

# HOLDING INTERNATIONAL ORGANIZATIONS ACCOUNTABLE UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT: CIVIL ACTIONS AGAINST THE UNITED NATIONS FOR NON-COMMERCIAL TORTS

## I. INTRODUCTION

### A. *The Mitrovica Detention Center*

During the afternoon hours of April 17, 2004, bedlam reigned at the U.N.-run Mitrovica Detention Center in northern Kosovo.<sup>1</sup> Having completed the first day of pre-induction training, a group of international correctional and police officers<sup>2</sup> were preparing to exit the facility when an assailant unexpectedly began firing at the group's three-vehicle convoy.<sup>3</sup> Trapped between the facility's closed gate and several buildings, the officers were in the "killing zone" of the Jordanian shooter's deadly volley.<sup>4</sup> But for a fortuitous event—the malfunctioning of the gunman's weapon—the officers would have been unable to mount the counterattack which ultimately ended the unprovoked assault.<sup>5</sup> In the end, three Americans lay dead while eleven others suffered serious injury.<sup>6</sup>

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1. Press Briefing, United Nations Interim Administration Mission in Kosovo, Statement of Police Commissioner Stefan Feller, Special Press Conference on Shooting Incident in Mitrovica Detention Centre Involving International Officers, Unofficial Transcript (Apr. 18, 2004), *available at* <http://www.unmikonline.org/press/2004/trans/tr180404.pdf>.

2. The group of twenty-four international officers consisted of twenty-one Americans, two Turks, and one Austrian. *Id.*

3. *Id.*

4. *Kosovo Prison Shooter May Have Had Hamas Ties*, FOXNEWS.COM, Apr. 24, 2004, <http://www.foxnews.com/story/0,2933,118065,00.html> [hereinafter *Kosovo Prison Shooter*]. Although the gunman was actually Palestinian, for consistency, I refer to him in this Note as Jordanian since he was a member of that country's police contingent.

5. In fact, once the assailant's weapon malfunctioned, the officers, who were originally armed only with pistols, seized several automatic rifles from the perpetrator's fellow countrymen and counterattacked the gunman's position, striking him fatally sixteen times. *Id.*

6. At the conclusion of the attack, two American officers had been killed, in addition to the Jordanian gunman. Press Release, United Nations Interim Administration Mission in Kosovo, SRSG Expresses Shock and Dismay at the Shooting Incident Involving International Officers, U.N. Doc. UNMIK/PR/1169 (Apr. 17, 2004), *available at* <http://www.unmikonline.org/press/2004/pressr/pr1169/pdf>. However, within days, another American officer died as a result of injuries sustained during the incident. Eli Kintisch, *Man Hurt in Shooting in Kosovo Dies from Wounds*, ST. LOUIS POST-DISPATCH, Apr. 26, 2004, at A8. The deceased American officers were Gary A. Weston, 52; Kim Marie Bigley, 47; and Lynn Marie Williams, 48. Michael Kelly, *Corrections Officers Shot at U.N.*

In the context of the numerous and often volatile regional conflicts and terrorist attacks of the late twentieth and early twenty-first centuries, this episode does not appear to be anything but a commonplace event. What makes this particular incident extraordinary is not that it occurred; rather, it is the relationship of the perpetrator to the victims of his homicidal and maniacal rampage.<sup>7</sup> The gunman, Ahmed Mustafa Ibrahim Ali, was a Sergeant Major in the Jordanian Special Police Unit, a contingent of the civilian police force of the United Nations Interim Administration Mission in Kosovo (UNMIK). The targets of Ali's rage: his fellow officers.<sup>8</sup>

Adding insult to injury, the post-incident actions of the victims' employer—the United Nations—can be described as equally despicable. According to one of the injured officers, the United Nations failed to provide the necessary follow-up medical or psychological care.<sup>9</sup> Nor did the United Nations compensate the officers or their respective estates for any lost wages.<sup>10</sup>

### *B. Scope of This Note*

What remedies do these victims have? Can they sue the United Nations under the doctrine of respondeat superior?<sup>11</sup> Or is the United Nations immune from liability for its actions and those of the employee-gunman? Short of a private bill,<sup>12</sup> what is the current status of the law in this regard? More importantly, can existing laws be used to compensate the victims?

*Detention Center in Kosovo*, CORRECTIONS TODAY, June 2004, at 62, available at <http://www.aca.org/fileupload/177/prasannak/kosovo.pdf>.

7. The term "maniacal" is an apt description of the gunman since, according to survivor accounts, the Jordanian was "smiling during his shooting spree." *Kosovo Prison Shooter*, *supra* note 4.

8. *Id.* Special Police Units (SPUs) are highly mobile, self-sufficient, paramilitary forces capable of rapid deployment to high-risk situations and, as such, are distinct from the regular UNMIK Police. Generally, SPU officers conduct crowd control during violent demonstrations and civil unrest; provide facility protection where necessary; and, ironically, provide protection and security to U.N. officials, UNMIK Police, and Border Police in the discharge of their duties. UNMIKOnline.org, Police & Justice (Pillar I)—Police, <http://www.unmikonline.org/justice/police.htm> (last visited Feb. 2, 2007).

9. Jeff Golimowski, *Worker Injured in Kosovo Says She Has Been Brushed Aside*, KAKE.COM, Mar. 23, 2006, <http://www.kake.com/home/headlines/2518316.html>. By way of illustration, Elizabeth Mechler, a correctional officer from Kansas, received a gunshot wound to the femoral artery of her left leg, returned to duty with crutches after six days in a military hospital, and was then summarily returned to the United States within a year. *Id.*

10. *Id.*

11. An open issue, not addressed in this Note, is whether Jordan, as the nation which "seconded" Ali to the United Nations, could be held vicariously liable for the officers' injuries.

12.

Private laws differ from public laws in that they lack general applicability and do not apply to all persons. Instead they are generally designed to provide legal relief to specified persons or entities adversely affected by laws of general applicability. Private laws apply only to the

This Note attempts to answer these questions. In Part II, I provide some background and briefly describe the two statutes relevant to any inquiry potentially involving tort claims against an international organization. In Part III, I discuss two independent approaches to overcoming the inevitable claim of immunity. Finally, in Part IV, I apply the results of my examination to the aforementioned incident. Of course, the best starting point for any analysis involving potential suits against the United Nations or its political trustee<sup>13</sup> is a short history of the wounded officers' primary obstacle: immunity.

## II. SOVEREIGN IMMUNITY

### A. *The Evolution of Sovereign Immunity*

#### 1. *Absolute Immunity*

"Chief Justice Marshall's opinion in *The Schooner Exchange v. McFaddon*<sup>[14]</sup> . . . is generally viewed as the source of [the Supreme Court's] foreign sovereign immunity jurisprudence."<sup>15</sup> In *The Schooner Exchange*, the Court confronted the overarching issue of whether the authority of American courts could be extended over independent sovereign powers. Concluding that "foreign sovereigns have no right to immunity in [American] courts,"<sup>16</sup> the Court nonetheless recognized that

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person named in the law and grant a benefit from the government to that person, not otherwise authorized by law . . . . The simplest definition of a private bill was offered by the late Asher Hinds, House Parliamentarian: A private bill is a bill for the relief of one or several specified persons, corporations, institutions, etc., and is distinguished from a public bill, which relates to public matters and deals with individuals only by classes.

Matthew Mantel, *Private Bills and Private Laws*, 99 LAW LIBR. J. 87, 88 (2007) (internal quotation marks and footnotes omitted).

13. Henry H. Perritt, Jr., *Providing Judicial Review for Decisions by Political Trustees*, 15 DUKE J. COMP. & INT'L L. 1, 1 n.1 (2004) (citing Henry H. Perritt, Jr., *Structures and Standards for Political Trusteeship*, 8 UCLA J. INT'L L. & FOREIGN AFF. 385, 389 (2003)) (defining political trustee as one or more states or international organizations exercising sovereignty over foreign territory).

14. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). Libellants alleged that while sailing to Spain on their vessel, it was seized on the orders of Napoleon, the Emperor of France, and outfitted as a "national armed vessel" of that country. *Id.* at 117, 146. Having been commissioned as a public vessel, it was later driven into the port of Philadelphia for safe harbor as a result of inclement weather, whereupon, the vessel "was seized, arrested, and detained in pursuance of the process of attachment issued upon the prayer of the libellants." *Id.* at 118.

15. *Austria v. Altmann*, 541 U.S. 677, 688 (2004).

16. *Id.* See *The Schooner Exchange*, 11 U.S. at 136 ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent

as a matter of grace and comity, the United States impliedly waives its jurisdiction over certain activities of foreign sovereigns.<sup>17</sup>

Interpreting *The Schooner Exchange* as extending absolute immunity<sup>18</sup> to foreign sovereigns<sup>19</sup> and noting that immunity is not mandatory under the Constitution, the Court began the practice of regularly deferring to the executive branch for the determination of whether a foreign sovereign should be granted immunity in an action before a court.<sup>20</sup>

Such deference to executive discretion by the courts was firmly established in a series of cases which reached the Supreme Court in the 1940s. In *Ex parte Peru*,<sup>21</sup> concluding that “the case involves the dignity and rights of a friendly sovereign state,”<sup>22</sup> the Supreme Court felt compelled to grant the requested relief<sup>23</sup> in order to avoid the delay and inconvenience of prolonged litigation.<sup>24</sup> To hold otherwise—allowing courts to seize and detain the property of foreign sovereigns—would “embarrass the executive arm of the government in conducting foreign relations.”<sup>25</sup> The Court commented further that when the Department of State through its Secretary chooses to settle claims against a vessel via

in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.”)

17. *The Schooner Exchange*, 11 U.S. at 137 (“This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive [sic] the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.”); *Altmann*, 541 U.S. at 688.

18. Absolute immunity, also known as “classical immunity,” is defined as the inability of one sovereign to be made a respondent in a case before a court of another sovereign without the consent of the former. Tate Letter, *infra* note 32, at 984.

19. *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486 (1983) (“Although the narrow holding of *The Schooner Exchange* was only that the courts of the United States lack jurisdiction over an armed ship of a foreign state found in our port, that opinion came to be regarded as extending virtually absolute immunity to foreign sovereigns.”).

20. *Id.*

21. *Ex parte Peru*, 318 U.S. 578 (1943).

22. *Id.* at 586–87.

23. *Id.* at 589–90. In the lower court, a Cuban corporation filed a libel suit against the Peruvian steamship “Ucayali” for failure to follow through on a charter agreement entered into between the corporation and a Peruvian corporation acting on behalf of the government of Peru. *Id.* at 580. The government of Peru sought and received from the U.S. Department of State formal recognition of the claim of immunity; however, the district court refused to accept the executive grant of immunity. *Id.* at 581–82. On a motion for leave to file a petition for a writ of prohibition or mandamus, the Republic of Peru sought to prevent the District Court for the Eastern District of Louisiana from exercising continued jurisdiction over the steamship. *Id.* at 579. The motion was granted; however, the Supreme Court was of the opinion that formal issuance of a writ would be unnecessary, such that it would issue only upon further application by the petitioner. *Id.* at 590.

24. *Id.* at 587.

25. *Id.* at 588.

diplomatic channels instead of continued litigation in a court of law, “it is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized . . . .”<sup>26</sup>

Two years later, in the case of *Mexico v. Hoffman*,<sup>27</sup> the Supreme Court was confronted with a situation similar to that which occurred in *Ex parte Peru*.<sup>28</sup> Reiterating Chief Justice Marshall’s introduction of the practice of deferring to the executive branch,<sup>29</sup> the Court refused to grant immunity to the foreign sovereign, thus permitting the action to be pursued against Mexico. In so holding, the Court stated that “[i]n the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of immunity exist.”<sup>30</sup> The Court concluded by stating that “it is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize.”<sup>31</sup>

## 2. Restrictive Immunity

In a 1952 letter (Tate Letter) to the Acting Attorney General, the U.S. Department of State announced the formal adoption of the policy of denying immunity to foreign sovereigns for certain categories of activities.<sup>32</sup> This policy shift from granting absolute immunity to

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26. *Id.* at 587. “[T]he judicial seizure of the vessel of a friendly foreign state is so serious a challenge to its dignity, and may so affect our friendly relations with it, that courts are required to accept and follow the executive determination that the vessel is immune.” *Id.* at 588.

27. *Mexico v. Hoffman*, 324 U.S. 30 (1945).

28. In this libel in rem action against the ship “Baja California,” the Republic of Mexico, through its ambassador, claimed that title to the ship was held in the name of the Republic. *Id.* at 31. Plaintiff challenged the claim to title and averred that at no time was the ship within the government’s possession, public service, or use. *Id.* Acting through the U.S. Attorney for the district, the U.S. Department of State reiterated Mexico’s claim to title but took no position regarding the vessel’s immunity. *Id.* at 31–32. Finding no precedent, the district court denied the claim to immunity. *Id.* at 32. The district court denied a second claim to immunity, and on the merits, granted judgment in favor of libellant. *Id.* at 32–33. On appeal, the Ninth Circuit found that Mexico was not immune due to lack of possession and service. *Id.* at 33.

29. *Id.* at 34.

30. *Id.* at 34–35.

31. *Id.* at 38.

32. Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), 26 Dep’t State Bull. 984 (1952), reprinted in Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 711 (1976) [hereinafter Tate Letter]; *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 487 (1983) (“[I]n the so-called Tate Letter, the State Department announced its adoption of the ‘restrictive’ theory of foreign sovereign immunity.”). See also H.R. REP. NO. 94-1487, at 8 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6607.

restrictive immunity<sup>33</sup> was founded upon multiple rationales.<sup>34</sup> First, and most importantly, the State Department recognized the growing trend among members of the international community to abandon absolute immunity in favor of restrictive immunity.<sup>35</sup> Second, since the grant of absolute immunity was based on reciprocity rather than right, granting such immunity would be “inconsistent with the action of the Government of the United States in subjecting itself to suit . . . and with its long established policy of not claiming immunity in foreign jurisdictions . . . .”<sup>36</sup> Lastly, restrictive immunity allows courts to determine the rights of persons wronged through their interaction with those governments that participate in activities traditionally reserved for commercial enterprises.<sup>37</sup>

According to the Supreme Court, the Tate Letter, with its adoption of the doctrine of restrictive immunity, had little positive effect on the necessary analysis completed by federal courts when determining if a foreign nation should receive immunity.<sup>38</sup> Indeed, the Tate Letter actually *caused* additional problems for both the executive and judicial branches, as well as for the litigants themselves.<sup>39</sup>

33. Restrictive immunity is defined as “the immunity of [a] sovereign . . . with regard to . . . public acts (*jure imperii*) . . . , but not with respect to private acts (*jure gestionis*).” Tate Letter, *supra* note 32, at 984.

34. *Alfred Dunhill*, 425 U.S. at 702.

35. Tate Letter, *supra* note 32, at 984; *Alfred Dunhill*, 425 U.S. at 704 (“There may be little codification or consensus as to the rules of international law concerning exercises of Governmental powers, including military powers and expropriations, within a sovereign state’s borders affecting the property or person of aliens. However, more discernible rules of international law have emerged with regard to the commercial dealing of private parties in the international market.”).

Discussing the effect such a trend should have on a court’s analysis, the Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964), stated that

the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.

36. Tate Letter, *supra* note 32, at 985 (noting that, in addition to the United States, ten of thirteen signatories to the Brussels Convention of 1926 “have already relinquished by treaty or in practice an important part of the immunity which they claim under the classical theory”).

37. *Id.*; *Alfred Dunhill*, 425 U.S. at 703–04 (“Of equal importance is the fact that subjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts. In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens. Subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on ‘national nerves.’”) (citation omitted).

38. *Austria v. Altmann*, 541 U.S. 677, 689–90 (2004).

39. *Id.* The Court noted several inter-related problems. First, foreign nations would often place undue diplomatic pressure upon the State Department, which would then file “suggestions” with the court. Second, immunity determinations became troublesome for courts when either foreign nations

### B. *Foreign Sovereign Immunities Act*

Following several years of study, draft bills, and minor technical improvements, Congress passed the Foreign Sovereign Immunities Act<sup>40</sup> (FSIA) in 1976<sup>41</sup> with the intent to correct the problems and deficiencies of the old regime.<sup>42</sup> The FSIA accomplishes several objectives,<sup>43</sup> two of which are of primary importance here: first, the FSIA codifies the doctrine of restrictive immunity; second, it transfers immunity determinations squarely from executive departments to the judicial branch.<sup>44</sup>

The structure of the FSIA, in particular section 1604,<sup>45</sup> presupposes immunity for the foreign sovereign.<sup>46</sup> Nonetheless, following this grant of statutory immunity are several provisions which set forth the exceptions under which a court of the United States may exercise jurisdiction over a foreign government.<sup>47</sup>

### C. *International Organizations Immunities Act*

Thirty years earlier, at the conclusion of World War II and before issuance of the Tate Letter, absolute immunity was still the predominant theory to which the United States and the international community adhered. This period also saw an increased presence and participation of international organizations in international affairs.<sup>48</sup> In order to address a

failed to request immunity from the State Department or the Secretary failed or refused to file recommendations with the court. Third, with the aforementioned problems in mind, the determinations of immunity would be made in two separate branches of government without clear or uniform standards. *See id.* at 690–91.

40. Foreign Sovereign Immunities Act (FSIA) of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.).

41. H.R. REP. NO. 94-1487, at 9–10.

42. *Id.* at 6–7.

43. The FSIA codifies the restrictive principle of sovereign immunity, ensures that this principle is applied in litigation before U.S. courts, provides for statutory procedures for obtaining in personam jurisdiction over foreign states, and conforms the execution immunity rules more closely to the jurisdictional immunity rules. *Id.* at 7–8.

44. *Austria v. Altmann*, 541 U.S. 689, 691 (2004). *See also* Kathleen Cully, Note, *Jurisdictional Immunities of Intergovernmental Organizations*, 91 YALE L.J. 1167, 1172 (1982).

45. The text of § 1604 reads as follows: “Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.” 28 U.S.C. § 1604 (2000).

46. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993).

47. H.R. REP. NO. 94-1487, at 17. *See also Altmann*, 541 U.S. at 691 (“[T]he Act carves out certain exceptions to its general grant of immunity . . .”).

48. Thomas J. O’Toole, *Sovereign Immunity Redivivus: Suits Against International Organizations*, 4 SUFFOLK TRANSNAT’L L. J. 1, 1 (1980).

perceived lack of protection for these newly emerging bodies, Congress passed the International Organizations Immunities Act<sup>49</sup> (IOIA) in 1945.<sup>50</sup> The central function of the IOIA was to grant international organizations “privileges and immunities of a governmental nature.”<sup>51</sup>

By conferring these privileges and immunities upon recognized international organizations,<sup>52</sup> the United States accomplished several important goals. Such legislation served the self-interest of the United States<sup>53</sup> and satisfied a likely condition precedent to the establishment of the headquarters of the United Nations in the United States.<sup>54</sup> Moreover, enactment of a law immunizing international organizations brought the United States in line with other nations’<sup>55</sup> actions to address the same problems.<sup>56</sup>

Herein lies the central problem. Given this bifurcated immunity scheme—one statute for foreign sovereigns and another for international organizations, the latter granting unqualified immunity—can the UNMIK police officers sue the United Nations? The answer to this question must be in the affirmative.

49. International Organizations Immunities Act (IOIA), Pub. L. No. 79-291, 59 Stat. 669 (1945) (codified at 22 U.S.C. §§ 288–288k (2007)).

50. H.R. REP. NO. 79-1203, at 946–47 (1945), *reprinted in* 1945 U.S. Code Cong. Serv. 946 (“[I]n cases where this Government associates itself with one or more foreign governments in an international organization, there exists at the present time no law of the United States whereby this country can extend privileges of a governmental character with respect to international organizations or their official in this country. It is to fill this need that this bill has been presented.”).

51. *Id.* at 946.

52. In order to qualify as an international organization under the IOIA, the entity must be public in character and one in which

the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities herein provided.

22 U.S.C. § 288 (2000).

53. H.R. REP. NO. 79-1203, at 947 (“[T]he self-interest of this Government in legislation of this character is twofold since such legislation will not only protect the official character of public international organizations located in this country but it will also tend to strengthen the position of international organizations of which the United States is a member when they are located or carry on activities in other countries.”).

54. *Id.*

55. The legislative history of the IOIA specifically identified the governments of Switzerland, Great Britain, Canada, and the Netherlands as having taken some action regarding international organizations. *Id.* at 947–48.

56. *Id.*

### III. RATIONALES FOR APPLICATION OF THE FSIA TO INTERNATIONAL ORGANIZATIONS

#### A. *The IOIA, FSIA, and Statutory Construction*

##### 1. *The “Plain Meaning” Rule*

The Supreme Court has clearly articulated that in the construction of a statute, a court should initially rely on the text of the statute itself.<sup>57</sup> “As in all statutory construction cases, [a court must] begin with the language of the statute. The first step ‘is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.’”<sup>58</sup> If the statutory language is unambiguous, no further inquiry is warranted.<sup>59</sup>

The immunity-granting provision of the IOIA<sup>60</sup> provides that “[i]nternational organizations . . . shall enjoy the *same* immunity . . . as is enjoyed by foreign governments . . . .”<sup>61</sup> On its face, the language of the provision is so unmistakable and singularly self-explanatory that the phrase is capable of only one interpretation: the immunity possessed by international organizations is neither greater nor less than whatever immunity is possessed by foreign governments.<sup>62</sup>

57. John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373, 1374 (1992) (“The Supreme Court has reminded us over and over again that when federal judges are required to interpret acts of Congress, they must begin by reading the text of the statute. As one rather weary opinion writer has repeatedly explained, ‘[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.’” (quoting *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984))). See generally NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46:1 (7th ed. 2007), Vol. 2A (noting a variety of expressions which explain the plain meaning rule).

58. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)).

59. *Id.*

60. 22 U.S.C. § 288a(b) (2000).

61. *Id.* (emphasis added). The full text of the statute provides that

[i]nternational organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.

*Id.*

62. O’Toole, *supra* note 48, at 11–12 (“The overriding Congressional intent which springs from a reading of the immunity provisions of the Act is that international organizations and foreign sovereigns shall be treated the same.”). *Contra* Gordon H. Glenn, Mary M. Kearney & David J. Padilla, *Immunities of International Organizations*, 22 VA. J. INT’L L. 247, 256 (1981–82) (“Purely as a matter of logic, this language is susceptible of two interpretations. Either it grants to international

Yet, despite the use of this patently unambiguous language, the provision has been repeatedly questioned by legal scholars nearly from its inception,<sup>63</sup> and largely overlooked by the courts.<sup>64</sup> Working under the premise that the statutory language at issue is capable of more than one interpretation, a court's analysis will typically involve some review of legislative history in an effort to discern Congressional intent.<sup>65</sup> It is upon this generalization that opponents of the "plain meaning" rule have relied in rejection of the idea that the FSIA altered the absolute immunity scheme originally propounded by the IOIA.

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organizations the absolute immunity enjoyed by foreign sovereigns in 1945, or the restrictive immunity presently applicable under the FSIA.").

63. Glenn et al., *supra* note 62, at 248 ("[T]he unfortunate shorthand employed by the drafters of the IOIA has generated considerable confusion over the precise scope of international organizations' immunities ever since 1952.").

64. Rendall-Speranza v. Nassim (*Rendall II*), 932 F. Supp. 19, 24 (D.D.C. 1996) ("Courts that have been presented with this question have avoided deciding it on the basis that the particular international organization at issue was immune from suit whether or not the FSIA applied."). *See, e.g.*, Broadbent v. Org. of Am. States, 628 F.2d 27, 32–33 (D.C. Cir. 1980) (noting but not deciding this issue of statutory construction); Rendall-Speranza v. Nassim (*Rendall III*), 107 F.3d 913, 916–17 (D.C. Cir. 1997) (same). *But see* Atkinson v. Inter-American Dev. Bank, 156 F.3d 1335, 1341 (D.C. Cir. 1998) ("[D]espite the lack of clear instruction as to whether Congress meant to incorporate in the IOIA subsequent changes to the law of immunity of foreign sovereigns, Congress' intent was to adopt that body of law only as it existed in 1945—when immunity of foreign sovereigns was absolute.").

65. *See, e.g.*, Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 65 (2004) (Stevens, J., concurring) ("[I]t is always appropriate to consider all available evidence of Congress' true intent when interpreting its work product."); Maine v. Thiboutot, 448 U.S. 1, 13–14 (1980) (Powell, J., dissenting) ("[T]he 'plain meaning' rule is not as inflexible as the Court imagines. Although plain meaning is always the starting point, this Court rarely ignores available aids to statutory construction. We have recognized consistently that statutes are to be interpreted not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed.") (citations and internal quotation marks omitted). *But see, e.g.*, Zedner v. United States, 547 U.S. 489, 510–11 (2006) (Scalia, J., concurring in part) ("[I]f legislative history is relevant when it confirms the plain meaning of the statutory text, it should also be relevant when it contradicts the plain meaning, thus rendering what is plain ambiguous. . . . [T]he use of legislative history is illegitimate and ill advised in the interpretation of any statute—and especially a statute that is clear on its face . . ."); Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) ("Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in 'looking over a crowd and picking out your friends.' Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.") (citation omitted).

## 2. *Discerning Legislative Intent*

As noted by the U.S. House of Representatives Committee on Ways and Means, “[t]he basic purpose of [the IOIA] is to confer upon international organizations and officials and employees thereof, privileges and immunities of a governmental nature.”<sup>66</sup> According to the drafters of the IOIA, these privileges and immunities were only considered to be similar to those immunities granted to foreign governments and officials.<sup>67</sup>

Referring to specific language within the committee report, these same opponents emphasize that the immunity granted to international organizations is only “similar to” that of foreign states,<sup>68</sup> and then only “of a governmental character.”<sup>69</sup> Apparently, the gist of this argument seems to be that since the language in the legislative history is somehow textually different from the statutory language,<sup>70</sup> Congress could only have intended to confer upon international organizations immunity comparable to, but not equivalent or identical to, that which is enjoyed by foreign states.<sup>71</sup> This argument does find some support in the statement by the committee “that the privileges to which international organizations . . . will be entitled are *somewhat more limited* than those which are extended by the United States to foreign governments.”<sup>72</sup> However, even if this statement is taken

66. H.R. REP. NO. 79-1203, at 946.

67. *Id.* at 950.

68. Cully, *supra* note 44, at 1171–72; Richard J. Oparil, *Immunity of International Organizations in United States Courts: Absolute or Restrictive?*, 24 VAND. J. TRANSNAT’L L. 689, 705–06 (1991).

69. Cully, *supra* note 44, at 1171–72; H.R. REP. NO. 79-1203, at 947.

70. Compare *supra* note 61 and accompanying text with *supra* text accompanying notes 66–67.

71. Oparil, *supra* note 68, at 705–06. Oparil further cites to particular language within the committee report to bolster this argument: “this legislation has the advantage of setting forth in *one place* all of the specific privileges which international organizations will enjoy.” *Id.* (citing H.R. REP. NO. 79-1203, at 950) (emphasis added). The inference desired from this committee language could only be that the laws concerning immunity for international organizations must somehow be encapsulated in a single statutory scheme. Thus, what Oparil essentially argues is that the legislative actions of later sessions of Congress are forever bound by the legislative undertakings of earlier sessions of Congress and cannot, for example, arrange the laws concerning immunity for international organizations among multiple statutes or arrive at a desired effect through piecemeal legislation. This is undeniably inaccurate. “[U]nder well-established constitutional precedent, . . . an act of Congress . . . does not bind future Congresses. Like any other act of Congress it may be repealed, modified, or amended at the unilateral will of future Congresses.” *United States v. Lopez Andino*, 831 F.2d 1164, 1172–73 (1st Cir. 1987) (Torruella, J., concurring) (“To be sure, Congress is generally free to change its mind; in amending legislation Congress is not bound by the intent of an earlier body. But it is bound by the Constitution.” (citing *Cnty.-Serv. Broad. of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1113 (D.C. Cir. 1978) (Skelly-Wright, C.J.))).

72. H.R. REP. NO. 79-1203, at 950–51 (emphasis added). This committee statement should not be taken literally, because if the statement is accurate, the statutory language—specifically, the use of the word “same” when referring to the relationship of the immunity of international organizations to that of foreign states in § 288a(b)—would become meaningless. To hold otherwise would violate the

at face value, the argument becomes self-defeating since any immunity different from the absolute immunity enjoyed by foreign nations is, by its very nature, less than absolute.<sup>73</sup> Moreover, any implication that the language in a committee report somehow supersedes the statutory language is inappropriate as “Congress [has] never enacted the language of [a] House Report . . . .”<sup>74</sup>

Of the more commonly asserted reasons given by opponents of any analysis of the IOIA utilizing the “plain meaning” rule is that the structure of the Act clearly signifies Congressional intent to retain the pre-FSIA doctrine of absolute immunity for international organizations.<sup>75</sup> Support for this argument is allegedly found in the IOIA provision which grants the president discretionary power to unilaterally modify the immunity of an international organization.<sup>76</sup> Admittedly, this provision “may indicate

“cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)) (internal quotation marks omitted). *See also, e.g.*, *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (“It is our duty to give effect, if possible, to every clause and word of a statute.”) (internal quotation marks omitted); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (“We are thus reluctant to treat statutory terms as surplusage in any setting. We are especially unwilling to do so when the term occupies so pivotal a place in the statutory scheme . . . .”) (citation and internal quotation marks omitted).

73. Recall that, at the time of issuance of this statement, foreign nations were accorded absolute immunity. In the alternative, the statement in the legislative history can be viewed as merely drawing a distinction between the *quantity* of immunity granted to international organizations and the *quality* of immunity so granted. In 1946, Congress, *inter alia*, granted absolute immunity to “[i]nternational organizations, their property and their assets . . . from suit and every form of judicial process” and further provided that the “[p]roperty and assets of international organizations . . . shall be immune from search . . . and from confiscation.” 22 U.S.C. § 288a(b), (c). In the qualitative sense, Congress could have accorded these same categories with some amount of immunity less than absolute. In a quantitative sense, Congress could have limited an international organization’s absolute immunity to, for example, only suits, but not from search or confiscation. *See, e.g.*, Exec. Order No. 12,425, 48 Fed. Reg. 28,069 (June 16, 1983) (immunity of property and assets of Interpol denied as to search and confiscation but retaining absolute immunity from suit).

74. *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 844 (D.C. Cir. 1984) (Edwards, J., dissenting in part); *see also* *Colo. River Indian Tribes v. Nat’l Indian Gaming Comm’n*, 466 F.3d 134, 139 (D.C. Cir. 2006) (“[A] committee report is not law . . . .”); *Jones v. Senkowski*, 2002 U.S. App. LEXIS 2669, at \*8 (2d Cir. 2002) (opinion vacated and withdrawn by court) (“Legislative history is not ‘the law’ . . . .”). For purposes of this Note, I distinguish between reference to legislative history to aid in the interpretation of a statute and reference to legislative history *instead* of the statute. As the latter gives statutory effect to the language in the legislative history, it is always improper.

75. Jared Sher, *Immunity*, 68 GEO. WASH. L. REV. 769, 771 (2000); Cully, *supra* note 44, at 1170; Glenn et al., *supra* note 62, at 256–57.

76. 22 U.S.C. § 288 (“The President shall be authorized, in the light of the functions performed by any such international organization, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in this subchapter (including the amendments made by this subchapter) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity. The President shall be authorized, if in his judgment such action should be

that Congress perceived the need for such restrictions because the IOIA otherwise granted absolute immunity.”<sup>77</sup> Nevertheless, while the soundness of this explanation is certainly compelling, the original purpose of the presidential modification provision is particularly limited in that it was intended only to curb abuses by international organizations in their *commercial* activities.<sup>78</sup> Given this original purpose, the discretionary nature of this authority, and the drastic consequences to an international organization upon which this power is employed, the use of this provision by the president may not be equitable when the conduct of the international organization is only of a *non-commercial* nature.

Along similar lines, these opponents further challenge any result based upon application of the “plain meaning” rule by emphasizing two aspects of the language of the FSIA itself. The first challenge concerns the FSIA’s statutory definition of “foreign state,”<sup>79</sup> and, in particular, the fact that international organizations are not expressly mentioned within this definition.<sup>80</sup> This argument is unpersuasive. The definition of “foreign state” uses inclusive language (i.e., “includes”),<sup>81</sup> rather than exclusive language (i.e., “means”).<sup>82</sup> While the term “includes” may sometimes be

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justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities herein provided in this subchapter or for any other reason, at any time to revoke the designation of any international organization under this section, whereupon the international organization in question shall cease to be classed as an international organization for the purposes of this subchapter.”).

77. Glenn et al., *supra* note 62, at 257.

78. See, e.g., *Broadbent v. Org. of Am. States*, 628 F.2d 27, 32 (D.C. Cir. 1980) (“The Senate Report on the IOIA stated: ‘This provision will permit the adjustment or limitation of the privileges in the event that any international organization should engage for example, in activities of a commercial nature.’ And in floor debate on the legislation, its supporters pointed again to this provision as a limitation on commercial abuses by an international organization. Hence this provision may reveal that Congress intended to grant absolute immunity to international organizations and give the President the authority to relax that immunity, through removal or restriction of immunity in cases involving the commercial activities of international organizations.”) (citations omitted); *Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335, 1341 (D.C. Cir. 1998) (“Not only does this description of the President’s role suggest that responsibility for modifying immunity granted by the IOIA rests with the President rather than with an evolving separate body of law . . . , it does so with specific regard to the notion of restrictive immunity for commercial activities.”); Lawrence Preuss, *The International Organizations Immunities Act*, 40 AM. J. INT’L L. 332, 335 (1946). But see H.R. REP. NO. 79-1203, at 948 (“The broad powers granted to the President will permit prompt action in connection with any abuse of the privileges and immunities granted hereunder or presumably for other reasons such as the conduct of improper activities by international organizations in the United States.”).

79. Within the FSIA, “[a] ‘foreign state’ . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state . . .” 28 U.S.C. § 1603(a) (2000).

80. Oparil, *supra* note 68, at 706.

81. “The term ‘includes’ . . . when used in a definition . . . shall not be deemed to exclude other things otherwise within the meaning of the term defined.” *Commissioner v. Morgan’s Inc.*, 293 U.S. 121, 125 n.1 (1934).

82. “As a rule, ‘[a] definition which declares what a term ‘means’ . . . excludes any meaning that

taken as synonymous with “means,” this is not necessarily so.<sup>83</sup> “[W]here ‘means’ is employed, the term and its definition are to be interchangeable equivalents, [while] the verb ‘includes’ imports a general class, some of whose particular instances are those specified in the definition.”<sup>84</sup> Thus, the use of the term “includes” within the FSIA definition of “foreign state” clearly implies that international organizations are not necessarily excluded.

The second textual challenge concerns the fact that the FSIA (and its legislative history) mentions the IOIA only with respect to a single provision.<sup>85</sup> This provision retains immunity for property held by international organizations and apparently reinforces the idea that Congress did not alter the immunity of international organizations.<sup>86</sup> This belief is strongly supported by a statement in the committee report that “[t]he reference to ‘international organizations’ in this subsection is not intended to restrict any immunity accorded to such international organizations under any other law or international agreement.”<sup>87</sup> Accordingly, as the IOIA is one such “other law” in relation to the FSIA, it is clear that Congress did not wish for the FSIA to change the immunity originally accorded to international organizations.<sup>88</sup>

Setting aside the legal principle that committee reports are not law,<sup>89</sup> reliance on this committee statement is misplaced. First, supporters of this textual challenge conveniently ignore other important language in the committee statement itself; it is only “this subsection,” i.e., section 1611(a), that precludes the FSIA from disturbing the IOIA absolute

is not stated.” *Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979) (citation omitted).

83. *Morgan’s Inc.*, 293 U.S. at 125 n.1.

84. *Id.* (suggesting that some instances are mentioned and other instances are not). Given the differentiation between “includes” and “means,” my rebuttal argument becomes even more persuasive since Congress utilized both terms within § 1603. Compare § 1603(d) (“A ‘commercial activity’ means . . .”) (emphasis added) with § 1603(a).

85. This reference states that

[n]otwithstanding the provisions of section 1610 of this chapter [concerning the lack of immunity for property in the United States held by foreign states used for commercial activity], the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

28 U.S.C. § 1611(a) (2007).

86. See, e.g., *Broadbent v. Org. of Am. States*, 628 F.2d 27, 31–32 (D.C. Cir. 1980); Oparil, *supra* note 68, at 706–07; Cully, *supra* note 44, at 1176–77.

87. H.R. REP. NO. 94-1487, at 31.

88. Oparil, *supra* note 68, at 707.

89. See *supra* note 74 and accompanying text.

immunity scheme. Nothing in the committee statement suggests that another section could not alter that immunity. Second, the Supreme Court has articulated “that legislative history need not confirm the details of changes in the law effected by statutory language before [the Court] will interpret that language according to its natural meaning.”<sup>90</sup> In other words, Congress can alter statutes, including immunity-granting statutes, with little or no explanation about such change in the legislative history. Lastly, because this committee statement has been wrested from its original context, its meaning is grossly overstated. Under the IOIA, immunity is granted to two distinct classes: international organizations and their property and assets.<sup>91</sup> Yet, the FSIA provision and its corresponding legislative history only relate to the property and assets of international organizations. Indeed, “[t]he purpose of this subsection is to permit international organizations . . . to carry out their function *from their offices located in the United States* without hindrance by private claimants seeking to attach the payment of funds to a foreign state . . . .”<sup>92</sup> Had Congress wanted to secure absolute immunity for international organizations as a whole, the emphasized language would have been superfluous. Its inclusion, therefore, must signify the maximum extent of the restriction on the immunity of international organizations. Similarly, it seems that if Congress wanted to have the effect that has been argued, why would Congress relegate placement of this so-called immunity-saving statement to its current location which pertains exclusively to property, when placement in some other location would more likely have the “intended” effect?<sup>93</sup>

One final reason given for rejecting any conclusion based solely upon the plain language of the IOIA is the subsequent introduction of Senate

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90. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 n.2 (1992).

91. See *supra* notes 60–61.

92. H.R. REP. NO. 94-1487, at 30 (emphasis added).

93. Since Congress was undoubtedly aware of the IOIA when it drafted and enacted the FSIA, it seems likely that Congress would have foreseen, and consequently avoided, potential problems involving the statutory construction of the FSIA by amending the IOIA accordingly. See O’Toole, *supra* note 48, at 11 (“One can certainly argue that if Congress intended to ossify the immunities of international organizations it could easily have so declared by adding the words ‘as of the date of this Act’ to the clause ‘. . . shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments.’”). But see *Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335, 1342 (D.C. Cir. 1992) (expressly rejecting this argument). For an example of such ossification, see *supra* note 45.

“An even more obvious and preferable solution would be an express legislative statement in the original incorporating statute [the IOIA] as to whether later changes in the incorporated measure are also adopted.” R. Pery Sentell, Jr., “*Reference Statutes*”—*Borrow Now and Pay Later?*, 10 GA. L. REV. 153, 155 n.9 (1975).

Bill 2715.<sup>94</sup> Fourteen years after the FSIA became effective, Senator Roth of Delaware proposed legislation which would have expressly defined the immunity granted to international organizations by the IOIA as equivalent to that conferred by the FSIA upon foreign governments.<sup>95</sup> The proposal of this amendment implies that the enactment of the FSIA could not have originally altered the immunity granted to international organizations under the IOIA. After all, if Congress thought the FSIA actually altered the immunity granted to international organizations, why would a Senate amendment stating the same be necessary? Certainly, such an inference is logical since, in rejecting passage of Senator Roth's amendment,<sup>96</sup> Congress may have desired that international organizations continue to enjoy absolute immunity; however, this assumption ignores three important qualifications. First, "Congress does not express its intent by a failure to legislate."<sup>97</sup> Second, the acts or views of a single Senator do not necessarily reflect those of the entire body of Congress.<sup>98</sup> Third, one could also logically infer that Congress did not see a need for any such amendment since the IOIA by its language already had the effect put forth by the amendment.

While looking to Congressional intent may, at times, be useful, doing so overlooks the dilemma that occurs when legislative intent is either inconclusive or, as demonstrated above, interpreted in such a manner that

94. Oparil, *supra* note 68, at 707.

95. The text of S. 2715 is as follows:

Be it enacted . . . , That . . . the International Organizations Immunities Act . . . is amended— . . . by adding at the end [of § 288a(b)] the following new paragraph: "(2) For purposes of this subsection, the phrase 'same immunity from suit and every form of judicial process as is enjoyed by foreign governments' means the same immunity to which foreign states are entitled under sections 1605 through 1607 of title 28, United States Code."

S. 2715, 101st Cong. (1990). The bill also sought to amend the definition of "foreign state" in the FSIA, located at 28 U.S.C. § 1603(a), by inserting the phrase "or any international organization" before the period. *Id.*

96. In fact, S. 2715 was not expressly rejected. The bill was introduced on the floor and referred to the Committee on Judiciary on June 7, 1990. The proposed amendment was later referred to the Subcommittee on Courts and Administrative Practice on September 9, 1990, without further action. Library of Congress / THOMAS: Bills, Resolutions, <http://thomas.loc.gov/bss/101search.html> (search "international organizations immunities act").

97. *Atkinson*, 156 F.3d at 1342 (citing *United States v. Estate of Romani*, 523 U.S. 517, 535 (1998) (Scalia, J. concurring)).

98. *Zedner v. United States*, 547 U.S. 489, 510 (2006) (Scalia, J., concurring in part) ("[U]sing committee reports and other such sources . . . accustoms us to believing that what is said by a single person in a floor debate or by a committee report represents the view of Congress as a whole—so that we sometimes even will say (when referring to a floor statement and committee report) that 'Congress has expressed' thus-and-so. There is no basis either in law or in reality for this naive belief.") (citation omitted).

incongruency results.<sup>99</sup> As the Supreme Court has been apt to point out, it is appropriate to utilize canons of statutory construction when nothing in the text, legislative history, or underlying policies<sup>100</sup> clearly resolves the statutory ambiguity.<sup>101</sup> One such canon seems appropriate here.

### 3. Application of the “Reference” Canon

When proposing, drafting, and enacting new legislation, lawmakers often incorporate or adopt by reference portions of earlier statutes.<sup>102</sup> This process is called “incorporation by reference” and the borrowing legislation is typically considered to be a “reference statute.”<sup>103</sup> “There are

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99. For an example of clearly incongruent legislative history, see *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 489 (1983), in which the Court decided that the FSIA also pertains to foreign plaintiffs. The Court reached this conclusion despite contrasting language in the legislative history of the FSIA. In one part, the Act provides jurisdiction for “any claim,” while in another part, the Act merely “ensure[s] [American] citizens” have access to the courts. *Id.* at 490. This example demonstrates why the use of legislative history is so highly contentious. *See supra* note 65.

100. The policy rationale for granting absolute immunity to international organizations stems from the belief that such immunity is necessary to protect the organization from biased local courts, interference by “host” governments, frivolous suits, “and the possibility that Member States would interpret the legal effects of their acts in different, and possibly inconsistent, ways.” Carla Bongiorno, *A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor*, 33 COLUM. HUM. RTS. L. REV. 623, 663 (2002).

While serious, these concerns overlook several important aspects of the law. First, application of the FSIA is *always* subordinate to existing treaties. *See supra* note 45; *see also, e.g.*, *Moore v. U.K.*, 384 F.3d 1079, 1088, 1090 (9th Cir. 2004) (affirming the dismissal of FSIA claim due to lack of subject-matter jurisdiction where pre-existing treaty (NATO-SOFA) supersedes and precludes FSIA). At least with respect to the United Nations, the U.N. Charter specifically provides that “[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.” U.N. Charter, art. 105, para. 1. Thus, if the conduct that caused the injury is a necessary function of the United Nations, there can be no legitimate interference by host governments.

Next, the argument that international organizations need to be protected from biased local courts is tenuous. It would be strange indeed if “foreign” international organizations somehow required more protection from “biased” courts than would equally “foreign” foreign sovereigns. Phrased differently, why would foreign nations, who are subjected to the FSIA, need any less protection from local courts than would international organizations for exactly the same conduct?

Additionally, the claim that international organizations need protection from frivolous suits is wholly without merit. While international organizations and governments alike are subjected to such suits, a court can efficiently and effectively act as a gatekeeper, separating frivolous suits from otherwise valid claims. *See, e.g.*, *Urban v. United Nations*, 768 F.2d 1497 (D.C. Cir. 1985) (per curiam) (dismissing sixteen appeals as frivolous and noting dismissal of eleven previous appeals also as frivolous).

101. *Chickasaw Nation v. United States*, 534 U.S. 84, 99 (2001) (O’Connor, J., dissenting). *But see, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 263 (1994) (“It is not uncommon to find ‘apparent tension’ between different canons of statutory construction. As Professor Llewellyn famously illustrated, many of the traditional canons have equal opposites.”).

102. *Sentell, supra* note 93, at 153–54.

103. *Id.* at 154.

two general types of reference statutes: statutes of specific reference and statutes of general reference.”<sup>104</sup>

“A statute of specific reference . . . refers . . . to a particular statute by its title or section number,” whereas a statute of general reference “refers to the law on the subject generally.”<sup>105</sup>

A statute of specific reference incorporates the provisions referred to from the statute as of the time of adoption without subsequent amendments, unless the legislature has expressly or by strong implication shown its intention to incorporate subsequent amendments with the statute. . . . A statute which refers to a subject generally adopts the law on the subject as of the time the law is enacted. This will include all the amendments and modifications of the law subsequent to the time the reference statute was enacted.<sup>106</sup>

This distinction is easily illustrated. In *United States v. Griner*,<sup>107</sup> the court was required to determine whether a Congressional “bookkeeping” error prohibited a sentencing court from imposing a post-imprisonment discretionary condition upon the probationer-defendant.<sup>108</sup> As part of the Sentencing Reform Act of 1984,<sup>109</sup> Congress provided in section 3583(d) that, as a condition of supervised release, a court may impose “any [discretionary] condition set forth . . . in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(19) . . . .”<sup>110</sup> In 1996, Congress amended 3563(b) by removing one subsection and renumbering the remaining conditions, causing subsection (b)(12)—the condition in question—to become subsection (b)(11).<sup>111</sup> However, Congress failed to amend section 3583(d), i.e., the reference provision, which still excluded subsection

104. 2B NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTITUTION § 51.07 (6th ed. 2006).

105. *Id.*

106. *Id.* § 51.08 (footnotes omitted). According to one author, “[u]nder general principles of statutory construction, a statute incorporating the general law on a subject also incorporates subsequent changes in that law, *whereas a reference to a body of general law in a statute dealing with a specific separate issue has no such effect.*” Cully, *supra* note 44, at 1177 (emphasis added). As the italicized language demonstrates, the canon has been slightly mischaracterized as it pertains to specific references. A statute of specific reference does not refer to “a body of general law in a statute dealing with a specific separate issue”; rather, a statute of specific reference refers solely to another statute.

107. *United States v. Griner*, 358 F.3d 979 (8th Cir. 2004).

108. *Id.* at 981–82.

109. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified at §§ 3563, 3583).

110. *Id.* at 1999–2000.

111. *Griner*, 358 F.3d at 981–82 (citing Mandatory Victims Restitution Act of 1996, Pub. L. 104-132, § 203(2), 110 Stat. 1227). Subsection (b)(12) required the defendant to “reside at, or participate in the program of, a community corrections facility for all or part of the term of probation . . . .” 98 Stat. at 1993.

(b)(11) from the list of permissible discretionary conditions.<sup>112</sup> The defendant relied on this faulty cross-reference in an attempt to escape the residency condition enumerated at subsection (b)(11).<sup>113</sup> Relying on a “well-settled canon,” the court held that, despite Congress’s error, section 3583(d) still permitted a court to impose the residency requirement as a condition of supervised release.<sup>114</sup> According to the court, when section 3583(d) originally referenced the various provisions in section 3563(b), it was as if those provisions were made a part of section 3583(d). Thus section 3583(d) “included the language of subsection (b)(12) *as it was then written* to permit community-corrections confinement.”<sup>115</sup>

Contrast the reference statute in *Griner* with that contained in the Alien Tort Statute,<sup>116</sup> which grants original jurisdiction to U.S. district courts for “any civil action by an alien for a tort only, committed in violation of the *law of nations* . . . .”<sup>117</sup> What exactly is the “law of nations,” and what torts violate this “amorphous entity”?<sup>118</sup> In *Filartiga v. Pena-Irala*,<sup>119</sup> the court of appeals addressed these “threshold” questions when it addressed the issue of whether torture constituted a violation of international law.<sup>120</sup> Although the court did not rely on any canons in reaching its decision, the end result would have been the same—international law must be “interpret[ed] . . . not as it was in 1789 [when the statute was enacted],<sup>[121]</sup> but as it has evolved and exists among the nations of the world today.”<sup>122</sup>

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112. *Griner*, 358 F.3d at 982.

113. *Id.* at 981. Essentially, defendant asserts that because section 3583(d) does not permit a court to impose subsection (b)(11) as a discretionary condition and the community-corrections residency condition is currently codified at subsection (b)(11), a sentencing court may not require a defendant to stay at such a facility.

114. *Id.* at 982. The “well settled canon” to which the court referred was used by the Supreme Court in *Hassett v. Welch*, 303 U.S. 303, 314 (1938) (quoting 2 SUTHERLAND ON STATUTORY CONSTRUCTION 787–88 (2d ed. 1904)), and paralleled the language of the canon used here.

115. *Id.* (emphasis added).

116. Alien Tort Statute, 28 U.S.C. § 1350 (2000).

117. *Id.* (emphasis added). The full text of the statute is as follows: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” *Id.*

118. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring). I use Judge Edwards’ descriptive phrase to strongly denote that the “law of nations” is a general reference. Indeed, can an “amorphous entity” ever be specific?

119. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

120. *Id.* at 880. These questions necessarily imply that torture was not thought to be contrary to the law of nations when the statute was first codified in 1789; otherwise, the court could have avoided the issue altogether. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004) (finding that the “law of nations” in 1789 consisted of only three offenses: offenses against ambassadors, violations of safe conduct, and piracy).

121. *Sosa*, 542 U.S. at 712–13 (citations omitted).

122. *Filartiga*, 630 F.2d at 881.

This conclusion necessarily reaffirms the principle embodied by the canon: a reference to a general body of law includes amendments and changes to that law since the time of the reference.<sup>123</sup>

A comparison of the reference statutes in *Griner* and *Filartiga* demonstrates that, as one judge has observed, a general reference “envisage[s] a systematic structure rather than an isolated statutory fragment, a forest rather than a single tree, a tree rather than a single leaf.”<sup>124</sup>

Returning to the IOIA statute at issue here, an analysis of the “borrowing” language in § 288a(b)—“shall enjoy the same immunity . . . as . . . foreign governments”—confirms that it fails to mention any particular statute either by title or section number. Doing so would have definitively made the IOIA a statute of specific reference as defined and exemplified above. Instead, the IOIA refers to the law on a subject generally: immunity for foreign governments.<sup>125</sup>

#### 4. Summary

Since the legislative intent of either statute has proven to be of such highly questionable value in the construction of the FSIA, it seems wholly appropriate to resort to canons of statutory construction, in particular the “reference” canon, to aid in a proper interpretation. Utilization of this canon reveals that when the degree of immunity granted to foreign nations was modified by the FSIA, the extent of immunity granted to international organizations was likewise changed.<sup>126</sup> Consequently, the absolute immunity originally enjoyed by international organizations, including the United Nations, is no longer applicable, having been replaced by the doctrine of restrictive immunity.<sup>127</sup>

123. See also, e.g., *Somermeier v. Dist. Dir. of Customs for the Port of Los Angeles—Long Beach*, 448 F.2d 1243, 1244 (9th Cir. 1971) (holding that state statute that referenced “existing provisions of federal law” meant law as it was “changed from time to time” and not as it existed when first enacted).

124. *Clark v. Crown Constr. Co.*, 887 F.2d 149, 152 (8th Cir. 1989) (Dumbauld, J., sitting by designation) (finding that a reference to the Longshoremen’s Act was a general reference). For an example of a statute that contains elements of both general and specific references, see *Morgan v. Robinson*, 156 F. Supp. 2d 1133, 1141–43 (C.D. Cal. 2001).

125. See *Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335, 1342 (D.C. Cir. 1998) (“Obviously, the 1945 Congress was legislating in shorthand, referring to another body of law—the law governing the immunity of foreign governments—to define the scope of the new immunity for international organizations.”).

126. *Rendall-Sperenza v. Nassim (Rendall II)*, 932 F. Supp. 19, 24 (D.D.C. 1996). *Contra Atkinson*, 156 F.3d at 1341.

127. The United States has taken the same position: International organizations are entitled only to

Nevertheless, even if the doctrine of absolute immunity granted to international organizations could not have been replaced by the theory of restrictive immunity promulgated by the FSIA, there exists, as a consequence of the establishment of UNMIK, another independent basis for finding that the organization should only be accorded immunity under the FSIA's restrictive immunity structure.

## *B. International Organizations as "States"*

### *1. A Short History of International Organizations*

International organizations first began appearing in the late nineteenth century and were primarily concerned with matters related to the public health, postal system, and telecommunications.<sup>128</sup> In the early twentieth century, international organizations entered the political arena, organized primarily for international peace and security.<sup>129</sup>

As a prime example, the League of Nations was established in 1919 under the auspices of the Treaty of Versailles "[i]n order to promote international co-operation and to achieve international peace and security . . . ."<sup>130</sup> Having been unable to prevent the onset of World War II, the League of Nations "faded into the twilight."<sup>131</sup> Yet, for all of the League's failings, "men of vision set themselves to the task of creating a new charter for international collaboration."<sup>132</sup> This task was finally accomplished in 1945, when the United Nations officially came into existence after ratification of its charter by fifty countries, including China, France, the Soviet Union, the United Kingdom, and the United States.<sup>133</sup>

the restrictive immunity granted by the FSIA. Letter from Robert B. Owen, Legal Adviser, Department of State, to Leroy D. Clark, General Counsel, Equal Employment Opportunity Commission (June 24, 1980), *reprinted in* Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 917, 917-18 (1980); *see also* *Broadbent v. Org. of Am States*, 628 F.2d 27, 31 (D.C. Cir. 1980) (noting that the United States as *amicus curiae* supported the idea that the FSIA amended the immunity granted to international organizations).

128. Christoph Schreuer, *The Changing Structure of International Organization*, 11 TRANSNAT'L LAW. 419, 420 (1998); History of the United Nations, <http://www.un.org/aboutun/unhistory> (last visited Feb. 10, 2007) [hereinafter U.N. History].

129. Schreuer, *supra* note 128, at 420; O'Toole, *supra* note 48, at 1 ("[T]hese new entities . . . exercise a political, economic and social influence of massive importance.").

130. League of Nations Covenant pmbl., *reprinted in* GERARD J. MANGONE, A SHORT HISTORY OF INTERNATIONAL ORGANIZATION 157 (1954).

131. MANGONE, *supra* note 130, at 153-54. The Assembly of the League of Nations was officially disbanded on April 6, 1946, when all remaining assets were transferred to the United Nations. *Id.* at 175.

132. *Id.* at 154.

133. U.N. History, *supra* note 128.

## 2. *Changing Characteristics of the United Nations*

The primary responsibility of the United Nations has generally been construed as “the maintenance of international peace and security.”<sup>134</sup> This responsibility, however, was rarely fulfilled during the Cold War.<sup>135</sup> With the end of the Cold War, this responsibility has been supplanted by a more proactive role in *intra*-national peace and security,<sup>136</sup> to the extent that the protection of human rights has become a responsibility shared between the principle state and the international community, with primary responsibility for such protection belonging to the state.<sup>137</sup>

However, “where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention<sup>[138]</sup> yields to the international responsibility to protect.”<sup>139</sup> Justification for disregarding the principle of non-intervention seems to be rooted in the idea that any state that would allow its citizens to suffer thereby forfeits any moral claim to be treated as legitimate; consequently any rights to sovereignty or non-intervention are suspended.<sup>140</sup> When such

134. U.N. Charter art. 1, para. 1; see Siobhan Wills, *The Need for Effective Protection of United Nations Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, HUM. RTS. BRIEF, Winter 2003, at 26.

135. See Julianne Peck, Note, *The U.N. and the Laws of War: How Can the World's Peacekeepers Be Held Accountable?*, 21 SYRACUSE J. INT'L L. & COM. 283, 284 (1995); Wills, *supra* note 134, at 26 (“[T]he UN Charter provides for coercive measures to compel states to comply with resolutions taken by the Security Council. These coercive measures require achieving and maintaining a consensus among the permanent members of the Security Council. As a result of the divisions of the Cold War, effective action by the Security Council was blocked . . .”).

136. Wills, *supra* note 134, at 26 (“In recent years, the traditionally passive role engendered by such [peacekeeping] missions has been replaced by a more active role of peace making involving, *inter alia*, national reconstruction, facilitating transition to democracy, and providing humanitarian assistance.”); see also Susan L. Turley, Note, *Keeping the Peace: Do the Laws of War Apply?*, 73 TEX. L. REV. 139, 140 (1994) (“With the Cold War evidently over, peacekeeping missions have been thrust into a position of international prominence. . . . [T]he number of such undertakings has exploded recently: between 1989 and 1993, the United Nations mounted as many peacekeeping deployments as it did during its first forty-three years.”). In fact, during the period from 1948 until 1989, there were eighteen peacekeeping operations, whereas during the period from 1990 until 2007, there were forty-three peacekeeping operations. U.N. Peacekeeping Operations Timeline, <http://www.un.org/Depts/dpko/dpko/timeline/pages/timeline.html> (last visited Feb. 10, 2007).

137. Siobhan Wills, *Military Interventions on Behalf of Vulnerable Populations: The Legal Responsibilities of States and International Organizations Engaged in Peace Support Operations*, 9 J. CONFLICT & SECURITY L. 387, 391 (2004) (citing DANISH INSTITUTE OF INTERNATIONAL AFFAIRS, HUMANITARIAN INTERVENTION: LEGAL AND POLITICAL ASPECTS 45 (1999)).

138. “The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference . . . .” *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 106 (June 27).

139. Wills, *supra* note 137, at 391.

140. *Id.* at 392.

intervention for the purpose of humanitarian concern is required by an external body, a presumption must arise whereby “a new relationship should come into being between the protected population and its protectors.”<sup>141</sup> I assert that just such a relationship existed between the people of Kosovo and their protector—the United Nations.

### 3. *The United Nations Has Assumed the Role of a State*

Subsequent to NATO’s<sup>142</sup> seventy-seven day long bombing campaign to stop Serbian attacks on ethnic Kosovar Albanians that ended in June 1999,<sup>143</sup> the United Nations Security Council adopted Resolution 1244.<sup>144</sup> With the implementation of this resolution, the United Nations seized control of Kosovo in an effort to remedy the chaos occurring within.<sup>145</sup> Regardless of whether the Yugoslav Republic voluntarily acquiesced in this transition of power,<sup>146</sup> without a doubt, this resolution ousted the

141. *Id.* at 393.

142. “The North Atlantic Treaty Organization (NATO) is an alliance of 26 countries from North America and Europe committed to fulfilling the goals of the North Atlantic Treaty . . .” What is NATO?, <http://www.nato.int/nato-welcome/index.html> (last visited Mar. 29, 2008).

143. Garentina Kraja, *Kosovo Takes First Small Steps Toward Sovereignty*, ST. LOUIS POST-DISPATCH, Feb. 3, 2007, at A24. Following World War II, Kosovo became a province of Serbia within the Federal Republic of Yugoslavia. Since 1974 and continuing beyond the effective dissolution of the socialist Yugoslav Republic between 1991 and 1992, Kosovo enjoyed substantial autonomy. When Slobodan Milosevic gained power in 1989, and playing upon the fears of ethnic Serbs living in the Albanian-majority province, Kosovar autonomy was eliminated in favor of more direct rule from Belgrade. Opposed to this change in the status quo, ethnic Albanians desired to form an independent republic—first by peaceful movements with subsequent escalation to armed resistance. In 1998, Milosevic ordered Serbian forces into Kosovo and armed open conflict resulted. It was this conflict which prompted NATO action. U.S. Dept. of State, Bureau of European & Eurasian Affairs, Background Note: Serbia, <http://www.state.gov/r/pa/ei/bgn/5388.htm> (last visited Feb. 10, 2007); NATO & Kosovo: Historical Overview, <http://www.nato.int/kosovo/history.htm> (last visited Feb. 4, 2007).

144. Bernhard Knoll, *From Benchmarking to Final Status? Kosovo and the Problem of an International Administration’s Open-Ended Mandate*, 16 EUR. J. INT’L L. 637, 638 (2005); S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

145. A provision of S.C. Res. 1244:

[a]uthorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.

S.C. Res. 1244, *supra* note 144, ¶ 10.

146. Is submission after a seventy-seven-day bombing campaign voluntary? Compare S.C. Res. 1244, *supra* note 144, Annex 2, ¶ 10 (stating that “[s]uspension of military activity will require acceptance of the principles set forth . . .” suggesting, at least to this author, coercion) (emphasis added) with Henry H. Perritt, Jr., *Structures and Standards for Political Trusteeship*, 8 UCLA J. INT’L

legitimate government<sup>147</sup> from the territory and installed the United Nations as the de facto state authority.<sup>148</sup>

*a. Statehood as a Result of Functionality*

Among the duties and responsibilities assumed by this new administration—duties normally undertaken by traditional nation-states—are the performance of basic civilian administrative functions, the reconstruction of the infrastructure and economy, and the maintenance of civil law and order, including local police protection.<sup>149</sup> As one legal scholar has commented: the “assumption of functional statehood [by international organizations] is incremental and spread over a variety of issues, such as treaty making, functional recognition of newcomers into the international community, public services, economic regulation, peace and security, lawmaking, adjudication, and protection of individuals.”<sup>150</sup>

Since the adoption of Resolution 1244, UNMIK has entered into international agreements with neighboring countries,<sup>151</sup> enacted regulations pertaining to the revitalization of the economy,<sup>152</sup> established

L. & FOREIGN AFF. 385, 390 & n.6, 398 (2003) (contending that acquiescence to intervention is consent and Yugoslavia acquiesced to United Nations intervention).

147. Ralph Wilde, Note, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, 95 AM. J. INT’L L. 583, 594 (2001) (“[UNMIK] replace[d] the Serb and FRY governments, which in 1999 opposed any alteration in Kosovo’s status.”). See also *supra* note 143.

148. Knoll, *supra* note 144 (“The resolution vested the right to exercise effective control within the territory in a UN subsidiary organ—the United Nations Interim Administration Mission in Kosovo (UNMIK)—thus reducing [the Yugoslav Republic’s] sovereign rights to a *nudum jus*.”).

149. S.C. Res. 1244, *supra* note 144, ¶¶ 11(b), (g), (i); Frederick Rawski, *To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations*, 18 CONN. J. INT’L L. 103, 117 (2002) (“In their initial stages, both UNMIK and UNTAET [the U.N. Temporary Administration in East Timor], as governing authorities, wielded absolute legislative, police and judicial power.”).

150. Schreuer, *supra* note 128, at 421.

151. See, e.g., Memorandum of Understanding on Police Cooperation Between the Government of the Republic of Albania and United Nations Interim Administration Mission in Kosovo, signed Sept. 9, 2002, available at [http://www.unmikonline.org/justice/documents/albpolcoope\\_eng.pdf](http://www.unmikonline.org/justice/documents/albpolcoope_eng.pdf); Protocol on Police Cooperation Between United Nations Interim Administration Mission in Kosovo and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, signed May 31, 2002, available at [http://www.unmikonline.org/justice/documents/PolCoopFRY\\_Eng.pdf](http://www.unmikonline.org/justice/documents/PolCoopFRY_Eng.pdf); Letter from Branko Bojchevski, Director of the Bureau for Public Security, Ministry of Interior of the Republic of Macedonia, to Jean-Christian Cady, Deputy Special Representative of the Secretary-General for Police and Justice, United Nations Interim Administration Mission in Kosovo (Nov. 27, 2002) (responding to and accepting UNMIK’s proposal regarding an interim protocol on police cooperation), available at [http://www.unmikonline.org/justice/documents/PolCoopFYROM\\_Eng.pdf](http://www.unmikonline.org/justice/documents/PolCoopFYROM_Eng.pdf).

To the extent that memoranda or protocols are distinguishable from treaties or other binding international agreements, Knoll, *supra* note 144, at 644, and thus do not establish “formal” international relationships, see *infra* note 179.

152. See, e.g., Regulation No. 1999/04 On the Currency Permitted to Be Used in Kosovo,

mechanisms for providing public services,<sup>153</sup> created laws,<sup>154</sup> provided for the maintenance of peace and security,<sup>155</sup> created means for the protection of individuals,<sup>156</sup> and provided for the adjudication of disputes.<sup>157</sup>

*b. Statehood as a Result of International Law*

However, should one aver that this functional approach merely establishes that UNMIK is the primary governmental entity in Kosovo (as

UNMIK/REG/1999/4 (Sept. 2, 1999), *available at* [http://www.unmikonline.org/regulations/1999/re99\\_04.pdf](http://www.unmikonline.org/regulations/1999/re99_04.pdf); Regulation No. 1999/16 On the Establishment of the Central Fiscal Authority of Kosovo and Other Related Matters, UNMIK/REG/1999/16 (Nov. 6, 1999), *available at* [http://www.unmikonline.org/regulations/1999/re99\\_16.pdf](http://www.unmikonline.org/regulations/1999/re99_16.pdf); Regulation No. 1999/20 On the Banking and Payments Authority of Kosovo, UNMIK/REG/1999/20 (Nov. 15, 1999), *available at* [http://www.unmikonline.org/regulations/1999/re99\\_20.pdf](http://www.unmikonline.org/regulations/1999/re99_20.pdf).

153. *See, e.g.*, Regulation No. 1999/12 On the Provision of Postal and Telecommunications Services in Kosovo, UNMIK/REG/1999/12 (Oct. 14, 1999), *available at* [http://www.unmikonline.org/regulations/1999/re99\\_12.pdf](http://www.unmikonline.org/regulations/1999/re99_12.pdf); Regulation No. 2000/12 On the Establishment of the Administrative Department of Public Services, UNMIK/REG/2000/12 (Mar. 14, 2000), *available at* [http://www.unmikonline.org/regulations/unmikgazette/02english/E2000regs/RE2000\\_12.htm](http://www.unmikonline.org/regulations/unmikgazette/02english/E2000regs/RE2000_12.htm); Regulation No. 2000/49 On the Establishment of the Administrative Department of Public Utilities, UNMIK/REG/2000/49 (Aug. 19, 2000), *available at* [http://www.unmikonline.org/regulations/unmikgazette/02english/E2000regs/RE2000\\_49.htm](http://www.unmikonline.org/regulations/unmikgazette/02english/E2000regs/RE2000_49.htm).

154. *See, e.g.*, Regulation No. 1999/24 On the Law Applicable in Kosovo, UNMIK/REG/1999/24 (Dec. 12, 1999), *amended by* Regulation No. 2000/59 (Oct. 27, 2000), *available at* [http://www.unmikonline.org/regulations/unmikgazette/02english/E2000regs/RE2000\\_59.htm](http://www.unmikonline.org/regulations/unmikgazette/02english/E2000regs/RE2000_59.htm); Regulation No. 2003/25 On the Provisional Criminal Code of Kosovo, UNMIK/REG/2003/25 (July 6, 2003), *amended by* Regulation No. 2004/19 (June 16, 2004), *available at* [http://www.unmikonline.org/regulations/unmikgazette/02english/E2003regs/RE2003\\_25.pdf](http://www.unmikonline.org/regulations/unmikgazette/02english/E2003regs/RE2003_25.pdf).

155. *See, e.g.*, Regulation No. 1999/2 On the Prevention of Access by Individuals and Their Removal to Secure Public Peace and Order, UNMIK/REG/1999/2 (Aug. 12, 1999), *available at* [http://www.unmikonline.org/regulations/1999/re99\\_02.pdf](http://www.unmikonline.org/regulations/1999/re99_02.pdf); Regulation No. 1999/08 On the Establishment of the Kosovo Protection Corps, UNMIK/REG/1999/8 (Sept. 20, 1999), *amended by* Regulation No. 2006/3 (Jan. 24, 2006), *available at* [http://www.unmikonline.org/regulations/1999/re99\\_08.pdf](http://www.unmikonline.org/regulations/1999/re99_08.pdf); Regulation No. 2000/33 On Licensing of Security Services Providers in Kosovo and the Regulation of Their Employees, UNMIK/REG/2000/33 (May 25, 2000), *available at* [http://www.unmikonline.org/regulations/unmikgazette/02english/E2000regs/RE2000\\_33.htm](http://www.unmikonline.org/regulations/unmikgazette/02english/E2000regs/RE2000_33.htm).

156. *See, e.g.*, Regulation No. 2000/4 On the Prohibition Against Inciting to National, Racial, Religious or Ethnic Hatred, Discord or Intolerance, UNMIK/REG/2000/4 (Feb. 1, 2000), *available at* [http://www.unmikonline.org/regulations/unmikgazette/02english/E2000regs/RE2000\\_04.htm](http://www.unmikonline.org/regulations/unmikgazette/02english/E2000regs/RE2000_04.htm); Regulation No. 2000/10 On the Establishment of the Administrative Department of Health and Social Welfare, UNMIK/REG/2000/10 (Mar. 3, 2000), *available at* [http://www.unmikonline.org/regulations/unmikgazette/02english/E2000regs/RE2000\\_10.htm](http://www.unmikonline.org/regulations/unmikgazette/02english/E2000regs/RE2000_10.htm); Regulation No. 2000/38 On the Establishment of the Ombudsperson Institution in Kosovo, UNMIK/REG/2000/38 (June 30, 2000), *available at* [http://www.unmikonline.org/regulations/unmikgazette/02english/E2000regs/RE2000\\_38.htm](http://www.unmikonline.org/regulations/unmikgazette/02english/E2000regs/RE2000_38.htm).

157. *See, e.g.*, Regulation No. 1999/05 On the Establishment of an Ad Hoc Court of Final Appeal and an Ad Hoc Office of the Public Prosecutor, UNMIK/REG/1999/5 (Sept. 4, 1999), *available at* [http://www.unmikonline.org/regulations/unmikgazette/02english/E1999regs/RE1999\\_05.htm](http://www.unmikonline.org/regulations/unmikgazette/02english/E1999regs/RE1999_05.htm); Regulation No. 1999/6 On Recommendations for the Structure and Administration of the Judiciary and Prosecution Service, UNMIK/REG/1999/6 (Sept. 7, 1999), *available at* [http://www.unmikonline.org/regulations/1999/re99\\_06/pdf](http://www.unmikonline.org/regulations/1999/re99_06/pdf).

opposed to establishing “statehood”), the territorial administration by the United Nations qualifies as a state for another reason. “Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.”<sup>158</sup>

It is beyond dispute that Kosovo has a permanent population<sup>159</sup> and a defined territory,<sup>160</sup> thus the relevant issues are whether the population and

158. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) [hereinafter RESTATEMENT (THIRD) FOREIGN RELATIONS]; *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro In Amministrazione Straordinaria*, 937 F.2d 44, 47 (2d Cir. 1991) (applying Restatement (Third) definition of “state”). See also Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 (“The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.”).

Notably, recognition of a state by other states is not necessary for satisfaction of the definition. RESTATEMENT (THIRD) FOREIGN RELATIONS § 202 cmt. b, *cited with approval in* *Kadic v. Karadzic*, 70 F.3d 232, 244 (2d Cir. 1995). For an informative discussion of the recognition, or lack thereof, of states, see *Knox v. Palestine Liberation Org.*, 306 F. Supp. 2d 424, 438–48 (S.D.N.Y. 2004).

159. “To be a state an entity must have a population that is significant and permanent.” RESTATEMENT (THIRD) FOREIGN RELATIONS § 201 cmt. c. As of November 2007, Kosovo had a population of approximately 1.9 million people. UNITED NATIONS INTERIM ADMIN. MISSION IN KOSOVO, KOSOVO IN NOVEMBER 2007 (2007), [http://www.unmikonline.org/docs/2007/Fact\\_Sheet\\_nov\\_2007.pdf](http://www.unmikonline.org/docs/2007/Fact_Sheet_nov_2007.pdf). By all accounts, this figure represents a significant amount. For comparison purposes, as of July 2007, Montenegro and Macedonia, Kosovo’s neighboring countries, have populations of approximately 685,000 and 2.06 million people respectively, CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 2007 (2007), *available at* <https://www.cia.gov/library/publications/the-world-factbook/index.html> (select appropriate country from pull-down menu), and have been Members of the United Nations since June 28, 2006, and April 8, 1993, respectively. United Nations, United Nations Member States, Note on Yugoslavia, <http://www.un.org/members/notes/yugoslavia.htm> (last visited Jan. 15, 2008).

The debate regarding which ethnic peoples, Serb or Albanian, inhabited the Kosovar region first is a significant aspect of the ongoing violence and controversy. Ethnic Serbs claim that, when their ancestors traveled south from the Balkans in the sixth century AD, Kosovo was relatively uninhabited, except for a few Albanians who then retreated further south. The ethnic Albanians claim that they are the direct descendants of Illyrians/Dardanians, the indigenous people of the region, who inhabited the area continually since between the sixth and fourth centuries BC. MIRANDA VICKERS, BETWEEN SERB AND ALBANIAN: A HISTORY OF KOSOVO xii–xiii, 1–6 (1998). See also NOEL MALCOLM, KOSOVO: A SHORT HISTORY 22–40 (1998). In either case, permanency of the settlement of Kosovo poses no problem for purposes of fulfilling the requirements of the definition since the region has continually been inhabited since at least the sixth century AD. Note, however, that by utilizing the former estimate, I assert no opinion as to which ethnic group inhabited modern day Kosovo first or who is “entitled” to inhabit it today. Rather, as a matter of logic, this estimate demonstrates that a settlement has been present at least since this era.

160. The international borders of Kosovo are those as defined in Annex VIII of the Ahtisaari Plan. DECLARATION OF INDEPENDENCE para. 8 (Kosovo 2008), *available at* <http://www.assembly-kosovo.org/?krye=news&newsid=1635&lang=en> [hereinafter KOSOVO DECLARATION]. The “Ahtisaari Plan,” named after Martti Ahtisaari, Special Envoy of the Secretary-General on Kosovo, provided that:

territory are controlled by the government asserting statehood,<sup>161</sup> and whether the putative state has the capacity to engage in formal relations with other states.

Whether an entity exercises governmental control depends on its capability to act independently of foreign governments.<sup>162</sup> This

[t]he territory of Kosovo shall be defined by the frontiers of the Socialist Autonomous Province of Kosovo within the Socialist Federal Republic of Yugoslavia as these frontiers stood on 31 December 1988, except as amended by the border demarcation agreement between the Federal Republic of Yugoslavia and the former Yugoslav Republic of Macedonia on 23 February 2001.

The Secretary-General, *Comprehensive Proposal for the Kosovo Status Settlement*, annex VIII, art. 3.2, delivered to the President of the Security Council, U.N. Doc. S/2007/168/Add.1 (Mar. 26, 2007), available at [http://www.unosek.org/docref/Comprehensive\\_proposal-english.pdf](http://www.unosek.org/docref/Comprehensive_proposal-english.pdf). Cf. Klinghoffer, 937 F.2d at 47 (finding that “contemplat[ion]” of acquiring territory in future is insufficient to meet the requirement).

Furthermore, “[a]n entity may satisfy the territorial requirement for statehood even if its boundaries have not been finally settled, if one or more of its boundaries are disputed, or if some of its territory is claimed by another state.” RESTATEMENT (THIRD) FOREIGN RELATIONS § 201 cmt. b. Thus, the territorial claims to Kosovo by Serbia are of no import. See Kraja, *supra* note 143.

161. “While the traditional definition [of a state] does not formally require [the assertion of statehood], an entity is not a state if it does not claim to be a state.” RESTATEMENT (THIRD) FOREIGN RELATIONS § 201 cmt. f. Concededly, neither the United Nations nor UNMIK has claimed to be a state; however, one purpose of the United Nations intervention and civil presence was to determine the final status of Kosovo. S.C. Res. 1244, *supra* note 144, ¶ 11(e) (“[T]he main responsibilities of the international civil presence will include . . . [f]acilitating a political process designed to determine Kosovo’s future status . . . .”); Statement by the President of the Security Council, Security Council, U.N. Doc. S/PRST/2005/51 (Oct. 24, 2005), available at [http://www.un.org/Docs/sc/unsc\\_pres\\_statements05.htm](http://www.un.org/Docs/sc/unsc_pres_statements05.htm) (select document “S/PRST/2005/51 of 24 October 2005”) (“The Council therefore supports the Secretary-General’s intention to start a political process to determine Kosovo’s Future Status, as foreseen in Security Council resolution 1244(1999).”). Thus, for purposes of this Note, I assume that if a civil suit were lodged against the United Nations, in which a plaintiff claimed the organization was a foreign state, the United Nations would act in a manner similar to other states and claim sovereign immunity.

Notwithstanding Kosovo’s declaration of independence, KOSOVO DECLARATION, *supra* note 160, in addition to the subsequent and various recognitions thereof, Nicholas Kulish & C.J. Chivers, *U.S. and Much of Europe Recognize Kosovo, Which Also Draws Expected Rejection*, N.Y. TIMES, Feb. 19, 2008, at A10, the application of this rationale remains viable for two reasons. First, with specific regard to Kosovo, the nation has pledged to continue acting in accordance with S.C. Res. 1244. KOSOVO DECLARATION, *supra* note 160, para. 12. See also Press Release, The Secretary-General, Secretary-General Says, Pending Security Council Guidance, Resolution 1244 (1999) Will Remain Legal Framework for Mandate of UN Kosovo Mission, U.N. Doc. SG/SM/11424 (Feb. 17, 2008), available at <http://www.un.org/News/Press/docs/2008/sgsm11424.doc.htm>. Moreover, “[p]ending guidance from the Security Council, UNMIK will continue to consider Security Council Resolution 1244 (1999) as the legal framework for its mandate and will continue to implement its mandate in the light of the evolving circumstances.” *Id.* Second, on a global scale, the rationale is easily applicable to all situations in which the United Nations establishes itself as the territorial administration. Indeed, if history is an accurate indication of future conduct, the United Nations will, with increasing frequency and scope, become the transitional authority in post-conflict territories. See generally *supra* note 136 and accompanying text; Wilde, *supra* note 147 (describing the historical and current practice of territorial administration by the United Nations).

162. *Knox*, 306 F. Supp. 2d at 435 (citation omitted).

requirement has been interpreted to mean that “the entity . . . be independent from direct orders from other State powers” and “have legal authority which is not in law dependent on any other earthly authority.”<sup>163</sup> In *Morgan Guar. Trust Co. v. Republic of Palau*,<sup>164</sup> the Second Circuit Court of Appeals held that Palau was not a foreign state under international law for purposes of the FSIA.<sup>165</sup> The court concluded that it was the United States, not Palau, which retained “ultimate authority over the governance” of the island group.<sup>166</sup> The court reached its decision because the “full power of administration, legislation and jurisdiction over the territory,” was vested in the United States,<sup>167</sup> which, as the administering authority, could suspend local laws inconsistent with the laws of the United States.<sup>168</sup> As a result, “it . . . cannot be said that Palau is an entity under the control of its own government.”<sup>169</sup>

UNMIK exercises similar plenary powers. Like U.S. governance over Palau, UNMIK has full and complete legislative and executive authority over Kosovo,<sup>170</sup> and can suspend any laws contrary to its mandate.<sup>171</sup> In

163. *Id.* (citations omitted).

164. *Morgan Guar. Trust Co. v. Republic of Palau*, 924 F.2d 1237 (2d Cir. 1991).

165. *Id.* at 1247.

166. *Id.* at 1245.

167. *Id.* at 1244 (quoting Trusteeship Agreement for the Former Japanese Mandated Islands Approved at the One Hundred and Twenty-Fourth Meeting of the Security Council, U.S.-U.N., art. 3, Apr. 2, 1947, 61 Stat. 3301). The United States also possessed the right to apply such laws as deemed appropriate to local conditions. See Trusteeship Agreement, *infra* note 170.

168. Trust Territory of the Pacific Islands, 44 Fed. Reg. 28,116 (May 14, 1979) [hereinafter Order No. 3039], *cited in Morgan Guar. Trust*, 924 F.2d at 1241. Pursuant to Order No. 3039, the High Commissioner (then the Secretary of the Interior), *Morgan Guar. Trust*, 924 F.2d at 1245, could suspend a law if he concluded that it was “inconsistent with the provisions of this Order, the Trusteeship Agreement, [or] with existing treaties, laws, and regulations of the United States generally applicable in the Trust Territory . . . .” Order No. 3039, *supra*, at 28,117, § 4. With regard to this power to suspend, the Second Circuit stated that “a political entity whose laws may be suspended by another cannot be said to be possessed of sovereignty of any kind, de facto or de jure.” *Morgan Guar. Trust*, 924 F.2d at 1245.

169. *Morgan Guar. Trust*, 924 F.2d at 1245 (internal quotation marks and citation omitted).

170. Compare Regulation No. 1999/1 On the Authority of the Interim Administration in Kosovo, UNMIK/REG/1999/1, § 1.1 (July 25, 1999), *amended by* Regulation No. 2000/54 (Sept. 27, 2000) (“All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.”) with Trusteeship Agreement for the Former Japanese Mandated Islands Approved at the One Hundred and Twenty-Fourth Meeting of the Security Council, U.S.-U.N., art. 3, Apr. 2, 1947, 61 Stat. 3301 (“The administering authority shall have full powers of administration, legislation, and jurisdiction over the territory subject to the provisions of this agreement, and may apply to the trust territory, subject to any modification which the administering authority may consider desirable, such of the laws of the United States as it may deem appropriate to local conditions and requirements.”).

171. The Secretary-General, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, ¶ 39, *delivered to the Security Council*, U.N. Doc. S/1999/779 (July 12, 1999), available at <http://www.un.org/Docs/sc/reports/1999/sgrep99.htm> (select document “S/1999/77”) (“[The Special Representative] may change, repeal or suspend existing laws to the extent

addition, UNMIK has the authority, administered through the Special Representative of the Secretary-General (SRSG), to disband the Kosovo Assembly and call for new elections.<sup>172</sup> Consequently, under circumstances virtually identical to the trusteeship by the United States over Palau, it seems clear that UNMIK is an entity that exercises sufficient governmental control over the territory and people of Kosovo.<sup>173</sup>

As to the last requirement, the capacity to engage in foreign relations depends on two characteristics: competence and separateness. To elaborate, “[a]n entity is not a state unless it has competence, *within its own constitutional system*, to conduct international relations with other states, as well as the political, technical, and financial capabilities to do so.”<sup>174</sup> Likewise, when a putative state relies upon another state for its international relations, that is, the other state “carries out or accepts responsibility” for those relations, then the putative state is not separate for purposes of determining capacity.<sup>175</sup>

As part of Kosovo’s constitutional system, UNMIK has reserved for itself certain powers and responsibilities,<sup>176</sup> one of which is the power to conclude agreements with states and international organizations.<sup>177</sup> The constitutional framework further requires the SRSG to “[o]verse[ ] the fulfillment of commitments in international agreements entered into *on behalf of UNMIK*.”<sup>178</sup> These exclusively reserved constitutional provisions—one granting authority to enter into international agreements,

necessary for the carrying out of his functions, or where existing laws are incompatible with the mandate, aims and purposes of the interim civil administration.”). See, e.g., *UN Vetoes Border Resolution*, BBC.COM, May 23, 2002, <http://news.bbc.co.uk/2/hi/europe/2009509.stm>.

172. Regulation No. 2001/09 On a Constitutional Framework for Provisional Self-Government in Kosovo, ch. 8.1(b), UNMIK/REG/2001/9 (May 15, 2001), available at [http://www.unmikonline.org/pub/misc/FrameworkPocket\\_ENG\\_Dec2002.pdf](http://www.unmikonline.org/pub/misc/FrameworkPocket_ENG_Dec2002.pdf).

173. Arguably, as an entity created under the authority of the United Nations and S.C. Res. 1244, one could assert that UNMIK is dependent upon another “earthly authority,” see *supra* text accompanying note 163; however, this is immaterial. The authority conferred by the United Nations under S.C. Res. 1244 is no different from the authority granted to the United States under the Trusteeship Agreement with the United Nations.

174. RESTATEMENT (THIRD) FOREIGN RELATIONS § 201 cmt. e (emphasis added).

175. See *Knox v. Palestinian Liberation Org.*, 306 F. Supp. 2d 424, 438 (quoting JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 47 (1979)).

176. Knoll, *supra* note 144, at 644.

177. Regulation No. 2001/09, ch. 8.1(m), *supra* note 172 (subject to the scope of S.C. Res. 1244). See also *id.* ch. 8.1(i) (“Exercising powers and responsibilities of an international nature in the legal field.”); *id.* ch. 8.1(o) (“External relations, including with states and international organisations, as may be necessary for the implementation of his mandate.”).

178. *Id.* ch. 8.1(n) (emphasis added). “[E]xternal agreements in the ‘reserved areas’ entered into by the international administration are of a different nature. As acts of agency performed by the international territorial administration, they are *not* attributable to the UN . . . .” Knoll, *supra* note 144, at 644.

the other granting authority to fulfill such agreements—demonstrate that UNMIK has sufficient competence and separateness to establish the requirement of capacity to engage in international relations.<sup>179</sup>

#### 4. Summary

Under either definition, the United Nations has assumed the role of a traditional state, and therefore must be treated accordingly. Despite the United Nations' legal classification as an international organization,<sup>180</sup> the consequences of "statehood" must necessarily include the loss of absolute immunity<sup>181</sup> and subjugation to the rigors of the FSIA. Consequently, this Note takes the position that the standards enunciated in the FSIA are applicable to the United Nations.<sup>182</sup>

179. The mere fact that a state chooses not to engage in international agreements does not affect fulfillment of the definition's requirements. See RESTATEMENT (THIRD) FOREIGN RELATIONS, § 201 cmt. e ("States do not cease to be states because they have agreed not to engage in certain international activities . . ."). Nevertheless, UNMIK has entered into several such agreements. Press Release, United Nations Interim Administration Mission in Kosovo, Kosovo Joins Enlarged Central European Free Trade Agreement, U.N. Doc. UNMIK/PR/1623 (Dec. 19, 2006) (stating, in addition to entering the Central European Free Trade Agreement, Kosovo is a signatory to the Energy Community Treaty and European Common Aviation Area Agreement).

180. Exec. Order No. 9,698, 11 Fed. Reg. 1,809 (Feb. 19, 1946).

181. See Ombudsperson Institution in Kosovo, *Special Report No. 1 on the Compatibility with Recognized International Standards of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo and on the Implementation of the Above Regulation*, ¶ 23, delivered to the Special Representative of the Secretary General of the United Nations (Aug. 26, 2001), available at <http://www.ombudspersonkosovo.org/repository/docs/E4010426a.pdf>. ("With regard to UNMIK's grant of immunity to itself and to KFOR, the Ombudsperson recalls that the main purpose of granting immunity to international organisations is to protect them against the unilateral interference by the individual government of the state in which they are located, a legitimate objective to ensure the effective operation of such organisations. The rationale for classical grants of immunity, however, does not apply to the circumstances prevailing in Kosovo, where the interim civilian administration (United Nations Mission in Kosovo—UNMIK) in fact acts as a surrogate state. It follows that the underlying purpose of a grant of immunity does not apply as there is no need for a government to be protected against itself. The Ombudsperson further recalls that no democratic state operating under the rule of law accords itself total immunity from any administrative, civil or criminal responsibility. Such blanket lack of accountability paves the way for the impunity of the state.") (internal citation omitted).

182. In addition to Article 105 of the United Nations Charter, on April 29, 1970, the United States acceded to the Convention on Privileges and Immunities of the United Nations. Convention on Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. No. 6900. Article 2 of the Convention states that "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." *Id.* art. 2 § 2. Thus, under the Convention, the United Nations is absolutely immune except under its express waiver; there are no other exceptions. *Boimah v. United Nations* Gen. Assembly, 664 F. Supp. 69, 71 (E.D.N.Y. 1987).

Concededly, my argument that the United Nations is subject to suit under the FSIA faces a formidable obstacle with the immunity granted by this treaty. To be sure, the FSIA expressly provides that where the FSIA and a treaty conflict, the treaty prevails. See *supra* note 45; H.R. REP. NO. 94-

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1487, at 17 (noting that “[i]n the event an international agreement expressly conflicts with [the FSIA], the international agreement would control.”). While full exploration of this issue is beyond the scope of this Note, I present a cursory overview of how such an argument could be framed.

From its inception, the primary responsibility of the United Nations has been the maintenance of international peace and security. *See supra* note 134 and accompanying text. This responsibility is vested in the Security Council, which fulfills this duty under authority granted to it by, *inter alia*, Chapters VII and XII. U.N. Charter art. 24, paras. 1, 2.

Under Chapter VII, the Security Council is empowered and required to “determine the existence of any threat to the peace, breach of the peace, or act of aggression,” *id.* art. 39, and can “decide what measures not involving the use of armed force are to be employed to give effect to its decisions.” *Id.* art. 41. *Cf. id.* art. 42 (authorizing the use of force if the measures under Article 41 would be or have been inadequate to achieve objective).

Under Chapter XII, the United Nations must “establish . . . an international trusteeship system for the administration and supervision of such territories as may be placed thereunder . . .” *Id.* art. 75. Under this trust system, the United Nations is permitted to act as the administering authority over the trust territory. *Id.* art. 81.

Certainly, the powers vested in the Security Council under Chapter VII are broad and would seem to encompass the administration of a trust territory. Michael J. Matheson, *United Nations Governance of Postconflict Societies*, 95 AM. J. INT’L L. 76, 83–84 (2001). Yet, the Charter seems to have specifically contemplated and provided for this situation with the creation of the trust system in Chapter XII. If the power granted to the Security Council pursuant to Chapter VII covers international administration of territory, why would the Charter provide for similar authority in Chapter XII? Would not Chapter XII become mere surplusage under this interpretation of Chapter VII? Against this backdrop, one could viably claim that the United Nations failed to properly create the interim administration in Kosovo when it invoked its power under Chapter VII. S.C. Res. 1244, *supra* note 144. In other words, the international administration in Kosovo is illegal. *See* Epaminontas E. Triantafilou, Note, *Matter of Law, Question of Policy: Kosovo’s Current and Future Status Under International Law*, 5 CHI. J. INT’L L. 355, 368 (2004) (concluding that UNMIK is illegitimate as a result of significant deviation from established interpretations of U.N. Charter). *But see* Matheson, *supra*, at 85 (“[T]he Council’s authority to require measures of the sort already taken in Kosovo . . . cannot be doubted.”); Enrico Milano, *Security Council Action in the Balkans: Reviewing the Legality of Kosovo’s Territorial Status*, 14 EUR. J. INT’L L. 999 (2003) (finding the civil presence in Kosovo legal and the KFOR security presence illegal). As such, the impropriety nullifies the territorial administration and any derivative immunity received under the Convention.

Even assuming, arguendo, that the Security Council can retroactively apply Chapter XII to UNMIK, another problem arises; it is only those territories falling within one of three enumerated categories which may be placed under the trusteeship system. U.N. Charter art. 77, para. 1. These categories are (a) territories held under mandate at the time of establishment of the Charter, (b) territories detached from enemy states following World War II, and (c) territories voluntarily placed under the trustee system by the state responsible for its administration. *Id.* Thus, the dispositive issue would become whether Kosovo falls within any of the designated trust categories.

Clearly Kosovo was neither a territory held under mandate in 1945 nor a territory detached from an enemy state following World War II. *See* Brian Deiwert, Note, *A New Trusteeship for World Peace and Security: Can an Old League of Nations Idea Be Applied to a Twenty-First Century Iraq?*, 14 IND. INT’L COMP. L. REV. 771, 792 & nn.239–240 (2004) (identifying the eleven trust territories placed under the U.N. trusteeship system). Therefore, only if Kosovo was voluntarily placed within the system by the state originally responsible for it would Kosovo satisfy the third category. Certainly, a colorable argument exists that Serbia did not agree to such international intervention or governance. *See supra* notes 146–47 and accompanying text; *see also* Deiwert, *supra*, at 792 (noting that only India has attempted such placement under Article 77(1)(c)). If this were the case, the establishment of UNMIK, even under the trust system, would be contrary to international law.

## IV. APPLICATION OF THE FSIA TO THE MITROVICA SHOOTING

A. *Procedural Aspects*

Unlike many other federal and state statutes, the FSIA does not provide any substantive rules for liability.<sup>183</sup> Instead, the FSIA merely explicates the circumstances by which a court may establish and exercise jurisdiction over a foreign sovereign.

Although “Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States,” such actions raise “sensitive issues concerning the foreign relations of the United States . . . .”<sup>184</sup> Consequently, “[a]t the threshold of every action in a district court against a foreign state, . . . the court must satisfy itself that one of the exceptions [of the FSIA] applies—and in doing so it must apply the detailed federal law standards set forth in the Act.”<sup>185</sup>

In *Argentine Republic v. Amerada Hess Shipping Corp.*,<sup>186</sup> the Supreme Court further elaborated on the requirements necessary for a court to exercise jurisdiction over a foreign nation. According to the Court,

[s]ections 1604 and 1330(a)<sup>[187]</sup> work in tandem: § 1604 bars federal and state courts from exercising jurisdiction when a foreign state is entitled to immunity, and § 1330(a) confers [subject matter] jurisdiction<sup>[188]</sup> on district courts to hear suits brought by United

183. *Robinson v. Gov’t of Malay*, 269 F.3d 133, 143 (2d Cir. 2001) (“The FSIA itself does not provide any substantive tort law to guide [a court’s] inquiry. It is ordinary tort law that applies to non-immune foreign governments and into which the court’s inquiry [should] properly [be] directed.”) (citing *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983)). See also § 1606, which provides that “[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances . . . .” 28 U.S.C. § 1606 (2007).

184. *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 493 (1983).

185. *Id.* at 493–94.

186. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

187. See § 1604. 28 U.S.C. § 1330(a) provides that

[t]he district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

28 U.S.C. § 1330(a) (2000).

188. The Court also addressed under what circumstances a court has personal jurisdiction:

[s]ubsection (b) of 28 U.S.C. § 1330 provides that “[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have [subject-matter]

States citizens and by aliens when a foreign state is *not* entitled to immunity.<sup>189</sup>

## B. “Substantive” Analysis

### 1. *The Non-Commercial Tort Exemption: § 1605(a)(5)*

Sections 1605 through 1607 of the FSIA provide the exclusive means through which a plaintiff can overcome the obstacles imposed by the grant of immunity articulated in section 1604.<sup>190</sup> Generally referred to as the non-commercial tort exception, section 1605(a)(5) removes the grant of immunity from a foreign sovereign upon the occurrence of a tortious act or omission.<sup>191</sup> As the name implies, this exception allows individuals to pursue claims against foreign governments for actions resulting in personal injury or death.<sup>192</sup> Originally intended to permit victims of traffic accidents to recover from a foreign sovereign defendant,<sup>193</sup> the broad language of the provision encompasses victims of other tortious actions as well.<sup>194</sup>

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jurisdiction under subsection (a) where service has been made under [28 U.S.C. § 1608].’ Thus, personal jurisdiction, like subject-matter jurisdiction, exists only when one of the exceptions to foreign sovereign immunity in §§ 1605–1607 applies.

*Amerada Hess*, 488 U.S. at 435 n.3 (first alteration added) (citing *Verlinden*, 461 U.S. at 485, 489 & n.14).

189. *Id.* at 434.

190. Since immunity is an affirmative defense, the foreign defendant has the burden of proving its claim of immunity. As part of this burden, the foreign state must produce evidence that the state (or instrumentality) is in fact the defendant and the act complained of was a public act (i.e., not within an exception). Once this *prima facie* evidence is produced, the burden then shifts to the plaintiff to show the state is not entitled to immunity. H.R. REP. NO. 94-1487, at 17. However, “even if the foreign state does not enter an appearance to assert an immunity defense, a district court still must determine that immunity is unavailable under the Act.” *Verlinden*, 461 U.S. at 493 n.20.

191. Section 1605(a)(5) provides that

[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case — not otherwise encompassed in [the commercial activities exception], in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to — (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

28 U.S.C. § 1605(a)(5) (2000).

192. H.R. REP. NO. 94-1487, at 21.

193. *Id.* at 20.

194. *Id.* at 20–21. *But see* *MacArthur Area Citizens Ass’n v. Peru*, 809 F.2d 918, 921 (D.C. Cir.

All such claims, whether caused by traffic accidents or other tortious conduct, must comply with the “substantive”<sup>195</sup> elements enumerated in 1605(a)(5), provided however, that the action does not fall within the commercial activities exception.<sup>196</sup> Thus, in order to prevail, a plaintiff must seek monetary damages from a qualified foreign defendant for conduct resulting in personal injury or death caused by the tortious act or omission of the foreign state, its officials, or employees.

Having concluded that the United Nations is a qualified foreign state, and with the Mitrovica incident in mind, it seems clear that the injured officers could seek monetary compensation from the United Nations for the injuries received as a result of the shooting.

What is not as clear, however, is whether the shooting by the Jordanian can be considered the conduct of an employee acting within the scope of employment. Because the non-commercial tort exception is essentially a *respondeat superior* statute,<sup>197</sup> courts confronted with this issue must first answer the question of what law to apply.<sup>198</sup> Consequently, whether the injurious conduct was within the scope of employment of the tortfeasor will be determined by a jurisdiction’s substantive law.<sup>199</sup>

1987) (finding that “the legislative history counsels that the exception should be narrowly construed so as not to encompass the farthest reaches of common law”).

195. See *supra* note 183 and accompanying text.

196. § 1605(a)(5). The commercial activities exception, enumerated at 28 U.S.C. § 1605(a)(2), provides that a foreign state is not immune when

the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2) (2000).

197. *Rendall-Speranza v. Nassim* (*Rendall II*), 932 F. Supp. 19, 24 (D.D.C. 1996) (noting that “[s]ection 1605(a)(5) is essentially a *respondeat superior* statute, providing an employer with liability for certain tortious acts of its employees”) (emphasis in original).

198. *Liu v. China*, 892 F.2d 1419, 1426 (9th Cir. 1989). At least two circuits are split on what substantive law should apply in FSIA cases. *In re Texas E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 870 F. Supp. 1293, 1336 n.61 (E.D. Pa. 1991) (noting the split). The Ninth Circuit Court of Appeals applies the federal choice of law rule. Under this rule, courts apply the law of the forum where the injury-causing conduct occurred, unless another jurisdiction has a more significant relationship to the tort and the parties. *Liu*, 892 F.2d at 1425–26. On the other hand, the Second Circuit applies the law of the forum. *Barkan v. Gen. Admin. of Civil Aviation of the People’s Republic of China*, 923 F.2d 957, 959–61 (2d Cir. 1991).

199. See *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 586 (9th Cir. 1983) (“The FSIA . . . does not affect the substantive law of liability. That liability—were a court to reach the merits of appellants’ claims—would be determined by state or Iranian law.”) (citation omitted). Although such analysis is far beyond the scope of this Note, as a matter of pure speculation, I think it highly doubtful that a court would find that Ali’s homicidal conduct was within the scope of his employment as an international police officer. Compare *Rendall-Speranza v. Nassim* (*Rendall I*), 942 F. Supp. 621, 626 (D.D.C. 1996), *rev’d on other grounds*, 107 F.3d 913 (D.C. Cir. 1997) (finding that assault and battery

The final element, and of fatal consequence here, is the requirement that the *injury* occur within the United States.<sup>200</sup> This requirement is distinguishable from any necessity that the *conduct*, i.e., the tortious act or omission, occur within the United States.<sup>201</sup> However, regrettably for the injured American officers, courts addressing this issue have interpreted the statutory language as requiring that both the conduct and injury occur within the United States.<sup>202</sup> While there is no doubt that the United States can exercise extraterritorial jurisdiction,<sup>203</sup> doing so could produce significant policy problems and anomalous results.<sup>204</sup>

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performed by employee of international organization was not within scope of employment) *and* Skeen v. Brazil, 566 F. Supp. 1414, 1418 (D.D.C. 1983) (finding that assault and shooting by employee of foreign country did not further the sovereign's interest and was not reasonably foreseeable as natural result of employment) *with* Liu, 892 F.2d at 1431 (under California law, the Republic of China was vicariously liable for government official's order for assassination of historian and journalist in United States). See generally RESTATEMENT (THIRD) OF AGENCY, §§ 7.03, 7.07 (2006).

To the extent that the officers could reframe their cause of action on the theory that the United Nations negligently hired or negligently supervised Ali, this claim has been explicitly rejected as "merely a semantic ploy" by the Supreme Court. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) ("[A] plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn, simply by charging the defendant with an obligation to announce its own tortious propensity before indulging it. To give jurisdictional significance to this feint of language would effectively thwart the Act's manifest purpose . . ."). *Contra id.* at 375 (Kennedy, J., dissenting in part) ("As a matter of substantive tort law, it is not a novel proposition or a play on words to describe with precision the conduct upon which various causes of action are based or to recognize that a single injury can arise from multiple causes, each of which constitutes an actionable wrong.").

200. For purposes of the FSIA, the term "United States" is defined as "all territory and waters, continental or insular, subject to the jurisdiction of the United States." 28 U.S.C. § 1603(c) (2000).

201. Joseph W. Dellapenna, *Refining the Foreign Sovereign Immunities Act*, 9 WILLAMETTE J. INT'L L. & DISP. RESOL. 57, 136 (2001).

202. *Id.* at n.328. *Cf. id.* at 137 & n.330 ("Several courts have stressed that the 'entire tort' must occur within the United States."). *But see* Burnett v. Al Baraka Inv. & Dev. Corp., 292 F. Supp. 2d 9, 19 n.4 (D.D.C. 2003) (following the statutory language and finding that only death or injury need occur in the United States).

203. *Equal Employment Opportunity Commission v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.").

204. Dellapenna, *supra* note 201, at 138 ("If there were no territorial restriction on the tortious act or omission, foreign sovereigns could be subject to suit in American courts for tortious conduct committed anywhere in the world, so long as the conduct had effects—no matter how tenuous—in the United States. These cases would likely be especially offensive to foreign sovereigns, raise difficult questions of causation, and burden an already overloaded federal court system. In addition, allowing these suits would create an anomaly whereby some direct victims of foreign torts could not sue under the Immunities Act (because the tort and injury occurred abroad), but some third parties affected by the very same torts would be able to sue.") (footnote omitted).

Likewise, as was feared when the Antiterrorism and Effective Death Penalty Act was proposed, other nations may choose "to respond in kind, thus potentially subjecting the American government to suits in foreign countries for actions taken in the United States." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 89 (D.C. Cir. 2002).

## 2. *The Re-immunizing Clauses*

Nevertheless, even if all the aforementioned requirements are met, a foreign state will still retain immunity if the alleged tortious conduct falls within either of two enumerated exceptions to the non-commercial tort provision.<sup>205</sup> The first exception tests whether the conduct at issue was performed (or not performed) at the discretion of the actor, regardless of whether the discretion was abused. The second exception examines whether the conduct arose out of a discrete class of pre-defined activities.

Addressing the latter exception first, it is evident that the officers' claim does not arise out of any statutorily defined conduct.<sup>206</sup> Therefore, the foreign sovereign would be unable to avoid liability because of a failure to meet the requirements of the second escape clause.

The first exception is not as easily dismissed. "In order for the tortious activity exception to be applied . . . , the torts alleged by [the officers] must not involve the exercise of discretionary functions."<sup>207</sup> Whether a discretionary function has occurred is determined by applying principles developed pursuant to the Federal Tort Claims Act.<sup>208</sup> The Supreme Court in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*<sup>209</sup> developed a two-pronged test for determining whether a discretionary function applies in a particular case.<sup>210</sup> Under the *Varig Airlines* test, a court must initially examine the nature of the conduct, as opposed to the status of the tortfeasor, and then inquire as to whether the conduct was grounded in the foreign sovereign's social, economic, or political policy.<sup>211</sup>

205. *Alicog v. Saudi Arabia*, 860 F. Supp. 379, 382 (S.D. Tex. 1994) ("The tort exception has exceptions itself . . . ."); see *supra* note 191.

206. The re-immunizing conduct as it pertains to the escape clause in § 1605(a)(5)(B) is malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. See *supra* note 191.

207. *Joseph v. Office of the Consulate Gen. of Nig.*, 830 F.2d 1018, 1026 (9th Cir. 1987).

208. *Id.* (citing *Olsen v. Mexico*, 729 F.2d 641, 646–47 (9th Cir. 1984), *cert. denied*, 469 U.S. 917 (1984)). Federal Tort Claims Act, ch. 646, 62 Stat. 933 (1949) (codified as amended in various sections of 28 U.S.C.).

209. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813–14 (1984).

210. *Joseph*, 830 F.2d at 1026.

211. *Id.*

In order for the Mitrovica officers to prevail, the *Varig Airlines* test must demonstrate that the conduct at issue is *not* a discretionary function. Applying the test to the Mitrovica shooting reveals that the exception will be inapplicable; that is, the conduct will not be found to be a discretionary function of the United Nations. Ignoring, as required, the status of Ali as an armed police officer of the defendant, the bellicose nature of Ali's conduct is outside the type of conduct that Congress intended to shield from tort liability<sup>212</sup> or that would be sanctioned by a foreign sovereign.<sup>213</sup> Furthermore, the conduct does not further any social, economic, or political policy of the United Nations.<sup>214</sup>

### C. A Modest Proposal for Reform

Although the United Nations will be unable to utilize either of the provision's two escape clauses in order to retain its much daunted immunity, the innocent victims of the Mitrovica shooting spree will, likewise, be unable to maintain a successful action against the United Nations for the conduct of its Jordanian employee. This lamentable conclusion necessarily begs the question of whether the FSIA should be amended in some fashion to permit such claims.

Despite statutory language that only injury or death need occur within the United States, Chief Justice Rehnquist's dictum<sup>215</sup> in *Amerada Hess* ably justifies why a strict interpretation of the statute would be

212. *Kalasho v. Iraq*, No. 06-11030, 2007 WL 2683553, at \*7 (E.D. Mich. Sept. 7, 2007) (noting that kidnapping, private imprisonment, assassination, attempted murder, assault and battery, and arson are not discretionary functions); *Liu*, 892 F.2d at 1431 ("hold[ing] that the discretionary function exception is inapplicable when an employee of a foreign government violates its own internal law"). See *Varig Airlines*, 467 U.S. at 813.

213. *But see, e.g., de Letelier v. Chile*, 502 F. Supp. 259, 266 (D.D.C. 1980) (assassination of Chilean ambassador in United States was directed by Chilean officials).

214. See *Liu v. Republic of China*, 642 F. Supp. 297, 305 (N.D. Cal. 1986) (killing of U.S. citizens is not a policy option available to foreign countries). See also *de Letelier v. Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980) ("While it seems apparent that a decision calculated to result in injury or death to a particular individual or individuals, made for whatever reason, would be one most assuredly involving policy judgment and decision and thus exempt as a discretionary act under section 1605(a)(5)(A), that exception is not applicable to bar this suit. As it has been recognized, there is no discretion to commit, or to have one's officers or agents commit, an illegal act. Whatever policy options may exist for a foreign country, it has no 'discretion' to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law.") (citations omitted).

215. *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 169 (D.C. Cir. 1994) (the statement is dictum because the conduct occurred outside the United States); Dellapenna, *supra* note 201, at 137 n.329.

insufficient, assuming all other elements are met, to overcome the presumption of immunity for foreign states. The Chief Justice averred:

The result in this case is not altered by the fact that petitioner's alleged tort may have had effects in the United States. . . . Under the commercial activity exception to the FSIA, § 1605(a)(2), a foreign state may be liable for its commercial activities 'outside the territory of the United States' having a 'direct effect' inside the United States. But the noncommercial tort exception, § 1605(a)(5), . . . makes no mention of 'territory outside the United States' or of 'direct effects' in the United States. Congress' decision to use explicit language in § 1605(a)(2), and not to do so in § 1605(a)(5), indicates that the exception in § 1605(a)(5) covers only torts occurring within the territorial jurisdiction of the United States.<sup>216</sup>

In light of this dicta and conflicting court interpretations,<sup>217</sup> I propose that the non-commercial tort exception be amended by mirroring the language in the commercial activities exception.<sup>218</sup> This change would unambiguously expand the jurisdiction of U.S. courts over conduct, occurring outside the United States, which has direct effects inside the United States.<sup>219</sup> However, because of various policy concerns,<sup>220</sup> the imposition of additional conditions is recommended to temper any

216. *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 441 (1989). Chief Justice Rehnquist's conclusion is further supported by the legislative history of the FSIA, H.R. REP. NO. 94-1487, at 21 ("[T]he tortious act or omission must occur within the jurisdiction of the United States . . ."), and precedent. *Persinger*, 729 F.2d at 843 (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)) ("When Congress uses explicit language in one part of a statute to cover a particular situation and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing."). *But see id.* at 843-44 (Edwards, J., dissenting in part) (discussing multiple reasons to adhere to the statutory language).

217. *See supra* note 202 and accompanying text.

218. *See supra* note 196. *Cf. Dellapenna, supra* note 201, at 139 (recommending an amendment to the situs requirement but only to the extent that a "substantial portion" of the tortious conduct occur in the United States).

Since § 1605(a)(5), as proposed, will still only pertain to "ordinary" torts, I see no conflict with 18 U.S.C. § 2337, which bars actions pursued against foreign states under 18 U.S.C. § 2333. 18 U.S.C. § 2337(2) (2000). 18 U.S.C. § 2333(a) permits civil actions for acts of international terrorism. 18 U.S.C. § 2333(a) (2000).

219. In *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992), the Supreme Court rejected the suggestion that the phrase "direct effect" should be construed as requiring "substantiality" or "foreseeability." Following the principle that jurisdiction must be based on more than "purely trivial effects," the Court endorsed the court of appeals' recognition that "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity." *Id.* (internal quotation marks and citation omitted).

220. *See supra* note 204.

perceived harshness of the proposed amendment.<sup>221</sup> For instance, the plaintiff could be required to show that the tortfeasor was motivated, in part, to act because of the victim's nationality. In other words, the victim's nationality played some role, however minor, in the victim-selection process.<sup>222</sup> Likewise, Congress could strictly define what type of conduct is actionable; permitting, for example, actions only when serious bodily injury or death occurs, while excluding traffic offenses.<sup>223</sup> Finally, Congress could authorize such actions only when the forum where the conduct occurs lacks an available remedy.<sup>224</sup> Conditions such as these would not be overly burdensome on a plaintiff and, at the same time, would alleviate the concerns expressed about the exercise of extraterritorial jurisdiction by the United States in the area of non-commercial torts.<sup>225</sup>

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221. *But see* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 14 (D.D.C. 1998) ("The state sponsored terrorism provisions represent a sea change in the United States' approach to foreign sovereign immunity. For the first time, Congress has expressly created an exception to immunity designed to influence the sovereign conduct of foreign states . . .").

222. Under the "passive personality" principle, a state exercises jurisdiction extraterritorially on the basis of the victim's nationality. RESTATEMENT (THIRD) FOREIGN RELATIONS § 402 cmt. g. While this basis is generally insufficient for ordinary torts, *id.*, I argue that when the victim is targeted *because of her nationality*, a sufficient basis for jurisdiction exists. *Cf.* United States v. Vasquez-Velasco, 15 F.3d 833, 841 n.7 (9th Cir. 1994) (noting that extraterritorial jurisdiction is inappropriate for *random* murder of Americans abroad suggesting that murder was not based on nationality). In this sense, a tort in which particular victims are selected based on nationality is an amalgam of an ordinary tort and terrorism, and lies on the theoretical continuum between the two.

In any event, jurisdiction is valid under my proposed amendment because "[j]urisdiction with respect to activity outside the state, but having or intended to have substantial effect within the state's territory, is an aspect of jurisdiction based on territoriality . . . ." RESTATEMENT (THIRD) FOREIGN RELATIONS § 402 cmt. d.

223. *See, e.g.*, 18 U.S.C. § 2332 (2003) (extraterritorial application of criminal law limited to homicide, conspiracy to commit homicide, and conduct resulting in serious bodily injury).

224. *See, e.g.*, Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2(b), 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2000)) ("A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.").

As it pertains to UNMIK, this condition would become especially relevant. *See* Regulation No. 2000/47 On the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo, § 3.1, UNMIK/REG/2000/47 (Aug. 18, 2000), *available at* [http://www.unmikonline.org/regulations/unmikgazette/02english/E2000regs/RE2000\\_47.htm](http://www.unmikonline.org/regulations/unmikgazette/02english/E2000regs/RE2000_47.htm) ("UNMIK, its property, funds and assets shall be immune from any legal process."). *See also supra* note 181.

225. *See supra* note 204. Admittedly, the most important policy concern expressed against extraterritorial jurisdiction is that the proposed change may be especially offensive to other nations. This is so because the United States could be viewed as holding other nations, which may have values different from those of the United States, to account for failure to conform to U.S. standards. However, by limiting causes of action to certain categories of conduct, perhaps only those in violation of the law of nations, any offensiveness will be significantly reduced. Moreover, even if the injury-causing conduct falls outside of internationally-recognized harms, a state still has several defenses available, such as the Act of State doctrine, or that the conduct was either within the scope of employment of the actor or the result of a discretionary decision.

## V. CONCLUSION

Long gone are the days when international organizations were minor participants in global politics in need of protection from member states. Today, these organizations, especially the United Nations, have accumulated immense wealth and wield vast amounts of power. Under such conditions, the lack of absolute immunity appears neither to threaten the existence of the organization nor its functionality.

Regrettably, whether utilizing either the statutory construction basis or the statehood theory, any claims made by the injured officers or their

Likewise, it has been suggested that, should the United States exercise the form of extraterritorial jurisdiction that I have proposed, other nations will follow suit, thus subjecting the United States to similar claims in those nations. While technically true, this idea ignores my “available remedy” requirement. Thus, if another state adopted an extraterritorial tort provision, then the United States is exposed to no more risk than if no provision existed at all because the United States provides an available forum and remedy vis-à-vis the Federal Tort Claims Act. Furthermore, nothing prevents another nation from enacting such a provision even if the United States fails to do so. If this were the case, the United States would be subject to suit abroad without any international parity.

It is also correct that, as a result of the proposed language, an “anomaly” could possibly result such that, while some direct victims would be unable to sue, some third parties affected by the same tort would be able to do so. Under the current regime, unless the conduct and injury occur within the United States, victims are unable to prevail on otherwise viable claims against a foreign sovereign. I argue that, despite any theoretical inequity among those who have been injured as a result of extraterritorial conduct, it is far better to allow a portion of this class of victims to bring claims rather than disallow the entire group.

Another concern is that if jurisdiction is expanded to cover conduct outside of the United States, there will be difficulties in proving causation. This concern is tenuous at best. Merely because the conduct may occur in a foreign land does not *automatically* make proof of this element any more difficult than if the conduct occurred in the United States. Indeed, the commercial activity exception routinely requires courts to determine whether an activity outside the United States caused a direct effect inside the United States. Likewise, under the Alien Tort Statute, U.S. courts have accepted jurisdiction over claims when the injurious conduct has occurred in foreign lands without evidentiary problems.

As perhaps a last ditch effort to avoid application of extraterritorial jurisdiction, the much-abused and oft-cited “floodgates” argument has been propounded. To be sure, any time jurisdiction is expanded or a new cause of action is created, courts may face an increase in workload. Yet, if lawmakers or judges had succumbed to this argument every time it was put forth, it is likely that many beneficial changes in the law would never have come to fruition. In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410–11 (1971) (Harlan, J., concurring), Justice Harlan persuasively wrote:

The only substantial policy consideration advanced against recognition of a federal cause of action for violation of Fourth Amendment rights by federal officials is the incremental expenditure of judicial resources that will be necessitated by this class of litigation. . . . Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

executors against the United Nations for damages resulting from the Mitrovica shooting will prove futile because of an inability to meet the minimum requirements of the FSIA's non-commercial tort exception. This fact alone demonstrates that, under either of the proposed theories, including the statutory amendment recommended in this Note, international organizations are well-protected by the FSIA.

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