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INTRODUCTION

Andrew Lockridge
Editor-in-Chief

Crimes against humanity, unilateral military force in the 21st century, immigration at home and abroad, and judicial review during the War on Terror. Though these themes may seem disparate to many, they are all contemporary issues that we see in the news every day. This issue of *The Journal of Law and Society* is the first in which we experimented with moving away from a theme, and I truly think it has benefitted our work. The essays published in the coming pages represent not only original and insightful political thought, but they look at issues of the modern day.

My staff and I sought to formulate a journal that contained a few different issues so that readers could pick up a copy of the Journal and learn a little bit about a number of fields. We spent countless hours reading many essays, choosing the finest, and working with the authors and professors to perfect the ones you see here. I am

very much thankful and indebted to those who contributed to this issue.

In her first semester as managing editor and chief of staff, Eszter Boldis was absolutely indispensible. I am grateful for her taking on such a difficult position and streamlining communication between members of the Journal, facilitating relations with the administration, and always looking to help out when we needed it. Without Eszter, the Journal would not look or feel nearly as organized as it does today.

Once again, director of publicity Evan Lester and his team consisting of Raul Beke and Micaela Rodgers were brilliant in their search for essays. They expanded our list of universities we communicate with and thus create a larger pool of essay submissions for us to choose from. After we receive all of the essays, our submissions editor Gracie Chediak organized and ran the selection process. Gracie has been on the Journal with me since it was revived three years ago, but we must now say goodbye as she graduates. She has truly been an integral part of building this Journal and making it what it is today.

After the selection process, it was time for Tyler Cundiff to take over as our articles editor. Tyler runs the group editing, oversees our citation editing process, and is somehow, despite his incredibly busy schedule, always available to help. This semesters editing groups were led by Raul Beke, Eszter Boldis, Evan Lester, Stephanie Schmidt, Mabel Tsui, and Shannon Zhang. They have become masters of editing and citations, and we will very much miss Raul, Stephanie, and Mabel upon their graduation.

In our faculty relations department, Gwen Holst took over and has done a wonderful job. She helps search for new professors and mentors for the Journal because with more help comes a better product. As such, I must thank Professors Lyn Boyd-Judson, Michael Cody, Lee Epstein, C. Kerry Fields, Ariela Gross, Nancy Lutkehaus, Erin Moore, Alison Dundes Renteln, Wayne Sandholtz, Jefferey Sellers, Nancy Staudt, and Karen Sternheimer. Our faculty advisory board was also led by Professor Jeb Barnes, and I am grateful to all of them for their help.

Leslie Chang has been an incredible asset in both our production phase but also helping Tyler with articles editing. I am very excited that she will be returning next semester to continue helping with production and articles. Shannon Zhang has also been incredibly important to the Journal in her maintaining of our website whilst simultaneously working on her article that is published in this edition.

Last, but not least, my staff and I must thank Professor Steve Lamy, Vice Dean for Academic Programs in the USC Dana and David Dornsife College of Letters, Arts and Sciences for providing funding for this journal. He and his office have been very generous to this Journal and we are all extremely grateful.

It has been a semester of hard work and dedication, and I believe that the essays you are about to read are evidence of that. I am excited to present the Spring 2014 edition of the *Journal of Law and Society*. I hope after reading these insightful articles that you leave feeling enlightened, informed, and refreshed.

Crimes Against Humanity: A Historical & Theoretical Account

Graham Stinnett*

It seems undeniable that the atrocities committed during the Holocaust, the Rwandan genocide and the Bosnian genocide were crimes against humanity, but what makes this so? In other words, what exactly is a 'crime against humanity'? This paper traces the theoretical basis behind the 'crimes against humanity' concept through the history of natural rights theories, international tribunals from Nuremberg to Rwanda, United Nations conferences, statutes and the International Criminal Court to arrive at the modern working definition. This task is of vital importance because the international community's ability to respond to future international atrocities via right and capacity to both enforce and adjudicate crimes against humanity depends on the strength and soundness of the concept itself. Furthermore, as the international enforcement of this right bridges the gap between state sovereignty and international intervention a firm grasp of the limits and capabilities associated with states policing crimes against humanity is crucial, especially given the fact of globalization.

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After the infamous September 11th attacks, international prosecutor Benjamin Ferencz explained that:

> "What has happened here is not war in its traditional sense. This is clearly a *crime against humanity*. War crimes are crimes which happen in war time. There is a confusion there. This is a crime against humanity because it is deliberate and intentional *killing* of large numbers of *civilians* for political or other purposes. That is not *tolerable* under the international systems. And it should be prosecuted pursuant to the existing laws."[1]

Mr. Ferencz aptly applied a working definition for a crime against humanity while expressing his assuredness in the crime's capacity for legal enforceability. How was Mr. Ferencz able to so quickly categorize a crime as unique as the September 11th attacks? Furthermore, how was he so sure of its international enforceability when a mere 60 years prior the term crime against humanity hardly existed? This diagnosis had the benefit of years of trial and tribulation molding and codifying the *crimes against humanity* concept to arrive at the current formal legal definition of *crimes against humanity*, which was enacted by the United Nations General Assembly with the Rome Statute in 1998. Article 7 of the Rome Statute defines *crimes against humanity* as follows:

> "For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: a) murder; b) extermination; c) enslavement; d) deportation or forcible transfer of population; e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; f) torture; g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in

[1] Katy Clark, (2001, September 19), Crimes Against Humanity: Benjamin Ferencz Interview. Ratical.org.

> this paragraph or any crime within the jurisdiction of the Court; i) enforced disappearance of persons; j) the crime of apartheid; k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."[2]

But, what of those who prosecuted perpetrators of crimes against humanity without the benefit of the Rome Statute definition; like Mr. Ferencz himself when he prosecuted perpetrators of the Holocaust without any codified discussion of crimes against humanity? Investigating the journey to the Rome Statute will provide a better fundamental understanding of the crimes against humanity concept and allow us to make and follow through with future diagnoses like Mr. Ferencz's.

The journey to the Rome Statute begins with the concepts of *natural rights* and *human rights*. While the discussion here may not appear to be necessarily central to the topic of crimes against humanity, it is an important discussion because it lays the philosophical background preceding the advent of the notion of crimes against humanity. The ancient and later medieval tradition of *natural law* evolved into the idea of natural rights during the pre-modern era and eventually formed the foundation for the modern conception of universal human rights in the 20th century.[3] Martin Dixon describes that natural law:

> "Presupposes an ideal system of law, founded on the nature of man as a reasonable being. Thus, rules of law are derived from the dictates of nature as a matter of human reason. Natural law can be contrasted with positive (consensual) law, the latter being based on the actual practice of states while the former is based on objectively correct moral principles.[4]

Similarly, natural *rights* are not subject to positive law and are considered inalienable and universal, to be extended to every human being across the globe. The origins of natural law can first be found with ancient Greek philosophers Plato, Aristotle and Cicero. In *Rhetoric*, Aristotle alludes that some elements of law are "eternal" and "unchangeable" and are not lim-

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[2] United Nations Treaty Database entry regarding the Rome Statute of International Criminal Court.

[3] Brian Tierney, *The Idea of Natural Rights-Origins and Persistence*, NW. U. J. INT'L HUM. RTS. 2, 1-14 (2004).

[4] DIXON MARTIN, TEXTBOOK ON INTERNATIONAL LAW (6th ed., 2007).

ited by territorial boundaries.[5] Islamic Natural Law and Christian Natural Law developed centuries later, with both of these movements combining religious beliefs with the arguments of the ancient Greeks. For example, Thomas Aquinas of the Christian Natural Law movement quoted Cicero stating that "nature" and "custom" were the sources of a society's laws.[6] Aquinas also asserts that all human or positive laws were to be judged by their congruence with natural law and that an unjust law is not actually a law.[7]

These religious natural law movements paved the way for Enlightenment era thinkers like John Locke and Thomas Jefferson to fully realize the concept of natural rights. The American and French Revolutions saw the use of natural rights concepts as justification for revolt. The American Declaration of Independence relied heavily on Locke's philosophy, making its case for independence by citing "The Laws of Nature" and "certain unalienable rights."[8] Following the vast global upheaval, exemplified by the American and French Revolutions, natural rights theories were criticized by more stabilized nations, and as a result positivism took the forefront of mainstream legal thought. At the same time, principles like territoriality (restricting states from exercising jurisdiction beyond their borders),[9] sovereign immunity (granting sovereigns or states immunity from civil suit or criminal prosecution)[10] and non-interference in foreign nations' affairs (barring States and/or groups of States from intervening with the affairs of any other State)[11] became internationally popular. However, Australian international human rights and criminal law expert Robert Dubler explains, "An exception developed in the case of manifest atrocities pursuant to the doctrine of humanitarian interventions."[12] This doctrine of humanitarian intervention would later be cited by Sir Hartley Shawcross and United States Prosecutors during the Nuremberg Trials following World War II (WWII) to give juridical foundation for crimes against humanity in international law.[13] Here in the aftermath of WWII came the true advent of the concrete term 'crimes against humanity' with its application to Nazi criminals. The US representative from the United

[5] Max S. Shellens, *Aristotle on Natural Law*, NAT. L. F. 4, 78 (1959).
[6] THOMAS AQUINAS, TREATISE ON LAW (SUMMA THEOLOGICA) (Stanley Parry ed.1969).
[7] *Id.* at 6.
[8] The Declaration of Independence para. 1-2 (U.S. 1776).
[9] Kenneth C. Randall, *Recent Book on International Law: Book Review - Universal Jurisdiction: International and Municipal Legal Perspectives*. AM. J. INT'L L. (2004).
[10] *Sovereign Immunity*, in WEST'S ENCYCLOPEDIA OF AMERICAN LAW (2nd ed. 2008).
[11] William C. Burton, *Non-interference*, in BURTON'S LEGAL THESAURUS (4th ed. 2006).
[12] Robert Dubler, *What's in a name? A theory of crimes against humanity,* AUSTL. INT'L L. J. 15, 85 (2008).
[13] *Id.*

Nations War Crimes Commission (UNWCC) suggested that the offenses to be prosecuted in the aftermath of WWII ought to include crimes against humanity, "being those committed against any persons because of their race or religion."[14] This notion delineated from the traditional concept of *war crimes* defined in Article 6(b) of the Nuremberg Charter essentially as "violations of the laws or customs of war."[15] Whereas Article 6(c) of the Nuremberg Charter defined *crimes against humanity* as:

> "namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, *before or during the war*, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."[16]

The italicized portion above became known as the 'war nexus' and it appears that the Allies inserted this portion in order to prevent future parties from holding leaders in the Allied states accountable for crimes against humanity within their own territories during peace time and without connection to plans of aggression.[17] Thus, only acts committed during the war were prosecuted as crimes against humanity. For example, the Nazi propagandist, Julius Streicher, wrote and published anti-Semitic hate speech for over 25 years; however, he was only tried on the basis of his crimes committed during the war. Nevertheless, on the basis of strictly wartime offenses, Streicher received the death penalty.[18] Convictions such as this for crimes against humanity were the first of their kind. All in all however, the notion left by the Nuremberg Trials, largely due to the "war nexus" stipulation, seemed to be that crimes against humanity were simply a minor extension of the traditional concept of war crimes.[19]

After the Nuremberg Trials, the limited conception and application of crimes against humanity would extend until the early 1990s. The Nuremberg definition of crimes against humanity dominated during this period, but the only defendants tried for crimes against humanity were

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[14] United Nations War Crimes Commission, History of The United Nations War Commission (London: UN War Crimes Comm by H.M. Stationery Office, 1948).
[15] United Nations, Charter of the International Military Tribunal (Article 6) (8 August 1945).
[16] *Id.* at 15.
[17] Dubler, *supra* note 12.
[18] Dubler, *supra* note 12.
[19] Egon Schwelb, *Crimes Against Humanity*, BRIT. Y.B. INT'L L. 23 (1946), 178.

Nazis. While there were certainly incidences of crimes against humanity (at least in the general sense) and alleged acts of mass atrocity committed by state leaders against their own citizens during this period, the United Nations Security Council rarely intervened. The acquiescence of the Security Council was largely due to the severe political tension and emphasis on sovereignty during the Cold War.[20] While the Nuremberg Trials may have appeared to be a significant step towards piercing through strict sovereignty in favor of individual rights and protections; the reality is that when the United Nations General Assembly accepted the Nuremberg Charter and Judgment in December of 1946, the Assembly also accepted the strict Nuremberg definition for crimes against humanity, which again was concerned more with international peace linked to war rather than the individual protections of citizens from their own leaders.[21] While the UN Charter did refer to fundamental human rights, these references were not enough to override procedural guidelines for the Security Council set in Chapter VII, which dictated that the Security Council could only act or intervene in cases that threatened international peace.[22] Thus, Cold War politics, the rigid Nuremberg definition and Security Council guidelines prevented any international response to intraterritorial human rights abuses and crimes against humanity during peacetime for close to 40 years.

Unfortunately it took another episode of vast European atrocity to elicit any type of real progress for international intervention on the basis of crimes against humanity. During the dissolution of Yugoslavia in 1991 there were reports of ethnic cleansing in the territory. Two years later the UN Security Council responded creating the International Criminal Tribunal for the former Yugoslavia (ICTY) based on the UN Charter Chapter VII guidelines.[23] Article 5 of the ICTY Statute defined crimes against humanity as:

> "... the following crimes when committed in armed conflicts, whether international or internal in character, and directed against any civilian population: a) murder; b) extermination; c) enslavement; d) deportation; e) imprisonment; f) torture; g) rape; persecution on political, racial and religious grounds; i) other inhumane acts."[24]

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[20] Dubler, *supra* note 12, at 12.
[21] United Nations General Assembly, Resolution 95 (I) (11 December 1946).
[22] Dubler, *supra* note 12, at 12.
[23] United Nations Security Council. Resolution 827 (25 May 1993).
[24] International Criminal Law Services, *Crimes Against Humanity*, INTERNATIONAL CRIMINAL LAW & PRACTICE TRAINING MATERIALS (2009).

Thus, the ICTY drew heavily upon the Nuremberg definition of crimes against humanity. According to William Schabas:

> "[w]ithout much doubt, it can be stated that the drafters of the ICTY Statute believed that such a limitation [the link to armed conflict] was imposed by customary international law and that to prosecute crimes against humanity in the absence of armed conflict would violate the maxim nullum crimen sine lege."[25]

With maxim *nullum crimen sine lege* translating to mean: No crime, no punishment without a previous penal law. Essentially the drafters of the ICTY statute did not want to delineate from the international precedent of the Nuremberg definition for crimes against humanity.

In 1994, following a systematically violent Hutu militia campaign against the Tutsi people in Rwanda, the UN Security Council acted again under Chapter VII of the UN Charter by adopting the International Criminal Tribunal (ICTR) Statute.[26] The ICTR Statute delineated from the ICTY Statute and the Nuremberg Charter because it was not entirely clear whether there was an armed conflict or not. Article 3 of the ICTR Statute reads as follows:

> "The [ICTR] shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: a) murder; b) extermination; c) enslavement; d) deportation; e) imprisonment; f) torture; g) rape; h) persecutions on political, racial and religious grounds; i) other inhumane acts."[27]

According to the UN Secretary-General Boutros Boutros-Ghali, the Security Council elected to take a more flexible approach and delineate from the ICTY regardless of whether the crimes were considered a part of customary international law.[28] Duško Tadić, the first defendant tried under the ICTY, argued against this delineation from customary international

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[25] WILLIAM SCHABAS, THE LAW OF THE AD HOC TRIBUNALS. THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE (2006).
[26] United Nations Security Council. Resolution 955 (8 November 1994).
[27] *Id.*
[28] *Special Report of the Secretary-General of the United Nations on the United Nations Assistance Mission for Rwanda*, UN GAOR, UN Doc S/1994/470 (1994).

law. In 1995 the Appeals Chamber held that although the UN General Assembly had affirmed the Nuremberg Charter, "there is no logical or legal basis for this requirement and it has been abandoned in subsequent state practice."[29] Said "requirement" is the "war nexus" stipulation discussed earlier. The Trial Chamber for *Prosecutor v. Tadić* case rendered its judgment on May 7 1997, finding Tadić guilty on 9 counts and partially guilty on 2 counts of crimes against humanity.[30] The judgment also provided the court's own definition for crimes against humanity. Most likely influenced by the ICTR Statute definition, the Trial Chamber stated:

> "[T]he 'population' element is intended to imply crimes of a collective nature and thus exclude single or isolated acts. ... Thus the emphasis is not on the individual victim but rather on the collective, the individual being victimized not because of his individual attributes but rather because of his membership of a targeted civilian population. This has been interpreted to mean, as elaborated below, that the acts must occur on a widespread or systematic basis, that there must be some form of a governmental, organisational or group policy to commit these acts and that the perpetrator must know of the context within which his actions are taken, as well as the requirement ... that the actions must be taken on discriminatory grounds."[31]

In the year following the Tadić decisions the United Nations General Assembly convened The Rome Conference to establish a permanent International Criminal Court (ICC) to replace the sporadic international criminal tribunals during the latter half of the 20th century. The conference, held in Rome from June 15 – July 17, 1998 was tasked with drafting a multilateral treaty to establish the court's function, jurisdiction and structure.[32] This treaty became known as the Rome Statute, or the ICC Statute, and was adopted on July 17, 1998 by a vote of 120 – 7, with 21 countries abstaining.[33] The countries that voted against the treaty were Iraq, Israel, Libya, the People's Republic of China, Qatar, the United States and Yem-

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[29] *Prosecutor v. Tadic* (Defense Motion for Interlocutory Appeal on jurisdiction), (2 October 1995).
[30] *Prosecutor v. Tadic* (Trial Chamber Judgment), (7 May 1997).
[31] *Id.*
[32] Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, THE AM. SOC'Y INT'L L., (1998).
[33] *Id*.

en.[34] The Rome Statute established 4 core international crimes: genocide, crimes against humanity, war crimes and the crime of aggression.[35] In accordance with the Rome Statute, the ICC can only investigate and prosecute these core international crimes in situations where states are unable or unwilling to do so themselves.[36] Also, the court can only investigate crimes in signatory states to the Rome Statute, unless explicitly authorized by the UN Security Council.[37] The treaty entered into force on July 1, 2002, does not have retroactive jurisdiction prior to this enforcement date and as of February 1, 2012 121 states are parties and 139 states are signatories to the Rome Statute.[38, 39] Heavily influenced by the Tadić decisions the Rome Statute definition for crimes against humanity was the most progressive of its kind and remains the modern technical definition of the concept today.

To date, the ICC has indicted 30 individuals, and 25 of these indictments have been for crimes against humanity, ranging from 1-22 counts.[40] Currently 2 of the individuals under indictment are confirmed deceased, 9 are fugitives (including 1 reportedly deceased), 3 are under arrest, 5 are in pre-trial stages, 3 are in trial stages and the remaining 3 have had their charges dismissed.[41] Currently the ICC has only convicted one individual of 3 counts of war crimes.[42] Many contend that the lack of convictions shows that the ICC has been unsuccessful, while others suggest that the ICC has been successful considering it is only a relatively recent institution. Other criticisms of the Rome Statute definition for crimes against humanity have revolved around the indeterminateness of the "widespread or systematic attack directed against any civilian population" requirement.[43] These criticisms have cited the subjectivity and the lack of any underlying principle or theory to guide the interpretation of this requirement. More will be discussed on the arguments for and against the modern concept of crimes against humanity in the next section.

Two schools of thought regarding crimes against humanity are the "New Doctrine of Humanitarian Intervention" and the "Laws of Humanity" theories.[44] As mentioned earlier, the original Doctrine of Humanitarian

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[34] *Id.*
[35] United Nations General Assembly, Rome Statute of the International Criminal Court. (17 July 1998).
[36] *Id.*
[37] *Id.*
[38] United Nations Treaty Database entry, *supra* note 1.
[39] United Nations General Assembly, Rome Statute, *supra* note 35.
[40] Citizens for Global Solutions. *Individuals Indicted by the ICC*, GlobalSolutions.org.
[41] *Id.*
[42] *Id.*
[43] Dubler, *supra* note 12.
[44] Dubler, *supra* note 12.

Intervention represented an important link between natural rights thinkers of the Enlightenment era and the international intervention and litigation exhibited at Nuremberg. Again, this original doctrine arose as an exception to the widely popular concepts of sovereign immunity and non-interference in a foreign nation's affairs, concepts that remain important today. This "new" Doctrine of Humanitarian Intervention is much in the same vein as the original; however, some believe that the precedent set by the Nuremberg trials has the potential for dangerous abuse. For example, Henri Donnedieu de Vabres, the French judge at Nuremberg, wrote:

> "The theory of 'crimes against humanity' is dangerous: ... dangerous for the States because it offers a pretext to intervention by a State in the internal affairs of weaker States."[45]

This concern led to the aforementioned "war nexus," the effect of which hindered the evolution of the crimes against humanity concept as well as the ability of the UN Security Council to act, that is until reinterpretation and affirmation in the 1990's, with the ICTY, ICTR and Rome Statute, respectively. Nevertheless, in line with this theory it is permissible to intervene on a state's internal affairs if it has the capacity to threaten the "peace, security and well being of the world." The second theory to consider is based solely on the "Laws of Humanity." In essence this theory views crimes against humanity as an attack on the victim's "humanity" or "humaneness" and thus is considered an international crime as the universal value of humanity is likewise considered under attack.[46] The French prosecutor at Nuremberg, Francois De Menton, held with this view calling the offenses at hand, "crimes against the human status."[47] This theory is grounded in natural law concepts of *universal* right and wrong. Yet, possibly for this reason, Richard Vernon said that it "seems at once too weak and too undiscriminating."[48] Thus, some theorists have amended this doctrine by citing the defining aspects of a crime against humanity as scale and seriousness. These theorists cite the Rome Statute preamble claiming that a crime against humanity must "shock the conscience of humanity."[49] Accordingly, if an attack is deemed to be of sufficient ferocity, seriousness and scale then the crime is considered to cross beyond the realm of domestic legal order (although not necessarily crossing territorial lines) and instead the international community is being threatened. This seriousness

[45] Dubler, *supra* note 12.
[46] Dubler, *supra* note 12.
[47] Dubler, *supra* note 12.
[48] Richard Vernon, *What Is a Crime Against Humanity?* J. POL. PHILOSOPHY 231, 237 (2002).
[49] United Nations General Assembly, Rome Statute, *supra* note 35.

and scale is not simply a body count, it often includes the capacity of the crime to threaten international peace. Similarly, this aspect plays a role in the Doctrine of Humanitarian Intervention in that a crime's magnitude and/or gravity, as well as its potential for threatening international peace formulate the warranting criteria for infringing upon a state's sovereignty.

In order to further gauge the evolution and application of crimes against humanity in international law, a few other cases outside of international criminal tribunals and the ICC are worthy of consideration. The first is the landmark U.S. federal case *Filártiga v. Peña-Irala* involving Paraguayan nationals concerning a dispute over an incident within Paraguay. The Filártiga family (Paraguayan nationals) contended that on March 29, 1976, their son Joelito Filártiga was kidnapped and tortured to death by Américo Norberto Peña-Irala, the Inspector General of Paraguayan Police.[50] The Filártigas claimed that their son was tortured in retaliation for his father's political activities and beliefs.[51] Eventually, Joelito's sister Dolly emigrated to the US and when Peña-Irala came to the US on a visitor's visa, Dolly brought a civil claim to US Courts for Joelito's wrongful death asking for damages of $10 million.[52] After an initial District Court dismissal, the US Circuit Court ruled in favor of Ms. Filártiga, citing the Alien Tort Statute and ruling that freedom from torture was guaranteed under international customary law.[53] This case was significant because it set a precedent for US federal courts to rule on cases of tortious acts committed by non-American citizens against other non-American citizens outside of the US.[54] Perhaps even more significant for the purposes of this paper is that the court's judgment included the following statement, "[t]he torturer has become – like the pirate and slave trader before him – hostis humanis generis, an enemy of all mankind."[55] While the court did not explicitly describe the case as an instance of a crime against humanity, it did reference the underlying principle that certain crimes, specifically torture, are in fact crimes against "all mankind" or humanity. Although this case occurred years before the Rome Statute and adoption of the ICC, the spirit of the case was in line with the modern conception of crimes against humanity. Here, a man was systematically kidnapped and tortured explicitly because of his affiliation with a certain political group and because the state in which these crimes were committed was either "unwilling" or "unable"

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[50] JOHN E. NOYES, LAURA A DICKINSON, MARK W, JANIS, INTERNATIONAL LAW STORIES (2007).
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*

to act; so it was within the jurisdiction of other entities outside of the state to act. Had this case occurred after the adoption of the Rome Statute and ICC, then it would have been within the rights of the ICC or UN Security Council (in accordance with Chapter VII of the UN Charter) to intervene in Paraguay's internal affairs. Thus, although the case was brought and tried as only a civil case, it seems that it certainly could be brought and tried as a criminal case were it to have occurred today.

Another important case for this study is the *Pinochet* case. On October 16, 1998, General Augusto Pinochet was arrested and detained in London for crimes against humanity committed in his native Chile following an indictment brought by the Spanish magistrate.[56] Though Pinochet was later released on the grounds of ill health, it was still a serious undertaking for international law as he was detained on criminal charges against humanity without a warrant or request for extradition by his native Chile.[57] This case was largely influenced by the then recent developments in the interpretation and application of crimes against humanity, exhibited by the ICTY, ICTR and the Rome Statute. The case made by the Spanish magistrate was in line with crimes against humanity theories as the courts deemed the crimes committed by Pinochet so egregious that they constituted crimes against humanity and thus could be subject to universal jurisdiction.[58]

On November 14th, 2012 at UCLA Jewish World Watch (JWW) held their "I Witness Awards" honoring the first chief prosecutor of the ICC, Luis Moreno-Ocampo, for his efforts in combating genocide and other global mass-atrocities. During Mr. Ocampo's acceptance speech he discussed the progress made in the realm of global justice by first quoting Robert Jackson, the chief US prosecutor at Nuremberg. Mr. Ocampo cited the importance of Nuremberg and how the "entire humanity was [the] prosecuting [party]"[59] echoing the sentiment of Robert Jackson who told the Nuremberg judges, "The real complaining party at your bar is Civilization."[60] He referenced another of Jackson's statements to the judges, "This time [it is] the Nazi's, but let me be clear, while this law is first applied against German aggressions, the law, if it is to serve a useful purpose, must condemn aggression by any other nation including those which sit here now in judgment."[61] Mr. Ocampo said this quote is dear to him "not just

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[56] Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction,* NEW ENG. L. REV. 35, 2 (2001).
[57] *Id.*
[58] *Id.*
[59] Luis Moreno-Ocampo, *JWW "I Witness Awards" Acceptance Speech,* (14 November 2012).
[60] *Id.*
[61] *Id.*

[because of its importance for the] Nazis, but for the future."[62] While these statements from Jackson may not be entirely technically sound, they hold some utility to be discussed momentarily. Mr. Ocampo eventually arrived at what he claims to be the biggest problem for global justice going forward, the issue of enforcement, an issue that will dictate the future utility of the crimes against humanity concept. He identified that the awareness concerning international crimes has seen a dramatic increase in recent years, as well as the capability for prosecution of said crimes. However, there is a large gap between these two phenomena and the ability to apprehend and arrest offenders.

As the chief prosecutor for the ICC Mr. Ocampo was in a unique prosecutorial position. Unlike national prosecutors, he had no police force at his disposal; and unlike the temporary international criminal tribunals before him, Mr. Ocampo prosecuted individuals still in power while under arrest warrant. Mr. Ocampo expressed his frustration with the fact that the arresting responsibility is placed upon the national authorities of the state in which crimes are being committed. There are some obvious inherent issues with this stipulation because quite often the potential arresting parties lack the power needed to apprehend and arrest these criminals. Even more disheartening is that often the individuals who possess arresting responsibility are the same individuals under arrest warrant, creating a significant enforcement issue.[63] Because this speech was directed towards ordinary citizens, Mr. Ocampo focused on what the audience members can do to try and combat this problem. Here Mr. Ocampo referred to the progress made towards global awareness. He said that while the heightened awareness of the crimes themselves is good, we "don't need any more stories about what's happening…we need stories about how we are managing the conflicts."[64] In other words, our focus on promoting awareness should not be focused on the crimes themselves, but instead on the criminals and the current inability to deal with them through apprehension and arrest.

However, Mr. Ocampo emphasized that tackling this issue will require patience and diligence; his reference to Nuremberg earlier in his speech helps to drive this point home. While Nuremberg was an important step for the goal of global justice, it took another 53 years before the idea expressed at Nuremberg became a reality through the formation of the ICC in 1998. Another example he gave for the necessity of patience and diligence is with the ICTY. He explained that while it took 18 years, there

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[62] *Id.*
[63] *Id.*
[64] Steven P. Remy, *Nazis on the Run: How Hitler's Henchmen Fled Justice by Gerald Steinacher (review),* HOLOCAUST AND GENOCIDE STUDIES 27, 510–12 (2013).

are now 0 individuals still at large who were indicted by the ICTY.[65] In other words, it may have taken nearly two decades to apprehend all 161 of the criminal indictees from the wars in the former Yugoslavia, but the point is that *all* were apprehended. A significant fact considering countless Nazi war criminals escaped prosecution.[66] With this information in mind, he stated that for now we ought to focus on educating the youth of the world, bringing awareness to numerous global authorities (not just US authorities) and utilizing the media. After Mr. Ocampo's acceptance speech he briefly discussed the issue of enforcement. He mentioned that he believes it is possible for the UN to take a more expansive role in the process of apprehension and arrest of international criminals in the future. In short he stated that he believes, "It may be possible for such a mandate to arise in the future, however, for the times being we ought to focus on raising awareness as to the gravity of this problem."[67]

The *Pinochet* and *Filártiga v. Peña-Irala* cases did not see this problem of apprehension and enforcement like many of the cases that Mr. Ocampo has overseen; both Peña and Pinochet had left their countries voluntarily and were only apprehended somewhat haphazardly. However, one case that may have set a potential precedent for international intervention and apprehension/arrest of international criminals is the *United States v. Alvarez-Machain* case. Humberto Álvarez Machaín, a Mexican physician, was allegedly involved in the kidnapping, torture, and murder of Drug Enforcement Agency (DEA) agent Enrique Camarena Salazar in 1985.[68] In April 1990, Álvarez was abducted from Mexico by a private US citizen contracted by the DEA and brought to the US to stand trial for these alleged offenses.[69] The case eventually reached the Supreme Court in which the court invoked the *Ker-Frisbie Doctrine*, which generally holds that criminal defendants may be prosecuted in US courts "regardless of the circumstances under which [they were] brought there."[70] Although Álvarez's acquittal was ultimately upheld, the Supreme Court's contentious decision held that jurisdiction was not affected by the manner in which the accused [Álvarez] was brought before it (i.e. illegal extradition).[71] Significant because this decision essentially supported illegal extradition, and because it held a potential, although dubious, solution to the problem that Mr.

[65] Moreno-Ocampo, *supra* note 59.
[66] Moreno-Ocampo, *supra* note 59.
[67] Moreno-Ocampo, *supra* note 59.
[68] Linda C. Ward, *Forcible Abduction Made Fashionable: United States v. Alvarez-Machain's Extension of the Ker-Frisbie Doctrine*, ARK. L. REV. 47, 477 (1994).
[69] Mark S. Zaid, *Military might versus sovereign right – the kidnapping of Dr. Humberto Álvarez-Machain and the resulting fallout,* HOUS. J. INT'L L. (1997).
[70] *Id.*
[71] *Id.*

Ocampo had been frustrated with in the cases he attempted to bring forth. Herein lies the possibility of a sign of a shift in international law from a system of purely state actors to a system which recognizes the rights and protections of collectives and individuals as just and necessary. The international criminal tribunals and the adoption of the ICC as well as other cases including *Pinochet* and *Peña* are likewise signs of a possible shift.

Now, from a more practical standpoint there obviously needs to be some discrimination as to what warrants a crime against humanity and international intervention against offenders. One cannot deny the slippery slope that could arise from international implementation of doctrines like *Ker-Frisbie*. Also, the probability that states will implement similar doctrines is low, as it is unlikely that states like the US will allow other states to intervene within US affairs, though the US seems to have granted itself this right. From a practical standpoint, the future utility of crimes against humanity will depend largely on interpretation of the Rome Statute and specifically the discriminatory grounds of what constitutes a crime against humanity. Once such interpretations gain traction in the future, it will be necessary to place emphasis on the discovery and acquisition of sufficient evidence, including evidence as to who the offender is, what crimes have been committed and evidence that the state has failed or is unwilling to act on its own before the case warrants international intervention and apprehension.

While there has been noteworthy progress and evolution of the concept and application of crimes against humanity, as evidenced by the progress made from Nuremberg to the present, there is still a great deal of work to be done. Currently the potential for crimes against humanity to be prosecuted effectively is mired in diplomatic relations, double-standards, lack of enforcement, and varied legal interpretations. Time alone will tell whether these obstacles will be overcome; however, the developments following Nuremberg, specifically the Rome Statute, are important and encouraging signs of progress towards the goal of global justice.

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THE SUPREME COURT AND THE WAR ON TERROR: EVALUATING THE JUSTICIABILITY OF WAR POWERS AND THE USE OF FORCE IN THE POST-9/11 ERA

Lindsey Ware*

Despite characterizations of the American system of government as one constitutionally grounded in Richard Neustadt's "separated institutions sharing powers," the judicial branch has adopted a precedent of deference to the executive and legislative branches with respect to United States foreign affairs. Given the Supreme Court's reluctance to entangle itself in politically-minded topics like foreign affairs, under what conditions prompted the Court to reassert its 'check' on executive war powers and use of force following the terrorist attacks of September 11th, 2001? This essay will seek to evaluate the circumstances prompting the Supreme Court to grant certiorari, or judicial review, and more actively intervene in four primary cases shaping war powers and the use of force during President Bush's War on Terror: Hamdi v. Rumsfeld (2004), Rasul v. Bush (2004), Hamdan v. Rumsfeld (2006), and Boumediene v. Bush (2008).

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INTRODUCTION

Political scientist Richard Neustadt's idealist conception of American government as an interdependent web of "separated institutions sharing powers" fails to explain recent judicial trends toward deference with respect to complicated legal challenges about executive-congressional authority in the realm of modern foreign affairs.[1] Rather than serve as an active referee or consistent constitutional 'check' in war power disputes between the political branches, the Supreme Court has remained reluctant to hear cases involving war powers and the use of force. By abstaining from cases deemed political in nature, the Court has invoked *stare decisis*, or legal precedent, to establish standards of justiciability, which rarely satisfy issues relating to foreign affairs.

Yet in the aftermath of the terrorist attacks on September 11, 2001, the expansion of presidential war powers in response to evolving national security threats has challenged constitutional boundaries and invoked greater judicial scrutiny. Although initially hesitant to take issue with foreign policy cases in the years immediately following 9/11, the Supreme Court has assumed a more active agenda pursuant to reconciling constitutional questions with the Bush Administration's use of military force and the legal status of military detainees. The Court's intervention in four significant cases during the Bush Administration's seven-plus years of wartime marks an important detour from the traditional trajectory of judicial deference.[2] This begs the question of whether these recent Supreme Court decisions were rendered for the sake of preserving judicial process or for clarifying constitutional substance.[3]

This essay will seek to evaluate the circumstances prompting the Supreme Court to grant certiorari, or judicial review, and to more actively invoke judicial review in four primary cases shaping war powers and the use of force during President Bush's War on Terror: *Hamdi v. Rumsfeld* (2004), *Rasul v. Bush* (2004), *Hamdan v. Rumsfeld* (2006), and *Boumediene v. Bush* (2008). Historically, the Supreme Court has remained reluctant to actively intervene in matters of foreign affairs, instead relying upon more black-and-white standards of judicial process to govern the Court's modern reassertion of its 'check' on the executive in the domain of war powers and use of force following 9/11.

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[1] RICHARD NEUSTADT, PRESIDENTIAL POWER 1964, at 24.
[2] Jonathan Mahler, *Why the Court Keeps Rebuking This President*, N.Y. TIMES (Jun. 15, 2008), http://www.nytimes.com/2008/06/15/weekinreview/15mahler.html?pagewanted=all&_r=2&.
[3] Jenny Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 5, 1013-1092 (2008).

This essay explores the extent to which the Court's inclination to grant certiorari to these cases integrates traditional standards of justiciability with modern foreign policy circumstances distinguishing the War on Terror. First, this essay will use a historical perspective to explore the evolution of the Court's approach to war powers and the use of force. In doing so, this essay will establish the historical framework through which the Supreme Court has come to decide justiciability in cases involving war powers and the use of force. Through an analysis of landmark cases such as *Marbury v. Madison* (1803) and *Baker v. Carr* (1962), this essay will posit the traditional legal 'test' assessing aspects of judicial process, like political question doctrine and standing, used to render cases judicable.

By analyzing the context and content of four cases - *Hamdi v. Rumsfeld* (2004), *Rasul v. Bush* (2004), *Hamdan v. Rumsfeld* (2006), and *Boumediene v. Bush* (2008) - this essay will evaluate the political, social, and legal circumstances accompanying increased judicial prerogative following 9/11. I will argue that the amalgamation of politically irreconcilable interbranch confrontation, a judicially palatable political context, and the traditional precedent for justiciability amounted to the Supreme Court's entry into seldom-charted foreign policy territory. In agreement with Stanford University Law Professor Jenny Martinez, this essay argues that recent Supreme Court case selections reflect the Court's reliance upon questions of judicial process rather than "substantive rights claims" to engage in cases challenging policies involving foreign affairs and the use of force following the attacks of September 11, 2001.[4]

This essay will evaluate the influence of a more activist Supreme Court upon the politics of foreign policymaking. By evaluating the positions of relevant political actors manifested in public opinion and perceptions of judicial legitimacy, this essay will gauge the saliency of an active Court with respect to the prevailing political dimensions of foreign affairs. Through a brief case study of the legal system in Germany, this essay will also introduce potential alternatives to the American norm of judicial deference.

To conclude, this essay will assess the viability of judicial involvement in matters of war powers and the use of force. While international terrorism and national security threats by non-state actors continue to transform US foreign policymaking, a national foreign policy dialogue encompassing constitutional considerations both domestic and abroad will facilitate the perseverance of a watchful Court. Although standards for justiciability will continue to ground the Court in precedent separating the judiciary from politicized foreign affairs, the expectation that "for the fore-

[4] *Id.*

seeable future, military conflict may be the rule, and times of peace the exception," will render a Court alert to constitutional challenges of war powers and use of force.[5]

PART I. THE COURT, WAR POWERS, AND JUSTICIABILITY: A HISTORICAL APPROACH

At the core of the Supreme Court's judicial power is its discretionary authority to grant a writ of certiorari. Although the Supreme Court acts upon over 8,000 petitions for certiorari filed every year, the Supreme Court hears and decides only a handful.[6] The rationale for granting certiorari most commonly serves the purpose of resolving conflicts within the Court of Appeals, but also to review cases that raise new issues of public importance. In the context of war powers and the use of force, granting certiorari is inextricably linked to justiciability, or the grounds upon which the Supreme Court can exercise its judicial authority. Procedurally, four of the nine Supreme Court Justices "must vote to accept a case," with the Court typically accepting "100-150 of the more than 7,000 cases that it is asked to review each year."[7] Thus, the Court enjoys significant discretion in selecting which cases to hear and which to remand back to the lower courts. This self-governed process enables the Supreme Court to selectively engage in or abstain from constitutional matters involving questions of war powers and the use of force.

Although most war powers disputes between Congress and the President are resolved through political avenues, a historical view of judicial intervention nonetheless demonstrates the constitutional weight of foreign policymaking.[8] While the Court has traditionally abstained from entangling itself with the political branches in the realm of foreign affairs, it would be inappropriate to generalize that the Court has not made its mark by granting certiorari to cases involving war powers and the use of force. Through stare decisis, the Court has established criteria to determine the justiciability of war powers questions.

In "Judicial Review of the War Power," constitutional scholar Louis Fisher argues that until the mid-twentieth century, the Court was active in deciding cases involving war powers, albeit reluctant to tangle

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[5] Mahler, *supra* note 2.
[6] Thomas Metzloff, "The Institution of the Supreme Court." Lecture. PoliSci 209D: Contemporary Constitutional Law. Duke University. September 2, 2013.
[7] *Supreme Court Procedures*, UNITED STATES COURTS, http://www.uscourts.gov/educational-resources/get-informed/supreme-court/supreme-court-procedures.aspx.
[8] Louis Fisher, *Judicial Review of the War Power*, 35 PRESIDENTIAL STUDIES QUARTERLY 3, 466-495 (2005), at 469.

with political questions.[9] Despite Chief Justice John Marshall's landmark opinion in *Marbury v. Madison* (1803) establishing the Court's power of judicial review to "say what the law is," Marshall demonstrated that this judicial power is not without political limits.[10] The *Marbury* decision, which reconciled a political dispute regarding the judicial appointment of William Marbury, empowered the Court to determine the constitutional bounds of legislative and executive action.

Contextualizing *Marbury* within Marshall's larger views illustrates his preference for judicial deference in matters involving domestic politics. For example, Marshall replied to a Cherokee tribe challenging treaty rights by the state of Georgia: "The propriety of such an interposition by the court may be well questioned. It savours too much of the exercise of political power to be within the proper province of the judicial department."[11] As a member of the House of Representatives, Marshall even went so far as to suggest that "the President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[12] These views reflect the foundations of political question doctrine, which stipulates that "certain matters are entrusted by the Constitution to the political departments of government" and "thus fall outside of the judicial province."[13] In short, the Court reserves judicial review for questions legal in nature, abstaining from fundamentally political cases. However, abstention is not always as clear in practice. Determining whether a question is political and outside the bounds of permissible judicial deliberation prompted a series of cases that set a modern 'test' to reconcile political question doctrine and render Court intervention today.

Even though political question doctrine limits the scope of the Court's inclination to grant certiorari to war powers cases, Fisher explains that the Court accepted a number of cases through the 1950s involving separation of powers, habeas corpus, and foreign affairs consistent with precedent for adjudication.[14] Notable cases like *United States v. Curtiss-Wright Export Corp.* (1936) and *Youngstown Sheet & Tube Co. v. Sawyer* (1952) rebuke conceptions of a purely deferential Court.[15] Rather, these two cases demonstrate early application of tests for justiciability.

While the Court made no mention of the judiciary in *Curtiss-*

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[9] *Id. a*t 467.
[10] Marbury v. Madison. 5 U.S. 137. (1803).
[11] THOMAS FRANK, POLITICAL QUESTIONS/JUDICIAL ANSWERS (1992).
[12] *Id.* at 11.
[13] ANN VAN WYNEN THOMAS & A.J. THOMAS, JR., THE WAR-MAKING POWERS OF THE PRESIDENT, (1982).
[14] Fisher, *supra* note 8, at 469.
[15] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, (1936).

Wright, the justices recognized a real and irreconcilable institutional conflict between the President and Congress regarding the validity of a congressional joint resolution and an executive-enacted arms embargo.[16] The Court upheld the President's "very delicate, plenary, and exclusive" powers; Fisher argues that Justice Sutherland's expansive opinion rather "provided fertile ground or a widely held belief that the field of foreign relations is different" and thus requires a higher threshold when applying the political question doctrine.[17]

Additionally, although the Court's decision in the later *Youngstown* case limited President Truman's authority to seize private property in order to avoid steelworker strikes during the Korean War, the Court employed a similar vein of constitutional reasoning to grant certiorari to hear *Youngstown*.[18] As in *Curtiss-Wright*, the Court identified an imminent war powers dispute between the President's claim to constitutional authority in seizing the mills versus the "legislative function which the Constitution has expressly confided to the Congress."[19] While the Court agreed upon the necessity to reconcile a narrow inter-branch constitutional question, rather than rule upon the merits of intervention in a case involving political dimensions, the *Youngstown* decision lacked a clear consensus to define the boundaries between executive and legislative war powers, resulting in five separate concurring opinions. Justice Black's opinion best reflects this lack of agreement among the justices, alluding to "a zone of twilight in which he (the President) and Congress may have concurrent authority" that has further stimulated uncertainty in constitutional challenges of war powers and the use of force among the political branches.[20]

But despite both the *Curtiss-Wright* and *Youngstown* decisions that expanded the Court's role in adjudicating war powers and use of force disputes, the contemporary standard of justiciability is most clearly defined in the Supreme Court's 1962 *Baker v. Carr* decision. Consistent with Fisher's argument that modern impressions of a deferential Court emerged after World War I, the Supreme Court decision in *Baker v. Carr* (1962) established criteria for considering political questions, later adopted by the Court to "systematically avoid war power questions" during the Vietnam War and in the aftermath of the Watergate scandal.[21]

In *Baker*, a case involving the redistricting of Tennessee state legislative districts, the Court clarified its "jurisdiction over foreign-relations

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[16] *Id.*
[17] Fisher, *supra* note 8, at 469.
[18] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, (1952).
[19] *Id.*
[20] *Id.*
[21] Fisher, *supra* note 8, at 469.

issues" through a domestic application of political question doctrine.[22] The Court held that political question doctrine did not sufficiently render the case non-justiciable; the issue fulfilled standards for justiciability and Supreme Court jurisdiction. By granting certiorari in *Baker*, the Court "significantly enlarg[ed] the judiciary's supervisory powers, narrowing the constraints of the political-question doctrine."[23] The Court's decision in *Baker* established a judicial test, rendering precedent for subsequent intervention in cases of a questionable political nature, like domestic re-apportionment or the bounds of executive war powers.

Despite this departure from strict interpretation of political question doctrine, Justice Brennan's opinion "reinforced [the Court's] commitment to abdication in foreign affairs."[24] In *Baker*, Justice Brennan explained foreign affairs as a domain that "def[ies] judicial application" because "all questions touching foreign relations are political questions."[25] As Justice Brennan "consider[ed] the contours of the 'political question' doctrine" with respect to foreign affairs, he set forth a test to reconcile political question doctrine with criteria for justiciability.[26] Justice Brennan opined that a constitutional challenge is not justiciable if it is:

> "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[27]

These standards clarifying the non-justiciability of political question doctrine reflect several practical concerns for judicial involvement in foreign affairs, including: the lack of judicial expertise, the murky legal

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[22] FRANCK, *supra* note 11, at 19.
[23] Baker v. Carr, 369 U.S. 186. (1962).
[24] FRANCK, *supra* note 11, at 19.
[25] Baker v. Carr, *supra* note 23.
[26] Baker v. Carr, *supra* note 23.
[27] Baker v. Carr, *supra* note 23.

basis for foreign affairs disputes, and the gravity of judicial interference with critical national security issues.[28] While Justice Frankfurter's dissenting opinion conveyed concern for impairing "the Court's position as the ultimate organ of 'the supreme Law of the Land,'" *Baker* remains the principal test for assessing the barriers of political question doctrine, with "the *Baker* formula [cited] routinely, ritually, in virtually every foreign affairs case."[29, 30]

While it is interesting to note the extent to which the Court's approach for adjudicating foreign affairs matters originates in domestic precedent, the standards for justiciability rendered in *Marbury* and *Baker*, as well as application in *Curtiss-Wright* and *Youngstown*, have set the tone for the Court's reluctant approach to hearing challenges to the constitutionality of war powers and the use of force. Thus, the traditional Supreme Court standard for justiciability in granting certiorari remains firmly rooted in traditional requirements of legal standing, mootness, and ripeness, as well as in satisfying political question doctrine. These tests provide broad criteria that capture the magnitude of judicial involvement in matters of war powers and the use of force. But as the following case study of post-9/11 Supreme Court decisions demonstrates, sensitive political climates, extenuating foreign policy circumstances, and concern for protecting individual liberties have woven such standard tests for justiciability into the complex legal framework, characterizing the Supreme Court's 'red line' in War on Terror. As Martinez explains, "ruling on a technical jurisdictional issue" versus the constitutionality of interrogation policy "leaves the judge's hands feeling much cleaner even if the practical outcome is the same" and allows the Court to delay "that day of [judicial] reckoning" between government-reasoned action and the urgency of terrorist threats.[31]

PART II. THE SUPREME COURT AND THE WAR ON TERROR: POST-9/11 JUDICIAL ADVANCES IN FOREIGN AFFAIRS

The terrorist attacks on September 11, 2001 ushered in a new narrative of American foreign policy in the context of global terrorism. In response, the Court has since strayed from expectations of deference to the executive and legislature. According to Arthur Garrison, the Bush Administration "viewed the attacks not as an international criminal act but an act of war warranting a complete military response." Given emerging wars in

[28] LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS (1990), at 45-51.
[29] Baker v. Carr, *supra* note 23.
[30] HENKIN, *supra* note 28, at 82.
[31] Martinez, supra note 3, at 1072-4.

Iraq and Afghanistan and the "shock of 9/11,"[32] the judiciary exercised initial compliance and supported "limitations on its own power... to review the Commander-in-Chief in time of war."[33, 34]

Yet the Bush Administration's aggressive assertion of executive authority – vested by the Authorization for Use of Military Force (AUMF - 2001) to use "all necessary and appropriate force against those nations, organizations, or persons [who] … planned, authorized, committed, or aided the terrorist attacks" – led the Court to intervene in emerging constitutional questions of war powers and the use of force.[35] In 2004, the Supreme Court granted certiorari to the first of a series of legal challenges brought by private individuals focusing principally on the rights of detainees, the constitutionality of military commissions, the jurisdiction over Guantanamo Bay detention facilities, and the constitutional status of habeas corpus for 'enemy combatants.' Even though these cases involved questions of separation of powers and executive use of force, the Court relied heavily on justifications concerning legal process and jurisprudence rather than the substance of legal challenges at hand.[36]

The Supreme Court's decision to grant certiorari in *Hamdi v. Rumsfeld* (2004) is indicative of the Court's reliance on clarifying jurisprudence to engage in matters of war powers. In *Hamdi*, the Supreme Court ruled in favor of Yaser Esam Hamdi, a US citizen who was captured in Afghanistan, deemed an 'enemy combatant' fighting for the Taliban, and held as a detainee at Guantanamo Bay during the Bush Administration.[37] While the government argued that Hamdi's US citizenship did not protect him from detention as an enemy combatant and that his detention fell under the purview of the Commander-in-Chief via the AUMF, the Court ruled that Hamdi's citizenship afforded him habeas corpus rights to challenge his detention in American courts.[38, 39] In this plurality opinion, the Court flexed its power of judicial review against the executive and in the face of the AUMF, prioritizing due process rights over 'military necessity.'

Specifically, Justice O'Connor opined for the plurality that "we necessarily reject the Government's assertion that separation of powers

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[32] ARTHUR H. GARRISON, SUPREME COURT JURISPRUDENCE IN TIMES OF NATIONAL CRISIS, TERRORISM, AND WAR: A HISTORICAL PERSPECTIVE (2011), at 282.
[33] Fisher, *supra* note 8, at 469.
[34] GARRISON, supra note 32, at 291.
[35] Jay Alan Bauer, *Detainees Under Review: Striking the Right Constitutional Balance Between the Executive's War Powers and Judicial Review*, 57 ALA. L. REV. 4, 1081-1103 (2006), at 1082.
[36] Stephen I. Vladeck, *The Supreme Court, the War on Terrorism, and the Separation of Powers*, 13 HUMAN RIGHTS 1, (2011).
[37] GARRISON, supra note 32, at 298-299.
[38] GARRISON, supra note 32, at 300.
[39] GARRISON, supra note 32, at 299.

principles mandate a heavily circumscribed role for the courts in such circumstances."[40] Justice O'Connor went even further to elaborate that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens," conveying the extent to which the Court was prepared to adjudicate wartime challenges on behalf of the Fifth Amendment and terrorism jurisprudence.[41] In this instance, the Court raised concerns focused principally on jurisdiction, legal procedure, and separation of powers, with only a subtle rhetorical nod to individual rights. However, as Fisher argues, the justices' "judicial rhetoric was not matched by the issuance of clear standards" to interpret this decision in challenges to the use of force and the legal status of detainees. In sum, the *Hamdi* decision, while demonstrative of the Court's ability to exercise judicial review during combat, failed to clearly assert the judiciary's enduring oversight and define the constitutional scope of executive powers in the progressing War on Terror.

On the same day the Court issued the *Hamdi* decision, the Court further expanded habeas corpus rights, finding 6-3 in *Rasul v. Bush* (2004) that Guantanamo Bay was "within United States jurisdiction and subject to its laws, meaning detainees there were entitled to some sort of due process in American courts."[42] In *Rasul,* the issue at hand was one of jurisdiction rather than a substantive Fifth Amendment claim. As Garrison explains, "the Supreme Court granted certiorari to answer the question of 'whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals.'"[43] The Court rendered *Rasul* justiciable to reassert its position of judicial review in the context of evolving executive and legislative war powers in the War on Terror. Set in the shadow of the Abu Ghraib scandal, the *Rasul* decision against the executive further compounded mounting criticism of the Bush Administration's claim to expansive war powers under the AUMF, with approval ratings dipping below 50 percent by the end of 2004.[44]

The *Rasul* ruling, essentially erasing distinctions between the habeas corpus rights of citizens and non-citizens, was a landmark decision that circumvented precedent in which it was decided that the Court formerly did not possess authority to issue writs of habeas corpus to prisoners outside US territorial jurisdiction.[45] Yet the Court distinguished *Rasul* in

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[40] Hamdi v. Rumsfeld, 542 U.S. 507. (2004)
[41] Vladeck, *supra* note 36.
[42] Mahler, *supra* note 2.
[43] GARRISON, supra note 32, at 322.
[44] *Presidential Approval Ratings*, GALLUP, http://www.gallup.com/poll/116500/presidential-approval-ratings-george-bush.aspx.
[45] GARRISON, supra note 32, at 322.

the following details: facts of the citizenship of the detained foreign nationals, the circumstances in which they were captured, and the Guantanamo territory in which they were held. Rather than decide the dispute on the merits of habeas corpus claims, the fact-specific Court ruling in *Rasul* solidified emerging patterns for adjudicating on grounds of jurisdiction, process, and legal procedure to manage constitutional questions of war powers and the use of force.[46]

Following the *Rasul* decision, Congress passed the Detainee Treatment Act (DTA) of 2005, specifically denying habeas corpus rights "to non-citizen detainees held at Guantanamo Bay as enemy combatants."[47] As a blatant political attempt to override the Court's *Rasul* decision, the DTA opened "uncharted territory" in "the application of the Constitution to non-citizen detainees at Guantanamo Bay."[48] While Congress and the President diminished the judiciary's jurisdiction under the DTA, the Supreme Court reclaimed its power of judicial review for Guantanamo cases two years later in *Hamdan v. Rumsfeld* (2006).

Instead of directly invoking arguments defending due process, *Hamdan* challenged the constitutionality of military commissions set up by the Bush Administration. By granting certiorari to *Hamdan*, the Court circumvented the Congress-passed DTA, citing that *Hamdan* was already pending at the time of the DTA's passage and therefore should be subject to the Court's jurisdiction.[49] The Court's decision to grant certiorari was unexpected in *Hamdan*, considering Hamdan's military tribunal began in 2004.[50] Constitutional scholar Michael Glennon holds that because the Court could have waited to see whether Hamdan was found guilty by the military commission but instead heard the case before his commission reached a verdict, "the Court seems disinclined to sit by the sidelines and defer to the executive's judgment."[51]

In deciding the challenge presented by Osama bin Laden's former chauffeur Salim Ahmed Hamdan, the Court invoked stare decisis through *Ex Parte Milligan* (1866).[52] According to this precedent, the Court ruled in a 5-3 decision that it *did* hold jurisdiction over the habeas corpus interests of

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[46] Anthony J. Colangelo, *Brief Remarks on the Supreme Court's Role After 9/11: Continuing the Legal Conversation in the War on Terror,* 62 SMU L. REV., 17-26 (2009), at 19.
[47] Bauer, *supra* note 35, at 1082.
[48] Bauer, *supra* note 35, at 1082.
[49] GARRISON, supra note 32, at 330.
[50] Charles Lane, *High Court to Hear Case on War Powers*, THE WASHINGTON POST (Nov. 8, 2005),
http://www.washingtonpost.com/wpdyn/content/article/2005/11/07/AR2005110700562.html.
[51] *Id.*
[52] GARRISON, supra note 32, at 330.

detainees and that the President's military commissions were unconstitutional, having not been authorized by Congress.[53] While the Court also considered the unconstitutionality of the commissions under the Geneva Conventions and Uniform Code of Military Justice (UCMJ), the Court effectively ruled that "the president had overstepped his authority under the Constitution's separation of powers."[54]

The *Hamdan* decision also forced the Bush Administration to abandon arguments asserting the "president's constitutional authority as commander-in-chief" within the context of the War on Terror as being sufficient to override challenges to executive war powers.[55] Justice Steven's opinion deflated the administration's claim for military necessity, rendering such justifications insufficient to fulfill requirements of the UCMJ and lacking appropriate evidence.[56]

However, similar to the Congressional response following the *Rasul* decision, the White House weighed Justice Kennedy's concurring opinion encouraging legislative alternatives by securing the passage of the Military Commissions Act (MCA) of 2006.[57] As Garrison explains, "the legislation sought to address the *Hamdan* decision" by dissolving habeas corpus protections for pending cases and closing procedural loopholes to reinstate military commissions under the legislative authority of Congress, not under contested AUMF war power allocations.[58]

This judicial meddling with the political branches continued with a landmark decision by the Supreme Court in *Boumediene v. Bush* (2008). *Boumediene* directly challenged the constitutionality of the MCA, although more profoundly in terms of Fifth Amendment due process rights and the Court's jurisdiction over protecting the legal status of detainees. After the Court initially refused to hear the case, the Court granted certiorari in *Boumediene* to reconcile detainee rights to due process before neutral, independent judicial bodies.[59]

In *Boumediene*, Justice Kennedy delivered the 5-4 majority opinion, asserting that while the MCA was enacted by a constitutional means to "remove habeas jurisdiction from the Court," such removal unconstitutionally suspended due process rights entitled to detainees.[60] In one of the first post-9/11 decisions specifically appealing to individual liberties pro-

[53] GARRISON, supra note 32, at 330.
[54] Mahler *supra* note 2.
[55] Vladeck, *supra* note 36.
[56] GARRISON, *supra* note 32, at 331.
[57] GARRISON, *supra* note 32, at 338.
[58] GARRISON, *supra* note 32, at 338.
[59] GARRISON, *supra* note 32, at 339.
[60] GARRISON, *supra* note 32, at 339.

tected by the Constitution, *Boumediene* characterized "the privilege of habeas corpus" as "one of the few safeguards of liberty specified in [the] Constitution."[61] Thus the Court reaffirmed the right of habeas corpus for detainees, citizens or non-citizens, held at Guantanamo Bay as the US assumed sovereignty and affirmed legal jurisdiction over the Guantanamo Bay territory.

According to SMU Associate Professor of Law Anthony Colangelo, the *Boumediene* decision did not advocate an unrestricted scope of habeas corpus, but rather reiterated a "functional approach" by which the Court can "evaluate the status of" detainees on a case-by-case basis.[62] In *Boumediene*, the Court warned that habeas corpus protections are not universal, but do render strict scrutiny on a fact-specific basis when national security and individual rights are at odds.[63] Thus, the *Boumediene* decision aligns with a gradual progression of Supreme Court activism in the series of post-9/11 cases invoking the rights of detainees in concert with the constitutionality of executive war powers, jurisdiction, and ultimate regard for individual rights.

Taking a cumulative view of these four cases, Garrison explains that "together these cases (*Rasul*, *Hamdan*, and *Hamdi*) continued the tradition of judicial protection of the boundaries of executive power in times of crisis."[64] Judicial interference with the political branches following the September 11th attacks has culminated in a legal narrative founded in traditional notions of justiciability with respect to wartime and foreign policy deference. The Court, initially hesitant to undermine executive authority in the years immediately following 9/11, has incrementally reaffirmed its duty to protect institutional prerogatives as well as balance separation of powers and individual rights.[65] Although the Court has continued to rely primarily on procedural and fact-specific interpretations of constitutional challenges to the use of force, the Court's exercise of judicial review in *Hamdi*, *Rasul*, *Hamdan*, and *Boumediene* reaffirms the judicial stake in preserving the separation of powers, despite new challenges to judicial involvement in US foreign affairs.

PART III. ASSESSING POST-9/11 CASES: THE COURT, WAR POWERS, AND JUSTICIABILITY IN THE 21ST CENTURY

Considering the national security and political conditions contex-

[61] Boumediene v. Bush, 553 U.S. 723, (2008).
[62] Colangelo, *supra* note 46, at 20.
[63] Colangelo, *supra* note 46, at 20.
[64] GARRISON, supra note 32, at 321.
[65] Vladeck, *supra* note 36.

tualizing Supreme Court decisions in *Hamdi, Rasul, Hamdan,* and *Boumediene*, the reasoning behind judicial action and justiciability in these cases is rather consistent with the Court's tendencies to provide tame constitutional answers of process and jurisdiction to substantively complicated war powers questions. Instead of taking the reins from the executive to assert judicial authority and define the boundaries of presidential war powers, the Court has maintained threads of deference by integrating traditional standards of justiciability with broad appeals to separation of powers to preserve both judicial legitimacy and executive flexibility for the uncertain future of the War on Terror.

This explanation of Supreme Court trends in post-9/11 decision-making is best articulated by Stanford Law Professor Jenny Martinez. In "Process and Substance in the 'War on Terror,'" Martinez demonstrates that while post-9/11 Supreme Court cases involve "profound infringements of individual rights," the Court has "not directly addressed these substantive rights claims."[66] Instead, Supreme Court decisions, as illustrated by cases like *Hamdi, Rasul, Hamdan,* and *Boumediene*, rely on constitutional questions of process.

Court decisions based upon process consider procedural elements such as the scope of the Court's jurisdiction, "whether the proper branch… has made the initial determination of policy, and whether proper procedures have been followed in implementing the policy," among other justifications.[67] Yet while legal questions challenging the separation of powers carry a particular significance in wartime contexts, procedural approaches to adjudicating foreign affairs decisions do implicate greater aspects of individual liberties.[68] For example, while *Rasul* primarily clarified jurisdictional process for Guantanamo detainees, a secondary implication of the decision protected the habeas corpus rights of prisoners to appeal their 'enemy combatant' classification through the courts. Thus, process can be invoked by the Court for the sake of clarifying process itself, but also to provide an instrumental tool to shape substantive legal considerations.[69]

One justification for the Court's reluctance to rely on substantive legal decisions rests on the Court's own reverence for stare decisis. Judicial precedent, which often serves the functional purpose of legal permanence, can prove restrictive in war and military contexts. As *New York Times* contributor Jonathan Mahler explains, "a military order, however unconstitutional, is not likely to outlive a military emergency, but a Supreme Court

[66] Martinez, *supra* note 3, at 1016.
[67] Martinez, *supra* note 3, at 1016.
[68] Martinez, *supra* note 3, at 1016.
[69] Martinez, *supra* note 3, at 1064.

decision will stand for generations to come."[70] Justice Jackson exhibited similar concerns in his dissent in *Korematsu v. United States* (1944), in which he stated that upholding the Japanese internment constitutionally endowed the executive with a "loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[71] The *Korematsu* decision underscores the modern limitations of judicial restraint during wartime. As late Chief Justice William H. Rehnquist explained: "There is no reason to think that future wartime presidents will act differently from Lincoln, Wilson, or Roosevelt, or that future Justices of the Supreme Court will decide questions differently than their predecessors."[72] Thus, when considering the justiciability of pending war powers or questions regarding the use of force, Supreme Court discretion remains limited to some degree by the bounds of historical and political context. Judicial intervention balances reluctance to interfere in complex foreign affairs with consideration of lasting impacts on constitutional allocations of war powers and their functional use.

In addition to preserving judicial values in precedent and avoiding hasty decisions to implicate current and future war powers disputes, Martinez notes that a more primary rationale for the Court's continued preference for process versus substance serves judicial interests in preserving the dignity and legitimacy of the Court.[73] In this manner, rendering post-9/11 cases justiciable on the grounds of process supports public expectations of a judicially independent Supreme Court, particularly during the heightened political environment following the terrorist attacks.

Although Louis Fisher contends that "public pressure affected judicial rulings on the war power" during the Korean and Vietnam Wars, the Courts are less responsive to modern public opinion than they are to the saliency or divisiveness of cases in the national political dialogue. Compared to a rapid decline in Congressional approval between 2002 and 2006 (as exhibited by Figure 1, page 52), the Supreme Court received overall steady approval ratings between the aforementioned years (Figure 2, page 52).[74, 75] While the institutional nature of the judiciary isolated from political checks is often criticized as some manifestation of an "undemocratic force" with unelected judges serving life sentences to adjudicate

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[70] Mahler, *supra* note 2.
[71] Mahler, *supra* note 2.
[72] WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 254 (1998), at 124.
[73] Martinez, *supra* note 3, at 1062.
[74] *Congress and the Public*, GALLUP, (2013), http://www.gallup.com/poll/1600/congress-public.aspx.
[75] *Supreme Court*, GALLUP, http://www.gallup.com/poll/4732/supreme-court.aspx.

checks upon the political branches of government, adhering to process in post-9/11 decisions has helped to preserve the Court's institutional credibility and legitimacy.[76] If the Supreme Court were to claim substantive arguments to justify controversial war powers cases involving torture, imprisonment, and the rights of military detainees, public trust in the Court would likely diminish, seeing substantive content as more reflective of highly politicized issues beyond the appropriate scope of judicial authority, especially during wartime. For example, an October 2013 Gallup poll revealed that 46 percent of Americans approve of the way the Supreme Court is handling its job, with 45 percent disapproving.[77] According to Gallup's Andrew Dugan, this division "perhaps reflect[s] the string of recent polarized court decisions" since the turn of the century.[78]

Furthermore, the "uncertain and unpleasant substance" characterizing the details of the War on Terror explains the Supreme Court's process-based approaches in *Hamdi, Rasul, Hamdan,* and *Boumediene.*[79] The specific foreign policy context of the War on Terror facilitates an uncertain legal and political environment to which the Court has responded by "using procedural devices to delay final resolution of the underlying substantive issues."[80] According to Martinez, it is "better to delay the decision about substantive rights at Guantanamo for a few more years… rather than run the risk of a wrong and premature decision."[81] In the context of these uncertainties, approaching post-9/11 war powers cases through the lens of legal *process* in turn permits the Court to evaluate the justiciability of foreign affairs cases through a "more sober" lens in the aftermath of September 11th.[82]

Although post-9/11 Supreme Court decisions evoke a sense of judicial legitimacy to 'police' the political branches with justifications for process fulfilling justiciability, the judiciary is neither immune to politics nor does the Court succumb to traditional US foreign policy politics. With respect to upholding stare decisis, preserving judicial legitimacy, and measuring substantive circumstances contextualizing post-9/11, the Court's adjudication on the basis of process rather reinforces traditional requirements of justiciability in foreign affairs-related cases like *Hamdi, Rasul, Hamdan,* and *Boumediene*.

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[76] Mahler, *supra* note 2.
[77] *Americans Still Divided on Approval of US Supreme Court,* GALLUP, *Gallup*, http://www.gallup.com/poll/165248/americans-still-divided-approval-supreme-court.aspx.
[78] *Id.*
[79] Martinez, *supra* note 3, at 1072.
[80] Martinez, *supra* note 3, at 1072.
[81] Martinez, *supra* note 3, at 1072.
[82] Martinez, *supra* note 3, at 1072.

PART IV. INTERNATIONAL JUDICIAL COMPARISONS: A CASE STUDY OF THE GERMAN CONSTITUTIONAL COURT

Looking at the larger picture of Supreme Court deference and discretionary conditions for justiciability in matters of foreign affairs, it is useful to compare the US Court to the activist German Constitutional Court (GCC). Constitutional scholar Thomas Franck invoked this comparison in *Political Questions/Judicial Answers* to contrast US judicial reluctance in foreign affairs with activist German adjudication. Franck explains that "unlike American courts," German courts "have chosen a path of activism, rejecting invitations to imitate the abdicationist US practice" by using a "thread of jurisprudence that is pursued with far greater consistency" than in American courts.[83] Opposite of the American judicial system, German courts originate with the premise that "everything is adjudicable," including political questions and foreign affairs.[84] Under these circumstances, Franck argues that there is "little serious conflict between the political and judicial organs" and that the GCC better grounds itself upon consistent theory for justiciability compared to American courts.[85] While both the German and American judiciaries arrive at similar judicial results, the German premise of wide-ranging justiciability eliminates aspects of inconsistency and discretion through which the US judiciary intervenes in foreign affairs issues.[86]

In another sense, however, the paradoxical standard for restricted discretion afforded to the US judicial branch to adjudicate foreign affairs cases affirms inherent American values in separation of powers.[87] While the Court's post-9/11 decisions have emulated traditional appeals to process over substance, the Court's approach to adjudicate war powers cases grants protections to "institutional prerogatives," while also subtly reflecting judicial views toward "the relationship between separation of powers and individual rights."[88] In this manner, the Court fulfills originalist views of separation of powers and foreign affairs in which the Framers deliberately introduced an invitation to struggle among the branches of government, with the aim of mitigating tyranny and instilling deliberateness in the US foreign policymaking process. While the Constitution empowers the judiciary to check the powers of the executive and legislative, separation of powers would risk losing institutional legitimacy if the Court were

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[83] FRANCK, *supra* note 11, at 107.
[84] FRANCK, *supra* note 11, at 108.
[85] FRANCK, *supra* note 11, at 124.
[86] FRANCK, *supra* note 11, at 124.
[87] Vladeck, *supra* note 36.
[88] Vladeck, *supra* note 36.

to be granted free-reign as it theoretically does in Germany. The evolution of the Court's ability to adjudicate foreign affairs cases reliant upon standards of justiciability and reasonable judicial discretion instills living constitutionalism with legitimacy in light of evolving US foreign policy and uncertainty in the War on Terror.

CONCLUSION

While the Supreme Court may not yet be synonymous with 'activism' with respect to adjudicating foreign affairs matters, the advent of evolving military threats and the continued reluctance of the Court to vocalize substantive constitutional considerations leaves a broad swath of national security and war powers questions unanswered. Recent revelations including the use of military drones and surveillance programs both at home and abroad have invoked a fierce constitutional debate involving individual liberties and the scope of executive war authority that only a *willing* judiciary can decide.

Reflected in post-9/11 cases, the willingness of the Supreme Court to approach cases rooted in foreign affairs remains subject to both traditional and discretionary judicial rationales influencing justiciability. Traditional concepts of legal standing and political question doctrine continue to provide a preliminary basis for judicial intervention in foreign affairs. Yet the intensity of inter-branch conflict, contexts of emergency or national security crisis, the orientation of public opinion, and the balance of individual rights with separation of powers grant the Court discretion to hear narrowly tailored and specified issues on a case-by-case basis of judicial review.

In the midst of Madisonian justifications to 'protect against tyranny,' originalist views prizing the Founders' intention of institutional struggle, affronts to individual liberties, and inter-branch confrontation at the hand of constitutionally ambiguous war powers, the core judicial position in the realm of foreign affairs continues to embody Justice Brandeis' ultimate dichotomy: "the most important thing we do is not doing."[89] But despite an overwhelming reputation for judicial deference, the Court continues to fulfill its role as an institutional 'check' on the political branches through pragmatic, functional, and reasoned approaches to foreign affairs. The Supreme Court's involvement in *Hamdi, Rasul, Hamdan*, and *Boumediene* demonstrates that the judiciary is not powerless nor at the mercy of politics in matters of US foreign policy. Rather, as notions of terrorism, foreign affairs, use of force, and war powers continue to evolve and

[89] Mahler, *supra* note 2.

complicate the behemoth that is 'US foreign policy,' the Supreme Court's power to grant certiorari and the fundamental constraints of justiciability will navigate the core constitutional and political foundations shaping America's place in the world.

APPENDIX

Figure 1.[90]

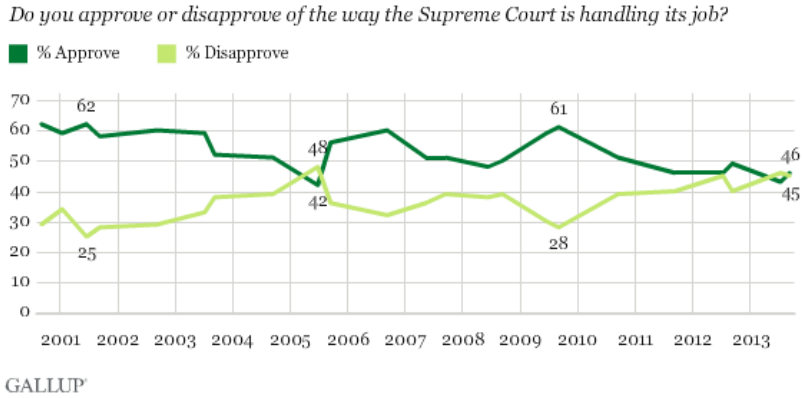
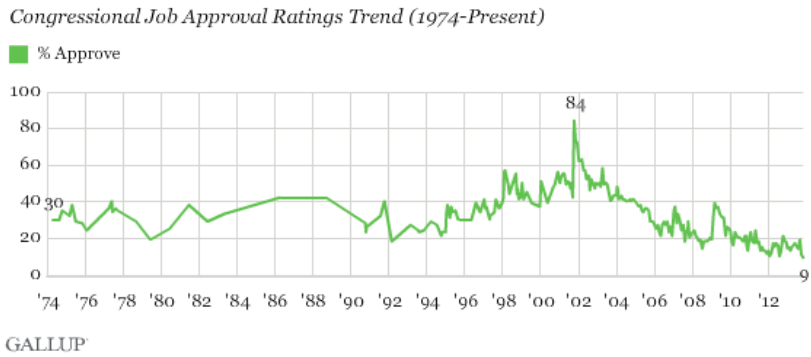


Figure 2.[91]



[90] *Supreme Court, supra* note 75.
[91] *Congress and the Public, supra* note 74.

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UNILATERAL PRESIDENTIAL ACTION AND THE UNITED NATIONS CHARTER

Dylan Markovic*

Throughout the modern era, Presidents of the United States have routinely cited United Nations Security Council Resolutions and the United Nations Charter for authority to use military force abroad. While the President is afforded special military privileges as Commander-in-Chief of the Armed Forces, many would argue that since it is the constitutionally prescribed authority of the Legislative branch to "declare war," the President has no legitimate authority to use military force without Congress' consent (except in special circumstances outlined in the Constitution). The matter may be a little more complicated, however, because of the special legislative status of treaties, which are ratified by the Senate. This paper seeks to answer the question of whether the ratification of the United Nations Charter by the Senate provides the President with the power to use military force unilaterally (that is, without the consent of Congress) in compliance with UN norms and statutes, or whether this claim is illegitimate–a question with tremendous ramifications for our representative democracy, the separation of powers outlined in the Constitution, and the responsible use of military force. This paper was written for a course taken in 2012 at Kenyon College with Professor Thomas Karako, "National Security Law and the Constitution".

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In the course of this paper, I will examine whether the United Nations Charter, specifically Chapter VII "Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression," is a "self-executing" treaty under the domestic law of the United States, thus authorizing the President take military action pursuant to a United Nations Security Council Resolution without supplemental congressional authorization. I will consider several things: first, do treaties become domestic law after approval by the Senate and ratification by the President, or is additional "implementing legislation" necessary before treaty provisions can be executed on the national level? Secondly, is there a provision of the UN Charter that designates it as a self-executing or non-self executing treaty under the domestic law of the United States? Third, I will consider the legislative history of the treaty in the United States Senate to evaluate the perceptions and understanding that the Senators had with regard to the legal force of the treaty at home. If it can be shown that a general understanding was ascribed by the Senators at the time of consideration to the UN Charter, then perhaps some light will be shed on whether the treaty was intended to be self-executing or non-self-executing. Fourth, I will take into account how the United Nations Participation Act of 1945 may have altered the original understanding of the UN Charter, a treaty ratified only half a year prior. Fifth, I will review the actions taken by President Harry Truman in the Korean War and evaluate the war's effect on subsequent conflicts. Finally, I will analyze the Bricker Amendment, an attempt to amend the Constitution that ultimately failed but may provide some insight to the question.

PART I. SELF-EXECUTION

On the surface, the Constitution of the United States seems to be clear on the status of treaties in domestic law. Article VI of the Constitution reads as follows:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or the laws of any State to the contrary notwithstanding."[1] (emphasis added)

In unequivocal terms, the writers of the Constitution decided that treaties made in accordance with the special process described under Article II, Section ii, (and existing treaties which predated the Constitution) would be held on par with ordinary legislation as the "supreme law" which governs the nation, second in status

[1] U.S. Const. art. VI, § 2.

only to the Constitution itself. The framers of the Constitution could have prescribed that treaties would take effect on an international level following ratification, but would require implementing legislation before the treaty would become law domestically; however, no such language can be seen or even reasonably inferred from the text. The only instance in which a treaty might be considered "non self-executing" is if the text of the treaty indicated that implementing legislation would be necessary for it to take effect, which would presumably be legal (I will examine whether there is such a provision in the treaty further down the page). By such reasoning, then, the UN Charter, as a treaty of the United States, can be considered self-executing.

Of course, the real understanding of the self-execution doctrine is more nuanced than this reading suggests. The latter portion of what is quoted from Article VI of the Constitution, "anything in the Constitution or the laws of any State notwithstanding," must also be considered in the making and execution of treaties—they may be law of the land, but they are limited in what they can accomplish. For example, if the President attempted to provide funds under the authority of a treaty without additional legislation from Congress, his action would be contradict the Constitution, which clearly enumerates the "power of the purse" to be a power of Congress, as stated in Article I, Section 9.

A similar argument could be made that the President cannot unilaterally authorize the use of armed forces pursuant to a UN Security Council Resolution, because Article I, Section 8 of the Constitution specifies that only the legislature has the power to "declare war". What constitutes "war", however, is a matter that has been continuously debated for hundreds of years, and many would argue that the President has the power to use force for purposes short of war because of his authority as Commander in Chief. This subject is much too broad to be addressed in this paper, though, so for my purposes, it will suffice to say that one potential roadblock for the self-execution of the UN Charter is that to many, Congress' power to declare war is not something that was ever intended to be delegated by treaty to the executive branch.

The prevailing consensus among scholars regarding treaties and their implementation is that treaties are self-executing in most cases. Some strict Constitutional textualists such as Professor Jordan Paust believe that "the whole doctrine of non-self-execution is invalid because it conflicts with the Supremacy Clause."[2] There is a small minority of dissenters, however, which counts most notably among its ranks, Professor John C. Yoo.

In Professor Yoo's writings, he outlines several reasons why treaties require implementing legislation before their provisions take effect as domestic law. One point he raises is that the power to make treaties is not found in Article I of the Constitution along with the rest of the legislative powers, but in Article II, which enumerates the powers of the executive branch.[3] He argues that "the Senate's participation

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[2] Carlos Manuel Vazquez, *Laughing at Treaties,* 99 COLUM. L. REV. 8, 2154-2217 (1999), at 2157.

[3] John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99

alone does not convert treaties into legislation." In the same text, Yoo posits that "the original understanding [of the Constitution] does not *compel* a reading of the Supremacy Clause that immediately makes treaties law within the United States..."[4] To support this understanding, Yoo references historical precedents in Britain, ideas that were likely on the minds of the founders as they set about forming a government of their own. His main argument for the purpose of the Supremacy Clause is summed up rather briefly: "Although, like statutes and the Constitution, treaties are supreme over inconsistent state law, the process and objectives of treaty-making are quite different from other forms of public lawmaking."[5] By this reasoning, Yoo seeks to avoid completely reading out the clause, but reading it in the most restrictive way possible. His object in all of this is to make sure that international law stays international and domestic law domestic. He is concerned about "the tight integration of international and domestic law," and labels self-executing theorists "internationalists."[6] He is not the first to be worried about the United States losing its sovereignty and becoming subordinate to the international community, as we will see in the case of the Bricker Amendment.

Although Yoo makes some interesting points, he is fighting a losing battle. To reach some of his conclusions would require one to completely ignore the black letter of Article VI of the Constitution. "[T]he *Restatement of the Foreign Relations Law of the United States* instructs that treaties are not self-executing 'if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation,'" Yoo writes, but as Vazquez will counter, this is only in very particular cases.[7][8] The Supremacy Clause simply does not appear to support Yoo's reading.

In response to Yoo's article supporting non-self-execution of treaties, Professor Carlos Vazquez wrote an article entitled "Laughing at Treaties." By choosing such a title, he clearly implies that Yoo's understanding of the Supremacy Clause stripped treaties of their power, defanging them until they are merely "laughable." In building up his case in favor of treaties operating as "supreme law of the land," Vazquez reaches back to the founding fathers. In *Federalist #22*, Alexander Hamilton writes that "the treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import as far as respects individuals, must, like all other laws, be ascertained by judicial determinations." In Hamilton's view, in order for treaties to be effective, they would have to be of equal status to the rest of the laws of the land, including statutes passed by Congress. He leaves no doubt of this when he suggests that treaties, just like other law, ought to be subject to judicial review. William Davie, delegate to

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COLUM. L. REV. 8, (1999), at 1966.
[4] *Id.* at 1961.
[5] *Id.* at 1958.
[6] *Id.*
[7] *Id.* at 1971.
[8] Vazquez, supra note 2, at 2175.

the Continental Congress, also stated that "it was necessary that treaties should operate as laws upon individuals. They ought to be binding upon us the moment they are made."[9] Vazquez thus concludes, "the debates at Philadelphia support the prevailing interpretation of the Supremacy Clause," that treaties should have the force of domestic law.[10]

In the course of his article, Vazquez responds directly to Yoo's claim that because treaty-making only involves the Senate and not the House, treaties cannot have the same effect as domestic law. Vazquez notes that Yoo himself believes that the framers of the Constitution found the House of Representatives unsuited for the process of treaty-making because it was too large, and treaties might require secrecy. Yoo's logic is therefore flawed: if the House were to be excluded from the process on the basis of secrecy, then surely all secrecy would be lost when, by Yoo's logic, Congress as a whole passes legislation to enact treaties as domestic law.[11] In fact, Vazquez sees the distinct process of treaty ratification as a safeguard against bad domestic legislation, because by requiring a supermajority of the Senate, it will be seen that "the greater the difficulty in making them, the more seriously they will be taken."[12] In the 1829 Supreme Court case *Foster v. Neilson*, Chief Justice Marshall rendered an opinion that supports Vazquez' argument for the legitimacy of the doctrine of self-execution:

> "A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States, *a different principle is established*. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision."[13] (emphasis added)

This dicta clarifies that although not done by traditional legislative processes, treaties are nonetheless a legitimate way of creating domestic law on par with statutes. However, Vazquez does see one caveat to self-execution in *Foster*. "If one accepts *Foster,*" he writes, "then in my view one must accept the validity and effectiveness of such a reservation. *Foster* held that the treaty makers could render an otherwise self-executing norm non-self- executing by framing it as a requirement of future legislation."[14] This is an important concept to keep in mind as we consider the text and his-

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[9] Oona Hathaway, et. al, *The Treaty Power: Its History, Scope, and Limits*, YALE L. J., (2014).
[10] Vazquez, supra note 2, at 2161.
[11] Vazquez, supra note 2, at 2160.
[12] Yoo, *supra* note 3.
[13] Foster v. Nielson, 27 U.S. (2 Pet.) 253, 314 (1829).
[14] Vazquez, *supra* note 2, at 2187 .

tory of the UN Charter.

Commenting on the self-executability of the UN Charter in particular, Louis Fisher writes the following:

> "It could be argued that Truman was required to enforce the UN Charter as a treaty, just as he is obliged under the Constitution to carry out any statute, since the term "Laws" includes treaties as well as statutes. But the Security Council resolution did not obligate the President, or the United States, to take any particular action. Furthermore, Truman was not at liberty to carry out a Security Council resolution if such action would violate the Constitution. Treaties may not be construed to extend so far as to authorize what the Constitution forbids."[15]

Fisher acknowledges the President's authority to oversee the execution of the laws in his capacity as Chief Executive, but he sees at least two problems with claiming authority under the charter. He does not believe that the charter binds the President to take positive military action in response to a Security Council resolution. More importantly, perhaps, he argues that an unconstitutional action cannot be made constitutional merely by virtue of it being a treaty stipulation.

Since treaties are understood as generally self-executing, then it seems reasonable that the President might claim authority to send forces into armed conflict by virtue of his power to take care that the laws are faithfully executed. Woods writes that in the Korean War, "Truman argued repeatedly that the United Nations Charter was a treaty he had the duty to execute, and whose authority obviated the need to consult Congress for a declaration of war." Considering the convincing arguments by Professor Vazquez in favor of self-executing treaties, it appears that the Senate saw the UN Charter as a non-self-executing treaty -- no term in the treaty makes itself-executing treaty. The Senate did not pass any legislation after the treaty's passage to change its meaning or repeal it. So, the President can technically enter into armed conflict unilaterally in accord with the charter.

PART II. THE WORDING OF THE CHARTER

While the reasoning above seems to indicate that treaties are self-executing as a general rule, but not necessarily in all cases, it makes sense to turn now to the actual text of Chapter VII of the UN Charter in order to see if there is anything contained within that would suggest that the treaty is either self-executing or non self-executing.

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[15] Louis Fisher, *Sidestepping Congress: Presidents Acting Under the UN and NATO,* 47 CASE W. RES. L. REV. 4, (1997).

To help determine this, I will look for clues in the articles relating to the introduction of personnel into armed combat.

Article 42

> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

The UN Charter clearly sanctions military action taken by member nations in accordance with a Security Council resolution, an idea that is further elaborated on in the pursuing articles of this chapter.

Article 43

> 1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
>
> 2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
>
> 3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

Clause 1 of Article 43 mandates that its constituent nations must provide armed forces. The number and kind of forces to be made available is determined by "special agreement[s]," which may be relevant to the question of domestic legality of the UN Charter. Clause 3 makes a good case for non self-execution when it says that the agreements shall be completed "in accordance with their respective constitutional processes." For the United States, this statement certainly seems to implicate Congress in the process of making such special agreements, since it falls under the legislative branch's

duties under Article I, Section 8 of the Constitution. To say that the ratification of the UN Charter by the President, with the advice and consent of the Senate, should constitute and thus override such a provision is not germane because the language clearly refers to agreements to be made by the power of the UN Charter, not the UN Charter itself. These "special agreements" cannot be covered by original ratification of the charter because the agreements are themselves distinct from the charter. The constitutional power to declare war is delegated to Congress, but the President has used force on several occasions (before the Korean War) without Congress' approval. For now it will suffice to say that a reasonable claim can be made that under Article 43, Congress should have a role in the negotiation of special agreements to send US troops into armed conflict sanctioned by the UN Security Council.

Article 44

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Article 48 suggests that the Security Council will determine which member states will participate in an action of which it approves. The word "required" in Clause 1 does not necessarily mean that all nations are "required" to take action; it only signifies that an action must take place in order for the resolution to be fulfilled. The remainder of the first clause, however, can be interpreted as saying that the Security Council will determine the proper force to be used pursuant to a resolution, and member states are obliged to carry out the action. The United States would have a safeguard against being forced to send its troops into armed conflict if it were against such a motion by virtue of the veto power; it holds as a permanent member of the Security Council. The aim of Clause 2 is to recognize military alliances (such as NATO) as legitimate actors in U.N. sanctioned armed conflict, so long as the Security Council designates such a body to be utilized. The word "shall" in this article, as in other articles, is a binding declaration on the member states, but whether it would be equivalent to the word "must" is not clear. Whether "shall" was intended to be positively binding or not, the strict text of Article 48 could reasonably be used as domestic constitutional authority for the President to enter into armed conflict.

Article 49

> The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

Article 49 of the UN Charter could be interpreted to authorize unilateral Presidential military action domestically. The article states that the "Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council." As a permanent member of the Security Council, the United States will always have the power to veto measures, ensuring that they will never have to be a party to a conflict if they choose not to be. If the Senate intended the charter to be self-executing, though, the President could easily and legitimately claim that Article 49, as a treaty consented to by the Senate, authorizes him under United States law to take military action, as it is his responsibility to be a part in "mutual assistance." Article 49 does not appear to differ substantially from the language of Article 49, except for the fact that it appears to implicate all of the member states, whereas Article 48, Clause 1 leaves open the option for the Security Council to designate particular member states for armed conflict.

Article 51

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Article 51 states that United Nations member states need not wait for the security council to draft a resolution and authorize military action when such action is taken as individual or collective self-defense. Indeed, almost any use of force that is not an initiation of hostilities could be justified as either individual or collective self-defense. What Article 51 does do, however, is to explicitly authorize such action. Rather, the language "[n]othing in the present Charter shall impair" states that the Charter should not be interpreted as *standing in the way* of armed defense, in case of an attack. The charter does not order a country to defend itself, nor does it order other countries to come to its aid in collective self-defense. In view of this, it would be a stretch for the President to claim that Article 51 is a self-executing provision that

justifies the use of military force without the consent of Congress. Certainly the Congress could authorize collective self-defense of a nation under attack, consistent with Article 51 of the UN Charter, but it does not appear to be a necessity. Article 51 appears to operate strictly on the level of international law; leaving the door open for the right to self-defense. Of course, if the United States itself were under attack, the question of whether the President has the domestic authority to respond to the attack under the UN Charter would be moot, as he clearly has that authority in his constitutionally enumerated powers.

The text of Chapter VII supports the idea that the UN Charter is self-executing, with one major caveat: the reference to "constitutional processes" in Article 43, Clause 3. This clause is impossible to ignore, as it pertains to the special agreements under which countries agree to commit troops to the UN to carry out action ordered by the Security Council. Another question is raised by this realization: does the US have the power to use military force pursuant to a Security Council resolution by itself? Can the Security Council authorize any nation, but no nation in particular, to take action? Yes, I believe it can, but this does not mean the US can read out the "constitutional processes" clause.

PART III. HISTORY OF THE CHARTER

When considering the entry into the United Nations toward the end of World War II, the Senate had really only one other world organization to consider as precedent: the League of Nations. The circumstances surrounding the League of Nations in 1919 and the United Nations in the mid-1940's were very similar: the world had just borne witness to the most horrific war it had ever seen (in each case), and the international community found it necessary to take steps to ensure that nothing like it would ever happen again. Although the League of Nations was largely an initiative of President Woodrow Wilson, the United States never joined because the Senate never gave its consent. Lou Fisher chronicles how "[t]he treaty of Versailles was defeated by the Senate in 1919 and again in 1920, largely because a number of senators insisted that any commitments of U.S. troops to a world body (the League of Nations) first had to be approved by Congress."[16] The Senate was unwilling to forego constitutional processes in order to commit troops to the League. In their view, only Congress could send troops abroad, a power that they were not about to cede to the President or a world organization, in view of the carnage of the first great war. Senator Henry Cabot Lodge spoke unequivocally about the role of Congress, should the Senate decide to enter into the League: "...unless in any particular case the Congress, which, under the Constitution, has the sole power to declare war or authorize the employment of the military or naval forces of the United States, shall by act or joint resolu-

[16] Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 1, (1995).

tion so provide," he said, there was no legal authority for the deployment of troops.[17] To be sure, the League of Nations treaty and the United Nations treaty were two separate things, so the approach taken by one Senate toward the former is not necessarily the approach taken by another to the latter. During the debates about the UN Charter treaty, however, it is reasonable to say that the Senate was largely informed by the recent history of the rejection of the League of Nations.

"In the meetings that led to the United Nations," Fisher writes, "the predominant view was that any commitment of US forces to a world body would require prior authorization by both houses of Congress." However, President Franklin D. Roosevelt held that "[i]t is clear that, if the world organization is to have any reality at all, our representative must be endowed in advance by the people themselves, by constitutional means through their representatives in the Congress, with authority to act."[18] Roosevelt evidently held the view that Congress' military powers should be delegated to the United States UN Representative, so that the President could pursue military action independent of Congress if sanctioned by the Security Council. Even President Harry Truman, Roosevelt's successor, shared the Senate's understanding of the UN Charter. Fisher writes:

> "President Truman, aware of this debate on which branch would control the sending of US forces to the United Nations, wired a note from Potsdam to Senator Kenneth McKellar on July 27, 1945. Truman pledged without equivocation: 'When any such agreement or agreements are negotiated it will be my purpose to ask the Congress for appropriate legislation to approve them.'"[19]

This note from the President is very interesting, considering the actions he would go on to take in the Korean War in stark contradiction to this telegram. Having received Truman's pledge, the Senate consented to the treaty in a lopsided vote of eighty-eight to two.[20] Although the House was, of course, not a participant in the treaty-making process, it nonetheless passed a concurrent resolution, expressing its support and understanding of the UN treaty. The so-called "Fulbright Resolution" condoned the "creation of appropriate international machinery with power adequate to establish and to maintain a just and lasting peace, among the nations of the world, and as favoring participation by the United States therein *through its constitutional processes*," (emphasis added).[21]

John Foster Dulles, a US delegate to the San Francisco Conference (where the UN Charter was originally drafted) reported to the Senate Committee on Foreign

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[17] *Cong. Rec. 8777* (1919)
[18] U.S. Department of State. Bulletin. 447, 448 (1944)
[19] Fisher, *supra* note 15, at 1249.
[20] 91 Con. Rec. 8190
[21] H.R. 2578, 107th Congress (1943)

Relations that "it is clearly my view, and it was the view of the entire United States delegation, that the agreement which will provide for the United States military contingent will have to be negotiated and then submitted to the Senate for ratification in the same way as a treaty."[22] When he was informed by one Senator that such action would have to be approved by both the Senate and the House, Dulles backtracked, saying "the central point he wanted to make, was that 'the use of force cannot be made by exclusive Presidential authority through an executive agreement.'"[23]

PART IV. UN PARTICIPATION ACT

The United Nations Participation Act of 1945, an attempt to clarify the roles and limitations of the charter in domestic law, passed only six months after the ratification of the United Nations Charter (and the entrance of the United States into the United Nations). The most relevant part of the act for the question posed in this paper is Section 6, which reads:

> "The President is authorized to negotiate a special agreement or agreements with the Security Council which shall be subject to the approval of the Congress by appropriate Act or joint resolution providing for the numbers and types of armed forces, their degree of readiness and general location, and the nature of facilities and assistance, including rights of passage, to be made available to the Security Council on its call for the purpose of maintaining international peace and security in accordance with article 43 of said Charter. The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under article 42 of said Charter and pursuant to such special agreement or agreements the armed forces, facilities, or assistance provided for therein: Provided, That nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements."

The language in Section 6 of the UN Participation unambiguously requires that special agreements (in which member nations provide troops for military action for UN Security Council resolutions) between the President and the UN Security Council be approved by Congress. Through the UN Participation Act, Congress

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[22] *The Charter of the United Nations: Hearings Before the Senate Comm. on Foreign Relations*. 79th Cong. (1945)
[23] 91 Cong. Rec., *supra* note 20, at 8027.

reasserted its constitutional power assumed under the "declare war" clause to decide when troops can be sent into armed conflict. Since the UN Participation Act is a statute, it is approximately equal in force under domestic law to the UN Charter, meaning that the principle of *lex posteriori* or the "last in time" rule is applicable here. Therefore, even if we suppose that the UN Charter is a self-executing treaty, since the UN Participation Act was passed after the ratification of the treaty, it overrides the charter. During the debate surrounding the act, especially regarding Section 6, several members of the Truman administration were called in to testify before Congress. The deliberations took place in 1945, several years before Truman's actions in Korea. In his account of the proceedings, Fisher writes that "[i]n his appearance before the House Committee on Foreign Affairs, Under Secretary of State Dean Acheson agreed that only after the President receives the approval of Congress is he 'bound to furnish that contingent of troops to the Security Council; and the President is not authorized to furnish any more than you have approved of in that agreement.'"[24, 25] This was a matter which Congress wanted to be absolutely clear on, so this same question was restated in multiple guises, each time with the same effect:

> "The judge [Congressman John Kee (D, W.Va)] asks whether the language beginning on line 19 of page 5, which says the President shall not be deemed to require the authorization of Congress to make available to the Security Council on its call in order to take action under article 42 of the Charter, means that the President may provide these forces prior to the time when any special agreement has been approved by Congress. The answer to that question is "No," that the President may not do that, that such special agreements refer to the special agreement which shall be subject to the approval of the Congress."[26]

The understanding of the Senate was the same as in the House: "The Senate Foreign Relations Committee further noted that 'all were agreed on the basic proposition that the military agreements could not be entered into solely by executive action.'"[27]This testimony and other instances prove that the understanding of the UN Participation Act held by both the legislature and the executive branch at the time of its passing was that the President would not be able to take action under the UN Charter without first securing approval from the Congress domestically. In the words of Congressmen Sol Bloom (D, NY), "the obligation of the United States to make forces available to the Security Council does not become effective until the special agreement has

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[24] Fisher, *supra* note 15, at 1250-51.
[25] *Participation by the United States in United Nations Organization: Hearings Before the House Committee on Foreign Affairs*, 79th Cong. 23 (1945).
[26] *Id.*
[27] *Id.* at 1252.

been passed upon by Congress."[28]

PART V. KOREA

"President Harry Truman's commitment of U.S. troops to Korea in June 1950," writes Louis Fisher, "still stands as the single most important precedent for the executive use of military force without congressional authority."[29] For Fisher and many other scholars, this is clearly a terrible precedent with far-reaching consequences. Good or bad, constitutional (and legal) or not, it is clear that Truman's actions opened a door for his successors to pass through, taking military action pursuant to UN Security Council resolutions without the approval of Congress.

In his analysis of the of the Korean War with respect to presidential power, Fisher quotes Truman as saying the following: "In accordance with the resolution of the Security Council, the United States will vigorously support the effort of the Council to terminate this serious breach of the peace."[30] This creates massive problems for Fisher, the UN Charter at the time of its ratification was understood as denying the President the power to go to war pursuant to a UN Security Council Resolution without first consulting Congress. Even if this were not the case, the language of the UN Participation Act serves to restrict the President's unilateral ability to wage war by the UN Charter,. After considering these questions myself, I am compelled to agree with Fisher that Truman did not have authority to enter armed conflict *under the charter*.

Not only do I not believe that Truman had the power to commit troops in Korea under the United Nations treaty, but Truman was not even compliant with the treaty, the very source of authority he claimed. As Secretary of State Dean Acheson would later recall in his memoirs, "some American action, said to be in support of the resolution of June 27, was in fact ordered, and possibly taken, prior to the resolution."[31] Thus, although Truman sought to justify his authority by citing the UN Charter, in reality, he seemed to be acting as he pleased with no regard to the law: he did not wait for even the legally dubious authority of a UN Security Council Resolution to move into action.

The question I am trying to answer is whether he had domestic permission strictly from the UN Charter in, by virtue of its status as a treaty—it is clear that he did not. Truman may have had authority under international law to engage in conflict, pursuant to UN Resolution 84, which gave member-states permission to intervene on the Korean Peninsula. Domestically, though, he appears to have acted under false or at least incorrect pretenses.

Truman labelled the Korean Conflict a "police action under the United Na-

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[28] *Id.* at 1253-4
[29] Fisher, *supra* note 16, at 12.
[30] Fisher, *supra* note 15, at 1259.
[31] DEAN ACHESON, PRESENT AT THE CREATION (2nd ed. 1987), at 408.

tions," rather than a war.[32] The implication here is that although only the Congress can "declare war," the President may take military action on a smaller scale. The language of Chapter VII of the UN Charter and the UN Participation Act say nothing about the magnitude of conflict; they discuss only the sending of American forces into armed conflict. Whether two or two hundred thousand, it makes no difference; the original understanding of the charter and the Participation Act dictate that congressional approval must be obtained.

To Truman's credit, he did try to consult with Congress to some extent. Fisher says:

> "He [Truman] reached Senator Connally by phone and asked whether he would have to ask Congress for a declaration of war if he decided to send American forces to Korea. Connally offered this advice: 'If a burglar breaks into your house, you can shoot at him without going down to the police station and getting permission. You might run into a long debate by Congress, which would tie your hands completely. You have a right to do it as commander-in-chief and under the U.N. Charter.'"[33]

There is something to be said about the mere fact that Truman sought the advice of a member of the legislature. He also spoke with Senate Majority Leader Scott Lucas, who gave him an answer similar to Connally's.[34] Perhaps Truman acted in better faith than some give him credit for, taking these two accounts into consideration. In modern times, one might even say that he complied with the spirit of the War Powers Resolution (although the War Powers Resolution passed in 1950, after Truman's critical decision). However, the support of two Senators cannot be said to override the understanding and texts of the relevant laws.

Truman's actions in Korea have had long-lasting ramifications and significantly influenced the foreign policy discretion of every President to follow. "Like my predecessors of both parties," President Clinton said, with regard to action in Haiti, "I have not agreed that I was constitutionally mandated [to obtain the support of Congress]."[35] President George H. W. Bush expressed similar sentiments in relation to the United Nations and his actions in Iraq: in a press conference on January 9, 1991, President George H. W. Bush was asked if he believed that he needed congressional authorization in order to begin offensive operations against Iraq:

> "I don't think I need it. I think Secretary Cheney expressed it very well the other day. There are different opinions on either side of this

[32] 1950 Pub. Papers 503
[33] Fisher, *supra* note 15, at 1262.
[34] Fisher, *supra* note 15, at 1262.
[35] William Clinton, *Weekly Comp. Pres. Doc.* 1616 (1994).

> question, but Saddam Hussein should be under no question on this: I feel that I have the authority to fully implement the United Nations resolutions."[36]

And on another occasion:

> George H. W. Bush: "I didn't have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait."[37]

As I have concluded from the preceding analysis, the President does *not* have the authority to implement UN resolutions by his own authority: the UN Charter was *not* intended to be a self-executing treaty, which subsequent legislation should have made clear, in any case. The effect of the precedent set by Truman in Korea is that it practically codified the practice of entering armed conflict pursuant only to UN resolutions, whether that is a legitimate domestic authority to claim or not. Although some of Truman's successors were wise enough to fortify their claims of authority by asserting additional powers, the UN Charter has nonetheless become a staple in the arsenals of Presidents, with the most recent being President Obama's initiative in Libya.

PART VI. BRICKER AMENDMENT

As a response to Truman's actions in Korea and to court decisions such as *Missouri v. Holland*, which appeared to many to subordinate domestic law to international law adopted by treaty, Senator John Bricker introduced a series of propositions in the 1950s to amend the Constitution. His "Bricker Amendment" proposed three ideas to assert the dominance of the Constitution domestically, reading as follows:

> Section 1. A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.
>
> Section 2. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.
>
> Section 3. Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations

[36] George H.W. Bush, *President's News Conference on the Persian Gulf Crisis*, January 9, 1991.
[37] George H.W.Bush, *Before the Texas State Republican Convention*, June 20, 1992. (Federal News Service)

imposed on treaties by this article.[38]

What Bricker likely had in mind with the first section was a remedy for the problem posed in *Missouri v. Holland*. For Bricker and his confederates, the decision rendered in the case was mistaken, because if a power is not enumerated to the federal government under the Constitution (in this case, the regulation of migratory birds), then it is a matter for the states to administer according to the Tenth Amendment. As the federal government is not given the power to regulate migratory birds the power cannot simply be established and delegated to the federal government in a treaty, as was done in this case. To Bricker, this was a case of the government not only overstepping its bounds, but also the beginning of a dangerous trend of codifying international law as domestic law. Therefore, to Bricker's mind, this section of the amendment was totally necessary to make sure that the Constitution was enforced.

The next section reinforces the principle that what cannot be done by statute cannot be done by treaty, but also has the effect of rendering treaties non self-executing. Here, Bricker uses different words to require that "implementing legislation" be enacted before a treaty can take effect as domestic law. This clearly contradicts Article VI's designation of treaties as "law of the land," but as a proposed amendment to the Constitution it cannot be unconstitutional.

Section 3 primarily seeks to address the problem of President once again "sidestepping Congress," this time doing by executive agreement what might otherwise be done by treaty or statute. The effect is that Congress regains its ability to check the power of the executive when he might seek to avoid its oversight.

For all the concern about Truman making war in Korea without consulting Congress, however, Bricker and other conservatives seemed to be more worried about the expanding influence of the President in domestic policy that did not pertain to war. Woods writes that "many conservatives wondered... [i]f Truman could invoke the Charter to justify a measure as serious as the deployment of American troops abroad, might he not appeal to the same authority to implement wide-ranging initiatives of social reconstruction?"[39] UN Conventions on issues as human rights were becoming more and more frequent, to the point where many were afraid that the UN Charter and Conventions might begin to trump the Constitution. In *Sei Fujii v. California*, the court referenced the UN Charter with respect to human rights guarantees, which further frightened Bricker.[40] Senator Bricker was worried about the "ominous potential of UN authority over American domestic policy," Woods says.[41] In one of his articles, Bricker went so far as to claim that a new method of amending the

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[38] Senate Rep. No. 412, at 1 (1953)
[39] Thomas E. Woods Jr., *Globalism and Sovereignty: A Short History of the Bricker Amendment,* 46 THE FREEMAN 4, (1996).
[40] Sei Fujii v. State of California, 38 Cal. 2D 718 (1952)
[41] Woods, *supra* note 39.

Constitution was being formed, claiming that "[i]n the treaty-making power, as interpreted by *Missouri v. Holland*, a way has been found to amend the Constitution by resorting to Article VI in preference to the more difficult method laid down in Article V."[42]

In the end, Democrats joined with the Eisenhower administration in providing opposition to the Bricker Amendment, and it was narrowly defeated in the Senate by only one vote. Although Bricker felt that "the rights of the states and the people were sufficiently imperiled" to warrant a Constitutional Amendment, others disagreed.[43] Although the effort fell short of Bricker's hopes, however, it was not necessarily without effect. The fact that his amendment came so close to being adopted shows the prevailing attitude of much of Congress toward the UN Charter less than a decade after its ratification. Although the amendment is not eternally enshrined in the Constitution, Bricker may have actually achieved his goal after all as a matter of policy. Consider the view of Louis Henkin: "Senator Bricker lost his battle, but his ghost is now enjoying victory in war. For the package of reservations, understandings, and declarations achieves virtually what the Bricker Amendment sought, and more."[44] Clearly, Senator Bricker has influenced the way we interpret treaties today.

CONCLUSION

In my paper on President Obama's authority to take military action in Libya, I wrote the following:

> "In his capacity as Chief Executive of the United States, the President had the vested authority under Article II to "take care that the laws are faithfully executed," which, it may be argued, he did when he took action to enforce the United Nations Charter, a treaty of the United States. As Article VI of the Constitution clearly states, treaties are "the Supreme Law of the Land," with status comparable to statutes. The authority to enforce treaties is not specifically cited in legal testimony and opinions regarding Libya, but in my view, the President was well within his power to enforce law both domestically and with regard to international obligations of the United States by taking action such as he did."

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[42] John Bricker, *Making Treaties and Other International Agreements,* 289 ANNALS OF AM. ACAD. POL. & SOC. SCI. 134-144 (1953).
[43] Woods, *supra* note 39.
[44] Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 341-350 (1995).

While it still may be true that Obama had authority to take action in Libya, I can no longer subscribe to the idea that he received domestic authority from the United Nations Charter, as I argued before. Although I still believe in the status of treaties as "law of the land" under Article VI of the Constitution, I have come to understand that, with respect to the UN Charter, the question is much more nuanced than I once thought. Almost all parts of my research, which was not conducted to affect any particular result, refute the opinion I once held that the President has the authority to take unilateral military action pursuant to the UN Charter and a UN Security Council Resolution requesting such action. The relevant text of the charter under Chapter VII, which pertains to the use of military force, seems to defeat the notion of the treaty's self-executability with one line: "...in accordance with their respective constitutional processes." The history of the charter during ratification discourse likewise admits of no understanding of Presidential military power, save that it would still require the assent of Congress. Even if this were not the case, the UN Participation Act still has the effect of prohibiting unilateral Presidential action, except for the delegation of up to 1,000 troops to serve in a non-combat role. Whether it is better called a "lie" or a "reassessment," when President Truman took military action in Korea, he directly contradicted what he himself conveyed to the Congress during the ratification debates: that military action would require approval by both Houses of Congress. The Bricker Amendment, while not strictly speaking a success, came within a hair's breadth of limiting the power of treaties. It also changed the way treaties are viewed by Congress, paving the way for the doctrine of reservations, understandings, and declarations (RUDs). With a more thorough understanding of the United Nations charter and the circumstances surrounding it, I can now say confidently that I do not believe it affords the President any authority to take unilateral military action abroad and that I do not believe it to be a self-executing treaty. It remains to be seen, however, how the charter will continue to be misconstrued in support of the efforts of future Presidents, just has it has been over and over again since Truman effectively granted the executive branch permission to exploit it in Korea.

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ENFRANCHISING THE FOREIGNERS: A CASE FOR GIVING PERMANENT RESIDENTS SUFFRAGE

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New York City is the only major most city to consider noncitizen voting; across the country, as the United States becomes more diverse, metropolitan areas are deliberating whether to extend the right to vote to noncitizens. In this paper, I explore the surprisingly rich history of noncitizen voting in the United States. By looking through Supreme Court cases as well as existing literature on the definition of citizenship and democracy, I consider arguments for and against the practice of noncitizens voting, namely the question of their loyalty versus the definition of a democracy. Lastly, several municipalities that have tried local noncitizen enfranchisement will be discussed, to demonstrate that noncitizen voting is feasible and even desirable at the local level. (As explained later in the paper, the only category of noncitizens that will be examined subsequently are permanent residents).

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Across the United States, local and state governments have become increasingly worried about potential voter fraud. Numerous states have instituted strict voter ID laws, which require a photo ID or at least a government-issued ID to cast a ballot. Advocates for stricter voter ID laws cite the potential for noncitizens to vote in elections as a reason for voter ID laws to be changed. In most of the United States, only citizens are allowed to vote, as mandated by state and federal law. The federal government has explicitly banned noncitizens from voting in federal elections via the National Voter Registration Act of 1993.[1] As voter ID laws become more stringent, states have found more instances of noncitizens being registered to vote, but as some states are attempting to stop immigrants from voting in order to prevent voter fraud, advocates for immigrants are working towards giving them the right to vote at the local level. Immigrants in the United States, both legal and illegal, numbered over fifty million in 2010, with permanent residents numbering approximately 12.4 million in NY 2011.[2] In cities such as Los Angeles and New York City, immigrants now consist of over a third of the population[3, 4], and advocates for immigrant rights see the disenfranchisement of immigrants as neglecting the voices of millions of people who work, live, and pay taxes in these cities. But, the suggestion that noncitizens should be given suffrage strikes a nerve with many Americans, who see voting as the defining right of citizenship and fear for the potential repercussion of outsiders voting and shaping policy.[5]

Current laws with respect to voting, however, and the commonly accepted expectation that only citizens can vote reflect only a relatively recent attitude in which voting and citizenship are inexorably intertwined. But no law has been passed in the United States that expressly forbids noncitizens from voting. Nevertheless, contemporary Americans see voting as the defining tenet of citizenship, and thus believe it should be a right reserved for only citizens. Americans often cite the Fourteenth Amendment when arguing against noncitizen voting, which states that:

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[1] National Voter Registration Act of 1993, 42 U.S.C. § 1973gg (1993).
[2] Paul Taylor, Et Al, *Reasons for Not Naturalizing*, HISPANIC TRENDS PROJECT (Nov. 14, 2012), http://www.pewhispanic.org/2012/11/14/iv-reasons-for-not-naturalizing/.
[3] The Newest New Yorkers 2000, NEW YORK CITY DEPARTMENT OF CITY PLANNING POPULATION DIVISION (2000), http://www.nyc.gov/html/dcp/pdf/census/nny_briefing_booklet.pdf.
[4] Los Angeles, USC CENTER FOR THE STUDY OF IMMIGRANT INTEGRATION, http://csii.usc.edu/documents/LOSANGELES_web.pdf.
[5] *78% Favor Proof of Citizenship Before Being Allowed to Vote*, RASMUSSEN REPORTS, http://www.rasmussenreports.com/public_content/politics/general_politics/march_2014/78_favor_proof_of_citizenship_before_being_allowed_to_vote.

> "But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."[6]

The Fourteenth Amendment, as seen above, is just one of three amendments that explicitly mention citizenship in the context of the right to vote (the other two are the Nineteenth Amendment and Twenty-Sixth Amendment). Additionally, the privilege and immunities clause of the Fourteenth Amendment says that states cannot infringe upon the privileges and immunities of *citizens;* voting is, thus, only a protected right of citizens, in that it cannot be taken away from citizens. But a careful reading of the Constitution indicates that there is no explicit ban of voting by noncitizens. Although voting is a protected right of citizens, noncitizens are not necessarily banned from the vote. Indeed, according to the Supreme Court in *Minor v. Happersett* (1875), the rights and privileges of a citizen have never been truly defined by the Constitution. To the Supreme Court, "It is clear, therefore...that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted." At that time, when the Court was arguing against giving women and racial minorities the right to vote, it stated that citizenship was not a necessary condition for voting and in the inverse situation, citizenship was no guarantee of voting. Despite the Nineteenth Amendment overturning this case and permitting women to vote, the Supreme Court's reasoning with respect to the link between citizenship and voting is still worthy of consideration, since no law or court ruling has overturned that particular logic.

Many people are surprised to find out that for most of American history, noncitizens were able to vote. From prior to the American Revolution to approximately the 1920s, noncitizen voting was legal in some states.[7] The definition of citizenship and its changing boundaries is crucial

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[6] U.S. Const. amend. XIV.

[7] Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW AND INEQUALITY: A JOURNAL OF THEORY AND PRACTICE 2, 271-322 (2000), at 273.

to how voting for noncitizens went from a fixture in society to unthinkable in the modern day.

Throughout the years, Americans have gathered in mass movements in order to demand the right to vote. Suffrage has become a mark of social standing precisely because the right was originally denied to so many groups of Americans. Having the right to vote "[distanced] the citizen from his inferiors", meaning slaves and women.

There was no unifying federal law in the nation's early history related to voting and its relationship to citizenship.[8] Even before the Revolutionary War, various states provided recent immigrants with the right to vote, reasoning that the ability to vote bestowed dignity upon these immigrants. Indeed, the ability to vote was a way to recruit immigrants to states—it was assumed that the immigrants would put down roots in a place where they had some say in their government. Additionally, propertied white males were able to vote in most states because they were assumed to be full-fledged persons—these men with property were the heads of their households and did not depend on anyone for their livelihood.[9] The United States set itself apart by valuing paid work and owning property as the highest mark of dignity, as opposed to previously.[10] The ability to vote was recognition of the immigrants as hard-working people, as well as their interests in how the government would tax them and rule over them. After the end of the Revolutionary War, a war fought based on the idea that "taxation without representation" is unfair, inhabitants who would be taxed but not have a say in how their money would be used seemed fundamentally unfair.[11] Furthermore, adding these immigrants to the electorate did not change its character significantly, as the majority of the electorate was white, propertied citizens. The mark of an empowered citizen in the United States during the eighteenth-century is an independent working member of society.[12] A common argument against franchising women and poor men was their dependence on others for survival; their votes would

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[8] The federal government actually promoted noncitizen voting in the Northwest Ordinance of 1789, and permitted resident aliens to serve in legislatures after a certain number of years as a resident. In other acts, Congress authorized the rights of aliens to vote for representatives in newly formed states.

[9] Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV 4, 1391-1470 (1993), at 1401.

[10] JUDITH SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION (1st ed., 1991), at 37.

[11] RON HAYDUK, DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES (1st ed., 2006), at 17.

[12] I say "empowered" because two forms of citizenship seemed to be at play in the United States--one is the "empowered' citizen, the independent man who can vote, and the other, a subject, who does not necessarily have any power to influence his government; SHKLAR, *supra* note 10, at 34.

be another vote for the propertied male, since they would vote for their provider. This so-called "stake-based conception" of qualification for suffrage remained prevalent in the United States until the War of 1812.[13]

Illinois was one of many states that utilized suffrage as a method of luring immigrants. Noncitizens voting ability was justified constitutionally as allowing Illinois to be compliant with a central tenet of democracy, the "just principles of reciprocity between the governed and governing," as explained in *Spragins v. Houghton* (1840). The case specifically points out that these noncitizens may have the right alongside citizens. Noncitizens, by virtue of their residency as residents, were technically citizens of the state who were able to weigh in on local matters by virtue of "habitation and residence," being able to identify "their interests and feelings with the citizen."[14] The court specifically noted that a foreign resident could be "a citizen of this state, but still not a citizen of the United States."[15]

The concept of state citizenship changed once the character of the potential electorate changed. After the War of 1812, immigrants came to the shores of the United States in a new wave. Unlike previous immigrants, who were usually wealthier immigrants from England, these immigrants tended to be poorer. They held to their cultures more closely, as they found assimilation more difficult.[16] The birth of nativist parties during the early nineteenth century, such as the Know-Nothing Parties, grew out of fear of these immigrants and the impending "takeover" of the United States by foreign elements.[17] Previously, another aspect of allowing immigrants with property to vote was the assumption that they were similar enough to the native population that was "reasonable" enough to vote. Tying property to the ability to vote would ensure that only white propertied men could vote; otherwise, arguments for suffrage on behalf of women and African-Americans could be justified. As the immigrant population changed in character, legislators grew more suspicious of the its competency to vote. The attitude of these legislators is exemplified by a New York delegate: "It is not thought advisable to permit aliens to vote, neither would it be safe to extend it to the blacks...because they are deemed incapable of exercising it discreetly, and therefore not safely, for the whole community."[18] A common fear was the malleability of immigrants, who presumably were not fully competent in English and therefore easily influenced; the immigrants might be "led up like cattle to the ballot-boxes, and

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[13] Harper-Ho, *supra* note 7, at 276.
[14] Raskin, *supra* note 9, at 1406
[15] Harper-Ho, *supra* note 7, at 274.
[16] Raskin, *supra* note 9, at 1404.
[17] HAYDUK, *supra* note 11, at 23.
[18] HAYDUK, *supra* note 11, at 22.

vote as they are told to vote." Another fear was foreign influence: seditious immigrants might vote on behalf of their native country, rather than in the best interests of the United States.[19]

In the years leading up to the Civil War, Southern states also looked upon new immigrants with suspicion because of their opposition to slavery.[20] One of the first amendments to the Confederate Constitution stated that only citizens could have voting rights at all levels of government. In reaction to general concerns about immigrants, states began to revoke the right of noncitizens' ability to vote prior to the Civil War; this trend, however, was reversed after the Civil War and noncitizens began to regain the suffrage. Northern troops, many of them immigrants, were rewarded with the vote for their service on behalf of the North, despite not being citizens. In the meantime, Southern and Western states allowed noncitizen voting as a method of recruiting settlers (as long as said immigrants declared their intention to settle and become citizens), similarly to states earlier in the nation's history.[21]

In the years prior to World War I, immigration to the United States continued. Most of these immigrants were Central, Western, and Southern Europeans, rather than the Western Europeans that Americans welcomed. These new foreigners' background were not similar enough for Americans to grant them the vote, in contrast to the Western Europeans, whose thought processes made them accepted and able to vote despite not being citizens.[22] By the Progressive era, anecdotal evidence of noncitizens manipulating votes (or being manipulated) and the idea that "foreigners owing no allegiance to this government, or, in fact, to any government on the face of the globe" created new fears regarding the legitimacy of elections.[23] The subsequent movement for the elimination of noncitizens' ability to vote led to the 1928 elections being the first national election without noncitizens voting. At the same time, rising suspicion of foreigners led to restrictions on immigration, effectively shutting out many immigrants and also marking the beginning of an era in which immigrants would not wield any major political influence as a voting bloc.

The exclusion of noncitizens from the suffrage is contradictory to the definition of a democracy, in which all peoples who are affected by a government may have a say in how that government is run. But this notion of suffrage for many people is in eternal conflict with other aspects of a

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[19] HAYDUK, *supra* note 11, at 18.
[20] Raskin, *supra* note 9, at 1409.
[21] Gerald Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 5, 1092-1136 (1977).
[22] Harper-Ho, *supra* note 7, at 282.
[23] HAYDUK, *supra* note 11, at 39.

society - namely, the competence of the electorate, and the nature of the United States as a country of laws. Illegal immigrants have thus excluded themselves from the debate over noncitizen voting, generally because it is understood that by not being recognized in a formal, legal process, they have renounced the ability to contribute their opinions to legislation. The presence of aliens has to be accounted for in policymaking—they utilize resources and pay taxes. While being disenfranchised, noncitizens have to depend on voters to make policy in their (the noncitizens') favor - an unlikely prospect when the fundamental makeup of resident noncitizens and the current voting electorate is dramatically different. Other forms of outreach to a representative - writing letters, calling, petitioning, or showing up to rallies - is seldom influential to a representative in the same way that a voter's potential vote is (although permanent residents are allowed to make campaign contributions).[24, 25, 26] Generally, immigrant rights advocates' primary goal is to see only permanent residents, among all immigrants, obtain the right to vote. It could be said that other immigrants - legal immigrants who have not obtained a green card and are in the United States on a more temporary basis, or illegal immigrants - are more transient. But permanent residents cannot be considered "transient," due to requirements that do not allow them to live outside of the United States for two years and that require any change of address to be reported to US Citizenship and Immigration Services.[27] Interestingly, US courts have categorized aliens as a suspect group, due to their 1) historically vulnerable status 2) their lack of political power, since immigrants cannot significantly influence their representatives in a manner that would seriously affect a politician's reelection chances, other than campaign contributions 3) an immutable trait—that they are not born in the United States and 4) their distinguishing characteristic of being foreign born.

Additionally, courts have designated voting a fundamental right to be subject to strict scrutiny. In *Sugarman v Dougall* (1973), the Supreme Court of the United States noted that "classifications based on alienage are 'subject to close scrutiny'…we held that the State's power 'to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.'" In the same case, the court notesd that the state has "broad power to

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[24] Paul Sherman, *Let Noncitizens Contribute to U.S. Elections,* N. Y. TIMES (Jan. 3, 2012), http://www.nytimes.com/2012/01/04/opinion/let-noncitizens-contribute-to-us-elections.html.

[25] April Chung, *Noncitizen Voting Rights and Alternatives: A Path Toward Greater Asian Pacific American and Latino Political Participation*, 4 UCLA ASIAN PAC. AM. L. J. 1, 163-185 (1996).

[26] *Id.* at 183.

[27] *Change of Address Information,* U.S. CITIZEN AND IMMIGRATION SERVICES, http://www.uscis.gov/forms/change-address-information.

define its political community." States have a natural right to restrict suffrage. After all, they have a vested interest in ensuring that the electorate is a good electorate—one whose members have a sense of solidarity totowards each other. Without a sense of solidarity among the electorate, groups within the electorate would see the decisions of the government or outcomes of elections as being corrupt because they will perceive that "some other group" made the decisions for them. In order to prevent revolts and to have decisions accepted by the populace, the government must consider the need to restrict the electorate to only those who will be invested in the government's decisions and who will find that the government represents them.

But in seeking to achieve this compelling government interest of restricting the electorate, which overrides the violation of aliens' rights to representation, a government must carefully decide on the methods by which to minimally infringe upon the rights of aliens. *Skafte v Rorex* (1976), ruled by the Colorado Supreme Court (a subsequent appeal was rejected by the Supreme Court of the United States) has established that "citizenship with respect to the franchise is not a suspect classification and therefore the compelling interest test does not apply." The Colorado Supreme Court stated that self-government's first task is to define its boundaries as a community. Many communities have chosen to define the "community of the governed" as being exclusively citizens.[28] The political community is restricted in this way because theoretically, obtaining citizenship is not difficult.

The noncitizen voting debate has centered around two questions - an immigrant's loyalty to the United States and his or her civic knowledge. A common argument against immigrants being allowed to vote is that presumably, they have not spent long enough in the country to feel a sense of patriotism. Ironically, a solution may be found in the early history of noncitizen voting in the United States. In 1848, Wisconsin passed a law in which aliens who declared their intent to become citizens were allowed to vote. Thirteen states followed Wisconsin's example of allowing aliens to vote in local, state, and national elections. Presumably, this solution could be applied to the present-day, with permanent residents being able to vote only in local elections. Permanent residents could be called upon to live longer in an area before being permitted to vote in local elections.

The argument that an immigrant does not have sufficient civic knowledge or a sufficient command of English is a valid worry, but legal

[28] Cristina Rodriguez, *Noncitizen Voting and the Extraconstitutional Construction of the Polity*, 8 INT'L J CONST. L. 1, 30-49 (2010).

precedence in the United States stipulates that literacy or tests for civic knowledge cannot be used to bar people from the vote. *Oregon v. Mitchell* (1970) stated that Congress' ban of literacy tests in the Voting Rights Act was justified, because "the tests are not necessary to ensure that voters be well informed." Although the Voting Rights Act targeted citizen voters in federal elections, the reasoning of the court still stands - a person's ability to contribute to a civil dialogue should not be arbitrarily restricted by tests created by the rest of the electorate. Categorizing an entire group of people as ignorant is not sufficient reason to disenfranchise them.

The campaign for noncitizens to vote has focused primarily on permanent residents to vote in local elections.[29] If noncitizens could vote, the local political community's definition would simply be extended to people who are close to naturalization. One argument against allowing these resident noncitizens to vote is that as permanent residents, these noncitizens should be on their way to become citizens and thus, the political community does not need to be extended prematurely. The citizenship process, however, is long—after becoming a permanent resident, resident noncitizens have to wait at least five years before they are qualified to undergo the naturalization process (except in special situations).[30] Even the application process takes up to a year and a half to make it through the naturalization process.[31] Moreover, making the choice to become a citizen does not automatically mean that one becomes a citizen--some groups of permanent residents have found that their applications for citizenship are more likely to be rejected for bureaucratic reasons than other permanent citizens.[32] This bureaucratic reason often stems from a rushed, underfunded agency trying to process as many applications as possible, but these mistakes extend the wait to become a citizen.[33]

In the meantime, permanent residents have several obligations as citizens—indeed, most of the obligations of citizens, as jury duty is restricted solely to citizens, but permanent residents are required to pay income taxes, among all other taxes required at the local level, and they are also required to register with the Selective Service.[34] Having made the in-

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[29] Sarah Song, *Democracy and noncitizen voting rights*, 13 CITIZENSHIP STUDIES 6, 607-620 (2009).
[30] *Citizenship Through Naturalization,* U.S. CITIZENSHIP AND IMMIGRATION SERVICES (2013), http://www.uscis.gov/us-citizenship/citizenship-through-naturalization.
[31] Julia Preston, *Goal Set for Reducing Backlog on Citizenship Applications*, N.Y. Times (Mar. 15, 2008), http://www.nytimes.com/2008/03/15/us/15immig.html?fta=y&_r=0.
[32] Lisa Garcia Bedolla, *Rethinking Citizenship: Noncitizen Voting and Immigrant Political Engagement in the United* States, TRANSFORMING POLITICS, TRANSFORMING AMERICA 60 (2006).
[33] Preston, *supra* note 31.
[34] *Rights and Responsibilities of a Green Card Holder (Permanent Resident),* US CITIZENSHIP AND IMMIGRATION SERVICES (2010), http://www.uscis.gov/green-card/after-green-card-

vestment in order to become permanent residents gives these noncitizens have a say in local elections because they have a stake in the community. The permanent resident presumably has the same desire to see his local government do what is best for the community.[35] Theoretically, if permanent residents obtained the ability to vote at the local level, they would still have to become citizens in order to vote in other elections. They would still file income taxes with the federal and state governments, where they would have no way to add their input to how the money would be used unless they become citizens. In the meantime, the ability to vote in local elections would not only allow permanent residents to invest emotionally in their community. One of the central arguments against noncitizens voting is that the federal concept of citizenship bars noncitizen voting at all levels. Yet precedent has shown that even federal statutes with regard to voting apply only at the federal level. In *Oregon v Mitchell* (1970), the Supreme Court held that Oregon would have to enforce the 18-year-old minimum-age requirement of the Voting Rights Act in federal elections, but in local and state elections, Oregon was free to set its own age restrictions.

Opponents against noncitizen voting suffrage rights say that the ability to vote would reduce the incentive to gain citizenship at the federal level. But there remain many advantages for naturalization. Citizens, in most proposals, would retain the exclusive right to vote in federal and state elections, which would continue to be an incentive for people to want to naturalize. Additionally, many jobs, especially those in the governmental sector, require citizenship, a barrier that immigrants, including permanent residents, regularly face while searching for a job. Additionally, permanent residents remain under stricter scrutiny than citizens; any changes in address must be reported to the federal government and some misdemeanors are reason enough to be deported for a permanent resident.[36]

In 1990, the German Constitutional Court ruled that allowing noncitizens to vote was actually a violation of the central tenet of democracy - the people, as referred to in the German Constitution, referred to the German people exclusively, defined by a mutual ethnicity, history and set of values. Foreigners (presumably at least first generation immigrants) would never be truly assimilated into the German people, and allowing them to vote was denying the German people their right to self-determination.

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granted/rights-and-responsibilities-permanent-resident/rights-and-responsibilities-green-card-holder-permanent-resident.

[35] RICHARD BELLAMY, CITIZENSHIP: A VERY SHORT INTRODUCTION, (1st ed., 2008), at 58.

[36] *Frequently Asked Questions*, US CITIZENSHIP AND IMMIGRATION SERVICES (2013), http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions.

Advocates for immigrant voting, however, having focused on the local and state level, effectively bypass the German court's fears. The German court feared that there would be a lack of a "national consciousness."[37] At the local level, presumably, the solidarity would not necessarily be the same as of a national consciousness. Rather than being bound necessarily by a sense of nationhood, the community would be bound by a collective concern over what is happening at the local level - i.e. schools, sales taxes, etc. - in other words, most of the government services that people experience on a daily basis rather than the sweeping policy issues decided by the federal government. The "warm feelings, even affection, for the country and national community; an appreciation of what it has offered to the immigrant...a sense of responsibility for and commitment to this new country and community" would be negligible when voting at the level.[38, 39] Even if one considers the idea of a solidarity between voters being important, in a world where immigration is more and more prevalent among many nations, the concept of some "primordial substrate" consisting of language, culture, and history bestowed upon citizens based on accident of birth is a relic of so-called "pre-national" thinking, when we have moved to a post-national world.[40]

Likewise, arguments focused on the attitudes of immigrants unfairly characterize citizens as being automatically more patriotic and more caring for their community compared to immigrants. One born into citizenship could care less about the United States than an immigrant who came to the US, fully aware of the promise that the United States has. For example, a citizen who is an anarchist would lack the warm feelings, the sense of responsibility, the pride, and the appreciation of the United States that an immigrant might have. This is not to say that all citizens have less appreciation for the United States than an immigrant - it is only unfair to categorize all immigrants as not having the loyalty necessary to be able to vote in at least municipal elections.

Another argument against noncitizen residents being able to vote is that they are naturally more "transient"--that is, their loyalties are more likely to shift because there is no guarantee that they will stay in the United States. First of all, permanent residents are more likely to stay in one place

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[37] Daniel Munro, *Integration Through Participation: Non-Citizen Resident Voting Rights in an Era of Globalization*, 9 J. INT'L MIGRATION AND INTEGRATION 1, 63-80 (2008).
[38] STANLEY RENSHON, NONCITIZEN VOTING AND AMERICAN DEMOCRACY 114 (1st ed., 2009), at 114.
[39] Additionally, dual citizens in this country are still allowed to vote, despite possible conflicts of interest in nationality. Politicians in the United States, such as Arnold Schwarzenegger, have served in public office while maintaining dual citizenship.
[40] Munro, *supra* note 37, at 69.

than other noncitizens, since they have to register every change of address with the US Citizenship and Immigration Services.[41] Secondly, permanent residents, in order to naturalize, must stay in the country for at least five years, and cannot leave the country for extended amounts of time without losing their right to permanent residency in the United States. US citizens, in contrast, are free to move wherever they wish within the United States, and they can even move abroad and retain their US citizenship permanently, while retaining the right to vote in US elections. Also, the US court system has addressed so-called transient residents, albeit with respect to students and member of the military more so than immigrants. In *Carrington v Rash* (1965), the petitioner, Sergeant Carrington, was a member of the Armed Forces who had declared his intention to settle permanently in Texas, but could not register to vote in Texas because of a ban in Texas on members of the military voting. The Court noted that Carrington had been recognized as a resident of Texas in 1962; his wife and children were living in El Paso in the house he had purchased. He also owned a small business there. "But for his uniform, the State concedes that the petitioner would be eligible to vote in El Paso, County."

In similar ways, permanent residents own businesses and homes in the United States - if they were citizens, they would have the necessary qualifications to vote, seeing how they often put roots down in a community. If it is accepted that voting and citizenship should not necessarily be coupled together, you can theoretically see how a permanent resident would be in a similar situation as Sergeant Carrington. The sergeant is barred from voting by his uniform; the permanent resident is barred by the years it takes to apply for citizenship.

The state of Texas cited two reasons for barring members of the military from voting; the first was that barring the military members from voting was necessary to prevent the military as a group overwhelming the needs of the civilian community with the military's short-sighted goals. Permanent residents are also suspected for their perceived goals being different than those of "citizens." At the local level, as previously stated, permanent residents would have the same interests as any other long-term resident of the community who happens to be a citizen. In *Carrington v. Rash*, the Supreme Court cited *Gray v. Sanders* (1963) as precedent for the concept that no sector of the population may be "fenced out" - excluded from the franchise due to a fear of the political views of any particular group overwhelming a community. This reasoning extends to permanent residents. In New York City, where the most recent, serious proposal for noncitizen voting was brought up, fears that the city would become dra-

[41] *Change of Address Information, supra* note 27.

matically more progressive echo Texas' fears of the military vote.[42] The Supreme Court has already established that a fear of changing the political dynamic of the electorate is no legitimate excuse for disenfranchising a group.

The second reason that Texas opposed members of the military voting was "the transient nature of service in the Armed Forces." The sergeant in question was deployed in White Sands, Arizona, but he wanted to vote in his "home," El Paso. Texas stated that since military members were subject to being deployed to other places without much notice, they could never be true residents, even if they happened to be deployed in Texas for longer than the minimum of one year in Texas and six months in the town in which they wished to vote. The Court pointed out how Texas had accommodated other transient voters such as students of workers for the federal government. Similarly, permanent residents are capable, if not even more so than soldiers, in abiding in one place for long enough to be invested in the issues of the time.

Another potential objection to permanent resident voting is the additional burden on the bureaucracy that would result. If a city or state decided to draw the lines of its political community to include noncitizens, voting administrators would have to make accommodations for permanent residents to vote. If the local election falls on the same day as a federal election, separate ballots would have to be made for permanent residents, and these would have to be given out in a way that would not visibly separate the permanent residents from the citizens. (Otherwise, if the local election fell on an "off-year", the same ballots could be handed out to all voters). But this burden on local and state bureaucracy is no reason not to have noncitizens banned from voting if the community decides that permanent residents are part of the political community. In *Oyama v. California* (1943), the Supreme Court ruled that "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State."

Cities with major immigrant populations face a wide racial disparity between who votes and who is affected by elections. In the United States, only a few municipalities have allowed noncitizens to vote, namely a few cities and towns in Montgomery County in Maryland as well as school districts in Chicago. Large cities that have considered initiatives for noncitizen voting include San Francisco, New York City, and Portland,

[42] RENSHON, *supra* note 38, at 42.

Maine, but in all of these major cities, noncitizen voting failed at the ballot box.[43]

An example of a major city with noncitizen voting on the ballot is the San Francisco Unified School District. The school district serves a student population that is forty one percent Asian and twenty-three percent Latino; only thirteen percent of the student population is white. Traditionally, Latino and Asian adults have lagged behind in terms of voter registration - forty percent of Latino parents in California are ineligible to vote, never mind those who have neglected to register.[44]

In San Francisco, a proposal in 2004 for noncitizen voting, known as Proposition F, would have extended the ability to vote in school board elections to all immigrants, legal and illegal, who were the caretakers of a child schooled in the San Francisco Unified School District. Proposition F failed by approximately five thousand votes; at the state level, it faced dismissive comments as well as the possibility of being challenged under the California State Constitution.[45] California's constitution specifies that only citizens are allowed to vote. Nonetheless, San Francisco's status as a charter city means that state laws do not always reign supreme - if the state law is judged to be barring the city from effectively ruling itself, the state law may be challenged. San Francisco's potential problems, if Proposition F had been voted forward, exemplifies most of the problems faced by local advocates - potential conflicts with state laws that may be mitigated by laws where cities' right to self-governance outweigh conflicts with the state.

The most recent city to consider this issue was New York City, where a proposal to allow noncitizens to vote had gained a veto-proof majority of the City Council. Recently, it was laid over by committee,[46] indicating that it might or might not be acted upon in the future. A little more than a third of New York City's population are immigrants (although it is unclear how many are legal immigrants who would theoretically be al-

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[43] Hunter Walker, *NYC Considering Allowing Non-Citizens To Vote*, TALKING POINTS MEMO (May 9, 2013), http://talkingpointsmemo.com/dc/nyc-considering-allowing-non-citizens-to-vote.

[44] Will Kane, *Latino kids now majority in state's public schools*, SAN FRANCISCO CHRONICLE (Nov. 13, 2010), http://www.sfgate.com/education/article/Latino-kids-now-majority-in-state-s-public-schools-3166843.php.

[45] Tara Kini, *Sharing the Vote: Noncitizen Voting Rights in Local School Board Elections*, 93 CALIF. L. REV. 1, 271-321 (2005).

[46] *Allowing immigrants lawfully present in New York city to vote in municipal elections,* THE NEW YORK CITY COUNCIL, (Dec. 31, 2013), http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=803591&GUID=3652CB45-9436-4D4F-ADE3-E17CE8A8AF28&Options=Advanced&Search=.

lowed to vote[47]); allowing permanent residents to vote would be the catalyst of a major change in the voter population. New York City has had experience with noncitizens voting. From 1969 to 2003, school board elections allowed both citizens and immigrants (of any immigration status) to vote for school board members; the Board of Elections held elections for school board members at separate times from other elections in order to keep citizen-only ballots separate. Noncitizen parent voters made a noticeable impact during the elections, guiding policy in a manner that reflected their influence.[48] The largest city to have noncitizens voting at almost every local election is Takoma Park, Maryland, one of a few Maryland communities to support noncitizen voting. Takoma Park has been traditionally a liberal town, which is reflected in how the town has chosen to extend voting rights not only to noncitizens, but also to felons who have served their time and sixteen-year-olds. Takoma Park is a relatively small town compared to San Francisco or New York City, with only seventeen thousand residents recorded.[49] In 2000, the census recorded that 20.2 percent of the adult population were immigrants;[50] residents voted in a referendum in 1991 and the City Council approved of the measure to allow noncitizens to vote.[51] Arguably, in such a small city known for being liberal and having fewer interests involved, it is easier for noncitizen voting to pass into law.

Extending the suffrage to permanent residents does not change the voting population to a more progressive one. Rather, it is to ensure that immigrants have a voice in the political system. Polls in New York indicate that the longer someone spends in the United States, the more opposed they are to noncitizens voting, whether they are a citizen or noncitizen.[52] Theoretically, this could be extended to indicate that citizens cannot adequately take into account the views of immigrants who are not citizens - otherwise noncitizens would not be so strongly in favor of seeing permanent residents vote. Fundamentally, giving permanent residents the ability to vote in local elections does not demean citizenship or contrary to Amer-

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[47] Keith Wagstaff, *Should we allow non-citizens to vote*, THE WEEK (May 9, 2013), http://theweek.com/article/index/243998/should-we-allow-non-citizens-to-vote.
[48] HAYDUK, *supra* note 11, at 102.
[49] Annys Shin, *Takoma Park 16-year-old Savors His History-making Moment at the Polls*, WASHINGTON POST (Nov. 3, 2013), http://www.washingtonpost.com/local/takoma-park-16-year-old-savors-his-history-making-moment-at-the-polls/2013/11/03/89f00962-425c-11e3-b028-de922d7a3f47_story.html.
[50] HAYDUK, *supra* note 11, at 89.
[51] Aaron Kraut, *Takoma Park stands by non-U.S. citizen voting law,* WASHINGTON POST (Mar. 14, 2005), http://articles.washingtonpost.com/2012-03-14/local/35449488_1_takoma-park-noncitizens-vote-campaign.
[52] Carlos Vargas-Ramos, *Expanding Voting Rights in New York City: New Yorkers and Non-Citizen Voting*, CENTER FOR PUERTO RICAN STUDIES, *available at* Hunter College (CUNY).

ican values. Communities and cities will simply be fairer to the immigrants living amongst them, who utilize the same services as citizens, but have no voice in their governments. Permanent residents may be foreigners on paper, but their commitment to the United States dictates that Americans treat them as their neighbors whose voices deserve to be heard.

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CONCEPTUAL CHALLENGE PERMEATING FRANCE'S APPROACH TO CHILDREN'S BEST INTERESTS IN IMMIGRATION LAW

Déborah Cápiro*

The 1989 Convention on the Rights of the Child (CRC) sought to reform the systems of protection and care accessible to all children by upholding the best interest principle as the cornerstone to render domestic systems of law and governance more "child-friendly." Since then, international, regional, and domestic laws have identified unaccompanied immigrant children as minors facing great vulnerability because of their underage status and lack of legal guardianship. Although ratifiers of the CRC have taken measures to render their system of protection and care for unaccompanied immigrant children more in line with the CRC standards, minors continue to face procedural adversities in conflict with their best interests. This BA Thesis examines France's system of protection and care towards children migrating alone as a case study by which to identify the tensions that exist between the Convention and national systems of governance. Relying on Jacqueline Bhabha's theory of conflicting legal frameworks, the purpose of this research is to demonstrate that inconsistencies in a state's interventions are not as much a failure to abide by international and regional legal standards, but the product of a state's efforts at reconciling priorities from two legal frameworks—immigration and child welfare.

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INTRODUCTION

The core principle of the 1989 Convention on the Rights of the Child (CRC) specifies that children's "best interests" - the term broadly describing a child's short and long term well-being - shall be a primary consideration in all government actions affecting children:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration."[1]

The *best interests* principle of the CRC stipulates the importance of a state, while making decisions that could have an impact on a child's life, to recognize that children's experiences ought to be continuous, their development uninterrupted, and their rights[2] respected. This consideration ought to comprise all children including those migrating alone across borders — minors without legal guardians who arrive or are found without proper documentation in a country other than that of their origin, such as unaccompanied immigrant children.[3] Unaccompanied minors are children who embark on migratory journeys in search of employment, safety, or with the hope of reuniting with family in the country of destination. In the absence of parents who can intervene on the child's behalf, international, regional, and national bodies of law have begun to include the *best interests* principle within protection measures to strengthen the opportunity of unaccompanied minors to be heard in judicial and administrative proceedings.

The Committee on the Rights of the Child[4] set standards for comprehensive child protection systems to guarantee the protection of unaccompanied immigrant children, which ought to be implemented by ratifiers of the Convention.[5] Furthermore, the United Nations High Commissioner for Refugees (UNHCR) developed a formal process for determining the best interests of children that a state ought to incorporate into their

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[1] UN General Assembly, *Convention on the Rights of the Child*, [1989] UN GENERAL ASSEMBLY, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3U.N. Doc. A/RES/44/25.

[2] Children's rights as stipulated in the CRC, regional and domestic legal bodies, such as the European Charter of Human Rights.

[3] Also referred to as unaccompanied minors.

[4] UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, [2005] UN COMMITTEE ON THE RIGHTS OF THE CHILD, 1 September 2005, U.N. Doc CRC/GC/2005/6.

[5] *Convention on the Rights of the Child*, *supra* note 1.

immigration proceedings.[6] According to the Committee on the Rights of the Child and UNHCR, it is a nation state's responsibility to implement the best interests principle for migrant children as part of their international legal obligations to ensure the well-being of all children. With all EU Member states having ratified the *Convention on the Rights of the Child*, the European Commission in its Action Plan on Unaccompanied Minors (2010-2014) envisioned and prioritized an approach towards the reception and care of unaccompanied immigrant minors guided by the *best interests* principle:

> "It is fundamental to ensure that (…), regardless of their immigration status, citizenship or background, all children are treated as children first and foremost."[7]

Given that EU Community Law is binding and takes precedence over national law, the European Union expects Member States to adopt an approach towards immigration policy that upholds the best interests principle for unaccompanied immigrant children. However, EU Community Law gives Member States enough flexibility to legislate domestic immigration laws, which has a bearing on the ways in which Members interpret and implement the *best interests* principle for unaccompanied minors. Even though EU Member States have sought to attend to the needs of unaccompanied immigrant children, states' migratory policies continue to undermine the imperative consideration of the *best interests* principle.

A Conceptual Challenge

This research uses France as a case study to demonstrate the existing tension between international guidelines and national programs in implementing the *best interests* principle for unaccompanied immigrant children, using France as a case study. France has one of the largest volumes of migrant children entering the Schengen territory—particularly through Charles de Gaulle airport. Unaccompanied minors are in a "legal" situation in French territory, which implies that as long as they are under the age of 18 they do not have to provide proof of residency for living in France. They are not the target of immigration controls and do not face the

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[6] UN Higher Commission for Refugees. *UNHCR Guidelines on Determining the Best Interests of the Child*, United Nations Higher Commission for Refugees, Geneva, May 2008.
[7] *Communication from the Commission to the Parliament and the Council: Action Plan on Unaccompanied Minors (2010-2014)*, European Commission, 2010; Appendix B.

possibility of deportation from within the territory.[8] France presents the example of a Member State that has taken positive measures to establish a more child-friendly system of protection and care towards unaccompanied minors—making a committed effort to render its immigration laws more in line with the CRC.

France's interpretation of its responsibility towards unaccompanied immigrant children is problematized on the one hand by having to categorize unaccompanied immigrant children as agents with legal autonomy and on the other as children with claims to special protection This research seeks to explore inconsistencies in state's policies towards unaccompanied immigrant children in order to investigate whether or not they can solely be traced to state's failure to abide by international legal norms. An analysis of the existing procedural standards reveals a categorical conflict in the ways in which this subgroup of children is examined under French law. The *transit zone*, France's extraterritorial space at the ports of entry, exemplifies the conflict that arises from the legal categorization of children migrating through intersecting systems of enforcement and protection. Rather than a political unwillingness to a place child's best interests at the heart of policy development, as is typically believed to be the case, the conflicting interests of their legal categorization - immigration enforcement versus a child's protection - stands out as the main obstacle to ensuring the rights of unaccompanied immigrant children in French immigration law. Jacqueline Bhabha's[9] theoretical framework will be referenced as a lens through which to analyze the conflict of interests between France's attempts to enforce immigration control policies and its legal obligation to implement initiatives to render immigration laws more suitable for migrant children.

Given that best interests govern in all systems that attend to children, how do the existing protection systems for all children benefit and shape the care that unaccompanied immigrant children are receiving in France? Which steps, if any, has the country taken to enhance protection systems for unaccompanied minors? How has France interpreted its responsibility to protect unaccompanied immigrant children in comparison to the standards set by the UN and the EU? How does France understand its obligations to ensure protection as a nation state, as an EU Member, and as a CRC signatory? When, why, and how do France's differing legal

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[8] LAURENT DELBOS ET AL. THE RECEPTION AND CARE OF UNACCOMPANIED MINORS IN EIGHT COUNTRIES OF THE EUROPEAN UNION, (2010) at 24.

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regimes it must abide by conflict with the need to ensure the short and long term well-being of migrant children? Identifying policy areas that ought to be improved as well as best practices that ought to serve as models for the immigration and custodial procedures of unaccompanied immigrant children might provide direction and inform others for future research - furthering the knowledge of obstacles Member States face in conforming to the legal mandates of the United Nation and the European Union.

METHODOLOGY

After initially reviewing the literature that has already addressed the topic of unaccompanied immigrant children in the European Union and in France and its shortcomings, the French system of protection and care for unaccompanied immigrant children upon arrival to French territory will be mapped. This will provide context by which to assess the strengths and weaknesses of France's interpretation of the *best interests* principle as well as the ways in which the principle is implemented by government officials and institutions. The mapping will consist of the child's arrival to the *transit zone* until the child is granted access to the territory where s/he can benefit from the domestic child welfare system. The report *The Reception and Care of Unaccompanied Minors in Eight Countries of the European Union*[10] provides the latest data and explanation of France's implementation of the *best interests* principle in its immigration proceedings. Secondly, Bhabha's theory of conflicting legal frameworks will serve as the lens through which to analyze the sources of conflict in France's system of reception and care.

LITERATURE REVIEW

Most of the literature on the subject of unaccompanied immigrant children in the European Union and in France focuses on two subjects. One topic evaluates primarily the role of the European Union and the Member States in providing protection for unaccompanied minors as well as the distribution of responsibility between regional and domestic bodies to implement best interests standards. A second trend in the literature examines the tensions that arise from unaccompanied immigrant children having to simultaneously navigate systems of protection and enforcement. It is necessary to revisit these prominent arguments to identify their short-

[10] A collaborative study of NGOs such as France Terre d'Asile, Consiglio Italiano per I Rifugiati and the Institute for Rights, Equality and Diversity, funded by the European Union's Fundamental Rights and Citizenship Programme

comings and the gaps in knowledge they generate. This literature review will also include an explanation of the legal framework referred to throughout the paper—mainly the stipulations of the CRC and France's responsibility to abide by regional human rights documents such as the European Convention on Human Rights.

THE LEGAL FRAMEWORK: INTERNATIONAL, REGIONAL, AND DOMESTIC

There is no single piece of international or regional legislation that directly addresses the issue of independent child migration. In the international legal framework, unaccompanied minors can only avail themselves of the CRC provisions. Enjoyment of the rights stipulated in the CRC is therefore not limited to children who are citizens of a nation state but must be available to all children—including asylum-seeking, refugee and migrant children irrespective of their nationality, migration status or statelessness.[11] Within the CRC approach the child is given a much greater role in deciding his or her fate than within any other more traditional approach. The CRC highlights the importance of the child's views—a perspective partially in conflict with national legal bodies in which the child is not considered an independent agent. Under domestic laws children's rights are inherently related to their dependence upon their legal guardians, whereas under the CRC, their rights are inherently a product of their agency. According to the CRC, the child is an individual with views and feelings of his or her own—thus has both civil and political rights and is entitled to special protections.[12] Under the CRC legal obligations, states are not only required to refrain from measures infringing upon children's rights, but are also expected to take measures to ensure the enjoyment of these rights without discrimination. However, the enforceability of the CRC remains limited to providing guidelines and recommendations from the UN Committee on the Rights of the Child and UNHCR, mainly because of the lack of enforcement mechanisms at the domestic level.[13]

At the regional level the European Convention on Human Rights (ECHR) remains the major binding human rights instrument protecting unaccompanied immigrant children within the Schengen space. Article 3 of the ECHR protects all children from ill treatment in the Member States throughout their transition into the country—upon arrival in a Member

[11] EUROPEAN COMMISSION, *supra* note 7, at Art. 3.1.
[12] EUROPEAN COMMISSION, *supra* note 7.
[13] Sajid Alikhan & Malika Floor, *Guardianship Provision Systems for Unaccompanied and Separated Children Seeking Asylum in Europe,* UNHCR THE UN REFUGEE AGENCY, (2010), http://www.defenceforchildren.nl/images/42/658.pdf

State's territory, while waiting for a pending decision, and upon admission into the territory.[14] The European Union has also shaped Member States' policies towards unaccompanied minors through the passage of EU directives and resolutions. EU legislation has left plenty of room for Member States to legislate immigration laws in conformity with the principle that states have the right to determine whom they want on their territory. The EU Council *Resolution on Unaccompanied Minors Who Are Nationals of Third Countries*[15] establishes that Member States may, in accordance with their national legislation, refuse admission at the frontier to unaccompanied minors, particularly if they are without required documentation and authorization. The same Resolution, however, establishes that children are entitled to the necessary protection and basic care, irrespective of their irregular or regular status:

> "Unaccompanied minors who, pursuant to national provisions, must remain at the border until a decision has been taken on their admission to the territory or on their return, should receive all necessary material support and care to satisfy their basic needs, such as food, accommodation suitable for their age, sanitary facilities and medical care." (97/C221/03)

The EU Council Directive on Returns stipulates that unaccompanied minors may only be deported if they can be returned to "adequate reception facilities" in the country to which they are being returned.[16] Although EU Council resolutions and directives[17] demonstrate a political commitment by Member States to recognize the rights of unaccompanied minors, the fact that minors can be refused admission undermines the protection standards established by these documents. EU legislation that has been developed to address Member States' protection systems for unaccompanied minors has not comprehensively and consistently incorporated the best interests of the child as a guiding principle.

Despite France's lack of a legal definition for this migrant group, unaccompanied minors are not considered to illegally be in French territo-

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[14] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL OF EUROPE, ETS 5; 213 UNTS 221 (EU).
[15] *Council Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries*. COUNCIL OF EUROPEAN UNION, 1997.
[16] Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (EC) No. 85/2005 of Dec. 2005, O.J. (L 326).
[17] COUNCIL OF EUROPEAN UNION, *supra* note 15.

ry. This suggests that considerations of child's best interests are given precedence over immigration enforcement concerns. France does not have a specific legal definition of this category of children; several texts mention foreign minors as "isolated foreign minors" but do not define this term.[18] Since 1982, the French government recognizes that every foreign minor present in the territory without a legal guardian is potentially a minor in danger.[19] The responsibility for protecting unaccompanied minors has been directed to the regional governments—the French "departments" or geo-political regional subdivisions. French immigration laws[20] stipulate that the obligation to obtain a residence permit applies to any foreigner above the age of 18 years, and thus this obligation does not apply to minors. This legislation specifies migrant minors can remain in the territory without having to undertake steps with administrative authorities and have a right of residence even though they are not provided with a residence permit. However, having resided in France as an "isolated foreign minor" does not automatically entail a right of residence upon reaching adulthood. The French Civil Code stipulates that a minor can claim French citizenship only if he or she is entrusted to the protection services before the age of 15.[21]

Children migrating alone who arrive to a French frontier—aerial, rail, or maritime—are legally categorized as foreigners under the Code de l'Entrée et du Sejour des Etrangers et du Droit d'Asile CESEDA[22] and their legal situation is quasi-identical to that of adults. Article 221-1 of the CESEDA indicates that any foreigner, whether minor or adult, who arrives in France via aerial, railways, or maritime frontier is not authorized to enter the territory. People who enter in these ways can be kept in a *transit zone*, removed from France, and returned to their countries of origin. On the other hand, minors who enter French territory through the land frontiers are automatically considered in French territory and therefore cannot be removed and returned. Particular measures, such as the designation of Ad Hoc Administrators who assist minors during their stay at the *transit zone* and advocate on their behalf throughout the administrative proceedings, have been taken by the French government to ensure the safety of unaccompanied minors.[23]

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[18] DELBOS, *supra* note 8.
[19] Art. 375 & 375-5, French Civil Code
[20] ENTRANCE AND RESIDENTS OF FOREIGNERS AND ASYLUM RIGHT CODE art. L311-1 (Fr.).
[21] DELBOS, *supra* note 8, at 29.
[22] DELBOS, *supra* note 8.
[23] République Française. Ministère de L'Immigration, de l'Integration, de l'Identité Nationale et du Developpement Solidaire. *Les Politiques Relatives a L'Accueil, L'integration et le Retour des Mineurs non accompangnés*. Paris: 2010.

RESPONSIBILITY

Critics make two arguments to condemn the failure to comprehensively implement the best interests principle: either denouncing 1) the domestic laws of the individual Member States or 2) the European Union's inability to harmonize immigration laws pertaining to unaccompanied minors. Most existing official memorandums and case laws from international and EU entities emphasize the responsibility and obligation of Member States to enhance protection systems for unaccompanied minors and incorporate considerations of the best interests principle into their immigration procedures. One of the dominant arguments renders Member States accountable by demonstrating that most of the responsibilities and jurisdiction over migrant children's policies lie within the jurisdiction of the Member State, not the European Union. UNHCR has provided states with orientation and objectives to implement best interests standards into their immigration proceedings. Specifically, the UNHCR's guidelines encourage states to implement a comprehensive child protection program including registration, documentation, case management, psychological support services, appropriate care management, family tracing and reunification, and community support mechanisms.[24]

The European Union has also recognized Member States' need to consider the best interests of unaccompanied immigrant children in immigration proceedings. In the 2006 case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, the European Court of Human Rights condemned Belgium's disregard of the *best interest* principle by deporting a 5-year old girl to the Democratic Republic of Congo without Belgian authorities ensuring that there was a caregiver on the receiving end. The Court recognized that due to her very young age and that she was unaccompanied by her family, her situation was one of extreme vulnerability.[25] Feijen argues that this case law set a precedent for the oversight of the Court over Member States' actions and provides evidence that the European Union expects Member States' governments to protect all foreign unaccompanied children by following the international guiding principles of best interests of the child.[26] The latest relevant EU agreement is the Action Plan on Unaccompanied Minors 2010-2014 in which the European Commission emphasized the importance for Member States to place the best interests standards at the

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[24] Marleen Altes Korthals, FIELD HANDBOOK FOR THE IMPLEMENTATION OF UNHCR BID GUIDELINES (2011).
[25] European Court of Human Rights 13178/03.
[26] Liv Feijen, *The Challenges of Ensuring Protection to Unaccompanied and Separated Children in Composite Flows in Europe.* 47 REFUGEE SURV. Q. 7, (2009).

heart of any action concerning unaccompanied minors.

The Human Rights Report *Lost in Transit* points at France's insufficient protection for unaccompanied migrant children at Charles de Gaulle Airport upon arrival—emphasizing the pertinent role and responsibility of an EU Member State in ensuring protection for immigrant children. On the same note, Drywood discusses how laws and policies relating to children have traditionally remained outside the purview of the EU and under the jurisdiction of national legislatures.[27] Given that most of the particular needs of the population of unaccompanied immigrant children fall within national legal boundaries, the EU has limited powers to legislate as an advocate of child's best interests. Masson continues the argument that protection should be initiated by the state; the author's analysis of the French system of reception and care for unaccompanied minors provide specific examples of state's necessity to intervene to prohibit forced returns and to appoint Ad Hoc Administrators.[28]

However, others, such as legal reviews and recommendations from NGOs, condemn Member States' differing practices and/or how they conflict with EU standards. Their primary concern denounces the EU for not establishing and enforcing standardized child-friendly immigration practices. For instance, Baldaccini criticizes the EU's inability to put into place a common policy governing admission of migrants entering the EU from third countries. Currently, Member States have considerable discretion to follow different national approaches to define and enforce what constitutes irregular status and the measures the country can take to control irregular immigration.[29] For example, the EU *Resolution on Unaccompanied Minors Who Are Nationals of Third Countries* upholds Member States' rights to refuse admission at the frontier to unaccompanied minors—allowing for this population to be the target of immigration enforcement and detention policies. The report *The Reception and Care of Unaccompanied Minors in Eight Countries of the European Union* presents the difference in practices across Member States and emphasizes the necessity for the European Union to standardize and harmonize practices across Member States

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[27] Eleanor Drywood, *Challenging Concepts of the "child" in asylum and immigration law: the example of the EU,* 32 J. SOC. WELFARE & FAMILY L. 3, 309-323 (2010).
[28] Benedicte Masson, *La situation et le traitement des mineurs isoles etrangers (MIE) en France*, E-MIGRINTER (2008), http://www.mshs.univ-poitiers.fr/migrinter/e-migrinter/200802/emigrinter2008_02_tout.pdf.
[29] Anneliese Baldaccini, *The EU Directive On Return: Principles and Protests,* 28 REFUGEE SURV. Q. 4, 114-138 (2010).

to ensure a coherent and consistent interpretation of the best interests principle.

BHABHA'S CONFLICTING LEGAL FRAMEWORKS

Another essential piece in the analysis of Member States' interpretation of the CRC towards the population of unaccompanied minors is the literature on the conflict between national frameworks for governing immigration and ensuring childcare protection. Jacqueline Bhabha is a well-known social scientist who provides a theoretical framework to understand states' dilemma as they shape policies for the reception and care of unaccompanied minors. Bhabha argues that despite an international framework, which recognizes children as individual rights bearers,[30] a state's approach to the reception and care of unaccompanied minors is conflicted between "two opposite normative frameworks."[31] In "International Migration Law and the Rights of Children" (2003) and "Minors or Aliens?" (2001), Bhabha argues that international migration is conceived as an activity of adults or families—the concept of the child as migrating independently of his or her family does not fit the established legal categories within immigration law. [32, 33] Therefore, children migrating alone are viewed the same as adults: as illegal migrants who have evaded immigration controls in order to obtain access to the territory. Given their irregular status, they are the targets of punitive detention policies. These immigration control preoccupations, Bhabha explains, take precedence over vulnerability and protection concerns for children. In "Arendt's Children" (2009), Bhabha takes her remarks a step forward and theorizes how the fundamental rights migrant children have under international law are unenforceable in practice.[34] Children who are the target of immigration controls and detention have very remote access to state entities that are able to protect them.

Bhabha argues that, under international law, the rights to protection, family life, education and health care that unaccompanied immigrant children have in theory are highly complex to implement in practice. Immigration law is framed on the notion that children are family dependents who lack agency and therefore, for the purpose of immigration law, a child

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[30] UN General Assembly, *supra* note 1, at 3.
[31] Jacqueline Bhabha, *International Migration Law and the Rights of Children,* 24 IMMIGR. & NAT'LITY L. REV., 301-322 (2003).
[32] *Id.* at 16.
[33] Jacqueline Bhabha, *Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum-Seekers*, 3 EUR. J. MIGRATION & L., 283-314 (2001).
[34] Jacqueline Bhabha, *Arendt's Children,* 31 HUMAN RIGHTS QUARTERLY 2, 410-451 (2009).

only exists in relation to a parent.[35] Since children's agency in immigration is generally not acknowledged, children are considered dependent rather than independent; in other words, the concept of "the child" as an autonomous entity does not exist under immigration law. However, domestic child protection law, which addresses the problems children without satisfactory homes face, does not cover issues of alienage and citizenship, including the risk of deportation and lack of entitlement to social benefits that non-citizen children face at *transit zones* and throughout their immigration proceedings.[36]

In the compilation of essays *Migrating Alone*, European practitioners—Kanics, Senovilla, Bruun— examine the migration of unaccompanied children to Europe through a similar approach as Bhabha's. They recognize that at the core of the problem of implementing best interests standards is that immigration and asylum issues—which include access to the territory, identification, and asylum process—are governed at a national level whereas competency relating to the care of children—reception and care, guardianship, fostering—are under the governance of regional or local authorities. Unaccompanied immigrant children do not receive a high level of legal protection because receiving countries consider them "migrants" before considering them "children." Consequently, a high number of unaccompanied and separated children do not benefit from existing local childcare systems. [37]

The literature pertaining to the most controversial issues—Member States' shortsighted implementation of the CRC and the EU failure at harmonizing Member States practices—is extensive. However, the existing literature has fallen short in identifying where the inadequacies at implementing the best interests principle for children in immigration proceedings arise. Bhabha's framework for understanding the political conflict embedded in this category of child migrants permits a more careful analysis of the roots of such controversial issues. Bhabha proposes a compelling and holistic theoretical framework that takes into consideration the more intrinsic reasons at the core of policy challenges surrounding the population of unaccompanied immigrant children. Given the absence of a theoretical analysis of the French model of reception and care, Bhabha's theory will provide a theory by which to assess the strengths and weaknesses of France's child protection program for unaccompanied minors by which to contextualize the challenges of incorporating best interests considerations

[35] Bhabha, *supra* note 33.
[36] Bhabha, *supra* note 34.
[37] Lise Bruun & Kanics Jhyothi, *Migrating Alone: Unaccompanied and Separated Children's Migration to Europe*, UNESCO.

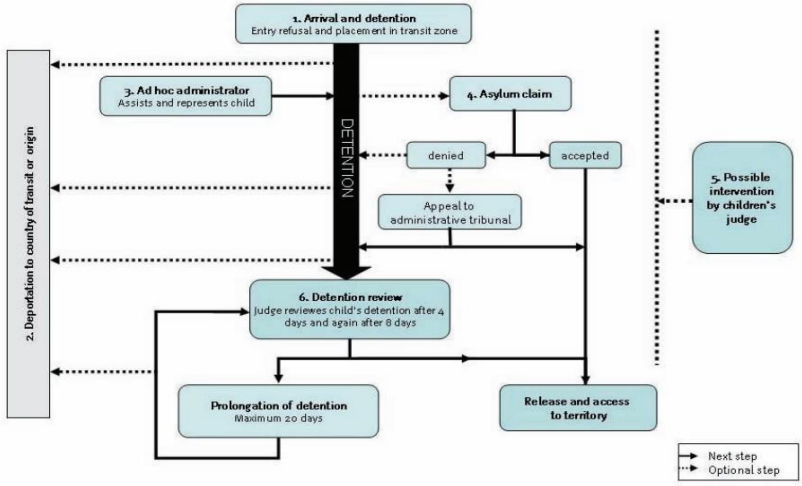
into child migration policies. France's acknowledgement of unaccompanied immigrant children as particularly vulnerable—reflected by the general legal status granted to any unaccompanied minor in French territory—presents a substantive case for analysis. Does France's right of residence for migrant minors, which could be interpreted as a "generous" and "child-friendly" measure towards this population, truly reflect the country's implementation of the best interests principle in its immigration procedures?

FRANCE'S SYSTEM OF RECEPTION

The migration of unaccompanied minors to France is a relatively recent phenomenon; the first cases of children migrating alone were in the 1990's.[38] The arrival of unaccompanied immigrant children into French territory is difficult to examine given that there is no reference institution where data is centralized. Local authorities responsible for child protection services maintain ad hoc data on unaccompanied immigrant youths; a wide-ranging estimate is 4000 to 8000 unaccompanied minors living in France each year and up to 1000 arriving every year to Charles de Gaulle airport.[39] The large majority of unaccompanied minors—80 to 95%— are male between 15 and 17 years old coming from countries in Sub-Saharan Africa, particularly former French colonies. Approximately 30% of unaccompanied minors arriving within French territory are sent back to either the last country of transit or their country of origin. 99% of minors enter French territory through one of the 4 principal points of entry: Charles de Gaulle Airport—one of Europe's main points of entrance into the Schengen borderless area, Orly Airport, Marseille Port and Marseille Airport.[40]

[38] *Id.* at 6.
[39] DELBOS, *supra* note 8, at 14-16.
[40] DELBOS, *supra* note 8, at 20.

Diagram 1: France's System of Reception for Unaccompanied Minors



Source: Troller, Simone, and Lelia Tawfik. "*Lost in Transit: Insufficient Protection for Unaccompanied Migrant Children at Roissy Charles de Gaulle Airport*." Human Rights Watch. New York: 2009.

THE *TRANSIT ZONE*: A LEGAL LIMBO

According to French law the airport *transit zone* is not considered "French territory" but has an extra-territorial status. There are more than 70 *transit zones* in France and its overseas territories. The *transit zone* at Charles de Gaulle Airport is the largest *transit zone*—housing a detention center for 164 persons. The detention center permits a prompt assessment of whether a person fulfills the conditions to enter France. Foreigners who have not been admitted into French territory are detained in the *transit zone*[41] at the airport's immigration controls.[42]

[41] Also known as "waiting area"
[42] Simone Troller, *In the Migration Trap: Unaccompanied Migrant Children in Europe*, HUMAN RIGHTS WATCH. 2010, http://www.hrw.org/world-report-2010/migration-trap.

The French Court of Cassation stated in *Amuur v. France* that a child held at a *transit zone* is de facto on French territory and gave the Children's Judge the powers to order entry into France if the child is in danger.[43] However, unaccompanied children remain in the *transit zone* without being considered inside France and are subject to a different legal regime than if they were in French territory. Certain unaccompanied minors are returned when getting off the plane during immigration controls at the gates. Such a fast-paced "*refoulement*"[44] does not permit the minor to be informed of his or her rights, to express a desire to request asylum, or to be assisted by an adult on behalf of his or her best interests. Minors thirteen years or older are detained in the *transit zone* with adults, whereas children under the age of thirteen are housed in a hotel near the airport under the supervision of specialized personnel from the airline companies or held in a separate room inside the airport under the supervision of employees of the French Red Cross.[45] An Immigration Judge[46] decides in a "detention review" whether the child can be released and permitted into French territory or deported to the country of origin.[47] If the minor files an asylum application s/he can be detained at the *transit zone* for a maximum of 20 days given that the total length of detention in the *transit zone* may not surpass 20 days for both children and adults.[48]

In "Arendt's Children," Bhabha recognizes *transit zones* to be part of a system of arbitrary detention, beyond the reach of domestic structures of accountability or international oversight functioning based on a completely different metric of rights.[49] Children detained in airport facilities or border lockups, although within the confines of the state, are considered to be legally outside it. Because the *transit zones* are outside the jurisdiction of domestic structures of welfare, children have no access to the domestic child protection institutions—such as the Childhood Social Aid—that ought to ensure their well-being. Maintaining children in a *transit zone* where domestic laws do not apply to them and where they cannot benefit from the intervention of social welfare institutions increases their vulnerability and exposure to an environment structured for adults—hindering their short and long term well-being. The refusal of admission to the territory and the placement of the minors in transit zones are contrary to the CRC, which mandates that in all decisions concerning children, the best

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[43] *Id.* at 10.
[44] Return, Article 33 (1) of the 1951 Convention relating to the Status of Refugees
[45] DELBOS, *supra* note 8.
[46] Juge des libertées et de la detention, Freedom and Detention Judge
[47] Troller, *supra* note 42, at 12
[48] Troller, *supra* note 42, at 14, 23.
[49] Bhabha, *supra* note 34 at 431.

interests of the child shall be a primary consideration (CRC, Art. 3 Sec. 1). The following sections explore the degree to which French immigration laws dictating the procedures for asylum application, legal counsel, and returns fail to consider child's best interests for unaccompanied minors who are at the *transit zone*.

ASYLUM

For most unaccompanied immigrant minors in the *transit zone,* the only option to access French territory is through an asylum request. To apply for asylum, minors have to file an application with the French Bureau of Protection of Refugees and Stateless Persons (OFPRA)[50] co-signed by an Ad Hoc Administrator or a legal representative. Unfortunately, OFPRA does not have officials who specialize in the cases of unaccompanied minors; consequently, officials examining applications of unaccompanied minors do not always have the necessary expertise in interpreting the specific claims of children asylum-seekers.[51] An initial assessment of the claim is made while the minor remains at the *transit zone* to determine whether or not the claim of persecution is legitimately founded and the child cannot be deported while his or her request is being examined. If the request is granted, the child receives permission to enter France—s/he is taken to another shelter, this one for similar, unaccompanied immigrant children who have requested asylum—and can then proceed to submit a regular asylum application.[52] If the child's claim has been denied, he or she can be held in detention and deported at any point in time.[53]

Bhabha makes the claim that with few exceptions, the immigration legal framework was designed for adult applicants, with children eligible solely as dependents to their parents' applications.[54] An unaccompanied minor asylum-seeker, like an adult applicant, must prove that s/he has a well-founded fear of persecution and must confront procedures and requirements intended for adults, which places him or her at a severe disadvantage while seeking protection through asylum.[55] As children might not be as able to talk as an adult would to an asylum officer about their reasons for leaving their home country in sufficient detail, unaccompanied

[50] Office Français de Protection des Refugiés et des Apatrides
[51] DELBOS, *supra* note 9, at 62
[52] *supra* note 25
[53] TROLLER, *supra* note 42, at 13 &14
[54] BHABHA, *supra* note 34 at 283-314
[55] Maura M Ooi, *Unaccompanied Should Not Mean Unprotected: the Inadequacies of Relief for Unaccompanied Immigrant Minors*, 25 GEORGETOWN IMMIGRATION LAW JOURNAL 4, 883-908 (2011).

minors can hardly establish an asylum claim by themselves. In theory, minors ought to benefit from the assistance of an Ad Hoc Administrator; however, minors have to submit their asylum application before they have had the opportunity to meet their assigned Ad Hoc Administrator. The legal procedure for obtaining asylum—as the only form of legal relief in France— is complicated and nearly impossible for minors to successfully navigate without an attorney. Children may not be able to coherently articulate their claim or explain their reasons for migrating as a consequence of such a fast-tracked assessment conducted immediately after the child arrives to the *transit zone*.[56]

The procedure in place for unaccompanied minors to apply for asylum at the *transit zone* demonstrates the absence of a child's best interests approach to processing children's request. Unaccompanied minors have to navigate immigration procedures to obtain relief in a similar manner of adult applicants. In the *transit zone* where immigration laws have precedence over all other systems of laws including children's rights to special protection, unaccompanied minors are legally understood to be asylum-seekers first and then children. The impossibility at reconciling the categories of children and of asylum seekers during both the application and the evaluation of the claim infringe upon the consideration of the particular needs of children and their best interests.

AD HOC ADMINISTRATORS

In theory, EU Community law stipulates that a legal representative must be named as soon as possible to provide information to the minor and assist him with the challenges the child might encounter when fulfilling the requirements of a procedure envisioned for adults.[57] Furthermore, guardianship is intended to safeguard children's interests especially because children tend to be unaware of their entitlements. In France, unaccompanied minors have no single guardian or advocate to ensure the minor's access to accommodation, care arrangements, education, or health services. Given the absence of an official caregiver, France has created a narrower role—the Ad Hoc Administrator—as part of an initiative to render the immigration process at the *transit zone* more suitable and accessible for children. French law dictates for an Ad Hoc Administrator to be appointed in order to represent and assist the minor in all procedures relative to his or her entry into the territory and to accompany him/her throughout

[56] TROLLER, *supra* note 42, at 4.
[57] Directive 2005/85/EC.

the various legal procedures.[58] The primary obligation of Ad Hoc Administrators is to compensate the children's legal incapacity and to validate all administrative procedures undertaken by the child—ensuring that the child's legal needs are protected. The Ad Hoc Administrator is also responsible for representing the child during his or her detention review and the asylum interview. The Children's Judge[59] and Children's Ombudsman can intervene on behalf of unaccompanied minors in the airport transit zone if the child is believed to be in danger, which could lead to his or her admission to French territory and placement under the care of child welfare institutions. However, these actors rarely intervene on behalf of the child's best interests.

Although French law clearly puts forth the necessity to appoint Ad Hoc Administrators to assist each individual child, appointments remain inconsistent and approximately 30% of minors are never appointed an administrator. The French government has expressed its challenges in recruiting Ad Hoc Administrators, due to a lack of experts on children's issues that have competent knowledge of immigration laws to fulfill this role. In order to solve this problem, the French Red Cross took the responsibility in 2005 of appointing Ad Hoc Administrators for unaccompanied minors in the *transit zone* of Charles de Gaulle airport. Certain regional departments that encounter very few cases of children migrating alone are unaccustomed to the phenomena and completely disregard the procedure of appointment.[60] The absence of the Ad Hoc Administrator early in the process poses an obstacle for the child to apply for asylum or seek any sort of relief from detention, given that under French law children cannot file applications for asylum without the signature of an Ad Hoc Administrator. A child can be deported even when s/he has never met his or her Ad Hoc Administrator.[61] In addition to the inconsistency of appointments, Ad Hoc Administrators are not trained in immigration law, which can lead to errors or legal misunderstandings affecting the minor's asylum application.

The appointment of an independent, profession guardian for each unaccompanied immigrant child has been identified not only by the European Union but also by the French government as necessary to ensure that the child's voice is heard and for decisions made during immigration proceedings to take into consideration the child's best interests. However, legal guardianship[62] programs for unaccompanied minors stipulated in

[58] DELBOS, *supra* note 8, at 96.
[59] Juge des enfants (specialized judiciary for children in criminal and civil proceedings).
[60] DELBOS, *supra* note 8, at 57.
[61] Troller, *supra* note 42, at 30.
[62] Legal Representation.

international and French domestic legal provisions have not been successfully transposed to the ground level.[63] Even though every child ought to benefit from the legal assistance and expertise of an Ad Hoc Administrator, appointments are not fully consistent and effective because it is an ad hoc procedure that varies in each *transit zone*. While the appointment of Ad Hoc Administrators in the *transit zone* is a measure to protect children's rights, the responsibility for such appointments is not under the jurisdiction of the competent childhood protection services. Instead, organizations such as the Red Cross, although they are experienced at attending to the need of incoming immigrants, might not be fully prepared to act in the child's best interest, are responsible for these appointments. Consequently, the appointment of Ad Hoc Administrators falls short from fully advocating for children's best interests within the immigration legal framework that characterizes the *transit zone*. Unaccompanied minors continue having to make legal decisions and access basic services without any guidance in adult-oriented immigration procedures. The inconsistent appointment of Ad Hoc Administrators furthermore reveals the conflict of interests that prevails the *transit zone*; the conflict between attempts at facilitating children's access to information and representation weakened by the priority to enforce immigration laws.[64]

RETURNS[65]

France has a legal obligation to abide by the principle of *non-refoulement* under the European Court of Human Rights (ECHR)' decision in *Nsona v. The Netherlands* to prohibit the return of a person to a place where his or her life could be threatened.[66] Under the case law of the ECHR, France is required to take positive steps to ensure that an unaccompanied minor is only returned when the conditions in the country of origin are safe for the repatriation process.[67] Along the same lines, EU and French law prohibit any forced return of unaccompanied minors once they are within the territory—the only exception being when the child expresses an explicit desire to return to the country of provenance. Upon arrival to the *transit zone*, every child is entitled to a 24-hour protection from deportation called the *jour franc.*[68] However, sometimes authorities do not grant

[63] Bruun, *supra* note 37, at 57-68.
[64] Bhabha, *supra* note 31, at 301-322.
[65] Also deportations.
[66] 63/1995/569/655.
[67] Troller, *supra* note 43, at 52.
[68] Day of protection.

children this right and fail to inform the child of his or her option by expediting the removal process.[69]

A voluntary departure requires a decision from an Immigration Judge. Oftentimes, the Judge relies on a social worker's intervention to ensure that the family is willing to accommodate the child upon his return and that the family's financial situation will allow for the minor's reception.[70] The Immigration Judge generally ought to rely on this assessment for each request for voluntary departure, but in practice judges rarely use this tool to assess the return conditions. The common practice is to identify a family member willing to receive the minor and to complete the return process—based on the assumption that family life in a home country is in the best interest of the child. Minors who are returned to their home countries rarely receive follow up from French authorities to confirm they have safely returned to their households. Voluntary returns and deportation are characterized by an incomplete assessment of the best interests of the child; the identification of a family member to receive the minor has replaced a thorough assessment of the child's best interests.[71] The desperation of many children to leave their home countries and families and search for a better life with the possibility of education or employment elsewhere complicates the simple official assumption that their "best interests" are automatically served by returning them to their countries of origins—an assumption upon which a majority of the returns are based.[72]

For those minors who have already accessed the territory, the return to the country of origin is organized by the Office Français de l'Immigration et de l'Integration (OFII).[73] Under the request of the Children's Judge, the OFII organizes the return of minors to their country of origin including assistance in obtaining traveling documents, contacting family members or entities in the country of origin capable of receiving the minor, and providing personnel to accompany the minors in the repatriation process. However, OFII only intervenes to ensure safety procedures in the repatriation process of minors who have been granted access to the French territory but not to minors who are deported on the basis of a denied access to the territory. Even though France has shown an active concern to ensure the safe repatriation of unaccompanied minors, children cannot benefit from the services of the OFII if their voluntary departure or deportation proceedings are taking place in a *transit zone*. The lack of as-

[69] Troller, *supra* note 43, at 17.
[70] DELBOS, *supra* note 8, at 41
[71] DELBOS, *supra* note 8, at 42
[72] Bhabha, *supra* note 33, at 436.
[73] Office of Immigration and Integration

sessment of the return conditions when unaccompanied minors go through removal proceedings and the absence of the OFII at the *transit zone* to ensure the safe repatriation of children demonstrate the deficiency of protective measures for children in a legal framework where the priority is the speedy removal of unaccompanied minors from the territory without any particular distinction for children and adults.

CHARLES DE GAULLE AIRPORT

Charles de Gaulle airport, located in the Parisian suburbs, offers a microcosm through which the French model of reception and care for unaccompanied minors can be understood. Unaccompanied immigrant children arriving to the airport are mostly nationals of the Democratic Republic of Congo, Congo-Brazzaville, Eritrea, Sri Lanka, Nepal, China, Lebanon, Brazil, Ivory Coast, Albania, Guinea-Conakry, Nigeria and Comoros Islands.[74] From January to May 2009, of the 265 unaccompanied children who were held in the *transit zone* at the airport, 59 were deported and 200 were granted permission to enter the territory. Similarly, around 30% of the children who arrived to Charles de Gaulle airport between 2008 and 2009 were deported to their country of origin or to a country through which they had transited before their arrival in France.[75]

At this particular *transit zone*, the French Red Cross and Famille Assistance[76] provide Ad Hoc Administrators for unaccompanied children; French Red Cross Ad Hoc Administrators are unpaid volunteers while those who work for Famille Assistance are remunerated.[77] However, approximately 30% of all children who entered through Charles de Gaulle airport between 2008 and 2009 were not assigned an Ad Hoc Administrator and were deported before the appointment was finalized. Ad Hoc Administrators in the airport *transit zone* are not subject to any external supervision or monitoring and their actions are not reviewed by any independent mechanism. Although they work under the jurisdiction of the prosecutor, their performance is not assessed nor is it clear what their specific guidelines are when working with unaccompanied minors.[78] The organization Anafé maintains presence at the detention center of Charles de Gaulle airport where it provides legal aid at no cost; however, their resources do not permit them to attend to the legal needs of every minor who

[74] Troller, *supra* note 42, at 6.
[75] Troller, *supra* note 42, at 1.
[76] Family Assistance.
[77] Troller, *supra* note 42, at 1.
[78] Delbos, *supra* note 8, at 56.

is detained.[79] The possibility to remain in French territory, to be transferred to Childhood Protection Services, and consequently to obtain residency is more tangible for children who have filed an asylum application and granted international protection.

Given that traditional structures of care for children cannot serve unaccompanied minors at the *transit zone* of Charles de Gaulle airport, the government has recognized the deficiency in services and has created ad hoc structures to attend to this population. The state has established two ad hoc institutions, the Lieu d'Accueil et d'Orientation (LAO),[80] managed by the Red Cross, and CAOMIDA,[81] which provide shelter for unaccompanied minors upon their exit from the transit zone of Charles de Gaulle airport. These centers examine the minors' situation and provide adequate orientation—but only for children who have been granted admission to the territory through an initial asylum approval.[82] These pilot programs demonstrate the acknowledgement and active response by the French government to the protection and service deficiency unaccompanied minors face—yet it does not address the continuing gap in protection and care that exist within the *transit zone*.

CHILDHOOD PROTECTION SERVICES

Unaccompanied minors who have been granted access to French territory - via asylum approval - can benefit from social protection services in the same manner as French minors on the basis of being children at risk.[83] The services unaccompanied minors receive are under the jurisdiction of local childhood services operated and administered by the regional offices of the Childhood Social Aid.[84] Once unaccompanied minors have been granted access to the territory, they are transferred to collective accommodation centers or shelters operated by the Childhood Social Aid or placed under the care of foster families—where they are able to benefit from permanent housing, schooling, healthcare, and guidance in the procedures relative to their right of residence. Protection services can be extended until the age of 21 for unaccompanied minors who reach the age of 18 and have experienced difficulties in social integration due to a lack of resources or support. The Childhood Social Aid - French departmental

[79] Troller, *supra* note 42, at 36.
[80] Place of Welcome and Orientation.
[81] Centre d'Accueil et d'Orientation pour Les Mineurs Isoleés Demandeurs d'Asile.
[82] DELBOS, *supra* note 8, at 109.
[83] DELBOS, *supra* note 8, at 108.
[84] Also known as Children Protection Services.

services with jurisdiction over child protection - is responsible for providing the child with access to healthcare, education, and guardianship when the minor has no family in France but does not operate in the *transit zones,* the very place children are in highest need of their services.

Most French departments have established, through the Childhood Social Aid, comprehensive entitlements for unaccompanied minors that match those of French-born children and mirror the obligations set out by international law. Tensions exist between the French governments and the regional departments that are financially responsible for the reception of minors. Many local branches of the Childhood Social Aid are responsible for all the financial costs of serving unaccompanied minors. At moments of economic turmoil in the country or in the respective regions, local offices have become reluctant to provide the necessary services to unaccompanied minors because they consider the State's involvement to be insufficient. Most shelters of the Childhood Social Aid are not locked, which leads to large proportions of at-risk children disappearing from state welfare institutions within days after being placed—at a rate above 60% in some centers.[85] In Pas-de-Calais—a point of passage of migrants on their way to the United Kingdom—the rate of runaways is extremely high; in 2009, 2,219 placements were issued for unaccompanied minors while only 21 minors were taken into long-term care by Childhood Social Aid—the remaining of the children ran away from the center to continue their trajectory to United Kingdom or to reunite with family members. However, these traditional structures of care and protection for children have no presence or jurisdiction in airports or ports of entry—in the *transit zones*—where unaccompanied minors are highly in need of their services. Children can only access the services of the Childhood Social Aid and of the pilot programs that have been established by the French government after they have exited the *transit zone*. Childhood protective services function outside and in opposition to the existing policies of detention inside the *transit zone*.[86]

France offers an example of reception and care where unaccompanied immigrant children that have been granted admission into the territory are able to benefit from local childcare programs.[87] French laws consolidate migrant children's care by integrating them into mainstream facilities for children in need or at risk. Unaccompanied immigrant children are not placed in specialized facilities solely for unaccompanied asylum-

[85] DELBOS, *supra* note 8, at 114.
[86] Bhabha, *supra* note 33.
[87] Khanics Jhyothi & Daniel Senovilla Hernandez, MIGRATING ALONE: UNACCOMPANIED AND SEPARATED CHILDREN'S MIGRATION TO EUROPE 3-20 (2010).

seeking children, but also in shelters and foster programs with French-born children in need (Table 1 on pages 117-118 identifies the advantages and disadvantages of both types of shelters). The advantages of the French model of reception is that the standards of care for independent child migrants in these facilities are similar to those provided to French-born children—children are supported by staff qualified in dealing with children's issues. Having access to childhood protection services exists as an indicator that independent child migrants are being recognized as children. Among the disadvantages of this model are that staff members at the facilities lack experience in treating the specific needs of migrant children. Furthermore, the placement of independent child migrants in mainstream facilities congests the availability of resources.

Table 1: Mainstream versus specialized facilities[88]

	Advantages	**Disadvantages**
Mainstream Facilities	Provision of a similar standard of care to that of French-born children. More focus on the fact that children are children first and foremost (they are supported by staff qualified in dealing with children's issues). Better possibilities of raising children's issues in consultations and planning of children's general care.	Lack of experience of staff in asylum issues. Possible negative staff attitudes towards asylum-seekers. "Bottlenecks" over integrating asylum-seeking children in these services because of insufficient resources.

[88] Shelters where unaccompanied minors live once they have been granted access into French territory.

Specialized facilities for unaccompanied asylum-seeking children	Ability to provide specific expertise on asylum issues.	Perception of unaccompanied children as "different." Risk of receiving a lower standard of care than other children. Staff unqualified in childcare and child protection.

Source: *Migrating Alone: Unaccompanied and Separated Children's Migration to Europe*. UNESCO. Paris: UNESCO Publishing, 2010

The French government criterion to grant –a right of residence to unaccompanied minors remains relatively unclear and inconsistent. Prefectures have to examine the immigration files of unaccompanied minors on a case-by-case basis, relying on criteria such as the youth's integration into French society and the nature of the child's relations with family in home country. There is no standardized procedure for unaccompanied minors to apply for residency unless they have been granted asylum and have consequently been taken under the custody of the Childhood Protection Services. Only minors who have arrived and have been granted admission into French territory before the age of 13 have access to a path towards regularizing their residence status automatically.[89] Unaccompanied minors aged 16 to 18 have no path to regularization their immigration status and most are considered illegal in the territory when they are no longer underage.[90]

EDUCATION AND HEALTHCARE

Unaccompanied minors who have been granted access into the territory enjoy the same legal rights and obligation to attend compulsory education as the domestic population. Despite the existence of a general right to education for migrant children, obstacles to securing this right are

[89] Olivier Piot, *Mineurs Isolés Étrangers, sans Famille, sans Papiers*, ALTERNATIVES INTERNATIONALES, (2012), http://www.alternatives-internationales.fr/mineurs-isoles-etrangers--sans-famille--sans-papiers--introduction-au-dossier-_fr_art_1153_59283.html.
[90] Evelyne Sire-Marin, *Le Rôle de L'institution Judiciaire*, PLEIN DROIT 52, 2002, at 27.

common and access to educational facilities may be problematic for a variety of reasons.[91] Minors under the age of 16 have automatic access to the public education system given that all children are required to attend school until the age of 16. Minors between the ages of 16 and 18 encounter greater difficulties in accessing education; they are only admitted if spaces are available and as they approach the time of graduation, their higher education prospects are limited. In an effort to coordinate and facilitate the access of migrants to school, including classes to learning French, agencies known as Centers for New Arrivals and Traveller Children (CASNAV)[92] administered by the Ministry of Education have been opened throughout the country. However, these establishments are usually saturated and most minors aged 16-18 do not benefit from their services.[93]

Similar to the right to education, all children are theoretically entitled to comprehensive health care on a par with the domestic population. The European Court of Human Rights has held that denial of the right to access healthcare for irregular migrants may constitute a violation of Article 3 of the European Convention on Human Rights, which prohibits inhuman and degrading treatment. In principle, unaccompanied minors are able to access hospital care regardless of their status because they are considered persons of reduced means and therefore have access to universal medical coverage according to French law (*Council Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries*). In practice, however, the health services unaccompanied minors are entitled to are elusive; the immigration status of a minor results in difficulties at the time of registration with social security offices. In some cases, problems arise because of discriminatory or administrative barriers. Children with an irregular status living outside shelters or reception centers cannot access medical treatment because they do not have documents and are not accompanied by official caregivers or " legal guardians." To effectively carry out these procedures and navigate the multiple administrative barriers, the child must have a legal representative or a legal guardian to validate his or her administrative processes. Minors who do not have access to ordinary healthcare services still have access to emergency care, but what counts as "emergency medical care" can be inconsistent and ad hoc.[94]

By virtue of international law and domestic regulations, France's childcare system entitles unaccompanied immigrant children to primary education and health care, even though they lack legal residency status.

[91] Bhabha, *supra* note 33, at 440.
[92] Centre Académique pour la Scolarisation des Nouveaux et des Enfants du Voyage.
[93] DELBOS, *supra* note 8, at 120.
[94] Bhabha, *supra* note 33, at 442-444.

However, as Bhabha argues in "Arendt's Children," entitlements depend on production of a government-issued document, which migrant children are not given. Given unaccompanied immigrant children's lack of official social membership or citizenship, they are excluded from automatic access to welfare and basic public goods.[95] Access to healthcare can be prevented when the minor is unable to demonstrate status or documentation proving his legal situation in the country or when the minor has not been assigned a legal representative who can certify the administrative procedures he/she undergoes.[96]

A Category of Conflicting Interests

This research began with the question of whether France's right of residence for migrant minors—what could be interpreted as a "generous" and "child-friendly" measure—truly reflects the country's implementation of the best interests principle in its immigration procedures. The mapping of France's system of reception and care for unaccompanied minors has permitted us to identify the most problematic as well as the most reformist areas in relation to child protection and best interests of the child. The extraterritoriality of the *transit zone* at the ports of entry, in particular at Charles de Gaulle Airport, which operates under a different legal regime than the French territory, is beyond the reach of domestic structures of welfare and accountability. Children find themselves at the peripheries of the systems of protection and care that ought to ensure their well-being—a zone without child welfare oversight and where the domestic child protection institutions do not provide care for children. In the *transit zone*, ensuring children's rights is a remote priority. Consequently, the placement of minors in the *transit zones* and the refusal to admit them into the territory insulates children from the rights they would be accorded on French territory and distances them from any possibility to benefit from child and social welfare institutions.

The inconsistency and delay in the appointment of Ad Hoc Administrators and the absence of the Administrator early in the process when children face the greatest obstacles hinders the possibility children have to enter the territory and consequently benefit from child protection programs. Furthermore children cannot file an asylum application without an Ad Hoc Administrator or legal representative to co-sign their applications. The legal procedure for obtaining asylum is piled with obstacles for minors to navigate without assistance. While in the *transit zone*, children

[95] Bhabha, *supra* note 33, at 416.
[96] Delbos, *supra* note 8, at 129.

are screened for asylum without proper legal orientation and assistance, and thus face tremendous challenges to present or articulate a claim for asylum. Another major area of conflict with best interest standards are returns; voluntary departures and returns are generally conducted without an assessment of the circumstances of the child upon return to their home country or country of provenance. French immigration authorities operate based on the assumption that child's best interests are guaranteed by reunifying children with their family in their country of origin. Returns lack a thorough assessment of what is best for the child's development in the short and long term.

As part of the obligations of being a ratifier of the CRC and of the European Convention on Human Rights, France has recognized that unaccompanied immigrant children are entitled to protection regardless of their irregular status on French territory. The assignment of Ad Hoc Administrators and the creation of pilot programs such as the Lieu d'Accueil et d'Orientation (LAO) at Charles de Gaulle airport to orient minors is a proof that France has recognized the necessity to render immigration proceedings more suitable for children—particularly when children have no means to access legal counsel. Since unaccompanied minors are not considered to be illegally in French territory, the consideration of their best interests is given precedence over their irregular immigration status and children are not the targets of immigration controls. French immigration law allows for their permanent stay without the fear of deportation while they are underage and children can, according to the law, benefit from the same social entitlements as French-born children. Children who have accessed French territory are entitled to protective measures to attend to their needs in the same fashion as French-born children. Unaccompanied minors are placed in shelters specifically for children at risk, are registered in school and can receive medical treatment if needed. Nonetheless, minors face administrative obstacles to access educational facilities—particularly minors aged 16-18—given the inability for most of them to demonstrate status documentation or the absence of a parent or legal guardian to certify the administrative procedures the minor undergoes.

France has acknowledged its responsibility to ensure the rights of unaccompanied minors immigrating to its territory but has not necessarily promoted a consistent and thorough consideration of the best interests of these children. Even though France has allowed for unaccompanied minors in the territory to benefit from the same entitlements as French-born children and has enacted legislation to appoint Ad Hoc Administrators for children in immigration custody—demonstrating a commitment to enhance the systems of protection and care available for this population—children's social entitlements in the *transit zone* are intersected by the mechanisms to enforce immigration laws that characterize the ports of

entry to the territory. Minors continue to face procedural adversities in conflict to their best interests given that mechanisms of enforcement take precedence over all other national, regional, and international legal responsibilities France has pledged to—including the CRC and the notion that the best interests principle should govern all actions pertaining to children.

CONCLUSIONS

Inconsistencies in France's interventions are primarily the product of state's efforts to recognize unaccompanied minors simultaneously as irregular immigrants under a system of enforcement and as a vulnerable and legally incompetent youth under a system of protection. France's interpretation of its responsibility towards unaccompanied immigrant children is problematized on the one hand by having to categorize unaccompanied immigrant children as both agents with legal autonomy and children with claims to special protection, and the incapacity at finding a compromise between these two categories. Children's entitlements are dichotomized depending on whether they fall under the system of protection or of enforcement—inside or outside the *transit zone*. France has recognized this contradiction and as a response has created the role of the Ad Hoc Administrator—an attempt to bridge the gap between the system of enforcement and protection which unaccompanied immigrant children are parts of simultaneously.[97]

While international, regional, and domestic policies may declare that an unaccompanied minor is a child first and an immigrant second and therefore the child's best interests should prevail, their categorization under immigration laws dismisses considerations of special protection. When an unaccompanied immigrant child arrives to a French port of entry, the immigration legal framework has no provisions to understand its legal situation beyond the illegal entry into the territory—immigration laws fail to distinguish between adults and children's needs within the context of *transit zones*. From the side of immigration controls, the child is viewed and categorized exclusively as an immigrant with an irregular status, which has a bearing on the treatment children receive.[98] In the *transit zone* the child is therefore not entitled to the necessary considerations of care and protection—and may be subject to the same hardships and procedural requirements imposed by immigration controls as those experienced by adults.[99]

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[97] Isabelle Debré. *Los mineurs isolés étrangers en France.* Sénat (2010).
[98] Bhabha, *supra* note 33.
[99] Bruun, *supra* note 37.

The case of France provides a concrete example of the inherent contradictions between the legal categories by which unaccompanied immigrant children's conditions have to be understood and categorized at the domestic level, exemplified in the contrast between the entitlements of the child in the *transit zone* and those bestowed once the child has been admitted into the territory. Unaccompanied immigrant minors benefit from measures of protection under the authority of traditional structures of care for children such as the Childhood Social Aid once they have accessed the territory—a concrete step towards recognizing childhood parameters before immigration status. However, even though France has recognized the necessity for unaccompanied immigrant children to be protected and taken care—allowing for their permanent stay without the fear of deportation while they are minors—these social entitlements are practically nonexistent in the *transit zone.* Consequently, the *transit zone*, in its absence of traditional structures of care and protection from which unaccompanied minors can benefit, problematizes France's efforts to ensure the best interests of unaccompanied minors. In the *transit zone*, immigration laws and domestic childcare provisions are in conflict where best interests considerations, which rely on the primary categorization of an unaccompanied minor as a "child," are absent from the scope of immigration laws.

Existing gaps in the literature could be further explored to more comprehensively understand the policy challenges unaccompanied immigrant children face in the international, regional, and domestic context—particularly as they initially arrive to a country of destination. Having identified the extraterritoriality of the *transit zone* as the main obstacle to consistent and thorough best interests considerations, subsequent research could further investigate the care unaccompanied minors receive at the ports of entry; how do other Member States' *transit zone* receive and provide care for unaccompanied minors? How have other Member States overcome the conflict of interests inherent in the category of unaccompanied minors? If so, what can we learn from countries that have successfully prioritized child's best interests over their immigration control preoccupations?

APPENDIX A

Excerpt from Committee on the Rights of the Child General Comment N°6 (2005)
Treatment of Unaccompanied and Separated Children
Outside Their Country of Origin:

IV. APPLICABLE PRINCIPLES

(a) Legal obligations of States parties for all unaccompanied or separated children in their territory and measures for their implementation:

12. State obligations under the Convention apply to each child within the State's territory and to all children subject to its jurisdiction (art. 2). These State obligations cannot be arbitrarily and unilaterally curtailed either by excluding zones or areas from a State's territory or by defining particular zones or areas as not, or only partly, under the jurisdiction of the State. Moreover, State obligations under the Convention apply within the borders of a State, including with respect to those children who come under the State's jurisdiction while attempting to enter the country's territory. Therefore, the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness.

13. Obligations deriving from the Convention vis-à-vis unaccompanied and separated children apply to all branches of government (executive, legislative and judicial). They include the obligation to establish national legislation; administrative structures; and the necessary research, information, data compilation and comprehensive training activities to support such measures. Such legal obligations are both negative and positive in nature, requiring States not only to refrain from measures infringing on such children's rights, but also to take measures to ensure the enjoyment of these rights without discrimination. Such responsibilities are not only limited to the provision of protection and assistance to children who are already unaccompanied or separated, but include measures to prevent separation (including the implementation of safeguards in case of evacuation). The positive aspect of these protection obligations also extends to requiring States to take all necessary measures to identify children as being unaccompanied or separated at the earliest possible stage, including at the bor-

der, to carry out tracing activities and, where possible and if in the child's best interest, to reunify separated and unaccompanied children with their families as soon as possible.

APPENDIX B

Excerpt from European Commission Action Plan on Unaccompanied Minors (2010-2014):

4.1. Procedures at first encounter and standards of protection

The relevant EU migration instruments already contain provisions on reinforced protection of unaccompanied minors. However these provisions are context-specific, in that they apply to asylum applicants, refugees, illegally-staying migrants and victims of trafficking in human beings. Moreover, they do not provide the same standards of reception and assistance. Also, in some Member States a specific difficulty arises in relation to border cases/transit zones. These potential protection gaps must be addressed.

In particular, EU legislation does not provide for the appointment of a representative from the moment an unaccompanied minor is detected by the authorities, namely before the relevant instruments are triggered. Representation is only explicitly stipulated for asylum applicants. Although important safeguards for unaccompanied minors are provided by the Return Directive, the Temporary Protection Directive, the Directive on Victims of trafficking in human beings 18 and relevant international instruments 19, a margin for interpretation is left to Member States. Moreover, no common understanding exists on the powers, the qualification and the role of representatives. Unaccompanied minors should be informed of their rights and have access to complaint and monitoring mechanisms in place.

Wherever unaccompanied minors are detected, they should be separated from adults, to protect them and sever relations with traffickers or smugglers and prevent (re)victimisation. From the first encounter, attention to protection is paramount, as is early profiling of the type of minor, as it can help to identify the most vulnerable unaccompanied minors. Applying the different measures provided for by the legislation and building the trust are indispensable to gain useful information for identification and family tracing, ensuring that unaccompanied minors do not disappear from care, identifying and prosecuting traffickers or smugglers.

Unaccompanied minors should always be placed in appropriate accommodation and treated in a manner that is fully compatible with their best interests. Where detention is exceptionally justified, it is to be used only as

a measure of last resort, for the shortest appropriate period of time and taking into account the best interests of the child as a primary consideration.

The disappearance of unaccompanied minors who should be in the care of national authorities is another major concern. Some (re-)fall prey to traffickers, others try to join members of their families or communities in other Member States and/or end up working in the grey economy and living in degrading situations.

APPENDIX C

Excerpt from Les Politiques Relatives à L'Accueil, L'integration et le Retour des Mineurs non accompangnés from the French Ministry of Immigration and Integration:

3-1-2. Le cadre juridique du maintien en zone d'attente

Le MNA se présentant à une frontière maritime, aérienne ou ferroviaire, se voit appliquer, comme on l'a vu ci-dessus, le droit des étrangers, codifié dans le CESEDA. Ainsi, l'article L. 221-1 du CESEDA indique que «l'étranger qui arrive en France par la voie ferroviaire, maritime ou aérienne et qui, soit n'est pas autorisé à entrer sur le territoire français, soit demande son admission au titre de l'asile, peut être maintenu dans une zone d'attente située dans une gare ferroviaire ouverte au trafic international (…), dans un port ou à proximité du lieu de débarquement, ou dans un aéroport pendant le temps strictement nécessaire à son départ et, s'il est demandeur d'asile, à un examen tendant à déterminer si sa demande n'est pas manifestement infondée».

Des dispositions particulières ont toutefois été prises au bénéfice des mineurs :

• l'article L. 221-5 du CESEDA dispose ainsi que, «lors de l'entrée en zone d'attente d'un mineur étranger non accompagné d'un représentant légal, le procureur de la République, avisé par l'autorité administrative en application de l'article L. 221-3» (ce dernier s'applique à tous les étrangers, qu'ils soient majeurs ou mineurs), «lui désigne sans délai un administrateur ad hoc (AAH). Celui-ci assiste le mineur durant son maintien en zone d'attente et assure sa représentation dans le cadre des procédures administratives et juridictionnelles relatives à son maintien. Il assure également la représentation du mineur dans toutes les procedures administratives et juridictionnelles afférentes à son entrée en France».

• des précautions particulières pour la protection des mineurs à tous les stades de
la procédure ont été introduites par voie réglementaire :
L'article 37 de la Convention internationale des droits de l'enfant prévoit que «tout enfant privé de liberté sera séparé des adultes». Ainsi, lors du maintien en zone d'attente, les mesures prises pour réserver des locaux aux

mineurs deviennent effectives et généralisées. Quant aux enfants de moins de 13 ans, ils sont placés dans des chambres d'hôtel sous surveillance. Pendant l'examen d'une demande d'asile effectuée par un MNA, ce dernier est accueilli dans un «centre d'accueil et d'orientation pour mineurs demandeurs d'asile» (CAOMIDA) spécialisé. Enfin, en cas de retour dans le pays d'origine, des mesures doivent être prises pour veiller à ce qu'un membre de la famille ou un représentant légal du mineur soit présent à l'arrivée à l'aéroport.

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