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Introduction

In this volume of the *Creighton International and Comparative Law Journal*, we are pleased to bring you many great articles discussing a broad range of topics on international law and comparative legal analysis. Among the topics discussed in Volume 7 are targeted sanctions as a solution to the problems of general sanctions, French interventionism in Mali, the LGBT community in Turkey, and World Trade Organization dispute settlement and the use of the rhetoric of sovereignty as a tool by member nations. Also included are several outstanding student articles discussing the topics of Uber’s interactions with the legal systems of European countries and the EU, the denial of issue preclusive effect to the International Trade Commission’s adjudications of patent validity, challenges facing Europe’s Schengen border agreement in light of the migrant crisis, and the European Court of Human Rights’ conflicting treatment of asylum seekers under the Dublin Regulation.

I would like to thank all of the writers, staff, and board of editors for the success of the *Creighton International and Comparative Law Journal* this academic year. Countless hours have been spent researching, writing, and editing to produce this fine volume. This hard work is what makes the success of this journal possible. I would also like to extend the appreciation of the journal to Creighton University School of Law’s Associate Dean Michael J. Kelly for his work as a faculty advisor over the past several years. Thank you.

Daniel E. Cummings
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French Interventionism in the Age of R2P: A Critical Examination of the Case of Mali*

AMIR SEYEDFARSHI*

Lead Article

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I. INTRODUCTION

In the past two decades the world has witnessed an increasing number of humanitarian interventions with a military component, whereby a country unilaterally or through a coalition of states intervenes in another country for humanitarian purposes. Such interventions have spawned contentious debate as to the humanitarian bona fides of military action, the possibility that humanitarian considerations may be invoked as a pretext for interventions that have strategic purposes and, at the most general level, the implications of new doctrines permitting non-consensual interventions in an international order based on state sovereignty. From American-led and Security Council-sanctioned intervention in Libya to the Russian intervention in the Crimea, humanitarian arguments for military action have given rise to a new set of challenges to concepts of legality and legitimacy in international affairs. The real concern with regards to the unilateral interventions is the legality and the legitimacy of such interventions under international law.

Responsibility to Protect (R2P) has become one of the major axes of recent developments in international law concerning the use of force. Not only does it encompass the duty and responsibility of the international community to protect against the violation of human rights, it goes further by justifying military

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interventions in the name of humanitarian law. The report of the ICISS and the United Nations Outcome Document of 2005 outlined the legal basis for embracing R2P. Pursuant to these documents, interventions based on R2P, must satisfy a number of conditions and criteria in order to fulfill the requirements of international law.

The Malian case is one of the recent examples in which French military forces acted in the name of humanitarian intervention during Operation Serval. This intervention was trumpeted as a humanitarian intervention in the sense that it saved the lives of innocent Malian people in an internal conflict. Initially, the French government justified this operation on the grounds of resolutions 2071 and 2085. Both resolutions condemned the violence in Mali, but neither expressly authorized the French government to use military forces in Mali; they only mentioned the use of African military forces. Second, the French government asserted that there had been consent and that the intervention would have not happened but for the invitation of the Malian interim government. As a third justification, the French government invoked the concept of collective self-defense based on Article 51 of

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the UN Charter. Ultimately, the French Secretary of State, Laurent Fabius, referenced the duty of France and the international community to intervene in Mali. This duty derives from the norm of the Responsibility to Protect.  

This paper will analyze the arguments for the legality of the French intervention in Mali during Operation Serval, which spanned across a number of different international legal doctrines, and will show that the operation likely violated the rules of international law despite the many justifications advanced by France. In particular, the attempt by France to ground the legality of the intervention in the doctrine of the Responsibility to Protect (hereinafter R2P) will be the critical focus of the argument developed in this article. While France insisted that it was acting consistent with R2P to address the duty of the international community, including the United Nations, to protect civilians in Mali, the mere invocation of the humanitarian welfare of the civilian population alone is not sufficient to ground the legality of an operation under R2P.  

This article will analyze the justificatory framework provided by the R2P doctrine and demonstrate that French arguments from humanitarianism failed to satisfy the threshold conditions for the legitimate invocation of R2P.

Lastly, this paper will explore whether international practice—including unilateral and multilateral interventions over the last decade that have referenced R2P—has resulted in any adaptation or variation of the requirements of the R2P doctrine. In Part I, I analyze the three initial arguments used by France to justify this intervention on the basis of (i) United Nations Security Council resolutions, (ii) consent of the Malian government; and (iii) collective self-defense. In Part II, this paper will survey the scholarship regarding the concept of R2P at large and its place in the international arena. In Part III, this paper will turn to the French argument for the legality of Operation Serval grounded in R2P to analyze whether the requirements of the doctrine were satisfied and offer a critical examination of the French deployment of the principle. Finally, I will explore the impact and

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implication of the use of R2P in contemporary international law, in light of the apparent plasticity of the doctrine when invoked by major powers.

II. ANALYSIS OF THE FRENCH ARGUMENTS FOR THE MILITARY INTERVENTION IN MALI

Faced with domestic and international criticism, the French government justified the legality of Operation Serval on three grounds. The first was that the use of military force accorded with the resolutions of the Security Council. The second ground was the invitation by the interim president of Mali to intervene. The third ground was based in the notion of collective self-defense and the idea that the French government had a duty to intervene in Mali. As I will discuss in this section, none of these arguments fulfill the requirements of customary international law.

A. SUMMARY OF OPERATION SERVAL

In January 2013, the French military initiated Operation Serval\(^9\) in Mali, Sub-Saharan Africa.\(^10\) After months of armed conflict between the forces of the Malian government and the Tuareg National Movement for the Liberation of Azawad (NMLA), the forces of Captain Sonog toppled Malian President Amadou Toure on March 21, 2012. According to many sources, the major political and military forces in northern Mali were a hodgepodge of militia groups, suspected of being involved with Al-Qaeda, who had been based in northern Mali since early 2012.\(^11\)

After Toure’s ouster, Dioncoundra Traore was sworn in as interim president on April 12, 2012, but the country remained in an unstable condition. French military forces entered into the armed conflict after attacks in Bamako resulted in casualties and presented a threat to the interim government. Faced with this escalation of violence, the French military, which had been ready to intervene for some months, commenced an incursion in Mali.\(^12\) The result of this successful


\(^11\) Id.

\(^12\) Id.
military operation was the overthrow of the rebel forces and the confirmation of
President Traore’s authority. The French forces were able to chase all military
armed groups acting against the Malian government.13

B. U.N. SECURITY COUNCIL RESOLUTIONS

1. Resolutions 2071 and 2085 of the United Nations Security Council

The French government attempted to justify its military intervention with
Security Council Resolutions.14 However these resolutions alone do not form a
sufficient legal foundation for the French intervention. Resolution 2071, adopted
on December 5th 2012, references the armed forces in Sahel and the presence of
military groups in Mali. According to the Resolution’s introduction, the Malian
army is responsible for the protection and the security of its people and all military
interventions must be Malian-led.15

Paragraph 6 of the Resolution states that the Security Council is ready to
respond to the request of the “Transitional Authorities of Mali” for international
military assistance in recovering the occupied regions in the north of the country.16
Moreover, the Resolution specifies in paragraph 7 that the Secretary General will
provide military and security planners to assist ECOWAS and the African Union
in close connection with Mali and neighboring countries.17 Where the body of the

13 See David J. Francis, THE REGIONAL IMPACT OF THE ARMED CONFLICT AND
FRENCH INTERVENTION IN MALI, NORWEGIAN PEACEBUILDING RESOURCE CENTER
5 (2013), http://www.peacebuilding.no/var/ezflow_site/storage/original/application/f18726c
3338e39049bd4d554d4a22c36.pdf (“Worthy of note is that President Hollande had
earlier refused to intervene in support of the beleaguered President Bozize of the
Central Africa Republic (CAR) in December 2012. The apparent U-turn on Mali
was because of the threat posed by that country and how this resonates with the
French domestic audience, i.e. the threat of the emergence of a terrorist state and
its impact on France.”).
14 See Resolution 2071, supra note 4; Resolution 2085, supra note 5.
15 See Resolution 2071, supra note 4. The Security Council unanimously adopted
Resolution 2071, presented by France and co-sponsored by Morocco, Togo, South
Africa, India, Germany and the United Kingdom.
16 Id. at ¶ 6.
17 Id. at ¶ 7. (“. . . immediately provide military and security planners to assist
ECOWAS and the African Union, in close consultation with Mali, the neighbouring
countries of Mali, countries of the region and all other interested bilateral partners
Resolution mentions the military intervention, it is loosely referenced and it is accompanied by the cooperation with other African countries. In paragraph 9, the Resolution requests that the Member States provide assistance, expertise and training to Malian forces, consistent with their respective domestic laws. Furthermore, the same paragraph emphasizes that the goal of such an action would be to restore the authority of Malian forces. The Resolution limits military assistance to the reinforcement of Malian forces so that they can regain the control of their territory.\(^\text{18}\) In fact, French forces intervened unilaterally in Mali. Not having acted to reinforce Malian forces, nor having been led by them, France intervened outside the scope of this resolution and may not rely on it.

Resolution 2085, adopted on December 20, 2012, reiterated the same guidelines found in Resolution 2071. Before the adoption of this Resolution, the French Ambassador to the United Nations, Gerard Arnaud, delivered a speech on December 10\(^\text{th}\), 2012 supporting any future military action by the Security Council.\(^\text{19}\) This second Resolution, strongly condemning the violation of human rights in Mali, initiated a deployment of an African-led international support mission to Mali (known as AFISMA) for an initial period of one year. AFISMA was to take all necessary measures to restore safety and security in compliance with international humanitarian law.\(^\text{20}\)

The deployment of the AFISMA forces, mentioned in paragraph 9, was to be for the following purposes, inter alia: 1) to contribute to the rebuilding of the capacity of the Malian Defense and Security Forces, in coordination with other international forces, 2) to support Malian authorities in recovering the areas in the northern region under terrorist control, 3) to support the Malian authorities in their primary responsibility to protect the population, and 4) to support the Malian authorities in facilitation of humanitarian assistance.\(^\text{21}\) Pursuant to paragraph 11 of

\(^{18}\) Id. at ¶ 9.


\(^{20}\) See Resolution 2085 supra note 5.

\(^{21}\) Id. ¶ 9. ("Decides to authorize the deployment of an African-led International Support Mission in Mali (AFISMA) for an initial period of one year, which shall
the Resolution, the UN Secretary General must continue to support planning and preparation for the deployment of AFISMA.22

Regarding the duties of the international community, paragraph 13 called upon Member States to contribute troops to AFISMA in order to fulfill its mandate.23 Moreover, paragraph 18 of the Resolution stated that any support provided by the UN, regional and subregional organizations, or Member States must be consistent with international humanitarian and refugee law.24

In sum, the text of Resolution 2085 refers explicitly to the deployment of the AFISMA military forces and makes no mention of the deployment of French forces.25 The use of military forces by Member States is limited to furthering cooperation with African forces.26

Furthermore, one of the arguments in favor of the legality of this intervention was the publication of a press release by the Security Council on January 10th, 2013.27 In this text, Member States insisted on the rapid deployment of military forces in Mali.28 However, the press release had no effect on the

22 Id., at ¶ 11.
23 See id., at ¶ 13.
24 Id., at ¶ 18.
25 See Laird, supra note 9, at 134-36 (discussing that paragraph 9 of the Resolution 2085 does not authorize the French intervention; it only requires an African led deployment).
26 Nabli, supra note 6 (stating that France had a duty to intervene in order to save human lives in Mali and adding that the French government did not follow Resolution 2085); see also id., at 134-36 (specifying that Resolution 2085 referred extensively to the deployment of military forces by the Member States).
28 Id. at ¶ 5 (“The members of the Security Council express their determination to pursue the full implementation of its resolutions on Mali, in particular resolution 2085 (2012) in all its dimensions. In this context, they call for a rapid deployment of the African-led International Support Mission in Mali (AFISMA.”).
disposition of the Security Council Resolutions, and the press release taken in its own terms insisted in particular on the deployment of African forces.\footnote{Karine Bannelier & Theodore Christakis, Under the UN Security Council’s Watchful Eyes: Military Intervention by Invitation in the Malian Conflict, Leiden J. Int’l L. 26, 855-874 (2013) (mentioning that the French government did not claim to intervene based on the Security Council resolutions, however they argued that the intervention furthered the objectives of Resolution 2085).}

2. **Legality of French Intervention Based on the Spirit of the U.N. Resolutions**

Some argue that the French military intervention was legal because it followed the general objectives of the UN Resolutions. This argument is unsatisfactory. The mere fact that the French military action happened to be in harmony with the goals of the aforementioned Security Council Resolutions cannot justify the actions of the French government.\footnote{See Raphael Van Steenberghe, Les Interventions Francaises et Africaines au Mali au Nom de la Lute Armee Contre le Terrorisme, Revue General de Droit International Public [R.G.D.I.P] 285 (2014) (Fr.) (stating that the resolutions did not mention France or the French government and believing that only the African forces were authorized to intervene based on this Resolution).} Raphael Van Steenberghe forwards the position that although these resolutions did not open the door for a French intervention, the French intervention was in compliance their objectives.\footnote{Id. at 286 (stating that even though the resolution did not allow French forces to intervene in Mali, the intervention was justified because the objectives of the resolutions were attained, and referring to the approval of the African countries by citing to the press release of the African Union Security and Peace Council who approved the French intervention). This press release is available at http://www.peaceau.org/uploads/cps-com-350-mali-14-01-2013.pdf.} It is true that the objective of the Resolution was to prevent rebel groups from taking over the Malian capital and to prevent further massacres. Nonetheless, allowing a military intervention to be based on the general spirit of a Resolution rather than its texts could open the door to seemingly any violation of international law, conscripting the Security Council Resolutions as an almost universal pretext for future actions. The consequences of such a methodology would be to invite a subjective interpretation of the United Nation’s Resolutions without contemplating the intended specific scope of the resolution.\footnote{Id.}
3. Resolution 2100 as Retroactive Approval

After Operation Serval was completed, the UN Security Council in April 15, 2013 passed Resolution 2100 approving the French intervention in Mali. This Resolution, adopted nearly three months after the intervention, is the first UN document discussing this intervention.\(^{33}\) The preamble of the Resolution praises the swift French action taken by the request of the Malian government.\(^{34}\) Paragraph 18 of the Resolution authorizes the deployment of French military forces for the duration of the mandate of The United Nations Multidimensional Integrated Stabilization Mission in Mali\(^{35}\) (MINUSMA). MINUSMA is a United Nations force charged with the reestablishment of government authority and stability in northern Mali. Resolution 2100 was approved after the military intervention was nearly completed, that is, it was adopted after the fact. The use of this Resolution cannot serve as a sufficient justification under international law.\(^{36}\) While it is true that Resolution 2100 welcomed France’s action, this resolution cannot be construed as an instrument sanctioning the violation of international law. Doing so would allow countries to violate international law first and later seek the assent of the United Nations for their wrongdoings.\(^{37}\)

The use of Resolution 2100 may be objected to on a number of grounds. There is no basis for a retroactive approval of a violation of international law. It is structurally impossible for the Security Council to pass a resolution retroactively validating a previous military action. For instance, in the case of Iraq, the Security Council passed various resolutions following the 2004 invasion. The Security Council in 2006 unanimously approved Resolution 1723, which \textit{inter alia} recognized the authority of multinational forces.\(^{38}\) Additionally, Resolution 1790, adopted in 2007, extended the mandate of multinational forces in Iraq.\(^{39}\) Both these resolutions expressed approval the action of multinational forces but they could not

\(^{36}\) Laird, \textit{supra} note 9 (speaking in favor of the intervention based on the idea that Resolution 2100 of April 2013 was seen as a green light by the members of the international community).
\(^{37}\) \textit{See} Bannelier & Christakis, \textit{supra} note 29, at 869 (calling Resolutions 2085 and 2100 as “blessing and authorization” to intervene in Mali).
be interpreted as approving the violation of international law by the United States and the United Kingdom.

Also, even if Resolution 2100 does not mention any violation of international law by France, its silence should not be construed as consent. France is one of the permanent members of the UN Security Council and is able to veto any resolution before the Security Council. Using to the veto power, a permanent member may block a resolution at the Security Council. It is inconceivable that France would be presented with a resolution condemning its action and not use the veto power. Thus, any resolutions contrary to the French position would not pass the scrutiny of the Security Council.

Lastly, the main role of the UN in Mali was the peacekeeping mission. In Resolution 2100, the UN approved both the peacekeeping mission and the action of the French government in order to stabilize the political situation of the sub Saharan region. The subsequent peacekeeping goal of the UN should not be interpreted as a free pass for any violation of international law, and cannot be used to cure any preceding violations.

Because it contained no specific mention of France, the resolutions of the UN Security Council did not provide any legal grounds for justifying the military operation in Mali. From the language of these Security Council instruments, it is clear that the Security Council did not intend to approve unilateral French military intervention.

C. INTERVENTION BY INVITATION: CONSENT

The second legal ground for the French intervention in Mali was that the interim government of President Traore consented.40 This argument lacks foundation.

The consent of a state may serve as authorization for a foreign military operation within the territory of the inviting state. It functions as an acceptance of

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the military intervention. While it is possible for a government to consent, this may effect complex and controversial results.\footnote{See Christine Gray, \textit{International Law And The Use Of Force} 81 (2008); Olivier Corten, \textit{The Law Against War, The Prohibition On The Use Of Force In Contemporary International Law}, 411(Christopher Sutcliff trans., 2010).}

In a situation of internal war, a request for intervention must come either from the legitimate government or the effective government.\footnote{Gray, \textit{supra} note 41, at 98.}

\textbf{1. Consent by a Legitimate Government Versus a Government with Effective Control}

The question of legitimacy of intervention arises when the legitimacy of the inviting party is itself in question.\footnote{Corten \textit{supra} note 41, at 752 (citing to Resolution 2131 of the United Nations General Assembly which specifically condemned any third state interference or intervention in a civil war taking place within the territory of another state).} The legitimacy of a state can materialize through its formal recognition by other states. Therefore, in this view, the “state’s consent lies at the core of the international system”.\footnote{See Christopher Le Mon, \textit{Unilateral Intervention by Invitation in Civil War: The Effective Control Test Tested}, 35 N.Y.U. J. Int’l & Pol. 741, 744 (2003).}

In the Malian situation, the intervention was requested by the interim president, whose legitimacy was disputed by different factions and groups.\footnote{See Bergamaschi & Diawara, \textit{supra} note 9, at 139-42.} The interim government tried to seek help from France after the coup d’\'etat. However, since the government of President Traore was not recognized internationally as a legitimate government, the argument of consent is untenable.\footnote{See Bannelier & Chrsitakis, \textit{supra} note 29, at 866 (stating that the government of President Traore was internationally recognized rather than the three Islamist groups in northern Mali).} Apart from France and small number of African countries, there is no other evidence of an external recognition of Traore.

Another element to consider in evaluating consent is whether the government has dominion over the territory it purports to control and can fulfill the governmental function there.\footnote{See Le Mon \textit{supra} note 44, at 745.}
Regarding the criterion of effective control, the Malian interim government struggled to control the northern part of the country. Furthermore, the unstable situation in the Malian capital, Bamako, where numerous groups were protesting in the streets on a daily basis and fear of a possible coup by captain Amadou Sanogo gripped the population, belies the effective control of the Malian government. The interim government had no control whatsoever over a considerable portion of Malian territory. The presence of numerous rebel groups in northern Mali was another indication of a lack of effective control on the part of the interim government.

2. Consent in an Internal Conflict

The issue of consent by a government engaged in civil war has always been subject to doctrinal debates among major international law scholars. For Christine Gray, the right to use force at the invitation of another government is acceptable only if the domestic unrest, occasioning the invitation, does not rise to the level of civil war. According to a number of authors, there is a general principle of non-intervention in the internal conflicts of another country. Military intervention in an internal conflict with rebels may complicate the legality of intervention by invitation.

In the case of international recognition of the inviting government by other countries, the intervention will be deemed valid. This has been a consistent

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49 See Corten, supra note 41, at 411.
50 Christine Gray, supra note 41, at 85. (stating that the right of third state to use force at the invitation of a government to maintain order is traditionally accepted if “the domestic unrest falls below the threshold of civil war”).
52 See Corten, supra note 42, at 276.
53 Id.; see also Le Mon, supra note 44, at 745 (stating that contrary to customary international law which recognizes the possibility for intervention in the case of belligerence, modern international law regarding invitation necessitates that the inviting party have external international legitimacy).
practice by numerous countries under international law.\textsuperscript{54} The precedent of ICJ in the case of the Military and Paramilitary Activity in Nicaragua provides that intervention based on the request of a rebel group violates international law.\textsuperscript{55} The ICJ concluded that there was insufficient state practice to overrule the customary international law prohibiting intervention on the side of a nonstate party.\textsuperscript{56} However, if the besieged central government were to requests help in a case where rebels had attacked the country, then an intervention pursuant to this invitation would be legitimate. If an intervention were requested by the rebels in this hypothetical then it would be a clear violation of international law.\textsuperscript{57}

With respect to interventions for of the purpose of fighting rebel groups in another country, legal scholarship is divided. Although this is a violation of the principle of self-determination, some argue that outside military intervention for humanitarian or peacekeeping purposes does not \textit{per se} violate international law.\textsuperscript{58} Therefore, the intervention to fight rebels must be limited to peacekeeping and humanitarian intervention.\textsuperscript{59}

Scholars such as Olivier Corten opine that pursuant to the state practice since the 1950s, even when intervention is consented to by an uncontested government, it should not be a means of settling an internal conflict.\textsuperscript{60}

There is no doubt about the presence of military groups and an internal conflict in Mali.\textsuperscript{61} The various forces and rebels in the north had been fighting with

\textsuperscript{54} See Corten \textit{supra} note 42, at 280.
\textsuperscript{55} See Bannelier & Christakis, \textit{supra} note 51, at 104-07 (referring substantially to the work of Prof. Roberto Ago, who believed that if a state acquiesces to a violation of the international law, the said consent creates an accord and an acceptance between both states).
\textsuperscript{56} Le Mon, \textit{supra} note 44, at 749 (distinguishing the situation of belligerency and specifying that the aid to rebels nonstate is legal under customary international law if there is a situation of belligerency).
\textsuperscript{57} Id.
\textsuperscript{58} Corten, \textit{supra} note 41, at 294.
\textsuperscript{59} Id. at 295 (speaking extensively about the French intervention in Chad in 1970s and mentioning that the French logistical support to Chad was not intended for the fight against rebels).
\textsuperscript{60} See id. at 309.
\textsuperscript{61} The French government contended that one of the reasons for intervening was to fight against terrorism. Moreover, the fight against terrorism does not extend the argument of the fight for humanitarian or peacekeeping purposes under
the central government for months before the French intervention. The rebel groups in northern Mali sought to take over and declare their independence. After their attack in Konna on January 9, 2013, the rebels and the Ansar Eldine group repeatedly threatened to attack Bamako and the Sevare airport. The fall of numerous cities in Mali, such as Tessalit and Konna was the evidence of the ongoing struggle for power in Mali. The presence of internal conflict automatically casts doubt on the legality of military operation in the country.

3. Consent Pursuant to Resolutions 2071 and 2085

Some authors reject any deficiency of consent by citing to Resolutions 2071 and 2085 of the Security Council. The adoption of these resolutions is not evidence of the Traore government’s legitimacy. For instance, in the case of Sudan, the Security Council has issued a number of resolutions regarding the internal conflict. In these resolutions the Security Council addresses both Sudan and South Sudan, without expressly legitimatizing the forces of South Sudan. This shows that the naming of a country or government in a Security Council resolution does not necessarily legitimize that entity. The Security Council has never expressly recognized the Malian interim government as legitimate. Moreover, some commentators have argued that since no one objected to the French intervention, it is fair to consider that the interim government was a legitimate one under international law. This argument is flawed, because the absence of contestation cannot create any external recognition of a state.

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62 See Laird, supra note 9, at 126.
63 See Remy, supra note 48.
64 See Van Steenberghe supra note 30, at 278 (mentioning that the Malian interim president’s letter to French president satisfies the requirement of the consent under international law and rejecting any objection regarding the validity of such consent).
65 Id.
67 See Laird, supra note 9, at 127 (“The Malian government was overthrown in coup d’etat early on in the conflict, but despite this, by the time France intervened a legitimate transitional Government had been restored which was internationally recognized by the Security Council in its resolutions”).
68 See Van Steenberghe, supra note 30, at 278.
Therefore, the argument of the legality an intervention based on the intervention by invitation is not satisfied in the case of Operation Serval.

D. COLLECTIVE SELF-DEFENSE: UNITED NATIONS CHARTER, ARTICLE 51

The third argument used by France was based on collective self-defense. Since the beginning of hostilities, French Secretary of State Laurent Fabius maintained since the beginning of hostilities that the intervention was an act of collective self-defense under Article 51 of the United Nations Charter. He went on to emphasize that any terrorist group in Africa was a threat to French interests and French nationals.

1. Scope of Self-Defense under Article 51

The use, extent and scope of self-defense are subject to various doctrinal debates and disagreements. Prior to the adoption of the UN Charter, customary international law regulated self-defense. Although Article 51 of the United Nations charter provides the legal framework for self-defense, the practice of this doctrine remains problematic and inconsistent. Article 51 is an exception to the general rule of Article 2(4) of the United Nations Charter and should be narrowly construed.

More narrowly, collective self-defense concerns when a third party may intervene militarily in order to help the victims of an armed attack. The right of self-defense is founded on the idea of redressing the peace. The scholarship on this point has diverged on the basis of the right to collective self-defense, criticizing the seeming contradiction of a collective action undertaken unilaterally.

It is still unclear whether Article 51 of the United Nations Charter recognizes the right of collective self-defense. The ICJ had the opportunity, albeit in brief and widely disagreed with, to discuss the collective right of self-defense in

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69 See Nabli, supra note 7.
70 See Fabius, supra note 7.
71 See Gray, supra note 42, at 114.
72 Id.
73 Id.
the case of Military and Paramilitary Action in Nicaragua. 75 According to the holding of the Court, there must first be an armed attack, which is defined more broadly than a frontier attack. Second, the state which has suffered the armed attack must declare that it has been the victim of the attack. Third, there can be no self-defense if the victim state does not request help. Lastly, the court requires that there be a reporting of the armed attack to the UN Security Council pursuant to Article 51 of the UN Charter. 76

2. Use of Self-Defense when there has been an Action by the Security Council

Broadly, one of the main issues remains the validity of intervention based on self-defense where the Security Council has already taken any action to resolve the question. Scholars such as Olivier Corten contend the right of self-defense cannot be exercised once the Security Council has taken certain measures. This prevents self-defense from being used in a unilateral manner and is based on the past and current precedents of international law. 77

Article 51 of the UN Charter reads inter alia that “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security”. Scholars have interpreted this to mean that the act of self-defense is permitted until there is an action by the Security Council. 78

As discussed previously, there was no armed attack in Mali, therefore the first prong of the test for self-defense was not satisfied. Mali was not being attacked by external military forces but was instead on the brink of civil war. The presence

76 See Gray, supra note 42, at 172.
77 Corten, supra note 42, at 411 (stating a detailed history of the use of self-defense by different countries).
of rebels inside Malian territory is not an external attack and does not permit the exercise of self-defense according the ICJ’s holding in Nicaragua holding.\textsuperscript{79}

Second, the Security Council had begun taking action regarding Mali as soon as the French government commenced diplomatic negotiations in 2012. The two aforementioned Security Council resolutions addressed the situation in Mali directly and the impact of the rebel presence on the region. The resolutions discussed the deployment of African-led military forces and further actions to be taken by the United Nations. Because the Security Council had taken action in this instance, any further military intervention on the part of France should have been suspended. Both Resolutions 2071 and 2085 are adequate and sufficient to fulfill the conditions of Article 51, terminating the right of self-defense. Once the Security Council has taken such measures, any further military action in self-defense on the part of an individual nation would be a violation of international law.\textsuperscript{80}

Lastly, some scholars have argued that the application of the self-defense doctrine extends to situations where there is an armed attack inside the territory of an innocent state. Thus, this would apply to a terrorist attack such as the one in Mali preceding the military intervention.\textsuperscript{81} This argument is also flawed.

The French government did not use any humanitarian-based arguments at the outset of this intervention. Rather they began by stating that Operation Serval did not violate any provision of international law, therefore it was justified. With France’s seeming contempt for international law drawing criticism from every quarter, R2P presented an attractive out. The next section will address the doctrine of R2P and its implications in contemporary international law.

III. R2P AND CONTEMPORARY INTERNATIONAL LAW

A. COLLECTIVE SELF-DEFENSE: UNITED NATIONS CHARTER, ARTICLE 51

\textsuperscript{79} Van Steenberghe, supra note 30, at 287.

\textsuperscript{80} Laird, supra note 9, at 127 (stating that France erred by claiming the use of Article 51 because self-defense was not relevant in this case and concluding that a justification based on Article 51 was not suitable and \textit{“perhaps was only utilized for political purpose”} (emphasis added)).

1. Creation of ICISS Report

The doctrine of R2P is the product of the work of a number of international and humanitarian law scholars. It owes its genesis principally to the work of Bernard Kouchner, Mario Bettati and Francis Deng. Following the events in Somalia and Bosnia, NATO intervened militarily in the former Yugoslavia for humanitarian purposes. The Security Council did not intervene. Ultimately, the NATO military action altered the terrain and ensured that the Kosovar population be protected from Serb military action. A new principle of international law arose as a result, the Responsibility to Protect. A historic moment in the emergence of R2P was the speech of Kofi Annan, then Secretary General of the United Nations, at the 2000 Millennium Report. In the speech he said:

“I also accept that the principles of sovereignty and non-interference offer vital protection to small and weak states. But to the critics I would pose this question: if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica to gross and systematic violations of human rights that offend every precept of our common humanity? We confront a real dilemma. Few would disagree that both the defence of humanity and the defence of sovereignty are principles that must be supported. Alas, that does not tell us which principle should prevail when they are in conflict.”

After Annan issued this invitation to governments to resolve the conflict between the necessity of humanitarian interventions and sovereignty, the International Commission on Intervention and State Sovereignty (ICISS) was created under the auspices of the Canadian government. Its mission was to achieve an international consensus on humanitarian intervention, which led to the

82 Weiss, supra note 1, at 21-25.
84 Weiss, supra note 1, at 22.
85 See Evans, supra note 1, at 31-33 (discussing the history of the terminology of Responsibility to Protect and stating that the expression of “Responsibility to Protect” was used for the first time in 1840).
production of a report on the Responsibility to Protect.\textsuperscript{87} The creation of this commission (ICISS) was a response to the lack of action by the international community regarding the crisis in Kosovo.

Gareth Evans, an Australian lawyer and legal scholar, and Mohamed Sahnoun, former Ambassador of Algeria, were appointed as the co-chairs of ICISS. Evans and Sahnoun were the principle authors of the ICISS report, which gave birth to R2P. The core question during the genesis of the report was determining the relationship between the notions of sovereignty and responsibility.

The ICISS report is grounded in the following two propositions: 1) the state has the primary responsibility to protect its population, and so sovereignty in R2P is a responsibility rather than a right; 2) if the state fails to provide appropriate protection to its population while the population is suffering serious harm, and the state is unwilling or unable to avert the harm, then the international community has a duty to intervene.\textsuperscript{88} In accordance with the report, R2P encompasses three major components: the responsibility to prevent, (i.e. preventing any potential causes of internal conflict or other crisis); the responsibility to react (responding militarily or otherwise to situations involving violation of human rights) and responsibility to rebuild (providing full assistance to the population after military intervention).\textsuperscript{89} The same report prescribes the point at which military action is to commence.\textsuperscript{90}

\textbf{2. Requirements for Military Action according to the ICISS Report}

The ICISS report states a number of requirements for the application of R2P. The first step consists of the determination of the “just threshold” stage and the seriousness of harm suffered by the population to be protected. The “just threshold” requires that there be a serious and imminent harm to human beings or humanity which is likely to create a situation dangerous to human rights, such as large scale loss of life or ethnic cleansing.\textsuperscript{91} In order to satisfy the just threshold, the commission gives some examples of conscience-shocking situations, such as actions defined in the 1948 Genocide Convention, various examples of ethnic cleansing, crimes against humanity violating the law of war, mass starvation, civil war, or natural and environmental catastrophes.

\begin{flushright}
\textsuperscript{87} See ICISS Report, supra note 3; Evans supra note 1, at 38-43.
\textsuperscript{88} See ICISS Report, supra note 3, at xi.
\textsuperscript{89} See id. at xiii.
\textsuperscript{90} Id.
\textsuperscript{91} See ICISS Report, supra note 3, at 32-33; Evans, supra note 1, at 142-45.
\end{flushright}
The second step is titled “right intention”. Right intention requires that the intervention be intended either to halt or avert human suffering. According to the report, there are a number of ways to fulfill this requirement. The criterion is satisfied if the military action takes place on a multilateral rather than unilateral basis. The report specifies that the overthrow of a particular regime is not “right intention”.92 Another way to ensure “right intention” would be to determine whether the military intervention is supported by the people where the intervention is to occur. Lastly, the opinion of other countries in the region must be taken into account in considering “right intention”.93

Third, intervention must be the last resort. The report specifies that there must be an exhaustion of all diplomatic and non-military avenues.94 Negotiation is heavily emphasized in the report and there must be a good faith attempt to avert the conflict before any application of military force. The report states that the action under the responsibility to react is only justified when the responsibility to prevent has been satisfied. Failure to proceed to carry out the negotiations will bar any military intervention.

Fourth, the intervention must be proportionate in scale and duration. This proportionality requirement subjects the military intervention to the rules of international humanitarian law. The operation must involve a reasonable prospect of success. The report stresses that there cannot be an escalation into a large conflict following an intervention for a limited purpose.95

The ICISS report specifies that the United Nations Security Council be the only authority carrying out such action. Furthermore, the ICISS provides that military interventions must have a clear objective and a reasonable prospect.96

Although the ICISS report raises the possibility of a right of intervention by member states in the case of inaction by the Security Council, it is not clear whether ICISS endorses any direct intervention by states.97 Accordingly, the ICISS report mentions the lack of consensus on the question of military intervention in the absence of UN Security Council authorization. ICISS expects that in the case of Security Council inaction a state or a coalition of states will intervene for the

92 See ICISS Report, supra note 3, at 36.
93 Id.
94 Id.
95 Id. at 37.
96 Id.; see also Evans, supra note 1, at 144-45.
97 See ICISS Report supra note 3, at 70.
protection of human rights. However such intervention presents the risk of further damages and possible violations of international law.\textsuperscript{98} Furthermore, the report mentions that a successful intervention not prosecuted by the Security Council would call into question the capabilities and legitimacy of the UN’s power.\textsuperscript{99}

After the September 11\textsuperscript{th} terrorist attacks, some proponents of this doctrine pushed for its inclusion in a UN report.\textsuperscript{100} In the spring of 2005, Kofi Annan in his UN General Assembly speech asked for the states to “embrace the ‘responsibility to protect’ as a basis for collective action against genocide, ethnic cleansing and crimes against humanity, and agree to act on this responsibility, recognizing that this responsibility lies first and foremost with each individual State, whose duty it is to protect its population.”\textsuperscript{101} The negotiations following Annan’s speech resulted in the Millennium+5 Summit in whose Outcome Document member states agreed to adhere to the principle of R2P, rather than the principles Annan proposed in 2001.\textsuperscript{102} This document represents a compromise between countries opposed and those in favor of R2P.

3. R2P in the Outcome Document of 2005

The Outcome Document of 2005 states the new rule of R2P, with some minor revisions from the ICISS report. This new document requires 1) that there be a mandate by the United Nations Security Council for any military action, and 2) the scope of R2P is limited to only four out of the five original cases defined by ICISS.\textsuperscript{103} Paragraph 138 of this document is considered quintessential to the concept of R2P. Under this paragraph, each individual state has the responsibility to protect its population from genocide, war crimes, and ethnic cleansing, and crimes against humanity.\textsuperscript{104} This paragraph did not include cases of natural disaster and the definition of “large scale loss of life” described in the ICISS has been narrowed as well. Moreover, R2P requires that the greater international community

\textsuperscript{98} Id. at 54-55; see also Pinget & Obenland, supra note 2, at 14.
\textsuperscript{99} See ICISS Report supra note 3, at 54-55.
\textsuperscript{100} U.N. Secretary-General, In Larger Freedom: Toward Development Security and Human Rights for All: Rep. of the Secretary-General, ¶¶ 2-5, U.N. Doc. A/59/2005 (Mar. 21, 2005); see also Evans, supra note 12, at 46.
\textsuperscript{102} See 2005 World Summit Outcome, supra note 4.
\textsuperscript{103} See id. at 32.
\textsuperscript{104} Id. at 30.
encourage and help states to exercise their own responsibilities and to support the UN in establishing early warning capability for timely response.\footnote{105 Id.; see also Evans, 	extit{supra} note 2, at 48.}

The United Nations General Assembly follow-up report of 2009 was intended to implement R2P in concept.\footnote{106 U.N. Secretary-General, 	extit{Implementing the Responsibility to Protect: Rep. of the Secretary-General}, ¶ 1, U.N. Doc. A/36/677 (Jan 12, 2009).} The report stated that under paragraph 138, R2P now contains the following three pillars:

1) The State carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement;

2) The international community has a responsibility to encourage and assist States in fulfilling this responsibility;

3) The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.

Moreover, Secretary General Ban Ki-moon, Annan’s successor, has published an annual report on R2P every year since 2009 and has urged States to implement the doctrine.\footnote{107 Id.; see also Pingeot & Obenland, 	extit{supra} note 2, at 17 (stating that Ban Ki-moon urges each state and society to adopt the principles of R2P immediately).} Also, the United Nations has instituted a Special Adviser for Responsibility to Protect, whose mission is to “lead[] the conceptual, political, institutional and operational development of the Responsibility to Protect.”\footnote{108 See U.N. S.C. Letter dated August 31, 2007 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2007/721 (Dec. 7, 2007).}

B. \textbf{ARGUMENTS FOR AND AGAINST R2P}

The conception, creation, and the inclusion of R2P into the international law arena has led to considerable debate between proponents and opponents of R2P.
1. Proponents of R2P

Proponents of R2P have gone as far as to argue that R2P should be the primary avenue for all humanitarian intervention and according to some authors, R2P is already the foundation for both multilateral and unilateral military force intervention in the modern era.\(^\text{109}\) Gareth Evans, the original author of the ICISS report, refutes the proposition that R2P is solely a means of unilateral intervention and details this misunderstanding about R2P.\(^\text{111}\) First, he argues that R2P is not limited to humanitarian intervention but has a broader dimension, including preventive actions such as preemptive deployment of humanitarian forces, and the responsibility to rebuild. Second, he argues R2P does not necessarily sanction the use of military force. In order to use coercive measures, there must be an extreme situation satisfying a “just threshold.” Third, he argues the humanitarian aims of R2P need not be limited to weak and friendless countries but can be applied to any state. In his view, even the most powerful countries on earth can be subject to military force; in this way, R2P has a potentially universal dimension. Lastly, he argues R2P’s scope of intervention is limited and does not include all kinds of intervention. Accordingly, R2P should not be widely used for all kinds of human rights violation, to avoid dilution of its usefulness, and should be limited to major violations of human rights.\(^\text{112}\)

2. Opponents of R2P

Some authors, such as Anne Orford, have questioned the nexus between “the authority to protect” and “the capacity to protect” in the doctrine of R2P.\(^\text{113}\) She argues that the doctrine of the Responsibility to Protect represents a shift from

\(^{109}\) See Gareth Evans & Ramesh Thakur, In Defence of the Responsibility to Protect, in Responsibility To Protect: Norms, Laws And The Use Of Force In International Politics 86, 86-87 (Gareth Evans & Ramesh Thakur eds., 2011).

\(^{110}\) Lee supra note 2, at 276 (believing that the doctrine of R2P justifies any military intervention based on the concept of self-defense).

\(^{111}\) See Evans, supra note 1, at 58 (believing that some critics oppose the idea of R2P because they are opposed to “imperialism”, “neo-imperialism or neo-colonialism” and they consider any external intervention as such).

\(^{112}\) Id. at 56-68.

\(^{113}\) Anne Orford, Lawful Authority and the Responsibility to Protect, in Legality And Legitimacy In Global Affairs 248 (Richard Falk et al. eds., 2012) (“If we turn to that history, we can see that the invocation of de facto authority based on the capacity to protect can lead to dramatically different political projects justified in the name of protection.”).
the concept of sovereignty to the idea of protection. She argues that the legitimacy of authority to intervene in R2P is determined by reference to the notion of protection rather than the notion of self-determination. For Anne Orford, the fact that the authority to protect derives its legitimacy from the principle of protection undermines the concept of authority as a right. She refers extensively to the work of Thomas Hobbes and states that the concept of authority is enmeshed with the idea of a sovereign state and its attending power.\footnote{Anne Orford, \textit{International Authority And The Responsibility To Protect} 137 (2011) (discussing that proponents of R2P consider that the protection can be guaranteed where there exists an authority capable of distinguishing between friends and enemies, and believing that there is a little discussion about legal limits of the R2P).} In the absence of a sovereign community, such as an international order, there cannot be any authority to provide protection.\footnote{Id. at 249.}

Using a more radical line of thought, scholars such as Alex De Waal criticize the notion of “droit d’ingerence”\footnote{Right to intervene.} and identify a symmetry between humanitarian doctrine and imperial occupation. De Waal adds that “an attempt for a humanitarian doctrine is a charter for imperial occupation, there may be cases in which the imperial rule is the lesser of two evils, perhaps to end genocide or to end slavery, but philanthropic imperialism is imperial nonetheless.”\footnote{Alex de Waal, \textit{No Such Thing as Humanitarian Intervention: Why We Need to Rethink How to Realize the "Responsibility to Protect" in Wartime}, HARVARD INT’L REV., (Mar. 21, 2007) http://hir.harvard.edu/no-such-thing-as-humanitarian-intervention?page=0 (discussing the problems created with the humanitarian intervention such as in Somalia and what went wrong there, and mentioning that the Security Council authorization that France obtained in order to attack Rwanda during the operation Turquoise was a “political act, aimed at securing a territorial foothold for the defeated genocide regime”); see also Asli U Bali, \textit{The Changing Landscape of Nuclear Non Proliferation, in Legality And Legitimacy In The Global Order} 291, 299 (Richard Falk et al. eds., 2012) (“[T]he emergent norm of the ‘the responsibility to protect’ is not exactly analogous to an embrace of the broader notion of a right of humanitarian intervention independent of UN authorization”).}
Moreover, some authors believe that R2P adopts a moral discourse that moves the debate toward a subjective standard of right and wrong.\(^{118}\) Lou Pingeot and Wolfgang Obenland have criticized the doctrine of R2P as broad and unclear, raising the possibility of multiple interpretations informed by a complex political dimensions and accompanied by little oversight.\(^{119}\)

3. Responsibility while Protecting (RwP)

Some member-states have gone further and proposed a higher degree of accountability and liability for those involved in R2P. For example, Brazil’s ambassador to the UN has suggested that there be a Responsibility While Protecting (RwP).\(^{120}\) This concept observes that military interventions often result in human loss and substantial material costs. Because there is a growing concern about the use and misuse of R2P in a way other than protecting civilians, RwP requires that intervening nations hold themselves to a high standard of diligence and responsibility in any military intervention.\(^{121}\)

RwP should be considered the best means for holding accountable those states who engage in R2P.\(^{122}\) RwP was intended to offer a new method of negotiation before any intervention takes place. In this methodology, the international community has a role as a mediator and negotiator for the purpose of R2P. Under RwP, the international community must be 1) rigorous in its efforts to exhaust all available peaceful means; 2) the use of force must always be authorized by the Security Council; 3) the use of force must be limited; 4) the use of force must

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\(^{118}\) Pingeot & Obenland, supra note 2, at 36. (discussing that the proponents of R2P believe that the moral consideration can command what law forbids).

\(^{119}\) Id. at 37 (stating that the powers capable of carrying the military arm are also the powers that cannot be held accountable).


\(^{121}\) See id.

\(^{122}\) See Monica Hertz, R2P and Brazil, in THE INTERNATIONAL POLITICS OF HUMAN RIGHTS, RALLYING TO THE R2P CAUSE? 107, 122 (Monica Serrano & Thomas G. Weiss eds. 2014) (stating that RwP may protect R2P from its “destructive forces” by offering the possibility to negotiate).
produce minimal violence and instability; and 5) the action must be proportionate and limited to the objective established by the Security Council.123

C. RELATIONSHIP BETWEEN R2P AND INTERNATIONAL LAW

After the Outcome Document of 2005, which detailed the various aspects of R2P, several scholars questioned the relationship between R2P and international law.124 There is still a debate regarding whether or not R2P is binding international law125 with some authors arguing that as a new legal norm it operates with binding force.126

Under customary international law, in order for an emergent norm to become binding, there must be state practice and opinio juris. However, according to majority opinion, lack of sufficient precedent and opinio juris in international law regarding this concept prevents the establishment of R2P as a binding norm under customary international law.127 Contrary to binding authority, international law can be a “soft law” without dispositive force unless incorporated within a norm having binding force. That is, unless R2P is incorporated into an instrument with

123 See U.N. General Assembly, Follow-Up to The Outcome of the Millennium Summit, Letter Dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General, supra note 120.
124 See Lee, supra note 2, at 277 (stating that R2P has been called a “concept,” a “principle,” a “norm,” an “initiative,” a “policy agenda” and a “framework” (quoting respectively Carsten Stahn, Lloyd Axworthy & Allan Rock, and Alex J. Bellamy)).
125 Carsten Stahn, Responsibility to Protect: Political Rhetoric or Emerging Legal Norm? 101 Am. J. Int’l L. 99, 101 (2007) (stating that none of the documents, originating R2P, can be considered as binding under international law).
126 Alex J. Bellamy, Sara E. Davies & Luke Glanville, THE RESPONSIBILITY TO PROTECT AND INTERNATIONAL LAW 5 (Alex J. Bellamy et al. eds., 2011) (stating that for those who claim R2P is a new legal norm, this norm provides legitimation of coercive interference in the affairs of any state unwilling to protect their populations).
127 See Mehrdad Payandeh, With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect within the Process of International Lawmaking, 35 Yale J. Int’l L. 469, 484 (2010) (“An additional problem in characterizing the responsibility to protect as an emerging norm of customary international law arises with regard to the constitutive elements of customary international law”).
binding authority, such as a treaty, R2P must be considered non-binding. Therefore, if a Security Council resolution incorporates R2P, R2P will then become binding.

In order to assess the force and weight of R2P, a distinction must be drawn between state’s action in the interest of their own citizens versus state action on behalf of another country. For Alex J. Bellamy and Ruben Reike, there is a distinction between the foundational pillars of R2P and the doctrine’s normative implications. The first pillar, national responsibility, provides that the state has a duty to protect its own population from genocide, war crimes, and any other violation of human rights. This is rooted in the concept of *jus cogens*. Accordingly, the primary responsibility of the state towards its citizens is a legal duty, set out in paragraph 139 of the Outcome Document 2005.

The second pillar expounds on the responsibility of the international community as a whole to take measures to assist states in need of humanitarian intervention. Bellamy and Reike refer to the precedent set forth in the ICJ case, *Bosnia v. Serbia*, a case that recognized an emerging legal duty to prevent genocide. Pursuant to this precedent and the practice of international law, there is a legal duty on the part of the international community to ensure that states uphold their legal obligation to protect their populations in the case of major violation of human rights. This responsibility in the second pillar includes helping states to practice R2P and providing them the necessary capacity to do so.

The third pillar of R2P concerns the duty of the international community to take action in situations where a state is unable to protect its population from the violation of human rights. However, it is unclear whether R2P expressly prescribes such a duty. It is recognized under international law that member states must respond decisively to genocide and mass atrocities occurring within other member states’ territory. Nevertheless, no provisions in R2P’s foundational documents suggest a legal duty on the part of the international community to intervene in cases

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129 See *id.* at 83 (citing to John Bolton’s position on this topic, former United States Ambassador to UN, who stated that the first pillar of R2P created a legal obligation and the second pillar a moral or political obligation).
131 See *Bellamy & Reike*, *supra* note 128, at 87-98.
132 *Id.*
where a state is violating or failing to avert any violation of *jus cogens*. Therefore, the third pillar of R2P cannot unequivocally be said to create such a responsibility or legal duty on the part of the international community.

Regarding the question of military intervention and R2P, Bellamy questions whether the principle imposes a legal duty for the UN Security Council to take coercive measures.

The legal posture of R2P can be fairly characterized as nothing more than soft law without any binding force in international arena. It does not fulfill the requirements of customary international law.

Customary international law did not offer any valid grounds for the French intervention in Mali. R2P is a new norm under international law, used frequently as one of the avenues for humanitarian intervention and so was perhaps the justification of last resort for the legality of Operation Serval. The following section will examine in depth into the application of R2P to the French intervention.

IV. ANALYSIS OF THE USE OF R2P IN THE MALIAN CASE

The invocation of R2P in justifying the military intervention by the French government in Mali raises more questions about R2P than it answers. The French

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133 *See* Ekkenhard Strauss, *A Bird in the Hand is Worth Two in the Bush*, in *THE RESPONSIBILITY TO PROTECT AND INTERNATIONAL LAW* 25, 52 (Alex Bellamy et al. eds., 2011) (“Apart from the lack of any evidence on the responsibility to protect, the different nature of international human rights and humanitarian law has to be taken into account while interpreting the outcome document…the latter intends to introduce standards of state behavior between individual that could lead to individual criminal responsibility in cases of ‘graves breaches.”).


135 *Id.* (discussing the different legal natures of the commitments in R2P and stating that the responsibility of the international community are mostly moral and political and therefore not legal).


137 *See* Pingeot & Obenland, *supra* note 2, at 20 (mentioning that Mali is one of the recent examples where there was a use of R2P based on humanitarian reasons); Francesco Francioni & Christine Bakkar, *Responsibility to Protect, Humanitarian*
authorities made the case for the necessity of humanitarian intervention in order to prevent the violation of human rights and protect the Malian people from mass atrocities and internal conflict. However, the use of R2P as justification is out of step with the sort of actions that R2P was intended to countenance.

A. THE LEGITIMACY OF THE APPLICATION OF R2P

According the criteria established by the ICISS report and Outcome Document of 2005, the first pillar of R2P imposes a duty by the state to intervene in the case of a violation of *jus cogens*. It is undisputed that terrorist groups and other rebels of MNLA (National Movement for Liberation of Azawad) were engaged in a violent regional melee impacting the Malian population, resulting in numerous violation of human rights. Nonetheless, in the Malian case, there was no evidence of war crimes, genocide, ethnic cleansing or any other atrocities rising to the level of a *jus cogens* violation. To construe *jus cogens* so broadly as to include the Malian situation would likely result in skepticism toward R2P on the whole.

Resolution 2085 condemned vigorously any violation of human rights by rebel groups in Mali without qualifying these violations as *jus cogens* violations. There was no mention of genocide or ethnic cleansing in the UN Resolutions. Under the principles of R2P, the state has to protect its population and if it fails to do so, then it falls to the international community to provide such protection.

The reader might find it interesting to compare the French interventions in Mali and Libya. In Libya, France attempted to justify their action and the use of military force based on R2P but their justification was not credible despite the Security Council’s authorization. Resolution 1973 of the Security Council stated that its goal was to protect Libyan civilians; however, this resolution was instead

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*Intervention and Human rights: Lesson from Libya to Mali, TRANSWORLD 5 (Apr. 8, 2013),* http://www.transworld-fp7.eu/?p=1138 (stating that there is a shift in the attitude of some European countries such as France to intervene militarily in Libya and Mali, and considering this activism to be “motivated by special national interest and former colonial ties”); David Petrasek, *supra* note 8.

138 *See* ICISS Report, *supra* note 3.

139 *See* Population at Risk, GLOBAL CENTER FOR RESPONSIBILITY TO PROTECT (Apr. 15, 2013), http://www.globalr2p.org/regions/mali (mentioning that the MNLA and the armed Islamist groups committed various human rights abuses such as “torture”, “extrajudicial killings”, “sexual violence” and “the recruitment of child soldiers”).

140 *See* Pingeot & Obenland, *supra* note 2, at 4.
used as an instrument of regime change. It must be emphasized that the military intervention in Libya was prosecuted by NATO forces, a clear overstepping of the limited Security Council mandate. Resolution 1973 mandated that the national or regional Libyan forces take all necessary measures to save civilians. One of the instigators of the military intervention in Libya was former French president Nicolas Sarkozy, who had had clear designs on action in Libya since the beginning of his presidency in 2007.

Similarly, the French government during Operation Unicorn used the same argument to intervene in Cote d’Ivoire. During this operation, the UN and French forces sought to topple Laurent Gbagbo, then the Ivorian president. In the same method as Operation Serval, the UN was informed first and then French forces launched their attack. In fact, both the forces of Laurent Gbagbo and his French selected successor, Alexander Ouattara were guilty of human rights violations, but only Gbagbo was ousted.

B. The Requirements of ICISS Report and Outcome Document of 2005

According to the ICISS report, any military interventions based on R2P must satisfy a set of criteria. One of these conditions is the just threshold. The mere fact that the rebel groups were preparing to attack the Malian capital does not satisfy the just threshold because the internal conflict and the struggle for power do not constitute threshold harm for the purpose of application of R2P.

Secondly, the “right intention” is also missing in the Malian case. Though the reasons behind the French intervention remain unclear, the situation did not rise

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141 See McMahon supra note 136, (manuscript at 17) (stating that the Resolution 1973 was approved with the abstention of five members of the Security Council which casts doubt on the legitimacy of such action); see also Lee, supra note 2, at 278.
143 Francis, supra note 13, at 5 (mentioning that one of the reasons for the non-intervention of France in Central African Republic was the fact Francois Hollande had tried to depart from the French Francafrique policies).
144 See Serrano & Weiss, supra note 1, at 13-17.
to the level of right intention because there was no violation of any human rights in the sense intended by the ICISS report or Outcome Document.

Francois Hollande after taking office in 2012 stated his intention to commence a new policy towards African countries by putting an end to the practice known as *francafrique*.\(^{146}\) *Francafrique* represents in concept the neocolonial relationship between France and major central African countries such as Cote d’Ivoire, Mali, Chad, Somalia and Central African Republic. One of the reasons can be traced back to the toppling of Moamar Ghadafi in Libya following the NATO campaign in 2012, which lead to instability in northern Mali. Second, France still had a significant financial interest in Mali. French firms were heavily present in public construction, transportation of commodities and in trade of information technologies. According to some sources, Mali and south Sahel contain numerous oil reserves and some authors considered this as a motivation for intervention in Mali.\(^{147}\) Also, France may have acted in Mali in order to stabilize the geopolitical situation in Nigeria. The French government is heavily involved in Nigeria and Areva (a French Holding) is one of the primary sources of atomic energy in the country.\(^{148}\)

Moreover, the public debt of Mali amounted to about 3.19 Billion dollars in 2012 and the French government was its main creditor, holding roughly 25 percent of it. In 1994, Mali had to pass a structural plan in order to readjust its public debt and following this restructuring, Mali was constrain to sell some portions of its agricultural land to France.\(^{149}\)

In terms of military cooperation, Malian President Amadou Toure refused to allow French military bases to be relocated to Mali. The French government was looking to establish a new military base in order to fulfill security needs in central


\(^{148}\) *Id.*

\(^{149}\) *See* Ali El Hadj Tahar, *Mali: Ingerence Humanitaire ou Nouveau Sahelistan?* MONDIALISATION.CA (Feb. 8, 2013), http://www.mondialisation.ca/mali-ingerence-humanitaire-ou-nouveau-sahelistan-troisieme-partie/5322837 (giving a detailed statistic about the public debt of Mali and different economic incentives that the French government might had in this attack).
Africa, and this was quite a source of conflict between Mali and the French government. Toure’s predecessors had also refused to acquiesce to the French request, which would have reestablished France’s major military headquarters in central Africa. These elements cast doubt on the validity and extent of France’s “right intention”.

Thirdly, Operation Serval was far from a necessary last resort in the effort to stabilize the situation in Mali. France had many options to secure stability without use of force such as diplomatic negotiation. As seen in Resolution 2085, the Security Council considered an African led force as the only force necessary for the Malian conflict.

The ICISS report and Outcome Document of 2005 state that military intervention under R2P must begin with a UN authorization and a mandate from Security Council. The Security Council was consulted and issued two resolutions in this case. But none of these resolutions, as discussed above, allowed for a unilateral military intervention.

This intervention was a successful one in that it furthered France’s humanitarian ambition. However, an invocation of R2P in the absence of Security Council authorization is outside of the mandate of the UN Charter. The ICISS report and the Outcome Document do not consider the possibility of an intervention when the Security Council is silent. The use of force by a Member State in such a situation would be a dilution of the authority and stature of the Security Council. Moreover, since the inception of R2P, there has been a dearth of UN Security Council resolutions regarding the use of R2P. This lack of precedential authority may encourage the violation of international law based the misapplication of R2P. The use of R2P in this context threatens to legitimize any intervention by a superpower, such as France under the banner of humanitarian intervention.

Following this analysis, it is disputed that there was any need for the application of R2P in Mali. Although the Security Council had characterized the situation in Mali as a direct threat to international peace, there was no Resolution on the subject of military intervention by any non-African-led force. Although

150 See Pape Semba Kane, Mali: The Forgotten War, Al Jazeera (Sept. 6, 2014), http://www.aljazeera.com/indepth/opinion/2014/09/mali-forgotten-war-20149691511333443.html (stating that three different Malian president resisted the French request for a military base and mentioning that the most France obtained was a 1985 military assistance and cooperation accord).
some scholars pointed to the situation in Mali as an example of a just use of R2P, they did not engage in a proper analysis for its application.\textsuperscript{151}

Lastly, the other components of R2P, which include the duty to prevent and duty to rebuild, were not applied in the Malian case.\textsuperscript{152} French military forces did not take any action to prevent the internal conflict through diplomatic actions or negotiations. They have made no actions to rebuild. Thus, none of the other components of R2P were fulfilled.

V. CONCLUSION: IMPLICATIONS OF THE USE OF R2P IN MALI

The military intervention based on R2P in Mali was undertaken in violation of international law notwithstanding the four independent legal rationales advanced by the French government in defense of the operation. Indeed, Operation Serval is a recent example in a long pattern of previous French interventions in the southern African continent, including in the Central African Republic, Chad, Somalia and Cote d’Ivoire. Despite the post-colonial context, the French appetite for intervening in Francophone African countries has remained pronounced, whether on the grounds of humanitarianism or in the service of a security strategy of stabilization centered on French interests and preferences in the region. What was novel about the operation in Mali was not the fact of intervention but the emergence of a specific justificatory strategy, grounded in R2P, that offered a potential new framework for French interventionism.

After the events of 2012 in Mali, France invoked R2P as a final argument for intervention when several other, more conventional claims were difficult to sustain. As discussed in this article, the other justifications advanced by France were based on Security Council resolutions, the doctrine of consent and the principle of collective self-defense, but in each case the argument presented by the French failed to fulfill basic requirements of international law. Against this backdrop and in light of the increasing reliance on R2P as a basis for legitimating intervention by the U.S. and other great powers, it is perhaps unsurprising that the French would offer a fourth rationale for their intervention grounded in humanitarianism. Yet, as with the other arguments proffered, the R2P rationale articulated by the French also failed to meet the basis requirements of the doctrine. In particular, as this article has shown, none of the requirements of Outcome Document of 2005 or the ICISS report were satisfied in the French intervention. There was no compelling basis for invoking R2P, since the threshold requirement

\begin{itemize}
\item \textsuperscript{151} See McMacon, \textit{supra} note 136, (manuscript at 18).
\item \textsuperscript{152} See Weiss, \textit{supra} note 1, at 21-25.
\end{itemize}
of evidence that *jus cogens* violations had occurred in one of the areas of defined R2P crimes (genocide, crimes against humanity, ethnic cleansing or war crimes) was never met. Furthermore, the internal conflict or the presence of the rebels in the capital did not trigger the threshold requirement of just cause for the purposes of R2P. France did not enjoy the right authority for intervening within the meaning of R2P.

Having established that France did not satisfy the criteria for resort to an R2P based military intervention, the question still remains how to constrain the uses of R2P as a justificatory basis for such interventionism. The danger of broad use of R2P that leads to a new permissive license for military interventions on humanitarian grounds—despite a failure to satisfy the requirements of the R2P framework—is evidently real and a source of significant concern for the countries of the Global South. The original drafters and proponents of R2P did not mean to create a concept that would lower the threshold for nonconsensual uses of force and provide a new authority for military interventions serving strategic purposes. Yet concerns that this might become the effect of the R2P doctrine were voiced by its opponents from the outset.\(^\text{153}\) By creating a doctrine that conceptually links humanitarian crises to military interventions, critics of R2P feared that international law suddenly offered an end run around sovereignty and the norm of non-intervention that required little more than the advancing of moral arguments by a would-be intervener. The Malian case suggests the real risks that the practical implementation of R2P, especially in cases of unilateral intervention, may produce the very risks these critics warned against.

What proposals like Responsibility While Protecting capture is that international law must require that the core rules of legal accountability be applied to countries violating R2P and also to those invoking the doctrine appropriately but then exceeding its limitations. For instance, if R2P is used and leads to the violation of human rights, then the country applying R2P must be liable under the rules of international law. In short, R2P as a principle may only serve to advance humanitarian goals consistent with international legality if it is limited to a framework under the supervision of the UN with any and all violations of the doctrinal requirements of R2P subjected to scrutiny must under the applicable rules of international humanitarian law.

\(^{153}\) *Waal, supra* note 117.
Issue Preclusion and the ITC’s Section 337 Investigations: A Reconsideration in Light of B & B Hardware, Inc. v. Hargis Industries, Inc.

DANIEL E. CUMMINGS*

I. INTRODUCTION

Electronic semiconductor manufacturer Texas Instruments brought suit against several defendants for importing and selling semiconductor devices that Texas Instruments believed to infringe two of its patents. Contemporaneously with the civil action, Texas Instruments initiated a proceeding against the defendants before the International Trade Commission (“ITC”) under 19 U.S.C. § 1337. After the parties litigated the issue of infringement at a formal hearing, the ITC determined that the defendant’s semiconductors violated two claims of one of Texas Instruments’ patents and granted an order prohibiting the defendants from importing goods manufactured by methods covered by those claims of the patent. On appeal, the Federal Circuit Court of Appeals upheld the ITC’s finding of infringement. After prevailing before the ITC, the civil action proceeded to trial. The jury found in favor of Texas Instruments at trial, but the trial judge granted the defendants’ motion for judgment as a matter of law, setting aside the jury verdict.

Perhaps more importantly, however, the court refused to give preclusive effect to the ITC’s prior determination that the defendants’ devices infringed upon Texas Instruments’ patent; this was affirmed on appeal by the Federal Circuit.

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2 See id. at 1562-63.
3 In re Certain Plastic Encapsulated Integrated Circuits, Inv. No. 337-TA-315, USITC Pub. 2574 (Feb. 18, 1992) (Final); see also Tex. Instruments, 90 F.3d 1562-63.
4 Tex. Instruments 90 F.3d at 1563; see also Tex. Instruments Inc. v. U.S. Int'l Trade Comm'n, 988 F.2d 1165 (Fed. Cir. 1993).
5 See Tex. Instruments, 90 F.3d at 1563.
6 Id.
7 See id. at 1568-69.
Instruments was forced to relitigate the identical issue before the district court that had already been decided. Ordinarily, the law prevents parties from having to relitigate the same issues and claims through the doctrines of issue preclusion and claim preclusion, traditionally known as collateral estoppel and res judicata.

This article will explore the legal anomaly that the ITC’s adjudications of patent issues do not carry issue preclusive effect in subsequent litigation. First, the article will discuss the doctrines of claim and issue preclusion, which ordinarily prevent the relitigation of claims and issues in subsequent litigation by giving preclusive effect to the prior determination. Next, the article will discuss claim and issue preclusion in the context of the adjudications of administrative tribunals. Then, the article will discuss the history and role of the International Trade Commission (“ITC”). After this, the article will discuss the Section 337 Investigations of unfair practices in import trade conducted by the ITC, including for violations of intellectual property rights. Next, the article will discuss how the adjudications of the ITC carry preclusive effect in every area other than patents, with this exception being primarily based on a single piece of legislative history to the Trade Act of 1974. The article will then discuss the recent U.S. Supreme Court case B & B Hardware v. Hargis Industries, Inc., in which the Court held that the determinations of likelihood of confusion in proceedings before the Trademark Trial and Appeal Board (“TTAB”) are entitled to issue preclusive effect in subsequent trademark infringement litigation. After this, the article will discuss critiques of the use of legislative history in statutory interpretation from a textualist perspective.

The article will then argue that the ITC’s adjudications of patent issues should be afforded preclusive effect in subsequent patent litigation. It begin by arguing that the determinations of patent validity in ITC Section 337 Investigations

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8 See id.
9 See generally RESTATMENT (SECOND) OF JUDGMENTS § 17 (1982).
10 See infra notes 23-249 and accompanying text.
11 See infra notes 23-27 and accompanying text.
12 See infra notes 28-47 and accompanying text.
13 See infra notes 48-57 and accompanying text.
14 See infra notes 58-79 and accompanying text.
15 See infra notes 80-106 and accompanying text.
16 See infra notes 107-65 and accompanying text.
17 See infra notes 166-79 and accompanying text.
18 See infra notes 180-249 and accompanying text.
meet all of the normal requirements for issue preclusion. The article will then argue that the legislative history in the Trade Act of 1974 is not authoritative in itself and should not be determinative as to whether the ITC’s determinations of patent validity and infringement are afforded preclusive effect. Next, the article will argue that affording preclusive effect to the ITC’s determinations of patent issues would not violate the U.S. district courts’ jurisdiction over patent cases. Finally, the article will argue that the recent B & B Hardware case weighs in favor of affording preclusive effect to administrative adjudications such as the ITC’s determinations of patent issues.

II. BACKGROUND

A. THE DOCTRINES OF CLAIM AND ISSUE PRECLUSION

In the Anglo-American legal system, the need for finality in litigation has produced a system of rules known as “res judicata.” The doctrine of claim preclusion (traditionally known as res judicata) provides that a judgment on the merits bars the relitigation of the same claim between the same parties. Whereas claim preclusion bars the relitigation of claims, the doctrine of issue preclusion (traditionally called collateral estoppel) bars the relitigation of issues already decided. The general rule of issue preclusion is: “When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the

19 See infra notes 180-98 and accompanying text.
20 See infra notes 199-209 and accompanying text.
21 See infra notes 210-22 and accompanying text.
22 See infra notes 223-38 and accompanying text.
24 The term “res judicata” can be used in its narrower sense to mean claim preclusion or in its broader sense to include both claim and issue preclusion. See Teply & Whitten, supra note 23, at 1030.
25 Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 502, (2001); see also RES JUDICATA, Black's Law Dictionary (10th ed. 2014) (Res Judicata is “[a]n affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been — but was not — raised in the first suit.”).
26 Taylor v. Sturgell, 553 U.S. 880, 892 (2008); see also COLLATERAL ESTOPPEL, Black's Law Dictionary (10th ed. 2014) (Collateral Estoppel is “[t]he binding effect of a judgment as to matters actually litigated and determined in one action on later controversies between the parties involving a different claim from that on which the original judgment was based.”).
determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."

B. CLAIM AND ISSUE PRECLUSION AND ADMINISTRATIVE AGENCY ADJUDICATIONS

It is well established that issue preclusion can arise not only from the determinations of a court, but also from the adjudications of an administrative agency authorized to resolve disputes. Because Congress is presumed to legislate

27 RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).
28 B & B Hardware, Inc. v. Hargis Indus., Inc. (B&B SCOTUS), 135 S. Ct. 1293, 1303 (2015); see also RESTATEMENT (SECOND) OF JUDGMENTS § 83 (1982):

(1) Except as stated in Subsections (2), (3), and (4), a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court.

(2) An adjudicative determination by an administrative tribunal is conclusive under the rules of res judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including:

(a) Adequate notice to persons who are to be bound by the adjudication, as stated in § 2;
(b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties;
(c) A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status, or a specific series thereof;
(d) A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and
(e) Such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

(3) An adjudicative determination of a claim by an administrative tribunal does not preclude relitigation in another tribunal of the same
against the background of common-law principles, including the doctrine of issue
preclusion, when it authorizes an administrative agency to act in a judicial capacity
it presumably authorizes the agency’s determinations to carry issue preclusive
effect. The U.S. Supreme Court has said that the application of claim and issue
preclusion is favored with regard to “determinations of administrative bodies that
have attained finality.” A principle policy behind this policy in favor of issue
preclusion is that no litigant should get a proverbial second bite at the apple. Another
important policy is the prevention of harassment by avoiding repetitious
litigation through giving preclusive effect in later litigation to the issues already
litigated and decided in earlier litigation. Issue preclusion also supports reliance
upon judicial determinations and promotes the consistency of results in various
forums.

or a related claim based on the same transaction if the scheme of remedies permits assertion of the second claim notwithstanding the adjudication of the first claim.

(4) An adjudicative determination of an issue by an administrative tribunal does not preclude relitigation of that issue in another tribunal if according preclusive effect to determination of the issue would be incompatible with a legislative policy that:

(a) The determination of the tribunal adjudicating the issue is not to be accorded conclusive effect in subsequent proceedings; or

(b) The tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question.

30 Id., at 107.
31 See id. (“Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise.”).
32 See David A. Brown, Collateral Estoppel Effects of Administrative Agency Determinations: Where Should Federal Courts Draw the Line?, 73 Cornell L. Rev. 817, 822 (1988); Univ. of Tenn. v. Elliott, 478 U.S. 788, 798 (1986) (“[G]iving preclusive effect to administrative factfinding serves the value underlying general principles of collateral estoppel: enforcing repose. This value . . . encompasses both the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources.”).
33 See Brown, supra note 32, at 822.
While issue preclusion of administrative agency determinations is supported by the same policies as issue preclusion of a court’s determinations, the ultimate question is one of legislative intent. To overcome the presumption in favor of administrative issue preclusion, there must be a clear statement of legislative intent to the contrary. However, such a statement to overcome this presumption need not be unequivocal, as such statements are not strictly construed.

The Supreme Court in *U.S. v. Utah Construction and Mining Co.* noted that issue preclusion will apply to administrative agencies when the agency is “acting in a judicial capacity,” when it “resolve[s] disputed issues of fact properly before it,” and when the parties have “an adequate opportunity to litigate” the issues. Also implicit in the *Utah Construction* standard is that the agency must have jurisdiction to adjudicate the dispute. The Court later affirmed this conclusion, stating, “the administrative nature of the factfinding process is not dispositive.” In another case, the Supreme Court held that while the Full Faith and Credit Statute did not require federal courts to give preclusive effect to unreviewed adjudications of state administrative agencies, it was “sound policy” to apply issue preclusion to such agencies according to “traditional principles.”

In order to meet the claim preclusion requirement that the parties have an adequate opportunity to litigate the issue, an administrative agency adjudication must at least meet the minimum procedural requirements of the Due Process Clause. Many other essential procedures may be required, such as the ability to

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34 Astoria, 501 U.S., at 108.
35 Id.
36 Id.
37 United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966) (“When an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.”); see also Brown, supra note 32, at 827-28.
38 See Brown, supra note 33, at 827-28.
39 Kremer v. Chem. Constr. Corp., 456 U.S. 461, 485 n. 26 (1982) (“In . . . Utah Construction . . . we held that, so long as opposing parties had an adequate opportunity to litigate disputed issues of fact, res judicata is properly applied to decisions of an administrative agency acting in a ‘judicial capacity.’”).
41 See Univ. of Tenn., 478 U.S. at 797 (relying upon Utah Constr.).
42 Brown, supra note 32, at 830-33; see also Kremer, 456 U.S. at 480-83.
present witnesses and cross-examine the opponent’s witnesses and the right to judicial review.\(^{43}\) The comments to the Restatement (Second) on Judgments section on preclusion of administrative adjudications states that the requirements set forth in that section, such as the right to present evidence and rebut the opponent’s evidence, a specific formulation of law and fact by the decision maker, and a rule of finality, are modeled after the procedures in the Administrative Procedure Act\(^{44}\) and Model State Administrative Procedure Act\(^{45}\), implying that adherence to such procedures is highly indicative of the fact that the parties had an adequate opportunity to litigate the issues in the administrative adjudication.\(^{46}\) If an adjudication otherwise meets all of the requirements for the application of the doctrine of issue preclusion, courts will not hesitate to give it preclusive effect, regardless of the fact the issue was adjudicated by an administrative agency, so long as the procedures are sufficient to ensure that the result is fair and reliable.\(^{47}\)

C. THE INTERNATIONAL TRADE COMMISSION

The United States International Trade Commission (the “ITC”) was originally created by Congress in 1916 as the United States Tariff Commission.\(^{48}\) The Tariff Commission was tasked with investigating and reporting on the effects of customs laws and tariff relations between the U.S. and other countries.\(^{49}\) The commission was given broad quasi-judicial powers such as the power to issue subpoenas and to secure the attendance of witnesses.\(^{50}\) In the Tariff Act of 1930, Congress authorized the Commission to investigate unfair practices in import trade in order to assist the President in exercising his authority to exclude imports under the Act.\(^{51}\) In conducting these investigations of unfair practices, the Commission was authorized to hold hearings, take evidence, and produce a transcript of the

\(^{43}\) Brown, *supra* note 32, at 831-33.


\(^{45}\) See, e.g., Neb. Rev. Stat. §§ 84-901 to 84-920.

\(^{46}\) *Restatement (Second) of Judgments* § 83, cmt. c (1982) (“The elements of adjudicatory procedure described in Subsection (2)(b)-(d) are found in proceedings under the Federal Administrative Procedure Act, 5 U.S.C. §§ 551 et seq., and in the Model State Administrative Procedure Act and state statutes similar to the latter.”).

\(^{47}\) See generally *Restatement (Second) of Judgments* § 83 (1982).


\(^{49}\) *Id.* at 796.

\(^{50}\) *Id.* at 797.

investigation. The Act provided that the Commission’s findings would be conclusive, subject to an appeal to the United States Court of Customs and Patent Appeals, the predecessor to the United States Circuit Court of Appeals for the Federal Circuit.

Congress changed the name of the Commission to its current name—the U.S. International Trade Commission (ITC)—in the Trade Act of 1974. This Act added a provision to the statute governing the Commission’s investigations, providing that, “all legal and equitable defenses may be presented in all cases.” The defenses that may be raised include the defense of patent invalidity. In 1988, Section 337 of the Tariff Act of 1930 was amended to expressly prohibit the importation of goods that infringe a valid registered U.S. patent or trademark.

D. Section 337 Investigations by the ITC

The ITC is required to conduct an investigation when a complaint is brought or may investigate upon its own initiative. An investigation of an alleged unfair practice in import trade is known as a Section 337 Investigation because it investigates allegations of violations of Section 337 of the Tariff Act of 1930. If there is reason to believe that there is a violation, the ITC may exclude articles from importation during the pendency of an investigation. If the ITC determines that articles violate the Tariff Act’s prohibitions on unfair practice, whether for a violation of intellectual property rights or other reasons, it must order that the articles be excluded from entry into the United States. The Tariff Act also

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52 Id.
55 Id. at 2053-54.
provides the ITC with the authority to issue cease and desist orders and provides for statutory damages for violations of an exclusion order.\textsuperscript{62}

A Section 337 Investigation is conducted in accordance with 19 U.S.C. § 1337 and the Administrative Procedures Act.\textsuperscript{63} The ITC is authorized by statute to “adopt such reasonable procedures and rules and regulations as it deems necessary to carry out its functions and duties.”\textsuperscript{64} The ITC exercised this authority by adopting rules governing its operations\textsuperscript{65} including rules relating specifically to Section 337 Investigations.\textsuperscript{66}

Section 337 Investigations are to be conducted expeditiously “to the extent practicable and consistent with requirements of law.”\textsuperscript{67} The investigation process begins when a party files a complaint, which the ITC reviews and determines whether to initiate an investigation, thereafter serving notice on the respondents if the investigation is initiated.\textsuperscript{68} Investigations include detailed pleadings\textsuperscript{69} and may include pre-trial motions.\textsuperscript{70} The discovery procedures in a Section 337 Investigation are very similar to those available in civil actions, including depositions, requests for production of documents, interrogatories, and requests for admissions.\textsuperscript{71} After discovery and pretrial procedures, the ITC will hold a hearing presided over by an administrative law judge and held in accordance with the Administrative Procedure Act.\textsuperscript{72} Hearings are held publicly and each party is provided “the right of adequate notice, cross-examination, presentation of evidence, objection, motion, argument,

\begin{footnotesize}
\textsuperscript{63} 19 C.F.R. § 210.36 (2015) ("Every hearing under this section shall be conducted in accordance with the Administrative Procedure Act . . . Hence, every party shall have the right of adequate notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing."); Intellectual Property Infringement and Other Unfair Acts, supra note 59.
\textsuperscript{64} 19 U.S.C. § 1335 (2015)
\textsuperscript{65} 19 C.F.R. §§ 201.0 to 213.6 (2015).
\textsuperscript{67} 19 C.F.R. § 210.2 (2015).
\textsuperscript{72} 19 C.F.R. § 210.36. The applicable sections of the Administrative Procedure Act are found in 5 U.S.C. §§ 554-556 (2015).
\end{footnotesize}
and all other rights essential to a fair hearing.” Any evidence that is material, relevant, and reliable may be admitted in a hearing. After the hearing, the administrative law judge will certify the record of the case to the commission along with an opinion of the initial determination of whether a violation of § 337 occurred, detailing the findings of fact, law, and discretion. Any unsuccessful party may then petition the commission for review of the administrative law judge’s findings if there are any clear errors of fact, errors of law, or an abuse of discretion. At the conclusion of the investigation, the commission’s determination is published in the Federal Register and transmitted to the President.

A final determination by the ITC in a Section 337 Investigation is appealable to the Federal Circuit Court of Appeals. The Federal Circuit also has exclusive appellate jurisdiction over patent cases and the proceedings of the USPTO with regard to patents or trademarks.

E. CLAIM AND ISSUE PRECLUSION AND ITC ADJUDICATIONS

The determinations of the ITC are typically afforded issue preclusive and claim preclusive effect in subsequent litigation. In Union Manufacturing, the

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79 28 U.S.C. § 1295(a)(1),(4) (2015) (“The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction . . . of an appeal from a final decision of a district court of the United States . . . in any civil action in any civil action arising under, or in any civil action in which a party has asserted a compulsory counterclaim arising under, any Act of Congress relating to patents . . . [or] of an appeal from a decision of . . . the Patent Trial and Appeal Board of the United States Patent and Trademark Office . . . or the Trademark Trial and Appeal Board with respect to applications for registration of marks.”).
80 See Union Mfg. Co. v. Han Baek Trading Co., 763 F.2d 42, 45 (2d Cir. 1985), disagreed with on other grounds by Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 773 (1992); Baltimore Luggage Co. v. Samsonite Corp., 977 F.2d 571 (4th Cir. 1992) (giving claim preclusive effect to an ITC determination with regard to
Second Circuit concluded that adjudications by the ITC in Section 337 Investigations regarding unfair trade practice and trademark infringement were entitled to issue preclusive effect in subsequent litigation in federal district courts.\footnote{763 F.2d 42 (1985).} The court noted that with the exception of determinations of patent validity, the ITC’s adjudications are universally afforded preclusive effect.\footnote{See id. at 45.} This conclusion is entirely consistent with the general principle that adjudications of administrative agencies will carry claim and issue preclusive effect in subsequent litigation unless Congress indicates to the contrary.\footnote{See Minn. Mining, at 81 (“In general, unless Congress expressly or impliedly indicated it intended otherwise, determinations of administrative agencies are also entitled to preclusive effect in federal court if the agency was acting in an adjudicatory capacity. . . . Indeed, a number of federal courts have accorded judicial decisions of the ITC preclusive effect.”).}

The sole exception to the preclusion of the ITC’s adjudications is determinations of patent infringement and validity, which carry no preclusive weight.\footnote{Union Mfg., at 45 (“The jurisdictional bar to res judicata treatment of ITC patent validity determinations simply does not apply to other decisions by the ITC. The ITC has full authority to decide trademark claims concerning imported goods, and the jurisdiction of federal district courts over unfair trade practice and trademark cases is not exclusive.”); see also Tex. Instruments Inc. v. Cypress Semiconductor Corp., 90 F.3d 1558, 1568-69 (Fed. Cir. 1996).} However, the record of a Section 337 Investigation by the ITC is admissible as relevant evidence in related federal court actions after the conclusion of the investigation.\footnote{28 U.S.C. § 1659(b) (2015).} The fundamental reason why determinations of patent validity and infringement do not support claim and issue preclusion in subsequent litigation is found in the legislative history of the Trade Act of 1974.\footnote{See S. Rep. No. 93-1298 (1974), reprinted in 1974 U.S.C.C.A.N. 7186, 1974 WL 11696 (Senate Finance Committee Report for the Trade Act of 1974).} The Trade Act of 1974 amended the Tariff Act of 1930, authorizing the ITC to exclude imports

from the country.\textsuperscript{87} Previously, the ITC could only make a recommendation with regard to exclusion of imports, which the Secretary of Treasury could then exclude at the direction of the President.\textsuperscript{88} The Act also allowed the ITC to consider “all legal and equitable defenses may be presented in all cases,” including the defense of patent invalidity.\textsuperscript{89} Prior to the Trade Act of 1974, the ITC could not adjudicate the issue of patent invalidity as a defense in a Section 337 Investigation regarding the importation of infringing goods.\textsuperscript{90}

The only relevant legislative history is found in a Senate committee report.\textsuperscript{91} There are two relevant pieces of that committee report; first, it states the following in a list of provisions incorporated by the committee bill:

7. Res judicata, collateral estoppel.-- Under the Committee bill,\textsuperscript{92} decisions by the U.S. Court of Customs and Patent Appeals

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\item \textsuperscript{87} Id. at 7211; Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975) (H.R. 10710).
\item \textsuperscript{89} Trade Act of 1974 § 341.
\item \textsuperscript{90} See Frischer & Co. v. Bakelite Corp., 39 F.2d 247, 258 (C.C.P.A. 1930) (“The United States Tariff Commission is, as we have noted, merely an administrative, fact-finding, body. It has no judicial powers. The right to pass upon the validity of a patent which has been issued by the Patent Office is a right possessed only by the courts of the United States given jurisdiction thereof by law.”).
\item \textsuperscript{92} The bill originally introduced in the House of Representatives gave the ITC the authority to exclude articles based on claims of unfair competition arising from patent infringement and provided a separate scheme for governing such patent claims, which read, in part:
\end{itemize}

Any order entered pursuant to this subsection shall be made on the record after opportunity for a full hearing, including the opportunity to present legal defenses. Any person adversely affected by an action of the commission or refusal of the commission to act shall have the right to seek judicial review in the United States Court of Customs and Patent Appeals within such time after said action is made and in such manner as appeals may be taken from decisions of the United States Customs Court.
reviewing Commission decisions under section 337 should not serve as res judicata or collateral estoppel in matters where U.S. District Courts have original jurisdiction.93

H.R. 10710, 93d Cong. § 341 (as introduced in the House of Representatives on Oct. 3, 1973). The Senate Committee report explains the differences between the House version and the Senate amendments:

Section 341 of the House bill would amend section 337 of the Tariff Act of 1930 to authorize the Commission, itself, to order the exclusion of articles involved in unfair methods and acts based upon United States patents.

The Committee bill, on the other hand, would authorize the Commission to order the exclusion of articles in all cases under section 337, patent and nonpatent. The Committee bill would also permit the commission to issue cease and desist orders rather than exclusion orders whenever it deemed such action a more suitable remedy. If the cease and desist order were not adhered to the exclusion order would go into effect.


(a) UNFAIR METHODS OF COMPETITION DECLARED UNLAWFUL.—Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.

H.R. 10710, 93d Cong. § 341 (as amended by the Senate on Dec. 13, 1974).

Later, the report goes on to state:

For a period of approximately 50 years, the Commission has entertained complaints of importation or sale of articles allegedly made in accordance with the specifications and claims of a U.S. patent. . . . The Commission has also established the precedent of considering U.S. patents as being valid unless and until a court of competent jurisdiction has held otherwise. However, the public policy recently enunciated by the Supreme Court in the field of patent law . . . and the ultimate issue of the fairness of competition raised by section 337, necessitate that the Commission review the validity and enforceability of patents, for the purposes of section 337, in accordance with contemporary legal standards when such issues are raised and are adequately supported. The Committee believes the Commission may (and should when presented) under existing law review the validity and enforceability of patents, but Commission precedent and certain court decisions have led to the need for the language of amended section 337(c). The Commission is not, of course, empowered under existing law to set aside a patent as being invalid or to render it unenforceable, and the extent of the Commission's authority under this bill is to take into consideration such defenses and to make findings thereon for the purposes of determining whether section 337 is being violated.

The relief provided for violations of section 337 is “in addition to” that granted in “any other provisions of law.” The criteria of section 337 differ in a number of respects from other statutory provisions for relief against unfair trade practices. For example, in patent-based cases, the Commission considers, for its own purposes under the section 337, the status of imports with respect to the claims of U.S. patents. The Commission's findings neither purport to be, nor can they be, regarded as binding interpretations of the U.S. patent laws in particular factual contexts. Therefore, it seems clear that any disposition of a Commission action by a Federal Court should not have a res judicata or collateral estoppel effect in cases before such courts.  

The committee report seems to base its rejection of the ITC’s patent adjudications carrying res judicata or collateral estoppel effect on two things: first, the language of the bill that the ITC remedies exist “in addition to any other

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provision of law”; and second, that the district courts have original jurisdiction over patent claims. 95

The Federal Circuit examined this legislative history in *Texas Instruments*, concluding that “Congress did not intend decisions of the ITC on patent issues to have preclusive effect.” 96 The court rejected the arguments that ITC adjudications on patents should be preclusive because of changes to the procedure of the ITC and because of the creation of the Federal Circuit with exclusive appellate jurisdiction over patent cases, reviewing both the district courts’ and the ITC’s patent determinations. 97 The court refused to consider the effect of these changes because none of the amendments or their legislative histories directly addressed the issue of claim and issue preclusion so as to change the court’s understanding of Congress’ intent based on the legislative history to the Trade Act of 1974. 98 In another case, a district court refused to give preclusive effect to an ITC determination of patent invalidity, even when that conclusion was affirmed on appeal by the Federal Circuit, an Article III court. 99 That same district court later gave preclusive effect to the factual findings of the ITC, but not its ultimate legal conclusion with regard to patent validity. 100 However, that application of issue preclusion for factual determinations but not the ultimate legal determination of patent validity has been criticized on the grounds that the subsequent Federal Circuit *Texas Instruments* case failed to make any such fact-law distinction in its rejection of ITC issue preclusion in patent cases. 101

95 See id.
96 *Tex. Instruments*, at 1569.
97 Id.
98 See id. (“While those changes have modified some ITC procedures and provided the ITC with the same appellate court of review as that of district courts deciding patent issues, none of these statutory amendments or their legislative histories dealt with the possible preclusive effect of ITC determinations or indicated an intent contrary to Congress's stated intention in 1974. Thus, the rule that decisions of the ITC involving patent issues have no preclusive effect in other forums has not changed.”).
100 See *In re Convertible Rowing II*, 814 F.Supp. 1197.
101 See, e.g., *Fuji Photo Film Co. v. Jazz Photo Corp. Inc.*, 173 F. Supp. 2d 268, 274 n. 2 (D.N.J. 2001) (“The Federal Circuit in *Texas Instruments* had ample opportunity to distinguish between a factual or legal preclusive effect and did not
Along with the legislative history, a primary rationale for the patent exception is that federal district courts have exclusive jurisdiction over patent cases.\textsuperscript{102} This has been interpreted to mean that the ITC has only the jurisdiction to decide the patent dispute before it, with no effect being given to its adjudication in subsequent litigation in the district courts.\textsuperscript{103} The statute providing the federal district courts with exclusive jurisdiction over patent cases reads, in part:

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights.

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trademark laws.\textsuperscript{104}

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\textsuperscript{103} Union Mfg., 763 F.2d at 45 (“Patent validity determinations of the ITC are properly not accorded res judicata effect because the ITC has no jurisdiction to determine patent validity except to the limited extent necessary to decide a case otherwise properly before it.”).
\textsuperscript{104} 28 U.S.C. § 1338 (2015). The statute is very similar to the original statute as enacted in 1948:

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases.

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trademark laws.
On its face, this statute only restricts the jurisdiction of state courts to adjudicate patent cases.\textsuperscript{105} As a result, the district courts and the ITC have overlapping jurisdiction with regard to patents; the district courts have jurisdiction over civil actions while the ITC has jurisdiction over patent issues within the context of Section 337 investigations.\textsuperscript{106}

F. \textit{B & B Hardware, Inc. v. Hargis Industries, Inc.}

In March, 2015, the United States Supreme Court decided the case \textit{B & B Hardware, Inc. v. Hargis Industries, Inc.}\textsuperscript{107} The Court held that determinations of likelihood-of-confusion between trademarks by the Trademark Trial and Appeal Board (“TTAB”) of the United States Patent and Trademark Office (“USPTO”) were entitled to preclusive effect in subsequent trademark infringement actions in federal courts.\textsuperscript{108}

The dispute in \textit{B & B Hardware} was the culmination of a series of disputes between plaintiff B & B Hardware, Inc. (“B & B”), which held the trademark SEALTIGHT for metal fasteners, and the defendant Hargis Industries, Inc. (“Hargis”), which held the trademark SEALTITE for metal screws.\textsuperscript{109} In 1997, Hargis filed a cancellation proceeding with the USPTO against the registration of

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\item Thomas R. Rouse, \textit{The Preclusive Effect of ITC Patent Fact Findings on Federal District Courts: A New Twist on in Re Convertible Rowing Exerciser Patent Litigation}, 27 Loy. L.A. L. Rev. 1417, 1421 (1994) (“Congress has granted overlapping jurisdiction to the ITC and the district courts in the area of patent law.”); see also Ashlow Ltd. v. Morgan Const. Co., 672 F.2d 371, 375 (4th Cir. 1982) (“In short, the Congress has created two separate jurisdictions: One with jurisdiction over “unfair acts” in connection with the importation of articles from abroad (the Commission), and the other with jurisdiction over the validity of domestic patents (the district court).”).
\item \textit{B&B SCOTUS}, 135 S. Ct. at 1303.
\item Id.
\item Id. at 1301 (“The twists and turns in the SEALTIGHT versus SEALTITE controversy are labyrinthine. The question whether either of these marks should be registered, and if so, which one, has bounced around within the PTO for about two decades; related infringement litigation has been before the Eighth Circuit three times; and two separate juries have been empaneled and returned verdicts. The full story could fill a long, unhappy book.”).
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B & B’s SEALTIGHT mark, alleging that it had been abandoned.\textsuperscript{110} In 1998, B & B filed a trademark infringement suit against Hargis in which the district court held that B & B’s SEALTIGHT trademark was merely descriptive and had not yet acquired secondary meaning entitling it to trademark protection.\textsuperscript{111} The jury made no findings regarding the issue of infringement.\textsuperscript{112} Hargis’ cancellation proceeding was stayed during the pendency of the infringement action.\textsuperscript{113} The district court was affirmed on appeal to the Eighth Circuit Court of Appeals.\textsuperscript{114} After the conclusion of the civil action, Hargis sought to amend its cancellation petition to assert that B & B’s trademark was merely descriptive.\textsuperscript{115} The TTAB denied Hargis’ motion to amend its petition and did not cancel B & B’s trademark registration.\textsuperscript{116}

While B & B had filed an opposition to Hargis’ trademark registration shortly after it was filed in 1996, B & B filed an amended opposition in 2003.\textsuperscript{117} After pretrial procedures and a trial, the TTAB made its decision in 2007.\textsuperscript{118} The TTAB ruled in favor of B & B, analyzing the likelihood of confusion in light of the factors found in \textit{Application of E. I. DuPont DeNemours & Co.} (\textquotedblleft the DuPont

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\item B & B Hardware, Inc. (B&B TTAB), 2007 WL 2698310, at *6 (T.T.A.B. 2007).
\item Id.
\item Id.
\item Id.
\item Id.
\item See B & B Hardware, Inc. v. Hargis Indus., Inc. (B&B 8th Cir. I), 252 F.3d 1010 (8th Cir. 2001).
\item B&B TTAB, 2007 WL 2698310, at *6.
\item Id.
\item Id.
\item See id.
\end{enumerate}
\end{footnotesize}
Factors”). The TTAB refused Hargis’ registration because of the likelihood of confusion it found between the SEALTITE and SEALTIGHT trademarks.

119 B&B SCOTUS, 135 S. Ct. at 1302; B&B TTAB, 2007 WL 2698310, at *6. The DuPont Factors are as follows:

“In testing for likelihood of confusion . . . the following, when of record, must be considered:
(1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.
(2) The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.
(3) The similarity or dissimilarity of established, likely-to-continue trade channels.
(4) The conditions under which and buyers to whom sales are made, i.e. “impulse” vs. careful, sophisticated purchasing.
(5) The fame of the prior mark (sales, advertising, length of use).
(6) The number and nature of similar marks in use on similar goods.
(7) The nature and extent of any actual confusion.
(8) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.
(9) The variety of goods on which a mark is or is not used (house mark, “family” mark, product mark).
(10) The market interface between applicant and the owner of a prior mark:
(a) a mere “consent” to register or use.
(b) agreement provisions designed to preclude confusion, i.e. limitations on continued use of the marks by each party.
(c) assignment of mark, application, registration and good will of the related business.
(d) laches and estoppel attributable to owner of prior mark and indicative of lack of confusion.
(11) The extent to which applicant has a right to exclude others from use of its mark on its goods.
(12) The extent of potential confusion, i.e., whether de minimis or substantial.
(13) Any other established fact probative of the effect of use.
In 2006, while its opposition proceeding before the TTAB was pending, B & B sued Hargis for trademark infringement in the United States District Court for the Eastern District of Arkansas. After the district court initially dismissed the action, the Eighth Circuit reversed and remanded the case. The case proceeded to trial and the jury found in Hargis’ favor. The district court denied B & B’s motions for judgment as a matter of law and for a new trial. The district court refused to give preclusive effect to the TTAB’s finding of a likelihood of confusion and excluded the decision from the evidence. The district court distinguished the Eight Circuit case upon which B & B had relied in its argument for giving the TTAB decision preclusive effect by stating that the TTAB’s decision to cancel a trademark registration in that case had been affirmed by the Court of Customs and Patent Appeals (the predecessor to the Federal Circuit Court of Appeals), an Article III court, whereas the TTAB decision was not appealed and therefore not affirmed by the Federal Circuit.

On appeal, a three-judge panel of the Eight Circuit affirmed the district court, with one judge dissenting. The majority did not adopt the district court’s rationale that the TTAB’s decisions are not entitled to issue preclusive effect because it is an administrative agency. The majority instead rejected issue

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122 B & B Hardware, Inc. v. Hargis Indus., Inc. (B&B 8th Cir. II), 569 F.3d 383 (8th Cir. 2009).
123 B & B Hardware, Inc. v. Hargis Indus., Inc. (B&B District Court II), 736 F. Supp. 2d 1212, 1214 (E.D. Ark. 2010) aff’d, 716 F.3d 1020 (8th Cir. 2013), rev’d and remanded, 135 S. Ct. 1293 (2015) and vacated and remanded, 800 F.3d 427 (8th Cir. 2015).
124 Id.
125 Id. at 1217-18.
126 See id. (citing Flavor Corp. of Am. v. Kemin Indus., Inc., 493 F.2d 275 (8th Cir. 1974)).
127 B & B Hardware, Inc. v. Hargis Indus., Inc. (B & B 8th Cir. III), 716 F.3d 1020, 1025 (8th Cir. 2013), rev’d and remanded, 135 S. Ct. 1293 (2015).
128 Id. at 1024-25 (“Principles of administrative law suggest that application of collateral estoppel may be appropriate where administrative agencies are acting in a judicial capacity.”).
preclusion because the test utilized by the TTAB for likelihood of confusion (the DuPont factors) was slightly different than the test used by the Eighth Circuit, the six-factor SquirtCo test.\textsuperscript{129} The majority also relied upon the fact that Hargis bore the burden of persuasion before the TTAB while B & B held the burden in the infringement action, precluding the application of claim preclusion.\textsuperscript{130} Judge Steven M. Colloton authored a dissenting opinion in which he argued that the TTAB’s decision on likelihood of confusion should have been admitted and given preclusive effect.\textsuperscript{131} Judge Colloton not only agreed with the majority that decisions of administrative agencies acting in a judicial capacity can be given preclusive effect, but that the TTAB’s decision should be given effect in that case because the differences in the standards used to analyze likelihood of confusion were minor.\textsuperscript{132}

The dissent noted that if issue preclusion were rejected because the appropriate balancing of the likelihood of confusion factors were different from a registration or cancellation proceeding and an infringement action, the result is that the decisions of the TTAB will effectively never be given preclusive effect.\textsuperscript{133} Judge Colloton also argued that issue preclusion should apply in spite of the difference in

\textsuperscript{129} Id. at 1024-26 (citing SquirtCo. v. Seven-Up Co., 628 F.2d 1086, 1091 (8th Cir. 1980)) (The SquirtCo factors are: “(1) the strength of the owner's mark; (2) the similarity of the owner's mark and the alleged infringer's mark; (3) the degree to which the products compete with each other; (4) the alleged infringer's intent to 'pass off' its goods as those of the trademark owner; (5) incidents of actual confusion; and (6) the type of product, its costs and conditions of purchase.”).

\textsuperscript{130} Id. (“Failure of one party to carry the burden of persuasion on an issue should not establish the issue in favor of an adversary who otherwise would have the burden of persuasion on that issue in a later litigation. . . . Thus, the fact that Hargis was unable to overcome B & B's challenge to the registration of Hargis's mark on the basis of likelihood of confusion does not establish that B & B can meet its burden of persuasion for trademark infringement purposes.”).

\textsuperscript{131} Id. at 1027-30 (Colloton, J., Dissenting).

\textsuperscript{132} Id. at 2017-29 (Colloton, J., Dissenting) (“Modest differences in analytical approach to the same ultimate issue, however, do not justify dispensing with collateral estoppel, just as variations in analysis among the circuits about a legal issue does not mean that one circuit's decision lacks preclusive effect in another.”).

\textsuperscript{133} Id. at 1029 (Colloton, J., Dissenting) (“The majority also concludes that the Trademark Board weighed the factors bearing on likelihood of confusion differently than the majority thinks they should be weighed in an infringement action. . . . This is tantamount to holding that a finding of the Trademark Board on likelihood of confusion will never be preclusive in an infringement action, because the majority believes that the balancing of factors that is appropriate in a registration or cancellation action is not appropriate in an infringement action.”).
the burden of persuasion because the difference did not affect the outcome of the
decision.\footnote{Id. at 1030 (Colloton, J., Dissenting) (“This
court has recognized, however, that
differences in the burden of persuasion counsel against application of collateral
estoppel only when the difference in burden affects who should prevail.”).}

The Supreme Court’s decision in \textit{B & B Hardware} was authored by
Justice Alito and joined by six other justices, with a dissenting opinion written by
Justice Thomas, joined by Justice Scalia.\footnote{\textit{See B&B SCOTUS}, 135 S. Ct. 1293.}
The Court’s opinion noted that the TTAB’s
opposition proceedings are “similar to a civil action in a federal district court.”\footnote{Id. at
1300 (citing U.S. PATENT AND TRADEMARK OFFICE, TRADEMARK TRIAL
AND APPEAL BOARD MANUAL OF PROCEDURE \S 102.03 (2014), available at
updated June, 2015) [hereinafter TTAB Manual]).}
The Court noted that the Federal Rules of Civil Procedure and Evidence apply in
the TTAB’s proceedings.\footnote{Id. (citing 37 C.F.R. \S 2.116(a) (2014) and 37 C.F.R. \S 2.122(a) (2014)).}
The Court also noted the availability of discovery and
depositions.\footnote{Id. (citing 37 C.F.R. \S 2.120 (2014) and 37 C.F.R. \S 2.123(a) (2014)); see also
TTAB Manual, \S 102.03 (“An inter partes proceeding before the Board is similar
to a civil action in a federal district court. There are pleadings . . . a wide range of
possible motions; conferencing; disclosures; discovery; trial; briefs; and, if
requested, an oral hearing, followed by a decision on the case.”).}
The primary difference between TTAB proceedings and a civil
action is that there is no live testimony, though the parties have a chance to submit
written testimony, subject to cross-examination and taken under oath, and to request
oral arguments.\footnote{Id. (citing 37 C.F.R. \S 2.123 (2014) and 37 C.F.R. \S 2.129 (2014)).}
The determinations of the TTAB are also subject to review by
the United States Court of Appeals for the Federal Circuit.\footnote{Id. at
1301 (citing 15 U.S.C. \S 1071(b)).}
In the alternative, a
party may bring a civil action in a federal district court to challenge the TTAB’s
rejection of a registration in which the issues will be tried de novo.\footnote{Id.}
However, Hargis neither sought review by the Federal Circuit of the TTAB’s rejection of its
registration application and determination of a likelihood of confusion nor did it
challenge it with a civil action.\footnote{Id. at 1302.}
The Court began by answering the question “whether an agency decision can ever ground issue preclusion” in the affirmative. The Court relied upon the 1991 case, Astoria Federal Savings & Loan Association v. Solimino. The unanimous Court in Astoria said that because Congress is presumed against the background of the common law and because the principle of issue preclusion is well established, the decisions of any administrative agency acting in a judicial capacity is presumably intended to have preclusive effect unless Congress indicates otherwise. The Astoria Court, however, made clear that the ultimate issue was not the wisdom of affording issue preclusion to the decisions of an administrative agency, but of Congressional intent.

The Court in B & B Hardware then looked to the Lanham Act to determine whether there was any evident Congressional intent for the decisions of the TTAB to not have preclusive effect. Specifically, the Court concluded that nothing in the text or the structure of the Lanham Act forbid issue preclusion. The Court did not, however, look to any of the Lanham Act’s legislative history to find Congressional intent with regard to issue preclusion. The Court rejected Hargis’ argument that the availability of de novo review in a civil action indicates a Congressional intent that the TTAB’s determinations not have preclusive effect. The Court reasoned that the present case was unlike a case where administrative process is a prerequisite to a civil action and giving preclusive effect to the agency’s determination would render the court process “strictly pro forma.” Because likelihood of confusion for registration and for infringement are the same standard, the fact that that the TTAB used slightly different factors than the Eighth Circuit

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143 Id. at 1302-03 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 27, p. 250 (1982)) (“Both this Court's cases and the Restatement make clear that issue preclusion is not limited to those situations in which the same issue is before two courts. Rather, where a single issue is before a court and an administrative agency, preclusion also often applies.”).
144 Id. at 1303-06 (citing Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104 (1991)).
145 Astoria, 501 U.S. at 107-10.
146 Id.
147 B&B SCOTUS, 135 S. Ct. at 1305.
148 Id.
149 See id.
150 Id.
151 Id. (“What matters here is that registration is not a prerequisite to an infringement action.”).
uses in its analysis was not sufficient to prevent issue preclusion. In the event that the use in question in an infringement action is not materially the same as the use indicated in the registration, then issue preclusion would not apply because the two issues would not be the same.

The Court rejected Hargis’ argument that the TTAB’s determination of likelihood of confusion should not be given preclusive effect because of the differences in procedure between the TTAB and federal courts. The Court said that redetermination of an issue may be appropriate if the procedures in the fundamentally deficient, but not simply because the procedures are different than those used in federal courts. While the TTAB’s procedures are undoubtedly different than federal district courts in that there are no live witnesses, this difference alone is not sufficient to prevent TTAB determinations from carrying preclusive effect. Courts of equity used different procedures than courts of law, yet that did not prevent issue preclusion, the Court noted. The Court said that rather focusing on whether there are any procedural differences between the administrative agency and the district court in which the subsequent action is brought, courts should inquire as to whether the procedures in the prior determination were “fundamentally poor, cursory, or unfair.”

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152 Id. at 1306-07.
153 Id. at 1308.
154 Id. at 1309; see also generally RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982) (“[Issue preclusion does not apply when] [a] new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them.”).
155 See B&B SCOTUS, 135 S. Ct. at 1309 (“Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation. But again, this only suggests that sometimes issue preclusion might be inappropriate, not that it always is.”).
156 Id. (“Procedural differences, by themselves, however, do not defeat issue preclusion.”).
157 Id.
158 Id. (“Rather than focusing on whether procedural differences exist—they often will—the correct inquiry is whether the procedures used in the first proceeding were fundamentally poor, cursory, or unfair.”).
to doubt the quality of the procedures utilized by the TTAB, the Court concluded, noting that they were largely the same procedures as utilized in the federal courts.\textsuperscript{159}

The Court also rejected Hargis’ argument that issue preclusion should not apply because there was an insufficient amount in controversy in the registration proceeding.\textsuperscript{160} The Court noted that there are substantial benefits to trademark registration, such that registration proceedings will ordinarily be sufficient to ground issue preclusion.\textsuperscript{161} The Court also clarified that the burden of persuasion was the same in both the TTAB proceeding and before the district court, with B & B bearing the burden in both cases.\textsuperscript{162}

In his dissent, Justice Thomas disagreed with the presumption of congressional intent in favor of issue preclusion from judicial determinations of administrative agencies expressed in \textit{Astoria} and relied upon by the majority.\textsuperscript{163} Justice Thomas argued that administrative agencies were not historically understood as courts of competent jurisdiction for purposes of issue preclusion.\textsuperscript{164} The dissent also questioned whether granting preclusive effect to administrative determinations of “private” (as opposed to “public” and “quasi-private”) rights constituted a violation of the doctrine of separation of powers.\textsuperscript{165}

\textsuperscript{159} \textit{Id.} The Court did not foreclose the possibility that in a particularly rare case the TTAB’s procedures could be insufficient, preventing issue preclusion if a party could demonstrate a “compelling showing of unfairness.” \textit{B&B SCOTUS}, 135 S. Ct. at 1309 (citing \textsc{Restatement (Second) of Judgments}, § 28, cmts. g and j, at 283–284 (1982)) (“It is conceivable, of course, that the TTAB’s procedures may prove ill-suited for a particular issue in a particular case, e.g., a party may have tried to introduce material evidence but was prevented by the TTAB from doing so, or the TTAB’s bar on live testimony may materially prejudice a party’s ability to present its case. The ordinary law of issue preclusion, however, already accounts for those ‘rare’ cases where a ‘compelling showing of unfairness’ can be made.”).

\textsuperscript{160} \textit{Id.} at 1309-10 (citing \textsc{Restatement (Second) of Judgments} § 28, cmt. j, at 283–284 (1982)).

\textsuperscript{161} \textit{Id.} at 1310.

\textsuperscript{162} \textit{Id.} at 1309.

\textsuperscript{163} \textit{Id.} at 1310-12 (Thomas, J., Dissenting).

\textsuperscript{164} \textit{See id.} (Thomas, J., Dissenting).

\textsuperscript{165} \textit{See id.} at 1316-18 (Thomas, J., Dissenting). The majority did not address whether giving preclusive effect to a determination by the TTAB of likelihood of confusion in a subsequent infringement action was a violation of the doctrine of separation of powers because it was not properly before the court on appeal. \textit{B&B SCOTUS}, 135 S. Ct. at 1304 (“Hargis seemingly conceded that TTAB decisions
G. The Use of Legislative History in Statutory Interpretation: A Textualist Approach

Significant debate exists about the proper role and weight to be given legislative history\textsuperscript{166} when interpreting a statute.\textsuperscript{167} One concern about the use of legislative history is the possibility that it can be used selectively by judges to interpret a statute in a manner consistent with the judge’s personal policy preferences.\textsuperscript{168} As Judge Harold Leventhal famously quipped, citing legislative history is akin to “looking over a crowd and picking out your friends.”\textsuperscript{169} The late Justice Scalia argued that the role of the Court is “not to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective—but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times.”\textsuperscript{170} In addition to this practical concern, Justice Scalia said, “My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be

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\textsuperscript{166} Legislative History, Black’s Law Dictionary (10th ed. 2014) (defining legislative history as “[t]he proceedings leading to the enactment of a statute, including hearings, committee reports, and floor debates.”).
\textsuperscript{168} See Schacter, supra note 167, at 7; Matter of Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989) (Easterbrook, J.) (“Often there is so much legislative history that a court can manipulate the meaning of a law by choosing which snippets to emphasize . . . Legislative history offers willful judges an opportunity to pose questions and devise answers, with predictable divergence in results. These and related concerns have [led] to skepticism about using legislative history to find legislative intent.”).
\end{flushleft}
used as an authoritative source of a statute’s meaning.” Similarly, one Circuit Court said, “While a committee report may ordinarily be used to interpret unclear language contained in a statute, a committee report cannot serve as an independent statutory source having the force of law.” The use of legislative history by the courts has also been criticized on the basis that treating legislative history as authoritative allows such history to effectively take the weight of law without surviving the rigors of the constitutionally prescribed methods for creating law. Another criticism is that legislative history often does not represent the actual intent of the legislators who passed the law, but instead is cobbled together by legislative staffers and lobbyists wanting to shape the interpretation of the law in favor of some agenda. Specifically, even if some relevance is attributed to legislative history, it is questionable whether committee reports have even this limited value when they are largely written by committee staff.

Textualist scholars argue that it is impossible to divine the intent of a collective body such as a legislature. Even if all those legislators voting in favor

172 Int’l Brotherhood of Elec. Workers, Local Union No. 474, AFL-CIO v. N.L.R.B., 814 F.2d 697, 712 (D.C. Cir. 1987) (Edwards, J.) (emphasis original); see also Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073, 1087 (9th Cir. 2013) (McKeown, J.) cert. denied, 134 S. Ct. 2877 (2014) (“Statements in committee reports do not carry the force of law. . . . Congress's authoritative statement is the statutory text, not the legislative history.”).
173 Schacter, supra note 167, at 8.
174 Id.; see also Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 617 (1991) (Scalia, J., concurring in judgment) (stating that it is a “mistake [to] fail[] to recognize how unreliable Committee Reports are—not only as a genuine indicator of congressional intent but as a safe predictor of judicial construction. We use them when it is convenient, and ignore them when it is not.”).
175 Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 376 (2012) (“As for committee reports, they are drafted by committee staff and are not voted on (and rarely even read) by the committee members, much less by the full house. And there is little reason to believe that the members of the committee reporting the bill hold views representative of the full chamber.”); see also generally Scalia & Garner, supra note 175, at 369-90 (discussing “the false notion that committee reports and floor speeches are worthwhile aids in statutory construction”).
176 See John F. Manning, Textualism as a Nondelegation Doctrine, 97 Colum. L. Rev. 673, 677-89 (1997); Frank H. Easterbrook, Text, History, and Structure in
of a given bill are aware of all of the accompanying legislative history accompanying the bill, which is a questionable proposition in itself, the mere awareness of such history does not equate with consent.\textsuperscript{177} One former federal judge noted that while an enacted statute definitively represents the intent of the entire Congress, the legislative history can only illustrate the intent of a small portion of Congress.\textsuperscript{178} In sum, for both pragmatic and theoretical reasons, textualist scholars and judges have rejected any approach to statutory interpretation that gives authoritative weight to the legislative history of a statute.\textsuperscript{179}

III. ARGUMENT

A. THE ITC’S PATENT ADJUDICATIONS MEET THE NORMAL REQUIREMENTS FOR ISSUE PRECLUSION

As a preliminary matter, the ITC’s adjudications, including determinations of patent validity in its Section 337 Investigations, meet all of the requirements to be afforded issue preclusion in subsequent litigation.\textsuperscript{180} To result in issue preclusion, an issue of fact or law must be “actually litigated and determined by a valid and final judgment.”\textsuperscript{181} Implicit in this standard is that the issue determined in the first adjudication must be the same issue sought to be precluded in the second action.\textsuperscript{182} When determining issues of patent validity or infringement in a Section 337 Investigation, the ITC looks to the same substantive law as the district courts
do in patent litigation.\textsuperscript{183} The substantive legal and factual issues before the ITC and the district courts in patent cases are identical.\textsuperscript{184}

Another requirement for issue preclusion is that the initial determination be final.\textsuperscript{185} For purposes of issue preclusion, the determination need only be “sufficiently firm to be accorded conclusive effect.”\textsuperscript{186} An ITC investigation becomes final sixty days after a final determination is made and transmitted to the President without disapproval.\textsuperscript{187} The losing party—or any party adversely affected by the ITC’s determination—can appeal to the Federal Circuit within sixty days after the final determination.\textsuperscript{188}

None of the ordinary exceptions to the application of issue preclusion seem to apply to the application of ITC determinations to district court patent infringement claims when the substantive legal issues are identical, the claims are very closely related, the burden of proof is the same in both cases, and both adjudications can be appealed to the same court, the Federal Circuit.\textsuperscript{189} One exception that could be raised is the requirement that the procedures in the first tribunal be of sufficient quality so as to ensure that the resulting determinations are reliable.\textsuperscript{190} But if an administrative tribunal provides the essential procedural protections afforded in a court, issue preclusion should apply to its determinations in future litigation involving the same issues.\textsuperscript{191} All of the ITC’s investigations, including its Section 337 Investigations regarding intellectual property rights violations, include an opportunity for a formal hearing conducted in accordance

\textsuperscript{183} 19 U.S.C. § 1337(a)(1)(B) (2015) (defining as an unlawful activity “[t]he importation . . . of articles that . . . infringe a valid and enforceable United States patent or . . . are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent”).
\textsuperscript{184} See id.
\textsuperscript{185} See RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).
\textsuperscript{186} See id. at § 13.
\textsuperscript{188} 19 U.S.C. § 1337(c) (2015).
\textsuperscript{189} See RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982).
\textsuperscript{190} See id. (stating that issue preclusion does not apply when “[a] new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them.”).
\textsuperscript{191} Id. at § 83, cmt. b (“Where an administrative forum has the essential procedural characteristics of a court, therefore, its determinations should be accorded the same finality that is accorded the judgment of a court.”).
with the Administrative Procedure Act.\textsuperscript{192} This formal hearing means that “every party shall have the right of adequate notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing.”\textsuperscript{193} The hearing is presided over by an administrative law judge.\textsuperscript{194} The Restatement (Second) of Judgments, when discussing the necessary procedures for an administrative adjudication to be afforded issue preclusive effect, models its requirements on the those mandated by the Administrative Procedure Act for formal adjudications.\textsuperscript{195} Because the ITC’s Section 337 Investigations are governed by the APA’s rigorous procedural requirements for formal adjudications, it is clear that its procedures are of sufficient quality so as to justify affording its determinations preclusive effect.\textsuperscript{196}

Finally, adjudications of administrative tribunals carry preclusive effect if Congress gives them this power, which is presumed because Congress legislates against the background of common law doctrines.\textsuperscript{197} In the absence of a contrary indication from Congress, the ITC’s adjudication of patent issues should carry preclusive effect in subsequent patent cases in the district courts.\textsuperscript{198}

B. THE LEGISLATIVE HISTORY OF THE TRADE ACT OF 1974 IS NOT AUTHORITATIVE AND SHOULD NOT BE DETERMINATIVE

The cases denying issue preclusion to the adjudications of patent issues in ITC investigations have almost universally reached this conclusion by relying on the legislative history of the Trade Act of 1974.\textsuperscript{199} Because legislative history is not

\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} See RESTATEMENT (SECOND) OF JUDGMENTS § 83, cmt. c (1982).
\textsuperscript{196} 19 C.F.R. § 210.36 (2015); see also 5 U.S.C. §§ 554-556 (2015) (containing the APA’s procedural requirements for formal adjudications); id.
\textsuperscript{197} Astoria, 501 U.S. at 108.
\textsuperscript{198} See id.
authoritative in itself and only valuable insofar as it explains the meaning of the text of a statute, and because the committee report’s conclusions are not supported by the text, the legislative history should not be determinative when interpreting § 1337.  

A corollary of the principle that it is the text of a law that is authoritative rather than the subjective intentions of the lawmaking legislative body (assuming that one could even accurately divine the subjective intentions of every legislator) is that legislative history is only valuable insofar as it illumines the meaning of the text itself. The first reason why the committee report concludes that the Trade Act of 1974 does not allow for the ITC’s adjudications of patent issues to carry claim and issue preclusive effect is that the text of the bill (and the law as passed) stated that the remedies afforded in § 337 (now § 1337) are “in addition to any other provision of law.” The current text of § 1337 retains this same language, providing that “...the following are unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provision of law, as provided in this section.” It is not clear how the committee report, and the courts following the committee report, reach the conclusion that the ITC’s determinations are not entitled to preclusive effect based upon that language. A plain reading of that language would indicate that it simply means that the remedies available from the ITC in a Section 337 Investigation do not abrogate other remedies available under the law nor is a party forced to elect between the remedies available from the ITC and other legal remedies.

The conclusion that because the ITC remedies are “in addition to” other remedies, the ITC’s determination of patent issues does not carry preclusive effect is also inexplicable in light of the fact that all non-patent determinations are afforded such preclusive effect in subsequent litigation. For example, the Second

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201 See id.
204 See id.
205 See id.
206 See, e.g., Union Mfg. 763 F.2d at 45-46 (“[A]uthority regarding ITC patent validity determinations has no bearing on ITC unfair trade practice and trademark
Circuit in *Union Manufacturing*, concluded that the ITC’s determinations of unfair competition and trademark issues were entitled to claim preclusive effect in subsequent litigation.\textsuperscript{207} If the words “in addition to” in § 1337 meant that the determinations made in the ITC’s Section 337 Investigations carry no effect in subsequent litigation under other provisions of law, one would expect that this would be true across the board, rather than being isolated to patent claims.\textsuperscript{208} After all, § 1337 covers not only patents, but also trademarks, all types of unfair competition, semiconductor chips, and more.\textsuperscript{209}

C. **A**ffording **I**ssue Preclusive **E**ffect to the ITC’s **A**djudications of **P**atent **V**alidity **W**ould **N**ot **V**iolate the District Court’s **E**xclusive **J**urisdiction **O**ver **P**atent **S**uits

Perhaps the primary rationale for denying the ITC’s adjudications of patent issues preclusive effect is because of the U.S. district courts’ original jurisdiction over patent cases.\textsuperscript{210} The legislative history to the Trade Act of 1974 states that “decisions by the U.S. Court of Customs and Patent Appeals reviewing Commission decisions under section 337 should not serve as res judicata or collateral estoppel in matters where U.S. District Courts have original jurisdiction.”\textsuperscript{211}

The statute granting the district courts original jurisdiction over patent claims states, in relevant part:

> The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights.

\textsuperscript{...} \textsuperscript{212}

\textsuperscript{207} *Id.* at 45.
\textsuperscript{209} *Id.*
\textsuperscript{211} *Id.*
It is often said that the U.S. district courts have exclusive jurisdiction over patent cases, but a closer read of the text of the statute shows that a more accurate statement is that the district courts have original jurisdiction over patent cases, exclusive of state court jurisdiction. While this statute clearly prevents state courts from exercising jurisdiction over patent claims, it is silent on the issue of how this affects federal administrative tribunals. It is also undeniable that Congress has granted the ITC the jurisdiction to determine patent issues within the context of its Section 337 Investigations of imports. By doing so, Congress has created a system with overlapping jurisdiction over patents.

A key policy underlying the U.S. district courts retaining jurisdiction over patent cases to the exclusion of state courts is the need for a uniform system of patent law. It is presumably to the end of uniformity that the Federal Circuit Court of Appeals is given exclusive appellate jurisdiction over all patent cases. Congress has also given the Federal Circuit exclusive appellate jurisdiction over appeals from the ITC’s adjudications in Section 337 Investigations. To the extent that the need for uniformity underlies the exclusion of state court jurisdiction over patent cases, this concern is obviated with regard to the ITC’s adjudications when

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215 See id.
218 Gunn, 133 S. Ct. at 1067.
219 See 28 U.S.C. § 1295(a)(1) (2015) (“The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction . . . of an appeal from a final decision of a district court of the United States . . . in any civil action arising under, or in any civil action in which a party has asserted a compulsory counterclaim arising under, any Act of Congress relating to patents . . .”).
the same appellate court hears its appeals and those of the district courts.221 In sum, neither the text of 28 U.S.C. § 1338 nor the need for uniformity can justify the denial of giving preclusive effect to the determinations of patent issues by the ITC in subsequent litigation.222

D. THE B. & B. HARDWARE CASE SUPPORTS AFFORDING ISSUE PRECLUSION TO THE ADJUDICATIONS OF ADMINISTRATIVE AGENCIES SUCH AS THE ITC

The U.S. Supreme Court in B & B Hardware signaled its continuing support for affording issue preclusive effect to the adjudications of administrative tribunals.223 While addressing the adjudications of the TTAB rather than the ITC, the case weighs strongly in favor of treating the ITC’s determinations of patent issues similarly.224

The Court in B & B Hardware held that the differences in procedure between the TTAB and the district courts did not stand in the way of the TTAB’s determinations being afforded issue preclusive effect in the district courts.225 A key difference is that the TTAB proceedings do not feature live witnesses.226 Yet the Court said that the issue is not whether the procedures are different, but whether they are “fundamentally poor, cursory, or unfair.”227 The procedures used by the ITC in its Section 337 Investigations are undoubtedly neither poor, cursory, nor unfair.228 The hearings in such adjudications are conducted in accordance with the requirements for formal adjudications under the Administrative Procedures Act.229 While the TTAB procedures do not provide an opportunity for live testimony, the ITC’s procedural rules ensure that “every party shall have the right of adequate notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing.”230 Another important feature of the ITC’s procedure is that, like the district courts, appeals of its patent determinations are taken to the Federal Circuit; appeals of the TTAB are taken to the Federal Circuit while trademark infringement cases in the district courts are taken to the

223 See generally B&B SCOTUS, 135 S. Ct. 1293.
224 See generally id.
225 Id. at 1309.
226 Id.
227 Id.
respective circuit court for each district court. Based on this arrangement of appellate jurisdiction, one would expect even more uniformity between the ITC and the district courts in patent law than between the TTAB and the district courts in trademark cases. Under the Court’s precedent in B & B Hardware, the ITC’s procedures certainly pose no obstacle to carrying preclusive effect.

The Court in B & B Hardware noted the presumption established by prior case law that Congress intends that an agency’s determination of an issue will have preclusive effect, unless there is a “contrary indication” to rebut the presumption. While this prior case law focuses on the intention of Congress, the Court here seems to move away from looking for signs of subjective congressional intent and looks for more objective indications of intent based upon the text and structure of the relevant law. In determining that there is no “evident’ reason” why Congress would not want the TTAB’s adjudications to have preclusive effect, the Court said that, “[t]he Lanham Act's text certainly does not forbid issue preclusion. Nor does the Act's structure.” This apparent focus on the objectified intent of Congress grounded in the text and structure of the law supports a diminished emphasis on legislative history in determining whether an administrative adjudication should have preclusive effect. As discussed above, the text and structure of 19 U.S.C. § 1337 and the Trade Act of 1974 do not support the legislative history’s conclusion that the ITC’s determinations of patent issues should not have preclusive effect.

IV. CONCLUSION

The doctrine of issue preclusion has long existed so that parties will not be required to relitigate the same issue over and over once it has been litigated and conclusively decided by a tribunal with proper jurisdiction. This includes adjudications by administrative agencies. Congress has granted the ITC the authority to adjudicate issues of patent law in the context of its Section 337

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232 See id.
234 B&B SCOTUS, 135 S. Ct. at 1304-05.
235 See id.
236 Id. at 1305.
237 See id.
239 See supra notes 23-27 and accompanying text.
240 See supra notes 28-47 and accompanying text.
Investigations. All of the prerequisites for the application of issue preclusion are generally present in the ITC’s determinations of patent issues. The single piece of legislative history for the Trade Act of 1974 is insufficient to justify the legal anomaly that the ITC’s adjudications of patent issues are not afforded preclusive effect. Legislative history is not authoritative in itself, and is only valuable when it makes clear the meaning of a statute’s text; it cannot impose independent requirements or limitations outside the text of a statute. Congressional intent with regard to whether issue preclusion applies should be sought in the text of the applicable statutes. The legislative history that courts have relied upon in denying preclusive effect to the ITC’s patent determinations is simply not based in any plausible reading of the actual text of 19 U.S.C. § 1337 or any other statute. The Supreme Court’s recent decision in B & B Hardware reinforces this conclusion. The Court reinforced its precedent that adjudications by administrative agencies are to be afforded preclusive effect in subsequent litigation unless Congress intends otherwise. The Court searched for any contrary Congressional intent not in statements buried in legislative history, but simply in the text and structure of the applicable statutes.

Courts would do well to take a second look at whether denying preclusive effect to the ITC’s determinations of patent issues makes sense. Rather than treating the legislative history of the Trade Act of 1974 as being authoritative in itself, courts ought to consider whether it presents any convincing basis for its conclusion that the ITC’s determinations of patent issues are not to be given preclusive effect. When courts engage in this inquiry, they will find no convincing arguments to justify excluding patent issues from the preclusive effect ordinarily afforded to the ITC and other administrative agencies. Courts should look to whether Congress intended the ITC’s determinations of patent issues to have preclusive effect. But courts should follow the lead of the Supreme Court in B & B Hardware and look for congressional intent in the text and structure of the law, rather than in legislative history that is ungrounded in the text of the statute.

241 See supra notes 48-79 and accompanying text.
242 See supra notes 180-98 and accompanying text.
243 See supra notes 199-209 and accompanying text.
244 See id.
245 See id.
246 See supra notes 199-222 and accompanying text.
247 See supra notes 223-38 and accompanying text.
248 See id.
249 See id.
Uber: Europe’s Backseat Driver for the Sharing Economy

A. Alexander DeMasi

I. INTRODUCTION

Since Uber’s European debut in 2011, the online taxi-hailing app has encountered tremendous opposition from local taxi services which complain it unfairly competes by bypassing local licensing and safety laws. With opposition growing across Europe, a Spanish case has been referred to the European Court of Justice (“ECJ”), the European Union’s (“EU”) highest court, to determine whether the United States startup is merely a “transport activity” or “an electronic intermediation or information society service”. This determination will be crucial for Uber, as it already faces several court injunctions throughout the EU. If Uber is deemed an intermediary that acts as an information society service, it will become tougher for national regulators to limit its operations under the EU’s 2006 Services Directive (“Services Directive”) and the 2015 Digital Single Market Strategy for Europe (“Digital Strategy”) initiated by the European Commission (“EC”), the executive body of the EU. However, if the ECJ determines Uber is a transport service, it may be subject to local jurisdictional boundaries determined by the 28 member states of the EU, empowering them to determine the legality of Uber’s practice. This ECJ’s determination is crucial because it will greatly affect the growth and future of Europe’s sharing economy.

This Article will proceed in three sections. First, the Background will examine the history of Uber; its basic business structure; and Uber’s recent lawsuits in France, Belgium, Germany, Italy, Netherlands, England, and Spain. Next, this Article will advance to the Argument that the ECJ should deem Uber a digital

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1 Juris Doctor Candidate, 2017, Creighton University School of Law.


2 Id.

3 Id.


5 Id.

6 See infra notes 9-90 and accompanying text.
service and will expand on the Services Directive and the Digital Strategy. Finally, this Article will propose a regulatory solution should the ECJ deem Uber an online intermediary of information society services.

II. BACKGROUND

A. UBER BASICS

Uber is an Android, iOS, and Windows Phone app that brings together riders with drivers while utilizing a smartphone’s GPS capabilities. The San Francisco-based tech company was founded in 2009 in response to common issues with local taxis. Soon thereafter, the company rapidly expanded across the United States. By the end of 2011, Uber had entered into Paris, marking its first debut into overseas markets.

In order to use Uber, a passenger must provide the company with his or her credit card information. From there, Uber takes a cut for itself and deposits the remaining amount into the driver’s account. The booking and billing process includes the customer utilizing the “Customer App” and the driver utilizing the “Driver App”; both licensed by Uber. The trip’s fare “is not calculated and displayed on a running basis”, as with a taxi service. Uber’s fare is calculated through the use of Uber’s fare calculation model, a software-based algorithm.

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7 See infra note 101.
8 See infra note 113.
9 John Patrick Pullen, Everything You Need to Know About Uber, TIME (Nov. 4, 2014), http://time.com/3556741/uber/.
12 Id.
13 Pullen, supra note 9.
14 Id.
16 Pullen, supra note 9.
The Uber driver is required to obtain a valid driver’s license and pass a background check. Additionally, he or she must be at least 21 years old and own their vehicle with a model year of 2000 or newer. For its most basic service, an Uber driver does not need a professional taxi license.

B. Uber Development

Uber’s primary service in the United States is broken down into 5 distinct offerings: UberX, Uber BLACK, Uber SELECT, UberXL, and UberLux. UberX, is Uber’s low-cost private service option where local drivers respond and connect with passengers at a low cost via the Uber app. Next, the company launched Uber BLACK, the luxury version of UberX. Drivers of Uber BLACK are required to own newer black vehicles which require the vehicle to have black leather interior. Uber SELECT is offered in certain cities and is similar to Uber BLACK, except each vehicle is not required to have black exterior and interior features. This service costs more than UberX, but less than Uber BLACK. UberXL is a step up from UberX that offers rides for passengers who need to transport up to six people. Finally, UberLUX is Uber’s most luxurious option, utilizing vehicles such as the BMW 7-Series, Mercedes Benz S-Class, and the Tesla Model S.

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18 Id.
20 Id.
22 Id.
24 Id.
26 Id.
In 2013, the company expanded its offerings and introduced UberChopper, a one-way helicopter service. In 2014, the company launched UberPool, a carpool sharing service where passengers are able to ride and divide the cost with another passenger who happens to be on a similar route. In 2015, Uber launched UberEats, a service that connects customers with local food delivery. These are only a few of the innovations the Silicon Valley startup has released. All of which, are subject to limited availability in select cities.

C. Uber’s European Expansion

1. France

In 2011, Uber expanded into Paris with its low-cost service, UberPop. Unlike the rest of Uber’s business in Europe, UberPop is Uber’s low-cost service that connects riders with regular drivers—similar to UberX in the United States. With UberPop, the driver is an unlicensed individual and is able to bypass typical requirements for taxi drivers in Europe such as professional training, social security contributions, taxes, and professional insurance.

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33 Id.
36 Id.
charge its user a much lower rate than its local competitors.\textsuperscript{37} Additionally, Uber offers alternate services provided by professional drivers, such as those found in traditional taxi services.\textsuperscript{38}

In September 2014, France’s National Assembly passed the Thévenoud Law, which imposed numerous regulations and restrictions on Uber, taxis, and French chauffeured cars (“VTCs”).\textsuperscript{39} The law provided a penalty of two years imprisonment and a fine of €300,000 for any person or organization who engages in providing consumers unlicensed transportation.\textsuperscript{40} In November 2014, VTC associations and taxi unions sought an injunction from the Paris Commercial Court to ban UberPop.\textsuperscript{41} On January 1, 2015, the Thévenoud Law went into effect, prohibiting the use of UberPop.\textsuperscript{42} Uber quickly appealed this decision and claimed that the Thévenoud Law violated the French Constitution.\textsuperscript{43} Uber circumvented the ban by initiating legal proceedings and continued to operate while the court reached a decision.\textsuperscript{44}

In July 2015, after months of complaints, riots, and the indictment of two of Uber’s French executives, Uber suspended its UberPop service in France.\textsuperscript{45}

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\begin{footnotesize}
\textsuperscript{37} Id.
\textsuperscript{40} Conseil constitutionnel [CC] [Constitutional Court] decision No. 2015-484 QPC, Sep. 25, 2015, (Fr.).
\textsuperscript{42} Id.
\textsuperscript{45} James Cook, Uber is Suspending One of its Services in France After Taxi Drivers RIoted in the Streets, BUS. INSIDER (July 3, 2015), http://www.businessinsider.com/uber-suspends-uber-pop-in-france-2015-7?
\end{footnotesize}
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September 22, 2015, France’s Constitutional Council upheld the Thévenoud Law and dismissed Uber’s appeal.\textsuperscript{46}

2. \textit{Belgium}

In February 2014, UberPop made its first appearance in Brussels.\textsuperscript{47} Two months later, the service was banned by the Commercial Court in Brussels because UberPop drivers lacked taxi licenses.\textsuperscript{48} Incumbent taxi services led the opposition in Brussels, deeming that the company held an unfair market advantage.\textsuperscript{49} Uber continued its UberPop services in the Belgian city.\textsuperscript{50} Despite the ban, the local government allowed Uber to continue its UberPop service and worked on legislation allowing the company to continue operating.\textsuperscript{51} After months of violent protests and demonstrations by local taxi providers, a Brussels court ruled that Uber was to terminate its UberPop service on September 24, 2015.\textsuperscript{52} Following the order, Uber suspended UberPop in Brussels on October 13, 2015.\textsuperscript{53}

3. \textit{Germany}


\textsuperscript{49}Id.


\textsuperscript{51}Id.


On March 18, 2015, a German court placed a second nationwide ban on UberPop.\footnote{German Court Places Nationwide Ban on UberPOP, \textsc{Fortune} (Mar. 18, 2015, 9:30 AM), \url{http://fortune.com/2015/03/18/german-court-ban-uber/}.} The court claimed the service violated Germany’s public transportation act and ruled that drivers must hold the same permits as taxi drivers in order to operate in Germany.\footnote{Melissa Eddy, \textit{An Uber Service is Banned in Germany Again}, \textsc{N.Y. Times} (Mar. 18, 2015), \url{http://www.nytimes.com/2015/03/19/technology/germany-frankfurt-uber-ruling-taxi.html}.} Uber continued to operate its UberX and UberBlack services for several months before terminating all services in Hamburg, Frankfurt, and Dusseldorf on October 30, 2015.\footnote{Ludwig Burger, \textit{Uber Germany Retreats to Berlin, Munich}, \textsc{Reuters} (Oct. 30, 2015), \url{http://www.reuters.com/article/2015/10/30/uber-germany-cities-idUSL8N12U59Z20151030}.} Uber still operates in Munich and Berlin, however, it is struggling as it grapples with Germany’s pervasive regulatory environment.\footnote{Id.}

4. \textit{Italy}

In March 2013, Uber expanded into its first Italian city, Milan.\footnote{How UBER Charmed its 1st Italian City..., \textsc{Uber} (Mar. 8, 2013), \url{http://newsroom.uber.com/milan/2013/03/how-uber-charmed-its-1st-italian-city/}.} In April 2015, Italian taxi associations filed a complaint against UberPop, alleging that the service created “unfair competition” for traditional taxi drivers.\footnote{‘Unfair Competition’: Italian Court Places Nationwide Ban on Lowcost Uber Service, \textsc{RT} (May 26, 2015), \url{https://www.rt.com/news/262217-italy-bans-uber-competition/}.} On May 26, 2015
an Italian court held that the service violated administrative rules that regulate the Italian taxi industry, and thus, it created unfair competition against traditional taxi services. Uber still operates its UberBlack service in Milan and Rome; however, it already faces stringent regulation which requires all UberBlack vehicles to be parked in specifically marked places.

5. Netherlands

Uber expanded its business into Amsterdam in late 2012. In December 2014 Dutch officials banned UberPop, claiming it fell afoul of licensing requirements for commercial drivers. A few months later Dutch prosecutors raided Uber’s offices in Amsterdam after police caught dozens of drivers providing illegal taxi services. Following the raid, prosecutors launched a criminal investigation against the company. As of January 30, 2016, the company has continued to provide an array of services, including UberPop, throughout the Netherlands.

6. England

Uber first appeared in London, England in June 2012. Since its debut, organizations such as the Rail and Maritime Transport Union, London Cab Drivers Club, and Licensed Taxi Drivers Association have protested Uber claiming it should follow the same regulations as local taxis. A formal lawsuit was filed by industry leaders and on July 3, 2014; and the Transport for London (“TfL”), the

63 Id.
67 Id.
68 Id.
government entity responsible for English transportation regulations, allowed Uber to continue operating while the lawsuit was pending.\textsuperscript{72}

On October 16, 2015, the United Kingdom’s High Court ruled that Uber did not have to adhere to local taxi regulations.\textsuperscript{73} The Court ruled that Uber’s app does not work as a taximeter and thus does not break local law.\textsuperscript{74} Under Section 11 of the Private Hire Vehicle Act of 1998 (“Act”), only black cabs are allowed to use meters and private-hire vehicles (“PHVs”) are granted a different license.\textsuperscript{75} The Court concluded that, for the purposes of the Act, a meter “does not include a device that receives GPS signals in the course of a journey, and forwards GPS data to a server located outside of the vehicle... and sends the fare information back to the device.”\textsuperscript{76} Since Uber’s app does not constitute as a meter used in black cabs, it does not have to follow local taxi regulations, but rather, only those imposed on PHV drivers.\textsuperscript{77}

This decision marked Uber’s first major victory in Europe, as London is the company’s largest European market for business.\textsuperscript{78} TfL, however, has proposed new regulations for the PHV industry that would severely restrict online car-sharing services such as Uber.\textsuperscript{79} The agency has proposed rules such as an English-language requirement for drivers and a required five-minute wait time between initiating a


\textsuperscript{75} Id.

\textsuperscript{76} Id.

\textsuperscript{77} Id.


ride and pick up.\textsuperscript{80} If adopted, these measures will become just another obstacle to company will have to overcome in its conquest for Europe.\textsuperscript{81}

7. Spain

In April 2014, UberPop began operating in Barcelona, the company’s first Spanish city.\textsuperscript{82} Shortly after, the service expanded into Madrid, where it was subject to strong opposition.\textsuperscript{83} On December 9, 2014, a Spanish court placed a nationwide ban on Uber after a complaint was filed by taxi drivers in Madrid.\textsuperscript{84} The complaint alleged that UberPop did not conform to Spanish law and potentially resulted in unfair competition for taxi drivers.\textsuperscript{85} A few weeks later, Uber suspended its business in Spain and appealed the decision.\textsuperscript{86}

On appeal, Uber requested that the case be referred to the ECJ to determine whether Spanish taxi regulations and court decisions violate EU treaties and laws.\textsuperscript{87} On July 20, 2015, a judge in Barcelona granted Uber’s request and a decision should be reached in late 2016.\textsuperscript{88} The Court has been asked to rule on whether Uber is a “mere transport activity” or “an electronic intermediation of information society service.”\textsuperscript{89} If deemed a transport service, the company will likely be subject to stricter regulations regarding licensing, insurance, and safety.\textsuperscript{90} As an intermediary

\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{83} Id.
\textsuperscript{86} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
service, Uber would be able to enjoy certain safeguards under the Services Directive and Digital Strategy.91

D. THE SERVICES DIRECTIVE

The Services Directive was passed on December 12, 2006 and put into effect to eliminate barriers against the development of services between Member States, to strengthen European economy, and to promote sustainability.92 It is commonly referred to as the “Bolkestein Directive,” as it was drafted under the direction of the former European Commissioner for the Internal Market, Frits Bolkestein. Under this decree, Member States are called to determine whether their legal systems make access to a particular “service activity or the exercise of it” compatible with EU standards.93 The Service Directive applies to services supplied by providers within the European Union.94 It does not, however, apply to services “in the field of transport.”95 Thus, Uber’s distinction as “digital service provider”, instead of a “transportation service” by the ECJ will be crucial in determining whether Uber’s service provided falls within the scope of the Services Directive.96

E. THE DIGITAL SINGLE MARKET STRATEGY FOR EUROPE

In 2010, the EU launched Europe 2020—the ten-year growth strategy for Member States of the EU.97 As part of its initiative to boost the growth of jobs, the EU has established seven flagship initiatives for smart, sustainable, and inclusive growth across Europe.98 In efforts to foster “smart growth” across Europe, the EC initiated the Digital Single Market Strategy on May 6, 2015.99 The plan has

91 Id.
94 Directive 2006/123 at 51.
95 Id.
96 Id.
97 Louch, supra note 4.
99 Communication from the Commission to the European Parliament, the Council, the European Strategy for Europe, at 1,4, COM (2015) 100 final (May 6, 2015),
established that the “creation of a Digital Single Market” is a key priority of the EU in its conquest for growth.100 The Digital Strategy defines a Digital Single Market as one where the free movement of goods, services, persons, and capital is guaranteed through fair competition for online activities and personal data protection.101

III. ARGUMENT

The ECJ should deem Uber as an intermediation of information society service where it will be subject to the scope of the Services Directive and supported by the Digital Strategy.102 Rapid innovations in internet commerce have normalized peer-to-peer (“P2P”) transactions, proving that the sharing economy is here to stay.103 One key innovation has been the rise of transportation network companies (“TNCs”), such as Uber, that provide prearranged transportation services through online-enabled platforms to connect riders and drivers for profit through their personal vehicles.104 These TNCs serve as intermediaries—acting as a third party who connects passengers with available drivers.105

An information society service is “any service normally provided for remuneration, at a distance, by electronic means, and at the individual request of a recipient of services.”106 The words “at a distance” simply mean that the service is provided without the parties being simultaneously present.107 As such, Uber should be protected by the safeguards of the Services Directive because it receives compensation for the service it provides as an intermediary between riders and

100 Id. at 3.
101 Id.
102 See Id.
105 Katz, supra note 103, at 1080.
drivers. Under this definition, Uber’s service falls straight into the scope of what the Services Directive intends to cover.

It is likely that those in opposition of Uber, specifically the UberPop service, will contend that the service provided is a transport service; a service that is an exception listed under the Services Directive. However, this greatly overlooks the social aspect of TNCs. TNCs allow users to communicate with their drivers before and after their trip. A majority of the information shared through TNCs, allows a user to connect with their driver through social media—linking the user to information that is disclosed via these accounts. This social aspect of TNCs creates risks and benefits that regulators could not include in the traditional notion of “transport” services, and as such, TNCs are unique from the transport services described in the Services Directive.

IV. PROPOSED SOLUTION

Should the ECJ deem Uber as an online intermediary of information society services, the EU should establish a directive that specifically covers TNCs and other P2P services. While TNCs and other P2P service providers provide services that are closely analogous to traditional services, their P2P nature creates unique risks for the users, providers, and intermediaries involved. These issues concern areas of liability, disclosure, information security, civil rights, and tax to name a few. These risks do not pose an intolerable danger to users or third parties. In fact, many of these risks exist in the market for traditional services. However, because these P2P services are difficult to place into traditional schemes, they should not be afforded the same legislation as their traditional counterparts.

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109 See Euro 2020 Index, supra note 97.
110 See Euro 2020, supra at 98.
111 See Katz, supra note 103, at 1114.
112 Id.
113 Id.
114 Id. at 1069.
115 Katz, supra note 103, at 1107.
116 Id. at 1092-1107, 1114.
117 Id. at 1125.
118 Id.
Targeted Sanctions: Providing a Solution to the Issue of General Sanctions

CHRIS HOTTON*

Lead Article

I. INTRODUCTION

Russia’s annexation of Crimea in Ukraine lead to repercussions from the international community. There was a strong reaction by the E.U. and U.S. to impose economic sanctions on the Russian government and officials.¹ On March 6, 2014, U.S. President Barack Obama signed Executive Order 13660 to authorize sanctions against individuals and entities responsible for violating Ukraine’s sovereignty.² These sanctions tightened restrictions on Russian banks, blacklisted dozens of senior officials, and targeted Russia’s state energy and arms sectors.³ The focus of these targeted sanctions is on “those considered materially or financially supporting actions undermining or threatening Ukraine’s sovereignty, territorial integrity and independence.”⁴ The nature of these sanctions is coming in the form of asset freezes on both shares and property, travel bans, and restrictions on access to long-term loans.⁵ Since 2014, the U.S. and E.U. have tightened the restrictions. In 2015, it was feared that sanctions could ratchet up to include the country’s all-important fuel exports, cut off Russian banks from international transactions, and limit Russian business’s ability to engage in lucrative overseas deals.⁶ The hope behind these sanctions is that the targeted individuals will alter their actions and eventually cause the withdrawal of Russian troops and rebel support in Ukraine.

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¹ J.D. Candidate, 2016, J. Reuben Clark Law School, Brigham Young University. Special thanks to Professor Eric Jensen, J. Reuben Clark Law School, Brigham Young University, for his guidance and direction on this paper.
⁴ How Far Do EU-US Sanctions on Russia Go?, supra note 1.
⁵ Id.
⁶ Id.

these individuals continue to ignore the enforcement tactics used by the E.U. and U.S., then it could lead to stricter targeted sanctions or other forms of enforcement.

Economic sanctions play a role in restoring peace and order by imposing restrictions on those who violate international law. Boundaries and specifications need to be placed on economic sanctions to ensure that human rights violations and economic destruction are avoided. Targeted sanctions are a tool that properly defines boundaries and specifications of those who will be punished, why they will be punished, and what method will be used. They provide the most effective means of limiting human rights violations and economic catastrophes.

This paper will argue the validity of targeted sanctions by detailing the history, legality, and effects of economic sanctions and then clearly explaining what targeted sanctions are and how they can be an effective enforcement tool in international law. Section II will layout the historical background and significance of economic sanctions and how they have evolved over time. A comparison will be done of the sanctions used in Malawi, North Korea, Iraq, and Russia. In each of these cases, sanctions were used in different ways and different results ensued. Section III will layout the legality surrounding sanctions. This will include the legal background of who can enforce sanctions and the legal instruments that give those states and organizations the authority to do so. Section IV will discuss targeted sanctions in detail. This Section will outline what targeted sanctions are, how they differ from non-targeted sanctions, and how they can be used to improve the effects of international enforcement. Section V will conclude.

II. HISTORY OF ECONOMIC SANCTIONS

A. HISTORICAL FOUNDATION

Economic sanctions have been around since the Greek ages. Nations and international organizations have held sanctions against nations, entities, and individuals for violations of international law. Common forms of economic sanctions are “manipulation of taxation, imports, exports, foreign aid, access to markets, or access to financial institutions.” Sanctions can be imposed regionally, such as the U.S. and E.U.’s sanctions against Russia, or by international

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organizations such as the United Nations (“UN”) through its executive arm the Security Council. Economic sanctions are the “withdrawal of customary trade and financial relations for foreign and security policy purposes.” There is a debate amongst international scholars as to the validity and limitations of economic sanctions. There is a growing concern that the utility of sanctions is greatly outweighed by the negative impact they have on civilian populations.

Sanctions are a tool used by states and international organizations, such as the UN. The power to enforce economic sanctions, prior to the formation of the charter to the UN, was used by the League of Nations. One example is in 1925, the League of Nations imposed sanctions against Greece for involvement in a border skirmish between it and Bulgaria. There is debate as to how the skirmish began but it resulted in Greek soldiers moving into Bulgarian territory along with air artillery and air campaign bombing. This sparked the Bulgarian government to appeal to the League of Nations asking them to intervene. The League of Nations ordered the withdrawal of both nations’ troops and threatened to take military action or use economic sanctions against Greece if the order was ignored. Troops were withdrawn and the enforcement mechanisms were never used.

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9 U.N. Charter art. 39, 41 (“[T]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . to restore international peace and security. . . . The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions. . . . These may include complete or partial interruption of economic relations. . . .”).
14 Id.
15 Id.
Since 1945, the UN has imposed multiple sanctions against nations and their governing officials and continues to hold sanctions against countries. Sanctions are a formidable alternative to armed conflict because they allow the UN to maintain peace and security without having to resort to war. The UN implements sanctions through the Security Council. In order for the authorization to be proper, the Security Council can only employ enforcement measures when there is an international “threat to the peace, breach of the peace, or act of aggression.” Despite the availability of this option since 1945, the UN did not first employ this technique until 1966 when it placed sanctions on Rhodesia. Still, this was not a commonly used method of enforcement until the past twenty years.

There are examples of nations imposing economic sanctions against each other, such as the U.S. against Russia for violations in Ukraine and Greece’s sanctions against Albania for imprisoning Greek citizens. For the past several decades the United States has become one of the leaders in utilizing economic sanctions. They have imposed sanctions against countries such as, Germany, North Korea, Cuba, South Vietnam, and Cambodia.

Sanctions have become more prevalent throughout the world. Currently, there are over forty nations or regions that are under sanction. The most common types of sanctions include an embargo on arms, restrictions on admission into the country, freezing funds and economic resources, banning certain imports, exports, and services, and restricting certain products. Historically, the intent of economic sanctions is to place financial restrictions on the government of the wrongdoer. Debate continues as to the merit of sanctions-regimes and their effectiveness.

Economic sanctions impose restrictions on a nation, entity, or individual’s finances or economic status. They act as a deterrent by reprimanding inappropriate behavior. There have been times throughout history where sanctions worked and the results were as desired and there have been times when sanctions missed the

16 Id. at 107.
17 Stalls, supra note 8.
18 Id. at 133.
19 Id.
20 Taylor, supra note 7.
23 See id.
mark. Recently the success rate is declining. “Evidence collected for the third edition of Economic Sanctions Reconsidered suggests that in about one-third of cases, economic sanctions were successful in achieving their stated policy objectives.” 24 Another study shows that sanctions, from 1915-2006, were effective only thirty percent of the time. 25 Despite the lack of success, the UN and other nations continue to use general sanctions as a means of enforcement. The use of these types of sanctions has created unnecessary results.

A constant concern surrounding sanctions are the effects they can have. A. Amir Al-Anbari, the former ambassador of Iraq to the U.K., the U.S., the UN and UNESCO, states that, “[i]n reality, economic sanctions are by no means peaceful and quite often are deadlier and more destructive than military action. Economic sanctions are not as harmless as they appear at first glance; they may involve the deprivation or infringement of human rights.” 26 Al-Anbari goes further to state, “[h]orrible as it is, the use of force ... is in my view less destructive than economic sanctions.” 27 The Secretary-General of the UN stated that:

Sanctions, as is generally recognized, are a blunt instrument. They raise the ethical question of whether suffering inflicted on vulnerable groups in the target country is a legitimate means of exerting pressure on political leaders whose behaviour is unlikely to be affected by the plight of their subjects. Sanctions also always have unintended or unwanted effects. They can complicate the work of humanitarian agencies by denying them certain categories of supplies and by obliging them to go through arduous procedures to obtain the necessary exemptions. They can conflict with the development objectives of the Organization and do long-term damage to the productive capacity of the target country. They can have a severe effect on other countries that are neighbours or major economic partners of the target country. They can also defeat their own purpose by provoking a patriotic response against the international community, symbolized by the United Nations, and by

26 Stalls, supra note 8, at 118-19.
27 Id.
rallying the population behind the leaders whose behaviour the sanctions are intended to modify.\(^{28}\)

Four brief case studies of nations that underwent economic sanctions will help illustrate the effectiveness of sanctions and the role they have played historically as a tool in international law. The first case study is Malawi where sanctions were threatened because the government was inflicting human rights violations on its citizens and denying its citizens the right to democracy. The threat of sanctions proved to be a successful deterrent. The second case study is North Korea where sanctions were implemented because of nuclear arms dealing. Results show that the sanctions proved ineffective. The third case study is Iraq for arms dealing. The U.N., U.S., and Great Britain placed heavy restrictions on Iraq which lead to human rights violations and debate as to the probative value of sanctions being outweighed by potential human rights issues. The fourth is Russia, which has current sanctions in place. Russia will be used to demonstrate modern sanctions versus traditional sanctions and how the use of targeting sanctions has proven useful.

B. **MALAWI**

In 1992, the United States significantly cut aid to Malawi in an attempt to promote democratic standards and human rights.\(^ {29}\) For the first thirty years of Malawi being out of colonial rule, the country was governed by President Banda and a single party system.\(^ {30}\) Throughout the early 1990s, pressure mounted against the government to change its political system to allow for a multiparty system and to improve the human rights conditions of its citizens.\(^ {31}\) Pressure came from citizens of Malawi, the Catholic Church, world banks, and other nations.\(^ {32}\) The U.S., along with the World Bank and other Western countries, placed economic sanctions against Malawi following the death of some thirty-eight individuals in an anti-government demonstration.\(^ {33}\) Malawi was reliant on the aid and as a result the country’s GNP decreased by 6.6\%.\(^ {34}\) The sanctions were lifted in 1993 once the

\(^{28}\) Craven, *supra* note 11, at 46.
\(^{29}\) Taylor, *supra* note 7.
\(^{31}\) *Id.*
\(^{32}\) *Id.*
\(^{33}\) *Id.*
\(^{34}\) Taylor, *supra* note 7.
new government was elected and put into power. A referendum was held and multi-party democracy was introduced.

This is an example of how targeted sanctions can be effective in achieving their desired result. Human rights were being violated by the governing party and so economic sanctions were positioned appropriately. Targeted sanctions were used against the forms of aid that the country relied upon, causing positive change. Sanctions that targeted specific government individuals and financial aid that the country was reliant on rather than general sanctions aimed at impairing all aid prevented the people of Malawi from being denied their human rights. The country was hurt economically and so changes were made.

C. NORTH KOREA

In 1992, the U.S. placed sanctions on “North Korea’s Lyongaksan Machineries and Equipment Export Corporation and Changgwang Sinyong Corporation for missile proliferation activities.” These sanctions grew to include missile sanctions against the same entities, but over time, North Korea negotiated with U.S. and UN officials to try and alleviate the sanctions by allowing on-site inspections and demonstrating the removal of nuclear material from the country. Throughout the late 1990s, the sanctions continued to expand as North Korea continued to engage in what appeared to be nuclear-missile programs. Sanctions were temporarily lifted in June 2000 for what appeared to be a time of cooperation, but were quickly re-imposed only a year later. During the 2000s and up to present day, the U.S., UN, and other nations have continued to impose and expand economic sanctions against North Korea.

35 Carpenter, supra note 30.
36 Id.
37 Id.
39 Id.
40 Id.
41 Id.
In 2008, the United States imposed sanctions on North Korea through its Office of Foreign Assets Control. This came as a response to the “threat to the national security and foreign policy of the United States constituted by the current existence and risk of the proliferation of weapons usable fissile material on the Korean Peninsula.” Sanctions initially included terminating the application of authorities under the Trading with the Enemy Act (“TWEA”), but have since been expanded to include blocking of property and interests in property, restricting imports and exports, and terminating any nuclear-arms dealing. The targeted sanctions focused on the government as well as specific persons with the purpose to eliminate North Korea’s nuclear arm and to serve as an effective punishment for violating international law. Commentators allege that hidden within these sanctions is an attempt by the U.S. “to destabilize and manipulate the current communist regime.” This hidden agenda has been a key factor in undermining the successfulness of the targeted sanctions because there needs to be a clear purpose of the sanctions and that purpose needs to be understood when the targeted sanctions are imposed.

The successfulness of the sanctions has come under scrutiny. One commentator stated that the “sanctions have proved largely ineffective in stopping the DPRK [Democratic People’s Republic of Korea (i.e. the North Korean government)] from developing an advanced rocketry program and the potential for nuclear weapons.” Several authors agree that North Korea has continued to develop its military capabilities and has consistently failed to “cooperate with the international community or adhere to its commitments.” Sanctions against North Korea have damaged their nuclear weapons development but have done little to harm the current regime. Targeted sanctions that clearly stated both objectives—to

43 Id.
44 Id.
45 Chronology of U.S.-North Korean Nuclear and Missile Diplomacy, ARMS CONTROL ASSOCIATION, (May 2015), https://www.armscontrol.org/factsheets/dprkchron. The TWEA is the Trading with the Enemy Act. It was enacted in 1917 and then was terminated with respect to North Korea in 2008 when the President of the United States signed Proclamation 8271. The TWEA was designed to restrict trade with countries that were considered hostile to the United States.
46 Id.
48 Id.
49 Id. at 254.
bring down North Koreas nuclear-proliferation and regime—could have improved results. Also, not enough was done to monitor the North Korean government during the sanctions-regime.

D. IRAQ

The sanctions against Iraq demonstrate the negative impact that non-targeted sanctions can have on a nation and its people. In 1990, Iraq invaded Kuwait and in response to that invasion, the U.S., the UN, and other nations imposed sanctions.\(^{50}\) The emphasis on the sanctions imposed by the UN Security Council was “sharply restricting all foreign trade.”\(^{51}\) The broad generality of UN Security Council’s definition of what constituted sanctions caused the sanctions to fail to meet their desired results. The UN Security Council had hoped that these sanctions would impact the then-Iraqi led government of Saddam Hussein, but instead it caused a trickle-down effect that assisted the government in taking money and supplies from the people, leaving the people with nothing.\(^{52}\) Initially, the sanctions were seen as being slow to produce the desired results and so the UN moved to the use of “all necessary means” in their sanctions to end Iraq’s occupation of Kuwait.\(^{53}\) According to a UN Roundtable, the purpose behind the sanctions was three-fold: 1) to coerce Iraq to meet the requirements in United Nations Security Council Resolution 687, 2) to prevent Iraq from becoming a military significant actor in the region, and 3) to bring about the fall of Saddam Hussein.\(^{54}\) Unfortunately, there were unintended consequences. During part of the sanctions era, the UN humanitarian coordinator in Iraq was quoted as saying, “We are in the process of


\(^{52}\) Id.


\(^{54}\) Id. at 7; see also S.C. Res. 687 (Apr. 8, 1991). Resolution 687 came after Iraq lost the Gulf War. It set the compliance terms for Iraq. The terms included respecting the sovereignty of Kuwait, recognizing the boundary line between Iraq and Kuwait, and a reminder to remove and destroy all biological and chemical weapons that they have in their possession.
destroying an entire society. It is as simple and terrifying as that.\footnote{55} One of the highly debated results of the sanctions is the death of approximately 500,000 Iraqi children, with some experts claiming that the number is unknown and others claiming that the number is not high enough.\footnote{56} There is debate from the other side of the issue, with individuals claiming that the sanctions were still necessary and had to be enforced.\footnote{57} Otherwise the only other option would have been war. Richard Holbrooke, the U.S. Ambassador to the UN under President Clinton stated, “The concept of sanctions is not just still valid; it's necessary. What else fills in the gap between pounding your breast and indulging in empty rhetoric and going to war besides economic sanctions?\footnote{58} But these opinions cannot overcome the role that sanctions played in destroying a country that was once the envy of the entire Middle-eastern region. In the 1980’s, Iraq was known for its “investment in health, education and physical infrastructure.”\footnote{59} Since the sanctions, the country has collapsed with the effects being the unnecessary deaths of thousands of children, a decimated economy, and restricted access to food and water.\footnote{60}

Due to the nature of the sanctions, Iraq was no longer free to import anything not expressly permitted by the UN and companies were forbidden from doing business with Iraq.\footnote{61} Restricting imports was a genuine issue because prior to 1990, Iraq had imported nearly 70% of its food, medicine, and chemicals for agriculture.\footnote{62} Iraq was known for its wealth that came as a result of its oil reserves but the United Nations did not understand that Iraq could not feed its citizens without the help of international trade.\footnote{63}

Some believe that the sanctions against Iraq generated positive results. One such consequence was the dismantling of the Iraq’s nuclear ambitions and potential ownership of “Weapons of Mass Destruction” (WMD). As a result of “the sanctions

\footnote{55} Reiff, supra note 51.  
\footnote{56} Id.; see also Sheldon Richman, Iraqi Sanctions: Were They Worth It?, GLOBAL POL’Y F., (Jan. 2004), https://www.globalpolicy.org/component/content/article/170/41952.html.  
\footnote{57} Richman, supra note 56.  
\footnote{58} Reiff, supra note 51.  
\footnote{59} Id.  
\footnote{60} Id.  
\footnote{62} Reiff, supra note 51.  
\footnote{63} See generally Hersey, supra note 61.
imposed on Iraq, which were enforced by NATO and largely by the United States, Iraq was never able to acquire inputs to any of its WMD programs.” Even critics of the sanctions regime could tell that the sanctions worked to prevent Saddam Hussein from building WMDs. It is debated that “without the sanctions the American victory in the second gulf war might very well not have been as smooth.” Sanctions led to the crippling Iraq’s government and military.

During the sanctions regime, “civilians faced unemployment, malnourishment, and disease while the very wealthy, those politically connected to the regime, and the political leadership itself . . . remained largely immune to the shortages of food and consumer goods.” Many of these effects came as a result of Saddam Hussein responding to the sanctions, rather than coming directly from the sanctions. The difficulty in all of this was finding a balance and choosing between two evils because if not for sanctions, the region in Iraq could have gone into a state of war.

Throughout the 1990s there was common dissent even among the members of the UN Security Council in regards to the sanctions; the U.S. and Great Britain wanted to hold fast to the sanctions whereas Russia and France wanted them eased or lifted. Members of the UN General Assembly began to feel that sanctions were wantonly brutal because they harmed the citizens without weakening Saddam Hussein’s power and there was concern from these countries that Iraqi civilians were suffering more than Saddam Hussein. In response to these concerns, the UN came out with a program titled oil-for-food, which would allow Saddam Hussein to sell oil for money and with that money would be permitted to buy essential humanitarian supplies for his citizens. The concern with this program was that

65 Id.
66 Reiff, supra note 51.
67 Hersey, supra note 61.
68 Reiff, supra note 51.
69 Id.
70 Id.
71 Id. (“The premise of the oil-for-food program, which was administered by the United Nations, was that Saddam Hussein would be allowed to sell a certain amount of oil. With the proceeds, Hussein's government would be permitted to buy essential humanitarian supplies, including food, medicine and materials needed to keep Iraq's crumbling infrastructure running.”).
there were several items that could be purchased for humanitarian aid but could quickly be used for military aid, such as chemical fertilizer or shoes. Saddam Hussein took advantage of the oil-for-food program by beginning a food rationing program whereby he would store food provided by foreign aid in warehouses and would ration it out to citizens creating dependence.

There has been “considerable negative humanitarian effects” from Saddam’s regime’s response to the sanctions. Some of the effects were unpredictable such as the issues with the country’s public system. The country’s health care system was geared towards taking care of the elite and was not ready for a nutritional shortage to the entire population. Food distribution was also a major concern because the Hussein regime was using food distribution as a means to punish or rewards citizens and so the areas of the country where the regime had less control generally ate better.

There is debate as to whether or not the sanctions played a role in debilitating the quality of life of the Iraqi citizens. The sanctions were so general and crippling that the country was left with very little options. Targeted sanctions would have helped maintain human rights in Iraq. Sanctions could have been specifically geared towards the Iraqi military and the creation of WMDs. The UN Security Council’s main concern was Iraq’s nuclear-proliferation. Therefore, sanctions could have been strategically focused to limit Saddam Hussein’s access to resources related to their development. There was no reason for food and medicine imports to be limited. In the end, sanctions in Iraq proved to be ineffective.

E. RUSSIA

Russia is currently under a sanction regime from the E.U. and U.S. for its invasion in Crimea. These sanctions have been mentioned previously in this paper, but it is important to compare the current sanctions against Russia with the past sanctions in Malawi, North Korea, and Iraq. The biggest difference between

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72 Id.
73 Richman, supra note 56; see also O’Connell, supra note 64. O’Connell discusses that it was Saddam’s decision to warehouse the purchases in an attempt to create an impression in the media that the sanctions were forcing the Iraqi people to starve when in fact he had warehouses full of food and medicine.
74 Wallenstein et al., supra note 53, at 18.
75 Id.
76 Id.
77 Supra notes 1-6 and accompanying text.
the modern sanctions against Russia and the past sanctions is that the modern ones are more targeted. They focus on the individuals and government leaders involved rather than on general punishments. The sanctions against Russia target the state’s financial, energy, and arms sectors and included the blacklisting of a dozen Russian officials.  

Examples include: Bank Rossiya, a major bank in Russia, including its biggest shareholders, Yuri Kovalchuk and Nikolai Shamalov; three major oil firms, Rosneft, Transneft, and Gazprom Neft; and several large Russian businesses and banks, including Sberbank a defense conglomerate. The expected results of these sanctions are intended to damage the Russian economy and prevent them from building their military threat to Ukraine.

The modern sanctions in Russia are targeted and specific. They are created in a way that it would be hard for the individuals under sanction to pass along the restrictions of the sanctions to others. This strategy differs from the sanctions placed against countries such as Iraq where the sanctions were general and caused a large-scale trickle-down effect. The goal for the targeted sanctions in Russia is that the government and individuals will be deterred from future negative decisions and that the citizens of Russia will not feel the effects. Unfortunately, in response to the E.U. and U.S. sanctions on Russia, the Russian government has put an embargo on food imports from Western countries.

Sanctions against Russia represent a more “modern” form as they are targeted on the individuals, businesses, and government leaders. There is less effect on the human rights of civilians. Russia’s embargo on food exports was created by the Russian government in response to the sanctions, not by the sanctions themselves. Targeted sanctions provide a better mechanism for international law enforcement because the specific sanctions are to designed to affect only the individual or organization violating the law.

III. LEGALITY OF SANCTIONS

The laws surrounding economic sanctions are predominantly governed by executive and legislative branches of nations or international governmental organization (“IGO”) treaties such as the UN Charter. The judicial branch has very little reach in the international arena in regards to the imposition of economic sanctions. International courts have played almost no role in the imposition of

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78 How Far do EU-US Sanctions on Russia Go?, supra note 1.
79 Id.
80 Id.
economic sanctions. Even the enforcement of when sanctions go too far is handled by states and international organizations.

The UN Security Council’s authority to impose sanctions is provided in Articles 39 and 41 of the UN Charter. There is debate as to the limitations of these articles because there is no stated legal constraint stated within them. Article 39 grants the UN Security Council the authority to determine the existence of “any threat” and then “make recommendations” or “decide what measures shall be taken” to “restore international peace and security.” 81 Article 41 grants the UN Security Council authority to “decide what measures . . . are to be employed” and that these measures may include “complete or partial interruption of economic relations.” 82 These articles are the authoritative power governing the application of economic sanctions. There is no limitation or exception given to these powers within these articles.

There are however two legal means restricting the members of the UN Security Council in regards to economic sanctions. The first is veto power. In Article 27 of the UN Charter it states that “decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members” and “decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.” 83 The issue with this was found in the sanctions against Iraq. The U.S. and Great Britain wanted to maintain sanctions and so they were able to veto the votes of the other members of the Security Council. One exception is that sanctions can be lifted upon an expiration date. If the sanctions have an expiration, then it would take an affirmative vote from nine of the fifteen members to reinstate them and no veto from a permanent member. If the sanctions do not have an expiration, then it takes an affirmative vote by nine members and no veto from a permanent member to remove them. 84

Countries derive their authority to impose sanctions from their own domestic laws and their agreement to international treaties. This can run counter to the idea that a country’s own laws are meant to govern within their own borders

81 U.N. Charter art. 39.
82 Id. at 41.
83 Id. at 27.
84 Id. (The UN Security Council has fifteen members, five permanent members, and ten non-permanent members. The five permanent members are the United States, the United Kingdom, China, France, and the Russian Federation.).
and are not to be applied extraterritorially. The effects of sanctions imposed by
other nations allow them to reach within another state’s national borders and thus
“[t]he objectives of sanctions regimes are antithetical to concepts of sovereignty in
international law.” For example, in 1995 the U.S. placed trade sanctions against
Iran and undermined its sovereignty. The sanctions reached a point where third-
parties could “no longer maintain Iranian business relations without fear of penalty
or losing the United States as a trade partner.” This level of power gave the U.S.
the ability to interfere with the business relation of Iran and third-party states.

International law places legal constraints on the ability of a nation or an IGO
to impose sanctions. Human rights act as a natural barrier to the full-on effects that
sanctions can have. Since WWII there have been three major legislative milestones
in human rights. The first came in 1948 when the Universal Declaration of Human
Rights (“UDHR”) was created by the UN General Assembly and was meant to
recognize “the inherent dignity and of the equal and inalienable rights of all
members of the human family.” The UDHR states that “human rights should be
protected by the rule of law.” The Declaration outlines almost thirty human rights
and further states that these rights represent the highest level of achievement. The
UDHR demonstrates a standard that in many ways is impractical. Some of the
human rights—such as the right to social security and the right to rest and paid
holidays—may not be economically achievable by the nation state. On the other
hand, some rights—such as life and liberty—are standards that each nation can and
should meet.

In 1966, two more documents on human rights were created and then
entered into force in 1976: the International Covenant on Civil and Political Rights
(“ICCPR”) and the International Covenant on Economic, Social, and Cultural
Rights (“ICESCR”). The ICCPR emphasizes that certain conditions need to be
present in order for human beings to enjoy their civil, political, economic, social,

85 Hersey, supra note 61, at 1248 (discussing that the U.S. presumes federal
legislation to be bounded by the territory of the U.S. and that the need for a strong
nation state as an international actor is apparent).
86 Id. at 1247.
87 Judson Bradley, The Legality of Executive Orders 13628 and 13645: A Bipartite
88 Id.
90 Id.
91 See id.
and cultural rights.\textsuperscript{92} The ICCPR also affirms that States are under an obligation to “promote universal respect for, and observance of, human rights and freedoms.”\textsuperscript{93} The Covenant then outlines several human rights that nations should ensure to pursue for their citizens. The ICESCR is more aspirational than the UDHR and ICCPR. These documents demonstrate a fundamental understanding internationally that every human being is entitled to certain rights and that these rights are to be safeguarded by a nation’s governing body.\textsuperscript{94}

The legal validity of economic sanctions is traditionally governed by a country’s domestic laws, international treaties to which it is a signatory, or international organizations to which it belongs. Articles 39 and 41 of the UN Charter give the UN its authority to impose sanctions. The laws surrounding economic sanctions also create constraints, such as human rights and \textit{jus cogens}. Documents such as the UDHR, ICCPR, and the ICESCR create a standard for human rights that is fundamentally understood by most nations. The doctrine of \textit{jus cogens} demands that there are certain human rights that cannot be violated by any other act or treaty. Human rights and \textit{jus cogens} violations create a barrier that sanctions cannot cross, regardless of the acts committed by the individuals or governments.

\section*{IV. TARGETED SANCTIONS}

Targeted sanctions “are measures that are designed and implemented in such a way as to affect only those parties that are held responsible for wrongful, unacceptable, illegal, or reprehensible behavior—meaning individuals, legal entities, and other nonstate actors.”\textsuperscript{95} It is theorized that they will “substantially reduce the amount of collateral damage incidental to a general sanctions regime.”\textsuperscript{96} Commentators have argued that properly targeting sanctions can eliminate civilian suffering and focus the pressure on the government, and thereby reduce human

\textsuperscript{93} Id.
\textsuperscript{95} Hersey, \textit{supra} note 61 at 1241.
\textsuperscript{96} Id. at 1242.
rights violations. These types of sanctions allow the sanctioning party the ability to focus on the targeted individual or government. The targeting state uses specific measures and guidelines to reprimand the individuals responsible for committing the wrongful acts. The scope of the sanctions can be narrowed and the intensity increased. One example, previously mentioned in this paper, is the use of targeted sanctions against Russia. These sanctions zeroed in on individuals and entities that violated the law.

The use of targeted sanctions by the UN and nations has increased over the last twenty-two years. They have been used to address a number of issues. The design of targeted sanctions differs greatly from general or comprehensive sanctions. This is done by “focusing measures on leaders, decision makers, and their principal supporters, rather than on the general population or by targeting a single sector, rather than an entire economy.” A study done by the Graduate Institute Geneva, Targeted Sanctions Consortium found that targeted sanctions have “three principal and fundamentally different purposes: to coerce a change in target’s behavior; to constrain a target from engaging in a proscribed activity; or to signal and/or stigmatize a target or others about the violation of an international norm.” They also found that targeted sanctions can be categorized into six

98 Hersey, supra note 61, at 1259-60.
99 Supra Section II(E).
101 Id. at 9 (noting that these issues include counter terrorism, prevent conflict, consolidate peace agreements, protect civilians, support democracy, improve resource governance, and limit the proliferation of weapons of mass destruction).
102 Id.
103 Id. at 12.
different groups: individual/entity, diplomatic, arms embargoes, commodity, transportation, and core economic sectors.  

Targeted sanctions continue to be the most used enforcement mechanism by the UN and nations around the world. Arms embargos, a form of targeted sanctions, are the most common type of sanctions that the UN has used in the last twenty-two years. They have been used to resolve a wide variety of international law violations from a high number of countries. The most common violations are issues with armed conflict, terrorism, and restoring a government. Targeted sanctions have also been used to eliminate a nation’s nuclear proliferation activities, such as the case with Iran and the Democratic People’s Republic of Korea. Other instances include: supporting a judicial process in Lebanon, providing support for better natural resources in Liberia, and protecting civilians in Libya. Chart 1 shows the findings at the Graduate Institute Geneva on the frequency of objectives for targeted sanctions.

<table>
<thead>
<tr>
<th>Objectives</th>
<th>Present</th>
<th></th>
<th>Main Objective</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Frequency</td>
<td>Percent</td>
<td>Frequency</td>
<td>Percent</td>
</tr>
<tr>
<td>Armed Conflict</td>
<td>42</td>
<td>67.7</td>
<td>37</td>
<td>59.7</td>
</tr>
<tr>
<td>Human Rights</td>
<td>21</td>
<td>33.9</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Democracy Support</td>
<td>17</td>
<td>27.4</td>
<td>6</td>
<td>9.7</td>
</tr>
<tr>
<td>Counter-terrorism</td>
<td>16</td>
<td>25.8</td>
<td>9</td>
<td>14.5</td>
</tr>
<tr>
<td>Good governance</td>
<td>8</td>
<td>12.9</td>
<td>1</td>
<td>1.6</td>
</tr>
</tbody>
</table>

104 See id. at 15-17 (explaining that sanctions are categorized as: individual (most likely asset freezes or travel bans); diplomatic (limitations on government officials such as travel and suspensions); arms embargoes (most common, suspension of international arms or proliferation-related dual-use goods); commodity (natural resources); transportation (prohibition of carriers); or economic sectors (typically finance or oil embargoes)).
105 See generally id.
106 Id.
107 Id. at 14.
108 Id.
In order to be effective, targeted sanctions should possess certain characteristics. They need to be narrowly defined with a detailed scope and provide for constant monitoring by a third party. Narrow definition allows for the targeting nation to focus its scope and increase its intensity. A venue is created whereby the sanctions are designed to “affect only those parties that are held responsible for wrongful, illegal, or reprehensible behavior.” A narrow definition in a targeted sanction would have a focus on individual accountability and would be designed to impact the government leader, political elite, or “segments of the society believed to be responsible for the objectionable behavior.” A narrow definition allows the enforcement to be carried out against a particular individual while at the same time makes it difficult for that punishment to be passed on to civilians.

Sanctions need to have constant monitoring by a third party in order to be effective. A lack of monitoring will undermine the effectiveness of the sanctions, as was seen by the arms embargo in Angola. It needs to be a third party monitoring in order to create a more likely scenario of fairness and justice. The objectives need to be clearly outlined to the third party so that they understand the purpose and mission behind the enforcement and the consequences for failure to comply.

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109 Id.
110 Hersey, supra note 61, at 1242.
111 Id. at 1241.
113 Id. at 13.
Implementing the appropriate sanctions is another important consideration. When creating sanctions, the targeting country needs to consider factors such as: the types of sanctions that would be most effective in achieving the desired result, the infrastructure that is in place in the targeted nation, potential human rights violations that could result, the length of time that the sanctions should remain in place, and the third party nations that will be affected by the sanctions. Implementation should be done at the targeting nation’s level because “it cannot be assured that self-interested states will implement the proper procedures and regulate themselves.” The implementation of the proper sanctions is important the sanctions overall effectiveness because the implementation follows naturally from the definition and scope. Once the definition and scope are understood, and proper monitoring has been put into place, then implementing the sanctions is the final step.

A counter-argument to targeted sanctions is that the “procedures associated with targeted sanctions are inadequate.” The laws surrounding targeted sanctions lack formal regulation that is governed by a legitimate international body. Sanctions need to become an issue of international law rather than an expression of extraterritoriality. The imposition of international law and regulation would create stability and enhance the safeguarding of human rights. This would also overcome the issue of sovereignty as the issue of sanctions would then turn on mutually-agreed upon international law between the two nations. Another option would be to grant the UN Security Council authority to develop a regulatory scheme. The scheme would be used to outline the targeted sanctions and prevent human rights violations against civilians.

Targeted sanctions will increase the effectiveness of sanctions as an enforcement mechanism in international law. A narrow definition and well-defined scope, coupled with proper monitoring and implementation, will generate a mechanism that is more equipped to restore order and peace. Targeting the wrongdoer with restrictions pertinent to them will also decrease the frequency of human rights violations and unnecessary economic downturn.

V. CONCLUSION

114 See Thomas Biersteker et al., supra note 100, at 33-39.
115 Hersey, supra note 61, at 1262.
116 Reiff, supra note 51, at 1241.
117 Id. at 1259.
118 Id.
119 Id. at 1260.
Economic sanctions are a common enforcement mechanism in international law. They place restrictions on the trade, finances, industry, military, and economy of targeted nations and can be imposed on governments, entities, or individuals. Historically, sanctions have been used in many countries with mixed results. Currently there are sanctions imposed on several nations, including North Korea and Russia. Legally, IGOs and nations are entitled to impose sanctions. This authority is granted to them via domestic laws and international treaties. Human rights and jus cogens act as limitations on the placing of economic sanctions. Many times, these limitations are violated during a sanctions regime.

Targeted sanctions are designed to increase effectiveness and decrease human rights violations. This is done by designing the sanctions with a narrow definition and detailed scope and constant monitoring. This better ensures that the wrongdoer is restricted in a specific way to restore order and peace and deter future improper actions. Targeted sanctions need to be properly implemented with time limitations and done by a third party. The use of targeting provides an effective means of ensuring that human rights of civilians are not violated and the desired results of the sanctions are achieved.
Schengen Acquis: The Development of the Right to Free Movement of Persons within the European Union Legal Framework and the Necessary Reforms to Adapt to Evolving Security Threats in the Region

Kaela McCabe

Student Article

I. INTRODUCTION

The creation of the Schengen area marked one of the grandest and most tangible achievements of the European Community. The ability to control one’s national borders—one of the most important aspects of sovereignty—had been a cornerstone of politics and a basis for wars in Europe. With the signing of the Schengen Agreement in 1985, the initial signatories abolished checks at the internal borders and created a single external border. The signing of this agreement constituted a significant step towards greater unity through freedom of movement for persons. As the area steadily grew to include most of the European Union, EU citizens and non-EU citizens alike have enjoyed traveling throughout the zone without enduring customs or passport controls.

The lack of internal border checks, however, creates a threat to national security for the Member States within the Schengen area. The Schengen acquis—the collection of rules and regulations for the Schengen area—contemplates the tendency of Member States to resort to internal border protection and allows for Member States to take action against threats to national security. The European Commission has outlined ways this can be accomplished unilaterally, through Member States cooperation, or with the aid of EU security agencies.

* Juris Doctor Candidate, 2016, Creighton University School of Law.
1 See infra notes 17-109 and accompanying text.
2 See id.
3 See id.
4 See id. (discussing the history and development of the Schengen Agreement).
5 See id.
6 See infra notes 110-225 and accompanying text.
7 See id.
8 See id.
The recent influx of refugees from Syria and other Middle Eastern countries is testing the limits of the security measures pursuant to the Schengen Agreement. Since the beginning of 2015, hundreds of thousands of refugees have been entering the Schengen area through its external border and traveling throughout the area to reach countries with the best social system to support them. In response, several Schengen area countries have reinstated border controls. These actions have shown the flexibility of the Schengen acquis in allowing Member States to maintain protection of internal borders within the Schengen area but also cast doubt on the effectiveness of the Schengen acquis in abolishing border checks within the EU.

As distrust and frustration builds among Member States, the question becomes whether the Schengen Agreement will continue to be enforced or whether this crisis has put in motion a preference by states to unilaterally protect their borders for national security and economic reasons. First, this paper will address the history and development of the Schengen Agreement. Next, it will explore the built-in flexibility of the Schengen Agreement, including the right to reinstate borders and to perform police checks near borders. Finally, it will assess what changes need to be made to the Schengen Agreement in the face of the current refugee crisis so that it will remain effective in the future as security risks to the European Union evolve.

II. OVERVIEW OF THE SCHENGEN AGREEMENT

A. HISTORY OF THE SCHENGEN AGREEMENT

The Schengen Agreement of 1985 created the Schengen area in Europe which is defined as “a territory where the free movement of persons is guaranteed.” The European countries that signed the Schengen Agreement agreed

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9 See infra notes 226-68 and accompanying text.
10 See id. (discussing the challenges to the Schengen Agreement posed by the refugee crisis).
11 See id.
12 See id.
13 See infra notes 269-82 and accompanying text.
14 See infra notes 17-109 and accompanying text.
15 See infra notes 110-225 and accompanying text.
16 See infra notes 269-82 and accompanying text.
to abolish “all internal borders in lieu of a single external border.”

Due to its success among original signatories, the Schengen Agreement was incorporated into the European Union legal framework by the Treaty of Amsterdam on May 1, 1999. The Schengen regulation has continued to be developed through EU legislation, including the Schengen Convention and the Schengen Borders Code.

Similar to the start of the European Union, which was a result of the European Coal and Steel Community between Germany and France, the foundation for the Schengen Agreement came out of a bilateral agreement between the German and French leaders. Throughout the early 1980’s, the idea of creating a passport-free zone in the European Community was met with resistance. Denmark, Greece, Ireland and the UK resisted the idea of free movement of persons. Some nations preferred to have a system that only applied to European Union citizens while keeping internal border controls for non-EU citizens. Other nations envisioned free movement for everyone. This debate ultimately deadlocked the Council.

In response to the lack of action at the EC level, the former French president Francois Mitterand and the former German chancellor Helmut Kohl signed the Saarbrücken Agreement removing border checks between the two countries in 1984. The following year, Germany and France signed the Schengen Agreement of 1985 with Belgium, the Netherlands, and Luxembourg. The agreement was named Schengen after the town in the Luxembourg where it was signed.

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18 Id.
19 Id.
23 Id.
24 The Schengen Area and Cooperation, supra note 17.
25 Id.
26 Krotz & Schild, supra note 22.
27 Fischer, supra note 21.
28 Id.
29 The Schengen Area and Cooperation, supra note 17.
the agreement had been signed, it would not be enforceable until the signatories had agreed to the implementation of the agreement.\textsuperscript{30}

In 1990, the Convention Implementing the Schengen Agreement was drafted to supplement the Schengen Agreement of 1985 and set forth the “arrangements and safeguards for implementing the freedom of movement.”\textsuperscript{31} The Convention laid out the mechanisms for implementing the uniform Schengen visa, determining in which state an asylum application would be submitted, and outlining measures to address cross-border crime, police cooperation, and judicial cooperation.\textsuperscript{32} The Schengen Agreement and these associated regulations became known as the “Schengen acquis.”\textsuperscript{33}

Once the necessary technical and legal prerequisites of the Schengen acquis were put into place in each of the signatory Member States, the Convention took effect in 1995.\textsuperscript{34} The border-free Schengen area gradually created tangible benefits for the members including crime-related information exchange and travel free of border controls.\textsuperscript{35} This led to a “process of both deepening and widening of the Schengen cooperation.”\textsuperscript{36} As the benefits of the Schengen area became apparent to other countries, there was a steady expansion of the area to include more EU Member and non-Member States.\textsuperscript{37} There was also increased cooperation and joint legislation on more Schengen-related issues among Member States.\textsuperscript{38} The deepening and widening of Schengen cooperation gradually led to its inclusion into the European Union legal framework.\textsuperscript{39}

\textsuperscript{31} European Commission Press Release MEMO/10/249, The European Union celebrates the 25th anniversary of the Schengen Area (June 11, 2010).
\textsuperscript{32} \textit{The Schengen Agreement}, GERMAN FEDERAL FOREIGN OFFICE (Dec. 12, 2013), http://www.auswaertiges-amt.de/EN/EinreiseUndAufenthalt/Schengen_node.html.
\textsuperscript{33} Id.
\textsuperscript{34} \textit{The Schengen Area and Cooperation}, supra note 17.
\textsuperscript{36} Krotz & Schild, supra note 22, at 171.
\textsuperscript{37} Id.
\textsuperscript{38} \textit{The Schengen Area and Cooperation}, supra note 17.
\textsuperscript{39} Id.; Fischer, supra note 21, at 38.
B. Schengen Agreement Integrated into European Union Legal Framework

The Schengen Agreement was absorbed into European Community law with the Treaty of Amsterdam in 1999.\(^\text{40}\) Integration of the Schengen acquis into the Treaty of Amsterdam empowered the Council to implement and build upon the policies of the Schengen Agreement and provided the Court of Justice of the European Community ("ECJ") jurisdiction to enforce it.\(^\text{31}\) However, the Treaty of Amsterdam explicitly stated that the jurisdiction of the ECJ did not extend to matters of internal security related to the Schengen Convention.\(^\text{42}\)

The Treaty of Amsterdam emphasized that the integration of the Schengen Agreement would lead to “enhancing European integration” and “enabling the European Union to develop more rapidly into an area of freedom, security and justice.”\(^\text{43}\) The Treaty also made admission for candidate Member States into the European Union dependent upon acceptance of the Schengen acquis.\(^\text{44}\) Article 8 of the Treaty stated that the Schengen acquis “must be accepted in full by all States candidates for admission.”\(^\text{45}\) Despite this hardline statement, the Treaty included several exceptions: (1) Ireland and the United Kingdom; (2) Denmark; and (3) Non-EU Member States.\(^\text{46}\)

1. The Special Arrangement of Ireland and the United Kingdom

Ireland and the United Kingdom did not agree to the Schengen acquis and were thus not bound by the provision in the Treaty of Amsterdam.\(^\text{47}\) However, the Treaty kept the door open to their admission, stating in Article 4 that “Ireland and the United Kingdom of Great Britain . . . may at any time request to take part in some or all of the provisions of this acquis.”\(^\text{48}\) Unlike other states, this provision

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\(^{40}\) See Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. (C 340) 01 [hereinafter Treaty of Amsterdam].

\(^{41}\) Id. at 19.


\(^{43}\) Treaty of Amsterdam, Protocol B (Protocol integrating the Schengen acquis into the framework of the European Union).

\(^{44}\) Id.

\(^{45}\) Id.

\(^{46}\) Id.

\(^{47}\) Id. at 93.

\(^{48}\) Id.
allows Ireland and the UK to take part in only some of the provisions without accepting the full acquis.\textsuperscript{49}

Neither country has accepted the Schengen acquis nor participated in common border policies with the European Union.\textsuperscript{50} Ireland and the United Kingdom already participate in the Common Travel Area which allows for free movement of persons between the two countries.\textsuperscript{51} Therefore, if Ireland joins Schengen independent of the United Kingdom, it will no longer have an open border with the UK.\textsuperscript{52} The country’s leaders have repeatedly stated that such a move is not in their best interest.\textsuperscript{53}

However, both countries have agreed to police cooperation with the Schengen countries.\textsuperscript{54} The ECJ has limited the extent of this police cooperation if the countries continue to refuse to adopt the Schengen acquis.\textsuperscript{55} In 2000, the UK petitioned the Council to also have access to the Visa Information System—a coordinated database that collects and processes data for visa applicants to the Schengen area—and argued that the VIS was within police cooperation and not one of the Schengen acquis.\textsuperscript{56} The ECJ ruled that the VIS was an integral part of the Schengen acquis and the UK could only gain access to it if it agreed to the rest of the Schengen acquis.\textsuperscript{57} The Court stated that the Member States that are signatories to the Schengen acquis are not required “to provide for special adaptation measures for the other Member States which have not taken part in the adoption of the measures relating to earlier stages of the acquis’ evolution.”\textsuperscript{58} This ruling indicates that the ECJ may have reached a limit in allowing Ireland and the UK to accept only some of the Schengen acquis without accepting both the benefits and burdens of the full acquis.\textsuperscript{59}

\textsuperscript{49} Huybreghts, \textit{supra} note 30, at 382.
\textsuperscript{50} \textit{Schengen and the Common Travel Area}, The Scottish Gov’t, http://www.gov.scot/Publications/2013/11/5894/16 (last updated Dec. 6, 2013).
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Case C-482/08, United Kingdom v. Council, 2010 E.C.R I-10435, I-10440.
\textsuperscript{55} See Id.
\textsuperscript{56} See \textit{id.} at I-10450.
\textsuperscript{57} Id. at I-10455-56.
\textsuperscript{58} Id. at I-10457.
\textsuperscript{59} See generally \textit{id.} (discussing how if the VIS were merely a police cooperation measure rather than an element of the common policy, it “would enable all the Member States to participate in the laying down of the detailed rules for
2. The Special Position of Denmark

Similarly, the Treaty of Amsterdam states that Denmark is in a special position to accept only some of the provisions of the Schengen acquis. 60 Denmark fully implements the Schengen acquis, but it does not agree to the “implementation and application of future decisions taken under the Agreement.” 61 It will decide on a “case-by-case basis whether to participate in the further development of the acquis under international law” and whether to implement “Community law developed without its participation into its national law.” 62 The Treaty gives Denmark “a period of 6 months after the Council has decided on a proposal or initiative to build upon the Schengen acquis” to decide if it will implement the Council decision or not. 63 However, Denmark must “implement certain measures relating to the common visa policy.” 64

3. Non-EU Member States as Associated Countries

The Treaty also lays out the process for including non-EU member states into the Schengen area. 65 Iceland and Norway, neither of which are members of the European Union, were included in the Treaty of Amsterdam as indicating their “intention to become bound” by the Schengen Agreement. 66 Countries that are not members of the European Union but are bound by the Schengen acquis are referred to as Associated Countries. 67 Both Switzerland and Liechtenstein joined later as Associated Countries. 68

Following the signing of the Treaty of Amsterdam, there was confusion over “whether new legislation based on the Treaties would become a development consultation of the VIS, even though some of them did not participate in the definition of the principles which governed the establishment of that database on visas, are not obliged to enter in the system the data for all visa applications received by them, and do not contribute to the management or financing of the system.”). 69

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60 The Schengen Agreement, supra note 32; see also id.
62 The Schengen Agreement, supra note 32; see also id.
64 The Schengen Agreement, supra note 32; see also id.
65 See Treaty of Amsterdam, Protocol B (Protocol integrating the Schengen acquis into the framework of the European Union).
66 Id.
67 See Huybreghts, supra note 30, at 381 (discussing the integration of Non-EU Member States into the Schengen area).
68 Id. at 386.
of the Schengen acquis.” If so, then the Associated Countries would “automatically become associated with parts of the European Union law not regulated in the Schengen Convention.” To resolve this confusion, the Council of the European Union issued a decision in May 1999 on the “implementation, application and development of the Schengen acquis” for Associated Countries. The decision listed the areas for closer cooperation that were regarded as “Schengen-relevant”: border policy, data protection, the Schengen Information System, limited police cooperation, judicial cooperation and the integrated visa policy. The Council signed Association Agreements with each of the Associated Countries separately which enables them “to cooperate through the Mixed Committee” when issues related to the Schengen Agreement are being discussed. This allows Associated Countries to be “fully involved in the decision-shaping process of Schengen-relevant EU/EC measures, but decision taking will take place in the Council bodies.” Associated Countries may draft proposals, but those must be introduced by the Commission or a Member State of the European Union.

C. DEVELOPMENT OF THE SCHENGEN ACQUIS WITHIN THE EU LEGAL FRAMEWORK

Since its integration into the Treaty of Amsterdam, the Schengen area has become “a cornerstone of European unity, along with the euro and a single market.” Free movement of persons within the Schengen area is now listed as a “fundamental right guaranteed by the EU to its citizens.” This has been the result

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69 Id. at 381.
70 Id.
72 Id at 31-32.
74 Id. at 153.
75 Id.
of a steady development of Schengen-related legislation within the EU legal framework.\textsuperscript{78}

With the admission of new members to the Schengen area and guidance needed for increased cooperation, the European Union updated the rules and regulations of the Convention.\textsuperscript{79} In 2006, the European Parliament and the Council passed Regulation (EC) No 562/2006 which established “a Community Code on the rules governing the movement of persons across borders,” commonly known as the Schengen Borders Code (“the Code”).\textsuperscript{80} The Code added to and repealed parts of the Schengen Convention.\textsuperscript{81} The Code emphasized the need for members to remove all obstacles to the free movement of people and goods across borders within the area.\textsuperscript{82} However, the Code laid out improved measures for “integrated management of the external borders.”\textsuperscript{83} Member states need to lay down “conditions, criteria and detailed rules governing checks at border crossing points” and “designate the national service or services responsible for border-control tasks in accordance with their national law.”\textsuperscript{84} The Code also allows for security checks to be carried out at airports.\textsuperscript{85}

The role of the Schengen area continues to be an essential part of the EU legal order as evidenced by its prominence in the 2012 Treaty on the Functioning of the European Union (“TFEU”).\textsuperscript{86} Article 67 of the TFEU outlined the general provisions of the EU, which included providing “an area of freedom, security and justice” and “ensur[ing] the absence of border controls for persons.”\textsuperscript{87} The TFEU also emphasized that freedom of movement within the EU is achieved in conjunction with “a common policy on asylum, immigration and external border

\textsuperscript{78} See id.
\textsuperscript{79} The Schengen Area and Cooperation, supra note 17.
\textsuperscript{81} Huybreghts, supra note 30, at 383.
\textsuperscript{83} Id. (Preamble no. 4).
\textsuperscript{84} Id. (Preamble nos. 8, 12).
\textsuperscript{87} Id. at art. 67
control, based on solidarity between Member States.”

Furthermore, the TFEU stated the EU “shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation.”

The intertwining of freedom of movement and these security measures in the TFEU indicate how the Schengen Agreement has grown beyond merely eliminating internal borders and now facilities important information exchange to combat security risks.

D. CURRENT MEMBERS OF THE SCHENGEN AREA AND NATIONS WITH APPROVAL PENDING

The benefits of the Schengen area have provided an incentive for nearly all of the EU Member states to join. The Schengen area gradually widened to incorporate almost all Member States of the European Union. Italy joined the agreement in 1990, followed by Spain and Portugal in 1991. Between 1992 and 1996, Greece, Austria, Denmark, Finland, and Sweden signed the agreement. In 2007, Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia joined; Norway and Iceland joined the Schengen area in 1999 as associated countries. Switzerland and Lichtenstein became associated countries in 2008. Only six of the twenty-eight EU Member States are not within the Schengen zone: Bulgaria, Croatia, Cyprus, Romania, Ireland and the UK. Of those, Romania, Bulgaria, Croatia, and Cyprus have expressed an interest in joining

88 Id.
89 Id.
90 See generally TFEU.
91 The Schengen Area and Cooperation, supra note 17.
92 Id.
93 Id.
94 Id.
95 The Schengen Agreement, supra note 32.
96 The Schengen Area and Cooperation, supra note 17.
and are awaiting approval for admittance. In order to join the border-free area, there must be a unanimous vote of its current 26 members.

Romania and Bulgaria began their process to join the Schengen acquis in 2010. Germany, the Netherlands, and Finland have voiced concern about Romania and Bulgaria joining because “both countries have serious corruption issues, and thus do not meet the key conditions for admission.” There is concern in their ability to secure the outer borders of the Schengen area, especially Romania’s border on the Black Sea. In September 2015, both Romania and Bulgaria attempted to speed the process by offering to take in thousands of refugees in exchange for admittance into the Schengen area. The offer has not been accepted by the European Union and Romania and Bulgaria continue to wait for admission.

Croatia is adapting its border system to the Schengen requirements and hopes to be included in the Schengen area soon. In July 2015, Croatia began its

101 Id.
104 Id.
Schengen Area membership application and declared its readiness for Schengen evaluation and intent to lift control at its internal borders.\textsuperscript{106}

Cyprus has also not been accepted into the Schengen area.\textsuperscript{107} Due to the tense political situation in the northern part of the island that is occupied by Turkish forces, Cyprus is unable to “exercise effective control over the occupied areas of the Republic.”\textsuperscript{108} The internal border dispute has thus brought a halt to its accession into the Schengen area.\textsuperscript{109}

III. THE FLEXIBILITY OF THE SCHENGEN AGREEMENT TO ALLOW NATIONS TO PROTECT INTERNAL BORDERS

The implementation of the Schengen Agreement has led to the abolition of checks at the common borders within the European Union, but with freedom of movement comes an increased risk to national security.\textsuperscript{110} Since its inception, the Schengen Agreement has incorporated coordination between the police and the judiciary among signatories to ensure that the lack of border controls does not undermine a nation’s ability to protect itself.\textsuperscript{111} Finding a balance between the necessity for Member States to protect themselves from cross-border crime and the free movement of people has been a continuous process for the European Union.\textsuperscript{112} In response, the EU has implemented security measures in various forms both on its internal and external borders.\textsuperscript{113}

\textsuperscript{106} Croatia Starts Schengen Area Membership Application, CROATIA WEEK (July 2, 2015), http://www.croatiaweek.com/croatia-starts-schengen-area-membership-application/\textsuperscript{2}.

\textsuperscript{107} Schengen: Controversial EU Free Movement Deal Explained, supra note 97.


\textsuperscript{109} Steffen Minter, IRREGULAR IMMIGRATION: AN ECONOMIC ANALYSIS OF POLICIES IN THE EU 25 (Mohr Siebeck, ed., 2015)

\textsuperscript{110} See generally The Schengen Area and Cooperation, supra note 17 (“In order to reconcile freedom and security, this freedom of movement was accompanied by so-called ‘compensatory’ measures. This involved improving cooperation and coordination between the police and the judicial authorities in order to safeguard internal security and, in particular, to fight organised crime. With this in mind, the Schengen Information System (SIS) was set up.”).

\textsuperscript{111} Id.

\textsuperscript{112} See id.

\textsuperscript{113} Id.
A. INTERNAL BORDER SECURITY

1. Requirements for Member State Admission into the Schengen Acquis

To ensure the safety of the Schengen area, the European Union requires that new members to the area are not only interested in joining, but must ultimately prove their “trust and solidarity” before being allowed admission into the area.\(^\text{114}\) Applicants are evaluated by Member States on the “quality of [their] border controls and visa systems.”\(^\text{115}\) The applicant must be able to demonstrate that it can control its “external border on behalf of the other Schengen states.”\(^\text{116}\) It must be able to demonstrate that it can cooperate well with other Schengen states “in order to maintain a high level of security once internal border controls are abolished.”\(^\text{117}\) It must show its ability to apply the established Schengen rules on “land, sea and air border controls, visa issuing, police cooperation and personal data protection.”\(^\text{118}\) Finally it must show it can “connect to and use the Schengen Information System (SIS) and Visa Information System (VIS).”\(^\text{119}\) Once a country joins, it is evaluated every five years “to ensure it maintains the necessary standards.”\(^\text{120}\)

2. Schengen Information System

Article 39 of the Schengen Agreement established the general requirement of police cooperation within the Schengen area.\(^\text{121}\) Title IV of the Convention Implementing the Schengen Agreement effected this cooperation with the Schengen Information System (“SIS”).\(^\text{122}\) The SIS is the main mechanism for

\(^{114}\) Frontex, supra note 85, at 8.

\(^{115}\) Id.


\(^{117}\) Id.

\(^{118}\) Id.

\(^{119}\) Id.

\(^{120}\) Frontex, supra note 85, at 8.


\(^{122}\) Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their
cooperation on security within the Schengen area. SIS is a database used by authorities of the Schengen member countries to share information. The Convention further elaborated that SIS is an “automated search procedure, to have access to alerts on persons and property for the purposes of border checks and other police and customs checks carried out within the country.” The SIS includes cross border cooperation for “persons who may have been involved in a serious crime or may not have the right to enter or stay in the EU.” It allows members to share information on missing persons, in particular children. Members also share “information on certain property, such as banknotes, cars, vans, firearms and identity documents that may have been stolen, misappropriated or lost.”

3. **Hot Pursuit**

The Convention also gave police of signatory states the ability to cross borders as part of protecting their national security. Police officers from one Member State are permitted to enter another Member State in hot pursuit of a suspected criminal. Hot pursuit allows police officers of one Member State who catch individuals in the act of committing serious offenses “to pursue the perpetrators across the border and detain them on the territory of another Schengen state.” While police can detain the perpetrator, they have no authority to apprehend the individual. The hot pursuit must cease as soon as the Member State in which the pursuit is occurring requests. The police must notify the Member State in which the hot pursuit takes place and the local authorities will

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123 Karanja, supra note 121, at 55.
124 Id.
125 Convention, supra note 122, art. 92.
127 Id.
128 Id.
129 Convention, supra note 122, art. 41.
130 Id.
131 European Commission, supra note 116.
132 Convention, supra note 122, art. 41.
133 Id.
convene to apprehend the person.\textsuperscript{134} Thus, hot pursuit provides a way for police-cooperation across borders to ensure internal border security.\textsuperscript{135}

4. Reinstate Border Controls

The Schengen Code allows for Member State authorities to reinstate internal border controls for a limited period.\textsuperscript{136} In order to do this, a Member State must show that it believes “there is a serious threat to public policy or internal security.”\textsuperscript{137} This must be limited to 30 days or “for the foreseeable duration of the serious threat if its duration exceeds the period of 30 days.”\textsuperscript{138} In order to reinstate internal borders, a Member State must notify other Member States and the Commission as soon as possible.\textsuperscript{139} The Member State must list the events that constitute a serious threat and have a consultation with the Commission and Member States at least 15 days before reinstating borders to discuss the proportionality of the threat to reinstating the borders.\textsuperscript{140} In urgent cases, a Member state may “exceptionally and immediately reintroduce border control at internal borders.”\textsuperscript{141} The Member State must notify the other Member States and the Commission without delay with the reasons for closing the borders.\textsuperscript{142} When a Member State reinstates border controls, the Commission monitors the situation to ensure the Member States’ response is proportional to the threat and keeps the European Parliament and the Council fully informed.\textsuperscript{143}

In the past, countries have resorted to reinstating internal border controls as a “reaction to intense migrant flow or during large-scale sports events, such as the Olympics and international football championships, or high-level political

\textsuperscript{134} Id.
\textsuperscript{135} See id.
\textsuperscript{136} Council Regulation No 562/2006, 2006 O.J. (L 105), art. 23.
\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} Id. at art. 24.
\textsuperscript{140} Id.
\textsuperscript{141} Id. at art 25.
\textsuperscript{142} Id.
\textsuperscript{143} European Commission Press Release IP/15/5638, European Commission Statement Following the Temporary Reintroduction of Border Controls by Germany, Particularly at the German-Austrian Border (Sept. 15, 2015).
events.”144 It is not uncommon for Member States to reinstate border controls; it has been done seven times since 2013.145

The Code states that the limited period of 30 days may be prolonged on the same grounds used initially by the Member State.146 The period may be renewed for periods of up to 30 days and any new elements that the Member State reports will be taken into account.147 The Member State must supply all the relevant information for prolonging the border control to the other Member States and the Commission.148 If the Member State prolongs border control three consecutive times, the Member State may be directed to report to the European Parliament.149

The decision to reinstate borders must also be communicated to the public in a transparent way unless “there are overriding security reasons for not doing so.”150 The Code requires that a Member State present a report to the Commission, European Parliament, and other Member States on the “operation of the checks” and “effectiveness of the reintroduction” once the border controls have been lifted.151 However, Member States, may at their request, keep the information relating to the reintroduction and prolongation of border controls confidential in these reports.152

5. Case Study: Police Enforcement near Internal Borders

The Code allows for Member States to protect themselves against security threats via exercise of police powers “insofar as the exercise of those powers does not have an effect equivalent to border checks.”153 In 2010, the European Court of Justice (“ECJ”) significantly strengthened the power of Member States to control the people coming inside their borders under this clause of the Code.154 In cases C-188/10 and C-189/10, Mr. Melki and Mr. Abdeli, Algerian nationals, who were in France illegally and put in detention after police control near the Belgian border, brought suit against the French government, claiming the police control constituted

144 Frontex, supra note 85, at 11.
145 Eddy & Bilefsky, supra note 76.
147 Id.
148 Id. at art. 26.
149 Id. at art. 27.
150 Id. at art. 30.
151 Id. at art. 29.
152 Id. at art. 31.
153 Id. at art. 21.
a border control within the Schengen area. The French police acted according to Article 78-2, paragraph 4 of the French Criminal Code of Procedure, which provides:

“[I]n an area between the land border of France and the States party to … Schengen … and a line drawn 20 kilometers inside that border, and in the publicly accessible areas of ports, airports, and railways or bus stations open to international traffic, the identity of any person may also be checked … in order to ascertain whether the obligations laid down by law to hold, carry, and produce papers and documents are observed.”

The plaintiffs claimed that the French regulation violated the Treaty of Lisbon which abolished internal border controls and “made freedom of movement for persons absolute, irrespective of the nationality of the persons concerned.” The French government argued that the provision was justified by the need to combat crime, much of which happens near border crossings.

The ECJ reiterated the definition of ‘border checks’ as stated in the Code as checks that must be “carried out at border crossing points, to ensure that persons may be authorized to enter the territory of the Member State.” The ECJ held that the identity checks authorized by this national legislation “are carried out not ‘at borders’ but within the national territory” and are not carried out “at the time when the border is crossed,” thus they do not fit the definition of border checks. Rather, they are an “exercise of police powers by the competent authorities of a Member State” done within the territory of that Member State, which is expressly authorized in Article 21 of the TFEU. Additionally, the ECJ ruled that the national legislation related to checking whether individuals were carrying the required papers and documents was not the same objective as border control.

The ECJ acknowledged that such a regulation cannot “have an effect equivalent to border checks” and that such checks on international trains or toll

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155 See id.
156 Code de procédure pénale [C. Pr. Pén.][Criminal Procedure Code] art. 78-2 (Fr.).
157 In re Melki at I-5734.
158 Id. at I-5737.
159 Id.
160 Id.
161 Id. at I-5708
162 Id. at I-5707.
ways “could constituted evidence of an equivalent effect.” According to Article 21 of the Code, police checks do not constitute an equivalent effect to border checks if they:

(i) do not have border control as an objective, (ii) are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime, (iii) are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders, or (iv) are carried out on the basis of spot-checks.  

In the Court’s analysis of equivalent effect, the ECJ upheld the provision that allowed for police action exclusively within 20 kilometers of the border and occurred on public transportation crossing borders, regardless of the person’s behavior or the surrounding circumstances. It found that such facts did “not suffice, in itself, to find that the exercise of that power had an equivalent effect within the meaning of Article 21(a).” Despite finding that this national legislation did not have an effect equivalent to a border control, the ECJ did not provide any guidelines for practical implementation that would avoid having the effect equivalent to a border check.

This ECJ ruling clarified the ability of national governments to police their borders so long as the national governments could claim an alternative reason for the police action beyond border control. The ECJ condoned the police control even if it is exclusively limited to areas near borders. Following this case, the European Commission issued a report on the application of the Code and affirmed that areas around the borders “present a particular risk for cross-border crime, so the frequency and intensity of police checks may be higher.”
Commission limits the checks in that they must be “based on concrete and factual police information and experience as regards threats to public security and must not be systematic.”\textsuperscript{171} In a survey done by the European Commission, most Member States acknowledged that they “carry out non-systematic, random police checks on the basis of risk assessments of the security situation.”\textsuperscript{172} Member States reported that these police checks are often done in cooperation with neighboring states or in joint patrols.\textsuperscript{173}

German, Greek, Netherlands, and Slovak’s governments expressed support of systematic police checks in border areas if they remained in compliance with Article 21 of the Code.\textsuperscript{174} This case shows how France, Germany, and the Netherlands—who were founding members of the Schengen area—have become proponents of increased police power along the borders.\textsuperscript{175} In contrast, the Czech government vehemently opposed such border policing, calling them “disguised border controls.”\textsuperscript{176} Following the In re Melki ruling, the Commission issued a report stressing Member States “to adapt [their national legislation] to the ruling of the Court of Justice in the Melki case as soon as possible.”\textsuperscript{177}

B. **EXTERNAL BORDER CONTROL**

The widening of the Schengen area to the states with land, sea, and air borders with non-EU nations increases the potential risk to internal security.\textsuperscript{178} Once an individual enters the Schengen area, the lack of border checks throughout the area make traveling easier, and detection of individuals and goods much more challenging.\textsuperscript{179} Therefore, securing the external border of the Schengen area is a major security concern for which all of the Schengen states are responsible.\textsuperscript{180} The ability of Member States with external borders to protect their national borders implicates the internal security of the rest of the Schengen states.\textsuperscript{181} As a result, the

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Id. at 4.
\item In re Melki at I-5735.
\item See id.
\item Id. at I-5735.
\item Commission Report on Application of Title III, supra note 170, at 10.
\item The Schengen Agreement, supra note 32.
\item The Schengen Agreement, supra note 32.
\item Id.
\end{enumerate}
\end{footnotesize}
Schengen Agreement allows for various ways that the Member States may cooperate to ensure the external borders are adequately protected.\(^{182}\)

1. **Visa Information System**

   Despite the security risks, it is necessary for business and tourism that the European economies be easily accessible.\(^{183}\) Additionally, the external borders must remain open to individuals “seeking refuge from war and persecution.”\(^{184}\) Therefore, the Schengen states must balance admission with security through common rules on visa requirements and issuance.\(^{185}\) These requirements and procedures are outlined in the Schengen Code and allow individuals into the Schengen area via an external border.\(^{186}\) The requirements include: possessing a valid travel document; possessing a valid visa, if required; having a justified purpose for the stay and to have sufficient funds to support oneself; not having an alert issued in the Schengen Information System; and not being “considered a threat to public policy, internal security, public health or the international relations of EU countries.”\(^{187}\) On October 11, 2014, the European Commission issued an additional requirement pursuant to the Visa Information System that Member States must check fingerprints to ensure that the visa holder matches the information stored in VIS.\(^{188}\)

2. **Financial Assistance to Member States with External Borders**

   Once a Member State is admitted into the Schengen area, the European Commission allots financial assistance to the countries specifically to strengthen their border controls on the external border.\(^{189}\) In the most recent accession of Member States to the European Union in 2004, the European Commission implemented the Schengen Facility to facilitate EU financial support for external

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\(^{182}\) Id.


\(^{184}\) Id.

\(^{185}\) *See* Id.

\(^{186}\) *See* Council Regulation No 562/2006, 2006 O.J. (L 105).

\(^{187}\) Frontex, *supra* note 85, at 10.


The Schengen Facility gave over 1 billion euros to Estonia, Hungary, Latvia, Lithuania, Poland, the Slovak Republic and Slovenia “to finance measures at the EU’s new external borders to implement the Schengen acquis and external border control.” The funds could only be used for constructing or renovating “border crossing infrastructure and related buildings,” “operating equipment,” “training of border guards,” and assistance towards “logistics and operations.”

The Commission oversees the projects in the Member States implemented by the funds in order to ensure the funds are used appropriately.

In 2007, the European Parliament and the Council set up the External Borders Fund to further fund the protection of the external borders of the EU. From 2007-2013, the Fund allotted €1820 million to Member States with external borders. The funds were used to improve “efficient management of flows of persons at external borders,” “coordination between border crossing points,” and “surveillance tasks and registration mechanisms at external borders.”

3. Schengen Information System for External Threats

As mentioned prior in regards to ensuring internal security, Member States also utilize the Schengen Information System (“SIS”) to share information on threats to external border security. A Member State may issue an alert for the purposes of refusing entry to a person which the other Member States can then access. The person must be deemed by the Member State to be a threat to public

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190 Id.
191 Id.
192 Id. at 4.
193 Id. at 7.
197 The Schengen Area and Cooperation, supra note 17.
policy, public security, or national security. Once a Member State issues an alert in the SIS against a person, that person’s entry is automatically refused throughout the Schengen area pursuant to Article 96 of the Code. Refusal is automatic even if “the alien is the spouse of a national of a Member State.” However, a third-country national who is a family member of a European Union citizen “is covered by Community law on freedom of movement.” The complications of automatic refusal under the original SIS system—which did not require explanations from Member States for denying entry—and the freedom of movement under Community law are addressed in the following case.

4. Case Study: Member State Ability to Deny Entry to the Schengen Area

In Commission v. Spain, the ECJ clarified the ability of Member States to deny entry to persons who appear on the list in the SIS I of persons not to be permitted entry but who are also family members of EU citizens and thus covered by Community law on freedom of movement. In this case, Spanish authorities refused entry and visas to two Algerian nationals who had family and spouses in the European Union. However, there were no reasons listed in the SIS I for why there was an alert entered on these individuals and therefore why they were denied entry into the Schengen area. Spain argued that Member States “are obliged, in accordance with Articles 5 and 15 of the CISA, to refuse entry or a visa to an alien for whom an alert has been issued for the purposes of refusing him entry,” regardless of the reasons given. The ECJ found this “automatic refusal” to be contrary to the laws of the free of movement of persons. Rather, a family member of an EU citizen may only be listed on the SIS I for entry refusal if he or she is a “genuine and sufficiently serious threat affecting one of the fundamental interests

201 Id.
202 Id.
204 Id.
205 Id. at I-1133.
206 Id. at I-1134.
207 Id. at I-1136.
208 Id.
of society.” The ECJ found that Spanish officials did not fulfil their obligations because they had not analyzed the situation to determine whether the two Algerian nationals “constituted a genuine, present and sufficiently serious threat.”

Following this case, the European Commission strengthened the role of supplementary information with the adoption of the Second Generation Schengen Information System (“SIS II”) in 2013. SIS II created the Supplementary Information Request at the National Entries (“Sirene Bureaux”) which is responsible for ensuring there is sufficient “supplementary information exchange and coordination of activities” in relation to SIS alerts. In addition, SIS II allows cooperation on “biometrics, new types of alerts, the possibility to link different alerts (such as an alert on a person and a vehicle) and a facility for direct queries on the system.” The new system also established “European Arrest Warrants (EAW), which are recognised as having the same legal value as the originals.” The EAW are intended to make it easier and quicker for Member State authorities to arrest dangerous persons regardless of what country issues the warrant. The improved SIS II system has provided Member States with a dynamic database for greater coordination in security matters.

209 Id. at I-1137.
210 Id. at I-1141.
214 Id.
215 Id.
5. **Member State Cooperation in a European Union Border Control Agency**

The European Union established a border control agency to protect its external borders.\(^{217}\) In 2004, the EU created the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) as the European border control agency for the external border of the Schengen zone.\(^{218}\) Frontex “reinforces and streamlines national border authorities.”\(^{219}\) Schengen countries are required to deploy appropriate staff and resources in sufficient numbers to ensure a “high and uniform level of control” at their external borders.\(^{220}\) To coordinate Frontex in times of migratory crisis, the European Union established the Rapid Border Intervention Teams mechanism (RABIT) in 2007.\(^{221}\) RABIT is intended to assist Member States in the case of an “urgent and exceptional migratory pressure” at its external borders from “large numbers of third-country nationals trying to enter illegally.”\(^{222}\) Once a Member State requests for RABIT, Frontex has five days to assess whether the situation requires EU-wide assistance on the external border.\(^{223}\) If Frontex determines there is a sufficient migratory pressure, all “Member States are obliged to send border guards if requested, unless they themselves face an exceptional


\(^{220}\) *Frontex, supra* note 85, at 11.


\(^{223}\) *Id*
situation.”224 The host Member State has command over the Frontex team and the team must follow the Schengen Borders Code.225

IV. THE IMPACT OF THE MIGRANT CRISIS ON THE SCHENGEN AREA

As with other achievements by the European Union, integration is precariously counterbalanced with the right to national sovereignty, and the migrant crisis has exposed the amount of power that still remains at a national level in the regulation of internal borders of Member States.226 Coined as “one of the worst humanitarian disasters since the 1940s,” the migration crisis has overwhelmed Europe and put immense pressure on the security of the Schengen area.227 Hundreds of thousands of “desperate people fleeing war and poverty converge to form an unstoppable human river flowing northward, usually to Germany or Sweden.”228 The majority of the migrants consist of Sunni refugees fleeing the Assad regime in Syria, Christians and Yazidis escaping the violence of the Islamic State, and many others fleeing poverty and oppression in their African and Middle Eastern countries.229

A. UNILATERAL INTERNAL BORDER PROTECTION BY MEMBER STATES

The diverging roles of national governments on migration policies and policing has exposed a tendency of Member States to resort to unilateral internal border protection.230 Several Member States have re-imposed border controls in

225 Id.
229 Mead, supra 227.
response to the influx of migrants.\textsuperscript{231} While the Schengen agreement allows for protection of internal borders under certain circumstances, the extent of measures taken and the time period of these measures brings into question whether the Member States continue to abide by the Schengen acquis.\textsuperscript{232} The actions of Hungary, Germany, Austria, and France have been the most influential in the chain reaction of Member States closing borders.\textsuperscript{233}

Hungary became the focus as an entry point for migrants due to its location as a Member State with an external Schengen area border.\textsuperscript{234} Migrants coming from Africa and the Middle East primarily use the Western Balkans Migration Route and attempt to enter the Schengen area via the Hungarian border with Serbia.\textsuperscript{235} Hungary has been under scrutiny for its apparent “inability to control the flow of people across its southern border with Serbia.”\textsuperscript{236} As the country became overwhelmed with the migrants entering its weakly guarded border, Hungary “dropped visa checks on foreigners buying train tickets for the wealthier countries to the west, particularly Germany.”\textsuperscript{237} In an attempt to stem the flow of migrants, the Hungarian parliament passed a new immigration law on September 15, 2015 which imposes imprisonment for illegal border crossings and rapid deportation of

\textsuperscript{231}\textit{Schengen: Controversial EU Free Movement Deal Explained}, supra 97.
\textsuperscript{232}\textit{See generally} Leo Cendrowicz, \textit{The End of Schengen? Restrictions by Denmark and Sweden are 'Threatening Europe's Passport-Free Zone'}, \textsc{Independent} (Jan. 4, 2016), http://www.independent.co.uk/news/world/europe/the-end-of-schengen-restrictions-by-denmark-and-sweden-are-threatening-europes-passport-free-zone-a6796696.html (explaining the various border controls reinstated in Europe through unilateral action by Member States and including a quote by German foreign ministry spokesman Martin Schaefer that “Schengen is very important but it is in danger.”).
\textsuperscript{233}\textit{See Schengen: Controversial EU Free Movement Deal Explained}, supra note 97.
\textsuperscript{234}\textit{Id.}
\textsuperscript{236}\textit{Hundreds Break Past Police At Hungary Border For Long March North}, \textsc{The Huffington Post}, (Sept. 7, 2015), http://www.huffingtonpost.com/entry/refugees-hungary-border_55edf746e4b002d5c07667a2.
\textsuperscript{237}\textit{Id.}
“economic migrants.”

Hungary also constructed a 13-foot high fence along its 110-mile border with Serbia. Despite these efforts, the response in Hungary indicated to other Member States the EU’s inability to establish effective border controls on the external borders. Frontex issued a statement in October 2015 that EU member states “provided the bloc's Frontex border agency with less than half the personnel it has requested for deployment to migrant hotspots.” This failure initially to protect the external borders of the Schengen area caused distrust among Member States in the Schengen area, resulting in more internal border protection.

Despite Germany’s initial acceptance of unregistered refugees, the large numbers pouring into the country overwhelmed its capacity and caused Germany to re-instate its borders. On September 13, 2015, Germany re-institated border controls, especially on the border with the Czech Republic, Poland, and Austria, and halted all railway traffic to and from Austria. This started a chain reaction in which Austria, the Czech Republic, and the Netherlands followed shortly thereafter.

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240 Than & Sekularac, supra note 238.


244 Id.

Austria has no external Schengen borders, but its internal borders with Hungary, Slovenia, and Germany made it a major corridor for migrants entering from the Baltic region seeking to reach Germany and Sweden. In response to Germany’s announcement on the previous day, Austrian officials announced they would be closing the border with Hungary for up to six months on September 14, 2015. The Austrian government deployed over 2,000 soldiers to patrol and conduct border checks along the border between Hungary and Austria. Austria also announced the construction of a razor wire fence along a 2.5 miles stretch on the border with Slovenia that has been a corridor for migrants. In addition to this initial border fence, Austria announced a plan to put “Phase 2” of the fence into effect to cover more of the Slovenian border “if the Slovenian measures do not work and it comes to illegal border crossings.” Both Hungary and Slovenia are members of the Schengen area.

France reinstated border controls on November 13, 2015, shortly after terrorist attacks in Paris. This response was regarded as a safety measure after the attack. The French government could not clarify whether the border checks would be “temporary or indefinite, but expected they would last for a considerable period of time.”

As Member States lose faith in the security of the external borders and the security within neighboring Member states, the crisis threatens to destabilize the

247 Eddy & Bilefsky, supra note 76.
249 Francois Murphy, Austria Plans Border Fence with Slovenia to Control Migrant Flow, HUFFINGTON POST (Nov. 13, 2015), http://www.huffingtonpost.com/entry/austria-plans-border-fence-with-slovenia-to-control-migrant-flow_5645e7a9e4b0603773489317.
250 Id.
251 The Schengen Area and Cooperation, supra note 17.
253 Id.
254 Id.
Schengen area and further the disillusionment of relations between Member States.\footnote{Ian Traynor & Helena Smith, \textit{EU Border Controls: Schengen Scheme on the Brink after Amsterdam Talks}, \textit{The Guardian} (Jan. 26, 2016), http://www.theguardian.com/world/2016/jan/25/refugee-crisis-schengen-area-scheme-brink-amsterdam-talks.} In addition to Hungary, Austria, Germany, and France, the Czech Republic, Slovakia, the Netherlands, and Sweden have also reinstated border controls.\footnote{Almukhtar, \textit{supra} note 248.}

B. \textbf{THE EUROPEAN UNION RESPONSE}

In response to so many nations closing borders to halt the flow of migrants, the EU Commission President, Jean-Claude Juncker, called free movement under Schengen “a unique symbol of European integration” in his State of the Union Address on September 9, 2015, and demanded “better joint management of our external borders and more solidarity in coping” with the influx.\footnote{European Commission Press Release IP/15/5638, \textit{supra} note 143.} There is concern that Member States will extend the temporary reinstatement of borders to permanent borders.\footnote{Simon Marks & Silvia Amaro, \textit{Analysis: Brussels Attacks Raise New Worries over Future of Schengen}, \textit{Euro Insight} (Mar. 23, 2016), https://euroinsight.mn-news.com/posts/analysis-brussels-attacks-raise-new-worries-over-future-of-schengen-2717.} The European Council President showed his acknowledgment of the threat but his confidence in the system in his announcement that “Saving Schengen is a race against time. And we are determined to win that race.”\footnote{Alastair MacDonald, \textit{Europe's 'Race Against Time' on Migrants Leads to Turkey}, \textit{Reuters} (Nov. 12, 2015), http://uk.reuters.com/article/uk-europe-migrants-eu-idUKKCN0T11GZ201511112.} Therefore, the European Union leaders have set forth a plan for joint action.\footnote{See European Commission IP/15/5904, Meeting on the Western Balkans Migration Route: Leaders Agree on 17-Point Plan of Action (Oct. 25, 2015), http://europa.eu/rapid/press-release_IP-15-5904_en.htm.}

After months of massive numbers of migrants illegally entering the external borders of the Schengen area, it became clear that Member States acting individually would not solve the migration problem affecting all of the European Union.\footnote{Id.} Therefore, on October 25, 2015, European Union leaders met to discuss
a way to cope with the flow from the Western Balkans Migration Route.\textsuperscript{262} Following this meeting, the European Commission President, Jean-Claude Juncker, announced that the countries had agreed on a “17-point plan of pragmatic and operational measures to ensure people are not left to fend for themselves in the rain and cold.”\textsuperscript{263} One of the major aspects of this plan is border management.\textsuperscript{264}

The 17-point plan seeks to increase efforts by Member States to manage external borders of the European Union almost exclusively by use of Frontex.\textsuperscript{265} The plan includes “upscale the Poseidon Sea Joint Operation in Greece,” an operation by Frontex; “reinforcing Frontex support at the border between Bulgaria and Turkey;” “strengthening border cooperation between Greece and the former Yugoslav Republic of Macedonia, with increased UNHCR engagement;” “Frontex support for Greece at its external land border;” “Working together with Frontex to monitor border crossings and support registration and fingerprinting at the Croatian-Serbian border crossing points;” “Strengthening the Frontex Western Balkans Risk Analysis Network with intensified reporting from all participants;” and engaging, where appropriate “the Rapid Border Intervention Team (RABIT) mechanism, which should be duly equipped.”\textsuperscript{266} The 17-point plan also emphasizes “the principle of refusing entry to third country nationals who do not confirm a wish to apply for international protection (in line with international and EU refugee law).”\textsuperscript{267} The joint agreement on the 17-point plan indicates that Member States are willing to cooperate on protecting the external borders as an alternative to unilaterally protecting internal borders.\textsuperscript{268}

V. THE FUTURE OF THE SCHENGEN AREA

The Schengen acquis are designed to be a flexible, sophisticated set of rules that Member States can utilize both to facilitate free movement of persons and use

\textsuperscript{263} European Commission Press Release IP/15/5904, supra note 260.
\textsuperscript{264} Id.
\textsuperscript{266} Id.
\textsuperscript{267} Id.
The acquis are not only used in ensuring freedom of movement but also providing uniformity in important areas such as visa requirements, police cooperation, and sharing of important security information. They ensure uniformity in business, traveling, and security while also allowing certain members to tailor their membership to their specific needs. They allow EU and non-EU citizens to experience a tangible aspect of the EU with significant benefits.

While there is uniformity in certain aspects of the application Schengen acquis, there is a lack of homogenized protection of external borders. The lack of protection of external borders is a weakness of the application the Schengen acquis that undermines the security of its internal borders. This has led to distrust among Member States that the Schengen area is secure and they have thus resorted to closing internal borders in times of crisis. Therefore, improved coordination on protection of external borders will be a focus in reforming Schengen. As evidenced by the 17-point plan agreed on by EU leaders, joint action at the external borders is a weakness in the Schengen area that Member States recognize and are attempting to remedy through increased cooperation. This will be a focus in the continued evolution of the Schengen acquis.

Recent actions by Member States reinstating border controls have made critics question whether Schengen acquis are at risk of becoming obsolete.

\[270\] Id.
\[271\] Schengen Area, supra note 77; see also Huybreghts, supra note 30, at 382.
\[272\] European Commission, supra note 116, at 3.
\[274\] Id.
\[275\] See Schengen: Controversial EU Free Movement Deal Explained, supra note 97.
\[277\] See Cullinane, supra note 268.
\[278\] See European Commission Press Release IP/15/6327, supra note 273.
Reinstatement of border checks, while appearing to be in total contravention of the Schengen acquis, is an important aspect of the agreement that has often been used by countries and followed by a re-opening of borders once a crisis has passed.\textsuperscript{280} So long as the border checks remain temporary, the recent actions by Member States to reinstate border controls are within the power of Member States under the Schengen acquis.\textsuperscript{281} The question that the European Commission needs to answer is how long these border controls can remain “temporary” and what sanctions the European Union can impose on signatories to the Schengen acquis that continue to have border controls beyond a “temporary” amount of time.\textsuperscript{282}

VI. CONCLUSION

The Schengen area is one of the greatest accomplishments of the European Union. Since the initial Schengen Agreement, the Member State signatories have contemplated how to balance security with free movement of persons. Therefore, while the Migrant Crisis and other security threats have shown the tendency of states to resort to reinstating border controls, the benefits of the Schengen acquis make a total breakdown of the system unlikely. Rather, these tests will help the acquis adapt to new security threats so that nations can more effectively protect their internal borders while remaining signatories of the Schengen acquis. A coordinated response in protecting the external borders is a key component to ensuring the safety of the internal borders. Borderless travel within the European Union is a major achievement and its founders, Germany and France, will not let it slip away. Rather, they will lead in reforming it to meet the evolving security needs of the region.

Shifting Standards: The Dublin Regulation and Italy

ANDREW T. RUBIN*

“Give me your tired, your poor, your huddled masses yearning to breathe free.”

I. INTRODUCTION

On April 2, 2013, the European Court of Human Rights decided *Mohammed Hussein v. The Netherlands and Italy*, a case regarding “a Somali asylum seeker who claimed . . . that she and her two young children would be subjected to ill-treatment if transferred from the Netherlands to Italy under the Dublin Regulation.” The same court decided a subsequent case, *Tarakhel v. Switzerland*, on November 4, 2014, in which an Afghan couple and their six children were going to be sent back to Italy under the Dublin Regulation, but also feared ill-treatment if they were sent back to Italy.

This article will describe how the European Court of Human Rights came to different conclusions in these cases with similar facts and the implications those decisions raise; it will provide background on the importance of the Dublin Regulation, explain the significance of Article 3 of the European Convention on Human Rights regarding asylum facilities, depict the Italian asylum system and its conditions, and detail the specifics of *Hussein* and *Tarakhel*. This article will then make the argument that the European Court of Human Rights made the incorrect decision in *Tarakhel* and conclude with a discussion on how similar issues should be resolved in the future.

II. BACKGROUND

The Dublin Regulation is a series of European Union laws that “serves to determine which European Union ("EU") Member State is responsible for examining an asylum application lodged by a third-country national on the territory..."
of one of the Member States of the European Union.” The Dublin Regulation states, “Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum.” The Regulation establishes the principle of a single State being responsible for assessing an application for asylum. The Dublin Regulation also seeks to prevent asylum seekers from being transferred between various countries and lodging requests in multiple countries.

The Dublin Regulation lists out a hierarchy of criteria in Chapter 3 that states, “The Member State responsible in accordance with the criteria shall be determined on the basis of the situation obtained when the asylum seeker first lodged his application with a Member State.” This means that the decision of which State is responsible for the application is determined at the time the asylum seeker first makes his application. Article 10, which is applicable to both cases discussed in this article because of the similar, irregular entries into Italy involved, declares:

Where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 18(3), including the data referred to in Chapter III of Regulation (EC) No 2725/2000, that an asylum seeker has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for asylum. This responsibility shall cease 12 months after the date on which the irregular border crossing took place.

As will be made clear during the discussion of each case, Italy is responsible for processing the asylum requests for both Hussein and Tarakhel under Article 10.

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9 Id.
11 Id. at Chap. 3 Art. 5. (1, 2).
12 Id. at Chap. 3 Art. 10.
13 Infra, Footnotes 25-42
Article 16 of the Dublin Regulation is also particularly relevant as it describes the obligations that Member States are required to take.\textsuperscript{14} Article 16 requires States to take charge of the asylum seeker, complete the examination of the application, and take back an applicant who is in another State’s territory without authorization.\textsuperscript{15}

Article 20 states the procedures for the return of an asylum seeker if that asylum seeker is in another State.\textsuperscript{16} This requires States to take back the asylum seeker within a set period of time after being notified.\textsuperscript{17} Article 20 also calls for the original State to inform the asylum seeker “of the time limit on carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means.”\textsuperscript{18} Additionally, Article 20 states, “The Member State responsible shall inform the requesting Member State, as appropriate, of the safe arrival of the asylum seeker or of the fact that he did not appear within the set time limit.”\textsuperscript{19}

The Dublin Regulation plays a significant role in asylum policy in Europe by laying out the responsibilities of member countries for what actions they must take for asylum seekers, when they are responsible for asylum seekers, and what happens when the asylum seekers leave their territory for another Member State.\textsuperscript{20} In addition to the Dublin Regulation, Article 3 of the European Human Rights Convention plays a significant role in the decisions of Hussein and Tarakhel.\textsuperscript{21}

The European Human Rights Convention was originally signed in 1950 in order to “pursue[... the maintenance and further realisation of Human Rights and Fundamental Freedoms.”\textsuperscript{22} This convention lists several rights that the signatory countries agreed to uphold, including Article 3, Prohibition of Torture.\textsuperscript{23} Article 3 states, “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”\textsuperscript{24} Article 3 also prevents States from sending people to another

\textsuperscript{15} Id.
\textsuperscript{16} Id. at Chapter 5 Article 20 (1) (e)
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Supra. Footnotes 5-16
\textsuperscript{22} Eur. Conv. on H.R.
\textsuperscript{23} Eur. Conv. on H.R. (Article 3)
\textsuperscript{24} Id.
State where that person will be subjected to such treatment.\textsuperscript{25} Article 3 was cited in both Hussein and Tarakhel as reasons to block Switzerland and the Netherlands from sending asylum seekers back to Italy to have their applications processed.\textsuperscript{26} In order to understand how being sent back to Italy may constitute a violation of Article 3, it is necessary to understand how the Italian asylum procedures work, as well as the type of conditions asylum seekers could expect to encounter.\textsuperscript{27}

In Italy, there is a method for how asylum claims are processed and what is done for the asylum seeker while his or her claim is being processed.\textsuperscript{28} Initially, a person should file a request for asylum with either the Border Police, if not yet in Italy, or with the Police Immigration Department if already inside Italy.\textsuperscript{29} Upon making the request in writing, the asylum seeker will have an interview with an interpreter, fill out a standard form detailing personal information, describe his or her trip to Italy, and give the reason for seeking asylum in Italy.\textsuperscript{30} The next step is for a hearing to be held by the Territorial Commission for the Recognition of International Protection to determine the asylum seeker’s status.\textsuperscript{31}

The Territorial Commission for the Recognition of International Protection’s decides the person’s status, which determines that person’s rights.\textsuperscript{32} The following are three outcomes that allow a person to remain in Italy: recognizing the person as a refugee; granting the asylum seeker subsidiary protection; or granting the asylum seeker a residence permit for compelling humanitarian reasons.\textsuperscript{33} There is a large difference in benefits based on the determination of the Commission.\textsuperscript{34} If the asylum seeker is declared a refugee, he is entitled to a renewable residence permit for five years, and a travel document for aliens, work, family reunion, social assistance, health care, social housing, and education under

\begin{itemize}
\item \textsuperscript{25} Mohammed Hussein and Others v. The Netherlands and Italy, Eur. Ct. H.R. 31 (2013).
\item \textsuperscript{27} Infra, Footnotes 25-42.
\item \textsuperscript{28} Mohammed Hussein and Others v. The Netherlands and Italy, Eur. Ct. H.R. (2013).
\item \textsuperscript{29} Id. at 10.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Id.
\item \textsuperscript{33} Id. at 11.
\item \textsuperscript{34} Id.
\end{itemize}
Italian domestic law.\textsuperscript{35} If the asylum seeker is granted subsidiary protection, he may receive the same benefits; however, he is given a three-year renewable residence permit.\textsuperscript{36} A person granted a residence permit for compelling humanitarian reasons is entitled to a one year renewable residence permit, however he is restricted to only being able to work, receive health care, and receive a travel document for aliens if he does not have a passport.\textsuperscript{37} This process is accompanied by facilities where asylum seekers stay while awaiting a hearing or while they attempt to integrate into Italian life.\textsuperscript{38}

According to COUNCIL DIRECTIVE 2003/9/EC of 27 January 2003, which establishes the standards applicable for receiving asylum seekers, facilities provided must have “[m]inimum standards for the reception of asylum seekers that will normally suffice to ensure them a dignified standard of living and comparable living conditions in all Member States . . . .”\textsuperscript{39} It also dictates that “reception of groups with special needs should be specifically designed to meet those needs.”\textsuperscript{40} These groups include several classifications of people, relevantly pregnant women, single individuals with minor children, and individuals who were subjected to torture or rape.\textsuperscript{41}

The three main reception centers established in Italy are Reception Centers for Asylum-Seekers (“CARA”), Reception Centers for Migrants (“CDA”), and local projects established in the context of the Protection System for Asylum-Seekers and Refugees (“SPRAR”).\textsuperscript{42} The SPRARs are generally viewed most favorably, providing 500 spots set aside for vulnerable people.\textsuperscript{43} CARAs are the most populous, and “those hosted in CARAs should benefit from a series of services beyond food and accommodation, which include health care and mental health care, training and recreational activities, and legal assistance. The relevant legal framework defines common minimum standards for CARAs at the national level . . . .”\textsuperscript{44}

\textsuperscript{35} Id. (explaining benefits of being a refugee).
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{40} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
However, not all facilities meet the required standards: “The issue of inadequate living conditions of asylum seekers in Italy has gained increasing attention from other EU Member States . . . a number of judgments by different administrative courts in Germany have suspended such transfers, owing notably to the risk of homelessness and a life below minimum subsistence standards.” As a result of the conditions encountered in some of these facilities, many asylum seekers use the European Human Rights Court to block their transfer back to Italy. This is the focus of both Hussein and Tarakhel, and the Court’s actions in both cases speak to the challenges faced by both the Italian government and the other European governments who signed the Dublin Regulation.

In Hussein, the facts of Ms. Hussein’s processing and treatment upon arrival were in dispute between the Italian Government and Ms. Hussein. However, the European Court of Human Rights decided that “it [was] not necessary to examine the question whether the application was deliberately grounded on a description of facts omitting or distorting events of central importance . . . .” The Court notes these discrepancies and provides a general summary of Ms. Hussein’s documented movements, which were not in dispute; she arrived in Italy on 22 August 2008, and was fingerprinted and registered as illegally entering Italy the next day. Following this, she was transferred to a CARA and applied for international protection. In October, Ms. Hussein was granted a temporary residence permit for three months, which allowed her to work in Italy. Finally, in January 2009, Ms. Hussein was granted a residence permit for three years under the subsidiary protection program for her claim that she was fleeing Somalia following a marriage to a clan member that was viewed as inferior to her own clan, and she faced violence for not following the wishes of her clan.

46 Mohammed, Eur. Ct. H.R. 16
49 Id. at 31.
50 Id. at 2.
51 Id.
52 Id.
Ms. Hussein was served notice of this residence permit in March 2009, and she left the CARA on 11 April 2009. In May 2009, Ms. Hussein applied for asylum in the Netherlands, however her fingerprints registered a ‘hit’ in the European Dactyloscopy (“EURODAC”), a fingerprinting database, that showed that she had registered in Italy in August, 2008. Ms. Hussein’s statements to the Dutch authorities were extremely inconsistent, and she claimed that she was raped and forced to live on the streets because the Italian authorities had not helped her. In August 2009, while still in the Netherlands, Ms. Hussein gave birth to a son. Also in August of the same year, the Dutch authorities asked the Italian authorities to accept responsibility for Ms. Hussein and her child under Article 10 of the Dublin Regulation; the Italians acknowledged and consented to receive Ms. Hussein. Following notification of Ms. Hussein’s removal, she filed a series of appeals and lost; however, her expulsion from the Netherlands to Italy was postponed until the European Court of Human Rights decided proceedings.

Following a discussion of Italian policies and the aforementioned procedures, the Court discussed the complaints against both the Netherlands and Italy. Ms. Hussein claimed that her transfer back to Italy would be a breach of the Prohibition Against Torture because “she and her children would risk being subjected to treatment in violation of Article 3,” and they would “be forced to live on the streets.” She also claimed that this transfer back to Italy would violate their rights under Article 8 because “they would not be able to build up a normal family life and would risk separation due to [Ms. Hussein] being forced to live on the streets, while her children stayed in a children’s home.

The Court reasoned that although States have “the right as a matter of international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens” they are also prevented from expelling someone if “substantial grounds have been shown for believing that the individual . . . faces a real risk of being subjected to treatment contrary to Article

53 Id. at 2, 3.
54 Id. at 3
55 Id. at 3, 4.
56 Id. at 4.
57 Id.
58 Id. at 5.
59 Id. at 30.
60 Id.
61 Id.
When determining whether a violation of Article 3 will occur, it must be analyzed based on a relative scale to the individual, factoring in “the duration, nature and context of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.”

Additionally, the Court states that an applicant may face a substantial lowering of their quality of life, but that is not enough to breach Article 3.

In Ms. Hussein’s case, the Court took into consideration that although “the general situation and living conditions in Italy of asylum seekers . . . may disclose some shortcomings, it has not been shown to disclose a systemic failure to provide support or facilities catering for asylum seekers as members of a particularly vulnerable group of people.” As a result of the lack of a systemic failure, Ms. Hussein’s complaints were rejected as manifestly ill-founded.

Specifically, the Court held that because the Netherlands had contacted the Italians and they would be expecting Ms. Hussein’s arrival, Ms. Hussein and her family would be received appropriately and not at risk of subjection to Article 3 violations. The Court stated, “There is no basis on which it can be assumed that the applicant will not be able to benefit from the available resources in Italy or that, if she encountered difficulties, the Italian authorities would not respond in an appropriate manner to any request for further assistance.”

As will be shown in Tarakhel, a similar issue was confronted by the Swiss authorities, however the Court came to a different conclusion about the level of assurances a transferring government had to receive prior to a transfer.

In Tarakhel, the applicants were eight Afghan nationals: Mr. Golajan Tarakhel, his wife, Mrs. Maryam Habibi, and their six minor children. Similar to Hussein, Article 3 of the European Convention on Human Rights formed the main thrust of their appeal, alleging that they would be exposed to inhuman and degrading treatment if they were returned to Italy from where they were currently living in Switzerland. The applicants claimed that the exposure to inhuman and

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62 Id. at 32.
63 Id. at 32.
64 Id. at 33.
65 Id.
66 Id. at 36.
67 Id. at 35.
68 Id.
70 Id.
71 Id.
degrading treatment would come from “the absence of individual guarantees as to how they would be taken charge of, in the view of systemic deficiencies in the reception arrangements for asylum seekers in Italy.”

The Tarakhels went to Europe as citizens of Afghanistan, then after settling in Iran for fifteen years, they passed through Turkey before taking a boat to Italy, where they underwent identification procedures and were registered in the EURODAC system to identify asylum seekers by fingerprints and pictures. After being sent to a CARA for reception and processing, the Tarakhels left and moved to Austria, where they lodged another asylum request. The Austrian government denied this request, and subsequently sent a request to Italy asking the Italian government to take charge of the Tarakhels under the Dublin Regulation. However, the Tarakhels moved to Switzerland before the transfer could occur, and the Austrians cancelled the request.

Once in Switzerland, the Tarakhels applied for asylum and were interviewed by the Swiss authorities where the Tarakhels stated “[t]hat the living conditions in Italy were difficult and that it would impossible for [Mr. Tarakhel] to find work there.” The Swiss requested that the Italian Government take charge, and Italy agreed. After a series of determinations and appeals by the Tarakhels, which were uniformly decided in favor of Switzerland’s decision to send them back to Italy, the Tarakhels submitted the issue to European Court of Human Rights.

In their claim to the European Court of Human Rights the Tarakhels claimed that Italy had systemic deficiencies in its asylum process, specifically criticizing Italy’s identification process, the accommodation centers and alleging inadequate living conditions within the centers. These claims were examined in detail by the Court, and the Court dismissed the slowness of identification process because it was demonstrated that the Italian authorities had identified the Tarakhels in ten days, despite being provided a false identity. For the other complaints, the Court found “the possibility that a significant number of asylum seekers . . . may be left

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72 Id.
73 Id. at 2.
74 Id. at 3.
75 Id. at 2.
76 Id.
77 Id at 3.
78 Id.
79 Id. at 4.
80 Id. at 27.
81 Id. at 34.
without accommodation or accommodated in overcrowded facilities without any privacy . . . is not unfounded. As a result of that finding it would be incumbent on Swiss authorities to receive assurances that the Tarakhels would be taken care of appropriately. The Court in Tarakhel then held that if the Swiss authorities did not receive individual guarantees that the Tarakhels would be taken care of appropriately, the Swiss authorities would be in violation of Article 3.

III. ARGUMENT

The European Court of Human Rights decisions in Hussein and Tarakhel are irreconcilable with each other and disrupt European norms and procedures for processing asylum seekers. The Court in Tarakhel erred greatly by requiring individual assurances from Italy, and created a disjointed policy that future Dublin Regulation countries may be hard pressed to implement and act upon.

The metamorphosis of the Court in these two cases is apparent in the holdings. In Tarakhel, the Court held that additional information was needed in spite of the Swiss government being informed “by the Italian Authorities that, if the applicants were returned to Italy, they would be accommodated in Bologna in one of the facilities funded by the ERF.” In Hussein, the Court held that because of the contact the Netherlands had with Italy, the Husseins would not be at risk of Article 3 violations. The differences between the holdings of the Court in both cases is highlighted in the dissenting opinion in Tarakhel:

[W]e cannot see how it is possible to depart from the Court’s findings in numerous recent cases and to justify a reversal of our case-law with the space of a few months . . . in which the Court held unanimously that no systemic failings existed and that there was no

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82 Id. at 36.
83 Id.
84 Id. at 37.
reason to believe that an asylum seeker . . . [w]ould not have received adequate support had they been sent back to Italy . . . 90

By requiring specific individual guarantees, the Court constrained one of the major goals of the Dublin Regulation: “A common policy on asylum . . . is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.” 91

The Court states that the presumption is that a State which is a party to the Dublin Regulation respects the fundamental rights laid down by the European Human Rights Convention. 92 The Court also states that although there is a presumption in favor, it is not irrefutable. 93 It may be refuted “if there are substantial grounds for believing that there are systemic flaws in the asylum procedure . . . resulting in inhuman or degrading treatment . . .” or where the person “faces a real risk of being subjected to treatment contrary to [Article 3].” 94 In Hussein, it was established that there were not systemic flaws in the Italian asylum system, which would have made it likely for either party to be treated inhumanly. 95

95 Mohammed Hussein and Others v. The Netherlands and Italy, Eur. Ct. H.R. 34-35 (2013) (“Taking into account the reports drawn up by both governmental and non-governmental institutions and organizations on the reception schemes for asylum seekers in Italy, the Court considers that, while the general situation and living conditions in Italy of asylum seekers, accepted refugees and aliens who have been granted a residence permit for international protection or humanitarian purposes may disclose some shortcomings (see paragraphs 43, 44, 46 and 49 above), it has not been shown to disclose a systemic failure to provide support or facilities catering for asylum seekers as members of a particularly vulnerable group of people, as was the case in M.S.S. v. Belgium and Greece.”).
The Court in *Tarakhel* comes to the opposite conclusion, using many of the same reports that the evaluation was based on in *Hussein*.\(^96\)

A potential difference between the two cases is a press briefing note on the status of Italy’s asylum system provided by the International Organization for Migration and cited by the Court in *Tarakhel*.\(^97\) The note advances the claim that Italy could not handle the number of asylum seekers because of the large increase in the amount of people arriving in Italy and overwhelming the reception centers.\(^98\) However, conditions in the reception centers were not cited by the Tarakhels as their sole reason for going to Switzerland and applying for asylum; rather, it was also because Mr. Tarakhel could not find a job in Italy.\(^99\) As stated in *Hussein*, merely “the fact that the applicant’s material and social living conditions would be significantly reduced if he or she were to be removed from the Contracting State is not sufficient in itself to give rise to a breach of Article 3.”\(^100\) The Tarakhels failed to demonstrate that they had been subjected to any inhumane or degrading treatment.\(^101\) The chief reason the Court forced Switzerland to seek individual assurances was because of a note in a press briefing which made claims stating the number of asylum seekers may be too high for Italy to handle; however, Italy was actively increasing the capacity of existing facilities to meet the increase in demand, directly disputing this claim.\(^102\)

The Court’s opinion in *Tarakhel*, only months after its decision in *Hussein* unsettles the principal of a common asylum policy in Europe by imposing additional requirements on fellow Dublin Regulation Countries, “despite the fact that neither systemic deficiencies nor a real and substantiated risk of ill treatment ... exist.”\(^103\) The establishment of the common standards in the Dublin Regulation

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\(^{98}\) *Id*.

\(^{99}\) *Id.* at 4.


\(^{101}\) *See Tarakhel v. Switzerland*, Eur. Ct. H.R. 41-48 (2014) (analyzing applicants’ claim that “they would be subjected to inhuman and degrading treatment” if they were returned to Italy).


were meant to make it easier to determine which country is responsible for processing an individual’s asylum request; when subjective additional standards are imposed, the Court risks destroying the mutual trust holding together the treaty.  

IV. CONCLUSION

In Hussein, the Court decided that there were no systematic deficiencies within Italy’s system, and Ms. Hussein and her family could be sent back to Italy since the Italians had been notified of their upcoming arrival.  

In Tarakhel, the Court decided that there was the potential for systematic deficiencies in Italy’s system, adding additional requirements to Switzerland’s attempt to return the Tarakhels to Italy.  

As a result of these increased requirements, the Court undermined the Dublin Regulation and unsettled its own judicial precedent.  

The issue laid out in the Dublin Regulation of determining which country is responsible for processing an asylum request is of the utmost importance as the number of refugees and immigrants seeking asylum continue to grow. By standardizing the requirements and procedures for assigning responsibility within the European Union, it allows countries to plan and budget the resources they can use to assist and protect those who fled their countries seeking better opportunities. When a Court disrupts those standards it can throw the entire system into turmoil and create an atmosphere of non-compliance where countries begin to look for ways around the standards, creating uncertainty because countries will become unsure of what the standards are, and how they will be enforced. By requiring additional information from Switzerland in Tarakhel, the European Court of Human Rights disrupted the standards previously required and enforced, and substituted their own standards in place of the agreed-to regulation. That will only increase mistrust and create more turmoil at a time when Europe is struggling under the influx of refugees seeking asylum.

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The LGBT Community in Turkey: Discrimination, Violence, and the Struggle for Equality

MICHAEL MCCLAIN* AND OLENKA WAITE-WRIGHT*

Lead Article

“I believe homosexuality is a biological disorder, an illness and should be treated.”
- Aliye Kavaf, Minister of State Responsible for Women and the Family, 2010.

I. INTRODUCTION

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1 The Minister was quoted during a media interview as saying “I believe homosexuality is a disorder, an illness and should be treated.” Faruk Bildirici, Esinsellik Hastalik, Tedavi Edilmeli, HÜRRİYET (Mar. 7, 2010), http://www.hurriyetdailynews.com/default.aspx?pageid=438&n=8216homosexuality-is-a-disease8217-says-minister-2010-03-07.
Turkey is a growing secular force located between a sometimes-Islamophobic Europe and the Middle East. This places Turkey in a unique position to affect both international and domestic policy throughout the region on issues involving finance, trade, and culture. In its quest to gain admission to the European Union, however, Turkey’s legal and cultural traditions have been under international scrutiny, especially in the area of equal protection and human rights. One group particularly affected by Turkey’s weak human rights record is the country’s LGBT community.

The story of Ahmet Yildiz highlights the violence and discrimination faced by many LGBT persons in Turkey. Ahmet, a 26-year-old honors student and gay activist was living in Istanbul when his family first learned of his sexual orientation. His father’s initial response was to order his son to return to his

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1 See Turkey/Europe-Islamophobia: Turkey Warns Against Rising Racism in Europe, INT’L ISLAMIC NEWS AGENCY (May 9, 2012), http://iina.me/wp_en/?p=1008278 (reporting on the Turkish President’s perspective on tensions between European views and Turkish EU accession); Muhammad Abdul Bari, Editorial, Islamophobia: Europe's New Political Disease, AL JAEEERA (May 6, 2012), http://www.aljazeera.com/indepth/opinion/2012/05/201255112042394786.html.
3 Yaroslav Trofimov, “Turkey’s Influence in Middle East Ebbs, WSJ.com, (Oct. 31, 2014) http://online.wsj.com/articles/turkeys-influence-in-middle-east-ebbs-1414771204. There are some arguments that Turkey’s influence has lessened since the start of the “Arab Spring”
5 In this paper, we use the abbreviation “LGBT” as an all-encompassing term to include persons who identify as “lesbian, gay, bisexual, and transgendered,” “queer,” “questioning,” “intersex,” “unsure,” “curious,” “two-spirited,” “transsexual,” “transssexual,” or “transvestite.”
hometown where doctors and imams would cure his homosexuality and find him a
wife. 8 Ahmet’s cousin said that Ahmet loved his family and struggled with the idea
of disappointing them, but ultimately decided he could not hide who he was. 9 After
receiving death threats from family members, Ahmet sought protection from
Turkish authorities, but prosecutors chose not to pursue his case. 10 On July 16,
2008, Ahmet was gunned down outside a café in Istanbul on his way to get ice
cream during a study-break. 11 Turkish prosecutors believe Ahmet’s father hunted
him down, traveling more than 600 miles to kill his son in Istanbul. 12 Although
Ahmet’s father was eventually charged with the murder, he had already fled the
country. 13

This tragedy has been called Turkey’s first “gay honor killing” and is the
topic of a feature film, Zenne. 14 Ahmet’s story has also prompted a flurry of
research and prompted discussion of the struggles of the LGBT community in
Turkey and throughout the Middle East. 15 Nonetheless, “honour killings,” a practice
formerly primarily directed at women, 16 are on the rise as families resort to the
murder of gay family members in an attempt to restore “family honor.” 17

1; Nicholas Birch, “Was Ahmet Yildiz the victim Turkey’s first honor killing”, THE
8 Bilefsky, supra note 7.
9 Id.
10 Id.
11 Suzan Fraser, “‘Zenne Dancer,’ Turkey’s First Gay Themed Movie, Highlights ‘Honor’ Killing,” HUFF. POST (Jan. 24, 2012),
http://www.huffingtonpost.com/2012/01/24/zenne-dancer-turkey-gay-movie-honor-killing_n_1227960.html. Id.
12 Bilefsky, supra note 7.
13 Id.
14 Ivan Watson, Shocking Gay Honor Killing Inspires Movie, CNN (Jan. 13, 2012),
15 Hossein Alizadeh, ‘The Other’ and LGBT Rights in Turkey, HUFF. POST (May. 17, 2013), Dr. Binnaz Toprak, “sponsored a motion demanding that the parliament
establish a commission of inquiry to identify all forms of discrimination and abuse
faced by the LGBT community.
16 Bilefsky, supra note 7.
17 See generally, Isil Egrikavuk, Gays and Transsexuals in Turkey Target in Small
“Honor Killings,” HURRIYET (Sept. 10, 2011),
Honor killings are not the only form of discrimination faced by members of Turkey’s LGBT community. There has also been an increase in documented hate crimes against LGBT persons. In the workplace, there are no legal protections for LGBT employees who are discriminated against on the basis of their sexual orientation or gender identity. LGBT citizens also often face discrimination in housing, including exclusion from government shelters and public housing. LGBT organizations are frequently harassed in the form of frequent government shutdowns and censorship of LGBT publications.

This Article analyzes the social and legal traditions that hinder Turkey’s movement towards equality and respect for human rights and suggests reforms necessary to protect all Turkish citizens, including members of the LGBT community. These include: (1) revision of Article 10 of the Constitution to provide express protections based on the categories of sexual orientation and gender identity; (2) revision of the Penal Code to include sanctions for hate crimes and “honor killings”; (3) changes in discriminatory employment and housing laws and practices; (4) sensitivity training for police officers, and (5) collaboration with religious and community leaders in an effort to change societal attitudes towards LGBT citizens. Part II of the paper explores homosexuality within the context of Islam, the Middle East and Turkey. Part III examines the scope of legal and social

20 Öz, at 36-37.
21 AMNESTY INT’L, ‘Not an Illness Nor a Crime’: Lesbian, Gay, Bisexual and Transgender People in Turkey Demand Equality, 35, EUR 44/001/2011 (June 21, 2011); Interview with Özlem Ezawba, Director, Mor Çati, in Istanbul, Turkey (Mar. 6, 2012); Öz, supra note 19, at 36.
23 See infra footnotes 27-67 and accompanying text.
discrimination faced by Turkey’s LGBT community and addresses the inadequacies of existing legal protections for gays and lesbians. Part IV discusses international obligations in light of Turkey’s bid for membership to the European Union. Part V offers recommendations for reforms aimed at protecting and enhancing LGBT rights in Turkey.

II. HOMOSEXUALITY AND GENDER IDENTITY: AN HISTORICAL, RELIGIOUS, AND CULTURAL FRAMEWORK

A. HOMOSEXUALITY IN ISLAM

The holy texts of Islam (the Qur’an and hadith) do not directly address the subject of homosexuality. Since the founding of Islam there have been divergent views on the issue of homosexuality, with some Islamic scholars viewing it as a normal and natural part of the human experience. Nonetheless, homosexuality has generally been treated as a crime and forbidden by Shari’a since the early days of Islam. Among classical Muslim jurists, the Qur’an’s verses recounting the story of Lot forms the basis for the condemnation of homosexuality. In the story, Allah punishes members of Lot’s tribe with a “storm of stones” after tribe members rejected Lot as their prophet and engaged in fornication and sodomy, including coercive same-sex acts with male visitors. The tradition of treating homosexuality as a crime is often attributed to a story that, after the death of the

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24 See infra footnotes 68-163 and accompanying text.
25 See infra footnotes 164-83 and accompanying text.
26 See infra footnotes 184-204 and accompanying text.
27 Samar Habib, ARABO-ISLAMIC TEXTS ON FEMALE HOMOSEXUALITY 850-1780 A.D. 238, 16 (2009).
28 Habib, supra note 23, at 17 (“Al-Hasan Al Bassri, or Ibn Hazm, who both treated homosxuality among men candidly and positively, and they both wrote about male homosexual relations ordinarily in their writings. There was also Yahya bin Aktham in Baghdad of the ninth century.”).
30 Habib, supra note 23, at 209 (citing the study by Jamal, 2001).
31 Kugle, supra note 25, at 50-51 (Muslim jurist and scholar Ibn Hazm “asserted that the Tribe of Lot was destroyed for their attitude of infidelity (kufr) and their violent rejection of the Prophet sent to them,” not expressly for homosexuality.).
32 Id. “[The] well-developed tradition of boy-love is evident in medieval Islamic and Persian literature” suggesting that the prohibition on homosexuality is a modern development. Tarik Bereket & Barry D. Adam, Navigating Islam and Same-Sex Liaisons Among Men in Turkey, 55 J. OF HOMOSEXUALITY 204, 210 (2008).
Prophet, his followers were unsure about how to address the issue when two men were found having homosexual sex. After several of the Prophet’s companions were unable to recall any guidance from the Prophet, the leader of the community ordered the men to be stoned. Another asserted basis for the treatment of homosexuality in Islam is the fact that religious texts and tradition make it clear that sexual acts are only meant to take place within the institution of marriage. Because Islam does not recognize the legitimacy of same-sex marriages, homosexuality is likened to adultery, which is expressly banned in Islam.

B. HOMOSEXUALITY IN THE MIDDLE EAST

Today, the norm in Islamic Middle Eastern countries is the rejection of homosexuality in all forms. Within these communities, homosexuality and perceived homosexuality are thought to bring shame to the family and the community. This attitude is reinforced in some “self-proclaimed Islamic republics” where the combination of conservative Islam, Shari’a, and national law are openly hostile to homosexuality. Many Middle Eastern countries have made homosexual acts expressly illegal. Homosexual acts have been criminalized in

34 *Id.*
36 *Id.*
37 Habib, *supra* note 20, at 16. (“Most Muslim communities confuse sexual orientation with gender identity.”) For this reason, this article focuses on Islamic views of homosexuality in the place of Islamic views of the LGBT community as a whole because the religious views are generally indistinguishable.
39 Factsheet: The LGBT Community in the Middle East, *supra* note 34.
Afghanistan, Iran, Kuwait, Lebanon, Saudi Arabia, Syria, Turkmenistan, the United Arab Emirates, Yemen, the Gaza Strip under the Palestinian Authority, and the Turkish Republic of Northern Cyprus. Homosexuality is punishable by death in Iran, Saudi Arabia, and Yemen. Homosexual acts, however, are no longer illegal in Iraq, Jordan, and in parts of Palestine. Although homosexuality is no longer a crime in these countries, there continue to be numerous reports of extrajudicial killings and torturing of LGBT people on the basis of their sexual orientation.

42 Id. at 23. In addition to the Penal Code, Islamic Shari’a law established in Afghanistan criminalizes homosexual acts with a maximum penalty of death. Id. However, there have been no reported cases of death sentences for homosexuality after the end of Taliban rule. Id.
43 Id. at 24-25 (sexual intercourse between men is punishable by the death penalty and the penal code also explicitly enumerates lesbianism).
44 Id. at 25.
45 Id.
46 Id. at 28. (“There is no codified Penal Law in Saudi-Arabia. Instead, the country applies strict Islamic Sharia law. According to the interpretation sodomy is criminalised. For a married man the penalty is death by stoning, while the penalty for an unmarried man is 100 blows of the whip as well as banishment for a year… Moreover are all sexual relations outside of marriage illegal in Saudi-Arabia according to the Sharia law, including sexual relations between women.”).
47 Id. at 29.
48 Id.
49 Id. (“All sexual acts outside of heterosexual marriage are banned in the United Arab Emirates.”).
50 Id. at 30.
51 Id. at 24. Punishes homosexuality under the Criminal Code prohibition on “Unnatural Offences” as “sexual intercourse with another person against the order of nature,” Id.
52 Id. at 31.
53 Id. at 4.
54 Id. at 26. The Iraqi Penal Code of 1969 was reinstated after the American invasion in 2003. Id. Under that Penal Code, same-sex relations are not criminalized. Id. However, there have been reports of self-proclaimed Shari’a judges sentencing people to death for committing homosexual acts. Id.
55 Id. at 44.
56 Id. (not including the Gaza Strip).
57 Factsheet: The LGBT Community in the Middle East, supra note 34.
C. **Homosexuality in Turkey**

Although the overwhelming majority of Turkish citizens identify as followers of Islam, Turkey’s political and cultural traditions make it unique within the Middle East. Turkey has been a secular republic since its founding in 1923. Nonetheless, Islam continues to have a powerful (and arguably growing) influence on Turkish values and norms.

Possibly as a result of Turkish secularism, Turkish law treats homosexuality in a facially neutral way, by failing to mention sexual orientation in much of their national law. Turkey neither criminalizes homosexual behavior nor does it recognize the need for gay and lesbian persons to enjoy special protections under law. Culturally, however, homosexuality remains a taboo subject in most sectors of Turkish society, existing in a state of “don’t ask, don’t tell.” Parents may know their son is gay, but choose to portray his lifestyle as that of a young bachelor, explaining to friends and relatives that the reason that he is living with another man (his “roommate”) is that he is saving money for a good marriage.

There are signs, however, that attitudes about homosexuality are shifting toward greater acceptance in Turkey, especially among young people. These changes in perception are also visible in the media and on social networking sites,

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58 It is estimated that 99.8% of Turkish citizens are Muslim. Middle East: Turkey, World Factbook Turkey, CIA (last updated June 20, 2014), https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html.
59 Id.
60 While Turkey is a secular nation, Islam still has a strong influence on Turkish values and norms. Bereket & Adam, supra note 28, at 205.
61 Öz, supra note 19, at 3.
62 Interview with İhsan Kaçar, Activist, Human Rights Association, in Istanbul, Turkey (Mar. 6, 2012); Interview with Fulya Yüksel & Koray Kaplıca, Graduate Students & Activists, Human Rights Association, in Istanbul, Turkey (Mar. 6, 2012).
63 Interview with İhsan Kaçar, supra note 59; see Bereket & Adam, supra note 28, at 212.
64 See Selahattin Gelbal & Veli Duyan, Attitudes of University Students toward Lesbians and Gay Men in Turkey, 55 Sex Roles 573 (2006). Interestingly, the study also showed a more positive view, and acceptance of, lesbians than gay men. Id. at 578. See also Factsheet: The LGBT Community in the Middle East, supra note 34.
with hundreds of Internet sites advertising or recommending LGBT-friendly hotels, bars, clubs, and *hamams*.\(^65\)

Turkey has also experienced a shift in the way that the LGBT community views itself. In the past, homosexuality was linked with traditional “gender” roles, in which the “male” partner did not necessarily label his sexual behavior as “gay,” since he maintained his role within the sexual relationship.\(^66\) More recently, some homosexual Turkish men have begun to use the term “gay” to define themselves.\(^67\) This shift has also contributed to a greater awareness of problems faced by the LGBT community and its struggle for equality within Turkey.

### III. FAILURE OF THE LEGAL SYSTEM TO PROTECT THE LGBT COMMUNITY

The Turkish Constitution grants certain rights and protections to its citizens. Among them, Article 12 recognizes fundamental rights and responsibilities of all persons in Turkish society, while Article 10 guarantees equal protection and prohibits discrimination on the basis of gender, religion, political belief, and other categories.\(^68\) Discrimination on the basis of sexual orientation, however, is not expressly prohibited.\(^69\) This failure to provide express protections for gays and lesbians perpetuates violence and discrimination against LGBT persons.

#### A. VIOLENT CRIMES AGAINST LGBT INDIVIDUALS

\(^65\) See, e.g., ISTANBULGAY: EVERYTHING ABOUT GAY ISTANBUL, ISTANBULGAY.COM (last visited May 9, 2012); TURKEY GAY GUIDE & FORUM, TURKEYGAYGUIDE.TRIPOD.COM (last visited May 9, 2012); Gay Guide, GayGuide.eu (last visited May 9, 2012) (containing links to gay-friendly dance clubs, hamams (traditional Turkish bathhouses), hotels, restaurants, apartments, etc.).


\(^67\) Id.

\(^68\) TÜRKİYE CUMHURIYETI ANAYASASI [CONSTITUTION] Oct. 17, 2001, art. 10, 12 (Turk.).

As the Turkish LGBT community gathers strength, support, and visibility, its members are increasingly targets of violence. While official data on crimes committed against LGBT persons is not tracked in Turkey, LGBT organizations and Amnesty International have documented and reported such crimes. LGBT groups have identified at least sixteen murders since 2010 that were likely based upon the victims’ “real or imputed sexual orientation or gender identity.” These include a transsexual woman who was stabbed thirty times in the city of Bursa and another who was murdered and dismembered in Izmir. In March 2009, prominent transgender rights activist Ebru Soykan was killed in her home in Istanbul. Prior to her murder, she had contacted police and prosecutors asking for police protection from her murderer.

“In a survey of lesbian, gay, bisexual, and transgender individuals, over 70% said that they feared they would be attacked due to their sexual orientation or gender identity.” Transgender sex workers had this fear particularly, many of whom reported knowing a transgender woman who had been murdered in the

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70 AMNESTY INT’L, ‘Not an Illness Nor a Crime’: Lesbian, Gay, Bisexual and Transgender People in Turkey Demand Equality, 30, EUR 44/001/2011 (June 21, 2011). Although beyond the scope of this paper, hate speech is also a problem encountered by the Turkish LGBT community and no specific law exists regarding hate speech in Turkey. Öz, supra note 68, at 18. Although Article 216 of the Turkish Penal Code criminalizes hostility, the Article bans provocation of another social group on grounds of social class, race, religion, sect, or coming from another origin. Id. Because LGBT groups are not an enumerated group, it is unclear that they can apply this Article when faced with hate speech. Id.


72 Id. at 31.

73 Id. at 30.


76 HUMAN RIGHTS WATCH, supra note 74.

77 AMNESTY INT’L, supra note 69, at 31.
There are also reports that Turkish police encouraged private gangs to attack transgender women.\textsuperscript{79}

Many hate crimes in Turkey go unreported, either because victims fear revealing their identity or because police fail to investigate such crimes actively, even when there are witnesses and documentation.\textsuperscript{80} Investigations are also compromised by the prejudicial attitudes of some police officers.\textsuperscript{81} In one case, for example, it was reported that a police officer responding to an alleged sexual assault told the victim, “[i]n any case you are gay, you are open to rape.”\textsuperscript{82} In addition, law enforcement officials often refuse to share details of an ongoing investigation or relevant documents with lawyers representing the victim’s family.\textsuperscript{83}

In the past, even when hate-motivated crimes were prosecuted, perpetrators were acquitted or received lenient sentences because of claims by defendants that the victim requested or initiated sex and that this amounted to “unjust provocation.”\textsuperscript{84} According to Amnesty International, such a defense is attempted in many cases involving a crime against an LGBT victim.\textsuperscript{85} This may be changing, however, in response to mounting pressure by LGBT organizations and international groups.\textsuperscript{86}

\textbf{B. Killings in the Name of Honor: An Emerging Trend Among Turkish Families with Homosexual Family Members?}

\textsuperscript{78} Id.
\textsuperscript{79} Öz, supra note 68, at 20.
\textsuperscript{80} See generally supra note 68. These cases include the murder of Ahmet Yıldız, the murder of Dilek, the rape of several gay men and transgender women in Eskişehir, and the stabbing of a gay man in Diyarbakır. Id.
\textsuperscript{81} Id.
\textsuperscript{82} AMNESTY INT’L, supra note 69, at 34.
\textsuperscript{83} See, supra note 68.
\textsuperscript{84} AMNESTY INT’L, supra note 69, at 34.
\textsuperscript{85} AMNESTY INT’L, supra note 69, at 34.
\textsuperscript{86} For instance, the Melek K. Murder Case, in October 2009, was the first case in which the Court determined that the murder was committed with homophobic motivation and rejected the murderer’s argument that the victim offered him sex that he committed the crime under unjust provocation. Öz, supra note 68, at 21. The perpetrator was sentenced to life in prison and was the first case in which the murderer was punished because of homophobic motivation. Id. However, this could be due to the eyewitness’ testimony, which could refute the claim of the victim’s offering the perpetrator sex.
Honor killings are a unique kind of hate crime in that they are not solely motivated by hate and misunderstanding. An “honor killing” is a form of intra-family violence, where the victim is killed because he or she is seen to have defiled the family’s honor and must be killed in order to restore it. These types of murders find their origin in tribal custom, not Islam, and are usually directed at women as the repositories of the family honor. As illustrated by the case of Ahmet Yıldız, however, recently the practice has turned against LGBT family members. Since 2004, Turkey has arguably made some small progress to prohibit honor killings. Previously, Article 51 of the Turkish Penal Code, Turkish Law 765 provided for sentence reductions for homicides that were the result of “unjust provocation.”

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87 The authors of this article have chosen to place the term ‘honor’ in quotations because through interviews and discussions with Turkish human rights organizations and shelters, the use of honor killing provides a justification for the killing within the term. Using “honor” before a crime frames the discussion as if it were something akin to self-defense. This is improper because it is not an honorable act.


91 UC DAVIS HUMAN RIGHTS INITIATIVE, *supra* note 87.

family honor. Under the revised Penal Code, Article 81 provides that “[a]ny person who unlawfully kills another person shall be sentenced to life imprisonment.” Article 82 provides for “aggravated life imprisonment” for acts committed with the motive of “custom.” Article 29 allows for a reduction in punishment for crimes committed out of “anger or asperity” due to an “unjust act.”

Some scholars and organizations believe that the revisions to the Penal Code are the Turkish government’s attempt to deter “honor” killings. The inclusion of custom as an aggravating factor and the change of mitigating language to “unjust act,” at least implicitly condemn “honor” killings and provide a more objective basis for sentence reductions based on “unjust acts.” Others, however, are deeply critical of the changes, which they argue continue to allow for leniency in cases of “honor” killings. They note that while the Unjust Provocation Article states that it may not be used in “honor” killings, the legislative Commentary of that Article directly contradicts it. This ambiguity grants the judge room to “legitimize” honor crimes. Article 82’s aggravating factor for custom killings is also problematic, as the First Criminal Supreme Court has ruled that “the applicable article applied only to custom killings, whereas the case at hand was an ‘honour’ killing because it did not involve a formal family decision.” While this ruling has since been amended to eliminate the family decision requirement, the distinction between an honor and custom killing remains, giving discretion to judges who are inclined to view “honor killings” as justified by provocation.

93 Id. at 399-400.
94 CONSTITUTION, supra note 67 at Art. 81(1).
95 Id. at Art. 82(1).
96 Id. at Art. 29.
98 İçli, supra note 91.
99 Ghosh, supra note 88.
100 Id.
102 Rebecca E. Boon, Note: They Killed Her for Going Out with Boys: Honor Killings in Turkey in Light of Turkey’s Accession to the European Union and
C. Police Brutality

LGBT individuals in Turkey also face a heightened risk of adverse treatment from state officials. Transgender individuals especially bear the brunt of this adverse treatment due to their greater visibility within the LGBT community. Transgender women have suffered a long history of violence by police in custody. Because police officers who view these women in public places assume them to be sex workers, they are routinely arrested, harassed, and, in some cases, physically abused. In a survey of 104 transgender women conducted by Lambda Istanbul in 2010, 89% reported that they had “been victims of physical violence in police pre-charge detention,” 97% reported being exposed “to verbal abuse, swearing and insult,” 77% reported “that they had suffered sexual violence,” and 86% reported “that the police refused to take records during their detention.” Other reported abuses included destruction of property, beatings, arson of transgender persons’ homes, and torture while in custody.

Prosecutions for such violations are rare. One transgender woman attempting to place a complaint about her treatment in the Alsancak police station in Izmir was told, “Here I take the records. Complain all you want, nothing will happen.” In an unusual case, Chief of Police Süleyman Ulusoy “was indicted for ill-treatment against nine transgender women during his tenure as head of the Beyoğlu police [force] between 1996 and 1997.” His prosecution was

Lessons for Iraq, 35 Hofstra L. Rev. 815, 839 (2006); Interview with İhsan Kaçar, Activist, Human Rights Association, in Istanbul, Turkey (Mar. 6, 2012); Interview with Fulya Yüksel & Koray Kaplıca, Graduate Students & Activists, Human Rights Association, in Istanbul, Turkey (Mar. 6, 2012); Interview with Özlem Ezawba, Director, Mor Çati, in Istanbul, Turkey (Mar. 6, 2012).  

Id.

Id. (“The police stations in the Beyoğlu area of Istanbul and the Alsancak area of İzmir, have been particularly notorious for the torture and other ill-treatment suffered by transgender women picked up by police officers on the street.”).

Id.


Id.
discontinued in 2004 before its conclusion under the terms of an amnesty law. This suspension was surprising, as “a videotape showing him beating transvestites with a hosepipe in the police headquarters in Istanbul had been broadcast on television in 2000.” According to a 2004 Amnesty International Report, he remained on duty in Istanbul after the incident.

On a positive note, the Amnesty International report cited a general reduction in cases of torture and other ill-treatment in police stations due to activism by citizens, publicizing of violence experienced, and NGOs’ campaigns against police torture. The report found, however, that cases of ill-treatment by law enforcement authorities remain high on the streets and beyond official places of detention.

D. DISCRIMINATION IN EMPLOYMENT

The right to work is guaranteed by Article 49 of the Turkish Constitution. In addition, Article 5 of the Labour Act prohibits discrimination by employers against certain groups, but does not include discrimination based upon sexual orientation or gender identity. Of special concern to the LGBT community is Article 125 of the Civil Servants Code, under which public employers may discipline civil servants (such as judges, prosecutors, army officers, police officers, etc.) whose behavior undermines the dignity of their profession or is considered immoral. In addition, Article 27 of the Law on Elementary and High School

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110 Id. See footnote 47 for explanation of law under which prosecution was discontinued. Law No. 4616 on Conditional Suspension of Trials and Sentences for Offences Committed up until April 1999.


112 Id.


114 Id. at 13.

115 See generally Öz, supra note 68, at 31; CONSTITUTION, supra note 67 at Art. 49.

116 See generally Öz, supra note 68, at 31-36 for discussion on employment issues by LGBT community in Turkey; CONSTITUTION, supra note 67 at Art. 5.

117 AMNESTY INT’L, supra note 69, at 22.

118 CONSTITUTION, supra note 67 at Art. 125; see Öz, supra note 68, at 31. Cases brought by Turkish citizens for employment discrimination on the basis of sexual orientation are rather rare, as many fear “coming out” in this way. Id. at 32. These laws have translated into courts dismissing cases in which the employee has been
Teacher’s Promotion and Discipline Number 1702 specifically provides that a teacher may be fired if his or her behavior is “impure” or renders the teacher unfit to teach. Since LGBT persons’ sexual orientation or gender identity is readily accepted as “immoral” or “impure,” this discipline may be imposed on LGBT teachers. In 2009, for example, a teacher challenged his dismissal on the basis of a finding by the Discipline Board of the Ministry of Education that he had entered into a “homosexual relationship.” The local administrative court hearing the case rejected the teacher’s appeal on grounds that Turkish law permits the firing of a public employee for “impure” homosexual behavior. This decision followed a similar holding by the Council of State, the highest administrative appeal court, in a case involving a police officer. Other cases involving Article 125 are pending before various administrative courts in Turkey.

Transgender Turkish citizens face particular employment challenges. According to an Amnesty International report, most transgender women found securing employment nearly impossible, most turn to the often-times dangerous and unlicensed sex industry, risking violence and possible murder at the hands of their clients and police officers. Transgender women who were employed before changing their gender also reported being forced out of their jobs as a result of the change. A survey conducted by Lambda Istanbul shows that “of the 90 transgender women who were asked why they left their employment, 42 percent... [stated that] they believed they would be fired, 30 percent said that they were fired, 29 percent said that were denied promotion[,] and 24 percent said that they were dismissed by his or her employer due explicitly to his sexual orientation, ruling such dismissals lawful. AMNESTY INT’L, supra note 18, at 22.

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119 Öz, supra note 68, at 29; CONSTITUTION, supra note 67 at Art. 27.
120 Öz, supra note 68, at 16.
121 AMNESTY INT’L, supra note 69, at 23.
122 Id.
123 Id.
124 See, Öz, supra note 68, at 34-35, Sedat Küçüközen Case (case pending involving a bank employee fired for his sexual orientation); A.Ş. Case, Çorum Administrative Court (pending case in which teacher was fired under Article 125); the Halil İbrahim Dinçdağ Case (case pending before the Turkish Football Federation where a referee was not allowed to enter a test to become a nationwide referee in May 2009 due to his sexual orientation).
125 Öz, supra note 68, at 32.
126 AMNESTY INT’L, supra note 69, at 23.
127 Id.
forced to resign. Further, transgender women are not recognized by the state as female, excluding them from licensed sex work and exposing them to greater risk of violence and physical harm.

E. Discrimination in Housing

Article 57 of the Constitution guarantees citizens a right to housing. No law, however, prohibits landlords from evicting tenants on the basis of their sexual orientation, sexual identity, or same-sex marital status.

Again, it is transgender women who face the greatest obstacles in obtaining housing. While same-sex “roommates” may often pass for heterosexual men or women who are saving money for school or marriage, transgender individuals’ greater visibility makes them more vulnerable to discrimination. Transgender women are consistently the targets of police harassment if they live in neighborhoods considered “unsuitable for ‘undesirable’ people.” This has resulted in transgender persons being clustered in certain areas of big cities (Istanbul, Izmir, and Ankara), exposing them to more targeted police harassment and frequent raids.

F. Freedom of Expression and Association

In the face of hostility and discrimination against the LGBT community, NGOs have organized in some of Turkey’s cities to provide support to LGBT citizens. There is even a LGBT publication, known as the Kaos GL Magazine.

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128 Id.
129 Id.
130 Oz, supra note 68, at 36. CONSTITUTION, supra note 67 at Art. 57.
131 Öz, supra note 68, at 37.
133 AMNESTY INT’L, supra note 69, at 20.
134 Öz, supra note 68, at 36-37.
135 AMNESTY INT’L, supra note 69, at 20-21 (These raids are justified “on the grounds that [the homes] were being used for prostitution.” Transgender women reported to Amnesty International “that the police often fabricated evidence showing that the houses were being used as a brothel” and issued orders that forbid entry into the home for a period of 3-6 months at a time.).
136 See supra Oz note 68.
137 See Öz, supra note 68, at 12-13.
These efforts have been hindered, however, by efforts to suppress such publications and to limit the right of free association of groups supportive of LGBT rights.

1. Freedom of the Press

Article 26 of the Turkish Constitution protects the freedom of expression and dissemination of thought. Like other areas of Turkish law, however, there is no specific guarantee in Article 26 that LGBT persons are able to use this right without discrimination. While Article 28 protects freedom of the press, it allows censorship for information which threatens the “internal or external security of the state, or the indivisible integrity of the state . . . which tend to incite offence . . .”

The Turkish government, through its police force and prosecutor’s office, has consistently violated the rights of LGBT-friendly publishers. The case of Kaos GL Magazine, which is currently pending before the European Court of Human Rights, is instructive. Kaos GL is a human rights organization dedicated to fighting militarism, nationalism, homophobia, transphobia, and sexism. In July 2006, the July-August edition of Kaos GL Magazine was confiscated by authorities on the same day it was printed. The Ankara 12th Criminal Court of Peace authorized the confiscation based on Article 28 of the Constitution, citing the magazine’s content as “pornographic” and breaching “general morality.”

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139 Id.
140 Oz, supra note 68, at 13. CONSTITUTION, supra note 67 at Art. 28.
142 The History Begins, supra note 141.
143 Id. To create additional problems for the magazine, Umut Guner, vice president of the Kaos GL Association and chief editor of the magazine was indicted with the Ankara Criminal Court of First Instance. Öz, supra note 68, at 14. However, he was acquitted because the magazine had been seized before distribution, failing to meet the requirements necessary for the crime of “obscenity.” Id. at 16.
144 Öz, supra note 68, at 13.
145 The History Begins, supra note 141.
GL appealed the decision to the Ankara Criminal Court of First Instance, which upheld the lower court’s decision. 146 Kaos GL then turned to the European Court of Human Rights (ECHR). 147 After the ECHR’s acceptance of the association’s appeal, the Turkish government responded saying, “freedom of expression is the cornerstone of a democratic society. However, as it is stated in Article 10/2 of the Convention the exercise of this right may be subject to some restrictions . . . In some circumstances, the limitation on the freedom of expression is a ‘must’ for society . . .” 148 The Turkish government went on to state that the measure imposed on the publisher was in compliance with Article 10/2 of the European Convention on Human Rights. 149 The case was still pending before the ECHR as of 2012.

Other publications have encountered problems, as “all publications on gay relationships [are] considered obscene and against morality.” 150 Turkish legislation does not clearly define “public morality,” a term used by the courts, and what violates that standard. 151

2. Freedom of Association

Turkey’s three biggest cities—Istanbul, Ankara, and Izmir—boast civil society networks (known as “initiatives”) that provide support and advice to Turkey’s LGBT community. 152 Despite constitutional protection for the right to associate, these organizations have faced repeated challenges to their operation.

The freedom to associate is found in Article 33 of the Turkish Constitution. 153 Like the freedom of expression, however, this freedom is not absolute. Article 56 of the Turkish Civil Code forbids the establishment of associations against laws and ethics 154 and Article 33 limits the freedom on the grounds of protecting national security, public order, public morals, and public

146 Id.
147 Kaos GL Case, ECHR, Case Number 4982/07. Öz, supra note 68, at 13
149 Id. at 15.
150 Id. at 16.
151 Id. For more information regarding cases in this subject, see Anıl Alacaoğlu/The Book “Third Class Woman” Case, was pending before the Ankara Criminal Court of Peace as of May 2012. Öz, supra note 68, at 16-17; Sel Yayıncılık (Sel Publications)- The Book “Aşkın L Hali” (The ‘L’ Aspect of Love) Case, Press Division of Istanbul Public Prosecutor’s Office, Case No. 2009/66795. Id. at 17.
152 AMNESTY INT’L, supra note 69, at 26.
153 CONSTITUTION, supra note 67 at Art. 33.
154 MEDENI KANUN [CIVIL CODE] Law No. 4963 [2003], art. 56 (Turk.).
health.\textsuperscript{155} The oversight of Turkish associations is delegated to the Directory of Associations, which has the right to make a claim against an association before the city public prosecutor in order to close down the association if it is determined that the association is against the law and ethics.\textsuperscript{156} If the prosecutor agrees, he or she may file a claim on behalf of the public with the Civil Court of First Instance, requesting the closure of that association.\textsuperscript{157} If the association is shut down, it has the right to appeal the decision to the High Criminal Court.\textsuperscript{158} The Directory has unsuccessfully petitioned for the shut-down of five legally registered LGBT organizations, although every LGBT organization has been met with resistance from the Directory.\textsuperscript{159}

Despite the lack of success in formally shutting down LGBT organizations, arbitrary sanctions against LGBT associations have been reported to Amnesty International.\textsuperscript{160} For instance, some associations were fined for providing the requisite documentation to the local authorities too early.\textsuperscript{161} The Directory has also required some associations to carry out up to eight separate audits in a span of three years—far more than other human rights associations.\textsuperscript{162} In this way, the Directory of Associations retains its power to harass LGBT-friendly associations through indirect means, while continuing its attempts to shut them down for their violation of Turkish morals and family structure.\textsuperscript{163}

IV. INTERNATIONAL OBLIGATIONS

Since October of 2005, Turkey has been in accession talks to become a member of the European Union.\textsuperscript{164} Since the early 2000’s, Turkey has enacted a series of economic and political reforms, such as an expansion of civil rights and

\textsuperscript{155} Id. at Art. 33.
\textsuperscript{156} Öz, supra note 68, at 7.
\textsuperscript{157} Id. at 7-8.
\textsuperscript{158} Id. at 8.
\textsuperscript{159} Id.
\textsuperscript{160} AMNESTY INT’L, supra note 69, at 27.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
the abolition of the death penalty, in pursuit of membership to the EU. However, these attempted human rights reforms were obstructed by a failure to implement them in practice, creating a very serious obstacle to EU membership.

In order to be granted membership to the EU, each candidate nation must adopt, implement, and enforce the entire body of European Community laws, often called the *acquis communautaire*. The *acquis* includes enacting all of the treaties, regulations, and directives passed by the EU and European Institutions, as well as following the judgments of the European Court of Justice. Any country being considered for membership to the EU must meet the conditions of each of the 35 “chapters” of the EU *acquis*. Among the 35 chapters of the *acquis* that every candidate must meet are standards on: the free movement of goods, freedom of movement of workers, free movement of capital, competition policy, transport policy, and social and employment policies.

Over the last two decades, the European Union has been increasingly aware of and committed to protecting the rights of LGBT individuals. In 2000, the EU adopted the EU Charter of Fundamental Rights, explicitly prohibiting discrimination based on sexual orientation in Article 21. The European Commission for Justice, Fundamental Rights and Citizenship then stated that its

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168 *Id*.


171 Charter of Fundamental Rights of the European Union art. 21, 2010 O.J. c. 83/02.
priority is to ensure that EU legislation fully complies with this Charter and adopted a Directive banning discrimination in employment and occupation on the basis of sexual orientation.\textsuperscript{172}

The lack of anti-discrimination laws protecting LGBT persons is a major point of contention regarding Turkey’s ascent to the European Union. Although striving to meet various legal and social standards required for EU ascension, Turkey has resisted efforts in the area of LGBT rights.\textsuperscript{173} For instance, in 2011, Turkey refused to amend its Equal Protection law to include protection from discrimination based on sexual orientation and gender identity.\textsuperscript{174} Turkey also refused to sign a EU-sponsored statement presented to the United Nations General Assembly that supported the de-criminalization of homosexuality.\textsuperscript{175}

Each year, the European Commission issues a report of Turkey’s progress regarding compliance to EU standards and regulations. According to the 2011 report:

The principle of anti-discrimination is enshrined in the Constitution and in several laws. However, comprehensive anti-discrimination legislation is lacking, the current legal framework is not adequately aligned with the EU acquis and, in practice, discrimination is taking place against various categories of persons. Legislation establishing an antidiscrimination and equality board has not been adopted.\textsuperscript{176}


\textsuperscript{174} Id.


The report also cites to Turkey’s failure to support a “European Union-sponsored amendment to the UN Resolution on extra-judicial executions and other unlawful killings calling on all States to decriminalize homosexuality, despite the fact that homosexuality is not a criminal offence in Turkey.” Instances of discrimination against LGBT citizens in the workplace, violence targeting LGBT citizens, and intimidation by the police were also cited as problematic to Turkey’s entrance into the European Union and the report finds that further measures are required to increase protections of and participation by Turkish LGBT citizens. According to the EU’s 2013 progress report on Turkey, the country still has quite a way to go before meeting the acquis standards; the report states that “substantial efforts are needed to effectively guarantee the rights of women, children, and lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals,” and that the authorities must “enhance efforts to protect other fundamental rights and freedoms so that all citizens can exercise their rights without hindrance.” In the 2014 progress report, the European Commission states that “respect for the fundamental rights of lesbian, gay, bisexual, transgender and intersex … persons needs to be improved.”

Turkey’s resistance to EU demands for the codification of protection for its LGBT citizens is consistent with the attitudes of the majority ruling AK party. Some commentators believe that the AKP government is no longer committed to the goal of EU membership, implementing policies that have instead limited separation of powers, judicial independence, and freedom of expression. The


177 Id.

178 Id.


181 Sergei Stanishev, European Left: AKP Policies Have Consequently Made Turkey Less Qualified for EU Accession, BLOGACTIV_EU (Mar. 22, 2012), http://kadersevinc.blogactiv.eu/2012/02/22/european-left-akp-policies-have-consequently-made-turkey-less-qualified-for-eu-accession/.
AK party has at times labeled the European Union as a “club of Christians”\textsuperscript{182} and has moved towards de-secularization of Turkish society.\textsuperscript{183} Given the sometimes-strained relationship between Turkey and the European Union, and the AK Party’s desire to maintain conservative Islamic ideals (resulting in discriminatory practices against the LGBT community), Turkey’s accession to the European Union may be a dream of the past. However, because the Turkish government continues its rhetoric of a desire to become an EU member state (fueled by popular pressure), EU recommendations and laws may still have pull among government officials and may result in significant changes in discriminatory laws and practices for the LGBT community. Turkey’s unique position as a candidate for EU membership creates an external pressure on the country to address LGBT issues, which contrasts the approach taken by many of its regional neighbors.

V. PROPOSALS FOR REFORM

Given Turkey’s struggles in the area of LGBT rights, as well as requirements imposed for EU membership, this article proposes several changes that should be implemented by the Turkish government. These include changes in formal law and policy, as well as practice reforms intended to reduce discrimination and violence on the basis of sexual orientation and identify and to promote LGBT rights.

A. CONSTITUTIONAL REFORM OF ARTICLE 10 AND THE INCLUSION OF “SEXUAL ORIENTATION” AND “GENDER IDENTITY”

Article 10 was one important battle in the war waged between LGBT activists and the Turkish government over constitutional reform in May 2010. Organizations such as Lambda Istanbul, the Human Rights Association, and Kaos GL have fiercely lobbied for the inclusion of “sexual orientation” and “gender identity” in Article 10’s anti-discrimination language.\textsuperscript{184} Specifically, these organizations sought to amend the law to read as follows:

\begin{itemize}
  \item Article 10: Recognize the Reality of LGBT!, KAOS GL (Jan. 10, 2012), http://www.kaosgl.org/page.php?id=10318; Interview with İhsan Kaçar, Activist, Human Rights Association, in Istanbul, Turkey (Mar. 6, 2012); Rex Wockner,
Every individual is equal before the law, irrespective of language, ethnicity, skin colour, gender, sexual orientation, gender identity, political view, philosophical belief, religion, sect, marital status, age, disability etc.  

Unfortunately, the government refused to support the proposed changes to Article 10, instead amending the Article to make it permissible to take positive action to combat unequal treatment. Following the government’s rejecting of suggestions for Constitutional amendments the previous year, human rights civil society organizations in Turkey worked with government officials to draft a proposed “Law to Combat Discrimination and Equality.” However, the version of the bill posted to the Ministry of the Interior’s website had removed protection against discrimination on the basis of gender identity and sexual orientation.

This open resistance to any sort of protection from discrimination for the LGBT community requires constitutional amendment. Amending Article 10 to include “sexual orientation and gender identity” as expressly protected categories would be a meaningful first step towards eliminating discrimination against the LGBT community, especially since discrimination claims in violation of the Constitution can be challenged in court. In addition, such an amendment would demonstrate the government’s commitment to equality for all persons and bring it into alignment with the requirements of the European Union.

B. FURTHER REFORM THE PENAL CODE TO EXPAND HATE CRIMES AND INCLUDE THE “HONOR KILLING” LANGUAGE


Annex to Article 10, supra note 184.


Id.

Turkey has a civil law tradition, meaning that “the primary sources . . . are enacted law and custom, with the former overwhelmingly more important.”

Positive law is the preeminent source of law and higher court decisions are not binding in the same way that they bind lower courts in the United States or England. In a civil law tradition, judges have a higher degree of judicial independence from other court rulings. The language and clarity of the law itself is extremely important, as it is the source of legal rights and obligations.

To provide greater protections for LGBT citizens experiencing violence in Turkey, the Penal Code must be further reformed to include sexual orientation and gender identity in hate crimes legislation, and “honor killings” must be explicitly included in Article 82 as a form of “custom” killings.

A hate crime consists of two elements: a criminal offense and a biased motive. Hate crime victims are a distinct category because they are unable to alter the characteristic which made them a target in the first place, a fact that causes psychological injury and fosters a sense of vulnerability. Hate crimes also have a negative impact on the targeted group, as all of its members are affected when one of its members is subjected to a hate crime.

As other jurisdictions have concluded, hate crime legislation has many benefits, including: (1) increased awareness of the reality of invidious discrimination faced by certain groups; (2) improved data collection; (3) enhanced symbolic value of “society’s rejection of crimes based on bias”; and (4) recognition of the harm done to the crime victim and the community. As part of the government’s second “democratization package,” the Turkish Parliament amended the Turkish Criminal Code in March of 2014 to include hate crimes and to increase penalties for discrimination based on “language, race, colour, gender, disability, political opinion, philosophical belief, religion, sect and similar reasons.”

190 Id.
191 See generally id.
193 Id. at 20.
194 Id.
195 Id. at 7, 22-23.
this form of violent discrimination, discrimination based on ethnic origin, sexual orientation, and gender identity are still not included. Suggested language for hate crime legislation in Turkey is as follows:

If crimes are committed with the motivation of hatred against, contempt for, or hostility to any individual on the basis of language, colour, race, disability, religion, ethnicity, sexual orientation, gender identity, gender, sex, political opinion, philosophical belief, sect, or any such considerations that against the public morality are aggravating circumstances that may double the penalty of any crime under the Turkish Penal Code.

The addition of specific “honor killing” language is also crucial to combating violence against the LGBT community. Although the adoption of reformed hate crime legislation should cover “honor” killings, it is important to also include “honor” killings in Article 82, as hate crimes would not necessarily protect women who encounter “honor” violence. The Turkish government might consider including the following language into Article 82:

“Honor”-based violence, defined as that exercised in the name of traditional codes of honor, shall be considered an aggravating factor in sentencing. This includes violence motivated by protection, retention, or restoration of honor of the community, the family, the perpetrator, or the victim.

C. PROTECTION FROM DISCRIMINATION IN THE AREA OF EMPLOYMENT

In addition to the proposed reform of Article 10, Article 5 of the Labour Act should be amended to include protection against employment discrimination on the basis of gender identity and sexual orientation. Article 125 of the Civil Servants Code should also specifically reference Article 5 language as follows:


197 Id at 59.

198 The Authors based their suggested language on Article 10 of the Turkish Constitution and existing Turkish anti-discrimination law, as well as penal codes of other nations. Other examples of specific penalty enhancements include Articles 33-42 of Belgium’s Law of 10 May 2007 and Article 30.6 of Andorra’s Criminal Code.
“Civil servants whose behaviours are against dignity of their profession or whose behaviours in their workplace are immoral shall receive disciplinary punishment, except upon the bases enumerated in Article 5 of the Labour Act; namely, no discrimination based on language, race, sex, sexual orientation, gender identity, political opinion, philosophical belief, religion and sex or similar reasons is permissible in the employment relationship” (emphasis added).

Finally, teachers should be granted similar protections as outlined above through a process of amending Article 27 of the Law on Elementary and High School Teacher’s Promotion and Discipline to reference Article 5 of the Labour Act.

D. POLICY REFORM: GOVERNMENT SHELTERS, POLICE TRAINING, AND CULTURE CHANGE

While legal reforms are an important component of progress and acceptance, they are only effective if they have a baseline level of societal support. For instance, individuals prosecuted for “honor” killings are sometimes given “heroic” treatment in prisons 199 and rarely express regret for their actions. 200 Given this non-legal dimension, policy, practice, and programmatic changes must be considered in order to achieve real equality for LGBT citizens.

First, government domestic abuse shelters must be reformed to allow admittance of LGBT persons. Currently, shelters deem LGBT persons ineligible for admission, leaving them vulnerable to domestic abuse, violence, and homelessness. 201 Next, the Turkish government should implement sensitivity training for its police force to combat the tradition of police brutality against LGBT individuals. This kind of violence should be unacceptable, regardless of the victims’ sexual orientation or gender identity, and all police violence throughout

201 AMNESTY INT’L, supra note 188, at 35; Interview with Özlem Ezawba, Director, Mor Çati, in Istanbul, Turkey (Mar. 6, 2012); Yasemin Öz, Study on Homophobia, Transphobia, and Discrimination on Grounds of Sexual Orientation and Gender Identity: Legal Report—Turkey, 36, DANISH INST. ON HUMAN RIGHTS, http://www.coe.int/t/commissioner/source/lgbt/turkeylegal_e.pdf (last visited May 5, 2012).
Turkey should be more rigorously investigated and punished. The Turkish government should also implement education programs and initiatives to promote awareness and acceptance of LGBT persons. Several studies have shown that an important indicator of acceptance of an LGBT person is whether that individual has a close friend of family member who knows that the person is gay, lesbian, bisexual or transgender.\(^{202}\) In a study conducted in a Turkish university, results demonstrated that individuals might change their attitudes towards homosexuality in a positive way after learning about homosexuals and having a positive experience with them.\(^ {203}\) People who know a homosexual have an increased tolerance for homosexuality, even if the person does not fully accept homosexuals or homosexuality.\(^ {204}\) This type of direct contact is very effective in raising awareness, although does not result in a complete shift from intolerance to tolerance.

Finally, given the prevalence of Islam in Turkey and the influence of imams, imams should be encouraged to examine the issue of homosexuality in the context of Islam’s traditional focus on social justice and protection of the weak. These principles are consistently found throughout Muslim religious teaching and should be applied to the LGBT community. This is the most ambitious of this Article’s recommendations, as adultery will still be a sin and condemned by all imams. However, taking the focus away from condemnation of homosexuality and examining the issue through the lens of protection for a minority group will hopefully turn societal views towards acceptance and aid in a decrease in violence experienced by the LGBT community.

VI. CONCLUSION

While there have been steps toward equality in the last several years\(^{205}\), the LGBT community faces discrimination in many areas of Turkish life. While a


\(^{203}\) Nuray Sakalli & Özanser Ugurlu, The Effects of Social Contact with a Lesbian Person on the Attitude Change Toward Homosexuality in Turkey, 44/1 JOURNAL OF HOMOSEXUALITY 111, 116-18 (2002). The study introduced a lesbian to 89 undergraduate students from Middle East Technical University. Id. at 111. The lesbian gave a brief presentation and then allowed for a question and answer session. Id. Participants were surveyed regarding their attitudes about homosexuality before and after the presentation. Id.

\(^{204}\) Id.

\(^{205}\) “A self-identified LGBTI person was elected to serve on a municipal council in Istanbul.” European Commission, supra note at 59. 2014 LGBT pride parades
change in societal attitudes towards homosexuality will not occur overnight, reforming the law is a first step towards protecting a minority group of citizens facing violence and oppression. Further, for Turkey to achieve European Union membership, it must address its lack of discrimination protections for the LGBT community. For these reasons, the Turkish government must protect LGBT citizens from all forms of discrimination, particularly in the areas of violence, employment, housing, freedom of expression and association. Continued inaction regarding LGBT rights is not simply an issue of protecting the right of an LGBT person to an apartment or retaining a good job – it can be a matter of life or death.

“went ahead without disruption in major cities.” Id. at 53. The LGBT community has also found an ally in the Grand National Assembly in Dr. Binnaz Toprak, who “sponsored a motion demanding that the parliament establish a commission of inquiry to identify all forms of discrimination and abuse faced by the LGBT community.” Hossein Alizadeh, ‘The Other’ and LGBT Rights in Turkey, HUFF. POST (May 17, 2013), http://www.huffingtonpost.com/hossein-alizadeh/the-other-and-lgbt-rights-in-turkey_b_3288724.html.
The Rhetoric of Sovereignty in the WTO: How Sovereignty can Impact State Conduct in the Dispute Settlement Framework

JOANN EZEBOA

I. INTRODUCTION

Sovereignty as it is understood in the modern day, dates back to the development of individual states, and became most apparent in practice by the time that the Peace of Westphalia treaties were signed in 1648. It was promulgated by the writings of scholars such as Machiavelli, Bodin, and Hobbes, and was etched in the teachings and practice of the world following World War II, with the desire to ensure an understanding of the importance of territorial restrictions between states. The notion is defined in Black’s Law Dictionary, and is understood as “the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation.”

This definition makes a significant distinction between “internal sovereignty,” which delineates the relationship between a state and its people with regards to internal affairs, and “external sovereignty,” which focuses on the relationship between several states, and highlights the importance of territorial independence.

The aforementioned distinction is integral to the understanding of sovereignty within the framework of the World Trade Organisation (WTO), as it highlights the core aspects of statehood that could lead to disparity in the actions of member countries when faced with compliance to organization rules, and rulings

2 Id.
3 Sovereignty, BLACK’S LAW DICTIONARY (3d. Ed. 1933) (emphasis added).
of the Dispute Settlement Body (DSB).\(^5\) It also highlights the importance of power to sovereign states, which when applied in the context of the WTO, hinges on the desire of nations to reap the benefits of bilateral and multilateral trade agreements by giving up some sovereignty to the WTO on paper, while seeking to maintain their full right to make trade decisions unilaterally in practice.\(^6\)

Furthermore, the distinction emphasizes that by relinquishing sovereignty in trade relations and allowing the WTO to influence aspects of trade that could affect the market, the populace may develop adverse perceptions regarding strength of their own government. This effect on popular sovereignty\(^7\) could ultimately cause a nation to struggle to maintain its legitimacy. Within the trade milieu in particular, critics of the organisation would argue that it is more important to focus on the financing of sunrise and sunset industries within one's own territory, rather than seek to implement the more efficient comparative advantage model, which can be perceived as aiding the progress of other nations’ economies to the detriment of indigenous economies. Therefore, this paper will provide a preliminary examination of the rhetoric of sovereignty in argumentation within WTO tribunals, while highlighting a few discrepancies in the notions of sovereignty to which varying countries subscribe when on trial at WTO level. It will also consider whether the actions discussed represent a desire to maintain power unilaterally, while still benefitting from the free trade agenda promulgated by the WTO.

In order to do this, I will briefly introduce the WTO’s current dispute settlement mechanism\(^8\), and shed light on some of the vices of its previous system. This is valuable to the analysis, as it creates an awareness of the system that seeks to ‘police’ adherence to free trade principles. I will then discuss a few member state case studies from the WTO Tribunal, analyse some pre-trial actions and arguments

\(^5\) See generally Dispute Settlement System Training Module: Chapter 3: WTO Bodies Involved in the Dispute Settlement Process, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/dispu_e/dispsettlement_cbt_e/c3s1p1_e.htm (last visited Dec. 11, 2013) [hereinafter Dispute Settlement Ch. 3].

\(^6\) See id.


\(^8\) Dispute Settlement System Training Module: Chapter 1: WTO Bodies Involved in the Dispute Settlement Process, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/dispu_e/dispsettlement_cbt_e/c3s1p1_e.htm (last visited Dec. 11, 2013) [hereinafter Dispute Settlement Ch.1].
at trial, and share a number of key reactions to the Tribunal rulings from the perspective of developed and developing nations. This will serve to provide an initial insight into the effect that the desire to maintain sovereign authority has on the countries, and the efficacy of the tribunal system.

I will then proceed with a discussion of the direct effect of judicial activism on sovereign prerogatives, and how this acts a drawback to the sovereignty of countries, as its very existence and performance casts doubt on member countries’ ability to act as sovereigns on trade matters. Following the discussion, this paper will make apparent some difficulties that the dispute settlement body faces in tackling disputes between member nations. It will also promulgate an initial assertion that as member nations seek to retain their sovereign authority within the framework, and argue that the dispute settlement body within the WTO seems to struggle to exert proper adjudicatory power over them. Finally, it will show how these issues have led to the disparity between the treatment of the stronger developed nations, and that of the less influential developing ones.

II. BACKGROUND

The idea that belonging to any supranational organisation requires members to give up a portion of their sovereignty to the international body at the helm of the organisation’s activities is not a foreign notion in the business of international relations. In fact, this very idea is integral to the functionality and legitimacy of the dispute settlement mechanism of the WTO (particularly the Dispute Settlement Body, the Panels, and the Appellate Body) because unlike courts, their validity and jurisdiction stems from the mere fact that through membership, countries are bound by the Dispute Settlement Understanding (DSU) which creates and empowers the entire framework. The DSU calls for “[p]rompt compliance with the recommendations and rulings of the Dispute Settlement Body…” and explains that this is “essential in order to ensure effective resolution of disputes to the benefit of all the members.”

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9 See generally, Dispute Settlement Ch. 3 supra note 5.
11 Id. art. 21.1.
Arguably, nations agree to forfeit portions of their sovereignty to supranational organisations because the world has become increasingly interdependent, and is seen to favour the harmonisation of countries and their activities based on a firm belief in the merits of globalisation. Additionally, it is believed that the maintenance of constructive relationships between countries is both advantageous and necessary in order to minimize opportunity costs, while increasing welfare and GDP for each state based on the notion of comparative advantage.\(^{12}\) However, it is well known based on the early writings of scholars, such as Hobbes, that sovereignty is a power that nations desire to maintain and utilize effectively in order to ensure that they have the freedom to act as a stand-alone on the world’s stage, while maintaining the required legitimacy that is required to enforce law within their borders.\(^{13}\) It goes without saying that a state that is deemed to be entirely subject to the control or influence of external organisations could lose the power of enforcement within its own territory, and among its peer nations.

John H Jackson, sheds light on what is the balance between the unconstrained judicial activism and judicial restraint of the appellate body.\(^{14}\) In theory, such activism could lead countries to unilaterally withdraw from the WTO.\(^{15}\) This assertion implies that member countries desire to maintain their full sovereignty, and by some measure, retract the mandate that they have given to the organization via membership. Conversely, it is also argued that judicial activism within the WTO is a necessary component of the legitimacy of its dispute settlement body which should be embraced, rather than lead countries to exit the organization. This is because when a body is given the power to act in a certain capacity, it owes a duty to act impartially and without deference to any organ from which its power springs.\(^{16}\) For example, arbitrators are selected and empaneled to adjudicate fairly,
regardless of which party to the dispute selected them. Evidently, those countries that oppose such judicial activism enough to contemplate withdrawal, also believe that that its practice constrains their sovereign ability to withdraw. For example, a group of Caribbean banana producing countries, which were rather disappointed with the outcome of the EC Bananas dispute in 1997, reportedly threatened to withdraw from the WTO, but did not do so. These tensions make evident the importance of sovereignty to member states in international relations, but also show the difficulties that countries face in holding fast to their sovereign authority on international matters.

There is a sense that developing countries have a stronger concern for their sovereignty within the WTO because they are not as powerful as the developed nations, and cannot advance their interests on the international scene economically and militarily. Therefore, they argue that they do not hold sovereignty within the framework, and use the discourse of sovereignty as a tool to influence the dispute mechanism procedure.

Developing a clear understanding of the actions of countries before the WTO Tribunal in reference to the coveted ‘sovereign authority’ requires a basic grasp of the organization’s dispute resolution system as this will aid in showing the strengths and weaknesses of the system. It will also shed light on the system’s loopholes, which leave room for states to act unilaterally as sovereigns - and the growth and development that the system has undergone to date.

III. AN INTRODUCTION TO WTO DISPUTE RESOLUTION

The Dispute Settlement Understanding (DSU), which is formally called the Understanding on Rules and Procedures governing the Settlement of Disputes, exists in order to establish rules and regulations to adjudicate disagreements arising under the Covered Agreements of the Final Act of the Uruguay Round. All member nations of the WTO are subject to the rules, and cannot reserve the right

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17 Bossche & Zdouc, supra. note 15.
to opt out, as some consent-based systems of international law condone. The DSU created and empowered the Dispute Settlement Body (DSB) consisting of representatives from all WTO member states. It acts as the final arbiter or adjudication system within the dispute settlement framework, and also establishes strict timeframes for the dispute settlement process. It also creates an appeals system that sets the standard for the interpretation of substantive provisions of the covered agreements. These rules and procedures have been implemented in order to provide “...security and predictability to the multilateral trading system...” and attain “…a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements.” The stages of dispute resolution covered include consultation, good offices, conciliation and mediation, a panel phase, appellate body review, and remedies. The earlier stages of consultation, good offices, conciliation and mediation are the customary approaches to the resolution of conflicts in public International Law making them generally accepted diplomatic means to the settlement of disputes. Therefore, the pacific nature of international organizations, acts in favor of the sovereign prerogative of individual member states.

The current dispute settlement procedure, known as the Dispute Settlement Understanding (DSU), was conceived based on the ineffectiveness of the prior dispute resolution method under the GATT, which failed to create an appropriate enforcement mechanism for the adoption arbitrated outcomes by parties to arbitrated disputes. “Under GATT, procedures for settling disputes were ineffective

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26 See generally DSU, 1869 U.N.T.S. 401, 33 I.L.M. 1226.
and time consuming since a single nation, including a the nation whose actions were the subject of the complaint, could effectively block or delay every stage of the dispute resolution process.”

27 This hindrance on the former dispute settlement process shows the extent to which countries sought to maintain their sovereignty, and the lengths to which they would go in order to achieve their goals. As the DSU was designed to create a definitive process under which member countries can be held accountable for their actions, it is clear that it invariably aimed to reduce the sovereignty of countries within the organization, as its very existence acts as a check on member countries that seek to implement policies or regulations that will make it arduous for foreign entrants to engage in business within a given country. The DSU creates exceptions, for barriers that are put in place in order to ensure that the goods brought into their countries meet specified standards, for example safety or environmental protection standards. It is not completely ludicrous to believe that some countries disguise their commitment to protectionism under the creation of barriers that force compliance with certain environmental standards and safety regulations. This practice is anticipated in the substantive provisions of the covered agreements, e.g., the chapeau to Article XX under the GATT 1994, but regardless of its mention, member nations are still seen to have applied the provisions loosely when their implemented measures are shown to constitute arbitrary or unjustifiable discrimination against other states. It is also interesting to note that the wording suggests that discrimination is considered appropriate as long as it is justifiable, and this could lead member countries to adopt measures for arbitrary reasons and then seek a dignified means to justify it. Such a loophole

28 DSU, 1869 U.N.T.S. 401, 33 I.L.M. 1226
29 General Agreement on Tariffs and Trade (GATT) art. XX (the chapeau) (entered into force Jan. 1, 1947), available at https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf (“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement [the GATT] shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (b) necessary to protect human, animal or plant life or health; . . . (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. . . “).
simply leaves too much power in the hands of member states, and could create a clear avenue for abuse of a system that is seeking to encourage free and fair trade.

The DSU was created as an authority in dealing with these borderline situations, and detailed supplemental agreements such as the Sanitary and Phytosanitary Measures (SPS) were created during the Uruguay round in order to specify the instances under which such regulatory action was permitted, even if they did restrict trade. Article 3.2 of the Dispute Settlement Understanding states that the function of the new framework under the WTO is “…to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law…”

The stringency of the new system was sought by the United States in 1988 when it pushed for the strengthening of the dispute settlement provisions (under the GATT) during the Uruguay Round, in part because its congress was not convinced that the GATT as it stood could offer the necessary “equitable balance of advantage” to the United States. In other words, the U.S. was concerned that formal concessions granted to U.S. exports going into other countries would be eroded by hidden barriers to trade and therefore sought to act in order to preserve and promote its own sovereign authority to act in the trading environment of member countries. Unsurprisingly, many other member countries hold this same concern. The true surprise exists in the fact that regardless of this concern, the U.S. and other member nations try to maintain their own sovereignty on such issues by using the same hidden barriers that they claim will be used against them. The case of Korea- Measures Affecting Imports of Fresh, Chilled and Frozen Beef [hereinafter Korea Beef Case] provides a salient example of a nation’s approach to applying the WTO rules, and its desire to reap the benefits of a free trade organisation, while imposing restrictions on its fellow trading partners in its own jurisdiction.

A. Case Study: The Korean Beef Case

Although this case was brought before the dispute settlement body using the policies stated in the GATT, it remains instrumental in gaining an understanding of member states inherent desire to maintain sovereignty, and skirt the rules to which

31 DSU, 1869 U.N.T.S. 401, 33 I.L.M. 1226 at art. 3.2.
32 Abels, supra note 30, at 491.
33 Suranovic, supra note 27.
they voluntarily subscribed in order to develop their own indigenous economy. In this case, the U.S. accused Korea of implementing protectionist measures that constrain the opportunities for the sale of imported beef by confining its sales to specialized stores (otherwise known as the dual retail system), and also by limiting the manner of its display. The U.S. also argued that Korea imposed a price increase on sales of imported beef, limited import authority to “super groups” and the Livestock Producers Marketing Organization (LPMO), and provided domestic support to the indigenous cattle industry in large amounts that led Korea to exceed the measure of support which had been reflected in its schedule. The U.S. claimed that all the adverse conditions created by Korea only applied to imported beef, and that their actions denied indigenous treatment to foreign produced beef. The Panel concluded that the support that Korea offered to the domestic industry amounted to domestic subsidies, and that it went contrary to the Agreement on Agriculture, Articles II, III, XI, and XVII of the GATT 1994, and Articles 1 and 3 of the Import Licensing Agreement. Following the panel’s findings, an appeal, and the report of the appellate body, the Dispute Settlement Body made some recommendations to the Korean government, which asked for reasonable time to implement. Here, although some of the actions that Korea engaged in were deemed legal in accord with the agreements, it seems that their separation of the domestic and imported meat signals an inherent desire to differentiate the types of beef in the face of consumers. The price mark-up is particularly problematic because it does not allow the market to dictate the price, as is the regular commercial model under free trade agreements. Therefore, this case highlights the innate desire of nations to engage in free trade with other

36 Id.
37 Id.
38 Id.
40 Bhala & Gantz, supra note 34.
countries, but also exposes their desire to retain benefits and advantages for their own countries and at the expense of the other trading nations.

IV. DIFFICULTIES FACING THE WTO DISPUTE SETTLEMENT MECHANISM

From the above case study, a few preliminary conclusions can be drawn. The mere fact that the covered agreements governing the trading policies of WTO countries create rules that can easily be abused by member nations, suggests that the measures implemented are not stringent enough, and that the system can be blamed for the member nations ability to outwit the rules because of the loopholes in the aforementioned covered agreements in a bid to retain their sovereignty.

In terms of dispute settlement, it seems that the WTO struggles to implement a scheme that deals with the intent to, or action that serves to contravene the laws stipulated in the covered agreements, or the outright contravention of these laws. Therefore, countries are seldom held wholly accountable for their actions. There is a stark contrast between the WTO dispute settlement method, and court proceedings that do not condone party influence.\footnote{See generally Suranovic, \textit{supra} note 27 (discussing the structure of settlement disputes in the WTO).} This contrast stems from the sources of their power and legitimacy. Whereas dispute settlement mechanisms within supranational organizations are products of state consent whose sovereignty is derived from the power given to the adjudicating body by each state, courts gain sovereign status from of their constitutional empowerment as the judicial arm of government.\footnote{Sovereignty, \textit{supra} note 7.} Due to the nature of international law, and supranational organizations receiving their legitimacy through their member states, it is extremely difficult for them to hold member states to account and assert authority through enforceable decisions the way court can. Instead, such dispute settlement mechanisms are resigned to recommendations lacking enforceability.

At times, it appears that member states, particularly the U.S., fear that the WTO can compel a member country’s internal legislative system “to abandon health and environmental standards’ if they are at odds with international trades rules”\footnote{Suranovic, \textit{supra} note 27 (citing \textit{Behind the Headlines, America’s Feature Inc.} (Oct. 1994), \url{http://www.execpc.com//~jfish/fwiw/fwiw0035.txt}).} Furthermore, developed nations are concerned that they lack power to veto decisions within WTO dispute settlements, particularly as the dispute settlement body is composed of a representative of all member countries who each have an equal say regarding the acceptance or rejection of panel reports. However, it seems
that these bodies do not have the authority to force states into taking any particular action within the WTO dispute settlement regime. Instead, recommendations are made, which do not completely strike down the actions of states, but only require marginal amendments or more proof for their esteemed position. It is clear that the diplomatic enforcement approach that the Dispute Settlement Body (particularly the appellate body) abides by is a lacklustre attempt to grapple with disagreements within the Organisation. This is evident because balancing to the regulatory goals of member states with the internal market disciplines set out in the covered agreements is ineffective, and in doing this, the DSB gives too much room for member states to advance their own protectionist agenda while laying claim to a desire to create a strong system of regulation.

It is understandable that states perceive the judicial activism of the panels and appellate body to be quite severe considering the fact that they vote in secret, require decisions to be rendered within established time frames, and act independently without underlying loyalty to any member state. These factors contribute extensively to the perception of judicial activism within the WTO because their implementation shows the supranational organisation, which derives legitimacy from the member nations, acting in a higher capacity that separates it from the source of its power. Therefore, the member nations believe that this could have the cumulative effect of eroding their sovereignty within the organisation. Outside of the framework, states subscribe to the business of settling their disagreements directly with other countries in time of dispute. This correlates with the ideas of Adam Smith, which he detailed in The Wealth of Nations. Smith, who was a scholar of Economic theory and practice, discussed what he felt was the appropriate response to trade disputes on an international level. Smith believed that if a country imposed restrictions on the exports of its trading partner, then that country reserved the right to retaliate and impose restrictions on their imports accordingly. His belief was that unilateral action, or the threat of such action was the most effective means of trade dispute settlement.

While this argument can be understood as rational human instinct in an economic context, it seems to suggest that countries are better off maintaining their sovereignty in trade relations and acting alone, which will invariably see some

44 DSU, 1869 U.N.T.S. 401, 33 I.L.M. 1226
45 See generally Stone, supra note 16 (discussing judicial activism).
46 See generally Adam Smith, The Wealth of Nations, (1776).
countries perform better (though at high comparative costs), and others decline rapidly. Interestingly, the WTO dispute settlement mechanism seems to agree with Smith to some extent, as it does not include a formal enforcement mechanism (in contrast to other alternative dispute resolution systems), and allows countries to retaliate as a last resort.

The ideas behind both Adam Smith’s belief in retaliation, and the provision that allows for such action the DSU, are similar in that they both believe that to be an option available to both parties to a dispute. Yet, while Smith believes that option to be a viable step which should be taken if such action is warranted, the dispute settlement framework would not uphold retaliation as the go-to method of dispute settlement, and would aim to ensure that member nations do not act in such a manner. Like Jean Baptiste Say\textsuperscript{48}, the WTO believes that the costs that a country inflicts upon itself when it retaliates are high, and that imposing such a sanction could create a power-play within the organisation, as no country will wish to back down, thereby creating a disincentive to lift the sanctions.

Beyond this reasoning, the fact remains that the creation of such a measure, even as a last resort, suggests that the WTO dispute settlement framework creates an environment where member states can act unilaterally against one another. This could be viewed as the WTO’s unintentional commitment to ensuring that countries do not feel that they have been stripped of their sovereign power. The use of the term ‘unintentional’ is to draw attention to the fact that the WTO dispute settlement mechanism believes itself to be a rigorous system, where each member nation has equal rights to bring complaints, and equal obligations to accept the results. In fact, it prides itself on the changes that it has adopted following the overly flexible GATT, arguing that it settles disputes largely on the rule of law, rather than in adherence to simple power politics.\textsuperscript{49}

However, this might be premature, and not as evident as the organisation makes it out to be. Instead, there are clear indications that the WTO has deviated from the theoretical notion of judicial activism that is inherent in letter of the DSU, to a watered-down adjudication system in practice, so as to ensure that the comfort of the countries within the system with regards to sovereignty, still remains. It is quite odd that member nations still seek to retain more of their sovereignty within the system, even though so much of it lies with them. This solidifies the idea that


\textsuperscript{49} \textit{Id.}
no portion of a states’ sovereignty is deemed immaterial, and displays the intrinsic need for states to remain all powerful at all times.

V. DISCUSSION OF JUDICIAL ACTIVISM IN CONTEXT: NON-STATE ACTORS WITH CASE EXAMPLES

Non-state actors such as anti-globalization advocates and doctrinaire free traders are of the opinion that judicial activism exists within the WTO dispute settlement mechanism, and they would argue that the system (vis-à-vis the appellate body) impedes upon the sovereignty of member nations by upholding arbitrary decisions.  

An example propagated by the anti-globalization advocates is the European Communities (EC) - Measures Concerning Meat and Meat Products (Hormones) [hereinafter European Beef Hormone Case] in which the European Community (now European Union) imposed a ban on meat products that did not adhere to certain sanitary requirements, developed based on consumer anxiety within the union and scientific evidence which the panel and appellate body considered unsatisfactory. These advocates argued that the ban imposed by the EC should have been upheld, as the decision made by the union was based on the popular opinion and will of the EC citizenry. Similarly, the free trade absolutists argued that in the United States — Import Prohibition of Certain Shrimp and Shrimp Products [hereinafter Shrimp Turtle Case], the appellate body should have upheld the ban, rather than claim that it could have been in accord with the agreement provision had it been implemented for animal preservation, rather than as a discriminatory measure. In that case, Washington banned the import of shrimp from countries that did not require the use of fishing methods that were safe for endangered sea turtles. Their argument was based on the idea that the appellate body’s ruling in this case was inconsistent with a prior decision made under the GATT system,

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51 Id.
53 Esserman & Howse, *supra* note 50.
54 Id.
which condemned a ban on tuna imports from countries that did not safeguard dolphins.\footnote{Id.}

On reflection, it seems that these interest groups are overstating the authority that the dispute settlement body possesses to comment on these matters, by viewing it as the judicial activism inherent in state or federal court procedure. While there are some questions as to the validity of the DSB’s decisions based on the aforementioned examples, it seems that the panels and appellate body have shown the WTO’s inclination to evade over-involvement in the internal regulatory affairs of member nations, and instead ask nations to submit clear proof of the reasons for their actions, or to make their regulations align entirely with the specific trade agreement in question. This desire is apparent in the European Beef Hormone Case, whose merits are discussed in more detailed below.

A. CASE STUDY: EUROPEAN HORMONE CASE

In this case, the panel dealt with the import restrictions that the European Union placed on beef treated with growth hormones.\footnote{Panel Report, European Communities - Measures Concerning Meat and Meat Products (Hormones), WT/DS26/R, (Aug. 18, 1997) [hereinafter European Hormone Case].} From the perspective of the EU, the trade barriers were put in place in order to ensure that safety standards were met, and not simply to prevent other member nations from gaining competitive advantage. The Union further explained that its actions were in compliance with the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). The SPS allowed member nations to ban or restrict imports in the event of improper sanitary measures being taken. With the backdrop of the mad cow disease that affected livestock across the world, it seemed that the measures were not completely unforeseen or unnecessary. Though, the United States and other third party countries that supported the case being brought against the EU, argued that their actions constituted protectionist behaviour. This was against the precepts of Articles III or XI of the GATT 1994, Articles 2, 3 and 5 of the SPS Agreement, Article 2 of the TBT Agreement and Article 4 of the Agreement on Agriculture.\footnote{Dispute Settlement: DS26: European Communities - Measures Concerning Meat and Meat Products (Hormones), WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm (last visited Jan. 24, 2014) [hereinafter European Hormone Case Summary].}
The key issue was therefore a matter of divergent views about appropriate policy approaches to risk management and assessment, and the legal status of the ‘precautionary principle’. The panel found that insufficient scientific evidence existed to prove that EU’s unilateral action was not a protectionist measure, and explained that their actions were inconsistent with Articles 3.1, 3.3, 5.1 and 5.5 of the SPS Agreement. However, this finding did not lead to a clear ruling on the next course of action for the EU. Instead, the panel left a wide variety of compliance options open to the EU such as technical changes in the policy specifics, and suggested that more complete scientific evidence would justify the ban.

On appeal, it was found that while the prohibition was inconsistent with articles 3.3 and 5.1 of the SPS agreement, it was not incongruent with articles 3.1 and 5.5 of the same agreement. The case lingered on for an extended period following requests by the European Communities to submit the determination of “a reasonable period of time” for implementation of the recommendations and rulings, to arbitration. The mere fact that either party can seek such redress from an external system (though it acts within the dispute settlement system noted under the DSU) shows the extent of the sovereignty that member countries maintain within the dispute settlement framework. This highlights the weakness of the system that exists in contrast to the power of the individual nations (particularly the developed countries) and invites the question: have they truly given up any of their sovereign authority through membership of the organisation?

VI. THE PLIGHT OF DEVELOPING COUNTRIES

Developing countries, in particular, had expected that with the implementation of the DSU, the dispute settlement mechanism would aid the weaker nations in enforcing their rights and obligations under the various WTO agreements. Remarkably, the benefits accruing to the new system was the major reason that countries had agreed to the Uruguay Round. However, it seems that the desired effects have not come to fruition in the manner that was hoped. The dispute settlement process is extremely expensive for developing countries (e.g. high legal fees), meaning that they are hardly able to engage in the process even when they believe they have been wronged within the framework. The cost of the procedure diminishes the promptness and willingness of developing countries to

\footnote{59} European Hormone Case, supra note 54.  
\footnote{60} European Hormone Case Summary, supra note 55.  
\footnote{61} Id.  
\footnote{62} Esserman & Howse, supra note 49.
initiate the dispute settlement method and exercise their rights within the organisation, as a developed country would.  

Also, the relief granted by the dispute settlement system takes many years to implement because the member countries often request lengthy periods of time within which to comply with the recommendations, notwithstanding the already lengthy panel and appellate procedure. This could mean that even if developing countries do assert their rights under the auspices of the WTO dispute settlement body, the developed nations will remain advantageous because they have some power to delay the dispute settlement period. Arguably, the mechanism gives too much sway to those who already possess much of the economic leverage in trade relations. This seems to take away from the developed nations who need it the most, effectively stripping them of their sovereignty within the dispute settlement process of the WTO and trade relations as a whole. The WTO dispute settlement regime operates under the pretext that all states are equal, and therefore sovereign in the same way. However, it is well known that sovereign power is affected by the capacity of member states to assert their prerogatives - an area in which developing countries are severely lacking. Furthermore, the remedy of retaliation that is available to member nations under the DSU is not particularly attractive to developing nations because there is a natural hesitation to take such a step against a developed nation that could be of assistance to the country in times of economic and political difficulty. This shows that regardless of its efforts, the DSU has not created the balance of power that was hoped for following the Uruguay Round. Instead, it seems to have reinforced the status quo with regards to the sovereign status of developed nations over that of developing ones.

A. Case Study: Indian Pharmaceuticals

This reinforcement is better understood when considering the effect of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement on the Indian pharmaceutical industry. In the words of Dr. Hira of Aid Research and Control Centra (ARCON), “WTO/TRIPS stands for a re-colonisation of the economically weak countries. The patent right is an obstacle in the fight against the

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63 Raghavan, supra note 18.
64 Id.
AIDS epidemic. These economic rules of the game are partly to blame for the fact that people are dying.”  

Many share this view and argue that the TRIPS agreement acts against developing countries, while working in favor of developed nations. In the view of the developing nations such as India, the patent system under the TRIPS will work against the development of cheaper pharmaceutical medicines, which will effectively compete with the outrageously priced drugs that are developed and sold by the “Big-Pharma” such as Novartis. India believes that the developed countries want to have a continued advantage over their country and countries alike, who are growing their economies by making medicines akin to those of developed countries. Doing so while creating jobs and driving down the price of medicine. India’s drug industry is unique in that for 30 years, it did not recognize pharmaceutical patents, as was its sovereign right prior to WTO membership. Therefore, it was able to develop the budding industry without high costs. However, its WTO membership in 1995 constrained that sovereignty, and required India to change its patent policy. It maintained in its new system protections for patients and generic manufacturers, which suggests that even developing countries make considerations that enable them to maintain sovereign authority in the face of challenges.

B. CASE STUDY: KOREAN BEEF CASE

In the Korean Beef Case, one of Korea’s arguments for implementing measures that amounted to the separation of imported beef from local beef was that it was necessary under Article XX(d) of the GATT beyond any traditional enforcement mechanism. The reasoning for this was that Korea was aiming for a higher degree of enforcement of the Unfair Competition Act with regards to beef, than it was regarding other products. The appellate body did agree that WTO members possess the sovereign right to decide what enforcement level they wish to attain under their laws and obligations as long as they are consistent with their GATT-WTO obligations. However, the appellate body did not take kindly to Korea’s arguments that its dual retail system was necessary based on a lack of an

68 Id.
69 Bhala & Gantz, supra note 34, at 458-640.
adequate amount of policemen to check all the shops and ensure the high standards of enforcement on a daily basis. Korea believed that it needed the system because it wanted to attain a high degree of enforcement against fraud in the market for beef, but did not have the manpower to achieve this goal of consumer protection via the police and law enforcement systems in the country. The dual retail system therefore acted as their means to an end, and not simply a protectionist measure.\textsuperscript{70}

The appellate body was right to reject this argument, as it is more sensible for Korea to improve its police capacity, or find some other way to meet its goals without overstepping the boundaries of its trade agreements. However, from the standpoint of the developing countries, such decisions emphasize the desire of the WTO to thwart the development of their economies and policy initiatives within the trading sector, thereby enforcing the status quo, which favours the developed world over the developing nations. In this argument, the power struggle is evident from both sides of the coin. Clearly, the less developed countries seek to cling to their sovereign status by creating policies that walk the fine line between compliance, and a subtle contravention of the rules. In so doing, they are able to retain membership of a trading organisation such as the WTO will be instrumental to their development, and at times, implement arbitrary rules that go unnoticed. Proof of this lies in the fact that Korea has been challenged in a similar situation regarding quantitative measures which violated GATT Article II(1)(b)\textsuperscript{71} by the U.S., Australia and New Zealand in 1989. Similarly, developed nations are quick to seek redress when they believe that protectionist actions are being carried out to their detriment, but also implement policies that effectively blur the line between acquiescence and infringement. An example of this is the U.S. Zeroing case where Mexico complained that the U.S. was calculating anti-dumping duties against foreign products arbitrarily. However, the U.S. argued (in accord with the lotus principle) that the WTO didn’t prohibit this, even though it seemed to be a protectionist move.\textsuperscript{72}

\textsuperscript{70}Id.
\textsuperscript{71}Id. (discussing a case in which Korea’s import monopoly—the LPMO—effectively imposed a tariff surcharge, which could not be characterized properly as a mere quota rent, and which caused the total tariff to exceed Korea’s bound commitment).
Essentially, the aforementioned analysis shows that the very nature of the dispute resolution system favours the developed nations because it gives the member countries that are able to afford adjudication using the system, the freedom to express their sovereign authority, without providing the same recourse to developing countries that cannot afford to bring complaints before the system.

VII. CONCLUSION

The arguments detailed above have shown that the WTO has not developed an entirely effective method of carrying out its adjudicatory role in settling the disputes. Member states seem to exert their authority in the process, and seek to maintain sovereign status during times of dispute. It is necessary for the dispute settlement framework to address the loopholes therein, in order that the issues noted in this paper can be adequately resolved. Although creating a fair and transparent process for settling disputes is no easy feat in international relations, more could be done to create a balance of power between countries of different socio-political and economic status. Furthermore, greater consideration could be given to the language of the conventions governing the WTO and its dispute settlement regime, in order to prevent construction in favour of sovereign ideologies and retention of power. In so doing, the WTO dispute settlement structure could become a stronger and more resilient body, which can better adapt to the changing trade environment and foster closer working relationships between nations.