic Committee, and institute programs to adapt to the realities of international basketball. In the meantime, basketball players, unlike members of many other professions, are not free to play where they want.

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248. *See* Julia Brighton, Note, *The NCAA and the Right of Publicity: How the O'Bannon/Keller Case May Finally Level the Playing Field*, 33 HASTINGS COMM. & ENT. L.J. 275, 289 (2011) (describing the structure and purpose of the U.S. Olympic Committee's trust fund program).

249. *See* Vladimir P. Belo, Note, *The Shirts off Their Backs: Colleges Getting Away With Violating the Right of Publicity*, 19 HASTINGS COMM. & ENT. L.J. 133, 154 (1996) (illustrating how monies are collected into the fund and subsequently used to pay the athlete's expenses).

The *Nullum Crimen Sine Lege* Principle in the Main Legal Traditions: Common Law, Civil Law, and Islamic Law Defining International Crimes Through the Limits Imposed by Article 22 of the Rome Statute

Rodrigo Dellutri*

I. Introduction

For as long as people have lived in organized societies, there have been tensions between those who ruled and those who were governed. Criminal legislation has proved to be an effective tool for exercising formal social control through the application of punishments.[1] This broad power has been limited through the development of the *nullum crimen sine lege* principle, which in its literal form means "no crime without a law."[2] It is also known as the legality or specificity principle.[3] Today, centuries after its inception, the principle is ingrained in main

1. *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 117 (1823) (suggesting that the use of punishments and rewards in legislation allows the government to maintain social control while keeping society happy); *see also* MICHEL FOUCAULT, DISCIPLINE AND PUNISH 215–16 (1975) (describing how specialized institutions facilitate the formation of disciplinary societies through the mechanism of "panopticism" or surveillance); *see also* Craig Hemmens, *Criminal Law, in* HANDBOOK OF CRIMINAL JUSTICE ADMINISTRATION 167, 167 (2001) (explaining that the government's enforcement of criminal laws affects human behavior and interaction).

2. *See* Prosecutor v. Delalić, Case No. IT-96-21-A, Appeals Chamber Judgment, ¶ 179 (Int'l Crim. Trib. for the Former Yugoslavia, Feb. 20, 2001) (quoting Prosecutor v. Delalić, Case No. IT-96-21-T, Trial Judgment, ¶ 313 (Int'l Crim. Trib. for the Former Yugoslavia, Nov. 16, 1998)) (maintaining that the *nullum crimen sine lege* principle protects individuals who reasonably believed that their unlawful acts were lawful at the time they were committed); *see also* Jonas Nilsson, *The Principle of Nullum Crimen Sine Lege*, *in* RETHINKING INTERNATIONAL CRIMINAL LAW: THE SUBSTANTIVE PART 37, 40 (2007) (noting that the *nullum crimen sine lege* principle prevents governments and judicial authorities from implementing formal laws to obtain unjust social control over citizens).

3. *See* HELEN DUFFY, THE "WAR ON TERROR" AND THE FRAMEWORK OF INTERNATIONAL LAW 350 (2005) (stating that the legality of *nullum crimen sine lege* principle requires criminal laws to be clear and precise); *see also* Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 121 (2008) (noting that the specificity principle is a corollary of *nullum crimen sine lege* that compels drafters to write precise criminal laws).

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legal traditions throughout the world, including the civil law, the common law, and the Islamic law.[4]

Although the principle is well known in the field of criminal law, it is reflected in different forms, both in name and scope, in diverse legal systems around the world. This is particularly important since countries that adhere to different legal systems have signed multilateral treaties that include the legality principle within their texts.[5] Some of these instruments were widely adopted on an international scale, such as the Universal Declaration of Human Rights,[6] the International Covenant on Civil and Political Rights,[7] and the Rome Statute of the International Criminal Court.[8] Many regional instruments also incorporate the principle, including

4. *See* MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES: NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT 88 (2002) (using German law as a model to study the principle of legality within a civil law system); *see also* Aly Mokhtar, *An Egyptian Judicial Perspective,* 80 DENV. U. L. REV. 777, 780 (2003) (discussing the importance of the *nullum crimen sine lege* principle in the Islamic legal tradition); *see also* Mohamed Shahabuddeen, *Does the Principle of Legality Stand in the Way of Progressive Development of Law?*, 2 J. INT'L CRIM. JUST. 1007, 1013–14 (2004) (analyzing the principle of legality in the context of a case in which the court held that common law marital immunity was no longer valid).

5. *See* William K. Lietzau, *A General Introduction to the General Introduction: Animating Principles Behind the Elements of Crimes, in* 2 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 285, 286 (Flavia Lattanzi & William A. Schabas eds., 2003) (examining the incorporation of the *nullum crimen sine lege* principle into the Rome Statute, which established the International Criminal Court); *see also* Alan Nissel, *Continuing Crimes in the Rome Statute*, 25 MICH. J. INT'L L. 653, 674–76 (2004) (asserting that the principle of legality first emerged in a multilateral treaty in the International Criminal Tribunal for the Former Yugoslavia).

6. "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed." *See* Universal Declaration of Human Rights, art. 11, para. 2, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (establishing *nullum crimen sine lege* as a guiding principle for the international community and adding that penalties imposed should not exceed what the applicable penalty was at the time the crime was committed).

7. "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations." *See* International Covenant on Civil and Political Rights art. 15, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (declaring that the *nullum crimen sine lege* principle is applicable where there is no criminal offense under either domestic or international law at the time when the act or omission is committed).

8. "*Nullum crimen sine lege*. 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted." *See* Rome Statute of the International Criminal Court art. 22, done July 17, 1988, 2187 U.N.T.S. 90, (entered into force July 1, 2002) (expressly stating that the principle of *nullum crimen sine lege* applies with respect to peoples within the jurisdiction of the International Criminal Court).

the European Convention on Human Rights,[9] the American Convention on Human Rights,[10] and the African Charter on Human and Peoples' Rights.[11]

These variances become highly relevant because the judges appointed by these instruments to analyze and apply this principle also come from different legal traditions.[12] Therefore, it is necessary to examine the origin of the principle to determine its common traces in each of the systems.

This article will expose the different scope assigned to the *nullum crimen sine lege* principle in three main legal systems of the world, with an emphasis on its application in the Rome Statute of the International Criminal Court. The study will provide insight into what can be expected from future international jurisprudence that will define the bounds of criminal conduct on an international level. Moreover, it will help evaluate the level of discretion in the definition of crimes to which citizens are exposed at both the domestic and the international level.

Part two will define the scope of *nullum crimen sine lege*, reviewing its origin and evolution within doctrine, and the different forms under which it has been adopted in the civil law, common law, and Islamic law traditions. Part three will compare these systems and determine their differences and similarities in order to understand the way in which the definition of a crime is construed in these main legal traditions. Part four will analyze Article 22 of the Rome Statute with respect to the definition of international crimes.

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9. "No punishment without law. 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations." *See* European Convention on Human Rights art. 7, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) (stating that the members of the Council of Europe agree to adhere to the principle of *nullum crimen sine lege*).

10. "Freedom from Ex Post Facto Laws. No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom." *See* American Convention on Human Rights art. 9, Nov. 22, 1969, 1144 U.N.T.S. 123 (declaring not only that the legality principle applies, but also that the guilty person may benefit from a lighter punishment if provided by an *ex post facto* law).

11. "No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender." *See* African Charter on Human and Peoples' Rights art. 7(2), *adopted* June 27, 1981, 21 I.L.M. 58 (1982) (providing a charter of human rights to the member states of the Organization of African Unity parties).

12. *See* Guido Acquaviva, *At the Origins of Crimes Against Humanity: Clues to a Proper Understanding of the Nullum Crimen Principle in the Nuremberg Judgment*, 9 J. INT'L CRIM. JUST. 881, 882–83 (2011) (discussing the contrasting views judges take on the application of *nullum crimen sine lege* in international law); *see also* Beth Van Schaack, *supra* note 3, at 134–35 (recognizing that because various states interpret *nullum crimen sine lege* differently, there is no uniform interpretation of the principle under international law).

II. Defining the *Nullum Crimen Sine Lege* Principle

Although many consequences derive from the principle, in its literal form it means "no crime without a law." This definition means that there can be no punishable conduct without a law that previously established it as a crime.

The principle was born as a reaction to the abuses of absolutist governments.[13] Its origins can be traced in the opposition of the baronial and knightly classes to the arbitrary power of monarchs, and it was included in the Magna Carta of 1215.[14] But, it was not until the Enlightenment that the philosophical and political roots of the principle of "strict legality," as Cassese calls it, can be found.[15] He distinguishes it from the doctrine of "substantive justice," applied by the Nazi regime, which tended to favor society over the individual.[16]

As Jeffries indicates, "It is impossible, and probably would be in any event unwise, to imagine a legal system consisting entirely of fixed, precise, mechanical rules. Every legal system will have some resort to discretion. The differences of degree, however, are not insignificant. Some legal regimes (or choices within them) enhance the rule of law and promote regularity, certainty, predictability, and evenhandedness; others exacerbate the risks of arbitrariness and discrimination."[17] These terms indicate that the purpose of the principle is to avoid arbitrariness.

More recently, in the 20th century, authoritarian penal law emerged, proscribing conduct related to family offenses, crimes of a social nature like failure to render aid or creation of a common danger, and economic offenses. This shift in the law was marked by the violation of

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13. *See* Aly Mokhtar, *Nullum Crimen, Nulla Poena Dine Lege: Aspects and Prospects*, 26 STATUTE L. REV. 41, 45 (2005) (noting that the origins of *nullum crimen sine lege* arose from the sovereign states' failure to recognize the doctrine of separation of powers); *see also* Emily A. White, Note, *Prosecutions Under the Adam Walsh Act: Is America Keeping Its Promise?*, 65 WASH. & LEE L. REV. 1783, 1794 (2008) (defining the principle of *nullum crimen sine lege* in connection with its Latin connotations).

14. *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 37 (2d ed. 2008) (identifying resistance to arbitrary exercise of power as spurring the development of the doctrine); *see also* Van Schaack, *supra* note 12, at 121 n.1 (2008) (explaining that the principle's resurgence was a reaction against oppressive government and judicial arbitrariness at the time of the Enlightenment); *see also* White, *supra* note 13, at 1785 (stating that the Magna Carta included principles consistent with the principle of *nullum crimen sine lege*).

15. *See* CASSESE, *supra* note 14, at 37 (crediting the thinkers of the Enlightenment with the doctrine's formation); *see also* Mokhtar, *supra* note 13, at 45 (attributing the progressive development during the Enlightenment to the principle's development); *see also* Franz von Liszt, *The Rationale for the Nullum Crimen Principle*, 5 J. INT'L CRIM. JUST. 1009, 1010 (2007) (remarking that the Enlightenment brought about the principle).

16. *See* CASSESE, *supra* note 14, at 39 (highlighting that even acts that were not prohibited could be punished if they harmed society); *see also* Antonio Cassese, *Balancing the Prosecution of Crimes Against Humanity and Non-Retroactivity of Criminal Law: The Kolk and Kislyiy v. Estonia Case Before the ECHR*, 4 J. INT'L CRIM. JUST. 410, 416–17 (2006) (noting that any conduct that was socially harmful or caused a danger to society would be prohibited and punished at the time of the Nuremberg Trial); *see also* Valentina Spiga, *Non-Retroactivity of Criminal Law: A New Chapter in the Hissène Habrè Saga*, 9 J. INT'L CRIM. JUST. 5, 11 (2011) (explaining that the Nuremberg International Military Tribunal's adoption of substantive justice expressing that acts that seriously harm society should not go unpunished).

17. *See* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 213 (1985) (explaining the tradeoffs of varying degrees of strict construction).

the principle of legality and almost universal acceptance of incrimination by analogy.[18] In this context, the Rome Statute's prohibition of analogy can be understood as a rejection of Nazi reasoning, which justified its interpretation of the law against the Jews.[19]

A. *Nullum Crimen Sine Lege* in Civil Law Traditions

The criminal law systems in civil law jurisdictions rest on the idea that judges have the exclusive mission of interpreting the law.[20] The lawmaker has the task of providing all the components of a crime in the code or statute, and the judge has a limited margin for innovation.[21] Given the existence of certain conduct characterized as a crime, there is a need to determine its scope and to interpret its provisions.

The principle analyzed contains different aspects. For Ambos, the four elements of the principle, generally recognized in civil law jurisdictions, are present among articles 22 and 24 of the Rome Statute: *lex praevia*, *lex certa*, *lex stricta*, and *lex scripta*.[22] The purpose of the prin-

18. *See* Rep. of the Ad Hoc Comm. on the Establishment of an Int'l Criminal Court, para. 57, U.N. Doc. A/50/22; GAOR, 50th Sess., Supp. No. 22 (Sept. 6, 1995) (revealing concerns that a procedural instrument that does not define the elements of crimes would violate the principle of legality); *see also* Marc Ancel, *The Collection of European Penal Codes and the Study of Comparative Law*, 106 U. PA. L. REV. 329, 381 (1958) (analyzing how modern penal law's movement away from defining every element of a crime violated the principle of legality and evidenced the acceptance of incrimination by analogy); *see also* Edward M. Wise, *General Rules of Criminal Law*, 25 DENV. J. INT'L L. & POL'Y 313, 315 (1997) (arguing that providing definitional elements of crimes is insufficient to meet the requirements of the principle of legality).

19. *See* Rome Statute of the International Criminal Court art. 22, para. 2, July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (establishing that definitions of crimes are to be strictly construed and not extended by analogy); *see also* Mauro Cantenacci, *The Principle of Legality*, *in* 2 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 85, 94–95 (Flavia Lattanzi & William A. Schabas eds., 2003) (asserting that the use of analogy to decide cases which have no applicable law by applying law which regulates other analogous cases violates the principle of legality in many countries); *see also* CASSESE, *supra* note 14, at 36–38 (distinguishing how Nazi reasoning put society before the individual, whereas strict legality means that an individual is criminally responsible only if his or her act was a criminal offense under applicable law at the moment the act was committed).

20. *See* FRANK B. CROSS & ROGER LEROY MILLER, THE LEGAL ENVIRONMENT OF BUSINESS: ETHICAL, REGULATORY, GLOBAL, AND CORPORATE ISSUES 164 (Jack Calhoun et al. eds., 8th ed. 2012) (noting that in a civil law system, statutory codes are the primary source of law that judges interpret); *see also* Carol Howells, *An Overview of the English Legal System*, *in* UNDERSTANDING BUSINESS: ENVIRONMENTS 161, 162 (Michael Lucas ed., 2000) (maintaining that civil law creates statutory law that establishes broad principles that judges interpret).

21. *See* MARIA BROUWER, GOVERNANCE AND INNOVATION 82 (2008) (rationalizing that because the civil law tradition may be less flexible but more calculable, the judge is limited to using his discretion in situations where the legislator overlooked the problem or intentionally left it for the courts); *see also* JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 30 (3d ed. 2007) (positing that a total separation of legislative and judicial power limits the judge's function to selecting applicable provisions of the code and applying it to the case).

22. The concepts *lex praevia*, *lex certa*, *lex stricta*, *and lex scripta* mean a law previously approved to the commission of the crime, based on clear terms, passed according to the legal requirements, and in a written version. *See* MACHTELD BOOT, NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT: GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES 365 (2002) (noting the four forms of *nullum crimen* in articles 22 and 24 of the Rome Statute and elaborating that *lex scripta* and *lex praevia* give the suspect the right to rely on law codified and valid at time of commission); *see also* Kai Ambos, *Remarks on the General Part of International Criminal Law*, 4 J. INT'L CRIM. JUST., 660, 670 (2006) (listing the four elements of *nullum crimen* present in articles 22 and 24 of the Rome Statute).

ciple of legality is to avoid the discretion of the tribunal.[23] In its basic form it implies that the crime cannot be created by means other than law.[24] It has three different functions: exclusivity, which means that crimes can only be created by law;[25] non-retroactivity, which implies that the law that creates a crime is proactive and not retroactive; [26] and prohibition of analogy, by which the law has to construe the crime with clear and defined limits.[27] This study will focus on the latter.

In the continental law tradition, the structure of the crime is divided into three parts. Its definition, according to the finalist school of thinking,[28] distinguishes between the subjective side of the act as part of the Tatbestand,[29] objective and subjective wrongfulness (Rechtswidrigkeit),[30] and culpability (Schuld) in a normative sense.[31] All of them are analyzed in relation to a certain human action. The principle *nullum crimen sine lege* is directly related to the Tatbe-

23. *See* Shahram Dana, *Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing*, 99 J. CRIM. L. & CRIMINOLOGY 857, 862 (2009) (noting that the principle of legality limits judicial sanctions to those provided by legislation and prohibits judges from applying penalties retroactively); *see also* Gwendolyn Stamper, Note, *Infusing Due Process and the Principle of Legality Into Contempt Proceedings Before the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, 109 MICH. L. REV. 1551, 1565 (2011) (contending that the principle of legality prevents capricious government power, inasmuch as it permits criminal responsibility only for acts that constituted a crime when they were committed).

24. *See* CARLOS FONTÁN BALESTRA, DERECHO PENAL—INTRODUCCIÓN Y PARTE GENERAL 123 (1969).

25. *See* Dana, *supra* note 23, at 862 (illustrating that the principle of legality requires a law-making body to clearly and precisely define the penalty applicable to a particular crime, including the form and severity of the punishment).

26. *See* Teague v. Lane, 489 U.S. 288, 309 (1989) (noting that nonretroactivity as applied to criminal law is fundamental); *see also* Williams v. United States, 401 U.S. 667, 691 (1971) (showing that according to Justice Harlan, no one benefits from retroactivity of criminal law).

27. *See* United States v. Harriss, 347 U.S. 612, 617 (1954) (describing the principle of legality in the U.S. as one where finiteness of a statute is critical for an individual to understand the extent of the law); *see also* CARLOS FONTÁN BALESTRA, TRATADO DE DERECHO PENAL—TOMO I—PARTE GENERAL 226 (2d ed. 1977); *see also* Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 651 (1958) (detailing the obligation of legislators to make their laws known to their subjects while discussing the abuses of such obligations in Nazi Germany).

28. The finalist school of thinking is represented by the German scholar Hans Welzel, whose most important work is *Studien zum System des Strafrechts* (1939). *See* Hans Welzel, *Studien zum System des Strafrechts*, 58 ZStW 491, 505 *et seq*. (1939).

29. *Tatbestand* literally means "the facts." It refers to the elements of the crime that are present in its definition, setting aside any consideration related to the mental element or the intention that the author had in mind when committing the crime.

30. *See* NINA PERŠAK, CRIMINALISING HARMFUL CONDUCT: THE HARM PRINCIPLE, ITS LIMITS AND CONTINENTAL COUNTERPARTS 80 (2007) (defining *Rechtswidrigkeit* as "material unlawfulness and wrongfulness of the act").

31. *See* Albin Eser, *Justification and Excuse: A Key Issue in the Concept of Crime*, *in* JUSTIFICATION AND EXCUSE: COMPARATIVE PERSPECTIVES 17, 37–38 (1987) (defining *Schuld* as "culpability" and declaring that the concept of crime distinguishes it from "wrongdoing"); *see also* PETER KOSLOWSKI, THE ETHICS OF BANKING: CONCLUSIONS FROM THE FINANCIAL CRISIS 22 (Deborah Shannon, trans., Springer, 2011) (discussing different applications of Schuld and its meaning of moral culpability in regard to penal law); *see also* Kai Ambos, *Toward a Universal System of Crime: Comments on George Fletcher's Grammar of Criminal Law,* 28 CARDOZO L. REV. 2647, 2649–50 (2007) (arguing that the bipartite structure of crime dominant in common law countries, which distinguishes only between wrong and culpability, must be replaced with a tripartite structure distinguishing between the objective and subjective elements of the act, wrongfulness, and culpability).

stand, the objective provisions that define the crime itself. It is called "tipus" in English or "tipo" in Spanish. There is a scale of descriptions in the law that captures the diverse punishable conduct, surrounded by a broad space that is legally neutral.[32] This sphere of liberty represents the universe of conduct that the legislator decided not to include in a criminal provision; it is part of the exercise of freedom to which every person is entitled. Ernst Beling, in his work *Die Lehre vom Verbrechen*, expressed that the hard core of every offense, the set of issues he called Tatbestand, could be defined to be free of all condemnatory judgment.[33] For example, according to his theory, the Tatbestand of murder would consist of the human act causing death.[34]

It has been recognized that the *nullum crimen sine lege* principle serves to provide notice to the citizens of banned conduct, which is essential for fairness.[35] Therefore, legislators are tasked with constructing statutes that provide advance notice of impermissible conduct.[36]

B. *Nullum Crimen Sine Lege* in the Common Law Tradition

The principle of legality and other aspects of Enlightenment ideology were exported to an emerging American nation through the European intellectual movement.[37] The idea was quickly taken up by American reformers who tried to replace the common law of crimes with systematic legislative codification.[38] But these early codification efforts failed; Livingston's penal code for Louisiana was never adopted, and by the mid-19th century, English common law was firmly in place in the United States. In accepting English common law, America also seems to have embraced both the roster of particular offenses defined by the English courts and

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32. *See* BALESTRA, *supra* note 24, at 34.

33. *See* George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880, 913–14 (1968) (clarifying the liability aspect of every criminal offense without reference to value considerations).

34. *See id.* (illustrating how the theory has little to do with comprehensive rules of liability).

35. *See* Brad R. Roth, *Coming to Terms With Ruthlessness: Sovereign Equality, Global Pluralism, and the Limits of International Criminal Justice*, 8 SANTA CLARA J. INT'L L. 231, 250–51 (2010) (explaining that notice is essential to avoid abuses of legality concerning *nullum crimen sine lege*); *see also* Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 156 (2008) (discussing that fair notice is recognized even when unusual forms of liability are disputed).

36. *See* Marcello Di Filippo, *Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes*, 19 EUR. J. INT'L L. 533, 541 (2008) (explaining that *nullum crimen sine lege* requires a strict construction of statutes); *see also* Josep María Tamarit Sumalla, *Transition, Historical Memory and Criminal Justice in Spain*, 9 J. INT'L CRIM. JUST. 729, 746 (2011) (arguing that a retroactive statute is inefficient for providing notice of impermissible conduct).

37. *See* Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1508 (2007) (suggesting that legislative supremacy was derived from the Enlightenment theory's emphasis on representative institutions, which emerged initially in Europe in the late eighteenth century); *see also* Emily A. White, *Prosecutions Under the Adam Walsh Act: Is America Keeping Its Promise?*, 65 WASH. & LEE L. REV. 1783, 1794 (2008) (discussing the debate on how *nullum crimen sine lege* first developed and concluding that it began in Europe in the late 1700s).

38. *See* Gail McKnight Beckman, *Three Penal Codes Compared*, 10 AM. J. LEGAL HIST. 148, 148-49 (1966) (discussing the initiative for penal law reform as evidenced by the three criminal codes drafted by Thomas Jefferson, Edward Livingston, and David Dudley Field during the time period between the American Revolution and the American Civil War); s*ee also* John Calvin Jeffries Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 190-91 (1985) (explaining that Enlightenment ideology was taken up by American reformers, which led to failed attempts to replace common law with legislative codification).

also the related assumption of residual judicial authority to create new crimes should the need arise.[39] Even as late as 1900 there seemed to be no common understanding of judicial incompetence to create new crimes.[40]

In the common law system, a crime has two parts, whereas the civil law tradition has three. The common law *bipartite* system divides the structure of crime between *actus reus* and *mens rea*.[41] The former is the external side of the criminal conduct, and the latter is the internal side.[42] It is a premise of this system that both *actus reus* and *mens rea* must be present in order to affirm the criminality of the conduct.[43] Otherwise, the conduct would not be punishable. The interpretation of criminal provisions is done through the application of the principles of legality and strict construction.[44] They do not conflict but complement each other.

In this legal system, the closest concept to the principle *nullum crimen sine lege* is called "specificity."[45] It fulfills the dual function of protecting citizens against arbitrary enforcement and warning them about what is due according to the law.[46] The idea of specificity is more

39. *See* State v. Buckman, 8 N.H. 203, 205-06 (1836) (analyzing the common law tradition of allowing the punishment of an analogous law when statutory provision is lacking, indistinguishable from judicial crime creation); *see also* WM. L. CLARK & WM. L. MARSHALL, A TREATISE ON THE LAW OF CRIMES 36-37 (1st ed. 1900) (illustrating the perceived possibility of judicial crime creation at the start of the 20th century).

40. *See* EMLIN MCCLAIN, A TREATISE ON THE CRIMINAL LAW AS NOW ADMINISTERED IN THE UNITED STATES 19–20 (1897) (stating that the courts have the power to punish acts not specified in statute); *see also* Jeffries, *supra* note 38, at 191-93 (illustrating that as late as 1900, there remained a recognition of judicial authority to define new crimes).

41. *See* Russell L. Christopher, *Tripartite Structures of Criminal Law in Germany and Other Civil Law Jurisdictions*, 28 CARDOZO L. REV. 2675, 2676 (2007) (discussing *mens rea* and *actus reus* as two dimensions of the bipartite system adopted by the International Criminal Court); *see also* George P. Fletcher, *Criminal Law: Criminal Theory in the Twentieth Century*, 2 THEORETICAL INQUIRES L. 265, 269 (2001) (characterizing *mens rea* and *actus reus* as the two components of the bipartite common law system).

42. *See* Christopher, *supra* note 41 (defining *mens rea* and *actus reus* as the internal and external aspects of a criminal offense); *see also* Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741, 741-42 (1993) (classifying *mens rea* as an actor's state of mind and *actus reus* as the attendant physical circumstances).

43. *See* Kimberly Kessler Ferzan, *Mental States and Responsibility: Holistic Culpability*, 28 CARDOZO L. REV. 2523, 2525 (2007) (acknowledging a consensus that crimes require an *actus reus* and a *mens rea*); *see also* Fletcher, *supra* note 41 (arguing that a *mens rea* and an *actus reus* must be present for every offense); *see also* Jeremy M. Miller, *Mens Rea Quagmire: The Conscience or Consciousness of the Criminal Law?*, 29 W. ST. U. L. REV. 21, 27 (2001) (highlighting that most modern crimes require a prohibitive act, as well as the requisite mental state).

44. *See* COLETTE RAUSCH, HANS-JORG ALBRECT & GORAN KLEMENCIC, MODEL CODES FOR POST-CONFLICT CRIMINAL JUSTICE VOL. 1 38, 41 (Vivienne O'Connor and Colette Rausch, eds., U.S. Institute of Peace Press, 2007) (declaring that the principles of legality are inherent in the rule of law, and that the strict constriction principle is essential to the interpretation of criminal law); *see also* Jeffries, *supra* note 38, at 206 (explaining that strict construction applies when interpreting an ambiguous statute).

45. *See* Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 165 (1937) (asserting that *nullum crimen sine lege* requires that conduct will not be held criminal unless the penal statute specifically describes the prohibited conduct); *see also* Van Schaack, *supra* note 35, at 121 (stating that the principle of *nullem crimen sine lege* requires criminal statutes to be drafted with precision).

46. *See* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (upholding the well-recognized requirement of due process that demands penal statutes to be sufficiently clear to inform those who are subject to it what conduct will render them liable to penalties); s*ee also* Timothy Lynch, *Polluting Our Principles: Environmental Prosecutions and the Bill of Rights*, 15 TEMP. ENVTL. L. & TECH. J. 161, 166 (1996) (declaring that the absence of specificity in criminal statutes encourages prosecutorial abuse).

proper than that of legality. While specificity refers exclusively to the elements that embody the definition of a crime, legality may extend more broadly to include the prohibition against retroactive criminal provisions or the determination of which branch of government is responsible for enacting criminal provisions.[47]

In the schooner *Enterprise* case,[48] Circuit Justice Livingston referenced the rule of lenity, one of the oldest concepts related to the specificity of the law. Livingston noted that ignorance of law is no excuse, but ambiguous language should be interpreted in favor of the defendant.[49] He also emphasized that the core of specificity is the certainty of the legal terms.[50] Beyond that, it is the duty of the judge not to apply a deficient or unclear law.

The rule that penal statutes must be strictly construed against the state is said to implement the ideal of legality.[51] Its origins can be traced into the 18th century in England. After "an irrational proliferation of capital offenses, judges invented strict construction to stem the march to the gallows."[52] In fact, as Jeffries highlights, "The idea that a judge should consider

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47. *See* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 282 (2d ed. 1999) (describing the concept of specificity in criminal law and the minimum standard it sets to ensure people are put on notice of prohibited action); *see also* FROM HUMAN RIGHTS TO INTERNATIONAL CRIMINAL LAW: STUDIES IN HONOR OF AN AFRICAN JURIST, THE LATE JUDGE LAITY KAMA 111 (Emmanuel Decaux & Adama Dieng eds., 2007) (stating that specificity is an important concept for prosecutors who must follow specific rules in detailing the facts of committed crimes).

48. "For although ignorance of the existence of a law be no excuse for its violation, yet if this ignorance be the consequence of an ambiguous or obscure phraseology, some indulgence is due to it. It should be a principle of every criminal code, and certainly belongs to ours, that no person be adjudged guilty of an offence unless it be created and promulgated in terms which leave no reasonable doubt of their meaning. If it be the duty of a jury to acquit where such doubts exist concerning a fact, it is equally incumbent on a judge not to apply the law to a case where he labours under the same uncertainty as to the meaning of the legislature." *See* THE ENTER., 8 F.Cas. 732, 734 (C.C.N.Y. 1810) (explaining that the common law rule of lenity and its underlying principle that penal statutes do not have to be strictly construed).

49. *See id.* (declaring that ignorance of an existing law is not an excuse for violation of that law).

50. *See* 82 C.J.S. § 86 (2011) (asserting that statutes must be definite and certain in order to be valid).

51. *See* NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 59:3 (7th ed. 2011) (justifying strict interpretation on the bases that it protects the rights of those accused and prevents the judiciary from taking over the role of the legislature); *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 48 (5th ed. 2009) (explaining that the rule of lenity is intended to prevent the judiciary from broadening the scope of written laws).

52. *See* John Calvin Jeffries Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 198 (1985) (suggesting that the rule of lenity was part of a movement to reduce capital punishment); *see also* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 897 (2004) (explaining that strict construction was a response to diminish the harsh sentencing of English common law).

the precedential value of a proposed decision is probably as old as the common law."[53] Within certain limits, the casuistic nature of law can be a virtue. The role of precedents is important to avoid undermining the law through infinite different decisions.[54]

However, the tendency to soften legal principles was ratified by the U.S. Supreme Court in *Sparf v. U.S.*[55] It is evident the framework of discretion is set by the highest American tribunal, which is decisive in a system where precedents are binding for the lower courts. In the opinion of Paust, this precedent is in line with those faculties recognized to the international tribunals to determine the content of Criminal Law, although the precedent quoted above made a reference that that law had to be preannounced.[56]

C. *Nullum Crimen Sine Lege* in the Islamic Law Tradition

As of July 21, 2009, 22 countries that are parties to the Rome Statute of the International Criminal Court have a legal system based totally or in part on the Islamic Law system known as

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53. I mean to say a little more than this. In many contexts, judicial innovation seems most defensible where it casts the least shadow. A common law judge may be emboldened to do justice in the case at hand if the result can readily be confined to those facts. The judge can rely on the traditional reluctance to accept as precedent pronouncements made on different facts. But in the criminal law, this urge toward particularity should be avoided. In this context, judicial lawmaking is best where it is not fact specific. The trouble with fact-specific innovation is that it invites further innovation on other facts; it implies an open-ended, flexible, progressive character inimical to the appropriate rule-of-law constraints on the use of penal sanctions. . . . This situation clearly differs from the incentive structure that prevails under common law methodology. Where judges stand ready to create new crimes (by attributing new meanings to pre-existing rubrics of common law criminalization), police and prosecutors will bring them new crimes to create. The same is true under vague statutes. *See* Jeffries, *supra* note 52, at 221 (explaining that judges have to be cognizant of the potential pitfalls of an open-ended or ambiguous ruling of law because the decisions are susceptible to erroneous future interpretations); *see also* MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 211 (Cambridge Univ. Press 1996) (explaining that judges often look to the future to evaluate the potential implications of their decisions).

54. *See* Gustavo Zagrebelsky, *Ronald Dworkin's Principle Based Constitutionalism: An Italian Point of View*, 1 INT'L J. CONST. L. 621, 648–49 (2003) (explaining that stare decisis can transform precedents into principles that can be easily applied on a case-by-case basis). *See generally* Jeff Todd, *Undead Precedent: The Curse of a Holding "Limited to Its Facts"*, 40 TEX. TECH. L. REV. 67, 75 (2007) (stating that precedent from a prior case applies when it is factually similar to the case at hand).

55. The tribunal expressed that "the law in criminal cases is to be determined by the court," and that "[u]nless there be a violation of law preannounced, and this by a constant and responsible tribunal, there is no crime, and can be no punishment." *See* Sparf v. U.S., 156 U.S. 51, 87–88 (1895) (explaining that it is within the jury's purview to determine the facts of the case, and if the facts as found by the jury do not create a violation, there can be no declaration of law by the court); s*ee also* People v. Thompson, 222 A.D.2d 156, 159 (N.Y. App. Div. 1996) (ruling that the judge's role in a criminal proceeding is limited to questions of law, and questions of fact are left solely for the jury's determination).

56. *See* Sparf v. United States, 156 U.S. 51, 88 (1895) (finding that criminal law can be determined by the court, but such a law must give notice before determination); *see also* Jordan J. Paust, *Nullum Crimen and Related Claims*, 25 DENV. J. INT'L L. & POL'Y 313, 321 (1997) (illustrating the Supreme Court's agreement with International Tribunals regarding the determination of criminal laws).

Shari'ah.[57] These states constitute no less than 20% of the 110 member states to the statute, making it particularly relevant to understand the scope of the legality principle in this legal system.

Shari'ah "safeguards the life, honor and liberty of the individual by laying down a set of principles designed to protect due process in the administration of justice."[58] Muslim jurists have formulated a number of legal maxims that complement the principle of legality in the Shari'ah.[59] One of these provides "that conduct of reasonable men (or the dictate of reason) alone is of no consequence without the support of a legal text."[60] Therefore, only forbidden conduct (*haram*) which derives from a legal text can be considered a crime. In contrast, the conduct of reasonable men or the dictate of reason are innocuous.[61] Kamali reaffirms the great importance of the principle to avoid arbitrariness.[62]

Awdah states that there is a clear text in the Shari'ah for every punishable offense, although the approach may differ with regard to the types of offenses.[63] In the view of this author, there are different ways in Shari'ah to implement the principle of legality in criminal

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57. The countries of Islamic Law tradition, or that have a dual system that includes Islamic Law, that ratified the RS are: Afghanistan, Albania, Benin, Burkina Faso, Comoros, Chad, Djibouti, Gabon, Gambia, Guinea, Guyana, Jordan, Mali, Niger, Nigeria, Senegal, Sierra Leone, Surinam, Tajikistan, and Uganda, all members of the Organization of the Islamic Conference (OIC). Bosnia and Herzegovina and the Central African Republic are member states of the RS and have an observer status at the OIC. *See The State Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/Menus/ASP/states+parties/ (last visited Oct. 26, 2011) (listing the nations that are member states of the Rome Statute).

58. *See* Mohammed Hashim Kamali, *The Right to Personal Safety (Haqq al-Amn) and the Principle of Legality in Islamic Shari'a*, *in* CRIMINAL JUSTICE IN ISLAM 57, 65 (Muhammad Abdel Haleem et al. eds., 2003) (arguing that Shari'ah law protects an individual's right to life, honor, and liberty); *see also* MOHAMMAD HASHIM KAMALI, SHARI'AH LAW: AN INTRODUCTION 181 (2008) (stating that the purpose of Shari'ah law is to safeguard due process).

59. *See* Dr. Umar F. Abd-Allah, *Living Islam With Purpose*, 7 UCLA J. ISLAMIC & NEAR E.L. 17, 47–48 (2008–9) (listing five legal maxims that Muslim jurists have relied upon since the founding of Islam); *see also* KAMALI, *supra* note 58, at 186 (explaining that Muslim jurists created several legal maxims that complement legality in the Shari'ah).

60. *See* Kamali, *supra* note 58, at 69 (Muhammad Abdel Haleem et al. eds., 2003) (quoting "the conduct of reasonable men (or the dictate of reasons) alone is of no consequence without the support of a legal text").

61. *See* Abd-Allah, *supra* note 59, at 48–49 (noting that certain actions are valid without intentions); *see also* KAMALI, *supra* note 58, at 186 (arguing that it is not a violation to commit or omit an act which is not forbidden by the clear provisions of the law); *see also* ABD AL-QADIR AWDAH, AL-TASHRI AL-JINAL'L AL-ISLAMI I, 115 (agreeing that committing an act not clearly forbidden by the law does not turn a person into a violator).

62. *See* KAMALI, *supra* note 58, at 180 (explaining that the Shari'ah avoids arbitrary rules by a single individual or group as well as that decisions should not be based on the sudden ideas of individuals); *see also* Hossein Esmaeili, *The Nature and Development of Law in Islam and the Rule of Law Challenge in the Middle East and the Muslim World*, 26 CONN. J. INT'L L. 329, 365 (2011) (explaining that limiting arbitrary detention is one of the strengths of the Shari'ah legal system).

63. *See* KAMALI, *supra* note 58, at 187 (noting that the Shari'ah addresses every type of punishable crime and that the approach to different crimes varies); *see also* AL-QADIR AWDAH, *supra* note 61, at 133 (Dar al-Kitab al-'Arabi) (discussing how Shari'ah defines every punishable offense); *see also* David A. Jordan, *The Dark Ages of Islam: Ijtihad, Apostasy, and Human Rights in Contemporary Islamic Jurisprudence,* 9 WASH. & LEE RACE & ETHNIC ANC. L.J. 55, 60 (2003) (noting that Ta'azir, a crime under the Shari'ah, does not have a penalty articulated in Islamic law).

law, depending on the seriousness of the crime:[64] Hudud, for the most serious crimes; Tazir, for lesser serious crimes; and Gisas, for crimes demanding retaliation.[65]

Kamali refers that "[i]t is a mistake to say that *ta'zir* offences are not regulated by the *nass* or to suggest that the judge is at liberty to determine both the crime and its punishment."[66] The author adds that the first duty of the judge is to determine whether the conduct is a *ma'siyah,* which means a transgression according to the clear texts of the Shari'ah.[67]

The approved punishments for these offenses range from a mere warning to fines and imprisonment; from there the judge will determine the appropriate sentence for a case, which may be suspended or be carried out promptly.[68] "The judge, in other words, enjoys discretionary powers in regard to *ta'zir* offenses, which Awdah characterizes as *sultat al-ikhtiyar* (power to select) as opposed to *sultat al-tahakkum* (power to legislate at will). According to Islamic constitutional theory, neither the judge nor any other organ of government enjoys unlimited powers of this latter type."[69]

There is a serious contradiction in Shari'ah regarding *ta'zir* offenses. When public interest (al-maslahah al-'ammah) is jeopardized, Shari'ah provides only general guidelines on the type of conduct that is deemed to be harmful to society. Therefore, although conduct can be per-

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64. *See* KAMALI, *supra* note 58, at 188–89 (discussing the three methods for implementing the principle of legality in criminal law and how the methods vary according to the seriousness of the crimes as well as the threat posed to society); *see also* Jordan, *supra* note 63 (explaining the different severity and penalties of the three categories of crimes under Shari'ah).

65. *See* Ogechi E. Anyanwu, *Crime and Justice in Postcolonial Nigeria: The Justifications and Challenges of Islamic Law of Shari´ah*, 21 J.L. & RELIGION 315, 334 (2005–2006) (explaining that the criminal aspect of Shari'ah law is divided into three categories—Hudud, Tazir and Gisas); *see also* Susan C. Hascall, *Sharia'ah and Choice: What the United States Should Learn from Islamic Law About the Role of Victims' Families in Death Penalty Cases*, 44 J. MARSHALL L. REV. 1, 60–61 (2010) (stating that under the three categories of Islamic Shari'ah law, hudud crimes are considered the most serious and qisas crimes the next most serious).

66. *See* KAMALI, *supra* note 58, at 189 (explaining that under Shari'ah, judicial arbitrariness is avoided through certain textual restrictions on the power of judges); *see also* Ferris K. Nesheiwat, *Honor Crimes in Jordan: Their Treatment Under Islamic and Jordanian Criminal Law*, 23 PENN. ST. INT'L L. REV. 251, 266 (2004) (suggesting that judges have the discretion to impose lesser penalties for qizas and tazir offenses as opposed to hudud crimes).

67. *See* KAMALI, *supra* note 58, at 189 (describing ma'siyah as the first of several processes checking the power of a judge dealing with ta'zir offenses); *see also* Robert Postawko, *Toward an Islamic Critique of Capital Punishment*, 1 UCLA J. ISLAMIC & NEAR E. L. 269, 305–6 (noting that ta'zir punishments are discretionary in that the sovereign may decided whether it is in the interests of the state to criminalize and punish certain behaviors).

68. *See* KAMALI, *supra* note 58, at 189 (noting that the judge can specify punishment for certain criminal conduct that already has been determined by legal text); *see also* Anyanwu, *supra* note 65, at 328 (arguing that Shari'ah punishments promote social solidarity and order through the reaffirmation of shared values).

69. *See* MOHAMMAD HASHIM KAMALI, SHARI'AH LAW: AN INTRODUCTION 181 (2008) (arguing that the power of the judge is limited in that he can only select punishments that have been validated by Shari'ah); *see also* Denis J. Wiechman, Jerry D. Kendall & Mohammad K. Azarian, *Islamic Law: Myths and Realities*, MEDIA MONITORS NETWORK (May 25, 2003), http://www.mediamonitors.net/ wiechmankendall&azarian1.html (last visited Oct. 26, 2011) (explaining the role that Shari'ah judges play in administering punishments); *see also* Osman Abd-el-Malek al-Saleh, *The Right of the Individual to Personal Security in Islam*, *in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM 72 (M. Cherif Bassiouni ed., 1982) (discussing individual liberty in Islam).

missible under the law, the judge is authorized to penalize it in cases where it is prejudicial to the public interest and causes harm (*darar*) to society."[70] This poses a threat to citizens, who are vulnerable to the discretion of judges. Moreover, the concept of conduct capable of harming the "public interest" is excessively broad.

In conclusion, Shari'ah upholds the legality ideal as a maxim to be followed, because judges cannot enact offenses. However, judges have a high level of discretion to determine the scope of offenses that involve public interest. A parallel can be drawn between this power and that exercised by the Nazi regime, which adjusted the scope of the law to serve what was interpreted to be the collective interest.

III. Article 22 of the Rome Statute: Defining the Scope of International Crimes

The category of international crimes contained in the Rome Statute is currently limited to three main groups: genocide, crimes against humanity, and war crimes. A fourth group, related to aggression, is in the process of being defined by the Special Working Group on the Crime of Aggression.[71] The Statute also includes a category of crimes related to the development of the judicial process.

Although the *nullum crimen sine lege* principle was incorporated into many different international constituent instruments such as the London Charter, the Statutes of the Tokyo Tribunal, the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR), it is still far from being fully applicable in international law.[72] The crimes contained within the charters of the existing tribunals contain terms that are broad, vague, and need further definition. At the same time, the system is also part of international law, which analyzes crimes in connection with other sources like customary law. Therefore, it is a hybrid of criminal and international systems—a *sui generis* category of international tribunals.

The analysis of principles becomes more complicated when judges participate in gap-filling and judicial activism. Gap-filling occurs when other institutions fail to articulate a specific rule, making it necessary for judges to make a policy determination to resolve the dispute. In contrast, judicial activism refers to judges' refusal to implement the announced public policy

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70. *See* KAMALI, *supra* note 69, at 189 (2008) (arguing that judges have more discretion to specify punishment for crimes that violate the public interest); *see also* Michael J. Kelly, *Islam & International Criminal Law: A Brief (In) Compatibility Study*, 1 NO. 8 PACE INT'L L. REV. ONLINE COMPANION 1, 16 (2010) (explaining that judges have flexibility to inflict punishment); *see also* MUHAMMAD ABU ZAHRAH, AL-JARIMA WAL-UQUBA FIL ISLAM (Crime and Punishment in Islam) (1974) (discussing offenses and punishments under Islamic law).

71. *See* International Criminal Court, Assembly of State Parties, Review Conference, ICC Doc. RC/Res.6 art. 8 *bis* (June 11, 2010) (defining the crime of aggression and listing State behavior that would qualify as an act of aggression); *see also* Alberto L. Zuppi, *Aggression as International Crime: Unattainable Crusade or Finally Conquering the Evil?*, 26 PENN ST. INT'L L. REV. 1, 22–26 (2007) (detailing how the Special Working Group engaged in the process of defining the crime of aggression and allocating the crime's jurisdiction).

72. *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 145 (2003) (describing the crime of genocide and crimes against humanity); *see also* Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 136 (2008) (illustrating that treaty provisions are deliberately vague because it would be impossible to envision every criminal act that deserves to be reprimanded).

decisions of otherwise authoritative institutions. Wessel states that the ICC engages in judicial activism if its decisions contravene the intent of the State Parties.[73] Nevertheless, it could be argued that because crimes under the Rome Statute are broadly defined, the rules of international law, such as applicable treaties and custom, may play a central role in filling the gaps without altering the principle analyzed. Precisely, the signatory states to the Rome Statute decided to incorporate that provision into Article 21.[74]

Given the broad statutory language, a certain degree of judicial discretion is both acceptable and necessary. The key issue is where to put the limit. Perhaps the test can be extracted from the proper article 22 of the Rome Statute: In the event of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted, or convicted.[75]

The ICTY applied the progressive development of international humanitarian law, which can be appreciated through the Tadic judgment.[76] The Tadic court followed the path of broadening the definition of some crimes. Specifically, in the case of crimes against humanity, it included internal conflicts as well as international conflicts.[77]

The ICTR, the sister tribunal of Yugoslavian Tribunal, is credited with progressively developing the jurisprudence on the interaction between gender and war.[78] In the Akayesu

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73. *See* Rome Statute of the International Criminal Court art. 22, July 17, 1988 (manifesting a resistance to judicial activism); *see also* Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication*, 44 COLUM. J. TRANSNAT'L L. 377, 386 (2006) (discussing how judicial policy making involves the related concepts of gap-filling and activism).

74. *See* Rome Statute of the International Criminal Court, art. 21, July 17, 1998, 2817 U.N.T.S. 3 (enumerating the materials the Court may use in their application and interpretation of law).

75. *See id.* (explaining what the Court may use in the interpretation of law).

76. *See* Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, (May 7, 1997), *available at* http://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf (exemplifying the Tribunal's methodology of decision making by broadening the definition of crimes against humanity); *see also* Tadic, Case No. IT-94-1, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 72 (Oct. 2, 1995) (reaffirming that a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility); *see also* International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/25704, annex 1 (1993), reprinted in 32 I.L.M. 1192 (1993) (exemplifying the Tribunal's methodology of decision making by broadening the definition of crimes against humanity).

77. *See* Tadic, Case No. IT-94-1-I, Opinion and Judgment, ¶ 649 (May 7, 1997), http://www.un.org/icty/tadic/trialc2/judgment-e/tad-tj970507e.htm (reaffirming that a perpetrator's single act is sufficient for criminal responsibility when it is examined within the context of a widespread systematic attack on a civilian population); *see also* Mark R. von Sternberg, *A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the "Elementary Dictates of Humanity,"* 22 BROOK. J. INT'L L. 111, 113 (1996) (explaining that the Criminal Tribunal for Yugoslavia agrees with the position that common article 3 of the Geneva Conventions extends to both civil wars and international conflicts).

78. *See* Wessel, *supra* note 73, at 391 (crediting the International Criminal Tribunal for Rwanda with progressively developing the interplay between war and gender); *see also About ITCR*, INT'L CRIM. TRIB. FOR RWANDA, http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx (last visited Oct. 5, 2011) (describing the International Criminal Tribunal for Rwanda's purpose to reconcile the nation and maintain regional peace).

case,[79] the Trial Chamber I also contributed to the progressive development of the law by defining the scope of the crime of rape in international law.

In developing their jurisprudence, these tribunals have strongly relied on customary law.[80] Nevertheless, according to Meron, it is not a prerequisite for the application of the *nullum crimen sine lege* principle to verify whether the crime analyzed has acquired the status of customary international law. To the contrary, verification would be required only in cases where custom is not well established.[81] According to article 21[82] of the Rome Statute, courts should resort to applicable treaties and principles of international law only after establishing the lack of a specific statutory provision on point or a sufficient level of vagueness in its interpretation. Specifically, article 21 enumerates the appropriate sources the court may consult to fill the gaps in the statutory definitions.[83] It also accepts that tribunals can develop principles and rules through their own decisions.[84]

Shahabuddeen shares this same idea, emphasizing that the principle in question "does not bar progressive development of the law."[85] In support, the author cites numerous precedents of the ICTY where the scope given to the definition of international crimes was at stake.[86]

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79. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998), *available at* http://www.un.org/ictr/english/judgements/akayesu.html (defining rape as a crime against humanity because it is a physical invasion of a sexual nature under coercion).

80. *See* John F. Murphy, *Civil Liability for the Commission of International Crimes As an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 4–5 (1999) (discussing the practice of international tribunes utilizing customary law to define international crimes); *see also* THEODORE MERON, THE MAKING OF INTERNATIONAL CRIMINAL JUSTICE: A VIEW FROM THE BENCH 32 (2011) (analyzing predominance of customary law in developing jurisprudence of the International Tribunal for the Former Yugoslavia).

81. *See* Prosecutor v. Delalić, Case No. IT-96-21-A, Appeals Judgment, ¶ 179 (Feb. 20, 2001), *available at* http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf (denying the defendant's claim that the alleged war crimes must undergo analysis pursuant to the *nullum crimen sine lege* principle); *see also* Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT'L L. 817, 822 (2005) (asserting that investigation into a customary law is necessary only if such conduct is not clearly unlawful).

82. *See* Rome Statute of the International Criminal Court, *supra* note 74 (providing that the Court should first apply the Rome Statute before applying treaties, principles, or rules of international law).

83. *See id.* (listing the sources of law for the ICC to follow and categorizing the sources by the amount of influence they should be afforded).

84. *See id.* (permitting the court to use principles and rules established by prior ICC decisions).

85. *See* Mohamed Shahabuddeen, *Does the Principle of Legality Stand in the Way of Progressive Development of Law?*, 2 J. INT'L CRIM. JUST. 1007, 1013 (2004) (arguing that legality permits the progressive development of the law because it allows courts to interpret and clarify the elements of existing law).

86. *See* Prosecutor v. Aleksovski, Case No. IT-95-14/1A, Judgment, ¶ 156–57 (Mar. 24, 2000) (claiming that relying on prior decisions when interpreting the law does not breach the principle of legality); *see also* Prosecutor v. Ojdanić, Case No. IT-99-37-AR72, ¶ 37–38 (May 21, 2003); see also Prosecutor v. Delalić, Case No. IT-96-21-A, Judgement, ¶ 173 (Feb. 20, 2001) (clarifying that interpretation of existing law does not offend the principle behind *nullum crimen sine lege); see also* Shahabuddeen, *supra* note 85, at 1012–13 (2004) (citing to ICTY cases to support the contention that *nullum crimen sine lege* does not preclude the progressive development of the law).

The Rome Statute of the ICC differs fundamentally from the IMT Statute in terms of its legal basis and, hence, its legal nature. From the beginning, the ICC was set up to act as a "court of the future" and is therefore fundamentally different in nature from the Nuremberg IMT.[87] As a joint organ of the States Parties, set up by international agreement, it has international legal personality and legal capacity under article 4(1) of the ICC Statute.[88]

Any criminal court that has the expectation of intervening in matters that occur all around the world must establish objective grounds to settle on, especially the court's lack of biased discretion. Therefore, it is understandable that the countries that intervened in the draft of the Rome Statute included the minimum standards accepted as fair, by the signatory parties, for any person subjected to criminal trial. It is easier to avoid arbitrariness by relying on the principle of specificity.

According to Jescheck, the goal of this principle can be achieved only by producing legislation through the enactment of international agreements.[89] The principle is less relevant to customary international law, general principles of law, and case law, because most are not derivations of codified or written law, and some demand a work or interpretation.

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court introduced the final version of the *nullum crimen sine lege* principle in article 22 of the Rome Statute, adopted in Rome on July 17, 1998. In accordance with its terms, the statute entered into force on July 1, 2002, once 60 States had become Parties.[90]

IV. An Analysis of *Nullum Sine Crimen Lege* Across the Three Systems

There is a missing element in the common law system related to the definition of the crime. As discussed above, the common law structure contemplates only the action taken by the defendant (actus reus) and her state of mind (mens rea). On the other hand, the German

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87. *See* James F. Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact*, 54 VILL. L. REV. 1, 3 (2009) (differentiating the ICC from all other international courts, including the Nuremberg Tribunal); *see also* Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 385 (2000) (suggesting the ICC may reshape the future of international law).

88. *See* Rome Statute of the International Criminal Court art. 4(1), July 17, 1998, 2187 U.N.T.S. 3 (declaring the legal status and powers of the ICC)*; see also* Hans-Heinrich Jescheck, *The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute*, 2 J. INT'L CRIM. JUST. 38, 40 (2004) (asserting that the ICC has both legal personality and legal capacity).

89. *See* Jescheck, *supra* note 88, at 41 (arguing that international agreements set down in writing are the only way to fully satisfy the principle of specificity).

90. *See id.* at 39 (explaining that the Rome Statute became effective on July 1, 2002, following ratification by the 60th signatory state); *see also* Akhavan Payam, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 A. J. INT'L L. 403, 412 (2005) (noting that the Rome Statute took effect July 1, 2002, and that Uganda was the 68th state to ratify the statute).

tripartite system considers the definition of the offense in the analysis of the crime.[91] For that purpose, the determination of the commission of a crime will require the revision of the act perpetrated.

In a subsequent step, to establish the existence of a crime, it is necessary to analyze whether every element of the current law applicable at the time of the act is fully satisfied. This step leads to the second difference. While the common law analysis tends to expand the terms of proscribed conduct, civil law judges are constrained by the specific provisions of the statute.[92] For instance, German judges have discretion only on the legal result, but not on the Tatbestand side of the legal norm. That is, discretion in choice of action is appropriate, but not in determination of the prerequisites for action. This distinction marks a difference between indefinite legal concepts and discretion.[93] On the other hand, the limitations of common law judges to construe elements of conduct in assessing criminality are encompassed in principles of interpretation. They have a high degree of discretion and are allowed to complete the holes that the law has not covered. For that reason the task of the judge is essential in saying what is the scope of the law.

Moreover, according to the common law tradition, the *stare decisis* doctrine implies that the judge from a lower court is obliged to follow the decisions of the higher tribunals that are above her. Therefore, the degree of discretion of the judge is balanced with the revision power that the higher courts exercise over the lower ones.

In Shari'ah law, the judge is not allowed to expand the terms of the crime. However, she may establish that certain conduct is a transgression that harms society, leaving a big gap through which arbitrariness could appear.

The German tripartite system departs from the premise that the criminal offense must be treated as a single entity. The inquiry focuses on a general "theory of crime" (Verbrechenslehre). The point is that all issues bearing on substantive liability must be ordered under a set of rules defining what it means to commit, and to be liable for, a crime.[94] This system contains

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91. *See* George P. Fletcher, *Contemporary Legal Scholarship: Achievements and Prospects*, 2 THEORETICAL INQUIRIES L. 265, 275 (2001) (observing that the German tripartite system is composed of three stages of analysis, including definition of the offense); *see also* Stefan Trechsel, *Comparative Observations on Human Rights Law and Criminal Law*, 2000 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 1, 16–17 (2000) (recognizing that definition of the offense constitutes one of the three elements of the German tripartite system).

92. *See* Robert Adriaansen, *At the Edges of the Law: Civil Law v. Common Law, a Response to Professor Richard B. Capalli*, 12 TEMP. INT'L & COMP. L.J. 107, 107–8 (1998) (explaining that civil law judges understand things in a structure-oriented way, and common law judges are largely unstructured in their methods); *see also* Gerald I. Lies, *Sale of a Business in Cross-Border Insolvency: The United States and Germany*, 10 AM. BANKR. INST. L. REV. 363, 419 n.65 (2002) (stating common law judges prefer broad discretion and civil law emphasizes the statute's language and predictability).

93. *See* James R, Maxeiner, *Legal Certainty: A European Alternative to American Legal Indeterminacy?*, 15 TUL. J. INT'L & COMP. L. 541, 561 (2007) (signaling the difference between indefinite legal concepts and discretion).

94. *See* CARLOS FONTÁN BALESTRA, DERECHO PENAL—INTRODUCCIÓN Y PARTE GENERAL, 272 (1969).

the elements of the crime within the definition of the crime.[95] Therefore, if one of the elements is not satisfied, the conduct will never be considered a crime, and the defendant should always be acquitted.[96]

Fletcher acknowledges the existence of another difference between the civil law and common law systems. For him, it would be a mistake to think that the tripartite structure of German criminal theory corresponds to the common law requirements of *actus reus* and *mens rea* for criminal liability.[97] These two terms help little in understanding the relationship between putatively defensive issues such as self-defense and duress, and the other issues of criminal liability.[98]

In the Islamic Law system there is no distinction between the religious and the secular; among legal, ethical, and moral questions; or between the public and private aspects of a Muslim´s life.[99] In consequence, there are some aspects of the Islamic legal system that have a direct impact on the implementation of the Rome Statute in certain Islamic countries such as the Islamic Republic of Iran and that relate to the application of the legality principle. Abtahi notes that some Iranian officers see a fundamental problem because there are diverging views related to the definition of crimes against humanity.[100] In this line definitional problems would be the

95. *See* Russell L. Christopher, *Tripartite Structures of Criminal Law in Germany and Other Civil Law Jurisdictions*, 28 CARDOZO L. REV. 2675, 2676–77 (2007) (asserting that under the German tripartite the establishment of liability requires that all the requisite elements of the crime be satisfied); *see also* Markus Dirk Dubber, *Theories of Crime and Punishment in German Criminal Law*, 53 AM. J. COMP. L. 679, 680 (2005) (stating that under German criminal law all the elements of a crime have to be satisfied in order to find liability).

96. *See* Wolfgang Naucke, *An Insider's Perspective on the Significance of the German Criminal Theory's General System for Analyzing Criminal Acts*, BYU L. REV. 305, 311 (1984) (discussing the three main features of a criminal action under German law that requires any criminal act to be wrongful and the conduct to be culpable with respect to the definition of the crime); *see, e.g.*, George P. Fletcher, *Criminal Theory in the Twentieth Century*, 2 THEORETICAL INQUIRIES L. 265, 275 (2001) (illustrating that the absence of culpability under the German tripartite system provides an adequate reason for acquittal).

97. *See* George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880, 915–16 (1968) (distinguishing the tripartite structure of German law, which gives German rules of liability their comprehensiveness from the common law concepts of *actus reus* and *mens rea*).

98. *See id.* (explaining that the *actus reus* and *mens rea* of common law create defenses, like duress and self-defense, as exceptions that need to be proven, where the tripartite system makes such defenses unavoidable steps in the process of determining guilt).

99. *See* Ogechi E. Anyanwu, *Crime and Justice in Postcolonial Nigeria: The Justifications and Challenges of Islamic Law of Shari'ah*, 21 J.L. & RELIGION 315, 332 (2005–2006) (discussing that because Muslims in general, and particularly Islamic scholars, make no distinction between legal, moral, and ethical questions, they are not opposed to the harsh sentences that accompany the Shari'ah law, such as stoning for committing adultery); *see also* Bharathi Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?*, 44 AM. U. L. REV. 1949, 1964 (1995) (stating that the Shari'ah regulates a variety of matters from dietary restrictions to wills and contracts because a major feature of Shari'ah law is that it does not draw distinctions among legal, ethical, and moral questions or between public and private aspects of Muslim life).

100. *See* Hirad Abtahi, *The Islamic Republic of Iran and the ICC*, 3 J. INT'L CRIM. JUST. 635, 644 (2005) (explaining that Iranian officials recognize a problem in the many interpretations of crimes against humanity).

consequence of their "mono-cultural view."[101] It is also feared that the absence of Muslim representation among ICC judges necessarily means a lack of familiarity with Shari'ah principles.[102] Moreover, there is concern that Muslims would be judged by non-Muslim judges.[103]

There are situations in which Shari'ah penal provisions are not expressly contemplated in codified law. In those cases, judges must have recourse either to authoritative and reliable Islamic sources or Fatwas (i.e., legal opinion), or both.[104] Therefore, the rule is the codified law, but there is an exception based on matters that affect serious public interests.

The drafters of the Rome Statute might have envisioned, when discussing its contents, that the interest of the judges to punish the most serious crimes would tempt them to expand the scope of the crimes and even force the interpretation of the terms. Having in mind the possibility of a deviation, it might be reasonable to think that the Rome Statute tried to include some objective limits to a predictable judicial labor that would expand, at some point, the terms of the crimes contained in the Statute.

However, from the analysis of the cases presented emerges the idea that the Rome Statute is not a closed body of norms. The three crimes currently operative have definitional gaps that, in some cases, would be covered by the elements of crimes.[105] In the absence of clear guidance, the analysis would continue, according to article 21 of the Rome Statute, with the applicable treaties and the principles and rules of international law, including the established principles of

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101. *See* F. S. MICHAELS, MONOCULTURE: HOW ONE STORY IS CHANGING EVERYTHING 4 (2011) (discussing that issues arise in a monoculture world view, because humans are not one-dimensional and the monoculture cannot include everyone); *see also* Abtahi, *supra* note 100 (explaining that many of these misunderstandings come from misunderstanding that words have different meanings in other cultures).

102. *See* STEVEN C. ROACH, POLITICIZING THE INTERNATIONAL CRIMINAL COURT: THE CONVERGENCE OF POLITICS, ETHICS, AND LAW, 154–55 (2006) (arguing that Islamic Law should be adopted into the International Criminal Law); *see also* Michael J. Kelly, *Islam & International Criminal Law: A Brief (in) Compatibility Study*, 1 PACE INT'L L. REV. ONLINE COMPANION 1, 26 (2010) (discussing that although Islamic States have signed treaties outlawing crimes against humanity, they have not participated for the most part in the investigation or prosecution of them).

103. *See* Abtahi, *supra* note 100, at 645 (acknowledging that the International Republic Institute (IRI) has expressed concern about the scarcity of Muslim Judges); *see also* Faisal Kutty, *The Shari'a Factor in International Commercial Arbitration*, 28 LOY. L.A. INT'L & COMP. L. REV. 565, 608 (explaining the traditional view that only a Muslim can make a judgment between two Muslims).

104. *See* Abtahi, *supra* note 100, at 645 (recognizing that Judicial Power allows judges to refer to Islamic penal provisions); *see also* Atul Aneja, *Riyadh to Put Fatwas on Internet*, THE HINDU, Oct. 9, 2007, *available at* http://www.thehundu.com/todays-paper/tp-international/article926431.ece (informing that fatwa rulings are now available on the Internet in order to facilitate judicial reform).

105. *See* INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES (2011) (listing the elements of the crimes of genocide, crimes against humanity, and war crimes, as taken from the Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court), *available at* http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B45BF9DE73D56/0/ElementsOfCrimesEng.pdf; *see also* Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, 21 EUR. J. INT'L L. 543, 569 (2010) (remarking that the Working Group on the Elements of Crimes guiding principal was to define the crimes to reflect customary international law).

the international law of armed conflict.[106] In the end, and with no other tool available, the Rome Statute establishes that the general principles of law derived by the Court from national laws of legal systems of the world will be applied.[107] For that purpose, it will be indispensable that these principles are not inconsistent with the Rome Statute and with international law and internationally recognized norms and standards.

According to section 2 of article 21 of the Rome Statute, the court may also apply principles and rules of law as interpreted in its previous decisions.[108] Finally, section 3 provides that the interpretation must not be inconsistent with internationally recognized human rights.[109]

Unlike the domestic criminal law systems, the judges of the ICC were given other tools to deal with the scope and definition of the crimes within the jurisdiction of the Rome Statute.[110] In the dispute between gap-filling and activism, it seems that the latter succeeds. The proper article 21, section 2, authorized judges to use the interpretations of the terms applied in previous cases.[111] The limitation imposed to analogy must be harmonized with the fact that undefined terms were included within the Rome Statute, and that article 21 incorporated custom through its provisions, unlike the domestic criminal tendency, which would reject this practice.

With all these elements in mind, it is clear that the drafters envisioned a balanced system, not so rigid that it would not allow the development of new interpretations of the international criminal law and at the same time, not so volatile that it would go beyond what the international community is prepared to accept as punishable.

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106. *See* INTERNATIONAL CRIMINAL COURT, *supra* note 105; *see also* Grover, *supra* note 105, at 569 (remarking that the Working Group on the Elements of Crimes guiding principal was to define the crimes to reflect customary international law).

107. *See* George E. Edwards, *International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy*, 26 YALE J. INT'L L. 323, 370 (2001) (listing general principles derived from national laws around the world as one source of law used by the International Criminal Court); *see also* Bing Bing Jia, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, 9 CHINESE J. INT'L L. 261, 262–63 (2009) (defining the term *principles of international law* as rules derived from customary law or the fundamentals of international law that are not linked to any national legal system).

108. *See* Rome Statute of the International Criminal Court, art. 21 sec. 2, July 17, 1998, 2187 U.N.T.S. 90 (promulgating that "[t]he Court may apply principles and rules of law as interpreted in its previous decisions."); *see also* Grover, *supra* note 105, at 558 (reviewing that according to article 21 of the Rome Statute, courts consider relevant treaties and principles and rules of international law when interpreting applicable law).

109. *See* Rome Statute of the International Criminal Court, *supra* note 108, at art. 21(3), 2187 U.N.T.S. 90 (stating that application and interpretation of law must be consistent with internationally recognized human rights).

110. *See* Marcus M. Mumford, *Building Upon a Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference*, 8 J. INT'L L. & PRAC. 151, 199 (1999) (complaining that the statute is overbroad and gives judges too much power); *see also* Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication*, 44 COLUM. J. TRANSNAT'L L. 377, 399 (2006) (exploring freedoms given to judges to define crimes by Article 10).

111. *See* Rome Statute of the International Criminal Court, *supra* note 108, at art. 21(2), 2187 U.N.T.S. 90 (stating that judges can apply principles and rules of law as interpreted in its previous decisions).

V. Conclusion

With reference to the legality principle, the common law system can be mentioned in the first place as the most flexible in terms of its application due to the discretion given to judges to define and expand the terms of the penal provisions, and consequently to determine what might constitute a crime. Next, the Shari'ah is strict in the application of the principle, with one fundamental exception related to conduct that affects the public interest. Last, the civil law system prescribes that no conduct can be deemed criminal unless it is previously determined by law, with no exception. Therefore, it is the strictest in terms of the *nullum crimen sine lege* principle, because it does not grant judges any power to develop concepts beyond those prescribed by the statute.

This article demonstrates that the *nullum crimen sine lege* principle is generally accepted by legal systems around the world. Although the principle was conceived as a reaction against arbitrariness, in this case it might favor those accused of the most serious crimes. Nevertheless, the rule of law demands that the principles generally accepted be equally applied to people as a consequence of their human condition.

The ban of analogy and the strict construction of the terms must be interpreted according to the rest of the provisions of the Rome Statute, which is a system that has unique characteristics. The inclusion of the principle in article 22, right after the enumeration of the applicable law, contained in article 21, helps the reader to understand that one must be interpreted in direct correlation with the other. Therefore, it is clearer at this point that the interpretation of the specificity principle cannot be done with the same fervor that it is in the domestic field. Nevertheless, it is still possible to deem the international criminal system a fair system.

The provisions of the Rome Statute are integrated by terms in constant evolution, although its principles slow these advances enough to allow their assimilation.

When Minority Groups Become "People" Under International Law

Wojciech Kornacki*

I. Introduction

This article is about the minority group Autochtonomia, living in a UN member state. The group's recorded history starts in the 1300s. Before 1945, four different states have occupied the region where Autochtonomians live at different times throughout history. However, since 1945, Autochtonomians have enjoyed substantial autonomy, as only one other state has controlled the region. However, that autonomy was revoked recently when the new president accused Autochtonomians of engaging in criminal activities. As a result, the state legislature closed minority schools and newspapers, and removed Autochtonomians from public employment. State nationalists severely beat several group members while state police idly stood by, and obtaining relief from state institutions proved unsuccessful.

During a presidential visit in the region, radical Autochtonomians attacked the presidential limousine and killed its driver. In response, the president declared martial law and directed state armed forces to resettle Autochtonomians. This sparked a panic, and Autochtonomians fled their homes. The UN expressed concern, and several Autochtonomians formed a resistance movement and contemplated declaring independence.

Do Autochtonomians have a right to remedial secession as "a people"? Can they resort to violence? Are there options other than declaring independence? This article identifies the international law concepts that transform a minority into "a people" by examining, in part, these questions.

Since decolonization, the principle of self-determination has evolved to encompass different groups living within the same state. Such groups have a right to participate in state affairs in accordance with the internal aspect of self-determination. In exceptional circumstances, when states commit massive human rights violations and deny minorities the right to "internal" self-determination, minorities seeking to preserve their characteristics may exemplify the qualities of the bearers of the right to self-determination, "the people." Hence, minorities may struggle for independence, autonomy, or any other mode of self-determination that best expresses their will.

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The analysis is accomplished through the prism of peoples' right to self-determination, rather than minority rights. Self-determination is a broader concept than minority rights. Section II examines the historical evolution of self-determination, focuses on its internal aspect, and explores its application to minorities. Section III analyzes the prohibition against the use of force on self-determination movements and addresses autonomy as a political settlement mechanism that offers a viable alternative to "secession or nothing." Section IV uses identified international law concepts to examine the circumstances of Kosovo, Quebec, and Tamil Eelam. Finally, section V outlines recommendations for peaceful resolutions of self-determinative conflicts.

II. Self-Determination

A. The Significance of Self-Determination

Since the emergence of states, self-determination of peoples has been one of the most important forces shaping the international community.[1] Self-determination is a fundamental principle of international law.[2] As a right, self-determination is inalienable,[3] continuing,[4] and cannot be the subject of treaty reservations.[5] The International Court of Justice (ICJ) declared that its character *erga omnes* was irreproachable.[6] It is a legitimate right and an ideal at the same

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1. *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 1 (1995) (appraising the political and jurisprudential significance of self-determination as it has evolved in the 20th century); *see also* Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT'L L. 551, 554 (2005) (explaining how current international law gives rise to the right to self-determination through sovereignty subject to the will of the people under occupation).

2. *See* UN Office of the High Commissioner for Human Rights (HCHR), General Recommendation No. 21: *Right to Self-Determination, Committee on the Elimination of Racial Discrimination*, ¶ 2, UN Doc. A/51/18 (Aug. 23, 1996), http://www.unhchr.ch/tbs/doc.nsf/0/dc598941c9e68a1a8025651e004d31d0?Opendocument (proclaiming the importance of self-determination as a principle of international law); *see also* The Final Act of the Helsinki Accords to the Conference on Security and Co-operation in Europe, art. VIII, Aug. 1, 1975, 14 I.L.M. 1292 (providing that all peoples have the right to self-determination and the freedom to pursue economic, social, cultural, and political development).

3. *See* UN Office of the High Commissioner for Human Rights (HCHR), General Comment No. 12: Art. 1 (*Right to Self-Determination*) (1984), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.8 (May 8, 2006) (setting forth the right of self-determination as immutable); *see also* African (Banjul) Charter on Human and Peoples' Rights, art. 20, June 27, 1981, 21 I.L.M. 58 (declaring that all people have an indisputable right to self-determination).

4. *See* International Covenant on Civil & Political Rights art. 1, Dec. 16, 1966, 6 I.L.M. 360, 993 U.N.T.S. 3 (asserting, without limitation, that all people have the right of self-determination); *see also* CASSESE, *supra* note 1, at 54 (concluding, based on the language in the International Covenant on Civil and Political Rights (CCPR), that the right of self-determination is permanent).

5. *See* UN Office of the High Commissioner for Human Rights (HCHR), General Comment No. 24: *Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant*, ¶ 9, UN Doc CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994) (excluding self-determination as a subject for reservation since it is essential to the purpose of the International Covenant on Civil and Political Rights); *see also* Antonio Cassese, *The Multifaceted Criminal Notion of Terrorism in International Law*, 4 J. INT'L CRIM. JUST. 933, 952 n.44 (2006) (providing as an example the rejection of Pakistan's attempt to make a reservation to self-determination in the 1997 Convention for the Suppression of Terrorist Bombing).

6. *See* East Timor (Port. v. Austl.), 1995 I.C.J. 90 at 102 (June 30) (holding as incontrovertible Portugal's assertion that self-determination is a right owed to all).

time.[7] Self-determination is a collective right of peoples to determine their future and also an individual right allowing everyone to participate in state political affairs.[8] It is extraordinary among human rights because it seeks to determine the political character of a state to the point of limiting state authority and territory.[9]

Self-determination emerged with democratic ideas opposing despots that swept Europe and America in the 1700s.[10] It reached its pinnacle with universal suffrage because it empowered citizens, not monarchs, to determine their state's future.[11] It is derived from the conflicting principles of nationalism and democracy.[12] During World War I, Lenin trumpeted self-determination of ethnic groups as a tool to break up the capitalist states.[13] Meanwhile, President Woodrow Wilson argued that self-determination meant self-government.[14] Self-determi-

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7. *See* Press Release, UN Office of the High Commissioner for Human Rights (HCHR), Commission on Human Rights Starts Debate on the Right of Peoples to Self-Determination (Mar. 20, 2002) http://www.unhchr.ch/huricane/huricane.nsf/view01/0FF5E37371706E6FC1256B830035F461?opendocument (describing self-determination as, simultaneously, an inherent right that states should strive for); *see also* Kenneth Anderson, *"Accountability" as "Legitimacy": Global Governance, Global Civil Society and the United Nations*, 36 BROOK. J. INT'L L. 841, 849 (2011) (recounting, as an example of self-determination as both an ideal and a right, how the UN's Cold War-era idealized approach to self-determination heavily contrasted with U.S. realist policies).

8. *See* Isabel Madariaga Cuneo, *The Rights of Indigenous Peoples and the Inter-American Human Rights System*, 22 ARIZ. J. INT'L & COMP. L. 53, 54 (2005) (describing the recent movement toward recognizing both individual rights and collective rights in Inter-American human rights jurisprudence); *see also* Susanna Mancini, *Rethinking the Boundaries of Democratic Secession: Liberalism, Nationalism, and the Right of Minorities to Self-Determination*, 6 INT'L J. CONST. L. 553, 554 (2008) (discussing self-determination's dual nature as a shared right for people to determine how they are governed, as well as an individual right to participate in the political process).

9. *See* James Anaya, *A Contemporary Definition of the International Norm of Self-Determination*, TRANSNAT'L L. & CONTEMP. PROBS. 131, 136 (1993) (asserting that self-determination has the potential to make states concede both land and power); *see also* Catherine J. Iorns, *Indigenous Peoples and Self Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT'L L. 199, 203 (1992) (arguing that state sovereignty threatens self-determination, prioritizing the right of a state to form its own identity).

10. *See* CASSESE, *supra* note 1, at 13 (explaining that self-determination emerged from the anti-tyrannical movement of the French Revolution); *see also* Lee Seshagiri, *Democratic Disobedience: Reconceiving Self-Determination and Secession at International Law*, 51 HARV. INT'L L.J. 553, 553 (2010) (stating that self-determination was introduced during the French and American revolutions).

11. *See* CASSESE, *supra* note 1, at 5 (providing that self-determination in Europe became paramount with universal suffrage); *see also* Zejnullah Gruda, *Some Key Principles for a Lasting Solution of the Status of Kosova: Uti Possidetis, The Ethnic Principle, and Self-Determination*, 80 CHI.-KENT L. REV. 353, 369 (2005) (claiming that self-determination is essential because it grants people the authority to determine the political future of the state).

12. *See* MALCOLM N. SHAW, *Self-Determination and the Use of Force*, *in* MINORITIES, PEOPLES, AND SELF-DETERMINATION: ESSAYS IN HONOUR OF PATRICK THORNBERRY 35 (Nazila Ghanea & Alexandra Xanthanaki eds., 2005) (maintaining that former colonial states are forced to choose between their cultural practices and democracy); *see also* Jure Vidmar, *The Right of Self-Determination And Multiparty Democracy: Two Sides of the Same Coin*, 10 HUM. RTS. L. REV. 239, 240 (2010) (concluding that self-determination emerged with democracy in the Western Hemisphere yet was associated with nationalism in Eastern Europe).

13. *See* Bartram S. Brown, *Human Rights, Sovereignty, and the Final Status of Kosovo*, 80 CHI.-KENT L. REV. 235, 241 (2005) (indicating that Lenin promoted self-determination during the Bolshevik Revolution); *see also* Gruda, *supra* note 11, at 366 (maintaining that Lenin sponsored self-determination).

14. *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 18 (1995) (discussing how Wilson insisted that self-determination was founded on the right of people to freely elect their leaders); *see also* Vidmar, *supra* note 12, at 240 (suggesting that Wilson believed that self-determination was the equivalent of democracy).

nation left an imprint on minority protections in the 1920s.[15] After World War II, it became recognized as "a prerequisite to the full enjoyment of all fundamental human rights."[16] During the Cold War, the realization of self-determination facilitated the decolonization drive.[17] Today, it represents the hopes of minorities for independence and freedom.[18]

Self-determination is one of the legally binding purposes of the UN Charter.[19] States have a duty to promote it,[20] and the prevention of its exercise amounts to an international crime.[21] It applies to all peoples, but the Charter does not clarify who are "peoples."[22]

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15. *See* MALCOLM N. SHAW, INTERNATIONAL LAW 251 (6th ed., Cambridge Univ. Press 2008) (illustrating that although self-determination was not codified by the League of Nations, its beneficial impact was established with minority rights in the 1920s); *see also* Deborah Z. Cass, *Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21, 24–25 (1992) (stating that self-determination became a prominent element of international law following World War I).

16. *See* Mitchell A. Hill, *What the Principle of Self-Determination Means Today*, 1 ILSA J. INT'L & COMP. L. 119, 127 (1995) (discussing how the 1970 Declaration states that self-determination requires a respect for fundamental human rights).

17. *See* G.A. Res. 637, ¶ 4, UN GAOR, 7th Sess., UN Doc. A/2309 (Dec. 16, 1952) (recommending that the concept of self-determination be upheld and promoted by members of the UN); *see also* Nele Matz, *Civilization and the Mandate System Under the League of Nations as Origin of Trusteeship*, *in* 9 MAX PLANCK Y.B. UNITED NATIONS L. 57 (Armin Von Bogandy, Rudiger Wolfrum & Christiane E. Philipp eds., Marinus Nijhoff Publishers 2005) (recognizing that the United Nations' commitment to the right of self-determination is the main reason why colonial rule is no longer permitted).

18. *See* Gaetano Pentassuglia, *State Sovereignty, Minorities and Self-Determination: A Comprehensive Legal View*, 9 INT'L J. MINORITY & GROUP RTS. 303, 315 (2002) (explaining that the use "self-determination" in the UN draft declaration links the right to the establishment of autonomous regimes in order to accommodate the indigenous people within a state); *see also* Marc Weller, *Settling Self-Determination Conflicts: Recent Developments*, 20 EUR. J. INT'L L. 111, 111 (2009) (claiming that self-determination encompasses ethnic groups' desire for independence and freedom).

19. *See* UN Charter art. 1, para. 2 (promoting collegial relations among nations through mutual respect for self-determination); *see also* KARL DOEHRING, *Self-Determination*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 47, 48–49 (Bruno Simma ed., Oxford Univ. Press 2002) (alluding to the Purposes of the UN Charter as "object[s] of legal protection"; making the Charter's mention of the right of self-determination in Art. 1 of the Charter legally binding); *see also* Nicola Bunick, Note, *Chechnya: Access Denied*, 40 GEO. J. INT'L L. 985, 992–93 (2009) (noting that Resolution 1514 and Resolution 1541 of the UN General Assembly are embraced to such a degree that they are evidence of the customary international law and essential legally binding).

20. *See* UN Charter art. 56 (requiring member states to pledge action toward promoting self-determination); *see also* G.A. Res. 2625, ¶ 3, UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8082 (Oct. 24, 1970) (compelling every state to sponsor the realization of self-determination with respect to the UN Charter).

21. *See* Int'l Law Comm'n, *Report of the International Law Commission on the Work of its 53rd Session*, 112–13, UN Doc. A/56/10 (Apr. 23, 2001) (permitting and respecting self-determination is an obligation mandated by general international law). *See generally* Kate Nahapetian, *Confronting State Complicity in International Law*, 7 UCLA J. INT'L L. & FOREIGN AFF. 99, 114 (2002) (pointing out that Article 1 of the UN Charter does not allow the hindrance of self-determination).

22. *See* UN Econ. & Soc. Council [ESCOR], Sub-Comm'n on Prevention of Discrimination & Prot. Of Minorities, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, ¶ 63, UN Doc. E/CN.4/Sub.2/404/Rev.1 (1981) (prepared by Aureliu Cristescu) (illustrating the different views in characterizing who is defined by the term "peoples"); *see also* Daniel Thürer & Thomas Burri, *Self-Determination*, *in* THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 2 (Rüdiger Wolfrum ed., 2010, online edition), http://www.mpepil.com/ (suggesting that the term "peoples" is overly vague and confusing to be used in determining rights and obligations under the UN Charter).

While self-determination is enshrined in the human rights covenants,[23] other documents address it vaguely, making its realization controversial.[24] The Declaration on the Granting of Independence to Colonial People recognized it as a legal right, and the Friendly Relations Declaration elaborated on its universal character.[25] The Friendly Relations Declaration can be regarded as an authoritative interpretation of the UN Charter.[26] Self-determination is a binding principle in international law and also a human right.[27]

It must be analyzed within the context of other international law principles. For example, the principle of state territorial integrity limits self-determination[28] and warns domestic dissidents against secession.[29] Other principles are national sovereignty and equality of persons.[30]

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23. *See* G.A. Res. 2200A, ¶ 52, UN GAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316 (Dec. 16, 1966) (proclaiming all peoples right of self-determination); *see also* International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. No. 16 at 49, UN Doc. A/6316 (Dec. 16, 1966) (proclaiming that all people have the right of self-determination): *see also* Jeanne M. Woods, *A Human Rights Framework for Corporate Accountability*, 17 ILSA J. INT'L & COMP. L. 321, 333 (2011) (stating that the right of self-determination is not only found in the UN Charter, but is also in major human rights covenants, the International Covenant of Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights).

24. *See* Alice Farmer, Note, *Toward a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resource-Rich Countries*, 39 N.Y.U. J. INT'L L. & POL. 417, 439–40 (2006) (discussing the heated discussions over self-determination when drafting the Covenants); *see also* Kristina Roepstorff, *Self-Determination of Indigenous Peoples Within the Human Rights Context: A Right to Autonomy?*, LAW AND DEVELOPMENT 5 (2004), http://www.lawanddevelopment.org/docs/selfdetermination.pdf (introducing the vagueness and ambiguity of "self-determination" evidenced in the relevant international law authorities).

25. *See* UN Charter art. 1, para. 2 (stating that the purpose of the UN is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples"); *see also* Roepstorff, *supra* note 24, at 10 (asserting that all people have the freedom to pursue their own political, economic, social and cultural interests).

26. *See* UN Charter art. 55 (requiring members of the UN to promote certain social and economic goals in order to ensure "peaceful and friendly relations among nations based on respect for equal rights and self-determination"); *see also* MALCOLM N. SHAW, INTERNATIONAL LAW 253 (6th ed., Cambridge Univ. Press 2008) (stating that the Friendly Relations Doctrine is the authority of the United Nations charter, and that it dictates that all states must protect peoples' rights of self-determination).

27. *See* Malcolm N. Shaw, *Self-Determination and the Use of Force*, *in* MINORITIES, PEOPLES, AND SELF-DETERMINATION: ESSAYS IN HONOUR OF PATRICK THORNBERRY 39 (Nazila Ghanea & Alexandra Xanthanaki eds., 2005) (asserting that self-determination is a fundamental legal right in international law); *see also* Edward A. Laing, *The Norm of Self-Determinism, 1941–1991*, 22 CAL. W. L. REV. 209, 212 (1992) (commenting that the UN Charter tasks its members to assist other nations in achieving self-determination).

28. *See* Frontier Dispute (Burk. Faso v. Mali) Judgment, 1986 I.C.J 69, ¶ 30 (Dec. 22) (finding that the doctrine of *uti possidetis* restricts self-determination in that it requires post-colonial states to exist within their colonial boundaries); *see also* Roepstorff, *supra* note 24 (discussing that *uti possidetis* limits the right to self-determination in order to protect the integrity of a sovereign state).

29. *See* PATRICK THORNBERRY, INDIGENOUS PEOPLES AND HUMAN RIGHTS 94 (2002); *see also* Mark W. Zacher, *The Territorial Integrity Norm: International Boundaries and the Use of Force*, 55 INT'L ORG. 215, 228 (2001) (illustrating an example where the world, besides Turkey, refuses to recognize the Turkish Republic of Northern Cyprus after Turkish forces occupied that area).

30. *See* Shaw, *supra* note 27, at 37 (commenting that in the UN Charter, two of its principles were to support equal rights and self-determination); *see also* Laing, *supra* note 27, at 212 (commenting that the UN Trusteeship System was created to ensure that all nations had the equal rights and self-determination).

Self-determination did not end with the demise of colonialism.[31] International law continues to shape the nature of self-determination, and due to the UN's broad mandate to promote this principle, its full potential is still not realized globally.[32]

Since 1945, at least 100 groups have demanded self-determination.[33] Currently, there are said to be 26 armed self-determination conflicts around the world.[34] The realization of the right of self-determination has been recognized to contribute to international peace and understanding.[35] It is also responsible for igniting conflicts in previously conflict-free areas. A closer analysis reveals that genuine self-determination conflicts reflect a natural correction of the previous denial of self-determination to the people concerned. Allowing self-determination may prevent some of the most vicious conflicts around the world.[36]

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31. *See* Organization of African Unity, African Charter on Human and Peoples' Rights art. 20, June 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986) (declaring that self-determination and the right to free oneself from colonization or foreign domination are unconditional rights owed to all people); *see also* Derege Demissie, Note, *Self-Determination Including Secession Versus the Territorial Integrity of Nation-States: A Prima Facie Case for Secession*, 20 SUFFOLK TRANSNAT'L L. REV. 165, 166 (1996) (commenting that Ethiopia recently added a provision to its constitution guaranteeing Ethiopians the right to self-determination).

32. *See* Shaw, *supra* note 27, at 54 (indicating that the UN's ability to promote self-determination is hampered by the increase in failing states, terrorism, and the increase of active states in the international arena); *see also* Michael Shane French-Merrill, Note, *The Role of the United Nations and Recognition in Sovereignty Determinations: How Australia Breached Its International Obligations in Ratifying the Timor Gap Treaty*, 8 CARDOZO J. INT'L & COMP. L. 285, 300 (2000) (commenting that the UN, in an attempt to promote the rights of self-determination, is not recognizing Indonesia's annexation of East Timorese because Indonesia's used illegal force to deny East Timorese's proper right to self-determination).

33. *See* Uriel Abulof, *We the Peoples? The Birth and Death of Self-Determination* (Liechtenstein Institute on Self-Determination, Princeton University, Working Paper, 2009), http://www.princeton.edu/~lisd/publications/abulof_workingpaper09.pdf (stating that since 1945 more than 300 groups have demanded self-determination); *see also* Betty Miller Unterberger, *Self-Determination*, ENCYCLOPEDIA OF AMERICAN FOREIGN POLICY (2002), http://findarticles.com/p/articles/mi_gx5215/is_2002/ai_n19132482/pg_6/?tag=mantle_skin; content (observing that in the period from 1946 to 1960, 37 new nations emerged from colonial status in Asia, Africa, and the Middle East due to the principle of self-determination).

34. *See* Marc Weller, *Settling Self-Determination Conflicts: Recent Developments*, 20 EUR. J. INT'L L. 111, 112 (2009) (acknowledging that some of the 26 conflicts involve low-level terrorist violence while others involve secessionist groups attempting to remove the central government from its territory); *see also* Stephan Wolff, *Managing Ethnic Conflict: The Merits and Perils of Territorial Accommodation*, 9 POL. STUD. REV. 26, 26 (2011) (Sept. 22, 2011), http://onlinelibrary.wiley.com/doi/10.1111/j.14789302.2010.00224.x/full (emphasizing that in addition to the 26 ongoing violent conflicts over self-determination, there have been 55 ethnic groups that have pursued self-determination with nonviolence).

35. *See* UN High Commissioner for Refugees (UNHCR), *CCPR General Comment No. 12: The Right to Self-Determination of Peoples*, ¶ 8 (Mar. 13, 1984) (considering that the right of self-determination contributes to building peace and understanding among nations); *see also* G.A. Res. 2625, ¶ 3, UN GAOR, Supp. No. 28, UN Doc. A/5217 (Oct. 24, 1970) (declaring that the Declaration on Principles of International Law contributes to development in the international field).

36. *See* Weller, *supra* note 34, at 111 (noting the desire for freedom and independence creates a powerful national movement often resulting in warfare); *see also UN Chronicle*, 23 UN CHRON. 37 (1986) (opining that State terrorism prevents peaceful problem solving).

B. Tracing Its Legal History

People have been struggling for self-determination for millennia.[37] The American Declaration of Independence and the French Constitution of September 3, 1791, are the early examples of legal aspects of self-determination.[38] Another example is the Polish Constitution of May 3, 1791. The American representatives of the 13 colonies declared their right to secede based on the abuses of their inalienable rights by the British crown[39] and their right to a free and democratic form of government.[40] They insisted on the notion that the government must be responsible to its people.[41] The French Constitution stated that a king who engaged in foreign aggression would abdicate his throne.[42] The Polish Constitution recognized that "all authority in human society takes its origin in the will of the people," and the king was merely the executor of the people's will.[43]

During World War I, both sides utilized self-determination for their own purposes. The Allies claimed they were fighting for "the right of peoples to decide their own destiny."[44] Ger-

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37. *See* Karl Doehring, *Self-Determination*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 56, 58 (Bruno Simma ed., 1995) (observing that the denial of fundamental rights has led to self-determination movements since the beginning of government); *see also* Betty Miller Unterberger, *Self-Determination*, ENCYCLOPEDIA OF AMERICAN FOREIGN POLICY (2002), http://findarticles.com/-p/articles/mi_gx5215/is_2002/ai_n19132482/pg_1/?tag=mantle_skin;content (observing that the denial of fundamental rights has led to self-determination movements since the beginning of government).

38. *See* Doehring, *supra* note 37, at 58 (establishing that the first legally relevant self-determination movements were the American Declaration of Independence of 1776 and the French Revolution); *see also* Chimene Keitner, *National Self-Determination: The Legacy of the French Revolution* (Columbia Int'l Aff. Online Working Paper, 2000), http://www.ciaonet.org/isa/woc01/index.html (commenting that the French Revolution spread revolutionary ideals throughout Europe by creating French administrations in several European countries).

39. *See* THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (explaining that it sometimes becomes necessary for a group of people to break the "political bands which have connected them with another").

40. *See* Doehring, *supra* note 37, at 58 (clarifying that the American Declaration of Independence sparked the creation of a new government rather than a secession from the previous government); *see also* Carlton F.W. Larson, *The Declaration of Independence: A 225th Anniversary Re-Interpretation*, 76 WASH. L. REV. 701, 759 (2001) (noting that the colonists asserted their inherent right to sovereignty, which resulted in the institution of a new government).

41. *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES, A LEGAL REAPPRAISAL 11 (1995) (expressing the shift from people being subject to the government to the government being subject to the people); *see also* Philip C. Aka, *Human Rights as Conflict Resolution in Africa in the New Century*, 11 TULSA J. COMP. & INT'L L. 179, 184 n.24 (2003) (acknowledging that the American Declaration of Independence was based on the idea that government exists to protect the rights of citizens).

42. *See* CONST. OF 1791, tit. VI (Fr.) (prohibiting foreign aggression by the government for conquest purposes); *see also* Craig Martin, *A Model for Constitutional Constraints on the Use of Force in Compliance with International Law*, 76 BROOK. L. REV. 611, 642 (2011) (outlining the limits of the king's power in regard to foreign aggression under the 1791 French Constitution).

43. *See* CONST. OF 1791, art. V & VII (Pol.) (affirming the people's power to determine the will of the government while restricting the king's power to execute the law); *see also* Mark F. Brzezinski, *Constitutional Heritage and Renewal: The Case of Poland*, 77 VA. L. REV. 49, 51 (1991) (emphasizing the Polish Constitution's focus on enhancing the power of the people and limiting the power of the king).

44. *See* Richard F. Iglar, *The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination: Slovenia's and Croatia's Right to Secede*, 15 B.C. INT'L & COMP. L. REV. 213, 221 (1992) (defining the Allies' use of self-determination as a right of the people).

many and Austria rebutted this by showing that the Allies mistreated minorities and colonial peoples.[45] Later, Germany offered Poles their independence if they fought for the German cause.[46]

In 1918, President Wilson redefined the concept of self-determination in his Fourteen Points speech.[47] He called for an association of nations to maintain stability, for each nation to determine its own institutions, and for readjustment of borders in accordance with ethnic nationalities.[48] This position countered Lenin's dream of creating a socialist federation of nations.[49] The victor nations established the League of Nations, in part, to protect minorities,[50] but in reality, the victors followed his speech only where it promoted their interests.[51]

In 1920, the League analyzed self-determination in the *Aaland Island* case.[52] The case addressed whether the islanders could secede from Finland, a new state, and join Sweden.[53]

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45. *See* CASSESE, *supra* note 41, at 24 (exemplifying the Allies' mistreatment of minorities and colonists); *see also* Lawrence S. Eastwood, Jr., *Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia*, 3 DUKE J. COMP. & INT'L L. 299, 313–15 (1993) (examining the critics' arguments against self-determination in World War I based on negative treatment of minorities and colonists).

46. *See* VEJAS GABRIEL LIULEVICIUS, THE GERMAN MYTH OF THE EAST: 1800 TO THE PRESENT 14 (2009) (alleging that Germany offered Poland independence in 1916 to increase support for Germany's cause in World War I).

47. *See* Bartram S. Brown, *Human Rights, Sovereignty, and the Final Status of Kosovo*, 80 CHI.-KENT L. REV. 235, 240–41 (2005) (explaining how President Woodrow Wilson redefined the concept of self-determination).

48. *See* President Woodrow Wilson, The Fourteen Points (Jan. 8, 1918), http://www.ourdocuments. gov/doc.php?doc=62&page=transcript (presenting President Wilson's Fourteen Points calling for nations to maintain stability, determine institutions and readjust boarders); *see also* James M. Boughton, *The Role of the IMF Peace and Security*, 20 AM. U. INT'L L. REV. 1117, 1119–20 (2005) (recognizing stability, institutions, and readjustment of borders as important issues in President Wilson's Fourteen Points plan).

49. *See* CASSESE, *supra* note 41, at 17 (describing Lenin's idea of a social federalist nation); *see also* Sikander Shah, *An In-Depth Analysis of the Evolution of Self-Determination Under International Law and the Ensuing Impact on the Kashmiri Freedom Struggle, Past and Present*, 34 N. KY. L. REV. 29, 30–31 (2007) (contrasting Lenin's dream of creating a socialist federation against President Wilson's plan for self-determination).

50. *See* CASSESE, *supra* note 41, at 30 (discussing the commission of jurists' dual interests of self-determination and the protection of minorities); *see also* Makau Matua, *The Iraq Paradox: Minority and Group Rights in a Viable Constitution*, 54 BUFF. L. REV. 927, 930 (2006) (stating that the League of Nations developed the first modern regime for minority protection).

51. *See* Thomas W. Simon, *Minorities in International Law*, 10 CAN. J.L. & JURIS. 507, 509 (1997) (highlighting the fact that minority concerns were driven by politics rather than humanitarianism); *see also* Carol Weisbrod, *Minorities and Diversities: The "Remarkable Experiment" of the League of Nations*, 8 CONN. J. INT'L L. 359, 366–68 (1993) (maintaining that the League of Nations' object in protecting minorities was driven by political objectives).

52. *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 27–28 (1995) (commenting on the Aaland Island's principle of self-determination); *see also* Christopher J. Fromherz, *Indigenous Peoples' Courts: Egalitarian Juridical Pluralism, Self-Determination, and the United Nations Declaration on the Rights of Indigenous Peoples*, 156 U. PA. L. REV. 1341, 1355–57 (2008) (discussing the Aaland Island's request for self-determination and the League's response to that request).

53. *See* MALCOLM N. SHAW, INTERNATIONAL LAW 251 (6th ed., Cambridge Univ. Press 2008) (addressing whether the Aaland Islanders could secede from Finland). *See generally* Bartam S. Brown, *Human Rights, Sovereignty, and the Final Status of Kosovo*, 80 CHI.-KENT L. REV. 235, 253 (citing Finland and Sweden's desire to control the Aaland Islands).

The League's experts established that self-determination was purely a political concept.[54] Further, they concluded that where self-determination could not be achieved because of geographical or economical reasons, the solution rested in the protection of minorities.[55] They also stated:

> The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees.[56]

Thus, they found that in exceptional cases where states manifestly abused their minorities, such minorities had a right to separate from the states.[57]

After World War II, the UN Charter incorporated the principle of self-determination.[58] Article 1(2) of the Charter states that one of the purposes of the UN is

> to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

Similar to Article 2(4)'s prohibition against states taking any actions that might impair the Charter's purposes, the legal nature of the purpose of the right to self-determination has never been seriously questioned.[59] Article 55 states that

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54. *See* CASSESE, *supra* note 52, at 30 (deducing that the protection of minorities was a fallback plan with the political purpose of guaranteeing the right to attain independent statehood); *see also* Lloyd Brown-John, *Self-Determination, Autonomy and State Secession in Federal Constitutional and International Law*, 40 S. TEX. L. REV. 567, 574 (stating that self-determination is a political concept).

55. *See Report Presented to the Council to the League of Nations by the Comm. of Rapporteurs*, League of Nations Doc. B7 211681106 (1921) (explaining that the separation of a minority can only be considered in exceptional circumstances and citing its geographical proximity to Finland); *see also* Brown, *supra* note 53, at 270 (explaining that compromise in the interest of the protection of minorities is sometimes necessary).

56. *See* CASSESE, *supra* note 52, at 31 (discussing the separation of a minority as an exceptional circumstance); *see also* Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 10–11 (1993) (declaring that the separation of a minority from its state is an absolute last resort).

57. *See* UN Charter art. 1, para. 2 (relaying goals of the United Nation centered around self-determination of peoples, peace, and friendly relations); *see also* UN Charter art. 55 (outlining goals of peaceful, friendly, and respectful relations among nations, based on equal rights and self-determination); *see also* Mortimer Sellers, *Republican Principles in International Law,* 11 CONN. J. INT'L L. 403, 425 (explaining that when a state lacks either the will or the power to enact and apply guarantees of human rights, separation of minorities may occur).

58. *See* Karl Doehring, *Self-Determination*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 57 (Bruno Simma ed., 2002) (discussing the UN Charter's view on self-determination after World War II); *see also* Richard Wilner, *Nationalist Movements and the Middle East Peace Process: Exercises in Self-Determination*, 1 U.C. DAVIS J. INT'L L. & POL'Y 297, 305 (commenting on the UN Charter's incorporation of the principle of self-determination).

59. *See* Doehring, *supra* note 58, at 57 (stating that the intent of the Charter's authors in classifying the legal purpose of self-determination is not decisive and has not been questioned); *see also* HELEN O'NIONS, MINORITY RIGHTS PROTECTION IN INTERNATIONAL LAW: THE ROMA OF EUROPE 226 (2007) (noting that the imprecision of the scope and application of the legal right to self-determination has not limited its use in international practice).

> with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

Furthermore, chapters XI and XII of the UN Charter, which address decolonization and the trusteeship system, contributed to the evolution of the right to self-determination[60] without ever mentioning it. While the UN could not define self-determination, the UN debates focused on people's internal political status,[61] and it did not mean the right of ethnic or national groups to secede from a state.[62]

During the Cold War, political ideologies attempted to redefine self-determination.[63] The Communist and newly independent states argued that externally, self-determination meant liberating peoples from oppressive regimes. Internally, the Communist states claimed that self-determination meant becoming a socialist country.[64] Under the Brezhnev adaptation of "internal" self-determination in Hungary and Czechoslovakia, once peoples "chose" a socialist form

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60. *See* Doehring, *supra* note 58, at 61 (noting that chapters XI and XII contributed to the establishment of the principle of self-determination through decolonization); *see also* W. Ofuatey-Kodjoe, *Self-Determination*, *in* 1 UNITED NATIONS LEGAL ORDER 349, 352–53 (Christopher C. Joyner & Oscar Schachter eds., 1995) (showing that chapters XI and XII expanded the principle of self-determination by stating the types of people the principle applies to).

61. *See* JÉRÉMIE GILBERT, INDIGENOUS PEOPLES' LAND RIGHTS UNDER INTERNATIONAL LAW: FROM VICTIMS TO ACTORS 207 (2006) (indicating that the debates show that self-determination is normally exercised within a State's territory through the internal aspect of self-determination); *see also* Malcolm N. Shaw, *Self-Determination and the Use of Force*, *in* MINORITIES, PEOPLES, AND SELF-DETERMINATION, ESSAYS IN HONOUR OF PATRICK THORNBERRY 16 (Nazila Ghanea & Alexandra Xanthanaki eds., 2005) (citing C. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty* 24 CASE W. RES. J. INT'L L. 199, 246 (1992)) (claiming that the UN discussions on peoples' right to establish their own internal political status has helped clarify the meaning and content of the principle of self-determination).

62. *See* CASSESE, *supra* note 52, at 42 (expressing that the meaning of self-determination in the UN Charter can be negatively inferred only from the UN debate preceding the adoption of Article 1(2)); *see also* Eric Ting-lun Huang, *The Evolution of the Concept of Self-Determination and the Right of the People of Taiwan to Self-Determination*, 14 N.Y. INT'L L. REV. 167, 174 (2001) (stating that the UN tried to alleviate Cold War hostilities by refusing to recognize a right to secession in the right to self-determination).

63. *See* Thomas D. Grant, *Regulating the Creation of States from Decolonization to Secession*, 5 J. INT'L L. & INT'L REL. 11, 27 (2009) (quoting NETA C. CRAWFORD, ARGUMENT AND CHANGE IN WORLD POLITY: ETHICS, DECOLONIZATION AND HUMANITARIAN INTERVENTION 316–17 (2002)) (noting that Western states favored internal self-determination, and socialist states favored an anti-colonial definition of external self-determination); *see also* Kristina Roepstorff, *Self-Determination of Indigenous Peoples Within the Human Rights Context: A Right to Autonomy?*, LAW AND DEVELOPMENT 9 (2004), http://lawanddevelopment.org/docs/selfdetermination.pdf (distinguishing the European view that self-determination supported colonization from the Soviet view that self-determination promoted decolonization).

64. *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 44–45 (1995) (stating that because internal self-determination allows people in a sovereign state to freely choose their rulers, they have the right to choose a socialist government); *see also* RICHARD SAKWA, THE RISE AND FALL OF THE SOVIET UNION 1917–1991 357 (1999) (explaining that the Brezhnev Doctrine stated that Communist parties had an international duty to all socialist countries because socialists and Communists had a single goal to make internal political choices).

of government and became members of the Soviet Bloc, they could be prevented from reverting to any other form of government and leaving the bloc, even by the use of force.[65] The Capitalist states argued that "external" self-determination was a non-binding principle, and "internal" self-determination rested on representative governments and human rights.[66] With the adoption of the human rights covenants, most states agreed that self-determination was broader than decolonization but not so broad to confer rights on national minorities.[67]

Since 1945, countless international documents have addressed various aspects of self-determination. The UN and African charters applied the right to colonial people[68] and all other peoples.[69] The Helsinki Final Act of 1975 reiterated that all peoples were free to determine their internal and external state political matters.[70] Indigenous people were recognized as the beneficiaries of the right.[71] Self-determination became a binding principle in international customary law.[72]

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65. *See* Doehring, *supra* note 58, at 65 (stating that the Brezhnev Doctrine allowed socialist states to use necessary means, even force, to thwart any change in the communist governmental system); *see also* William C. Plouffe, Jr., *Sovereignty in the "New World Order": The Once and Future Position of the United States, a Merlinesque Task of Quasi-Legal Definition*, 4 TULSA J. COMP. & INT'L L. 49, 63 (1996) (explaining that under the Brezhnev Doctrine, a member state that "strayed from the socialist path" would be taken over).

66. *See* CASSESE, *supra* note 64, at 46 (stating that the West defined self-determination in terms of internal self-determination and universal application whereas Third World states focused on the principle's "external" aspects); *see also* Andrew Coleman & Jackson Maogoto, *Democracy's Global Quest: A Noble Crusade Wrapped in Dirty Reality?*, 28 SUFFOLK TRANSNAT'L L. REV. 175, 200 (2005) (demonstrating the capitalist states' assertion that the right to self-determination only supported a nation's right to choose a democratic government).

67. *See* CASSESE, *supra* note 64, at 51–52 (indicating that a majority of states took a position that the article on self-determination should cover more than colonialism but should not include minorities); *see also* Christopher J. Fromherz, Comment, *Indigenous Peoples' Courts: Egalitarian Juridical Pluralism, Self-Determination, and the United Nations Declaration on the Rights of Indigenous Peoples*, 156 U. PA. L. REV. 1341, 1357 (2008) (arguing that in drafting article 1(2), the drafters established self-determination rights for peoples but not secession rights for minorities).

68. *See* UN Charter arts. 73 & 74 (announcing the United Nations' policies with respect to non-self-governing territories).

69. *See* UN Charter art. 1, para. 2 (listing the principles to be followed by the United Nations and its members); *see also* African Charter on Human and Peoples' Rights art. 20, June 27, 1981, 21 I.L.M. 58 (establishing that all peoples have the right to existence and self-determination).

70. *See* Conference on Security and Co-Operation in Europe Final Act, Aug. 1, 1975, 14 I.L.M. 1292 (affirming that all participating states will recognize the equal rights of all peoples and respect their right to self-determination).

71. *See* Declaration on the Rights of Indigenous Peoples art. 3, G.A. Res. 61/295, UN Doc. A/RES/61/295 (Sept. 13, 2007) (recognizing that indigenous peoples have the right to freely determine their political status and freely pursue their economic, social, and cultural development by virtue of their right to self-determination); *see also* Aliza Gail Organick, *Listening to Indigenous Voices: What the UN Declaration on the Rights of Indigenous Peoples Means for U.S. Tribes*, 16 U.C. DAVIS J. L. & POL'Y 171, 183 (2009) (noting that the UN Declaration on the Rights of Indigenous Peoples acknowledged the rights of indigenous people to self-determination).

72. *See* Malcolm N. Shaw, *Self-Determination and the Use of Force*, *in* MINORITIES, PEOPLES, AND SELF-DETERMINATION: ESSAYS IN HONOUR OF PATRICK THORNBERRY 38 (Nazila Ghanea & Alexandra Xanthanaki eds., 2005) (stating that self-determination became a right under international law through treaty, custom, and the principle of law in general); *see also* Edward A. Laing, *The Norm of Self-Determination, 1941–1991*, 22 CAL. W. INT'L L.J. 209, 221–22 (1992) (citing various authorities who argue that self-determination became a binding principle of customary international law during the 1970s).

The external aspect of it has been distinguished from the internal aspect.[73] Its external aspect includes independence, association, or integration, in the post-colonial context.[74] Its internal aspect includes democratic self-rule and autonomy.[75] The Vienna Action Plan emphasized the right and the need to facilitate full participation of minorities in all aspects of political life.[76] Numerous UN bodies, including the UNGA, UNSC, UNHRC, and ICJ, recognized that all peoples had the right to self-determination,[77] and the struggle for self-determination could not be considered as a form of aggression.[78]

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73. *See* UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 21: Right to Self-Determination* ¶ 4, UN DOC. A/51/18 (Aug. 23, 1996) (distinguishing the internal and external aspects of self-determination); *see also* Patrick Thornberry, *The Democratic or Internal Aspect of Self-Determination With Some Remarks on Federalism, in* MODERN LAW OF SELF-DETERMINATION 101 (1993) (discussing the distinction between external and internal self-determination).

74. *See* Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations, G.A. Res. 2625, Annex, UN GAOR, 25th Sess. Supp. No. 28, UN Doc. A/5217 at 121 (Oct. 24, 1970) (declaring that states should refrain from interfering with the independence of other states and that self-determination is vital to the promotion of good relations between states); *see also* John W. Head, *Selling Hong Kong to China: What Happened to the Right of Self-Determination*, 46 U. KAN. L. REV. 283, 288–90 (1998) (explaining that external self-determination focuses on the group's ability to determine its own status as an independent state with respect to the international community).

75. *See* Douglas Sanders, *Self-Determination and Indigenous Peoples, in* MODERN LAW OF SELF-DETERMINATION 79 (1993) (asserting that internal self-determination for cultural minorities and indigenous peoples within a state will generally require decentralization, autonomy or self-government); *see also* Shaw, *supra* note 72, at 42 (quoting the Canadian Supreme Court in defining internal self-determination as a group of people acting within an existing state to develop its own political, economic, social, and cultural identity).

76. *See* World Conference on Human Rights, Vienna Declaration and Programme of Action, June 14–25, 1993, art. 31, UN Doc. A/CONF.157/23 (July 12, 1993) (urging states to ensure the full and free participation of indigenous people in all aspects of society); *see also* Tina Reuter, *Dealing With Claims of Ethnic Minorities in International Law,* 24 CONN. J. INT'L L. 201, 233–34 (2009) (noting that the 1993 World Conference on Human Rights grants ethnic minority groups the right to correctional secession if they are subject to severe discrimination and denied participation in government).

77. *See* UN Comm. on the Elimination of Racial Discrimination, *General Recommendation XXI: Right to Self-Determination*, ¶ 2, UN Doc. A/51/18 (Aug. 23, 1996) (stating that the right to self-determination of peoples is a fundamental principle of international law); *see also* Case Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90, 102 (June 30) (ruling that "[the] principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court"); *see also* Friendly Relations Declaration, G.A. Res. 2625 (XXV), UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/5217, art. 2 (Oct. 24, 1970) (proclaiming that all people have the right to determine their political status and to pursue their economic, social, and cultural development without external interference); *see also* Anti-Colonial Declaration, G.A. Res. 1514 (XV), UN GAOR, 15th Sess., Supp. No. 16, UN Doc. A/4684, at 67 (Dec. 14, 1960) (declaring that "all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"); *see also* Definition of Aggression, G.A. Res. 3314, 29th Sess., Supp. No. 19, UN Doc. A/9619, art. 7 (Dec. 14 1974) (declaring that nothing in the Definition should be construed to prejudice the right to self-determination as derived from the UN Charter); *see also* Western Sahara, Advisory Opinion, 1975 I.C.J. 12, at 31 (Oct. 16) (reaffirming that a right to self-determination by all peoples was expressly stated in the UN Charter as well as UN Res. 1514); *see also* Anti-Apartheid Resolution, S.C. Res. 556 UN Doc. S/RES/556, at 4 (October 23, 1984) (reaffirming the legitimacy of the oppressed peoples' struggle for their right to self-determination in South Africa).

78. *See* Definition of Aggression, G.A. Res. 3314, art. 7, UN GAOR, 29th Sess., Supp. No. 19, UN Doc. A/9619, (Dec. 14, 1974) (stating that nothing in the Definition should be construed to prejudice the struggle for self-determination as enumerated from the UN Charter).

Decolonization became a unique form of self-determination.[79] Thanks to decolonization and the elimination of apartheid, hundreds of millions of people enjoy their fundamental right of self-determination today.[80] Once self-determination was universally recognized, its assertion was no longer limited to colonial people.[81] Currently, self-determination is normally realized internally, except in the most extreme situations.[82]

Self-determination has been evolving to meet the changing needs of the international community.[83] After World War II, it focused on decolonization. With the end of colonization, it shifted toward racist regimes and other forms of alien domination.[84] With the collapse of the

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79. *See* Karl Doehring, *Self-Determination*, *in* CHARTER OF THE UNITED NATIONS: A COMMENTARY 68 Bruno Simma ed., 1995) (arguing that there is a "dual status" with respect to colonial peoples in that a colony was not an independent state that was to be overthrown by another state, nor was it an ethnic minority in a homogeneous state because did it possess the same status as the population of a colonial power); *see also* Russell Miller, *Self-Determination in International Law and the Demise of Democracy?,* 41 COLUM. J. TRANSNAT'L L. 601, 625 (2003) (noting that the decolonization period was dominated by a form of external self-determination, which may include claims for territorial independence and a right to secede).

80. *See* G.A. Res. 50/6 UN Doc. A/RES 50/6 68, at13 (Oct. 24 1995) (declaring that decolonization and the end of apartheid resulted in the exercise of self-determination by hundreds of millions of people); *see also* Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law,* 34 N.Y.U. J. INT'L L. & POL. 189, 219 (2001) (noting that indigenous peoples have drawn heavily from decolonization and to a lesser extent, the end of apartheid in their claims for the right of self-determination).

81. *See* Doehring, *supra* note 79, at 70 (arguing that the right of self-determination is not reserved for decolonization but, rather, is universally recognized in article 1 of the human rights covenants); *see also* Dinah Shelton, *Agora: The ICJ's Kosovo Advisory Opinion: Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon,* 105 AM. J. INT'L L. 60, 60 (2011) (noting that the 1993 Vienna Declaration extended the universal application of the right of self-determination that applied to peoples under colonial or foreign occupation to peoples of a represented government).

82. *See* Reference re Secession of Quebec (1998), 2 SCR 217, 71 (Can. Que) (finding that the right to self-determination is normally fulfilled through internal self-determination and in the most extreme cases, through external self-determination); *see also* Cherylyn Ahrens, *Chechnya and the Right of Self-Determination,* 42 COLUM. J. TRANSNAT'L L. 575, 578 (2004) (illustrating that although all people have a right to internal self-determination, a right of external-determination may arise only from rare or extreme circumstances).

83. *See* Malcolm N. Shaw, *The Right to Self-Determination: Meaning and Scope*, *in* MINORITIES, PEOPLES, AND SELF-DETERMINATION: ESSAYS IN HONOUR OF PATRICK THORNBERRY, 16–18 (Nazila Ghanea-Hercock & Alexandra Xanthaki eds., 2005) (tracing the evolution of self-determination from a principle in the UN Charter to a right applicable only during decolonization under the Declaration Against Colonialism to eventually a right enjoyed by all peoples without distinction pursuant to the 1993 Vienna Declaration and Programme of Action); *see also* Valerie Epps, *Self-Determination in the Taiwan/China Context*, 32 NEW ENG. L. REV. 685, 686 (1998) (tracing the evolution of self-determination as a right that originally applied to nations during the drafting of the UN Charter to a right that applied to peoples under colonial rule to a right enjoyed by all peoples under the 1993 Vienna Declaration).

84. *See* Shaw, *supra* note 83, at 16–17 (noting that the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States expanded the beneficiaries of self-determination to peoples under colonial or racist regimes or other forms of alien domination); *see also* Melysa Sperber, *John Walker Lindh and Yaser Esam Hamdi: Closing the Loophole in International Humanitarian Law for American Nationals Captured Abroad While Fighting With Enemy Forces,* 40 AM. CRIM. L. REV. 159, 179 (2003) (noting that the creation of the Additional Protocols to the Geneva Conventions in the late 1960s and the early 1970s sought to broaden the scope of humanitarian law to include "armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination").

USSR and Yugoslavia, it re-focused again.[85] The spread of democracy reinforced its internal aspect, thanks in part to the successful aboriginal demands for self-determination against the settler state.[86]

C. The Internal Aspect of Self-Determination

"Internal" self-determination means the right to "authentic self-government."[87] It consists of the totality of the civil and political rights found in the ICCPR.[88] This includes freedom of expression, assembly, association, and participation in government.[89] It is realized through a free and genuine expression of the will of the peoples concerned.[90] A plebiscite is the best way to test a people's will.[91] States must represent the whole population regardless of race, ethnicity, or nationality, among others.[92]

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85. *See* Shaw, *supra* note 83, at 16–17 (analyzing the history of self-determination in the context of international law); *see also* Sikander Shah, *An In-Depth Analysis of the Evolution of Self-Determination Under International Law and the Ensuing Impact on the Kashmiri Freedom Struggle, Past and Present*, 34 N. KY. L. REV. 29, 49–50 (2007) (discussing the gradual acceptance of self-determination in the context of international law and its ensuing ramifications).

86. *See* PAUL G. MCHUGH, ABORIGINAL SOCIETIES AND THE COMMON LAW: A HISTORY OF SOVEREIGNTY, STATUS, AND SELF-DETERMINATION 315 (2004); *see also* Eric Ting-lun Huang, *The Evolution of the Concept of Self-Determination and the Right of the People of Taiwan to Self-Determination*, 14 N.Y. INT'L L. REV. 167, 193 (2001) (analyzing the similarities between human rights and self-determination).

87. *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 101 (1995) (defining internal self-determination); *see also* Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT'L L. 1141, 1166 (2008) (explaining the notion of indigenous self-government under the scrutiny of self-determination).

88. *See* CASSESE, *supra* note 87, at 53 (maintaining that the freedom of self-determination is not absolute); *see also* Christopher J. Fromherz, Comment, *Indigenous Peoples' Courts: Egalitarian Juridical Pluralism, Self-Determination, and the United Nations Declaration on the Right of Indigenous Peoples*, 156 U. PA. L. REV. 1341, 1360 (2008) (providing an explanation of self-determination through the United Nations Declaration on the Rights of Indigenous Peoples).

89. *See* CASSESE, *supra* note 87, at 52 (explaining what the right of self-determination entails); *see also* Jure Vidmar, *The Right of Self-Determination and Multiparty Democracy: Two Sides of the Same Coin*, 10 HUM. RTS. L. REV. 239, 258 (2010) (recognizing the link between human rights and self-determination).

90. *See* Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 32 (Oct. 16) (asserting that self-determination requires the free participation of the people).

91. *See* Karl Doehring, *Self-Determination*, *in* CHARTER OF THE UNITED NATIONS: A COMMENTARY 69 (Bruno Simma ed., 1995); *see also* Lung-chu Chen & W. Michael Reismant, *Who Owns Taiwan: A Search for International Title*, 81 YALE L. J. 599, 660–61 (1972) (stating that the plebiscite is the preferred method for determining the status of trust territories by the United Nations).

92. *See* UN Comm. on the Elimination of Racial Discrimination, *General Recommendation XXI: Right to Self-Determination*, ¶ 4, UN Doc. A/51/18, (Aug. 23, 1996) (stating that governments should not discriminate when defining the scope of a population); *see also* Lung-Chu Chen, *Self-Determination and World Public Order*, 66 NOTRE DAME L. REV. 1287, 1290–91 (1991) (illustrating the various facets that define a population and how it is represented through plebiscites).

Political participation in state government must occur through genuine and free elections without any interference.[93] States have a duty not to deprive any peoples from exercising their right to self-determination, freedom, and independence, [94] either domestically or through foreign interference.[95] People must determine their political future through democratic means.[96] Post-World War II single-party Communist states were deemed to satisfy the internal aspect of self-determination,[97] even though most followed the directives from Moscow.

Once linked to individual political and civil rights, self-determination is not absolute.[98] Interests of others in the same state, not only those seeking self-determination, must be consid-

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93. *See* Doehring, *supra* note 91, at 64 (concluding that free elections are essential to the right of self-determination); *see also* Tina Kempin, *Dealing With Claims of Ethnic Minorities in International Law*, 24 CONN. J. INT'L 201, 223 (2009) (interpreting the ICCPR as requiring genuine periodic elections and the opportunity to take part in the conduct of public affairs).

94. *See* Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance With the Charter of the United Nations, G.A. Res. 2625 (XXV), at 3, UN GAOR, 25th Sess., 1883d plen. mtg., UN Do A/8018 (Oct. 24, 1970) (stating that states shall refrain from coercion targeting the independence or territorial integrity of any state); *see also* Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L 1, 15 (1993) (holding that states have the duty to refrain from forcible action that would deprive people of their freedom and independence).

95. *See* CASSESE, *supra* note 87, at 55 (interpreting Article 1(1) as prohibiting states from infringing on another state's right through meddling); *see also* Holly A. Osterlanda, *National Self-Determination and Secession: The Slovak Model*, 25 CASE W. RES. J. INT'L 655, 671 (1993) (asserting that groups of people are entitled to pursue their political, cultural, and economic objectives without outside coercion).

96. *See* NATO Office of Information and Press, *Final Report: The Kosovo Crisis in an International Law Perspective: Self-Determination, Territorial Integrity and the NATO Intervention*, 23 (June 16, 2001) (prepared by Dajena Kumbaro) (stating that self-determination encompasses the right to determine political destiny without improper distinctions).

97. *See* CASSESE, *supra* note 87, at 63 (noting that both external and internal dimensions were used in implementation); *see also* Gregory H. Foxa, *Self-Determination in the Post-Cold War Era: A New Internal Focus?*, 16 MICH. J. INT'L L. 733, 745 (1995) (book review) (citing Yugoslavia, Slovenia, Croatia, Macedonia, and Bosnia as countries that voted for independence through referenda).

98. *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 53 (1995) (explaining that self-determination is subject to the same limitations as other Covenant provisions); *see also* Roy E. Thoman, *The New World Order: Sovereignty, Human Rights, and the Self-Determination of Peoples*, 16 WIS. INT'L L.J. 271, 272 (1997) (book review) (suggesting that the general interest of the international community serves as a limitation on self-determination).

ered.[99] The manifestation of self-determination through political participation may be exceptionally curtailed during public emergencies. ICCPR Article 4(1) states:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.[100]

Once emergencies end, states must restore political participation because self-determination is a continuing right.[101]

States should be particularly sensitive to the rights of persons belonging to ethnic groups.[102] This includes vesting these groups with constitutional protections,[103] other safeguards,[104] and promoting empowerment of various groups through domestic institutions.[105]

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99. *See* Jure Vidmar, *The Right of Self-Determination and Multiparty Democracy: Two Sides of the Same Coin?,* 10 HUM. RTS. L. REV. 239, 240 (2010) (acknowledging the structural and institutional changes that inevitably affect most groups in the state); *see also* Kempin, *supra* note 93, at 213 (reporting that the public funding of one minority amounts to discrimination of other minorities in violation of the ICCPR).

100. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), ¶ 4, UN Doc. A/RES/2200A (Dec. 16, 1966) (establishing public emergencies as a notable limitation to the exercise of self-determination).

101. *See* CASSESE, *supra* note 98, at 53–54 (stressing that the Covenant establishes self-determination as a continuing right); *see also* James E. Falkowski, *Secessionary Self-Determination: A Jeffersonian Perspective*, 9 B.U. INT'L L.J. 209, 230 (1991) (concluding that self-determination is a continuing right based on the construction of the resolution).

102. *See* UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 21, Right to Self-Determination* (Aug. 23, 1996) UN Doc A/51/18, para. 2 (explaining that self-determination should include the right of ethnic people to celebrate their own culture); *see also* Dinah Shelton, *Agora: The ICJ's Kosovo Advisory Option: Self-Determination in Regional Human Rights,* 105 AM. J. INT'L L. 60, 62 (2011) (specifying indigenous people as a group receiving special treatment under self-determination).

103. *See* UN Committee on the Elimination of Racial Discrimination, *supra* note 102 (establishing that the ICCPR provides peoples the right to self-determination); *see also* Ved P. Nanda, *The New Dynamics of Self-Determination: Revisiting Self-Determination as an International Law Concept: A Major Challenge in the Post–Cold War Era*, 3 ILSA J. INT'L & COMP. L. 443, 453 (1997) (explaining that self-determination of ethnic groups should be encouraged by constitutional frameworks).

104. *See* UN Committee on the Elimination of Racial Discrimination, *supra* note 102, at para. 1 (iterating that the ICCPR establishes the right to self-determination as a right under international law); *see also* Nanda, *supra*, note 103 (explaining that democratic forms of governments are needed to promote self-determination for ethnic groups).

105. *See* UNSC Report of the Secretary General, An Agenda for Peace Preventive Diplomacy, Peacemaking and Peace-Keeping (1992) UN Doc S/24111, A/47/277, para. 81 (Agenda for Peace); *see also* Walter Clarke & Jeffrey Herbst, *Somalia and the Future of Humanitarian Intervention*, 75 FOREIGN AFF. 70, 84 (1996) (explaining the need for domestic institutions that are capable of self-governance).

In the *Aaland Island* case, the League considered minority rights to be "a sort of a fall-back solution" to independence.[106] Following the Cold War, OSCE recognized that minorities effectively exercised their rights through "equal access to public service."[107] Meaningful participation of national minorities in public life became crucial for a peaceful and democratic society.[108] States ensured their stability by committing to human and minority rights.[109] Therefore, states maintain "internal" self-determination by respecting, in part, minority rights.[110]

A state with a representative government, allowing any group equal access to political participation and decision making, has met the requirement of "internal" self-determination.[111] So long as states respect the specific rights of minorities, and "internal" self-determination is satisfied, any secession is unnecessary.[112] By establishing a genuinely representative government and recognizing that the secession would have a great destabilizing effect, all states make them-

106. *See* ANTONIO CASSESE, *supra* note 98, at 30 (1995) (explaining that in many situations successful self-determination of minorities was an afterthought of independence); *see also* LOWELL S. GUSTAFSON, THE SOVEREIGNTY DISPUTE OVER THE FALKLAND (MALVINAS) ISLANDS 66 (1988) (commenting on the right to self applied only to Finland as a state, and that the minorities were entitled to minority rights).

107. *See* OSCE High Commissioner on National Minorities, The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note 22 (Sept. 1999) (establishing the minority's right to equality in terms of access to public service); *see also* John Packer, *The Origin and Nature of the Lund Recommendations on the Effective Participation of National Minorities in Public Life*, 4 HELSINKI MONITOR 30 (2000) (discussing the importance of affording minorities the equal accommodations).

108. *See* OSCE High Commissioner on National Minorities, *supra* note 107, at Note 7 (Sept. 1999) (stating public participation by minorities in elections is essential); *see also* Packer, *supra* note 107, at 30–31 (explaining the need for minorities to take an equal role in national decision making).

109. *See* Agenda for Peace, *supra* note 105, at 18 (stressing that nation's stability is directly connected to their attention to human and minority rights); *see also* Mortin H. Halperin, *Guaranteeing Democracy*, 91 FOREIGN POL'Y 105, 108 (1993) (commenting on the connection between stability and minorities rights in multi-ethnic nations).

110. *See* Karl Doehring, *Self-Determination*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 65 (Bruno Simma ed.,1995) (explaining that internal self-determination means that ethnic minorities may refuse full assimilation in order to protect and preserve their own characteristics); *see also* KRISTIN HENRAD, DEVISING AN ADEQUATE SYSTEM OF MINORITY RIGHTS AND THE RIGHT TO SELF-DETERMINATION 299 (2000) (reiterating that the right of people to choose their own government and the necessary participation of all people, including minorities, in the decision-making process of the state is related to the concept of internal self-determination).

111. *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 112 (1995) (detailing that if the government of a sovereign State is representative of the whole population by granting equal access to the political decision-making process; political institutions to any group; and access to government groups regardless of race, creed, or color then it respects self-determination); *see also* DAVID RAIC, STATEHOOD AND THE LAW OF SELF-DETERMINATION 306 (2002) (affirming that internal self-determination is crucial to preserve individual human rights and to evaluate the legitimacy and representativeness of the government of a state).

112. *See* Abdullahi Ahmed An-Na'im, *The National Question, Secession and Constitutionalism: The Mediation of Competing Claims to Self-Determination*, *in* CONSTITUTIONALISM & DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 121 (Douglas Greenberg et al. eds., 1993) (declaring that the legal right to secede may arise when internal self-determination is denied to anyone, including minorities); *see also* Doehring, *supra* note 110, at 65 (finding that any right to offensively exercise self-determination is unnecessary and unavailable when internal self-determination is maintained by respecting minority rights).

selves almost immune from any successful secession.[113] A state that bases its government on equality, nondiscrimination, and "internal" self-determination is entitled to territorial integrity.[114] The *Aaland Island*, *Quebec*, and *Zaire* cases stand for this principle.

There are various modes of realizing self-determination. They include independence, local government, federalism, confederalism, "or any other form of relations that accords with the wishes of the people."[115] But the right to self-determination does not mean an automatic right to secede.[116] Post-Cold War trends reveal greater acceptance of self-determination not involving full independence.[117]

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113. *See* Frederic L. Kirgis, Jr., *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. OF INT'L L. 304, 309 (1994) (illustrating that the greater the degree to which government is representative and the greater the degree to which claim is destabilizing, the more unacceptable a self-determination claim); *see also* Kristina Roepstorff, *Self-Determination of Indigenous Peoples Within the Human Rights Context: A Right to Autonomy?*, LAWANDDEVELOPMENT 5 (2004), http://lawanddevelopment.org/docs/self determination.pdf (clarifying that the more representative a government is and the higher the degree to which the claim is stabilizing, the less likely a right to secession will be acknowledged).

114. *See* ANNA MOLCHANOVA, NATIONAL SELF-DETERMINATION AND JUSTICE IN MULTINATIONAL STATES 147 (2009) (supporting the territorial integrity of states that value self-determination as well as human rights); *see also* Reference re Secession of Quebec, (1998) 2 S.C.R. 217 (Can. Que) (stating that a state whose government respects the people within its territory by endorsing equality, nondiscrimination, and internal self-determination is worthy of territorial integrity backed by international law).

115. *See* Katangese Peoples' Congress v. Zaire, Comm. No. 75/92 para. 4 (African Commission for Human and Peoples' rights 995), http://www.achpr.org/english/Decison_Communication/DRC/Comm.%2075-92.pdf asserting the Afr. Comm'n on Human and Peoples' Rights' belief that independence, self-government, local government, federalism, confederalism, unitarism, or any method of maintaining relations that is in harmony with people's wishes are ways in which self-determination may be exercised) In this case, the ACHPR examined whether the people of Katanga exemplified as "a people" and could secede from Zaire; *see also* Mtendeweka Owen Mhango, *Recognizing a Right to Autonomy for Ethnic Groups Under the African Charter on Human and Peoples' Rights: Katangese People's Congress v. Zaire*, 14 AM. UNIV. WASH. C. OF L. HUM. RTS. BRIEF 11, 12 (2007) (elaborating that self-determination may be exercised by independence, self-government, local government, federalism, confederalism, unitarism, or any method of maintaining relations that is in harmony with people's wishes, but that it also has to fully acknowledge other recognized principles such as sovereignty and territorial integrity).

116. *See* C. Lloyd Brown-John, *Self-Determination, Autonomy, and State Secession in Federal Constitutional and International Law, in* COMPARATIVE FEDERALISM IN THE DEVOLUTION AREA 46 (Neil Colman McCabe ed., 2002) (finding that the right of secession does not automatically come even if it is to ensure indigenous peoples' right to self-determination); *see also* Malcolm N. Shaw, *The Right to Self-Determination: Meaning and Scope*, *in* MINORITIES, PEOPLES AND SELF-DETERMINATION 23 (Nazila Ghanea & Alexandra Xanthaki, eds., 2005) (establishing that because the right of self-determination does not automatically mean the right to secede, the fear of states that the beneficiaries of self-determination will try to secede is unsupported).

117. *See* Richard Falk, *Self-Determination Under International Law: The Coherence of Doctrine Versus the Incoherence of Experience*, *in* THE SELF DETERMINATION OF PEOPLES: COMMUNITY, NATION AND STATE IN AN INTERDEPENDENT WORLD 31, 36 (Wolfgang Danspeckgruber ed., 2002) (finding that the Cold War experience shows that self-determination involving full independence can lead to bitter warfare); *see also* Marc Weller, *Settling Self-Determination Conflicts: Recent Developments*, 20 EUR. J. INT'L L. 111, 116 (2009) (noting that even after the violence that resulted from the Cold War, autonomy is once again endorsed but is being questioned as to whether minorities have a right to self-governance).

"Internal" self-determination becomes more relevant with the spread of human rights and the weakening of state sovereignty.[118] As international boundaries of states are redrawn, the concept of self-determination shifts away from the state-centered status quo and moves toward its human aspect.[119]

D. When Does a Minority Group Becomes "a People"?

Under present international law, the following four concepts are relevant to answering this question: 1) location, 2) the will to exist, 3) denial of "internal" self-determination, and 4) brutal oppression. The fourth concept, brutal oppression, establishes the remedial aspect of self-determination.

1. Location

The language "All peoples have the right of self-determination"[120] has no territorial limitation. However, most scholars agree that "a people" must exist within a confined territory, and there can be a number of peoples in one state.[121] The Canadian Supreme Court supported this conclusion reasoning that the idea that only the entire state population constitutes "a people" undermines the remedial purpose of self-determination.[122] This conclusion may result from

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118. *See* Roepstorff, *supra* note 113, at 5 (noting the weight internal self-determination has in the debate on self-determination due to the human rights movement and the weakening of state sovereignty); *see also* Allan Rosas, *Internal Self-Determination*, *in* MODERN LAW OF SELF-DETERMINATION 229 (Christian Tomuschat ed., 1993) (alleging that the general trend in downplaying State sovereignty to favor human rights, popular sovereignty, and a democratic system of government is in line with the notion of internal self-determination).

119. *See* Reference re Secession of Quebec, *supra* note 114, at 70 (assessing the growth of self-determination into the field of human rights); *see also* Shaw, *supra* note 116, at 23 (emphasizing self-determination as a human right rather than purely a right of the state).

120. *See* International Covenant on Civil and Political Rights, art. 1, Dec. 16, 1966, 999 U.N.T.S. 171 (proclaiming the rights that people possess under the umbrella of self-determination); s*ee also* Dinah Shelton, *Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon*, 105 AM. J. INT'L L. 60, 81 n.24 (2011) (citing Article 1 of the International Covenant on Civil and Political Rights, which states that the right to self-determination belongs to the peoples).

121. *See* James Crawford, *The Rights of Peoples: "Peoples" or "Governments"?, in* THE RIGHTS OF PEOPLES 61 (James Crawford ed., 1988) (illustrating the possibility that there could be more than one peoples existing within one state); s*ee also* PATRICK THORNBERRY, INDIGENOUS PEOPLES AND HUMAN RIGHTS 127 (Manchester Univ. Press 2002).

122. *See* Reference re Secession of Quebec, *supra* note 114, at 70 (declaring the possibility that "a people" can constitute a minority within a state); s*ee also* Pius L. Okoronkwo, *Self-Determination and the Legality of Biafra's Secession Under International Law*, 25 LOY. L.A. INT'L & COMP. L. REV. 63, 83 (2002) (acknowledging the Supreme Court of Canada's statement that "a people" need not make up the entire state population).

the international practice of recognizing state borders irrespective of the composition of the population,[123] and no definition of "a people." The lack of the definition negatively impacts minorities[124] struggling for equal rights.[125]

123. See ETIENNE BALIBAR, POLITICS AND THE OTHER SCENE 84 (2002) (noting the diminishing of the past tendency for a border to separate people with different political, cultural, or socioeconomic characteristics); *see also* Gudmundur Alfredsson, *Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law*, in MINORITIES, PEOPLES AND SELF-DETERMINATION: ESSAYS IN HONOUR OF PATRICK THORNBERRY 171 (Nazila Ghanea & Alexandra Xanthanaki eds., 2005) (concluding that the drawing of borders no longer groups together only those who have a common nationality, ethnicity, language, or religion).

124. There is no one definition of a minority. In its 1919 *Greco-Bulgarian Communities* case, the Permanent Court of International Justice defined "a minority" as a group living in a specific territory, with a specific identity, and with a view to preserve its identity. *See* JORRI C. DUURSMA, FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES: SELF-DETERMINATION AND STATEHOOD 59 (1996) (positing that the definition of a minority is the same as that of a community, which describes a group of people with similar characteristics living in a particular location). Today, Organization for Security and Co-operation in Europe uses the term "national minorities" to encompass "a wide range of minority groups, including religious, linguistic and cultural as well as ethnic minorities, regardless of whether these groups are recognized as such by the states where they reside and irrespective of the denomination under which they are recognized" as stated in the 2008 Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations. *See* OSCE HIGH COMMISSIONER ON NATIONAL MINORITIES, THE BOLZANO/BOZEN RECOMMENDATIONS ON NATIONAL MINORITIES IN INTER-STATE RELATIONS & EXPLANATORY NOTE 3 (2008) (suggesting that the term national minorities is a broad term that includes many minority groups). The 2005 United Nations High Commissioner for Refugees' Commentary to the Minority Declaration states that minorities are even harder to define outside of Europe, because many African countries are composed of minority groups without a clear majority. *See* UN Sub-Commission on the Promotion and Protection of Human Rights, *Commentary of the Working Group on Minorities to the United Nations Declaring on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, ¶ 12, E/CN.4/Sub.2/AC.5/2005/2 (Apr. 4, 2005) (listing the different difficulties that arise when trying to define terms like national minorities and minority).

125. *See* Alfredsson, *supra* note 123, at 163 (stressing the inability of minority groups to benefit from their rights and achieve equality due to the absence of definitions for these groups); s*ee also* Howard J. Vogel, *Reframing Rights From the Ground Up: The Contribution of the New UN Law of Self-Determination to Recovering the Principle of Sociability on the Way to a Relational Theory of International Human Rights*, 20 TEMP. INT'L & COMP. L.J. 443, 457-58 (2006) (explaining the difficulty of determining who is afforded the right to self-determination when there are no precise definitions of the minority groups).

James Amaya noted that human society is much more complex than a formalistic definition of "a people," and everyone (presumably everywhere) has a right to self-determination, to participate in one's government, and to develop one's unique characteristics. Yet although all have the right, it does not mean that all are entitled to the remedies flowing from the right.[126]

The ICJ found that groups in Western Sahara,[127] East Timor,[128] and Palestine[129] had a right to self-determination as peoples.[130] The UNSC recognized the legitimacy of black South Africans' struggle for self-determination[131] and called for meaningful self-rule of the inhabitants of Kosovo.[132] An agreement between the Sudanese government and the Sudanese People's Liberation Movement established the right of self-determination for various groups in Southern Sudan.[133]

The concept of location is not exact, yet its importance rests in localizing the will of all peoples concerned. Autochtonomians have lived in the same region since the 1300s.

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126. *See* S. James Anaya, *A Contemporary Definition of the International Norm of Self-Determination*, 3 GA. L. REV. 131, 162 (1993) (revealing that the right to a self-determination remedy lies with those whose normal right to self-determination have been violated); s*ee also* S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 326 (1994) (maintaining that the remedial aspects of self-determination apply only to a narrow group of people who have suffered a violation of their rights).

127. *See* Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 68 (Oct. 16) (finding that groups in Western Sahara had a right to self-determination because there were no legal ties between Western Sahara and Morocco or the Mauritanian entity which could have affected the applicability of the principle of self-determination to the decolonization of Western Sahara).

128. *See* Case Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90, 106 (June 30) (observing that East Timor was a non-self-governing territory and that its people had the right to self-determination).

129. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 183 (July 9) (concluding that the Palestinian people had a right to self-determination based on an agreement between Israel and Palestine that referred to the Palestinian people's legitimate rights, including, as per the General Assembly, the right to self-determination); *see also* G.A. Res. 58/163,¶ 1, UN Doc. A/RES/58/163 (Dec. 22, 2002) (authorizing Palestine's right to self-determination as a people).

130. *See* Daniel Thürer & Thomas Burri, *Self-Determination*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 34 (2008) http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law9780199231690-e873&recno=3&author=Thürer%20%20Daniel4-5 (asserting the applicability of the principle of self-determination outside the context of decolonization, inasmuch as the UNGA has recognized the right of self-determination of the Palestinians and of the inhabitants of South Africa); *see, e.g.,* G.A. Res. 48/94, ¶¶ 3, 4, UN Doc. A/RES/48/94 (Dec. 20, 1993) (confirming the right to self-determination of the Palestinian people and of those peoples under colonial domination).

131. *See* S.C. Res. 556, preamble, UN Doc. S/RES/556 (Oct. 23, 1984) (pronouncing the legitimacy of the struggle of the oppressed people of South Africa for the full exercise of their right to self-determination).

132. *See* S.C. Res. 1244, preamble, UN Doc. S/RES/1244 (June 10, 1999) (supporting the call in previous resolutions for meaningful self-administration for Kosovo).

133. *See* Machakos Protocol, Sudan-Sudan People's Liberation Movement/Sudan People's Liberation Army, July 20, 2002, http://www.sudanlions.org/upload/The%20Machakos%20Protocol.pdf (declaring that the people of South Sudan have a right to self-determination); *see also* U.S. Dep't of State, *Background Note: Sudan*, DEPARTMENT OF STATE: BUREAU OF AFRICAN AFFAIRS (April 11, 2011), http://www.state.gov/r/pa/ei/bgn/5424.htm (discussing the agreement, known as the Machakos Protocol, reached between Sudan and Sudan People's Liberation Movement/Army, which memorialized the right of self-determination of the people of South Sudan).

2. "Internal" Self-Determination

In addressing the internal aspect of self-determination, the ICERD committee commented that every citizen has a right to participate in the conduct of public affairs at any level,[134] and to enjoy

> Political rights, in particular the right to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;[135]

When a military junta overthrows a democratically elected government, the overthrow violates the right to (internal) self-determination, because it defies the will of the people.[136] But when citizens vote in a referendum on self-determination, a state may reasonably restrict who qualifies to vote as a member of "a people" because ICCPR article 25 is not absolute and should be read in light of ICCPR article 1.[137]

For minorities to participate effectively in public affairs, they must have an ability to express their opinions on decisions affecting them.[138] This includes the right to participate substantively in decisions on the regional and national levels.[139] State decision making via consultation, referenda, or other means should always include minorities to inspire transparency and public trust.[140] This allows each group to exercise its right to "internal" self-determination while simultaneously considering the views of others.

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134. *See* UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 21: Right to Self-Determination, UN Doc. A/51/18 (August 23, 1996) (espousing the right of citizens to participate in all facets of public affairs); *see also* Minority Rights Group International, *Self-Determination*, MINORITY RIGHTS, http://www.minorityrights.org/2813/themes/selfdetermination.html (stating that internal self-determination affords peoples greater control over their political development).

135. International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195, art. 5(c) (providing that all States Parties guarantee political rights for their citizens).

136. *See* Jawara v. The Gambia, 2000 AHRLR 107, ¶ 73 (2000) (emphasizing the right of self-determination of peoples as guaranteed by UN charter).

137. *See* Marie-Helene Gillot et al. v. France, Communication No. 932/2000, UN Doc. A/57/40 at ¶13.16 (2002) (exploring whether or not allowing representatives of New Caledonia to vote violates article 25 of the ICCR).

138. *See* UNCHR, General Comment 23: The Rights of Minorities, Art. 27 (1994) 4 (outlining the rights of minorities against discrimination under the covenant of the UNCHR).

139. *See* Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res 47/135 (Dec. 18 1992) (Minorities Declaration), at art. 2(3); *see also* Minority Rights Group International, *Guarded Optimism but a Not-So-New Dawn for Minorities Amidst South Sudan Vote,* http://www.minorityrights.org/10444/meet-minority-rights-activists/paul-oleyo-longony.html (expounding on the exercise of minority rights in a referendum vote for independence through an interview with Paul Oleyo, Executive Director of Boma Community Initiative, prior to South Sudanese independence).

140. *See* OSCE High Commissioner on National Minorities, The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note 20 (September 1999); *see also* PACT Sudan, It's Not Too Late for Peace: Pact Policy Paper on the Referenda in Southern Sudan and Abyei, http://www.pactworld.org/galleries/resourcecenter/Pact%20Policy%20Paper%20on%20Sudan%20Referenda.pdf (recommending, in part, that the state of Sudan recognize the rights of minorities in the upcoming referendum).

To ensure such participation, states should reserve seats for minorities in decision-making bodies.[141] But political representation without considering minority aspirations in the decision-making processes undermines the concept of self-determination.[142] It could also increase the risk of secessionism, because a minority that is a regional majority could stop its ineffective participation and begin to consider itself as a separate nation.[143] Having exhausted all domestic remedies, Autochtonomians seek to exercise self-determination irrespective of state territory.

The ICERD and ICCPR committees recognize that the rights of peoples to self-determination, listed in ICCPR, exist besides the rights of minorities.[144] Minority rights are specific human rights for individuals belonging to vulnerable groups within a population.[145] They are not the basis of the right of peoples to remedial self-determination.[146] Since "[a]ll human rights are universal, indivisible and interdependent and interrelated,"[147] minority rights protect minority members because of their vulnerability, without negating their right to self-determination.

3. Will to Exist

"A people" comes into existence when a group asserts its will to exist and becomes aware of its identity based on given political considerations.[148] James Amaya describes this as "the col-

141. *See* OSCE High Commissioner on National Minorities, *supra* note 140, at note 22; *see also* Inter-Parliamentary Union, FAQ on Minority Representation, http://www.ipu.org/dem-e/minorities/faq.htm (showing that an "inclusive parliament" is one that reserves space for accurate representation of minorities).

142. *See* James Anaya, *A Contemporary Definition of the International Norm of Self-Determination*, TRANSNAT'L L & CONTEMP PROBS 131, 155 (1993); *see also* Amitai Etzioni, *The Evils of Self-Determination*, FOREIGN POLICY No. 89, 21 (1992–93).

143. *See* International Conference on Human Rights, Minorities in a Decentralized Environment, http://www.minelres.lv/publicat/Eide_Yalta98.htm.

144. *See* UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 21, Right to Self-Determination (Aug. 23, 1996) UN Doc A/51/18 (General Recommendation 21) 1; *see also* UNCHR, General Comment 23: The rights of minorities, art. 27(1994) UN Doc CCPR/C/21/Rev.1/Add.5 (General Comment 23); *see also* UNHCR, International Covenant on Civil and Political Rights Charter (showing in its charter to the UN that it upholds the right to self-determination).

145. *See* Isaac Levitats, *Minority Rights*, ENCYCLOPEDIA JUDAICA (2007), http://www.encyclopedia.com/article-1G2-2587513953/minority-rights.html (defining minority rights and explaining their development); *see also* Daniel Thürer & Thomas Burri, *Self-Determination*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW (Dec. 2008), http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e873&recno=3&author=Th%C3%BCrer%20%20Daniel (discussing self-determination and minority rights).

146. *See* Asbjorn Eide, Background Paper, *Minorities in a Decentralized Environment*, International Conference on Human Rights, Human Rights for Human Development (Sept. 2–4, 1998), http://www.minelres.lv/publicat/Eide_Yalta98.htm (detailing the evolution of international standards concerning minority rights).

147. *See* World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 5, UN Doc. A/CONF.157/23 (July 12, 1993) (defining human rights as universal, indivisible, interdependent and interrelated); *see also* DANIEL J. WHELAN, INDIVISIBLE HUMAN RIGHTS: A HISTORY 1 (2010) (analyzing the UN's description of human rights as universal, indivisible, interdependent, and interrelated).

148. See Jure Vidmar, *The Right of Self-Determination and Multiparty Democracy: Two Sides of the Same Coin?*, 10 HUM. RTS. L. REV. 239, 249 (2010) (classifying self-determination as an instinctual human right); see also Aaron Kreuter, Note, Self-Determination, Sovereignty, and the Failure of States: Somaliland and the Case for Justified Secession, 19 MINN. J. INTL. L. 363, 368–69 (2010) (describing internal and external pulls toward self-determination).

lective character of the human impulse toward self-determination . . . affirming the value of community bonds" regardless of state or sovereignty.[149] If the majority of a group remains genuinely passive in safeguarding its identity, the group is not a bearer of the right to self-determination.[150] Under international customary law, leaders of groups claiming self-determination on behalf of the group must actually represent the entire group.[151]

Populations living in colonies became "peoples," in part, based on the anti-colonization movement seeking to preserve their characteristics.[152] In the colonial context, and otherwise generally, "peoples" have a right to external self-determination, while minorities usually do not have this option.[153] Autochtonomians have sought to preserve their identity by seeking relief, fleeing their homes, and forming a resistance group.

4. Brutal Oppression

Brutal state oppression of its domestic groups confined within state borders results in a clear deprivation of the right to self-determination, and in questioning state's borders. In the external aspect of self-determination, all peoples have the right to "determine freely their political status and their place in the international community based upon the principle of equal rights."[154] In the same sentence, the ICERD committee listed two examples of "external" self-determination exemplified for all peoples: "the liberation of peoples from colonialism" and

149. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (S. Afr. v. Namib.), Advisory Opinion, 1971 I.C.J. 16, 31 (June 21) (discussing self-determination and United Nations Customary Law); *see also* Anaya, *supra* note 142, at 162 (discussing omnipresent draw of groups toward self-determination).

150. *See* Karl Doehring, *Self-Determination, in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 69 (Bruno Simma ed., 1995).

151. *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 146 (1995) (explaining international customary laws regarding self-determination).

152. *See* Gudmundur Alfredsson, *Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law, in* MINORITIES, PEOPLES AND SELF-DETERMINATION: ESSAYS IN HONOUR OF PATRICK THORNEBERRY 170 (Nazila Ghanea & Alexandra Xanthanaki eds., 2005); *see also* Robin Perry, *Balancing Rights or Building Rights? Reconciling the Right to Use Customary Systems of Law with Competing Human Rights in Pursuit of Indigenous Sovereignty*, 24 HARV. HUM. RTS. J. 71, 84 (2011) (noting that the survival of indigenous peoples as peoples depends on self-determination).

153. *See* Alfredsson, *supra* note 152, at 164 (differentiating peoples from groups in that "peoples" have a right to external self-determination that involves the option of independence, while groups do not); *see also* Bartram S. Brown, *Human Rights, Sovereignty, and the Final Status of Kosovo*, 80 CHI.-KENT L. REV. 235, 264–66 (2005) (describing the inherent tension between external self-determination and minority rights because only a collective "people," not a minority, can exercise sovereign dominion over a territory).

154. *See* Rep. of the Comm. on the Elimination of Racial Discrimination, Annex VIII, 125, UN Doc. A/51/18; GAOR, 51st Sess., Supp. No. 18 (1996) (expressing the views of the committee that all peoples have these prescribed rights); *see also* Russel A. Miller, *Self-Determination in International Law and the Demise of Democracy?*, 41 COLUM. J. TRANSNAT'L L. 601, 621–22 (2003) (stating that all people subject to colonial control have the right to freely pursue their political status and that this right also demands that a government represent all people in the territory regardless of race, color, or creed).

"the prohibition to subject peoples to alien subjugation, domination and exploitation."[155] The two examples have an unambiguous history of brutal oppression.

Antonio Cassese recognized that in exceptional cases of brutal oppression of minorities, "it may be too late to plead . . . internal self-determination,"[156] and the international community will consider other modes of self-determination.[157] Karl Doehring identified minorities living within a state, colonial peoples, and the population of a state that is under foreign domination as the potential bearers of peoples' right to self-determination.[158]

Similar to the colonial people and the population of a state, minorities must undergo a parallel form of brutal oppression to exemplify characteristics of "a people" with a remedial right to self-determination. Without the total denial of "internal" self-determination, courts will stop short of examining whether a group constitutes "a people."[159] This comports with Amaya's analysis, because while self-determination is universal, its remedial aspect applies in limited instances.

Before the denial of political participation leads to the point of no return, the state and the minority are free to agree on the internal aspect of self-determination. This may include ade-

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155. *See* Rep. of the Comm. on the Elimination of Racial Discrimination, Annex VIII, 125, UN Doc. A/51/18; GAOR, 51st Sess., Supp. No. 18 (1996) (noting the two examples the committee uses which exemplify the right to external self-determination); *see also* Tina Kempin Reuter, *Dealing with Claims of Ethnic Minorities in International Law*, 24 CONN. J. INT'L L. 201, 222 (2009) (stating that the right of people to freely determine their political status and place in the international community is exemplified by the liberation of peoples from colonialism and the prohibition to subject peoples to exploitation and the like).

156. *See* CASSESE, *supra* note 151, at 359; *see also* Paul A. Clark, Development, *Taking Self-Determination Seriously: When Can Cultural and Political Minorities Control Their Own Fate?*, 5 CHI. J. INT'L L. 737, 738–39 (2005) (explaining that a weakness in the concept of self-determination is that minority rights seem to receive little attention until a genocide type event is commenced).

157. *See* CASSESE, *supra* note 151, at 360; *see also* Philip C. Aka, *Prospects for Igbo Human Rights in Nigeria in the New Century*, 48 HOW. L.J. 165, 251–52 (2004) (noting that when efforts of internal self-determination fail, such as the imposition of economic pressure on the offending government or negotiation, the international community should be proactive in helping the minority group secure its rights).

158. *See* Doehring, *supra* note 150, at 55 (naming minorities living inside a State territory, colonial peoples living beyond the boundaries of the colonial power, and the population of the sovereign State as bearers of the right of self-determination); *see also* Chaim Gans, *National Self-Determination: A Sub- and Inter-Statist Conception*, 13 CAN. J.L. & JURIS. 185, 194 (2000) (describing the bearer of the right to self-determination as any national group or faction thereof that has at least a majority presence in the territory).

159. *See, e.g.*, Reference de Recession de Quebec (1998) 2 S.C.R. 217 (Can.) (holding that Quebec did not bear the right to self-determination as they could not be defined as "peoples" under oppression or domination because the group was not denied access to the government by Canada and, therefore, the group's efforts at internal self-determination had not been exhausted); *see also* Daniel Thürer & Thomas Burri, *Self-Determination*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW (2010), http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e873&recno=172&subject=Human%20rights (noting that self-determination is acceptable where the use of force to prevent self-determination is unlawful).

quately resourced territorial or nonterritorial democratic self-governance within a state.[160] Each party should examine in good faith various modes of self-determination. The *Zaire* commission recognized this principle by listing various modes short of secession once the evidence showed no total denial of "internal" self-determination.[161]

The brutal state oppression of Autochtonomians results in total denial of "internal" self-determination. Before it is too late, the state and Autochtonomians should agree on a meaningful mode of self-determination. After all, self-determination primarily means the right of the people concerned to express their wishes about their future.[162]

E. Remedial Secession

> Secession is the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane.[163]

The ICERD committee did not find a general right of peoples to unilaterally secede from a state under international law.[164] International law has not crystallized the proper conditions

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160. *See* OSCE High Comm'r on Nat'l Minorities, *The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note* 10 (1999) (stating effective participation in government of minorities can come from either territorial or non-territorial self-governance, and that the State should devote adequate resources to either arrangement); *see also* Nedzad Basic, *International Law and Security Dilemmas in Multiethnic States*, 8 ANN. SURV. INT'L & COMP. L. 1, 13 (2002) (describing self-determination as being self-governance, and that this can be achieved by either territorial or non-territorial means).

161. *See* PATRICK THORNBERRY, INDIGENOUS PEOPLES AND HUMAN RIGHTS 256 (Manchester Univ. Press 2002); *see also* Lee Seshagiri, Note*, Democratic Disobedience: Reconceiving Self-Determination and Secession at International Law*, 51 HARV. INT'L L.J. 533, 566 (2010) (arguing that disassociating self-determination from secession will allow self-determination's scope to broaden as opposed to self-determination's scope and content narrowing).

162. *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES, A LEGAL REAPPRAISAL, 352 (1995); *see also* Curtis G. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples*, 5 HARV. HUM. RTS. J. 65, 76 (1992) (analyzing that self-determination has evolved to allow people to determine their future).

163. *See* Reference re Secession of Quebec (1998) 2 S.C.R. 217 (Can. Que).

164. *See* Rep. of the Comm. on the Elimination of Racial Discrimination, Aug. 5–23, 1996, 1–26, UN Doc. A/51/18: GAOR, 51st Sess., Supp. No. 18 (Sep. 30, 1996) (discussing that the committee's view did not recognize the general right of peoples under international law to unilaterally secede from a state); *see also* Charles Whites, Comment, *Reference re Secession of Quebec: Secession by Quebec Is a Nearly Impossible Task*, 19 N.Y.L. SCH. J. INT'L & COMP. L. 323, 344 (1999) (asserting that Quebec did not have a right to unilaterally secede under international law).

for secession.[165] This may be because states avoid creating a precedent, and each "secession-like" case is considered "unique."[166]

Any claim of right to secede will be interpreted very strictly.[167] If the right to secede were universal, the ensuing mass fragmentation could undermine peace and security, and create 5,000 countries.[168] However, secession is not illegal,[169] and international law is neutral on the subject.[170]

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165. *See* Malcolm N. Shaw, *Self-Determination and the Use of Force*, *in* MINORITIES, PEOPLES, AND SELF-DETERMINATION: ESSAYS IN HONOUR OF PATRICK THORNBERRY 35, 43 (Nazila Ghanea & Alexandra Xanthanaki, eds. 2005) (opining that secession may be considered only when internal self-determination is beyond reach); *see also* Seshagiri, *supra* note 161, at 567 (suggesting that the self-determination doctrine's failure to develop depicts the international community's opposition toward unilateral secession).

166. *See* Gregory Marchildon & Edward Maxwell, *Quebec's Right of Secession Under Canadian and International Law*, 32 VA. J. INT'L L. 583, 617 (arguing that precedent can be set for many secessionist groups in other states with Quebec's unique situation because there was no prior precedent); *see also* Thomas Burri & Daniel Thürer, *Self-Determination*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW 8 (2010), http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e873&recno=1&searchType=Quick&query=Self-Determination (noting that the Kosovo case ignored the self-determination issue to avoid making precedent).

167. *See* CASSESE, *supra* note 162, at 112 (asserting that the declaration on friendly relations clause has a strict literal and logical construction); *see also* Stephen A. Wangsgard, Comment, *Secession, Humanitarian Intervention, and Clear Objectives: When to Commit United States Military Forces*, 3 TULSA J. COMP. & INT'L L. 313, 317 (1996) (listing several factors that the right to secede internationally are contingent upon).

168. *See* Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Postcolonial Age*, 32 STAN. J. INT'L L. 255, 264–65 (1996) (stressing that secession is perceived as a threat to peace and security); *see also* Uriel Abulof, *We the Peoples? The Birth and Death of Self-Determination* 41 (Liechtenstein Inst. on Self-Determination, Working Paper No. 09, 2009), http://www.princeton.edu/~lisd/publications/abulof_workingpaper09.pdf (proclaiming that the fear of universal secession will result in too many countries).

169. *See* Reference re Secession of Quebec, *supra* note 163 (stating that international law contains neither a right of unilateral secession nor an explicit denial of such right); *see also* Thürer & Burri, *supra* note 166, at 8 (explaining that the legality of secession has been recognized by international law).

170. *See* Reference re Secession of Quebec, *supra* note 169, at 217 (stating that "[i]nternational law does not specifically grant component parts of sovereign states the right to secede unilaterally from their parent state"); *see also* Thürer & Burri, *supra* note 166, at 8 (showing that international law has not taken a hard stance on the issue of secession).

While secession addresses only a very limited part of self-determination,[171] it casts a long shadow over it.[172] The "secession or nothing" approach has resulted in making self-determination conflicts last longer.[173] It has also made states fearful of self-determination.[174] While there is no clear right to unilaterally secede, remedial secession may exist for "peoples" under specific circumstances.[175]

Secession as an international law remedy allows a general right to secede to an identifiable group if the group has suffered certain injustices for which secession is the appropriate remedy of last resort.[176] The right to secede may apply to a population of a well-defined territory where the state brutally oppresses the population.[177] Remedial secession focuses on the origin of a particular conflict, and the international implications of the state-driven oppression against a

171. *See* James Crawford, *The Rights of Peoples: "Peoples" or "Governments"?*, *in* THE RIGHTS OF PEOPLES 59 (James Crawford ed., 1988) (showing that the UN views the right of self-determination separately from the issue of decolonization); *see also* ALEXANDRA XANTHANAKI, *The Right to Self-Determination: Meaning and Scope, in* MINORITIES, PEOPLES, AND SELF-DETERMINATION, ESSAYS IN HONOUR OF PATRICK THORNBERRY 23 (Nazila Ghanea & Alexandra Xanthanaki eds., 2005) (asserting that secession should not be equated with self-determination).

172. *See* David Binder & Barbara Crossette, *As Ethnic Wars Multiply, U.S. Strives for a Policy*, N.Y. TIMES, Feb. 7, 1993, at A1 (quoting Secretary of State Warren Christopher as he expressed his concern over the possible domino effect of secession); *see also* Uriel Abulof, *We the Peoples? The Birth and Death of Self-Determination* 41 (Liechtenstein Inst. on Self-Determination, Working Paper No. 9, 2009), http://www.princeton.edu/~lisd/publications/abulof_workingpaper09.pdf (stating that the fear of a secessionist chain reaction has cast a shadow over self-determination).

173. *See* Marc Weller, *Settling Self-Determination Conflicts: Recent Developments*, 20 EUR. J. INT'L L. 111, 111, 114 (2009) (stating that the all-or-nothing approach to self-determination has prolonged armed conflicts rather than resolve them); *see also* Marc Weller, *The Self-Determination Trap*, 4 ETHNOPOLITICS 3, 3 (2005) (showing that current self-determination practice leads to "prolonged and bloody internal armed conflicts").

174. *See* XANTHANAKI, *supra* note 171, at 23 (discussing the unjustified fear of states that the beneficiaries of self-determination will try to secede); *see also* Weller, *supra* note 173, at 112 (giving examples of self determination movements that have used terrorist tactics against the central government).

175. *See* Fredric L. Kirgis, Jr., *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L L. 304, 310 (1994) (concluding that the international community will recognize secession claims in certain circumstances); *see also* Kristina Roepstorff, *Self-Determination of Indigenous Peoples Within the Human Rights Context: A Right to Autonomy?*, LAWANDDEVELOPMENT, at 19 (2004), http://lawanddevelopment.org/docs/selfdetermination.pdf (explaining that gross human rights violations can establish the right to secede).

176. *See* Allen Buchanan, *Theories of Secession*, 26 PHIL. & PUB. AFF. 31, 36 (1997) (establishing that under the Remedial Rights Only Theory, as a remedy of last resort, persons have the right to secede to defend themselves from serious injustices); *see also* Andrei Kreptul, *The Constitutional Right of Secession in Political Theory and History,* 17 J. LIBERTARIAN STUD. 39, 46 (2003) (referencing Buchanan's Remedial Rights Only Theory, which states that a right to secede exists after a group has suffered injustices for which secession is an appropriate remedy of last resort).

177. *See* XANTHANAKI, *supra* note 171, at 23 (arguing that the right to self-determination may exist in a defined territory where the government severely discriminates or is not representative with regard to certain segments of the population); *see also* Geoff Gilbert, *Autonomy and Minority Groups: A Right in International Law?*, 35 CORNELL INT'L L.J. 307, 309 (2002) (highlighting that external self-determination is traditionally interpreted as applicable to situations where there is colonial domination or a racist regime).

part of its population. The basis of remedial secession is found in the increased importance of human rights during state creation.[178]

Secession, as a remedy for gross human rights violations that result in "external" self-determination, raises difficult questions as to "what is 'a people', who belongs to 'a people', and how the will of 'a people' is determined." It also raises concerns as to the degree of human rights violations, their duration, and last resort. These concerns mirror the concerns associated with humanitarian interventions.[179]

The right of a colonial people to establish their own state has never been disputed because decolonization has been qualified as a special kind of self-determination.[180] For ethnic minorities, a comparable right may arise only when they are subject to brutal state oppression.[181]

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178. *See* Milena Sterio, *A Grotian Moment: Changes in the Legal Theory of Statehood*, 39 DENV. J. INT'L L. & POL'Y 209, 223 (2011) (describing a shift in focus from territory to human rights with regard to remedial secession and the requirements of statehood); *see also* Grace Bolton & Gezim Visoka, *Recognizing Kosovo's Independence: Remedial Secession or Earned Sovereignty?*, U. OXFORD, 3 (Oct. 2010), http://www.sant.ox.ac.uk/seesox/pdf/RecognizingKosovosindependence.pdf (setting forth human rights as increasingly prominent in remedial secession theory).

179. *See* Roya M. Hanna, Comment, *Right to Self Determination in In Re Secession of Quebec*, 23 MD. J. INT'L L. & TRADE 213, 243 (1999) (considering the risk of further human rights violations as a potential response to humanitarian intervention during the course of secessionist movements); *see also* Daniel Thürer & Thomas Burri, *Self-Determination*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW (Dec. 2008), http://www.mpepil.com/subscriber_article?script=yes&id</epil/entrieslaw9780199231690e873&recno=3&author=Th%C3%BCrer%20%20%20Daniel (examining secession and self-determination issues in the context of human rights intervention in Kosovo).

180. *See* Karl Doehring, *Self-Determination*, *in* THE CHARTER OF THE UNITED NATIONS, A COMMENTARY 67 (Bruno Simma ed., 1995) (referring to the fact that the right of a people to establish their own state in the context of decolonization has never been disputed); *see also* Jianming Shen, *Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan*, 15 AM. U. INT'L L. REV. 1101, 1142 (2000) (explaining that the principles of self-determination and decolonization are closely related and have produced many newly independent states).

181. *See* Doehring, *supra* note 180, at 66 (recognizing a possible right to secession in the instance where a minority is brutally discriminated against by the sovereign state power); *see also* XANTHANAKI, *supra* note 171, at 23 (arguing that the right to self-determination may exist in a defined territory where the government severely discriminates or is not representative with regard to certain segments of the population).

This creates a double standard because states may aid anti-colonization movements[182] but not minority movements denied "internal" self-determination.[183] Brutally oppressed groups will struggle for self-determination regardless of their legal rights.[184]

The Friendly Relations Declaration reveals that territorial integrity of states will not be impaired so long as every state observes the principle of self-determination.[185] It states:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.[186]

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182. *See* G.A. Res. 2625 (XXV), UN GOAR, 25th Sess., UN Doc. A/8082, at 122 (Oct. 24, 1970) (reaffirming that colonization is a major detriment to international peace and security); *see also* Laurence S. Hanauer, *The Irrelevance of Self-Determination Law to Ethno-National Conflict: A New Look at the Western Sahara Case*, 9 EMORY INT'L L. REV. 133, 145 (1995) (focusing on General Assembly resolutions which reflect states' distaste for colonialism).

183. *See* Dinah Shelton, *Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon*, 105 AM. J. INT'L L. 60, 81 (2011) (noting that any claimed right to secession is limited by states' concern for territorial integrity); *see also* Weller, *supra* note 173, at 112–13 (2009) (suggesting that states try to limit the application of self-determination to colonial contexts).

184. *See* INDEP. INT'L COMM'N ON KOSOVO, KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 19 (2001) (characterizing the war in Kosovo as a ramification of the desired right to self-determination); *see also* Richard Falk, *The Kosovo Advisory Opinion: Conflict Resolution and Precedent*, 105 AM. J. INT'L L. 50, 56 (2011) (maintaining the position that Kosovo sought independence from Serbia without compromise).

185. *See* G.A. Res. 2625 (XXV), UN GAOR, 25th Sess., UN Doc. A/8082, at 123–24 (Oct. 24, 1970) (establishing that the other provisions cannot impair the principle of self-determination as described in the statute); *see also* Doehring, *supra* note 180, at 57–58 (stating that the friendly Relations Declarations reveals the practice by the UN to discourage actions that impair the territorial integrity of a state).

186. *See* Accordance With International Law of Unilateral Declaration of Independence in Respect to Kosovo, Advisory Opinion, ¶ 80 (July 22, 2010), http://www.icj-cij.org/docket/files/141/15987.pdf (citing Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 100, ¶ 191 (June 27) (Merits Judgment)) (recognizing the Friendly Relations Declaration as reflecting international customary law).

This prescription may arise when the state denies access of a certain group to its political institutions.[187] The Canadian Supreme Court recognized that a "definable group" deprived of meaningful political, social, and cultural participation in government may have a right to "external" self-determination in exceptional cases, which are beyond the colonial context.[188]

Even if it is an option, the right to secession may be unwarranted if the state stops the discrimination and institutes legal remedies.[189] In absence of concrete evidence showing human rights violations, and denial of participation in government rising to the point of calling into question the state's territorial integrity, alternate modes of self-determination compatible with territorial integrity should be exercised.[190] They may include enhanced local self-government in a demographic area, or union with confirmation of territorial unity.[191]

However, if the state continues to brutally oppress minorities by violating their fundamental human rights, such as right to life, prohibition against torture, and others, then a right to secede could be recognized.[192] The international community supported armed secessionist movements outside of the colonial context[193] amid massive human rights violations in the

187. *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 112 (1995) (explaining that the language of the text may be interpreted as giving the group that right to self-determination where the government denies access to political decision making and political institutions); *see also* Tina Kempin Reuter, *Dealing With Claims of Ethnic Minorities in International Law*, 24 CONN. J. INT'L L. 201, 220–21 (2009) (discussing how the definition of self-determination has expanded to the right to determine his or her political status if such fundamental right is violated).

188. *See* Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 76 (Can. Que) (establishing that external self-determination can be used after the internal self-determination remedies are exhausted); *see, e.g.*, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Separate Opinion of Advisory Opinion, ¶¶ 15–17 (July 22, 2010), http://www.icj-cij.org/docket/files/141/15987.pdf (recognizing that the criteria set out in *Reference re Secession of Quebec* for external self-determination applied to the circumstances of Kosovo).

189. *See* Doehring, *supra* note 180, at 58 (noting that the right to secession is excessive when the state is willing to stop the discrimination or if legal remedies are available); *see also* Lorie M. Graham, *Self-Determination for Indigenous Peoples After Kosovo: Translating Self-Determination "Into Practice" and "Into Peace,"* 6 ILSA J. INT'L & COMP. L. 455, 462–64 (stating that the right to secession is limited as a remedy when a state fails to meet its obligations).

190. *See* Katangese Peoples' Cong. v. Zaire, Comm. No. 75/92, at para. 6 (Afr. Comm'n on Human and Peoples' Rights 1995), http://www.worldcourts.com/achpr/eng/decisions/Undated_Katangese_Peoples_Congress_v._Zaire.htm (determining the circumstances when internal self-determination may be exercised).

191. *See* Marc Weller, *Settling Self-Determination Conflicts: Recent Developments*, 20 EUR. J. INT'L L. 111, 115 (2009) (reviewing settlements to identify an emerging pattern for settling self-determination disputes); *see also* AUTONOMY, SELF-GOVERNANCE AND CONFLICT RESOLUTION 19 (Marc Weller & Stefan Wolff eds., 2005) (emphasizing that enhanced local self-government is a method satisfying the demand for self-determination in China).

192. *See* Karl Doehring, *Self-Determination, in* THE CHARTER OF THE UNITED NATIONS, A COMMENTARY 58 (Bruno Simma ed., 1995) (identifying examples of discrimination that give rise to the right of secession); *see also International Law—Unilateral Secession—International Court of Justice Concludes That Kosovo's Unilateral Declaration of Independence Did Not Violate International Law in Accordance With International Law of Unilateral Declaration of Independence in Respect to Kosovo* (July 22, 2010), http://www.icj-cij.org/docket/files/141/15987.pdf, 124 HARV. L. REV. 1098, 1104–05 (2011) (arguing that the International Court of Justice should have recognized Kosovo's right to secede on the ground that the Serbian government denied its fundamental rights).

193. *See* DAJENA KUMBARO, NORTH ATLANTIC TREATY ORGANIZATION [NATO], THE KOSOVO CRISIS IN AN INTERNATIONAL LAW PERSPECTIVE: SELF-DETERMINATION, TERRITORIAL INTEGRITY AND THE NATO INTERVENTION, 35–39 (2001), http://www.nato.int/acad/fellow/99-01/kumbaro.pdf (discussing how the first time there was widespread international acceptance of secessionist movements during the events in Yugoslavia).

FRY. The African Commission held that the people of Katanga could not secede because they were not oppressed and were not denied political participation.[194] The Canadian Supreme Court found that Quebecers were not oppressed and had access to their government.[195]

Secession addresses the concept of redrawing a state's borders to more accurately reflect a state's legitimacy.[196] International law places strong emphasis on territorial integrity and sovereignty of states but does not prohibit secession. Eventually, there will come a point when the state's continuing exercise of authority over territory, in which the state previously brutalized identifiable groups, will only result in more violence because the vast majority of such groups will resist it. Hence, the key feature legitimizing state control over the territory is rendered ineffective by the resisting population.[197] The Helsinki Act reiterates this position. It states in chapter 8:

> The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.[198]

The act restated the norm established by the Friendly Relations Declaration that states have a duty to respect self-determination of peoples, externally and internally. The international community and the oppressed groups will question the territorial integrity and sovereignty of states violating the right to self-determination.

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194. *See* Katangese Peoples' Congress v. Zaire, Communication 75/92, AHRLR, 72, ¶ 6 (2000) (Afr. Comm'n Hum. & Peoples' Rights 1995) (Zaire), http://www.chr.up.ac.za/images/files/publications/ahrlr/ahrlr_2000.pdf (reporting that the request for independence for Katanga has no merit due to the absence of a human rights violation or evidence that the people of Katanga have been denied the right to participate in government).

195. *See* Reference re Secession of Quebec, *supra* note 188, at154 (holding that the Quebec population is not oppressed or denied meaningful access to government and therefore cannot effect secession from Canada unilaterally); *see also* Charles Whites, *Reference re Secession of Quebec: Secession by Quebec Is a Nearly Impossible Task*, 19 N.Y.L. SCH. J. INT'L & COMP. L. 323, 343–44 (1999) (discussing the Canadian Supreme Court's analysis that the right to unilateral secession is available only to those under colonial rule or victims of egregious human rights abuses).

196. *See* Scott Boykin, *The Ethics of Secession, in* SECESSION, STATE AND LIBERTY (David Gordon ed., 1998) (alleging that a right of secession challenges a state's legitimacy and authority by challenging the soundness of its institutions); *see also* Kristina Roepstorff, *Self-Determination of Indigenous Peoples Within the Human Rights Context: A Right to Autonomy*?, LAWANDDEVELOPMENT.ORG, at 18 (2004), http://lawanddevelopment.org/docs/selfdetermination.pdf (describing secession as a means of legitimizing a state's boundaries).

197. *See* MARC WELLER, CONTESTED STATEHOOD: KOSOVO'S STRUGGLE FOR INDEPENDENCE 3–4 (2009) (noting that state sovereignty is being undermined by resistant ethnic populations unwilling to accept state boundaries that they consider unjust); *see also* Mary Beth Sheridan & Rebecca Hamilton, *South Sudan Secedes Amid Tensions*, WASH. POST, July 7, 2011, http://www.washingtonpost.com/world/africa/south-sudan-secedes-amid-tensions/2011/07/07/gIQAQ8RT2H_story_1.html (indicting that Southern Sudan was motivated to wage a bloody civil war for secession based on the north's religious discrimination).

198. *See* The Final Act of the Conference on Security and Cooperation in Europe ¶44, 14 I.L.M. 1292, Aug. 1, 1975 (declaring that the participating states will respect the people's right to self-determination and will act in conformity with principles of the Charter of the United Nations).

Antonio Cassese pointed out the Friendly Relations Declaration implicitly authorized secession over territorial integrity under very narrow circumstances. He identified them as when a state (1) persistently refuses to grant participatory rights to a religious or racial group, (2) grossly and systematically tramples upon their fundamental rights, (3) denies the possibility of reaching a peaceful settlement within the framework of the state structure, and (4) commits gross fundamental human rights breaches.[199]

The circumstances address the four concepts transforming a minority into "a people" with a remedial right to secession. Martti Ahtisaari has recognized the same result when he recommended Kosovo's supervised independence,[200] after he considered the history of Belgrade's oppression, and the impossibility to peacefully agree on "internal" self-determination between the two parties.[201]

III. Self-Determination Movements and Political Settlements

A. Legitimacy of Armed Force by Self-Determination Movements

The debate of the international community on liberation movements using force to advance self-determination has created an "awkward legal situation."[202] The arguments echo the arguments in favor of the use of force in prodemocratic invasions.[203] The UNGA attempted to address this matter in several resolutions.[204]

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199. *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 119–20 (1995) (suggesting certain conditions that would warrant secession); *see also* Pius L. Okoronkwo, *Self-Determination and the Legality of Biafra's Secession Under International Law*, 25 LOY. L.A. INT'L & COMP. L. REV. 63, 107–08 (2002) (asserting that the Declaration on Friendly Relations encourages the right of self-determination under limited circumstances in which the state undermines the principle of equal rights by limiting access to government, employing physical attacks, violating of human rights, or oppressing its people).

200. *See* UNSC, *Report of the Special Envoy of the Secretary-General on Kosovo's Future Status*, ¶ 6–7, UN Doc. S/2007/168 (March 26, 2007) (*prepared by* Martti Ahtisaari) (recommending the supervised independence of Kosovo from Serbia because of their strained relationship stemming from the Milosevic Regime's systematic discrimination and brutal repression of Kosovo's Albanian majority).

201. *See* UNSC, *Report of the Special Envoy of the Secretary-General on Kosovo's Future Status,* ¶ 5, UN Doc. S/2007/168 (March 26, 2007) (*prepared by* Martti Ahtisaari) (finding that upon consideration of Kosovo's difficult past, the present realities of Kosovo and the negotiations between Kosovo and Serbia, independence from Serbia is the only viable option to ensure the viability of a stable Kosovo).

202. *See* CASSESE, *supra* note 199, at 151 (highlighting the ongoing debate regarding the legality of a national liberation movement's use of force as they do not possess a right to use force but cannot be held responsible if the force was in response to a denial of the right to self-determination); *see also* JUDITH GAIL GARDAM, NON-COMBATANT IMMUNITY AS A NORM OF INTERNATIONAL HUMANITARIAN LAW 72–75 (1993) (comparing the varied analysis taken by states as to the legality and the possible sources of legality of the use of force taken by national liberation movement's exercising their right to self-determination).

203. *See* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 59 (3d ed. 2008).

204. *See* Malcolm N. Shaw, *Self-Determination and the Use of Force*, *in* MINORITIES, PEOPLES, AND SELF-DETERMINATION, ESSAYS IN HONOUR OF PATRICK THORNBERRY 44 (Nazila Ghanea & Alexandra Xanthanaki eds., 2005) (noting that the General Assembly reaffirmed the legitimacy of the struggle of peoples for liberation through resolutions); *see also Self-Determination*, UNREPRESENTED NATIONS AND PEOPLES ORGANIZATION (July 19, 2006), http://www.unpo.org/article/4957 (emphasizing that self-determination is an integral part of human rights law, which has a universal application).

In 1970, the Friendly Relations Declaration recognized that states that conducted themselves in accordance with the principle of self-determination by not forcibly depriving peoples of it, by providing assistance to such peoples struggling for it, and by having a representative and nondiscriminatory government, would have their territorial integrity intact.[205] While the first two requirements dealt with "external" self-determination, the third one focused on its internal aspect.

The Declaration required peoples struggling for self-determination to receive support in accordance to the UN Charter.[206] Consequently, the peoples' struggle had to be conducted through legitimate means. For the armed struggle to be legitimate, it had to be the last resort in protecting human rights.[207] Yet most states oppose the idea of legitimizing armed self-determination movements by making them subjects of international law.[208]

In 1974, the Definition of Aggression stated that people forcibly deprived of "the right to self-determination, freedom and independence . . . particularly peoples under colonial and racist regimes or other forms of alien domination" were not in any way prejudiced by the definition.[209] It also reiterated that states could provide support to self-determination movements in accordance with the Charter.[210]

The 2010 Kampala amendments to the definition of aggression focused only on public officials acting on behalf of a state.[211] Hence, self-determination movements remain unaffected by the amendments.

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205. *See* Friendly Relations Declaration, G.A. Res. 2625 (XXV), UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/5217, at 3 (Oct. 24, 1970) (stressing that the purposes of the UN can be implemented only if States enjoy sovereign equality); *see also* Lung-Chu Chen, *Self-Determination and World Public Order*, 66 NOTRE DAME L. REV. 1287, 1291 (1991) (arguing that authority that comes from the people and rests upon the people can be best expressed in free and genuine elections).

206. *See* G.A. Res. 2625 (XXV), *supra* note 205, at 3 (declaring that those involved in forcible action in pursuit of the exercise of their right to self-determination are entitled to seek and receive support); *see also* Eric Kolodner, *Essay: The Future of the Right to Self-Determination*, 10 CONN. J. INT'L L. 153, 157–58 (1994) (emphasizing that movements for self-determination can only guarantee the protection of the rights of peoples with international support).

207. *See* Christof Heyns, *A "Struggle Approach" to Human Rights, in* LAW AND PLURALISM 171 (Arend Soeteman ed., 2001) (positing that human rights are triggers of resistance against the illegitimate use of power).

208. Andrew Clapman, The UN Audiovisual Library of International Law, *Rethinking the Role of Non-State Actors Under International Law*, http://untreaty.un.org/-cod/avl/faculty/Clapham.html (noting that threats to human dignity may come from States or non-state actors); *see also* Mary Ellen O'Connell, *Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy*, 36 COLUM. J. TRANSNAT'L L. 473, 475 (1997) (demonstrating that the UN Charter prohibits the use of force except in self-defense of an armed attack).

209. *See* Definition of Aggression, G.A. Res. 3314 (XXIX), UN GAOR, 29th Sess., Supp. No. 31, UN Doc. A/9619, at ¶ 7 (Dec. 14, 1974) (articulating that peoples in struggle may seek and receive support to end colonial and racist regimes).

210. *See* G.A. Res. 3314 (XXIX), *supra* note 209 (specifying that self-determination movements must also be in conformity with the Declaration).

211. *See* Amendments to the Rome Statute of the International Criminal Court art. 8, R.C. Res. 6, ICC RC/11 (June 11, 2010) (stating that the Court shall exercise jurisdiction over the crime of aggression).

In 1981, the Non-Intervention Declaration recognized that the principle of non-intervention included the right and duty of states to

> support the right of self-determination, freedom and independence of peoples under colonial domination, foreign occupation or racist regimes, as well as the right of these peoples to wage both political and armed struggle to that end, in accordance with the purposes and principles of the Charter.[212]

The 2000 UN Millennium Goals Declaration recognized people's right to self-determination only in the colonial or foreign oppression situations. It also called on all states to respect "equal rights of all without distinction,"[213] which seems to express the nondiscriminatory aspect of "internal" self-determination from the Friendly Relations Declaration.

The Friendly Relations Declaration did not clearly condone the use of force by self-determination movements.[214] The Definition of Aggression established that peoples' self-determination movements were outside the definition.[215] The Kampala amendments and the Millennium Declaration reiterated the existing law, but avoided the issue. While the resolutions are not binding, they indicate the legal position of the UN members or their divisions.[216] Most Western countries voted against the Non-Intervention Declaration.[217]

In absence of definitive international conventions, clear international customs, and judicial opinions on point, we turn to international law experts. Antonio Cassese summarized the international opinion on the use of force by liberation movements as a "legal entitlement," but not a right.[218] He considered the contention that the peoples deprived of "internal" self-determination might have a license to raise arms.[219] He distinguished between the covenants and customary law. "The Covenants do not provide for the employment of force" or any effective

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212. *See* G.A. Res. 3314, art. 7, UN Doc. A/9619 (Dec. 14, 1974) (noting that the Definition of Aggression did not negatively affect individuals forcibly deprived of the right to self-determination).

213. *See id.* (stating that the Definition of Aggression allowed states to support self-determination movements as long as such movements adhered to the principles of the UN Charter).

214. *See* G.A. R.C. Res. 6, ¶ 5, UN Doc RC/Res.6 (June 11, 2010) (calling for the ratification of the Definition of Aggression amendments by State Parties).

215. *See* G.A. Res. 36/103, art. III, ¶ b, UN Doc A36/103 (Dec. 9, 1981) (describing the rights of the states as enumerated under the Definition of Aggression).

216. *See* G.A. Res. 55/2, art. I, ¶ 4 UN Doc A/55/L.2 (Sep. 18, 2000) (declaring that all people must accept and support those states that have the right of self-determination).

217. *See* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 5 (2000) (holding that the Friendly Declarations Doctrine did not support or allow the use of force to achieve self-determination).

218. *See* Karl Doehring, *Self-Determination, in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 66 (Bruno Simma ed., 1995) (stressing that self-determination movements were excluded from the Definition of Aggression); *see also* YORAM DINSTEIN, WAR AGGRESSION AND SELF-DEFENCE 119 (3d ed. 2001) (maintaining that self-determination movements were immune from the Definition of Aggression).

219. *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 154 (1995) (hypothesizing that those deprived of the right to self-determination should have the right to stage armed resistance); *see also* Doehring, *supra* note 218, at 67 (demonstrating that the non-binding resolutions provided an indication of the legal position of UN members).

means of realizing the right to self-determination.[220] Customary law allows racial groups denied 'internal' self-determination to use force where peaceful means failed.[221]

Karl Doehring concluded that in the struggle for "internal" self-determination, "armed self-help" could be used only when the oppressive government committed severe human rights violations, even though most states object to forceful succession.[222] He did not limit "armed self-help" to racial groups and colonialism because the right to self-determination was universally recognized in the Covenants.[223] Malcolm Shaw supports the view that force may be used where "forcible action has been taken" to suppress the right to self-determination, which is illegal *ab initio*.[224]

Christine Gray concurred with Doehring's observations. While pointing out that there was little state support for it, she recognized that in the context of minorities, their self-determination claims were strengthened when met by forceful state repression.[225] The reverse may also be true. Self-determination movements are weakened when they commit human rights violations to further their claims.

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220. *See* GRAY, *supra* note 217, at 5-6 (recognizing that the majority of Western countries did not support the Non-Intervention Declaration).

221. *See* CASSESE, *supra* note 219, at 160 (contrasting the conduct permitted by treaties and customary law with regard to internal self-determination); *see also* Linda A. Malone, *Introduction: Seeking Reconciliation of Self-Determination, Territorial Integrity, and Humanitarian Intervention*, 41 WM. & MARY L. REV. 1677, 1680 (2000) (explaining why force is permissible where peaceful means fail).

222. *See* Doehring, *supra* note 218, at 70 (emphasizing that the other conditions warranting armed self-help are largely undefined); *see also* Christopher J. Fromhertz, *Indigenous Peoples' Courts: Egalitarian Juridical Pluralism and the United Nations Declaration on the Rights of Indigenous Peoples*, 156 U. PA. L. REV. 1341, 1362 (2008) (interpreting customary law to confer a right to forcefully assert internal self-determination in opposition to gross discrimination).

223. *See* Doehring, *supra* note 218, at 70 (arguing that armed conflicts in pursuit of self-determination have an international character); *see also* Edward A. Laing, *The Norm of Self-Determination,* 1941–91, 22 CAL. W. INT'L L.J. 209, 214 (1992) (identifying two international covenants on human rights that recognize a right to self-determination in all peoples).

224. *See* Malcolm N. Shaw, *Self-Determination and the Use of Force*, *in* MINORITIES, PEOPLES, AND SELF-DETERMINATION, ESSAYS IN HONOUR OF PATRICK THORNBERRY 45 (Nazila Ghanea & Alexandra Xanthanaki eds., 2005) (positing that this right comes from the concept of self-determination itself and not from the UN Charter); *see also* Daniel Philpott, *In Defence of Self-Determination*, 105 ETHICS 352, 382 (1995) (suggesting that forceful secession is an acceptable means of self-determination when a people would otherwise face great cruelty).

225. *See* GRAY, *supra* note 217, at 64 (theorizing that even in the face of state opposition, self-determination movements gained strength).

The above analysis reveals that the international community continues to struggle with the legitimacy of self-determination movements using force. Ultimately, the preemptory norms of human rights and international humanitarian law found in the international customary law bind states and non-state actors.[226] For their struggle to be legitimate, Autochtonomians must respect human rights.

B. Political Settlements

By virtue of the right to self-determination, all people freely determine their political status.[227] All people shall express their political will through universal, periodic, and genuine elections.[228] During such times, the people should be presented with a "number of realistic and viable alternatives" to ensure the expression of their will is genuine and free.[229] The Canadian Supreme Court explained that a clear majority must unequivocally express its will to have legitimacy.[230]

People can express their will by voting for the establishment of a new state, the free association or integration with another state, or the emergence into any other political status.[231] The

226. *See* Human Rights Council, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc A/HRC/12/48 396 (Sept. 25, 2009) (emphasizing that customary law applies to all responses to human rights violations); *See also* Karen Parker, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 443 (1989) (citing M. MCDOUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 185 (1980)) (arguing that human rights instruments have risen to the level of *jus cogens*).

227. *See* G.A. Res. 1514 (XV), ¶ 2, UN Doc A/RES/1514 (Dec. 14, 1960) (declaring statuses that all peoples may freely determine by virtue of the right to self-determination); *see also* W. Ofuatey-Kodjoe, *Self-Determination*, *in* UNITED NATIONS LEGAL ORDER 349, 377 (Oscar Schachter & Christopher C. Joyner eds., 1995) (listing four conditions by which a group might attain the self-government needed for self-determination).

228. *See* G.A. Res. 217 (III), art. 21 ¶ 3, UN Doc. A/RES/217 (Dec. 10, 1948) (defining the political elections to which all people are entitled).

229. *See* CASSESE, *supra* note 219, at 213; *see also* YVES BEIGBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS 97 (1994) (claiming a main objective of the UN was to regulate the elections of newly independent nations in order to ensure that the right to self determination was being exercised freely).

230. *See* Reference re Secession of Quebec (1998), 2 S.C.R. 217, 5 (Can. Que) (opining that a clear majority would express the unambiguity of Quebec's desire to secede, and if that majority were reached, the people of Canada would have no legitimate objections to Quebec's secession).

231. *See* G.A. Res. 2625 (XXV), UN GAOR, 25th Sess., UN Doc. A/8082, at 123 (Oct. 24, 1970) (explaining that every state has an inalienable right to choose its political, social, and economic systems without interference from any other state); *see also* Pius L. Okoronkwo, *Self-Determination and the Legality of Biafra's Secession Under International Law*, 25 LOY. L.A. INT'L & COMP. L. REV. 63, 73–75 (2002) (arguing that self-determination of a people not only is permissible but a necessity when those people are not content with the governmental system because government is based on the will of the people and not that of a monarch).

three examples constitute modes of implementing the right of self-determination "externally,"[232] mostly by colonial people.[233] In foreign military occupation situations, the withdrawal of the foreign power realizes the right of self-determination.[234] There are multiple other scenarios.

Borders of Rwanda, Burundi, British Cameroon, Ethiopia and Eritrea, and Palestine changed with the UN's assistance without consulting the peoples concerned.[235] But such actions did not invalidate the right to consult the local population of their wishes. In the above examples, holding a plebiscite was unnecessary, or there was no "people" to declare their will.[236]

While the law on implementing external and internal aspects of self-determination is imprecise,[237] the Friendly Relations Declaration should guide such attempts. Peaceful settlement of disputes, fulfilling in good faith the Charter obligations and cooperation with the UN in accordance with the Charter, shed light on implementing the right to self-determination.[238]

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232. *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 331 (1995); *see also* Willem van Genugten, *Protection of Indigenous Peoples of the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems*, 104 AM. J. INT'L L. 29, 40–41 (2010) (stating that the right to external self-determination should be exercised when the authorities of a sovereign state systematically deny a people's fundamental participatory rights).

233. *See* CASSESE, *supra* note 232, at 147 (emphasizing that the international community "completely disregarded" the internal aspect of self-determination for colonial people); *see also* Jean C. Wen, *One China, Freely and Fairly Elected: A New Solution to the Issue of Taiwan*, 21 COLUM. J. ASIAN L. 87, 99–100 (2007) (stating that the international community has ignored Taiwan's requests for recognition of its independence gained through internal self-determination).

234. *See* CASSESE, *supra* note 232, at 147 (demonstrating that foreign withdrawal harkens self-determination); *see also* Eyal Benvenisti, *Future Implication of the Iraq Conflict: Water Conflicts During the Occupation of Iraq*, 97 AM. J. INT'L L. 860, 861–62 (2003) (explaining that according to Palestinians, Israeli occupation of the Gaza Strip is equal to foreign military occupation, therefore, Palestinians have a legitimate right to exercise self-determination).

235. *See* Susanna Mancini, *Rethinking the Boundaries of Democratic Secession: Liberalism, Nationalism, and the Right of Minorities to Self-Determination*, 6 INT'L J. CONST. L. 553, 556 (2008) (listing instances where decolonization of the African continent was based on arbitrary geographical and political lines, with no regard for the ethnic or national interests of the people); *see also* DAVID BIRMINGHAM, THE DECOLONIZATION OF AFRICA 6 (2009) (explaining that the rapid decolonization of Africa decimated the African countries' monetary, trade, communication, and credit systems).

236. *See* Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 33 (Oct. 16) (stating that the UN did not feel they had to consult the people of a certain territory because they did not believe the population constituted a group that was entitled to self-determination); *see also* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 54–55 (1992) (noting that self-determination has changed the face of the world, mostly because of the UN's efforts at plebiscites and elections in territories trying to advance independence).

237. *See* Rep. of the Comm. on the Elimination of Racial Discrimination, 51st Sess., 125 UN Doc. A/51/18 (Sept. 30, 1996) (distinguishing between internal aspects and external aspects of self-determination); *see also* CASSESE, *supra* note 232, at 330–31 (characterizing the law of self-determination as imprecise).

238. *See* Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/RES/ 2625(XXV), at 122 (Oct. 24, 1970) (codifying a list of principles, which includes the three additional guidelines for the implementation of self-determination); *see also* CASSESE, *supra* note 232, at 336 (stating the three additional guidelines for the proper implementation of the right to self-determination).

Peaceful settlement of international disputes suggests negotiation, judicial settlement, resort to regional bodies, or other arrangements, so long as they are nonviolent. Due to the increased involvement of the UNSC in previously considered internal affairs of states, where states violate their international obligations, the argument that the struggle of a part of the state's population for self-determination is internal is no longer valid.[239] Good faith implies that states will not alter the constituency taking part in a referendum.[240] State promotion of the right to self-determination through cooperation in accordance with the Charter means "universal respect for and observance of human rights and fundamental freedoms' found in the Charter."[241]

The end of the Cold War brought many states and groups to a negotiating table.

The Cold War superpowers stopped funding the conflicts, and the post–Cold War era rekindled old self-determination claims. All this created more incentives for states to negotiate rather than fight. Approximately 32 self-determination settlements have been achieved since about 1988.[242] In many cases, secession has proven impractical.[243]

International law establishes that the people's right to self-determination is usually realized within the framework of an existing state, through people's pursuit of their political, social, economic, and cultural development.[244] Autonomy became the classical solution for political settlements on self-determination claims outside of the colonial context.[245] Autonomy

239. *See* S.C. Res. 1207, ¶¶ 1–4, UN Doc. S/RES/1207 (Nov. 17, 1998) (condemning Yugoslavia for its failure to honor international obligations and follow the directions of the Tribunal for the former Yugoslavia).

240. *See* CASSESE, *supra* note 232, at 337 (asserting that states must refrain from moving populations before the holding of the plebiscite or referendum).

241. *See* UN Charter art. 55, ¶ 1(c) (promoting the United Nations' principles of respect for and observance of human rights and fundamental freedoms); *see also* Office of the UN High Commissioner for Human Rights (OHCHR), Committee on the Elimination of Racial Discrimination, General Recommendation No. 21, 135 UN Doc. A/51/18 (Aug. 23, 1996) (establishing the requirements a state must meet to promote the right to self-determination).

242. *See* Marc Weller, *Settling Self-Determination Conflicts: Recent Developments*, 20 EUR. J. INT'L L. 111, 114 (2009), http://www.ejil.org/pdfs/20/1/1788.pdf (estimating the number of self-determination settlements since the end of the Cold War).

243. *See* Eric Brahm, *Self-Determination Procedures*, BEYOND INTRACTABILITY, http://www.beyondintractability.org/essay/self_determination (asserting that in most self-determination cases, secession is extreme and impractical).

244. *See* Reference re Secession of Quebec [1998], 2 S.C.R. 217, 126 (Can. Que.) (defining internal self-determination as people's pursuit of political, economic, social, and cultural development within an existing state); *see also* Johan D. van der Vyer, *The Right to Self-Determination and Its Enforcement*, 10 ILSA J. INT'L & COMP. L. 421, 429 (2004) (describing an individual's pursuit of internal self-determination).

245. *See The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs*, League of Nations Doc. B7/21/68/106 (1921) (explaining that the Aaland Islands did not have a right to secede from Finland in part because Finland guaranteed Aaland Islanders autonomous rights); *see also* Weller, *supra* note 242, at 115 (asserting the dominant role of territorial autonomy to resolve non-colonial self-determination controversies).

proved what the Canadian Supreme Court recognized: a state's territorial integrity and peoples' self-determination were not incompatible.[246] As Patrick Thornberry pointed out, autonomy lacks emotional force, and it could be a positive tool in reconciliation and conflict alleviation.[247]

Autonomy addresses some of the limitations posed by self-determination. As delegates of the 1919 Peace Conference discovered, the absolute application of "external" self-determination may be impossible due to mixed populations and the need for each state's stability.[248]

Autonomy allows states to preserve their territorial integrity while minorities attain self-rule.[249] Generally, states retain authority over defense and foreign affairs, and they ensure that autonomy complies with their constitutions.[250] Territorial autonomy allows for self-governance of a distinct unit within a state without the threat of secession.[251] Also, when properly designed, autonomy allows minorities to be fairly represented and exercise a wide range of participatory rights.[252]

The need for political settlements on self-determination claims may never arise when minorities achieve control over their existence through the democratic processes.[253] Failure to address minority self-determination issues may result in conflicts. Prior to the outbreak of the

246. *See* Reference re Secession of Quebec, *supra* note 244, at ¶ 73 (maintaining that territorial integrity and self-determination are compatible); *see also* Robert Trisotto, *Seceding in the Twenty-First Century: A Paradigm for the Ages*, 35 BROOK. J. INT'L L. 419, 430–31 (2010) (discussing difficulties arising from balancing territorial integrity and self-determination).

247. *See* PATRICK THORNBERRY, *Images of Autonomy and Individual and Collective Rights in International Instruments on the Rights of Minorities*, *in* AUTONOMY: APPLICATIONS AND IMPLICATIONS 97, 123–24 (1998) (differentiating between the strong connection people feel toward self-determination and the lack of emotional force people have toward autonomy).

248. *See* Ruth E. Gordon, *Some Legal Problems With Trusteeship*, 28 CORNELL INT'L L.J. 301, 317 n.92 (1995) (noting that some scholars believe national determinism, rather than self-determinism, was achieved in minority populations after World War I).

249. *See* Weller, *supra* note 242, at 118 (noting self-governance arrangements that balanced autonomy with a legally entrenched commitment to territorial unity). *But see* HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 46–47 (1996) (distinguishing African states where territorial integrity and national unity are more fundamental than self-determination).

250. *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 355 (1995) (proposing reasons that autonomy does not undermine state sovereignty); *see also* HANNUM, *supra* note 249, at 467 (recognizing that international law places few restrictions on a state's authority).

251. *See* Weller, *supra* note 242, at 116 (noting that self-governance may cause groups inclined to secession to maintain the status quo); *see also* Jane Wright, *Minority Groups, Autonomy, and Self-Determination*, 19 OXFORD. J. L. STUD. 605, 606 (1999) (addressing the theory that secessionist entities within a state will not disrupt the state's territorial integrity when they are allowed to self-govern).

252. *See* UN Human Rights Council, *Report of the Independent Expert on Minority Issues*, UN Doc. A/HRC/13/23 (Jan. 7, 2010) (describing the benefits limited territorial autonomy affords minorities).

253. *See* Geoff Gilbert, *Autonomy and Minority Groups: A Right in International Law?*, 35 CORNELL INT'L L.J. 307, 337 (2002) (commenting on the argument that where there is a prevalence of democracy, there is a lesser need for self-determination); *see also* Wright, *supra* note 251, at 615–16 (asserting that democratic processes provide the requisite means for minorities to attain autonomy).

conflict in Georgia, various forms of "meaningful autonomy" for Abhazia and South Osetia within Georgia have been proposed but never implemented by all the parties.[254]

Autonomy can also be nonterritorial, local, cultural, or a mixture. However, the key difference between self-determination and autonomy is that autonomy does not entail any claim of independence.[255] Since the right to self-determination is a continuing right, a political settlement realizing "internal" self-determination through autonomy may have to be renegotiated when there is a drastic change in state's affairs. As a continuing right, self-determination continues after independence.[256] It also continues after autonomy.

Minority groups have enjoyed various forms of autonomy since at least the Ottoman Empire.[257] While the Minority Declaration does not list autonomy, it lists state obligations, which may be best implemented by a form of autonomy.[258] Minority rights under ICCPR Article 27 are difficult to realize without granting some type of autonomy to minorities.[259] Thus, vulnerable groups that enjoy minority rights become protected when states recognize their "internal" self-determination. This recognition in turn strengthens territorial integrity of states because their minorities seek to realize their rights internally.

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254. *See* Independent International Fact-Finding Mission on the Conflict in Georgia Report 28 (2009), http://www.ceiig.ch/pdf/IIFFMCG_Volume_I.pdf (explaining that negotiated changes in the political statuses of Abhazia and South Osetia never came to fruition).

255. *See* LAURI HANNIKAINEN, AUTONOMY: APPLICATIONS AND IMPLICATIONS 79 (1998) (stating that the right to self-determination is broader than autonomy because it provides full independence compared to limited self-government); *see also* Director of the European Centre for Minority Issues, *Towards a General Comment on Self-Determination and Autonomy*, at 21, UN Doc. 21, E/CN.4/Sub.2/AC.5/2005/WP.5 (May 25, 2005) (by Marc Weller), http://www2.ohchr.org/english/issues/minorities/group/11session.htm) (confirming that the related concepts of autonomy and self-determination are different particularly because autonomy does not imply a claim of independence as self-determination does).

256. *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 54 (1995) (observing that the language of Article 1 of the UN Covenant on Economic, Social and Cultural Rights and the UN Covenant on Civil and Political Rights compels the conclusion that self-determination is a continuing right); *see also* Youngjin Jung, *In Pursuit of Reconstructing Iraq: Does Self-Determination Matter?*, 33 DENV. J. INT'L L. & POL'Y 391, 402–3 (2005) (stating that self-determination persists after independence because it is a right of the people, not a right of a state).

257. *See* W. Michael Reisman, *Autonomy, Interdependence, and Responsibility*, 103 YALE L.J. 401, 414 (1993) (explaining that the Ottoman Empire's millet system permitted religious minorities to manage themselves under individual autonomous institutions); *see also* Wright, *supra* note 251, at 606 (providing examples of various forms of autonomy enjoyed by minority groups throughout history, including the millet system of the Ottoman Empire).

258. *See* UN Secretary-General, *Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, at 6, UN Doc. E/CN.4/Sub.2/AC.5/2005/2 (Apr. 4, 2005), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/133/85/PDF/G0513385.pdf?OpenElement (stating that state duties to protect minorities might be executed through measures of autonomy even though the Minority Declaration does not specifically grant autonomy to minority groups).

259. *See* Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities*, 66 NOTRE DAME L. REV. 1539, 1546–47 (1991) (claiming there is support for the argument that the rights under Article 27 cannot survive without an autonomy scheme for minorities); *see also* Wright, *supra* note 251, at 609 (opining that for the rights under Article 27 to become effective, some autonomy rights for minorities may need to be granted).

IV. Application of International Law Concepts to Case Scenarios

A. Kosovo

1. Location

Kosovar Albanians living in Kosovo have maintained their distinct characteristics for centuries.[260] Immediately before the conflict, they constituted about 80% of approximately 2 million Kosovar inhabitants.[261] The Ottoman Empire recognized their distinctiveness, and so did Yugoslavia in 1918.[262] In 1974, Kosovo became a province under the new Yugoslav constitution.[263] Hence, the Kosovar Albanians have been, and are, a distinct population living in a confined territory.

2. "Internal" Self-Determination

The Belgrade government violated the right of Kosovar Albanians to "internal" self-determination by dissolving the Kosovar Assembly, firing Kosovar Albanians from state jobs, closing local schools and media, and introducing family planning for Kosovar Albanians.[264] It also began massive arrests of Kosovar Albanians to the point where it was said that every family had a member who either was in jail or awaiting trial.[265] Marc Weller traces the lack of genuine representation of Kosovar Albanians in Belgrade to 1988.[266] Essentially, Belgrade denied Kosovar Albanians any political participation in the government.

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260. *See* NATO, *Final Report: The Kosovo Crisis in an International Law Perspective: Self-Determination, Territorial Integrity and the NATO Intervention* 39 (June 16, 2001) (prepared by Dajena Kumbaro), http://www.nato.int/acad/fellow/99-01/kumbaro.pdf (recognizing that Kosovar Albanians have maintained their Albanian language, culture, and traditions for centuries).

261. *See* Helge Brunborg, *Report on the Size and Ethnic Composition of the Population of Kosovo* 1 (Aug. 14, 2002), http://www.icty.org/x/file/About/OTP/War_Demographics/en/milosevic_kosovo_020814.pdf (reporting on the population of Kosovo before the conflict); *see also* MARC WELLER, CONTESTED STATEHOOD: KOSOVO'S STRUGGLE FOR INDEPENDENCE 10 (2009) (commenting on the size of the ethnic Albanian population in pre-conflict Kosovo).

262. *See* NATO Office of Information and Press, *Final Report: The Kosovo Crisis in an International Law Perspective: Self-Determination, Territorial Integrity and the NATO Intervention*, at 39–40, http://www.nato.int/acad/fellow/99-01/kumbaro.pdf (by Dajena Kumbaro) (NATO Report) (asserting that Kosovo constituted a political administrative unit within the Ottoman Empire and that Yugoslavia recognized Kosovo as a distinct geographical region with clear borders).

263. *See* NATO Report, *supra* note 262, at 40 (explaining that the 1974 Socialist Federal Republic of Yugoslavia Constitution upgraded Kosovo's status from an autonomous region to a province).

264. *See* NATO Report, *supra* note 262, at 42–43 (discussing the 1989 constitutional amendments that eliminated Kosovo's autonomy as well as the control Serbia exerted over Kosovo).

265. *See* INDEP. INT'L COMM'N ON KOSOVO, KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 42 (2000) (KOSOVO REPORT) (discussing the widespread arrest, torture, and detention without trial of Kosovar Albanians); *see also* Maria J. Stephan, *Strategic Nonviolence: Fighting for Statehood: The Role of Civilian-Based Resistance in the East Timorese, Palestinian, and Kosovo Albanian Self-Determination Movements*, 30 FLETCHER F. WORLD AFF. J. 57, 71 (2006) (discussing Serbia's imposition of martial law and imprisonment of hundreds of Albanian activists and intellectuals).

266. *See* Weller, *supra* note 261, at 12 (noting that in 1988 Kosovar inhabitants were no longer represented fairly in the overall state); *see also* Stephan, *supra* note 265 (explaining that in 1988 the Serbian leader proposed constitutional amendments limiting Kosovo's autonomy, which triggered a mass uprising by Kosovar Albanians).

3. The Will to Exist

The majority of Kosovar Albanians asserted their will to exist on numerous occasions. Most recently, in 1989, Kosovar Albanians peacefully resisted Belgrade's attempts to create "an apartheidlike society in Kosovo."[267] When a decade of nonviolent resistance did not restore their equal treatment and "internal" self-determination, the Kosovar Albanians turned to armed resistance. They established their own underground government and voted overwhelmingly for, declared, and fought for independence.

Their elected unofficial president, Ibrahim Rugova,[268] motivated primarily by Polish Solidarity, advocated a nonviolent response to the abuses.[269] After the 1991 referendum strongly supporting independence, and the 1991 declaration of Kosovo's independence,[270] Rugova's main goal became full independence for Kosovo.[271]

While the Dayton Accord of 1995 did not address the future of Kosovo, the UNSC, UNGA, and HRC recognized the denial of "internal" self-determination and called for Kosovo's autonomy and self-rule.[272] The Kosovar Albanians leaders and Belgrade held numerous talks, without results, in Rambouillet and Paris.[273]

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267. *See* KOSOVO REPORT, *supra* note 265, at 1 (stating that following the revocation of Kosovo's autonomy in 1989, the purpose of Belgrade's policy was to change Kosovo's ethnic composition); *see also* Margaret E. McGuinness, *Multilateralism and War: A Taxonomy of Institutional Functions*, 51 VILL. L. REV. 149, 204–5 (2006) (stating that Kosovar Albanians declared their independence and secretly elected a president after being relegated to a second-tier society and removed from key positions in government, education, and other employment).

268. *See A Kosovo Chronology*, PUBLIC BROADCASTING SERVICE, http://www.pbs.org/wgbh/pages/frontline/shows/kosovo/etc/cron.html (PBS Chronology) (noting that in May 1992, Kosovar Albanians elected Ibrahim Rugova, a literary scholar and pacifist, in unofficial elections).

269. *See* KOSOVO REPORT, *supra* note 265, at 43–44 (explaining that Polish Solidarity greatly influenced the nonviolent Albanian political movement to operate a self-organized parallel system in Kosovo); *see also* Korab R. Sejdiu, *The Revival of a Forgotten Dispute: Deciding Kosova's Future*, 3 RUTGERS J.L. & PUB. POL'Y 106, 108 (2006) (noting that Ibrahim Rugova led Kosovar Albanians in a decade of peaceful resistance).

270. *See* North Atlantic Treaty Organization (NATO), *The Kosovo Crisis in an International Law Perspective: Self-Determination, Territorial Integrity and the NATO Intervention*, at 39 (June 16, 2001) (prepared by Dajena Kumbaro) (claiming that since Kosovo's declaration of independence, references to self-determination have been made in support of Kosovar Albanians becoming independent from Serbia).

271. *See* KOSOVO REPORT, *supra* note 265, at 48 (stating that Rugova and his political party, the Democratic League of Kosovo, LDK, demanded nothing less than independence for Kosovo); *see also* Ted Baggett, *Recent Development, Human Rights Abuses in Yugoslavia: To Bring an End to Political Oppression, the International Community Should Assist in Establishing an Independent Kosovo*, 27 GA. J. INT'L & COMP. L. 457, 464 (1999) (noting that in 1996 Rugova stated that independence was the only acceptable solution to the Kosovo problem).

272. *See* North Atlantic Treaty Organization [NATO], *supra* note 270, at 40 (asserting that the international community's pronouncements regarding Kosovo are a basis for why Kosovo should be entitled to the right of self-determination).

273. *See* KOSOVO REPORT, *supra* note 265, at 87 (opining that the time gained during the Rambouillet negotiations aided the Yugoslav army in its defense efforts against NATO); *see also* David Wippman, *Kosovo and the Limit of International Law*, 25 FORDHAM INT'L L.J. 129, 133 (explaining that weeks of negotiations between Albanian and FRY representatives in Rambouillet failed when Serb negotiators reneged previously accepted positions).

At this juncture, the restoration of autonomy and greater "internal" self-determination securing the territorial integrity of the FRY, and meaningfully accommodating the aspirations of Kosovar Albanians, did not seem implausible. At various points, Belgrade stopped its offensive or withdrew its forces from Kosovo. Despite the declaration of independence, Pristina engaged in talks, and it appeared that Belgrade could stop the pattern of abuse. Thus, there could be no justifiable remedial secession. However, this changed after the negotiations failed, persistent human rights abuses increased, and the KLA resorted to armed resistance.[274]

4. Brutal Oppression

The KLA began attacks on the Kosovar Serbs, hoping that Belgrade's response would escalate the conflict and provoke an international intervention.[275] Belgrade responded with more extrajudicial killings and torture.[276] The Serb forces aimed to break the KLA by targeting its base—the Kosovar Albanians. While the KLA committed numerous atrocities against the Kosovar Serbs and Albanians,[277] the atrocities did not approach the magnitude of the human rights violations perpetrated by Belgrade.[278] The UNSC became increasingly concerned about Belgrade's repression in Kosovo and the refusal to allow the ICTY prosecutor to investigate it.[279]

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274. *See* KOSOVO REPORT, *supra* note 265, at 50–51 (describing the emergence of the KLA and its first violent act of killing a Serb policeman in 1995); *see also* TIM JUDAH, KOSOVO: WHAT EVERYONE NEEDS TO KNOW 79 (2008) (discussing violent actions, resulting in death, taken by the KLA against people they regarded as Albanian collaborators).

275. *See* KOSOVO REPORT, *supra* note 265, at 52 (positing that the strategy of the KLA was aimed toward provoking the international community and inciting international intervention); *see also* Alan J. Kuperman, *The Moral Hazard of Humanitarian Intervention: Lessons From the Balkans*, 52 INT'L STUD. Q. 49, 69 (2008) (hypothesizing that KLA members used force in their rebellion with the belief it would attract international humanitarian intervention).

276. *See* KOSOVO REOPORT, *supra* note 265, at 53 (2000) (noting that the Humanitarian Law Center's investigations into the death of three ethnic Albanians found Serbian police officers responsible for physical abuse and extrajudicial killing); *see also* Kuperman, *supra* note 275, at 65 (explaining that Serb forces responded with a counterinsurgency to the KLA's use of violence against Serb policemen).

277. *See* EUR. CONSULT. ASS., *Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo*, 1st Sess., DOC. NO. 12462 (2011) (finding the KLA responsible for human organ trafficking and inhuman treatment).

278. *See* INDEP. INT'L COMM'N ON KOSOVO, KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 72 (2000) (KOSOVO REPORT); *see also* Laurel Fletcher, Karen Musalo, Diane Orentlicher, & Kathleen Pratt, *No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia*, 5 HASTINGS WOMEN'S L.J. 89, 94 (1994) (describing detention camps operated by Serb forces in which Muslims were tortured, mutilated, starved, and killed).

279. *See* S.C. Res. 1199, ¶¶ 2–4, UN Doc. S/RES/1199, (Sept. 23, 1998). The resolution also condemned terrorist activities by nonstate actors.

By 1998, there were hundreds of people murdered and 200,000 internally displaced and seeking refuge in Albania.[280] After the 1999 diplomatic efforts failed,[281] and the armed conflict resumed,[282] NATO prepared for air strikes against Serb targets.[283] In response, the Serb forces "launched a vicious campaign against the Kosovar Albanian population," which included terror, rape, and ethnic cleansing.[284] Almost 1.5 million, or approximately 90%, of the Kosovar Albanians became internally displaced.[285] At this point, the oppression became so pervasive that Belgrade's authority over Kosovo had to be replaced with another entity to secure the survival of Kosovar Albanians and restore stability.

5. Political Settlement

After 78 days of bombing, new diplomatic efforts succeeded. The UN Secretary General appointed Martti Ahtisaari to recommend a settlement status for Kosovo.[286] In his 2007 report, Martti Ahtisaari recommended independence supervised by the UN, because of Kosovo's recent history and the failure of negotiations.[287]

Belgrade impaired its own state's territorial integrity by totally denying the Kosovar Albanians their right to self-determination. The vast majority of Kosovar Albanians asserted their will to exist initially through peaceful and later armed struggle. Because of geopolitical considerations, complete denial of "internal" self-determination, and the brutal oppression, Kosovar Albanians became "a people" under international law. The magnitude of abuses dictated that Kosovar Albanians were entitled to remedial secession because no autonomy or other modes of self-determination than full independence were possible.

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280. *See* KOSOVO REPORT, *supra* note 278, at 74; *see also* Carlyn M. Carey, *Internal Displacement: Is Prevention Through Accountability Possible? A Kosovo Case Study*, 49 AM. U. L. REV. 243, 255 (1999) (explaining that between 770 and 2,000 civilians were killed, more than 100 towns containing 200,000 homes were destroyed, and more than 230,000 to 300,000 people were displaced).

281. *See* PBS FRONTLINE, *A Kosovo Chronology*, http://www.pbs.org/wgbh/ pages/frontline/shows/kosovo/etc/cron.html (providing a time line that traces the roots of the war in Kosovo from Slobodan Milosevic's rise to power in 1987 through NATO's victory in 1999).

282. *See* KOSOVO REPORT, *supra* note 278, at 72; *see also* Minorities at Risk Project, *Chronology for Kosovo Albanians in Yugoslavia* (2004), http://www.unhcr.org/refworld/docid/469f38f51e.html (providing a time line of the armed conflict relating to Kosovar Albanians in Yugoslavia).

283. *See* PBS FRONTLINE, *supra* note 281 (providing a chronology that traces the roots of the war in Kosovo from Slobodan Milosevic's rise to power in 1987 through NATO's victory in 1999).

284. *See* KOSOVO REPORT, *supra* note 278, at 88; *see also* Josh Friedman, *Crisis in Yugoslavia/Emptying Kosovo/Piecing Together the Serbs' Deadly Terror Campaign*, NEWSDAY, Apr. 6, 1999, at A04 (reporting on atrocities and ethnic cleansing taking place in Kosovo).

285. *See* KOSOVO REPORT, *supra* note 278, at 90; *see also* H.B. McCullough, *A Critique of the Report of the Panel on United Nations Peace Operations*, 29 PEPP. L. REV 15, 30 (2001) (explaining that roughly 1.5 million people were displaced from their homes in Kosovo following the bombardment by NATO).

286. *See* Special Envoy of the Secretary-General, *Rep. of the Special Envoy of the Secretary-General on Kosovo's Future Status*, ¶ 7, UN Doc. S/2007/168 (Mar. 26, 2007) (by Martti Ahtisaari) (advising that an autonomous Kosovo within Serbia would not be feasible).

287. *See id*. at ¶ 5 (reasoning that independence is a necessary precursor to a fully responsible and accountable government in Kosovo).

B. Quebec

1. Location

Quebec is one of the ten provinces forming the federal state of Canada.[288] About 80% of Quebec is French speaking.[289] The French settled Quebec in the early 1600s, and British troops conquered it in 1759.[290] With Canadian independence, the Constitution Act of 1867 has guaranteed the protection of French language and culture in Canada.[291] Canada has recognized Quebecers' distinctive characteristics since its independence.

2. "Internal" Self-Determination

Quebecers enjoy the right to "internal" self-determination in Canada. Since around the 1860s, when Quebec became a Canadian industrial power, Quebecers have been advocating for more meaningful "internal" self-determination.[292] Initially, this included greater participation in the commercial life of Quebec, then mostly controlled by Anglo-Saxon interests. In the 1960s, the French-Canadian nationalists called for "the increased use of the French language" across all sectors of Quebec.[293] During the same time, its nationalist party, the Parti Quebecois, began advocating secession.[294]

The rest of Canada responded to these new demands. In 1974, French became the official language of Quebec.[295] Following the 1982 constitutional changes, to which Quebec did not

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288. *See* Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can. Que) (deciding whether Quebec has the right to unilaterally secede from Canada under Canadian domestic law or international law); *see also Provinces and Territories*, GOV'T OF CANADA SITE, http://canada.gc.ca/othergov-autregouv/prov-eng.html (last modified Nov. 30, 2010) (listing Canada's ten provinces and territories).

289. *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 248 (1999) (describing the historical background of Quebec); *see also* The Daily, *2006 Census: Immigration, Citizenship, Language, Mobility and Migration*, STATISTICS CANADA, Dec. 4, 2007, http://www.statcan.gc.ca/daily-quotidien/071204/dq071204a-eng.htm (indicating that 81.8% of the Quebec population spoke French in 2006).

290. *See* Gouvernement du Québec, *Québec's Political and Constitutional Status*, SECRÉTARIAT AUX AFFAIRES INTERGOUVERNEMENTALES CANADIENNES, http://www.saic.gouv.qc.ca/publications/documents_inst_const/statut-pol_en.pdf (discussing the early history of Quebec).

291. *See* Constitution Act, 1867, 30 & 31 Vict., c. 3, §9 (U.K.) (guaranteeing the right to use the French language in the debates of the Houses of Parliament of Canada and further guaranteeing that the Acts of the Parliament of Canada shall be printed and published in French); *see also* Reference re Secession of Quebec, *supra* note 288 (illustrating that the Constitution Act of 1867 made French an official language in Canada).

292. *See* CASSESE, *supra* note 289, at 248; *see also* Johan D. van der Vyver, *Self-Determination of the Peoples of Quebec Under International Law*, 10 FLA. ST. J. TRANSNAT'L L. & POL'Y 1, 11 (2000) (defining internal self-determination as a people's pursuit of its political, economic, social and cultural development within the overall context of its mother state).

293. *See* CASSESE, *supra* note 289, at 248; *see also* Daniel W. Gade, *Language, Identity, and the Scriptorial Landscape in Québec and Catalonia*, 93 GEOGRAPHICAL REV. 429, 435 (2003) (explaining that advocates of the Révolution tranquille, which developed in the 1960s, believed that protecting the French language would usher in a new cultural landscape for Quebec).

294. *See* THOMAS D. MUSGRAVE, SELF-DETERMINATION AND NATIONAL MINORITIES xiii (1997).

295. *See* CASSESE, *supra* note 289, at 248 (describing the government's enforcement of French as the official language of Canada); *see also* Canada, *Official Languages Act*, 1985, c. 31 (4th Supp.) (declaring the status and use of French as the official language of Canada).

consent, Quebec and Canadian representatives held extensive negotiations to bring Quebec into "the constitutional fold." Quebec agreed to the Meech Lake Accord and Charlottetown Agreements granting it special status, but other provinces refused to ratify them.[296]

Quebec held two referenda on its rightful place in relation to Canada.[297] Despite Quebec's lack of approval of the new constitution, "Quebecers occupy prominent positions within the government of Canada. . . . The population of Quebec is equitably represented in legislative, executive and judicial institutions."[298]

Increased autonomy and a representative government indicate that Canada does not deprive Quebecers of their right to "internal" self-determination. Thus, any claim of unilateral secession seems excessive in implementing the most appropriate mode of self-determination for Quebecers.

3. The Will to Exist

After two referenda, most Quebecers favor remaining in Canada: "The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves."[299] Unlike in East Timor, where 78.5% of all the voters desired independence,[300] less than 50% of Quebecers ever voted for independence.[301]

Two points emerge based on the results of the referenda. First, Quebecers prefer to safeguard their identity within Canada. Second, the secessionist movement does not represent the will of all Quebecers. Since the majority of Quebecers prefer to remain in Canada, secession is

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296. *See* Jay Makarenko, *Charlottetown Accord: History and Overview*, GOVERNMENT AND INSTITUTIONS, Feb. 10, 2009, http://www.mapleleafweb.com/features/charlottetown-accord-history-and-overview (explaining that certain provinces were hesitant and ultimately rejected both the Meech Lake Accord and the Charlottetown Accord).

297. *See* Gouvernement du Québec, *Quebec's Political and Constitutional Status—An Overview*, BIBLIOTHÈQUE NATIONALE DU QUÉBEC (1999) (Quebec Report), http://www.saic.gouv.qc.ca/publications/documents_inst_const/statut-pol_en.pdf (explaining Quebec's continued deferral of Canadawide negotiations).

298. *See* Reference re Secession of Quebec, *supra* note 288, at 275 (holding that Quebec cannot secede from Canada unilaterally); *see also* Gouvernement du Québec, *supra* note 297 (explaining that the Quebecois people's quest for equality remains an important issue and has come to be a force in Quebec's institutional and democratic life).

299. *See* Reference re Secession of Quebec [1998] 2 S.C.R. 217, 253 (Can. Que) (stating that if a majority of the people of Quebec choose secession, there would be no basis to deny the government of Quebec the right to pursue this); *see also* Gouvernement du Québec, *supra* note 297 (explaining that the sovereign political will is the main determinate in the political future of Quebec and its people).

300. *See* THOMAS MUSGRAVE, SELF-DETERMINATION AND NATIONAL MINORITIES, Pp. xii (1997) (noting the preferences amongst voters in East Timar and highlighting the prevalent desire for independence).

301. *See* Gouvernement du Québec, *supra* note 297 (citing that in the 1980 referendum, 40.44% of Quebecers supported sovereignty, compared with 49.42% in the 1995 referendum).

not the most appropriate mode of self-determination for all Quebecers. Because only approximately 33% of Quebecers are pro-separation,[302] the interests of the rest of Quebec must also be considered.

4. Brutal Oppression

"The Quebec people is not the victim of attacks on its physical existence or integrity, or of a massive violation of its fundamental rights."[303] Unlike the situation in Kosovo during the 1990s, Quebecers are not killed or oppressed. Similarly to the *Aaland Islanders* and *Zaire* cases, the territorial integrity of Canada should prevail because Quebecers are meaningfully represented in the Canadian government. Quebecers do not exemplify the characteristics of "a people" entitled to remedial secession because they are not denied "internal" self-determination, the clear majority of Quebecers did not assert their will to separate, and there is no brutal oppression. Therefore, the exercise of the most extreme mode of self-determination in Quebec is unnecessary. "[I]nternational law does not grant autonomous regions or states within a federal government the right freely to determine their international status, regardless of whether or not they represent ethnic and cultural groups distinctly different from the rest of the population."[304] Secession of Quebec is not remedial. Canada has a representative government and it respects the right to "internal" self-determination of Quebecers, the people concerned.

5. Political Settlement

While Toronto and Quebec agreed on Quebec's increased autonomy, other provinces rejected the agreements. In realizing self-determination of one group, interests of others must also be considered. Quebec rejected the changes to the constitution, but the changes in themselves do not amount to a denial of self-determination.[305] Unlike in Kosovo, there is no history of brutal oppression, Quebecers actively participate in the government, and the negotiations produce democratic results.

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302. *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 250 (1995) (explaining that a significant minority of Quebec people are pro-separation); *see also* Gouvernement du Québec, *supra* note 297 (stating that among Quebec's main political parties and most political interveners there is a profound consensus that its future depends on the sovereign will of its people).

303. *See Reference re Secession of Quebec*, *supra* note 299, at 135 (translating the amicus curiae that states that the people of Quebec are not oppressed); *see also* Paul Wells, *Top Court Rules Quebec Can't Secede*, 21 NAT'L L.J. 4, 4 (1998) (commenting that the Quebec people cannot secede because they are neither colonized nor an oppressed people).

304. *See* Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Advisory Opinion, 2009 I.C.J. Lexis 211, 19 (Apr. 17) (agreeing with Ireland's statement that the right to self-determination does not equal a unilateral right to secede); *see also* CASSESE, *supra* note 302, at 251 (explaining that international law does not allow regions within a federal government to determine their respective international status).

305. *See Reference re Secession of Quebec*, *supra* note 299, at 137 (holding that a failure to reach an agreement on constitutional amendments does not equate to a denial of self-determination); *see also* Michael A. Murphy, *Representing Indigenous Self-Determination*, 58 U. TORONTO L.J. 185, 186 (2008) (explaining that giving minority groups a political voice provides access to political power and advances self-determination).

Ultimately, all Canadian politicians must resolve the claim of self-determination of Quebec through a degree of an enhanced autonomy or secession.[306] The realization of Quebec's "internal" self-determination requires balancing "the interests of the other provinces, the federal government and Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities."[307] It must also include the interests of aboriginal peoples.[308]

C. Tamil Eelam

1. The Location

Sri Lanka Tamils[309] constitute approximately 12% of about 20 million Sri Lankans. They live in all nine provinces of the island,[310] but their highest concentration is in the Northern Province, where prior to the conflict, Muslims and Sinhalese accounted for over 30% of the inhabitants.[311]

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306. *See* CASSESE, *supra* note 302, at 255 (listing enhanced autonomy or ultimate secession as two options to resolve Quebec's desire for self-determination); *see also* Frederic L. Kirgis, Jr., *The Degrees of Self-Determination in the United Nations Era*, 88 A.J.I.L. 304, 308 (1994) (describing that different degrees of self-determination exist in relation to the degree of the respective representative government).

307. *See Reference re Secession of Quebec*, *supra* note 299, at 151 (describing the various governmental interests that must be balanced against Quebec's realization of internal self-determination); *see also* G.A. Res. 2625 (XXV), at 122, UN Doc. A/ 85 (Oct. 24, 1970) (condemning any attempt to disrupt national unity, territorial integrity, or political independence).

308. *See Reference re Secession of Quebec*, *supra* note 299, at 96 (noting that aboriginal peoples also look to the Constitution of Canada for protection of their rights and interests); *see also Aboriginal identity population by age groups, median age and sex*, STAT. CANADA (2006), http://www12.statcan.ca/census-recensement/2006/dp-pd/hlt/97-558/pagespage.cfm?Lang=E&Geo=PR&Code=01&Table=1&Data=Count&Sex=1&Age=1&StartRec=1&Sort=2&Display=Page (demonstrating that according to the 2006 census, individuals of aboriginal descent made up 4% of Canada's population).

309. *See* Rohan Edrisinha, *Multination Federalism and Minority Rights in Sri Lanka*, *in* MULTICULTURALISM IN ASIA 244, 257 (Will Kymlicka & Baogang He eds., 2005) (indicating that there are 60 million Tamil speakers in India).

310. *See Brief Analysis of Population and Housing Characteristics*, SRI LANKA DEP'T CENSUS & STAT. 1, 10 (2001), http://www.statistics.gov.lk/PopHouSat/PDF/p7%20population%20and%20Housing%20Text-11-12-06.pdf (providing 2001 census statistics that Sri Lanka Tamils occupy all nine Sri Lankan provinces where the next census was conducted in 2011).

311. *See* Elizabeth Nissan, *Historical Context*, CONCILIATION RESOURCES (Aug.1998), http://www.c-r.org/our-work/accord/sri-lanka/historical-context.php (outlining the demographics of Sri Lanka's provinces of Sri Lanka as of 1998).

Most Tamils are Hindu. The Sinhalese are predominately Buddhist and constitute 72% of population.[312] Muslims and Christians are other sizable religious minorities.[313] The Indian Tamils, aboriginal Veddahs, and European descendants[314] account for the remaining 16%.

After independence, the state constitution contained no Tamil-specific protections. The Tamil and Sinhalese hoped to resolve their differences within a strong central government.[315]

2. "Internal" Self-Determination

Sri Lanka, a "majoritarian representative democracy,"[316] failed to find a durable compromise between the majority and the Tamils,[317] but it did not completely deny the Tamil right to "internal" self-determination. The Tamils felt they became what Marc Weller calls a disfranchised minority in the democratic state.[318]

When faced with Tamil autonomous aspirations, the Marxist-Leninist rebels,[319] and correcting the Tamil colonial preferential treatment,[320] the Sinhalese governments in Colombo chose nationalism over Tamil self-rule. In the 1950s and 1960s, they established Sinhalese as the official language and withdrew from the Bandaranaike-Chelvanayakam and Senanayake-

312. *See* Edrisinha, *supra* note 309 (detailing the ethnic makeup of the Sinhalese majority of Sri Lanka).

313. *See Brief Analysis of Population and Housing Characteristics* [2001] SRI LANKA DEPT OF CENSUS AND STATISTICS 11 at 3 (Feb. 25, 2011), http://www.statistics.gov.lk/PopHouSat/PDF/p7%20population%20and%20Housing%20Text-11-12-06.pdf (noting that Islam and Roman Catholic followers account for 8.5% and 6.1%, respectively, of the Sri Lanka population).

314. *See* Background Note: Sri Lanka, U.S. DEPT OF STATE, (April 6, 2011), http://www.state.gov/r/pa/ei/bgn/5249.htm (detailing the minority population makeup of Sri Lanka).

315. *See* Edrisinha, *supra* note 309, at 247 (describing how Tamil and Sinhalese ethnic groups share the prevailing view that a strong central government in Sri Lanka would benefit both groups).

316. *See* U.N.C.H.R., Promotion and Protection of Legal Rights Subcomm, Rep. on the Sub-Regional Seminar on Minority Rights: Cultural Diversity and Development in South Asia, ¶ 9, UN Doc. E/CN.4/Sub.2/AC.5/2005/WP.6; ESCOR, 57th Sess., (Nov. 21-24, 2004) (describing oppressing the minority population as a potential risk of a majority-dominated democracy); *see also* Godfrey Gunatilleke, *Negotiating Development in an Evolving Democracy—Lessons from Sri Lanka*, MARGA INSTITUTE, http://www.margasrilanka.org/reading_negotiating-develop-mentinan-evolving.htm (discussing the Sri Lankan majority's use of the democratic process to gain total control of the nation).

317. *See* CHRISTIAN WAGNER, SRI LANKA IN ELECTIONS IN ASIA AND THE PACIFIC: A DATA HANDBOOK—VOLUME I: MIDDLE EAST, CENTRAL ASIA, AND SOUTH ASIA 697 (2002) (recognizing the failure of the democratic system in Sri Lanka to establish peace between the Sinhalese majority and the Tamil minority).

318. *See* MARC WELLER, CONTESTED STATEHOOD, KOSOVO'S STRUGGLE FOR INDEPENDENCE 12 (2009) (asserting a concern that the minority population can be abused in a democratic state); *see also* Iqbal Athas, *Sri Lankan President Meets With Tamil Leaders*, CNN.COM (June 8, 2010, 2:18 AM), http://www.cnn.com/2010/WORLD/asiapcf/06/08/sri.lanka.meeting/index.html?iref=allsearch (quoting the Sri Lankan president in discussing the need for the Tamil minority to feel as though they are involved in a political solution).

319. *See* U.N.C.H.R. Report of the Working Group on Enforced or Involuntary Disappearances ¶ 84–85, UN Doc E/CN.4/2000/64/Add.1; ESCOR, 56th Sess. (Dec. 21, 1999) (recounting the number of people kidnapped by communist groups in Sri Lanka in 1999).

320. *See* EIAS Roundtable Discussion Report, Sri Lanka in the Post Conflict Situation, (Jun. 10, 2010), http://www.eias.org/documents/Report_Roundtable_Discussion_on_Sri_Lanka_in_the_Post_Conflict_Situation.pdf (discussing how the Tamils enjoyed better access to education and greater representation under British rule).

Chelvanayakam pacts. Both pacts aimed to increase Tamil autonomy, yet the main Tamil governing coalition party advocated against secession.[321]

In the 1970s, the Sinhalese nationalists adopted constitutional changes making Sri Lanka a "unitary state" and giving Buddhism "the foremost place" in Sri Lanka.[322] The changes undermined the Tamils' aspiration to federal autonomy.[323] While the constitution contained minority protections, and in 1987 the Tamil language became an official language,[324] Colombo did not meaningfully enforce the laws. From the ongoing political deadlock centering "around language, education, land settlement, and public sector employment," the LTTE emerged as a radical organization seeking secession through violence.[325]

Colombo provided too little, too late to address the Tamil aspirations meaningfully.[326] Constitutionally guaranteed Tamil autonomy and meaningful political participation could have prevented the conflict.

3. The Will to Exist

Sri Lanka Tamils expressed their will to exist through democratic means. Despite political setbacks, most Tamil parties pursued peaceful policies. However, the LTTE undermined their efforts. It began a policy of assassinations of their Tamil and Sinhalese opponents, "indiscriminate suicide bombings,"[327] and expulsions of Muslims.[328] In 2006, the EU listed the LTTE as a terrorist organization.[329]

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321. *See* Rohan Edrisinha, *Multination Federalism and Minority Rights in Sri Lanka*, *in* MULTICULTURALISM IN ASIA 244, 248 (Will Kymlicka & Baogang He eds., 2005) (explaining Tamil's stance against secession).

322. *See* CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA. Sept. 7, 1978, arts. 2 & 9, http://www.priu.gov.lk/Cons/1978Constitution/Chapter_01_Amd.html (defining Sri Lanka as a "unified state" that places Buddhism in "the foremost place" of its society).

323. *See* Edrisinha, *supra* note 321, at 252 (discussing how the constitutional changes undermined Tamil's desire of a federal autonomy).

324. *See* UN High Comm'r for Human Rights, *Report on the Sub-Regional Seminar on Minority Rights: Cultural Diversity and Development in South Asia*, ¶ 8, UN Doc. AC.5/2005/WP.6 (November 21–24, 2004), http://www2.ohchr.org/english/issues/minorities/group/11session.htm (stating that Tamil was made the official language of Sri Lanka in 1987); *see also* Shantha K. Hennayake, *The Peace Accord and the Tamils in Sri Lanka*, ASIAN SURVEY 401, 401 (Vol. 29, 1989) (explaining that Tamil was made the official language of Sri Lanka after the Peace Accord made by India and Sri Lanka in July 1987).

325. *See* EIAS Roundtable Discussion Report, *supra* note 320 (enumerating the violent tactics used by the LTTE in their attempt to establish a separate Tamil state).

326. *See* Edrisinha, *supra* note 321, at 245 (explaining how Colombo undermined Tamil's aspirations).

327. *See* EIAS Roundtable Discussion Report, *supra* note 320 (stating that the LTTE specialized in "indiscriminate suicide bombings").

328. *See id.* (accusing the LTTE of human rights abuses such as mass expulsions of Muslims).

329. *See id.* (stating that the EU listed the LTTE as a terrorist organization).

In 1985, the six main Tamil political groups, including the LTTE, agreed on the following four principles for any durable compromise:

1. Recognition of the Tamils of Sri Lanka as a distinct nationality;
2. Recognition of an identified Tamil homeland and the guarantee of its territorial integrity;
3. Based on the above, recognition of the inalienable right of self-determination of the Tamil nation; and
4. Recognition of the right to full citizenship and other fundamental democratic rights of all Tamils, who look upon the island as their country.

The principles received Tamilwide support. They sought autonomy, yet they included the right to secession. Colombo rejected the first three.[330]

Following Indian diplomatic efforts, the 1987 Indo-Sri Lanka Accord aimed to decentralize Sri Lanka. It also authorized Indian peacekeepers to disarm the LTTE and assist in a referendum on creating the Northern Province. The LTTE's attacks on the Indian forces led to their departure and no referendum.[331] The Accord failed to resolve the conflict.[332]

In 1994, after the failed negotiations with the LTTE, Colombo introduced constitutional reforms seeking to devolve its central power. In 1995, the Sri Lanka Peace Support Group proposed to create a confederation. Both efforts failed. The nationalists rejected the devolution. The LTTE rejected the unilateral changes[333] and resumed hostilities.[334]

The 2002 Oslo Agreement crystallized the positions of both sides by addressing the internal aspect of self-determination. The Tamils sought "maximum autonomy, and recognition of Tamil nationalism." Colombo agreed to the autonomy within Sri Lanka "with appropriate safeguards for the minorities in the Tamil majority areas." However, neither side implemented the agreement.[335] In 2009, Colombo defeated the LTTE.

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330. *See* Edrisinha, *supra* note 321, at 251 (reporting the government of Sri Lanka's rejection of the first three principles).

331. *See* EIAS Roundtable Discussion Report, Sri Lanka in the Post Conflict Situation, (Jun. 10, 2010), http://www.eias.org/documents/Report_Roundtable_Discussion_on_Sri_Lanka_in_the_Post_Conflict_Situation.pdf (describing how the LTTE attack on the Indian Peace Keeping Force (IPKF) forced the IPKF to withdraw before a referendum could be reached).

332. *See* Rohan Edrisinha, *Multination Federalism and Minority Rights in Sri Lanka*, *in* MULTICULTURALISM IN ASIA 244, 252 (Will Kymlicka & Baogang He eds., 2005) (pronouncing the failure of the Indo-Lanka Accord).

333. *See* Edrisinha, *supra* note 332, at 254–55 (asserting strong opposition to the constitutional reforms).

334. *See* EIAS Roundtable Discussion Report, *supra* note 331 (recounting how the LTTE resumed hostile actions within months of a failed cease-fire).

335. *See* Edrisinha, *supra* note 332, at 255 (implying the agreement has yet to be implemented).

The LTTE pursued secession through violence on behalf of all Tamils, even though it killed many Tamils who refused to support it.[336] The postconflict fragmentation of Tamil politics reveals divisions within the Tamil population over its future.[337]

4. Brutal Oppression

The 30 years of conflict in Sri Lanka led to massive human rights violations.[338] It resulted in the disappearance of thousands of Tamils,[339] ethnic cleansing of Muslims, and internal displacement of over 570,000 people.[340] Until its defeat, the LTTE engaged in torture, denied civil and political rights, recruited children for combat, and organized bomb attacks targeting civilians and civilian buildings.[341] The pro-Colombo forces engaged in armed attacks, torture,[342] kidnapping, and extortion with impunity.[343]

5. Political Settlement

The military victory over the LTTE did not resolve the political deadlock in Sri Lanka. While there seems to be an agreement on what the solution should be, there is no political will to achieve it.[344] Regardless of the military outcome, the right to "internal" self-determination continues for the Tamils.

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336. *See* UN Econ. & Soc. Council (ECOR), Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Mission to Sri Lanka*, ¶ 21, UN Doc. E/CN.4/2006/53/Add.5 (Mar. 27, 2006) (prepared by Philip Alston) (explaining how the LTTE reinforces support from the Tamil population "through the use of violence").

337. *See* EIAS Roundtable Discussion Report, *supra* note 331 (noting the division between the antigovernment and progovernment populations, pro-LTTE and anti-LTTE groups, and Tamils in Sri Lanka and those outside the country).

338. *See* EIAS Roundtable Discussion Report, *supra* note 331 (discussing how the European Union sanctioned Sri Lanka for not complying with 3 of the 27 international conventions, including human rights issues).

339. *See* UN Econ. & Soc. Council (ECOR), Comm'n on Human Rights [UNCHR], Working Group on Enforced or Involuntary Disappearances, *Rep. on the Visit to Sri Lanka by a Member of the Working Group on Enforced or Involuntary Disappearances*, ¶ 1, UN Doc. E/CN.4/2000/64/Add.1 (Dec. 21, 1999) (attributing 12,258 disappearances between 1980 and 1999 to confrontations between the government and various militant groups, including the LTTE).

340. *See* U.N.G.A. Human Rights Council, Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, *Mission to Sri Lanka*, ¶ 15, UN Doc A/HRC/8/6/Add.4 (May 21, 2008) (prepared by Walter Kälin) (estimating that as of December 2007, there were 577,000 internally displaced persons).

341. *See* BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: SRI LANKA, Mar. 11, 2010, http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136093.htm (demonstrating the LTTE's participation in torture, denial of freedoms, and recruitment of adults and children for combat against civilians and property).

342. *See* U.N.G.A. Human Rights Council, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Mission to Sri Lanka*, ¶ 70, UN Doc A/HRC/7/3/Add.6 (Feb. 26, 2008) (prepared by Manfred Nowak) (using the high number of indictments for torture and complaints to indicate that the Terrorist Investigation Department and security forces use torture on LTTE suspects).

343. *See* BUREAU OF DEMOCRACY, *supra* note 341 (asserting the human rights observers' allegations that government forces attacked civilians and practiced kidnapping and extortion with impunity).

344. *See* EIAS Roundtable Discussion Report, Sri Lanka in the Post Conflict Situation (Jun. 10, 2010), http://www.eias.org/documents/Report_Roundtable_Discussion_on_Sri_Lanka_in_the_Post_Conflict_Situation.pdf (remarking that no political will to achieve shared political objectives existed).

Sri Lanka Tamils localized their will to preserve their characteristics in the North. However, just as in Quebec, their claim of self-determination was subject to the interests of other minorities living there. The Tamils felt disfranchised by the nationalist legislation disregarding their self-rule aspirations. The constitutional changes, Colombo's attempts to decentralize and negotiate, and the creation of multiple Tamil political parties[345] indicate no total denial of "internal" self-determination, yet Colombo resorted to massive human rights violations in its fight against the LTTE in the North.

The wide acceptance of the four principles and the Oslo Agreement reveal that the most appropriate mode of self-determination may be Tamil territorial self-rule within Sri Lanka. Any durable solution must also address the aspirations of other minorities in Sri Lanka and enshrine peace in the respect for human rights.[346] Failure to take appropriate measures may result in future conflicts.

Conclusion

Considering the importance and evolution of the right to self-determination, its binding force, and the horrible consequences for international peace and security its denial causes, the time for an effective self-determination implementation mechanism is long overdue. Currently, the international community is not adequately equipped to address new self-determination claims. The UN Decolonization Committee has no mechanism for examining claims from non-state actors asserting to represent peoples aspiring to the right of self-determination, let alone of assessing them according to a set of agreed criteria.[347] Since the internal aspect of self-determination gained more importance,[348] the present legal structure must develop ways of implementing self-determination for minority groups with states.[349] The UN should lead the development of such an implementation mechanism because self-determination is one of its purposes.

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345. *See* Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *supra* note 336 (reporting that Tamil political parties fought alongside the LTTE until the LTTE began to kill its members).

346. *See* Report of the Special Rapporteur on Extrajudicial, *supra* note 336 (stating that peace based on respect for human rights develops when disappearances are publicly recorded).

347. *See* Kumar Rupesinghe & Valery A. Tishkov, *Ethnicity and Power in the Contemporary World*, UNUP (1996), http://unu.edu/unupress/unupbooks/ uu12ee/uu12ee04.htm#3 (providing that the UN does not have a formal process for adjudicating self-determination claims).

348. *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 160 (1995) (recognizing that the internal part of self-determination has become increasingly prominent); *see also* Russell A. Miller, *Self-Determination in International Law and the Demise of Democracy?* 41 COLUM. J. TRANSNAT'L L. 601, 625 (2003) (noting that there has been a trend toward internal self-determination since decolonization).

349. *See* CASSESE, *supra* note 348, at 331–32 (maintaining that the legal system must find ways for minorities to achieve self determination); *see also* Milena Sterio, *On the Right to External Self-Determination: "Selfistans." Secession, and the Great Power's Rule*, 19 MINN. J. INT'L L. 137, 137 (2010) (stressing that oppressed groups should have the right to an identity that is shared and recognized worldwide).

While UN resolutions set out the law on realizing self-determination for non-self-governing territories, the law on realizing self-determination in the context of independent states is not so clear. This is, in part, because there is no consensus on who are "peoples."[350] This article addresses this issue by identifying some of the key concepts guiding the emergence of "a people."

Any self-determination implementation mechanism should resolve conflicts proactively before they threaten international peace and security. New self-determination claims are prone to arise in states experiencing internal political shifts. Non-majority groups are most vulnerable during such situations. The international community should create an outlet for their continuing right to self-determination before their aspirations turn into massive human rights violations.

The implementation mechanism will establish a level of predictability for states and non-state actors alike. It will strengthen territorial integrity of states by promoting the internal aspect of self-determination. It will foster cooperation and peaceful resolution of conflicts, and discourage foreign intervention. It will allow minority groups to seek the best mode of implementing self-determination before turning to violence.

The examples of Kosovo, Quebec, and Sri Lanka demonstrate the need for such a mechanism. The Kosovar Albanians became "a people" under international law with their own state only after two decades of discrimination, brutal oppression, NATO's intervention, eight years of UN administration, and the ICJ's decision. The example of Quebec shows that because the Canadian government is representing all the provinces and indigenous peoples meaningfully, it is entitled to its territorial integrity. Sri Lanka exposes real threats of majoritarian democracies disfranchising minorities and creating violent terrorist groups. Ultimately, members of a minority group should not have to undergo brutal oppression before the international community recognizes their unique situation, which qualifies them as "peoples" under international law.[351] Similarly, the entire population of a state should not have to become a casualty of an armed conflict because its government failed to address the aspirations of some of its groups meaningfully.

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350. *See* THOMAS MUSGRAVE, SELF-DETERMINATION AND NATIONAL MINORITIES xiii (1997) (demonstrating that there is disagreement regarding what should be considered a "people").

351. *See* Rupesinghe & Tishkov, *supra* note 347 (showing that the right to self-determination has caused violence).

Appendix I

List of Abbreviations

ACHPR	African Commission on Human and People's Rights
COE	Council of Europe
CSCE	Conference on Security and Cooperation in Europe
EIAS	European Institute for Asian Studies
FRY	Former Republic of Yugoslavia
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
IGAD	Intergovernmental Authority on Development
ILC	International Law Commission
KLA	Kosovo Liberation Army
LTTE	Liberation Tigers of Tamil Eelam
NATO	North Atlantic Treaty Organization
OSCE	Organization for Security and Cooperation in Europe (evolved from CSCE)
PBS	Public Broadcasting Service
PCIJ	Permanent Court of International Justice
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council (successor to UNCHR)
UNSC	United Nations Security Council
USDOS	United States Department of State
USSR	Union of Socialist Soviet Republics
WWI	World War I
WWII	World War II

Appendix II

Selected Quotes on Self-Determination, "a People," and Secession

In the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

—The Declaration of Independence of the Thirteen Colonies,
In CONGRESS, July 4, 1776

The more I think about the President's declaration as to the right of "self-determination," the more convinced I am of the danger of putting such ideas into the minds of certain races. It is bound to be the basis of impossible demands on the Peace Congress, and create trouble in many lands. . . . The phrase is simply loaded with dynamite. It will raise hopes which can never be realized. It will, I fear, cost thousands of lives. In the end it is bound to be discredited, to be called the dream of an idealist who failed to realize the danger until too late to check those who attempt to put the principle into force. What a calamity that the phrase was ever uttered! What misery it will cause! Think of the feelings of the author when he counts the dead who dies because he coined a phrase! A man, who is a leader of public thought, should beware of intemperate or undigested declarations. He is responsible for the consequences.

—Robert Lansing, Wilson's Secretary of State, 1918

It would be dangerous to put forth the people's right of self-determination as a basis for the friendly relations between the nations. This would open the door to inadmissible interventions, if, as seems probable, one wishes to take inspiration from the people's right of self-determination in the action of the Organization and not in the relations between the peoples.

—The remarks of the Belgian representative, UNCIO, vol. VI

A nation is built when the communities that comprise it make commitments to it, when they forgo choices and opportunities on behalf of a nation, . . . when the communities that comprise it make compromises, when they offer each other guarantees, when they make transfers and perhaps most pointedly, when they receive from others the benefits of national solidarity. The threads of a thousand acts of accommodation are the fabric of a nation.

—Reference to the Secession of Quebec, 2 SCR 217

So, as far as the question of secession of a particular section of a Member State is concerned, the United Nations' attitude is unequivocal. As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State.

—U Thant, UN Secretary-General,
Press Conference in Dakar, Senegal 1970

Why is the right to secession conditional while the preservation of territorial integrity is not?

—Daniel Thürer, "Secession," in *The Max Planck Encyclopedia of Public International Law*, 2010

[T]he tendency of every national movement is towards the formation of national states, under which these requirements of modern capitalism are best satisfied. . . . [T]he national state is typical and normal for the capitalist period. Consequently, if we want to grasp the meaning of self-determination of nations . . . by examining the historico-economic conditions of the national movements, we must inevitably reach the conclusion that the self-determination of nations means the political separation *of these nations from alien national bodies, and the formation of an independent national state. . . . [It] would be wrong to interpret the right to self-determination as meaning anything but the right to existence as a separate state.*

—V. I. Lenin, *The Right of Nations to Self-Determination*
(Moscow, Progress Publishers 1964)

God . . . divided Humanity into distinct groups upon the face of our globe, and thus planted the seeds of nations. [But] [b]ad governments have disfigured the design of God. . . . The divine design will infallibly be fulfilled. . . . The Countries of the People will rise, defined by the voice of the free, upon the ruins of the countries of the Kings and privileged castes. Between these Countries there will be harmony and brotherhood.

—D.E.D. Beales, "Mazzini on Revolutionary Nationalism,"
in D. Thomson (ed.), *Political Ideas*
(Harmondsworth, Penguin, 1969)

Perhaps no contemporary norm of international law has been so vigorously promoted or widely accepted as the right of all peoples to self-determination. Yet the meaning and content of that right remain as vague and imprecise as when they were enunciated by President Woodrow Wilson and others at Versailles.

—H. Hannum, "Autonomy, Sovereignty and Self-Determination,"
in *The Accommodation of Conflicting Rights* (Philadelphia,
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Goodyear Dunlop Tires Operations, S.A. v. Brown

131 S. Ct. 2846 (2011)

The U.S. Supreme Court held that the Fourteenth Amendment's Due Process Clause did not permit the North Carolina state courts to exercise in personam jurisdiction over a U.S.-based tire manufacturer's foreign subsidiaries.

I. Holding

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*,[1] a unanimous U.S. Supreme Court, in an opinion by Justice Ginsburg, held that three petitioner-subsidiaries of Goodyear Dunlop Tires USA could not be sued in North Carolina on claims unrelated to their activity in the forum state.[2] The Due Process Clause of the Fourteenth Amendment did not permit general jurisdiction over a foreign defendant whose only contact with the forum state was the limited distribution of its products by a third party.[3] Further, the Court declined to consider the respondents' untimely assertion of a "single-enterprise" theory as a basis for consolidation of petitioners' ties to the forum for jurisdictional purposes.[4]

II. Facts and Procedure

In April 2004, a bus carrying young soccer players from North Carolina overturned on a road outside Paris, France.[5] Two of the passengers on the bus, Julian Brown and Matthew Helms, were killed.[6] The boys' parents filed suit in Superior Court of Onslow County, North Carolina, against Goodyear USA, an Ohio corporation, and three of its foreign subsidiaries organized and operating in Turkey, France, and Luxembourg.[7] The parents' suit for wrongful death alleged negligence and advanced a product liability theory, asserting that a defective tire caused the crash.[8] The subsidiaries manufactured tires primarily for the European and Asian markets, producing sizes and types of tires different from those sold in the United States.[9] None of the subsidiaries designed, manufactured, or advertised their products in North Carolina.[10] They did not solicit business or ship products to North Carolina.[11] However, a small percentage of their tires were distributed to and within North Carolina by other Goodyear USA affiliates.[12]

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1. 131 S. Ct. 2846 (2011).
2. *Id.* at 2857.
3. *Id.*
4. *Id.*
5. *Id.* at 2851.
6. *Id.*
7. *Goodyear*, 131 S. Ct. at 2851–52.
8. *Id.* at 2851.
9. *Id.* at 2853.
10. *Id.*
11. *Id.*
12. *Id.*

The trial court denied the subsidiaries' motion to dismiss the claims for want of personal jurisdiction.[13] The North Carolina Court of Appeals affirmed, finding that general jurisdiction was supported by "continuous and systematic" contacts with the forum, which resulted from the small percentage of tires that the subsidiaries' placed into the stream of commerce without restricting distribution to, or within, North Carolina.[14] The North Carolina Supreme Court declined to exercise discretionary review.[15]

III. Discussion

A. The Due Process Clause of the Fourteenth Amendment

In addressing the question whether the North Carolina courts properly exercised general jurisdiction over the foreign subsidiaries, the Supreme Court focused on the Due Process Clause of the Fourteenth Amendment.[16] Specifically, the Court invoked its "canonical" decision in *International Shoe Co. v. Washington*,[17] where the Supreme Court held that a state court may exercise long-arm jurisdiction over a foreign defendant only where the defendant has "minimum contacts" with the forum state, such that "traditional notions of fair play and substantial justice" are not offended.[18]

The Court gave meaning to this standard by emphasizing the judicial distinction between general and specific jurisdiction, a dichotomy that has arisen in the wake of *International Shoe*.[19] Where the defendant's contacts to the forum state form the basis of the suit in question, the Fourteenth Amendment allows the exercise of specific jurisdiction.[20] Even "single or occasional acts" can form the basis of specific jurisdiction, but courts must still ask whether those acts were the result of the defendant "purposefully avail[ing] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[21]

The Fourteenth Amendment's Due Process Clause also permits jurisdiction over an out-of-state defendant where the cause of action is unrelated the defendant's activity within the forum state.[22] However, this so-called general jurisdiction requires a heightened showing of "continuous and systematic" in-state activity by the defendant, typified by the presence of an individual's domicile or a corporation's principal place of business.[23]

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13. *Goodyear*, 131 S. Ct. at 2853.
14. Brown v. Meter, 199 N.C. App. 50, 63 (2009), *review denied*, 364 N.C. 128 (2010), *cert. granted*, 131 S. Ct. 63 (2010), *rev'd sub nom.* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011).
15. 364 N.C. 128 (2010).
16. *Id.*
17. 326 U.S. 310 (1945).
18. *Goodyear*, 131 S. Ct. at 2853 (quoting *International Shoe*, 326 U.S. at 316).
19. *Id.* at 2853–54.
20. *Id.* at 2853.
21. *Id.* at 2854 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).
22. *Id.*
23. *Id.* at 2853–54.

Here, the Court agreed with the North Carolina Court of Appeals in finding that the specific jurisdiction provision in North Carolina's long-arm statute was inapplicable, because the accident giving rise to the suit occurred outside the forum state.[24] Thus, the Court turned next to the respondents' assertion of general jurisdiction based upon a stream-of-commerce theory.

B. The Respondents' Stream-of-Commerce Theory

The North Carolina courts based general jurisdiction upon the small percentage of the petitioners' tires ("tens of thousands out of tens of millions between 2004 and 2007"[25]) that were distributed to and within North Carolina by a Goodyear affiliate.[26] This reasoning, however, found no traction with the Supreme Court.[27] In situations where an out-of-state defendant, by placing his product into the stream of commerce, produces an injury *within* the forum state, specific jurisdiction may be proper.[28] However, as in the case here, where the injury occurred outside the forum state, the Court's prior holdings in *Perkins v. Benguet Consolidated Mining Co.*[29] and *Helicopteros Nacionales de Colombia, S.A. v. Hall*[30] require more than "continuous activity of some sorts within a state."[31]

Specifically, the Court chose to make no distinction between the limited distribution of the petitioners' tires in North Carolina and the limited, but regular, purchases in Texas that were held insufficient to support general jurisdiction over the defendant in *Helicopteros*.[32] In contrast to the defendant in *Perkins*, the petitioners in *Goodyear* never maintained a principal place of business in the forum state.[33] Thus, the court reasoned that the subsidiaries' contacts fell "far short" of the "continuous and systematic general business contacts" necessary to sustain general jurisdiction.[34]

C. Respondents' Belated Assertion of a "Single Enterprise" Theory

Finally, the Court turned to the respondents' remaining "single enterprise" theory of jurisdiction. This final argument was based on the belated assertion that the Court should combine

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24. *Goodyear*, 131 S. Ct. at 2855.
25. *Id.* at 2852.
26. *Id.* at 2854–55.
27. *Id.* at 2857.
28. *Id.* at 2855.
29. 342 U.S. 437 (1952) (holding that general jurisdiction was properly maintained in a state where the defendant corporation temporarily maintained its principal place of business and directed its business activities).
30. 466 U.S. 408 (1984) (holding that general jurisdiction could not be maintained despite the defendant corporation's regular purchases of equipment in the state and its acceptance of checks drawn from banks in the state).
31. *Goodyear*, 131 S. Ct. at 2856 (quoting *International Shoe*, 326 U.S. at 318).
32. *Id.* at 2856.
33. *Id.* at 2857.
34. *Id.* at 2857 (quoting *Helicopteros*, 466 U.S. at 416).

the petitioners' and Goodyear USA's ties to North Carolina under a "unitary business" theory.[35] That reasoning would require the petitioners to be "draw[n] in" by the state court's jurisdiction over Goodyear USA.[36] Because the respondents failed to assert this theory, both in the lower courts and in their brief in opposition to the petition for certiorari, the Court declined to address it, deeming the contention forfeited.[37] However, the Court did mention in a dictum that such an inquiry might be similar to the corporate law question of piercing the corporate veil.[38]

IV. Conclusion

The Supreme Court unanimously held that the petitioner-defendants were not amenable to suit in North Carolina. This protection for out-of-state defendants comports with the Due Process Clause of the Fourteenth Amendment by preventing manufacturers from being haled into distant courts wherever their products may be fortuitously located. The decision also upholds the Court's precedent in *International Shoe*, by enforcing a heightened minimum contacts requirement where no nexus between the cause of action and the forum state can be shown. With this decision, the 1952 *Perkins* case remains the sole application of general jurisdiction affirmed by the Supreme Court.

Douglas Moquet

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35. *Id.*
36. *Id.*
37. *Goodyear*, 131 S. Ct. at 2857.
38. *Id.*

John Wiley & Sons, Inc. v. Kirtsaeng

No. 09-4896-cv, 2011 U.S. App. LEXIS 16830, 2011 WL 3560003 (2d Cir. Aug. 15, 2011)

The Second Circuit extended copyright protection to the plaintiff-appellee's foreign-manufactured books, which the the defendant-appellant imported and resold in the United States, pursuant to a finding that the "first-sale doctrine" does not apply to works manufactured outside of the United States.

I. Holding

In *John Wiley & Sons, Inc. v. Kirtsaeng*,[1] the U.S. Court of Appeals for the Second Circuit held that the "first-sale doctrine," which allows a person who buys a legally produced, copyrighted work to sell or otherwise to dispose of the work as he sees fit, does not apply to works manufactured outside of the United States.[2] The Court of Appeals further held that the district court did not err in declining to instruct the jury regarding the unsettled state of the first-sale doctrine, and that it did not err in admitting evidence of the defendant-appellant's gross revenues.[3]

II. Facts and Procedural History

A. Facts

The plaintiff-appellee John Wiley & Sons, Inc. (Wiley), a publisher of textbooks, relied on a wholly owned subsidiary, John Wiley & Sons (Asia) Pte Ltd. (Wiley Asia), to manufacture books for sale outside of the United States.[4] Although the written content of books for sale in domestic and foreign markets is usually similar,[5] books specifically intended for foreign markets usually have a legend authorizing sale within a specific country or region.[6]

The defendant-appellant Supap Kirtsaeng (Kirtsaeng) moved from Thailand to the United States to pursue an undergraduate degree in mathematics and later a doctoral degree.[7] Between 2007 and September 8, 2008, friends and family of Kirtsaeng shipped him foreign-edition textbooks.[8] Wiley Asia printed some of these foreign edition textbooks abroad.[9] Kirt-

1. No. 09-4896-cv, 2011 U.S. App. LEXIS 16830, 2011 WL 3560003 (2d Cir. Aug. 15, 2011) (*John Wiley*).
2. *John Wiley*, 2011 U.S. App. LEXIS 16830, at *40.
3. *Id*. at *40.
4. *Id*. at *5.
5. Foreign editions can differ from domestic editions in design, supplemental content such as an accompanying CD-ROM, and quality of printing. *Id*.
6. *Id*.
7. *Id*. at *6.
8. *John Wiley*, 2011 U.S. App. LEXIS 16830, at *6–7.
9. *Id*. at *7.

saeng resold the textbooks on commercial websites. He deducted shipping costs from the sales revenue, reimbursed his family and friends for the costs, and retained the remaining profit.[10] Kirtsaeng claimed that before selling the foreign edition textbooks, he consulted with friends in Thailand and checked Google Answers[11] to confirm that it was legal to resell the textbooks in the United States.[12]

B. Procedural Posture

Wiley filed this action against Kirtsaeng in the U.S. District Court for the Southern District of New York.[13] Wiley asserted copyright infringement under 17 U.S.C. § 501, trademark infringement under 15 U.S.C. § 1114(a), and unfair competition under New York State law.[14] Wiley's desired remedies were a preliminary and permanent injunction, as well as statutory damages,[15] although it later abandoned its trademark and unfair competition claims.[16] The Second Circuit noted that the total number of statutory damages awards depends on the number of works infringed and not the number of infringements of those works.[17]

1. Relevant Pre-Trial Proceedings

Prior to trial, Kirtsaeng submitted proposed jury instructions advising the jury that the first-sale doctrine was a defense to copyright infringement; however, the district court issued an order prohibiting Kirtsaeng from raising such a defense.[18] The order also rejected the first-sale doctrine's relevance to foreign edition textbooks.[19]

Subsequently Kirtsaeng filed motions *in limine* to preclude introduction of Kirtsaeng's online PayPal sales records as well as profits Kirtsaeng earned from other sales activities.[20] The PayPal records showed Kirtsaeng's gross revenues from selling Wiley's foreign edition books.[21]

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10. *Id*.
11. Google Answers is a website that enables web users to seek research assistance from other web users. *Id*., GOOGLE ANSWERS, http://answers.google.com/answers/.
12. *John Wiley*, 2011 U.S. App. LEXIS 16830, at *7.
13. *Id*. (affirming John Wiley & Sons, Inc. v. Kirtsaeng, No. 08 Civ. 7834(DCP), 2009 U.S. Dist. LEXIS 96520, 2009 WL 3364037 (S.D.N.Y. Oct. 19, 2009)).
14. *Id.* at *7. Wiley's third claim for relief was common law unfair competition under state law. *See* Amended Complaint at 31–32 John Wiley & Sons, Inc. v. Kirtsaeng, 2011 U.S. App. LEXIS 16830 (2d Cir. Aug. 15, 2011) (No. 09-4896-cv).
15. *John Wiley*, 2011 U.S. App. LEXIS 16830, at *7–8.
16. *Id.* at *8 n. 8.
17. *Id.* at *9. The Second Circuit found that "the total number of awards of statutory damages that a plaintiff may recover in any given action depends on the number of works that are infringed . . . regardless of the number of infringements of those works." *See* WB Music Corp. v. RTV Commc'n Grp., Inc., 445 F.3d 538, 540 (2d Cir. 2006) (internal quotation marks omitted).
18. *John Wiley*, 2011 U.S. App. LEXIS 16830, at *10 (affirming John Wiley & Sons, Inc. v. Kirtsaeng, No. 08 Civ. 7834(DCP), 2009 U.S. Dist. LEXIS 96520, at *11).
19. *Id.* (affirming John Wiley & Sons, Inc. v. Kirtsaeng, No. 08 Civ. 7834(DCP), 2009 U.S. Dist. LEXIS 96520, at *20).
20. *Id.*
21. *Id.*

The district court held that Wiley was prohibited from introducing evidence of the profits Kirtsaeng earned from selling textbooks printed by other publishers.[22] The court further found that Wiley's counsel could inquire about additional revenues and profits as well as where that money went, in order to establish an accurate record of Kirtsaeng's net worth.[23] Moreover, the court held that it would be improper for Wiley's counsel to refer to unrelated sales activities as infringing sales.[24]

2. Events at Trial

During the examination of Kirtsaeng, Wiley's counsel questioned him about his net worth during 2009.[25] Wiley's counsel tried to enter into evidence a record of Kirtsaeng's PayPal revenues, which showed $1.2 million in revenue.[26] The PayPal record contradicted Kirtsaeng's previous statement that he earned only $900,000 in revenues.[27] Following a sidebar discussion, the district court found the PayPal record was "'confusing and unfairly prejudicial.'"[28]

At the close of the trial, the district court charged the jury to determine (1) whether Kirtsaeng infringed the copyrights of each of the eight works, and (2) whether any such infringements were willful.[29] The court instructed the jury that if it found Kirtsaeng infringed Wiley's copyright, it could award between $750 and $30,000 in damages for each infringed work.[30] Moreover, the court instructed the jury that if it found Kirtsaeng's infringement to be willful, it could award up to $150,000 in damages for each infringed work, whereas, if it found that Kirtsaeng was unaware and had no reason to believe his conduct was an infringement, it could award as little as $200 for each infringed work.[31]

The jury found Kirtsaeng liable for willful copyright infringement of all eight works and awarded $75,000 in damages for each work.[32] On appeal Kirtsaeng claimed that the district court erred in finding the first-sale doctrine was not an available defense, that the court should have advised the jury that the first-sale doctrine was a defense to willful infringement, and that

22. *Id.* at *11.
23. *John Wiley*, 2011 U.S. App. LEXIS 16830, at *11.
24. *Id.*
25. *Id.* at *11–12.
26. *Id.* at *12.
27. *Id.*
28. *Id.*
29. *John Wiley*, 2011 U.S. App. LEXIS 16830, at *12–13.
30. *Id.* at *13.
31. *Id.*
32. *Id.*

admitting into evidence testimony concerning Kirtsaeng's gross receipts was "unduly prejudicial" with regard to the jury's damages assessment.[33]

III. Discussion

A. Majority Opinion

1. The First-Sale Doctrine Does Not Apply to Goods Manufactured Outside of the United States

a. Standard of Review

The Second Circuit, in the majority opinion by Judge Cabranes, found the threshold question to be whether the district court correctly held that in section 109(a) of the Copyright Act,[34] the phrase "'lawfully made under this title'" does not include copyrighted goods manufactured abroad.[35] Such legal issues of statutory interpretation are reviewed *de novo* to determine whether the lower court correctly interpreted the statute.[36]

b. Interpretation of the First-Sale Doctrine

Under section 602(a)(1) of the Copyright Act,[37] it is a copyright infringement to import into the United States copies of a work acquired outside of the United States without the authority of the copyright owner.[38] Kirtsaeng contended, however, that, even if the conduct at issue was covered by section 602(a)(1), the first-sale doctrine shielded him from liability.[39] The Second Circuit recognized the tension between § 602(a)(1) and § 109(a) to the extent that § 602(a)(1) seeks to provide copyright owners with broad control over the conditions in which their copyrighted material may be imported into the United States, while § 109(a) restricts the

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33. *Id.* at *14.

34. The first-sale doctrine is codified at 17 U.S.C. §109(a), which provides:

> Notwithstanding the provisions of section 106(3) [of the Copyright Act], the owner of a particular copy . . . lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy.

17 U.S.C. §109(a) (2008).

35. *John Wiley*, 2011 U.S. App. LEXIS 16830, at *14.

36. *Id.* When a district court decision presents only "a legal issue of statutory interpretation . . . [w]e review *de novo* whether the district court correctly interpreted the statute." Perry v. Dowling, 95 F.3d 231, 235 (2d Cir. 1996) (citing White v. Shalala, 7 F.3d 296, 299 (2d Cir. 1993)).

37. 17 U.S.C. § 602(a)(1) (2010). Section 602(a)(1) of the Copyright Act provides:

> Importation into the United States, without the authority of the owner of copyright under this title, of copies . . . of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies . . . under section 106, actionable under section 501.

38. *John Wiley*, 2011 U.S. App. LEXIS 16830, at *15.

39. *Id.*

ability of the copyright owner to limit distribution after an initial sale.[40] In *Quality King Distributors, Inc. v. L'anza Research International, Inc.*,[41] the U.S. Supreme Court addressed this tension for the first time.[42] *Quality King*, a corporation that manufactured and sold shampoos, conditioners, and other products, sold its products domestically and internationally.[43] Its prices to foreign distributors were 35% to 40% lower than the prices it charged domestic distributors.[44] The corporation brought suit against a distributor that purchased the corporation's products from one of the corporation's foreign distributors and then re-imported the products for re-sale in the United States.[45] The Court held, in a unanimous opinion, that § 109(a) in conjunction with § 106(3) limits the scope of § 602(a).[46]

In *John Wiley*, the Second Circuit found a "key factual difference at work in *Quality King*."[47] The court stated that the copyrighted items in *Quality King* were all manufactured in the United States.[48] Although the Supreme Court's opinion did not address whether § 109(a) applies to items manufactured abroad, the Second Circuit found that the opinion contained "instructive *dicta* that guides" the disposition of the present case.[49] The Supreme Court found that the first-sale doctrine, which is codified in § 109(a), does not include § 602(a), but that the two sections have independent meanings.[50] The Supreme Court further noted that copies lawfully made under another country's laws is an example of copies under § 602(a) that are not subject to the first-sale doctrine.[51] The Second Circuit asserted that the Supreme Court's opinion suggests that copyrighted material manufactured outside the United States cannot be subject to the first-sale doctrine under § 109(a).[52]

c. Textual Analysis of Section 109(a)

The Second Circuit conducted a textual analysis of the phrase "lawfully made under this title" contained in section 109(a) and found it to be insufficient to require Wiley's desired interpretation.[53] The court focused on the words "made" and "under," finding that the word

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40. *Id.* at *18.
41. 523 U.S. 135 (1998).
42. *John Wiley*, 2011 U.S. App. LEXIS 16830, at *18.
43. *Id.*
44. *Id.*
45. *Id.* at *18–19.
46. *Id.* at *19.
47. *Id.*
48. *John Wiley*, 2011 U.S. App. LEXIS 16830, at *19.
49. *Id.* at *20.
50. *Id.* (citing Quality King Distributors, Inc. v. L'anza Research Int'l, Inc., 523 U.S. 135, 148–49 (1998) (*Quality King*)).
51. *Id.* (citing *Quality King*, 523 U.S. at 148).
52. *Id.* at *21 (citing *Quality King*, 523 U.S. at 148–49).
53. *Id.* at *22, 27.

"made" is not a term of art in the Copyright Act.[54] Courts must draw the meaning of "under" from its context.[55]

The Second Circuit found Wiley's contention that this phrase must be interpreted to mean "lawfully made in the United States" to be consistent with the text of section 109(a).[56] Wiley further argued that copyrighted works can be "made" under Title 17 only if they are physically made in the United States, because Title 17 applies only in the United States.[57] The Second Circuit found the application of Title 17 outside of the United States to be more complicated than Wiley's assertion, because certain provisions of Title 17, such as § 104(b)(2),[58] account for activity occurring abroad.[59] Moreover, the court noted that if Congress had intended the first-sale doctrine to apply only to copyrighted works manufactured in the United States, it could have written the statute to say that specifically.[60] Finally, the court held that the phrase at issue was not clear and could be interpreted a variety of different ways.[61]

d. Relying on Section 602(a)(1) and *Quality King*

Since a textual analysis of section 109(a) left the Second Circuit concluding that the text was "utterly ambiguous," the court adopted an interpretation of that section consistent with both section 602(a)(1) and the Supreme Court's opinion in *Quality King*.[62]

The Second Circuit stated that the purpose of section 602(a)(1) is to grant copyright holders flexibility to treat domestic and foreign markets for a particular copyrighted work differently.[63] If section 109(a) applied only to works manufactured domestically, copyright owners could still control the circumstances surrounding importation of copies manufactured abroad.[64] Further, if the first-sale doctrine applied to every copyrighted work, under Title 17, manufactured abroad, then section 602(a)(1) would have no authority in the majority of cases.[65] The Second Circuit found that such an interpretation of the Copyright Act results in a finding that the first-sale doctrine should be interpreted as applying only to domestically manufactured works.[66]

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54. *John Wiley*, 2011 U.S. App. LEXIS 16830, at *23.
55. *Id.*
56. *Id.*
57. *Id.* at *23–24.
58. Section 104(b)(2) provides that "'[t]he works specified by sections 102 and 103, when published are subject to protection under this title if the work is first published in the United States or in a foreign nation that, on the date of first publication, is a treaty party[.]'" *Id.* at *25.
59. *Id.* at *24–25.
60. *John Wiley*, 2011 U.S. App. LEXIS 16830, at *26.
61. *Id.* at *27.
62. *Id.* at *28.
63. *Id.* at *29.
64. *Id.*
65. *Id.* at *29–30.
66. *John Wiley*, 2011 U.S. App. LEXIS 16830, at *30.

Further, the Second Circuit's interpretation of section 109(a) is, as noted by the court, consistent with the Supreme Court's reasoning in *Quality King*.[67] The court's reasoning indicates that it does not view works "lawfully made" under foreign laws as being "lawfully made" according to section 109(a) of the Copyright Act.[68]

e. Application of the Adopted Interpretation of Section 109(a)

Applying its adopted interpretation of section 109(a), that the first-sale doctrine applies only to domestically manufactured works, the Second Circuit concluded that the district court correctly decided that Kirtsaeng could not benefit from the first-sale doctrine, because all of the textbooks were manufactured abroad.[69] The Second Circuit further held that the phrase "lawfully made under this Title" in section 109(a) refers exclusively to works manufactured in territories where the Copyright Act is law and not to works manufactured under foreign laws.[70]

2. The District Court Did Not Err in Its Instructions to the Jury

Kirtsaeng contended that the district court erred by rejecting his proposed jury instructions and that the rejection was prejudicial because the charge was crucial to his argument that his pre-sale research regarding the legality of sales showed that the infringement was not willful.[71] The Second Circuit found Kirtsaeng's objection waived, because his counsel did not object to the final instructions during trial.[72] Further, Kirtsaeng failed to meet his burden under the plain error standard,[73] because there was no binding authority requiring the district court to allow the jury to consider the law's unsettled state when determining whether the infringement was willful.[74] Moreover, Kirtsaeng had the opportunity to introduce evidence

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67. *Id.* at *31.

68. *Id.* The Second Circuit noted that the Supreme Court in *Quality King* reasoned that the scope of section 602(a)(1) is broader than that of section 109(a), partially because section 602(a)(1) "'applies to a category of copies that are neither piratical nor 'lawfully made under this title.' That category encompasses copies that were 'lawfully made' not under the United States Copyright Act, but instead, under the law of some other country.'" *Id.* (quoting *Quality King*, 523 U.S. at 147).

69. *Id.* at *32.

70. *Id.*

71. *Id.* at *35.

72. *John Wiley*, 2011 U.S. App. LEXIS 16830, at *38. The Second Circuit cited *Jarvis v. Ford Motor Co.*, 283 F.3d 33, 57 (2d Cir. 2002), to support the point that failing "'to object to a jury instruction . . . prior to the jury retiring results in a waiver of that objection.'" *Id.*

73. Under Federal Rule of Civil Procedure 51(d)(2), the plain error standard requires a court's action to contravene an established rule of law. *Id.* at *35–36.

74. *Id.* at *36.

and argue that research led him to believe that his conduct was not unlawful.[75] The Second Circuit therefore concluded that the district court did not err in rejecting Kirtsaeng's proposed jury instructions.[76]

3. The District Court Did Not Err in Allowing Into Evidence the Amount of the Defendant's Gross Revenues

Kirtsaeng contended that the district court's allowance into evidence of the amount of his gross revenues was prejudicial, because it confused the jury regarding the amount of damages that Wiley should have been awarded.[77] Kirtsaeng did not object to the court's evidentiary ruling, so he had to show that the court committed plain error.[78] The Second Circuit noted that, in order to overcome its deference to district court decisions admitting evidence pursuant to Federal Rule of Evidence 403(b) and reverse the court's evidentiary ruling, the ruling must be "an abuse of discretion."[79] The Second Circuit found abundant evidence independently supporting the jury's finding of willfulness; thus, the admission was not prejudicial.[80] The court held that the district court's admission was neither an abuse of discretion nor plain error.[81] Therefore, the court did not need to address whether Kirtsaeng's counsel properly objected to the admission into evidence.[82]

B. Dissenting Opinion

In dissent, Judge Murtha argued that the statutory text does not specifically refer to a place of manufacture; rather, the question posed by the text is whether a particular copy was lawfully manufactured under Title 17.[83] The dissent concluded that a copy authorized by a U.S. copyright holder is lawful under U.S. copyright law, regardless of where it was manufactured.[84] Applying this reasoning, the dissent argued that Wiley, a U.S. copyright holder, authorized its subsidiary to print copies outside of the United States, which were then purchased and imported into the United States.[85] Moreover, the dissent argued that if Congress intended section 109(a) to apply only to copies manufactured in the United States, it could have stated that.[86] Congress's omission of the place of manufacture was intentional, and thus section 109(a) is not limited to copies manufactured in the United States.[87] Further, the dissent contended that because the Supreme Court in *Quality King* did not specifically refer to the place of

75. *Id.*
76. *Id.*
77. *Id.* at *37.
78. *John Wiley*, 2011 U.S. App. LEXIS 16830, at *38.
79. *Id.*
80. *Id.* at *39.
81. *Id.* at *38–39.
82. *Id.* at *38.
83. *Id.* at *44.
84. *John Wiley*, 2011 U.S. App. LEXIS 16830, at *45.
85. *Id.*
86. *Id.* at *46.
87. *Id.* at *46–47.

manufacture, its decision did not directly apply to whether or not the first-sale doctrine is applicable to copies manufactured abroad.[88]

The dissent drew upon economic justifications to support application of the first-sale doctrine to copies manufactured outside of the United States.[89] Not applying the first-sale doctrine to foreign-made copies would result in high transaction costs and lead to secondary market uncertainty, because copyright holders would control all commercial activities involving their works.[90] Moreover, this would afford greater copyright protection to foreign-made copies, because the owner of the foreign work would be required to obtain permission from the copyright holder, whereas, once a domestically manufactured work is sold, the copyright holder loses control over its distribution.[91] The dissent argued that it was not Congress's intent to provide an incentive to manufacture copies abroad.[92]

The dissent argued that application of the first-sale doctrine to foreign-made copies will not leave section 602(a) without meaning.[93] The section applies to copies of works that are piratical copies as well as works lawfully manufactured under a source of law other than Title 17.[94] The dissent further contended that there was nothing in the history, purpose, or polices of the first-sale doctrine that limited its applicability to copies of works manufactured in the United States.[95]

IV. Conclusion

The majority held that the first-sale doctrine does not apply to copyrighted works manufactured outside the United States; the district court did not err in failing to charge the jury as to the first-sale doctrine's unsettled state; and the district court did not err in its admission into evidence Kirtsaeng's gross revenues.[96] In contrast, the dissenting opinion concluded that the first-sale defense should apply to copyrighted works that have U.S. copyright protection.[97]

Christina Bezas

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88. *Id.* at *52.
89. *Id.* at *48–49.
90. *John Wiley*, 2011 U.S. App. LEXIS 16830. at *49.
91. *Id.*
92. *Id.*
93. *Id.* at *51.
94. *Id.*
95. *Id.* at *51–52.
96. *John Wiley*, 2011 U.S. App. LEXIS 16830, at *40.
97. *Id.* at *41.

Sakka (Litigation Guardian of) v. Société Air France

[2011] O.J. No. 1424; 2011 CarswellOnt 2129; 2011 ONSC 1995

The Ontario Superior Court of Justice interpreted Article 29 of the Warsaw Convention, pursuant to the intent of its drafters, as applying to the exclusion of local law; it granted the defendant Société Air France's motion to dismiss on the ground that the plaintiff failed to bring a cause of action within the two-year window under Article 29.

I. Holding

In *Sakka (Litigation Guardian of) v. Société Air France*,[1] the Ontario Superior Court of Justice held that the defendant Société Air France (Air France) was entitled to summary judgment because the plaintiffs failed to commence their action within the two-year limitation period, and that the plaintiffs' former lawyer, Jacques Gauthier, was not entitled to dismissal of their negligence case against him on the ground that French law allowed the limitation period to be tolled for disabilities,[2] such as that of the plaintiff Marwa Sakka.[3]

Timely filing is a precondition to filing suit under Article 29 of the Warsaw Convention.[4] The court held that the intention of the drafters of Article 29 should be controlling, as opposed to the interpretation offered under French law,[5] which was that adopted by the French Cour de cassation in *Veuve Kamara c. Cie Nationale Air-France*[6] and other cases.[7] In addition, the court dismissed the argument made by Gauthier that French law allowed a longer period, because the Convention provides a complete and exclusive set of rules for determining liability of airplane carriers.[8]

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1. [2011] O.J. No. 1424; 2011 CarswellOnt 2129; 2011 ONSC 1995.
2. A minority of courts did interpret Article 29 as allowing for the tolling of the limitation (*see* Halmos v. Pan Am. World Airways, Inc., 727 F. Supp. 122, 123 (S.D.N.Y. 1989) *and* Joseph v. Syrian Arab Airlines, 88 F.R.D. 530, 532 (S.D.N.Y. 1980)) but were subsequently overruled (*see* Duay v. Continental Airlines, Inc., No. H-10-cv-1454 (S.D.Tex. Dec. 21, 2010)).
3. *Société Air France*, 2011 ONSC 1995 at para. 35.
4. Convention on the Unification of Certain Rules Relating to International Carriage by Air, opened for signature Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, R.S.C. 1985, c. C-26 (R.S.C., ch. C-26 (1985) (Can.)), entered into force on Oct. 29, 1934; *see also* Federico Ortino and Gideon R.E. Jurgens, *The IATA Agreements and the European Regulation: The Latest Attempts in the Pursuit of a Fair and Uniform Liability Regime for International Air Transportation*, 64 J. AIR L. & COM. 377, 380–85 (1999) (providing a brief introduction into the history of the Warsaw Convention) *and* Andreas F. Lowenfeld and Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498–501 (explaining the reasons behind the formulation of the Warsaw Convention and its effect on international law).
5. *Société Air France*, 2011 ONSC 1995 at para. 26.
6. D. S. I968, J. 745 (Cass. I'ère civ. 24 June 1968). This is the case cited by the Ontario Superior Court of Justice.
7. Other leading cases on this point are Société Nationale des transports aériens la Compagnie Air France c. Missirian, Bull. Civ. I 1963, p. 471, no. 560, and Société Air Algérie c. Balouka Ricchiero et autres, 24 RFDA 85 (Cass. Comm. 30 June 1969).
8. *Id.* at para. 30.

II. Facts and Procedural History

Plaintiff Marwa Sakka (Marwa) and her mother, the plaintiff Maram Sakka (Maram), flew Air France from Toronto, Canada, to Paris, France, on May 23, 2003.[9] Marwa suffers from cerebral palsy, which prevents her from walking properly.[10] They alleged that when the flight arrived in Paris, Maram attempted, to no avail, to obtain assistance from Air France personnel in transferring Marwa from her seat to the wheelchair that was located at the bridge platform leading into the airport.[11] As a result, Maram allegedly was forced to carry her daughter to the wheelchair herself.[12] While carrying her, Maram allegedly tripped on the uneven surface between the exit door of the plane and the bridge, resulting in injury to Marwa's knees.[13]

Gauthier commenced the action almost six years later, on May 20, 2009.[14] The defendant Air France moved for summary judgment under Article 29 of the Convention[15] and the plaintiffs brought a cross-motion to contest the proper interpretation of that article.[16] The Ontario Superior Court of Justice granted summary judgment in favor of Air France on the ground that failure to commence the action within the two years of the date of the plaintiffs' departure from Paris was dispositive of the claim against it.[17] The plaintiffs subsequently brought suit against Gauthier for negligence in failing to properly commence the action within the two-year limitation period.[18]

III. Discussion

A. Warsaw Convention

In 1929, various nations, including Canada and France, convened in Warsaw, Poland, and signed a treaty entitled the Convention on the Unification of Certain Rules Relating to International Carriage by Air (the Warsaw Convention)[19] in order to regulate uniformly the state of international carriage by air and the liability of the carrier.[20] The Warsaw Convention and its amending conventions and protocols were incorporated into the law of Canada by the Carriage by Air Act.[21] With effect from November 4, 2003, the Warsaw Convention was

9. *Id.* at para. 5.
10. *Id.* at para. 4.
11. *Id.* at para. 6.
12. *Id.*
13. *Société Air France*, 2011 ONSC 1995 at para. 6.
14. *Id.* at para. 7.
15. *Id.* at para. 1.
16. *Id.* at para. 2.
17. *Id.* at para. 35.
18. *Id.* at para. 10.
19. *Supra* note 4.
20. *Société Air France*, 2011 ONSC 1995 at para. 13.
21. R.S.C. 1985, chap. C-26, as amended.

superseded in Canada by the Montreal Convention,[22] but the events relevant to *Société Air France* occurred before that date and therefore are governed by the Warsaw Convention.

1. Article 17

Article 17 sets forth the scope of when the Warsaw Convention applies by limiting it to injuries and deaths occurring while on the aircraft or in the course of boarding or exiting the aircraft.[23] The Warsaw Convention applies in this case because the alleged injury occurred while the plaintiff was attempting to disembark the aircraft.[24]

2. Article 29

Interpretation of Article 29 is the main contested issue in this case. Under this provision, the time to bring an action is limited to two years.[25] The plaintiff was injured on May 24, 2004, and the action was commenced on May 20, 2009.

B. Jurisdiction

Gauthier argued that Ontario did not have jurisdiction over this case[26] because there was no evidence of the circumstances in which the plane tickets were purchased, and Article 28 of the Convention did not establish jurisdiction in Ontario.[27] The Ontario Superior Court of Justice disagreed and predicated jurisdiction upon Article 28, which states that the plaintiffs have the option of commencing the action at the place of destination.[28] Here, the place of destination was Canada; therefore, the court had proper jurisdiction to decide this action. Courts have consistently held that the place of destination under Article 28 is where the "contract of carriage ends."[29] The plaintiffs' contract of carriage began and ended in Canada, so it is justified that Ontario would have jurisdiction.[30]

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22. Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, opened for signature May 28, 1999, S. Treaty Doc. No. 106-45, 2242 U.N.T.S. 309, entered into force on Nov. 4, 2003.

23. *Supra* note 4, at art. 17.

24. *Société Air France*, 2011 ONSC 1995 at para. 32.

25. *Supra* note 4, at art. 29.

26. The court observed, "It is unusual for this defendant to raise a jurisdictional argument under Article 28 and maintain that Ontario has no jurisdiction in the matter. It is for the defendant Société Air France to challenge the jurisdiction of the court." *Société Air France*, 2011 ONSC 1995 at para. 31.

27. *Id.* at para. 25.

28. *Id.* at para. 15.

29. *Supra* note 4, at 28. *See* Gayda v. LOT Polish Airlines, 702 F.2d 424, 425 (2d Cir. 1983) (stressing that under Article 28, the destination listed in the contract for carriage is what dominates); *see also* Duff v. Varig Airlines, Inc., 185 Ill.App.3d 992, 996 (Illinois 1989) (stating that the "destination" for purposes of Article 28 is the final stop as indicated by the passenger's ticket).

30. *Société Air France*, 2011 ONSC 1995 at para. 31.

C. Applicable Law

1. Interpretation Under French Domestic Law

Gauthier argued that because the injury occurred in France, French law should apply, and thus the French interpretation of Article 29 should be enforced.[31] Under this interpretation, Article 29 is classified as a statute of limitation.[32] This in turn signifies that the minority, disability, or guardianship of the plaintiff, as predicated under the French Civil Code, can toll the limitation and allow a suit to be commenced in France after it has expired.[33] Gauthier supported his argument with the affidavit of François Balsan, a French lawyer, which stated that the decisions of the French High Court, Cour de Cassation, supported the theory that the limitation under Article 29 can be tolled by the plaintiff's minority, disability, or guardianship.[34] Gauthier contended that because the plaintiff Maram is the mother of the plaintiff Marwa, they are entitled to the tolling of Article 29 under the guardian prong[35] and the disability prong.[36] According to Gauthier, Maram, as litigation guardian of her disabled daughter, could still bring an action under French law.[37]

2. Interpretation Under the Drafter's Intent of Article 29

Conversely, the defendant Air France argued that the two-year limit under Article 29 was not subject to tolling because the provision is a condition precedent to the commencement of a suit, and as such cannot be modified under domestic law.[38] The defendant also argued that as a general matter, the interpretation of the Convention has supported the theory that "the High Contracting Parties drafted a uniform international code, which could be applied by the courts of all High Contracting parties, without reference to the rules of their own domestic law."[39] Therefore, it is the defendant Air France's contention that allowing Article 29 to be interpreted under French law "would undermine the uniform regulation of air carrier liability that the Warsaw Convention was designed to foster."[40]

The defendant Air France also cited American and British jurisprudence to bolster the general theory that the drafters of the Warsaw Convention intended to implement a *uniform* set of guidelines that eliminated the complications of conflicting domestic laws in the signatory nations. In *El Al Israel Airlines Ltd. v. Tseng*,[41] which did not involve Article 29, Justice Ginsburg of the U.S. Supreme Court stated, "[G]iven the Convention's comprehensive scheme of

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31. *Id.* at para. 22.
32. *Id.* at para. 24.
33. *Id.*
34. *Id.* at para. 23.
35. *Id.* at para. 24.
36. This prong is alleged to be relevant because of the plaintiff Marwa's cerebral palsy.
37. *Société Air France*, 2011 ONSC 1995 at para. 24.
38. *Id.* at para. 17.
39. *Id.* at para. 18.
40. *Id.*
41. 525 U.S. 155 (1999).

liability rules and its textual emphasis on uniformity, we would be hard put to conclude that the delegates at Warsaw meant to subject air carriers to the distinct, nonuniform liability rules of the individual signatory nations."[42] Similarly, the House of Lords in *Sidhu v. British Airways Plc*[43] stated that "[the Warsaw Convention] . . . is intended to be uniform and to be exclusive also of any resort to the rules of domestic law."[44]

D. Determining the Controlling Law

The main issue centered on whether the court should adopt the interpretation set forth by the drafters of Article 29 or the interpretation set forth under French domestic law. The court did not dispute that the French position was as represented, but ultimately decided to adopt the interpretation set forth by the drafters, stating that validation through legislative history can be supported under Article 32 of the Vienna Convention on the Law of Treaties.[45] Under Article 32 of the Vienna Convention, if there is any ambiguity as to a treaty provision, preparatory materials can be reviewed to aid in interpretation.[46] The Minutes of the Second Conference on Private Aeronautical Law[47] showed that delegates from the Warsaw Convention intended to avoid situations where domestic law might apply and create ambiguity regarding the two-year limitation under Article 29.[48] The British Columbia Court of Appeals in *Gal v. Northern Mountain Helicopters Inc.*[49] and the U.S. Court of Appeals for the Second Circuit in *Fishman by Fishman v. Delta Air Lines Inc.*[50] both similarly held that the plain meaning of Article 29 under the Convention was that the two-year time frame was a necessary element of the cause of action and, thus, a precondition that is not subject to tolling.[51] The Ontario Superior Court of Justice specifically agreed with the interpretation of Article 29 set forth in *Northern Mountain Helicopters*[52] and stated that "the overwhelming weight of international authorities" supported the view held by the defendant Air France.[53]

IV. Conclusion

The Ontario Superior Court of Justice granted the defendant Air France's motion to dismiss based on the plaintiffs' failure to bring a cause of action within two years under Article 29

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42. *Société Air France*, 2011 ONSC 1995 at para. 18 (quoting El Al Israel Airlines Ltd v. Tseng, 525 U.S. 155, 157 (1999)).
43. [1997] 1 All E.R. 193 (U.K. H.L.).
44. *Société Air France*, 2011 ONSC 1995 at para. 19 (quoting Sudhu v. British Airways plc, [1997] 1 All E.R. 193, 212 (U.K. H.L.)).
45. *Id.* at para. 29 (citing Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980)).
46. *Id.*
47. Second International Conference on Private Aeronautical Law, October 4–12, 1929, Warsaw, Minutes 110–13 (R.C. Horner & D. Legrez transls. 1975).
48. *Société Air France*, 2011 ONSC 1995 at para. 29.
49. 1999 CarswellBC 1852 (B.C. C.A.).
50. 132 F.3d 138 (2d Cir. 1998).
51. *Société Air France*, 2011 ONSC 1995 at para. 27.
52. *Id.*
53. *Id.* at para. 28.

of the Warsaw Convention.[54] In line with this reasoning, the court also dismissed Gauthier's motion to dismiss the case against him,[55] affirming the international consensus that Article 29 of the Convention should be construed with deference to the intent of the drafters and not the perspective of the participating domestic courts to the treaty.

Philip Kim

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54. *Id.* at para. 35.

55. *Id.* at para. 36.

NML Capital, Ltd. v. Banco Central de la República Argentina

652 F.3d 172 (2d Cir. July 5, 2011)

The Second Circuit held that funds in a central bank or monetary authority's own account are immune from attachment regardless of whether that bank or authority is independent from its parent state.

I. Holding

In *NML Capital, Ltd. v. Banco Central de la República Argentina*,[1] the U.S. Court of Appeals for the Second Circuit held that Argentine funds in the Federal Reserve Bank of New York (FRBNY) were immune from attachment under § 1611(b)(1)[2] of the Foreign Sovereign Immunities Act of 1976 (FSIA).[3] The court held that the plain language, history, and structure of § 1611(b)(1) immunized a foreign central bank or monetary authority's property held for its own account, whether or not the bank or authority was independent from its parent state.[4] The court adopted a modified central bank functions test, which it found that Banco Central de la República Argentina (BCRA) met.[5] The court also found that BCRA's immunity was not waived, and therefore the funds at issue could not be attached.[6]

II. Facts and Procedure

In December 2001, Argentine President Nestor Kirchner authorized a delay in repaying funds the Republic of Argentina (Argentina) had borrowed from foreign creditors.[7] Argentina began restructuring programs and exchanged previously defaulted debt instruments for new

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1. 652 F.3d 172 (2d Cir. 2011).
2. 28 U.S.C. § 1611(b)(1) (2006). *See* Paul L. Lee, *Central Banks and Sovereign Immunity*, 41 COLUM. J. TRANSNAT'L L. 327 (2003) (reviewing the FSIA framework for resolving claims of sovereign immunity for foreign central banks and their property); *see also* Note, *Too Sovereign to Be Sued: Immunity of Central Banks in Times of Financial Crisis*, 124 HARV. L. REV. 550 (2010) (discussing the need for sovereign immunity of central banks, especially during financial crises).
3. Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).
4. *NML Capital*, 652 F.3d at 187–88.
5. *Id*. at 194.
6. *Id*. at 196.
7. *Id*. at 175. *See generally* Jayson J. Falcone, *Argentina's Plight—An Unusual Temporary Solution to a Sovereign Debt Crisis*, 27 SUFFOLK TRANSNAT'L L. REV. 357 (2004) (detailing Argentina's sovereign debt defaults between the mid 1990s and 2002).

instruments with less favorable terms.[8] The plaintiffs NML Capital Ltd. and EM Ltd. refused to participate in these programs and sued Argentina in U.S. federal court instead.[9] Argentina had waived its right to sovereign immunity on the debt instruments.[10] The plaintiffs received a final judgment in the U.S. District Court for the Southern District of New York (S.D.N.Y.) for nearly $2.4 billion.[11] The plaintiffs then sought to attach and restrain FRBNY funds in a BCRA account to help execute the judgments.[12]

The plaintiffs argued that two emergency decrees issued by the Argentine president Nestor Kirchner (Kirchner Decrees) effectively transferred ownership of some BCRA assets, including certain assets held at FRBNY, to Argentina.[13] In *EM Ltd. v. Republic of Argentina* (*EM* I),[14] the plaintiffs claimed the Kirchner Decrees changed the legal status of assets held in a BCRA account at the FRBNY (FRBNY funds).[15]

The plaintiffs obtained attachment and restraining orders; however, those amended notices were vacated because the Kirchner decrees did not legally transfer BCRA funds to Argentina.[16] While the initial litigation, *EM* I, was pending, the plaintiffs initiated this suit seeking a declaratory judgment that BCRA was liable for Argentina's debts, because Argentina consistently disregarded BCRA's separateness.[17] The district court's holding assumed that immunity under § 1611(b)(1) is dependent on a central bank's independence from its parent state.[18]

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8. *NML Capital*, 652 F.3d at 176.
9. *Id*.
10. *Id*. at 175–76.
11. *Id*. at 176.
12. *Id*. at 176–77.
13. *Id*. at 179.
14. 473 F.3d 463 (2d Cir. 2007).
15. *NML Capital*, 652 F.3d at 179.
16. *Id*. at 181.
17. *Id*.
18. *Id*. at 187–88 (citing EM Ltd. v. Republic of Argentina, 720 F. Supp. 2d 273, 304 (S.D.N.Y. 2010)).

III. Discussion

A. Context

In an opinion by Judge Cabranes, the U.S. Court of Appeals recounted the history of Argentine defaults and refusal to honor promises made to creditors.[19] However, the court also noted the political reasons behind the FSIA's narrow exceptions for attaching a foreign state's assets.[20] Specifically, Congress worried about potential foreign investment and foreign relations problems if a foreign sovereign's funds could be attached without an explicit waiver.[21]

Argentina and its nationalized corporations face similar litigation, as seen recently with Energia Argentina S.A. (ENARSA), an Argentine energy company. In *NML Capital, Ltd. v. Argentina*,[22] the S.D.N.Y. found that Argentina's broad control over ENARSA's general activities did not render it an alter ego of Argentina.[23] Further, Argentina did not violate ENARSA's independent status by subsidizing ENARSA's losses or using it to carry out national policies.[24]

B. Issue and Claim Preclusion

The court of appeals affirmed the district court's decision that the second set of claims was not barred under either issue or claim preclusion.[25] Thus, the plaintiffs could assert a different theory from the one proposed in *EM* I. Here, the plaintiffs argued that Argentina's consistent disregard for BCRA's independence impaired BCRA's separateness and transformed BCRA into Argentina's alter ego.[26] Although "both sets of motions ultimately asked the District Court to determine whether the FRBNY funds are attachable interests of the Republic,"[27] the legal and factual issues presented in the two claims were very different.

The motion to attach the FRBNY funds was not barred by issue preclusion, either.[28] The original question was whether the FRBNY funds were attachable because the Kirchner Decrees transferred title from BCRA to the republic.[29] In contrast, the plaintiffs subsequently asked whether the FRBNY funds were attachable because the plaintiffs overcame the presumption of judicial separateness that BCRA would normally be afforded.[30]

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19. *EM Ltd.*, 473 F.3d at 466 n.2 (detailing Argentina's history of defaults from the year 1827 until the present).
20. *NML Capital*, 652 F.3d at 189 (quoting FSIA House Report 31, *reprinted in* 1976 U.S.C.C.A.N. 6604 at 6630).
21. *Id.*
22. 2011 WL 524433 (S.D.N.Y. Feb. 15, 2011).
23. *Id.* at *1.
24. *Id.*
25. *NML Capital*, 652 F.3d at 184.
26. *Id.* at 181.
27. *Id.* at 185–86.
28. *Id.* at 197.
29. *Id.* at 185–86.
30. *Id.*

C. Immunity From Attachment

The Second Circuit reversed the district court's decision that the FRBNY funds were not immune from attachment under § 1611(b)(1).[31] It held that the district court "misread the FSIA when it concluded that a court facing the question of whether the assets of a central bank are attachable property under the FSIA must first decide whether the central bank is entitled to the presumption of independence from its parent state."[32] The court of appeals held that the statute immunized property of a foreign central bank or monetary authority without regard to whether the bank or authority is independent from its parent state.[33] First, the court found that the statute anticipated the possibility that property held by the central bank may also be property of the sovereign state.[34] Second, when Congress passed the FSIA, it had reason to believe that foreign banks and authorities "would not be independent of their parent states because, at that time, most were not."[35]

The S.D.N.Y.'s decision in the ENARSA case focused on the energy company's independence from Argentina.[36] In ENARSA, the court found that Argentina did not control the company's daily operations in a manner that implicated the alter ego theory.[37] However, here, the Court of Appeals read the FSIA to grant immunity regardless of the relationship between BCRA and Argentina.[38]

D. Property "Held for Its Own Account"

Since the definition of the phrase "held for its own account" was a matter of first impression in the second circuit,[39] the court looked to three competing definitions.[40] Ultimately, the court adopted a modified central bank functions test[41] in which "property of a central bank is immune from attachment if the central bank uses such property for central banking functions

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31. *NML Capital*, 652 F.3d at 187–88.
32. *Id*.
33. *Id*.
34. *Id*. at 189–90.
35. *Id*. at 190 (noting that central banks function as departments of ministries of finance and were not independent).
36. NML Capital, Ltd. v. Argentina, 2011 WL 524433 (S.D.N.Y. Feb 15, 2011).
37. *Id*. at *7.
38. *NML Capital*, 652 F.3d at 187–88.
39. *Id*. at 191.
40. *Id*. at 191–92 (defining "held for its own account" as (1) property used for traditional central banking activities; (2) an account is in the central bank's name; or (3) property held for the central bank's own profit or advantage).
41. *See* Ernest T. Patrikis, *Foreign Central Bank Property: Immunity From Attachment in the United States*, 1982 U. ILL. L. REV. 265, 277 (1982).

as such functions are normally understood, irrespective of their commercial nature."[42] Since the modified test "combines the plain language of the statute and central bank activities tests as conjunctive requirements," the court thought it best accorded with the text and purpose of § 1611(b)(1).[43]

The court's decision means that funds held in an account in the name of a central bank are presumed to be immune from attachment under § 1611(b)(1).[44] The record clearly established that BCRA engaged in central banking functions.[45] The FRBNY funds were held in BCRA's name at FRBNY.[46] Therefore, under the modified central bank functions test, BCRA held the property for its own account.

Although funds held in a central bank's account are presumed to be immune from attachment, that presumption is rebuttable.[47] A plaintiff may demonstrate "with specificity that the funds are not being used for central banking functions."[48] Although it is an uphill battle for the challenging party to attach funds, a central bank cannot shield itself from all liability merely by claiming that the funds are commercial in nature.

E. Waiver of Immunity

Although Argentina effectively waived its immunity in the original debt instrument,[49] its statement of waiver could not be interpreted as an effective waiver of BCRA's immunity. Because neither BCRA nor the Republic expressly waived BCRA's immunity, the court refused to find an express waiver in this instance. The court found that even though the Republic's waiver of immunity from attachment was worded broadly, it did not clearly and unambiguously waive BCRA's immunity from attachment.[50]

IV. Conclusion

The court of appeals held that the funds were immune from attachment and execution. In so doing, the court respected the Foreign Sovereign Immunities Act and enforced the "strict

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42. *NML Capital*, 652 F.3d at 194.
43. *Id*. at 194.
44. *Id*.
45. *Id*. (finding BCRA's accumulating "foreign exchange reserves to facilitate the regulation of the peso and the custody of cash reserves of commercial banks pursuant to central bank regulations are paradigmatic central banking functions").
46. *Id*. at 194–95.
47. *Id*. at 197.
48. *NML Capital*, 652 F.3d at 194.
49. *See* FSIA § 1611(b)(1) (noting the only exception to the immunity for property of a central bank or monetary authority held for its own account is when the bank or authority or the parent government explicitly waived the immunity from attachment in aid of execution or from execution).
50. *NML Capital*, 652 F.3d at 195–96.

limitations on attaching and executing upon assets of a foreign state."[51] The court adopted a modified central bank functions test, after citing two S.D.N.Y. decisions that adopted that test.[52] Although Argentina explicitly waived its immunity, BCRA did not explicitly waive its immunity, nor did Argentina explicitly waive BCRA's immunity.

Ultimately, the deference afforded the FSIA trumped any condemnation of Argentine default policy. Accordingly, the court vacated the lower court's opinion and remanded the case for proceedings consistent with its opinion.

Litigation continues in the S.D.N.Y.,[53] and the plaintiffs are "engaged in a legitimate effort to find assets which can be applied through court process to satisfy judgments against the Republic of Argentina, which the Republic refuses to pay in violation of its legal obligations."[54]

However, the ongoing battle between the plaintiffs and the BCRA demonstrates the difficulty inherent in attaching a foreign sovereign's funds under the FSIA.

Joshua Alter

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51. *Id*. at 196.

52. *See, e.g.*, Weston Compagnie de Finance et d'Investissement, S.A. v. La República del Ecuador, 823 F. Supp. 1106, 1112 (S.D.N.Y. 1993); Olympic Chartering, S.A. v. Ministry of Indus. & Trade of Jordan, 134 F. Supp. 2d 528, 534 (S.D.N.Y. 2001).

53. NML Capital, Ltd. v. Republic of Argentina, 2011 WL 3897827 (S.D.N.Y. Sept. 2, 2011) (denying the plaintiffs' subpoena on the manager of the Bank for International Settlements (BIS) to compel discovery of BCRA business at the BIS).

54. *Id*. at *1.

Walters v. Industrial and Commercial Bank of China, Ltd.

2011 WL 2643697 (2d Cir. March 29, 2011)

The Second Circuit held that the Foreign Sovereign Immunities Act's execution-immunity provision may be applied when the foreign sovereign entity fails to appear.

I. Holdings

In *Walters v. Industrial and Commercial Bank of China, Ltd.,*[1] the Court of Appeals for the Second Circuit, in an opinion by Judge Raggi, affirmed that the Foreign Sovereign Immunities Act's (FSIA)[2] execution immunity may be applied even if the foreign sovereign does not appear.[3] The Court reasoned, as its sister courts have held,[4] that the plain meaning of 28 U.S.C. § 1609 permits the issue to be raised sua sponte or by a third party.[5] The Court accorded the Industrial and Commercial Bank of China's (the Bank) standing to raise the execution-immunity issue.[6]

The Court also held that the People's Republic of China (China) did not waive its execution immunity under § 1610(a)(1) by its commercial and tortious conduct or failure to appear.[7] The Court reasoned that even though China's commercial and tortious conduct established subject-matter jurisdiction, that conduct could not establish an exception to execution immunity.[8] It also stated that failure to appear was not a sufficiently affirmative act to manifest intentional relinquishment of immunity, as required by § 1610(a)(1).[9]

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1. 2011 WL 2643697 (2d Cir. 2011) (*Walters*).
2. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1609 (2011), which states in its entirety:

   > Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in section 1610 and 1611 of this chapter.

3. *Walters*, 2011 WL 2643697 at *8.
4. *Id.* at *8 (citing Rubin v. Islamic Republic of China, 637 F.3d 783, 801 (7th Cir. 2011); Peterson v. Islamic Republic of Iran, 627 F.3d 1117, 1128–29 (9th Cir. 2010); Walker Int'l Holdings Ltd. v. Republic of Congo, 395 F.3d 229, 233 (5th Cir. 2004)).
5. *Id.* at *8–9.
6. *Id.* at *10.
7. *Id.*
8. *Id.* at *11.
9. *Walters*, 2011 WL 2643697 at *12.

The district court's decision to dismiss without prejudice petitioners' argument that it satisfied the requirements of § 1610(a)(2) and § 1610(c)[10] was affirmed, because petitioners did not state their claim with sufficient particularity.[11]

In this case's prior history, the District Court for the Southern District of Missouri issued a default judgment against only China after China did not appear to contest the claims against it.[12] Because the decision was entered only against China, the Court of Appeals held that petitioners could not execute their default judgment against China's agencies or instrumentalities.[13]

II. Facts and Procedural History

On November 11, 1990, Kale Ryan Walters was killed while hunting with his father allegedly because a Chinese-manufactured gun malfunctioned and discharged.[14] In November 1993, Debbie and Max Walters, the deceased's parents, brought suit for product liability, negligence, and breach of contract in the U.S. District Court for the Western District of Missouri against China and entities allegedly controlled by China.[15] On October 22, 1996, the district court entered a default judgment against China for $10 million.[16]

For ten years, the Walterses tried unsuccessfully to collect their default judgment.[17] In October 2006, the District Court for the Western District of Missouri granted the Walterses' request to extend the judgment for ten more years so that they could continue to try to execute the default judgment.[18] On September 1, 2009, the Walterses filed a petition requesting a turnover order to enforce the default judgment against the People's Republic of China by collecting China's assets in the possession of the Industrial and Commercial Bank of China.[19] They served restraining notices and subpoenas on the New York branches of the respondent

10. *Id.* at *3 (citing Order ¶¶ 4–5, Walters v. People's Republic of China, No. 18 Misc. 302 (S.D.N.Y. Feb. 2, 2010)).

11. *Id.* at *13.

12. *Id.* at *1 (citing Final Judgment, Walters v. Century Int'l Arms, Inc., No. 93–5118–CV–SW–1 (W.D. Mo. Oct. 22, 1996).

13. *Id.* at *14.

14. *Id.* at *1.

15. *Walters,* 2011 WL 2643697 at *1.

16. *Id.*

17. *Id.* at *2.

18. *Id.* (citing Order, Walters v. People's Republic of China, No. 93–5118–CV–SWDW (W.D. Mo. Oct. 18, 2006)).

19. *Walters*, 2011 WL 2643697 at *2 (citing Order ¶¶ 4–5, Walters v. People's Republic of China, No. 18 Misc. 302 (S.D.N.Y. Feb. 2, 2010)).

banks.[20] The banks moved to vacate the restraining notices and quash the subpoenas; the district court granted this motion on December 2, 2009.[21]

On February 2, 2010, the U.S. District Court for the Southern District of New York also dismissed the petition.[22] The district court dismissed without prejudice the parts of the petition that could conceivably fall within § 1610(a)(2) and dismissed with prejudice the parts of the petition seeking assets beyond the scope of the exception to execution immunity described in 29 U.S.C. § 1610(a)(2).[23] Petitioners appealed, and on July 7, 2011, the Second Circuit affirmed.

III. Discussion

A. Standard of Review

Appellate courts review district court rulings for orders of attachment or execution under the FSIA for abuse of discretion.[24] Abuse of discretion is found only if the district court "applies legal standards incorrectly, relies on clearly erroneous findings of fact, or proceeds on the basis of an erroneous view of the applicable law."[25] Appellate courts interpret legal conclusions under the FSIA de novo.[26]

B. The FSIA Establishes Narrower Jurisdictional Immunity Than Execution Immunity

To frame its treatment of the petitioners' appellate arguments, the court discussed the differences between the parameters of jurisdictional immunity and execution immunity under the FSIA.[27] The court noted that §1604, which governs jurisdictional immunity, is subject to different exceptions than § 1609, which governs execution immunity.[28] The court concluded that the provisions governing the two different types of immunity "operate independently,"[29] and that execution immunity is broader than jurisdictional immunity.[30] Important to this case was the fact that §1605(a)(2) extends jurisdiction to courts over foreign states when the claim arises out

20. *Walters*, 2011 WL 2643697 at *2 (citing Order ¶¶ 4–5, Walters v. People's Republic of China, No. 18 Misc. 302 (S.D.N.Y. Feb. 2, 2010)).
21. Walters v. People's Republic of China, 672 F. Supp. 2d 573, 575 (S.D.N.Y. 2009).
22. *Walters*, 2011 WL 2643697 at *3 (citing No. 18 Misc. 302).
23. *Id.*
24. *Id.* (citing Aurelius Capital Partners, L.P. v. Republic of Argentina, 584 F.3d 120, 129 (2d Cir. 2009)).
25. *Id.* (citing *Aurelius*, 584 F.3d at 129).
26. *Id.* at *4 (citing Carpenter v. Republic of Chile, 610 F.3d 776, 778 (2d Cir. 2010)).
27. *Id.* at *4–7.
28. *Walters*, 2011 WL 2643697 at *5.
29. *Id.* at *6.
30. *Id.*

of a foreign state's commercial conduct in the United States.[31] However, under § 1610(a)(2) the exception to execution immunity extends only to property "that is or was used for the commercial activity upon which the claim was based."[32] This interpretation of the FSIA inhibits the plaintiffs from collecting on a judgment in circumstances where a foreign sovereign partakes in tortious commercial conduct in the United States but does not have property relating to the commercial conduct in the United States.[33]

The court acknowledged that this statutory interpretation interprets congressional intent as creating a right without a remedy.[34] However, noting that "the enforcement of judgments against foreign sovereign state property remained a somewhat controversial subject"[35] when the FSIA was enacted, the Court of Appeals found it reasonable to conclude that Congress was aware that it was creating a right without a remedy. Other circuits support this interpretation.[36] Accordingly, the court interpreted the FSIA to mean that a foreign state's agency or instrumentality's execution immunity was narrower than the foreign state's own immunity.[37]

C. The Bank Has Standing to Raise Execution Immunity

Petitioners argued that the Bank lacked standing to invoke China's execution immunity.[38] The court reasoned that because the statute states that "property in the United States of a foreign sovereign shall be immune from attachment arrest and execution,"[39] execution immunity exists "in the property itself."[40] Therefore, the property's execution immunity could be raised by the court sua sponte or by a third party.[41]

The Court also found that even if execution immunity was an affirmative defense, the district court could still dismiss the action on execution-immunity grounds.[42] The Second Circuit had affirmed the court's power to dismiss actions by sua sponte raising other affirmative defenses like statute of limitations and res judicata.[43]

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31. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(2) (2011).

32. *Id*.

33. *Walters*, 2011 WL 2643697 at *6.

34. *Id.*

35. H.R. Rep. No. 94-1487, at 27 (1976).

36. *Walters*, 2011 WL 2643697 at *6 (quoting Connecticut Bank of Commerce v. Republic of Congo, 309 F.3d 240, 255–56 (5th Cir. 2002) (arguing that the international community viewed execution against a foreign state's property as more offensive than exercising jurisdiction)).

37. *Id.* at *7.

38. *Id.*

39. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1609 (2011).

40. *Walters*, 2011 WL 2643697 at *8.

41. *Id.*

42. *Id.* at *10.

43. *Id.* (citing Leonhard v. United States, 633 F.2d, 599, 609 n.11 (2d Cir. 1980) (opining that the court may raise a statute of limitations issue sua sponte). *See* Doe v. Pfrommer, 148 F.3d 73, 80 (2d Cir. 1998) (stating that courts are not barred from raising a res judicata issue).

D. China Did Not Waive Execution Immunity, by Either Its Commercial and Tortious Conduct or Its Failure to Appear

Using its analysis of the FSIA's differing treatment of jurisdictional and execution immunity as a foundation, the Court reasoned that petitioners could not rely on the same commercial and tortious conduct that established the exception to jurisdictional immunity in the Western District of Missouri case.[44]

It further supported its conclusion by comparing § 1609 and § 1605, applying the construction principle *expressio unius est exclusio alterius* (the mention of one thing implies the exclusion of the other).[45] Section 1605, the section covering jurisdictional immunity, is subject to exception when foreign sovereigns conduct commercial and tortious activities in the United States; § 1609, the section addressing execution immunity, is subject to no such exception.[46] Including an exception for commercial and tortious conduct in one section but not in another suggested to the Court that the exception's exclusion from the execution-immunity section was deliberate and intentional.[47]

China was also found not to have waived its execution immunity by failing to appear.[48] Although foreign sovereigns may waive their execution immunity under the FSIA "either explicitly or by implication,"[49] the Court found that the waiver must still be "intentional relinquishment of a known right."[50] Such intentional relinquishments must be manifested by some "affirmative act" of the foreign sovereign, and the mere failure to appear is too passive to satisfy this requirement.[51] Prior second circuit decisions supported the Court's view,[52] and the legislative intent indicated that implied waivers were meant to be construed narrowly.[53]

E. Petitioners Failed to Satisfy § 1610(a)(2) and § 1610(c)

Section 1610(a)–(c) requires the court to determine whether the property at issue falls within one of the exceptions to execution immunity.[54] Petitioners did not state the specific accounts or funds they sought to attach, they did not describe the property with sufficient particularity for the court to determine if the property fell within one of the exceptions.[55] The

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44. *Walters*, 2011 WL 2643697 at *11; *see also* Final Judgment, *Walters*, No. 93–5118–CV–SW–1.
45. *Walters,* 2011 WL 2643697 at *11.
46. *Id.*
47. *Id.*
48. *Id.* at *12.
49. *Id.* (quoting Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1610(a)(1) (2011)).
50. *Id.* (quoting Schipani v. McLeod, 541 F.3d 158, 159 n.3 (2d Cir. 2008).
51. *Walters*, 2011 WL 2643697 at *12.
52. *Id.* (quoting Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 243 (2d Cir. 1996) (stating, "'[T]he implied waiver provision of Section 1605(a)(1) must be construed narrowly.'")).
53. *Id.*
54. *Id.* at *13.
55. *Id.*

court held that the burden of identifying assets should remain on the judgment debtors, because petitioners can use discovery to obtain sufficient information about the property.[56] Therefore, it affirmed the district court's partial dismissal without prejudice to re-plead.[57]

F. Petitioners Were Not Entitled to Collect Assets From PRC's Agencies or Instrumentalities Under § 1610(a) and (b)

The Court found that petitioners failed to preserve properly the issue of the agencies' and instrumentalities' immunity because they did not raise it during the district court proceedings.[58] Even if the issue had been properly preserved, however, the Court found that petitioners' argument would still fail.[59] Petitioners' Missouri default judgment was entered only against China, not against the respondent banks.[60] Further, the immunity of the agency or instrumentality would have had to have been waived for § 1610(b) to apply.[61] The Court noted that the respondent banks consistently contested the petitioners' attempts to execute judgment and, therefore, could not be found to have waived immunity.[62]

IV. Conclusion

The Court of Appeals affirmed the district court's judgment on all issues raised.[63] It declined to decide, however, whether the petitioners could execute a judgment against a Chinese agency or instrumentality.[64] Therefore, although the Second Circuit's decision served as an additional roadblock to the Walterses' ability to collect their default judgment, the Second Circuit did suggest the possibility of executing against a Chinese agency or instrumentality.

Kristina Duffy

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56. *Id.*
57. *Walters*, 2011 WL 2643697 at *14.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at *15.
62. *Id.*
63. *Walters*, 2011 WL 2643697 at *15.
64. *Id.*

NML Capital, Ltd. v. Argentina

2011 WL 524433 (S.D.N.Y. Feb. 15, 2011)

The U.S. District Court, S.D.N.Y., found that Argentina's broad control over ENARSA's general activities did not render that instrumentality an alter ego of the sovereign.

I. Holding

In *NML Capital Ltd. v. Argentina*,[1] the U.S. District Court for the Southern District of New York held that the plaintiff, NML Capital (NML), failed to show that Energia Argentina S.A. (ENARSA) is an alter ego of the Republic of Argentina (the Republic).[2] Therefore, ENARSA cannot be held jointly and severally liable for Argentina's sovereign debt.[3]

II. Facts and Procedural History

ENARSA is an Argentine instrumentality created by the Argentine government to increase the country's role in the energy industry.[4] The company is characterized as a *sociedad anonima*, an independent stock corporation that is a juridical entity with its own legal personality.[5] Based on ENARSA's founding statutes, Law No. 25.943 and Decree No. 1692/2004, the company must comply with the policies of the national government.[6] The national government owns a majority of the company's stock.[7] The remaining shareholders are Argentine provincial governments, which hold less than 3% of the instrumentality's shares.[8] In its history, ENARSA's shares have never been sold or distributed to the public.[9] The Argentine government also holds five of the seven seats on the instrumentality's board of directors.[10]

The Republic provided ENARSA with its initial capital at its creation.[11] Additionally, the instrumentality receives its annual budget from the national government.[12] The company's actions are dictated by the national government's policies.[13] For example, upon the order of an

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1. NML Capital, Ltd. v. Argentina, 2011 WL 524433 (S.D.N.Y. Feb. 15, 2011).
2. *Id.* at *1.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at *2.
7. *NML Capital*, 2011 WL 524433, at *1.
8. *Id.*
9. *Id.* at *2.
10. *Id.*
11. *Id.* at *3.
12. *Id.*
13. *NML Capital*, 2011 WL 524433, at *2.

executive decree,[14] ENARSA was responsible for transporting natural gas across the border between Argentina and Bolivia.[15] At the Republic's direction, the company sells natural gas at an unprofitable price.[16] In return, the government subsidizes the company's losses.[17] The Argentine government also conducts major public works projects through ENARSA with the use of government funds.[18]

Argentina defaulted on its sovereign debt on December 23, 2001.[19] Argentina waived its sovereign immunity and agreed to be sued in the United States on its bond debts.[20] NML recovered judgments in numerous actions against Argentina.[21] Despite these rulings, NML failed to receive payment on the debts.[22] If ENARSA was found to be the alter ego of the Republic, it could be held liable for the Republic's actions.[23] Such a finding would enable NML to collect on its prevailing judgments from ENARSA's assets.[24]

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14. *See Agreements With the Republic of Bolivia*, ENARSA ENERGIA, http://www.enarsa.com.ar/english/noticia05.htm (last visited Oct. 26, 2011) (providing background on Executive Decree No. 267/2007, which established this agreement between Argentina and Bolivia).

15. *NML Capital*, 2011 WL 524433, at *2.

16. *Id.* at *3.

17. *Id.*

18. *Id.*

19. *Id.* at *1. There has been a great deal of reporting regarding Argentina's default and debt restructuring. *See* Patrick Bolton and David A. Skeel, Jr., *Sovereign Debt Restructuring: Redesigning the International Lender of Last Resort*, 6 CHI. J. INT'L L. 177, 191–92 (2005) (appraising the restructuring of Argentina's debt); *see also* Ross P. Buckley, *Sovereign Debt Restructuring: Why Are Developing Nations So Slow to Play the Default Card in Renegotiating Their Sovereign Indebtedness?*, 6 CHI. J. INT'L 345, 347 (2005) (summarizing a history of Argentina's debt crisis); *see also* Celeste Boeri, *How to Solve Argentina's Debt Crisis: Will the IMF's Plan Work?*, 4 CHI. J. INT'L L. 245 (2003) (presenting an overview over the causes and effects of Argentina's public debt default); *see also A Victory by Default? Argentina's Debt Restructuring*, THE ECONOMIST, Mar. 3, 2005, *available at* www.economist.com (reporting the effects of Argentina's default).

20. *NML Capital*, 2011 WL 524433, at *5.

21. *Id.* at *1. *See* NML Capital, Ltd. v. Argentina, 2008 WL 1318018 (S.D.N.Y. Apr. 10, 2008); *see also* NML Capital, Ltd. v. Argentina, 2008 WL 839740 (S.D.N.Y. Mar. 28, 2008); *see also* NML Capital, Ltd. v. Argentina, 2008 WL 1719487 (S.D.N.Y. Apr. 10, 2008); *see also* NML Capital, Ltd. v. Argentina, 2008 WL 1718726 (S.D.N.Y. Apr. 10, 2008).

22. *Id.*

23. First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba, 462 U.S. 611, 629 (1983) (*Bancec)*. *Bancec* is widely considered the governing case in this body of law. *See* Paul L. Lee, *Central Banks and Sovereign Immunity*, 41 COLUM. J. TRANSNAT'L L. 327, 361 (2003) (characterizing *Bancec* as the most prominent case regarding the relationship between governments and instrumentalities). Subsequently, numerous courts have applied *Bancec*'s principles. *See* Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc., 183 F.3d 1277, 1281 (11th Cir. 1999) (holding that a company majority owned by Cuba's government was not the alter ego of the Cuban government); *see also* LNC Inv., Inc. v. Republic of Nicaragua, 115 F. Supp. 2d 358, 360 (S.D.N.Y. 2000) (utilizing the *Bancec* principles to conclude that the central bank was not the government's alter ego because the government did not have control over day-to-day operations), *aff'd sub nom.* LNC Invs., Inc. v. Banco Central De Nicaragua, 228 F.3d 423 (2d Cir. 2000) (per curiam); *see also* Hester Int'l Corp. v. Federal Republic of Nigeria, 879 F.2d 170, 178-81 (5th Cir. 1989) (concluding that a general supervisory role and not day-to-day management control did not support a finding of an alter ego relationship).

24. *Bancec*, 462 U.S. at 629.

NML brought this suit in the U.S. District Court for the Southern District of New York, seeking a declaratory judgment that ENARSA is an alter ego of the Republic.[25] In addition, NML sought a judgment holding ENARSA jointly and severally liable for Argentina's obligations on the defaulted bonds.[26] NML sought to recover $1.5 billion on its theory of ENARSA's liability.[27]

The defendants, the Republic and ENARSA, filed separate motions to dismiss the alter ego complaint.[28] In their motions, both the defendants claim that the court lacks subject-matter jurisdiction and personal jurisdiction over ENARSA.[29] Furthermore, the defendants assert that the complaint fails to state a valid claim for relief.[30] Finally, the Republic asserts that NML failed to serve properly an indispensable party, ENARSA.[31]

III. Discussion

A. Joinder

The Republic argued that NML failed to effectuate proper service upon ENARSA and thus failed to join an indispensable party.[32] Service of process upon a foreign government entity that is consistent with the methods laid out under the Hague Convention[33] is valid in U.S. actions under the Foreign Sovereign Immunities Act (FSIA).[34] NML served the summons and complaint, through an independent contractor appointed by the U.S. State Department, upon the Argentine Ministry of Foreign Affairs.[35] The court found that such service was proper under the Hague Convention standards.[36]

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25. *NML Capital*, 2011 WL 524433, at *1.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *NML Capital*, 2011 WL 524433, at *1.
32. *Id.* at *4.
33. The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters is a by-product of the Hague Conference on Private International Law. The rules created by the conference were promulgated with the ultimate goal of simplifying and expediting the service of individuals abroad. (Service Abroad of Judicial and Extrajudicial Documents, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163). *See* Stephen F. Downs, *The Effect of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 2 CORNELL INT'L L. J. 125 (1969) (presenting the background and effects of the U,S. participation in the convention); *see also* Patricia N. McCausland, *How May I Serve You—Service of Process by Mail Under the Hague Convention on the Service Abroad of Judicial and Extradjudicial Documents in Civil or Commercial Matters*, 12 PACE L. REV. 177 (1992) (examining the methods of service under the Hague Service Convention).
34. Foreign Sovereign Immunities Act, 28 U.S.C. § 1608 (2006). *See* Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRASNAT'L L. 33 (1978) (assessing the FSIA and discussing its implication on U.S. foreign policy).
35. *NML Capital*, 2011 WL 524433, at *4.
36. *Id.*

B. Jurisdiction and Merits of the Complaint

To exercise personal jurisdiction over a foreign state or instrumentality, specific requirements, which differ from the traditional methods of jurisdiction over a domestic party, must be met. The court must have subject-matter jurisdiction over the parties, and those parties must have been properly served as provided in the FSIA.[37] The court found that ENARSA was properly served. However, subject-matter jurisdiction is based on whether the state or instrumentality is entitled to immunity.[38] NML claimed that ENARSA's immunity was waived because it is an alter ego of the Republic.[39] Additionally, NML claimed that the court had subject-matter jurisdiction under sections 1330(a) and 1605 (a)(2) of the FSIA because the Republic engaged in commercial activities within the United States through ENARSA.[40] The court found that the question of subject-matter jurisdiction depended on the validity of the alter ego theory.[41]

C. Pleading Standard

In order to survive a motion to dismiss, a complaint must plead sufficient facts to state a claim for relief that is plausible on its face.[42] The court must accept as true all facts alleged in the complaint and draw all reasonable inferences in the plaintiff's favor.[43]

D. Burden of Proof

The plaintiff bears the burden of asserting facts sufficient to establish that an agency or instrumentality should not be presumed distinct from the sovereign.[44]

E. Alter Ego Analysis

The court cited the standard the U.S. Supreme Court set forth in *First City National Bank v. Bancec*.[45] According to the Supreme Court, courts are to presume that government instrumentalities established as juridical entities, which are distinct and independent from the sovereign, have an independent status.[46] However, there are three circumstances in which the instrumentality could be found to be the alter ego of the sovereign. The alter ego relationship may exist if (1) the instrumentality was established to shield the sovereign from liability, (2) the sovereign ignored corporate formalities and exercised excessive control while running the instrumentality, or (3) the sovereign has directed the instrumentality to act on its behalf and

37. *Id.*

38. *Id.*

39. *Id.* at *5.

40. *Id.*

41. *NML Capital*, 2011 WL 524433, at *5.

42. *Id.* (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007), and Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949–50 (2009)).

43. *Id.* (citing ATSI Commc'ns. Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007)).

44. *Id.* (citing Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi, 215 F.3d 247, 252 (2d Cir. 2000).

45. *Bancec*, 462 U.S. at 626–27.

46. *Bancec,* 462 U.S. at 626–27; *NML Capital*, 2011 WL 524433, at *6.

the instrumentality has done so.[47] Along with these factors, *Bancec* also provides an exception, in which a presumption of separateness could be rebutted if such a conclusion would be a fraud or injustice against the interested creditors.[48]

The district court found that the Republic exercised control over ENARSA, but did so pursuant to publicly announced policies, declared and implemented by legislation and decrees.[49] Therefore, ENARSA was acting based on its founding statute, which directed it to comply with the policies of the national government.[50] Despite the plaintiff's allegations that ENARSA's role in several national projects was dictated by the Republic, the court found that the complaint failed to include detailed allegations to the effect that the Republic managed the day-to-day business of ENARSA.[51] Nor did ENARSA dispose of funds in an abnormal way or in a way that treated such funds as funds of the Republic.[52] The Republic was involved in ENARSA's transactions, but the court found the Republic to be exercising solely broad control in order to have ENARSA comply with national policies.[53]

The court contrasted ENARSA with the central bank of the Republic, which in a prior case the court found to be an alter ego of the sovereign.[54] Unlike the case involving the central bank, in this case the Republic did not intervene in the affairs of the instrumentality to the same degree as it did with other entities, nor did it do so with a deceptive purpose.[55]

Subsequent to the court's findings in this case, the Second Circuit Court of Appeals heard an additional case regarding NML and the Republic's central bank.[56] In that case, NML sought declaratory judgment that the central bank was liable for the Republic's debts.[57] Unlike the court in this case, the Second Circuit did not immediately use *Bancec* in assessing the bank's liability.[58] Rather, the Second Circuit found instrumentalities, such as the central bank,

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47. *NML Capital*, 2011 WL 524433, at *6.

48. *Id.* at *8.

49. *Id.* at *7.

50. *Id.*

51. *Id.*

52. *Id.*

53. *NML Capital*, 2011 WL 524433, at *7.

54. *Id.* (discussing EM Ltd. v. Republic of Arg., 720 F. Supp. 2d 273 (S.D.N.Y. 2010)).

55. *NML Capital*, 2011 WL 524433, at *7.

56. NML Capital, Ltd. v. Banco Central de la Republica Argentina, 652 F.3d 172, (2d Cir. 2011). *See* Joshua Alter, Recent Decision, *NML Capital, Ltd. v. Banco Central de la República Argentina*, N.Y. INT'L L. REV., Winter 2012, _ (providing summary and analysis of the District Court of the Southern District of New York's decision).

57. *Banco Central*, 652 F.3d at 181.

58. *Id.* at 187.

are protected under the rebuttable presumption of § 1611(b)(1)[59] of the Foreign Sovereign Immunities Act.[60] The court reasoned that if the bank's property was immune under § 1611(b)(1), its relationship to the Republic, as determined under the *Bancec* test, was irrelevant.[61] Central banks are not treated like typical government instrumentalities, whose property can be attached through an alter ego finding.[62] A corporation similar to ENARSA is not subject to such immunity, thus the *Bancec* factors were controlling in the alter ego claim analysis.

Finally, the court reviewed the *Bancec* exception, which rebutted the presumption of an instrumentality's independence. The presumption could be rebutted if treating the entity as independent would be a fraud or injustice against the government's creditors.[63] The court found that ENARSA had not been used to further the Republic's failure to pay its debts.[64]

IV. Conclusion

The court's findings were based on the complaint's failure to raise specific examples of the Republic's control over the day-to-day activities and transactions of ENARSA. The Republic's broad control over ENARSA was maintained to ensure the entity complied with national policy, as the entity was charged with doing in its founding statute. Therefore, ENARSA did not fall within the *Bancec* exceptions and is not an alter ego of the Republic.

Daniel Schilling

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59. 28 U.S.C. § 1611(b)(1), which states in its entirety:

> (b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—
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> (1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver.

60. *Banco Central*, 652 F.3d at 187.

61. *Id.*

62. *Id.*

63. *NML Capital*, 2011 WL 524433, at *8.

64. *Id.*