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International Copyright: Protection for Copyright Holders in the Internet Age

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Part I

Introduction

International copyright infringement is a phrase that carries significant meaning in the Internet age. With one keystroke, a copyrighted work can be accessed, reproduced, or distributed worldwide. Consequently, right holders may not receive any remuneration for their efforts. Further compounding the issue is the problem that the Internet transcends national boundaries. The Internet has truly created a global arena in terms of business, trade, and communication.

This paper will address international copyright issues created by the Internet. Part II discusses the background of copyright law and the rights that it seeks to protect. Part III addresses the need for increased awareness as technology advances. Part IV addresses regulation of copyright laws in the global arena. Among the items discussed are the World Intellectual Property Organization,[1] Berne Convention,[2] TRIPs agreement,[3] WIPO Copyright Treaty,[4] and the WIPO Performances and Phonograms Treaty.[5] Also addressed is the United States response to copyright issues in the Internet age via the Digital Millennium Copyright Act.[6] Part V discusses the various issues created by international copyright infringement. In addition to the United States presumption against extraterritorial application of U.S. laws,[7] a right holder must consider whether jurisdiction can be obtained over the infringer and, if so, whether there is a convenient forum for the action to be held. Further, the courts must wrestle with the appropriate

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1. *See* Convention Establishing the World Intellectual Property Organization (WIPO), July 14, 1967, 21 U.S.T. 1770, 828 U.N.T.S. 3.
2. Berne Convention for the Protection of Literary and Artistic Property (Berne Convention), Sept. 9, 1886, 828 U.N.T.S. 221 (as amended).
3. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, pmbl., Marakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197 (1994) [hereinafter TRIPs agreement].
4. WIPO Copyright Treaty, Dec. 23, 1996, 36 I.L.M. 65 (1997).
5. WIPO Performances and Phonograms Treaty, Dec. 23, 1996, 36 I.L.M. 76 (1997).
6. Digital Millenium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 286.
7. For cases dealing with the presumption against extraterritorial application of U.S. laws *see, e.g.,* Bridgeman Art Library v. Corel Corp., 25 F. Supp. 2d 421 (1998); Shaw v. Rizzoli Int'l Publs. Inc., 1999 U.S. Dist. LEXIS 3233 (1999).

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law to apply.[8] Part VI considers alternative solutions to the problems of international copyright infringements.

Part II

A Background of Copyright Law

A basic premise of copyright law is to encourage creativity by recognizing a property right in the works of authorship.[9] In effect, a copyright is a property that should be respected as any other property right.[10] Further, another principle of copyright is to secure the property rights of the actual creator of the work, which follows logically from its purpose of encouraging creativity.[11]

United States copyright protection has its origin in Article I of the Constitution, which grants Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and

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8. *See, e.g.,* Hasbro Bradley, Inc. v. Sparkle Toys, Inc., 780 F.2d 189, 194 (1985) (commenting on the non-extraterritoriality of copyrights); Subafilms, Ltd. v. MGM-Pathie Communs. Co., 24 F.3d 1088, 1095 (1994) (asserting that had Congress intended the Copyright Act to apply extraterritorially, it would have expressly stated so); Gushi Bros. Co. v. Bank of Guam, 28 F.3d 1535, 1540 (1994) (submitting that the Supreme Court affirmed in *EEOC v. Arabian Oil Co.,* 499 U.S. 244, 248 (1991), that U.S. legislation applies only within the jurisdiction of the U.S., unless expressly provided by Congress).

9. *See* Senator Orrin G. Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. PITT. L. REV. 719, 721 (1998) (stating that the first purpose of copyright law is an author's property rights to her work, articulated in the Copyright Clause of the Constitution); Lisa Anne Katz Jones, *Is Viewing a Web Page Copyright Infringement?*, 4 U. VIC. APPEAL 60, 70 (1998) (asserting that the primary purpose of copyright law is to protect an author's rights to her works from misappropriation). *But see* Matthew G. Passmore, *A Brief Return to the Digital Sampling Debate*, 20 HASTINGS COMM. & ENT. L.J. 833, 846 (1998) ("The primary purpose of copyright law is to foster the creation and dissemination of intellectual works for the public welfare . . . [a]nd the interests of authors must yield to the public welfare where they conflict.") (quoting STAFF OF HOUSE COMM. ON THE JUDICIARY, 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 6 (Comm. Print 1961)).

10. *See* Hatch, *supra* note 9, at 721 (suggesting that similar to real property rights, copyrights are a "bundle of rights" that may not be applicable in every situation . . . copyrights apply only to expressions, not ideas); Susan Shoenfeld, *The Applicability of Eleventh Amendment Immunity*, 36 AM. U. L. REV. 163, 175 (1986) (opining that one may perceive copyright as a property right that results from the author's creation of the work). *See generally* David Friedman, *In Defense of Private Orderings: Comments on Julie Cohen's "Copyright and the Jurisprudence of Self-Help,"* 13 BERKELEY TECH. L.J. 1151, 1159 (1998) (comparing copyrights to property rights in that copyrights are good against the world, unlike a contract right that is only good against the contracting party).

11. *See* Hatch, *supra* note 9, at 723 (noting that another purpose of copyright law is to protect the creator's rights to his works and on the same token, foster creativity); *see also* Kathleen Connolly Butler, *Keeping the World Safe from Naked-Chicks-in-Art Refrigerator Magnets: The Plot to Control Art Images in the Public Domain through Copyrights in Photographic and Digital Reproductions*, 21 HASTINGS COMM. & ENT. L.J. 55, 60 (1998) (listing the five copyrights afforded the author as: reproduction, adaptation, distribution, performance, and display of her work); Jo Dale Carothers, *Protection of Intellectual Property on the World Wide Web: Is the Digital Millennium Copyright Act Sufficient?*, 41 ARIZ. L. REV. 937, 953 n.163 (1999) (stating that one of the primary objectives of copyright law is to promote the creation of original works (citing 17 U.S.C. §§ 101 to 1101 (1994))).

Discoveries. . . ."[12] The first U.S. copyright statute was passed in 1790, limiting protection to maps, charts, and books.[13] Copyright law evolved in the 19th century to expand protection to include such works as photographs, which was a new technology at the time.[14] As technology continued to develop, Congress again expanded the statute in 1909 and 1912 to protect works such as motion pictures—another new technology.[15]

The last major revision of the Copyright Act, in 1976, created the current U.S. copyright law.[16] As it stands, copyright protection is offered for creative works of authors whose works are fixed in any tangible medium.[17] The statute does not provide protection for titles, single words, short phrases or ideas, but it does protect the expression of those ideas.[18]

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12. U.S. CONST. art. I., § 8, cl. 8. *See* Michael A. Forhan, Note, *Tasani v. New York Times: The Write Stuff for Copyright Law*, 27 CAP. U.L. REV. 863, 866 (1999); *see also* Statute of Anne of 1710. 8 Anne, ch. 19 (1710) (recognizing, specifically, the rights of authors and the foundation of all subsequent legislation on the subject of copyright in the United States and abroad).

13. Copyright Act of May 31, 1790, 1 Stat. 124 (1790) (assuring protection to the author or his assigns of any "map, chart or book" for fourteen years upon: (1) recording the title, prior to publication, in the register book of the clerk's office of the district court where the author or proprietor resided; (2) publishing a copy of the record so made in one or more newspapers for four weeks; and (3) depositing a copy of the work itself in the office of the Secretary of State within 6 months after publication); *see* Forhan, *supra* note 12, at 866 (referring to Goldstein v. California, 412 U.S. 546, 562 n.17 (1973)); *see also* Robert A. Gorman, Commentary: *Comments on a Manifesto Concerning the Legal Protection of Computer Programs,* 5 ALB. L.J. SCI. & TECH. 277, 280 (1996) (discussing the Copyright Act of 1790).

14. *See* Copyright Act of 1865, 13 Stat. 540 (1865) (adding photographs to the list of works that receive copyright protection); Forhan, *supra* note 12, at 866 ("Amendments were made several times during the 19th Century to extend copyright to more works, most notably, the then-new technology of photographs."); *see also* Burrow-Giles Litho. Co. v. Sarony, 111 U.S. 53, 60 (1884) (discussing how the word "writings" in Article I § 8 cl. 8 in the U.S. Constitution was meant to be read broadly and include photographs).

15. *See* Forhan, *supra* note 12, at 867 (noting that Congress began to provide protection for "many articles which, under modern reproductive processes, are entitled to protection" such as the 1912 amendment concerning motion pictures); *see also* Goldstein v. California, 412 U.S. 546, 562 n.17 (1973) (discussing the changes, made by Congress, of the original copyright statute); Brian A. Carlson, Comment, *Balancing the Digital Scales of Copyright Law,* 50 SMU L. REV. 825, 831 (1997) (discussing how Congress "consolidated and amended the federal copyright statutes in the Copyright Act of 1909").

16. *See* 17 U.S.C. 102(a), (b) (1997); *see also* Forhan, *supra* note 12, at 867 ("The Copyright Act of 1976 was passed in response to additional technological innovations, such as television and computer software . . . and is the current United States copyright law."); Carlson, *supra* note 7, at 831 (noting how "television and computer software all prominently influenced the passage of the 1976 Act").

17. 17 U.S.C. 102 (a) (1997); *see* Forhan, *supra* note 12, at 867 (explaining the attempt to establish a media-neutral policy by protecting fixed works); Carte P. Goodwin, Comment: *Live, In Concert . . . And Beyond: A New Standard of Contributory Copyright Infringement*, 13 EMORY INT'L L. REV. 345, 359 (1999) (stating the rationale of the Act to be based on Copyright Clause of the Constitution which extends protection only to fixed works).

18. 17 U.S.C. 102(b) (1997). *See* RALPH S. BROWN & ROBERT C. DENICOLA, CASES ON COPYRIGHT 105 (7th ed. 1998); Forhan, *supra* note 12, at 867 (stating the Copyright Act of 1976 was meant to encompass only creative works fixed in a tangible medium).

Part III

The Impact of Modern Technology on Copyrights

For most people, listening to music is a form of enjoyment, relaxation, and release. There is no reason to believe that it will ever stop being so. However, as modern technology advances, the availability of music is causing varied reactions among artists and copyright holders. Today, all one needs is access to the Internet, and the proper accessories in order to be able to download a song and record it onto a compact disc.[19] Moreover, uploading a song onto the Internet is as easy as downloading.[20] One more factor is involved—the price. More accurately, it is the lack of the price. The entire process just described can be done for free. In other words, an artist's music can be distributed without any compensation to him—a violation of copyright law.[21]

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19. June Chung, Note, *The Digital Performance Right in Sound Recordings Act and Its Failure to Address the Issue of Digital Music's New Form of Distribution*, 39 ARIZ. L. REV. 1361, 1366 (1997) (stating the ease with which one can access and download copyrighted material); Forhan, *supra* note 12, at 870 (stating that once access to the Internet is made "the user can access information residing on any of the servers connected to the network."); *see also* Needham J. Boddie II et al., *A Review of Copyright and the Internet*, 20 CAMPBELL L. REV. 193, 197 (1998) (describing common methods by which one can establish a link to the Internet).

20. *See* Chung, *supra* note 19, at 1366 (noting how simple it is to upload music from a compact disc onto the Internet for others to download); *see also* Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L. J. 345, 345 n.5 (1993) (recognizing that a bulletin board system is an on-line service that allows users to exchange music and other forms of information by uploading materials from the user's computer to the system and by downloading materials from the BBS to his own computer); Timothy L. Skelton, Comment, *Internet Copyright Infringement and Service Providers: The Case for a Negotiated Rulemaking Alternative*, 35 SAN DIEGO L. REV. 219, 312 (1998) (pointing out unilaterally applied technological measures will not prevent any Internet user from taking any of the 4.7 billion CDs already out in the marketplace and uploading the music on them to the Internet).

21. *See* Chung, *supra* note 19 (discussing how downloading and uploading music from and onto the Internet, or distributing music for free, is in violation of copyright law); *see also* Kenneth D. Suzan, Comment, *Tapping to the Beat of a Digital Drummer: Fine Tuning U.S. Copyright Law for Music Distribution on the Internet*, (noting that copyright violations are "commonplace" on the Net, and that "the issue of compensation for copyrighted works on the Internet is exactly what concerns the general and legal communities . . . in essence, there's no way to ensure that a teenager who buys a new record will not send it to 1,000 of her closest friends."); Randy Gidseg, et al., *Intellectual Property Crimes*, 36 AM. CRIM. L. REV. 835, 859 (1999) (stating that "[t]he Copyright Act of 1976 protects the use of the text files, image files, and sound files on the Internet.").

Downloading music from the Internet is quickly gaining popularity.[22] This is all made possible through technology known as MP3[23] and MIDI.[24] Music can be recorded onto a computer's memory through the use of a MIDI file.[25] Once music has been converted into digital data and stored into a MIDI file, it can be recorded in a computer's memory, where it can be saved onto a disc or any other form of recordable medium.[26] Once the sound recording is stored into a computer in its digital format, a user can upload the file onto the Internet through

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22. *See, e.g.,* Recording Indus. Ass'n of America v. Diamond Multimedia Sys., 180 F.3d 1072, 1074 (9th Cir. 1999) (stating that, "MP3's popularity is due in large part to the fact that it is a standard, non-proprietary compression algorithm freely available for use by anyone, unlike various proprietary (and copyright-secure) competitor algorithms."); Suzan, *supra* note 21, at 804 (recognizing that popularity among Internet users has skyrocketed with 10,000 users plugged into the system daily); *Franklin Pierce Law Centers Seventh Biennial Intellectual Property System Major Problems Conference Digital Technology and Copyright: A Threat Or A Promise?*, 39 J.L. & TECH. 291 (1999) (stating that, "[s]o long as the general public believes that private copying for non-commercial use is not wrong in the digital environment, it is simply a given that we will see the immediate uploading and free downloading of best-selling novels, music, and—once the bandwith is there—theatrical motion pictures by millions of people.").

23. An MP3 is the common name for MPEG-1 (Motion Pictures Expert Group) Audio Layer 3. This form of compression is approximately 12 times smaller than a CD file. The result is a compressed file with near CD quality sound, suitable for sending and downloading via the Internet. The current standard is 128 Kbps transfer rate, which is the perfect blend of both file size and sound quality. *MPEG3.com Tutorial* (visited Nov. 26, 1999) <http://www.mpeg3.com/tutorials/index.asp>. *See Recording Indus.*, 180 F.3d at 1074 (explaining that the MPEG-1 Audio Layer 3 (commonly known as "MP3") is the most popular digital audio compression algorithm in use on the Internet, and the compression it provides makes an audio file "smaller" by a factor of twelve to one without significantly reducing sound quality); Skelton, *supra* note 20, at 298 (explaining "MP3's" are commercial music recordings that have been specially processed to reduce transmission time).

24. Music Instrument Digital Interface. *See* Don E. Tomlinson and Timothy Nielander, *Unchained Melody: Music Licensing in the Digital Age*, 6 TEX. INTELL. PROP. L.J. 277, 289 (1998) (explaining that a MIDI file containing instructions for generating motion pictures or other audiovisual works is not considered a sound recording since it is an audiovisual work); *see also* Joseph V. Myers III, Note, *Speaking Frankly About Copyright Infringement On Computer Bulletin Boards: Lessons To Be Learned From Frank Music, Netcom, And The White Paper*, 49 VAND. L. REV. 439, 478 n. 220 (1996) (stating "[t]he acronym 'MIDI' stands for musical instrument digital interface and refers to digitized versions of music."); Keith Stephens & John P. Sumner, *Software Objects: A New Trend In Programming And Software Patents*, 12 COMPUTER & HIGH TECH. L.J. 1, 7 n.15 (1996) ("Musical Instrument Digital Interface").

25. *See* Chung, *supra* note 19, at 1367 ("Unlike analog, digital broadcasts are 'far more resistant to interference,' and digital audio also allows for infinite copies to be made while retaining the original sound quality."); Andrea Sloan Pink, Comment, *Copyright Infringement Post Isoquantic Shift: Should Bulletin Board Services Be Liable?*, 43 UCLA L. REV. 587, 610 n. 146 (1995) (noting that MIDI files contain music stored in a digitized form that can be played through a musical synthesizer, translated into sheet music by a computer, or stored on floppy or hard disks); *see also* Keith E. Witek, *Software Patent Infringement on the Internet and on Modern Computer Systems—Who is Liable for Damages?*, 14 COMPUTER & HIGH TECH. L.J. 303, 356 (1998) (explaining how the music can be recorded to the computer's memory through the use of a MIDI file).

26. *See* Chung, *supra* note 19, at 1367 (discussing how MIDI is the industry standard for converting music into digital data and is a relatively cheap, high quality transmission of music); Witek, *supra* note 25, at 356 (stating "[d]uring the program execution or through use of the operating system of the computer, the program may be printed, saved to floppy or hard disk, be sent out on the modem, copied on magnetic tape in the course of routine backup, display data on a monitor using VRAM, process sounds or data via a DSP card or sound card, make music on a MIDI card, or communicate with other devices via a SCSI interface, . . .").

the use of a modem.[27] "From there, virtually anyone with a modem can download the information and, with a sound card that gives the computer audio capability, listen to the music in its digital format."[28] Therefore, with the proper equipment (computer, modem, sound card, and any software necessary to decompress data), one can download the sound files to a computer and then transfer the music onto a recordable compact disc that will have the same digital sound quality as a compact disc purchased from the local record store.[29] In fact, the number one search term over the Internet this past year was "MP3"—overtaking "sex."[30] Recent studies show that the number of users who purchase music online will grow from approximately 6 million in 1998 to 33 million by 2003.[31] Any way you look at it, that is staggering growth. However, that number only accounts for the number of people who *purchase* the music. Purchasing music online does not present a copyright problem, as the copyright holder will be compensated.[32] Online music piracy is the major concern, with the major "perpetrators" being college students.[33]

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27. *See* Chung, *supra* note 19, at 1367 (noting that a user can listen to music in its digital format with a "sound card" that gives the computer audio capability); Suzan, *supra* note 21, at 817 (noting that the song "Unchained Melody" is just one of 690 copyrighted compositions that were uploaded to the CompuServe MIDI/Music Forum); *see also* Scott K. Pomeroy, *Legal Issues In Cyberspace: Hazards On The Information Superhighway: Comment: Promoting The Progress Of Science And the Useful Arts In The Digital Domain: Copyright, Computer Bulletin Boards, And Liability For Infringement By Others*, 45 EMORY L.J. 1035, 1053 (1996) (noting that on a single bulletin board, CompuServe subscribers are alleged to have uploaded and downloaded more than 500 copyrighted musical works).

28. Chung, *supra* note 19, at 1367. *See* Myers, *supra* note 24, at 478 n.220 (describing a MIDI music BBS which was a facility for MIDI enthusiasts to exchange and listen to one another's MIDI files.); *see also* Adam P. Segal, *Dissemination of Digitized Music on the Internet: A Challenge to the Copyright Act*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 97, 130 (1996) (noting how easy it is to download information with a proper connection to the Internet).

29. *See* Chung, *supra* note 19, at 1367 ("Once the music has been converted into digital data and stored into a MIDI file, it can be recorded in a computer's memory, wherefrom it can be saved onto a disc or any other form of recordable medium.").

30. Christopher Jones and Jennifer Sullivan, *More Popular than Sex*, (visited Apr. 25, 2000) http://www.wired.com/news/mp3/0,1285,31834,00.html.

31. *See id.*; *see also* Alice Rawsthorn, *Wrangles over Music Royalties Likely to Stall Some Web Sales,* THE SAN DIEGO UNION-TRIBUNE, February 17, 1998, at 6 (noting that digital music sales are expected to take off this year and to be worth $1.64 billion, or 7.5 percent of global record sales, in 2003, according to Jupiter, a U.S. research consultancy). *Cf., Deal May Make Online Music Pay,* THE WASHINGTON POST, January 12, 2000, at E01 (stating "[l]ast year, sales of online music amounted to roughly $1 million, according to Boston-based Forrester Research, but they are expected to rise to as much as $ 4 billion by 2003. That's a hefty slice of the $13 billion in music sold in the United States each year.").

32. *See, e.g.,* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 396 (1968) (explaining that the Copyright Act enumerates several exclusive rights that can be infringed if used without the copyright holder's authorization); Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394, 405 (1974) (explaining that unauthorized use of copyrighted material inconsistent with "exclusive rights" constitutes copyright infringement).

33. *See Music Industry Tackles Web Piracy*, (visited Apr. 25, 2000) http://www.bib.net/mi60498.htm; *see also* United States v. LaMacchia, 8 F. Supp. 535, 536 (D. Mass. 1994) (describing that federal prosecution of a student bulletin board operator whose trafficking in copyrighted programs drew "worldwide traffic generated by the offer of free software."). *See generally* Matt Richtell, *Record Label Assert Control in Cyberspace*, N.Y. TIMES, July 5, 1999 (noting that, in the last two years, the recording industry has spent more than $1 million on an information campaign, predominantly at universities, in an effort to persuade campuses to take steps to prevent piracy and to persuade students not to participate in illicit swapping of music files).

The Internet's involvement clearly illustrates the international law dilemma—a music fan in New York can upload his favorite Guns n' Roses song, while an equally avid fan in Ireland can download it, record it onto a compact disc, and, if he so chooses, distribute it at his will. This problem was the topic of a United Nations Conference in 1996.[34] The conference was necessary because of the potential impact the Internet could have on the global music business.[35] Two treaties were adopted, the WIPO Copyright Treaty[36] and the WIPO Performances and Phonograms Treaty,[37] both of which will be discussed later in this article.

The motion picture industry is also greatly impacted by advancement in technology.[38] The United States earns over $5 billion from the sale of films and television programs in Europe alone.[39] "On average, American movies cost $53 million to produce and another $20 million to market."[40] Consequently, foreign markets are essential in order to earn back the investment.[41] However, "the American film industry loses $2.5 billion annually because of copyright infringement,"[42] mostly due to the illegal copying of video cassettes.[43]

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34. *See* Susan A. Mort, *The WTO, WIPO & The Internet: Confounding the Borders of Copyright and Neighboring Rights*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 173, 175 (1997) (stating the purpose of the conference to draft new agreements covering the protection of copyrights in digital media); *see also* Chung, *supra* note 19, at 1385 (discussing the inherent difficulty in policing the Internet without uniform copyright laws); Pamela Samuelson, *The Digital Agenda of the World Intellectual Property Organization*, 37 VA. J. INT'L L. 369, 370 (1997) (indicating the need to update world intellectual property law).

35. *See* Chung, *supra* note 19, at 1385 (stating the Internet to be a truly global object); *see also* Mihaly Ficsor, *Towards a Global Solution: The Digital Agenda of the Berne Protocol and the New Instrument, in The Future of Copyright in a Digital Environment*, 118-28 (P. Bernt Hugenholtz ed., 1996) (discussing interrelated digital agenda issues and the expansiveness of the Internet); David L. Hayes, *Advanced Copyright Issues on the Internet*, 7 TEX. INTELL. PROP. L.J. 1, 3 (1998) (expounding the Internet as a "major global data pipeline through which large amounts of intellectual property are moved").

36. WIPO Copyright Treaty, Dec. 23, 1996, 36 I.L.M. 65 (1997).

37. *See* WIPO Performances and Phonograms Treaty, Dec. 23, 1996, 36 I.L.M. 76 (1997); Chung, *supra* note 19, at 1385 (discussing the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty).

38. *See* Carolyn Andrepont, *Legislative Update, Digital Millenium Copyright Act: Copyright Protections for the Digital Age*, 9 J. ART & ENT. LAW 397, 406 (1999) (discussing the advancement in digital transmission technology which make copyrighted materials more vulnerable to piracy); *see also* Margaret Quan, *Valenti Asks Satellite Broadcasters To Secure Transmissions of Films*, ELECTRONIC ENGINEERING TIMES, Sept. 21, 1998 at P2 (stating the major concern of the movie industry to be the maintenance of secure digital transmissions).

39. *See* Andrepont, *supra* note 38, at 405 (detailing the sale of films and television programs in Europe); *see also*, Bonnie J. K. Richardson, Congressional Testimony, May 21, 1998, available in 1998 WL 12760304 at P5.

40. Andrepont, *supra* note 38; *see also* Quan, *supra* note 38, at P9 (noting the estimation of Jack Valenti, Chairman and Chief Executive Officer of the Motion Picture Association of America, that movies, on average, cost $33 million to produce and another $20 million to market).

41. *See* Andrepont, *supra* note 38, at 405 (stressing that foreign markets are "essential in order to earn back the incredible investment funds needed to create the films"); *see also* Bonnie J. K. Richardson, Congressional Testimony, May 21, 1998, available in 1998 WL 12760304 at P6.

42. Andrepont, *supra* note 38, at 405.

43. *See* Robert Marich, *Wilson Waves Pirate Sword*, THE HOLLYWOOD REPORTER, Feb. 28, 1997 (explaining that the illegal copying of video cassettes is a significant issue and that excluding cultural products, such as films, from the 1993 GATT Treaty, was a terrible mistake and something that should be revisited) (quoting California Gov. Pete Wilson speech regarding overseas video piracy and the battle to pry open protectionist markets); Bonnie J. K. Richardson, Congressional Testimony, May 21, 1998, available in 1998 WL 12760304 at P7.

The latest technological advancement affecting the motion picture industry is digital transmission.[44] Digital transmission is a new form of motion picture signal which is carried on airwaves, rather than through a cable (for television), or reels of 35mm film (for movie theaters),[45] which makes the material much more vulnerable to pirating.[46] In fact, most film studios fear that if they transmit films to theaters via satellites, cyberthieves might be able to steal the transmission and make a perfect copy.[47]

Technological advancements are nothing new to society. We have seen progress from Henry Ford's Model T to the Lambourghini; from telegraphs to telephones to cellular phones; from radio to television; from ovens to toaster-ovens to microwave ovens. Now we have the Internet.[48] Unlike some of the other advances that preceded, a twelve-year-old boy's expertise on the Internet transcends national boundaries.[49] Because the Internet allows access to copyrighted works with a single keystroke, immediate advancements are necessary in the realm of

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44. *See* Andrepont, *supra* note 38 (explaining the important role of the Digital Millenium Copyright Act as legislation prohibiting any device or measure designed to facilitate illegal reproduction of copyrighted materials by scrambling the anti-piracy device, encrypted signals); *see also* Quan, *supra* note 38, at P9 (stating the major concern of the movie industry to be the maintenance of secure digital transmissions); Robin Brown, *TV Copies Still at Issue* THE HOLLYWOOD REPORTER, July 2, 1999 (proclaiming that Hollywood studios still have concerns about copyright protection for films and television shows delivered over digital television).

45. *See* Andrepont, *supra* note 38 (discussing the advancement in digital transmission technology); James Sterngold, *A Preview of Coming Attractions; Digital Projectors Could Bring Drastic Changes to Movie Industry*, N.Y. TIMES, Feb. 22, 1999, at C1 (highlighting the advantages of digital transmission as a much clearer picture, and the ability of smaller theaters to get the same access to first-run hits as urban cinemas).

46. *See* Andrepont, *supra* note 38 (stating that the added vulnerability stems from ability of consumers "to create perfect copies of copyrighted films."); Michael Foley, *Illegal Access to Pay TV "Up to 20% of Total Market*," THE IRISH TIMES, May 13, 1997, at 2 (supporting that there is a piracy problem with digital television); *see also* Quan, *supra* note 38, at P9 (stating the major concern of the movie industry to be the maintenance of secure digital transmissions); Robin Brown, *TV Copies Still at Issue,* THE HOLLYWOOD REPORTER, July 2, 1999, (proclaiming that Hollywood studios still have concerns about copyright protection for films and television shows delivered over digital television).

47. *See* Sterngold, *supra* note 45 (explaining that many studios fear that if movies are sent via satellite transmission, the signal may be intercepted and a perfect copy may be created); *see also* Andrepont, *supra* note 38, at 400 (stating copying will rise since the technology allows consumers to create perfect copies); Hilary Clarke, THE HOLLYWOOD REPORTER, November 3, 1995 (noting digital transmissions are "expected to enable perfect-quality copies, which could then be sold on the black market").

48. *See generally* Reno v. American Civil Liberties Union, 521 U.S. 844, 850 (1997) (noting that "The Internet is an international network of interconnected computers."); Angela Proffitt, Note & Comment, *Drop the Government, Keep the Law: New International Body for Domain Name Assignment Can Learn from United States Trademark Experience*, 19 LOY. L.A. ENT. L.J. 601, 601 (1999) (explaining that the Internet was conceived almost thirty years ago by the United States Department of Defense as a closed conduit for military and academic communications); R. Carter Kirkwood, Comment, *When Should Computer Owners Be Liable for Copyright Infringement by Users?*, 64 U. CHI. L. REV. 709, 712 (1997) (describing that a computer network is made up of three primary building blocks: computers, software, and telecommunication lines and that most networks consist of "server" computers, where information is stored, reproduced, and controlled, and "client" computers, that customers use to "dial into" or access the information on the servers).

49. *See generally* Sanu K. Thomas, Note, *The Protection and Promotion of E-Commerce: Should There be a Global Regulatory Scheme for Digital Signatures*, 22 FORDHAM INT'L L.J. 1002, 1022 (1999) (stating that the Internet has become a universal appliance for everyday life and has become accessible from almost anywhere in the world); Hayes, *supra* note 35 (detailing the "major global data pipeline").

copyright law.[50] Advances in digital technology have "successfully contributed to the creation of a global information system."[51] With it comes the promise of a dramatic increase in international trade.[52] However, almost as certain to occur is copyright infringement.

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50. *See* Andrepont, *supra* note 38, at 404 (discussing how the DMCA substantially mitigates the existing threat to copyrighted materials posed by the relative case with which digital works can be copied and disseminated worldwide); Robert A. Cinque, Note, *Making Cyberspace Safe for Copyright: The Protection of Electronic Works in a Protocol to the Berne Convention*, 18 FORDHAM INT'L L.J. 1258 (1995) ("With the click of a mouse or the tap of a key, virtually anyone with a computer and a telephone can obtain vast quantities of information from almost anywhere on the globe."); *see also* Andreas P. Reindl, *Choosing Law in Cyberspace: Conflicts on Global Networks*, 19 MICH. J. INT'L L. 799, 800 (1998) ("The universal availability of copyrighted works is integral to the global information infrastructure . . . . [v]ideos, recordings of musical performances, and texts can be posted anywhere in the world, retrieved from any database in a foreign country, or made available by on-line service providers to subscribers on a global scale.").

51. Andrepont, *supra* note 38, at 400; *see* Proffitt, *supra* note 48 (noting that approximately 102 million users access the Internet). *See* Michael F. Morano, Note, *Legislating in the Face of New Technology: Copyright Laws for the Digital Age,* 20 FORDHAM INT'L L.J. 1374, 1374-75 (1997) (stating that "Computer technology has advanced to a point where individuals on opposite sides of the world may instantaneously exchange information. By accessing online services and the Internet . . . individuals may use computers to obtain journals, articles, world news, and even transfer funds in their bank accounts."); *see also* Benjamin R. Kuhn, *A Dilemma in Cyberspace and Beyond: Copyright Law for Intellectual Property Distributed Over the Information Superhighways of Today and Tomorrow*, 10 TEMP. INT'L & COMP. L. J. 171, 171 (1996) (stating that "The Internet . . . [runs] like a commune with 4.8 million fiercely independent members. . . . It crosses national boundaries and answers to no sovereign. It is literally lawless."). *See generally* Reindl, *supra* note 50, at 799-800 n.1 (discussing the term 'global information infrastructure,' also frequently called 'cyberspace,' as standing for the worldwide agglomeration of computer networks that allow decentralized, simultaneous transfer of data in digital form).

52. *See* Alan N. Sutin, *Roadblocks Stall Electronic Commerce; Legal Obstacles Hinder International Trade in Cyberspace*, N.Y.L.J., July 13, 1998, at S6; John A. Barrett, Jr., Recent Development, *International Legal Education in the United States: Being Educated for Domestic Practice While Living in a Global Society*, 12 AM. U.J. INT'L L. & POL'Y 975, 990 (1997) (noting that the World Wide Web has accelerated the pace of international trade); Thomas, *supra* note 49, at 1021-22 (noting how some commentators have argued that the explosion of the Internet as a vehicle for consumers will cause an increase in the international trade of goods and services); *see also* Kuhn, *supra* note 44, at 174 (noting that the U.S. and international legal systems should prepare for the coming changes given today's information technology and the advances in such technology on the horizon).

Part IV

The International Response to Copyright Issues

A. The WIPO and the Berne Convention

The World Intellectual Property Organization (WIPO)[53] is an intergovernmental organization with headquarters in Geneva, Switzerland.[54] It is an international organization dedicated to helping to ensure that the rights of creators and owners of intellectual property are protected worldwide and that inventors and authors are, thus, recognized and rewarded for their ingenuity.[55]

As early as the nineteenth century, international conventions have governed intellectual property law between member states.[56] The most important convention to deal with copyright

53. Convention Establishing the World Intellectual Property Organization (WIPO), July 14, 1967, 21 U.S.T. 1770, 828 U.N.T.S. 3. *See* Darrell G. Dotson, Comment, *International Law in the Americas: Rethinking National Sovereignty in an Age of Regional Integration: Comment: The European Controversy Over Genetic-Engineering Patents*, 19 HOUS. J. INT'L L. 919, 922 (1997) (discussing how the United Nations attempted to harmonize international patent law by forming the World Intellectual Property Organization on July 14, 1967); *see also* Mark Powell, *The European Union's Database Directive: An International Antidote to the Side Effects of Feist?*, 20 FORDHAM INT'L L. J. 1215, 1215-16 n.5 (1997) ("The World Intellectual Property Organization . . . [I]s one of the sixteen specialized agencies of the United Nations system of organizations . . . [R]esponsible for the promotion of the protection of intellectual property throughout the world.").

54. *World Intellectual Property Organization*, (visited Apr. 25, 2000) <http://www.wipo.org/eng/dgtext.htm>. *See* Tara Kalagher Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 GEO. WASH. J. INT'L L. & ECON. 327 (1993-1994) (discussing how the World Intellectual Property Organization is an agency of the United Nations Educational, Scientific and Cultural Organization and is headquartered in Geneva, Switzerland); *see also* Powell, *supra* note 53, at 1216 n.5 ("The World Intellectual Property Organization . . . is an international organization with headquarters in Geneva, Switzerland.").

55. *See* World Intellectual Property Organization, (visited Apr. 25, 2000) <http://www.wipo.org/eng/infbroch/infbroch98.htm#P23_2347>; *see also* Robert W. Pritchard, Article, *The Future is Now-The Case for Patent Harmonization*, 20 N.C. J. INT'L LAW & COM. REG. 291 (1995) ("The United Nations created WIPO for the purpose of worldwide promotion of patents, copyrights, trademarks, and other intellectual property rights."); Amy E. Simpson, *Copyright Law and Software Regulations in the People's Republic of China: Have the Chinese Pirates Affected World Trade?*, 20 N.C.J. INT'L LAW & COM. REG. 575 n.30 (1995) (discussing the WIPO's objective to promote protection of intellectual property throughout the world by ensuring administrative cooperation among member states).

56. *See* Susan A. Mort, *The WTO, WIPO & The Internet: Confounding the Borders of Copyright and Neighboring Rights*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 173, 178 (1997); *see also* Joanna Schmidt-Szalewski, *The International Protection of Trademarks After the Trips Agreement*, 9 DUKE J. COMP. & INT'L L. 189-91 (1998) (discussing several international agreements signed to facilitate the international protection of industrial property rights including the oldest agreement, the Paris Convention, signed in 1883); Christian L. Broadbent & Amanda M. McMillian, *Other International Issues: Russia and the World Trade Organization: Will Trips Be a Stumbling Block to Accession?*, 8 DUKE J. COMP. & INT'L L. 519, 526 (1998) (discussing several international agreements dealing with trademarks including the Madrid Agreement of 1891).

issues is the Berne Convention.[57] This treaty provides a basic framework with which member states must comply through domestic laws.[58] The goal was to help nationals of its member states obtain international protection of their right to control, and receive payment for, the use of their creative works such as: novels, short stories, poems, plays, songs, operas, musicals, sonatas, drawings, paintings, sculptures, and architectural works.[59] Article 6b recognizes an author's right to have his work respected, and his right to object to any alterations that would affect his reputation.[60] Such rights "shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the county where protection is maintained."[61]

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57. Berne Convention for the Protection of Literary and Artistic Property (Berne Convention), Sept. 9, 1886, 828 U.N.T.S. 221 (as amended). *See* Symposium, *The Impact of Internationalization of Transnational Commercial Law: Licensing on the Global Information Infrastructure: Disharmony in Cyberspace*, 16 J. INT'L L. BUS. 224, 229 (1995) (citing the Berne Convention as achieving relatively wide acceptance in the international community); *see also* Crystal D. Talley, *Japan's Retreat from Reverse Engineering: An Unnecessary Surrender*, 29 CORNELL INT'L L.J. 807, 807-08 (1996) (discussing the Berne Convention as providing the international basis for copyright law in the United States, Europe, and Japan).

58. *See* Alexander A. Caviedes, *International Copyright Law: Should The European Union Dictate Its Development*?, 16 B.U. INT'L L.J. 165, 171 (1998); *see also* Mort, *supra* note 56, at 178 (noting that the contracting parties simply agree to follow the principle of national treatment, thereby providing the same level of protection for nationals of other member states as they do for their own); Talley, *supra* note 57, at 814 ("The three guiding principles of the Berne Convention are national treatment, automatic protection, and independent protection. First, individuals are accorded national treatment in that both citizens and non-citizens qualify for identical treatment. Second, protection is automatic rather than dependent upon observation of formalities. Finally, a base level of protections is available in all member countries."); Gregory S. Kolton, Comment, *Copyright Law and the People's Courts in the People's Republic of China: A Review and Critique of China's Intellectual Property Courts*, 17 U. PA. J. INT'L ECON. L. 415, 421 n.30 (1996) ("The Berne Convention is not intended to supersede a member state's copyright laws; rather it is intended to supplement these laws, thus ensuring relative consistency in protection among member states."); Paul Edward Geller, *From Patchwork to Network: Strategies for International Intellectual Property in Flux*, 9 DUKE J. COMP. & INT'L L. 69, 69-70 (1998) (discussing the Berne and Paris Conventions, which require each member state to protect foreign treaty claimants like domestic claimants by using the same legal rules amongst competitors in media and technology markets within each set of borders).

59. *General Information about the WIPO*, (visited Apr. 25, 2000) http://www.wipo.org/eng/inflbroch99.htm. *See also* Peter Burger, *The Berne Convention: Its History And Its Key Role in the Future*, 3 J.L. & TECH. 1,2 (1988) (arguing that the Berne Convention helped overcome the differences among countries by maintaining the highest standard of international copyright protection available to authors over their literary and artistic works); Caviedes, *supra* note 58, at 171 (stating the history and various modes of protection the Berne convention provided for author's literary and artistic works).

60. *See* Senator Orrin G. Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. PITT. L. REV. 719, 725 (1998); World Intellectual Property Organization [hereinafter WIPO], Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, (Geneva) Dec. 2 to 20, 1996, art. 6(1) (Apr. 25, 2000) http://www.wipo.org/eng/diplconf/distrib/94dc.htm ("Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership"). *But see* SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986, 477 (1987) (noting that the perceived need to temper authors' rights as required to serve the public interest had been an integral part of the Berne Convention).

61. Berne convention for the protection of Literary and Artistic Works, (visited Apr. 25, 2000) http://www.wipo.org/eng/iplex/wo_ber.htm. *See* Robert J. Gutowski, 47 BUFF. L. REV. 713, 719-720 (1999) (discussing the duration of copyright protection available to authors under the Berne Convention and the central principle of national treatment as applied to member and non-member nations (The principle of national treatment requires that parties to an agreement extend the same protection to foreign nationals, from member nations, as they do domestic nationals)); *see also* WIPO, *supra* note 59, art. 7(1) (granting copyright protection for the life of the author plus 50 years).

The Berne Convention, along with eighteen other treaties addressing international intellectual property, operate under the oversight of the WIPO.[62] Despite the WIPO's centralized involvement, it has shortcomings.[63] The most prominent deficiency in the WIPO is its failure to provide for adequate enforcement of the treaties that it oversees.[64] The dissatisfaction with the WIPO's inability to enforce was addressed in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs agreement) signed on April 15, 1994.[65]

B. The TRIPs Agreement

The TRIPs agreement was a result of concern among developed countries, who lobbied heavily for protection against piracy of intellectual property.[66] As part of the same negotiations, the World Trade Organization (WTO) was created to act as the enforcement arm of TRIPs.[67]

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62. *See* Laurinda L. Hicks & James R. Holbein, *Convergence of National Intellectual Property Norms in International Trading Agreement*, 12 AM. U. J. INT'L L. & POL'Y 769, 778-79, 781 (1997) (noting that today both Berne and Paris Conventions are administered by the WIPO); Mort, *supra* note 56, at 176-77 (noting that until the creation of the WIPO in 1967, these various other conventions operated independently).

63. *See* Gutkowski, *supra* note 61, at 720 (noting that the WIPO Conventions are not equipped to address the present reality of the "global village"); Gellar, *supra* note 58, at 100 (recognizing that despite the WIPO conventions longevity it has been wrought with numerous criticisms); Harriet R. Freeman, *Reshaping Trademark Protection in Today's Global Village: Looking Beyond GATT's Uruguay Toward Global Trademark Harmonization and Centralization*, 1 ILSA J. INT'L & COMP. L. 67, 74 (1995) (stating, for example, that the national treatment principle affords protection only to the degree that a member country protects its own citizens).

64. *See* Mort, *supra* note 56, at 178; *see also* Anthony D. Sabatelli and J.C. Rasser, *Impediments To Global Patent Law Harmonization*, 22 N. KY. L. REV. 579, 611 (1995) (stating that international patent law also is without an enforcement mechanism). *But see* Camille Laturno, Comment, *International Arbitration of the Creative: A Look at the World Intellectual Property Organization's New Arbitration Rules*, 9 TRANSNAT'L LAW. 357, 376 (1996) (arguing that the lack of an enforcement provision is because the WIPO had been drafted at a time when intellectual property matters were less litigious than they are now).

65. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, pmbl., Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197 (1994); *see also* Gutkowski, *supra* note 61, at 715 n.3 ("TRIPs establishes standards concerning the availability, scope and use of eight categories of intellectual property: copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout-designs (topographies) of integrated circuits, and control of anti-competitive practices in contractual licenses").

66. *See* Ned Milenkovich, Comment, *Deleting The Bolar Amendment To The Hatch-Waxman Act: Harmonizing Pharmaceutical Patent Protection In A Global Village*, 32 J. MARSHALL L. REV. 751, 758-59 (1999); *see also* Jeanmarie LoVoi, *Anti-Piracy Efforts Triumph Under TRIPs but New Copying Technology Undermines the Success*, 25 BROOK. J. INT'L L. 445, 448 (1999) (illustrating China's attempts to reconcile copyright laws with provisions set forth in TRIPs as firm evidence the international arena is committed to battling piracy). *See generally* Robert J. Pechman, *Seeking Multilateral Protection for Intellectual Property: The United States "TRIPs" over Special 301*, 7 MINN. J. GLOBAL TRADE 179, 179-81 (1998) (describing TRIP as being introduced to "create internationally binding minimum standards of protection for intellectual property").

67. *See* Pechman, *supra* note 66, at 179-81 (stating that internationally binding standards of protection for intellectual property were enforced through the dispute settlement agreement of the World Trade Organization (WTO)); Milenkovich, *supra* note 66, at 754 (explaining that the United States enforces global agreements by way of a dispute resolution system developed in the World Trade Organization against offending member nations); Mort, *supra* note 56, at 178 (describing the WTO as a system to settle disputes and institute sanctions against noncompliant countries).

Although TRIPs created few new rights, it incorporated the substantive rights of the Berne, Rome, and Paris Conventions, while creating new measures of enforcement.[68]

A main objective of TRIPs is equitable treatment.[69] All signatories to the agreement must ensure effective, expeditious, equitable, and impartial enforcement of TRIPs rights.[70] To that end, they are obliged to abide by articles 1 through 21 of the Berne Convention, regardless of whether an individual signatory belonged to the Berne Convention.[71] In addition, it reinforced the principles of national treatment and most favored nation.[72] National treatment is an inter-

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68. *See* Mort, *supra* note 56, at 183. *See* Marie Wilson, *TRIPs Agreement Implications for Asian Protection of Computer Technology*, 4 ANN. SURV. INT'L & COMP. L. 18, 24 (1997) (explaining that the TRIPs agreement "builds on and works in conjunction with existing international treaties, requiring all WTO members to follow the Berne and Paris Conventions, and the Washington Treaty on Intellectual Property in Respect of Integrated Circuits."). "In addition, the TRIPs Agreement requires detailed administrative, civil, and criminal remedies to protect individual rightholders, and is the first multilateral intellectual property agreement that is enforceable between nations in dispute settlement proceedings." *Id. See also* Monique L. Cordray, *GATT v. WIPO*, 76 J. PAT. & TRADEMARK OFF. SOC'Y 121, 126-37 (1994) (discussing the higher standards of intellectual property protection provided by TRIPs as compared to those provided by the standards of traditional WIPO treaties; how the U.S. achieved those higher standards; GATT's relatively effective dispute settlement mechanisms; and enforcement procedures required by TRIPs).

69. *See* Nicole Telecki, *The Role of Special 301 in the Development of International Protection of Intellectual Property Rights After the Uruguay Round*, 14 B.U. INT'L L.J. 187, 191 (1996) (explaining the principles of most favored nation and national treatment to intellectual property rights as applied in TRIPs. "Most-favoured nation treatment requires that any protection and rights granted to nationals of any Member must be accorded to nationals of all members."); *see also* Pechman, *supra* note 66, at 187 (stating Members of TRIPs "must make available fair and equitable judicial procedures for civil infringement suits, including timely written notice to defendants, the right to legal counsel, and the ability for claimants to present all relevant evidence."); John E. Giust, *Noncompliance with TRIPs by Developed and Developing Countries: Is TRIPs Working?*, 8 IND. INT'L & COMP. L. REV. 69, 71 (1997) (explaining that in TRIPs, "[e]ach Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property.").

70. *See* Wilson, *supra* note 68, at 46 (explaining that all the signatories to the TRIPs Agreement must ensure effective, expeditious, and impartial enforcement of substantive TRIPs rights); *see also* Martin D.H. Woodward, *TRIPs and NAFTA's Chapter 17: How Will Trade-Related Multilateral Agreements Affect International Copyright?*, 31 TEX. INT'L L.J. 269, 273 (1996) (discussing that TRIPs directs signatories to adopt specific enforcement measures for intellectual property rights of individuals); Christopher S. Mayer, *The Brazilian Pharmaceutical Industry Goes Walking From Ipanema to Prosperity: Will the New Intellectual Property Law Spur Domestic Investment?*, 12 TEMP. INT'L & COMP. L.J. 377, 381 (1998) (explaining minimum required provisions relating to developing countries).

71. As a result, membership in the Berne Convention has nearly doubled since 1986. *See* Mort, *supra* note 56, at 184; *see also* Lisa M. Brownlee, *Recent Changes in the Duration of Copyright in the United States and European Union: Procedure and Policy*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 579, 591 (1996) (stating TRIPs asserts that its members must "comply with articles 1 through 21 of the Berne Convention and the Appendix thereto . . . . [w]hile TRIPs provides for national treatment by signatory countries, it specifically allows the exemptions to national treatment permitted under Berne to continue."); Doriane Lambelet, *Internationalizing the Copyright Code: An Analysis of Legislative Proposals Seeking Adherence to the Berne Convention*, 76 GEO. L.J. 467, 470 (1987) (explaining that there is a concern Berne members will use a mechanism "which permits a signatory to retaliate against non-signatories that do not adequately and effectively protect the interests of its citizens.").

72. *See* Mort, *supra* note 56, at 184 n.64 (noting that the TRIPs Agreement reinforced the principles of national treatment and most favored nation, which aim to eliminate discrimination on both the national and international level); Kimberly Hancock, *Foreign and International Law: A) Foreign Law: 1997 Canadian Copyright Act Revisions*, 13 BERKELEY TECH. L.J. 517, 529 (1998) (stating that national treatment is the principle of the Berne Convention, Paris Convention, and TRIPs); *see also* Wilson, *supra* note 68, at 24 (discussing that national and most favored nation treatment are required under the TRIPs agreement).

national law principle where persons protected by the convention can claim the protection that the law of that state grants to its own nationals.[73] Unlike national treatment, the most favored nation principle had never been adopted to intellectual property prior to TRIPs.[74] This principle is aimed at eliminating discrimination against developing countries by requiring signatories to the agreement to afford every signatory the same favor, advantage, privilege or immunity.[75] Prior to this provision, it was common for countries to grant intellectual property rights to a foreign national only if there was an agreement of reciprocity between the two countries.[76] Reciprocity had little value to developing countries because they did not have much to protect.[77]

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73. *See* Hancock, *supra* note 72, at 529-30 ("National treatment, as used in international copyright conventions, means that persons protected by the convention can claim in all contracting states the protection that the law of that state grants to its own nationals."); Giust, *supra* note 69, at 71 (stating TRIPs is organized around the principle of national treatment, "[e]ach Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property. . . ."). *But see* David Nimmer, *GATT's Entertainment: Before and NAFTA*, 15 LOY. L.A. ENT. L.J. 133, 143 (1995) (explaining an exception to the principle of national treatment, wherein the European Union may accord preferential treatment under the General Agreement on Trade in Services to its own domestic entities).

74. *See* Hancock, *supra* note 72, at 529-30 (noting that the principle of national treatment may be limited by the rule of reciprocity); Wilson, *supra* note 68, at 19 (discussing that the TRIPs agreement added intellectual property rules to the global trading system by requiring minimum standards and meaningful enforcement procedures applicable to all members); Adrian Otten & Hannu Wager, *Compliance with TRIPs: The Emerging World View*, 29 VAND. J. TRANSNAT'L L. 391, 396 (1996) (describing articles 3, 4, and 5 of the TRIPs agreement which include fundamental rules on most favored nation treatment, which are common to all categories of intellectual property covered by TRIPs).

75. *See* Hancock, *supra* note 72, at 529-30 (noting that two specific NAFTA provisions provide possible exemptions from the rule of national treatment); Alexander A. Caviedes, *International Copyright Law: Should The European Union Dictate Its Development*?, 16 B.U. INT'L L.J. 165, 175 (1998) discussing Article 4 of the TRIPs Agreement which provides "any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members."); *see also* Mayer, *supra* note 70, at 383 (illustrating that in Article 27 of TRIPs "patents shall be available and patent rights enjoyable without discrimination as to the place of invention, field of technology, or whether the products are imported or locally produced.").

76. *See* Hancock, *supra* note 72, at 529-30 ("Reciprocity means that country A will protect works originating in country B only to the extent that country B protects works originating in country A."); Wilson, *supra* note 68, at 32 (explaining that reciprocity protects others innovations to the extent there is reciprocal national treatment); *see also* Pechman, *supra* note 66, at 182 (stating that under the requirement of reciprocity "no member nation may afford protection to its own citizens under its intellectual property laws unless it affords the same protection to the nationals of the other member nations.").

77. *See* Hancock, *supra* note 72, at 529-30 ("Reciprocity can therefore be seen as an intermediate stage which allows for an increase in copyright protection in a situation in which general agreement on the increased level of protection cannot be obtained."); Dr. James Otieno-Odek, *Public Domain in Patentability After the Uruguay Round: A Developing Country's Perspective with Specific Reference to Kenya*, 4 TUL. J. INT'L & COMP. L. 15, 40 (1995) (explaining that developing countries may find it difficult to use the transitional provisions of TRIPs as a tool to "create a viable public domain in an effort to enhance its national technological requirements."); *see also* Caviedes, *supra* note 75 at 195 (stating that to developing countries, reciprocity was of little value because they did not produce technology and thus had little or nothing to protect).

TRIPs provides for the dispute settlement mechanism that previous international conventions were lacking.[78] Signatories must provide, through domestic law, a method in which intellectual property right holders can enforce their rights.[79] Article 23.1 provides that signatories are required to abide by any decisions that are brought before the Dispute Settlement Body of the WTO.[80]

C. WIPO Treaties

The WIPO recognized the potential for international copyright infringement in the Internet age when it enacted the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty in December 1996.[81] Both treaties provide for technological measures of protection in response of the emergence of the Internet.[82]

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78. *See* Mort, *supra* note 56, at 185 n.13 (stating, "the TRIPS Agreement established the WTO and created an enforcement mechanism to ensure that international intellectual property treaties are upheld."); Pechman, *supra* note 66, at 188 (discussing that TRIPs fills a major gap left by other multinational intellectual property agreements by providing a detailed dispute settlement mechanism); *see also* Telecki, *supra* note 69 (stating "TRIPS establishes minimum standards for intellectual property protection and provides a mechanism for dispute settlement through the DSU.").

79. *See* Mort, *supra* note 56, at 185 (noting that under the TRIPs Agreement, "members [must] provide domestic procedures and remedies so that right holders can enforce their rights effectively."); Woodward, *supra* note 70, at 280 (explaining that if a country's domestic legislation does not grant these rights, TRIPs requires at least the possibility of protection of copyright holders in the subject matter of broadcasts); *see also* Frank J. Garcia, *Protection of Intellectual Property Rights in the North American Free Trade Agreement: A Successful Case of Regional Trade Regulation*, 8 AM. U.J. INT'L L. & POL'Y 817, 819 (1993) (stating that "[t]he protection against international piracy afforded by an IP owner's domestic laws is limited. Pirated goods can be excluded from the domestic market at the border, although such exclusion places an additional burden upon already overworked customs and border officials.").

80. *See* Telecki, *supra* note 69, at 214 (stating that when members seek the redress of a violation, they shall recourse to, and abide by, the rules and procedures of Article 23.1); Kevin M. McDonald, Esq., *The Unilateral Undermining of Conventional International Trade Law Via Section 301*, 7 D.C.L. J. INT'L L. & PRAC. 395, 397 (1998) (explaining that in the WTO, a Dispute Settlement Body administers dispute settlements); *see also* Susana Hernandez Puente, *Section 301 and the New WTO Dispute Settlement Understanding*, 2 ILSA J. INT'L & COMP. L. 213, 225 (1995) (stating that "Article 23.1 establishes a positive obligation requiring contracting parties; seeking redress of a practice they consider a GATT violation of obligations or other nullification, or impairment of benefits under the covered agreements; to have recourse to, and abide by, the DSU procedures and rules.").

81. *See* Carolyn Andrepont, *Legislative Update*, *Digital Millenium Copyright Act: Copyright Protections for the Digital Age*, 9 L. ART & ENT. LAW 397, 401-03 (1999) (stating that the first treaty, Copyright Treaty, serves to strengthen the Berne Convention by including protections for cyberspace commerce and the second treaty, the Performance and Phonograph Treaty, introduced protections for sound recording performances in the digital arena); Mort, *supra* note 56, at 198 (discussing the WIPO's conference that convened in Geneva from December 2 to 20, 1996. At the end of the discussions a consensus was reached on treaties dealing with copyright and performances and phonograms); *see also* Michael F. Morano, Note, *Legislating in the Face of New Technology: Copyright Laws for the Digital Age*, 20 FORDHAM INT'L L. J. 1374, 1377 (1997) (discussing the enormous impact the treaties have had in increasing protection to allow creators to disseminate their works over the Internet).

82. *See* June Chung, Note, *The Digital Performance Right in Sound Recordings Act and Its Failure to Address the Issue of Digital Music's New Form of Distribution*, 39 Ariz. L. Rev. 1361, 1386 (1997) ("Both address the challenges of digital technology in relation to the Internet. They provide for technological measures of protection and information regarding management of electronic rights."); Julie S. Sheinblatt, *Foreign and International Law: b) International Law and Treaties: The WIPO Copyright Treaty* 13 BERKELEY TECH. L.J. 535, (1998) (stating the treaties were created in response to the arrival of the digital age); *see also* Mort, *supra* note 56, at 173 (explaining that the goals of the treaties are to make the Internet a reliable conduit for global commerce).

C.1. WIPO Copyright Treaty

The WIPO Copyright Treaty builds upon the Berne Convention, and brings into the Internet age[83] computer programs that have been considered literary.[84] More significantly, the Copyright Treaty recognizes a broad right to communication, including the Internet.[85] The right of public communication permits copyright holders to make their works available by wire or wireless means.[86] When or whether reproduction by recipients is an infringement of copyright is left to the domestic law of the individual signatories.[87] In fact, Internet Service Providers (ISPs) were granted political accommodation under the Copyright Treaty before any

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83. *See* Senator Orrin G. Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 PITT. L. REV. 719, 745 (noting the Berne Convention as the most important international agreement on copyright); Mort, *supra* note 56, at 188 (explaining that the WIPO organized a committee of experts to clarify the existing or establish new international norms under the present text of the Berne Convention); *see also* Neil W. Netanel, *The Impact of the WIPO Copyright Treaty on TRIPs Dispute Settlement*, 37 VA. J. INT'L L. 441, 447 (1997) (stating that TRIPs incorporates substantial provisions of the Paris Act of the Berne Convention).

84. *See* Hatch, *supra* note 83, at 746 (discussing how the Copyright Treaty recognizes a right of rental for computer programs, cinematographic works, and works embodied in sound recordings); Mort, *supra* note 56, at 188 (stating "Article 4 additionally extends protection to computer programs as literary works, whatever the mode or form of their expression, thereby broadening slightly the protection previously granted under the TRIPs Agreement."); *see also* Ingrid M. Arckens, *Obtaining International Copyright Protection For Software: National Laws And International Copyright Conventions*, 38 FED. COMM. L.J. 283, 289 (1986) (explaining that in an amendment of the Copyright Act there is a specific inclusion of computer programs as literary works).

85. *See* Hatch, *supra* note 83, at 746 ("The Copyright Treaty reorganizes a broad right of public distribution for covered works and recognizes a right of rental for computer programs, cinematographic works, and works embodied in sound recordings); Mort, *supra* note 56, at 188 (stating, "[t]he Preamble to the WIPO Copyright Treaty express[es] a desire to maintain effective and uniform protection of literary and artistic rights, it recognizes the need for new rules and the reinterpretation of old ones, to provide this protection in light of developing information and communication technologies."); *see also* Tricia A. Hoefling, *The (Draft) WIPO Arbitration Rules for Administration Challenge Panel Procedures Concerning Internet Domain Names*, 8 AM. REV. INT'L ARB. 173, 193 (1997) (explaining an exception "to the Article 3 rule that all communications be sent by electronic transmission on the Internet; documentary evidence may be sent by postal or courier service.").

86. *See* Mort, *supra* note 56, at 199 (suggesting that the right of public communication as perhaps the most important right contained in the WIPO Copyright Treaty); Stephen Fraser, *The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure*, 15 J. MARSHALL J. COMPUTER & INFO. L. 759, 774 (1997) (stating that an author can communicate to the public about their works through wire or wireless means); *see also* Michael P. Ryan, *The Function-Specific and Linkage-Bargain Diplomacy of International Intellectual Property Lawmaking*, 19 U. PA. J. INT'L ECON. L. 535, 584 (1998) (stating "[p]roducers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.").

87. *See* Mort, *supra* note 56, at 197-200 (stating that where a medium of communication allows one to obtain a tangible copy, that local law must apply in the event of infringement); Camille A. Laturno, *International Arbitration of the Creative: A Look at the World Intellectual Property Organization's New Arbitration Rules*, 9 TRANSNAT'L LAW. 357, 362 (1996) (stating that "[m]ost copyright protection is determined under the domestic laws of various nations rather than by treaty."); *see also* Sheinblatt, *supra* note 82, at 540 (discussing that the WIPO Copyright Treaty incorporates the "exclusive right of authorizing the reproduction" of protected works set forth in Article 9 of the Berne Convention). Section 106 of the Copyright Act sets out an "exclusive" right "to reproduce the copyrighted work" as well. The United States' general exclusive right of reproduction, then, seems to be in accord with the Treaty's exclusive right of reproduction. *Id.*

domestic law was enacted, as they feared an onslaught of lawsuits from copyright holders.[88] Signatories are required to provide legal protection to copyright holders whose rights have been infringed via technological circumvention.[89] Similar provisions require the protection of authors against removal of the identity of the work, its author, any rights holder, or the terms and conditions of its use.[90]

Missing from the Copyright Treaty is an enforcement provision that is consistent with TRIPs.[91] The Copyright Treaty merely requires that each signatory adopt necessary measures to ensure the treaty's application and to prevent infringement.[92] This seems to be inconsistent

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88. *See* Mort, *supra* note 56, at 200 (noting that Internet service providers and telecom companies requested clarification before implementing any laws for fear that the Treaty could be interpreted broadly, which may result in endless lawsuits); *see also* Sheinblatt, *supra* note 82, at 549-50 (suggesting that the Copyright Treaty fails to clarify the potential liability of Internet service providers); Jessica Litman, Symposium, *Copyright Owners' Rights and Users' Privileges on the Internet: Reforming Information Law in Copyright's Image,* 22 DAYTON L. REV. 587, 604 (1997) (asserting that a majority of the delegates representing nations did not support the language in the Treaty, which was eventually struck, but remaining members reached an agreed statement on the language of the Treaty); Daniel G. Asmus, *Service Provider Liability: Australian High Court Gives the World a First—Should the United States Follow Suit?*, 17 DICK. J. INT'L L. 189, 221 (1998) (noting that Internet service providers thought that the language of the WIPO treaties was vague in terms of their liability for failure to monitor Internet transmissions and copyright violations).

89. *See* World Intellectual Property Organization: Copyright Treaty, *adopted* December 20, 1996, 36 I.L.M. 65, 71, art. XII. (providing, "Contracting Parties shall provide adequate and effective legal remedies against any person [who] . . . induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention"); Hatch, *supra* note 83, at 746 (asserting that the Treaty requires signatories to provide legal protection and remedies to copyright holders against circumventing measures such as encryption, and piracy); *see also* Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised,* 14 BERKELEY TECH. L.J. 519, 521 (1999) (stating that the Copyright Treaty requires countries to implement protection to copyright holders and their works against infringement); Marian Nash (Leich), *Contemporary Practice of The United States Relating to International Law: Copyright and Neighboring Rights,* 92 A.J.I.L. 44, 54 (1998) (suggesting that the United States encourages other countries to implement adequate measures to protect their intellectual property).

90. *See* World Intellectual Property Organization: Copyright Treaty, *adopted* December 20, 1996, 36 I.L.M. 65, 71-72, art. XII (stating that signatories shall provide legal protection against the removal of "Rights Management Information"—information including that which identifies the work, author, copyright owner, terms and conditions of usage); Mort, *supra* note 56, at 200 (stating that signatory nations must protect authors from the removal or alteration of "rights management information"); *see also* Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47, 99 (1999) (providing that the Treaty's signatory nations are required to, among other obligations, protect authors from persons removing digital rights management information, and distribution of the author's work after such removal); David L. Hayes, *Advanced Copyright Issues on the Internet*, 7 TEX. INTELL. PROP. L.J. 1, 26 (1998) (asserting that the Treaty protects copyright holders from persons removing information identifying the rights holder, the author, the work itself, or terms of use).

91. *See* World Intellectual Property Organization: Copyright Treaty, *adopted* December 20, 1996, 36 I.L.M. 65, 72, art. XIV (providing that, "Contracting Parties shall ensure that enforcement procedures are available under their law so to permit effecting action against any act of infringement of rights covered by this Treaty").

92. *See id.*; *see also* Mort, *supra* note 56, at 201 (noting that signatories must provide adequate legal measures to protect authors from infringement of rights under the Copyright Treaty); Neil Smith and Andrew V. Smith, *Technical Protection Devices and Copyright Law*, 3 B.U. J. SCI. & TECH. L. 7, 14 n.49 (1997) (concluding that the Copyright Treaty did not address mandatory anti-circumvention measures, but does require signatory nations to provide adequate legal measures against circumvention); Shahram A. Shayesteh, *High-Speed Chase on the Information Superhighway: The Evolution of Criminal Liability for Internet Piracy*, 33 LOY. L.A. L. REV. 183, 208 (1999) (stating that the Treaty requires signatory nations to implement legal and effective protective measures against circumvention of the technological measures which copyright owners use).

with TRIPs enforcement guidelines, since domestic standards in each signatory country can be different.[93]

C.2. Performances and Phonograms Treaty

The WIPO Performances and Phonograms Treaty recognized the importance of protecting sound recordings in the Internet era.[94] Prior to this treaty, no major international agreement protected phonographic rights beyond that of reproduction.[95] Because of the Phonogram Treaty, protected rights have been expanded to include the right of public distribution, rental right, and the right to make works available to the public.[96] For example, under applicable law and in accordance with industry practices, a record company would need an artist's permission to distribute his CD to the public, rent it to the public, or transmit the sound recording to the

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93. *See* Mort, *supra* note 56, at 185 (stating that members must provide measures to copyright holders such that the measures enforce rights equitably and deter future infringement); Alexander A. Caviedes, *International Copyright Law: Should The European Union Dictate Its Development*?, 16 B.U. INT'L L.J. 165, 192 (1998) (suggesting if the signatory's domestic law affords less protection than that required under TRIPs agreement, then the agreement will apply). *But cf.* Andreas P. Reindl, *Choosing Law in Cyberspace: Conflicts on Global Networks*, 19 MICH. J. INT'L L. 799, 812 (1998) (describing countries have already moved toward harmonizing international copyright laws, as evidenced in the TRIPs Agreement and two WIPO agreements); Brenda Tiffany Dieck, *Reevaluating the Forum Non-Conveniens Doctrine in Multi-territorial Copyright Infringement Cases*, 74 WASH. L. REV. 127, 147 (1999) (concluding as a result of international copyright law harmonization, courts can assume that domestic copyright laws are the same or similar).

94. *See* Carolyn Andrepont, *Legislative Update*, *Digital Millenium Copyright Act: Copyright Protections for the Digital Age*, 9 L. ART & ENT. LAW 397, 402 (1999) (asserting the Treaty protects sound recording performances in the digital era); *see also* Steven V. Podolsky, *Chasing the Future: Has the Digital Performance in Sound Recordings Act of 1995 Kept Pace with Technological Advances in Musical Performance, or is Copyright Law Lagging Behind*?, 21 HASTINGS COMM. & ENT. L.J. 651, 682 (1999) (noting the Phonograms Treaty addresses the rights of performers and producers in regard to digitally transmitted sound recordings); *see also* Hatch, *supra* note 83, at 720 (describing Senator Hatch's endorsement of legislation, including that which implemented that Phonograms Treaty, to establish rules for the Internet).

95. *See* Mort, *supra* note 56, at 205 (suggesting there were no significant agreements prior to the Treaty that protected rights aside from reproduction); *see also* Litman, *supra* note 88, at 598 (stating members of the WIPO convened to propose treaties to resolve copyright issues posed by new technology); *see also* Eric J. Schwartz, *The Impact of Technological Change in the Canada/U.S. Context: Protecting and Exploiting U.S. and Canadian Intellectual Property Abroad in a Technologically Changing World Economy—a U.S. Perspective*, 25 CAN.-U.S. L.J. 97, 100 (1999) (opining that the threat of the Internet resulted in the enactment of the Trade Related Aspects for Intellectual Property Rights ("TRIPs") so to expand on the standards originally established in the Berne Convention).

96. *See* World Intellectual Property Organization: Performances and Phonograms Treaty, *adopted* January 20, 1997, 36 I.L.M. 76, 82-83, ch. II, arts. VII-X (stating the Treaty protects a performer's moral rights, including rights of reproduction, distribution, rental, and making available to the public fixed performances); Hatch, *supra* note 1, at 747 (advising these rights only apply to audio performers); *see also* Andy Y. Sun, *From Pirate King to Jungle King: Transformation of Taiwan's Intellectual Property Protection*, 9 FORDHAM I. P., MEDIA & ENT. L.J. 67, 121 n.135 (1998) (opining the WIPO Performances and Phonograms Treaty, among other agreements and conventions, precludes unauthorized fixation, bootlegging, and distribution including reproduction and rental control of fixed performances); Podolsky, *supra* note 94, at 681 (providing the Treaty protects a performer's rights, including moral, economic, distribution, enforcement and national treatment rights).

public over the Internet.[97] In addition to the above rights, the Phonograms Treaty protects a performer's moral rights, economic right in unfixed performances, and right to make fixed performances available.[98]

D. U.S. Copyright Response to the Internet Age

On October 28, 1998, President Clinton signed the Digital Millennium Copyright Act (DMCA).[99] It has been called the most important law in intellectual property this decade.[100] The DMCA implements both the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty; updates the current copyright laws to reflect the Internet age; and outlaws the manufacture of devices or software designed to circumvent security measures created for the Internet.[101] Prior to the signing of the DMCA, the law did not prohibit devices that were

97. *See* World Intellectual Property Organization: Performances and Phonograms Treaty, *adopted* January 20, 1997, 36 I.L.M. 76, 82-83, ch. II, arts. V, VI, X, (stating the Treaty protects a performer's moral rights, including economic, and the right to make fixed performances available to the public); Hatch, *supra* note 83, at 747) (providing that a record company is required to get the performer's permission to distribute, rent to the public, or transmit over the Internet copies of the performer's music); *see also* Ryan S. Henriquez, *Facing the Music on the Internet: Identifying Divergent Strategies for Different Segments of the Music Industry in Approaching Digital Distribution*, 7 UCLA ENT. L. REV. 57, 72 (1999) (asserting legal reproduction of a sound recording requires permission from the copyright owner—the recording artist or the record company).

98. *See* Mort, *supra* note 56, at 207 (noting the Treaty provides the performer with six rights, including moral rights—that which allows an author "to object to any distortion, mutilation, or other modification" of the work.); *see also* Podolsky, *supra* note 94, at 681 (suggesting the Treaty protects a performer's rights, including moral, economic, distribution, enforcement and national treatment rights); Nash (Leich), *supra* note 89, at 57 (noting that Article 5 of the Treaty provides for an artist's moral rights, and Article 10 and 14 provide for performers' and producers' exclusive rights to authorize distribution to the public fixed performances and phonograms).

99. Digital Millenium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860. *See* Andrepont, *supra* note 94, at 398 (stating the DMCA was a response to the need for improved copyright protection); *see also* Daniel G. Asmus, *Service Provider Liability: Australian High Court Gives the World a First—Should the United States Follow Suit?*, 17 DICK. J. INT'L L. 189, 225 (1998) (asserting the President signed into law the Digital Millenium Copyright Act).

100. *See* Andrepont, *supra* note 94, at 398 (opining the DMCA is deemed the most significant law on intellectual property this decade); Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHI.-KENT. L. REV.1257, 1292 (1998) (opining the DMCA criminally penalizes making or using devices for the intent of circumventing technological protections); *see also* John M. Conley et al., *Database Protection in a Digital World,* 6 RICH. J. L. & TECH. 2, 63 (1999) (asserting the DMCA is significant legislation and perhaps, unintended impact on the protection of databases); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised,* 14 BERKELEY TECH. L.J. 519, 521 (1999) (stating the DMCA surpasses treaty requirements in that it broadly bans acts or technologies that circumvent access controls).

101. *See* Andrepont, *supra* note 94, at 401 (noting that the objective of the WIPO Copyright Treaty is to protect "cyberspace commerce"); *see also* Samuelson, *supra* note 100, at 521 (1999) (describing how the WIPO Copyright Treaty "established several important international norms for applying copyright law in the digital environment"); *Senate Passes Digital Millenium Copyright Act,* COMPUTER AND ONLINE INDUSTRY LITIGATION REPORTER, July 7, 1998, at 10 (stating that the WIPO Performances and Phonograms Treaty "extends international protection for sound recordings").

designed specifically to penetrate encryption codes that a copyright holder may have established.[102]

In addition to incorporating the two international treaties, the DMCA addresses the area of the Internet Service Providers (ISPs).[103] An ISP is defined as "any entity offering the transmission, routing, or providing of connections for digital online communications, . . . without modification to the content of the material as sent or received."[104] Specifically, the DMCA created limitations on the potential liability of ISPs for copyright infringement that fall within one of four categories: (1) transitory communications,[105] (2) system caching,[106] (3)

102. *See* Andrepont, *supra* note 94, at 409 (noting that an exception in the law exists that would allow groups such as educational institutions to circumvent encryption); Lemley, *supra* note 100, at 745 (stating that "the primary purpose of the DMCA is to intervene in the innovation marketplace, by interposing what one might call, 'unilateral technological disarmament' on designers of encryption-breaking systems"); *see also* Shayesteh, *supra* note 92, at 209 (stating that after the passage of the DMCA, "if a pirate hacks a password or some form of encryption to obtain access to a copyrighted software file, he or she will be in violation of federal copyright law." This provision will become effective on October 28, 2000).

103. *See* Andrepont, *supra* note 94, at 412-17 (noting that an exception in the law exists that would allow groups such as educational institutions to circumvent encryption); Jo Dale Carothers, *Protection of Intellectual Property on the World Wide Web: Is the Digital Millennium Copyright Act Sufficient?*, 41 ARIZ. L. REV. 937, 939 (1999) (describing how the DMCA now protects ISPs from liability); *see also* Georgia Holmes and Daniel A. Levin, *Who Owns Course Materials Prepared by a Teacher or Professor? The Application of Copyright Law to Teaching Materials in the Internet Age,* 2000 B.Y.U. L. REV. 165, 184 (2000) (noting that Title II of the DMCA "governs the Copyright liability of the ISPs . . . and generally grants them immunity from liability for the infringing activities of their subscribers. . . .").

104. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 512 (1998). *See* Hank Intven et al., *Internet Telephony—The Regulatory Issues,* 21 HASTINGS COMM. & ENT. L. J. 1, 7 (1998) (noting that ISPs are the sources through which a party may connect to the Internet); Foo Choy Peng, *Yahoo! Waits on Mainland Reform,* SOUTH CHINA MORNING POST, Sept. 29, 1999, at Business Post 1 (describing how an Internet joint venture was complicated because there is no definition of ISPs).

105. To qualify, the following conditions must be met: (1) the transmission is not initiated by the provider; (2) the transmission or storage is carried out through an automatic process, and the provider does not select or modify the material or select the recipients of it; and (3) the material is not ordinarily accessible to anyone other than the intended recipients, and no copy of it is maintained any longer than is required to complete the transmission. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 512 (1998). *See* Sharon Appel, *Copyright, Digitization of Images, and Art Museums: Cyberspace and Other New Frontiers*, 6 UCLA ENT. L. REV. 149, 208 (1999) (noting this limitation applies to the transmission, routing, or providing of connections for digital online communications by reason of the intermediate and transient storage or transmission of material through the provider's system or network); Mark K. Suri, *Avoid Online Copyright Infringement Liability; Requirements under the Digital Millennium Copyright Act,* ASSOCIATION MANAGEMENT 91, 92 (1999) (defining transitory communications as including only "pure online service providers who are acting as a genuine conduits of information"); Kevin Davis, *Fair Use on the Internet: A Fine Line Between Fair and Foul,* 34 U.S.F. L. REV. 129, 134 (1999) (noting that the exemptions from copyright infringement have been granted for service providers for transitory communication).

storage of information on either systems or networks at the direction of users,[107] and (4) information location tools.[108] To be eligible to benefit from these limitations, the provider must: (1) designate an agent to receive notifications of claimed infringement; (2) implement a policy for terminating subscribers who are repeat infringers; and (3) accommodate, and not interfere with standard technical measures used by copyright owners to identify or protect their copyrighted works.[109]

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106. To qualify, the following conditions must be met: (1) the content of the material cannot be modified; (2) the provider must comply with rules concerning refreshing, reloading, or other updating of material when specified by the person making the material available; (3) the ISP must not interfere with the ability to return materials to the person who posted it; (4) the provider must limit access to material to those users of its system or network that have met the conditions imposed by the individual who posted the information; and (5) the provider must respond expeditiously to any material available online with the authorization of the copyright owner. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 512 (1998). *See* Andrepont, *supra* note 94, at 415 (noting that "the system catching liability limitation provides that a service provider will not be liable for any monetary, injunctive or other equitable relief as long as the conditions are met"); I. Trotter Hardy, *Copyright Owners' Rights & Users' Privileges on the Internet: Computer RAM "Copies": A Hit or Myth? Historical Perspectives on Caching as a Microcosm of Current Copyright Concerns,* 22 DAYTON L. REV. 423, 427 (1997) (describing how the purpose of system caching is to provide "faster access to information stored on a PC's hard disk or RAM memory"); *see also* Richard S. Vermut, *File Caching on the Internet: Technical Infringement or Safeguard for Efficient Network Operation?*, 4 J. INTELL. PROP. L. 273, 277 (1997) (discussing the fact that "when a request for information is made, the system's caching software takes the request, looks in the cache to see if it is available and, if so, retrieves it directly from the cache").

107. *See supra* note 106 and accompanying text; s*ee also* Andrepont, *supra* note 94, at 415-16 (noting that "the statute provides penalties for knowingly misrepresenting any information on either a notice of infringement or a counter notice of compliance."); Jenevra Georgini, *Through Seamless Webs & Forking Paths: Safeguarding Authors' Rights in Hypertext,* 60 BROOK. L. REV. 1175, 1177 (1994) (describing how far "electronic data storage and information retrieval methods [have] advanced"); Jennifer L. Kostyu, *Copyright Infringement on the Internet: Determining the Liability of Internet Service Providers,* 48 CATH. U. L. REV. 1237, 1253 (1999) (noting that "storage and transmission of information is a necessary action for a working network system and the incidental copying that occurs automatically and uniformly does not constitute "copying" as defined by statute.") (citing *Religious Technology Center v. Netcom On-line Communication Services, Inc*., 907 F. Supp. 1361 (N.D. Cal. 1995)).

108. S*ee* Andrepont, *supra* note 94, at 416-17 (noting that [l]iability is limited to acts which refer or link users to sites containing infringing materials); David L. Hayes, *Advanced Copyright Issues on the Internet,* 7 TEX. INTELL. PROP. L.J. 1, 80 (1998) (discussing Senate Bill 1146 and how it provided exemptions from liability for certain information location tools such as "a site-linking aid or directly, including a hyperlink or index; a navigational aid; including a search engine or browser; and the tools for the creation of a site linking aid"); Jeffrey P. Cunard & Jennifer B. Coplan, *WIPO Treaty Implementation: Debate Over OSP Liability; Legislative Battle Heats up in Connection with Two Bills,* COMPUTER LAW STRATEGIST, October 1997, Vol. 15; No. 6; pg. 1 (providing examples of information location tools that are excluded from liability such as "web site directories, indexes, hyperlinks, browsers or search engines").

109. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 512 (1998). *See* Appel, *supra* note 105, at 208-09 (describing the three ways that the DMCA limits liability to service providers); Howard C. Anawalt, *Using Digital Locks in Invention Development,* 15 COMPUTER & HIGH TECH. L. J. 363, 368 (1999) (stating that in order to be relieved from liability, "the online service provider must carry out policies that terminate users who are repeat offenders . . . "); *see also* Susan A. Mort, *The WTO, WIPO & The Internet: Confounding the Borders of Copyright and Neighboring Rights*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 173, 174-75 (1997) (describing how WIPO, in 1996, met to form agreements regarding "the protection of copyright and neighboring rights in digital environments").

Clearly, the goal of the DMCA is to protect copyright in the digital era.[110] However, one author suggested that it may have its shortcomings.[111] It seems clear that the DMCA seems to outlaw technologies if their primary purpose is to circumvent a technical protection measure that effectively protects a right of a copyright owner to control its work (i.e., a right to control illegal copying).[112] However, the DMCA recognizes that certain circumventions should be lawful.[113] Moreover, backup copying is a specially privileged activity in the copyright statute.[114] Because the copyright owner does not have a statutory right to control backup copying, perhaps a computer program specifically intended to enable backup copying should be outside the statute.[115] It is important to understand that these programs are needed for backup copying

110. *See* Richard G. Frenkel, *Intellectual Property in the Balance: Proposals for Improving Industrial Design Protection in the Post-TRIPs Era*, 32 LOY. L.A. L.REV. 531, 577 (1999) (describing the DMCA's goals); *see also* Universal Studios, Inc. v. Reimerdes, 2000 US Dist. LEXIS 906, 936 (2000) (describing the DMCA as a "tool to protect copyright in the digital age"); *The Most Significant Legal Development in 1998,* 3 CYBER LAW 13, Feb. 1999, at 13-14 (noting how Congress' passage of the DMCA was part of a goal to educate regarding the Internet).

111. *See* Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L. J. 519, 519 (1999) (describing how the provisions of the DMCA are much broader than WIPO intended them to be); *see also* Jonathan Band and Taro Issihiki, *The New Anti- Circumvention Provisions in the Copyright Act: A Flawed First Step,* 3 CYBER LAW. 2, (1999) (stating how the DMCA "still has significant shortcomings").

112. *See* Samuelson, *supra* note 111, at 550-51 (discussing Vault v. Quaid and unauthorized copying); *see also* Copyright Protection and Management Systems, 17 U.S.C.S. § 1201(a)(1)(A) (1999) (providing that "[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title. . ."); Copyright Protections and Management Systems, 17 U.S.C.S. 1203(a) (1999) (stating that "[a]ny person injured by a violation of section 1201 or 1202 may bring a civil action in an appropriate United States district court for such violation).

113. *See* Samuelson, *supra* note 111, at 550-51 (opining that the DMCA should exempt acts of circumvention for legitimate purposes); *see also* Copyright Protection and Management Systems, 17 U.S.C.S. § 1201(a)(1)(A) (1999) (providing that "[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title. . . ."); Copyright Protections and Management Systems, 17 U.S.C.S. 1203(a) (1999) (stating that "[a]ny person injured by a violation of section 1201 or 1202 may bring a civil action in an appropriate United States district court for such violation").

114. Notwithstanding the provisions of Section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided: (1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or (2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful. 17 U.S.C. 117 (1994). *See* Triad Sys. Corp. v. Southeastern Express Co., 1994 U.S. Dist. LEXIS 5390, 35 (1994) (discussing how unfair use does not apply to backup copying); *see also* Subject Matter and Scope of Copyright, 17 U.S.C.S. 117(a) (1999) (providing that "it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program. . . . ").

115. *See* Samuelson, *supra* note 111, at 501-51; *see also* 17 U.S.C.S. 1201(f) (1999) (permitting reverse engineering of technological protection measures by the lawful possessor of a computer program for the sole purpose of identifying and analyzing those elements of the program that are necessary to enable the program to exchange information with another program). Spoofing is defined as the "interception, alteration, and retransmission of a cipher signal or data in such a way as to mislead the recipient" or "an attempt to gain access to an automated information system by posing as an authorized user." INSTITUTE FOR TELECOMMUNICATION SCIENCES (visited Apr. 25, 2000) <http://glossary.its.bldrdoc.gov>.

purposes.[116] In other words, these technological programs are prohibited by the DMCA because they are designed to circumvent technological protections, but they are designed as such for a legal purpose as recognized by the DMCA—backup copying. As a result, the DMCA could potentially have a chilling effect on traditional fair-use activities.[117]

The DMCA represented the United States' first major legislation influenced by the Internet.[118] While certainly a step in the right direction, it is too early to predict its success or failure. The law was only enacted in October 1998, but already there is criticism.[119] The upcoming years, or even months, will determine whether the criticism is warranted.

Part V

Issues Caused by International Copyright Infringement

Other problems arise in a case of international copyright infringement. These problems are separate and apart from the shortcomings of the international treaties and domestic law.

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116. *See* Samuelson, *supra* note 111, at 501-51; *see also* Vault v. Quaid, 847 F.2d 255, 261 (5th Cir. 1988) (noting that Congress created the copying exception in § 117(1) recognizing that a computer program could not be utilized unless it was first copied into a computer's memory); Mark A. Haynes, Commentary, *Black Holes of Innovation in the Software Arts*, 14 BERKELEY TECH. L. J. 567, 569 (1999) (noting that inventors waste valuable time and resources reinventing old technology when they do not have access to copyrighted works thereby hampering the creation of new technology).

117. *See* Appel, *supra* note 105, at 208, 215 (discussing how the implementation of encryption technologies and pay-per-view viewing on the Internet facilitated by the DMCA will likely have this effect). *But see* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984) (articulating the Supreme Court's contributory infringement standard as requiring the copying device "need merely [be] capable of substantial noninfringing uses" in order to exculpate the producer or distributor of the device); *Vault*, 847 F.2d at 262 (5th Cir. 1988) (holding that the producer of a software product that enabled circumvention of a copy-protect program was not a contributory copyright infringer because the software product had a substantial non-infringing use under the copyright law to make backup copies).

118. *See generally* WILLIAM J. CLINTON & ALBERT GORE, JR., A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE (1997) (visited Apr. 25, 2000)<http://www.ecommerce.gov/framewrk.htm> (outlining a strategy for facilitating the growth of electronic commerce and fostering business and consumer confidence); BRUCE A. LEHMAN, PATENTS AND TRADEMARKS OFFICE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 213-17 (1995) (visited Apr. 25, 2000) <http://www.uspto.gov/web/offices/com/doc/ipnii/> (emphasizing the ambiguity in the law relating to the right of distribution by computer transmission and recommending certain amendments to the right of distribution by computer transmission); RONALD H. BROWN, SECRETARY OF COMMERCE, NATIONAL INFORMATION INFRASTRUCTURE: AGENDA FOR ACTION (1993) (visited Apr. 25, 2000) <http://metalab.unc.edu/nii/NII-Table-of-Contents.html> (discussing the goals and objectives for developing an advanced national information infrastructure).

119. *See* Samuelson, *supra* note 111, at 557 (suggesting that the anti-device provisions of the DMCA be modified by narrow judicial interpretation or by legislative amendments to overcome inconsistencies in the statute). *But see* Anawalt, *supra* note 109, at 377-78 (extolling the benefits and protection provided to inventors by the anti-circumvention provisions of the DMCA which establish federal civil and criminal sanctions against those who circumvent digital locks and outlaws the manufacture of circumvention devices). *See generally* Appel, *supra* note 105, at 181 (concluding that the DMCA strengthens the rights of copyright holders by extending existing legal precepts to the digital environment and conferring new rights).

Assuming the treaty and domestic law components function efficiently—and that is a big assumption—we must consider the presumption against the extraterritorial application of United States law by the U.S. courts.[120] That is, if a U.S. copyright holder's rights have been infringed abroad, they would have to contend with the hesitancy of U.S. courts to apply U.S. law abroad.[121] Further, infringements that cross national boundaries bring with them the question of jurisdiction; whether a particular forum is convenient to hear the issue; and choice of law issues.[122] This part of the article will address these areas.

A. Presumption Against Extraterritoriality

"[L]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial boundaries of the United States."[123] Those words have been stated by the United States Supreme Court countless times.[124] The presumption has a long history, with its origin in

120. *See, e.g.,* American Banana Co. v. United Fruit Co., 213 U.S. 347, 356-57 (1909) (establishing the traditional view that acts of Congress should apply only to conduct that occurs within the United States unless as a contrary intent appears, regardless of whether that conduct causes effects in the United States); Zoelsch v. Arthur Anderson & Co., 824 F.2d 27, 31 (D.C. Cir. 1987) (posing the view that acts of Congress apply only to conduct that causes effects within the United States unless a contrary intent appears); Environmental Defense Fund v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993) (asserting the view that acts of Congress apply to conduct occurring within or having an effect with the United States unless a contrary intent appears).

121. *See, e.g.,* Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088, 1094 (9th Cir. 1994) (en banc) (holding that the mere authorization of extraterritorial acts of infringement does not state a claim under the Copyright Act). *But see, e.g.,* Update Art, Inc. v. Modiin Publishing, Ltd., 843 F.2d 67, 73 (2d Cir. 1988) (holding that extraterritorial application of the copyright laws was permissible "when the type of infringement permits further reproduction abroad"). *See generally* David R. Toraya, Note, *Federal Jurisdiction over Foreign Copyright Infringement Actions—An Unsolicited Reply to Professor Nimmer,* 70 CORNELL L. REV. 1165, 1166 (1985) (criticizing Professor Nimmer's theory that foreign copyright can be distinguished from foreign trademark or patent because copyrights are created without administrative action and actions for infringement may be adjudicated in the courts of a sovereign other than the one in which the cause of action arose).

122. *See, e.g.,* Boosey & Hawkes Music Publishers Ltd. v. Walt Disney Co., 145 F.3d 481, 491-92 (2d Cir. 1998) (reversing a forum non conveniens dismissal of damage claims under foreign copyright laws); Itar-Tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82, 90-91 (2d Cir. 1998) (determining the issue of ownership of copyright under Russian law and following the principle of *lex loci delicti* under United States law to determine issues of infringement); London Films Production v. Intercontinental Communications, Inc., 580 F. Supp. 47, 48-49 (S.D.N.Y. 1984) (using a two-step process to find that the application of possibly 18 different foreign laws should not be a dispositive obstacle to litigation of a copyright infringement claim in a federal court in New York).

123. Blackmer v. United States, 284 U.S. 421, 437 (1932). *See* Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949) (quoting *Blackmer*); Equal Employment Opportunity Commission v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) (quoting *Foley Bros.*).

124. *See Arabian American Oil Co.,* 499 U.S. at 248 (1991) (discussing how this canon of construction serves to protect against unintended clashes between our laws and those of other nations which could result in international discord); *Foley Bros., Inc*, 336 U.S. at 284-85 (1949) (stating that this canon applies only within the territorial jurisdiction of the United States.); Benz v. Compania Naveria Hidalgo, S.A., 353 U.S. 138, 147 (1957) (holding that in this case there was no foreign applicability to the Labor Management Relations Act of 1947); *see also* William S. Dodge, *Understanding the Presumption Against Extraterritoriality,* 16 BERKELEY J. INT'L LAW 85, 89 (1998) (concluding the only legitimate reason for the presumption is that Congress generally legislates with domestic concerns in mind and that the presumption can be rebutted when there is reason to believe Congress' intent was something other than domestic concerns).

international law.[125] It is a principle of international law that national laws cannot extend beyond its own territories.[126] This, combined with a presumption that Congress does not intend to violate international law, gives rise to the presumption against extraterritoriality.[127]

As the years went by, the rationale for the presumption developed. In fact, the Supreme Court has employed at least three other rationales for the use of the presumption, in addition to that which was just described: (1) international comity;[128] (2) choice-of-law principles;[129] (3) likely Congressional intent;[130] and (4) separation of powers considerations.[131]

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125. *See* Dodge, *supra* note 124, at 84-85; *see also American Banana Co.*, 213 U.S. at 356 (1909) (applying the presumption against extraterritoriality to limit the Sherman Act to anti-competitive conduct within the United States); N.Y. Central R.R. v. Chisholm, 268 U.S. 29, 32 (1925) (denying a claim under the Federal Employer's Liability Act for the death of a United States citizen working abroad for a United States company based on the presumption against extraterritoriality).

126. *See* Dodge, *supra* note 124, at 85; *see also* Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law,* 24 LAW & POL'Y INT'L BUS. 1, 10-16 (1992) (explaining the international law roots of the presumption); Curtis A. Bradley, *Extraterritorial Application of U.S. Intellectual Property Law: Principal Paper: Territorial Intellectual Property Rights in an Age of Globalism,* 37 VA. J. INT'L L. 505, 583 (1997) (concluding global cooperation and development may depend on territorialism).

127. *See* Dodge, *supra* note 124, at 85 (submitting that the presumption against extraterritoriality originated in the 19th century when the Supreme Court used the presumption to limit the scope of federal customs and piracy law); *see also* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.) ("[a]n act of Congress ought never be construed to violate the law of nations if any other possible construction remains."); Bradley, *supra* note 126, at 510-19 (outlining the nature and origin or the presumption against extraterritoriality and discussing recent academic criticism).

128. *See* Bradley, *supra* note 126, at 515 (noting that, related to the principle of international law, the international comity doctrine acts like a deference to the foreign interest); Equal Employment Opportunity Commission v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) (stating the presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.").

129. *See* Bradley, *supra* note 126, at 515 (noting that the accepted principle is to apply the law of the place of the wrongful conduct); *see also* American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) (stating "the general and almost universal [choice-of-law] rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."); COMMENTARIES ON THE CONFLICT OF LAWS 20 (1841) (stating "[n]o State or nation can, by its laws, directly affect, or bind property out of its own territory, or bind persons not resident therein. . . .").

130. *See* Bradley, *supra* note 126, at 516 (stating that this rationale presumes that Congress legislates with domestic intentions in mind, rather than conduct abroad); Equal Employment Opportunity Commission v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) (stating "[t]his 'canon of construction . . . is a valid approach whereby unexpressed congressional intent may be ascertained.'"); Smith v. United States, 507 U.S. 197, 204 (1993) (stating that it is a well-established principle in American jurisprudence that, "unless a contrary intent appears, [legislation] is meant to apply only within the territorial jurisdiction of the U.S.") (quoting Foley Bros., Inc. v. Filado, 336 U.S. 281, 285 (1949)).

131. *See* Bradley, *supra* note 126, at 516 (noting that the Supreme Court has expressed the view that determination of whether and how to apply federal legislation to conduct abroad raises difficult and sensitive policy questions that tend to fall outside the powers of the judiciary); *see also Arabian American Oil Co.*, 499 U.S. at 259 (1991) (stating "Congress . . . [is] able to calibrate its provisions in a way that we cannot."); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 19 (1963) (applying presumption because of concern with, among other things, "embarrassment in foreign affairs" and stating that "the arguments should be directed at Congress rather than to us").

Courts have consistently held that U.S. copyright law does not apply beyond U.S. territorial boundaries.[132] This view was recently reiterated in *Subafilms, Ltd. v. MGM-Pathe Communications, Co*.[133] The presumption was invoked as the court noted that "there is no clear expression of congressional intent in either the 1976 Act or other relevant enactments to alter the preexisting extraterritoriality doctrine."[134] Further, the court cautioned against extraterritorial application while Congress was making efforts to achieve international copyright protection.[135] Of course, this decision was reached before the Digital Millennium Copyright Act[136] was signed, and one wonders what might have been the outcome had U.S. courts decided to apply copyright laws to acts that occurred abroad. More likely than not, Congressional efforts would have been neutralized. In fact, as the *Subafilms* court noted, the extraterritorial application of copyright law could also send a message to other nations that the U.S. does not trust their enforcement mechanisms as adequate.[137] In contrast, by keeping the effect of the Act

132. *See* Bradley, *supra* note 126, at 523. *See, e.g.,* Spindelfabrik Suessen-Schurr v. Schubert & Salzer, 903 F.2d 1568 1577-78 (Fed. Cir. 990) (stating that "because its machines are all manufactured in Germany, the injunction impermissibly extends the reach of American patent law beyond the boundaries of the U.S. by applying its prohibition to those machines); Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137, 1141 (7th Cir. 1975) (noting that Plaintiff, Honeywell, alleged that Metz makes and sells the accused devices, but these acts occurred in Europe rather than in this country, and although the patent laws of the U.S. do not have extraterritorial effect, "active inducement" may be found in events outside the U.S. if they result in a direct infringement.

133. 24 F.3d 1088 (9th Cir. 1994) (en banc). *See* Bradley, *supra* note 126, at 515 (noting that, related to the principle of international law, the international comity doctrine acts like a deference to the foreign interest); *see also* Deepsouth Packing Co. v. Laitran Corp. 406 U.S. 518, 526 (1972) (stating "[c]ertainly, if Deepsouth's conduct was intended to lead to use of patented deveiners inside the United States its production and sales activity would be subject to injunction as an induced or contributory infringement.").

134. *See* Bradley, *supra* note 126, at 525; *see also* Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088, 1096 (9th Cir. 1994) (en banc) (noting that "these are not clear expression of congressional intent in issuance of 1976 Act or other relevant enactments to alter the preexisting extraterritoriality doctrine"); Peter Starr Prod. Co. v. Twin Continental Films, Inc., 783 F.2d 1440, 1440 (9th Cir. 1986) (stating that a copyright infringement action cannot be brought in a United States federal court if the infringement occurs entirely outside the United States).

135. *See Subafilms*, 24 F.3d at 1097-98 (reasoning that if a United States federal court extended U.S. copyright law beyond U.S. boundaries, it could "disrupt" Congress' attempts to work with other nations in creating an international intellectual property scheme); *see also* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (detailing that a nation should never violate the laws of other nations); Bradley, *supra* note 126, at 515 (describing the doctrine of international comity).

136. *See* Carolyn Andrepont, *Legislative Update*, *Digital Millenium Copyright Act: Copyright Protections for the Digital Age*, 9 L. ART & ENT. LAW 397, 397 (1999) (indicating that the Act implements two international treaties: the World International Property Organization (CWIPO) copyright treaty and WIPO Performances and Phonograms Treaty); *see also* Jo Dale Carothers, *Protection of Intellectual Property on the World Wide Web: Is the Digital Millennium Copyright Act Sufficient?*, 41 ARIZ. L. REV. 937, 960-61 (1999) (explaining that signatory nations of the treaty are required to amend their own laws so that they are in accordance with the treaties).

137. *Subafilms*, 24 F.3d at 1098 (describing the ramifications as twofold: weakening the U.S. position in negotiations with countries where copyright violations are commonplace and assigning other countries to decide not to join the Convention); *see also* Kmart Corp. v. Cartier, Inc., 486 U.S. 281 (1988) (upholding United States Customs Service regulation construing § 526 of the Tariff Act of 1930 as permitting the unauthorized importation of goods bearing a valid U.S. trademark if the U.S. trademark owner is an affiliate of a foreign registrant); Christopher Mohr, *Gray Market Goods And Copyright Law: An End Run Around Kmart v. Cartier*, 45 CATH. U. L. REV. 561, 610 n.258 (1996) (noting that the U.S. may offend other nations if it were to apply its own laws in an extraterritorial fashion, thereby displacing the law of another country which rightfully applies under treaty).

within U.S. territory, the courts not only avoid potential conflict between the U.S. and other nations, but also avoid difficult choice of law decisions that would otherwise arise.[138]

The treaties discussed earlier in this article add more reason to continuing with the presumption of extraterritoriality. They are the documents that regulate the protection of intellectual property in the global arena. The principles they are founded on, national treatment and minimum rights, support a territorial approach to intellectual property laws.[139] The national treatment principle is emphasized precisely because each nation's intellectual property laws are assumed not to apply extraterritorially.[140] In fact, extraterritorial application of a nation's intellectual property laws could render the treaties' principles meaningless.[141] For example, assume the United States afforded more rights to a U.S. right holder than, say, Ireland does to one who holds a right in Ireland. In theory, if the United States applied intellectual property laws extraterritorially, then the U.S. right holder would enjoy more protection than the Irish right holder, even if the infringement of the U.S. right took place in Ireland. That is, because, in this scenario, the Irish laws do not protect right holders as much as the U.S. laws, the national treatment principle would be frustrated.

Similarly, extraterritorial application would frustrate the minimum rights principle of the international treaties.[142] This principle recognizes that domestic laws will differ, and grants individual countries the authority to afford right holders more rights than the minimum stan-

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138. *See* Mohr, *supra* note 137. *See, e.g., Subafilms*, 24 F.3d at 1098 (citing a House Report which notes that membership in the Berne Convention does not require that countries have identical procedural laws) (citations omitted); Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955) (concluding that where the extent of literary property within a given jurisdiction is in question, and that extent depends upon acts which have taken place outside of that jurisdiction, the determination should be made according to the law of that jurisdiction, as though the acts had taken place within its borders).

139. *See* Bradley, *supra* note 126, at 547 (noting that courts have recognized the national treatment principle implies a territorial application to choice of law, "pursuant to which the applicable law is the law of the place where the conduct in question occurs"); *see also* MARSHALL A. LEAFFER, INTRODUCTION IN INTERNATIONAL TREATIES ON INTELLECTUAL PROPERTY 7-10 (1990).

140. *See* Bradley, *supra* note 126, at 548 n.219 (providing examples of courts that have acknowledged that the national treatment principle is a choice of law rule which implies a rule of territoriality); *see also* Leaffer, *supra* note 139, at 7-10. *See generally* Samantha D. Slotkin, Note & Comment, *Trademark Policy in Latin America: A Case Study on Reebok International Ltd.*, 18 LOY. L.A. INT'L & COMP. L.J. 671, 681 (1996) (describing how each member country has its own standard for determining whether a trademark is well known).

141. For decisions expressing courts' reluctance to apply foreign intellectual property laws, *see* ("[T]he courts in each of those countries are much more familiar with their own copyright laws than a United States court could be . . . [t]hus, these issues are more appropriately decided in their respective countries."); Packard Instrument Co. v. Beckman Instruments, Inc., 346 F. Supp. 408, 410-11 (N.D. Ill. 1972) (refusing to exercise jurisdiction over foreign patent claims because of, among other things, possibility of friction with foreign nations, difficulty of determining foreign law, and "risks of distortion of meaning" associated with translation from foreign languages); *see also* Bradley, *supra* note 126, at 577 ("Despite this general and growing receptivity to applying foreign law, U.S. courts to date have been reluctant to adjudicate claims based on foreign intellectual property laws.").

142. *See* Bradley, *supra* note 126, at 549 (stating that the "minimum rights" principle supports the notion of a territorial application of intellectual property protection system that attempts to impose a minimum level of protection); *see also* Slotkin, *supra* note 140, at 680 (discussing the minimum rights principle that was established at the Paris Convention); W. Fletcher Fairly, Comment, *The Helms-Burton Act: The Effect of International Law on Domestic Implementation*, 46 AM. U. L. REV. 1289, 1323-24 (1997) (stating that under NAFTA each member is entitled to the "Minimum Standard Treatment" in accordance with international law).

dard.[143] This right of individual countries would be frustrated if other countries were to apply their laws extraterritorially.[144]

A.1. Rebutting the Presumption of Extraterritoriality

Of course, a presumption against extraterritoriality is just that—a presumption.[145] In certain limited circumstances, the presumption can be overcome.[146] U.S. courts consider the following when deciding whether the presumption should be rebutted: (1) whether there will be adverse effects in the United States if the statute is applied extraterritorially, (2) whether extraterritorial application of the law will result in international discord, and (3) whether the conduct sought to be regulated occurs largely within the United States.[147]

If failure to apply a statute extraterritorially will create adverse effects in the United States, extraterritorial application of the statute is proper.[148] The U.S. Supreme Court used this rationale to apply the Lanham Trademark Act of 1964[149] extraterritorially in *Steele v. Bulova Watch*

143. *See* Bradley, *supra* note 126, at 548 (noting another fundamental feature of the intellectual property protection system is that it attempts to impose minimum levels of protection); *see also* Fairly, *supra* note 142, at 1321-22 (stating that the existence of a Canadian statute that directly conflicts with the Helms-Burton Act is significant because international law requires an assessment of each state's interest when both regulate the same conduct). *See generally* Slotkin, *supra* note 140, at 681 (describing how each member country has its own standard for determining whether a trademark is well known).

144. *See* Bradley, *supra* note 126, at 515; *see also* Fairly, *supra* note 142, at 1321-22 (explaining how Canada currently has regulations that prohibit Canadian companies from complying with U.S. extraterritorial laws); Suzanne Harrison, *The Extraterritoriality of the Bankruptcy Code: Will the Borders Contain the Code?*, 12 BANK. DEV. J. 809, 820 (1996) (discussing how the Haitian government opposed a United States Immigration and Nationality Act).

145. *See* Harrison, *supra* note 144, at 824 (discussing the validity of the presumption against extraterritoriality); *see also* Bradley, *supra* note 126, at 545 (discussing the viability of the presumption against extraterritoriality); Fairly, *supra* note 142, at 1328-29 (stating that the presumption against extraterritoriality, is just that a presumption and can be overcome by making an affirmative showing that Congress manifested clear intent to give the legislation extraterritorial effect).

146. *See* Harrison, *supra* note 144, at 824 (discussing the justifications behind the presumption and whether or not the presumption should be abolished); *see also* Kollias v. D & G Marine Maintenance, 29 F.3d 67, 70-72 (2d Cir. 1994) (addressing the argument that the presumption against extraterritoriality should not apply if and when the policies embedded in the presumption are not implicated); Bradley, *supra* note 126, at 546 (arguing that one way of responding to this attack on the presumption against extraterritoriality would be to question the accuracy of its premise, namely, that the international law, choice of law, and congressional intent justifications no longer support the presumption).

147. *See* Harrison, *supra* note 144, at 821 (establishing the foundation for the three-prong test); *see also* EDF, Inc. v. Massey, 986 F.2d 528, 530-532 (D.C. Cir. 1993) (discussing the principles courts should consider when deciding whether the presumption should be rebutted); Steele v. Bulova Watch Co., 344 U.S. 280 (1952) (noting how the Supreme Court applied the Lanham Trademark Act of 1964 extraterritorially).

148. *See* Harrison, *supra* note 144, at 821-22 (describing the application of Lanham Act of 1964); *see also Steele*, 344 U.S. at 285-287 (emphasizing the harmful economic impact that this trademark infringement would have if the Lanham Act was not given extraterritorial effect); *see also* Bradley, *supra* note 126, at 520 (stating that absent some act of infringement within the United States, courts generally refuse to apply the patent and copyright statutes to conduct abroad).

149. 15 U.S.C. § 1051 (1976). *See* Bradley, *supra* note 126, at 527 (discussing the Lanham Act as applied by the court in *Steele*); *see also* Slotkin, *supra* note 140, at 692 (discussing the extraterritorial reach of the Lanham Act).

Co.[150] The Court determined that harmful economic results would occur in the United States if they did not apply the Lanham Act extraterritorially.[151]

International relations are also considered when deciding whether to rebut the presumption against extraterritoriality. In *Benz v. Compania Naviera Hidalgo*[152] and *McCulloch v. Sociedad Nacional de Marineros de Honduras*,[153] the Supreme Court considered the international implications before deciding that the Labor Relations Management Act[154] and the National Labor Relations Act,[155] respectively, did not apply extraterritorially.[156] The Court's decisions ultimately hinged on the great risk of international discord given the context of both cases.[157]

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150. 344 U.S. 280 (1952). *See* Bradley, *supra* note 126, at 527 (discussing the *Steele* decision and the extraterritorial reach of the Lanham Act); *see also* Harrison, *supra* note 144, at 824 (examining the justifications for the presumption against extraterritoriality).

151. The Bulova Watch Company, a New York corporation, sued the defendant, a U.S. citizen, for acts that had occurred in Mexico. The defendant, who operated a watch business in Mexico City, had been stamping the name "Bulova" on watches without Bulova's permission. *Steele*, 344 U.S. at 280 n.112 (1952). *See* Harrison, *supra* note 144, at 821 (establishing the foundation for the three-prong test); *see also* Slotkin, *supra* note 140, at 692 (discussing the "minimum rights" principle established at the Paris Convention and its application).

152. 353 U.S. 138 (1957).

153. 372 U.S. 10 (1963).

154. 29 U.S.C. § 141 (1947). *See* Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 139 (1957) (describing "picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel is temporarily in an American port."); McCulloch v. Sociedad Nacional de Marineros de Hunduras, 372 U.S. 10, 12 (1963) (addressing whether the National Labor Relations Act included an application to foreign maritime operations).

155. Section 9(c), *as amended*, 29 U.S.C.A. § 159(c). *See Benz*, 354 U.S. at 143 (concluding that "Congress did not fashion the Act to resolve labor disputes between nationals of other countries operating ships under foreign laws."); *McCulloch*, 372 U.S. at 12 (addressing whether the National Labor Relations Act included an application to foreign maritime operations).

156. *See* Harrison, *supra* note 144, at 823 (noting that in both *Benz* and *McCulloch*, the Court did not apply extraterritoriality); *see also Benz*, 354 U.S. at 142 (stating that the exercise of jurisdiction, to which another country may subject itself, is not mandatory, but discretionary and sometimes none at all); *McCulloch*, 372 U.S. at 13 (holding that the jurisdictional provisions of the National Labor Relations Act do not extend to maritime operations of foreign flagships employing alien seamen).

157. Both cases involved foreign seamen. In *Benz*, the seamen went on strike while docked in Portland, Oregon, and claimed relief under the Labor Management and Relations Act. 354 U.S. at 139-40 (1957). The Court considered the possibility of international discord in deciding against applying the Act. *Id*. at 147. In *McCullogh*, an American Union petitioned the National Labor Relations Board to represent the foreign seamen because they were part of a corporation owned by an American corporation. 372 U.S. at 13. In deciding against extraterritorial application, the Court considered the fact that they were all Honduran residents and represented by Honduran unions, and the potential for international discord. *Id*. at 13-14. *See* Harrison, *supra* note 144, at 823 (noting that, "[a]lthough the Court in both cases examined the statutory language and legislative history of the Acts, its decisions ultimately hinged on the tenuous relations that the factual circumstances had with the United States and the great risk of international discord if extraterritorial application was allowed."). *See generally* AMERICAN BANKRUPTCY INSTITUTE JOURNAL, Benchnotes, 1996 ABI JNL, LEXIS 464, 11 (1996) (stating the presumption that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States serves to protect against unintended clashes between our laws and those of other nations which could result in international discord).

The third criteria employed in the expanded extraterritorial test is whether the conduct sought to be regulated occurred largely within the United States.[158] In *Environmental Defense Fund, Inc. v. Massey*,[159] the court reasoned that there was no extraterritoriality issue because the National Environmental Protection Act (NEPA)[160] regulated conduct that was domestic, not extraterritorial.[161]

B. Jurisdiction

A common problem facing participants in international actions is one of proper jurisdiction.[162] U.S. courts commonly employ the standard of minimum contacts to exercise jurisdic-

158. *See* Harrison, *supra* note 144, at 823 (discussing that "although the court in *Massey* placed considerable emphasis on this factor, supportive case law is scarce."); *see also* Equal Employment Opportunity Commission v. Arabian American Oil Co., 499 U.S. 244 (1991) (stating that absent an alternative apparent intent, it is presumed that legislation of Congress, is meant to apply only within the territorial jurisdiction of the United States). *See generally* John C. Coffe, J.R., Symposium, *The Risks and Rewards of Regulating Corporate Takeovers: The Uncertain Case for Takeover Reform: An Essay on Stockholders, Stakeholders and Bust-Ups,* 1988 WIS. L. REV. 435, 462 (1988) (providing that under the extraterritorial test, the focus is on whether the regulated behavior occurs inside or outside the state).

159. 986 F.2d 528 (D.C. Cir. 1993). In *Massey*, the Circuit court reversed the district court's decision and held that the presumption against the extraterritorial application of statutes does not apply where the conduct regulated by the statute occurs primarily, in the United States, and the alleged extraterritorial effect of the statute would be felt in a continent without a sovereign, and an area over which the United States has a great measure of legislative control. *Id.* at 529. *See* EDF, Inc. v. Massey, 772 F. Supp. 1296, 1297 (1991) (moving for a preliminary injunction seeking to enjoin the National Science Foundation (NSF) from taking steps to incinerate food-related waste and selected domestic waste at NSF's McMurdo Station in the Antarctica); *see also* Harrison *supra,* note 144, at 823 (discussing how the *Massey* case based its holding primarily on this factor stating that the National Environmental Protection Act could be applied extraterritorially since the conduct sought to be regulated occurred largely within the United States).

160. 42 U.S.C. §§ 4331-4370d, ELR Stat. NEPA §§ 2-209 (1969).

161. *See* Jeffrey E. Gonzalez-Perez, Douglas A. Klein, *The D.C. Circuit Review: September 1992–August 1993: Environmental Law: The International Reach Of The Environmental Impact Statement Requirement Of The National Environmental Policy Act*, 62 GEO. WASH. L. REV. 757, 784 (1994) (discussing an executive order made by President Carter, which governs major federal actions significantly affecting the environment of the global commons, the environment of a foreign nation and natural or ecological resources of global importance); *see also* Smith v. U.S. 507 U.S. 197, 197 (1993) ("[l]egislation of Congress, unless a contrary intent appears, is construed as applying only within the territorial jurisdiction of the United States"); Harrison *supra* note 144, at 824 (providing that there are "two primary justifications for the presumption against extraterritoriality": (1) the desire to avoid international conflict; and (2) the notion that Congress is largely concerned with domestic matters and therefore "legislates against the backdrop of the presumption against extraterritoriality").

162. *See* Stephan Wilske, Teresa Schiller, *International Jurisdiction in Cyberspace: Which States May Regulate the Internet?*, 50 FED. COMM. L. J. 117, 139 (1997) (discussing how the World Wide Web poses the greatest problems for international jurisdiction); *see also* Roger M. Baron*, Child Custody Jurisdiction*, 38 S.D. L. REV. 479, 499 (1993) (providing a discussion of the complex problems of child custody jurisdiction on a state-to-state and international basis in the process of being resolved by uniform acts, federal laws and international treaties); Mark S. Torpoco, *Mickey and the Mouse: The Motion Picture and Television Industry's Copyright Concerns on the Internet*, 5 UCLA ENT. L. REV. 1, 45-48 (1997) (providing a discussion of how the problem of international jurisdiction is complicated by the fact that the copyright laws of the various nation states are not standardized).

tion over a defendant.[163] Through this standard, state courts have been able to exercise jurisdiction over an individual not present in the forum if the individual has established minimum contacts with the forum.[164] When analyzing the minimum contacts standard, the Supreme Court considers whether a defendant could reasonably anticipate being sued in the particular forum, or, whether he purposefully availed himself of the privileges of the forum,[165] and certain fairness factors.[166]

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163. *See* International Shoe Co. v. State of Washington, et al., 326 U.S. 310, 316 (1945) (stating that due process requires a defendant to be subject to a judgment in personam if he or she has minimum contacts with the jurisdiction to not offend "traditional notions of fair play and substantial justice"); *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-77 (1985) (providing that the finding of minimum contacts establishes a prima facie case of jurisdiction, thereafter shifting the burden upon the defendant to prove its unreasonableness); Pennoyer v. Neff, 95 U.S. 714, 722 (1878) ("[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory . . . [and] no State can exercise direct jurisdiction and authority over persons or property without its territory.").

164. *See* Kai Burmeister, *Jurisdiction, Choice of Law, Copyright, and the Internet: Protection Against Framing in an International Setting*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 625, 636 (1999) (providing the three kinds of jurisdictions distinguished as legislative, judicial, and enforcement jurisdiction); *see also* Rein v. The Socialist People's Libyan Arab Jamahiriya, 38 I.L.M. 447, 458 (2d Cir. 1999) (providing that where a case concerns the nonpayment of a letter of credit that was to be paid in U.S. dollars into a bank account in New York City, the defendant had sufficient minimum contacts with the United States to establish personal jurisdiction over it in an American forum without violating the requirements of due process); Chicago Bridge & Iron Co. v. Iran, 19 I.L.M. 1436, 1438 (1980) (providing that it is clear that *International Shoe* minimum contacts analysis governs all exercises of personal jurisdiction).

165. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (stating "[i]t is that the defendant's conduct and connection with the forum State are such that she should reasonably anticipate being hauled into court there"); *see also* Dixon v. Mack, 507 F. Supp. 345, 350 (1980) (explaining that where one partakes in a conspiracy with the knowledge that overt acts in furtherance of the conspiracy had taken place in New York, a defendant has purposely availed himself of the privilege of conducting activities within the forum state); Burmeister, *supra* note 164, at 625 (providing a discussion of the applicability of the foreseeability test used in World-Wide Volkswagen Corp. v. Woodson).

166. In the international setting, such fairness factors include: (1) burden on the defendant; (2) the forum state's interest in adjudicating the dispute; and (3) the plaintiff's interest in obtaining convenient and effective relief. *See* Burmeister, *supra* note 164, at 643, stating:

> Three criteria relative to minimum contacts prior to the application of specific jurisdiction: 1) the contacts must be related to or have given rise to the plaintiff's cause of action; 2) the contacts must involve some act(s) by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thereby invoking the benefits and protection of its laws; and 3) the contacts must be such that the defendant can reasonably anticipate being hauled into court in the forum state.

See also Martin A. McCrory, *Hazardous Jurisdiction/Chatham Steel Corporation v. Brown: A Note on Personal Jurisdiction and Cercla*, 44 CLEV. ST. L. REV. 473, 492 (1996) (discussing jurisdictional fairness factors as developed by the Supreme Court); Bret A. Sumner, Comment, *Due Process and True Conflicts: The Constitutional Limits on Extraterritorial Federal Legislation and the Cuban Liberty and Democratic Solitary (Libertad) Act of 1996*, 46 CATH. U. L. REV. 907, 923 (1997) (providing that the personal jurisdiction requirement embedded in the Due Process Clause of the Fifth Amendment applies to foreign defendants hauled into a United States court under extraterritorial federal legislation).

The problem with jurisdiction and the Internet seems clear—can a user in Europe reasonably expect to be sued in a United States court? In the end, the issue comes down to the determination of purposeful availment.[167]

Unfortunately, there does not appear to be a definitive answer. Courts are split over Internet activity that is sufficient to justify jurisdiction.[168] Several courts have found that defendants have purposefully availed themselves of the forum state involving the improper use of trademarks on the Internet.[169] In *Inset Systems, Inc. v. Instruction Set, Inc.*,[170] the court found that the

167. *See* Burmeister, *supra* note 164, at 625 (stating that one has clear notice that they are subject to suit when they "purposefully avail" themselves of the privileges and the advantage of conducting activities within the forum state); *see also* Inset Sys. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (1996) (stating that Instruction has purposely availed itself to the privileges of the forum state, as it has directed its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all 50 states); *Dixon*, 507 F. Supp. at 350 (explaining that where one partakes in a conspiracy with the knowledge that overt acts in furtherance of the conspiracy had taken place in New York, a defendant has purposely availed himself of the privilege of conducting activities within the forum state).

168. *See* Andrew E. Costa, Comment, *Minimum Contacts in Cyberspace: A Taxonomy of the Case Law*, 35 HOUS. L. REV. 453, 502 (1988) (discussing various cases giving a sense that it is not the conduct, but rather the medium that serves as the basis for jurisdiction); *see also* Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1336 (1996) (finding the defendant subject to the jurisdiction of the forum where it invoked promotional activities or active solicitations providing the minimum contacts necessary for exercising personal jurisdiction over a non-resident corporation); Burmeister, *supra* note 164, at 625 (discussing how the increased mobility communication and commercial transactions involving parties located in the whole country led to the development of the minimum contact standard).

169. *See* David Willie, *Personal Jurisdiction and the Internet: Proposed Limits on State Jurisdiction Over Data Communications in Tort Cases*, 87 KY. L.J. 95, 105-07 (1998-99) (discussing several cases where the courts have applied "the purposeful availment" test to find personal jurisdiction in trademark infringement cases involving allegedly improper uses of trademarks on a Web page). *But see* Costa, *supra* note 168, at 491 (discussing the apparent trend by some courts to find personal jurisdiction as a matter of law from the mere existence of a Web site or home page that is accessible to residents of the forum state). *See generally* Serge G. Avakian, Comment, *Global Unfair Competition in the Online Commerce Era*, 46 UCLA L. REV. 905, 907 (1999) (discussing how the resolution of Internet-related trademark litigation must look to the practical capabilities of the medium in which the litigation arose, as well as the international implications of the remedy).

170. 937 F. Supp. 161 (D. Conn. 1996). *See* Scott D. Sanford, Note, *Nowhere to Run . . . Nowhere to Hide . . . : Trademark Holders Reign Supreme in Panavision Int'l, L.P. v. Toeppen*, 29 GOLDEN GATE U. L. REV. 1, 32 (1999) (discussing inconsistencies with *Inset* and other cases, in which similar circumstances arose, however the court did not exercise jurisdiction); *see also* Tammy S. Trout-McIntyre, Casenote and Comment, *Personal Jurisdiction and the Internet: Does the Shoe Fit?* 21 HAMLINE L. REV. 223, 252 (1997) (discussing the *Inset* case and providing a discussion of due process).

defendant purposefully availed himself of the Connecticut laws by directing his Internet advertisements to all states.[171] In *Maritz v. Cybergold, Inc.*,[172] the court held that Cybergold consciously decided to transmit advertising information to all Internet users, knowing that the information would be transmitted globally.[173]

However, personal jurisdiction was not found in *Hearst Corp. v. Goldberger*,[174] where the court held that a Web site, although it can be viewed in all fifty states, is not targeted at any particular state.[175] Analogizing it to advertising in a national magazine, where it is not directed at any one state, the court did not find the defendant purposely availed himself of the forum.[176]

Given the inconsistent outcomes in the domestic setting, the issue of jurisdiction is problematic in the global arena. As the use of the Internet grows, U.S. courts will no doubt be called upon to make a final determination.

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171. *Inset Systems*, 937 F. Supp. at 164 (concluding that advertising via the Internet is solicitation of a sufficient repetitive nature to satisfy subsection (c)(2) of the Connecticut long-arm statute, thereby conferring Connecticut's long-arm jurisdiction upon ISI). *See* C.G.S. § 33-411(c)(2), Connecticut's long-arm statute, which provided that:

> [e]very foreign corporation shall be subject to suit in this state, by a resident of this state . . . on any cause of action arising . . . (2) out of any business solicited in this state . . . if the corporation has repeatedly so solicited business, whether the orders or offers relating thereto were accepted within or without the state. . . .

(repealed Jan. 1, 1997); Whelan En'g Co., Inc. v. Tomar Elecs., 672 F. Supp. 659, 661-62 (D. Conn. 1987) (concluding that the accused purposefully availed itself of the privilege of doing business within the state and therefore could reasonably be expected to be brought into court). In *Whelan*, there was advertising in 30 publications known to have been circulated in Connecticut over the course of a year and a half, plus delivery of 30 allegedly infringing catalogs to Connecticut residents, plus two sales of the allegedly infringing products to Connecticut residents, which may or may not have been due to the solicitation activities. *Id.* Nevertheless, the Court found such circumstances to satisfy C.G.S. § 33-411(c)(2). *Id.*

172. 947 F. Supp. 1328 (E.D. Mo. 1996).

173. *Maritz*, 947 F. Supp. at 1333 (concluding that the Web site operator who has reached out to all states and can reasonably expect to answer in the courts of such states since a Web site operator consciously decides to transmit information to any Internet user accessing its Web page); *see also* Wille, *supra* note 169, at 105 (discussing the difference between the different approaches courts take to determine whether, for the purposes of finding jurisdiction, "purposeful availment" is demonstrated merely by establishing a Web site that can be accessed anywhere in the world). *See generally* Corey B. Ackerman, Note, *World-Wide Volkswagen, Meet the World Wide Web: An Examination of Personal Jurisdiction Applied to a New World*, 71 ST. JOHN'S L. REV. 403 (1997) (analyzing the expanding reach of the Internet as it presents difficult legal questions pertaining to issues of personal jurisdiction over Internet users).

174. 1997 U.S. Dist. LEXIS 2065, 68 (1997) (holding that personal jurisdiction could not be exercised where the infringement allegedly occurred due to the Internet domain name).

175. *See Goldberger*, 1997 U.S. Dist. LEXIS 2065, 31-32 (1997); Willie, *supra* note 169, at 104-05 (stating that "setting up a web site with the knowledge that it is accessible everywhere cannot constitute purposeful availment"). *But see* Bensusan Restaurant Corp. v. King, 937 F. Supp, 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d (2d Cir. 1997) (holding that creating a Web site does not amount to purposeful availment of the benefits of any particular forum because a finding of jurisdiction could subject a defendant to nationwide jurisdiction, exercising jurisdiction would be inappropriate as it could have a "devastating impact" on users of the World Wide Web).

176. *See Goldberger*, 1997 U.S. Dist. LEXIS 2065, 32 (1997) (stating, "New York law is clear . . . that advertisements in national publications are not sufficient to provide personal jurisdiction."); Willie, *supra* note 169, at 106 (discussing how the drawing of an analogy to advertising in a national magazine, the court found that a Web site, although it can be viewed in all fifty states, is not targeted at any particular state); *see also* General Motors Acceptance Corp. v. Richardson, 300 N.Y.S.2d 757, 761 (Sup. Ct., Monroe Co. 1969) (stating "solicitation of business in New York by means of advertisements, market quotations, and notices of sale . . . without more, is not enough to provide a jurisdictional basis under CPLR 302(a)(1).").

C. Doctrine of Forum Non Conveniens

Adding to the problems of international copyright infringement is the question of what is a convenient forum.[177] As a result, U.S. courts are called on to decide whether to apply the doctrine of forum non conveniens.[178] Because cases are treated in accordance with their specific facts, the application of this doctrine has produced sporadic results, forcing the copyright holders to bring the claim in multiple forums, with the end result being the termination of the action due to the expensive costs of litigating in multiple countries.[179]

As we have already discussed, the Internet has transcended traditional jurisdictional boundaries. It allows for almost instantaneous copyright infringement in multiple countries. As a result, a right holder can have a claim in multiple forums. When the more convenient forum is outside of the U.S. courts, i.e., in a foreign country, the U.S. court may dismiss the case in

177. *See* Creative Tech., Ltd. v. Aztech System Pte, Ltd., 61 F.3d 696, 699 (1995) (focusing on the issue of whether or not the High Court of Singapore was an adequate alternative forum on the grounds of forum non conveniens). In *Creative Tech*, there were twelve registered U.S. copyrights at issue and both parties to the action were Singapore corporations. *Id*. The Court held that the district court did not abuse its discretion in determining that the foreign court was an adequate alternative forum in which to adjudicate plaintiff's U.S. copyright infringement claim. *Id.* at 701; *see also* Lynn Carino, Note, *Creative Technology, Ltd v. Aztech Systems Pte, Ltd: The Ninth Circuit Sends a United States Copyright Infringement Case to Singapore on a Motion of Forum Non Conveniens,* 41 VILL. L. REV. 325, 328 (1996) (stating the doctrine of forum of non conveniens inhibits U.S. copyright holders from obtaining enforcement against international copyright infringements and under this doctrine, the U.S. federal courts may dismiss a cause of action either instituted in an inconvenient forum or not relating to the community of the forum). *See generally* David R. Toraya, Note, *Federal Jurisdiction over Foreign Copyright Infringement Actions—An Unsolicited Reply to Professor Nimmer,* 70 CORNELL L. REV. 1165, 1188-92 (1985) (discussing issue of adjudicating foreign copyright actions and suggesting that courts should adopt an approach that incorporates both the foreign country's local interests and the forum convenience of hearing the case in the U.S.).

178. BLACK'S LAW DICTIONARY 655 (6th ed.) (1990). *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-08 (1947) (discussing factors to be considered when determining whether dismissal on grounds of forum non conveniens is appropriate); *see also* Carino, *supra* note 177, at 344 (stating that the doctrine is well established and can apply even where the alternative forum would not provide the same range of remedies as would the original forum). Furthermore, courts may choose to apply this doctrine whenever dismissal would "best serve the convenience of the parties and the ends of justice and an adequate alternative forum is available.") (quoting *Koster v. Lumbermens Mut. Casualty Co*. 330 U.S. 518, 527 (1947)). *Id*.

179. *See* Brenda Tiffany Dieck, *Reevaluating the Forum Non-Conveniens Doctrine in Multi-territorial Copyright Infringement* Cases, 74 WASH. L. REV. 127, 127 (1999) (noting that "[t]he courts' liberal use of dismissals has forced copyright owners to bring separate claims in multiple fora, effectively terminating the claims due to the enormous costs of litigating in multiple countries."). *See, e.g.,* Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney, 934 F. Supp. 119, 124-25 (S.D.N.Y. 1996) (analyzing forum non conveniens factors and granting the motion), *rev'd in part*, 145 F. 3d 481, 491-92 (2d Cir. 1998) (concluding that although no one forum would be able to adjudicate all of the plaintiff's eighteen copyright claims, the courts of each nation respectively constituted adequate alternative forum) (relying on *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981)). *See generally* Jane C. Ginsburg, *Extraterritoriality and Multi-territoriality in Copyright Infringement*, 37 VA. J. INT'L L. 587, 600-02 (1997) (discussing jurisdiction in copyright infringement cases and defining multi-territorial claims as claims involving acts or parties located in multiple countries).

favor of the foreign jurisdiction via the forum non conveniens doctrine.[180] In *Piper v. Reyno,*[181] the Supreme Court created the forum non conveniens test that must be examined in international cases.[182] The Court used a two-prong analysis, first determining whether an adequate alternative forum exists,[183] and, if one does exist, then balancing a series of interests.[184]

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180. *See* Dieck, *supra* note 179, at 132 (stating "forum non conveniens is a judicially created doctrine that allows the judge, at her discretion, to dismiss a case on grounds of convenience to the parties and the court . . . when the more convenient forum is outside the federal system); *see also Piper*, 454 U.S. at 253 (interpreting federal venue transfer statute 28 U.S.C. § 1404(a) to mean the district courts were given more discretion to transfer . . . than they had to dismiss on grounds of forum non conveniens thus, continuing this federal doctrine's application only in cases where the alternative forum is abroad); Overseas Programming Cos. v. Cinematographische Commerzanstalt, 684 F.2d 232, 234 n.6 (explaining the factors the court considered when reversing dismissal when U.S. plaintiff sued foreign defendants to enforce U.S. copyrights).

181. 454 U.S. 235 (1981).

182. *Piper*, 454 U.S. at 255-60 (expanding upon the forum non conveniens factors as applied in the international realm and creating a two-part inquiry for transnational suits). *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07 (1947) (stating "[i]n all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is *amenable to process*; the doctrine furnishes criteria for choice between them) (emphasis added); Dieck, *supra* note 179, at 133 (discussing the "*Piper* Test" for forum non conveniens dismissals).

183. *See Piper*, 454 U.S. at 255 n.22 (espousing that the first determination a court should make is whether an alternative forum exists); *Gilbert*, 330 U.S. at 508 (emphasizing appellate obligation to enforce principle that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed"); Dieck, *supra* note 179, at 133 (noting that an adequate alternative forum is one in which the defendants are amenable to process, and the forum provides an adequate remedy); *see also* Boosey & Hawks Music Publishers, Ltd. v. Walt Disney Co. 145 F. 3d 481, 491 (1998) (stating the district court first must determine whether there exists an alternative forum with jurisdiction to hear the case and, if so, the court then weighs the factors set out in "the *Gilbert* factors," to decide which "forum . . . will be most convenient and will best serve the ends of justice."). *See, e.g., In re* Carbide Corp. Gas Plant Disaster, 809 F.2d 195, 198 (2d Cir. 1987) (following the dictates of *Piper*). In deciding *In re Carbide*, the Second Circuit declined to compare the advantages and disadvantages to the respective parties of American versus Indian laws or to determine the impact upon plaintiffs' claims of the laws of India, where UCC had acknowledged that it would make itself amenable to process, except to ascertain whether India provided an adequate alternative forum, as distinguished from no remedy at all. *Id*. Judge Keenan reviewed the affidavits of experts on India's laws and legal system, which described in detail its procedural and substantive aspects, and concluded that, despite some of the Indian system's disadvantages, it afforded an adequate alternative forum for the enforcement of plaintiffs' claims. *Id*.

184. *Piper*, 454 U.S. at 255-50 (undertaking the second prong of the two-part analysis and balancing the varied interests). "If an adequate alternative forum exists, the court then weighs the Gulf Oil factors to determine which forum would be more convenient for the litigants and the least inconvenienced by the litigation." *Id*. Furthermore, the Court described an adequate alternative forum generally as one in which the defendants are amenable to process—that is, are willing to accept service and waive any foreign statutes of limitation—and provides an adequate remedy. *Id.* In *Gilbert*, the Supreme Court discussed how the jurisdictional factors should be balanced:

> If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.

See Gilbert, 330 U.S. at 508-09; *see also* Dieck, *supra* note 179, at 134 (presenting the interests that are to be considered as: relative ease of access to sources of proof; availability of witnesses, view of the premises, if appropriate, and all other practical problems). *See generally* Curtis A. Bradley, *Extraterritorial Application of U.S. Intellectual Property Law: Principal Paper: Territorial Intellectual Property Rights in an Age of Globalism,* 37 VA. J. INT'L L. 505, 580 (1997) (supporting two-prong test established in *Gilbert*, and later refined in *Piper*, that in order to obtain a forum non conveniens dismissal, the defendant must show that there is an adequate forum available and that various private and public interest factors weigh in favor of dismissal).

The forum non conveniens doctrine was invoked to dismiss an international copyright infringement claim in *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney*[185] (the "Fantasia case"). The plaintiff brought copyright infringement claims against the defendant that occurred in eighteen different countries[186] when Disney released Fantasia on video.[187] The district court dismissed the action on forum non conveniens grounds.[188] On appeal, the Second Circuit reversed the dismissal, finding that the district court did not properly apply the first prong of the *Piper* test.[189] However, the appellate court did not decide whether the district court needed to determine whether there was one single forum that must have jurisdiction over all eighteen claims.[190]

The outcome of the Fantasia case poses a problem in the Internet age. In a situation where a copyright has been infringed, twenty separate foreign courts would satisfy the alternative

185. 934 F. Supp. 119 (S.D.N.Y. 1996), *rev'd in part*, 145 F.3d 481 (2d Cir. 1998).

186. Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney, 934 F. Supp. 119 (S.D.N.Y. 1996), *rev'd in part*, 145 F.3d 481, 491 (2d Cir. 1998) (restating the facts as stated by the district court). *See* Dieck, *supra* note 179, at 136 (stating that the plaintiff did not claim that an infringement occurred in the United States, where the work was in the public domain); Susan S. Blaha, *Case Summary: Boosey & Hawkes Music Publishers Ltd. v. The Walt Disney Co.*, 9 J. ART & ENT. LAW 449, § Facts-B (1999) (listing copyright infringement in at least 18 different countries as among the causes of action in plaintiff's complaint).

187. *Boosey & Hawkes*, 145 F.3d at 491 (stating that plaintiffs' copyright infringement claim was based upon Fantasia being released on videocassette). *See* Dieck, *supra* note 179, at 135-36 (noting that Stravinsky had valid copyrights in many foreign countries, in which Disney distributed copies of the video); Blaha, *supra*, note 186, at § Legal Analysis-B (citing the fact that plaintiffs (Boosey & Hawkes) sought a declaratory judgment the "1939 Agreement did not include Disney's right to use Stravinsky's composition in video format").

188. *Boosey & Hawkes,* 934 F. Supp. at 124 (S.D.N.Y. 1996) (balancing the private interests of the litigants against public interests, the district court decided to grant the defendant's motion to dismiss the second cause of action of copyright infringement). *See* Dieck, *supra* note 179, at 136 (restating the district court's decision); Blaha, *supra*, note 186, at § Facts-B (noting that the district court determined that foreign copyright law would have to be applied to Boosey & Hawkes' copyright claims).

189. *Boosey & Hawkes*, 145 F.3d at 491 (stating that forum non conveniens proves to be inappropriate in this case once the *Gilbert* factors are taken into account in the second prong of the *Piper* test). The *Gilbert* factors are the public interests and the private interests of the litigants that are balanced against one another in gauging the applicability of forum non conveniens to a particular case. *Id*. *See also Gilbert*, 330 U.S. at 509-10 (applying the relevant jurisdictional factors); Dieck, *supra* note 179, at 137 (stating that the failure occurred when the District Court did not "consider whether an alternative forum would be capable of adjudicating the copyright infringement actions").

190. *Boosey & Hawkes*, 145 F.3d at 492 ("Everything before us suggests that trial would be easier, expeditious and inexpensive in the District Court than dispersed to 18 foreign nations[,]" however, the court failed to mention whether one jurisdiction should hear all 18 and if it was the District Court's responsibility to make that determination); *Boosey & Hawkes*, 934 F. Supp. at 125 (reasoning that the cases should be litigated in each of the countries where the copyright infringement cause of action arose, thereby avoiding difficulties in applying varied foreign copyright laws); *see also* Dieck, *supra* note 179, at 137 (noting that the Circuit Court did so *expressly*) (emphasis added).

forum prong of the *Piper* test.[191] For practical purposes, however, it is highly unlikely that a plaintiff will be willing to expend the costs of litigating in eighteen different foreign courts.

D. Choice of Law

Further complicating the issue is the determination of the law to be applied. Copyright law is governed by the principle of territoriality, which states that courts must look to the location where the acts occurred.[192] The same choice of law rule has been incorporated into the Berne Convention for cinemagraphic works, which provides that copyright protection "shall be governed exclusively by the laws of the country where protection is claimed."[193] Further, there is the principle of the country of protection (lex loci protectionis) which reasons that the choice of law is determined by the law of the country in which the protection is being sought.[194]

However, the Internet again raises concerns over the applicability of traditional principles. A single use of a copyrighted work might lead to effects in multiple countries.[195] A person pro-

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191. *See* Dieck, *supra* note 179, at 140 (noting that this occurs in cases where there is a number of related infringements that arise in several different countries and in such a situation, courts tend to regard each country involved as a potential alternate forum); *see also* Murray v. British Broadcasting Corp., 81 F.3d 287, 292 (2d Cir. 1996) ("The requirement of an alternative forum is ordinarily satisfied if the defendant is amenable to process in another jurisdiction, except in rare circumstances when the remedy offered by the other forum is clearly unsatisfactory."); Creative Technology v. Aztech System Pte., Ltd., 61 F.3d 696, 701 (9th Cir. 1995) (stating that it is enough to satisfy the first prong if a foreign court will hear the claim that arose under its laws but refuses to hear a related claim that arose under U.S. law).

192. *See* Andreas Reindl, *Choosing Law in Cyberspace: Conflicts on Global Networks*, 19 MICH. J. INT'L L. 799, 803-04 (1998) ("Copyright choice of law rules follow a strictly territorial approach, and courts must look to the location where the acts of use occurred to decide questions of infringement."); *see also* Kai Burmeister, *Jurisdiction, Choice of Law, Copyright, and the Internet: Protection Against Framing in an International Setting*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 625, § II-B-1 (1999) (stating the rule that a country's copyright laws do not extend beyond its borders); Igor Shoiket, *Creative Technology, Ltd. v. Aztech System Pte, Ltd.: Using Forum Non Conveniens to Dismiss a Copyright Infringement Action Brought by Foreign Owner of U.S. Copyrights*, 31 U.S.F.L. REV. 505, 510-11 (1997) (explaining that territoriality means that copyright law exists under the laws of separate countries).

193. Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, art 5(2), UNTS 221, 232. *See* Reindl, *supra* note 192, at 804 (stating that protection granted under one country's laws does not necessarily mean that the same work would enjoy the same protection outside that country); *see also* Christopher Mohr, *Gray Market Goods And Copyright Law: An End Run Around Kmart v. Cartier*, 45 CATH. U. L. REV. 561, 610 n.258 (1996) (describing the political difficulties that may arise if a country tried to extend its own copyright protections beyond its borders, against the Berne Convention).

194. *See* Burmeister, *supra* note 192, at § II-B-1 (defining lex loci protectionis as the "origination and the scope of copyright protection [that] is determined by the law of the country in which copyright protection is actually being sought."); *see also* Shira Perlmutter, *Freeing Copyright from Formalities*, 13 CARDOZO ARTS & ENT. L. J. 565, II-A n. 41 (1993) (referring to lex loci protectionis by another term, national treatment, and stating the principle grants foreign holders of copyrights the same protection as those who are citizens); Robert A. Cinque, Note, *Making Cyberspace Safe for Copyright: The Protection of Electronic Works in a Protocol to the Berne Convention*, 18 FORDHAM INT'L L.J. 1258, at 1272 n.100 (1995) (citing the Berne Convention and its purpose of providing "uniformity of protection" through national treatment).

195. *See* Burmeister, *supra* note 192, at § I-A (indicating that since the Internet is a worldwide network, its reaches do not stop at the borders of countries); *see also* Chris Reed, *Sovereignty and the Globalization of Intellectual Property: Controlling Worldwide Web Links*, 6 IND. J. GLOBAL LEG. STUD. 167, 168 (1998) (observing that if a linking Web site infringes upon another Web site, then that infringement could potentially reoccur "everywhere that the linking web site is received," thereby creating a problem that could balloon instantaneously and across several national boundaries).

viding access to a copyrighted work on a Web site frequently cannot control where viewers and listeners are located.[196] Further, inevitably a user who lawfully acquires rights for a copyrighted work for exploitation on the Internet may violate copyright laws in one country, but not another.[197] As inconsistent standards of protection persist among copyright laws, problems are certain to occur when works are internationally exploited.[198]

The advent of the Internet age has brought severe criticism for traditional choice of law rules.[199] It is apparent that uniform standards of copyright law would severely minimize the choice of law problem.[200] The international copyright community took steps toward harmoni-

196. *See* Reindl, *supra* note 192, at 807 (observing that a "global digital network" such as the Internet can wreak havoc in territoriality-based law, such as copyright); *see also* Jane C. Ginsburg, *The Fourth Annual Herbert Tenzer Distinguished Lecture in Intellectual Property: Copyright Without Borders? Choice of Forum and Choice of Law for Copyright Infringement in Cyberspace*, 15 CARDOZO ARTS & ENT L.J. 153, § I (stressing that the role of territoriality becomes tenuous along highways like the Internet, where infringement may be accomplished in an instant and from a remote location); Reed, *supra*, n. 195, at 168 (noting that a linking Web site can exponentially increase the number of viewers of a Web site, which is beyond the control of the purveyor of the Web site).

197. *See* Reindl, *supra* note 192, at 808; *see also* Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1210 (1998) (stating that "absent international choice-of-law rules, the forum's choice-of-law rules will determine the governing law."). Goldsmith further states that:

> In regulatory contexts, the forum will invariably apply local law. However, regardless of which substantive law the forum applies, the application of that law will frequently create spillover effects on activities in other countries and on the ability of other interested nations to apply their own law.

Id. Peter P. Swire, *Of Elephants, Mice, And Privacy: International Choice of Law and the Internet*, 32 INT'L LAW 991, 993 (1998) (stating that even though choice-of-law rules can be set at the national or even sub-national level, in bilateral agreements, as a matter of European Union law, or in multilateral conventions, often the rules created in these various fora themselves conflict).

198. *See* Reindl, *supra* note 192, at 808; *see also* Eric J. Schwartz, *The Impact of Technological Change in the Canada/U.S. Context: Protecting and Exploiting U.S. and Canadian Intellectual Property Abroad in a Technologically Changing World Economy—a U.S. Perspective*, 25 CAN.-U.S. L.J. 97, 100 (1999) (stating that the continued need to develop international standards has resulted in the important growth of standards in the signed agreement on Trade Related Aspects for Intellectual Property Rights known as the TRIPs); Robert M. Sherwood, *Intellectual Property Systems and Investment Stimulation: The Rating of Systems in Eighteen Developing Countries*, 37 IDEA 261, 261 (1997) (discussing generally that deficiencies in recent copyright law amendments cause concern and some problems remain in the patent law and regarding trade secret protection).

199. *See* Reindl, *supra* note 192, at 809; *see also* Goldsmith, *supra* note 186, at 1236 (stating that several factors diminish the skeptics' concerns about the unfeasibility of applying traditional choice-of-law rules to cyberspace); Richard H. Acker, *Choice-of-Law Questions in Cyberfraud*, 1996 U. CHI. LEGAL F. 437, 437 (1996) (stating that cyberspace's lack of a fixed physical location may stretch traditional choice-of-law rules to their limits and produce illogical results that bear little if any relation to either party's interests).

200. *See* Michael F. Morano, Note, *Legislating in the Face of New Technology: Copyright Laws for the Digital Age*, 20 FORDHAM INT'L L.J. 1374, 1399 (1997) (discussing that the Software Directive is one of the more important accomplishments of EC intellectual property legislation since it illustrates the intent of the European Community to increase intellectual property protection and to develop international standards of copyright law); *see also* Ginsburg, *supra* note 196, at 1475 (defining copyright as a "bundle of rights" including the exclusive rights to reproduce the work in copies, to prepare derivative works based on the copyrighted work, to distribute copies of the work, and to perform or display the work publicly); Pamela Samuelson, et al., *Toward a Third Intellectual Property Paradigm: Article: A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308, 2353 (1994) (stating that the originality standard of copyright law would not pose a problem for most industrial design elements of programs since program development requires creativity).

zation by adopting the two WIPO treaties.[201] However, the treaties will not render the choice of law obsolete.[202]

Part VI

Other Options

As we move further into the Internet age, it is clear many questions of law will arise. The issues of what constitutes infringement;[203] what actions create jurisdiction;[204] what law should be applied;[205] and when should domestic law be applied abroad will undoubtedly come before

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201. *See* Reindl, *supra* note 192, at 812; *see also* Jack E. Brown, *Proposed International Protection of Electronic Databases*, 27 CUMB. L. REV. 17, 29 (1996) (stating that the proposed WIPO treaty recognizes the need for mutuality in the protection accorded among all countries in which such databases are in demand); Paul Edward Geller, *From Patchwork to Network: Strategies for International Intellectual in Flux*, 9 DUKE J. COMP. & INT'L L. 69, 85 (1998) (stating that the WIPO treaties leave the rights of reproduction and communication to the public open-ended and contemplate new exceptions in digital media).

202. *See* Reindl, *supra* note 192, at 812; *see also* Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 218-19 (1998) (stating that recent WIPO treaties have accordingly set the tone for proposed domestic legislation designed to bring copyright law into the digital age); Daniel G. Asmus, *Service Provider Liability: Australian High Court Gives the World a First—Should the United States Follow Suit?*, 17 DICK. J. INT'L L. 189, 228 (1998) (stating that the WIPO Treaties have the potential to bring a degree of uniformity into the international arena).

203. *See* K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 349 (1999) (stating that copyright law prohibits the commercial appropriation of an author's creative works, thus constituting actionable infringement); *see also*, Michael Landau & Donald E. Biederman, *The Case for a Specialized Copyright Court: Eliminating the Jurisdictional Advantage*, 21 HASTINGS COMM. & ENT. L.J. 717, 723 (1999) (stating that copyright infringement requires a substantial copying of protectable expression); Randy Gidseg & Bridget Santorelli & Elizabeth Walsh & Greg Wells, *Intellectual Property Crimes*, 36 AM. CRIM. L. REV. 835, 836 (1999) (stating that criminal liability for copyright infringement is predicated on a finding that the alleged perpetrator acted willfully).

204. *See* Landau & Biederman, *supra* note 203, at 720 (stating that the district courts have original jurisdiction over any civil action arising under the copyright laws, and such jurisdiction is exclusive to the state courts); *see also* Hayden R. Brainard, *Survey and Study of Technology Development and Transfer Needs in New York*, 9 ALB. L.J. SCI. & TECH. 423, 473 (1999) (stating that since trade secrets are not protected by statute in every jurisdiction, the use of non-compete and/or non-disclosure provisions in employment contracts, and license agreements, becomes very important); Walter A. Effross, *High-Tech Heroes, Virtual Villains, and Jacked-In Justice: Visions of Law and Lawyers in Cyberpunk Science Fiction*, 45 BUFFALO L. REV. 931,963 (1997) (discussing how questions of jurisdiction plague those seeking to prosecute computer crimes).

205. *See* Jay L. Koh, *From Hoops to Hard Drives: An Accession Law Approach to the Inevitable Misappropriation of Trade Secrets*, 48 AM. U.L. REV. 271, 314 (1998) (stating that the dispute over inevitable misappropriation of trade secrets can be recharacterized as an application of the law of concurrent property interests); *see also* Jeanne English Sullivan, *Copyright for Visual Art in the Digital Age: A Modern Adventure in Wonderland*, 14 CARDOZO ARTS & ENT L.J. 563, 591 (1996) (noting that the copyright law as applied to the visual arts lacks predictability, and, as a result, inhibits the use of copyrighted visual works); Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121, 159 (1999) (discussing that no clear decisional rule exists to determine the law that should be applied when information products are transmitted from one jurisdiction to another).

the courts.[206] However, the seriousness of these questions would be lessened if similar copyright laws were established around the world. Obviously, this is easier said than done. However, it might be possible, especially for the United States, to at least influence legislation abroad.

The United States is clearly the leader of the global economy.[207] If the U.S. is unable to directly influence favorable domestic legislation abroad, it can certainly further its own cause by exercising restraint in its own jurisdiction. By invoking the presumption of extraterritoriality, and therefore avoid applying U.S. law abroad, the U.S. might at least influence other countries from legislating in a way that would hurt U.S. copyright holders. Imagine, if you will, a scenario in which Germany applies its law to an act that occurred within the United States, an act which was legal within the U.S. but illegal within Germany. Such an application would persuade individuals from taking similar actions within the U.S., presumably to the detriment of the U.S. economy. In such a scenario, it would not be likely that the U.S. would feel any moral sense to be flexible to Germany's needs or requests. Similarly, the reverse would be true. After all, the desired goal of harmonization of laws seems to be inconsistent with an extraterritorial application.[208]

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206. *See* Alexander A. Caviedes, *International Copyright Law: Should The European Union Dictate Its Development?*, 16 B.U. INT'L L.J. 165, 171 (1998) (discussing treaty provisions that provide a basic framework with which Member States must comply through their domestic laws); *see also* Allen Z. Hertz, *Proceedings of the Canada-United States Law Institute Conference: Nafta Revisited: Shaping the Trident: Intellectual Property Under Nafta, Investment Protection Agreements and at the World Trade Organization*, 23 CAN.-U.S. L. J. 261, 263 (1997) (discussing the possibilities for the treatment of foreign rightholders is governed by domestic treaties and domestic law); J. Thomas McCarthy, *Intellectual Property—America's Overlooked Export*, 20 DAYTON L. REV. 809, 809 (1995) (stating that a new phenomenon in U.S. intellectual property law is that changes in our domestic law are being driven by the needs of world trade).

207. *See* Scott H. Segal & Stephen J. Orava, *Playing the Zone and Controlling the Board: The Emerging Jurisdictional Consensus and the Court of International Trade*, 44 AM. U. L. REV. 2393, 2395 (1995) (quoting the then-Senate Majority Leader George Mitchell, "[e]xpanded international trade has been the engine of American prosperity since the end of the Second World War. . . . The General Agreement on Tariffs and Trade (GATT) will define the American role in the global economy and in world affairs well into the 21st century."); *see also* Michael L. Doane, *Trips and International Intellectual Property Protection in an Age of Advancing Technology*, 9 AM. U.J. INT'L L. & POL'Y 465, 465 (1994) (discussing generally that an important factor in the development of the United States as the world's leading technological innovator is its strong protection of intellectual property rights); Leah Sherry, *Science Based Standards for the Uniform Global Protection of Intellectual Property: The Case of Logic Functions Expressions*, 26 CAL. W. INT'L L. J. 335, 335 (1999) (stating that the United States' current international trade policy is guided by the desire to enhance America's ability to compete in foreign markets by expanding opportunities for the global economy and insisting on similar responsibility from other countries).

208. *See* Curtis A. Bradley, *Extraterritorial Application of U.S. Intellectual Property Law: Principal Paper: Territorial Intellectual Property Rights in an Age of Globalism,* 37 VA. J. INT'L L. 505, 549 (1997); Wolfgang Fikentscher, *Comparative Law: Third World Trade Partnership: Supranational Authority vs. National Extraterritorial Antitrust—a Plea for "Harmonized" Regionalism*, 82 MICH. L. REV. 1489, 1507 (1984) (discussing that international cooperation and adjustment of national rules and administrative activities for exercising public control over economic behavior with extraterritorial repercussions need not be conceived of as worldwide or UN-wide); *see also* Ernst-Ulrich Petersmann, *Symposium on Global Competition and Public Policy in an Era of Technological Integration: the Institutional and Jurisdictional Architecture: International Competition Rules for Governments and for Private Business: A "Trade Law Approach" for Linking Trade and Competition Rules in the WTO*, 72 CHI.-KENT. L. REV. 545, 556 (1996) (stating that nondiscriminatory border adjustment measures permitted under Article III of GATT and mutual recognition of equivalent national standards allow more flexibility than full international harmonization of national rules).

Alternatively, careful exercise of domestic jurisdiction may be proper. It has been suggested that:

> A U.S. court, for example, could grant injunctive remedies under U.S. law for acts that commence a course of infringing conduct in the United States, for example, acts of authorizing or copying, without regard for whether eventual exploitation is to take place at home or abroad. Such an injunction would be justifiable if it forestalled piracy, whether at home or abroad, but did not risk interfering with such relief as might be granted under foreign laws for exploitation abroad.[209]

Conversely, consistent application of foreign laws by U.S. courts might have the same desired effect. Certainly, the usefulness of this remedy depends on the amount of protection afforded by the foreign law.[210] In fact, the trend has been towards greater receptivity to applying foreign law in U.S. courts.[211] This trend may reflect the nature of today's global marketplace, where U.S. individuals and businesses have an interest in having foreign courts consider claims under U.S. law—which would be less likely to occur if U.S. courts do not reciprocate.[212]

Another option in countering copyright infringement is targeted litigation.[213] Although an individual artist may not be able to afford the cost of litigating a matter in a foreign jurisdiction, the same may not be said for an American corporation. Domestically, the entertainment industries are responding to infringements on the Internet by sending e-mail messages ordering infringers to cease and desist or face litigation.[214] As one author suggested, however, the targets

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209. Jeffrey Lewis, Note & Comment, *The Yellow Submarine Steers Clear of U.S. Copyright Law: The Ninth Circuit Reexamines the Doctrine of Contributory Infringement*, 18 LOY. L.A. INT'L & COMP. L. J. 371, 394 n.165 (1996).

210. *See* Lewis, *supra* note 209, at 397; *see also* Reindl, *supra* note 192, at 804 (stating that copyright protection arises from the jurisdiction where the infringement occurred, therefore only providing the protection that those laws afford); Kai Burmeister, *Jurisdiction, Choice of Law, Copyright, and the Internet: Protection Against Framing in an International Setting*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 625, at § II-B-1 (1999) (stating that the scope of protection is determined by the law of the jurisdiction under which the infringement arose).

211. *See* Bradley, *supra* note 208, at 576; *see also* Lewis, *supra* note 209, at 376. *Cf.*, Subafilms, Ltd v. MGM-Pathe Communications Co., 24 F.3d 1088, 1098 (1994) (indicating that the alternative, applying U.S. copyright law, would present difficult choice of law problems).

212. *See* Lewis, *supra* note 209, at 377-78; *see also* Alexander Gigante, *Ice Patch on the Information Superhighway: Foreign Liability for Domestically Created Content*, 14 CARDOZO ARTS & ENT. L.J. 523, 551 (1996) (pointing out that in order to get international copyright protection in connection with the Internet, one would have to rely on protection that "emanate[s] from . . . nations that are already parties to an array of international agreements granting reciprocal protection); F. Jay Dougherty, *Symposium International Rights of Publicity: The Right of Publicity—Towards a Comparative and International Perspective*, LOY. L.A. ENT. L.J. 421, 421 (1998) (noting that because the Internet transcends national borders, American claimants may find it increasingly necessary to pursue claims in foreign courts).

213. *See* Mark S. Torpoco, *Mickey and the Mouse: The Motion Picture and Television Industry's Copyright Concerns on the Internet*, 5 UCLA ENT. L. REV. 1, 66 (1997) (proposing that such litigation should be aimed at "1) sites infringing copyrighted works set up for commercial purposes and 2) sites involving the mass copying of sensitive information. . . ."). *But see* Jon M. Garon, *Media and Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, CARDOZO ARTS & ENT. L.J. 491, § I-B-2 (1999) (noting that the lack of a large target to pursue in litigation may leave no recourse for victims but to wait for more advanced technology in order to catch the infringers).

214. *See* Torpoco, *supra* note 213, at 66.

of these suits should be carefully selected in order to avoid bad publicity.[215] In any event, large American corporations clearly have the "deep pockets" necessary to litigate a claim in a foreign court. If the claim and award are large enough, it may just be enough of an incentive to either deter foreign copyright infringement, or influence foreign law.

Further, many American companies are multi-million dollar corporations that operate worldwide. Thus, they are in a position to wield considerable influence over the international economy. Consider a scenario where a foreign law operates to the detriment of an American company that has major operations in that country. Ultimately, either one of two things is likely to follow. Either the foreign country will amend its laws, or the American company will pull out of the country—taking with it an enormous impact on the local economy. In effect, American corporations have within their means the ability to create global trends just as they create marketing trends for their products.[216]

Conclusion

Whenever legal questions cross national boundaries, there are always problems. The Internet will almost certainly make these problems even more prevalent, as a single keystroke is crossing multiple national boundaries. United States and foreign legislators alike have recognized the need to address these issues, and thus have become signatories to multiple international treaties. However, as we have seen in the copyright treaties, these provide only a minimum level of protection for right holders. Treaty language permits domestic law to provide greater protection. Consequently, copyright law around the world is not uniform. An act constituting infringement in the U.S. may be perfectly legal in a European country. What is a right holder to do? What are the United States courts to do? Applying U.S. law to acts that occur abroad certainly will not aid in the efforts to induce foreign countries to develop domestic laws that parallel American law. Even if U.S. courts did apply U.S. law extraterritorially, there might not be jurisdiction over the defendant, or the interests of justice may be better served in a more convenient forum.

There are many issues brought to light in an international setting. Advancing technology ensures that these issues will not go away. Perhaps these issues will be decided by the courts in upcoming years, or by U.S. and foreign legislators. One way or another, these issues will have to be addressed.

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215. *Id*.

216. *See* Jay D. Hair, *Business and Environment: The Expanding Dialogue*, 15 ENVTL. L. 745, 749 (1985) (indicating that American corporations exert a great deal of influence on a global scale). *Cf*., Kenneth Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U.L. REV. 849, 885 (1994) (comparing the size of some major American corporations to that of small countries); Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 327 n.179 (1990) (describing American corporations as extremely large and complex, averaging as many as 189 subsidiaries, and conducting business worldwide).

Need World's Collide: The Hudad Crimes of Islamic Law and International Human Rights

By Edna Boyle-Lewicki*

> [B]y year's end the authorities had beheaded 40 men and 1 woman for murder, 14 men for rape, 6 men and 2 women for drug offenses, 5 men for armed robbery, and 1 man for witchcraft. . . . For less serious crimes, such as drunkenness or publicly flouting Islamic precepts, flogging with a cane is frequently the punishment.[1]

Reports regarding criminal justice in Muslim countries often give the impression that Islam is barbaric with virtually no regard for human rights.[2] However, there are several problems with such a facile analysis. Not all states ruled by Muslims or comprised of a Muslim majority are necessarily "Islamic" states governed by principles of Islamic law. Furthermore, even the most arguably theocratic states, such as the Islamic State of Afghanistan and the Islamic Republic of Iran, may be responding to political unrest in ways that are not true to the spirit or letter of Islamic law.[3] While notions of due process are not necessarily complied with due to the severity of the punishment, the fact that certain actions are classified as criminal—be it the mundane act of indecent exposure or the most serious offenses, such as drug trafficking, rape, and murder—is not surprising. This paper will investigate the seven *hudad* crimes enu-

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1. COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1996, REPORT SUBMITTED TO THE COMMITTEE ON FOREIGN RELATIONS, U.S. SENATE, AND THE COMMITTEE ON INTERNATIONAL RELATIONS, U.S. HOUSE OF REPRESENTATIVES BY THE DEPARTMENT OF STATE at 1245 (1997). *See* John F. Burns, *Stoning of Afghan Adulterers: Some Take Part, Others Just To Watch*, N.Y. TIMES, Nov. 3, 1996, at 18 (stating that severe punishments are imposed, including death, under the view of the Shari'a). *See generally* Abdullahi Ahmed An-Na'im, *Human Rights in the Muslim World's Socio-Political Conditions and Scriptural Imperatives*, 3 HARV. HUM. RTS. J. 13, 22-25 (1990) (discussing areas where the *Shari'a* conflicts with international human rights standards).

2. *Id*.

3. *See generally* Donald L. Horowitz, *The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change*, 42 AM. J. COMP. L. 543 (1994).

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This paper is dedicated to the author's father, Stephen G. Boyle, retired teacher of Social Studies at Hicksville Junior High School, who has always insisted that his daughters and his students attempt to understand others before judging them.

merated in the Qur'an and Sunna and the punishments prescribed for them in Islamic law,[4] how these compare and contrast with contemporary international human rights norms, and possible means of reconciliation.

Sources of Human Rights

International Human Rights: The International Bill of Human Rights is composed of the Universal Declaration of Human Rights (UDHR) of 1948, the International Covenant on Civil and Political Rights (ICCPR), and on the International Covenant on Economic, Social, and Cultural Rights (ICESCR) of 1966.[5] The UDHR was formulated in the wake of World War II, when it became obvious that domestic rights legislation could be easily curtailed to satisfy the purposes of the present regimes.[6] The UDHR includes the absolute prohibition of torture and

4. The primary focus of this paper is on the *Shari'a* rules. Actual practice will be compared and contrasted with the *Shari'a* in the final section. It would be unfair to judge Islamic legal theory on the practice of criminal law in various Muslim countries because there is no country which has adopted the *Shari'a* as its sole legal authority. The laws of the many totalitarian regimes in Muslim nations, whether they label themselves "secular" or "Islamic," speak for themselves—not for the laws of Islam.

   See Bernard K. Freamon, *Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence*, 11 HARV. HUM. RTS. J. 1, 3 (1998) (stating a number of governments now assert the right and obligation to govern their populations in accordance with the precepts of Islamic law, known to Muslims as the *Shari'a* and that the constitutions of several Middle Eastern and African nations posit the *Shari'a* as the fundamental source of law for all juridical matters, public and private); *see also* JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 1 (1991) (explaining that *Shari'a* is a commonly used Arabic word literally meaning "way," "road," or "path" to the watering place or oasis and, in the legal sense, the term has a comprehensive and technical meaning, describing the behavioral path that all Muslims must take to achieve salvation, regulating the life of a Muslim in every aspect—including prayers and rituals, child rearing, family life, politics, and ethics—encompassing all aspects of public and private law, hygiene, and even courtesy and good manners).

5. *Universal Declaration on Human Rights*, U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1948) (containing core human rights principles that are widely recognized by the international community). *See* Nadine Strossen, *United States Ratification of the International Bill of Rights: A Fitting Celebration of the Bicentennial of the U.S. Bill of Rights*, 24 TUL. L. REV. 203 (1992) (stating that the three documents that constitute the International Bill of Rights are the Universal Declaration of Human Rights, which the United Nations adopted by consensus in 1948, and two covenants that spell out in greater detail the broad principles enunciated in the Universal Declaration: the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR")). S*ee generally* Frank C. Newman, *The Randolph W. Thrower Symposium: Comparative Constitutionalism: Introduction: The United States Bill of Rights, International Bill of Human Rights, and Other "Bills,"* 40 EMORY L.J. 731, 734 (1991) (noting that when the Universal Declaration of Human Rights was adopted in 1948, Americans hoped that it would embody the consensus of the international community in favor of human rights and individual liberty, therefore, its principles have become the basis of a number of binding international covenants and conventions).

6. *See* Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51 (1992).

cruel, inhuman or degrading treatment,[7] the right to equal protection of the law,[8] to marry "without any limitation due to race, nationality or religion," to equal rights of each spouse,[9] and

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7. *Universal Declaration on Human Rights*, art. 5, U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316, (1967) (stating "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."). *See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), which provides the following definition of torture:

> Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions.

See generally Dolly M.E. Filartiga v. Americo Norberto Pena, 630 F.2d 876, 883-84 (1980) (providing examples of the how the international consensus surrounding torture has found expression in numerous international treaties and accords, in addition to pinpointing exactly where the wording can be found).

8. *Universal Declaration on Human Rights*, U.N. GAOR, Art. 7, Supp. No. 16, at 52, U.N. Doc. A/6316 (1948) (stating "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."). *See* Elene G. Mountis, *Cultural Relativity and Universalism: Reevaluating Gender Rights in Multicultural Context,* 15 DICK. J. INT'L L. 113, 119 (1996) (supporting context of Art. 7 by saying, "Universal Declaration of Human Rights includes anti-discrimination provisions requiring that all people are equal before the law."). *See generally* Geraldine A. Del Prado, *The United Nations and the Promotion and Protection of the Right of Women: How Well Has The Organization Fulfilled Its Responsibility?,* 2 WM. & MARY J. WOMEN & L. 51 (1995) (discussing the modification of the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customs and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women though legal, in an effort to remedy unequal treatment under the law).

9. *Universal Declaration of Human Rights,* U.N. GAOR, Art. 16, Supp. No. 16, at 52, U.N. Doc. A/6316, (1967) which provides that:

> (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
>
> (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
>
> (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

See also JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 107, 162 (1991) (arguing that "single women living in a Muslim country without the protection of a male relative" fits the "social group" category because "gender and the absence of male relatives are not within the control of group members, and choice of marital status is a freedom guaranteed under core norms of international human rights law" as represented in the Universal Declaration of Human Rights, art. 16, and the International Covenant on Civil and Political Rights, art. 23).

"the right to freedom of thought, conscience and religion" including the right to change one's religion.[10] The ICCPR contains similar provisions,[11] requiring even in times of national emer-

10. *Universal Declaration of Human Rights, supra* note 5, at Art. 18 (stating that "everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."). *See also* Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or Clash with a Construct?*, 15 MICH. J. INT'L L. 307 (1994) (discussing "freedom" as a concept defined within specific cultural and ideological boundaries and without a universal definition, and noting that the problem we face is the demands by some religious and secular intellectuals for freedom in its modern, humanist form in the environment created by a religious revolution.)

> Religion does not deny freedom, but its freedom starts with servitude to God. Accepting this means interpreting freedom within the boundaries of *Shari'a* . . . and Islamic values. . . . In the Islamic *Shari'a*, freedom of expression does not extend to the freedom to corrupt. The purpose of religion is to lead human beings to perfection; not everything can be permitted.

Id. at 317. *See generally* JOHN KELSAY, SAUDI ARABIA, PAKISTAN, AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, IN HUMAN RIGHTS AND THE CONFLICT OF CULTURES: WESTERN AND ISLAMIC PERSPECTIVES ON RELIGIOUS LIBERTY 35-37 (1988) (stating that aspects of the Universal Declaration of Human Rights (UDHR), passed by the General Assembly in 1948, had provoked criticism by the representative of Saudi Arabia, who asserted that the declaration conflicted with Islamic law, but Saudi Arabia was the only Muslim country in the United Nations that failed to vote for it).

11. International Covenant on Civil and Political Rights, Dec. 19, 1966, arts. 7, 18, and 23, 999 U.N.T.S. 171. Article 13 provides:

> (1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> (2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> (3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
>
> (4) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. *Id.*

Article 23 provides*:*

> (1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State
>
> (2) The right of men and women of marriageable age to marry and to found a family shall be recognized
>
> (3) No marriage shall be entered into without free and full consent of the intending spouse
>
> (4) Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children. *Id.*

gency that torture and cruel punishment is prohibited and the guarantee of freedom of thought, conscience and religion maintained.[12]

Additional conventions and treaties whose purpose is to further protect the rights of specific groups have more recently been formulated.[13] Human rights instruments have been promulgated by nations in various regions specifically addressing the societal concerns that may be lacking in a United Nations document.[14]

Without exception, the Muslim nations belong to the United Nations.[15] When the UN was drafting the Universal Declaration of Human Rights (UDHR) in 1948, Saudi Arabia was the only Muslim country to reject some of the principles in the UDHR because of conflicting

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12. *See* INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE UNITED KINGDOM 280-81 (1995) (analyzing the Article 7 guarantee of protection from torture and from cruel, inhuman, or degrading treatment or punishment as one of the best established among all human rights and norms); *see also* P. Ghandi, *The Human Rights Committee and Articles 7 and 10 of the International Covenant on Civil and Political Rights 1966*, 13 DALHOUSIE L.J. 758, 773-74 (1990) (arguing that there are certain factors that should be taken into account, as essential elements, when determining what classifies as cruel, inhuman and degrading punishment); Peter Cumper, *Freedom of Thought, Conscience, and Religion: The Three Freedoms in* INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE UNITED KINGDOM 353, 355-89 (David Harris & Sarah Jones eds., 1995) (discussing the four separate components of Art. 18); Sandy Ghandhi, *Family and Child Rights in* INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE UNITED KINGDOM 490-534 (David Harris & Sarah Jones eds., 1995) (providing an overview to the various ambiguities, protections and expectations derived from article 23 of ICCPR).

13. *See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (imposing an "unambigious duty" on member States to prosecute acts defined as criminal and providing that each State party "shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."); *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, Supp. No. 34, at 91, U.N. Doc. A/1034 (1975) (clarifying the unified principle that "[N]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"). Among the most important of these are the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the UN Convention on the Elimination of All Forms of Discrimination Against Women, the UN Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, and the UN Convention on the Rights of the Child.

14. *See, e.g.*, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, art 3, 213 U.N.T.S. 222 (considering the Universal Declaration of Human Rights and attempting to create greater unity between its Members and that one of the methods by which that aim is to be pursued is the maintenance and further realization of Human Rights and Fundamental Freedoms); *American Convention on Human Rights*, *opened for signature* Nov. 22, 1969, art 5(2), O.A.S.T.S. No. 36 at 1, O.A.S. Doc. OEA/Ser. L/V/ii.50, docc. 6 at 27 (1980) (remaining among the most important human rights treaties to which the U.S., could but has not become a party, the American Convention on Human Rights*)*; *African Charter on Human and Peoples' Rights*, *adopted* June 27, 1981, art. 50 A.U. Doc. CAB/LEG/67/3 Rev. 5 (stating "[a]ll peoples shall have the right to existence . . . they shall have the unquestionable and inalienable right to self-determination . . . they shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen").

15. *See* BASIC DOCUMENTS OF THE UNITED NATIONS (Louis B. Sohn, ed. Foundation Press 1956); *see also* ANDREW MARTIN & JOHN B. S. EDWARDS, THE CHANGING CHARTER - A STUDY IN THE REFORM OF THE UNITED NATIONS (1955); *see also Revision of UN Charter: Hearings Before the Subcomm. On the Committee of Foreign Relations,* 81st Cong. 2nd Session (1950) (regarding resolutions relative to revision of UN Charter).

Islamic law.[16] Some Muslim countries have ratified all or parts of the International Bill of Human Rights, such as Afghanistan, Egypt, Iran, Iraq, Jordan, Libya, Morocco, the Sudan, Syria, and Tunisia; others, including Kuwait, Pakistan, Saudi Arabia, Turkey, and the United Arab Emirates have not.[17] Muslim nations often lack a domestic apparatus for redressing human rights violations, therefore aggrieved citizens apply principles of international human rights to try to pressure the government to rectify the situation.[18]

Islam: The Qur'an is the primary source of all law, followed by the Sunna, or tradition, of the Prophet Mohammed.[19] In early Islam, there was a group known as the *mu'tazila*, relying

16. *See* ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 12-13 (1991); JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT 24-6 (1999) (discussing the Saudi Arabian abstention and focusing their reason for refusal as: the wording of Art. 16 on equal marriage rights and because of objections to the clause in Art. 18 which states that everyone has the right to "change his religion or belief."); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U.L. REV. 1, 15 (1982) (stating that on December 10, 1948, the General Assembly, after some amendments, approved the Universal Declaration of Human Rights unanimously, with eight abstentions: the Soviet bloc, Saudi Arabia, and the Union of South Africa).

17. *See* MAYER, *supra* note 16, at 24; *see also* Carolyn Ratner, *Islamic Laws and Violations of Human Rights in the Sudan,* 18 B.C. THIRD WORLD L.J. 137, 148 (1998) (reviewing JUDITH MILLER, GOD HAS NINETY-NINE NAMES, and stating that in 1948, seven out of the then eight Muslim states voted in favor of the Universal Declaration of Human Rights but Saudi Arabia remained the only Muslim country in the United Nations that failed to ratify it); M.H.A. Reisman, *Some Reflections on Human Rights and Clerical Claims to Political Power*, 19 YALE J. INT'L L. 509, 516 (1994) (claiming despite majority endorsement of the Declaration, reservations among the Muslim states were never entirely vanquished); *see generally* Mayer, *supra* note 10, at 349 n.170 (comparing the constitutions of various Muslim countries to establish the wide range of models that they exemplify).

18. *See* MAYER, *supra* note 16; Mayer, *supra* note 10, at 343 (stating that since torture has been a routine feature of criminal justice in many Muslim countries, the disparity between theory and practice raises troubling questions. The evidence that self-professed Islamic States like Iran and Saudi Arabia subsequently continued their patterns of recourse to egregious torture suggests that this Islamic rights model, in practice, lacked normative force even among countries that ranked among its most vigorous official proponents in the international fora); *see generally* Arden B. Levy, *International Prosecution of Rape in Warfare: Nondiscriminatory Recognition and Enforcement*, 4 UCLA WOMEN'S L.J. 255, 263-64 (1994) (discussing how after significant delays, and only as a result of political pressure, the European Community conducted initial investigations and hearings on the nature of rape committed in the Balkans and its impact on Muslim women victims).

19. *See* Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, Saudi Arabia Country Report on Human Rights Practices for 1997 1, 3 (1998) (noting that the supreme law of the land as established by governmental decree are the Koran and the Sunna of the Prophet Mohammed); *see also* Bernard Freamon, *Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence*, 11 HARV. HUM. RTS. J. 1, 18 (1998)

> The Qur'an is proof of the prophecy of Muhammed, the most authoritative guide for Muslims, and the first source of the Shari'ah. All other sources of Islamic law derive their validity and authority from the Qur'an, and some say it is the only true source of law in Islamic jurisprudence. The Holy Book describes itself as the last in a series of revelations of Divine Law that began with the Torah, and several Qur'an verses plainly indicate that it is the basis and main source of law in Islam.

Id. See, e.g., THE MEANING OF THE HOLY QUR'AN 11:114 (Abdullah Yusuf'Ali trans., Amana Publications, New rev. 8th ed. 1996) (stating that the *Sunnah* consists of the Prophet's (peace be upon him) statements and behavior (doings and sayings) and his approval or disapproval of the statements and behavior of others that he observed during his lifetime; it is extremely important because through it, the Prophet Muhammad interpreted, clarified, explained and complemented many of the principles announced in the Qur'an). *See generally* Anthony Chase, *Legal Guardians: Islamic Law, International Law, Human Rights Law, and the Salman Rushdie Affair*, 11 AM. U.J. INT'L L. & POL'Y 375, 404 (1996) (noting that the *Sunna*—made up of "valid" *ahadith*—is a source of law equivalent in religious force to the Qur'an, therefore, the Qur'an is not normally seen as superior to the *Sunna*, rather the two are seen as integral coequals that theoretically cannot contradict each other).

largely on reason to resolve ambiguous religious questions.[20] Although this movement was suppressed by the dominant Sunni philosophers who feared that this rationalist approach could lead Muslims away from the dictates of the Qur'an, it has retained some influence in Twelve Shi'i Islam, the dominant sect of contemporary Iran.[21] Likewise, the Kharijite sect has always espoused a modern form of democracy.[22] However, Sunni Islam stresses the duties of the believers, while contemporary international law, with its historical base in the Age of Reason, stresses the rights of man.[23]

Islam places greater emphasis on the obligations of believers than on individual rights.[24] The individual is primarily conceived of as a member of the *umma*, or community.[25] The indi-

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20. *See* NOEL J. COULSON, A HISTORY OF ISLAMIC LAW (1964). *See generally* AZIZ AL-AHMAH, ISLAMIC LAW: SOCIAL AND HISTORICAL CONTEXT (1988); JOSEPH SCHACHT, ORIGINS OF MUHAMMEDIAN JURISPRUDENCE (1950).

21. *See* Alison E. Graves, *Women in Iran: Obstacles to Human Rights and Possible Solutions*, 5 AM. U.J. GENDER & LAW 57, 59 n.25 (1996) (explaining the historical development of Shi'i):

> The development of Twelve Shi'i political theory [the current political theory in Iran today], and in particular the Twelve Shi'i theory of the imamate, produced a concept of law which was fundamentally different from that of the Sunnis. For the Twelve Shi'i, the imam was the infallible interpreter of divine revelation, and the sole repository of all truth and knowledge. Because the Shi'ite imam was infallible, Shi'i jurists rejected human reasoning and personal judgment in any form as criteria for the formulation of legal rulings. But, just as Sunni legal practice differed from Sunni legal theory, so did Shi'i legal practice differ from Shi'i legal theory. In practice, the Shi'i jurists found themselves forced to give a place to human reason.

Id. See also MAYER, *supra* note 16, at 48.

22. *See* Donna E. Arzt, *Heroes or Heretics: Religious Dissidents Under Islamic Law*, 14 WIS. INT'L L.J. 349, 377 (1996) (identifying a third sect, the *Kharijites* ("seceders"), who believed that leaders should be democratically elected on the basis of piety and personal ability alone, was hostile to communities); MAYER, *supra* note 16, at 50. *See generally* PETER MANSFIELD, THE ARABS (2d ed. 1985) (providing deeper explanation of various sects of Islam including the Kharijites).

23. *See generally* Zainab Chaudhry, Comment, *The Myth of Misogyny: A Reanalysis of Women's Inheritance in Islamic Law*, 61 ALB. L. REV. 511 (1997) (comparing the historical and contemporary views of the duties of believers and the rights of man); Clark Benner Lombardi, *Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Shari'a in a Modern Arab State*, 37 COLUM. J. TRANSNAT'L L. 81, 92-97 (1998) (discussing the competing definitions of the *Shari'a* and the duties that conform to the fundamental principles of it); Freamon, *supra* note 19 (discussing the Islamic religion, focusing on the two branches—Sunni and Shi'a—but also limiting discussion to the legal doctrine of Sunni and its applications).

24. *See generally* Bassam Tibi, *Islamic Law/Shari'a, Human Rights and International Relations, in* ISLAMIC LAW REFORM AND HUMAN RIGHTS: CHALLENGES AND REJOINDERS 87 (Tore Linkholm & Kari Vogt eds., 1993); Freamon, *supra* note 19, 15 n.48 (discussing how the Qur'an contains over 350 verses that lay down specific legal rules for the believers, governing such things as "marriage, divorce, burial, dietary restrictions, criminal law, and procedure, reception of evidence, commercial transactions, diplomacy, war, inheritence, and organization of government"); THE MEANING OF THE HOLY QUR'AN, *supra* note 19, at 3:78-91.

25. *See* Tibi, *supra* note 24, at 87; Freamon, *supra* note 19 (explaining "the language of the Qu'an is paramount, Muslims are not permitted to reach independent judgments and apply them. The judge applies Quranic rules in cases where individuals make the decisions about their own lives."); *see also* Theodore A. Mahr, Note, *An Introduction to Law and Law Libraries in India*, 82 LAW LIBR. J. 91, 98 (1990) (stating "the doctrine of ijma is characteristically Islamic and reflects the traditions' preoccupation with the community," which Muslims call *umma*); Leila P. Sayeh and Adrianen M. Morse, Jr., *Islam and the Treatment of Women: An Incomplete Understanding of Gradualism*, 30 TEX. INT'L L.J. 311, 330 n.129 (1995) (stating "umma means community").

vidual's rights are not absolute; he is due these rights only in return for fulfilling certain obligations, be it to God, other individuals, or the State.[26] Conversely, God has rights *vis à vis* man, and it is for this reason the *hudad* crimes and punishments pose such a problem for legal reform. In contrast to the teaching of the Qur'an that if *a person* forgives one who has wronged him, God will reward him, the *hudad* penalties are applied to crimes which violate the rights of God as well as those of man.[27] Only God can forgive the crime or change the law. Islam teaches that Mohammed was the final prophet, thus, no further revelation will be forthcoming.[28] Muslims who oppose the application of international human rights norms, insisting instead on a more "Islamic" approach believe that international law "exceed[s] the limits of rights and freedoms permitted by Islam."[29] While the Muslim belief may be sincere, it has been frequently invoked by totalitarian rulers for their own purposes regardless of how repressive the method to satisfy the means. Thus, Iran's Ayatollah Ali Khamenei asserted "[w]hen we want to find out what is right and what is wrong, we do not go to the United Nations; we go to the Holy Koran. . . . For us the UDHR is nothing but a collection of mumbo-jumbo by disciples of Satan."[30] Of course, religiously oriented regimes are not the only ones guilty of brutality toward their subjects. Secular regimes fearful of Islamization, such as those of the late Shah of Iran, Saddam

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26. *See* Tibi, *supra* note 24, at 87; Freamon, *supra* note 19, at 15 n.48; *see also* THE MEANING OF THE HOLY QUR'AN, *supra* note 19, at 3:78-91 (stating that the ultimate source of authority for all human affairs is God alone, everything and everyone, including Prophets and other ruling authorities, are subordinate to Divine Law, which emanates from Divine Revelation); *Kitab-al Salat, in* 1 SUNAN ABU DAWUD (Ahmad Hasan trans., SH. Muhammad Ashraf 1984) (stating the Sunnah establishes that there shall be five daily prayers and that each shall be performed in a specific manner and at specific times, and that there are rules governing the establishment of mosques, the qualifications of the imam, the governance of the organization and conduct of established congregational and individual prayer).

27. *See* M. Cherif Bassiouni, *Protection of Diplomats Under Islamic Law*, 74 AM. J. INT'L L. 609, 623-24 (1980) (discussing the Hudad, which are the most serious of all crimes since they are specified in the Koran); *see also* Rose Marie Karadsheh, *Creating an International Criminal Court: Confronting the Conflicting Criminal Procedures of Iran and the United States,* 14 DICK. J. INT'L L. 243 (1996) (presenting the Hudad crimes as acts prohibited by God—these include "theft, robbery, adultery, apostasy, drinking alcoholic beverages, and rebellion against Islam . . . since the Koran explicitly provides the form of punishment to be meted out for each crime, the judge has no discretion regarding punishment . . . forms of the death penalty include stoning for adultery, and crucifixion and death by sword for homicide during robbery. . . . The most well known punishment is amputation of the arm or hand for theft"); *see generally* MATTHEW LIPPMAN ET AL., ISLAMIC CRIMINAL LAW AND PROCEDURE 45-49 (1988) (detailing the Hudad crimes and the way they are seen in the eyes of God).

28. *See, e.g.,* COULSON, *supra* note 20; AZIZ AL-AHMAH, ISLAMIC LAW: SOCIAL AND HISTORICAL CONTEXT (1988); SCHACHT, *supra* note 20.

29. ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 2 (1991); Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures Or A Clash With A Construct?* 15 MICH. J. INT'L L. 307, 308-309 (1994) (discussing how Muslims have offered the constructs of Islamic rights and reject the universality of civil and political rights set forth in the International Bill of Human Rights); *see also* Urfan Khaliq, *Beyond the Veil: An Analysis of the Provisions of the Women's Convention in the Law As Stipulated in Shari'ah*, 2 BUFF. J. INT'L L. 1, 6 (1995) (discussing the sacred text of Islam, the Qur'an, and how the notion of inalienable human rights is unknown as a concept in Islam with the exception of those rights which are owed to Allah).

30. Quoted by Edward Mortimer, *Islam and Human Rights*, INDEX ON CENSORSHIP, October 1983, 5 *in* MAYER, *supra* note 29; *see* Mayer, *supra* note 29, at 352-354 (providing that Article 6 of the Basic Law enacted by the Saudi Royal family states that the citizens "are to pay allegiance to the king in accordance with the Holy Koran and the Prophet's tradition, in submission and obedience and in times of ease and difficulty, fortune and adversity"); *see also* Johan D. Van der Vyver, *Universality and Relativity of Human Rights: American Relativism*, 4 BUFF. HUM. RTS. L. REV. 43, 62 (1998) (providing that when Muslims speak about human rights in Islam, in terms of the rights that are divine, eternal, universal, and absolute, which are guaranteed and protected through the Shari'a, bestowed by Allah the highest ranking in the Holy Koran).

Hussein in Iraq, and Hafez al-Asad in Syria, have brutally repressed Islamic movements.[31] On the other hand, a few countries have found it prudent to give some respect to human rights.[32] Thus, in 1988, Mu'ammar al-Qadhdhafi issued a Libyan human rights charter, releasing hundreds of political prisoners, indicating a willingness to establish ties with Amnesty International.[33] In Tunisia, following the overthrow of the Bourguiba regime, the new government announced a policy of respect for human rights and permitted the establishment of a chapter of Amnesty International, the first in the Arab world.[34] A meeting of Arab intellectuals in Tunisia in 1983 resulted in the formation of the Arab Human Rights Organization, which now has branches in several Arab nations and in Western Europe.[35] "Tunisia has also become the home

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31. *See* MAYER, *supra* note 29, at 30; Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter*, 35 COLUM. J. TRANSNAT'L L. 271 335-337 (1997) (discussing discrimination and distinction on the basis of sex and how the Islamic movement violates articles 55 and 56 of the United Nations Charter which prevent any particular religion being privileged over others or of being determinative of human rights standards); *see also* Louis Rene Beres, *Implications of a Palestinian State for Israeli Security and Nuclear War: A Jurisprudential Assessment*, 17 DICK. J. INT'L L. 229, 276 (1999) (quoting Hafez Assad, then Syria's Defense Minister, "[O]ur forces are now entirely ready . . . to initiate the act of liberation itself, and to explode the Zionist presence in the Arab homeland. . . . The time has come to enter into a battle of annihilation."); Khaliq, *supra* note 29, at 5 (noting the "Islamic Revolution in Iran in 1979, it can also be argued that the outbreak of the Arab-Israeli Wars . . . has led Muslim communities throughout the world to once again become highly aware of their religious identity.").

32. *See* Kimberly Younce Schooley, Comment, *Cultural Sovereignty, Islam, and Human Rights—Toward A Communitarian Revision*, 25 CUMB. L. REV. 651, 654 (1994) (discussing the role of human rights in an international community consisting of a group of sovereign, rather than unified states); Berta Esperanza Hernandez-Truyol, *Conceptualizing Violence: Present and Future Developments In International Law: Panel I: Human Rights and Civil Wrongs at Home and Abroad: Old Problems and New Paradigms: Sex, Culture, and Rights: A Re/Conceptualization of Violence in the Twenty-First Century,* 60 ALB. L. REV. 607, 612 (1997) ("The purpose[ ] of the United Nations [is] . . . to achieve international cooperation . . . in promoting and encouraging respect for human rights"); *see also* Sheetal B. Shah, Note, *Illuminating the Possible in the Developing World: Guaranteeing the Human Right to Health in India*, 32 VAND. J. TRANSNAT'L L. 435, 450 (1999) (stating "in order to give respect to the principles embodied in international human rights and the founding principles of the UDHR, social rights need to be treated as enforceable human rights obligations.").

33. SEE MAYER, *supra* note 29, at 18-19; Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 779 (U.S. App. D.C. 1984) (providing that violations of international law include gross violations of human rights); Cara Levy Rodriguez, Comment, *Slaying the Monster: Why the United States Should Not Support the Rome Treaty,* 14 AM. U. INT'L L. REV. 805, 834 (1999) (providing that Libya sits on the United Nations Human Rights Commission); *see, e.g.,* Adam Abdelmoula, *Libya: The Control of Lawyers By the State*, 17 J. LEGAL PROF. 55, 72 (1992) (noting the increasing international, regional and local concern about the human rights record of the Libyan government and especially with regard to the independence of the legal profession as an essential element of permitting those rights, yielded some fruit in the Spring of 1990).

34. See MAYER, *supra* note 29, at 18; Donna E. Artz, *Heroes or Heretics: Religious Dissidents Under Islamic Law,* 14 WIS. INT'L L. J. 349, 386 (1996) ("Tunisia became the first state in the Arab world to authorize the establishment of a chapter of Amnesty International . . . the Ayatollah Khomeini denounced AI as a 'satanic power' engaged in 'stifling' Iran's Islamic Republic"); *see also* Mayer, *supra* note 29, at 320 (discussing a critical report by Amnesty International in September 1993 about human rights violations in Saudi Arabia).

35. See KEVIN DWYER, ARAB VOICES: THE HUMAN RIGHTS DEBATE IN THE MIDDLE EAST 159 (1991); *see also* Joan Fitzpatrick and Katrina R. Kelly, *Gender Aspects of Migration: Law and the Female Migrant*, 22 HASTINGS INT'L & COMP. L. REV. 47, 47 (1998) ("Human rights organizations are becoming increasingly concerned with the capacity of multinational corporations to manipulate the apparatus of state power in developing countries and thereby become complicit in human rights violations"); Fionnuala Ni Aolain, *Legal Developments: The Fortification of An Emergency Regime,* 59 ALB. L. REV. 1353, 1369 (1996) (providing that human rights reforms during the Arab-Israeli peace process were designed to illustrate the benefits of the peace process to the communities most adversely affected by the limitation of rights protection).

of the new Arab Institute of Human Rights . . . founded in 1989, that aims to promote observance of the Universal Declaration of Human Rights throughout the Arab world . . . "[36]

The Universal Islamic Declaration of Human Rights was formulated in 1981, by people from various parts of the Muslim world, under the auspices of the Islamic Council.[37] The UIDHR states that the basis of all law is the *shari'a*. Divine revelation has priority over human reason in determining human rights limitations in an Islamic state.[38] In 1990, the Organization of the Islamic Conference (OIC) issued the Cairo Declaration on Human Rights in Islam.[39] The OIC is comprised of representatives of various Muslim governments. The Cairo Declaration reflects the need for "Islamic" rationales for practices of member states which do not conform within international human rights norms.[40] The Cairo Declaration's treatment of criminal law is particularly disturbing to human rights advocates because of its vague treatment

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36. DWYER, *supra* note 35, at 157. *See* Michael L. Siegel, Comment, *Hate Speech, Civil Rights, and the Internet: The Jurisdictional and Human Rights Nightmare,* 9 ALB. L.J. SCI. & TECH. 375, 375 (1999) (providing that the Universal Declaration of Human Rights (UDHR) states that everyone has a right to the freedom of opinion and expression without interference); *see also* Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts,* 54 U. CIN. L. REV. 367, 400 (1985) ("The Universal Declaration of Human Rights no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement,' but is rather an authoritative statement of the international community.").

37. See MAYER, *supra* note 29, at 27; *see also* Van der Vyver, *supra* note 30, at 61 (providing that the Universal Islamic Declaration of Human Rights states in its Preamble that "Islam gave to mankind an ideal code of human rights fourteen centuries ago"); Joelle Entelis, Note, *International Human Rights: Islam's Friend or Foe? Algeria as an Example of the Compatibility of International Human Rights Regarding Women's Equality and Islamic Law*, 20 FORDHAM INT'L L.J. 1251, 1254 (1997) ("The Universal Islamic Declaration of Human Rights . . . is an example of an Islamic approach to human rights which refuses to grant women equality with men in rights and freedom").

38. See MAYER, *supra* note 29, at 58; *see also* K.M. Sharma, *What's in a Name? Law, Religion, and Islamic Names*, 26 DENV. J. INT'L L. & POL'Y 151, 151 (1998) ("Islam's most sacred and revered scripture, the Qur'an, is the compilation of divinely-inspired Allah's revelations to the Prophet Muhammad. . . . Islam is the second largest religion and source of law in the world; its followers are spread all over the globe"); Clark Benner Lombardi, Note, *Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Shari'a in a Modern Arab State*, 37 COLUM. J. TRANSNAT'L L. 81, 82 (1998) (discussing the trends of movements over the past thirty years of the imposition of some form of shari'a, or Islamic law, appearing in many Muslim nations).

39. See Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures Or A Clash With A Construct?,* 15 MICH. J. INT'L L. 307, 307 (1994) (providing that the Cairo Declaration assumes more general significance than the previous Islamic human rights schemes because it embodies an approach to rights endorsed by the foreign ministers of the Organization of the Islamic Conference (OIC)); *see also* Mark N. Templeton, *Part II The Bill and Comparative Media Law: Chapter 4; A Human Rights Perspective in the Broadcasting Bill Debate*, 5 CARDOZO J. INT'L & COMP. L. 401, 408 (1997) (providing that the Cairo Declaration states that "[e]veryone shall have the right to express his opinion. . . ." and that "[i]nformation is a vital necessity to society."); Leila Hilal, *International Column: The Cairo Declaration on Human Rights in Islam and International Women's Rights*, 5 CIRCLES BU. W. J. L. & SOC. POL. 85, 85 (1997) ("The Cairo Declaration is a recent pronouncement of human rights in Islam . . . drafted by the Organization of the Islamic Conference in 1990 and carries the purpose of contributing to the efforts of mankind to assert human rights . . . in accordance with Shari'ah").

40. See Mayer, *supra* note 39, at 307 (providing that all Muslim countries belong to the charter of the OIC); *see also* Entelis, *supra* note 37, at 1256 (noting that the Cairo Declaration does not actually represent beliefs of many Muslim states who have ratified it); James H. Wyman, Comment*, Vengeance is Whose?: The Death Penalty and Cultural Relativism in International Law*, 6 J. TRANSNAT'L L. & POL'Y 543, 566 (1997) ("The Cairo Declaration sets forth a series of nominal rights and freedoms, every one of which is subject to a qualifying clause in Article 24 that provides: All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'a. . . .").

of crime and punishment[41] and its acceptance of the death penalty "for a Shari'a–prescribed reason"[42] for internationally unacceptable reasons including apostasy and adultery.

The majority of Muslim nation states today are governed to some degree in accordance with written constitutions.[43] The constitutions of several Muslim nations reflect the ideals of European constitutionalism far more than they do Islam, opening them up to criticism from those seeking Islamization.[44] On the other hand, Saudi Arabia long resisted a formal constitution, and even now, it has a "Basic Law" rather than a constitution, as does Oman.[45] The ulti-

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41. See Mayer, *supra* note 39, at 340 (quoting Article 19(d) of the Cairo Declaration, which reads "There shall be no crime or punishment except as provided for in the Shari'ah." This nebulous formulation does nothing to protect the accused from trial for *ex post facto* crimes or arbitrary punishments); *see also* Wyman, *supra* note 40, at 567 (stating "shari'a is notoriously incomplete in the area of criminal procedure; indeed, this lack is the very reason Muslim states began borrowing laws from European countries in the nineteenth century. How the Cairo Declaration purports to interpret Shari'a as a working legal code in a twentieth-century world is left unanswered"); Entilis, *supra* note 37, at 1294 (providing that the shari'a is the only source of reference in clarifying the provisions of the Cairo Declaration).

42. Cario Decl. art. 2(a), in U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993); *see* Mayer, *supra* note 39, at 341 ("If one follows interpretations of the scope of the death penalty of shari'a law like those used by Iran and Saudi Arabia, this permits the imposition of the death penalty for crimes such as fornication, highway robbery, apostasy, and also potentially for political opposition or adherence to disfavored religions or sects, which contemporary regimes may classify as religious offenses."); *see also* David F. Forte, *Apostasy and Blasphemy in Pakistan*, 10 CONN. J. INT'L L. 27, 44 (1994) (discussing how apostasy, to change one's religion, was tantamount to committing treason and is a capital offense and particularly heinous under the Shari'a); Entelis, *supra* note 37, at 1270 (providing that under the Shari'a, men and women received equal rewards and punishments based on their conduct).

43. See Bernard K. Freamon, *Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence*, 11 HARV. HUM. RTS. J. 1, 8 (1998) ("As of 1994, 37 Muslim nations had a written constitution or an equivalent organic instrument that could be called a constitution."); *see also* Carolyn Ratner, Book Review, *Islamic Laws and Violations of Human Rights in the Sudan: God Has Ninety-Nine Names,* 18 B.C. THIRD WORLD L.J.137, 145 (1998) (The 1973 Constitution reads, "Islamic law and custom [Shari'a law] shall be the main sources of legislation. Personal matters of non-Muslims shall be governed by their personal laws."); M. Cherif Bassouni, *Protection of Diplomats Under Islamic Law*, 74 AM. J. INT'L L. 609, 629 (1980) ("Laws on the subject of the protection of the rights of the criminally accused are in harmony with the fundamental principles of human rights under international law as well as in harmony with the respect accorded to the equality and dignity of all persons under most constitutions and laws of Muslim and non-Muslim nations of the world").

44. *Id.*

45. *See* Entelis, *supra* note 37, at 1290 (providing that the Basic Law was issued in March of 1992 by King Fahd of Saudi Arabia); *see also* A. Michael Tarazi, *Recent Development: Saudi Arabia's New Basic Laws*: *The Struggle for Participatory Islamic Government*, 34 HARV. INT'L L.J. 258, 274 (1993) (stating that a textual analysis of Saudi Arabia's Basic Law and Consultative Council Law casts doubt on their efficacy in producing a meaningful participatory government); Donna E. Arzt, *Religious Human Rights in the World Today: A Report on the 1994 Atlanta Conference: Legal Perspectives on Religious Human Rights: Religious Human Rights in Muslim States of the Middle East and North Africa*, 10 EMORY INT'L L. REV. 139, 140 (1996) ("Today, 34 states with majority Muslim populations have written constitutions. Of those, 23 (to which should be added Oman and Saudi Arabia) have officially proclaimed Islam to be the state religion and/or Shari'a to be the principal source of law.").

mate source of law in both is the *shari'a*.[46] Likewise, the constitution of post-revolutionary Iran prescribes that the law must conform to the *shari'a*.[47]

There is a wide spectrum of opinion by contemporary Muslim thinkers on the question of human rights.[48] Ayatollah Taleghani of Iran condemned the violations of the Khomeini regime while comparing them to similar violations occurring in the West.[49] Mehdi Bazargan was one of the founders in 1961 of the Liberation Movement of Iran, a human rights organization in that country which opposed both the human rights violations of the Pahlavi regime and later of the revolutionary government.[50] Others attempt to find the modern concept of "human rights"

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46. For an excellent discussion of Saudi legal reform, *see* Tarazi, *supra* note 45, at 258-75 (discussing the two major laws issued in Saudi Arabia in 1992: the Basic Law of Government (Basic Law) and the Consultative Council Law): *see also* Lombardi, *supra* note 38, at 81 ("When interpreting constitutional Islamization clauses, courts have confronted two main problems: (1) developing a workable definition of shari'a, a concept that has had widely divergent understandings over the centuries, and (2) determining the appropriate role for constitutional shari'a."); Rose Marie Karadsheh, *Creating an International Criminal Court: Confronting the Conflicting Criminal Procedures of Iran and the United States*, 14 DICK. J. INT'L L. 243, 265 (1996) (providing that shari'a is derived from the holy book of Muslims, the Koran).

47. See Ann Elizabeth Mayer, *Islam and the State*, 12 CARDOZO L. REV. 1015, 1036-37 (1991) (stating that the 1979 Iranian Constitution is, according to its own preamble, based on Islamic principles); s*ee also* Karadsheh, *supra* note 46, at 265 ("The constitution created after the Iranian revolution states that in the absence of the Imam, all political and legal power emanates from a Just Jurist."); Mary Carter Duncan*, Recent Developments: Playing by Their Rules: The Death Penalty and Foreigners in Saudi Arabia*, 27 GA. J. INT'L & COMP. L. 231, 231 (1998) (providing that as of 1998, only Saudi Arabia, Iran, and Sudan follow shari'a).

48. Some of the leading conservatives include Sultanhussein Tabandeh, the leader of the Ni'matullahi Sufi order and author of *A Muslim Commentary on the UDHR*, and Abul a'la Mawdudi, author of *Human Rights in Islam* and founder of the Pakistan group Jam'at-I-Islami (died 1979). Liberals include Shariati, Ayatollah Taleghani, Abdullahi An-Na'im, author of *Toward an Islamic Reformation*, and Mahmoud Mohamed Taha (executed 1985). *See* Freamon, *supra* note 43, at 1 (citing the authors as to how "[t]hey espouse a rejection of Western notions of human rights in favor of a literal adherence to the Shari'a"); *see also* Donna E. Artz, *Heroes or Heretics: Religious Dissidents Under Islamic Law*, 14 WIS. INT'L L.J. 349, 405 (1996) (providing that the "sociologist Ali Shariati called for a rethinking of Islam and a rereading of the Qur'an in contextual rather than in metaphysical terms.").

49. *See* Hilary Charlesworth, Christine Chinkin, Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 642 (1991) (stating "the United States used the repression of women in Iran after the 1979 revolution as an additional justification for its hostility to the Khomeini regime."); *see also* Jennifer Jewett, Note, *The Recommendations of the International Conference on Population and Development: The Possibility of the Empowerment of Women in Egypt*, 29 CORNELL INT'L L.J. 191, 213 (1996) (providing that the Khomeini regime eradicated the liberal trend toward gender equality); Olivia Q. Goldman, *The Need for an Independent National Mechanism to Protect Group Rights: A Case Study of the Kurds*, 2 TULSA J. COMP. & INT'L L. 45, 45 (1994) ("In addition to its religious objections to the splintering of the Islamic community, the Khomeini regime also feared the domino effect of granting autonomy to the Kurds who were just one of several minorities.").

50. For a general account of his career, *see* H.E. CHEHABI, IRANIAN POLITICS AND RELIGIOUS MODERNISM: THE LIBERATION MOVEMENT OF IRAN UNDER THE SHAH AND KHOMEINI (1990); *See* Ann Elizabeth Mayer, *Universal Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?*, 15 MICH. J. INT'L L. 307, 368-69 (1994) (describing Bazargan as one whose work was consistent with Islamic law, who confronted the post-revolutionary clerical regime, and who supported human rights. Mayer records that nine of Bazargan's associates were imprisoned following the circulation of a petition in 1990 that criticized the regime for not abiding by the principles of the revolution. Bazargan himself, who had briefly served as the first Prime Minister following the revolution, may have escaped punishment only because of his age (86) and stature). *Id.*

See e.g., Bradford Williams, Note, *The Aftermath of Matimak Trading Co. v. Khalily: Is the American Legal System Ready for Global Interdependence?,* 23 N.C. J. INT'L L. & COM. REG. 201, 213 n.91 (1997) (stating that the United States recognized Bazargan's revolutionary leadership after the fall of Shah Mohammed Reza Pahlevi's government in 1979).

in the Qur'an and Sunna, dismissing anything not found in the original sources as un-Islamic.[51] The difficulty with this approach is that the original texts do not address the modern nation-state and the problems which arise therein.[52] Indeed, most of the "rights" conservative Islamic thinkers embrace are those of individuals *vis à vis* each other.[53] Hence, a woman has the "right" to have her chastity respected and protected and an individual's "right to life" is actually the right not to be murdered by other individuals.[54] However, the criminal law of every civilized nation embraces the latter principle, while the former may refer to anything ranging from the right not to be raped (again, part of the criminal law in some form everywhere) to the *obligation* to dress or behave modestly.[55] In relation to the *hudad* crimes, the problem is exacerbated because the *shari'a* is so clear as to the crimes and punishments, but the potential for the abuse of the criminal justice system by a repressive state is not explored.[56] The emphasis is on the

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51. *See* ANN E. MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 54-55 (1995) (asserting that certain authors on Islamic law are against individualism and protection of individual freedoms, and in general, believe that basic human rights are incompatible with the Islamic framework). *See e.g.,* Ratner, *supra* note 43, at 141-42 (describing that the first source of Islamic law is the Qu'ran which provides an important Islamic legal foundation, a moral system, dogma, ethics, history, wisdom, and legislation. The second source is the Sunna which is a collection of sayings of the Prophet Mohammed, founder of Islam); Bassiouni, *supra* note 43, at 629 (explaining that basic human rights found in Islamic Law, include the principle of legality articulated in the Qu'ran, which entitles an alleged criminal to be tried for crimes listed in the Qu'ran or those which are well-established within the criminal code of Islamic Law); Kent Benedict Gravelle, *Islamic Law in Sudan: A Comparitive Analysis*, 5 ILSA J. INT'L & COMP. L. 1, 8-9 (1998) (listing proposed punishments in accordance to the Qu'ran to include stoning to death for adultery, recommended amputation for thievery and public whipping for adultery); *but c.f.* Riffat Hassan, *Religious Perspectives on Religious Human Rights: Religious Human Rights and the Qur'an*, 10 EMORY INT'L L. REV. 85, 85 (1996) (opining that the Qur'an prescribes protection of one's human rights, including the right to be free from bondage; religious, political, economic authoritarianism, tribalism, racism, sexism, and slavery).

52. *See generally* MAYER, *supra* note 51, at 54-55; Ratner, *supra* note 43, at 141-142; Gravelle, *supra* note 51, at 8-9.

53. *See generally* Bassam Tibi, *Islamic Law/Shari'a, Human Rights and International Relations in* ISLAMIC LAW REFORM AND HUMAN RIGHTS: CHALLENGES AND REJOINDERS 87 (Tore Linkholm & Kari Vogt eds., 1993); Bernard K. Freamon, *Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence*, 11 HARV. HUM. RTS. J. 1, 15 n.48 (1998).

54. *See* Gregory A. Kelson, *Female Circumcision in the Modern Age: Should Female Circumcision Now be Considered Grounds for Asylum in the United States?,* 4 BUFF. HUM. RTS. L. REV. 185, 188 (1998) (providing that female circumcision is a means of guaranteeing a woman's chastity, as well as controlling a woman's sex drive after marriage. It is primarily practiced in Islamic countries); Richard L. Elbert, *Love, God, and Country: Religious Freedom and the Marriage Penalty Tax*, 5 SETON HALL CONST. L.J. 1171, 1205-06 (1995) (asserting that the Qu'ran provides that, in choosing a woman to marry, a man shall seek one who is chaste, which according to Islamic culture, is considered to be spiritually and physically clean and necessary); Doriane Lambelet Coleman, *The Seattle Compromise: Multicultural Sensitivity and Americanization*, 47 DUKE L.J. 717, 727 (1998) (discussing the forms of practice ranging from simple "sunna" circumcisions requiring "only" the partial or complete removal of the clitoris to complete "Pharaonic infibulations" requiring removal of all of a girl's external genitalia followed by the stitching together of the resulting wound.").

55. *See, e.g.,* MAYER, *supra* note 51, at 74 (listing the individual rights afforded under the Universal Islamic Declaration of Human Rights, which also incorporates the *Shari'a*); A. Yasmine Rassam, *Islam and Justice: Debating the Future of Human Rights in the Middle East and North Africa*, 10 PACE INT'L L. REV. 187, 187 (1998) ("Sheikh Rached Al-Ghannouchi argued that although international standards of human rights like the right to freedom, the right to life, the right to a fair trial, and the right of freedom of movement are inherent to Islamic principles, such 'rights,' as the right to use one's body in homosexual acts, are not.").

duties of individuals to fulfill their obligations to the *umma*, not on the society's obligation to safeguard the rights of all its citizens. For example, A.K. Brohi, a former Pakistani government minister, writes that "[t]here can, in the strict theory of the Islamic law, be no conflict between the State Authority and the individual—since both have to obey the Divine Law. . . . By accepting to live in Bondage to this Divine Law, man learns to be free."[57] Unfortunately for Muslims, past and present, all too often the state authorities have either disregarded those aspects of Divine Law which do not abet their ends, or have insisted on an interpretation of Divine Law resulting only in bondage, not freedom.[58] Mohammed himself was the first ruler of an Islamic state, and by most accounts, a just and compassionate one.[59] It is admirable that the modern Islamic state should take this as an ideal, but dangerous to assume that all subsequent rulers will follow the Prophet's example—especially when history, both early and modern, indicates that the results have been quite different. Thus, the stage is set for human rights violations within the criminal justice system for three main reasons: (i) the greater value placed on the commu-

56. *See generally* M. Cherif Bassiouni, *Protection of Diplomats Under Islamic Law*, 74 AM. J. INT'L L. 609, 623-24 (1980) (listing the seven Hudad crimes as: adultery, defamation, alcoholism, theft, highway robbery, apostasy, and transgression of Islam); Rose Marie Karadsheh, *Creating an International Criminal Court: Confronting the Conflicting Criminal Procedures of Iran and the United States*, 14 DICK. J. INT'L L. 243, 246 (1996) (providing that the Hudad crimes are one of four categories of crimes under the Iranian Penal Code which also lists the punishment for each crime such that a judge may not have discretion regarding punishment); Lino J. Lauro and Peter A. Samuelson, *Toward Pluralism in Sudan: A Traditionalist Approach*, 37 HARV. INT'L L.J. 65, 81 (1996) (opining that the imposition of punishments according to the 1991 Islamic Penal Code evidence the ideological mission to eliminate all non-conforming communities which underlies human rights violations).

57. A. K. Brohi, *Islam and Human Rights*, quoted in ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 61 (1991). *See, e.g.,* Ted L. Stein, *Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal*, 78 AM. J. INT'L L. 1, 38 (1984) (asserting that the Islamic Republic believes that there is one and only one God, for whom the people are to implement the divine law and necessarily must follow His orders); Clark Benner Lombardi, *Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Shari'a in a Modern Arab State*, 37 COLUM J. TRANSNAT'L L. 81, 91 (1998) (stating that Muslims consider as an important religious duty obedience to the Shari'a, although traditionally, there has been no unanimity as to the interpretation of the law); Kimberly Younce Schooley, *Cultural Sovereignty, Islam, and Human Rights—Toward a Communitarian Revision*, 25 CUMB. L. REV. 651, 666 (1994) (explaining that according to the Shari'a, "human rights" are the rights and freedoms one acquires upon fulfillment of obligations prescribed by the Shari'a).

58. *See generally* Jennifer Jewett, *The Recommendations of the International Conference on Population and Development: The Possibility of the Empowerment of Women in Egypt*, 29 CORNELL INT'L L.J. 191, 206 (1996) (noting that in the twentieth century, Muslims began to adopt Western ideals that were incompatible to the teachings of the Shari'a, and consequently, resulted in a call for leaders to reform the Shari'a); Lino J. Lauro and Peter A. Samuelson, *supra* note 56, at 66-67 (explaining that the National Islamic Front in Sudan has adopted a "purist" interpretation of the Shari'a, which other Muslims oppose. Moreover, traditional Islamic jurisprudence differs greatly from the interpretations followed by the Muslim fundamentalists in the last fifty years). *But see generally* Lombardi, *supra* note 57, at 93 n.39 (asserting that there are many versions of the Shari'a and God shall reward anyone who follows the incorrect version, so long as he does so in good faith).

59. *See* MAJID KHADDURI, THE ISLAMIC CONCEPTION OF JUSTICE 8-9 (1995) (asserting that the Prophet Muhammad sought to establish equality among the oppressed society by stressing religious values, social reform, and justice); Carolyn Ratner, Book Review, *Islamic Laws and Violations of Human Rights in the Sudan: God Has Ninety-Nine Names,* 18 B.C. THIRD WORLD L.J. 137, 142 (1998) (stating that the Prophet Mohammed founded Islam in seventh century Arabia); M. Nadeem Ahmad Siddiq, *Enforced Apostasy: Zaheeruddin v. State and the Official Persecution of the Ahmadiyya Community in Pakistan*, 14 LAW & INEQ. J. 275, 275 (1995) (citing the Holy Qur'an: "Muhammad is not the father of any of your men, but he is the Messenger of Allah, and the Seal of the Prophets. And Allah has full knowledge of all things.").

nity and the lesser value of the individual; (ii) the assumption that the government will obey the same laws that it demands its citizens obey; (iii) the reliance on Divine Law of the Qur'an and Sunna as the source of modern jurisprudence, taking precedence over sources of law such as human reason, natural law and positive law.

Hudad Crimes

Apostasy: The Qur'an declares "there is no compulsion in religion,"[60] and forcible conversion to Islam was never the norm. Certain religions such as Judaism, Christianity, and Zoroastrianism were accorded better treatment within Islamic societies than extended to non-Christians in medieval Europe.[61] Even Islamic conquerors of polytheistic or animistic societies did not demand that the conquered people convert or die.[62] However, Islam unequivocally prohibits a Muslim from abandoning the faith, whether or not the person intends to embrace another faith.[63] The Qur'an itself does not stipulate a severe penalty for apostasy, in contrast to the *shari'a* rules requiring a death sentence.[64] This generally extends only to those who (a) were

60. QUR'AN 2:256 (stating "[l]et there be no compulsion [i]n religion"); *see* Anthony Chase, *Legal Guardians: Islamic Law, International Law, Human Rights Law, and the Salman Rushdie Affair,* 11 AM. U.J. INT'L L. & POL'Y 375, 403 (1996) (defining apostasy—according to the Qu'ran—to be the wrath of God, especially if a believer abandons his faith); Tad Stahnke, *Proselytism and the Freedom to Change Religion in International Human Rights Law*, 1999 BYU L. REV. 251, 281 (1999) (stating that some Islamic countries in following the *Shari'a*, prohibit apostasy); Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment. (Part 2 of 3*), 94 YALE L.J. 1983, 2038 (1985) (providing that apostasy is "the total renunciation of a religion for another religion or for no religion at all").

61. *See* Ann Elizabeth Mayer, *Religious Law and Legal Pluralism: Islam and the State*, 12 CARDOZO L. REV. 1015, 1025 (1991) (providing that historically, Muslims were tolerant of adherence to non-Muslim beliefs, so long as they accepted a subordinate status); *see generally* J. Paul Martin, *Christianity and Islam: Lessons from Africa*, 1998 BYU L. REV. 401, 412-13 (1998) (describing that presently, there is religious tolerance between Islamic and Christian communities); Roger S. Clark, *Steven Spielberg's Amistad and Other Things I Have Thought About in the Past Forty Years: Interntational (Criminal) Law, Conflicts of Laws, Insurance and Slavery*, 30 RUTGERS L.J. 371, 386 (1999) (providing that in the 1800s, prohibiting or enslaving Christians were features in a number of treatises between European powers and the Islamic states of the Mediterranean and the Persian Gulf).

62. *See* Karima Bennoune, *As-Salamu'Alaykum? Humanitarian Law in Islamic Jurisprudence*, 15 MICH. J. INT'L L. 605 (1994).

63. *See* Ratner, *supra* note 59, at 152 (explaining that under Shari'a, abandonment of the Islamic faith is punishable by death); Ann E. Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?*, 15 MICH. J. INT'L L. 307, 322 (1994) (providing that historically, the Islamic religion was interpreted to bar conversion from Islam, and thus imposing a punishment of death for male apostates, or imprisonment for females apostates). *See e.g.,* Tad Stahnke, *Proselytism and the Freedom to Change Religion in International Human Rights Law*, 1999 BYU L. REV. 251, 282 (1999) (asserting that apostasy in the Islamic nation of Mauritania is punishable by death, unless one repents within three days).

formerly Muslim, (b) have not only ceased to practice their faith, but openly attack it, and (c) have refused to recant and return to Islam.[65] However, far from a theoretical penalty, it was on this basis that the *fatwa* was issued against Salman Rushdie.[66] This is also true in regard to the treatment by Iran of members of the Bahai faith. The founder of Bahai'ism, Baha'ullah, was himself a Muslim, as were many of his followers.[67] While present-day Bahai'is may have been

64. However, some modern commentators have suggested that the *Shari'a* does not mean merely religious apostasy, but must include a criminal or political aspect as well. *See* ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 170 (1991) stating:

> For example, the Lebanese scholar Subhi Mahmassani asserted that the circumstances in which the penalty was meant to apply were intended to be narrow ones. He pointed out that the Prophet never killed anyone merely for apostasy. Instead, the death penalty was applied when the act of apostasy from Islam was linked to an act of political betrayal of the community. This being the case, Mahmassani argued that the death penalty was not meant to apply to a simple change of faith but to punish acts such as treason, joining forces with the enemy and sedition. The position has also been taken that the death penalty that was imposed on the tribes that abjured Islam after the Prophet's death was tied to a peculiar historical situation, and that there is no Islamic precedent for imposing the death penalty in the case of individual decisions to change religion.

See also Peter A. Samuelson, *Pluralism Betrayed: The Battle Between Secularism and Islam in Algeria's Quest for Democracy*, 20 YALE J. INT'L L. 309, 339 (1995) (asserting that the Qu'ran doesn't mandate capital punishment for apostasy); Ratner, *supra* note 59, at 152 (explaining that under Shari'a, abandonment of the Islamic faith is punishable by death); Mayer, *supra* note 63, at 322 (providing that historically, the Islamic religion was interpreted to bar conversion from Islam, thus imposing a punishment of death for male apostates, or imprisonment for females apostates); *see e.g.,* Stahnke, *supra* note 63, at 282 (asserting that apostasy in the Islamic nation of Mauritania is punishable by death, unless one repents within three days).

65. *See* Ratner, *supra* note 59, at 152 (noting that under the Shari'a, abandonment of the Islamic faith is punishable by death).

66. Rushdie's novel of some 600 pages is not about the historical Mohammed or early Islam at all. It is actually a modern allegory about, among other things, the plight of the eastern immigrant in western society, the misunderstandings between men and women, and our inability, in a celebrity-obsessed age, to recognize either the satanic or the divine when we encounter them. All the sections dealing with early Islam are the hallucinations or dreams of a modern Indian movie star, Gibreel Farishta, who believes he is the Quranic Angel Gibreel. The novel does *not* say that the Prophet's wives were prostitutes; instead, a group of subversives, angry at Mohammed's success in winning converts to his faith, decide that the 12 prostitutes in an Arabian brothel will adopt the identities of the Prophet's 12 wives; they are eventually discovered and executed for their offenses. A far more telling scene, with regard to the issuance of the *fatwa*, is Gibreel's dream of a Khomeini-esque Imam, exiled in London, who upon his triumphant return home following the overthrow of a corrupt, barbaric, westernized monarch literally devours the revolutionaries who have put him in power.

See M.M. Slaughter, *The Salman Rushdie Affair: Apostasy, Honor, and Freedom of Speech*, 79 VA. L. REV. 153, 153-54 (1993) (describing Salman Rushdie's book, SATANIC VERSES, as a portrayal of Islam and the prophet Mohammed satirically. The Muslim public, including the Ayatollah Khomeini of Iran, was outraged, and deemed Rushdie's work an act of apostasy. The Ayatollah then issued the fatwa for such religious sedition)*;* Toby R. Unger, *The Status of the Arts in An Emerging State of Palestine*, 14 ARIZ. J. INT'L & COMP. L. 193, 221 n.191 (1997) (stating that a "fatwa," or religious order for one's death, was issued by the Ayatollah of Iran against Salman for writing SATANIC VERSES, which Islamic Fundamentalists deem to be blasphemous to the Qu'ran, the prophet Mohammed, and in general, Islam); Donna E. Arzt, *Religious Human Rights in Muslim States of the Middle East and North Africa*, 10 EMORY INT'L L. REV. 139, 142 (1996) (stating that the although the Universal Islamic Declaration of Human Rights provides that under the shari'ah, every person is entitled to freedom of expression, no one is allowed to utter slander or defame others, thus justifying Ayatollah's issuance of a fatwa against Salman Rushdie).

born into the Bahai religion, their parents or ancestors were generally Muslims who adopted the faith. Since one born to Muslim parents is automatically Muslim, these people are viewed as apostates by the Iranian government[68] and have been executed for their beliefs. The Iranian government claims these executions are for political crimes, such as espionage.[69] By claiming that the Baha'is are secular criminals rather than religious sinners, the Iranian government is able to avoid greater condemnation from the international community.[70] The hypocrisy of this position becomes apparent when considered in light of the Iranian constitution.[71] Non-conformist Muslims who present little threat to the military establishment are sometimes tried for

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67. *See* Donna E. Arzt, *Legal Perspectives on Religious Human Rights: Religious Human Rights in Muslim States of the Middle East and North Africa*, 10 EMORY INT'L L. REV. 139, 157-58 (1996) (providing that the Baha'i religion was founded in Persia in 1863 by Baha'u'llah who claimed to be God's messenger, and whose teachings advocated humanity as a unified race and religion and society); Siddiq, *supra* note 59, at 275 (stating "a Muslim includes a person belonging to the Christians, Hindus, Sikh, Buddhist or Parsi community, a person of the Quadiani Group or Lahori Group . . . or a Bahai, and a person belonging to any of the Scheduled Castes.").

68. *See* MAYER, *supra* note 64, at 165; Donna E. Artz, *Heroes or Heretics: Religious Dissidents Under Islamic Law*, 14 WIS. INT'L L.J. 349, 737 n.91 (1996) (asserting that orthodox Muslims regard Baha'is as apostates); Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT'L L.J. 505, 551 (1993) (opining that some governments persecute those who are apostates from the state's dominant religion, and who adhere to different beliefs. The Iranian Baha'i community succumbed to this in the 1980s).

69. *See U.N. Commission on Human Rights Resolutions: Report of the Rapporteur*, U.N. GAOR, Xth Sess., Supp. No., at 494 n.24, U.N. Doc. E/CN.4/45 (1988) (reporting that religious intolerance and discrimination in Iran has included torture of Baha'is by Iranians in an attempt to force them to renounce their faith); MAYER, *supra* note 64, at 157-158; Arzt, *supra* note 67, at 160 (asserting that Iranian government attempted to cover up the reason for Baha'is execution as an insubordinate political crime); S.I. Strong, *Law and Religion in Israel and Iran: How the Integration of Secular and Spiritual Laws Affects Human Rights and The Potential for Violence*, 19 MICH. J. INT'L L. 109, 153 (1997) (concluding that Iran claims the execution of Baha'is are for their political, rather than religious beliefs).

70. In fact, following international condemnation of the death sentence on Salman Rushdie, the regime also made the preposterous claim that the author was an anti-revolutionary agent who had plotted with the British government to destroy Islam and therefore was deserving of death for his secular offenses. *See* MAYER, *supra* note 64, at 181; *see also* Arzt, *supra* note 67, at 160 (asserting that the Iranian government attempts to cover up the reason for Baha'is execution as an insubordinate political crime); *see e.g.*, James H. Wyman, *Vengeance is Whose?: The Death Penalty and Cultural Relativism in International Law,* 6 J. TRANSNAT'L L. & POL'Y 543, 564 (1997) (stating that grounds for capital punishment in Iran include criminal offenses, which are often the reasons cited for the execution of Baha'is whose religion Iran does not recognize).

71. Iran Const. art. 4 reprinted in 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert Blaustien & Gisbert Flanz eds. 1971) ("All civil, penal . . . and other laws and regulations must be based on Islamic criteria." In other words, as long as specific laws conform to *Islamic* criteria, they will pass muster, so guarantees of various freedoms only apply within the narrower Islamic framework, not a potentially broader secular one. Article 9 states that "No individual, group or authority, has the right to infringe in the slightest way upon the political, cultural, economic and military independence or the territorial integrity of Iran under the pretext of exercising freedom." Article 13 recognizes only the Zoroastrian, Jewish and Christian minority faiths. Thus, political and religious crimes are interwoven.).

    See Lori Lyman Bruun, *Beyond the 1948 Convention—Emerging Principles of Genocide in Customary International Law*, 17 MD. J. INT'L L. & TRADE 193, (1993) (arguing that despite the fact that the number of Baha'is exceed Christians, Jews, and Zoroastrians, the 1979 Iranian Constitution only officially recognizes the latter three); Arzt, *supra* note 67, at 159 (explaining that the 1979 Iranian constitution recognizes Jews, Christians, and Zorastrians, but does not mention Baha'is); Wyman, *supra* note 70, at 564 (asserting that the Iranian Constitution does not officially recognize Baha'is).

other crimes against the state when their real "crime" is religious.[72] Muslims who do not subscribe to the official Islamic ideology and who fail the ideological screening tests are subject to various restraints, such as exclusion from employment.[73]

Iran is not the only government enforcing the penalties for apostasy in the past decade. The Saudi government beheaded a Shi'ite for apostasy in 1992.[74] Her opponents declaring her deserving of death, accused a Jordanian feminist critical of Islamic fundamentalism of atheism. The group sought a court order ruling them immune from prosecution if she were killed.[75]

Apostasy is also used as a convenient means of permanently silencing political opponents.[76] This is particularly obvious in the execution of Mahmoud Mohammed Taha in the Sudan, who criticized the human rights violations of the Nimeiri government.[77] Rather than

72. *See* Lino J. Lauro and Peter A. Samuelson, *Toward Pluralism in Sudan: A Traditionalist Approach*, 37 HARV. INT'L L.J. 65, 81 (1996) (asserting that although the Islamic Penal Code exempts non-Muslims from public drunkenness, there have been reports that such persons have been arrested for the mere smell of alcohol on their breath. The Iranian government justifies such action by claiming it is disruptive to the Islamic order); Christy Cutbill McCormick, *Exporting the First Amendment: America's Response to Religious Persecution Abroad*, 4 J. INT'L LEGAL STUD. 283, 303 (1998) (stating that it is a crime in Egypt for non-Muslims to proselytize); Carolyn Ratner, *Violations of Human Rights in the Sudan: God has Ninety-Nine Names*, 18 B.C. THIRD WORLD L.J. 137, 147 (1998) (suggesting that the Shari'a's guarantee of providing freedom of religion is elusive in that it should be interpreted to mean that one practice Islam or die).

73. *See* MAYER, *supra* note 64, at 156 (stating that in spite of Article 12 of the Iranian Constitution, declaring Twelve Shi'ism to be the official school, accords full respect to "[o]ther Islamic schools, including the Hanafi, Shafi'i, Maliki, Hanbali, and Zaydi. . . ."); *see also* Gary Peller, *Frontier of Legal Thought III*, 1991 DUKE L.J. 758, 819 (1990) (providing that the ideology of Islam is generally conservative); Ali Khan, *A Theory of Universal Democracy*, 16 WIS. INT'L L.J. 61, 89 (1997) (stating that "since the political ideology of an Islamic state centers around God, many Islamic states distinguish between Islamic and Western democracy").

74. *See* Ann Elizabeth Mayer, *Universal Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?*, 15 MICH. J. INT'L L. 307, 358 (1994) (describing the events leading up to the youth's death to have been tensions between the Saudis and the Shi'i minority whose roots lay in Saudi Arabia's adversary, Iran); David F. Forte, *Apostasy and Blasphemy in Pakistan*, 10 CONN. J. INT'L L. 27, 50 (1994) (naming other countries which impose a sentence of death for apostasy, such as Pakistan, the United Arab Emirates which sentenced 12 persons for producing a play that criticized Islam and Christianity, and Saudi Arabia and Qatar which criminalize criticism of Islam, and particularly in Saudi Arabia which beheaded a youth for blasphemy); *but c.f.* Kent Benedict Gravelle, *Islamic Law in Sudan: A Comparative Analysis*, 5 ILSA J. INT'L & COMP. L. 1, 13 (1998) (providing that in Saudi Arabia, apostasy is punishable by death, however, that sentence has not been imposed in several years).

75. *See* Mayer, *supra* note 74, at 336 (suggesting that women who do not adhere to fundamentalist Islam are considered atheists, and thus could be subject to death threats); Forte, *supra* note 74, at 53 (describing an incident where Islamic fundamentalists sought the annulment of a marriage of an outspoken feminist, accusing her of apostasy, however, the case was dismissed. Mayer also mentions the assassination of the Egyptian intellectual Farag Fuda in 1992 and the death threats made against Professor Nasr Hamid Abu Zayd of the University of Cairo since 1993. Neither man had abandoned Islam, but their liberal views were proof enough for their fundamentalist enemies.); Anthony Chase, *Legal Guardians: Islamic Law, International Law, Human Rights Law, and the Salman Rushdie Affair*, 11 AM. U.J. INT'L L. & POL'Y 375, 375 (1996) (providing that within the Islamic legal system, death is an admissible sentence for apostasy).

76. *See* Chase, *supra* note 75, at 404 (stating that apostasy, "turning away" has political overtones and historically, there were apostasy wars in Islam in order to ward off the secession of enemy tribes); Reginald Ezetah, *The Right to Democracy: A Qualitative Inquiry*, 22 BROOKLYN J. INT'L L. 495, 524 (1997) (stating that in some African countries, candidates for political office are screened for apostasy before they are permitted to further their office); *see, e.g.,* Mayer, *supra* note 74, at 341 (noting that in certain Islamic countries, grounds for a sentence of death include political opposition).

finding a basis in secular criminal law for trying the elderly scholar, the regime used his original, controversial approach to religious thought to accuse him of apostasy.[78] Taha's execution was based solely on *shari'a* rules, [79] yet the sentence was carried out by a non-traditional Islamic punishment, hanging.[80] In Egypt, some Muslims have pressed for legislation adopting the death penalty for apostasy.[81] If such legislation were passed, it could be a very dangerous weapon in the hands of a repressive government, claiming anyone who disagreed with its policies was guilty of renouncing Islam. It should be noted the *shari'a* indicates that one should submit to the government. Governments that have executed apostates have typically not given them the opportunity, mandated by *shari'a* law, to recant and return to Islam.[82]

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77. *See* Kimberly Younce Schooley, *Cultural Sovereignty, Islam, and Human Rights—Towards a Communitarian Revision*, 25 CUMB. L. REV. 651 (1995) (discussing Taha's theories and beliefs); Donna E. Arzt, *Religious Human Rights In The World Today: A Report on the 1994 Atlanta Conference: Legal Perspectives on Religious Human Rights: Religious Human Rights In Muslim States Of The Middle East And North Africa*, 10 EMORY INT'L L. REV. 139, 152 (1996) (recognizing that although neither apostasy nor heresy were then crimes in the Sudan, Taha's appellate court ordered Taha executed without the opportunity to repent.).

78. *See* ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 182-85 (1991); *see also* Urfan Khaliq, *Beyond the Veil?: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah*, 2 BUFF. J. INT'L L. 1, 7 n.3 (1995) (providing that Taha was executed for his blasphemous advocating of view that the Qu'ran only applied to seventh century Arabia and, in present day, it should be abrogated to be compatible for modern society); Lino J. Lauro and Peter A. Samuelson, *supra* note 72, at 89 (asserting that the execution penalty for apostasy is rarely applied in Sudan, however, when it is applied, it deters the public's vocalization of its dissent of the Sudanese government. For example, Mahmoud Mohammed Taha was executed for voicing his views of Islam that offended the ruling clique); Nathaniel Sheppard Jr., *In Unfriendly Region, U.S. Courting Sudan,* CHICAGO TRIBUNE, March 10, 1985, at 4 (providing that Nimieri's extremist embrace of the Shari'a code was the reason behind his insistence that Mahmoud Mohammed Taha was guilty of heresy and that he ought to be executed for his public criticism of the government).

79. *See* MAYER, *supra* note 78, at 169; Bernard K. Freamon, *Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence*, 11 HARV. HUM. RTS. J. 1, 4 (1998) (pointing to the KUWAIT CONST. pt. 1, art. 2 "The religion of the State is Islam, and the Islamic Shari'a shall be a main source of legislation"); Mayer, *supra* note 74, at 322 (explaining that non-Muslim faiths are restricted from seeking converts among Muslims).

80. *See* MAYER, *supra* note 78, at 185; Ratner, *supra* note 72, at 152 (stating "[t]he most recent and relevant illustration was the hanging of Mahmoud Muhammad Taha, a Muslim whose unorthodox religious views resulted in his execution in 1985."); Schooley, *supra* note 77, at 683 (noting that without the opportunity to repent or recant, Taha was hanged on January 18, 1985. Under Shari'a law one guilty of apostasy must be given the opportunity to recant; however, Taha was denied this opportunity).

81. *See* MAYER, *supra* note 78, at 169; Ratner, *supra* note 72, at 152 (explaining how Sheik Mohammed al-Ghozali, Egypt's model of the mainstream Muslim cleric, when asked whether people who espouse secular views should be punished, answered: "[A] secularist represents a danger to society and the nation that must be eliminated. . . . It is the duty of the government to kill him."); Forte, *supra* note 74, at 53 (providing that the Grand Mufti of Egypt believed that the death sentence is appropriate for apostates who express dissenting views of Islamic law).

82. *See* MAYER, *supra* note 78, at 169; Forte, *supra* note 74, at 46-47 (stating "[m]ost schools require that the apostate be 'exhorted' to repent, but the Shi'ites will not accept the recantation of an apostate who was born a Muslim."); *see also* Arzt, *supra* note 77, at 152 (recognizing that although neither apostasy nor heresy were then crimes in the Sudan, Taha's appellate court ordered Taha executed without the opportunity to repent. This violated Shari'a and multiple articles of Sudan's Constitution, as well as the Code of Penal Procedure's prohibition on execution of persons over 70 years of age).

Ironically, early Islam tolerated and even encouraged diversity of opinion.[83] Hence, among the majority Sunni Muslims, four separate law schools developed their own doctrines and opinions.[84] Shi'i Islam traced a different line of succession from Mohammed, holding that his successors should be members of the Prophet's family, continuing to engage in the process of *ijtihad*, or reasoning by the jurists, although Sunni Islam "closed the door of *ijtihad*" in the third century of the Islamic era.[85]

Of course, conversion *to* Islam is not only acceptable, but also praiseworthy. Thus, the UIDHR's version of the right to freedom of assembly is actually limited to guaranteeing the rights of organizations to propagate the Islamic faith.[86]

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83. *See* Schooley, *supra* note 77, at 665 (stating that "difference was sanctioned by the doctrine of ikhtilaf derived from a saying of the Prophet stating: 'Difference of opinion within my community is a sign of the bounty of Allah.'"); *see also* M.M. Slaughter, *The Salman Rushdie Affair: Apostasy, Honor, And Freedom Of Speech*, 79 VA. L. REV. 153, 172 (1993) (explaining that although apostasy and blasphemy are crimes in traditional Islam, Islamicists are quick to rebut the claim that their religion is monolithically repressive and intolerant. They point to a tradition of satire and free thinking by ancient and modern Islamic writers); *cf.* Donna E. Arzt, *Heroes Or Heretics: Religious Dissidents Under Islamic Law*, 14 WIS. INT'L L.J. 349, 376 (1996) (stating "[f]rom the early days of Islam, apostasy completely coincided with treason, because warring societies were based on religion and someone who publicly abused his religion would objectively join the other party as a combatant.").

84. *See* Zainab Chaudhry, *The Myth of Misogyny: A Reanalysis of Women's Inheritance In Islamic Law*, 61 ALB. L. REV. 511, 518-19 (1997) (explaining the four sources of Islamic law unanimously accepted by the four Sunni schools of jurisprudence); Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origin and Elements*, 1 J. ISLAMIC L. 1, 13 (1996) (stating "[t]he four Sunni schools of Islamic jurisprudence are the: (1) Hanafi; (2) Maliki; (3) Shafi'i; and (4) Hanbali."); 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? Appendix I*, 44 AM. U. L. REV. 1949, 1970 (1995) (noting that Islam underscores the importance of the differences among various schools of law by giving Muslims the right to switch schools. A [Sunni] Muslim may even for the sake of convenience adopt a different school where one school's legal regime proves more favorable to his purposes than another).

85. *See* NOEL J. COULSON, CONFLICTS AND TENSIONS IN ISLAMIC JURISPRUDENCE 42-43 (1969) (recounting that in the tenth century the Muslim jurists appeared to conclude that the labors of past generations of jurists had now brought the "[Islamic] doctrine to maturity . . . [and] [f]urther ijtihad [juristic law-finding] would be without purpose or profit. . . . " "The door of ijtihad," as the Arabic expression has it, "was closed." Future generations of jurists were denied the right of independent inquiry and were bound instead by the principle termed taqlid to "follow" or "imitate" the doctrines of their predecessors.); T.S. Twibell, *Implementation of the United Nations Convention on Contracts for the International Sale of Goods Under Shari'a (Islamic Law): Will Article 78 of the CISG be enforced when the Forum is in an Islamic State?*, 9 INT'L LEGAL PERSP. 25, 64 (1997) (commenting that the Shi'i will only follow the teachings of the Qu'ran and believe that only if an individual is deemed competent under Islamic standards may he then make his own judgments); Leila P. Sayeh and Adriaen M. Morse, Jr., *Islam and the Treatment of Women: An Incomplete Understanding of Gradualism,* 30 TEX. INT'L L.J. 311, 316-17 (1995) (comparing Sunni and Shi'i, and finding that both deem the Qu'ran as the primary authority capturing the word of God, however, both schools of thought differ on the construction of the Qu'ran verses, the authenticity of certain verses, the acceptance of some legal sources, and certain practical issues). *See generally* Ann Elizabeth Mayer, *Islam and the State*, 12 CARDOZO L. REV. 1015, 1024 (stating that diverse interpretation of Islamic sources were tolerated in the pre-modern era, which resulted in different schools of Islamic law).

86. *See* MAYER, *supra* note 78, at 107. The English version of the UIDHR states that institutions may exist which "enjoin what is right and . . . prevent what is wrong." However, Ms. Mayer's translation of the Arabic version of the UIDHR says these rights are limited to the spreading of Islam; *see, e.g.,* Arzt, *supra* note 83, at 362 (explaining that the UIDHR contains qualified passages like Article XII(a) providing every person with the right to express his thoughts and beliefs, only "so long as he remains within the limits prescribed by the Law").

Human rights norms make religious affiliation a matter of personal choice.[87] The ICCPR allows no derogation from this even in times of national emergency.[88] Freedom of expression, including expressions regarding religious belief, are also protected, as is freedom of assembly.[89] The major curb on these freedoms is the State's right to derogate "in time of public emergency which threatens the life of the nation."[90] This is different from the Qur'anic statement, which only prohibits forcible conversion. As Ann Elizabeth Mayer notes, "[t]here is no theory in international law that supports the notion that fundamental human rights may be curtailed . . . by reference to the requirements of a particular religion."[91] The ICCPR further provides that "[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a

87. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966).

88. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) [hereinafter ICCPR]; Jamie Frederic Metzl, *Rwandan Genocide and the International Law of Radio Jamming*, 91 AM. J. INT'L L. 628, 641 (1997) (quoting the same language as in the above parenthesis).

89. *See* ICCPR *supra* note 87, art 22 (freedom of association); *see also* Todd Howland, *Rael v. Taylor and the Colorado Constitution: How Human Rights Law Ensures Constitutional Protection in the Private Sphere*, 26 DENV. J. INT'L L. & POL'Y 1, 14 (1997) (examining the Traveaux Preparatiores of the ICCPR indicating that the treaty was designed to reach individual action. Although a suggestion was made that freedom of assembly should be protected only against 'governmental' interference, it was generally understood that the individual should be protected against all kinds of interference in the exercise of this right); Ann Elizabeth Mayer, *Universal Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?*, 15 MICH. J. INT'L L. 307, 337 (1994) (recognizing that the ICCPR establishes a right of peaceful assembly, or the right to freedom of association).

90. ICCPR, *supra* note 87, at art. 4. *See* David Petrasek, *Current Development: Moving Forward On The Development Of Minimum Humanitarian Standards*, 92 AM.J. INT'L L. 557, 560 (1998) (noting that the Human Rights Committee (charged with monitoring the application of the ICCPR) made the point that there is a considerable risk that the proposed draft third optional protocol might implicitly invite State parties to feel free to derogate from the provisions of the ICCPR during states of emergency); *see also* Vijayashri Sripati, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000),* 14 AM. U. INT'L L. REV. 413, 463 (1998) (stating "[t]he ICCPR forbids torture and summary killing in all circumstances, but creates emergency exceptions to guarantees of due process, free speech, and other political liberties. When an emergency threatens the life of the nation, a government may formally derogate from ICCPR guarantees of due process, and use preventive detention within certain limits."); Lucien J. Dhooge, *Smoke Across The Waters: Tobacco Production And Exportation As International Human Rights Violations*, 22 FORDHAM INT'L L.J. 355, 447 (1998) (noting that Article 4 of the ICCPR permits derogation in the event of a publicly proclaimed emergency that threatens the life of the nation, provided that such measures are strictly required by the exigency of the situation and are applied in an equitable fashion).

91. ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 76 (1991). *See* Heather A. Wilson, Book Review, *The Evolving Antarctica Legal Regime*, 83 AM J. INT'L. L. 670, 671 (1989) (commenting that there has been significant development in the area of human rights law in the postwar period, evidenced by several international treaties and conventions which protect rights including freedom to practice one's religion); Theodor Meron, *The Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AM. J. INT'L L. 589, 601 n.69 (1983) (noting the beliefs of others that some human rights cannot be modified, given that several international agreements mandate that certain basic human rights are not to be deprived).

religion or belief of choice."[92] To punish an apostate, even for offensive words concerning his former faith, is not acceptable under human rights law.[93]

Adultery: Adultery refers to an illicit sexual liaison where at least one of the parties is married to a third party.[94] It does not include premarital sex, although that too is forbidden.[95] Both adultery and fornication, although the penalties differ, are classified together in Islamic law as *zina*. Adultery is punishable by death by stoning.[96] The crime must occur publicly and be witnessed by at least four witnesses for the death sentence to be imposed.[97] Islamic law permits

92. ICCPR, *supra* note 87, at art. 18. *Accord* T. Jeremy Gunn, Note*, Freedom of Religion or Belief. Ensuring Effective International Legal Protection*, 90 AM. J. INT'L L. 707, 708 (1996) (providing that Tahzib believes that the United Nations needs to enhance the rights of religion already articulated in the Universal Declaration and the ICCPR).

93. *See* Moshe Hirsch, *The Fundamental Agreement Between the Holy Sea and the State of Israel: A Third Anniversary Perspective: The Freedom of Proselytism Under the Fundamental Agreement and International Law*, 47 CATH. U.L. REV. 407, 424-25 (1998) (explaining that everyone has the freedom to change his religion, and consequently, national laws that prohibit or punish "apostasy" are unlawful); *see also* Larry Cata Backer, *Exposing the Perversions of Toleration: The Decriminalization of Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration*, 45 FLA. L. REV. 755, 799 (1993) (stating "[a]t its core, it is a toleration designed to emphasize the fundamental inferiority and subservient status of those tolerated and to ensure that members of the dominant group are not tempted to apostasy); Makau wa Mutua, *Limitations on Religious Rights: Problematizing Religious Freedom in the African Context*, 5 BUFF. HUM. RTS. L. REV. 75, 85 n.15 (1999) (noting that the crime of apostasy, which disallows individuals from freely changing their faith, violates human rights standards by preventing the freedom of choice).

94. *See* Yadira Calvo, *Language and the Law*, 7 AM. U.J. GENDER SOC. POL'Y & L. 381, 382 (1999) (defining adultery as "illicit carnal intercourse, when one or both of the partners is married"); *accord* Major William T. Barto, *The Scarlet Letter and the Military Justice System*, 1997 ARMY LAW. 3, 4 (1997) (stating that despite various definitions, adultery is the breach of a marital relationship through sexual intercourse); Dr. Chaim Povarsky, *Regulating Advanced Reproductive Technologies: A Comparative Analysis of Jewish and American Law*, 29 U. TOL. L. REV. 409, 418 (1998) (noting that some courts have held that the essential factor to adultery is the act of intercourse.).

95. *See* Tamilla F. Ghodsi, Note, *Tying A Slipknot: Temporary Marriages in Iran*, 15 MICH. J. INT'L 645, 676 (1994) (stating that premarital affairs would threaten the stability of marriage and because of this threat Islam strictly forbids premarital sex); Sarah Y. Lai and Regan E. Ralph, *Female Sexual Autonomy and Human Rights*, 8 HARV. HUM. RTS. J. 201, 219 (1995) (noting that a mixture of Hausa custom and Islamic law attaches a social stigma to premarital sex); Siobhan K. Fishen, Note, *Occupation of the Womb: Forced Impregnation as Genocide*, 46 DUKE L.J. 91, 93 (1996) (stating that Islamic culture emphasizes virginity and chastity before marriage.).

96. *See* Matthew Lippman, *Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law*, 12 B.C. INT'L & COMP. L. REV. 40 (1989) (providing a general discussion of Hudad crimes); Thomas M. Franck, *Is Personal Freedom A Western Value?*, 91 AM. J. INT'L L. 593, 606 (1997) (explaining how a local government abandoned a law mandating stoning to death for adultery); *see also* Rose Marie Karadsheh, *Creating an International Criminal Court: Confronting the Conflicting Criminal Procedures of Iran and the United States*, 14 DICK. J. INT'L L. 243, 267 (1996) (stating that "[s]ince the Koran explicitly provides the form of punishment to be meted out for each crime, the judge has no discretion regarding punishment. Forms of the death penalty include stoning for adultery.").

97. *See* Bharathi Anandhi Venkatraman, Comment, *Islamic States and the United Nation 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, 1994 (stating that "[t]he evidentiary requirements mandated by this standard included, in the case of adultery, confession or the testimony of four Muslim males of good moral standing to implicate the accused parties."); *see also* Sarah A. Rumage, *Resisting the West: The Clinton Administration's Promotion of Abortion at the 1994 Cairo Conference and the Strength of the Islamic Response*, 27 CAL. W. INT'L L.J. 1, 19 (1996) (noting that in Islam, adultery is severely punished and hence must be proven by four witnesses, who can describe the act and the physical appearance of the accused's genitals in some detail); David F. Forte*, Apostasy and Blasphemy in Pakistan,* 10 CONN. J. INT'L L. 27, 38 (1994) (recognizing that to convict a man accused of adultery four Muslim witnesses of good character must be presented).

divorce, so presumably someone unhappily married would be able to terminate the marriage and later marry someone else.[98] Either party may initiate divorce; however, a husband may unilaterally divorce his wife at will.[99] A woman may only be granted a divorce by an Islamic court if she has specific, limited grievances.[100] Polygamous marriages are permitted to men, who may have up to four wives simultaneously, but a woman may not have more than one husband.[101] With regard to intermarriage, there is also a disparity between what is permitted for men and for women.[102] No Muslim may marry a pagan or atheist.[103] Muslim men may marry Jewish and

98. *See* Vrinda Narain, *Women's Rights and the Accommodation of "Difference": Muslim Women in India*, 8 S. CAL. REV. L. & WOMEN'S STUD. 43, 48 (1998) (explaining that under Hanafi law, applicable to the majority of Muslims in India, women could obtain a divorce if they apostatized from Islam); *see also* Sara Ahmad, *Judicial Complicity with Communal Violence in India*, 17 J. INT'L L. BUS. 320, 336 (1996) (explaining how in MD. Ahmed Khan v. Shah Bano Begum, A.I.R. 1985 S.C. 945, the Supreme Court of Iran addressed the plight of destitute divorced Muslim women); Adrien Katherine Wing, *Conceptualizing Violence: Present and Future Developments in International Law: Panel III: Sex and Sexuality: Violence and Culture in the New International Order: A Critical Conceptualization of Violence: South Africa and Palestinian Women*, 60 ALB. L. REV. 943, 963 (1997) (opining that the environment for Islamic women has improved from the seventh century conditions where polygamy allowed a man to have four wives. The improvements include allowing women to divorce, however, on limited grounds).

99. *See* Mark Cammack, *Indonesia's Marriage Law: Legislating Social Change in an Islamic Society*, 44 AM. J. COMP. L. 45, 45 (1996) (explaining the Muslim husband's power to unilaterally repudiate his first wife); Venkatraman, *supra* note 97, at 1960 (explaining the restrictions on a wife to obtain a divorce); *id*. at 1975 (customary forms of divorce allow a Muslim husband to unilaterally divorce his wife).

100. *See* MAYER, *supra* note 91, at 127; Cammack, *supra* note 99, at 45 (explaining the Muslim husband's power unilaterally to repudiate his wife or to take a second wife); *see also* Venkatraman, *supra* note 97, at 1975 (explaining that one of the customary forms of divorce practiced by Muslims, known as *talaq*, enables a husband to unilaterally divorce his wife with the utterance of one of several expressions three times).

101. *See* ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 111 (1991); Berta Esperanza Hernandez-Truyol, *Women's Rights as Human Rights—Rules, Realities and the Role of Culture: A Formula for Reform*, 21 BROOK. J. INT'L L. 605, 660 n.209 (1996) (stating that "men may take up to four wives, that Muslim women may not marry outside the faith, and that women are entitled to only one-half the inheritance share that men inherit in the same capacity . . . [and] that women are compelled to wear concealing garments in public."); *see also* Urfan Khaliq, *Beyond the Veil?: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah*, 2 BUFF. J. INT'L L. 1, 30 (1995) (explaining that verse 3:4 of the *Qur'an* allows an individual to have up to four wives, but only if he can treat all his wives equally and love all of them in the same way to the same degree).

102. *See* Adriew Katherine Wing and Sylke Merchan, *Rape, Ethnicity, and Culture: Spirit Injury From Bosnia to Black America*, 25 COLUM. HUM. RTS. L. REV. 1, 22 (1993) (indicating the shari'a in Islamic law forbids intermarriage by Muslim women).

103. *See* S.I. Strong, *Law and Religion in Israel and Iran: How the Integration of Secular and Spiritual Laws Affects Human Rights and the Potential for Violence*, 19 MICH. J. INT'L L. 109, 181 (1997) (explaining that Muslims cannot rely on these provisions of local governmental law since in rejecting Islam they would be guilty of apostasy); *see also* Michael R. Moodie, *Symposium on Religious Law: Roman Catholic, Islamic, and Jewish Treatment of Familial Issues, Including Education, Abortion, In Vitro Fertilization, Prenuptial Agreements, Contraception, and Marital Fraud*, 16 LOY. L.A. INT'L & COMP. L.J. 9 (1993) (noting that if a woman is either an atheist or a pagan, she cannot enter into a valid Islamic marriage contract with a man); Richard Klein, *Immigration Laws as Instruments of Discrimination: Legislation Designed to Limit Chinese Immigration into the United Kingdom*, 7 TOURO INT'L L. REV. 1, 11 (1997).

> When Poles, Italians, Spanish and Portuguese live in France and decide to naturalize, it matters little whether they are Catholics, Protestants, Jews, or atheists . . . but the rules of Islam are not simply religious rules. They are rules of living that concern . . . marriage, divorce, the care of children, the behavior of men, the behavior of women . . . These rules are contrary to all the rules of French law on the custody of children in the case of divorce, and they are contrary to [French rules on] the rights of women with respect to husbands).

Id.

Christian women (*dhimmis*) as well as Muslims, but a Muslim woman may not intermarry.[104] It has been suggested by Sultanhussein Tabandeh that if a Muslim woman does so, the marriage is invalid, children of the union are illegitimate, and she deserves punishment, presumably for engaging in illicit sexual relations.[105] Therefore, men are far less likely to be compromised, since they have a greater choice of potential mates and can marry and divorce at will. The only equality, such as it is, is that a man who is caught in adultery with another's wife will face the same penalty as the woman.[106] In addition, an apostate from Islam, even where the death penalty is not enforced, is viewed as "civilly dead," automatically terminating his marriage.[107] A man who is believed to have abandoned Islam yet remains with his wife is thus guilty of *zina*, regardless of the wishes of the couple.[108] In Iran, those Baha'is who have escaped the death penalty for

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104. *See* RUQAIYYAH MAQSOOD, ISLAM 181 (1994); *see also* Adrien Katherine Wing, *Conceptualizing Violence: Present and Future Developments in International Law: Panel III: Sex and Sexuality: Violence and Culture in the New International Order: A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women*, 60 ALB. L. REV. 943, 963 (1997) (noting that Muslim men can marry a Muslim, Christian, or Jewish woman, while a Muslim woman can only marry a Muslim); Alison E. Graves, *Women in Iran: Obstacles to Human Rights and Possible Solutions*, 5 AM. U. J. GENDER & LAW 57, n. 30 (1996) (noting that Sunnis allow men to marry women "of the Book," which are Muslims, Jews and Christians—those that have similar Holy Books to the Quran).

105. *See* MAYER, *supra* note 101, at 151.

106. *See* Carolyn Ratner, *Islamic Laws as Violations of Human Rights in the Sudan*, 18 B.C. THIRD WORLD L.J. 137, 147 (1998) (book review) (explaining that penal codes institute flogging and amputation for certain crimes and death for adultery and fornication); Sherry F. Colb, *The Three Faces of Evil*, 86 GEO. L.J. 677, 715 (1998) (reviewing ELYN R. SAKS, JEKYLL ON TRIAL: MULTIPLE PERSONALITY DISORDER & CRIMINAL LAW)

> under the Iranian Penal Code, death by stoning is a method of punishment for adultery and other sexual offenses but that while men and women are subject to the same punishments, this Penal Code provision discriminates against women because in Iran women are more readily accused and convicted of adultery because of the patriarchal culture and sexist legal system.

Id.

Anika Rahman, Esq., *A View Towards Women's Reproductive Rights Perspective on Selected Laws and Policies in Pakistan*, 15 WHITTIER L. REV. 981, 998 (1994) (recognizing that if the accused is a Muslim, then the maximum punishment will be imposed provided that the accused confesses or four adult and pious Muslims witness the act of penetration.).

107. For background information on civil death *see* Rebecca Jurado, *The Essence of Her Womanhood: Defining the Privacy Rights of Women Prisoners and the Employment Rights of Women Guards*, 7 AM. U.J. GENDER SOC. POL'Y & L. 1, 14 (1999) (explaining the origin of the Civil Death Doctrine, which provides that conviction and incarceration repealed various rights including the right to vote, contract, marry, sue, or be sued); *see also* Mavis Maclean, *Child Support in the U.K.: Making the Move from Court to Agency*, 31 HOUS. L. REV. 515, 519 (1994) (explaining how Protestant acceptance of divorce following a marital offence was based on the Gospel of St. Matthew, which states that if adultery can be punished by death, then the adulterer can be deemed civilly dead and, therefore, the innocent party may be free to remarry).

108. *See* MAYER, *supra* note 101, at 121; Sarah A. Rumage, *Resisting the West: The Clinton Administration's Promotion of Abortion at the 1994 Cairo Conference and the Strength of the Islamic Response*, 27 CAL. W. INT'L L.J. 1, 15 n. 44 (1996) (stating that in Islam, adultery is called zina, and means sexual intercourse between a man and a woman not married to each other); *see also* Michael F. Polk, Note, *Women Persecuted Under Islamic Law: The Zina Ordinance in Pakistan as a Basis for Asylum Claims in the United States*, 12 GEO. IMMIGR. L.J. 379, 380 (1998) (explaining that a man and a woman are said to commit 'zina' if they willfully have sexual intercourse without being validly married to each other).

apostasy or secular crimes have nonetheless incurred civil death, resulting in the invalidation of their marriages and liability for committing *zina.*[109]

International human rights texts declare that marriage is a right and that equal rights exist between the spouses.[110] It is hard to reconcile the provision of equal rights with the practice of plural marriage for men and monogamy for women. Furthermore, the UDHR specifically states that a state does not have the authority to impede marriages solely for reasons of race, ethnicity, or religion.[111] Therefore, state enforcement of the Islamic prohibition of a Muslim women's marriage to a non-Muslim violates this Article of the UDHR. In addition, the ICCPR states a "sentence of death may be imposed only for the most serious crimes. . . ."[112] While "serious crimes" are not defined, it does not seem possible that the international standards would accept adultery as the type of crime for which the death penalty may be imposed.[113]

Fornication: Illicit sexual relations where neither party is married, while not a capital crime, is incorporated in the Islamic category of *zina,* punishable by 100 lashes.[114] As with

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109. *See* MAYER, *supra* note 101, at 178 (1991); Donna E. Arzt, *Heroes or Heretics: Religious Dissidents Under Islamic Law*, 14 WIS. INT'L L.J. 349, 376 (1996) (explaining that short of physical death, apostates who did not repent suffered various elements of "civil death," including suspension of the right to dispose or inherit property, dissolution of marriage contracts upon the apostasy of either spouse, and a declaration that their children were illegitimate); *see also* Abdullahi Ahmed An-Naim, *The Islamic Law of Apostasy and its Modern Applicability: A Case from the Sudan*, 16 RELIGION 197, 218 (1986) (describing the ramifications of civil death).

110. *See* Ladan Askari, Note, *The Convention on the Rights of the Child: The Necessity of Adding A Provision to Ban Child Marriages*, 5 ILSA J. INT'L COMP. L. 123, 135 (1998) (stating that the Convention on the Elimination of Discrimination Against Women was created to equalize relationships between adult men and women).; Kimberly Younce Schooley, *Cultural Sovereignty, Islam and Human Rights—Towards A Communitarian Revision*, 25 CUMB. L. REV. 651, 656 (1994-1995) (discussing how the International Bill Of Rights and the Universal Declaration Of Human Rights definitively defines the concept of sexual equality.).

111. *See* Kris Ann Balser Moussette, Note, *Female Genital Mutilation and Refugee Status in the United States—A Step in the Right Direction*, 19 B.C. INT'L & COMP. L. REV. 353, 353 (1996) (noting that Article 16 of UDHR states: "Men and women of full age, without any limitation due to race, nationality or religion, have the right to found a family. They are entitled to equal rights in marriage, during marriage and at its dissolution."); Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash Of Cultures Or a Clash With Construct?*, 15 MICH. J. INT'L L. 307, 333 (1994) (discussing the freedom to marry under UDHR 16(1)).

112. Universal Declaration on Human Rights, art. 6, U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316, (1967). *See* Thomas J. Walsh, *On the Abolition of Man: A Discussion of the Moral and Legal Issues Surrounding the Death Penalty*, 44 CLEV. ST. L. REV. 23, 43 (1996) (noting that in 1966, the International Covenant on Civil and Political Rights (ICCPR) was adopted by the United Nations, and that covenant expressly lays down the notion that the death penalty should only be imposed but "for the most serious crimes"); *see also* James H. Wyman, *Vengeance is Whose?: The Death Penalty and Cultural Relativism in International Law*, 6 J. TRANSNAT'L L. & POL'Y 543, 557 (1997) (explaining that Article VI, § 2 of the ICCPR provides that a "sentence of death may be imposed for only the most serious crimes").

113. *See* Schooley, *supra* note 110, at 658 (discussing the controversial Convention of Elimination of Discrimination Against Women which requires appropriate measures to be taken to modify social and cultural patterns of conduct of men and women, with a view to eliminating prejudices and customary practices based on the idea of inferiority or superiority of either of the sexes.).

114. *See* Surah XXIV, 2; *see also* Sajeda Amin and Sara Hossain, *Religious & Cultural Rights: Women's Reproductive Rights and the Politics of Fundamentalism: A View from Bangladesh*, 44 AM. U.L. REV. 1319, 1340 (1995) (explaining that fundamentalists chose as their first target single women identified as having transgressed social norms accusing women of zina, and sentencing them to punishments such as stoning, caning, and, in one particularly horrifying case, burning at the stake).

adultery, the testimony of four eyewitnesses to the actual act is required for a conviction.[115] Shi'i Islam permits the institution of "temporary marriage" for any specific period of time, which can be used to permit brief sexual encounters.[116] This form of "marriage" requires only payment of a gift to the bride, not for her maintenance during the marriage.[117] Sunni Muslims regard the practice as little better than prostitution.[118]

International human rights law is silent on the question of fornication; however, the concept of "privacy" is inherent in much of international human rights.[119] The illegality of consensual relations between two unmarried people is hard to reconcile with the right to privacy guaranteed in the ICCPR. Neither flogging for fornication nor a death sentence for adultery can be countenanced. This is tempered by the reality that the prosecution's burden of proof, requiring four eyewitnesses to the act of penetration, is improbably heavy.[120] If an Islamic state

115. *See* 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? Appendix I*, 44 AM. U.L. REV. 1949, 1994 (1995) (noting that the Hudood Ordinance of 1979 required that evidentiary showings and punishments for the crimes of rape, adultery and fornication, armed robbery, the use of alcohol and narcotics and false accusations of adultery follow the Islamic standard including, in the case of adultery, confession or the testimony of four Muslim males of good moral standing to implicate the accused parties); *see also* Asifa Quraishi, *Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective*, 18 MICH. J. INT'L L. 287, 300 (1997) (explaining that in traditional Islamic jurisprudence, the majority opinion is that pregnancy alone is not sufficient evidence to prove zina, since the Quran specifies nothing less than four eyewitnesses, and a fundamental principle of Islamic criminal procedure is that the benefit of the doubt lies with the accused).

116. *See* Tamilla F. Ghodsi, Note, *Tying a Slipknot: Temporary Marriages in Iran*, 15 MICH. J. INT'L L. 645, 681 (1994) (stating that "[t]he woman in the temporary marriage is specifically referred to as the object of a lease and furthermore, the need to gratify men's uncontrollable and unlimited sexual desires is the primary rationale for the institution . . ."); *see also* Alison E. Graves, *Women in Iran: Obstacles to Human Rights and Possible Solutions*, 5 AM. U. J. GENDER & LAW 57, n. 29 (1996) (describing the uniqueness of temporary marriage to the Iranian sect of Shi'ism and how it is a temporary contract of marriage and is valid only among the Ithna 'ashari' Shi'as also known as the Imamiyyas); Graeme Newman, *Khomeini and Criminal Justice: Notes on Crime and Culture*, 73 J. CRIM. L. & CRIMINOLOGY 561, 578 (1982) (explaining that from the point of view of western morals, which require extensive renunciations because of the monogamous family structure, the notion of temporary marriage (which can be of one hour's duration) and the encouragement of marriage of children (a girl is considered marriageable over the age of 10), makes for a lot of freedom, but only from the adult male's point of view).

117. *See* Ghodsi, *supra* note 116, at 665 (explaining that there are three components of temporary marriages that will serve as the initial basis of comparison with permanent marriages: (1) the legal form of the contract; (2) the duration of the term of marriage; and (3) the consideration for the marriage).

118. *See* ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 130-31 (1991); *see also* Graves, *supra* note 116, at n.29 (commenting that Sunni Muslims believe the prophet Muhammad abolished temporary marriages because they were heathen practices); Ghodsi, *supra* note 116, at 646 (explaining that Sunni Muslims do not recognize the legitimacy of this institution, which was outlawed by the second Caliph, Omar, a follower of the Prophet Muhammad); Newman, *supra* note 116, at 578 (comparing the Sunni daily lives or roles recognizing that freedom may be structured into a system of domination; the Shiite sect, for example, has certain freedoms structured into its marriage law where women may legally belong to a man in one of two ways—by continuing marriage or temporary marriage).

119. The International Covenant on Civil and Political Rights, open for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). Article 17 of the ICCPR states: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation . . . Everyone has the right to the protection of the law against such interference or attacks."

120. *See* QURAN 24:4 (stating that those who defame chaste women and do not bring four witnesses should be punished with eighty lashes and do not have the opportunity for testimony afterwards).

refused to find guilt in any *zina* case that did not meet this standard, the likelihood of conviction would be diminished.

Rebellion:

> Rebellion, *baghi*, is the intentional, forceful overthrow or attempted overthrow of the legitimate leader of the Islamic state. . . . The *Imam* is obligated to consider the rebels' demands; if the demands lack merit, he is required to call upon the rebels to heed his request that they end their rebellion. The *Imam* is legally justified in ordering the army to attack rebels who refuse to lay down their arms. Rebels who are killed are considered to have been punished by *Hudad*. . . .[121]

There are several points to be noted here. The rebels must be acting intentionally and forcefully.[122] Therefore, a government which brutally represses marches, meetings, or dissemination of dissident literature cannot rightfully claim that the *shari'a* mandates its acts.[123] The government must be legitimate and Islamic; rebels who rise against a totalitarian or imperialist government should therefore not be deemed to violate the *shari'a*. A government legitimately in power must nonetheless attempt to resolve any real difficulties brought to its attention by a minority before using drastic means. Furthermore, before ordering in the troops, the government must request that the rebels end their rebellion, with no fear of reprisals for their plot.[124] If the rebellion leads to armed conflict between the rebels and the state, only those who *de facto* die in battle are subject to the *hudad* death sentence; the *shari'a* does not prescribe execution of the survivors following cessation of hostilities.[125] The charge that Muslim conquerors

121. Matthew Lippman, *Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law*, 12 B.C. INT'L & COMP. L. REV. 40, 42 (1989). *See* David F. Forte, *Apostasy and Blasphemy in Pakistan*, 10 CONN. J. INT'L L. 27, 45 (1994) (noting that an apostate would deserve death either because of his act of rebellion or because he had become an unbeliever.); *see also* Kimberly Younce Schooley, *Cultural Sovereignty, Islam, and Human Rights—Toward a Community Revision*, 25 CUMB. L. REV. 651, 695 (1995) (stating that "[t]o rebel against it in the name of freedom is to become separated from the potency and grace of the Divine and to lose inner freedom, the only real freedom.").

122. *See* Kent Benedict Gravelle, *Islamic Law in Sudan: A Comparative Analysis*, 5 ILSA J. INT'L & COMP L. 1, 1 (1998) (stating "[t]he sixth and final Hudad crime is transgression or rebellion against the legitimate authority. Most Islamic jurists agree that a transgression must be 'by force' and the legitimate authority himself, must not be a transgressor of Islam in order for the rebel to be punished."); *see also* Leslie Shirin Farhangi, Note, *Insuring Against Abuse of Diplomatic Immunity*, 38 STAN. L. REV. 1517, 1533 (1986) (identifying the seven Hudad crimes are adultery, defamation, alcoholism, theft, brigandage, apostasy, and rebellion/corruption of Islam).

123. For further discussion of the government's repression, *see generally* M. Cherif Bassiouni, *Protection of Diplomats Under Islamic Law*, 74 AM. J. INTL L. 609, 623 (1980).

124. *Id.*

125. *See id.* ("A *Had* crime is not punishable unless it continues in fact and those who engage in it do not stop. If they stop, they are not to be punished."); *see also* Anthony Chase, *Legal Guardians: Islamic Law, International Law, Human Rights Law, and the Salman Rushdie Affair*, 11 AM. U.J. INT'L L. & POL'Y 375, 398 (1996) (explaining that in Islam the principle of the sanctity of life is not absolute, but is in tension with the notion of retribution which puts a relative value on an individual's life, depending on religion, gender, whether free or slave, embryonic or not, etc.); Graves, *supra* note 116, at n.56 (1996) (quoting the Quran: "As for those from whom ye fear rebellion, admonish them and banish them to beds apart, and scourge them. Then if they obey you, seek not a way against them.").

demanded that the vanquished "convert or die" is false.[126] It should be noted that the existence of a *hudad* penalty for rebellion does not diminish the state's power to impose discretionary *tazir* punishments for participants in an unsuccessful rebellion.[127]

The UN Second Optional Protocol, whose purpose is the abolition of the death penalty, specifically allows for pre-accession reservation providing for the death penalty during wartime when a person has been convicted of a serious military crime.[128] Virtually every nation prohibits treason, thus, the ICCPR permits derogation from several articles when the "life of the nation" is threatened.[129] Obviously, those clauses of the UDHR and ICCPR guaranteeing free-

126. *See* RUQAIYYAH MAQSOOD, ISLAM 15-16 (1994) Mohammed defeated those followers of Abu Sufyan who had previously sworn allegiance and then fought against the army of Islam, he gave the rebels the opportunity to return to Islam and be spared. Those who were executed refused to submit to the authority of the Prophet and were regarded as enemies of the state. It is also noteworthy that the rebels were only those who had participated in the rebellion—adult free men, not children, women, or slaves. Mohammed himself later married a rebel's widow. *Id.*

127. *See* Chase, *supra* note 125, at 397 (explaining that all crimes which cannot meet the high evidentiary requirements necessary for a *had* conviction are tried as *tazir* crimes; *tazir* crimes generally carry lesser penalties and accept the necessity of deference to the power and discretion of temporal rulers); *see also* Rose Marie Karadsheh, *Creating an International Criminal Court: Confronting the Conflicting Criminal Procedures of Iran and the United States*, 14 DICK. J. INT'L L. 243, 267 (1996) ("The Iranian Penal Code has divided crimes into four categories based upon the punishment for each offense called hudad, qisa, ta'zir and diyat; Hudad crimes are acts prohibited by God.").

128. G.A. Res. 217 A, U.N. GAOR, 3d. Sess., art. 2, Supp. No. 13, at 75, U.N. Doc. A/810 (1948). *See* Jennifer Myer, *Human Rights and Development: Using Advanced Technology to Promote Human Rights in Sub-Saharan Africa*, 30 CASE W. RES. J. INT'L L. 343, 345 (1998) (stating that the role of the Universal Declaration of Human Rights is the preservation and enlargement of an individual's human rights); Christy A. Short, *The Abolition of the Death Penalty: Does "Abolition" Really Mean What You Think it Means?*, 6 IND. J. GLOBAL LEG. STUD. 721, 725 (1999) (explaining that wartime crimes are not protected by the UDHR).

129. *Universal Declaration on Human Rights*, art. 4, sec. 1, U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316, (1967); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953); International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 art. 4, § 1 (1966) (entered into force Mar. 23, 1976); American Convention on Human Rights, Nov. 22, 1969, O.A.S. Official Records OEA/ser. K/XVI/1.1, doc. 65 rev. 1 corr. 1 (entered into force July 18, 1978), 9 I.L.M. 673 (1970). Reads in pertinent part:

Article 15(1) of the European Convention states:

> In times of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its obligations under international law.

Similarly, Article 4(1) of the ICCPR provides:

> In times 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 obligations under international law. . . .

Finally, Article 27(1) of the American Convention states:

> In times of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. . . .

See generally Short, *supra* note 109, at 725 (describing the ICCPR as an example of an international human rights treaty concerned with the "right to life").

dom of conscience, expression, and assembly would preclude any punishment for non-violent opposition to a government or its policies.[130]

Highway Robbery: A *shari'a* penalty for highway robbery (*haraba*) is death by crucifixion.[131] Other possible punishments prescribed by the Qur'an are beheading, cross amputation, or banishment.[132]

International human rights texts do not discuss punishments for specific violations of criminal law.[133] However, the prohibition against torture would certainly apply to death by crucifixion and cross amputation.[134] A death sentence might be acceptable if carried out in a humane manner and for a particularly serious act. Forcibly expelling a convicted brigand from his country with no right to ever return may also violate international norms.[135]

Theft: In Islamic law, theft is punished by amputation of the thief's hand.[136] Theft (*saraqa*) only involves the actual misappropriation, in secret, of another's tangible prop erty.[137] A repeat

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130. G.A. Res. 2200A (XX1), U.N. GAOR, 21st Sess., Sup. No. 16, at 52, U.N. Doc. A/6316 (1967) (entered into force Mar. 23, 1976). Article 4 specifies that states may not derogate from a variety of human rights norms under any circumstances, including prohibitions against the arbitrary deprivation of life, the right to freedom from torture and cruel and inhuman treatment, prohibitions against slavery, and the right to freedom of thought and conscience.

131. *See generally* William A. Schabas, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: War Crimes, Crimes Against Humanity and the Death Penalty*, 60 ALB. L. REV 733 (1997).

132. *See generally* Matthew Lippman, *Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law*, 12 B.C. INT'L & COMP. L. REV. 40 (1989).

133. *See* U.N. Doc. A/6316 (1967).

134. *See* In re Kemmler, 136 U.S. 436, 436 (1890) (per curiam) (holding that torture as defined by the U.S. Constitution includes something that causes a lingering death and is "something more than mere extinguishment of life"); DeJuan Bouvean, *A Case Study of Sudan and the Organization of African Unity*, 41 HOW. L.J. 413 (1998) (discussing the Shari'a's sanctions regarding crucifixion and amputation); Laura Dalton, *Stanford v. Kentucky and Wilkins v. Missouri: A Violation of an Emerging Rule of Customary International Law*, 32 WM. & MARY L. REV. 161 (1990) (explaining that since early times crucifixion and amputation have been prohibited in both the United States and England).

135. Universal Declaration of Human Rights, art. 13, U.N. GAOR 217A (III) (1948) ("Everyone has the right to leave any country, including his own, and return to his country."); UDHR, art. 15, U.N. GAOR 217A (III) (1948) ("no one shall be arbitrarily deprived of his nationality. . . ."); International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, art. 12, sec. 4, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (stating "[n]o one shall be arbitrarily deprived of the right to enter his own country."); Gregory L. Ryan, *Why the Inclusion of Perjury as an Aggravated Felony Subjecting Legal Aliens to Deportation Under the Anti-Terrorism and Effective Death Penalty Act Violates the Eighth Amendment*, 28 ST. MARY'S L.J. 989 (1997) (explaining the Banishment-Equivalency Rationale which stands for the proposition that banishment is "cruel and inhuman punishment").

136. *See* Surah V 38; Carolyn Ratner, *Islamic Laws as Violations of Human Rights in the Sudan: God has Ninety-Nine Names,* 18 B.C. THIRD WORLD L.J. 137, 153 (1998) (discussing the punishment for theft in Sudan as amputation of the right hand); Karadsheh, *supra* note 127, at 268 (describing amputation of the hand as a well-known punishment for theft under the Hudad laws); Thomas M. Franck, *Is Personal Freedom a Western Value?*, 91 AM. J. INT'L L. 593, 607 (1997) (discussing that some nations such as Malaysia have abandoned this law for theft).

offender can lose the other hand, followed by each foot for third and fourth offenses.[138] There are several limitations on this penalty. The individual circumstances of each case are investigated before conviction and sentencing. For example, a destitute person who stole food for herself or her family would not be liable; the failure of the *umma* to provide for a needy family in their midst would be to blame.[139] The item taken must have some monetary value.[140] Adverse possession of another's real property is not included, nor is theft of *haram* (forbidden) substances, such as pork or alcohol. In addition, theft of a book, especially the Qur'an, is not subject to this penalty, nor is theft of Islamic religious articles.[141] Acts such as embezzlement, telephone or credit scams, theft of services, and misappropriation of intellectual property are not included, although they may be punished at the state's discretion as *tazir* offenses.[142] Fur-

137. *See* Lippman, *supra* note 132 (provides a general discussion of Hudad crimes, e.g., theft, highway robbery, adultery, sodomy, the accusation of unlawful intercourse.); Jennifer N. Lehman, *NAFTA and the Expansion of Free Trade: Current Issues and Future Prospects: The Continued Struggle with Stolen Cultural Property: The Hague Convention, The UNESCO Convention, and the UNIDROIT Draft Convention,* 14 ARIZ. J. INT'L & COMP. LAW 527, 540 (1997) (discussing Iraq's efforts to prohibit misappropriation of cultural property); Richard E. Vaughan, *Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say "Property"? A Lockean, Confucian, and Islamic Comparison*, 2 ILSA J. INT'L & COMP L. 307, 327 (1996) (stating that "Islamic countries classify property into moveable and immoveables, similar to that of civil code countries, rather than real and personal property.").

138. *See* Laurie Mylorie, *Iraq's New Reign of Terror,* N.Y. TIMES, Oct. 2, 1994, at sec. 4, p. 17 ("Islamic punishment for theft is amputation of the right hand, [while] a repeat offender will lose a foot."); U.S. Dept. of State, Dept. of State Human Rights Country Reports, *Iraq Report on Human Rights Practices for 1996* (Feb. 1997) (search of LEXIS, News Library, Arc News) (discusses eyewitness reports that the Iraqi government carried out second amputation on repeat offenders); Stoer H. Rowley, *Embargo Dims Iraqui's Memory of Good Life*, CHI. TRIBUNE, Oct. 16, 1994, at 7 (discussing the harshness of Islamic Law, which calls for severing the hand of a thief. Repeat offenders can lose legs, ears, even their lives).

139. *See* RUQAIYYAH MAQSOOD, ISLAM 137 (1994); *see also* Christopher A. Ford, *Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis*, 30 TEX. INT'L L.J. 499, 508 (1995) (discussing that with regard to the Umma, unity was regarded as fundamental to Islamic beliefs); Theodore A. Mahr, *An Introduction to Law and Law Libraries in India*, 82 LAW LIBR. J. 91, 97 (1990) ("Islamic law is a religious system, it is a system of 'oughts' and 'ought-nots,' rather than a specific legal code."); Donna E. Arzt, *Heroes or Heretics: Religious Dissidents Under Islamic Law*, 14 WIS. INT'L L.J. 349, 371 (1996) (explaining that the aim of Islamic law is to ensure the welfare of the Umma).

140. *See* Vaughan, *supra* note 137, at 332 (describing the difference between physical property and ideas under Islamic Law. The punishment for the theft of property is the amputation of the hand, thus there had to have been a certain minimum monetary value involved); *see also* Brian Bengs, *Dead on Arrival? A Comparison of the Unidroit Convention on Stolen or Illegally Exported Cultural Objects and U.S. Property Law*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 503, 508 (1996) (discussing the difference between monetary value and items that had societal identity value); David A. Westbrook, *Islamic International Law and Public International Law: Separate Expressions of World Order*, 33 VA. J. INT'L L. 819, 860 (1993) ("Islamic international law thus ultimately aspires to global community, aspires to be the vehicle through which Islam becomes the world, through which the babble of humanity becomes the umma.").

141. *See* T.S. Twibell, *Implementation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) Under Shari'a (Islamic Law): Will Article 78 of the CISG be Enforced When the Forum is in an Islamic State?*, 9 INT'L LEGAL PERSP. 25, 59 (1997) (noting that knowledge of the Koran is a deeply ingrained aspiration of a Muslim); Vaughan, *supra* note 137, at 332 (explaining that one cannot steal ideas under Islamic Law and thus stealing a book of ideas is not punishable. This law is not explicitly provided for in the Koran but comes from a jurist's opinion); Franck, *supra* note 136, at 602 (stating that "the Moslem religion had unequivocally proclaimed the right to freedom of conscience and had declared itself against any kind of compulsion in matters of faith or religious practice.").

thermore, it is noteworthy that one of the basic tenets of Islam is *zakah*, the payment of a religious tax used to aid the poor.[143] A modern parallel is the International Covenant on Economic, Social and Cultural Rights, providing, among other things, for a minimum standard of living.[144]

Similar to highway robbery, international human rights texts do not encompass the punishment for theft by private actors. It is a matter for domestic criminal law.[145] However, amputation would be classified as either torture or cruel or inhuman punishment. Theft and

142. *See* Anika Rahman, *A View Towards Women's Reproductive Rights Perspective on Selected Laws and Policies in Pakistan*, 15 WHITTIER L. REV. 981, 999 (1994) (stating "[i]f a case is proven on the basis of evidence other than that of the eyewitness accounts of four Muslim men or of the accused's confession, then the accused is sentenced to a lesser class of punishments known as Tazir."); Anthony Chase, *Legal Guardians: Islamic Law, International Law, Human Rights Law, and the Salman Rushdie Affair*, 11 AM. U.J. INT'L L. & POL'Y 375, 398 (1996) (explaining that *tazir* offenses usually carry lesser penalties and there is more deference given to temporal rulers with respect to such offenses); Vaughan, *supra* note 137, at 334 (stating "the prevailing Islamic approach to copyright has been that there should be no obstruction to the duplication of original material since the most widespread dissemination of knowledge is for the good of all").

143. *See* Matthew Lippman, *Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law*, 12 B.C. INT'L & COMP. L. REV. 40 (1989) (describes *zakah* as a fundamental duty of every Muslim); Bernard K. Freamon, *Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence*, 11 HARV. HUM. RTS. J. 1, 24 (1998) (discussing *zakah* as a pillar of faith that must be complied with); Lino J. Lauro and Peter A. Samuelson, *Toward Pluralism in Sudan: A Traditionalist Approach*, 37 HARV. INT'L L.J. 65, 85 (1996) (stating "[a]ccording to the *Qur'an, zakat* is for 'the indigent and the poor, those who collect the tax, those whose hearts are to be won over [for ransoming] war-captives, for the relief of those who are in chronic debt, for the "cause of God" [Such as *jihad* and social welfare purposes like education and health], and for the wayfarer. . . .'"); Vaughan, *supra* note 137, at 335 (explaining that *zakat* is the sharing of wealth for the good of all).

144. International Covenant on Economic, Social and Cultural Rights art. 11 [hereinafter ICESCR]. *See* Rocio Romero, *On the Enforcement and Realization of Economic, Social, and Cultural Rights in Latin America and the Caribbean*, 2 YALE H.R. & DEV. L.J. 215, 218 (1999) ("ESCR set the minimum standards that the State must meet in economic and social terms to guarantee the functioning of a just society and to legitimate its own existence."); Victor M. Uribe, *Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice*, 19 HOUS. J. INT'L L. 375, 391 (1997) (discussing that aliens and nationals are entitled to equal treatment under the laws of the host state); *see also* Prudence E. Taylor, *From Environmental to Ecological Human Rights: A New Dynamic in International Law?*, 10 GEO. INT'L ENVTL. L. REV. 309, 316 (1998) (describing that if such standards were breached it became a matter of legitimate international concern).

145. *See* Beth Stephens, *Conceptualizing Violence: Present and Future Developments in International Law: Human Rights and Civil Wrongs at Home and Abroad: Old Problems and New Paradigms: Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?*, 60 ALB. L. REV. 579, 579 (1997) (stating "enforcement of these international rules is left to those States directly affected. . . . In addition, States are free in their domestic legal systems to impose tort liability on those who have violated international criminal or civil norms. . . . The need to invoke international law to address 'domestic' violence implies a breakdown of domestic legal remedies."); Steven R. Ratner, *The Schizophrenias of International Criminal Law,* 33 TEX. INT'L L.J. 237, 250 (1998) (explaining international criminal law by no means "incorporates" all— or even most—humanitarian or human rights law). *See generally* Dorothy Q. Thomas, *Symposium on Reconceptualizing Violence Against Women by Intimate Partners: Critical Issues: Domestic Violence as a Human Rights Issue*, 58 ALB. L. REV. 1119, 1120 (1995) (discussing the aim of the human rights movement as to enforce states' obligations in this regard by denouncing violations of their duties under international law).

brigandage are crimes in every civilized society.[146] In fact, for the state to tolerate them would run afoul of human rights norms which declare that no one should be deprived of his property without due process of law.

Use of Alcohol: Drinking alcohol is forbidden by the Qur'an[147] and is punishable by eighty lashes.[148] The specific offense is actually consuming the beverage, not for being discovered drunk.[149]

Human rights law does not encompass the use of controlled substances. The Islamic ban on alcohol is little different from the ban on other controlled substances. However, international norms frown on any corporal punishment, and the severity of the *hadd* penalty places it in the category of cruel, inhumane, or degrading punishment, if not torture.

Defamation: The Qur'an prescribes eighty lashes for those convicted of making false accusations of adultery or fornication.[150] Therefore, anyone who cannot bring four witnesses to tes-

146. *See generally* Michael E. Tigar, *The Right of Property and the Law of Theft*, 62 TEX. L. REV. 1443 (1984) (discussing the right to one's own property as fundamental to every society); Stephen F. Grover, *The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study*, 70 TEX. L. REV. 1431 (1992) (explaining the international problem of art theft); *but see* Randy Gidseg, *Intellectual Property Crimes*, 36 AM. CRIM. L. REV. 835, 836 (1999) (stating "because of increased technological complexity, delays in civil litigation, and advances in computer technology, all of which permit thieves to profit more rapidly from trade secrets, traditional remedies, such as injunctions and civil damages, have become ineffective.").

147. *See* Carolyn Ratner, Book Review, *Islamic Laws as Violations of Human Rights in the Sudan: God has Ninety-Nine Names,* 18 B.C. THIRD WORLD L.J. 137, 141 (1998) (discussing the Koran's prohibition of drinking alcohol because of its moral consequences); Kimberly Younce Schooley, *Cultural Sovereignty, Islam, and Human Rights—Toward a Communitarian Revision,* 25 CUMB. L. REV. 651, 662 (1994) (explaining that under Islamic principles drinking alcohol and gambling are condemned activities); Arzt, *supra* note 139, at 374 (describing the consumption of alcohol as a hudad offense against God).

148. *See* Lino J. Lauro and Peter A. Samuelson, *supra* note 143, at 188 (discussing the punishment of eighty lashes given to a bishop to demonstrate the regime's power); *see also* Julie Dror Chadbourne, *Never Wear Your Shoes After Midnight: Legal Trends Under the Pakistan Zina Ordinance*, 17 WIS. INT'L L.J. 179, 185 (1999) ("Stripes are lashes or strokes in whipping. Although the Ordinance still includes this as punishment, in fact, whipping as a sentence was abolished in the Pakistani criminal system in 1996."); *but see* Kent Benedict Gravelle, *Islamic Law in Sudan: A Comparative Analysis*, 5 ILSA J. INT'L & COMP L. 1, 29 (1998) (explaining that the punishment for consuming or brewing alcohol in Sudan is forty lashes).

149. *See* Donna E. Arzt, *Heroes or Heretics: Religious Dissidents Under Islamic Law,* 14 WIS. INT'L L.J. 349, 383 (1996) (explaining there is a difference between actually consuming alcohol and being intoxicated with regard to the law); Ratner, *supra* note 147, at 141 (describing the offense designated in the Koran as "drinking alcohol"); Lino J. Lauro and Peter A. Samuelson, *supra* note 143, at 81 (stating that the Penal code of most Islamic countries "makes it an offense if anyone 'drinks alcohol and thereby provokes the feelings of others or causes annoyance.'" Reports indicate that persons with alcohol on their breath are immediately arrested, regardless of the annoyance requirement.).

150. *See* Surah XXIV 4; *see also* Gravelle, *supra* note 148, at 15.

> People rarely bring accusations of fornication because if the accuser does not bring forth four male witnesses, the accuser himself is guilty of the second Hudad crime, false accusation of fornication, and is subjected to eighty lashes. The Qu'ran states, "[a]nd those who accuse honorable women but bring not four witnesses, scourge them with eighty stripes."

See also Asifa Quraishi, *Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective*, 18 MICH. J. INT'L L. 287, 293 (1997) (discussing that if one defames a chaste woman falsely they shall be subject to eighty lashes as punishment); Julie Dror Chadbourne, *Never Wear Your Shoes After Midnight: Legal Trends Under the Pakistan Zina Ordinance*, 17 WIS. INT'L L.J. 179, 184 (1999) (explaining that the crime for false accusations of adultery or fornication is known as *qazf*).

tify to the crime would refrain from making the accusation, since he would be liable for this punishment.

International human rights law does not treat this subject. Domestic legislation is the appropriate means to enact civil or criminal penalties for slander, libel, and perjury.[151] For any system of justice to work, it is necessary that innocence be presumed and guilt established only upon reliable testimony.[152] Viewed as perjury rather than mere slander, it is highly reasonable that falsely accusing an innocent party of a serious crime is itself an offense to be punished by the state.[153] Accordingly, the Islamic criminalizing of defamation does not run afoul of international norms.

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151. *See* Michael H. Posner and Peter J. Spiro, *The Ratification of the International Covenant on Civil and Political Rights: Article: Adding Teeth to United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993*, 42 DEPAUL L. REV. 1209, 1227 (1993)

> Through operation of the normal legislative process, the International Human Rights Conformity Act of 1993 will eliminate such disparities between U.S. and international law as will result from entrenchment of these conditions. Indeed, in assuming the form of domestic legislation, the draft Act presents an excellent opportunity to raise national consciousness of our failure to fully comply with prevailing international standards and to cement a natural and powerful alliance between domestic and international human rights advocacy groups.

Id. Thomas David Jones, *Human Rights: Freedom of Expression and Group Defamation Under British, Canadian, Indian, Nigerian and United States Law—A Comparative Analysis*, 18 SUFFOLK TRANSNAT'L L. REV. 427, 477 (1995) (discussing that domestic statutes are applied when there is libel of an ethnic minority); Sarah Obaditch Kambour, *Constitutional Law—First Amendment Jurisprudence in Great Britain—A Local Authority Is not Entitled to Maintain an Action for Damages in Libel Against a Publication Where the Publication Addressed the Propriety of Actions Taken by the Authority in the Course of its Governmental and Administrative Function*, 24 SETON HALL L. REV. 1549, 1551 (1994) (explaining that to comply with the European Convention, states may incorporate the rights under that treaty into their domestic laws).

152. *See* Thomas Swenson, *The German "Plea Bargaining" Debate,* 7 PACE INT'L L. REV. 373, 406 (1995) (illustrating that the presumption of innocence is integral to German law); William S. Laufer, *The Rhetoric of Innocence,* 70 WASH. L. REV. 329, 333 (1995) ("Without divine judgments, the law must presume goodness, honesty, and duty. A mere accusation could not amount to a presumption of guilt."); Gregory W. O'Reilly, *Federal Jurisdiction and Procedure*, 107 HARV. L. REV. 254, 278 (1993) (discussing that in the United States there must be proof of guilt beyond a reasonable doubt for capital punishment).

153. *See* Johnson v. State, 632 A.2d 152, 155 (MD 1993) (applying Md. Ann. Code art. 27, 461A(a)(4) (1992) which allows for the defendant's right to inquire into the bias or prejudice of the victim regarding the complainant's motive for making a false accusation); *see also* David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1029 (1990) (discussing false accusations of rape as a crime); Captain David C. Rodearmel, *Military Law in Communist China: Development, Structure and Function*, 119 MIL. L. REV. 1, 31 (1988) (describing false accusations of crime as being severely discouraged in the military).

Some Options for Dealing with *Hudad* Offenses in a Modern Islamic State

Separation of "mosque and state": Despite the historic intertwining of the Islamic faith and the Islamic state, some Muslim thinkers are willing to consider the possibility of secularizing the state, leaving the practice of religion to its adherents.[154] Ishtiaq Ahmed states:

> As far as I understand, constitutionalism and universal human rights cannot be harmonized with a state based on religious public law, because it inescapably includes a religious basis of identification between state and individual, thus creating a basis for discrimination on such grounds. But for a state based on secularism, constitutionalism and universal human rights respect for religion is intrinsic to the idea of inalienable individual autonomy.[155]

Professor Ahmed reminds the reader that the framers of the U.S. Constitution chose a secularized form of government precisely because they wanted a state influenced by Christian principles which they thought would be impossible if a state-sponsored Christianity was "corrupted by power politics."[156] Furthermore, Islamic legal obligations are binding on all Muslims everywhere.[157] A devout Muslim who knows that the *shari'a* forbids the consumption of alcohol

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154. *See* Patrick R. Hugg, *The Republic Of Turkey In Europe: Reconsidering The Luxembourg Exclusion*, 23 FORDHAM INT'L L.J. 606, 625-27 (2000) (describing Turkey, a secular Islamic state, as a stable country in a volatile region); IAN O. LESSER, BRIDGE OR BARRIER? TURKEY AND THE WEST AFTER THE COLD WAR, IN TURKEY'S NEW GEOPOLITICS: FROM THE BALKANS TO WESTERN CHINA xii (Graham Fuller & Ian Lesser eds. 1993).

155. Ishtiaq Ahmed, *Abdullahi An-Na'im on Constitutional and Human Rights Issues*, in ISLAMIC LAW REFORM AND HUMAN RIGHTS 71 (1993). *See generally* David A.J. Richards, *Symposium on Taking Legal Argument Seriously: Constitutional Legitimacy, The Principle of Free Speech, and the Politics of Identity*, 74 CHI.-KENT. L. REV. 779, 786 (1999) (discussing the Constitution as guaranteeing human rights); *but see* Michael G. Weisberg, *Balancing Cultural Integrity Against Individual Liberty: Civil Court Review of Ecclesiastical Judgments*, 25 U. MICH. J.L. REF. 955, 961 (1992) ("Religious groups may see their own law as equal or superior to secular law and may view religious and secular law as competing against each other.").

156. *See* Ishtiaq Ahmed, *supra* note 155, at 71; Michael J. Baxter, *"Overall, the First Amendment Has Been Very Good for Christianity"—Not!: A Response to Dyson's Rebuke*, 43 DEPAUL L. REV. 425, 436 (1994) (discussing that a corrupt dichotomy existed in ecclesiastical practices which included politics that supported ideas of slavery); *see also* Jean Bethke Elshtain, *How Should We Talk?*, 49 CASE W. RES. 731, 734 (1999) (describing Christian politics as not civilly practical because positions advanced from this doctrine are directly Biblically enjoined and inspired).

157. *See, e.g.*, EGYPT CONST. pt. 1, art. II ("Islam is the religion of the state. . . . Islamic jurisprudence is the principal source of legislation."); IRAN CONST. ch. 1, arts. 1, 2 ("The form of government of Iran is that of an Islamic Republic, endorsed by the people of Iran on the basis of their longstanding belief in the sovereignty of truth and *Qur'anic* justice. . . . The Islamic Republic is a system based on belief in: [1] the One God . . . , His exclusive sovereignty and the right to legislate, . . . [2] Divine revelation and its fundamental role in setting forth the laws."); SYRIA CONST. ch. 1, pt. 1, art. 3(2) ("Islamic Jurisprudence is a main source of legislation"); KUWAIT CONST. pt. 1, art. 2 ("The religion of the State is Islam, and the Islamic *Sharia* shall be a main source of legislation."); SUDAN CONST. pt. 1, § 4 ("The Islamic *Sharia* and custom shall be the main sources of legislation."); U.A.E. CONST. ch. 1, art. 7 ("The Islamic *Shari'a* shall be a principal source of legislation in the Union."); YEMEN CONST. § 1, art. 3 ("The Islamic *Shari'a* [jurisprudence] shall be the source of all legislations.").

Although Saudi Arabia, like the United Kingdom, has no written constitution, the Saudi government and people unquestionably consider the *Shari'a* to be the fundamental law of the land. *See* SAUDI ARABIA, BASIC LAW, ch. 1, art. 1 (issued by King Fahd ibn Abdulaziz on March 1, 1992, and *cited in* XVI CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 41, 44 (Albert P. Blaustein & Gisbert H. Flanz eds., 1997) ("The Kingdom of Saudi Arabia is an Arab and Islamic Sovereign State. Its religion is Islam and its Constitution the *Holy Qur'an* and the *Prophet's Sunnah*.")).

and specifies flogging as the appropriate punishment for its infraction will not drink, whether he lives in Riyadh or in Brooklyn.[158]

Reasoning (Ijtihad) and Analogy (Qiyas): During his lifetime, Mohammed administered the criminal laws. Following his death, each of the early Caliphs continued to judge cases and hand down sentences based on the Qur'an and Sunna.[159] Throughout the years immediately after the Prophet's death, it became apparent that not every matter that came before the court had a literal answer in these authorities. Therefore, the Caliphs and Muslim jurists developed a body of law based on their own reasoning.[160] This process was known as *ijtihad*.[161] Perhaps the most important aspect of *ijtihad* was *qiyas*, which means reasoning by analogy.[162] Anticipating the U.S. Supreme Court by centuries, it was thus "the province and duty" of judges "to say

158. *See* AKBAR S. AHMED, LIVING ISLAM 110-11 (1994); Fitnat Naa-Adjeley Adjetey, *Religious & Cultural Rights: Reclaiming The African Woman's Individuality: The Struggle Between Women's Reproductive Autonomy And African Society And Culture*, 44 AM. U.L. REV. 1351, 1369 (1995) (stating the compulsory nature of Islamic Law regardless of locality).

159. *See* MAJID KHADDURI, THE ISLAMIC THEORY OF INTERNATIONAL RELATIONS AND ITS CONTEMPORARY RELEVANCE, IN ISLAM AND INTERNATIONAL RELATIONS 24, 31-32 (1965) (describing Caliph's authority in an Islamic State); *see also* Alison E. Graves, *Women in Iran: Obstacles to Human Rights and Possible Solutions*, 5 AM. U. J. GENDER & LAW 57, 65 (1996) (discussing that the Caliphs were appointed after the death of Muhammad by his wife and daughter); Kimberly Younce Schooley, *Cultural Sovereignty, Islam, and Human Rights—Toward a Communitarian Revision,* 25 CUMB. L. REV. 651, 666 (1994) (explaining that judges are appointed by the Caliph, who are not authorized to interpret the law but to apply the law developed by jurists).

160. *See* Christopher A. Ford, *Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis*, 30 TEX. INT'L L.J. 499, 525 (1995) (stating the justification for the Caliph's position being the presumption they possessed "keen piety and . . . [were] ideally qualified for their office"); NOEL J. COULSON, A HISTORY OF ISLAMIC LAW 129 (1964) (same); Joelle Entelis, Note, *International Human Rights: Islam's Friend Or Foe?*, 20 FORDHAM INT'L L.J. 1251, 1263 (1997) (describing the limitation of the literal words of the *Holy Qur'an* as a body of law).

161. *See* Mohammad Hashim Kamali, *Appellate Review and Judicial Independence in Islamic Law, in* ISLAM AND PUBLIC LAW 50 (1993); *see also* Urfan Khaliq, *Beyond the Veil?; An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah*, 2 BUFF. J. INT'L L. 1, 11 (1995) (stating that *ijtihad* literally means an effort or exercise to arrive at one's own judgment); T.S. Twibell, *Implementation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) Under Shari'a (Islamic Law): Will Article 78 of the CISG be Enforced When the Forum is in an Islamic State?*, 9 INT'L LEGAL PERSP. 25, 61 (1997) (discussing that *ijtihad,* the science of interpretation and rule-making, is based on the principle that if the *Sunnah* and *Qur'an* are silent on an issue, local custom and scholarly opinion may be used as long as they are consistent with the *Qur'an* and the *Sunnah*); Azizah al-Hibri, *Redefining Muslim Women's Rights*, 12 AM. U.J. INT'L L. & POL'Y 1, 5 (1997) (describing *ijtihad* as a science of interpretation used according to local custom).

162. *See* Kamali, *supra* note 161, at 72; *see also* Bernard K. Freamon, *Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence*, 11 HARV. HUM. RTS. J. 1, 14 (1998) (defining qiyas as "analogical reasoning"); Khaliq, *supra* note 161, at 12 (stating that qiya "means analogy or analogical deduction"); John Entelis, *International Human Rights: Islam's Friend or Foe?*, 20 FORDHAM INT'L L.J. 1251, 1257 (1997) (defining qiyas as a way to interpret the Qur'an).

what the law is."[163] However, after several centuries, Sunni Islam "closed the door of *ijtihad*" because it was believed that virtually all questions had been resolved.[164]

Islamic society had indeed undergone numerous changes in its first 300 years, as converts were made in diverse and far-flung regions ranging from India to Southern Europe and Northern Africa and as many segments of Muslim life became more urbanized.[165] The past 150 years have been a time of extraordinary change for the entire world and for Muslim societies. The rise of the nation-state, industrialization and technology, numerous wars, a broad recognition for the first time in history that women and men have equal abilities in many areas, new advances in medicine and psychology, and vast wealth are only the most obvious changes.[166] Perhaps it is time to recognize that "re-opening" the *ijtihad* process to deal with these amazing developments need not mean a repudiation of the work of past jurists, but an opportunity to answer important questions that the medieval *mujtahid* could not have imagined.[167] There are examples of cases, which arose as early as under the Second Caliph, Umar b. al-Khattab, demonstrating that similar cases of the same period nonetheless resulted in different outcomes according to the *ijtihad* of the particular judge.[168] The Caliph himself decided two nearly iden-

163. James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219, 249 (1992) (describing the Supreme Court's judicial authority to review legislative action and determine its constitutionality). *See* Marbury v. Madison, 5 U.S. 137 (1803); *see also* Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 447 (1989) (discussing the power of the Supreme Court to review the legality of actions or inactions by the executive branch).

164. *See* T.S. Twibell, *Implementation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) Under Shari'a (Islamic Law): Will Article 78 of the CISG be Enforced When the Forum is in an Islamic State?,* 9 INT'L LEGAL PERSP. 25, 61 (1997) (stating that Sunni Islam schools closed off the formation of the Ijtihad over 150 years ago); Khaliq, *supra* note 161, at 11 (discussing that the closure of ijtihad was based on political reasons); Leila P. Sayeh and Adriaen M. Morse Jr., *Islam and the Treatment of Women: An Incomplete Understanding of Gradualism*, 30 TEX. INT'L L.J. 311, 318 (1995) ("Finally, in the tenth century, the religious leadership of the Sunni decided that henceforth only the accepted schools of interpretation would delineate the meaning of the Qur'an and the Hadith based on their earlier ijtihad. This is known as the closing of the door of ijtihad.").

165. *See* F.E. PETERS, ALLAH'S COMMONWEALTH 126 (1973); ALBERT HOURANI, A HISTORY OF THE ARAB PEOPLES 55 (1991); WORLD RELIGIONS 475-76 (Geoffrey Parrinder ed., 1983).

166. *See* AKBAR S. AHMED, LIVING ISLAM 139-40 (1994); F.E. PETERS, ALLAH'S COMMONWEALTH 373-96 (1973); ALBERT HOURANI, A HISTORY OF THE ARAB PEOPLES 112 (1991); Azizah al-Hibri, *Islam, Law And Custom: Redefining Muslim Women's Rights*, 12 AM. U.J. INT'L L. & POL'Y 1, 44 (1997) ("A good Muslim must strive to achieve the ideals of Islam which include the Principle of Equality.").

167. *See* Christopher A. Ford, *Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis*, 30 TEX. INT'L L.J. 499, 532-3 (1995) ("Revivalist Islam is abandoning the traditional docility of the *mujtahids* . . . reject[ing] the medieval jurists' preference for order-at-any-price in favor of a radically new ethic of Islamic revolution: It revives the doctrine of *jihad*, casting it as a 'call to justice' that hopes to restore sanctity to power even if this means destroying the authority which previous generations of jurists devoted their careers to upholding."); PANAYIOTIS J. VATIKIOTIS, ISLAM AND THE STATE 58, 65-67 (1987); BRUCE LAWRENCE, HOLY WAR (JIHAD) IN ISLAMIC RELIGION AND NATION-STATE IDEOLOGIES, IN JUST WAR AND JIHAD 147 (John Kelsay & James T. Johnson eds., 1991) (discussing *Shi'ite* "call to justice" of *jihad*).

168. *See* Abu Muhammad 'Abdallah b. Qudama al-Maqdisi, AL-MUGHNI VI (Riyad) 180, *quoted in* Mohammad Hashim Kamali, *Appellate Review and Judicial Independence in Islamic Law*, *in* ISLAM AND PUBLIC LAW 50, 52 (Chibli Mallat, ed. 1981).

tical cases with contrary results.[169] When the losers in the first case questioned the second decision, the Caliph replied "that was our judgment then and this is what we adjudicate now."[170] In fact, the Prophet himself admitted that he was a human being who could indeed make an error in adjudication.[171] For crimes which are not subject to *hudad* penalties, this would be particularly appropriate. However, it is also possible to think of instances where reasoning could be applied to these crimes as well.[172] For example, the thief who steals food is not subject to amputation.[173] Perhaps this could be extended to the thief who, while not literally starving, lives in poverty in a society where the majority of the wealth is concentrated in the hands of a privileged minority. Account could be taken of a psychological disorder, such as compulsive theft or lying, before deciding that *hudad* penalties were called for, especially since the option of *tazir* punishments and civil remedies is not foreclosed.[174] The mentally disabled are exempt from

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169. *See* ALBERT HOURANI, A HISTORY OF THE ARAB PEOPLES 68 (1991); Zainab Chaudhry, *The Myth of Misogyny: A Reanalysis of Women's Inheritance In Islamic Law*, 61 ALB. L. REV. 511, 520 (1997) (defining *ijtihad* as the independent reasoning used to interpret and discover Islamic laws from religious texts); *see also* Khaliq, *supra* note 161, at 11 (stating *ijtihad* literally means an effort or an exercise to arrive at one's own judgment); M. Cherif Bassiouni, *Protection Of Diplomats Under Islamic Law*, 74 AM. J. INT'L L. 609, 617 (1980) (stating that "the Sunnis have not relied on *ijtihad* since the ninth century").

170. Abu Muhammad, *supra* note 168, at 52; *see* Mohammad Hashim Kamali, *Appellate Review and Judicial Independence in Islamic Law*, *in* ISLAM AND PUBLIC LAW 52 (Chibli Mallat, ed. 1993) (quoting Abu Muhammad 'Abdallah b. Qudama al-Maqdisi, AL-MUGHNI (Riyadh), 1981, VI 180).

171. *See* Kamali, *supra* note 170, at 64.

172. *See* Steven D. Jamar, *The Protection of Intellectual Property Under Islamic Law*, 21 CAP. U. L. REV. 1079, 1085 (1992) (describing the varying degree of penalties for thieves:

> Islamic law did recognize that physical property on one hand and ideas on the other are conceptually separable, at least in the context of the *huhad*, the amputation of the hand of a thief, under certain limited circumstances, for things of certain minimum monetary value. For example, the *Hedaya* provided that one does not amputate the hand of a thief for stealing a book because the thief's intention is not to steal the book as paper, but the *ideas in the book*, which was not tangible property. However, the same source notes that stealing a book of accounts is "appreciable" property, and not just the paper and materials which make up the book. It must be noted that this particular rule is not *Qur'anic*, does not come from the traditions, is not based on consensus, and is not from the *qiyas* type of reasoning. That is, this rule comes from a commentary on the law written by a prominent jurist.) (emphasis added).

William F. Schulz, Essay, *Terror, Torment, And Tyranny: The State Of Human Rights Today*, 12 EMORY INT'L L. REV. 1255, 1266-67 (1998) (stating the objective behind amputating a thief's hands); *Amputations, Floggings Still Used; Sixteen Nations Employ Corporal Punishment to Enforce Law, Group Says*, ROCKY MTN. NEWS, May 1, 1994, at 82A.

173. *See* Schulz, *supra* note 172, at 1266-67 (stating the objective behind amputating a thief's hands); *Amputations, Floggings Still Used; Sixteen Nations Employ Corporal Punishment to Enforce Law, Group Says*, ROCKY MTN. NEWS, May 1, 1994, at 82A; Jamar, *supra* note 172, at 1085 (describing the varying degree of penalties for thieves).

174. *See* Kent Benedict Gravelle, *Islamic Law In Sudan: A Comparative Analysis*, 5 ILSA J. INT'L & COMP. L. 1 (1998) (stating "there are six *Hudad* crimes. They are: 1) fornication and false accusation of fornication; 2) drinking alcoholic beverages; 3) theft; 4) brigandage or highway robbery; 5) apostasy; and 6) rebellion or transgression against the legitimate authority."); Rose Marie Karadsheh, *Creating an International Criminal Court: Confronting the Conflicting Criminal Procedures of Iran and the United States*, 14 DICK. J. INT'L L. 243, 267 (1996) (stating *Hudad* crimes are acts prohibited by God); M.M. Slaughter, *The Salman Rushdie Affair: Apostasy, Honor, and Freedom of Speech*, 79 VA. L. REV. 153, 179 (1993) (stating *Hudad* crimes are crimes against God carrying mandatory sentences as opposed to *tazir* crimes which require discretionary punishment); Rudolf Peters, *Valuing Life: Equality and Equivalence of Human Beings in Islamic Criminal Law*, Lecture at The Netherlands Institute, Cairo, Egypt (Feb. 8, 1996) (stating that death for the taking of a life is accepted as a legitimate punishment in an Islamic legal system). *See generally* Anthony Chase, *Legal Guardians: Islamic Law, International Law, Human Rights Law, and the Salman Rushdie Affair*, 11 AM. U. J. INT'L L. & POL'Y 375, 397 (1996) (describing *tazir* crimes as crimes generally carrying lesser penalties).

responsibility for violating these laws.[175] If alcoholism is a disease, punishment for the crime of drinking should be suspended conditioned on the convict seeking treatment for his illness. Likewise, children are not to receive the *hudad* penalties, but some Islamic law schools rule that puberty begins as young as age nine.[176] Modern psychology, however, suggests that puberty itself is not the onset of adulthood, but an intermediate phase in human development.[177] Therefore, it is plausible to decide that these penalties are only applicable to adults, not just inapplicable to children.[178] This could spare teenagers who violate the law from the most severe penalties.

Shi'i Islam, which follows a line of succession from the family of the Prophet rather than Sunni acceptance of the authority of the Caliphs, is better suited for flexibility in deciding legal issues.[179] The main branch, Twelver Shi'ism, believed there were 12 imams who were the direct descendants of Mohammed and succeeded him as the true Caliph.[180] The last disappeared while a child and is known as the "hidden Imam" who will eventually return to rule the Islamic world.[181] During the occultation of the Twelfth Imam, the people are to be guided by mullahs who are empowered to interpret the laws.[182] If they chose to engage in modern *ijtihad* to resolve conflicts between traditional Islamic law and international human rights, the prominent Shi'i clerics in Iran may be a positive force for safeguarding human rights in that country and an example to other Muslim governments. Former Iranian President Rafsanjani declared that stoning is not an appropriate punishment and is generally only imposed by tasteless judges.[183] This could be an isolated remark, it could also be a first step toward a revival of Shi'i *ijtihad* in this area.

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175. *See* Muhammad Salim al-'Aawwa, *The Basis of Islamic Penal Legislation*, *in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM, 127, 127-29 (M. Cherif Bassiouni ed., 1982); ANN E. MAYER, ISLAM AND HUMAN RIGHTS: TRADITION & POLITICS 113, 136 (1991); MOHAMMAD H. KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 366-392 (1991).

176. For a further discussion of the six hudad crimes and their penalties, *see* Gravelle, *supra* note 174 (discussing the drinking of alcoholic beverages and the consequences of such action for both Muslims and non-Muslims); *see also* Julie Dior Chadbourne, *Never Wear Your Shoes After Midnight: Legal Trends Under the Pakistan Zina Ordinance*, 17 WIS. INT'L L.J. 179, 247-50 (1999) (discussing puberty and the ages at which both male and female are considered adult within the Islamic society); Kimberley Younce Schooley, *Cultural Sovereignty, Islam, and Human Rights—Toward a Communitarian Revision*, 25 CUMB. L. REV. 651, 679 (1999) (discussing puberty as it relates to children in the Islamic community and the differences in the ages of attaining adulthood).

177. *See* KEITH HODKINSON, MUSLIM FAMILY LAW: A SOURCEBOOK 1 (1984); CAROLYN FLUEHR-LOBBAN, ISLAMIC LAW AND SOCIETY IN THE SUDAN 50 (1987); *see also* Tamilla F. Ghodsi, *Tying a Slipknot: Temporary Marriages in Iran*, 15 MICH. J. INT'L L. 645, 673 n.154 (1994).

178. *See id.*

179. *See id.*

180. *See id.*

181. *See id.*

182. *See* RUQAIYYAH MAQSOOD, ISLAM 24-25 (1994); *see also* ALBERT HOURANI, A HISTORY OF THE ARAB PEOPLES 61 (1991); F.E. PETERS, ALLAH'S COMMONWEALTH 576 (1973); AKBAR S. AHMED, LIVING ISLAM 53 (1994).

183. *See* DARIUS M. REJALI, TORTURE AND MODERNITY: SELF, SOCIETY, AND STATE IN MODERN IRAN 124 (1994); *see also* Chase, *supra* note 174, at 388 (noting Rafsanjani's push towards modernization of human rights in Iran); *but see* Ghodsi, *supra* note 177, at 674 (noting that stoning is still one of the maximum penalties that exists under present Islamic regimes and for certain crimes stoning is still implemented).

Public Policy (Maslaha): Another aspect of *ijtihad* was reasoning based on public policy. Islam exists in order to promote good and avert evil.[184] When engaging in *ijtihad*, the early jurists took account of the result their judgments would have on the public interest.[185] The Hanbali jurist Najm al-Din al-Tawfi argued that if *maslaha* conflicted with a textual source, *maslaha* should take precedence because ensuring the public good is the ultimate purpose of Islamic law![186] This view has been echoed in the modern era by Muhammad Bin Ashur, a Tunisian imam, who suggested that the public interest is the primary purpose of legislation and should therefore be the basis for all legal decisions.[187] The likelihood of adopting such a radical thinking may be slight, but it is heartening that there have been devout and learned Muslims who believed that the interpretation of immutable Divine law need not be inconsistent with the changes in Islamic and world society.

Consensus of jurists (Ijma): "The state, whether it is controlled by a Caliph, an Imam, an Amir or a Sultan, has always aimed to gain the support of the *ulama* as a legitimizing body representing religious authority."[188] In many parts of the Muslim world, the government has hijacked this process by first deciding its own policies and then according *ulama* status only to those jurists who agree.[189] Yet there is no theological reason why Muslim scholars who hold minority views should not be included in formulating a consensus. The vitality of the Islamic

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184. *See* WORLD RELIGIONS 462 (Geoffrey Parrinder ed., 1983); SUBHI MAHMASSANI, THE PHILOSOPHY OF JURISPRUDENCE IN ISLAM 71 (Farhat J. Ziadeh Trans., 1987). For an extensive analysis of the *ijtihad,* see Bernard Weiss, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 AM. J. COMP. L. 199 (1978) (discussing the history of the *ijtihad* in the Islamic culture).

185. *See* ALBERT HOURANI, A HISTORY OF THE ARAB PEOPLES 68 (1991); Zainab Chaudhry, *The Myth of Misogyny: A Reanalysis of Women's Inheritance in Islamic Law*, 61 ALB. L. REV. 511, 520 (1997) (defining *ijtihad* as the independent reasoning used to interpret and discover Islamic laws from religious texts); Urfan Khaliq, *Beyond The Veil?: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah*, 2 BUFF. JOUR. INT'L L. 1, 11 (1995) (stating *ijtihad* literally means an effort or an exercise to arrive at one's own judgment); *but see* M. Cherif Bassiouni, *Protection of Diplomats Under Islamic Law*, 74 AM. J. INT'L L. 609, 617 (1980) (stating that "the Sunnis have not relied on *ijtihad* since the ninth century").

186. *See* MAJID KHADDURI, THE ISLAMIC CONCEPTION OF JUSTICE 137 (1984); *see also* RUQIYYAH WARIS MAQSOOD, ISLAM 11-20 (1994); *but see* Khaled Abou El Fadl, *The Religious Voices in the Public Square: Muslim Minorities and Self-Restraint in Liberal Democracies*, 29 LOY. L.A. L. REV. 1525, 1527-28 (1996) (discussing the tension that exists between the individual Muslim and the communal understanding of what is good and what is bad).

187. *See* KHADDURI, *supra* note 186, at 138; *but see* Bassiouni, *supra* note 185, at 617 (stating that "the Sunnis have not relied on *ijtihad* since the ninth century"); Azizah al-Hibri, *Islam, Law And Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L L. & POL'Y 1, 8 (1997) (stating that Tunisia itself has structured its code to the doctrine of *Takhayur*).

188. Mohammed Arkoun, *The Concept of "Islamic Reformation," in* ISLAMIC LAW REFORM AND HUMAN RIGHTS (Nordic Human Rights Publications ed., 1993); *see also* Anthony Chase, *Legal Guardians: Islamic Law, International Law, Human Rights Law, and the Salman Rushdie Affair*, 11 AM. U. J. INT'L L. & POL'Y 375, 385 (1996) (recognizing *ulama* as scholars or authorities in the religious sciences); Tayyab Mahmud, *Freedom of Religion & Religious Minorities in Pakistan: A Study of Judicial Practice*, 19 FORDHAM INT'L L.J. 40, 62 (1995) (describing *ulama* as religious scholars and preachers).

189. *See* Mahmud, *supra* note 188, at 55 (detailing growing tensions between the *ulama* and Western-educated politicians); Lino J. Lauro and Peter A. Samuelson, *Toward Pluralism in Sudan: A Traditionalist Approach*, 37 HARV. INT'L L.J. 65, 119 (1996) (stating many purists argue that the ulama have led the faithful astray); S.I. Strong, *Law and Religion in Israel and Iran: How the Integration of Secular and Spiritual Laws Affects Human Rights and the Potential for Violence*, 19 MICH. J. INT'L L. 109, 125 (1997) (stating that the following of the *ulama* differs within the various branches of Islam).

faith has been due at least in part to the existence of two main branches, four Sunni law schools, and various movements, especially Sufism.[190] While the tragic reality is that those who disagree with the majority have been persecuted and even killed by their opponents, the Islamic ideal is discourse and debate. If the arguments of liberal dissidents do not prevail, it should be because they are not persuasive, not because they have been silenced.

Support of the people: Abdullahi An-Na'im suggests that the word *Umma* should be redefined to include all citizens of a Muslim state as equal members of the community.[191] While Islam distinguishes between persons based on status—Muslim and non-believer, male and female, adult and child, slave and free person—the ideal expressed in the Qur'an is of a single community.[192] The fact is that throughout the Muslim world the ordinary people *are* speaking out in support of human rights and in condemnation of oppression. The Tunisian Human Rights League has produced a charter adapted from the UDHR to reflect Islamic culture and the commitment of individual members rather than state parties.[193] A group of Saudi conserva-

190. *See* MAQSOOD, *supra* note 182, at 117-22; MARTIN LINGS, WHAT IS SUFISM? (1975); REYNOLD A. NICHOLSON, THE MYSTICS OF ISLAM: AN INTRODUCTION TO SUFISM (1975); *see also* Mark Cammack, Lawrence A. Young & Tim Heaton, *Indonesia's Marriage Law: Legislating Social Change in an Islamic Society–Indonesia's Marriage Law,* 44 AM. J. COMP. L. 45, 47 (1996) (stating that Sufism "emphasizes interior religious states and direct personal experience of God over conformance to external behavioral rules").

191. *See* Ishtiaq Ahmed, *Abdullahi An-Na'im on Constitutional and Human Rights Issues*, *in* ISLAMIC LAW REFORM AND HUMAN RIGHTS 71 (Nordic Huamn Rights Publications ed., 1993); *see also* KHADDURI, *supra* note 186, at 46 (noting that originally, since Muhammad superseded the teachings of all previous prophets, an 'umma' (or community) had been created which was defined solely and exclusively by belief, and in which all other loyalties—tribal, racial, class, territorial, sexual, and cultural—were replaced by common Islamic brotherhood); *see also* Christopher A. Ford, *Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis*, 30 TEX. INT'L L.J. 499, 510-512 (1995) (outlining an historical account of the fragmentation of the umma and its effect on the Muslim state from a universal to national perspective).

192. *See* RUQAIYYAH MAQSOOD, ISLAM 132 (Surah 49:10) (NTC Pub. Group ed., 1994) (stating "[b]elievers are a single Ummah, so make peace and reconciliation, and fear Allah, that you may receive mercy."); *see also* KHADDURI, *supra* note 186, at 46, 51 (1979) (quoting The Holy Qur'an XI:120 and stating that the fundamental unity of all believers in Islam is grounded clearly in the Qur'an which asserts that "had thy Lord pleased, He would have made mankind one nation; but those only to whom thy Lord hath granted His mercy will cease to differ."); Fred M. Donner, *The Sources of Islamic Conceptions of War, in* JUST WAR AND JIHAD 31, 51 (John Kelsay & James T. Johnson eds., 1991) (noting that Islamic jurisprudence presupposed both religious and political monism; that is "the Islamic community is or should be, not only a religious unity but also a political unity, governed by a single Islamic government headed by the caliph (khalifa) or iman.").

193. *See* KEVIN DWYER, ARAB VOICES: THE HUMAN RIGHTS DEBATE IN THE MIDDLE EAST 165-181 (1991); *see also* A. Yasmine Rassam, Book Review, *Islam & Justice: Debating the Future of Human Rights in the Middle East and North Africa,* 10 PACE INT'L L. REV. 187, 191 (1998) (discussing the tensions that exist between Islamic law and international civil and political rights; focusing on the debate between "Islamist[s] and secularist[s] living in the Middle East); Charles J. Adams, *Maududi and the Islamic State, in* VOICES OF RESURGENT ISLAM 99, 113-14 (John L. Esposito ed., 1983) (describing the modernists' and secular modernists' theories in support of international human rights).

tives, including clergy, lawyers, and intellectuals, formed the Committee for the Defense of Legitimate Rights in May, 1993, only to be banned within two weeks by the government.[194] The Iranian Revolution was born of the struggle against the Shah's murderous regime. Recent elections in that country indicate that the reforms begun with the election of President Mohammed Khatemi in 1997 have gathered great popular support, including a commitment to the rule of law and more freedom of the press and political activity.[195] Millions may follow the admonition of the Prophet:

> He who amongst you sees something abominable should modify it with the help of his hand; and if he has not the strength to do that, then he should do it by word of mouth; and if has not the strength enough for that, then he should at least (abhor it) from his heart.[196]

If free discourse among all Muslims were encouraged, the *umma* might find ways to reconcile Islamic law with human rights.

Conclusion

Some scholars believe that Islam, at least as currently understood, will be unable to accommodate international human rights norms drawn from a Western heritage based on reason. Professor Bassam Tibi states that "[u]nless Muslims change their world-view" of a society based on responsibilities rather than rights, "and the cultural patterns and attitudes related to it, the conflict between Islamic human rights schemes and international human rights standards will

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194. *See* Ann E. Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?*, 15 MICH. J. INT'L L. 307, 365 (1994) (describing the shocking chain of events resulting in two lawyers being banned from practicing and four university professors and a civil servant being dismissed); *see also* Adib al-Jadir, *Forward to the Special Edition on Human Rights in the Arab World*, 9 J. ARAB AFF. 1, 2-3 (1990) (detailing the emergence of the Arab Organization for Human Rights (AOHR), founded in 1983, which continues to operate in the face of daunting obstacles, espousing human rights standards set forth in international law); *Saudi Rights Group Says It is Not Out to Stir Trouble*, Reuter Library Report, June 14, 1993, *available in* LEXIS-NEXIS Library, ALLWLD File (discussing the human rights committees' dissent from the official Saudi construct of Islam).

195. *See* Shaul Bakhash, *How the Good Guys Won In Iran*, THE WASHINGTON POST, February 27, 2000, at B1; *see also* R. Hrair Dekmejian, ISLAM IN REVOLUTION: FUNDAMENTALISM IN THE ARAB WORLD 163 (2d ed., 1995) (discussing historical events that led Muslim communities to venture outside their own sphere and have a significant impact on events in the non-Muslim world); HUMAN RIGHTS COUNTRY REPORTS, U.S. DEP'T OF STATE, IRAN REPORT ON HUMAN RIGHTS PRACTICES FOR 1996 (1997) (discussing the history and reformation of freedom of speech and press in the Islamic culture).

196. MAQSOOD, *supra* note 192, at 126. For a thorough treatment on the subject of Islamic Law, s*ee* ABDUR RAHAM DOI, SHARIAH: THE ISLAMIC LAW 45-63 (1984); *see also* Bernard K. Freamon, *Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence,* 11 HARV. RTS. J. 1, 19-20 (1998) (describing the *Sunnah* which "consists of the Prophet's (peace be upon him) statements and behavior ("doings and sayings") and his approval and disapproval of the statements and behavior of others that he observed during his lifetime.").

continue to prevail. . . . It is the conflict between a man-centered and a theocentric view of the world. . . . "[197]

Article 17 of the ICCPR provides that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."[198] Islamic law also places a high value on privacy. Legislation in the spirit of Islam could incorporate procedural means to safeguard individuals from state action such as illegal searches, thereby lowering the likelihood that individuals would be caught committing *zina* or drinking alcohol.

While cultures and societies vary, there will be some disagreement as to what constitutes human rights norms. Nonetheless, the reticence of some conservative Muslim scholars and officials to admit that religious values are being imposed on the criminal law may actually be a sign that they understand that their position is unacceptable in the international community. Acknowledging the conflict could open the door to a re-examination of the issues. Trying to obscure the differences between Islamic and international conceptions of human rights, however, will only lead to complacency by governments which are in violation, and confusion by those, in the Islamic and non-Muslim worlds alike, who would condemn such violations.

Human rights organizations should be aware of the difference between truly Islamic criminal justice and the actions of regimes which instead impose their own punishments. For example, post-revolutionary Iran executed large numbers of political opponents and common criminals, but the form of execution was generally by firing squad or hanging—two Western "innovations"—and not by beheading, crucifixion, or stoning.[199] Similarly, flogging has been administered not only to drunks, slanderers, and fornicators, but also to punish non-Qur'anic crimes such as driving without a license, or, for women, not being properly veiled.[200] The

197. Bassam Tibi, *Islamic Law/Shari'a, Human Rights and International Relations in* ISLAMIC LAW REFORM AND HUMAN RIGHTS: CHALLENGES AND REJOINDERS 87, 94-95 (Tore Linkholm & Kari Vogt eds. 1994). For a thorough examination of the conflict between Western reform of international human rights and Islamic culture and religion, *see* Mayer, *supra* note 194, at 309-21; *see also* BAGHDAD RAID SAID SIGN OF U.S. ARROGANCE, HYPOCRISY, MIDDLE EAST INTELLIGENCE REPORT, June 29, 1993, *available in* LEXIS-NEXIS Library, MDEAFR File (noting that U.S. tactics during and preceding the Persian Gulf War created a backlash, enflaming the conflict between international human rights standards and Islamic cultural norms).

198. *International Covenant on Civil and Political Rights,* G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966). *See* Interview with King Fahd, King of Saudi Arabia (Mar. 28, 1992), *quoted in Empty Reforms, Saudi Arabia's New Basic Laws,* MIDDLE EAST WATCH, May 1992, at 32 (describing widespread spying and surveillance by state security police and extensive intrusions of privacy by government agents); Mayer, *supra* note 194, at 344-47 (discussing the right to security and privacy in Iran and under the ICCPR).

199. *See* DARIUS M. REJALI, TORTURE AND MODERNITY: SELF, SOCIETY, AND STATE IN MODERN IRAN 180 (1994); ALBERT HOURANI, A HISTORY OF THE ARAB PEOPLES 196 (1991); WORLD RELIGIONS 485 (Geoffrey Parrinder ed., 1983).

200. *See* Firouzeh Bahrampour, Note, *The Caning of Michael Fay: Can Singapore's Punishment Withstand the Scrutiny of International Law?,* 10 AM, U.J. INT'L L. & POL'Y 1075, 1089 (1995) (noting that Islamic law allows 30 lashes with a stick for theft, 80 lashes for drinking or possessing alcohol, and 100 lashes for rape); *see also* REJALI, *supra* note 199, at 125; Anthony Chase, *Legal Guardians: Islamic Law, International Law, Human Rights Law, and the Salman Rushdie Affair*, 11 AM. U.J. INT'L L & POL'Y 375, 297 (1996) (stating *tazir* crimes generally carry lesser penalties including flogging).

shari'a does give rulers the option of additional punishments, *quesas* or "equivalence," of which an obvious example is the death penalty for a murderer and *tazir*, which may be decided by the ruler.[201] The point is that Iranian authorities cannot assert that the *shari'a requires* them to flog unveiled women or execute drug dealers. Therefore, they should be urged to adopt less severe methods for dealing with crimes that are not *hudad*.

A strong criminal justice system that responds appropriately to modern crime is a better deterrent for habitual crime than the lopsided application of *shari'a* law. It would be absurd to amputate the hand of a 15-year-old shoplifter while administering a "slap on the wrist" to a con artist who tricks dozens of people out of substantial amounts of money, or to stone to death the consensual adulterer but provide no penalty for marital rape. The other categories of punishment—*quesas* and *tazir*—can be the basis for legislation to adequately punish violent crime and high-level economic crime.

An independent judiciary is also of vital importance. A government that can dictate to the courts or remove troublesome judges is a recipe for disaster. A society that safeguards due process can also be one which deters crime. Conversely, a corrupt judiciary that does not punish the influential guilty and has no qualms about wrongly punishing the powerless innocent breeds contempt for the law at all levels of society.

Freedom of expression, including for the most radical beliefs, should be guaranteed. If all citizens of a state, including the most conservative clergymen, have an equal right to assemble and to free speech, the imams will lose none of their powers to persuade their followers, only the power to force their will on others. A rejection of all forms of government oppression and the ensuring of free elections would go a long way toward ensuring greater protection of human rights in the Muslim world. For Western governments to be credible, they must condemn the abuse of human beings by *any* regime which engages in violations, not selectively choosing to look the other way when the abuses are committed by friendly or economically important nations while roundly condemning the actions of hostile governments.[202] As Ann Elizabeth Mayer states "[r]espect for international human rights law does not require that every culture

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201. *See* Kent Benedict Gravelle, *Islamic Law in Sudan: A Comparative Analysis*, 5 ILSA J. INT'L & COMP. L. 1 (1998) (providing *Quesas* crimes include murder, manslaughter, assault and battery and that specific penalties are not prescribed. Instead, the victim or the victim's family chooses monetary compensation or retaliation in kind as punishment.); HOURANI, *supra* note 199, at 273.

202. For example, the U.S. supported the Shah of Iran's brutal regime but has been outspoken in its condemnation of the government of the Islamic Republic of Iran for its human rights abuses; provided support for the repressive Zia regime in Pakistan; and welcomed President Nimeiri of the Sudan to the White House despite Nimeiri's execution of the 76-year-old Taha for apostasy. *See* ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 7 (1991).

For a critical appraisal of the inconsistency of U.S. policy in dealing with Islamic fundamentalism and its subdued attitude in condemning the abuses of rights committed by friendlier regimes pursuing fundamentalist polices, *see* Mayer, *supra* note 194, at 312-14 (1994) (stating "distinguish[ing] between Muslim reactions to human rights ideals as such and their hostile reactions to the double standards employed by Western governments in their approach to human rights. . . ."); *see also* Samuel P. Huntington, *The Clash of Civilizations?,* 72 FOREIGN AFF. 22 (1993) (debating whether human rights are Western in origin, and thus unsuitable for non-Western cultures).

use an identical approach, but it does require that human rights be defined and protected in a manner consonant with international principles."[203]

There is not one nation in the world today which *shari'a* law solely governs. The hypothetical question for Muslim states is what kind of reform, if any, should be implemented to "Islamize" the law. While the European influence on the laws of many Eastern and African nations may be both imperialist and outdated, there are other possibilities beside a full-fledged acceptance of *shari'a* to the exclusion of all else. It is theoretically possible to imagine separate codes of "Saudi Arabian law," "Egyptian law," "Iranian law," etc., incorporating Islamic principle and practice in areas other than personal status, while contemporaneously responding to the needs of those specific nation-states as they enter the 21st century. An example is the criminalizing of driving while intoxicated as a different offense than consumption of alcohol.

The very idea of international standards is that human beings—male and female, rich and poor, in the majority or the minority—share a common humanity and deserve equal protection of their rights and freedoms.[204] But this is neither a new idea nor an un-Islamic one. In his final sermon, the founder of Islam taught as much: "An Arab has no superiority over a non-Arab; a white has no superiority over a black, nor a black over a white, except by piety and good deeds."[205]

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203. MAYER, *supra* note 202, at 20. *See* Shahriar Zarshenaz, *Untitled Essay, in* INSIDE IRAN: A SPECIAL SURVEY, INDEX ON CENSORSHIP 10 (1992) (discussing Iran's unwillingness to adhere to modern civilization in the face of religious culture which has superseded it); *see also Islam Guarantees on Human Rights,* RIDADH DAILY, June 17, 1993, *available in* LEXIS, Nexis Library, Saudi File (stating "while the principles and objectives upon which human rights are founded are of the universal nature their application requires consideration for the diversity of societies, taking into account their various historical, cultural, and religious backgrounds and legal systems.").

204. *See* MAYER, *supra* note 202, at 9. For a comprehensive discussion on various Islamic human rights, *see, e.g.*, Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?*, 15 MICH. J. INT'L L. 307, 327-32 (1994) (discussing, *inter alia,* Islamic human rights such as womens' rights, freedom of religion, freedom of press, freedom of assembly and association and criminal justice); Douglas Lee Donoho, *Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards*, 27 STAN. J. INT'L L. 345, 353 (1991) (discussing universal rights in the context of cultural variance).

205. RUQAIYYAH MAQSOOD, ISLAM 19 (1994). *See* Rhoda E. Howard, *Dignity, Community, and Human Rights, in* HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 81, 83 (Abdullahi An-Na''im ed., 1992) (stressing that human rights principles address universal problems facing all societies due to the adoption of the nation-state); *but see* JACK DONELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE (1989) (discussing the imposition of Western norms and morals and the reluctance of cultural relativists of non-Western cultures to adhere to such impositions).

Nelson v. Saudi Arabia and the Need for a Human Rights Exception to the Foreign Sovereign Immunities Act

By Alexander J. Mueller*

> Scott Nelson, a U.S. citizen, was arrested and detained without charge in 1984 after having blown the whistle on a health and safety hazard at the King Faisal Hospital in Riyadh, where he was employed as a monitoring systems engineer. During the 39 days in which he was detained in a cell infested with rats and swarms of insects, Saudi officials whipped the soles of his feet with a bamboo cane and beat him so severely that he lost consciousness. At one point, they strapped a rod tightly behind Mr. Nelson's knees and forced him to do deep knee bends until both knees snapped and he fell to the floor in agony. As a result of this torture, an administrative law judge has determined that Mr. Nelson is permanently disabled.[1]

The most shocking aspect of Scott Nelson's ordeal is not the horribly brutal torture that Mr. Nelson endured at the hands of the Saudi government. More shocking is the fact that when Mr. Nelson went to the courts of his country for a remedy he was turned away.[2] The Supreme Court denied Mr. Nelson his day in court despite the fact that Congress had passed

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1. Hearings Before the House International Relations Committee Subcommittee on International Operations and Human Rights, 104th Cong. (1996) (prepared statement of Daniel Wolf, Hughes Hubbard & Reed) ; *see also*, John Hart Stevenson, Casenote, *A License to Kill: a Look at Saudi Arabia v. Nelson*, 17 HOUS. J. INT'L L. 177, 178 (1994) (stating the Supreme Court could have permitted U.S. jurisdiction for torture of and intentional torts against American citizens by foreign sovereigns, but the Court refused to do so); *see also*, Everett C. Johnson, Jr., *Saudi Arabia v. Nelson: the Foreign Sovereign Immunities Act in Perspective*, 16 HOUS. J. INT'L L. 291, 295 (1993) (itemizing the Nelsons' allegations, the intentional torts of battery, unlawful detainment, wrongful arrest and imprisonment, inhuman torture, disruption of normal family life, and mental anguish, all in violation of U.S. or international law).

2. *See* Saudi Arabia v. Nelson, 507 U.S. 349, (1993); *see also* Johnson, Jr., *supra* note 1, at 302 (stating that all of the Nelsons' claims against Saudi Arabia were dismissed for lack of subject matter jurisdiction under the FSIA.). Foreign sovereign immunity, the sovereign immunity of the United States, diplomatic immunity, judicial immunity, official act immunity, or any other form of immunity, is predicated upon the realization that an aggrieved party might be without a remedy. *Id.* at 293; Steven Weisman, *Individual Protection Crumbles While Sovereignty Reigns: A Comment on Saudi Arabia v. Nelson*, 11 HOFSTRA LAB. L.J. 429, 455 (1994) (discussing the argument that the Eleventh Circuit's decision in *Nelson* provided a spark of hope to those similarly aggrieved by providing the United States courts as a forum to afford at least a limited remedy when such wrongs can be linked with a commercial activity. The Supreme Court, though, has doused the spark of hope lit by the Eleventh Circuit).

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legislation specifically designed to accommodate American citizens in Nelson's position.[3] A close examination of the events surrounding Nelson's detention and torture, the subsequent court proceedings, the passage of the Foreign Sovereign Immunities Act of 1976 (the "FSIA"), and the attempted amendments to the FSIA demonstrate both that the Supreme Court misapplied the FSIA and that the Act itself was drafted in a way that prevents it from being used by the courts to further the legislative intent behind passage of the Act.

Introduction

The events giving rise to the Supreme Court's decision in *Nelson* began in 1983 when Scott Nelson responded to an advertisement in an American publication for a 'monitoring systems engineer' to work at the King Faisal Specialist Hospital in Riyadh, Saudi Arabia.[4] Recruitment for positions at the hospital was carried out by the Hospitals Corporation of America, an independent corporation which had a contract for recruitment with the Saudi government.[5] At the request of hospital officials Nelson traveled to Riyadh for an interview, and subsequently signed a contract with the hospital in Florida and underwent job training in Tennessee.[6] Before he left, Nelson was informed that his family could contact him in an emergency through Royspec, the purchasing agent for the hospital in the United States.[7]

Nelson began his work at the hospital in November of 1983, but, in March, 1984, he discovered several safety defects at the hospital, and, over the course of the next several months,

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3. *See* Christopher W. Haffke, *The Torture Victim Protection Act: More Symbol Than Substance*, 43 EMORY L.J. 1467, 1492 (1994) (observing as authorized by the United States Constitution, art. I, section 8, cl. 10, Congress is permitted to extend extraterritorial jurisdiction to crimes against the law of nations. The principle of universal jurisdiction authorizes states to prosecute individuals for particularly egregious crimes for which there is universal condemnation, regardless of where such crimes were committed); *see also* Weisman, *supra* note 2, at 441 (noting in 1976 Congress enacted the Foreign Sovereign Immunities Act (FSIA) to facilitate bringing actions, arising out of commercial activity, against foreign governments in United States courts by leaving to the discretion of the courts, rather than the executive branch, the determination of whether the court should hear a case. The FSIA provides a uniform statutory procedure for establishing subject matter and personal jurisdiction over sovereign entities, so that the seizure of property situated in this country is no longer necessary to secure jurisdiction). *See generally* Johnson, Jr., *supra* note 1, at 292-93 (discussing that whether or not Congress should enact legislation broadening the jurisdiction of U.S. courts in human rights cases is worthy of debate.).

4. Saudi Arabia v. Nelson, 507 U.S. 349, 353 (1993).

5. *See* Johnson, Jr., *supra* note 1, at 294 (noting the fact that Hospital Corporation of America (HCA) was a privately owned corporation under contract with the Saudi government to assist in recruitment for the hospital); *see also* Stevenson, *supra* note 1, at 178-79 (stating that in August 1973, Saudi Arabia and Hospital Corporation of America (HCA) entered into a contract in which HCA agreed to assume complete managerial responsibility for the operations of the King Faisal Specialist Hospital. The contract provided that Saudi Arabia "select the candidates to be employed and set their salary and other remuneration"). *See generally* Thora A. Johnson, *A Violation of Jus Cogens Norms as an Implicit Waiver of Immunity Under the Federal Sovereign Immunities Act*, 19 MD. J. INT'L L. & TRADE 259, 291 (1995) (discussing the Hospital Corporation of America's recruitment of American personnel to work for the King Faisal Specialist Hospital in Saudi Arabia).

6. Saudi Arabia v. Nelson, 507 U.S. 349, 352 (1993).

7. Saudi Arabia v. Nelson, 507 U.S. at 352. *See* Dean Brockbank, *The Sovereign Immunity Circle: An Economic Analysis of Saudi Arabia v. Nelson and the Foreign Sovereign Immmunities Act*, 2 GEO. MASON L. REV. 1, 7-8 (1994) (informing the Saudi government is the sole owner of Royspec).

repeatedly expressed his concern to officials of the hospital and the Saudi government.[8] Nelson's warnings went unheeded until September 27, 1984 when he was arrested by Saudi agents, who asserted that the arrest was in response to Nelson's false claim on his resume (that he had a doctorate).[9] For thirty-nine days Nelson was repeatedly beaten and interrogated.[10] Nelson was finally released on November 5, 1984.[11]

Scott Nelson brought suit against the Saudi government, King Faisal Specialist Hospital, and Royspec in United States District Court for the Southern District of Florida.[12] Nelson's complaint contained sixteen causes of action including the intentional torts of battery and unlawful detainment as well as a cause of action for negligent failure to warn of possible dan-

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8. *See* Johnson, Jr., *supra* note 1, at 262 (stating that Mr. Nelson discovered safety defects in the Hospital's oxygen and nitrous oxide lines that posed fire hazards and other dangers to the patients. He reported the defects for seven months and was repeatedly told to ignore them); *see also* Weisman, *supra* note 2, at 433 (noting Mr. Nelson eventually reported the defects to an investigative commission of the Saudi government.). *See generally* Richard H. Seamon, *Causation and the Discretionary Function Exception to the Federal Tort Claims Act*, 30 U.C. DAVIS L. REV. 691, 721 (1997) (discussing the Nelsons' lawsuit against the Saudi Arabian government in a United States federal court, alleging that Saudi police tortured and imprisoned Mr. Nelson for raising safety concerns at the government hospital in Saudi Arabia where he worked).

9. Johnson, Jr., *supra* note 1, at 294 (noting on September 27, 1984, Mr. Nelson was arrested by Saudi law enforcement officials. The Saudi government maintained that Mr. Nelson was arrested because of his misrepresentations and forgery, but Nelson claimed that his reports of a safety violation at the Hospital led to his arrest). *See* Brockbank, *supra* note 7, at 7 (stating that on September 27, 1984, in retaliation for Nelson's reporting of the safety violations, Hospital officials summoned him to a hospital security office where several agents of the Saudi government arrested him); *see also* Weisman, *supra* note 2, at 433 (discussing Nelson's allegations, on September 27, 1984, he was summoned to the Hospital's security office, and from there he was moved to a jail cell where he was imprisoned for thirty-nine days and neither informed of any charges against him nor accused of any crime).

10. Keith Highet & George Kahale III, *Sovereign Immunity—Commercial Activity—Exercise of Police Power—Jurisdictional Nexus*, 85 AM. J. INT'L L. 557 (1991) (stating that Mr. Nelson was arrested, imprisoned for thirty-nine days without being informed of the charges against him, and "shackled, tortured and beaten" by agents and employees of Saudi Arabia). *See* Amelia L. McCarthy, *The Commercial Activity Exception—Justice Demands Congress Define a Line in the Shifting Sands of Sovereign Immunity*, 77 MARQ. L. REV. 893, 905 (1994) (same); *see also* Deidre E. Whelan, *The Commercial Activity Exception in the Foreign Sovereign Immunities Act: Saudi Arabia v. Nelson*, 27 CREIGHTON L. REV. 1069, 1072-1073 (1994).

> Nelson was subsequently transported to the Al Sijan Prison in Saudi Arabia to await trial on unknown charges. . . . Nelson claimed that at Al Sijan he was held in a rat-infested, overcrowded cell, had to fight with other prisoners for food, and was brought outside only one day per week. He further alleged that he was never told the reason for his imprisonment, that the Saudi government did not notify his family of his location, and that his wife was informed by a Saudi official that if she performed sexual favors, Nelson would be released.

Id.

11. *See* Whelan, *supra* note 10, at 1073 (noting that Nelson was released on November 5, 1984, at the request of Massachusetts Senator Edward M. Kennedy); Brockbank, *supra* note 7, at 8 (stating Saudi officials finally released Nelson on November 5, 1984 after the personal intervention of a U.S. Senator). *See generally* Johnson, Jr., supra note 1, at 295 (noting the Nelsons' return to the U.S. a few days following Mr. Nelson's November 5th release).

12. *See* Nelson v. Saudi Arabia, No. 88-1791, slip op. at 5 (S.D. Fla. 1989).

gers related to his employment in Saudi Arabia.[13] The district court dismissed Nelson's action for lack of subject matter jurisdiction pursuant to the FSIA.[14] Nelson appealed the decision to the United States Court of Appeals for the Eleventh Circuit, which reversed, holding that the detention and torture of Scott Nelson fell within the commercial activities exception to the Foreign Sovereign Immunities Act (FSIA).[15] The Court of Appeals held that the recruitment and hiring of Nelson was a commercial activity of the Saudi government within the meaning of the FSIA and that his subsequent arrest and torture at the hands of Saudi agents was based upon his recruitment and hiring in the United States.[16] The Supreme Court reversed and granted defendant's motion to dismiss based on lack of subject matter jurisdiction under the FSIA.[17] In granting the defendant's motion to dismiss, the Supreme Court held that the recruitment of Nelson was not a commercial activity within the meaning of the FSIA and therefore did not reach the question of whether the detention and torture was 'based upon' activity carried out in the United States.[18] In his dissent opinion, Justice Stevens, joined by Justices Blackmun and Kennedy, argued that the Court had jurisdiction to hear Nelson's claim alleging a negligent failure to warn because the failure to warn was based on a commercial activity having substantial contact with the United States, specifically the recruitment and hiring of Nelson.[19] The following analysis demonstrates that all of Nelson's causes of action, including his tort claims for battery and unlawful detainment, fit within the commercial activities exception to the FSIA.

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13. *See* Saudi Arabia v. Nelson, 507 U.S. 349, 353-54. Nelson's complaint listed sixteen causes of action, which fell into three categories, Counts II through VII and counts X, XI, XIV, and XV alleged various intentional torts, including battery, unlawful detainment, wrongful arrest and imprisonment, false imprisonment, inhuman torture, disruption of normal family life, and infliction of mental anguish. Counts I, IX, and XIII charged petitioners with negligently failing to warn Nelson of otherwise undisclosed dangers of his employment, namely, that if he attempted to report safety hazards the hospital would likely retaliate against him and the Saudi government might detain and physically abuse him without legal cause. Finally, counts VIII, XII, and XVI alleged that Vivian Nelson sustained derivative injury resulting from petitioners' actions. *Id*.

14. *See* Nelson v. Saudi Arabia, 923 F.2d 1528, 1529 (11th Cir. 1991). The district court's conclusion that Nelson's claims were not based upon the commercial activities of Saudi Arabia carried on in the United States, as required by the Foreign Sovereign Immunities Act of 1976 (the FSIA), and subsequent granting of Saudi Arabia's motion to dismiss for lack of subject matter jurisdiction. *Id*.

15. *Id*. at 1536. Since the recruitment and hiring of Nelson in the United States was a "commercial activity" of the Saudi government, and that Nelson's subsequent detention and torture were "based upon" Nelson's recruitment and hiring in the United States, the district court erred in determining that there was no subject matter jurisdiction under the FSIA. *Id*.

16. *Id*. at 1530.

17. Saudi Arabia v. Nelson, 507 U.S. 349, 360 (holding the Nelsons' action was not "based upon a commercial activity" within the meaning of the first clause of § 1605(a)(2) of the Act, and thereby reversing the judgment of the Court of Appeals).

18. *Id.* at 352.

19. *Id.*, at 369 (Stevens, J., dissenting).

I. The Purpose of the Commercial Activities Exception to the Foreign Sovereign Immunities Act of 1976

The Foreign Sovereign Immunities Act (FSIA), which is the sole basis of subject matter jurisdiction over foreign sovereigns, provides that a sovereign shall be immune from the jurisdiction of United States courts except under certain circumstances.[20] The FSIA contains a list of exceptions, including an exception for situations in which a foreign sovereign is engaged in commercial activities.[21] The commercial activity exception to the FSIA reads as follows:

> A foreign state shall not be immune from the jurisdiction of courts of the U.S. or of the states in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that causes a direct effect in the United States.[22]

It is the first type of exception listed in the clause that is the focus of analysis by the *Nelson* Court. An examination of the history of sovereign immunity in the United States and the legislative history of the FSIA demonstrates that the Court's holding was not in keeping with the purpose of the FSIA. The FSIA was enacted to confront the often difficult immunity decisions

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20. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. 1330, 1332 (a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1988)). *See* Monroe Leigh, Decision*,* 81 AM. J. INT'L L. 944, 949 (1987) (noting the FSIA does not extend foreign sovereign immunity in actions seeking damages for personal injury or loss of property caused by the tortious act or omission of a foreign state or its official or employee if the act or omission occurs in the United States and is not part of the exercise of a discretionary function); Mark L. Movsesian, *The Decline of the Nation State and its Effect on Constitutional and International Economic Law: Contribution: the Persistent Nation State and the Foreign Sovereign Immunities Act,* 18 CARDOZO L. REV. 1083, 1083 (1996) (observing that the Foreign Sovereign Immunities Act of 1976 (FSIA) confers on United States courts jurisdiction of actions against a "foreign state").

21. *See* Keith E. Sealing, *"State Sponsors of Terrorism" Are Entitled to Due Process Too: The Amended Foreign Sovereign Immunities Act Is Unconstitutional*, 15 AM. U. INT'L L. REV. 395, 396 (2000) (observing in 1996, Congress, as part of the Antiterrorism and Effective Death Penalty Act of 1996, amended the list of noncommercial tort exceptions to sovereign immunity in the Foreign Sovereign Immunities Act (FSIA)); *see also* Naomi Roht-Arriaza, *The Foreign Sovereign Immunities Act and Human Rights Violations: One Step Forward, Two Steps Back?*, 16 BERK. J. INT'L LAW 71, 73 (1998) (observing the FSIA's presumption that states are immune from suit, unless otherwise provided by international agreement, and the subsequent creation of exceptions to the presumption; most exceptions relate to commercial activities, other exceptions cover cases of waiver (express and implied), expropriation in violation of international law, noncommercial torts occurring in the U.S., and disputes over rights in real property and estates located in the U.S.). *See generally* Margot C. Wuebbels, *Commercial Terrorism: A Commercial Activity Exception Under § 1605(A)(2) of the Foreign Sovereign Immunities Act*, 35 ARIZ. L. REV. 1123, 1127 (1993) (noting Congress' deliberate ambiguity in drafting the exceptions to allow courts' use of discretion in determining whether the conduct was commercial or governmental).

22. 28 U.S.C. 1605 (a)(2)(1994).

that had traditionally been left to the State Department.[23] In its report to the Congress accompanying the final bill, the House Judiciary Committee stated,

> A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.[24]

The Supreme Court's early view of sovereign immunity was set forth in *The Schooner Exchange v. M'Faddon & Others*.[25] In *Schooner Exchange* the Supreme Court stated, "[t]hat law (the law of nations) requires the consent of the sovereign either express or implied, before he can be subjected to a foreign jurisdiction."[26] The Court's holding in *The Schooner Exchange* set forth the absolute theory of immunity which became the guiding principle for American courts

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23. *See* Roht-Arriaza, *supra* note 21, at 72-73 (stating that the Foreign Sovereign Immunities Act of 1976 (FSIA) principal objective was to transfer the determination of sovereign immunity from the State Department to the courts); *see also* Shobha Varughese George, *Head-of-State Immunity in the United States Courts: Still Confused After All These Years*, 64 FORDHAM L. REV. 1051, 1052 (1995) (noting in the absence of clear statutory guidance, courts have deferred to State Department's "suggestions" as to what qualified as immunity, or, in the absence of such suggestions, solved the problem under existing statutory or case law); Marianne D. Short & Charles H. Brower II, *The Taming of the Shrew: May the Act of State Doctrine and Foreign Sovereign Immunity Eat and Drink as Friends?*, 20 HAMLINE L. REV. 723, 729 (1997) (opining that the State Department, unbound by principles of stare decisis and subject to intense political pressures, provided inconsistent guidelines as to what constituted sovereign versus commercial activities. Seeking to impose uniform standards on immunity determinations, Congress passed the FSIA, which vested courts with exclusive authority in these matters).

24. R. REP. NO. 94-1487, at 7 (1976). *See* Sienho Yee, *The Discretionary Function Exception Under the Foreign Sovereign Immunities Act: When in America, Do the Romans Do as the Romans Wish?,* 93 COLUM. L. REV. 744, 747 (1993) (detailing Congress' dual purpose in enacting the FSIA in 1976 to "bring U.S. practice into conformity with that of most other nations" by codifying the narrow view of foreign sovereign immunity, and to transfer the authority to grant sovereign immunity from the executive branch to the judicial branch); *see also* M. Scott Bucci, *Breaking Through the Immunity Wall? Implications of the Terrorism Exception to the Foreign Sovereign Immunities Act*, 3 J. INT'L LEGAL STUD. 293, 301 (1997) (stating that Congress's main objective in enacting the Foreign Sovereign Immunities Act was to codify the restrictive theory and to shift the burden of determining when immunity applied from the executive branch to the judicial branch).

25. U.S. 116 (1812). The action involved two residents of Maryland who brought suit against the French government after a vessel that they owned was seized apparently on the orders of Napoleon. When a ship belonging to Napoleon entered the port of Philadelphia it was seized pursuant to an order of attachment resulting from the suit brought by the two Americans. The Supreme Court held that the French vessel was exempt from the jurisdiction of United States courts. *Id*. at 146-47.

26. *Id.* at 137. "[O]ne sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him." *Id*.

until the early 1950s.[27] In 1952, in a letter from Jack Tate, the acting legal advisor to the Secretary of State to Philip Perlman, the Acting Attorney General, the State Department declared its intent to adopt the restrictive theory of immunity.[28] Tate stated that, ". . . under the restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)."[29] In his letter Tate stated that the reason the State Department was adopting the restrictive theory was to adapt to the reality that an increasing number of foreign countries were engaging in commercial activities.[30] The letter stated, "Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to

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27. *See* Sealing, *supra* note 21, at 426-27 (stating that the concept of sovereign immunity holds that states are equal sovereigns and one state cannot exercise jurisdiction over another state or its agents in domestic courts. The theory was made the law of the land in the United States by Justice Marshall in The Schooner Exchange v. McFaddon); *see also* Michael J. Coursey, Book Review, *United States Law of Sovereign Immunity Relating to International Financial Transactions*, 78 AM. J. INT'L L. 944, 944 (1984) (stating that Marshall's seminal opinion in Schooner Exchange v. McFaddon, the Supreme Court followed an executive branch "suggestion" and adopted the "absolute" theory of immunity). *See generally* Harold G. Maier, Book Review, *Preparing Students for Practice in International Law: on Teaching The Law of International Transactions: State Immunity: an Analytical and Prognostic View*, 80 AM. J. INT'L L. 758, 760 (1986) (observing that in Schooner Exchange v. M'Faddon, Marshall makes it clear that while there may be an international legal rule requiring notice when sovereign immunity will not be extended to public acts or sovereign property, there is no international rule requiring immunity for foreign sovereigns, even for public acts, as long as notice that immunity will not be granted is given in advance by the host sovereign).

28. *See Sovereign Immunity—Foreign Sovereign Immunities Act—letters of credit to American companies through a New York bank establish jurisdiction*, 75 AM. J. INT'L L. 968, 970 (1981) (describing that under the restrictive theory of immunity, "only uniquely governmental actions by foreign countries will be accorded immunity"); *see also* Leigh, *supra* note 20, at (stating that "the US Foreign Sovereign Immunities Act of 1976 adopted a more restrictive theory of immunity"); Roht-Arriaza, *supra* note 21, at 73 (describing the restrictive theory of immunity and the "procedures for suing foreign states in U.S. courts").

29. Citing letter from Jack B. Tate, Acting Legal Adviser to the Department of State to Philip Perlman, Acting Attorney General (May 19, 1952), reprinted in 26 DEPT. ST. BULL. at 984 (1952). *See* Marian L. Nash, *U.S. Practice,* 74 AM. J. INT'L L. 917, 918 (1980) (stating that unless the parties agree otherwise, under the FSIA "international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities, while retaining immunity for their acts of a public character"); *see also* James Crawford, *Execution of Judgments and Foreign Sovereign Immunity,* 75 AM. J. INT'L L. 820, 852-54 (1981) (observing under the restrictive theory of immunity, immunity will be granted for transactions viewed as *jure imperii* but not necessarily for transactions labeled *jure gestionis*).

30. *See* David MacKusick, *Human Rights vs. Sovereign Rights: The State Sponsored Terrorism Exception to the Foreign Sovereign Immunities Act,* 10 EMORY INT'L L. REV. 741, 748 (1996) (noting that due to the states' increasing involvement in commercial activities, "most countries abandoned the absolute theory for the restrictive theory"); *see also* Varughese George, *supra* note 23, at 1083 (discussing the increased involvement in commercial activities by individuals such as heads-of states and the importance of a restrictive theory of immunity); Jerrold L. Mallory, *Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 173-74 (1986) (discussing and applying the Tate letter in the context of governments' increased level of participation in commercial activities).

have their rights determined in court."[31] While the Tate letter provided basic principle for determining when to apply sovereign immunity it did not provide a framework for the Courts to determine what constitutes a public act.[32] The FSIA was enacted to confront the confusion in the courts regarding the application of the principle of restrictive immunity.[33] However, the Supreme Court's holding in *Nelson* demonstrates that the FSIA did little to clear up this confusion.

The legislative history of the FSIA reveals that the purpose of its enactment was fundamentally similar to the purpose described in the Tate Letter. By enacting the FSIA, Congress wanted to create jurisdictional rules that would assist the Courts in coping with a world in which lawsuits against foreign sovereigns by American citizens are becoming more frequent.[34] The Report of the House Judiciary Committee that accompanied the bill states that the Act has four fundamental purposes: (1) to codify the restrictive principle of sovereign immunity; (2) to insure that this restrictive principle of immunity is applied in litigation before U.S. courts; (3) to

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31. Citing letter from Jack B. Tate, Acting Legal Adviser to the Department of State to Philip Perlman, Acting Attorney General (May 19, 1952), reprinted in 26 DEPT. ST. BULL. at 984 (1952). *See* Luca G. Radicoti di Brozolo, *Sovereign Immunity—immunity from execution—customary international law—Vienna Convention on Diplomatic Relations—embassy bank accounts—aircraft belonging to state owned airline,* 84 AM. J. INT'L L. 573, 576 (1990) (noting that since much of the activity of states is commercial, under the restrictive theory of immunity "courts should rely on an objective criteria (*i.e.*, the actual destination of the assets) and not a subjective criteria (e.g., whether title to the assets is held by the state directly or through a public agency")). *See also* Margot C. Wuebbels, *Commercial Terrorism: A Commercial Activity Exception under §1605(a)(2) of the Foreign Sovereign Immunities Act,* 35 ARIZ. L. REV. 1123, 1131-35 (1993) (discussing the jurisdiction conferred on United States and foreign courts with regard to commercial activities under the FSIA).

32. *See* Mark B. Baker, *Whither Weltover: Has the U.S. Supreme Court Clarified or Confused the Exceptions Enumerated in the Foreign Sovereign Immunities Act?*, 9 TEMP. INT'L & COMP. L.J. 1, 4-5 (1995) (discussing the fact that under the Tate letter it was difficult to distinguish public from private acts); *see also* Wuebbels, *supra* note 31, at 1125 (noting that the Tate letter did not offer much help in distinguishing between public and private acts and how the State Department and courts, as a result, "struggled to distinguish the two categories"); Mallory, *supra* note 30, at 174 (noting that the Tate letter made the application of the restrictive theory of immunity difficult because it didn't provide a definition of a public or a private act).

33. *See* Jon H. Sylvester, *Impracticability, Mutual Mistake and Related Contractual Bases for Equitably Adjusting the External Debt of Sub-Saharan Africa*, 13 J. INT'L L. BUS. 258, 292 (1992) (noting that the "FSIA was enacted in 1976 to codify the restrictive principle of sovereign immunity"); *see also* Matthew Bensen, *The All New (International) "People's Court": The Future of the Direct Effect Clause after Voest-Alpine Trading U.S. Corp. v. Bank of China*, 4 MINN. L. REV. 997, 1003 (1999) (stating that "The FSIA was designed to balance the competing interests in providing American individuals with a forum to adjudicate commercial disputes and the interests of foreign governments in being free from excessive litigation"); Baker, *supra* note 32, at 4 (discussing how courts moved away from a judicial interpretation of sovereign immunity and focused instead on an executive interpretation).

34. H.R. REPORT NO. 94-1487, at 6 (1976); The House Report states, "At the hearings on the bill it was pointed out that American citizens are increasingly coming into contact with foreign states and entities owned by foreign states. These interactions arise in a variety of circumstances, and they call into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes." *See* Joseph M. Terry, *Jurisdictional Discovery under the Foreign Sovereign Immunities Act*, 66 U. CHI. L. REV. 1029, 1045-46 (1999) (discussing Congress' desire to create rights for foreign sovereigns that are commensurate with those available to the United States in the litigation process); see also Scott A. Rosenberg, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. REV. 933, 938 (1982) (discussing the case Verlinden B.V. v. Central Bank of Nigeria in which the 2nd Circuit held that "Congress intended that the FSIA empower the federal courts to exercise jurisdiction over non[-]diverse parties").

provide a statutory procedure for making service upon, and obtaining in personam jurisdiction over a foreign state, and; (4) to make it easier for an American judgment creditor to enforce a judgment against a foreign sovereign.[35] This paper will demonstrate that the Court's decision in *Nelson* conflicts directly with these first two goals.

II. The Supreme Court's Misapplication of the Commercial Activities Exception to the Foreign Sovereign Immunities Act

In *Nelson* the Court articulated a three part test for determining if an activity falls within the commercial activities exception to the Foreign Sovereign Immunities Act.[36] The Court stated, "For there to be jurisdiction in this case, therefore, the Nelsons' action must be 'based upon' some 'commercial activity' by petitioners that had 'substantial contact' with the U.S. within the meaning of the Act."[37] An analysis of the commercial activities exception, therefore, requires application of three terms: (1) 'based upon;' (2) 'commercial activity;' and (3) 'substantial contact.' The Supreme Court concluded that because the detention and torture of Scott Nelson were not based upon a commercial activity within the meaning of the FSIA, the Court need not reach the question of 'substantial contact.'[38] Although Justice White reached the same conclusion, he noted in his concurring opinion that the Court erred in finding that the activity

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35. H.R. REPORT NO. 94-1487, at 8 (1976). *See* Rosenberg, *supra* note 34, at 1004-05 (stating that one of the fundamental purposes of the FSIA is to "provide long-arm jurisdiction" in order to establish the contacts necessary in a foreign state); *see also* Lydia M. Valenti, *The Use of Procedure to Effect Equity: Section 1605(b) of the Foreign Sovereign Immunities Act of 1976,* 10 FLA. ST. U. L. REV. 129, 141 (1982) (discussing under the FSIA the ability to exercise long-arm jurisdiction over ships and cargo).

36. *See* Ronald Mok, *Expropriation Claims in United States Courts: The Act of State Doctrine, The Sovereign Immunity Doctrine, and the Foreign Sovereign Immunities Act. A Road Map for the Expropriated Victim*, 8 PACE INT'L L. REV. 199, 229 (1996) (discussing the three part test under the commercial activities exception of the FSIA as set out by the court in de Sanchez v. Banco Cent. de. Nicaragua); *see also* Bret A. Sumner, *Due Process and True Conflicts: The Constitutional Limits on Extraterritorial Federal Legislation and the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996*, 46 CATH. U. L. REV. 907, 921 (1997) (setting out the three part test: "(1.) commercial activity in the U.S.; (2.) an act performed in the U.S. in connection with commercial activity occurring elsewhere; or (3.) an act outside the territory of the U.S. in connection with commercial activity elsewhere that causes a direct effect in the U.S." (quoting 28 U.S.C. 1605(a)(2)); Michael Wallace Gordon, *United States Extraterritorial Subject Matter Jurisdiction in Securities Fraud Litigation*, 10 FLA. J. INT'L L. 487, 501 (1996) (illustrating the interpretation of step three of the test to determine whether an act falls within the exception).

37. Saudi Arabia v. Nelson, 507 U.S. 349, 356 (1993). *See* Fawwaz Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511, 1513 (D.C. Cir. 1988) (arguing that substantial contacts cannot be established by "acts that are not themselves commercial transactions, but that are merely precursors to commercial transactions"); Peter D. Trooboff, *Jurisdiction—Foreign Sovereign Immunities Act—commercial activities exception—direct effect*, 82 AM. J. INT'L L. 828, 829 (1988) (explaining the requirement to to satisfy the substantial contacts requirement; a showing of more of a connection than that which is generally required to satisfy due process); *see also* Richard L. Garnett, *The Perils of Working for a Foreign Government: Foreign Sovereign Immunity and Employment*, 29 CAL. W. INT'L L.J. 133, 147 (1998) (discussing the issue of whether recruitment of employees in a foreign forum was enough to satisfy the substantial contact requirement under the FSIA).

38. *See* Saudi Arabia v. Nelson, 507 U.S. 349, 358 (1993). *See generally* Georges R. Delaume, *The Foreign Sovereign Immunities Act and Public Debt Litigation: Some Fifteen Years Later,* 88 AM. J. INT'L L. 257, 257-61 (1994) (discussing exactly how to determine whether something is based on a commercial activity under the FSIA); Mark A. Barnett, *Jurisdiction—Foreign Sovereign Immunities Act—commercial activity exception,* 84 AM. J. INT'L L. 262, 263 (1990) (noting in order to determine whether a commercial activity exists "there ha[s] to be a nexus between the activity of the defendant within the United States and the grievance that gave rise to the cause of action").

on which the Nelsons' suit was based was not a commercial activity and that they therefore need not address the issue of substantial contacts.[39]

A. Nelson's Claim Was 'Based Upon' Saudi Arabia's Operation of the Hospital

The first step in an analysis of a claim under the FSIA commercial activity exception is to determine the conduct on which the plaintiff's claim is based. The applicable portion of Section 1605(a)(2) of the FSIA is the first clause which reads, "A foreign state shall not be immune from the jurisdiction of courts of the U.S. or of the states in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state."[40] The Supreme Court correctly points out that the FSIA does not define the term 'based upon' and there is little legislative history available to assist in defining this term.[41]

The majority, via statutory interpretation, argued that because the two clauses which follow the first clause use the term 'in connection with,' and the first clause does not use that term, the first clause should be interpreted to require something more than a simple connection

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39. *See* Saudi Arabia v. Nelson, 507 U.S. 349, 364 (1993). In his concurring opinion, Justice White argues that Nelson's claim is based on a commercial activity. Justice White states, "To run and operate a hospital, even a public hospital, is to engage in a commercial enterprise." Justice White further argues that retaliating against a whistleblower is also an activity that is commercial in nature. The concurring opinion also highlights the fact that private security forces have frequently been used by private actors to retaliate against whistleblowers. White states, "Therefore, had the hospital retaliated against Nelson by hiring thugs to do the same job, I assume the majority—no longer able to describe this conduct as 'a foreign state's exercise of the power of its police'—would consent to calling it commercial." *Id*. at 364. Justice White expresses his discomfort with the notion that the use of police officers automatically rendered the activity in this case sovereign in nature. However, Justice White reaches the same conclusion as the majority because he felt that the commercial activity of running the hospital did not have a sufficient connection to the United States. He stated, "Conversely, petitioners' commercial conduct in Saudi Arabia, though constituting the basis of Nelson's suit, lacks a sufficient nexus to the United States. Neither the hospital's employment practices, nor its disciplinary procedures, has any apparent connection to this country." *Id*. at 372-73; *see also* Deirdre E. Whelan, *The Commercial Activity Exception in the Foreign Sovereign Immunities Act: Saudi Arabia v. Nelson,* 27 CREIGHTON L. REV. 1069 (1994). The author discusses Justice White's conclusion in the Nelson case. *Id.* at 1076-77. The author also adds her personal opinion as to problems with White's analysis and his conclusion that the operation of the hospital was a commercial activity. *Id.* at 1095; Steven R. Swanson, *Jurisdictional Discovery Under the Foreign Sovereign Immunities Act*, 13 EMORY INT'L L. REV. 445, 456 n.63 (1999) (agreeing with Justice White, in that the detainment and beating of the plaintiff by Saudi Arabian officials was in connection with the commercial activity of running a hospital, rather than it being a sovereign activity, "[a]fter all, private businesses sometimes use force to accomplish their goals").

40. 28 U.S.C. 1605 (a) (2) (1994). *See generally* Bret A. Sumner, *Due Process and True Conflicts: The Constitutional Limits on Extraterritorial Federal Legislation and the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996*, 46 CATH. U. L. REV. 907, 928 (1997) (discussing the application of a conduct test in order to determine whether the United States can exercise jurisdiction under the FSIA); Whelan, *supra* note 39, at 1083 (noting that the FSIA is vague as to its definition of commercial activity and that it "merely specifies what element of the conduct determines commerciality (i.e. nature rather than purpose) (quoting Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 612 (1992))).

41. Saudi Arabia v. Nelson, 507 U.S. 349, 357 (1993). *See generally* Garnett, *supra* note 37, at 141 (noting that in "early cases the phrase 'based upon' was ignored or liberally interpreted, [but] more recently it has received a stricter constructio"). *But see* Barnett, *supra* note 38, at 267 (stating that "to be 'based upon' such activity, the pending cause of action should have a logical nexus to the 'commercial activity' involved").

between the suit and the commercial activity engaged in.[42] In other words, the language of the first clause should be read to require a more substantial connection between the basis of the suit and the commercial activity.[43] The Court's statutory interpretation however does very little to flesh out a meaning of the term 'based upon.'[44]

In *Santos v. Compagnie Nationale Air France,*[45] a worker at Orly Airport in France brought suit against Air France after he was injured when an employee of Air France drove a vehicle into a loading platform.[46] The Court of Appeals for the Seventh Circuit affirmed the holding of the District Court that Air France was immune from suit under the FSIA because the employee's suit was not 'based upon' the commercial activities of Air France in the United States.[47] The Court focused on the fact that, under the terms of a lease between Air France and the plaintiff's employer, the employer was obligated to provide Air France with airport workers such as the plaintiff.[48] The Court points out, however, that the plaintiff did not assert any rights under the lease.[49] The Court stated, "We conclude that a claim is 'based upon' events in the United States if those events establish a legal element of the claim."[50] The *Santos* Court also stated that, "This court and most others have stated that the term 'based upon' requires an identifiable nexus

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42. *Nelson*, 507 U.S. at 358-59. *See* Monroe Leigh, *Foreign Sovereign Immunity—preexisting treaty exception—waiver—commercial activity exception*, 81 AM. J. INT'L L. 422, 424 (1987) (referring to the case Ministry of Supply, Cairo v. Universe Tankships, Inc., in which the court determined that the institution of a lawsuit in the United States to "confirm [an] English arbitral award" was not a substantial connection and therefore, the commercial activity exception did not apply); *see also* Keith E. Sealing, *"State Sponsors of Terrorism" Are Entitled to Due Process Too: The Amended Foreign Sovereign Immunities Act Is Unconstitutional*, 15 AM. U. INT'L L. REV. 395, 441 (2000) (stating that the "minimum contacts test is inapplicable to foreign sovereigns because Congress intended the courts to apply a more strict standard under the FSIA when exercising personal jurisdiction over a foreign sovereign").

43. *See* Barnett, *supra* note 38, at 266 (noting that in order to establish both personal and subject matter jurisdiction under the FSIA, there must be a substantial connection to the United States); see also Adam C. Belsky, et. al., *Implied Waiver under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CALIF. L. REV. 365, 408 (1989) (stating that the simple fact that one does business in the United States is not enough to satisfy § 1605(a)(2): "a nexus between the commercial activity in the U.S. and the underlying lawsuit is necessary"); Sealing, *supra* note 42, at 409 (instructing one must avail oneself of contacts that create a substantial connection between the suit and the basis for the activity).

44. Saudi Arabia v. Nelson, 507 U.S. 349, 357 (1993).

45. 934 F.2d 890, 891 (7th Cir. 1991).

46. *Id*.

47. *Id*. The court held that "none of the elements of Santos' claim concern acts in the United States. . . . Santos could not use the lease nor any other activities of Air France in the United States to prove any relevant proposition." *Id.* at 894.

48. *Id*. at 892 (The Court stated that Santos "could go further by arguing that it was reasonably foreseeable to Air France that he, or at least *some* worker that American provided under the lease, would be injured while at Orly.").

49. *Id*. at 892 (stating that Santos is not claiming any rights under "Air France's execution of an airplane lease in the United States with [his] employer, American Trans Air."). His only reason for suing Air France is because he was injured by an Air France employee. *Id.*

50. *Id*. at 891. The court further notes that "[a]n action is based upon the elements that prove the claim, no more and no less [, and if] one of those elements consists of commercial activity within the United States or other conduct specified in the Act, this country's courts have jurisdiction." *Id.*

between the claim and the commercial activity at issue (citations omitted).[51] One recent case states that 'the nexus requirement implies a bond or link that connects the foreign state to the wrongful act for which it is sought to be held liable."[52] In dicta, the *Santos* Court also asserts that a single employment contract can be sufficient to satisfy the 'based upon' requirement.[53]

The *Santos* Court's analysis centers on the notion that the 'based upon' requirement can be satisfied by showing that the defendant owed a duty to the plaintiff (particularly in the employment context).[54] At common law an employer is held to have a duty to provide an employee with a safe work environment.[55] Nelson's Saudi Arabian employers clearly violated this duty to him by detaining and torturing him in the hospital.[56] Therefore, using the *Santos* duty analysis, it can be said that Nelson's claim was 'based upon' the Saudi government's failure to provide

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51. Miguel Santos v. Compagnie Nationale Air France, 934 F.3d 890, 893 (7th Cir. 1991) (noting it must then be determined *how much* of a nexus is required).

52. *Id*. at 891 (stating that "judicial authority reveals that a claim is 'based upon' the commercial activity of a foreign state when there is a 'jurisdictional nexus' between the acts for which damages are sought, and the foreign sovereign's commercial activity" (citing Nelson v. Saudi Arabia, 923 F.2d 1528, 1534 (11th Cir. 1991))).

53. Miguel Santos v. Compagnie Nationale Air France, 934 F.2d 890, 891 (1991) (*citing* H.R. Report No. 94-1487 (1976), reprinted in 1976 U.S. Code Cong. & Admin. News 6604, 6615). The court stated, "In particular, a usual element of a plaintiff's case is showing that the defendant owed him or her some duty. If the duty arose from commercial acts in the United States, then the United States courts have jurisdiction, even if the acts that breached the duty all occurred elsewhere. Along these lines, the House Report that accompanied the Immunities Act states that the making of a 'single contract' can support jurisdiction." *Id*. *But see,* Jeffrey Jacobson, *Trying to Fit A Square Peg into a Round Hole: The Foreign Sovereign Immunities Act and Human Rights Violations*, 19 WHITTIER L. REV. 757, 770 (1998) (discussing the restrictive interpretation of the "based upon" requirement by the Supreme Court in *Nelson* to exclude tortious conduct that was an abuse of police power that is sovereign in nature which makes it unlikely that a plaintiff would succeed with a human rights violation claim).

54. *See Miguel Santos*, 934 F.2d at 894 (stating that "[i]n the employment context . . . if the plaintiff claims a breach of a duty that arose within the United States, jurisdiction is present."). *See generally* Richard L. Garnett, *The Perils of Working for a Foreign Government: Foreign Sovereign Immunity and Employment*, 29 CAL. W. INT'L L.J. 133 (1998) (discussing how courts have applied the commercial activity exception in the employment context).

55. *See* Bailey Administratrix v. Central Vermont Railway, Inc., 319 U.S. 350 (1943) (holding that at common law an employer has a duty to provide employees with a safe work environment); Kreigh v. Westinghouse, Church, Kerr & Company, 214 U.S. 249 (1909) (holding that at common law an employer has a duty to provide employees with a safe work environment); Patton v. Texas and Pacific Railway Company, 179 U.S. 658, 664 (1901) (holding that at common law an employer has a duty to provide employees with a safe work environment).

56. *See* Nelson v. Saudi Arabia, 923 F.2d 1528, 1530 (11th Cir. 1991). It is important to note that the facts as summarized in the record by the Eleventh Circuit differ in significant ways from those provided in the Supreme Court's opinion. Particularly relevant here is the fact that the Court of Appeals opinion states that Nelson was brought to the security office and then transferred to a jail cell. The opinion does not state that the jail cell was off site and therefore seems to imply that Nelson was detained on the hospital premises. It is in this jail cell that Nelson was beaten and tortured. The location of the jail cell is important because if the jail cell was located in the hospital it makes the argument that the Saudi Arabian government failed to provide a safe work place even stronger. The Supreme Court record indicates that Nelson was only detained at the hospital for two days and then was transferred to the Al Sijan Prison.; Saudi Arabia v. Nelson, 507 U.S. 349, 353 (1993). Applying either version of the facts, both the Eleventh Circuit and the Supreme Court agree that Nelson endured some form of torture on the hospital premises which was his place of employment; Keith Highet and George Kahale III, Decision, *Nelson v. Saudi Arabia, 923 F. 2d 1528,* 85 AM. J. INT'L L. 557, 557 (1991) (discussing how Nelson was "'shackled, tortured and beaten' by agents of Saudi Arabia").

him with a safe work place. Further, this duty to provide a safe work place arose from an employment contract which was entered into in the United States.[57]

The correct definition of the term 'based upon' as used in the FSIA was central to the Fifth Circuit's holding in *Callejo v. Bancomer*.[58] In *Callejo*, the suit was brought by American investors in response to exchange control regulations issued by the Mexican government.[59] The regulations required that deposits in Mexican banks be repaid in pesos at certain exchange rates which were well below the current market rate.[60] The *Callejo* Court focused on the 'gravamen of the complaint.'[61] The Fifth Circuit stated:

> We do not read Section 1605(a)(2)'s 'based upon' requirement, however, to be equivalent merely to a requirement of causation. . . . To say that the commercial activity exception does not apply whenever a suit is caused by a foreign sovereign's act would, in large measure, read the exception out of the law. We believe, instead, that the focus should be on the elements of the cause of action itself: Is the gravamen of the complaint a sovereign activity by the defendant? Here, the answer is clearly no; the activities of Bancomer that are the bases of the Callejos' complaint—the sale of the certificates of deposit and the subsequent payment in pesos rather then dollars—were commercial in nature.[62]

In the instant case, the gravamen of the plaintiff's complaint is that he was detained and tortured by the people that employed him.[63] Rather than heeding the *Callejo* Court's warning that the 'based upon' requirement should not be equated with causation, the Supreme Court 'read the exception out of the law' by asserting that the Nelsons' claim was based solely on the actions of the government employees that arrested him.[64] If the Supreme Court's interpretation of the 'based upon' requirement is taken to its logical extension, almost any activity carried out by a government would be outside the commercial activities exception merely because a government actor played some role in the incident.[65] Indeed, in his concurrence Justice White

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57. *See* Nelson v. Saudi Arabia, 923 F.2d 1528, 1530 (11th Cir. 1991). *See generally* Highet and Kahale III, *supra* note 56, at 557-58 (discussing Nelson's claims against the Saudi Arabian government).

58. 764 F. 2d 1101, 1101 (5th Cir. 1985) (holding that because the court was barred under the act of state doctrine from inquiring into the validity of acts of foreign states performed in their own territory, the district court's dismissal of the suit was affirmed).

59. *Id.*

60. *Id.*

61. *Id.* (noting plaintiff's contentions that the commercial activity exception to the act of state doctrine applied since Mexico's actions were clearly sovereign and not commercial in nature).

62. *Id.* (noting the "commercial activity exception" is valid, however, the focus should be on the "elements of the cause of action.").

63. Saudi Arabia v. Nelson, 507 U.S. 349, 353 (1993).

64. *Id.*

65. *See generally* John Hart Stevenson, Casenote, *A License to Kill: A Look at Saudi Arabia v. Nelson*, 17 HOUS. J. INT'L L. 177, 185 (1994) (noting that Justice Kennedy "emphasized that if such claims were classified as commercial, the commercial activities exception would 'swallow the rule of foreign sovereign immunity Congress enacted in the FSIA.'").

argued that the majority's emphasis on the use of government agent's to detain and torture Nelson fails to capture the respondents' claim in full.[66] Justice White pointed out that Nelson's complaint alleges that agents of the hospital brought him to the security office and that the hospital had a role in his subsequent beating and torture,[67] and argued that the majority's 'based upon' analysis is simply wrong.[68] He wrote,

> [t]hus, even assuming for the sake of argument that the role of the official police somehow affected the nature of petitioners' conduct, the claim cannot be said to rest entirely upon activities sovereign in nature. At the very least it consists of both commercial and sovereign elements, thereby presenting the specific question the majority chooses to elude.[69]

One of the fundamental problems with the FSIA is that it does not define and give substance to the 'based upon' requirement contained in the commercial activities exception.[70] Absent a statutory framework for defining what 'based upon' means, courts are unlikely to be able to complete even the first step of a proper commercial activities exception analysis.[71] While *Santos*, *Callejo*, and the legislative history provide some understanding of the meaning of 'based upon' within the commercial activities exception, the definition of the term is still fairly ambiguous.[72] What seems clear, however, is that Justice White was correct in arguing that Nelson's claim was not based solely upon the activities of Saudi government agents.

B. Saudi Arabia's Operation of the Hospital Constitutes a Commercial Activity Within the Meaning of the FSIA

To determine whether Saudi Arabia was engaged in a commercial activity within the meaning of the FSIA, we must examine the specific activities that Saudi Arabia was engaged in. First, Saudi Arabia had a contract with the Hospital Corporation of America, an independent

66. *Id.* (noting the "commercial activity exception does not apply whenever a suit is caused by a foreign sovereign act, . . . read the exception out of the law.").

67. Saudi Arabia v. Nelson, 507 U.S. 367 (1993) (White, J., concurring) (explaining Nelson's torture at the hands of the Saudi Arabian government).

68. *Id.* at 367.

69. *Id.*

70. *See* Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(a)(4), 1391(f), 1441(d), 1602-1611 (1988)); *see also* Keith Highet and George Kahale III, Decision, *Nelson v. Saudi Arabia, 923 F. 2d 1528,* 85 AM. J. INT'L. L. 557, 557 (1991) (discussing the Court of Appeals' interpretation of the phrase "based upon"); John Hart Stevenson, Casenote, *A License to Kill: A Look at Saudi Arabia v. Nelson,* 17 HOUS. J. INT'L L. 177 (1994) (discussing the FISA and its interpretation in Saudi Arabia v. Nelson).

71. *See* Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(a)(4), 1391(f), 1441(d), 1602-1611 (1988)); *see also* Highet and Kahale III, *supra* note 70, at 557 (discussing the phrase "commercial activities"); Stevenson, *supra* note 70, at 178-83 (discussing the FISA and its interpretation in Saudi Arabia v. Nelson).

72. *See* Santos v. Compagnie Nationale Air France, 934 F. 2d 890, 893 (7th Cir. 1991) (concluding a claim is "based upon" events in the United States if those events establish a legal element of the claim); Callejo v. Bancomer, 764 F. 2d 1101, 1101 (1985) (discussing the phrase "based upon"); Stevenson, *supra* note 70, at 178 (discussing the definition of the phrase "based upon").

corporation, to recruit employees in America to work at the King Faisal Hospital in Riyadh.[73] The Kingdom of Saudi Arabia owned and operated the King Faisal Specialist Hospital and Royspec Purchasing Services, which served as the Hospital's corporate purchasing agent in the United States.[74] Nelson's recruitment was carried out by the Hospital Corporation of America and he signed an employment contract in Miami before beginning work in Saudi Arabia.[75]

Royspec was listed as a contact for Nelson's family in America while he was in Saudi Arabia.[76] The Kingdom of Saudi Arabia's extensive involvement in running the hospital and recruiting employees for the hospital is important because there is case law supporting the proposition that a government can become so involved in a particular commercial activity that it becomes, in effect, a commercial entity.[77] In *United States v. Planters' Bank of Georgia*, Chief Justice Marshall stated:

> It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.[78]

It could be argued that the activities of the Saudi government took on a commercial nature when the government became involved in operation of the hospital and its corporate purchasing agent in the United States.

1. The Statutory Definition

The FSIA provides that a commercial activity is "either a regular course of commercial conduct or a particular commercial transaction or act."[79] The statute further provides that,

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73. *See* Nelson v. Saudi Arabia, 923 F.2d 1528, 1530 (11th Cir. 1991).

74. *See* Saudi Arabia v. Nelson, 507 U.S. 349 (1993) (White, J., concurring) (stating "King Faisal Specialist Hospital and Royspec Purchasing Services" belonged to Saudi Arabian government).

75. *Id.* at 352 (stating how Nelson signed a contract while in the United States).

76. *Id.*

77. *See* Bank of United States v. Planters' Bank of Georgia 22 U.S. 904, 909 (1824) (discussing how government activity can become a commercial activity). *See, e.g.,* Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 310 (2d Cir. 1981) (contract for the purchase of cement is a commercial activity); Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines, 965 F.2d 1375, 1984 (5th Cir. 1992) (sale of airplanes qualifies as commercial activity).

78. 9 Wheat 904, 907 (1824). *See* Bank of United States v. Planters' Bank of Georgia 22 U.S. 904, 909 (1824) (quoting Chief Justice Marshall); *see also* Segni v. Commercial Office of Spain, 835 F.2d 160, 165 (7th Cir. 1987) (analyzing Segni's employment as a contract under which he would provide services in the area of product marketing of Spanish wine as a commercial activity in which a private person would engage); Practical Concepts, Inc. v. Republic of Bolivia, 811 F.2d 1543, 1545 (D.C. Cir. 1987) (finding a consulting services contract to create and implement "a comprehensive program for development of Bolivia's rural areas" to be a commercial activity).

79. 28 U.S.C. 1603(d). *See* Ministry of Supply, Cairo v. Universe Tankships, Inc., 708 F.2d 80, 84 (2nd Cir. 1984) (defining commercial activity broadly to include actions committed outside United States territory if those actions were "an integral part of the state's regular course of commercial conduct" or if they had "substantial contact with the United States"). *See generally* Naomi Roht-Arriaza, *The Foreign Sovereign Immunities Act and Human Rights Violations: One Step Forward, Two Steps Back?*, 16 BERK. J. INT'L LAW 71, 82-83 (1998) (discussing the future expansion of sovereign immunity exceptions through amendments to the FSIA).

"[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[80]

The definition of commercial activity provided in the statute leaves a great deal of room for interpretation. Indeed, the House Report that accompanied the Bill stated that, "[t]he courts would have a great deal of latitude in determining what is a 'commercial activity' for purposes of this bill."[81] However, the House Report does provide an illustrative list of some of the types of activities that would be considered 'commercial' in nature within the meaning of the Bill.[82] The Report states that, "[a]ctivities such as a foreign government's sale of a service or product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition,"[83] There are two critical parts of this list that need to be examined in connection with *Nelson*. First, it would be very difficult to argue that the provision of health care is not a service within any reasonable definition of the term.[84] Second, Scott Nelson was hired as an inspector or troubleshooter by the Saudi government. Clearly, Nelson's job at the hospital does not fit into any of the categories of employees listed in the House Report.[85] However, it is important to note that the Foreign Relations Committee's use of the phrase 'such as' indicates that this list is an illustrative list and that the list was not intended to be exclusive.[86] The fact that the list does not include Nelson's job does not mean that Congress did not intend that it be included within the definition.[87]

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80. 28 U.S.C. 1603(d). *See* Callejo v. Bancomer, S.A., 764 F.2d 1101, 1108 (5th Cir. 1985) (noting that an activity is commercial in nature if it is of a kind in which private persons would normally participate for profit). *See generally* Danielle Mazzini, *Stable International Contracts in Emerging Markets: An Endangered Species?*, 15 B.U. INT'L L. J. 343, 364 (1997) (discussing the international law standards of the FSIA).

81. H.R. REP. NO. 94-1487 at 16.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id. See* Saudi Arabia v. Nelson, 507 U.S. 349, 364 (1993) (White, J., concurring) (noting the House and Senate reports compel the conclusion that the acts committed against Nelson were within the bounds of commercial activity). *See generally* Dean Brockbank, *The Sovereign Immunity Circle: An Economic Analysis of Nelson v. Saudi Arabia and the Foreign Sovereign Immunities Act*, 2 GEO. MASON L. REV. 1, 11 (1994) (asserting "*Nelson* greatly narrows the only prescribed remedy for United States citizens to have their grievances addressed and rights preserved when dealing with foreign states").

86. H.R. REP. NO. 1487, 94-1487, at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605. *See* Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines, 965 F.2d 1375, 1384 (5th Cir. 1992) (noting "Congress provided some guidance in the second sentence of 1603(d), which directs us to look at the 'natuer' of an activity rather than at its 'purpose' in determining whether it is commercial"); *see also* AMPAC Group Inc. v. Republic of Honduras, 797 F. Supp. 973, 976 (S.D. Fla. 1992) (stating that "[b]y statute, the Court must focus on the type of transaction, rather than what entity is a party to it, or its ultimate objective").

87. Saudi Arabia v. Nelson, 507 U.S. 348, 364 (1993) (White, J., concurring) (running and operating a hospital is to engage in a commercial enterprise and that retaliation for whistleblowing within that organization is within the bounds of the commercial activity); H.R. REP. NO. 1487, 94-1487, at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605. *But see* Deirdre E. Whelan, *The Commercial Activity Exception in the Foreign Sovereign Immunities Act: Saudi Arabia v. Nelson*, 27 CREIGHTON L. REV. 1069, 1094-95 (1994) (criticizing Justice White for ignoring the "plain meaning of the 'based upon' requirement by allowing a mere connection between the injury-causing activity and the commercial activity asserted to suffice for jurisdictional purposes").

2. Case Law Defining Commercial Activity: The Private Person Test

In *Republic of Argentina and Banco Central de La Republica Argentina v. Weltover, Inc.*,[88] the Supreme Court articulated the private person test for determining whether an activity is commercial within the meaning of the FSIA.[89] The Court stated:

> . . . because the act provides that the commercial character of an act is to be determined by reference to its 'nature' rather then its 'purpose,' 28 U.S.C. 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motives behind them) are the type of actions by which a private person engages in "trade or traffic and commerce" (citation omitted).[90]

In *Weltover,* the Supreme Court held that the issuance of bonds by the government of Argentina was a 'commercial activity' within the meaning of the FSIA.[91] The Supreme Court also noted that the Congress intended to codify the restrictive theory of immunity by enacting the FSIA.[92] The Court held that the codification of the restrictive theory of sovereign immunity had certain implications for the definition of a 'commercial activity' within the meaning of

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88. 504 U.S. 607 (1992).

89. *Id.* at 614 (discussing when a foreign government acts not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are commercial within the meaning of the FSIA).

90. *Id.*

91. *See id.* In *Weltover*, Argentina issued bonds in an attempt to sure up its currency. The bonds provided that they were to be paid at the election of the holder in U.S. dollars. Argentina rescheduled the maturity dates of the bonds and two Panamanian corporations and a Swiss bank brought suit claiming breach of contract. It should be noted that Argentina's claim was brought under the third clause of the FSIA and not the first as in *Nelson*. *See also* Joseph D. Pizzurro, *International Decisions*, 86 AM. J. INT'L L. 820, 822 (1992) (noting that "Argentina's actions in issuing the Bonds and failing to pay those debt obligations when they became due was held to constitute commercial activity."); Keith Highet & George Kahale III, *Weltover, Inc. v. Republic of Argentina*, 85 AM. J. INT'L L. 560, 562 (1991) (discussing that, "[t]his activity was characterized by the court as 'quintessentially commercial,' especially in view of the fact that Banco Central had earned a commission on the transaction and so had acted as any commercial entity might in the circumstances."); Philip J. Power, Note: *Sovereign Debt: The Rise of the Secondary Market and Its Implications for Future Restructurings*, 64 FORDHAM L. REV. 2701, 2729-30 (1996) (stating that, "[o]n appeal, the Supreme Court held that Argentina's issuance of the bonds to its foreign creditors was a commercial activity within the meaning of the FSIA, and that the country's refusal to pay the bonds at their stated maturity had a direct effect in the United States.").

92. *Weltover*, 504 U.S. at 614. The Court stated, "[g]iven that the FSIA was enacted less than six months after our decision in *Alfred Dunhill* was announced, we think that the plurality's contemporaneous description of the then-prevailing restrictive theory of sovereign immunity is of significant assistance in construing the scope of the Act." *Id. See* Pizzurro, *supra* note 91, at 822 (stating that, "[s]ince *Dunhill* was decided less than six months prior to enactment of the FSIA, the Court in *Weltover* felt that that formulation of the then-prevailing restrictive theory of sovereign immunity was significant in construing the statute."); *see also* Avi Lew, *Republic of Argentina v. Weltover, Inc.: Interpreting the Foreign Sovereign Immunity Act's Commercial Activity Exception to Jurisdictional Immunity*, 17 FORDHAM INT'L L.J. 726, 730 (1994) (noting that, "In enacting the FSIA, Congress codified the "restrictive" theory of sovereign immunity espoused in the Tate letter."); Power, *supra* note 91, at 2727-28 (stating that "[e]nacted to codify the so-called 'restrictive theory' of sovereign immunity, the FSIA acts as a jurisdictional bar to certain suits involving the official acts of a foreign country.").

the FSIA.[93] The Court stated, "[i]n accord with that description we conclude that when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA."[94] In *Nelson*, Saudi Arabia was clearly acting as a 'private player' within the market.[95] Saudi Arabia was doing much more then simply playing a regulatory role in its health care industry—it owned and operated the King Faisal Hospital as well as Royspec, and had entered into a contract with the Hospitals Corporation of America.[96]

The second important part of the Supreme Court's analysis in *Weltover* is the distinction between nature and purpose.[97] The House Report provides that "commercial activities" shall be defined in terms of the nature of the act and not simply its purpose.[98] *Weltover* emphasizes this distinction and uses it as a basis for its definition of a commercial activity.[99] The court held that

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93. *See Weltover*, 504 U.S. at 614 (discussing how the court took into account past decisions for assistance in construing the scope of the act); *see also* Lew, *supra* note 92, at 728 (discussing how the Court held that a non-U.S. sovereign's unilateral rescheduling of the bonds had a direct effect in the United States, subjecting it to suit in a U.S. court pursuant to the FSIA); *id*. at 733 (discussing how the Tate letter, which eventually developed into the commercial exception of the FSIA, indicated that the State Department would adopt the "restrictive" doctrine, which provides that sovereign immunity in the United States should be granted only with respect to causes of action arising out of a sovereign's governmental actions, but not those arising out of its commercial actions).

94. Republic of Argentina and Banco Central de La Republica Argentina v. Weltover, Inc., 504 U.S. 607 (1992).

95. *See* Nelson v. Saudi Arabia, 923 F.2d 1528, 1536 (11th Cir. 1991) (discussing how Saudi Arabia was no longer a regulator of a market, but a private player because Nelson's detention and torture were so intertwined with his work at the hospital); *Weltover*, 504 U.S. at 614 (concluding that when a foreign government acts not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA); *see also* Wolf v. Federal Republic of Germany, 95 F.3d 536, 543 (7th Cir. 1996) (discussing how a state engages in commercial activity only when it exercises powers that can also be exercised by private citizens, or when it acts like a private player in the market).

96. *See* Nelson v. Saudi Arabia, 923 F.2d 1528, 1533 (11th Cir. 1991) (describing how all employment contracts were between the Saudi Arabian government and the employee, shows how the Saudis did more then just regulate); *Weltover*, 504 U.S. at 615 (describing the commercial character of the bonds and that they may be held by private parties); *see also* Southway v. Central Bank of Nigeria, 198 F.3d 1210, 1217 (10th Cir. 1999) (stating that given the commercial nature of contractual relationships in the marketplace, many contracts entered into by a foreign state will fall within the FSIA's commercial activity exception precisely because those contacts are of a type in which private actors might enter).

97. *See Weltover*, 504 U.S. at 614-15.

98. H.R. REP. NO. 94-1487 at 16. *See Weltover*, 504 U.S. at 614 (stating that the commercial character of an act is to be determined by reference to its nature rather than its purpose); *see also* Southway v. Central Bank of Nigeria, 198 F.3d 1210, 1217 (10th Cir. 1999) (describing that the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose).

99. *See Weltover*, 504 U.S. at 614 (defining commercial activity); *See Southway*, 198 F.3d at 1217 (stating that the FSIA defines commercial activity as either a regular course of commercial conduct of a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose); *see also* Wolf v. Federal Republic of Germany, 95 F.3d 536, 543 (7th Cir. 1996) (discussing commercial activity and FSIA's definition).

a particular activity is commercial in nature if it is the type of activity that a private party engages in during "trade and traffic or commerce."[100]

The distinction between nature and purpose is an extremely important one and Congress' emphasis on the nature of an activity is critical to the practical application of the FSIA by the courts.[101] Congress emphasized the nature and purpose distinction because it wanted to prevent foreign governments from always claiming that the commercial activities exception did not apply to them.[102] If the determination of whether or not an activity is commercial within the meaning of the FSIA hinged on the purpose of the activity, a government could always claim that the activity was carried out to further the public good and thus avoid application of the commercial activities exception.[103]

The "private person" test was utilized by the Supreme Court in *Texas Trading and Milling Corp. v. Federal Republic of Nigeria*.[104] In *Texas Trading and Milling Corp.*, the government of

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100. *Weltover,* 504 U.S. at 614. *See Southway,* 198 F.3d at 1217 (discussing the commercial nature of contracts and how the contracts were of the type that private actors might enter). *See generally* Wolf v. Federal Republic of Germany, 95 F.3d 536, 543-544 (7th Cir. 1996) (stating how the actions undertaken by the German government were sovereign acts and were not the kind of ordinary commercial transaction that a private party might undertake).

101. *See* Howard Jacob Lager, Comment, *Avoiding the "Nature-Purpose" Distinction: Redefining an International Commercial Act of State*, 18 U. PA. J. INT'L ECON. L. 1085, 1101 (1997) (noting that the FSIA's reliance on an activities nature to determine commercial character has been sharply criticized by commentators and courts).

102. *See, e.g.,* Najarro de Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1390 (5th Cir. 1985) (discussing how the commercial activity exception is the most frequently argued of the sovereign immunity exceptions); Southway v. Central Bank of Nigeria, 198 F.3d 1210, 1219 (10th Cir. 1999) (stating how Congress intended to permit a private person to maintain an action against a foreign state); Republic of Argentina and Banco Central v. Weltover, Inc., 504 U.S. 607, 613 (1992) (describing how lower courts have consistently held that foreign sovereigns were not immune from the jurisdiction of American courts in cases arising out of purely commercial transactions).

103. *See Najarro de Sanchez*, 770 F.2d at 1390 (holding that the Nicaraguan National Bank's issuance of a check was a sovereign activity subject to the commercial activities exception). In *Najarro de Sanchez*, the Fifth Circuit highlighted the frequent difficulty that courts encounter in attempting to label an activity either sovereign or commercial in nature. For example, the Court argued that the issuance of the check to the plaintiff in this case could constitute either a sale of foreign currency (an activity frequently engaged in by private actors) or an attempt to regulate Nicaragua's currency (an activity that is completely sovereign in nature). In holding that the issuance of the check was a sovereign activity within the meaning of the FSIA, the court pointed out that Nicaraguan law gave the national bank responsibility for managing Nicaragua's monetary reserves. *See also* Mark B. Baker, *Whither Weltover: Has the U.S. Supreme Court Clarified or Confused the Exceptions Enumerated in the Foreign Sovereign Immunities Act?*, 9 TEMP. INT'L & COMP. L.J. 1, 13 n.93 (1995) ("The court employed the concepts of "nature, purpose and profits" as such: "Congress's intent in instructing us to focus on the nature of an activity rather than on its purpose was to preclude foreign governments from always being able to claim sovereign immunity. Whenever a government enters the market place to buy or sell goods, its [ultimate purpose] is not to earn profits; in some sense, its motivation is the public good."); Howard Jacob Lager, Comment, *Avoiding the "Nature-Purpose" Distinction: Redefining an International Commercial Act of State*, 18 U. PA. J. INT'L ECON. L. 1085, 1091 (1997) (discussing the effective application the Act's definition of "commercial activity" has since redirected Congress' focus on the "nature" rather than the "purpose" of an activity, resulting in preventing foreign governments from always claiming a "public" purpose to each of its commercial transactions because every time a government enters the marketplace to buy or sell goods, its purpose is in some sense, its motivation can be linked to some public good).

104. 647 F.2d 300 (2nd Cir. 1981).

Nigeria ordered vast quantities of cement from foreign developers in order to ensure a supply of cement for its infrastructure.[105] However, the government ordered so much cement that the Nigerian ports could no longer handle the influx and cement-bearing ships were turned away without payment being made for the cargo they carried.[106] Several American suppliers brought suit for breach of contract.[107] In finding that the actions of the Nigerian government amounted to a commercial activity, the Court stated "if the activity is one in which a private person could engage, it (the government) is not entitled to immunity."[108] It would seem that application of this test to the facts of *Nelson* indicates that the government of Saudi Arabia was engaged in an activity that a private person could be engaged in. Hospitals are frequently run by private actors and it would be very difficult to argue that a private actor could not engage in the kind of intimidation of a whistleblower that the Saudi government carried out against Nelson.

C. The Saudi Government's Commercial Activities Create a Sufficient Jurisdictional Nexus with the United States

The statute requires that there be a "jurisdictional nexus" between the foreign sovereign's activity and the United States.[109] Writing for the Eleventh Circuit Court of Appeals, Chief Judge Re of the United States Court of International Trade (sitting by designation) argued that the concept of a "jurisdictional nexus" within the meaning of the commercial activities exception can best be understood by likening it to the requirement of proof of a "causal connection" in a tort case.[110] Judge Re also drew a parallel to the requirement of a nexus in long-arm statutes.[111]

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105. *Id.* at 303 (discussing how the government of Nigeria embarked on an ambitious program to purchase immense amounts of cement).

106. *Id.* at 305 (describing how demurrage was piling up at astronomical rates and suppliers, hiring, loading, and dispatching more ships daily that Nigeria decided to act).

107. *Id.* at 306 (the four suppliers at issue in this case that sued in the Southern District of New York are Texas Trading, Nikkei, East Europe and Chenax).

108. *Id.* at 309 (citing *Hearing on H.R. 11315 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 94th Congress, 2d Sess. 28* (1976) testimony of Monroe Leigh, Legal Adviser, Department of State).

109. *Compare* Republic of Argentina and Banco Central v. Weltover, Inc., 504 U.S. 607, 619 (1992) (noting Argentina's unilateral rescheduling of the maturity dates on the bonds had a direct effect in the United States); *with* Southway v. Central Bank of Nigeria, 198 F.3d 1210, 1218 (10th Cir. 1999) (discussing Nigeria's connection to the United States); *and* Wolf v. Federal Republic of Germany, 95 F.3d 536, 543 (7th Cir. 1996) (discussing the requirement of a connection between the foreign country's activity and the United States).

110. *See* Nelson v. Saudi Arabia, 923 F.2d 1528, 1534 (11th Cir. 1991) (comparing the statute to the requirement that there be a causal connection in order to impose liability in the civil law of torts).

111. *Id.* at 1534. The Court of Appeals further stated, "This jurisdictional nexus requirement between the act complained of or grievance, and the commercial activity or business enterprise conducted by the foreign state is salutatory and necessary to satisfy both the Congressional policy of the FSIA and sound principles of comity." The Eleventh Circuit opinion also points out that Royspec, the purchasing agent for the Saudi government in the United States maintained an office in Maryland and that Nelson's family was given the phone number of the office in Maryland as a way of reaching Nelson while he was in Saudi Arabia. Based on these factors, the Eleventh Circuit concluded that Royspec was under the subject matter jurisdiction of the court. *Id.* at 1533.

Nelson's assertion that Saudi Arabia's actions fell within the commercial activities exception to the FSIA was based upon the first clause of the commercial activities exception which refers to "any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state."[112] It is the phrase "carried on in the United States" that gives rise to the requirement that there be a jurisdictional nexus with the United States.[113] A definition of an activity 'carried on in the United States' is provided in section 1603(e) of the FSIA which states that such an activity is a "commercial activity carried on by such state and having substantial contact with the United States."[114] Therefore, as Justice Stevens stated in his dissent, in order to determine if the court has subject matter jurisdiction, the Court must determine whether the activity has a "substantial contact" with the United States.[115] The Eleventh Circuit stated, "In the present case, however, it is clear from the record that the recruitment and hiring of Nelson in the United States, was part of a process having substantial contact with the United States."[116] An examination of the relevant case law demonstrates that the Eleventh Circuit's analysis of the jurisdictional requirement is correct.

Texas Trading & Milling Corp. v. Federal Republic of Nigeria recognized that the application of a jurisdictional nexus requirement must fit into the context of a modern economy when the Court stated that "[c]onduct crucial to modern commerce, telephone calls, telexes, electronic transfers of intangible debits and credits can take place in several jurisdictions. Outmoded rules placing such activity in one jurisdiction or another are not helpful here."[117] A major weakness of the Supreme Court's analysis of the jurisdictional nexus issue is that it fails to account for the fact that in a modern global economy a commercial activity largely carried out in one jurisdiction can still have a substantial connection with another jurisdiction.[118]

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112. 28 U.S.C. § 1605(a)(2) (2000).

113. 28 U.S.C. § 1605(a)(2) (2000). *See* Nelson v. Saudi Arabia, 923 F.2d 1528, 1532-33 (11th Cir. 1991) (discussing 28 U.S.C. § 1605(a)(2) and that under the FSIA, a commercial activity carried on in the United States by a foreign state is defined as a commercial activity carried on by such state and denotes substantial contact with the United States); *see also* Najarro de Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1390 (5th Cir. 1985) (discussing 28 U.S.C. § 1605(a)(2) and that under the FSIA, commercial activities conducted in the United States by foreign states meets the definition of commercial activity resulting in substantial contact).

114. 28 U.S.C.S. § 1603(e) (2000).

115. Saudi Arabia v. Nelson, 113 S.Ct. 1471 at 1487 (1993) (Stevens, J., dissenting) (stating that, "Under the Foreign Sovereign Immunities Act of 1976 (FSIA), a foreign state is subject to the jurisdiction of American courts if two conditions are met: The action must be "based upon a commercial activity" and that activity must have a "substantial contact with the United States.").

116. *See* Nelson v. Saudi Arabia, 923 F.2d 1528, 1533 (11th Cir. 1991).

117. Texas Trading and Milling Corp. v. Federal Republic of Nigeria 647 F.2d 300, 311 (2d Cir. 1981).

118. *See generally* Amelia L. McCarthy, Comment, *The Commercial Activity Exception - Justice Demands Congress Define a Line in the Shifting Sands of Sovereignimmunity*, 77 MARQ. L. REV. 893, 923 (1994) (proposing that foreign policy and justice require that Congress amend the commercial activity exception to the FSIA to give judicial recourse to American citizens who are being recruited and hired by foreign states to protect them from denial of internationally protected human rights); Margot C. Wuebbels, Note, *Commercial Terrorism: A Commercial Activity Exception Under 1605(a)(2) of the Foreign Sovereign Immunities Act*, 35 ARIZ. L. REV. 1123, 1131-35 (1993) (offering an analysis of the lower courts construction of tests to decide substantial basis under the statute including the jurisdictional nexus test). *But see* Deirdre E. Whelan, *The Commercial Activity Exception in the Foreign Sovereign Immunities Act: Saudi Arabia v. Nelson*, 27 CREIGHTON L. REV. 1069, 1071 (1994) (determining "that the Supreme Court's interpretation of the first clause of the immunity exception promotes the intent of the FSIA and provides a better framework than had previously existed for the commercial activity exception").

1. Defining 'Substantial Contact'

In *Fawwaz Zedan v. Kingdom of Saudi Arabia*,[119] the Court of Appeals for the D.C. Circuit dealt with the problem of defining "substantial contact" within the context of the first clause of section 1605(a)(2).[120] In *Zedan*, an American citizen received a telephone call from Prince Sultan, the royal representative of a non-governmental agency in charge of completing a road construction project in Saudi Arabia.[121] At the prince's invitation, Zedan traveled to Saudi Arabia to work on the project.[122] Eventually, he entered into a contract with a private Saudi corporation to continue work on the construction project.[123] However, the Saudi government soon became concerned over the slow pace of the project and took over the project from the corporation.[124] It provided Zedan with a guarantee that he would be paid pursuant to the terms of his contract with the private corporation.[125] Upon completion of the project, Zedan returned home and brought suit for breach of contract when the Saudi government failed to pay him as promised.[126]

In holding that the district court did not have jurisdiction under the first clause of section 1605(a)(2), the Court of Appeals stated that the "substantial contact" requirement is stricter then the standard applied in a minimum contacts due process inquiry.[127] The Court also pointed out that the legislative history indicates Congress' intent was that the "substantial con-

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119. Fawwaz Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511 (D.C. Cir. 1988).

120. *Fawwaz Zedan,* 849 F.2d at 1513. Section 1605(a)(2) of the Foreign Sovereign Immunities Act provides in pertinent part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . .
>
> (2) in which the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]

121. *Id.* at 1512 (Riyadh Outer Ring Road Project).

122. *Id.* (Zedan was working as an engineer).

123. *Id.* (describing the agreement, a five-year employment contract with a private corporation managed by Sheik Al-Muraibidh known as Al-Muraibidh Establishment. The agreement provided for a monthly salary and a percentage of net profits).

124. Fawwaz Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511, 1512 (D.C. Cir. 1988) (Zedan was then placed in charge of the entire project).

125. *Id.* (noting that Zedan's affidavit did not identify the person in the Saudi Arabian government who assured him that the money would be forwarded to him).

126. *Id.* (discussing the request for damages in the amount of $632,860).

127. *Id.* (citing Maritime International Nominees Establishment v. Guinea, 224 U.S. App. D.C. 119, 693 F.2d 1094, 1109 (1982), *cert. denied*, 464 U.S. 815, 78 L. Ed. 2d 84, 104 S. Ct. 71 (1983) (the holding was that two business meetings between a representative of the foreign sovereign and the plaintiff in the United States did not satisfy the substantial contacts test); McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957) (finding that it was "sufficient for due process that the suit was based on a contract which had substantial connection with the United States."). *See generally* International Shoe Co. v. State of Washington, 326 U.S. 310 (1945) (holding that due process requires a finding that defendant had sufficient 'minimum contacts' with the forum state so as not to offend traditional notions of fair play and substantial justice).

tacts" requirement would not be satisfied by the "U.S. citizenship or U.S. residence of the plaintiff" alone.[128]

The *Zedan* facts can be distinguished from the facts in the instant case. The Court of Appeals in *Zedan* emphasized the fact that Zedan did not enter into an employment contract during his phone call or at any other time while he was in the United States.[129] The Court states, "It would seem then a contractual arrangement, one part of which is to be performed in the United States, constitutes a substantial contact with the United States."[130] Importantly, Nelson did enter into a contract in the United States with the Saudi government. Moreover, he rendered partial performance of his duties under the contract by attending a training session in Tennessee before departing for Saudi Arabia.[131] Using the standard applied in *Zedan*, there was "substantial contact" between the commercial activity of the Saudi government and the United States.

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128. Fawwaz Zedan v. Kingdom of Saudi Arabia, 849 F.2d at 1513; citing H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17 (1976). The House report lists several examples of activities which meet the 'substantial contacts' requirement:

> cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts occurring in the United States, and an indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States—for example, loans, guarantees or insurance provided by the Export-Import Bank of the United States.

See Steven Weisman, Comment, *Individual Protection Crumbles While Sovereignty Reigns: A Comment on Saudi Arabia v. Nelson*, 11 HOFSTRA LAB. L.J. 429, 449 (1994) (gleaning from the court's statements in Zedan "that the minimum contacts actually required must be at least continuous business relations with the United States."). *But see* Saudi Arabia v. Nelson, 507 U.S. 349, 356 (1993). In *Nelson* the Court did not reach the issue of substantial contact with the United States because it concluded that the suit was not based on a commercial activity.

129. *See Fawwaz Zedan,* 849 F.2d at 1513-14 (discussing Zedan's theory that the phone call was a preliminary step in a chain of events leading to the employment contract with Sheik Al-Muraibidh which was subsequently assigned to and guaranteed by the Saudi government); Peter D. Trooboff, Decision: *Jurisdiction-Foreign Sovereignty Immunities Act-commercial activity exception-direct effect,* 82 AM. J. INT'L L. 828, 828 (1988) (holding that Zedan's telephone call did not have the requisite substantiality of contact with the United States); *see also* Weisman, *supra* note 128, at 447 (discussing the facts of the Zedan case).

130. *Fawwaz Zedan,* 849 F.2d at 1512 (analyzing the legislative history regarding the meaning of "substantial contact"). *See* Saudi Arabia v. Nelson, 507 U.S. 349, 378 (1993) (Stevens, J., dissenting) (finding substantial contact with the United States based upon the employer's commercial transaction of engaging Nelson "as an employee with specific responsibilities in that enterprise"). *See also* Amelia L. McCarthy, Comment, *The Commercial Activity Exception—Justice Demands Congress Define a Line in the Shifting Sands of Sovereign Immunity,* 77 MARQ. L. REV. 893, 923 (1994) (suggesting that the issue before the Supreme Court in *Nelson* was "whether the sovereign may use means that might otherwise be treated as an exercise of sovereign governmental power to address commercially created problems and thereby avoid what would otherwise be under the jurisdiction of United States courts").

131. *See Fawwaz Zedan,* 849 F.2d at 1512; Saudi Arabia v. Nelson, 507 U.S. 349, 378 (1993) (Stevens, J., dissenting) (linking Nelson's recruitment, employment contract and orientation in the United States with performance of his position in Saudi Arabia and injuries sustained in that position); *see also* Weisman, *supra* note 128, at 447 (1994) (discussing the "substantial contract" requirement).

2. The *Vencedora* Analysis

In *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*[132] the Fifth Circuit analyzed the approaches adopted by the different circuits and chose among them.[133] The *Vencedora* Court highlighted four approaches to jurisdictional analysis under the first clause: (1) a "literal" approach; (2) a bifurcated literal and nexus approach; (3) a "nexus" approach and (4) a "doing business" approach.[134]

Under the literal approach, the activity that gives rise to the claim must have occurred in the United States.[135] It is not enough that there is a connection between the activity in the United States and an activity outside the United States, which in turn gives rise to the claim.[136] The *Vencedora* Court correctly points out that this approach has not received widespread acceptance.[137] Application of this approach to Nelson would necessarily preclude a finding of jurisdiction because Nelson's claims do not arise directly from activities of the Saudi government carried out in the United States.

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132. 730 F.2d 195 (5th Cir. 1984). In *Vencedora*, a Panamanian corporation brought an action against an agency of the Algerian government to recover for the loss of one of its ships. The Court of Appeals affirmed the Circuit Court's dismissal of the action for lack of personal jurisdiction and subject matter jurisdiction. The Panamanian plaintiffs asserted that the district court had jurisdiction based on the Algerian government's ongoing business activities in the United States. The Court of Appeals found that these business activities did not satisfy the jurisdictional requirements of the first clause of 1605(a)(2). *See generally* Margot C. Wuebbels, Note, *Commercial Terrorism: A Commercial Activity Exception Under 1605(a)(2) of the Foreign Sovereign Immunities Act,* 35 ARIZ. L. REV. 1123, 1133 n.94 (1993) (adopting the nexus test interpretation for the first clause of § 1605 (a)(2)).

133. *See Vencedora,* 730 F.2d at 202 (adopting the Third Circuit's nexus interpretation of the first clause of section 1605(a)(2)). *See generally* Wuebbels, *supra* note 132 (stating the "Third Circuit's nexus test better serves the purpose of simply requiring a connection between the lawsuit and the United States").

134. *Vencedora,* 730 F.2d at 200 (noting the inconsistent judicial reading and application of the first clause of section 1605(a)(2) by the courts). *See generally* Wuebbels, *supra* note 132, at 1133 n.102, and n.104 (discussing the four approaches highlighted in *Vencedora*).

135. *See Vencedora,* 730 F.2d at 200 (citing Gibbons v. Udaras, 549 F. Supp. 1094 (S.D.N.Y. 1982)); Sugarman v. Aeromexico, Inc., 626 F.2d 270, 273 (3d Cir. 1980) (rejecting the literal test and reasoning that if Congress had wanted the literal approach it would have drafted the Act to reflect that intent); Wuebbels, *supra* note 132, at 1131-32 (noting that the *Gibbons* Court considered a literal test but rejected it).

136. *See Gibbons*, 549 F. Supp. 1094, 1109 n.5 (S.D.N.Y. 1982) (noting "clause 1 confers subject matter jurisdiction over a cause of action based upon an act performed *in the United States* in connection with that activity but not over a cause of action based upon an act performed *abroad* in connection with the activity") (emphasis in original). *But see* Gemini Shipping v. Foreign Trade Organization for Chemicals & Foodstuffs, 647 F.2d 317, 319 (2d Cir. 1981) (combining the literal wording of section 1605(a)(2) requiring that the commercial activity be "carried on in the United States" with Section 1603(3) providing that a commercial activity is carried on if it has "substantial contact with the United States" to find that soliciting bids in the United States and paying under the contract through a letter of credit confirmed by a New York bank were sufficient to satisfy the standards for jurisdiction). *See generally* Wuebbels, *supra* note 132, at 1131 (analyzing the "literal test").

137. *See Gemini,* 647 F.2d 317 (stating "the drafters of the FSIA intended no such niggardly construction"); s*ee also* Wuebbels, *supra* note 132, at 1132 (observing "in the rare instances where the literal test has been applied by the district courts, it has been repudiated by the circuits on appeal"*); Gibbons,* 549 F. Supp. 1094 (rejecting a literal reading of the first clause of § 1605(a)(2)).

The second approach is a hybrid of the literal approach and a nexus approach. This approach requires a finding that "the commercial activity in the United States constitutes or directly causes the occurrence of an element of the cause of action."[138] Under this approach, it would appear that Saudi Arabia's activities in the United States, specifically their recruitment and hiring of Nelson, could be found to have directly caused the detention and torture of Nelson, which constitutes an element of Nelson's cause of action.

The third approach is the "nexus" approach which was articulated by the Third Circuit in *Sugarman v. Aeromexico, Inc*.[139] In *Sugarman*, the Third Circuit found a nexus where a passenger, on the return leg of a round trip flight from New Jersey to Mexico, alleged that an extended flight delay at the airport in Mexico caused him to have a heart attack.[140] The *Sugarman* Court based jurisdiction on the fact that the passenger was on a flight returning to the United States and that he had bought his ticket in New Jersey.[141] The Third Circuit justified its "nexus" approach by pointing out that due process problems would not arise where, "the acts complained of, although themselves extra-territorial, grow out of a regular course of commercial conduct carried on in the United States."[142]

The fourth approach to jurisdictional analysis is the "doing business" test.[143] This approach represents the broadest possible application of the first clause of the commercial activ-

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138. Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, *supra* note 132, at 200 (citing Gilson v. Republic of Ireland, D.C. 73, 682 F. 2d 1022 (D.C. Cir. 1982)). The *Vencedora* Court points out that although the *Gilson* Court applied its analysis to only the second clause of 1605(a)(2), other courts have held that the hybrid approach applies to all three clauses. *See* Wuebbels, *supra* note 132 (noting that this test is also known as the causal connection test).

139. 626 F.2d 270 (requiring a nexus between the commercial activity in the United States and the grievance). *See* Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 200-01 (5th Cir. 1984) (citing *Sugarman*); *see also* Velidor v. L/P/G Benghazi, 653 F.2d 812, 814 (3d Cir. 1981) (finding jurisdictional nexus satisfied when the acts constituting the breach of contract may have taken place outside the United States).

140. *See Sugarman,* 626 F.2d, at 272-73 (the plaintiff passenger was waiting for 15 hours under extremely brutal conditions); Wuebbels, *supra* note 132, at 1131 (discussing the "nexus test"); *but see* America West Airlines, Inc. v. CPA Group, Ltd., 877 F.2d 793, 796 (9th Cir. 1989) (holding that there was no nexus in this case between the cause of action and any activities carried on by the foreign sovereign in the United States). The sovereign's national airline and its subsidiary serviced an aircraft engine, which later malfunctioned, causing an emergency landing. Carrying on of commercial activities in the United States, in and of itself, is insufficient to create jurisdiction under the Act. *Id.*

141. *See Sugarman,* 626 F.2d at 273 (construing Congress' intent not to require the misconduct complained of to take place in the United States). *But cf.* American Express International v. Mendez-Capellan, 889 F.2d 1175 (1st Cir. 1989) (holding that the district court lacked personal jurisdiction under Puerto Rican long arm statutes over a Dominican citizen because the cause of action did not arise from the agency's contacts with Puerto Rico).

142. *Sugarman,* 626 F.2d at 273 (observing when Congress' intent was to limit the acts subject to liability to acts carried out in the United States, the statute is clear as in the third clause's "direct effects in the United States" requirement); *see also* Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308 (2nd Cir. 1981) (noting, "The words 'regular course of conduct' seem to authorize the courts to cast the net wide and to identify a broad series of acts as the relevant set of activities"); Margot C. Wuebbels, Note, *Commercial Terrorism: A Commercial Activity Exception Under 1605(a)(2) of the Foreign Sovereign Immunities Act,* 35 ARIZ. L. REV. 1123, 1132 (1993) (discussing the "nexus test").

143. *See* Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195,201 (5th Cir. 1984) (citing *Rio Grande Transport, Inc*., 516 F. Supp. 1155 (S.D.N.Y. 1981)); *see also* Harris v. VAO Intourist, 481 F.Supp. 1056 (E.D.N.Y. 1979) (concluding that if Congress wished to provide broader protection it would have utilized a broad "doing business" presence concept in the traditional sense). *See generally* Wuebbels, *supra* note 142, at 1134 (noting many courts have rejected the doing business test on the ground that the restrictive wording of the Act makes clear the limited case where a doing business test should apply).

ities exception to the FSIA.[144] Under the doing business test the defendant need only have "a broad course of conduct" which is connected to the United States.[145] Under the "doing business test" the acts complained of need not have any connection to the United States.[146]

The *Vencedora* Court uses the Southern District's holding in *Rio Grande Transport, Inc.*[147] to illustrate this particular approach to jurisdictional analysis.[148] In *Rio Grande Transport, Inc.* the defendant's ship was involved in a collision as it was traveling between Europe and Algeria, its regular route.[149] Even though the acts giving rise to the collision had no particular connection to the United States, the court found jurisdiction based on the fact that the defendant shipping company had substantial commercial contacts with the United States.[150]

In contrast to the "nexus" approach articulated in *Sugarman*, under the "doing business test" the acts complained of need not have arisen out of commercial activity conducted in the

144. *See Texas Trading,* 647 F.2d 300 (stating that, "Before the FSIA, plaintiffs enjoyed a broad right to bring suits against foreign states, subject only to State Department intervention and the presence of attachable assets. Congress in the FSIA certainly did not intend significantly to constrict jurisdiction; it intended to regulate it"); *see also* Ministry of Supply Cairo v. Universe Tankships, 708 F.2d 80, 84 (2d Cir. 1983) (interpreting no immunity for acts if they comprise an integral part of the state's regular course of commercial conduct or a particular commercial transaction having substantial contact with the United States). *See generally* Deirdre E. Whelan, *The Commercial Activity Exception in the Foreign Sovereign Immunities Act: Saudi Arabia v. Nelson,* 27 CREIGHTON L. REV. 1069, 1070 (1994) (noting that Congress left it to the courts to define the terms of the statute and to decide immunity on a case-by-case basis).

145. *See Vencedora*, 730 F.2d at 200 (citing *Rio Grande Transport, Inc.,* 516 F. Supp. 1155 (S.D.N.Y. 1981)). *But see* Saudi Arabia v. Nelson, 507 U.S. 349, 356 (1993) (reasoning that the "based upon" requirement of the first clause was not satisfied in *Nelson* because the Saudis' tortious acts of arresting, imprisoning and torturing Nelson had a connection with the recruitment and hiring of Nelson). *See generally* Whelan, *supra* note 144, at 1087 (discussing the "private player" test relied on by the Supreme Court in *Weltover* provided that where a foreign government acts as a market participant or "private player" rather than as a market regulator, its activities are commercial in nature for purposes of the FSIA).

146. *See Vencedora*, 730 F.2d at 195; *see also* Tabular Inspectors, Inc. v. Petroleos Mexicanos, 977 F.2d 180 (5th Cir. 1992) (the case involved preventing a United States parent company doing business through a Mexican subsidiary from gaining jurisdiction in the United States to sue for the purchase price of valves); William R. Dorsey, III, *Reflections on the Foreign Sovereign Immunities Act After Twenty Years*, 28 J. MAR. L. & COM. 257, 295-96 (1997) (concluding that the *Nelson* decision "embraces the view of most the circuits that the test for jurisdiction under the first clause is something more than a doing business test, that is, the foreign sovereign can be sued in the United States if it is doing commercial business in the United States even though there is no specific connection between the lawsuit and the United States").

147. 516 F. Supp. at 1161.

148. *See Vencedora,* 730 F.2d at 200 (noting that the court did not specifically refer to its interpretation by that name); Wuebbels, *supra* note 142, at 1133 (discussing the "doing business test").

149. *See Rio Grande Transport, Inc.,* 516 F. Supp. at 1162 (reasoning although the regular route had no connection with the United States, the broad Congressional definition of "commercial activity" included a "regular course of commercial conduct" which meant that "Congress apparently did not intend to require that the specific commercial transaction or act upon which an action is based [had to] have occurred in the United States or have had substantial contact with the United States; only the broad course of conduct must be so connected."); *see also* Dorsey, *supra* note 146 (discussing the court's holding in *Rio Grande*); Wuebbels, *supra* note 142.

150. *See* Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 200 (5th Cir. 1984); *see generally* Wuebbels, *supra* note 142, at 1133 (discussing the "doing business test"); Dorsey *supra* note 146.

United States.[151] Furthermore, it is interesting to note that, in a separate opinion in *Vencedora*, Judge Higginbotham argued that the "doing business" test is the correct test to be used in connection with the first clause of the commercial activities exception.[152]

The jurisdictional analysis conducted by the *Vencedora* Court supports the proposition that the activities carried out by the Saudi government created a sufficient jurisdictional connection with the United States to support application of the first clause of the commercial activities exception to the Saudi government.[153] With the exception of the first approach (i.e., the literal approach) all of the approaches outlined in *Vencedora* support the contention that Saudi Arabia's activities fit into the commercial activities exception.[154] In order for the literal approach to apply, the activity complained of would have had to occur in the United States.[155] However, as the Court points out, the literal approach has received very limited acceptance.[156]

The nexus approach and the doing business approach present the most clear cut argument that Saudi Arabia's activities fell within the commercial activities exception. Recall that under the nexus approach, the acts complained of must have 'grown out of' a 'regular course of com-

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151. *See* Sugarman v. Aeromexico, Inc., 626 F.2d 270 (3d Cir. 1980) (holding that Aeromexico's sale of air travel tickets in the U.S. was a sufficient nexus to satisfy "commercial activity," even though the injury occurred outside the United States, when the plaintiff/appellant's return flight from Mexico was delayed). *Cf.* Wuebbels, *supra* note 142, at 1132 (defining the nexus test as requiring "only some connection between the plaintiff's grievance and the foreign entity's commercial activity in the United States"). *But see* Kevin Leung, *Cicippio v. Islamic Republic of Iran: Putting the Foreign Sovereign Immunity Act's Commercial Activities Exception in Context*, 17 LOY. L.A. INT'L & COMP. L. J. 701, 711 (1995) (explaining that the "doing business" test examines the relationship between the defendant and the United States, rather than that between the lawsuit and the United States).

152. *See Vencedora*, 730 F.2d at 205-206 (Higginbotham, concurring in part; dissenting in part). Judge Higginbotham argued that application of the "doing business" test is supported by the statutory language and the legislative history of the act, he also argued that application of the "doing business" test satisfies the Congressional purpose in enacting the FSIA, stating "[s]uch a restriction fulfills the congressional purpose of avoiding use of our court system by strangers with foreign disputes." *Id*.

153. *See* Keith Highet and George Kahale III, Decision, 87 AM. J. INT'L L. 442, 443 (1993) (noting that Justice White felt the activity of operating a hospital was commercial and satisfied one of the elements for establishing jurisdiction under the first clause).

154. *See* Dynda L. Artz, Comment, *The Noncorporate Plaintiff: Hostage to the Gordian Knot of the Foreeign Sovereign Immunities Act of 1976*, 54 U. CIN. L. REV. 907, 926 (1986).

155. *See Vencedora,* 730 F.2d at 202 (stating, "A literal reading of the clause would require the act complained of to have occurred in the United States; 'the drafters of the FISA intended no such niggardly construction.'") (quoting Gemini Shipping v. Foreign Trade Organization for Chemicals & Foodstuffs, 647 F.2d 317, 319 (2d Cir. 1981)); *see also* Leung, *supra* note 151, at 710-11 (explaining that the literal method "employs a literal reading of the 'based upon' requirement and requires that the cause of action be based directly on the defendant's commercial activities in the United States"); Daniel C. Rodgers, *Act of State Doctrine Overrides American Antitrust Law: O.N.E. Shipping v. Floata Mercante Grancolombiana, S.A.*, 13 MAR. LAW 211, 223 (1988) (observing that a literal reading of the statute instructs that the determination of the existence of commercial activity must be done by looking at its nature, rather than its purpose).

156. *See* Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 200 (5th Cir. 1984) (stating that the literal approach has been "repudiated by the circuits"). *See e.g.*, Gibbons v. Udaras, 549 F.Supp. 1094, 1109 n.5 (S.D.N.Y. 1982) (rejecting the literal analysis, stating that it is contrary to the legislative intent behind the statute); Margot C. Wuebbels, *Commercial Terrorism: A Commercial Activity Exception Under §1605(a)(2) of the Foreign Sovereign Immunities Act*, 35 ARIZ. L. REV. 1123, 1132 (1993) (pointing out that district courts have rarely used the test and when they do, they are reversed on appeal).

mercial conduct' carried on in the United States.[157] Clearly, the fact that Saudi Arabia regularly engaged in recruiting activities in the United States and in fact owned a corporation based in the United States (which was in charge of purchasing for the Saudi hospitals) is indicative of a regular course of commercial activity.[158] Further, Nelson's hiring and his subsequent torture arose from the commercial activities of Saudi Arabia in the United States; in particular, the recruiting activities carried out in the United States on behalf of the Saudi government resulted in Nelson signing a contract in the United States.[159] It should be noted that, in *Vencedora*, the Fifth Circuit adopted the nexus approach as its own.[160]

Application of the "doing business test" to the Saudi government's actions presents an even more clear cut case. The Saudi government, by virtue of the purchasing agency it owned in the United States and the recruitment activities it engaged in, clearly had substantial commercial contacts with the United States.[161] Additionally, under the "doing business test" the acts complained of need not have arisen out of the commercial conduct in the United States.[162]

The "direct causal connection" requirement utilized by the hybrid approach creates a closer question. Nelson signed a contract in the United States to serve as a "troubleshooter" at the King Faisal Hospital.[163] In addition, when he attended his training session in the United

157. *See Vencedora*, 730 F.2d at 200-201 (quoting *Sugarman,* 626 F.2d at 273); *see also* Colonial Bank v. Campagnie Generale Maritimeet Financiere, 645 F. Supp. 1457 (S.D.N.Y. 1986) (holding that a sufficient nexus did not exist for a foreign sovereign, whose commercial activity in the United States was limited to purchasing vessels for a subsidiary that sailed to U.S. ports); Dynda L. Artz, *The Noncorporate Plaintiff: Hostage to the Gordian Knot of the Foreign Sovereign Immunities Act of 1976*, 54 U. CIN. L. REV. 907, 911 and n.27 (1986) (citing a House Report that gave some guidance as to what constitutes "commercial activity").

158. *See* Highet and Kahale III, *supra* note 153, at 443 (noting that Justice White felt the activity of operating a hospital was commercial and satisfied one of the elements for establishing jurisdiction under the first clause).

159. *Id.*

160. *See Vencedora,* 730 F.2d at 201 (stating, "We regard a nexus approach simply as a more effective means of carrying out the goal of requiring a connection between the lawsuit and the United States that the language of clause one appears to embody.").

161. *See* Wuebbels, *supra* note 156, at 1133-34 (stating that the "doing business" test is controversial, in that it requires only a broad course of conduct with the United States by a foreign sovereign in order to trigger the exception); *see also* Keith Highet and George Kahale, III, Decision*: Weltover, Inc. v. Republic of Argentina*, 85 AM. J. INT'L L. 560, 563 and n.13 (1991) (characterizing the "doing business" test as troubling, in that its analysis could allow for jurisdiction for almost any foreign entity, most notably those with multiple consulates in the United States. *But see* Hugh R. Kross, Michael A. Rodenbaugh, Eric C. Strain, *Recent Developments in Aviation Law*, 65 J. AIR L. & COM. 3, 7 (1999) (stating that the language of the statute does not require a test more stringent than the "doing business" test) (citing Theo Davies & Co. v. Republic of the Marshall Islands, 174 F.3d 969 (9th Cir. 1998).

162. *See Vencedora*, 730 F.2d at 201 (noting that the broad course of contact required under the "doing business" test is consistent with Congress' apparent intent to allow recourse for those injured by commercial acts of a foreign sovereign) (citing In re Rio Grande Transport, Inc., 516 F.Supp. 1155 (S.D.N.Y. 1981)); *see also* Wuebbels, *supra* note 156, at 1133-34 (explaining that the "doing business" test only requires that a foreign sovereign be connected to the United States through a "broad course of conduct"); William R. Dorsey, III, *Reflections on the Foreign Sovereign Immunities Act After Twenty Years*, 28 J. MAR. L. & COM. 257, 296 (1997) (stating that the "doing business" test requires no relationship between the lawsuit and the United States, rather it only requires that the foreign sovereign is "doing business" in the United States) (citing *Rio Grande Transport*, 516 F. Supp. 1155 (S.D.N.Y. 1981)).

States he was presumably instructed in how to carry out his troubleshooting duties as required by the contract.[164] It is Nelson's performance of these duties in accordance with his training and under the terms of his contract that directly caused the captivity and torture he endured.[165] Therefore, a direct connection can be drawn between Saudi Arabia's recruitment and training activities in the United States and Nelson's subsequent arrest and torture.[166] Indeed, in his dissent, Justice Stevens highlighted the existence of a "direct connection" between the commercial activities carried out by Saudi Arabia in the United States and Nelson's detention and torture.[167] He stated, "The position for which respondent was recruited and ultimately hired was that of a monitoring systems manager, a troubleshooter, and taking respondent's allegations as true, it was precisely respondents' performance of those responsibilities that led to the hospital's retaliatory actions against him."[168] It seems that the facts of this case support a finding that there was a direct connection between Saudi Arabia's commercial activities in the United States and Nelson's subsequent detention and torture.

II. In the Wake of the Supreme Court's Holding in *Nelson* Congress Should Enact a Human Rights Exception to the Foreign Sovereign Immunities Act

In parsing the language of the commercial activities exception, the Justices in the majority clearly felt that they were being true to the legislative intent of the statute.[169] Nonetheless, the end result of the litigation was that an American citizen whose human rights were grossly violated by the Saudi government was left with little recourse in the American courts.[170] Absent from many of the scholarly commentaries is a recognition of the injustice suffered by Nelson.[171] However, a vocal critic of the Supreme Court's decision is Judge Edward D. Re (the author of the Eleventh Circuit's opinion) who has compared *Nelson* to the Supreme Court's infamous

163. *See* Saudia Arabia v. Nelson, 507 U.S. 349, 352 (1993) (listing Mr. Nelson's responsibilities as "monitoring all facilities, equipment, utilities and maintenance systems to insure the safety of patients, hospital staff and others").

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 378 (Stevens, J., dissenting) (pointing out that Mr. Nelson had been recruited and attended an orientation session in the United States and had been hired as a "troubleshooter," which included responsibilities that, when carried out, led to Mr. Nelson's alleged detention and torture. *But see* Republic of Argentina and Banco Central v. Weltover, Inc., 504 U.S. 607, 612 (1992) (discussing Argentina's issuance and continued liability under the Bonds constituted a commercial activity and the extension of the payment schedules was taken in connection with that activity); Wolf v. Federal Republic of Germany, 95 F.3d 536, 543-544 (7th Cir. 1996) (discussing Weltover and stating how Germany's actions were not commercial within the meaning of FSIA).

168. Saudi Arabia v. Nelson, 507 U.S. 349, 378 (1993) (Stevens, J., dissenting) (theorizing that defendant/petitioner should be subject to jurisdiction because as a sovereign that sought the benefits of a private marketplace, it shed its sovereign status and therefore should be treated as a private business).

169. *See* David A. Brittenham, Note, *Foreign Sovereign Immunity And Commercial Activity: A Conflicts Approach*, 83 COLUM. L. REV. 1440, 1479 (1983) (noting that there was no Congressional intent to foreclose the development of a choice-of-custom approach to immunity determinations under "direct effect" jurisdiction).

170. *See* Amelia L. McCarthy, Comment, *The Commercial Activity Exception—Justice Demands Congress Define A Line In The Shifting Sands Of Sovereign Immunity*, 77 MARQ. L. REV .893 , 894 (1994) (arguing that Congressional action is needed to prevent future American citizens from suffering Scott Nelson's plight).

171. *Id.*

decision in *Korematsu v. United States* (upholding the United States government's internment of Japanese-Americans during World War II).[172] In order to avoid further injustices of the kind visited on Scott Nelson, Congress should enact a human rights exception to the FSIA.

At the outset it should be noted that there have been several attempts to amend the FSIA to provide an exception for human rights abuses. In the 102nd and 103rd Congresses, Congressman Lawrence J. Smith sought to introduce legislation that was intended to encompass the "torture and extrajudicial killing" of an American citizen by the government of a foreign state.[173] Neither of the proposed amendments ever became law. In the 103rd Congress, Congressmen Schumer and Pallone unsuccessfully sought passage of a bill that would add an exception for the "torture or extrajudicial killing" of an American citizen by a foreign sovereign.[174] Finally, in 1996, President Clinton signed the Antiterrorism and Effective Death Penalty Act.[175] The Act added an exception to the FSIA which covered the torture or extrajudicial killing of an American citizen.[176] However, the Act provides limited protection because it only applies to acts committed by governments that are currently on the State Department's list of terrorist

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172. *See* Edward D. Re, Address at the American Society of International Law (April 2, 1993) (citing Korematsu v. United States, 323 U.S. 214 (1944)); *see also* Edward D. Re, Address at the St. John's Law Review Association's Rededication Symposia, International Human Rights Before Domestic Courts: Human Rights, International Law and Domestic Courts in 70 ST. JOHN'S L. REV. 51,70-74 (1996). In his address at the St. John's Law Review Symposia on 'International Human Rights Before Domestic Courts,' Judge Re stated:

> I share Justice Blackmun's hope for the future and conclude by expressing the thought that courts cannot be oblivious to the consequences of judicial decisions that ignore international human rights, and, by inaction or restrictive statutory interpretation, tolerate or permit their violation. In the application of constitutional guarantees, and in the interpretation of laws that affect human rights, the Supreme Court can neither abandon nor restrict its special role as guardian of the Constitution and protector of fundamental human rights.

173. *See* Jeffrey Jacobson, *Trying to Fit a Square Peg into A Round Hole: The Foreign Sovereign Immunities Act and Human Rights Violations*, 19 WHITTIER L. REV. 757, 774-75 (1998) (citing H.R. Rep. No. 102-900, 102nd Congress 2d Sess. 3 (1992)) (listing Congressman Smith's proposed amendment, the insertion of the language of the Torture Victims Protection Act ("TVPA") as one of the recent attempts to fit a human rights exception into the FSIA). *See also* David J. Bederman, *Problems of Proving International Human Rights Law in U.S. Courts: Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT'L COMP. L. 255, § IV (1996) (explaining that Congressman Smith's proposed amendment would allow a lawsuit to be brought against a foreign sovereign if the "torturer or extrajudicial killer was acting within the scope of his or her office or employment.").

174. *See* Jacobsen, *supra* note 173 (observing the proposed legislation took Congressman Smith's proposition one step further, making the FSIA apply to cases where "monetary damages are sought against a foreign state for personal injury or death of a U.S. citizen . . . and caused by the torture or extrajudicial killing of that person by such foreign state or by a war crime committed by the military of such foreign state action within the scope of his or her office or employment"); *see also*, Bederman, *supra* note 173 (describing the steps that Congressmen Schumer and Pallone took as a response to the Nelson and Princz cases); John Hart Stevenson, *A License to Kill: a Look at Saudi Arabia v. Nelson*, 17 HOUS. J. INT'L L. 177, n.98 (1994) (quoting Congressman Schumer calling the decision "reprehensible").

175. Pub.L.No. 104-32, 110 Stat. 1214 (1996). *See* Keith A. Sealing, *"State Sponsors of Terrorism" are Entitled to Due Process Too: the Amended Foreign Sovereign Immunities Act Is Unconstitutional*, 15 AM. U. INT'L REV. 395, 396 (2000) (describing this piece of legislation as a response to the result in Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239 (2d Cir. 1996)); *see also* Melinda Smith, Comment: *Criminal Defense Attorneys and Noncitizen Clients: Understanding Immigrants, Basic Immigration Law & How Recent Changes in Those Laws may Affect Your Criminal Cases*, 33 AKRON L. REV. 163, 164 (1999) (discusing the effect of the The Antiterrorism and Effective Death Penalty Act of 1996).

nations (Iran, Libya, North Korea, Sudan, and Syria).[177] The need for a human rights exception to the FSIA remains.

A. The Need to Uphold Jus Cogens Norms Against Torture

The need for a human rights exception to the Foreign Sovereign Immunities Act is best illustrated by a trio of cases, of which *Nelson* is one. These cases are important because they illustrate the fact that the courts will not grant jurisdiction even where the alleged acts of a sovereign clearly violate *jus cogens* norms against torture.[178] The Vienna Convention on the Law of Treaties defines *jus cogens* as a "norm accepted and recognized by the international community of states as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[179] The FSIA should be amended so that the courts of the United States are given the jurisdiction necessary to uphold the *jus cogens* norm against torture.[180]

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176. Pub. L. No. 104-32, 110 Stat. 1214 (1996). *See* H.R. Rep. No. 518, 104th Cong. 2d Sess. (1996); Rein v. Socialist People's Libyan Arab Jamahiriya, 995 F.Supp. 325, 329 (E.D.N.Y. 1998) (pointing to the Executive Branch's virtually unlimited power to put a country on the list). *See generally* Jacobson, *supra* note 173, at 776 (citing H.R. Rep. No. 104-383 (1996) mentioning that the AEDPA also includes aircraft sabotage and hostage taking). *See also* H.R. Rep. No. 518, 104th Cong. 2d Sess. (1996); Naomi Roht-Arriaza, *The Foreign Sovereign Immunities Act and Human Rights Violations: One Step Forward, Two Steps Back?*, 16 BERK. J. INT'L LAW 71 (1997) (citing Alejandre v. Republic of Cuba, 996 F.Supp 1239 (S.D. Fla. 1997), as one of the first two published applications of the AEDPA, seeking money damages for the families of pilots who were shot down by the Cuban military while flying in international airspace).

177. Pub. L. No. 104-32, 110 Stat. 1214 (1996). *See* Jacobson, *supra* note 173, at 776 (citing 28 U.S.C. § 1605(a)(7) listing the plaintiff's burden to show that the terrorist state has been allowed a reasonable opportunity to arbitrate the claim, pursuant to the international rules of arbitration as the second major limitation); *see also* Flatow v. The Islamic Republic of Iran, 999 F. Supp. 1 (D.D.C. 1998) (holding that the family of a college student killed by Iranian backed terrorists while travelling in Israel could bring an action pursuant to the state-sponsored terrorism exception to the FSIA).

178. The other two cases are Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994) and Siderman de Blake v. the Republic of Argentina, 965 F.2d 699 (9th Cir. 1992). *See* Leslie McKay, *A New Take on Antiterrorism: Smith v. Socialist People's Libyan Arab Jamahiriya*, 13 AM. U. INT'L REV. 439, § I-C (1997) (defining *jus cogens* as a set of peremptory norms "whose perceived importance, based on certain values and interests, rises to the level which is acknowledged to be superior to another principle, norm or rule and thus overrides it").

179. Siderman de Blake v. the Republic of Argentina, 965 F.2d 699, 714 (9th Cir. 1992) (quoting Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 532, 8 I.L.M. 679). *See* Rachael E. Schwartz, *"And Tomorrow"? The Torture Victim Protection Act*, U. ARIZ. J. INT'L & COMP LAW 271, § III-B (1994) (noting that the Vienna Convention on the Law of Treaties renders any treaty void if it conflicts with a *jus cogens*, or peremptory norm); Marc Rosen, *The Alien Tort Claims Act and the Foreign Sovereign Immunities Act: A Policy Solution*, 16 CARDOZO J. INT'L & COMP. L. 461, 486 (1998) (noting that there is controversy "as to how a norm precisely attains *jus cogens* status or what the consequences are if one does").

180. *See Siderman de Blake*, 965 F.2d at 717. (stating, "That states engage in official torture cannot be doubted, but all states believe it is wrong, all that engage in torture deny it, and no state claims a sovereign right to torture its own citizens . . . [u]nder international law any state that engages in official torture violates *jus cogens*."); Marc Rosen, *The Alien Tort Claims Act and the Foreign Sovereign Immunities Act: A Policy Solution*, 16 CARDOZO J. INT'L & COMP. L. 461, 505 (1998) (asserting that even with the passage of the AEDPA, Congress "still has not satisfied its obligation to provide a forum to all victims of human rights violations"); *see also* Jeffrey Rabkin, *Universal Justice: The Role of Federal Courts in International Civil Litigation*, 95 COLUM. L. REV. 2120, 2155 (1995) (suggesting in the alternative that it is up to the Supreme Court to recognize *jus cogens* violations as an implied waiver of the FSIA).

In *Siderman de Blake v. The Republic of Argentina,*[181] an Argentine family and their American daughter brought suit against the Argentinean government based on the alleged torture of one of the family members and the expropriation of the family's property.[182] While the Ninth Circuit held that it had jurisdiction over the expropriation claims through the commercial activities exception to the FSIA it refused to hear the causes of action relating to torture.[183] The Court acknowledged that the alleged acts of torture violated *jus cogens* norms.[184] Nevertheless, the Court concluded that the FSIA denied the Court jurisdiction.[185] The Ninth Circuit stated, "We deal not only with customary international law, but with an affirmative act of Congress, the FSIA. . . . Nothing in the text or legislative history of the FSIA explicitly addresses the effect violations of *jus cogens* might have on the FSIA's cloak of immunity."[186] The Court also stated that, "the fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA."[187]

The issues confronted by the Courts in *Nelson* and *Siderman de Blake* arose again in *Princz v. United States*.[188] Hugo Princz was a prisoner in a Nazi concentration camp who brought an

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181. 965 F.2d. 699 (9th Cir. 1992).

182. *Id.* at 702-03 (ten masked men under the direction of the military governor of Tucuman, Argentina forcibly entered the home of Jose and Lea Siderman, dragged Jose out of the house, tortured Jose due to his Jewish faith and told Jose that if he and his family did not leave Argentina that they would be killed).

183. *Id. at* 713 (the torture claims were not heard on the grounds that they fell within no exception to immunity under the FSIA). *See* Republic of Argentina and Banco Central v. Weltover, Inc., 504 U.S. 607, 612 (1992) (describing the commercial activities exception to the FSIA); *see also* Southway v. Central Bank of Nigeria, 198 F.3d 1210, 1217 (10th Cir. 1999) (discussing how many contracts entered into by a foreign state will fall within the FSIA's commercial activity exception).

184. *See* Siderman de Blake v. The Republic of Argentina, 965 F.2d 699, 714 (9th Cir. 1992) (stating, "[W]e agree with the Sidermans that official acts of torture of the sort they allege Argentina to have committed constitute a *jus cogens* violation"). The court concluded that the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*. *Id*. at 717.

185. *Id.* at 714 (the court concluded that other federal courts have set a precedent that forecloses the Siderman's attempt to posit a basis for jurisdiction not expressly countenanced by the FSIA).

186. *Id.* at 718. The Ninth Circuit highlighted the fact that the international community has condemned torture conducted by a state:

> Given this extraordinary consensus, we conclude that the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of jus cogens. The crack of the whip, the clamp of the thumb screw, the crush of the iron maiden, and, in these more modern efficient times, the shock of the electric cattle prod are forms of torture that the international order will not tolerate. . . . Clearly, the FSIA does not specifically provide for an exception to sovereign immunity based on *jus cogen*.

Id.

187. *Siderman*, 965 F.2d at 719 (the court concluded that if violations of *jus cogens* committed outside the United States are to be exceptions to immunity, it must be at the explicit direction of Congress).

188. Princz v. Federal Republic of Germany, 26 F.3d 1166, (D.C. Cir. 1993). Mr. Princz, a Jewish American, was living in what is now Slovakia with his family when he was turned over to the Nazi SS. During the war Princz was forced to work in chemical and munitions plants at Treblinka, Birkenau, and Dachau. His mother, father, sister, and two brothers were all murdered by the Nazis. When the war ended, Mr. Princz was liberated from a train packed with refugees headed to another concentration camp to be executed. The issue confronting the courts here concerned whether there was an exception to the general grant of sovereign immunity under the Foreign Sovereign Immunities Act of 1976 which would give the courts federal subject matter jurisdiction over Mr. Princz's claims.

action against the Federal Republic of Germany to recover damages for injuries suffered during his imprisonment.[189] When the German government set up a fund to pay reparations to Holocaust survivors, Mr. Princz was denied payment.[190] Despite numerous gross violations of Mr. Princz's human rights, the Supreme Court held that the FSIA denied the Court jurisdiction over Princz's claim.[191] In so doing, the Court refused to apply the commercial activities or waiver exception of the FSIA.[192] While acknowledging that the torture of Hugo Princz violated *jus cogens* norms against torture, the Ninth Circuit refused to grant jurisdiction under the FSIA.[193] Circuit Judge Ginsburg stated, "The district court held that it had jurisdiction of the case on the ground that the FSIA 'has no role to play where the claims alleged involve undisputed acts of barbarism committed by a one time outlaw nation which demonstrated callous disrespect for the humanity of an American citizen simply because he was Jewish.' As we shall see below, that is not the law."[194] *Siderman de Blake*, *Nelson* and *Princz* highlight the need to amend the FSIA to accommodate the *jus cogens* norm against state sponsored torture.

B. The Need to Provide International Leadership

A second reason that the FSIA should be amended to include a human rights exception to the FSIA is that passage of such an amendment would constitute an act of international moral leadership on the part of the United States.[195] In the Committee Report accompanying the proposed 1992 Amendments, the Committee responded to assertions by witnesses from the Bush

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189. *Id.* at 1168 ("Hugo Princz, a Holocaust survivor, brought suit in the district court against the Federal Republic of Germany to recover money damages for the injuries he suffered and the slave labor he performed while a prisoner in Nazi concentration camps").

190. *Id.* at 1166 (noting, "It appears that Mr. Princz would have qualified for reparations when the German government changed the criteria for eligibility in 1965, but he did not apply again before the statute of limitations ran in 1969").

191. *Id.* at 1171 (stating, "[T]he district court is without subject matter jurisdiction of the present case").

192. *See Princz,* 26 F.3d at 1173 (the court held that even if the Nazis' leasing of Mr. Princz's labor was a "commercial activity" within the meaning of the FSIA, the activity did not have a direct effect in the United States and that the waiver exception to the FSIA cannot be read so broadly); Republic of Argentina and Banco Central v. Weltover, Inc., 504 U.S. 607, 612 (1992) (discussing Argentina's issuance and continued liability under the Bonds constituted a commercial activity and the extension of the payment schedules was taken in connection with that activity); *see also* Wolf v. Federal Republic of Germany, 95 F.3d 536, 543-544 (7th Cir. 1996) (discussing *Weltover* and stating how Germany's actions were not commercial within the meaning of the FSIA).

193. *See* Princz v. Federal Republic of Germany, 26 F.3d at 1174 (1993) (noting that, "The universal and fundamental rights of human beings identified by Nuremberg—rights against genocide, enslavement, and other inhumane acts are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*").

194. *Id.* at 1173 (outlining the opinion that the district court does not have subject matter jurisdiction of Mr. Princz's claims).

195. *See* Jennifer A. Gergen, Note, *Human Rights And The Foreign Sovereign Immunities Act*, 36 VA. J. INT'L L. 765, 791 (1996) (discussing the notion that a foreign sovereign's conduct may be influenced with the possibility of being held accountable in the United States via a human rights exception).

Administration that a human rights exception would unduly interfere with the exercise of American foreign policy.[196] The Report stated:

> While sensitive to the precept that the United States should avoid unilateral actions that would impose American legal principles upon the foreign governments, the Committee believes that the attitude of these witnesses reflects an abdication of the United States' moral responsibility to provide leadership in the area of human rights by undertaking efforts to extend the scope of international laws protecting those rights.[197]

The 1992 Committee Report highlights the fact that a human rights exception to the FSIA would do more then just give individual citizens an avenue to pursue their human rights grievances against foreign sovereigns. A human rights exception to the FSIA would send a signal to the world that the United States will not tolerate the torture and mistreatment of its citizens abroad.[198]

C. The Need to Allow Individual Claims by U.S. Citizens to Be Heard

The third reason that the Congress should amend the FSIA is simply to make it easier for American citizens who have suffered human rights abuses at the hands of a foreign sovereign to

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196. H.R. REP. NO. 102-900 at 5 (1992) (domestic judicial proceedings and remedies which intrude on the sovereign conduct of a foreign state may have political significance and consequences with foreign policy ramifications). *See* Bernard Ilkhanoff, *United States v. Noriega: The Act of State Doctrine and the Relationship Between the Judiciary and the Executive*, 7 TEMP. INT'L & COMP. L.J. 345, 345-46 n.216 (1993) (noting, "It has been stated by a divided U.S. Supreme Court that where there has been an express statement by the Executive that the application of the doctrine would not advance American foreign policy interests, the court should not apply the doctrine"); *see also* Kathryn L. Boyd, *Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level*, 1999 B.Y.U. L. Rev. 1139, 1139-40 n.4 (1999) stating, ("[M]ost governments are ambivalent about the enforcement of international law when it would disadvantage them"); Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz v. Federal Republic of Germany*, 16 MICH. J. INT'L L. 403, 423 (1995) (opining, "The relationship between the branches of government is an issue because court judgments against foreign sovereigns could interfere with the foreign policy of the political branches").

197. H.R. REP. NO. 102-900 at 4 (1992) (noting that, "In this instance, the Administration's inordinate deference to real or imagined sensitivities of unnamed foreign governments is particularly disturbing because it directly affects the rights of U.S. citizens to have their day in court").

198. *See* Beth Ann Isenberg, *Genocide, Rape, and Crimes Against Humanity: An Affirmation of Individual Accountability in the Former Yugoslavia in the Karadzic Actions*, 60 ALB. L. REV. 1051-52 (1997) (recognizing that, "The United States has the opportunity to make a positive, definitive, and necessary statement in the realm of fundamental human rights law"); *see also* Michael H. Posner and Peter J. Spiro, Symposium, *The Ratification of the International Covenant on Civil and Political Rights: Article: Adding Teeth to United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993*, 42 DEPAUL L. REV. 1209, 1209 (1993) (the United States ratification of the International Covenant on Civil and Political Rights in June of 1992 allows for more active participation in the development and monitoring of international human rights standards throughout the world and exhibits a renewed commitment to the international protection of human rights that will help to ensure that important democratic principles and values take hold in the infant democracies of Eastern Europe, the former Soviet Union). *See generally* Michael J. Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 374 n.302 (1986) (discussing how two federal courts have implicitly recognized the human rights exception by finding that torture perpetrated by a state official could properly be characterized as an act of the state).

bring an action in American courts. The House Report that accompanied the proposed 1994 amendment stated, "In recent years, several U.S. citizens have been physically abused abroad by officers of foreign governments and have faced difficulties in obtaining a remedy."[199] The Judiciary Committee cited several specific reasons for drafting the proposed 1994 amendment. First, an American may encounter grave difficulty in obtaining a remedy in the courts of a foreign nation.[200] Second, although the victim has the option of turning to the State Department to assist in obtaining a diplomatic remedy, diplomatic concerns often outweigh the State Department's concern for the well-being of American citizens.[201] Indeed, the Report cited the fact that the State Department submitted a brief on behalf of Saudi Arabia in the *Nelson* case.[202] The text of the Report of the Judiciary Committee is vital because it highlights the fact that, absent a human rights exception to the FSIA, an American citizen is forced to rely on the gov-

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199. H.R. REP. NO. 102-900 at 3 (1992) (stating that, "[A] U.S. citizen who is tortured or executed abroad cannot sue the foreign sovereign in U.S. courts, even when the foreign country wrongly refuses to hear the citizens case. Therefore, in some instances a U.S. citizen who was tortured will be without a remedy"). Judicial remedies are often not available in countries where torture is prevalent. *Id.* at 4. *See* Jack Alan Levy, *As Between Princz and King: Reassessing the Law of Foreign Sovereign Immunity as Applied to Jus Cogens Violators,* 86 GEO. L.J. 2703, 2731 (1998) (discussing the author's proposed amendment to the FSIA that "would remove any legal obstacles to the execution of judgments against foreign sovereigns who violate *jus cogens humanum* norms").

200. *See* Jordan J. Paust, *Conceptualizing Violence Present and Future Developments in International Law: Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes Against Humanity: It's No Defense: Nullum Crimen, International Crime and the Gingerbread Man*, 60 ALB. L. REV. 657, 660 (1997) (stating that, "Immunity can have devastating consequences for women who are victims of international crime, often operating as an additional denial of justice and a perpetuation of state-sponsored or tolerated oppression"); *see also* Judge Edward D. Re, *Rededication Symposia: International Human Rights before Domestic Courts: Human Rights, International Law and Domestic Courts*, 70 ST. JOHN'S L. REV. 51, 64-5 (1996) (noting that since there are "limited remedies available to victims of torture abroad, and [there exists a] potential deprivation of their 'day in court,' it would indeed be appropriate for Congress seriously to consider amending the FSIA so as to reflect the restrictive theory of sovereign immunity"); Michael Singer, *The Act of State Doctrine of the United Kingdom: An Analysis, with Comparisons to United States Practice*, 75 AM. J. INT'L L. 283, 308 (1981) (discussing the difficulties that may be encountered by American courts when they recognize that a harmful or offensive act exists but lack subject matter jurisdiction to deal with it).

201. *See* H.R. REP. NO. 102-900 at 3 (1992) (stating that, "The difficulty some U.S. citizens have had in obtaining remedies for torture suffered abroad illustrates the need for H.R. 2357"). The State Departments familiar role of being a conciliator and maintaining foreign relations may conflict with its role of defending the rights of U.S. citizens. *Id*. at 4. *See also* Judge Edward D. Re, *Symposium on Human Rights before Domestic Courts: Concluding Remarks: Human Rights, Domestic Courts, and Effective Remedies,* 67 ST. JOHN'S L. REV. 581, 584 (1993) (discussing the theory that the FSIA was created to transfer decision making on questions of immunity from the State Department to the courts).

202. *See* H.R. REP. NO. 102-900 at 4 (1992) (stating that, "[I]n one recent case, the State Department actually filed a brief before the Supreme Court on behalf of Saudi Arabia, asking the Court to overturn an 11th Circuit Court of Appeals decision which had allowed a U.S. citizen to sue Saudi Arabia under the FSIA"); *see also Hearing on S. 825, Before the Senate Subcommittee on Courts and Administrative Practice,* 103rd Cong. 702 (1994) (statement of Abraham D. Sofaer, Legal Adviser to the State Department). The Committee Report quotes the testimony Abraham D. Sofaer, a Legal Adviser to the State Department during the Reagan Administration, regarding S. 825, a bill designed to serve the same purpose as the proposed amendments to the FSIA:

> The Department's decision with respect to espousal is likely to be influenced not only by the merits of the case but by the Department's concern for offending a foreign state and creating a potential irritant in its dealings with that state. This is particularly likely to occur where the claimant alleged that espousal is necessary because local remedies in the state that is alleged to have injured him are ineffective and inadequate.

See generally Judge Edward D. Re, *Symposium on Human Rights before Domestic Courts: Concluding Remarks: Human Rights, Domestic Courts, and Effective Remedies*, 67 ST. JOHN'S L. REV. 581, 588 (1993) (discussing the Nelson case and the brief submitted by the State Department).

ernment for a remedy even though the government is frequently motivated by diplomatic concerns and not necessarily the well-being of the injured individual.[203] Finally, the Committee report underlines the absurdity of allowing an American citizen to bring a claim based on commercial dealings with a foreign sovereign but not one based on allegations of torture and human rights abuses.[204] The Report states, "The Committee believes that the right of a U.S. citizen to be compensated by a foreign sovereign for torture is at least as important as the right to sue a foreign government for breach of contract."[205]

D. Criticism of a Proposed Amendment

Despite the numerous potential benefits of enacting a human rights exception to the FSIA, both attempts at amending the FSIA were defeated. Critics of the proposed amendments typically cite two reasons why a human rights exception should not be enacted: 1) a human rights exception is not in keeping with the original purposes of the FSIA; 2) passage of such an amendment would greatly increase the risk that foreign nations would expand the jurisdiction of their courts over American citizens.[206] In fact, an examination of the legislative history shows

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203. *See* H.R. REP. NO. 102-900 at 3 (1992) (stating that, "The difficulty some U.S. citizens have had in obtaining remedies for torture suffered abroad illustrates the need for H.R. 2357"). "[T]he State Departments familiar role of being a conciliator and maintaining foreign relations may conflict with its role of defending the rights of U.S. citizens." *Id.*, at 4. *See also Hearing on S. 825, Before the Senate Subcommittee on Courts and Administrative Practice,* 103d Cong. 702 (1994) (statement of Abraham D. Sofaer, Legal Adviser to the State Department).

204. H.R. REP. NO. 102-900 at 6-7 (1992):

> An amendment to limit the scope of the bill to U.S. citizens whose presence in the foreign state was in connection with a commercial activity carried on in the United States by that foreign state was specifically rejected. In the Committees view, such a proposal would establish an arbitrary distinction and would be inconsistent with the FSIA which clearly authorizes suits [not only for] commercial torts, but [for] non-commercial torts as well.

See DC Ct. Denies Libyan Motion to Dismiss Insurers' Damages Suit, INSURANCE INDUSTRY LITIGATION REPORTER, Nov. 3. 1999, Vol. 15; No.9; P. 11 (discussing Congress' 1996 amendment to the FSIA which allowed "suits for personal injury and wrongful death caused by acts of torture, summary execution, aircraft sabotage, hostage taking, or provision of support or resources for such acts committed outside the United States"); *U.S. Appeals Court: Kidnapping not a Commercial Act under FSIA,* Mealey's INTERNATIONAL ARBITRATION REPORT, Oct. 1994, Vol. 9; No.10 (discussing the case *Cicippio v. Islamic Republic of Iran* in which the lower court held that "state-supported kidnapping and other criminal ventures were not covered by the commercial activity exception contained in the FSIA").

205. H.R. REP. 102-900 at 4 (1992); *see also Hearing on S. 825, Before the Senate Subcommittee on Courts and Administrative Practice,* 103d Cong. 702 (1994) (statement of Abraham D. Sofaer, Legal Adviser to the State Department); *see In re* Estate of Marcos, 25 F.3d 1467, 1475 (1994) (describing how the "right to be free from official torture is fundamental and universal, a right deserving of the highest stature under international law, a norm of *jus cogens*"); Steven Weisman, *Individual Protection Crumbles while Sovereignty Reigns: A Comment on Saudi Arabia v. Nelson,* 11 HOFSTRA LAB. L.J. 429, 444 (1994) (discussing the decision in the Nelson case and the authority of municipal courts in situations involving the torture of American citizens).

206. *See* H.R. REP. NO. 102-900 at 11-12 (1992) (dissenting views in the Report conclude that the amendment is inconsistent with the general terms of international law as well as the basic tenets of legal jurisdiction).

that a human rights exception would further a central purpose of the FSIA.[207] Recall that one of the central reasons for enacting the FSIA was to remove determinations of sovereign immunity from the political realm of the State Department and to establish a framework for the judiciary to decide these questions in an impartial manner (i.e., free from the political and diplomatic considerations that burden the State Department).[208] Enactment of a human rights exception would further this purpose by providing American citizens with a judicial remedy when they suffer human rights abuses at the hands of a foreign sovereign.[209] Indeed, the fact that the State Department filed a brief on behalf of the Saudi government illustrates why the Congress wanted to ensure that the judiciary (and not the executive branch) was responsible for determinations of sovereign immunity.[210]

Finally, concerns expressed by opponents of the amendments that passage of a human rights exception would result in a retaliatory expansion of the jurisdiction of foreign courts are legitimate.[211] The dissenters in the Report accompanying the proposed 1994 amendments cor-

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207. Foreign Sovereign Immunities Act, 28 U.S.C.S. § 1330 (2000) (discusses in the subsequent notes that the Act confers very broad original jurisdiction on Federal District Courts concerning nonjury civil actions against foreign states). *See* Sienho Yee, *The Discretionary Function Exception under the Foreign Sovereign Immunities Act: When in America, Do the Romans Do as the Romans Wish?,* 93 COLUM. L. REV. 744, 761 (1993) (describing one of the central purposes of the FSIA as "[providing] a mechanism for injured plaintiffs to seek remedies against a foreign sovereign in a U.S. Court"); *see also* Consumers Energy Co. v. Certain Underwriters at Lloyd's of London, 45 F. Supp. 2d 600, 606 (1999) (stating that one of the primary goals of the FSIA was to establish "uniformity in actions involving foreign states").

208. *See* H.R. REP. NO. 102-900 at 4 (1992) (stating that, "[T]he State Departments familiar role of being a conciliator and maintaining foreign relations may conflict with its role of defending the rights of U.S. citizens"); Kevin Leung, *Cicippio v. Islamic Republic of Iran: Putting the Foreign Sovereign Immunity Act's Commercial Activities Exception in Context,* 17 LOY. L.A. INT'L & COMP. L. J. 701, 731(1995) (describing one of the central purposes behind the enactment of the FSIA as transferring decision-making power from the executive to the judicial branch in cases involving international concerns).

209. *See* H.R. REP. NO. 102-900 at 3 (1992) (stating that, "The difficulty some U.S. citizens have had in obtaining remedies for torture suffered abroad illustrates the need for H.R. 2357"); Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz v. Federal Republic of Germany*, 16 MICH. J. INT'L L. 403, 418 (1995) (noting, "The lesson of Princz is that in order to allow claims for human rights violations against foreign sovereigns in American courts, Congress would have to change the FSIA"); Jack Alan Levy, *As Between Princz and King: Reassessing the Law of Foreign Sovereign Immunity as Applied to Jus Cogens Violators,* 86 GEO. L. J. 2703, 2731 (1998) (discussing the author's proposed amendment to the FSIA that "would remove any legal obstacles to the execution of judgments against foreign sovereigns who violate *jus cogens humanum* norms").

210. *See* H.R. REP. NO. 102-900 at 4 (1992) (discussing, "[I]n one recent case, the State Department actually filed a brief before the Supreme Court on behalf of Saudi Arabia, asking the Court to overturn an 11th Circuit Court of Appeals decision which had allowed a U.S. citizen to sue Saudi Arabia under the FSIA"); Margot C. Wuebbels, *Commercial Terrorism: A Commercial Activity Exception under §1605(a)(2) of the Foreign Sovereign Immunities Act,* 35 ARIZ. L. REV. 1123, 1126 (1993) (stating that the FSIA "depoliticizes the issue of sovereign immunity and places upon the judiciary the responsibility of deciding whether a foreign sovereign is entitled to immunity in a given case"); *see also* Naomi Roht-Arriaza, *The Foreign Sovereign Immunities Act and Human Rights Violations: One Step Forward, Two Steps Back?,* 16 BERK. J. INT'L LAW 71, 72-3 (1998) (describing the FSIA and its principal purpose of transferring "the determination of sovereign immunity from the State Department to the courts").

rectly urge that their fellow congressmen balance the risk of increased legal exposure of Americans to foreign jurisdiction against the need to provide a remedy for individuals like Nelson.[212] The dissenters stated, "Simply stated, the risks that other nations will greatly expand their exception to the doctrine of foreign sovereign immunity should H.R. 934 become law are greater than the benefit to the few individuals who would be helped by it."[213] In fact, it is not at all clear that the risks of increased exposure to litigation in foreign courts outweigh the needs of the individuals who suffer human rights abuses at the hands of a foreign sovereign.[214] The brutal torture endured by Scott Nelson at the hands of Saudi agents undermines the dissenters' argument.[215]

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211. *See* Princz v. Federal Republic of Germany, 26 F.3d 1166, 1174 (1993):

> We think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading . . . would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations. In many if not most cases the outlaw regime would no longer even be in power and our Government could have normal relations with the government of the day—unless disrupted by our courts.

See generally Reimann, *supra* note 209, at 425 (noting that, "Further restricting the immunity of foreign states in American courts entails the risk of retaliation . . . there is no guarantee either that retaliatory immunity exceptions will be so limited, nor that all foreign tribunals will provide an acceptable level of impartiality and fairness"). *But see* Andrew Saindon, *The Act of State Doctrine and International Human Rights Cases in United States Courts,* 7 MD. J. CONTEMP. L. ISSUES 287, 311 (1995/1996) (stating "[w]hile there have been critics of the expanding role of United States courts in the field of international human rights, the general policy of expansion continues with broad support.").

212. *See* Dean Brockbank, *The Sovereign Immunity Circle: An Economic Analysis of Nelson v. Saudi Arabia and the Foreign Sovereign Immunities Act,* 2 GEO. MASON L. REV. 1, 10-12 (1994) (discussing the Nelson case, the adequacies of remedies, and the need for balancing of competing interests); M.O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry,* 39 VA. J. INT'L L. 1069, 1113 (1999) (describing the necessity for balancing "an injured plaintiff's claim to relief, the ideological or 'dignity' interests of the sovereign, and the functional costs and benefits of making the sovereign defendant accountable in damages for the alleged injury" under the FSIA). *But see Princz,* 26 F.3d at 1183 (noting that, "The only way to reconcile the FSIA's presumption of foreign sovereign immunity with international law is to interpret § 1605(a)(1) of the Act as encompassing the principle that a foreign state implicitly waives its right to sovereign immunity in United States courts by violating *jus cogens* norms").

213. *See* H.R. REP. 103-702 at 12 (dissenting views). *But see* Andrew M. Scoble, Comment, *Enforcing the Customary International Law of Human Rights in Federal Court,* 74 CALIF. L. REV. 127, 175 n.278 (1986) (noting, "There is increasing support for a human rights exception to the act of state doctrine"); Joseph G. Bergen, *Princz v. the Federal Republic of Germany: Why the Courts Should Find that Violating Jus Cogen Norms Constitutes an Implied Waiver of Sovereign Immunity,* 14 CONN. J. INT'L L. 169, 180 (1999) (discussing "attempts to pass H.R. 934 [and how they] can be interpreted as clear evidence that when Congress passed the FSIA, it did not intend jus cogen violations to constitute a waiver of sovereign immunity").

214. *See* Curtis A. Bradley and Jack L. Goldsmith, *Pinochet And International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2182 (199) (noting how the Bush and Clinton administrations opposed human rights amendments because harmful effect on U.S. foreign relations would outweigh the benefit of such amendments).

215. *See* Jennifer A. Gergen, Note, *Human Rights And The Foreign Sovereign Immunities Act*, 36 VA. J. INT'L L. 765, 791 (1996) (discussing the notion that a foreign sovereign's conduct may be influenced with the possibility of being held accountable in the United States via a human rights exception).

Conclusion

An analysis of the Supreme Court's holding in *Nelson* demonstrates that the Supreme Court should have interpreted Scott Nelson's claims as falling within the commercial activities exception to the FSIA. Nelson's claims were clearly based upon a commercial activity of the Saudi Arabian government that resulted in substantial contact with the United States. Perhaps, the most important legacy of the Supreme Court's holding in *Nelson,* however, is that it highlights an urgent need for Congress to enact a human rights exception to the FSIA. Absent such an amendment the injustices suffered by Scott Nelson are likely to be revisited upon other victims of human rights violations by foreign sovereigns, who will be left similarly without legal remedy.

Favour Mind Limited v. Pacific Shores, Inc.

98 Civ. 7038, 1999 U.S. Dist. LEXIS 18887 (S.D.N.Y. Dec. 7, 1999)

Post Reversion Hong Kong Corporations Are "Citizens or Subjects of a Foreign State" Within the Meaning of 28 U.S.C. § 1332(a)(2) for the Purposes of Subject Matter Jurisdiction, Due to China's Position That They Are Chinese Citizens.

In *Favour Mind Limited v. Pacific Shores, Inc.*,[1] the United States District Court for the Southern District of New York held that a corporation chartered in post-reversion Hong Kong (hereinafter "Hong Kong SAR") [2] is a "citizen or subject" of the People's Republic of China[3]—a "Foreign State" within the meaning of 28 U.S.C. § 1332(a)(2)—and that the court could properly assert subject matter jurisdiction over cases and controversies between these Hong Kong SAR corporations and citizens of a U.S. State.[4]

The plaintiff, Favour Mind, a Hong Kong SAR corporation, sought to recover for an alleged breach of contract from defendant Robert Czwartacky, a citizen of North Carolina, as well as Pacific Shores and Cameron Roberts Ltd., corporations chartered in the State of New York.[5] Czwartacky was the owner, an officer and director of Pacific Shores and Cameron.[6] The alleged breach of contract was Czwartacky's failure to make payments required under a garment sales agreement for which his corporations received multiple deliveries.[7] Czwartacky filed a motion to dismiss this complaint for lack of subject matter jurisdiction, arguing that Favour Mind, as a Hong Kong corporation, could not invoke the Court's alienage diversity[8] jurisdiction in light of the Second Circuit's decision in *Matimak Trading Co. v. Khalily*.[9]

I. The *Matimak* Decision

Matimak Trading, like the instant case, was a Hong Kong corporation's breach of con tract action against two New York corporations in the Southern District of New York.[10] There, too, the plaintiff invoked the district court's alienage diversity jurisdiction pursuant to

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1. 98 Civ. 7038, 1999 U.S. Dist. LEXIS 18887 (S.D.N.Y. Dec. 7, 1999) [hereinafter "*Favour Mind*"].
2. *See id.* at *8 n. 4 (stating "[t]he Hong Kong SAR effectively came into being upon Hong Kong's reversion to China in July 1997, after more than a century of British Rule.") (SAR stands for Special Administrative Region).
3. *See id.* at *20 (Explaining that issue of citizenship rests entirely with China, which considers Hong Kong SAR corporations to be "citizens of China").
4. *See id.* at *31 (denying the defendants motion to dismiss for lack of alienage jurisdiction).
5. *See id.* at *6.
6. *Id.*
7. *See id.* at *1-2. (noting that the invoices reflect that the defendant owed Favour Mind $216,408.06 under the contracts in question).
8. *See id.* at *3 (explaining that jurisdiction invoked pursuant to § 1332(a)(2) is commonly referred to as "alienage diversity" jurisdiction).
9. 118 F.3d 76 (2d Cir. 1997), *cert denied*, 522 U.S. 1091 (1998).
10. *See id.* at 78.

§ 1332(a)(2).[11] Unlike in *Favour Mind* however, the plaintiff filed its complaint[12] when Hong Kong was a dependent territory of Great Britain.[13] After finding that Hong Kong was not a foreign state, and accordingly that the plaintiff was not a citizen or subject of a foreign state, the court dismissed the case.[14]

The *Matimak* court first considered whether pre-reversion Hong Kong was a "foreign state" within the meaning of § 1332. "[The] court adopted the generally held principle 'that 'a foreign state' is one formally recognized by the executive branch of the United States government."[15] The parties had agreed that the United States had not formally recognized Hong Kong as a foreign state.[16] The plaintiff argued, however, that Hong Kong had received "de facto recognition as a foreign state" because of the United States' diplomatic and economic ties with Hong Kong.[17] Upon review of Congress's position on Hong Kong's sovereign status, as set forth in the United States-Hong Kong Policy Act of 1992,[18] and the United States' amicus brief, which explicitly stated that the State Department did not consider Hong Kong to be a de facto nation, the Second Circuit found that Hong Kong had not received de facto recognition as a foreign state.[19]

The *Matimak* court next examined whether the plaintiff was a "Citizen or Subject" of the United Kingdom within the meaning of § 1332. The analysis began, as it must, with "the truism that a foreign state is entitled to define who are its citizens or subjects."[20] There was no evidence that Great Britain considered Hong Kong corporations to be British citizens. On the contrary, the relevant provisions of British law[21] "squarely specified that the privileges of British nationality are not conferred on corporations formed under the laws of Hong Kong."[22] Accord-

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11. *See id.*

12. *See Favour Mind,* 1999 U.S. Dist. LEXIS 18887 at *9 n.5 (pointing out that diversity jurisdiction is determined as of the commencement of an action) (citing *Maryland Cas. Co. v. W.R. Grace & Co.*, 23 F.3d 617, 622 [2d Cir. 1993]).

13. *See id.* at *9.

14. *See id.* at *10.

15. *Matimak*, 118 F.3d at 39 (quoting 13B Wright & Miller, Federal Practice & Procedure § 3604 (1984); the court provided the following quotation to explain this approach:

> Because the Constitution empowers only the President to 'receive Ambassadors and other public Ministers,' the courts have deferred to the executive branch when determining what entities shall be considered foreign states. The recognition of foreign states and of foreign governments, therefore is wholly a prerogative of the executive branch.

Matimak, 118 F.3d at 79 (quoting Iran Handicraft & Carpet Export Ctr. v. Marjan Int'l Corp., 655 F. Supp. 1275, 1277 [S.D.N.Y. 1987]).

16. *Favour Mind*, at *11.

17. *See id.* at *11.

18. 22 USCS § 5701 (2000).

19. *See id.* at *14.

20. *Matimak*, 118 F.3d at 85 (citing United States v. Wong Kim Ark, 169 U.S. 649, 668 (1898) (stating "Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship.")).

21. See British Nationality Act 1981 § 4(1)(2).

22. *See id.* at 85-86.

ingly, the *Matimak* Court found that the plaintiff was not a "Citizen or Subject" of Great Britain.

The plaintiff not being considered a citizen of Great Britain, combined with the court's finding that Hong Kong was not a "foreign state" within the meaning of the statute resulted in the plaintiff being pronounced "stateless." More importantly, the Court declared that a "stateless person—the proverbial man without a country—cannot sue a United States citizen under alienage jurisdiction."[23] The *Matimak* decision was expressly limited, however, to complaints filed prior to the July 1, 1997, reversion of Hong Kong to China.[24]

II. The Application of the *Matimak* Decision to *Favour Mind*

The court in *Favour Mind,* following the holding in *Matimak*, found that Hong Kong SAR—like pre-reversion Hong Kong—is not a foreign state for the purposes of alienage jurisdiction.[25] The court's decision was based in part on the failure of the amicus brief offered by the United States in support of the plaintiff's position to assert that Hong Kong SAR was considered by the executive branch of the United States to be a foreign state.[26] The government's position was clearly that Hong Kong SAR corporations are citizens of China.[27] In light of the lack of any clear evidence presented by the plaintiff that there had been a change in United States foreign policy with respect to the Hong Kong SAR, the court could not justify a different outcome than in *Matimak* with respect to the status of Hong Kong SAR as a foreign state.[28]

However, the court did accept the plaintiff's argument that Hong Kong SAR corporations were citizens of China for the purposes of § 1332(a)(2). The court explained that the "determination of this issue rests entirely upon whether China itself considers Hong Kong SAR corporations like Favour Mind to be 'citizens of China.'"[29] In its amicus brief, the Hong Kong SAR offered a diplomatic note from the government of China, stating as follows:

> Hong Kong is an inalienable part of the People's Republic of China. The Hong Kong SAR is a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy. Companies established in the Hong Kong SAR in accordance with its laws and decrees therefore enjoy the nationality of the People's Republic of China.[30]

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23. *See id.* at 86.
24. *Id.* at 80 n.1.
25. *Favour Mind,* 1999 U.S. Dist. LEXIS 18887 at *20.
26. *See id.* at *19.
27. *See id.*
28. *See id.*
29. *See id.* at *21.
30. *Id.* at *22.

In light of this explicit statement by the Chinese government that it considered Hong Kong SAR corporations to be citizens of China, the court found that the plaintiff could invoke the alienage jurisdiction of the federal district courts as defined in § 1332(a)(2).[31]

Although the statement by the Chinese government was found dispositive of the question, the Court offered further support for finding the plaintiff's Chinese citizenship.[32] The language of both the Joint Declaration[33] and the Basic Law[34] reflected China's desire for a "high degree of integration between China and Hong Kong."[35] For example, the Joint Declaration provides that upon reversion, the Hong Kong SAR "will be directly under the authority of the Central People's Government of the People's Republic of China."[36] Moreover, the Basic Law states "the People's Republic of China will resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997, thus fulfilling the long cherished common aspiration of the Chinese people for recovery of Hong Kong."[37]

II. Conclusion

Favour Mind has cleared up the temporary uncertainty with respect to alienage jurisdiction arising out of the reversion of Hong Kong to China. The overriding message of *Matimak* remains unchanged, however: that courts must defer to the executive branch of the United States government and the policies of foreign governments when evaluating the status of alien territories and alien parties for the purposes of § 1332. The clear message from the Chinese government and unequivocal language in the agreement affecting Hong Kong's reversion leave little question that Hong Kong is an inalienable part of China, deserving the privilege to assert alienage jurisdiction in U.S. federal courts.

Gasper LaRosa

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31. *See id.* (explaining that the plaintiff's subject matter jurisdiction rested in its citizenship in China, a "foreign state" duly recognized by the executive branch of the United States).

32. *See id.* at *23.

33. *See id.* at *8 (explaining that in the early 1980s, with the expiration of its lease from China imminent, Great Britain agreed to relinquish its interest in Hong Kong to China; this agreement was embodied in the 1984 Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong ["the Joint Declaration"]; 23 I.L.M. 1366 (1984)).

34. The Basic Law Of The Hong Kong Special Administrative Region Of The People's Republic Of China (hereinafter "Basic Law"), 29 I.L.M. 1519, 1520 (1990); *see also id.* at *8 (stating "[t]he Basic Law serves as a quasi-constitutional document for the Hong Kong SAR, clarifying the relationship between the Hong Kong SAR and China.").

35. *See id.* at *23.

36. See 29 I.L.M. 1519, 1520 (1990).

37. *See id.* at *23-24.

Nieman v. Dryclean U.S.A. Franchise Company, Inc.

178 F.3d 1126 (11th Cir. 1999)

Eleventh Circuit Holds that Federal Trade Commission's Franchise Rule Does Not Apply Extraterritorially to Agreement Between U.S. Company and Argentine Citizen.

In *Nieman v. Dryclean U.S.A. Franchise Company, Inc.*,[1] the United States Court of Appeals for the Eleventh Circuit held that the Federal Trade Commission Act[2] does not authorize extraterritorial application of the Federal Trade Commission's Franchise Rule.[3] Reversing a judgment of the District Court for the Southern District of Florida, the court found that neither Congress nor the Federal Trade Commission had ever evinced an intent to apply the Rule extraterritorially.[4]

The case arose out of negotiations between defendant Dryclean U.S.A. ("DUSA") and plaintiff Mario Nieman, an Argentine citizen, who sought a master franchise agreement awarding him the right to sell Dryclean franchises throughout Argentina.[5] The parties executed a letter agreement in February 1994, which was signed by Nieman in Argentina and mailed to DUSA in Florida, where a DUSA representative also signed it.[6] The agreement was essentially a sixty-day option contract, under which Nieman gave DUSA a $50,000 non-refundable deposit in exchange for DUSA's agreement not to negotiate with other parties similarly interested in the Argentine master franchise agreement.[7]

Unfortunately, Nieman failed to arrange the required financing within the sixty-day period, and DUSA kept the non-refundable deposit.[8] Nieman subsequently brought suit for the deposit's return in the District Court for the Southern District of Florida, relying both upon provisions of the Florida Deceptive and Unfair Trade Practices Act (DUTPA),[9] and upon the Federal Trade Commission (FTC) Franchise Rule.[10] The basis of Nieman's complaint was

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1. 178 F.3d 1126 (11th Cir. 1999) ("*Nieman II*").
2. 15 U.S.C.S. § 41 *et seq*. (2000).
3. 16 C.F.R. § 436.1 (1998).
4. *Id.* at 1131.
5. *Id.* at 1128.
6. *Id. See also id.* at 1128, note 2 (explaining that Nieman was in fact negotiating on behalf of a group of Argentine businessmen, but that only Nieman sought relief in U.S. court).
7. *Id. See also* Nieman v. Dryclean U.S.A. Franchise Company, Inc., 1997 U.S. Dist. LEXIS 22008 (SDFL 1997) ("*Nieman I*").
8. *See Nieman II*, 178 F.3d at 1128.
9. FLA. STAT. ANN. §§ 501.201 to 501.211 (West 1994). DUTPA, enacted to protect individuals and business consumers from unfair competition and deceptive, unconscionable practices in the conduct of trade, defines unfair or deceptive acts so that a violation of the FTC rule is also a violation of DUTPA. The Florida Act is therefore dependent upon the Federal Act. *See Nieman I*, 1997 U.S. Dist. LEXIS 22008 (SDFL 1997), at *1-*2.
10. 16 CFR § 436.1 (1998).

that DUSA had failed to disclose information required both under DUTPA and under the FTC Franchise Rule ("the Rule"), which prohibited a franchisor from taking a non-refundable deposit from a potential franchisee without certain disclosures.[11] DUSA defended on the ground that neither law applied in the first instance, as the transaction in question took place in Argentina and neither DUTPA nor the FTC Rule applied extraterritorially.[12] DUSA did not dispute, however, that it had not made the disclosures.[13]

Both parties moved for summary judgment. On March 26, 1997, the district court granted judgment in favor of Nieman, holding that DUTPA and the FTC Rule did apply to the transaction in question, because "Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although some acts are done outside the territorial limits [of the U.S.]"[14] The court ordered DUSA to return the full amount of Nieman's $50,000 deposit.[15]

DUSA appealed, and the U.S. Court of Appeals for the Eleventh Circuit reversed, holding that the FTC Franchise Rule did not apply extraterritorially.[16] Beginning with the undisputed fact that Congress does possess the power to regulate extraterritorial acts of its citizens, the court nevertheless pointed out that whether Congress has exercised such authority is of course an issue of statutory construction.[17] The court noted that it is "a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States'"[18] Further, the Court stressed that this presumption against extraterritoriality could be overcome "only by clear expression of Congress' intention to extend the reach of the relevant Act beyond those places where the United States has sovereignty or has some measure of legislative control."[19]

Turning to the FTC Act, the court noted that the Act provides that "unfair or deceptive acts or practices in or affecting commerce . . . are hereby declared unlawful"[20] and defines "commerce" to mean "commerce among the several States or with foreign nations."[21] Based upon these passages, Nieman argued that by defining commerce to include foreign commerce,

11. *See Nieman I*, 1997 U.S. Dist. LEXIS 22008 (SDFL 1997), at *2.

12. *See Nieman II*, 178 F.3d at 1128. DUSA also argued that Nieman lacked standing to sue under DUTPA because the law was intended to protect consumers, not sophisticated businessmen like Nieman. The district court disagreed and held that Nieman did have standing. *See Nieman I*, 1997 U.S. Dist. LEXIS 22008 (SDFL 1997), at *3-*4.

13. *Id.*

14. *See Nieman I*, 1997 U.S. Dist. LEXIS 22008 (SDFL 1997), at *5.

15. *Id.*

16. *Nieman II*, 178 F.3d at 1130-1131.

17. *Id.* at 1129.

18. *Id.* (relying upon EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991)).

19. *Id.*

20. 15 U.S.C. § 45(a)(1) (1994).

21. 15 U.S.C. § 44 (1994).

Congress evinced its intention that the Act should apply extraterritorially.[22] Specifically, Nieman relied upon the Seventh Circuit's decision in *Branch v. FTC*,[23] which held that the FTC Act authorized the Federal Trade Commission to exercise jurisdiction over a U.S. correspondence school that had made fraudulent representations to Latin American customers.[24]

However, the court found *Branch* readily distinguishable. The *Branch* court, it noted, found FTC jurisdiction based upon the effect of unfair trade practices on domestic competition, and not on foreign customers.[25] The instant case, by way of contrast, offered "no evidence that DUSA's non-disclosure affected domestic competition in any way."[26] Moreover, the court stated that *Branch* not only was "not the law of this Circuit,"[27] but also was outdated in light of subsequent Supreme Court decisions.[28] As the court simply stated, "we disagree with the *Branch* court's analysis."[29]

Rather, the court agreed with DUSA that the FTC Act's language did not support its extraterritorial application, and that Nieman's chosen passages were "at best ambiguous and, more importantly, are virtually identical to those that the Supreme Court found *not* to support extraterritorial application of Title VII of the Civil Rights Act. . . ."[30] Specifically, the Supreme Court in *EEOC v. Arabian American Oil Co.*[31] found that similar language of the Civil Rights Act, defining commerce as "trade . . . among the several States; or between a State and any place outside thereof,"[32] was also not supportive of extraterritorial application. Therefore, with respect to the instant case, the court found that the *Arabian American Oil Co.* holding "compels us to conclude that Congress did not intend the similarly worded . . . provisions of the FTC Act to apply extraterritorially."[33]

Beyond this, the court found that even assuming *arguendo* that Congress did intend extraterritorial application of the FTC Rule, "the evidence does not suggest that the FTC exercised such authority."[34] Indeed, the court found several facts that evidenced a contrary intention.

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22. *See Nieman II*, 178 F.3d at 1129.
23. 141 F.2d 31 (7th Cir. 1944).
24. *Id. See Branch*, 141 F.2d at 34-36.
25. *See Nieman II*, 178 F.3d at 1130.
26. *Id.*
27. *Id.*
28. *Id.* Unfortunately, the court did not cite the subsequent decisions that it had found persuasive.
29. *Id.*
30. *Id.* (emphasis added). *See* Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq. See also Arabian Am. Oil Co.*, 499 U.S. at 249-51 (1991) (stating that such language did not support extraterritorial application of Title VII).
31. 499 U.S. 244 (1991).
32. *See Nieman II*, 178 F.3d at 1130-31. *See also Arabian Am. Oil Co.*, 499 U.S. at 251.
33. *See Nieman II*, 178 F.3d at 1131.
34. *Id.*

First, the Franchise Rule, when promulgated, was accompanied by a Statement of Basis and Purpose that was silent regarding franchising in other countries.[35] Second, the provisions of the Rule itself "reveal a purely domestic focus,"[36] as shown by its consideration of potential conflicts with state law without mention of foreign law.[37] Third, the FTC has "never indicated that the Franchise Rule was intended to apply to foreign franchisees."[38] For example, the Final Interpretative Guide[39] contains a section on potential state law conflicts, but no corresponding section on foreign law conflicts.[40] Finally, the FTC itself recently issued an "Advance Notice of Proposed Rulemaking, proposing to modify the Rule to 'clarify' that it does not apply to the sale of franchises to be located outside the United States."[41] Although the FTC still has yet to issue a "formal modification" of the Rule, the court found this advance notice to be evidence that the extraterritorial application of the Rule was "not contemplated at the time it was promulgated."[42]

In light of this evidence, the court ruled that DUSA's failure to comply with the Franchise Rule's disclosure requirements "does not provide Nieman with a cause of action to seek refund of his non-refundable deposit."[43] The judgment of the district court was accordingly reversed.[44]

The practice of extraterritorial application of a nation's laws—and of U.S. laws in particular—has rarely been invoked without protest. Since the close of the Second World War, and Learned Hand's landmark decision in *United States v. Aluminum Co. of America*,[45] the increase in U.S. extraterritorial activity, antitrust and otherwise, has been the bane of many foreign governments, who quite understandably view such efforts as imposing American economic policy on the world at large.[46] But, of course, the U.S. is far from alone in this practice. The trade laws

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35. *Id. See* 43 Fed. Reg. 59,621, 59,623-59,624 (1978).

36. *Id.*

37. *Id. See, e.g.*, 16 CFR § 436.1(a)(21) (required disclosure statement shall not contain information "other than that required by this part or by State law not preempted by this part").

38. *See Nieman II*, 178 F.3d at 1131.

39. *See* 44 Fed. Reg. 49,966, 49,971 (1979).

40. *Id.*

41. *Id. See, e.g.*, 62 Fed. Reg. 9115, 9119 (1997); 62 Fed. Reg. 28,822, 28,823 (1997).

42. *See Nieman II*, 178 F.3d at 1131.

43. *Id.*

44. *Id.*

45. 148 F.2d 416 (2d Cir. 1945) (holding that the Sherman Act applied to extraterritorial activities if they were "intended to affect imports or exports, [and] shown actually to have had some effect on them"). *Id.* at 444.

46. *See, e.g,* Comment, *The Protection of Trading Interests Act of 1980: Britain's Response to U.S. Extraterritorial Antitrust Enforcement*, 2 NW. J. INT'L L. & BUS. 476, 477-78 nn.10-12 (1980).

of several European nations, and the European Economic Community, have also been applied extraterritorially.[47]

That this practice will continue is quite certain. But that it may be reined in somewhat by careful jurisprudence should be the striven-for goal. The *Nieman* court's cautious approach to Congressional intent regarding extraterritoriality, though by no means unique, is nonetheless too seldom employed.[48] This is unfortunate in the first instance because purely national approaches to international trade breed an ill-concealed hostility toward the interloping nation. Second, and perhaps more importantly, such approaches can serve only to confound businessmen seeking sureness in their dealings.

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47. *See, e.g.*, Thomas W. Dunfee & Aryeh S. Friedman, *The Extra-Territorial Application of United States Antitrust Laws: A Proposal for An Interim Solution*, 45 OHIO ST. L.J. 883, *886-887, nn. 24-25 (1984). With respect to EEC laws, illustrative is the case of Imperial Chem. Indus. Ltd. v. E.C. Comm'n, 11 Comm. Mkt. L.R. 557 (1972) (Court of Justice of the EC holding that its antitrust laws are applicable to conduct occurring outside the Community).

48. For cases exemplary of an incautious approach to extraterritoriality, *see, e.g., In re* Uranium Antitrust Litigation, 480 F. Supp. 1138 (N.D. Ill. 1979), *aff'd*, 617 F.2d 1248 (7th Cir. 1980); International Association of Machinists v. The Organization of Petroleum Exporting Countries (OPEC), 649 F.2d 1354 (9th Cir. 1981); Laker Airways Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984).

Criminal Proceedings against Donatella Calfa

Court of Justice of the European Communities January 19, 1999

European Court of Justice Holds that Greek Law Requiring Lifetime Expulsion of Foreign Nationals Convicted of Drug Offenses Is Incompatible with Certain Freedoms Guaranteed by EC Law and Not Justified by Public Policy.

On January 19, 1999, the Court of Justice of the European Communities (ECJ) held that a Greek law, which required automatic lifetime expulsion from Greece of any foreign national convicted of drug offenses, was incompatible with certain freedoms granted EC members with respect to travel.[1] Although public policy exceptions may in some instances justify national legislation derogating from EC law, the Court found that the statute in question did not satisfy the exception, as it required expulsion automatically upon conviction and took no account of the personal conduct of the offender or the danger presented to Greek public policy.[2]

Ms. Donatella Calfa, an Italian national, was found guilty of possession and use of prohibited drugs while visiting as a tourist in Crete.[3] The Plimeliodikio (Criminal Court of First Instance) at Heraklion sentenced her to three months' imprisonment and further ordered her expelled for life from Greek territory.[4]

On September 25, 1995, Ms. Calfa appealed to the Arios Pagos (Supreme Court of Cassation), arguing, *inter alia*, that certain articles of the Treaty Establishing the European Community ("the Treaty") relating to European citizenship and the freedom to provide services,[5] did not allow Greece to expel for life a national from another EC Member State if that measure could not be taken against a Greek citizen.[6] Recognizing that the case concerned the compatibility of national legislation with Community law, the Arios Pagos suspended proceedings and referred the matter to the ECJ,[7] asking in essence whether the named Articles of the Treaty precluded a law that, with certain exceptions, required a Member State's courts to order the expul-

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1. *Criminal Proceedings against Donatella Calfa*, Court of Justice of the European Communities, Case C-348/96, 1999 ECJ CELEX LEXIS 2178 (1999) (hereinafter "*Calfa*"). Specifically, the Court relied upon Article 59 of the Treaty Establishing the European Economic Community (hereinafter "EC Treaty"), Part Two, Title III, Chapter 3, which provides that "restrictions on freedom to provide services within the community shall be progressively abolished. . . ." *Calfa* at *11.

2. *Calfa*, 1999 ECJ CELEX LEXIS 2178, at *15.

3. *Id.* at *7.

4. *Id.*

5. Specifically, Articles 8 and 8a (European citizenship) and Article 59 of the EC Treaty (freedom to provide services).

6. *Id.* at *7-*8. *See* Law No. 1729/1987. The law in question allows Greek nationals convicted of drug offenses (who may not be subject to a deportation order) to be ordered not to reside in certain parts of Greek territories. However this prohibition is discretionary, and also may not be imposed for periods of more than five years. *Id.* at *6-*7.

7. The matter was referred under Article 177 of the EC Treaty, which allows for preliminary rulings with respect to questions of Treaty interpretation.

sion for life from its territory those nationals of other Member States found guilty of obtaining and possessing drugs for personal use.[8]

The ECJ[9] began by stating that the principle of freedom to provide services, under Article 59 of the Treaty, "which is one of its fundamental principles, includes the freedom for the recipients of services to go to another Member State in order to receive a service there, without being obstructed by restrictions. . . ."[10] In *Cowan v. Tresor Public*,[11] the Court held that tourists, such as Ms. Calfa, "must be regarded as recipients of services. . . ." Also in *Cowan*, the Court found that although criminal legislation is in principle a matter for which Member States are individually responsible, Community law does set certain limits to their power, and such legislation may not restrict the freedoms guaranteed by Community law.[12]

As for the instant case, the Court found that the penalty of expulsion for life, applicable only to nationals of other Member States, was indeed an "obstacle to the freedom to provide services"[13] under Article 59 of the Treaty, because it was "the very negation of that freedom."[14] However, there remained the question whether such a penalty could nevertheless be justified by the public policy exception under Article 56 of the Treaty, which permits Member States to adopt, with respect to nationals of other Member States, measures not similarly applicable to their own.[15] Under *Regina v. Pierre Boucherau*,[16] in order to qualify for such an exception, there must exist a "genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society."[17] In the instant case, the Court accepted that a Member State may consider drug use to constitute "a danger for society such as to justify special measures against foreign nationals who contravene its laws on drugs, in order to maintain public order."[18]

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8. *Id.* at *10-*11.

9. The Court was composed of the following Judges: G.C. Rodriguez Iglesias, President, P.J.G. Kapteyn and P. Jann (Presidents of Chambers), C. Gulmann, J.L. Murray, D.A.O. Edward, H. Ragnemalm (Rapporteur), L. Sevon, M. Wathelet, R. Schintgen, and K.M. Ioannou, Judges, and A. La Pergola (Advocate General).

10. *Calfa*, 1999 ECJ CELEX LEXIS 2178, at *11.

11. *Id. See* Case 186/87 Cowan v. Tresor Public, 1989 ECR 195 (British citizen suing French Treasury for compensation resulting from a violent assault suffered at the exit of a metro station in Paris). *See also* Joined cases 286/82 and 26/83 Luisi and Carbone v. Ministero del Tesoro 1984 ECR 377 (holding that freedom to provide services includes the freedom for recipients of services to visit another Member State for such services, without restrictions, and that tourists are to be regarded as recipients of services).

12. *Calfa*, 1999 ECJ CELEX LEXIS 2178, at *11 (citing *Cowan*, 1989 ECR 195, paragraph 19).

13. *Calfa*, 1999 ECJ CELEX LEXIS 2178, at *11.

14. *Id.*

15. *Id.* at *12.

16. Case 30/77 Boucherau 1977 ECR 1999 (French national found guilty of possession of narcotics while employed and living in United Kingdom).

17. *Id.* at *2.

18. *Calfa*, 1999 ECJ CELEX LEXIS 2178, at *13.

However, the Court stressed that the public policy exception, like all derogations from fundamental Treaty principles, must be strictly interpreted.[19] Toward this goal, the Court looked to Directive 64/221,[20] which dealt with measures taken on the grounds of public policy. Specifically, Article 3 of that Directive provides that measures having the effect of restricting the residence of an individual must be based exclusively on the "personal conduct of the individual concerned."[21] In addition, a criminal conviction cannot in itself constitute the grounds for taking such measures.[22] Rather, as the Court concluded, a conviction can be taken into account only insofar as the circumstances surrounding the conviction are "evidence of personal conduct constituting a present threat to the requirements of public policy."[23] Therefore, an expulsion order against a Community national could be made only if, besides the drug offense, that national's "personal conduct created a genuine and sufficiently serious threat affecting one of the fundamental interests of society."[24]

In the present case, the Court found that the Greek anti-drug legislation required expulsion for life automatically upon criminal conviction.[25] Only in the case of Greek nationals was a lesser punishment permitted: that of expulsion from certain Greek territories, but not from Greece as a whole.[26] Yet this lesser expulsion was also discretionary, and could not exceed a period of five years.[27] In contrast, the law requires that nationals of other Member States be expelled automatically, without regard for the personal conduct of the offender or the danger posed to public policy.[28] Therefore, the Court found that the conditions necessary for applying the public policy exception, as set forth under the Directive, were not fulfilled.[29] The relevant Treaty provisions[30] therefore preclude any legislation that, as does the Greek law, requires a Member States' courts to expel for life nationals of other Member States found guilty of obtaining and possessing drugs for their own personal use.[31]

There is little doubt that the Court in *Calfa* followed closely the precedents established in *Boucherau* and *Cowan*. *Boucherau*, in particular, involving a French national convicted of

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19. *Id.*

20. *Id.* at *13-*14 (Directive 64/221, Article 1(1) and Article 3, as cited in Case 30/77 *Bouchereau*, 1977 ECR 1999).

21. *Id.* at *14 (Directive 64/221, Article 3).

22. *Id*.

23. *Id.* (again, relying upon Case 30/77 Bouchereau 1977 ECR 1999).

24. *Id.*

25. *Id.* at *14-*15.

26. *Id.* at *6-*7.

27. *Id.* at *7.

28. *Id.* at *15.

29. *Id.*

30. Specifically, Articles 48, 52 and 59 of the EC Treaty, and Article 3 of Directive 64/221. Article 48 provides that "[f]reedom of movement for workers shall be secured within the community [and that] such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment. . . ." EC Treaty, Part Two, Title III, Chapter 1, Article 48. Article 52 concerns the wider matter of abolishing "restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State," including self-employment, companies or firms. EC Treaty, Part Two, Title III, Chapter 2, Article 52. For Article 59, *see supra,* note 1.

31. *Id.* at *15-*16.

unlawful possession of drugs in the United Kingdom, is nearly identical.[32] Yet there the individual in question was fully employed, and thus clearly beyond the realm of vacationing tourist.[33] But a decade later in *Luisi and Carbone v. Ministero del Tesoro,*[34] the Court also declared that the freedom to provide or receive services unobstructed included situations involving tourists, who "must be regarded as recipients of services."[35] It is therefore no great surprise that the *Calfa* Court found the relevant Greek legislation incompatible with the rather progressive approaches to nationality and community embraced by the EC Treaty. After all, even as far back as 1972, the Court had stressed the right to equal treatment among EC nationals as laid down in Community law.[36] It is, however, interesting to note that the *Calfa* Court rested almost entirely upon the freedom to provide services, and not at all on equal treatment.

But what may be deemed extraordinary is the possible impact of *Calfa* upon the drug policies of Member States whose pursuit of narco-traffickers is zealous, to say the least. A brief glimpse of those parties submitting written observations in *Calfa* reveals the contentiousness of the issue: Greece, France, the United Kingdom and the Netherlands all weighed in.[37] But it should be recalled that the Court by no means dismissed the importance of such anti-drug efforts. Rather, although it accepted that drugs may be considered a danger to society justifying "special measures,"[38] the Court found that the particular measures taken—automatic expulsion upon conviction—were improper under Community law.[39]

The importance of this distinction may be obvious, but it is still deserving of brief mention. The Court, while recognizing the ravages of the illicit international drug trade, has nevertheless refused to allow anti-drug efforts to subvert the contemporary notion of basic freedoms. Many American observers might readily conjure up the tattered image of the Fourth Amendment as fair warning against the extreme end of such efforts, and applaud the *Calfa* decision, but the fact remains that these competing interests—prohibitive law and protective law—will not soon go quietly away. Yet it may be the case that in the narrow confines of *Calfa*'s facts, where banishment is the sentence, a wider truth may be discerned. This simply is the likelihood that an archaic approach to crime[40] in the twenty-first century may not only be ineffectual, but, by international legal standards, intolerable.

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32. Case 30/77 Bouchereau 1977 ECR 1999.

33. *Id.*

34. Joined Cases 286/82 and 26/83 (1984) ECR 377.

35. *Id.*

36. *See* Case 1/72 Frilli v. Belgium (1972) ECR 457 (maintaining that the right to equal treatment under Community law could not be made dependent upon, among other things, the existence of a reciprocal agreement between the relevant Member State and the national's home country).

37. *Calfa*, 1999 ECJ CELEX LEXIS 2178, at *2.

38. *Id.* at *13.

39. *Id.* at *15.

40. Expulsion, or banishment, is of course of indeterminate origin, the practice being evident in almost all cultures throughout history. In Greece, in particular, reliable recorded history reveals such banishments as that of the generals Pythodorous and Sophocles in 424 B.C. for having "taken bribes to depart when they might have subdued Sicily" during the course of the Peloponnesian War. *See* ROBERT B. STRASSLER, THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR 258 (1996).

Beanal v. Freeport-McMoran, Inc.

197 F.3d 161 (5th Cir. 1999)

Environmental Action by an Indonesian Citizen Challenging Mining Operations and Cultural Genocide by United States Companies Failed to State a Cause of Action of Customary International Law Under the Alien Tort Claims Act.

In *Beanal v. Freeport-McMoran, Inc.*,[1] the United States Court of Appeals, Fifth Circuit, held that an environmental action by an Indonesian citizen failed to state a claim upon which relief could be granted in challenging mining operations and charging cultural genocide by United States companies failed to state a claim upon which relief could be granted in part because the alleged activities were not shown to violate a universally accepted standard or norm of customary international law as required by the Alien Tort Claims Act.[2]

Freeport-McMoran, Inc. and Freeport-McMoran Copper & Gold, Inc. (hereinafter "Freeport") are Delaware corporations headquartered in New Orleans, Louisiana, that operate an open pit copper, gold and silver mine in the Jayawijaya Mountain in Irian Jaya, Indonesia, known as the "Grasberg Mine."[3] Tom Beanal ("Beanal"), a resident of Timika, Irian Jaya within the Republic of Indonesia ("Republic") and leader of the Amungme Tribal Council of Lambaga Adat Suki Amungme (the "Amungme") filed claims against Freeport,[4] alleging that Freeport engaged in mining operations injuring the Amungme's environment and habitat in depositing 100,000 tons of mine tailings per day into the Aghwagaon, Otomona and Akjwa Rivers, increasing the likelihood of flooding, massive landslides and acid rock damage in Amungme lands,[5] engaging in cultural genocide in destroying the Amungme's habitat and religious symbols, causing the Amungme to be displaced and relocate to other areas in Indonesia,[6] and that Freeport's security force acted in concert with the Republic to violate international human rights by imposing mental torture, making death threats, surveilling and imposing house arrest on the Amungme people.[7]

Beanal filed a complaint against Freeport in federal district court in the Eastern District of Louisiana for alleged violations of international law, invoking jurisdiction under 28 U.S.C. § 1332, the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991, §§. 1, *et seq.*, 28 U.S.C. § 1350.[8] The district court dismissed Beanal's complaint and

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1. 197 F.3d 161 (5th Cir. 1999) [hereinafter "*Beanal*"].
2. *Beanal*, 197 F.3d at 161, 165, 169.
3. *Id.* at 163. The "Grasberg mine" is an open pit copper, gold, and silver mine approximately 26,400 square kilometers in size. *Id.*
4. *Id.*
5. *Id.* at 166. *See, e.g.,* Beanal v. Freeport-McMoran, Inc., No. 96-1474, 1998 U.S. Dist. LEXIS 2522, at *3 n.1, 4-5 (E.D.La. 1998) (detailing pertinent sections of Beanal's Third Amended Complaint).
6. *Beanal*, 197 F.3d at 167. *Supra* note 5.
7. *Id.* at 165. *Supra* note 5.
8. *Id.* at 163. "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Alien Tort Statute, 28 U.S.C. § 1350 (1999).

granted leave to amend his complaint to state his claims of genocide and individual human rights violations more specifically pursuant to Rule 12(e) of the Federal Rules of Civil Procedure.[9] The district court later dismissed Beanal's Second Amended Complaint, because Beanal inappropriately added third parties and again instructed Beanal to plead sufficient facts to support his allegations of genocide and individual human rights violations.[10] Beanal's Third Amended Complaint was then dismissed with prejudice for failure to state a claim for which relief may be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure[11] and Beanal appealed to the United States Court of Appeals, Fifth Circuit.[12]

Upon appeal, Beanal claims his pleadings sufficiently state claims for violations of the 'law of nations' or customary international law under the Alien Tort Claims Act.[13] Freeport argued, and the Court of Appeals affirmed the decision made by the district court, that Beanal's complaint failed to meet the minimum pleading requirements with respect to his allegations of individual human rights violations, environmental torts and abuses and cultural genocide.[14] Although the Court of Appeals recognized Beanal had raised complex issues of international law, it acknowledged that its sole duty was not to resolve those complex issues but rather to determine whether the pleadings state a claim upon which relief can be granted.[15]

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9. *Beanal*, 197 F.3d at 163. A motion for a more definite statement under Rule 12(e) is considered a proper remedy when a complaint is ambiguous or fails to provide notice of circumstances that give rise to a claim as required under Fed. Rules Civ. Proc. 8(a) (1999). Rule 12(e) states:

> If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleadings. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

Fed. Rules Civ. Proc. 12(e) (1999).

10. *Beanal*, 197 F.3d at 163.

11. Fed. Rules Civ. Proc. 12(b)(6) (1999). Rule 12(b)(6) states:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed. Rules Civ. Proc. 12(b)(6) (1999).

12. *Beanal*, 197 F.3d at 163-64 n.1 (amici curiae submitting briefs to support Beanal's claims include the Sierra Club, Earthrights International, Center for Constitutional Rights, Center for Justice and Accountability, and the Four Directions Council).

13. *Beanal*, 197 F.3d at 165. *Supra* note 8.

14. *Beanal*, 197 F.3d at 169.

15. *Id.* at 165 (the court discussed that the 'law of nations' is defined by customary usage and established principles of the international community yet also asserted that defining the 'law of nations' is confusing and hotly debated among academics).

The Court of Appeals first addressed Beanal's claim of individual human rights violations. Freeport argued that Beanal failed to plead the requisite state action to support his claim under the Alien Tort Statute.[16] The Court of Appeals affirmed the district court's dismissal of Beanal's claims for failure to specifically identify particular incidents of violations imposed against him.[17] The Court of Appeals did not reach the question whether state action is required to sustain an action for individual human rights violations under the Alien Tort Statute, because it affirmed the district court's holding of failure to state a claim with specificity.[18] The Court of Appeals also did not address the issue of whether Beanal's allegations of individual human rights violations were also actionable under the Torture Victim Protection Act of 1991.[19] Although Freeport argued that the Torture Victim Protection Act of 1991 was inapplicable to corporations and the district court upheld a plain language interpretation of the statute, the Court of Appeals determined it was unnecessary to render a decision on the statute because it found Beanal initially failed to state the requisite facts to support his claim of individual human rights violations.[20]

Freeport argued, and the Court of Appeals affirmed the district court's conclusion, that Beanal's allegations that Freeport, through its mining activities, engaged in environmental torts and abuses in violation of international law failed to show that Freeport's mining activities violated any universally accepted environmental standards or norms.[21] The Court of Appeals supported Freeport's argument that it would be improper for United States environmental policy to displace environmental policies of other governments, especially when the alleged environmental torts and abuses did not affect the environmental conditions of neighboring countries.[22] Rather, the court held that the Alien Tort Statute is applicable only to 'shockingly egregious violations of universally recognized principles of international law.'[23]

Freeport asserted, and the Court of Appeals also affirmed the district court's decision, that Beanal's complaint that Freeport's mining activities subjected the Amungme to the destruction of their cultural and social framework was devoid of underlying facts to support a claim of

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16. *Beanal*, 197 F.3d at 165.

17. *Id.* at 165-66. Beanal's claims are devoid of names, dates, locations, times or any facts that would put Freeport on notice as to what conduct supports the nature of his claims. *Id.* at 165.

18. *Id.* at 165.

19. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350, note §§ 1, *et seq.* (1999). Section 2 of the Torture Victim Protection Act of 1991 establishes a civil action and states:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

Torture Victim Protection Act of 1991, 28 U.S.C. § 1350, note, § 2, (1999).

20. *Id.* at 169.

21. *Id.* at 166-67.

22. *Id.*

23. *Id.* at 167 (citing Zapata v. Quinn, 707 F.2d 691-92 (2d Cir. 1983) (per curiam)).

genocide.[24] Furthermore, Beanal's and the amici curiae briefs' suggestion that the Court of Appeals recognize cultural genocide as a violation of customary international law was found insufficient by the Court of Appeals, because Beanal had not demonstrated that cultural genocide was universally accepted as a violation of international norms and standards.[25] The Court of Appeals again was hesitant, as it was with respect to the environmental torts and abuses alleged by Beanal, to impose United States policy upon the policies of another country especially when cultural genocide had not been universally accepted as a cause of action in the international law context.[26]

It was observed by the Court of Appeals that the district court below gave Beanal numerous opportunities and considerable guidance in amending his complaints to survive a motion to dismiss.[27] The Court of Appeals affirmed the district court's decision without having to make any determinations about alleged violations of international law that have not been universally accepted as environmental standards or norms and warned federal courts to act cautiously when adjudicating environmental claims under international law to insure that environmental policies of the United States do not displace environmental policies of other governments, especially when the federal courts adjudicate environmental claims under international law that are not universally recognized as an international law violation.[28] The court's conclusion that Freeport's mining activities failed to violate a universally recognized environmental standard in the international community, however, may suggest to multi-national corporations that engaging in tortious conduct abroad is permissible under the Alien Tort Claims Statute, provided it does not involve any direct action by that foreign government.[29]

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24. *Beanal*, 197 F.3d at 167-68.

25. *Id.* at 168 (the amici curiae briefs referred to several international agreements, conventions and declarations that proclaimed there is a right to enjoy or freely pursue culture but the court of appeals held that these documents were vague and failed to identify any type of conduct that might constitute a violation of cultural genocide); *see also* Martin A. Geer, *Foreigners in Their Own Land: Cultural Land and Transnational Corporations-Emergent International Rights and Wrongs*, 38 VA. J. INT'L L. 331, 360-63 n.127 (1998) (acknowledging that genocide is a matter of universal concern but noted that cultural genocide, a harm which is aimed at a group's cultural characteristics, has not attained universal jurisdiction even though some international conventions have referred to cultural genocide amongst its text).

26. *Id.* at 167-68.

27. *Id.* at 169.

28. *Id*. at 167.

29. Brad J. Kieserman, Comment, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 CATH. U.L. REV. 881, 916-18, 925 (1999) (discussing how the court of appeals based its dismissal primarily on the ambiguity in Beanal's allegations regarding the role played by the Indonesian military at the Irian Jaya mine and ignored the long-term and economically interdependent association between Indonesia and Freeport that provided the requisite state action to support Beanal's claim under the Alien Tort Statute); *see also* Gregory G.A. Tzeutschler, Note, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 COLUM. HUMAN RIGHTS L. REV. 359, 361-62 (1999) ("[T]he lack of international regulation of extractive and manufacturing industries' activities is of concern. Extractive industries operate in remote areas far from oversight. The security and environmental practices of these corporations threaten indigenous cultures, unique ecosystems, and many people's lives. Manufacturing firms can easily evade domestic regulation as a result of global competition among poor countries trying to attract low-wage industrial jobs.").

The courts, however, should not be quick to dismiss alien tort claims against U.S.-based corporations because there is an uncertain role played by foreign-state actors in the challenged conduct.[30] Rather, the courts should determine whether there is any substantial relationship between a domestic corporation acting abroad and foreign government, because it would be unwise to allow a domestically chartered corporation to evade liability for abusive overseas conduct.[31]

The court's willingness, however, to consider environmental damage as a potential violation of human rights is an important sign of recognizing a new notion that environmental damage may violate individual human rights.[32] Although international institutions are better equipped to resolve disputes over international human rights violations,[33] the United States should attempt to strengthen these institutions rather than attempting to impose United States environmental policy under the guise of international law.[34] Although the Court of Appeals in *Beanal* found it unnecessary to address the issue whether state action was requisite to support a claim under the Alien Tort Statute,[35] the United States ought to urge the international community to develop clear standards of liability for environmental offenses that apply across nations to both state and private actors and address the shortcomings of current remedies available to victims of international environmental abuses.[36]

Randi Alarcon

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30. *Id.* at 918.

31. *Id.* at 918. *See generally* John Doe I v. Unocal Corp., 963 F.Supp 880, 896 (C.D. Cal. 1997) (refused to dismiss claim against a corporation that allegedly committed no direct tortious conduct but knew of or benefited from the human rights abuses of the foreign host-government).

32. Anastasia Khokhryakova, *Beanal v. Freeport-McMoRan, Inc.: Liability of a Private Actor for an International Environmental Tort Under the Alien Tort Claims Act*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 463 (1998); *see* Richard Campbell & Armin Rosencranz, *Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts*, 18 STAN. ENVTL. L.J. 145, 149 (1999) (noting that, "State and federal courts have slowly begun to accept such claims as they increasingly recognize the complicity of U.S. multinationals in human rights and environmental abuses abroad.").

33. *See* Anastasia Khokhryakova, *Beanal v. Freeport-McMoran, Inc.: Liability of a Private Actor for an International Environmental Tort Under the Alien Tort Claims Act*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 463 (1998).

34. *Id*.

35. *Supra* note 16.

36. Anastasia Khokhryakova, *Beanal v. Freeport-McMoran, Inc.: Liability of a Private Actor for an International Environmental Tort Under the Alien Tort Claims Act*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 463 (1998).