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INTERPRETATION OF INTERNATIONAL AGREEMENTS BY DOMESTIC COURTS AND THE POLITICS OF INTERNATIONAL TREATY RELATIONS: REFLECTIONS ON SOME RECENT DECISIONS OF THE UNITED STATES SUPREME COURT

Martin A. Rogoff*

INTRODUCTION

In its 1993 decision in Sale v. Haitian Centers Council, Inc.,¹ the United States Supreme Court upheld the policy of the Clinton administration of intercepting on the high seas Haitians bound for the United States and forcibly repatriating them without first determining whether they could be classified as refugees, thereby qualifying for political asylum in the United States. More specifically, the Court held that the forced repatriations undertaken by the Coast Guard beyond the territorial sea of the United States violated neither the Immigration and

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Nationality Act of 1952,\textsuperscript{2} nor Article 33 of the United Nations Convention Relating to the Status of Refugees.\textsuperscript{3} The decision was widely criticized on humanitarian grounds, as repatriated Haitians were very likely to face persecution on their return to Haiti.\textsuperscript{4} Moreover, according to the critics, the United States policy upheld by the Court in this case represented a fundamental reversal of long-standing American generosity toward those fleeing from tyrannical governments.\textsuperscript{5} Also, commentary on the legal basis of the Court’s holding has been uniformly critical.\textsuperscript{6}

There is, however, another disturbing aspect of this case which merits full discussion: the Supreme Court’s approach to the interpretation of the United Nations Convention Relating to the Status of Refugees. The majority opinion limited the scope of applicability of the Convention’s prohibition of expelling or returning refugees to actions taken by the

\begin{itemize}
\item \textsuperscript{2} Immigration and Nationality Act of 1952, § 243(h), 8 U.S.C. § 1253(h) (1994).
\item \textsuperscript{5} See, e.g., A. M. Rosenthal, \textit{The Haitian Mirror}, N.Y. TIMES, May 10, 1994, at A23.
\end{itemize}
United States within its territorial limits. According to the Court, the relevant provision of the Convention does not apply to actions of United States Government officials taken on the high seas. The Court's reading of the Convention was determinative, since the potentially applicable provision of the Immigration and Nationality Act had been amended to conform to the requirements of the 1967 Protocol which made the substantive provisions of the Convention applicable to the United States. In his dissenting opinion, Justice Blackmun takes issue with the territorial limitations of the Court's reading of the Convention. In Justice Blackmun's view, the Convention is clearly applicable to the actions of parties wherever undertaken. He thought that the majority's limiting interpretation of the scope of territorial application of the Convention was counter to its express language, its object and purpose, and its humanitarian intent.

Although the Court's interpretation of the U.N. Refugee Convention is regrettable, since it significantly narrows the scope of a multinational agreement entered into for humanitarian purposes without a firm textual basis for doing so, it is even more regrettable that the restrictive method of interpretation employed by the Court in this case is not unique. It represents rather the continuation of an approach that has been consistently applied by the Court to the interpretation of international agreements for the past decade. For example, a year earlier, in 1992, in United States v. Alvarez-Machain the Court decided that a foreign national

8. Id. at 2562, 2564.
9. Id. at 2568 (Blackmun, J. dissenting).
10. Id. at 2568.
11. Id. at 2568-70 (Blackmun, J., dissenting).
12. United States v. Alvarez-Machain, 504 U.S. 655 (1992). See generally Jacques Sernmelman, United States v. Alvarez-Machain, 86 Am. J. Int'l L. 811 (1992). Professor Henkin has commented on the link between the Supreme Court's approach to treaty interpretation in its decisions in Sale and Alvarez-Machain: For the second time in two years the Supreme Court has adopted an eccentric, highly implausible interpretation of a treaty. It has interpreted those treaties, I am persuaded, not as other state parties would interpret them, not as an international tribunal would interpret them, not indeed as the United States Supreme Court would have interpreted them earlier in our history when the justices took the law of nations seriously, when they appeared to recognize that in such cases U.S. courts were sitting in effect as international tribunals. Is it not time for the U.S. Supreme Court to think afresh about its role in determining and applying international law and obligations, and to assure that they are faithfully complied with?
could be tried in United States courts for a crime against American law committed abroad, even though the accused had been forcibly kidnapped with the complicity of United States agents from a state (Mexico) with which the United States had an extradition treaty and the foreign state had protested against the kidnapping and the subsequent prosecution in the United States.\textsuperscript{13} Crucial to the Court’s decision in that case was its narrow reading of the sphere of applicability of the extradition treaty between Mexico and the United States. The Court found that the treaty did not provide the sole means for the United States to obtain custody of an accused who was physically present in Mexico.\textsuperscript{14} According to the Court, the treaty provided only an optional procedure and did not proscribe other, even clearly illegal, possibilities.\textsuperscript{15} Justice Stevens, in his dissenting opinion, disagreed with the majority on the scope of applicability of the extradition treaty. He would have found that the question of the legality of the United States prosecution was governed by the treaty, that is to say, that the extradition procedures elaborated in the U.S.-Mexican treaty were not optional, but provided the sole means for the United States to obtain custody of an accused physically located in Mexico.\textsuperscript{16} Predictably, reaction to the Court’s decision was almost uniformly negative.\textsuperscript{17}

\textsuperscript{13} Alvarez-Machain, 504 U.S. at 668-70.

\textsuperscript{14} Id.

\textsuperscript{15} Id.

\textsuperscript{16} Id. at 671-73 (Stevens, J., dissenting).

The approach to the interpretation of international agreements employed by the Court in Sale and Alvarez-Machain can be characterized as “restrictive,” since the Court chooses to read the treaty narrowly, or restrictively, leaving to national decision-makers the largest latitude possible. This approach can also be seen in several other important cases decided by the Supreme Court during the 1980s. For example, Volkswagenwerk Aktiengesellschaft v. Schlunk,18 decided by the Court in 1988, involving the scope of applicability of the Hague Service Convention, Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa,19 decided in 1987, involving the Hague Evidence Convention, and Sumitomo Shoji America, Inc. v. Avagliano,20 decided in 1982, involving the Treaty of Friendship Commerce and Navigation between the United States and Japan, each exhibit the Court’s tendency to limit the sphere of applicability of United States treaty commitments. While each of these cases is usually viewed narrowly, within the context of its particular substantive area of the law (e.g., Sale, immigration law; Alvarez-Machain, law enforcement; Volkswagenwerk and Aérospatiale, transnational litigation; Sumitomo, civil rights or FCN agreements), the cumulative effect of these decisions provides reasonable ground for apprehension on the part of a foreign nation contemplating the conclusion of an international agreement with the United States.21

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21. In addition to the five cases mentioned as representative of the current trend toward restrictive interpretation, the Supreme Court has decided a number of other cases involving the interpretation of international agreements of the United States during the same period. None of these cases involved the high profile political issues involved in Sale, Alvarez-Machain, Schlunk, Aérospatiale, and Sumitomo. See Zicherman v. Korean Air Lines Co., 64 LW 4055 (1996) (concerning a damage ac-
Perhaps at one time a narrow or restrictive reading of consensual international obligations was justified by international law. According to past concepts of state sovereignty and to contemporary views regarding the undertaking of international obligations, international agreements were to be strictly construed. Limitations on the sovereignty of states were not to be presumed. In cases of doubt or ambiguity, international agreement for loss of a relative in an airplane crash against an international air carrier; Itel Containers Int’l Corp. v. Huddleston, 507 U.S. 60 (1993) (concerning the application of a state tax to cargo containers used in international trade); Eastern Airlines v. Floyd, 499 U.S. 530 (1991) (concerning a damage action for mental distress by an airline passenger against an international air carrier); Chan v. Korean Air Lines, 490 U.S. 122 (1989) (concerning a damage action by an airline passenger against an international air carrier); United States v. Stuart, 489 U.S. 353 (1989) (concerning the validity of a summons issued by the Internal Revenue Service pursuant to its interpretation of the 1942 Convention Respecting Double Taxation between the United States and Canada); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (concerning the application of a domestic immigration statute, where the Court decided that a “more generous” domestic standard applied rather than a standard based on an international agreement); O’Connor v. United States, 479 U.S. 27 (1986) (concerning a claim by United States citizens for tax refunds from the United States Government); Air France v. Saks, 470 U.S. 392 (1985) (concerning a damage action by an airline passenger against an international air carrier); Trans World Airlines, Inc. v. Franklin Mint, 466 U.S. 243 (1984) (concerning a damage action by a shipper against an international air carrier). Floyd, Chan, Saks, and Franklin Mint involved the application of the Warsaw Convention, Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934) in private damage actions. In Itel (imposition of tax by state legislature) and O’Connor (refusal by IRS to refund taxes) the actions of United States public officials were upheld against United States nationals despite their arguments that such actions violated international obligations of the United States. In Stuart (issuance of summons by IRS to Canadian national and to United States banks), once again, the actions of United States public officials were upheld; even though a foreign national was involved, the IRS was acting pursuant to a request made by the Canadian Government. In Cardoza-Fonseca, the Court reversed a determination of the INS, directing it to apply a more lenient standard than the one contained in the statutory provision which enacted into domestic law the requirement of an international agreement. Finally, David Scheffer highlights the instability in treaty relations that results from “radical methods of reinterpretation posing as legitimate tools of foreign policy making.” David J. Scheffer, Nouveau Law and Foreign Policy, 76 FOREIGN POL’Y 44, 44 (1989).

22. See, e.g., J. G. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 456-57 (9th ed. 1984); Mustafa Kamil Yasseen, L’Interpretation des Traités d’après La Convention de Vienne sur le Droit des Traités, 151 REC. DES COURS 1, at 10 (1976); H. Lauterpacht, Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties, 26 BRIT. Y.B. INT’L L. 48 (1949) [hereinafter Lauterpacht, Restrictive Interpretation].

23. International law governs the relations between independent states. The rules
al agreements were to be interpreted to preserve a state's maximum freedom of action. There is even authority supporting the view that the presumption against derogation of sovereignty may be applied even more stringently when a national court, rather than an international tribunal, is faced with a question of treaty interpretation. From this point of view, the Supreme Court, in *Sale, Alvarez-Machain*, and the other recent cases mentioned above, is following a well-established and time-sanctioned tradition of interpretation of international agreements. United States courts, however, have traditionally not taken a restrictive approach to treaty interpretation, but rather have liberally construed United States treaty obligations. Thus, the Court's recent trend toward


25. *ld. at 283-88; Lauterpacht, Restrictive Interpretation, supra note 22, at 67.

According to the Supreme Court:

When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred.

*Nielsen v. Johnson, 279 U.S. 47, 52; see Kolovrat v. Oregon, 366 U.S. 187, 193 (1960) (stating, "[T]his Court has many times set its face against treaty interpretations that unduly restrict rights a treaty is adopted to protect."); Bacardi Corp. of Am. v. Domenech, 311 U.S. 150, 163 (1940) (commenting "[A]ccording to the accepted canon, we should construe the treaty liberally to give effect to the purpose which animates it"); Factor v. Laubenheimer, 290 U.S. 276, 293 (1933) (noting, "[I]n choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements."); Jordan v. Tashiro, 278 U.S. 123, 127 (1928) (holding "[T]he principles which should control the diplomatic relations of nations, and the good faith of treaties as well, require that their obligations should be liberally construed so as to affect the apparent intention of the parties to secure equality and reciprocity"); Asakura v. Seattle, 265 U.S. 332, 342 (1923) (stating, "[T]reaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred"); DeGeofroy v. Riggs, 133 U.S. 258, 271 (1890). In *DeGeofroy*, the court explained:

[It] is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intentions of the parties to secure equality and reciprocity between them. As they are contracts between
restrictive interpretation of treaties is a disturbing innovation in American jurisprudence.

In addition to the legal conceptions and perceived political imperatives operative at the international level, domestic political and legal considerations frequently operate in favor of a narrow construction of the applicability of international agreements by United States courts. American courts often follow the lead of the executive branch in interpreting international agreements, or they interpret international obligations so as to allow maximum freedom for the actions of domestic officials or for the operation of domestic legislation. For example, in Sale and independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended.

Id.; Hauenstein v. Lynham, 100 U.S. 483 (1879) (asking, “If the treaty admits of two interpretations, and one is limited, and the other liberal; why should not the most liberal expositions be adopted?”). Cf. Rocca v. Thompson, 223 U.S. 317 (1911); Tucker v. Alexandroff, 183 U.S. 424 (1901).

26. According to the Restatement:

(1) The President has authority to determine the interpretation of an international agreement to be asserted by the United States in its relations with other states.

(2) Courts in the United States have final authority to interpret an international agreement for purposes of applying it as law in the United States, but will give great weight to an interpretation made by the Executive Branch.


27. See Manuel R. Angulo & James D. Reardon, Jr., The Apparent Political and Administrative Expediency Exception Established by the Supreme Court in United States v. Humberto Alvarez-Machain to the Rule of Law as Recognized by Principles of International Law, 16 B.C. INT’L & COMP. L. REV. 245 (1993); Kevin R. Johnson, Responding to the “Litigation Explosion”: The Plain Meaning of Executive Branch Primacy Over Immigration, 71 N.C. L. REV. 413 (1993); see also Japan Whaling Ass’n v. American Cetacean Soc’y, 478 U.S. 221 (1986) (holding that the application of sanctions under the Pelley and Packwood Amendments is optional); Note, Discretion and Legitimacy in International Regulation, 107 HARV. L. REV. 1099 (1994) (arguing that “it is possible to secure the benefits of effective international regulation while maintaining norms of democracy and accountability”).

Alvarez-Machain, the challenged actions were undertaken by the executive branch of government,29 in Volkswagenwerk30 and Aérospatiale31 the actions in question were undertaken by American courts, and in Sumitomo,32 the applicability of federal civil rights legislation was at issue. In addition, particularly troublesome domestic legal difficulties (such as the conflict between prior treaty and subsequent statutory provisions33 or the question of whether a treaty or certain parts of a treaty are self-executing or not34) may be circumvented by finding that the international agreement in question is inapplicable.

The decisions in Sale and Alvarez-Machain indicate that the time has come to reexamine the approach taken by the Supreme Court as to the interpretation of international agreements.35 An approach which restricts

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35. This Article focuses on the interpretation of international agreements by national courts, especially the United States Supreme Court. In practice, however, international agreements are frequently interpreted by executive branch officials for a variety of political and administrative purposes. With respect to non-judicial interpretation of international agreements, see Ian Johnstone, Treaty Interpretation: The Authority of Interpretative Communities, 12 MICH. J. INT’L L. 371 (1991) (arguing that treaty auto-interpretation is not an unconstrained activity determined entirely by short-term national interests and power politics, but is in fact constrained by a set of conventions and institutional practices that structure the interpretative process); Kenneth J. Vandevelde, Treaty Interpretation from a Negotiator’s Perspective, 21 VAND. J. TRANSNAT’L L. 281 (1988) (arguing that international law needs a theory of treaty interpretation
the sphere of applicability of such agreements may neatly solve a number of domestic legal problems or allow the actions of United States officials to be sustained, but it is certainly not conducive to international cooperation and in actuality no longer serves the real interests of the United States. Moreover, such an approach is no longer in accord with current thinking about international agreements nor with the expectations of the parties to such agreements. Finally, domestic legal problems involving the status and applicability of treaties can be satisfactorily resolved by different, more forthright, legal approaches, which are more in keeping with current views regarding the relationship between domestic and international law.


\textsuperscript{36} For an excellent critique of the treaty interpretation decisions of the Rehnquist Court, see David J. Bederman, Revivalist Canons and Treaty Interpretation, 41 UCLA L. REV. 953 (1994). Professor Bederman characterizes his critique as “an internal critique,” by which he means “one that chiefly focuses on the inherent cohesion and cogency of a set of interpretative norms, as expressed by the Supreme Court.” Id. at 1021 n.450. He proposes the following rules for treaty interpretation:

1. Rule One: Begin interpretation with the treaty’s text.
2. Rule Two: When an interpreter is permitted to break from the treaty’s text and search for extrinsic sources of meaning, it should remember that negotiating history and evidence of subsequent practice by a relevant number of treaty parties are to be vastly preferred over the legislative history of the advice and consent process or subsequent, unilateral interpretations by the executive branch . . . .
3. Rule Three: If textual and extratextual sources fail, the interpreter should construe the treaty so as to reasonably ensure that the United States will not be charged later by another country with breaching the agreement.

\textit{Id.} at 1030-33. While seconding the interpretative rules proposed by Professor Bederman and also regarding principled decision according to preexisting rules as
es to the interpretation of international agreements can each be employed to justify either an expansive or restrictive reading of the scope of applicability of an agreement. Thus, the particular interpretative rule or methodology used by the Court to justify its reading of a specific treaty provision in an individual case is not the determinative factor in a case. Analysis therefore must focus rather on clarifying the legal context (e.g., whether a particular interpretation will create or avoid conflict with an act of Congress, or whether a particular interpretation will require a further determination as to whether the agreement is self-executing or not) and the institutional context (e.g., the specific interests of the legislative, executive, and judicial branches of government in the subject of the litigation) in which the question of interpretation arises. It is only to the extent that such considerations are appropriately reflected in rules of interpretation that such rules will act as real determinants of decision. This is particularly true in the foreign relations arena, where United States law has traditionally accorded broad scope to executive action. In other words, any attempt to explain and critique Sale, Alvarez-Machain, and the other cases under review in this Article must take account of the political, as well as the legal, factors at work.


39. See SERGE SUR, L’INTERPRÉTATION EN DROIT INTERNATIONAL PUBLIC 60, 81.
It is the thesis of this Article that when an examination of an international agreement, whether bilateral or multilateral, reasonably indicates that the parties sought to deal comprehensively with a particular problem area or relationship, in case of doubt or ambiguity in applying the agreement in a specific situation, the agreement should be interpreted as applicable to that problem or relationship and as providing the sole means for dealing with that problem or arising out of that relationship. Interpreting international agreements in this manner would, it is submitted, actually best effectuate the intent of the parties to the agreement and would be most conducive to predictability and stability in the relationship of states. When states have concluded an agreement for the purpose of removing certain matters from the "realm of contentiousness," any interpretation of the scope of applicability of that agreement must keep this objective foremost in mind.

This Article begins with an analysis of the Court's interpretation of the international agreements involved in the Sale and Alvarez-Machain cases. Then, the Volkswagenwerk, Aérospatiale, and Sumitomo cases are discussed. Next, the article considers the legal factors involved in the interpretation of international agreements by national courts. The focus in this section is on conceptions of intention and sovereignty. Finally, the political functions of international agreements at both the international and national levels are analyzed with a view to understanding the interrelationship of politics and law in the interpretation of international agreements.

99 (1974) (stressing the close interrelationship between law and politics in the interpretation of international agreements and other international acts); see also infra notes 386-89 and accompanying text.

40. One need only peruse the current issue of the United States Treaties in Force to see that we are parties to thousands of treaties and agreements establishing civilized rules of travel, trade, diplomacy, arms control, the environment, antiterrorism, health, military base management and myriad other subjects of profound practical concern to Americans. A nation that deliberately sets out to debase its treaty-worthiness, quite simply, is in danger of becoming a global street person: self-destructive and heedless of its own best interests. Thomas M. Franck, Taking Treaties Seriously, 82 AM. J. INT'L L. 67, 68 (1988).


42. Id.
I. SALE v. HAITIAN CENTERS COUNCIL, INC.

In Sale, the Supreme Court had to decide whether forced repatriations by the United States Coast Guard, acting pursuant to an Executive Order, of persons fleeing from Haiti and interdicted in international waters violated section 243(h)(1) of the Immigration and Nationality Act of 1952. Critical to this determination was the question of whether Article 33(1) of the United Nations Convention Relating to the Status of Refugees applied to action taken by the United States Coast Guard on the high seas. The operative Executive Order explicitly states the government's view that:


The government's action was challenged by Haitian Centers Council, representing a number of interdicted Haitians, which argued that the obligations contained in Article 33(1) of the Convention applied to actions by United States Government officials on the high seas.

It is not my intention to rehash the arguments for respondent Haitian Centers Council, Inc. which have been ably presented in briefs by counsel and by numerous amici curii and in law review articles written both before and after the decision. I do, however, want to examine the Court's approach to the interpretation of the international agreement at issue in Sale and to discuss the likely legal and political consequences of that approach.

Article 33(1) of the Refugee Convention provides:

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

46. United Nations Refugee Convention, supra note 3, art. 33(1).
The United Nations Convention Relating to the Status of Refugees was concluded at a conference of plenipotentiaries in Geneva in 1951. The Convention subsequently entered into force in 1954. The 1951 Convention was adopted to deal with the massive refugee problems caused by World War II and its aftermath. Thus, the applicability of the Convention was specifically limited to “events occurring in Europe before 1 January 1951,” or to “events occurring in Europe or elsewhere before 1 January 1951.” A state becoming a party to the Convention could specify which meaning applied to the obligations it was assuming.

Most of the substantive provisions of the Convention deal with the status of refugees in the nations to which they fled. Discrimination on the basis of race, religion, or country of origin is prohibited. Specific provisions cover juridical status (personal status, access to courts, etc.), employment, welfare (housing, public education, labor legislation and social security, etc.), and administrative measures (freedom of movement, travel documents, transfer of assets, etc.). In 1967, a Protocol was adopted to increase the sphere of applicability of the Convention. The Protocol incorporated the substantive provisions of the Convention and extended them by eliminating the geographic and temporal limitations. The Protocol entered into force for the United States in 1968. The United States had not been a party to the 1951 Convention. In 1980, Congress amended United States immigration law to conform to the requirements of the Protocol.

47. See id.
48. See id.
49. See id.
50. Id. art. 1.
51. Id.
52. Id. art. 3.
53. Id. passim.
55. Refugee Protocol, supra note 54, art. 1.
56. Id. art. 1.
The practice in some states of returning refugees to Nazi Germany where they faced almost certain persecution, torture, imprisonment, or death was of immediate concern to the drafters of Article 33 of the 1951 Convention.88 The non-return, or non-refoulement, obligation contained in Article 33 of the Convention is different from most of the other provisions. It does not relate to the situation of the refugee in the country of refuge, but rather to his right not to be returned to the country in which he fears persecution.99 The drafters saw this provision as especially significant, as evidenced by the fact that Article 42 includes it in its short list of provisions to which no reservations can be made.60

58. As one participant in the conference which drafted the Convention said with respect to Article 33:
   
   ... a state could not seize a refugee in its territory and hand him over to his oppressors. It may not—indeed, a fortiori—reach out beyond its borders, pick up a refugee off of the high seas and forcibly return him into the hands of his oppressors.


The origins and purpose of the Refugee Convention reveal that petitioners' core claim—that a contracting State's obligation under Article 33 of the Convention not to return refugees to their country of persecution somehow dissolves at its borders—turns the intent of the Convention's drafters on its head. The Convention was triggered by the Second World War, primarily in response to the tragic experience of Jewish refugees during that period. If petitioners' reading is correct, and history repeated itself, the United States could escape its obligations under Article 33 simply by dispatching the Coast Guard to the high seas, apprehending fleeing Jews before they reached our waters, and deliberately returning them to their Nazi persecutors. This cannot be the law.

Argument, I.B.2, id. (No. 92-344).


59. United Nations Refugee Convention, supra note 3, art. 33. It is important to note that Article 33 says nothing about the admission of refugees; it deals simply with the obligation of non-return to a country where a refugee's life or freedom would be threatened on account of his "race, religion, nationality, membership of a particular social group or political opinion."

60. Id. art. 42.
Before turning to Article 33 of the Refugee Convention, the Sale Court began its analysis by considering the sphere of applicability of section 243(h)(1) of the Immigration and Nationality Act. That section reads as follows:

The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, membership in a particular social group, or political opinion.61

The Court concluded that this section applies only to domestic actions of the Attorney General.62 The Court based its view on the reference in section 243(h)(1) to the Attorney General and to the presence of other provisions in the Act which expressly confer certain responsibilities on the President, the Secretary of State, and other officers.63 Moreover, the Court thought that the placement of section 243(h)(1) in Part V of the Act (entitled “Deportation; Adjustment of Status”) indicated that it applied only to domestic exclusion and deportation proceedings.64 If there were any remaining doubts about the scope of application of the section, however, “the presumption that Acts of Congress do not ordinarily apply outside our borders would support an interpretation of section 243(h) as applying only within United States territory.”65

The Court next considered the history of the Refugee Act of 1980, which amended section 243(h)(1) to delete the words “within the United States” and to add the word “return.”66 As originally enacted, the Act authorized the Attorney General to withhold the deportation of aliens within the United States.67 The Court explained that the reason for the

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62. Id.
63. Id.
64. Id.
67. Before the amendments made by the Refugee Act of 1980, section 243(h)(1) of the Immigration and Nationality Act of 1952 read as follows:
The Attorney General is authorized to withhold deportation of any alien . . . within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opin-
1980 changes relates to a 1958 decision of the Court, *Leng May Ma v. Barber*, which created a category of aliens who were physically within the United States but not considered so under immigration law. In the Court's view, the term "deport" would not apply to such an individual, who was technically not considered to be "within the United States." Therefore, to cover an alien physically within United States territory but not yet technically "within the United States," the *Leng May Ma* situation, it was necessary to add the word "return" to the statute and to delete the phrase "within the United States."

The Court then considered the possibility that the changes in section 243(h)(1) were not driven by domestic considerations, but rather were the result of conforming United States nationality law to the requirements of the U.N. Refugee Convention and Protocol. While the Court read the legislative history of the Act to include this possibility, it characterized the intent to harmonize United States law with the Protocol as only a "general intent," presumably not determinative with respect to the technical reading to be given to particular provisions of the Act. Moreover, the Court was of the view that "[t]he President and the Senate believed that the Protocol was largely consistent with existing law." In any event, amending the Act by extending the protections of the Convention to the *Leng May Ma*-type alien (those aliens physically, ion and for such period of time as he deems to be necessary for such reason. Justice Blackmun points out that the Refugee Act of 1980 explicitly amended this provision in three respects: Congress (1) deleted the words "within the United States;" (2) barred the Government from "return[ing]," as well as "deport[ing]" alien refugees; and (3) made the prohibition against return mandatory, thereby eliminating the discretion of the Attorney General over such decisions.


68. 357 U.S. 185 (1958).
70. Id.
71. Id.
72. Id.
73. Id. at 2562, n.3.
but not technically, present within the United States) would harmonize United States immigration law with the requirements of the Convention. Thus, in the Court's view, it was entirely consistent to interpret the 1980 amendment to section 243(h)(1) as conforming United States immigration law to the requirements of Article 33 of the Convention while at the same time restrictively interpreting the geographic sphere of applicability of section 243(h)(1).

The Court then turned to an analysis of Article 33 of the Convention. The Court found an analysis of Article 33 necessary because of the "possibilities" that "under the Supremacy Clause, the broader treaty obligation might . . . provide the controlling rule of law" or that in interpreting the Act the "general intent" to conform it to the Protocol might be relevant. 75

The Court indicated at the outset that it regarded both the text and the negotiating history of Article 33 to "affirmatively indicate that it was not intended to have extraterritorial effect." 76 As for the text, the Court compares Article 33(1) and Article 33(2), which allows a nation to deport "a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is . . ." and concludes from this comparison that it would "create an absurd anomaly" if Article 33(1) applied on the high seas. 77 In that case a nation could expel dangerous refugees located within its territory, but would have to accord the benefits of Article 33(1) to dangerous refugees intercepted on the high seas. Also, the Court did not regard the French term "refouler" (which is included in a parenthetical in the English version of the Convention as well as in the equally-authoritative French version) as equivalent in meaning to the word "return." 78 Thus, according to the Court, the word "return" has a narrower meaning in the Convention than in colloquial English. 79 In the Court's view, "return," as used in the Convention, "means a defensive act of resistance or exclusion at a border rather than an act of transporting someone to a particular destination." 80

The Court properly commences its interpretation of the Convention with the text itself. Article 31(1) of the Vienna Convention on the Law

75. Id. at 2563.
76. Id. at 2563.
77. Id.
78. Id.
80. Id. at 2564.
of Treaties provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” The Court’s textual analysis can be faulted, however, in several respects.

First, it is highly doubtful that the Court’s technical and narrow interpretations of the words “return” and “refouler” reflect those word’s ordinary meanings, in English or in French. While the French term “refouler” may certainly be translated as “repulse, repel, drive back”, the word does not contain a geographic referent. Presumably the repulsing, repelling, or driving back can occur at any geographic point; it is not inherent in the meaning of the word that the act take place “at a border” as the Court thought. Moreover, according to Article 31(4) of the Vienna Convention, “[a] special meaning shall be given to a term if it is established that the parties so intended.”

This provision would appear to place the burden squarely on the proponent of the special meaning. There are indications that the French term “refouler” was inserted in the English text to refer to the European practice with respect to non-refoulement. Whether this practice, however, was limited to the prohibition of returning only those aliens physically in the territory of the state of refuge is unclear. Thus, it is unlikely that the government could have sustained its burden as required by Article 31(4).

Second, even though Article 31 of the Vienna Convention is generally regarded as directing a court’s attention first and foremost to the text, that article contains within it an explicit reference to “the object and purpose” of the treaty. The Court makes a brief mention of the

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[The Vienna Convention on the Law of Treaties] represents generally accepted principles and the United States has also appeared willing to accept them despite differences of nuance and emphasis.


83. Id. art. 31(4).


85. GOODWIN-GILL, supra note 84, at 74-75.

86. The Vienna Convention states:
"Protocol's broad remedial goals" and its "general humanitarian intent." The opinion does not, however, seek to discover the object and purpose of Article 33 in order to interpret its words in the light of that object and purpose, nor does it describe more specifically than "broad remedial goals" and "general humanitarian intent" the object and purpose of the Convention as a whole.

Finally, the Court did not take into account those means of interpretation enumerated in Article 31(3) of the Vienna Convention. Article 31(3) provides:

There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

In this regard, the Court should have considered the 1981 agreement between the United States and Haiti which contains a provision stating that "... under these arrangements [for the interdiction and selective return to Haiti of certain Haitian migrants and vessels interdicted on the high seas by the United States Coast Guard] the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status." Furthermore, in its preambulatory language, the Agreement speaks of respect for "the international obligations mandated by the Protocol Relating to the Status of Refugees . . ." A reasonable inference from these provisions is that both Haiti and the United States understood the

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A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. (emphasis supplied)

Vienna Convention on the Law of Treaties, supra note 81, art. 31(1).

88. Id. at 2565.
89. Vienna Convention on the Law of Treaties, supra note 81, art. 31(3).
91. Agreement on Migrant(s)-Interdiction, supra note 90.
Protocol as mandating the non-return of fleeing Haitians who qualify for refugee status. Moreover, since the 1981 agreement encompasses operations in international waters, it also seems reasonable to infer that both Haiti and the United States regarded the Protocol as applying in those waters.

Well over 100 nations are parties to the Refugee Convention and Protocol. An examination of the “subsequent practice” of those nations would thus appear to be part of the Article 31 analysis mandated by the Vienna Convention. While current evaluation of relevant practice is not unanimous, there are strong indications that the broader interpretation of the non-refoulement obligation of Article 33 of the Refugee Convention has now become a principle of customary international law. This would certainly appear to be relevant in ascertaining the meaning of Article 33 of the Convention, particularly since at the time of its conclusion it is probably safe to say that “there was no unanimity, perhaps deliberately so” as to the sphere of geographic applicability of the non-refoulement obligation.

After completing its textual analysis of Article 33, the Court then looked to the negotiating history of the Convention to support its view that Article 33 has no extraterritorial application. The Court cites statements made by two delegates at the Geneva Conference which support its restrictive reading of Article 33. According to Article 32 of the Vienna Convention, however:

Recourse may be had to supplementary means of interpretation, including the preparatory work of a treaty and the circumstances of its conclusion, in order to conform the meaning resulting from the application of article

92. According to article 31(3) of the Vienna Convention on the Law of Treaties, supra note 81:
   There shall be taken into account, together with the context: (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; . . . .

93. See GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW, supra note 84, at 81, 97-98.

31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

As has been demonstrated above, the Court's interpretation falls far short of the requirements of Article 31. Therefore, reference to the preparatory work "to confirm the meaning resulting from the application of article 31" would at best be premature. Reference to the preparatory work on the grounds of ambiguity, obscurity, absurdity, or unreasonableness is also not justified. The text is quite clear and straight-forward. A literal reading produces a result that is clear and sensible. The use of preparatory work in this case is an excellent example of the dangers of resorting to such material before undertaking a thorough textual analysis, including consideration of the object and purpose of the agreement.

Even if the Court were justified in looking to the preparatory work to ascertain the intent of the parties concerning the geographic applicability of the non-refoulement obligation, the two statements quoted are at best inconclusive, and, to the extent that they do express a geographic limitation regarding the obligation of non-refoulement, are not necessarily representative of the views of all, or even the majority, of the parties to the Convention.

To appreciate the Sale court's approach to statutory and treaty interpretation, it is important to understand that the court never loses sight of the fact that what is really at issue in the case is the exercise of presidential power. Even though certain tasks may be assigned to the Attorney General, the operative source of law for the forcible repatriation of the people fleeing from Haiti is an Executive Order.97 According to the

95. Vienna Convention on the Law of Treaties, supra note 81, art. 32.
96. The United Nations Conference states:

If there was too ready admission of the preparatory work, the State which had found a clear provision of the treaty inconvenient for one reason or another was likely to be furnished with a tabula in naufragio, because there was generally something in the preparatory work that could be found to support almost any contention.

97. Exec. Order No. 12,807, supra note 45.

[The presumption that Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested] has special force when we are construing treaty and statutory provisions that may involve foreign and
court, the President may act unless he is "clearly prohib[ed]" from doing so by the Convention or statute. In this case, despite many indications to the contrary, neither the statute nor the Convention expressly accord extraterritorial effect to the non-refoulement obligation of Article 33 or section 243(h)(1). In the absence of an express prohibition, is the Court to strike down the action of the president, particularly an action that appears to enjoy broad domestic political support?

What the Court is really doing in Sale is applying the restrictive approach to both statutory and treaty interpretation. Since this case deals with foreign affairs, both the statute and the treaty in question are narrowly construed so as not to interfere with presidential action. When interpreting the Convention, the Court does not employ the term national sovereignty or talk in terms of a presumption in favor of freedom of action of states. Nevertheless, its interpretative approach is similar. Rather than resolve doubt in favor of restrictions on state action, it preserves maximum freedom of action for national officials. The effect of the Court's decision is to narrow the scope of applicability of the treaty to the territorial limits of the United States, rather than to regard the Convention and Protocol as dealing comprehensively with the refoulement problem, as was probably the intention of the drafters.

Likewise, the Court neglects to consider the current state of the international law with respect to non-refoulement. According to a number of scholars in the field, the obligation to return aliens to countries where they may be subject to torture, imprisonment, or death has become a norm of customary international law. There are even those who regard such a norm as jus cogens.

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98. Sale, 113 S. Ct. at 2567.
99. Id. at 2562.
100. See Frelick, supra note 6, at 680-81 (illustrating the highly political nature of the refugee issue in the United States); see also Johnson, Judicial Acquiescence, supra note 67, at 1 (asserting that domestic politics plays an influential role in executive decision-making).
103. GOODWIN-GILL, supra note 84, at 76; Perluss & Hartman, supra note 94, at 551.
The *Sale* case is an example of the Supreme Court reading a treaty which on its face appears to deal comprehensively with a particular matter (the problem of non-refoulement) and interpreting it narrowly so as to exclude its operation in a factual situation that appears reasonably to fall within the parameters of the agreement. While the effect of the decision may be to uphold a national policy that is desirable in the short-run,105 the Court's interpretation creates the potential for similar action by other nations seeking to avoid or limit their obligations to refugees.106 "This Court's interpretation of this fundamental safeguard may well influence, for years to come, the behavior of other countries and thus the fates of untold numbers of refugees throughout the world."107 Thus, the Court's restrictive interpretation given to the geo-

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105. See Frelick, *supra* note 6, at 680-81 (justifying United States interdiction policy in humanitarian terms: by sending a clear signal to Haitians not to attempt the perilous sea voyage to United States shores in unseaworthy vessels, the policy will save many lives). Recent reports indicate, however, that rather than discourage Haitian emigration, United States interdiction policy has merely displaced it, particularly by sea to the Turks and Caicos Islands and overland to the Dominican Republic. *Haitians, Thwarted at Sea, Look for a Back Door*, N.Y. TIMES, Feb. 27, 1994, at A11; see Howard W. French, *Across the Mist, Haiti's Solution May Lie Offshore*, N.Y. TIMES, May 7, 1994, at A4 (suggesting that the United States might use the sparsely populated Ile de la Gonâve, 11 miles off the coast of Haiti, to establish a facility for the screening of Haitian refugees); Grover J. Rees, *To the Rescue?*, N.Y. TIMES, May 24, 1994, at A2 (stating that former General Counsel of United States Immigration and Naturalization Service suggests that the Guantánamo operation be reopened with U.N. participation). On May 7, 1994, President Clinton announced that he was reversing the policy upheld in *Sale* and would now grant asylum hearings at sea or at other countries in the region to Haitians trying to reach the United States. Gwen Ifill, *Clinton Grants Haitian Exiles Hearings at Sea*, N.Y. TIMES, May 8, 1994, at A1; see also Douglas Jehl, *U.S. Sees New Policy on Haitian Refugees as Buying Time*, N.Y. TIMES, May 10, 1994, at A3 (documenting Clinton's change in policy). For more recent developments, see *infra* notes 470-475 and accompanying text.

106. Newmark, *supra* note 6, at 858 (stating that the Supreme Court's interpretation of the United Nation Convention's prohibition against refoulement is likely to have a significant impact on the field of refugee law). One should bear in mind that affirming the decision of the Court of Appeals enjoining the Coast Guard from forcibly repatriating would not have opened the doors of the United States to all those persons fleeing Haiti. The United States would then have had to screen the Haitians to see if they qualified for refugee status. This would essentially have required the government to devote more resources to processing the Haitian applicants for refugee status.

graphic sphere of applicability of Article 33 of the Convention will certainly provide a precedent for other nations faced with similar choices. Moreover, it will preclude the United States from protesting against actions taken pursuant to such restrictive interpretations, no matter how contrary particular actions are to our views of fundamental humanitarian behavior.

The Court's decision also represents a strong endorsement of presidential prerogative in the foreign affairs area, at the expense of Congress and the courts. Congressional will as expressed in the 1980 amendments to the INA is thwarted through strained interpretations of both treaty and statute. Moreover, the Court shows such great deference to executive interpretation of both statute and treaty, that effective judicial review is all but illusory.

II. UNITED STATES v. ALVAREZ-MACHAIN

United States v. Alvarez-Machain presents an even more egregious example than Sale of the short-sightedness of the Court's restrictive method of treaty interpretation. This case gives rise to similar concerns regarding the Court's overall approach to questions involving the interpretation of international agreements and the separation of powers. In Alvarez-Machain, the Court's decision not only frustrates the reasonable expectations of Mexico as a party to an extradition treaty but also condones, in effect, a flagrant violation of some of the most fundamental principles of international law by agents of the executive branch of the United States Government. Furthermore, as Professor Henkin

108. Newmark, supra note 6, at 858.
109. Id.
111. Id. at 2567.
113. While, as indicated in the text, the legal implications of Alvarez-Machain may very well be more disturbing than those of Sale (e.g., because the Sale court simply construed a consensual obligation narrowly, while the Alvarez-Machain court also upholds a governmental action that clearly violated basic principles of international law), the humanitarian implications of Sale are not any less compelling and disturbing than those of Alvarez-Machain.
114. See Charter of the Organization of American States, Apr. 30, 1948, entered into force, Dec. 13, 1951, art. 18, 119 U.N.T.S. 3 (stating that "[n]o State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed
comments, “in reaction to the general outrage, the United States will, at the least, have to disown that interpretation if it is to maintain its network of extradition treaties . . . .”115 Thus, the Court’s interpretation of the extradition treaty with Mexico jeopardizes the important interest of the United States in the smooth functioning of international extradition procedures.116 The decision destabilizes and renders problematic the international extradition system of the United States, and also creates a focal point for international tensions and hard feelings, particularly with our neighboring states of Mexico and Canada.117 In addition, it repre-
resents one more important precedent for United States courts to apply the restrictive approach to the interpretation of international obligations of the United States.

Although the Court's opinion focuses on demonstrating that no violation of the U.S.-Mexican Extradition Treaty\textsuperscript{118} occurred, there are other approaches that the Court might have taken. Perhaps the most straightforward way to have reached the same result, without engaging in a tortured construction of the treaty, would have been for the Court to regard the abduction as violating the Treaty but to preclude the defendant from raising the treaty violation as a bar to jurisdiction.\textsuperscript{119} This result can be justified as an application of the \textit{Ker-Frisbie} rule: that "the power of a court to try a person for a crime is not impaired by the fact that he has been brought within the court's jurisdiction by reason of a 'forcible abduction.'"\textsuperscript{120}

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The Court, however, may have been concerned with its decision in United States v. Rauscher,\textsuperscript{121} which held that persons brought before a United States court pursuant to an extradition treaty may not be tried for a crime other than the crime for which they have been extradited.\textsuperscript{122} Read broadly, Rauscher could prohibit a trial if the accused's presence before the court or aspects of the proceedings violate an extradition treaty. In Alvarez-Machain, the Court does not read Rauscher in this manner. Instead, it restricts the holding to defendants brought to the United States by way of an extradition treaty and regards the Rauscher exception to Ker-Frisbie as inapplicable to forcibly abducted defendants.\textsuperscript{123} In sum, if a nation elects to proceed pursuant to an extradition treaty, it must abide by the terms of that treaty. If it elects not to invoke the treaty and employs alternative means to gain custody of a defendant, even if those means violate the extradition treaty, Rauscher will not necessarily bar prosecution. Thus, even taking account of Rauscher, the Court could have upheld the prosecution of Alvarez-Machain while at the same time finding that the United States violated its extradition treaty with Mexico.

The Court might also have decided to overrule Ker or to distinguish it from Alvarez-Machain on its facts.\textsuperscript{124} Proceeding in either manner, however, would have required the Court to affirm the decision of the court of appeals prohibiting the prosecution of the defendant.\textsuperscript{125} The Court quite obviously did not want to uphold the lower court decision. Either rationale for not applying the Ker-Frisbie rule (overruling or distinguishing Ker) may also have allowed the Court to side-step the treaty interpretation question. The internationally illegal act of forcible abduction or the violation of domestic due process, which forcible ab-

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\textsuperscript{121} United States v. Rauscher, 119 U.S. 407 (1886).

\textsuperscript{122} Id. at 433.


duction would entail, would, without more, bar prosecution before a court in the United States.  

There are strong reasons for overruling or distinguishing Ker. The Ker precedent is both antiquated and problematic. International law has developed considerably since the 1880s in giving expression to the requirements of peaceful and cooperative solutions to problems between states. More specifically, the principles of non-intervention and the prohibition of the use of force in international relations are fundamental and widely-accepted concepts in contemporary international law. Although courts in the United States have recently reaffirmed the Ker-Frisbie rule and the Supreme Court has approved it in dicta, 127 Alvarez-Machain provided the Court with the opportunity to reassess the doctrine in light of modern developments in international law.

There are several important distinctions between Ker and Alvarez-Machain. 128 First, Ker was an American national, 129 while Alvarez-Machain was a Mexican national. 130 Second, Peru made no formal protest to Ker's prosecution in a United States court, 131 but in Alvarez-Machain, Mexico protested vigorously. 132 Third, Ker was abducted by a private party, 133 while the abduction in Alvarez-Machain involved agents of the United States Government. 134 Fourth, Ker's abduction took place during a period of serious internal disorder in Peru, when compliance with a request for extradition may not have been possible by local authorities. 135 No such problems existed regarding the a request for Alvarez-Machain's extradition.

In light of current developments in international law and the factual differences between Ker and Alvarez-Machain, the Court had the options

126. See generally Jacques Semmelman, Due Process, International Law, and Jurisdiction over Criminal Defendants Abducted Extraterritorially: The Ker-Frisbie Doctrine Reexamined, 30 COLUM. J. TRANSNAT'L L. 513 (1992) (suggesting that alternative interpretations of the Ker-Frisbie doctrine would have reached a better result in the eyes of the world community).
127. Id. at 515.
131. Fairman, supra note 128, at 685.
133. Ker, 119 U.S. at 438.
135. Fairman, supra note 128.
of distinguishing Ker or overruling it with respect to international abductions. The Court took neither route, which indicates that the Court was determined to uphold the federal power to prosecute in this case in spite of the illegal international abduction. After reaffirming the Ker-Frisbie rule, the Court states that “[i]f we conclude that the Treaty does not prohibit respondent’s abduction, the rule in Ker applies, and the court need not inquire as to how respondent came before it.” 136

The treaty interpretation issue in Alvarez-Machain is straight-forward: whether the United States-Mexican Extradition Treaty, explicitly or implicitly, prevents the prosecution in a United States court of a Mexican national abducted from Mexico with the complicity of United States agents, when Mexico has formally protested against the abduction. The threshold question is whether the abduction violates the extradition treaty between the United States and Mexico. To answer this question, the Court first looks to the terms of the Treaty. 137 According to the Court, “[t]he Treaty says nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nation, or the consequences under the Treaty if such an abduction occurs.” 138 The Court then goes on to reject respondent’s claims that various articles of the Treaty, particularly article 22(1), which says that the Treaty shall apply to certain enumerated offenses (including murder, which was the offense involved in this case), 139 and article 9, which says that neither party “shall be bound to deliver up its own nationals . . .” 140 must be understood to presuppose a context in which the Treaty is the exclusive means by which one party can obtain custody of a national of the other party physically located in his national state. 141 Any other interpretation of the Treaty, in respondent’s view, would undercut and thereby defeat the obvious intent of these provisions. 142

Although the Court was obviously unimpressed by this contention, respondent’s argument based on the express language of article 9 is compelling. While article 9 recognizes the right of a party to withhold the extradition of its own national, it explicitly provides alternative

137. Id.
138. Id.
139. Extradition Treaty, supra note 118, art. 22(1).
140. Id. art. 9.
142. Id. at 666.
procedures for dealing with such situations. Thus, the requested nation must grant extradition or "submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense." It appears that the Treaty does in fact provide explicitly and comprehensively for dealing with nationals of the requested state.

In its textual analysis, the Court also looks to the object and purpose of the treaty, which it determines not by direct reference to language in the treaty itself, but by consulting Moore's 1891 treatise on extradition. The Preamble to the U.S.-Mexican Treaty, however, says that the parties entered into this agreement "desiring to cooperate more closely in the fight against crime and, to this end, to mutually render better assistance in matters of extradition." Citing a passage in Moore's 100-year-old treatise dealing with extradition treaties in general is certainly not an adequate way of ascertaining the object and purpose of a treaty entered into in 1978 against the background of modern problems in fighting crime and the post-war growth in the interdependence and cooperation of nations.

143. Extradition Treaty, supra note 118, art. 9.
144. Id.
145. See supra note 86 and accompanying text.
146. United States v. Alvarez-Machain, 504 U.S. 655, 664 (citing 1 John Bassett Moore, A Treatise on Extradition and Interstate Rendition 82 (1891) which states that "[e]xtradition treaties exist so as to impose mutual obligations to surrender individuals in certain defined sets of circumstances, following established procedures"). Moore stresses the importance of assuring reciprocity in the duty of delivering up fugitives upon demand in discussing the purpose of concluding extradition treaties.
147. Extradition Treaty, supra note 118, pmbl.
148. It is significant that the Extradition Treaty was signed the same day as two other bilateral agreements between the United States and Mexico: Treaty on Maritime Boundaries, United States-United Mexican States, May 4, 1978, reprinted in 17 I.L.M. 1073 (1978), and Tourism Agreement, United States-United Mexican States, May 4, 1978, 30 U.S.T. 4443, reprinted in 17 I.L.M. 1076 (1978). The Preamble to the Tourism Agreement states "[t]hat both countries face an historic opportunity for creating a new concept of neighborly relations . . . " and "[t]hat international cooperation and economic exchange should serve to foster man's development, to enhance mutual respect for human dignity, and to promote shared well-being . . . ." A short time later, the United States and Mexico entered into another agreement for cooperation, Memorandum of Understanding for Cooperation on Environmental Programs and Transboundary Problems, United States-United Mexican States, June 14, 1978, 30 U.S.T. 1574, reprinted in 17 I.L.M. 1056 (1978). Also relevant, as an indication of the meaning of "to cooperate more closely in the fight against crime" and also perhaps as an indication of subsequent practice, is the Mutual Legal Assistance Coopera-
Next the Court considers "whether the Treaty should be interpreted so as to include an implied term prohibiting prosecution where the defendant’s presence is obtained by means other than those established in the Treaty." In other words, should the Treaty be regarded as governing the relationship of the parties with respect to questions concerning the obtaining of custody by a party of a national of the other party physically located in his national state. Simple common sense would seem clearly to mandate that this be so. If not, why would the parties have entered into an agreement containing a detailed set of standards and procedures for accomplishing a certain result if it were contemplated that the same result could be achieved by other means. Also, considering that the violation of the territorial sovereignty of one state by the agents of another state is clearly prohibited by international law (and here there is no disagreement between any of the participants in this case—the Court as well as the parties). Is it reasonable to suppose that the parties considered abduction a viable law-enforcement option and that if they had wanted to preclude this possibility they would have included a provision to that effect in the agreement?

Article 31(3) of the Vienna Convention on the Law of Treaties states that “[t]here shall be taken into account, together with the context: . . . (c) any relevant rules of international law applicable in the relations between the parties.” This rule is known as the principle of consistency; its purpose is to make clear that the parties to a treaty “intend something not inconsistent with generally recognized principles of international law . . . .” In light of this principle of customary international law, codified in the Vienna Convention, the Court should have given considerable weight to other applicable and well-established princi-

\begin{enumerate}
\item Alvarez-Machain, 504 U.S. at 666.
\item Louis Henkin et al., INTERNATIONAL LAW 37 (1987).
\item Vienna Convention on the Law of Treaties, supra note 81, art. 31(3).
\item Lassa Oppenheim, OPPENHEIM'S INTERNATIONAL LAW 1275 (9th ed., pts. 2-4, R. Jennings & A. Watts eds., 1992); see Starke, supra note 22, at 457.
\end{enumerate}
ples of international law, like non-intervention, respect for the territorial
integrity and political independence of sovereign states, and the settle-
ment of international disputes by peaceful means. The Court could also
have made reference to the concept of due process or the international
law of human rights. It appears, however, that the Court approached this
inquiry in the spirit suggested by the petitioner's brief: that the relevant
background principles of international law within whose context the
treaty must be interpreted are not the broad prohibitions against inter-
vention or the use of force, but rather are limited to the more specific
principle permitting prosecution after forcible abduction that is expressed
in United States jurisprudence by the Ker-Frisbie rule. The United
States thus urged the Court in effect to apply the municipal law maxim
lex specialis derogat generali (special provisions should control the
general). The problem with that argument in this case, however, is
that showing that municipal legal systems have allowed prosecutions
before their courts in spite of the forcible abduction of the defendant
from another sovereign state is far from demonstrating the existence of a
norm of customary international law to that effect, especially when the
internationally wrongful act involves the violation of the territorial integ-
rit y of a sovereign state.

The Court attaches considerable importance to the United States con-
tention that Mexico was aware, when it entered into the U.S.-Mexican
Extradition Treaty of 1978 (the Treaty at issue in this case), of United
States caselaw sanctioning the prosecution in United States courts of
individuals abducted in violation of international law from nations with
which the United States had extradition treaties. Thus, the Court
cites diplomatic correspondence between the United States and Mexico
regarding the Martinez Incident of 1905, in which United States Secre-
tary of State called the attention of the Mexican Government to the
1886 decision of the Supreme Court in Ker v. Illinois, in which the
Court held that an American citizen abducted from Peru could be tried
in an Illinois court even though at the time there was an extradition
treaty in force between the United States and Peru. The Secretary

154. STARKE, supra note 22, at 457.
155. Asylum Case (Colom. v. Peru), 1950 I.C.J. 266; The S.S. "Lotus" (Fr. v.
Turk.), supra note 12.
156. Ker v. Illinois, 119 U.S. 436 (1886); see Frisbie v. Collins, 342 U.S. 519,
reh'g denied, 343 U.S. 937 (1952).
suggested that the proper remedy for Mexico was a request to the United States for the extradition of Martinez' abductor.\textsuperscript{158}

Even if Mexican Government representatives were aware of the Ker decision and the diplomatic correspondence concerning the Martinez Incident when the 1978 treaty was negotiated, it would be unlikely that they would regard prosecution following the illegal kidnapping as an accurate statement of contemporary law. Thus, a South African court passing recently on the legality of a domestic prosecution following an illegal international abduction regarded United States law as moving away from the Ker and Frisbie decisions.\textsuperscript{159} The South African court relied principally on the 1974 Court of Appeals decision in United States v. Toscanino,\textsuperscript{160} which it interpreted as refusing to follow the decisions in Ker and Frisbie. This view of American law by the South African court certainly represents a reasonable reading of the United States cases.

Finally, it should be noted that a holding by the Court that prosecution in United States courts of a person illegally abducted from a foreign nation with which the United States had an extradition treaty would not necessarily lead to the disallowing of prosecution in United States courts of persons illegally abducted from all foreign nations.\textsuperscript{161} The bar to prosecution would depend on the existence of an extradition treaty between the United States and the foreign nation. Thus, such a holding would not apply in the case of abduction from countries like Libya, Syria, Iran, Lebanon, Jordan, Yemen, Tunisia, China, Viet Nam, Kampuchea, Afghanistan, North Korea, Morocco, Kuwait, Somalia, the Sudan, Ethiopia, and Mozambique, with which the United States presently does not have extradition treaties.\textsuperscript{162}

\begin{footnotesize}
\begin{enumerate}
\item[158.] Id. at 665 n. 11.
\item[159.] S. v. Ebrahim, 1991 (2) SA 553 (a), reprinted in 31 I.L.M. 888 (1992) (John Dugard ed. and trans.).
\item[160.] 500 F.2d 267 (2nd Cir.) (en banc), \textit{reh'g denied} 504 F.2d 1380 (2nd Cir. 1974).
\item[161.] See, \textit{e.g.}, Bush, \textit{supra} note 17, at 977-83 (mentioning seven possible situations in which the United States should be able to prosecute persons illegally abducted from foreign nations, including: the unimaginably evil fugitive—an Eichman exception; a fugitive abducted from a territory no longer functioning as a sovereign state; a fugitive who worked for or was controlled by an asylum state which is unlikely to surrender him; a fugitive located in a country which refuses to make good faith efforts to arrest and prosecute him).
\end{enumerate}
\end{footnotesize}
The same narrow reading of international agreements employed by the Court in Sale and Alvarez-Machain is apparent in three treaty interpretation cases decided by the Supreme Court during the 1980s. Although these decisions did not involve high-profile and highly-charged issues and therefore did not arouse the same public outcry as Sale and Alvarez-Machain, they indicate that the restrictive approach to the interpretation of international agreements that results in sustaining the actions of American officials and favoring domestic policies over international cooperation may be more than an outcome-oriented technique used by the Court in certain politically-sensitive situations. Indeed, as at least two, and perhaps all three, of these cases demonstrate, the Court could have reached the same result even it had taken a more expansive view of the coverage or the substantive requirements of the relevant international agreements. The restrictive approach thus appears to represent a consistent approach followed by the Court over the past decade to the interpretation of the international obligations of the United States.

163. The Aérospatiale decision, however, was “almost uniformly condemned as inconsistent with America’s obligations under the Evidence Convention and offensive to other signatories.” Russell J. Weintraub, The Need for Awareness of International Standards When Construing Multilateral Conventions: The Arbitration, Evidence, and Service Conventions, 28 Texas Int’l L. J. 441, 460 (1993).

In *Schlunk*, the Court interpreted the Hague Service Convention\(^{165}\) to allow service on a foreign corporation by serving its wholly-owned domestic subsidiary in the United States free from the requirements of the Convention.\(^6\) While concurring in the Court’s decision, Justice Brennan, joined by Justices Marshall and Blackmun, strongly disagreed with the majority’s interpretation of the relevant provision of the Convention. The basic disagreement between the majority and the concurring justices centered on their varying interpretations of the scope of the Convention, as defined in Article 1. The majority took a narrow, textual approach to the construction of Article 1, unwilling to impose obligations not clearly stipulated in the Convention, while Justice Brennan read Article 1 more expansively, viewing its specific language in the light of the Convention’s broad remedial and cooperative purposes.

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166. See Hague Service Convention, supra note 165, art. 2 (requiring each state party to designate a Central Authority to receive requests for service from other state parties); art. 5 (providing that the Central Authority “shall serve the document or arrange to have it served by an appropriate agency . . . .”); art. 15 (providing an important limitation on default judgments, which may be entered only if timely service “by the method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory” or “actual[] deliver[y] to the defendant or his residence” can be established); see also id., art. 16 (empowering judges to extend the time for appeal if the defendant did not have timely notice of a document required to be transmitted according to the Convention or of the judgment and he has shown a *prima facie* defense on the merits).
The Hague Service Convention provides a mechanism for the service of legal documents abroad. Its principal purposes are to facilitate service abroad and to ensure that persons affected by foreign proceedings receive timely notice. Article 1 provides: "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." To decide whether plaintiff (who brought suit in a state court in Illinois) had to employ the procedures of the Convention to serve defendant (a German corporation) the Court had to interpret the words "where there is occasion to transmit a ... document for service abroad." The act of serving defendant's wholly-owned American subsidiary did of course require the physical transmission of a legal document abroad; but in order for the document to reach defendant, transmission abroad by the American subsidiary would be necessary. Thus, the Court had to decide whether service on the German corporation was effected for purposes of the Convention when service was made on its American subsidiary or whether transmittal of the document to the corporation in Germany triggered the application of the Convention by satisfying the "for service abroad" language of Article 1.

In determining whether there is "occasion to transmit" a complaint "for service abroad," the Court decided that it should look to the internal law of the forum state, stating that "[i]f the internal law of the forum state defines the applicable method of serving process as requiring the transmittal of documents abroad, then the Hague Service Con-

167. Weintraub, supra note 163, at 467. The Preamble to the Hague Evidence Convention states that the signatories "[d]esire[e] to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time, [and] Desir[e] to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure ... ." Hague Service Convention, supra note 149, pmbl. From the perspective of the United States, "the convention makes no basic changes in United States practice, while it makes substantial changes in the practices of many of the civil law countries, moving their practices in the direction of our generous system of international judicial assistance and our concepts of "due process" in the service of process ... ." Philip Amram, Report of the Tenth Session, supra note 165, at 90.

Applying this standard, the Court referred to the law of Illinois, which deemed service on a wholly-owned subsidiary to be effective service on the parent corporation. The concurring justices took issue with the Court’s reading of the Convention. For them, the appropriate standard for determining whether the transmittal of documents abroad was required should be set not by the domestic law of the forum state, but rather by a uniform international standard, developed with the purposes of the Convention clearly in view.

The Court’s approach to the interpretation of the Convention, in marked contrast to that of Justice Brennan, makes the sphere of application of the Convention ultimately depend on domestic law. It is to national law, unfettered, apparently, by any international standards, that a domestic court must look when it seeks to determine if transmittal abroad of judicial documents is required for their effectiveness. Again, as with the decisions in Sale and Alvarez-Machain, the decision in Schlunk is arguably not in the best interests of the United States. Moreover, the Court’s interpretation runs counter to a principal purpose of the Convention, which was to eliminate the much criticized practice of several of the European signatories called notification au parquet.

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169. Schlunk, 486 U.S. at 700.
170. Id. at 706. Schlunk has been narrowly construed in two subsequent lower court cases. Fleming v. Yamaha Motor Corp., 774 F. Supp. 992 (W.D. Va. 1991) (holding the Hague Service Convention applicable in the absence of a state service statute similar to the Illinois statute involved in Schlunk); McClennon v. Nissan Motor Corp., 726 F. Supp. 822 (N.D. Fla. 1989) (holding that since the Florida service statute required transmittal of documents abroad, the Hague Service Convention was applicable).
171. Schlunk, 486 U.S. at 708 (Brennan, J., concurring). Brennan states: I do not join the Court’s opinion because I find it implausible that the Convention’s framers intended to leave each contracting nation, and each of the 50 States within our Nation, free to decide for itself under what circumstances, if any, the Convention would control. Rather, in my view, the words “service abroad,” read in light of the negotiating history, embody a substantive standard that limits a forum’s latitude to deem service complete domestically.
172. Weintraub, supra note 163, at 471.
173. Notification au parquet permits service of process on a foreign defendant by the deposit of documents with a designated local official. Although the official generally is supposed to transmit the documents abroad to the defendant, the statute of limitations begins to run from the time that the official receives the documents, and there allegedly is no sanction for failure to transmit them . . . . At the time of the 10th Conference, France, the Netherlands, Greece, Belgium and Italy used some type of notification au parquet . . . . There is no question that the Conference wanted to
By interpreting the Convention to refer to the law of the forum state in determining whether transmittal of documents abroad is necessary, the Court in effect sanctioned the continuance of the European practice of notification au parquet.\footnote{174}

It is probably fair to say that the meaning of the Convention is obscure with regard to the precise question involved in Schlunk.\footnote{175} This obscurity appears to have resulted from the inability of the delegates to the Tenth Hague Conference to reach agreement.\footnote{176} The majority chose to restrict the applicability of the Convention thereby rendering it subject to the differing service requirements of the state parties (and perhaps even, as in the case of the United States, their constituent units). Perhaps one could say that the majority chose to accord primacy to domestic freedom of action rather than to international cooperation. Or perhaps eliminate notification au parquet. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 703 (1988).

\footnote{174}Id. at 705. The majority states that “[t]he interpretation of the Convention does not necessarily advance this particular objective [to ensure that there will be adequate notice in cases in which there is occasion to serve process abroad], inasmuch as it makes recourse to the Convention’s means of service dependant on the forum’s internal law.” \textit{Id.} The Court then goes on to state that “we do not think that this country, or any other country, will draft its internal laws deliberately so as to circumvent the Convention in cases in which it would be appropriate to transmit judicial documents for service abroad.” \textit{Id.} Justice Brennan makes the following telling reply: “[t]he fact remains, however, that had we been content to rely on foreign notions of fair play and substantial justice, we would have found it unnecessary, in the first place, to participate in a Convention ‘to ensure that judicial . . . documents to be served abroad [would] be brought to the notice of the addressee in sufficient time.’” \textit{Id.} at 716.

\footnote{175}Note, \textit{The Supreme Court Interprets the Hague Service Convention}, supra note 165, at 769, 774-75. \textit{But see Ristau}, supra note 168 (quoting the Convention drafting Commission). The Commission states:

Moreover, it was thought that it is up to the law of the forum state to prescribe under what circumstances resort should be made to the Convention, and that it would not be proper to limit, in this respect, the discretion of the judge who is seized with the case . . . .

In granting the court of the forum state the discretion to determine, under the domestic law, when the Convention machinery should or should not be employed, the Convention establishes more of a freedom than an obligation. Under the actual text of the Convention, the obligatory character of the Convention does not depend upon the presence of certain objective conditions; the Convention needs to be applied by a contracting state only if the law of that state says so.

\footnote{176}Id. at 130.
\footnote{175}Id.
the Court was simply uncomfortable with having to develop substantive standards to fill in the gaps in Article 1, such as defining the term “service” without a clear textual basis in the Convention for doing so. One additional consideration is that the domestic service requirements at issue in Schlunk were based on state law. Thus, besides having had to develop substantive rules, the Court would have also had to preempt state law by creating an international standard at the federal level, again without a clear textual basis in the Convention for doing so.

Even though the majority’s approach is understandable and its legal justification, based on the text of the Convention and its negotiating history, “plausible,” the decision advances neither the purposes of the Convention stipulated by the contracting states in its preamble nor the purposes of the United States in becoming a party.178

B. Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa

Extraterritorial discovery between litigants located in different nations has long been a source of difficulty for litigants.179 It is often costly, cumbersome, and time-consuming. Extraterritorial discovery has also led to serious problems between nations, as it may be perceived by foreign nations as infringing upon their sovereign rights.180 This has been particularly true with regard to extraterritorial discovery by United States courts. The strong negative reaction of foreign nations to discovery in connection with proceedings in American courts is well known and has led a number of foreign states to enact so-called “blocking statutes” to impede the discovery efforts of United States courts.181 Friction is even more pronounced when litigants in proceedings before American courts seek discovery in civil law countries, which approach the performance

177. See Service of Process, supra note 165, at 284.
178. See supra notes 163 and 173 and accompanying text. See also Note, The Supreme Court Interprets the Hague Service Convention, supra note 165, at 793-96.
of functions in connection with litigation, including the gathering of evidence, from significantly different legal perspectives.\(^\text{182}\)

In 1968, in an attempt to deal with the problems arising from the need for extraterritorial discovery, the United States and twenty-three other nations met at the Hague and drafted the Hague Evidence Convention.\(^\text{183}\) The Convention was eventually signed by twenty nations, including the United States and France.\(^\text{184}\) An important purpose of the Convention was to provide a practical mechanism for easing the burden on litigants in common-law countries in procuring evidence located abroad.\(^\text{185}\)

In the \textit{Aérospatiale} case, the Supreme Court had to deal with the problem of the relationship between the requirements of the Hague Evidence Convention and the power of the federal courts to order extraterritorial discovery under the Federal Rules, free from the requirements of the Convention.\(^\text{186}\) As in \textit{Sale}, \textit{Alvarez-Machain}, and \textit{Schlunk}, the

\begin{enumerate}
\item \text{See} Diana Lloyd Muse, \textit{Discovery in France and the Hague Convention: The Search for a French Connection}, 64 N.Y.U. L. REV. 1073, 1079-90 (1989) (discussing the French system and indicating that “[t]he two major features of the French system that distinguish it from the American are the judge’s plenary power over the evidence-gathering process and the limited scope of evidence gathering;” furthermore, “important policies [particularly those pertaining to judicial and national sovereignty] lie behind these components of the French system”); Brigitte E. Herzog, \textit{The 1980 French Law on Documents and Information}, 75 AM. J. INT’L L. 382 (1981) (indicating that one of the principal motivations for the highly restrictive 1980 French law pertaining to extraterritorial discovery was that “the terms of the Hague [Evidence] Convention . . . , and in particular the reservations made by France in ratifying that Convention, were frequently disregarded by American litigants”).
\item Harold G. Maier, \textit{Extraterritorial Discovery: Cooperation, Coercion and the Hague Evidence Convention}, 19 VAND. J. TRANSNAT’L L. 239, 242 (1986) (citing Report of the United States Delegation to the Eleventh Session of the Hague Conference on Private International Law, 8 I.L.M. 785, 806-08 (1969)). Professor Maier explains that “[t]he Convention sought to establish a system for transnational evidence-gathering which was acceptable to the states parties and which would harmonize conflicting views about sovereignty and jurisdiction reflected in differing systems of civil procedure used by the members.” \textit{Id.}
\item Maier, \textit{supra} note 185, at 239-40; see Axel Heck, \textit{U.S. Misinterpretation of the Hague Evidence Convention}, 24 COLUM. J. TRANSNAT’L L. 231 (1986) (discussing
\end{enumerate}
Court in *Aérospatiale* interpreted an international agreement of the United States in order to determine its applicability. The Court asked whether the Convention provided the sole, or at least the preferred means of obtaining evidence abroad, or did it provide only one among other possible options, to be employed by the American judge at his discretion?

*Aérospatiale* was a products liability case brought in the Federal District Court for the Southern District of Iowa. Plaintiffs sought discovery from two French corporate defendants of documents and other information located in France. Defendants filed a motion for a protective order, arguing that the Hague Evidence Convention dictated the exclusive procedures that must be followed for pretrial discovery.\textsuperscript{187} Defendants motion was denied by a Federal Magistrate, and that decision was affirmed by the Circuit Court of Appeals for the Eighth Circuit.\textsuperscript{188}

The Supreme Court, in an opinion by Justice Stevens, posed the question presented as “the extent to which a Federal District Court must employ the procedures set forth in the Convention when litigants seek answers to interrogatories, the production of documents, and admissions from a French adversary over whom the court had personal jurisdiction.”\textsuperscript{189} The Court outlined four possibilities:

First, the Hague Convention might be read as requiring its use to the exclusion of any other discovery procedures whenever evidence located abroad is sought for use in an American court. Second, the Hague Convention might be interpreted to require first, but not exclusive use of its procedures. Two other interpretations assume that international comity, rather than the obligations created by the treaty, should guide judicial resort to the Hague Convention. Third, then, the Convention might be viewed as establishing a supplemental set of discovery procedures, strictly optional under treaty law, to which concerns of comity nevertheless require first resort by American courts in all cases. Fourth, the treaty may be viewed as an undertaking among sovereigns to facilitate discovery to which an American court should resort when it deems that course of action appropriate . . . .\textsuperscript{190}

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\textsuperscript{188} 782 F.2d 120 (8th Cir. 1986).

\textsuperscript{189} *Aérospatiale*, 482 U.S. at 524.

\textsuperscript{190} Id. at 533.
The Court then went on to “reject the first two of the possible interpretations as inconsistent with the language and negotiating history of the Hague Convention,”\(^1\) stressing that neither the preamble nor the text itself speaks in mandatory terms or in any way expresses an intent to preempt other means of discovery.\(^2\) As previously seen in Sale, Alvarez-Machain, and Schlunk, the Court in Aérospatiale was unwilling to interpret the Convention to create binding legal obligations “[i]n the absence of explicit textual support . . . .”\(^3\) It should be noted that by rejecting the first two possible interpretations, the Court rejected even the lesser legal obligation of first use of the Convention in extraterritorial discovery situations.\(^4\) Also, the Court did not require first use of the Convention’s procedures on the basis of comity. Rather, it accorded discretion to the trial court to determine on a case-by-case basis whether the procedures of the Convention should be utilized.

Justice Blackmun, concurring in part and dissenting in part, joined by Justices Brennan, Marshall, and O’Connor, interpreted the Convention as establishing “a general presumption that, in most cases, courts should resort first to the Convention procedures.”\(^5\) He castigates the Court’s decision as “an affront to the nations that have joined the United States in ratifying the Hague Convention . . . .”\(^6\) In Justice Blackmun’s view, “[t]he Court ignores the importance of the Convention by relegating it to an ‘optional’ status . . . .”\(^7\) He correctly points out that “[t]he Convention . . . serves the long-term interests of the United States in helping to further and to maintain the climate of cooperation and goodwill necessary to the functioning of the international legal and commercial systems . . . .”\(^8\) The concern on the part of other nations

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191. Id. at 534.
192. Id. at 534-40.
193. Id. at 537.
196. Aérospatiale, 482 U.S. at 547.
197. Id. at 548.
198. Id. at 550. Bermann writes:
concerning the particular issues and more general principles involved in _Aérospatiale_ is amply evidenced by the amicus briefs filed by Germany, France, Switzerland, and the United Kingdom. According to Professor Weintraub, the Court’s decision has been almost universally condemned.

The fact remains that American courts would actually be aided in making proper claims for cooperation from those in control of evidence abroad if the courts adopted a more gracious, indeed more honest, reception of the Convention than the Supreme Court has accorded it. Both by its substance and its rhetoric, the _Aérospatiale_ ruling unfortunately misses an important opportunity to promote the spirit of accommodation essential to the internationalization of law and legal practice.

Bermann, _supra_ note 195, at 552.

199. The amicus briefs of France, Germany, Switzerland, and the United Kingdom are reprinted in 25 I.L.M. 1475, 1519 (France), 25 I.L.M. 1475, 1539 (Germany), 25 I.L.M. 1475, 1549 (Switzerland), and 25 I.L.M. 1475, 1557 (United Kingdom).

200. Weintraub, _supra_ note 163, at 460. For a sampling of the critical literature, which is far too voluminous to cite in full, see generally Patricia A. Kuhn, Comment, Société Nationale Industrielle Aérospatiale: The Supreme Court’s Misguided Approach to the Hague Evidence Convention, 69 B.U. L. Rev. 1011 (1989) (discussing _Aérospatiale_’s unworkable guidelines); James G. Dwyer & Lois A. Yurow, _Taking Evidence Abroad and Breaking Treaties: Aérospatiale and the Need for Common Sense_, 21 Geo. Wash. J. Int’l L. & Econ. 439 (1988) (explaining the United States Court’s desire to conform the Hague Convention with the Federal Rules of Evidence); Bermann, _supra_ note 195, at 539 (stating that “. . . [t]he majority’s position unnecessarily reduces the Convention to modest legal significance . . . [T]he Court belittles the Convention through what can be described without exaggeration as ridicule and caricature”); _But see_ J. Albert Garcia, Note, _A Look Behind the Aérospatiale Curtain, or Why the Hague Evidence Convention Had to Be Effectively Nullified_, 23 Texas Int’l L.J. 269, 270 (1988) (hereinafter Garcia, _Aérospatiale Curtain_) (arguing that “despite the Court’s unorthodox methods, the result was nonetheless correct and was reached in perhaps the best possible manner”); Garcia, _Aérospatiale Curtain, supra_, at 270 (asserting that the result was “to protect the United States’ basic interest in the fair adjudication of claims in its courts”); Garcia, _Aérospatiale Curtain, supra_, at 282 (conceding that the Court’s decision violated the Hague Evidence Convention).

C. SUMITOMO SHOJI AMERICA, INC. v. AVIGLIANO\(^{291}\)

The Sumitomo case, decided by the Supreme Court in 1982, also dealt with question of the scope of applicability of an international agreement of the United States: the bilateral Friendship, Commerce and Navigation (FCN) Treaty of 1953 with Japan.\(^{202}\) The specific question in Sumitomo concerned the applicability of Title VII of the Civil Rights Act of 1964, which, in part, prohibited discrimination on the basis of national origin in employment\(^{203}\) to a wholly-owned American subsidiary of a Japanese corporation. The defendant corporation contended that Article VIII of the Treaty allowed it to "engage . . . accountants and other technical experts, executive personnel, attorneys, agents and other specialists of [its] choice," notwithstanding the requirements of Title VII of the Civil Rights Act.

The Court granted certiorari in Sumitomo to decide whether Article VIII(1) of the United States-Japan FCN Treaty provides a defense to a Title VII employment discrimination suit against an American subsidiary of a Japanese company.\(^{205}\) The Court was most likely influenced in its

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204. Art. VIII (1) of the U.S.-Japan FCN Treaty reads in full:

1. Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations exclusively for, and rendering reports, to such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

decision to review the case because of conflicting decisions in the Second and the Fifth Circuits. In Spiess v. C. Itoh & Co. (America), Inc., the Fifth Circuit decided that Article VIII of the Treaty could be invoked by an American subsidiary of a Japanese corporation, thereby shielding the company from application of the non-discrimination requirements of Title VII of the Civil Rights Act. On the other hand, in Avigliano (sic) v. Sumitomo Shoji America, Inc., the Second Circuit, although it agreed with the Spiess court that Article VIII of the Treaty could be invoked by an American subsidiary of a Japanese corporation, had read Article VIII of the Treaty narrowly, holding that it did not bar the application of the non-discrimination requirements of Title VII.

The difficult issue in Sumitomo was the relationship between Article VIII of the Treaty and Title VII of the Civil Rights Act. This question arguably would have been posed directly if plaintiff’s complaint of employment discrimination on the basis of national origin had been brought against a Japanese corporation that operated in the United States without being incorporated in the United States. To resolve that problem, the Court had to read the two provisions as harmonious, or if it was unable to reconcile them, it had to decide whether to give priority to the requirements of the treaty or to those of the subsequent statute. The Court avoided this issue by holding that Sumitomo was not a company of Japan and therefore was not covered by Article VIII of the Treaty. It was therefore unnecessary for the Court to delimit the scope of application of the Treaty and to define the substantive requirements of Article VIII, or to grapple with the problem of reconciling a prior treaty commitment with a subsequent statute. An important issue, however, remained unresolved. More significantly, the United States-

Japanese FCN Treaty was held not to govern a matter that certainly concerned investment and the conduct of business in the United States by Japanese nationals.

The precise treaty interpretation issue in \textit{Sumitomo} was whether the Sumitomo Shoji America Corporation was a "compan[y] of [Japan]" within the meaning of Article VIII of the Treaty, and therefore entitled to engage certain personnel "of [its] choice."\textsuperscript{210} To answer this question, the Court referred to the definitional section of the Treaty, Article XXII(3), which provides that:

Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and have their juridical status recognized with the territories of the other Party.\textsuperscript{211}

Because the Sumitomo Corporation was "constituted under the applicable laws and regulations" of New York, the Court decided that "based on Article XXII(3), it is a company of the United States, not a company of Japan."\textsuperscript{212} In its interpretation of Article XXII(3), the Court accorded great weight to the statements of both the Japanese Ministry of Foreign Affairs and the United States Department of State that Article VIII rights do not apply to locally incorporated subsidiaries.\textsuperscript{213} The Court further supports its reading of the Treaty by close textual references\textsuperscript{214} and by its view that the purpose of the Treaty is to establish national treatment for Japanese businesses in the United States.\textsuperscript{215}

\textsuperscript{210} Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 182 (1982).
\textsuperscript{211} U.S.-Japan FCN Treaty, supra note 202, art. XXII(3), at 4.
\textsuperscript{212} Sumitomo, 457 U.S. at 182.
\textsuperscript{213} Id. at 184-85 (citing Kolovrat v. Oregon, 366 U.S. 187 (1961), for the proposition that "[a]lthough not conclusive, the meaning attached by treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight").
\textsuperscript{214} Sumitomo, 457 U.S. at 182-83, n.8.
\textsuperscript{215} Id. at 185-88. The court added:

The purpose of the [post World War II FCNJ] Treaties was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage . . . . By treating [foreign] subsidiaries as domestic companies, the purpose of the Treaty provisions—to assure that corporations of one Treaty party have the right to conduct business within the territory of the other party without suffering discrimination as an alien entity—is fully met.

\textit{Id.} at 187-88.
The two Circuit Courts, however, agreed that Article VIII of the Treaty applied to the Sumitomo Corporation. They reasoned that the overall purpose of the Treaty was, as Judge Mansfield stated, “not to protect foreign investments made through branches, but rather to protect foreign investments generally . . . regardless of the specific corporate vehicle employed.” According to Judge Mansfield, Article XXII(3) merely “defines a company’s nationality for the purpose of recognizing its status as a legal entity but not for the purpose of restricting substantive rights granted elsewhere in the Treaty.”

Even though both constructions of the Treaty are plausible, based on their different but equally supportable views of the Treaty’s purpose and on reasonable inferences from the text, the better approach was that taken by the Circuit Courts. That approach imparted importance to the Treaty in a situation where it was clearly relevant, as the problem presented to the Court arose in the context of Japanese investment and the conduct of business in the United States. Furthermore, by resolving the

217. Avigliano, 638 F.2d at 557; Spiess, 643 F.2d at 356-57.
218. Contrast, for example, the interpretation and rationale of the Second and Fifth Circuits in Avigliano and Spiess with that of the Supreme Court in Avigliano. See Cynthia B. Summervill, Recent Developments, Civil Rights—Friendship, Commerce and Navigation Treaty of 1953 Between the United States and Japan Immunizes Company Incorporated Under the Laws of the United States but Wholly Owned by a Japanese Corporation from United States Employment Antidiscrimination Laws, 17 Tex. Int’l L.J. 508 (1982) (arguing that the greater interest involved in Sumitomo is “that of stability in treaty application in the face of inconsistent domestic or foreign laws”); Ritomsky & Jarvis, supra note 209, at 195 (arguing that “the decision of the Supreme Court, although not as clear as it might have been, does contain the correct standards by which the rights granted under FCN treaties should be judged”). The three following articles by Herman Walker, Jr., principal architect and negotiator of America’s post-World War II FCN treaties, are cited frequently in the Spiess and Avigliano cases and by academic commentators with respect to the purposes of FCN treaties: Herman Walker, Jr., Modern Treaties of Friendship, Commerce and Navigation, 42 Minn. L. Rev. 805 (1958); Herman Walker, Jr., Provisions on Companies in United States Commercial Treaties, 50 Am. J. Int’l L. 373 (1956); Herman Walker, Jr., Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice, 5 Am. J. Comp. L. 229 (1956) (stating that the principal purpose of FCN treaties was to encourage and facilitate foreign investment by establishing or confirming a potential host country’s policy of promoting equity and hospitality for foreign investors and indicating that evidence of a friendly disposition was as important a purpose as establishing legal rights).
applicability question as they did, the Circuit courts reached what should have been the real heart of the controversy: whether the employment discrimination requirements of Title VII applied or were rendered inapplicable by Article VIII of the Treaty. Viewing the question in this light, the Circuit Courts were able to give full consideration to both the international as well as the domestic policies involved in the controversy. The decision of the Second Circuit, upholding the application of Title VII to Sumitomo's employment practices as consistent with the substantive requirements of the Treaty, demonstrates that the result desired by both the Japanese and American Governments could be achieved without restricting the sphere of operation of the Treaty.

IV. THE INTERPRETATION OF INTERNATIONAL AGREEMENTS BY NATIONAL COURTS: THE LEGITIMACY OF RESTRICTIVE INTERPRETATION

A. NATIONAL COURTS AND INTERNATIONAL RULES OF INTERPRETATION

The problem addressed in this Article, the interpretation of international agreements by national courts, could be effectively resolved by entrusting all questions of treaty interpretation to international judicial or

219. Avigliano, 638 F.2d. at 558.
220. It is surprising that the interpretation of international agreements by domestic courts has received so little attention from international legal scholars, since the frequency of application of international agreements by domestic courts far exceeds their application in international forums. While there is a vast body of scholarly literature dealing with the interpretation of international agreements, it focuses by and large on the interpretation by international judicial and arbitral tribunals. Symptomatic of this lack of attention is the Vienna Convention on the Law of Treaties, which does not address the matter at all. But see ARNOLD D. MCNAIR, THE LAW OF TREATIES 345-63 (1961) (citing literature on the interpretation of international agreements); Schreuer, Interpretation of Treaties, supra note 24 (explaining how domestic courts rely on the Vienna Convention to provide a framework for application of international legal principles).

When national legal scholars consider treaty interpretation, they usually limit their consideration to the particular legal and constitutional system which is the focus of their interest. They usually deal with rules of interpretation as questions of the relative competence of different branches of a particular domestic government to interpret international agreements or analyze domestic treaty-interpretation decisions for doctrinal consistency. See, e.g., Bederman, supra note 36, at 953; Koplow, supra note 35, at 1353; James C. Wolf, Note, The Jurisprudence of Treaty Interpretation, 21 U.C. DAVIS L. REV. 1023 (1988).
arbitral tribunals. That would eliminate problems associated with national courts’ according priority to domestic legal, institutional, and political concerns and minimize the lack of uniformity in the interpretation of multilateral conventions. There are provisions in many international agreements which do confer jurisdiction on international tribunals when questions concerning the “interpretation or application” of the agreement arise.\(^2\) For a variety of reasons, however, reference to an international decision-maker is the exception, rather than the rule. In those cases where international agreements do contain reference to an international decision-maker, other problems arise concerning the determination of the tribunal’s jurisdiction in the particular case, which may be even more problematic than the issues encountered in the interpretation and application of treaties by domestic courts.\(^2\)

An alternative approach to the interpretation of international agreements by domestic courts is referral of the question of interpretation to the International Court of Justice (ICJ) or other designated international tribunal, leaving application determinations to the national court. A similar approach has worked well in the European Union. According to Article 177 of the Treaty of Rome, “when . . . a question [of the interpretation of this Treaty] is raised before any court or tribunal of a Member State, that court or tribunal may . . . request the Court of Justice to give a ruling thereon.”\(^2\) If “such question is raised in a case

\[\text{\footnotesize 221. See I.C.J. 1992-1993 Y.B. 113-31 (1993) (listing 263 treaties and other instruments containing clauses relating to the jurisdiction of the ICJ in contentious proceedings; such clauses generally provide that disputes concerning the application or interpretation of the instrument may be referred to the Court for decision.) See Fred L. Morrison, Treaties as a Source of Jurisdiction, Especially in U.S Practice, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 58 (Lori F. Damrosch ed., 1987); Jonathan I. Charney, Compromissory Clauses and the Jurisdiction of the International Court of Justice, 81 AM. J. INT’L L. 855 (1987).}
\[\text{\footnotesize 223. See Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 3 [hereinafter EEC TREATY]; see Anne-Marie Burley & Walter Mattli, Europe Before the Court: A Political Theory of Legal Integration, 47 INT’L ORG. 41, 58, 58-72 (1993) (asserting that the Article 177 jurisdiction of the European Court of Justice was included “[a]lmost as an afterthought . . . ” and illustrating the importance of article 177 jurisdiction to the work of the Court and the role that it has played in political integration in the European Community); see also T. C. HARTLEY,}
pending before a court or tribunal of a Member State against whose
decisions there is no judicial remedy under national law, that court or
tribunal shall bring the matter before the Court of Justice." A 1976
United States Department of State study recommended that this "prelimi-
nary opinion procedure" be adopted by amending the Statute of the In-
ternational Court of Justice to allow the ICJ to render such preliminary
opinions on questions of treaty interpretation. No action has yet been
taken on this recommendation.

Procedures and principles of interpretation of international

The Foundations of European Community Law 246-82 (Tony Honoré & Joseph
Raz eds., 1988).

224. EEC Treaty, supra note 223.

225. U.S. DEP'T OF STATE, WIDENING ACCESS TO THE INTERNATIONAL COURT OF
JUSTICE (1976), reprinted in 16 INT'L LEGAL MATERIALS 187, 204-06 (1977); see
REPORT OF THE SECRETARY-GENERAL ON AN AGENDA FOR PEACE, U.N. DOC.
S/24111 (June 17, 1992), reprinted in 31 I.L.M. 953, 964-65 (1992) (discussing the
feasibility of the issuance of interpretative opinions by the ICJ). A recent ABA report
containing recommendations regarding the International Court of Justice does not men-
tion the preliminary opinion procedure. American Bar Association Section of Int'l. L.
& Practice & the Standing Comm. on World Order Under Law, Report on Improving
the Effectiveness of the United Nations in Advancing the Rule of Law in the World,

226. The term "procedures" of interpretation is used here to refer to the particular
procedures utilized by a domestic court to determine the meaning of a treaty provi-
sion. Thus, the court may undertake interpretation itself, giving little, some, or conclu-
sive weight to executive branch views; or it may formally refer the question of inter-
pretation to the executive branch, as is the practice of the French Conseil d'État.

227. See Lauterpacht, Restrictive Interpretation, supra note 22, at 53. The author
states:

In a sense the controversy as to the justification of rules of interpretation par-
takes of some degree of artificiality inasmuch as it tends to exaggerate their
importance. For as a rule they are not the determining cause of judicial deci-
sion, but the form in which the judge cloaks a result arrived at by other
means. It is elegant—and it inspires confidence—to give the garb of an estab-
lished rule of interpretation to a conclusion reached as to the meaning of a . . .
treaty. But it is a fallacy to assume that the existence of these rules is
a secure safeguard against arbitrariness or impartiality. The very choice of any
single rule or of a combination or cumulation of them is the result of a judg-
ment arrived at, independently of any rules of construction, by reference to
considerations of good faith, of justice, and of public policy within the orbit of
the express or implied intention of the parties or of the legislature.

Id; see Jules Basdevant, Le rôle du juge national dans l'interprétation des traités
diplomatiques, 38 REVUE CRITIQUE DU DROIT INT'L PRIVÉ 413, 427 (1949). Judge
Basdevant remarks:
agreements employed by international tribunals and by national courts are not necessarily the same;\textsuperscript{228} they may also differ significantly between the courts of different nations.\textsuperscript{229} This can be expected, because

The interpretation of a treaty, like that of a law or a contract, is a legal work of art; it thus does not depend solely, or even principally, on preestablished rules; it depends above all on the unique qualities of the interpreter, qualities which we normally will find in the judge.

\textit{Id.} (translated by author). \textit{But see Myres S. McDougal et al., The Interpretation of Agreements and World Public Order: Principles of Content and Procedure} 8-10 (1967) (rejecting the two extreme views of the value of rules of interpretation (i.e., that "interpretation [according to established principles] is so easy as to be almost automatic" on the one hand and that "[principles of interpretation] often abrogate each other and frequently appear worthless" on the other)).

\textit{228. See Restatement of Foreign Relations Law, supra} note 26, §325, cmt. 8:

\begin{quote}
\textit{Interpretation by United States courts.} This section [which follows articles 31(1) and 31(3) of the Vienna Convention on the Law of Treaties] suggests a mode of interpretation of international agreements somewhat different from that ordinarily applied by courts in the United States. Courts in the United States are more generally willing than those of other states to look outside the instrument to determine its meaning. In most cases, the United States approach would lead to the same result, but an international tribunal using the approach called for by this section might find the United States interpretation erroneous and the United States action pursuant to that interpretation a violation of the agreement.
\end{quote}


\textit{229. Schreuer, Interpretation of Treaties, supra} note 24, at 290-94; Ignaz Seidl-Hohenveldern, \textit{Internationale Präjudizentscheidungen zur Auslegung Völkerrechtlicher Verträge}, in \textit{Festschrift für Alfred Verdross} 479 (1971); Wilhelm F. Bayer,
national courts inhabit unique jurisprudential worlds—far removed from international judicial or arbitral tribunals. National courts have

Auslegung und Ergänzung International Vereinheitlichter Normen Durch Staatliche Gerichte, 20 Zeitschrift für ausländisches und internationales Privatrecht 603 (1955). Approaches to treaty interpretation may also differ significantly between different courts in the same nation. See, e.g., Jacques Benoist, L’Interprétation des Traités d’après la Jurisprudence Française, 6 Revue Hellénique de Droit International 103 (1953); A. M. Donner, National Law and the Case Law of the Court of Justice of the European Communities, 1 Common Mkt. L. Rev. 8, 9 (1963) (illustrating that national judges often “tend to read international conventions through national spectacles . . . .”). More picturesquely this phenomenon has been expressed by Professor von Caemmerer, when he speaks of the Heimwärtsstreben of judges, straining to reach home ground, by which is meant the efforts of judges to find grounds for applying their own law, a field where they naturally feel more secure. O. C. Giles, Uniform Commercial Law: An Essay on International Conventions in National Courts 31 (1970); see also Vagts, supra note 28, at 473 (discussing the interpretation of international agreements in American courts). Vagts writes:

[T]he true difficulty with the practice of United States courts in treaty interpretation arises not from new theory, but from an old preference for reading treaties as fitting into the familiar landscape of American law, rather than facing the reality that treaties in fact change national law . . . . Few judges have any substantial experience with foreign relations, few of them have had any significant portion of their legal education abroad and the libraries they use may lack international materials. They are largely untouched by criticism or other professional pressures from outside the country in which they practice.

Id. at 481-82; see Friedrich V. Kratochwil, Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs 255 (1989) [hereinafter Kratochwil, Rules, Norms, and Decisions] (commenting on the “partisan nature” and the “lack of international credibility of domestic decisions”).


their own institutional and doctrinal histories and stand in particular relationships to other internal legal institutions (such as the legislature, the executive, other courts or court systems, and the bureaucracy). Even though there may be considerable similarity in the principles and terminology employed by tribunals at the national and international levels with regard to the interpretation of international agreements, decisional outcomes may differ significantly, indicating the different application of those principles in specific cases.

While differences in approach are to be expected, national courts should not allow concerns at the national level or greater familiarity with domestic legal concepts and methods to obscure the international objectives sought by the conclusion of an international agreement. This is true not only from the viewpoint of international law and the other party or parties to the particular international agreement—the subject of

interpretation in a national court—but also from the domestic political perspective of the court’s own state. Presumably, the particular treaty serves important national interests of all of its signatories. A national court can best effectuate the interests of its own state by recognizing this concept. In most cases, the cooperative legal relationship established by the treaty will endure well beyond the particular case before the national court. Therefore, the court should consider the impact of its interpretation on the future development of that relationship. These considerations will be fully explored and systematically analyzed in the next part of this Article.

A complicating legal factor for the national court, however, is the dual nature of an international agreement when it is a source of law in a domestic court. In the United States, for example, the international agreement is both a legally binding international obligation of the United States and the law of the land. A court interpreting and applying law would appear to be legally obliged to take both domestic and international perspectives into account, such as what occurred in the previously discussed cases. In Sale, Alvarez-Machain, Schlunk, Aérospatiale, and Sumitomo, however, short-term national interests overrode international cooperation through international agreement. The Supreme Court in each of those cases applied a restrictive interpretation to the international agreement at issue to exclude or vitiate its application. The Court’s failure to employ the terminology of restrictive interpretation in each of those cases should not obscure what the Court did. The Court in effect preserved the freedom of action of domestic decision-makers, rather than limiting their freedom of action in the interests of the other party or parties to the international agreement.

233. Multilateral agreements adopted by international conferences, such as the agreements involved in Sale, Aérospatiale, and Schlunk call for even greater deference to the international purpose of the agreement. See Giles, supra note 229, at 29 (asserting that “judges interpreting convention law must bear in mind that they are interpreting a body of rules decided upon by an international body and not by their own legislator, although the latter has enacted the law in their country”).

234. See Steiner & Vagts, supra note 228, at 634 (calling attention to “[t]he evident tension . . . between the concepts of a treaty as ‘supreme law’ and as an act pursuing foreign-relations goals” and stating that “problems of interpretation may occasionally shade into ‘political questions’”).

235. See Mc Dougal et al., supra note 227, at xi (stating that “in every particular controversy authorized decision-makers who are charged with the task of interpretation must proceed within the frame of reference provided by the basis prescriptions of all the public order systems to which they are responsible”).
In contrast to the American view that treaties are the law of the land and may be applied directly by courts, in England, courts may not in principle apply treaties directly. They may only if the treaty has been incorporated into English law by legislation.\textsuperscript{236} Treaty interpretation in English courts is therefore a matter of statutory interpretation.\textsuperscript{237} Nevertheless, English courts have not hesitated to look past the parliamentary enactment directly to the treaty itself.\textsuperscript{238} Subsequently, they have rejected domestic approaches to interpretation in favor of “broad principles of general acceptance.”\textsuperscript{239}

This view was described and justified by Lord Denning in \textit{James Buchanan \& Co. Ltd. v. Babco Forwarding \& Shipping (U.K.) Ltd.}.\textsuperscript{240} Even though the treaty before the court (the European Convention on the Contract for the International Carriage of Goods of 1956) had been incorporated into English law by an act of Parliament (Carriage of Goods by Road Act of 1965), Lord Denning nevertheless “put on one side our traditional rules of interpretation.”\textsuperscript{241} “We ought, he says, in interpreting this convention, to adopt the European method.”\textsuperscript{242} The English example indicates that there are no inherent problems, and indeed much benefit, in domestic courts adopting and implementing methods of interpretation that are aimed at achieving international cooperation within the context of an ongoing treaty regime. The foregoing example is especially suggestive because the dualist view of the relationship between national law and international law is an accepted feature of English jurisprudence.\textsuperscript{243}

\begin{itemize}
  \item \textsuperscript{236} Schreuer, \textit{Interpretation of Treaties}, supra note 24, at 256.
  \item \textsuperscript{237} \textit{Id.} at 251.
  \item \textsuperscript{238} \textit{See id.} at 257-61 (discussing of English treaty interpretation cases).
  \item \textsuperscript{239} \textit{See, e.g.}, Philippson v. Imperial Airways, Ltd., 1 All E.R. 761 (1939); Stag Line, Ltd. v. Foscolo, Mango \& Co., 41 Lloyd’s List L. Rep. 165 (1932).
  \item \textsuperscript{241} \textit{James Buchanan \& Co.,} 1977 Q.B. at 213.
  \item \textsuperscript{242} \textit{Id;} see Macarthys Ltd. Smith, 3 All E.R. 325 (1979) (C.A.) (“assume[ing] that our Parliament, whenever it passes legislation, intends to fulfil its obligations under the Treaty of Rome”).
  \item \textsuperscript{243} \textit{Oppenheim’s International Law}, supra note 152, at 58-60.
\end{itemize}
Despite the different legal, institutional, and political contexts in which they are situated, are domestic courts and international tribunals bound by the same rules of international law with regard to the interpretation of international agreements? As a general matter, customary international law is indifferent to the rules of interpretation applied by domestic courts. Customary international law is concerned only with actual decisional outcomes. A nation, therefore, may be in violation of an international treaty obligation by virtue of a decision by its court system—whatever rules of treaty interpretation are applied in reaching that decision. Similarly, customary international law is equally disinterested in the rules of interpretation applied by domestic courts if treaty commitments are necessarily honored.

The Vienna Convention on the Law of Treaties contains principles of treaty interpretation which would appear to be binding on the parties to the Convention. This is the assumption of the drafters of the Third Restatement of the Foreign Relations Law of the United States. All treaties affect private rights or, generally, require for the implementation of its obligations, a modification of existing law, the necessary changes in the law must be the subject of action by or under the authority of an Act of Parliament before an English court can give effect to the changes in the law called for by the treaty. Even then the court, unless directed otherwise by the legislation, will apply the law as changed by the legislation rather than as changed by the terms of the treaty itself. To that extent therefore treaties which are binding on the United Kingdom in international law do not as such affect or form part of the law of the land; they may not be invoked directly by individuals as a basis for legal rights or obligations to be asserted before the courts.

Where a treaty affects private rights or, generally, requires for the implementation of its obligations, a modification of existing law, the necessary changes in the law must be the subject of action by or under the authority of an Act of Parliament before an English court can give effect to the changes in the law called for by the treaty. Even then the court, unless directed otherwise by the legislation, will apply the law as changed by the legislation rather than as changed by the terms of the treaty itself. To that extent therefore treaties which are binding on the United Kingdom in international law do not as such affect or form part of the law of the land; they may not be invoked directly by individuals as a basis for legal rights or obligations to be asserted before the courts.

Id.

244. There are two principal sources of international rules for the interpretation of treaties between states: the rules contained in articles 31-33 of the Vienna Convention on the Law of Treaties, supra note 81; and the rules of customary international law.

245. Basdevant, supra note 227, at 416, 419.

246. As of December 31, 1993, there were 74 parties to the Vienna Convention on the Law of Treaties. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, U.N. Doc. ST/LEG/SER.E/12 at 829-830 (1994). The United States is not a party to the Vienna Convention, although it participated in the Vienna Conference which adopted the text and is a signatory to the Convention. France is the only country which participated in the Vienna Conference which did not sign the final text, nor has France subsequently become a party to the Convention. See Olivier Deleau, Les positions françaises à la Conférence de Vienne sur le droit des traités, 1969 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 7 (describing the French view of the Vienna Convention).

247. See RESTATEMENT OF FOREIGN RELATIONS LAW, supra note 26, §325, cmt. a (following Articles 31(1) and 31(3) of the Vienna Convention on the Law of Treaties).
though the United States is not a party to the Vienna Convention and is not formally bound by its rules of interpretation, United States courts have generally cited the Convention with approval and followed its approach when helpful.246

B. THE RESTRICTIVE APPROACH TO TREATY INTERPRETATION: ASCERTAINING THE INTENTION OF THE PARTIES

Whatever rules of interpretation a domestic court applies, there is one fundamental principle that appears well-accepted: the principal goal of treaty interpretation is to ascertain and give effect to the intent of the parties.249 The theory of restrictive interpretation, as it developed originally at the international level and was applied in national courts, served the legitimate interests of courts in seeking to effectuate the intentions of the parties to international agreements. To achieve that end it acted as a “default” rule, a presumption that the parties had a certain intent when actual intent could not be readily determined from the document.250 If there is doubt, the principle says, in effect, that the obligor

Customary international law of interpretation. Customary international law has not developed rules and modes of interpretation having the definiteness and precision to which this section aspires. Therefore, unless the Vienna Convention comes into force for the United States, this section does not strictly govern interpretation by the United States or by courts in the United States. But it represents generally accepted principles and the United States has also appeared willing to accept them despite differences of nuance and emphasis.

Id.

248. See generally Frankowska, supra note 81, at 281.
249. See McNair, supra note 220, at 365 (opining that “the main task of any tribunal which is asked to apply or construe or interpret a treaty . . . can be described as the duty of giving effect to the expressed intention of the parties”); MCDougal ET AL., supra note 227, at 10 (asserting that the goal of treaty interpretation is “the closest possible approximation to the shared expectations of the particular parties to the agreement”); Charles DE Vischer, Problèmes D’Interprétation Judiciaire EN Droit International Public 10 (1963) (observing that “[i]n the treaty, the security guaranteed by fidelity to the promise given is the objective of the contracting parties. The function of interpretation is to give full effect to this fundamental requirement”). But see Gidon Gottlieb, The Conceptual World of the Yale School of International Law, 21 WORLD Pol. 108, 126 (1969) (maintaining that “the process of interpretation does not primarily serve one dominant goal. It serves a congeries of competing purposes, and the discovery of the shared expectations of the parties to an agreement is but one of the many functions assigned to the process”).
state is free from the legal fetters of the agreement. A presumption favoring the restrictive interpretation of the agreement was in accord with positivistic international legal theory and state practice as it developed in the late 18th and 19th centuries and the early 20th century.  

According to Vattel, the “sole object” of treaty interpretation “is to discover the intention of the maker or makers of the treaty.” Thus, “when any obscurity is met with in the treaty we must seek for the probable intention of the parties to it and interpret it accordingly.”

Following this rule . . . expressions must be taken in their most extended meaning when it is probable that the speaker meant them to have such meaning; and, on the other hand, they should be taken in a restricted sense if it appears that the speaker had that sense in view.

More specifically, with respect to restrictive interpretation, Vattel asserts:

that “[i]nternational courts are constrained to concentrate on what is fair (what was expected and intended) as between the two parties to one discrete transaction. It is significant that the law of treaties essentially has no default rules”). See De Visscher, supra note 249, at 35-38 (discussing “presuppositions” and “presumptions” and stating that “presuppositions” are fundamental “givens” of the international legal order which express the general structure of current relations between states). “Thus: their sovereignty in a defined territory, their independence and their equality in the exercise of state functions; inherent competences and prerogatives, not as it often said flowing from the nature of states, but from the general conditions of their coexistence.” Id. “Presumptions,” on the other hand, are “indirect” means of judicially establishing facts. Id. See id. at 84-92 (discussing restrictive interpretation).

251. Positivism regards the legal order as a system of norms. See Hans Kelsen, General Theory of Law and State 113 (Anders Wedberg trans. 1945) (opining that “[a] norm is a valid legal norm by virtue of the fact that it has been created according to a definite rule and by virtue thereof only”); H. L. A. Hart, The Concept of Law 181 (1961) (stating that “it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality”). The principal implications of legal positivism for international law are that (1) rules of international law must be found in pre-existing volitional acts of states (manifested by either explicit or tacit agreement) and (2) natural law is not a valid basis for international law. See also David J. Bederman, The 1871 London Declaration, Rebus sic Stantibus and a Primitivist View of the Law of Nations, 82 Am. J. Int’l L. 1 (1988).


253. De Vattel, supra note 252, at 201.

254. Id.

255. Id.
... if a case should arise which can not at all be brought under the motive of the law or promise, the case should be excepted from its application, although if the meaning of the terms be alone regarded, the case would fall under the provisions of the law or promise ... . We resort to restrictive interpretation in order to avoid falling into absurdities.\textsuperscript{256}

It is instructive to note that, as elaborated by Vattel, the restrictive theory is really nothing more than a tool to be employed by treaty interpreters in appropriate situations to effectuate the intentions of the parties. In this sense, it is the counterpart or companion to the "extended" theory of interpretation. Vattel bases both approaches on probability, stating that:

when certitude can not be had in human affairs we must act on probabilities. It is ordinarily very probable that words have been used in their customary sense and the presumption to that effect is always very strong and can only be overcome by an even stronger presumption to the contrary.\textsuperscript{257}

Viewed against the background of 19th and early 20th century legal positivism, in cases of doubt, states most likely intended their treaty obligations to be interpreted narrowly. In light of post-World War II developments in the theory and practice of general international law and the international law of treaties this assumption may no longer be true.

Moreover, considerations of state sovereignty do not figure in Vattel's presentation and discussion of the restrictive approach to treaty interpretation. Vattel recommends other principles of interpretation which point in the opposite direction. He states:

There are certain things which equity prefers rather to extend than to restrict; that is to say, with regard to those things, when the precise intent of the law or contract can not be ascertained, it is safer, in the interests of justice, to give a liberal, rather than a strict interpretation to the terms, to extend the meaning of the terms rather than restrict it.\textsuperscript{258}

\textsuperscript{256} Id. at 210.

\textsuperscript{257} Id. at 202; see HUGO GROT IUS, 2 THE LAW OF WAR AND PEACE 409 (Francis W. Kelsey ed., 1964) (asserting that "[t]he measure of correct interpretation is the inference of intent from the most probable indications"); Béla Vitányi, \textit{Treaty Interpretation in the Legal Theory of Grotius and Its Influence on Modern Doctrine}, 14 NETH. Y.B. INT'L L. 41, 48-51 (1983).

\textsuperscript{258} DE VATTEL, supra note 252, at 264.
“[W]hatever makes for the common benefit of the contracting parties and tends to put them on a footing of equality is favorable.”

“[W]hatever does not make for the common benefit of the contracting parties, and tends to destroy the equality of a contract, whatever burdens only one of the parties, or one more than the other, is objectionable.”

Although Vattel’s focus on “equality” and restricting the effect of “unequal treaties” has been read as supporting the rule of restrictive interpretation, the example that Vattel gives of “unequal treaties” points rather in the direction of treaties between weaker and stronger states, or treaties that lack true mutuality, rather than toward treaty provisions which in their application inhibit the freedom of action of sovereign states. Nowhere in his discussion of treaty interpretation does Vattel make the connection between state sovereignty and the restrictive approach to treaty interpretation.

The Permanent Court of International Justice cited with apparent approval the principle of restrictive interpretation in its Wimbledon decision of 1923. That case has foreshadowed later developments in international jurisprudence, however, because the Court did not actual-

259. Id.
260. Id. at 213-14.
261. See MCNAIR, supra note 220, at 765.
262. De Vattel gives the following example:

In unequal treaties, and especially in unequal alliances, all the unequal clauses, and particularly those which burden the weaker ally, are objectionable. On this principle that, in cases of doubt, we should extend what makes for equality and restrict what destroys it, is based the well-known rule: He who seeks to avoid a loss has a better cause than he who seeks to obtain an advantage . . . .

DE VATTEL, supra note 252, at 214.

263. In his Introduction to THE LAW OF NATIONS, De Vattel writes:

    The laws of the natural society of Nations are so important to the welfare of every State that if the habit should prevail of treading them under foot no Nation could hope to protect its existence or its domestic peace, whatever wise and just and temperate measures it might take.

Id. at 8. He then specifically includes “the various agreements which Nations may enter into” as “a division of the Law of Nations.” Id. Lord McNair states flatly: “In general, sovereignty plays no part in the interpretation of treaties.” ARNOLD D. MCNAIR, supra note 220, at 765.


265. For a review of the international jurisprudence until 1949, see Lauterpacht, Restrictive Interpretation, supra note 22, at 61-67. Lauterpacht concludes:
ly apply the principle, as it regarded the relevant provision of the Treaty of Versailles as sufficiently clear. Furthermore, it did not give its approval to the restrictive principle as a general matter, but regarded it as potentially applicable only because Germany characterized the particular sovereign right at stake as an international servitude (a right of passage through the territory of another state).

The *Lotus Case*, which the Permanent Court of International Justice (PCIJ) decided in 1927, placed the firm imprimatur of international jurisprudence on the theory of the sources of international law that undergirds the application of the restrictive principle of treaty interpretation. In the *Lotus Case*, the PCIJ made the following often-quoted statement:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.266

The positivistic view of international law, so well and concisely expressed by the Permanent Court of International Justice in the *Lotus Case* does not, however, ineluctably lead to a theory of treaty interpretation protective of the freedom of action of the state parties to international agreements. In the first place, the principle cuts both ways: solicitude for the freedom of action of one state party necessarily deprives the other state party or parties of legal rights which are equally attributes of their national sovereignty.267 Turkey’s freedom to prosecute

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266. S.S. Lotus Case (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) at 18.
267. In the words of Lord McNair.
Lieutenant Demons recognized by the PCJ in the *Lotus Case* necessarily diminished the bundle of (sovereign?) rights possessed by France, which included those contained in the treaty that was being interpreted by the PCJ.\(^{268}\) Furthermore, as Professor Wildhaber has remarked: "Treaty obligations do not derogate from the formal sovereignty of the states parties. Nor do they hamper, except in special cases, material sovereignty. Auto-limitations are emanations from, not violations of, sovereignty."\(^{269}\)

Another important question with respect to the interpretation of international agreements is the degree of latitude that the interpreter should have when it is impossible to extract from an agreement any indication of the substantive intent of the parties.\(^{270}\) Given that situation, what was the parties’ intent, or their presumed intent, as to how the court should proceed?\(^{271}\) Did they intend that a tribunal seeking to apply the

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It is difficult to defend the rule on the basis of logic. Every treaty obligation limits the sovereign powers of a State. With rare exceptions a treaty imposes obligations on both parties . . . both parties are *ex hypothesi* sovereign States; if a so-called rule of interpretation is applied to restrict the obligation of one party, a sovereign State, it reduces the reciprocal benefit or "consideration" due to the other party, also a sovereign State, which seems to me to be absurd. It is difficult to believe that this could accord with the intention of the contracting parties.

**McNair**, supra note 220, at 765.

268. The *Lotus Case* was in fact a treaty interpretation case. In that case the Permanent Court of International Justice was interpreting Article 15 of the Treaty of Lausanne of July 24, 1923, which provided that "all questions of jurisdiction shall, as between Turkey and the other contracting powers, be decided in accordance with the principles of international law." *S.S. Lotus Case*, 1927 P.C.I.J. at 16.


270. Judge Lauterpacht describes five ways in which an absence of an effective common intention may occur: (1) Although using identical language, the parties did not intend the same result; (2) One or more of the parties deliberately intended to benefit from an ambiguity surrounding the expression or provision which it succeeded in having inserted in the treaty; (3) Being unable to reach an agreed solution, the parties used an ambiguous or non-committal expression, leaving the divergence of views to be resolved in the future; (4) The particular problem did not occur to the parties, although it falls within the purview of the treaty; and (5) Two or more provisions of the treaty are mutually inconsistent. Lauterpacht, *Restrictive Interpretation*, supra note 22, at 70-81.

271. *See* H. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 2-25 (1933) [hereinafter LAUTERPACHT, THE FUNCTION OF LAW] (pointing out that international law immediately confronts the doctrine of sovereignty and must ad-
treaty in such circumstances should resolve the dispute before it as best it could based on legal principles available to it? Or did they, on the other hand, intend that the tribunal regard the dispute as non-judiciable, because the treaty contained no specific applicable legal standards?

Sir Hersh Lauterpacht traces the view that there are "inherent limitations" in the process of international adjudication to Vattel, who maintained that international law was not applicable if the vital interests of states were in issue. Later, in the 19th and early 20th centuries, theorists and statesmen frequently expressed the view that the international judicial function is necessarily limited because of the incompleteness of international law as a legal system. Thus, if there were no specific rules of international law, customary or conventional, that applied to the dispute at hand, that dispute was not subject to resolution by an international tribunal. Judge Lauterpacht was perhaps the most tenacious and effective opponent of this point of view, but it is probably safe to say that Judge Lauterpacht's point of view has not exercised much influence in practice. One may conclude, therefore, that in seeking to de-

dress the inherent conflicts contained within the concept of state sovereignty); see also Gottlieb, The Conceptual World of the Yale School of International Law, supra note 198, at 122, who makes the following observation:

Parties, especially sovereign states, who enter into agreements expect deference to their agreement. States, whether we like it or not, are notoriously jealous of their sovereignty. They genuinely expect in most instances to delegate as little discretion to interpreters as possible. States generally prefer, therefore, the adoption of guidance devices that leave little discretion to the interpreter. The important point to notice, however, is that genuine expectations of states exist also about the role and the discretion of interpreters.

272. LAUTERPACHT, THE FUNCTION OF LAW, supra note 271, at 7, citing DB VATTEL, supra note 252, at 222-32. According to Lauterpacht:

The doctrine of the inherent limitations of the judicial process among States is, first and foremost, the work of international lawyers anxious to give legal expression to the State's claim to be independent of law. The principal function which the doctrine of the "inherent limitations" has been called upon to fulfil since its inception, has been to supply a legal cloak for the traditional claim of the sovereign State to remain the ultimate judge of disputed legal rights in its controversies with other States.

Id. at 6-7.

273. See LAUTERPACHT, THE FUNCTION OF LAW, supra note 271, at 51-56 (commenting on the application of the rule of international law and its "considerable gaps and deficiencies").

274. See id.; Lauterpacht, Restrictive Interpretation, supra note 22.

275. But see the response of the International Court of Justice to the arguments of the United States on the question of admissibility in Military and Paramilitary Activi-
termine the intent of parties to international agreements in the absence of a clear expression of intent in the agreement itself, the presumption that the treaty-makers did not intend to confer on the decision-making tribunal a competence to fill in gaps in the parties intent with respect to substantive questions was well justified. 276

The foregoing review of the theoretical background to the restrictive approach to treaty interpretation reveals that at one time it may have served a useful purpose in orienting treaty interpreters to be sensitive to the mindsets brought to treaty negotiations by the representatives of states and to treaty ratification by domestic parliamentarians or executive branch personnel. In that sense, the restrictive approach was true to the fundamental purpose of interpretation—to ascertain the intent (substantive as well as procedural) of the parties. That set of assumptions as to intent, however, is no longer the best reflection of reality, as the next section will seek to demonstrate.

C. THE RESTRICTIVE APPROACH, STATE SOVEREIGNTY AND THE NATURE OF INTERNATIONAL LAW

Sovereignty is a powerful idea. No matter how hard theorists have tried to deconstruct or decompose it or to diminish it by treating it as a relative concept, the ideas and feelings expressed by the term “sovereignty” continue to exercise a strong influence on contemporary political and legal thinking. 277 More narrowly, ideas and predispositions derived

276. This narrow view of the competence of the international tribunals also finds expression in Article 38 of the Statute of the International Court of Justice, which provides that the Court shall have the power to decide a case ex aequo et bono only if the parties agree thereto.

277. Ernst Cassirer highlights the affective character of what he calls “the myth of the state”:...
directly from particular views of sovereignty, whether articulated or not, like those attitudes expressed by the terms “monism” and “dualism,” substantially influence judicial thinking and therefore decisions in particular cases.

Myth does not arise solely from intellectual processes; it sprouts forth from deep human emotions . . . .

[1] In myth man begins to learn a new and strange art: the art of expressing, and that means of organizing, his most deeply rooted instincts, his hopes and fears . . . .

In all critical moments of man’s social life, the rational forces that resist the rise of the old mythical conceptions are no longer sure of themselves. In these moments the time for myth has come again.


278. According to the monist theory, there exists only one normative system of which international law and domestic law both form parts. Most jurists of the monist persuasion regard international law as hierarchically superior to domestic law. J. G. Starke, Monism and Dualism in the Theory of International Law, 17 BRIT. Y.B. INT’L L. 66, 74-75 (1936).

279. According to the dualist theory, there exist two completely separate legal systems: the international legal system, which governs the relations of states and whose norms derive from the common will of those states; and national legal systems, whose law governs the relations of individuals and whose norms derive from the will of each state itself. Id. at 70. Most dualists regard domestic law as hierarchically superior to international law. According to Professor Starke:

Reduced to its lowest terms, the doctrine of state primacy is a denial of international law as law, and an affirmation of international anarchy. International law becomes merely that portion of the law of the state which governs its relations vis-à-vis other states. The juridical status of other countries in relation to a particular state is made to turn not on objective norms, but on a basic norm of that state order recognizing the existence of other states as normative systems. The thesis of state primacy thus raises fundamental inconsistencies of principle which in the last resort can only be reconciled by saying that international law as law does not exist.

Id. at 77.

280. Rosalyn Higgins notes that:

The difference in response to a clash of international and domestic law in various domestic courts is substantially conditioned by whether the country concerned is monist or dualist in its approach. I say “substantially” conditioned, because in reality there is usually little explanation or discussion of these large jurisprudential matters in the domestic court hearing. The response of the court to the problem is often instinctive rather than explicitly predicated . . . .

Related to this great jurisprudential debate is a further reality not be found in the textbooks . . . . This is the reality of legal culture.

The German political theorist, Georg Jellinek, calls sovereignty a "polemic notion,"\textsuperscript{281} stressing the essentially hortatory character of the term and thereby implicitly denying its claim to acceptance as settled or accepted international legal doctrine.\textsuperscript{282} Professor Henkin describes sovereignty as a "mythology,"\textsuperscript{283} and as a term "largely unnecessary and better avoided,"\textsuperscript{284} because "it is often a catchword, a substitute for thinking and precision."\textsuperscript{285} He recommends that sovereignty be "decomposed"\textsuperscript{286} so as to identify the elements that are inherent in the concept and those which are only metaphors or fictions. Professor See also James A. Rosenau, Global Changes and Theoretical Challenges: Toward a Postinternational Politics for the 1990s, in \textit{Global Changes and Theoretical Challenges: Approaches to World Politics for the 1990s}, at 1, 1-2 (Ernst-Otto Czempiel & James Rosenau eds.) (hereinafter Czempiel & Rosenau, \textit{Global Changes and Theoretical Challenges}). Rosenau writes:

Leaders and publics . . . conduct themselves in terms of some notions of why and how the issues and situations of world politics unfold as they do . . . .

[T]he in the public arena acquire at least some of their conceptual tools and competing value systems for assessing world affairs from the insights and ideas that emerge from the formulations and debates of those for whom the study of world affairs is a full-time occupation.

\textit{Id.; see} \textit{De Visscher, supra} note 249, at 13-20.

281. \textit{George Jellinek}, \textit{Allgemeine Staatslehre} 441 (3d ed. 1914). "Sovereignty is . . . a polemical concept, at first defensive in nature and later offensive." \textit{Id; See id.} at 434-89.


Wildhaber expresses the same idea when he says that “sovereignty is a relative notion, variable in the course of times, adaptable to new situations and exigencies, a discretionary freedom within, and not from, international law.”

On the purely descriptive, non-normative, level, however, it has long been recognized that states are not free in practice from non-legal restraints on their behavior. Thus, military, political, economic, ideological, religious, cultural, and other sorts of constraints arising from sources external to a state clearly circumscribe the de facto freedom of that state to act. These constraints produce important effects within that state regardless of the intentions of domestic decision-makers. This state of affairs—the conflict between de jure theories of absolute sovereignty on the one hand and present-day realities of power on the other—confronts international legal theorists with the problem of giving theoretical expression to the actual configuration of legal competence in the contemporary world.

Contemporary international law only dimly reflects this reality, clinging as it does to the state sovereignty paradigm, despite the many discussions in the literature and in international bodies and conferences about interdependence, cooperation, and multilateralism. This is nowhere more clear than in the U.N. Charter, which is premised on the sovereign equality of states and in the Statute of the International Court of


289. U.N. Charter art. 2, ¶ 1 (stating, “Nothing contained in the present Charter shall authorize the United Nations to intervene in mat...
Justice, which conditions jurisdiction on the consent of the states concerned. In addition, customary international law is, in practice, not binding on states who have not participated or acquiesced in the formation of the particular rule.

Without a doubt, great material and intellectual changes have occurred in the world since the development and elaboration of the concept of sovereignty. The concept itself has changed over time and has been employed in a number of different contexts and for different ends.

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290. Statute of the International Court of Justice, art. 36.

291. See Asylum Case (Colom. v. Peru), 1950 I.C.J. 266 (holding that asylum may not be granted unilaterally but requires the participation or consideration of both party-states involved); Ted I. Stein, The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law, 26 HARV. INT'L L. J. 457 (1985); Prosper Weil, Towards Relative Normativity in International Law?, 77 AM. J. INT'L L. 413 (1983). But see Jonathan I. Charney, Universal International Law, 87 AM. J. INT'L L. 529 (1993); Jonathan I. Charney, The Persistent Objector Rule and the Development of Customary International Law, [1985] 56 BRIT. Y.B. INT'L L. 1 (noting that while modern theories of international law do not require a state to consent expressly to a rule in order to be bound by it, express rejection of the rule may exempt the party from being bound).


293. See generally F. H. HINSLEY, SOVEREIGNTY (2d ed. 1986) (noting that the
Despite this evolution in the concept of sovereignty, the fundamental conceptual orientation furnished by the notion of sovereignty continues to play an important, if not determinative, role in contemporary international legal and political thinking.

Over a generation ago, C. Wilfred Jenks described the task confronting international law in terms which still are valid today:

The task which now confronts us in the field of international law is twofold. One element in that task is to achieve an intellectual revolution, corresponding to the political and social changes which have taken place and to the contemporary changes of outlook in other branches of knowledge, which will give us a legal system with sufficiently broad and deep foundations to command the allegiance of a world community with a fundamentally changed composition and distribution of influence. A second and equally important element in that task is to achieve this result by a sufficiently evolutionary process to avoid impairing the authority of well-established law . . . .

Elaborating on the intellectual revolution he was calling for, Jenks focuses on the concept of sovereignty. "The primary preoccupation of progressive thought in the field of international law since 1919 has been to subdue the claims of sovereignty in the interest of the rule of law." In a later work, Sovereignty Within the Law, written in collaboration with Arthur Larson and other contributors, Jenks characterizes the question "of the relationship to each other of law and sovereignty" as:

not a problem for the cloister or the study. It is a practical problem which confronts statesmen, diplomats, international civil servants and legal practitioners every day. The manner in which it is resolved will decide

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295. Id. at 123.
the issue between world order and international anarchy and determine the
answers to countless everyday problems.296

International legal scholars certainly attempted to develop and articu-
late a vision of the international community and international law that
transcends traditional notions of state sovereignty.297 These efforts,
while perhaps resonating within the academic world, appear to have had
little, if any, broader impact. Sir Hersh Lauterpacht298 and Alejandro


297. See, e.g., PHILIP ALLOTT, EUNOMIA: A NEW ORDER FOR A NEW WORLD
(1990) (proposing ways of dealing with perennial problems which human society faces
on an international level); PHILIP C. JESSUP, TRANSNATIONAL LAW (1956) (dealing
with the problems of defining and empowering a single system of international law);
ALEJANDRO ALVAREZ, LE DROIT INTERNATIONAL NOUVEAU DANS SES RAPPORTS
AVEC LA VIE ACTUELLE DES PEUPLES (1959); see also McDougal et al., supra
note 227 (sampling, surveying, and explaining international agreements to provide
insights about world public order); RICHARD FALK, THE PROMISE OF WORLD ORDER:
ESSAYS IN NORMATIVE INTERNATIONAL RELATIONS (1987) (analyzing and interpreting
modern trends in international relations); RICHARD A. FALK, A STUDY OF FUTURE
WORLDS (1975) (laying out a broad “transnational movement for global reform”
designed to influence and inspire discourse); INTERNATIONAL LAW: A CONTEMPORARY
PERSPECTIVE (Richard Falk et al. eds., 1985) (compiling a collection of works exploring
new perspectives on international law). But see Janice E. Thomson & Stephen D.
Krasner, Global Transactions and the Consolidation of Sovereignty, in Czempiel &
Rosenau, GLOBAL CHANGES AND THEORETICAL CHALLENGES, supra note 280, at 195,
198 (arguing that “the commonplace notion that there is an inherent conflict between
sovereignty and economic transactions is fundamentally misplaced. The consolidation
of sovereignty—that is, the establishment of a set of institutions exercising final au-
thority over a defined territory—was a necessary condition for more international
economic transactions”); Erich Weede, Collective Goods in an Interdependent World:
Authority and Order as Determinants of Peace and Prosperity, in Czempiel &
Rosenau, GLOBAL CHANGES AND THEORETICAL CHALLENGES, supra note 280, at 242,
(elaborating on Thomson and Krasner’s argument by stressing the need for “property
rights, authority, and order” and concluding that “[h]istorically, the fragmented and
pluralistic character of Western societies has served us well”).

298. See, e.g., LAUTERPACHT, THE FUNCTION OF LAW, supra note 271 (examining
persistent problems in international philosophy and the principal issues surrounding the
philosophy of international law); H. Lauterpacht, The International Community and the
Universality of International Law, in 1 INTERNATIONAL LAW: THE COLLECTED PAPERS
OF HERSH LAUTERPACHT 261-75 (E. Lauterpacht ed., 1970). See also individual opin-
ions of Judge Lauterpacht Concerning the Application of the Convention of 1902
Governing the Guardianship of Infants (Neth. v. Swed.), 1958 I.C.J. 55, 79 (Nov. 28)
(concurring and discussing the relationship between a nation’s domestic statutory laws
and that nation’s responsibilities under treaties); Certain Norwegian Loans (Fr. v.
Nor.), 1957 I.C.J. 9, 34 (July 6) (concurring that the court was incompetent to decide
the merits of the present case, but basing that conclusion on different grounds—no
Alvarez, however, as judges on the International Court of Justice, appropriate pleadings existed upon which to base jurisdiction); Admissibility of Hearings of Petitioners by the Committee on South West Africa, 1956 I.C.J. 23, 35 (June 1) (elaborating on certain questions not addressed in the court's opinion, mainly, whether the court was required to limit its opinion to general "academic" issues or should more appropriately have considered the specific circumstances of the present case); South-West Africa—Voting Procedure, 1955 I.C.J. 67, 90 (June 7) (concurring in the court's unanimous opinion, and examining the fundamental role of the court and the nature of its judicial pronouncements); Interhandel, 1959 I.C.J. 6, 95 (Mar. 21) (Lanterpacht, J., dissenting) (dissenting from the judgment on grounds that the court could not properly assume jurisdiction over the case).

299. See the individual opinions of Judge Alvarez in: Corfu Channel (U.K. v. Alb.) 1949 I.C.J. 4, 40 (Apr. 9) (arguing that "in consequence of profound changes that had taken place in international relations, a new international law had arisen; it is founded on social interdependence") (emphasis added). In another opinion, Judge Alvarez writes:

This law of social interdependence has certain characteristics of which the following are the most essential: (a) it is concerned not only with the delimitation of the rights of States, but also with harmonizing them; (b) in every question it takes into account all its various aspects; (c) it takes the general interest fully into account; (d) it emphasizes the notion of the duties of States, not only toward each other but also towards the international society; (e) it condemns the abuse of right; (f) it adjusts itself to the necessities of international life and evolves together with it; accordingly, it is in harmony with policy; (g) to the rights conferred by strictly juridical law it adds that which States possess to belong to the international organization which is being set up.

Competence of the General Assembly for the Admission of a State to the United Nations, 1948 I.C.J. 57, 69-70 (May 8); see Fisheries, 1951 I.C.J. 116, 146 (Dec. 18, 1951) (advocating and employing a different judicial method, one based on the characteristics of the new international law of social interdependence enumerated in the Admissions case, for "[t]he adaptation of the law of nations to the new conditions of international life"); see also Effect of Awards of Compensation Made by the U.N. Administrative Tribunal, 1954 I.C.J. 47, 67 (July 13) (Alvarez, J., dissenting) (contrasting the approach of classical international law and the new international law to the resolution of a legal problem concerning the effect to be given by the General Assembly to an award made by the U.N. Administrative Tribunal); Anglo-Iranian Oil Co. 1952 I.C.J. 93, 124 (July 22) (Alvarez, J., dissenting) (stressing the importance of the concept of abuse of rights in the new international law); Reservations to the Convention on Genocide, 1951 I.C.J. 15, 49 (May 28) (Alvarez, J., dissenting) (applying the principles of the new international law to the interpretation of a multilateral convention); Asylum (Colom. v. Peru), 1950 I.C.J. 266, 290 (Nov. 20) (Alvarez, J., dissenting). In one dissent, Alvarez argues:

The community of States, which had hitherto remained anarchical, has become in fact an organized international society. This transformation is a fact which does not require the consecration of an international agreement . . . . It has an existence and a personality distinct from those of its members. It has its own
sought to move beyond classical international legal analysis. Their individual and dissenting opinions offer illuminating examples of how such analysis might work in practice. International relations theorists, too, sought new models with which to approach their discipline, and a number of useful perspectives emerged, although, once again, the impact of these theories has been limited to scholarly circles.

American legal and political theorists have by and large not been given to systematic analysis and synthesis of high-level abstractions, like "sovereignty" or "the state." There is no real analog in American

purposes); International Status of South-West Africa, 1950 I.C.J. 128, 175 (July 11) (Alvarez, J., dissenting); see Competence of the Assembly Regarding Admission to the United Nations, 1950 I.C.J. 4, 12 (Mar. 3) (dissenting, and discussing the remarkable forces shaping the modern era of international law); ALVAREZ, supra note 297.


Dating back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood, recently this concept has suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of human rights . . . . Whatever the situation in domestic litigation, the traditional doctrine [that only States, and not individuals, have the right to challenge a violation of the sovereignty of a State] upheld and acted upon by the Trial Chamber is not reconcilable, in this International Tribunal, with the view that an accused, being entitled to a full defence, cannot be deprived of a plea so intimately connected with, and grounded in, international law as a defence based on violation of State sovereignty.

35 LL.M. at 50.


[It is not the widely-acknowledged incompetence of democratic politicians that create our problems so much as the absence of thought and understanding about the nature of the late twentieth-century state, democratic society, and mass culture . . . . Indeed, it may be the contemporary absence of inventiveness, in ideas no less than in institutions, that best defines the condition that needs to
scholarship to the vast continental literature dealing with the concept of sovereignty. There are no American Bodins, Hobbes, Rousseaus, or Hegels. American legal and political theory tends to focus more on practical analysis and problem solving rather than on descriptive system building. Systematic thinking, the sort of thinking that gives coherence and expression to deeply-shared sentiments and aspirations of people, however, serves an important social and political purpose.

National judges, particularly federal judges of the United States, are strategically positioned to articulate and further develop the new embryonic conceptions of international law and international community, which emphasize interdependence, multilateralism, and cooperation. Courts are institutions which draw practical conclusions from ideas and principles and give deeper meaning and operational form to the ideas and principles on which they rely. Courts thus play a significant role in contributing to the development of that "critical mass" of opinion which may then be given systematic expression by scholars and publicists and eventually emerge as the new way of conceptualizing social and legal realities.

Since 1945, there have been significant changes in the power relationships in the world. Most notable as a long-term trend is the vast de-

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303. See Walker, INSIDE/OUTSIDE, supra note 282, at 162-69.
304. Higgins, supra note 280, at 218 ("[I]mportant opportunities do remain for national courts to contribute to international law. In a decentralized legal order it is important that they do so . . . ."); see Richard A. Falk, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 170 (1964). Falk states:

A domestic court operates at that peculiarly sensitive point where national and international authority intersect. The character of this intersection is closely connected with the role that can be given to law in world politics . . . .

The relationship between national and international authority . . . is not conceived of as a problem calling for doctrinal reconciliation. It [should] instead [be] approached as a matter of social and political dynamics—as a search for a conception of domestic jurisdiction that is broad enough both to acknowledge the national setting and to explain the duty of upholding international law.

Id.

305. For provocative comments on recent developments, see Samuel P. Huntington, The Clash of Civilizations?, FOREIGN AFF., Summer 1993, at 22 (hypothesizing that the source of conflict in the "new world" will not be ideology or economics, but culture); Zbigniew Brzezinski, The Cold War and Its Aftermath, FOREIGN AFF., Fall 1992, at 31 (discussing the state of international relations in the post cold war era). See also David Strang, Global Patterns of Decolonization, 1500-1987, 35 INT'L STUD. Q. 429, 443 (1991) (arguing that the rate of decolonization is dependent primarily on
centralization of political power, starting with post-war decolonization, and continuing with the division of Pakistan, the breakup of Soviet empire, and the fragmentation of other states (e.g., Yugoslavia and Czechoslovakia). Also, even in states that are probably in no danger of fragmentation, one can observe strong tendencies toward decentralization (e.g., France, the United States, the United Kingdom, Spain) or separatism (e.g., India, Italy, Canada, and Turkey in the larger world economic and political system).


307. The strong resurgence of localism in the United States may in part be related to the end of the Cold War and its centralizing forces. According to Professor Steel, "the Cold War . . . reorganized the structure of our society. It transformed a highly decentralized nation into an increasingly centralized one. Whereas major economic and political decisions were once made in scores of state capitals and major cities, they are now being made in Washington." Ronald Steel, Temptations of a Superpower 28 (1995). Daniel Deudney and G. John Ikenberry make the following perceptive observation:

The permanence and pervasiveness of international conflict, beginning in the 1940's, made it necessary and possible for the United States to build a strong state, manage an industrial economy, reduce social inequalities, and foster national cohesion . . . .

The end of the Cold War threatens to unravel those accomplishments and return the United States to the impasses of the 1920's and 1930's.

Daniel Deudney & G. John Ikenberry, After the Long War, FOREIGN POL'Y, Spring 1994, at 21, 23; see James O. Goldsborough, California's Foreign Policy, FOREIGN AFF., Spring 1993, at 88, 89 (arguing that "California is so big, and its problems so immense, that it needs its own foreign policy"); Michael H. Shuman, Dateline Main Street: Courts v. Local Foreign Policies, FOREIGN POL'Y, Spring 1992, at 158 (arguing that courts should not exclude cities and towns from the foreign policy arena unless the particular local action conflicts with a specific law or provision of the Constitution); Chadwick F. Alger, The World Relations of Cities: Closing the Gap Between Social Science Paradigms and Everyday Human Experience, 34 INT'L STUD. Q. 493 (1990) (exploring issues related to cities trying to deal directly with global matters).


309. See Victor M. Pérez-Díaz, The Return of Civil Society: The Emergence of Democratic Spain 184-235 (1993) (discussing the emergence of a new democratic tradition in modern Spain, and the complexities faced by Spanish culture as it becomes more interrelated with the rest of Europe); Edward Moxon-Browne, Political Change in Spain 40-66 (1989); Peter J. Donaghy & Michael
Tribal conflict dominates many African nations. There appears to be a trend toward smaller political units, with less power residing at the traditional nation-state level. Increasingly, the principal threats to peace and security today lie in internal conflicts, for which contemporary international law does not even provide an adequate framework for discussion, let alone effective action. Perhaps the time is ripe for the

313. See ATUL KOHLI, DEMOCRACY AND DISCONTENT: INDIA’S GROWING CRISIS OF GOVERNABILITY (1990); Sudipta Kaviraj, Crisis of the Nation-state in India, 42 POL. STUD. 115 (1994).

311. See generally ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 18-62 (1993) (exploring the origins of effective government, and relating them to the recent trends toward decentralization in Italy).


313. See MICHAEL M. GUNTER, THE KURDS IN TURKEY: A POLITICAL DILEMMA (1990). There exists the potential for significant political realignments in other states, too, such as China, for example:

Despite the novelties imposed by industrialization, the communist-party state, and modern communications technology, the overall pattern—a growing imbalance between increased population and increasingly exhausted arable land—has been repeated several times in China’s long imperial history. Each time, the result has been the overburdening of the administrative capacity of the state and a constellation of political conflicts—between regions, between the capital and the provinces, and between different elite and popular groups — leading to the collapse of the central government.


314. For an analysis of contemporary tribal conflict, which some term “ethnic fragmentation” and “ethnopolitical conflict,” see Ted R. Gurr, Peoples Against States: Ethnopolitical Conflict and the Changing World System, 38 INT’L STUD. Q. 347 (1994) (arguing that “[t]he most protracted and deadly ethnopolitical conflicts are likely to occur in poor, weak, heterogeneous states like those of Africa”).

315. The case of the former Yugoslavia exemplifies both the practical and conceptual difficulties in confronting and even talking about an important international problem. See Marc Weller, The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia, 86 AM. J. INT’L L. 569, 577-78 (1992) (pointing out that Yugoslavia had to agree to the initial convening of the Security Council to deal with the crisis and also to the Counsel-imposed arms embargo because of perceived problems with article 2(7)); see also Gidon Gottleib, Nations Without States, FOREIGN AFF., May-June 1994, at 100 (recommending that “[t]he principle of self-determination must be supplemented by a new scheme that is less territorial in character and more regional in scope”); Amitai Etzioni, The Evils of Self-Determination, FOREIGN POL’Y,
reception of new theories of political power and of the meaning of law in the international community.316

Concurrently, the link of national power and political stability to economic strength has become well-accepted,317 as has the notion that

Winter 1992-93, at 21, 34 (arguing that since “excessive” self-determination is incompatible with democracy, “[s]elf-determination should not be treated as an absolute value . . . “). Alden and Schurmann comment:

The politics of the future will be defined by the twin challenges of empowering people to shape their lives within communities (ethnic, religious, territorial), while preserving a peaceful world by bringing states together on a regional or global scale when problems demand collective action . . . .

Local issues and global politics are already acquiring an importance in people’s lives that the nation-state is losing.


316. See Barkin & Cronin, supra note 287, at 125-28 (asserting that the end of the cold war encouraged a change in the nature of discourse about foreign affairs and in the conduct of foreign affairs). Rethinking sovereignty seems to be a recurrent preoccupation of scholars in the aftermath of cataclysmic international conflict and its resolution. See, e.g., 1 RAYMOND CARRÉ DE MALBERG, CONTRIBUTION À LA THÉORIE GÉNÉRALE DE L’ÊTAT v-xx (2 vols. 1920-1922); ALVAREZ, supra note 297; CASSIRER, supra note 277. The legal thought of Carré de Malberg has been compared to that of Kelsen. Olivier Beaud, La souveraineté dans la “Contribution à la théorie générale de l’Etat” de Carré de Malberg, REVUE DU DROIT PUBLIC 1251, 1253 (Sept.-Oct. 1994). Professor Kratochwil observes that “[f]rom Grotius to Vattel to Triepel, treatises on international law were always inquiries about law in general, and they concerned a wide variety of historical, political, and philosophical issues.” KRATOCWIL, RULES, NORMS, AND DECISIONS, supra note 229, at 5. He continues:

The revival of this kind of philosophic inquiry seems timely since the classic international lawyer writing and teaching public international law is more and more superseded by several specialists. This trend has serious implications for our understanding of international reality. While the lawyer-bureaucrat, attached to the policy-making machinery, may influence the creation of legal norms through (state-) practice by proposing accepting new “standard solutions,” such impact is no longer mediated through the development of a conceptual framework which is in tune with the changes in international reality.

Id; see MATHEW HORSMAN & ANDREW MARSHALL, AFTER THE NATION-STATE: CITIZENS, TRIBALISM AND THE NEW WORLD DISORDER (1994).

317. See generally C. Fred Bergsten, The Primacy of Economics, FOREIGN POL’Y, Summer 1992, at 3 (arguing that, in the post-Cold War world, economic issues take preeminence over traditional security concerns, and discussing the implications of economic primacy for the foreign policy of the United States). The exact nature of the link between national security and economic policy, however, may differ significantly from situation to situation. Kal J. Holsti, Politics in Command: Foreign Trade as National Security Policy, 40 INT’L ORG. 643 (1986); see THEODORE H. MORAN, AMERICAN ECONOMIC POLICY AND NATIONAL SECURITY (1993); JOHN M. STOPFORD
open markets and free trade are preconditions to economic strength.318 Also, environmental concerns which transcend the frontiers of states are beginning to be seen as having important economic and even strategic aspects.319 There has been renewed interest in the ideas, interdependence, and reciprocity of international relations and these concepts have been subjected to deep and incisive analysis.320

At the international level,321 state sovereignty theories amount essen-

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318. Ohmae states:
The nation state has become an unnatural, even dysfunctional, unit for organizing human activity and managing economic endeavor in a borderless world. It represents no genuine, shared community of economic interests; it defines no meaningful flows of economic activity. In fact, it overlooks the true linkages and synergies that exist among often disparate populations by combining important measure of human activity at the wrong level of analysis.


319. See, e.g., Paul Wapner, Politics Beyond the State: Environmental Activism and World Civic Politics, 47 WORLD POL. 311 (1995) (arguing that “activist organizations” such as Greenpeace and Amnesty International are political actors); Jessica T. Mathews, Redefining Security, FOREIGN AFF., Spring 1989, at 162 (asserting that nations can no longer separate foreign from domestic affairs, and must deal with issues, that were already extremely complex in the domestic arena, such as the environment, in international forums); Norman Myers, Environment and Security, FOREIGN POL’Y, Spring 1989, at 23 (arguing that there are significant connections between environmental problems and political instability).

320. See Joseph A. Kroll, The Complexity of Interdependence, 37 INT’L STUD. Q. 321 (1993) (providing a general structure for resolving the conflicts over the meaning of “interdependence” in international politics); Robert O. Keohane, Reciprocity in International Relations, 40 INT’L ORG. 1 (1986) (arguing that the concept of reciprocity is ambiguous, and would be best divided into two separate types: specific and diffuse); see also Elisabeth Zoller, Peacetime Unilateral Remedies: An Analysis of Countermeasures 14-27 (1984) (exploring the relationship between coercion and international law).

321. While the focus of this section is on sovereignty in the external relations of states, it is important to note that the concept of sovereignty developed originally to express claims to exclusive power within territorial units. See Jean Bodin, Six Livres de la République (1576); see also Jean-Jacques Chevallier, Les Grandes Œuvres Politiques de Machiavel à nos Jours 38-51 (1960). In this sense, the concept played a progressive role in attempts to reduce disorder and violence within those units. Although xenophobes and absolutists later, on occasion, employed the theories of Machiavelli, Bodin, Hobbes, Rousseau, and others, their origins reside in attempts to solve pressing contemporary problems in ways conducive to the peace,
tially to claims of freedom by domestic decision-makers from all external legal restraints on domestic decision-making—no matter whether the decision in question has only domestic effects or has effects on other nations as well. Thus, the notion of state sovereignty is linked inextricably with the "territorial home" of the state, and expresses at both intellectual and affective levels the attachment that people have for a particular territorial unit. Therefore, in seeking to understand the attraction of the concept of sovereignty, it is necessary to inquire into the "political aims in organizing space" and why it is that people are attached to particular territorial units. Foremost among the reasons for territorial divisions and identifications is security. In the words of Professor Gottmann, "[s]ecurity must be organized against outsiders first, and within the community itself afterwards." Territorial exclusivity, then, and the theory of sovereignty which is its political and legal expression, are based in large part on the instinctual human drive for physical survival and on the fear of threats from persons outside the particular community.

order, and well-being of the nations or peoples to which they were addressed.

322. Brownlie writes:

The competence of states in respect of their territory is usually described in terms of sovereignty and jurisdiction . . . . The normal complement of states’ rights, the typical case of legal competence, is described commonly as "sovereignty": particular rights, or accumulation of rights quantitatively less than the norm, are referred to as "jurisdiction". In brief, "sovereignty" is legal shorthand for legal personality of a certain kind, that of statehood . . . .


323. See CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 204 (P. E. Corbett trans., 3rd ed. 1968) (describing international law as a normative order, not simply a record of practice, and discussing strengths and weaknesses of various theories of international law); See also id. at 204-15 (discussing the significance of territory in international law).


325. Id.

326. Professor Gottmann also calls attention to the economic function of territorial organization. From this perspective, the territorial unit is also "a springboard for opportunity." Id. at 14. Gottmann writes:

Sovereignty has been interpreted too often as a function of the regulation of power, and especially political power. In the administration of territory, how-
Professor Gottmann describes modern trends as “result[ing] largely from a shift toward universal concerns of a decisive character.” He reminds us that “the concept of territory has steadily evolved through the centuries,” and he points out that “several fundamental functions

ever, sovereignty had to deal with economic resources and services, with the management of ways of life, and with improvement and development as well as with regulation, limitation, and prevention. The sovereign’s duties had been essentially political, religious, and military until the sixteenth century . . . .

With an expanding world opening up before a rising number of sovereign states, new purposes of government were coming to the fore in the economic realm. The characteristics of territory and their use were acquiring a new significance.

*Id.* at 52. With another view on territoriality, Sack writes:

Territoriality in humans is best understood as a spatial strategy to affect, influence, or control resources and people, by controlling area; and, as a strategy, territoriality can be turned on and off . . . . Territoriality in humans is best thought of not as biologically motivated, but rather as socially and geographically rooted . . . . For humans, territoriality is not an instinct or drive, but rather a complex strategy to affect, influence, and control access to people, things, and relationships . . . . Territories are socially constructed forms of spatial relations and their effects depends on who is controlling whom and for what purposes.


in Western Europe the eighteenth century marks not only the dawn of the age of nationalism but the dusk of religious modes of thought . . . . Nationalism has to be understood by aligning it, not with self-consciously held political ideologies, but with the large cultural systems that preceded it, out of which—as well as against which—it came into being.

*Id.*

327. GOTTMANN, supra note 324, at 155; see JESSUP, supra note 297, at 1-34 (describing “the universality of human problems”).

328. GOTTMANN, supra note 324, at 123. Professor Gottmann traces developments in the history of thinking about territory and sovereignty. *Id.* at 123-27. He concludes:

The movement toward statehood and national sovereignty, begun in the sixteenth century, seems to have achieved its apogee . . . . The sovereign state, based on exclusive territorial jurisdiction, may have been the evolution’s purpose from the sixteenth to the mid-twentieth century. By 1970 sovereignty has been by-passed, and a new fluidity has infiltrated the recently shaped map of multiple national states.

*Id.* at 126-27; see SACK, HUMAN TERRITORIALITY, supra note 326, at 52-91; Hendrik Spruyt, Institutional Selection in International Relations: State Anarchy as Order, 48 INT’L ORG. 527 (1994) (arguing that the sovereign territorial state prevailed over other forms of political organization for economic reasons, “because it proved more effec-
of territorial sovereignty have been recently challenged and may hardly be held to operate any longer with the same results as in the past.\footnote{329}

Most importantly, the function of territory as providing protection, or security, is now seriously questioned.\footnote{330} Physical frontiers no longer offer adequate protection against threats which nuclear, chemical, or biological warfare pose.

There have already been significant developments with regard to particular international law doctrines which are premised on recognizing the new reality: for example, the individual as subject of international law,\footnote{331} the relat$m$icity of the concept of “domestic jurisdiction,”\footnote{332} the international law of human rights,\footnote{333} and the law with respect to the

\footnote{329. Gottman, supra note 324, at 277.}

\footnote{330. Id.; see also id. at 130.}

\footnote{331. “International law is no longer . . . concerned solely with states. Many of its rules are directly concerned with regulating the position and activities of individuals; and many more indirectly affect them.” Oppenheim’s International Law, supra note 152, at 846. Ian Brownlie, however, maintains that “to classify the individual as a ‘subject’ of the law is unhelpful, since this may seem to imply the existence of capacities which do not exist and does not avoid the task of distinguishing between the individual and other types of subject.” Brownlie, supra note 322, at 67; see International Military Tribunal (Nuremberg) Judgment and Sentences, 41 Am. J. Int’l L. 172, 221 (1946) (“That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized”); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (holding that deliberate torture perpetrated under color of official authority violates universally accepted norms of international law of human rights, regardless of the nationality of the parties, and thus, whenever an alleged torturer is found and served with process by an alien within the borders of the United States, the Alien Tort Statute provides federal jurisdiction).}

\footnote{332. Article 2(7) of the U.N. Charter states that “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter . . . .” According to the Permanent Court of International Justice, “[t]he question whether a certain matter is or is not . . . within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations.” Tunis and Morocco Nationality Decrees Case, 1923 P.C.I.J. (ser.B) No.4, at 24; see Brownlie, supra note 322, at 291-97, 553-59 (discussing how international law, by progressively limiting the scope of the domestic jurisdiction of states, brought more and more matters within its sphere of concern and regulation).}

\footnote{333. See generally Brownlie, supra note 322, at 553-94 (discussing the vast ex-}
right of intervention.334 Significant changes have occurred in the practice of international diplomacy335 and in the international law of treaties336 to reflect those practices. States modify or interpret national constitutions to mandate a more international approach to questions arising in the context of the relationship of international agreements and of customary international law to domestic law.337 These developments

pansion in the scope of application and the substantive law of human rights since 1945). Certain developments in the human rights area have required fundamental reconceptualizations of some well-accepted principles of international law, such as whether the individual is a subject of international law, and the appropriate sphere of application of international law vis-à-vis domestic law. See supra note 331; supra note 332.

334. Although contemporary international law would appear to prohibit intervention, by force or threat of force, by one state in the domestic affairs of another, U.N. CHARTER art. 2, ¶ 4, in the absence of U.N. authorization, U.N. CHARTER art. 39, or if not undertaken in self-defense, U.N. CHARTER art. 51, claims have been advanced that intervention to further accepted purposes of the community of states is permissible including, inter alia, intervention to protect or promote democracy and humanitarian intervention. See generally LAW AND FORCE IN THE NEW INTERNATIONAL ORDER (Lori Fisler Damrosch & David J. Scheffer eds., 1991) (noting that the end of the Cold War has focused new attention on international law especially in areas that previously seemed to elude legal control). See also WEBER, supra note 282 (investigating the relationship between sovereignty and its supposed conceptual opposite—intervention—because, she argues, the sovereignty/intervention boundary is the very location of the state).

335. The hallmarks of present day negotiations are continuity and interrelatedness. Conference diplomacy and standing preparatory bodies, like the International Law Commission, are becoming increasingly important. Rather than each negotiation being a unique event to deal with a particular, discrete problem, length, complexity, continuity, and inclusiveness characterize modern day negotiations. Martin A. Rogoff, The Obligation to Negotiate in International Law: Rules and Realities, 16 Mich. J. Int'l L. 141, 183 (1994); see infra notes 339-46 and accompanying text; James K. Sebenius, Challenging Conventional Explanations of International Cooperation: Negotiation Analysis and the Case of Epistemic Communities, 46 Int'l Org. 323, 364 (1992) (suggesting a new approach to the analysis of international cooperation which eschews the binary win-lose scheme and directs attention to "the key issues of distribution, integrative potential, and the possibility of suboptimal cooperation"); Gidon Gottlieb, Global Bargaining: The Legal and Diplomatic Framework, in LAW-MAKING IN THE GLOBAL COMMUNITY 109 (Nicholas G. Onuf ed., 1982) (declaring that a new world order shaped more by bargains, compromises, and necessity than by grand architectural designs is underway).


337. See the constitutional provisions cited infra note 368, and the decisions of
at the level of legal doctrine are partial and disparate recognition of the
new underlying social, economic, and psychological reality of interna-
tional life.

With regard to the specific question of interpretation of international
agreements, contemporary statesmen and parliamentarians now approach
treaty negotiation and ratification with a different mindset, one that
partakes more of the multilateral, cooperative, collaborative model, rather
than the bilateral, zero-sum game model. 338 Provisions in agreements
calling for further negotiations or establishing forums for further negotia-
tions are evidence of this trend and are increasingly common. Recent
examples are numerous: arms control, 339 confidence building, 340 envi-

338. See ARTHUR A. STEIN, WHY NATIONS COOPERATE: CIRCUMSTANCE AND
CHOICE IN INTERNATIONAL RELATIONS (1990) (discussing reasons for the attractiveness
of political cooperation among nations); ROBERT AXELROD, THE EVOLUTION OF COOP-
ERATION (1984) (tracing the evolution of cooperation as a tool to enhance treaty
negotiation); JAMES N. ROSENAU, THE STUDY OF GLOBAL INTERDEPENDENCE: ESSAYS
ON THE TRANSNATIONALIZATION OF WORLD AFFAIRS (1980) (noting that the essays
contained in the work focus on change in world affairs, how to study that change
and the transnationalization of world affairs); Terrence Hopman, Two Paradigms of
Negotiation: Bargaining and Problem Solving, 542 THE ANNALS OF THE AMERICAN
ACADEMY OF POLITICAL AND SOCIAL SCIENCE 24 (1995) (arguing that most research
tends to reveal that problem solving produces greater flexibility and more frequent,
efficient, equitable, and durable agreements than bargaining does); Otmar J. Bartos,
Modeling Distributive and Integrative Negotiations, 542 THE ANNALS OF THE AMERICAN
ACADEMY OF POLITICAL AND SOCIAL SCIENCE 48 (suggesting modalities for
increasing flexibility in both distributive, or bargaining-type, and integrative, or problem-solving type, negotiations). Regime theory has recently had a major influence on
thinking about international relations. See also ROBERT O. KEOHANE, AFTER HEGEMONY:
COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984) [herein-
after KEOHANE, AFTER HEGEMONY]; INTERNATIONAL REGIMES (Stephen D. Krasner
ed., 1983) [hereinafter Krasner, INTERNATIONAL REGIMES]; Friedrich Kratochwil &
John G. Ruggie, International Organization: A State of the Art on an Art of the
State, 40 INT'L ORG. 753 (1986) [hereinafter Kratochwil & Ruggie, International
Organization] (examining the shifting focus of the study of international organiza-
tions); infra notes 346-49 and accompanying text.

339. See, e.g., Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26,
ABMs); Interim Agreement on Certain Measures with Respect to the Limitation of
Interim Agreement] (regarding temporary arms control agreement between the United
States and the U.S.S.R.). Both agreements contain provisions for the continuation of
active negotiations for the limitation of offensive strategic arms. ABM Treaty, supra,
art X; Interim Agreement, supra, arts. VII and VIII(2); see Treaty on the Limitation
environmental,\textsuperscript{341} international telecommunications,\textsuperscript{342} cooperation in transnational litigation\textsuperscript{343} and extradition,\textsuperscript{344} and economic cooperation.\textsuperscript{345}


340. See, e.g., The CSCE experience. Final Act of the Conference on Security and Cooperation in Europe, Aug. 1, 1975, U.S. DEP'T OF STATE PUB. NO. 8826, GEN. FOREIGN POL'Y SERIES 298 (1975), \textit{reprinted in} 14 \textsc{I.L.M.} 1292 (1975) [Helsinki Accords] (promoting better relations among European states and ensuring conditions in which people can live in true and lasting peace free from any threat to or attempt against their security); Conference on Security and Co-operation in Europe: Charter of Paris for a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter, Nov. 21, 1990, \textit{reprinted in} 30 \textsc{I.L.M.} 190 (1991) (marking the beginning of a new era of democracy, peace and unity and covering human rights, military security, economic, environmental, and scientific cooperation, and setting up new institutional arrangements for the CSCE); Organization for Security and Co-operation in Europe, Budapest Summit Declaration on Genuine Partnership in a New Era, \textit{reprinted in} 34 \textsc{I.L.M.} 764 (1995) (changing the CSCE's name to Organization for Security and Co-operation in Europe (OSCE), noting social and economic instability and the threat of terrorism, and explaining that OSCE's primary purpose will be early warning, conflict resolution and crisis management, use of peacekeeping operations and missions, and strengthening OSCE political, consultative and decision-making bodies); \textsc{Emmanuel Decaux}, \textsc{Sécurité et Coopération en Europe} (1992); \textsc{Vojtech Mastny}, \textsc{The Helsinki Process and the Reintegration of Europe: Analysis and Documentation} (1992) (analyzing the Helsinki process as a force for change and concluding that the issue of human rights has become an increasingly important element in the evolving definition of European Security).

341. See \textsc{Environmental Change and International Law: New Challenges and Dimensions} (E. Brown Weiss ed., 1992) (noting that global change is causing independent states to realize they are locked together in sharing the common global environment). See also M.J. Peterson, \textit{Whalers, Cetologists, Environmentalists, and the International Management of Whaling}, 46 \textsc{Int'l Org.} 147 (1992) (describing the impact of environmentalists on the management of the whaling industry); Peter M. Haas, \textit{Banning Chlorofluorocarbons: Epistemic Community Efforts to Protect Stratospheric Ozone}, 46 \textsc{Int'l Org.} 187 (1992) (exploring community efforts to protect the ozone by banning chlorofluorocarbons); Richard Falk, \textit{Evasions of Sovereignty, in Walker & Mendlovitz, Contending Sovereignties, supra} note 282, at 64-65 (discussing the intergovernmental reaction to the harmful effects of ozone depletion).


343. See the work of the Hague Conference on Private International Law, under

344. The United States and its treaty partners modernized several extradition treaties recently to deal with new problems or concerns. See, e.g., U.S.-U.K. Supplementary Treaty Concerning the Extradition Treaty, done June 25, 1985, entered into force Dec. 23, 1986, 24 LL.M. 1105 (1985) (identifying a number of offenses which are not regarded as political offenses such as murder, manslaughter and kidnapping, and amending several articles of the Extradition Treaty); U.S.-Italy Extradition Treaty, entered into force Sept. 24, 1984, T.I.A.S. No. 10,837 (updating and amending several articles of the extradition treaty). International conventions, too, have addressed extradition in the context of needs of the nations of the world to deal effectively with matters like: (1) Hostage-taking, see, e.g., International Convention Against the Taking of Hostages, art. 8, G.A. Res. 34/146, U.N. GAOR, 34th Sess., U.N. Doc. A/C.6/34/22 (1979), reprinted in 18 LL.M. 1456 (1979) (agreeing that the state in which an alleged hostage-taker is found shall either extradite the hostage-taker or be obligated to submit the case to its competent authorities for prosecution); and (2) Aircraft hijacking, see, e.g., Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), art. 4, 22 U.S.T. 1641, T.I.A.S. No. 7192, reprinted in 10 LL.M. 133 (1971) (committing each contracting state to take necessary measures to establish jurisdiction over the offense of unlawful seizure of aircraft and any other act of violence against passengers or crew committed by the alleged offender).

345. See the recent GATT revisions, which establish the World Trade Organization. General Agreement on Tariffs and Trade, Agreement Establishing the Multilateral Trade Organization [hereinafter World Trade Organization], GATT Doc. MTN/FA, pt. II, art. III(2) (Dec. 15, 1993), reprinted in 33 LL.M. 13, 16 (1994), which provides:

The [WTO] shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreement in the annexes to this Agreement. The [WTO] may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations . . . .

Contemporary international relations theory reflects these developments in its focus on international regimes. Regime theory developed in order to explain cooperative behavior in international relations. Regimes may be broadly defined as “governing arrangements constructed by states to coordinate their expectations and organize aspects of international behavior in various issue-areas.” An international regime is commonly understood to consist of four elements “around which actor expectations converge in a given issue-area[:]” (1) Principles (“beliefs of fact, causation, and rectitude”); (2) Norms (“standards of behavior defined in terms of rights and obligations”); (3) Rules (“specific prescriptions and proscriptions for action”); and (4) Decision-making procedures (“prevailing practices for making and implementing collective choice”). International regimes are not simply “one-shot” arrange-

new WTO system represents a stunning victory for international trade ‘legalists’ in their running debate with trade ‘pragmatists’ . . . . ”; see also General Agreement on Tariffs and Trade, General Agreement on Trade in Services, GATT Doc. MTN, pt. IV, art. XIX, Annex 1B and Add. 1 (Dec. 15, 1993), reprinted in 33 I.L.M. 44, 61 (1994). These sections provide:

1. In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations . . . with a view to achieving a progressively higher level of liberalization . . . .

4. The process of progressive liberalization shall be advanced in each such round through bilateral, plurilateral or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by Members under this Agreement.

Id.

Other recent examples of continuing cooperation in the economic area, including the strengthening or creation of international decision-making or administrative organs are the Treaty on European Union (Treaty of Maastricht) and the North American Free Trade Agreement (NAFTA).

Regime theory, see infra notes 346-50 and accompanying text, has dealt extensively with cooperation in the area of international economic relations. Regime theory studies of various aspects of economic cooperation highlight the continuity and interrelatedness in this area. See the contributions of John Gerard Ruggie, Charles Lipson, and Jock A. Finlayson and Mark W. Zacher to Krasner, INTERNATIONAL REGIMES, supra note 338, at 195-231, 233-71, 273-314. The epistemic community approach. See infra notes 441-44 and accompanying text, illustrates the same phenomena; see also William J. Drake & Kalypso Nicolaidis, Ideas, Interests, and Institutionalization: “Trade in Services” and the Uruguay Round, 46 INT’L ORG. 37 (1992) (describing the epistemic community approach toward various aspects of international economic cooperation).

346. KEOHANE, AFTER HEGEMONY, supra note 338, at 49.
348. Stephen D. Krasner, Structural Causes and Regime Consequences: Regimes as
ments, but rather imply “a form of cooperation that is more than the following of short-run self-interest.” Thus, while an international agreement entered into to deal with a discrete, temporally-limited matter would probably not qualify as a regime, the types of agreements which come before United States courts for interpretation routinely would. These agreements, such as agreements to facilitate international cooperation in civil and criminal matters, aviation, international trade, and environmental protection, establish substantive rules and decision-making procedures (whether created specifically by the agreement or, in effect, relying on domestic decision-making forums), and contemplate the establishment and maintenance of ongoing cooperative arrangements. The relevance of regime theory to treaty interpretation is that it articulates and highlights the long-term interests that states have not only in particular decisions, but also in the maintenance and the constructive evolution of the regime itself. Because regime theory and the social reality it represents are now part of the discourse and frame of reference of those involved in the management of international relations, judges should take this into account in the search for intent in interpreting international agreements.

Intervening Variables, in Krasner, INTERNATIONAL REGIMES, supra note 338, at 1, 1-2; see Kratochwil & Ruggie, International Organization, supra note 338, at 769-71 (suggesting that students of international organization have shifted their focus systematically away from international institutions toward broader forms of organized international behavior).


350. See Oran R. Young, Regime Dynamics: The Rise and Fall of International Regimes, in Krasner, INTERNATIONAL REGIMES, supra note 338, at 93-113.

351. Regime theory is certainly open to criticism, as the following comment by Susan Strange indicates. The important point here, however, is that contemporary regime theory expresses a cooperative attitude that currently exists on the part of those who negotiate international agreements:

[F]irst ... the study of regimes is, for the most part, a fad, one of those shifts of fashion not too difficult to explain as a temporary reaction to events in the real world but making little in the way of a long-term contribution to knowledge. Second, it is imprecise and woolly. Third, it is value-biased, as dangerous as loaded dice. Fourth, it distorts by overemphasizing the static and underemphasizing the dynamic element of change in world politics. And fifth, it is narrowminded, rooted in a state-centric paradigm that limits vision of a wider reality.

Susan Strange, Cave! Hic Dragones: A Critique of Regime Analysis, in Krasner, INTERNATIONAL REGIMES, supra note 338, at 337.
On a more general level, the cooperative behavior of states and regime theory which attempts to understand and explain it result from what one cultural anthropologist described as the rapidly increasing “density of interaction” between states and among peoples which suggests the emergence of a “global civilization.” Professor Falk elaborated on this concept:

In effect, a global ethos is emerging that suggests a shared destiny for the human species and a fundamental unity across space and through time, built around the bioethical impulse of all human groups to survive and flourish. Such an ethos has implications for the assessment of problems, the provision of solutions, and the overall orientation of action and actors. For most people and leaders, this shared sense of destiny does not displace a persisting primary attachment to the state as a vehicle for aspiration and as an absolute, unconditional bastion of security.

Because sovereignty is not a concept with an indelibly fixed political or legal content, it is not necessarily incompatible with the global ethos described by Professor Falk. National decision-makers then, even though seeking to promote the national interest through the negotiation, conclusion, and approval of international agreements, also have broader identifications and an interest in the cooperative management and solution of common problems. This too is part of the mindset of the parties to international agreements and is legitimately taken into account in their interpretation.


353. Id. Bateson writes:

Unlike the notion of world government, the notion of an emerging global civilization suggests a loosely integrated form of world order that might have the following characteristics: it would develop gradually, and may indeed already be in the process of development; it could coexist with rich cultural and political diversity; it would not rely on the centralization of power characteristic of the modern states; and it might make a virtue of ambiguity.

D. Analogies to Recent Developments

Recent developments in at least two areas of the law (American conflict of laws theory and the law of the European Union) demonstrate that legal "paradigms" can and do change, and that courts can and do play a significant role in that process. It is beyond the scope of this article to consider these developments in detail, but some comparative consideration is suggestive with respect to the impact judges can have not only on doctrinal improvement of the law but also on the progressive articulation of fundamental jurisprudential premises that are responsive to changing political, economic, social, and psychological realities.

1. American Conflict of Laws Theory

It may be instructive in considering the state sovereignty paradigm in international law to examine the American experience over the past three or four decades in the fields of choice of law\(^3\) and the jurisdiction of courts.\(^3\) In these areas, thinking in the United States, judicial as well as academic, evolved from a state sovereignty paradigm, with an analytical focus on power and territoriality, to a focus on fairness to litigants and on the optimal implementation of governmental policy in situations where the policies of more than one governmental unit may be relevant. To be sure, state sovereignty in the American constitutional context is far removed from state sovereignty in the international community. Nevertheless, doctrinal developments in the area of the jurisdiction of courts from cases like *Pennoyer v. Neff*\(^4\) to *International Shoe*\(^5\) and

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355. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970) (using the term "paradigm"). For Kuhn, paradigms are "universally recognized scientific achievements that for a time provide model problems and solutions to a community of practitioners." *Id.* at viii. "A paradigm is an accepted model or pattern." *Id.* at 23. A field enters into a state of crisis when there develops "a growing sense . . . that an existing paradigm has ceased to function adequately in the exploration of an aspect of nature which that paradigm itself had previously led the way." *Id.* at 92; see THOMAS S. KUHN, THE COPERNICAN REVOLUTION (1958) (setting forth his classic case study of a paradigm shift).


357. See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 97-123 (1985) (outlining the historical development of jurisdictional doctrine); see also FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 108-14 (3d ed. 1985) (outlining special problems attendant with pleading where domestic law is not judicially notice-able).

358. 95 U.S. 714 (1878).
Shaffer v. Heitner\textsuperscript{360} and in the area of choice of law from cases like Slater\textsuperscript{361} and Dodge\textsuperscript{362} to Allstate Insurance Co. v. Hague,\textsuperscript{363} manifest the replacement of a territorialist paradigm with a paradigm based on function and fairness.

The several States of the Union are not, it is true, in every respect independent... But, except as restrained and limited by [the Constitution], they possess and exercise the authority of independent States, and the principles of public law... are applicable to them. One of these principles is that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.

Id. at 722.


But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the lex fori, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligatio, which like other obligations, follows the person, and may be enforced wherever the person may be found.

... But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation... but equally determines its extent.

Id. at 126. The leading academic proponent of the territorialist-vested rights paradigm was Professor Beale of the Harvard Law School. See JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS at 107 (1935) (stating that “[a] right having been created by appropriate law, the recognition of its existence should follow everywhere. Thus an act valid where done cannot be called into question anywhere”); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 384, ¶ 2 (1934) (stating that “[i]f no cause of action is created at the place of wrong, no recovery in tort can be had in any other state”); see also BEALE, supra, at 115-27 (presenting Beale’s views on the relationship between sovereignty and jurisdiction and his view of international law).

362. New York Life Insurance Co. v. Dodge, 246 U.S. 357 (1918) (presenting a due process analysis resulting in the constitutional requirement of strict application of the place of contracting rule in spite of significant contacts with forum state); see Home Insurance Co. v. Dick, 281 U.S. 397 (1930) (holding that the individual state may not validly affect contracts which are neither made nor are to be performed in that state).

363. 449 U.S. 302, 312-13 (stating that “for a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary or fundamentally unfair”); see also Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Sun Oil Co. v. Wortman, 486 U.S. 717 (1988).
Why did this paradigm shift come about? Obviously, the state-power basis for allocating jurisdictional (legislative or judicial) competence was no longer reflective of political reality or social and economic needs in the United States. Decisions grounded in territorialist thinking proved more and more unsatisfactory when viewed from the emerging perspectives of fairness to litigants and optimal effectuation and reconciliation of conflicting state polities in a society that was becoming more mobile and interdependent. With respect to choice of law, for example, courts strove mightily to reach appropriate results within the context of the traditional territorial model, often employing rather transparent techniques, which came to be called “escape devices,” to avoid the logical consequences of prevalent theory.364

The paradigm shift in conflict of laws premises and analysis was initiated by legal scholars raising questions about traditional territorialist thinking.365 State court judges, relying in large part on this scholarly analysis, began to articulate a new conflicts theory which justified their asking the questions that they felt were relevant to fair and enlightened decision-making.366 Today, when territorial factors are deemed impor-

364. See Lea Brilmayer, Conflict of Laws: Cases and Materials 124-89 (4th ed. 1995) (discussing escape devices including characterization of the cause of action, such as tort, contract, or personal status; characterization of particular issues, such as substance versus procedure; application of the public policy doctrine, and the use of the renvoi device).


366. See opinions by Judge Fuld of the New York Court of Appeals: Neumeier v. Kuehner, 286 N.E.2d 454 (1972) (supporting the principle that to ignore the laws of the domicile of an accident victim does not further the substantive law of the state in which the accident occurred); Babcock v. Jackson, 191 N.E.2d 279 (1963) (discarding territorialist choice of law in favor of a contract-based doctrine); Haag v. Barnes, 175 N.E.2d 441 (1961) (applying Illinois law where not in conflict with the New York
tant over and above their value in establishing state interests or contacts, it is principally for the policy reasons of practicality and predictability, rather than for solicitude for state prerogatives and vested rights.  

2. The Law of the European Union

Developments in the law of the European Union and its member states during the past few decades also provide a good illustration of the articulation and acceptance of a new legal paradigm to meet changing social, economic, and political needs. At the legal level, the integration of sovereign states into a supranational organization called for significant rethinking of traditional approaches to the relationship between national law and the law of the supranational organization. A significant start to this process was begun in the post-World War II constitutions of many European states. Later, the European Court of Justice developed and

See also opinions by Judge Traynor of the California Supreme Court: Bernkrant v. Fowler, 360 P.2d 906 (1961) (giving effect to the common policy behind the laws of both states where there is no conflict); Grant v. McAuliffe, 264 P.2d 944 (1953) (concluding that the law of the forum should govern the survival of causes of action); Clark v. Clark, 222 A.2d 205 (N.H., 1966).


articulated a coherent and compelling view of the relationship between community law and national law,\(^{369}\) which has been accepted by some member states, but not by others, who have developed their own approaches.\(^{370}\) In all cases, however, the traditional state sovereignty paradigm has been replaced with new thinking to reflect the growing sense of legal interdependency of EU members. This new legal paradigm has now been accepted by European society generally.\(^{371}\) The creative and catalytic role of the European Court of Justice in this development,\(^{372}\) as well as the contributions of courts of member states,\(^{373}\) has been

broader adoption of international law).

369. See infra notes 375-78 and accompanying text.


371. See Craig A. Whitney, France Starts New Conservative Era as Chirac Is Sworn In, N.Y. TIMES, May 18, 1995, at A3 (reporting that in assuming office as President of France, Jacques Chirac said that he hoped his fellow citizens would be “more patriotic and at the same time more European”).

372. See generally CLARENCE J. MANN, THE FUNCTION OF JUDICIAL DECISION IN EUROPEAN ECONOMIC INTEGRATION (1972) (describing the role of the European Court of Justice in expanding European interdependence); Burley & Mattli, supra note 223 (examining the legal foundation of the European Community with regard to political and economic integration and the unexpected impact of the European Court of Justice); J.H.H. Weiler, The Transformation of Europe, 100 YALE L. J. 2403 (1991) (supporting the importance of legal infrastructure to European integration); Eric Stein, Lawyers, Judges, and the Making of a Transnational Constitution, 75 AM. J. INT’L L. 1 (1981) (outlining the constitutional framework for a federalist structure in Europe with respect to the European Court of Justice); see also J. G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS (1988) (showing how the European Court of Human Rights has had a dramatic effect on domestic law and practice of member states).

373. See supra note 232 (regarding French decisions); supra note 370 (regarding Belgian decision); infra note 379 (regarding German decisions); see also Judgment of Dec. 27, 1973, (Frontini v. Ministero delle Finanze) Foro It. I 314, No. 183, 1974, 2 CMLR 372 (Italian Constitutional Court) (ruling that the Italian Constitutional Court has jurisdiction over implementing Community regulations in accordance with section 2 of EEC Treaty Ratification Act 1957 (No. 1203)); Judgment of June 8, 1984 (SpA Granital v. Administrazione delle Finanze dello Stato) Foro It. I 2052, No. 170/84, 1984, 29 Giur It. 1098, No. 170, 21 Common Mkt. L. Rev. 756 (Italian Constitutional Court) (deciding that the Italian court has authority to enforce Community law);
notable. In this regard, one may compare the role of the European Court of Justice to that of the United States Supreme Court during the first few decades of the 19th century in promoting political and legal integration by forging new theories of state relations.\textsuperscript{374}

More specifically, the European Court of Justice, relying on rather imprecise and inconclusive provisions of the Treaty of Rome, decided that community law has a "direct effect" within member states and that community law is "supreme" and must be accorded priority by domestic authorities over their own national law. In the landmark case, \textit{Van Gend en Loos}, the Court articulated its legal vision of the community:

\begin{quote}
[T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subject of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.\textsuperscript{375}
\end{quote}

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374. See, e.g., Gibbons v. Ogden, 9 Wheat. 1 (1824) (holding that a New York law granting exclusive navigation of its waters is violative of the Commerce Clause of the United States Constitution); McCulloch v. Maryland, 4 Wheat. 316 (1819) (finding a Maryland act imposing tax on all banks in Maryland not chartered by state legislature to be in violation of the United States Constitution); Martin v. Hunter's Lessee, 1 Wheat. 304 (1816) (stating that the federal government alone has treaty-making power over which the United States Supreme Court has jurisdiction, even in matters involving citizens of another country); see Werner J. Feld & Elliot E. Slotnick, "Marshalling" the European Community Court: A Comparative Study in Judicial Integration, 25 EMORY L. J. 317 (1976) (comparing the judicial infrastructure of the European Community with that of the United States); CHARLES WARREN, THE SUPREME COURT AND SOVEREIGN STATES (1924) (providing the American background for legal integration); Paul R. Dubinsky, The Essential Function of Federal Courts: The European Union and the United States Compared, 42 AM. J. COMP. L. 295 (1994) (comparing the relationship between European Court of Justice and national courts of member states to the relationship between federal and state courts of the United States); Trevor C. Hartley. Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community, 34 AM. J. COMP. L. 229 (1986) (discussing the different aspects of federalism).

It is not only the Treaty of Rome itself that may produce direct effects within member states, but also the legislative products of community institutions. Furthermore, if community law conflicts with national law, it is community law which must be accorded priority. According to the European Court of Justice:

The integration into the laws of each Member State of provisions which derive from the Community . . . make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty . . . .

In adopting these bold interpretations of the Treaty of Rome, which in effect seriously undercut the national sovereignty of member states, the Court was careful to articulate its legal vision of the community in "nominally apolitical" terms, focusing narrowly on the "economic, social, and technical" issues presented to it for resolution. According to Professors Burley and Mattli, because "integration is most likely to occur within a domain shielded from the interplay of direct political interests . . . actors are best able to circumvent and overcome political obstacles by acting as nonpolitically as possible."

National decision-makers by and large were receptive to the broad jurisdictional claims of the European Community Court and to the Court's theory that a new legal order had been brought into existence by the Treaty of Rome, which allowed supranational (i.e., community) organs to exercise legislative authority over nationals of member states and asserted the supremacy of supranational (i.e., community) law. By and large, national courts accepted these results.

378. Id. at 57.
379. One particularly sensitive issue, however, the supremacy of community law over national constitutional provisions has produced an ongoing dialogue between the European Court of Justice and national courts, as the judges in supranational and national court systems have sought to accommodate each others' legitimate interests and concerns. See, e.g., Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel, 1970 ECR 1125 (holding that German national law will not override Community law and that only Community law may rule
3. The Law of International Organizations

The examples given above of the role of courts in the development and articulation of new legal and political paradigms have two important legal elements in common: (1) a constitutive document (the United States Constitution and the Treaty of Rome), and (2) a court empowered to interpret that document (the United States Supreme Court and the European Court of Justice). Do we find an analogy in the contemporary international legal order, with the U.N. Charter as constitutive document and the International Court of Justice as interpreter of that document? While not articulating his vision in exactly the same terms, one writer seems to think so. In his book, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations*, Djura Ninčić argues that the Charter “not only reaffirms sovereignty . . . but also, and as part of the same process, determines its scope. The Charter tends, in a sense, to restrict sovereignty.”380 He continues:

The evolution of the United Nations and of the concept of sovereignty are thus a reflection and a part of general progressive advance in the social, political and international field. This advance tends to overcome the discrepancies, whether apparent or real, between the United Nations and sovereignty which themselves result from the basic contradictions

between independence and interdependence in our day. The obvious instrumentality for solving these contradictions, is the United Nations, which is designed to promote both independence and interdependence, and establish a system of international relations based on peaceful and active coexistence which is alone in accordance with the international realities of our time. Through this process and within such a system of international relations, sovereignty, far from being alienated, is brought to fulfillment even when it appears to be restricted.\textsuperscript{381}

Whatever the ultimate prospects for the development of an integrative international jurisprudence on the basis of the United Nations Charter, to date little movement in this direction has taken place. The International Court of Justice does not possess a jurisdictional competence that is at all analogous to that of the United States Supreme Court or the European Court of Justice. Moreover, the U.N. Charter is through and through a political document. To the extent that it articulates rules or principles of general application, it does so at such a high level of abstraction that considerable discretion (one could say, discretion tantamount to choosing between competing political, social, or economic policies) would be accorded to judges seeking to apply it. This is a far cry from the highly technical Treaty of Rome or even the United States Constitution. The recent history of the International Court of Justice indicates that the more its decisions move toward the political end of the spectrum, the weaker is its authority and its ability to attract litigants.\textsuperscript{382} It is unlikely, therefore, that the international community can look to the Court, at least for the foreseeable future, to articulate a new paradigm of law in the international community.

\textsuperscript{381} Id. at 343. But see WALTER SCHIFFER, THE LEGAL COMMUNITY OF MANKIND: A CRITICAL ANALYSIS OF THE MODERN CONCEPT OF WORLD ORGANIZATION (1954) (arguing that a world organization based on an association of independent states is doomed to failure because it is based on a premise that is self-contradictory).

\textsuperscript{382} See, e.g., Nuclear Tests (Austl. v. Fr. and N.Z. v. Fr.), 1974 I.C.J. 253, 457 (considering the permissibility of nuclear testing in light of political pressures and indicating that political considerations have a significant impact on the Court's decision); Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392. The greatest contributions of the court have come in the settlement of international boundary disputes.
The previous section analyzed certain legal and political conceptions that influence or at least precondition judicial attitudes in the interpretation of international agreements. Principally it considered the idea of sovereignty, which expresses a certain view of international relations and international law, grounded in interpretations of international politics and international society as well as in the advocacy of certain preferred arrangements with respect to the allocation of power. The appeal of the idea of sovereignty ultimately relates to its ability to express and advocate a view of international political life which serves the political interests of people in positions of power. In order to critique effectively the concept of sovereignty, therefore, it is necessary to demonstrate that the doctrine, at least in its absolute form, no longer expresses the real political interests of nations or of their leaders. This critique of the doctrine of sovereignty, focusing on the political interests and perceptions of national decision-makers, is at least as important, if not more so, than a critique of sovereignty at the doctrinal level (e.g., by demonstrating logical inconsistencies) or at the descriptive level (e.g., by demonstrating that in fact the peoples of the world are interdependent and that power processes are necessarily interrelated and interpenetrating). It is not the intention of this section to deal comprehensively with the idea of sovereignty in international law, but rather to limit analysis to the political utility *vel non* of the idea of sovereignty as it bears on the interpretation of international agreements by courts of the United States.

McDougal, Lasswell and Miller pose the question which is at the heart of trying to understand the process of interpretation and the relation of legal rules and extrinsic factors (such as political considerations) to that process: “precisely what is involved in an act of interpretation.”383 In other words, what are courts in fact doing when they engage in an act of interpretation of an international agreement? What policies are they seeking to effectuate? To what forces are they responding? How do they actually go about resolving the question before them when there is an agreed-upon treaty text that addresses or possibly addresses the matter?

To limit the analysis and evaluation of decisions by domestic courts interpreting international agreements to purely legal factors is both unrealistic and unwise—unrealistic because through the act of interpretation the court necessarily exercises political judgment; and unwise, because a critique limited to legal factors fails to account for and to evaluate what very well may be the principal determinants of decision. Furthermore, political factors bear importantly on the approach of domestic courts to the interpretation of international agreements, and in fact, on their willingness to interpret such agreements in the first place. To the extent that political factors are given expression in authoritative legal rules or principles, of course, those factors cease to be political and enter the realm of law. Ideally, law should seek to give expression to the greatest extent possible to all those factors which determine decision, including those which originate in the political realm. By seeking to understand what those factors are and whether, and to what extent, they can be given legal form, domestic courts can contribute to widening the scope of the legal sphere.

At the outset, it is important to understand that all acts of interpretation take place in a political context, involve judgments which are at least to some extent political, and in turn have a political impact.

384. Virally states:

If the object of legal science is the complete [understanding of a legal phenomenon], it must not limit itself to the exigetical or logical-conceptual analysis of legal norms. Since . . . a legal phenomenon is not only normative, but also socio-historic (which is what confers concreteness [positivité] on the legal order), the science of law must also seek to understand it by taking this aspect into account. This will enable it to free itself from a strictly formalistic and static perspective, in order to envision the legal order in evolution, in formation, and in action in a real society.

Michel Virally, *Le phénomène juridique*, 82 REVUE DU DROIT PUBLIC 5, 64 (1966).

385. Georg Schwarzenberger, *Myths and Realities of Treaty Interpretation: Articles 27-29 of the Vienna Draft Convention on the Law of Treaties*, 9 VA J. INT'L L. 1, 15-17 (1968). Professor Schwarzenberger uses the term “sociological” to describe the various factors bearing on the interpretation of international agreements. Thus, he recommends the use of “the typology of laws of reciprocity, co-ordination and power” as a means of understanding the process of interpretation. For him, “reciprocity” means the mutual interest of parties in performing consensual obligation; “co-ordination” means the cooperation of the parties in the furtherance of community aspirations resulting from the congenial atmosphere of the closely knit community; and “power” means the dominant position of one party tending to encourage legal interpretation in favor of the stronger side. Id.

Judge Lauterpacht takes a broader view of the juridical character of the judicial function. For him, a dispute is within the realm of law if it is ‘capable of

reasonable
The political element may be more or less significant in a particular act of interpretation, but it is present nevertheless.\textsuperscript{386} If a decision were fully determined by legal factors, there would be no need for interpretation.\textsuperscript{387} Professor Sur characterized interpretation as a "hinge concept" ("une notion charnière") between law and politics. He writes:

Interpretation in international law constitutes the obligatory point of passage between fact and law, between law and politics; it falls within the domain of the law as well as within that of politics; it places [these two domains] in contact with each other without doing away with either. It constitutes therefore a mixed concept. It is [interpretation] which allows legal officials to take into consideration or not [the principle] of effectiveness, in all its diverse meanings and in its multiple role.\textsuperscript{388}

\[\ldots\]

\[\ldots\] Interpretation cannot be defined as a strictly juridical activity, confined within its own domain, reserved to a given organ, relating to a particular function, subject to certain methods or associated with a specific principle, or having a generic value \ldots. It is necessary therefore to

\begin{quote}
adjustment by reference to accepted principles of international law." LAUTERPACHT, supra note 271, at 245 (quoting Hyde, vol. 2, at 112, emphasis added by Lauterpacht). Moreover, once "[s]ates recognize the authority of obligatory judicial settlement," id. at 77, any act of reasonable interpretation presumably falls within the domain of law. See id. at 60-104.
\end{quote}

\textsuperscript{386} SUR, supra note 39, at 99. Sur notes:

The more this activity [interpretation] is regulated, and the more that this regulation depends on general characteristics of the established legal order, the less important is the role of interpretation, insofar as the restrictions on its freedom allow it only a weak influence on the legal order. On the other hand, an un fettered freedom, a nonexistent or imprecise regulation, a concurrence of legal factors confer on it a determinant role, which goes to the limit of consistency of the legal order if it allows contradictory interpretations of equal validity. In the first case, where it is considered narrowly, interpretation appears only as a residual, limited, regulated, and enclosed legal category. In its broader sense in the second case, it is fundamental for the functioning of the legal order.

\textit{Id}; see MARTIN M. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE 1-49 (1964).

\textsuperscript{387} In the sense used in this article, law is a normative system, or, as explained by Professor Sur, "a system of division of competencies, a coordinated and harmonious system of norms, a logical and artificial mechanism, crystallizing and integrating an ideology \ldots." SUR, supra note 39, at 21. Legal decisions are those that may be said to follow logically from the application of a particular norm or norms. Political decisions, on the other hand, are those that are not fully determined by norms but by the decision-maker's application of his own policy preferences (either substantive or his decision to defer to another's policy preferences).

\textsuperscript{388} Id.
reject a specifically juristic characterization in order to fully account for this activity . . . .

This section will explore the political context, both international and domestic, in which the interpretation of international agreements by national courts takes place, and the political impact of decisions interpreting international agreements, with specific reference to law, politics, and practice in the United States.

B. Focus of Analysis

In order to ascertain and describe with specificity the political context, both domestic and international, in which international agreements come before courts of the United States for interpretation, it is first necessary to understand (1) exactly what sort of agreements we are talking about, and (2) what are the precise legal characteristics of such agreements. This section will describe and characterize the international agreements that have come before courts of the United States for interpretation during the past decade. The next section will discuss the legal characteristics of those agreements.

An examination of the international agreements that the United States Supreme Court interpreted over the past decade indicate that overwhelm-

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[T]he present writer's limited conception of interpretation makes him unable to agree with Professor Sur's description of interpretation as a concept charnière, the "hinge" between politics and law, the locus where politics is transformed into law . . . . For law is above all the continuation of politics by more limited means, viz., means limited by the general concept of law, and which will still further be limited in the event of an interpreter being subject himself to functional limitations, such as a judge.

Sur, however, does not say that interpretation is purely a political act. He specifically rejects that position, which he attributes to MacDougal:

The intervention of the political element must not lead to the denial of the juridical character of the process of interpretation, to the rejection of [legal] regulation of [that process], as MacDougal's position, which entirely subordinates interpretation to the realization of objectives external to if not contrary to law, would tend to do, and which, from this point of view, criticizes objective recourse to the text as a fundamental element in the interpretation of treaties . . . . As a hinge concept (concept charnière), interpretation belongs to the domain of politics as well as to the domain of positive law.

Sur, supra note 39, at 84.
ingly these agreements are “treaties” both in the international sense and in the American constitutional sense. A review of recent lower federal court decisions involving the interpretation of international agreements indicates the same thing, as does a review of recent state court decisions interpreting international agreements. Furthermore, the treaties which federal and state courts construed during the period under review are overwhelmingly of the cooperative, rule-making sort. Thus, approximately twenty percent of all recent federal treaty interpretation cases involve applications of the Warsaw Convention.

390. Vienna Convention on the Law of Treaties, supra note 81, art. 2(1)(a) (defining a “treaty” as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”); see Kelvin Widdows, What is an Agreement in International Law?, 50 BRIT. Y.B. INT’L L. 117 (1979); J.E.S. Fawcett, The Legal Character of International Agreements, 30 BRIT. Y.B. INT’L L. 381 (1953).

391. A treaty in the American constitutional sense is an international agreement that has been ratified by the President after he has received the “advice and consent” of the Senate to do so. U.S. CONST. art. II, sec. 2; see GLENNON, supra note 33, at 123-63; HENKIN, supra note 33, at 129-71. Although equally obligatory at the international level, a treaty in the American constitutional sense differs significantly, politically as well as legally, from other types of international legal undertakings of the United States (such as executive agreements and congressional-executive agreements). See GLENNON, supra note 33, at 164-91; HENKIN, supra note 33, at 173-88; see also SEN. COMM. ON FOREIGN RELATIONS, supra note 228 (emphasizing the difference between United States and international treaty interpretation); Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 HARV. L. REV. 1221 (1995) (challenging the free-form method of constitutional analysis and suggesting more constrained modes of constitutional argument).

392. See treaties cited infra notes 395-405 (involving lower federal court interpretations of international agreements).

393. See cases cited infra note 405 (addressing international criminal and extradition agreements).

ty percent deal with aspects of international cooperation in the area of criminal justice (e.g., extradition, criminal cooperation, and prisoner exchange). \(^395\)


Another twenty percent involve cooperation in international civil litigation and arbitration (e.g., procedural matters, the enforcement of foreign arbitral awards, and domestic relations matters).\textsuperscript{396} Other significant categories of treaties that federal courts recently interpreted include Friendship Commerce and Navigation (FCN) agreements,\textsuperscript{397} tax treaties,\textsuperscript{398} treaties dealing with maritime matters,\textsuperscript{399} and diplomatic


\textsuperscript{398} Xerox Corp. v. United States, 41 F.3d 647 (Fed. Cir. 1994) (United States-U.K. Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains of Dec. 31, 1975, as amended); Barquero v. United States, 18 F.3d 1311 (5th Cir. 1994) (United States-Mexico Tax Information Exchange Agreement of 1989); Stuart v. United States, 813
It is rare that a sole executive agreement or an agreement dealing with sensitive defense.


402. While federal courts recently considered a number of defense-related treaties, as a rule, the questions for decision dealt with non-sensitive, routine, administrative-type issues. See, e.g., More v. Intelcom Support Servs., Inc., 960 F.2d 466 (5th Cir. 1992) (pertaining to a breach of contract suit by Filipino workers against a defense contractor under the United States-Philippines Agreement Relating to the Recruitment and Employment of Philippine Citizens by the United States Military and Civilian Agencies of the United States Government in Certain Areas of the Pacific and Southeast Asia); Robins Island Preservation Fund v. Southold Dev. Corp., 959 F.2d 409 (2d Cir. 1992) (questioning the title to Robins Island in the Peconic Bay of Long Island between domestic claimants under the United States-Great Britain Provisional Treaty of Peace of Nov. 30, 1782, the Definitive Treaty of Peace of Sept. 3, 1783, and the Jay Treaty of Nov. 19, 1794); Rainbow Navig. Inc. v. Dep't of Navy, 911 F.2d 797 (D.C. Cir. 1990) (questioning the United States Navy's implementation of the United States-Iceland Treaty to Facilitate Their Defense Relationship regarding the allocation of military cargo trade between companies of the two countries); A & E Pac. Constr. Co. v. Saipan Stevedore Co., Inc., 888 F.2d 68 (9th Cir. 1989) (concerning a private antitrust action in regard to the United States-Northern Mariana Islands Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political
economic,\footnote{403} or environmental\footnote{404} issues must be interpreted by a fed-

Union with the United States); United States ex rel. Chunie v. Ringrose, 788 F.2d 638 (9th Cir. 1986) (questioning the title to the Santa Barbara Islands between do-
mestic claimants in relation to the United States-Mexico Treaty of Guadalupe Hidalgo of Feb. 2, 1848); Heller v. United States, 776 F.2d 92 (3d Cir. 1985) (involving a jurisdic-
tional question regarding the application of the Federal Tort Claims Act in con-
nection with the United States-Philippines Agreement Concerning Military Bases of

\footnote{403} See, e.g., Babbitt Elecs., Inc. v. Dynascan Corp., 38 F.3d 1161 (11th Cir. 1994) (considering trademark infringement question under the Inter-American Convention for Trademark and Commercial Protection of 1929); Alliance of Descendants of Texas Land Grants v. United States, 37 F.3d 1478 (Fed. Cir. 1994) (involving a claim for compensation for a United States land appropriation in southern Texas and the United States-Mexico Convention Providing for the Final Adjustment and Settlement of Certain Unsettled Claims of Nov. 19, 1941); Mississippi Poultry Ass’n, Inc. v. Madigan, 992 F.2d 1359 (5th Cir. 1993) (questioning the Secretary of Agriculture’s interpretation of a provision in the Poultry Products Inspection Act with respect to imported poultry and the GATT); Wood v. United States, 961 F.2d 195 (Fed. Cir. 1992) (questioning whether suit was properly brought in United States District Court or should have been brought in the United States Court of Claims under the United States-Brazil Treaty [on] Certificates of Airworthiness for Imported Aircraft Products and Components of June 16, 1976).


eral court. The experience of the state courts is similar.\textsuperscript{505}

C. THE LEGAL CHARACTERISTICS OF INTERNATIONAL AGREEMENTS

1. At the International Level

It is useful to begin with the Vienna Convention on the Law of Treaties’ definition of “treaty” as “an international agreement concluded between States in written form and governed by international law . . .”406 There are two important aspects of this definition: (1) a treaty is an agreement between states; and (2) international law governs a treaty. This is the class of international agreements with which we are concerned.

Considered broadly, the legal effects of treaties between states are the following: (1) the rule pacta sunt servanda\textsuperscript{407} applies; (2) the treaty binds the state; and (3) treaty obligations have priority over domestic law.\textsuperscript{408} Thus, as a consequence of entering into a treaty, domestic treaty-makers indisputably undertake certain clearly understood legal obligations for a period that the agreement determines.\textsuperscript{409} There are alternatives to the treaty that domestic treaty-makers know how to employ when they want to produce other sorts of effects, such as the undertaking of political or moral obligations, without legal consequences.\textsuperscript{410}

2. In the United States Legal System

The international agreements which are the subjects of interpretation in United States courts are almost always “treaties” in the constitutional sense, that is the President ratifies them after receiving the advice and consent of the Senate.\textsuperscript{411} In some cases, the international agreements


\textsuperscript{408} \textit{See} \textit{SUZANNE BASTID, LES TRAITÉS DANS LA VIE INTERNATIONALE: CONCLUSION ET EFFETS} 116-20 (1985).

\textsuperscript{409} \textit{But see infra} notes 424-27 and accompanying text (indicating that in spite of treaty commitments and obligations, states often do not complete undertakings).


\textsuperscript{411} \textit{See} \textit{CARTER & TRIMBLE, INTERNATIONAL LAW, supra} note 407, at 165-69.
involved are so-called congressional-executive agreements, those agreements which the Executive branch entered into with the prior authorization of Congress or which Congress subsequently approved. Only rarely do sole executive agreements come before the courts for interpretation and application.

The principal legal effect of treaties at the domestic level is that treaties are the law of the land and have a legal status equal to that of laws. This reflects the fact that there has been congressional approval of the undertaking of the international obligations contained in the treaty. Both state and federal courts may apply treaties, provided that the treaties are self-executing. Thus, one may describe virtually all international agreements which come before United States courts for interpretation as legislative equivalents. As such, they contain mandatory rules which are sufficiently specific to allow courts to apply them in a way similar to the application by courts of domestic legislation.

D. THE POLITICAL USES OF INTERNATIONAL AGREEMENTS

1. At the International Level

States have entered into international agreements since time immemorial, in spite of the often-voiced skepticism regarding their utili-

412. See id. at 165.
413. U.S. CONST. art. VI, § 2 (stating that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").
414. See supra note 34.
415. According to United States law, whether a treaty, or certain provisions of a treaty, are self-executing or not depends on the intention of the parties to the treaty as determined from the text of the treaty. Foster v. Neilson, 26 U.S. (2 Pet.) 253 (1828); United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833); Asakura v. Seattle, 265 U.S. 332 (1924). An important factor in determining whether or not a treaty is self-executing in case of doubt regarding the intent of the parties is whether the treaty contains provisions which are of a character and specificity to indicate that judicial application was intended. Sei Fujii v. State, 242 P.2d 617, 621 (1952) (holding that certain provisions of the U.N. Charter were not self-executing because the language employed in the particular provisions was not "definite" and did not "prescrib[e] in detail the rules governing rights and obligations of individuals . . . .").
416. ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 1-5 (rev. ed. 1962); see also PETER (PANAYIOTIS) KARAVITES, PROMISE-GIVING AND TREATY-MAKING: HOMER AND THE NEAR EAST (1992); Theodor Meron, Authority to Make Treaties in the Late Middle Ages, 89 AM. J. INT'L L. 1 (1995) (illustrating that trea-
It is clear then that international agreements play an important role in the political relations of states. Principally, international agreements provide a certain degree of predictability and stability in international relations. There is no doubt that states take treaties seriously. The principal domestic political authorities usually negotiate and approve the treaties and conclude them with great publicity and formality. Compliance is the norm rather than the exception. One

ties were viable legal instruments even in the middle ages, and discussing the relationship between medieval treaties and their modern counterparts); Allen Z. Hertz, *Medieval Treaty Obligation*, 6 CONN. J. INT’L L. 425 (1991) (comparing medieval treaty jurisprudence with international legal obligations of today).


418. Richard B. Bilder, *Managing the Risk of International Agreement* 3-11 (1981); see Thomas M. Franck, *Taking Treaties Seriously*, supra note 40, at 67 (1988) (stating that “[t]reaties are the bones and sinew of the global body politic, making it possible for state to move from talk through compromise to solemn commitment. They are also its moral fiber, the evidence that governments and peoples have pledged their ‘full faith and credit’ to one another”).


420. See generally Franck, *Taking Treaties Seriously*, supra note 40 (discussing the importance states assign to the treaties into which they enter).

421. There are of course secret agreements entered into by states, but these agreements rarely, if ever, come before courts for interpretation and application. See Loch K. Johnson, *The Making of International Agreements: Congress Confronts the Executive* 3-30 (1984) (describing and analyzing the types of agreements entered into by the United States between January 1, 1946 and December 31, 1972, categorized by content and by form); see also COMM. ON FOREIGN RELATIONS, supra note 228, at 203-37 (discussing trends in major categories of United States treaties from 1983-92).

422. See Henkin, Nations supra note 407, at 39-87 (2d ed. 1979) (arguing that nations usually comply with international obligations); Abram Chayes & Antonia H. Chayes, *On Compliance*, 47 INT’L ORG. 175, 177-87 (1993) (discussing the levels of and problems with compliance by nations with international agreements); See generally Abram Chayes & Antonia H. Chayes, *Compliance Without Enforcement: State Behav-
must expect this, as domestic political elites often invest considerable political capital in negotiating and obtaining domestic approval of particular agreements and thus have important stakes in their continued observance. The recent NAFTA and GATT debates and approval processes in the United States exemplify this, as do the various middle eastern peace agreements, along with the Maastricht Treaty. Sometimes domestic proponents of a particular treaty do not succeed in their efforts to bring into force a treaty which they negotiated because of insurmountable domestic opposition. This is a further indication that states do not undertake international legal commitments lightly.
One must distinguish the political uses and international legal effects of treaties from other types of international agreements that are not intended to create binding legal obligations. While this latter class of agreements certainly plays an important role in international relations, treaties are something different and may have certain particular political functions. Because there are so many different types of treaties, whether characterized by subject matter, number of parties, ongoing institutional structures or lack of them, it is difficult to make any definitive list of the precise political functions that international agreements may serve. It would be helpful at the outset, however, to distinguish and highlight certain aspects of international agreements. Treaties are formal instruments, which states carefully negotiate, and give rise to legal claims that may be enforceable in international or national judicial tribunals.²⁹ Treaty are accompanied with detailed bodies of law (both international and domestic) laying out legal consequences. If states did not want these legal consequences to flow from their agreements, they would undertake an alternative form of accord, such as a non-binding agreement, an agreement to agree later, or an agreement to establish a procedure for reaching agreement.

Professor Baxter has distinguished between different types of “treaties” on the basis of the relativity of the intent of the parties to accord them legally binding force.³⁰ In spite of the broad mandate of the Vienna Convention on the Law of Treaties, which defines all agreements between states in written form as treaties and then attaches to them the obligation of good faith performance, Professor Baxter argues that this is not in fact expressive of the reality of interstate consensual relations.³¹


⁴³¹ Id. at 549. See generally RAYMOND COHEN, INTERNATIONAL POLITICS: THE RULES OF THE GAME (1981); Charles Lipson, Why are Some International Agreements Informal?, 45 INT’L ORG. 495, 512-13 (1991) (explaining that although all treaties are treated equally, it is understood that certain types of agreements, such as declarations of alliances, establishments of neutral territories, and announcements of policy guidelines are more likely to be violated than others); Anthony Aust, The Theory and Practice of Informal International Instruments, 35 INT’L & COMP. L. Q. 791 (1986) (discussing dispute settlement, termination, and amendment of treaties); Schachter, The
For example, he characterizes agreements of alliance and military cooperation, agreements for the neutralization of a given area, and agreements which lay out agreed policies for the future (like the Atlantic Charter and the Yalta Agreement) as "political treaties" and describes them as "legally fragile." He also discusses the "vast mass of agreements, commitments, and correspondence between governments, between the ministries of different governments, and between officials of different governments in which undertakings of one sort or the other are made" and opines that in spite of the Vienna Convention, "it is probably fair to say that States have no intention of 'enforcing' most of these undertakings . . ." The relations of states within the context of established treaty regimes are clearly political, as Professor Baxter's description of the relativity of the legal character of agreements which the Vienna Convention would clearly regard as treaties implicitly recognizes. We have already mentioned stability and predictability and the reference of certain categories of disputes to resolution according to pre-existing rules applied in judicial forums in accord with a body of law regulating such application. The ultimate political purpose served at the international level by the type of treaties which come before courts of the United States for interpretation, then, may be to remove certain categories of disputes from the political arena—to depoliticize the issues involved. Rather than resolve certain matters through negotiation based on power, influence, and other such factors, the parties manifested their intent to remove such factors from consideration.

2. In the United States Legal System

International agreements also play a political role at the national level. One important political function of treaties and other types of international agreements at the domestic level is to enable proponents of certain interests to impose them on the domestic society as a whole (for example, economic arrangements like NAFTA and the recent GATT

Twilight Existence, supra note 410.

432. Baxter, Infinite Variety, supra note 430, at 550-51 (stating, "Other treaties like the Nuclear Test ban treaty of 1963, dealing with sensitive matters of national security, provide for an easy way out and thus create 'obligations' of such a fragility that legal enforcement may be difficult or even impossible").

433. Id. at 55.

434. Id. at 556.

435. See generally id. (discussing the political character of international agreements).
revisions, agreements with important national security implications like the Panama Canal Treaty and arms control treaties, arrangements for environmental protection, etc.). Domestic society is not monolithic. Different persons and groups have different, often sharply conflicting, economic, political, moral and ethical interests (civil rights, women's rights, etc.). When the United States becomes party to a treaty or to a congressional-executive agreement, certain domestic interests win and certain lose. The results are either embodied in domestic law by statute or have the force of law by virtue of being self-executing international agreements. In either case, the negotiated outcome has the legal force of domestic legislation.

A second important domestic political function of international agreements is to establish rules and procedures of an administrative or technical nature to facilitate cooperation between an interested domestic constituency and its foreign counterparts. This function of international agreements is to facilitate the work of domestic governmental agencies.


437. Peter B. Evans, Building an Integrative Approach to International and Domestic Politics, in DOUBLE-EDGED DIPLOMACY, supra note 436, at 397 (stating, "International bargains are not simply about relations between nations. They are also about the distribution of costs and benefits among domestic groups and about domestic opinion divided on the best way of relating to the external environment").

438. See RESTATEMENT OF FOREIGN RELATIONS LAW, supra note 26, § 111 (discussing embodiment of treaty provisions in the domestic law of the United States).

439. See id. at cmt. d (discussing the domestic legal force of international agreements).
and provide legal predictability for private parties. For example, treaties for cooperation in civil and criminal matters operate to establish known, convenient, and mutually-acceptable procedures for domestic courts, administrative agencies, and litigants.

These conclusions have important implications for the interpretation of international agreements by courts of the United States. Thus, giving full effect to the agreement in light of its objects and purposes, just like domestic courts would do in interpreting a domestic statute, is in accord with the internal political function of the agreement, which the court must not overlook in interpreting the agreement. In effect, allowing courts that are interpreting international agreements to give broad effect to the agreement in light of its object and purpose, best furthers the domestic political purposes of choosing among competing policies or of establishing rules for international cooperation. For example, a narrow reading of an international agreement, ostensibly to enhance freedom of action by the United States vis-à-vis the other parties to the agreement, may result in an interpretation contrary to the interests of those national constituencies who were successful in the domestic political process in having the United States enter into that particular agreement or in having certain specific provisions included in the agreement. Essentially, there are significant domestic political reasons for courts of the United States to approach the interpretation of treaties just as they would approach the interpretation of federal statutes.440

While the goal of interpretation should be the same, the court must define the object and purpose of the agreement by reference not only to the domestic purpose of the agreement, but also to its international purpose. Thus, while the ultimate goal of interpretation of an international agreement is the same as that for the interpretation of a domestic statute, courts must proceed somewhat differently by enlarging the scope of their analysis.

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440. On statutory interpretation by United States courts, see WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 48 (1994) (critiquing intentionalism, purposivism, and textualism, and arguing that "statutory interpretation is multifaceted and evolutive rather than single-faceted and static, involves policy choices and discretion by the interpreter over time as she applies the statute to specific problems, and is responsive to the current as well as the historic political culture").
In determining how to factor in the international element, recent work by political scientists on “epistemic communities” is suggestive. An “epistemic community” has been described as:

A network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain . . . [who] have (1) a shared set of normative and principled beliefs . . . (2) shared causal beliefs . . . (3) shared notions of validity . . . and (4) a common policy enterprise . . . .

Although the impact of epistemic community members is certainly “conditioned and bounded by international and national structural realities,” analysis has demonstrated that “epistemic agreement [is] possible . . . in those areas removed from the political whirl.”

National judges, when they interpret international agreements, especially the typical international agreements that come before national courts for interpretation and application, may profitably be thought of as members of an epistemic community. From this point of view, they should be cognizant of the perspectives of their foreign counterparts and seek to implement policy that advances the common enterprise of the community.

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441. The term epistemic communities . . . designates those knowledge-oriented work communities in which cultural standards and social arrangements interpenetrate around a primary commitment to epistemic criteria in knowledge production and application . . . . Any special way of knowing, whose development and elaboration requires the establishment of an autonomous social space, will tend toward the structure of an epistemic community . . . .

The establishment of a common frame of reference with shared epistemic criteria provides all members of such a community access to a consensually validated perspective for the construction of reality.


443. Id. at 7.


445. See notes 390-405 supra and accompanying text (stating that the overwhelming majority of these agreements are cooperative and rulemaking treaties).

446. The notion of “epistemic community” as it applies to national judicial offi-
The international epistemic community of domestic judges appears presently, however, to be inchoate at best. Although the elements exist for domestic judges to identify with their foreign counterparts, especially in those nations where judicial independence and the rule of law are realities, it is probably safe to say that this has not yet occurred in fact. Opinions like those of Lord Denning and the South African Supreme Court in the Ebrahim case are rare. This does not mean to say, however, that the formation of an epistemic community of national judges is not possible; simply that it has not yet occurred. Such a development is highly desirable, and national judges, particularly judges on their nations' highest courts, have the ability to bring it into existence. All that is required is an openness to the interpretative goals and methodologies of their foreign counterparts.

E. THE POLITICS OF INTERPRETATION OF INTERNATIONAL AGREEMENTS BY UNITED STATES AUTHORITIES

It is not only national courts that interpret international agreements. In fact, interpretation of international agreements goes on continuously in executive branch departments and to a lesser extent in national legislatures. It is important to distinguish the political functions which interpretation serve when different organs of government undertake it in order to focus clearly on the political function of interpretation when courts perform it.

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447. See supra notes 240-41 and accompanying text.
448. See supra notes 159-60 and accompanying text.
449. Reisman states:
The President and the Senate and the House and the courts must, in the discharge of certain of their assigned duties, make independent and sometimes continuous interpretations of treaties. Because of checks and balances and separation of powers, each branch, in performing its functions, must often consider, take account of, appraise and sometimes reach its own conclusion as to, in light of the case or context, the proper interpretation of agreements.
450. Id.
National executive agencies at all levels must interpret international agreements to apply them administratively in the myriads of routine cases that present themselves on a daily basis. Also, executive authorities must interpret international agreements in those situations where they contemplate some sort of governmental action which may possibly violate an international obligation. Senate interpretation occurs when the President transmits the treaty for the Senate’s advice and consent to ratification. Legislative interpretation as a whole occurs most prominently when the legislature must conform domestic law to the requirements of an international agreement. Courts must interpret international agreements in adjudicating the cases which come before them.

It is important to realize that the political context in which the interpretation of international agreements takes place may very well be different depending on the branch of government that faces the problem of interpretation. For instance, the executive branch often acts as an advocate for the national interest or the interests of a specific national constituency in a particular situation. It may be responding to short-term political pressures or goals, or possibly to certain long-term objectives. The Executive branch may also be concerned with preserving

451. See generally Johnstone, supra note 35 (discussing nonjudicial interpretation of international agreements).
453. See generally DAVID P. FORSYTHE, THE POLITICS OF INTERNATIONAL LAW: U.S. FOREIGN POLICY RECONSIDERED 1-9, 141-55 (1990) (discussing the relationship between international law and policy choice and proposing that international law should be viewed within a political context).
454. See BILDER, supra note 418, at 10. Bilder states:
[Government officials probably look at questions of treaty obligation and breach more flexibly and in a broader context than traditional legal analysis assumes. For them, an agreement will often not be simply an instrument for creating legal rights and obligations, but a multipurpose foreign policy tool, constituting only one element in the more complex pattern of their nation’s overall foreign policy.

Id.; see Richard B. Bilder, Breach of Treaty and Response Thereto, Address for Panel on Some Contemporary Problems in Treaty Law Suggested by the Draft Articles on the Law of Treaties of the International Law Commission (Apr. 8, 1967), 61 PROC. AM. SOC’Y INT’L L. Apr. 27-29, 1967, at 193 (examining the different roles of the concept of treaty breach in international and domestic contexts, addressing the possible implications, and advocating empirical research). For a discussion of interpretation by national officials of international agreements of a “political” character (i.e., those that are unlikely to the submitted to impartial tribunals), see Johnstone, supra note 35.
its lead role in the conduct of the foreign relations of the United States. The legislative branch also approaches treaty interpretation in a political context. Thus, it may be concerned with harmonizing the international undertakings of the United States with national legislative policies. The Legislative branch is also subject to short-term political pressures; and it may be concerned with preserving its institutional role or particular foreign policy preference when confronted with executive action.

The judiciary approaches treaty interpretation from a markedly different perspective. First and foremost, it is concerned with deciding the particular case that is before it. More broadly, it is concerned with the rule of law and with its own proper institutional role. Also, because treaty interpretation involves the foreign relations of the United States, courts are concerned with effectuating the policies of those parts of the government which are charged with primary responsibility in that area. While this may require the serious consideration of the views of the executive branch, nevertheless the courts remain the final arbiters of the meaning of the agreement.

The application of these general political concerns in particular cases, however, necessarily depends upon the nature of the agreement that is before the court for interpretation. At one extreme, a court might characterize a question of interpretation as a political question, and, in effect,

455. See supra note 452 and accompanying text.
456. For a discussion of adjudicative interpretation, see Owen M. Fiss, Objectivity and Interpretation, 34 STAN. L. REV. 739 (1982).
457. See Koh, supra note 452, at 334 (stating that the foreign affairs power and the power of treaty interpretation are allocated among the three branches of government).
458. Koh states: Article III of the Constitution (not to mention Marbury v. Madison) settled that the courts, not the President or the Senate, bear the final authority to decide cases and controversies arising under treaties made by the United States. Once the Supreme Court has ruled on a matter of treaty interpretation, its ruling is authoritative as United States law and binds the political branches of the federal government, as well as all lower courts and the states. Koh, supra note 452, at 333; see Vagts, supra note 28, at 482-83 (stating that the courts of the United States assert ultimate authority over treaty interpretation although they place “great” or “decisive” weight on executive branch determinations); RESTATEMENT OF FOREIGN RELATIONS LAW § 326, supra note 26, § 326 (stating, “Courts in the United States have final authority to interpret an international agreement for purposes of applying it as law in the United States, but will give great weight to an interpretation made by the Executive branch”); Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 229 (1986) (holding that a question of treaty interpretation is not a political question).
 defer completely to an executive determination. 459 Although this possibility presently appears to be contrary to current Supreme Court practice, it is not unthinkable that the Court would invoke the doctrine in a particularly sensitive situation. As already noted, however, those treaties which come before United States courts for interpretation in specific cases deal, for the most part, with matters which are "legislative" in nature. Because the political function which such agreements perform is to remove the matter under consideration from the political process and to subject it to resolution according to legal rules and procedures, courts should defer little, if at all, to executive preferences for interpretation. 461

459. See generally, FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS, supra note 230 (arguing that the political-question doctrine is entirely incompatible with the American Constitution and that courts should stop abdicating in foreign affairs cases).

460. See Japan Whaling Ass'n, 478 U.S. at 229 (holding that a question of treaty interpretation is not a political question); see also David J. Bederman, Revivalist Canons and Treaty Interpretation, 41 UCLA L. REV. 953, 955-63 (1994) (discussing recent treaty jurisprudence in the United States Supreme Court).

461. Interpretation by the courts, even of sensitive international agreements in delicate situations, may be politically useful to the executive. See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 113-14 (1962) (quoting a letter dated July 18, 1793, from Secretary of State Jefferson to Chief Justice Jay and his Associate Justices). The letter reads in part:

Gentlemen:

The war which has taken place among the powers of Europe produces frequent transactions within our ports and limits, on which questions arise of considerable difficulty, and of greater importance to the peace of the United States. These questions depend for their solution on the construction of our treaties, on the laws of nature and nations, and on the laws of the land, and are often presented under circumstances which do not give a cognizance of them to the tribunals of the country. Yet, their decision is so little analogous to the ordinary functions of the Executive, as to occasion much embarrassment and difficulty to them. The President therefore would be much relieved if he found himself free to refer questions of this description to the opinions of the judges of the Supreme Court of the United States, whose knowledge of the subject would secure us against errors dangerous to the peace of the United States, and their authority insure the respect of all parties.

Id. The Justices, by a letter to the President, dated August 8, 1793, declined to answer such questions submitted to them on the grounds that the Court's function was to decide actual controversies. Id. at 114; see Kratochwil, The Role of Domestic Courts as Agencies of the International Legal Order, in INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 236, supra note 297, at 240-41 (discussing the unvariability of judicial remedy when the issue involves foreign relations).
Furthermore, assuming that one should interpret a particular agreement to further United States interests, the judiciary is clearly the branch of government best equipped to determine the long-term interests of the United States in the interpretation of a particular international agreement. This is because the judiciary is not subject to the intense political pressures, deriving from both domestic and international sources, as are the political branches of government. Courts can thus give full consideration to the matters which the agreement addresses in the "depoliticized" context which the parties intended to establish by entering into the agreement in the first place.

Developments in the law of sovereign immunity of the United States provide a useful lesson in the advantages of the "depoliticization" of decision-making in the foreign affairs area. These developments provide convincing evidence that removing foreign affairs matters, in appropriate cases, from the political realm to judicial resolution, actually reduces political tensions and occasions for political confrontation, to the benefit of the United States and the other states involved. As the legislative history of the Foreign Sovereign Immunities Act of 1976 clearly indicates, this was the actual intention of the Department of State in sponsoring the legislation.

An analogous process operates in technical spheres, where policy decisions are increasingly made by experts, thereby removing such decisions from the political process. See also Haas, supra note 442, at 8 (quoting Harvey Brooks, Scientific Concepts and Cultural Change, DAEDALUS, Winter 1965, at 68: "Much of the history of social progress in the Twentieth Century can be described in terms of the transfer of wider and wider areas of public policy from politics to expertise").

462. See, e.g., infra note 463 and accompanying text.


The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts.

Almost all treaties that come before United States courts for interpretation are legislative in character: they establish general legal regimes for the regulation of particular problems. In almost all cases, these agreements do not raise sensitive national security issues. They tend rather to involve rules concerning ordinary governmental operations, albeit in a transnational setting. The treaties involved in Sale, Alvarez-Machain, Schlunk, Aérospatiale, and Sumitomo provide excellent examples. With the possible exception of the Refugee Convention involved in the Sale case, the other treaties clearly fit this pattern. As such, their political function is to remove the particular matters under consideration from the political realm and to subject them to the rule of law. By performing this function, these treaties allow, and mandate, interpretation and application in such manner so as to effectuate the long-term interests of the United States, as dispassionate judicial analysis determines those interests, eschewing concern for what might appear at the time to be important political interests and judgments.

After the decision in Alvarez-Machain, Dr. Alvarez-Machain was promptly acquitted of the criminal charges against him and allowed to return to Mexico. It is hard to discern any damage to the interests

464. See supra notes 394-400 and accompanying text.
465. See supra notes 401-04 and accompanying text.
466. See supra notes 394-405 and accompanying text.
467. See supra notes 1-3, 12-20 and accompanying text.
468. On the basis of several case studies, Professor Forsythe remarks that Finally, it cannot be stressed too much that there is a profound difference between what is frequently perceived in Washington as necessary for the U.S. national interest in the short term, and what turns out to be necessary for improved international order in the long term. FORSYTHE, supra note 453, at 154; see FRANCIS A. BOYLE, WORLD POLITICS AND INTERNATIONAL LAW (1985) (arguing that adherence to the rules of international law, which develop through the agreements of states indicating how to resolve particular matters, will best serve the interests of the United States); KRATOCHWIL, supra note 178, at 11, 48 (“Norms are . . . not only ‘guidance devices,’ but also the means which allow people to pursue goals, share meanings, communicate with each other, criticize assertions, and justify actions . . . it is the function of norms to fortify socially optimal solutions against the temptations of individually rational defections”).
of the United States by that decision, and whether there would have been any real damage to the political interests of the United States had the Supreme Court allowed him to return to Mexico even without being tried. In fact, by turning the matter of extradition over to the courts, as the treaty does, the executive branch absolves itself of the domestic political cost which it may have incurred by repatriating Dr. Alvarez-Machain on its own.

The aftermath of Sale is somewhat more complicated. In October 1994, the United States, with the approval of the United Nations,470 intervened in Haiti to restore the Aristide government.471 Although undertaken by 15,000 American troops, the intervention took place pursuant to a negotiated agreement472 with Haitian leaders and with minimal violence and few casualties.473 Regardless of the legality or advisability of undertaking this action,474 intervention proved to be a viable option in dealing with the Haitian refugee problem and can be added to the other possible courses of action discussed earlier in this Article.475 In short, there turned out to be no real need for the United States Supreme Court to uphold the government policy of interdicting Haitians on the high seas. The Administration itself ultimately found that policy unsatisfactory as a means of dealing with the constellation of problems produced by the situation in Haiti. Sale, then, like Alvarez-Machain, stands

474. See generally id. (discussing the legality and advisability of United States intervention in Haiti); Michael J. Glennon at 70; Monroe Leigh at 74; Theodor Meron at 78; W. Michael Reisman at 82; and Phillip R. Trimble at 84.
475. See supra note 105. Another possible response to large-scale migrations is temporary refuge. See Joan Fitzpatrick, Flight from Asylum: Trends Toward Temporary "Refuge" and Local Responses to Forced Migrations, 35 VA. J. INT’L L. 13 (1994). But see Louis Henkin, An Agenda for the Next Century: The Myth and Mantra of State Sovereignty, 35 VA. J. INT’L L. 115 ("bristling...at the invocation of state sovereignty as an axiom, even as a kind of mantra...[expressing dismay of] the ‘exclusive power of the state’ over...‘entry into and presence in its territory’...[and] find[ing] no comfort in the invocation of a ‘competing humanitarian impulse,’ with its ring of Victorian charity").
as an example of the Court's responding to short-term political interests with a decision that weakens the treaty relations of the United States, as well as the international rule of law, for no tangible gains of any sort. It would have been far better, in both situations, for the Court to have interpreted the international agreements involved in those cases in a straight-forward, reasonable manner, in accordance with international and national legal standards and principles. Government officials of the United States would then have had to work with these legal "givens" as they proceeded to make decisions and to develop policies. In both cases, ultimate outcomes would probably have been the same.

This discussion of the real international interests of the United States concludes with some remarks of a more general nature. Although Susan Strange is addressing international economic matters, her following comments regarding long-term United States interests have broader relevance:

[Although] there is disorder in the world economy and some disintegration of "regimes" so-called, the reason for this is not to be found in the decline of U.S. power. Rather, the explanation lies in the misuse of American hegemonic power in a unilateralist manner and in pursuit of national interests far too narrowly and shortsightedly conceived. Asymmetric structural power has allowed the United States to break the rules with impunity and to pass the consequent risks and pains of adjustment on to others. This idea has damaged the stability and prosperity of the whole world economy and has not been in the long-term best interests of the United States itself.\textsuperscript{476}

Fundamental to Strange's analysis of the long-term interests of the United States is her view that the power of the United States ultimately rests on its "structural power . . . [—] the ability . . . to determine the way in which certain basic social needs are provided."\textsuperscript{477} Thus, it is the United States that determines the framework within which decisions are made and sanctions applied. "For the target or object of structural power, the price of resistance is determined more by the system than by any other political authority."\textsuperscript{478} From this point of view, enhancing the rule of law in the international community will best achieve the long-term interests of the United States, because when taken collectively, to

\textsuperscript{476} Susan Strange, \textit{Toward a Theory of Transnational Empire}, in Czempiel & Rosenau, \textit{Global Changes and Theoretical Challenges}, \textit{supra} note 280, at 161, 165.

\textsuperscript{477} \textit{Id.}

\textsuperscript{478} \textit{Id.}
the extent that Strange's analysis is correct, the rules and principles of international law embody the structure of the international political system, a system which the United States, by and large, determines, and which serves the interests of the United States.

CONCLUSION

Professor Virally observed that the old expression *ubi societas, ibi jus* (where there is society, there is law) is equally true if it is transposed to read *ubi jus, ibi societas* (where there is law, there is society). That is to say, it is not necessarily political community that precedes law, but that it is law that defines and gives coherence to political community. Law, in fact, is the language in which political community is expressed; and legal institutions and processes are the organizational manifestations of political community. The formulation of legal principles and the establishment of legal institutions are always mixed acts (*actes charnières*, to paraphrase Serge Sur); that is, they are expressions of existing community on the one hand and claims or arguments that community exists on the other. Thus, law, even substantive law, is not only normative, but also constitutive. This is equally true for the decisions of courts interpreting and applying law.

When viewed in this light, the decisions of national courts interpreting and applying international agreements and the doctrinal rationales which national courts advance for particular approaches, are not only expressive of underlying ideas of international political community, but are also claims and arguments for the existence of community. To the extent that courts advance these claims, and people accept as reasonable and appropriate their decisions based on these claims, community is proclaimed, defined, and enhanced.

One can also express similar conclusions in contemporary international relations terms. As Alexander Wendt has argued in an important

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479. Virally, *supra* note 384, at 36. Professor Virally writes that "in reality, neither terms takes precedence. It is in submitting itself to a legal order, even an embryonic and primitive one, that a social group consolidates and differentiates itself enough to form a society." *Id.*

480. *See generally* PETER L. BERGER & THOMAS LUCKMAN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE ON THE SOCIOLOGY OF KNOWLEDGE (1966) (discussing the role of knowledge in Society, developing a theory for the sociology of knowledge, and arguing that the sociology of knowledge is concerned with the analysis of the social construction of reality).
article dealing with the consequences of the present “anarchy” in international society,

self-help and power politics do not follow either logically or causally from anarchy and that if today we find ourselves in a self-help world, this is due to process, not structure. There is no “logic” of anarchy apart from the practices that create and instantiate one structure of identities and interests rather than another; structure has no existence or causal powers apart from process. Self-help and power politics are institutions, not essential features of anarchy. Anarchy is what states make of it.482

While cases involving the interpretation of international agreements by national courts represent only one small part of the flow of decisions that impact law in the international community, they are nonetheless a highly significant part, for they represent the efforts of the states to harmonize their actions and to settle their differences, as well as differences involving their nationals, on the basis of principles rather than politics. The extent to which national courts contribute to the enlargement of this legal enclave, this sphere of legality, in the international political process serves the interests of all states and their leaders in the

481. See generally Hedley Bull, The Anarchical Society: A Study of Order in World Politics 46-51 (1977) (discussing the anarchical international society as a result of the absence of government or rule, and attacking the argument that states do not form a society because they are in a condition of international anarchy).


In short, we see international relations as an overlapping web of hierarchical [directive-rules], heteronomous [commitment-rules], and hegemonial [instruction-rules] relations of rule . . . [W]e do not view the formally anarchic character of interstate relations—as opposed to domestic politics—as the distinguishing analytical feature of world politics. Rather the paradigm of rule forces us to acknowledge the remarkable analytical similarities between domestic and international politics. It does so by turning our attention toward the pervasive presence of rules and rule, and away from the presence or absence of specific institutions.

Nicholas Onuf & Frank F. Klink, Anarchy, Authority, Rule, 33 INT’L STUD. Q. 149, 170 (1989); see Nicholas Onuf, Do Rules Say What They Do? From Ordinary Language to International Law, 26 HARV. INT’L L. J. 385 (1985) (arguing that the reality of the international order can be anchored in contemporary philosophy of language).
construction of a more stable, predictable, and less contentious, and ultimately more peaceful, efficient, and harmonious international order. 483

483. Kratochwil, supra note 229, at 59 (writing that “regimes are usually the result of accretion and incremental choices . . . .” Moreover, [a]ctors are not only programmed by rules and norms, but they reproduce and change by their practice the normative structures by which they are able to act, share meanings, communicate intentions, criticize claims, and justify choices. Thus, one of the most important sources of change . . . is the practice of the actors themselves and its concomitant process of interstitial law-making in the international arena.

Id. at 61; see John G. Ruggie, International Structure and International Transformation: Space, Time, and Method, in Czempiel & Rosenau, GLOBAL CHANGES AND THEORETICAL CHALLENGES, supra note 280, at 21, 32 (stating, “[T]he fabric of international life is made up of micro cases . . . . If change comes it will be the product of micro practices. Hence if we want to understand change or help to shape it, it is to these micro practices that we should look”).