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Treaties and National Security

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TREATIES AND NATIONAL SECURITY

SUSAN ROSE-ACKERMAN & BENJAMIN BILLA*

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I. INTRODUCTION

In December 2006, the British Serious Fraud Office (SFO) closed an investigation into a case that has become a vexing test for the emerging international anti-corruption regime. The centerpiece of this regime is the Anti-Bribery Con-

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vention negotiated under the auspices of the Organisation for Economic Co-operation and Development (OECD).[1] The Convention—to which Britain is a party—requires the State Parties to outlaw overseas bribery.[2] In closing the investigation into corruption involving a large defense procurement contract (dubbed Al Yamamah or "the dove"), the SFO and the Attorney General cited national security concerns. The press release from the SFO is terse. We quote it in its entirety:

> The Director of the Serious Fraud Office has decided to discontinue the investigation into the affairs of BAE Systems Plc as far as they relate to the Al Yamamah defense contract with the government of Saudi Arabia. The decision has been taken following representations that have been made both by the Attorney General and the Director of the SFO concerning the need to safeguard national and international security. It has been necessary to balance the need to maintain the rule of law against the wider public interest. No weight has been given to commercial interests or to the national economic interest.[3]

This Article argues that the British government, by invoking national security as an unexplained justification for quashing a bribery investigation, violated the Anti-Bribery Convention. Under U.K. law, the important issue is how exercises of

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1. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Apr. 18, 1998, 337 I.L.M. 8, 112 Stat. 3302, *available at* http://www.oecd.org/document/21/0,2340,en_2649_201185_2017813_1_1_1_1,00.html [hereinafter OECD Convention].

2. *Id.* art. 1. The Convention came into force on February 15, 1999 and has been ratified by thirty-six countries, both Organisation for Economic Co-operation and Development (OECD) members and invited non-members. For the list of countries, see Organisation for Economic Co-operation and Development (OECD), OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Ratification Status as of 19 June 2007, *available at* http://www.oecd.org/dataoecd/59/13/1898632.pdf.

3. Press Release, Serious Fraud Office, Serious Fraud Office Statement (Dec. 14, 2006), *available at* http://www.sfo.gov.uk/news/prout/pr_497.asp?seltxt= [hereinafter SFO]. The Attorney General Lord Peter Goldsmith's presentation to the House of Lords on Dec. 14, 2006 is in 687 PARL. DEB., H.L. (5th Ser.) (2006) 1711-17 (presentation by Att'y Gen. Lord Peter Goldsmith on the SFO). *See also* Stephen Fidler, *Blair Bows to Pressure on Jobs*, FIN. TIMES, Dec. 15, 2006, at 3; David Leigh & Rob Evans, *"National Interest" Halts Arms Corruption Inquiry*, GUARDIAN, Dec. 15, 2006, at 1.

prosecutorial discretion are constrained by treaty obligations. In this case, failure to prosecute undermines the basic purpose of the OECD Convention, as agreed on by the treaty partners. This fact, we argue, should influence exercises of prosecutorial discretion.[4]

The main thrust of our analysis, however, concerns the international law of national security. The Convention does not contain an explicit national security exception. Moreover, we argue that international law does not authorize states to read into treaties an implicit open-ended exception. Many treaties contain explicit exceptions, but most of these significantly constrain the exercise of such exceptions either substantively or procedurally, or both. Any effort to justify the British position must come to terms with the multitudinous and constrained character of explicit national security exceptions.

We use the British case as a reference point in developing our larger claims. The Al Yamamah deal involved the sale of jet airplanes from the United Kingdom to the Saudi Air Force with BAE Systems (BAE) as the prime contractor, and it proceeded in three phases.[5] The first, beginning in 1988, called

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4. *See infra* Part II.C.

5. BAE Systems was formed by a merger of British Aerospace and Marconi Electronic Systems. The links between the U.K. government and BAE Systems are strong. First, the U.K. government has a special share in BAE so that certain provisions in BAE's Articles of Association can only be changed with the written consent of the Secretary of State for Trade and Industry. *S*ee Competition Commission, British Aerospace plc and Thompson-CSF SA: A Report on the Proposed Merger 3 (1991), *available at* http://www.competition-commission.org.uk/rep_pub/reports/1991/fulltext/296c2.pdf. The second link is the Defense Industrial Strategy (DIS) of the U.K. government, a white paper published on December 15, 2005. The primary motive of the DIS is the support of U.K. companies in key defense areas. According to one commentator: "The strategy is aimed at keeping BAE Systems as the country's national champion." Douglass Barrie, *British Defense Industrial Strategy Secures BAE Systems as U.K. Champion*, AVIATION WEEK & SPACE TECH., Dec. 17, 2005, *available at* http://www.aviationweek.com/aw/generic/story_generic.jsp?channel=awst&id=news/12195p1.xml. BAE Systems CEO Mike Turner said of the DIS: "If we didn't have the DIS and our profitability and the terms of trade had stayed as they were . . . then there had to be a question mark about our future in the U.K." *Id.* The final link pertains to the Al Yamamah deal itself. The British group that went to Bermuda to sign the first agreement included two officials from the Ministry of Defense and a BAE director. David Pallister, *The Arms Deal They Called the Dove: How Britain Grasped the Biggest Prize*, GUARDIAN, Dec. 15, 2006, at 6. Under the agreement between the British and Saudi governments, the Saudis pay for the arma-

for the sale of 122 jet airplanes and many other types of military equipment and the construction of two airbases. Five years later, after the U.K. strengthened its anti-bribery legislation,[6] Saudi Arabia agreed to purchase another 48 planes. In 2003, the SFO began its investigation of the Al Yamamah deal. In August 2006, BAE agreed to supply an additional 72 planes, but that agreement was reputedly at risk as a result of the SFO investigation. All told, the deal has produced a revenue stream for BAE of about U.S. $2 billion per year—around $40 billion in total since the first agreement was struck. Long before the SFO began its investigation, there were rumors that BAE, as well as some of its subcontractors, had bribed the Saudi royal family and government officials in order to obtain the deal. The bribes were allegedly concealed by inflating the price of the goods.[7] It was also alleged that BAE maintained a slush fund worth millions of dollars for use by the Saudi royal family.[8]

Although the British government cited national security concerns as one of the main reasons for ending the investigation, other observers argued that political and economic mo-

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ments in barrels of oil and BAE is then paid by the Ministry of Defense. Sasha Lilley, *BAE System's Dirty Dealings*, CORPWATCH, Nov. 11, 2003, http://www.corpwatch.org/article.php?id=9008. The deal has been touted as "Britain's biggest sale ever, of anything, to anyone." David White & Robert Mauthner, *Britain's Arms Sale of the Century: The 10 Billion Pounds UK-Saudi Deal*, FIN. TIMES, July 9, 1988, at 7.

6. The act is included in the Anti-Terrorism, Crime and Security Act, 2001, c. 24 (Eng.).

7. The contract details are summarized in Pallister, *supra* note 5. *See also* Michael Robinson, *BBC Lifts the Lid on Secret BAE Slush Fund*, BBC NEWS, Oct. 5, 2004, http://news.bbc.co.uk/2/hi/business/3712770.stm; David Leigh & Rob Evans, *BAE Accused of Arms Deal Slush Fund*, GUARDIAN, Sept. 11, 2003, at 1; David Leigh & Rob Evans, *Diplomat Linked to BAE Slush Fund Claims*, GUARDIAN, Sept. 13, 2003, at 2; David Leigh & Rob Evans, *BAE Denies Existence of £20m Slush Fund*, GUARDIAN, Sept. 11, 2003, at 6. Early concerns about the deal are noted in CATHERINE COURTNEY, TRANSPARENCY INTERNATIONAL, CORRUPTION IN THE OFFICIAL ARMS TRADE 19, 21 (2002), *available at* http://www.armstradetreaty.org/docs/transparency.alert.report.pdf.

8. In June 2007 the BBC and The Guardian presented evidence of massive payments from BAE and the British government to Prince Bandar bin Sultan, former Saudi ambassador to Washington. Prince Bandar responded that the payments had been paid into Saudi government bank accounts. *See* David Leigh & Rob Evans, *BAE Accused of Secretly Paying £1bn to Saudi Prince*, GUARDIAN, June 7, 2007, at 1; *BAE and Saudi Arabia: The Plot Thickens*, ECONOMIST, June 9, 2007, at 64.

tives played a large role. The Attorney General responded with the claim that the Saudis had threatened to withdraw intelligence help if the case were not dropped; he also asserted that the case against BAE was weak and not worth pursuing, a position not explicitly endorsed by the SFO.[9] In the House of Lords debate on the matter, Lord Anthony Lester responded to the Attorney General by noting that "the government acted in clear breach of its obligations under the OECD convention against corruption."[10] Others have questioned the substance of the national security claims, arguing that the Saudis have no interest in failing to cooperate with British intelligence.[11]

We do not try to resolve this continuing controversy. Instead, we use it to motivate our inquiry into the more general questions raised by state efforts to use national security as: (1) the basis of an implied exception in international treaties; and (2) an argument for the exercise of prosecutorial discretion.

Part II argues that international law does not support efforts to read an implicit national security exception into treaties. Customary international law contains no such general presumption; rather, it includes exceptional reasons for derogation that encompass particularly acute security threats that could undermine a country's very existence or make compliance impossible or extremely costly. Many treaties contain explicit national security exceptions, and these take various forms tailored to the particular subject at issue. A general presumption of an implied national security exception would have the effect of either writing nuanced or constraining lan-

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9. *See* David Leigh & Richard Norton-Taylor, *Lives at Stake If Inquiry Had Upset Saudis, Says Goldsmith*, GUARDIAN, Jan. 18, 2007, at 4; SFO, *supra* note 3. As a result of the continuing controversy, Attorney General Goldsmith appeared again before the House of Lords on February 1, 2007 for an extended interchange. *See* 689 PARL. DEB., H. L. (5th ser.) (2007) 339-83.

10. Anthony Lester, Comment, *Lord Goldsmith's Folly Has Now Been Brutally Exposed*, GUARDIAN, Feb. 1, 2007, at 33. In contrast, the Attorney General was defended by Lord Harry Woolf. *See* Harry Woolf, Op-Ed., *Don't Abolish the Attorney General*, SUNDAY TELEGRAPH, Feb. 4, 2007, at 21.

11. The British intelligence services distanced themselves from Lord Goldsmith's claims. *See* Leigh & Norton-Taylor, *supra* note 9; Rob Evans, *Britain Censured over Decision to Drop BAE Saudi Corruption Inquiry*, GUARDIAN, Jan. 19, 2007, at 4. *The Economist* pointed out in an editorial that the Saudis needed the assistance of British intelligence at least as much as the United Kingdom needed help from the Saudis. Editorial, *Arms Deals and Bribery: The Bigger Bang*, ECONOMIST, June 16, 2007, at 15.

guage out of existing treaties, or, alternatively, of introducing ambiguity into treaties lacking explicit terms, because it would not be clear *which* of the different types of "national security exception" should be implied.

The OECD Anti-Bribery Convention has no explicit national security exception, and article 5 of the treaty states that investigations shall not be "influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."[12] Given this language, there is no basis for implying an open-ended, self-judging national security exception, and the BAE case does not fall under the customary law exceptions that involve national security. We agree, however, that the U.K. Serious Fraud Office does have discretion under U.K. law to decide which cases to pursue, and we discuss the way such discretion can legitimately affect enforcement choices.

Even if one rejects our first argument and proposes an implicit national security exception, one would still need to articulate the substance of such an exception to the OECD Anti-Bribery Convention. Given that standard doctrines of customary international law do not provide an answer, one way to do this would be to examine the explicit exceptions in other treaties. Part III examines the diversity of national security exceptions that are currently written into important treaties. As is shown in Part III, treaties vary, and it is unclear which version of the exception should be read into the Convention. Importantly, in spite of this variability, there are both procedural and substantive limits to explicit exceptions. These limits ought to apply *a fortiori* to implicit exceptions. A Party cannot claim that an implicit exception is stronger than commonly used weaker provisions. Otherwise, the best way to include a strong national security exception in a treaty would be simply to avoid any mention of the issue. If international law is to constrain state behavior, this result seems absurd. The development of international law as a set of principled constraints would be stymied if states could simply assert the existence of a favorable norm whenever a treaty imposed costs. If international law is to have any bite, states should negotiate over diffi-

12. OECD Convention, *supra* note 1, art. 5.

cult issues ex ante rather than leave them to ad hoc and ex post assertions by interested State Parties.

II. Do All Treaties Contain an Implicit National Security Exception?

There is no general international law doctrine establishing an implicit, open-ended national security exception for all treaties. We base this conclusion on two arguments. First, customary international law does not contain a national security exception. Neither the Vienna Convention on the Law of Treaties ("Vienna Convention") nor the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles") contains a national security exception.[13] Moreover, these conventions, both widely accepted as customary law, place specific limits on the exceptions they do include. These doctrines have been reviewed by courts and are not left to the unilateral discretion of sovereign states. Even when states do exercise discretion, it must be done in "good faith." Second, explicit security exceptions are commonly included in treaties, but they vary from treaty to treaty and often within a particular treaty. Given our conclusion that no implicit exemption exists, we end this Part by returning to the explicit language of the OECD Anti-Bribery Convention and its accompanying commentary to consider the breadth of the allowance for prosecutorial discretion consistent with the aims of that treaty.

A. *Customary International Law*

Customary international law identifies exceptions that apply to all treaties, even when not explicitly mentioned. The four that are most likely to be invoked in relation to national security are *clausula rebus sic stantibus*, the law of reprisal, self-defense, and the doctrine of necessity. The first stipulates that a treaty may become inapplicable due to a fundamental change of circumstances. The second permits a party to sus-

13. *See* Vienna Convention on the Law of Treaties, May 3, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; Int'l Law Comm'n, *Report of the International Law Commission*, at 43, U.N. Doc. A/56/10 (2001), *available at* http://www.un.org/documents/ga/docs/56/a5610.pdf [hereinafter ILC Articles] (Draft Articles on the Responsibility of States for Internationally Wrongful Acts).

pend or terminate a treaty in response to a breach by another party. Both of these principles are widely accepted parts of customary international law and have been codified in the Vienna Convention on the Law of Treaties.[14] The third and fourth exceptions, the doctrines of necessity and self-defense, are not codified in the Vienna Convention. However, they are recognized by the ILC Articles,[15] which have arguably achieved the status of customary international law.[16] They are frequently incorporated explicitly into treaty language, and in such cases they are interpreted in the light of customary international law, not just in terms of the particular treaty in which they appear.[17]

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14. *See* Vienna Convention, *supra* note 13, arts. 60, 62.

15. *See* ILC Articles, *supra* note 13. Paragraph 76 of this report reproduces all of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, and paragraph 77 contains commentaries on the Draft Articles. For clarity, subsequent citations to ILC Articles are by page and article numbers. "Established in 1948, the International Law Commission's mandate is the progressive development and codification of international law, in accordance with article 13(1)(a) of the Charter of the United Nations." International Law Commission, http://www.un.org/law/ilc/ (last visited Jan. 19, 2008). The Articles were adopted by the ILC in 2001, and on December 12, 2001 the UN General Assembly "commend[ed] them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action." Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, ¶ 3, U.N. Doc. A/RES/56/83 (Jan. 28, 2002). A similar resolution was adopted in 2004. G.A. Res. 59/35, U.N. Doc. A/RES/59/35 (Dec. 16, 2004). Opinions differ on whether the UN should attempt to codify these resolutions into a convention. *See* James Crawford & Simon Olleson, *The Continuing Debate on a UN Convention on State Responsibility*, 54 INT'L & COMP. L. Q. 959 (2005).

16. *See* Andrea K. Bjorklund, *Emergency Exceptions to International Obligations in the Realm of Foreign Investment: The State of Necessity and Force Majeure as Circumstances Precluding Wrongfulness*, *in* OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., forthcoming 2008). Crawford and Olleson summarize the 2004 debate over the ILC Articles in the UN General Assembly. Some delegates urged codification of the ILC Articles in a convention while others claimed that they were gradually obtaining the status of customary international law and that this trend should be allowed to continue. The Secretary-General was requested to compile decisions of international courts that referred to the ILC Articles in time for an autumn 2007 meeting of the appropriate committee of the General Assembly. Crawford & Olleson, *supra* note 15, at 965.

17. *See, e.g.*, BVerfG [Federal Constitutional Court] July 5, 2007, 75/2007 Argentinien-Anleihen: Staatsnotstand berechtigt nicht zur Zahlung-

The presence of these and other customary law exceptions[18] highlights the lack of an implicit national security exception. There is no basis to treat such an exception as part of customary international law over and above the invocation of existing doctrines that can apply to national security concerns. The implicit exceptions are tailored to permit states to respond to emergencies and to hostile actions by others. They seem quite well-crafted to prevent states from invoking broad, open-ended national security claims that could undermine much of international law.

Moreover, when tribunals review state actions, a state cannot unilaterally invoke even recognized exceptions on the basis of its own assertion that they apply. Tribunals generally do not give states carte blanche to interpret these doctrines as they wish. We consider each of the implicit exceptions briefly to demonstrate this point.

Invoking *clausula rebus sic stantibus*, or a fundamental change in circumstances, Iceland challenged the jurisdiction of the International Court of Justice (ICJ) in the *Fisheries Jurisdiction Case*.[19] The ICJ rejected this challenge to its jurisdiction, a separate issue that does not concern us here. However, relevant to our inquiry, the ICJ went on to suggest that it would review a claim of changed circumstance on the merits as a question of fact:

> The Court, at the present stage of the proceedings, does not need to pronounce on this *question of fact*, as to which there appears to be a serious divergence of views between the two Governments. If, as contended by Iceland, there have been any fundamental changes in fishing techniques in the waters around Iceland, *those changes might be relevant for the decision on*

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sverweigerung gegenüber privaten Gläubigern (F.R.G.) (indicating that the ILC Articles have the status of customary international law and interpreting "necessity" in this light). For a summary of the decision, see Stephen W. Schill, *German Constitutional Court Rules on Necessity in Argentine Bondholder Case*, ASIL INSIGHTS, July 31, 2007, http://asil.org/insights/2007/07/insights070731.html.

18. *See, e.g.*, Vienna Convention, *supra* note 13, §§ 2, 3 ("Invalidity of Treaties" and "Termination and Suspension of the Operation of Treaties").

19. Fisheries Jurisdiction Case (U.K. v. Ice.), 1973 I.C.J. 3 (Feb. 2) (Jurisdiction of the Court), *available at* http://www.icj-cij.org/docket/files/55/5749.pdf.

> *the merits of the dispute, and the Court might need to examine the contention at that stage . . . .*[20]

The law of reprisal is also subject to limits. As the *Naulilaa Case*[21] explains, "reprisals (1) can only be executed by agencies or instrumentalities of a State; (2) must be proportionate; and (3) must follow a failed attempt to resolve the violation by peaceful negotiation."[22] The Vienna Convention requires that the breach eliciting the response be "material" and defines a "material breach" as "(a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty."[23] ILC articles 49 through 54 specify additional limitations on countermeasures that may be taken in response to international law violations by other parties.[24] Furthermore, UN Charter article 2(4) limits the traditional ability of states to use force in reprisals.[25]

The doctrine of necessity is a recognized principle of customary international law, but it has been strictly limited by the ILC Commentary and international tribunals in part because of the potential for abuse by states eager to avoid treaty obligations.[26] The ILC Commentary states that "necessity will only rarely be available to excuse non-performance of an obligation" and "is subject to strict limitations to safeguard against possible abuse."[27] Bjorklund suggests that "its successful invo-

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20. *Id.* ¶ 40 (emphasis added). Iceland seems not to have raised the fundamental change of circumstances claim at the merits stage. *See generally* Fisheries Jurisdiction Case (U.K. v. Ice.), 1974 I.C.J. 3 (July 25) (Merits), *available at* http://www.icj-cij.org/docket/files/55/5977.pdf.

21. Naulilaa Case, 8 Trib. Arb. Mixtes 409 (Port.-Ger. 1928), *reprinted in* 2 R. INT'L ARB. AWARDS 1011 (1949).

22. Andrew D. Mitchell, *Does One Illegality Merit Another?: The Law of Belligerent Reprisals in International Law*, 170 MIL. L. REV. 155, 158-59 (2001).

23. Vienna Convention, *supra* note 13, art. 60(1)-(3).

24. ILC Articles, *supra* note 13, arts. 49-54.

25. U.N. Charter art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.").

26. The language in article 25 states the customary view. ILC Articles, *supra* note 13, at 49 (art. 25); *see* August Reinisch, *Necessity in International Investment Arbitration—An Unnecessary Split of Opinions in Recent ICSID Cases?: Comments on* CMS v. Argentina *and* LG&E v. Argentina, 8 J. WORLD INV. & TRADE 191 (2007).

27. ILC Articles, *supra* note 13, at 195 (commentary to article 25).

cation is virtually impossible," at least in the context of international investment.[28] To invoke a necessity defense successfully, a state must show that the act in question is "(a) the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) [d]oes not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole."[29] Once these requirements have been satisfied, the state must show that neither "[t]he international obligation in question excludes the possibility of invoking necessity," nor has "[t]he State . . . contributed to the situation of necessity."[30]

As Reinisch argues, the limited nature of the exception is made clear by its negative formulation. Necessity may not be invoked *unless* certain specific conditions hold.[31] These conditions can involve national security, but simply mentioning national security as an excuse is not sufficient. Rather, the conditions in article 25 limit the situations in which a state can equate its national security concerns with necessity. Of particular importance to our argument is the ILC Commentary's mention of obligations toward "the international community as a whole."[32] The collective interest in an honest contracting environment is both a major justification for the OECD Anti-Bribery Convention's efforts to limit corruption in international business dealings[33] and a reason to enforce the treaty to its fullest extent.

The recent case law concerns disputes where necessity is included as an exception in the treaty language. Bjorklund discusses four recent foreign investment cases dealing with the necessity defense—three cases from the International Centre for the Settlement of Investment Disputes (ICSID) relating to the 2001 Argentine economic crisis[34] and one ICJ case dealing

28. Bjorklund, *supra* note 16.

29. ILC Articles, *supra* note 13, at 49 (art. 25(1)).

30. *Id.* (art. 25(2)).

31. Reinisch, *supra* note 26, at 30; *see also* ILC Articles, *supra* note 13, at 49 (art. 25(1)).

32. ILC Articles, *supra* note 13, at 195 (commentary to article 25).

33. *See generally* OECD, Fighting Bribery and Corruption: Frequently Asked Questions, http://www.oecd.org/document/18/0,3343,en_2649_201185_35430226_1_1_1_1,00.html (last visited Oct. 4, 2007).

34. CMS Gas Transmission Co. v. Argentina (U.S. v. Arg.), ICSID (W. Bank), Case No. ARB/01/8 (May 12, 2005), 44 I.L.M. 1205, *available at*

with a dispute between Hungary and Slovakia relating to a system of locks on the Danube River.[35] All of the tribunals considered claims of necessity to be reviewable, and three rejected the claims. The language of each treaty provided that either Party could take "measures necessary for" a list of eventualities, including public order and security.[36] Bjorklund concludes that "[a]ll tribunals to date" have rejected efforts by states to judge for themselves whether they have complied with the exception."[37]

As we discuss below, some treaties do give states more leeway to define necessity by stating that a Party can take steps that "it considers necessary"[38] and providing that tribunals will scrutinize these steps only for good faith.[39] However, in our reading, the status of necessity in customary international law cannot be broader than the narrowest formulations included in explicit treaty language, and these are clearly neither open-ended nor entirely self-judging. On the general proposition that drafters do not include meaningless language in treaties, permissive wording would be included in a treaty only if it were thought necessary to overcome a background presumption against a broad interpretation of the doctrine. One does not have to state that a doctrine's application can be determined by a Party if it is obvious from customary international law that that is so.

States sometimes attempt to give self-defense a very broad interpretation. However, the ICJ cabined the meaning of self-

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http://www.worldbank.org/icsid/cases/CMS_Award.pdf (rejecting necessity); LG&E Energy Corp. v. Argentina (U.S. v. Arg.), ICSID (W. Bank), Case No. ARB/02/1 (Oct. 3, 2006), 46 I.L.M. 36, *available at* http://www.worldbank.org/icsid/cases/pdf/09_LGE_Liability_e.pdf (accepting necessity); Enron Corp. v. Argentina (U.S. v. Arg.), ICSID (W. Bank), Case No. ARB/01/3 (May 22, 2007), *available at* http://ita.law.uvic.ca/documents/Enron-Award.pdf (following the decision in *CMS* on necessity).

35. Gabcíkovo-Nagymaros Project (Hung.-Slovk.), 1997 I.C.J. 7 (Sept. 25) (rejecting necessity).

36. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, 31 I.L.M. 124, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/argentina_us.pdf [hereinafter Protection of Investment Treaty].

37. *See* Bjorklund, *supra* note 16.

38. *See, e.g.*, Protection of Investment Treaty, *supra* note 36, art. 18(2).

39. *See infra* Parts III.C and III.F.

defense in *Nicaragua v. United States*[40] in a way that makes clear that the term is not self-judging. The Court first rejected U.S. arguments that the controversy was not justiciable.[41] It then rejected the U.S. claim that it was acting in self-defense when it mined Nicaraguan harbors and engaged in other actions designed to destabilize the Nicaraguan regime in the 1980s. In denying the United States' claim, the Court first held that a successful claim of self-defense, whether individual or collective, must be in response to an "armed attack."[42] It then held that a claim of collective self-defense introduces two additional requirements: The state allegedly under armed attack must declare itself to be so threatened, and it must request assistance.[43] The Court found that Nicaragua's activities in El Salvador, Honduras, and Costa Rica did not rise to the level of an armed attack[44] and that when the United States began its activities none of those countries had declared that they were under an armed attack or had requested assistance.[45]

A few other universal exceptions could be invoked in relation to national security concerns. These include the doctrines of distress,[46] impossibility,[47] and *force majeure.*[48] The doctrine of distress is related to that of necessity,[49] but operates on a smaller scale, protecting "lives"[50] rather than "essential interest[s]."[51] Likewise, the doctrines of impossibility and *force majeure* are similar to necessity and have limited reach. The latter requires that performance of the obligation be "materially impossible" as a result of an "irresistible force" or "un-

40. Military and Paramilitary Activities (Nicar. v. U.S), 1986 I.C.J. 14 (June 27) (Merits). For a discussion of this case, see *infra* Part III.C and also see Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 179-99 (Nov. 6) (Merits).

41. Military and Paramilitary Activities, 1986 I.C.J. at 26-28.

42. *Id.* at 103-04; *see also* Oil Platforms, 2003 I.C.J. at 179-99.

43. Military and Paramilitary Activities, 1986 I.C.J. at 105.

44. *Id.* at 119-20.

45. *Id.* at 120-21. El Salvador did eventually declare itself under armed attack and formally requested that the United States exercise its right of collective self-defense, but, as the court observed, "this occurred only on a date much later than the commencement of the United States activities which were allegedly justified by this request." *Id.* at 120.

46. ILC Articles, *supra* note 13, at 49 (art. 24).

47. *See* Vienna Convention, *supra* note 13, art. 61.

48. ILC Articles, *supra* note 13, at 48 (art. 23).

49. *See* Bjorklund, *supra* note 16.

50. ILC Articles, *supra* note 13, at 49 (art. 24(1)).

51. *Id.* at 49 (art. 25(1)).

foreseen event."[52] The Vienna Convention limits the application of the impossibility doctrine to situations in which "the permanent disappearance or destruction of an object indispensable for the execution of a treaty" renders performance impossible.[53] Neither distress nor *force majeure* can be invoked if the state invoking the exception has contributed to the situation, and both relate only to situations where there is no choice but to breach the obligation.[54] Additionally, distress requires that there be "no other reasonable way" to save the lives in question.[55]

In short, although a state can invoke a number of customary international law doctrines in connection with threats to national security, none of them provide an umbrella for a broad-based, open-ended national security exception. Furthermore, even when a state justifies an action by referring to

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52. *Id.* at 48 (art. 23(1)).

53. Vienna Convention, *supra* note 13, art. 61(1). The following cases accept impossibility or *force majeure* as legal principles, but then give them limited reach and reject their application to the cases at hand: Russian Indemnity Case (Russ. v. Turk), Hague Ct. Rep. (Scott) 297 (Perm. Ct. Arb. 1912); Payment of Various Serbian Loans Issued in France, 1929 P.C.I.J. (ser. A) No. 20/21; Societé Commerciale de Belgique, 1939 P.C.I.J. (ser. A/B) No. 78. The court in *Russian Indemnity* assessed the facts and held that the Ottoman Empire could not invoke *force majeure* to relieve itself of repaying loans despite very serious financial difficulties and "insurrections and wars." Russian Indemnity Case, Hague Ct. Rep. (Scott) at 317-18. The court in *Serbian Loans* and *Societé Commerciale* treat the doctrines of impossibility and *force majeure* as equivalent. In *Serbian Loans*, the intervention of a world war did not relieve the Serbian government from obligations to repay calculated in terms of gold specie. Payment of Various Serbian Loans Issued in France, 1929 P.C.I.J. (ser. A) No. 20/21, at 39-40. In *Societé Commerciale*, the Greek government argued that its budgetary and monetary situation made it "materially impossible" for it to execute an award. Societé Commerciale de Belgique, 1939 P.C.I.J. (ser. A/B) No. 78, at 20. The PCIJ held that the Greek government's claim could not be entertained "if it were regarded as a plea in defense designed to obtain from the Court a declaration in law to the effect that the Greek Government is justified, owing to force majeure, in not executing the awards. . . ." *Id.* at 21-22. The Court did not entertain this claim because it turned on factual matters not before the Court. *Id.* at 22.

54. ILC Articles, *supra* note 13, at 48-49 (arts. 23(2), 24(2)); *see* Bjorklund, *supra* note 16 ("Necessity involves the element of volition in that a State chooses not to comply with its obligation, albeit for good reason, whereas force majeure involves an inability to comply with the obligation."); *id.* (referring to "situations of distress where the notion of volition is nullified because the action is necessary to save a life").

55. ILC Articles, *supra* note 13, at 49 (art. 24(1)).

one of these implicit exceptions, its action is subject to review in whatever forum is available for resolving disputes under the treaty in question. Issues of the relationship between customary law and a particular treaty are of course more difficult for treaties, such as the OECD Anti-Bribery Convention, that do not include formal enforcement mechanisms. One can, however, learn from the decisions of tribunals that interpret these doctrines in other treaty contexts. In most cases, the reasoning of these decisions is quite general and is not specific to the treaty in question. After all, such generality is what is implied by the claim that a doctrine is "customary."

B. *Explicit Exceptions*

Some treaties contain explicit national security exceptions, and others do not. This varied practice suggests that no widely recognized implicit exception exists, because otherwise drafters could rely on a common background norm. Moreover, different treaties contain very different exceptions. Indeed, alternative formulations sometimes occur within the same treaty. There is simply no such thing as "the" national security exception.

Consider a few examples. Article XXI of the General Agreement on Tariffs and Trade (GATT) contains national security exceptions, but tailors them to particular substantive provisions. It permits a broader exception for the furnishing of information—considered a secondary duty under the GATT—than it does for derogations from primary obligations.[56] The North American Free Trade Agreement (NAFTA) and the U.S. Model Bilateral Investment Treaty (BIT), like the GATT, have exceptions that both limit information disclosure by a Party if it is "contrary to its essential security interests" and permit a Party to take measures "that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace

56. General Agreement on Tariffs and Trade art. 21, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. In 1994, the GATT was incorporated into the World Trade Organization with no change in this article. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M., 1125 (1994); Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12 MICH. J. INT'L L. 558, 582-84 (1990-1991).

and security, or the protection of its own essential security interests."[57] Although the language in all three documents gives considerable discretion to the State Party that invokes the exception, this discretion cannot be bootstrapped into a stronger implicit exception. According to the GATT panel in *Nicaragua v. United States* (1984) (*Nicaragua I*), the treaty's language is a ceiling rather than a floor. The panel rejected the United States' claim of an implicit national security exception that would create an exception broader than the explicit text.[58] No GATT panel has ever held that an implicit national security exception prevents a derogation from being a violation.[59]

The Rome Statute established the International Criminal Court (ICC) and endowed it with the power to try cases not being pursued in national courts.[60] The ICC has real clout vis à vis State Parties, and so one might think that the Parties would have been particularly eager to draft a broad national security exception. The Rome Statute, however, does not contain a blanket exception, but instead only permits states to refuse to provide certain kinds of information on national security grounds. Its drafters did not give treaty adherents a broad or open-ended right to appeal to an implicit national security exception.[61] Rather, the Rome Statute presumes that a State Party can only invoke national security by referencing the recognized customary law doctrines outlined above or through the particular portions of the treaty that explicitly allow a national security exception to demands for the provision of information.

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57. Protection of Investment Treaty, *supra* note 36, art. 18; *see also* North American Free Trade Agreement, U.S.-Can.-Mex., art. 2102, Dec. 17, 1992, 32 I.L.M 289 (1993) [hereinafter NAFTA] (containing similar provisions).

58. *See* Recourse to Article XXIII:2 by Nicaragua, *United States—Imports of Sugar from Nicaragua*, L/5513, (July 1, 1983) (GATT Doc.) *available at* http://www.wto.org/gatt_docs/English/SULPDF/91010025.pdf; Communication from Nicaragua, *United States—Imports of Sugar from Nicaragua*, L/5492 (May 16, 1983), *available at* http://www.wto.org/gatt_docs/English/SULPDF/91000408.pdf; Report of the Panel, *United States—Imports of Sugar from Nicaragua*, ¶ 4.4-4.7, L/5607 (Mar. 13, 1984), GATT B.I.S.D. (31st Supp.) at 67, 74 (1984), *available at* http://www.worldtradelaw.net/reports/gattpanels/ussugarnicaragua.pdf.

59. *See infra* Part III.A for further discussion of the GATT cases.

60. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

61. *See infra* Part III.D for further discussion of the Rome Statute.

Many human rights treaties include national security provisions that vary in language and only apply to particular sections of the treaty. The overarching International Covenant on Civil and Political Rights (ICCPR) contains an exception for national emergencies; it does not presume that such an exception is an implicit condition. The ICCPR then goes on to identify both antidiscrimination norms and seven articles within the treaty as being nonderogable.[62] It establishes a process for announcing a public emergency that only justifies particular derogations and requires the party to give reasons.[63] The European Convention on Human Rights (ECHR) also includes national security exemptions for some, but not all, of the rights it seeks to protect.[64] When national security is invoked to limit rights, the restrictions must be "prescribed by law" and "necessary in a democratic society."[65]

Similarly, the conventions dealing with children's rights,[66]

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62. International Covenant on Civil and Political Rights art. 4(1)-(2), Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR].

63. *Id.* art. 4(3).

64. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 E.T.S. 5, *available at* http://www.hri.org/docs/ECHR50.html [hereinafter ECHR]. Articles 6 (fair trial), 8 (respect for private and family life), 9 (freedom of thought conscience and religion), 10 (freedom of expression), and 11 (right of peaceful assembly and association) permit national security exceptions. Articles 2 (right to life), 3 (prohibition on torture), 4 (prohibition on slavery), 5 (liberty and security of person), 7 (no punishment without law), and 12 (right to marry) have no such exceptions.

65. *Id.* art. 9(2); *see also* arts. 8(2) ("in accordance with the law" and "necessary in a democratic society"), 10(2) (same as article 9); 11(2) (same as article 9). Article 6(1), dealing with the right to a fair trial, permits the press and the public to be excluded from the trial in a limited class of cases including "the interest of national security in a democratic society." *Id.* art. 6(1).

66. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 [hereinafter CRC]. The CRC has thirty-five substantive articles, but only three include national security exceptions. These three deal with travel by parents and children and children's freedom of expression and association. *Id.* arts. 10(2), 13(2), 15(2). These rights may be subject to certain restrictions but only if the restrictions are provided by law and are necessary for the protection of national security or public order. Article 15 limits the concept of "necessity" to its meaning in "democratic" societies. *Id.* art. 15.

migrant workers,[67] refugees,[68] and stateless persons[69] include diverse but limited exceptions. The limits are of three kinds: (1) They are restricted to certain portions of the treaty; (2) they may only apply if the national security threat is compelling or linked to an emergency; or (3) they are conditioned either procedurally or substantively. For example, under the convention dealing with migrant workers, two articles allow the exception only if no other treaty rights are violated; another article permits individuals to be expelled on national security grounds, but they must be informed of this action in a language they can understand.[70]

Outside of the human rights area, the Comprehensive Nuclear Test Ban Treaty has a broad exception that allows an inspected state to "take measures it deems necessary to protect national security interests."[71] Under the International Convention for the Suppression of Acts of Nuclear Terrorism, Parties cannot be required to supply information which would "jeopardize the security of the State concerned . . . ."[72] An older treaty, the Convention and Statute on Freedom of Transit, permits states to impose restrictions "in case of an emergency affecting the safety of the State or the vital interests

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67. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, at 261, U.N. GAOR, 45th Sess., Supp. No. 49, U.N. Doc. A/45/49 (Dec. 18, 1990) [hereinafter Migrant Workers Convention].

68. Convention Relating to the Status of Refugees art. 9, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150.

69. Convention Relating to the Status of Stateless Persons art. 9, Sept. 28, 1954, 360 U.N.T.S. 117. These treaties condition use of the national security exception to "time of war or other grave and exceptional circumstances" and only permit "provisional measures." For a further discussion of these treaties, see *infra* Part III.F.

70. Migrant Workers Convention, *supra* note 67. Only six articles include national security exceptions with wording similar to the CRC. *Id.* arts. 8, 13, 22, 26, 39, 40. Two articles require the national security exception to be consistent with the other rights recognized in the Convention. *Id.* arts. 8, 39. Article 22 requires that the decision to expel individuals be communicated in a language these individuals can understand. National security can be invoked as an excuse for not giving reasons or for denying review, but only if the national security concerns are "compelling." *Id.* art. 22(3)-(4).

71. Comprehensive Nuclear Test Ban Treaty art. IV(57)(b), Sept. 24, 1996, S. TREATY DOC. NO. 105-28 (1997), 35 I.L.M. 1439.

72. International Convention for the Suppression of Acts of Nuclear Terrorism art. 7, G.A. Res. 59/290, U.N. Doc. A/RES/59/290 (Apr. 13, 2005).

of the country," but this must be done only in "exceptional" cases. The principle of freedom of transit "must be observed to the utmost possible extent."[73] Although the statute does not prescribe rights and duties for belligerents, it is to "continue in force in time of war so far as such rights and duties permit."[74]

Of particular relevance to the interpretation of the OECD Anti-Bribery Convention, the United Nations Convention against Corruption has two very limited explicit national security exceptions. First, in the midst of a section promoting the participation of civil society, the treaty states that information dissemination may be restricted in order to protect national security or public order.[75] Second, a State Party can refuse to provide mutual legal assistance if it considers that execution of the request "is likely to prejudice sovereignty, security, ordre public, or other essential interests."[76]

Finally, a few treaties dealing with particularly egregious violations of human rights explicitly rule out any national security exceptions. The International Convention for the Protection of All Persons from Enforced Disappearance asserts

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73. Convention and Statute on Freedom of Transit art. 7, Apr. 20, 1921, VII L.N.T.S. 29. The Convention also permits contracting states to deny transit to passengers whose entry is forbidden and to goods whose importation is prohibited on a number of grounds including "security." The transit of arms can also be prohibited. *Id.* art. 5.

74. *Id.* art. 8.

75. United Nations Convention against Corruption art. 13(1)(d)(ii), U.N. Doc. A/58/422 (Dec. 9, 2003), *reprinted in* 43 I.L.M. 37 (2004), *available at* http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf ("Participation of society: 1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as: . . . [r]especting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary . . . [f]or the protection of national security or *ordre public* or of public health or morals.").

76. *Id.* art. 46(21)(b). The Council of Europe has a similar provision in its treaty on corruption. Council of Europe, Criminal Law Convention on Corruption art. 26(2), Jan. 27, 1999, Europ. T.S. No. 173.

that no exceptional circumstances whatsoever, "whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance."[77] The Convention against Torture contains identical language.[78] These provisions might be read to suggest that the background against which treaties are written includes an implicit exception for national security that is overridden in a particular case. However, as we argued above, customary international law does not include an open-ended background presumption, although it does include other implicit exceptions, such as self-defense and necessity, which have limited applicability in the national security area. Thus, we read this language not as overcoming an implicit background norm related to national security, but as emphasizing the reach of the treaty and preempting the narrow implicit exceptions that do exist as they apply to war, threats of war, and emergencies. Treaties seldom include blanket statements. However, it is not uncommon for states to put national security exceptions into implementing legislation, a practice which the drafters of these treaties wished to avoid.

Given that neither customary international law nor the language of other treaties spells out a broad, open-ended national security exemption, it seems clear that none can be read into the OECD Anti-Bribery Convention. In the absence of explicit language, State Parties are limited to accepted customary law exceptions covering emergencies and imminent threats.

C. *Prosecutorial Discretion*

Against this background, the British government's treatment of the Al Yamamah corruption case appears to be inconsistent with its treaty obligations. Nevertheless, the OECD Anti-Bribery Convention does grant signatory states a degree of prosecutorial discretion.[79] This opens up the possibility

77. International Convention for the Protection of all Persons from Enforced Disappearance art. 1(2), U.N. Doc. E/CN.4/2005/WG.22/WP.1/REV.4 (Sept. 23, 2005).

78. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2(2), Dec. 10, 1984, 1465 U.N.T.S. 85.

79. OECD Convention, *supra* note 1, art. 5; *see also* OECD, Commentaries on the OECD Convention on Combating Bribery ¶ 27, http://www.oecd.org/document/1/0,3343,en_2649_201185_2048129_1_1_1_1,00.html (last

that, despite the fact that the treaty does not allow for a national security exception, a prosecutor could be justified in simply declining to prosecute in cases where national security concerns are implicated.

Before coming to a final assessment of the U.K. government's conduct, we examine the relevant provision of the treaty as well as the Official Commentary. Article 5 of the OECD Convention lists three factors that should not influence prosecutors: economic interest, interstate relations, and the identity of those involved. It continues:

> Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.[80]

The Official Commentary to the Convention states:

> Article 5 recognises the fundamental nature of national regimes of prosecutorial discretion. It recognises as well that, in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature.[81]

Although it recognizes the "fundamental nature" of prosecutorial discretion, the Commentary points out that such discretion must go along with prosecutorial independence and that this independence must be protected and not be subject to improper influence. However, "improper" in the Commentary is not a self-defining term. Of some help is the clause "by concerns of a political nature"—influence by political concerns is inherently improper. The prohibition against political influence is especially relevant to the British case because the Serious Fraud Office is not independent and must obtain the

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visited Oct. 11, 2007) [hereinafter OECD, Commentaries on the OECD Convention].

80. OECD Convention, *supra* note 1, art. 5.

81. OECD, Commentaries on the OECD Convention, *supra* note 79, ¶ 27.

approval of the Attorney General, a member of the Cabinet, to proceed with prosecutions.

However, the extent to which political concerns can be differentiated from security or intelligence concerns is up for debate. "Political concerns" could be interpreted broadly to include both domestic and international security concerns. It might also be interpreted narrowly to exclude pure security concerns and include only domestic political factors related to partisanship or the protection of the reputations of politicians or the government. However, returning to the text of article 5, interstate relations are expressly excluded from the concerns that may properly influence investigations and prosecutions of the bribery of a foreign public official.[82] This proscription seems to directly address the purported risk to Saudi intelligence cooperation that the U.K. government cited as justification for quashing the BAE investigation.

Nevertheless, the British read article 5 as permitting them to exercise prosecutorial discretion on "public interest" grounds such as national security. The British Code for Crown Prosecutors explicitly invokes the "Shawcross Exercise," requiring that "the public interest" be a factor in determining whether to go forward with a case. The Code contains guidelines for making such judgments and states that a prosecution is "less likely to be needed" under certain circumstances including the possibility that "details may be made public that could harm sources of information, international relations or national security."[83] In quashing the BAE case, the Attorney General attempted to justify his actions as just such an exercise of discretion.[84]

The Vienna Convention requires Parties to exercise good faith in carrying out treaty responsibilities and states that treaties shall be interpreted in good faith—that is, in the light of their underlying goals and principles.[85] Because the primary goal of the OECD Anti-Bribery Convention is to limit corruption in international business dealings, ambiguities surround-

82. OECD Convention, *supra* note 1, art. 5.

83. Crown Prosecution Service, Code for Crown Prosecutors, art. 5 (2004) (UK), *available at* http://www.cps.gov.uk/publications/docs/code2004english.pdf.

84. Parl. Deb., H.C. (Jan. 19, 2007) 1429W.

85. Vienna Convention, *supra* note 13, arts. 26, 31(1).

ing article 5 should be resolved in favor of vigorous enforcement. Given the United Kingdom's accession to the OECD Anti-Bribery Convention, public interest concerns militate in favor of vigorous prosecution in good faith. The three considerations explicitly prohibited by article 5 of the Convention do not authorize parties to invoke an implicit, open-ended national security exception as a justification for failing to prosecute. Just because these three proscriptions are mentioned does not imply that other factors, more destructive of the treaty's reach, are within the discretion of State Parties. Of course, national security concerns could enter into British prosecutorial decisions through the customary international law doctrines of reprisal, self-defense, and necessity. However, the United Kingdom did not invoke these doctrines, perhaps because they appear inapplicable to the case of a lucrative defense contract. The action of the Attorney General therefore puts at risk both the treaty's purposes and the United Kingdom's reputation as a responsible international actor.

Failure to prosecute such cases can adversely affect the public interest and national and international security by encouraging a corruption-fueled arms race.[86] Within the United Kingdom, many critics of the decision argued that the phrase "potential effect upon relations with another State" ruled out exactly the kind of national security concerns raised by the government.[87] As Peter Cullen argues, national security arguments based on defense or on "considerations of international relations . . . clearly fall foul of the Article 5 prohibitions."[88]

"National security" should not be used as a blanket excuse for overlooking the corruption of political allies or for targeting the corruption of opponents. Thus, although states retain discretion in initiating and pursuing prosecutions, a broad

86. We are grateful to Michael Likosky for suggesting this point. The preamble to the UN Convention against Corruption lists one of the justifications for the Convention as concerns "about the seriousness of the problems and threats posed by corruption to the stability and security of societies . . . ." United Nations Convention Against Corruption, *supra* note 75, at pmbl. ¶ 1.

87. A particularly articulate expression of this critique is included in several of the statements made in the debate in the House of Lords on Feb. 1, 2007. *See* 689 PARL. DEB., H. L. (5th ser.) (2007) 339-83.

88. Peter J. Cullen, *Article 5: Enforcement*, *in* THE OECD CONVENTION ON BRIBERY: A COMMENTARY 289, 289-331 (Mark Pieth, Lucinda Low & Peter J. Cullen eds., 2007).

reading of the political concerns that should *not* influence prosecutions is the only one consistent with the purpose of the treaty. Article 5 does not permit states to assert a national security interest as an overarching exception to their enforcement strategy.[89]

That said, there is no international tribunal where those who criticize the SFO's decision can get a hearing. Interpretive issues that arise under the OECD Anti-Bribery Convention must be taken up by the OECD itself, by domestic courts, by civil society groups, and by scholars concerned with the integrity and force of international law. They ought not to be left to government officials of State Parties who may only be trying to advance the narrow interests of the states they represent or to shore up the political position of their governments.

III. The Limited Nature of Explicit Exceptions

Explicit national security exceptions provide specific illustrations of the way that international law deals with security concerns. Those who disagree with our claim that no implicit exception exists must articulate just what an implicit exception would entail. Explicit treaty terms and their interpretation by courts and commentators serve as a guide. Despite considerable variation among treaties, explicit national security exceptions point to some general principles.

The most persuasive material comes from treaties where the issue has received some detailed consideration. Thus, we begin with GATT, its close cousin NAFTA, the Rome Statute establishing the ICC, the ICCPR, and the ECHR. These treaties incorporate subsets of the following principles: a threshold of harm requirement; a notice requirement; a reason-giving requirement; a narrow-tailoring requirement; and provi-

89. *But see* Cullen, *supra* note 88, at 325. Cullen argues that "Article 5 may not prevent a very limited national security exception," but he seriously hedges this claim with procedural constraints that would require states to deal with national security concerns without abandoning the prosecution and to demonstrate a clear legal basis and to provide reasons. As we will see in Part III, *infra,* his preferred procedural constraints are similar to those imposed in treaties with explicit national security exceptions and the limited exception he advocates seems consistent with the customary international law doctrines outlined in Part II.A *supra.*

sions for review.[90] The ICJ has interpreted national and international security language in treaties and, unless the language is explicit, has refused to view the clauses as ones whose meaning is left to the parties. Its own jurisprudence sets interpretive limits, and in all cases, good faith acts as a background constraint on the ability of states to interpret treaties as they wish.

We next review the language in a number of other treaties to document the pervasiveness of explicit exceptions. Most of the treaties in this second group do not have strong international enforcement institutions, but they do demonstrate that the exceptions are usually constrained so that State Parties do not have completely free reign to apply them. A few treaty provisions are indeed open-ended, but they are not relevant in formulating an implicit exception. An implicit exception would have to be based on the narrowest formulation actually included in a valid treaty. Any other view would read the limited exceptions out of treaties.

To see this, suppose the reverse—that is, that the background norm is an open-ended national security exception whose meaning can be entirely determined by individual states. Treaties could then only narrow the background norm. In that case, treaties would not include national security exceptions, but would only include clauses that limited their exercise. Treaties would state that parties *cannot* evoke national security as a reason for failing to comply with certain treaty obligations. With very few exceptions, this is not how treaties are drafted. Rather, national security enters as a reason to take an exception to a treaty.

However, some argue that treaties are themselves a source of customary international law, so that one can read a number of treaties, compute the average provision on some issue, and declare that to be customary law. Such a strategy would undermine existing treaties that contain provisions that do not match the average—both treaties that make no mention of the issue and those that craft detailed provisions to suit their subject matter.

Whatever general principles help determine the overall content of customary law, our examination of the concept of

90. NAFTA, *supra* note 57, art. 2005; GATT, *supra* note 56, Rome Statute, *supra* note 60, arts. 5, 24, 81-85, ICCPR, *supra* note 62, art. 4.

national security convinces us that it only enters customary law through the narrow exceptions outlined in Part II. Because national security concerns are not obscure or unacknowledged issues, they are likely to be considered in treaty drafting, not simply overlooked. We reason that states that want strong protections insist on their inclusion in the treaty language. They do not rely on customary law. If the issue is not mentioned explicitly, only the limited background norms of customary international law apply.

A. *GATT Article XXI*

The GATT treaty includes a national security exception, and several cases seek to articulate the meaning of the treaty language. Article XXI states:

> Nothing in this Agreement shall be construed:
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
> (i) relating to fissionable materials or the materials from which they are derived;
> (ii) relating to the traffic in arms, ammunition and implements of war and such traffic in other goods and materials as is carried on directly for the purpose of supplying a military establishment;
> (iii) taken in time of war or other emergency in international relations; or
> (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[91]

This article has been a factor in five GATT disputes, and these disputes have begun to establish a framework for its interpretation. Four of these cases reached panels; they consist of an early post-World War II dispute involving trade between the United States and Czechoslovakia, two cases concerning

91. GATT, *supra* note 56, art. XXI.

U.S. trade with Nicaragua, and a challenge to trade restrictions imposed by the European Community (EC) on Yugoslavia. The fifth dispute, which arose out of the Falklands War, did not go to a GATT panel but nevertheless raises some important issues.

In 1949, Czechoslovakia challenged a U.S. measure that banned the export of certain products to Czechoslovakia on national security grounds. The panel rejected the Czechoslovak complaint, with the panel members referring to the provisions of article XXI in general terms.[92] For example, one delegate argued that "since the question clearly concerned Article XXI, the United States action would seem to be justified because every country must have the last resort relating to its own security."[93] Still, the specific provisions of the article were mentioned.[94] Furthermore, when Czechoslovakia charged that the United States' construction of the term "war material" in article XXI(b)(ii) was too expansive, the U.S. delegate responded with a defense on the merits, arguing that the U.S. export control regime was "highly selective."[95] Thus, disputants argued about whether the action of the United States fell within the treaty clause.

We have already mentioned *Nicaragua v. United States* (1984) (*Nicaragua I*) as a case demonstrating the exclusive nature of the treaty language when a Party claims a national security exception. In that case, Nicaragua challenged a Reagan

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92. The vote was 17 for dismissal (including a U.S. panel member), 3 abstentions, 2 absent, and 1 affirmative vote (from the Czechoslovak member). Summary Record of the Twenty-Second Meeting, *Request of the Government of Czechoslovakia for a decision under Article XXIII*, GATT/CP.3/SR.22, at 4-9 (June 8, 1949) [hereinafter Article XXIII]; *see also* Hannes L. Schloemann & Stefan Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence,* 93 AM. J. INT'L L. 424, 433 (1999).

93. Article XXIII, *supra* note 92, at 7 (citing a statement from Mr. Shackle of the United Kingdom).

94. *See id.* at 5-9 (citing Mr. Herrera-Arando of Cuba as stating that article XXI overrode article I, Mr. Augenthaler of Czechoslovakia arguing that the United States had interpreted the expression "war material" too broadly, Mr. Hasnie from Pakistan arguing that the case be decided under article XXI alone, and Chairman Wilgress of Canada stating that the United States had defended its actions under articles XX and XXI); Hahn, *supra* note 56, at 570.

95. Schloemann & Ohlhoff, *supra* note 92, at 433; GATT, *supra* note 56, art. XXI.

Administration policy that drastically reduced U.S. sugar imports from Nicaragua. The United States declined to invoke article XXI and argued instead that its actions were beyond the scope of GATT and hence beyond the panel's jurisdiction. The panel simply held the United States in violation of GATT without examining the applicability of article XXI. It did not interpret the U.S. action as a valid exception to the treaty.[96]

The third case relating to article XXI, *Nicaragua v. United States* (1985-1986) (*Nicaragua II*), was Nicaragua's response to a complete import and export embargo imposed by the United States.[97] This time, the United States invoked article XXI but argued that its action was unreviewable by the panel both by the clear terms of the article, which were "crafted specifically" to prohibit such review, and by the terms of reference of the panel, which explicitly instructed the panel not to "examine or judge the validity of or motivation for the invocation of Article XXI(b)(iii) by the United States."[98] Under the GATT rules in force at that time, both parties had to agree on the terms of reference ex ante, and the United States insisted on these restricted terms.[99]

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96. *See* Report of the Panel, *United States—Imports of Sugar from Nicaragua*, ¶¶ 2.3, 4.4-4.7, L/5607 (Mar. 13, 1984), GATT B.I.S.D. (31st Supp.) at 67, 74 (1984), *available at* http://www.worldtradelaw.net/reports/gattpanels/ussugarnicaragua.pdf.

97. Report of the Panel, *United States—Trade Measures Affecting Nicaragua* (*Nicaragua II*), L/6053 (Oct. 13, 1986), *available at* http://www.wto.org/gatt_docs/English/SULPDF/91240197.pdf.

98. GATT Council, *Minutes of Meeting Held in the Centre William Rappard on March 12, 1986*, C/M/196, at 7-8 (1986).

99. Note that such a move is no longer possible, since the Dispute Settlement Understanding established under the WTO does not require the consent of the defendant to establish the terms of reference for a panel. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instrument—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU]. The DSU has "taken care of the three occasions on which, under the GATT, a party was able to block the beginning of the panel process." Claus-Dieter Ehlermann, *Experience from the WTO Appellate Body*, 38 TEX. INT'L L. J. 469, 471-72 (2003). The defendant cannot block establishment of a panel unless it can convince the General Council of the WTO unanimously to decide not to establish a panel. *Id.* Similarly, if the parties cannot agree to the selection of panelists, WTO officials can select the members. *Id.* art. 8.7. Finally, if the parties cannot agree on the terms of reference, the panel will use the standard terms of reference in the DSU. These standard terms are very general, stating that the panel

The panel determined that it was limited by its terms of reference not to examine the U.S. action, but it made clear that, in general, panels could review invocations of article XXI.[100] In doing so, it drew on the well-established principle of national and international law that provisions of treaties must be interpreted in conjunction with other provisions in the same treaty.[101] Hence, national security exceptions must be interpreted in light of other treaty provisions; they are not mere reflections of a general limitation on treaties that is independent of the explicit provisions in particular treaties.[102] The content of a national security exception must come from the treaty itself, and will be subject to review according to the terms of the treaty. Here, the panel observed that reading article XXI in conjunction with the rest of the treaty favored reviewability of decisions under article XXI:

> If it were accepted that the interpretation of Article XXI was reserved entirely to the contracting party invoking it, how could the CONTRACTING PARTIES ensure that this general exception to all obligations under the General Agreement is not invoked excessively or for purposes other than those set out in this provision? If the CONTRACTING PARTIES give a panel the task of examining a case involving an Article XXI invocation without authorizing it to examine the justification of that invocation, do they limit the adversely affected contracting party's right to have its complaint investigated in accordance with Article XXIII:2?[103]

In 1991, in the fourth and most recent case, the Socialist Federal Republic of Yugoslavia challenged restrictions on trade that the EC had imposed in response to the Yugoslav

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will rule in light of the relevant provisions cited by the parties. *Id.* art. 7. Ehlermann, a former member of the WTO's Appellate Body that hears appeals from panels, claims that the most important innovation introduced by the DSU is "the transformation of the traditional, consensus-based dispute settlement system into a compulsory, quasi-automatic system of adjudication." Ehlermann, *supra*, at 474.

100. *See* Report by the Panel, *Nicaragua II*, ¶ 5.17; *see also* Schloemann & Ohlhoff, *supra* note 92, at 435.

101. Schloemann & Ohlhoff, *supra* note 92, at 435.

102. *See id.*

103. *Nicaragua II*, ¶ 5.17.

civil war. The EC explicitly grounded its action in article XXI. Although panel proceedings were suspended in 1993 in light of the uncertainty surrounding the status of the new Federal Republic of Yugoslavia (Serbia and Montenegro), the Council agreed to establish a panel to review the EC's invocation of article XXI, and the EC did not claim that such review was barred.[104]

Finally, we mention one dispute that did not reach a panel. In 1982, in response to the attempted annexation of the Falkland/Malvinas Islands by Argentina, the EC, Australia, and Canada imposed trade restrictions on Argentina. In a contentious GATT Council meeting, these countries stated that they "had taken certain measures on the basis of their inherent rights, of which Article XXI of the General Agreement was a reflection."[105] However, they could not obtain unanimous support for this interpretation of article XXI, and many delegates were concerned that recognizing Parties' "inherent rights" to define national security would give them carte blanche to undermine the treaty.[106] Instead, the Council issued a "Decision Concerning Article XXI of the General Agreement" that reads (in relevant part) as follows:

> Considering that the exceptions envisaged in Article XXI of the General Agreement constitute an important element for safeguarding the rights of contracting parties when they consider that reasons of security are involved;

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104. Schloemann & Ohlhoff, *supra* note 92, at 436; *see also* Communication from the European Communities, *Trade Measures Taken by the European Community against the Socialist Federal Republic of Yugoslavia*, L/6948 (Dec. 2, 1991), *available at* http://www.wto.org/gatt_docs/English/SULPDF/91600060.pdf; Request for Consultations under Article XXIII:1 by Yugoslavia, *EEC—Trade Measures Taken for Non-Economic Reasons*, DS27/1 (Jan. 13, 1992); Communication by Yugoslavia, *EEC—Trade Measures Taken for Non-economic Reasons: Recourse to Article XXIII:2 by Yugoslavia*, DS27/2 (Feb. 10, 1992).

105. GATT Council, *Minutes of Meeting Held in the Centre William Rappard on May 7, 1982*, C/M/157, at 10 (June 22, 1982), *available at* http://www.wto.org/gatt_docs/English/SULPDF/90440042.pdf; *see also* Communication by the Commission of the European Communities, *Trade Restrictions Affecting Argentina Applied for Non-economic Reasons*, L/5319/Rev.1 (May 18, 1982).

106. *See Minutes of Meeting Held in the Centre William Rappard on May 7, 1982*, C/M/157, at 5-12.

> Noting that recourse to Article XXI could constitute, in certain circumstances, an element of disruption and uncertainty for international trade and affect benefits accruing to contracting parties under the General Agreement;
> Recognizing that in taking action in terms of exceptions provided in Article XXI of the General Agreement, contracting parties should take into consideration the interests of third parties which may be affected;
> *That* until such time as the CONTRACTING PARTIES may decide to make a formal interpretation of Article XXI it is appropriate to set procedural guidelines for its application;
> The CONTRACTING PARTIES decide that:
> 1. Subject to the exception in Article XXI:a, contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI.
> 2. *When action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement. . . .*[107]

Hannes L. Schloemann and Stefan Ohlhoff propose that the WTO regularize the process of invoking the national security exception by allowing states to define their essential security interests subject to review for good faith as required by the Vienna Convention.[108] In their view, the WTO should require states to provide a substantive justification on the merits to demonstrate such good faith. This solution, they claim, balances sovereignty concerns, which require a state to be allowed to define its own security interests, with the need to prevent abuse. Each of these competing concerns is central to the viability of the treaty system.[109]

To summarize, no GATT panel has ever declared any part of article XXI to be solely under the discretion of a State Party.

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107. Decision Concerning Article XXI of the General Agreement, L/5426 (Dec. 2, 1982), GATT B.I.S.D. (29th Supp.) at 23 (1983), *available at* http://www.wto.org/gatt_docs/English/SULPDF/91000212.pdf (emphasis added).

108. Schloemann & Ohlhoff, *supra* note 92; *see* Vienna Convention, *supra* note 13, arts. 26, 31(1).

109. Schloemann & Ohlhoff, *supra* note 92.

Even when a GATT panel has discussed the issue—for example, in the Czechoslovakia case—an expansive concept of national security was not unanimously accepted, and the panel members who supported an expansive reading of the article were motivated by the desire to maintain the integrity of the specific treaty system.[110] Moreover, given the facts in the Czechoslovakia case, the decision was arguably in line with the text of article XXI. A GATT panel might well have reached a different result under a fact pattern that presented an obvious violation of the text of the article. When a party argued that an explicit national security exception was unreviewable, the panel suggested that exceptions should be read in the context of the treaty in question and not as specific expressions of a general principle that reserves questions of national security to individual states. In the most recent case, the party invoking article XXI did not claim that the treaty barred review. Although there has been no WTO jurisprudence and no decision by a WTO body relating to article XXI,[111] it is fair to assume that arguments for reviewability of national security concerns are even stronger now.[112] The process has become more judicialized, and disputes are to be resolved using "customary rules of interpretation of public international law," which include "good faith."[113]

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110. *See id.* at 433, 434 n.61.

111. World Trade Organization, WTO Analytical Index: Guide to WTO Law and Practice (2007), *available at* http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_08_e.htm.

112. Schloemann & Ohlhoff, *supra* note 92, at 439-41 ("[T]he DSU [Dispute Settlement Understanding] itself is not subject to a national security exception. To the contrary, its Article 23 requires members, '[w]hen [they] seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, [to] have recourse to, and abide by, the rules and procedures' of the DSU. . . . By not including a provision excluding the application of the DSU to disputes in which one of the members invokes the national security exceptions or a provision defining particular standards of review or any other particular rule applying to the resolution of such disputes, the members presumably decided that such disputes should not, in principle, be treated differently from other disputes under the covered agreements.").

113. Ehlermann, *supra* note 99, at 480; *see* Vienna Convention, *supra* note 13, arts. 26, 31(1) ("Every treaty is binding upon the parties to it and must be performed by them in good faith. . . . A treaty shall be interpreted in good

B. *North American Free Trade Agreement*

NAFTA article 2102 contains an explicit national security exception that is similar to the exception in GATT.[114] According to the Statement of Administrative Action in the United States' NAFTA Implementation Act of 1993, this exception is "self-judging" in nature but must be invoked in good faith:

> Article 2102 governs the extent to which a government may take action that would otherwise be inconsistent with the NAFTA in order to protect its essential security interests. . . . *The national security exception is self-judging in nature, although each government would expect the provisions to be applied by the other in good faith.*[115]

The NAFTA dispute resolution procedures can be used to test whether a given invocation of national security concerns satisfies the good faith requirement.[116] Before resorting to formal dispute resolution procedures, parties are encouraged to resolve their disagreements informally through cooperation and consultation.[117]

In 1996 Canada initiated such a consultation in a challenge to the United States' Helms-Burton Act, which punished

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faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

114. NAFTA, *supra* note 57, art. 2102 ("[N]othing in this Agreement shall be construed: (a) to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; (b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests (i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment, (ii) taken in time of war or other emergency in international relations, or (iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or (c) to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.").

115. Legislative Line Item Veto Act of 1993, H.R. 159, 103d Cong. (1st Sess. 1993) (emphasis added).

116. The dispute resolution procedures are laid out in Chapter 20: Institutional Arrangements and Dispute Settlement Procedures. NAFTA, *supra* note 57, ch. 20.

117. *See* NAFTA, *supra* note 57, arts. 2003, 2004, 2006.

countries for trading with Cuba, but failed to pursue the matter further.[118] Antonella Troia presents arguments for each side and concludes that had the dispute reached a formal dispute resolution, Canada would likely have won.[119] Canada instead introduced a resolution before the Organization of American States (OAS) condemning the Act, which passed over U.S. objections by a vote of thirty-three to one.[120]

Further evidence that article 2102 is not entirely self-judging appears in Chapter 11 of NAFTA dealing with investment.[121] Article 1138 gives State Parties the freedom to restrict investments or acquisitions by other Parties and asserts that such restrictions are not subject to NAFTA's dispute settlement provisions. Article 1138 takes care to emphasize that, whether or not other decisions taken under the national security exception are reviewable, if the decision involves investment, the State Party's decision is final. Although there is no case law on the issue, one commentary argues that "if the Parties had agreed that Article 2102 were entirely self-judging, Article 1138 would not be necessary."[122]

In short, the explicit security provision in NAFTA gives parties considerable discretion in defining their national security interests. But, as with the WTO, this discretion is subject to a reviewable good faith requirement. Outside the invest-

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118. "Two rounds of NAFTA consultations were held in Washington in April and May of 1996 and a NAFTA Commission meeting was held in late June." Stephen J. Randall, *A Not So Magnificent Obsession: The United States, Cuba, and Canada from Revolution to the Helms-Burton Law* (19 Can.-Am. Pub. Policy, Working Paper No. 36, 1998); Kristopher Moore, *Cuba in the Wake of NAFTA*, 8 REVISTA MEXICANA DE ESTUDIOS CANADIANSES 145, 151 (2004), *available at* http://amec.com.mx/downloads/num8_otono_2004.pdf ("Canada and Mexico did not, in the end, challenge Helms-Burton within the framework of NAFTA . . . .").

119. Antonella Troia, Note, *The Helms-Burton Controversy: An Examination of Arguments that the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 Violates U.S. Obligations under NAFTA*, 23 BROOK. J. INT'L L. 603 (1997).

120. The resolution passed in June 1996 and was followed on August 23 by a unanimous opinion of the Inter-American Judicial Committee that the Helms-Burton Act did not conform to international law. *See* Peter McKenna, *Canada, the United States, and the Organization of American States*, 29 AM. REV. CAN. STUD. 473, 477 (1999).

121. NAFTA, *supra* note 57, ch. 11.

122. MEG N. KINNEAR, ANDREA BJORKLUND & JOHN F. G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, 1138-6 (2006).

ment area, NAFTA provides for formal dispute resolution, consultation, and information-sharing.[123]

C. *International Court of Justice:* Nicaragua v. United States

Besides the GATT adjudications summarized above, the most important source for case law on the meaning of national security exceptions has been the ICJ and, in particular, its 1986 decision on the merits in *Nicaragua v. United States.*[124] In 1984, Nicaragua brought a case to the ICJ alleging that the United States had violated its obligations under general international law, the UN Charter, the OAS Charter, and the bilateral United States-Nicaragua Treaty of Friendship, Commerce, and Navigation (TFC). The United States challenged the jurisdiction of the Court, and when it lost that challenge, it decided not to appear further. The ICJ nevertheless proceeded to resolve the case on the merits in June 1986, holding in favor of Nicaragua on a number of its claims. The Court, finding that it did not have the jurisdiction to apply multilateral treaties in this case, decided the case on the basis of customary international law and the TFC.[125] It refused to allow the individual states to have the final word in deciding the meaning of "self-defense," "collective self-defense," "necessity," and "proportionality."[126] Especially important for our purposes is its treatment of language in the TFC article XXI, paragraph 1(d):

> The present Treaty shall not preclude the application of measures: . . .
>
> (d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international

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123. NAFTA includes these review mechanisms even though such formal measures might be thought less important in a treaty with only three State Parties, since the small number of Parties creates strong inherent incentives for each to act in a manner consistent with their obligations.

124. Military and Paramilitary Activities (Nicar. v. U.S), 1986 I.C.J. 14 (June 27) (Merits). For similar reasoning, see Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 179-99 (Nov. 6) (Merits).

125. The UN Charter refers to customary international law, and customary international law is a free-standing body of law that "continues to exist alongside treaty law." Military and Paramilitary Activities, 1986 I.C.J. at 94.

126. *Id.* at 102-04.

> peace and security, or necessary to protect its essential security interests . . . .[127]

The ICJ distinguished between the GATT language that allows a Party to take actions it "considers necessary" and the TFC that "speaks simply of 'necessary' measures, not those considered by a party to be such."[128] The language of the TFC, the Court asserted, gave it more interpretive leeway than under GATT.[129] In particular, the Court found that the United States' mining of Nicaraguan ports, direct attacks on ports and oil installations, and imposition of a trade embargo were not "necessary" to protect the essential security interests of the United States.[130]

This judicial interpretation of treaty language demonstrates how the specific wording of a treaty determines the way interpretive discretion is allocated between a state and a tribunal. Some explicit exceptions are more open-ended than others, and some treaties give tribunals more authority to evaluate state conduct as lawful or unlawful. As demonstrated in this case, when a court has authority to interpret a treaty, it will not necessarily defer to the interpretations favored by State Parties. The GATT cases discussed above demonstrate that even relatively open-ended treaty language will not prevent a tribunal from peering into the conduct of states and measuring that conduct against legal standards.

D. *European Court of Human Rights*

The European Court of Human Rights has had numerous opportunities to interpret the national security exceptions in the European Convention on Human Rights. These cases provide important illustrations of nuanced case-by-case analyses that subject national laws and practice to detailed scrutiny. As we noted above, some rights included in the European Convention have no national security exception, but others permit exceptions so long as they are "prescribed by law and are nec-

127. Treaty of Friendship, Commerce, and Navigation, U.S.-Nicar., art. XXI(1), Jan. 21, 1956, 9 U.S.T. 449.

128. Military and Paramilitary Activities, 1986 I.C.J. at 116.

129. The Court used this discretion to find that some of the U.S. actions were not "necessary." *Id.* at 122-23, 141-42.

130. *Id.* at 141-42.

essary in a democratic society."[131] Even when the Court finds for the government in cases that implicate national security, the justices scrutinize both the quality of national laws and their application in practice. They consider the processes used by the state and the underlying substance of the claimed exception. The exceptions are not self-judging, and the Court worries that broad exceptions will undermine the goals of the Convention. "National security" is not a talisman that gives member countries carte blanche.

For example, consider an important early case, *Klass v. Germany*, brought under article 8's privacy protections.[132] In this case, the Court reviewed a German law permitting the state to monitor private communications. The German Federal Constitutional Court had already struck down one provision of the law, and the plaintiffs appealed to the European Court of Human Rights with respect to the remaining portions of the law. Asserting that the interference with the right must be narrowly interpreted, the justices went through a quite detailed analysis to determine if the legislation and its implementation were "necessary in a democratic society."[133] They upheld the statute but stated:

> As concerns the fixing of the conditions under which the system of surveillance is to be operated, the Court points out that the domestic legislation enjoys a certain discretion. . . . Nevertheless, the Court stresses that this does not mean that the Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the grounds of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate.

131. ECHR, *supra* note 64, arts. 8(2), 9(2), 10(2), 11(2).

132. Klass et al. v. Germany, 28 Eur. Ct. H.R. (ser. A) (1978), *available at* http://www.legislationline.org//legislation.php?tid=46&lid=4871&less=false.

133. ECHR, *supra* note 64, art. 8.

> The Court must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse.[134]

Subsequent cases, often finding domestic legislation and state practice in violation of article 8 of the Convention, cite this case and provide similarly careful reviews of both the formal law and its implementation.[135] An illustrative recent case is *Association for European Integration and Human Rights v. Bulgaria.*[136] Citing its own case law, the Court outlined a test for whether a law interfering with the right of privacy was sufficiently foreseeable and compatible with the rule of law to stand scrutiny. The criteria are clarity and precision:

> To ensure the effective implementation of the above principles [of clarity and precision], the Court has developed the following minimum safeguards that should be set out in statute law to avoid abuses: the nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their communications monitored; a limit on the duration of such monitoring; the procedure to be followed for examining, using and storing

134. Klass et al. v. Germany, 28 Eur. Ct. H.R. (ser. A) ¶¶ 49-50.

135. *See, e.g.*, Moldovy v. Moldovia, App. No. 41827/02, Eur. Ct. H.R. (2007) ¶ 36, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Moldovy&sessionid=4805956&skin=hudoc-en (holding that the Court must examine claim that a restriction is "necessary in a democratic society"); Bartik v. Russia, App. No. 55565/00, Eur. Ct. H.R. (2006) ¶ 49, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=7&portal=hbkm&action=html&highlight=Mikhaylovich&sessionid=4805965&skin=hudoc-en (process inadequate); Volokhy v. Ukraine, App. No. 23543/02, Eur. Ct. H.R. (2006) ¶ 52, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Volokhy&sessionid=4805944&skin=hudoc-en (finding that there must be safeguards against abuse to prevent surveillance from undermining democracy); Al-Nashif v. Bulgaria, 36 Eur. H.R. Rep. 37 (2002) (Eur. Ct. H.R.) ¶ 123, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Al-Nashif&sessionid=4805960&skin=hudoc-en (noting that even when national security is at stake, rule of law requires independent review).

136. Ass'n for Eur. Integration and Human Rights et al. v. Bulgaria, App. No. 62540/00. Eur. Ct. H.R. (2007), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=European%20%7C%20Integration%20%7C%20Human%20%7C%20Rights&sessionid=4806018&skin=hudoc-en.

> the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which data obtained may or must be erased or the records destroyed.[137]

The Court then went on to evaluate the Bulgarian law and its implementation in terms of this list and found several violations of the Convention in the way the law was implemented.[138] The Court recognized that nation states must have some discretion to determine when their national security is at stake, but insisted on its own authority to judge whether exceptions have been carefully tailored to avoid undermining democratic and rule-of-law values.[139]

E. *International Criminal Court*

The Rome Statute for the ICC details the ways in which State Parties must cooperate with the Court and the prosecutor (articles 88–93).[140] A national security exception only applies to the obligations listed under "other forms of cooperation" (article 93) and then only with respect to "the production of documents" or the "disclosure of evidence."[141] Article 93(4) states that "a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security."[142] This must be done in accordance with article 72, which also protects national security information from disclosure and applies in the following circumstances:

> (1) . . . in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests.
>
> (2) . . . when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security

137. *Id.*, ¶ 76 (citations omitted).
138. *Id.*, ¶¶ 78-94.
139. *Id.*
140. Rome Statute, *supra* note 60, arts. 88-93.
141. *Id.* art. 93(4).
142. *Id.*

> interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.[143]

Articles 93(5) and 93(6) condition a denial of assistance in a similar way. Articles 72, 93(5), and 93(6) have the same goals: to encourage a cooperative solution and to require a state that invokes a national security exception to provide reasons in most cases.[144]

The statute contains an explicit national security exception with respect to information disclosure. It recognizes that a state may seek an exception on grounds outside of the treaty's explicit national security exceptions, but it reserves the right to order disclosure in such cases. Paragraph 1 of article 72 contains the important phrase "in the opinion of that State," and paragraphs 2, 4, and 5 contain similar language.[145] This gives the state a role in determining what information prejudices its national security interests, but it does not imply that application of the exception is entirely under its control. Rather, if a state asserts that the disclosure of certain information would undermine its national security interests, this will activate article 72(5), which spells out how the state can resolve the matter cooperatively with the Court or the prosecutor.[146] If a cooperative agreement is not reached, the state is obligated under article 72(6) to give "specific reasons" for withholding the information unless the reasons themselves would "necessarily . . . prejudice . . . the State's national security interests."[147] If the Court determines that the information is necessary and relevant, other options are available.[148] The Court can request further consultations that may involve ex

143. *Id.* art. 72(1)-(2).

144. *Id.* arts. 72, 93(5)-(6). Although the wording differs slightly between articles 72 and 93(4)-(6), the differences are not material. Furthermore, even if the subject matter of article 93(4) differs from that covered by article 72(1)-(2), 93(4) is still meant to incorporate the procedures and protections under article 72 for excepting to the subject matter of article 93. The language of 93(5) and (6) is similar to that of 72. We demonstrate these points in more depth in our memorandum for Transparency International.

145. Rome Statute, *supra* note 60, art. 72(1), (2), (4), (5).

146. *Id.* art. 72(5).

147. *Id.* art. 72(6).

148. At the 2000 Annual Meeting of the American Bar Association, an "all-star cast of American and English lawyers" carried out an oral argument that simulated the prosecution of a head of state in front of the ICC. The follow-

parte or in camera hearings,[149] refer the matter to the Assembly of State Parties or the UN Security Council for resolution,[150] or make factual inferences at the trial.[151] If a state refuses on other grounds not included in the treaty language, the

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ing excerpt from the transcript nicely lays out the workings of article 72(7)(a):

> Article 93 is then the Article to which we have to have some reference, for that is the ability of states to deny the provision of assistance where matters concern, or rather, as the terminology of the section is, relate to national security. There are terms slightly different from that used as we shall see in Article 72, where the phrase "prejudice its national security interests" is replied upon.
>
> So going back to what I said in the beginning, an assumption that people will work together is a first working step that states will behave honorably, if and when they decline to provide materials. We better have a quick look at the detail of Article 72 although, as His Honor Judge Leigh correctly said, it is pretty complex and would take a full five minutes to go through or more. But what Article 72 and Article 73 does, in short form, is to recognize that the documents of the type required by any defendant or by a prosecutor for the thing is mutual as between defense and prosecution, may lie with the interested party claiming prejudice, may lie with another party. The combination of Articles 73 and 72 effectively brings the Court in, gives it jurisdiction, whenever a claim is made by either that particular type of party, a party whose documents they are, or a party into whose hands they have fallen. We then see, very quickly, that the first approach to the problem is to resolve it by cooperative means. Various means or methods of cooperation are referred to. If, at that stage, by cooperation it is not solved, and if the Court determines that the documents are relevant, then further orders may be made under Article 72(7)(a). As you can see, under Article 72(7)(a), where disclosure of the information is sought and national security has been invoked, the Court may request further consultations and it may conclude that by invoking national security "the requested State is not acting in accordance with its obligations." It may then refer the matter being the ultimate sanction to the other State Parties or to the Security Council. But in either case, whether it makes that sort of order or whether it is simply faced with the failure to disclose by some other party, appropriate inferences may be drawn."

Pieter H.F. Bekker & David Stoelting, *The ICC Prosecutor v. President Medema: Simulated Proceedings Before the International Criminal Court*, 2 PEPP. DISP. RESOL. L.J. 1, 38-39 (2002).

149. Rome Statute, *supra* note 60, art. 72(7)(a)(i).

150. *Id.* arts. 72(7)(a)(ii), 87(7).

151. *Id.* art. 72(7)(a)(iii).

court may order disclosure or draw appropriate inferences at trial.[152]

The exact terms of the national security exception were a source of concern for the United States, which ultimately refused to accede to the ICC. As former Ambassador-at-Large for War Crimes Issues David Scheffer recounts:

> Article 72 (Protection of national security information) raised issues of particular concern to the United States. Our experience with the International Criminal Tribunal for the former Yugoslavia (ICTY) showed that some sensitive information collected by the U.S. Government could be made available as lead evidence to the prosecutor, provided that detailed procedures were strictly followed. We applied years of experience with the ICTY to the challenge of similar cooperation with a permanent court. It was not easy. . . . Our view prevailed: a national government must have the right of final refusal if the request pertains to its national security pursuant to Article 93(4). In the case of a government's refusal, the court may seek a remedy from the Assembly of States Parties or the Security Council pursuant to Article 87(7).[153]

Ambassador Scheffer not only refers to the authority of the Assembly of States Parties and the Security Council to review invocations of the national security exception; he also points to experience with the ICTY, another international tribunal with even more authority to demand information from state participants. As the ICTY stated in *Prosecutor v. Blaskic*:

> [T]o grant States a blanket right to withhold, for security purposes, documents necessary for trial might jeopardise the very function of the International Tribunal, and defeat its essential object and purpose. . . . To admit that a State holding such documents may unilaterally assert national security claims and refuse to surrender those documents could lead to the stultification of international criminal proceedings: . . .

152. *Id.* art. 72(7)(b)(i), (ii).

153. David J. Scheffer, *Developments in International Criminal Law: The United States and the International Criminal Court*, 93 AM. J. INT'L. L. 12, 15-16 (1999).

> The very *raison d'être* of the International Tribunal would then be undermined.[154]

William Bradford suggests that the ICC might decide to follow this ICTY decision and also points to the availability of review by the Security Council or the Assembly of States Parties. He argues that, were the United States a signatory, its unwillingness to share sources and methods with the ICC "might lead to a Security Council vote on whether the United States has a duty to share national security information with potential adversaries."[155]

To summarize, the Rome Statute refuses to recognize an implicit national security exception with regard to the disclosure of information, and it establishes a process for exercising the explicit exceptions included in the treaty. Although the court itself does not have the power to order the disclosure of information when the state invokes the exception, the Assembly of States Parties and the Security Council have power of review. Additionally, the court can request further consultations with the state and can draw inferences from any refusal to provide information. The drafters meant the national security exception to be bounded by a requirement to give reasons and to be invoked as a prelude to efforts to achieve a cooperative resolution. The drafters did not include a blanket exception because they recognized that the treaty might be undermined if the exceptions were invoked too often and too broadly as a way of denying information to the ICC.

F. *International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights allows State Parties to derogate from certain obligations under extreme circumstances and forbids derogation altogether for other provisions (article 4).[156] Compliance with the ICCPR is subject to review by the Human Rights Committee through re-

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154. Prosecutor v. Blaskic, Case No. IT-95-14-AR108, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II, ¶ 65 (Oct. 29, 1997), *available at* http://www.un.org/icty/blaskic/appeal/decision-e/71029JT3.html (quotations omitted).

155. William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L.J. 639, 834 n.604 (2004).

156. ICCPR, *supra* note 62, art. 4.

ports that State Parties are required to submit at the Committee's request.[157]

The General Comment on article 4 begins by acknowledging the importance of the article in balancing States' need to temporarily derogate from their obligations under the Covenant and the need to prevent abuses of the derogation provisions by establishing safeguards:

> Article 4 of the Covenant is of paramount importance for the system of protection for human rights under the Covenant. On the one hand, it allows for a State party unilaterally to derogate temporarily from a part of its obligations under the Covenant. On the other hand, article 4 subjects both this very measure of derogation, as well as its material consequences, to a specific regime of safeguards.[158]

The article includes four categories of safeguards: a threshold of harm, a notice requirement, a requirement to give reasons, and a narrow-tailoring requirement.

Threats to a State Party's interests must exceed a high threshold before derogation is possible. Such threats must constitute a "public emergency which threatens the life of the nation."[159] The General Comment elaborates:

> Not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by article 4, paragraph 1. . . . The Covenant requires that even during an armed conflict measures derogating from the Covenant are al-

157. *Id.* art. 40(1)(b). If a State Party recognizes the competence of the Committee to receive and consider communications that claim that the Party is not fulfilling its obligations under the treaty, it gets certain rights. In particular, it may submit such communications with respect to other States Parties that have also recognized the competence of the Committee in this respect. *Id.* art. 41. In addition, if a State Party to the ICCPR is also a party to the First Optional Protocol, then the Committee can receive and consider communications from individuals claiming to be the victims of violations of any of the rights in the Covenant. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 383.

158. General Comment No. 29, States of Emergency (Article 4), ¶ 1, CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) [hereinafter General Comment No. 29].

159. ICCPR, *supra* note 62, art. 4(1).

> lowed only if and to the extent that the situation constitutes a threat to the life of the nation. If States Parties consider invoking article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances.[160]

The Committee has frequently criticized State Parties for derogating from treaty provisions in situations that fail to meet this threshold.[161]

The General Comment further states that a public emergency is not sufficient to justify derogating from treaty obligations: "Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State Party must have officially proclaimed a state of emergency."[162] States must also "immediately inform the other States Parties" of their intent to derogate "through the intermediary of the Secretary-General of the United Nations."[163] The derogating party must specify "the provisions from which it has derogated and . . . the reasons by which it was actuated."[164]

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160. General Comment No. 29, *supra* note 158, ¶ 3.

161. *See* U.N. Econ. & Soc. Council (ECOSOC), Human Rights Comm., *Consideration of the Reports Submitted by States Parties Under Article 40 of the Covenant: International Covenant on Civil and Political Rights* (ICCPR)*: Comments of the Human Rights Committee: United Republic of Tanzania*, ¶ 7, U.N. Doc. CCPR/C/79/Add.12 (Dec. 28, 1992); ECOSOC, Human Rights Comm., *ICCPR: Dominican Republic*, ¶ 4, U.N. Doc. CCPR/C/79/Add.18 (May 5, 1993); ECOSOC, Human Rights Comm., *ICCPR: Uruguay*, ¶ 8, U.N. Doc. CCPR/C/79/Add.19 (May 5, 1993); ECOSOC, Human Rights Comm., *ICCPR: United Kingdom of Great Britain and Northern Ireland*, ¶ 23, U.N. Doc. CCPR/C/79/Add.55 (July 27, 1995); ECOSOC, Human Rights Comm., *ICCPR: Peru*, ¶ 11, U.N. Doc. CCPR/C/79/Add.67 (July 25, 1996); ECOSOC, Human Rights Comm., ICCPR: Colombia, ¶ 25, U.N. Doc. CCPR/C/79/Add.76 (May 3, 1997); ECOSOC, Human Rights Comm., *ICCPR: Bolivia*, ¶ 14, U.N. Doc. CCPR/C/79/Add.74 (May 5, 1997); ECOSOC, Human Rights Comm., *ICCPR: Lebanon*, ¶ 10, U.N. Doc. CCPR/C/79/Add.78 (May 5, 1997); ECOSOC, Human Rights Comm., *ICCPR: Israel*, ¶ 11, U.N. Doc. CCPR/C/79/Add.93 (Aug. 18, 1998).

162. General Comment No. 29, *supra* note 158, ¶ 2.

163. ICCPR, *supra* note 62, art. 4(3).

164. *Id.*

These notice and rationale requirements support both the Committee's official monitoring role as well as informal monitoring by other Parties:

> In paragraph 3 of article 4, States parties, when they resort to their power of derogation under article 4, commit themselves to a regime of international notification. A State party availing itself of the right of derogation must immediately inform the other States parties, through the United Nations Secretary-General, of the provisions it has derogated from and of the reasons for such measures. Such notification is essential not only for the discharge of the Committee's functions, in particular in assessing whether the measures taken by the State party were strictly required by the exigencies of the situation, but also to permit other States parties to monitor compliance with the provisions of the Covenant. . . . [T]he Committee emphasizes that the notification by States parties should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law.[165]

Hence, the Committee must determine whether the measures a State takes are narrowly tailored "to the extent strictly required by the exigencies of the situation."[166] Further buttressing this narrow-tailoring requirement is the mandate that such derogations be of an "exceptional and temporary nature" as well as the directive that "[t]he restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant."[167] Elaborating further on this narrow-tailoring requirement, the Committee observes:

> A fundamental requirement for any measures derogating from the Covenant, as set forth in article 4, paragraph 1, is that such measures are limited to the extent strictly required by the exigencies of the situation. . . . [T]he obligation to limit any derogations to those strictly required by the exigencies of the situa-

165. General Comment No. 29, *supra* note 158, ¶ 17.
166. ICCPR, *supra* note 62, art. 4(1).
167. General Comment No. 29, *supra* note 158, ¶¶ 1, 2.

> tion reflects the principle of proportionality which is common to derogation and limitation powers. Moreover, the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party.[168]

Thus, similar to the Rome Statute establishing the ICC, the ICCPR's national security exception is limited both substantively and procedurally. It only applies to some portions of the treaty, it can only be invoked "temporarily" to deal with an "emergency," and it is subject to safeguards. These safeguards require the Party to provide notice and a statement of reasons to other State Parties and to limit its actions to measures that are narrowly tailored to fit the nature of the emergency.

G. *Other Treaties*

Many other treaties contain explicit national security exceptions that apply to part or all of the treaty. These exceptions are defined in more or less expansive language, depending upon the treaty and the particular substantive issue. As we argued in Part II.B, the variety and limited applicability and scope of explicit exceptions imply that no implicit national security exception ought to be read into a treaty that lacks such provisions.[169] In this Part, we return to these treaties to further support our claim that even explicit exceptions are constrained by the text of the treaties in which they appear. We have already argued that point in some detail for GATT, NAFTA, the ICC, and the ICCPR. Here we simply point to the limited nature of the exceptions in a broader range of treaties.

Typically, use of a national security exception must be "provided by" or "prescribed by" or "in conformity with" the law and be "necessary."[170] Some provisions limit necessary

168. *Id.* ¶ 4.

169. *See supra* Part II.B.

170. CRC, *supra* note 66, arts. 10, 13, 15; Migrant Workers Convention, *supra* note 67, arts. 8(1), 13(3) (constraining the exception as applied to

provisions to those "necessary in a *democratic* society."[171] Other treaty language provides that national security can limit a treaty's provisions only in "exceptional circumstances," for "compelling reasons," or "for as short a period as possible."[172] This language implies that the exception is not open-ended or entirely up to the judgment of individual states. If the treaty contains any sort of enforcement or oversight mechanism, those charged with that responsibility could rule that the use of the exception was unlawful, not (democratically) necessary, not justified by exceptional circumstances, or imposed for too long.

Cases raising similar issues have arisen in the aftermath of the 2002 Argentine economic crisis. Argentina has bilateral investment treaties with a number of countries that are sources of foreign direct investment. Most modern BITs permit an investor from one state to initiate arbitration against a host state in the World Bank's International Centre for the Settlement of Investment Disputes. Argentina's BIT with the United States allows such arbitration, but it contains a national security exception. Argentina, in cases brought against it, has argued that the national security exception in that BIT includes economic emergencies.[173] The treaty language (article XI) is as follows:

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travel rights by stating that it must be used in a way that is consistent with other rights in the Convention); Convention Relating to the Status of Refugees, *supra* note 68, art. 9; United Nations Convention against Corruption, *supra* note 75, art. 13(d).

171. *See, e.g.*, CRC, *supra* note 66, art. 15 (emphasis added).

172. Migrant Workers Convention, *supra* note 67, art. 22(3)-(4); Convention Relating to the Status of Refugees, *supra* note 68, arts. 28(1), 32(2); Convention Relating to the Status of Stateless Persons, *supra* note 69, arts. 28, (31)(2). These treaties seem to equate war with "other grave and exceptional circumstances" and permit "provisional measures" in such cases. Convention Relating to the Status of Refugees, *supra* note 68, art. 9; Convention Relating to the Status of Stateless Persons, *supra* note 69, art. 9; Convention and Statute on Freedom of Transit, *supra* note 73, art. 7 (requiring that the time be as short as possible).

173. The ICSID cases are: CMS Gas Transmission Co. v. Argentina (U.S. v. Arg.), ICSID (W. Bank), Case No. ARB/01/8 (May 12, 2005), 44 I.L.M. 1205, *available at* http://www.worldbank.org/icsid/cases/CMS_Award.pdf; LG&E Energy Corp. v. Argentina (U.S. v. Arg.), ICSID (W. Bank), Case No. ARB/02/1 (Oct. 3, 2006), 46 I.L.M. 36, *available at* http://www.worldbank.org/icsid/cases/pdf/09_LGE_Liability_e.pdf; Enron Corp. v. Argentina (U.S. v. Arg.), ICSID (W. Bank), Case No. ARB/01/3 (May 22, 2007), *availa-*

> This treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.[174]

Argentina argued that security interests can include economic security, especially in times of crisis.[175] In the *CMS* case, the tribunal agreed that "essential security interests" could include major economic emergencies.[176] It then investigated whether article XI is self-judging, and concluded that it is not: "When States intend to create for themselves a right to determine unilaterally the legitimacy of extraordinary measures importing non-compliance with obligations assumed in a treaty, they do so expressly."[177] Article XI of the BIT therefore gives the tribunal scope to exercise judgment:

> If the legitimacy of such measures is challenged before an international tribunal, it is not for the State in question but for the international jurisdiction to determine whether the plea of necessity may exclude wrongfulness. It must also be noted that clauses dealing with investments and commerce do not generally affect security as much as military events do and, therefore, would normally fall outside the scope of such dramatic events.[178]

This holding is thus a particularly clear statement of the limits imposed by explicit treaty terms and the unwillingness of

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ble at http://ita.law.uvic.ca/documents/Enron-Award.pdf. In *CMS* and *Enron*, the ICSID tribunals denied Argentina's evocation of necessity. In *LG&E* it approved the evocation of necessity.

174. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.- Arg., art. XI, Nov. 14, 1991, S. TREATY DOC. NO. 103-2.

175. CMS v. Argentina, 44 I.L.M. ¶ 352.

176. *Id.* ¶ 360; *see also* LG&E v. Argentina, 46 I.L.M. 36; Enron v. Argentina, ICSID (W. Bank), Case No. ARB/01/3. Although *LG&E* resolved the issue for Argentina while *CMS* and *Enron* held that Argentina could not use necessity as a defense, all three decisions held that the ICSID panel was empowered to evaluate Argentina's use of the defense.

177. CMS v. Argentina, 44 I.L.M. ¶ 37. The tribunal goes on to cite the GATT as an example of an expressly self-judging provision, although we have seen that even that case is not completely open-ended. *Id.*

178. *Id.* ¶ 373.

a tribunal to imply that states can decide on their own when and how to exercise even explicit exceptions.[179] In line with the narrow-tailoring requirement mentioned above, when a state invokes necessity in derogating from the terms of a BIT, it must prove a nexus between the actions it has taken and the resolution of the crisis.[180]

A few treaties give more authority to states to determine the meaning of the national security exception. For example, the Comprehensive Nuclear Test Ban Treaty says that "the inspected State Party shall have . . . [t]he right to take measures it deems necessary to protect national security interests".[181] Similar language is now included in the 2004 U.S. Model BIT. Article 18 states: "Nothing in the treaty shall be construed:

> 1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
>
> 2. to preclude a Party from applying measures that it considers necessary for fulfillment of its obligations with respect to the maintenance or restoration of international peace and security, or the protection of its own security interests.[182]

Notice the shift in language between the Argentine-U.S. BIT, which followed the U.S. Model BIT of the time, and the

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179. *See* Reinisch, *supra* note 26 (comparing the holdings in *CMS* and *LG&E*).

180. The ILC Articles state that the measures taken invoking necessity must be the "only way" to safeguard essential interests. ILC Articles, *supra* note 13, at 49 (art. 25(1)(a)). Thus, it is not enough that the measures are a response to the crisis, there must also be no other less draconian means of responding. *See generally* CMS v. Argentina, 44 I.L.M. ¶ 352; LG&E v. Argentina, 46 I.L.M. 36; Enron v. Argentina, ICSID (W. Bank), Case No. ARB/01/3; Reinisch, *supra* note 26 (discussing how tribunals divided on whether Argentina's actions met this test, with *CMS* and *Enron* finding that it did not and *LG&E* finding that it did).

181. Comprehensive Nuclear Test Ban Treaty, *supra* note 71, art. IV(57)(b).

182. Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, art. 18, Nov. 2004, *available at* http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf [hereinafter 2004 U.S. Model BIT].

2004 U.S. Model BIT.[183] The latter permits the State Party to determine what is necessary to serve its national security interests. Unlike the earlier treaty, there is no mention of war or emergency ("public order"), so the exception can apply in peacetime if a state makes that determination. This language emphasizes the self-judging character of the national security exception. Even so, future disputes will test the limits of a state's freedom to decide for itself when its security is threatened and whether its actions are a valid response. For example, suppose a state expropriates a shoe factory owned by a foreign investor and defends its action in an ensuing arbitral dispute by claiming that foreign investment in the shoe industry raises national security concerns. The aggrieved investor will refer to the Vienna Convention to argue that the state did not invoke the exception in good faith, a claim that would inevitably involve the arbitrators in defining the scope of the exception.[184]

The Third Geneva Convention, dealing with the treatment of prisoners of war, includes explicit and limited clauses that make exceptions for national security.[185] The broadest exception applies to Protecting Powers; that is, those charged with protecting the interests of prisoners under the treaty. These Powers are told not to "exceed their mission" and to "take account of the imperative necessities of security of the State wherein they carry out their duty." This gives the Detaining Power leverage to limit the Protecting Powers' operation, but does not give complete freedom to the Detaining Power to determine when the clause applies. The treaty permits a few more limited national security exceptions, only one of which is self-judging in the sense of the U.S. Model BIT. Thus, article 103 states that a prisoner awaiting judicial investigation can be detained "if it is essential to do so in the interests of national security."[186] Article 105 permits trials of detainees to be held

183. *See id.*; Protection of Investment Treaty, *supra* note 36, art. XI ("This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.").

184. *See* Vienna Convention, *supra* note 13, art. 26.

185. Geneva Convention Relative to the Treatment of Prisoners of War art. 8, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

186. *Id.* art. 103.

"in camera" but only "exceptionally . . . in the interest of State security."[187] Finally, article 125 allows the Detaining Powers to invoke "measures . . . [they] consider essential to ensure their security" as a rationale for restricting visits and assistance from representatives of aid and relief organizations.[188] Thus, the drafters of a treaty that is clearly designed to operate when national security is at risk went to the trouble of clarifying just when a Power can take national security into account. They did not leave it to the Detaining Power to make this judgment entirely on its own.

In contrast, the Fourth Geneva Convention dealing with the treatment of civilians contains broad national security exceptions in article 5 that apply both in the territory of a Party and in occupied territory.[189] In order for article 5 to apply, the Party must be "satisfied" that the person in its territory is "definitely suspected of or engaged in activities hostile to the security of the State."[190] Such a person can be deprived of rights guaranteed by the Convention. Note that the Party is given explicit authority to make this judgment. In occupied territory, those detained as spies or saboteurs or under suspicion of hostile activity can forfeit their rights of communication if "absolute military security so requires."[191] The language here is less clearly self-judging than when a Party is acting within its own territory, but still gives considerable discretion to the Occupying Power.

The difference between the two conventions is noteworthy. The Third Convention has limited exceptions covering specific aspects of the treaty; the Fourth includes blanket exceptions that the drafters included to avoid any presumption against giving the Parties broad discretion.

We conclude that even those who would read some kind of national security exception into all treaties cannot read in an exception that is stronger than the weakest language in existing treaties. It would undermine the development of international law as a system governing interstate relations for an

187. *Id.* art. 105.

188. *Id.* art. 125.

189. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 5(1), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

190. *Id.*

191. *Id.* art. 5(2).

implicit exception to be stronger than the weakest ones that drafters actually have included in treaties. The weakest exceptions are limited in two ways. First, the measures taken must be provided by law and must be limited to those that are necessary. Second, the circumstances must pass a threshold so that they are considered compelling or exceptional. The first limitation constrains the type of measures, and the second constrains the range of circumstances. Neither the measures employed nor the circumstances in which they are employed are open-ended, and each limitation implies some outside judgment or review of the exception's application. Invocation of the provisions does not fall entirely to the discretion of the State Party that asserts a national security interest. In addition, some treaties include procedural requirements, such as notice or the giving of reasons.

IV. Conclusion

International law does not include an implicit, open-ended national security exception that applies across all treaties. There are three reasons why any such exception must derive from the specific treaty in question.

First, there is a body of customary law that applies across treaty contexts and that is codified in the Vienna Convention and expressed in the ILC Articles. This law does not include a blanket national security exception, and the exceptions it does include are reviewable.

Second, GATT, NAFTA, the Rome Statute for the ICC, the ECHR, the ICCPR, and many other treaties contain explicit national security exceptions, belying the existence of a strong inherent exception. These explicit exceptions vary both between treaties and within particular treaties with respect to different provisions. Many include important structural features. Some describe thresholds that threats to national security interests must reach before a Party can legitimately claim an exception. For the ICCPR and the ECHR, that threshold is high, in accordance with the fundamental rights that these treaties protect. For GATT and NAFTA, the bar is set lower, likely because individual rights are not implicated. Still, a good faith requirement provides a backstop, as it does for all treaties. GATT, the Rome Statute, and the ICCPR contain a notice requirement, and the Rome Statute and the

ICCPR require that reasons be given. Additionally, several treaties require derogation measures to be narrowly tailored. Under the ICCPR, measures must be "strictly required by the exigencies of the situation." The Rome Statute suggests specific measures that will both tailor derogation and promote cooperation between the ICC and the Parties. The case law under the ECHR has created a similar narrow tailoring requirement. GATT and NAFTA also promote cooperation and consultation between Parties to minimize the magnitude of derogations. Other treaties confirm the generally limited nature of explicit national security exceptions but have fewer procedural constraints. Ultimately, the language of most treaties does not imply that the exceptions are entirely open-ended. The few treaties that do seem to permit states unconstrained discretion only demonstrate the range of choices available to drafters.

Third, several treaties include a means for review, and such review has been exercised by GATT panels and the ICJ. The European Court of Human Rights reviews both laws on the books and their implementation according to substantive and procedural criteria. The ICCPR requires reports to the Human Rights Committee and encourages peer review among parties. It also has an optional protocol through which individuals can bring complaints. The GATT panel system has reviewed claims for exceptions based on national security grounds, and that treaty's dispute resolution mechanism has been strengthened by the creation of the WTO. NAFTA provides for consultation followed by dispute resolution between the parties and also provides less formal, yet powerful, means to encourage compliance through consultations and cooperation. The Rome Statute provides that the ICC, the Security Council, and the Assembly of States Parties can review requests for exceptions.

The case law, as articulated by GATT dispute resolution panels and the ICJ, has rejected an inherent open-ended right to take an exception to a treaty on national security grounds. Although the GATT gives states the prerogative to define their national security concerns, GATT panels can review whether such concerns are expressed in good faith. The ICJ, the European Court of Human Rights, and various ICSID panels also assert the right to interpret both customary international law and treaty language. These cases show that when a treaty has a

formal process of review, even permissive terms will raise justifiable issues at least with respect to their good faith application.

Even those who argue for an implicit national security exception in treaties cannot, we claim, legitimately go further than the weakest explicit versions. At most, therefore, proponents of an implicit exception can only advance an exception of relatively limited scope, especially in the context of an anti-corruption treaty. A broad exception can only be asserted by those willing to accept the anomalous result that the best way to be sure that national security interests are preserved is to avoid any mention of them in the text of a treaty.

Our reason for this claim is as follows: customary law includes a number of doctrines that are implicitly included in treaties unless explicitly excluded. Several of these doctrines apply to certain kinds of national security concerns. Thus, those who wish to go beyond established doctrines need to articulate grounds for their proposed extensions. Unless such commentators are willing to create a new national security doctrine independent of the existing international law regime, they must look to ratified treaties for guidance. Because treaties vary and because a broad, open-ended exception applied by interested state parties would undermine much of the existing international regime, we argue that it cannot be defended unless one is willing to accept these quite serious consequences. Defenders of the international law regime should be very cautious about accepting arguments for broad implicit exceptions that are not explicitly part of any bargained-for agreements.

Our analysis brings to the forefront an inherent tension between law and government discretion. Treaties, by their nature as legal instruments, curb governments' discretion by binding states to norms agreed upon by the Parties. The treaty regime accommodates this tension with escape valves that operate both through customary international law that applies across the board to all treaties and through the language of individual treaties that allow derogations in specified circumstances. These escape valves relieve some of the pressure on states. The exceptions help to maintain the treaty system both by limiting violations (in that not every derogation need be a violation) and by encouraging accession (in that states will be more likely to sign a treaty if there are reasonable means to

escape its requirements when circumstances so dictate).[192] However, limits on these safety valves are equally necessary, lest exceptions undermine the entire regime to the point that it loses any semblance of law. A broad, implicit national security exception that applies to all treaties and that can be invoked and defined at the discretion of a Party would swallow up the narrower escape valves—such as necessity, fundamental change of circumstances, and self-defense—that have been applied as part of customary international law and would blow a gaping hole in the treaty regime. The very existence of treaties implies that State Parties, by the act of acceding to them, cannot legitimately claim to have complete discretion to comply or not to comply with their obligations. States cede some autonomy when they accede to a treaty.

The alternative approach—that an explicit exception is required to get around a claimed broad, implicit national security exception—implies that accession to a treaty without such an explicit exception is almost a non-event because the state in question retains virtually unlimited discretion to comply or not to comply with the treaty's terms. Under this approach, only treaties with explicit national security exceptions have any real force, and this force comes from the implied

192. Of course, nation states do explicitly violate treaties when political pressures are too strong and no exception is available. An important example is the pressure imposed by the United States after the ICC was established. The United States urged countries to sign bilateral agreements promising not to surrender U.S. citizens or employees to the court. Refusal to sign could jeopardize U.S. military aid to countries not on the exempt list. As of August 2006, fifty-seven State Parties had refused to sign such agreements and forty-three state parties had signed. Judith Kelley, *Who Keeps Commitments and Why?: The International Criminal Court and Bilateral Nonsurrender Agreements,* 101 AM. POL. SCI. REV. 573, 574 (2007). Although the United States and some of the State Parties who signed these bilaterial agreements tried to argue that the action did not violate the treaty, the general view, even among signers of non-surrender agreements, was that the agreements did violate the ICC. *Id.* at 576. Kelley demonstrates that non-signers were, in part, motivated by beliefs both in the moral value of the Court and in the importance of keeping international commitments (*pacta sunt servanda*—commitments must be observed). States with high domestic rule of law scores were especially likely to refuse to sign the bilateral agreements. *Id.* at 579-82. Thus, a state such as the United Kingdom that is generally classed in the high rule of law category is particularly eager to claim, as it did in quashing the SFO investigation, that its actions are not treaty violations.

revocation of national autonomy through a clause that on its face purports to *reserve* some autonomy to State Parties.

To summarize, a state's accession to a treaty implies that the state is bound to the treaty's terms, just as contractual obligations follow from the consummation of a valid contract. Accordingly, when states seek to reserve discretion that goes beyond the accepted principles of customary international law, they must do so explicitly. Two corollaries follow, both of which arise in the case law dealing with such exceptions. First, explicit exceptions are to be read narrowly and according to their terms. The GATT cases discussed in Part III.A support this proposition. Second, when there is no explicit exception, there is no exception except through the accepted principles of customary international law. This proposition was expressed most clearly in *Nicaragua I* under the GATT dispute resolution system, discussed above in Parts II.B and III.A.

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Controversy over the U.K. Al Yamamah decision continues. In March 2007, the Organisation for Economic Co-operation and Development Working Group on Bribery reiterated its serious concerns about the United Kingdom's discontinuance of the Al Yamamah investigation. The Working Group failed, however, to directly confront the status of the British claim to a national security exception to the treaty.[193] In the United Kingdom, two nongovernmental organizations are

193. The Working Group on Bribery brings together all thirty-six countries that have ratified the Convention. Its statement sidestepped direct confrontation with the national security issue by simply noting that the United Kingdom "has stated that the discontinuance was based on national and international security considerations" and then underlining that it is "in this respect that bribery of foreign public officials is contrary to international public policy and distorts international competitive conditions." OECD, OECD to Conduct a Further Examination of UK Efforts Against Bribery, Mar. 14, 2007, http://www.oecd.org/document/12/0,2340,en_2649_201185_38251148_1_1_1_1,00.html (last visited Nov. 15, 2007). Transparency International submitted two letters to the OECD Legal Director before the March meeting outlining its concerns about the British actions in the Al Yamamah case as well as broader questions about its commitment to enforce the treaty. One of these letters included our memo, and both outlined the arguments against reading a national security exception into the Convention.

challenging the decision to terminate the investigation.[194] One argument they make is that no implied national security exception can be read into the treaty. The plaintiffs assert that if a public body announces that it will comply with an international law obligation, domestic British courts can review subsequent decisions for compliance with that obligation.[195] The British High Court agreed with the plaintiffs and permitted the plaintiffs' challenge on the merits to go forward.[196] Therefore, our argument in this Article may face a judicial test.

More generally, because the treaty itself establishes no international forum for formal challenges to a state's enforcement actions, the OECD Anti-Bribery Convention's ultimate importance will depend upon efforts by the OECD and civil society to highlight breaches by member states and to pressure these states to take the goals of the treaty seriously in making national prosecutorial decisions.[197] Daniel K. Tarullo, in a recent article on the OECD Anti-Bribery Convention, points to the Convention's enforcement problems and recommends that the OECD establish a committee of national prosecutors to monitor the enforcement practices of signatory states.[198] The aim of his proposal is to help prosecutors develop inde-

194. The groups are Corner House and the Campaign Against Arms Trade (CAAT). The progress of the lawsuit is detailed on the website of CAAT. Campaign Against Arms Trade (CAAT), Developments Following the Dropping of the SFO Investigation, http://www.caat.org.uk/issues/sfo/sfo-latest.php (last visited Nov. 7, 2007). On April 20, 2007 the plaintiffs lodged their full grounds for judicial review. The statement includes the claim that no implicit national security exemption exists in the OECD Convention. Corner House Research v. Dir. of Serious Fraud Office, Detailed Statement of Grounds, Q.B.D. Claim No. CO/1567/2007, ¶ 28, *available at* http://www.caat.org.uk/issues/sfo/JR_grounds.pdf.

195. Corner House Research v. Dir. of Serious Fraud Office, Q.B.D. Claim No. CO/1567/2007, ¶ 20.

196. The ruling was announced on November 9, 2007 with full judicial review set for early 2008. *See* The Corner House, CAAT and The Corner House Win Landmark Ruling on BAE-Saudi Corruption Case, http://www.thecornerhouse.org.uk/item.shtml?x=558414 (last visited Jan. 20, 2008); *see also* Haroon Siddique, *High Court to Review Halted BAE-Saudi Investigation,* GUARDIAN, Nov. 9, 2007.

197. Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665 (2003-2004).

198. *Id.* at 701-708. The committee would ensure both the "efficient exchanges of information pertaining to specific instances of bribery" and "good faith investigation by home-country prosecutors of companies implicated by such information." *Id.* at 701. Even if it is unable to push signato-

pendent criteria for enforcement, share experiences, and criticize weak or poorly targeted enforcement. The committee would give prosecutors leverage with their own governments and promote their independence from domestic politics and other internal pressures. This seems a worthy proposal that could help spur enforcement by member states in the absence of stronger sanctioning devices.

Another response would be to amend the treaty to include an explicit and strictly limited national security exception. Such an exception, should it be negotiated, ought to be very narrowly tailored—even more narrowly tailored than most existing treaty language. As we noted above, the failure to prosecute allegations of corruption can itself have national security consequences.[199] If a state's multinational firms can bribe with impunity in order to make sales of defense equipment, they facilitate the accumulation of armaments by regimes that may themselves be national security threats to their neighbors and that may use their militaries to intimidate and suppress their own populations. The hope of large corrupt returns can encourage rulers to buy large quantities of weapons as a way to accumulate illicit wealth, and if their corrupt gains can be safely stowed abroad, they may be tempted to use these weapons offensively or against their own citizens, thus creating the need for even more purchases in the future.

Even if the weapons are not actually used, a perception of widespread corruption can destabilize regimes. A study of corruption in the international arms trade cited several examples of the impact of corruption on national and international security.[200] According to the study, one factor prolonging the civil war in Sri Lanka is the reluctance of politicians and officials to give up lucrative payoffs from arms deals.[201] In Angola, the 1994 peace accords were undermined by corrupt weapons deals.[202] Corruption linked to defense spending has been a source of grievance for opposition groups in Southeast Asia, in Iran under the Shah, and in other countries.[203] Weap-

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ries to begin or maintain prosecutions, it may at least help bring international pressure to bear with respect to individual cases. *Id.* at 706.

199. *See* Reinisch, *supra* note 26, at 66; *supra* Part II.C.

200. COURTNEY, *supra* note 7, at 14.

201. *Id.* at 11.

202. *Id.*

203. *Id.* at 14.

ons sales can also backfire: Western nations saw the weapons they sold to Iraq in the 1980s turn against them in the first Gulf War.[204] As Lord Ahmed argued in a debate over the U.K. Arms Export Bill:

> The short-term approach of providing military equipment or assistance to strategically important states ignores the long-term implications of arming countries in a region that is susceptible to change.[205]

Any potential national security amendment should not give signatories a free pass just because a business deal involves weapons or other national security products. Most international arms sales should come under the terms of the treaty. If they do not, the OECD Anti-Bribery Convention will be unable to help limit a type of corruption that undermines state stability and produces security threats of its own.

To counter objections to the national security argument for dropping the case, the U.K. Attorney General stated that the case against BAE Systems was weak. Others have sharply questioned that conclusion. The Serious Fraud Office in its own press release did not refer to any weakness in the case, indicating instead that "[i]t has been necessary to balance the rule of law against the wider public interest."[206] This may be standard language for U.K. prosecutors instructed to engage in such balancing by their own Code for Crown Prosecutors. However, in the context of an international treaty regime that depends on the good faith efforts of member states, it sends a disturbing message to those who see the control of corruption as central to efforts to promote the rule of law and economic and political development on a global scale.[207] Upholding treaty obligations and furthering cooperative international efforts to control corruption must be part of that balancing process in the United Kingdom and anywhere the OECD Anti-Bribery Convention is in force.

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204. *Id.* at 20.

205. 630 PARL. DEB., H.L. (5th ser.) (2002) 493, *quoted in* COURTNEY, *supra* note 7, at 20.

206. *See* SFO, *supra* note 3.

207. To quote Judge Dionisio Anzilotti, dissenting in a case before the PCIJ: "It is clear that international law would be merely an empty phrase if it is sufficient for a State to invoke public interest in order to evade the fulfillment of its engagements." Oscar Chinn (Gr. Brit. v. Belg.), 1934 P.C.I.J. (ser. A/B) No. 63, at 112 (Dec. 12) (separate opinion of Judge Anzilotti).